Celebrity Justice: A New Double Standard

BY THEODORE J. BOUTROUS, JR., AND MICHAEL H. DORE

The symbolic figure of Blind Justice presides over courthouses throughout the country. Inside the courtroom, however, there is a growing trend to apply two different standards of justice: one for celebrities and one for everybody else. In recent high-profile cases, secrecy has supplanted the public's constitutional right of access, with courts doing everything they can to close the proceedings and information related to the case. The prosecutions of Kobe Bryant, Martha Stewart, and Michael Jackson are perhaps the most prominent examples of this troubling approach.

But public scrutiny of the justice system is not self-defeating. The constitutional right of access should not be diminished by a defendant's star power, and, if anything, heightened public interest should be valued for the light it shines on the particular proceeding and the judicial process in general. " 'People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.' "[1]

More and more, however, courts and parties in high-profile cases are turning the First Amendment upside down by urging and imposing greater secrecy the greater the public interest in the case. Public access often is treated as an inconvenience, an intrusion, or a barrier to achieving a fair trial, while local officials seek to charge the media huge parking and other fees simply for doing their jobs of covering judicial proceedings and reporting the news to the public.[2] There is a very real trend toward litigants and courts acting as though the dissemination of basic, official information about a legal proceeding is an inherent evil that must be prevented. As a result, the parties routinely request, and the courts too often grant, orders imposing wide-ranging secrecy in a number of contexts. Voir dire and other court proceedings are closed to the public. Traditionally public court records, like indictments and exhibits entered into evidence, are sealed. Even prior restraints, almost universally rejected in the law, are imposed and upheld. In effect, the presumption of openness mandated by the Constitution is being reversed, and intense public interest in a high-profile trial is identified, explicitly or implicitly, as the reason why.

Celebrity trials are entitled to no such additional secrecy. Courts in these cases are rightly concerned about protecting the defendant's fair trial rights and often face challenges in doing so, but that does not justify cutting off the free flow of information to the public. The First Amendment presumes that openness will enhance fairness, and it imposes a heavy burden on those who seek to defeat that presumption. Among other things, advocates for secrecy must make a very specific, compelling, narrowly targeted showing that an overriding interest will be injured before any part of a judicial record may be sealed or a hearing closed.[3] There simply is no celebrity exception to these exacting constitutional standards that govern in every other case.

Theodore J. Boutrous, Jr. (tboutrous@gibsondunn.com), is a partner and co-chair of the media practice group at Gibson, Dunn & Crutcher LLP; Michael H. Dore (mdore@gibsondunn.com) is an associate with the firm and member of the group. The authors represent a coalition of major news organizations in the pending Michael Jackson criminal case.

First Amendment Right of Access

"What transpires in the court room is public property."[4] This assertion stems from the strong presumption, rooted in the First Amendment, that everything that happens in the courtroom, and all records filed in and by the court, will be open to public view and scrutiny.[5] Indeed, the "presumption of openness inheres in the very nature of a criminal trial under our system of justice."[6]

This openness is crucial in maintaining the public's trust in the judicial system and allows even "people not actually attending trials [to] have confidence that standards of fairness are being observed."[7] As the U.S. Supreme Court has noted, "the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known."[8] Openness, therefore, "enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system."[9]

The courts have established specific procedures and standards to protect this important First Amendment interest. Accordingly, "[t]he presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."[10] This interest "is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered."[11]

In the recent high-profile cases involving Kobe Bryant, Martha Stewart, and Michael Jackson, however, courts have, in essence, held that the greater the public interest in judicial records and proceedings, the greater the need for secrecy—a dangerous and unsupported proposition that turns the First Amendment on its head. These courts have eschewed more narrowly tailored alternatives to secrecy, such as rigorous voir dire, to ensure an unbiased jury.[12] Instead, they have invoked the heightened public interest to justify extraordinarily broad orders closing proceedings, sealing judicial records, and imposing prior restraints on trial participants and, in one instance, even on the press. Such a double standard, which allows celebrities to litigate in secret and keep details off the public record, is deeply troubling and plainly violates the First Amendment.

The Kobe Bryant Case

The sexual assault case against basketball star Kobe Bryant, which was ultimately dismissed on September 1, 2004,[13] reflected the extent to which closure and secrecy, permissible only in the rarest circumstances, can expand over the course of judicial proceedings. From the numerous hearing closures, sealing orders, and broad gag orders, an environment devel-

oped in which disclosure was discouraged and the media had to fight to obtain basic access to records and proceedings. In fact, more than a month after the case was dismissed, approximately 200 documents remained under seal.[14]

In-Camera Hearing Transcripts

The culture of secrecy reached its peak with an order by the trial court threatening contempt sanctions against anyone who revealed the contents of in-camera hearing transcripts mistakenly released to the press.[15] These transcripts were the product of in-camera proceedings, held in accordance with Colorado's rape shield statute,[16] regarding the "relevancy and materiality of evidence of specific instances of the victim's . . . prior or subsequent sexual conduct, or opinion evidence of the victim's . . . sexual conduct."[17] A court reporter mistakenly e-mailed the transcripts to seven media entities a few days after the hearing.[18] Four hours after e-mailing the transcripts, the court reporter sent out another e-mail, saying that "[t]he transcripts sent earlier today are SEALED and should be deleted."[19] Then, more than an hour later, the court reporter relayed an order from the trial court judge stating that "[a]nyone who has received these transcripts is ordered to delete and destroy any copies and not reveal any contents thereof, or be subject to contempt of Court."[20]

The media companies did not publish the information they received but they did not destroy it either. Instead, they filed an Original Proceeding Petition with the Supreme Court of Colorado, asking the court to set aside the trial court's order as an unconstitutional prior restraint against publication, in violation of the First Amendment to the U.S. Constitution and article II, section 10 of the Colorado Constitution.[21]

The Colorado high court determined that the trial court's order was a prior restraint against publishing the contents of the transcripts.[22] But it also found that "narrowly tailored, the prior restraint is constitutional," and "it is necessary to protect against an evil that is great and certain and would result from the reportage."[23] In support of this conclusion, the court found that "[t]he state has an interest of the highest order in this case in providing a confidential evidentiary proceeding under the rape shield statute, because such hearings protect victims' privacy, encourage victims to report sexual assault, and further the prosecution and deterrence of sexual assault."[24] The court thus upheld, by a vote of four to three, the bulk of the trial court's order, striking only the provision requiring the media companies to destroy any and all copies of the in-camera transcripts.[25]

The dissent argued that protecting the confidentiality of the in-camera proceedings was "our responsibility, which we unfortunately failed to carry out."[26]

> Having failed, we, the judiciary—the government—cannot now order the media to perform the role that we were obligated, but failed, to do—to protect the privacy interests of the alleged victim. Nonetheless, the majority approves the court's power to prevent the dissemination of speech which the court deems dangerous and offensive. In doing so, the majority authorizes the court, rather than the media, to determine what can or cannot be published concerning truthful information regarding a matter of public importance. The power the majority authorizes is the power of the government to censor the media, which is precisely the power the First Amendment forbids.[27]

Nevertheless, the position that the trial court could conscript the media in its efforts to maintain secrecy in the Bryant prosecution carried the day.[28]

Upholding Prior Restraint

To say the least, the order upholding a prior restraint was unusual.[29] Prior restraints are the "most serious and least tolerable infringement on First Amendment rights,"[30] and the U.S. Supreme Court never has upheld one.[31] Although not unconstitutional per se, a prior restraint bears "a heavy presumption against its constitutional validity."[32] Yet the Colorado court took the radical step of restricting the press's right to publish lawfully obtained, truthful information about an official judicial proceeding that had prompted significant public interest and concern.

There is no question that the very fact of intense public and media interest in the case prompted this extraordinary and dangerous ruling. Tacitly likening the press to a swarm of locusts, the majority noted that "[t]he pre-trial proceedings in this case are constantly monitored and reported by the press," and that "[s]uch media-intense activity has befallen a small mountain courthouse and has prompted a sizeable commitment of Colorado judicial resources."[33]

The majority found a heightened state interest in protecting the alleged victim's privacy, in part because Bryant is a very well-known professional basketball player.[34] Also, "[t]he press has been covering every minute detail of this case, and most of this coverage has been published or broadcast nationwide."[35] Moreover, "the reported news is typically posted on the Internet, and thus available to computer users worldwide."[36] The prior restraint was therefore justified, according to the majority, because "[u]nder the circumstances and context of this case, any details of the victim's sexual conduct reported from the *in camera* transcripts will be instantaneously available world-wide and will irretrievably affect the victim and her reputation."[37]

First Amendment Right of Access

In seeking access to the courts, however, members of the press act as "surrogates for the public."[38] Thus, the ability of the press to report on the criminal justice system is a fundamental aspect of effective and fair judicial administration. The press " 'does not simply publish information about trials.' "[39] Rather, it "guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism."[40] The media, therefore, are far more integral to the proper functioning of the judicial system than the majority suggested.

Even more important, drawing a link between public interest in information and the need to keep that information secret effectively renders the First Amendment right of access meaningless. In the Bryant case, the majority found that a prior restraint was justified because the trial was a source of public interest and because the disputed transcripts could be widely distributed to the public. But even in the smallest cases, anyone can post information on the Internet for instantaneous worldwide availability. The crux of the court's decision, therefore, was that because people would want to know the information, because the public had an interest, the courts could issue a prior restraint. Much of the unpublished

information was ultimately released after a strong hint from Justice Stephen Breyer in response to the media's request for a stay from the U.S. Supreme Court, but the prior restraint ruling in the Bryant case was never overruled.[41]

To make matters worse, the accuser's lawyers used the release of the information as the basis for explaining her desire to cease cooperation with the prosecutors, which ended the criminal case.[42] The attitude that dissemination of truthful reports about judicial proceedings is something "bad" that prevents fair trials and should be condemned is utterly specious. Unfortunately, the Bryant case may reinforce this view, which will only contribute to attempts to impose greater secrecy.

The Martha Stewart Case

The criminal prosecution of Martha Stewart also "found itself the focus of an unusually high level of media attention."[43] Also, like the Bryant case, the trial court in the Stewart prosecution used media interest as justification for imposing unusual secrecy. Citing "an extraordinary interest quite beyond the public's right to know,"[44] the district court barred the press and public from juror voir dire preceding Martha Stewart's felony trial.[45] The court found that without such closure, "there is a substantial risk that the defendant's absolute right to a fair trial and an impartial jury will be impaired."[46] Thus, because the case had "generated such widespread publicity," the court ordered that only redacted transcripts of each day's closed proceedings be released.[47]

Celebrity Status Does Not Justify Closure

The U.S. Court of Appeals for the Second Circuit reversed, holding that "[t]he mere fact that the suit has been the subject of intense media coverage is not . . . sufficient to justify closure."[48] The court noted that "[t]o hold otherwise would render the First Amendment right of access meaningless; the very demand for openness would paradoxically defeat its availability. . . . [I]n general, openness acts to protect, rather than to threaten, the right to a fair trial."[49]

The Second Circuit thus rejected the concept that increased public attention somehow warrants a higher level of secrecy than the First Amendment otherwise provides. According to the court, "[t]he mere fact of intense media coverage of a celebrity defendant, without further compelling justification, is simply not enough to justify closure."[50]

Unlike the Colorado Supreme Court, the Second Circuit recognized that if "courts could routinely deny the media access to those cases of most interest to the public," then the "exception to openness would swallow the rule."[51] Courts in any case attracting public scrutiny could respond by closing the proceedings and sealing most of the documents filed therein. As the *Stewart* court observed, however, this practice would be, and is, antithetical to the principles underlying our judicial system:

> Our national experience instructs us that except in rare circumstances openness preserves, indeed, is essential to, the realization of [the right to a fair trial] and to public confidence in the administration of justice. The burden is heavy on those who seek to restrict access to the media, a vital means to open justice.[52]

The Michael Jackson Case

Perhaps the most glaring example of this trend toward a new double standard of justice in celebrity cases is the pending felony child molestation case against Michael Jackson in California. From the outset of the proceedings, secrecy has been anything but a rarity.

On November 17, 2003, the Superior Court for the County of Santa Barbara issued a search warrant of Jackson's Neverland ranch and other locations.[53] The Santa Barbara Sheriff's Department and District Attorney's Office executed the warrant the next day.[54] Section 1534(a) of the California Penal Code explicitly provides that "[t]he documents and records of the court relating to the warrant shall be open to the public as a judicial record" ten days after execution, but the trial court ordered the warrant records sealed for forty-five days from the date of issuance.[55] The court subsequently ordered that the warrant records remain sealed "until, at a minimum, the arraignment in this matter."[56] A group of major news organizations then filed a motion to unseal these records, including the warrant return, the inventory of items seized, and the supporting affidavits.[57]

Jackson's first arraignment was held January 16, 2004, and the court scheduled the arguments on the media's motion to unseal the warrant records for the same day.[58] Without explanation, the court barred cameras from the courtroom for this and all other hearings.[59] During the January 16 proceeding, over the objections of Jackson and the news organizations, the court issued a broad gag order that bars the parties, their lawyers, and even potential witnesses from disseminating to the public any substantive information whatsoever.[60] The order bars discussion of the details of the charges, the identities of potential witnesses, and statements about any evidence that might be introduced or excluded.[61]

As for the warrant materials, Jackson opposed the media's motion, identifying a series of "compelling reasons" why it was necessary to keep the records under seal.[62] One such reason was that it was "absolutely clear to anyone who lives in this state and perhaps throughout the world, that everything that happens in this case" draws immense media and public interest; thus, "the people who are in the prospective pool of jurors are watching everything we do."[63] After the hearing, however, Jackson promptly left the courthouse and danced on the roof of his SUV, creating just the sort of spectacle he supposedly wanted to avoid.[64]

One week later, the court issued an order holding that the "privacy of the minors involved" and the purported need to maintain "a jury pool unprejudiced by the disclosures that would result" justified sealing the entire eighty-two-page affidavit that provided the basis for the searches, except for some "general introductory material."[65] The court found that "the most glaringly obvious fact about the present case is the significant media and public interest that it is generating."[66] Michael Jackson is a "celebrity defendant" and "a figure recognized around the world," the court noted, "and the events surrounding execution of the search warrant, his arrest and even the file-stamping of the felony complaint have received

wide-spread publicity."[67]

Decorum Order

In the months that followed, the court broadened the scope of the secrecy it imposed in the case, especially in relation to the grand jury proceedings. In March 2004, the court issued a Decorum Order that, among other things, restricted all persons, even those not involved in the grand jury process, from communicating with any person summoned to appear as a grand juror.[68] The general order, ostensibly binding the world at large, also mandated that no grand juror, prospective grand juror, or witness could be photographed, even while entering or exiting the courthouse or any other facility utilized by the grand jury.[69] This broad prohibition led to disturbing displays of government power. One sheriff's deputy, for example, ordered a freelance photographer on assignment from the Associated Press to delete several photographs from his digital camera because, according to a report of the incident, "they revealed too much of the people entering the building."[70]

The media contested the Decorum Order on an emergency basis. The trial court responded by modifying some of its provisions, and the court of appeal stayed and modified several others.[71] In addition, the trial court held one hearing that was ancillary to the grand jury proceedings in open court.[72] Nevertheless, several troubling provisions of the Decorum Order remained;[73] and county officials were permitted to continue the extraordinary, and seemingly unprecedented, step of moving the grand jury out of the courthouse to a secret location, and then, once that location was discovered, barricading the public streets to exclude the press.[74]

Criminal Trial Court Proceedings

In the criminal trial court proceedings, the trial court—over the repeated objections of the media—has adopted extraordinary procedures that in effect require every document of substance to be filed under seal in the first instance, along with a motion to seal, and those documents are presumed to be secret until the court rules otherwise.[75]

As part of this process, the trial court has established a categorical rule that bans public filing by the parties of records containing what it has broadly and vaguely defined to be "sensitive material,"[76] including any part of a motion or brief that might reveal the substantive allegations of the felony charges, the identity of any potential witness or alleged coconspirators, or the evidence; and it vets each document to redact such information before public release.[77]

The records sealed according to the court's procedures include the key parts of the grand jury indictment itself, dozens of search warrants and related materials, and major portions of Jackson's motion to dismiss the indictment and related briefs. The court's approach not only imposes tremendous and unnecessary burdens on the court and its staff, but it delays public access to judicial records for weeks and sometimes months, irrespective of whether the First Amendment standards for sealing documents have been satisfied.

Secrecy Due to Celebrity Status

The prime basis for the closure rulings is Michael Jackson's star power. Rejecting the compelling rationale offered by the Second Circuit in the Stewart case, the court has instead pointed out that although "Ms. Stewart was certainly a high profile defendant, . . . with all due respect to Ms. Stewart, her status pales in comparison with that of Mr. Jackson."[78] According to the court, the "very nature of who the defendant is makes every move by the court, the prosecution and the defense center stage in a world-wide media theatre."[79] Following from such observations is the court's view that greater media attention demands greater secrecy.[80]

Materials Should Be Disclosed

Celebrity status, however, is no justification for closure. The Jackson court has redacted page after page of crucial information about the charges against Jackson and Jackson's attack on those charges because this is "not just any garden variety high-profile case,"[81] the "case has generated extensive publicity,"[82] and it "involves one of the most, if not the most, noteworthy public personalities in the world."[83] For example, the court has redacted seven pages describing twenty-eight alleged overt acts of conspiracy from Jackson's indictment. These portions of the indictment remain under seal even though such secrecy is indefensible in a "criminal law tradition [that] insists on public indictment"[84] and even though the parties have given in open court detailed accounts of the redacted information.

Similarly, vast portions of Jackson's motion to dismiss the indictment, the district attorney's opposition, and Jackson's reply remain under seal. Jackson's motion, argued in open court, accuses the district attorney of a gross and unprecedented abuse of power in bringing the charges. Such an allegation of wrongdoing by government officials creates an even greater need for total public access, in part so the press may fulfill its role, recognized by the Supreme Court, of preventing injustice by ensuring "extensive public scrutiny and criticism" of police and court procedures.[85]

Many more judicial records have been sealed wholly or in part, including the aforementioned eighty-two-page search warrant affidavit, which was entered into evidence at the hearing on Jackson's motion to dismiss the indictment. It is well established that "access to search warrant materials after indictment is almost universal."[86] Because that document and other materials have been submitted as evidence as a basis for adjudication, they are subject to an even stronger presumption of openness and access.[87]

Beyond the individual reasons why these materials, and others, should be disclosed to the public, there remains the more general notion that they were all placed under seal in violation of the First Amendment and California law.[88] The trial court's directives to the parties require that virtually all judicial records be filed under seal, along with a motion requesting sealing, so that the court can review the records before releasing them to the public or sealing them permanently in whole or in part. The parties must file these motions to seal even if they believe no sealing is necessary. By adopting these procedures, however, the court has literally reversed the presumption of openness and established a presumption of secrecy.[89] Instead of enjoying the presumption of openness, the public and press must fight to unseal these judicial records. This creates a thick atmosphere of secrecy and causes significant delay in the

release of records that arguably do not even contain information that may permissibly be kept secret.

Presumption of Openness in Associated Press

Similar approaches taken by trial courts have been soundly rejected by the Ninth Circuit Court of Appeal and the Supreme Court of California. For example, in *Associated Press v. U.S. District Court*, the legal proceedings surrounding a criminal indictment had "created much public interest and received extensive coverage in the press."[90] The district court responded by ordering that all future filings be filed under seal to allow the court to initially review them before making a decision about whether they should be publicly disclosed.[91] The district court wrote a "thorough opinion carefully analyzing the various issues" and modified its sealing procedure so that there would be rulings on each sealed document forty-eight hours after being submitted.[92]

The Ninth Circuit, however, ruled that the district court's orders "violate[d] the public's [F]irst [A]mendment right of access to criminal proceedings."[93] According to the court, "orders that seal each and every document filed impermissibly reverse the 'presumption of openness' " inherent in our criminal justice system.[94] And while this reverse presumption lasted for only forty-eight hours in *Associated Press*, the court of appeals held that this delay was "a total restraint on the public's [F]irst [A]mendment right of access even though the restraint [was] limited in time."[95]

Presumption of Openness in NBC Subsidiary

NBC Subsidiary (KNBC-TV), Inc. v. Superior Court,[96] the seminal case under California law regarding the presumption of openness, presented nearly identical issues. Like the Michael Jackson case, *NBC Subsidiary* involved "prominent figures in the entertainment industry" and a high-profile case that attracted intense media coverage.[97] And like the trial court in the Jackson case, the trial court in *NBC Subsidiary* was understandably concerned about protecting the parties' fair trial rights and ensuring that "the litigants appear before a fair and impartial jury untainted by information obtained that was not presented to the jury."[98]

To address this concern, the trial court "issued orders excluding the public and the press from all courtroom proceedings held outside the presence of the jury, and sealing the transcripts of those proceedings."[99] The court justified this approach on the ground that "it's a higher profile case, . . . [and] the information, unlike other cases, all the information is being disseminated in the news media."[100] The *NBC Subsidiary* trial court "characterized its stated goal as 'ensur[ing] that the jurors do not hear' prejudicial material that may be published by the media . . . and suggested that because cautionary instructions cannot guarantee that jurors will not learn of excluded or otherwise inadmissible information, such instructions always are inadequate, at least in cases with saturated media coverage."[101]

The California Supreme Court rejected this approach, however, holding that "[n]either the high court cases, nor their progeny . . . suggest that closure is appropriate merely because standard alternatives short of closure . . . cannot be guaranteed to preclude jurors from learning of inadmissible material."[102]

The supreme court deemed insufficient to justify closure of the trial court's supposition that jurors might see press coverage and might be influenced by it.[103] The court reasoned that, despite the intense publicity, there was no basis for concluding that alternatives to closure, such as "frequent and specific admonitions and instructions, coupled with careful voir dire of the jurors and/or other measures, would not have constituted an adequate and less restrictive alternative to closure of all the proceedings that were held outside the presence of the jury."[104] Courts "must presume that jurors generally follow instructions to avoid media coverage, and to disregard coverage that they happen to hear or see."[105] In short, the court said, "[A]s the high court made clear . . . 'The First Amendment right of access cannot be overcome by the conclusory assertion that publicity *might* deprive the defendant of [a fair trial].' "[106]

Trying to Strike a Balance

The Jackson court's rulings cannot be squared with these basic principles. The rulings have deprived the public of some of the most basic information about the case and limited the public's ability to scrutinize the proceedings contemporaneously. At the same time, as in the Kobe Bryant and Martha Stewart cases, the media's vigilant efforts to enforce First Amendment principles have produced some positive results, prompting far more openness than otherwise would have occurred. The court has released large quantities of documents and held major hearings, which have lasted for several days and included testimony from the district attorney and the accuser's mother, in open court. The court genuinely seems to be seeking to strike a balance between the First Amendment and fair trial rights at stake. But too much secrecy does great damage to First Amendment freedoms by restricting the well-documented fairness-enhancing effect of judicial openness. The media, therefore, have appealed all of the sealing orders, the gag order, and the unique procedures adopted by the court.

Conclusion

Courts in recent high-profile cases have used the interest generated by those proceedings to prevent the public from serving its traditional role as a vigilant guardian of fairness in the criminal justice system. Even if such secrecy is designed to serve the understandable goals of protecting an alleged victim of sexual assault or a defendant's right to a fair trial, constitutional requirements must be respected. Celebrity status does not demand an exception to the First Amendment standards that govern in every other case, and the public's right of access is not diminished by heightened interest in the proceedings. To hold otherwise, as is the trend in celebrity cases, fosters public suspicion and misunderstanding, casting a shadow over a system that derives its strength from openness and transparency.

Endnotes

1. Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 13 (1986) [*Press-Enterprise II*] (quoting Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 572 (1980) (plurality)).

2. *See* Dawn Hobbs, *Media Groups Object to Parking Fees*, SANTA BARBARA NEWS-PRESS, Feb. 4, 2004, *available at* www.newspress.com/mjacksonupdate/0204mediaobjects.htm.

3. Press-Enterprise Co. v. Superior Court,

464 U.S. 501, 510 (1984) [*Press-Enterprise I*].

4. Craig v. Harney, 331 U.S. 367, 374 (1947); *see also* NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, 980 P.2d 337, 351 (Cal. 1999) (quoting same).

5. *See, e.g.*, Columbia Broad. Sys., Inc. v. U.S. Dist. Court, 729 F.2d 1174 (9th Cir. 1984) (noting "the presumption that the public and the press have a right of access to criminal proceedings and documents filed therein" and that "[t]he right of access is grounded in the First Amendment and in common law, and extends to documents filed in pretrial proceedings as well as in the trial itself.") (internal citations omitted).

6. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 573 (1980) (plurality).

7. *Press-Enterprise I,* 464 U.S. at 508.

8. *Id.* (emphasis in original).

9. *Id.*

10. *Id.* at 510; *see also* Globe Newspaper v. Superior Court, 457 U.S. 596, 606–07 (1982) ("Where . . . the state attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.") (emphasis omitted)).

11. *Press-Enterprise I,* 464 U.S. at 510.

12. *See* Neb. Press Ass'n v. Stuart, 427 U.S. 539, 563–64 (1976) (invalidating prior restraint prohibiting the press from publishing accounts of a "widely reported murder of six persons" in a small rural town because, inter alia, the lower courts had given insufficient consideration to alternatives such as postponement of the trial, "searching questioning of prospective jurors . . . to screen out those with fixed opinions as to guilt or innocence; . . . [and] the use of emphatic and clear instructions on the sworn duty of each juror to decide the issues only on evidence presented in open court"); Murphy v. Florida, 421 U.S. 794, 795, 800 (1975) (holding that, despite "extensive press coverage" and the fact the defendant's "flamboyant lifestyle made him a continuing subject of press interest," voir dire indicated "no such hostility to petitioner by the jurors who served in his trial as to suggest a partiality that could not be laid aside"); *see also* Gentile v. State Bar of Nev., 501 U.S. 1030, 1054–55 (1991) (opinion of Kennedy, J., joined by Marshall, Blackmun, and Stevens, JJ.) ("Empirical research suggests that in the few instances when jurors have been exposed to extensive and prejudicial publicity, they are able to disregard it and base their verdict upon the evidence presented in court. . . . Voir dire can play an important role in reminding jurors to set aside out-of-court information and to decide the case upon the evidence presented at trial."); Columbia Broad. Sys., Inc. v. U.S. Dist. Court, 729 F.2d 1179 (1984) ("Recent highly publicized cases indicate that even when exposed to heavy and widespread publicity many, if not most, potential jurors are untainted by press coverage.").

13. Order re Motion to Dismiss, People v. Bryant, No. 03-CR-204 (Dist. Ct., Eagle County, Colo., Sept. 1, 2004), *available at* www.courts.state.co.us/exec/media/eagle/08–04/orderremotiontodismiss.pdf.

14. Index of Documents Filed Under Seal, People v. Bryant, No. 03-CR-204 (Dist. Ct., Eagle County, Colo., Oct. 20, 2004), *available at* www.courts.state.co.us/exec/media/eagle/ courtdocuments.htm. Such a delay amplifies the harm to the public's rights because of "the critical importance of *contemporaneous* access . . . to the public's role as overseer of the criminal justice process." Washington Post v. Robinson, 935 F.2d 282, 287 (D.C. Cir. 1991) (emphasis in original). Even a forty-eight-hour delay in unsealing judicial records "is a total restraint on the public's first amendment right of access even though the restraint is limited in time." Associated Press v. U.S. Dist. Court, 705 F.2d 1143, 1147 (9th Cir. 1983); *see also, e.g*., Sammartino v. First Judicial Dist. Court, 303 F.3d 959, 973 (9th Cir. 2002) (noting that the "Supreme Court has made clear that '[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury. . . .'") (quoting Elrod v. Burns, 427 U.S. 347, 373 (1976)).

15. *See* People v. Bryant, 94 P.3d 624, 626 (Colo. 2004).

16. COLO. REV. STAT. § 18–3-407(2) (2003).

17. *Id.* § 18–3-407(2)(a).

18. *Bryant,* 94 P.3d at 626.

19. Steve Lipsher, *Error Releases Kobe Transcripts*, DENVER POST, June 25, 2004, at B-01.

20. *Id.; Bryant,* 94 P.3d at 626.

21. *Bryant*, 94 P.3d at 636.

22. *Id.*

23. *Id.* at 632.

24. *Id.*

25. *Id.* at 638. The Supreme Court of Colorado further ordered the trial court to "make its relevancy and materiality determinations under the rape shield statute as expeditiously as reasonably possible regarding the evidence it heard in the rape shield *in camera* proceedings." *Id.* Only the evidence deemed immaterial and irrelevant would be kept under seal in the future. *See id.* at 631.

26. *Id.* at 639 (Bender, J., dissenting).

27. *Id.* at 639–40 (Bender, J., dissenting) (internal footnote omitted).

28. In reaching its decision, the majority relied in part on opinions from the U.S. Supreme Court that did not involve prior restraint, such as *Florida Star v. B.J.F.,* 491 U.S. 524 (1989). *See id.* at 634 & n.9. The majority "acknowledge[d] that *Florida Star* involved penal sanctions for speech rather than a prior restraint." *Id.* at 634 n.9. Nevertheless, "in *Smith v. Daily Mail,* the Court stated that 'whether we view the statute as a prior restraint or as a penal sanction for publishing lawfully obtained, truthful information is not dispositive because even the latter action requires the highest form of state interest to sustain its validity.'" *Id.* (quoting Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 101 (1979)). "Thus," the majority concluded, "the court's discussion necessitates the 'highest form' of state interest—the identical requirement as a prior restraint." *Id.*

But the majority did not address the policy behind distinguishing a prior restraint from a penalty imposed after the speech took place. In *Southeastern Promotions Ltd. v. Conrad,* 420 U.S. 546 (1975), for example, a case cited in the *Daily Mail* paragraph quoted by the majority, the U.S. Supreme Court gave a fuller explanation of why there would be such a distinction, noting that "[t]he presumption against prior restraints is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties." 420 U.S. at 559. According to the Court, "[b]ehind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand." *Id.* (emphasis in original). "It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable." *Id.*

29. "In the case of a prior restraint on pure speech, the hurdle is substantially higher [than for an ordinary preliminary injunction]: publication must threaten an interest more fundamental than the First Amendment itself. Indeed, the Supreme Court has never upheld a prior restraint, even faced with the competing interest of national security or the Sixth Amendment right to a fair trial." Procter & Gamble Co. v. Bankers Trust Co., 78 F.3d 219, 226–27 (6th Cir. 1996); *cf. Nebraska Press Ass'n,* 427 U.S. at 563 (the Sixth Amendment right of a criminal defendant to a fair trial does not outrank the First Amendment right of the press to publish information); New York Times v. United States, 403 U.S. 713, 714 (1971) [*Pentagon Papers*] (per curiam) (rejecting prior restraint suppressing classified information in the Pentagon Papers); Religious Tech. Ctr. v. Lerma, 897 F. Supp. 260, 263 (E.D. Va. 1995) ("If a threat to national security was insufficient to warrant a prior restraint in *New York Times Co. v. United States,* the threat to plaintiff's copyrights and trade secrets is woefully inadequate.").

30. *Neb. Press Ass'n,* 427 U.S. at 558.

31. *See generally supra* note 29.

32. *Pentagon Papers,* 403 U.S. at 714.

33. People v. Bryant, 94 P.3d 624, 632 (Colo. 2004).

34. *Id.*

35. *Id.*
36. *Id.*
37. *Id.*
38. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 572–73 (1980) (plurality).
39. Neb. Press Ass'n v. Stuart, 427 U.S. 539, 559–60 (1976) (quoting Sheppard v. Maxwell, 384 U.S. 333, 350 (1966)).
40. *Id.*
41. After the opinion was issued, the media filed an application to the U.S. Supreme Court for a stay. Associated Press v. Dist. Court, 125 S. Ct. 1 (2004) (Breyer, J.). Justice Breyer, the Circuit Justice for the Tenth Circuit, denied the application without prejudice because "[m]y reading of the transcripts leads me to believe that the trial court's determination as to the relevancy of the rape shield material will significantly change the circumstances that have led to this application." *Id.* at 4. The trial court subsequently released most of the transcripts, redacting only sixty-eight lines. *See* Dave Zelio, *Judge in Kobe Bryant Trial Releases Transcript of Defense and Prosecution Dueling over Evidence*, ASSOCIATED PRESS, Aug. 3, 2004; Steve Lipsher & Felisa Cardona, *Media Drop Bryant Lawsuit,* DENVER POST, Aug. 4, 2004, at B-02. The media entities then decided not to petition Justice Breyer to order disclosure of this edited information. *Id.*
42. *See* Howard Pankratz & Steve Lipsher, *Dismissed—Prosecution: Accuser Is Unable to Proceed with Trial Defense*, DENVER POST, Sept. 2, 2004, at A-01; Howard Pankratz, *Bryant Trial Judge Clashes with Lawyers for Accuser*, DENVER POST, Aug. 15, 2004, at A-01.
43. ABC, Inc. v. Stewart, 360 F.3d 90, 94 (2d Cir. 2004).
44. *Id.* at 96.
45. *Id.*
46. *Id.* at 95.
47. *Id.*
48. *Id.* at 102.
49. *Id.*; *see also* Neb. Press Ass'n v. Stuart, 427 U.S. 539, 565 (1976) ("[P]re-trial publicity, even if pervasive and concentrated, cannot be regarded as leading automatically and in every kind of criminal case to an unfair trial.").
50. *Stewart,* 360 F.3d at 106.
51. *Id.* at 101.
52. *Id.* at 105–06.
53. *See* Notice of Motion and Motion Filed by National Broadcasting Company, Inc.; CBS Broadcasting, Inc.; Fox News Network L.L.C.; ABC, Inc.; Cable News Network, Inc.; and the New York Times Company, Seeking to Unseal Certain Court Records Related to Search Warrant #884686 at 3, People v. Jackson, No. 1133603 (Cal. Super. Ct. Jan. 7, 2004) [hereinafter Notice of Motion].
54. *Id.*
55. *See id.*
56. Agreement of Parties and Order Sealing Search Warrants, Affidavits in Support Thereof, and Returns at 3, People v. Jackson, No. 1133603 (Cal. Super. Ct. Dec. 26, 2003).
57. Notice of Motion, *supra* note 53.
58. Reporter's Transcript of Proceedings at 18:20–28:15, People v. Jackson, No. 1133603 (Cal. Super. Ct. Jan. 16, 2004). [hereinafter Reporter's Transcripts].
59. *See, e.g.,* Order on Media Request to Permit Coverage, People v. Jackson, No. 1133603 (Cal. Super. Ct. Jan. 12, 2004) (checking box on form denying the request to photograph, record, or broadcast in the courtroom). At every hearing thereafter, the court has denied media requests that still and video cameras be allowed in the courtroom.
60. Reporter's Transcripts, *supra* note 58, at 74:22–77:18.
61. *Id.* The court subsequently memorialized this gag order in writing and later amended it to include a "safe harbor" provision that requires those subject to the order to obtain approval from the trial court in advance before making any public statements about the case. Order re "Safe Harbor" Proposals, People v. Jackson, No. 1133603 (Cal. Super. Ct. Jan. 23, 2004).
62. Reporter's Transcripts, *supra* note 58, at 24:10–28:15.
63. *Id.* at 24:16–23.
64. *Jackson Pleads Not Guilty, Then Gives Fans a Thrill: Circus-like Atmosphere Surrounds Hearing; Gag Order Imposed*, CNN, Jan. 18, 2004, *available at* www.cnn.com/2004/LAW/ 01/16/jackson. arraignment/.
65. Findings and Order re Sealing of Search Warrant Materials at 2, 6, People v. Jackson, No. 1133603 (Cal. Super. Ct. Jan. 23, 2004).
66. *Id.* at 4.
67. *Id.* On February 2, 2004, the court released heavily redacted versions of the warrant and inventory, and general introductory material from the affidavit, although the eighty-two-page affidavit remains under seal.
68. Grand Jury Decorum Order at 2, *In re* Santa Barbara Criminal Grand Jury, No. 04–002 (Cal. Super. Ct. Mar. 24, 2004).
69. *Id.* Such broad prohibitions were in clear conflict with pronouncements by the California courts that it is "well established that injunctions are not effective against the world at large." People *ex rel.* Gwinn v. Kothari, 83 Cal. App. 4th 759, 765 (2000); *see also id.* at 769 ("[A]n injunction is binding only on parties to an action or those acting in concert with them."); Planned Parenthood Golden Gate v. Foti, 107 Cal. App. 4th 345, 354 (2003) (holding that "because [the injunction's notice provision] purports to enjoin all demonstrators in addition to the enjoined parties, the restriction is overbroad on its face").
70. Tim Molloy, *Media Access Again Issue in Jackson Molestation Case*, ASSOCIATED PRESS, Mar. 26, 2004.
71. *See* Order, Nat'l Broad. Co. et al. v. Superior Court, No. B174116 (Cal. Ct. App. Apr. 1, 2004) (staying provisions of amended Decorum Order).
72. *See* Reporter's Transcripts, *supra* note 58, at 25:17–30:27 (defense requested unredacted copies of search warrants and expressed concern regarding the manner in which the grand jury proceedings were being conducted).
73. For example, the amended Decorum Order broadly restricted the ability of grand jury witnesses to talk to anyone to whom they wanted about what they said and observed in the grand jury room. Amended Grand Jury Decorum Order [3–29–04] at 3, *In re* Santa Barbara Criminal Grand Jury, No. 04–002 (Cal. Super. Ct. Mar. 29, 2004).
74. *See* Dawn Hobbs, *Accuser Testifies Before Grand Jury, Source Says*, SANTA BARBARA NEWS-PRESS, Mar. 31, 2004, *available at* www.newspress.com/mjacksonupdate/0331boytestifies.htm (noting that grand jury proceedings were held in "a barricaded area behind the Santa Barbara County Sheriff's Department"); Dawn Hobbs, *Witnesses Testify at "Secret" Location*, SANTA BARBARA NEWS-PRESS, Mar. 30, 2004, *available at* www.newspress.com/mjacksonupdate/0330secretlocation.htm ("Undercover deputies shuttled witnesses in unmarked vans with blackened windows to the sheriff's training facility [for grand jury testimony].").
75. *See* Respondent Santa Superior Court's Reply Brief at 16–17, NBC Universal, Inc. et al. v. People of the State of California, No. B176587 (Cal. Ct. App. 2004); *id.* at 13 (rejecting the notion that the First Amendment gives the public the "right to look first, before the court has had an opportunity to judge the nature of the questioned documents or other matter"); *see also* Reporter's Transcripts, *supra* note 58, at 5:26–6:28.
76. *See* Respondent Santa Superior Court's Reply Brief, *supra* note 75, at 16.
77. *Id.* at 16–17.
78. *See id.* at 8.
79. *Id.* at 2.
80. *Id.*
81. *Id.* at 8.
82. *Id.* at 12.
83. *Id.*
84. Smith v. Doe, 538 U.S. 84, 99 (2003); *see also* United States v. Smith, 776 F.2d 1104, 1112 (3d Cir. 1985) ("Because of our historic experience and the societal interest served by public access to indictments and informations, . . . such access is protected by the First Amendment.").
85. Gentile v. State Bar of Neb., 501 U.S. 1030, 1035 (1991) (plurality) (citation omitted); *see also id.* at 1035–36 ("Public awareness and criticism have even greater importance where . . . the criticism questions the judgment of an elected public prosecutor.").
86. *In re* Search Warrant, M-3–94–80, 1994

U.S. Dist. LEXIS 18360, at *17 (S.D. Ohio June 7, 1994); *see also, e.g., In re* Application and Affidavit for a Search Warrant, 923 F.2d 324, 326 (4th Cir. 1991) (upholding district court's order unsealing warrant affidavit following the indictment but before trial); *In re* Search Warrants Issued on May 21, 1987, No. 87-186 (JHG), 1990 U.S. Dist. LEXIS 9329 at *19 (D.D.C. July 26, 1990) ("[o]nce an individual is so indicted, the public has a legitimate interest in information contained in the affidavits in support of the search warrant . . . which led to the indictment").

87. *Cf.* NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, 20 Cal. 4th 1178, 1208 n.25 (1999) ("Numerous reviewing courts . . . have found a First Amendment right of access to civil litigation documents filed in court as a basis for adjudication. . . . By contrast, decisions have held that the First Amendment does not compel public access to discovery materials that are neither used at trial nor submitted as a basis for adjudication.").

88. Under Rule 243.2 of the California Rules of Court, a court may order a record sealed after a party moves to seal the record and only if it expressly finds facts that establish that (1) there exists an overriding interest that overcomes the right of public access to the record; (2) the overriding interest supports sealing of the record; (3) a substantial probability exists that the overriding interest will be prejudiced if the record is not sealed; (4) the proposed sealing is narrowly tailored; and (5) no less restrictive means exist to achieve the overriding interest. CAL. R. CT. 243.1(d). Even if the court makes these express findings, its order must (1) specifically set forth the facts that support the findings, and (2) direct the sealing of only those documents and pages, or, if reasonably practicable, portions of those documents and pages that contain the material that needs to be placed under seal. All other portions of each document or page must be included in the public file. CAL. R. CT. 243.1(e).

89. *See NBC Subsidiary,* 980 P.2d at 355 ([The "presumption of openness may be overcome only by an *overriding interest* based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. *The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered*.") (quoting *Press-Enterprise I,* 464 U.S. at 510) (italics added by Supreme Court of California); *see also* CAL. R. CT. 243.1(c) (noting that "[u]nless confidentiality is required by law, court records are presumed to be open").

90. 705 F.2d 1143, 1144 (9th Cir. 1983).

91. *Id.*

92. *Id.* at 1145.

93. *Id.* at 1147.

94. *Id.* (quoting *Richmond Newspapers,* 448 U.S. at 573 (plurality)).

95. *Id.*

96. *Id.* 980 P.2d 337 (1999).

97. *Id.* at 340.

98. *Id.* at 341.

99. *Id.* at 340.

100. *Id.* at 342 (quoting trial court); *see also id.* at 341 (trial court justified closure because " 'I do not want to have a situation I have seen in other cases where the press reports something that was out of the presence of the jury and then, somehow, someone reads it.' ").

101. *Id.* at 369 n.49.

102. *Id.*

103. *Id.* at 369–70.

104. *Id.*

105. *Id.* at 369.

106. *Id.* at 370 (quoting Press-Enterprise Co. v. Superior Court, 470 U.S. 1, 15 (1986) (italics added by California Supreme Court).