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Constitutional Law - Criminal Law - Procedural and Substantive Rights to the Media Govern Requests to Restrict News Coverage of Criminal Cases: State ex rel. New Mexico Press Association v. Kaufman

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CONSTITUTIONAL LAW—CRIMINAL LAW—Procedural and Substantive Rights to the Media Govern Requests to Restrict News Coverage of Criminal Cases: *State ex rel. New Mexico Press Association v. Kaufman*

I. INTRODUCTION

When the New Mexico Supreme Court completed its version of the "delicate balancing act" between free press and fair trial rights,[1] the result was the creation of substantial new rights for the news media.[2] In *State ex rel. New Mexico Press Association v. Kaufman,*[3] the supreme court struck down three specific restrictive orders imposed by a state trial court judge on media coverage of a pending criminal trial. In the process, the court extended to the news media significant procedural and substantive rights which will govern future requests to restrict media coverage of criminal cases.[4]

Kaufman is strong recognition of the acknowledged first amendment right of the public and of the press to attend criminal trials.[5] The decision also conforms with United States Supreme Court precedent on prior restraints in the free press–fair trial context.[6] By requiring the functional analysis of prior restraint to be applied to all requests to restrict coverage of criminal cases, *Kaufman* is a potentially bold statement that could clothe all requested restrictions with the impermissible trappings of prior restraint. The New Mexico court, however, set up a range of burdens of proof which could diminish that functional protection. This Note will examine and evaluate the decision and its potential scope in light of recent United States Supreme Court free press–fair trial decisions.

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1. "Free press–fair trial" is a general label encompassing all situations where the right of the news media to report on criminal proceedings and the right of the criminal defendant to a fair trial are seemingly at odds. The conflict is rooted in the United States Constitution. The first amendment provides: "Congress shall make no law . . . abridging the freedom of speech or of the press. . . ." U.S. Const. amend. I. The sixth amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury. . . ." U.S. Const. amend. VI.

2. For the purposes of this Note, use of the terms "news media" and "media" includes both the electronic and printed media. Similarly, use of the term "press" includes both the electronic and printed media, unless otherwise stated.

3. 98 N.M. 261, 648 P.2d 300 (1982).

4. *Id.* at 265, 267, 648 P.2d at 304, 306.

5. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980). *See infra* notes 68-77 and accompanying text.

6. Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976). *See infra* text accompanying notes 61-65 and 89-92. In its dictionary sense, prior restraint is any restriction on a publication before actual publication. Black's Law Dictionary 1074 (5th ed. 1979).

II. STATEMENT OF THE CASE

In the criminal case underlying *Kaufman,* the defendant, Richard Nave Chapman, was charged with the murder of a fellow inmate at the New Mexico State Penitentiary during a bloody, three-day riot in February 1980.[7] The riot, which took the lives of thirty-three inmates, captured extensive media attention and led to murder indictments against thirty-eight penitentiary inmates.[8]

Chapman's trial was scheduled for January 1982 and was the first of the penitentiary riot murder cases to be tried after the effective date of a revised and liberal canon of the New Mexico Code of Judicial Conduct permitting the news media to photograph trials.[9] Before the trial started, Chapman's attorney moved for various restrictions on media coverage without objection from state prosecutors. Although there was a hearing on the motion, no notice was given to the news media and, therefore, no media representatives attended. Trial Judge Bruce Kaufman entered an order that 1) prohibited any photographs of Chapman "within the confines of the Judicial Complex," 2) barred publication of the names of prospective or selected jurors, and 3) required reporters covering the trial to "preserve articles, tapes or transcripts, if such are made, until ten (10) days after the verdict."[10]

After the trial started, the New Mexico Press Association and the New Mexico Broadcasters Association petitioned the New Mexico Supreme Court for a writ of prohibition,[11] challenging each of the three restrictions. The supreme court issued an alternative writ prohibiting enforcement of the requirement that reporters preserve articles and tapes, and ordered briefs and a hearing on the entire order issued by Judge Kaufman. Before the hearing, Chapman was convicted and sentenced.[12] Subsequently, the New Mexico Supreme Court reversed Judge Kaufman on each of the

7. The facts in this section of the Note are taken from the *Kaufman* opinion, from conversations with attorneys involved in the case, and from the briefs of the parties and amici curiae. All briefs filed in the case are available at the University of New Mexico School of Law Library.

8. Of all the murder cases stemming from the riot, only four have resulted in convictions, and of those four, only one conviction was upheld on appeal. Five of the defendants were acquitted and charges against thirteen others were dropped. All of the other cases were plea-bargained.

9. 20 N.M. St. B. Bull. 1249-51 (Dec. 10, 1981). The canon, however, has been revised again, diluting the expansion. See N.M. Code of Judicial Conduct, Canon 8 (1983) for the current version of the canon. *See also infra* notes 18 and 21.

10. Judge Kaufman's order is attached as Exhibit A to the Petitioner's Petition for Writ of Prohibition, State *ex rel.* New Mexico Press Ass'n v. Kaufman.

11. Amicus curiae briefs were submitted by the Journal Publishing Company, publisher of the *Albuquerque Journal,* and the New Mexico Criminal Defense Lawyers' Association.

12. Chapman also was convicted in a second riot murder case. Ironically, Chapman was granted a new trial in both cases because of juror misconduct in obtaining extra-judicial information, some of which came second-hand from media reports. The charges against Chapman in the case underlying *Kaufman* were resolved in a plea bargain. Chapman's motion for a new trial in the second case—a capital murder case—was affirmed by the New Mexico Supreme Court and the trial is pending.

three specific media restraints. In the process, the court 1) announced new media rights to notice and an opportunity to be heard when restrictions on coverage of criminal cases are sought,[13] 2) established the burden of proof for requested restrictions,[14] and 3) provided certain functional considerations for trial courts faced with requested media restrictions.[15]

III. DISCUSSION AND ANALYSIS

The specific restrictions at issue in *Kaufman,* all based on Chapman's claim that without them he would be denied a fair trial,[16] hinted at a variety of the issues that can arise in free press–fair trial disputes.[17] Ignoring those hints, the New Mexico Supreme Court's treatment of the three specific restrictions was narrow and not particularly remarkable. Yet, the court ventured beyond the specific issues and enumerated expansive procedural and substantive guidelines for future cases involving press restrictions. When compared to United States Supreme Court free press–fair trial decisions, the broad holdings of *Kaufman* emerge with the constitutional balance of free press–fair trial tipped in favor of the news media.

A. Specific Restrictions

The issue of allowing cameras in the courtroom, although a timely debate, was not of constitutional dimension[18] and previously had been addressed in the court's revised canon.[19] Chapman alleged that photographs would taint the public's perception of him and would endanger the empanelling of an impartial jury. The court concluded the allegations

13. *Kaufman,* 98 N.M. at 265, 648 P.2d at 304.

14. *Id.* at 265, 267, 648 P.2d at 304, 306.

15. *Id.* at 265, 648 P.2d at 304. Two threshold issues, mootness and standing, are not analyzed in this Note. The court disposed of Chapman's mootness claim by relying on the "well-defined exception" of hearing cases with important issues "capable of repetition yet evading review." *Id.* at 265-66, 648 P.2d at 304-05. The court found that the news media had standing based on cases from other jurisdictions which found that although there is no right of the media to *intervene* in a criminal case, restrictive orders can be challenged through separate actions for declaratory judgment, mandamus, or prohibition. *Id.* at 264, 648 P.2d at 303. An additional consideration was the need to clarify the free press–fair trial issues. *Id.* at 265, 648 P.2d at 304. The Respondent's Answer Brief in the *Kaufman* prohibition proceeding is devoted to procedural and jurisdictional issues and suggests several alternatives to prohibition.

16. Brief of Defendant Chapman at 2, 7, State *ex rel.* New Mexico Press Ass'n v. Kaufman, 98 N.M. 261, 648 P.2d 300 (1982).

17. *See infra* notes 51-72 and accompanying text.

18. Chandler v. Florida, 449 U.S. 560 (1981). *Chandler* upheld the right of the states to experiment with cameras in the courtroom, but did not give the right constitutional status. The amicus brief of the New Mexico Criminal Defense Lawyers' Association focused exclusively on the cameras issues, taking the position that cameras in the courtroom are inherently prejudicial to a defendant's rights. *See also infra* note 21 and accompanying text.

19. 20 N.M. St. B. Bull. 1249-51 (Dec. 10, 1981). See N.M. Code of Judicial Conduct, Canon 8 (1983) for the current version of the canon.

were insufficient to constitute the "good cause" required to ban cameras.[20] That requirement was set out in revised Canon 3A(7) of the New Mexico Code of Judicial Conduct which, at the time of *Kaufman*, had expanded the right of the media to photograph courtroom proceedings by abolishing a previous requirement of consent of the parties.[21] As the court also noted, even before adoption of the revised canon, photographs of defendants were prohibited only in the courtroom itself. Therefore, extending the ban to "the confines of the Judicial Complex" would be contrary to prior law.[22]

Chapman's request concerning reporters' articles and tapes flirted with the issue of the court's power to impose orders on nonparticipants in the trial.[23] The court did not address that issue but did dismiss Chapman's request as a "novel notion" with no support under any legal theory.[24] In its brief, three-paragraph treatment of this requested restriction, the New Mexico Supreme Court referred to two United States Supreme Court decisions which refused to permit interference with a publisher's conduct of his business.

One case to which the court referred was *Miami Herald Publishing Co. v. Tornillo*.[25] In *Tornillo*, the United States Supreme Court held unconstitutional a Florida statute that required newspapers to grant reply space to candidates for public office editorially attacked by the newspapers because of the statute's "intrusion into the function of editors."[26]

20. 98 N.M. at 267, 648 P.2d at 306. Chapman claimed that photographs of himself, coupled with the notoriety of all of the penitentiary riot cases, would endanger both of his trials. He expressed particular concern about photographs taken *outside* the courtroom, while handcuffed, during transportation to and from the proceedings. Brief of Defendant Chapman at 13, State *ex rel.* New Mexico Press Ass'n v. Kaufman, 98 N.M. 261, 648 P.2d 300 (1982).

21. The revised canon, applicable to still photographs, television cameras, and tape recordings, replaced a previous, temporary provision requiring consent of the parties. The revision, modeled after a similar canon in Florida, was adopted after the Florida provision was upheld in Chandler v. Florida. *See supra* note 18. The revised canon, by dispensing with the consent requirement, placed New Mexico among the more progressive states experimenting with courtroom photography. *See Cameras in the Courts*, The News Media and the Law, October-November 1981, at 64, June-July 1982, at 48.

The 1981 revision of the canon now has been revised again, diluting the no-consent provision. N.M. Code of Judicial Conduct, Canon 8 (1983). The new revision, which put the provisions concerning cameras into a new Canon 8 of the Code of Judicial Conduct, retains the no-consent-required provision, but adds a section allowing any party to object to the presence of cameras. *Id.* at 7(b). The latest revision adds other new limitations as well, including a prohibition on filming the jury selection process, *id.* at 1(c), and prohibiting the pick-up or broadcast of any tender on the admissibility of evidence made outside of the jury's presence, *id.* at 1(e).

22. *Kaufman*, 98 N.M. at 267, 648 P.2d at 306.

23. Brief of Defendant Chapman at 2, State *ex rel.* New Mexico Press Ass'n v. Kaufman, 98 N.M. 261, 648 P.2d 300 (1982).

24. 98 N.M. at 268, 648 P.2d at 307. Chapman wanted the articles and tapes for post-trial motions and for pre-trial motions in the capital murder case against him. Brief of Defendant Chapman at 4-5, State *ex rel.* New Mexico Press Ass'n v. Kaufman, 98 N.M. 261, 648 P.2d 300 (1982).

25. 418 U.S. 241 (1974).

26. *Id.* at 258.

The second case cited by the court was *Columbia Broadcasting System v. Democratic National Committee*.[27] In *Columbia Broadcasting System*, the United States Supreme Court held that broadcasters were not required to accept paid political advertisements.[28] *Kaufman* does not make clear whether Chapman's request for preservation of reporters' articles and tapes fell within the range of impermissible interference with editorial function. The use of the two decisions, however, implies an unwillingness to distinguish between such impermissible interference and compulsory access to the media, the distinction sought by Chapman.[29]

The restriction that captured the court's attention was the ban on publication of jurors' names. The court treated the request, which hinted at a claim of prejudicial publicity,[30] as a direct prior restraint. Adapting the functional test for judging a prior restraint set out in *Nebraska Press Assn. v. Stuart*,[31] the court found Chapman's mere speculation that publication of jurors' names would subject them to intimidation insufficient to meet the *Nebraska* requirements.[32] The court held that a prior restraint on the publication of jurors' names must be based on imperative cirumstances clearly demonstrating both jeopardy to the defendant's right to a fair trial and a lack of any reasonable alternatives to protect that right.[33]

B. The Broader Kaufman Holdings

Prior to *Kaufman*, New Mexico courts had not faced a challenge by the news media to restrictive orders imposed on news coverage of a

27. 412 U.S. 94 (1973).

28. *Id.* at 120-21.

29. Brief of Defendant Chapman at 3, State *ex rel.* New Mexico Press Ass'n v. Kaufman, 98 N.M. 261, 648 P.2d 300 (1982). Nor did the court address whether the preservation of materials sought by Chapman would violate a provision of the courtroom photography rules making film, videotapes, photographs, or audio reproductions of trial coverage inadmissible as evidence in the trial itself or any subsequent or collateral proceedings. That provision was in effect at the time of *Kaufman*, N.M. Code of Judicial Conduct, Canon 3A(7), guideline 8, 20 N.M. St. B. Bull. 1249, 1251 (Dec. 10, 1981), and remained intact in subsequent Code revisions. N.M. Code of Judicial Conduct, Canon 8, guideline 8 (1983).

30. Brief of Defendant Chapman at 7-10, State *ex rel.* New Mexico Press Ass'n v. Kaufman, 98 N.M. 261, 648 P.2d 300 (1982). Chapman conceded that the restriction constituted a prior restraint but argued that its impact was minimal. There also was some concern about potential jury tampering and concern by the jurors about publication of their names. 98 N.M. at 266, 648 P.2d at 304; Brief of Defendant Chapman at 8, State *ex rel.* New Mexico Press Ass'n v. Kaufman, 98 N.M. 261, 648 P.2d 300 (1982). The trial judge ruled out sequestering the jury. 98 N.M. at 266, 648 P.2d at 305.

31. 427 U.S. 539, 563 (1976). The functional test is explained and discussed *infra*, notes 89-90 and accompanying text. The New Mexico court's "adaptation" of the *Nebraska Press* test is substantively illusory, amounting only to a change in wording. *Compare Kaufman*, 98 N.M. at 266, 648 P.2d at 305, *with Nebraska Press*, 427 U.S. at 563.

32. 98 N.M. at 267, 648 P.2d at 306. One compelling reason for the court's finding was that the names of the jurors were not only announced in open court but also were filed as part of the public record and, thus, were available for inspection by anyone. *Id.*

33. *Id.*

criminal case.[34] The timing was, perhaps, opportune for the media. The United States Supreme Court's decision in *Richmond Newspapers, Inc. v. Virginia*[35] was still fresh. That decision squarely found, for the first time, a first amendment right of the public and of the press to attend criminal trials.[36] Additionally, in January 1981, only six months before the *Kaufman* decision, the revised canon of the New Mexico Code of Judicial Conduct took effect, expanding the media's right to photograph courtroom proceedings.[37] Finally, the court itself had signalled its readiness to tackle some of the issues in a decision issued only three months prior to *Kaufman*.[38]

The significance of *Kaufman* lies in its broadness. Far from limiting itself to the specific restrictions before it, the New Mexico Supreme Court clearly gave guidance for future free press–fair trial disputes without distinction as to the type of media restriction sought.[39] The broad holdings of *Kaufman* encompass procedural rights to notice and an opportunity to be heard, functional considerations involving the substance of the requested restriction, and burden of proof.

Before restrictions can be imposed on media coverage of a criminal case, *Kaufman* first requires "some minimum form of notice" to the media and a hearing.[40] The hearing must occur prior to trial, if possible, but

34. Respondent's Answer Brief at 2, State *ex rel.* New Mexico Press Ass'n v. Kaufman, 98 N.M. 261, 648 P.2d 300 (1982). There have been some cases involving defendants' claims of prejudicial publicity. *See* Selgado v. Baker, 394 F.2d 831 (10th Cir. 1968) (two newspaper articles, describing defendant's arrest and arraignment but read by none of the jurors, did not constitute prejudicial publicity); United States v. Tokoph, 514 F.2d 597 (10th Cir. 1975) (factual articles about court proceedings and pleadings were not so highly prejudicial or pervasive that defendant could not get a fair trial); State v. Padilla, 85 N.M. 140, 509 P.2d 1335 (1973) (defendant unable to show prejudice because of adverse publicity during retrial in different county two and one-half years after offense). Other cases involved closing court proceedings and contempt, although the cases in these two categories did not directly involve the press. *See* State v. Padilla, 91 N.M. 800, 581 P.2d 1295 (Ct. App. 1978) (no abuse of discretion to close trial to "disinterested" persons during testimony in rape case); State v. Velasquez, 76 N.M. 49, 412 P.2d 4, *cert. denied*, 385 U.S. 867 (1966) (no abuse of discretion to deny defendant's motion to close trial to general public where defendant claimed potential danger to himself and his family); Smotherman v. United States, 186 F.2d 676 (10th Cir. 1950) (contempt); United States v. Tijerina, 412 F.2d 661 (10th Cir.), *cert. denied*, 396 U.S. 990 (1969) (contempt).

35. 448 U.S. 555 (1980).

36. *Id.* at 581.

37. *See supra* note 21 and accompanying text.

38. State *ex rel.* Journal Publishing Co. v. Allen, No. 14,188 (Mar. 12, 1982) (per curiam), 8 Med. L. Rptr. 1320 (1982). The narrow issue in *Allen* was the proper basis for limiting still photography under the canon. The court referred to the canon's "good cause" test and stated, "Our rule is not specific as to the details of what constitutes good cause. We have the Chapman case before us in which we propose to address a number of the questions soon." *Id.*

39. 98 N.M. at 265-66, 648 P.2d at 304-05. The court's wording on this key point, however, could have been clearer. For example, the court could have said the new protections apply "when any" or "whenever" restrictions are sought, rather than making the protections applicable "[w]hen restrictions are sought in a criminal case. . . ." *Id.* at 265, 648 P.2d at 304.

40. 98 N.M. at 265, 648 P.2d at 304.

short notice, proof by affidavit, and abbreviated hearings are acceptable.[41] Second, *Kaufman* requires certain functional considerations by trial courts faced with requested restrictions. The trial court must 1) consider all reasonable alternatives, 2) determine if the restriction sought is the least restrictive means available, and 3) determine if the restriction would be effective.[42] In addition, no order can be broader in application or duration than necessary to accomplish its purpose and the trial court must give oral or written findings, although they need not be formal.[43]

Kaufman does not stop with this functional blueprint; instead, it enters the unsettled world of judicial standards in free press–fair trial issues. Basing its distinctions on the purpose of the requested restriction rather than the type, *Kaufman* states that if a restriction is sought to protect a defendant's right to a fair trial, the evidence must show a "substantial likelihood" that the right will be denied absent the restriction.[44] If the restriction is sought to protect other rights, "which involve important constitutional interests," a higher standard requiring proof of a "serious and imminent" threat to that interest must be satisfied.[45] Finally, at the top of the court-constructed range of burdens is the requirement for restrictions amounting to prior restraints. Prior restraints must be supported by "imperative circumstances" and a "clear" demonstration of harm and a lack of alternatives.[46] In all instances, the burden is on the proponent of the restriction.[47]

Although the *Kaufman* decision is laced with references to at least some of the United States Supreme Court's free press–fair trial decisions, the New Mexico court purported to draw from a state court decision, *Seattle Times Co. v. Ishikawa,*[48] for its broad holdings. *Ishikawa,* however, differs in some significant respects from *Kaufman. Ishikawa* was specifically limited to pre-trial criminal hearings or the records of such hearings.[49] In contrast to *Kaufman, Ishikawa* established a mere "liklihood [sic] of jeopardy" test to decide fair trial based restrictive requests.[50] Despite the *Kaufman* court's refusal to directly rely on United States

41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.* These other interests, which the New Mexico court did not identify, at least include the prosecutor's interest in protecting ongoing investigations and the safety of witnesses. See Seattle Times Co. v. Ishikawa, 97 Wash. 2d 30, 34, 640 P.2d 716, 720 (1982), relied on by the *Kaufman* court.
46. 98 N.M. at 267, 648 P.2d at 306.
47. *See id.* at 265, 648 P.2d at 304.
48. 97 Wash. 2d 30, 640 P.2d 716 (1982).
49. *Id.* at 34, 640 P.2d at 720 (1982).
50. *Id.* at 721. *Ishikawa* also limited the right to object to restrictions to those present when the request is made and placed the burden of suggesting alternatives on the party objecting to the restrictions. *Id.* at 34, 35, 640 P.2d at 720, 721.

Supreme Court decisions for its broad holdings, these cases give the *Kaufman* decision substance and provide a measure for its significance.

C. *Supreme Court Precedent*

Free press–fair trial issues[51] have followed each other to the courthouse doors in various, and somewhat predictable, guises. An early issue was the claim of prejudicial publicity and its impact on the right to an impartial jury.[52] A representative case is *Sheppard v. Maxwell*.[53] Sam Sheppard, a prominent Cleveland osteopath, was convicted of the 1954 murder of his wife in a trial described as having a "carnival atmosphere."[54] The United States Supreme Court, in a habeas corpus proceeding twelve years later, reversed the conviction. Aiming its criticism at the trial judge for failing to exercise proper control of the courtroom, the Court set out a laundry list of acceptable measures, including jury sequestration, continuance, transfer, insulating witnesses, rules for the use of the courtroom by the news media, and the prohibition of extra-judicial statements by parties, attorneys, or officers of the court.[55]

The *Sheppard* list, virtually codified in subsequent cases,[56] has been credited with igniting one of the most persistent fires in the free press–

51. Among those issues is judicial contempt power, a potential issue with all judicial "gag" orders. The contempt power, in turn, raises other issues, some of which are presented in Barnett, *The Puzzle of Prior Restraint*, 29 Stan. L. Rev. 539, 551-60 (1977). *See also* Landau, *Fair Trial and Free Press: A Due Process Proposal*, 62 A.B.A. J. 55, 58-60 (1976). The Barnett article is part of a symposium on free press–fair trial issues in light of the *Nebraska Press* decision. Of particular interest is an article from the perspective of defense counsel, Garry and Riordan, *Gag Orders: Cui Bono?*, 29 Stan. L. Rev. 575 (1977).

52. The Court's first reversal of a conviction because of prejudicial publicity was in Marshall v. United States, 360 U.S. 310 (1959) (seven jurors admitted reading newspaper article which said the defendant, charged with illegally dispensing prescription drugs, had been convicted of forgery and had practiced medicine without a license). The first reversal of a state court conviction on prejudicial publicity grounds was Irvin v. Dowd, 366 U.S. 717 (1961) (pre-trial publicity included defendant's prior criminal record, offers to plead guilty and confessions; prospective and selected jurors, during voir dire, admitted fixed belief in guilt). See also Rideau v. Louisiana, 373 U.S. 723 (1963) and Estes v. Texas, 381 U.S. 532 (1965), both involving television coverage of trials. An early case, and one of the most notorious, was the trial of Bruno Hauptmann for the kidnapping and murder of the infant child of world-famous Charles Lindbergh and his wife. State v. Hauptmann, 115 N.J.L. 412, 180 A. 809, *cert. denied*, 296 U.S. 649 (1935).

Prejudicial publicity as an issue apparently has waned. See *Prejudicial Publicity: Criminal Defendants Batting .000*, The News Media and the Law, February-March 1982, at 39, reporting a decline in the number of persons seeking review on prejudicial publicity grounds and a distinct trend by the Supreme Court to refuse review of claims. It is interesting that although Chapman's requested restrictions were suffused with claims of potential prejudicial publicity, the court did not deal with that potential impact to any substantial degree.

53. 384 U.S. 333 (1966).

54. *Id.* at 358. "The fact is that bedlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom, hounding most of the participants in the trial, especially Sheppard." *Id.* at 355.

55. *Id.* at 358-63.

56. *See, e.g.*, Nebraska Press Ass'n v. Stuart, 427 U.S. at 555.

fair trial controversy—restraints on what can be published.[57] These so-called "gag" orders take two forms: 1) control of extra-judicial statements by those within the court's control and 2) direct orders to the media.[58] Direct orders are any orders telling the press it cannot publish what it already knows.[59] This second variety of the "gag" sometimes constitutes a prior restraint.[60] Prior restraints, however, are presumptively unconsti-

57. Portman, *The Defense of Fair Trial From Sheppard to Nebraska Press Association: Benign Neglect to Affirmative Action and Beyond*, 29 Stan. L. Rev. 393, 406 (1977); *Free Press–Fair Trial: An Introduction*, 20 St. Louis U.L.J. 640, 643 (1976). *See also* W. Overbeck and R. Pullen, Major Principles of Media Law 157-59 (1982). One writer's informal survey revealed no reported cases of "gag" orders until 1966. F. Graham, Mass Media and the Supreme Court 291, 293 (Devol 2d ed. 1976). By other accounts, there were 174 reports of "gag" orders between 1967 and 1975, 61 involving closed proceedings, 63 imposing restrictions on court participants and 50 direct restraints against the media. Overbeck and Pullen, *supra*, at 161. The variety of "gag" orders has been considerable, including, but certainly not limited to, prohibiting the reporting of public records of pre-trial judicial proceedings; forbidding publication of a change in plea made in open court; forbidding memory sketches of an open court proceeding; barring publication of a public jury verdict; requiring reporters to sign an agreement not to report parts of a public court proceeding as a condition for being admitted; forever sealing the identity of jurors; prohibiting the publication of any information not introduced in open court; and prohibiting reports of a restrictive order itself. These and other examples are documented in Landau, *supra* note 51, at 56-57.

58. Those of the first form are generally found to be valid, Portman, *supra* note 57, at 408-09; *see, e.g.*, United States v. Tijerina, 412 F.2d 661 (10th Cir. 1969). Yet, they can raise additional problems. For example, if the restricted information "leaks" out and is published, the reporter who publishes it could find himself called upon to disclose his source, thereby creating the potential for issues of reporter privilege and contempt of court for refusing to disclose a source. *See* Schmidt and Volner, *Nebraska Press Association: An Open or Shut Decision?*, 29 Stan. L. Rev. 529, 534-37 (1977). Furthermore, restrictions on trial participants can stem from other authority, including professional rules of conduct for attorneys. Model Code of Professional Responsibility DR 7-107 (1979). Here too the restriction has come under constitutional attack. *See* Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975); Hirschkop v. Snead, 594 F.2d 356 (4th Cir. 1979).

59. The definition should, perhaps, also include information the media has a right to obtain. Depending on such definitions, it is a murky line that separates prior restraint from any form of "gag" order. One position is that regardless of form, the effect is the same. *See, e.g.*, Note—Constitutional Law—Closure of Trials—*The Press and the Public Have a First Amendment Right of Access to Attend Criminal Trials, Which Cannot Be Closed Absent an Overriding Interest, Richmond Newspapers Inc. v. Virginia*, 64 Marq. L. Rev. 717, 733-34, 740 (1982) [hereinafter cited as Note, *The Press and the Public*]. The counter argument is that "gag" orders merely cut off one source of information, leaving the enterprising reporter free to attempt to obtain the information from other sources. For another view of the distinction, see 1 J. Choper, Y. Kamisar, and L. Tribe, The Supreme Court: Trends and Developments: *Fair Trial v. Free Press: The Gannett Case* 209, 233-35 (1978-79).

In any event, restrictions against the news media can lead to issues of contempt and reporter privilege. Additionally, restrictions on what the press seeks to find out implicate issues of closure and its broader scope of access to information in general. For a limited, but intriguing, discussion among constitutional authorities of the access/prior restraint distinction in light of the *Richmond Newspapers* decision, see 2 J. Choper, Y. Kamisar, and L. Tribe, The Supreme Court: Trends and Developments: *Richmond Newspapers:* A Panel Discussion 169, 184-89 (1979-80).

60. A prior restraint generally is any method of prohibiting publication in advance of the publication. It constitutes one of two methods of "control" of the media; the other is subsequent punishment by, for example, a defamation action or contempt of court citation. For an excellent discussion of the doctrine of prior restraint in a broad first amendment context, without particular free press–fair trial treatment, see Emerson, *The Doctrine of Prior Restraint*, 20 Law & Contemp. Probs. 648 (1955). *See also* Barnett, *supra* note 51.

tutional[61] and it is significant that this heavy burden remained intact in the first free press–fair trial case to present the issue to the Court: *Nebraska Press Assn. v. Stuart.*[62]

In the criminal case underlying *Nebraska Press,* the defendant was charged with the gory and sexually-tinged murders of an entire family in the small Nebraska town of Sutherland.[63] The restraint against the press, as it was finally considered by the Supreme Court, prohibited the publication of any confessions made by the defendant to anyone other than the news media and any other information "strongly implicative" of the defendant as the perpetrator of the murders.[64] Chief Justice Burger's opinion for the Court, fashioning a functional test to consider the propriety of the restriction, found the restriction unable to meet the high burden applicable to a prior restraint.[65]

Nebraska Press, while shutting the door on the prior restraint variety of press restriction, opened it for the next version of press restraint: closing courtroom proceedings.[66] In two decisions just a year apart, *Gannett Co., Inc. v. DePasquale*[67] and *Richmond Newspapers, Inc. v. Virginia,*[68] the Supreme Court addressed the issue. *Gannett* involved the closing of a pre-trial hearing to suppress allegedly involuntary confessions and certain physical evidence in a murder case.[69] At issue in *Richmond* was the closing of an entire trial—the defendant's fourth trial on the same murder charges.[70]

61. New York Times v. United States, 403 U.S. 713 (1971). *See also* Near v. Minnesota, 283 U.S. 697 (1931). Neither of these cases involved criminal proceedings and thus they are not true free press–fair trial cases.

62. 427 U.S. at 571 (Powell, J., concurring).

63. The facts are taken from the opinion of the Court, 427 U.S. at 543-46. See also Schmidt, *Nebraska Press Association: An Expansion of Freedom and Contraction of Theory,* 29 Stan. L. Rev. 431, 455-56 (1977), for a discussion of the facts of the case.

64. The restraint, however, had quite an interesting prior existence. For a description of its evolution, see Schmidt, *supra* note 63, at 455-57.

65. 427 U.S. at 570.

66. The case itself referred to that possibility. *Id.* at 565 n.8, and commentators were quick to forecast the tactic. *See, e.g.,* Schmidt and Volner, *supra* note 58, at 530-31; Schmidt, *supra* note 63, at 470-72; Prettyman, *Nebraska Press Association v. Stuart: Have We Seen the Last of Prior Restraints on the Reporting of Judicial Proceedings,* 20 St. Louis U.L.J. 654, 661 (1976). Prettyman argued the *Nebraska* case for the media.

67. 443 U.S. 368 (1979).

68. 448 U.S. 555 (1980).

69. 443 U.S. at 376-77. The closure motion was based on defense counsel's claim of unabated and adverse publicity, despite the fact that there had been no publicity for 90 days prior to the hearing. *Id.* at 408 (dissenting opinion). When the motion was made, neither the prosecutor nor the Gannett reporter present objected. The reporter did object the next day, but the challenge was rejected by the trial judge after a subsequent hearing. 443 U.S. at 375-77.

70. 448 U.S. at 559. A conviction after the first trial was reversed on appeal. The second and third proceedings ended in mistrials. The defense motion to close the trial, like the proceedings in *Gannett,* drew no immediate objection from either the prosecutor or the reporters present. When the reporters did object, the trial judge held a hearing on the objection and closed the hearing as well. The trial itself ended the next day when the judge declared the defendant not guilty after granting a defense motion to strike the prosecution's evidence. *Id.* at 561-62.

Gannett's 5–4 decision upheld the closing of the pre-trial suppression hearing. The Court found that the sixth amendment is personal to the defendant and confers no right of access upon the public.[71] In *Richmond,* a majority used the first amendment to find that right of access applicable to trials and reversed the closing of the trial.[72]

1. Procedure and Proof

None of the United States Supreme Court's free press–fair trial decisions explicity have held that notice and an opportunity to be heard must be extended to the media in cases involving press restrictions. It is, however, at least implicit in *Richmond,* where the Court held that "[a]bsent an overriding interest *articulated in findings,* the trial of a criminal case must be open to the public."[73] Although the trial court in *Richmond* did hold a hearing on whether to close the trial, that hearing was closed to the media. The trial judge's failure to articulate any findings was clearly significant in the Court's decision to overturn the closing.[74] In contrast, the hearing held in *Gannett* and the findings made by the trial judge were an equally significant factor in the Court's decision upholding that closing.[75]

71. 443 U.S. at 394. The pre-trial suppression hearing, at issue in *Gannett,* can be one of the more crucial steps in the criminal proceeding because it involves potentially damaging information which, by virtue of an open hearing, could reach the ears of potential jurors even if it were found to be inadmissible. The other side of that argument, however, is the fact that most criminal cases end before trial. Such was the focus of some of the debate in *Gannett* itself. *Compare* 443 U.S. at 379 (majority opinion) *with* 443 U.S. at 435-36 (Blackmun, J., concurring in part and dissenting in part).

Somewhat apart from its no-public-access holding, *Gannett* generated considerable consternation because of the seemingly interchangeable use of "pre-trial" and "trial" in Justice Stewart's majority opinion. *See, e.g.,* 443 U.S. at 370, 391. That issue was laid to rest in part by *Richmond,* but the debate over the closure of pre-trial proceedings rages on, due to the variety of pre-trial proceedings in the criminal process. Most recently, the United States Supreme Court has extended *Richmond's* presumption of openness to the voir dire. In Press Enterprise Co. v. Superior Court, 52 U.S.L.W. 4113 (Jan. 18, 1984), the Court held that closed proceedings, although not absolutely prohibited, must be rare and that the presumption of openness can be overcome "only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Id.* at 4115-16.

72. 448 U.S. at 580-81. *Gannett,* having found no right of access in the sixth amendment, did not decide the first amendment question. 443 U.S. at 392. *Richmond,* despite its near unanimity of conclusion—only one justice dissented—did not command a majority. Indeed, there were six concurrences. *Gannett* was slightly less fractured, with two separate concurrences and one dissent.

Gannett had the predictable result of sparking a flurry of closed proceedings, abated somewhat by the later *Richmond* decision. One survey documented 400 efforts to close criminal proceedings between the 1979 *Gannett* decision and May 30, 1981. *See Court Watch Summary,* The News Media and the Law, June-July 1981, at 53. The summary is somewhat difficult to interpret, but of those 400 proceedings, 319 involved pre-trial proceedings and 81 involved trials or post-trial matters. More than half of the efforts to close proceedings were successful.

Closure proceedings, like other forms of media gags, have had their quirks—some involving closing the doors to the press but not the public and some shutting out the public but not the press. Note, *The Press and the Public, supra* note 59, at 737.

73. 448 U.S. at 581 (footnote omitted, emphasis added).

74. *Id.* at 580-81.

75. *See* 443 U.S. at 376-77, 393-94.

Although granting rights to notice and an opportunity to be heard no longer seem particularly novel, some courts have limited the right to object to restrictions to those present in the courtroom at the time of the request.[76] *Kaufman* refuses to impose that limitation, although it does not detail the procedures for notice. By its refusal, the New Mexico Supreme Court has extended the media's right of access to criminal proceedings beyond the basics of *Richmond*.[77]

Gannett and *Richmond* also enmeshed the United States Supreme Court in the issue of the proper burden of proof for those seeking to restrict the media. When measured against these decisions, it is clear the New Mexico Supreme Court charted a hazardous course in attempting to establish burdens applicable to *all* varieties of media restrictions.[78]

Gannett is as devoid of an explicit statement on the proper burden of proof to support a restriction against the press as it was on the notice issue. The standard, however, is again implicit in the Supreme Court's approval of the trial court's action, which required the defendant to show a "reasonable probability" of prejudice to his fair trial rights without the restriction.[79] In contrast, the *Gannett* dissenters would have required a showing that the restriction was "strictly and inescapably necessary," bolstered with certain functional considerations.[80] To further muddle the

76. *Compare, e.g.*, United States v. Schiavo, 504 F.2d 1, 7-8 (3d Cir. 1974) (oral order restricting news media procedurally deficient; court should have held hearing and provided notice); Des Moines Register and Tribune v. Osmundson, 248 N.W.2d 493, 497 (Iowa 1976) (notice given to media plaintiffs and other local news media); State *ex rel.* Beacon Journal Publishing Co. v. Kainrad, 46 Ohio St. 2d 349, 348 N.E.2d 695 (1976) (obligatory for court to hold hearing and make findings before issuing order not to publish), *with* Sacramento Bee v. United States Dist. Court, 656 F.2d 477, 482 (9th Cir. 1981) (limiting opportunity to object to those present when the restriction is sought); United States v. Chagra, 701 F.2d 354, 363-64 (5th Cir. 1983) (same limitation in context of bail reduction hearing); Seattle Times v. Ishikawa, 97 Wash. 2d 30, 34, 640 P.2d 716, 720 (1982) (same limitation in context of pre-trial hearing). For additional discussion of the *Ishikawa* case, see *supra* text accompanying notes 48-50. For a general discussion of due process for reporters, see Landau, *supra* note 51, at 58-60.

77. The facts of *Kaufman* did not present the court with the pre-trial/trial distinction marking *Richmond* and *Gannett* and the court offered no comment on the distinction. The broadness of *Kaufman* and the court's wording that its protections apply when restrictions are sought in a criminal *case* (emphasis intended), however, give some basis for the position that it is applicable to all stages of criminal proceedings as well as to all types of requested restrictions.

78. As one comment, looking at *Richmond* and *Gannett* generally, stated, "How the Court could have spoken with less clarity and given less direction to lower courts than it did in the twelve opinions in these two cases is difficult to imagine." Schmidt and Schmidt, *Some Observations on the Swinging Courthouse Doors of Gannett and Richmond Newspapers*, 59 Den. L.J. 721, 721 (1982). The article gives an extensive analysis of the two cases and some of the free press–fair trial issues they raise. *See also* Lewis, *A Public Right to Know About Public Institutions: The First Amendment as Sword*, 1980 Sup. Ct. Rev. 1. For another discussion of the two cases in a more general context of access to information, see 2 J. Choper, Y. Kamisar, and L. Tribe, The Supreme Court: Trends and Developments: *Right of Access to Information Generated or Controlled by the Government: Richmond Newspapers Examined and Gannett Revisited* 145 (1979-80). For another interesting and wide-ranging discussion, see Choper, Kamisar and Tribe, *supra* note 59, at 169.

79. *See* 443 U.S. at 376.

80. *Id.* at 440-42 (Blackmun, J., dissenting).

issue, the concurring opinion of Justice Powell advocated a showing of mere likelihood of jeopardy to a fair trial, although it was again coupled with some functional requirements.[81]

Richmond was even more striking in its lack of explicit statement on burden of proof. The opinion for the Court merely referred to "overriding interests"[82] that could suffice to support a closed trial without identifying those interests. *Nebraska Press*, the most direct link in the chain of Supreme Court decisions to *Kaufman*, also was largely silent on the burden of proof applicable to prior restraint[83] and is more important for its mandate of functional considerations.[84]

The significance of the burden of proof can be measured in part by its purpose. Burdens of proof are a means to "allocate the risk of error between litigants and to indicate the relative importance attached to the ultimate decisions."[85] In civil cases, where the dispute usually concerns money and where society has "a minimal concern with the outcome," the plaintiff's burden is a mere preponderance of the evidence and litigants share the risk of an erroneous decision almost equally.[86] In contrast, in criminal cases, the "transcending value" of the defendant's interests call for the prosecution to prove guilt beyond reasonable doubt.[87] Somewhere in the middle is an intermediate standard calling for proof by what can be considered a clear and convincing nature.[88]

Where the *Kaufman* burdens fall in that recognized hierarchy is not answered. Unless the "substantial likelihood" required to support restrictions based on a claim of unfair trial falls somewhere in the intermediate range, the court simply has valued the media's first amendment interests lower than the rights of a criminal defendant.

2. Functional Considerations

Functionally, however, *Kaufman* takes a measurable step toward affording all press restrictions the protection of prior restraint. *Nebraska*

81. 443 U.S. at 400-01 (Powell, J., concurring). Powell based his opinion not on the sixth amendment, as did the majority, but on the first amendment. *Id.* at 397. Rejecting the "strict standard" of *Nebraska Press*, Justice Powell would have required the trial court to consider whether alternatives were reasonably available and no broader than necessary to achieve the goal. He also would have imposed a right to be heard, but would have limited that right to those present when the order was sought. *Id.* at 400-01.

82. 448 U.S. at 581.

83. The *Nebraska Press* decision did purport to use a formulation of the largely discredited "clear and present danger" test. 427 U.S. at 563. *See generally* Barnett, *supra* note 51, at 540-42; Schmidt, *supra* note 63, at 458-66. *See also* Cole and Spak, *Defense Counsel and the First Amendment: "A Time to Keep Silence and a Time to Speak,"* 6 St. Mary's L.J. 347, 355 (1974).

84. The functional requirements are identified and discussed *infra* notes 89-90 and accompanying text.

85. Addington v. Texas, 441 U.S. 418, 423 (1979). *See also In re* Winship, 397 U.S. 358 (1970).

86. 441 U.S. at 423.

87. 397 U.S. at 364.

88. *See* 441 U.S. at 424.

Press set forth a three-part test for judging the propriety of a prior restraint based on a defendant's fair trial claim. The *Nebraska* test requires consideration of 1) the nature and extent of the publicity, 2) whether other alternatives would be likely to mitigate the effect, and 3) the effectiveness of the proposed restraining order in preventing the threatened danger.[89] It is a test which can be read, and has been read, as making it almost impossible for any prior restraint to be valid.[90] And it is the essence of this test—the consideration of alternatives and effectiveness—that the New Mexico court adopted to instruct trial courts faced with questions of press restrictions. Compared substantively, there is little difference between the requirements of *Nebraska Press* and *Kaufman*. Both decisions require consideration of the effectiveness of the requested restriction. *Kaufman* requires consideration of all reasonable alternatives, and only the least restrictive alternative is permissible. *Nebraska Press* collapses these considerations into a single inquiry of whether other alternatives would be effective. *Nebraska Press* also requires consideration of the nature and extent of the offending press activity, a consideration underlying *Kaufman* as a basic starting point.

The strength of the *Nebraska Press–Kaufman* functional requirements can be illustrated by comparison with the strict test articulated by the *Gannett* dissenters. As cast by those Justices, a defendant should support a requested restriction against the press with a showing that the restriction is "strictly and inescapably necessary" to ensure a fair trial.[91] A defendant could meet that burden by showing a substantial probability that 1) there will be irreparable damage to a fair trial because of the *nature and extent of the publicity,* 2) *alternatives* would not protect his rights, and 3) the restriction would be *effective*.[92] Thus, even where the ultimate showing of need for a press restriction is as high as the "strictly and inescapably necessary" standard set by the *Gannett* dissent, the functional considerations virtually mirror those of *Nebraska Press* and *Kaufman*.

Gannett and *Richmond* both involved closing courtroom proceedings.[93] The Supreme Court, with some recognition that the *Nebraska Press* func-

89. 427 U.S. at 562.

90. *See, e.g.*, Goodale, *The Press Ungagged: The Practical Effect of Gag Order Litigation of Nebraska Press Association v. Stuart*, 29 Stan. L. Rev. 497 (1977).

91. 443 U.S. at 440.

92. *Id.* at 441-42 (emphasis added).

93. The Supreme Court has dealt with one further closure case, Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982), decided after *Kaufman*. In *Globe*, the court struck down a state statute making closure mandatory in certain sex crime cases involving minors. For a discussion of the case, see 4 J. Choper, Y. Kamisar, and L. Tribe, The Supreme Court: Trends and Developments: *Globe Newspaper: The Court Balks at Mandatory Closure Rules—Even for Specific Testimony* 121 (1981-82).

Globe is particularly interesting in a broader access-to-information context because the reasoning of the opinion by Justice Brennan focuses on what Brennan had termed the "structural" role of the

tional requirements would render closure as impossible as prior restraint,[94] drew a sharp line between the two types of restrictions.[95] In striking contrast, the *Kaufman* court reached out to find an element of closure in the facts and equated closure with prior restraint.[96] The court's action supports an expansive functional reading of *Kaufman* that folds closure, as well as other forms of press restrictions, in the protective blanket of the doctrine against prior restraint.

Reading *Kaufman* in that expansive manner can be bewildering when considered against the limitless variety of potential restrictions against the news media, limits subject only to the imaginations of defense attorneys. The strength of *Kaufman's* functional test, however, can be illustrated with the other restrictions at issue in the case. For example, a ban on photographs "within the confines of the Judicial Complex" would fail the effectiveness prong of the test. Not only would photographs taken outside of the "confines of the Judicial Complex" be permissible, but any photographs of the defendant that news organizations might have in their files would be unrestricted. Moreover, if a judicial order sought to reach into such internal files, the restriction easily would be transformed into a prior restraint. Similarly, an order requiring the preservation of reporters' articles, tapes, and transcripts would fail to be effective for its intent—evidence of prejudicial publicity for subsequent proceedings—unless it were cemented with an order guarantying the defendant access to the materials. It could not be considered the least restrictive means available because the defendant himself could shoulder the task of preserving some of the items.

D. Inconsistencies in Kaufman

An expansive reading of *Kaufman* is undermined somewhat by portions of the opinion which emphasize the issue involving photographs of the

news media in our society, rather than the historical nature of the proceedings—the basis of support used by Chief Justice Burger in *Richmond*. Brennan articulated his theory in his *Richmond* concurrence, 448 U.S. at 586-98, and talked about it in a more general way in a 1979 speech. *See* Address by William J. Brennan, Jr., 32 Rutgers L. Rev. 173 (1979). *See also* Chief Justice Burger's *Globe* dissent, 457 U.S. at 612. For a critical analysis of the Brennan theory, in a general access context, see BeVier, *Like Mackerel in the Moonlight: Some Reflections on Richmond Newspapers*, 10 Hofstra L. Rev. 311 (1982).

94. Justice Powell, in his *Gannett* concurrence, found it "difficult to imagine a case where closure could be ordered appropriately" under the dissent's standards. 443 U.S. at 399 (Powell, J., concurring).

95. 443 U.S. at 393 n. 25, 399-400 (Powell, J., concurring), 441-42 (Blackmun, J., dissenting). *Nebraska Press*, the very case which held the burdens of prior restraint applicable in the free press–fair trial context, also distinguished closure. *See supra* note 66.

96. *See* 98 N.M. at 266, 648 P.2d at 305. This treatment by the court is consistent with the position that while definitional, and perhaps procedural, difficulties abound, the effect of a prior restraint and other restrictions—including, at a minimum, "gag" orders and the closing of court proceedings—is identical.

defendant. For example, articulating its standard for media restrictions grounded on a defendant's fair trial claim, the court stated that the evidence must show a substantial likelihood that the *"presence of cameras"*[97] would deny the defendant a fair trial. Although the timeliness of the "cameras in the courtroom" debate makes any focus on that issue understandable,[98] it is unlikely the court was limiting the protections extended to the press in its broad holdings only to instances where the defendant seeks a restriction on camera coverage.

Yet, the court's reference to the "presence of cameras" is not the only indication of particular attention to that subject. After specifying the functional tests trial courts must apply when considering press restrictions, the court added a specific provision aimed at television coverage and its effect on individual participants in the trial.[99] Acknowledging the genesis of this provision in two Florida cases that dealt specifically with television coverage,[100] the court still failed to explain its adoption of the provision within the broad context of *Kaufman*.

IV. CONCLUSION

Kaufman should not be considered merely a "cameras in the courtroom" case. The New Mexico Supreme Court clearly set out to provide guidelines for the difficult confrontation of constitutional right versus constitutional right in free press–fair trial cases.[101] By giving the news media rights to notice and a hearing when restrictions are sought, the court defined the right of access to criminal proceedings to an extent at least as expansive, and perhaps more so, than the United States Supreme Court in *Richmond Newspapers, Inc. v. Virginia*. The broadness of *Kaufman* in attempting to cover all potential restrictions against the media, while perhaps questionable as a method of judicial decision-making, indicates the court's awareness of the breadth of the media's first amendment rights and the considered treatment demanded of any infringement. The course of subsequent cases will define the details of the new rights extended to the media. Further, the vagaries of the court's approach to the burden of proof leaves ample room for trial courts to balance the

97. 98 N.M. at 265, 648 P.2d at 304 (emphasis added).

98. *See supra* text accompanying notes 9, 21.

99. *See* 98 N.M. at 265, 648 P.2d at 304.

100. The two cases are *In re* Post-Newsweek Stations, Florida, Inc., 370 So. 2d 764 (Fla. 1979) and State v. Palm Beach Newspapers Inc., 395 So. 2d 544 (Fla. 1981).

101. 98 N.M. at 265, 648 P.2d at 304. By purporting to balance the competing constitutional rights, *id.* at 263-64, 648 P.2d at 302-03, the New Mexico court was in line with the majority view on how best to resolve free press–fair trial issues. One view, that there need be no balancing because both rights can be accommodated without damage to the other—even at the extreme of dismissing criminal charges if a fair trial cannot be conducted without infringing on the media's first amendment rights—has been advanced but never accepted.

sometimes competing interests of the news media and a crimimal defendant. By specifying the functional considerations required before a restriction can be imposed, however, the New Mexico court has firmly embedded the rights of the media within the constitutional balance.

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