CHAPTER THIRTEEN: PRIOR RESTRAINT

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The Prohibition Against Prior Restraint Derives From the First Amendment

The courts define a prior restraint as "a predetermined judicial prohibition restraining specific expression." *Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 248 (7th Cir. 1975).* The prohibition against prior restraint derives from the First Amendment to the United States Constitution, which provides:

> 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.

Similarly, the Illinois Constitution provides that: "All persons may speak, write and publish freely, being responsible for the abuse of that liberty." *Illinois Constitution (1970), Article 1, Section 4*. The First Amendment to the United States Constitution applies to the states through the due process clause of the Fourteenth Amendment, and it is because of these federal and state constitutional provisions that prior restraints are often held invalid.

Prior Restraints Have Often Been Successfully Challenged

The issue of prior restraint has been present in many widely publicized cases. The government unsuccessfully sought to enjoin publication of the "Pentagon Papers" in *New York Times, Co. v. United States, 403 U.S. 713 (1971).* CBS successfully challenged a prior restraint barring litigants in a group of civil suits arising out of the antiwar demonstrations at Kent State University from discussing the cases with the news media. *CBS, Inc. v. Young, 522 F.2d 234 (6th Cir. 1975).* A temporary restraining order preventing CBS from broadcasting the government's undercover videotape of John DeLorean was struck down in *CBS, Inc. v U.S. District Court, 729 F.2d 1174 (9th Cir. 1984).* Former Panama Leader Manuel Noriega unsuccessfully attempted to restrain CNN from broadcasting recorded conversations between him and his defense counsel in *U.S. v. Noriega, 917 F.2d 1543 (11th Cir. 1990).*

A Prior Restraint Can Take Many Forms

The most obvious form of prior restraint is a judicial injunction or "gag order" against the dissemination of particular information the media has obtained. A court injunction prohibiting Business Week magazine from publishing documents which the court had placed under seal in a case involving Procter & Gamble's investment in derivatives was held to be an unconstitutional prior restraint, in *Procter & Gamble Co. v. Bankers Trust Co., 78 F.3d 219 (6th Cir. 1996).* The court stated that prohibiting the publication of a news story is "the essence of censorship."

Any burden placed on communication prior to its dissemination is arguably prior restraint, regardless of the form that burden takes. A special use tax on paper and ink products used in newspaper production was held to violate the First Amendment. *Minneapolis Star &*

Tribune Co. v. Minnesota Commr. of Revenue, 460 U.S. 575 (1983). An Illinois statute requiring a licensee to advertise in certain law enforcement publications was held unconstitutional as a prior restraint. *Hornstein v. Hartigan, 676 F.Supp. 894 (C.D. Ill. 1988).* Ordinances banning news racks in residential areas have been declared unconstitutional as prior restraints. *Chicago Newspaper Publishers Assn. v. City of Wheaton, 697 F.Supp. 1464 (N.D. Ill. 1988).* A federal regulation requiring a government permit prior to protesting in a national park was declared an invalid prior restraint in *U.S. v. Frandsen, 212 F.3d 1231 (11th Cir. 2000).* An Illinois statute making it a crime to interfere with a hunter legally taking a wild animal (the Illinois Hunter Interference Prohibition Act) was found to be unconstitutional as a prior restraint in *People v. Sanders, 182 Ill.2d 524 (1998).*

On the other hand, a court order limiting a newspaper's access to sidebar conference transcripts until after the trial was found not to be a prior restraint, in *People v. Reynolds, 274 Ill.App.3d 696 (1st Dist. 1995).*

<u>Prohibition Against Prior Restraint is One of the Most Secure First Amendment Rights</u>

There is heavy presumption that any prior restraint on publication of information or ideas is constitutionally invalid. This doctrine has been firmly established for 60 years, since the U.S. Supreme Court decided *Near v. Minnesota, 283 U.S. 697 (1931).* The Illinois Supreme Court also recognizes that prior restraint bears a heavy presumption against its validity. *In Re a Minor,*

127 Ill.2d 247 (1989). Thus of all the protection accorded to the media under the First Amendment, the prohibition against prior restraint is perhaps the most secure.

Chief Justice Warren Burger, in delivering the opinion in *Nebraska Press Assn. v. Stuart, 427 U.S. 539 (1976)*, reviewed prior decisions of the Court and concluded that:

> The thread running through all these cases is that prior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights. A prior restraint . . . has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication "chills" speech, prior restraint "freezes" it at least for the time.

Prior restraints are not *per se* unconstitutional, *U.S. v. Frandsen*, but they are such an "extraordinary remedy" that they will only be upheld where the evil that would result from publication can be shown to be both "great and certain," and cannot be militated by less intrusive measures." *Procter & Gamble Co. v. Bankers Trust Co.*

<u>The Media at Large Enjoys No Special Privilege Beyond That of the Public at Large</u>

It is well to remember that the media is protected by the First Amendment, not because of any special status accorded to the news media, but because in seeking out news and reporting it, the media act as an agent of the public. The Supreme Court has held that "[the] First Amendment generally grants the press no right to information about a trial superior to that of the general public." *Nixon v. Warner Communications, Inc., 435 U. S. 589 (1978).* However,

Justice Thomas Clark in *Sheppard v. Maxwell, 384 U.S. 333 (1966)*, wrote for the majority as follows:

> A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. An impressive record of service in this regard documents its function over several centuries. The press does not simply furnish information about trials, but guards against the miscarriage of justice by subjecting police, prosecutors and judicial processes to extensive public scrutiny and criticism. This court has, therefore, been unwilling to place any direct limitations on the freedom traditionally exercised by the news media for what transpires in the courtroom is public property.

Prohibition Against Prior Restraint Must Sometimes Yield to the Right to a Fair Trial

Although there is a heavy presumption against the validity of a prior restraint, the difficulty faced by courts in widely publicized cases is that the First Amendment may not be the only constitutional consideration at stake. The right of the accused to trial by an impartial jury, which is guaranteed by the Sixth Amendment, can be seriously threatened by the conduct of the news media prior to and during trial. *Report of the Committee on the Operation of the Jury System on the "Free Press-Fair Trial" Issue, 45 F.R.D. 391 (1968).*

The U.S. Supreme Court has long been aware that "free speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them." *Bridges v. California, 314 U.S. 252 (1941).* The judiciary's obligation to ensure fair trials pursuant to the Sixth Amendment provides courts with the discretion to "place restrictions

on parties, jurors, lawyers and other involved with the proceedings despite the fact that such restrictions might affect First Amendment considerations." *U.S. v. Noriega*. As the U.S. Supreme Court has stated, "Where the exercise of free press rights actually tramples upon Sixth Amendment rights, the former must nonetheless yield to the latter." *In re Application of Dow Jones & Co., 842 F.2d 603 (2nd Cir. 1988).*

Courts generally apply a balancing test when a prior restraint is required to protect the interests of a fair trial. A conclusory claim that publicity might hamper a defendant's right to a fair trial is insufficient to overcome the protection of the First Amendment.

> [Before] a prior restraint may be imposed by a judge, even in the interest of assuring a fair trial, there must be "an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately 'imperil.'"

U.S. v. CBS, Inc., 497 F. 2d 102 (5th Cir. 1974), quoting from *Craig v. Harney, 331 U. S. 367 (1947).*

The rule followed in Illinois is that a judicial order restraining speech will not be held as a prior restraint if it is necessary to obviate a "serious and imminent" threat of impending harm, which cannot adequately be addressed by other, less restrictive means. *In Re a Minor*. The court must make "specific findings" that such a threat exists, supported by "substantial evidence." In *In Re a Minor*, the court's vague reference to "certain threats" which had been "circulating in the community" did not satisfy the rule. In *Interest of Summerville, 190 Ill.App.3d 1072 (1st Dist. 1989)*, a child custody case, an order prohibiting the parties and their attorneys from discussing the case with the media was struck down because there were no specific findings made by the court that there was a serious threat to the fairness of the proceeding. The court stated that a

finding of “possibilities” of future harm to the minor child would also be insufficient to conclude a serious threat to the administration of justice existed.

The U.S. Supreme Court in *Nebraska Press Assn.* noted that in the overwhelming majority of criminal trials, pre-trial publicity does not present unmanageable threats to Sixth Amendment rights; accordingly, gag orders should be reserved for exceptional circumstances. The American Bar Association in its *Standards Relating to the Administration of Criminal Justice, Fair Trial and Free Press, Standard 8-3.1*, has recommended that no judicial protective order directed to the media be issued in any case, but that traditional judicial remedies be exclusively relied upon to assure the protection of the Sixth Amendment right to a fair trial. An absolute rule as suggested by the above standards underscores the importance of the public having accurate information concerning the operation of its criminal justice system.

Prior Restraints May Also be Justified to Protect the Identity of Minors

The courts are more likely to employ a gag order in juvenile proceedings. In Illinois, the Juvenile Court Act provides that the general public, except for the news media and the victim, shall be excluded from any hearing, but the court may, for the minor’s protection and for good cause shown, prohibit any person or agency present in court from further disclosing the minor’s identity. *Ill. Rev. Stat., Ch. 37, Par. 801-5(6).*

Even in this area, however, restraint cannot be imposed without limitation. The Illinois Supreme Court in *In Re a Minor, 127 Ill.2d 247 (1989),* held that this provision did not justify a court’s order prohibiting the publication of the identity of a juvenile accused of murder where the

reporter had learned the juvenile's identity through routine reporting techniques. However, in a later case, *In Re a Minor, 149 Ill.2d 382 (1992)*, the Illinois Supreme Court held that the Act imposed a valid prior restraint where the reporter has learned the identity of the minor in a hearing closed to the public.

A prior restraint under the Act must be narrowly tailored. The Illinois Appellate Court in *Interest of M.B., 137 Ill.App.3d 992 (4th Dist. 1985)*, found that a gag order directing the news media to not discuss any information obtained in any further hearings, to not disseminate any information as to date, time or location of further hearings and to not reveal the placement of the minor, went beyond what was authorized by the statute and constituted a constitutionally invalid prior restraint. The court in this case noted that the identity of the minor, a babysitter who had allegedly mistreated an infant, had already been widely disseminated such that the court's order was ineffective and alternative measures would have been sufficient.

Alternatives to a gag order include limiting what lawyers, the police and witnesses may say; changing the venue, or location, of the proceeding; granting continuances; searching questioning on voir dire (examination of prospective jurors); sequestering of jurors and giving clear instructions to jurors to disregard those reports.

Prior Restraints that are Overbroad or Vague are Invalid

Gag orders have been struck down on grounds that they are overbroad and vague. A restraining order prohibiting Monsanto, manufacturer of the chemical dioxin, from any media contact in connection with a case it was defending, was found to be both overbroad and vague,

and thus unconstitutional, in *Kemner v. Monsanto Co., 112 Ill.2d 223 (1986).* An order restraining a newspaper from publishing any editorial regarding a libel suit it was defending was declared invalid in *Cooper v. Rockford Newspapers, Inc., 34 Ill.App.3d 645 (2nd Dist. 1975)*, on the grounds it was overbroad.

Publication Protected from Prior Restraint may still be Subject to Subsequent Punishment

Though the Supreme Court has accorded virtually absolute protection to the dissemination of information and ideas, prohibitions against prior restraint do not necessarily protect the press from subsequent punishment. It has long been the position of the Supreme Court that a marketplace theory of speech should prevail so that debate on public issues will be uninhibited, robust and wide open. Therefore, prior restraints that freeze expression are usually struck down. On the other hand, once information has been published, the First Amendment may not prohibit criminal sanctions for violation of statutes, or civil sanctions such as libel suits. In the "Pentagon Papers" case, the papers were stolen from the Pentagon. *New York Times, Co. v. United States.* More recently, in a case involving a CBS "48 Hours" show exposing conditions at a meat packing plant, it was alleged CBS obtained video footage through "calculated misdeeds." *CBS v. Davis, 510 U.S. 1315 (1994).* Yet the Court will not uphold a gag order on information illegally obtained for that reason, since subsequent civil or criminal proceedings are available for appropriate sanctions.

In an important decision, the First Amendment was relied upon to protect against subsequent punishment. In *Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978)*, the Supreme Court reviewed a Virginia statute that made it a criminal offense to divulge information concerning pending judicial inquiry proceedings. The court found that an accurate factual publication served the public interest in scrutinizing the proceeding and was protected by the First Amendment. Therefore, the imposition of criminal sanctions was not justified. The court also held unconstitutional a West Virginia law that imposed criminal sanctions on a

newspaper for the truthful publication of an alleged juvenile delinquent's name that was lawfully obtained in *Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979)*. However, it has also been held that defiance of a judicial gag order can result in a finding of contempt even if the speech is ultimately held to be protected. *Walker v. City of Birmingham, 388 U.S. 307 (1967)*.

Conclusion

In summary, prior restraint on publication meets with a heavy presumption against its validity. The courts consider prior restraint the most serious and least tolerable infringement on First Amendment rights. Prior restraints will be justified in exceptional circumstances only. Two recognized areas where prior restraints have been justified are serious and imminent threats to a fair trial, and shielding the identity of minors. Even if publication is protected, subsequent punishment for defiance of a gag order or violation of a statute, or civil legal recourse, may not be similarly protected by the First Amendment.

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