the Court unanimously set aside a state court injunction barring the publication of information that might prejudice the subsequent trial of a criminal defendant.[442] Though agreed as to the result, the Justices were divided as to whether "gag orders" were ever permissible and if so what the standards for imposing them were. The Court used the Learned Hand formulation of the "clear and present danger" test[443] and considered as factors in any decision on the imposition of a restraint upon press reporters "(a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger."[444] Though the Court found that one seeking a restraining order must meet "the heavy burden of demonstrating, in advance of trial, that without a prior restraint a fair trial would be denied," it refused to "rule out the possibility of showing the kind of threat to fair trial rights that would possess the requisite degree of certainty to justify restraint."[445] Justice Brennan's concurring opinion flatly took the position that such restraining orders were never permissible. Commentary and reporting on the criminal justice system is at the core of First Amendment values, he would have held, and secrecy can do so much harm "that there can be no prohibition on the publication by the press of any information pertaining to pending judicial proceedings or the operation of the criminal justice system, no matter how shabby the means by which the information is obtained."[446] The only circumstance in which prior restraint of protected speech might be permissible is when publication would cause "virtually certain, direct, and imme-

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

[443] 427 U.S. at 562, quoting Dennis v. United States, 183 F.2d 201, 212 (2d Cir. 1950), *aff'd*, 341 U.S. 494, 510 (1951).

[444] Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 562 (1976) (opinion of Chief Justice Burger, concurred in by Justices Blackmun and Rehnquist, and, also writing brief concurrences, Justices White and Powell). Applying the tests, the Chief Justice agreed that (a) there was intense and pervasive pretrial publicity and more could be expected, but that (b) the lower courts had made little effort to assess the prospects of other methods of preventing or mitigating the effects of such publicity and that (c) in any event the restraining order was unlikely to have the desired effect of protecting the defendant's rights. Id. at 562–67.

[445] 427 U.S. at 569–70. The Court distinguished between reporting on judicial proceedings held in public and reporting of information gained from other sources, but found that a heavy burden must be met to secure a prior restraint on either. Id. at 570. *See also* Oklahoma Pub. Co. v. District Court, 430 U.S. 308 (1977) (setting aside injunction restraining news media from publishing name of juvenile involved in pending proceeding when name has been learned at open detention hearing that could have been closed but was not); Smith v. Daily Mail Pub. Co., 443 U.S. 97 (1979).

[446] 427 U.S. at 572, 588. Justices Stewart and Marshall joined this opinion and Justice Stevens noted his general agreement except that he reserved decision in particularly egregious situations, even though stating that he might well agree with