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DISCOVERY AND THE FIRST AMENDMENT

In *Sheppard v. Maxwell*,¹ the United States Supreme Court imposed a duty upon trial courts to protect a defendant's constitutional interest in a trial untainted by prejudicial publicity.² The Court reversed a criminal conviction in *Sheppard* because massive, pervasive, and prejudicial publicity had prevented the defendant from receiving a fair trial. Several procedures suggested by the Court could prevent or mitigate such prejudicial publicity; these methods include a change of venue, postponement, searching questioning of prospective jurors, emphatic and clear instructions on the sworn duty of each juror, sequestration of jurors, and control of sources of information.³ As a result of *Sheppard*, judicial activism to ensure a fair trial has increased. Trial courts were compelled, not merely encouraged, to impose restrictions on the first amendment interests of parties, counsel, other officers of the court, and ultimately, on the press.⁴ Considering this escalation of the existing fair trial-first amendment controversy,⁵ the Supreme Court squarely addressed the free press impact of judicial restraining orders in *Nebraska Press Association v. Stuart*.⁶ In reaffirming the importance of traditional first amendment protection the Court severely limited those occasions when a restraint directed at the press could be imposed.⁷ *Nebraska Press*, however, failed to address the issue of the validity of restraints imposed upon the parties and their counsel that proscribe extrajudicial statements whose publication could be prejudicial to a fair trial.

In *In re Halkin*,⁸ the United States Court of Appeals for the District of Columbia considered this issue in the specific context of a

1. 384 U.S. 333 (1966).

2. "The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences." *Id.* at 363.

3. *Id.* at 353, 357-62.

4. TWENTIETH CENTURY FUND, TASK FORCE ON JUSTICE, PUBLICITY, AND THE FIRST AMENDMENT: RIGHTS IN CONFLICT 71-72 (1976).

5. *See id.* at 47.

6. 427 U.S. 539 (1976).

7. The Court in *Nebraska Press* articulated a three-part, ad hoc test to be applied before a restraint on the press could be justified. Such a restraint will succeed only if: (1) pretrial publicity is likely to be so pervasive that it probably will have a prejudicial effect; (2) none of the alternative measures recommended in *Sheppard* will prevent prejudice; and (3) the restraint probably will be effective. 427 U.S. at 562-67.

8. 598 F.2d 176 (D.C. Cir. 1979).

protective order⁹ entered by the district court prohibiting public disclosure of information obtained through discovery.¹⁰ The principal issues in *Halkin* were the precise nature of first amendment interests in material obtained through discovery and the circumstances that justify a protective order restraining these interests for the protection of a fair trial. The court in *Halkin* concluded that strong first amendment interests attach to material obtained through discovery. Given the implication of first amendment interests, the court predictably applied the clear precedent of *Nebraska Press*, which compelled limitations on protective orders.

THE NATURE OF THE INTEREST: QUALITY NOT REDUCED

The *Halkin* controversy arose amidst allegations that certain government agencies, principally the Central Intelligence Agency and the National Security Agency, had violated the statutory and constitutional rights of United States citizens opposed to the Vietnam War by conducting unlawful surveillance programs.¹¹ Pursuant to rule 34 of the Federal Rules of Civil Procedure, the plaintiffs sought and obtained several documents relating to Operation CHAOS, the code name for the CIA's surveillance of domestic antiwar activities.¹² The material had been purged of all matters "which the Government asserted would (1) impair the United States' diplomatic and foreign relations . . . , or (2) reveal . . . intelligence . . . , or (3) implicate the privacy interests of third parties."¹³ Although these domestic surveillance programs already had been the subject of broad coverage by the media,¹⁴ the plaintiffs' counsel believed that the documents contained newsworthy information not reported previously and announced his intention to release several of the documents.¹⁵ Defendants moved for a protective order, arguing that public disclosure would be "prejudicial to the defendants' right to adjudication of the issues in this civil action in an uncolored

9. FED. R. CIV. P. 26(c).

10. 598 F.2d at 182 n.8.

11. *Id.* at 179-80. Certain common carriers also were implicated.

12. *Id.* at 180.

13. *Id.*

14. The publicity was described as an "onslaught" and "massive and concentrated." *Id.* at 200-01 (Wilkey, J., dissenting).

15. *Id.* at 180-81.

and unbiased climate, including a fair trial.”¹⁶ The district court entered an order restraining the plaintiffs and their counsel from disclosing any information obtained through discovery.¹⁷ Without identifying any findings of fact, the court concluded that disclosures would be “contrary to the rules applicable to the conduct of litigation before [that] Court and inconsistent with the obligations of parties and their counsel to further the just determination of matters within its jurisdiction.”¹⁸ Considering this to be unduly restrictive of valuable public information, plaintiffs then petitioned the Court of Appeals for the District of Columbia for a writ of mandamus vacating the district court’s order.¹⁹

The court of appeals was confronted with the threshold issue of whether first amendment rights attach to material obtained through discovery. If no first amendment interests were implicated, or if only reduced first amendment interests attached to the material, the plaintiffs faced an overwhelming burden in their action for mandamus. The court of appeals concluded, however, that the discovery process implied neither a waiver nor a reduction of first amendment rights, that the source from which material was obtained would not reduce first amendment interests, and that first amendment rights in material obtained through discovery could be neither ignored nor disparaged in determining whether a protective order would issue.

Use of Discovery and Implied Waiver of First Amendment Rights

Initially, the court concluded that parties have no first amendment right of access to information generally unavailable to the

16. *Id.* at 181-82. The defendants’ motion also relied on Local Rule 1-27(d). This rule provides in part:

Conduct of Attorneys in Civil Cases. A lawyer shall not during [his] investigation or litigation make or participate in making an extrajudicial statement, other than a quotation from or reference to public records, which a reasonable person would expect to be disseminated by means of a public communication if there is a reasonable likelihood that such dissemination will interfere with a fair trial.

Id. at 181 n.5.

17. *Id.* at 182.

18. *Id.*

19. Plaintiffs sought a “writ of mandamus and/or prohibition.” *Id.* at 179. The court considered the grounds for issuing the two writs to be indistinguishable. *Id.* at 179 n.1.

public.²⁰ The defendants had argued that because access was not a first amendment right but was dependent on the court's processes, any first amendment interest in the material was waived implicitly through use of the discovery process.²¹ Prior cases could be interpreted to support such a theory of implied waiver. In *International Products Corp. v. Koons*,²² for example, the Court of Appeals for the Second Circuit considered an appeal²³ from a district court order sealing a deposition. The order enjoined the defendants and their counsel from disclosing to third parties any of the testimony, documents, or writings contained in the depositions submitted to the court concerning questionable payments to foreign officials.²⁴ Although the Second Circuit held that the order was invalid as overbroad,²⁵ the decision stated:

The portion of the order which seals the deposition and limits defendants and others in their use of information obtained therefrom was plainly authorized by F.R. Civ. Proc., 30(b), and we entertain no doubt as to the constitutionality of a rule allowing a federal court to forbid the publicizing, in advance of trial, of information obtained by one party from another by use of the court's processes.²⁶

The court, however, indicated that even in the absence of such a

20. *Id.* at 190, citing *Pell v. Procunier*, 417 U.S. 187, 834 (1974) and *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965). Chief Justice Warren expressed this point in a simple example in *Zemel*:

There are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. For example, the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right. *The right to speak and publish does not carry with it the unrestrained right to gather information.*

381 U.S. at 16-17 (emphasis supplied).

21. *Cf. Gumbel v. Pitkin*, 124 U.S. 131, 144 (1888) (court has inherent power over its own processes to prevent abuses).

22. 325 F.2d 403 (2d Cir. 1963).

23. The court ultimately treated the appeal as a petition for mandamus. Ordinarily, an order entered under rule 26(c) is not appealable. In limited circumstances, however, an appellate court may consider an appeal from a nonappealable order as a petition for mandamus. *Id.* at 407.

24. *Id.* at 404 n.1.

25. The Second Circuit held the order violative of first amendment rights because it restricted disclosure of information obtained independent of the discovery process. *Id.* at 407-08.

26. *Id.* at 407.

rule, such power existed in the "inherent equitable powers of courts of law over their own process, to prevent abuses, oppression, and injustices."²⁷

*Rodgers v United States Steel Corp.*²⁸ expressly interpreted *Koons* to support a theory of implied waiver of first amendment rights through the use of discovery. In *Rodgers*, the validity of a protective order sealing depositions was again at issue and again was held constitutionally infirm. The court in *Rodgers*, however, implicitly supported a theory of waiver.

[W]e emphasize that we need not and do not consider here whether a protective order which prohibits parties or their counsel from disclosing information or matters obtained solely as a result of the discovery process is ever subject to the First Amendment's prohibitions. It may well be, for instance, that the parties and counsel, by taking advantage of or a part in the discovery processes, *implicitly waive* their First Amendment rights freely to disclose or disseminate the information obtained through those processes.²⁹

The District of Columbia Circuit emphatically and correctly rejected the *Rodgers* analysis in *Halkin*, stating: "Waivers of First Amendment rights are to be inferred only in 'clear and compelling' circumstances."³⁰ Certainly nothing in the Federal Rules supports such an implied waiver of first amendment rights. To the contrary, the presumption arises that discovery imposes no inherent limits on the use of material thereby obtained.³¹ From this analysis the court

27. *Id.* at 407-08, quoting *Gumbel v. Pitkin*, 124 U.S. 131, 144 (1888).

28. 536 F.2d 1001 (3d Cir. 1976).

29. *Id.* at 1006 (emphasis supplied).

30. 598 F.2d at 189, quoting *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 145 (1967) (plurality opinion).

31. 598 F.2d at 189. The statement continues, "absent a protective order entered 'for good cause shown.'" *Id.* What constitutes good cause is the fundamental issue in *Halkin*. The court further agreed with the general contention that if material is obtained through the discovery process, one may use that material in any way that the law permits. *Id.* at 188, citing *Leonia Amusement Corp. v. Loew's, Inc.*, 18 F.R.D. 503, 508 (S.D.N.Y. 1955).

One leading commentator on the Federal Rules has noted that discovery proceedings generally are public proceedings. 4 MOORE'S FEDERAL PRACTICE ¶ 26.75, at 543 n.3 (Supp. 1978). The characterization of discovery proceedings as public proceedings assumes added significance given the Supreme Court's decision in *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977) (per curiam), which relied on a principle clearly set forth in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). These cases dictate that sanctions may not be imposed against the publication of open court proceedings. The Court in *Sheppard* acknowledged this

in *Halkin* found nothing inherent in the system of discovery to support a theory of implied waiver. A better interpretation of the *Koons* statement is that a properly drawn protective order is not necessarily incompatible with the first amendment. This limited construction, accepted by the court in *Halkin*,³² implies no derogation of first amendment interest in material obtained through discovery

Significance of the Source of the Material

To further buttress its conclusion that strong first amendment rights attach to material obtained through discovery, the court in *Halkin* concluded that the first amendment interest in such material must be considered independently of the means by which it is obtained. Accordingly, the court noted: "The inherent value of speech in terms of its capacity for informing the public does not turn on how or where the information was acquired."³³ The first amendment interest in the material at issue in *Halkin* comprised not only the plaintiffs' interest in expression but also the public's right to receive information about the operation of the government; therefore, the obtainment of information through discovery did not affect significantly the value of that information.

That the source of material has no effect on first amendment rights was shown in *First National Bank of Boston v. Bellotti*.³⁴ In *Bellotti*, the Supreme Court addressed the constitutionality of a Massachusetts statute³⁵ that prohibited business corporations from making expenditures for the purpose of influencing referenda on any issue not affecting materially the property, business, or assets of those corporations.³⁶ The Massachusetts Supreme Judicial Court had upheld the statute by distinguishing between the first amend-

rule, stating that "there is nothing that proscribes the press from reporting events that transpire in the courtroom." *Sheppard v. Maxwell*, 384 U.S. 333, 362-63. In *Nebraska Press*, the Supreme Court reaffirmed the conclusion that open court proceedings may not be censored. Upon consideration of a trial court order prohibiting dissemination of information adduced in an open court hearing, the Court relied primarily upon *Cox*, and found such a restriction plainly violative of settled principles. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 568 (1976).

32. 598 F.2d at 189. *Accord*, *Reliance Ins. Co. v. Barron's*, 428 F. Supp. 200, 204 (S.D.N.Y. 1977).

33. 598 F.2d at 187.

34. 435 U.S. 765 (1978).

35. MASS. GEN. LAWS ANN. ch. 55, § 8 (1975).

36. 435 U.S. at 768 n.2.

ment rights of natural persons and the more limited rights of a corporation.³⁷ Reversing the Massachusetts court, the Supreme Court declared that the state decision had focused incorrectly on the extent of first amendment rights of corporations and had erred in failing to note that "[t]he constitution often protects interests broader than those of the party seeking their vindication. The First Amendment, in particular, serves significant societal interests."³⁸ To protect societal interests, then, the issue must be framed not in terms of the source of the information, but rather as whether the information itself warrants first amendment protection.³⁹

The court in *Halkin* further asserted that first amendment protection applies even to dissemination of information obtained by theft or in violation of a security agreement.⁴⁰ To justify the assertion that constitutional rights attach to stolen material, the court relied on *New York Times Co. v. United States*⁴¹ and *Rodgers v. United States Steel Corp.*⁴² Although *New York Times* primarily was concerned with whether alleged national security interests justified an injunction prohibiting publication of material by the press, the opinion illustrates the insignificance of the source of the material in the determination of first amendment rights.⁴³ The dissenters described the papers as "purloined,"⁴⁴ obtained by unauthorized means,⁴⁵ "stolen,"⁴⁶ and "feloniously acquired."⁴⁷ The per curiam

37. *First Nat'l Bank of Boston v. Attorney Gen.*, 371 Mass. 773, 359 N.E.2d 1262 (1977), *rev'd sub nom.*, *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). The Massachusetts court deemed these rights limited because "[t]he liberty referred to in the [fourteenth amendment] is the liberty of natural, not artificial persons." *Id.* at ___, 359 N.E.2d at 1269, quoting *Northwestern Nat'l Life Ins. Co. v. Riggs*, 203 U.S. 243, 255 (1906).

38. 435 U.S. at 776.

39. Three of the dissenters in *Bellotti* contended that first amendment protection applied even though the source of the expression was a corporation. They contended, however, that "corporate expenditures lack the connection with individual self-expression" necessary for first amendment predominance in this situation. 435 U.S. at 807 (White, J., dissenting). In *Halkin*, individual expression was clearly at issue.

40. 598 F.2d 187-88.

41. 403 U.S. 713 (1971). *New York Times* commonly is referred to as the "Pentagon Papers" case.

42. 536 F.2d 1001 (3d Cir. 1976).

43. The Court held that the government had failed to meet the heavy burden of justification for a prior restraint. 403 U.S. at 714. Prior restraints bear a heavy presumption against their validity. See *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

44. 403 U.S. at 749 (Burger, C.J., dissenting).

45. *Id.* at 750 (Burger, C.J., dissenting).

46. *Id.*

opinion, however, did not refer to reduced first amendment rights in the stolen material. Instead, the Court dealt with the issue of whether the asserted countervailing interest would justify a restraint on publication; it thereby implied that the stolen character of the material would have no effect upon first amendment rights.

The Court of Appeals for the Third Circuit in *Rodgers* expressly adopted this reading of *New York Times*. The district court had entered a protective order sealing a deposition and restricting dissemination of other material. Mandamus was requested from the Third Circuit on the ground that the protective order was a prior restraint in violation of first amendment rights. The protective order was defended on the basis that some of the material had been stolen. Relying directly on *New York Times*, the Third Circuit rejected this argument, stating that "[e]ven if, as respondents contend, [the material] were stolen, and we express no opinion on this, . . . that fact would not dictate a different result."⁴⁸

A contrary view of the nature of the first amendment interest in stolen material was suggested by the Court of Appeals for the District of Columbia in *Liberty Lobby, Inc. v. Pearson*.⁴⁹ *Liberty Lobby*, a political action organization, sought an injunction prohibiting dissemination of allegedly stolen information.⁵⁰ The court concluded that an injunction would not issue because no clear showing of an unlawful taking had been made. Implicit in the decision was the intimation that a showing of theft would dictate a different result. Neither the Third Circuit in *Rodgers* nor the Supreme Court in *New York Times*⁵¹ discussed *Liberty Lobby* in reaching their decisions. Perhaps courts should interpret *Liberty Lobby* to suggest that, although the stolen character of the material does not affect whether first amendment rights attach, it may affect the weight of countervailing interests in determining whether the court should

47. *Id.* at 754 (Harlan, J., dissenting). Although the concurring opinions avoided reference to the papers as stolen, Justice Harlan accurately acknowledged "the seemingly uncontested facts that the documents . . . were purloined from the Government's possession and that the newspapers received them with knowledge that they had been feloniously acquired." *Id.*

48. 536 F.2d at 1008 n.16.

49. 390 F.2d 489 (D.C. Cir. 1968).

50. *Liberty Lobby*, a political lobbying organization, sought an injunction against defendants Pearson and Anderson, publishers of the newspaper column *Washington Merry-Go-Round*, prohibiting further publication of information wrongfully removed from *Liberty Lobby's* files by a former employee. *Id.* at 490.

51. Justice Harlan alone suggested comparison. 403 U.S. at 754 (Harlan, J. dissenting).

restrict first amendment rights. The court in *Liberty Lobby* may have foreshadowed this conclusion in stating that "[u]pon a proper showing the wide sweep of the First Amendment might conceivably yield to an invasion of privacy and deprivation of rights of property in private manuscripts."⁵²

Similarly, no derogation of first amendment interests results when material is obtained in violation of an express security agreement. Clear justification for this conclusion was presented in *United States v. Marchetti*.⁵³ Victor Marchetti had been an employee of the CIA for nearly fourteen years and had held various positions, including Executive Assistant to the Deputy Director. Upon commencement of his employment, Marchetti signed a security agreement pledging never to divulge any classified information; he signed a similar agreement when he resigned. Following his resignation, Marchetti published a book and a magazine article, and made appearances on television and radio shows, all of which related somewhat to his former employment. When in 1972 Marchetti wrote another magazine article intended for publication, the United States obtained an injunction prohibiting its publication on the ground that classified material was included in the article. An injunction was granted by the district court and affirmed by the Court of Appeals for the Fourth Circuit. The security agreement notwithstanding, Marchetti's first amendment rights were considered clearly at issue. As the Fourth Circuit succinctly stated, "Marchetti

. . . by signing a secrecy agreement did not surrender his First Amendment right of free speech. The agreement is enforceable only because it is not a violation of those rights."⁵⁴

First amendment rights thus were not reduced even though the material was obtained in violation of a security agreement. The premise that the source of information does not affect first amendment interest, as drawn from these cases and as applied by the court in *Halkin*, is well supported. If first amendment protection attaches to stolen material or material obtained in violation of a security agreement, then first amendment interest doubtless remains in material legitimately obtained through the use of discovery. The plaintiffs' reliance upon the process of discovery in *Halkin* did not

52. 390 F.2d at 491.

53. 466 F.2d 1309 (4th Cir.), cert. denied, 409 U.S. 1063 (1972).

54. 466 F.2d at 1317.

derogate their interest in dissemination of the material or society's interest in the information.

Rejection of the "Bitter-with-the-Sweet" Analysis

The final justification offered by the court in *Halkin* supporting the first amendment interest in discovery material in essence was a rebuttal to the argument offered in the dissent by Judge Wilkey. The dissent postulated a qualitative difference between the first amendment interests in dissemination of discovery materials and other kinds of information⁵⁵ because the access to discovery material depends not on the first amendment but on the statutory scheme provided by the Federal Rules.⁵⁶ Judge Wilkey noted an anomaly in the majority opinion: although discovery may be denied completely without violating first amendment protection, after access has been obtained, any restriction on dissemination would require first amendment consideration.⁵⁷ Moreover, the dissent asserted that a recipient's interest in discovery material is analogous to the property interest of an individual in a government job addressed by the Supreme Court in *Arnett v. Kennedy*.⁵⁸ The dissent in *Halkin* adopted expressly the statement of Justice Rehnquist in his dissent in *Arnett*, that any interest in a benefit conferred by the discretion of the government could be made conditional on any limitation attending that grant.⁵⁹ Consequently, because access to the material at issue in *Halkin* depended on the Federal Rules, the Federal Rules alone governed the limits a court could place on the use of material obtained through discovery.

As persuasive as this argument seems, it was rejected by the majority in *Halkin* as it had been by a majority of the Supreme Court in *Arnett*.⁶⁰ The court relied upon the principle enunciated in *Perry v. Sinderman*⁶¹ that

even though a person has no "right" to a valuable governmental benefit and even though the government may deny him that

55. 598 F.2d at 202-03 (Wilkey, J., dissenting).

56. See note 21 *supra* & accompanying text.

57. 598 F.2d at 208-09 (Wilkey, J., dissenting).

58. 416 U.S. 134 (1974) (plurality opinion).

59. 598 F.2d at 207 (Wilkey, J., dissenting).

60. 416 U.S. at 177-78 (White, J., concurring in part).

61. 408 U.S. 593 (1972).

benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—*especially, his interest in freedom of speech*. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized or inhibited. This would allow the government to “produce a result which [it] could not command directly.” Such interference with constitutional rights is impermissible.⁶²

Consequently, although conditions on discovery may be imposed,⁶³ these conditions may not compel a waiver of first amendment rights or justify a court’s disregard of constitutionally imposed protection. The source of first amendment protection is the Constitution; when applying the Federal Rules, courts must consider the constitutional protection attached to material obtained through discovery.

THE IMPACT OF THE FIRST AMENDMENT AND THE HALKIN TEST

The conclusion that first amendment protection attached to material obtained through discovery proved to be a mere starting point for the more practical question of what circumstances would justify restraints on dissemination. The Supreme Court in *Near v. Minnesota*⁶⁴ declared resolutely that first amendment rights are not absolute and that circumstances might require limitation of those rights. The court in *Halkin* identified this principle in previous cases that had found that a properly drawn protective order could survive constitutional scrutiny.⁶⁵ These cases, however, provided little guidance for determining when the requisite conditions justifying restriction of first amendment rights were present. *Halkin* is significant in its attempt to provide a framework for determining the validity of any particular protective order inhibiting first amendment rights. The court proposed three criteria for evaluation of such restrictions: “the harm posed by dissemination must be substantial and serious; the restraining order must be narrowly drawn and pre-

62. *Id.* at 597 (citations omitted) (emphasis supplied).

63. FED. R. CIV. P. 26(c).

64. 283 U.S. 697 (1931).

65. 598 F.2d at 189. See *Dellums v. Powell*, 561 F.2d 242, 249 (D.C. Cir.), *cert. denied*, 434 U.S. 880 (1977); *International Prod. Corp. v. Koons*, 325 F.2d 403 (2d Cir. 1963); *Reliance Ins. Co. v. Barron's*, 428 F. Supp. 200 (S.D.N.Y. 1977).

cise; and, there must be no alternative means of protecting the public interest which intrudes less directly on expression."⁶⁶ Furthermore, "the trial court must make the necessary findings on each element of the standard."⁶⁷ The strictness of the test is apparent; the court in *Halkin* nevertheless determined that the Constitution demands no less.

Protective Orders as Paradigmatic Prior Restraints

The plaintiffs in *Halkin* sought to characterize the protective order as a prior restraint on expression.⁶⁸ Although *Near v. Minnesota* clearly asserted that prior restraints are not unconstitutional per se, *Near* also indicated that the core of first amendment protection is the limitation of prior restraints to exceptional cases.⁶⁹ First amendment protection is especially sensitive to prior restraints because "prior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights."⁷⁰ Consequently, any prior restraint bears a heavy presumption against its constitutional validity.⁷¹

Protective orders, as regarded by the court in *Halkin*, possess many of the characteristics of prior restraints. Such protective

66. 598 F.2d at 191 (footnotes omitted).

67. *Id.* at 192.

68. The classic system of prior restraint prevents communication rather than relying on a subsequent punishment to deter expression. Prior restraint procedure, however, also includes subsequent punishment in the form of contempt proceedings. See *Near v. Minnesota*, 283 U.S. 697 (1931). See generally Emerson, *The Doctrine of Prior Restraint*, 20 J.L. & CONTEMP. PROB. 648 (1955).

69. 283 U.S. at 713. The Court in *Near* went so far as to state possible exceptions:

No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops. On similar grounds, the primary requirements of decency may be enforced against obscene publications. The security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government.

Id. at 716 (footnotes omitted). Although these examples are not exclusive, the clear import is that exceptions will lie only in exceptional circumstances. The Court consistently has maintained this high level of constitutional protection. For example, in *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976), the Court found the principles of *Near* "universally accepted." *Id.* at 557.

70. 427 U.S. at 559. Prior restraints are the least tolerable because of the immediate and irreversible sanction. If subsequent punishment chills, prior restraint freezes. *Id.*, citing A. BICKEL, *THE MORALITY OF CONSENT* 61 (1975).

71. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). Accord, *Nebraska Press*, 427 U.S. at 558; *Carroll v. Princess Anne*, 393 U.S. 175, 181 (1968).

orders could have an even greater chilling effect on first amendment rights through the operation of the collateral bar rule. This rule states that a court order must be obeyed until set aside and a violation may not be defended on the ground that the order is unconstitutional. A clear example of the operation of the rule is *Walker v. City of Birmingham*.⁷² In *Walker*, city officials sought and obtained an injunction against several individuals and two organizations, enjoining them from, among other things, participating in or encouraging street parades without a permit as required by a city ordinance. No attempt was made to have the injunction set aside; the participants in a civil rights march knowingly violated it. Several of the marchers were fined and sentenced to five days in jail for violation of the injunction,⁷³ and the Supreme Court of Alabama affirmed their convictions.⁷⁴ The United States Supreme Court also affirmed,⁷⁵ adopting the Alabama Supreme Court's ruling that one "may not raise the question of [an order's] unconstitutionality on appeal from a judgment of conviction for contempt of the order."⁷⁶

In a subsequent case, *Shuttlesworth v. City of Birmingham*,⁷⁷ the Supreme Court refused to uphold a conviction based on violation of the ordinance involved in *Walker*, and held that the ordinance was void on its face. The affirmance in *Walker* thus illustrates the harshness of the collateral bar rule; an unconstitutional ordinance may be the basis for a valid court order. The chilling of first amendment rights is apparent. Although the court in *Halkin* declined to determine whether the collateral bar rule could be applied constitutionally to the protective order at issue, the uncertainty of its application is, in itself, a substantial chill.⁷⁸

The inapplicability of the collateral bar rule, however, would not render the characterization of the protective order as a prior restraint inappropriate. At least three other factors increase the probability that a protective order would be a more serious restriction on first amendment interests than would a subsequent criminal

72. 388 U.S. 307 (1967). *But see* *United States v. Dickenson*, 465 F.2d 496 (5th Cir. 1972), *cert. denied*, 414 U.S. 979 (1973).

73. 388 U.S. at 311-12.

74. 279 Ala. 53, 181 So. 2d 493 (1966), *aff'd*, 388 U.S. 307 (1967).

75. 388 U.S. at 321 (1967).

76. 388 U.S. at 319-20, *citing* *Fields v. City of Fairfield*, 273 Ala. 588, 143 So. 2d 177 (1962), *rev'd on other grounds*, 375 U.S. 248 (1963).

77. 394 U.S. 147 (1969).

78. 598 F.2d at 184 n.15.

punishment. Contempt proceedings may not include the same procedural protections as attend criminal prosecutions. The most notable distinction is the right to trial by jury. Other distinctions include the "presumption of innocence, the heavier burden of proof . . . , the stricter rules of evidence, the stronger objection to vagueness, [and] the immeasurably tighter and more technical procedure"⁷⁹ that attend a criminal prosecution. In addition, a judicial order focuses on a particular individual, thereby increasing the possibility of punishment⁸⁰ and the likelihood of self-censorship.⁸¹ Finally, the violation of any order "strikes sharply at the status of the [court], whose prestige thus becomes involved and whose power must be vindicated."⁸²

A protective order entered in accordance with rule 26(c), however, need not present the strict restraint on expression characteristic of a prior restraint. Comparison with the injunction in *Walker*, the nature of which approached more closely the classic prior restraint, is illustrative. Although the order in *Walker* was based on an ordinance of suspect constitutionality,⁸³ the Federal Rules of Civil Procedure have survived at least cursory judicial and legislative scrutiny.⁸⁴ Furthermore, rules such as Local Rule 1-27(d)⁸⁵ which prohibit extrajudicial statements by counsel, have survived constitutional inspection.⁸⁶ Finally, the Supreme Court in *Nebraska Press*

79. Emerson, *supra* note 68, at 657.

80. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 726 n.2 (1978).

81. Kalven, *Foreward: Even When a Nation is at War*, 85 HARV. L. REV. 1, 34 n.156 (1971). Professor Kalven observed this phenomenon in *New York Times*, in which the newspapers indicated apparent willingness to obey an order but were not deterred subsequently by the possibility of criminal sanctions.

82. Emerson, *supra* note 68, at 660.

83. See note 77 *supra* & accompanying text.

84. See 28 U.S.C. § 2072 (1970).

85. See note 16 *supra*.

86. The court in *Halkin* declined to address the constitutionality of this rule. The rule prohibits dissemination if there is a "reasonable likelihood" that dissemination will interfere with a fair trial. See note 16 *supra*. The reasonable likelihood standard may not provide sufficient protection for expression. In *Nebraska Press*, the Supreme Court implied support for the reasonable likelihood test when it reaffirmed the *Sheppard v. Maxwell* mandate that trial courts must act affirmatively to ensure a fair and impartial trial "where there is a reasonable likelihood that prejudicial news prior to a trial will prevent a fair trial." 427 U.S. at 553, quoting *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966) (emphasis supplied). The reasonable likelihood test has been adopted expressly by some courts. See, e.g., *United States v. Tijerina*, 412 F.2d 661, 666 (10th Cir.), cert. denied, 396 U.S. 990 (1969); *Central S.C. Chapter, Soc. of Professional Journalists v. Martin*, 431 F. Supp. 1182, 1188 (D.S.C.), *aff'd with qualification*, 556 F.2d 706 (4th Cir. 1977), cert. denied, 434 U.S. 1022 (1978).

indicated that such a restraint on parties and counsel may be an acceptable, less intrusive means of ensuring a fair trial by preventing prejudicial publicity.⁸⁷

The most significant distinction between the order in *Walker* and a protective order may be the scope of the restriction.⁸⁸ The injunction in *Walker* restrained "agents, members, employees, servants, followers, attorneys, successors, and all other persons in active concert with the respondents from engaging in, sponsoring, inciting or encouraging mass street parades . . . , trespass[ing] . . . , congregating . . . , or performing acts calculated to cause breaches of the peace."⁸⁹ Such an overbroad and vague order is suspect immediately. A protective order under rule 26(c) however, presents an opportunity for avoiding these weaknesses. In the *Halkin* context, the district court could have considered each document individually. Moreover, unlike the ex parte injunction in *Walker*, the determination of the appropriateness of a protective order could be made in an adversary proceeding.⁹⁰

By relying on these distinctions in authority, breadth, and precision, the court in *Halkin* carefully avoided classifying the protective order as a prior restraint and thereby circumvented the "almost insurmountable presumption against the validity of this order."⁹¹

Other courts have concluded that reasonable likelihood provides insufficient protection; only a serious and imminent threat justifies a restraint. *See, e.g., Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 249 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976); *CBS, Inc. v. Young*, 522 F.2d 234, 238 (6th Cir. 1975). The serious and imminent standard has been endorsed by the American Bar Association. ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, FAIR TRIAL AND FREE PRESS 3 (2d ed. Tent. Draft, 1978).

The Court in *Halkin* declined to express a preference for either standard. It did require, however, a "concrete and specific showing of the likelihood of harm" before a protective order could issue. 598 F.2d at 193 n.42. On its face, this test intimates an inclination toward the serious and imminent standard.

87. 427 U.S. at 564.

88. The broad sweep of a restriction has proven a fatal flaw in court orders prohibiting forms of expression. *See, e.g., Nebraska Press*, 427 U.S. 539, 545 (1976) (enjoining the reporting of other facts "strongly implicative" of a defendant); *Rodgers v. United States Steel Corp.*, 536 F.2d 1001, 1006-07 (3d Cir. 1976) (preventing dissemination of all information, independent of source); *CBS, Inc. v. Young*, 522 F.2d 234, 239 (6th Cir. 1975) (restricting all parties concerned with litigation).

89. 388 U.S. at 322 (Appendix A).

90. The Court in *Halkin* criticized ex parte orders and endorsed the participation of both parties in in camera proceedings. 598 F.2d at 194 & n.43. *See Kerr v. United States Dist. Court*, 426 U.S. 394, 405-06 (1976); *Dellums v. Powell*, 561 F.2d 242, 251, *cert. denied*, 434 U.S. 880 (1977).

91. 598 F.2d at 186. *See* note 71 *supra* & accompanying text.

The court's resolution of the prior restraint question, however, was not dispositive of the issue of validity. On the contrary, because the order posed many of the dangers of a prior restraint, close scrutiny still was required to determine if first amendment protection had been violated.⁹²

The Test in Halkin

After the court in *Halkin* determined that substantial first amendment interests attach to material obtained through the discovery process, and that the nature of restraint posed by a rule 26(c) protective order compelled close constitutional scrutiny, little doubt remained as to the ultimate disposition of the protective order at issue. The order was unaccompanied by findings of fact, a fatal flaw under the *Halkin* standard.⁹³ The merit of the decision in *Halkin*, however, lies not in the vacating of the order of the district court,⁹⁴ but in the provision of a contextual framework to assist district courts in shaping future protective orders to meet constitutional standards. The tripartite test offered is clear, reasonable, and flexible; furthermore, the test does not conflict with the Federal Rules, but complements the rules by guiding district courts in the determination of whether the requisite "good cause" for granting a protec-

92. 598 F.2d at 186. The opinion refers to Justice Frankfurter's admonition about prior restraints in *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957). In *Kingsley Books*, the Court upheld a state obscenity statute providing for confiscation of material following a final judgment on the obscenity of the material. In response to the assertion that the statute constituted an unlawful prior restraint, Justice Frankfurter observed, "[t]he phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test." *Id.* at 441. Although the statute may have been a prior restraint, such a characterization was not fatal to the statute's validity per se; rather, an analysis of whether the particular material at issue could be restrained still was required. The court in *Halkin* asserted the converse of this premise; failure to characterize a restriction as a prior restraint does not obviate the need for a pragmatic assessment of the constitutional validity of the restriction.

The Court of Appeals for the Seventh Circuit reached a similar conclusion in *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 248-49 (7th Cir. 1975). In a challenge to the validity of a local court rule prohibiting extrajudicial statements by counsel, the Seventh Circuit relied on the holding in *In re Oliver*, 452 F.2d 111 (7th Cir. 1971), and declared that the rule was not a prior restraint. Close scrutiny nevertheless was required to determine the validity of the rule.

93. See note 67 *supra* & accompanying text.

94. Mandamus, in fact, did not issue; the order was not vacated technically. Instead, the court transmitted a copy of the decision to the district court for appropriate proceedings. The defendants were not precluded from seeking a new protective order in accordance with the principles of *Halkin*. 598 F.2d at 200.

tive order is present.⁹⁵ Substantively, as discussed earlier, the test provides that after a finding that a requested protective order actually would restrain expression, the district court must evaluate any contemplated restriction according to three criteria: the harm posed by dissemination must be substantial and serious; the restraining order must be drawn as narrowly as possible; no alternative means of protecting the countervailing interest that intrude less directly on first amendment rights can be available.⁹⁶ Furthermore, the district court must make specific findings of fact on each element of the test.⁹⁷

As support for its test, the court in *Halkin* relied on a series of landmark Supreme Court cases⁹⁸ which analyzed judicial restrictions on first amendment rights. The surest aid proved to be *Nebraska Press Association v. Stuart*.⁹⁹ *Nebraska Press*, like *Halkin*, focused on the fundamental fair trial-first amendment conflict, but in the context of a sensational murder trial. In 1975, the local police in a small Nebraska town discovered the six members of the Henry Kellie family murdered, with attendant signs of necrophilia. The crime attracted widespread local and national media coverage. Two days following the arrest of Edwin Charles Simants, the suspected murderer, Simants' attorney joined the prosecution in seeking an order from the county court restricting pretrial publicity to ensure the impanelling of an impartial jury. An order was granted prohibiting public dissemination of any testimony or evidence adduced during an open preliminary hearing. The following day, a group of media representatives intervened in the Nebraska district court and requested that the injunction against dissemination be lifted. The district court rejected the request but held the restraint to be effective only until a jury was impanelled.¹⁰⁰ The media group then sought expedited relief from the Supreme Court of Nebraska, and after five days of inaction by that court, sought a stay from Justice Blackmun. Justice Blackmun granted a partial stay,¹⁰¹ thereby further limiting the restriction. Shortly thereafter, the Supreme Court

95. FED. R. CIV. P. 26(c).

96. See note 66 *supra* & accompanying text.

97. *Id.* at 192.

98. *Id.* at 191 nn.33-36.

99. 427 U.S. 539 (1976).

100. *Id.* at 543-44.

101. *Nebraska Press Ass'n v. Stuart*, 423 U.S.: 1327 (Blackmun, Circuit Justice, 1975).

of Nebraska acted and the protective order again was limited. By this time, the order restricted reporting of only three matters: confessions and admissions made by the defendant to law enforcement officials; confessions or admissions made to any third parties except members of the press; and other facts "strongly implicative" of the accused.¹⁰² This order, thrice limited, was struck down by a unanimous United States Supreme Court.

Chief Justice Burger, writing for the Court, categorized the order as a prior restraint¹⁰³ and, relying on *Near v. Minnesota*¹⁰⁴ and *Patterson v. Colorado*,¹⁰⁵ reaffirmed that the principles embodied in the first amendment weigh strongly against prior restraints. Rather than merely stating that the order at issue failed to fall within one of the categories of *Near* which justify the imposition of a prior restraint, the Court turned to the test espoused by Judge Learned Hand in *United States v. Dennis*.¹⁰⁶ A court must determine whether "the gravity of evil," discounted by its probability, justifies such invasion as is necessary to avoid the danger.¹⁰⁷ Clearly, the protective order in *Nebraska Press* was not per se invalid under this standard, but required a contextual analysis to determine if the order could withstand constitutional challenge. In its analysis of the order, the Court set forth a test for determining the validity of an order restraining the press. First, the probable extent of pretrial publicity must be determined, and the trial court must conclude that the publicity will affect adversely jurors or prospective jurors.¹⁰⁸ In addition, less restrictive alternatives for dealing with the problem must be deemed ineffectual. The alternatives suggested were

102. 427 U.S. at 545.

103. *Id.* at 556.

104. 283 U.S. 697 (1931).

105. 205 U.S. 454 (1907).

106. 183 F.2d 201 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951).

107. 183 F.2d at 212. This test was adopted expressly by the Supreme Court in its affirmation. 341 U.S. at 510. Until *Nebraska Press*, however, the *Dennis* test was used to determine the validity of a subsequent-punishment type of restriction. For a brief criticism of this test and its application in the *Nebraska Press* prior restraint context, see Schmidt, *Nebraska Press Association: An Expansion of Freedom and Contraction of Theory*, 29 STAN. L. REV. 431, 458 (1977).

108. 427 U.S. at 562. The Court determined that the trial judge could conclude reasonably, "based on human experience," that pretrial publicity would be pervasive and that the publicity might affect adversely potential jurors. *Id.* at 563. The trial judge determined only that this publicity "could impinge upon the defendant's right to a fair trial;" therefore, his conclusion "was of necessity speculative." *Id.* (emphasis original).

adopted from *Sheppard v. Maxwell* and included change of venue, postponement, searching voir dire, emphatic and clear instructions to the jurors, and possible sequestration of jurors after they have been impanelled.¹⁰⁹ Finally, the court must conclude that the restraint imposed will be effective.¹¹⁰

The test proposed in *Halkin* is similar to the *Nebraska Press* standard. The first requirement in *Halkin* was that the harm posed by dissemination must be substantial and serious. To justify this requirement, the court relied not only on *Nebraska Press* and Judge Hand's test in *Dennis*, but also on a principle drawn from a line of cases beginning with *Bridges v. California*¹¹¹ and reaffirmed by the Supreme Court recently in *Landmark Communications, Inc. v. Virginia*.¹¹² This principle asserts that, before a court can use its contempt power to punish an out-of-court statement, "the substantive evil must be extremely serious and the degree of imminence extremely high."¹¹³ The harm posed must be more than probable; "it must immediately imperil."¹¹⁴ The reaffirmance of this principle in *Landmark Communications* indicates that this requirement is well founded.

The second and third requirements imposed by *Halkin*, that any order be as precise as possible and that less restrictive alternatives by unavailable, seem equally well founded. *Halkin* merely bifur-

109. *Id.* at 563-64, citing *Sheppard v. Maxwell*, 384 U.S. 333, 357-62 (1966). The Court suggested that restraints on parties, counsel, police and witnesses might be an acceptable, less intrusive alternative to direct restraints on the press. *Id.* The court, however, admonished that mere exposure of jurors to pretrial publicity alone does not prejudice presumptively a defendant's right to a fair trial. *Id.* at 565, quoting *Murphy v. Florida*, 421 U.S. 794, 799 (1975).

The speculative nature of the effectiveness of alternatives has led one commentator to assert that alternatives at least must be tried before a restraint on expression could be found valid. See L. TRIBE, *supra* note 80. Another commentator has stated that "the practical impact of the rule announced [in *Nebraska Press*] is to outlaw all prior restraints in the fair trial/free press cases." Goodale, *The Press Ungagged: The Practical Effect on Gag Order Litigation of Nebraska Press Association v. Stuart*, 29 STAN. L. REV. 497, 497-98 (1977). Although this statement is probably overbroad, *Nebraska Press* may be interpreted safely as comporting with the *Near* principle that restraints must be limited to exceptional cases. See note 70 *supra* & accompanying text.

110. 427 U.S. at 565.

111. 314 U.S. 252 (1941). *Accord*, *Wood v. Georgia*, 370 U.S. 375 (1962); *Craig v. Harney*, 331 U.S. 367 (1947); *Pennekamp v. Florida*, 328 U.S. 331 (1946).

112. 435 U.S. 829 (1978).

113. *Bridges v. California*, 314 U.S. at 263.

114. *Craig v. Harney*, 331 U.S. 367, 376 (1946).

cated the less restrictive alternative portion of the *Nebraska Press* standard. The fundamental principle, however, remains clear; when a restriction on first amendment rights is contemplated, the court must ensure that the restriction imposes the least limitation on the rights of expression necessary to protect the countervailing justifying interest. Support for this principle is stated clearly in *Carroll v. Princess Anne*.¹¹⁵ "An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate."¹¹⁶ Thus, the *Halkin* requirement that the possibility of alternatives with less severe impact on first amendment rights must be investigated merely restates the more general principle of *Carroll* that restrictions be as narrow as possible.

Two major distinctions between *Nebraska Press* and *Halkin*, however, appear to weaken the *Halkin* analysis that so strongly relied upon *Nebraska Press*. First, the Court in *Nebraska Press* was influenced by its classification of the protective order as a prior restraint and by the belief that prior restraints are the least tolerable infringement on first amendment rights.¹¹⁷ The order in *Halkin* was not characterized as a prior restraint; consequently, the strong presumption against the order's validity was avoided.¹¹⁸ The second distinction lies in the different targets of the restraint. In *Nebraska Press*, the press was restricted; in *Halkin*, the persons restricted were the parties and their counsel. The Court in *Nebraska Press* strongly implied that restrictions on lawyers, parties, police, and witnesses would be an acceptable, less intrusive alternative to a restraint on the press.¹¹⁹ Three justices, in concurrence, expressly

115. 393 U.S. 175 (1968). *Carroll* concerned an injunction restraining a "white supremacist" group from holding a public rally. The Supreme Court held the injunction invalid because it was obtained by an ex parte proceeding. Absent a showing of unavailability of the adverse party, an adversary proceeding was required to ensure protection of first amendment interests.

116. *Id.* at 183. A similar result was reached by the Court more recently in *Procunier v. Martinez*, 416 U.S. 396 (1974). The Court in *Procunier* considered prison mail censorship regulations. Holding that the regulations were void for vagueness and violative of due process, the Court asserted that any restriction of first amendment rights would be invalid if unnecessarily broad. "[T]he limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved." *Id.* at 413.

117. 427 U.S. at 559.

118. See note 71 *supra* & accompanying text.

119. See 427 U.S. at 553-54: "[n]either prosecutors, counsel for defense, the accused,

endorsed control of statements to the media by counsel and witnesses, stating: "[i]t is very doubtful that the court would not have the power to control release of information by these individuals in appropriate cases and to impose suitable limitations whose transgressions could result in disciplinary proceedings."¹²⁰ Furthermore, the concurring opinion rejected application of the *Nebraska Press* three-part test for determining the validity of an order. Rather, the concurrence asserted that the order involved was a prior restraint, that it failed to fall within the exceptional circumstances requirement of *Near v. Minnesota*,¹²¹ and that no reason justified expanding the *Near* exceptions.¹²² Consequently, the majority's analysis or proposed test was unnecessary. Justice White, in a separate concurrence, approached this position by expressing grave doubt that such a prior restraint on the press to protect a fair trial ever could be justified.¹²³ Thus, four members of the Court expressed disagreement with the ad hoc balancing test in *Nebraska Press*.

The above considerations need not weigh against the constitutional standard and its application proposed in *Halkin*. Although *Halkin* involves parties and counsel rather than the press, the proposed test does not conflict with *Nebraska Press*; to the contrary, the tests are complementary. Although the Supreme Court has recognized the special role of the press in informing and educating the public,¹²⁴ "the press does not have a monopoly on either the First Amendment or the ability to enlighten."¹²⁵ Chief Justice Burger,

witnesses, court staff nor enforcement officers should be permitted to frustrate [the administration of justice]." *Id.*, quoting *Sheppard v. Maxwell*, 384 U.S. at 363. Although the Court observed that this precise matter was not at issue, it noted reports of organizations that lend support to this type of restraint. 427 U.S. at 564 n.8.

120. *Id.* at 601 n.27 (Brennan, J., concurring) (citations omitted).

121. See note 69 *supra*.

122. In essence, Justice Brennan interpreted the three exceptional circumstances proposed in *Near* as only two separate categories: (1) speech not encompassed by the protection of the first amendment, and (2) military emergencies. 427 U.S. at 590-91. The expression involved in *Nebraska Press*, reporting on the judicial system, fit into neither of these categories. Justice Brennan, joined by Justices Stewart and Marshall, emphatically declined to create a new category. *Id.* at 594.

123. *Id.* at 570-71 (White, J., concurring).

124. *Mills v. Alabama*, 384 U.S. 214, 219 (1966). See *Saxbe v. Washington Post Co.*, 417 U.S. 843, 863-64 (1974) (Powell, J., dissenting).

125. *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 782 (1978). See *Buckley v. Valeo*, 424 U.S. 1, 51 n.56 (1976) (*per curiam*); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 389-90 (1969); *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964); *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

concurring in *First National Bank of Boston v. Bellotti*, clearly rejected any contention that the first amendment conferred on the press a special protection not also guaranteed to other persons and categories.¹²⁶ Moreover, *Halkin* does not conflict with the *Nebraska Press* proposition that restraints on parties, counsel, and witnesses would be a preferable, less intrusive alternative to a restraint imposed directly on the press;¹²⁷ rather, *Halkin* is the next logical step. The key is to focus not on "the power to control release" of information by those individuals, but on "control[ing] release in appropriate cases."¹²⁸ *Halkin* merely provides guidance in determining the presence of an appropriate case. Accordingly, as *Nebraska Press* required examination of less intrusive alternatives before restraining the press, *Halkin* requires a similar examination before restraining the first amendment rights of parties and counsel.

Although the Court in *Nebraska Press* considered that protective order a prior restraint whereas the court in *Halkin* did not reach that conclusion, this distinction does not vitiate the *Halkin* standard. *Nebraska Press* adopted the *Dennis* version of the clear and present danger test, a test not associated originally with prior restraints.¹²⁹ The result in *Halkin* therefore may receive stronger support, because the protective order was not a prior restraint.

Two other areas, neglected by the court in *Halkin*, warrant discussion. First, the *Halkin* test, although virtually identical to the test in *Nebraska Press*, failed to incorporate the requirement that any restraint imposed must carry an expectation of effectiveness. The Court in *Nebraska Press* asserted two bases for this requirement: the problem of jurisdiction over persons subject to the order could render the restraint ineffective,¹³⁰ and the absence of accurate news accounts resulting from a restraint could prove counter-

126. 435 U.S. at 802 (Burger, C.J., concurring).

127. See notes 119 & 120 *supra* & accompanying text.

128. *Nebraska Press*, 427 U.S. at 601 n.27 (Brennan, J., concurring) (emphasis supplied).

129. See, e.g., *Dennis v. United States*, 341 U.S. 494 (1951) (criminal proceeding). The "clear and present" danger standard was articulated most recently in *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978). Although the Court admonished the Supreme Court of Virginia for its mechanical application of the test, the Court implicitly supported the ad hoc balancing approach in the context of a subsequent restraint on expression, a state criminal statute. Reversing the Virginia court for improperly applying the test, the Supreme Court instructed that "[p]roperly applied, the test requires a court to make inquiry into the imminence and magnitude of the danger and then to balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression." *Id.* at 842-43.

130. 427 U.S. at 565-66.

productive by enhancing the "generative propensities of rumors."¹³¹ Although the danger posed by the latter consideration is much less in civil discovery than in a sensational small town criminal trial, the possibility that a protective order might not prevent dissemination effectively is more significant. A clear example is found in *Halkin*, in which no violation of the protective order entered by the district court was shown or implied, yet the documents subject to the order were obtained by and printed in a prominent newspaper.¹³² Furthermore, the existing protective order might not have prevented dissemination had an individual sought access to the documents through a Freedom of Information Act request.¹³³ Finally, the documents could have been filed with the pleadings, thereby rendering them public records and thus open to general inspection and dissemination.¹³⁴ These examples illustrate that if the practical effectiveness of a restraint was a valid consideration in *Nebraska Press*, it should be an equally valid component of the *Halkin* standard. The court in *Halkin* may have considered effectiveness insignificant, because practical effectiveness was not dispositive in *Halkin* and was supported weakly in *Nebraska Press*. An analysis of practical effectiveness, however, could prove valuable in future applications of *Halkin*, and should not be ignored.

Finally, the protective order in *Halkin* could have been found invalid without the articulation of a new constitutional standard or its application. Although the district court cannot be criticized for failing to apply a then nonexistent standard, the protective order contained other serious flaws. First, overbreadth of a restraint had been established as clear justification for appellate courts to vacate similar orders,¹³⁵ and the protective order in *Halkin* appeared overbroad on its face. The order was based substantially on Local Rule 1-27(d).¹³⁶ That rule, however, applies only to extrajudicial statements by counsel and therefore provides no justification for restraining expression of parties. Also, the order was entered absent the

131. *Id.* at 567.

132. 598 F.2d at 182.

133. This possibility was acknowledged by the dissent in *Halkin*: "Presumably, plaintiffs could also obtain these materials through the FOIA." *Id.* at 207 n.30 (Wilkey, J., dissenting).

134. See note 31 *supra*.

135. See, e.g., *Rodgers v. United States Steel Corp.*, 536 F.2d 1001 (3d Cir. 1976); *CBS, Inc. v. Young*, 522 F.2d 234 (6th Cir. 1975); *Chase v. Robson*, 435 F.2d 1059 (7th Cir. 1970); *International Prods. Corp. v. Koons*, 325 F.2d 403 (2d Cir. 1963).

136. 598 F.2d at 182 n.8.

showing of good cause required by the Federal Rules.¹³⁷ The *Halkin* test provides a more comprehensive definition for good cause when first amendment interests are implicated. Even before this test had been proposed, however, good cause required "a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements."¹³⁸ In *Halkin*, the defendants had moved for a protective order on the bald assertion that public disclosure would be prejudicial to a fair trial.¹³⁹ The controversy certainly had been the subject of broad media coverage and the disclosure of the protected documents could be expected to receive substantial attention. Nevertheless, the defendants claimed no anticipation of increased harm from the release of these particular documents, and the district court did not indicate that the imminence of such specific harm was presumed.

CONCLUSION

The constitutional analysis in *Halkin* may have resulted from a feeling by the court that mandamus would be more appropriate than a later appeal to protect precious constitutional rights.¹⁴⁰ Although its constitutional analysis arguably was unnecessary, the court's desire to guide district courts faced with similar controversies was understandable. After a thorough treatment of the issues, the court reached a proper conclusion. The plaintiffs had an interest in the material obtained through discovery that warranted first amendment protection. In addition, the protective order could not withstand constitutional scrutiny. The court provided a reasonable, flexible standard for resolving future first amendment-discovery conflicts in accordance with the first amendment-fair trial principles of *Nebraska Press*.

The ad hoc balancing of the *Halkin* test is perhaps unavoidable, considering the impracticability of any rigid system of rules when first amendment protection is involved. *Halkin* does not contradict the Federal Rules of Civil Procedure or portend any derogation of

137. FED. R. CIV. P. 26(c).

138. 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2035 (1970). See, e.g., *Essex Wire Corp. v. Eastern Elec. Sales Co.*, 48 F.R.D. 308, 311 (E.D. Pa. 1969).

139. 598 F.2d 181-82.

140. *Id.* at 198. See, e.g., *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 472-73 (1962) (special responsibility to protect constitutional right to jury trial).

the right to a fair trial. In applying *Halkin*, district courts may maintain both discretion to shape relief and to ensure protection of the interest in fair resolution of litigation. *Halkin* merely requires that first amendment interests be granted proper consideration.

K. R. V