

1978

The Rights of the Press and the Closed Court Criminal Proceeding

G. Michael Fenner

Creighton University School of Law, fenner@creighton.edu

James L. Koley

Creighton University School of Law

Follow this and additional works at: <https://digitalcommons.unl.edu/nlr>

Recommended Citation

G. Michael Fenner and James L. Koley, *The Rights of the Press and the Closed Court Criminal Proceeding*, 57 Neb. L. Rev. 442 (1978)
Available at: <https://digitalcommons.unl.edu/nlr/vol57/iss2/9>

This Article is brought to you for free and open access by the Law, College of at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Nebraska Law Review by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.

By G. Michael Fenner*
and James L. Koley**

The Rights of the Press and the Closed Court Criminal Proceeding

ARTICLE OUTLINE

- I. INTRODUCTION
- II. PROCEDURAL CONSTITUTIONAL RIGHTS: PROCEDURAL DUE PROCESS
 - A. The Application of Procedural Due Process Rights
 - B. The Scope of the Right
 - 1. *"the private interest that will be affected by the official action"*
 - 2. *"the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"*
 - 3. *"the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail"*
 - C. Procedural Due Process: Conclusion
- III. SUBSTANTIVE CONSTITUTIONAL RIGHTS
 - A. Closed Judicial Proceedings in Criminal Cases as Prior Restraints on News Reporting by the Media
 - 1. *Prior Restraints on Media Reports Concerning Judicial Proceedings in Criminal Prosecutions are Unconstitutional*
 - 2. *Closed Judicial Proceedings in Criminal Cases Constitute Prior Restraints on the Media*
 - B. The Rights of the Public and the Press to Observe Judicial Proceedings in Criminal Cases: The Public Right to a Public Trial
 - 1. *The Right*
 - 2. *The Extent of the Right: Pretrial Hearings*

* B.A. 1966, University of Kansas; J.D. 1969, University of Missouri-Kansas City. Associate Professor of Law, Creighton University. Of Counsel, McGill, Koley, Parsonage & Ryan, P.C., Omaha, Nebraska.

** B.A. 1952, Creighton University; J.D. 1954, Creighton University. Partner, McGill, Koley, Parsonage & Ryan, P.C., Omaha, Nebraska. Mr. Koley acted as a general counsel for the Petitioners in *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976).

3. *The Right: Nebraska*
4. *State v. Simants: Contrary Dictum in Nebraska*
- C. **The Media's Right to Gather and the Public's Right to Receive Information**
 1. *The Right to Gather Information*
 2. *The Right to Receive Information*
 3. *The Effect of the Rights to Gather and Receive*

IV. PROCEDURAL AND SUBSTANTIVE CONSTITUTIONAL RIGHTS: THE BURDEN OF PROOF

- A. **The Burden is on Those Who Would Close the Court to Prove That There Are No Less Restrictive Alternatives**
 1. *Voir Dire*
 2. *Change of Venire*
 3. *Change of Venue*
 4. *Continuance*
 5. *Enforcement of Courtroom Decorum*
 6. *Sequestration of Jurors*
 7. *Judicial Instructions*
 8. *Control Over Courtroom Personnel and Officers of the Court*
 9. *Mistrials, New Trials, and Reversals*
 10. *Other "Alternatives"*
 11. *Less Restrictive Alternatives: Conclusion*
- B. **The Burden is on Those Who Would Close the Court to Prove That Open Proceedings Would Result in Denial of Defendant's Rights**
- C. **The Burden is on Those Who Would Close the Court to Prove That the Closing Will Protect Defendant's Rights**

V. CONCLUSION

I. INTRODUCTION

The Supreme Court having stated in nearly absolute terms that the media cannot be prohibited from publishing those things which occur in open court,¹ it seems inevitable that defendants will begin urging and courts will begin considering new means to achieve the same end, that is, keeping information out of the papers and off radio and television. It further seems likely that this same end will be sought through the means of the closed court.²

The closing of courts in criminal proceedings raises a number

-
1. *Oklahoma Publishing Co. v. District Court for Okla. County*, 430 U.S. 308 (1977) (per curiam); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); Barnett, *The Puzzle of Prior Restraint*, 29 STAN. L. REV. 539, 546 & n.50, 555-56 (1977). See also note 91 *infra*.
 2. This is perhaps particularly likely in Nebraska in light of *State v.*

of substantial constitutional issues. These issues involve the constitutional rights of the media, the defendant, and the public. The issues raised are both substantive and procedural. The substantive rights are: the media's rights to freedom of the press,³ to public judicial proceedings in criminal cases,⁴ and to gather information;⁵ the defendant's right to a fair trial untainted by prejudicial publicity;⁶ and the public's rights to an open court,⁷ to receive information,⁸ and to a criminal justice system which operates as justly and expeditiously as possible.

Whether one agrees that closing the court in a criminal proceeding in a particular situation violates the media's substantive constitutional rights, it is indisputable that consideration of closing the court *threatens* those rights.⁹ It is the *threat* to these substantive rights which brings into play the procedural right involved—the procedural due process¹⁰ right to notice and a hearing.¹¹ This article first discusses the procedural due process rights of the media and then the substantive rights involved, focusing again on the rights of the nonparty—the media.

II. PROCEDURAL CONSTITUTIONAL RIGHTS: PROCEDURAL DUE PROCESS

In spite of the conceded importance of procedural due process in our constitutional system, it remains the least discussed aspect of the media's rights in regard to judicial proceedings in criminal cases—least discussed in the cases, in the literature, and, it seems, by the attorneys. Before exploring the right and its application, the reasons for its apparent disregard might be stated briefly. The answer, in part, lies in Professor McKay's recognition that

Simants, 194 Neb. 783, 790, 236 N.W.2d 794, 799 (1975), *rev'd on other grounds sub nom.* Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976). See note 185 and accompanying text *infra* (quoting *Simants*, 194 Neb. at 790, 236 N.W.2d at 799). Simant's attorney had requested a closed preliminary hearing but that request was denied and a silence order was entered instead. Nebraska Press Ass'n v. Stuart, 427 U.S. at 572 (Brennan, J., concurring in the judgment). The silence order was subsequently declared unconstitutional.

3. See § IV of text *infra*.
4. See § III-B of text *infra*.
5. See § III-C-1 & 3 of text *infra*.
6. See note 16 *infra*.
7. See § III-B of text *infra*.
8. See § III-C-2 of text *infra*.
9. See § III of text *infra*.
10. See § II of text *infra*.
11. See § II-B *infra*.

[s]ometimes the best known, the most obvious principles prove also to be the ones most readily overlooked. Thus, in concentrating on substantive rights, such as freedom of expression, it is a common mistake to disregard the procedural connotations It is easy to forget the importance of Sir Henry Maine's reminder that liberty is secreted "in the interstices of procedure."¹²

The right to procedural due process is addressed relatively infrequently by the attorneys, in part because the informal approach to the trial judge can often be the best approach. Of all the ways of handling the problem, it is the easiest, the quickest, and the least expensive for the client. In addition, in many cases it may contribute to maintaining the kind of relationship with the court which may produce the best result for the client in the long run.

The right to procedural due process is not often addressed as such by the courts, in part because courts considering restrictions on the publication of criminal justice system information are often willing, even eager, for some press participation. Otherwise there ordinarily will be no one to present the first amendment position; the hearing on the restrictive order will have no adversary. This participation can range anywhere from formal intervention, to an *amicus curiae* brief and argument by the press, and even to "I will not allow you to participate in any way—but give my secretary a copy of the brief you tried to file." Courts eager for media participation do not feel much of a need to justify their position with a scholarly opinion. One cannot imagine a trial court being reversed for allowing press participation in a hearing on a proposed closed court order.¹³ The point, however, is not that the judge should allow media participation in his own best interest, but that the Constitution demands an adversary hearing with notice and the opportunity to participate for the media.

A. Application of Procedural Due Process Rights

Mr. Justice Frankfurter, recognizing that "[t]he history of American freedom is, in no small measure, the history of procedure,"¹⁴ has referred to procedural due process as "perhaps the most majestic concept in our whole constitutional system."¹⁵ In no area

12. McKay, *The Preference for Freedom*, 34 N.Y.U. L. REV. 1182, 1218 (1959) (quoting MAINE, *EARLY LAW AND CUSTOM* 389 (1883)).

13. Regarding reversal for not allowing media participation, see note 50 and accompanying text *infra*. See also text accompanying note 37 *infra*.

14. *Malinski v. New York*, 324 U.S. 401, 414 (1945) (Frankfurter, J., separate opinion).

15. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 174 (1951) (Frankfurter, J., concurring).

of the law has the United States Supreme Court more consistently stressed the importance of procedural safeguards than in the areas of first amendment rights and the rights of the criminally accused. A fortiori, these safeguards apply when these two sets of rights are both potentially involved in the so called free press-fair trial controversy.¹⁶

The contemplated closing of the court inescapably *threatens* first amendment rights,¹⁷ and "where first amendment rights are threatened with limitation in any degree, the most exacting measure of procedural due process will be prescribed to insure their maximum protection."¹⁸ More generally, the Supreme Court has stated that the decision as to whether the procedural due process right applies in any given situation is a function of "the *nature* of the interests at stake,"¹⁹ and whether they are within the fifth or the fourteenth amendment protection of life, liberty, and property.²⁰ Procedural

16. Much of the analysis in this area begins with the premise that the rights of the media and the defendant are necessarily infringed and that the answer is to find one right more important than the other or to try to compromise the two in some sort of balance. The authors believe that this premise is wrong and that the bulk of the analysis of this subject never recovers from the fact that its premise is faulty. It is a mistake to consider the rights of the press and the rights of the defendant in the criminal case as opposed to one another. The controversy is not one of free press v. fair trial. While the possibility of such a conflict is not denied, see *Sheppard v. Maxwell*, 384 U.S. 333 (1966), that conflict is much more rare and much more easily avoided than is suggested by characterizing the topic as free press v. fair trial. Such a characterization jumps the analysis ahead too many steps by incorporating a suggestion that infringement of the right to a fair trial either is inherent or has been found to exist. In most cases, this will not be true. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 625 n.15 (1978). See generally *id.* § 12-11.

17. The first amendment right to freedom of the press is applicable to the states through the fourteenth amendment. *E.g.*, *Stromberg v. California*, 283 U.S. 359 (1931); *Fiske v. Kansas*, 274 U.S. 380 (1927).

18. *McKay*, *supra* note 12, at 1219. See also *id.* at 1204, 1219. *McKay* notes that the so called "preferred position" of first amendment rights manifests itself in part in the "insistence upon more exacting standards of procedural due process where freedom of speech is in any way regulated." *Id.* at 1204.

19. *Smith v. Organization of Foster Families*, 431 U.S. 816, 841 (1977) (quoting *Board of Regents v. Roth*, 408 U.S. 564, 571 (1972) (emphasis in original)).

20. *Smith v. Organization of Foster Families*, 431 U.S. 816, 838-39 (1977); *Matthews v. Eldridge*, 424 U.S. 319, 332 (1976); *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313 (1950) ("[t]he cryptic and abstract words of the Due Process Clause . . . at a minimum . . . require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing"). Regarding fourteenth amendment "liberty," see, *e.g.*, *Board of Regents v. Roth*, 408 U.S. 564,

due process must be afforded those whose rights are so threatened.²¹ The closed judicial proceeding in the criminal case inescapably *threatens* such liberties of the media.²² What about the judge, for example, whose fear of exposure or personal animosity towards the press leads him to routinely close criminal action proceedings as a means of personal defense?²³

In *Carroll v. President of Princess Anne*,²⁴ county officials obtained an *ex parte* ten day restraining order against arguably first amendment protected activities; the National States Right Party, a "white supremacist" organization, was restrained from holding rallies or meetings in the county. The Supreme Court found the *ex parte* nature of the hearing to be constitutionally procedurally defective.²⁵ The Court stated that "the failure to invite participation of the party seeking to exercise First Amendment rights . . . substantially imperils the protection which the Amendment seeks to assure."²⁶

The first amendment cases which perhaps most clearly illustrate the notice and hearing rights of the media are those dealing with obscenity. It is in these cases that the procedural rights of one whose first amendment rights are threatened were given their first thorough discussion. When the state attempts to regulate books or movies as obscene, the first decision with which the court is faced is not whether an infringement of the speaker's first amendment rights can be upheld, but whether the particular speech involved is obscene and therefore outside the protection of the first amend-

572 (1972); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

21. *Smith v. Organization of Foster Families*, 431 U.S. 816 (1977). See also *Carroll v. President of Princess Anne*, 393 U.S. 175 (1968); *Freedman v. Maryland*, 380 U.S. 51 (1965); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963).

22. In requesting the closed judicial proceedings, the defendant no doubt asserts his right to a fair trial by an impartial jury. The sixth amendment right to an impartial jury applies to state trials through the fourteenth amendment. *Duncan v. Louisiana*, 391 U.S. 145 (1968). If it is possible for the defendant to make a *prima facie* case of infringement of this right—and, if at all possible, this will not be as simple as defense counsel (and the prosecuting attorney) might suggest—he would be entitled to a hearing. See § IV-B of text *infra*. The point is that the press has a right to participate.

23. See also note 173 and text accompanying note 172 *infra*.

24. 393 U.S. 175 (1968).

25. "The 10-day order here must be set aside because of a basic infirmity in the procedure by which it was obtained. It was issued *ex parte*, without notice to petitioners and without any effort, however informal, to invite or permit their participation in the proceedings." *Id.* at 180.

26. *Id.* at 184.

ment, that is, whether the material is entitled to any first amendment protection at all. These cases make it clear that procedural due process requirements attach to the initial decision as to whether first amendment rights are infringed or not. These cases indicate that decisions which threaten first amendment rights—even preliminary, nonfinal decisions²⁷—must provide those whose rights are threatened with notice and an opportunity to be heard. The model in regard to the procedural safeguards in these cases “postpones any restraint . . . until a judicial determination . . . following notice and an adversary hearing.”²⁸

“[O]nly a judicial determination in an adversary proceeding insures the necessary sensitivity to freedom of expression”²⁹

[T]he Fourteenth Amendment requires that regulation by the States of obscenity conform to procedures that will ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line. It is characteristic of the freedoms of expression in general that they are vulnerable to gravely damaging yet barely visible encroachments. Our insistence that regulations of obscenity scrupulously embody the most rigorous procedural safeguards . . . is therefore but a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks. . . . “[T]he line between speech unconditionally guaranteed and speech which may legitimately be regulated . . . is finely drawn The separation of legitimate from illegitimate speech calls for . . . sensitive tools”³⁰

If strict procedural due process is constitutionally required in deciding whether sexually explicit matter can be regulated, then a fortiori procedural safeguards at least as strict are required in the area of political speech or press—speech which involves the workings of our criminal justice system. A plurality of the Court recently made this same point in *Young v. American Mini Theatres*:³¹

[E]ven though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser,

27. See, e.g., *id.* at 181.

28. *Freedman v. Maryland*, 380 U.S. 51, 60 (1965) (referring to *Kinsley Books, Inc. v. Brown*, 354 U.S. 436 (1957)).

29. *Freedman v. Maryland*, 380 U.S. 51, 58 (1965).

30. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963) (citations omitted). Accord, *United States v. Thirty-seven Photographs*, 402 U.S. 363 (1971) (procedural safeguards applicable to customs seizures); *Blount v. Rizzi*, 400 U.S. 410 (1971) (procedural safeguards applicable to mail censorship).

31. 427 U.S. 50 (1976).

magnitude than the interest in untrammelled political debate that inspired Voltaire's immortal comment ["I disapprove of what you say, but I will defend to the death your right to say it"]. Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every school child can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theaters of our choice.³²

Though "few of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our choice," we do provide that right with the strictest of procedural safeguards. Certainly the role of the press as disseminator of information regarding our criminal justice system is entitled, at a minimum, to procedural safeguards equivalent to those provided purveyors of pornography.³³ Certainly the threat to the first amendment is greater in the realm of political speech than in the area of sexually explicit speech. Who would stand for a rule which provided the former less protection than the latter?

In deciding whether to close judicial proceedings in a criminal case the court must decide either that doing so will not infringe the constitutional rights of the media (or the public) or, if it will infringe the media's rights, that such infringement can be justified constitutionally. Resolution of these questions most clearly threatens the media's right of freedom of the press³⁴ and the right—particularly clear in Nebraska—of the public and the press to observe judicial proceedings in criminal cases.³⁵ It also threatens the media's less sharply identified, perhaps only because less frequently discussed, right to gather information.³⁶ Any order issuing from a procedurally defective hearing, in addition to its substantive constitutional problems, would be unconstitutional as procedurally defective.³⁷

32. *Id.* at 70. The Voltaire quotation appears *id.* at 63. Both quotations appear in Part III of Mr. Justice Stevens' opinion for the Court; while a majority joined in the judgment and in Parts I and II, only three other Justices joined in Part III of the opinion.

33. "In the present case, [involving "political" speech"] the reasons for insisting upon an opportunity for hearing and notice, at least in the absence of a showing that reasonable efforts to notify the adverse parties were unsuccessful, are even more compelling than in cases involving allegedly obscene books." *Carroll v. President of Princess Anne*, 393 U.S. 175, 182 (1968).

34. See § III-A of text *infra*.

35. See § III-B of text *infra*.

36. See § III-C of text *infra*.

37. In *Northwest Publications, Inc. v. Anderson*, — Minn. —, 259 N.W.2d

There is but one exception to the rule requiring notice and a hearing when judicial action poses such a threat to fifth or fourteenth amendment rights, particularly when these rights involve first amendment speech and press. The exception allows interim relief for the shortest possible term until the participation of those whose rights are so threatened can be secured.³⁸ This exception does not apply in the situation under discussion. This is not like the case in which Nazis in full dress uniform are about to parade through a predominately Jewish neighborhood, many of the residents of which are survivors of concentration camps.³⁹ Here the media, the holder of the threatened rights, is not about to do anything except in response to action by the court. The court can control the alleged evil, prejudicial publicity, until participation of the press is secured, and it can do so without infringing, or even threatening, anyone's rights. The question of closing the court only arises when there is to be some kind of a hearing which someone alleges should be closed. The *most* the court would have to do is briefly postpone the hearing while the media is notified, their presence is secured, and a hearing is held on the closed court question.⁴⁰

254 (1977), the Minnesota Supreme Court recently recognized that a court order sealing court records will be unconstitutional when the public and the press are not given prior notice and an opportunity to be heard. The court also recognized that the burden of proof is on those who would close the court, that a strong factual basis for the issuance of the order must appear in the record, and that the trial court should "consider all alternatives to the exceptional remedy of a prior restraint and exhibit the reasons for its conclusion that each is inadequate." *Id.* at —, 259 N.W.2d at 257 (footnote omitted). See also *Carroll v. President of Princess Anne*, 393 U.S. 175 (1968).

Regarding the question of whether the press would have to obey such an order in spite of its procedural and substantive unconstitutionality, see note 112 and accompanying text *infra*.

38. *E.g.*, *Carroll v. President of Princess Anne*, 393 U.S. 175 (1968); Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518, 532-37 (1970). See also *Board of Regents v. Roth*, 408 U.S. 564, 570 n.7 (1972).
39. See *National Socialist Party of America v. Village of Skokie*, 98 S. Ct. 14 (1977) (Stevens, J., Circuit Justice) (The National Socialist Party of America's application for a stay of an injunction against their march was denied.); *Village of Skokie v. National Socialist Party of America*, 46 U.S.L.W. 2396 (Ill. S. Ct. Jan. 27, 1978) (per curiam) (reversing the lower court injunction).
40. Judge Eric Younger recently suggested that the judge faced with this sort of problem should always "[h]old a 'hearing' even though the proceeding may be very informal and at an odd hour." Younger, *The Sheppard Mandate Today: A Trial Judge's Perspective*, 56 NEB. L. REV. 1, 20 (1977). See also *Carroll v. President of Princess Anne*, 393 U.S. 175, 180 (1968) (a hearing "however informal"). In most cases the trial judge will not experience this sort of extreme time pressure.

There is a second situation in which notice to the media and an opportunity to participate in a hearing would not be required. This is the situation in which those having requested the action which allegedly infringes first amendment rights do not make a *prima facie* case for the judicial action requested.⁴¹ In a case of this sort, the request for a closed court can simply be denied. This, however, is not an exception to the rule, for in this situation the rule really never applies in the first place.

B. The Scope of the Right

Once it is determined that the procedural due process right applies, it must be decided what it means. What is necessary to satisfy this constitutional demand? The minimum requirement is notice to those whose rights are threatened and an opportunity for participation in some type of hearing. The media must be notified that the court is going to consider closing a judicial proceeding in a criminal case and be given the opportunity to be heard.⁴²

The Supreme Court has stated that it must be decided "‘what process is due’ in the particular context,"⁴³ a decision which calls for an analysis, and a balancing, of the governmental and private interests which are involved.⁴⁴

But, even in the emergency situation, notice and "hearing" always should be possible.

41. See, e.g., Judge John C. Burke's denial of the City of Omaha's request for "a temporary restraining order to prevent . . . anyone . . . 'from making or holding any meetings, giving speeches, or making other oral or written representations upon public property owned by the City of Omaha.'" Omaha World-Herald, Aug. 21, 1976 at 13, col. 7 (quoting from the city's petition). The city sought the order to prevent the Ku Klux Klan from speaking on public property.
42. *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313-14 (1950) ("[A]t a minimum" due process requires "notice and opportunity for hearing This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest."); *Schroeder v. City of New York*, 371 U.S. 208, 212 (1962) ("[T]he requirement that parties be notified of proceedings affecting their legally protected interest is obviously a vital corollary to one of the most fundamental requisites of due process—the right to be heard."). See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 608 (1976) (Brennan, J., concurring in the judgment) (Unless the media was "notified and accorded an opportunity to be heard," they would not be bound by an order not to publish.).
43. *Smith v. Organization of Foster Families*, 431 U.S. 816, 847 (1977). See, e.g., *Matthews v. Eldridge*, 424 U.S. 319, 334-35 (1976); *Morrissey v. Brewer*, 408 U.S. 471 (1972).
44. *Matthews v. Eldridge*, 424 U.S. 319, 334-35 (1976) (citations omitted).

More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.⁴⁵

1. "the private interest that will be affected by the official action"⁴⁶

The Supreme Court has identified a number of private interests which entitle those whose rights are threatened to notice and an opportunity for an adversary hearing. Among those interests have been the broad category into which the rights most immediately involved here are placed—first amendment rights. In analyzing the private interests that will be affected by the governmental action involved, it may be noted that first amendment rights are certainly as important and as worthy of procedural due process protections as, for example, the revocation of a driver's license⁴⁷ and the suspension of a high school student.⁴⁸

So crucial, in fact, is the procedural protection of speech that even the safeguards required by another specific constitutional right may not always suffice when speech is involved. Thus, although the Fourth Amendment provides restrictions on searches and seizures, the First Amendment requires even more stringent procedures when the material to be seized includes items . . . that may constitute protected speech.⁴⁹

The private interests in, and the importance of, the procedural due process right in this situation are underscored by the *uniquely*

45. *Id.* (citing *Goldberg v. Kelly*, 397 U.S. 254, 263-71 (1970)). More recently the three requisite considerations were quoted in *Smith v. Organization of Foster Families*, 431 U.S. 816, 848-49 (1977), and in *Dixon v. Love*, 431 U.S. 105, 112-13 (1977).

46. *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976). See note 45 and accompanying text *supra*.

47. *Dixon v. Love*, 431 U.S. 105 (1977). In *Dixon*, the Court held the due process clause applicable to the deprivation of a driver's license by the state but, applying the three-step inquiry of *Matthews v. Eldridge*, 424 U.S. 319, 334-35 (1976), concluded that "something less than an evidentiary hearing is sufficient prior to adverse administrative action." 431 U.S. at 113.

48. *Goss v. Lopez*, 419 U.S. 565 (1975) (requiring an informal hearing before high school student may be suspended).

49. Quint, *Towards First Amendment Limitations on the Introduction of Evidence: The Problems of United States v. Rosenberg*, 86 YALE L.J. 1622, 1649 (1977).

irretrievable loss which would be incurred by the media (and the public) through the denial of the right. The media's rights can never be vindicated except in the abstract. The media can appeal the decision to close a particular judicial proceeding but unless it can move up the appellate ladder quickly enough to get an injunction against holding the closed hearing, its rights in that particular situation will be lost forever.⁵⁰ If an appellate court eventually decides that the closing was unconstitutional, it cannot reverse and remand for an open hearing. Obviously, neither the defendant's conviction nor his acquittal will be reversed for violation of the rights of the media.

It is no answer, no sufficient guarantee of the procedural due process right or the underlying substantive rights, to suggest that a closing order will be lifted at some future time. The right delayed is the right denied. Chief Justice Burger, writing for the Court in *Nebraska Press Association v. Stuart*,⁵¹ recognized the importance of "the element of time" to freedom of the press and that "bringing news to the public promptly" is a "traditional function of" the press.⁵² Irreparable injury sets in every moment publication is delayed.⁵³ "Indeed, it is the hypothesis of the First Amendment that injury is inflicted upon our society when we stifle the immediacy of speech."⁵⁴ The Supreme Court has consistently noted the inadequacy of "[d]iscussion that follows the termination of a case."⁵⁵

50. Before the rights of the press were fully recognized in *Nebraska Press Ass'n*, the case, under the name *State v. Simants*, went from county court to the district court, to the Nebraska Supreme Court, to Mr. Justice Blackmun as Circuit Justice, back to the Nebraska Supreme Court, back to Mr. Justice Blackmun, back again to the Nebraska Supreme Court and eventually to the Supreme Court of the United States. The closing order could be reversed, as was the gag order in *Nebraska Press Ass'n*, but the right to be present at the hearing cannot be retrieved. Review comes only after the restraint is in effect. The media is not a party to the criminal action and, therefore, review must be by stay application or original writ with the consequent burdens. See also notes 77 and 334 *infra*.

51. 427 U.S. 539 (1976).

52. *Id.* at 561.

53. *Id.* Accord, e.g., *Nebraska Press Ass'n v. Stuart*, 423 U.S. 1327, 1329 (1975) (Blackmun, J., Circuit Justice); Barnett, *supra* note 1, at 545.

The fair trial-free press confrontation can be contrasted, for example, with cases involving allegedly obscene publications in which, according to Professor Tribe, brief delay may be "tolerable because the class of expression, both protected and unprotected, generally lacks topical content." L. TRIBE, *supra* note 16, § 12-33, at 731.

54. A. BICKEL, *THE MORALITY OF CONSENT* 61 (1975) (paraphrased by the Court in *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976)).

55. *Pennekamp v. Florida*, 328 U.S. 331, 346 (1946) (The quotation contin-

In the case of a closed proceeding, the restraint really could never be lifted. At best, the media, at some subsequent time, could be provided with a cold record of the proceedings, which by then are no longer news, but history.⁵⁶ How many attorneys experienced in courts of record have not seen a record which seemed inadvertently or even intentionally altered? One of the protections provided by the free press is that against misconduct in the criminal justice system. The closed proceeding with a transcript eliminates that protection. In the situation in which the press is needed the most, the very corruption to be exposed may well be in a position to control the best, and sometimes the only, remaining evidence of misconduct—the transcript.

The procedural due process question is not whether first amendment rights are infringed but whether the contemplated action threatens their infringement. This is not a proper situation for the application of hindsight. If the rights are threatened the procedural due process rights apply, regardless of how the issue may be resolved. Not to grant the media notice and the opportunity to be heard is constitutional error. It is the next assertion of the first amendment right which is being protected, perhaps as much as the current one.

Clearly, then, the first part of the procedural due process test demands notice and an opportunity to be heard for the media. Even if one disagrees with the authors' conclusions regarding the violation of first amendment rights inherent in closing the court in criminal cases, most would no doubt agree that the rights are applicable and that in some situations closed courts in criminal cases would violate first amendment rights. What about the judge, for example, who perceiving the press as out to get him routinely closes his court, citing the defendant's right to a trial untainted by preju-

ues: "may be inadequate to emphasize the danger to public welfare of supposedly wrongful judicial conduct."). See *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 163 (1969) (Harlan, J., concurring); *Carroll v. President of Princess Anne*, 393 U.S. 175, 182 (1968) ("The present case involves . . . 'political' speech in which the element of timeliness may be important."); *A Quantity of Books v. Kansas*, 378 U.S. 205, 224 (1964) (Harlan, J., dissenting) ("On the other hand, the subject of sex is of constant but rarely particularly topical interest."); *Bridges v. California*, 314 U.S. 252, 268-69 (1941).

56. "[A] transcript of a proceeding is a sterile substitute for observing the actual conduct of a hearing, as reviewing courts are well aware. Actual observation of the demeanor, voice, and gestures of the participants in a hearing must be as informative to the press and public as those same matters are to juries during trial." *State ex rel. Dayton Newspapers, Inc. v. Phillips*, 46 Ohio St. 2d 457, 471, 351 N.E.2d 127, 136 (1976) (Stern, J., concurring).

dicial publicity as his motive? Once it is determined that first amendment rights can apply to the situation under discussion, the holder of the right is entitled to notice and an opportunity to be heard.

2. "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"⁵⁷

If the procedure used provides for anything less than notice to the media and the opportunity for them to participate in an adversary hearing, then that procedure is constitutionally defective. First amendment rights demand assurance that the court faced with the initial decision is aware of, and has considered, both sides of the central questions, and that it has considered both sides of the law and of the facts. Too often the only assurance that the trial court has considered the issues is the judicial maxim that the judge is presumed to know all of the law.⁵⁸ Whether this is, as Professor Irving Younger has commented in another context, "another pious fiction, that we pretend to believe, to get our work done,"⁵⁹ it certainly provides no assurances regarding the trial judge's consideration of the appropriate facts.

To experienced lawyers it is commonplace that the outcome of a lawsuit—and hence the vindication of legal rights—depends more often on how the factfinder appraises the facts than on a disputed construction of a statute or interpretation of a line of precedents. Thus the procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied.⁶⁰

This demand for assurances is, of course, quite consistent with the Supreme Court's insistence, in *Nebraska Press Association*,⁶¹ upon a complete record whenever this type of decision is made. A hearing at which the media is represented and a record is made is the best insurance against the first amendment being sacrificed, whether in a good faith attempt to protect the defendant or in an attempt to hide some flaw in the criminal justice system. The hearing tends to insure that the judge is aware of both sides of the

57. *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976). See note 45 and accompanying text *supra*.

58. See Gunter, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 44 (1972).

59. I. YOUNGER, *THE ART OF CROSS-EXAMINATION* 12 (ABA Litigation Section Monograph Series 1976).

60. *Speiser v. Randall*, 357 U.S. 513, 520 (1958).

61. 427 U.S. 539, 562-64 (1976).

law and the facts, and the record tends to insure that, having been made aware of the issues, the judge considers them.

There are many risks inherent in closing judicial proceedings in criminal cases without an adversary hearing with media participation. Judge Eric Younger has pointed out that without an adversary hearing the legal system would be left with "a burden almost unknown in our jurisprudence, the true *sua sponte* duty of a trial judge."⁶² In this situation the trial judge will often find himself "in the position of sole guardian of First Amendment interests even against the express wishes of both parties."⁶³ The defense attorney is, of course, single minded in his regard for his client's interests; a good deal of the time this means the less publicity the better, whether truly out of fair trial concerns or simply to save the client's face. The prosecutor is interested in a conviction which will stand on appeal; currently reversal of a conviction because of prejudicial publicity, though *extremely* rare, constitutes a real possibility while *reversal of a conviction* for infringement of the media's rights, of course, remains unheard of. Judge Younger notes that the emotional and intellectual "burden on a trial judge who is asked to go counter to the wishes of a defendant in a capital case on a major constitutional point *where the state joins in the defense position* is almost unbelievable."⁶⁴ These burdens, though perhaps less severe, are also present in the noncapital case.

Not only is the situation unique by reason of the *sua sponte* nature of the decision the judge is called upon to make, but also by reason of the unique lack of judicial detachment and neutrality inherent in the situation. Most other first amendment procedural due process rights cases involve the interposition of the courts as impartial referees to protect the rights involved. The court is brought into the dispute as a neutral third party. In the present situation, however, the court is uniquely involved, from the start,

62. Younger, *supra* note 40, at 6.

63. *Id.* at 6-7. Judge Younger continues: "It is a rare situation in which a trial judge's decision on *any* issue enjoys the support of *both* parties all the way through the United States Supreme Court argument and is unanimously reversed. *Nebraska Press Association v. Stuart* was, of course, such a case." *Id.* at 7 (footnote omitted).

64. *Id.* Judge Younger continues:

Any judge with courage is accustomed to risking reversal on a "tough call" where he thinks he is right, but here we ask him to run with the bulls at Pamplona with swim fins on. He might still win, but he would have designed the contest differently if he would have been consulted in advance.

Id. The answer is that the contest has been designed differently; the Constitution has designed it differently; the procedural due process right removes the swim fins.

as a participant. It is, after all, the working of the court which is to be reported.⁶⁵ The court is not called into this dispute; rather, it has been there, very nearly from the beginning, already a participant. The court has a stake in the proceedings which may lessen its neutrality.

In addition to the *sua sponte* duty of the court and its unique involvement as a participant in the situation being regulated, the court is faced with the important, albeit less unique, responsibility of making a primary judgment.⁶⁶ Absent some legislation governing this situation the court is the sole interpreter of the constitutional values involved. These cases typically do not involve judicial review of legislative or executive acts. There is, for example, no presumptively valid decision by another branch from which the court can work. There is no "legislative history" to guide the court.⁶⁷

Not only does the situation present unique risks in the way in which it leaves threatened first amendment rights unrepresented, but cases in which prejudicial publicity causes any real problem are extremely rare.⁶⁸ This means that the trial judge will have little or no experience in dealing with these situations. The infrequency with which the problem arises decreases the likelihood that the judge will be equipped to handle its unusual burdens.

Failure to invite media participation is also destructive of the first amendment burden of proof requirements. The burden of proof is on those who seek to close the court.⁶⁹ What advocate would not feel that burden lightened knowing that his side of the issue would be the only side whose case would be presented?

65. The pressure on the judge will be to determine, rightly or wrongly, that there will be nothing about proceedings to be held in his courtroom which will raise political issues of the sort the first amendment was designed to insure would be publicized. Where this is not the situation, the lack of a hearing with media participation makes it too easy for the court to hide what it suspects (or knows) to be worthy of publication.

66. See *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 164 (1951) (Frankfurter, J., concurring).

67. This by no means suggests, however, that were there governing legislation, such legislation would be constitutional, see note 136 *infra*, or the media would have any less right to a hearing. This is simply a further indication of how alone the court (or, perhaps more correctly, the first amendment) typically stands in these cases without the participation of the media. Regarding "legislation" in this area, see, e.g., L. TRIBE, *supra* note 16, § 12-11, at 627 & n.26.

68. E.g., Younger, *supra* note 40, at 2.

69. See § IV of text *infra*.

The principal risk in not holding a hearing with media participation is that the deck is stacked against the first amendment. The procedural safeguards of notice and an opportunity to participate in a hearing on the closed court question "assure the fullest presentation and consideration of the matter which the circumstances permit The participation of both sides is necessary. . . . Certainly, the failure to invite participation of the party seeking to exercise First Amendment rights . . . substantially imperils the protection which the Amendment seeks to assure."⁷⁰

The "additional procedural safeguards"—notice to the media and an adversary hearing—promote a number of important values (many of which have been previously discussed). They will result in the fullest presentation and consideration of all of the important constitutional issues involved. It certainly would be a fiction to believe that without media participation all of the relevant legal principles and facts will be before the court. These procedural safeguards make a balanced judgment more likely, a judgment less likely predisposed to suppression and more likely sensitive to first amendment values. The hearing certainly tends to guarantee that the burden of proof will be an actual burden and that any order issued will be as narrowly drawn as possible.

The adversary hearing forces all but the most recalcitrant of judges to be intellectually honest and to confront exactly what they are trying to accomplish and how best to do so. It also promotes judicial honesty and facing up to the real issues by requiring a complete record which will be available for, and will enable, appellate review—review which in first amendment cases includes both the law and the facts.⁷¹

Finally, "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights."⁷² It is important that the opportunity for an adversary hearing be provided not only for the sake of fairness but also for its appearance; "justice must not only be done but must manifestly be seen to be done."⁷³

70. *Carroll v. President of Princess Anne*, 393 U.S. 175, 181, 184 (1968). Even if it were possible for a court to decide that a closing does infringe first amendment rights but that the infringement is justified, the first amendment would demand that the court's order "be tailored as precisely as possible to the exact needs of the case. . . . [F]ailure to invite participation of the [media] reduces the possibility of a narrowly-drawn order." *Id.* at 184.

71. *E.g.*, *Fiske v. Kansas*, 274 U.S. 380 (1927).

72. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170 (1951) (Frankfurter, J., concurring).

73. *Rex v. Justices of Bodmin*, [1947] 1 K.B. 321, 325 (1946) (quoted in

3. "the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail"⁷⁴

"In striking the appropriate due process balance the final factor to be assessed is the public interest. This includes the administrative burden and other societal costs that would be associated with requiring [an adversary hearing] as a matter of constitutional right"⁷⁵ The societal costs, monetary and otherwise, and the administrative burden of providing the media notice and an opportunity for a hearing prior to closing judicial proceedings in criminal cases are at most insubstantial. In the main, these procedural safeguards will not require that an additional hearing be held but simply that the media be given notice and be allowed to participate in a hearing which is being held anyway. The public interest in efficiency would not be impeded by media participation. If in some sort of emergency situation, an immediate hearing were to become necessary, the greatest inefficiency possible would be a few hours of delay so that the media could be notified and their physical presence secured.⁷⁶ And in most cases even such a short delay could be minimized, if not avoided altogether, with a little foresight, by anticipation of potential problems and advance notification of the media of their potential interest.⁷⁷

C. Procedural Due Process: Conclusion

Given the private interests threatened—the nature of the interests at stake and the irreparable nature of the threatened loss—the unique risk of erroneous deprivation coupled with the value of notice and opportunity to be heard, and the nearly absolute lack of a countervailing governmental interest in denying notice and an

Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 172 n.19 (1951) (Frankfurter, J., concurring)).

74. *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976). See note 45 and accompanying text *supra*.

75. *Id.* at 347.

76. Of course the media must be allowed sufficient time to prepare its position. The opportunity to participate must be a real one. However, with some foresight by media counsel regarding the law, and with cooperation between media counsel on the one hand and the client's reporters and counsel for the parties on the other hand regarding the facts, this preparation time need not present any danger to defendant's rights or to the criminal justice system generally.

77. In fact the real fiscal and administrative burdens will be found in the situation in which the media is deprived of its procedural due process rights. See note 50 *supra*. See also text accompanying notes 139-42 *infra*.

adversary hearing, it is inconceivable that these two basic procedural due process requirements are not the constitutional right of the media in this situation.

[A] democratic government must . . . practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.

. . . .
 . . . The validity and moral authority of a conclusion largely depends on the mode by which it was reached. Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightfulness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has any better way been found for generating the feeling, so important to a popular government, that justice has been done.⁷⁸

III. SUBSTANTIVE CONSTITUTIONAL RIGHTS

A. Closed Judicial Proceedings in Criminal Cases as Prior Restraints On News Reporting by the Media

1. *Prior Restraints on Media Reports Concerning Judicial Proceedings in Criminal Prosecution are Unconstitutional*

The particular facts regarding previously attempted prior restraints on news reporting by the press have been many and varied. The one thing that has remained constant is that when such attempts have been subjected to constitutional scrutiny by the United States Supreme Court, they have without exception been struck down in the face of the first amendment. The most recent in this line of cases is *Nebraska Press Association v. Stuart*.⁷⁹

It is "generally, if not universally"⁸⁰ conceded that "the main purpose of [the first amendment] is 'to prevent all such *previous restraints* upon publication as had been practiced by other govern-

78. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170-72 (1951) (Frankfurter, J., concurring). Mr. Justice Frankfurter quotes from 5 THE WRITINGS AND SPEECHES OF DANIEL WEBSTER 163 (Nat'l ed. 1903): "In a government like ours, entirely popular, care should be taken in every part of the system, not only to do right, but to satisfy the community that right is done." 341 U.S. at 170-72. He also quotes from *Rex v. Justices of Bodmin*, [1947] 1 K.B. 321, 325 (1946): "Time and again this court has said that justice must not only be done but must manifestly be seen to be done . . ." 341 U.S. at 170-72.

79. 427 U.S. 539 (1976).

80. *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931). *Accord*, e.g., *New York Times v. United States*, 403 U.S. 713 (1971); *Tinker v. Des Moines Independent School Dist.*, 393 U.S. 503, 509, 511, 514 (1969); *Grosjean v. American Press Co.*, 297 U.S. 233, 249 (1936).

ments.’”⁸¹ “Prior restraints are ‘the essence of censorship,’ and ‘[o]ur distaste for censorship—reflecting the natural distaste of a free people—is deep-written in our law.’”⁸²

In *Nebraska Press Association*, Chief Justice Burger, for the Court, stated:

[Prior] restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights. . . .

A prior restraint . . . has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication “chills” speech, prior restraint “freezes” it

The damage can be particularly great when the prior restraint falls upon the communication of news and commentary on current events [T]he protection against prior restraint should have particular force as applied to reporting of criminal proceedings, whether the crime in question is a single isolated act or a pattern of criminal conduct.⁸³

The Chief Justice recognized that in the past “every member of the Court” was in agreement “tacitly or explicitly” that “prior restraint[s] are” presumptively unconstitutional.”⁸⁴

A majority of the Court has gone on to state their virtual agreement that such prior restraints are always unconstitutional, that the ban is absolute. In *Nebraska Press Association*, three Justices made it quite clear that prior restraints on news reporting by the press are simply and always impermissible.⁸⁵ Two other Justices stated their virtual agreement with that ultimate conclusion. Mr. Justice Stevens, concurring in the judgment, stated that he “subscribe[s] to most of what Mr. Justice Brennan says and, if ever required to face the issue squarely, may well accept his ultimate conclusion.”⁸⁶ Citing Mr. Justice Brandeis’ concurring opinion in *Ashwander v. Tennessee Valley Authority*,⁸⁷ Mr. Justice Stevens indicated not disagreement but simply reluctance to go further than immediately necessary when deciding constitutional questions. Mr. Justice White, in his concurring opinion, stated: “Technically there is no need to go farther than the court does to dispose of this case. . . . I should add, however, that for reasons which the Court itself canvasses there is grave doubt in my mind whether

81. *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 557 (1976) (quoting *Patterson v. Colorado*, 205 U.S. 454, 462 (1907) (emphasis in original)).

82. *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 589 (1976) (Brennan, J., concurring in the judgment) (citations omitted).

83. *Id.* at 559 (emphasis added).

84. *Id.* at 558.

85. *Id.* at 572-73 (Brennan, J., concurring in the judgment).

86. *Id.* at 617 (Stevens, J., concurring).

87. 297 U.S. 288, 346-47 (1936).

[such] orders with respect to the press . . . would ever be justifiable."⁸⁸

This admittedly "extraordinary protection against prior restraints enjoyed by the press under our constitutional system"⁸⁹ applies in part precisely because "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights."⁹⁰ This "extraordinary protection" applies with particular force to media reporting of judicial proceedings in criminal cases.⁹¹

2. Closed Judicial Proceedings in Criminal Cases Constitute Prior Restraints on the Media

Although the concept of prior restraint has played an extremely important role in first amendment analysis, from *Near v. Minne-*

88. 427 U.S. at 570-71. See *Prettyman, Nebraska Press Association v. Stuart: Have We Seen the Last of Prior Restraints on the Reporting of Judicial Proceedings?*, 20 ST. LOUIS U. L.J. 654 (1976); L. TRIBE, *supra* note 16, § 12-11, at 627. The record in *Nebraska Press Ass'n*, which was not enough to justify prior restraint, included "the premeditated mass murder" in a town of about 850 of six members of one family, ranging in ages from five to 66, evidence of sexual assault both before and after death, a number of incriminating statements by the accused (one of which the Court characterized as "evidently a confession"), and "intense . . . pervasive" and "widespread" local, regional and national news coverage. 427 U.S. at 570-71. See note 314 *infra*.

89. *New York Times Co. v. United States*, 403 U.S. 713, 730-31 (1971) (White, J., concurring).

90. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

91. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492 (1975). Although the focus of this article is on prior restraint of press reports and comments regarding judicial proceedings in criminal cases, and it is in this context that the absolute bar to prior restraints is discussed, apart from such cases there is only one exception to the absolute ban, whatever the circumstances. "Our cases, it is true, have indicated there is a single, extremely narrow class of cases in which the First Amendment's ban on prior judicial restraint may be overridden." *New York Times Co. v. United States*, 403 U.S. 713, 726 (1971) (Brennan, J., concurring). That single exception involves military security, such things as the publication of sailing dates of troop transports and the number and location of troops and the obstruction of recruiting. *Id.* It is noteworthy that while the Supreme Court recognizes this single exception it has only been adverted to in dictum and the United States Supreme Court has *never* applied the exception. It is further noteworthy that this exception was not even applied in *New York Times* in spite of the fact that the Pentagon Papers were classified "Top Secret-Sensitive," were obtained surreptitiously, and a majority of the Court believed that their release would be harmful to the nation and that those

sota⁹² in 1931 to last term's decision in *Nebraska Press Association*, there is no clear, precise definition as to what constitutes prior restraint.⁹³ One way to approach the limits of the doctrine is to look for common threads in the cases and in the literature to decide what types of restraints have been found to be prior restraints, and why. If what makes prior restraints so particularly objectionable can be established, press rights in closed judicial proceedings can be analyzed in those terms. A number of principles basic to prior restraint analysis can be, and have been, delineated.

First, and perhaps most often, the prior restraint is discussed in terms of what it is not; it is not subsequent punishment.⁹⁴ But, of course, that sort of statement is not really helpful. It simply restates the initial question. What is it about that which is commonly labeled prior restraint which distinguishes it from other forms of restraint, including that which is commonly labeled subsequent punishment?

A number of features of the prior restraint can be identified. The most important and most frequently discussed are the extent of its coverage, its timing, its effectiveness, the dynamics of such restraint, and the speculative nature of the need for such a restraint. Of all the alternative forms of regulation, that which is most soundly condemned is that which does the most damage—the prior restraint. It does the most damage in part because of the content of its coverage. More information is swept under its prohibition than would be prohibited by alternatives to the prior restraint. The restriction tends to be broadly stated and therefore more repressive of the amount of information available to the public. One author has stated: "The theory on which the prior form of restraint is nullified appears to be . . . that the prior restraint is viewed as excessively and unnecessarily stifling, as a *more restrictive alternative* than subsequent punishment."⁹⁵ When Profes-

responsible might even be prosecuted after release for violating certain espionage statutes. See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 591-92 (1976) (Brennan, J., concurring in the judgment).

92. 283 U.S. 697 (1931).

93. Things have not changed much since Professor Emerson wrote in 1955: "Despite an ancient and celebrated history, the doctrine of prior restraint remains today curiously confused and unformed." Emerson, *The Doctrine of Prior Restraint*, 20 LAW AND CONTEMP. PROB. 648, 649 (1955).

94. E.g., *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 589 (1976) (Brennan, J., concurring in the judgment); Emerson, *supra* note 93, *passim*; Note, *Prior Restraints and the Press Following the Pentagon Papers Cases—Is the Immunity Dissolving?*, 47 NOTRE DAME LAW. 927, 928 (1972).

95. Barnett, *supra* note 1, at 543 (emphasis in original) (footnote omitted).

sor Emerson discussed the nature of the prior restraint, setting out its elements as he saw them, he described the first element as follows:

A system of prior restraint normally brings within the complex of government machinery a far greater amount of communication than a system of subsequent punishment. It subjects to government scrutiny and approval *all* expression in the area controlled—the innocent and borderline as well as the offensive, the routine as well as the unusual.⁹⁶

It is, in short, a more complete restriction on communication.

These problems are certainly inescapably associated with the closed court. The breadth of the restraint is great—greater, for example, than the gag order unanimously declared unconstitutional in *Nebraska Press Association*. The gag order generally allows some things to be published, while restricting others. The closed court prevents the publication of anything which occurs therein.⁹⁷ It does so, presumably, to protect the defendant's rights to a fair trial but it does so in spite of a number of less restrictive, but effective, alternatives.⁹⁸

Second, the prior restraint is the most damaging of the alternative means of regulation because of its timing. It "prevent[s] communication from occurring at all."⁹⁹ Professor Emerson discussed the second element of the prior restraint as keeping the communication from ever reaching the market place. And, he said, if it should reach the market place in spite of the prior restraint it is often at a time when publication has become "obsolete or unprofitable."¹⁰⁰ He contrasts this with procedures which allow the communication to occur and then allow action to be taken against the speaker.¹⁰¹ These elements of the prior restraint are certainly present in the closed court situation. The closed court will prevent all or at least some of the publication from ever occurring. Whatever does eventually become available comes at a time when its publication is obsolete or unprofitable.¹⁰² And this happens in an area in which timing is of the essence.¹⁰³

96. Emerson, *supra* note 93, at 656. See also *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 589-90 (1976) (Brennan, J., concurring in the judgment) (quoting a later restatement of these same points by Professor Emerson and referring to them as a cogent summary).

97. For an additional discussion of this same point, see notes 50, 51-55, 62-64 and accompanying text *supra*, and text accompanying notes 121 and 132 *infra*.

98. See § IV-A of text *infra*.

99. Emerson, *supra* note 93, at 648.

100. *Id.* at 657.

101. *Id.*

102. *E.g.*, notes 49-56 and accompanying text *supra*.

103. *E.g.*, notes 51-55 and accompanying text *supra*.

Also characteristic of prior restraints, and perhaps their "most significant feature,"¹⁰⁴ is the fact that the dynamics of the system drive forward excesses. Professor Emerson questions the general ability, personality, and objectivity of the censor. Although the trial judge is not the same sort of professional censor that so troubled Professor Emerson, there are factors present which, in similar ways, adversely affect the assumed ability and objectivity of the trial judge. In every instance of the closed court the censor is a principal subject of the censored material. The judge will be inclined to decide that in his court nothing will occur which needs public exposure. A unique lack of judicial detachment and neutrality is inherent in the situation. In some cases both the prosecutor and defense counsel agree on closing the court. By the time a closed court order is appealed, there can be a reversal, but nothing left to remand; the proceeding will be over. The only remand comes in those *extremely* rare cases in which the defendant, over the appropriate objection, has been denied a fair trial.¹⁰⁵

The dynamics of the system are such that the decision to prevent publication is easier than the available alternatives and, therefore, more likely to be turned to. Once the restraint is in force, the burdens are on those restrained, not on the government. The proceeding is closed with but a stroke of the pen and the next step is left to the media.¹⁰⁶ The stroke of a pen substitutes for the often long and hard decision to undertake subsequent punishment. More immediately, the stroke of the pen substitutes for a more extensive voir dire, a change of venire or venue, a continuance, sequestration of jurors, more complicated instructions, and all of the other alternatives.¹⁰⁷ This would be very attractive to the judge who knows either that nothing untoward will happen in his court or that it will. There is a built-in drive toward censorship.

The prior restraint is also characterized by its procedures. "It is evident that one of the most important characteristics of a prior restraint is that the decision to restrain publication often rests with a single government official"¹⁰⁸ rather than a jury. The publisher

104. Emerson, *supra* note 93, at 658.

105. See note 65 and accompanying text *supra*. See also Barnett, *supra* note 1, at 542 ("[J]udges may be led to close hearings as a prophylactic measure against the possibility that prejudicial information will be revealed.").

106. Emerson, *supra* note 93, at 657.

107. See § IV-A of text *infra*.

108. Note, *supra* note 94, at 931. Accord, Emerson, *supra* note 93, at 657.

does not get the advantages of the procedural protections built around the criminal prosecution or even the civil action.¹⁰⁹

A recent decision by the Court of Appeals for the Seventh Circuit is illustrative. *Chicago Council of Lawyers v. Bauer*¹¹⁰ involved a challenge to a local rule of court proscribing extrajudicial comments by attorneys. The seventh circuit said that this did not constitute a prior restraint. In doing so, it identified three elements of a prior restraint. The first was punishment by contempt. The fact that violation of the prior restraint is punishable by contempt is in large part the reason that the criminal procedural safeguards do not apply. The second and third elements were identified as "a predetermined judicial prohibition restraining specified expression . . . [which] cannot be violated even though the judicial action is unconstitutional if opportunities for appeal existed and were ignored."¹¹¹ The "predetermined judicial prohibition" of the closing order restrains the publication of those things which occur at the closed proceeding. Regarding the violation of the prohibition, the seventh circuit distinguished between court rules and judicial orders. In *Chicago Council of Lawyers* the restraint was imposed by rule of court. A rule of court can be violated and then challenged as unconstitutional even though opportunities for appeal exist; a court order cannot.¹¹² It is this feature, said the seventh circuit, which distinguished that prohibition from a prior restraint. In the closed court situation, the restraint is imposed by judicial orders, not court rules. In any event, in most closed court cases assertion of the first amendment right by violating the closing order

109. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976); *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 248 (7th Cir. 1975), *cert. denied sub nom. Cunningham v. Chicago Council of Lawyers*, 427 U.S. 912 (1976); A. BICKEL, *supra* note 54; L. TRIBE, *supra* note 16, § 12-32, at 726; Emerson, *supra* note 93, at 657; Note, *supra* note 94, at 931.

110. 522 F.2d 242 (7th Cir. 1975), *cert. denied sub nom. Cunningham v. Chicago Council of Lawyers*, 427 U.S. 912 (1976).

111. *Id.* at 248.

112. *Walker v. Birmingham*, 388 U.S. 307 (1967) (unconstitutional court order must be obeyed pending appeal); *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 248 (7th Cir. 1975), *cert. denied sub nom. Cunningham v. Chicago Council of Lawyers*, 427 U.S. 912 (1976); *United States v. Dickinson*, 465 F.2d 496, 500, 509-14 (5th Cir. 1972), *on remand*, 476 F.2d 373 (5th Cir. 1973), *cert. denied*, 414 U.S. 976 (1973); L. TRIBE, *supra* note 16, § 12-32, at 726-28; Goodale, *The Press Ungagged: The Practical Effect on Gag Order Litigation of Nebraska Press Association v. Stuart*, 29 STAN. L. REV. 497, 504-13 (1977); Note, *Gag Orders On the Press: A Due Process Defense to Contempt Citations*, 4 HASTINGS CONST. L.Q. 187 (1977). But see Barnett, *supra* note 1, at 555.

and asserting its unconstitutionality as a defense to a subsequent prosecution will not be possible. This method of protecting the rights of the media—a method which, according to the seventh circuit, provides sufficient protection to take the situation out of the category of prior restraint—will not provide any significant protection in the closed court cases. However, if one did violate such an order (through eavesdropping, getting information from participants, or however), one would not only be subject to contempt, but also would most certainly be punished “because the judge whose order has been disobeyed can be expected to pursue the matter.”¹¹³

There is one final particularly abhorrent feature common to prior restraints, that is, the speculative nature of the damage that will be done should the publication be allowed. What damage will be done, if any, cannot be known until after the publication has occurred.¹¹⁴ Such speculation permeates the use of the closed court to prevent an unfair trial by reason of prejudicial publicity.¹¹⁵

It is these things which make the prior restraint anathema under the first amendment. The closed court in the criminal action suf-

113. Barnett, *supra* note 1, at 552. Accord, A. BICKEL, *supra* note 54, at 61.

114. See, e.g., L. TRIBE, *supra* note 16, § 12-12, at 631, § 12-33, at 730; note 328 and accompanying text *infra*. See also *New York Times Co. v. United States*, 403 U.S. 713 (1971) (speculative effect of publication of the Pentagon Papers). The prepublication order, in these circumstances, can never be sufficiently narrow.

115. See, e.g., notes 321-34 *infra*.

The speculative nature of the damage partially accounts for the distinction between the closed proceeding which is justifiable and the closed proceeding which is an unconstitutional prior restraint. For example, the publication (distribution) of obscene materials and false advertising can be prevented.

[R]elative certainty can ordinarily be obtained in the context of prepublication restraints on the publication of obscene material or commercial advertisements. The existence of obscenity and the falsity of an advertiser's factual representations need not depend on contextual elements which take shape only after the material's dissemination. . . . A court's determination that material is obscene or an advertisement is false is . . . as plausible before as after the communication's publication.

L. TRIBE, *supra* note 16, § 12-33, at 730. The same might be said in regard to the *in camera* proceeding in a civil action regarding a trade secret, see note 334 *infra*, or in a criminal prosecution in which an undercover agent's identity needed protection or a witness refused to testify except *in camera* for fear of reprisals. See generally L. TRIBE, *supra* note 16, § 12-11, at 629 n.28 (citing cases). The damage would be the certain loss of the testimony. In addition, the court is not just

fers from these same problems and should be just as anathematic.¹¹⁶ In any event, and perhaps most inescapably, the logic of the Supreme Court's recognition that "the character of every act depends upon the circumstances in which it is done"¹¹⁷ applies with full force to the question at hand. When the act of closing the court is considered in the circumstances in which it is contemplated, the conclusion is inescapable that such a closing would constitute a prior restraint on the press. The principal reason that such an order is considered is to prevent what might occur in court from being reported by the press. A major, if in truth not the only, reason that such an order is considered is to restrain the press, to remove its opportunity to publish, and to effect that same prior restraint that was held unconstitutional in *Nebraska Press Association*.¹¹⁸

The order closing the court must be considered "in light of its history and of its present setting."¹¹⁹ The history of the closed court and its present setting both indicate that it is a substitute for restraints directed solely at the press—restraints recently and unequivocally declared unconstitutional. Generally a court's real

concerned with media reports of the identity of the witness. There could be a demonstrable need not relating to the press at all, i.e., keeping a member of the reprisal organization from personally observing. And, while in regard to the fair trial question damage to the sixth amendment right is necessarily speculative, there are other situations in which damage to other constitutional rights may not be speculative. For example, attendance at a judicial conference, an executive session of a legislative body, or a meeting of the President's Cabinet could create a certain interference with a known constitutional right, i.e., judicial, legislative or executive privilege, and constitutional separation of powers. See, e.g., *United States v. Nixon*, 418 U.S. 683, 705-06, 708 (1974) (regarding the existence of a constitutional executive privilege); note 320 *infra*.

116. Certainly, whether it is labeled a "prior restraint" or not, closing the court in a criminal action should be as difficult to accomplish as a "prior restraint." The procedural safeguards, § II of text *supra*, should be provided and the burden of proof should be as tough and should be allocated to those who would close the proceeding, § IV of text *infra*. The Minnesota Supreme Court has recently recognized a district court order sealing court records as a prior restraint. *Northwest Publications, Inc. v. Anderson*, — Minn. —, 259 N.W.2d 254 (1977).

117. *Schenck v. United States*, 249 U.S. 47, 51 (1919) (Holmes, J.).

118. In any event, leaving aside any question of intent, this becomes one of those "varied forms of governmental action" which unintentionally but "inevitably" lead to the abridgment of the "indispensable liberties . . . of speech [and] press." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 461 (1958). See also *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

119. *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936).

concern is not with attendance by members of the public at large and word of mouth reports of the proceedings, but with keeping these reports out of the papers and magazines and off television and radio. The court is concerned with the media. The fact that this constitutes a somewhat novel form of censorship does not insulate it from attack.¹²⁰ "If courts begin closing hearings in order to prevent potentially prejudicial publicity, the Supreme Court will be faced with prior restraints in a form different from, but just as effective as, the one struck down in *Nebraska Press Ass'n*."¹²¹

120. *E.g.*, *Oliver v. Postel*, 30 N.Y.2d 171, 182, 282 N.E.2d 306, 311, 331 N.Y.S. 2d 407, 414 (1972). *Grosjean v. American Press Co.*, 297 U.S. 233, 249 (1936), makes the point that protection of first amendment rights is not limited "to any particular way of abridging [them]."

121. *Prettyman*, *supra* note 88, at 661. *Accord, e.g.*, Gaare, 'Gag' Issue Falls on Deaf Lawyer Ears, 64 A.B.A. J. 176, 176 (1978) ("[C]losing court-rooms . . . is really just another form of prior restraint on publication."); *State ex rel. Dayton Newspapers, Inc. v. Phillips*, 46 Ohio St. 2d 457, 351 N.E.2d 127 (1976).

This case deals with the right of a newspaper to observe and publish a report of what happens at a judicial proceeding in a criminal case [in this case a suppression hearing].

A court order which denies that right has the force of law. There can be no dispute about the fact that such an order abridges the freedom of the press. Such abridgment is prohibited by the First Amendment to the Constitution of the United States

Id. at 460, 351 N.E.2d at 130.

The New York Supreme Court, Appellate Division, recently recognized the closed court as an unconstitutional substitute for the gag order. In *Gannett Co. v. DePasquale*, 55 App. Div. 2d 107, 110-11, 389 N.Y.S.2d 719, 722 (1976), *modified*, No. 549 (Ct. App. Dec. 19, 1977), the court held that the closing of a pretrial suppression hearing constituted a violation of the right of the press to publish free from unlawful governmental interference, in part because it was merely a substitute for a gag order. The New York Court of Appeals noted that the appeal had become moot, *Gannett Co. v. DePasquale*, No. 549, slip op. at 4 (N.Y. Ct. App. Dec. 19, 1977), but then proceeded to the merits to uphold the closure of the suppression hearing. The decision seems clearly in error because it requires the trial court to determine whether the public interest in an open court is a "genuine" or "legitimate" public interest as opposed to "mere" or "active" curiosity. *Id.* at 9-10. This standard is certainly too vague, providing insufficient protection to first amendment rights. See, *e.g.*, *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *Craig v. Harney*, 331 U.S. 367 (1947); *Bridges v. California*, 314 U.S. 252 (1941); notes 137-44 and accompanying text *infra*. The decision, further, seems to place not only the burden to act but also the burden of proof on the media to demonstrate that the public's concern measures up to this vague standard. This placement of the burden of proof is clearly in error. See note 196 and accompanying text *infra*. See also § IV of text *infra*. All of this occurred in a case in which the trial court had entered its closing order without notice to or an opportunity for a

If one argues that closing the court in a criminal action is not always a prior restraint on the media, but admits that it can be such a restraint, one must then face the question of how to make a principled judgment as to which closings fall into which category. Although ultimately impossible to apply, one possible alternative to prior restraint analysis would involve an ends test, that is, to what end is the court imposing the closing order—out of genuine concern for the rights of the defendant or simply to silence the press?¹²² This test would recognize that merely silencing the press is not a constitutional end, but would attempt to use it as a legitimate means. It is legitimate to silence the press when the court's motives are pure; when the court is doing so to protect a defendant and not to hide its own wrongdoing.

This test requires either a facial assessment of ends or an inquiry into motive. The facial assessment of ends is doomed. One can assume that as trial courts become more sophisticated in these types of cases, as they gain more experience with them, they will avoid making records that either state or clearly demonstrate that the end of their action is media restraint. The case in which openness is most needed, the case of judicial wrongdoing, is the case in which the true end will be most actively and intentionally hidden. The court, in this situation, could always find and state another end.

The inquiry into motives is equally unacceptable,¹²³ if not impossible. In searching for a motive to restrain the press versus a motive to secure defendant's rights, one might first ask whether the reviewing court or even the trial court can ever separate the two. Is it any more legitimate for one court to psychoanalyze another than for a court to psychoanalyze a legislature? Motive, then, can be extremely difficult to ascertain. Improper motive may be

hearing by the media and had used as its applicable constitutional burden "a reasonable probability of prejudice." The lack of notice and opportunity to participate in an adversary hearing is constitutionally infirm, see § II of text *supra*, and the test of "reasonable probability" is too weak a burden, insufficiently protective of fundamental rights even if properly placed.

122. See *Oliver v. Postel*, 30 N.Y.2d 171, 282 N.E.2d 306, 331 N.Y.S.2d 407 (1972) (a judge who simply wanted to silence the press and whose desire to do so came through unmistakably in the record).

123. E.g., *United States v. O'Brien*, 391 U.S. 367 (1968); Brest, Palmer v. Thompson: *An Approach to the Problem of Unconstitutional Motive*, 1971 SUP. CT. REV. 95; Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970). But see, e.g., *Washington v. Davis*, 426 U.S. 229, 244 n.11 (1976). See also *Trimble v. Gordon*, 430 U.S. 762, 783 (1977) (Rehnquist, J., dissenting); L. TRIBE, *supra* note 16, § 12-6, at 594-98.

hidden as well as improper end.¹²⁴ There is, additionally, a certain futility in invalidating governmental action, judicial or otherwise, on a ground which permits it to be restaged, in the same case or the next, stressing the correct factors the second time, in a form which will withstand constitutional challenge. In any event, is it not true, as Chief Justice Chase said as long ago as *Ex parte McCordle*,¹²⁵ that the proper question is not one of motives but of power.¹²⁶

A second suggestion might be a test which attempts to distinguish the direct prior restraint from the indirect. Unless it is restated as a direct versus indirect effect test, it will run full circle.

[T]he term abridgment [of freedom of speech or press] is capable of a broad construction or of narrow construction. It may refer only to direct abridgment in the sense that it refers to legislation [or judicial orders] directed against speech or press . . . as such and, therefore, does not include indirect abridgments where Congress [or the courts] are concerned with appropriate public interests, and application of the legislation [or court order] does have an indirect effect on the exercise of these freedoms¹²⁷

If direct versus indirect abridgments are used in the sense of the

124. It is no doubt also true that it will be much easier for a single judge to hide motive than for an entire legislative body to do so.

125. 74 U.S. (7 Wall.) 506, 514 (1868).

126. In most cases it will not be as easy as it was in *Oliver v. Postel*, 30 N.Y.2d 171, 282 N.E.2d 306, 331 N.Y.S.2d 407 (1972), to find an improper motive behind an order closing the court. It is clear from the record in *Oliver* that the trial judge closed a criminal trial in response to certain newspaper articles concerning defendant's previous record and underworld connections. The judge, expressing a concern that these articles would have a prejudicial effect on defendant's right to a fair trial, asked the reporters to refrain from further publication of such articles and threatened them with contempt. When they continued to publish, he closed the court.

The appellate court in reversing the closing order made the point that questioning the jurors revealed not one had read the articles in question. Further,

the articles complained of . . . in no way related to any events which had transpired in the courtroom[;] their publication obviously would not, indeed could not, have been prevented by refusing to allow the press to attend the trial. In other words, even if the reporting in this case was improper and tended to prejudice the defendant, it is manifest that closing the trial was not the means to be employed to cure the prejudice or prevent a continuation of the impropriety.

Id. at 181, 282 N.E.2d at 311, 331 N.Y.S.2d at 414. To some extent *Des Moines Register & Tribune Co. v. Osmundson*, 248 N.W.2d 493, 500 (Iowa 1976), is, in this regard, similar to *Oliver*.

127. P. KAUPER, *CIVIL LIBERTIES AND THE CONSTITUTION* 116 (1962), partially reprinted in W. LOCKHART, Y. KAMISAR, & J. CHOPER, *CONSTITUTIONAL LAW* 783 (4th ed. 1975).

preceeding quotation, the test is really an ends test. The name is different, but the problems remain the same.

What about the direct-indirect effect test? The "direct" prior restraint would be defined as one preventing the press from publishing what it knows and the indirect prior restraint as one backing away one step and attempting to keep the press from discovering information in the first place. In the case of the direct prior restraint the court's order works directly against media publication. In the case of the indirect restraint the order works against the media's sources. The direct prior restraint interferes directly with publication. The indirect prior restraint, the argument goes, interferes directly with gathering and indirectly with the publishing. While the effect in the one case is arguably less direct than in the other, the judicial body issuing the order hopes and intends that the effect on what is published will be at least as great.¹²⁸

An "indirect" prior restraint would be an order closing the court. This order, however, does operate directly against the press; it directly restrains the press (and the public at large) from attending the proceeding. Its intended effect, at best, is to keep certain information from being reported in hope of protecting the right of an accused to a fair trial. Its intended effect, at worst, is to keep certain information from being reported out of spite or to hide incompetence or malfeasance. The order directly restrains the obtainment of the information to be published;¹²⁹ it directly restrains the media from attending the proceeding and *without intermediate instrumentality* it restrains publication.¹³⁰ A direct-indirect effect test would exalt form over substance, a technique usually employed as a means of avoiding resolution of difficult underlying questions.

Ultimately the only thing indirect about this restraint is the intent of the censoring judge, which brings the issue full circle to the problems of psychoanalysis and motivation discussed in connection with the ends test.¹³¹ Press scrutiny is most needed in the one class of cases in which, under a test such as an ends test or direct-indirect effect test, press scrutiny is least likely to be avail-

128. In fact the effect of the closed court will be more restrictive than the tailored gag order. See text accompanying notes 95-98 *supra*; text accompanying note 132 *infra*.

129. See § III-C of text *infra* (discussion of the media's right to gather information).

130. The restraint is only "indirect" in the sense that it does not restrain the press from publishing something they already know, but neither did the prior restraint in, e.g., *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931).

131. See notes 122-26 and accompanying text *supra*.

able—the case of the judge who is cleverly dishonest about his motives.

Two additional problems with an ends test or a direct-indirect prior restraint test must be noted. First, any such test would have difficulty containing the judge who, with the purest of motives, goes along with a prosecutor urging closing and stating a concern for a conviction which will be upheld on appeal but who is really concerned with hiding some wrongdoing of his own. The psychoanalysis problem has now been compounded; both the motivation of the court and the prosecutor must be judged, and the variables continue at least through the defense attorney.

Second, an analysis which rules out the gag order and falls back on closing the court results in a system which decreases the amount of information available to the public. The gag order will have been unanimously struck down and replaced with an alternative which is more restrictive of available information. The effect of the closed court on what is published can be expected to be greater than the effect of any tailored gag order. Yet our judicial system would be adopting this alternative in spite of the number of less restrictive alternatives.¹³²

Even a system of press freedom through constitutionally mandated neutrality, a system which allows no strictures on the press unless those strictures are general in nature,¹³³ must be able to strike down facially neutral regulation which is, in fact, directed at the media.¹³⁴ The theory of enforcing press freedom through neutrality cannot exalt form over substance.¹³⁵

Two choices remain, an ad hoc balancing (by whatever name) or a recognition of the closed court as an infringement of first amendment rights, and a prior infringement at that.¹³⁶ The ad hoc balancing is not sufficiently protective of press freedoms, especially in the situation in which the censor is one of the subjects of the

132. Section IV-A of text *infra*.

133. Bezanson, *The New Free Press Guarantee*, 63 VA. L. REV. 731 (1977). See also *Railway Express Agency v. New York*, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring).

134. Bezanson, *supra* note 133, at 761-62.

135. *Id.* at 738; *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 708 (1931) (citations omitted). See also *Ashton v. Kentucky*, 384 U.S. 195, 200 (1966) ("When First Amendment rights are involved, we look even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer.")

136. Neither the constitutionality nor the effectiveness of a categorical balancing is within the scope of this article. It would seem very difficult to draw up a categorical balance sufficiently precise to withstand first amendment attack. See also note 67 *supra*.

censored materials. Such a test would tend seriously to inhibit reporting and commentary about the criminal justice system,¹³⁷ putting all citizens in serious jeopardy. The relevant analogies run all the way from a President deciding what evidence is relevant to accusations that he has engaged in criminal and impeachable offenses to the cat guarding the canary.¹³⁸

One problem with an ad hoc balancing test, its uncertainty, is vividly illustrated by the judicial chronology in *Nebraska Press Association*. The crime which precipitated the case occurred on October 18, 1975. On October 22, 1975, the county court issued an order barring public discussion with certain limited exceptions, of the evidence to be offered at the preliminary hearing held later that same day. Five days later the district court terminated the county court's order and entered a new one of its own. On November 20, 1975, Mr. Justice Blackmun, as Circuit Justice, partially stayed the district court's order, partially modified it, and left part of it in

137. E.g., Barnett, *supra* note 1, at 558-60. The inhibitive effect of such a test is illustrated in a letter written by H. Brandt Ayers, the editor and publisher of *The Anniston (Ala.) Star* (circulation 28,000) to counsel for twenty-five newspaper publishers and a broadcasting company as *amici curiae* in *Nebraska Press Ass'n*:

"Small town dailies would be the unknown, unseen and friendless victims if the Supreme Court upholds the order of Judge Stuart. If the already irresistible powers of the judiciary are swollen by absorbing an additional function, that of government censor, the chilling effect upon vigorous public debate would be deepest in the thousands of small towns where independent, locally owned, daily and weekly newspapers are published.

"Our papers are not read in the White House, the Congress, the Supreme Court or by network news executives. The causes for which we contend and the problems we face are invisible to the world of power and intellect. We have no in-house legal staff. We retain no great, national law firms. We do not have spacious profits with which to defend ourselves and our principles, all the way to the Supreme Court, each and every time we feel them to be under attack.

"Our only alternative is obedient silence. You hear us when we speak now. Who will notice if we are silenced? The small town press will be the unknown soldier of a war between the First and Sixth Amendments, a war that should never have been declared, and can still be avoided.

"Only by associating ourselves in this brief with our stronger brothers are we able to raise our voices on this issue at all, but I am confident that the Court will listen to us because we represent the most defenseless among the petitioners."

Brief for the Washington Post Co., *amici curiae*, at 31-32, *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976) (quoting letter from H. Brandt Ayers to counsel for Washington Post).

138. See also text accompanying note 172 *infra*; note 173 *infra*.

force.¹³⁹ On December 1, 1975, the Nebraska Supreme Court entered a fourth different order.¹⁴⁰ And finally, on June 30, 1976, the Supreme Court of the United States unanimously declared all of these orders unconstitutional.¹⁴¹ The matter was presented to four different courts and to Mr. Justice Blackmun as Circuit Justice and five different orders were entered. Each time a different court considered the order, it reached a different conclusion.¹⁴²

The solution is that the closed court must be recognized as a prior restraint on the first amendment free press right. Neither the gag order nor the closed court is an acceptable (or necessary) way of enforcing the right to a fair trial. Free press is the norm and has a preferred position against restrictions. The infringement of this right in this situation is clear¹⁴³ and the burden is on those who would close the court to justify such a restriction.¹⁴⁴

B. The Rights of the Public and the Press to Observe Judicial Proceedings in Criminal Cases: The Public Right to a Public Trial

1. The Right

The right to a public trial in a criminal prosecution is a right enjoyed by both the accused¹⁴⁵ and the public.¹⁴⁶ The public's right to be present at judicial proceedings in criminal cases is "as basic

139. *Nebraska Press Ass'n v. Stuart*, 423 U.S. 1319 (1975) (Blackmun, J., Circuit Justice).

140. *State v. Simants*, 194 Neb. 783, 236 N.W.2d 794 (1975), *rev'd sub nom. Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976).

141. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976).

142. As Professor Emerson has noted: "The principal difficulty with the ad hoc balancing test is that it frames the issues in such a broad and undefined way, is in effect so unstructured, that it can hardly be described as a rule of law at all." T. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* 54 (1966).

An ad hoc balance, or some variation thereof, becomes an even more indefinite test in cases involving first amendment rights because, in such cases, appellate courts make an independent review of the facts which go into the balance. *E.g.*, *Fiske v. Kansas*, 274 U.S. 380, 385-86 (1927).

143. Infringement of the fair trial right, on the other hand, is not clear. *See, e.g.*, § IV-B of text *infra*.

144. *See* § IV of text *infra*.

145. U.S. CONST. amend. VI.

146. *E.g.*, *Lewis v. Peyton*, 352 F.2d 791 (4th Cir. 1965); *United States v. General Motors Corp.*, 352 F. Supp. 1071 (E.D. Mich. 1973); *United States v. Lopez*, 328 F. Supp. 1077 (E.D.N.Y. 1971); *United States ex rel. Mayberry v. Yeager*, 321 F. Supp. 199 (D.N.J. 1971); *United States v. American Radiator & Standard Sanitary Corp.*, 274 F. Supp. 790

as that of a defendant.”¹⁴⁷ “In our opinion,” the Kentucky Supreme Court has stated, “the question of the right of the public to attend court proceedings and the right of the press to be there as a part of the public is so well settled and well established that it requires no further amplification at our hands.”¹⁴⁸

In fact, the common law guarantee of public trials seems to have been developed for the benefit and protection of the public rather than the defendant.¹⁴⁹ The English legal system began requiring public trials at a time when that system had very little regard for the rights of the accused.¹⁵⁰ They were, however, concerned about corruption among the judiciary.

In his *Rationale of Judicial Evidence*, published in 1897, Jeremy Bentham approached the subject of the right to a public trial by contrasting the Roman and English procedures:

In the Roman procedure, as exemplified on the continent, the whole business of examination is performed in *secreto judicis*: in a place, which, whether actually the private closet of the judge or not, is at any rate equally inaccessible to the public at large. Screened by this means almost entirely from the force of the moral sanction, from the tutelary inspection of the public eye; improbity, and (what is still more common) indolence and indifference, may accomplish their ends with comparatively little risk. The court above . . . , were they to discover any marks of improbity apparent to their eyes, would naturally prevent it from taking effect. But under the system of privacy, it is only from the information given them by the inferior judges themselves, that the superior judges

(W.D. Pa. 1967); CONGRESSIONAL RESEARCH SERVICE, *THE CONSTITUTION OF THE UNITED STATES OF AMERICA—ANALYSIS AND INTERPRETATION*, S. Doc. No. 92-82, 92d Cong., 2d Sess., amend. VI 1200 (1973) (“It appears that while it is possible to exclude some persons from the courtroom, it is not permissible to bar wholly the public and the press either with or without the concurrence of the defendant.”). See also *United States v. Clark*, 475 F.2d 240 (2d Cir. 1973); *United States ex rel. Bennett v. Rundle*, 419 F.2d 599 (3d Cir. 1969); *Fite v. Retail Credit Co.*, 386 F.Supp. 1045 (D. Mont. 1975).

147. *E.W. Scripps Co. v. Fulton*, 100 Ohio App. 157, 161, 125 N.E.2d 896, 899 (1955). Accord, e.g., *Phoenix Newspapers, Inc. v. Winsor*, 111 Ariz. 475, 533 P.2d 72 (1975); *Oxnard Publishing Co. v. Superior Court*, 68 Cal. Rptr. 83 (Ct. App. 1968).

148. *Johnson v. Simpson*, 433 S.W.2d 644, 646 (Ky. 1968).

149. 6 J. WIGMORE, *EVIDENCE* § 1834, at 435-42 (rev. ed. J. Chadbourn 1976); 31 N.Y.U. L. REV. 611 (1956).

150. 6 J. WIGMORE, *supra* note 149, § 1834, at 436 n.1. E.g., “Sir Thomas Smith, writing on the laws of England in 1565, spoke about the right to a public trial.” Quick, *A Public Criminal Trial*, 60 DICK. L. REV. 21, 22 (1955).

obtain what information they acquire concerning what is done by those inferior judges. In case of mere indolence, impropriety of conduct may rise to such a degree as to be continually giving birth to wrong decision, and frustrating the purposes of justice, without betraying itself by any such indications as would necessarily find their way to the eye of the court above. And in case of improbity, or prepossession; if the seducing motive or prejudice were either inbibed by the inferior judges from the superior, or shared with them in any other way; a check which at best (as we have seen) is but inadequate, would by that means be reduced to nothing.

Happily for England, the one of the two rival principles to which good fortune rather than wisdom had given the ascendant, was the principle of publicity. At first the small body of men who in each district, under the name of freeholders, lorded it over a larger body of slaves and other humble dependants,—then by degrees a sort of select committee of that body,—gained or preserved, together with the right of access and the duty of attendance, a sort of influence which (by the favour of fortune) operated as a check upon the king's completely dependant creatures, who in this department of government operated as instruments of his will under the name of judges.¹⁵¹

A century later Mr. Justice Brandeis summed it up in a sentence: "Sunlight is said to be the best of disinfectants."¹⁵² And a century and a half later Mr. Justice Brennan, concurring in *Nebraska Press Association*, expressed the same point:

Commentary and reporting on the criminal justice system is at the core of First Amendment values, for the operation and integrity of that system is of crucial import to citizens concerned with the administration of Government. Secrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges; free and robust reporting, criticism, and debate can contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and public accountability.¹⁵³

The public's right to public judicial proceedings in criminal cases, and the corresponding lack of a right of the defendant to a private trial, serves a number of basic and important purposes. The United States Supreme Court has often stressed the fundamental importance of free exchange of information in a democracy; such a free exchange is an essential ingredient of self government.¹⁵⁴ More specifically, "[o]ne of the demands of a democratic

151. 1 J. BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 583-84 (1827).

152. L. BRANDEIS, *OTHER PEOPLE'S MONEY* 62 (1933) (quoted in *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 587 (1976) (Brennan, J., concurring in the judgment)).

153. 427 U.S. at 587 (Brennan, J., concurring in the judgment).

154. *E.g.*, *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964); *Stromberg v.*

society is that the public should know what goes on in courts by being told by the press what happens there, to the end that the public may judge whether our system of criminal justice is fair and right."¹⁵⁵ It is to that end that "[w]hat transpires in the court room is public property."¹⁵⁶

The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy's abuse of the *lettre de cachet*. All of these institutions obviously symbolized a menace to liberty. In the hands of despotic groups each of them had become an instrument for the suppression of political and religious heresies in ruthless disregard of the right of an accused to a fair trial. Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.¹⁵⁷

The public proceeding restrains abuse of judicial power today just as it has for the last 200 years.¹⁵⁸ The judicial despot, while not having at his command the resources of the executive or legislative branches, has a tenure, an isolation from political pressures, which makes him perhaps more dangerous in the long run. Exposure is the only control over the corrupt and the petty, the tyrannous and the weak, the unjust, the incompetent, and the incapacitated.

Public trials prevent favored treatment for a favored defendant or class of defendants. "The right to a public trial is not only to protect the accused but to protect as much the public's right to know what goes on when men's lives and liberty are at stake, for a secret trial can result in favor to as well as unjust prosecution of a defendant."¹⁵⁹ The public trial protects the public's right to know about its government¹⁶⁰ and promotes public confidence in

California, 283 U.S. 359, 369 (1931); *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

155. *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 920 (1950) (Frankfurter, J., opinion respecting denial of certiorari).

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

157. *In re Oliver*, 333 U.S. 257, 268-70 (1948) (footnotes omitted).

158. See, e.g., notes 56 and 67 and accompanying text *supra*; notes 173-75 and accompanying text *infra*.

159. *Lewis v. Peyton*, 352 F.2d 791, 792 (4th Cir. 1965). Accord, e.g., *United States v. General Motors Corp.*, 352 F. Supp. 1071 (E.D. Mich. 1973); *State ex rel. Dayton Newspapers, Inc. v. Phillips*, 46 Ohio St. 2d 457, 467, 351 N.E.2d 127, 133-34 (1976); Quick, *supra* note 150, at 31-32.

160. See generally § III-C-2 of text *infra*.

judicial remedies.¹⁶¹ "Secrecy . . . can only breed ignorance and distrust of courts . . ." ¹⁶² Additionally, this public right restrains "against possible perjury by witnesses who know that their testimony is exposed to public knowledge."¹⁶³ Further, "[p]ublic trials come to the attention of key witnesses unknown to the parties. These witnesses may then voluntarily come forward and give important testimony."¹⁶⁴

The public's right to a public trial is reinforced by the lack of any contrary right on behalf of the criminal defendant. The United States Supreme Court has stated that "although the defendant can, under some circumstances, waive his constitutional right to a public trial, he has no absolute right to compel a private trial."¹⁶⁵ This waiver by the defendant can be effective only insofar as the right is his. While his allegation on appeal that his right to a public trial was denied will not be grounds for reversal if he has effectively waived his right, he cannot waive the public's right.

The Kentucky Supreme Court made the following response to a defendant's argument that he had a right to a closed trial:

It is insisted by some the right to public trial is solely for the benefit of the criminal defendant and if he has no objection to a closed trial then the public should not be permitted to object. This con-

-
161. *In re Oliver*, 333 U.S. 257, 270 n.24 (1948); 6 J. WIGMORE, *supra* note 149, § 1834, at 438 n.6.
 162. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 587 (1976) (Brennan, J., concurring in the judgment). For an expansion of this quotation, see text accompanying note 153 *supra*. *Accord*, *United States v. Kobli*, 172 F.2d 919 (3d Cir. 1949); *United States v. Lopez*, 328 F. Supp. 1077, 1087 (E.D.N.Y. 1971) ("The public has an independent right to be present to see that justice is fairly done. [This] is important . . . to insure a sense of confidence in the judicial process. Conducting trials behind closed doors might engender an apprehension and distrust of the legal system which would, in the end, destroy its ability to peacefully settle disputes."); *United States ex rel. Mayberry v. Yeager*, 321 F. Supp. 199 (D.N.J. 1971); *Oxnard Publishing Co. v. Superior Court*, 68 Cal. Rptr. 83 (Ct. App. 1968).
 163. *United States ex rel. Bennett v. Rundle*, 419 F.2d 599, 606 (3d Cir. 1969). *Accord*, *Lewis v. Peyton*, 352 F.2d 791 (4th Cir. 1965); *United States v. Kobli*, 172 F.2d 919, 921 (3d Cir. 1949); *Snyder v. Coiner*, 365 F. Supp. 321, 324 (N.D.W. Va. 1973), *aff'd*, 510 F.2d 224 (4th Cir. 1975); *United States ex rel. Mayberry v. Yeager*, 321 F. Supp. 199 (D.N.J. 1971); *Oxnard Publishing Co. v. Superior Court*, 68 Cal. Rptr. 83 (Ct. App. 1968).
 164. *In re Oliver*, 333 U.S. 257, 270 n.24 (1948). *Accord*, *United States ex rel. Bennett v. Rundle*, 419 F.2d 599, 606 (3d Cir. 1969); *United States v. Kobli*, 172 F.2d 919, 921, 923 (3d Cir. 1949); *Tanksley v. United States*, 145 F.2d 58, 59 (9th Cir. 1944); *Snyder v. Coiner*, 365 F. Supp. 321, 324 (N.D.W. Va. 1973), *aff'd*, 510 F.2d 224 (4th Cir. 1975).
 165. *Singer v. United States*, 380 U.S. 24, 35 (1965).

tention overlooks the fact that the public is a party to all criminal proceedings. The proceeding is prosecuted in the name of the public. In our opinion there is nothing that better protects the rights of the public than their presence in proceedings where these rights are on trial. . . .

. . . .

. . . In our opinion the question of the right of the public to attend court proceedings and the right of the press to be there as a part of the public is so well settled and well established that it requires no further amplification at our hands.¹⁶⁶

The exercise of the public's right to be present at criminal proceedings necessarily depends upon the press. In regard to this right and the role of the press, the newspaper employee's status as a member of the public gives him the same right to attend as other members of the public. Any other rule would be unenforceable. If the public can attend except for representatives of the press, then the press simply waits outside and gets the story second-hand. This substitution of second-hand information would help no one.¹⁶⁷ Even more importantly, as Mr. Justice White has recognized, "in a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations."¹⁶⁸ As John Adams asked, regarding judges, among other public officials: "How are their character and conduct to be known to their constituents but by the press?"¹⁶⁹ "There is *no other way* the busy ordinary citizen can evaluate how the judicial system is administering justice except through the media he reads, hears or watches. A free press is the *only guarantee* a citizen has of his right to know what is going on in his government."¹⁷⁰

166. *Johnson v. Simpson*, 433 S.W.2d 644, 646 (Ky. 1968).

167. See also notes 342-43 and accompanying text *infra*.

168. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491 (1975). But see *Branzburg v. Hayes*, 408 U.S. 665 (1972). "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." *Id.* at 684-85 (dictum). Two points should be made about this statement: (1) insofar as the statement allows prohibitions against publishing it clearly has been rejected (*Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976)); and (2) the use of the word "necessary" recognizes that any vitality the statement has is severely limited by the need to establish that closing is the least restrictive alternative and that, probably, burden of proof is a consideration (§ IV of text *infra*).

169. 27 Mass. L.Q. 11, 16 (1942) (quoting Letter from John Adams to William Cushing, Chief Justice of the Massachusetts Boston (Mar. 7, 1789)), quoted in L. LEVY, *FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY* 195 (1963).

170. *State ex rel. Dayton Newspapers, Inc. v. Phillips*, 46 Ohio St. 2d 457,

As the United States Supreme Court has recently noted, the role of the press has a particular relationship to judicial proceedings; the press "serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice."¹⁷¹ The role of the press relates with even more particularity to the situation of the closed court. In the closed court the censors would be the trial judges and, perhaps, magistrates and similar officials. Those who would order proceedings closed would be among those whose performance of official duties would be cloaked by the closing. "Judges are men, not angels. While some would exercise the power of censorship with high regard for the true interests of the judicial process, others might exercise it to prevent proper criticism of their own administration of office."¹⁷²

2. *The Extent of the Right: Pretrial Hearings*

While the extent of the public's right to a public trial is less frequently discussed than its existence, it is clear that public scrutiny is as important, and perhaps can be more important, at pretrial proceedings than at the trial itself. Take, for example, the suppression hearing in which the issue is the behavior of various components of the criminal justice system rather than the guilt of the defendant. This right to a public trial attaches at the suppression hearing, "because of the importance of providing an opportunity for the public to observe judicial proceedings at which the conduct of enforcement officials is questioned . . . rather than permit[ting] such crucial steps in the criminal process to become associated with secrecy."¹⁷³

467, 351 N.E.2d 127, 134 (1976) (emphasis added).

171. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 492 (1975).

172. Rifkind, *When the Press Collides with Justice*, in SELECTED ESSAYS ON CONSTITUTIONAL LAW, 651, 653 (Ass'n of American Law Schools ed. 1963). See also text accompanying notes 23 and 138 *supra*; note 173 *infra*.

173. United States v. Clark, 475 F.2d 240, 246-47 (2d Cir. 1973). Accord, e.g., United States *ex rel.* Bennett v. Rundle, 419 F.2d 599 (3d Cir. 1969); United States v. Lopez, 328 F. Supp. 1077, 1087 (E.D.N.Y. 1971) ("This right to a public trial attaches at the suppression hearing—often the crucial stage"); United States v. American Radiator & Standard Sanitary Corp., 274 F. Supp. 790 (W.D. Pa. 1967); State *ex rel.* Dayton Newspapers, Inc. v. Phillips, 46 Ohio St. 2d 457, 351 N.E.2d 127 (1976).

A hearing on a motion to suppress evidence is a sensitive and extremely important proceeding. The issues in such a hearing are often the competence, efficiency, judgment, courage and behavior of the police, the prosecutor, the defense counsel, the court employees and the judge. Because of corruption or malice, a secret judicial proceeding may be and

As a result of many pretrial proceedings, either the prosecution proceeds, eventually to trial, or a defendant is set free. The potential for abuse is obvious in either case—the railroad defendant or the railroad public. In the latter situation, if the abuse leads to the prosecution being dropped, who will protect the right of the public? Certainly not the defendant. To allow that type of pretrial proceeding to be closed would allow the one accused of wrongdoing to negate the independent right of the public and the press who have been guilty of no wrongdoing.¹⁷⁴

Additionally, the pretrial hearing, like the trial, can lead to the deprivation of the liberty of the defendant. At the conclusion of the hearing the defendant may be committed to jail to await trial. Further, of course, the defendant could be sentenced to jail for contempt committed at the hearing without any separate hearing or trial on the contempt charge.

To allow the pretrial proceedings to be closed would be to deny "[o]ne of the demands of a democratic society . . . that the public should know what goes on in courts by being told by the press what happens there, to the end that the public may judge whether our system of criminal justice is fair and right."¹⁷⁵

has been used to railroad accused persons charged with crime. Secret proceedings may be used to cover up for incompetent and corrupt police, prosecutors and judges, and the influence of corrupt politicians on the judicial system. The public and the victims of crime are entitled to know what is going on. The public is entitled to know what is happening to the accused. There is no other way the busy ordinary citizen can evaluate how the judicial system is administering justice except through the media he reads, hears or watches. A free press is the only guarantee a citizen has of his right to know what is going on in his government.

Id. at 466-67, 351 N.E.2d at 133-34.

174. This is especially intolerable in light of the alternative measures available sufficiently to protect the rights of all, including the accused. See § IV-A of text *infra*. These alternatives will be available after the pretrial proceeding has been concluded and the extent of the resulting publicity, if any, can be assessed. Note 313 and accompanying text *infra*. This is, no doubt, why the Nebraska legislature has specifically chosen to provide that "all judicial proceedings of all courts" must be open. NEB. REV. STAT. § 24-311 (Reissue 1975) (emphasis added).
175. *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 920 (1950) (Frankfurter, J., opinion respecting denial of certiorari). Regarding the importance of the pretrial proceeding, see *Coleman v. Alabama*, 399 U.S. 1, 9-10 (1970). But see *Lingo v. Hann*, 161 Neb. 67, 74, 71 N.W.2d 716, 721 (1955) ("A preliminary hearing before a magistrate is not a criminal prosecution or trial within the meaning of section 11, art. I of our Constitution.") (quoting *Roberts v. State*, 145 Neb. 658, 661, 17 N.W.2d 666, 668 (1945)). *Lingo*, which held the accused did not have a right to counsel at his preliminary hearing, has been overruled by implication by *Coleman v. Alabama*, 399 U.S. 1 (1970).

3. *The Right: Nebraska*

The Nebraska Constitution, Nebraska statutes, and Nebraska common law all provide the public the right to open judicial proceedings in criminal cases, a right to be present to observe the administration of criminal justice. The Nebraska Constitution states: "All courts shall be open, and every person, for any injury done him in his lands, goods, person or reputation, shall have a remedy by due course of law, and justice administered without denial or delay."¹⁷⁶ In addition, the Nebraska Constitution, like the sixth amendment to the United States Constitution, guarantees the right to a public trial.¹⁷⁷

These constitutional provisions are backed by legislation which clearly establishes the right of the public to the open and public transaction of all judicial proceedings. The Nebraska statute on the subject distinctly and imperatively states: "*All judicial proceedings of all courts* established in this State *must* be open to the attendance of the public unless otherwise specifically provided by statute."¹⁷⁸ This statute has been on the books since 1879 in almost exactly the same form. The only change, a significant one, came in 1969 when the Unicameral felt impelled to further clarify its meaning by adding that "*all judicial proceedings of all courts*"¹⁷⁹ must be open to the attendance of the public unless otherwise specifically provided by statute.

The Nebraska Supreme Court first addressed itself to the subject of the public's right to attend judicial proceedings in *Rhoades v. State*.¹⁸⁰ The court stated that under the Nebraska Constitution "the general public, as such, cannot be excluded" from a criminal trial.¹⁸¹ The court went on to state:

The public is admitted so that it may know that the accused is fairly dealt with and so that his triers will be keenly alive to a sense of their responsibility. Reasonable restrictions, for want of space, upon the number admitted are permissible; also upon persons of immature years where the evidence relates to scandalous, indecent or immoral matters. When those present conduct themselves in a manner tending to obstruct justice, or tending to give either the state or the defendant an unfair trial, the courtroom may

176. NEB. CONST. art. I, § 13.

177. *Id.* § 11.

178. NEB. REV. STAT. § 24-311 (Reissue 1975) (emphasis added).

179. *Id.* (emphasis added). The 1969 Amendment added the two italicized words.

180. 102 Neb. 750, 169 N.W. 433 (1918).

181. *Id.* at 752, 169 N.W. at 434.

be cleared of them.^[182] Other occasions may arise when, in the discretion of the court, such order would be permissible.¹⁸³

4. *State v. Simants: Contrary Dictum in Nebraska*

In spite of all of the above, and without any mention of the relevant constitutional provisions, federal or Nebraska, or the previous case law, and without discussion of the Nebraska statute, the Nebraska Supreme Court, in *State v. Simants*,¹⁸⁴ in dictum, has made one contradictory statement:

One other aspect of this case requires our attention. Counsel for Simants asked the court below to close to the public, including the press, such of the pretrial proceedings as might be necessary to insure the empaneling of an impartial jury. This request the District Court denied. Relators point out that section 24-311 . . . provides that all judicial proceedings shall be open. State and Simants respond that the statute, if construed to apply to all pretrial proceedings, irrespective of how disclosures during such proceedings might affect Simants' right to be tried by an impartial jury and affect the duty of the State to assure such impartial jury, is then unconstitutional. We have a duty to construe statutes to make them constitutional if possible. ABA Standard 3.1, Fair Trial and Free Press, in our judgment supplies an applicable standard for such construction. We, therefore, vacate the order . . . and direct the District Court to consider any applications the State or the accused may make for closed pretrial proceedings in future instances in accord with the following standard which we adopt. ABA Standard 3.1, Fair Trial and Free Press: "Pretrial hearings . . .

"Motion to exclude public from all or part of pretrial hearing.

"In any preliminary hearing, bail hearing, or other pretrial hearing in a criminal case, including a motion to suppress evidence, the defendant may move that all or part of the hearing be held in chambers or otherwise closed to the public, including representatives of the news media, on the ground that 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 by an impartial jury. The motion shall be granted unless the presiding officer determines that there is no substantial likelihood of such interference. With the consent of the defendant, the presiding officer may take such action on his own motion or at the suggestion of the prosecution.

182. The court is clearly referring to removing a person from the courtroom because of his actions while in the courtroom, not because of actions outside the courtroom or because of the article the reporter publishes outside the courtroom. If the proceeding is a trial, the court can prevent these sorts of out of court activities from resulting in an unfair trial by sequestering the jury. See § IV-A-6 *infra*. If the proceeding is pretrial, the myriad of other less restrictive alternatives will still be available. See § IV-A *infra*.

183. 102 Neb. at 752, 169 N.W. at 434. But see *State v. Simants*, 194 Neb. 783, 790, 236 N.W.2d 794, 799 (1975), *rev'd sub nom.* Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) (quoted and discussed in text accompanying notes 185-94 *infra*).

184. 194 Neb. 783, 236 N.W.2d 794 (1975).

Whenever under this rule all or part of any pretrial hearing is held in chambers or otherwise closed to the public, a complete record of the proceedings shall be kept and shall be made available to the public following the completion of trial or disposition of the case without trial. Nothing in this rule is intended to interfere with the power of the presiding officer in any pretrial hearing to caution those present that dissemination of certain information by any means of public communication may jeopardize the right to a fair trial by an impartial jury."¹⁸⁵

The following observations about that dictum are appropriate. First, it is "mere *obiter dictum*, and not binding as a precedent."¹⁸⁶ While this dictum is not authoritative, the federal¹⁸⁷ and Nebraska¹⁸⁸ constitutional provisions, Nebraska statutes,¹⁸⁹ and applicable cases,¹⁹⁰ are authoritative; each of the latter requires open judicial proceedings in criminal cases.

Second, and perhaps ultimately most importantly, it is apparent that *Simants* applied the same analysis and conclusions of law to the closed court issue that it applied to the order forbidding publication by the press. The analysis in *Simants* in regard to closed pretrial proceedings is based upon the effect that an open pretrial proceeding might have on the defendant's right to trial by an impartial jury. Just as surely as *Simants* failed to consider less restrictive alternatives in regard to the gag order, it failed to consider less restrictive alternatives in regard to the issue of closed pretrial proceedings. Just as surely as *Simants* failed to demonstrate that without the gag order the defendant would be deprived of his right to an impartial jury, it failed to demonstrate that without closed pretrial proceedings the defendant would be deprived of his right to an impartial jury. Just as surely as *Simants* failed to establish that the gag order would effectively secure trial by an impartial

185. *Id.* at 801-02, 236 N.W.2d 794, 805-06 (1975) (quoting ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS § 3.1 (1966)).

186. *State ex rel. City of McCook v. Marsh*, 107 Neb. 637, 645, 187 N.W. 84, 87 (1922). *Accord*, *Yoder v. Nu-Enamel Corp.*, 140 Neb. 585, 589, 300 N.W. 840, 842 (1941) (One question before the court concerned "[c]onstruing the dictum contained in [a previous case]"; the court stated that "a case is not authority for any point not necessary to be passed on in order to decide the cause."); *D.J. O'Brien Co. v. Omaha Water Co.*, 83 Neb. 71, 77, 118 N.W. 1110, 1113 (1908); *Bliss v. Beck*, 80 Neb. 290, 295, 114 N.W. 162, 164 (1908) ("the well-settled rule that a case is not authority as to any point not necessary to be passed upon in order to decide the cause"); *Funke v. Allen*, 54 Neb. 407, 410, 74 N.W. 832, 833 (1898).

187. U.S. CONST. amend. VI.

188. NEB. CONST. art. I, §§ 11, 13; text accompanying note 178 *supra*.

189. Notes 178-79 and accompanying text *supra*.

190. *See Rhoades v. State*, 102 Neb. 750, 169 N.W. 433 (1918); notes 180-83

jury, it failed to demonstrate that the closed pretrial proceeding would effectively secure trial by an impartial jury. Just as surely as *Simants* failed to present a real conflict between first and sixth amendment rights in regard to the restrictive order therein, it failed to present such a conflict in the issue of closed pretrial proceedings.

These two separate but related conclusions—that the press could be gagged and that the court could be closed—were laid upon a single foundation. When the United States Supreme Court unanimously reversed the restrictive order against the press it did so largely by completely rejecting that foundational argument. The closed hearings dictum in *Simants* was made for the same reasons as, and as a result of, the analysis that was applied to the trial court's order forbidding publication by the press. The United States Supreme Court clearly, directly, and without doubt or dissent, ruled that the *Simants* test was an unconstitutional test in regard to restrictions on publication. There is no logic to any other conclusion regarding the *Simants* dictum in regard to closed proceedings. As surely as the former was reversed in *Nebraska Press Association*, the latter would have been reversed had it been before the Supreme Court of the United States.

Third, the issue of closed pretrial proceedings was not raised by the Nebraska Press Association or by the trial judge, but was raised by counsel for *Simants*. Counsel for *Simants* was an intervenor in the only action appropriately before the Nebraska Supreme Court, the Nebraska Press Association's mandamus action against the trial judge.¹⁹¹ Under the Nebraska intervention statute,¹⁹² reinforced by the Nebraska Supreme Court in *State ex rel. Nelson v. Butler*,¹⁹³ intervenors are precluded from raising new issues. It seems most unlikely that the two paragraphs of dicta quoted from *Simants* were meant to overrule the lengthy and well-reasoned opinion in *Butler* without mentioning either the *Butler* case or the intervention issue. Fourth, this issue of closed pretrial proceedings, raised by intervenor, was not briefed before the court and was argued only in passing. Finally, the author of the "Standard" refer-

and accompanying text *supra*.

191. In the Nebraska Supreme Court, the Nebraska Press Association attempted to appeal Judge Stuart's district court order, to which *Simants* was obviously a party, and to file an original mandamus action, to which *Simants* was not a party, on its own behalf against Judge Stuart. The appeal was not allowed but the mandamus action was. *Simants'* status in the mandamus action, at best, was that of intervenor. *State v. Simants*, 194 Neb. 783, 787-88, 236 N.W.2d 794, 798 (1975).

192. NEB. REV. STAT. § 25-328 (Reissue 1975).

193. 145 Neb. 638, 650, 17 N.W.2d 683, 691 (1945).

red to in *Simants*, the American Bar Association, repudiated that standard at its 1976 annual meeting by the adoption of a resolution calling for new recommended court procedures.¹⁹⁴

C. The Media's Right to Gather and the Public's Right to Receive Information

1. The Right to Gather Information

The constitutional rights of the free press, under the first amendment to the United States Constitution,¹⁹⁵ include an affirmative right to gather information. The conclusion that such a right exists is logically and authoritatively inescapable. Freedom of the press necessarily means more than just the right to publish. In fact, the constitutional right to freedom of the press has three component parts: gathering, publishing, and circulating. Any part of that right without any other would be meaningless.¹⁹⁶

The existence of the right to publish, that is, to be free from prior restraints, is unquestioned.¹⁹⁷ In regard to the right to circulate, Chief Justice Hughes, quoting Mr. Justice Field, seemed to be restating the obvious when he said "Liberty of circulation is as essential to [freedom of the press] as liberty of publishing; indeed, without the circulation, the publication would be of little value."¹⁹⁸

194. ABA, RECOMMENDED COURT PROCEDURE TO ACCOMMODATE RIGHTS OF FAIR TRIAL AND FREE PRESS (1976); 62 A.B.A. J. 1277, 1280 (1976); Comment, *Applying Due Process to Gag Rules and Orders*, 55 NEB. L. REV. 427 (1976).

In addition, when the ABA Standard refers to preventing disclosure where "likely to interfere" with defendant's rights and granting the motion to close unless the judge determines "there is no substantial likelihood of such interference," the Standard itself mistakes the burden of proof. A mere likelihood has never been enough to justify infringement of first amendment rights. See § IV of text *infra*.

195. See NEB. CONST. art. I, § 5.

196. Justice Michael Musmanno expressed this point as follows:

Freedom of the press is not restricted to the operation of linotype machines and printing presses. A rotary press needs raw material like a flour mill needs wheat. A print shop without material to print would be as meaningless as a vineyard without grapes, an orchard without trees, or a lawn without verdure.

Freedom of the press means freedom to gather news, write it, publish it, and circulate it. When any one of these integral operations is interdicted, freedom of the press becomes a river without water.

In re Mack, 386 Pa. 251, 273, 126 A.2d 679, 689 (1956) (Musmanno, J., dissenting). *Accord*, *Herbert v. Lando*, 568 F.2d 974, 976 (2d Cir. 1977).

197. See § III-A of text *supra*.

198. *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) (quoting *Ex parte*

And, the Chief Justice might have added, without a right to gather information, the right of publication would be of little value.

Regarding the right to gather, the press, to fulfill its vital role, necessarily depends on its ability to acquire the information it intends to disseminate. "The right to gather news would appear to be as basic to a free press as the right to publish."¹⁹⁹ "Without the opportunity to gather and obtain the news, the right to publish or to comment upon it, would be of little value."²⁰⁰ Without the right to gather information "freedom of the press could be eviscerated."²⁰¹

In *Branzburg v. Hayes*,²⁰² the United States Supreme Court explicitly recognized the existence of a right to gather information as a part of the first amendment right to freedom of the press.²⁰³

A corollary of the right to publish must be the right to gather news. The full flow of information to the public protected by the free-press guarantee^[204] would be severely curtailed if no protection whatever were afforded to the process by which news is assembled and disseminated. We have, therefore, recognized that there is a right to publish without prior government approval, . . . a right to distribute information, . . . and a right to receive printed material.

Jackson, 96 U.S. 727, 733 (1877)). See also *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 156-57 n.18 (1946); Oral Argument Transcript, at 53-54, *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976). While Mr. Justice Marshall was questioning the Nebraska Assistant Attorney General as to whether or not the preliminary hearing in the Simants case was a public hearing, the following exchange occurred:

Question: . . . It was public except for the press?

Mr. Mosher: Well, even the press, the way the case was developed was entitled to attend.

Question: They could hear it but they couldn't publish it.

Mr. Mosher: That's correct.

Question: Well, I don't know how any newspaper can exist if all it does is hear.

Transcript of Oral Argument at 53-54. It is equally true that no newspaper can exist if it cannot hear.

199. *THE MEDIA AND THE LAW* 23 (H. Simons & J. Califano eds. 1976).

200. *Kovach v. Maddux*, 238 F. Supp. 835, 839 (M.D. Tenn. 1965).

201. *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972).

202. *Id.*

203. *Id.* at 681, 707 (majority opinion); *id.* at 709 (Powell, J., concurring); *id.* at 720-24 (Douglas, J., dissenting); *id.* at 727-28 (Stewart, J., dissenting). See also *Saxbe v. Washington Post Co.*, 417 U.S. 843, 859, 861 (1974) (Powell, J., dissenting); *KQED v. Houchins*, 546 F.2d 284, 285 (9th Cir. 1976); Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U.L.Q. 1, 20; Note, *The Right of the Press to Gather Information*, 71 COLUM. L. REV. 838 (1971); Note, *The Rights of the Public and the Press to Gather Information*, 87 HARV. L. REV. 1505 (1974).

204. On numerous other occasions, the Supreme Court has recognized the

No less important to the news dissemination process is the gathering of information. News must not be unnecessarily cut off at its source, for without freedom to acquire information the right to publish would be impermissibly compromised. Accordingly, a right to gather news, of some dimensions, must exist.²⁰⁵

2. The Right to Receive Information

Not only does the media have a right to gather and disseminate information, but the public has a long recognized complimentary right to receive information.²⁰⁶ The Supreme Court has recognized this right most recently in two "commercial speech" cases. In *Linmark Associates, Inc. v. Township of Willingboro*,²⁰⁷ the Court, in the process of striking down a city ordinance prohibiting the posting of real estate "For Sale" and "Sold" signs, referred to both the speaker and the listener's "First Amendment interest in the subject matter of the speech that is regulated here."²⁰⁸ In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,²⁰⁹

free flow of information as a basic objective of the first amendment. See *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 41-42 (1971); *Red Lion Broadcasting Co. v. Federal Communications Comm'n*, 395 U.S. 367, 390 (1969); *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967); *Grosjean v. American Press Co.*, 297 U.S. 233, 243 (1936). This flow cannot be protected unless acquisition, publication and dissemination are protected.

205. *Branzburg v. Hayes*, 408 U.S. 665, 727-28 (1972) (Stewart, J., dissenting) (citations omitted). It is significant to note that the majority in *Branzburg* refused to create a testimonial privilege for reporters called before a grand jury because the Court found that the reporter's claim that such compulsory testimony would inhibit his right to gather information (from informants) was largely speculative. In the instant case, however, the proposed inhibition of the right to gather information is not in the least speculative. On the contrary, since the very purpose of the closing order would be to maintain secrecy, the inhibition would be unmistakably clear. In fact, it is the effect of an open hearing on defendant's rights which is, at most, speculative. See § IV-B of text *infra*. See also, e.g., *Schnell v. City of Chicago*, 407 F.2d 1084 (7th Cir. 1969) (a cause of action was stated by reporters for a denial of their first amendment right to gather and report news); *Consumers Union of United States, Inc. v. Periodical Correspondents' Ass'n*, 365 F. Supp. 18, 26 (D.D.C. 1973), *rev'd on other grounds*, 515 F.2d 1341 (D.C. Cir. 1975) ("Access, to news, if unreasonably or arbitrarily denied by congressional action or publishers meeting under congressional auspices, constitutes a direct limitation upon the content of news, as recognized in *Branzburg*.").
206. See generally *Emerson*, *supra* note 203, at 6-7; Note, *The Constitutional Right to Know*, 4 HASTINGS CONST. L.Q. 109 (1977).
207. 431 U.S. 85 (1977).
208. *Id.* at 92.
209. 425 U.S. 748 (1976). See also *Virginia Citizens Consumer Council, Inc. v. Virginia State Bd. of Pharmacy*, 373 F. Supp. 683 (E.D. Va.

the Court held that a state statute barring advertisements by pharmacists violated the consumer's right to receive information.²¹⁰

*Procunier v. Martinez*²¹¹ recognized a right to receive personal correspondence.²¹² *Lamont v. Postmaster General*²¹³ held that a federal statutory requirement that foreign mailings of "Communist political propaganda" be delivered only upon request by the addressee violated the addressee's first amendment rights.²¹⁴ In *Martin v. City of Struthers*²¹⁵ the Court overturned a municipal ordinance forbidding door-to-door distribution of religious handbills as violative of the first amendment rights of both the distributor and the recipients.²¹⁶ The right to receive was one basis for the decision in *Thomas v. Collins*,²¹⁷ in which the Supreme Court "held that a labor organizer's right to speak and the rights of workers 'to hear what he had to say,' . . . were both abridged by a state law requiring organizers to register before soliciting union membership."²¹⁸

Kleindienst v. Mandel,²¹⁹ a case involving the exclusion of an alien who had scheduled a speaking tour in this country, acknowledged a first amendment right to receive information but deferred to Congress' plenary power to exclude aliens. In *Stanley v. Georgia*²²⁰ the state had criminalized private possession of pornographic materials. While declaring the state statute unconstitutional, the Supreme Court stated that under first amendment speech and press principles "[i]t is now well established that the Constitution protects the right to receive information and ideas This right to receive information and ideas . . . is fundamental to our free society."²²¹ And even in *Griswold v. Connecticut*²²² the

1974) (lower court decision).

210. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 753 (1976). This case was litigated not by those whose speech was restricted (pharmacists) but by those whose receipt of information was restricted (one individual consumer and two consumer organizations).

211. 416 U.S. 396 (1974).

212. *See id.* at 408-09.

213. 381 U.S. 301 (1965).

214. *Id.* at 305, 307.

215. 319 U.S. 141 (1943).

216. *Id.* at 143, 149. *See also* *Marsh v. Alabama*, 326 U.S. 501, 505, 508-09 (1946).

217. 323 U.S. 516 (1945).

218. *Kleindienst v. Mandel*, 408 U.S. 753, 763 (1972) (quoting *Thomas v. Collins*, 323 U.S. 516, 534 (1945)).

219. 408 U.S. 753, 762-65 (1972).

220. 394 U.S. 557 (1969).

221. *Id.* at 564 (citations omitted).

222. 381 U.S. 479 (1965).

Court referred to a right to receive as within the penumbra of first amendment freedoms of speech and press.²²³ "Recognition of the right to receive is . . . a significant step toward a comprehensive right to know; it is grounded on the same fundamental bases as the right to know, and it established that First Amendment coverage extends to both ends of the flow of information."²²⁴

3. *The Effect of the Right to Gather and Receive*

In the face of the above, it is futile to deny the existence of a right to gather information and a right to receive information. On the other hand, no one argues that these two rights are absolute.²²⁵ The media neither has nor claims an absolute right to know, an absolute right to gather whatever information, private or even public, strikes their fancy; and the public has no absolute right to receive everything. What this does mean is that each of these rights exists and each must be reckoned with.

While neither right is absolute, each provides some protection. The protection provided is two-fold. First, these rights not only strengthen, but independently support the conclusion that the media has procedural due process rights in regard to the closing of the court. Second, these rights do provide some substantive protection. While they are not absolute, neither can the government simply disregard them. There must be some demonstrated good reason for their infringement. It takes more than just conclusions, more than just allegations, more than just the kind of speculation condemned in *Nebraska Press Association*.²²⁶

In addition, the rights to gather and to receive information are not considered in the abstract. The media need not place all of their reliance on their right to gather information or the public's right to receive information. These two rights apply in this situation

223. *Id.* at 482. Regarding the general right to receive information, see *Saxbe v. Washington Post Co.*, 417 U.S. 843, 872 (1974) (Powell, J., dissenting), and *Red Lion Broadcasting Co. v. Federal Communications Comm'n*, 395 U.S. 367, 390 (1969).

224. Note, *supra* note 206, at 137.

225. See *Zemel v. Rusk*, 381 U.S. 1 (1965). In *Zemel* the plaintiff challenged the State Department's refusal to authorize his travel to Cuba, alleging a sort of first amendment right of the individual to receive or to gather information. The Supreme Court held that this was a restriction on action and not protected by the first amendment. The Court went on to state that "[t]he right to speak and publish does not carry with it the *unrestrained* right to gather information." *Id.* at 17 (emphasis added).

226. See notes 320, 325-34 and accompanying text *infra*.

in combination with the media's constitutional right to be free from prior restraints and the constitutional right to public judicial proceedings in criminal cases. This combination of rights put the media in a very strong position.²²⁷

IV. PROCEDURAL AND SUBSTANTIVE CONSTITUTIONAL RIGHTS: THE BURDEN OF PROOF

Ultimately the first amendment right to freedom of the press is not an absolute right, although as a restriction on prior restraints on the press it is nearly absolute.²²⁸ It is, however, a right which cannot be infringed until those who would do so have met a very strict and demanding burden of proof. Once it is found that first amendment rights are being or will be infringed, the burden of proof is on those who would infringe those rights, and not on those who would assert them. It is the infringement and not the assertion of the right which must be justified.²²⁹ Because "the line between speech unconditionally guaranteed and speech which may legitimately be regulated . . . is finely drawn . . . [and t]he separation of legitimate from illegitimate speech calls for . . . sensitive tools"²³⁰ and because "it is plain that where the burden of proof lies may be decisive of the outcome,"²³¹ the Supreme Court has held

227. As a general rule, a combination of constitutional rights puts the litigant asserting those rights in a stronger position than only one (or even any number less than all) of the rights. However, the free press proscription against prior restraints is so very nearly absolute that the litigant suffering an infringement of that right could hardly be litigating from a stronger position. The combination of rights concept becomes important insofar as one disputes the conclusion that the closed judicial proceeding works a prior restraint on the media or, if one believes that whether such a closing constitutes a prior restraint is a close question, in shifting the balance in the resolution of that "close question."

228. See notes 88 and 91 *supra*.

229. See, e.g., *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 558-59, 569-70 (1976); *Buckley v. Valeo*, 424 U.S. 1, 25 (1976); *Cousins v. Wigoda*, 419 U.S. 477, 489 (1975); *New York Times Co. v. United States*, 403 U.S. 713 (1971); *NAACP v. Button*, 371 U.S. 415, 438-39 (1963); *Speiser v. Randall*, 357 U.S. 513, 528-29 (1958).

The governing principle is that the press, in general, is to be free and unrestrained and that the facts are presumed to be in the public domain. The accused, and the prosecution if it joins him, bears the burden of showing that publicizing particular facts will irreparably impair the ability of those exposed to them to reach an independent and impartial judgment as to guilt.

Nebraska Press Ass'n v. Stuart, 423 U.S. 1327, 1333 (1975) (Blackmun, J., Circuit Justice).

230. *Speiser v. Randall*, 357 U.S. 513, 525 (1958).

231. *Id.*

that "the burden of proof should operate to decide close cases in favor of the speech's being found protected."²³²

The burden of proof on those who would close the court in a criminal action contains at least three elements: the burden of establishing that closing the proceeding is the least restrictive alternative, the burden of establishing that closing the proceeding will effectively secure the desired end, and the burden of establishing that the defendant will be deprived of his rights if the proceeding is not closed.²³³ These burdens must be demonstrably overcome on the record. Judicial conclusions to the effect that these burdens of proof have been satisfied are not sufficient.²³⁴ Further, "the burden [of proof] on the Government is not reduced by the temporary nature of a restraint."²³⁵

Not only is the burden of proof on those who would close the proceeding, but there are certain constitutionally mandated procedural safeguards which govern how the court must proceed in such a situation. Adequate notice of an impending consideration of a closed court order must be given to all involved, including representatives of the media, and an evidentiary hearing, adversary in nature, must be held to supply a factual basis for any such order in order to make a record on each of the three elements of the burden of proof.²³⁶ Absent these procedural safeguards, such an order would not only violate substantive constitutional rights, but also the fourteenth amendment rights to procedural due process.

A. The Burden is on Those Who Would Close the Court to Prove That There Are No Less Restrictive Alternatives

First, and perhaps most importantly, those who would close the proceeding must establish that doing so is the least restrictive alter-

232. Monaghan, *supra* note 38, at 546.

233. *E.g.*, *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 562-67 (1976); *id.* at 571 (Powell, J., concurring). *See also* *Miller v. Kentucky*, 40 F.2d 820 (6th Cir. 1930).

234. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 593 (1976) (Brennan, J., concurring in the judgment). *See also id.* at 563, 565; *Wood v. Georgia*, 370 U.S. 375, 386-88 (1962).

235. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). *See also id.* at 580 (Brennan, J., concurring in the judgment) (referring to the partial stay of the district court's order in *Nebraska Press Ass'n v. Stuart*, 423 U.S. 1327, 1329 (1975) (Blackmun, J., Circuit Justice), as "concluding that each passing day constituted an irreparable infringement on First Amendment values").

236. *See* § II of text *supra*.

native available; all other alternatives, short of infringing first amendment rights, must be shown to be ineffective.²³⁷

"There are many ways to try to assure the kind of impartial jury that the Fourteenth Amendment guarantees,"²³⁸ many "procedures . . . sufficient to guarantee . . . a fair trial"²³⁹ short of infringing first amendment rights. Prior restraints on news reporting by the press are not, and never have been, among the available tools for the protection of the rights of the defendant in a criminal case. This ban on prior restraints is workable in criminal cases in part because of this myriad of effective and less restrictive alternatives available for the protection of the defendant. Indeed, these less restrictive alternatives seem to satisfy the requirement that the

237. *E.g.*, *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 562-65 (1976); *id.* at 571 (Powell, J., concurring); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Gooding v. Wilson*, 405 U.S. 518, 522 (1972); *Carroll v. President of Princess Anne*, 393 U.S. 175, 183 (1968); *Sheppard v. Maxwell*, 384 U.S. 333, 357-58 (1966); *Sherbert v. Verner*, 374 U.S. 398, 407 (1963); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940); *New York Times Co. v. Starkey*, 51 App. Div. 2d 60, 64, 380 N.Y.S.2d 239, 243-44 (1976) ("All other measures within the power of the court to insure a fair trial must be found to be unavailing or deficient.").

See also *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977); *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951). (a barrier to interstate commerce will not be acceptable if there is a less restrictive alternative). In *United States Trust Co.*, the Court noted that it "is customary in reviewing economic and social regulation, [that] courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." 431 U.S. at 22-23. The Court recognized that *United States Trust Co.* is that type of case but went on to state that "a State is not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally well." *Id.* at 31. The Court concluded that the state had failed to demonstrate the necessity for the alternative it chose. *Id.* In *United States Trust Co.*, the Supreme Court used a less, if not least, restrictive alternative analysis as a part of a reasonableness test. The Court held at a minimum that, if there is an alternative which does not impair the constitutional right, that alternative must be chosen regardless of whether the right is a fundamental right unless those who would infringe the right can demonstrate the necessity of choosing their alternative. *See* *Scott v. Scott*, [1913] A.C. 417, 438 (Viscount Haldane, L.C.) (Before the Courts of England can be closed, those who would close them have the burden of proof and they "must satisfy the Court that by nothing short of the exclusion of the public can justice be done.").

238. *Groppi v. Wisconsin*, 400 U.S. 505, 509 (1971).

239. *Sheppard v. Maxwell*, 384 U.S. 333, 358 (1966). *See also* *Times-Picayune Publishing Corp. v. Schulingkamp*, 419 U.S. 1301, 1308 (1974) (opinion in chambers of Powell, J.).

defendant's fair trial right be protected without any need to resort to infringement of the media's constitutional rights whether by prior restraint or not. The mandate of *Nebraska Press Association* is that these alternatives must be used.²⁴⁰

This does not suggest that the end, a fair trial, cannot be achieved, but simply that infringing first amendment rights is not the way to do it. This does not deny the authority to solve the problem. When first amendment rights are the issue, those who would close the court must make a clear showing that there is no less drastic means of effecting the permissible end before the limitation of first amendment rights can ever be considered.

The available less restrictive, but effective, alternatives, to be used singly or in combination, include: voir dire, change of venue, change of venue, continuance, enforcement of courtroom decorum, sequestration of jurors, judicial instructions, control over courtroom personnel and officers of the court, mistrials, new trials, and reversals.

1. *Voir Dire*

The voir dire examination of prospective jurors is a powerful tool for counteracting the effects of publicity. The United States Supreme Court places great faith in the use of voir dire to screen out prejudiced jurors and to impress upon others their duty to decide only on the basis of the evidence admitted at trial.²⁴¹ In *Ne-*

240. 427 U.S. at 562-65.

241. *E.g., id.* at 564; *id.* at 602 (Brennan, J., concurring in the judgment); *Murphy v. Florida*, 421 U.S. 794, 800-03 (1975) (voir dire found to be an adequate safeguard to the accused's right to an impartial jury in a highly publicized case); *Ham v. South Carolina*, 409 U.S. 524 (1973) (use of voir dire to screen out racially prejudiced jurors); *Beck v. Washington*, 369 U.S. 541, 556-57 (1962).

See *Swain v. Alabama*, 380 U.S. 202, 218 n.24 (1965). See also *Calley v. Callaway*, 519 F.2d 184, 209 (5th Cir. 1975) (en banc), *cert. denied sub nom. Calley v. Hoffman*, 425 U.S. 911 (1976) (voir dire in "My-Lai Massacre" trial of Lt. Calley insured fair trial); *Margoles v. United States*, 407 F.2d 727, 730 (7th Cir.), *cert. denied*, 396 U.S. 833 (1969); *United States v. Mitchell*, 389 F. Supp. 917, 920 (D.D.C. 1975), *aff'd*, 559 F.2d 31 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933, *application for suspension denied*, 431 U.S. 935 (1977) (former Attorney General John Mitchell's motions regarding pretrial publicity deferred until after the voir dire, at which time the court concluded that exhaustive voir dire examination and a continuance assured the accused of a fair trial); *Babcock, Voir Dire: Preserving "Its Wonderful Power"*, 27 STAN. L. REV. 545 (1975).

Regarding an empirical study which indicates that voir dire reduces the effect of prejudicial extra judicial information, see Simon,

braska, the supreme court has recently recognized the ameliorative effect of "the care exercised . . . in the selection of the jury."²⁴²

If necessary, voir dire can be conducted with prospective jurors individually or in small groups.²⁴³ This will facilitate a more effective voir dire by making it more likely that prejudices can be discovered and avoiding contamination of the rest of the panel by a prospective juror who has been influenced by publicity. For additional protection, the allowable number of peremptory challenges can be increased²⁴⁴ and the defendant can be given the benefit of the doubt on challenges for cause.²⁴⁵

The court can also voir dire jurors after the trial has begun to assess the effect, if any, of potentially prejudicial information which may have come to the attention of jurors after they were sworn but before they reached a verdict. If a juror has been prejudiced, he can be dismissed and the trial continued with an alternate

Does the Court's Decision in Nebraska Press Association Fit the Research Evidence on the Impact on Jurors of News Coverage?, 29 STAN. L. REV. 515, 525-26 (1977). But see Schmidt, *Nebraska Press Association: An Expansion of Freedom and Contraction of Theory*, 29 STAN. L. REV. 431, 449 (1977) (concluding that the results of empirical studies are inconsistent and the experiments themselves "fall too far short of reality to provide convincing evidence").

242. *State v. Ell*, 196 Neb. 800, 806, 246 N.W.2d 594, 598 (1976). See also NEB. REV. STAT. §§ 25-1636, 29-2006 (Reissue 1975).

243. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 602 (1976) (Brennan, J., concurring in the judgment); *United States v. Titsworth*, 422 F. Supp. 587 (D. Neb. 1976).

244. *People v. Speck*, 41 Ill. 2d 177, 213, 242 N.E.2d 208, 227 (1968); Note, *The Discretionary Power to Grant Additional Peremptory Challenges in Highly Publicized Criminal Trials: Securing a Fair and Impartial Trial*, 25 BUFFALO L. REV. 545, 557 (1976).

In Nebraska, as in many other jurisdictions, the legislature has placed limits on the number of peremptory challenges. NEB. REV. STAT. § 29-2005 (Reissue 1975) (twelve for the defense and 10 for the prosecution in capital or life imprisonment cases, six in cases in which a sentence of more than 18 months is possible, and three in all other criminal trials). However, if the choice were between that statutory limit and freedom of the press, the statutory limit would be unconstitutional as applied. See notes 256-61 and accompanying text *infra*. In *People v. Speck*, 41 Ill. 2d 177, 213, 242 N.E.2d 208, 227 (1968), Richard Speck was permitted to exercise 160 peremptory challenges even though under the applicable Illinois statute (ILL. ANN. STAT. ch. 38, § 115-4(e) (Smith-Hurd 1977)) he was entitled to only 20.

245. See *United States v. Burr*, 25 F. Cas. 49, 51 (C.C.D. Va. 1807) (No. 14,693) (Marshall, C.J., Circuit Justice). Chief Justice Marshall stated "that light impressions which may fairly be supposed to yield to the testimony" do not disqualify a juror, "but . . . those strong and deep

juror,²⁴⁶ or a new trial can be ordered.²⁴⁷ Not only can the voir dire be of benefit in keeping prejudiced persons off the jury and in impressing those chosen with their duty as jurors, but it can also be of great benefit in assessing the need for the use of other less restrictive alternatives such as a change of venue or a continuance.²⁴⁸

2. *Change of Venue*

Similarly, in most cases the panel of prospective jurors may be enlarged²⁴⁹ or an entirely new panel may be called.²⁵⁰ As additional protection, some jurisdictions specifically provide for calling a foreign jury.²⁵¹ Even absent such a specific provision, drawing jurors from another county, where jurisdictionally possible, could provide a possible alternative remedy to prejudicial pretrial publicity.²⁵²

impressions which will close the mind against the testimony" suffice for a challenge for cause. *Id.*

246. See *State v. Allen*, 73 N.J. 132, —, 373 A.2d 377, 391 (1977) (Pashman, J., concurring).

247. *United States v. Titsworth*, 422 F. Supp. 587 (D. Neb. 1976). After six and one-half hours of deliberation, at 10:05 p.m., the jury adjourned until 8:45 the next morning, at which time they reconvened and, approximately 25 minutes later, returned a guilty verdict. Defense counsel then informed the court of a news story the previous evening which recited allegedly prejudicial information. "[T]he Court examined each juror individually in chambers with respect to his exposure to the publicity." *Id.* at 589. After conferring with the jurors, the judge ordered a new trial. See also *State v. Allen*, 73 N.J. 132, —, 373 A.2d 377, 391 (1977) (Pashman, J., concurring).

248. *E.g.*, *United States v. Mitchell*, 389 F. Supp. 917 (D.D.C. 1975), *aff'd*, 559 F.2d 31 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933, *application for suspension denied*, 431 U.S. 935 (1977) (discussed at note 225 *supra*); *United States v. Kahaner*, 204 F. Supp. 921, 924 (S.D.N.Y. 1962), *aff'd*, 317 F.2d 459 (2d Cir.), *cert. denied*, 375 U.S. 836 (1963) ("Whether or not the publicity has been of such a nature that the selection of a fair and impartial jury is foreclosed at this time cannot be determined until jurors are questioned on the voir dire.").

249. In an appropriate case the pool from which prospective jurors are drawn may also be made smaller in an effort to protect defendant's right to a fair trial. In *United States v. Holovachka*, 314 F.2d 345 (7th Cir.), *cert. denied*, 374 U.S. 809 (1963), the court affirmed the federal district court's exclusion from the jury list of residents of the counties served by the newspapers which had published articles allegedly prejudicial to the defendant's right to a fair trial.

250. *E.g.*, Note, *Community Hostility and the Right to an Impartial Jury*, 60 COLUM. L. REV. 349, 365-67 (1960).

251. *E.g.*, *State v. Allen*, 73 N.J. 132, —, 373 A.2d 377, 383 (1977); *id.* at —, 373 A.2d at 391 (Pashman, J., concurring).

252. *E.g.*, *United States v. Holovachka*, 314 F.2d 345 (7th Cir.), *cert. denied*,

3. *Change of Venue*

Obviously, a change of venue may protect against jury prejudice.²⁵³ The change of venue to secure an impartial jury may be granted upon motion of the defendant or the prosecution or upon the court's own motion; in other words a change of venue may be granted even if the defendant is not requesting such a change.²⁵⁴ Clearly a change of venue causes some inconvenience for the judiciary, the prosecutorial staff, the defendant, and the witnesses. However, inconvenience has never been a good and sufficient reason for the infringement of constitutional rights.

In regard to the use of this less restrictive alternative in Nebraska, a Nebraska statute provides that venue in a criminal action "may" be changed to "some adjoining county" when it appears "that a fair impartial trial cannot be had" in the county in which the offense was committed.²⁵⁵ This statute could be interpreted in one of three ways. First, the statute can be interpreted as barring any transfer which places the trial in a county which does not adjoin the one in which the crime was committed. Second, the "may" could be interpreted as a discretionary guideline rather than as an absolute limit. Third, the statute could be interpreted as allowing the court before which the case is initially brought the authority to transfer it to any adjoining county. The judge to whom the

374 U.S. 809 (1963) (jury panel drawn from two different counties within trial court's district).

253. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 563 (1976); *id.* at 602-03 (Brennan, J., concurring in the judgment); *Sheppard v. Maxwell*, 384 U.S. 333, 362-63 (1966); *Irvin v. Dowd*, 366 U.S. 717 (1961); *Shepherd v. Florida*, 341 U.S. 50, 52-53 (1951) (Jackson, J., concurring); Note, *The Efficacy of a Change of Venue in Protecting a Defendant's Right to an Impartial Jury*, 42 NOTRE DAME LAW. 925 (1967). See *Zediker v. State*, 114 Neb. 292, 207 N.W. 168 (1926); *Olsen v. State*, 114 Neb. 112, 206 N.W. 1 (1925); *Gandy v. Estate of Bissell*, 81 Neb. 102, 115, 115 N.W. 571, 575 (1908); *Lucas v. State*, 75 Neb. 11, 15-17, 105 N.W. 976, 977-78 (1905). See also *State v. Ell*, 196 Neb. 800, 806, 246 N.W.2d 594, 598 (1976).

Certainly there could be cases in which prejudicial pretrial publicity is state-wide or in which the publicity will follow the defendant. All this means is that the selection of alternatives must be based on the facts of the particular case. Surely it does not deny the general validity of the alternative. Additionally the change of venue used in combination with one or more of the other alternatives could well protect the defendant's rights.

254. *E.g.*, *State ex rel. Dayton Newspapers, Inc. v. Phillips*, 46 Ohio St. 2d 457, 475, 351 N.E.2d 127, 138 (1976) (Stern, J., concurring); Ranney, *Remedies For Prejudicial Publicity: A Brief Review*, 21 VILL. L. REV. 819, 830 (1976).
255. NEB. REV. STAT. § 29-1301 (Reissue 1975).

case is transferred could then decide whether the defendant could get a fair trial in that second county. If he decides not, then he can grant another change of venue to any county adjoining that second county, whether it adjoins the first county or not, and so on. The trial could be held across the state from where the crime was committed so long as each county to which the case is transferred adjoins the one from which it was last transferred.

If the first of the above interpretations is followed—if it is read as an absolute bar against any transfer further than a county adjoining the one in which the crime was committed—it cannot survive constitutional challenge. The United States Supreme Court said as much in *Nebraska Press Association* in regard to this very Nebraska statute. "We have held that state laws restricting venue must on occasion yield to the constitutional requirement that the State afford a fair trial."²⁵⁶ There can be no question but that the statute would be unconstitutional were it interpreted as providing that when a fair and impartial jury cannot be impanelled in the county where the offense was committed or in any adjoining county, the defendant must nonetheless be tried in one of those counties, either forgoing his right to a trial by jury or accepting a jury or judge which is not fair and impartial. "No legislation could be valid that in any manner limits or modifies this right."²⁵⁷ It would be even more ridiculous to suggest that rather than expanding the area for venue changes the defendant could not be tried. It is equally clear that such a statute cannot be used as an excuse for infringing first amendment rights.²⁵⁸

256. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 563 n.7 (1976) (citing *Groppi v. Wisconsin*, 400 U.S. 505 (1971)). *Accord, e.g.*, *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 602-03 (1976) (Brennan, J., concurring in the judgment); *State v. Mejia*, 250 La. 518, 527, 197 So. 2d 73, 76 (1967) (A second removal was ordered, though to do so was contrary to state law. "A finding that an impartial jury could not be selected to try the accused is the strongest reason for disregarding a legislative pronouncement which would deny the removal."); *Lucas v. State*, 75 Neb. 11, 15-17, 105 N.W. 976, 976-78 (1905) (legislation limiting the right to "public trial 'by an impartial jury'" could not be valid).

257. *Lucas v. State*, 75 Neb. 11, 16, 105 N.W. 976, 978 (1905).

258. In *Irvin v. Dowd*, 366 U.S. 717 (1961), the Supreme Court held the judgment of a state trial court unconstitutional for having refused to grant defendant's motion for a second change of venue, made necessary by pretrial publicity, even though that state's statute did not specifically provide for a second change of venue. In *Rideau v. Louisiana*, 373 U.S. 723 (1963), the Supreme Court held that refusal to grant defendant's request for a change of venue when necessary to protect his sixth amendment rights was a denial of due process.

Such an interpretation of this statute would not only violate the first and sixth amendment rights, but also the criminal defendant's fourteenth amendment right to equal protection of the law. Section 25-410 of the *Nebraska Revised Statutes*, provides that "in the interest of justice" a civil action can be transferred to any other county in the state.²⁵⁹ To allow such a broad change of venue in a civil case and a change of venue only to an adjoining county in a criminal case constitutes an unreasonable difference in treatment of the class of criminal defendants in violation of the equal protection clause of the fourteenth amendment.²⁶⁰ Further, even if this difference in treatment were arguably reasonable, first amendment rights are at stake, and sixth amendment rights are potentially involved. Therefore the legislature must demonstrate a "compelling state interest" in so distinguishing between the criminal and civil defendant.²⁶¹ Such a compelling state interest, of course, could not be demonstrated here.

If we recognize, as we must, that modern communication media pose problems for fair trials different from those in our country's early days, we should also recognize that the speed and ease of modern transportation greatly reduces the burden imposed by moving a trial to another county. . . . [T]here appears little reason why the trial court should struggle to keep the trial in the county, when to do so . . . prevent[s] the residents of the county from actually being informed about one of the crucial stages of the trial process [in this case a hearing on a motion to suppress]. The public [and] the press . . . all stand to lose much and gain little from such a decision.²⁶²

4. Continuance

Of course, there is nothing that proscribes the press from reporting events that transpire in the courtroom. But where there is a rea-

259. "For the convenience of the parties and witnesses or in the interest of justice, a district court of any county may transfer any civil action to the district court of any other county in this state." NEB. REV. STAT. § 25-410 (Reissue 1975). On January 4, 1978, a bill was introduced in the Nebraska Unicameral which would allow a change of venue in criminal cases, upon motion of the defendant, to counties other than those adjoining the county in which the crime was committed. L.B. 562, 85th Leg., 2d Sess. § 1 (1978).

260. *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972); *Reed v. Reed*, 404 U.S. 71, 75-76 (1971); *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

261. *Eisenstadt v. Baird*, 405 U.S. 438, 433 (1972); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *DeGregory v. Attorney General*, 383 U.S. 825, 829 (1966); *NAACP v. Button*, 371 U.S. 415, 439 (1963); *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

262. *State ex rel. Dayton Newspapers, Inc. v. Phillips*, 46 Ohio St. 2d 457, 475-76, 351 N.E.2d 127, 138 (1976) (Stern, J., concurring).

sonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should *continue the case* until the threat abates, or transfer it to another county not so permeated with publicity.²⁶³

As Chief Judge Brown of the Court of Appeals for the Fifth Circuit has stated, "It is the nature of news that it is so readily forgotten—time can erase impressions, even sensational ones. Thus, while prejudicial news coverage may poison the minds of jurors or immediate prospective jurors for the present, the contamination may be only temporary"²⁶⁴ The United States Supreme Court has recognized that even a short delay²⁶⁵ between an arrest accompanied by massive publicity and the subsequent trial can insure a fair trial.²⁶⁶ The Nebraska Supreme Court has also recently recog-

263. *Sheppard v. Maxwell*, 384 U.S. 333, 362-63 (1966) (emphasis added).

264. *United States v. Dickinson*, 465 F.2d 496, 507-08 (5th Cir. 1972) (Brown, C.J.). *Accord*, *Dowling, Fair Trial v. Free Press: Proposals for Statutory Reform*, 3 U.S.F. L. REV. 49, 69-70 (1968).

265. Of course too long a delay could result in speedy trial problems. *See* notes 266-67 *infra*.

266. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 563-64 (1976) ("postponement of the trial to allow public attention to subside"); *id.* at 602 n.28 (Brennan, J., concurring in the judgment) ("And somewhat substantial delays designed to ensure fair proceedings need not transgress the speedy trial guarantee."); *Murphy v. Florida*, 421 U.S. 794, 802 (1975) (seven month period of delay); *Beck v. Washington*, 369 U.S. 541, 556-57 (1962) (nine and one-half month period of delay). *Accord*, *Calley v. Callaway*, 519 F.2d 184, 208 (5th Cir. 1975) (en banc), *cert. denied sub nom. Calley v. Hoffman*, 425 U.S. 911 (1976); *United States v. Collins*, 472 F.2d 1017 (5th Cir. 1972), *cert. denied sub nom. Branch v. United States*, 411 U.S. 983 (1973); *United States v. Dioguardi*, 147 F. Supp. 421, 422 (S.D.N.Y. 1956); A. FRIENDLY & R. GOLDFARB, *CRIME AND PUBLICITY* 96-101 (1967). *But see* Isaacson, *Fair Trial and Free Press: An Opportunity for Coexistence*, 29 STAN. L. REV. 561, 562 (1977).

See also Speedy Trial Act of 1974, 18 U.S.C. § 3161 (1976). The Act provides in part:

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment might be filed, or in computing the time within which the trial of any such offense might commence:

...

(8) (A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reason for finding that the ends of justice served by the granting of such continuance outweigh the

nized the ameliorative effect of "the length of time between the dissemination of the publicity complained of and the date of the trial."²⁶⁷

In those situations in which the impressions of the jurors or prospective jurors arguably will not be erased so easily, as in the small town where the victims of the crime were well known, the impressions may be erased more quickly in other judicial districts. In that situation the continuance can be effectively combined with the change of venue, exhaustive voir dire, and judicial instruction.

5. *Enforcement of Courtroom Decorum*

Another less restrictive alternative involves enforcing courtroom decorum. Although at first it may seem to be stretching the point to include an item like courtroom decorum, in what is perhaps the most famous prejudicial publicity case to be handed down by the United States Supreme Court²⁶⁸ it was, in considerable part, the failure of the trial judge to enforce proper courtroom decorum, both at pretrial proceedings and during the trial itself, which denied the defendant's right to a fair trial. This was the less restrictive alternative first discussed in *Sheppard v. Maxwell*.²⁶⁹

In *Sheppard*, in addition to what the Court characterized as virulent publicity about [the defendant] and the murder . . . , only

best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

267. *State v. Ell*, 196 Neb. 800, 806, 246 N.W.2d 594, 598 (1976). Nebraska statutes require that criminal trials commence within six months of the date the accused is charged, NEB. REV. STAT. §§ 29-1205 to 1208 (Reissue 1975), unless defendant waives his right to a speedy trial. U.S. CONST. amend. VI; NEB. CONST. art. I, § 11. See NEB. REV. STAT. § 29-1207(4) (b) (Reissue 1975). Such a strict requirement of so short a time, like the Nebraska statutory limitation on change of venue, see § IV-A-3 of text *supra*, and on peremptory challenges, see note 244 and accompanying text *supra*, may be unconstitutional when applied to infringe the first amendment rights of the press. This does not mean, however, that the continuance may be indefinite in spite of the constitutional speedy trial requirement, only that something in excess of six months may nevertheless be "speedy."

268. *Sheppard v. Maxwell*, 384 U.S. 333, 354 (1966).

269. *Id.* at 358. See also *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 601 (1976) (Brennan, J., concurring in the judgment).

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. Furthermore, the trial began two weeks before a hotly contested election at which both Chief Prosecutor Mahon and Judge Blythin were candidates for judgeships.²⁷⁰

At this televised inquest,

Sheppard was brought into the room by police who searched him in full view of several hundred spectators. Sheppard's counsel were present during the three-day inquest but were not permitted to participate. When Sheppard's chief counsel attempted to place some documents in the record, he was forcibly ejected from the room by the Coroner, who received cheers, hugs, and kisses from ladies in the audience. Sheppard was questioned for five and one-half hours about his actions on the night of the murder, his married life, and a love affair with Susan Hayes.²⁷¹

As for the trial itself,

[t]he fact is that bedlam reigned at the courthouse . . . and newsmen took over practically the entire courtroom, hounding most of the participants in the trial, especially Sheppard. At a temporary table within a few feet of the jury box and counsel table sat some 20 reporters Having assigned almost all of the available seats in the courtroom to the news media the judge lost his ability to supervise that environment. The movement of the reporters in and out of the courtroom caused frequent confusion and disruption of the trial.²⁷²

One could hardly imagine such a carnival-like atmosphere had it not actually happened. The point is that the trial judge must maintain control; the dignity and decorum of the courtroom must be enforced. Cameras and microphones can be kept out of the courtroom²⁷³ and order can be kept among the spectators, the public and the press alike, and the participants.²⁷⁴

270. 384 U.S. at 354.

271. *Id.* at 339-40.

272. *Id.* at 355.

273. FED. R. CRIM. P. 53, for example, prohibits filming and photographing in federal courtrooms. See also *Estes v. Texas*, 381 U.S. 532 (1965), (pretrial and trial proceedings were televised). In *Estes*, the Supreme Court held that the combined effect of the television cameras on the jury, the witnesses, the judge, and the defendant produced an inherent lack of due process.

274. The carnival atmosphere at trial could easily have been avoided since the courtroom and courthouse premises are subject to the control of the court. . . . The number of reporters in the courtroom itself could have been limited at the first sign that their presence would disrupt the trial. They certainly should not have been placed inside the bar. Furthermore, the judge should have more closely regulated the conduct of newsmen in the courtroom. For instance, the judge

6. *Sequestration of Jurors*

Sequestration of the jury can also be utilized to avoid prejudice.²⁷⁵ In addition to its obvious benefit of insulating jurors from publicity after they have been sworn, Chief Justice Burger has stated that this alternative "enhances the likelihood of dissipating the impact of pretrial publicity and emphasizes the elements of the jurors' oaths."²⁷⁶

7. *Judicial Instructions*

Instructions to the jury can also be an effective technique for insuring impartiality.²⁷⁷ The American legal system demands a great deal of jurors; great trust is placed in the ability of jurors to disregard a myriad of factors that could influence their decisions. Under the American system of the criminal jury trial, a juror tries

belatedly asked them not to handle and photograph trial exhibits lying on the counsel table during recesses.

Sheppard v. Maxwell, 384 U.S. 333, 358 (1966).

275. *E.g.*, Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 564 (1976); *id.* at 601 (Brennan, J., concurring in the judgment); Sheppard v. Maxwell, 384 U.S. 363 (1966); Holt v. United States, 218 U.S. 245, 250 (1910). See *Estes v. Texas*, 381 U.S. 532, 546 n.3 (1965) (It is interesting to note that at the time of *Estes* seven states required that the jury be sequestered during felony trials.); Stanga, *Judicial Protection of the Criminal Defendant Against Adverse Press Coverage*, 13 WM. & MARY L. REV. 1, 23-29 (1971); Comment, *Sequestration: A Possible Solution to the Free Press—Fair Trial Dilemma*, 23 AM. U. L. REV. 923 (1974).

United States v. Holovachka, 314 F.2d 345, 352 (7th Cir.), *cert. denied*, 374 U.S. 809 (1963) upheld the trial court's sequestration of the jury over the objection of the defendant.

276. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 564 (1976). Of course there are disadvantages associated with this alternative. It can be costly. It works a hardship on jurors with a "consequent difficulty in jury selection. [And], many defendants are wary of jury sequestration . . . [arguing] that the jurors will resent it and hold a defendant responsible" *State v. Allen*, 73 N.J. 132, —, 373 A.2d 377, 381 (1977). These considerations, while relevant, must not be considered in the abstract, but in light of the first amendment rights at stake. The *Allen* court, while stating that sequestration can be a harsh alternative, notes that it will not be necessary in most trials and that is should be given serious consideration in those few in which it is necessary. *Id.* at —, 373 A.2d at 383.
277. *E.g.*, Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 564 (1976) ("the use of emphatic and clear instructions on the sworn duty of each juror to decide the issues only on evidence presented in open court"). See also *State v. Ell*, 196 Neb. 800, 807, 246 N.W.2d 594, 599 (1976); A. FRIENDLY & R. GOLDFARB, *supra* note 266, at 106-09; Schmidt, *supra* note 241, at 450.

questions of fact based solely upon the evidence presented at the trial. The juror is typically instructed not to "consider any evidence which has been stricken from the record," not to "be influenced by statement of counsel not supported by evidence," and not to consider his personal knowledge of "any material or particular fact not supported by the evidence."²⁷⁸

He is required to divorce pity, passion and prejudice from his mind. He is forbidden to be governed by sentiment, conjecture, public opinion or public feeling. If evidence is admitted and afterwards ordered stricken out, he must disregard it. He cannot draw inferences from rulings made by the trial judge on objections to the admission of evidence.²⁷⁹

Jurors are even asked to disregard a defendant's "confession" as evidence of guilt when that confession has been found inadmissible as substantive evidence and has been admitted solely to determine the credibility of the testifying defendant.²⁸⁰

It is clear not only that a great deal is demanded of jurors, but also that they perform as demanded.²⁸¹ Recent examples of situations involving massive pretrial publicity, Watergate and My-Lai, demonstrate that jurors can and do reach impartial verdicts in such cases. For example, a jury in New York acquitted former Attorney General John Mitchell and former Commerce Secretary Maurice Stans.²⁸² A jury in the District of Columbia acquitted former Governor John Connally.²⁸³ A jury in the District of Columbia convicted Watergate burglar G. Gordon Liddy. The court of appeals affirmed that conviction and the Supreme Court denied defendant's petition for a writ of certiorari which argued in part that publicity had made it impossible to select an impartial jury.²⁸⁴ A jury in

278. NEBRASKA JURY INSTRUCTIONS, No. 1.01 (1969). Regarding statements of counsel not supported by evidence, see *State v. Reinert*, 197 Neb. 379, 380, 248 N.W.2d 782 (1977).

279. Younger, *Fair Trial, Free Press and the Man in the Middle*, 56 A.B.A. J. 127, 128 (1970).

280. *Harris v. New York*, 401 U.S. 222, 223 (1971). But see *Bruton v. United States*, 391 U.S. 123, 129 (1968) (admission of a confession by petitioner's co-defendant, who did not take the stand and whose confession implicated petitioner, held to violate petitioner's right to confront the witnesses against him even though jury was instructed not to consider the confession as substantive evidence of petitioner's guilt); *Jackson v. Denno*, 378 U.S. 368, 382 n.10 (1964). See also *Oregon v. Hass*, 420 U.S. 714 (1975).

281. *Apodaca v. Oregon*, 406 U.S. 404, 413-14 (1972); *Johnson v. Louisiana*, 406 U.S. 356, 361-62 (1972).

282. *United States v. Mitchell*, No. 73-439 (S.D.N.Y. 1974).

283. *United States v. Connally*, No. 74-440 (D.D.C. Apr. 18, 1975).

284. *Liddy v. United States*, 420 U.S. 911 (1975).

the District of Columbia convicted former White House aide Dwight Chapin. The court of appeals affirmed, and the Supreme Court denied Mr. Chapin's petition for certiorari, which argued that pre-trial publicity had made the selection of a fair jury impossible.²⁸⁵ A court martial convicted Lieutenant William Calley for his role in the so-called "My-Lai Massacre." A federal district court reversed the conviction on a finding that publicity had made it impossible to obtain a fair jury panel. The United States Court of Appeals for the Fifth Circuit reversed *en banc* and found that Lieutenant Calley had received a fair trial.²⁸⁶

The effectiveness of jury instruction has not gone unquestioned. Mr. Justice Jackson, for example, has stated: "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction."²⁸⁷ The problem with such a statement is that it greatly understates the usefulness of instructions. There is evidence that jury instructions can be effective, particularly when used in combination with other protective techniques.

There is supportive empirical evidence, although the results of such studies are somewhat inconsistent and the tests are unavoidably flawed by inability to test real juries in real trials. Courts which have addressed the question generally support this conclusion. These cases and their principles cannot be used to sustain convictions and then be ignored in regard to the first amendment rights of the media. Experience in actual trial situations, with acquittals in highly publicized trials, tends to affirm the conclusion. In any event, it does not make sense to suddenly disregard this long relied upon alternative and instead infringe first amendment rights. Neither the time nor the circumstances are right for abandoning "our own longstanding perceptions about jury behavior."²⁸⁸

8. Control Over Courtroom Personnel and Officers of the Court

Another alternative to the closed court is judicial control over courtroom personnel and officers of the court. This alternative can be less restrictive but it can also be equally restrictive and, in the latter situation, an alternative, but an unacceptable one. In *Shep-*

285. *Chapin v. United States*, 515 F.2d 1274 (D.C. Cir.), *cert. denied*, 423 U.S. 1015 (1975).

286. *Calley v. Callaway*, 519 F.2d 184 (5th Cir. 1975) (*en banc*), *cert. denied sub nom. Calley v. Hoffman*, 425 U.S. 911 (1976).

287. *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring).

288. *Johnson v. Louisiana*, 406 U.S. 356, 362 (1972). *See also Lakeside v. Oregon*, 46 U.S.L.W. 4248, 4250 n.11 (U.S. Mar. 22, 1978).

pard v. Maxwell,²⁸⁹ the Supreme Court indicated that in some cases an exercise of control by the court over "the release of leads, information and gossip to the press"²⁹⁰ by employees and officers of the court may be allowed and be effective in protecting the defendant's right to a fair trial.

This "control" could be anything from educating those involved in regard to the problems that can be created by what they say, to judicial orders of silence. In the latter situation, of course, the *Nebraska Press Association* gag on the press has been replaced with a gag on someone else. Such action threatens not only the rights of the press, but also the first amendment rights of those gagged, adding another layer of constitutional problems to this alternative and making it one that the courts should turn to only most reluctantly and most carefully, if ever.

Even the judicial gag order could run all the way from one directed at the court's own employees, clerks, and secretaries, to one directed at the defendant and his attorney. Such an order directed against the defendant, in addition to not being responsive to any request the defendant might have made, presents serious constitutional problems regarding the defendant's own rights to free speech and to due process of law.²⁹¹

In an illustrative contemporary case in Hawaii, Mayor Frank Fasi of Honolulu is simultaneously involved in a campaign for governor and a trial for bribery. Mayor Fasi alleges that the bribery trial is "a political vendetta."²⁹² He has accused the incumbent governor, who narrowly defeated Mayor Fasi in the last gubernatorial primary, of using the bribery charge in a last ditch attempt to keep the governorship. To silence Mayor Fasi would strike at the heart of the first amendment.

289. 384 U.S. 333 (1966).

290. *Id.* at 359.

291. See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 564-65 n.8 (1976) ("We are not now confronted with such issues."); *id.* at 601 n.27 (Brennan, J., concurring in the judgment); *CBS, Inc. v. Young*, 522 F.2d 234, 240 (6th Cir. 1975) (trial court's order that all parties, their relatives, close friends and associates refrain from discussing the case with the media or the public held to be a prior restraint and unconstitutional). But compare *In re Oliver*, 452 F.2d 111 (7th Cir. 1971) (local rule barring extra-judicial comments by lawyers during pending cases held unconstitutional, but court indicated more narrowly drawn rule could be constitutional) with *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975), *cert. denied sub nom. Cunningham v. Chicago Council of Lawyers*, 427 U.S. 912 (1976).

292. *Wall St. J.*, October 11, 1977, at 1, col. 4.

Mayor Fasi has not been silenced. *The Wall Street Journal*²⁹³ reports that "just four days before jury selection began, Mr. Fasi bought 37 minutes of television time to put on a program called 'My Side of the Story.'" The prosecutor "declined to act on the judge's suggestion that the state seek to block the Fasi TV program" apparently because he agreed with the mayor that the latter's actions were protected by the first amendment. "I'm innocent until proven guilty," said Mayor Fasi. "I have a constitutional right to go before the public"²⁹⁴

What could the court do to someone like a Mayor Fasi, a candidate for a state's highest executive office, who is running against the man who controls the state's prosecutorial arm? His opponent, the incumbent governor, is prosecuting the mayor, alleging that the latter has accepted bribes. The mayor, who was running a very close race with the governor, counters that the charges are baseless and have been trumped up by the incumbent to destroy the mayor's campaign, so that the governor can maintain control of the state house. Is it constitutional to gag the mayor or even his attorney? If not, then, when the mayor buys large amounts of television time to protest his innocence and challenge the integrity of his opponent, is it constitutional to stop the incumbent from responding, directly or through the prosecutor?

It is arguable that the rights of the candidate for public office and of the public to know about their candidates shift the balance in this situation. But is not the problem much the same outside the electoral process? What about the businessman negotiating a deal in competition with the president or governor's close friend?

It could be argued that in each of those cases the defendant has not sought any restrictions and that even if the court has no power to gag or close in those situations, it can when the defendant requests that it do so. But what about the defendant candidate who wants these things kept out of the papers? He wants the hearing closed and the participants gagged. He knows who is going to obey the order and who is not. He knows how to leak information to the media and hide his own role in the leak and he wants his honest opponent silenced. What does the court do in the face of the leaks

293. *Id.*

294. *Id.* at 36, col. 3-4. See, e.g., *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 606 (1976) (Brennan, J., concurring in the judgment) ("even a brief delay in reporting . . . shortly before an election may have a decisive impact on the outcome of the democratic process"); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 163 (1969) (Harlan, J., concurring).

and the defendant's (and the media's) protestations of innocence regarding the leaks?

The point is that when courts get into the business of trying to control what is seen and heard, the lines become more and more difficult to draw. Even in a particular situation in which a closing order might seem necessary, the court must consider the consequences of opening the door to an ad hoc balancing of the free press and fair trial rights in all cases in which such an order is sought.²⁹⁵

An additional problem with gagging the participants in the trial involves enforcing such an order. Information will leak out and will be reported. Generally the only way to discover the source of the leak will be through the reporter, and the reporter may or may not be willing or able to reveal his sources. This puts the court in the situation of having to face multiple constitutional problems: those associated with the rights of the media, those associated with the gag of the participants, and those associated with requiring disclosure of reporters' sources.²⁹⁶

9. *Mistrials, New Trials, and Reversals*

If the use of the other alternatives, alone or in combination, proves unsuccessful, if it becomes apparent that a jury, impaneled free from unconstitutional prejudice subsequently becomes prejudiced prior to the close of the trial, the availability of a mistrial allows the trial judge to avoid infringement of either first or sixth amendment rights.²⁹⁷

Finally reversals and new trials, though hardly desirable, are always possible if, after careful scrutiny of the complete record of the proceedings and upon mature reflection, a court determines that trial by an impartial jury was denied the accused.²⁹⁸

295. See Barnett, *supra* note 1, at 559.

296. Regarding the latter problem, see *Branzburg v. Hayes*, 408 U.S. 665 (1972). See generally Schmidt & Volner, *Nebraska Press Association: An Open or Shut Decision?*, 29 STAN. L. REV. 529, 535 n.40 (1977) (experience of William Farr, then a reporter for the Los Angeles Herald Examiner, who refused to reveal a source regarding a story on the Charles Manson trial). See also note 342 and accompanying text *infra*.

297. *E.g.*, *State v. Allen*, 73 N.J. 132, —, 373 A.2d 377, 391 (1977) (Pashman, J., concurring); *Napoli v. Supreme Court*, 40 App. Div. 2d 159, 338 N.Y.S.2d 721 (1972). See also *United States v. Tittsworth*, 422 F. Supp. 587 (D. Neb. 1976) (discussed note 247 *supra*).

298. *E.g.*, *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 603 (1976) (Brennan, J., concurring in the judgment) ("Finally, if the trial court fails . . . to utilize these [less restrictive alternatives] effectively, there are the 'palliatives' of reversals on appeal and directions for a new trial.");

10. Other "Alternatives"

Two additional procedures have been mentioned which, while they may not be "less restrictive alternatives," are worthy of some mention. The first is the civil damage action against the press and the second is the contempt power of the courts.²⁹⁹

United States District Court Judge Fred M. Winner has suggested that

the publisher's judgment of what he wants to publish should be exposed to monetary risk if he is guilty of an error in judgment.

...

If a man's Sixth Amendment rights are violated, why is that not just as actionable as violations of his Fourth Amendment rights? . . .

Let a jury decide upon proper instructions whether a newspaper has violated a defendant's constitutional rights and whether that newspaper should pay damages . . .³⁰⁰

Some of the problems with that approach are demonstrated by *McNally v. Pulitzer Publishing Co.*³⁰¹ Among other things, McNally sued a reporter, his publisher and various prison officials for damages for violation of his right to a fair trial. "Assuming, without deciding, that a cause of action for damages [for violation of the fair trial right] against private parties acting under color of federal law may exist . . . [i]t is elementary that . . . the plaintiff must demonstrate"³⁰² that the right was deprived. In *McNally*, plaintiff's conviction had been upheld against his claim of violation of his right to a fair trial and the result of that earlier appeal was found to work an estoppel in this civil action.

Sheppard v. Maxwell, 384 U.S. 333, 363 (1966); United States v. Tittsworth, 422 F. Supp. 587 (D. Neb. 1976). See also, e.g., *Estes v. Texas*, 381 U.S. 532 (1965); *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Zediker v. State*, 114 Neb. 292, 301, 207 N.W. 168, 171 (1926) (reversed and remanded for a new trial "with instructions to the district court to grant application for a change of venue"); *Olsen v. State*, 114 Neb. 112, 116, 206 N.W. 1, 2 (1925) (reversed and remanded for a new trial "with directions to grant a change of venue").

299. Winner, *Free Press—Fair Trial: A Simplistic Approach*, LITIGATION, Summer 1976, at 5-6. See also *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 588 n.15 (1976) (Brennan, J., concurring in the judgment); *id.* at 594 n.20.

300. Winner, *supra* note 299, at 6. Judge Winner does recognize that alternatives such as "[c]hange of venue, full voir dire juror examination and juror sequestration will suffice in almost all cases." *Id.*

Violation of fourth amendment rights by federal officials was held actionable in a private damage action in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

301. 532 F.2d 69 (8th Cir. 1976).

302. *Id.* at 76.

The immediate problem with the analogy between the civil action for violation of fourth amendment rights and the violation of sixth amendment rights, as suggested by *McNally*, is that even if the analogy is valid, the fourth amendment right is a right against federal officials, not private parties. As a general rule, it would be difficult to find the media acting under color of law.³⁰³

An additional, and perhaps larger and ultimately more fatal problem with the civil damage action is, as *McNally* indicates, that the convicted defendant's proper remedy is appeal and, if his fair trial right was denied, reversal. If the defendant has been convicted and the conviction upheld on appeal then the fair trial right has not been denied. The remedy would only be available to those who had been acquitted or to those whose convictions were reversed. It should prove difficult for those acquitted to prove that their right to a fair trial was denied. This leaves the remedy available to those whose convictions have been reversed.³⁰⁴ Cases in which publicity is a basis for reversal are so extremely rare as to render this remedy virtually meaningless. In any event, in this situation the aggrieved has another remedy, one which he has already taken advantage of, that is, reversal. It is doubtful that a second remedy, civil damages, will accomplish enough to justify its creation in this area of first amendment rights.³⁰⁵

In *Nebraska Press Association*, the Supreme Court left open the question whether courts have the power to punish the media for

303. Any other kind of civil damage action "alternative" would have to be legislatively created. Any such statute clearly would pose constitutional problems of a nature which are outside the scope of this article.

304. The unconstitutional conviction cannot be allowed to stand while it is suggested as solace to the convicted that he sue those responsible to compensate for the loss of freedom. This is, after all, not at all similar to the unconstitutional search and seizure, another area in which the civil damage action against the offending party has been suggested. There the constitutional violation has aided the fact finding process, and the evidence unconstitutionally seized will actually assist in reaching a just and true result. The whole problem with unconstitutionally prejudicial publicity is that its effect on the trier of fact produces unjust, incorrect results.

305. Cf. *Martin v. Merola*, 522 F.2d 191, 194 (2d Cir. 1976) ("Until the state prosecutions have been concluded, it is simply impossible to make any reasoned evaluation of plaintiffs' claim that they have been deprived of the opportunity to secure a fair trial by reason of the defendants' actions.") In *Martin* the plaintiffs, under indictment on felony charges, filed a damage action alleging, *inter alia*, denial of their right to a fair trial by the prosecutors having announced to the press the arrest of plaintiffs and having asserted that they were linked directly to crime families.

contempt for publications which endanger the criminal defendant's sixth amendment right to a fair trial.³⁰⁶ It did, however, seem to recognize that the jurisdictional problems inherent in this "alternative" make it unlikely to be effective in the very types of cases where the sixth amendment right encounters real jeopardy—the trial of more than local interest.³⁰⁷ The jurisdictional and the practical difficulties of controlling "each newspaper, magazine, radio station and network, and each television station and network . . . [are] self evident."³⁰⁸

In any event, this is not the place for a complete discussion of the contempt power, other than to note that

[a]ny attempt to control the press by means of the contempt power will encounter serious first amendment objections. The courts have long held that utilization of the contempt power is justified only where the out-of-court speech or publication constitutes a clear and present danger to the administration of justice.³⁰⁹

The dangers created in this area are, by their very nature, sufficiently speculative to make this test extremely difficult to apply with any specificity.³¹⁰ In addition, it is perhaps worthy of note that not one of the attempts by various Supreme Court Justices to delineate less restrictive alternatives for the protection of the right to a fair trial has included contempt as an "alternative."

11. *Less Restrictive Alternatives: Conclusion*

The one situation in which these less restrictive alternatives might not protect a defendant's fair trial right is the case in which the publicity at the time of the crime is intense and nationwide, the publicity will follow the defendant anywhere, the publicity will not die down significantly, and in any event, would regenerate later if the trial were postponed. In light of the fact that trials like those of the Watergate defendants and Lieutenant Calley satisfied the constitutional fair trial requirements, this situation must

306. 427 U.S. at 557 n.5; *id.* at 594 n.20 (Brennan, J., concurring in the judgment).

307. *Id.* at 565-66. Can the court in North Platte, Nebraska, get jurisdiction over papers and television and radio stations and networks in other counties or even other states? Can such an order ever be enforced in the really newsworthy case?

308. Goodale, *supra* note 112, at 502.

309. Ranney, *supra* note 254, at 827-28 (footnote omitted). See also *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 921-36 (1950) (Frankfurter, J., opinion respecting denial of certiorari) (summary of British contempt cases).

310. See §§ IV-B to C *infra*.

be limited to the most extreme cases, that is, the assassination of the President or other famous person. It is possible in that type of case that there would not be any effective less restrictive alternative.³¹¹ However, in the case in which the publicity is that extreme it is quite unlikely, first, that it is the open judicial proceeding which would lead to violation of the defendant's right and, second, that the closed court alternative itself would be effective.³¹² In addition, it is in this type of case, the case of assassination of high political leaders, that the public's need to know is the greatest. The aftermath of the assassination of President Kennedy should serve as a lesson demonstrating what would happen if the courts tried to conduct secret proceedings in these kinds of cases.

A situation in which consideration of these less restrictive alternatives may be particularly appropriate is the case in which a closed court is requested in the pretrial stages. In this situation all of these alternatives will be available to the court after the pretrial proceeding has been conducted and the effect, if any, of the publicity can be assessed. The court can hold the preliminary hearing in open court and if that hearing turns out in fact to generate a good deal of publicity adverse to the defendant, *then* the court can change the venue, grant a continuance, or do what ever else is necessary to protect the rights of the accused.³¹³

Whether particularly appropriate or not, consideration and use of these less restrictive alternatives is mandated by *Nebraska Press Association*. Before a hearing or a trial in a criminal prosecution could ever be closed, those who would close the proceeding must demonstrate on the record that these alternative techniques will not suffice to protect the rights of the accused. The United States Supreme Court found nothing in *Nebraska Press Association* demonstrating that these less restrictive alternatives would not fully protect the rights of the defendant therein. The record in that case included "the premeditated mass murder," in a town of about 850, of six members of one family, ranging in ages from 66 to five, evidence of sexual assault on children and an elderly woman, both before and after death, a number of incriminating statements (if not outright confessions) by the accused, and "intense . . . pervasive" and "widespread news coverage," locally, regionally and nationally.³¹⁴

311. *But see* notes 281-86 and accompanying text *supra*.

312. *See* § III-B *infra*.

313. *See, e.g., State ex rel. Dayton Newspapers, Inc. v. Phillips*, 46 Ohio St. 2d 457, 461, 351 N.E.2d 127, 130-31 (1976).

314. 427 U.S. at 542, 562-63. *See id.* at 567-69, 573-75 (Brennan, J., concurring in the judgment); Oral Argument Transcript at 57-58, *Ne-*

The single real criticism of the less restrictive alternative analysis in this particular area of the law involves the results of empirical studies on the effectiveness of these alternatives. The results of the studies which have been done are to some extent inconsistent. Most seem to find that initial prejudice can be overcome by factors such as judicial instruction, the solemnity of the situation and the sense of responsibility thereby created, juror commitment on voir dire, and a continuance to allow time for the prejudice to dissipate.³¹⁵ However, some of the literature either discounts the cleansing abilities of these alternatives or expresses doubts about the reliability of the studies which indicate that the alternatives are effective.³¹⁶

Two points should be made in this regard. First, even those who argue against the effectiveness of many of the alternatives discussed must admit their effectiveness in the vast majority of criminal trials. In the vast majority of criminal cases the effectiveness of alternatives such as change of venue, voir dire, change of venire, continuance, and sequestration when the publicity comes after the empanelling of the jury cannot be doubted. Additionally, in many cases alternatives which may be less effective when used singly may become very effective when combined with others.

Second, the burden of proof is on those who argue that the rights of the media should be infringed because under the circumstances of the particular case, or even as a general proposition, the alternatives will not be effective. Criticism of the Court's opinion in *Nebraska Press Association* for not relying on empirical data perhaps misunderstands the point of the burden of proof. The lack of pre-

Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); Larson, *Free Press v. Fair Trial in Nebraska: A Position Paper*, 55 NEB. L. REV. 543, 545-47 (1976). See also Joint Appendix filed in *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976).

Judge Eric Younger has stated "that the factors present in the *Simants* case [*Nebraska Press Ass'n*] make as good a case for [a restrictive] order as is ever likely to exist, with the possible exceptions of Presidential assassinations." Younger, *supra* note 40, at 16.

315. See generally H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* (1966); Simon, *supra* note 241, at 528; Schmidt, *supra* note 241, at 443-52.

The Supreme Court's opinion in *Nebraska Press Association v. Stuart* made no mention of the empirical studies discussed above. Nevertheless, the opinion was consistent with the bulk of the findings of those studies in coming down strongly on the side of a free press. Experiments to date indicate that for the most part juries are able and willing to put aside extraneous information and base their decisions on the evidence.

Id. at 443-52 (footnotes omitted).

316. *E.g.*, Schmidt, *supra* note 241, at 443-52 (footnotes omitted).

sentation of such data is not the fault of the court so much as the litigant with the burden. If the data is not presented convincingly, then a ruling against the party with the burden is demanded. These alternatives are accepted as alternatives; they have a place in our jurisprudence, and will maintain that place until those who would infringe first amendment rights instead are able to demonstrate that they can no longer be considered effective.

Granted, one might appreciate discussion by the highest court of the land of relevant studies in a case of such major constitutional proportions, whether brought up by counsel or not. If legislative facts are to be judicially noticed, some "legislative history" would be helpful.³¹⁷ In *Nebraska Press Association*, Chief Justice Burger stated: "Sequestration of jurors is, of course, always available. Although that measure insulates jurors only after they are sworn, it also enhances the likelihood of dissipating the impact of pretrial publicity and emphasizes the elements of the jurors' oaths."³¹⁸ Certainly one might wish he had explained how he knew, or whether his judgment was intuitive. But in the end, as Zachariah Chafee, Jr., has stated: "What a majority of the Supreme Court votes, however, does have considerable bearing on truth in constitutional law."³¹⁹

One of the great lessons of adjudication of fundamental constitutional rights is that this lack of conclusiveness cannot be enough to justify falling back on the infringement of a known and certain right. The argument that results of studies in this area are inconclusive simply adds another layer of speculation to the question of whether the defendant's rights will be infringed; the same kind of speculation condemned in *Nebraska Press Association*.³²⁰

317. See, e.g., *Brown v. Board of Education*, 347 U.S. 483, 494-95 n.11 (1954).

318. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 564 (1976).

319. Chafee, Book Review, 62 HARV. L. REV. 891, 895 (1949), reprinted in *SELECTED ESSAYS ON CONSTITUTIONAL LAW* 618, 621 (Ass'n of Am. Law Schools ed. 1963) (A. MEIKELJOHN, *FREE SPEECH* (1948)).

The justification came before the policy rather than vice versa. The policy was not first decided upon and the alternatives then offered as justification. It is clear that prior to the prejudicial publicity problem in criminal cases, most, if not all of these alternatives had been used to counteract potential juror prejudice in other situations. The natural, and the only justifiable, next step was to apply these same alternatives in the prejudicial publicity cases.

320. 427 U.S. at 563; *id.* at 599, 604 (Brennan, J., concurring in the judgment). See also, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (Court refused to allow states, in promotion of speculative rights of the fetus, to infringe known and certain fundamental right of the woman). Entirely consistent with this is *Branzburg v. Hayes*, 408 U.S. 665, 690-91 (1972), in which the Court found that the effect of the state action on the

B. The Burden is on Those Who Would Close the Court to Prove That Open Proceedings Would Result in Denial of Defendant's Rights

The second element of the burden of proof on those who would close the court in a criminal case is to establish a causal relationship between the exercise of the right (the open court) and the substantive evil the government has the right to regulate (the unfair trial). Those who would close the court first must establish that without such restrictions the defendant will be deprived of his right to an impartial jury.³²¹ *Nebraska Press Association* recognized "the problems inherent in . . . demonstrating, in advance of trial that . . . a fair trial will be denied."³²² This burden is so heavy in part because of the number of effective alternative ways of securing a fair trial.³²³ Additionally, in advance of the proceeding the extent of any publicity and its impact on the eventual jurors (particularly in light of the less restrictive alternatives) is "of necessity speculative, dealing . . . with factors unknown and unknowable."³²⁴

In *Nebraska Press Association*, the Supreme Court held that the trial court was correct in finding "intense and pervasive pretrial publicity,"³²⁵ but constitutionally unable to make the further finding that such publicity would fatally affect the upcoming trial because of what the Supreme Court characterized as unknowable factors. "A free press cannot be shackled by speculations as to inflammatory publicity."³²⁶ Speculation of a number of forms is inherent in this situation.

The court considering the closing order must first speculate as to whether there will be any prejudicial publicity emanating from the judicial proceeding if it is left open. Most judicial proceedings in criminal cases attract no attention or such little attention as to be insignificant.³²⁷ Even in the case which seems more "news-

rights of the press was speculative and, therefore, the question was resolved against the press.

321. *E.g.*, *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 562, 569 (1976); *Nebraska Press Ass'n v. Stuart*, 423 U.S. 1327, 1333 (1975) (Blackmun, J., Circuit Justice). *See also* *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 571 (1976) (Powell, J., concurring).

322. 427 U.S. at 569.

323. *See* § IV-A of text *supra*.

324. 427 U.S. at 563 (emphasis added). *Accord, id.* at 599 ("the harm to a fair trial . . . must inherently remain speculative"); *id.* at 604 (Brennan, J., concurring in the judgment).

325. *Id.* at 563.

326. *United States v. General Motors Corp.*, 352 F. Supp. 1071, 1074 (E.D. Mich. 1973).

327. *See, e.g.*, note 329 *infra*.

worthy," the court still must speculate as to the form of the publicity, its context, its intensity, its frequency, its longevity, and in short, all of those things which go to make up its impact.³²⁸

If the proceeding for which closing is considered is pretrial, the speculative nature of the decision is geometrically increased. In addition to other factors the court must speculate whether the defendant will eventually go to trial, in the face of the fact that most criminal matters do not go to trial.³²⁹ And, the court must speculate whether, if the defendant does go to trial, the publicity about which it has already speculated will make it impossible to impanel a fair and impartial jury.³³⁰ To some extent the court is called

328. Mr. Justice Brennan, concurring in the judgment in *Nebraska Press Ass'n*, discussed this speculation by stating that the court

will be unable to predict the manner in which the potentially prejudicial information would be published, the frequency with which it would be repeated or the emphasis it would be given, the context in which or purpose for which it would be reported, the scope of the audience that would be exposed to the information, or the impact, evaluated in terms of current standards for assessing juror impartiality, the information would have on that audience.

427 U.S. at 599-600 (Brennan, J., concurring in the judgment) (footnotes omitted). See also *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975) ("It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable.").

329. *E.g.*, *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 600 (1976) (Brennan, J., concurring in the judgment) ("[W]e can take judicial notice of the fact that . . . few criminal cases proceed to trial, and the judge would thus have to predict what the likelihood was that a jury would even have to be impaneled.").

Even further, the court must speculate whether the trial will be a jury trial. Restraint would not be appropriate if the case were tried to the court. See *L. TRIBE*, *supra* note 16, § 12-11, at 625.

In 1964 Attorney General Nicholas deB. Katzenbach said that twelve and a half percent of the cases involving Federal defendants went to trial and only eight percent were tried by juries. So we deal, at the outside, with eight percent of the Federal cases.

Judge Skelly Wright, of the D.C. Court of Appeals, has stated in discussing the issues of free press and free trial that there is no problem at all in the great majority of the hundreds of thousands of criminal cases which are brought each year in this country because less than one percent of the cases are ever given a line of notice in the press and of that one percent seventy-five to ninety percent plead guilty. So, as Judge Wright has pointed out, what is involved is a small fraction of the less than one percent of the criminal cases brought.

A. COX, M. HOWE, & J.R. WIGGINS, *CIVIL RIGHTS, THE CONSTITUTION, AND THE COURTS*, 56, 70-71 (1967).

330. The court must speculate about the scope of the audience to be reached

upon to speculate that if the defendant goes to trial the facts being kept from potential jurors, by keeping them from the press by closing the proceeding, will not be admitted eventually at the trial.³³¹ The final element of speculation is that the court must speculate that the closed proceeding will be effective; that the press will not, on its own, at another time and place, uncover and then publish the same information which is being kept from them by closing the proceedings in the first place.³³²

It is based on this speculation and presumption, that courts are asked to order the public, including the press, excluded from pre-trial or trial proceedings. Not only is "[s]uch a speculative and presumptive judgment . . . an impossible one to make in most cases,"³³³ but it is also an unconstitutional judgment. Clearly this speculation cannot justify the infringement of first amendment rights.³³⁴

by the publicity, and the impact on that audience. It must also speculate about the effectiveness of the less restrictive alternatives, all of which will be available after the pretrial proceeding. See, e.g., notes 313-28 and accompanying text *supra*.

331. See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 600 (1976) (Brennan, J., concurring in the judgment). Mr. Justice Brennan footnotes that "all of the material that was suppressed in this case was eventually admitted at Simants' trial." *Id.* at 600 n.25.

332. See § IV-C *infra*.

333. *State ex rel. Dayton Newspapers, Inc. v. Phillips*, 46 Ohio St. 2d 457, 469, 351 N.E.2d 127, 135 (1976).

334. A major point of *Nebraska Press Ass'n* was that in that case there was no "conflict" between the first and the sixth (both through the fourteenth) amendments. There is a right to a free press, and the infringement of that right was clear; there is a right to an impartial judicial proceeding, but there was no infringement (clear or otherwise) of that right, or, at least, there was nothing in that record which demonstrated such an infringement. There was only speculation about publication compounded by speculation about the effect of whatever publication might occur. See also *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975); *Roe v. Wade*, 410 U.S. 113 (1973); note 16 *supra*.

The speculative nature of the decisions required in these situations is underscored by the fact that the gag order which was the subject of the appeal in *Nebraska Press Ass'n* had been passed on by three Nebraska Courts, each of which reached a different conclusion. See *State v. Simants*, 194 Neb. 783, 236 N.W.2d 794 (1975), *rev'd on other grounds sub nom. Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976). Mr. Justice Blackman, in ruling on a stay application reached a fourth conclusion in *Nebraska Press Ass'n v. Stuart*, 423 U.S. 1327 (1975) (Blackmun, J., Circuit Justice), and the United States Supreme Court reached a fifth when it unanimously declared each of the previous four unconstitutional in *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976).

In those criminal cases in which one could argue that some in-

Those who would close the court seem to argue that their burden of proof is met through the following assumption: either one who is exposed to publicity regarding the case could never be an impartial juror or it will be impossible to separate those who will not be able to render an impartial verdict from those who will. Not only are these assumptions factually unwarranted, they are constitutionally prohibited. Constitutional fair trial standards do not demand jurors unexposed to publicity concerning the trial.

It is not required, however, that the jurors be totally ignorant of the facts and issues involved. . . . To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard.³³⁵

In Nebraska, assumptions disqualifying jurors who have been impressed by publicity regarding the case are, if anything, even more specifically prohibited. Nebraska has a statute of long standing which provides in relevant part:

The following shall be good causes for challenge to any person called as a juror or alternate juror, on the trial of any indictment: . . . (2) that he has formed or expressed an opinion as to the guilt or innocence of the accused; *Provided, if a juror or alternate juror shall state that he has formed or expressed an opinion as to the guilt or innocence of the accused, the court shall thereupon proceed to examine, on oath, such juror or alternate juror as to the ground of such opinion; and if it shall appear to have been founded upon*

fringement of the rights of the defendant is not speculative, e.g., Lee Harvey Oswald and the assassination of President Kennedy, Jack Ruby and the killing of Lee Harvey Oswald, the closed proceeding, inevitably, will be of no help to that defendant. The publicity will be there in any event. Although the closed court in civil proceedings is outside the scope of this article, it is clear that the speculative nature of the problem in the criminal cases may not necessarily carry over. For example, in civil actions in which it is necessary to protect a trade secret, courts have allowed the receipt of certain *portions* of the evidence *in camera*. The damage to a trade secret in these cases is not so speculative. "[I]t also would be folly to commence a suit to protect a thing that will be lost by that suit." *Curtis, Inc. v. District Court*, 186 Colo. 226, 231, 526 P.2d 1335, 1337 (1974). Similarly, there may be little speculation involved in regard to certain very limited situations in criminal cases. For example, *in camera* testimony to prevent the revelation of the identity of an undercover agent. (This does not mean that restrictions would always be justified in this situation; only that damage to a legitimate governmental interest may be less speculative.)

335. *Irvin v. Dowd*, 366 U.S. 717, 722-23 (1961). See also, e.g., *Murphy v. Florida*, 421 U.S. 794, 799-800 (1975); *Lutwak v. United States*, 344 U.S. 604, 619 (1953); *Holt v. United States*, 218 U.S. 245, 248 (1910); *Reynolds v. United States*, 98 U.S. 145 (1878).

*reading newspaper statements, communications, comments or reports; or upon rumor or hearsay, and not upon conversations with witnesses of the transactions or reading reports of their testimony or hearing them testify, and the juror or alternate juror shall say on oath that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and the evidence, the court, if satisfied that such juror or alternate juror is impartial and will render such verdict, may, in its discretion, admit such juror or alternate juror as competent to serve in such case . . .*³³⁶

This statute has been interpreted in a line of cases going back almost 100 years to mean that a potential juror is not automatically disqualified by exposure to newspaper publicity about the crime being tried. Even his opinions as to guilt or innocence from reading or hearing about the case do not automatically disqualify him.³³⁷

In *Fisher v. State*,³³⁸ for example, the defendant was convicted of killing her son by whipping him to death with a ruler and a stick. The case was publicized extensively in the North Platte area before trial. One newspaper quoted the county attorney as saying the coroner's jury found the boy's death "hastened by malnutrition" and the result of a "most inhuman beating administered by his mother."³³⁹ Yet the defendant failed to gain reversal:

The claim of error is predicated on an assumption that the jurors read the matters published and were influenced, prejudiced, and disqualified thereby. This assignment is wholly unsupported. Opportunity for prejudice or disqualification is not sufficient to raise a presumption that they exist.³⁴⁰

C. The Burden is on Those Who Would Close the Court to Prove that The Closing Will Protect Defendant's Rights

The third part of the burden of proof on those who would close the proceeding is the burden of establishing that doing so will effectively secure the desired end, that is, trial by an impartial jury.³⁴¹

336. NEB. REV. STAT. § 29-2006 (Reissue 1975) (emphasis partially added). See also *id.* § 25-1636.

337. *E.g.*, *Fugate v. State*, 169 Neb. 420, 99 N.W.2d 868 (1959); *Sundahl v. State*, 154 Neb. 550, 48 N.W.2d 689 (1951); *Kitts v. State*, 153 Neb. 784, 46 N.W.2d 158 (1951); *Ringer v. State*, 114 Neb. 404, 410-11, 207 N.W. 928, 930-31 (1926); *Rottman v. State*, 63 Neb. 648, 650, 88 N.W. 857 (1902); *Basye v. State*, 45 Neb. 261, 277, 63 N.W. 811, 816 (1895); *Bohanan v. State*, 18 Neb. 57, 24 N.W. 390 (1885); *Curry v. State*, 5 Neb. 412 (1877). See also *State v. Bautista*, 193 Neb. 476, 227 N.W.2d 835 (1975).

338. 154 Neb. 166, 47 N.W.2d 349 (1951).

339. *Id.* at 168, 47 N.W.2d at 352 (quoting North Platte daily paper).

340. *Id.* at 169, 47 N.W.2d at 352. See NEB. REV. STAT. § 29-2006 (Reissue 1975).

341. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 565, 569 (1976); *Nebraska*

Not only is closing the pretrial proceeding not the least restrictive alternative and not only is it extremely difficult, if not impossible, to show that defendant's rights will be denied if the proceeding is not closed, but there is serious question as to whether closing the proceeding is even an effective alternative. It is difficult to prove that closing the proceeding will keep facts from the potential jurors. In some cases it will be difficult to demonstrate that keeping facts from the media will not work against the accused.

Closing a hearing would not restrict the press, in its various component parts, from, for example, gathering news in other ways and then publishing that news, publishing whatever information by chance or by design leaks out however accurate or garbled the leaked information may be,³⁴² or even indulging in speculation or publicizing gossip or rumors—gossip spawned in part perhaps by the secrecy surrounding the closed proceeding, rumors which “could well be more damaging than reasonably accurate news accounts.”³⁴³

The question of whether an order closing the court would serve its intended purpose is a very real one.³⁴⁴ In any event, the burden of demonstrating the efficiency of closing the court is on those who would close it and, once again, speculation in that regard will not be enough. Like the other parts of the burden, this part, if it can be met at all, must be met factually on the record.³⁴⁵

Press Ass'n v. Stuart, 423 U.S. 1327, 1333 (1975) (Blackmun, J., Circuit Justice); Cantwell v. Connecticut, 310 U.S. 296, 304 (1940). Mr. Justice Powell concurring in Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 571 (1976), states that it must be shown that the threat to the right of the accused must be “posed by the actual publicity to be restrained [A] restraint may not issue unless it also is shown that previous publicity or publicity from unrestrained sources will not render the restraint inefficacious.” See also Oliver v. Postel, 30 N.Y.2d 171, 282 N.E.2d 306, 331 N.Y.S.2d 407 (1972).

342. To prevent this sort of thing, courts would be likely to more frequently consider gagging the participants in the trial or hearing, the constitutionality and efficiency of which is in doubt, see notes 290-95 and accompanying text *supra*, and to enforce those gag orders ordering revelation of sources when such an order appears to have been violated, opening yet a third constitutional can of worms. Note 296 *supra*.

343. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 567 (1976). See generally *id.* at 599-600 n.22 (Brennan, J., concurring in the judgment). “Secrecy, where events of public importance are involved, always suggests suppression, and suppression in its own turn, generates rumors; and rumors, which are planted in the soil of suspicion eventually send forth the ugly plant of perverted truth.” *In re Mack*, 386 Pa. 251, 277, 126 A.2d 679, 691-92 (1956) (Musmanno, J., dissenting).

344. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 569 (1976).

345. See note 234 and accompanying text *supra*. See also notes 325-34 and accompanying text *supra*.

As stated above, but worth restating, the Supreme Court of the United States has held that these same burdens of proof were not met in *Nebraska Press Association*, a case in which the record included: A town of about 850; "the premediated mass murder" of six members of one family, ranging in age from 66 to five; evidence of sexual assault on children and an elderly woman, both before and after death; a number of incriminating statements (if not outright confessions) by the accused; and "widespread" intense and pervasive local, regional, and national news coverage, including a National Broadcasting Company helicopter which arrived in North Platte, Nebraska, from Denver, Colorado, before the bodies had been removed from their house.³⁴⁶

V. CONCLUSION

For over 200 years the general rule has been that the courtrooms of the United States have been open to the public and the media. During this period trials generally have been fair and public, in spite of the fact that many of the cases have been notorious, or have involved bizarre facts.

For all of those years, the Constitution and common law of the United States have guaranteed the openness of judicial proceedings, federal and state. For over 200 years, means other than closing pretrial proceedings in criminal cases have been available, and have been utilized, to permit both the rights to freedom of the press and to an impartial jury to flourish. Neither right has been used to diminish the power and the majesty of the other. There is no reason to now suggest that secret court proceedings, with all of the severe social and political implications which they raise, are suddenly necessary to assure fair trials.

346. Note 314 and accompanying text *supra*.