TRIAL BY DOCUDRAMA: FACT OR FICTION?

I. INTRODUCTION

Journalists, critics, and viewers have debated the merits and faults of docudramas[1] since the advent of theater and motion pictures.[2] The docudrama as an art form has evolved into a unique hybrid,[3] being neither completely factual nor totally fictional.[4] It may dramatize an historic event or depict the lives of real people,[5] but should not be confused with a documentary. A documentary is a non-fictional story that maintains strict fidelity to fact, whereas a docudrama is a creative interpretation of reality.[6] Despite much criticism, the television docudrama has mass appeal and the television industry's use of current events has captured audience interest.[7] Yesterday's sensational or gory crime may be tomorrow's movie of the week.[8]

In the spirit of attracting viewers and capitalizing on current media coverage, a docudrama depicting the life of a criminal defendant may be broadcast prior to that defendant's trial. In *Hunt*

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1 Docudramas are an art form that utilize simulated dialogue, composite characters, and telescope events occurring over a period of time into a composite scene or scenes. Davis v. Costa-Gavras, 654 F. Supp. 653, 658 (S.D.N.Y. 1987) (docudramas partake of author's license because they are creative interpretations of reality).

2 Shakespeare has been accused of rewriting history. Also, Hollywood's versions of how the West was won rarely depicted reality. *See* Lasky, *TV Docudramas: A License to Lie*, READER'S DIGEST, Apr. 1986, at 93 [hereinafter Lasky].

3 In many ways the "historical" picture, which originated in the early days of motion pictures, can be considered the precursor of the modern television docudrama. The subject matter was quite diverse, encompassing Biblical stories, "biographies" of famous people and glorifications of outlaws and robber barons. Anderson, *Pictures Never Lie*, FILMS IN REVIEW, Apr. 1984, at 231.

4 *See infra* note 7 and accompanying text.

5 *Costa-Gavras*, 654 F. Supp. at 658. Plaintiff brought a defamation claim against a group of film makers, alleging that nine scenes in the movie *Missing* created or distorted facts about him. Although the plaintiff failed to prevail on a summary judgment motion, the court's opinion articulated a significant point relevant to the issue of disclaimers. The court regarded the use of the disclaimer in the prologue as an informative device, alerting viewers to the fact that the events depicted in the film did not in reality occur in the same chronological order. The court held the defendants to be defamation proof because the prologue to *Missing* stated the following: "This film is *based on* a true story. The incidents and facts are documented. Some of the names have been changed to protect the innocent and also to protect the film." *Id.* at 657 (emphasis in original).

6 *Id. See* Pilgrim, *Docudramas and False-Light Invasion of Privacy*, 10 COMMUNICATIONS AND THE LAW 3, 4 (1988) [hereinafter Pilgrim].

7 "Dramas based on fact are a part of literature and the theater, and if television is going to be a vital and contemporary medium, they have to be part of TV, too." Henry, *The Dangers of Docudrama*, TIME, Feb. 25, 1985, at 95 [hereinafter *Dangers of Docudrama*] (quoting CBS Vice-President Donald Wear).

8 Examples of such movies of the week include *Kill Me If You Can*, a CBS docudrama about sex offender Carl Chessman and *The Atlanta Child Murders*, a CBS docudrama concerning mass murderer Wayne Williams.

v. National Broadcasting Co.[9] this scenario became a reality. On October 28, 1987, Joe Hunt filed a complaint against the National Broadcasting Company ("NBC") seeking to enjoin its scheduled broadcast of the docudrama *Billionaire Boys Club* on November 8 and 9, 1987.[10] Hunt, a previously convicted murderer, was awaiting trial for his alleged role in the murder of Hedayat Eslaminia.[11] The docudrama not only portrayed Hunt planning and committing the Eslaminia murder, but it also established what may have been his motive.[12] Hunt protested the airing of this docudrama, asserting that NBC's broadcast would infringe his sixth amendment right to a fair trial.[13] The network counter-argued that such a prior restraint would infringe its first amendment right of freedom of the press.[14] The court held that Hunt failed to establish that "without [prior] restraint, pretrial publicity 'would so distort the views of potential jurors that *12 could not be found* who would, under proper instructions, fulfill their sworn duty to render a just verdict exclusively on the evidence presented in open court.' "[15] As a result, *Billionaire Boys Club* was aired on national television at the originally scheduled time.

As the networks[16] continue to vie for high Nielsen ratings,[17] sensationalized docudramas will permeate the media.[18] Such docudramas can be produced quickly and easily due to the net-

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9 872 F.2d 289 (9th Cir. 1989).

10 *Id.* at 290.

11 *Id.*

12 *Id.* at 290-91.

13 In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, 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 defence.

U.S. CONST. amend. VI.

14 "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

15 *Hunt*, 872 F.2d at 293-94 (citing Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 569 (1976) (emphasis added in *Hunt*)).

16 Networks are television companies that, among other things, produce programs for broadcast.

17 This rating system determines how many viewers are tuned in to a particular program at a given time. The program with the most viewers commands the highest rating. *See* Lasky, *supra* note 2, at 92-93.

18 "Docudramas have been made about nearly every conceivable political event and personality." Carson, *The Kennedys*, AMERICAN FILM, Nov. 1988, at 40. The more sensational the subject matter, the greater the likelihood it will be depicted on the screen, for this assures high ratings. *See* Lasky, *supra* note 2, at 92-93.

works' advanced capability and speed,[19] making it likely that other criminal defendants will be put in the same precarious position as Hunt.[20] This risk arises despite the fact that courts have exacted a variety of measures to protect an individual's sixth amendment right to a fair trial.[21]

This Note takes the position, in accordance with the court in *Hunt*, that prior restraint of a documdrama is an inappropriate measure to protect an accused person's rights. However, since the Ninth Circuit only addressed the issue of whether the trial court abused its discretion in denying Hunt's motion for a preliminary injunction,[22] and failed to take a position regarding the conflict between a criminal defendant's sixth amendment right to a fair trial and the media's first amendment right to publish information,[23] this tension remains unresolved.

This conflict between the media's freedom of expression and the criminal defendant's need for protection against additional pre-trial publicity, which results from the broadcast of a docudrama depicting the defendant's crime or prosecution, is the main focus of this Note. Part II explores the role of the Federal Communications Commission ("FCC")[24] in the area of television broadcasting. Part III describes the procedures currently employed by the three major television networks when airing

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19 Note, *Television Docudramas: Is the Titillation Worth the Risk?*, 20 RUTGERS L.J. 461, 462 (1989)[hereinafter *Television Docudramas*] (The likelihood that networks are going to produce and broadcast sensationalized dramatizations is great.).

20 The district court in *Hunt* held that the precedent in both the Supreme Court and the Ninth Circuit prevented granting a prior restraint, citing the rule that a party must demonstrate either a combination of probable success on the merits and the possibility of irreparable injury or that serious questions are raised and the balance of the hardships tips in its favor. Hunt v. National Broadcasting Co., 872 F.2d 289, 293 (9th Cir. 1989) (citing Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); Columbia Broadcasting Sys. v. United States Dist. Ct. for the C.D. Cal., 729 F.2d 1174 (9th Cir. 1983); Goldblum v. National Broadcasting Corp., 584 F.2d 904 (9th Cir. 1979)).

21 Such measures include *voir dire*, change of venue, continuance, and jury sequestration. The *voir dire* is the preliminary examination a court makes of one presented as a potential juror. Change of venue is the removal of a suit begun in one jurisdiction to another jurisdiction because the court feels the defendant cannot receive a fair trial in the original jurisdiction. A continuance is the adjournment or postponement of a trial. Jury sequestration may occur in a case of great notoriety when a trial judge will order the jury to be isolated from the public for the duration of the trial to prevent exposure to publicity. *See generally* J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE §§ 2.16, 11.10 (1985).

22 *Hunt*, 872 F.2d at 296.

23 *Id.*

24 The FCC regulates the broadcasting industry. It is an administrative agency, guided by broad congressional mandate. The FCC has the power to establish rules and regulations within the parameters of the 1934 Federal Communications Act. *See infra* notes 28-36 and accompanying text; W. FRANCOIS, MASS MEDIA LAW AND REGULATION 542 (5th ed. 1990) [hereinafter FRANCOIS]. Regulations made by the FCC carry the force of law. 47 U.S.C. § 303 (1988).

docudramas. Part IV addresses the first amendment protection afforded the motion picture industry as an analogy to the protection that should be granted to the broadcast industry. Part V examines the history of prior restraint and its impact on the docudrama. Part VI analyzes the court's decision in *Hunt*, which epitomizes a controversy that is certain to persist, and perhaps intensify, given the mass appeal of the docudrama. Finally, Part VII advocates that the FCC institute a regulation mandating that all broadcast networks air pre-screening and on-screen advisories to notify viewers of the precise nature of the docudrama.[25] The suggested advisories would serve to protect a criminal defendant's sixth amendment guaranty, while not impinging on the media's first amendment right of freedom of the press.[26]

II. THE FCC AND TELEVISION BROADCASTING

Television, the medium through which the docudrama reaches millions of viewers,[27] is regulated by the FCC.[28] The FCC is an independent regulatory agency governed by the Federal Communications Act of 1934 ("1934 Act" or "Act").[29] The precursor to the 1934 Act was the Radio Act of 1927 ("1927 Act").[30] The Federal Radio Commission (the "Commission") had the complex task of eliminating the chaotic interference existing on the radio,[31] and was empowered to issue licenses, allo-

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25 The advisory would be a disclaimer designed to inform viewers of the fictional nature of the docudrama. It would be presented in both audio and visual form at prescribed intervals and it would state that the audience is viewing a docudrama which is a fictionalization of an actual event. The recommendation for the use of a disclaimer was originally designed to protect fictional dialogue. The disclaimer would also serve to preclude defamation suits and right of publicity actions by explicitly stating the fictional nature of the docudrama. *See* Note, *Television Docudramas and The Right of Publicity: Too Bad Liz, That's Show Biz*, 8 HASTINGS COMM/ENT L.J. 257, 286 (1987).

26 For a discussion of entertainment broadcasters' first amendment rights, see *infra* notes 93-95 and accompanying text.

27 "In 1977, an estimated 80 million persons watched the final episode of an eight-part 'docudrama' based on Alex Haley's best-selling novel, *Roots*." FRANCOIS, *supra* note 24, at 540.

28 The Mass Media Bureau of the FCC deals exclusively with broadcasting and cable television. 47 C.F.R. § 0.61 (1989).

29 Pub. L. No. 73-416, ch. 652, 18 Stat. 1064 (1934) (codified as amended at 18 U.S.C. §§ 1304, 1464 (1988) and 47 U.S.C. §§ 151-609 (1988)).

30 Pub. L. No. 69-632, ch. 169, 44 Stat. 1162 (1927). The Radio Act instructed the Federal Radio Commission "to issue licenses in 'the public interest, convenience, or necessity.'" R. SUMMERS & H. SUMMERS, BROADCASTING AND THE PUBLIC 176 (1966) (quoting the 1927 Act). The 1927 Act also contained a no censorship provision. *Id.*

31 In 1926, the court in United States v. Zenith Radio Corp., 12 F.2d 614 (N.D. Ill. 1926), held that radio licensees could operate on any frequency. As a result broadcasters jumped frequency, boosted power and otherwise operated as they wished. FRANCOIS, *supra* note 24 at 540.

cate frequencies, and specify operating conditions.[32] The 1934 Act contains most of the same provisions as the 1927 Act. The purpose of the 1934 Act was to provide an efficient national communications system. Empowered by the 1934 Act, the FCC has the authority to make rules and regulations, conduct hearings, and issue, renew, or deny renewal of broadcast licenses.[33] The FCC grants broadcast licenses and otherwise regulates broadcasters as the "public convenience, interest, or necessity" requires.[34] The rules and regulations promulgated by the FCC must not contravene section 326 of the 1934 Act[35] which prohibits the FCC from acting as a censor.[36] As long as the FCC regulates without censoring, its powers are broadbased and guided only by the wide ranging congressional mandate of the 1934 Act.

Objectivity by the FCC is paramount in fulfilling its mandate. The FCC's independence is maintained through the appointment, rather than the election, of its five-member board.[37] Members are appointed by the President of the United States subject to Senate approval.[38] Since members are not elected officials, they are presumably not subject to the pressure of lobbying groups. Likewise, the members do not have to worry about either campaign contributions or re-election and are therefore free to act in an objective fashion.[39]

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32 FRANCOIS, *supra* note 24, at 542.

33 47 U.S.C. § 303 (1988).

34 *Id.* § 307.

35 Section 326 of the Federal Communications Act of 1934 ("1934 Act") states:

> Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

Id. § 326.

36 *Id.*

37 The 1934 Act provided that a seven-member Commission be established. 47 U.S.C. § 154 (1934). In 1982, as part of the Budget Reconciliation Act, the size of the Commission was reduced to five as an economic measure. Omnibus Budget Reconciliation Act of 1982, Pub. L. No. 94-12, 96 Stat. 763, 805 (codified as amended at 47 U.S.C. § 154 (1988)). The Commission remains a five-member panel. 47 U.S.C. § 154 (1988).

38 The appointment process is provided for in Article II of the Constitution which provides in relevant part:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law . . . .

U.S. CONST. art. II, § 2, cl. 2.

39 Senator Clarence C. Dill of Washington, then chairman of the Senate Interstate Commerce Committee, favored "an entirely independent body to take charge of the regulation of radio communication in all its forms." S. REP. No. 772, 69th CONG., 1st Sess. 2 (1926). Senator Dill viewed the exercise of the power of regulation as "fraught

The FCC's strength is derived, in part, from its power to grant or deny a license or license renewal. For example, television stations must renew their licenses every five years.[40] A license applicant must meet certain criteria established by both Congress and the FCC.[41] Among other things, persons who seek a new television license or a renewal must conduct ascertainment proceedings. The ascertainment process is undertaken to help broadcasters discover community problems which they must attempt to explore in their programming. The FCC may deny a license renewal request upon a finding that a broadcaster has failed to act in the public interest.[42] Despite this power, very few renewal applications are denied.[43]

The Supreme Court has determined that a licensee is a trustee or fiduciary for the public interest in terms of both the privilege to broadcast on the very limited number of frequencies available, as well as providing content that serves the public interest.[44] In this capacity, broadcasters are required to act affirmatively to inform viewers. Thus, pursuant to this obligation, a broadcaster should not present what appears to be a completely factual adaptation of an event without concurrently informing the audience of the fictionalized nature of the broadcast. An advisory would assist broadcasters in their pursuit to serve the public interest.[45]

The FCC has in fact developed a body of rules to protect the public interest.[46] For instance, the Fairness Doctrine,[47] prior to

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with such great possibilities that it should not be entrusted to any one man nor to any administrative department of the Government." *Id.* He advocated that the "regulatory power . . . be as free from political influence or arbitrary control as possible." *Id.*

[40] 47 U.S.C. § 307(c) (1988).

[41] *Id.* § 308(b).

[42] *Id.* § 307(d). *See* National Broadcasting Co. v. United States, 319 U.S. 190, 223 (1943) (denial of broadcast license on grounds of failure to meet standard of public interest, convenience or necessity is valid exercise of Commission authority).

[43] FRANCOIS, *supra* note 24, at 543.

[44] There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 389 (1969).

[45] *See* 47 U.S.C. § 307.

[46] *See generally* 47 C.F.R. §§ 0.1-100.5 (1989). The Federal Communications Act mandates that the FCC exercise its power to regulate broadcasters specifically in consideration of the requirements of service to the "public convenience, interest, or necessity." 47 U.S.C. § 303 (1988). *See generally* FRANCOIS, *supra* note 24, at 553-64.

[47] 47 U.S.C. § 315 (1988). The Fairness Doctrine was a broad doctrine, affecting advertising, political campaigns, and political candidates. It put broadcasters under an affirmative obligation to present each side of a public issue in a fair manner. *See* D. PEMBER, MASS MEDIA LAW 539-552 (1984) [hereinafter PEMBER]. The Fairness Doctrine

its abandonment, imposed an affirmative responsibility on broadcasters to provide the viewing public with coverage of all sides of an important public issue.[48] The Fairness Doctrine was applied to television advertising in an effort to inform and protect the viewer. In 1967, for example, the FCC ruled that television stations carrying advertising for cigarettes were also required to air public service messages depicting the dangers of smoking.[49] It is apparent that the Fairness Doctrine, as a means of regulating content, required more speech rather than less, and therefore acted as a less intrusive method of regulation than censorship.

The FCC should mandate a docudrama advisory requirement to comply with the spirit of the Fairness Doctrine. In fact, such a disclaimer may be required to serve the public interest.[50] The advisory would require that a broadcaster inform viewers of the docudrama's fictional nature and would thus serve to affirmatively set the tone for the manner in which viewers assimilate the information on the screen. An individual's perception of a broadcast he believes to be a real life enactment is very different from a broadcast he understands to be a fictionalization of events and circumstances. A viewer is entitled to be informed of the nature of a broadcast, and viewer confusion could be alleviated with little or no artistic sacrifice made by the docudrama producer. The use of such an advisory would thus guaranty that the content of the docudrama would remain unaltered, while also eliminating any threat of censorship.

III. Television Standards for Docudramas

Television networks are presently self-regulating, with each network setting its own standards for docudramas. Such self-regulation causes a lack of uniformity in the broadcast industry. The consistent use of a disclaimer, uniform in both form and content, would ensure a more informed audience.

The American Broadcasting Company ("ABC") considers

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was repealed by vote of the FCC on August 4, 1987. Licensees are no longer required to present all sides of an issue. The Commission concluded—based on its 1985 Fairness Report—that enforcement of the Doctrine was contrary to the public interest. *See* Meredith Corp. v. FCC, 2 FCC Rec. 5043, 63 R.R.2d (P & F) 541 (1987), *aff'd sub nom.* Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir.), *cert. denied*, 110 S. Ct. 717 (1989); FRANCOIS, *supra* note 24, at 572-73.

[48] 47 U.S.C. § 315 (1988).

[49] Banzhaf v. FCC, 405 F.2d 1082, 1087 (D.C. Cir. 1968).

[50] FCC Commissioner James Quello stated that "[the FCC's] decision [to abandon the Fairness Doctrine] does not absolve licensees of their public trust responsibilities to present programming that meets the needs of their communities." FRANCOIS, *supra* note 24, at 573.

disclaimers to be of crucial importance to their responsible presentation of programming. Its position is that the purpose of the disclaimer is to disclose to the viewing public the basis of the dramatization and establish the type and degree of substantiation and documentation used.[51] ABC requires that disclaimers be presented at the beginning of the telecast of each docudrama.[52] The substance of the identification, and the manner in which it is presented to the viewers, is determined on an individual basis by ABC's Department of Broadcast Standards and Practices and ABC's legal department.[53]

While this disclaimer requirement by ABC is a step in the right direction, it does not necessarily give notice of the particular nature of the docudrama. The disclaimer is not required to state that a docudrama is fictionalized and thus does not resolve the common problem of viewer misperception.[54] Osborne Elliot, Dean of Columbia University's Graduate School of Journalism, stated that "docudramas confuse audiences with their blurring of reality and entertainment."[55] Former CBS News President Richard Salant "believes [that] viewers tend to confuse docudramas with news."[56] This confusion can lead to prejudice, especially when the docudrama is depicting a criminal defendant. Salant asserts that docudramas are more convincing on television than through any other medium. He strongly advocates an advisory to viewers and suggests that the networks keep reminding viewers that what they are seeing is partly fiction.[57]

The Columbia Broadcasting System ("CBS") categorizes dramas based on facts within a broad continuum.[58] CBS believes that a viewer who is aware of the type of program he is watching is able to evaluate the program in light of his own knowledge and experience.[59] Accordingly, CBS deems it a requirement that "the program and its promotional material . . . represent clearly

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51 AMERICAN BROADCASTING COMPANY, DEPARTMENT OF BROADCASTING STANDARDS AND PRACTICES, PROGRAM STANDARDS 6-10 (May 15, 1989).

52 *Id.* at 11.

53 *Id.*

54 Only one of five suggested disclaimers uses the term "fictionalized" to disclose the nature of the docudrama. It states, "Although the following film is fictionalized, it was inspired/suggested by real people and events." *Id.*

55 Lasky, *supra* note 2, at 92.

56 *Id.* at 93.

57 *Id.*

58 Programs which combine fact and fiction "can be placed along a continuum . . . begin[ning] with pure and unequivocal fact at one end and end[ing] with pure fiction at the other." COLUMBIA BROADCASTING SYSTEM, CBS PROGRAM STANDARDS 7 (as in effect Dec. 1990).

59 *Id.*

to . . . viewer[s the program's] genre and frame of reference."[60] While CBS has five specific guidelines to insure the integrity of its docudrama form,[61] it does not require a mandatory advisory indicating the fictional nature of a docudrama.

Not surprisingly, CBS used a docudrama advisory on one noted occasion. In February, 1985, CBS broadcast a five hour, two-part television docudrama, restaging the trial of Wayne Williams,[62] entitled *The Atlanta Child Murders*.[63] Williams was convicted of murdering two young black children. Abby Mann, the writer and producer of the docudrama, believed that Williams was railroaded in an effort to put an end to local hysteria and national scrutiny.[64] Mann contended that local officials were so eager to close the books on as many as twenty-nine allegedly connected murders that they would have blamed anyone.[65] Andrew Young, then Mayor of Atlanta, and other community leaders insisted that the docudrama was a distortion of the events surrounding the Williams trial.[66] CBS had earlier received protests from people who had previewed *The Atlanta Child Murders* as well.[67] In order to alleviate the controversy created by this impending docudrama, CBS decided at the last minute to insert an

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60 *Id.*

61 The guidelines are:

> Unsubstantiated elements may be included only if they do not distort the material factual elements of the historical record.
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> Omissions of historical information which materially distort the perception of historical events are not acceptable.
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> Editing or condensation in the portrayal of historical events should maintain the accuracy or value of those events. Distortions of time, changes in the sequence of events or composite events which materially alter the historical record are to be avoided.
>
> All characters, including composite characters, based on real persons must accurately reflect those persons in reality and their actual roles and behavior in any significant events in which they are portrayed. Thus, in a composite character based on real persons, each of the characteristics and actions ascribed to the composite character(s) must be properly derived from the characteristics and actions of a real person or persons involved in those events. Composite or fictional characters used in roles essential to development of the main plot(s) must be carefully reviewed to ensure that their fictional or representative nature does not undermine in any material way the overall accuracy of the historical events portrayed.
>
> Care should be exercised in the employment of production techniques, such as casting, character and dialogue interpretation which have the potential to alter or distort the historical record.

Id. at 8.

62 *See, e.g.*, Williams v. State, 251 Ga. 749, 312 S.E.2d 40 (1983).

63 *See Dangers of Docudrama*, *supra* note 7, at 95.

64 *Id.*

65 *Id.*

66 Lasky, *supra* note 2, at 93.

67 *Id.*

on-screen advisory prior to broadcast.[68]

This action by CBS indicates that networks may yield to viewer pressure. However, criminal defendants should not have to depend on viewer pressure to insure that an advisory will be employed to inform viewers that the docudrama being broadcast is fictionalized. Additionally, even where there is no issue of a criminal defendant's rights, the viewers deserve to be kept free from confusion.[69]

NBC's broadcast standards offer no definition of docudrama.[70] The NBC guidelines generally prohibit dramatizations giving the impression that the material is representative of an actual event occurring at the time of the broadcast.[71] Although dramatized or re-enacted events must be disclosed, there are no guidelines as to content or placement of disclaimers.[72]

There is a compelling need for some means of protecting those who are portrayed in a docudrama, particularly criminal defendants. An on-screen visual and audio advisory is a viable means of alerting viewers, prior to their viewing and throughout the program, that they are watching a fictional account of an event or series of events. The advisory will remind viewers who may become so engrossed in a particular docudrama story that they are watching a fictionalized account rather than a documentary. The public interest necessitates that the fine line delineating fact from fiction be clarified. Therefore, the FCC should enact such a regulation since the networks themselves may not feel compelled to issue such advisories.

Instituting a requirement for mandatory advisories during the broadcasting of docudramas is completely within the power of the FCC.[73] Whereas an injunction against the broadcast of a docudrama would act as a prior restraint and thereby wrongfully

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68 *Id.*

69 The proposed advisory would also be of great service to those viewing a new television phenomenon known as news recreations. This new concept of simulated reenactments can be very confusing to viewers. An advisory would abate that confusion.

70 NBC discusses what it calls "Fact-Based Dramas" very briefly by stating that it "prohibits the broadcast of any deceptive or misleading programs or program material." The Network directs "Program Standards, in cooperation with the Law Department, [to] review[] all such programs for accuracy and factuality." PROGRAM STANDARDS, NBC TELEVISION NETWORK 6 (as in effect Dec. 1990).

71 NBC policy advises that any program which contains taped, filmed, or recorded material, and which makes an affirmative attempt to create the impression that it is "live" or occurring simultaneously with the broadcast, will contain an announcement at the time of broadcast that it contains recorded material. *Id.* at 10.

72 *See id.* at 9.

73 *See supra* note 24.

censor speech, an advisory would not contravene the mandate against censorship.

IV. Constitutional Protection of Motion Pictures

The fictional and profitable qualities of the television docudrama give rise to the notion that its very nature may exempt it from first amendment protection.[74] Similar arguments have been made in an attempt to eliminate first amendment guaranties for movies as well. It has been argued by those critical of the motion picture medium "that motion pictures do not fall within the First Amendment's aegis because their production, distribution, and exhibition is a large-scale business conducted for private profit."[75] These arguments, in fact, persuaded the Supreme Court to refuse to afford films first amendment protection in the early case of *Mutual Film Corp. v. Industrial Commission of Ohio*.[76] However, this view is no longer adhered to by the courts.

In *Joseph Burstyn, Inc. v. Wilson*,[77] the Supreme Court essentially abandoned its holding in *Mutual Film* and held that film is a medium protected by the first amendment.[78] The *Burstyn* case involved *The Miracle*, a film produced by Roberto Rossellini in Italy. The forty minute film depicted a young simple-minded girl who, while tending sheep on a mountainside, noticed a stranger. She believed the stranger to be Saint Joseph. This stranger "plie[d] the girl with wine, and when she [wa]s in a state of tumult, he apparently ravishe[d] her."[79]

The film was examined by the motion picture division of the New York Education Department and was subsequently licensed for showing on November 30, 1950.[80] Following the approval and licensing of the film, it was exhibited in a New York City mo-

[74] *See* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952). For the provisions of the first amendment, see *supra* note 14.

[75] *Burstyn*, 343 U.S. at 501.

[76] 236 U.S. 230 (1915). In *Mutual Film*, the Court held that the exhibition of moving pictures is a business pure and simple, originated and conducted for profit. *Id.* at 244. Comparing films to spectacles such as the circus and theaters, the Court asserted that motion pictures should not be regarded as part of the press. *Id. See* Pember, *supra* note 47, at 405.

[77] 343 U.S. 495 (1952).

[78] *Id.* at 502. The Court stated,

> [W]e conclude that expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments. To the extent that language in the opinion in *Mutual Film* is out of harmony with the views here set forth, we no longer adhere to it.

Id. (citation omitted) (Frankfurter, J., concurring).

[79] *Id.* at 507.

[80] *Id.* at 497-98.

tion picture theater for approximately eight weeks. During this time, the New York State Board of Regents received hundreds of letters and other communications both protesting and defending the exhibition of the film.[81] A large segment of the New York Catholic community led by Cardinal Spellman condemned the film and "call[ed] on 'all right thinking citizens' to unite to tighten censorship laws."[82] In response, the Chancellor of the Board of Regents decided that the film should be re-evaluated. He then formed a committee consisting of three Regents to do so. This committee determined that the film was "sacrilegious" and on February 16, 1951, the Regents rescinded the original license.[83]

The Appellate Division of the New York State Supreme Court upheld the Regents' determination, and rejected Burstyn's argument that the provisions of the New York Education Law[84] violated the first amendment[85] as a prior restraint upon both freedom of speech and of the press.[86] Burstyn had also argued, unsuccessfully, that the rescission of the license was invalid under the fourteenth amendment[87] for it violated both the guaranty of separation of church and state and the constitutional right of free exercise of religion because the term "sacrilegious" was so vague and indefinite as to offend due process.[88]

The Supreme Court reversed and, in so doing, voided two provisions of the New York Education Law. One provision prohibited the commercial showing of any motion picture without a license. The second provision allowed a license to be withheld if

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81 *Id.* at 498.

82 *Id.* at 513.

83 *Id.* at 499.

84 The law in effect at the time provided that:

> The director of the [motion picture] division [of the education department] or, when authorized by the regents, the officers of a local office or bureau shall cause to be promptly examined every motion picture film submitted to them as herein required, and unless such film or a part thereof is obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime, shall issue a license therefor. If such director or, when so authorized, such officer shall not license any film submitted, he shall furnish to the applicant therefor a written report of the reasons for his refusal and a description of each rejected part of a film not rejected in toto.

N.Y. EDUC. LAW § 122 (McKinney 1947).

85 For the provisions of the first amendment, see *supra* note 14.

86 Joseph Burstyn, Inc. v. Wilson, 278 A.D. 253, 104 N.Y.S.2d 740 (3d Dept. 1951).

87 The fourteenth amendment provides in part that "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

88 *Burstyn*, 278 A.D. at 256-58, 104 N.Y.S.2d at 743-45.

the censor determined that the film was sacrilegious.[89] The Supreme Court determined that the provisions operated as a prior restraint on freedom of speech. The Supreme Court held that "expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth amendments."[90] The argument that motion pictures are a medium of entertainment and, therefore, not protected by the first amendment, was found unpersuasive by the Supreme Court.[91] However, the Court did make it clear that the Constitution does not require absolute freedom to exhibit every motion picture of every kind.[92] The Court, therefore, reserved the right to censor obscenity.[93]

The Court's holding in *Burstyn* exemplifies the proposition that "works of fiction are constitutionally protected in the same manner as political treatises and topical news stories."[94] The courts have supported the view that entertainment, although fictional in nature, is entitled to the same protection as the exposition of ideas.[95]

> Using fiction as a vehicle, commentaries on our values, habits, customs, laws, prejudices, justice, heritage and future are frequently expressed. What may be difficult to communicate or understand when factually reported may be poignant and powerful if offered in satire, science fiction or parable. Indeed, Dickens and Dostoevski may well have written more trenchant and comprehensive commentaries on their times than any factual recitation could ever yield. Such authors are

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[89] *Supra* note 84.

[90] *Burstyn*, 343 U.S. at 502. "We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment." *Id.* at 502 n.12 (quoting United States v. Paramount Pictures, 334 U.S. 131, 166 (1948)).

[91] *Id.* at 501. "The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform." *Id.*

[92] *Id.* at 502.

[93] *See* Miller v. California, 413 U.S. 15 (1973). The Supreme Court reaffirmed that obscene material is not protected by the first amendment. The guidelines of the Court's obscenity test are:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24 (citation omitted).

[94] Guglielmi v. Spelling-Goldberg Prods., 25 Cal. 3d 860, 867, 603 P.2d 454, 459, 160 Cal. Rptr. 352, 357 (1979).

[95] *Id.* at 867, 603 P.2d at 458-59, 160 Cal. Rptr. at 356-57. *See also* Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977) ("There is no doubt that entertainment . . . enjoys First Amendment protection."). *Zacchini*, 433 U.S. at 578.

> no less entitled to express their views than the town crier with the daily news or the philosopher with his discourse on the nature of justice. Even the author who creates distracting tales for amusement is entitled to constitutional protection.[96]

Thus, works of fiction have equal stature under the first amendment with works of non-fiction. There is no doubt that what the docudrama producer presents is *in part* fiction. A disclaimer would merely confirm the nature of the docudrama and would in no manner infringe on anyone's constitutional rights.

The censorship of movies was again addressed by the Supreme Court in *Kingsley International Pictures Corp. v. Regents of the University of the State of New York.*[97] Kingsley, the distributor of the motion picture entitled *Lady Chatterley's Lover*, submitted the film to the Motion Picture Division of the New York Department of Education for a license. The Division refused to issue a license upon finding three isolated scenes immoral.[98] In order for a license to be issued, the Motion Picture Division required that the scenes be deleted.[99] The distributor then petitioned the Regents for a review of the ruling. The Regents upheld the determination not to issue a license on the ground that the theme of the motion picture was immoral since it portrayed an adulterous relationship in a desirable manner.[100] The Court in *Kingsley* held that New York State's denial of a license, based on the Regents' determination that the film in question portrayed a relationship that was contrary to popular moral standards, religious precepts, and the state legal code, was unconstitutional.[101]

In a concurring opinion, Justice Douglas stated that the censorship of movies is unconstitutional because it is a form of "previous restraint."[102] "If a particular movie violates a valid law, the exhibitor can be prosecuted in the usual way. I can find in the First Amend-

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[96] *Guglielmi*, 25 Cal. 3d at 867-68, 603 P.2d at 459, 160 Cal. Rptr. at 357. *See also* Berlin v. E.C. Publications, Inc., 329 F.2d 541, 545 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964) (holding that "parody and satire *are* deserving of substantial freedom—both as entertainment and as a form of social and literary criticism") (emphasis in original).

[97] 360 U.S. 684 (1959).

[98] *Id.* at 685.

[99] *Id.*

[100] *Id.*

[101] *Id.* at 688.

> It is contended that the State's action was justified because the motion picture attractively portrays a relationship which is contrary to the moral standards, the religious precepts, and the legal code of its citizenry. This argument misconceives what it is that the Constitution protects. Its guarantee is not confined to the expression of ideas that are conventional or shared by a majority.

Id. at 688-89.

[102] *Id.* at 697 (Douglas, J., concurring in result). Justice Black joined the Douglas opinion.

ment no room for any censor whether he is scanning an editorial, reading a news broadcast, editing a novel or a play, or previewing a movie."[103] While Justice Douglas did not speak specifically to the issue of "docudramas" in his concurrence, his opinion can readily be applied to docudrama censorship.

V. Prior Restraint

Television docudrama should not be subject to prior restraint. "Such a course would inevitably chill the exercise of free speech—limiting not only the manner and form of expression but the interchange of ideas as well."[104] The United States Constitution and system of government are intolerant of the censorship of speech without good cause.[105] This intolerance is well illustrated by the prior restraint cases adjudicated before *Hunt.*[106]

The majority of cases focusing on the issue of prior restraint have been concerned with the publication or broadcast of factual material.[107] This is significant because "the essence of the docudrama is fictionalization of factual material."[108] As such, it must be considered apart from news and informational broadcasts. Prior to *Nebraska Press Association v. Stuart*,[109] the cases on prior restraint did not involve protection of a defendant's right to a fair trial.[110] Nonetheless, the opinions on prior restraint have a common thread. The cases hold "that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights."[111]

Nebraska Press involved the imposition of a restrictive order on the media. On the morning of October 19, 1976, Erwin Charles Simants was arrested for the gruesome murders of six members of the Henry Kellie family. The murders occurred in the Kellie family home, located in a small rural community with a population of approximately 850.[112] The crime attracted wide-

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[103] *Id.* at 697-98.

[104] Guglielmi v. Spelling-Goldberg Prods., 25 Cal. 3d 860, 867, 603 P.2d 454, 460, 160 Cal. Rptr. 352, 358 (1979).

[105] "A prior restraint . . . by definition, has an immediate and irreversible sanction." Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976).

[106] *See id.* at 539; N.Y. Times v. United States, 403 U.S. 713 (1971); Near v. Minnesota, 282 U.S. 697 (1931).

[107] *See Nebraska Press*, 427 U.S. at 556.

[108] Pilgrim, *supra* note 6, at 4.

[109] 427 U.S. 539 (1976).

[110] *Id.* at 556.

[111] *Id.* at 559.

[112] *Id.* at 542.

spread news coverage.[113] Three days after the crime, both the County Attorney and Simants asked the county court to issue a restrictive order "relating to 'matters that may or may not be publicly reported or disclosed to the public,' because of the 'mass coverage by the news media' and the 'reasonable likelihood of prejudicial news which would make difficult, if not impossible, the impaneling of an impartial jury and tend to prevent a fair trial.' "[114] The motion was granted. The order prohibited reports or commentary on certain public judicial proceedings.[115] The Nebraska State Supreme Court modified the order in an action brought by petitioners—several press and broadcast associations, publishers, and individual reporters.[116] The petitioners sought a stay of the trial court's original order, but it was not granted.[117] The Supreme Court granted *certiorari* to decide the issue of whether the restrictive order violated the constitutional guaranty of freedom of the press.[118]

The Supreme Court in *Nebraska Press* held that the order prohibiting reporting or commentary on judicial proceedings in the multiple murders of the Kellie family was invalid,[119] because the "prohibition regarding 'implicative' information [was] too vague and too broad to survive the scrutiny [the Court has] given to restraints on First Amendment rights."[120] The Court determined that "[t]he heavy burden imposed as a condition to securing a prior restraint was not met,"[121] and reversed the judgment of the Nebraska Supreme Court.[122] The Supreme Court stated that "pretrial publicity, even if pervasive and concentrated, cannot be regarded as leading automatically and in every kind of criminal case to an unfair trial."[123]

The *Nebraska Press* Court established a three-prong test to determine the permissibility of imposing a prior restraint on the press. In making the decision, the court

> must examine the evidence before the trial judge when the order [for prior restraint] was entered to determine (a) the na-

113 Local, regional, and national newspapers, and radio and television stations covered the murders. *Id.*
114 *Id.*
115 *Id.*
116 *Id.* at 545.
117 *Id.* at 546.
118 *Id.*
119 *Id.* at 570.
120 *Id.* at 568.
121 *Id.* at 570.
122 *Id.* at 565.
123 *Id.*

ture and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger.[124]

Case law indicates that a prior restraint on the press has been found permissible only in the most extraordinary circumstances.[125] Even in *New York Times Co. v. United States*,[126] for example, although the Court of Appeals for the Second Circuit issued a temporary restraining order,[127] the Supreme Court refused to grant a permanent injunction. In this case, the government sought to restrain publication of "material whose disclosure would pose a 'grave and immediate danger to the security of the United States.' "[128] The government requested that the federal courts restrain the *New York Times* and the *Washington Post* from publishing a series of articles based on classified documents from a forty-seven volume government study entitled *History of the United States Decision-Making Process on Vietnam Policy*.[129] Former Attorney General John Mitchell asked the *New York Times* and the *Washington Post*, after their publication of the initial articles, to stop the series. The newspapers refused and the government sought an injunction to force the papers to stop publication. The Supreme Court had previously determined that in cases involving prior restraint, the party seeking the restraint bears the burden of showing justification for such a restraint.[130] In denying the permanent injunction, the Supreme Court concluded that the government had not met this burden[131] in light of the Court's prior rulings condemning prior restraint as presumptively unconstitutional.[132]

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124 *Id.* at 562.

125 *See, e.g.*, N.Y. Times v. United States, 403 U.S. 713 (1971) (per curiam) (The Court lifted a temporary restraining order, thus allowing the *New York Times* and *Washington Post* to publish articles based on a classified government study concerning United States policy and decision making during the Vietnam War. The government failed to prove that a restraint on expression was justified.); Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971) (A real estate broker applied for and obtained an injunction prohibiting the distribution of leaflets describing his bigoted practices in real estate transactions. The Court held that the real estate broker did not meet the heavy burden of showing justification for the restraint and that the injunction operated not to redress private wrongs, "but to suppress, on the basis of previous publications, distribution of literature 'of any kind.' " *Keefe*, 402 U.S. at 418-19.); Near v. Minnesota, 283 U.S. 697, 716 (1931) (While "the protection even as to previous restraint is not absolutely unlimited, the limitation has been recognized only in exceptional cases.").

126 403 U.S. 713 (1971) (per curiam).

127 United States v. N.Y. Times Co., 444 F.2d 544 (2d Cir. 1971).

128 *N.Y. Times*, 403 U.S. at 741 (Marshall, J., concurring) (citation omitted).

129 This is also known as the famous "Pentagon Papers" decision.

130 Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971).

131 *N.Y. Times*, 403 U.S. at 713.

132 *Id.* at 714. "Any system of prior restraints of expression comes to this Court bear-

The damage resulting from prior restraint can be particularly great when it involves the dissemination of news or commentary on current events.[133] The harm caused by prior restraint however, has not discouraged criminal defendants from initiating actions asserting that unfair and prejudicial news commentary will have a detrimental effect on their pending trials.[134] Nevertheless, even as these cases have become increasingly prevalent, prior restraints have not been issued.

The goal of the courts to ensure fair trials can be achieved without instituting the drastic measure of prior restraint. For example, in *Sheppard v. Maxwell*,[135] the Supreme Court held that the defendant did not receive a fair trial and reversed his murder conviction.[136] The defendant, Dr. Sheppard, was a physician charged with the brutal murder of his wife, who had been bludgeoned to death.[137] The publicity surrounding this case was pervasive, including the publication of incriminating evidence not introduced at trial.[138] The Supreme Court determined that the trial judge did not sufficiently protect Dr. Sheppard from the inherently prejudicial publicity, and

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ing a heavy presumption against its constitutional validity." Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) (notification system of a commission created by the Rhode Island legislature to deal with obscene material held to be a system of informal censorship in violation of the fourteenth amendment). *See also* Carroll v. Princess Anne, 393 U.S. 175 (1968) (*ex parte* order obtained by local officials to restrain white supremist rally reversed by the Supreme Court, which held that the lack of an adversarial proceeding violated first amendment principles made applicable to the states by the fourteenth amendment).

[133] Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976).

[134] *See, e.g.*, Chandler v. Florida, 449 U.S. 560 (1981) (An absolute constitutional ban on broadcast coverage of trials cannot be justified simply because there is a danger that the broadcasting of prejudicial accounts of pretrial and trial events may impair the ability of jurors to render an impartial verdict.); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (Reversing the lower court, the Court found that the right of the public and press to attend criminal trials is guaranteed under the first and fourteenth amendments, and that absent an overriding interest articulated in the court's findings, the trial of a criminal case must be open to the public.); Sheppard v. Maxwell, 384 U.S. 333 (1966) (Petitioner filed a habeas corpus petition contending that publicity prevented him from receiving a fair trial.); Irwin v. Dodd, 366 U.S. 717, 727 (1961) (The Supreme Court overturned a guilty verdict because a "pattern of deep and bitter prejudice" was shown to be present throughout the community.); Hunt v. National Broadcasting Co., 872 F.2d 289 (9th Cir. 1989) (A criminal defendant filed a motion requesting a temporary restraining order and a preliminary injunction against a television network to enjoin the broadcast and distribution of a docudrama portraying the defendant planning and committing murder.). *But see* Patterson v. Colorado, 205 U.S. 454 (1907) (The Supreme Court upheld a Colorado decision to punish the editor and publisher of a Denver newspaper for printing articles questioning the motives of the state's high court in cases still pending.).

[135] 384 U.S. 333 (1966).

[136] *Id.*

[137] *Id.* at 335.

[138] *Id.* at 360. The incriminating evidence included the defendant's refusal to take a lie detector test, and a story that he had been called a "Jekyll-Hyde" personality by his wife. *Id.* at 360-61.

failed to control disruptive influences in the courtroom.[139] The *Sheppard* decision did not advocate prior restraint, but held that the trial judge must take action to ensure that prejudicial news does not prevent a fair trial.[140] "[T]he judge should continue the case until the threat abates, or transfer . . . [the case] to another county" where there has been significantly less publicity.[141] "The courts must take such steps by rule and regulation that will protect [the criminal defendant] from prejudicial outside interferences."[142]

However, the Supreme Court disapproved of more than just the pre-trial publicity surrounding this case, including the trial judge's failure to limit the number of newsmen, and to adopt strict rules for their use of the courtroom.[143] Additionally, the Court held that the trial court should have insulated the witnesses and controlled the release of "leads, information, and gossip."[144] The Court was also concerned with other aspects of the trial court's handling of the case, including its refusal to honor certain requests made by the defense counsel, such as motions for change of venue, continuance, and mistrial.[145]

The American legal system protects the first amendment right to free speech and press to the greatest extent possible, even though potential jurors might be affected. "Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice."[146] Although the judicial system is premised on "[t]he theory . . . that the conclusions . . . reached in a case will be induced only by evidence and argument in open court,"[147] and not by extraneous influences such as talk or print out of court,[148] *Nebraska Press* nonetheless firmly established the proposition that pre-trial publicity, including pervasive and adverse publicity,[149] does not necessarily lead to an unfair trial.[150]

In *Columbia Broadcasting Systems v. United States District Court for the*

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[139] *Id.* at 355. Newsmen were allowed to take over almost the entire courtroom, thereby causing frequent confusion and disruption at the trial. Newsmen hounded jury participants and a broadcast station was set up next to the jury room. *Id.*

[140] *Id.* at 334.

[141] *Id.* at 363.

[142] *Id.*

[143] *Id.* at 358. *See also id.* at 355.

[144] *Id.* at 359.

[145] *Id.* at 348, 354 n.9.

[146] Pennekamp v. Florida, 328 U.S. 331, 347 (1946) (The Court reversed a Florida state court decision which held the publisher and associate editor of the *Miami Herald*, a Florida newspaper, in contempt for the publication of two editorials highly critical of the administration of justice in the trial courts of Dade County.).

[147] Patterson v. Colorado, 205 U.S. 454, 462 (1907).

[148] *Id.*

[149] Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 565 (1976). *See infra* note 152.

[150] *Nebraska Press*, 427 U.S. at 554. *Compare* Gannett Co. v. DePasquale, 443 U.S. 368

Central District of California,[151] the Court of Appeals for the Ninth Circuit asserted that most potential jurors are untainted by press coverage, even when the cases have aroused heavy and widespread publicity.[152] The defendant, John DeLorean, a prominent car manufacturer, was charged with conspiracy to import cocaine.[153] On October 22, 1983, DeLorean's counsel filed an *ex parte* application for a temporary restraining order alleging "that CBS had obtained and intended to broadcast video tapes made by the government during an investigation [of DeLorean]."[154] DeLorean's counsel argued, and the district court held, that public dissemination of the government tapes would irreparably harm DeLorean's sixth amendment right to a fair trial.[155] Consequently, a temporary restraining order was issued. On appeal, CBS argued that such an order violated the network's rights under the first amendment.[156] The court of appeals agreed and vacated the restraining order,[157] holding that the dissemination of the government tapes generated in the investigation would not evoke the sort of community-wide prejudice necessary to justify the prior restraint of the tapes.[158]

Goldblum v. National Broadcasting Corp.[159] involved the telecast of a well-publicized NBC docudrama, *Billion Dollar Bubble*, based on "events surrounding manipulations in an extensive securities and insurance fraud which caused the insolvency of the Equity Funding Corporation."[160] Goldblum was serving a prison term for his participation in the Equity Funding fraud,[161] and argued that the film

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(1979) (The Supreme Court held that, in a trial, there is no constitutional right to keep out the press even if all parties agree.).

151 729 F.2d 1174 (9th Cir. 1983).

152 *Id.* at 1179. "[P]recedent and experience indicate that widespread publicity, without more, does not automatically lead to an unfair trial." *Id.* at 1180. In the Abscam prosecutions, which drew concentrated media coverage, approximately 50 percent of the prospective jurors indicated that they had heard of Abscam and only eight or ten had " 'anything more than a most generalized kind of recollection what it was all about.' " United States v. Myers, 635 F.2d 945, 948 (2d Cir. 1980) (quoting trial transcript at 1478).

153 *Columbia Broadcasting*, 729 F.2d at 1181.

154 *Id.* at 1176.

155 *Id.* The district court determined that the dissemination of the government tapes would be prejudicial because "the potential for irreparable harm to defendant's right to a fair trial is directly proportional to the amount of public attention accorded this case." *Id.* at 1179 (quoting the district court). The sixth amendment provides in part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." U.S. CONST. amend. VI.

156 *Columbia Broadcasting*, 729 F.2d at 1176. For the provisions of the first amendment, see *supra* note 14.

157 *Columbia Broadcasting*, 729 F.2d at 1183.

158 *Id.*

159 584 F.2d 904 (9th Cir. 1979).

160 *Id.* at 905.

161 *Id.*

would jeopardize his right to a fair trial in the pending civil matter involving the demise of Equity Funding.[162]

The United States District Court for the Central District of California ordered NBC to present the film in court so that it could view it for inaccuracies and determine whether or not to issue an injunction suspending the film's broadcast.[163] NBC refused and its counsel was imprisoned for contempt of court when the network declined to produce the film.[164] NBC claimed that the order for the production of the film was an infringement on its first amendment rights,[165] and accordingly filed an "Emergency Petition for Mandamus."[166] The court of appeals vacated the district court's order and entered a stay reasoning that "[t]he express and sole purpose of the district court's order to submit the film for viewing . . . was to determine whether or not to issue an injunction."[167] The court stated that such an injunction would be a prior restraint of speech and, as such, presumptively unconstitutional.[168]

Courts have been reluctant to issue a prior restraint order because such a restraint has an immediate and irreversible impact and is therefore arguably the most insidious form of government control. Speakers and publishers are denied the opportunity to speak or print.[169] This is in complete contrast to the damages granted to a plaintiff in a libel action. Although subsequent punishment may serve to deter some speakers, it still provides an arena for public debate and knowledge.[170] However, "[a] procedure . . . aimed toward prepublication censorship is an inherent threat to expression, [and] one that chills speech."[171]

Most cases in which pre-trial publicity has given rise to constitu-

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162 Goldblum also argued that the film would inflame public opinion against him and jeopardize his possible parole. Additionally, he argued that it might deprive him of his right to a trial by an impartial jury in any criminal action which might still be brought against him. *Id.* at 905-06.

163 *Id.* at 906.

164 *Id.*

165 NBC was scheduled to air the film at 10 p.m. Eastern Daylight Time on June 8, 1978. *Id.* at 905. The district judge ordered NBC to produce the film on June 8, 1978 at 9 a.m. Pacific Daylight Time. *Id.* at 906.

166 *Id.*

167 *Id.*

168 *Id.* *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976). *See also supra* note 132.

169 "It can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time." *Nebraska Press*, 427 U.S. at 559.

170 *See* J. NOIWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW § 16.6 (1986).

171 *Goldblum*, 584 F.2d at 907. "Prior restraints are 'the essence of censorship.'" *Nebraska Press*, 427 U.S. at 589 (quoting Near v. Minnesota, 283 U.S. 697, 713 (1931)). "Our distaste for censorship—reflecting the natural distaste of a free people—is deep-written in our law." Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 553 (1975).

tional problems have involved "lurid subject matter"[172] and small rural communities.[173] "[I]n a populous metropolitan area, the pool of potential jurors is so large that even in cases attracting extensive and inflammatory publicity, it is usually possible to find an adequate number of untainted jurors."[174] This is less probable in a smaller community.

Rideau v. Louisiana[175] was a case containing both lurid subject matter and a trial in a small community. In this case, the Supreme Court reversed a murder conviction and death sentence, holding that the defendant was denied a fair trial.[176] Rideau was arrested shortly after a man robbed a bank in Lake Charles, Louisiana, kidnapped three of the employees and murdered one of them.[177] The defendant was apprehended by police and taken to the local jail. The following morning he was interviewed for approximately twenty minutes by the local sheriff. A moving picture and sound track were made of the interview, in which the defendant admitted to bank robbery, kidnapping, and murder.[178] The sound track was subsequently broadcast on three separate occasions.[179]

Calcasieu Parish, where the incident occurred, was a small community with an approximate population of 150,000.[180] Rideau's appointed counsel moved for a change of venue stating that

> to require the Defendant to be tried on the charges which have been preferred against him in the Parish of Calcasieu, would be a travesty of justice and would be a violation to the Defendant's rights for a fair and impartial trial, which is guaranteed to every person . . . by the Constitution of the United States.[181]

The Supreme Court held that "it was a denial of due process of law to refuse the [defendant's] request for a change of venue, after the

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172 Columbia Broadcasting Sys. v. United States Dist. Ct. for the C.D. Cal., 729 F.2d 1174, 1181 (9th Cir. 1983). Lurid subject matter includes crimes of violence and passion. *Id.* Two cases dealing with lurid subject matter are Rideau v. Louisiana, 373 U.S. 723 (1963), and Sheppard v. Maxwell, 384 U.S. 333 (1966). In *Rideau* "the defendant was charged with armed robbery, kidnapping and murder. In *Sheppard* the defendant was a prominent [doctor] accused of bludgeoning his pregnant wife." *Columbia Broadcasting*, 729 F.2d at 1181 (citation omitted).

173 *Columbia Broadcasting*, 729 F.2d at 1181.

174 *Id.* " '[A] metropolitan setting with its diverse population tends to blunt the penetrating effect of publicity.' " *Id.* at 1182 (quoting People v. Manson, 61 Cal. App. 3d 102, 190, 132 Cal. Rptr. 265, 318 (1976), *cert. denied*, 430 U.S. 986 (1977)).

175 373 U.S. 723 (1963).

176 *Id.* at 727.

177 *Id.* at 723-24.

178 *Id.* at 724.

179 *Id.*

180 *Id.* at 724.

181 *Id.* at 724 n.1.

people of Calcasieu Parish had been exposed [to Rideau's confession]."[182] Thus, it was the failure of the lower court to grant the request for a change of venue that was the determinative factor in the Supreme Court's reversal, rather than a finding that a prior restraint should have been issued.

The courts have thus far determined that it is unnecessary to issue a prior restraint in an attempt to protect a criminal defendant's sixth amendment right to a fair trial.[183] The issuance of a prior restraint is not a satisfactory means for ensuring accuracy in the docudrama medium, as docudramas, being both fact and fiction, are protected by the first amendment. To restrain the airing of a docudrama is censorship. Such a restraint can be equated with the banning of the sale of a newspaper on a particular day because the article to be printed is potentially prejudicial to the criminal defendant.[184]

By acting as a censor, a court would be functioning beyond its permitted power. The judicial branch is without power to intervene in broadcasting unless the FCC acts in contravention of the Constitution. The FCC is prohibited from acting as a censor,[185] and from this fact it may be inferred that courts, likewise, may not act as censors of the broadcast medium.

VI. ANALYSIS OF *HUNT V. NATIONAL BROADCASTING CO.*

The *Hunt v. National Broadcasting Co.*[186] case came before the United States Court of Appeals for the Ninth Circuit in 1988. Initially, NBC and the film producer, ITC Productions, removed the case from Los Angeles County to federal district court where Hunt's motion for a temporary restraining order and a preliminary injunction was denied.[187] In its decision, the court of appeals addressed two issues presented by Hunt's appeal. The first issue was whether the appeal was moot since the docudrama had

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[182] *Id.* at 726.

[183] *See* Columbia Broadcasting Sys. v. United States Dist. Ct. for the C.D. Cal., 729 F.2d 1174 (9th Cir. 1983); Goldblum v. National Broadcasting Corp., 584 F.2d 904 (9th Cir. 1979); People v. Manson, 61 Cal. App. 3d 102, 132 Cal. Rptr. 265 (1976), *cert. denied*, 430 U.S. 986 (1977).

[184] Article III, section 2 of the Constitution limits federal court jurisdiction to cases and controversies. If a court proceeded to act as a censor, it would be acting in an advisory capacity. Thus, prior to a showing of a justiciable controversy, it would be making a determination. *See* Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937). Legal historians agree that the first amendment was intended to block prior censorship. A. KELLY, W. HARBISON & H. BELZ, THE AMERICAN CONSTITUTION ITS ORIGINS AND DEVELOPMENT 135-36 (1983).

[185] *See supra* note 35.

[186] 872 F.2d 289 (9th Cir. 1989).

[187] *Id.* at 290.

already been broadcast.[188] The second issue was whether the denial of Hunt's motion for a preliminary injunction was an abuse of discretion.

The court of appeals held that the appeal was not moot based on the Supreme Court's decision in *Nebraska Press Association v. Stuart.*[189] In *Nebraska Press*, the Supreme Court held that the case before it was not moot even though the order restraining the media from broadcasting certain information concerning the murder of the Kellie family had expired before the case reached the Supreme Court. "[J]urisdiction is not necessarily defeated simply because the order attacked has expired, if the underlying dispute between the parties is one 'capable of repetition, yet evading review.' "[190]

In *Hunt*, the court of appeals found that the *Nebraska Press* rule applied because it was likely that NBC would broadcast the docudrama again. The court also acknowledged the possibility of a resurgence of public interest in Hunt and the *Billionaire Boys Club* if there were to be a new trial.[191] The court further held that "NBC . . . failed to meet the heavy burden required by the Supreme Court to demonstrate that this action [was] moot."[192] In order to meet this burden, the defendant would have had to show that there was " 'no reasonable expectation that the alleged violation will recur.' "[193]

The court of appeals also reviewed the second issue, Hunt's motion for a preliminary injunction. "A district court has discretion to grant or deny a motion for a preliminary injunction, and . . . will [be] reverse[d] only if that discretion has been abused."[194] The district court would abuse its discretion if it fails to apply the correct standard governing the issuance of preliminary injunctions, if it misapplies the underlying substantive

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188 The docudrama was broadcast as scheduled on November 8 and 9, 1987. *Id.*

189 *See id.* at 295; 427 U.S. 539 (1976).

190 *Nebraska Press*, 427 U.S. at 546 (quoting Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911)). *See* Sosna v. Iowa, 419 U.S. 393 (1975) (holding that while there must be a live controversy at every stage of a proceeding, including at the time of Supreme Court review, the "controversy may exist, however, between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot"). *Sosna*, 419 U.S. at 402.

191 *Hunt*, 872 F.2d at 291.

192 *Id.* at 292.

193 *Id.* (quoting County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979)).

194 *Id. See also* Zepeda v. United States Immigration and Naturalization Serv., 753 F.2d 719, 724 (9th Cir. 1983) ("At the preliminary injunction stage, . . . the district court's order will be reversed only if the order rests on an erroneous legal premise and, thus, constitutes an abuse of discretion."); Sports Form, Inc. v. United Press Int'l, Inc., 686 F.2d 750, 752 (9th Cir. 1982) ("[T]he appellate court will reverse only if the disctrict court abused its discretion.").

law,[195] or "if its decision rest[s] on a clearly erroneous finding of a material fact."[196]

Hunt did not argue "that the district court applied an incorrect standard for determining whether a preliminary injunction should issue, [or] . . . that the district court's decision rested on a clearly erroneous finding of a material fact,"[197] but rather, "that the district court misapprehended and misapplied the law."[198] The district court held that precedent precluded the "granting [of] Hunt's motion for a prior restraint on the exercise of first amendment rights"[199] because he failed to bear his burden of showing justification necessary to satisfy a prior restraint.[200]

A prior restraint may be granted only if in its absence twelve jurors could not be secured who would base their verdict only on evidence admitted at trial,[201] and if other alternative measures available to the courts are procedurally insufficient to secure a non-biased jury. The alternatives available to the trial courts include tactics such as *voir dire*, jury instructions, delay, change of venue, or jury sequestration.[202] The *Hunt* district court considered such measures and concluded that Hunt failed to demonstrate that they would protect his rights, but moreover that a prior restraint would be effective.[203] The court of appeals denied the preliminary injunction after examining whether the decision " 'was based on a consideration of the relevant factors' and [whether] there has been no 'clear error of judgement'."[204] In so doing, the court of appeals in *Hunt* was explicit in asserting its lack of authority to reverse a decision simply because it may have reached a different result.[205]

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195 *Hunt*, 872 F.2d at 293; *see Zepeda*, 753 F.2d at 724-25; *Sports Form*, 686 F.2d at 752.
196 *Hunt*, 872 F.2d at 292.
197 *Id.* at 293.
198 *Id.*
199 *Id.*
200 *Id.* The district court relied on three cases: Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); Columbia Broadcasting Sys. v. United States Dist. Ct. for the C.D. Cal., 729 F.2d 1174 (9th Cir. 1983); and Goldblum v. National Broadcasting Corp., 584 F.2d 904 (9th Cir. 1979). *Id.*
201 *Nebraska Press*, 427 U.S. at 569; *see Hunt*, 872 F.2d at 295.
202 *Nebraska Press*, 427 U.S. at 563 (discussing alternatives presented in Sheppard v. Maxwell, 384 U.S. 333, 357-62 (1966)). *See infra* note 21.
203 *Hunt*, 872 F.2d at 295-96.
204 *Id.* at 296 (quoting Zepeda v. United States Immigration and Naturalization Serv., 753 F.2d 719, 725 (9th Cir. 1983) (originally *quoted in* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1970)).
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> In reviewing the district judge's application of a preliminary test to the substantive legal area and the facts before him, we will not reverse the district court's order simply because we would have reached a different result. . . . "The [reviewing] court is not empowered to substitute its judgment for that of the [district court]."

Evidence indicating that the court of appeals may have arrived at a different conclusion, had it not been acting in its appellate capacity, may be inferred from the court's treatment of NBC's request that the court adopt the position espoused in the concurring opinion of *Columbia Broadcasting Systems v. United States District Court for the Central District of California*.[206] In his concurrence, Judge Goodwin asserted that there is no conflict between the sixth amendment right to a fair trial and the first amendment right to publish information. Judge Goodwin argued that both first and sixth amendment guaranties are limitations upon the government and not upon citizens.[207] Constitutional claims can only run against the government, as the Constitution does not prescribe how private individuals are to behave unless they act on behalf of, or in lieu of, the government.[208] "Only [the] government can violate a constitutional command. If one of us claims a right against another person or institution, . . . it may be a right under some law, but it is not a constitutional right."[209]

The court of appeals in *Hunt* chose not to make a determination regarding the precedential value of the *CBS* concurrence.[210] Although the court acknowledged that the concurring opinion may have constituted a majority vote on that issue, the decision was affirmed on the ground that there was no abuse of discretion by the district judge. The court of appeals was not ready to adopt the position that prior restraint of broadcasts is never appropriate, preferring instead to make determinations on an *ad hoc* basis.

Hunt, 872 F.2d at 292 (quoting Zepeda v. United States Immigration and Naturalization Serv., 753 F.2d 719, 724 (9th Cir. 1983)) (quoting Sports Form, Inc. v. United Press Int'l, Inc., 686 F.2d 750, 752 (9th Cir. 1982)).

206 729 F.2d 1174 (9th Cir. 1983).

207 *Id.* at 1184.

> The Sixth Amendment tells the government that it cannot deprive individuals of their liberty without a fair trial, and by judicial decision that guarantee has come to mean that the government may not perform governmental acts that deprive a person of a fair trial. . . .
>
> The First Amendment tells the government that it may not prevent the press . . . from publishing the product of their investigation and reporting. . . . These rights simply limit the reach of government power over both the individual and the press.

Id. For a further discussion of the sixth amendment and fair trials, see Linde, *Fair Trials and Press Freedom — Two Rights Against the State*, 13 WILLAMETTE L.J. 211 (1977) [hereinafter Linde].

208 Linde, *supra* note 207, at 217.

209 *Id.*

210 "[W]e need not address NBC's argument that Judge Goodwin's *CBS* concurrence is binding and correct." *Hunt*, 872 F.2d at 296.

VII. Docudrama and the Criminal Defendant

The *Hunt* case demonstrates that it would generally be difficult for criminal defendants to satisfy the criteria necessary for the issuance of a prior restraint, it being a most extraordinary remedy because of its capacity to prevent the exercise of free speech.[211] Free speech is guarantied because of our fundamental respect for an individual's right to self-expression.[212]

As previously noted, a court must determine from the available evidence the character of the pre-trial press coverage, whether other measures would lessen the impact of uninhibited pre-trial publicity, and how effectively a restraining order would prevent the threatened danger.[213] It would be difficult for a criminal defendant, such as Hunt, to overcome the impact of prejudicial news coverage.[214] Although there are alternatives to prior restraint,[215] the imposition of these measures can be costly and time consuming, and a failure to provide a curative measure can result in a mistrial or a reversal.[216] For example, in *Rideau v. Louisiana*,[217] the Supreme Court reversed the murder conviction and death sentence of Wilbert Rideau due to the failure of the trial court to grant his motion for a change of venue.[218] The Court determined that the *voir dire* had been improperly conducted because three people selected for the jury had stated that they observed a broadcast of the sheriff's interrogation of the defendant prior to jury selection.[219] Under the constitutional guaranty of due process, a person accused of committing a crime is guarantied certain rights.[220] The *Rideau* court held "that due process of law . . . required a trial before a jury drawn from a community of people who had not seen and heard Rideau's televised 'interview.' "[221]

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211 *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 562 (1976); United States v. McKenzie, 697 F.2d 1225, 1227 (5th Cir. 1983).

212 Guglielmi v. Spelling-Goldberg Prods., 25 Cal. 3d 860, 866, 603 P.2d 454, 458, 160 Cal. Rptr. 352, 356 (1979). *See* Cohen v. California, 403 U.S. 15, 24-26, *reh'g denied*, 404 U.S. 876 (1971); Whitney v. California, 274 U.S. 357, 375 (1927), *rev'd on other grounds*, 395 U.S. 444, 449 (1969).

213 *See supra* note 124 and accompanying text.

214 *See, e.g.*, *The Billionaire Boy and The Missing Body*, NEWSWEEK, May 4, 1987, at 61.

215 *See supra* note 21.

216 Rideau v. Louisiana, 373 U.S. 723 (1963).

217 373 U.S. 723 (1963).

218 *Id.* at 726.

219 *Id.* at 725.

220 For the pertinent provisions of the fourteenth amendment, see *supra* note 87.

221 *Rideau*, 373 U.S. at 727. Aside from the three members of the jury who had seen and heard the television interview, there were two deputy sheriffs of Calcasieu Parish on the jury as well. *Id.* at 725.

A change of venue in the *Hunt* case, however, may have been ineffective because the docudrama was broadcast on national television. Because most households own at least one television set or have access to a television,[222] the likelihood that a potential juror viewed the docudrama is as great in an alternative jurisdiction as in the original. It is doubtful, however, that every potential juror viewed the broadcast. It seems extreme to assume that the minds of all potential jurors who viewed the broadcast have been so tainted as to prevent a fair trial.

Other commentators have taken the position that "[a] docudrama like 'The Billionaire Boys Club' is so uniquely prejudicial that it can fulfill each element of the three-prong *Nebraska Press* prior restraint test."[223] Furthermore, advances in communications make it difficult to find a jurisdiction that would not be bombarded by the publicity associated with a nationally televised docudrama.[224] However, this does not mean that all potential jurors in a jurisdiction viewed the docudrama. Publicity might produce a negative effect and deter viewers from the broadcast, even though the majority of the public may originally have been drawn to the broadcast because of the controversial publicity.

As it is likely that this controversy will arise again, an on-screen audio and visual advisory would be an effective and economically efficient solution.[225] Viewers would be informed that the docudrama is not an accurate portrayal, but rather a fictionalization of an actual event. If an audio and visual disclaimer of the film's factual nature is properly enforced, a criminal defendant would be unable to satisfy the first prong of the *Nebraska Press* prior restraint test.[226] The publicity would not prejudice the entire community to the extent that twelve unbiased jurors could not be found. It would be highly unlikely that an entire community would be inflamed if an on-screen warning device was utilized. Such an advisory would eliminate not only the need for a change of venue, but also the need for jury sequestration and continuances. The danger that the docudrama will be viewed as mostly fact, when it is primarily fictitious, would be dispelled not only from the outset, but also intermittently throughout the broadcast.

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222 Nearly 72 million homes, or 97 percent of all homes, have television sets. The average person watches more than three hours of television daily. FRANCOIS, *supra* note 24, at 431.

223 *Television Docudramas*, *supra* note 19, at 471 (footnote omitted).

224 *Id.* at 475 (footnote omitted).

225 *See supra* note 25.

226 *See supra* note 124 and accompanying text.

Therefore, the advisory measure would serve to benefit both the taxpayer and the criminal defendant. First, court expenditures would be reduced since there would be less need for such measures as jury sequestration and continuance. Next, criminal defendants would avoid trial delays and consequently have speedier trials. These are great advantages which can be achieved with minimal effort on the part of the television networks. In addition, an advisory is a less harsh measure than the remedy of a prior restraint in the sense that there is no prepublication censorship. It serves to protect the criminal defendant's right to a fair trial without challenging a broadcaster's right to broadcast.

The ultimate result of implementing the audio and visual disclaimer, in a criminal publicity context, would be to protect the criminal defendant's right to a fair and unbiased trial. It may be argued that this solution would be inadequate because a criminal defendant's sixth amendment right to a fair trial would still be impeded, and nothing short of a prior restraint would be acceptable. However, it is not required that jurors be completely ignorant of the facts and issues of a particular case,[227] for "it is an impossible standard to require that [the] tribunal . . . be a laboratory, completely sterilized and freed from any external factors."[228] Although a docudrama may have some influence on its audience, an advisory would prevent a viewer from assuming that a particular portrayal is factual.[229] The advisory is sufficient if it allows a juror to lay aside his impressions or opinions and render a verdict based on the evidence presented in court.[230] An advisory would assure that viewers who become jurors after viewing a docudrama would be able to separate truth from fiction.

VIII. Conclusion

The television docudrama has an avid audience.[231] Many of these viewers are potential jurors for criminal prosecutions, who, in turn, may witness a fictionalized trial of a criminal defendant

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227 Irwin v. Dowd, 366 U.S. 717, 722 (1961).

228 Rideau v. Louisiana, 373 U.S. 723, 733 (1962) (Clark, J., dissenting).

229 An advisory will also prevent future viewers from believing a depiction to be true. Critic Pat Anderson fears that what today is known to be based on fact but exaggerated or doctored in some manner, may be considered a faithful portrayal in the future. Anderson, *Pictures Never Lie*, Films in Review, Apr. 1984, at 232.

230 *See supra* note 152. It has been argued that most potential jurors are untainted by press coverage, even when the cases have aroused heavy and widespread publicity. Columbia Broadcasting Sys. v. United States Dist. Ct. for the C.D. Cal., 729 F.2d 1174, 1178 (9th Cir. 1983).

231 *See Television Docudramas*, *supra* note 19, at 475 n.98.

prior to the defendant's criminal proceeding. Criminal defendants demand and are due a fair trial. The FCC should impose a regulation requiring that an advisory be administered both through audio and visual means intermittently throughout the broadcast of a docudrama, clearly informing the viewers that they are viewing a fictionalized account.

The FCC mandates that broadcasters ascertain the needs and interests of the community and broadcast accordingly to meet those interests. There is community interest in providing fair trials to criminal defendants. It would be irresponsible for broadcasters to ignore this community concern by presenting to viewers what appears to be a re-enactment of an actual trial without clearly informing the public of the trial's fictional nature. This can be particularly problematic to a community when a criminal defendant is about to stand trial shortly following a national broadcast of that defendant's fictionalized trial. The criminal defendant can face undue prejudice as there are viewers who might consider the docudrama a portrayal of accurate information. The docudrama has been deemed a confusing medium and "many will see the docudrama as mostly fact, when it is mostly fiction."[232] "Television is much too powerful a medium to be playing so loose with the line between fiction and fact."[233]

The mandatory advisory for docudramas would effectively protect the criminal defendant, while informing the public of the docudrama's fictional nature. As a visual disclaimer alone may not be fully adequate because there are viewers who will not or cannot pay attention to the print on the screen, an audio disclaimer should be used as well. This mandatory requirement would allow broadcasters to effectively defend challenges regarding their fiduciary duty to act in the public interest with regard to docudrama presentation. Proper compliance would serve as an adequate defense to such challenges. The ramifications of compliance are three-fold: most importantly, a criminal defendant's right to a fair trial will be protected; the viewers will be properly informed and thereby capable of discerning fact from fiction; and finally, broadcasters will not be compelled to defend against challenges to their right to broadcast.

Debra Meyer Glatt

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232 Lasky, *supra* note 2, at 95 (quoting John Siegenthaler, Editorial Director of *USA Today* and publisher of the Nashville *Tennessean*).
233 *Id.* at 94.