ANOTHER ATTEMPT TO SOLVE THE PRIOR RESTRAINT MYSTERY: APPLYING THE *NEBRASKA PRESS* STANDARD TO MEDIA DISCLOSURE OF ATTORNEY-CLIENT COMMUNICATIONS

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Given their duty to protect a defendant's right to a fair trial,[1] courts sometimes must ascertain whether they can exercise control over the media's First Amendment protected right to report and have access to high profile cases.[2] In doing so, courts must balance the First Amendment rights of the press[3] with the Sixth Amendment rights[4] of criminal defendants. The analysis required to

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[1] *See* Sheppard v. Maxwell, 384 U.S. 333, 335 (1966) (discussing due process requirements for a fair trial in the face of media publicity). In *Sheppard*, the Supreme Court reversed a conviction for murder, holding that publicity surrounding the trial had deprived the defendant of his right to a fair trial, and provided guidelines on how to balance the interests of the press and the rights of a criminal defendant. *See id.* In criticizing the trial court for allowing a "carnival atmosphere" in the courtroom and for failing to control the flow of publicity, the Supreme Court ordered lower courts to take an affirmative role in protecting the rights of defendants from undue interference by the press. *See id.* The Court stated that "[d]ue process requires that the accused receive a trial by an impartial jury free from outside influences. Given 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.* at 362. The Court then enumerated some ways in which courts could make sure that publicity does not affect the defendant's right to a fair trial. For example, courts could regulate the conduct of reporters in the courtroom, order a change of venue, order a continuance of the trial, isolate the witnesses, and control the release of information to the media by law enforcement personnel and counsel. *See id.* at 358-63. The Court also urged lower courts to take steps that would protect the judicial process from prejudicial outside interference. *See id.*

[2] *See* Richmond Newspapers v. Virginia, 448 U.S. 555 (1980) (holding that criminal trials are presumptively open to the public and the media); *see also* Press-Enterprise Co. v. Superior Court (II), 478 U.S. 1 (1986); Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982).

[3] The First Amendment states in part that "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." U.S. CONST. amend. I.

[4] The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI. In addition, the Supreme Court has stated that the right to a fair trial includes "the principle that 'one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on the grounds of official suspicion, indictment,

make this determination is particularly difficult in cases where the criminal defendant asks the court to issue a restraining order on publication of information.

Because such an order would be issued before publication to prevent the disclosure of the information, it should be considered a prior restraint.[5] Prior restraints on the media have long been considered to be the most serious and least tolerable infringement on First Amendment rights.[6] For this reason, the Supreme Court has made it clear that prior restraints carry a "heavy presumption" against constitutional validity.[7] However, the Court has stated that situations may exist where a prior restraint on the press could be justified.[8] In the 1976 decision of *Nebraska Press Ass'n v. Stuart*,[9] the Supreme Court designed a standard to determine whether a prior restraint is constitutional, holding that the need to protect a defendant's right to a fair trial may lead to one of those situations justifying a prior restraint.[10] Since then, courts have struggled with the

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continued custody, or other circumstances not adduced as proof at trial.'" Holbrook v. Flynn, 475 U.S. 560, 567 (1986) (citing Taylor v. Kentucky, 436 U.S. 478, 485 (1978)).

5 The Supreme Court has defined a prior restraint as any prohibition on speech issued in advance of publication. *See* Near v. Minnesota, 283 U.S. 697, 721 (1931). According to the prior restraint doctrine, "the government may not restrain a particular expression prior to its dissemination even though the same expression could be constitutionally subjected to punishment after dissemination." MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 127 (1984). Originally, the phrase "prior restraint" was used to describe an administrative licensing system which allowed the state to determine what could be published in advance. *See id.* Through the analysis of the Supreme Court, however, the prior restraints doctrine has been extended to statutes that allow suppression of speech, to injunctions issued by courts after full hearings, and to temporary restraining orders. *See, e.g.*, Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) (banning publication of information implicating the accused in a criminal trial); *Near*, 283 U.S. at 697 (finding a statute that allowed suppression of a newspaper after a hearing in court unconstitutional). The doctrine is not related to the substance of the speech but rather to the effect that the government's method of regulation will have on speech. In *Chicago Council of Lawyers v. Bauer*, the court suggested that prior restraints are defined by four elements: (1) there is a governmental order that restrains specified expression; (2) the order must be obeyed until reversed; (3) the violation of the order may be punished as contempt; and (4) the proceedings conducted for its violation do not include all the safeguards of a criminal trial, including the fact that the violator cannot argue the constitutionality of the order as a defense to its violation. *See* Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 248 (7th Cir. 1975).

6 *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976).

7 *See* New York Times Co. v. United States (The Pentagon Papers Case), 403 U.S. 713, 714 (1971) (per curiam); *see also* Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971).

8 In *Near*, the Court stated that the protection against prior restraints was not absolute and suggested three exceptions: cases of obscene material, cases of fighting words and incitement to violence or to overthrow the government, and cases of national security during war (where the information to be published could endanger troops or the success of a mission). *See Near*, 283 U.S. at 716. Unfortunately, the Court offered no explanation to justify why these exceptions should be considered to be outside the theory of prior restraints. *See id.*

9 427 U.S. 539 (1976).

10 *See id.*

issue, searching, mostly in vain, for that exceptional case where a prior restraint would be justified.

Adding to the confusion, the Supreme Court has not consistently applied the prior restraint doctrine. As a result, almost a decade ago, two Supreme Court justices reminded the Court of the "extraordinary consequence for freedom of the press"[11] presented by restraining order petitions and suggested that it was "[i]mperative that the Court reexamine the premises and operation of *Nebraska Press* itself."[12] The Court, however, neglected to examine the issue on that occasion and has continued to avoid it in more recent instances.[13]

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[11] Cable News Network v. Noriega, 498 U.S. 976, 976-77 (1990) (citations omitted) (Marshall and O'Connor, JJ., dissenting).

[12] *Id.* In his dissent from the Supreme Court's denial of certiorari in this case, Justice Marshall, joined by Justice O'Connor, concluded that the case provided a good opportunity to reexamine the prior restraint doctrine. Evaluating the facts of the case, he concluded that the courts below erred in granting a prior restraint when the petitioner did not meet the heavy burden of proof required to defeat the presumption of invalidity of a prior restraint. Marshall stated

> [i]n my view, this case is of extraordinary consequence for freedom of the press. Our precedents make unmistakably clear that "[a]ny prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity," and that the proponent of this drastic remedy "carries a heavy burden of showing justification for [its] imposition." I do not see how the prior restraint imposed in this case can be reconciled with these teachings. Even more fundamentally, if the lower courts in this case are correct in their remarkable conclusion that publication can be automatically restrained pending application of the demanding test established by *Nebraska Press*, then I think it is imperative that we reexamine the premises and operation of *Nebraska Press* itself.

Id. (citations omitted).

[13] The prior restraint doctrine has not been applied consistently by the Supreme Court, which has created a chilling effect on publishers. For example, compare the decisions of two Justices of the Supreme Court in deciding whether to stay restraining orders decided less than a year apart. In *CBS v. Davis*, 510 U.S. 1315 (1994), Justice Blackmun issued a stay of an order banning the broadcast of a videotape that had been acquired surreptitiously. He concluded that the order was an unconstitutional prior restraint, stating specifically that the manner in which the information was obtained was not relevant. *See id.* In contrast, in *McGraw-Hill Cos. v. Procter & Gamble Co.*, 515 U.S. 1309 (1995), Justice Stevens did not lift an order denying jurisdiction in the matter until the district court had a chance to hold a hearing, stating that the manner in which the information was obtained might very well be a factor in deciding the validity of the order.

The uncertainty over the application of the prior restraint doctrine, the judiciary's contempt power, and the effect of the collateral bar rule work together to chill freedom of the press and amount to unjustified court censorship. When facing a court's prior restraint order, the press has two options: it can comply with the order and thus be forced not to publish until the order is reversed; or it can disobey it, exercise its First Amendment rights, and then suffer the consequences of a subsequent contempt conviction. In other words, the publisher is forced to choose between a waiver of its constitutional rights or an almost certain conviction for contempt. The prospect of a certain contempt action with no constitutional defense creates a strong incentive for the publisher to comply with an unconstitutional prior restraint order that should not have been issued in the first place. *See* Walker v. City of Birmingham, 388 U.S. 307, 313 (1967); *see also* United States v. Dickinson, 465 F.2d 496, 509 (5th Cir. 1972) (ruling that an injunction must be obeyed, irrespective of the validity of the order). *Procter & Gamble Co. v. Bankers Trust Co.*, 925 F. Supp. 1270 (S.D.

Twenty-two years after the *Nebraska Press* decision, the Supreme Court of South Carolina held it had finally found that elusive case justifying a prior restraint.[14] The court attempted to provide the guidance that the U.S. Supreme Court failed to give over the past two decades, thus providing the high court yet another chance to solve the confusion. But, once again, the Court refused to take the opportunity to do so. Its denial of review, which left the decision of the South Carolina Supreme Court intact, has only created more confusion about, and lessened the media's confidence in, the doctrine that is supposed to provide the highest protection against the worst type of government intervention. The South Carolina Supreme Court's opinion is well-intentioned, but its result turns the Supreme Court's analysis on its head. Although the court was correct in concluding that the *Nebraska Press* standard should be revised, its proposed revision is not an adequate analysis of the relevant issues. Accordingly, the Supreme Court should have granted review and used the opportunity to finally solve the mystery surrounding the prior restraint doctrine.

I. THE ISSUES INVOLVED

The Sixth Amendment right to a fair trial is recognized as one of the "most fundamental of all freedoms"[15] and as essential "to the preservation and enjoyment of all other rights."[16] It includes the

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Ohio 1996), *cert. denied*, 517 U.S. 1205 (1996), exemplifies the dilemmas and the risks created by the confusing state of the prior restraint doctrine today. There, the publishers of the magazine *Business Week* were faced with the dilemma of suppressing a story and complying with an order, or challenging it and risking contempt. They decided to suppress the story and the court eventually permanently banned them from publishing it. Given the lack of clear guidelines as to whether the media can challenge the constitutionality of the order by violating it, *Business Week* decided to hold the story and appeal the order. *See id.* The public never got to see the original story. At first sight the order seemed to be a transparently invalid prior restraint. It was issued without notice to the publisher, who was not even a party to the litigation, there was no threat to the fairness of the trial, and the circumstances did not comply with any of the exceptions recognized by *Near v. Minnesota*. Yet, the publisher was not confident enough to violate the rule because the risk of a contempt conviction was too high. In the end, the combination of confusion about the doctrine and the contempt power of the court resulted not in a mere chilling of the speech in question, but in its total suppression, which is precisely what the prior restraint doctrine should help prevent.

[14] *See* State Record Co. v. State, 504 S.E.2d 592 (S.C. 1997), *cert. denied*, 119 S. Ct. 1355 (1999).

[15] Estes v. Texas, 381 U.S. 532, 540 (1965). Chief Justice Rehnquist has stated that "[f]ew, if any, interests under the Constitution are more fundamental than the right to a fair trial by impartial jurors, and an outcome affected by extrajudicial statements would violate that fundamental right." Gentile v. State Bar of Nevada, 501 U.S. 1030, 1075 (1991) (Rehnquist, J., dissenting as to Part III).

[16] Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 586 (1976) (Brennan, J., with Stewart and Marshall, JJ., concurring).

defendant's right to have his or her guilt determined solely on the basis of the evidence introduced at trial,[17] to have a speedy and public trial by an impartial jury, to be informed of the nature and cause of the accusation, to confront the state's witnesses, and to have effective assistance of counsel.[18] These rights must be protected by trial courts.[19]

Concurrently, the First Amendment protects media coverage of criminal matters because media access to criminal trials also helps protect the defendant's right to a fair trial.[20] Public scrutiny of criminal trials is an effective restraint on possible abuse of judicial power, enhancing the quality and integrity of the process, thus benefiting both the defendant and society at large.[21] Therefore, the First Amendment's protection of freedom of the press serves the media as well as the individuals who depend on it to fulfill the values of freedom of expression, participation in democratic government, and self-realization.[22]

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17 *See* Holbrook v. Flynn, 475 U.S. 560, 567 (1986) (citing Taylor v. Kentucky, 436 U.S. 478, 485 (1978)).

18 *See* U.S. CONST. amend. VI.

19 *See* Sheppard v. Maxwell, 384 U.S. 333, 335 (1966) (holding that courts have to take an affirmative role in protecting the rights of defendants from undue interference by the press).

20 *See In re* Oliver, 333 U.S. 257, 272-73 (1948). The right to a public trial "has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." *Id.* In *Estes v. Texas*, 381 U.S. 532, 538-39 (1965), the Court recognized that the purpose of the requirement of a public trial exists to guarantee a fair trial for the accused. In *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980), Chief Justice Burger announced the judgment of the Court and wrote an opinion, joined by Justices White and Stevens, asserting that criminal trials are presumptively open to the public and the media, in part because the openness itself acts as an assurance of fairness for all concerned. In a separate concurring opinion, Justices Brennan and Marshall agreed, declaring that "[p]ublicity serves to advance several of the particular purposes of the trial (and, indeed, the judicial) process. Open trials play a fundamental role in furthering the efforts of our judicial system to assure the criminal defendant a fair and accurate adjudication of guilt or innocence." *Id.* at 593 (Brennan, J., concurring). *See also* Press-Enterprise Co. v. Superior Court (II), 478 U.S. 1, 7 (1986) (stating that "the right to an open public trial is a shared right of the accused and the public, the common concern being the assurance of fairness"); Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 508 (1984) (stating that "openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system") (citing *Richmond Newspapers*, 448 U.S. at 555).

21 *See In re* Oliver, 333 U.S. at 270 n.24. While the right to a public trial is guaranteed to the accused, publicity also provides various benefits to the public, including the fact that through public trials the public learns about the government. *See id.* In *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966), the Court stated that "[t]he press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial process to extensive public scrutiny and criticism." *Id. See also* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606 (1982); Cox Broad. v. Cohn, 420 U.S. 469, 491-92 (1975).

22 *See generally* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948). Meiklejohn has been the most commonly cited proponent of the model that interprets the First Amendment as a method of protecting and encouraging self-govern-

There are instances, however, where criminal defendants claim the First Amendment rights of the press actually interfere with their right to a fair trial. In such cases, courts face the difficult task of balancing those interests. In *Nebraska Press Ass'n v. Stuart*,[23] the Supreme Court attempted to design a standard that courts could apply to determine whether the imposition of prior restraints on the media to protect the rights of criminal defendants would be constitutionally valid. In an attempt to reconcile the conflict between the Sixth Amendment right to a fair trial and the First Amendment freedom of the press, the Court stated that orders banning publication could be constitutionally valid under very limited circumstances.

II. THE *NEBRASKA PRESS* STANDARD

In *Nebraska Press*, the United States Supreme Court reversed a decision of the Nebraska Supreme Court upholding an order banning the publication of a defendant's admissions, or of facts strongly implicative of him, in a widely reported murder trial.[24] The original order had been justified by the lower courts because of the threat to the defendant's right to a fair trial.[25] The Supreme Court began its analysis by emphasizing that prior restraints on publication are the most serious and "least tolerable infringement" on First Amendment rights.[26] However, the Court reiterated that First Amendment rights are not absolute and that, although the barriers against prior restraints remain high, courts need to balance the defendant's right to a fair trial with the First Amendment rights of the press on a case-by-case basis.[27]

Under the *Nebraska Press* standard, the petitioner of the restraining order has the burden of proof to show that the order is needed to protect his or her rights.[28] To meet this burden, a party

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ment by the public. *See also* Martin Redish, *Self-Realization, Democracy and Freedom of Expression: A Reply to Professor Baker*, 130 U. PA. L. REV. 678 (1982) (arguing that free speech enhances the individual's contribution to the social welfare and, thus, to self-fulfillment); Martin Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982) (positing that the constitutional guarantee of free speech aids in the development of people's autonomy); THOMAS EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT (1966) (arguing that the First Amendment protection of free speech is necessary (1) to assure individual self-fulfillment; (2) as a means to attain the truth; (3) as a method of securing participation by the members of society in social and political decision-making; and (4) as a method to keep the balance between stability and change in society).

23 427 U.S. 539 (1976).

24 *See id.* at 545.

25 *See id.* at 542.

26 *Id.* at 559.

27 *See id.* at 570.

28 *See id.* at 562.

seeking an injunction must show that the publicity generated in the absence of an injunction would be so prejudicial that the defendant could not possibly get a fair trial.[29] The Court made it clear that mere allegations or speculation would not satisfy this showing of prejudice.[30] The petitioner must also show that there are no alternative measures which could mitigate the effect of the publicity and that the injunction would be effective in guaranteeing a fair trial.[31] Finally, the Court stated that the petitioner had to show the requested restraint would effectively protect the defendant's rights.[32] In applying the standard, courts should evaluate all three aspects of this test.

Applying the above standard to the facts of the case, the Court concluded that the order imposed on the press was unconstitutional because the defendant failed to meet the required burden of proof to defeat the presumption against the validity of the order. First, the Court noted that even in a rural community of only 850 people, it was speculative to conclude that the publicity would make it impossible to find twelve unbiased jurors.[33] Second, the petitioner failed to demonstrate a lack of other alternatives available to protect the defendant's rights.[34] Finally, the Court also determined that it was not clear that the order would have

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29 *See id.*

30 *See id.* at 563, 569. Other courts have developed the elements of the type of evidence needed to show actual prejudice caused by pre-trial publicity. *See, e.g.*, United States v. De La Vega, 913 F.2d 861, 864-65 (11th Cir. 1990) (stating that a finding of actual prejudice requires "demonstration that one or more jurors entertained an opinion before the trial that the defendant was guilty and show[ing] that the jurors could not put prejudice aside and render a verdict based solely on the evidence presented"), *cert. denied*, 500 U.S. 916 (1990); United States v. Goodman, 605 F.2d 870, 882 (5th Cir. 1979) (holding that when determining whether jury was prejudiced, the trial judge must consider many things, such as the character and nature of the information published, the time of the publication, the credibility of the source to which the information is attributed, and the pervasiveness of the publicity); Hayton v. Egeler, 405 F. Supp. 1133, 1138 (D. Mich. 1975), (holding that factors to consider include: timing of publicity, degree of prejudicial character, probability that jurors might have seen the publicity, and whether trial was conducted in federal or state court), *aff'd*, 555 F.2d 599 (6th Cir. 1975), *cert. denied*, 434 U.S. 973 (1977); Johnson v. Beto, 337 F. Supp. 1371 (D. Tex. 1972), *aff'd*, 469 F.2d 1396 (5th Cir. 1972) (holding that in determining whether prejudice from publicity would prevent the accused from receiving a fair trial, criteria include: notoriety of accused or facts involved in the case, substance of the publicity and trial, size of the community, whether members of the jury have heard of the accused, and whether the accused challenges members of the jury for cause). *Accord* Coleman v. Zant, 708 F.2d 541, 544 (11th Cir. 1983).

31 *See Nebraska Press*, 427 U.S. at 562. These measures include: (1) change of trial venue to a place less exposed to the publicity; (2) postponement of the trial; (3) questioning of prospective jurors; (4) jury sequestration; and (5) clear instructions to the jury to decide issues only on the evidence. *See id.* at 563-64.

32 *See id.* at 562.

33 *See id.* at 569. The record at trial did not clearly show that the publicity "would so distort the views of potential jurors that [twelve] could not be found." *Id.*

34 *See id.*

successfully protected the rights of the defendant because the effect of the publicity on the public was too difficult to predict.[35]

In a concurring opinion, Justice Brennan, joined by Justices Stewart and Marshall, advocated in favor of an absolute ban on prior restraints on publication of information related to criminal trials.[36] Brennan argued that the majority opinion created a standard that was impossible to meet for several reasons. First, he argued that it would be difficult to prove that there are no alternatives to protect a defendant's rights other than a restraining order. Additionally, while the majority concluded that speculation about the effect of publicity would not be enough to satisfy the burden needed to defeat the presumption against a prior restraint, the effect of publicity can only be speculative.[37] It is almost impossible to determine the future effect of publicity with any degree of certainty because judges cannot predict who will read the information or what effect it will have on the readers.[38]

Over the years, Brennan has been proven right. The *Nebraska Press* standard has proven to be difficult to apply and almost impossible to meet. The use of this standard has threatened the First Amendment protection of freedom of the press and has resulted in questionable decisions.[39]

III. Prior Restraint and Fair Trials Since *Nebraska Press*

Since *Nebraska Press* was decided, courts have been struggling with the Supreme Court's standard to determine the constitutionality of prior restraints on pre-trial publicity. Because the Court concluded that an injunction could be justified in some cases, criminal defendants routinely request, and courts frequently grant, protective orders, gag orders on attorneys and other trial participants, and restraining orders on the media.[40] However, in the

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35 *See id.*

36 Brennan concluded that, even though the right to a fair trial is one of the most sacred rights, a prior restraint is an impermissible way to attempt to enforce or protect it. *See id.* at 607-08.

37 *See Nebraska Press*, 427 U.S. at 569. Brennan also warned that the suggestion that courts have the power to impose prior restraints on the media to protect a defendant's rights would lead to judges becoming pre-publication censors, and to an increase in litigation of prior restraint orders, which is precisely what the Court wanted to avoid by creating the standard in the first place. *See id.* at 607-08.

38 *See id.* at 569.

39 *See infra* note 41 and accompanying text. For examples of inconsistent results in cases involving civil litigation, see *supra* note 13.

40 A recent outline of all the reported cases lists 46 cases where the orders were requested to protect the right to a fair trial, 41 cases where the order was requested to protect a trial participant, and 131 cases where the order imposed a restraint on communications by or with a trial participant. *See* Floyd Abrams, *Prior Restraints, in* Commu-

twenty-three years following *Nebraska Press*, only two restraining orders have survived constitutional attack.[41] In all other cases, the orders were either denied or reversed on appeal.[42]

NICATIONS LAW 1998, at 871-956 (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series 1998).

41 *See* United States v. Noriega (*In re* Cable News Network), 917 F.2d 1543 (11th Cir. 1990), *cert. denied sub nom.* Cable News Network v. Noriega, 498 U.S. 976 (1990); *see also* KUTV v. Wilkinson, 686 P.2d 456 (Utah 1984). The *KUTV* court was the first court to allow a prior restraint order under the *Nebraska Press* test. The trial court issued a temporary restraining order and later held a hearing to determine whether it would issue a restraining order prohibiting the news media from reporting on a criminal defendant's alleged connections to the Mafia. After deciding that there were no alternatives to a restraining order, the court issued an order enjoining the press until the jury had retired to deliberate. *See id.* at 461. The court decided that sequestration was not a reasonable alternative because of the costs involved and the amount of time the jurors would have to be confined. *Id.* at 460. Sequestering the jury and constantly admonishing them through voir dire were also rejected as alternatives because they could prejudice the jury against the defendant. *See id.* In *KUTV*, however, the court actually misapplied the *Nebraska Press* standard. With no evidence to support it, the court speculated that repeated warnings and sequestration would prejudice the jury against the defendant. *See id.* The court also considered that the inconvenience caused by sequestration outweighed the First Amendment rights of the press. *See id.* at 460. However, considerations of cost and inconvenience are not valid reasons to enjoin the press under the *Nebraska Press* analysis. In the end, while affirming the trial court by asserting that it had substantiated its finding on the *Nebraska Press* standard, the court actually engaged in the speculation *Nebraska Press* repudiated. In addition, the court added a fourth element to the analysis under the Utah Constitution: "the degree of public interest in immediate access to the information to be published." *Id.* at 462. The court then concluded that there was no significant public interest in the information in question. *See id.* In so doing, of course, the court violated one of the most basic principles of First Amendment jurisprudence. It invaded the decision-making process of the editors and became a pre-publication censor with the power to decide what information could and should be published by the news media. Therefore, at least in this particular case, there was an erroneous application of the *Nebraska Press* standard which led to the wrong result.

On another occasion, a court interpreted an apparent prior restraint order to be a constitutional restriction on time and place and did not discuss the prior restraint doctrine. *See* Tsokalas v. Purtill, 756 F. Supp. 89 (D. Conn. 1991) (ordering confiscation of a sketch artist's drawing to prevent its publication).

42 *See, e.g.*, CBS v. Davis, 510 U.S. 1315 (1994); *In re* Charlotte Observer, 921 F.2d 47 (4th Cir. 1990); *In re* King World Productions, 898 F.2d 56 (6th Cir. 1990); Hunt v. NBC, 872 F.2d 289 (9th Cir. 1989); *In re* Providence Journal Co., 820 F.2d 1342 (1st Cir. 1986), *modified* 820 F.2d 1354 (1st Cir. 1987), *cert. dismissed*, 485 U.S. 693 (1988); CBS v. United States District Court, 729 F.2d 1174 (9th Cir. 1984); Goldblum v. NBC, 584 F.2d 904 (9th Cir. 1978); Jones v. Turner, 23 Media L. Rep. (BNA) 1122 (S.D.N.Y. 1995); Menendez v. Fox Broad. Co., No. 94-233-9R, 1994 WL 525520 (C.D. Cal. Apr. 19, 1994); Corbitt v. NBC, 20 Media L. Rep. (BNA) 2037 (N.D. Ill. 1992); Fort Wayne Journal Gazette v. Baker, 788 F. Supp. 379 (N.D. Ind. 1992); Lambert v. Polk County, 723 F. Supp. 128 (S.D. Iowa 1989); *In re* CBS, Inc., 570 F. Supp. 578 (E.D. La. 1983), *appeal dismissed sub nom.* United States v. McKenzie, 735 F.2d 907 (5th Cir. 1984); KCST-TV Channel 39 v. Municipal Court, 246 Cal. Rptr. 869 (Cal. Ct. App. 1988); State v. Lynch, 1989 WL 112545 (Del. Super. Ct. Sept. 26, 1989); Gardner v. Bradenton Herald, Inc., 413 So. 2d 10 (Fla. 1982), *cert. denied*, 459 U.S. 865 (1982); Clear Channel Communications, Inc. v. Murray, 636 So. 2d 818 (Fla. Dist. Ct. App. 1994); Times Publ'g Co. v. Florida, 632 So. 2d 1072 (Fla. Dist. Ct. App. 1994); Florida Publ'g Co. v. Brooke, 576 So. 2d 842 (Fla. Dist. Ct. App. 1991); Miami Herald Publ'g Co. v. Morphonios, 467 So. 2d 1026 (Fla. Dist. Ct. App. 1985); Des Moines Register & Tribune Co. v. Osmundson, 248 N.W.2d 493 (Iowa 1976); State *ex rel.* New Mexico Press Ass'n v. Kaufman, 648 P.2d 300 (N.M. 1982); Wittek v. Cirigliano, 576 N.Y.S.2d 527 (N.Y. App. Div. 1991); Hays v. Marano, 493 N.Y.S.2d 904 (N.Y. App. Div. 1985); State *ex rel.* Chillicothe Gazette, Inc. v. Ross County Court of Common Pleas, 442 N.E.2d 747 (Ohio 1982); KUTV,

The parties requesting injunctions against the media have struggled to meet the *Nebraska Press* standard because of the difficulties implicit in showing that twelve impartial jurors cannot be found, or that alternative measures will not mitigate or eliminate the risks created by trial publicity. Even in a case where the publicity included video tapes of the defendant committing the crime for which he was being tried, the court held that a prior restraint was unnecessary to protect the defendant's right to a fair trial. This case involved the famous automobile industrialist John DeLorean, who filed a petition for an order prohibiting the broadcast of FBI surveillance video tapes.[43] After considering the *Nebraska Press* standard, the district court found that broadcasting the tapes would affect the defendant's right to a fair trial and entered a temporary restraining order delaying publication.[44] However, the court of appeals reversed, holding that the order was an unconstitutional prior restraint.[45] The court held that the restraining order had been based on speculation about the effect of publicity and that there were alternatives available to protect the defendant's rights.[46]

The DeLorean case was highly publicized, and the publicity in question involved highly incriminating evidence. In that case, the defendant's right to a fair trial was arguably in jeopardy. Yet, the court found a prior restraint to be unconstitutional under the circumstances. Realizing that those circumstances were fairly extreme, the court questioned whether "there may be . . . [any] reason for courts ever to conclude that traditional methods are inadequate and that the extraordinary remedy of prohibiting expression is required."[47]

This realization provided confidence for the press, but this confidence was interrupted by the series of decisions involving

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Inc. v. Conder, 668 P.2d 513 (Utah 1983). For cases denying or vacating prior restraint orders related to the publication of information about juvenile delinquency proceedings, see *In re* Lifetime Cable, 17 Media L. Rep. (BNA) 1648 (D.C. Cir.), *cert. denied sub nom.* Foretich v. Lifetime Cable, 498 U.S. 847 (1990); KGTV Channel 10 v. Superior Court, 32 Cal. Rptr. 2d 181 (Cal. Ct. App. 1994); San Bernadino County Dep't of Public Social Servs. v. Superior Court, 283 Cal. Rptr. 332 (Cal. Ct. App. 1991); *In re* Minor, 537 N.E.2d 292 (Ill. 1989); Minneapolis Star & Tribune Co. v. Schmidt, 360 N.W.2d 433 (Minn. Ct. App. 1985); Minneapolis Star & Tribune Co. v. Lee, 353 N.W.2d 213 (Minn. Ct. App. 1984); New Jersey *ex rel.* HN, 632 A.2d 537 (N.J. Super. Ct. App. Div. 1993); Edward A. Sherman Publ'g Co. v. Goldberg, 443 A.2d 1252 (R.I. 1982); State *ex rel.* Register-Herald v. Canterbury, 449 S.E.2d 272 (W. Va. 1994).

43 *See* CBS v. United States District Court, 729 F.2d 1174 (9th Cir. 1983).

44 *See id.* at 1178-79.

45 *See id.* at 1180.

46 *See id.* at 1180-81. The court concluded that it was not clear that the publicity would actually prejudice the entire pool of available jurors, making it impossible to find twelve impartial ones. *See id.*

47 *Id.* at 1183.

CNN's attempt to broadcast audiotapes of General Manuel Noriega's conversations with his attorney.[48] This sequence of decisions began when the District Court for the Southern District of Florida granted Panamanian General Manuel Noriega's request to ban CNN's broadcast of six recordings of telephone calls made by Noriega from his prison cell.[49] When Noriega requested the restraining order, the issue for the court was the same as in other fair trial/prior restraint cases: the judge had a duty to protect the rights of the defendant and had to apply the *Nebraska Press* standard to decide whether to issue a prior restraint order. Since *Nebraska Press* held that there could be a case where a prior restraint would be acceptable, the judge needed to examine the tapes to determine whether this was the rare case in which a prior restraint could be constitutionally valid. Consequently, the court issued a temporary restraining order postponing broadcast of the tapes and ordered CNN to produce the tapes so the court could decide whether a permanent injunction should be issued.[50]

The trial judge in *Noriega* attempted to apply the *Nebraska Press* standard and tried to avoid speculating about the character of the publicity at stake. However, the order issued should have been found unconstitutional because Noriega had not overcome the burden of proof required of parties seeking to impose a prior restraint on the media. Accordingly, the order effectively shifted the burden of proof onto the press to prove that the information would not affect the defendant. Also, because the order banned publication of protected speech until it was cleared by the court, the court acted as a pre-publication censor. Hence, the court issued a temporary prior restraint on publication to determine whether it should issue a permanent one.

The U.S. Supreme Court's denial of review in *Noriega* created doubts about the future of the prior restraint doctrine, and thereby generated concern among the media. However, soon after the case was resolved, appellate courts again resumed their trend of consistently reversing restraining orders on the media.[51]

Yet, just when it seemed to be time to "consign *Noriega* to the dustbin of historical oddities,"[52] the South Carolina Supreme

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48 *See* United States v. Noriega (*In re* Cable News Network), 752 F. Supp. 1045 (S.D. Fla. 1990), *aff'd*, 917 F.2d 1543 (11th Cir.), *cert. denied sub nom.* Cable News Network v. Noriega, 498 U.S. 976 (1990).

49 *See id.* at 1047.

50 *See id.*

51 *See* Abrams, *supra* note 40, at 866.

52 *Id.*

Court, in *State Record Co. v. State*,[53] concluded it had found a reason to hold that a restraint was justified: the protection of privileged attorney-client communications. Moreover, recognizing that the *Nebraska Press* standard has always been confusing and difficult to apply, the South Carolina Supreme Court accepted the challenge to revise it.

IV. THE SOUTH CAROLINA SUPREME COURT OPINION IN *STATE RECORD CO. V. STATE*

The South Carolina Supreme Court's opinion in *State Record Co. v. State* is the most recent attempt by a court to solve the conflict between a criminal defendant's right to a fair trial and the media's rights under the First Amendment. In that case, B.J. Quattlebaum was indicted for several felonies, including murder and armed robbery, and the prosecution sought the death penalty.[54] While he was imprisoned, a member of the sheriff's department surreptitiously videotaped a privileged conversation between Quattlebaum and his attorney.[55] Although it is not entirely clear how it happened, the videotape was provided to WIS-TV, a television station.[56] Upon learning of the videotape's existence and the media's acquisition of the tape, Quattlebaum moved for a temporary restraining order ("TRO") prohibiting dissemination of its audio content.[57] The circuit court granted the TRO, prohibiting all trial participants and all media from disseminating the contents of the privileged communication.[58] After a hearing the next day, the circuit court continued its order in effect until a jury was empanelled and sequestered in Quattlebaum's case.[59] The State Record Co., a local newspaper, appealed the order and the Supreme Court of South Carolina affirmed, holding that "[t]he circuit court properly enjoined dissemination of the privileged communication."[60] The newspaper then sought review by the Supreme Court of the United States, which denied certiorari.[61]

In upholding the restraining order, the South Carolina Supreme Court summarized its conclusion by stating:

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53 504 S.E.2d 592 (S.C. 1998), *cert. denied*, 119 S. Ct. 1355 (1999).

54 *See id.* at 593.

55 *See id.* The court stated that it was undisputed that the conversation was in fact a privileged attorney-client communication. *See id.* at 593 n.1.

56 *See id.* at 593.

57 *See id.*

58 *See id.*

59 *See id.* at 593.

60 *Id.* at 594.

61 *See generally State Record Co. v. State*, 119 S. Ct. 1355 (1999).

> It is difficult to conceive of a situation in which the rights of a defendant to a fair trial were more at jeopardy than the instant case. If Quattlebaum's Sixth Amendment rights were insufficient to justify imposition of the prior restraint in this case, we can think of no situation in which a prior restraint would ever be justified or in which alternative measures would not be found sufficient to mitigate any threatened prejudice. Since *Nebraska Press* did not foreclose the possibility that there may be situations in which a prior restraint is justified, we find the egregious circumstances of this case sufficient to warrant imposition of the extremely limited temporary restraining order imposed by the circuit court. Any contrary holding would potentially have denied Quattlebaum's fundamental right to a fair trial and have been shocking to the universal sense of justice; such a result will not be endorsed by this Court.[62]

While this conclusion initially seems reasonable, a closer examination of the court's analysis again exposes the inoperability of the standard created by the Supreme Court in *Nebraska Press.*

In applying the *Nebraska Press* standard, the South Carolina Supreme Court first concluded that the case had generated much publicity.[63] Second, the court concluded that the prior restraint would be effective in eliminating the unwanted effects of the pretrial publicity on the public and possible jurors.[64] Most of the court's attention was directed towards the discussion of this second prong of the *Nebraska Press* standard. Because courts can, in most cases, avoid issuing restraining orders by using alternative measures to protect the defendant's rights,[65] the court was forced to provide a new interpretation of this element of the standard.[66] According

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62 *State Record,* 504 S.E.2d at 598-99.

63 *See id.* at 596. The publicity was generated by the fact that the case was a death penalty case and because of the controversy over the videotape. *See id.*

64 *See id.* The court did not address the fact that the prosecution had had possession of the videotape for about a year and presumably knew of its contents. *See infra* notes 90-104 and accompanying text.

65 According to the U.S. Supreme Court, alternative measures to protect defendant's rights include: change of trial venue to a place less exposed to the publicity; postponement of the trial; questioning of prospective jurors; jury sequestration; and clear instructions to the jury to decide issues only on the evidence. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 563-64 (1976); Schiavone Const. Co v. Merola, 678 F. Supp. 64, 66-67 (S.D.N.Y. 1988) (stating that "the right to a fair trial, in context of prejudicial pre-trial publicity and potential tainting of the jury pool, is satisfied where, by means of change of venue, voir dire, lapse of time between publicity and trial, and/or other factors, impartial jury has been selected"), *aff'd,* 848 F.2d 43 (2d Cir. 1988), *cert. denied,* 488 U.S. 855 (1988).

66 In a separate opinion, Justice Toal agreed with this proposition, stating: "If a trial judge has to eliminate all other alternatives . . . then in reality there exists an absolute prohibition against any prior restraint. In the final analysis, *Nebraska Press,* for all its language to the contrary, may have effectively established the constitutional doctrine that the First Amendment trumps the Fifth, Sixth, and Fourteenth Amendments." *State Record,* 500 S.E.2d at 600 (Toal, J., concurring and dissenting).

to the court,

> The most troubling element of *Nebraska Press* is the second prong, whether 'other measures would be likely to mitigate the effects of unrestrained pre-trial publicity.' The problem with application of this factor is that it is simply untenable to suggest that other measures would not, in any case, be 'likely to mitigate' the effects of pre-trial publicity. It could always be argued that other measures would, to some degree, 'mitigate' the effects of pre-trial publicity. . . . Although alternate measures might 'make less severe' the effects of pre-trial publicity, they could not, in this case, ensure Quattlebaum's right to a fair trial. Were we to premise our analysis solely upon whether other measures would be 'likely to mitigate' the effects of pre-trial publicity, then we can conceive of no situation which would meet the elements of *Nebraska Press*. We do not believe the Supreme Court intended the second prong of *Nebraska Press* to be read in isolation so as to foreclose the possibility, in all circumstances, of a prior restraint. Had it intended such a result, it would have imposed an absolute ban on prior restraints. Indeed, a majority of the Court specifically declined to do so . . . Rather, as we view the *Nebraska Press* test, it must be viewed in its entirety, with a view toward ensuring a defendant's fundamental right to a fair trial, and not merely with an eye toward 'mitigating the effects' of pre-trial publicity.[67]

Thus, the court interpreted *Nebraska Press* to justify a prior restraint if alternative measures could not *guarantee* a fair trial. In this particular case, the court was convinced that nothing short of a restraint could guarantee a fair trial because, as the court concluded,

> [w]ere we to hold otherwise, the contents of the videotape in question could have been disclosed and the substance of the privileged communication with his attorney divulged. Once disclosed, although other measures might have alleviated the prejudice to Quattlebaum, his right to a fair trial could not have been guaranteed.[68]

However, the court failed to realize that, once the declarations at issue in *Nebraska Press* were divulged, the courts could not *guarantee* protecting the defendant's rights either. Yet, in *Nebraska Press*, the Supreme Court held that a prior restraint was not justified. The South Carolina Supreme Court attempted to distinguish the

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[67] *Id.* at 596-97 (citing *Nebraska Press*, 427 U.S. at 570).

[68] *Id.* at 597.

circumstances of the case by emphasizing the fact that this case involved the possible disclosure of privileged communications between attorney and client. It stated:

> Our decision to affirm the circuit court's issuance of a temporary restraining order is bolstered by the uncertainty of the precise standard necessary to justify a prior restraint in cases in which the defendant claims, not only that pre-trial publicity threatens his right to a fair trial, but also that his attorney client privilege has been violated, thereby jeopardizing his right to effective assistance of counsel. We refer to the uncertainty created by the decisions of the District Court, and the Eleventh Circuit Court of Appeals, in *United States v. Noriega*. . . .[69]

Although admitting that the Court's analysis in *Noriega* was severely flawed,[70] the court cited dictum by the court of appeals in that case, noting that "[t]he determination of whether the telephonic communications between Noriega and his defense counsel are privileged, while not necessarily dispositive of whether such communication should be publicly broadcast, would be relevant to the District Court's assessment of potential harm to Noriega's right to a fair trial."[71] However, this line of reasoning is not the proper analysis under the prior restraint doctrine.

In *Noriega*, the district court misapplied the *Nebraska Press* standard in two distinct ways: by shifting the burden of proof to the media, and by forcing the court to act as a pre-publication censor.[72] The court of appeals then compounded the mistake by applying the wrong analysis to the issue.[73] To its credit, in *State Record*, the South Carolina Supreme Court sought to avoid these mistakes. It admitted that "[t]he court's hands are somewhat 'tied' in this case in that it is impossible, without disclosing the contents of the video tape, to accurately portray the potential prejudice to [the defendant]."[74]

Evidently, the South Carolina Supreme Court wanted to prevent the disclosure of the videotape and searched for a way to justify it. The South Carolina court achieved its goal by altering the

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69 *Id.* at 597-98 (citing United States v. Noriega, 917 F.2d 1543 (11th Cir. 1990)).

70 The court noted that "[c]learly, [the *Noriega* court's analysis] does not comport with the *Nebraska Press* three-prong test as that test requires a showing of prejudice in the first instance before a prior restraint is ever justified." *Id.* at 598. The analysis was also flawed because the Court of Appeals applied a balancing of interests analysis usually used to determine questions of access to information, rather than the prior restraints analysis. *See id.*

71 *Id.* at 598 (citing *Noriega*, 917 F.2d at 1551).

72 *See* United States v. Noriega (*In re* Cable News Network), 752 F. Supp. 1032 (S.D. Fla. 1990).

73 *See* State Record v. State, 504 S.E.2d 592, 598; *see also Noriega*, 917 F.2d at 1543.

74 *State Record*, 504 S.E.2d at 598 n.23.

meaning and application of the *Nebraska Press* standard. The court concluded that "[a]lthough other measures may have . . . mitigated the effects of pre-trial publicity, the only measure certain to ensure Quattlebaum's fundamental right to a fair trial was imposition of the prior restraint."[75] This conclusion is problematic because it is not justified under the *Nebraska Press* standard, which required the court to conclude that a prior restraint was improper. Because other measures could have sufficiently mitigated the effects of the publicity, the court was *not* justified in imposing a prior restraint. In the end, the court justified its decision with the assumption that the disclosure of the content of the videotape would have a prejudicial effect on the defendant's right to effective assistance of counsel. However, this assumption is tantamount to speculation, since the attorney representing the defendant could have been equally effective after the disclosure of the information.[76] This is precisely the type of analysis that *Nebraska Press* held could *not* be used to justify the restraint. With its new analysis, the South Carolina Supreme Court completely changed the character of the *Nebraska Press* standard.

V. THE *NEBRASKA PRESS* STANDARD REVISITED

The South Carolina Supreme Court first revisited the *Nebraska Press* standard by reformulating the second factor that courts should examine when determining the constitutionality of a restraining order. The court correctly stated that alternative measures would always help mitigate the dangers of unwanted publicity. Accordingly, if defendants were required to demonstrate that alternative measures would not mitigate the dangers of publicity, a restraining order would never be justified. Thus, the court correctly concluded that this must not have been the correct interpretation of Supreme Court's opinion in *Nebraska Press.* However, the court erred by expanding this analysis to conclude that the Supreme Court's standard was that the restraining order would be valid only if the alternatives could not *guarantee* a fair trial.

In *Nebraska Press,* the Court did not impose the burden of showing that alternative measures would not mitigate the effect of the undesired publicity on the defendant. In other words, a restraining order would not be invalidated solely because other mea-

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[75] *Id.* at 596 n.14.

[76] Most courts hold that a defendant claiming ineffective assistance of counsel based on disclosure of privileged communication has the burden of proving some actual prejudice caused by the disclosure of the information on the representation. For a review of these cases, see *infra* notes 98-104 and accompanying text.

sures might mitigate the effects of the pre-trial publicity. As Justice Toal explained in her separate opinion in *State Record*, in order to recognize the viability of the standard while allowing for the imposition of restraining orders in some cases, *Nebraska Press* should be read to require a showing that the measures would not *sufficiently* mitigate the effect of the publicity.[77] Hence, the court must "consider the degree to which other measures will mitigate the adverse effects of the pre-trial news coverage *in light of* the nature and extent of that publicity."[78]

Therefore, the Supreme Court of South Carolina's analysis lowered the burden of proof that criminal defendants have to meet in order to support a claim for a restraining order. Whereas defendants previously had to demonstrate that the alternative measures could not sufficiently mitigate the effects of the publicity, the South Carolina court's reasoning asks defendants to show that these alternative measures could not guarantee a protection of their rights. The latter is easier to show because it will always be difficult for a court to conclude that a fair trial is "guaranteed."

Through its analysis, the court simply shifted the weight of the evidence from the defendant to the media, because it is almost impossible to show that alternative measures can actually guarantee a defendant's rights. By making this shift, the court also made it more difficult for the press to oppose a restrictive order, therefore reducing the effectiveness of the "heavy presumption" that supposedly protects the media's rights. If the court's analysis had ended here, the press could still claim some protection under the presumption, but the analysis went further to transform the presumption altogether.

The second part of the South Carolina Supreme Court's revision of the *Nebraska Press* standard consisted of transforming it from a "heavy presumption" in favor of the unconstitutionality of the restraining order to a "balancing of interests" with more weight given to the protection of the defendant's rights. The court concluded that the *Nebraska Press* test "must be viewed in its entirety, *with a view toward ensuring a defendant's fundamental right to a fair trial*, and not merely with an eye toward 'mitigating the effects' of pre-trial publicity."[79] Although the court recognized that *Nebraska*

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77 *See State Record*, 504 S.E.2d at 601 ("We cannot say on this record that alternatives to a prior restraint on petitioners would not have sufficiently mitigated the adverse effects of pre-trial publicity so as to make prior restraint unnecessary." (quoting *Nebraska Press*, 427 U.S. at 569) (emphasis added)).

78 *Id.* at 601.

79 *Id.* at 597 (emphasis added).

Press declined to assign priorities between the First and Sixth Amendments, the practical conclusion of the court's analysis in *State Record* is the prioritization of the Sixth Amendment.[80]

The South Carolina Supreme Court properly stated that *Nebraska Press* does not grant a priority to the First Amendment right of the press over the Sixth Amendment rights of the defendant, but the court seemed to forget that *Nebraska Press* did recognize a heavy presumption[81] in favor of the party whose First Amendment rights are threatened by the restraining order. Instead, as previously indicated, the court demonstrated uncertainty as to which standard should apply.

However, there should have been no uncertainty. The issue in *State Record* was the same as in all other prior restraint cases in which the analyses were based on the *Nebraska Press* standard—whether the party seeking the injunction could meet the burden of proof to defeat the heavy presumption against the constitutionality of the order. The court was bound by that standard and should have attempted to apply it accordingly. Instead, the South Carolina Supreme Court *assumed*, and therefore speculated, that the disclosure of the information by the press would *per se* jeopardize the defendant's right to a fair trial.[82]

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[80] *See id.* In her separate opinion, Justice Toal stated:

> The majority notes that "a number of lower courts have held that a defendant's Sixth Amendment right to a fair trial is superior to the right of free speech and that, where the two rights collide, the latter must give way to the former." However, none of the cases cited by the majority involved prior restraints. In fact, these cases explicitly distinguished prior restraints from other restrictions on freedom of expression and acknowledged the virtual per se invalidity of the former.

Id. at 602 (citations omitted).

[81] This "heavy presumption" standard was first developed by the Supreme Court in *New York Times Co. v. United States* (The Pentagon Papers Case), 403 U.S. 713, 714 (1971) (per curiam) (Black, J., concurring), where the Court held that an order banning the publication of certain articles for alleged national security reasons was unconstitutional.

[82] In her separate opinion, Justice Toal explained that the court's reasoning must have been based on the conclusion that the publicity would damage the defendant's rights in three important respects:

> First, the sanctity of his attorney-client privilege would have been invaded. Second, his Fifth Amendment right against compulsory self-incrimination would potentially have been compromised. Finally, the selection of the normal alternatives to the prior restraint, including continuance of the case until public attention abates, change of venue to a locale not so infected with the pre-trial publicity, and voir dire questioning of the jury to eliminate any biased jurors, would have impaired the defendant's right to a speedy trial by a jury of his peers.

State Record, 504 S.E.2d at 600. Justice Toal also pointed out, however, that the trial court did not explain its reasoning. It simply concluded that "[t]he publication or the transmission of that privileged communication, or its characterization would make it much more unlikely that the defendant could obtain a fair and impartial trial, given even all the protections that our system has in place to ensure a fair and impartial trial." *Id.* at 604 n.8 (Toal, J., concurring and dissenting). Justice Toal concluded that:

To justify the immediate infringement of the First Amendment generated by a restraining order, *Nebraska Press* requires a finding that, absent the prior restraint, the defendant would be denied a fair trial. The Supreme Court adopted this view because the effect of a prior restraint on the media is immediate and absolute,[83] while the negative effect of publicity on the defendant's rights to a fair trial is a mere possibility.[84] In contrast, in *State Record*, the court assumed the effect of the publicity by simply concluding that the defendant would have been denied a fair trial because his attorney-client privilege would have been violated absent the restraining order.[85]

> [t]he record here simply does not support such a conclusion. The trial court's consideration of alternative measures was, at best, cursory. The trial court failed to make specific findings regarding the degree to which other measures would mitigate the effects of the pre-trial publicity. Such findings are basic to the balancing required by *Nebraska Press*. If the trial court had explored each of the alternatives, it would have had to conclude that the prior restraint was not necessary.

Id. (footnotes omitted).

83 The Court recognized that "[a] prior restraint . . . by definition, has an immediate and irreversible sanction." Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976). For these reasons, any delay of publication, for even minimal periods of time, unquestionably constitutes irreparable injury to the news media, and thus justifies the presumption of constitutional invalidity. *See* CBS v. Davis, 510 U.S. 1315, 1318 (1994) (holding delay of broadcast would cause irreparable harm to news media); *see also* New York Times v. United States (The Pentagon Papers Case), 403 U.S. at 714-15 (holding that every delay in lifting the injunctions against the newspapers was a continuing violation of the First Amendment).

84 The evidence on the effect of pre-trial publicity on potential jurors is, at best, inconclusive. *See, e.g.*, Robb M. Jones, *The Latest Empirical Studies on Pre-trial Publicity, Jury Bias, and Judicial Remedies—Not Enough to Overcome the First Amendment Right of Access to Pre-trial Hearings*, 40 AM. U. L. REV. 841, 844 (1991); F. Gerald Klein & Paul H. Jess, *Prejudicial Publicity: Its Effects on Law School Mock Juries*, 43 JOURNALISM Q. 113 (1966), *cited in* Scott A. Hagan, KUTV v. Wilkinson: *Another Episode in the Fair Trial/Free Press Saga*, UTAH L. REV. 739, 752-53 (1985); Amy L. Otto et al., *The Biasing Impact of Pre-trial Publicity on Juror Judgments*, 18 LAW & HUM. BEHAV. 453, 455 (1994); Alice M. Padawer-Singer & Allen H. Barton, *The Impact of Pre-trial Publicity on Jurors Verdicts*, *in* THE JURY SYSTEM IN AMERICA 123, 135 (1975); Rita J. Simon, *Does the Court's Decision in* Nebraska Press Association *Fit the Research Evidence on the Impact on Jurors of News Coverage?*, 29 STAN. L. REV. 515, 517, 520 (1977). For a discussion of some of the empirical studies, see Robert E. Drechsel, *An Alternative View of Media-Judiciary Relations: What the Non-Legal Evidence Suggests About the Fair Trial-Free Press Issue*, 18 HOFSTRA L. REV. 1, 14-15 (1989); John Kaplan, *Of Babies and Bathwater*, 29 STAN. L. REV. 621, 623 (1976-1977) (using surveys of actual jurors to conclude that newspaper publicity, or any other assertions of the facts of a case made outside of court, have virtually no impact upon the jury trying the case). The Report of the ABA Advisory Committee on Fair Trial and Free Press (the *Reardon Report*) states: "There are no determinative empirical data that will supply ready answers to the questions of whether jurors can put aside preconceived opinions, and abide by judges' instructions to decide only the evidence of record" *quoted in* Benno C. Schmidt, Jr., Nebraska Press Association*: An Expansion of Freedom and Contraction of Theory*, 29 STAN. L. REV. 431, 445 n.71 (1977) (internal quotes omitted).

85 *See generally* James D. Callahan, *Stop the Presses! The Quattlebaum Doctrine: Imposing Prior Restraints to Keep Attorney-Client Privileged Communications Out of the Headlines*, 50 S.C. L. REV. 995 (1999). The author argues that, in cases where the criminal defendant shows the press might disclose privileged communications, the burden should be on the media to show that the information is not privileged information and that

> [i]f the third party fails to demonstrate that the communication does not fall

VI. ATTORNEY-CLIENT PRIVILEGE AND THE RIGHT TO A FAIR TRIAL

The attorney-client privilege is the oldest of the privileges recognized by the common law.[86] The privilege is codified in rules of evidence that protect the confidentiality of communications between a client and his or her attorney.[87] In general terms, the attorney-client privilege grants clients the right to refuse to disclose, and prevent others from disclosing, confidential communications between clients and their lawyers.[88] Invoking the privilege, there-

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> within the ambit of attorney-client-privileged communications under the jurisdiction's rules, then the publication may be restrained until such time that the communication is no longer privileged. If the media succeed in demonstrating that the material is not protected by the attorney-client privilege, then the burden should shift to the criminal defendant to demonstrate that other constitutional interests and rights outweigh the media's free press rights.

Id.

86 *See* Cox v. Admin. United States Steel & Carnegie, 17 F.3d 1347, 1414 (11th Cir. 1994) (quoting United States v. Zolin, 491 U.S. 554, 562 (1989)), *cert. denied.*, 513 U.S. 1110 (1994); *accord* Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). The *Restatement of the Law Governing Lawyers* summarizes the origin of the privilege:

> The modern attorney-client privilege evolved from an earlier reluctance of English courts to require lawyers to breach the code of a gentleman by being compelled to reveal in court what they had been told by clients. The privilege, such as it was then, belonged to the lawyer. It was a rule congenial with the law, which prevailed in England until the mid-19th century, that made parties to litigation themselves incompetent to testify, whether called as witnesses in their own behalf or by their adversaries.

RESTATEMENT OF LAW GOVERNING LAWYERS § 118 cmt. c (1996). The modern conception of the privilege, reflected in the *Restatement*, protects clients, not lawyers, and clients have primary authority to determine whether to assert the privilege. For more information on the history of the attorney-client privilege, see 8 J. WIGMORE, EVIDENCE § 2290 (J. McNaughton rev. 1961); *see also* 1 C. MCCORMICK, EVIDENCE § 87 (4th ed. 1992); PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES ch. 1 (1993); Geoffrey Hazard, *An Historical Perspective on the Attorney-Client Privilege*, 66 CALIF. L. REV. 1061 (1978); D.F. Partlett, *Attorney-Client Privilege, Professions, and the Common Law Tradition*, 10 J. LEGAL PROF. 9 (1985).

87 The privilege is a product of state and federal common law. It does not have a constitutional foundation. *See infra* notes 89-98 and accompanying text.

88 Probably the most often-cited definition of the privilege is based on factors outlined by Wigmore. *See* PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 2:1, at 8 (2d ed. 1999); *see also* CHARLES WOLFRAM, MODERN LEGAL ETHICS § 6.3.1, at 250 n.52 (1986). According to this definition, the privilege requires that

> (1) a person (client) who seeks legal advice or assistance (2) from a lawyer acting in behalf of the client, (3) for an indefinite time may invoke, and the lawyer must invoke in the client's behalf, and unqualified privilege not to testify (4) concerning the contents of a client communication (5) that was made by the client or the client's communicative agent (6) in confidence (7) to the lawyer or the lawyer's confidential agent, (8) unless the client expressly or by implication waives the privilege.

Id. at 251. The *Restatement of Law Governing Lawyers* defines attorney-client privilege as "a communication made between privileged persons in confidence for the purpose of obtaining or providing legal assistance." RESTATEMENT OF LAW GOVERNING LAWYERS § 118 (1996). The *Restatement* defines privileged persons as "the client (including a prospective client), the client's lawyer, agents of either who facilitate the communications between them, and agents of the lawyer who facilitate the representation." *Id.* § 120. *See also* UNIF. R. EVID. 502(b) ("A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client . . . ."). In most states, the privilege

fore, prevents the admission of confidential communications between a client and his attorney into evidence. This protection is granted in order to encourage full and frank communication between attorneys and their clients.[89] By promoting client confidence in the secrecy of communications with their attorneys, the privilege ensures the quality of legal advice and enhances the effectiveness of communication within the attorney-client relationship. As explained in the comments to the *Restatement of Law Governing Lawyers*:

> The rationale for the privilege is that confidentiality enhances the value of client-lawyer communications and hence the efficacy of legal services. . . . [A] client who consults a lawyer needs to disclose all of the facts to the lawyer and must be able to receive in return communications from the lawyer reflecting those facts. It is assumed that, in the absence of such frank and full discussion between client and lawyer, adequate legal assistance cannot be realized. . . . Full disclosure by clients facilitates efficient presentation at trials and other proceedings and in a lawyer's advising functions.
>
> [Another] assumption supporting the privilege is . . . that clients would be unwilling to disclose personal, embarrassing, or unpleasant facts unless they could be assured that neither they nor their lawyers could be called later to testify to the communication. Relatedly, it is assumed that lawyers would not feel free in probing [clients'] stories and giving advice unless assured that they would not thereby expose the client to adverse evidentiary risk. Those assumptions cannot be tested but are widely believed by lawyers to be sound. . . . The privilege provides a zone of privacy within which a client may more effectively exer-

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is defined by evidence rules or statutes. In a few states, the privilege is common law. In the federal system, the definition of the privilege is left to the common-law process with respect to issues on which federal law applies. Federal Rule of Evidence 501 provides generally that questions of privilege "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." FED. R. EVID. 501. On elements of a claim or defense as to which state law supplies the rule of decision, however, Rule 501 provides that the federal courts are to apply the attorney-client privilege of the relevant state. *Id.* *See also* RESTATEMENT OF LAW GOVERNING LAWYERS § 118 cmt. d (P.F.D. March 1996); *In re* Shell Oil Refinery, 812 F. Supp. 658 (E.D. La. 1993); United States v. Pappas, 806 F. Supp. 1 (D. N.H. 1992); Arcuri v. Trump Taj Mahal Assocs., 154 F.R.D. 97 (D. N.J. 1994).

89 *See* Swidler & Berlin v. United States, 524 U.S. 399 (1998); Jaffe v. Redmond, 518 U.S. 1 (1996). *See also* Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (holding that the purpose of the privilege is to encourage full and frank communications, thereby promoting broader public interests); United States v. González, 521 U.S. 1118 (1997); *In re* Grand Jury Subpoenas, 803 F.2d 493, 496 (9th Cir. 1997). *See also* United States v. Saccoccia, 898 F. Supp. 53, 57 (D. R.I. 1995) (holding that the "privilege is based on the concern that if damaging information communicated in confidence to an attorney later might be revealed to third parties, the client would be deterred from making full disclosure").

cise the full autonomy that the law and legal institutions allow.[90]

However, the South Carolina Supreme Court's reasoning in *State Record* extends beyond the traditional basis for the privilege—the need to protect a client's confidence in the attorney. Throughout the opinion, the court equated the violation of the attorney-client privilege with a violation of the defendant's right to effective assistance of counsel under the Sixth Amendment. Accordingly, the court's analysis provides a constitutional dimension to the defendant's right to protect privileged communications. Yet, the extent to which the attorney-client privilege is an element of Sixth Amendment constitutional protections remains unclear. Although some courts have held that police intrusions into confidential client-lawyer communication can violate the defendant's Sixth Amendment rights under some circumstances,[91] courts have consistently rejected the notion that the privilege has a constitutional dimension protected by the Sixth Amendment.[92]

In *State Record,* no one doubted that the videotape contained a privileged attorney-client communication,[93] which was not de-

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90 RESTATEMENT OF LAW GOVERNING LAWYERS § 118 cmt. c (1996).

91 *See, e.g.,* Shillinger v. Haworth, 70 F.3d 1132, 1142 (10th Cir. 1995) (holding that intentional intrusion into the attorney-client relationship constitutes violation of Sixth Amendment); *In re* Grand Jury Proceedings (Doe), 983 F.2d 1076 (9th Cir. 1993) (holding that although the attorney-client privilege is not a constitutional right, its violation may implicate a violation of due process); Greater Newburyport Clamshell Alliance v. Public Serv. Co. of New Hampshire, 838 F.2d 13, 19 (1st Cir. 1988) (holding that the Sixth Amendment provides a shield for the attorney-client privilege in criminal proceedings); Bishop v. Rose, 701 F.2d 1150, 1157 (6th Cir. 1983) (holding that use of defendant's letter to attorney to impeach defendant's credibility at trial was not harmless error but not deciding whether the communication of information alone established prejudice to support a finding of a Sixth Amendment violation); United States v. Neill, 952 F. Supp. 834 (D. D.C. 1997) (holding that the government's intentional intrusion creates a rebuttable presumption that the content of the conversations has been disclosed to prosecution and that the defendant was prejudiced); United States v. Marshank, 777 F. Supp. 1507 (N.D. Cal. 1991) (holding that government interference with the defendant's relationship with his or her attorney may render that attorney's assistance ineffective and thus violate the Sixth Amendment); United States v. Cooper, 397 F. Supp. 277 (D. Neb. 1975) (stating that "no prejudice need be shown as a prerequisite to a new trial if overheard confidential communications between a defendant and his counsel or conversations of counsel about defendant's case are within the knowledge of the prosecuting attorney at the time of the trial").

92 *See* Bradt v. Smith, 634 F.2d 796 (6th Cir. 1981) (holding that the attorney-client privilege has no constitutional foundation); *see also* Lange v. Young, 869 F.2d 1008, 1012 n.2 (7th Cir. 1989) (holding that "the privilege is a creation of the common law, not the Constitution"); Clutchett v. Rushen, 770 F.2d 1469, 1471 (9th Cir. 1985) (stating that the privilege has not been held a constitutional right), *cert. denied,* 475 U.S. 1085 (1986); Granviel v. Estelle, 655 F.2d 673, 682-83 (5th Cir. 1981) (holding that the Sixth Amendment does not guarantee the attorney-client privilege); Beckler v. Superior Court, 568 F.2d 661, 662 n.2 (9th Cir. 1978); Lovelace v. Witney, 684 F. Supp. 1438, 1442 n.6 (N.D. Ill. 1988); Magida *ex rel* Vulcan Detinning Co. v. Continental Can Co., 12 F.R.D. 74, 76 (S.D.N.Y. 1951) (holding that the privilege is the "product of legislation without constitutional guarantee"). *See also* cases cited *infra* note 98.

93 *See* State Record v. State, 504 S.E.2d at 593 n.1. The court never mentioned whether

stroyed by the fact that the tape had been obtained surreptitiously.[94] The real issue was whether the possible disclosure of the privileged communication would constitute a violation of the defendant's Sixth Amendment right to a fair trial. The court assumed that the media's disclosure of the tape would prejudice the defendant's case and that, therefore, his right to a fair trial could not have been guaranteed.[95] Although the court did not explain the exact nature of the potential prejudice to the defendant's case, it concluded that a restraining order on the press would be the only way to avoid this unspecified prejudice.

It is important to note that the court failed to address the fact that the videotape had been disclosed *already.* Since the prosecutors had the tape in their possession for more than a year before it was leaked to the press, it would be naïve to believe that the contents of the tape were unknown to the state at the time of the tape's disclosure. At least one court has held that, under similar conditions, it can be presumed the state has knowledge of the content of the communications.[96] Under such circumstances, it can be argued that any prejudice to the defendant's rights had been caused by the state's intrusion into the attorney-client relationship.[97]

According to *Nebraska Press,* the court was required to find that the proposed restraining order would have been effective in protecting the defendant's rights. Although the order would have prevented the disclosure of confidential information by the press, it was not *that* disclosure which violated the defendant's Sixth Amendment rights. Rather, the defendant's rights were violated by the state when it intruded into the attorney-client relationship and

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it was even aware of the contents of the video tape. It simply assumed the contents were privileged and that their disclosure would be prejudicial.

94 Although at one time courts considered the privilege lost when eavesdroppers were able to intercept the communication, the modern view is that the unknown presence of an eavesdropper does not defeat the claim of privilege if the client and the attorney have acted reasonably to assure that the conversation was confidential and did not know of the presence of the eavesdropper. *See* WOLFRAM, *supra* note 88, § 6.3.7, at 265 (citing United States v. Bigos, 459 F.2d 639 (1st Cir. 1972), *cert. denied,* 409 U.S. 847 (1972)); Blackmon v. State, 653 P.2d 669 (Alaska App. 1982); People v. Duarte, 398 N.E.2d 332 (Ill. App. 1979); O'Brien v. United States, 386 U.S. 345 (1967); Black v. United States, 385 U.S. 26 (1966).

95 *See State Record,* 504 S.E.2d at 597.

96 *See* United States v. Neill, 952 F. Supp. 834, 840 (D. D.C. 1997) (holding that the government's intentional intrusion creates a rebuttable presumption that the content of the conversations has been disclosed to the prosecution and that the defendant was prejudiced) (citing Briggs v. Goodwin, 698 F.2d 486, 495 (D.C. Cir. 1983), *vacated on other grounds,* 712 F.2d 1444, *cert. denied,* 464 U.S. 1040 (1984)).

97 In her separate opinion in *State Record,* Justice Toal adopted this view and argued that the significance of the attorney-client privilege should have been limited to a determination of whether the prosecution would be prohibited from obtaining the communications. *See State Record,* 504 S.E.2d at 604.

gained access to the communications. Since the prosecutors already had acquired access to the information, the order could not have prevented the material from falling into the prosecution's hands. At this point, the restraining order on the press would have been ineffective to protect the defendant's rights.

Alternatively, even if the court did not want to presume that the information had already been disclosed to the state, the court should have imposed a restraining order on the state to refrain prosecutors from viewing the tape. Moreover, the court was unjustified in finding that the disclosure by the press would automatically constitute a violation of the defendant's constitutional rights. By failing to address this issue, the court neglected to recognize the fact that it is possible to have an intrusion into the attorney-client relationship that does not amount to a violation of the defendant's Sixth Amendment rights.

Courts have severely limited the circumstances in which intrusions into the attorney-client relationships are violations of the Sixth Amendment. While the Constitution recognizes a right to a fair trial and to effective assistance of counsel, it does not guarantee a "perfect trial"[98] or protection of the attorney-client privilege. In *United States v. Gotti*,[99] for example, the defendant requested the adoption of a rule that would have presumptively prohibited the interception of attorney-client communications absent a showing of probable cause to believe that the interception would be warranted by an exception to the attorney-client privilege.[100] The court refused to adopt such a rule, thus recognizing that some intrusions would not constitute constitutional violations.

In fact, courts have consistently held that not all intrusions into the attorney-client relationship are violations of a constitutional right. In most cases, courts have held that, in order to justify

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98 For example, in *United States v. Hasting*, the Court held that "given the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and . . . the Constitution does not guarantee such a trial." United States v. Hasting, 461 U.S. 499, 508-09 (1983). *See also* United States v. Lane, 474 U.S. 438, 445 (1986); Hogue v. Scott, 874 F. Supp. 1486 (N.D. Tex. 1994) (holding that a defendant is entitled to a fair trial before an impartial tribunal but the Constitution does not require jurors to be completely unaware of facts and issues relevant to the trial), *aff'd*, 131 F.3d 466 (5th Cir. 1997), *cert. denied*, 479 U.S. 922 (1998); Andrews v. Collins, 810 F. Supp. 759 (E.D. Tex. 1992) (holding that, although juror exposure to publicity may infringe on defendant's right to impartial jury, Constitution does not require that jurors be completely unaware of facts and issues to be tried), *aff'd*, 21 F.3d 612, *cert. denied*, 513 U.S. 1114 (1995). *See also* McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 553 (1984); Lutwak v. United States, 344 U.S. 604, 619 (1953); United States v. Fritz, 580 F.2d 370, 378 (10th Cir. 1978), *cert. denied*, 439 U.S. 947 (1978).

99 771 F. Supp. 535 (E.D.N.Y. 1991).

100 *See id.* at 543.

a finding of a constitutional violation, the defendant bears the burden of proof to show that the intrusion caused prejudice or that it affected the ability of the attorney to give effective representation.[101] For example, in *Weatherford v. Bursey*,[102] an undercover government agent posed as a co-defendant and participated in confidential communications between the attorney and the defendant. In that case, the United States Supreme Court held that an intrusion into the attorney-client confidential communications was not a violation of the Sixth Amendment because the defendant had not suffered any prejudice from the intrusion.[103] The Court concluded that the defendant failed to support his claim of a con-

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[101] *See, e.g.*, Partington v. Gedan, 961 F.2d 852, 863 (9th Cir. 1992) (stating that a violation of the attorney-client privilege implicates the Sixth Amendment right to counsel only when the government interferes with the relationship between a criminal defendant and his attorney); United States v. Ofshe, 817 F.2d 1508, 1515 (11th Cir. 1987) (holding that taping of communications between attorney and client did not violate Sixth Amendment because the defendant did not show any prejudice resulted); United States v. Ginsberg, 758 F.2d 823, 833 (2d Cir. 1985) (holding that, to make out a violation of his Sixth Amendment rights, the defendant must allege specific facts that indicate both communication of privileged information to the prosecutor and prejudice); United States v. Steele, 727 F.2d 580, 586 (6th Cir. 1984) (holding that use of an informant in the defense camp did not violate the defendant's rights because there was no tainted evidence, no communication of defense strategy to the prosecution, and no purposeful intrusion); United States v. Melvin, 650 F.2d 641, 644 (5th Cir. 1981) (holding that the lower court erred when it found a violation of the defendant's rights without first finding that the intrusion into the attorney-client privilege did in fact prejudice the representation); United States v. Sander, 615 F.2d 215, 219 (5th Cir. 1980) (holding that police examination of an attorney's files did not violate the client's Sixth Amendment rights absent a showing of prejudice); United States v. Irwin, 612 F.2d 1182, 1186-87 (9th Cir. 1980) (stating that mere intrusion into the attorney-client relationship is not a violation of the Sixth Amendment and that the right is only violated if intrusion substantially prejudices the defendant); United States v. Lin Lyn Trading, Ltd., 925 F. Supp. 1507, 1517 (D. Utah 1996) (holding that the Sixth Amendment is violated when government interferes with the relationship between criminal defendant and his attorney, and such interference substantially prejudices the criminal defendant); United States v. Marshank, 777 F. Supp. 1507, 1525 (N.D. Cal. 1991) (holding that not all government interference with a defendant's relationship with his or her attorney constitutes Sixth Amendment violation and that the defendant's rights are violated only when government intrusion results in prejudice to the defendant); United States v. Curcio, 608 F. Supp. 1346, 1358 (D.C. Conn. 1985) (deciding that a telephone conversation between the defendant and his brother's attorney during trial of the defendant and his brother was not the fruit of a Sixth Amendment violation where the monitored conversation disclosed no trial strategy that could have benefited the prosecution); Carey v. State of Maryland, 617 F. Supp. 1143, 1150 (D.C. Md. 1985) (holding that, even when the government has deliberately infringed upon the attorney-client relationship, a defendant is required to demonstrate prejudice or substantial threat of prejudice), *aff'd*, 795 F.2d 1007 (1986); Klein v. Smith, 383 F. Supp. 485, 486 (S.D.N.Y. 1974) (rejecting a claim that any intrusion into the confidentiality of the attorney-client relationship requires reversal of conviction), *aff'd*, 559 F.2d 189 (2d Cir. 1977), *cert. denied*, 434 U.S. 987 (1977); State v. Coburn, 315 N.W.2d 742, 748 (Iowa 1982) (holding that, in order for there to be a violation of the defendant's Sixth Amendment right, there must be actual gaining, rather than mere opportunity for gaining, of information relative to a charge against the defendant by intrusion into the attorney client relationship, and prejudice will not be presumed unless intrusion is "gross" (citing United States v. Cooper, 397 F. Supp 277, 285 (D.C. Neb. 1975))).

[102] 429 U.S. 545 (1977).

[103] *See id.* at 556-57.

stitutional violation because the informer did not reveal the contents of those communications to the prosecution.[104] According to the Court, the informer's presence during the conversations with the attorney did not have any impact on the defense attorney's ability to effectively represent the client.[105] The Court refused to adopt a presumption that the disclosure of the content of the communications would have a detrimental effect on the representation in all cases.[106] The Court did not decide whether prejudice could be presumed if the intercepted attorney-client conversation was revealed to the prosecution already, but lower courts have adopted the view that the question should be addressed on a case-by-case basis.[107]

The South Carolina Supreme Court should have gone through this analysis in *State Record* and should have concluded that any harm to the defendant's rights had been inflicted long before the press had access to the videotape. Any possible prejudice that could have been caused by the media's publication was still in the future and remained speculative. The court did not have any indication of the content of the videotape and, therefore, could not assume the effect its disclosure would have on possible jurors. Before imposing the restraining order on the press, the court was required to determine if the intrusion by the government into the attorney-client relationship was a violation of the defendant's constitutional rights. To do this, the court needed to make a finding that there was a disclosure and that the disclosure would prevent the attorney from offering effective assistance of counsel.[108] If this were true, however, the court should have found that the violation of the defendant's rights had been caused by the government, which could not be remedied by restraining the press.

On the other hand, if the court found that the defendant's constitutional rights had not been violated by the government's intrusion, the court would have been facing a typical restraining or-

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104 *See id.*

105 *See id.*

106 *See id.*

107 *See* Bishop v. Rose, 701 F.2d 1150, 1156-57 (6th Cir. 1983); *see also* United States *ex rel* Shiflet v. Lane, 625 F. Supp. 677, 685 (N.D. Ill. 1985), *rev'd on other grounds*, 815 F.2d 457 (7th Cir. 1987). For the case-by-case analysis, courts have examined, among others, the following factors: whether the intrusion was accidental or intentional, whether the government had the intent of acquiring confidential information, whether the intercepted communication was (or would be) introduced as evidence at trial, whether the information was used to the detriment of the defendant's representation and whether the government acquired information that revealed trial preparation or tactics. *See* United States v. Brugman, 655 F.2d 540, 546 (4th Cir. 1981).

108 *See supra* notes 89-98 and accompanying text.

der petition and should have followed the analysis provided by *Nebraska Press.* Since the defendant would not have been able to meet this standard, there was also no justification for imposing the order. In other words, if the court found a violation of the defendant's rights by the government, it could not justify issuing the restraining order; and, if it did not find a violation by the government, the defendant could not support its request for the order. Either way, issuing the order was not justified.

Furthermore, even assuming that publication of the information would have prejudiced the defendant, the court was still required to explore less intrusive alternatives to avoid imposing a prior restraint. Given that the initial prejudice to the defendant was caused by the state's intrusion into his attorney-client relationship, the court had other means available to protect the defendant's rights and to discourage future intrusions into the defendant's attorney-client communications.

The state should not be allowed to take advantage of information obtained surreptitiously and illegally, and the defendant should not be tried and convicted based on illegally-obtained privileged communications. In such circumstances, courts should, at the very least, exclude all testimony concerning the content of the conversation.[109] If the prejudicial effect of the state's access to the information cannot be eliminated by the exclusion of the evidence, the court has other alternatives: it may declare a mistrial; disqualify the prosecution team; move the trial to a different jurisdiction where it would be tried by a different state's attorney's office; or dismiss the charges.[110]

In *State Record v. State* the South Carolina Supreme Court did not discuss any of these options. By the time the press considered publishing the information, the defendant's rights were, in all likelihood, already damaged by the state's possession of the videotape. Therefore, the court was supposed to determine whether, under

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109 *See* United States v. Edgar, 82 F.3d 499, 506-07 (1st Cir. 1996); *see also* United States v. Rogers, 751 F.2d 1074, 1079 (9th Cir. 1985); Bishop v. Rose, 701 F.2d 1150 (6th Cir. 1983). *See also* WOLFRAM, *supra* note 88, § 6.3.7, at 265; People v. Harfmann, 555 P.2d 187 (Colo. App. 1987).

110 Although it would not be entirely out of the question, dismissal of the prosecution is not automatic. At least in cases that involve police informants who acquire privileged information under false pretenses, the defendant would have to show that the information was used to his or her prejudice. *See* Weatherford v. Bursey, 429 U.S. 545, 558 (1977); *see also* United States v. Morrison, 449 U.S. 361 (1981); United States v. Rogers, 751 F.2d 1074, 1079 (9th Cir. 1985) (holding that dismissal is the appropriate remedy if the effect of prejudice cannot be eliminated by exclusion of evidence); Bishop v. Rose, 701 F.2d 1150, 1156 (6th Cir. 1983); United States v. Omni Intern. Corp., 634 F. Supp. 1414, 1421 (D. Md. 1986).

the circumstances, a restraining order on the media would have been effective in protecting the defendant's rights. By assuming that the publication of the information would have a prejudicial effect, the court not only failed to apply the *Nebraska Press* standard, but it also failed to do that which it claimed was the most important task for a court—the protection of the defendant's rights against the improper intrusion into the defendant's attorney-client relationship.

CONCLUSION

It seems that the standard created by the court in *Nebraska Press* may have reached its limits and that, as Justices Marshall and O'Connor have suggested,[111] it must be re-examined following a consistent line of analysis to harmonize policies with precedents protecting the First Amendment. The South Carolina Supreme Court's analysis in *State Record v. State* goes in the opposite direction from that of the U.S. Supreme Court in *Nebraska Press.* While in *Nebraska Press,* the Supreme Court suggested few restraints should survive a constitutional attack, the result of the South Carolina Supreme Court's analysis is "a 'rubber stamped' restraint whenever there is any *potential* prejudice to the defendant."[112] The court should have protected the media's First Amendment right to publish the information until the party seeking the injunction could meet the heavy burden to defeat the presumption of the injunction's invalidity. Instead, the South Carolina court suggested that courts should consider a balancing approach favoring the interests of the defendants.

On the other hand, if the threat of disclosure of privileged communications is not enough to meet the *Nebraska Press* standard, the court's analysis is correct in one regard: it is difficult to imagine that any court would ever be able to justify a prior restraint. Thus, the solution is to abandon the standard altogether and adopt the absolute rule against the use of prior restraints proposed by Justice Brennan over twenty years ago.[113] There is no real need for a bal-

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111 *See* Cable News Network v. Noriega, 498 U.S. 976, 976-77 (1990) (Marshall, J., dissenting).

112 *State Record,* 504 S.E.2d at 600-01 (Toal, J., concurring and dissenting) (emphasis added). The effect of the decision is a "rubber stamp" because the court presumed the prejudice, and it converted the *Nebraska Press* standard from a "heavy presumption" to a balancing of interests in which more weight would be given to the arguments of the defendant.

113 In 1980, the ABA adopted Standard 8-3.1 for its Standards for Criminal Justice, which precluded any and all prior restraint orders on the press. *See* STANDARDS (SECOND) FOR CRIMINAL JUSTICE Standard 8-3.1 (American Bar Ass'n 1980). In 1991, however, the ABA again revised its standards for criminal justice and abandoned this total ban for a

ancing of interests approach to the issues related to prior restraints in the fair trial context. The advantages of a new absolute rule against prior restraints in the fair trial context should be readily apparent. An absolute rule would eliminate much groundless and expensive litigation. It would also eliminate the risk of a chilling effect and delays in the publication of the information.

In *Nebraska Press*, the Court stated that the press has a duty to promote the fair administration of justice through the exercise of editorial self-restraint.[114] The television station and the newspaper involved in *State Record* responded to this calling. They were responsible enough to voluntarily withhold publication of the surreptitiously taped attorney-client conversation.[115] Unfortunately, not all members of the press would necessarily act with such self-discipline and concern for the accused. However, just because there is the possibility of misconduct, it does not follow that courts should eliminate or limit the constitutionally protected rights of the press.[116] The media must exercise self-control and good judgment in the selection of information it wishes to publish, but that selection must be left to the press and not to the courts.[117] Otherwise, courts could interfere with the flow of information, which is precisely the risk that the prior restraint doctrine was intended to prevent in the first place.

"clear and present danger test." STANDARDS (THIRD) FOR CRIMINAL JUSTICE Standard 8-3.1 (American Bar Ass'n 1991).

114 The Court stated: "[t]he extraordinary protections afforded by the First Amendment carry with them something in the nature of a fiduciary duty to exercise the protected rights responsibly—a duty widely acknowledged but not always observed by editors and publishers. It is not asking too much to suggest that those who exercise First Amendment rights in newspapers or broadcasting enterprises direct some effort to protect the right of an accused to a fair trial by unbiased jurors." *Nebraska Press*, 427 U.S. at 560.

115 On the other hand, maybe they were just being careful not to violate the court's order, since they probably knew they could not have argued its unconstitutionality in a contempt hearing. Knowing that there was a chance the order would be upheld on appeal, it would have been too much of a risk to violate it at this point. *See* discussion of this issue *supra*, note 13.

116 In *Near v. Minnesota*, the Court stated: "The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct." *Near v. Minnesota*, 283 U.S. at 720. Likewise, in his concurring opinion in *Miami Herald v. Tornillo*, Justice White stated: "Of course, the press is not always accurate, or even responsible, and may not present a fair and full debate on important public issues. But the balance struck by the First Amendment with respect to the press is that society must take the risk that occasionally debate on vital matters will not be comprehensive and that all viewpoints may not be expressed." Miami Herald v. Tornillo, 418 U.S. 241, 270 (1974) (White, J., concurring).

117 *See* Miami Herald, 418 U.S. at 258 ("The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment.").