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Few constitutional rights are more fragile than those dealing with the rights of free expression protected by the first amendment. The history of press and speech freedom in the United States is littered with local, state, and federal laws that have violated the letter and spirit of the constitutional guarantees.[1] Over the years the judiciary has played a major role in preserving free expression against these attacks, but some courts have also taken a turn at the undermining process.[2] A recent example of judicial infringement on freedom of the press and expression took place in the United States District Court for the District of Utah in 1969 and 1973. That attack came in the form of a 1969 order prohibiting sketching in the courtroom and its environs and a 1973 amendment thereto extending the prohibition to drawings of courtroom scenes regardless of where made.

On May 8, 1969, Utah's federal district court promulgated a general order prohibiting "the taking of photographs in any form, including the taking of television pictures, *and the making of artist's drawings, cartoons, or caricatures in any form* . . . in the courtroom or its environs . . .

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[1]Anyone's "dishonor roll" would have to include the Alien and Sedition Act, ch. 74, 1 Stat. 596 (1798) (expired 1801) which made it a felony to publish any writing with an intent to resist, oppose, or defeat any law or act of Congress or the President. Also, the New York statute upheld in Gitlow v. New York, 268 U.S. 652 (1925), prohibiting the publication of any writing advising or teaching that organized government should be overthrown by any unlawful means. And the Minnesota statute struck down in Near v. Minnesota, 283 U.S. 697 (1931), which provided that any malicious, scandalous, and defamatory publication could be declared a nuisance and further publication thereof enjoined.

[2]In 1826 a federal district court judge in Missouri, James H. Peck, held in contempt and disbarred one Luke Lawless for publishing in a local newspaper an article criticizing a decision of the judge. Nelles & King, *Contempt by Publication in the United States,* 28 COLUM. L. REV. 401, 423-31 (1928).

In 1938, a labor leader in California sent a telegram to Frances Perkins, Roosevelt's Secretary of Labor, in which he criticized a decision, calling it "outrageous," of a state trial court judge. The labor leader was held in contempt. His conviction was upheld by the California Supreme Court, Bridges v. Superior Court, 14 Cal. 2d 464, 94 P.2d 983 (1939), but reversed by a unanimous United States Supreme Court, Bridges v. California, 314 U.S. 252 (1941).

Also in 1938, a newspaper in Los Angeles published a series of editorials commenting on certain trials. The newspaper was held in contempt. On appeal to the California Supreme Court, the conviction was upheld because the judicial proceedings commented on by the offending editorials had not reached "such a point of finality as to form a proper subject of

whether the court is in session or not."[3] The order went uncontested. On January 26, 1973, when drawings of a civil rights trial in federal court were broadcast by a Salt Lake City television station, several staff members of the station were immediately ordered into court to show cause why they should not be held in contempt for violation of the 1969 general order. That hearing established that the drawings had been made in the television studios from the artist's memory. The judge presiding at the hearing dismissed the show cause order[4] but then amended the general order to prohibit the making of "cartoons, artists' drawings, caricatures, or whatever they may be called, [whether] made on these premises or elsewhere."[5]

This article will discuss the constitutionality of that order, particularly the 1973 amendment that extends the authority of the judge from the

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comment" and "[l]iberty of the press is subordinated to the independence of the judiciary...." Times-Mirror Co. v. Superior Court, 15 Cal. 2d 99, 106, 118, 98 P.2d 1029, 1033, 1044 (1940). The conviction was reversed by a unanimous United States Supreme Court. Bridges v. California, *supra.*

See also United States v. Dickinson, 465 F.2d 496 (5th Cir. 1972).

[3]General Order of the United States District Court for the District of Utah (May 8, 1969) (emphasis added). The complete order reads:

> Pursuant to the recommendation and resolution of the Judicial Conference of the United States adopted March 8, 1962, the taking of photographs in any form, including the taking of television pictures, and the making of artist's drawings, cartoons or caricatures in any form, and the broadcasting or recording for broadcasting by radio, television or other means, in the courtroom or its environs in connection with any judicial proceedings are hereby prohibited, whether court is actually in session or not.
>
> The term "environs" as used in this order means any place in the Post Office and Federal Courthouse located at Fourth South and Main Street, Salt Lake City, Utah.
>
> This rule does not apply to the use of copying machines such as Xerox. The court may permit photographs to be taken or recordings to be made by or under the direction of counsel and under such conditions as may be directed by the court. Dated this 8th day of May, 1969.

It should be noted that the 1962 report of the Judicial Conference, to which reference was made, contained no provisions whatsoever on sketching. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 9-10 (1962). The limited references to sketching found in a 1968 report of a Judicial Conference committee, COMMITTEE ON THE OPERATION OF THE JURY SYSTEM, JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE COMMITTEE ON THE OPERATION OF THE JURY SYSTEM ON THE "FREE PRESS-FAIR TRIAL" ISSUE (1968) (reported in 45 F.R.D. 391 (1969)) [hereinafter referred to as *Kaufman Report*], are discussed in text accompanying notes 21-24 *infra.*

[4]Transcript of Proceedings, *In re* KCPX Television Station, C 28-73 (D. Utah, proceedings of Feb. 2, 1973).

[5]*Id.* at 38-39.

The Utah district currently has two active federal district court judges: Chief Judge Willis W. Ritter and Judge Aldon J. Anderson. The 1969 general order appeared over the signature of Chief Judge Ritter. Chief Judge Ritter was also the presiding judge at the 1973 hearing and it was he who at that hearing promulgated the amendment extending the sketching ban to all sketches of courtroom scenes regardless where made.

Judge Anderson has indicated that the practice in his court regarding sketching is uniform with the practice in Chief Judge Ritter's court. Interview with Judge Aldon J. Anderson, United States District Court for the District of Utah, Salt Lake City, Utah (telephone), Jan. 20, 1975. Though Judge Anderson prohibits in-court sketching, it is unclear whether he views the prohibition as extending to sketches made from memory.

courtroom and its environs to the desks of those who make news decisions for the press.

I. Sketching and the Courts: A Very Brief History

For centuries, sketches have been used to report judicial proceedings to the nonattending public. Particularly in America, sketches of courtroom scenes have been a widely used news-reporting medium. Scenes from the Salem witchcraft trials,[6] the trials of religious nonconformists Roger Williams[7] and Anne Hutchinson,[8] and the free press trial of John Peter Zenger[9] were sketched by eyewitnesses and contemporaneously published. In fact, few if any notable trials — from those early colonial trials mentioned above to the recent trials of the Watergate conspirators — have failed to be recorded for news publication by artists present at the proceedings.[10]

In the present century, because of the advent of modern photography and photojournalism, the use of sketches for general news purposes has waned. Yet sketches of in-court scenes continue to be widely used because of the nearly universal ban imposed by the American judiciary on the use of television or photography equipment in the courtrooms.[11] Indeed, sketches of in-court scenes, under presently existing strictures, constitute the only visual medium by which the news of the courtroom can be conveyed to the general public.

Sketches of courtroom scenes are particularly important to television news reporting. Severely limited — compared to the newspaper — in the number of minutes and words it can employ to convey the news, the television news program compensates with greater use of sight, sound, and movement. The unique advantage of television news reporting is its ability to let the viewer *see* the news. Deprived of the use of sketches of courtroom scenes, the television news program is reduced — if it is to report the goings-on at judicial proceedings at all — to a reading over the air of an abbreviated newspaper account.[12]

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[6]W.C.H. Wood & R. Gabriel, America: Its People and Values 75 (1971) [hereinafter cited as Wood].

[7]H. B. Wilder, D. Ludlum & P. Brown, This Is America's Story 107 (3d ed. 1968).

[8]Wood 77.

[9]*Id.* at 112.

[10]B. Aymar & E. Sagarin, A Pictorial History of the World's Great Trials from Socrates to Eichman (1967) contains an extensive collection of sketches, drawings, and paintings depicting trials and judicial proceedings through the centuries.

[11]The ban on photography and television in the courtroom is discussed at note 13 *infra*.

The wide use of trial sketches is demonstrated by the fact that the National Broadcasting Company (NBC), in 1973, televised nationally on the NBC Nightly News at least 49 sketches of trial scenes. Brief for Applicant at 5, Application of National Broadcasting Co., 64 N.J. 476, 317 A.2d 695 (1974). There is evidence that similar extensive use of such sketches is made by the other national television networks. *Id.*

[12]*See* Columbia Broadcasting System, Inc., Television News Reporting 116 (1958), where

But despite its unobtrusive nature and its long tradition as a news conveying tool, the sketching of courtroom scenes has sometimes been restricted by rules aimed at curtailing media coverage of trials generally.[13]

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television's dependence on visual representations is explained:

> Because one of its chief concerns is to allow its viewer to see the news, television has freed itself from the obligation of the newspaper to make the news clear through printed words. Its purpose is to outline, to bring to its audience's eye and mind much of the same news a paper prints. In many ways, the television news program faces what seem insurmountable obstacles; so it appears that its problems are far more complex than those of a newspaper. Its dimensions, though less than the newspaper's in terms of time and space, are increased in the areas of sight, sound, and movement. Television news has these three vital and essential qualities to help it report the news.

[13]Historically in America, the promulgation of judicial restrictions on media coverage of trials has occurred as the third phase of a three-fold phenomenon. The first element of the phenomenon is the crime or other underlying fact situation with its resulting trial, all marked by a particular convergence of personalities, facts, and circumstances that make for heightened newsworthiness. Second, the media then responds with extensive and pervasive pretrial and trial coverage. The affair becomes notorious, heavily publicized, and highly sensational; public interest in the proceedings becomes intense. A judicial reaction to all this often follows. The judiciary declares that the extensive coverage and attendant public interest was detrimental to the right of the accused to a fair trial and to the essential dignity of judicial proceedings and therefore promulgates orders restricting media coverage of future cases. This three-fold pattern has appeared repeatedly in the present century.

The trial of Bruno Hauptmann, the alleged kidnapper of the Lindbergh child, was accompanied by probably the most massive pretrial and trial publicity of any criminal case in American history up to that time. The trial itself was broadcast live over the radio. *See* S. WHIPPLE, THE TRIAL OF BRUNO RICHARD HAUPTMANN 46-47 (no date); G. WALLER, KIDNAP: THE STORY OF THE LINDBERGH CASE 252-53 (1961). After conviction, Hauptmann appealed, assigning as error, *inter alia,* the massive and prejudicial pretrail publicity and the confusion caused during trial by members of the press, their clerks, and messenger boys. The conviction was upheld, State v. Hauptmann, 115 N.J.L. 412, 180 A. 809 (Ct. Err. & App.), *cert. denied,* 296 U.S. 649 (1935), and Hauptmann was executed. S. WHIPPLE, *supra* at 88-89. But the trial acted as a catalyst in the legal profession and intensified the concern with "the dangers attendant upon the use of radio in connection with trials." *See* Estes v. Texas, 381 U.S. 532, 596-601 (1965) (appendix to opinion of Harlan, J., concurring, consisting of portions of amicus curiae brief of the American Bar Association). *See also* 62 A.B.A. REP. 851-66 (1937). In 1937, the American Bar Association adopted canon 35 of the Canons of Judicial Ethics which barred taking of photographs in the courtroom and the broadcasting of court proceedings. 62 A.B.A. REP. 1123, 1134 (1937). The canon originally read:

> Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the courtroom, during sessions of the court or recesses between sessions, and the broadcasting of court proceedings are calculated to detract from the essential dignity of the proceedings, degrade the court and create misconceptions with respect thereto in the mind of the public and should not be permitted.

With the advent of television, canon 35 was amended by inserting a ban on the "televising" of court proceedings. 77 A.B.A. REP. 110-11 (1952). A large majority of the states adopted canon 35 and in 1946 the essence of the canon was embodied in rule 53 of the Federal Rules of Criminal Procedure which now reads:

> The taking of photographs in the court room during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the court room shall not be permitted by the court.

Both canon 35 and rule 53 were aimed at media coverage of trial proceedings. Neither attempted to reach or deal with pretrial publicity. In 1959, however, the United States Supreme Court reversed a criminal conviction solely because of prejudicial news articles read by the jurors. Marshall v. United States, 360 U.S. 310 (1959). The scope and potential impact

of that decision were limited, though, because it was based on supervisory and not constitutional grounds. Yet within 2 years, the Court invoked the due process clause to strike down a murder conviction of a state court on the ground that massive adverse publicity had created an atmosphere of "sustained excitement," "strong prejudice," and "public passion." Irvin v. Dowd, 366 U.S. 717 (1961). This opened the floodgate on appeals alleging prejudicial publicity resulting in denial of due process. *See* R. Ainsworth, *Fair Trial — Free Press,* 45 F.R.D. 417, 419 (1969). Supreme Court activity in the area of prejudicial publicity in criminal trials continued, reaching a peak in the 1965 and 1966 terms with decisions in the cases of Estes v. Texas, 381 U.S. 532 (1965), and Sheppard v. Maxwell, 384 U.S. 333 (1966).

In 1962, when Texas brought criminal charges against the fertilizer tank swindler, Billie Sol Estes, it was only one of two states not subscribing to canon 35; in Texas, broadcasting of trials was allowed in certain circumstances. JUDICIAL CANON 28 OF THE INTEGRATED STATE BAR OF TEXAS, 27 TEX. B.J. 102 (1964). The trial of Estes received nationwide publicity and parts of the proceedings were televised. The Supreme Court held that the defendant was deprived of due process because of the confusion in the courtroom caused by large numbers of rather too eager photographers and the subtle psychological impact that awareness of the televising was deemed to have on all trial participants. Estes v. Texas, *supra.* But the decision rendered in the *Sheppard* case was to have ultimately the greatest impact on press coverage of judicial proceedings.

Dr. Sam Sheppard was accused of the murder of his young, pretty, and pregnant wife. During the course of the investigation, and on through trial, every detail of the crime was widely publicized. The newspapers in the area, in front-page stories, began calling for the arrest of Sheppard. After the arrest, the newspapers and other media alleged the defendant to be "a bare-faced liar," a "Jekyll-Hyde," and a "perjuror." Much emphasis was placed on the defendant's love affair with another woman, and wide circulation was given to the claim of a woman convict that Sheppard was the father of her illegitimate child. The trial itself was later described by appellate courts as amounting to a carnival and a Roman holiday because of the activities of the press. The Supreme Court reversed Dr. Sheppard's conviction on the grounds that massive prejudicial publicity and pervasive news coverage of the trial had deprived the defendant of due process and a fair trial. Yet the Court went further: it recommended and even demanded that courts in the future take remedial measures to prevent "prejudice at its inception." Specifically, the Court (1) emphasized the power inherent in the trial judge to control and even limit the presence of the press in the courtroom and environs; (2) stated that the trial court should have insulated the witnesses; and most importantly, (3) concluded that the trial court should have prohibited extrajudicial statements prejudicial to the defendant made by any person subject to the court's control: parties, witnesses, attorneys, court officials, and law enforcement officers. Sheppard v. Maxwell, *supra.*

Following *Sheppard* there was a spate of reports recommending guidelines for and limitations on media coverage of judicial proceedings. *See, e.g., Kaufman Report,* note 3 *supra*; ADVISORY COMMITTEE ON FAIR TRIAL AND FREE PRESS, ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS — TENTATIVE DRAFT (1966) APPROVED DRAFT (1968) [hereinafter cited as *Reardon Report*]; ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, SPECIAL COMMITTEE ON RADIO, TELEVISION, AND THE ADMINISTRATION OF JUSTICE, FREEDOM OF THE PRESS AND FAIR TRIAL, FINAL REPORT WITH RECOMMENDATIONS (1967) [hereinafter cited as the *Medina Report*]. Some recommendations were incorporated into the local rules of various state and federal trial courts. The central theme of the reports was that trial courts could, and in appropriate cases should, prohibit the divulgence, by persons connected with the case, of information prejudicial to the parties or otherwise inimical to a fair trial. Because of recognized constitutional strictures, the reports generally recommended that no ban be placed on or penalty imposed for publication of any information regarding a case once divulged. For example, the *Kaufman Report* stated:

> The Committee does not presently recommend any direct curb or restraint on publication by the press of potentially prejudicial material. *Such a curb, it feels, is both unwise as a matter of policy and poses serious constitutional problems.*

Id. at 45 F.R.D. 401-02 (emphasis added). Evidence has appeared establishing that in some jurisdictions, trial courts are with increasing frequency imposing bans on prosecutors, police officers, witnesses, and others from divulging information in criminal cases likely to receive pretrial publicity. *See* Warren & Abell, *Free Press — Fair Trial: The "Gag Order," A Cali-*

In 1949, New Jersey became the first state jurisdiction to ban sketching in the courtroom.[14] Prior to that year, the New Jersey courts had operated under canon 35 of the American Bar Association's Judicial Canons of Ethics which banned photography and television from the courtroom but was silent as to sketching.[15] But the New Jersey Supreme Court then amended the canon to provide that "the making of sketches of the courtroom or of any persons in it during sessions of the court or recesses between sessions . . . should not be permitted."[16] New Jersey remained the only state which prohibited in-court sketching until 1971 when the Rhode Island Supreme Court framed a similar rule.[17] Apparently neither state, however, banned the sketching of courtroom scenes from memory.

In 1974 the National Broadcasting Company (NBC) successfully petitioned the New Jersey Supreme Court for a modification of its sketching rule. In a reported decision,[18] the New Jersey Supreme Court decided as a matter of policy that the ban on sketching should be removed. Coincidentally with the granting of the NBC petition, the court adopted the new Code of Judicial Conduct of the American Bar Association, noting that the Code "contains no prohibition against sketching judicial proceedings in a courtroom, in the manner described."[19] Rhode Island remains the only state that prohibits in-court sketching.

Judicial limitations on sketching in the federal courts have had a more varied history. Among the flurry of studies, reports, and monographs on

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fornia Aberration, 45 S. CAL. L. REV. 51 (1972). However, court-imposed prohibitions on publication of such information once divulged have been relatively rare though certainly not nonexistent. *See, e.g.,* United States v. Dickinson, 465 F.2d 496 (5th Cir. 1972).

[14]Brief for Applicant at 2-3, Application of National Broadcasting Co., 64 N.J. 476, 317 A.2d 695 (1974).

Hereafter in the text, sketching done in the courtroom will be referred to as in-court sketching. Sketching of courtroom scenes done from memory at locations other than the courtroom or its environs will be referred to, at times, as sketching from memory.

[15]*Id.* at 2-3.

[16]*Id.* at 3.

[17]109 R.I. 968 (1971). The pertinent paragraph, ¶ 30, Provisional Order No. 9, CANONS OF JUDICIAL ETHICS FOR THE STATE OF RHODE ISLAND, reads:

> Proceedings in court should be conducted with fitting conduct and decorum. The taking of photographs or sketching in the court room and the broadcasting or televising of court proceedings detract from the essential dignity of the court and should not be permitted.
>
> The restriction shall not apply to substantially ceremonial proceedings, such as proceedings involving admission of applicants to the bar or admission of applicants for naturalization.

As of January 20, 1975, the Rhode Island Supreme Court was not considering either modifying or deleting the in-court sketching ban. Also as of that date, no petition for modification of or attack on the ban had been commenced by interested parties. Letter from Walter J. Kane, Head Clerk, Rhode Island Supreme Court, to Brigham Young University Law Review, January 20, 1975.

[18]Application of National Broadcasting Co., 64 N.J. 476, 317 A.2d 695 (1974).

[19]*Id.* at 478, 317 A.2d at 697.

fair trial and free press appearing in the wake of the United States Supreme Court's decision in *Sheppard v. Maxwell*,[20] only one made any reference to or suggestion concerning in-court sketching. The *Kaufman Report*, a report prepared by a committee of the Federal Judicial Conference, contained suggestions for special orders applicable to "widely publicized and sensational cases."[21] Such cases were defined in the report as those "likely to receive massive publicity and where the court's standing rules and orders might be inadequate to eliminate prejudicial influences from the courtroom."[22] One of those special orders provides that the court *may* direct "that the names and addresses of jurors or prospective jurors not be publicly released except as required by statute, and that no photograph be taken or sketch made of any juror within the environs of the court."[23] To date three federal district courts have adopted, for use only in "widely publicized and sensational cases," the narrowly drawn "special order" suggestions of the *Kaufman Report*.[24]

Other than the ban promulgated by the Utah federal district court, there is only one instance of a federal judge imposing a blanket ban on the sketching of courtroom scenes wherever made and on the publication of such sketches. In the summer of 1973, the federal government began the criminal prosecution of certain members of the Vietnam Veterans Against the War, individuals popularly known as the "Gainesville Eight," who were accused of conspiring to disrupt the 1972 Republican National Convention. During pretrial proceedings, the trial judge announced orally from the bench a ban on in-court sketching during the course of the Gainesville Eight trial. When the judge became aware later that certain artists were sketching courtroom scenes from memory at locations outside the courtroom, he amended his order to state "that no sketches for publication of proceedings in the courtroom or its environs were to be made, even though such sketches were made not in the courtroom or its environs but from memory . . . ." Soon after this order was promulgated, which was applicable only to the rather notorious Gainesville Eight trial, the trial judge issued a written general order imposing a blanket ban on sketches, regardless of where made, of scenes from the judge's courtroom and on publication of the same; the ban extended to all proceedings then pending or thereafter to be brought before the judge.[25]

Appeals were taken from the court's orders and from contempt con-

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[20]384 U.S. 333 (1966). *See* note 13 *supra*.

[21]*Kaufman Report, supra* note 3, at 45 F.R.D. 409.

[22]*Id.*

[23]*Id.* at 45 F.R.D. 410-11.

[24]S.D. Ind., Rule 29(5); D. Minn., Rule 7(c)(5); and W.D. Okla., Rule 26(m)(5). *See* note 29 *infra*.

[25]Facts are taken from statement of facts in the appellate court's decision. United States v. Columbia Broadcasting Sys., 497 F.2d 102 (5th Cir. 1974).

victions arising out of violations of the sketching and publication ban.[26] A unanimous Fifth Circuit Court of Appeals in the case of *United States v. Columbia Broadcasting System*[27] held that the orders were unconstitutionally overbroad and accordingly directed that they be vacated.[28]

It appears, then, that as of the present time only in the state courts of Rhode Island and in Utah's federal courts is in-court sketching prohibited. Only Utah's federal courts prohibit sketches of courtroom scenes made from memory.[29]

II. UTAH'S SKETCHING BAN: AN INQUIRY INTO ITS CONSTITUTIONALITY

The Utah federal court's sketching ban is analytically divisible into two parts: (1) the prohibition on in-court sketching and (2) the prohibition on the making and publication of drawings of courtroom scenes regardless of where made.[30] This article will examine the latter aspect of

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[26]*Id.* (appeal from the orders); United States v. Columbia Broadcasting Sys., 497 F.2d 107 (5th Cir. 1974) (appeal from conviction of criminal contempt); Columbia Broadcasting Sys. v. Arnow, 497 F.2d 110 (5th Cir. 1974) (petition for mandamus dismissed as moot); National Broadcasting Co. v. Arnow, 497 F.2d 110 (5th Cir. 1974) (petition for mandamus dismissed as moot).

[27]497 F.2d 102 (5th Cir. 1974).

[28]The conviction of criminal contempt was reversed on a finding that the district judge should have disqualified himself. United States v. Columbia Broadcasting Sys., 497 F.2d 107 (5th Cir. 1974).

[29]The survey of federal district court rules was made using H. FISCHER & J. WILLS, FEDERAL LOCAL COURT RULES (1975 repl.). Not all federal district courts have local rules in effect. The district court of Utah is among that group. *Id.* at xiii. Whenever a district court promulgates local rules or amendments thereto, the court is directed to furnish copies of those rules and amendments to the United States Supreme Court. FED. R. CIV. P. 83. Apparently, neither the 1969 general order prohibiting in-court sketching nor the 1973 amendment thereto of Utah's federal district court was sent to the Supreme Court as required by rule 83 of the Federal Rules of Civil Procedure.

For the information on state court practices, reliance was placed on a survey found in Brief for Applicant at 14-15, Application of National Broadcasting Co., 64 N.J. 476, 317 A.2d 695 (1974).

[30]It may be argued that the court intended to prohibit only the *making* of sketches from memory and not the *publication* of the same. The difficulty in interpretation arises because the amended general order is ambiguous. It reads:

> The broadcasting or reporting for broadcasting by the radio, television, or other means, including the newspapers, whether done in the courtroom or its environs, in connection with any judicial proceeding, is hereby prohibited, whether court is actually in session or not — and emphasize — whether the cartoons, artists' drawings, caricatures, or whatever they may be called, are made on these premises or elsewhere.

Transcript of Proceedings at 38-39, *In re* KCPX Television Station, C 28-73 (D. Utah, proceedings of Feb. 2, 1973).

But there is rather clear evidence that the court's prohibition is meant to include *publication* of sketches of courtroom scenes. The 1973 show cause order, *see* text accompanying note 4 *supra,* was directed to KCPX Television Station; Harold Woolley, the vice president and general manager of the station; Art Kent, the news director; and Allan Moll, Linda Ormes, and Sandy Gilmour, all news reporters of the station. The artist of the offending sketches, a Mr. Eduard Brijs, was not even named in the show cause order though he did appear as a witness at the hearing. *Id.* at 8-14.

the court's order in the context of three constitutional doctrines or principles: prior restraint on expression, public trials, and overbreadth. The three arguments advanced in *support* of the sketching ban — protection of privacy, protection of reputational interests, and elimination of a chilling effect on the right to litigate — will also be examined. Finally, the article will analyze the more narrow aspect of the court's order — the ban on in-court sketching.

Before proceeding with the analysis of the sketching ban, however, it should be noted what issues and principles of law are *not* raised by the prohibition. First, it may be thought that the ban is merely an extension of general principles articulated in the Supreme Court's decision in *Estes v. Texas,*[31] where photography and especially television were banned from the courtroom on due process grounds. Such is not the case. *Estes* banned television and photography from the courtroom because (1) they were deemed disruptive and (2) they were deemed to have a subtle and adverse pyschological impact on jurors, witnesses, and other trial participants. These considerations are irrelevant to an analysis of sketching of courtroom scenes done *outside* of the courtroom. These same considerations appear to have a minimal relevancy to sketching done in court because drawing is generally as unobtrusive as taking written notes and can be carried on without the awareness of trial participants. In short, the principles and policies examined in *Estes* are only indirectly, if at all, of importance in a discussion of the Utah sketching ban.

Second, the sketching ban is not an attempt at resolution of a *fair* trial–free press conflict. That may appear as a surprising assertion, but it becomes evident as one understands what the courts mean by a fair trial in a society that guarantees a free press. The Supreme Court confronted the fair trial–free press conflict in *Sheppard v. Maxwell,*[32] where the Court found that massive and adverse publicity attendant upon a criminal trial can so taint the proceeding that the accused is denied due process, to wit, a fair trial conducted before unbiased and unprejudiced jurors. The Court, which earlier in *Estes* had looked at the prejudice resulting from news-gathering activities, in *Sheppard* focused on the *content* of news reports. The particular concern was that the content might bias potential and empaneled jurors. The Court firmly directed that trial judges take certain steps to control publicity before and during trials in those criminal cases in which publicity might jeopardize an accused's

Further, it is mere sophistry to argue that a prohibition on the making of a sketch is not constitutionally offensive because such a prohibition does not extend to publication. Since the making of a sketch constitutes a component part of the publication process, to prohibit the making of a sketch is to prevent publication. An order need not use the word *publication* to constitute in fact a prohibition of that activity.

[31]381 U.S. 532 (1965). *See* note 13 *supra.*

[32]384 U.S. 333 (1966). *See* note 13 *supra.*

chances for a fair trial. The conflict between fair trial and free press, therefore, as that conflict is normally viewed, arises when a court seeks to preserve an unbiased panel of jurors during a criminal proceeding by restricting, in any of a variety of ways, media coverage of any stage of a criminal prosecution.[33]

However, the goal of the Utah sketching ban apparently is *not* to ensure an unbiased panel of jurors for criminal trials. The court did not advance such as a goal of the sketching ban at the time the ban was promulgated. Indeed, if the court were attempting to protect potential or empaneled jurors from prejudicial publicity, arguably the prohibition would have included other means of publicity, such as written reports in newspapers and verbal accounts on television. It is rather clear that the ban was promulgated not to ensure fair criminal trials but to protect privacy, reputational interests, and the right to litigate.[34] The court said as much at the time it imposed the ban. The Utah federal court viewed sketching, apparently, as uniquely harmful to those latter interests and thus singled out the sketching medium for prohibition. For these reasons the sketching ban must be viewed as only tangentially, if at all, concerned with implementing the fair trial–free press guidelines of *Sheppard v. Maxwell*.[35]

Such, then, are the issues the sketching ban does not raise. Turning to the issues raised, the first is the operation of the sketching ban as a prior restraint.

A. The Sketching Ban as a Prior Restraint on Expression[36]

Speaking generally, any official restriction that operates directly to prevent or prohibit expression in advance of publication is a prior restraint. Prior restraint is thus distinguished from subsequent punishment which is a penalty imposed on the publisher after publication for having made the communication. Such a penalty may certainly induce self-censorship because of the publisher's desire to avoid the threatened sanction, and the chilling effect of the threatened and subsequent penalty can itself constitute grounds for constitutional attack. But under a system of subsequent punishment no official action is taken to stop com-

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[33]*See, e.g., Kaufman Report, supra* note 3; *Reardon Report, supra* note 13; *Medina Report, supra* note 13.

[34]*See* notes 66-67 and accompanying text *infra*.

[35]384 U.S. 333 (1966).

[36]The Supreme Court first invoked the doctrine of prior restraint in Near v. Minnesota, 283 U.S. 697 (1931), and has since employed the doctrine on numerous occasions. *See, e.g.,* New York Times Co. v. United States, 403 U.S. 713 (1971); Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963); Thomas v. Collins, 323 U.S. 516 (1945).

The classic analysis of the prior restraint doctrine continues to be Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROB. 648 (1955). A more current treatment of the doctrine is found in Note, *Prior Restraint and the Press Following the Pentagon Papers Cases — Is the Immunity Dissolving?*, 47 NOTRE DAME LAW. 927 (1972).

munication before the event, whereas a system of prior restraint, if successfully implemented, prevents the expression from being made at all.[37]

Though it has followed the prior restraint–subsequent punishment distinction,[38] the Supreme Court has never given a narrow, limiting definition to the concept of prior restraint.[39] However, the recent *Pentagon Papers* cases[40] offer a classic example of the operation of the doctrine. After the *New York Times* and other newspapers began publication of certain materials, the Government acted to prevent further publication. The Supreme Court declared that the order secured by the Government enjoining publication constituted a prior restraint, which, under all of the facts of the case, was constitutionally impermissible.

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[37]As stated in Emerson, *supra* note 36, at 648:

> The concept of prior restraint, roughly speaking, deals with official restrictions imposed upon speech or other forms of expression in advance of actual publication. Prior restraint is thus distinguished from subsequent punishment, which is a penalty imposed after the communication has been made as a punishment for having made it. Again speaking generally, a system of prior restraint would prevent communication from occurring at all; a system of subsequent punishment allows the communication but imposes a penalty after the event. Of course, the deterrent effect of a later penalty may operate to prevent a communication from ever being made. Nevertheless, for a variety of reasons, the impact upon freedom of expression may be quite different, depending upon whether the system of control is designed to block publication in advance or deter it by subsequent punishment.
>
> In constitutional terms, the doctrine of prior restraint holds that the First Amendment forbids the Federal Government to impose any system of prior restraint, with certain limited exceptions, in any area of expression that is within the boundaries of that Amendment. By incorporating the First Amendment in the Fourteenth Amendment, the same limitations are applicable to the states.

[38]Though the prior restraint - subsequent punishment distinction has been criticized, Freund, *The Supreme Court and Civil Liberties,* 4 VAND. L. REV. 533, 544 (1951); Note, *Prior Restraint — A Test of Invalidity in Free Speech Cases,* 49 COLUM. L. REV. 1001, 1006 (1949), it is clear that the Court in Near v. Minnesota, 283 U.S. 697 (1931), considered the distinction crucial. In fact, the four dissenters stated that the "Minnesota statute does not operate as a *previous restraint* on publication within the proper meaning of that phrase." *Id.* at 735 (emphasis in original).

The prior restraint - subsequent punishment distinction is often traced to a famous passage by Blackstone:

> The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity.

4 W. BLACKSTONE, COMMENTARIES *151-52.

[39]Speaking for a unanimous Court in Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 256 (1974), Chief Justice Burger said:

> The Florida [right to reply] statute operates as a command in the same sense as a statute or regulation forbidding appellant from publishing specified matter. *Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers. Grosjean v. American Press Co.,* 297 U.S. 233, 244-45 (1936).

Id. (emphasis added).

[40]New York Times Co. v. United States, 403 U.S. 713 (1971).

When, in the *Pentagon Papers* cases, the Supreme Court struck down the Government's injunction, it was merely attaching well-established legal consequences to a finding of prior restraint. With certain limited exceptions, any governmental system of prior restraint is prohibited.[41] Or, in the words of the Court, a prior restraint on expression carries a "heavy presumption against its constitutional validity."[42] The weight of that presumption is demonstrated by the paucity of cases sustaining an activity operating as a prior restraint.[43]

A judge can impose a constitutionally valid prior restraint only in exceptional and extremely limited circumstances.

> [B]efore a prior restraint may be imposed by a judge, even in the interest

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[41]Emerson, *supra* note 36, at 648.

[42]Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963). *See* New York Times v. United States, 403 U.S. 713, 714, 814 (1971); Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971).

[43]In Near v. Minnesota, 283 U.S. 697, 715-16 (1931), Chief Justice Hughes indicated that there are certain exceptions to the absolute prohibition against prior restraints:

> The objective has also been made that the principle as to immunity from previous restraint is stated too broadly, if every such restraint is deemed to be prohibited. That is undoubtedly true; the protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases: "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right." *Schenck v. United States,* 249 U.S. 47, 52. 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 protested against incitements to acts of violence and the overthrow by force of orderly government. The constitutional guaranty of free speech does not "protect a man from an injunction against uttering words that may have all the effect of force. *Gompers v. Buck Stove & Range Co.,* 221 U.S. 418, 439." *Schenck v. United States, supra.* These limitations are not applicable here.

Id. (footnote omitted).

In shorthand form, the exceptions are national security, obscenity, and fighting words.

Only the obscenity exception has been invoked with any degree of success, *see, e.g.,* Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957), but even in the obscenity area a prior restraint must overcome a heavy presumption against its constitutionality. Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963) (striking down a system of prior administrative restraints on obscenity).

The Government has met marked failure in its efforts to invoke the national security exception. *See* New York Times Co. v. United States, 403 U.S. 713, 726-27 (1971), where Justice Brennan stated in his concurring opinion:

> Thus, only governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order.

See also Note, *The National Security Exception to the Doctrine of Prior Restraint,* 13 WM. & MARY L. REV. 214 (1971).

Fighting words are almost exclusively dealt with by subsequent punishment rather than by prior restraint. *See, e.g.,* Chaplinsky v. New Hampshire, 314 U.S. 568 (1942).

Other possible exceptions to the prohibition of prior restraints, dubbed "ministerial restraints" and "news management," are discussed in Note, *Prior Restraint and the Press Following the Pentagon Papers Cases — Is the Immunity Dissolving?,* 47 NOTRE DAME LAW. 927, 944-48 (1972).

> of assuring a fair trial, there must be "an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil."[44]

Thus, when a judge, in the absence of immediately imperiling circumstances, prohibits a reporter from communicating what he witnesses in court, the prohibition constitutes an impermissible prior restraint on communication. To give an example, a federal district court judge sitting in Baton Rouge, Louisiana, ordered that "no report of the testimony taken in this case today shall be made in any newspaper or by radio or television, or by another news media." Two reporters violated the order by publishing an account of what they had witnessed in court. The result was a contempt conviction and an appeal therefrom. A unanimous Fifth Circuit Court of Appeals, in the case of *United States v. Dickinson,*[45] struck down the order as an impermissible prior restraint. Chief Judge John R. Brown, speaking for the court, said:

> The initial question with which we are confronted concerns the constitutionality of the District Court's order. Sympathetic as we are to the legitimate objective earnestly pursued by the conscientious Trial Judge (preservation of an impartial venire within the local community whenever the state criminal prosecution should reach trial), we must conclude that a blanket ban on publication of Court proceedings so far transgresses First Amendment freedoms that any such absolute proscription "cannot withstand the mildest breeze emanating from the Constitution."[46]

In constitutional contemplation there is no difference between a journalist writing down what he has previously observed in court and a journalist-artist drawing the same.[47] The Utah federal court's ban on sketching courtroom scenes from memory is in substance the same type of prior restraint struck down by the Fifth Circuit Court of Appeals in *Dickinson.* The order there and the Utah order were framed to prevent expression, to prohibit before the fact the making of a communication.

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[44]United States v. Columbia Broadcasting Sys., 497 F.2d 102, 104 (5th Cir. 1974) (quoting Craig v. Harney, 331 U.S. 367, 376 (1947)).

[45]465 F.2d 496 (5th Cir. 1972).

[46]*Id.* at 500 (quoting Southeastern Promotions, Ltd. v. City of West Palm Beach, 457 F.2d 1016, 1017 (5th Cir. (1972)).

[47]If there is an intent to communicate and an element of communicativeness present in the conduct, such will be treated in constitutional adjudication as expression or "speech" within the meaning of the first amendment. Spence v. Washington, 418 U.S. 405 (1974); Tinker v. Des Moines School Dist., 393 U.S. 503 (1969). In Spence v. Washington, *supra,* for example, a student hung an American flag, upside down with a peace sign attached thereto, out of his window. The Court concluded that such was protected expression because "[a]n intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it." *Id.* 410-11.

A sketching of a courtroom scene by an artist-journalist intended for publication is likewise within the meaning of "expression" and as such is entitled to constitutional protection. The contrary cannot seriously be argued.

The Utah order in particular was not framed to counter an imminent and immediately imperiling danger to the administration of justice. The sketching ban, as a prior restraint on expression, cannot, therefore, "withstand the mildest breeze emanating from the Constitution."

B. The Sketching Ban and the Guarantees of Public Trial

Not only does the broad sketching ban constitute unconstitutional censorship, it operates in derogation of the constitutional mandate that what transpires in the courtroom shall be public.[48] That guarantee of public trial is embodied in part in the sixth amendment, which deals with criminal proceedings.[49] Arguably, it is also an integral part of fifth and

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[48]The Supreme Court in Craig v. Harney, 331 U.S. 367, 374 (1947) declared:

> *A trial is a public event. What transpires in the court room is public property* . . . . Those who see and hear what transpired can report it with impunity. There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it.

Id. (emphasis added). Only several months later, the Court in *In re* Oliver, 333 U.S. 257, 266-71 (1948), articulated the meaning of a public trail in the American tradition.

> This nation's accepted practice of guaranteeing a public trial to an accused has its roots in our English common law heritage. The exact date of its origin is obscure, but it likely evolved long before the settlement of our land as an accompaniment of the ancient institution of jury trial. In this country the guarantee to an accused of the right to a public trial first appeared in a state constitution in 1776. Following the ratification in 1791 of the Federal Constitution's Sixth Amendment, which commands that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ." most of the original states and those subsequently admitted to the Union adopted similar constitutional provisions. Today almost without exception every state by constitution, statute, or judicial decision, requires that all criminal trials be open to the public.
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> The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy's abuse of the *lettre de cachet*. All of these institutions obviously symbolized a menace to liberty. In the hands of despotic groups each of them had become an instrument for the suppression of political and religious heresies in ruthless disregard of the right of an accused to a fair trial. Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power. One need not wholly agree with a statement made on the subject by Jeremy Bentham over 120 years ago to appreciate the fear of secret trials felt by him, his predecessors and contemporaries. Bentham said: ". . . suppose the proceedings to be completely secret, and the court, on the occasion, to consist of no more than a single judge, — that judge will be at once indolent and arbitrary: how corrupt soever his inclination may be, it will find no check, at any rate no tolerably efficient check, to oppose it. Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance."

Id. (footnotes omitted).

[49]The sixth amentment states, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ." U.S. CONST. amend. VI.

fourteenth amendment guarantees of due process and thus a requirement of civil trials.[50] Substantial authority indicates that the guarantee of public trials belongs not only to the accused and other parties to an action but to the public as well.[51] Numerous actions to ensure a public trial have been commenced and successfully prosecuted by the media where the media was asserting not *jus tertii* rights and claims, that is, those of the accused, but rather the right of the media to report on courtroom proceedings and the right of the *public* to know of the same.[52] In fact, society's interest in public trials will prevail over the accused's request for a secret, private proceeding.[53]

Over the years, courts have articulated the policies underlying the tradition and mandate of public trials. First, public trials operate as a re-

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[50]The assertion that public civil trials are guaranteed by due process provisions has two underpinnings: policy and tradition. Civil trials have traditionally been open to the public and to representatives of the media. The pleadings and transcripts are of public record. A closed civil proceeding is probably more rare in the American justice system than a closed criminal proceeding since a large number of "criminal" cases involve juvenile defendants and are thus, to a greater or lesser degree depending on the jurisdiction, closed to the public.

The policies advanced in support of public trials often arise out of a criminal trial context, but they apply with equal cogency to civil proceedings. For a discussion of these policies see notes 54-57 and accompanying text *infra*.

[51]As the court stated in United States *ex. rel.* Mayberry v. Yeager, 321 F. Supp. 199, 204 (D.N.J. 1971):

> If a public trial was not accorded to the petitioner, the Due Process clause of the Fourteenth Amendment was violated. In re Oliver, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948). Public trial is essentially a right of the accused. Geise v. United States, 265 F.2d 659 (9 Cir. 1959). *There is, however, a correlative right to preserve the public's right to be informed about criminal prosecutions in the best interests of all citizens.* Lewis v. Peyton, 352 F.2d 791 (4 Cir. 1965); United States v. Sorrentino, 175 F.2d 721 (3 Cir. 1949).

Id. (emphasis added). *But see* Estes v. Texas, 381 U.S. 532, 588 (Harlan, J., concurring):

> Thus the right of "public trial" is not one belonging to the public, but one belonging to the accused, and inherent in the institutional process by which justice is administered.

But Justice Harlan, in the same concurring opinion, stated:

> Once beyond the confines of the courthouse, a newsgathering agency may publicize, within wide limits, what its representatives have heard and seen in the courtroom.

Id. at 589.

[52]*See, e.g.*, Phoenix Newspapers, Inc. v. Jennings, 107 Ariz. 557, 490 P.2d 563 (1971); Phoenix Newspapers, Inc. v. Superior Court, 101 Ariz. 257, 418 P.2d 594 (1966); Johnson v. Simpson, 433 S.W.2d 644 (Ky. 1968); E. W. Scripps Co. v. Fulton, 100 Ohio App. 157, 125 N.E.2d 896 (1955); Oliver v. Postel, 30 N.Y.2d 171, 282 N.E.2d 306, 331 N.Y.S.2d 407 (1972).

[53]*See* Cox v. State, 3 Md. App. 136, 137, 238 A.2d 157, 158 (Ct. Spec. App. 1968), where the court said:

> The Appellant next contends that the trial judge improperly denied his request for a private trial. He contends that the right to a public trial is a right belonging solely to the accused and that the accused may, therefore, waive this right if he so desires.
>
> It is true that the Sixth Amendment to the Federal Constitution guarantees to an accused "the right to a speedy and public trial." But we do not read this guarantee as carrying with it a right in the accused to demand a private trial. Under our form of government, secrecy in any phase of its administration is abhorrent; secrecy in the administration of justice is intolerable. Our citizens have the same interest in insuring that fair play is accorded an accused at trial as they do in seeing that the rights of society are preserved and respected in the trial of an alleged offender against its laws.

straint on arbitrariness and other abuses of judicial power.[54] Second, an open forum encourages veracity in the witnesses.[55] Third, a notified public may be able to come forth with additional and necessary evidence.[56] Finally, and perhaps most important, public trials serve as an educational tool that operates to instill, in the public, confidence in the nation's system of justice.[57]

Since sketching serves, under present strictures, as the only means of visual communication of courtroom activities,[58] a court, by eliminating sketching, makes trials less public and less open. Those who receive information solely from nonvisual media are less well informed than they could be were drawings and sketches available. Many rely on television as one source, or even an exclusive source of news;[59] but, as noted above,

[54]*See, e.g., In re* Oliver, 333 U.S. 257, 270 (1948); United States *ex rel.* Bennett v. Rundle, 419 F.2d 599, 606 (3d Cir. 1969).

[55]As Blackstone said:

> This open examination of witnesses *viva voce,* in the presence of all mankind, is much more conducive to the clearing up of truth, than the private and secret examination taken down in writing before an officer or his clerk in the ecclesiastical courts, and all others that have borrowed their practice from the civil law; where a witness may frequently depose that, in private, which he will be ashamed to testify in a public and solemn tribunal.

W. BLACKSTONE, COMMENTARIES *373. *See* United States v. American Radiator & Std. Sanitary Corp., 274 F. Supp. 790, 794 (W.D. Pa. 1967).

[56]*See Reardon Report, supra* note 13, at 50: "Finally, as in the case of reports of arrests and requests for evidence, reporting of the trial may evoke evidence that will aid in convicting or exonerating the accused."

[57]*See, e.g.,* United States v. American Radiator & Std. Sanitary Corp. 274 F. Supp. 790, 794 (W.D. Pa. 1967), where the court said a public trial "has an educative effect which can increase respect for law and provide confidence in judicial remedies."

Most of the various policies underlying public trials were summed up in State v. Haskins, 38 N.J. Super. 250, 252, 118 A.2d 707, 709 (App. Div. 1955):

> [A] public trial serves as a very salutary restraint upon gross abuses of the judicial power, upon lesser evils, such as indolence or a petty arbitrariness on the part of the judge and — by exposing witnesses to the eyes and the ears of the public — upon any tendency toward mendacity on their part. There are incidental virtues. By adding a certain formality and solemnity to the trial, it brings to lawyers, and to the jury also, a sense of their responsibility; and by enabling the community to know what the courts are doing, it gives a community confidence in its courts.

[58]*See* note 13 *supra.*

[59]In 1959, a survey asking from which source people get most of their news revealed the following:

Television	19%
Newspapers	21%
Both newspapers and television (with or without other media)	26%
Newspapers and other media but not television	10%
Television and other media but not newspapers	6%
Media other than television or newspapers	17%

In 1972, the survey was repeated with the following results:

Television	33%
Newspapers	19%
Both newspapers and television (with or without other media)	26%
Newspapers and other media but not television	5%

the effectiveness of television to report the news is dependent on its ability to use sketches and other visual media.[60]

Certainly there are departures from the mandate of completely public trials,[61] but all such departures, including the sketching ban, are sustainable only if they meet a standard of "strict and inescapable necessity."[62] There has never been a showing that the Utah federal court's sketching ban is necessary, let alone inescapably necessary, to accomplish an articulated and permissible goal.

C. The Sketching Ban and the Requirement of Narrowly Drawn Restrictions

Overbreadth is the third infirmity of constitutional proportions inherent in the sketching prohibition. The ban extends to civil as well as to criminal proceedings, to mundane, nonsensational proceedings as well as to notorious, highly publicized events, to nonjury as well as to jury trials, to fair as well as to unfair portrayals, to sketches made in the newsroom as well as to sketches made in the courtroom. Seemingly the ban was promulgated without heed to the principle that "constitutional standards restrict the methods by which a court . . . can limit the press *to the narrowest rules or orders which will accomplish the desired goal.*"[63] Or, in the Supreme Court's articulation of the overbreadth doctrine:

> [E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.[64]

Yet in attempting to measure the sketching ban against the requirement of "narrowness" or "less drastic means," one is confronted with the difficulty of identifying the goals or objectives sought to be achieved by

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Television and other media but not newspapers	5%
Media other than television or newspapers	12%

THE ROPER ORGANIZATION, INC., WHAT PEOPLE THINK OF TELEVISION AND OTHER MASS MEDIA 1959-1972, at 2-3 (1973).

[60]*See* note 12 *supra* and accompanying text.

[61]The public may be excluded from the courtroom in order to preserve order, United States *ex rel.* Orlando v. Ray, 350 F.2d 967 (2d Cir. 1965), *cert. denied,* 384 U.S. 1008 (1966); United States v. Kobli, 172 F.2d 919 (3d Cir. 1949); to insure the safety of witnesses and parties, United States *ex rel.* Bruno v. Herold, 408 F.2d 125 (2d Cir. 1969), *cert. denied,* 397 U.S. 957 (1970); and to protect the morals of the public, United States v. Kobli, *supra.*

[62]*See* United States *ex rel.* Bennett v. Rundle, 419 F.2d 599, 607 (3d Cir. 1969), where the court said:

> It has always been recognized that any claim of practical justification for a departure from the constitutional requirement of a public trial must be tested by a standard of strict and inescapable necessity.

[63]Dorfman v. Meiszner, 430 F.2d 558, 561-62 (7th Cir. 1970).

[64]Shelton v. Tucker, 364 U.S. 479, 488 (1960).

the prohibition. The court seems not to have been motivated by standard concerns such as disruption and distraction in the courtroom, prejudicial publicity affecting an accused's right to fair trial, or a distortion of the response of jurors, witnesses, and other participants caused by an awareness of the gaze of others (even beyond those present in court) upon them.[65] Rather, the court, in promulgating its prohibition, seems to have been motivated by a concern for reputational interests, privacy, and a potential litigant's right of access to the courts.

The court's reasons for the amendment to and extension of the sketching ban, taken from the transcript of the 1973 proceeding at which the amendment was promulgated, are reproduced in complete, verbatim form in the appendix to this article. By way of summary, however, the court asserted that litigants and accused have a right to participate in judicial proceedings without being exposed to the glare of publicity. Particularly, such trial participants have a right not to be degraded by grotesque representations of their physical characteristics which subject the participant to ridicule and contempt.[66] The existence of such uncomplimentary exposure and publicity, or even the threat thereof, has a chilling effect on the exercise of one's right to seek justice in the judicial forum. Rather than face the exposure of uncomplimentary publicity, potential litigants forego litigation which would otherwise be available for the vindication of their rights.[67]

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[65]*See* notes 31-35 *supra* and accompanying text.

[66]Transcript of proceedings 33-34, *In re* KCPX Television Station, C 28-73 (D. Utah, proceedings of Feb. 2, 1973).

> Now, the purpose of this order was at the time it was entered, and still is, to protect people who have business with the federal court and are compelled, if they want to do business, to come here.
>
> . . . .
>
> The Constitution of the United States of America gives the citizens and other people in the country the right to a trial, a common law trial, the kind of trial that the founders knew about in their time. And by that I mean this: Folks have the right to come here and do their business with the court without being pilloried. They have the right to come here and do business with the court and not be subjected to ridicule, hatred, contempt, and they have the right to come here and do business with this court without being held up to degradation by grotesque representations of their physical characteristics.
>
> . . . We are concerned with people, human beings, who have a constitutional right, when they are compelled to come here to do business, to be free from being made a public display of.

[67]*Id.* at 37-38.

> It is a tragedy to have to come to court. It is a disaster to have to come to court. Folks do not come here because they want to. They come here because they have to. And they have a constitutional right not to be photographed in here, not to be drawn in grotesque shapes and forms and colors and displayed to the community. There is a very, very wrong influence in that sort of stuff, and that influence is that some people would rather forego coming to court and seeking justice, having their rights vindicated, than to be subjected to notoriety, ridicule, being pilloried in the market place, and so cold chills run up their spines. They say, "Oh, let's forget it. Let's forget it."
>
> That is a serious, chilling effect upon the need and the desire and the opportunity to

Laudatory as these concerns for reputational interests, privacy, and right of access to the courts may be, they cannot sustain the sketching ban against constitutional attack.

The court attempted to protect reputational interests by suppressing all communications of courtroom scenes conveyed by one medium, sketching. The basis of the suppression, apparently, was the fear or belief that sketching would be used to defame. Indeed, the court, in imposing the blanket sketching ban, seemed to proceed on the premise that not only some but all sketches represent people in grotesque shapes and in a defamatory style. That premise is not true in fact. Sketching is no more inherently defamatory than the written word. Yet the court banned all sketches because some hold the subject up to "ridicule, hatred, [and] contempt." Such a ban is no more constitutionally sound and permissible than a ban imposed on all books because some books are obscene.

If, however, a sketch is in fact injurious to the subject's reputation, the injured reputational interests may be vindicated and the rights of a free press thus curtailed, *but only* if the evidentiary standards for libel cases enunciated in *Gertz v. Robert Welch, Inc.*,[68] *Curtis Publishing Co. v. Butts*,[69] and *New York Times Co. v. Sullivan*[70] are met. Under the doctrine of the latter two cases, a public official or public figure can successfully prosecute a defamation action only on proof that the reporting was done with knowledge of the report's falsity or with reckless disregard for the truth of the publication. Under *Gertz*, a private individual can hold the press liable for a libelous report only by proving that the defendant's conduct in publishing the report amounted at least to negligence. If such is proven, the plaintiff may then recover a money judgment only for actual injuries, the existence of which are proven by competent evidence.[71] These principles and evidentiary standards are aimed at preventing a concern for reputational interests, manifested in libel and slander actions, from unduly restricting or infringing upon the preeminent interest in free expression. It can thus be correctly asserted that governmental systems designed to protect or vindicate reputational interests, because of their necessary chilling effect on the exercise of free expression, must be very narrow and limited indeed.

The Utah court, however, in promulgating the sketching ban, disregarded the constitutional principles of *New York Times* and subsequent cases. The sketching ban, arguably an attempt to balance reputational interests against free expression guarantees, operates to make repu-

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appear in court and have their cases heard.

[68]418 U.S. 323 (1974).

[69]388 U.S. 130 (1967).

[70]376 U.S. 254 (1964).

[71]*See* Note, *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 41, 139-48 (1974) for a general discussion of Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

tational interests not merely preeminent but absolute. The court's ban does not merely prohibit the defamatory sketch, it absolutely prohibits all sketches of courtroom scenes.

Neither can a system designed to protect privacy interests be sufficiently broad, within current constitutional strictures, to validate the court's sketching prohibition. While there is undoubtedly a right to privacy of constitutional dimensions,[72] the right does have outer boundaries which simply do not reach far enough to sustain the sketching ban. First, one cannot demand in a public forum the same degree of privacy and freedom from exposure that one can rightfully claim in the confines of the home. In other words, substantive privacy stops where the public forum begins.[73] And though in some contexts there may be a dispute as to what constitutes a public forum or to what degree of publicity the forum is susceptible, there is no doubt that the courtroom, in all its normal uses, is a public forum. The Supreme Court declared in *Craig v. Harney*[74] that:

> A trial is a public event. What transpires in the courtroom is public property. . . . Those who see and hear what transpired can report it with impunity. There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it.

Secondly, when the right to privacy clashes with freedom of the press, particularly the right of the media to report newsworthy happenings, free press prevails. Only if the news reporting is done with actual malice, that is, knowledge of falsity or reckless disregard for the truth, may the right to privacy be vindicated and the rights of a free press curtailed. Such is the holding and measure of *Time, Inc. v. Hill*,[75] where the Court said:

> Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press.[76]

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[72] *See, e.g.*, Doe v. Bolton, 410 U.S. 179 (1973); Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965).

[73] *Compare* Cohen v. California, 403 U.S. 15 (1971) *with* Rowan v. Post Office Dept., 397 U.S. 728 (1970).

The Court has said on occasion that the fourth amendment right of privacy protects people, not places, *see, e.g.*, Katz v. United States, 389 U.S. 347, 351 (1967), but "[a]lthough the Supreme Court has repeatedly denied that the Fourth Amendment protects the privacy of places rather than people, it has yet to produce a Fourth Amendment holding which does not depend on the nature of the place where the unreasonable search or seizure took place." Note, *Privacy in the First Amendment*, 82 YALE L.J. 1462, 1477 (1973).

It should be noted that the broad right to privacy discussed in Griswold v. Connecticut, 381 U.S. 479 (1965), and based on elements of the first, third, fourth, fifth, ninth, and fourteenth amendments, was used in that case to vindicate the privacy of a very private place — the marital bedroom.

[74] 331 U.S. 367, 374 (1947).

[75] 385 U.S. 374 (1967).

There is no right of privacy, constitutional or otherwise, sufficiently broad in scope and potency to sustain the overly restrictive sketching ban of Utah's federal district court.

The sketching ban is justified also, it is argued, because the threat of unfavorable publicity and exposure attendant upon litigation has a chilling effect upon the exercise of the right to litigate. The sketching ban, therefore, seeks to minimize that chilling effect by eliminating or greatly reducing publicity of courtroom events. This chilling-effect argument, certainly novel, contains fundamental difficulties. First, the argument is based on the unproven factual premise that people actually forego litigation rather than face the risk of public exposure. That factual premise may be true. The contrary is not asserted here, though the ever-increasing civil caseload of the courts would tend to indicate that the factual premise of the chilling argument is erroneous.[77] And it can be noted that in the present situation, no litigant is alleging a chilling effect and requesting protection therefrom. Rather, the court, on an untested, unproven factual premise, offers protection against the supposed chill by promulgating an order that substantially infringes upon first amendment rights of free expression and fifth and sixth amendment rights of public trial. It seems not too much to ask that, before a substantial restriction on fundamental personal liberties is imposed, the factual basis of that restriction be demonstrated by some type of convincing empirical evidence. No such evidence has appeared to support the sketching ban.

Even granting, however, that the court's factual premise is correct, there remain grave questions whether the sketching ban represents the proper balance between, on the one hand, the above described interests in free expression and public trial and, on the other, the right to litigate in the federal judicial forum. The long-standing American tradition of public trials, enshrined in part in the sixth amendment, militates against the sketching ban. Not only has the courtroom traditionally been an open forum (in a physical sense), but journalists have repeatedly been protected in their right to report on what they witness in court.[78] And court records, often containing a verbatim account of courtroom proceedings, are open to the public.[79] Only in exceptional circumstances is

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[76] *Id.* at 388.

[77] In 1960, there were 51,062 civil (*i.e.*, noncriminal, nonbankruptcy) cases filed in the federal district courts; in 1970, 82,665. P. BATOR, P. MISKIN, D. SHAPIRO & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 51 (2d ed. 1973).

[78] *See, e.g.*, Columbia Broadcasting Sys. v. United States, 497 F.2d 102 (5th Cir. 1974); United States v. Dickinson, 465 F.2d 496 (5th Cir. 1972).

[79] In Cox Broadcasting Corp. v. Cohn, 43 U.S.L.W. 4343 (U.S. March 3, 1975), the Supreme Court reviewed a Georgia statute forbidding the publication of the names of rape victims. The Court identified the issue and gave its holding in these words:

the courtroom a forum of limited exposure.[80]

Further, a press entitled to report on judicial proceedings by effective means such as sketching confers a substantial benefit on society. A free press reports abuses of delegated judicial power, perversions of adversary processes, and concomitant miscarriages of justice. A public awareness of such evils will, if the evils are sufficiently grave and the awareness thereof sufficiently keen, lead to reform. Successful reform of the justice system, that is, reform that eradicates the evils exposed, preserves and enhances the value of the right to litigate within that system.[81] Yet the Utah federal district court with its sketching ban seeks to preserve the right to litigate by curtailing those very institutions — public trial and free press — which have traditionally operated to make the right meaningful.

D. Sketching in Court and the Judge's Discretion

Much that has already been said herein concerning the courtroom as a public place, the right of the media to report courtroom happenings,

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[The issue is] whether the State may impose sanctions on the accurate publication of the name of a rape victim obtained from public records — more specifically, from judicial records which are maintained in connection with a public prosecution and which themselves are open to public inspection. We are convinced that the State may not do so.

Id. at 4350.

The *Cox Broadcasting* case is also important for its treatment of the right of privacy-free press conflict. *See* notes 72-76 *supra* and accompanying text. The appellee (a private citizen) claimed a right to be free from unwanted publicity (about his affairs) which would be offensive to a man of ordinary sensitivities. *Id.* at 4349. The Court, however, held that the appellee did not have a right to privacy sufficiently broad in scope to prevent the press from reporting fully the events of a judicial proceeding.

Appellee has claimed in this litigation that the efforts of the press have infringed his right to privacy by broadcasting to the world the fact that his daughter was a rape victim. The commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions, however, are without question events of legitimate concern to the public and *consequently fall within the responsibility of the press to report the operations of government.*

Id. at 4350 (emphasis added).

[80]Hearings in juvenile courts are generally closed, i.e., the general public is excluded. *See, e.g.,* NEV. REV. STAT. 62.193(1) (1971).

For other examples of instances where all or part of the public may be excluded from the courtroom, *see* note 61 *supra.*

[81]This principle was recently articulated by Mr. Justice White, speaking for an eight-man majority (Justice Rehnquist dissented on jurisdictional grounds) in Cox Broadcasting Corp. v. Cohn, 43 U.S.L.W. 4343, 4350 (U.S. March 3, 1975):

In the first place, in a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations.... Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally. *With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice.*

Id. (emphasis added) (citations omitted).

and the danger of overbroad restrictions applies to the more narrow aspect of the sketching ban — the prohibition on sketching *in* the courtroom. However, an additional element is involved with the in-court sketching ban: the trial judge's broad discretion to control courtroom activity, or stated differently, the judge's power to maintain order.[82] But a power to maintain order should not include the power to control that which is not disruptive or distracting where other legitimate interests are involved. There needs to be a limit or restraint on a trial court's order-keeping power to prevent that power from being arbitrarily and broadly exercised to satisfy a judge's personal whims. Therefore, before a trial judge can exercise his order-keeping power to prohibit an activity in the courtroom, there must be an actual showing that the activity is obtrusive or disruptive. Such is the holding of *Columbia Broadcasting*,[83] where the Fifth Circuit Court of Appeals struck down a blanket ban on in-court sketching imposed by a federal district court. The court recognized the trial judge's broad discretion to control courtroom activity but concluded that without evidence that sketching is in some way obtrusive or disruptive, the sweeping prohibition of in-court sketching could not be condoned. The panel was unanimously and "firmly of the view that the restraint imposed by the court below is overly broad and thus invalid."[84]

Sketching is not inherently disruptive. The person who draws in the courtroom can do so, if he desires, with little more distraction to the participants than one who takes pencil notes. Orderly sketching in the courtroom is, therefore, simply not an activity that can be controlled or regulated by a trial judge's order-keeping power.

III. Conclusion: The Media Should Act

The Salt Lake City media have failed to take legal action to challenge the local rule prohibiting the drawing of courtroom scenes. Some media representatives have advanced as a reason for this inaction a reluctance to violate the order, undergo prosecution for contempt, and suffer a criminal conviction all for the sole purpose of testing the validity of the rule in a higher court.[85] But a criminal contempt proceeding is not the only procedure available for challenging the constitutionality of the local rule. Television and newspaper representatives have available to them,

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[82]*See, e.g.*, United States v. Columbia Broadcasting Sys., 497 F.2d 102, 106-07 (5th Cir. 1974) (ordinarily the trial judge has extremely broad discretion to control courtroom activity).

[83]United States v. Columbia Broadcasting Sys., 497 F.2d 102 (5th Cir. 1974). *See* notes 25-28 *supra* and accompanying text.

[84]*Id.* at 107.

[85]In United States v. Dickinson, 465 F.2d 496 (5th Cir. 1972), *see* text accompanying notes 45-46 *supra*, the appellate court struck down the court order violated by the contemnors but held that, in the circumstances of the case, the order could not be disregarded with impunity.

as effective procedural alternatives with which to challenge the rule, either an action for declaratory judgment[86] or a petition for an extra-

Id. at 509. The court relied on the "well-established principle in proceedings for criminal contempt that an injunction duly issuing out of a court having . . . jurisdiction *must be obeyed,* irrespective of the ultimate validity of the order. Invalidity is no defense to criminal contempt." *Id.* (emphasis in original). *See* Walker v. City of Birmingham, 388 U.S. 307 (1967). The case was remanded to the district court for a determination as to whether or not it would still consider the conduct contemptuous in view of the appellate court's decision that the order violated was unconstitutional. The district court, on remand, sustained the contempt conviction. United States v. Dickinson, 349 F. Supp. 227 (M.D. La. 1972).

Testing the validity of a court order in a contempt proceeding is thus an extremely risky undertaking.

[86]Both the legislative history of the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201-02 (1970), and subsequent judicial treatment of the Act indicate that the declaratory judgment procedure may be properly invoked to challenge a local rule of court.

From the legislative history of the Federal Declaratory Judgment Act, it is clear that Congress intended that interested parties who desired to test the validity or meaning of a statute carrying penalties not be forced to violate the statute and thus face the risks of testing constitutionality in a criminal prosecution. Congress intended the declaratory judgment action to serve as a less risky, less dangerous procedural alternative. The Senate committee report on the proposed Federal Declaratory Judgment Act stated:

> The [declaratory judgment] procedure [in the States] has been especially useful in avoiding the necessity, now so often present, of having to act at one's peril or to act on one's own interpretation of his rights, or abandon one's rights because of a fear of incurring damages. So now it is often necessary, in the absence of the declaratory judgment procedure to violate or purport to violate a statute in order to obtain a judicial determination of its meaning or validity.

S. REP. No. 1005, 73d Cong., 2d Sess., 2-3 (1934).

Professor Borchard, the great and long-time champion of a federal declaratory judgment act, submitted a written statement at the congressional hearing on the Act containing an explanation of one role of the declaratory judgment procedure:

> [T]he declaratory judgment serves another useful purpose. It often happens that courts are unwilling to grant injunctions to restrain the enforcement of penal statutes or ordinances, and relegate the plaintiff to his option, either to violate the statute and take his chances in testing constitutionality on a criminal prosecution, or else to forego, in the fear of prosecution, the exercise of his claimed rights. Into this dilemma no civilized legal system operating under a constitution should force any person. The court, in effect, by refusing an injunction informs the prospective victim that the only way to determine whether the suspect is a mushroom or a toadstool, is to eat it. Assuming that the plaintiff has a vital interest in the enforcement of the challenged statute or ordinance, there is no reason why a declaratory judgment should not be issued, instead of compelling a violation of the statute as a condition precedent to challenging its constitutionality.

Hearings on H.R. 5623 Before a Subcom. of the Senate Comm. on the Judiciary, 70th Cong., 1st Sess. 75-76 (1928).

Recent Supreme Court decisions have reemphasized that Congress intended, with the Federal Declaratory Judgment Act, to provide a means for testing the validity of statutes carrying criminal penalties. *See, e.g.,* Steffel v. Thompson, 415 U.S. 452 (1974); Perez v. Ledesma, 401 U.S. 82, 93 (1971) (Brennan, J., concurring and dissenting); Zwickler v. Koota, 389 U.S. 241 (1967).

Recent case law also supports the contention that the declaratory judgment procedure may be properly invoked to challenge a local rule of a federal district court. When Judge Richard Austin of Chicago promulgated a local rule prohibiting photography not only in the courtroom and its immediate environs but also in virtually the entire Federal Courthouse and Office Building, including the ground floors (19 floors from the nearest courtroom), the plaza (a site of frequent demonstrations), and the sidewalks surrounding the buildings, certain news photographers brought a class action seeking a declaration that the rule was invalid

ordinary writ such as mandamus or prohibition.[87] Either alternative can be used without subjecting the media to the risks of a criminal prosecution.

Yet even in the absence of these procedural alternatives, it can seriously be contemplated whether the media are justified in acquiescing in an unconstitutional rule which infringes important first, fifth, and sixth amendment rights because of the possible criminal penalties violation of

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and an injunction against its enforcement. Both the United States Attorney and the United States Marshall for the district were named as defendants. The judge was not joined. After the district court dismissed the complaint, the Seventh Circuit Court of Appeals unanimously reversed. Dorfman v. Meiszner, 430 F.2d 558 (7th Cir. 1970). The appellate court held that the plaintiffs were entitled to a declaratory judgment to the effect that the local rule went beyond the scope of the first amendment and to an injunction prohibiting enforcement of those parts of the rule declared invalid. *Id.* at 561.

[87]The power to issue writs of mandamus or prohibition to a district court judge is conferred upon the federal circuit courts of appeal by the All Writs Act, 28 U.S.C. § 1651 (1970). Concededly, the proper use or scope of that power is difficult to ascertain. But whatever may be the limitations upon the use of an extraordinary writ in other circumstances, it appears clear that a circuit court of appeals properly exercises its power under the All Writs Act when it issues a writ to nullify an unlawful or unconstitutional local rule of a district court. For example, when a district court promulgated a local rule limiting the *pro hac vice* appearance of out-of-state attorneys, certain of the affected attorneys filed petitions in the circuit court of appeals for writs of mandamus to determine the validity of the rule. Sanders v. Russell, 401 F.2d 241 (5th Cir. 1968). The respondent district court judges asserted (1) that the court of appeals had no jurisdiction to entertain the petitions for mandamus because the appellate court had no supervisory power to question rules promulgated by a district court; and (2) that mandamus was not the proper remedy. The circuit court of appeals responded that "*[t]hese arguments are patently without merit . . . . [T]here is no doubt of our supervisory power by the grant of a writ of mandamus to prohibit the District Court from enforcing its rule.*" *Id.* at 244 (emphasis added). Proceeding to the substantive issue of whether enforcement of the local rule should be prohibited, the court found that the rule contravened what it termed the "congressional intent" or policy to facilitate proceedings in vindication of civil rights brought or sought to be brought in federal court. Though the local rule possibly contained infirmities of constitutional dimensions, the court did not reach those issues. On the more narrow basis that the rule contravened congressional intent, the court declared the local rule invalid and issued a writ of mandamus against its enforcement. *Id.* at 244-48.

The declaration in Sanders v. Russell, *supra,* affirming the existence of a supervisory power in the circuit courts of appeal operative on the district courts though the extraordinary writs is well founded. *See* 9 J. MOORE, FEDERAL PRACTICE ¶ 110.28, at 305-06, 312-13 (2d ed. 1973) [hereinafter cited as MOORE]. Though the extent of the appellate courts' power to issue writs of mandamus is often treated as a "jurisdictional" question, the courts have never limited themselves to an arbitrary and technical definition of "jurisdiction" as the word is used in section 1651. Will v. United States, 389 U.S. 90, 95 (1967). *See* 9 MOORE ¶ 110.26, at 283-84. Indeed, the United States Supreme Court has declared that "exceptional circumstances amounting to judicial 'usurpation of power' will justify the invocation of this extraordinary remedy." Will v. United States, *supra* at 95.

Indeed, in the case of LaBuy v. Howes Leather Co., 352 U.S. 249 (1957), the High Court expressly affirmed the existence, finding it inherent in the All Writs Act, of the circuit courts' supervisory power over the district courts. *Id.* at 259-60. The circuit courts are obligated to exercise this supervisory power with sound discretion, but where there is no normal process of appeal by which judicial action can be reviewed, as is certainly the case when a district court promulgates a local rule general in application and not tied to any specific pending litigation, an extraordinary writ is, in the words of the All Writs Act, both "necessary" and "proper." In such a case, a writ would issue as an appropriate exercise of the circuit court's discretion. 9 MOORE ¶ 110.26, at 284-85. *See* Sanders v. Russell, *supra.*

the rule would entail. Justice Black once observed, "If there is any one thing that could strongly indicate that the Founders were wrong in reposing so much trust in a free press, I would suggest that it would be for the press itself not to wake up to the grave danger to its freedom . . . ."[88] The duty to preserve the rights of a free press rests first, rightfully, on the press.[89] The media should challenge the sketching ban.

APPENDIX: THE UTAH FEDERAL DISTRICT COURT'S RATIONALE FOR THE SKETCHING BAN*

Now, the purpose of this order was at the time it was entered, and still is, to protect people who have business with the federal court and are compelled, if they want to do business, to come here.

Some are brought by the United States Government under arrest. More come here because they have business with the court, have a lawsuit pending, have to come here to attend the bankruptcy court.

The founders of this nation 200 years ago wrote a Constitution, and we operate under that Constitution in this court. And you people are the beneficiaries of the wisdom of the founders who gave us the Constitution.

Now, there is a very important matter here. The Constitution of the United States of America gives the citizens and other people in the country the right to a trial, a common law trial, the kind of trial that the founders knew about in their time. And by that I mean this: Folks have the right to come here and do their business with the court without being pilloried. They have the right to come here and do business with the court and not be subjected to ridicule, hatred, contempt, and they have the right to come here and do business with this court without being held up to degradation by grotesque representations of their physical characteristics.

We are not concerned with the geography of this courtroom. We are not concerned with the tables and chairs and the windows and doors and the contents. We are concerned with people, human beings, who have a constitutional right when they are compelled to come here to do business,

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[88]Time, Inc. v. Hill, 385 U.S. 374, 400 (1967) (concurring opinion).

[89]Under current doctrines on standing, it is doubtful that a member of the public in his role as a receiver of the news could successfully maintain an action attacking the sketching ban. Probably, only the media can successfully meet the requirements of standing. *See, e.g.*, Sierra Club v. Morton, 405 U.S. 727 (1972); *cf.* Association of Data Processing Service Organ v. Camp, 397 U.S. 150 (1970).

*In a 1973 hearing, the Utah federal district court prohibited, by amendment to a 1969 general order, all sketches of courtroom scenes regardless of where made. *See* notes 3-5 *supra* and accompanying text. At that hearing the court articulated the purposes and policies underlying both the 1969 general order and the 1973 amendment. The statement is reproduced in this appendix. It is taken verbatim from the reporter's transcript of the hearing. Transcript of Proceedings 33-39, *In re* KCPX Television Station, C 28-73 (D. Utah, proceedings of Feb. 2, 1973).

to be free from being made a public display of.

Now, that goes not only for television and radio, it goes for the newspapers. Since I have been here nobody, nobody at all, has made a photograph in this courtroom, and as long as I am here nobody will. People have a constitutional right to be free from that kind of harassment, that kind of an interference with their constitutional right to a trial in a courtroom that is quiet, serene, where gentlemen talk about the law, where witnesses are examined, cross-examined, and where the jurors sit there and observe what is going on without the fear, the indimidation, the ridicule of unwanted photographs or grotesque cartoons or caricatures.

Now, you have seen a lot of that this week. It started with KCPX. It is not finished yet.

I said citizens are entitled to come here and not be pilloried. At the time this Constitution was written it was the practice for the establishment in the various communities to haul the unfortunate persons, whoever they might be, male or female, down to the market place, put them in stocks and display them. This was the purpose, to display them to the curious. That appealed to prejudice and ignorance. And these cartoons, in the court's view of it, and the stations that run them, appeal to those in the community who are ignorant and prejudiced.

And there is a constitutional right of people who must come here to have their business transacted not to have that done.

Now, that is the purpose of this order, was then, is now.

Now, the suggestion is made that this order read carefully doesn't reach a fellow who came in here at twelve ten, while the judge was out of the room and the marshals were out of the room and there was no supervision in here. He says he spent ten minutes, he saw the defendant, the plaintiff in the lawsuit, and then he spent all afternoon until four o'clock doing something else away from the courtroom. And then he says he made these cartoons over there. That doesn't improve the situation very much, because it adds to the unreliable and grotesque character of his product. Instead of being anywhere near exact, anywhere near precise, anywhere near a fair representation of this room and the people in it, it was what he was thinking about then he would like to put in that caricature.

Now, I saw that on the eleven o'clock news myself, so I know what it was. It is my duty as the judge of this court to see that the guarantees of the Constitution of the United States are effected. This is a constitutional court. It was not created in the Constitution. Congress was empowered to set up the federal courts and the intermediate appellate courts, but it was contemplated by the founders. And it is here, as all you folks know very well, that the cases come in which people are complaining about the violation of their constitutional rights.

Now, in the Barker case the plaintiffs were here complaining about

the violation of their constitutional rights, and in my view of it KCPX was in the process at the same time of violating another consittutional right of those poor, unfortunate people to have to come here.

It is a tragedy to have to come to court. It is a disaster to have to come to court. Folks do not come here because they want to. They come here because they have to. And they have a constitutional right not to be photographed in here, not to be drawn in grotesque shapes and forms and colors and displayed to the community. There is a very, very wrong influence in that sort of stuff, and that influence is that some people would rather forego coming to court and seeking justice, having their rights vindicated, than to be subjected to notoriety, ridicule, being pilloried in the market place, and so cold chills run up their spines. They say, "Oh, let's forget it. Let's forget it."

That is a serious, chilling effect upon the need and the desire and the opportunity to appear in court and have their cases heard.

Now, this is not a small matter. In my view it is of the utmost importance.

Now, I have just read this order, and I must say to you, in all frankness, that I think the people at KCPX were entitled to interpret it as they say they did. There is that avenue of escape from the express terms of what I wrote, but there is no escape, no escape at all, from the spirit and purpose of this order.

The vice is not whether he drew something in here or out of here; the vice is the pillory, the ridicule, the holding people up to hatred, contempt, degradation. It is not hard to find words for it.

Now, the order is hereby amended, effective this date at 11:10, amended by adding this sentence:

> The broadcasting or reporting for broadcasting by the radio, television, or other means, including the newspapers, whether done in the courtroom or its environs, in connection with any judicial proceeding, is hereby prohibited, whether court is actually in session or not — and emphasize — whether the cartoons, artists' drawings, caricatures, or whatever they may be called, are made on these premises or elsewhere.