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CONSTITUTIONAL LAW: GAG ME WITH A PRIOR RESTRAINT: A CHILLING EFFECT THAT SENDS SHIVERS DOWN THE SPINES OF ATTORNEYS AND THE MEDIA

“Sunlight is said to be the best of disinfectant, the electric light the most efficient policeman.”¹

This statement aptly describes the press and its role in the legal system. The media, as part of its duty to inform the public, reports and comments on judicial proceedings. But the media does more than this; as an “electric light,” it guards against the miscarriage of justice by subjecting the legal system to extensive public scrutiny and criticism.²

The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech. . . .”³ The media’s right to report on the judiciary exists at the core of First Amendment values. If the media lacked access to the courts, secret judicial actions would increase the public’s ignorance and distrust of the legal system.⁴ With uninhibited reporting, criticism, and debate, public knowledge and comprehension of the justice system will increase. In addition, by subjecting the system to the cleansing effects of exposure and public accountability, the quality of the judiciary will improve.⁵

The Sixth Amendment provides, “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury”⁶ The First and Sixth Amendments may conflict with each other when the media asserts its right to report and comment, because the publicity about a criminal defendant has the potential to prejudice a jury.⁷

In *Radio and Television News Association v. United States District*

1. *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 587 (1976) (quoting L. BRANDEIS, *OTHER PEOPLE’S MONEY* 62 (1933)).

2. *Id.* at 587.

3. U.S. CONST. amend. I.

4. *Nebraska Press Ass’n*, 427 U.S. at 587.

5. *Id.*

6. U.S. CONST. amend. VI.

7. See, e.g., *Nebraska Press Ass’n*, 427 U.S. 539; *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Estes v. Texas*, 381 U.S. 532 (1965); *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Irwin v. Dowd*, 366 U.S. 717 (1961). See also Note, *Gag Orders: Enhancing Fair Trials or Impeding a Free Press?*, 26 ARIZ. L. REV. 933 (1984); Note, *John Z. DeLorean v. the Media: The Right to a Fair Trial Without a Prior Restraint upon the Media*, 15 GOLDEN GATE U.L. REV. 81 (1985);

*Court*⁸ (“*Radio and TV*”), the Ninth Circuit dealt with this conflict. In this case, the Ninth Circuit upheld an order restraining trial counsel for a criminal defendant from making extrajudicial statements to the news media.⁹ The court concluded that the media’s interest in interviewing trial participants was outside the scope of protection of the First Amendment.¹⁰

I. STATEMENT OF THE CASE

The dispute in *Radio and TV* stems from the espionage trial of Richard Miller, a former FBI agent. Miller allegedly passed classified government documents to two Soviet emigrés, Svetlana and Nikolay Ogorodnikov, who also faced espionage charges. The judicial proceedings against Miller received extensive press coverage. In order to assure a fair trial, the district court warned trial counsel against engaging in pretrial publicity.¹¹ However, shortly before the Ogorodnikovs’ trial, the *Los Angeles Times* published an article which quoted several statements made by Miller’s defense attorneys.¹²

Note, *Finding the Path Between an Attorney’s First Amendment Right to Free Speech and a Client’s Sixth Amendment Right to a Fair Trial*, 22 WILLIAMETTE L. REV. 187 (1985).

8. 781 F.2d 1443 (9th Cir.), *cert. denied*, — U.S. —, 106 S. Ct. 2276 (1986).

9. *Id.* at 1444.

10. *Id.* at 1447.

11. *Levine v. United States Dist. Court*, 764 F.2d 590, 591-92 (9th Cir.), *reh’g denied*, 775 F.2d 1054 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 2276 (1986) (“*Levine II*”).

12. Overend, *Lawyers Contend FBI Exaggerated Evidence in Spy Case*, *Los Angeles Times*, Mar. 3, 1985, § 1, at 3, col. 1. The following are excerpts from the article:

Defense lawyers in the Richard W. Miller spy case have accused the FBI of initially exaggerating the evidence against Miller and two Russian emigrés charged with conspiring to pass secret government documents to the Soviet Union. . . .

They said in interviews last week that the three accused spies should never have been prosecuted for espionage because the government has been unable to establish that Miller actually passed any documents . . . or caused any harm to the security interests of the United States. . . .

“I don’t think the case should ever have been brought. The initial characterization by the government that this was a major espionage case with untold damage was an incorrect assessment.”

“They acted hastily in filing the espionage charges. . . . To a large extent, the FBI misled the U.S. Attorney’s office about the stength of the case until it was too late. . . .”

“Those two people were indicted with the hope that the charges would be substantiated, and they haven’t been able to do it. . . . The only reason Miller is still charged with passing documents is that he admitted it after five days of questioning, and he’d already told them he’d say anything just to end the questioning.”

“If he admitted passing pumpkin papers from the Alger Hiss case, I think he’d be charged with it. . . .”

“We’ve got two dummies here, no question about that, . . . [b]ut these people should have never been taken seriously as spies. It’s unrealistic to talk about the Miller case in the same breath as other espionage cases that have come along in the last few years”

In response to the article in the *Times*, the United States Attorney filed a motion for a restraining order regarding extrajudicial statements, which the district court granted.¹³ The order prohibited attorneys involved in the Miller case from "making any public statements about any aspect of this case that bears upon the merits to be resolved by the jury."¹⁴ The court based its decision on the "existence of a serious and imminent threat to the administration of justice."¹⁵

Miller and his attorney, Joel Levine, petitioned to the Ninth Circuit to dissolve the restraining order. The court granted the petition and found the order overbroad.¹⁶ It directed the district court to define the scope of the restraining order to include only statements which would "pose a serious threat to the administration of justice."¹⁷ The district court then amended the order which prohibited trial counsel from making extrajudicial statements relating to certain subjects.¹⁸

Id.

13. *Levine*, 764 F.2d at 593.

14. *Id.*

15. *Id.* at 597. The district court in oral findings stated:

[I]n view of the comments contained in the Los Angeles Times article, it is plain that the serious and imminent threat to a fair trial outweighs any First Amendment rights at stake. To claim that the need to argue a client's case in detail in the press on the eve of trial is mandated by an ethical or legal responsibility belittles the government's, the defendants', and most importantly in this instance, the public's right to a fair trial before an unbiased jury

Neither the press nor the public has the right to hear counsel argue their case prior to this court and the impaneled jury hearing the evidence, when doing so seriously impedes the fair and effective administration of justice However, the extent of such publicity in its prejudicial potential is of necessity speculative Nonetheless, based upon the details contained within the . . . article, which this court is in no position to assess the veracity of and the motivations behind the article, this court finds it quite reasonable to expect that such publicity has been and will become even more pervasive, creating in effect a lobbying effort by counsel on behalf of their clients. The public has a right to expect a fairer trial than that.

Id.

16. *Id.* at 599.

17. *Id.* The appellate court noted that it would be appropriate to proscribe statements related to the following six subjects:

- (1) The character, credibility, or reputation of a party;
- (2) The identity of a witness or the expected testimony of a party of a witness;
- (3) The contents of any pretrial confession, admission, or statement given by defendant of that person's refusal or failure to make a statement;
- (4) The identity or nature of physical evidence expected to be presented or the absence of such physical evidence;
- (5) The strengths or weaknesses of the case of either party; and
- (6) Any other information the lawyer knows or reasonably should know is likely to be inadmissible as evidence and would create a substantial risk of prejudice if disclosed.

Id.

18. *Id.* The district court adopted the six categories suggested by the Ninth Circuit. See *supra* note 17.

While Miller and Levine seemed satisfied with this new order, the Radio and Television News Association¹⁹ appealed to vacate the amended order.²⁰ The Association argued that the order denied media access to the trial participants, constituting a prior restraint on the media's ability to gather news.²¹ The Ninth Circuit held that such restraints did not infringe the freedom of the press, as guaranteed by the First Amendment.²²

II. TRIAL PARTICIPANTS' FIRST AMENDMENT RIGHTS

A. *Levine Court*

1. Majority Opinion

The *Levine* court viewed the district court's order as a prior restraint.²³ Prior restraints receive strict scrutiny from the judiciary, because of the peculiar dangers involved.²⁴ One danger arises from the difficulty in knowing what a person will say in advance. "Without such knowledge, to forbid such individuals from engaging in speech is to run the risk that protected speech along with unprotected will either be chilled, or possibly punished."²⁵ Thus, the United States Supreme Court on numerous occasions has stated that any "system of prior restraint bears a heavy presumption against its validity."²⁶

But the Ninth Circuit found scrutiny, in light of the media's First Amendment rights, unnecessary. The gag order did not deny the media access to the proceedings or bar the press from releasing information, so the court concluded that *Levine* lacked standing to assert the constitutional rights of non-party media organizations.²⁷

19. The Radio and Television News Association is an umbrella organization representing broadcasting journalists. *Radio and Television News Ass'n*, 781 F.2d at 1444.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Levine*, 764 F.2d at 594. The concept of prior restraint deals with official restrictions imposed upon speech or other forms of expression in advance of actual publications. See T. Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648 (1955); M. NIMMER, NIMMER ON FREEDOM OF SPEECH § 4.03 (1984).

24. *Levine*, 764 F.2d at 595. See M. NIMMER, *supra* note 23 at § 4.04; L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-32 (1978).

25. M. NIMMER, *supra* note 23 at § 4.04.

26. See *Nebraska Press Ass'n*, 427 U.S. at 556-59; *New York Times v. United States* (Pentagon Papers Case), 403 U.S. 713, 717 (1971); *Bantam Books v. Sullivan*, 372 U.S. 58, 70 (1968). See also A. BICKEL, THE MORALITY OF CONSENT 61 (1975).

27. *Levine*, 764 F.2d at 594. The court distinguished *Levine* from *Columbia Broadcasting Sys. v. United States Dist. Court*, 729 F.2d 1174 (9th Cir. 1984), and *Associated Press v. United States Dist. Court*, 705 F.2d 1143 (9th Cir. 1983), where restraining orders prohibited the media from attending criminal proceedings or reporting on them. *Levine*, 764 F.2d at 594.

However, the Ninth Circuit then analyzed the district court's order in terms of the attorney's own First Amendment right to free speech. It examined the validity of the order by measuring it against a judicially created three-part test.²⁸ To uphold the order, the government must establish²⁹ that (1) the activity restrained poses either a clear and present danger or serious and imminent threat to a protected competing interest,³⁰ (2) the order is narrowly drawn,³¹ and (3) less restrictive alternatives are not available.³² As to the first prong, it found that intense prejudicial publicity during and prior to the trial could sway even the most impartial jury, and that the level of publicity would increase as the trial approached.³³

However, the Ninth Circuit found that the restraining order failed to meet the second prong; the order was not narrowly drawn.³⁴ The court stated that "many statements that bear upon the merits to be resolved by the jury present no danger to the administration of justice."³⁵ The court then ordered the district judge to devise an order specifying

See generally Sack, *Principle and Nebraska Press Association v. Stuart*, 29 STAN. L. REV. 411, 427-28 (1977) (noting the "fundamental difference" between a restraining order against the press and one against the trial participants).

28. *Levine*, 764 F.2d at 594. *See infra* notes 30-32 and accompanying text.

29. The government had the burden of proof to show no violation of the First Amendment, rather than the party challenging the order. This differs from most situations, because of the presumption against prior restraints. *Levine*, 764 F.2d at 595.

30. *Id.* *See* *United States v. Sherman*, 581 F.2d 1358, 1361 (9th Cir. 1978) (Ninth Circuit stated that the government must show that a post trial order restraining everyone, including news media, to stay away from jurors, protected the jurors from a clear and present danger or a serious and imminent threat. The court concluded that no clear and present danger to the jurors existed, with respect to protecting them from harassment); *Wood v. Georgia*, 370 U.S. 175, 183-85 (1962) (The Court concluded that a trial court's punishment of a sheriff for making an out of court statement to the local press abridged his right of free speech. The Court stated that out of court publications were governed by a clear and present danger standard, and found that the sheriff's statements did not pose such a threat to the administration of justice).

31. *Levine*, 764 F.2d at 595. *See* *Carroll v. President and Comm'rs. of Princess Anne*, 393 U.S. 175, 183-84 (1968) (an order restraining members of political parties from holding rallies for ten months must be narrowly tailored to the needs of the case; the Court also noted that it would require the participation of both sides of the case to effectuate this goal).

32. *Levine*, 764 F.2d at 595. *See Nebraska Press Ass'n*, 427 U.S. at 563 (the Court listed the alternatives to imposing a prior restraint: change of venue, postponement, jury voir dire, sequestration of jurors). Subsequent cases have followed the *Nebraska Press Ass'n* test: *Columbia Broadcasting Sys.*, 729 F.2d 1174; *Sherman*, 581 F.2d 1358; *Central South Carolina Chapter of Professional Journalists v. Martin*, 431 F. Supp 1182 (D.S.C.), *aff'd*, 556 F.2d 706 (4th Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978).

33. *Levine*, 764 F.2d at 598.

34. *Id.* at 599.

35. *Id.* (quoting *In re Halkin*, 598 F.2d 176, 196-97 (D.C. Cir. 1979)).

the proscribed types of statements."³⁶

The Ninth Circuit also examined the order in view of the third factor. It agreed with the district court that no less restrictive alternatives existed, since voir dire,³⁷ change of venue,³⁸ postponement,³⁹ or sequestration,⁴⁰ would be ineffective or counterproductive.⁴¹

2. Concurring Opinion

Judge Sneed wrote a concurring opinion to express a slightly different view about gag orders. He stated that an attorney's respect for the profession and the integrity of the judicial process should eliminate any need for gag orders.⁴² Judge Sneed then suggested that the Sixth Amendment does not guarantee society a fair trial for the accused—instead the public merely expects a fair trial. Thus, a balance must be struck between the press' First Amendment rights, the defendant's Sixth Amendment rights, and the public's expectation that the trial will be fair and before an impartial jury.⁴³ He concluded the courts must undertake this balancing reluctantly; only when attorneys use the press to obtain a partial jury, should the courts respond to such action.⁴⁴

3. Dissenting Opinion

Judge Nelson dissented from the application and result of the three-part test in *Levine*. She wrote that the trial record did not demonstrate a "clear and present danger or serious and imminent threat to the empaneling of an impartial jury."⁴⁵ She further stated that the district court should focus more on the impact of pretrial publicity on potential jurors before issuing a gag order. Judge Nelson relied on *Columbia Broadcasting Systems v. United States District Court*⁴⁶ as authority for this contention. The court in *Columbia Broadcasting Systems* stated:

36. See *supra* note 17.

37. *Levine*, 764 F.2d at 600. The court concluded that voir dire would not decrease the prejudice surrounding the trial, and eliminate the damage already done to the *Miller* trial. *Id.*

38. *Id.* The court concluded that a change of venue would only work if trial publicity was focused on a specific geographic location. *Id.*

39. *Id.* A postponement would only be appropriate if the publicity was temporary. The media would continue to cover the *Miller* case, despite any attempts to postpone—the unusual facts would continue to attract media coverage and sensationalism. *Id.*

40. *Id.* Sequestration would have negative effects on the jurors, a result well-documented. *Id.* See also J. VAN DYKE, JURY SELECTION PROCEDURES 181-82. (1977).

41. *Levine*, 764 F.2d at 600-01.

42. *Id.* at 601.

43. *Id.* at 603.

44. *Id.*

45. *Id.*

46. 729 F.2d 1174.

Only if it is 'clear . . . that further publicity, unchecked, would so distort the views of potential jurors that 12 c[an]not be found who would, under proper instructions, fulfill their sworn duty to render a just verdict exclusively on the evidence presented in open court' can an appellate court even consider upholding a prior restraint.⁴⁷

Based on this, the *Levine* dissent found the possibility of prejudice in the *Miller* trial remote. Judge Nelson suggested that with a population of twelve million in the Central District of California, selecting an unbiased panel of jurors could occur.⁴⁸ She then concluded that a gag order may be permissible in certain cases. But she also emphasized that a court should seriously consider whether the benefits to the Sixth Amendment would outweigh the costs to the First Amendment before resorting to a restraining order on speech.⁴⁹

B. History and Analysis of Restraining Orders on Trial Participants

Despite the United States Supreme Court's "heavy presumption"⁵⁰ against prior restraints, a majority of courts have upheld restraining orders prohibiting trial participants from discussing their cases.⁵¹ In upholding prior restraints, courts have provided that the accused receive a trial with an impartial jury, free of outside influences.⁵² Given the far reaching effects of modern communication, and the difficulty of erasing prejudicial publicity from the jurors' minds, courts must take strong action to assure a fair trial.⁵³ The United States Supreme Court used this rationale in *Sheppard v. Maxwell*.⁵⁴ In this case, Sam Sheppard was accused and convicted of murdering his wife. Judge Bell's opinion for the state supreme court best describes the trial court atmosphere:

Murder and mystery, society, sex and suspense were com-

47. *Id.* at 1178.

48. *Levine*, 764 F.2d at 603. See *Nebraska Press Ass'n*, 427 U.S. at 562 n.7 (The Court suggested that a pool of 80,000 prospective jurors might be sufficient).

49. *Levine*, 764 F.2d at 604.

50. See *supra* note 26 and accompanying text.

51. *Levine*, 764 F.2d at 596. See, e.g., *In re Russell*, 726 F.2d 1007 (4th Cir.), *cert. denied*, 469 U.S. 837 (1984); *In re San Juan Star*, 662 F.2d 108 (1st Cir. 1981); *United States v. Tijerina*, 412 F.2d 661 (10th Cir.), *cert. denied*, 396 U.S. 990 (1969); *Central South Carolina Chapter of Professional Journalists v. Martin*, 431 F. Supp. 118 (D.S.C. 1977); *KPNX Broadcasting v. Superior Court*, 139 Ariz. 246, 678 P.2d 431 (1984); *Houston Chronicle Publishing v. Hardy*, 678 S.W. 2d 495 (Tex. 1984), *cert. denied*, 470 U.S. 1052 (1985); *State ex rel. Angel v. Woodahl*, 171 Mont. 13, 555 P.2d 501 (1976).

52. *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1962).

53. *Id.*

54. 384 U.S. 333 (1962).

bined in this case in such a manner as to intrigue and captivate the public fancy. . . . Throughout the preindictment investigation, the subsequent legal skirmishes and the nine-week trial, circulation-conscious editors catered to the insatiable interest of the American public. . . . In this atmosphere of a 'Roman Holiday,' Sam Sheppard stood trial for his life.⁵⁵

The Supreme Court dealt with the issue of whether or not defendant Sheppard received a fair trial, since the trial judge had failed to protect Sheppard from the prejudicial publicity surrounding his case.⁵⁶ The Court concluded that "where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial," the trial court should continue the case, transfer it, or see that neither "the accused, witnesses, court staff, nor enforcement officers coming under jurisdiction of the Court should be permitted to frustrate its function."⁵⁷ The Supreme Court further stated that the carnival atmosphere of the trial could have been avoided since the courtroom and courtroom premises are subject to the control of the court.⁵⁸

Another case, *United States v. Tijerina*,⁵⁹ also followed this line of reasoning. The court stated that the judiciary must take steps to protect judicial proceedings from outside influences.⁶⁰ No one, including trial participants, can frustrate this function.⁶¹ The court further noted that orders against extrajudicial statements preserve the integrity of the trial, "the most fundamental of all freedoms."⁶²

Courts have invalidated restraining orders against trial participants in only two instances. In *Chase v. Robson*,⁶³ the appellate court held the restraining order constitutionally impermissible.⁶⁴ In this case, Frederick Chase and others were charged with depredation of selective service files.⁶⁵ The district court judge issued a restraining order based on defendants' contact with the press, and defense counsel's association with an attorney who had a reputation for "trying his cases in the press."⁶⁶ The Seventh Circuit found this basis had "insufficient support for the

55. *Id.* at 362.

56. *Id.* at 335.

57. *Id.* at 363.

58. *Id.* at 358.

59. 412 F.2d at 661 (10th Cir. 1969).

60. *Id.* at 667 (citing *Sheppard*, 384 U.S. at 363).

61. *Tijerina*, 412 F.2d at 667.

62. *Id.*

63. 435 F.2d 1059 (7th Cir. 1970).

64. *Id.* at 1061-62.

65. *Id.* at 1060.

66. *Id.* at 1061.

proposition that the defendant's future First Amendment utterance . . . would interfere with the fair administration of trial."⁶⁷ The appellate court noted that defendant's press releases were seven months old when the district court issued the order.⁶⁸ The court further declared the defense counsel's association with other attorneys irrelevant.⁶⁹ Using the standard from *Nebraska Press Association*, the court concluded that a serious and imminent threat to the administration of justice did not exist in the *Chase* case.⁷⁰

The second instance where a court invalidated a restraining order occurred in *In Re Halkin*.⁷¹ Plaintiffs alleged government agencies conducted unlawful surveillance of them because plaintiffs opposed the Vietnam War.⁷² The district court issued an order which prohibited the disclosure of information obtained through plaintiffs' discovery.⁷³ The information consisted of government documents which the plaintiffs wanted to release to the public. The defendant argued that public disclosure would be "prejudicial to the defendants' right to adjudication of the issues in this civil action in an uncolored and unbiased climate," and the district court agreed.⁷⁴ The appellate court reversed the order, stating that the district court had made no finding that disclosure would preclude a fair trial, and had failed to assess the potential harm posed by dissemination.⁷⁵

III. MEDIA'S FIRST AMENDMENT RIGHTS

A. Radio and Television News Association *Court*

1. Majority Opinion

The Ninth Circuit in *Radio and TV* reviewed the amended order which resulted from the *Levine* decision. The amended gag order reflected the Ninth Circuit's previous recommendations, which prohibited counsel in the *Miller* trial from making extrajudicial statements relating to several subjects.⁷⁶

The Ninth Circuit declared that under the First Amendment, the

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. 598 F.2d 176 (D.C. Cir. 1979).

72. *Id.* at 180.

73. *Id.* at 182.

74. *Id.* at 181.

75. *Id.* at 196.

76. *Radio and Television News Ass'n*, 781 F.2d at 1444. See *supra* note 17 and accompanying text.

media had the right of access or right to gather information with respect to criminal trials.⁷⁷ However, this right has been limited to the ability of newspeople to attend the trials and report on their observations.⁷⁸ The media's right to information about a trial is founded on, and not superior to, the public's right to information.⁷⁹ Moreover, neither the First Amendment nor Supreme Court decisions guarantee the media a right to interview counsel in a criminal trial.⁸⁰ Therefore, the appellate court held that the media's desire to access certain sources of information was not sufficient to invoke the First Amendment's right of freedom of the press.⁸¹ As a result, the court did not see the need to scrutinize the amended order against the three factors from *Levine*.⁸² The court stated that it had to determine only whether or not the restrictions imposed were reasonable, and served a legitimate purpose.⁸³ On the basis of the district court record, the Ninth Circuit concluded that the restrictions were reasonable, because a potential impairment to the fairness of the trial could occur. Ensuring a fair trial is certainly a legitimate purpose.

2. Dissent

Again dissenting, Judge Nelson agreed that the Radio and Television News Association had failed to allege a First Amendment violation. But she noted that the gag order should not have been granted in the first place due to its impingement on trial participants' rights.⁸⁴ Judge Nelson also questioned whether the district court's "wholesale adoption of the six categories"⁸⁵ complied with the Ninth Circuit's order in *Levine* to

77. *Radio and Television News Ass'n*, 781 F.2d at 1446. See *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980) (public has presumptive right of access to criminal trials); *KPNX Broadcasting*, 139 Ariz. 246, 678 P.2d. 431 (1984) (order prohibiting media sketches of criminal proceeding violated the media's constitutional right of access).

78. *Radio and Television News Ass'n*, 781 F.2d at 1446.

79. *Id.* See *Nixon v. Warner Communications*, 435 U.S. 589, 609 (1978) (the press cannot obtain copies of the White House tapes—to which the public has never had access); *Pell v. Procunier*, 417 U.S. 817, 829-35 (1975) (government does not have an affirmative duty to allow face-to-face interviews with prison inmates—a source of information not available to the public generally). See generally Comment, *News-Source Privilege in Libel Cases: A Critical Analysis*, 57 WASH. L. REV. 349, 354-57, 360-62 (1982).

80. *Radio and Television News Ass'n*, 781 F.2d at 1447.

81. *Id.*

82. *Id.* See *supra* notes 30-32 and accompanying text.

83. *Radio and Television News Ass'n*, 781 F.2d at 1447. See *Pell*, 417 U.S. at 830 (The Court noted that the regulation prohibiting the media from interviewing prison inmates was not intended to conceal prison conditions).

84. *Radio and Television News Ass'n*, 781 F.2d at 1448. See *supra* notes 45-49 and accompanying text.

85. *Radio and Television News Ass'n*, 781 F.2d at 1448. See *supra* note 17 and accompanying text.

“fashion an order specifying the proscribed types of statements” based on the determination of which types of extrajudicial statements threatened the empaneling of an impartial jury.⁸⁶ She stated that the district court should have set forth a brief rationale for each of the categories the court adopted, since a constitutionally sensitive area of prior restraint and First Amendment surrounded the gag order.⁸⁷

B. History and Analysis of the Media's First Amendment Right of Access/Right to Gather Information

Courts have long recognized the media's right of access to the courtroom. In *Richmond Newspapers v. Virginia*,⁸⁸ the United States Supreme Court first acknowledged the media's right of access or right to gather information under the First Amendment. In *Richmond Newspapers*, the trial judge closed a criminal proceeding to the public.⁸⁹ The Supreme Court reversed this judgment because the trial court failed to consider alternative solutions to avoid prejudicial publicity, such as sequestration of jurors.⁹⁰ The Court also stated that media presence at criminal trials enhanced the integrity of the judicial system.⁹¹ However, the Court limited the right of access to sitting, watching, listening, and reporting on criminal trials.⁹² Such a limitation grants the media access to the same information that a private individual could obtain.

In *Nixon v. Warner Communications*,⁹³ the Supreme Court concluded that “[t]he First Amendment generally grants the press no right to information about a trial superior to that of the general public.”⁹⁴ In *Pell v. Procunier*,⁹⁵ the Court concluded that a regulation restricting interviews with specific prison inmates did not deny press access to information available to the general public.⁹⁶ In addition, the Court in *Branzburg v. Hayes*⁹⁷ stated that the “first amendment does not grant the press a constitutional right of special access to information not available

86. *Radio and Television News Ass'n*, 781 F.2d at 1448 (quoting *Levine*, 764 F.2d at 599).

87. *Id.* at 1448.

88. 448 U.S. 555 (1980).

89. *Id.* at 561.

90. *Id.* at 580-81.

91. *Id.* at 569-73.

92. *Id.* at 576. See *supra* note 79 and accompanying text.

93. 435 U.S. 589 (1978).

94. *Id.* at 609.

95. 417 U.S. 817 (1975).

96. *Pell*, 416 U.S. at 835. See *Saxbe v. Washington Post*, 417 U.S. 843 (1974) (Court reached the same conclusion with respect to federal prison inmates).

97. 408 U.S. 665 (1972).

to the public generally."⁹⁸

However, in recognizing the media's right of access to the courtroom, courts have repeatedly invalidated prior restraints on the media's reporting of a criminal proceeding.⁹⁹ Moreover, courts have invalidated orders restraining media access to criminal proceedings.¹⁰⁰

In 1976, the United States Supreme Court decided *Nebraska Press Association v. Stuart*.¹⁰¹ In *Nebraska Press Association*, police discovered six members of a family murdered, and subsequently arrested Charles Simants. Extensive press coverage surrounded the case, and the trial judge issued a restraining order prohibiting the media from broadcasting or publishing accounts of defendant's confession made to the police.¹⁰² The United States Supreme Court held that the order violated the freedom of the press.¹⁰³ The Court reviewed the order under a strict scrutiny standard, and created a three-part test. All three prongs of this test must be met before a trial judge can issue a restraining order. The judge must find that:

1. The extent of publicity would prejudice the accused's fair trial right;
2. Traditional devices such as a change of venue, continuance, voir dire, would not ensure a fair trial; and
3. The prior restraint of publication would be effective and accomplish its purpose.¹⁰⁴

Chief Justice Burger's opinion for the Court couched the first prong of this test in Learned Hand's clear and present danger terms.¹⁰⁵ The clear and present danger standard had never before applied to prior restraints.¹⁰⁶ This standard of review differs from the *Sheppard* case and its reasonable likelihood standard which was used in the context of re-

98. *Id.* at 684. See also *Associated Press*, 705 F.2d at 1145 (acknowledged media's constitutional right of access).

99. See *Columbia Broadcasting Sys.*, 729 F.2d 1174; *Nebraska Press Ass'n*, 427 U.S. 539.

100. See *Associated Press*, 705 F.2d 1143; *Richmond Newspapers*, 448 U.S. 555 (1980).

101. 427 U.S. 539 (1976). See also Schmidt, *Nebraska Press Association: An Expansion of Freedom and Contraction of Theory*, 29 STAN. L. REV. 431 (1977), describing *Nebraska Press Ass'n* as the "most important decision on the variety of problems that go under the name of fair trial/fair press controversy." Schmidt, *supra* at 431.

102. *Nebraska Press Ass'n*, 427 U.S. at 542.

103. *Id.* at 570.

104. *Id.* at 563.

105. Note, *Rights in Collision: Deciding Cases in the Free Press/Fair Trial Debate*, 49 CINCINNATI L. REV. 440, 451 (1980). "[T]he gravity of the 'evil' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." *Nebraska Press Ass'n*, 427 U.S. at 562 (citing *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950)).

106. Note, *Rights in Collision: Deciding Cases in the Fair Press/Fair Trial Debate*, *supra* note 105 at 452.

straints on trial participants; the *Nebraska Press Association* clear and present danger test should not apply when the trial court issues an order restraining the trial participants from certain conduct.¹⁰⁷ This test becomes applicable only when a prior restraint exists on the press' right to speak or publish.¹⁰⁸ Case law supports this interpretation of *Nebraska Press Association*. For example, in *Central South Carolina Chapter of Professional Journalists v. Martin*,¹⁰⁹ the district court interpreted *Nebraska Press Association* to hold that

proscriptions on trial participants' prejudicial statements in a criminal trial are not to be considered as prior restraints on non-trial participants' First Amendment rights to publish and comment upon judicial proceedings and that proscriptions on trial participants' are to be judged by the *Sheppard* reasonableness standard as it regulates the conduct of the participants in the trial.¹¹⁰

The *Levine* court incorrectly used the *Nebraska Press Association* test in evaluating gag orders on trial participants.¹¹¹ Some other courts have used a "serious and imminent threat"¹¹² standard, but in determining the necessity of a gag order on trial participants, no clear agreement exists as to which standard applies.¹¹³ Some courts have applied a "reasonable likelihood of interference"¹¹⁴ test, which is more consistent with *Sheppard*.

With the application of varying standards, the courts appear to fail to recognize the basic difference between gag orders against trial participants and those against the media. Orders restricting media access to the

107. *Central South Carolina Chapter*, 431 F. Supp. at 1188.

108. *Id.*

109. 431 F. Supp. 1182 (D.S.C. 1977).

110. *Central South Carolina Chapter*, 431 F. Supp. at 1188.

111. See *supra* notes 28-41 and accompanying text.

112. See *United States v. Marciano Garcia*, 456 F. Supp. 1354, 1357-58 (D.P.R. 1978). Other tests have been set forth. *Central South Carolina Chapter*, 431 F. Supp. at 1188-89 (the court applied a "substantial likelihood standard"); *State v. Schmid*, 109 Ariz. 349, 509 P.2d 619 (1973) ("likely to interfere standard"); *Hamilton v. Municipal Court*, 270 Cal. App. 2d 797, 76 Cal. Rptr. 168 (1969), *cert. denied*, 396 U.S. 985 (1969) ("high probability of interference" with fair trial); *State ex rel. Miami Herald v. McIntosh*, 340 So.2d 904 (Fla. 1977) (at the court's discretion for good cause).

113. Note, *Restraints on Defense Publicity in Criminal Jury Cases*, 45 UTAH L. REV. 45, 46 n.4 (1984).

114. See, e.g., *United States v. Mandel*, 408 F. Supp. 673, 679 (D. Md. 1975); *United States v. Anderson*, 356 F. Supp. 1311, 1313 (D.N.J. 1973); *Rosato v. Superior Court*, 51 Cal. App. 3d 190, 124 Cal. Rptr. 427 (1975), *cert. denied*, 427 U.S. 912 (1976); *Younger v. Smith*, 30 Cal. App. 3d 138, 106 Cal. Rptr. 242 (1973); *People v. Watson*, 15 Cal. App. 3d 28, 92 Cal. Rptr. 860, 868-69 (1971), *cert. denied*, 404 U.S. 850 (1971); *State v. Carter*, 141 N.J. Super. 405, 363 A.2d 366, 369 (1976); *People v. Dupree*, 88 Misc. 2d 780, 388 N.Y.S.2d 203 (1976).

courtroom interfere directly with the freedom of the press, a right guaranteed by the Constitution.¹¹⁵ Journalists are prevented from disseminating information to the public, and the public is deprived of particular news.¹¹⁶ By contrast, a gag order against people involved in a government proceedings cannot pass First Amendment muster, unless a compelling reason exists in abridging the right to speak.¹¹⁷ These gag orders affect different groups, yet courts merge these orders together.

C. Radio and TV's Evaluation of Miller's Gag Order

The court in *Radio and TV* upheld the amended gag order based on "whether the restrictions imposed are reasonable and whether the interests [of the government] override the very limited incidental effects of the [order] on First Amendment rights."¹¹⁸ Also, the restrictions imposed must serve a legitimate purpose.¹¹⁹ The court evaluated the *Radio and TV* restraining order against a rational basis criterion different from either the reasonable likelihood or clear and present danger standard of review. It also determined that since an infringement on the trial participants did not occur in *Levine*,¹²⁰ the *Radio and TV* court appeared to apply a lesser standard than the *Nebraska Press Association* or *Sheppard* test.

On closer reflection, the amended gag order does not even seem to meet the more lenient, rational basis standard established by the *Radio and TV* court for the analysis of the media's right. The order on its face appears reasonable, because the possibility of prejudice and bias does exist. But the chance of prejudicial publicity always pervades a case, especially a criminal trial with distinctive fact situations. If courts applied the standard of *Radio and TV* in similar situations, then courts would be bound to uphold every restraining order, simply because a chance of prejudicial publicity exists. The *Radio and TV* court should have also focused on the actual impact of pretrial publicity on the *Miller* case, as opposed to centering on the chances of prejudicial publicity on the *Miller* case. As noted in Judge Nelson's dissenting opinion in *Levine*, the impact of publicity should have been the court's focus.¹²¹ In *Radio and TV*, the press had already published an account of the *Miller* trial; therefore, the court should have analyzed this situation based on the potential im-

115. Sack, *supra* note 27 at 427-28.

116. *Id.*

117. *Id.*

118. *Radio and Television News Ass'n*, 781 F.2d at 1447.

119. *Id.*

120. *Id.*

121. *Levine*, 764 F.2d at 603.

pact the newspaper account had on the case. If the court considered the impact of pretrial publicity and weighed it against the reasonableness of the order, the decision in *Radio and TV* would have been different. The court would have had to examine the impact of pretrial publicity in prejudicing an entire community of potential *Miller* jurors. As noted in Judge Nelson's dissenting opinion in *Levine*, widespread prejudice in a large metropolitan area appears remote.¹²² With a population of twelve million people in the Central District of California¹²³ alone, the chance of finding twelve jurors who have not read the newspaper article in question seems high. According to Judge Nelson in *Levine*, media coverage would still pervade the *Miller* trial, even with a gag order restricting trial participants' comments.¹²⁴ She further cautioned that "the court should consider seriously whether the benefits to the First Amendment will outweigh the costs to the Sixth Amendment before resorting to a prior restraint on speech."¹²⁵ As a result, the impact of prejudicial publicity is low, and consequently, fails this prong of the test.

Radio and TV's second prong of its test was whether the government's interest overrides the effect of the order on First Amendment rights. The government does have an interest in assuring a fair trial for *Miller*. However, the gag order substantially affects the First Amendment rights of the attorneys involved in this proceeding. As noted in Judge Nelson's dissenting opinion, this gag order in effect denies a person the opportunity to defend himself publicly through a spokesperson.¹²⁶ An analogy best illustrates this "chilling" effect of a gag order: "if an accused wants to charge that the indictment against him was politically motivated, the freedom to make such a charge against the state is surely protected by the First Amendment."¹²⁷ Thus, to deprive a defendant of a chance to criticize the government through his attorney severely restricts his First Amendment rights.¹²⁸ Thus, the government's interest in a fair trial does not outweigh the defendant's First Amendment's right.

The third requirement set forth in *Radio and TV* concerned whether or not the order served a legitimate purpose. This requirement does not seem to pose a problem. Based on both the *Levine* and *Radio and TV* opinions and records, no illegitimate purposes existed. Neither the dis-

122. *Id.*

123. *Id.*

124. *Id.* at 604.

125. *Id.*

126. *Levine II*, 775 F.2d at 1055 (Norris, J., dissenting).

127. *Id.*

128. *Id.*

strict court nor the Ninth Circuit appear to hide the *Miller* proceedings from the public.

However, even though the gag order met the third requirement, arguably the first and second prongs were not met. As a result, the court should not have upheld the order in *Radio and TV*. Since the prejudicial impact of pretrial publicity was remote, the jury pool of the Central District virtually assured the trial judge that twelve unbiased jurors existed. Moreover, the infringement of the defendant's First Amendment right to speak against the government clearly outweighed the government's interest in conducting a proceeding without the defense attorney's comments on the case. Such additional factors further demonstrate that the gag order should not have been upheld.

III. CONCLUSION

Courts have used different standards in determining the legitimacy of gag orders on trial participants or the media. In *Levine*, the district court scrutinized the gag order against trial participants under the *Nebraska Press Association* clear and present danger standard. Instead, the order should have been measured against the *Sheppard* reasonableness standard. But even with an analysis under *Sheppard*, the result may be the same: a "reasonable likelihood that prejudicial news prior to trial will prevent a fair trial"¹²⁹ did exist. However, the court should have also taken Judge Nelson's dissent into consideration; the court should consider the possible impact of prejudicial news on potential jurors. If either the district court or the Ninth Circuit in *Levine* weighed in this factor, the gag order would not have been imposed.

In *Radio and TV*, the Ninth Circuit applied a test different from that in *Nebraska Press Association* or *Sheppard*. But the court's analysis failed to recognize that the amended gag order really did not satisfy two of the three prongs of their own test. Moreover, the fact that the prejudicial impact on potential jurors was virtually nonexistent, and that there was a possible impingement on the defendant's First Amendment rights further strengthen the argument posed in the dissenting opinion of *Levine* and *Radio and TV*. As stated in the dissenting opinion, the gag order should not have been imposed on the trial participants of the *Miller* proceeding.¹³⁰

The *Levine* and *Radio and TV* cases leave the judiciary with a questionable precedent. Courts may now apply the *Nebraska Press Associa-*

129. See *supra* note 57 and accompanying text.

130. *Radio and Television News Ass'n* 781 F.2d at 1448.

tion test to gag orders against trial participants. The application of such a strict standard will "chill" the speech of parties to a suit and their counsel. But even under a *Sheppard* reasonableness analysis, some gag orders on trial participants may still pass muster, and may also "chill" the trial participants' speech. If courts factored the actual impact of pre-trial publicity on possible jurors into its analysis, then not all gag orders would be upheld. The media's coverage of a criminal proceeding does not always bias the population.

The judiciary has the duty and authority to ensure that defendants receive a fair trial. Courts need to maintain the impartiality of the proceedings. Gag orders are one way of controlling the courtroom. However, the implication of gag orders can lead to First Amendment concerns of both the trial participants and the media. Courts need to look at the long-range consequences of a gag order, and the actual impact on a potential jury. If courts continue to validate prior restraints in similiar situations, attorneys will be prevented from voicing comments and criticism about the proceedings. The accused faces not only the vast resources and prestige of the government, but the media's power to disseminate information about the trial. As a result, attorneys need to speak out to lessen the damage to their client's current and future image.¹³¹ As noted by Judge Norris' dissent in *Levine II*, "the imperative duty of an attorney is to protect the interests of his client out of court as well as in court."¹³²

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131. *Levine II*, 775 F.2d at 1055.

132. *Id.* (citing A. STANSBURY, REPORT OF THE TRIAL OF JAMES H. PECK 455 (1833)). This was a statement made by President Buchanan at the impeachment trial of a judge who jailed an attorney because he criticized that judge. *Id.*

