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Inside Edition: Out of a Prior Restraint and above the Law?

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INSIDE EDITION: OUT OF A PRIOR RESTRAINT AND ABOVE THE LAW?

I. INTRODUCTION

The public's insatiable appetite for scandal and intrigue has always supported a healthy market for investigative reporting, the most recent entrants including a spate of tabloid television programs of the same genre as the printed exposés commonly found at supermarket check-outs. While the First Amendment affords producers of such information the same protection as other, more reserved, members of the media, recent electronic developments, particularly in videocamera technology, have enabled the media to invade people's private lives to an extent which the framers of the Constitution could not have conceived. These developments are placing tremendous pressure on the juxtaposition of free speech and the still amorphous right to privacy, leaving one to wonder not *if* a cataclysmic adjustment between these rights will occur, but *when* the inevitable realignment will take place.

Upon deciding *In re King World Productions, Inc.*,[1] *("King World")* the United States Court of Appeals for the Sixth Circuit vacated a temporary restraining order enjoining the news program *Inside Edition* from broadcasting a secretly made videotape of a doctor purportedly engaging in medical malpractice.[2] The plaintiff doctor claimed the videotape was made in violation of the federal anti-wiretap statute.[3] In vacating the order, the court held that the doctor had failed to show the type of irreparable harm necessary to overcome the strong presumption against prior restraints of First Amendment rights.[4]

According to the doctrine of prior restraint, "the government may not restrain a particular expression prior to its dissemination even though the same expression could be constitutionally subjected to punishment after dissemination."[5] Unlike most familiar prior restraint cases, the information

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1. *In re* King World Prods., Inc., 898 F.2d 56 (6th Cir. 1990).

2. *Id.* at 60.

3. *Id.* at 58; 18 U.S.C. § 2511 (1988) (prohibits the interception and disclosure of wire, oral, or electronic communications).

4. *King World Prods.*, 898 F.2d at 60.

5. Martin H. Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53 (1984).

at issue in this case was allegedly obtained illegally.[6] The case further defines the strict limits on prior restraints relating to the First Amendment Freedom of the Press clause and brings into focus the courts' disparate treatment of privacy and speech interests.[7] This case also raises doubts as to whether any limitations exist on the media's ability to gather and air information in defiance of the law.[8]

This Note briefly traces the development of First Amendment prior restraint law from colonial times to the present day, including the limits on prior restraints.[9] It then reviews the facts and holding of *King World*.[10] The reasoning of the court of appeals, the competing interest in privacy, and the inadequacy of remedies under the current laws are discussed.[11] This case is then distinguished from other important prior restraint cases.[12] Finally, this Note examines how this case may help shape the future of First Amendment law and constitutional values.[13]

II. HISTORICAL BACKGROUND OF PRIOR RESTRAINT LAW

A. Early Conceptions of Freedom of the Press

Freedom of the press concepts and the aversion to prior restraints are frequently traced to seventeenth century England.[14] The Licensing Act of 1662 required the acquisition of a license to import or sell books, the licensing of all printed materials and the registration of printing presses by a governmental monopoly called the Stationers' Company.[15] The Act expired some thirty years later in 1694, and the system was discontinued.[16] Eventually, freedom of the press came to be viewed as a right in England.[17] This chain of events inspired Blackstone's now famous observa-

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6. *In re* King World Prods., Inc., 898 F.2d 56, 57-58 (6th Cir. 1990). *See* discussion *infra* parts II.B, IV.D.

7. *See* discussion *infra* parts III.B, IV.A-B.

8. *Id.*

9. *See* discussion *infra* part II.

10. *In re* King World Prods., Inc., 898 F.2d 56 (6th Cir. 1990); *see* discussion *infra* part III.

11. *See* discussion *infra* part IV.A-C.

12. *See* discussion *infra* part IV.D.

13. *See* discussion *infra* part V.

14. John C. Jeffries, Jr., *Rethinking Prior Restraint*, 92 YALE L.J. 409, 412 (1983); ROBERT B. DOWNS, *Freedom of Speech and Press: Development of a Concept*, *in* THE FIRST FREEDOM TODAY 2, 3 (Robert B. Downs & Ralph E. McCoy eds., 1984).

15. Jeffries, *supra* note 14, at 412; DOWNS, *supra* note 14, at 3.

16. Jeffries, *supra* note 14, at 412; DOWNS, *supra* note 14, at 3.

17. Jeffries, *supra* note 14, at 412.

tion:

> The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press, but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity.[18]

When America was colonized, contrary to popular notion, freedom of expression was not an ideal that gained immediate currency in the New World.[19] The colonial legislative assemblies, for example, were extremely intolerant of seditious libel.[20] Early Americans found religious liberty not through the law, but by settling geographically with others of similar beliefs.[21] It was therefore in a setting of repression that the framers began drafting the Constitution.[22]

When drafting the original Constitution, the framers believed a bill of rights was unnecessary because the federal government was to be limited to certain delegated powers.[23] "For why declare [in a bill of rights] that things shall not be done which there is no power to do? Why, for instance should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?"[24] The absence of such a bill of rights, however, proved a significant barrier to the Constitution's ratification.[25] In response, the first ten amendments to the Constitution, the Bill of Rights, were proposed during the first session of Congress in 1789 and were ratified effective December 15, 1791.[26]

Thus, the drafters provided that "Congress shall make no law . . . abridging the freedom . . . of the press."[27] Unfortunately, they left no guide as to what they believed this should mean.[28] Interestingly, however,

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18. *Id.* at 413 (quoting 4 WILLIAM BLACKSTONE COMMENTARIES 152).

19. DOWNS, *supra* note 14, at 2-3.

20. *Id.* at 3-4.

21. *Id.* at 2-3.

22. *Id.* at 5.

23. *Id.*; MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH 1-2 (1984).

24. NIMMER, *supra* note 23, at 1-2 n.4 (quoting The FEDERALIST No. 84 (ALEXANDER HAMILTON)).

25. *Id.* at 1-2, 1-3.

26. *Id.* at 1-3.

27. U.S. CONST. amend. I.

28. NIMMER, *supra* note 23, at 1-2 to 1-4.

much of the debate surrounding the First Amendment is relatively recent history.[29] What follows is a discussion of the twentieth century case law in this area.

B. The Free Press and Prior Restraint Doctrine Today

1. *Near v. Minnesota*

The modern doctrine of prior restraint finds its main precedent in *Near v. Minnesota*.[30] In *Near*, the Supreme Court examined a Minnesota law which provided that the publication of "a malicious, scandalous, and defamatory newspaper" could be enjoined as a nuisance.[31] The defendant published "The Saturday Press" which ran a series of articles critical of various government officials.[32] The trial court found that the paper violated the statute and permanently enjoined further publication.[33] Upon review, the Supreme Court held the statute unconstitutional, declaring that it, in effect, amounted to censorship.[34] Reflecting upon the First Amendment Freedom of the Press clause, the Court stated that "[i]n determining the extent of the constitutional protection it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication."[35]

The Court did, however, recognize limited exceptions to the general prohibition.[36] Where national security is at stake, the Court stated, "[n]o one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops."[37] Restriction of obscenity, incitement to violence, the forceful overthrow of government and "words that may have all the effect of force"[38] were also deemed worthy exceptions.[39]

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29. *Id.* at 1-3.
30. Near v. Minnesota, 283 U.S. 697 (1931); Jeffries, *supra* note 14, at 414.
31. *Near*, 283 U.S. at 702.
32. *Id.* at 703-04.
33. *Id.* at 706.
34. *Id.* at 713, 722-23.
35. *Id.* at 713.
36. *Near*, 283 U.S. at 716.
37. *Id.*
38. Schenck v. United States, 249 U.S. 47, 52 (1919).
39. *Near*, 283 U.S. at 716.

2. *Kingsley Books v. Brown*

In 1957 the Supreme Court had occasion to refine the theory of prior restraint of obscenity in *Kingsley Books v. Brown*.[40] In that case, a section of the New York criminal code authorized the issuance of an injunction prior to trial of the sale and distribution of obscenity provided the court observed certain procedural safeguards designed to protect the rights of the accused to a prompt determination of the matter.[41] The Supreme Court upheld the law, finding it no more restrictive of speech than many schemes of subsequent punishment.[42]

3. *New York Times Company v. United States*

The national security exception discussed in *Near*[43] was the subject of the famous 1971 Pentagon Papers Case, *New York Times Co. v. United States*.[44] Two newspapers, the New York Times and the Washington Post, planned to publish a secret study entitled "History of U.S. Decision-Making Process on Viet Nam Policy."[45] When the United States attempted to enjoin the papers, the cases were rapidly appealed all the way to the Supreme Court.[46] The cases evoked a strong reaction from the Court; a short per curiam opinion was accompanied by six concurring opinions and three dissents.[47] The per curiam opinion said only that the government had not met the heavy burden of justifying the prior restraint in the face of a strong presumption against its validity.[48]

Justice Black, however, would have vacated the injunction without even an oral argument.[49] He believed the government had no power ever to enjoin the publication of news.[50] He remarked, "In my view it is unfortunate that some of my Brethren are apparently willing to hold that the

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40. Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957).

41. *Id.* at 437.

42. *Id.* at 442-44.

43. Near v. Minnesota, 283 U.S. 697, 716 (1931).

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

45. *Id.* at 714.

46. *Id.* at 714, 753.

47. *See generally id.* Concurring opinions were filed by Justices Black, Douglas, Brennan, Stewart, White and Marshall. Dissenting opinions were filed by Mr. Chief Justice Burger and Justices Harlan and Blackmun.

48. *Id.* at 714.

49. New York Times Co. v. United States, 403 U.S. 713, 714 (1971).

50. *Id.* at 715.

publication of news may sometimes be enjoined. Such a holding would make a shambles of the First Amendment."[51] Justice Douglas shared Justice Black's view and believed that Congress shared it as well since they had made no effort to prevent publication of the information at issue.[52] But the other concurring opinions were less extreme. Justice Brennan, for example, concurred in the holding but seemed to favor limiting its reach to factually similar situations; he acknowledged that in some instances national security interests could justify a prior restraint.[53] Justice Stewart only reluctantly joined after finding that the relief requested was in fact an executive, rather than judicial, function.[54]

4. *Nebraska Press Association v. Stuart*

The rights of the accused to a fair trial were balanced against the freedom of the press in *Nebraska Press Ass'n v. Stuart*.[55] The Nebraska Supreme Court modified a lower court's gag order so that the media was prevented from reporting information on the confessions or admissions of a multiple murder suspect and on "facts 'strongly implicative' of the accused."[56] Upon review, the Supreme Court cited a "whole panoply of protections" for the criminal defendant through the process of appellate review and said "[a] prior restraint, by contrast and by definition, has an immediate and irreversible sanction."[57] In reversing the Nebraska court, the Supreme Court said that the alternatives to prior restraint (change of venue, careful questioning of potential jurors, etc.) had neither been shown inadequate nor had the effectiveness of the prior restraint in protecting the rights of the accused been demonstrated.[58]

5. *Seattle Times Company v. Rhinehart*

Finally, in the more recent case of *Seattle Times Co. v. Rhinehart*,[59] the Supreme Court considered whether information gained through pre-trial

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51. *Id.*
52. *Id.* at 720-22.
53. *Id.* at 724-27.
54. New York Times Co. v. United States, 403 U.S. 713, 727-30 (1971).
55. Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976).
56. *Id.* at 545.
57. *Id.* at 559.
58. *Id.* at 565-67.
59. Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984).

discovery in preparation of a civil suit was protected by the First Amendment.[60] Members of a religious organization sued two newspapers for defamation after the papers ran a series of articles about the group.[61] Citing a fear of harassment and other adverse affects, the organization sought and obtained an order from the trial court restricting the newspapers' use of certain information obtained through discovery.[62] In upholding the order, the Supreme Court stated "[a] litigant has no First Amendment right of access to information made available only for purposes of trying his suit."[63] It was the method by which the information was obtained, however, and not the information itself, that formed the basis for the court's decision: "[T]he party may disseminate the identical information covered by the protective order as long as the information is gained through means independent of the court's processes."[64]

III. PROCEDURAL HISTORY

A. *Facts of* In re King World Productions, Inc.

Dr. Stuart M. Berger, the respondent in this case, lived and practiced medicine in New York.[65] He was nationally known for his diet program,[66] wrote a weekly column for the New York Post[67] and authored the best-sellers *Dr. Berger's Immune Power Diet*, *The Southhampton Diet*, and *How to Be Your Own Nutritionist*.[68] Dr. Berger appeared on a variety of television and radio programs and was the subject of several news articles.[69]

The doctor's methods and claims regarding his diet program and medical practice were controversial and attracted extensive criticism.[70] At

60. *Id.* at 22.
61. *Id.* at 22-23.
62. *Id.* at 26-27.
63. *Id.* at 32.
64. Seattle Times Co. v. Rhinehart, 467 U.S. 20, 34 (1984).
65. *In re* King World Prods., Inc., 898 F.2d 56, 57 (6th Cir. 1990).
66. *Id.*
67. *Federal Court Enjoins Exclusive 'Inside Edition' Footage Revealing Practices of New York Nutritionist Dr. Stuart Berger*, PR Newswire, Jan. 19, 1990, *available in* LEXIS, Nexis Library, CURRNT File [hereinafter *Federal Court Enjoins*].
68. *Diet Doctor Loses Bid to Halt TV Program*, UPI, Jan. 30, 1990, *available in* LEXIS, Nexis Library, CURRNT File [hereinafter *Diet Doctor Loses Bid*].
69. *In re* King World Prods., Inc., 898 F.2d at 57.
70. *Id.*

the time the appellate court was writing its opinion for this case, Dr. Berger was under investigation by the New York State Department of Health, Office of Professional Medical Conduct for allegedly unethical and fraudulent conduct.[71] The investigation was reported by ABC News, the Wall Street Journal and other news organizations.[72]

The petitioner in this case, King World Productions, was a New York corporation that produced and broadcasted the news program *Inside Edition* through its subsidiary, Inside Edition, Inc.[73] In January 1990, *Inside Edition* was rated eighth highest in first-run syndicated programs.[74] Other top-rated shows distributed by King World included "Wheel of Fortune," "Jeopardy," and "The Oprah Winfrey Show."[75] The company also distributed feature films and television programs, sold advertising, and owned a television station in Buffalo, New York.[76]

In October 1989, during an investigation of Dr. Berger, *Inside Edition* sent producer Amy Wasserstrom to his office posing as a patient.[77] Equipped with a hidden videocamera, Wasserstrom secretly taped the visit during which the doctor allegedly committed medical malpractice and engaged in unethical behavior.[78] "During that first visit," Wasserstrom reported, "before receiving the results of any tests, Dr. Berger diagnosed me as having 'chronic fatigue syndrome' and prescribed a course of treatment which included fatigue shots."[79] She was billed $845 for the visit.[80] On her second visit, Dr. Berger diagnosed her as being allergic to yeast and billed her $221.[81] During her third visit, she was given an intravenous "drip" treatment of vitamins.[82] At some point during the course of the investigation, two certified physicians pronounced Wasserstrom healthy.[83] One particular examination failed to disclose a yeast allergy.[84] *Inside Edition* then revealed to Dr. Berger their plan to show the videotape during

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71. *Id.*
72. *Id.*
73. *Id.*
74. *Federal Court Enjoins, supra* note 67.
75. *Id.*
76. *Id.*
77. *Diet Doctor Loses Bid, supra* note 68; *In re* King World Prods., Inc., 898 F.2d 56, 57 (6th Cir. 1990).
78. *Diet Doctor Loses Bid, supra* note 68; *King World Prods.*, 898 F.2d at 56-58.
79. *Diet Doctor Loses Bid, supra* note 68.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Federal Court Enjoins, supra* note 67.
84. *Diet Doctor Loses Bid, supra* note 68.

a report on his medical practice.[85]

Dr. Berger sued King World in the United States District Court for the Eastern District of Michigan to enjoin the broadcast of the videotape.[86] He contended that surreptitiously videotaping the office visits constituted a violation of 18 U.S.C. § 2511 (the federal anti-wiretap statute), invasion of privacy, fraud, and trespass.[87] The doctor claimed he would suffer irreparable harm from the broadcast[88] and sought $10 million in damages in addition to the injunction.[89]

Based on the violation of federal anti-wiretap law and New York tort law, the district court issued a temporary restraining order on January 18, 1990, prohibiting *Inside Edition* from broadcasting the videotapes on its January 22, 1990, program.[90] The district court's decision hinged on the construction of the federal anti-wiretap law found in *Stockler v. Garratt*.[91] There, the Sixth Circuit Court of Appeals held that liability under the statute applies even if the illegal recording is not actually used for criminal or tortious purposes.[92] Rejecting King World's freedom of the press defense, the district court stated, "the First Amendment is just not interested in protecting the news media from calculated misdeeds."[93] King World immediately petitioned the United States Court of Appeals, Sixth Circuit, for a writ of mandamus claiming the temporary restraining order was an unconstitutional prior restraint of its First Amendment rights.[94]

B. The Sixth Circuit Court of Appeals' Decision

In considering King World's petition, the court of appeals noted that the writ of mandamus traditionally has been used "to confine a lower court to lawfully exercise its prescribed jurisdiction or compel it to exercise its authority when it is its duty to so act."[95] Mandamus is a drastic remedy

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85. *In re* King World Prods., Inc., 898 F.2d 56, 58 (6th Cir. 1990).

86. *Id.*

87. *Id.*

88. *Id.*

89. *Inside Edition Wins Case Over Diet Doctor*, UPI, Jan. 29, 1990, *available in* LEXIS, Nexis Library, CURRNT File.

90. *In re* King World Prods., Inc., 898 F.2d 56, 58 (6th Cir. 1990).

91. *Id.* at 59 (citing Stockler v. Garratt, 893 F.2d 856 (6th Cir. 1990)).

92. *Id.* at 59.

93. *Id.*

94. *Id.* at 57-58.

95. *In re* King World Prods., Inc., 898 F.2d 56, 58 (6th Cir. 1990).

used only in extraordinary circumstances.[96] The court pointed out that "[t]here must be a demonstration of a clear abuse of discretion or conduct amounting to usurpation of judicial power in order to grant such a writ."[97] A key issue to the court of appeals' decision was whether the district court's order was clearly erroneous as a matter of law.[98] That consideration in turn depended on whether the temporary restraining order violated King World's First Amendment rights.[99]

The appellate court rejected the district court's finding that a violation of the anti-wiretap statute could form the basis for limiting the media's First Amendment rights.[100] The court of appeals said that "[w]hile section 2511 proscribes certain conduct, it in no way provides for a prior restraint of the press in their exercise of [F]irst [A]mendment rights even if the press's conduct clearly violates section 2511."[101] Further, the court said that the *purpose* of the First Amendment is to protect the right to disseminate information such as that in the videotape regardless of how it is obtained.[102]

In support of its position, the court of appeals pointed out that even publication of national security information had been protected from prior restraint.[103] "Any prior restraint," the court said, "bears a heavy presumption against its constitutional validity."[104] The fact that the district court's order was temporary did not lighten the presumption because "a prior restraint, by . . . definition, has an immediate and irreversible sanction."[105]

The court acknowledged that *Inside Edition's* broadcast of the videotape might embarrass Dr. Berger and cautioned that their decision was not to be construed as approval of the program's methods.[106] The court held, however, that Dr. Berger failed to show an irreparable injury sufficient to justify a prior restraint of *Inside Edition's* First Amendment rights.[107] The district court was therefore found to have abused its discretion and the writ of mandamus was granted, compelling the district

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96. BLACK'S LAW DICTIONARY 961 (6th ed. 1990).

97. *In re* King World Prods., Inc., 898 F.2d 56, 58 (6th Cir. 1990).

98. *Id.* at 59.

99. *See id.*

100. *Id.*

101. *Id.*

102. *In re* King World Prods., Inc., 898 F.2d 56, 59 (6th Cir. 1990).

103. *Id.* at 59-60 (citing New York Times Co. v. United States, 403 U.S. 713 (1971)).

104. *Id.* at 60 (citations omitted).

105. *King World*, 898 F.2d at 60 (citing Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976)).

106. *In re* King World Prods., Inc., 898 F.2d 56, 60 (6th Cir. 1990).

107. *Id.*

court to vacate its temporary restraining order.[108]

Following the court of appeals' decision, Dr. Berger petitioned the United States Supreme Court for a stay, pending review of the case by the Court.[109] Justice Scalia denied the request without comment.[110]

IV. ANALYSIS AND CRITIQUE

A. *The Court of Appeals' Reasoning in* King World

Legal scholars have variously characterized the doctrine of prior restraint as confused, simplistic, and irrelevant.[111] Perhaps for the same reasons, the Sixth Circuit Court of Appeals could offer only superficial justification for its decision in *King World.* In response to the district court's temporary restraining order enjoining the broadcast of the surreptitiously made videotape, the court of appeals propounded a belief in the media's virtually absolute freedom from prior restraints under the First Amendment.[112] Inexplicably, the court of appeals then adopted a more moderate balancing test to determine if the restraining order was warranted.[113] Concluding without explanation that it was not warranted, the court vacated the order.[114]

1. An Unqualified Freedom of the Press Asserted

Recalling that a prior restraint had been invalidated even where national security information was involved, the court cited *New York Times v. United States,*[115] the Pentagon Papers case, for the proposition that:

> Protection of the right to information that appeals to the public at large and which is disseminated by the media is the cornerstone of the free press clause of the [F]irst [A]mendment. No matter how inappropriate the acquisition, or its correctness, the right to disseminate that information is what the Constitution intended to

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108. *Id.*

109. *Diet Doctor Loses Bid, supra* note 68.

110. *Id.*

111. Thomas I. Emerson, *The Doctrine of Prior Restraint,* 20 LAW & CONTEMP. PROBS. 648, 649 (1955); Redish, *supra* note 5, at 59; Jeffries, *supra* note 14, at 420.

112. *In re* King World Prods., Inc., 898 F.2d 56, 59-60 (6th Cir. 1990).

113. *Id.* at 60.

114. *Id.*

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

protect.[116]

But how the *New York Times* decision can be made to stand for this expansive view of prior restraint law was not explained by the *King World* court.

To be sure, the concurring opinions of Justice Black and Justice Douglas in *New York Times,* with their distinct absolutist slant,[117] would lend support for an argument that the *King World* court's view *should* be the law. But, as previously discussed, the holding of the Supreme Court in the brief per curiam opinion in *New York Times* speaks only of a heavy presumption against prior restraints and is devoid of any language approaching the extreme view adopted by the court of appeals in *King World.*[118]

2. A Balancing Standard Adopted

After espousing an unqualified freedom of the press, the court of appeals, in a peculiar turn of reasoning, retreated and stated that there was merely a strong presumption against prior restraints; a view that accurately reflects the holding of the Supreme Court in *New York Times.*[119] The court then pronounced this rule: "In order to support the temporary restraining order, Dr. Berger must show that he will suffer an irreparable harm great enough to justify a prior restraint in the face of this stringent standard."[120] A non sequitur at best, the weighing of interests implicit in this rule seems to directly contradict the absolute privilege of the press previously asserted.

Furthermore, the court offered no authority in support of its balancing standard.[121] This is not to suggest that a balancing standard is inappropriate, as will be discussed later.[122] But the court of appeals did not claim to establish a new rule; rather the balancing standard seems to be offered as the logical conclusion to the propositions cited from earlier cases.[123] Unfortunately, the infirmity of the court's balancing standard does not end there.

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116. *King World,* 898 F.2d at 59.
117. *See New York Times,* 403 U.S. at 714-724; *supra* part II.B.3.
118. *New York Times,* 403 U.S. at 714.
119. *In re* King World Prods., Inc., 898 F.2d 56, 60 (6th Cir. 1990).
120. *Id.*
121. *Id.*
122. *See* discussion *infra* part V.B.
123. *In re* King World Prods., Inc., 898 F.2d 56, 60 (6th Cir. 1990).

broadcast.[125] The court then held, "Dr. Berger has simply failed to show the type of irreparable harm or injury that would tip the scale toward justifying a prior restraint."[126]

The court of appeals granted *Inside Edition's* petition for a writ of mandamus, thereby requiring the district court to vacate its temporary restraining order.[127] The summary manner with which the court dealt with the issue suggests, perhaps, that in reality the standard actually applied was closer to the absolutist, but contradictory, position first expressed by the court. "We do not," the court concluded, "nibble away at [F]irst [A]mendment rights."[128] What other rights have been devoured in the wake of this decision, however, may be open to question.

B. Privacy Interests Ignored by the Court of Appeals

Justice Douglas said "[t]he right to be let alone is indeed the beginning of all freedom."[129] Apparently, however, the court of appeals in *King World* believed that the recognition of an enforceable[130] right to be let alone would mark the end of the freedom of the press. While purporting to weigh Dr. Berger's justification for imposing a prior restraint on *Inside Edition*, the court neglected even to discuss the infringement on Dr. Berger's privacy represented by the surreptitious videotape.[131] The court apparently failed to consider that the enactment of the federal anti-wiretap statute suggests the existence of a congressionally recognized privacy interest in situations such as the one confronted by Dr. Berger.[132] Furthermore, the court of appeals ignored some important guidelines provided by the Supreme Court in a case also involving a conflict between the media's First Amendment rights and an individual's privacy rights.[133]

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125. *Id.*

126. *Id.*

127. *Id.*

128. *In re* King World Prods., Inc., 898 F.2d 56, 60 (6th Cir. 1990).

129. Public Utils. Comm'n v. Pollak, 343 U.S. 451, 467 (1952) (Douglas, J., dissenting).

130. Because damages are inadequate as a remedy (*see* discussion *infra* part IV.C.), vacating the temporary restraining order in this case had the effect of denying the protection of the right to privacy.

131. *See King World*, 898 F.2d at 60.

132. *See infra* part IV.B.1.

133. *See infra* part IV.B.2.

While serviceable as a general principle, the standard articulated by the court is hopelessly vague as a working rule against which a set of facts may be evaluated. "Dr. Berger must show," the court said, "that he will suffer an irreparable harm great enough to justify a prior restraint."[124] What level of proof is required by the word "show?" A preponderance of the evidence? Clear and convincing evidence? Evidence leaving no reasonable doubt?

What is the definition of "irreparable harm?" Does it include injuries that cannot be reduced to a monetary value, such as the loss of reputation and self-esteem? Does it include economic losses that are nearly impossible to quantify with any degree of certainty, such as the loss of future business?

How great is "great enough?" If Dr. Berger had shown that the broadcast of the videotape would cause the loss of 50% of his medical practice regardless of the truth of the allegations, would that have been great enough? Would 75% be enough? Or 90%?

If a court is permitted to consider harm that cannot be quantified, such as the loss of reputation and self-esteem, by what standard should the court gauge such a loss? According to Dr. Berger's perception—a subjective standard? Or by a "reasonable person's" perception—an objective standard?

Finally, how are the media's interests to be balanced against the plaintiffs? Should different kinds of information which the media may seek to publish or broadcast receive different weights in the eyes of the court? For example, should extremely personal information about a private individual be entitled to as much protection from prior restraint as information about alleged governmental misconduct?

3. An Unsupported Conclusion

The *King World* court did not answer these questions. In fact, the court did not offer *any* guidance, either by reference to authority in the case law or by a detailed analysis leading to its own decision, on how its balancing standard should be applied. The court simply rejected without explanation Dr. Berger's contention that proving damages would be extremely difficult if *Inside Edition* were permitted to broadcast the videotape and acknowledged he may suffer some embarrassment from the

124. *Id.*

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1. The Existence of a Congressionally Recognized Privacy Interest

The existence of a congressionally recognized privacy interest in the *King World* case is evidenced by the code allegedly violated by *Inside Edition*: 18 U.S.C. § 2511, the federal anti-wiretap statute. That law proscribes interception and disclosure of wire, oral or electronic communications.[134] While abuse by law enforcement agencies was probably the main concern of Congress in enacting this legislation, it is clear that privacy was the underlying value which they sought to protect.[135] "Privacy," a Senate Report said, "cannot be left to depend solely on physical protection, or it will gradually erode as technology advances. Congress must act to protect the privacy of our citizens. If we do not, we will promote the gradual erosion of this precious right."[136]

The prophetic comment in the Senate Report was fulfilled with startling accuracy in the *King World* case. As video cameras have become smaller and more sophisticated, their use has grown[137] and the opportunities for the invasion of privacy have burgeoned. These technological advances enabled *Inside Edition* to smuggle a camera into Dr. Berger's office and secretly videotape him—a feat that would have been impossible only a few years ago.[138] Thus, resort to physical protection in a home or office no longer provides the measure of privacy that it did before these advances.

The elevation of privacy to the status of a right is a relatively recent development in our society.[139] Arguably, this is because the need for protection of privacy is relatively recent as well.[140] The inherently personal nature of privacy concerns, however, has thwarted a precise definition of the right; instead, society has carved out certain aspects of life and denominated them "private."[141] For example, freedom of association, sanctity of the home, and control over a person's own body have been

134. 18 U.S.C. § 2511 (1988).

135. S. REP. No. 541, 99th Cong., 2d Sess. (1986).

136. *Id.*

137. *See* Jane Hall, *Should Hidden Cameras Be Used For TV News?*, L.A. TIMES, Jan. 25, 1990, § F (Calendar), at 1.

138. *Id.*

139. *See* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 488 (1975) ("[T]he century has experienced a strong tide running in favor of the so-called right of privacy."); Arthur R. Miller, *The William O. Douglas Lecture: Press Versus Privacy*, 16 GONZ. L. REV. 843, 845 (1981); Irwin R. Kramer, *The Full Court Press: Sacrificing Vital Privacy Interests on the Altar of First Amendment Rhetoric*, 8 CARDOZO ARTS & ENT. L.J. 113, 119 (1989).

140. Miller, *supra* note 139, at 845.

141. *Id.*; Kramer, *supra* note 139, at 119.

recognized by the Supreme Court as constitutionally protected.[142]

Congress recognized the threat to privacy posed by the explosive growth in technology and accordingly enacted the federal anti-wiretap statute, 18 U.S.C. § 2511.[143] If, as Dr. Berger claimed, *Inside Edition* violated section 2511 when it secretly videotaped him, he plainly suffered an invasion of his privacy which Congress had actively and explicitly sought to protect.

2. Privacy and Prior Restraint in *Seattle Times Company v. Rhinehart*

Even if Dr. Berger had a legally recognized privacy interest that was violated by *Inside Edition*, it does not follow from that fact alone that he was entitled to the temporary restraining order. However, the case law is not entirely silent on this point. In *Seattle Times Co. v. Rhinehart*,[144] the Supreme Court recognized privacy as a legitimate consideration in evaluating a prior restraint of the press.[145] The Supreme Court in *Seattle Times* upheld a prior restraint on the dissemination of information gained through discovery, finding a substantial governmental interest[146] in preventing abuse of the pre-trial discovery process.[147] The Court observed that the rules of discovery provided litigants with the opportunity to obtain information that, if released, could infringe on privacy interests.[148] The Court concluded that "[t]he prevention of the abuse that can attend the coerced production of information under a State's discovery rule is sufficient justification for the authorization of protective orders."[149]

Therefore, in *Seattle Times*, the issue of whether or not the media had the right to disseminate the information in question turned on the *way* in which that information was obtained.[150] The Supreme Court made much

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142. Miller, *supra* note 139, at 844-45 (citing NAACP v. Alabama, 357 U.S. 449, 462 (1958); Stanley v. Georgia, 394 U.S. 557, 564 (1969); Roe v. Wade, 410 U.S. 113, 152-56 (1973)).

143. S. REP. No. 541, 99th Cong., 2d Sess. (1986).

144. Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984).

145. *See id.* at 30, 34-36.

146. *Id.* at 35. The complete test employed by the Court in determining whether the prior restraint could be applied was to determine "whether the 'practice in question [furthers] an important or substantial governmental interest unrelated to the suppression of expression' and whether 'the limitation of First Amendment freedoms [is] no greater than is necessary or essential to the protection of the particular governmental interest involved.'" *Id.* at 32 (quoting Procunier v. Martinez, 416 U.S. 396, 413 (1974)).

147. Seattle Times Co. v. Rhinehart, 467 U.S. 20, 37 (1984).

148. *Id.* at 34-36.

149. *Id.* at 35-36.

150. *Id.* at 34.

of the fact that the media obtained the information in question only through the rules of discovery, calling the process "a matter of legislative grace."[151] The Court said that the First Amendment did not extend to information gathered in this way.[152]

In *King World*, however, not only was the information at issue *not* made available through "legislative grace," it was specifically *protected* by the legislature through the federal anti-wiretap statute.[153] Yet the court of appeals effortlessly found that the First Amendment entitled the media to disseminate the information.[154] This disregard of legislative intent in defining what information is protected by the First Amendment is irreconcilable with the principles articulated by the Supreme Court in *Seattle Times*.[155]

The divergence between the court of appeals' view and the Supreme Court's view in these two cases is apparent in their respective statements regarding the right of the media to gather information. Finding that court control over discovered information did not rise to the level of censorship, the Supreme Court in *Seattle Times* quoted an earlier case saying, "[t]he right to speak and publish does not carry with it the unrestrained right to gather information."[156] In contrast, the court of appeals believed that

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151. Seattle Times Co. v. Rhinehart, 467 U.S. 20, 32 (1984). By way of further emphasis, the Court said "the party may disseminate the identical information covered by the protective order as long as the information is gained through means independent of the court's processes." *Id.* at 34.

152. "A litigant has no First Amendment right of access to information made available only for purposes of trying his suit." *Id.* at 32.

153. *In re* King World Prods., Inc., 898 F.2d 56, 58 (6th Cir. 1990); 18 U.S.C. § 2511 (1988).

154. "Protection of the right to information that appeals to the public at large and which is disseminated by the media is the cornerstone of the free press clause of the [F]irst [A]mendment." *King World* 898 F.2d at 59.

155. It may be tempting to draw a distinction between the cases based on the fact that in *Seattle Times*, the Washington state rules of discovery (Rule 26 (c)) specifically provided for an injunctive order whereas the federal anti-wiretap law made no such provision. Possibly Congress believed Federal Rule of Civil Procedure 65(b), Temporary Restraining Orders, provided sufficient authorization for a prior restraint. The rules of discovery make the information legally available to the opposing party, therefore some sort of protection must be provided to prevent the unjust damage to reputation and invasion of privacy cited by the Court in *Seattle Times*. In the case of the anti-wiretap statute, however, the government's primary motive was to prevent the information from even becoming available. *See* S. REP. No. 541, 99th Cong., 2d Sess. (1986). It was therefore reasonable that Congress would expect the courts to adhere to traditional notions of justice by denying a wilful violator of § 2511 of the fruits of her wrongdoing and, further, to avail themselves of all the tools already at their disposal, including the Federal Rules of Civil Procedure.

156. Seattle Times Co. v. Rhinehart, 467 U.S. 20, 32 (1984) (quoting Zemel v. Rusk, 381 U.S. 1, 16-17 (1965)).

"[n]o matter how inappropriate the acquisition, or its correctness, the right to disseminate that information is what the Constitution intended to protect."[157]

C. Comparison of Available Remedies

In seeking the restraining order, it was Dr. Berger's contention that damages would be difficult to prove if *Inside Edition* were allowed to air the videotape.[158] In response, the court of appeals said, "[w]e fail to see how the broadcast of the video footage will hamper Dr. Berger's ability to prove the alleged torts or the alleged violations of section 2511."[159] But this conclusory remark misses the point. In effect, Dr. Berger was complaining of the inadequacy of damages as a remedy because they would be difficult (or impossible) to quantify. The court of appeals offered no answer to this.[160]

As one writer said regarding prior restraints and national security, "virginity matters."[161] The comment was in reference to the fact that for some types of speech the amount of "harm" caused by the speech varies with the frequency of publication.[162] If, for example, a work of obscenity causes harm when published, a similar harm will likely result from each subsequent publication.[163] In the case of a national security secret, however, all of the damage from publication results from the initial disclosure.[164] Once the secret is disclosed, no further harm results from subsequent disclosure because the information is no longer secret. That writer suggests a prior restraint may be more defensible in the second situation when the damage flows almost exclusively from the initial disclosure.[165] This is the situation in *King World*. Whatever damage Dr. Berger sustained from the disclosure occurred primarily from the first broadcast of the videotapes. His only opportunity to avoid the damage was to prevent the initial showing of the tapes; after that, he was left with the task of quantifying the damage already done.

Presumably, the damage to Dr. Berger's medical practice was

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157. *In re* King World Prods., Inc., 898 F.2d 56, 59 (6th Cir. 1990).
158. *Id.* at 60.
159. *Id.*
160. *Id.*
161. Jeffries, *supra* note 14, at 412.
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.*

susceptible to quantification by comparing business activity before and after the broadcast. Undoubtedly, however, evidentiary problems would make it difficult to be precise in this area and convincing a jury could be even more difficult. But this aside, there is the injury to Dr. Berger personally from the invasion of his privacy. Professor Arthur Miller observed that "[l]oss of privacy leads to loss of dignity and loss of self."[166] Being forced to reduce that loss to a dollar value aggravates it. How does one put a price tag on her own dignity? For this reason, a part of Dr. Berger's injury was irreparable, making a prior restraint the most complete remedy.

D. Distinguishing King World *from Other Major Prior Restraint Cases*

Regardless of the cursory nature of the court of appeals' analysis in *King World*, its dislike of prior restraints joins a long tradition in history and in case law.[167] The court neglected to consider, however, several important distinctions between the facts of *King World* and those of other important prior restraint decisions. As a result, this case serves mainly to confuse, rather than clarify, the law.

1. *New York Times Company v. United States*

As discussed, the court of appeals in *King World* relied heavily in its decision on the *New York Times* case and attached considerable weight to the fact that "even prior restraint of the dissemination of national security information has been denied."[168] But the court failed to recognize the strong countervailing interests at stake in *New York Times*. The information at issue in that case was a classified study concerning United States involvement in the Vietnam War.[169] The government sought to prevent publication because of the potential damage to national security that publication could cause.[170] Obviously, the government had a strong interest in national security. However, the same information was also valuable for informing the public of the government's activities in that

166. Miller, *supra* note 139, at 845.

167. *See generally supra* part II.

168. *In re* King World Prods., Inc., 898 F.2d 56, 59-60 (6th Cir. 1990).

169. New York Times Co. v. United States, 403 U.S. 713, 714 (1971).

170. *Id.* at 725 (Brennan, J., concurring).

highly controversial war.[171] Supervising and reporting the actions of government has always been the premier function of a free press.[172] Therefore, in *New York Times*, the characteristic of the information that created an interest in the government (national security) also created an interest in the press (informing the public on a critical national issue).

Thus, it was not so much a matter of a prior restraint being too offensive to the Constitution to stand *even* when national security was at stake, as the court of appeals in *King World* suggested; rather, it was a matter of strong competing interests to be *weighed* against each other. In the *King World* case, no similar issue of public debate was involved, only the actions of a private doctor.[173] Consequently, the strong policy consideration of ensuring that the media is able to bring information before the public was absent in *King World*.[174]

2. *Near v. Minnesota*

Like *New York Times*, *Near v. Minnesota*[175] involved a strong public policy interest in not restraining the information sought to be published.[176] In *Near*, the Supreme Court held unconstitutional a state law which permitted a trial court to enjoin the publication of a newspaper running articles critical of local government.[177] Addressing the historical roots of the free press, the Supreme Court in *Near* stated "[t]hat liberty was especially cherished for the immunity it afforded from previous restraint of the publication of censure of public officers and charges of official misconduct."[178] Again, unlike *King World*, this case involved an important issue of public debate.

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171. "A debate of large proportions goes on in the Nation over our posture in Vietnam. That debate antedated the disclosure of the contents of the present documents. The latter are highly relevant to the debate in progress." *Id.* at 724 (Douglas, J., concurring).

172. "The press was protected so that it could bare the secrets of government and inform the people." *Id.* at 717. *See generally*, DOWNS, *supra* note 14; NIMMER, *supra* note 23.

173. *In re* King World Prods., Inc., 898 F.2d 56, 57-58 (6th Cir. 1990).

174. *See infra* part V.A regarding the public's interest in knowing about a doctor's malpractice.

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

176. *Id.*

177. *Id.* at 702-03, 722-23.

178. *Id.* at 717.

3. *Nebraska Press Association v. Stuart*

Nebraska Press Ass'n v. Stuart[179] involved a murder trial gag order.[180] The Supreme Court determined that the rights of the accused were adequately protected through means other than a prior restraint of speech (change of venue, appellate review, etc.).[181] The rights of the press, however, were severely compromised by the gag order.[182] In *King World*, on the other hand, Dr. Berger had no preventative means of protecting his rights other than the temporary restraining order. His only remedy was to seek damages in a civil action after the violation of his rights had already occurred.

Furthermore, in *Nebraska Press*, the Supreme Court characterized the press' injury from the prior restraint as "immediate and irreversible."[183] If the *immediacy* and *irreversiblilty* of an injury are relevant considerations where the press' rights are concerned, the same considerations should apply to those rights that are in conflict with the press' rights. What the *King World* court failed to consider was the *duration* of the violation. If *Inside Edition* had the right to broadcast the videotape, the injury caused by the temporary restraining order, while immediate and irreversible, would nonetheless be *temporary*, pending the court's final order. When the order was lifted, *Inside Edition* would be free to broadcast the tape. The enjoyment of the right would not be destroyed but only suspended for a limited period of time.

If, however, *Inside Edition* did not have the right to broadcast the videotape, the injury to Dr. Berger was not only immediate and irreversible, but *permanent* as well. Once the videotape was aired, the intrusion on Dr. Berger's privacy was complete; the essential characteristic of privacy—seclusion—was destroyed. Dr. Berger may be compensated, but the violation lingers on and the enjoyment of the right is gone forever.

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

180. *Id.* at 541.

181. *Id.* at 559, 563-65.

182. "A prior restraint, by contrast and by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time." *Id.* at 559.

183. *Id.*

V. IMPLICATIONS OF THE *KING WORLD* DECISION AND THE FUTURE OF PRIOR RESTRAINT LAW

A. The Message to the Media: Double Standards and Economic Incentives

Some people will probably have difficulty mustering any sympathy for Dr. Berger; after all, the videotape showed the doctor engaging in allegedly blatant medical malpractice.[184] An argument could be made that *Inside Edition* performed a valuable public service by exposing a charlatan. The problem with such an argument is, of course, that excusing the media's conduct based on the results achieved would make a shambles of our system of justice. Is the media now to act as some sort of super-police force? Has it gone from government watchdog to government *surrogate*?[185] Who will be the media's watchdog? Whether guilty or innocent, Dr. Berger suffered as a result of *Inside Edition's* broadcast. Are accused wrongdoers to be tried in the media without the benefit of any of the procedural safeguards built into a criminal or civil trial?

Nor can the bitter hypocrisy of the situation easily be ignored. *Inside Edition* self-righteously garbed itself in the First Amendment and mounted an assault on individual privacy that, if conducted by the government, would have had the media howling. In their haste to accuse Dr. Berger of medical malpractice, *Inside Edition* recklessly disregarded their own obligations under the federal anti-wiretap law. Apparently the media claims for itself privileges enjoyed nowhere else in society.[186] The events of this case give rise to a specter of tyranny historically associated only with government. Yet the court of appeals contented itself to note that their decision was "not intended to constitute an approval" of *Inside Edition's* actions.[187] This convenient fiction ignores an important economic reality of the media in our society.

It is unlikely that the leviathan broadcasting companies are particularly concerned about a few after-the-fact civil suits resulting from the broadcast of surreptitious videotapes. As discussed earlier, the damage resulting from

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184. *In re* King World Prods., Inc., 898 F.2d 56, 58 (6th Cir. 1990); *Diet Doctor Loses Bid, supra* note 68.

185. At the time of the court of appeals decision, Dr. Berger was under investigation by the New York State Department of Health, Office of Professional Medical Conduct. *King World*, 898 F.2d at 57.

186. *See generally* Miller, *supra* note 139, at 850.

187. *King World*, 898 F.2d at 60.

such an invasion of privacy is extremely difficult to quantify and prove.[188] While the cost of litigating a civil suit may be prohibitive for an individual, for a multi-million dollar corporation it is literally just a cost of doing business. Moreover, the boost to advertising revenues that high ratings can bring may provide an incentive to risk litigation in pursuit of those high ratings. With no possibility of having the broadcast of a film segment enjoined, all any economic media network needs to concern itself with is whether the potential boost to ratings, and thus revenues, is high enough to compensate for any civil damages they may potentially incur.

Whether an individual's privacy is preserved from illegal action by the media, then, will depend not on how those rights are weighed against the rights of a free press in the context of our societal values, but on whether the advertising revenues thus generated exceed any anticipated civil damages. Surely the noble rights secured in the Constitution deserve a more deliberative determination.

B. Commentaries on the State of Prior Restraint Law

Over the years, the subject of prior restraints has received a variety of treatments by legal writers attempting to wring a cohesive system of principles from the historical origins and case law.[189] There is certainly general agreement on the nebulous state of the doctrine but less accord on what shape a clear scheme of prior restraint should take.[190] While some advocate retaining the traditional aversion, others question the appropriateness of the simplistic, broad-sweeping presumption against prior restraints.[191] Two writers in particular have proposed solutions which seem to offer a more equitable resolution to conflicts like the one in *King World.*

Professor Martin H. Redish attributes the ambiguous state of the doctrine to a lack of judicial analysis: "[F]irst Amendment interests are not served by attempts to avoid difficult questions by use of oversimplified formulas. Nowhere is this more evident than in the current structure of the prior restraint doctrine."[192] Rejecting traditional arguments supporting the presumption against prior restraints, he instead advocates a requirement of a full and fair judicial hearing before any prior restraint may be made.[193]

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188. *See supra* part IV.C.
189. *See infra* this part.
190. *See infra* this part.
191. Redish, *supra* note 5; Jeffries, *supra* note 14.
192. Redish, *supra* note 5, at 54, 100 (footnote omitted).
193. *Id.* at 58.

Professor John C. Jeffries advocates abandoning the rule altogether, characterizing it as "a doctrine of honored past but contemporary irrelevance—a formulation whose current contribution to the interpretation of the First Amendment is chiefly confusion."[194] Jeffries believes the focus should be on balancing rights brought into conflict by the challenged communication and not on the form of relief requested, whether a prior restraint or a subsequent punishment.[195] "The difficult process of judicial weighing is," he believes, "entirely unaided by reference to the doctrine of prior restraint."[196]

Both views share a theme only superficially treated by the court of appeals in *King World*—the balancing of interests. The rule against prior restraint enjoys such a strong tradition, that it has impeded the progress of judicial analysis of First Amendment rights. The world is a different place than it was when the rule was developed. The media represent a powerful element in our society. It has been suggested that it is not the media that needs protection but individuals who need protection from the media.[197] As Professor Jeffries observed, the process of judicial weighing is a difficult one.[198] Imposing an artificial restriction on remedies purely in compliance with a tradition whose justification has faded does indeed obscure the issues involved in balancing conflicting rights.[199]

C. The First Fruit of King World

All of this raises the question of where this case will take the law of prior restraint. It would be tempting to dismiss *King World* as an isolated case destined for obscurity. It could be hoped that the media will exercise a good measure of self-restraint in the exercise of its unique privilege.

At least part of the answer came less than three months after the court of appeals in *King World* rendered its decision. In April 1990, the United States District Court for the District of Columbia, at the request of a young girl, issued an order restraining Lifetime Cable, a television network, from airing a film in which the girl describes instances of alleged sexual abuse.[200] The girl's guardian claimed the film was made surreptitiously;

194. Jeffries, *supra* note 14, at 420, 437.
195. *Id.* at 437.
196. *Id.*
197. Miller, *supra* note 139, at 843-44.
198. Jeffries, *supra* note 14, at 437.
199. *See supra* this part.
200. Foretich v. Lifetime Cable, 17 Media L. Rep. (BNA) 1647 (1990).

Lifetime Cable denied that charge.[201] Finding the girl would suffer "irreparable harm" from the broadcast, the district court judge issued the order pending a preliminary injunction hearing.[202] The Court of Appeals for the D.C. Circuit, citing *King World* in a short, unpublished decision, vacated the district court's order.[203] The court stated, "[a]ny rights that [the father] or [the girl] may have must . . . be redressed in legal actions that do not require a prior restraint in derogation of the First Amendment."[204]

VI. CONCLUSION

The presumption against prior restraints has played an important role in preserving the vitality of the First Amendment freedom of the press clause. As technology progresses, however, the threats to privacy are becoming greater than could possibly have been imagined by the drafters of the Constitution. The law must continue to provide *meaningful* remedies to those whose privacy is unjustly invaded by media companies whose motives necessarily include not only news reporting but profit as well. The presumption against prior restraints should be relaxed in the case of news regarding private individuals to permit a rational weighing of the media's right to report and the individual's right to be left alone.

William Medlen[*]

201. Victor A. Kovner & Harriette K. Dorsen, *Recent Developments in Intrusion, Private Facts, False Light and Commercialization Claims*, Nov. 8-9, 1990, *available in* Westlaw, TP-ALL database.

202. Foretich v. Lifetime Cable, 17 Media L. Rep. (BNA) 1647 (1990).

203. *Id.* at 1648.

204. *Id.*

* Dedicated to my family, to Larry and to Helen and Guy.