

The Press Ungagged:
The Practical Effect on Gag Order Litigation of
Nebraska Press Association v. Stuart

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The Press Ungagged: The Practical Effect on Gag Order Litigation of *Nebraska Press Association v. Stuart*

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Until the Supreme Court's decision in *Nebraska Press Association v. Stuart*,¹ press lawyers had thought that national security cases were the sole exception² to the constitutional prohibition against prior restraints on the press.³ Speaking for five justices in *Nebraska Press Association*, Chief Justice Burger ostensibly attempted to fashion a second exception to the no-prior-restraints rule for fair trial/free press cases.⁴ Close examination of the Burger criteria, however, indicates that they constitute a test that is not a test, an exception that is not an exception.

Under the standards laid down in Chief Justice Burger's opinion, the press may be restrained from reporting, at least before the impaneling of a jury in a criminal trial,⁵ when (1) pretrial publicity is likely to be so pervasive that it probably will have an effect on jurors; (2) there are no alternative methods of dealing with the problem through (a) change of venue, (b) postponement of the trial, (c) questioning jurors closely during voir dire, or (d) clear instructions at trial; and (3) the prior restraint will be effective.⁶ Although Justice White joined this opinion and provided its fifth vote, "for the reasons the Court itself canvasses" he doubted whether prior restraints in fair trial cases "would ever be justifiable."⁷ I shall attempt to demonstrate that Justice White was quite right and that the

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1. 96 S. Ct. 2791 (1976).

2. This exclusion of the national security area from the rule forbidding prior restraints was circumscribed in *New York Times Co. v. United States*, 403 U.S. 713 (1971) (*Pentagon Papers Case*), which authorized prior restraints against the press only if the government could prove that publication would "immediately and irreparably damage national security." *Id.* at 730 (White, J., concurring).

3. In *Nebraska Press Ass'n*, the press argued that there should be no additional exception and that, apart from national security situations, all prior restraints were unconstitutional per se. Brief for Petitioners at 46-49. In response, the State of Nebraska, relying on *Sheppard v. Maxwell*, 384 U.S. 333 (1966), argued that prior restraints also should be permitted in fair trial/free press cases. 96 S. Ct. at 2819 (Brennan, J., concurring).

4. 96 S. Ct. at 2804-06.

5. The orders involved in the case applied only until the jury was impaneled. *Id.* at 2795.

6. *Id.* at 2807.

7. *Id.* at 2808 (White, J., concurring).

practical impact of the rule announced by Chief Justice Burger is to outlaw all prior restraints in fair trial/free press cases.

This Comment first analyzes the three parts of Chief Justice Burger's test and then assesses the impact of the case on future fair trial/free press controversies in order to demonstrate that *Nebraska Press Association* must be counted as a stunning victory for the press. Not only was there a unanimous vote by the Court⁸ against the prior restraints in a case involving a highly inflammatory murder in a small town; in effect, there was also a decision denying prior restraints in any future case of this sort.

I. ANALYSIS AND APPLICATION OF CHIEF JUSTICE BURGER'S TEST

A. A Finding of Pervasive Publicity that Affects Jurors

It long has been the position of the press that there is no certain way to prove that pretrial publicity is prejudicial until a juror is asked on voir dire questions designed to determine whether he or she is prejudiced.⁹ If the answer at that time is "yes", the juror may be stricken from the panel; if the answer is "no", the juror may be included and sequestered. This is a fair trial. Any other approach to finding juror prejudice must be based on unprovable assumptions. As will be demonstrated, the Court apparently has come close to adopting that view. Thus, for long-time observers of the fair trial/free press controversy, the first part of Chief Justice Burger's test, which requires a finding that there is a risk of pervasive publicity *and* that such publicity will prejudice prospective jurors, has an ironic ring. If prejudice cannot be proved until voir dire, a test requiring such proof as a prerequisite for pretrial and thus pre-voir-dire restraints on the press will never be satisfied.

To meet the first part of Chief Justice Burger's test, courts may not simply assume that pretrial publicity is prejudicial; prejudice must be proved in each instance.¹⁰ This conclusion appears to be the holding of

8. Four of the nine justices, Brennan, Stewart, Stevens, and Marshall, refused to find an exception to the no-prior-restraint rule when pretrial publicity endangered a defendant's right to a fair trial. *Id.* at 2819-20 (Brennan, J., concurring); *id.* at 2830 (Stevens, J., concurring). Of the five remaining justices joining in the majority opinion, only four, Burger, Blackmun, Powell, and Rehnquist, acknowledged that restraints on pretrial publicity might be justifiable in rare circumstances. *Id.* at 2804-05; *id.* at 2808 (Powell, J., concurring). Justice White, joining the majority because "there is no need to go farther than the court does to dispose of this case," expressed "grave doubt" as to the constitutionality of prior restraints in any future fair trial case. *Id.* at 2808 (White, J., concurring).

9. See AMERICAN NEWSPAPER PUBLISHERS ASS'N, FREE PRESS AND FAIR TRIAL 60 (1967).

10. Although Chief Justice Burger initially stated that the trial judge in *Nebraska Press Ass'n* could "reasonably conclude, based on common human experience, that publicity *might* impair the defendant's right to a fair trial," 96 S. Ct. at 2804 (emphasis added), he apparently held this

Murphy v. Florida,¹¹ a Supreme Court case decided several months before *Nebraska Press Association*. In that case, a convicted burglar popularly known as "Murph the Surf" sought to reverse his conviction because of prejudicial publicity. A juror had stated on voir dire that "Murph's" reputation was known to him, but that he nonetheless could decide the case fairly.¹² The Court declined to reverse, holding that a juror could decide a case fairly even if subjected to prejudicial publicity.¹³ Referring to *Murphy* in *Nebraska Press Association*, Chief Justice Burger wrote:

We have noted earlier that pretrial publicity, even if pervasive and concentrated, cannot be regarded as leading automatically and in every kind of criminal case to an unfair trial. The decided cases "cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process".¹⁴

If prejudice, therefore, is not to be presumed, even when a juror has admitted prior knowledge, then a direct admission of prejudice by the juror or its equivalent must be required.

Consistent with the dictates of *Murphy*, Chief Justice Burger held in *Nebraska Press Association* that the findings of the state courts that permitted the prior restraint did not satisfy the first part of his test.¹⁵ Earlier, speaking of the Nebraska trial judge, the Chief Justice stated: "His conclusion as to the impact of such publicity on prospective jurors was of necessity speculative, dealing as he was with factors unknown and unknowable."¹⁶ Although this speculative conclusion by the trial judge would justify his utilization of alternate means to a "gag" order to insure a trial free of juror prejudice,¹⁷ it is insufficient under the first part of the test to support the imposition of prior restraints on the press. The test requires actual proof that the publicity will be prejudicial.¹⁸ The key point after *Murphy* is that, under the first leg of the test, the publicity's impact on the

conclusion insufficient to satisfy the first part of the test. Thus, the Chief Justice later stated that the trial court had not met that part of the test because it had not found "that further publicity, unchecked, would so distort the views of potential jurors that 12 could not be found who would, under proper instructions, fulfill their sworn duty to render a just verdict exclusively on the evidence presented in open court." *Id.* at 2807 (emphasis added).

11. 421 U.S. 794 (1975).

12. *Id.* at 801-02. Other jurors stated that press accounts had caused them to bear actual prejudice toward the defendant. *Id.* at 804-06 (Brennan, J., dissenting). This aspect of the case, however, is of no relevance in the instant context; nothing in the argument presented here would preclude the removal of a potential juror because of demonstrated prejudice.

13. *Id.* at 802.

14. 96 S. Ct. at 2805, quoting *Murphy v. Florida*, 421 U.S. 794, 799 (1975).

15. *Id.* at 2807, quoted in note 10 *supra*.

16. 96 S. Ct. at 2804.

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

18. See note 10 *supra*.

jurors is *always* unprovable until voir dire. By that time it is usually too late to deal with prejudicial pretrial publicity, and after voir dire there is no justification for prior restraints because sequestration provides a total prophylactic against prejudicial publicity.

Because the majority's test consists of three conjunctive parts, the near impossibility as a practical matter of meeting the first part means that prior restraints virtually may never issue, whether or not the other two standards were satisfied. Moreover, for similar reasons, these standards themselves are most difficult to meet.

B. A Finding that There Are No Alternative Methods Available to the Court Other Than Issuance of Prior Restraints on the Press

The second part of the test in *Nebraska Press Association* requires that the court find, in advance of impaneling a jury, that neither (1) change of venue, (2) postponement of trial, (3) searching questioning of prospective jurors, nor (4) the use of emphatic and clear instructions to the jury on its duty to decide the case only on the evidence would blunt the impact of pretrial publicity.¹⁹

The virtual impossibility of satisfying this second part of the test set forth by Chief Justice Burger is especially evident from the Court's comments in *Sheppard v. Maxwell*,²⁰ which overturned a conviction obtained at a trial having a "carnival atmosphere."²¹ In *Sheppard*, the publicity given the trial was enormous and its probable prejudicial impact clear.

Sheppard stood indicted for the murder of his wife; the State was demanding the death penalty. For months the virulent publicity about Sheppard and the murder had made the case notorious. Charges and countercharges were aired in the news media besides those for which Sheppard was called to trial. In addition, only three months before trial, Sheppard was examined for more than five hours without counsel during a three-day inquest which ended in a public brawl. The inquest was televised live from a high school gymnasium seating hundreds of people.²²

In responding to the contention that the trial judge was powerless to control inflammatory news accounts, Justice Clark pointed to the availability of the same alternate means to reduce the appearance of prejudicial material and to protect the jury from outside influence that Chief Justice Burger listed in *Nebraska Press Association*. Justice Clark concluded that such procedures, which fall short of prior restraints of the press, "would have been sufficient to guarantee Sheppard a fair trial."²³ Few cases ca

19. 96 S. Ct. at 2805.

20. 384 U.S. 333 (1966).

21. *Id.* at 358.

22. *Id.* at 354.

23. *Id.* at 358.

rival *Sheppard* in the quantity and inflammatory character of the pretrial publicity, yet the Court was willing to assume that measures apart from restraining the press could have insured a fair trial. Thus, at the very least, for a trial judge to be justified in concluding that prior restraint of the press is the only way to avoid impinging upon the defendant's right to a fair trial, the publicity expected to be generated by the case must be *more* pervasive and prejudicial than that preceding the trial in *Sheppard*.

Even if a judge made detailed findings that pretrial publicity about a particular case will be so pervasive that restraint of the press is the only means by which a fair trial can be insured,²⁴ it is at best dubious whether he would be upheld on appeal given the first part of the Burger test, as interpreted in light of *Murphy*.²⁵ For example, in order to decide before voir dire that "searching questioning of prospective jurors"²⁶ would be ineffective, a court would have to assume the impossibility of finding any juror not prejudiced by the publicity. Pre-voir-dire decisions that the other three alternatives to prior restraints also would not afford the defendant a fair trial should be no easier to justify. Thus, although it is conceivable that a court might find before impaneling a jury that Chief Justice Burger's second test had been met, any such finding probably would be "speculative" and would not survive attack on appeal.

C. A Finding that the Prior Restraint Will Be Effective

The last leg of Chief Justice Burger's tripartite test requires a determination that a prior restraint will be effective if entered.²⁷ The Chief Justice assumed that, under the present state of the law, in personam jurisdiction over each media organization subject to a restraining order is required for the order to be effective.²⁸ If a media organization is not within the court's territorial jurisdiction, it is not bound.²⁹ Chief Justice Burger's opinion suggests that the jurisdiction of the court is circumscribed by the principles of state sovereignty set forth in *Pennoy v. Neff*³⁰ and *Hanson v.*

24. In *Nebraska Press Ass'n* Chief Justice Burger found that the Nebraska courts did not apply this part of the test correctly, having only decided without sufficient evidence "that such measures might not be adequate." 96 S. Ct. at 2805.

25. See text accompanying notes 11-15 *supra*.

26. 96 S. Ct. at 2805.

27. *Id.* at 2806.

28. *Id.* The press representatives in *Nebraska Press Ass'n* voluntarily submitted to the jurisdiction of the Nebraska court, and, as the Supreme Court of Nebraska pointed out, they otherwise would have been free to disobey the order of the trial court without fear of contempt actions because they were not *named* in the general order issued by the lower court and were thus not subject to its jurisdiction. *State v. Simants*, 194 Neb. 183, —, 236 N.W.2d 794, 802 (1975); see text accompanying notes 36-37 *infra*.

29. See *State v. Simants*, 194 Neb. 183, —, 236 N.W.2d 794, 802 (1975).

30. 95 U.S. 714 (1878).

Denckla,³¹ which held that the due process clause of the fourteenth amendment requires that a party have significant contacts with a state before courts there constitutionally can exercise power over him.³² Although the standards by which the requisite contacts with a state are gauged have undergone considerable evolution since *Pennoyer*,³³ the Court at least highlighted the question raised by other authorities of whether the mere dissemination of information within the forum state by out-of-state press is sufficient contact with the forum to satisfy current notions of due process.³⁴ Moreover, the Court may be endorsing the suggestion by some courts and commentators that when first amendment considerations are at issue, there must be a greater showing of contact with the forum state than is necessary in asserting jurisdiction in other types of cases.³⁵

Apart from these jurisdictional issues, it is clear from the Chief Justice's opinion that the "at-large" type of order used by the Nebraska courts, which enjoins the press generally, also would present severe constitutional problems because "even a cursory examination suggests how awkwardly broad prior restraints on publication, directed not at named parties but at-large, would fit into our jurisprudence."³⁶ If a court's restraining order may not be directed against the press "at-large," the order would have to specify each media organization sought to be restrained. The practical difficulty of identifying each newspaper, magazine, radio station and network, and each television station and network, whose publicity of the trial might have an impact in the community, is self evident. The burden that this part of the Burger test imposes on judges attempting to identify and obtain jurisdiction over nationwide press organizations should not be taken lightly. In the *Pentagon Papers* case,³⁷ for example, the government was forced to obtain a prior restraint first against *The New York Times*, then against the *Washington Post*, then against the *Boston Globe*, and finally against the *St. Louis Post-Dispatch*. One judge likened it to riding "herd on a swarm of bees."³⁸ In addition, because the question of in personam

31. 357 U.S. 235 (1958).

32. *Hanson v. Denckla*, 357 U.S. 235, 251 (1958); *Pennoyer v. Neff*, 95 U.S. 714, 722 (1878).

33. See, e.g., *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

34. See, e.g., *Curtis Publishing Co. v. Birdsong*, 360 F.2d 344 (5th Cir. 1966) (mailing 70,000 copies of allegedly libelous article into Alabama was insufficient connection with state to allow Alabama courts to exercise jurisdiction over the defendant).

35. See *New York Times Co. v. Connor*, 365 F.2d 567, 572 (5th Cir. 1966); Comment, *Long-Arm Jurisdiction Over Publishers: To Chill a Mocking Word*, 67 COLUM. L. REV. 342 (1967). In a footnote to his discussion, the Chief Justice seemed to have left open the question of whether seeking broad long-arm jurisdiction over out-of-state media organizations might create special first amendment difficulties. 96 S. Ct. at 2806 n.10.

36. 96 S. Ct. at 2806 n.10.

37. *New York Times Co. v. United States*, 403 U.S. 713 (1971).

38. This comment was made by Judge Roger Robb of the D.C. Circuit Court of Appeal.

jurisdiction over out-of-state press is far from settled, any foreign media organization identified in the restraining order would probably challenge the jurisdiction of the issuing court. It therefore seems likely that few courts issuing orders against the press will have met the third part of the Burger test, given the cost and delay associated with issuing an order that effectively asserts judicial authority over those bound by it.

Finally, Chief Justice Burger's opinion raises the question of whether, so long as private conversation is beyond the scope of judicial orders, restraining orders directed solely at the press can ever effectively cease the flow of prejudicial information concerning criminal trials.³⁹ Because restraints on the press create a situation in which rumor and public speculation are expanded and are the exclusive sources of information about a defendant and his trial, it is dubious whether elimination of the usually more accurate press accounts could ever be effective in suppressing pretrial prejudice.

D. Application of Chief Justice Burger's Test by Appellate Courts

Nebraska Press Association involved a sexually-motivated mass murder in a small town, with an admission of guilt made by the defendant to relatives and a confession to public officials.⁴⁰ Certainly, "a confession or a statement against interest is the paradigm" of prejudicial information that could reach jurors.⁴¹ Nonetheless, the majority opinion concluded that the trial judge could only speculate as to the prejudicial effects on potential jurors of publicity concerning these inflammatory events and therefore that a prior restraint was not justified.

If the consequences of publicity in this case are too speculative to meet the test for the issuance of a prior restraint, it would be difficult to imagine a case that did. An examination of the reported fair trial cases prior to *Nebraska Press Association* involving direct restraints on the press indicates that the application of the Burger criteria would have forbidden the restraint in every single instance. A great majority of these cases deal with the imposition of prior restraints once the trial has begun.⁴² Because

during argument before that court on whether to continue to enjoin the Washington Post from printing the Pentagon Papers. N.Y. Times, June 23, 1971, at 23, col. 6.

39. 96 S. Ct. at 2806.

40. 96 S. Ct. at 2794-95.

41. *Nebraska Press Ass'n. v. Stuart*, 423 U.S. 1327 (1975) (Blackmun, Circuit Justice), vacated, 96 S. Ct. 2791 (1976) (reapplication for stay): "A prospective juror who has read or heard of the confession or statement repeatedly in the news may well be unable to form an independent judgment as to guilt or innocence from the evidence adduced at trial."

42. Cases involving prior restraints once trial has begun include: *United States v. Schiavo*, 504 F.2d 1 (3d Cir. 1974); *United States v. Dickinson*, 465 F.2d 496 (5th Cir. 1972), *aff'd*, 476 F.2d 373 (5th Cir.), *cert. denied*, 414 U.S. 979 (1973); *Phoenix Newspapers Inc. v. Superior*

sequestration would be a total remedy against prejudicial publicity in the situations, such restraints are void under the requirement in *Nebraska Press Association* that orders directed at the press be used only as a last resort. Further, such orders also would be void to the extent that they involve directions not to print testimony given in open court.⁴⁴ This leaves *Times-Picayune Publishing Corp. v. Schulz*,⁴⁵ *Chronicle Publishing Corp. v. Municipal Court*⁴⁶ and *Baltimore Radio Show v. State*,⁴⁷ all of which overruled prior restraints involving the publication of prior records before trial. Consistent with those cases, *Nebraska Press Association's* 3-part test clearly would have resulted in the denial of a prior restraint. For example, *Baltimore Radio* involved a broadcast of a particularly lurid description of a crime in which the defendants were identified as having earlier convictions.⁴⁸ Yet, the effect that the publication of a defendant's prior criminal record will produce on a prospective juror appears at least as "unknown and unknowable" as that produced by the publication of a prior confession. Therefore, a restraint would be inappropriate under *Nebraska Press Association*.

In sum, Chief Justice Burger's test is not a test at all; it disintegrates upon careful analysis and application to particular facts. Because the Court unanimously rejected the prior restraint in this case, which involved particularly inflammatory revelations in the press, it seems difficult to believe that any other case will provide an exception to the rule against prior restraints in fair trial/free press cases.

II. THE CONSEQUENCES OF *Nebraska Press Association* FOR COLLATERAL ATTACK OF PRIOR RESTRAINTS

For reasons stated above, the *Nebraska Press Association* decision must be viewed as an all but total victory for the press. The ruling maintains

Court, 101 Ariz. 257, 418 P.2d 594 (1966); *Wood v. Goodson*, 253 Ark. 196, 485 S.W.2d 1 (1972); *In re Shortridge*, 99 Cal. 526, 34 P. 227 (1893); *Younger v. Smith*, 30 Cal. App. 138, 106 Cal. Rptr. 225 (2d Dist. 1973); *State v. Payne*, No. 74-77 (Cir. Ct. Manatee County, Florida, Apr. 4, 1974); *Johnson v. Simpson*, 433 S.W.2d 644 (Ct. App. Ky. 1968); *Olive Postel*, 30 N.Y.2d 171, 282 N.E.2d 306, 331 N.Y.S.2d 407 (1972); *New York Times Co. v. Starkey*, 51 App. Div. 2d 60, 380 N.Y.S.2d 239 (2d Dep't 1976); *Ithaca Journal News, Inc. v. City Court*, 58 Misc. 2d 73, 294 N.Y.S.2d 558 (Sup. Ct. 1968); *State v. Summers*, 1 Cr.-74-52 (Ct. Com. Pleas, Fayette County, Ohio 1974); *Ex parte McCormick*, 129 Tex. 407, 88 S.W.2d 104 (1935); *Ex parte Foster*, 44 Tex. Cr. 423, 71 S.W. 593 (1903); *State ex Superior Court v. Sperry*, 79 Wash.2d 69, 483 P.2d 608, cert. denied, 404 U.S. 939 (1972); 43. 96 S. Ct. at 2805-06.

44. See *Sheppard v. Maxwell*, 384 U.S. 333, 362-63 (1966).

45. 419 U.S. 1301 (1974) (Powell, Circuit Justice).

46. No. 35016 (Cal. Ct. App. May 10, 1974).

47. 193 Md. 300, 67 A.2d 497 (1949), cert. denied, 338 U.S. 912 (1950).

48. *Id.* at 307-15, 67 A.2d at 500-04.

tradition that no prior restraint issued against the press in a fair trial/free press context has ever been upheld on appeal.⁴⁹ In recent years, however, the problem for the press has not been winning prior restraint cases, because it invariably wins; the problem has been dealing with the issuance of temporary restraining orders. These orders present particularly thorny practical problems because, as Chief Justice Burger recognized,⁵⁰ if they are not lifted before press time, the restrained news story frequently will never be published; there is nothing duller than yesterday's news.

Yet, in *United States v. Dickinson*,⁵¹ a newspaper was held in contempt for disobeying a temporary restraining order that subsequently had been held unconstitutional on appeal. According to that case, only reversal of a prior restraint order on appeal *before* the order was disobeyed would justify the disobedience in most cases.⁵² This decision placed the press in a "damned if you do, damned if you don't" position. If the press appealed, it lost the story, because appellate courts typically were not prepared to meet a printing schedule.⁵³ Hence the inevitable victory on the merits was Pyrrhic. If the press printed the story, it faced a possible contempt action for its violation of an unconstitutional order.⁵⁴ This situation terrified the press: Having fought off governmental censorship successfully for centuries, the American press suddenly found itself faced with censorship maintained by the judiciary, the one branch of government that historically had protected the press from the others.⁵⁵

Since *Dickinson*, many,⁵⁶ but not all, newspapers have been appealing restraining orders rather than disobeying them. This trend has reversed the practice followed by most newspapers before *Dickinson* and by some after

49. See also *Wood v. Goodson*, 253 Ark. 196, 201-03, 485 S.W.2d 213, 216-17 (1972).

50. 96 S. Ct. at 2803; see text accompanying note 94 *infra*.

51. 465 F.2d 496 (5th Cir. 1972), *aff'd*, 476 F.2d 373 (5th Cir.), *cert. denied*, 414 U.S. 979 (1973).

52. *Id.* at 509.

53. See, e.g., *American Broadcasting Co. v. RCC Smith Cabinet Mfg. Co.*, 312 N.E.2d 85 (Ind. Ct. App. 1974) (6-month lag between entering of preliminary injunction and its reversal on appeal).

54. *United States v. Dickinson*, 465 F.2d 496 (5th Cir. 1972), *aff'd*, 476 F.2d 373 (5th Cir.), *cert. denied*, 414 U.S. 979 (1973), appears to be the only case holding the press in contempt for violation of orders—constitutional or otherwise—not to print in a fair trial/free press setting. Nonetheless, the rarity with which the media disobeys restraints, despite accurate predictions that they are illegal, must be attributed to the fear of contempt charges. See text accompanying notes 52-58 *infra*. But see, e.g., *Oliver v. Postel*, 30 N.Y.2d 171, 180, 282 N.E.2d 306, 309, 331 N.Y.S.2d 407, 412 (1972) (if the trial judge had attempted to punish the press with contempt for violating an unconstitutional gag order, "his action would have clashed with the . . . First Amendment").

55. See generally L. LEVY, *LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY* (1960).

56. This probably accounts for the fact that in *Nebraska Press Ass'n* the respondents, representatives of the press, appealed the prior restraint order even though they legally were not subject to it. See *State v. Simants*, 197 Neb. 783, —, 236 N.W.2d 794, 802 (1975).

that case,⁵⁷ of disobeying and attacking such orders collaterally.⁵⁸ To attack collaterally, the newspaper would await prosecution in a contempt proceeding and defend by asserting that the restraining order was void.⁵⁹ For reasons that are explained more fully below, there is no reason that this tradition should not have continued after *Dickinson* in state courts, where the practice of collaterally attacking restraints on the press originated. Furthermore, there is no reason that the practice should not continue there after *Nebraska Press Association*. The federal courts have no comparable tradition of collateral attack on prior restraints because those courts until recently rarely issued such orders.⁶⁰ If, however, a federal court enters a

57. See, e.g., *Cooper v. Rockford Newspapers, Inc.*, 34 Ill. App. 3d 645, 339 N.E. 2d 447 (1975); *New York Times Co. v. Starkey*, 51 App. Div. 2d 60, 380 N.Y.S.2d 239 (1976).

58. See, e.g., *Oliver v. Postel*, 30 N.Y.2d 171, 282 N.E.2d 306, 331 N.Y.S.2d 407 (1972).

59. See RESTATEMENT OF JUDGMENTS § 11 (1942); see, e.g., *Wood v. Goodson*, 253 Ark. 196, 485 S.W.2d 213 (1972).

60. A complete legal history of why federal courts have no such tradition is beyond the scope of this Comment. It may well be, however, that the federal courts' aversion to restraints on the press originated in the historical statutory treatment of federal criminal contempt. The Contempt Statute of 1831, 4 Stat. 487 (1831), was enacted by Congress in direct response to a federal district judge's imprisoning of a writer who criticized one of the judge's opinions. See Nelles & King, *Contempt by Publication in the United States*, 28 COLUM. L. REV. 401, 430 (1928). By enacting the 1831 Statute, Congress intended to eliminate constructive contempt from the federal system. See *Nye v. United States*, 313 U.S. 33, 45-51 (1941); Note, *Contempt by Publication: The Limitation on Indirect Contempt of Court*, 48 VA. L. REV. 556, 558-59 (1962). The descendant of the 1831 Statute is § 401 of the Federal Criminal Code, 18 U.S.C. § 401(1) (1971), which, together with Rule 42 of the Federal Rules of Criminal Procedure, defines the power of the federal courts to punish contempts both summarily and on notice. Because the historical purpose and policy underlying § 401 is well known, the federal courts have generally assumed that § 401 prohibited any contempt proceedings for out of court publication, Note, *supra* at 558-59; however, the provisions § 401(3) and Rule 42(b) providing for nonsummary contempt for disobedience of a court's lawful order have recently been interpreted to permit nonsummary contempt for violation of an order not to publish. See *In re Grand Jury*, 315 F. Supp. 681, 686 (1970) (dictum); *United States v. Dickinson*, 465 F.2d 496 (5th Cir. 1972), *aff'd*, 476 F.2d 373 (5th Cir.), *cert. denied*, 414 U.S. 979 (1973). Quære, however, whether the *Dickinson* interpretation is correct. The analytical question that arises is whether the federal courts can use prior restraints to fill the jurisdictional void created by Congress in enacting § 401. In other words, if under § 401, a newspaper cannot be punished for publishing prejudicial material when the court has not ordered it not to publish, does it make a difference if the court does issue such an order? It is submitted that it does not, and should not, make any difference and therefore *Dickinson's* interpretation of § 401 is incorrect. Not only are prior restraint orders almost inevitably unlawful, and therefore not properly within the ambit of § 401(3), but also this expansive interpretation directly contradicts the congressional purpose and policy underlying § 401. Compare the opinion of Judge Adams in *Schiavo*, in which he states that the federal courts may lack subject matter jurisdiction to issue and enforce "[gag] orders affecting the conduct of non-parties such as news reporters or their publishers." *United States v. Schiavo*, 504 F.2d 1, 9 n.1a (3d Cir. 1974) (Adams, J., concurring). If Judge Adams is correct in stating that federal courts may not have subject matter jurisdiction, then the 3-part test announced in *Nebraska Press Ass'n* for state courts may not be relevant for federal courts, and all prior restraints in the fair trial/free press area in federal courts can be disobeyed with impunity.

prior restraint order against the press, my view is that it also may be attacked collaterally, despite recent developments in the Supreme Court that have restricted that procedure as a matter of federal law.

A. Collateral Attack on State Court Orders

In *Nebraska Press Association*, the Court mandated a minimum federal standard for issuing press restraints in fair trial/free press cases that established a strong presumption against the validity of those restraints.⁶¹ The decision, however, does not resolve the question of when a contempt defendant must be allowed the opportunity to challenge an order collaterally in the contempt proceeding.⁶² As a general rule, states have allowed collateral attacks on a state court order only when the order was "void" because the court had no competency to render the order,⁶³ had failed to meet procedural requirements,⁶⁴ had no jurisdiction over the parties or subject matter,⁶⁵ or because of its obvious constitutional invalidity.⁶⁶ Before *Nebraska Press Association*, many states had allowed collateral attacks upon fair trial prior restraints because they assumed the *absolute* constitutional invalidity of the orders.⁶⁷ The *nonabsolute* 3-part test announced by Chief Justice Burger, however, may make collateral attack a less obvious alternative for the press because of the press's inability to demonstrate an order's *obvious* constitutional invalidity. This section discusses the availability of collateral attack in different circumstances that might arise.

Although *Nebraska Press Association* indicates that prior restraint orders are *usually* void, it of course does not prohibit a state court from adopting a more press-protective standard,⁶⁸ including a rule that orders of this kind

61. 96 S. Ct. at 2804.

62. The failure to clarify this area of when collateral attack must be allowed is not a major flaw of the opinion, for the issue was not raised. The press was appealing the restraint order, not attacking it collaterally.

63. See, e.g., RESTATEMENT OF JUDGMENTS § 7 (1942).

64. See, e.g., *id.* §§ 6, 8.

65. See, e.g., *id.* § 5.

66. The theory in this type of case is that the unconstitutional decree is a nullity, and that therefore no action can be brought to enforce it. See, e.g., *Poulos v. New Hampshire*, 345 U.S. 395 (1953); *State ex rel. Liversey v. Judge of Civil District Court*, 34 La. Ann. 741 (1882); *Ex parte Henry*, 147 Tex. 315, 215 S.W.2d 588 (1948); *State ex rel. Superior Court v. Sperry*, 79 Wash. 2d 69, 483 P.2d 608, *cert. denied*, 404 U.S. 939 (1971); *Rendleman, More on Void Orders*, 7 GA. L. REV. 246, 247-50 (1973); *Vestal, Law of the Case: Single Suit Preclusion*, 1967 UTAH L. REV. 1, 29.

67. See, e.g., *Wood v. Goodson*, 253 Ark. 196, 485 S.W.2d 213 (1972).

68. Cf. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974) (suggesting that the states may establish a stricter standard for finding journalists liable for defamation than the Court interpreted the first amendment to require); *Branzburg v. Hayes*, 408 U.S. 665, 706 (1972) (suggesting that the states may adopt stricter rules for the protection of the press from grand jury

are *always* void.⁶⁹ If this is the rule of a state, and if, as is usual, collateral attack is available as a means of testing the void order,⁷⁰ then disobedience could be vindicated in the collateral proceeding. If, however, a state adopts no special rule and therefore is bound by the formulation of the Supreme Court in *Nebraska Press Association*, collateral attack becomes more risky than before that case. Even after *Nebraska Press Association*, however, if the trial court makes no finding as to the pervasiveness and effect of publicity, the availability of alternative measures, or the effectiveness of the order, the order would be clearly unconstitutional⁷¹ and, therefore, would be void on its face⁷² and could be disobeyed and subsequently attacked collaterally.⁷³ A prior restraint order also could be disregarded with impunity where the issuing court did not have in personam jurisdiction over the organization⁷⁴ or if the order prohibited the publication of testimony in open court.⁷⁵

A closer case under state law arises if the judge, before impaneling the jury, makes a questionable finding that all three parts of the Burger test are met. Under these circumstances the order not to print arguably could be disobeyed because, for the reasons stated in Part I above, an appellate court inevitably would find it void. Under this theory, it should make no difference to a state court accepting the doctrine of collateral attack that a lower court made improper findings under the test on its way to entering the prior restraint. If, however, the state rule on collateral attack depends on an order being void "on its face," a court order that facially defers to Chief Justice Burger's test might not meet the voidness standard, and an appeal might be required. Under such circumstances, the publication involved probably should follow the method of pre-press-time appeal to be discussed *infra* for federal cases.⁷⁶

B. Collateral Attack on Federal Court Orders

Although many states permit the press to disobey and collaterally attack an order that is void, the doctrine of collateral attack has been

subpoenas than the Court did under the first amendment).

69. See, e.g., *State ex rel. Superior Court v. Sperry*, 79 Wash. 2d 69, 483 P.2d 608, cert. denied, 404 U.S. 939 (1971).

70. See, e.g., *Wood v. Goodson*, 253 Ark. 196, 203, 485 S.W.2d 213, 217 (1972); RESTATEMENT OF JUDGMENTS § 11 (1942); cf. J. MOORE, FEDERAL PRACTICE ¶ 0.405 [4.-1], at 635 (2d ed. 1974) (similar Federal rule).

71. See text accompanying notes 5-6 *supra*.

72. See note 61 *supra* and accompanying text.

73. See, e.g., a post-*Nebraska Press Ass'n* case in Louisiana in which the highest court in that state vacated a restraint on the press because the showings required by *Nebraska Press Ass'n* had not been made. *N.Y. Times*, July 8, 1976, § 1, at 19, col. 1.

74. See RESTATEMENT OF JUDGMENTS § 5, comment c (1942); Cox, *The Void Order and the Duty to Obey*, 16 U. CHI. L. REV. 86 (1948); note 65 *supra* and accompanying text.

75. See *Wood v. Goodson*, 253 Ark. 196, 485 S.W.2d 213 (1972).

76. See text accompanying note 93 *infra*.

circumscribed severely in the federal courts by *Walker v. City of Birmingham*,⁷⁷ which held that a void order must be obeyed until overturned on appeal. The *Dickinson* case, which allowed a state to require a successful appeal by the press before immunizing disobedience of an unconstitutional restraint order,⁷⁸ rested largely on *Walker's* reasoning.⁷⁹ Yet these two cases, in my opinion, are not authority for requiring preappeal obedience to an order prohibiting trial-related publications that is made without a finding under Chief Justice Burger's 3-part test or to one prohibiting publication of testimony given in open court.⁸⁰ Moreover, *Walker* and *Dickinson* probably are not authority for requiring a successfully completed appeal before disobedience to *any* order invalidly restraining freedom of the press. It may be advisable in all of these situations, however, to obey and appeal the order until press time, when further obedience would frustrate the press' first amendment rights.

In *Walker*, supporters of Martin Luther King were found in contempt for violating an order prohibiting them from participating in a civil rights march.⁸¹ Although the Supreme Court subsequently held that the ordinance under which the order was issued violated the first amendment,⁸² it nonetheless affirmed the contempt convictions, holding that where there was an opportunity for appeal and no appeal was taken, all jurisdictionally proper orders must be obeyed, even if invalid.⁸³ The *Walker* majority, however, apparently endorsed exceptions for orders that are "transparently invalid," or have only "frivolous" pretenses to validity.⁸⁴ Thus, because any prior restraint prohibiting the publication of testimony in open court,⁸⁵ or made absent the findings required by the *Nebraska Press Association* test,⁸⁶ is transparently invalid, the *Walker* rule against collateral attack does not apply. Moreover, the Court in *Walker* emphasized the several appellate opportunities available to but foregone by the marchers over the several days prior to the scheduled parade.⁸⁷ The Court's emphasis indicates that the case may require no more than an attempt to appeal a

77. 388 U.S. 307 (1967).

78. See text accompanying notes 51-52 *supra*.

79. See 465 F.2d at 509-10 (1972).

80. The issue of prohibiting publication of testimony given in open court was effectively settled by *Sheppard v. Maxwell*, 384 U.S. 333, 362-63 (1966). Such orders are now assumed to be totally void and ineffectual.

81. 388 U.S. at 312.

82. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1968).

83. 388 U.S. at 320.

84. *Id.* at 315.

85. See *Sheppard v. Maxwell*, 384 U.S. 333, 362-63 (1966); cf. *Cox Broadcasting Corp. v. Cohn*, 421 U.S. 469, 492-94 (1975).

86. See text accompanying note 6 *supra*.

87. 388 U.S. at 318-20. Note also that the defendant in the contempt action in *Dickinson* also had failed to seek appellate remedies. 465 F.2d at 500.

void restraining order up to the time the constitutionally protected action is planned to take place.⁸⁸ The Court's pronouncement that the "case would arise in quite a different constitutional posture if the petitioners, before disobeying the injunction, had challenged it in the Alabama courts, and had been met with *delay or frustration of their constitutional claims*"⁸⁹ also supports this interpretation. Thus, if an appeal had been taken from the void order in *Walker*, but no court had acted on it by the time the parade began, the result may well have been different.

This view that an impending delay of constitutional claims may be the decisive factor in such cases is in accord with earlier decisions of the Court that suggest that "timeliness" is a critical element of first amendment expression, and is to be considered by a court determining the validity of prohibitions of first amendment freedoms.⁹⁰ In his pointed remarks about the *Pentagon Papers* case in *Nebraska Press Association*, Chief Justice Burger also recognized that temporary restraining orders might deprive the press of its ability to report the news. The Chief Justice noted that the request for the prior restraints in both *Pentagon Papers* and *Nebraska Press Association* were in major respects identical—both orders were temporary, expiring in the first case after the government had had time to study the effects of publication, and in the second once the trial began.⁹¹ However, Chief Justice Burger pointed out in *Nebraska Press Association* that a temporary restraining order has as serious an impact as a permanent restraint because of the perishability of news:

Of course, the order at issue—like the order requested in *New York Times*—does not prohibit but only postpones publication. Some news can be delayed and most commentary can even more readily be delayed without serious injury, and there often is a self-imposed delay when responsible editors call for verification of information. But such delays are normally slight and they are self-imposed. Delays imposed by governmental authority are a different matter. . . . As a practical matter,

88. Cf. Note, *Collateral Attack of Injunctions Restraining First Amendment Activity*, 45 S. CAL. L. REV. 1083 (1972) (otherwise first amendment rights, which often require recognition of the importance of timing, can be exercised only at the expense of being punished for contempt); 56 CAL. L. REV. 517, 522 (1968) (the Court implied that "under certain circumstances violation of an injunction which inhibits first amendment exercise may be justified").

89. 388 U.S. at 318 (emphasis added).

90. The most prominent case is *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175 (1968). In *Carroll*, the Court cited first amendment activity as being an area where "the element of timeliness may be important," and implied that this determination must be left to the discretion of those desiring to exercise their rights. *Id.* at 182, 184. In *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969), a case arising out of the same incident as *Walker*, Justice Harlan's concurrence explained: "Timing is of the essence in politics. It is almost impossible to predict the political future; and when an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all." *Id.* at 163.

91. 96 S. Ct. at 2803.

moreover, the element of time is not unimportant if press coverage is to fulfill its traditional function of bringing news to the public promptly.⁹²

Accordingly, if a federal court issues an invalid order not to publish in a fair trial case, the order should be appealed up to press time; if there is no proper relief by that time, it can be disobeyed.⁹³ Even if there are no findings under the Burger 3-part test or even if the order prohibits publication of testimony given in open court, and the press therefore may presume the order "transparently invalid" and subject to collateral attack, the risk to the newspaper inherent in making such a presumption may be limited by appealing until press time.

Under *Walker*, and as in state courts allowing collateral attacks, an order incorrectly purporting to meet Chief Justice Burger's three subtests creates the most ambiguity for a newspaper desiring to publish and collaterally attack the order instead of waiting out the appellate process. Assuming there is jurisdiction⁹⁴ and open court testimony is not involved, there may be difficulty in attacking such an order collaterally. It is improvident to predict how often these several aggravating factors will be combined to "gag" effectively a publisher or broadcaster in the future, even though the invalid order almost inevitably will be overturned once the appeal is completed. Analytically, however, the question of whether to allow the collateral attack will resemble the one facing the court in *Dickinson* of whether a reporter should be fined for disobeying an unconstitutional order.⁹⁵ The doctrine of collateral attack found in those state courts which protect disobedience to invalid orders will be of little use in federal courts, nor will the "transparently invalid" doctrine apply because the order is merely void. Nonetheless, if the requirement of appealing a void order is merely to provide the courts with the *opportunity* to protect the newspaper publisher's rights *before* they are exercised, then a *pending*, not a *successful*, appeal is all that is necessary and this most difficult of all orders should be subject to collateral attack.

C. Summary: Collateral Attack on Fair Trial Prior Restraints

Despite the virtual impossibility of meeting the 3-part test in *Nebraska Press Association*, it is possible that both federal and state courts will issue temporary prior restraints based upon a misinterpretation of the case. A

92. *Id.*

93. This procedure was used successfully by the *New York Times* in *New York Times Co. v. Starkey*, 51 App. Div. 2d 60, 380 N.Y.S.2d 239 (1976).

94. See *United States v. Dickinson*, 465 F.2d 496, 511 (5th Cir. 1972), *aff'd*, 476 F.2d 373 (5th Cir.), *cert. denied*, 414 U.S. 979 (1973).

95. See Note, *supra* note 88, at 1102-07.

careful reading of the case and others leading up to it indicates that such restraints will be overturned on appeal, but the press still may be faced with the dilemma of losing a story by obeying an unconstitutional order or risking a contempt conviction by disobeying it, as occurred in *Dickinson*. This possibility could arise in at least three fact situations, assuming the court has proper jurisdiction: first, an order not to print testimony given in open court; second, an order not to print made without the necessary findings under Chief Justice Burger's 3-part test; and finally, an order not to print made after a 3-part finding under the test.

In the first situation, if a state court permits collateral attack, the facially invalid order can be disobeyed. In federal court, the order is "transparently invalid" and therefore within the exception to *Walker*'s requirement of appeal before disobeying a court order.⁹⁶ But even if appeal is required or desirable in terms of avoiding the risk of being denied collateral review, a *successfully* completed appeal may not be necessary and good faith efforts to appeal as far as possible before press time may protect disobedience under *Walker*. In the second situation the same result should pertain, because failing to use the 3-part test renders an order not to print "transparently invalid." The third situation seems to present more difficulties because the order is facially sufficient, or, in federal terms, it is not "transparently invalid." Yet, if a state court permits collateral attack, it should allow that procedure to be invoked with respect to all of these inevitably unconstitutional restraints. In federal court, *Walker* at least insures that an appeal before and up to press time will allow the contempt defendant to attack the invalid order collaterally.

III. CONCLUSION

The Supreme Court in *Nebraska Press Association* declined to state that there should be no prior restraints against the press in fair trial/free press cases. In reaching this decision the Court apparently was influenced by the idea that to do otherwise would require making the first amendment absolute. Chief Justice Burger pointed this out at the end of his opinion:

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. This court has frequently denied that First Amendment rights are absolute and has consistently rejected the proposition that a prior restraint can never be employed.⁹⁷

96. *Walker v. City of Birmingham*, 388 U.S. 307, 315 (1967).

97. 96 S. Ct. at 2808, *citing* *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *Near v. Minnesota*, 283 U.S. 697 (1931).

In my view, however, this fear of absolutism was misplaced. It is hardly absolutist to argue, as the press did in that case, that exceptions to the rule against prior restraints should be limited to national security cases.

Nonetheless, at the same time as it gave lip service to the proposition that exceptions qualify the rule against prior restraints in fair trial/free press cases, the Court created a test for those exceptions that is in reality impossible to meet. Analytically, it appears difficult to read the case in any way other than barring all prior restraints against the press in fair trial/free press cases.

Unfortunately, because the majority did not accurately characterize its decision, it may engender some confusion in the lower courts as to their ability to issue prior restraints in fair trial/free press cases. The hazard that this creates, of course, is the issuance of temporary restraining orders. Even though such orders will almost assuredly be constitutionally invalid, they nonetheless might force the press to miss deadlines if a successful appeal is required before disobedience is immune from contempt charges. It is my view, however, that because *Nebraska Press Association* makes all such restraints unconstitutional, disobedience and collateral attack frequently should be appropriate and effective in preventing contempt convictions. Therefore, despite its failure explicitly to bar fair trial prior restraints, *Nebraska Press Association* should rapidly discourage such restraints, making the case an extremely important victory for the press.