INTRODUCTION

In preparing my remarks for today, I began by reviewing the Nebraska Supreme Court's opinion that was ultimately reversed by *Nebraska Press*.[1] It does not get much attention from legal scholars, but as a current member of the court, I was interested in reviewing the court's reasons for upholding the prior restraint on the press.

I also thought it would be interesting to review the legal literature published immediately after *Nebraska Press* to find out about the initial reactions to and predictions about the case, and to compare those to how the case actually played out in practice over the last 40 years.

I found, perhaps unsurprisingly, that the common thread in all of these sources was courts' and scholars' struggle to strike a balance between the need for secrecy to protect the rights of the accused and the need for transparency to protect the rights of the press and society. Although, after *Nebraska Press*, it is clear that a court can almost never impose a prior restraint on the press except in the most extreme circumstances, if ever, the case spawned a lot of speculation and concern about other, less direct

[1] *State v. Simants*, 194 Neb. 783, 236 N.W.2d 794 (1975), *reversed*, *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 562, 96 S. Ct. 2791, 49 L. Ed. 2d 683 (1976).

restraints that still create secrecy. Battles over those kinds of restraints continue today. Other modern instances of this struggle include other efforts to increase access to information about criminal proceedings, such as journalists' efforts to secure the right to tweet or live blog from court.

DISCUSSION

STATE v. SIMANTS

In its opinion, the Nebraska Supreme Court was very anxious about what it called the press's "extremist and absolutist position."[2] It said that the position of the press was that "even if in some cases because of the exercise of freedom of the press pretrial publicity was such that trial by an impartial jury became impossible, it is better that an accused go free than that freedom of the press be impinged even in the slightest degree."[3]

The court took pains to reject the absolutist approach and stressed that the rights of the accused to an impartial jury and society's interest in ensuring an impartial jury deserve to be protected as well.[4] It reasoned that "[s]ociety as a whole loses a great deal when a criminal has to go free because he cannot be

[2] *Id.* at 799, 236 N.W.2d at 804.

[3] *Id.* at 793-94, 236 N.W.2d at 801.

[4] *Id.* at 799, 236 N.W.2d at 804.

tried."[5] And it also loses when an innocent person is convicted because an impartial jury cannot be obtained.[6]

The Nebraska Supreme Court ultimately got the balance of rights wrong in the case. The U.S. Supreme Court said it should have explicitly considered alternative, less-restrictive means, and it should have considered whether the gag order would be effective in a small Nebraska town where news and rumors spread easily. It appears that the court assumed there were no less-restrictive means of protecting Simants' rights to a fair trial.

But it also got the case sort of right, in that it concluded, like the U.S. Supreme Court in *Nebraska Press*, that First Amendment rights are not absolute, but must be balanced against the right of the defendant to a fair trial.

Initial Reactions

Soon after the *Nebraska Press* decision was released, Stanford Law Review published a symposium issue of 11 articles commenting on the case.[7] Several other law reviews published articles as well.[8]

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[5] *Id.*

[6] *Id.*

[7] Symposium: Nebraska Press Association v. Stuart, 29 Stan. L. Review 393 (1977).

[8] *The Supreme Court, 1975 Term*, 90 Harv. L. Rev. 159 (1976); Scott D. Baskin, Note, *Protective Orders Against the Press and the Inherent Powers of the Courts*, 87 Yale L.J. 342 (1977).

The commentators offered varying perspectives on the test Chief Justice Burger used in the case. As you know, Justice Burger and the majority held that when considering imposing a prior restraint on the press, a trial judge must consider "(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."[9]

Many of the commentators predicted that the practical effect of the balancing test would be to prohibit essentially all prior restraints on the press, because the test would be difficult if not impossible to meet.[10] But at least one suggested that the case

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[9] *Nebraska Press Ass'n v. Stuart, supra* note 1, at 562.

[10] Robert D. Sack, *Principle and Nebraska Press Association v. Stuart*, 29 Stan. L. Rev. 411 (1977) (predicting that "the long-term effect of the decision will be the necessary protection of the press from direct subjection to "gag" orders"); James C. Goodale, *The Press Ungagged: The Practical Effect on Gag Order Litigation of Nebraska Press Association v. Stuart*, 29 Stan. L. Rev. 497 (1977) ("Close examination of the Burger criteria, however, indicates that they constitute a test that is not a test, an exception that is not an exception."); Richard M. Schmidt, Jr. & Ian D. Volner, *Nebraska Press Association: An Open or Shut Decision?*, 29 L. Rev. 529 (1977) (noting that "many editorial writers and commentators hailed the Supreme Court's action as settling the question of prior restraint and ending for all time attempts to "gag" the press"); Eric Younger, *Some Thoughts on the Defense of Publicity Cases*, 29 Stan. L. Rev. 591, 595

should not discourage trial judges from exploring carefully refined prior restraints in the appropriate case.[11] Others were critical that the test did not sufficiently protect the needs of defendants.[12]

The commentators also offered plenty of speculation about whether, with direct restraints on the press all but eliminated as an option to protect defendants from prejudicial publicity, trial courts might turn to other, less direct methods of restraint. I think one comment from a Stanford Symposium article sums up the theme of many of the immediate reactions to the case--the article said: "The Supreme Court in *Nebraska Press Association* may have freed the press but also shut it out of the courthouse."[13]

Legal scholars and commentators were immediately concerned that the "other measures" a court must consider under prong 2 of the test would become indirect restraints with essentially the same effect as direct restraints--keeping information away from the press and the public. Their chief concerns were that courts

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(1977) (observing that "the Supreme court ma[de] direct orders restraining the press virtually impossible").

[11] William H. Erickson, *Fair Trial and Free Press: The Practical Dilemma*, 29 Stan. L. Rev. 485 (1977).

[12] James M. Shellow, *The Voice of the Grass: Erwin Charles Simants' Efforts to Secure a Fair Trial*, 29 Stan. L. Rev. 477 (1977).

[13] Richard M. Schmidt, Jr. & Ian D. Volner, *supra* note 10, at 530.

would impose "gag orders" on the attorneys, parties, or witnesses, and that courts would close proceedings to the public altogether.[14] And they wondered whether these kinds of restrictions would be constitutional.

The Court had appeared to suggest that gag orders may be appropriate in an earlier case--*Sheppard v. Maxwell*[15]-- where the Court reversed a denial of habeas corpus because the trial judge failed to protect the defendant from prejudicial publicity. The Court said that "the trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court

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[14] See Marc A. Franklin, *Untested Assumptions and Unanswered Questions*, 29 Stan. L. Rev. 387, 391 (1977) (observing that a "likely sequel *to Nebraska Press Association* is an increase in efforts by trial courts to close pretrial hearings to the public and the press and to keep information from reaching the press"); Bennco C. Schmidt, Jr., *Nebraska Press Association: An Expansion of Freedom and Contraction of Theory*, 29 Stan. L. Rev. 431, 470 (1977) ("The entire Court's recognition of a categorical right of the press to report anything that occurs in open court may encourage trial courts to close certain types of hearings, or even certain parts of criminal trials."); Richard M. Schmidt, Jr. & Ian D. Volner, *supra* note 10, at 530 (noting that "an argument can be made that the closing of court proceedings and the silencing of trial participants will become alternative methods used by courts that cannot meet the strict standards the Supreme Court demanded for the imposition of prior restraints on the press").

[15] *Sheppard v. Maxwell*, 384 U.S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966).

official which divulged prejudicial matters."[16] And in *Nebraska Press*, the Court at least alluded that closed hearings may be appropriate--it said: "The County Court could not know that closure of the preliminary hearing was an alternative open to it until the Nebraska Supreme Court so construed state law."[17]

We now know that the scholars' concerns about indirect restraints were well-founded. In response to closed proceedings after *Nebraska Press*, the Supreme Court ruled in a series of decisions in the 1980s that there is a qualified First Amendment right of access to attend criminal trials,[18] and that that right applies to voir dire[19] and trial-like preliminary hearings.[20] Lower courts extended the First Amendment qualified right of access to suppression hearings,[21] bail reduction hearings,[22] change of venue

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[16] *Id.* at 361.

[17] *Nebraska Press Ass'n v. Stuart, supra* note 1, at 568.

[18] *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980) (plurality opinion).

[19] *Press-Enterprise Co. v. Superior Court of Cal.*, 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984).

[20] *Press-Enterprise Co. v. Superior Court of Cal.*, 478 U.S. 1, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986).

[21] See, e.g., *Application of The Herald Co.*, 734 F.2d 93 (2d Cir. 1984).

[22] See, e.g., *U.S. v. Chagra*, 701 F.2d 354 (5th Cir. 1983).

hearings,[23] and plea hearings,[24] among others. But, of course, these proceedings may be closed if the trial court finds that closure is essential to preserve the right to a fair trial and is narrowly tailored to serve that interest.[25]

RELEVANCE TODAY

And controversies over other kinds of restraints, such as gag orders on trial participants, are still alive today. In my review of the modern commentary mentioning *Nebraska Press*, I found a fair amount of discussion of this issue.[26]

Lower federal courts are divided about whether gag orders on trial participants should be evaluated under the high standard imposed by *Nebraska Press* when they are challenged by the media. Some have found that gag orders on participants do not constitute prior restraints on the media, and they therefore should be upheld under a challenge from the media if there is a "reasonable

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[23] See, e.g., *In re The Charlotte Observer*, 882 F.2d 850 (4th Cir. 1989).

[24] See, e.g., *U.S. v. Haller*, 837 F.2d 84 (2d Cir. 1988).

[25] See *Press-Enterprise Co. v. Superior Court of Cal., supra* note 20.

[26] See C. Thomas Dienes, *Gagging Trial Participants*, 19 SPG Comm. Law. 3 (2001); Deborah R. Linfield, *The Second Circuit Reestablishes the Limited Role of the Gag Order: In re Application of the New York Times Company and Down Jones & Company, Inc.*, 56 Brook. L. Rev. 657 (1990); David D. Smyth III, *A New Framework for Analyzing Gag Orders Against Trial Witnesses*, 56 Baylor L. Rev. 89 (2004); Jonathan Eric Pahl, Note, *Court-Ordered Restrictions on Trial Participant Speech*, 57 Duke L.J. 1113 (2008).

likelihood that pretrial publicity would prejudice a fair trial."[27] Others apply a more intermediate approach,[28] and some apply a strict prior restraint analysis.[29] One commentator argues that the *Nebraska Press* test should always apply to these types of restraints because "[i]n form, a gag order on trial participants is a judicial injunction. In purpose, operation, and effect the order is as much a prior restraint as a gag order on media publication."[30]

The split over the standard to be applied to gag orders on trial participants creates some interesting problems in this technological age. One commentator raised a very interesting question--what if a trial participant is subject to a gag order, and that participant maintains a blog? Is the gag order now a restraint on the media and subject to *Nebraska Press*?[31]

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[27] *Application of Dow Jones & Co., Inc.*, 842 F.2d 603 (2d Cir. 1988).

[28] See, e.g., *U.S. v. Brown*, 218 F.3d 415 (5th Cir. 2000) (On challenge by defendant to gag order affecting trial participants, gag order will be upheld if the trial court determines "there is a 'substantial likelihood' . . . that extrajudicial commentary by trial participants will undermine a fair trial.").

[29] *Journal Pub. Co. v. Mechem*, 801 F.2d 1233 (10th Cir. 1986) (applying strict scrutiny to order barring jurors from interviews with press).

[30] C. Thomas Dienes, *supra* note 26, at 3.

[31] David D. Smyth III, *supra* note 26, at 122.

Other modern commentary focuses on a broader principle that undergirds the analysis in *Nebraska Press*--that the government should not interfere with what the *Nebraska Press* Court called the press's "traditional function of bringing news to the public promptly."[32] In one modern application of this principle, some argue that journalists should be allowed to tweet from courtrooms.[33] They say that live tweeting or blogging will allow journalists to provide contemporaneous reports from courtrooms and increase transparency and understanding of the judicial process. A federal district judge in Sioux City, Iowa recently allowed a reporter to blog from his courtroom.[34] But others have banned tweeting.[35]

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[32] *Nebraska Press Ass'n v. Stuart*, *supra* note 1, at 561.

[33] Richard M. Goehler, Monica L. Dais, & David Bralow, *The Legal Case for Twitter in the Courtroom*, 27 APR Comm. Law. 14 (2010); Esther Seitz, *#Oyez, #Oyez: Why Judges Should Let Reporters Tweet From the Courtroom*, 101 Ill. B.J. 38 (2013).

[34] Richard M. Goehler, *supra* note 33, at 14.

[35] *Id.*