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Elisa R. Paisner

Michael S. Williams

CRIMINAL LAW AND PROCEDURE

LEVINE v. UNITED STATES DISTRICT COURT: GAG ORDERS—THE SILENT BAR

I. INTRODUCTION

The Ninth Circuit in *Levine v. United States District Court*[1] granted a petition for a writ of mandamus to review a district court's order prohibiting the attorneys in a criminal trial from communicating with the media.[2]

The Ninth Circuit held that the defense attorneys' extrajudicial comments justifiably posed a serious and imminent threat to the administration of justice[3] and that less restrictive alterna-

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1. 764 F.2d 590 (9th Cir. 1985) (per Beezer, J.; the other panel members were Sneed, J., special concurring opinion, and Nelson, J., concurring in part, dissenting in part), *petition for cert. filed*, 54 U.S.L.W. 3533 (U.S. Jan. 29, 1986) (No. 85-1291).

2. *Id.* at 591.

3. *Id.* at 598. The case had been the subject of considerable national and local media attention. *Id.* at 592. At issue were various pretrial statements made by defense attorneys to a reporter for the Los Angeles Times, including allegations that the FBI had exaggerated the evidence against the defendants. Defense attorneys claimed that the government was unable to establish that Miller had actually passed documents to the Russians or had caused a breach to national security interests. Defense attorneys also claimed that the dismissal of various counts against the Ogorodnikovs for aiding and abetting espionage was a concession of a weak case and that the government's case was based solely on Miller's admissions made after five days of questioning. *Id.*

Defense attorneys also provided detailed portions of their own case strategy. 764 F.2d at 592. During an interview with the Los Angeles Times, defense attorneys stated that they intended to show that Svetlana Ogorodnikova was an emotionally troubled and alcoholic FBI informant with a marginal IQ who thought she was helping the FBI. Further, the article revealed that through her sexual relationship with Miller and, earlier with another FBI counterintelligence agent, Svetlana Ogorodnikova was used as a means of infiltrating the Soviet intelligence network. Additionally, it was claimed that Miller

tives to the gag order were not available.[4] The court found, however, that the restraining order as issued was overbroad[5] because many statements that bore "upon the merits to be resolved by the jury" would present no danger to the administration of justice.[6] Accordingly, the district court was ordered to determine which types of extrajudicial statements posed a serious and imminent threat, and to fashion the order specifying the proscribed types of statements.[7] This was the first gag order in any circuit to be upheld on a district court's finding that a serious and imminent threat to the administration of justice existed because of the attorneys' comments.[8]

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too was a bumbler who, fearing that he would be pulled from the case because of his past record, did not tell his superiors of his attempt to infiltrate the Soviet network. The defense also reported that they intended to show that Nikolay Ogorodnikov, sympathetic with his wife's personal problems, had allowed her to live with him and their son and was indicted only because of 'guilt by association.' Overend, *Lawyers Contend FBI Exaggerated Evidence in Spy Case*, Los Angeles Times, Mar. 3, 1985, Y1, at 3, col. 1.

4. 764 F.2d at 599-600.

5. *Id.* at 598-99.

6. *Id.* at 599.

7. *Id.* at 599-601.

8. *Id.* at 597-98. The district court stated that:

> [I]n view of the comments contained in the Los Angeles Times article, it is plain that the serious and imminent threat to a fair trial outweighs any First Amendment rights at stake. To claim that the need to argue a client's case in detail in the press on the eve of trial is mandated by an ethical or legal responsibility belittles the government's, the defendants', and most importantly in this instance, the public's right to a fair trial before an unbiased jury.
>
> With the nearness of trial, the potential for prejudice becomes particularly acute. There's nothing in the Code of Professional Responsibility requiring or even recommending that an attorney argue his . . . case in the press or on the courthouse steps.
>
> . . . .
>
> Instead, it is the integrity of our judicial process that is fundamentally at stake. This trial will not become a circus show performed outside the courtroom, yet defense counsel's actions clearly foreshadow such an eventuality if this court does not take action.
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> . . . .
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> . . . [T]his court finds it quite reasonable to expect that such publicity has been and will become even more pervasive, creating in effect a lobbying effort by counsel on behalf of their clients. The public has a right to expect a fairer trial than that.

Id.

II. FACTS

Richard W. Miller, a former FBI agent, and Svetlana Ogorodnikova and her husband, Nikolay Ogorodnikov were charged with espionage.[9] Initially the district court, aware of government and defense attorneys' "on the record" interviews with the media, admonished counsel to maintain an atmosphere in which a fair trial could be conducted.[10] When additional comments by counsel subsequently appeared in a news article just prior to the Ogorodnikovs' trial,[11] the district court issued a restraining order silencing the attorneys from making statements to the news media.[12]

On appeal, defense attorneys argued that the district court's order was an unconstitutional restraint on the media's ability to gather news.[13] Additionally, defense attorneys claimed that the district court's findings were inadequate, unsupported by the record, and would not properly sustain its gag order. For these reasons, appellants contended that the order abridged their first amendment right to free speech.[14]

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9. 764 F.2d at 591-92. On October 2, 1984, Richard W. Miller and Svetlana Ogorodnikova and Nikolay Ogorodnikov, were arrested and charged, inter alia, with conspiring to transmit national defense and classified information to agents and representatives of the Soviet Union. An indictment was returned on October 12, 1984 naming all three defendants; a superseding indictment was returned in November, 1984. The indictment also named Aleksandr Grishin, Vice Counsel, Soviet Consulate, San Francisco, Ca., as an unindicted co-conspirator. *Id.* The Ogorodnikovs' trial was severed on January 22, 1985 and the government's case was soon to proceed at the time of the district court's restraining order. *Id.*

10. *Id.* at 592. During a status conference on November 6, 1984, the district court admonished the parties not to engage in pretrial publicity. *Id.* In response to additional comments made by the defense counsel to the media, the government filed a motion for an order restraining extrajudicial statements by the parties and their agents on November 22, 1984. *Id.* The district court denied the motion on December 14, 1984 but again sought the cooperation of counsel. *Id.* Defense attorneys advised the district court that they might "at some future time deem it necessary in the interest of our client to make a statement outside the courtroom." *Id.*

11. *See supra* note 9.

12. 764 F.2d at 593. The government renewed its motion for the restraining order in order to protect the rights of all parties and the public to a fair trial. *Id.* A hearing was held on March 5, 1985, where Levine acknowledged that he had spoken with the reporter although he had not been quoted. *Id.* After reviewing the statements reported in the article, the district court ordered the restraining order encompassing all attorneys, all parties, their representatives and agents, and witnesses. *Id.* In June, the district court removed the parties and the witnesses from the scope of the order. *Id.*

13. *Id.* at 594.

14. *Id.* at 595. Appellants argued that the order could be upheld only if the govern-

II. BACKGROUND

A. FAIR TRIAL-FREE PRESS

The Supreme Court has long held that the very essence of a fair trial as guaranteed by the sixth amendment is dependent upon a panel of impartial jurors, free from outside influences.[15] The pervasiveness of modern news coverage[16] has set an accused's sixth amendment right to a fair trial against the press' first amendment right to be free from governmental restraint.[17]

The publicity which attends certain criminal trials has required the Supreme Court to establish guidelines concerning the

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ment had shown that an impartial jury could not be selected, that the district court had overstated the amount of publicity in the case, and that the order was both vague and overbroad. *Id.* at 598-99. Appellants also challenged the district court's finding that less restrictive alternatives to the restraining order were not available. *Id.* They argued that a searching voir dire would eliminate any bias caused by pretrial publicity and that the record did not prove that jurors would not follow emphatic and clear instructions by the court. *Id.* at 599-600.

15. *See, e.g.*, Estes v. Texas, 381 U.S. 532, 540 (1965)(the right to a fair trial held to be "the most fundamental of all freedoms"); Irvin v. Dowd, 366 U.S. 717, 721 (1965)(an accused's sixth amendment right to a panel of unbiased jurors held to be "most priceless"); Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 551 (1976); and Sheppard v. Maxwell, 384 U.S. 333, 362 (1966).

16. Sheppard v. Maxwell, 384 U.S. at 362. In *Sheppard*, Justice Clark noted that "[g]iven the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused." *Id.*

Earlier in *Irvin v. Dowd*, Justice Frankfurter observed that in each term substantial claims were made that a jury trial had been distorted because of inflammatory newspaper accounts making it difficult, if not impossible, to secure an unbiased jury. 366 U.S. at 730. *See also* Stroble v. California, 343 U.S. 181, 195 (1952)(extensive adverse modern coverage, albeit pervasive and prejudicial, does not alone presumptively deprive an accused of his right to a fair trial).

17. The sixth amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . . " U.S. CONST. amend. VI. The first amendment states that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . . U.S. CONST. amend. I.

The Supreme Court has observed that

> [a] responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field . . . . The Press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors and the judicial processes to extensive scrutiny and criticism.

Sheppard v. Maxwell, 384 U.S. 333, 350 (1966). *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 561 (1976); CBS v. United States District Court, 729 F.2d 1174, 1178 (9th Cir. 1983).

judiciary's power to restrict prejudicial publicity.[18] In *Sheppard v. Maxwell*,[19] the Supreme Court reversed a conviction of murder because the lower court failed to invoke procedures to protect the defendant from the massive, pervasive and prejudicial publicity that attended his prosecution.[20] The defendant, charged with bludgeoning his pregnant wife to death in their home, was, from the outset, the focus of official attention and the subject of media headlines.[21] The lower court had further failed to take adequate steps to control the media's conduct in the courtroom.[22] The lack of any restraints on the press had resulted in bedlam and an atmosphere that the Ohio Supreme Court labelled a "Roman Holiday" for the news media.[23] The United States Supreme Court found that the trial court's "fundamental error" in permitting such an unrestrained atmosphere was exacerbated by the court's disavowal that it had the power to control the publicity about the trial.[24] The Supreme Court confirmed the trial court's authority and responsibility to pro-

18. "In an overwhelming majority of criminal trials, pretrial publicity presents few unmanageable threats to [an accused's sixth amendment right]. But when the case is a "sensational" one tensions develop between the right of the accused to a trial by an impartial jury and the rights guaranteed by the First Amendment." *Nebraska Press Ass'n*, 427 U.S. at 551.

19. 384 U.S. 333 (1966).

20. *Id.* at 335.

21. *Id.* The totality of the circumstances in the *Sheppard* prosecution had denied the accused a fair trial. For months before the trial, virulent publicity made the case notorious. Headline stories concentrated on Sheppard's lack of cooperation and refusal to take a lie detector test. *Id.* at 338. An inquest was called where Sheppard was searched in full view of a swarm of media personnel and a multitude of spectators and ended with the defense attorney excluded from the room. *Id.* at 339-40. His personal life and extramarital affairs were aired and manipulated. *Id.* at 340. By the time Sheppard was convicted there were enough media clippings to fill five volumes. *Id.* at 342.

Twenty-five days before trial, 75 veniremen were called as prospective jurors. Their names and addresses were published and many received letters and phone calls regarding the prosecution. *Id.* at 342. The jurors were continually exposed to the media and even had their pictures taken in the jury box and jury room. *Id.* at 345. Only given "suggestions" and "requests" not to comment on the case, jurors were pursued by the media and thrust into the "role of celebrities." *Id.* at 353. Much of the material printed or broadcast was never heard from the witness stand. *Id.* at 360.

22. The Supreme Court found numerous instances where bedlam reigned during the trial. Twenty reporters sat at a table only a few feet away from the counsel's table and jury box. Representatives of the media filled the majority of the courtroom, taking a front seat to the defendant's own family. Reporters moved in and out of the courtroom causing confusion and disruption. The media had total freedom in the corridors and were accosting those entering and leaving the courtroom. *Id.* at 355. Only belatedly were the reporters asked not to handle the evidence. *Id.* at 358.

23. *Id.* at 356.

24. *Id.* at 357.

tect a defendant's right to a fair trial consistent with due process.[25] To assure this mandate, the Supreme Court enumerated measures available to trial courts in order to avoid the problems that beleaguered the case.[26] These procedures included regulating the conduct of newsmen and controlling information released by counsel for both sides.[27]

The problem of prejudicial publicity had already manifested itself in cases preceding *Sheppard*.[28] The cumulative effect led the Supreme Court in *Sheppard* to caution trial courts of the need to take "strong measures" to ensure that the delicate balance between fair trial and open press "is never weighed against the accused."[29] With this directive, *Sheppard* provided the precedent for the future course of fair trial-free press issues.[30]

1. *The Right to Report Events*

Trial courts began utilizing restraining orders to prevent the

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25. *Id.* at 358-62.

26. These measures included adopting stricter rules for the use of the courtroom by the media, limiting their number, and more closely supervising their courtroom conduct. Further, the Supreme Court stated that the court should have insulated the witnesses; controlled the release of leads, information and gossip to the press by police officers, witnesses and counsel; and proscribed extrajudicial statements by lawyers, witnesses, parties or court officials divulging prejudicial matters. Additionally, the Supreme Court pointed out that the court could request appropriate city officials to regulate information released by their employees. 384 U.S. at 358-62. *See* Hirschkop v. Snead, 594 F.2d 356, 366 n.8 (4th Cir. 1979)(noting that these procedures have been interpreted as a directive rather than a suggestion).

Chief Justice Burger, in *Nebraska Press Ass'n*, listed traditional alternatives to prior restraints of publication: (a) a change of venue; (b) postponement of the trial date; (c) searching voir dire; (d) use of emphatic and clear instructions; and (e) sequestration. 427 U.S. at 565 (citing with approval Sheppard v. Maxwell, 384 U.S. 333, 357-62 (1966)).

27. *Sheppard*, 384 U.S. at 358-62.

28. *See, e.g.*, Estes v. Texas, 381 U.S. 532, 550-51 (1965)(defendant denied due process where the televising of his entire trial affected jurors, witnesses and judge); Rideau v. Louisiana, 373 U.S. 723, 724-27 (1963)(refusal to change venue of trial denial of due process where film of defendant confessing to sheriff was shown three times on TV and seen in a community of approximately 150,000); Irvin v. Dowd, 366 U.S. 717, 723-28 (1961)(conviction of murder overturned where extensive publicity affected pool of veniremen and newspaper coverage which appeared in 95% of homes in county included details of defendant's background, previous criminal record, line-up identification, and confessions).

29. 384 U.S. at 362.

30. *See* Portman, *The Defense of Trial from* Sheppard *to* Nebraska Press Association: *Benign Neglect to Affirmative Action and Beyond*, 29 STAN. L. REV. 393, 403 (1977).

publication of prejudicial material.[31] In one line of cases, courts have attempted to restrain the right of the press to report events relating to criminal proceedings.[32] However, in *Nebraska Press Association v. Stuart*,[33] the Supreme Court invalidated such a restraining order on first amendment grounds.[34] The crime, which took place in a small rural community, involved a brutal murder.[35] A description of the suspect was released by the police and immediately attracted extensive local, regional and national news coverage.[36] The trial court found that the potential for pretrial publicity concerning the murder posed a threat to the accused's right to a fair trial.[37]

The gag order in *Nebraska Press Association* prohibited members of a state press association from publishing or broadcasting accounts or admissions and other facts, "strongly implicative" of the defendant as the murderer, that were made to persons other than the press.[38] The Supreme Court reversed the conviction because the trial court failed to show that the alternatives to prior restraints outlined in *Sheppard*[39] would be in-

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31. *See, e.g., Nebraska Press Ass'n*, 427 U.S. 539, 543-46 (1976)(gag order prohibited state press association from publishing accounts, admissions and information strongly implicative of accused as murderer).

32. *See, e.g., id.*; CBS v. United States District Court, 729 F.2d 1174 (9th Cir. 1983)(district court's order restraining television network from disseminating and/or broadcasting any portion of government's surveillance tapes violated first amendment guarantee of the press where no showing that unchecked publicity would distort views of potential jurors).

33. 427 U.S. 539 (1976).

34. *Id.* at 570. The Supreme Court set forth the following three-part test for evaluating the constitutionality of prior restraints on the press:

> [W]e 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. at 562.

35. *Id.* at 542. In a small rural town in Nebraska of about 850 people, defendant had murdered six members of a family in their home during the course of a sexual assault. *Id.*

36. *Id.*

37. The trial court's conclusion "as to the impact of such publicity . . . was of necessity speculative, dealing as he was with factors unknown and unknowable." *Id.* at 563.

38. *Id.* at *568.*

39. *Nebraska Press Ass'n*, 427 U.S. at 563-64 (citing with approval Sheppard v. Maxwell, 384 U.S. 333, 362-63 (1966)). *See supra* note 26.

sufficient to mitigate the adverse effects of pretrial publicity,[40] because the restraining order would not serve its intended purpose,[41] and because the prohibition regarding "implicative" information was too vague and too overbroad to survive the scrutiny given to restraints on first amendment rights.[42] Applying a "clear and present danger" standard,[43] the Court reaffirmed the presumptive invalidity of prior restraints[44] and unanimously invalidated the order.[45]

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40. *Nebraska Press Ass'n*, 427 U.S. at 565-68.

41. *Id.* The Supreme Court noted that because the murders took place in such a small community, rumors would have spread by word of mouth even without the news accounts. Further, since the order also prohibited the reporting of evidence adduced at an open preliminary hearing it violated first amendment principles: "[T]here is nothing that prOscribes the press from reporting events that transpire in the courtroom." *Id.* at 568 (quoting Sheppard v. Maxwell, 384 U.S. 333, 362-63 (1966)).

42. *Nebraska Press Ass'n*, 427 U.S. at 568.

43. *Id.* at 562. Chief Justice Burger adopted the "clear and present danger" test articulated in the Court of Appeals decision by Judge Learned Hand in *United States v. Dennis*. In *Dennis*, defendants, leaders of the Communist Party in the United States were convicted under the Smith Act for conspiring to teach and advocate the overthrow and destruction of the United States by force and violence. 183 F.2d 201, 205-06 (2d Cir. 1950), *aff'd*, 341 U.S. 494, 497 (1951).

Judge Hand stated that the validity of subsequent punishment under the Smith Act is determined by whether "the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." 183 F.2d at 212. *But see* Schmidt, Nebraska Press Association: *An Expansion of Freedom and Contraction of Theory*, 29 STAN. L. REV. 431, 459-61 (1977)(questioning the appropriateness of this test by suggesting that it is both inconsistent in light of Chief Justice Burger's own differentiation of first amendment considerations between subsequent punishment and prior restraints and a weak and amorphous standard).

44. *Nebraska Press Ass'n*, 427 U.S. at 558. Chief Justice Burger characterized prior restraints as, "the most serious and least tolerable infringement on First Amendment rights . . . . A prior restraint . . . has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for a time." *Id.* at 559. *See* New York Times v. United States, 403 U.S. 713 (1971); Near v. Minnesota *ex rel.* Olson, 283 U.S. 197 (1931).

45. *Nebraska Press Ass'n*, 427 U.S. at 570-617. Five separate opinions were published. Chief Justice Burger reaffirmed that first amendment protection was not absolute, but that the presumption against prior restraints remains intact. *Id.* at 570. Justice White added that there was a grave doubt in his mind as to whether restraints on the press could ever be justified. *Id.* (White, J., concurring). Justice Powell emphasized the heavy burden that rests on any party who seeks a prior restraint on pretrail publicity. *Id.* at 571-72 (Powell, J., concurring).

Justice Brennan, joined by Justice Stewart and Justice Marshall would have held that a prior restraint on the freedom of the press was unconstitutionally impermissible as a means of protecting a defendant's right to a fair trial. *Id.* at 572 (Brennan, J., concurring). Justice Stevens, agreed with Justice Brennan, but was not so willing to give the same absolute protection, without considering the nature and means by which the information was obtained. *Id.* at 617 (Stevens, J., concurring).

Recently, in *Columbia Broadcasting Systems v. United States District Court*,[46] the Ninth Circuit invalidated a similar order restraining a television network from disseminating or broadcasting any portion of the surveillance tapes made while the government was investigating John DeLorean's involvement in a major cocaine transaction.[47] The appellate court disagreed with the district court's contention that the nature of the tapes distinguished this case from other publicized trials.[48] Applying the test enumerated in *Nebraska Press Association*,[49] the court noted that a prior restraint is invalid "unless it is 'clear that future publicity, unchecked, would so distort the views of potential jurors that *12 could not be found* who would . . . fulfill their sworn duty.' "[50] The court instead considered the nature of the case[51] and the venue of the trial.[52] It looked not only to the effect that the videotape might have had on individual viewers but also to the impact that the publicity might have had to imflame and prejudice the entire community.[53] The court found that the defendant's activities in a nonviolent crime were insufficiently lurid or sensational, despite the defendant's prominence, to taint all of the twelve million people in the Central District of Califor-

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46. 729 F.2d 1174 (9th Cir. 1983). *See* Note, *John Z. DeLorean v. The Media: The Right To A Fair Trial Without A Prior Restraint Upon The Media*, 15 GOLDEN GATE U.L. REV. 81 (1985).

47. 729 F.2d at 1176.

48. *Id.* at 1180.

49. *See supra* note 34.

50. 729 F.2d at 1180 (emphasis in original) (quoting Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 569).

51. 729 F.2d at 1181. The court found that in cases in which the defendant was denied a fair trial, there was lurid and inflammatory subject matter involving violence and passion. On the other hand, cases involving other offenses, such as white collar crime, do not pose the same danger. The Ninth Circuit cited with approval the District of Columbia Circuit which stated about the Watergate case that it "may come as a surprise to lawyers and judges, but it is simply a fact of life that matters which interest them may be less fascinating to the public generally." *Id.* (quoting United States v. Haldeman, 559 F.2d 31, 62 n.37 (D.C. Cir. 1976)).

52. 729 F.2d at 1181-82. In large urban areas courts have held that prejudicial publicity is a lesser danger than in small rural communities "where [t]he whole community . . . becomes interested in all the morbid details." *Id.* at 1181 (quoting Estes v. Texas, 381 U.S. 532, 545 (1965)). The court in *CBS* also commented that in addition to the large population in the Central District of California, the heterogeneity of the district was also a significant factor making it unlikely that even the most sensational case would become a *cause celebre*. 729 F.2d at 1181.

53. *Id.* at 1180. The Ninth Circuit noted that the district court failed to make such an analysis. For that reason alone, the court found that the district court's conclusion that the release of the surveillance tapes would be prejudicial was suspect. *Id.*

nia.[54] The Ninth Circuit further confirmed the validity of traditional methods utilized in avoiding prejudicial publicity, short of the prior restraint.[55]

2. *The Right of Access*

Courts have further attempted to minimize the effect of prejudicial publicity by restraining the media's access to criminal proceedings.[56] For the first time, in *Richmond Newspapers, Inc. v. Virginia*,[57] the Supreme Court concluded that the first and fourteenth amendments afforded the public and the media the right of access to a criminal trial.[58] In the words of the Court, "absent an overriding interest articulated in the findings, the trial of a criminal case must be open to the public."[59] The Court reasoned that historically the presence of the public and the media at a criminal trial have significantly enhanced the integrity and the quality of the judicial processes.[60] Despite the fact that this was the accused's fourth trial,[61] the Supreme Court found that the trial court's order to close the proceedings was defective since it had not considered alternative solutions such

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54. *Id.* at 1181-82.

55. *Id.* at 1183. *See supra* note 26 for discussion of the traditional methods for avoiding prejudicial publicity.

56. *Compare* Gannett Co., Inc. v. DePasquale, 443 U.S. 368, 385 (1979) (sixth amendment right to a public trial personal to accused and does not give the public or press an enforceable right of access to a pretrial suppression hearing) *with* United States v. Brooklier, 685 F.2d 1162 (9th Cir. 1982)(first amendment right of access to criminal trials applies to suppression hearings). *See also* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575 (1980) ("presumption of openness" gives public right of access to criminal trials); Associated Press v. United States District Court, 705 F.2d 1143 (9th Cir. 1983)(closure order pertaining to pretrial criminal documents violates public's first amendment right of access).

57. 448 U.S. 555 (1980).

58. *Id.* at 580. In *Branzburg v. Hayes*, the Supreme Court rejected the premise that the first amendment afforded a reporter a constitutional testimonial privilege to refuse to name his confidential sources when testifying pursuant to a grand jury subpoena. 408 U.S. 665, 702 (1972). However, the Court recognized that gathering of news qualified for some first amendment protection. *Id.* at 681. In the context of a criminal trial, later decisions, such as *Richmond Newspapers*, defined this right to attend the trial and to report on what transpired. 448 U.S. at 576-77. *See also* KPNX Broadcasting Co. v. Maricopa County Superior Court, 139 Ariz. 246, 678 P.2d 431, 441 (1984)(media liaison order was proper exercise of trial court's duty to protect accused's right to a fair trial; sketch order unconstitutional prior restraint on press' first amendment right of access).

59. *Richmond Newspapers*, 448 U.S. at 581.

60. *Id.* at 569-73.

61. *Id.* at 559. Defendant's conviction for murder after his first trial was reversed on appeal and two subsequent retrials ended in mistrials. *Id.*

as the possibility of excluding witnesses or sequestering jurors.[62] The closure order abridged the public's first amendment interests because the trial court and the parties had unfettered discretion in closing the proceeding.[63]

Similarly, in *Associated Press v. United States District Court*,[64] the Ninth Circuit held that a district court's blanket order sealing pretrial criminal documents violated the public's first amendment right of access.[65] Responding to the extensive press coverage generated in the DeLorean case, the district court issued the closure order *sua sponte*.[66] Even though some documents were to be sealed for only forty-eight hours, the Ninth Circuit struck down the closure order because the trial court had not shown that this procedure was "strictly and inescapably necessary in order to protect the fair-trial guarantee."[67]

B. Fair Trial-Free Speech

Sheppard v. Maxwell[68] marked the first time that the Supreme Court recommended alternatives to restraints on the press in order to mitigate the problems caused by pervasive publicity.[69] The Supreme Court found that the inflammatory publicity which frustrated the trial court's function in that case might

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62. *Id.* at 580-81 (citing Sheppard v. Maxwell, 384 U.S. 333, 357-62 (1966) and Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 563-65 (1976)). *See supra* note 26.

63. 448 U.S. at 584-98 (Brennan, J., concurring).

64. 705 F.2d 1143 (9th Cir. 1983).

65. *Id.* at 1145-47. In order to satisfy the burden in closing a trial the accused must show:

> [1] a substantial probability that irreparable damage to his fair-trial right will result from conducting the proceeding in public . . . [2] a substantial probability that alternatives to closure will not protect adequately his right to a fair trial . . . [3] a substantial probability that closure will be effective in protecting against the preceived harm.

Id. at 1145-47 (citing United States v. Brooklier, 685 F.2d 1162, 1167 (9th Cir. 1982)).

66. 705 F.2d at 1144. The order was issued "without any notice to, or opportunity to be heard by, the parties, the press, or the public." *Id.*

67. *Id.* at 1145. *See also* Zurcher v. The Stanford Daily, 436 U.S. 547 (1978)(no special protection for newspapers that might be searched by government authorities pursuant to a search warrant); Branzburg v. Hayes, 408 U.S. 665 (1972)(no constitutional testimonial privilege for reporters refusing to disclose names of confidential sources while testifying pursuant to grand jury subpoena).

68. 384 U.S. 333 (1966).

69. *Id.* at 362-63. *See supra* note 26.

well have been prevented by effective control of the sources.[70] Specifically, the Court called for silencing extrajudicial statements made by the trial participants.[71]

1. *Restraints on Attorneys: Disciplinary Rule 7-107*

In 1969, the American Bar Association adopted DR 7-107 to give force to an attorney's ethical obligations to prevent adverse trial publicity.[72] Taking its cue from case law, the rule is con-

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70. 384 U.S. at 359-61. In *Sheppard*, prejudicial news accounts could be traced both to the prosecution and the defense. Much of that evidence was never offered at trial. The trial court "should have made some effort to control the release of leads, information and gossip to the press by police officers, witnesses and the counsel for both sides." *Id.* at 359.

71. *Id.* "[T]he trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters, such as . . . statements concerning the merits of the case." *Id.* at 361. The Supreme Court has seen that the cure lies in

> those remedial measures that will prevent the prejudice at its inception. The courts must take steps by rule and regulation that will protect their processes from prejudicial outside influences. Neither prosecutors, counsel for defense, the accused, witnesses . . . should be permitted to frustrate its function. Collaboration between counsel and the press . . . is highly censurable and worthy of disciplinary measures.

Id. at 362-63 (emphasis omitted).

72. MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-107 (1969). California has not adopted DR 7-107, nor has the Central District of California adopted a local rule dealing specifically with extrajudicial statements.

See ABA STANDARDS FOR CRIMINAL JUSTICE, FAIR TRIAL AND FREE PRESS, Standard 8-1.1 (1980):

> Standard 8-1.1. Extrajudicial statements by attorneys:
>
> (a) A lawyer shall not release or authorize the release of information or opinion for dissemination by any means of public communication if such dissemination would pose a clear and present danger to the fairness of the trial.
>
> (b) . . . [F]rom the commencement of the investigation of a criminal matter until the completion of trial or disposition without trial, a lawyer may be subject to disciplinary action with respect to extrajudicial statements concerning the following matters:
>
> (i) the prior criminal record . . . the character or reputation of the accused, or any opinion as to the accused's guilt or innocence or as to the merits of the case or the evidence in the case[.]

See also Report of the Judicial Conference Committee on the Operation of the Jury System, "Free Press-Fair Trial" Issue, 45 F.R.D. 391, 401-03 (1968). The Committee recommended action in three areas:

> (1) that the district courts have the power and the duty to control the release of prejudicial information by attorneys;

cerned with the effects of prejudicial publicity on criminal jury trials[73] and has withstood constitutional analysis.[74]

In *Hirschkop v. Snead*,[75] the Fourth Circuit noted that attorneys, as officers of the court, have a fiduciary duty "to the court, to the litigants . . . and to the public to protect the judicial processes from extraneous influences which impair its fairness."[76]

In *Hirschkop*, a Virginia attorney brought suit challenging the constitutionality of that state's disciplinary rule restricting

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> recommends action by local rule to restrict the release of such information; (2) that a similar power existed to restrict disclosures by court personnel; and (3) that each district provide by local rule for specific orders governing the proceedings in any case in which prejudicial influences might otherwise penetrate a trial.

Id. at 401.

73. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 550 (1976).

74. Two circuits have upheld in principle the enforcement of ethical rules restricting lawyers' comments concerning pending cases. *See* Hirschkop v. Snead, 594 F.2d 356, 374 (4th Cir. 1979)(upholding disciplinary rules as applied to criminal jury trials, requiring a reasonable likelihood standard). The *Hirschkop* court applied the two-step test formulated in *Procunier v. Martinez* for determining the constitutionality of governmental restraints on speech: "First, the regulation . . . in question must further an important or substantial governmental interest unrelated to the suppression of the expression . . . . Second, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the particular governmental interest involved." *Id.* at 363 (citing Procunier v. Martinez, 416 U.S. 396, 413 (1974)). *But cf.* Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975), *cert. denied sub nom.* Cunningham v. Chicago Council of Lawyers, 427 U.S. 912 (1976)(disciplinary rules upheld but must incorporate "serious and imminent danger" standard into specific rules governing conduct).

75. 594 F.2d at 366. The court ruled that Hirschkop had standing to challenge the rule even though there were no pending complaints charging him with violations. Hirschkop, who was active in civil rights and civil liberties matters, had 22 complaints filed against him from 1965 to 1975. When the State Bar Executive Committee admitted that the claims were meritless, Hirschkop agreed to drop his claims against the State Bar. The settlement agreement, however, did not consider the rule's constitutionality nor immunize the attorney from appropriate disciplinary action in the future. *Id.* at 363.

76. 594 F.2d 356, 366 (4th Cir. 1979). In his concurring opinion in *Nebraska Press Ass'n*, Justice Brennan stated that:

> As officers of the court, court personnel and attorneys have a fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice. It is very doubtful that the court would not have the power to control release of information by these individuals . . . and to impose suitable limitations whose transgression could result in disciplinary proceedings.

427 U.S. at 601 n.27 (Brennan, J., concurring).

attorneys' comments about pending litigation.[77] In sustaining the constitutionality of the disciplinary rule, the Fourth Circuit reasoned that the rule amounted to a legislative finding that certain speech for publication by an attorney engaged in pending or contemplated litigation would be so inherently prejudicial to the system's integrity and an accused's right to a fair trial that it may be proscribed.[78] Because questions of the admissibility of evidence were undecided at the time of publication, the Fourth Circuit was satisfied that speech which had a "reasonable likelihood of interference" with a fair trial was contemplated by the rule.[79] The court found that Virginia's rule was definitive as to the types of statements it proscribed.[80] Further, since the rule was distinguishable from a prior restraint, as it imposed sanctions post-judgment, the court declined to impose the more stringent "clear and present danger" standard devised for and applicable to prior restraints.[81]

In *Chicago Council of Lawyers v. Bauer*,[82] the Seventh Circuit stated that where there is tension between an attorney's right to free speech and an accused's right to fair trial, the former must yield to the latter.[83] The court conceded that an attorney's statements may be the source of prejudicial publicity necessitating prohibitions on their speech.[84] At the same time, however, the court noted that countervailing factors exist, especially for the defense.[85] It stated that, as sources of crucial infor-

77. *Hirschkop*, 594 F.2d at 374.

78. *Id.* at 366-67.

79. *Id.* As an example, the court noted that premature release of a defendant's prior record or confession before the trial court had ruled on its admissibility would threaten the integrity of subsequent proceedings. *Id.* at 368.

80. *Id.*

81. *Id.* at 368 n.13. The court stated that if the defendant decided not to contest the admissibility of his confession, or, having contested it, the court ruled against him, there was only a potential for prejudice. The court could not be certain that the standard requiring a clear and present danger or serious and imminent danger would ever be met. *Id.*

82. 522 F.2d 242 (7th Cir. 1975), *cert. denied sub nom.* Cunningham v. Chicago Council of Lawyers, 427 U.S. 912 (1976). In this case, an association of local attorneys brought a proceeding for declaratory judgment and injunction against the enforcement of local "no-comment" rules seeking to proscribe extrajudicial statements by attorneys during both civil and criminal cases. *Id.* at 247. The district court entered a judgment granting the motion of defendants and intervenors to dismiss for failure to state a cause of action. *Id.*

83. *Id.* at 248.

84. *Id.* at 250.

85. *Id.*

mation, attorneys served an important function as a check on the government by exposing abuses or urging action.[86] Further, the attorney, who was more articulate and more knowledgeable in the law than the accused, could best counter any injury to the defendant or his family caused by the publicity generated when it becomes publicly known that a person is under investigation or has been indicted.[87]

While not finding the "no-comment" rule a traditional prior restraint, the Seventh Circuit recognized that the rule involved

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86. *Id.* The dissenting opinion in the denial of rehearing en banc in *Levine*, stated:

> "[T]he freedom to make . . . a charge [that an indictment is politically or religiously motivated] against the state is surely paramount among the freedoms protected by the first amendment. To deprive an accused of his most valuable resource in criticizing the government—his lawyer—is to restrict, and to restrict severely, his first amendment rights."

775 F.2d 1054, 1055 (9th Cir. 1985)(Norris, J., dissenting).

87. 522 F.2d at 250. Moreover, as recognized by a prominent criminal defense attorney, defense attorneys will strive to neutralize the imbalance caused by the initial publication by the government by seeking a partial jury. CALIFORNIA DEFENDER 68 (Spring 1985)(interview with Howard L. Weitzman). Weitzman commented on the need to orchestrate media exposure in the DeLorean case:

> In determining whether or not to work with the press, you should first consider whether the government used the press . . . .
>
> Inevitably the government uses the press . . . to begin a campaign in an attempt to bias and prejudice the public image of the defendants . . . . [I]t is encumbent upon the defense attorney representing a client in a high publicity case to attempt to neutralize the negative publicity. . . .
>
> . . . .
>
> It must be remembered that the potential jurors read the press releases and come into court with an impression in high profile cases of what the case is all about.

CALIFORNIA DEFENDER at 69.

See also 775 F.2d at 1055. The dissenting opinion from the denial of rehearing en banc in *Levine* found it implicit in Judge Beezer's majority and Judge Sneed's concurring opinions that there was something improper and even possibly unethical for a lawyer not to limit his client's defense to in-court statements. This, the dissent argued, was a myopic view considering that when, as in this case, an indictment is the subject of great public interest, the damage to the accused's reputation and the resulting emotional distress can be magnified.

> The range of options available to the lawyer must include speaking out publicly to mitigate the damage to the client in the eyes of the community at large. Marshalled against the accused is not only the awesome resources and prestige of the United States Government, but also the power of the media to disseminate the government's charges.

Id.

inherent features that were similar to prior restraints.[88] The court ruled, therefore, that "[o]nly those comments that pose a 'serious and imminent threat' of interference with the fair administration of justice can be constitutionally proscribed."[89]

2. *Prior Restraints on Trial Participants*

A majority of courts have upheld gag orders on trial participants.[90] These courts are in disagreement, however, as to which standard is appropriate to determine the validity of the order. In *In re Russell*,[91] the court found that a gag order prohibiting witnesses from discussing proposed trial testimony with the media did not violate the witnesses' first amendment rights.[92] Petitioners were selected as potential witnesses in a criminal proceeding

88. 522 F.2d at 248-49. The court noted that a prior restraint constituted a predetermined judicial prohibition restraining specific expression. This order could not be violated even if the judicial action was unconstitutional as long as opportunities for appeal existed. *Id.* at 248. "The validity of the rules, however, can be challenged by one prosecuted for violating them since . . . there is a fundamental distinction . . . between actions taken by the court in its legislative role and those taken in its adjudicative role." *Id.*

89. *Id.* at 249. The court emphasized that while the "serious and imminent threat" of interference would eliminate overbreadth, specific rules were also necessary to avoid vagueness. *Id.* at 249-50. As an example, the phrase "participating in or associated with the investigation" as used in the local "no-comment" rule and the American Bar Association rule proscribing extrajudicial statements during the investigating stage was found to be too vague as applied to defense attorneys. The local rule could be used to establish a presumption of serious and imminent threat to a fair trial only as applied to government attorneys. *Id.* at 252-53. The term "merits" as incorporated into that rule excluded those statements which were arguably opinions on merits and which should not be restricted, then it could properly be used creating a presumption of a serious and imminent threat. *Id.* at 255.

90. *See, e.g., In re* Russell, 726 F.2d 1007, 1010 (4th Cir.) (gag order prohibiting potential witnesses from discussing their proposed trial testimony with news media did not violate witnesses' first amendment rights), *cert. denied*, 105 S. Ct 134 (1984); United States v. Tijerina, 412 F.2d 661, 666 (10th Cir.)(order prohibiting trial participants' statements regarding the merits of the case did not violate first amendment), *cert. denied*, 396 U.S. 990 (1969); Central South Carolina Chapter of Professional Journalists v. Martin, 431 F. Supp. 1182, 1190 (D.S.C. 1977)(society of news media establishments sought injunctive relief against court order restraining trial participants from "mingling" with the press near the courthouse and from giving news interviews not impermissibly vague or overbroad), *aff'd in part*, 556 F.2d 706 (4th Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978); KPNX Broadcasting Co. v. Maricopa County Superior Court, 139 Ariz. 246, 678 P.2d 431 (1984)(media liaison order was proper exercise of trial court's duty to protect accused's right to a fair trial; sketch order unconstitutional prior restraint on press' first amendment right of access).

91. 726 F.2d 1007 (4th Cir.), *cert. denied*, 105 S.Ct. 134 (1984).

92. *Id.* at 1010.

against alleged members of the Ku Klux Klan and Nazi Party that involved a shooting incident in Greensboro, North Carolina.[93] The Fourth Circuit concluded that the publicity which the trial had already attracted, together with the inflammatory and prejudicial statements that reasonably could be expected from the witnesses, and the ineffectiveness of alternative methods available, supported the trial court's determination that there was a reasonable likelihood that the defendants would be denied a fair trial.[94] The court also found that the order was not vague or overbroad when it prohibited the witnesses from making extrajudicial statements related to their testimony, or to any other party or issue which they might reasonably expect to be involved in the case, or to any of the events leading up to the incident.[95]

Similarly, in *United States v. Tijerina*,[96] the Tenth Circuit upheld an order forbidding extrajudicial statements made by the trial participants concerning, among other things, the merits of the case and evidence.[97] At issue were various statements made by the defendants at a public political convention.[98] The court found these statements endangered the rights of the defendants and the government to a fair and impartial jury.[99] It further found that a fair trial applied to both the prosecution and the defense.[100] Thus, the court rejected the defendants' contention that they could not be charged with a violation of the order because the order was entered for their protection.[101] Since there was a reasonable likelihood that prejudicial news would affect an impartial jury and prevent a fair trial, the court found that the defendants' first amendment rights had not been violated.[102]

An order similar to the one issued in *Tijerina* was struck down by the Seventh Circuit in *Chase v. Robson*.[103] Defendants

93. *Id.* at 1008.
94. *Id.* at 1010.
95. *Id.* at 1011.
96. 412 F.2d 661 (10th Cir.), *cert. denied*, 396 U.S. 990 (1969).
97. *Id.* at 663.
98. *Id.*
99. *Id.* at 665.
100. *Id.*
101. *Id.*
102. *Id.*
103. 435 F.2d 1059 (7th Cir. 1970)(per curiam).

had been charged with removing and destroying selective service records maintained at the Chicago area headquarters.[104] The trial court based its order on newspaper accounts that were seven months old as well as the defense attorney's past association with William Kunstler, an attorney not involved in the case.[105] Unlike the *Tijerina* court, the Seventh Circuit required a showing of a clear and present danger of a serious and imminent threat to the administration of justice before allowing the gag order.[106] The court found that the dated newspaper accounts and the defense attorney's past association with a well-known attorney were not only insufficient for the stricter standard, but also did not satisfy the lesser finding of a reasonable likelihood of a serious and imminent threat to the administration of justice.[107] Moreover the court found that the order, which applied to the fifteen defendants and their three attorneys, was unconstitutionally overbroad as it also included unprohibited speech.[108]

In *In re Halkin*,[109] an order which prohibited extrajudicial disclosure of information by counsel and parties was deficient because the order did not specify the reasons for the prohibition.[110] Defendant charged that certain government agencies had conducted unlawful surveillance of United States citizens who opposed the Vietnam War.[111] The order barred the parties and their counsel from making statements about information obtained through discovery, and from publicly disclosing the material, except as such material became part of the record.[112] The District of Columbia Circuit found that the order prohibiting political expression was overbroad since there were no expressed findings, no reasons articulated, and no evidence presented as to whether publication would preclude a fair trial.[113]

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104. *Id.* at 1060.
105. *Id.*
106. *Id.* at 1061.
107. *Id.*
108. *Id.*
109. 598 F.2d 176 (D.C. Cir.), *cert. denied*, 444 U.S. 840 (1979).
110. *Id.* at 196-97.
111. *Id.* at 180.
112. *Id.* at 179.
113. *Id.* at 196-97. When the order was issued, however, the trial court had actually only examined, in addition to the moving papers, memoranda and the parties' correspondence, a two paragraph letter from plaintiff's counsel describing three documents and photocopies that the plaintiffs proposed to release to the media, and a draft press release

III. COURT'S ANALYSIS

A. MAJORITY

The primary issue on appeal in *Levine* was whether the district court should be compelled to dissolve its gag order silencing the attorneys from communicating with the media about the merits of the case.[114] The Ninth Circuit confirmed petitioner's characterization that the order was a prior restraint.[115] Moreover, because the district court's order did not prohibit the press from attending the criminal proceedings or reporting about them,[116] the Ninth Circuit distinguished the press issue raised here from those issues raised in *Associated Press v. United States District Court*[117] and *Columbia Broadcasting Systems v. United States District Court.*[118] By denying the media access to the litigants, the court conceded that the gag order raised a different first amendment issue by impairing the media's ability to gather news.[119] The Ninth Circuit concluded, however, that the petitioners lacked standing to assert the rights of nonparty media organizations.[120]

Thus the court's analysis focused on the attorneys' rights to free speech.[121] The Ninth Circuit rejected the argument that the restraining order against the defense attorneys prevented the

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describing the significance of the documents. *Id.*

114. 764 F.2d at 591.

115. *Id.* at 595.

116. *Id.* at 594. *See supra* note 56 and accompanying text.

117. 705 F.2d 1143, 1145-47 (9th Cir. 1983). *See supra* note 64 and accompanying text.

118. 729 F.2d 1174, 1178-79 (9th Cir. 1983). *See supra* note 46 and accompanying text.

119. 764 F.2d at 594. In Branzburg v. Hayes, 408 U.S. 665 (1972), the Supreme Court found that news gathering qualified for first amendment protection. *Id.* at 681. *See supra* note 58. However, in *KPNX Broadcasting Co. v. Maricopa County Superior Court*, a media liaison order was found to be outside the scope of the press' first amendment right to attend and report on criminal trials, and only to collaterally affect the media's ability to interview trial participants. 139 Ariz. 246, 678 P.2d 431, 439 (1984).

120. 764 F.2d at 594. Subsequently, the Radio and Television News Association of Southern California, an organization representing broadcast journalists, filed a petition for writ of mandamus seeking to compel the district court to vacate its gag order. The Ninth Circuit held that gag orders restraining trial counsel from making extrajudicial statements to the news media, while indirectly denying the media access to trial participants, did not infringe on the first amendment rights of the press. Radio and T.V. News Assoc. v. United States District Court, 781 F.2d 1443 (9th Cir. 1986).

121. *Id.* at 595.

defendant from communicating with the media.[122] The court reasoned that Miller had access to the media because he had testified at the Ogorodnikovs' trial and was not prevented by the gag order from issuing a statement through his family.[123] Additionally, because the restraining order only limited extrajudicial statements by Miller's attorneys, who were free to present his case in open court, the Ninth Circuit did not decide whether the gag order was permissible when a defendant could not communicate with the media.[124]

Recognizing that restrictions on trial participants are an effective method of inhibiting excessive trial publicity as established in *Sheppard v. Maxwell*[125] and *Nebraska Press Association v. Stuart*,[126] the Ninth Circuit measured the district court's order against the Supreme Court's requirements for determining the validity of a prior restraint.[127] While the court recognized that the right to a fair trial is guaranteed to an accused by the sixth amendment,[128] it did not find that a corresponding right is so afforded to the prosecutor as a litigant.[129] The court noted that the defendant's interest in seeking a partial jury was to be checked by society's interests and expectations in a fair result.[130]

The Ninth Circuit confirmed the district court's finding that the publicity had created, and would continue to create, a clear and present danger or serious and imminent threat to the administration of justice.[131] Emphasis was placed on the fact that

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122. *Id.* at 593 n.1.

123. *Id.* Implicit within the court's reasoning is the assumption that statements made by the attorneys would be more credible, and therefore prejudicial, than statements made directly by the defendant at his co-defendant's trial or by the defendant's family. *See* Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975), *cert. denied sub nom.*, Cunningham v. Chicago Council of Lawyers, 427 U.S. 912 (1976).

124. 764 F.2d at 593 n.1. The court also noted that this petition did not challenge the government's ability to deny Miller direct contact with the media. *Id.*

125. 384 U.S. 333, 360-63 (1966).

126. 427 U.S. 539, 564 (1976).

127. 764 F.2d at 595. The Ninth Circuit held that such a challenge requires that the party requesting the order show that: (1) the activity restrained poses either a clear and present danger or a serious and imminent threat to a protected competing interest; (2) the order is narrowly drawn; and (3) less restrictive alternatives are not available. *Id.* (citations omitted).

128. *Id.* at 596.

129. *Id.* at 596-97.

130. *Id.* at 597.

131. *Id.* at 598.

the restraining order was aimed expressly at publicity generated during or immediately before trial, when the potential for prejudice was greater.[132]

The court then reviewed the narrowness of the order and found that it was not unconstitutionally vague because it gave clear guidance as to the types of punishable speech.[133] However, since many statements that bore upon the merits to be resolved by the jury did not present a threat to the administration of justice, the court agreed with the *In re Halkin* case that the order was overbroad.[134]

The Ninth Circuit further found that the less restrictive alternatives outlined in *Nebraska Press Association*[135] would be ineffective or counterproductive in this situation.[136] For example, while a searching vior dire might eliminate bias caused by extrajudicial statements, it would not neutralize the prejudice caused during trial nor assuage harm inflicted on the integrity of

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132. *Id.* The court distinguished *Nebraska Press Ass'n*, *CBS*, and *Associated Press*, and explained that in those cases prior restraints were aimed solely at pretrial publicity and were invalidated on the grounds that an impartial jury could not be selected. *Id.* at 598. *See also Chicago Council of Lawyers*, 522 F.2d at 253-54 (possibility of prejudice "more concrete" the closer to trial).

133. 764 F.2d at 599. *Cf.* Hirschkop v. Snead, 594 F.2d 356, 371 (4th Cir. 1979)(holding that "other matters that are reasonably likely to interfere with a fair trial" is too vague).

134. 764 F.2d at 599 (citing *In re* Halkin, 598 F.2d 176, 196-97 & n.51 (D.C. Cir.), *cert. denied*, 444 U.S. 840 (1979)). It suggested the self-imposed limitations set forth in 28 C.F.R. § 50.2(b) for specific statements proscribed for the prosecution. The court also listed a number of subjects which would be applicable to the defense:

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

Id.

135. 427 U.S. at 563-64.

136. 764 F.2d at 599-600.

the judicial process.[137] Also, the court concluded that use of emphatic and clear instructions was frequently ineffective.[138] Likewise, a change of venue or postponement of trial would not suffice because national news coverage was involved and the threat of publicity would not abate.[139] Lastly, sequestering the jury might unnecessarily incur resentment or harassment and disrupt the quality of the jury's deliberations.[140] This, the court reasoned, would misplace the burden of prejudicial publicity on the jurors rather than on the attorneys who had caused it.[141]

The Ninth Circuit granted the petition for the writ of mandamus[142] because it concluded that the order restraining the attorneys' extrajudicial statements was appropriate in light of the inadequacies of other remedies.[143] The reasons for the district court's order had adequately outweighed the heavy presumption against the validity of a prior restraint.[144] Accordingly, it upheld the gag order, but directed the district court to specify the proscribed types of statements.[145]

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137. *Id.* The district court found it ironic that it addressed the restraining order on the same day that it received a suggested voir dire questionnaire concerned with pretrial publicity. *Id.* The Ninth Circuit agreed with the district court that counsels' misinterpretation of their obligations concerning prejudicial comments would continue during trial and the voir dire would be powerless to eliminate the prejudice caused by such publicity. *Id.* at 600.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 601.

142. *Id.* To determine the validity of issuing a writ of mandamus the court applied the guidelines set forth in *Bauman v. United States District Court:*

> (1) The party seeking the writ has no other adequate means, such as direct appeal, to attain the relief he or she desires. (2) The petitioner will be damaged or prejudiced in a way not correctable on appeal . . . . (3) The district court's order is clearly erroneous as a matter of law. (4) The district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules. (5) The district court's order raises new and important problems or issues of law of first impression.

Id. at 593-94 (citing Bauman v. United States District Court, 557 F.2d 650, 654-55 (9th Cir. 1977)). The court found the first three requirements were fulfilled and exercised its jurisdiction under mandamus. 764 F.2d at 593-94.

143. *Id.* at 601.

144. *See supra* notes 44-45.

145. 764 F.2d at 601.

B. Concurrence

Judge Sneed wrote separately to express a slightly different view.[146] The concurrence initially suggested that an attorney's respect for the profession and the integrity of the judicial process should eliminate the need for these gag orders.[147] It admitted, however, that the level of professional conduct needed, and the incapacity of bar associations to secure such conduct, required the court to fix limits on the attorneys' "lobbying efforts."[148] Under the facts of this case, the concurrence agreed that the imposition of the gag order was proper.[149]

Additionally, the concurring opinion agreed with the majority that while the accused may seek, to some extent, a partial jury, the sixth amendment does not guarantee such a right.[150] Moreover, the concurrence noted that the sixth amendment does not guarantee society a fair trial, but that society nonetheless expects one.[151] Yet because the accused has a *right* to an impartial jury and the people merely an *expectation* of one, restraints on prosecutors may be more stringent than those on defense counsel.[152] Thus where speech provokes or threatens an impartial jury or fair trial, the concurrence reluctantly agreed that courts could impose narrowly drawn restraints.[153]

C. Dissent

Judge Nelson, concurring in part and dissenting in part, could not totally concur because she did not find an adequate showing of a clear and imminent danger or a serious and imminent threat to an impartial jury.[154] Following the Ninth Circuit's earlier opinion in *Columbia Broadcasting Systems v. United States District Court*,[155] the dissent focused on the impact of

146. *Id.* at 601-03.
147. *Id.* at 601 (Sneed, J., concurring).
148. *Id.* at 601-02 (Sneed, J., concurring).
149. *Id.* at 602 (Sneed, J., concurring).
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.* at 603 (Sneed, J., concurring).
154. *Id. See* CBS v. United States District Court, 729 F.2d 1174, 1178-82 (9th Cir. 1983).
155. 729 F.2d 1174 (9th Cir. 1983).

the pretrial publicity rather than on its source.[156] In assessing the prejudicial nature of pretrial publicity, the court in *CBS* had looked not only to the effect that the publicity might have had on the individual, but also to the impact that the publicity might have had to inflame the entire community.[157]

The dissent then argued that among twelve million people in the Central District of California an unbiased panel of jurors could be selected.[158] The dissent found that gag orders on attorneys' statements were not always impermissible but rather distinguished the situation where the jury had been empaneled.[159] In addition, the trial court judge would need to scrutinize anew the alternatives to the gag order.[160] Remedies such as jury sequestration and curative jury instructions would require re-examination of the degree and nature of the publicity at that time, as well as of the efficacy of the proposed order in curbing the publicity.[161]

The dissent sympathized with the concerns about the professional obligation of lawyers to refrain from engaging in publicity campaigns and noted that rules of professional conduct are post-judgment remedies which are less effective but safer than prior restraints.[162] On this record, however, the dissenting opinion noted that the publicity in this case was likely to be widespread even if the attorneys' comments were restrained and, as a result, the benefits to the sixth amendment did not outweigh the costs to the first amendment.[163]

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156. 764 F.2d at 603 (Nelson, J., concurring in part, dissenting in part). *See supra* note 52 and accompanying text.

157. 729 F.2d at 1180. *See also* Irvin v. Dowd, 366 U.S. 717, 727 (1961) (murder conviction reversed because "pattern of deep and bitter prejudice [was] shown to be present throughout the community.").

158. 764 F.2d at 603-04 (Nelson, J., concurring in part, dissenting in part).

159. *Id.*

160. *Id.* at 604 (Nelson, J., concurring in part, dissenting in part).

161. *Id. Cf.* Associated Press v. United States District Court, 705 F.2d 1143 (9th Cir. 1983). In *Associated Press*, the Ninth Circuit struck down a court-ordered sealing of documents finding that there was not a " 'substantial probability that closure [would] be effective in protecting against the perceived harm.' " *Id.* at 1146 (quoting United States v. Brooklier, 685 F.2d 1162, 1167 (9th Cir. 1982)).

162. 764 F.2d at 604 (Nelson, J., concurring in part, dissenting in part).

163. *Id. See also* Hirschkop v. Snead, 594 F.2d 356, 370 (4th Cir. 1979) (efficacy of the tactic of silencing attorneys is not complete answer since others, like police officers, speak to the press; but attorneys as officers of the court are held to a higher standard).

IV. CRITIQUE

The trial court in this case was faced with the fact that prejudicial publicity had been generated and would continue to escalate. An initial admonition by the court to the parties to voluntarily restrain from prejudicial comments had gone unheeded.[164] As the Ogorodnikovs' trial neared, defense attorneys' extrajudicial statements increased.[165] Contemplating the dangers posed to the defendant's right to a fair trial, the court felt pressed to issue the gag order.[166]

The use of a prior restraint inevitably raises the question of whether such a drastic measure is ever appropriate.[167] The Supreme Court's hostility to prior restraints on the press is evident from its consistency in overruling such orders.[168] Few exceptions have been countenanced.[169] Nonetheless, recent court decisions have embraced the suggestions set forth in *Sheppard v. Maxwell*[170] and have increasingly opted to gag attorneys and other

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164. *See supra* note 11.

165. 764 F.2d at 592. When the Ninth Circuit denied the government's motion for an order restraining extrajudicial comments on December 14, 1984, defense counsel advised the court they they might "at some future time deem it necessary in the interest of our client to make a statement outside the courtroom." *Id.*

166. *Id. See supra* note 8.

167. *See supra* notes 44-45.

168. In 1977 Stanford's Law School held a symposium in which numerous authors reviewed the *Nebraska Press Ass'n v. Stuart* decision. *See, e.g.*, Goodall, *The Press Ungagged: The Practical Effect on Gag Order Litigation of* Nebraska Press Association v. Stuart, 29 STAN. L. REV. 497, 512-13 (1977); Portman, *The Defense of Fair Trial from* Sheppard *to* Nebraska Press Association v. Stuart: *Benign Neglect to Affirmative Action and Beyond*, 29 STAN. L. REV. 393, 409 (1977); Sack, *Principle and* Nebraska Press Association v. Stuart, 29 STAN. L. REV. 411, 427 (1977); B. Schmidt, Nebraska Press Association: *An Expansion of Freedom and Contraction of Theory*, 29 STAN. L. REV. 431, 468 (1977); R. Schmidt, Nebraska Press Association: *An Open or Shut Decision?*, 29 STAN. L. REV. 529, 534 (1977).

169. *See, e.g.*, Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931). The Supreme Court struck down an injunction involving a state statute which allowed enjoining any "malicious, scandalous and defamatory newspaper, magazine or other periodical." *Id.* at 701-02. The trial court had issued a permanent injunction against the defendant who had published anti-Semitic articles critical of local officials. The Supreme Court reversed the conviction on the grounds that a prior restraint is the "essence of censorship." *Id.* at 713. The Court mentioned only three "exceptional cases" in which a prior restraint might be acceptable: (1) to prevent actual obstruction to the government's recruiting or publishing the sailing dates of transports, or the number and location of troops; (2) in obscene materials; and (3) to avoid acts of violence and the overthrow of the government. *Id.* at 701-02. *See also* cases cited *infra* note 179.

170. Sheppard v. Maxwell, 384 U.S. 333 (1966). *See supra* note 26.

trial participants.[171]

It is not surprising that the Ninth Circuit viewed the facts here, involving the first FBI agent to be charged with espionage and of having an affair with his co-defendant, as the substance of potentially pervasive news coverage.[172] However, the publicity here was not of the inflammatory and lurid nature that the Supreme Court had previously condemned.[173] Since not all publicity, even if pervasive, denies a defendant a fair trial,[174] the Ninth Circuit's affirmation of the prior restraint in this case attracts close scrutiny.

The court's focus on attorneys as the source of the detrimental publicity rather than on the actual impact of that publicity led to a rule that inhibits the inherent function of the press.[175] Silencing attorneys of necessity implicates the media's access to that information.[176] Limiting information is significant only when the attorneys are restricted access to the media who disseminate those comments to the public. Thus, whatever the courts choose to call it, the ultimate focus still must be on the press. Within this context, *Nebraska Press Association v. Stuart* has signalled the Supreme Court's hostility to the prior re-

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171. *E.g.*, *In re* Halkin, 598 F.2d 176 (D.C. Cir.), *cert. denied*, 444 U.S. 840 (1979). The District of Columbia Circuit noted that an order directed only at trial participants represented a less sweeping curtailment of first amendment rights than an order broadly restraining the press. *Id.* at 195 & n.44.

172. *See supra* note 3.

173. *See, e.g.*, Nebraska Press Association v. Stuart, 427 U.S. 539, 542-43 (1976)(six members of family found murdered in their home; defendant had committed murders in course of sexual assault); Sheppard v. Maxwell, 384 U.S. 333, 335-36 (1966)(defendant accused of bludgeoning his pregnant wife). *See supra* note 51.

174. *See supra* note 18.

175. *See* Branzburg v. Hayes, 408 U.S. 665 (1972). There the Supreme Court remarked:

> A principle is that the effective self-government cannot succeed unless the people are immersed in a steady, robust, unimpeded, and uncensored flow of opinion and reporting which are continuously subjected to critique, rebuttal, and re-examination. In this respect [the reporter's] status as a news gatherer and an integral part of that process becomes critical.

Id. at 715. *See also Levine*, 775 F.2d 1054, 1055 (9th Cir. 1985) (Norris, J., dissenting from the denial of rehearing en banc)(to uphold the gag order "will significantly restrict the media's ability to gather information and the public's right to be informed about our criminal justice system.").

176. Schmidt, Nebraska Press Association: *An Open or Shut Decision?*, 29 STAN. L. REV. 529, 530 (1977).

straint.[177] It is well established that the public's need for a free flow of information is paramount.[178] Indeed, with few narrow exceptions, cases raising a press issue in the interest of a fair trial have held the restraints to be unconstitutional.[179]

This change in focus from the press to the attorneys is not, at first blush, too significant since the Ninth Circuit appropriately confirmed the "clear and present danger" standard used to test a restraining order's validity. By holding that the record supported a clear and imminent danger, however, the court has required a less rigorous showing than has been demanded in the traditional press cases established in *Nebraska Press Association* and its progeny.[180]

Following *Nebraska Press Association*, the Ninth Circuit reviewed the efficacy of the more traditional, less burdensome alternatives.[181] In *Levine*, however, the court made no attempt to determine the effect of the publicity on the entire community. In *Columbia Broadcasting Systems v. United States District Court*, the court held that "in a large metropolitan area, prejudicial publicity is less likely to endanger" the right of an accused to a fair trial.[182] Moreover, the *Levine* court reasoned that voir dire could not eliminate prejudice caused during the trial.[183] Yet,

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177. Nebraska Press Association v. Stuart, 427 U.S. 539 (1976). *See supra* note 45.

178. *See* Note, *supra* note 46, at 96-97.

179. *See, e.g.*, Near v. Minnesota, 283 U.S. 697 (1931). *See also* New York Times v. United States, 403 U.S. 713 (1971). There, Justice Black viewed the publishing of the Pentagon Papers as "paramount among the responsibilities of a free press [whose duty is] to prevent any part of the government from deceiving the people and sending them off to distant lands to die." *Id.* at 717. The Court recognized a narrow military exception which might justify the prior restraint when disclosure "will surely result in direct, immediate, and irreparable damage to our Nation or its people." *Id.* at 730. In Roth v. United States, 354 U.S. 476, 481-83 (1957), the validity of federal and state obscenity laws were sustained. The Supreme Court affirmed the conviction for mailing obscene books and advertisements and noted that "obscenity [is] utterly without redeeming social importance" and thus "not within the area of constitutionally protected speech or press." *Id.* at 485-86. In Chaplinsky v. New Hamphshire, 315 U.S. 568, 571-72 (1942), the Supreme Court upheld a conviction under a statute based upon the "fighting words" doctrine declaring that libel, obscenity and "fighting words" are not afforded first amendment protection.

180. *See supra* note 34.

181. 764 F.2d at 599-600.

182. 729 F.2d 1174, 1181 (9th Cir. 1983).

183. In *CBS*, the Ninth Circuit found that the district court's reasoning amounted to a general rejection of voir dire as an effective alternative to prior restraints, when the district court stated that "No matter how searching the questions . . . certain matters

it made no attempt to consider the effect of repeated and strong admonitions both to the trial participants and to the jury during the trial.[184] Nor did the court consider the actual impact, if any, that the publicity would have on the jury.[185] The Ninth Circuit further accepted the district court's reasoning that sequestration is a greater burden than the effects of the restraining order.[186] By doing this the court ignored the fact that although this measure would insulate jurors only after they are sworn, it would also enhance likelihood of diffusing the impact of pretrial publicity and emphasize the elements of the jurors' oaths.[187] Essentially, the court focused its attention on a potentially burdened jury rather than on the interests of the public in obtaining the information or on the attorneys' freedom of expression.

Above all, the court did not emphasize sufficiently the ethical obligations imposed by the disciplinary rules which regulate attorneys' conduct.[188] While it is true that these disciplinary measures would come into effect only after the extrajudicial statements were made, subsequent remedies are a solution consistent with the entire penal process. An accused who has been denied a fair trial may always exercise his right to appeal. This remedy is undoubtedly time consuming and costly but so too is the resort to a prior restraint.[189] It is inevitable in a fair trial-free speech case that the court will be compelled to elect the preeminence of one constitutional right over another.[190] As Judge Nelson noted in her dissenting opinion, "concern over the professional ethics of those who try their cases in the press, however, should not replace dispassionate analysis when First Amendment freedoms are in the balance."[191]

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are not detectable, especially those motives to bias and prejudice." 729 F.2d at 1182.

184. Although unconventional, the court could consider continuing voir dire during the trial.

185. In *CBS*, the court noted that potential jurors are untainted by press coverage even when exposed to widespread publicity. 729 F.2d at 1179. In November, 1985, Miller's trial for espionage ended in a mistrial giving support to the truth of this statement.

186. 764 F.2d at 600.

187. 427 U.S. at 564.

188. 764 F.2d at 601 (Sneed, J., concurring).

189. *See supra* note 44.

190. Erickson, *Fair Trial and Free Press: The Practical Dilemma*, 29 STAN. L. REV. 485, 489 (1977).

191. 764 F.2d at 604 (Nelson, J., concurring in part, dissenting in part). In the denial of the rehearing en banc, the dissenting opinion argued that the range of options

V. CONCLUSION

Absent controlling Supreme Court precedent, *Levine* is the first decision in any circuit approving a gag order on defense attorneys under the "clear and present danger" standard.[192] The decision is therefore likely to have adverse consequences on the future of the free speech of trial participants.[193] A potentially dangerous effect is the possibility of chilling the speech of attorneys called upon to represent unpopular defendants in high visibility cases.[194] The unpopular accused is especially dependent on his attorney to speak out publicly because the need to mitigate the damage caused by the indictment in the eyes of the community is magnified[195] and because the need to seek a partial jury is critical. With the media's increasing interest in reporting on criminal activities, upholding the gag order in this case may signal the court's willingness to temper its position as to the validity of prior restraints.

*Elisa R. Paisner**

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available to the attorney in defending his client must include publicly speaking out to mitigate the damage caused to his client in the community by the government's accusation. 775 F.2d at 1055 (Norris, J., dissenting).

192. *Id.*

193. *Id.*

194. *Id.* at 1056.

195. *Id.* at 1055.

* Golden Gate University School of Law, Class of 1987.

CRIMINAL LAW AND PROCEDURE

SUMMARIES

UNITED STATES v. BRANSON: NO NARROWING OF *MIRANDA*

I. INTRODUCTION

In *United States v. Branson*,[1] the Ninth Circuit held that the prosecution's repeated references to the fact that defendant Roger Branson remained silent during his post-arrest interrogation, after he had been read his *Miranda*[2] rights, violated his fifth amendment privilege against self-incrimination.[3]

II. FACTS

Branson was arrested and charged with knowingly passing counterfeit bills.[4] Following his arrest, after he had received the *Miranda* warnings, Branson refused to respond when he was asked about the source of the counterfeit money.[5] Later, at trial, the prosecution referred to this silence as proof that Branson

1. 756 F.2d 752 (9th Cir. 1985) (per Ferguson, J.; the other panel members were Pregerson, J., and Stephens, D.J., Senior United States District Judge for the Central District of California, sitting by designation.

2. 384 U.S. 436 (1966). *See infra* notes 9-14 and accompanying text.

3. The fifth amendment provides in pertinent part: "[N]or shall [any person] be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

4. 756 F.2d at 753.

5. *Id.* Branson was charged under a statute which requires that the government prove knowledge of falsity as an element of the crime of counterfeiting. Branson was arrested after he purchased a money order with three counterfeit bills. The Secret Service traced the bills through the money order to Branson. 18 U.S.C. § 472 (1970).

knew the money was counterfeit.[6] A jury convicted Branson of knowingly passing counterfeit money, and he appealed to the Ninth Circuit.[7]

III. BACKGROUND

The fifth amendment commands that no person shall be compelled in any criminal case to be a witness against himself.[8] In *Miranda v. Arizona*,[9] the Supreme Court held that this privilege against self-incrimination can only be fulfilled if an individual's silence during an in-custody interrogation is protected from the government's use of that silence as inferential proof of guilt.[10] The Court stated that it is impermissible to penalize an individual for exercising his fifth amendment privilege by allowing the prosecution to imply that silence in the face of an accusation is in itself damning.[11]

Miranda recognized that the fifth amendment privilege may be waived.[12] The *Miranda* Court held, however, that if the government claims a waiver, it bears a heavy burden of showing that the waiver was voluntary, knowing, and intelligent.[13] Moreover, even after waiving the privilege by beginning to talk, a defendant may revoke this waiver by indicating in any manner, at any time, prior to or during the interrogation, a desire to remain silent.[14]

The Ninth Circuit has recognized a selective revocation of a

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6. *Id.*

7. *Id.* Branson did not object to the use of his silence by the prosecutor at trial under the belief that an objection would compound the prejudice against him. Since Branson did not object, the Ninth Circuit had to find a "plain error" in the proceedings before review was proper under Federal Rule of Civil Procedure 52(b). *Id.*

8. U.S. CONST. amend. V.

9. 384 U.S. 436 (1966). The *Miranda* warnings consist of the following: (1) a person has the right to remain silent, (2) anything he says can be used against him in a court of law, (3) he has a right to the presence of an attorney, and (4) if he cannot afford an attorney, one will be appointed for him. Unless the warnings are given and a knowing and intelligent waiver demonstrated, evidence obtained as a result of the interrogation may not be used against a defendant as proof of guilt. *Id.* at 478.

10. *Id.* at 460.

11. *Id.* at 468 n.37.

12. *Id.* at 473.

13. *Id.* at 475.

14. *Id.* at 473.

waiver.[15] A suspect may indicate a willingness to respond to some questions and not to others, and this intermittent silence will be protected.[16] The court established the limit of a selective waiver in *United States v. Lorenzo*.[17] When the defendant refused to answer a single question in the midst of an extended, entirely voluntary exculpatory statement, the court held that the right to remain silent had not been invoked.[18] In the court's view, this brief silence merely amounted to an uncomfortable pause during a narration, not an indication of a desire to remain silent.[19] Consequently, the prosecutor's reference to the defendant's silence was not error, since that event was not protected by the fifth amendment.[20]

The opposite result was reached by the court in *Scarborough v. Arizona*.[21] The defendant, after his arrest, neither answered questions, nor made an exculpatory statement.[22] At the trial, the prosecutor pointed out that the defendant had remained silent after being accused of the crimes.[23] Since the defendant's conduct was a clear invocation of the fifth amendment privilege, the court held that any reference to his silence was fundamental error.[24]

IV. THE COURT'S ANALYSIS

The primary issue considered by the court was whether Branson had successfully revoked his initial waiver of the fifth amendment privilege by refusing to continue responding to questions after being asked where he had obtained the counterfeit bills.[25]

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15. United States v. Lorenzo, 570 F.2d 294, 298 (9th Cir. 1978).

16. *Id.*

17. 570 F.2d 294 (9th Cir. 1978).

18. *Id.* at 298. Defendant Lorenzo, like Branson, was accused and convicted of knowingly passing counterfeit money. *Id.* at 294.

19. *Id.* at 298.

20. *Id.*

21. 531 F.2d 959 (9th Cir. 1976). Defendant Scarborough was arrested for robbery and assault with a deadly weapon. *Id.* at 960.

22. *Id.* at 960.

23. *Id.*

24. *Id.* at 961.

25. 756 F.2d at 753. The court also addressed the government's contention that, even if there were prosecutorial error, it was harmless beyond a reasonable doubt and did not contribute to the jury's verdict. There was dramatic evidence to the contrary,

The court began its analysis by rejecting the government's reliance on *United States v. Lorenzo*.[26] Factually, *Lorenzo* differed significantly from *Branson*. While Branson neither offered an exculpatory story, nor resumed talking after initially refusing to answer a question,[27] Lorenzo's conduct was marked by a willingness to speak on his own behalf, both before and after refusing to answer the single question.[28] Branson had, by his unambiguous conduct, successfully communicated to the arresting officers that he wished to remain silent.[29] Consequently, Branson had totally revoked his earlier waiver of the privilege, and any use of that protected silence was plain error.[30] The facts in *Branson* more closely resembled those in *Scarborough v. Arizona*,[31] since neither defendant resumed speaking after initially refusing to answer a question, and neither offered an exculpatory narrative.[32] The Ninth Circuit, therefore, applied its holding in *Scarborough* to *Branson* by ruling that to allow the state to use the defendant's silence against him would violate the spirit of the fifth amendment.[33]

V. CONCLUSION

The Ninth Circuit acted correctly in firmly rejecting the government's attempt to narrow the right to revoke a waiver of the fifth amendment privilege. Once the court decided that Branson had revoked his waiver, the well-established principle that a defendant's post-*Miranda* silence may not be used against him controlled. The Ninth Circuit acted consistently with its previous decisions, United States Supreme Court authority and the Constitution, by properly refusing to countenance the prose-

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however. After the jurors had begun their deliberations, they sent a note to the judge asking him if they could base their decision on Branson's silence when he was asked about the source of the money. The judge responded that they were free to consider any relevant evidence. The court concluded that the reasonable inference was that the prosecutor's reference to Branson's silence did influence the verdict and that, therefore, it was not harmless. *Id.* at 754.

26. 570 F.2d 294 (9th Cir. 1978).

27. 756 F.2d at 754.

28. *Id.* at 753.

29. *Id.*

30. *Id.* The use of this protected silence was the "plain error" needed by the reviewing court to overturn the lower court. *See supra* note 7.

31. 531 F.2d 959 (9th Cir. 1976).

32. 756 F.2d at 754.

33. *Id.*

cution's use of a defendant's protected silence.

*Michael S. Williams**

U.S. v. FLYNT: REAFFIRMING THE IMPORTANCE OF THE PSYCHOLOGICAL CAPACITY TO COMMIT A CRIME

I. INTRODUCTION

In *United States v. Flynt*,[1] the Ninth Circuit held that the district court abused its discretion in refusing to grant a continuance to enable the defendant to obtain psychiatric evidence, where his only defense to the charge of contempt of court was lack of mental capacity to commit the offense.[2] The Ninth Circuit also ruled that the imposition of a summary contempt sentence is erroneous where there is a substantial issue as to the defendant's mental capacity to commit contempt.[3]

II. FACTS

Defendant Larry Flynt, during his arraignment on an indictment for flag desecration[4] and for illegally wearing a Purple Heart, launched an obscene verbal attack on the federal magistrate conducting the proceeding.[5] The district judge, assigned by

* Golden Gate University School of Law, Class of 1986

1. 756 F.2d 1352 (9th Cir.), *modified*, 764 F.2d 675 (9th Cir. 1985) (per Reinhardt, J.; the other panel members were Fletcher, J., and Ely, J.). (Judge Ely died before the opinion was prepared, but he heard the arguments and concurred in the result.)

2. *Id.* at 1362.

3. *Id.* at 1366.

4. Flynt wore an American flag as a diaper during an earlier, unrelated court appearance. *Id.* at 1355.

5. Part of the dialogue between the magistrate and Flynt was as follows:

> THE MAGISTRATE: All right. I am going to appoint Mr. Isaacman to represent you as your attorney for these proceedings. you may choose to call—
>
> THE DEFENDANT: Then take my ass to jail, cocksucker, because I—

the magistrate to try the case, sent Flynt to the Medical Center for Federal Prisoners to undergo a psychiatric examination to determine his competence to stand trial.[6] The magistrate also ordered Flynt to show cause before the Chief Judge to the District Court why he should not be held in criminal contempt for the obscenities he hurled at the court during the arraignment.[7]

At the contempt hearing, Flynt's attorney informed the court that the defense would be based on a lack of mental capacity to commit contempt, and requested a thirty-day continuance to obtain expert testimony and substitute counsel.[8] The court

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> THE MAGISTRATE: All right.
>
> THE DEFENDANT: —refuse to go through this bullshit.
>
> THE MAGISTRATE: All right, would you proceed with the arraignment?
>
> THE DEFENDANT: You, dumb, ignorant mother-fucker. Now, I am telling you; you are not going to get away with this.
>
> THE MAGISTRATE: Proceed with the arraignment.
>
> THE DEFENDANT: There are [sic] no fucking way you are going to get away with it. You are denying me my counsel of my choice. You are just as dumb as that goddamn Burger up there on the Supreme Court, and I am ready to stay in jail until hell freezes over or until I have the attorney of my choice.
>
> You goddamn, no good, 14 karat piece of shit. Just cause you got on that robe, you don't have any goddamn right to abuse the Constitution that you are supposed to be upholding.

Id. at 1355 n.1.

6. Flynt's psychiatric examinations were completed in January 1984. The government psychiatrists concluded that Flynt suffered a mental disease characterized by frenetic activity, restlessness, grandiosity, flight of ideas, instability, and antisocial behavior. The psychiatrists concluded that Flynt had an intense need for control and attention, which manifested itself in abusive and uncontrollable courtroom behavior. The report concluded, however, that Flynt was competent to stand trial. *Id.* at 1365.

7. *Id.* at 1355. One of the issues Flynt raised on appeal was that the magistrate's assignment of the contempt hearing to the chief judge was not random as required by General Order 224, Rule 8.1. (C.D. Cal. Rules of the Court). This Rule requires random assignment of criminal cases to district judges to assure fairness and objectivity. The government argued that only arraignable crimes are covered by this Rule. However, the Ninth Circuit held that the crime of contempt is entitled to the same assurance of fairness as other crimes, and therefore Order 224 applies to criminal contempt proceedings as well. 756 F.2d at 1355 n.2.

8. Because Flynt had been incarcerated prior to the hearing at the Medical Center for Federal Prisoners, he had been unable to obtain examinations by psychiatrists of his own choosing. Flynt made several attempts to consult with psychiatric experts while he was at the Medical Center. He filed an ex parte application for transfer back to California to see his own psychiatrists, and also two habeas corpus petitions seeking both better medical care at the Prisoners' Medical Center and opportunities to consult with witnesses regarding pending litigation. *Id.* at 1356.

denied this motion, finding that there was no basis for the request. A one-day continuance was granted to permit Flynt to obtain substitute counsel, and the hearing was continued the following day.[9]

Defense counsel renewed the motion for a thirty-day continuance when the hearing reconvened, presenting evidence that Flynt's psychiatric experts could not complete their evaluation within the previously granted one-day continuance. Once again, the motion was denied.[10]

During this second appearance, Flynt responded with a number of obscene epithets when asked about his outbursts at the arraignment.[11] Flynt was gagged and was admonished that further outbursts would be punished by summary contempt citations. With the gag removed, he engaged in several additional bouts of offensive language. After each, he was summarily found guilty of contempt, and sentenced to thirty-day prison terms.[12]

At the close of the hearing, the district court found Flynt guilty of contempt at the time of the arraignment, and sentenced him to six-months' imprisonment. This sentence provoked another outburst, and the judge summarily sentenced him to an additional six months in prison. The contempt sentences

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9. *Id.*

10. Flynt's attorney informed the judge that a psychiatrist, psychologist and a psychopharmacologist had all been contacted and had agreed to evaluate Flynt, but could not do so within the constraint of a one-day continuance. Flynt's defense consequently consisted of nonexpert witnesses whose attempts to testify as to Flynt's mental condition were disallowed by the district judge on the ground of lack of qualifications. *Id.*

11. The following is an example of Flynt's abusive language, spoken when the judge had concluded sentencing:

> THE DEFENDANT: Give me more, mother-fucker. Is that all you can give me, you chicken shit cocksucker? Lay 18 months on me, you dumb mother-fucker.
>
> THE COURT: Now—
>
> THE DEFENDANT: Fuck you in your ass.
>
> THE COURT: That is enough.
>
> THE DEFENDANT: You suck—
>
> THE COURT: That will be another six months which will also be consecutive.
>
> THE DEFENDANT: I want you to give me more. Give me more.

Id. at 1357 n.6.

12. *Id.* at 1357.

totalled fifteen months.[13] Flynt appealed the contempt convictions to the Ninth Circuit.

III. THE COURT'S ANALYSIS

The Ninth Circuit first analyzed the district court's denial of a continuance. It then addressed the judge's use of the summary contempt power.

A. The Denial of a Continuance

1. *Background*

In considering the denial of the continuance,[14] the Ninth Circuit focused on the procedural fairness of the proceedings, as there was no question that the contempt had been committed.[15] In particular, it recognized the recent Supreme Court decision in *Ake v. Oklahoma*,[16] which emphasized the crucial importance psychiatric testimony may have whenever the defendant's mental condition is relevant to criminal culpability.

Four factors were identified as relevant in deciding whether

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13. *Id.* Flynt served more than five months in prison before being released by a Ninth Circuit panel pending this review. *Id.* at 1358.

14. The lower court's discretion to deny or grant a continuance will not be disturbed on appeal absent a clear abuse of that discretion. A clear abuse of discretion will not be found unless the lower court's action was arbitrary or unreasonable. *Id.*

15. *Id.*

16. 108 S.Ct. 1087 (1985). When an indigent defendant in a murder prosecution was not provided with psychiatric assistance to support an insanity defense, the Supreme Court stated: "[W]hen the State has made the defendant's mental condition relevant to his criminal culpability, and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshall his defense." *Id.* at 1095.

See also United States v. Fessel, 531 F.2d 1275, 1280-81 (5th Cir. 1976) (abuse of discretion to deny a continuance to obtain psychiatric records to establish insanity defense where this was the only defense available); United States v. Walker, 537 F.2d 1192, 1194 (4th Cir. 1976) (abuse of discretion to deny a continuance to obtain psychiatric evidence where psychiatrist had determined in only a 30-minute examination that defendant was competent to stand trial).

The test in the Ninth Circuit for determining the mental capacity to commit an offense is whether "at the time of the alleged criminal conduct, as a result of mental disease or defect [the defendant] lacked substantial capacity to conform his conduct to the requirements of the law or to appreciate the wrongfulness of his conduct." *Flynt*, 756 F.2d at 1365 n.11 (quoting United States v. Monroe, 552 F.2d 860, 863 (9th Cir.), *cert. denied*, 431 U.S. 972 (1977)).

Flynt's procedural rights had been violated. First, the appellant must have been diligent in preparing his defense prior to the hearing.[17] Second, the continuance must serve a useful purpose.[18] Third, the reviewing court must examine the inconvenience that might be caused to the district court or to the opposing party if the continuance is granted.[19] Finally, the court must weigh the harm to the appellant caused by the denial of the continuance.[20]

2. *Discussion*

With regard to the first factor, the court noted that Flynt had been sufficiently diligent in preparing his defense.[21] While incarcerated in the Medical Center, he had sought release, to no avail, for the purpose of obtaining psychiatric evaluations,[22] but had remained in detention until three days before the hearing.[23] Moreover, at the time of requesting the continuance, he had contacted and retained psychiatric experts; the one-day continuance granted by the court was, however, insufficient to conduct

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17. *See, e.g.*, United States v. Lustig, 555 F.2d 737, 744 (9th Cir.), *cert. denied*, 434 U.S. 926 (1977). Defendant, on trial for the sale of cocaine, had more than a month to find substitute counsel before trial. Not only was defendant's failure to secure substitute counsel due to lack of due diligence, but also the defendant made no showing that prejudice was caused by denial of a continuance. *Id.* at 744. *Cf.* United States v. Barret, 703 F.2d 1076 (9th Cir. 1983). When the defendant was notified only eight days before trial that the government was going to use an expert to establish identification through photographs taken at bank robbery, and defendant's diligent effort to obtain his own expert was unavailing, the court's failure to grant a continuance to secure an expert was a clear abuse of discretion. *Id.* at 1080.

18. *See, e.g.*, United States v. Hernandez, 608 F.2d 741 (9th Cir. 1979). Defendant, a heroin dealer, did not show that he would be able to make use of a continuance, since he presented no showing that the sought-after evidence was obtainable or actually existed. *Id.* at 746.

19. *See, e.g.*, United States v. Shuey, 541 F.2d 845 (9th Cir. 1976), *cert. denied*, 429 U.S. 1092 (1977). In a prosecution under the Mann Act (18 U.S.C. § 2422,), a continuance to obtain substitute counsel was properly denied when the government had obtained six witnesses from another state. *Id.* at 847.

20. *See, e.g.*, United States v. Long, 706 F.2d 1044, 1053 (9th Cir. 1983). Defendant failed to show he was prejudiced by the denial of a continuance since he was unable to identify any evidence he would have been able to present had the continuance been granted. *Id.* at 1053.

21. In reaching the conclusion that diligence had been shown, the court did not go so far as to ratify Flynt's course of conduct. The court conceded that in other circumstances, Flynt might fail to satisfy the diligence factor. *Flynt*, 756 F.2d at 1360.

22. 756 F.2d at 1359.

23. *Id.*

the necessary tests.[24]

The second factor considered was whether the continuance under the circumstances of this case would have been useful to him in establishing a viable defense.[25] The Ninth Circuit observed that the evidence before the district court of Flynt's defense that he lacked mental capacity to commit contempt, his erratic behavior, and the availability of psychiatric experts, as well as other factors,[26] clearly indicated that the testimony would be relevant. In this situation, the showing that expert testimony was available and relevant was held to be sufficient to demonstrate the usefulness of a continuance.[27]

The third factor, inconvenience to the court or opposing party, was not an obstacle to the granting of the continuance in this case. It would not have involved any rescheduling difficulties for the court, and the government had no witnesses to call.[28]

The fourth factor, prejudice, was critical to the decision to overrule the denial of the continuance.[29] Flynt's courtroom conduct could not be disputed, and the sole defense was that he lacked the requisite mental capacity to commit the offense. He could not establish this defense without expert witnesses. The court discounted the testimony of the non-expert witnesses who did testify precisely because they lacked any qualifications to testify on the subject.[30] In view of the pivotal role played by expert testimony, the trial court's denial of a continuance effectively deprived Flynt of the opportunity to present any defense. Therefore, the Ninth Circuit concluded that the denial of the continuance was arbitrary and unreasonable.[31]

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24. *See supra* note 10.

25. 756 F.2d at 1360.

26. *Id.* The district court had before it the report from the Medical Center. *See supra* note 6.

27. The court concluded that the district judge could not reasonably have demanded greater specificity than that the evidence would be relevant since he had denied Flynt an opportunity to gather that evidence. 756 F.2d at 1360.

28. *Id.*

29. *See supra* note 16 and accompanying text. The importance of psychiatric testimony was "compelling" in the Ninth Circuit's view, and Flynt suffered "severe" prejudice by being denied expert psychiatric testimony. 756 F.2d at 1361-62.

30. *See supra* note 10.

31. 756 F.2d at 1362.

B. Use of Summary Contempt Power

The district court, viewing Flynt's obscene disruptions during the contempt hearing, exercised its power to punish contumacious behavior through summary proceedings.[32] The Ninth Circuit addressed the question of whether this summary contempt power had been appropriately exercised.[33]

1. *Background*

There are two statutory prerequisites for the exercise of the power to summarily punish a defendant for contempt of court. First, the contempt must have occurred within the sight and hearing of the judge. Second, the conduct must have taken place in the actual presence of the court.[34] However, since the use of the power dispenses with ordinarily required procedural protections, it is only appropriate when the court is fully cognizant of all the facts bearing on the contumacious conduct, and when instant punishment is necessary to avoid disruption of ongoing proceedings.[35] In all cases, only the least possible power to

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32. The source of the district court's summary contempt power lies in the Federal Rule of Criminal Procedure which states in pertinent part:

> a. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court.
> b. A criminal contempt . . . shall be prosecuted on notice. The notice shall [allow] a reasonable time for the preparation of the defense . . . . If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing.

Fed. R. Crim. P. 42.

33. The appellate court reviewed the lower court's action under an abuse of discretion standard. 756 F.2d at 1362 (citing United States v. Wilson, 421 U.S. 309 (1975)). When witnesses who were granted immunity in a robbery prosecution refused to testify, there was no abuse of discretion in imposing a summary contempt sentence to protect the orderly progress of a criminal trial, especially when judge, jurors, and witnesses were all waiting, and the refusal to testify was an open, serious threat to the continuation of the trial. United States v. Wilson, 421 U.S. at 319.

34. The justifications for the summary contempt power include the fact that a judge must have a method of immediately remedying in-court disruption of ongoing proceedings, and also that the judge, being a percipient witness, has the facts of the contempt before him. *Flynt*, 756 F.2d at 1363.

35. *Id.* at 1364.

achieve the proposed end may be used.[36] Since it combines the functions of judge, jury, and prosecutor in one person, the summary contempt power is subject to abuse, and therefore its use must remain extraordinary and undertaken only after careful thought.[37]

In *Panico v. United States*,[38] the defendant was summarily cited for his courtroom behavior, despite a contention that mental illness made him incapable of forming the criminal intent requisite for the crime.[39] The Supreme Court held that fair administration of criminal justice requires a plenary hearing under Federal Rule Criminal Procedure 42(b)[40] to determine a defendant's criminal responsibility for his conduct.[41]

In *Rollerson v. United States*,[42] the District of Columbia Circuit struck down a summary contempt conviction imposed by a district judge after the defendant threw a water pitcher at the prosecutor. The defendant's evidence as to his insanity presented as a defense to the underlying charge raised a *substantial issue*[43] as to his criminal responsibility for his in-court conduct. Therefore, a Rule 42(b) evidentiary hearing was mandated.[44]

2. *Discussion*

In *Flynt*, the judge had both seen and heard the contempt, and it had occurred in the actual presence of the district court.[45] However, that court had before it evidence that raised a sub-

36. *Id.* at 1363 (citing United States v. Wilson, 421 U.S. 309, 316 (1975)).

37. United States v. Wilson, 421 U.S. 309, 319 (1975). *See also* United States v. Gustafson, 650 F.2d 1017 (9th Cir. 1981). In this case, a lawyer who continually disobeyed the court's instructions was summarily cited for contempt. The Ninth Circuit stated that because the summary contempt power has a manifest potential for abuse, a full Rule 42(b) hearing will be required if the judge cannot marshall all the facts to support the summary action. *Id.* at 1020.

38. 375 U.S. 29 (1975).

39. *Id.* at 30.

40. *See supra* note 32.

41. 375 U.S. at 30.

42. 343 F.2d 269 (D.C. Cir. 1964).

43. *Flynt*, 756 F.2d at 1364 (citing Rollerson v. United States, 343 F.2d 269, 277 (D.C. Cir. 1964))(emphasis added in *Flynt*, 756 F.2d at 1364).

44. 343 F.2d at 277.

45. 756 F.2d at 1364.

stantial issue as to Flynt's criminal responsibility.[46] The district court had the Medical Center's report detailing Flynt's personality disorders. Additionally, the judge had witnessed Flynt's violet language and bizarre behavior.[47] Without further information about the psychiatric basis and causation of this behavior, the court was not equipped to decide whether the defendant was capable of the crime. The Ninth Circuit, therefore, adopted the "substantial issue" test developed in *Rollerson*. Because the district court did not hold a full Rule 42(b) hearing, even though Flynt had clearly raised a substantial issue as to his mental capacity, his summary convictions of contempt were reversed.[48]

III. CONCLUSION

The Ninth Circuit correctly concluded that Flynt was unfairly denied a continuance that would certainly have been pivotal to his defense. The evidence of mental instability was simply too dramatic to ignore, and therefore prejudice to Flynt entirely outweighed any relevant countervailing considerations.

The Ninth Circuit also properly struck down the district court's summary imposition of punishment. However extreme the provocation, the Ninth Circuit could not countenance the abuse of the summary contempt power. A judge may never invoke the power beyond the minimum needs of the court, and in the future may not do so at all where a substantial issue is raised concerning the defendant's criminal capacity. By reversing the convictions, the Ninth Circuit strongly vindicated the crucial

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46. *Id.* at 1365. The court also questioned the district judge's imposition of a six-month sentence at the close of the hearing. There was no disruption of *ongoing* proceedings since the proceedings were ending. *Id.* at 1366 n.13.

47. *Id.* at 1366-67. The fact that the judge had witnessed Flynt's remarks was significant in another context as well. A judge should recuse himself in the interests of fairness if that judge was the object of the contemnor's attacks. *Id.* at 1366 n.13. Under a Rule 42(b) hearing, a judge involved in the contempt must not preside over the contempt hearing. *See supra* note 32.

48. 756 F.2d at 1366. Appellate courts have a special responsibility to protect against abuse of the summary contempt power. *See supra* note 37 and accompany text. In *Flynt*, the court decided that remanding the case would serve no purpose, since the five months already served by Flynt were clearly in excess of the least possible power adequate to achieve the proposed end, which was presumably vindication of the court's authority. Rather, the punishment meted out may have instead accomplished Flynt's purposes, since he could then see that his abusive language had hit the bull's eye. Therefore, all of Flynt's contempt convictions were vacated and reversed. 756 F.2d at 1366.

importance of a defendant's mental state to a fair adjudication of guilt or innocence.

*Michael S. Williams**

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* Golden Gate University School of Law, Class of 1986.