RESTRICTIVE COURT ORDERS AND A FREE PRESS: A STUDY OF THE CONFLICT BETWEEN CONSTITUTIONAL VALUES

A Thesis Presented

by

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Submitted in Partial Fulfillment of the

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Purpose of the Study

News coverage of judicial proceedings is frequently seen by judges as a deterrent to a fair and impartial trial. Consequently, judges issue restrictive (gag) orders on the press in order to prevent publicity which may hinder the defendant's case. The purpose of this treatise is to discuss the history and reasoning behind the free press, fair trial conflict and to analyze and discuss the implications of the current trends in the resolution of the conflict.

Procedure

In order to analyze this constitutional dilemma, the thesis begins with the origins of the restrictive orders, a study of the relevant cases and the precedents they established, the effects of publicity on a jury, and alternatives to prior restraint. The section dealing with current trends includes a comprehensive discussion of the recent Nebraska Press Association versus Stuart case, the ramifications of the decision, and the need for the preservation of a free press and a fair trial.

Findings

If the values of a free press and a fair trial are to remain intact, the bench, bar, law enforcement officials, and the press must separately and jointly regulate what they do or say in each particular trial. The bench should consider all alternatives short of prior restraint, while the bar and law enforcement officials should be limited or prohibited from disseminating information that could prejudice a jury. The press should be responsible and objective in its coverage, reporting news to inform the public, not to exploit a sensational event for the sake of a "good story."

Conclusions

A give and take process exists and will continue to exist between the free press of the First Amendment and the fair trial rights of the Sixth Amendment. A general rule prohibiting all prior restraint is inconceivable at this time because rare situations do arise when "a clear and present danger" to Sixth Amendment rights negates all remedies short of gag rulings. One optimal avenue of solving the conflict without infringing on the two values may be to totally prohibit the defense and prosecuting attorneys as well as law enforcement officials from discussing the arrest or trial with the press. This remedy, along with voluntary cooperation by both parties, could be the key to solving the constitutional conflict.

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Chapter I

INTRODUCTION OF THE PROBLEM

A long man awaits the decision of the jury in the midst of a crowded, tense courtroom. Accused of committing a multiple murder, this man has been thrust into the spotlight of a sensational event, an event which provides headline material for the press corps. With the approach of digging reporters on one side, and the frequently cautious stance of court officials on the other, this situation has revived the constitutional dilemma of assuring an accused individual a fair trial by an impartial jury while at the same time preserving the freedom of the press in reporting news and informing the public. The conflict between the free press of the First Amendment and the fair trial of the Sixth Amendment persists because both are absolute values treasured by the American democracy. As absolute values, one can be vacated only at the expense of another.

The free press, fair trial controversy is a historical product, spurred by the inclusion of the First and Sixth Amendments to the United States Constitution which respectively state that "Congress shall make no law . . .

abridging the freedom of speech, or the press" and that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ." Since the country's inception, the press and the courts have debated the priority of these values when they converge in trial proceedings. Recently, however, trial courts have played the role of the bully by prohibiting the press from publishing certain information concerning the defendant and proceedings in order to preserve the impartiality of jurors. These prohibitions, labeled restrictive or "gag orders," include such tenets as forbidding the publication of a defendant's criminal record, public record pretrial proceedings, confessions to law enforcement officers or third parties, or any other facts "strongly implicative" of the accused. The need for these orders is speculative when one considers Tans and Chaffee's evidence (1969, p. 647) that the reporting of the arrest and charge are the most biasing factors in the impaneling of an impartial jury. Naturally, the press treats restrictive orders as an unconstitutional infringement on First Amendment rights, but more importantly they see it as eroding the basis of American freedom. The American Newspaper Association Report (1967, p. 9) expresses this belief when it says "there can be no fair trial without a free press, and without a fair trial no freedom can exist."

Tocqueville (1945, p. 192) upholds the sanctity of a free press, regardless of its imposition on other values;

> There is no medium between servitude and extreme license; in order to enjoy the inestimable benefits which the liberty of the press ensures, it is necessary to submit to the inevitable evils which it engenders.

This treatise will probe the history, nature, and trends of the free press versus fair trial issue with emphasis on the creation of a workable balance between the two values. Along with a study of restrictive court orders and the ramifications they produce, conventional and potential alternate remedies will be analyzed. The focal point of the study will be a discussion of a recent landmark case, Nebraska Press Association versus Stuart, in which the United States Supreme Court in a unanimous decision vacated a Nebraska district court's gag order on the press before the trial of a multiple murder-sex case. The High Court seemed to prohibit all future prior restraint on the media, but a close analysis of the decision shows the potential for future restrictions on the press.

Chapter II

REVIEW OF THE LITERATURE

The evidence and analysis included in this study originate from books, periodicals, scholarly journals, law reviews, legal documents, and newspapers. Books such as John Lofton's Justice and the Press, Donald Gillmor's Free Press and Fair Trial, Harold Nelson and Dwight Teeter's Law of Mass Communications and James Barron and Donald Gillmor's Mass Communication Law provided most of the background information including historical trends, case precedents, and remedies. Several periodicals such as Editor and Publisher, Columbia Journalism Review, Time, Trial, Quill, and U.S. News and World Report provided the analysis of relevant cases including the Nebraska case and developments after this latest decision.

Journalism Quarterly provided the bulk of the empirical research on the effects of pretrial publicity on jurors. The Yale Law Journal, Nebraska Law Review, and Creighton Law Review were valuable in the discussion of the Nebraska decision, its relationship to past decisions, and potential remedies. The Supreme Court Reporter and

Federal Supplements provided the detailed discussions of the cases while newspapers and new supplements such as the New York Times, Houston Post, and Publisher's Auxiliary aided in the day to day monitoring of the free press, fair trial developments following the Nebraska case.

Historical Perspective of Trial Publicity and Restrictive Orders

Press coverage and its convergence with the preservation of a fair trial has existed in the United States since the country's inception, but the twentieth century, with its endless processions of political events and court cases, provides the major battleground for the constitutional conflict. The genesis of the value conflict, however, occurred in developments preceding the twentieth century.

Origins and Developments Before Twentieth Century

The legal basis of American law is an offshoot of English common law. According to N.V.K. Murthy (1959, p. 317), an Englishman, Sir William Blackstone, incorporated the summary power to limit press coverage of judicial proceedings in England's common law. Blackstone's idea was based on a 1765 court case which was never decided. The case involved a newspaper publisher who was cited for contempt because he printed a criticism of the conduct

of a court proceeding. Because of a technical mistake, the case had to be retired, but political changes in the country caused the proceedings to be dropped. The opinion was written, however, which said that the court had the power to try the publisher summarily. It was published in 1802, spurring Blackstone to use his authority to restrict publicity on judicial proceedings.

Generally accepted by British courts, this premise was not viewed with approval in colonial America because it represented the old world monarchy and privileged classes. Nevertheless, Schmidt (1976, p. 25) notes that the inclusion of the First and Sixth Amendments in the Constitution bred early free press versus fair trial cases, notably the 1851 case of United States v. Reed and the 1878 case of Reynolds v. United States. In U.S. v. Reed, the defendant, accused of murder, demanded a new trial because two jurors had read a newspaper account of the proceedings while the trial was in progress. However, the U.S. Supreme Court ruled that "There was nothing in the newspapers calculated to influence their decision, and both of them swear that these papers had not the slightest influence in their verdict." In the 1878 case of Reynolds v. U.S., the Supreme Court said that because of the growth of the newspaper enterprise and the education level, cases of public interest and accounts of them ultimately will be

read by virtually everyone. The Court, quoting from Chief Justice John Marshall's opinion in the 1807 trial of Aaron Burr, said,

> Light impressions which may fairly be presumed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of the testimony, constitute no sufficient objection to a juror; but that those strong and deep impressions which close the mind against the testimony that may be offered in opposition to them, which will combat that testimony and resist its force, will constitute a sufficient objection to him.

The Reynolds and Reed cases, by acknowledging the presenceof a convergence between the press and the courts, helped pave the way for the free press versus fair trial explosion of the twentieth century.

Twentieth Century Background Through the 1950's

The free press, fair trial conflict arrived in the 1900's in the midst of a spectacular, national tragedy. Perhaps the most sensational crime story of the modern era, in terms of a national following, was the kidnapping and murder of the 19 month old son of Charles Lindbergh, the famous aviator, in 1932. Nelson and Teeter (1969, pp. 309-310) write that the prime suspect, Bruno Richard Hauptmann, was showered with inflammatory news stories from the outset of his arrest and the kidnapping story was front-page news for weeks. The site of the trial,

Flemington, New Jersey, had more than 700 newsmen within its confines. Much of the publicity was clearly prejudicial, with lawyers and newsmen writing statements to the effect that Hauptmann was a "think lacking in human characteristics." Hauptmann's trial was jammed with 150 reporters and photographers, with Sidney B. Whipple (1935, p. 315) saying, "the attempt to turn the Hauptmann trial into a circus had begun long before the lawyers were engaged and every sensational New York newspaper wanted to be the ringmaster." The trial and subsequent execution of Hauptmann resulted in the American Bar Association's adoption in 1937 of Canon 35 of its Canons of Professional Ethics, which recommended that judges not allow photographing, broadcasting, or televising of court proceedings because they

> detract from the essential dignity of the proceedings, distract the participants and witnesses in giving testimony, and create misconceptions with respect thereto in the mind of the public and should not be permitted.

The canon came after a report issued by the ABA committee of lawyers, editors, and publishers who termed Hauptmann's trial "the most spectacular and depressing example of improper publicity and professional misconduct ever presented to the people of the United States in a criminal trial" (Nelson and Teeter, 1969, p. 309).

Nelson and Teeter (1969, p. 393) note that the free

press versus fair trial issue blossomed during the 1950's and 60's, with an estimation that between 1951 and 1969 at least 421 appeals on grounds of prejudicial publicity were carried to state and federal appeals courts. Several cases during the 1950's paved the way for the gag order barrage that was to occur in the next two decades. In the 1950 case of Stroble v. California (343 U.S. 181), the U.S. Supreme Court ruled that publicity had little effect on the fairness of a case which involved the murder of a young girl by an elderly man. News stories relying on the confession released by the district attorney on the murder day and used as evidence at the preliminary hearing, referred to the suspect as a "were-wolf," "fiend," and a "sex-mad killer." After the Court upheld the conviction, Justice Frankfurter directly blamed the district attorney for the prejudicial material, but also chastised the press for its exploitation of the district attorney's comments;

> To have the prosecutor himself feed the press with evidence that no self-restrained press ought to publish in anticipation of a trial is to make the State itself through the prosecutor who yields the power, a conscious participant in trial by newspaper, instead of those methods which centuries of experience have shown to be indispensable to the fair administration of justice . . . Such passion as the newspapers stirred in this case can be explained (apart from mere commercial exploitation of revolting crime) only as want of confidence in the orderly court of justice.

Stroble v. California revealed that it was not simply the

media that caused the flow of prejudicial publicity, but also court officials who released information on the arrest and trial. Therefore, total prohibition of court officials' statements about the arrest and trial to the press may be looked upon as a strong solution to preventing prejudicial coverage.

The 1951 case of Shepard v. Florida (341 U.S. 50) differed in that the Supreme Court reversed a conviction because of inflammatory newspaper coverage during the trial proceedings. Three Negro men had been accused of raping a white girl in Florida with a local newspaper writing a story that they had confessed. A cartoon appeared in some papers picturing three electric chairs and captioned, "No Compromise-Supreme Penalty." The defendants were handed the death penalty, but an appeal to the U.S. Supreme Court brought a reversal of the conviction, with Justice Jackson noting that prejudicial news coverage obstructed justice;

> But prejudicial influences outside the courtroom, becoming all too typical of a highly publicized trial, was brought to bear on this jury with such force that the conclusion is inescapable that these defendants were prejudiced as guilty and the trial was but a legal gesture to register a verdict already dictated by the press and the public opinion which it generated.

The 1959 case of Marshall v. United States (360 U.S. 310) was significant in that the U.S. Supreme Court granted

a new trial despite the statements of jurors that they would not be influenced by news articles, that they could decide the case only on the evidence offered, and that they felt no prejudice against the defendant as a result of the articles. The Court also ruled that publicity need not be massive or prolonged to constitute grounds for a new trial.

The events following the assassination of President John F. Kennedy initiated the intense conflict between a free press and a fair trial during the 1960's. Nelson and Teeter (1969, p. 228) note that the month after Kennedy's assassination, the ABA charged that the media coverage imputing Lee Harvey Oswald's guilt, involving statements by officials and public disclosures of the details of 'evidence,' would have made it extremely difficult to impanel an unprejudiced jury and afford the accused a fair trial. The Warren Commission, in its Warren Report (1964, pp. 98-99), primarily blamed police and prosecutors for the judicial travesty, but also directed attacks at the press for its role;

> The general disorder in the Police and Courts Building during November 22-24 reveals a regrettable lack of self-discipline by the newsmen. The Commission believes that the news media, as well as the police authorities, who failed to impose conditions more in keeping with the orderly processes of justice, must share responsibil-. ity for the failure of law enforcement which occurred in connection with the

> death of Oswald. On previous occasions, public bodies have voiced the need for the exercise of self-restraint by the news media in periods when the demand for information must be tempered by other fundamental requirements of our society.

Courts regularly resorted to overturning convictions because of prejudicial publicity in the 1960's. Irvin v. Dowd, Rideau v. Louisiana, Estes v. Texas, and Sheppard v. Maxwell are four landmark cases which precipitated the trend toward the issuance of restrictive orders. The Reardon Report, a set of joint press-bar guidelines formulated in 1966, is believed to have helped fuel the fire.

Irvin v. Dowd

The 1961 case of Irvin v. Dowd (366 U.S. 717) represents the first time that the Supreme Court overturned a state criminal conviction because publicity before the trial had prevented a fair trial before an impartial jury. Leslie Irvin, a parolee accused of murdering six people near Evansville, Indiana, was described in press reports released by the Evansville police and the Vanderburgh County prosecutor as "Mad Dog Irvin" and in other accounts as the "confessed slayer of six." After being indicted by the Vanderburgh County Grand Jury, Irvin's counsel sought a change of venue from Vanderburgh County which was granted, but to a nearby county which had garnered similar

prejudicial accounts.

Because of the news saturation, a second change of venue was sought away from the area but was denied because Indiana law allows only one change of venue. Out of the 430 prospective jurors to serve in Irvin's trial, 370 believed him guilty and four of the final 12 believed him guilty. Justice Clark said the decision to reverse the conviction was based on the inflammatory publicity appearing several months before the trial in newspapers delivered to 95 percent of the county residences. The stories revealed Irvin's background, including juvenile crimes, arson and burglary convictions, and a court-martial on AWOL charges during the war. Besides announcing his confession to the murders, headlines announced his police line-up identification, that he faced a lie detector test, and that he had been placed at the scene of the crime. Clark said that prejudicial publicity cannot be purged from a juror's mind, footnoting this contention with a juror's remark that "You can't forget what you hear and see."

Rideau v. Louisiana

The broadcasting of prejudicial pretrial publicity brought another Supreme Court reversal of a conviction in the 1963 case of Rideau v. Louisiana (373 U.S. 723). Wilbert Rideau, arrested on a bank robbery charge in

Lake Charles, Louisiana and held in the Calcasieu Parish jail, was featured in a filmed interview with the parish sheriff in which Rideau said he committed the bank robbery, kidnapping, and the murder. The interview was broadcast over a Lake Charles television station three times a week over a three day period to 97,000 viewers of the 150,000 persons living in the parish.

The motion of a change of venue, instigated because of the saturation of coverage, was denied and Rideau was convicted and sentenced to death. The conviction was affirmed by the Louisiana Supreme Court but the U.S. Supreme Court granted certiorari with Justice Potter Stewart giving the majority opinion. Potter noted that three of the twelve jurors had stated during voir dire examinations, when they were questioned to determine their impartiality before the trial, that they had seen and heard Rideau's interview and that two of the jurors were Calcasieu Parish deputy sheriffs. Justice Stewart declared that the "kangaroo court proceedings in this case involved a more subtle but no less real deprivation of due process of law." Rideau's conviction was reversed, and a new trial was ordered by the Supreme Court.

Estes v. Texas

The influence of television coverage on the criminal jury came to the national spotlight in the 1965 case of Estes v. Texas (381 U.S. 532) in which Texas financier, Billie Sol Estes, was convicted of swindling but not until he received a new trial as a result of the manner in which a judge allowed Estes' original trial to be photographed and televised.

The U.S. Supreme Court found that Estes had been deprived of a fair trial because of the inclusion of a television camera in the courtroom. Justice Tom C. Clark, speaking for the Court, said that television introduces an irrelevant factor into the trial which could increase the likelihood of prejudicing jurors as well as impairing the quality of witnesses' testimony. Dealing with prejudicial effects, Clark added,

> The heightened public clamor resulting from radio and television coverage will inevitably result in prejudice. The distractions, intrusions into confidential attorney-client relationships and the temptation offered by television to play to the public audience might often have a direct effect not only upon the lawyers, but the judge, the jury, and the witnesses.

In a more blatant tone, Clark summed up television's role in judicial proceedings as "a weapon which intentionally or inadvertently can destroy an accused and his case in the eyes of the public."

The Estes case has often been cited as a precedent in the issuance of restrictive orders. Donald Gillmor (1974, p. 9) notes that in Abzill v. Fisher, the court contended that freedom of the press did not include the right of access to sources of information closed to the general public.

Sheppard V. Maxwell

Though the free press versus fair trial issue was well-known to the press and bar during the 1960's, the general populace of the United States had only a dim notion of the value conflict. The 1966 case of Sheppard v. Maxwell (384 U.S. 333) implanted the conflict in everyone's mind, and in the same vein spurred the issuance of gag orders with the Reporters Committee for Freedom of the Press accounting for 174 cases involving restrictive court orders since the Sheppard ruling (Landau, 1976, p. 55).

Dr. Samuel Sheppard, accused in a 1954 case of murdering his pregnant wife in their home in the Cleveland suburbs, was met with press coverage both before and during the trial. Newspapers, seeming eager for his conviction, published vivid headlines and cartoons such as a front page charge that "somebody is getting away with murder." After an inquest in which Sheppard was questioned for five and one-half hours about his actions

on the murder night, his married life, and his love affair with Susan Hayes, the newspapers printed evidence that tended to incriminate Sheppard and pointed out discrepancies in his statements to authorities and the relationship between his love affair and the murder motive. Prejudicial publicity mounted after the arrest, epitomized by a cartoon which pictured the body of a sphinx and Sheppard's head with the legend below: "I Will Do Everything In My Power to Help Solve This Terrible Murder."

Trial jurors were constantly exposed to press coverage because they were not sequestered. They were allowed to go home and read about the proceedings with only mild suggestions from the judge that they not expose themselves to the publicity. Sheppard was ultimately convicted, but in 1966 on a second appeal to the U.S. Supreme Court, the justices reversed the conviction on the basis that prejudicial news accounts deprived him of a fair trial. Justice Tome C. Clark held that because of the "carnival atmosphere," the trial judge should have taken the steps to preserve impartiality, such as ordering a continuance, change of venue, sequestration, or granting a new trial. Clark emphasized the importance of these remedies, saying, "But we must remember that reversals are but pallitives; the cure lies in those remedial measures that will prevent the prejudice at its inception . . ."

Clark's last statement marks a critical juncture for press freedom in two instances. First, judges were given total dominion over their courtrooms with the power to prevent publicity from seeping into the proceedings by any means and second, a major assumption of the statement was that the trial court should control the release of information to the press by police officers, witnesses, counsel, or other court officials. These measures became the focal point in the joint press-bar guidelines of 1966, the Reardon Report, which took into account the problem of officially inspired publicity.

Officially Inspired Publicity

In most cases involving prejudicial publicity, the press have been viewed as the chief perpetrators. There are, however, several instances where government officials and agencies initiate the flow of prejudicial information. Jerome Barron and Donald Gillmor (1974, pp. 395-96) present three cases illustrating the official involvement.

In a case involving the corruption trial of Teamster's leader James Hoffa, Senator Robert Kennedy expressed his personal vendetta against Hoffa by making the following comments on television;

> I think it is an extremely dangerous situation at the present time; this man who has a background of corruption and dishonesty, has misused hundreds of thousands of dollars of union funds, betrayed the union membership, sold out the membership, put gangsters and racketeers in positions of power, and still heads the Teamsters Union.

Later, after Kennedy became Attorney General, the Justice Department issued prejudicial press releases concerning Hoffa. There was also evidence that Kennedy gave assistance and encouragement to reporters who attacked Hoffa in Life and Look magazines.

In March 1965, President Johnson announced to a nationwide television audience the arrest of four men in connection with the murder of a Detroit housewife, shot to death while participating in a civil rights demonstration. After Johnson identified the suspects and castigated the Ku Klux Klan to which they belonged, the Chicago Tribune came out with a headline connoting the helplessness of the defendants saying: "How can such men expect to receive a just trial when they have been condemned in advance on the highest authority."

In another case, FBI director J. Edgar Hoover announced that the three men arrested in connection with the kidnapping of Frank Sinatra Jr. had previous criminal records while in actuality their records contained only arrests, not convictions. The ABA considered

not only the press, but also the conduit role of court and government officials in its 1966 joint press-bar guidelines, the Reardon Report.

The Reardon Report

In 1966, the American Bar Association's Advisory Committee on Fair Trial and Free Press adopted a series of press-bar guidelines, inspired by Massachusetts Supreme Court Justice Paul Reardon, which aimed at limiting or prohibiting the dissemination of publicity at its source to preserve a fair trial. In this case, the sources were attorneys, law enforcement officers, judicial officials, and the press. The four sections of the Reardon Report include recommendations relating to the conduct of attorneys in criminal cases, recommendations relating to the conduct of law enforcement officers, judges, and judicial employees in criminal cases, recommendations relating to the conduct of judicial proceedings in criminal cases, and recommendations relating to the exercise of the contempt power (1968).

The first section, relating to attorneys, states that

> it is the duty of the lawyer not to release or authorize the release of information or opinion for dissemination by any means of public communcation . . . if there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice.

More specifically, lawyers were prohibited from releasing such matters as a defendant's prior criminal record, the existence or contents of a confession, the defendant's taking of examinations, the identity, testimony, or credibility of prospective witnesses, the possibility of a plea of guilty to the offense charged, and any opinion as to the accused's guilt or innocence.

The recommendations relating to law enforcement officers, judges, and judicial employees are essentially the same as the preceding recommendations to lawyers. Among the guidelines included in the second section are a prohibition of releasing the identity of a suspect prior to arrest, limiting the results of investigative procedures to the extent necessary to aid in the investigation to warn the public of any dangers, and a regulation prohibiting the deliberate posing of a person in custody for photographing or televising by the press and the interviewing by the press of a person in custody unless, in writing, he requests orconsents to an interview after being informed of his right to meet with his counsel and of his right to refuse to grant an interview. In addition, judicial employees and judges were prohibited from releasing information which could hinder a fair trial.

In the third section, relating to the conduct of judicial proceedings, a motion to exclude the public from

all or part of a pretrial hearing is recommended if "dissemination of evidence or argument adduced at the hearing may disclose matters that will be inadmissible in evidence at the trial and is therefore likely to interfere with his right to a fair trial." Also, correct procedures on how and when to order a change of venue or continuance, waiver of jury, selection of jury, sequestration of the jury, cautioning and questioning jurors about exposure to prejudicial material, and setting aside the verdict were included in this section. The Committee advises that these procedures be enacted whenever there is a "reasonable likelihood" that publicity will endanger a fair trial.

The fourth section, dealing with the contempt power guideline, emphasized that one who released or published an extrajudicial statement beyond the public record of count and "willfully designed by the person to affect the outcome of the trial" would be punished by a contempt citation.

Though seemingly directed at newsmen, the recommendations were also aimed at figures, like Kennedy and Johnson, who had a personal stake in seeing men jailed. According to Deby K. Samuels (1973, p. 4), the Sheppard decision and the Reardon Report were the dual catalyst sparking the rash of restrictive orders throughout the 1960's and 70's. The Reardon Report's major contribution was its emphasis on the closing of proceedings, the limiting or prohibiting

of public dissemination about the trial, the prohibiting of releasing confessions or prior criminal records, and opinions as to the accused's guilt or innocence.

Chapter III

STUDIES OF THE PREJUDICIAL EFFECTS OF PRETRIAL PUBLICITY

Research into the effects of pretrial publicity on jurors has produced some results favorable to the issuance of restrictive orders on the press. For instance, a high relationship exists between publication of a confession and an impartial jury. Barron and Gillmor (1974, pp. 391-92) note, however, that these same studies indicate that there is as yet little evidence that coverage including criminal records, descriptions of evidence, and opinions of court officers as to guilt or innocence have any significant effects. Tans and Chaffee (1969, p. 647) found that the reporting of the arrest itself was found to be a biasing factor.

Patrick Oster (1976, p. 46) reports that Allen H. Barton and Alice M. Padawer, in a 1976 study, suggested that jurors are convinced more readily of the defendant's guilt if exposed to prejudicial pretrial publicity. In cases that can go either way, jurors who had read about a defendant's prior criminal record and alleged retracted confessions found the defendant guilty 80 percent of the time. Of those who did not read the stories, only 39 percent voted to convict.

F. Gerald Kline and Paul H. Jess (1976, pp. 111-116) constructed mock juries to explore the saliency of pre-trial publicity. Six man juries were assembled from a 48 man pool with one control and one experimental jury assigned to each of four trials. Both groups read prejudicial and non-prejudicial news stories before the trials, and in each of the four trials at least one member in each of the prejudiced jurors referred to the publicity. In three of the four cases the experimental juries decided not to use the prejudicial stories because of pressures from within their groups, pressures found to be related to the judge's instructions read immediately prior to deliberations. Of the 41 jurors who returned post-trial questionnaires, 35 said they had already made up their minds prior to deliberations, prompting Kline and Jess to conclude that since all four prejudiced jurors referred to the outside evidence, such material does have an effect.

Tans and Chaffee (1976) explored a number of issues involving the prejudicial effects of pretrial publicity, specifically the effect of confessions, favorable or unfavorable publicity, quantity of publicity, and police reports. The researchers tested two hypotheses, one being that the probability that a potential juror will prejudge a suspect's guilt or innocence is a function of the amount of his prior information about the case. The second hypothesis tested was that a potential juror will

tend to prejudge a suspect more innocent the more favorable to the suspect is his information, and more guilty the more unfavorable his information. A pretest with 110 college students indicated that reports of a district attorney's statement and the amount of bond greatly influenced judgements of guilt. The suspect's own statement and possible motives had some effect but his criminal record did not.

The second hypothesis was supported in that the suspect was judged guilty when the information was unfavorable and innocent when it was favorable. The experiment showed that the most damaging single element in the stories was the police report that the suspect had confessed. The incidence of judgement was also the highest under the confession condition. For the defendant, the most beneficial elements of the news coverage was the news of his release and the district attorney's favorable statement. Generally, the more information presented, the more likely the person is to prejudge, and the judgement rendered varies with the kind of information presented.

Rita James Simon and Thomas Eimermann (1970, p. 142-144) conducted a poll to determine a community's reaction to news items of a murder case. The stories, by ABA standards, were relatively mild in that they did not give prior criminal records, did not mention anything about the defendant's giving or refusing to give a statement or

confession, did not make statements about the defendants' character, and did not express an opinion as to their guilt or innocence. For survey purposes, 170 names were randomly selected from the county voters registration lists of 57,000 with 130 agreeing to participate. Sixty-five percent of those who could remember something about the case said they favored the prosecution while 27 percent described themselves as indifferent and eight percent could not answer the question.

Stanley Sue and Ronald E. Smith (1974, pp. 86-87) found that jurors remember what the judge tells them to forget, in the case of judicial instructions, and that when the prosecution's case is weak, damaging publicity and inadmissible evidence swing the jury to a guilty verdict. The researchers also discovered that those people who read damaging relevant newspaper accounts vote guilty significantly more often than those who read irrelevant pretrial publicity; they were also more convinced of the validity of the prosecution's case. Ardyth Sohn (1976, p. 100) discovered that the kind of crime (felony or misdemeanor) affected belief in the guilt or innocence of the accused in that there is tendency for some people to assume the accused in a pretrial news story is more guilty than innocent if he or she is charged with committing a felony rather than a misdemeanor. This research has a special relevance in the area of press coverage of sensational murder cases.

Chapter IV

ALTERNATIVES TO PRIOR RESTRAINT

Whenever the possibility exists that there is a likelihood of prejudicing a juror with press coverage, several procedural safeguards are available. Among these safeguards are a change of venue, change of venire, continuance, voir dire examination, severance, waiver of jury trial, sequestration, judicial instructions, mistrial and new trial, and silence orders. According to Lofton (1968) and Gillmor (1966), these measures seem to alleviate the problem in only a minimal way.

Change of venue, changing the location of the trial, has been used in trials involving widespread news coverage on the theory that prejudice will be lessened if the trial is moved to an area where coverage has not saturated the community. Gillmor (1966, p. 124) says that courts have been hesitant to grant this motion and press publicity alone is usually insufficient grounds unless it has so aroused public hostility toward the accused that a fair trial appears to be impossible. The chief difficulty with the change of venue is that there is frequently no place for a defendant to go, considering the widespread coverage

of the mass media. The Yale Law Journal (1974, pp. 123) notes that it is useless if publicity has been nationwide or in a court of limited jurisdiction if the publicity has been spread through the entire jurisdiction. Moreover, Gillmor (1966, pp. 124-26) says the defendant is relinquishing his right to a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed. The delay stems from the fact that venue motions impose upon the defendant the added burden of showing to the court that a fair and impartial trial would be impossible in the original community. Furthermore, even in jurisdictions where the change of venue is liberally granted, appellate courts hesitate to reverse a trial court's decision.

Lofton (1968, p. 329) adds that a change of venue may pose a financial hardship for a defendant and his counsel to go to trial in another county and there is no assurance that the new location will be any more hospitable.

The change of venire, the summoning on jurors from another locale, contains many of the same drawbacks as the venue motion and is useless where the publicity has spread throughout the jurisdiction from which the court can summon a jury.

Continuance, a motion designed to postpone a trial until prejudicial publicity has subsided, has not achieved

much popularity because of several inherent problems. The Yale Law Journal (1975, p. 123) says continuance offers no assurance that the effect of prejudicial publicity will lessen during the period of the continuance or that publicity will not be revived as the new trial date draws near. Gillmor (1966, p. 136) believes that continuance can endangerthe case for the prosecution and defense in that important witnesses and evidence may not be available at a later date. It allows time for witnesses to disappear and for their memories to dim while at the same time interfering with the defendant's right to a speedy trial. If the defendant is not able to make bond or the offense is not a bailable one, it requires him to remain in jail pending trial.

The voir dire challenges, the questioning of jurors to determine their capacity for impartiality, frequently involves many problems. Gillmor (1966, p. 125) notes that counts have developed no method of measuring the actual influence of press publicity on a juror and they have balked at the testimony of expert witnesses. Few jurors will impugn their own capacity for detachment and objectivity and many inexperienced judges and lawyers are not satisfied that a juror can in his deliberations completely separate what he learned in court from what he has learned out of court. In other cases, The Yale Law Journal (1975, p. 124) notes that asking a juror whether

he has seen or heard a prejudicial newspaper report or radio broadcast can call attention to the publicity that the defendant hopes to mitigate. Also, as found in Reynolds v. United States, it is possible that prejudiced jurors would be unwilling to admit their prejudice or would ever be conscious of it, while well-intentioned but naive jurors would admit their slightest predisposition and thus be challenged. A voir dire which eliminates those jurors who have been exposed to the publicity may leave the defendant with jurors who are generally uniformed and are not capable of satisfactory service on a jury.

The remedy of a jury waiver can only be initiated by the defendant, but there are important constraints on the defendant's ability to waive a jury trial. The Federal R. Criminal (Yale Law Journal, 1975, p. 23) provides that "Cases required to be tried by jury shall be tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government." State practice varies, but in some jurisdictions the defendant's right to waive a jury trial is subject to limitations. The reasons for the limitations are varied. In State v. Taylor (391 S.W. 2d 835) the court refused a jury waiver by the defendant because of the presence of substantial evidence to support a guilty verdict. The black defendant, accused of unlawfully selling a narcotic

drug, based his waiver motion on the belief that the jury gave the testimony of a white narcotics agent much more weight than a jury would have accorded that testimony at other times. The court said that the

> reviewing court does not weigh evidence but determines only whether there is sufficient substantial evidence to support the verdict and the verdict supported by substantial evidence will not be disturbed on appeal.

Putthammer (1953, p. 179) argues that waiver limitations are due to such facts as that it places a heavy, unfair burden on the judge to individually decide the case. The burden is especially intense in deciding felony cases. Also, some states believe that waiver would deprive the defendant of the "right" to be tried by the jury.

Sequestration, the isolation of a jury from prejudicial information and influence, is frequently used to preserve a fair trial. The Sheppard v. Maxwell case represented a gross neglect of this remedy in that jurors were free to read or heat what they wanted. The difficulty of sequestration, according to Lofton (1968, p. 247), is that even when jurors are sequestered, surveillance over them is not likely to be so strict as to prevent members from listening to radio or television news concerning the case or discussing it over the phone. Gillmor (1966, p. 247) believes the chief difficulty with sequestration is knowing in advance when prejudicial material will appear

in thepress, when a newspaper carrying such material might unexpectedly turn up, and the possibility that jurors will feel resentment against the defendant who requests that they be locked up because of the inconvenience. Because of these reasons and the added expense to the state, this remedy is seldom used. The Yale Law Journal (1975, p. 123) says when effectively applied, sequestration can prevent publicity from reaching the jurors after they have been impaneled but it does not remove the effects of prior publicity.

The Journal notes that judicial instructions, in which the judge instructs the jury that it must decide a case purely on the law and evidence presented, is at best a weak remedy. Judicial instructions are widely criticized as being ineffective and at times harmful because they call the jury's attention to the publicity in question. Gillmor (1966, p. 183) notes that adequate instructions by a judge may defeat motions for a new trial, but that evidence exists which shows that strong prohibiting instructions by the judge may boomerang and serve primarily to remind the jury of something it would not otherwise have thought of doing. Some courts have held that failure of the judge to charge the jury was grounds for reversal while others have ruled that any kind of charge to the jury is inadequate where articles have been flagrantly prejudicial. The latter proposition

supports the notion of implied bias or presumed partiality of jurors where publicity has been widespread as being a sufficient cause for mistrial or a new trial. The opinions in Rideau, Sheppard, and Estes support this rationale, showing the Supreme Court's lack of confidence in jury instructions.

At the conclusion of a trial, a new trial may be ordered by a court of original jurisdiction or by an appellate court reversing a lower court's determination on the basis of the lower court's denying of other remedies for insuring a fair trial. According to Gillmor (1966, pp. 126-132), the general rule that has evolved in the federal and state courts is that even a preconceived opinion as to the guilt or innocence of a defendant being tried on a criminal charge, based upon newspaper reports and which would require some evidence to remove, is insufficient to disqualify a juror or result in a mistrial or reversal if that person satisfies the judge that he will fairly decide the case on the evidence and the legal principles laid down by the court. It has been held that if it does not appear the jurors have read the newspaper, a verdict will not be set aside simply because the storieswere published before the trial. Even when the evidence of guilt is overwhelming, a reversal may not be warranted. Gillmor concludes that the major disadvantage of a mistrial or a new trial motion is the

financial and psychological costs it imposes upon the defendant who must stand trial for a second time. This situation occurs frequently in sensational cases.

Contempt Power

Because of the weaknesses of conventional remedies and the occurrence of sensational trials, silence orders are frequently issued to the media. These orders prohibit the reporting of events in the courtroom and are enforced by the threat of a contempt citation. As cited in Branzburg v. Hayes (408 U.S. 665),

> Newsmen . . . 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.

The Yale Law Journal (1975, p. 124) notes that contempt orders are seen as unconstitutional infringements on freedom of the press, but more important they are an incomplete solution to assuring the defendant a fair trial. If is of little service to the accused who is written into jail by a prejudicial press that the editor or publisher is fined or imprisoned.

The first federal case where a reporter was cited for contempt for covering a public meeting and the first federal case where the media was told that they obey invalid injunctions throughout an appeal was the 1972 case of United States v. Dickinson. According to Deby K.

Samuels (1973, p. 7) the crucial part of the decision was that while the right to issue such an order was condemned, the enforcement of it was not. As found in the 1941 case of Bridges v. California, an adjudication of contempt, whether by state or federal court, could be permitted to stand only if the "clear and present danger" to a fair trial was demonstrated to be "extremely serious and the degree of imminence extremely high." The Georgetown Law Journal (1972, p. 208-9) says this test has been abandoned in most cases because of the common "garden-variety" newspaper accounts which cannot measure up to the standard. After this measure was enforced, Justice Frankfurter complained that under it the states would no longer be able to use it as an effective sanction, unless misbehavior physically prevented continuation of court-room proceedings. Since the initiation of the clear and present danger standard, the Supreme Court has never upheld a conviction for contempt by publication.

Chapter V

FREE PRESS VERSUS FAIR TRIAL IN THE 1970'S

The 1970's provided the backdrop for two of the most dramatic events in American political history, the My Lai massacre and the Watergate affair, two events which spurred judicial proceedings involving the trial of subordinates when in actuality the crime was centered higher up in the chain of command. In the case of Lieutenant William Calley, an army man charged with slaughtering helpless residents in the Vietnam village of My Lai in 1968, Federal District Court Judge J. Robert Elliott reversed his conviction and released him from confinement because of the "massive adverse pretrial publicity" which had prevented the six-officer panel at his court martial from considering the case without prejudice (Time, 1974, p. 15). On appeal the Fifth Circuit, sitting en banc, reversed the district court chiefly because, in its view, the intense publicity had not been prejudicial to Calley and the circuit court noted that the trial court had tried other procedures, voir dire and regulations, to insure a fair trial (Calley v. Calloway, 382 F. Supplement 650).

The prosecution of the Watergate defendants followed

two years of charges, headlines, nationally televised hearings, impeachment proceedings, and the resignation and pardon of President Richard M. Nixon. It may have been literally impossible to impanel a jury anywhere in the nation that did not have some preconception of the guilt or innocence of the defendants (Time, 1974, p. 15). As Harvard Law School professor John Ely said, "Members of a jury anywhere who had never heard of Watergate would be badly qualified for any purpose" (Newsweek, 1974, p. 44). Former Attorney General John Mitchell, convicted of obstruction of justice and perjury, is still seeking reversal because of prejudicial publicity influencing his case.

In the 1974 case of U.S. v. Albott Laboratories (505 F.2d 565), the Fourth Circuit Court of Appeals held that pretrial publicity had not been so inflammatory that a fair trial was absolutely precluded, and that it was improper to dismiss the indictment without at least an attempt to see if an impartial jury could be provided. In the case of Patricia Hearst, daughter of newspaper tycoon William RandolphHearst, government prosecutors tried unsuccessfully to obtain a gag order that would prevent defense attorneys from talking to the news media but the judge, explaining to the court why he was going to sequester the jury, told the 74 prospective jurors "this is going to be the most fully covered case" with

"as broad as coverage as possible" because it is "a public trial" (Publisher's Auxiliary, 6-25-75, p. 4).

Judicial Proceedings of Nebraska Press Association versus Stuart

Despite the trend of dismissing restrictive court orders in the 1970's, cases continued to develop where trial courts issued "gag orders" on the media without giving adequate consideration to all other remedies short of prior restraint. This premise was the focal point in the recent case of Nebraska Press Association versus Stuart (96 S.Ct. 2791), argued on April 19, 1976 and decided June 30, 1976. For the first time, the U.S. Supreme Court issued a ruling on banning the press from publishing facts that could hinder a fair trial, saying that judges "generally" cannot issue gag orders in criminal cases, even if they believe such orders would help assure impartiality. Inferred in the unanimous opinion was that while the constitutional right of a free press had been violated in this specific case, gag orders could still be a possibility in future criminal cases. A study of the proceedings explains the "ad-hoc" approach.

On the evening of October 18, 1975, local police found the six members of the James Henry Kellie family murdered in their home of Sutherland, Nebraska, population 840. Bennett (1976, p. 24) reports that the assailant,

carrying a .22 caliber rifle, first raped ten year old daughter Florence then shot her in the forehead. As the other family members responded to her screams, he shot each one of them. There was also evidence of necrophelia. The police released the description of a suspect, Edwin Charles Simants, an unemployed handyman with an IQ of 75, to reporters who had hurried to the scene of the crime. Simants, arrested and arrainged in the Lincoln County Court the next morning, drew widespread news coverage immediately by local, regional and national newspapers, radio, and television. On that morning an Associated Press bulletin reported that Sheriff Hop Gilster said that Simants told the accused's father "that he was responsible for the killings." Three days after the murder, the County attorney and Simants' attorney asked Lincoln County Court judge Ronald Ruff to enter a restrictive order relating to "matters that may or may not be publicly reported to the public " because of the widespread publicity. The judge disallowed reporting of any testimony at the preliminary hearing, which was open to the public.

Nebraska news organizations appealed the issuance of the gag order to District Court Judge Hugh Stuart, who ended Ruff's order and entered his own saying "because of the nature of the crimes charged in the

complaint there is a clear and present danger that pretrial publicity could impinge upon the defendant's right to a fair trial." The Supreme Court Reporter (96 S.Ct. 279) reported that the order applied only until the jury was impaneled and prohibited the press from reporting the confession, the fact or nature of statements Simants had made to other persons, the contents of a note he had written the night of the crime, the result of the pathologist's report, and the identity of the victims of the alleged sexual assault and the nature of the assault.

The petitioners applied to the Nebraska Supreme Court, but the Court also ruled in favor of Simants, prohibiting the reporting of only three matters; (a) the existence and nature of any confessions or admissions made by the defendants to law officers, (b) any confessions or admissions made to any third parties, except members of the press, and (c) other facts "strongly implicative" of the accused. The order expired by its own terms once the jury was impaneled and for this reason Simants argued that the case was moot. An appeal taken to the U.S. Supreme Court brought a different opinion, with the Court saying that the jurisdiction was not defeated because the free press versus fair trial issue was one "capable of repetition, yet evading review." The Court found that if Simants' conviction was reversed by the

Nebraska Supreme Court and a new trial was ordered, the District Court could enter another restrictive order to prevent a resurgence of prejudicial publicity before Simants' retrial. The Supreme Court's vacating of the gag order was based on an opinion in Near v. Minnesota (283 U.S. 697) which read,

> Any prior restraint on expression comes to this court with a heavy presumption against its constitutional validity. The respondent thus carries a heavy burden of showing justification for the imposition of such a restraint.

The Court noted that the trial judge could reasonably expect a deluge of pretrial publicity and its potential dangers, but his conclusion as to the impact of the coverage on prospective jurors "was of necessity speculative, dealing as he was with factors unknown and unknowable." The Court said that the Nebraska Supreme Court no more than implied that alternative measures short of prior restraints would have prevented a fair trial and that it was not clear that prior restraint on publication would have effectively protected Simants' rights based on the limited territorial jurisdiction of the trial court issuing the order, the difficulties inherent in predicting what information would undermine the juror's impartiality, the problem of drafting an order that would effectively keep prejudicial information from prospective jurors, and the fact that the events occurred in a small

town where rumors would travel quickly by word of mouth.

The Sheppard v. Maxwell case, while causing a proliferation of gag orders after 1966, served as a catalyst in the vacating of the Nebraska gag order. The order, by prohibiting the reporting of evidence adduced at the open preliminary hearing, violated the principle cited in Sheppard that "there is nothing that proscribes the press from reporting events that transpire in the courtroom." The Court also found that the order restraining publication of the facts "strongly implicative" of the accused was not strong enough to negate First Amendment rights.

Discussion of And Reasoning Behind the Decision

The U.S. Supreme Court's opinion in Nebraska Press Association v. Stuart that alternative measures in insuring a fair trial should have been evaluated more strongly by the lower courts presents a problem, for alternative measures would have helped little. The Creighton Law Review (1976, pp. 711-14) explains the rationale for this contention. First, the suggestion of a continuance of a trial date does not acknowledge the defendant's right to a speedy trial and the prosecutor's obligation, by Nebraska statute, to bring the matter to trial within six months. Further, Nebraska requires that the trial of a defendant who is in custody and whose pretrial

liberty presents unusual risks, must be given preference over other criminal cases. Simants, held without bail, received a January 5, 1976 trial date. Because of the early trial date and the great national and regional interests, continuance was untenable. The remedy of a change of venue was not practical because of a Nebraska statute which permits change of venue in criminal cases only to a county adjoining the county in which the crime was committed. All of the counties surrounding Lincoln, Nebraska were barraged with coverage of the case, so the probability of finding an impartial jury by a venue change could not have been appreciably increased.

Voir dire challenges were not expressly addressed by any of the courts in the litigation, possibly due to the assumption thatthis method would be useless in a community so small and already exposed to intensive publicity. The absence of reference in the appellate opinions may reflect merely a deference to the lower court's discretion. The other alternative considered and adopted by the Nebraska Supreme Court was a preliminary hearing closed to the public and press, though the County Court denied this closure method because of a statute requiring all judicial proceedings be open. However, the Nebraska Supreme Court incorporated the ABA standard relating to pretrial hearings in order to permit the statute to stand against a constitutional challenge found on the Sixth

Amendment right to an impartial jury. The constitutionality of this ABA standard, however, has not been settled by the U.S. Supreme Court and some courts have abused this alternative by not applying the "reasonable likelihood" of prejudice standard to the case.

Though freedom of the press generally does not embrace a right of "special access to information not available to the public" as found in Branzburg v. Hayes (408 U.S. 665), these type of proceedings are objectionable under most circumstances because of a general distaste for secrecy in judicial proceedings and of the likelihood of creating suspicion of a judge's bias. Several unique aspects of preliminary hearings, however, do offset the holding that the public has an absolute right to know. First, the only evidence offered in a preliminary hearing is that of the prosecution and secondly, a large segment of the public may not distinguish between a preliminary hearing and a trial and thereby interpret the outcome as a testament of guilt rather than a finding of probable cause to hold over the defendant.

The gag order issued in the Nebraska case, in lieu of the unfeasibility of conventional alternatives to solve the free press versus fair trial conflict, was based on the "clear and present danger" rule that the "substantive evil" be extremely serious and the degree of "imminence" extremely high relating to prejudicial infiltration.

The Nebraska Law Review (1976, pp. 570-71) finds that in balancing the two amendments, borderline cases should be resolved in favor of a free press because of other available alternatives, but that the Simants case justified prior restraints on publication during the pretrial period because of its exceptional, highly publicized, sensational nature. It contended that because of the community attitudes, the publication of the existence and contents of alleged confessions made by Simants, and the magnitude of the crime which focused state and national attention on a small rural community, the clear and present danger criteria was warranted.

The U.S. Supreme Court did not believe the clear and present criteria was warranted and in its ruling seemed to ban all future restrictive orders on the press. According to Benno C. Schmidt (1976, pp. 51-53) the Nebraska decision is at best a hollow victory because of the Supreme Court's reliance on a highly particularistic approach to First Amendment cases. The court reached back to a 1950 Court of Appeals opinion by Judge Learned Hand in which decisions were reached by weighing the circumstances of the individual case and balancing First Amendment principles against other social values. Known as ad hoc balancing, critics of this approach have claimed that no predictable standards emerge; that the scales tend to be tipped against the First Amendment

because particular (often trivial) examples of free expression tend to be weighed against general social values while the overall value of freedom of expression is ignored; that the particularized focus tends to overlook the dynamics of how restrictions on free speech will be administered; and that the absence of general rules leaves room for excessive judicial discretion in individual cases. Ad hoc defenders, on the other hand, argue that First Amendment issues are too complex for categorical responses; that broad rules are brittle and will tend to generate categorical exceptions; and that categorical judicial guarantees leave too little room for policy judgements by other government branches.

Chief Justice Burger did not extend a general rule, but only said that prior restraint was unconstitutional as applied to this particular case, ending his opinion with a qualified commitment to an ad hoc approach;"However difficult it may be, we need not rule out the possibility of showing the kind of threat to fair trial rights that would possess the requisite degree of certainty to justify restraint." Justice White jointed with Burger's opinion for the Court along with Blackmun, Powell, and Rehnquist, but added a few words of his own suggesting he favored a general rule; "There is a grave doubt in my mind whether orders with respect to the press such as were entered in this case would ever be justifiable." But because this was

the first case to raise the question squarely, "It may be the better part of discretion, however, not to announce such a rule." Brennan, Stuart, and Marshall argued for a categorical rule against prior restraints, arguing that the only exception to the absolute prohibition against them might be when the publication of military secrets would be irreparably damaging to national security. Justice Stevens concurred with Brennan, but added that he might uphold prior restraints, depending on misconduct by the press in acquiring prejudicial information.

Martin Shapiro (1976, p. 34), an expert on Supreme Court proceedings, criticizes the Court's ad hoc approach because he believes it destroys the Miranda rulings, saying that "Nebraska Press Association is yet another end run around Miranda and exclusion designed to get a confession to the jury whether or not it was legally obtained." According to Shapiro, the case presented the opportunity to take constructive first steps particularly toward creating a confessions rule, but instead the Chief Justice refused to take any step toward constructing any rule other than the assertion that the Supreme Court itself would do what it pleases with each case as it arises;

> The Chief Justice refuses to take the first steps toward carving out a confessions exception to the rule against prior restraint because he wants to get confessions to the jury no matter what. The liberals refuse to take any steps toward protecting the Miranda and exclusionary rules in which they do believe because their absolutist First Amendment doctrines debar them from dealing constructively with the real problem.

Ramifications of the Nebraska Decision

Discussed at length in the Nebraska decision were the implications for related problems of court closings, sealing court documents, and censoring defendants, witnesses, police, lawyers and other officials involved in the case. Landau (1976, p. 29) believes that both the majority opinion and the concurring opinions appear to indicate that the Court might be susceptible to upholding orders closing access to proceedings, documents, and persons involved in the trial, actions which some members of the press believe are prior restraints because they operate just as effectively to stop the public dissemination of information about the courts. Schmidt (1976, p. 53) says that out of Justice Burger's circumstantial approach, a trial judge may be forced to issue a short-term injunction in order to provide time for even an expedited decision. As long as prior restraints are possible, short-term restraining orders can be issued whenever a plausible claim of special circumstances can

be made. Secondly, Schmidt notes that the ad hoc position of Burger may spur longer term pretrial restraints. Some trial judges may test Burger's position by issuing pretrial restraints together with findings that Sheppard alternatives are inadequate. The Nebraska decision could lead to a closing of certain types of hearings on other parts of the criminal trial along with Burger's note that the closing of the proceedings with the defendant's consent may be a way of avoiding prejudicial publicity without direct controls on the press. The decision may produce more of this kind of shutting off information at the source.

The following August after the June 30, 1976 Nebraska decision, the ABA adopted a resolution spelling out the proposed procedure courts may adapt to accommodate the free press, fair trial values (Editor and Publisher, August 14, 1976, p. 9). The key portion and the first step in the section, suggested by Jack C. Landau, Newhouse News Service's Supreme Court Reporter in 1974, provided that "Any interested party, including news media personnel, be given notice and an opportunity to be heard either before a court enters an order concerning pretrial and trial publicity of criminal proceedings." The premise underlying this section was that members of the press are usually the best equipped to provide First Amendment input to a judge's consideration.

The other steps recommended were (1) that the court set forth facts and reasons to explain the necessity for a restrictive order (2) that expedited judicial review of restrictive orders should be provided before the issues involved become moot (3) that standing guidelines rather than standing orders set the normal standards of conduct to the disclosure of information by attorneys, law-enforcement officers, judges, judicial employees, and for the guidance by news media personnel and that these guidelines not be enforceable by the power of contempt and (4) that special orders be entered only for specific cases where the court determines that prejudicial publicity would prevent a fair trial. Violation of these special orders would be met by a contempt citation. These guidelines gave the trial judge the power to individually determine if the procedure should be adopted for use in the courts.

The idea of the press providing input to a judge's consideration, the explanation for a restrictive order, the question of mootness, and the clear and present danger clauses embodied in this new procedure clearly eminate from the debate in the Nebraska decision. A clause of the procedure states that the guidelines are not intended to spur the entry of gag orders, but rather to regulate and moderate their use. The controversial point of the whole procedure, however,

arises when the Advisory Committee states that it "strongly recommends against any orders which impose direct restraints on the news media." The words "strongly recommmends" invoke friction from both the press and the bar because many believe in no court restraints under any circumstances. Donald N. Mann of WBBM radio and a member of the ABA Standing Committee elaborates on this position;

> The press could never partake in a procedure which involves prior restraint on freedom of the press. By so stating (its recommendation against imposition of prior restraints) the Committee admitted that the possibility exists that direct prior restraints may be imposed against the press within the recommended procedure. The net result of this approach is riddled with ambiguity, uncertainty, and impossility.

An editorial comment in Editor and Publisher (Aug. 21, 1976, p. 4) noted that the new ABA procedure walked right thorugh the loopholes offered in the Nebraska case.

> The Court unanimously upset the Nebraska gag order but did not rule out the possibility that under proper circumstances and with adequate proof a gag order might be sustained. So the ABA with ambiguous language left the door open for further gag orders and more contempt cases against newsmen. In spite of the High Court's repeated assertion in the Nebraska and Sheppard cases that the judiciary is capable of protecting a defendant's right to a fair trial without enjoining the press from public information in the public domain, the ABA persists in saying the contrary.

One can reasonably conclude that the possibility of

prior restraints on the press still remains, as witnessed by the ad hoc decision of the Supreme Court and the ABA guidelines. It is the loopholes in the Nebraska decision that judges explored in subsequent court cases.

Rulings Since the Nebraska Decision

Since the Nebraska decision and the adoption of the new ABA guidelines, trial judges have explored the available loopholes of temporarily delaying the proceedings, closing preliminary hearings, sealing documents, and restricting trial participants from talking with the press.

Quill (Sept. 15, 1976, pp. 13-14) reports that in New York, State Supreme Court Justice Martin Evans prohibited the defense, prosecution, and court staff involved in the murder trial of a Black Muslum from talking to the press. He also refused to allow reporters in his court to see a transcript of a partially inaudible tape recording that was introduced into evidence. In another case, Oklahoma County Special Judge Charles Halley restricted the press from publishing the name or photograph of an 11 year old accused of second degree murder, saying that the ruling was not contrary to the Simant's case because the murder count was not a misdemeanor nor was it a felony since the child could only

be subject to a delinquency ruling of second degree murder. Maguire (Jan. 1977, p. 15) reports that the U.S. Supreme Court, considering that the right to rehabilitation may have outweighed the freedom to print in this case, issued a stay in November, permitting identification until it hears full arguments later in 1977.

Quill (Sept. 15, 1976, p. 14) reports three other developments, one being an Oklahoma case where reporters covering a fraud trial in Tulsa were asked to sign statements requesting that they avoid using hearsay, conjecture, or personal opinion in their reporting. The statement, coming from the U.S. District Court, said the measure was "an effort to avoid mistrial and the expense of retrial and/or the cost to the taxpayers to sequester the jury." In another case, the Colorado Supreme Court ruled that knowledge of a criminal case that a juror receives through the news media is not a basis for a mistrial, saying that requiring jurors to have no knowledge of a case "is to establish an impossible standard in a nation that nurtures freedom of the press." In another major move, the U.S. Court of Appeals for the Fourth Circuit ruled that the sealing of court papers was a violation of First Amendment rights in connection with the corruption trial of Maryland's Governor Marvin Mandel. The case ended in a mistrial.

In Hartford, Connecticut, three Connecticut dailies

asked a judge presiding over a murder trial to halt the proceedings until the legality of his barring the press and the public could be resolved (Publisher's Auxiliary, 2-9-76, p. 4). The judge had ordered four reporters and a spectator from the courtroom while lawyers argued pretrial motions in a murder case. Counsel for the Courant, one of the papers, claimed that the gag rule was unconstitutional and asked that the judge make the gag order in writing and give the papers a court hearing on the matter before issuing any more orders. Farber (1976, p. 20) says that in the kidnapping case of Samuel Bronfman, 22 year old heir to the Seagram liquor fortune, the judge directed the defense and prosecuting attorneys not to discuss the case with reporters until the jury reached a verdict. The jury in this case was not sequestered. The New York Times (2-16-76, p. 20) reports that in a kidnapping case in Madera, California, the three defendants argued that justice would be served only with a gag order prohibiting those in the case from talking with the public or press, and sealing the transcript of the grand jury hearings which led to the indictment.

It is evident from the cases presented that judges and defendants are resorting to court closings, the sealing of court documents, and the censoring of those involved in the case from talking to the press. The

trial court may well pursue these avenues in the most recent free press versus fair trial confrontation, the murder trial of Fort Worth millionaire T. Cullen Davis, accused of killing his 12 year old stepdaughter, Andrea Wilborn, and Stan Farr, his ex-wife's lover. The trial began on February 21, 1977 in Judge Tom Cave's 213th District Court in Forth Worth. Cartwright (1977, p. 153) says that Davis's attorneys, Richard "Racehorse" Haynes, Phil Burleson, and Bill Magnussen, elected not to seek a change of venue or continuance but to immediately begin their defense. He points out that the people of Fort Worth might not have taken the murder case seriously if Farr was the only victim, making it "another in a long series of lovers' triangles that were blown apart with a gun." But the death of the innocent teenager, Andrea, induced the sensational element which made it different.

Because of this element, Cave's court is experiencing difficulty in the jury selection and news coverage of the case. The Galveston Daily News (2-24-77, 2-26-77) reported that the judge expected the impancling process to last at least four weeks and instructed potential jurors that they would be sequestered for as long as two months if chosen. He also noted that the case could be prolonged if the news media did not comply with his request to withhold the identities and quotes of persons questioned during jury selection.

The Houston Post (2-27-77, p. 14a) reports that in the opening week of the trial, Cave met in advance with reporters to coordinate their coverage, issued rules of decorum, and assigned 30 of 60 seats in the courtroom to the news media. At the end of the trial's first week, not a single juror had been chosen with defense attorney Haynes pointing out that the causal factor of selection problems was the publication in a local newspaper of the names, addresses and remarks of prospective jurors, one of whom said he believed Davis killed Andrea Wilborn. Haynes said that "many times if people have an idea they'll see their names in the newspaper tomorrow they'll be loathe about what they say today." Judge Cave, clarifying his court's present situation, directed a warning at news representatives which brought the possibility of a gag order into reality;

> The more that is published and the more seen on TV from this point forward means it will take longer to pick a jury . . . Lay off publication of individual jurors, who they are, where they live and what they say. Now do I make myself clear! I don't want to make this an order, but if I have to I damn sure will.

The T. Cullen Davis case is not only significant in the free press versus fair trial arena because of the statements hedging toward the issuance of gag orders, but also because it is a high society murder with a wealthy defendant. With a prominent reputation and the

financial resources needed to extend the litigation, the case presents quite a contrast from the trial of Edwin Simants, the unemployed handyman. Jurors may respond differently to the widespread coverage of this prominent figure versus the low profile of Simants.

Chapter VI

SHOULD ONE AMENDMENT HAVE PRIORITY?

The Case for the First Amendment

Judge Harold Medina, 89 year old senior judge of New York's U.S. Court of Appeals, believes the press must not make concessions where First Amendment issues are involved. According to Publisher's Auxiliary (4-10-76, p. 12), the judge states that "First Amendment constitutional rights of freedom of the press and speech are more important than the guarantee of a fair and impartial trial extended by the Sixth Amendment," basing his assertion on the assumption that judges have other alternatives, such as change of venue or sequestration, to consider before muzzling the press. Concerning the voluntary guidelines on pretrial publicity used by the press, Medina says the guidelines have been turned into "hard and fast rules" by judges and lawyers which impair press freedom.

It is clear that journalists, along with lawyers and judges, believe that gag orders are an infringement on freedom of the press. While the case for supporting the Sixth Amendment is backed by empirical studies and a majority of the bench and bar, support for a free press

is based on three general contentions; (1) the explicit wording of the First Amendment (2) the role of the press in American society and (3) the benefits the press provides to the defendant.

Under the first contention, the Georgetown Law Journal (1972, p. 199) says that the First Amendment emphatically states that "no law" shall abridge the freedom of the press, while the Sixth Amendment fails to define permissible limits of means for protecting concepts such as "impartial," "speedy," and "public." The structure may leave the guarantee of a fair trial open to interpretation by the courts.

Secondly, the press is seen as playing the role of the protector of American freedom. Regarded as the "Fourth Estate," the press is responsible for informing the public on matters of vital interest as well as keeping checks on the legislative, executive, and judicial branches of government. The press is also known as a watchdog, performing the invaluable service of examining official bodies such as the police and courts to uncover any traces of misconduct. These roles blend in with the third contention for freedom of the press, the benefits a defendant and/or plaintiff may receive from trial publicity.

Despite trials where widespread publicity has proved detrimental to the preservation of a fair trial, some cases have proven that news coverage has little effect on

jurors, such as in the trials of former Secretary of State John Connelly and black school-teacher Angela Davis. Lofton (1968) asserts that in some instances publicity can aid the defendant. Judges, in enforcing a postponement in the publication of trial news, may be overlooking the corrective effect of concurrent trial coverage in that the prompt reporting of trial testimony might cause a reader with contradictory information to come forward and inform the court. Lofton (1971) says such were the events in a 1964 New York City case involving Gregory Cruz, an alleged murder suspect, when newspaper reports uncovered evidence that helped free him before trial from false police charges. Lofton (1968) adds that pretrial publication of confessions is often defended by the press not only on the ground that it prevents behind the scenes deals, but that it also is a means of exposing police resort to duress and that it may lead to more accurate information if the confession contains inconsistencies. Barring officials from giving out certain information during the pretrial stage or prohibiting the press from publishing such information means placing an extraordinary confidence in the integrity of law enforcement officers or the ability of the courts to correct any wrong. Lofton says,

> Maximum press accessibility to police records and other pretrial information is necessary to help protect citizens from illegal detention and from arrest or conviction without cause, to safeguard the community against the unjustifiable release of arrested persons through pressure or influence, and to insure the integrity of public records that could be tampered with. One answer to harmful pretrial publicity is the exercise of wiser judgement by editors and not censorship by officials [267].

A subsidiary contention against infringement on freedom of the press is that gag orders place an unusually heavy burden on the community press. Publisher's Auxiliary (2-10-76) reports this problem in an interview with H. Brandt Ayers, the publisher of a small paper in Anniston, Alabama. Ayers says that prior restraint places a much heavier burden on the small papers because they lack the finances and the big law firms to defend their case. In a statement to the Supreme Court filed as part of the brief in the Nebraska case, Ayers said small U.S. newspapers "are not read in the White House, the Congress, the Supreme Court or by network news executives . . . We retain no great national law firms" and that without adequate profits to defend themselves, the small paper's "only alternative is obedient silence."

The press regards itself as a public informant and watchdog of people's interests with many members of the bar and bench supporting this contention. Many, however, believe that the press in practice has not lived up to its

ideal role of watchdog and informant.

The Case for the Sixth Amendment

The theory of insuring a fair trial by placing gag orders on the press is justified by the bench and bar on the grounds of the empirical evidence proving the prejudicial danger of news coverage, the nature of the coverage, the carelessness of reporters, the weaknesses of alternative remedies, and the "clear and present danger" rule. Lofton (1968) selects several danger spots of wide coverage.

First, most police investigation publicity does not favor the suspect in that it is not unusual for newspaper headlines and articles to indirectly pronounce guilt solely on the basis of police assertions, sometimes unreliable, which appear in the paper. Lofton believes that out of court reports of the defendant's criminal record may influence the jury more than admissible evidence because it is frequently more detailed. The same premise applies to the publication of confessions in that newspapers are seldom cautious about printing confessions involuntarily given. It is because of the strict rules as to the admissibility of confessions in evidence that pretrial publication of confessions is questionable. The confession may be repudiated by its author, but the repudiation may not be reported and even if reported, it may not be read

or believed by all who read the original publication.

Frequently, the personal goals of prosecutors, defense attorneys, and law enforcement officers are seen as more easily attainable by using the press. Jacob (1973, p. 55) says that the prosecutor's position is "an attractive springboard for higher office ." The prosecutor fills press space and television time and his investigations are a prime source of newspaper headlines. He controls the dissemination of pretrial publicity while at the same time seeking advancement to a judgeship, a congressional seat, or a higher state office. The prosecutor, therefore, possesses the means (media coverage) to attain a personal end (higher office). By releasing information prejudicial to the defendant, the prosecutor has a greater chance of obtaining a conviction which makes him look better in the eyes of the political and judicial hierarchy.

Defense attorneys may issue statements to the media in order to advertise themselves and their services to the public. According to Canon 27 of the bar's Code of Professional Ethics, attorneys are forbidden to advertise their services. Jacob (1973) notes that lawyers on the bottom of the stratification system, including solo practitioners and public defenders, are least likely to adhere to the Code in order to make an adequate living. Because most murder defendants are represented by this group, the chances of issuing statements to the press are

great.

Law enforcement officers involved in the arrest of the defendant may have an intense desire to see their arrest turn into a conviction, making them look good in the eyes of the public. In order to show they are doing a good job which might lead them to a commendation or promotion, police may leak information to the press which by its prejudicial nature could force a conviction.

The press, therefore, can be seen both as an instigator and a conduit of prejudicial publicity which can destroy a fair trial. The Georgetown Law Journal (1972) believes that the value of a fair trial is absolute and coverage must be controlled or prohibited to protect that right;

> The right to a fair trial is the ultimate protector of our property and our liberty, and all the information the press can disseminate will do little to protect us from loss of freedoms if there is no due process, no assurance of fair procedures, to stop that loss.

The free press versus fair trial issue does not involve giving one value priority over the other in a general sense. Only on the basis of individual situations does a set of priorities seem workable.

Chapter VII

CONCLUSIONS

At the beginning of this treatise, it was inferred that freedom of the press may have assumed priority over the right to a speedy, public trial by an impartial jury because of the Nebraska decision which seemed to permanently ban prior restraints on the press. However, the decision not only failed to eliminate the probability of future gag orders but in the process encouraged courts to explore available loopholes in contending with pervasive publicity. The main issue is not whether one side will assume priority over the other, but whether the two constitutional values can exist in the same culture. Both rights are absolute values, and as absolute values conflict will always occur. Smith and Hunsaker (1975) believe that conflict may be healthy in a sense "because it permits disagreement, which in turn spurs progress and assures a constant reassessment of accepted standards." This conflict criterion was a causal factor of the ad hoc approach in the Nebraska case, for the formation of a general rule banning all restraints of the press would have seriously threatened the existence of the Sixth Amendment. Schmidt (1976) quotes Alexander Bickel, who realized the danger of expending one value

for the existence of another when he wrote after the Pentagon Papers case;

> The conflict and contention by which we extend freedom seem to mark a contradiction . . . for they endanger an assured freedom, which appeared limitless because its limits were untried . . . We extend the legal reality of freedom at some cost in its limitless appearance.

A general rule barring all restrictive orders is unreasonable in terms of the defendantinvolved in one of the rare, sensational cases, such as Sheppard and Simants, where a definite "clear and present danger" is involved and where all possible remedies short of prior restraint are useless. One available avenue of correction would be a joint effort by the media, bench, bar, and law enforcement officers to reevaluate and regulatetheir separate roles in the trial proceedings. As Deby K. Samuels (1973, p. 2) says . . . "it seems that the only productive approach (to resolving the dilemma of fair trial and press press) will be the voluntary, responsible execution of duties by all members of the bar, bench, and press." The bench should make a strong effort to exhaust all remedies short of gagging the press, lawyers and law enforcement officers need to temper the release of statements in order to avoid the propogation of inaccurate or misleading publicity, and the press should only publish matters relevant to the public interest.

In terms of the rare cases where restraints on the

press are the only alternative, the press will naturally resent the infringement on its prima facie constitutional right to publish. In these situations, however, restraint is a small price to pay for insuring the existence of both amendments. One way to alleviate the friction in these cases, as suggested by the ABA guidelines adopted after the Nebraska decision, is to set aside special pretrial meetings between the bench and the press to decide the appropriate action to be taken and to reach a general consensus. The assumption behind this proposal is that much of the press's antagonism toward gag orders is that they are secretly formulated by the court and suddenly unleashed at them. Timothy Poulton, a circuit court judge, reports in the New York Times (7-29-76, p. 30) that at the beginning of the case

> the judge should call a conference with the press, state an estimate of the length of the trial, and ask if they will agree to wait until the trial is over to publish accounts which contain matters other than those received in evidence,

all being done in a spirit of cooperation. To limit possible press infringement, the media should be allowed under the ABA guidelines to state its case to the bench during this meeting and discuss alternatives.

While the individual trial judge should be given the power and discretion to choose appropriate remedies of assuring a fair trial, the newspaper editor or television

station manager should publish only that information necessary to inform the public on matters of special interest. Lofton (1968) suggests that the press could be more objective about suspects or defendants in criminal cases, could subscribe to the free press, fair trial guidelines, and could employ writers with specialized training for police and court reporting.

One remedy which would neither impair the right of a free press nor the right of a fair trail would be to prohibit the bench, bar, and law enforcement officers from releasing any information about pretrial proceedings in sensational cases. The threat of prejudicial publicity finding its way into the newspapers would be drastically reduced or even eliminated without placing a prior restraint on the press. In theory, prohibition of pretrial statements is an ideal remedy, but in practice it is riddled with many problems. First, some lawyers and policemen will violate the rules either to attain personal goals or because of carelessness. Second, it places extraordinary confidence in the ability of the judicial system to resolve all trial cases in the most efficient and ethical manner. and third,it places a heavy burden on the press in fulfilling its assignments and informing the public. The press, unable to obtain information from these traditional informants, may be tempted to use devious and even illegal means to gain the information. Though the

remedy of prohibition runs into many potential problems, it also holds great promise because it circumvents infringement on the values of a free press and a fair trial.

Publisher's Auxiliary (1-25-77) suggests a more middle-of-the road approach. In the trial of John Adamson, accused of murdering Phoenix investigative reporter Don Bolles, Superior Court Judge Ben C. Birdsall appointed George W. Ridge, Jr., a lawyer and chairman of the University of Arizona Journalism Department, to serve as a news liaison officer in the proceedings. Ridge worked independently with members of the press covering the trial to iron our problems of media coverage. The arrangement worked smoothly on at least two occasions to obtain modifications in the trial guidelines. Originally, the judge ordered that the courtroom be locked while the court was in session with nobody being permitted to leave. Ridge convinced the judge to allow newsmen on dealine to leave. In another situation, Ridge convinced the judge to allow photographers to take stock photographs of the courtroom, jail, and other locations. Ridge said,

> This was the kind of case which draws large amounts of press coverage. The judge didn't have to tell me why he wanted to create a liaison post. He just thought that there should be someone around who knew the press role and who would act as a buffer for both the court and the press.

The United States Constitution makes a blanket

statement when it asserts, "Congress shall make no law abridging the freedom of speech, or of the press," a statement which seems to explicitly ban all restraints on the publication of news. In a general sense, the Nebraska Press Association versus Stuart case, decided 200 years later, reaffirms that principle. However, the Founding fathers' formulation of another principle, a speedy, public trial by an impartial jury, is implicit in the same decision. The significance of a ruling which flowed from the murder in the Nebraska wastelands is that it tested the durability of two cherished values, and as a consequence, both still exist. The optimal remedies for the present free press versus fair trial conflict are joint regulation by the press, bar, bench and law enforcement officers, prohibition of statements by the bench, bar, and law enforcement officers in the pretrial stage, and the infusion of "buffers," such as liaison people, to hear and resolve problems on both sides.

Chapter VIII

SUMMARY

The free press versus fair trial issue, a product of the United States Constitution, still creates battles between the press and judiciary over which amendment, the First or Sixth, should have priority during criminal proceedings. Media representatives argue that gag orders infringe upon their constitutional right to freely publish, while the bench and bar believe widespread news coverage of a trial prejudices the jury against the defendant.

The 1950's ushered in numerous free press, fair trial confrontations which was to become the pattern for the next two decades. While the Supreme Court supported the press by prohibiting the issuance of prior restraints by lower courts, the Court also reversed convictions, such as in the Sheppard and Estes cases, because of the prejudicial effects of publicity. In response to the growing intensity of this conflict, the ABA issued a series of joint bar-press guidelines, the Reardon Report, which suggested methods for insuring a defendant a fair trial. This report, in conjunction with court reversals because of prejudicial publicity, led to the flourishing of restrictive court orders on the press, orders which limited information

available in open court, limited publication of public-record information not introduced in open court, barred the press from all or part of the court-proceedings, prevented verdict publication, limited dissemination of information by court and law officers, and prohibited publication of confessions, previous criminal records, and public record pretrial proceedings.

Empirical findings of publicity's effect on jurors are speculative, but the findings do prove that the mere publishing of the arrest and charge along with the publication of confessions has an effect of bias. Also, the conventional remedies used to insure a fair trial, such as change of venue and sequestration, are at best weak solutions but are effective aids.

A study of the 1976 U.S. Supreme Court decision in Nebraska Press Association versus Stuart revealed that the High Court came close to prohibiting all future gag orders. In reality, however, the Court's ad hoc approach left open the possibilities of barring the press from some hearings, sealing court records, or gagging lawyers and court officials. Critics of the decision reflect a breadth of views, some hailing the decision as a victory ending all gag orders, others cautious of the implicit views of future gag orders, and still others criticizing the Court's ad hoc reasoning and avoidance of the "clear and present danger" principle.

New ABA press-bar guidelines and post-Nebraska court rulings reflect the influential aspects of the 1976 decision. In one facet the press is given more say in defending its position, such as being allowed to provide First Amendment input to a judge considering a gag order. At the same time, however, trial judges are exploring the available loopholes of the Nebraska decision.

In discussing the benefits and dangers of both values, one can come to the conclusion that neither value will assume permanent precedenceover the other in today's American democracy. Because of their absolute dimensions, the free press and fair trial values must engage in a give and take process in order for both to exist. Consequently, the optimal remedies for the conflict as it exists today are joint press-bar regulations, prohibition of statements by judicial officials, and the infusion of "buffers," such as liaison roles, to mediate between the two sides during trial proceedings.

BIBLIOGRAPHY

A. Books

Barron, Jerome and Gillmor, Donald M. Mass communication law; cases and comment. St. Paul, Minn.: West Pub. Co., 1974.

Georgetown Law Journal Association. Media and the First Amendment in a Free Society. University of Massachusetts Press, 1972.

Gillmor, Donald M. Free Press and Fair Trial. Washington D.C., Public Affairs Press, 1966.

Jacob, Herbert. Urban Justice. Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1973.

Lofton, John. Justice and the Press. Boston: Beacon Press, 1968.

Nelson, Harold and Teeter, Dwight. Law of Mass Communications. Mineola, New York: The Foundation Press, Inc., 1969.

President's Commission on the Assassination of President Kennedy. The Warren Report. n.p.: Associated Press, 1964.

Putthammer, Ernest W. Administration of Criminal Law. The University of Chicago Press, 1953.

Smith, Craig R. and Hunsaker, Donald M. The Bases of Argument: Ideas in Conflict. New York: The Bobbs-Merrill Company, Inc., 1972.

Tocqueville, Alexis Charles Henri Maurice Cleŕal de. Democracy in America. New York: A. A. Knopf, 1945.

Whipple, Sidney Beaumont. The Lindbergh Crime. New York: Blue Ribbon Books, 1935.

B. Periodicals

Bennett, Stephen A. "Fair Trial v. Free Press," Trial, September, 1976, pp. 24-25.

Cartwright, Gary. "Rich Man, Dead Man," Texas Monthly, March 1977, pp. 87-91, 144-153.

Editor and Publisher. August 21, 1976, p. 4.

"Fair Trials and the Free Press," Time, October 28, 1974, pp. 15-16.

"Fair Trial vs. Free Press," Newsweek, March 4, 1974, p. 44.

"Free Press and Fair Trial," Seminar, September 1967, pp. 9-14.

Klene, Gerald F. and Jess, Paul H. "Pretrial Publicity: Its Effect on Law School Mock Jurors," Journalism Quarterly, XLIII (Spring 1976), pp. 111-116.

Landau, Jack C. "Fair Trial and Free Press: A Due Process Proposal," American Bar Association Journal, LXII (January 1976), pp. 55-59.

Landau, Jack C. "Free Press Boon: A Stop to Direct Gag Orders?," Trial, September 1976, pp. 27-29.

"Lawyers vote approval of gag order procedure," Editor and Publisher, August 14, 1976, p. 9.

Lofton, John. "Pretrial Crime News: To Curb or Not to Curb," Current History, August 1971, pp. 71-74, 112.

"Meanwhile in Court," Quill, September 15, 1976, p. 12.

Murthy, N.V.K. "Freedom of the Press and Fair Trial in the U.S.A.," Journalism Quarterly, XXXVI (Summer 1959), pp. 307-317.

Oster, Patrick M. "Free Press vs. Fair Trial," U.S. News and World Report, February 23, 1976, pp. 44-46.

Schmidt, Benno C., Jr. "The Nebraska decision," Columbia Journalism Review, November/December 1976, pp. 51-53.

Schmidt, Richard M. "Sibling Rivalry," Quill, September 15, 1976, pp. 25-27.

Shapiro, Martin. "Free Press Boon Fair Trial Blow: An End Run Around Miranda?," Trial, September, 1976, pp. 32-35.

Simon, Rita James and Eimermann, Thomas. "Newspaper Coverage of Crimes and Trials, Journalism Quarterly XLVII (Spring 1970), pp. 142-144.

Sohn, Ardyth Broadrick. "Determining Guilt or Innocence of Accused from Pretrial News Stories," Journalism Quarterly, LIII (Spring 1976), pp. 100-105.

Sue, Stanley and Smith, Ronald E. "How Not to Get a Fair Trial," Psychology Today, VII (May 1974), pp. 86, 90.

Tans, Mary Dee and Chaffee, Stephen H. "Pretrial Publicity and Juror Prejudice," Journalism Quarterly XLIII (Fall 1969), p. 647.

C. Cases

Branzburg v. Hayes, 408 U.S. 665 (1972).

Calley v. Calloway, 382 F. Supplement, 650.

Estes v. Texas, 381 U.S. 532 (1965).

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

Marshall v. United States, 360 U.S. 310 (1959).

Near v. Minnesota, 283 U.S. 697 (1931).

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

Rideau V. Louisiana, 373 U.S. 723 (1963).

Shepard v. Florida, 341 U.S. 181 (1950).

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

State v. Taylor, 391 S.W.2d 835 (1965).

Stroble v. California, 343 U.S. 181 (1950).

U.S. v. Albott Laboratories, 505 F.2d 565 (1974).

D. Documents, Law Journals

A.B.A. Advisory Committee on Fair Trial and Free Press. Standards Relating to Fair Trial and Free Press, Chicago, March, 1968.

Creighton Law Review. "Judicial Restraint of the Press," IX (June 1976), pp. 693-716.

Larson, Milton R. "Free Press v. Fair Trial in Nebraska: A Position Paper," Nebraska Law Review, LV (1976), pp. 543-571.

Samuels, Deby K. Judges and Trial News Challenges. Freedom of Information Report No. 317. Columbia, Missouri School of Journalism, University of Missouri, 1973.

The Yale Law Journal. "Prejudicial Publicity in Trials of Public Officials," LXXXV, No. 1 (November, 1975), pp. 123-135.

E. Newspapers and News Supplements

"Arizona judge had idea that worked for court, press," Publisher's Auxiliary, January 25, 1977, p. 3.

"Davis Optimistic of Acquittal in Killing of Child," Galveston Daily News, February 24, 1977, p. 2B.

Farber, M. A. "Bronfman Judge Warns Lawyers Not to Talk Outside of Courtroom," New York Times, October 16, 1976, p. 20.

"Hearst's trial gag order is denied," Publisher's Auxiliary, June 25, 1975, p. 4.

"Judge excludes press from trial; delay asked," Publisher's Auxiliary, October 9, 1976, p. 4.

Maguire, W. Terry. "Free Press vs. government interests big '76 issue: Inside: The Law - Part I," Publisher's Auxiliary, February 10, 1976, p. 2.

Maguire, W. Terry. "Rights of the press to gather, publish news expanding," Publisher's Auxiliary, January 25, 1977, p. 15.

"Media bother judge in Davis murder trial," Houston Post, February 27, 1977, p. 14A.

"No Juror Picked for Davis Trial," The Galveston Daily News, February 26, 1977, p. 6A.

Poulton, Timothy. "Letter to the Editor," New York Times, August 5, 1976, p. 30.

"Press must fight gag orders, judge says," Publisher's Auxiliary, April 10, 1976, p. 12.