NEBRASKA PRESS ASSN. v. STUART
SUPREME COURT OF THE UNITED STATES
427 U.S. 539
June 30, 1976
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OPINION: Justice Burger...The respondent State District Judge entered an order restraining the petitioners from publishing or broadcasting accounts of confessions or admissions made by the accused or facts "strongly implicative" of the accused in a widely reported murder of six persons. We granted certiorari to decide whether the...order...violated the constitutional guarantee of freedom of the press.

On the evening of October 18, 1975, local police found the six members of the Henry Kellie family murdered in their home in Sutherland, Neb., a town of about 850 people. Police released the description of a suspect, Erwin Charles Simants, to the reporters who had hastened to the scene of the crime. Simants was arrested and arraigned in Lincoln County Court the following morning, ending a tense night for this small rural community.

The crime immediately attracted widespread news coverage, by local, regional, and national newspapers, radio and television stations. Three days after the crime, the County Attorney and Simants' attorney joined in **asking the County Court to enter a restrictive order** relating to "matters that may or may not be publicly reported or disclosed to the public," because of the "mass coverage by news media" and the "reasonable likelihood of prejudicial news which would make difficult, if not impossible, the impaneling of an impartial jury and tend to prevent a fair trial." The County Court heard oral argument but took no evidence; no attorney for members of the press appeared at this stage. The County Court granted the prosecutor's motion for a restrictive order and entered it the next day, October 22. **The order prohibited everyone in attendance from "releasing**

or authorizing the release for public dissemination in any form or manner whatsoever any testimony given or evidence adduced"; the order also required members of the press to observe the Nebraska Bar-Press Guidelines. Simants' preliminary hearing was held the same day, open to the public but subject to the order. The County Court bound over the defendant for trial to the State District Court. The charges, as amended to reflect the autopsy findings, were that Simants had committed the murders in the course of a sexual assault.

Petitioners - several press and broadcast associations, publishers, and individual reporters - [asked] ...that the restrictive order...be vacated. The District Court conducted a hearing, at which the County Judge testified and newspaper articles about the Simants case were admitted in evidence. The District Judge granted petitioners' motion to intervene and, on October 27, entered his own restrictive order. **The judge found "because of the nature of the crimes charged in the complaint that there is a clear and present danger that pre-trial publicity could impinge upon the defendant's right to a fair trial."** The order applied only until the jury was impaneled, and specifically prohibited petitioners from reporting five subjects: (1) the existence or contents of a confession Simants had made to law enforcement officers, which had been introduced in open court at arraignment; (2) the fact or nature of statements Simants had made to other persons; (3) the contents of a note he had written the night of the crime; (4) certain aspects of the medical testimony at the preliminary hearing; and (5) the identity of the victims of the alleged sexual assault and the nature of the assault. It also prohibited reporting the exact nature of the restrictive order itself. Like the County Court's order, this order incorporated the Nebraska Bar-Press Guidelines. Finally, the order set out a plan for attendance, seating, and courthouse traffic control during the trial...

[On appeal], [t]he Nebraska Supreme Court balanced the "heavy presumption against... constitutional validity" that an order restraining publication bears, *New York Times Co. v. United States*[1], against the importance of the defendant's right to trial by an impartial jury. Both society and the individual defendant, the court held, had a vital interest in assuring that Simants be tried by an impartial jury. Because of the publicity surrounding the crime, the court determined that this right was in jeopardy. The court noted that Nebraska statutes required the District Court to try Simants within six months of his arrest, and that a change of venue could move the trial only to adjoining counties, which had been subject to essentially the same publicity as Lincoln County. The Nebraska Supreme Court... rejected that "absolutist position," but modified the District Court's order...The order as modified prohibited reporting of only three matters: (a) the existence and nature of any confessions or admissions made by the defendant to law enforcement officers, (b) any confessions or admissions made to any third parties, except members of the press, and (c) other facts "strongly implicative" of the accused. The Nebraska Supreme Court did not rely on the Nebraska Bar-Press Guidelines... [T]he court remanded the case to the District Judge...[to determine] whether pre-trial hearings should be closed to the press and public...We are informed by the parties that since we granted certiorari, Simants has been convicted of murder and sentenced to death. His appeal is pending in the Nebraska Supreme Court...

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[1]Case 1A-P-3 on this website.

The problems presented by this case are almost as old as the Republic. Neither in the Constitution nor in contemporaneous writings do we find that the conflict between these two important rights was anticipated, yet it is inconceivable that the authors of the Constitution were unaware of the potential conflicts between the right to an unbiased jury and the guarantee of freedom of the press. **The unusually able lawyers who helped write the Constitution and later drafted the Bill of Rights were familiar with the historic episode in which John Adams defended British soldiers charged with homicide for firing into a crowd of Boston demonstrators; they were intimately familiar with the clash of the adversary system and the part that passions of the populace sometimes play in influencing potential jurors.** They did not address themselves directly to the situation presented by this case; their chief concern was the need for freedom of expression in the political arena and the dialogue in ideas. But they recognized that there were risks to private rights from an unfettered press. Jefferson, for example, writing from Paris in 1786 concerning press attacks on John Jay, stated:

> "In truth it is afflicting that a man who has past his life in serving the public... should yet be liable to have his peace of mind so much disturbed by any individual who shall think proper to arraign him in a newspaper. It is however an evil for which there is no remedy..."

...The speed of communication and the pervasiveness of the modern news media have exacerbated these problems...The trial of Bruno Hauptmann in a small New Jersey community for the abduction and murder of the Charles Lindberghs' infant child probably was the most widely covered trial up to that time, and the nature of the coverage produced widespread public reaction. Criticism was directed at the "carnival" atmosphere that pervaded the community and the courtroom itself. Responsible leaders of press and the legal profession - including other judges - pointed out that much of this sorry performance could have been controlled by a vigilant trial judge and by other public officers subject to the control of the court. The excesses of press and radio and lack of responsibility of those in authority in the Hauptmann case and others of that era led to efforts to develop... **voluntary guidelines** like Nebraska's.

In practice, of course, even the most ideal guidelines are subjected to powerful strains when a case such as Simants' arises, with reporters from many parts of the country on the scene. Reporters from distant places are unlikely to consider themselves bound by local standards...To contemplate how a state court can control acts of a newspaper or broadcaster outside its jurisdiction, even though the newspapers and broadcasts reach the very community from which jurors are to be selected, suggests something of the practical difficulties of managing such guidelines...

The Sixth Amendment...guarantees "trial by an impartial jury..." in federal criminal prosecutions. Because "trial by jury in criminal cases is fundamental to the American scheme of justice," the Due Process Clause of the Fourteenth Amendment guarantees the same right in state criminal prosecutions. In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, indifferent jurors...In the overwhelming majority of criminal trials, pre-trial publicity presents few unmanageable threats to this important right. But when the case is a "sensational" one

tensions develop between the right of the accused to trial by an impartial jury and the rights guaranteed others by the First Amendment...

In *Irvin v. Dowd*, the defendant was convicted of murder following intensive and hostile news coverage. The trial judge had granted a defense motion for a change of venue, but only to an adjacent county, which had been exposed to essentially the same news coverage. At trial, 430 persons were called for jury service; 268 were excused because they had fixed opinions as to guilt. **Eight of the 12 who served as jurors thought the defendant guilty, but said they could nevertheless render an impartial verdict**. On review the Court vacated the conviction and death sentence and remanded to allow a new trial for, "with his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion..." In *Sheppard v. Maxwell*[2], the Court focused sharply on the impact of pre-trial publicity and a trial court's duty to protect the defendant's constitutional right to a fair trial...[T]he Court ordered a new trial for the petitioner, even though the first trial had occurred 12 years before. Beyond doubt the press had shown no responsible concern for the constitutional guarantee of a fair trial; the community from which the jury was drawn had been inundated by publicity hostile to the defendant. But the trial judge "did not fulfill his duty to protect [the defendant] from the inherently prejudicial publicity which saturated the community and to control disruptive influences in the courtroom." The Court...issued a strong warning:

> "...[T]he trial courts must take strong measures to ensure that the balance is never weighed against the accused...Of course, **there is nothing that proscribes the press from reporting events that transpire in the courtroom**. But where there is a reasonable likelihood that prejudicial news **prior to trial** will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity. In addition, sequestration of the jury was something the judge should have raised **sua sponte** with counsel. If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered..."

"*Sua sponte*" = "of its own accord." In other words, on the court's own initiative, without being first asked to do so by a party's lawyer.

...Cases such as [*Sheppard*] are relatively rare, and we have held in other cases that trials have been fair in spite of widespread publicity. In *Stroble v. California,* for example, the Court affirmed a conviction and death sentence challenged on the ground that pre-trial news accounts, including the prosecutor's release of the defendant's recorded confession, were allegedly so inflammatory as to amount to a denial of due process. The Court disapproved of the prosecutor's conduct, but noted that the publicity had receded some six weeks before trial, that the defendant had not moved for a change of venue, and that the confession had been found voluntary and admitted in evidence at trial. The Court also noted the thorough examination of jurors on voir dire and the careful review of the facts by the state courts, and held that petitioner had failed to demonstrate a denial of due process.

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[2]Case 1A-P-2 on this website.

Taken together, these cases demonstrate that pre-trial publicity - even pervasive, adverse publicity - does not inevitably lead to an unfair trial. The capacity of the jury eventually impaneled to decide the case fairly is influenced by the tone and extent of the publicity, which is in part, and often in large part, shaped by what attorneys, police, and other officials do to precipitate news coverage. **The trial judge has a major responsibility.** What the judge says about a case, in or out of the court-room, is likely to appear in newspapers and broadcasts. More important, the measures a judge takes or fails to take to mitigate the effects of pre-trial publicity - the measures described in *Sheppard* - may well determine whether the defendant receives a trial consistent with the requirements of due process...

The First Amendment provides that "Congress shall make no law... abridging the freedom...of the press," and it is "no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action." *Near v. Minnesota*[3]. The Court has interpreted these guarantees to afford special protection against orders that prohibit the publication or broadcast of particular information or commentary - orders that impose a "previous" or "prior" restraint on speech. **None of our decided cases on prior restraint involved restrictive orders entered to protect a defendant's right to a fair and impartial jury, but the opinions on prior restraint have a common thread relevant to this case.**

Apparently, this is the first case the Supreme Court reviewed dealing with a judge's order in a trial setting that restrained the press "prior" to any publication.

In *Near v. Minnesota,* the Court held invalid a Minnesota statute providing for the abatement as a public nuisance of any "malicious, scandalous and defamatory newspaper, magazine or other periodical." Near had published an occasional weekly newspaper described by the County Attorney's complaint as "largely devoted to malicious, scandalous and defamatory articles" concerning political and other public figures. Publication was enjoined pursuant to the statute. Excerpts from Near's paper, set out in the dissenting opinion of Mr. Justice Butler, show beyond question that one of its principal characteristics was blatant anti-Semitism.

Chief Justice Hughes, writing for the Court, noted that freedom of the press is not an absolute right, and the State may punish its abuses. He observed that the statute was "not aimed at the redress of individual or private wrongs." He then focused on the statute:

> "[T]he operation and effect of the statute in substance is that public authorities may bring the owner or publisher of a newspaper or periodical before a judge upon a charge of conducting a business of publishing scandalous and defamatory matter...and unless the owner or publisher is able...to satisfy the judge that the [matter is] true and...published with **good motives**...his newspaper or periodical is suppressed....<u>This is of the essence of censorship</u>."

[3]Case 1A-P-1 on this website.

...The principles enunciated in *Near* were so universally accepted that the precise issue did not come before us again until *Organization for a Better Austin v. Keefe*. There the state courts had enjoined the petitioners from picketing or passing out literature of any kind in a specified area. Noting the similarity to *Near v. Minnesota*, a unanimous Court held:

> "Here, as in that case, the injunction operates, not to redress alleged private wrongs, but to suppress, on the basis of previous publications, distribution of literature 'of any kind' in a city of 18,000..."

"Any **prior restraint** on expression comes to this Court with a 'heavy presumption' against its constitutional validity." *Carroll v. Princess Anne (1968); Bantam Books, Inc. v. Sullivan (1963)...*

More recently in *New York Times Co. v. United States,* the Government sought to enjoin the publication of excerpts from a massive, classified study of this Nation's involvement in the Viet Nam conflict, going back to the end of the Second World War. The...Court...concluded that the Government had not met its heavy burden of showing justification for the prior restraint. Each of the six concurring Justices and the three dissenting Justices expressed his views separately, but "every member of the Court, tacitly or explicitly, accepted the *Near* and *Keefe* condemnation of prior restraint as presumptively unconstitutional." The Court's conclusion in *New York Times* suggests that the burden on the Government is not reduced by the temporary nature of a restraint; in that case the Government asked for a temporary restraint solely to permit it to study and assess the impact on national security of the lengthy documents at issue.

The thread running through all these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights. A criminal penalty or a judgment in a defamation case is subject to the whole panoply of protections afforded by deferring the impact of the judgment until all avenues of appellate review have been exhausted. Only after judgment has become final, correct or otherwise, does the law's sanction become fully operative. 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...**

The extraordinary protections afforded by the First Amendment carry with them something in the nature of a fiduciary duty to exercise the protected rights <u>responsibly</u> - a duty widely acknowledged but not always observed by editors and publishers. It is not asking too much to suggest that those who exercise First Amendment rights in newspapers or broadcasting enterprises direct some effort to protect the rights of an accused to a fair trial by unbiased jurors.

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

Delays imposed by governmental authority are a different matter.

"We have learned, and continue to learn, from what we view as the unhappy experiences of other nations where government has been allowed to meddle in the internal editorial affairs of newspapers. Regardless of how beneficent-sounding the purposes of controlling the press might be, we... remain intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of this Nation's press." *Miami Herald Publishing Co. v. Tornillo*.

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

The authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other. In this case, the petitioners would have us declare the right of an accused subordinate to their right to publish in all circumstances. But if the authors of these guarantees, fully aware of the potential conflicts between them, were unwilling or unable to resolve the issue by assigning to one priority over the other, it is not for us to rewrite the Constitution by undertaking what they declined to do. It is unnecessary, after nearly two centuries, to establish a priority applicable in all circumstances. Yet it is nonetheless clear that the barriers to prior restraint remain high unless we are to abandon what the Court has said for nearly a quarter of our national existence and implied throughout all of it. The history of even wartime suspension of categorical guarantees, such as *habeas corpus* or the right to trial by civilian courts (*Ex parte Milligan*) cautions against suspending explicit guarantees...

We...now...examine the evidence before the trial judge when the order was entered to determine (a) the nature and extent of pre-trial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pre-trial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger. The precise terms of the restraining order are also important. We must then consider whether the record supports the entry of a prior restraint on publication, one of the most extraordinary remedies known to our jurisprudence.

In assessing the probable extent of publicity, the trial judge had before him newspapers demonstrating that the crime had already drawn intensive news coverage, and the testimony of the County Judge, who had entered the initial restraining order based on the local and national attention the case had attracted. The District Judge was required to assess the probable publicity that would be given these shocking crimes prior to the time a jury was selected and sequestered. He then had to examine the probable nature of the publicity and determine how it would affect prospective jurors.

Our review of the pre-trial record persuades us that the trial judge was justified in concluding that there would be intense and pervasive pre-trial publicity concerning this case. He could also reasonably conclude...that publicity might impair the defendant's right to a fair trial. He did not purport to say more, for he found only "a clear and present danger that pre-trial publicity could impinge upon the defendant's right to a fair trial." His conclusion as to the impact of such publicity

on prospective jurors was of necessity speculative, dealing as he was with factors unknown and unknowable...

Most of the alternatives to prior restraint of publication in these circumstances were discussed with obvious approval in *Sheppard v. Maxwell:* (a) **change of trial venue** to a place less exposed to the intense publicity...;(b) **postponement of the trial** to allow public attention to subside;(c) **searching questioning of prospective jurors...**to screen out those with fixed opinions as to guilt or innocence; (d) the use of **emphatic and clear instructions** on the sworn duty of each juror to decide the issues only on evidence presented in open court. **Sequestration** of jurors is, of course, always available. Although that measure insulates jurors only after they are sworn, it also enhances the likelihood of dissipating the impact of pre-trial publicity and emphasizes the elements of the jurors' oaths...

[W]e note that the events disclosed by the record took place in a community of 850 people. It is reasonable to assume that, without any news accounts being printed or broadcast, rumors would travel swiftly by word of mouth. One can only speculate on the accuracy of such reports, given the generative propensities of rumors; they could well be more damaging than reasonably accurate news accounts. But plainly a whole community cannot be restrained from discussing a subject intimately affecting life within it. **Given these practical problems, it is far from clear that prior restraint on publication would have protected Simants' rights.**

Finally, another feature of this case leads us to conclude that the restrictive order entered here is not supportable. At the...preliminary hearing open to the public and the press...[t]here was testimony concerning at least two incriminating statements made by Simants to private persons; the statement - evidently a confession - that he gave to law enforcement officials was also introduced. The State District Court's later order was entered after this public hearing and, as modified by the Nebraska Supreme Court, enjoined reporting of (1) "confessions or admissions against interest made by the accused to law enforcement officials"; (2) "confessions or admissions against interest, oral or written, if any, made by the accused to third parties, excepting any statements, if any, made by the accused to representatives of the news media"; and (3) all "other information strongly implicative of the accused as the perpetrator of the slayings."

To the extent that this order prohibited the reporting of evidence adduced at the open preliminary hearing, it plainly violated settled principles: "There is nothing that proscribes the press from reporting events that transpire in the courtroom." ***Sheppard v. Maxwell.*** **The County Court could not know that <u>closure of the preliminary hearing was an alternative</u> open to it until the Nebraska Supreme Court so construed state law; but <u>once a public hearing had been held, what transpired there could not be subject to prior restraint</u>.**

The third prohibition of the order...regarding "implicative" information is too vague and too broad to survive the scrutiny we have given to restraints on First Amendment rights...[and] falls outside permissible limits. The record demonstrates...that there was indeed a risk that pretrial news accounts, true or false, would have some adverse impact on the attitudes of those who might be called as jurors. But on the record now before us it is not clear that further publicity, unchecked, would so

distort the views of potential jurors that 12 could not be found who would, under proper instructions, fulfill their sworn duty to render a just verdict exclusively on the evidence presented in open court. We cannot say on this record that alternatives to a prior restraint on petitioners would not have sufficiently mitigated the adverse effects of pre-trial publicity so as to make prior restraint unnecessary. Nor can we conclude that the restraining order actually entered would serve its intended purpose. Reasonable minds can have few doubts about the gravity of the evil pre-trial publicity can work, but the probability that it would do so here was not demonstrated with the degree of certainty our cases on prior restraint require...

Our analysis ends as it began, with a confrontation between prior restraint imposed to protect one vital constitutional guarantee and the explicit command of another that the freedom to speak and publish shall not be abridged. We reaffirm that the guarantees of freedom of expression are not an absolute prohibition under all circumstances, but the barriers to prior restraint remain high and the presumption against its use continues intact. We hold that, with respect to the order entered in this case prohibiting reporting or commentary on judicial proceedings held in public, the barriers have not been overcome; to the extent that this order restrained publication of such material, it is clearly invalid. To the extent that it prohibited publication based on information gained from other sources, we conclude that the heavy burden imposed as a condition to securing a prior restraint was not met and the judgment of the Nebraska Supreme Court is therefore Reversed...

CONCURRENCE: Justice Powell...In my judgment a prior restraint properly may issue only when it is shown to be necessary to prevent the dissemination of prejudicial publicity that otherwise poses a high likelihood of preventing, directly and irreparably, the impaneling of a jury meeting the Sixth Amendment requirement of impartiality. This requires a showing that (i) there is a clear threat to the fairness of trial, (ii) such a threat is posed by the actual publicity to be restrained, and (iii) no less restrictive alternatives are available. Notwithstanding such a showing, **a restraint may not issue unless it also is shown that previous publicity or publicity from unrestrained sources will not render the restraint inefficacious...**

In other words, if the cat is already out of the bag, restraining the press will not serve its intended purpose.

CONCURRENCE: Justice Brennan/Stewart/Marshall...**Much of the information that the Nebraska courts enjoined petitioners from publishing was already in the public domain...**

The only exception that has thus far been recognized...to the blanket prohibition against prior restraints against publication of material which would otherwise be constitutionally shielded was the "military security" situation addressed in *New York Times Co. v. United States*. But unlike the virtually certain, direct, and immediate harm required for such a restraint under *Near* and *New York Times*, the harm to a fair trial that might otherwise eventuate from publications which are suppressed pursuant to orders such as that under review must inherently remain speculative...**[I]t is important**

to note that <u>once the jury is impaneled</u>, the techniques of sequestration of jurors and control over the courtroom and conduct of trial should prevent prejudicial publicity from infecting the fairness of judicial proceedings...

I'm not entirely sure what to make of all of that. But, at least we know the Court does not like the idea of "prior restraint."