



3-1-1990

Billionaire Boys' Club: Billionaires by Crime?

Lisa Karen Garner

Follow this and additional works at: <https://digitalcommons.lmu.edu/elr>



Part of the [Law Commons](#)

Recommended Citation

Lisa Karen Garner, *Billionaire Boys' Club: Billionaires by Crime?*, 10 Loy. L.A. Ent. L. Rev. 573 (1989).
Available at: <https://digitalcommons.lmu.edu/elr/vol10/iss2/5>

This Notes and Comments is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Entertainment Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

BILLIONAIRE BOYS' CLUB: BILLIONAIRES BY CRIME?

I disapprove of what you say, but I will defend to the death
your right to say it.

-Voltaire

I. INTRODUCTION

When high stakes crimes are committed, television and movie opportunists are often the ones to "cash-in" by cinematically exploiting the unfortunate situation for an eager public. The perpetrator is defenseless against these Hollywood looters; unless he can enjoin their actions. However uncomfortable we may feel by the showing of these movies, a prior restraint in the fair trial context should never be allowed since it essentially cuts off the press and the public from their first amendment guarantees. In addition, alternatives to prior restraint effectively guard the defendant's valuable right to an impartial jury trial.

*Hunt v. National Broadcasting Co.*¹ ("*Hunt*") raises the issue of whether prior restraints on freedom of the press are ever appropriate. In *Hunt*, the National Broadcasting Company ("NBC") wanted to broadcast a made-for-television movie based on the bizarre events involving the charismatic leader of the Billionaire Boys Club, Joe Hunt, who was already convicted of killing one man at the time of the broadcast. Joe Hunt wanted to thwart the airing of the movie because he felt that broadcasting it would prejudice the jury in his trial for the killing of a second man, thus denying him his constitutional right to a fair trial. The district court denied Hunt's request for both a temporary restraining order and a preliminary injunction.² The Ninth Circuit affirmed the district court's decision, and NBC aired the program as scheduled.³

This note examines the Ninth Circuit Court of Appeals and the United States Supreme Court decisions involving prior restraints in light of *Hunt*, and recommends that prior restraints in the fair trial context should be declared per se unconstitutional.

II. CASE FACTS

Joe Hunt sought to enjoin NBC and I.T.C. Productions ("*ITC*")

1. 872 F.2d 289 (9th Cir. 1989).

2. *Id.* at 290.

3. *Id.*

from televising the docudrama *Billionaire Boys Club* on November 8 and 9, 1987.⁴ The television movie depicts Hunt, the club's founder and leader, plotting and participating in the murders of Ronald Levin and Hedayat Eslaminia,⁵ both for financial gain.⁶ At the time of Hunt's action for injunctive relief in October 1987, he had already been convicted of the murder of Levin, and was awaiting trial for the Eslaminia murder.⁷ Hunt argued that airing the docudrama would affect both his pending Eslaminia murder trial and any new trial for Levin's murder, if Hunt's conviction was overturned on appeal.⁸ The NBC docudrama portrayed Hunt's motive for murdering both these men as being for profit, and illustrated how Hunt's megalomaniacal personality and behavior led to the conclusion that he committed these murders.⁹

The district court denied Hunt's application for a temporary restraining order and preliminary injunction against both NBC and the producer of the docudrama, ITC.¹⁰ Although the movie had already been aired once, the Ninth Circuit heard the case because the movie could be rebroadcast.¹¹

A. *The Sordid Details*

Hunt's objection to the broadcast of the television movie needs to be viewed against the background of the criminal case. BBC Consolidated, Inc.,¹² known by its members as the Billionaire Boys Club ("BBC"), was comprised of well-educated young men from affluent families in the Los Angeles area who revered the club's leader and founder Joe Hunt.¹³

Hunt attended the Harvard School in the 1970s, a prestigious boys' school in Studio City, California.¹⁴ Hunt claimed that he had graduated

4. *Id.*

5. Eslaminia was a former member of the Shah of Iran's cabinet. McGarry, *Trial by TV*, CAL. LAW., May 1988, at 31. McGarry was one of the attorneys for Joe Hunt. *Id.*

6. *Hunt*, 872 F.2d at 291.

7. *Id.* at 290. Hunt was convicted of Levin's murder in Los Angeles, California. *Id.* Hunt is awaiting trial for Eslaminia's murder in San Mateo County, California and is acting as his own attorney. *Murderer Becomes Lawyer in 2nd Trial*, Sacramento Bee, Dec. 28, 1989, at B5.

8. *Hunt*, 872 F.2d at 291.

9. *Id.*

10. *Id.* at 290.

11. *Id.* at 291. NBC acknowledged that the movie could be repeated, and in fact, it was in July 1989. L.A. Times, July 29, 1989, § 5, at 1, col. 4.

12. The name was taken from the initials of the Bombay Bicycle Club, a Chicago bar frequented by Joe Hunt. *High-Life 'Club' Leads Rich Boys Down a Dark Path*, L.A. Times, Nov. 2, 1986, § 2, at 1, col. 1.

13. *Id.*

14. *Id.* at 3.

from the University of Southern California and had become a successful trader in the Chicago commodities market.¹⁵ In reality, Hunt did not graduate from the University of Southern California, botched most of his investments, and was expelled from the Chicago Mercantile Exchange.¹⁶ When he returned to Los Angeles, he met up with his old high school friends, including twins Tom and Dave May (of the May Co.) and Dean Karny, all of whom would become BBC members and would later testify against their former leader.¹⁷ Hunt presented to his friends his visionary plan for a new kind of company—"an organization that would combine business and pleasure, run by young men who shared ideas, profits and even living quarters."¹⁸

The resulting business organization, BBC Consolidated, operated out of chic West Hollywood offices.¹⁹ The BBC empire included subsidiaries that were involved in a myriad of business ventures with items such as milling machines, imported cars, trading funds and even a fire retardant product.²⁰ The BBC members were not salaried employees but participants in a joint venture.²¹ Hunt convinced them that by subordinating themselves and their interests in BBC Consolidated in favor of him and the corporation, they would all become financially successful.²² Over time, thirty young men joined the BBC, all taken in by Hunt's rhetoric and charisma.²³

The business organization and its members were guided by what Hunt termed "paradox philosophy."²⁴ Hunt defined paradox philosophy as a system of situational ethics in which good and bad were relative terms, interchangeable depending on the circumstances.²⁵ One member said that he became so warped by Hunt and his use of this philosophy that he "started being less obligated to follow rules and doing more what was acceptable under the circumstances."²⁶

The BBC members lived well, but their investments were not as

15. *Id.*

16. *Id.*

17. L.A. Times, Nov. 2, 1986, § 2, at 3. In those days Hunt, the son of a San Fernando Valley small businessman, attended Harvard School on a scholarship and used his original name, Joseph Henry Gamsky. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. L.A. Times, Mar. 2, 1987, § 2, at 3.

22. *Id.*

23. L.A. Times, Nov. 2, 1986, § 2, at 3.

24. L.A. Times, Mar. 2, 1987, § 2, at 3.

25. *Id.*

26. *Id.*

profitable as hoped. As a result, the BBC used money from new investors to pay off the old ones, a procedure known as the Ponzi scheme.²⁷ By early 1984, the BBC had lost \$900,000, much of it money from the members' parents.²⁸ By June of 1984, the BBC was running out of money.²⁹

At that crucial point, Ron Levin, a forty-two year old journalist and self-admitted con artist, entered the picture.³⁰ Levin agreed to put five million dollars in a brokerage house account and to let Hunt, a self-proclaimed genius at commodities, trade it; they would split the profit.³¹ Levin, however, was running his own scheme. Keeping Hunt in the dark, Levin persuaded the brokerage company that he was preparing a documentary about commodities trading, and that while none of the orders would actually be executed, the financial advisor he was bringing in should not be told so he would make real decisions.³² Hunt surprisingly parlayed the five million into thirteen million, but when he asked for his share—four million—Levin told Hunt that it had all been just a game.³³ Not surprisingly, Hunt was furious.³⁴

Shortly thereafter, Hunt learned that Levin was planning to leave for New York. Hunt decided to use this opportunity to kill Levin, but not before forcing him, at gunpoint, to sign certain papers, including a check for a large sum of money.³⁵ Hunt prepared a detailed list of the procedure he and his bodyguard Jim Pittman would use at Levin's house.³⁶

The information about the planning of Levin's murder was provided by Dean Karny, a BBC ringleader who was given immunity for his testimony and was placed in the California Witness Protection Program.³⁷ At Hunt's preliminary hearing, Karny testified that on June 7, 1984, Hunt came into his bedroom at the deluxe Wilshire Boulevard condo-

27. L.A. Times, Nov. 2, 1986, § 2, at 3.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. L.A. Times, Nov. 2, 1986, § 2, at 3.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* The lists on seven pages of yellow legal paper in Hunt's handwriting were headed AT LEVIN'S TO DO and then listed items including: "close blinds," "scan for tape recorder," "tape mouth," "put gloves on," "handcuff," "explain situation," "kill dog." L.A. Times, Feb. 3, 1987, § 2, at 1, col. 1. These lists, along with the testimony of Dean Karny, were the key pieces of evidence used to convict Joe Hunt. See *infra* note 49 and accompanying text.

37. L.A. Times, Nov. 2, 1986, § 2, at 3.

minium they shared, waving a check for \$1.5 million drawn on Levin's Swiss bank account.³⁸ Hunt told Karny "that he had killed Ron Levin" and had dumped the body in a deserted canyon.³⁹ Later, Hunt assembled the inner circle of the BBC, nine of his most trusted cohorts, and announced that he and Jim Pittman had killed Ron Levin.⁴⁰

A month later, the BBC's cold-blooded desperation for money led some members to formulate a plan to kidnap and torture Hedayat Eslaminia, the father of BBC member Reza Eslaminia.⁴¹ They plotted to force the elder Eslaminia to transfer his assets, estimated at over \$30 million, to his son or BBC businesses, and then to kill him.⁴² To carry out this scheme, Karny testified that he, Hunt, Ben Dosti, Pittman and Reza Eslaminia met in San Francisco.⁴³ Dressed as deliverymen, they delivered a trunk to the Eslaminia estate, administered chloroform to Mr. Eslaminia, and then beat him into submission.⁴⁴ The group finally stuffed Eslaminia in the trunk for the trip back to Los Angeles, where he was to be kept in the basement of a rented house until he signed the appropriate papers.⁴⁵ Hedayat Eslaminia never made it to Los Angeles. At the penalty phase of Hunt's trial for Levin's murder, Karny testified that he had punched air holes in the trunk but had also taped over them each time Eslaminia started making noises.⁴⁶ Hunt, who was driving the truck at the time, ordered Karny to check on Eslaminia so Karny opened the trunk.⁴⁷ Karny thought the man was breathing, but a few minutes later confirmed that Eslaminia was dead.⁴⁸ The body was dumped in Soledad Canyon in the Angeles National Forest and was later identified through dental records.⁴⁹

Hunt was arrested with Pittman in October of 1984 in connection with Levin's death, and both men were charged with Eslaminia's murder in December of that year.⁵⁰ Hunt's trial for the Eslaminia murder is still

38. *Id.* The check bounced. *Id.* at 1.

39. *Id.*

40. *Id.* (testimony of Dean Karny).

41. L.A. Times, Nov. 2, 1986, § 2, at 3.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Slow Death in a Trunk Described to Hunt Jury*, L.A. Times, May 20, 1987, § 2, at 6, col. 2.

47. *Id.*

48. *Id.* Hunt's defense co-counsel Richard Chier had only one question for Karny at this point: "At the time [Eslaminia] died, his life was in your hands, wasn't it?" *Id.*

49. L.A. Times, Nov. 2, 1986, § 2, at 3, col. 1. Karny led authorities to the spot. Levin's remains are thought to be in the same area. *Id.*

50. *Id.* Hunt had been previously arrested in September of 1984 but released for lack of

pending.⁵¹

Since Levin's body was never found, much of what happened within the BBC remains shrouded in mystery and speculation.⁵² Soon after Hunt was arrested, members began to "cash-in" on their original investment by selling the rights to their life stories. A book has been published on the events,⁵³ and Hunt plans to tell his side of the story in a feature film to balance the NBC miniseries.⁵⁴

B. *Objections to the Broadcast*

Hunt had two main objections to the NBC docudrama. First, Hunt maintained that the docudrama did not accurately portray the events re-

evidence. Ben Dosti and Reza Eslaminia were reported to be hiding out in Europe, searching for the elder Eslaminia's assets. They were arrested in 1985 when they returned to the United States and tried to pick up false passports. Ben Dosti is the son of a L.A. Times food critic. *Id.* Both men were convicted and sentenced on May 10, 1988 to life in prison without the possibility of parole for their roles in Eslaminia's death. L.A. Times, May 11, 1988, § 2, at 1, col. 5.

51. *See supra* note 7.

52. L.A. Times, Nov. 2, 1986, § 2, at 1, col. 1. Hunt's bail was paid by the father of his former girlfriend, film and music producer Bobby Roberts. Hunt resided at Roberts' Bel-Air home during the trial. Roberts also hired defense attorney Arthur Barends who was assisted by Chier. Previously, Barends had unsuccessfully defended Marvin Pancoast, convicted in 1984 of the murder of Vicki Morgan, the mistress of Alfred Bloomingdale. *Id.*

The defense position throughout the trial was that Hunt did make those lists on yellow legal paper and had planned to kill Levin, but that Levin disappeared before Hunt could execute his plan. The defense tried to show that Levin had a good reason for leaving town, as he was facing charges of grand theft for receiving one million dollars in stolen computer goods. *Id.* The defense maintained Hunt had told the BBC members that he had killed Levin to manipulate BBC members and bind them together in a scheme that was spinning out of control and to reassure the boys that the money Levin owed to the BBC was on its way. The defense also tried to show that BBC members who testified against Hunt were out for revenge for their financial losses. *Id.* Tom and Dave May, for example, who together lost \$180,000 testified against Hunt. L.A. Times, Mar. 2, 1987, § 2, at 1, col. 1. They partially recouped their losses when they cooperated with ITC's producing of the miniseries and were paid \$65,000. Evan Dicker, grandson of the founder of the tony Los Angeles law firm of Dicker & Dicker, was also paid an undisclosed fee for his cooperation. L.A. Times, Nov 2, 1987, § 6, at 1, col. 1.

Hunt was originally scheduled to testify in his own defense, but at the last minute, Barends rested. Thus, the defense then had to rely on the testimony of Hunt's former girlfriend and her mother who both said that Hunt was home getting ready for bed at the time he and Pittman were supposed to have shot Levin. In addition, an Arizona couple testified that they had seen a man late in 1986 who resembled Levin. *New Tactic Stuns Trial: Hunt Will Not Testify*, L.A. Times, Apr. 7, 1987, § 2, at 1, col. 6. Many reports of Levin spottings were discounted throughout the trial. *See BBC Jury Warned To Disregard Reports that Victim is Alive*, L.A. Times, Apr. 22, 1987, § 2, at 6, col. 5.

53. The docudrama was based on the book *The Pied Piper of Beverly Hills* by Sue Horton. L.A. Times, Nov. 2, 1987, § 6, at 10.

54. L.A. Times, July 29, 1989, § 5, at 10. Screenwriter Peter Brooke and producer Tim Scott are developing this film in cooperation with Hunt. *Id.*

counted above.⁵⁵ Lois Timnick, the Los Angeles Times reporter assigned to cover Hunt's trial, illustrated some of the discrepancies between the film version of the events and the real-life version.⁵⁶ Timnick noted that key witness Dean Karny is portrayed in the film as a conscience-stricken youth who was innocently drawn into the BBC by the charismatic Hunt, while during the trial "he came across as a wimpy clone of Hunt who finally went to the police to save his own skin."⁵⁷ In the movie, Hunt's bodyguard Jim Pittman confesses that he helped to kidnap Eslaminia, which his attorney maintains is untrue.⁵⁸ Finally, the movie gives the impression that the police investigating the murders were all bungling cops and that the murders were solved by Tom and Dave May⁵⁹ and Jeff Raymond⁶⁰ when, in fact, respected Beverly Hills Police Detective Les Zoeller and investigators in Northern California were the real-life heroes.⁶¹

While these discrepancies may not be vital to Hunt's case, the differences between real fact and film fact illustrate that NBC was not concerned about the true story. Lois Timnick considered the movie "smaller than life, a pale and sometimes misleading imitation of reality, slanted toward the prosecution's view."⁶² She commented that the docudrama "ignored—almost entirely—the defense version of what happened, which may explain why Hunt's Los Angeles attorney, Arthur Barends, was not invited to the preview screening . . . Such one-sided courtroom drama may be fine in fiction, but it appears ill-placed in a purportedly factual account of a real-life story that is still being played out in the courts."⁶³

Howard Rosenberg, who reviewed the docudrama for the Los Angeles Times, thought the movie convinced viewers that Hunt, Jim Pittman, Reza Eslaminia and Ben Dosti were all guilty.⁶⁴ "It's hard to make a

55. Brief of Appellant Joe Hunt at 10-12, *Hunt v. National Broadcasting Co.*, 872 F.2d 289 (9th Cir. 1989) (No. 87-6625).

56. Timnick, *What's on the Tube Not Quite the Real Picture*, L.A. Times, Nov. 10, 1987, § 6, at 8.

57. *Id.*

58. *Id.*

59. Called Eric and Chris Fairmont in the film. *Id.*

60. Called Brad Sedgwick in the film. *Id.*

61. Timnick, *What's on the Tube Not Quite the Real Picture*, L.A. Times, Nov. 10, 1987, § 6, at 8.

62. *Id.*, at 1.

63. *Id.* at 7.

64. Rosenberg, *The 'Boys Club' and Trial by TV*, L.A. Times, Nov. 6, 1987, § 6, at 1, col.

2. Rosenberg did not give the film rave reviews either. He wrote,

We see indulged snots on the screen—a privileged fraternity of weak, sniveling Leopolds and Loebns in designer suits and haircuts—who soon grow tiresome. Except for Hunt, they are elegantly tailored look-alikes, an almost comical herd in search of a

case for NBC airing the 'Billionaire Boys Club' at this time," remarked Rosenberg. "The argument for postponement, on ethical grounds if not legal ones, is much stronger."⁶⁵ District Attorney Fred Wapner, who prosecuted Hunt in Los Angeles, commented, "The cutting back and forth from the courtroom to the actual enactment bothered me. You assume that [what you are seeing is] the *true* story I really think it is irresponsible to have aired this now while the trials are still going on. The story is so inherently entertaining that if they had waited and done it better, it would have been just as interesting two years from now."⁶⁶ Santa Monica Superior Court Judge Laurence J. Rittenband, who presided at Hunt's trial, did not object to the film but admitted that "the public will get a false picture of what happens at a real trial because none of that testimony about Hunt's character and other alleged crimes . . . could ever come up during the guilt phase of a trial the way it did in the movie."⁶⁷

Hunt's second objection to the broadcast of the docudrama is that it interfered with his right to a fair trial.⁶⁸ Hunt argued that his right to a fair trial outweighed NBC's first amendment right to broadcast a fiction film.⁶⁹ Hunt cited a Second Circuit decision which stated that "[w]hen the exercise of free press rights actually tramples upon Sixth Amendment rights, the former must nonetheless yield to the latter."⁷⁰ Hunt contended that NBC's right to broadcast a fiction film was not equal to its right to broadcast news events; and thus NBC would not be significantly harmed by an order preventing it from airing *Billionaire Boys Club* until after all of Hunt's appeals were exhausted.⁷¹

III. COURT'S HOLDING

The district court held that the Supreme Court and the Ninth Circuit precedent prevented the district court from granting Hunt's motion for a prior restraint on the exercise of NBC's first amendment rights.⁷² The Ninth Circuit upheld the district court's denial of Hunt's motion for

leader, mental sloths who fall for Hunt's line about blasting "through the tyranny created by mediocre minds." And Hunt himself is pretty much of a bore.

Id. at 31. Hunt was played by actor Judd Nelson. *Id.* at 1.

65. *Id.* at 31.

66. L.A. Times, Nov. 10, 1987, § 6, at 8 (emphasis and insert in original).

67. *Id.*

68. Brief of Appellant Joe Hunt at 8, *Hunt v. National Broadcasting Co.*, 872 F.2d 289 (9th Cir. 1989) (No. 87-6625).

69. *Id.* at 7.

70. *Id.* at 9 (quoting *In re Application of Dow Jones & Co.*, 842 F.2d 603 (2d Cir. 1988)).

71. *Id.* at 11-12.

72. *Hunt*, 872 F.2d at 290.

a preliminary injunction.⁷³

IV. BACKGROUND: THE DOCTRINE AGAINST PRIOR RESTRAINTS

A. Overview

A prior restraint restricts speech or other expression before it is communicated.⁷⁴ By comparison, subsequent punishment, defined as punishment after publication or after speech, as in libel actions, imposes a penalty after the expression.⁷⁵

The first amendment was designed to prevent the federal government from imposing prior restraints in any area of expression protected by the first amendment.⁷⁶ A prior restraint imposes a harsh consequence because it restrains speech before there is an adequate determination that the subject speech or publication is not protected by the first amendment.⁷⁷ Additionally, a person disobeying a prior restraint order may not use the defense that the prior restraint is unconstitutional.⁷⁸ This rule is known as the collateral bar rule, and its application further illustrates how a prior restraint suffocates speech.⁷⁹ By contrast, in a subsequent punishment action, the defense that the speech at issue is protected by the first amendment is allowed.⁸⁰

Professor Thomas Emerson summarized the prior restraint doctrine as follows:

In the first place, the doctrine deals with limitations of form rather than substance. The issue is not whether the govern-

73. *Id.*

74. Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648 (1955).

75. *Id.*

76. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-34 (1988). The English Licensing Act of 1662, which was effective throughout most of the second half of the seventeenth century, illustrates prior restraints during the colonial period of American history. That act prohibited the printing of any material without the prior approval of church and state authorities. Emerson, *supra* note 74, at 650-51. See also *Near v. Minnesota*, 283 U.S. 697, 713 (1931).

77. TRIBE, *supra* note 76, at § 12-34.

78. Barnett, *The Puzzle of Prior Restraint*, 29 STAN. L. REV. 539, 552 (1977).

79. *Id.* at 551. In this Note, mention of the collateral bar rule only serves to show the strictness of a prior restraint. The Supreme Court has sometimes declined to apply it. TRIBE, *supra* note 76, at § 12-35. See, e.g., *Maness v. Meyers*, 419 U.S. 449 (1975) (allowing privilege against self-incrimination to be invoked at contempt hearing for failure to produce evidence); *Branzburg v. Hayes*, 408 U.S. 665 (1972) (permitting first amendment newsgathering defense to be raised in contempt proceedings for failure to testify). Some lower courts also have restricted its application. See, e.g., *In re Timmons*, 607 F.2d 120 (5th Cir. 1979); *In re Halkin*, 598 F.2d 176 (D.C. Cir. 1979); *Goldblum v. National Broadcasting Co.*, 584 F.2d 904 (9th Cir. 1979); *Glen v. Hongisto*, 438 F. Supp. 10 (N.D. Cal. 1977); *Cooper v. Rockford Newspapers, Inc.*, 50 Ill. App. 3d 250, 8 Ill. Dec. 508, 365 N.E.2d 746 (1977).

80. TRIBE, *supra* note 76, at § 12-35.

ment may impose a particular restriction of substance in an area of public expression, such as forbidding obscenity in newspapers, but whether it may do so by a particular method, such as advance screening of newspaper copy.⁸¹ In other words, restrictions which could be validly imposed when enforced by subsequent punishment are, nevertheless, forbidden if attempted by prior restraint. The major considerations underlying the doctrine of prior restraint, therefore, are matters of administration, techniques of enforcement, methods of operation, and their effect upon the basic objectives of the first amendment.⁸²

B. *Near v. Minnesota*

The Supreme Court did not invoke the doctrine of prior restraint for almost 130 years after the first amendment was ratified.⁸³ Then, in 1931, the Court addressed the doctrine in *Near v. Minnesota*,⁸⁴ a case involving the application of the Minnesota Gag Law ("Gag Law").⁸⁵ In essence, the Gag Law allowed the government to enjoin a publication deemed to be a nuisance.⁸⁶ The Minnesota Supreme Court found that the periodical, *The Saturday Press*, was a nuisance because it had printed malicious, scandalous and defamatory articles about Jewish people and certain public officials, such as the Chief of Police and the County Attorney of Minneapolis.⁸⁷ Applying the Gag Law, the court issued a permanent injunction against the publishers of *The Saturday Press* to prevent future articles of such nature.⁸⁸ The publishers appealed.

The United States Supreme Court found that the Minnesota statute constituted a prior restraint and thus violated the first amendment.⁸⁹ Writing for the Court, Chief Justice Hughes enunciated the doctrine of prior restraint: "The exceptional nature of its limitations places in a strong light the general conception that liberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints or cen-

81. For an example of this type of prior restraint, see *Goldblum*, *infra* notes 131 & 135 and accompanying text.

82. Emerson, *supra* note 74, at 648.

83. *Id.* at 652.

84. 283 U.S. 697 (1931).

85. *Id.*

86. *Id.* at 701-02.

87. *Id.* at 703-04.

88. *Id.* at 705.

89. *Near*, 283 U.S. at 723.

sorship.”⁹⁰ The Court also noted that immunity from prior restraint prefaced the intention of the first amendment.⁹¹

C. *Nebraska Press Association v. Stuart*

1. The Test

The decision in *Nebraska Press Association v. Stuart*⁹² (“*Nebraska Press*”) has influenced all prior restraint cases since its inception in 1976. In *Nebraska Press*, the Supreme Court adopted a three part test that a defendant must meet when requesting a prior restraint.⁹³ The defendant must show: (1) that the pretrial publicity about the case is extensive; (2) that alternatives to prior restraint⁹⁴ will not mitigate the harmful effects of unrestrained pretrial publicity; and (3) that a prior restraint would effectively protect the defendant’s right to a fair trial.⁹⁵ This three-pronged test must lead to the conclusion that without a prior restraint, the defendant would be prevented from securing twelve jurors who could, with proper judicial instructions, render an impartial verdict based only on the evidence admitted during trial.⁹⁶ The heavy burden on the defendant, however, makes this test nearly impossible to meet.⁹⁷

2. The Decision

In *Nebraska Press*, a state court judge issued an order preventing the Nebraska Press Association from publishing or broadcasting accounts of confessions or admissions made by the accused, Erwin Charles Simants, or facts “strongly implicative” of the accused in a widely reported mur-

90. *Id.* at 716.

91. *Id.* at 717.

92. 427 U.S. 539 (1976).

93. *Id.* at 562.

94. The alternatives to prior restraint include: (a) change of trial venue to a place less exposed to publicity; (b) postponement of the trial until public attention subsides; (c) specific voir dire to determine the influence of publicity on a prospective juror; (d) the use of clear and emphatic jury instructions on the sworn duty of each juror to decide the issues only on evidence presented in open court; (e) sequestration of jurors. *Nebraska Press*, 427 U.S. at 563-64. See also *Sheppard v. Maxwell*, 384 U.S. 333, 357-62 (1966).

95. *Nebraska Press*, 427 U.S. at 562. The Supreme Court stated that courts reviewing a prior restraint:

must examine the evidence before the trial judge when the order was entered to determine (a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger.

Id.

96. *Id.* at 569.

97. *Id.* at 541.

der of six persons.⁹⁸ After unsuccessfully challenging the order, the Nebraska Press Association appealed to the Supreme Court. The Court granted certiorari to decide whether the entry of such an order violated the constitutional guarantee of freedom of the press.⁹⁹ The Court refused to uphold the district court's order, deeming it a prior restraint.¹⁰⁰

Applying the *Nebraska Press* test, the Court concluded that the accused Simants could not meet it.¹⁰¹ First, the Court found that the widespread nature of the publicity might impair the defendant's right to a fair trial but that this evidence alone would not lead to the conclusion that an impartial jury could not be impanelled.¹⁰² Secondly, there was no showing that alternatives to prior restraint could not adequately be employed to insure the defendant a fair trial despite the publicity.¹⁰³ Third, the Court concluded that there was no proof that a prior restraint would protect the defendant's rights.¹⁰⁴ In support of this conclusion, the Court noted that an order for restraint of the press was difficult to draft because it had to accommodate two needs—the need to protect the defendant's rights as much as possible and the need to restrict the press as little as possible.¹⁰⁵ The Court also pointed out that a trial judge would have difficulty predicting, in advance of trial,¹⁰⁶ what information would prejudice potential jurors; and that even if an order could be drafted, information that fell in a grey area could still expose the jury pool to prejudicial publicity.¹⁰⁷

V. THE HUNT COURT'S REASONING

In declining to issue an injunction against NBC's *Billionaire Boys Club*, the district court relied upon *Nebraska Press* and two other key cases: *Columbia Broadcasting Systems v. United States District Court*¹⁰⁸ ("CBS") and *Goldblum v. National Broadcasting Co.*¹⁰⁹ ("Goldblum").

98. See *infra* section VI Establishing a Per Se Rule Against Prior Restraints.

99. *Id.*

100. *Nebraska Press*, 427 U.S. at 570. The Supreme Court acknowledged that in such a small community (population 800), rumors could travel faster than the time it took to print the newspapers. *Id.* at 567.

101. *Id.* at 569.

102. *Id.* at 563.

103. *Id.* at 565.

104. *Id.* at 567.

105. *Nebraska Press*, 427 U.S. at 566.

106. See *infra* section VI(A) for discussion on obtaining proof of the effectiveness of a prior restraint.

107. *Nebraska Press*, 427 U.S. at 567.

108. 729 F.2d 1174 (9th Cir. 1983).

109. 584 F.2d 904 (9th Cir. 1979).

A. *Columbia Broadcasting Systems v. United States District Court: Pretrial Publicity*

In *CBS*, John DeLorean, a sports car manufacturer charged with conspiracy to import cocaine, filed an application to restrain CBS from broadcasting video tapes made by the government during its investigation of him.¹¹⁰ The government joined DeLorean's application.¹¹¹ The district court found that public dissemination of the video tapes would irreparably harm DeLorean's right to a fair trial; therefore, the court issued an order enjoining CBS from airing the tapes on its news broadcasts.¹¹² On appeal, CBS contended that this prior restraint on the broadcast violated its first amendment rights.¹¹³

Both the district court and the Ninth Circuit applied the *Nebraska Press* test to this case.¹¹⁴ While the district court concluded that DeLorean met the three elements set forth in *Nebraska Press*,¹¹⁵ the court of appeals disagreed, implying that the showing required by *Nebraska Press* was even more rigorous.¹¹⁶

In *CBS*, the Ninth Circuit extended the *Nebraska Press* test, explaining that to assess the prejudicial effect of pretrial publicity, courts must look not only to the publicity's effect on each viewer individually, but to the publicity's "capacity to inflame and prejudice the entire community."¹¹⁷ Thus, there are two relevant factors in evaluating the likely impact of pretrial publicity upon a community: (1) the subject matter of the case and (2) the composition of the community.¹¹⁸ The *CBS* court stated that whether the case facts would raise the level of emotion in the community to unusual proportions and whether the size of the community was small and rural, or populous, metropolitan and heterogeneous, should be taken into account in determining whether to impose a prior restraint.¹¹⁹

To evaluate the *Nebraska Press* elements after *CBS*, the Ninth Circuit looks to the prejudicial effect of pretrial publicity on the entire community.¹²⁰ The Ninth Circuit noted that when the Supreme Court

110. *CBS*, 729 F.2d at 1176.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 1178.

115. See *supra* note 95 and accompanying text.

116. *CBS*, 729 F.2d at 1178.

117. *Id.* at 1180. See also *Hunt*, 872 F.2d at 294.

118. *CBS*, 729 F.2d at 1181-82.

119. *Id.*

120. *Id.* at 1180.

overturns convictions based on pretrial publicity claims, the Court does so because "‘deep and bitter prejudice’ [was] shown to be present throughout the community."¹²¹ In *CBS*, the Ninth Circuit could not find such sentiment.¹²² The court in *CBS* noted that the Central District of California, where DeLorean was tried, is the most populous district in the federal judicial system and that DeLorean was certain to find twelve impartial jurors since the district’s population was so diverse.¹²³ The Ninth Circuit also found that the charge against DeLorean, conspiracy to import cocaine, was not a crime that would inflame public sentiment against him.¹²⁴

In addition, the district court in *CBS* found that the alternatives to prior restraint, such as voir dire and specific jury instructions, would not mitigate the effects of publicity.¹²⁵ The Ninth Circuit emphasized that the district court underestimated the effectiveness of these judicial methods in alleviating the problems publicity presents.¹²⁶

In applying the *CBS* principle to *Hunt*, the Ninth Circuit found that *Hunt* failed to demonstrate that the NBC broadcast would inflame and prejudice the entire San Mateo community.¹²⁷ In addition, while *Hunt*’s case may involve lurid or inflammatory subject matter, the court reasoned that San Mateo County is a populous, metropolitan and heterogeneous area where prejudicial publicity is less likely to endanger *Hunt*’s right to a fair trial.¹²⁸ Similarly, *Hunt* could not prove that, should he secure a retrial in Los Angeles on the Levin charge, twelve unbiased jurors could not be found.¹²⁹

121. *Id.* (quoting *Irvin v. Dowd*, 366 U.S. 717, 727 (1961)). See generally *Stroble v. California*, 343 U.S. 181, 191-93 (1952); *Murphy v. Florida*, 421 U.S. 794, 802 (1975); *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966); *Estes v. Texas*, 381 U.S. 532, 545 (1965); *Rideau v. Louisiana*, 373 U.S. 723, 726 (1963).

122. *CBS*, 729 F.2d at 1181. For examples of cases in which the subject matter of the case itself caused such prejudice throughout the community, see *Rideau v. Louisiana*, 373 U.S. 723 (1963) (defendant charged with armed robbery, kidnapping, and murder); *Sheppard v. Maxwell*, 384 U.S. 333 (1966) (prominent doctor accused of bludgeoning his pregnant wife to death).

123. *CBS*, 729 F.2d at 1181-82.

124. *Id.* at 1181. The court noted that this indictment was similar to hundreds of others before judges in California. *Id.*

125. *CBS*, 729 F.2d at 1182-83.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* See *People v. Manson*, 61 Cal. App. 3d 102, 189-90, 132 Cal. Rptr. 265 (1976) cert. denied, 430 U.S. 986 (1977) (Los Angeles County, with a population of seven million in 1970, was a heterogeneous, metropolitan area capable of supplying satisfactory jury panel for the trial of Charles Manson for highly publicized crimes.).

B. Goldblum v. National Broadcasting Co.: Prior Restraints Presumed Unconstitutional

The Ninth Circuit cited their decision in *Goldblum* to emphasize its strong stance against any sort of prior restraint.¹³⁰ Stanley Goldblum, the former executive officer of the Equity Funding Corporation, was serving a prison sentence for his role in the Equity Funding fraud when he attempted to enjoin NBC's broadcast of the "Billion Dollar Bubble."¹³¹ Goldblum contended that the broadcast of the film would be an inaccurate portrayal of the incident and of Goldblum's role in it.¹³² The inaccurate portrayal would inflame public opinion against him, jeopardize his release on parole, infringe upon both his right to trial by an impartial jury in any state or federal criminal action which might be brought against him in the future, and also upon his right to a fair trial in a pending civil case involving the demise of Equity Funding.¹³³

In *Goldblum*, the district court judge ordered NBC to produce the film so that the court could view it for inaccuracies.¹³⁴ Counsel for NBC was imprisoned on contempt of court charges when he refused to turn over the film.¹³⁵ The Court of Appeals for the Ninth Circuit vacated the district court's order to produce the film and reviewed whether the district court had the power to order the film produced in the first place.¹³⁶ The Ninth Circuit stated, "The express and sole purpose of the district court's order to submit the film for viewing by the court was to determine whether or not to issue an injunction suspending its broadcast. Necessarily, any such injunction would be a sweeping prior restraint of speech and, therefore, presumptively unconstitutional."¹³⁷ The court found that Goldblum's injunction arguments of inaccuracy and possible inflamed community opinion against him were "wholly speculative," and instead, the court focused on the order to produce the film as if it were a prior restraint.¹³⁸ The court stated:

It is a fundamental principle of the first amendment that the press may not be required to justify or defend what it prints or says until after the expression has taken place The district

130. See *Goldblum*, 584 F.2d 904 (9th Cir. 1979); *Hunt*, 872 F.2d 289 (9th Cir. 1989).

131. *Goldblum*, 584 F.2d at 905.

132. *Id.* Apparently, if NBC wants to avoid the litigation involved in *Hunt* and *Goldblum*, NBC should avoid titles with "Billion" in them.

133. *Id.*

134. *Id.* at 906.

135. *Id.*

136. *Goldblum*, 584 F.2d at 906-07.

137. *Id.* at 906.

138. *Id.* at 906-07.

court proceedings here intervened in the editorial process by ordering an official of the broadcasting company to produce a film just before its scheduled broadcast so that it could be examined for inaccuracies. A procedure thus aimed toward pre-publication censorship is an inherent threat to expression, one that chills speech.¹³⁹

With this opinion's strong stance against any sort of prior restraint, the Ninth Circuit clarified that prior restraints will not be tolerated. *Goldblum*, however, failed to declare prior restraints unconstitutional per se, as NBC urged the court to do in *Hunt*.¹⁴⁰

C. Alternatives to Prior Restraint

The Ninth Circuit stressed that Hunt did not meet his burden of demonstrating element number two of the *Nebraska Press* test, that alternatives to prior restraint, such as voir dire, jury instructions, delay, change of venue or jury sequestration, could not effectively protect his rights to a fair trial;¹⁴¹ nor had Hunt demonstrated element number three of the test, that a prior restraint would sufficiently protect his rights.¹⁴² The court reasoned that aside from the docudrama, substantial publicity surrounding Hunt's trial and the Billionaire Boys Club had already reached the public.¹⁴³

VI. ESTABLISHING A PER SE RULE AGAINST PRIOR RESTRAINTS

A. The Ultimate Conclusion

A per se rule against prior restraints should be declared so that the interminable litigation arising from requests for prior restraints will end. Remember, a prior restraint does not just effect the defendant; it also has repercussions on the press, which is subjected to the restraining order, and on millions of people who rely on the press for information. The mere existence of the *Nebraska Press* test instead of a per se rule allows defendants to believe that they can somehow obtain the proof required and succeed in meeting the test. As the following discussion will show,

139. *Id.* at 907.

140. Brief of Appellee at 31, *Hunt* (No. 87-6625). NBC urged the court to declare prior restraints unconstitutional in the fair trial context. *Id.* This per se rule therefore would be applied to Goldblum's request but not to the district court judge's order to produce the film for his viewing.

141. *Hunt*, 872 F.2d at 295-96.

142. *Id.*

143. *Id.* at 296. See, e.g., *supra* notes 12-50 and accompanying text.

the test is unworkable and creates an absurdity that cannot ever be coherently solved because of the nature of the problem and proof required.

The three parts of the *Nebraska Press* test must add up to the ultimate conclusion—that twelve impartial jurors cannot be found. Part one of the test, that extensive publicity about the case exists, and part two, showing that alternatives to prior restraint are ineffective to preserve fair trial rights, are not as burdensome for the defendant to overcome as is the third part of the *Nebraska Press* test.

In *Hunt*, the first prong of the test is passed simply because a movie was made about the events. The producers were inspired to make the movie because of the publicity; and precisely because the publicity has generated public interest, the movie-makers hope that docudramas like *Billionaire Boys Club* will score high ratings.¹⁴⁴ The *Billionaire Boys Club* does not merely portray Hunt, but also gives viewers a glimpse into the lives of the rich and infamous.¹⁴⁵ The movie is only at its most entertaining if viewers are led to believe that Hunt is guilty.¹⁴⁶

Meeting the second prong—that there are viable alternatives to prior restraint—is more difficult. Hunt could argue, for instance, that change of venue, one alternative to prior restraint, would not protect his fair trial rights since the docudrama was shown on national television, and not just in a limited area. Still, Hunt would be hard-pressed to show that extensive voir dire of the jury panel would not weed out the biased jurors. Until Hunt failed to impanel a jury he has virtually no evidence that a jury could not be impanelled.

The third prong of the test, that a prior restraint will protect the defendant's rights, however, will always defeat any defendant requesting a prior restraint. The third prong is the threshold constitutional inquiry, for within the third prong lies the balance between the sixth amendment right to a fair trial and the first amendment freedoms of speech and the press. The third prong is the decisive factor: if a defendant proves that only a prior restraint will protect his fair trial rights, the court will order first amendment freedoms of speech and press temporarily mute. Without proof that a prior restraint would protect a defendant's fair trial

144. Incidentally, the docudrama won the A.C. Nielsen Co. ratings race when it was first aired on Sunday night, November 8, 1987. The "Billionaire Boys Club" attracted 34% of the viewers in the 9 p.m. to 11 p.m. time slot. *Docudrama Wins the Ratings Race*, L.A. Times, Nov. 10, 1987, § 6, at 1.

145. For examples of the types of BBC members, see *supra* notes 13 & 17 and accompanying text, and notes 50-52.

146. If the movie showed that it was more likely that Levin disappeared than was murdered, the docudrama would not be as interesting. See *supra* note 52 regarding Levin's alleged disappearance.

rights, nevertheless, the *Nebraska Press* test cannot be met. Hunt would have to prove that the movie contaminated the entire jury pool.

Hence, to prove a prior restraint would protect Hunt's right to an impartial jury trial, the docudrama must be aired. Hunt must then prove that everyone saw or discussed the movie, believed the docudrama's version of the events and concluded that Hunt is guilty. In addition, every potential juror needs to state that no matter what evidence was presented to the contrary, they would believe Hunt's guilt. Further, the defendant must prove that the docudrama was so influential that no potential juror would take their civic duty seriously and consequently would ignore all instructions from the judge.¹⁴⁷ Only then, could a court conclude that twelve impartial people cannot be found. Since this proof cannot be obtained until after the broadcast of the movie, an injunction against NBC would be useless.

To change the facts of *Hunt* for demonstrative purposes, suppose Hunt showed that, because of the pretrial publicity, impanelling a jury was impossible before the movie was aired. Even then, Hunt has no basis for arguing that an injunction against NBC's docudrama would alleviate any future harm to his fair trial rights. If Hunt could not obtain twelve impartial jurors in the face of pretrial publicity, showing the docudrama certainly could not add to the harm already done. Both these situations put Hunt in a Catch-22.

Thus, the third prong becomes a per se condemnation of all fair trial prior restraints. By attempting to enjoin the docudrama only, Hunt assumes that television and print news coverage of his story was objective and that the biased stance taken by the docudrama is instrumental in interfering with his fair trial rights.¹⁴⁸ Undoubtedly, the *Billionaire Boys Club* is a biased, one-sided movie.¹⁴⁹ The docudrama distorts the facts so much that the movie is fiction. Because the movie portrays real-life characters, the movie has the appearance of truth.¹⁵⁰ In spite of the shoddy aura this kind of movie projects, rather than interfering with Americans' first amendment rights, methods other than prior restraint will protect

147. This is also a problem in trying to meet the second prong. See *supra* pp. 589-90 for analysis of second prong.

148. Hunt stated that the injunction he was requesting was not a prior restraint of the press since it would not interfere with NBC's right to broadcast news. "Defendants' fiction film is more akin to . . . commercial speech, than to fact, and is therefore clearly distinguishable from news, or 'press.'" Brief of Appellant Joe Hunt at 11, *Hunt v. National Broadcasting Co.*, 872 F.2d 289 (9th Cir. 1989) (No. 87-6625).

149. See *supra* notes 62-63 and accompanying text.

150. See, e.g., *supra* notes 64 & 66-67 and accompanying text.

the defendant.¹⁵¹ If a court is willing to allow such a slanted docudrama to air on national television, however, the courts should be forthright about their position and declare a per se rule against prior restraints in the fair trial context.

B. Prior Restraints in Fair Trial Context are Unnecessary

In *Nebraska Press*, the Court noted that “[i]t is significant that when this Court has reversed a state conviction because of prejudicial publicity, it carefully noted that some course of action short of prior restraint would have made a critical difference.”¹⁵² Referring to the *Nebraska Press* decision, the Ninth Circuit considered the Supreme Court’s pronouncements on alternatives to prior restraint and concluded that “there may be no reason for courts to ever conclude that traditional methods are inadequate and that the extraordinary remedy of prohibiting expression is required.”¹⁵³ The alternative measures listed in *Nebraska Press*¹⁵⁴ have always been sufficient to protect a defendant’s sixth amendment rights.¹⁵⁵ If celebrity defendants such as Sirhan Sirhan, Charles Manson, John DeLorean, Bob Haldeman and John Mitchell, among others,¹⁵⁶ could be fairly tried, then one can safely assume every defendant will receive a fair trial despite pretrial publicity.¹⁵⁷ Since *Nebraska Press*, state and federal appellate courts have consistently held that all trial court restraints on pretrial publicity have failed to meet the requirements set forth in *Nebraska Press*.¹⁵⁸ The Supreme Court has reserved judgment on whether any defendant could meet the *Nebraska Press* test.¹⁵⁹

In view of the numerous safeguards protecting a defendant’s fair

151. See *infra* section VI(B) Prior Restraints in Fair Trial Context are Unnecessary.

152. *Nebraska Press*, 427 U.S. at 569.

153. *CBS*, 729 F.2d at 1183.

154. See *supra* note 94.

155. In re *CBS, Inc.*, 570 F. Supp. 578, 583 (E.D. La. 1983) *app. dism. sub nom. United States v. McKenzie*, 735 F.2d 907 (5th Cir. 1984).

156. Not to mention Zsa Zsa Gabor.

157. See *People v. Sirhan*, 7 Cal. 3d 710, 497 P.2d 1121, 102 Cal. Rptr. 385 (1972), *cert. denied*, 410 U.S. 947 (1973), *overruled on other grounds, Hawkins v. Superior Court*, 22 Cal. 3d 584, 586 P.2d 916, 150 Cal. Rptr. 435 (1978); *People v. Manson*, 61 Cal. App. 3d 102, 132 Cal. Rptr. 265 (1976), *cert. denied*, 430 U.S. 986 (1977); *United States v. Haldeman*, 559 F.2d 31 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977); *United States v. Mitchell*, 551 F.2d 1252 (D.C. Cir. 1976), *rev'd on other grounds sub nom. Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978); *Columbia Broadcasting Sys., v. United States District Court*, 729 F.2d 1174 (9th Cir. 1983). In the first four cases the courts rejected the claim of prejudicial publicity. See also discussion of *CBS*, *supra* notes 110-28 and accompanying text.

158. *CBS*, 729 F.2d at 1178. See, e.g., In re *CBS*, 697 F.2d 1228 (5th Cir. 1983); *Arkansas Gazette Co. v. Lofton*, 269 Ark. 109, 598 S.W.2d 745 (1980); *Des Moines Register & Tribune Co. v. Osmundson*, 248 N.W.2d 493 (Iowa 1976).

159. *Nebraska Press*, 427 U.S. at 569-70.

trial rights, no situation exists, and probably will not exist in the future, that prevents a defendant from receiving a fair trial despite the publicity. A prior restraint is not only a measure of last resort, but a measure which should not require application. Imagine the unimaginable: pretrial publicity prevents a defendant from obtaining a fair trial, and the alternatives to prior restraint prove insufficient.¹⁶⁰ The defendant essentially could not be fairly tried at all. The defendant would have to go free. Is it not better to allow one defendant to go free rather than to jeopardize the trust that millions have in the press? While first amendment rights should not be balanced against sixth amendment fair trial rights, only rare circumstances will render these rights incompatible.

VII. CONCLUSION

The Supreme Court stated that "[t]he thread running through all these cases is that prior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights A prior restraint, . . . by definition, has an immediate and irreversible sanction."¹⁶¹ The Court also remarked that "[a]ny prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity."¹⁶² Still, the Supreme Court is undecided about prior restraints. The Court has not declared prior restraints per se unconstitutional, nor has the Court indicated under what circumstances prior restraints may be valid.¹⁶³ Despite its definitional vagueness, the Supreme Court has never held that first amendment rights are absolute or that prior restraints can never be imposed.¹⁶⁴

The inability of defendants to meet the demands of *Nebraska Press*,

160. See *supra* section VI(A) entitled The Ultimate Conclusion. Hunt would ultimately be proving that he could never be fairly tried.

161. *Nebraska Press*, 427 U.S. at 559.

162. *Id.* at 558 (quoting *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418-20 (1971)).

163. Even when the Court has reversed a state criminal conviction because of prejudicial publicity, it has carefully noted that a course of action other than a prior restraint would have been a necessary precaution. *Nebraska Press*, 427 U.S. at 569. See *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966); *Estes v. Texas*, 381 U.S. 532, 550-51 (1965); *Rideau v. Louisiana*, 373 U.S. 723, 726 (1963); *Irvin v. Dowd*, 366 U.S. 717, 728 (1961).

164. *Nebraska Press*, 427 U.S. at 570. The Court noted that there are exceptional times when prior restraints can be imposed. *Near v. Minnesota*, 283 U.S. 697, 716 (1931). When a nation is at war, it is proper to impose restrictions on publications that would block the recruitment of troops or those that would reveal information about the size, location, and movement of troops. In addition, obscenity can be restricted as well as information that would incite acts of violence or the overthrow of orderly government by force. *Id.* These exceptions would remain intact in the presence of a per se rule of unconstitutional prior restraints in the fair trial context.

however, has led many commentators to conclude that, as a practical matter, the decision bars all prior restraints on reporting judicial proceedings.¹⁶⁵ In addition, the concurring opinion of Justice Brennan, joined by Justices Marshall and Stewart in *Nebraska Press*, emphasizes the belief that prior restraints are never permissible in the fair trial context.¹⁶⁶ Justice White did not set forth a per se rule there, but did state in his concurring opinion, "If the recurring result, however, in case after case is to be similar to our judgment today, we should at some point announce a more general rule and avoid the interminable litigation that our failure to do so would necessarily entail."¹⁶⁷

The time has arrived for the Supreme Court to announce such a rule. Prior restraints can restrain protected speech as well as unprotected speech because prior restraints are imposed before a determination is made as to whether the speech is protected by the first amendment.¹⁶⁸ Thus, when the media faces a prior restraint the collateral bar rule¹⁶⁹ poses a dilemma: whether to disobey the prior restraint and risk criminal contempt or suffer the violation of first amendment rights.¹⁷⁰

Hunt could have been spared his appeal had the Ninth Circuit or the Supreme Court declared prior restraints unconstitutional per se. Certainly, other cases like *Hunt* will arise. Television remains the perfect place to exploit the defendants, as well as the victims of crimes.¹⁷¹ True-to-life drama is becoming increasingly prevalent in the television media; technological advances in the film and television industries allow these movies to be produced quickly and aired shortly thereafter.¹⁷² Instead of

165. CBS, 729 F.2d at 1178 n.4. See, e.g., Portman, *The Defense of Fair Trial from Shepard to Nebraska Press Association: Benign Neglect to Affirmative Action and Beyond*, 29 STAN. L. REV. 393, 409 n.72 (1977); 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); Younger, *Some Thoughts on the Defense of Publicity Cases*, 29 STAN. L. REV. 591 (1977).

166. *Nebraska Press*, 427 U.S. at 572-73.

167. *Id.* at 571.

168. See *supra* note 77.

169. See *supra* notes 78-79 and accompanying text.

170. Brief of Appellee at 36, *Hunt*, (No. 87-6625). See, e.g., Walker v. City of Birmingham, 388 U.S. 307, 315 (1967) (upholding contempt citations imposed on petitioners, even though injunction was found unconstitutional).

171. ABC, for instance, aired "The Preppie Murder" on September 24, 1989. The story centers on prep school graduate Robert Chambers who kills his well-to-do girlfriend Jennifer Levin in New York's Central Park. Based on a true story, this film is another example of television's interest in criminal defendants such as Joe Hunt. Rosenberg, "Preppie Murder" *Drama Pleads Case for Victims*, L.A. Times, Sept. 23, 1989, § 5, at 1, col. 1.

172. See e.g., Baker, *Writers and Agents: The Rush to Cash In*, NEWSWEEK, Jan. 22, 1990, at 20. Within days after the suicide death of Boston murder suspect Charles Stuart, a producer announced plans to make a television movie which will be aired on CBS later in 1990. *Id.*

prior restraints, defendants' fair trial rights can be protected by other methods.¹⁷³ In the past, alternatives to prior restraint have protected both a defendant's right to a fair trial and the first amendment rights of millions of Americans. These methods can continue to sufficiently guard first and sixth amendment rights in the future.

*Lisa Karen Garner**

173. *See supra* note 94 on alternatives to prior restraint.

* The Author thanks the following people for their assistance: Lisa Agrusa, Mary Dev-
ereaux, Debbie Levine, Prof. Christopher May, Karen Poston, Dennis Yokoyama, and Cherise
Wolas.