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Trial Participants in the Newsgathering Process

C. Thomas Dienes

TRIAL PARTICIPANTS IN THE NEWSGATHERING PROCESS

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I. INTRODUCTION

The 1990s produced a number of sensational criminal and civil trials. The media and public avidly followed the murder trials of O.J. Simpson and the Menendez brothers, the Oklahoma City bombing trials of Timothy McVeigh and Terry Nichols, and the trial of those charged in the World Trade Center bombing. Civil trials involving products liability, medical malpractice, environmental pollution; the civil trial of O.J. Simpson; Paula Jones's sexual harassment action against President Clinton; and the notorious antitrust case against Microsoft similarly captured the public's attention. Also, as might be expected, trial judges and the legal system generally grappled with questions concerning the effects of potentially harmful publicity on the administration of justice.[1] Most of the attention naturally concerned the potential prejudicial effect of media coverage in criminal cases on the fair trial rights of the defendant.[2] Even when the publicity is gener-

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* Lyle T. Alverson Professor of Law, George Washington University Law School. B.S., Loyola University, Chicago; J.D., Northwestern University; Ph.D., Northwestern University. The author was General Counsel at *U.S. News and World Report* and continues to serve as Legal Consultant to *U.S. News* and *Fast Company Magazine*.

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1. *See generally* C. THOMAS DIENES ET AL., NEWSGATHERING AND THE LAW (2d ed. 1999) (providing much of the background material for this article).

2. *See generally* TIMOTHY R. MURPHY ET AL., MANAGING NOTORIOUS TRIALS (2d ed. 1998); RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE THEORY OF THE FIRST AMENDMENT § 15.28 (1996); HARVEY L. ZUCKMAN ET AL., MODERN COMMUNICATION LAW (1999); Thomas F. Liotti, *Closing the Courtroom Door to the Public: Whose Rights Are Violated?*, 63 BROOK. L. REV. 501 (1997); Lance R. Peterson, Note, *A First Amendment-Sixth Amendment Dilemma: Manuel Noriega Pushes the Ameri-*

ated by the defense in criminal cases, however, there is concern for the effect of outside influences on the courtroom proceedings.[3] Similarly, the potential for harmful publicity in civil cases, e.g., disclosure of trade secrets, private personal matters, or other confidential information, stimulates judicial and legislative concern.[4]

When the legal system moves to combat such harmful publicity, however, it confronts limitations imposed by the First Amendment. Supreme Court precedent has sharply curtailed direct sanctions against the media for prejudicial publicity and restraining orders (gag orders) on media publication. Demanding standards of justification, such as the clear and present danger doctrine and strict scrutiny, generally make such regulation unavailable.[5]

Indirect regulation of the media, however, is a different matter.[6] It is believed, probably mistakenly, that if the media is prevented from obtaining access to the sources of information, the potential for harmful publicity can be curtailed. Some indirect regulations, such as complete or partial closure of judicial proceedings, are subject to significant First Amendment limitations.

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can Judicial System to the Outer Limits of the First Amendment, 25 J. MARSHALL L. REV. 563 (1992); Mark R. Stabile, Note, *Free Press-Fair Trial: Can They Be Reconciled in a Highly Publicized Criminal Case?*, 79 GEO. L.J. 337 (1990); Symposium, *Impact of the Media on Criminal Trials*, 4 SW. J. L. & TRADE AM. 1 (1997); Symposium, *The Right to a Fair Trial*, 1998 U. CHI. LEGAL F. 1.

3. See, for example, *Gentile v. State Bar*, 501 U.S. 1030 (1991), which involved disciplinary action against defense counsel for extrajudicial comments. *See infra* Part III.B (discussing *Gentile*). Chief Justice Rehnquist indicated that our criminal justice system is founded upon the following principle:

> The outcome of a criminal trial is to be decided by impartial jurors, who know as little as possible of the case, based on material admitted into evidence before them in a court proceeding. Extrajudicial comments on, or discussion of, evidence which might never be admitted at trial and *ex parte* statements by counsel giving their version of the facts obviously threaten to undermine this basic tenet.

Id. at 1070. This principle applies to all extrajudicial commentary.

4. Witness the extensive publicity involving the sexual harassment proceedings involving President Clinton and Paula Jones. *See* Jones v. Clinton, 12 F. Supp. 2d 931 (E.D. Ark. 1998). *See also* Gerald T. Wetherington et al., *Preparing for the High Profile Case: An Omnibus Treatment for Judges and Lawyers*, 51 FLA. L. REV. 425 (1999) (discussing both criminal and civil cases). *See generally* DIENES, *supra* note 1, at 128-36, 266-81; Martha McElveen Ezzard, *Confidentially in Civil Proceedings: Public Access Versus Litigant's Privacy*, 22 COLO. LAW. 2237 (1993); Emily Bazelon, Note, *Public Access to Juvenile and Family Court: Should the Courtroom Doors Be Open or Closed?*, 18 YALE L. & POL'Y REV. 155 (1999) (comparing California and New York state law regarding press access to juvenile proceedings and the balancing of public interest and privacy concerns).

5. *See infra* Part II.B.

6. *See infra* Part II.C.

But judicial restraining orders or standing rules on speech by trial participants generally, and by attorneys in particular, enjoy a much greater likelihood of success.[7] Indeed, Supreme Court precedent, especially *Gentile v. State Bar*,[8] which held that a state, pursuant to a standing rule, can constitutionally sanction lawyer speech that is "substantially likely" to prejudice a defendant's fair trial rights,[9] invites use of such restraints as standing rules and gag orders to limit lawyer speech. I believe that, in the years following the O.J. Simpson cases and *Gentile*, there has been an increasing use of broad, sweeping judicial gag orders on trial participants, including lawyers, prohibiting them from speaking to the press concerning trial proceedings.

Consider how the process works. A crime occurs and the investigation begins. The vast media network communicates ongoing events to the public. Public discussion develops, aided now by the expanding availability of the Internet. Investigative journalists may unearth previously unknown information, but most of the news comes from government sources. A person or persons are arrested and charged with the crime. If it is a major event, the government often will issue press releases, conduct press conferences, and give media interviews. Reporters for the major media may pick up the breaking news directly, but, in any case, the newswires and copying among the media will carry the news to media outlets around the country and the world. The persons charged and their legal representatives may feel the need to respond—more press conferences and interviews develop and spread the news to the public. Other persons with information concerning the crime may tell their stories to the media, which then carries the news to the public. Commentary in the media will develop; the events will be discussed publicly. All of this takes place against the background of pre-arrest publicity concerning the crime. As the criminal proceedings continue, the media continues to communicate the news to the public. Government, interested parties, the media, and the public are in a constantly evolving communication process.

If this interactive process is interrupted by improper, poorly fashioned restraints, there is a danger that the process will be

7. *See infra* Part II.D.

8. 501 U.S. 1030 (1991); *see also infra* notes 172-209 and accompanying text (discussing *Gentile*).

9. *Id.* at 1076.

skewed. It seems unlikely that indirect restraints would curtail trial publicity, but they might change the way in which newsgathering occurs and, therefore, what is published. They may significantly burden the newsgathering process. For example, it seems likely that journalists would rely more on leaks.[10] Because government officials are more likely to have established relationships with journalists, greater use of leaks and "confidential sources" might produce a bias. On the other hand, it has been suggested that defense lawyers depend heavily on the media to communicate with the public.[11] Reliance on other unidentified sources also may produce a greater amount of inaccurate information or at least information where the public will not know the biases of the informant.[12] There really is very little empirical information on the effect of indirect restraints on the newsgathering process.

The legal system responds. Judges may seek to close or par-

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10. See, for example, David A. Anderson, *Democracy and the Demystification of Courts: An Essay*, 14 REV. LITIG. 627, 636, 639 (1995), which argues:

> The principal effect of . . . the hundreds of rules and gag orders . . . has been to drive the sources of trial publicity underground . . . . Now [trial participants] speak clandestinely to selected media. Leaked information is a form of currency that can be used to reward friends and punish enemies, and perhaps thereby manipulate coverage . . . . Without power to directly control the media, the goal of controlling pretrial and trial publicity is unattainable.

Id. For another example, see Laurie L. Levenson, *Foreword* to Symposium, *The Sound of Silence: Reflections on the Use of the Gag Order*, 17 LOY. L.A. ENT. L. REV. 305, 309 (1997), in which Levenson states, "I doubt that gag orders will ever work to stem the tide of leaks of information that inevitably occur in a high-profile case. Instead, they tend to drive the media underground and put a premium on clever media manipulation."

11. *See* Anderson, *supra* note 10, at 635. Anderson notes that prosecutors are politicians who "operate in a high-visibility business where success and advancement are often aided by publicity." *Id.* He adds: "Most defense lawyers are not in politics, but for them too, publicity is important as a source of business and professional recognition." *Id. See also* Michael E. Swartz, Note, *Trial Participant Speech Restrictions Gagging First Amendment Rights*, 90 COLUM. L. REV. 1411, 1422 (1990) ("After an indictment, public opinion weighs heavily against the accused. . . . The defendant's interest in rebutting charges is at its peak. The criminally accused have an interest in promptly and publicly responding to charges so they may counter injury to themselves, their families, or their friends.") (footnotes omitted).

12. *See* Gerald F. Uelmen, *Leaks, Gags and Shield: Taking Responsibility*, 37 SANTA CLARA L. REV. 943, 950-56 (1997). Uelmen examines the motivations that prosecutors and defense attorneys have for communicating with the media. He argues:

> Rather than suppress the barrage of publicity surrounding high profile cases, however, these [indirect restraints] more often spur the media to a relentless pursuit of even more questionable sources of information. . . . Rather than seeking to suppress identifiable sources of information, our goal should be to encourage the flow of information to the public that is attributed to an identified source, who takes public responsibility for its accuracy and appropriateness. The public, including potential jurors, will then be better equipped to critically evaluate the information, and assess its reliability and credibility.

Id. at 944-45.

tially close pretrial proceedings, but First Amendment precedent severely limits their ability to do so.[13] Even when closure occurs, leaks to the media do provide selective, perhaps inaccurate, information. Other pre-existent restraints may restrict the flow of information and commentary. For example, standing disciplinary rules are designed to limit what lawyers can say.[14] Moreover, judges can, and increasingly do, issue restraining (gag) orders prohibiting speech by trial participants to the public and press.[15]

Often, such gag orders are sweeping restraints on speech. In the O.J. Simpson civil case, for example, Judge Fujisaki issued the following order: "[This] Court makes an oral order that no counsel may discuss anything connected with this trial with the media or in public places. This order encompasses all parties, attorneys and witnesses under the control of counsel. Counsel may inform the media and the public of the order."[16] In the trial of those accused of the 1993 bombing of the World Trade Center, Judge Duffy drafted his gag order as follows:

> There will be no more statements [in the press, on TV, in radio, or in any other electronic media] issued by either side or their agents. The next time I pick up a paper and see a quotation from any of you, you had best be prepared to have some money. The first time will be $200. Thereafter, the fines will be squared.[17]

Chief Judge Richard Matsch's order in the Oklahoma City bombing trial of Timothy McVeigh was somewhat less sweeping, but broad nevertheless:

> ORDERED that all of the lawyers appearing in this case, together with any persons associated with them, the defendant, personnel in all law enforcement agencies involved in this case, and all court personnel are prohibited from making any comments or statements outside the courtroom, concerning any of the evidence, court rulings and opinions regarding the trial proceedings and anything concerning

13. *See infra* Part II.C.

14. *See infra* Part III.

15. *See infra* Part IV.

16. Notice of Motion and Motion for an Order Vacating the Portion of the Court's August 13, 1996 Order Restricting Comment by Parties, Witnesses and Attorneys at *12, Rufo v. Simpson, 1996 WL 512006 (Cal. Super. Ct. Aug. 16, 1996) (Nos. SC031947, SC036340 and SC036876) [hereinafter "Notice of Motion"]; *see infra* text accompanying notes 326-36 (discussing Judge Fujisaki's implementation of the gag order and appellate review of the order).

17. United States v. Salameh, 992 F.2d 445, 446 (2d Cir. 1993) (quoting Hearing Transcript at 33-34, Apr. 1, 1993); *see also infra* text accompanying notes 344-48 (discussing the Second Circuit's decision to overturn Judge Duffy's gag order).

> the jury which a reasonable person would expect to be disseminated by any means of public communication.[18]

Although restraints on trial participants only indirectly burden media publication, they are subject to First Amendment limitations.[19] While it is newsgathering, rather than publication, that is restrained, newsgathering is constitutionally protected, albeit to a lesser extent than publication.[20] In this Article, I argue that the increasing use of standing rules and broad gag orders directed at trial participants, especially lawyers, is a significant interference with the role of the press in a free society and with the public's right to information.

Further, I argue that the Supreme Court wrongly decided *Gentile* and that only if strict scrutiny review, or its functional equivalent, the clear and present danger doctrine, is satisfied can such standing orders limiting attorney speech, and consequently the newsgathering process, be justified. It would follow that the standards for restraining lawyer free speech that are more lenient than the substantial likelihood test sanctioned in *Gentile*, e.g., the "reasonable likelihood" of prejudice standard, should be held unconstitutional. Neither the "substantial likelihood" test nor the "reasonable likelihood" test is sufficiently narrowly tailored; neither requires a trial court to make specific record findings that alternative means of avoiding harm would be ineffective.

Finally, I argue that, even if the substantial likelihood test or reasonable likelihood test is constitutionally adequate to justify standing rules, they are not constitutionally sufficient standards for review of judicial gag orders. The prior restraint doctrine is especially relevant to judicial gag orders on trial participants, including lawyers. I also argue that the media should be able to challenge such gag orders either as a prior restraint on trial participants or on the newsgathering process itself. Although I am unwilling to go as far as Professor Erwin Chemerinsky, who argues that the actual malice standard of *New York Times v. Sullivan*[21] should be used in reviewing restraints on lawyer free

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18. United States v. McVeigh, 1997 WL 202537, at *2 (D. Colo. Apr. 16, 1997) (No. 96-CR-68-M) (order prohibiting out of court comments); *see also infra* text accompanying notes 337-42 (discussing Judge Matsch's implementation of the gag order and his decision to uphold it when challenged).

19. *See infra* Part II.D.

20. *See infra* Part II.C.

21. 376 U.S. 254 (1964).

speech,[22] I do believe that stringent standards of judicial scrutiny must be used in reviewing any content-based restraints on the freedom of lawyer's speech and on the media's right to gather the news. I argue that the utilitarian rationale employed by the Court for using strict scrutiny or its equivalent in reviewing closure of judicial proceedings supports similar treatment of restraints on the free speech of lawyers and other trial participants.

Most articles on lawyer free speech, in the context of free press-fair trial issues, primarily stress the First Amendment rights of the speaker or the constitutional rights of the defendant. I consider the effect of standing rules and gag orders not only on rights of the participant-speaker and the parties, but on the newsgathering process itself and ultimately on the First Amendment right of the public to receive information. It is the combination of these public and personal interests that makes anything less than strict scrutiny constitutionally inadequate.

In Part Two, I address the role of a free press in a free society, especially the dependence of the public on the press for information. I examine the different judicial treatment of restraints on publication and on newsgathering, discuss the recognition of a First Amendment-based right of public and press access to judicial proceedings, and discuss the difference between standing rules and judicial gag orders. In Part Three, I focus on the nature of standing disciplinary rules regulating out-of-court lawyer speech, what I believe to be the flawed analysis of the Supreme Court in *Gentile* on the constitutional standards required for standing rules on lawyer extrajudicial speech, and the constitutionality of disciplinary rules using a "reasonable likelihood" standard. In Part Four, I examine the applicability of the prior restraint doctrine to gag orders on trial participants, especially lawyers, the ability of the media to challenge such orders, and the lower court response to gag orders. Finally, in Part Five, I conclude with the argument for strict scrutiny review of direct restraints on lawyer speech and of indirect restraints on newsgathering based on the personal and societal interests implicated.

22. *See* Erwin Chemerinsky, *Silence Is Not Golden: Protecting Lawyer Speech Under the First Amendment*, 47 EMORY L.J. 859, 861 (1998).

II. THE ROLE OF A FREE PRESS IN A FREE SOCIETY

A. *The Citizen-Critic in American Democracy*

A critical foundation of the role of the press in American society is the citizen-critic or democratic model of the First Amendment. Our constitutionalism begins from the premise that political sovereignty resides in the people. "We the People of the United States" created the Constitution to "secure the Blessings of Liberty to ourselves and our Posterity."[23] Government derives its just powers from the consent of the governed; government officials exercise those powers as trustees in the public interest. If "We the People" are to exercise meaningfully that governing role in our democracy, freedom of expression, especially on matters of public interest and concern, is a necessity.[24] As Alexander Meiklejohn put it, the "principle of the freedom of speech springs from the necessities of the program of self-government. . . . It is a deduction from the basic American agreement that public issues should be decided by universal suffrage."[25]

When we speak of freedom of speech in democratic society, our focus is generally on the freedom of the speaker to criticize government and public officials. As James Madison stated, in our system, "the censorial power is in the people over the Government, and not in the Government over the people."[26] But if the people are to hold government officials accountable, if speech in our democracy is to be meaningful, the people must be informed.[27]

Again, Madison provides the essential argument. "A popular Government, without popular information, or the means of ac-

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23. U.S. CONST. pmbl.

24. *See Sullivan*, 376 U.S. at 282 ("It is as much [the citizen's] duty to criticize as it is the official's duty to administer.").

25. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 26-27 (1948), *reprinted in* ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 27 (1965); *see also* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) ("'[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.'" (quoting Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964))); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 29 (1971); Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 202.

26. 3 ANNALS OF CONG. 934 (1794).

27. *See* Saxbe v. Wash. Post Co., 417 U.S. 843, 862-63 (1974) (Powell, J., dissenting) ("[P]ublic debate must not only be unfettered; it must also be informed. For that reason this Court has repeatedly stated that First Amendment concerns encompass the receipt of information and ideas as well as the right of free expression.").

quiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both."[28] The First Amendment must encompass not only a right to express ideas, but also the right of the public to receive information.[29] Nevertheless, the Court has been reluctant to speak broadly of a First Amendment "right to know."[30] Perhaps this reluctance reflects an unwillingness to recognize an affirmative constitutional duty on government to provide information to the public.[31] Although the Court has been unwilling to recognize such a broad right to know, it has recognized a First Amendment-based right of the public to receive information and ideas.[32] Government may not interfere with the free flow of information in democratic society without substantial justification.

Where does the "free press" fit into this model of a "free society?" While it has been argued that the First Amendment Press Clause has an independent constitutional significance, establishing the press as "a fourth institution outside the Govern-

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28. Letter from James Madison to W.T. Barry (Aug. 4, 1822), *reprinted in* 9 WRITINGS OF JAMES MADISON 103 (Gaillard Hunt ed., 1910).

29. Bd. of Educ. v. Pico, 457 U.S. 853, 867 (1982) ("[T]he right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom."); *see* Houchins v. KQED, Inc., 438 U.S. 1, 32 (1978) (Stevens, J., dissenting) ("Without some protection for the acquisition of information about the operation of public institutions such as prisons by the public at large, the process of self-governance contemplated by the Framers would be stripped of its substance.").

30. *See* Kleindienst v. Mandel, 408 U.S. 753, 770 (1972) (rejecting First Amendment right to hear foreign lecturer who was denied a visa); Zemel v. Rusk, 381 U.S. 1, 17 (1965) ("The right to speak and publish does not carry with it the unrestrained right to gather information.").

31. *See* LUCAS A. POWE, JR., THE FOURTH ESTATE AND THE CONSTITUTION: FREEDOM OF THE PRESS IN AMERICA 133-59 (1991); Lillian R. BeVier, *An Informed Public, an Informing Press: The Search for a Constitutional Principle*, 68 CAL. L. REV. 482, 517 (1980) (concluding "that a judicially enforceable right to know would be inconsistent with the democratic processes envisioned by the Constitution and thus could not be justified by a [F]irst [A]mendment principle whose office is to vindicate those processes."); David M. O'Brien, *The First Amendment and the Public's "Right to Know,"* 7 HASTINGS CONST. L.Q. 579, 586 (1980) (rejecting a First Amendment right to know).

32. First Nat'l Bank v. Bellotti, 435 U.S. 765, 783 (1978) ("[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw."); Stanley v. Georgia, 394 U.S. 557, 564 (1969) ("It is now well established that the Constitution protects the right to receive information and ideas."); Griswold v. Connecticut, 381 U.S. 479, 482 (1965) ("The right of freedom of speech and press includes . . . the right to receive, the right to read and freedom of inquiry . . . ." (citation omitted)); Lamont v. Postmaster Gen., 381 U.S. 301, 305-07 (1965) (rejecting restrictions on the public's right to receive publications through the mail); Martin v. City of Struthers, 319 U.S. 141, 143 (1943) ("[The First Amendment] embraces the right to distribute literature and necessarily protects the right to receive it." (citation omitted)); Grosjean v. Am. Press Co., 297 U.S. 233, 250 (1936) (holding unconstitutional a tax on publications because an "informed public opinion is the most potent of all restraints upon misgovernment").

ment," intended to provide "an additional check on the three official branches,"[33] this is not the press model that has been accepted. Rather, the Press Clause has been treated as a companion to the Speech Clause, having no independent substantive significance.[34] Instead of being able to claim constitutional rights and privileges on its own, the press claims First Amendment rights as the agent or surrogate of the public.[35]

Even if rejection of the Fourth Branch argument does limit the constitutional claims that the press may effectively pursue, it does not diminish the vital role the press plays in making the democratic model work. In modern society, it is increasingly difficult for any citizen or group of citizens to perform the "checking function" on government. Citizens are unable to obtain the information and ideas to evaluate adequately government action and hold public officials accountable.[36] As Justice Powell stated:

> An informed public depends on accurate and effective reporting by the news media. . . . For most citizens the prospect of personal familiarity with newsworthy events is hopelessly unrealistic. In seeking out the news the press therefore acts as an agent of the public at large. It is the means by which the people receive that free flow of information and ideas essential to intelligent self-government.[37]

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33. Potter Stewart, *"Or of the Press,"* 26 HASTINGS L.J. 631, 634 (1975); *see* Vikram David Amar, *From Watergate to Ken Starr: Potter Stewart's "Or of the Press" a Quarter Century Later*, 50 HASTINGS L.J. 711, 712 (1999) ("Constitutional developments of recent decades have borne out the correctness and centrality of Justice Stewart's first big point—that the criticism of government is fully protected expression that lies at the heart of the First Amendment."). *See generally* Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521.

34. *See Bellotti*, 435 U.S. at 798 (Burger, C.J., concurring) ("First, although certainty on this point is not possible, the history of the Clause does not suggest that the [Framers] contemplated a 'special' or 'institutional' privilege."); Saxbe v. Wash. Post Co., 417 U.S. 843 (1974) (rejecting an affirmative First Amendment-based press right of access to prisons or right to interview specific prisoners); Pell v. Procunier, 417 U.S. 817, 834-35 (1974) (same). *See generally* SMOLLA, *supra* note 2, § 22:1-9; Amar, *supra* note 33, at 713 n.11 ("[T]he Court has thus far failed to afford the Press any special First Amendment protection since Justice Stewart wrote.").

35. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 572-73 (1980) ("Instead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media. In a sense, this validates the media claim of functioning as surrogates for the public."); *see* Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 84 (1998) ("Despite the textual mandate of the Press Clause, cases dealing with press access and reporters' privileges have rejected the notion that the Press Clause confers on the press distinct rights not conferred by the Speech Clause on all speakers and all writers.").

36. *See generally* Blasi, *supra* note 33.

37. *Saxbe*, 417 U.S. at 863 (Powell, J., dissenting).

Even if citizens do secure accurate information, or simply wish to question or express opinions contrary to government authority, the citizen's ability to make herself heard in modern society is severely limited (although the Internet may be changing this). In *Mills v. Alabama*,[38] the Court addressed the role of the press in holding the government accountable and checking abuses of the public trust: "Thus, the press serves and was designated to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve."[39]

At least, this is the paradigm—the press acting as the "eyes and ears" of the public and as its watchdog checking abuses of the public trust.[40] Of course, the reality often falls far short of the ideal. While the press often is woefully deficient in performing its agency role in free, democratic society, the answer is not to make the press less free or to limit its ability to communicate and gather information relevant to the citizen-critic. The press is subject to government regulation in the First Amendment regime in the public interest, but that regulation must be narrowly tailored and subject to close judicial scrutiny.

B. *Restraints on Publication*

When people refer to freedom of the press, most are thinking of the freedom of the media to publish. The struggle against government censorship of publication was the crucible in which our conception of freedom of speech and press was forged.[41] Even today, prior restraints are highly suspect, both substantively and procedurally; they are presumptively unconstitutional.[42] Government

38. 384 U.S. 214 (1966).

39. *Id.* at 219.

40. Houchins v. KQED, Inc. 438 U.S. 1, 8 (1978) ("Beyond question, the role of the media is important; acting as the 'eyes and ears' of the public, they can be a powerful and constructive force, contributing to remedial action in the conduct of public business. They have served that function since the beginning of the Republic, but like all other components of our society media representatives are subject to limits.").

41. *See* Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 713 (1931) ("In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication.").

42. *See* N.Y. Times v. United States, 403 U.S. 713, 714 (1971). The *New York Times* Court stated that "'[a]ny system of prior restraints of expression comes to this Court

bears a "heavy burden of showing justification" when it employs this form of regulation.[43]

Similarly, government efforts to dictate what the press may and may not publish are severely limited.[44] When government undertakes to regulate protected speech based on its content, whether it regulates based on the viewpoint of the publication or its subject matter, the regulation usually is presumptively invalid.[45] Regulation based on some harm believed to be caused by the communication is subject to strict scrutiny review, i.e., the government must establish that it is necessary for a compelling state interest.[46] There must be no less restrictive alternative.[47] "[A]bove

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bearing a heavy presumption against its constitutional validity.'" *Id.* (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963)). The Court went on to explain that "[t]he Government 'thus carries a heavy burden of showing justification for the imposition of such a restraint.'" *Id.* (quoting Org. for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971)). *See generally* SMOLLA, *supra* note 2, at ch. 15; ZUCKMAN, *supra* note 2, at 83-91.

43. *N.Y. Times*, 403 U.S. at 714.

44. *See* Wooley v. Maynard, 430 U.S. 705, 714 (1977) ("The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'") (quoting Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974) (invalidating a Florida statute affording a right of reply to personal attacks on political candidates by newspapers).

45. *See* Turner Broad. Sys. v. FCC, 512 U.S. 622, 641 (1994) ("[T]he First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals."); R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid."); Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd., 502 U.S. 105, 115 (1991) ("A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech.").

46. United States v. Playboy Entm't Group, Inc., 120 S. Ct. 1878, 1886 (2000) ("Since [the challenged law] is a content-based speech restriction, it can stand only if it satisfies strict scrutiny. If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest. . . . To do otherwise would be to restrict speech without an adequate justification, a course the First Amendment does not permit.") (citations omitted); Reno v. ACLU, 521 U.S. 844, 868 (1997) (holding that "the [Communications Decency Act] is a content-based blanket restriction on speech" subject to the "most stringent review"); *Turner Broad. Sys.*, 512 U.S. at 642 (requiring "the most exacting scrutiny"); *Simon & Schuster, Inc.*, 502 U.S. at 117, 118 (requiring a showing that the challenged regulation "establish[ing] a financial disincentive to create or publish works with a particular content" serves a compelling state interest and is narrowly tailored to that interest); Boos v. Barry, 485 U.S. 312 (1987) (holding that a provision of the District of Columbia Code prohibiting the display of any sign critical of a foreign government within 500 feet of its embassy to be a content-based restriction on speech that "must be subjected to the most exacting scrutiny"); Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987) (stating that a state content-based tax regulation must serve a compelling state interest and must be narrowly tailored to achieve that end in order to satisfy the First Amendment).

47. *Playboy*, 120 S. Ct. at 1886 ("If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative."); *Reno*, 521 U.S. at 879 ("The breadth of this content-based restriction on speech imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective

all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[48]

1. Prior Restraint

Judicial gag orders based on content generally are treated as prior restraints.[49] *Nebraska Press Ass'n v. Stuart*[50] is a classic example of the rigorous scrutiny applied to such restraining orders even in the free press-fair trial context. Many trial judges had read the Court's opinion in *Sheppard v. Maxwell*[51] as authorizing them to use their discretion to protect defendants by restraining press publication. In *Nebraska Press*, however, Chief Justice Burger, writing for a unanimous Court, overturned even the modified gag order on press publication.[52] He described such a prior restraint as "one of the most extraordinary remedies known to our jurisprudence"[53] and as "the most serious and the least tolerable infringement on First Amendment rights."[54] Since a free press is critical to proper judicial administration, "the protection against prior restraint should have particular force as applied to reporting of criminal proceedings . . . ."[55]

The presumption against prior restraint can be overcome, the Court held, only if there is a clear and present danger of preju-

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as the [Communications Decency Act].").

48. Police Dep't v. Mosley, 408 U.S. 92, 95 (1972).

49. *See, e.g.*, Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931) (striking down a judicial order that had perpetually enjoined the publication of a scurrilous publication as a prior restraint and establishing the presumption against prior restraints); *see also* N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971) (holding that the Executive had failed to meet the heavy burden of justification necessary to enjoin newspapers from publishing classified materials concerning the Vietnam War). Judicial gag orders that are content-neutral, on the other hand, receive only a form of intermediate review. *See* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 767 (1994) (holding that speech-free buffer zones around abortion clinics are constitutional after applying a somewhat-less-than-strict-scrutiny standard, i.e., burdening no more speech than necessary to serve a significant government interest); *see also* Schenck v. Pro-Choice Network, 519 U.S. 357 (1997) (applying the *Madsen* standard to strike down floating buffer zones and uphold fixed buffer zones).

50. 427 U.S. 539 (1976).

51. 384 U.S. 333 (1966). *See generally* Symposium, *Neb. Press Ass'n v. Stuart*, 29 STAN. L. REV. 383 (1977).

52. *Neb. Press*, 427 U.S. at 540, 570.

53. *Id.* at 562.

54. *Id.* at 559.

55. *Id.*

dice.[56] More particularly, before issuing the restraining order, the trial judge must conduct a hearing and make on-the-record findings based on the evidence on three issues: "(a) the nature and extent of pre-trial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger."[57] The potential for prejudice is always speculative and the efficacy of a gag order is always questionable.[58] Most importantly, the availability of less restrictive alternatives, especially a searching voir dire, makes the requisite showing practically impossible.[59]

Although *Nebraska Press* did not adopt a per se rule invalidating all gag orders on the media, it did erect a near-absolute rule of invalidity. While trial courts continue occasionally to issue such orders, they are regularly reversed on appeal.[60] For example, the Sixth Circuit in *Procter & Gamble v. Bankers Trust Co.*[61] reversed an ex parte restraining order that barred *Business Week* from publishing material under a protective order.[62] Calling this a "patently invalid" order which "should never have been entered," the appellate court stressed that it had not been shown that publication would pose any "grave threat to a critical government interest or to a constitutional right . . . ."[63] Even a temporary order to preserve the status quo, the court said, must clear a substantial hurdle: "publication must threaten an interest more fundamental than the First Amendment itself."[64]

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56. *Id.* at 562.

57. *Id.*

58. *See id.* at 565.

59. *See id.* at 563-64.

60. *See generally* DIENES, *supra* note 1, at 33 n.98; SMOLLA, *supra* note 2, § 15.32. *But see* United States v. Noriega, 752 F. Supp. 1032 (S.D. Fla.) [hereinafter "Noriega I"], *aff'd*, 917 F.2d 1543 (11th Cir.) (per curiam) [hereinafter "Noriega II"], *cert denied sub nom.* CNN, Inc. v. Noriega, 498 U.S. 976 (1990). In *Noriega I*, the district court issued a temporary restraining order on broadcast of tapes of conversations between Panamanian dictator Manuel Noriega, charged with violation of drug laws, and his attorneys and required submission of the tapes for in camera review. *See Noriega I*, 752 F. Supp. at 1036. The appellate court affirmed. *See Noriega II*, 917 F.2d at 1552. In subsequent proceedings, CNN was found guilty of criminal contempt for its violation of the restraining order. *See* United States v. CNN, Inc., 865 F. Supp. 1549, 1564 (S.D. Fla. 1994). For a discussion on *Noriega*, see generally DIENES, *supra* note 1, at 31-33; RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY ch. 9 (1992); SMOLLA, *supra* note 2, §§ 15:37-15:40. *See also In re* State Record Co., 504 S.E.2d 592 (S.C. 1998) (upholding gag order on television studio's broadcast of a videotaped, privileged communication between a murder defendant and his attorney).

61. 78 F.3d 219 (6th Cir. 1996).

62. *Id.* at 221.

63. *Id.* at 225.

64. *Id.* at 227.

There are still aberrations where a gag order on the media survives even the exacting scrutiny mandated by *Nebraska Press*. In such cases, the collateral bar doctrine, which requires obedience to a non-frivolous judicial order pending expedited review, continues to pose a significant obstacle to media publication.[65] Nevertheless, the presumptive invalidity of a content-based prior restraint and the demanding standard of constitutional review that is used are significant obstacles to the use of judicial gag orders. The question remains whether courts will apply *Nebraska Press* and the prior restraint doctrine to gag orders imposed on trial participants, including attorneys, especially when only the non-party press challenges the restraint.

2. Sanctions Based on Publication

Freedom of the media to publish is not limited to freedom from administrative or judicial censorship. When the government imposes sanctions based on the content of the publication, the regulation is presumptively invalid.[66] For example, in the free press-fair trial context, contempt citations against the press for prejudicial publication are unconstitutional unless the publication is shown to create a clear and present danger to the administration of justice.[67] The severity of this First Amendment review is such that contempt sanctions are regularly invalidated and seldom used. Similarly, imposition of civil or criminal sanctions

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65. *See* Walker v. City of Birmingham, 388 U.S. 307 (1967) (upholding convictions for violating a court order forbidding a civil rights march without a permit and disallowing a First Amendment defense to the validity of the order); *In re* Providence Journal Co., 820 F.2d 1342 (1st Cir. 1986), *modified on reh'g en banc*, 820 F.2d 1354 (1st Cir. 1987) (holding an order prohibiting publication of information obtained through a Freedom of Information Act request to the FBI to be transparently invalid). In the en banc proceeding, the First Circuit held that a publisher who is subject to a transparently unconstitutional prior restraint must make a good faith effort to seek emergency relief from an appellate court before publishing. *Providence*, 820 F.2d at 1355.

66. *See* Reno v. ACLU, 521 U.S. 844, 885 (1997) (discussing regulation of indecent speech on the Internet); Fla. Star v. B.J.F., 491 U.S. 524, 530-33 (1989) (involving publication of names of rape victims); Hustler Magazine v. Falwell, 485 U.S. 46, 50-51 (1988) (discussing intentional infliction of emotional distress claims brought by public figures); Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 101-02 (1979) (involving publication of names of juvenile homicide suspects); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269-70 (1964) (discussing defamation claims based on reporting on the official activities of a public official). *See generally* SMOLLA, *supra* note 2, at chs. 3 & 4.

67. *See* Bridges v. California, 314 U.S. 252, 263 (1941); *see also* Wood v. Georgia, 370 U.S. 375, 384 (1962); Craig v. Harney, 331 U.S. 367, 372 (1947); Pennekamp v. Florida, 328 U.S. 331, 334 (1946).

on the media for publishing truthful information of public significance that the media has lawfully obtained has been held unconstitutional.[68]

An excellent example of the presumptive invalidity of content-based sanctions on press publication is the "Son of Sam" decision, *Simon & Schuster, Inc. v. New York State Crime Victims Board*.[69] The Court unanimously held unconstitutional a law requiring that income received by an accused or convicted criminal resulting from publications dealing with his crime be deposited in a victims' compensation fund.[70] The Court held that the law was content-based because it discriminated between income derived from speech (publication) and other income from the crime and discriminated against speech involving a particular subject matter, i.e., speech about crime.[71] Invoking the presumption of invalidity, the Court held that the state had failed to satisfy strict scrutiny.[72] Although the "Son of Sam" law served compelling interests in compensating crime victims and preventing criminals from profiting from crime, it was not narrowly tailored.[73] It was "significantly overinclusive," covering numerous valuable works dealing with the author's thoughts and recollections, regardless of whether the state's interests would be served.[74] The government could pursue its interests using less restrictive means.[75]

During the O.J. Simpson criminal litigation, California sought

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68. *See Fla. Star*, 491 U.S. at 539, 541 (holding that the First Amendment prevents using a rape shield statute to establish negligence per se against a newspaper for publishing the name of a rape victim after it obtained the information from a publicly released police report); *Daily Mail Publ'g Co.*, 443 U.S. at 103-04 (striking down a statute allowing prosecution of newspapers for publishing the name of a juvenile homicide suspect); Landmark Communications Inc. v. Virginia, 435 U.S. 829, 840 (1978) (holding that a newspaper may not be prosecuted for publishing truthful information about the proceedings of a confidential judicial review commission); Okla. Publ'g Co. v. Dist. Court, 430 U.S. 308, 310 (1977) (reversing an injunction on the publication of a juvenile defendant's name and picture obtained from an open hearing of juvenile court); Cox Broad. Corp. v. Cohn, 420 U.S. 469, 491 (1975) (rejecting civil liability for the publication of a rape victim's name when the name was obtained from publicly available government records).

69. 502 U.S. 105 (1991). The presumptive invalidity of content-based regulation is not limited to print publication. *See, e.g.*, United States v. Playboy Entm't Group, Inc., 120 S. Ct. 1878 (2000) (cable); Reno v. ACLU, 521 U.S. 844 (1997) (Internet); Sable Communications, Inc. v. FCC, 492 U.S. 115 (1989) (dial-a-porn). But it does not apply to broadcasting. *See* FCC v. Pacifica Found., 438 U.S. 726, 748-50 (1978).

70. *See* N.Y. Exec. Law § 632-a (McKinney 1982 & Supp. 1991).

71. *Simon & Schuster, Inc.*, 502 U.S. at 116.

72. *Id.* at 115-16, 123.

73. *Id.* at 118-19, 123.

74. *Id.* at 121.

75. *See id.* at 123.

to curb "checkbook journalism" by banning press payments to jurors for their stories[76] and by prohibiting payments to prospective witnesses for selling their information to the press.[77] Citing *Simon & Schuster, Inc.* and using strict scrutiny review, the courts held both laws unconstitutional as content-based regulations on speech.[78] Even though the laws did not discriminate on the basis of viewpoint and furthered the compelling interest in the integrity of the criminal justice system, the state failed to overcome the First Amendment presumption of invalidity. Simply put, the laws were not narrowly tailored but were instead overly broad intrusions on the press's right to publish.[79]

When government regulation of speech is content-neutral, courts use a less demanding form of judicial balancing.[80] Usually this involves some form of "intermediate review" such as that formulated in *United States v. O'Brien*:[81] "[A] government regulation is sufficiently justified . . . if it furthers an important or substantial government interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction of alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[82] While the *O'Brien* test might be read to adopt a less restrictive means test, the Court has rejected such an interpretation. Rather, the standard is satisfied if the challenged regulation directly and effectively furthers the government interest.[83] In practice, this intermediate form of judicial review is often extremely deferential.[84]

A court often will use this intermediate form of scrutiny when

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76. *See* CAL. PENAL CODE § 116.5 (West 1999).

77. *See id.* § 132.5 (West 1999); CAL. CIV. CODE § 1669.7 (West 1999).

78. Dove Audio, Inc. v. Lungren, No. CV 95-2570 RG (JRX), 1995 WL 432631, at *2 (C.D. Cal. June 14, 1995) (striking down CAL. PENAL CODE § 116.5 (enacted 1994)); Cal. First Amendment Coalition v. Lungren, No. C 95-0440-FMS, 1995 WL 482066, at *1 (N.D. Cal. Aug. 10, 1995) (permanently enjoining enforcement of CAL. PENAL CODE § 132.5 (enacted 1994) and CAL. CIV. CODE § 1669.7 (enacted 1994)).

79. *See Dove Audio, Inc.*, 1995 WL 432631, at *5; *Cal. First Amendment Coalition*, 1995 WL 482066, at *8.

80. *See generally* SMOLLA, *supra* note 2, at ch. 9.

81. 391 U.S. 367 (1968). For examples of intermediate review in press cases, see *Turner Broadcasting System v. FCC*, 520 U.S. 180 (1997) and *Turner Broadcasting System v. FCC*, 512 U.S. 622 (1994).

82. *O'Brien*, 391 U.S. at 377.

83. *See* Ward v. Rock Against Racism, 491 U.S. 781, 797-802 (1989).

84. *See* Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1180 (1996); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 50-52 (1987).

it determines that the burden of a regulation on speech is only incidental rather than direct. If the government justifies its regulation without reference to speech content, e.g., because of "secondary effects" of the speech, the courts may label it content-neutral and invoke intermediate review.[85] As I discuss below, the "substantial likelihood" test sanctioned in *Gentile* often is treated as a form of intermediate review.[86]

Then there are some contexts, usually when government is managing the forum or financing the speech rather than regulating it, in which the courts abandon the above models. In reviewing restraints on freedom of expression in the military, prisons, schools, broadcasting, public subsidies, and nonpublic forums, courts often approve even content-based regulations with little more than an ad hoc balancing test. This is often simply a general requirement of reasonableness or an even more deferential rationality test.[87]

For example, consider the judicial treatment of restraints on the speech of government employees. When the government acts as employer rather than as regulator of the marketplace of ideas, courts abandon the usual rule of presumptive invalidity of content-based restraints. If the employee is able to prove that she was disciplined because of her expressive activity, then the courts apply an ad hoc interest balancing test formulated in *Pickering v. Board of Education.*[88] Even this less speech-protective balancing test is used only if the speech involves matters of public rather than private concern.[89] Can the lawyer as an officer of the court be analogized to a government employee?

Standing rules on attorney extrajudicial speech limit speech on the basis of content. The Court in *Gentile*, however, did not treat the restrictions as presumptively invalid; strict scrutiny was not

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85. *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47-48 (1986) (upholding zoning ordinance that limited the permissible locations of adult motion picture theaters).

86. *See infra* notes 172-91 and accompanying text (discussing *Gentile* and the test that the Court applied).

87. *See generally* DIENES, *supra* note 1, at 3-4; C. Thomas Dienes, *The Trashing of the Public Forum: Problems in First Amendment Analysis*, 55 GEO. WASH. L. REV. 109 (1986); C. Thomas Dienes, *When the First Amendment Is Not Preferred: The Military and Other "Special Contexts,"* 56 U. CIN. L. REV. 779 (1988); C. Thomas Dienes & Annemargaret Connolly, *When Students Speak: Judicial Review in the Academic Marketplace*, 7 YALE L. & POL'Y REV. 343 (1989).

88. 391 U.S. 563, 574 (1995).

89. *See* United States v. Nat'l Treasury Employees Union, 513 U.S. 454 (1998); Rankin v. McPherson, 483 U.S. 378 (1987); Connick v. Myers, 461 U.S. 138 (1983).

constitutionally required. I will consider below whether any of the above exceptions justify this departure.[90]

C. *Restraints on Newsgathering*

There is little question today that the First Amendment protects newsgathering. Even as the Court in *Branzburg v. Hayes*[91] formally rejected a First Amendment-based journalist's privilege, it stated: "Nor is it suggested that newsgathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated."[92] Justice Stewart, dissenting, was similarly emphatic: "News must not be unnecessarily cut off at its source, for without freedom to acquire information the right to publish would be impermissibly compromised. Accordingly, a right to gather news, of some dimensions, must exist."[93] The lower court progeny of *Branzburg* recognizing a First Amendment-based journalist's privilege attests to the fact that newsgathering is constitutionally protected.[94]

But newsgathering generally is not as protected as publishing.[95] Restraints on newsgathering are treated as incidental bur-

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90. *See infra* Part III.

91. 408 U.S. 665 (1972).

92. *Id.* at 681.

93. *Id.* at 728 (Stewart, J., dissenting).

94. *See generally* DIENES, *supra* note 1, at 837-928 and cases cited therein.

95. *Compare* Randall P. Bezanson, *Means and Ends and* Food Lion*: The Tension Between Exemption and Independence in Newsgathering by the Press*, 47 EMORY L.J. 895, 897 (1998) (arguing that press freedom "consists of independence in publication judgments, not privilege to engage in conduct" and therefore that the press bears "a heavy burden of proof to justify an exception or exemption" from generally applicable laws), *with* Erwin Chemerinsky, *Protect the Press: A First Amendment Standard for Safeguarding Aggressive Newsgathering*, 33 U. RICH. L. REV. 1143, 1144-45 (2000) (arguing that media liability for violation of generally applicable laws should be imposed only if they survive intermediate scrutiny—that is, only if application of the law "is proven to be substantially related to achieve an important government purpose."), C. Thomas Dienes, *Protecting Investigative Journalism*, 67 GEO. WASH. L. REV. 1139, 1141, 1151 (1999) (arguing for a First Amendment-based privilege or defense for certain intrusion contexts and for limiting damages for newsgathering torts to those caused by the newsgathering itself, barring recovery of consequential damages from publication), Eric B. Easton, *Two Wrongs Mock a Right: Overcoming the* Cohen *Maledicta That Bar First Amendment Protection for Newsgathering*, 58 OHIO ST. L.J. 1135, 1139 (1997) (arguing that liability for newsgathering torts should be based on a standard similar to actual malice such as "bad faith" or "outrageous conduct."), *and* David A. Logan, *Masked Media: Judges, Juries, and the Law of Surreptitious Newsgathering*, 83 IOWA L. REV. 161, 164 (1997) (supporting a common law tort principle-based regime to limit the size of awards to victims of tortious newsgathering "to avoid creating excessive disincentives to engage in investigative reporting").

dens on freedom of speech.[96] Justice Brennan explained the dichotomy in terms of two models of the First Amendment. The *free speech* model posits that "the primary purpose of the First Amendment is more or less absolutely to prohibit any interference with freedom of expression."[97] Government burdens on speech and publication are subject to close judicial scrutiny. Under the *structural* model, the press engages in activities designed to promote effective public discussion; it performs "communicative functions required by our democratic beliefs."[98] This model, applicable to newsgathering, requires that courts balance the effects of a regulation on the informing and checking role of the media against the social values the regulation serves. A less speech-protective standard of judicial review is used to evaluate restraints on newsgathering.

Whatever the merits of Justice Brennan's theoretical construct, the courts generally have not accorded newsgathering as much constitutional protection as publication.[99] Thus, the Supreme Court has indicated repeatedly that the press is subject to generally applicable laws that incidentally, albeit significantly, burden the media's newsgathering function.[100] And yet, even as the

96. *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 604 (1982) (Brennan, J.) (recognizing a presumptive right of access to criminal trials and applying strict scrutiny to their closure: "The First Amendment is thus broad enough to encompass those rights that, while not unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights."); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 587 (1980) (Brennan, J., concurring) (finding that the First Amendment guarantees the public's and the press's right of access to criminal trials in order to foster informed debate on public issues: "[T]he First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a *structural* role to play in securing and fostering our republican system of self-government."); William J. Brennan, Jr., Address at the Dedication of the S.I. Newhouse Center for Law and Justice (Oct. 17, 1979), *in* 32 RUTGERS L. REV. 173, 175-82 (1979). *See generally* DIENES, *supra* note 1, at 14-15, 45-46 (discussing Justice Brennan's structuralist approach).

97. Brennan, *supra* note 96, at 176.

98. *Id.* at 177.

99. *See supra* note 96.

100. *See* Cohen v. Cowles Media Co., 501 U.S. 663, 669 (1991) (upholding a promissory estoppel claim and citing a "well-established line of decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news."). Likewise, in *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), the Court held that there is no First Amendment restriction on searches of newsrooms but that the courts should apply "warrant requirements with particular exactitude when First Amendment interests would be endangered by the search." *Id.* at 565. In *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973), the Court held that the press has no special protection from generally applicable antidiscrimination laws. *Id.* at 380-81, 391. The Court in *Branzburg v. Hayes*, 408 U.S. 665 (1972), held that reporters have no First

courts reject any First Amendment defenses or privileges to tort and contract liability for newsgathering activities,[101] judges do invoke First Amendment concerns in applying legal standards to the facts. First Amendment considerations are employed in an episodic, uncertain form of balancing analysis.[102]

In a number of decisions fashioning a First Amendment right of public access to judicial proceedings, the courts have employed standards of judicial review that approximate strict scrutiny even though it is newsgathering that is burdened.[103] Thus, in *Globe Newspaper Co. v. Superior Court*,[104] which invalidated a state statute requiring the closing of the courtroom to the press and public during the testimony of minor victims of designated sexual

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Amendment privilege to refuse to disclose confidential information to grand juries. *Id.* at 690-91. Similarly, in *Associated Press v. United States*, 326 U.S. 1 (1945), the Court held that the press has no special protection from generally applicable antitrust laws. *Id.* at 7. Finally, in *Associated Press v. NLRB*, 301 U.S. 103 (1937), the Court held that the National Labor Relations Act applies to the press:

> The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others. He must answer for libel. He may be punished for contempt of court. He is subject to the anti-trust laws. Like others he must pay equitable and nondiscriminatory taxes on his business.

Id. at 132-33 (citations omitted).

101. *See* Dietemann v. Time, Inc., 449 F.2d 245, 249 (9th Cir. 1971) (holding that the First Amendment did not bar an action for invasion of privacy where defendant's employees gained access to plaintiff's home by subterfuge and, without his consent, photographed him, recorded their conversation, and transmitted it to third parties); Food Lion, Inc. v. Capital Cities/ABC, Inc., 887 F. Supp. 811, 822 (M.D.N.C. 1995) (holding that there was no First Amendment defense to, inter alia, trespass and fraud claims stemming from undercover reporting of unsanitary food handling practices); Sanders v. ABC, Inc., 978 P.2d 67, 77 (Cal. 1999) (declining to consider constitutional defenses because they were not presented for review, while holding that "a person who lacks a reasonable expectation of complete privacy in a conversation, because it could be seen and overheard by coworkers (but not the general public), may nevertheless have a claim for invasion of privacy by intrusion based on a television reporter's covert videotaping of that conversation."); Shulman v. Group W Prods., Inc., 955 P.2d 469, 477 (Cal. 1998) (holding that there was no First Amendment defense to an intrusion claim based upon the filming of an accident victim receiving medical care in a rescue helicopter); *see also* Wilson v. Layne, 526 U.S. 603, 614 (1999) (holding that law enforcement officer's act of bringing reporters into a home while attempting execution of a warrant violated the Fourth Amendment).

102. *See* Desnick v. ABC, Inc., 44 F.3d 1345, 1365 (7th Cir. 1995) (considering First Amendment values in dismissing trespass and intrusion claims stemming from undercover reporting that occurred in the publicly accessible areas of a business); PETA v. Bobby Berosini, Ltd., 895 P.2d 1269, 1278-79 (Nev. 1995) (holding that, in determining whether conduct is actionable as intrusion, the court must consider the facts and circumstances of the conduct and the reasonable privacy expectations of the plaintiff); Jerome A. Barron, Cohen v. Cowles Media *and Its Significance for First Amendment Law and Journalism*, 3 WM. & MARY BILL RTS. J. 419, 463 (1994) ("*Cohen* was a press case where First Amendment Rights were in conflict."); Dienes, *supra* note 95, at 1149-51.

103. *See* DIENES, *supra* note 1, § 2-2; SMOLLA, *supra* note 2, § 25:1.

104. 457 U.S. 596 (1982).

offenses, the Court recognized a presumptive right of access.[105] Justice Brennan, for the Court, asked whether the mandatory closure rule "is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest."[106] While the dissent applied a deferential balancing analysis,[107] the Court struck down the state rule because the mandatory closure law was not narrowly tailored.[108]

In *Press-Enterprise Co. v. Superior Court* (*"Press-Enterprise II"*),[109] the Court extended the presumptive right of public access from criminal trials to pretrial proceedings. The California Supreme Court had held that a trial court could close a preliminary hearing if it was established that there existed a "'reasonable likelihood of substantial prejudice.'"[110] But the Supreme Court reversed, holding that closure was constitutionally permissible only if "specific, on the record findings [were] made demonstrating that 'closure is essential to preserve higher values and is narrowly tailored to serve that interest.'"[111] When it is concern over prejudice to a defendant's fair trial rights that motivates closure, the Court continued, the trial judge must find "first, [that] there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent, and, second, [that] reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights."[112] Thus, the Court rejected the dissent's argument that only a generalized balancing test should be used in reviewing closure orders.[113]

Of special importance to the subject of restraints on attorney free speech, the Court rejected the "reasonable likelihood" test because it imposes "a lesser burden on the defendant than the 'substantial probability' test which . . . is called for by the First Amendment."[114] The Court stressed that, in applying the narrow tailoring standard, the trial court had failed to consider whether

105. *Id.* at 610-11.
106. *Id.* at 606-07.
107. *See id.* at 616 (Burger, C.J., dissenting).
108. *Id.* at 609.
109. 478 U.S. 1 (1986).
110. *Id.* at 6.
111. *Id.* at 13-14 (quoting Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 510 (1984) [hereinafter "Press-Enterprise I"]).
112. *Id.* at 14.
113. *Id.*
114. *Id.*

reasonable alternatives to closure could protect the defendant's fair trial rights.[115] This demand for consideration of less restrictive means is the essence of strict scrutiny, which I argue is the constitutionally correct standard for reviewing restraints on attorney free speech.

In fashioning the presumptive right of public access, the Court focused on two considerations—"whether the place and process have historically been open to the press and general public," and "whether public access plays a significant positive role in the functioning of the particular process in question."[116] While the experience that history provides is important in developing the public access right, it is the functional value of access that properly has proven critical. Furthermore, it is not simply the value of openness to the particular proceeding but to self government and to citizenship that has provided, and should provide, the focus for the developing First Amendment right.

Consider the analysis of the value of openness developed in the watershed case, *Richmond Newspapers, Inc. v. Virginia*,[117] in which the Court initially established the public's and press's right of access to criminal trials. Chief Justice Burger, writing for the Court, concluded that such an access right is implicit in the First Amendment: "The explicit, guaranteed rights to speak and to publish concerning what takes place at a trial would lose much meaning if access to observe the trial could . . . be foreclosed arbitrarily."[118]

Justice Brennan, concurring, focused on the importance of public and press access "in securing and fostering our republican system of government"—the *structural* role of the First Amendment.[119] To provide some limiting principles to this structural analysis, he urged consideration of tradition and function.[120] Openness of the criminal trial, he argued, assists in "a fair and accurate adjudication of guilt or innocence;"[121] it informs the citizenry to assure "that procedural rights are respected, and that

115. *Id.*
116. *Id.* at 8.
117. 448 U.S. 555 (1980).
118. *Id.* at 576-77.
119. *Id.* at 587 (Brennan, J., concurring).
120. *Id.* at 589 (Brennan, J., concurring).
121. *Id.* at 593 (Brennan, J., concurring).

justice is afforded equally;"[122] it provides "an important check, akin in purpose to other checks and balances that infuse our system of government;"[123] and "[p]ublicizing trial proceedings aids accurate factfinding."[124] Similar functional analyses as the basis for heightened First Amendment scrutiny of closure orders limiting public and press access rights (and newsgathering) pervade the Supreme Court and lower court access jurisprudence.

Recently, the California Supreme Court extended the First Amendment-based right of public access to civil trials. In *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*,[125] the court stressed that the public has an interest, in *all* civil cases, in observing and assessing the performance of its public judicial system, and that interest strongly supports a general right of access in ordinary civil cases."[126] The same "utilitarian values" identified by Justice Brennan and invoked by the lower courts in support of the access right in criminal trials applied with equal force in ordinary civil trials and proceedings.[127]

> [U]nder the case law described above, public access plays an important and specific structural role in the conduct of such proceedings. Public access to civil proceedings serves to (i) demonstrate that justice is meted out fairly, thereby promoting public confidence in such governmental proceedings; (ii) provide a means by which citizens scrutinize and check the use and possible abuse of judicial power; and (iii) enhance the truthfinding function of the proceeding.[128]

The California court acknowledged the role of the press in implementing these utilitarian values. To secure the First Amendment-based access right, the court invoked the constitutional rule of presumptive openness and the stringent constitutional standard of review that the Supreme Court fashioned in *Press-Enterprise II*.[129]

I argue that courts should apply functional considerations similar to those that have driven the development of the public and press access right when government undertakes to gag or

122. *Id.* at 595 (Brennan, J., concurring).
123. *Id.* at 596 (Brennan, J., concurring).
124. *Id.* (Brennan, J., concurring).
125. 980 P.2d 337 (Cal. 1999).
126. *Id.* at 360.
127. *See id.*
128. *Id.* at 366.
129. *See id.* at 361.

otherwise restrain the free speech rights of lawyers and other trial participants and thereby burdens the structural role of a free press in its newsgathering activities. As in the public access cases, government should not be allowed to gag or otherwise restrain speech of public interest and concern without record findings establishing, first, that the restraint is narrowly tailored to serve overriding public concerns and, second, that no less burdensome alternatives to such restraint are reasonably available.[130]

D. *Restraining the Speech of Trial Participants*

In *Sheppard v. Maxwell*,[131] the Supreme Court stated:

> The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function.[132]

The Court did not identify, however, when the threat of prejudice is sufficiently serious as to justify suppression of the speech of these trial participants.[133]

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130. *See infra* Part V (discussing the need for strict scrutiny).

131. 384 U.S. 333 (1966).

132. *Id.* at 363. *See generally* DIENES, *supra* note 1, at ch. 7; SMOLLA, *supra* note 2, §§ 15:41-15:52; Chemerinsky, *Lawyers Have Free Speech Rights, Too: Why Gag Orders on Trial Participants Are Almost Always Unconstitutional*, 17 LOY L.A. ENT. L. REV. 311 (1997); Chemerinsky, *supra* note 22; Symposium, *The Sound of Silence: Reflections on the Use of the Gag Order*, 17 LOY. L.A. ENT. L. REV. 305 (1997); Lloyd L. Weinreb, *Speaking out Outside the Courtroom*, 47 EMORY L.J. 889 (1998); Katrina M. Kelly, Comment, *The "Impartial" Jury and Media Overload: Rethinking Attorney Speech Regulations in the 1990s*, 16 N. ILL. U. L. REV. 483 (1996); Eileen A. Minnefor, Note, *Looking for Fair Trials in the Information Age: The Need for More Stringent Gag Orders Against Trial Participants*, 30 U.S.F. L. REV. 95 (1995); Stabile, *supra* note 2; Swartz, *supra* note 11; René L. Todd, Note, *Prior Restraint by Any Other Name: The Judicial Response to Media Challenges of Gag Orders Directed at Trial Participants*, 88 MICH. L. REV. 1171 (1990); Loretta S. Yuan, Comment, *Gag Orders and the Ultimate Sanction*, 18 LOY. L.A. ENT. L. REV. 629 (1998).

133. The Sheppard trial was permeated with a "carnival atmosphere," *Sheppard*, 384 U.S. at 358, and "bedlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom, hounding most of the participants in the trial, especially Sheppard." *Id.* at 355. Sheppard was subjected to massive and pervasive publicity before and during the trial, and most of the putative evidence was never admitted at trial. *Id.* at 353, 356-57. The trial judge denied a change of venue and merely suggested to the jurors that they try to avoid outside influences. *Id.* at 355. The jurors were finally sequestered when the case was submitted to them, but they still had uncontrolled access to telephones. *Id.* at 352-53. Sheppard was convicted of second-degree murder in the bludgeoning death of his pregnant wife. *Id.* at 335.

As indicated above, there are two primary methods by which trial courts can restrain the speech of trial participants and thereby limit potentially harmful media publicity. First, trial courts, acting on a case-by-case basis, can impose restrictive (gag) orders on some or all trial participants. Second, standing rules can be adopted to define the limits of permissible extrajudicial commentary by the lawyers involved.

While courts often use standing rules in fashioning gag orders to restrain trial participants, especially lawyers, it is important to distinguish the two forms of regulations. Standing rules are adopted under the authority of the court, but it is only the gag order that traditionally is denominated as a "prior restraint." The gag order directly restrains the parties to particular litigation before the court who are identified in the order from speaking about all or certain aspects of the case. There is no preexisting standard governing the scope of the order regarding either the parties restrained or the subject matter of the restraint. If the gag order is violated, the court imposes contempt sanctions. On the other hand, a standing disciplinary rule binds the parties identified in the rule independent of any particular litigation. The rule is more like a statute prohibiting certain kinds of publications, e.g., the names of rape victims. Whereas the collateral bar doctrine prohibits violation of a gag order pending appeal, the standing rule is subject to constitutional attack when it is enforced.

On the other hand, the two forms of restraints are similar in many respects.[134] Both forms of restraint are enforced by sanctions imposed *after* a violation occurs. The panoply of criminal procedural safeguards is not necessarily available. The purpose and effect of both forms of control is to restrain extrajudicial speech. The Seventh Circuit in *Chicago Council of Lawyers v. Bauer*[135] declined to invoke the "'heavy presumption'" of invalidity applicable to prior restraints in reviewing the constitutionality of local standing rules,[136] but it did subject the disciplinary rules to

134. On the similarities and distinctions between gag orders and standing rules, see Douglas E. Mirell, *Gag Orders & Attorney Discipline Rules: Why Not Base the Former upon the Latter?*, 17 LOY. L.A. ENT. L. REV. 353, 363-67 (1997) (contrasting the purposes for the existence of, and sanctions for the violation of, gag attorney disciplinary rules on trial publicity); Yuan, *supra* note 132, at 635-36 (discussing similarities and differences between gag orders and standing rules and emphasizing the differences in methods available to challenge each type of restraint).

135. 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976).

136. *Id.* at 249.

"even closer scrutiny than a legislative restriction."[137] The appellate court explained: "[W]e cannot label the no-comment rules as 'prior restraints' given the connotations of that term, but we do recognize that these rules have some of the inherent features of 'prior restraints' which have caused the judiciary to review them with particular care."[138]

The focus of Part Three is on standing disciplinary rules. In Part Four, I focus on judicial gag orders.

III. STANDING DISCIPLINARY RULES

A. *The Form of the Standing Rules*

In *Sheppard*, the Court declared that "[c]ollaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures."[139] In 1968, the American Bar Association ("ABA") responded to *Sheppard* and to the report of the Warren Commission on the need for ethical standards to prevent publicity that threatens to interfere with the administration of justice by recommending Disciplinary Rule 7-107.[140] The Rule prohibited pretrial commentary and barred out-of-court statements during trial "reasonably likely to interfere with a fair trial."[141] A majority of state and federal courts subsequently adopted local rules incorporating the "reasonable likelihood" test.[142]

In *Chicago Council of Lawyers v. Bauer*,[143] decided in 1975, however, the Seventh Circuit held that the reasonable likelihood test incorporated in local rules, while not a prior restraint, was unconstitutionally overbroad.[144] The appellate court stated: "Only those comments that pose a 'serious and imminent threat' of interference with the fair administration of justice can be constitu-

137. *Id.*
138. *Id.* at 248-49.
139. Sheppard v. Maxwell, 384 U.S. 333, 363 (1966).
140. *See* Gentile v. State Bar, 501 U.S. 1030, 1067-68 (1991) (discussing MODEL CODE OF PROF'L RESPONSIBILITY DR 7-107 (1969)).
141. MODEL CODE OF PROF'L RESPONSIBILITY DR 7-107[D] (1969).
142. *Gentile*, 501 U.S. at 1067-68.
143. 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976).
144. *Id.* at 249.

tionally proscribed."[145] One year later, the Supreme Court in *Nebraska Press Association v. Stuart*[146] used the prior restraint doctrine and the clear and present danger doctrine to hold gag orders on the media unconstitutional.[147] While the Court and Justice Brennan, concurring, distinguished and endorsed restraints on trial attorneys,[148] this was dicta and the Justices did not provide reasons. In any case, in 1978, the ABA, recommending adoption of the "clear and present danger" test, amended its Standards for Criminal Justice.[149]

Then, in 1983, the ABA drafted the Model Rules of Professional Conduct. Rule 3.6 of the Model Rules was divided into three sections.[150] The first prohibits extrajudicial statements that "a lawyer knows or reasonably should know" will have a "substantial likelihood of materially prejudicing an adjudicative proceeding."[151] The second part of Rule 3.6 identifies statements likely to violate this test.[152] The third part provides a "safe harbor," identifying various kinds of statements that, if made without elaboration, would not violate the ethical standards.[153] This method of identifying statements that will presumptively violate the rules and those that will be "safe" is common to standing disciplinary rules.

By 1991, when *Gentile* was decided, thirty-two states had adopted local standing rules based on Rule 3.6.[154] Eleven states continued to follow the "reasonable likelihood" test.[155] Five states and the District of Columbia used the clear and present danger doctrine or its equivalent.[156] It should be noted that, even today, the overwhelming majority of federal district courts employ the deferential reasonable likelihood standard.[157]

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145. *Id.*

146. 427 U.S. 539 (1976).

147. *See id.* at 556-62.

148. *See id.* at 552-54; *id.* at 601 (Brennan, J., concurring).

149. *See* CRIMINAL JUSTICE STANDARD 8-1.1 (1978).

150. *See* MODEL RULES OF PROF'L CONDUCT R. 3.6 (1992). *See generally* Joel H. Swift, *Model Rule 3.6: An Unconstitutional Regulation of Defense Attorney Trial Publicity*, 64 B.U. L. REV. 1003 (1984); Gabriel G. Gregg, Comment, *ABA Rule 3.6 and California Rule 5-120: A Flawed Approach to the Problem of Trial Publicity*, 43 UCLA L. REV. 1321 (1996).

151. MODEL RULES OF PROF'L CONDUCT R. 3.6(a) (1992).

152. *Id.* R. 3.6(b).

153. *Id.* R. 3.6(c).

154. Gentile v. State Bar, 501 U.S. 1030, 1068 (1991).

155. *Id.*

156. *Id.*

157. *See* SMOLLA, *supra* note 2, § 15:46 n.13.

B. Gentile v. State Bar

Although the Seventh Circuit in *Bauer* had held that the "serious and imminent threat" test was constitutionally mandated for imposition of disciplinary rules,[158] the Fourth Circuit in *Hirschkop v. Snead*[159] rejected the Seventh Circuit's reasoning and holding.[160] *Hirschkop* held that the "reasonable likelihood" standard was constitutional.[161] The local disciplinary rule furthered the "substantial interest in assuring every person the right to a fair trial" and was "'no greater than is necessary or essential'" to protecting that interest.[162] Less intrusive means of assuring the fair trial right were summarily dismissed as "inadequate,"[163] even though this seems inconsistent with the Court's conclusions in *Nebraska Press*.

In this harbinger of *Gentile*, the Fourth Circuit, in justifying the deferential standard of review, stressed the role of the lawyer as an officer of the court.[164] For the Fourth Circuit, this meant that the lawyer has a duty "to protect the judicial processes from those extraneous influences which impair its fairness."[165] Lawyers violate this responsibility when they engage in potentially harmful extrajudicial commentary "even though the prejudice itself may be wholly or partially avoidable."[166] The Fourth Circuit concluded that "the reasonable likelihood test divides the innocuous from the culpable, adds clarity to the rule and makes it more definite in application. [It found] no requirement in the Constitution of anything else."[167] *Hirschkop* suggests that a lawyer can be restrained even when the order is broad and reasonable alternative means are available.[168] It reflects a sharp departure from the precedent recognizing the presumptive invalidity of content-based regulation.

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158. Chi. Council of Lawyers v. Bauer, 522 F.2d 242, 249 (7th Cir. 1975); *see also supra* notes 136-38 and accompanying text.

159. 594 F.2d 356 (4th Cir. 1979).

160. *Id.* at 370.

161. *Id.*

162. *Id.* at 363 (quoting Procunier v. Martinez, 416 U.S. 396, 413 (1974)).

163. *Id.* at 365.

164. *Id.* at 366.

165. *Id.*

166. *Id.* at 367.

167. *Id.* at 370.

168. *See id.* at 366.

For Judge Winter, dissenting in *Hirschkop*, uncertainties in what extrajudicial commentary might create a reasonable likelihood of prejudice would force lawyers to speculate on unforeseen consequences, creating a chilling effect on lawyer speech.[169] He warned: "Under these circumstances, the prudent course is to avoid all comment, no matter how remote the chance of prejudice might seem at the time."[170] Judge Winter quoted the conclusion of the ABA, which had amended its model rules to adopt the clear and present danger test, in "[r]ecognizing that 'the reasonable likelihood test is too relaxed to provide full protection to the [F]irst [A]mendment interests of attorneys.'"[171]

While the Fourth and Seventh Circuits differed over the constitutionality of standing rules using the "reasonable likelihood" test, in *Gentile v. State Bar,*[172] the Supreme Court upheld the constitutionality of the "substantial likelihood" of material prejudice test.[173] Nevada had adopted Model Rule 3.6 in its local disciplinary Rule 177.[174] Dominic Gentile's client was indicted on criminal charges.[175] After extensive publicity adverse to his client, Gentile concluded that he was obliged to respond and called a press conference.[176] The night before the conference, he carefully planned his remarks in light of Rule 177.[177] At the press conference, he asserted his client's innocence, claimed that it was probably a police officer who had committed the crime, and charged that his client was a scapegoat for a crooked police department.[178] Six months after the press conference, Gentile's client was acquitted.[179] However, the Southern Nevada Disciplinary Board of the State Bar determined, following a hearing, that Gentile had violated Rule 177 and recommended a private reprimand.[180] The Nevada Supreme Court affirmed.[181]

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169. *See id.* at 380 (Winter, J., dissenting).
170. *Id.* (Winter, J., dissenting).
171. *Id.* at 381 (Winter, J., dissenting) (quoting STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, FAIR TRIAL AND FREE PRESS STANDARD 3 (1978)).
172. 501 U.S. 1030 (1991).
173. *Id.* at 1063.
174. *Id.* at 1033.
175. *Id.*
176. *Id.* at 1039-43.
177. *Id.* at 1044.
178. *Id.* at 1045.
179. *Id.* at 1033.
180. *Id.*
181. *Id.*

The Supreme Court reversed.[182] In an opinion by Justice Kennedy, the Court held 5-4 that the safe harbor provision of the rules was unconstitutionally vague.[183] The Court went on, however, to hold in an opinion by Chief Justice Rehnquist, writing for the five justice majority, "that the 'substantial likelihood of material prejudice' standard applied by Nevada and most other States satisfies the First Amendment."[184] The Court found that the standard, while admittedly not as protective of lawyer speech as the clear and present danger doctrine, "constitute[d] a constitutionally permissible balance between the First Amendment rights of attorneys . . . and the State's interest in fair trials."[185]

The Court's methodology in *Gentile* should not be read as a simple ad hoc balancing test (which I believe to be a fair assessment of the reasonable likelihood standard).[186] The Chief Justice described Rule 177 as "designed to protect the integrity and fairness of a State's judicial system" and the interest in protecting the right to a fair trial from extrajudicial commentary as most "fundamental."[187] The Court determined that the restraint on speech embodied in the disciplinary rule was "narrowly tailored" to achieve those objectives because: (1) it was limited to speech that was substantially likely to have a material effect; (2) "it [was] neutral as to points of view, applying equally to all attorneys;" and (3) it only delayed the speech until the trial concluded.[188]

On the other hand, the Chief Justice admitted he was not engaging in strict scrutiny analysis or using what I consider to be the formulaic equivalent, the clear and present danger doctrine.[189] There was no requirement that the trial court conduct a hearing and make record findings that less restrictive means were unavailable. In fact, the Court noted that alternatives to the restraint on speech "entail serious costs to the system" and con-

182. *Id.* at 1058.

183. *Id.* at 1048.

184. *Id.* at 1063. Justice O'Connor provided the crucial fifth vote in both opinions. *See id.* at 1032.

185. *Id.* at 1075.

186. *See* SMOLLA, *supra* note 2, § 15:46, p. 15-73 ("A careful reading of *Gentile* shows that the opinion of the Chief Justice clearly understood the 'substantial likelihood of material prejudice' formula as a variant of intermediate scrutiny.").

187. *Gentile*, 501 U.S. at 1075.

188. *Id.* at 1076.

189. *See id.* at 1072-74.

cluded that "[t]he State has a substantial interest in preventing officers of the court, such as lawyers, from imposing such costs on the judicial system and on the litigants."[190] In the regimen of *Nebraska Press* and strict scrutiny, however, such costs are acceptable given the importance of freedom of speech and press, especially speech concerning the operation of our justice system. Under the more demanding constitutional standards, viewpoint neutrality is insufficient; presumptive invalidity applies when the state regulates speech based on its content. Delays in speech or publication, which the Chief Justice considers to operate to narrow the regulation, are unacceptable. I believe that the *Gentile* analysis is best understood as a form of intermediate scrutiny, comparable to the *O'Brien* test.[191]

Disciplinary rules, however, are a form of content-based regulation. Government regulates because of the harm believed to be caused by the extrajudicial commentary of trial participants. Rules are set forth in terms of particular subject matters which presumptively create a substantial likelihood of material prejudice. Such regulation is usually presumptively invalid and subject to strict scrutiny.[192] Further, disciplinary rules involve speech important to the public. As Justice Kennedy stated: "The judicial system, and in particular our criminal justice courts, play a vital part in a democratic state, and the public has a legitimate interest in their operations."[193] As applied to Gentile, Rule 177 operated to restrain speech charging corruption in the police department and a cover-up using Gentile's client as a scapegoat.[194] This was core political speech central to First Amendment concerns.[195]

The question, then, is whether such a marked departure from regular First Amendment analysis is justified. The *Gentile* Court offers two such justifications. First, the Chief Justice warned of an increased threat of prejudice because lawyers' commentary will "be received as especially authoritative" because of their

190. *Id.* at 1075.

191. Justice Kennedy uses the language of *O'Brien* in applying the substantial likelihood of material prejudice test to Gentile's speech. *See id.* at 1054. *See also supra* note 186; *supra* notes 80-84 and accompanying text (describing the *O'Brien* test).

192. *See supra* note 45.

193. *Gentile*, 501 U.S. at 1035 (plurality opinion).

194. *Id.* at 1045. Justice Kennedy stated: "There is no question that speech critical of the exercise of the State's power lies at the very center of the First Amendment." *Id.* at 1034 (plurality opinion). He refers to Gentile's speech as "lying at the core of the First Amendment." *Id.* at 1035 (plurality opinion).

195. *Id.* at 1034-35 (plurality opinion).

"special access to information through discovery and client communication."[196] Second, and more importantly, the Court stressed the role of lawyers as "officers of the court."[197]

At the outset, it should be noted that the first justification, based on threat of prejudice, is entirely speculative. The Chief Justice offered no empirical support for the claim that the speech of attorneys involves a greater threat of prejudice, and I know of none.[198] It is hard to believe that Gentile's act of setting forth the defense theory of the case and asserting his client's innocence or a prosecutor's comments on the merits of the case are any more potentially harmful than media publication concerning evidence such as confessions, eyewitness accounts, etc.[199] Yet media publication concerning such potentially prejudicial information enjoys far greater constitutional protection than the speech of lawyers. Further, *Nebraska Press* and its progeny argue that alternative means of avoiding prejudice, although not without costs, are usually effective in avoiding prejudice. Restraints on press publication are overturned routinely, usually based on availability of alternatives.[200] Indeed, the real uncertainty is whether a restraint

196. *Id.* at 1074.

197. *Id.* at 1074-76 (quoting Neb. Press Ass'n v. Stuart, 427 U.S. 539, 601 n.27 (1976)).

198. While there is dispute about the prejudicial effects of publicity, it does seem likely that the effects are not great. Justice Kennedy in *Gentile* stated:

> 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.... Our colleagues' historical survey notwithstanding, respondent has not demonstrated any sufficient state interest in restricting the speech of attorneys to justify a lower standard of First Amendment scrutiny.

Id. at 1054-55 (plurality opinion); *see* Robert E. Drechsel, *An Alternative View of Media—Judiciary Relations: What the Non-Legal Evidence Suggests About the Fair Trial-Free Press Issue*, 18 HOFSTRA L. REV. 1, 35 (1989) ("The evidence also indicates that the magnitude of the fair trial-free press issue may be overblown."); Rita J. Simon, *Does the Court's Decision in* Nebraska Press Association *Fit the Research Evidence on the Impact on Jurors of News Coverage?*, 29 STAN. L. REV. 515, 528 (1977) ("Experiments to date indicate that for the most part juries are able and willing to put aside extraneous information and base their decisions on the evidence.").

199. Anderson, *supra* note 10, at 649, similarly argues that it was highly improbable that Gentile's remarks could realistically threaten the integrity of the proceeding. He concludes:

> It is hard to escape the conclusion that Gentile was punished—and lawyers will be silenced in the future—for reasons that have less to do with making sure that trials reach right results than with indicating the unrealistic ideal that Chief Justice Rehnquist expressed in *Gentile*: "[L]aw suits should be tried in court, not in the media."

Id. (quoting *Gentile*, 1030 U.S. at 1080 n.6 (Rehnquist, C.J., dissenting)).

200. *See* DIENES, *supra* note 1, § 2-1(d) n.98.

on lawyers' extrajudicial commentary can really dry up the flow of information and opinion to the media given the reality of "leaks." More likely, the media will be forced to rely on less accurate, perhaps more biased, sources for news.[201] Finally, even if we assume that the *Gentile* Court is correct in its speculations on prejudice, that would justify at best only a very limited restraint directed at the use of the lawyers' special information. Put another way, the danger of prejudice goes to the application of the standard for restraint, not whether a diminished standard of speech protection should apply. As Justice Kennedy stated: "Rule 177, on its face and as applied here, is neither limited to nor even directed at preventing release of information received through court proceedings or special access afforded attorneys."[202] Justice Kennedy also argued that the "authoritativeness" of lawyers is in fact a reason for especially protecting their speech.[203]

It is the argument that lawyers are officers of the court with special fiduciary duties that really drives *Gentile*, Justice O'Connor's pivotal concurring opinion, and lower courts that depart from strict scrutiny review. Chief Justice Rehnquist, in *Gentile*, stated that "[l]awyers representing clients in pending cases are key participants in the criminal justice system, and the State may demand some adherence to the precepts of that system in regulating their speech as well as their conduct."[204] This has been a recurrent theme in cases involving the professional responsibilities of lawyers and is reflected in the disciplinary rules.[205] Ac-

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201. Anderson, *supra* note 10, at 635, argues that gag orders on lawyers have been "a spectacular failure. Neither disciplinary rules nor court orders can stop lawyers from talking to the media." He adds that "[a]ttempts to control the flow of information to media from other sources . . . are even more ineffectual." *Id.* at 636.

202. *Gentile*, 501 U.S. at 1053 (plurality opinion).

203. *Id.* at 1056-57 (plurality opinion).

> Because attorneys participate in the criminal justice system and are trained in its complexities, they hold unique qualifications as a source of information about pending cases. . . . To the extent the press and public rely upon attorneys for information because attorneys are well informed, this may prove the value to the public of speech by members of the bar.

Id. (plurality opinion).

204. *Id.* at 1074. Justice O'Connor, concurring, similarly stated: "Lawyers are officers of the court and, as such, may legitimately be subject to ethical precepts that keep them from engaging in what otherwise might be constitutionally protected speech." *Id.* at 1081-82 (O'Connor, J., concurring) (citation omitted).

205. The Court relies primarily on *In re Sawyer*, 360 U.S. 622, 646-47 (1959) (Stewart, J., concurring) ("Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech."). Justice Brennan, concurring in *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976), stated that "[a]s officers of the court, court personnel and attorneys have a fiduciary responsibility not to engage in public

cepting that the lawyer is an officer of the court, however, does not tell us anything about what this status entails or what extrajudicial commentary constitutes a violation of the lawyer's fiduciary duty. Professor Erwin Chemerinsky has argued that an inferential leap is involved:

> [T]he descriptive statement that attorneys are officers of the court does not justify the normative conclusion that a lesser standard of constitutional review should be used in reviewing restrictions on attorney speech. Even accepting the characterization that lawyers are officers of the court, that says nothing about the duties that are attendant to this role.[206]

Some lower courts seem to treat the fiduciary role of the lawyer as justifying a ban on any extrajudicial commentary, which may have been the earliest approach. If the lawyer speaks about the case outside of the courtroom, he violates his responsibility. But none of the modern disciplinary rules go that far. The more extreme positions restricting attorney free speech, e.g., "special environment" contexts, sound very much like the speech of government employees, in which the courts show extreme deference to claimed governmental expertise.[207] The disciplinary rules of five states and the District of Columbia, some lower courts, and the *Gentile* plurality take the position that the fiduciary role of the lawyer requires only that he or she avoid extrajudicial commentary that creates a serious and imminent threat of prejudice.[208] I would add to this the express requirement that the harm must be unavoidable by less restrictive means, which I believe is implicit in the clear and present danger doctrine.[209]

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debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice." *Id.* at 601 n.27 (Brennan, J., concurring). *See generally* Kevin Cole & Fred C. Zacharias, *The Agony of Victory and the Ethics of Lawyer Speech*, 69 S. CAL. L. REV. 1627 (1996); Minnefor, *supra* note 132; Weinreb, *supra* note 132.

206. Chemerinsky, *supra* note 22, at 872.

207. *See supra* notes 87-89 and accompanying text (discussing restraints on government employees' speech).

208. *See supra* text accompanying note 156 (observing states' use of the clear and present danger doctrine or its equivalent). Justice Kennedy stated:

> At the very least, however, we can say that the Rule which punished petitioner's statements represents a limitation of First Amendment freedoms greater than is necessary or essential to the protection of the particular governmental interest, and does not protect against a danger of the necessary gravity, imminence, or likelihood.

Gentile, 501 U.S. at 1057-58 (plurality opinion).

209. *See* Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("Only an emergency can justify repression."); Abrams v. United States, 250 U.S. 616, 630-

In summary, the very nature of disciplinary rules as content-based regulations of speech concerning the operations of the justice system mandates strict scrutiny. The *Gentile* Court's rationale for departing from the rule of the presumptive invalidity of such restraints is inadequate. In Part Five, I focus more particularly on the affirmative values of lawyer speech to the speaker, to his or her client, and to the public. The nature of the restraint imposed by disciplinary rules and the importance of the freedom of speech and press rights at stake mandate strict scrutiny review.

C. *The "Reasonable Likelihood" Standard*

After *Gentile*, the primary constitutional issue regarding standing disciplinary rules is the validity of those rules employing the "reasonable likelihood" standard. Following *Gentile*, four states abandoned that deferential standard in favor of a more speech-protective disciplinary rule.[210] As indicated above, prior to *Gentile*, the Fourth and Seventh Circuits had come to different conclusions on the First Amendment validity of the reasonable likelihood rule.[211]

In *In re Morrissey*,[212] the Fourth Circuit again considered the reasonable likelihood standard and, once again, upheld its constitutionality.[213] Morrissey, an experienced lawyer, was convicted of two counts of criminal contempt for violating Local Rule 57 of the United States District Court for the Eastern District of Virginia.[214] The charges against Morrissey arose from extrajudicial commentary made to the press in connection with his defense of Joel W. Harris, a longtime Richmond, Virginia political figure.[215] Harris had been charged with drug distribution, with claims of

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31 (1919) (Holmes, J., dissenting) ("Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping [First Amendment] command . . . .").

210. *See* SMOLLA, *supra* note 2, § 15:46 n.12.

211. *See supra* notes 131-33, 146-56 and accompanying text.

212. 168 F.3d 134 (4th Cir. 1999). *See generally* SMOLLA, *supra* note 2, § 15:46 (discussing *Morrissey*). Professor Smolla wrote the petition for certiorari for Morrissey. *See* Petition for Writ of Certiorari, *In re* Morrissey, 168 F.3d 134 (4th Cir.), *cert. denied*, 119 S. Ct. 2394 (1999) (mem.).

213. *Morrissey*, 168 F.3d at 136.

214. *Id.* at 135.

215. *Id.* at 136.

trading drugs for sex and political persecution, adding to the case's notoriety.[216] In spite of warnings about the disciplinary rule, Morrissey held a press conference during which he made comments regarding the case and played a videotape of a major prosecution witness before the grand jury recanting his testimony.[217] Several weeks later, Morrissey gave a newspaper interview in which he stated that the charges against Harris never "should have been filed" and that, if the charges had occurred when he headed the state prosecutor's office, they "would have been laughed out of court."[218]

These two incidents provided the basis for Morrissey's contempt conviction. He was sentenced to thirty days for the first violation of Rule 57 and sixty additional days on the second count.[219] The federal district court held that Morrissey's extrajudicial commentary created a reasonable likelihood of prejudice involving comments regarding prospective witnesses and opinions on the merits of the evidence, as provided for in the disciplinary rules.[220] Rejecting Morrissey's argument that *Gentile* implicitly invalidated the less speech protective "reasonable likelihood" standard, the court upheld the constitutionality of Rule 57.[221]

The Fourth Circuit, relying heavily on its earlier decisions in *Hirschkop v. Snead*[222] and *In re Russell*,[223] rejected Morrissey's facial challenge to Rule 57 and affirmed.[224] In spite of Morrissey's argument that *Gentile* had established a constitutional minimum that necessarily rendered the "reasonable likelihood" test unconstitutional, the Fourth Circuit rejected the claim.[225] While I would like to agree with Morrissey's argument, I cannot do so. Simply, the *Gentile* Court did not address the lesser standard. All the Court did was reject the necessity of showing a serious and imminent threat of prejudice.[226] While the Court did say that the "sub-

216. *Id.*
217. *Id.*
218. *Id.* at 137.
219. *See* Petition for Writ of Certiorari at 3, *In re* Morrissey, 168 F.3d 134 (4th Cir.), *cert. denied*, 119 S. Ct. 2394 (1999) (mem.).
220. *See Morrissey*, 168 F.3d at 137.
221. *In re* Morrissey, 996 F. Supp. 530, 538-40 (E.D. Va. 1998).
222. 594 F.2d 356 (4th Cir. 1979).
223. 726 F.2d 1007 (4th Cir. 1984).
224. *Morrissey*, 168 F.3d at 141.
225. *Id.* at 139.
226. *See* Gentile v. State Bar, 501 U.S. 1030, 1063 (1991).

stantial likelihood" test provided sufficient protection given the lower standards applicable to lawyer's speech, it did not say that this was a constitutional minimum.[227]

The Fourth Circuit did err, however, when it found support for its holding in *United States v. Cutler*.[228] In *Cutler*, the Second Circuit applied the "reasonable likelihood" standard in local rules to affirm sanctions against Bruce Cutler, mob-leader John Gotti's lawyer.[229] But the Court expressly avoided the constitutional issue by invoking the collateral bar rule against Cutler.

> In sum, Cutler could have, and should have, sought modification of the orders in district court, challenged them on a direct appeal, or sought a writ of mandamus or declaratory relief. Having failed utterly to make any good faith effort to undertake even one of these steps, he cannot now challenge the orders' validity.[230]

This merely returns us to the basic issue: Does the reasonable likelihood standard in Local Rule 57 satisfy the First Amendment mandate? In holding that it does, the Fourth Circuit invoked the Supreme Court's holding in *Procunier v. Martinez*,[231] a 1974 decision involving censorship of prisoner mail, as setting forth the First Amendment standard for content-based regulation of speech.[232] Since speech in prisons is a special environment involving a markedly more deferential constitutional scrutiny, the court's choice of precedent is questionable. If it signifies that lawyers' extrajudicial commentary is to be judged by the deferential standards used in the prison speech cases, it devalues lawyer speech far below what the Supreme Court did in *Gentile*.[233]

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227. *See id.*

228. 58 F.3d 825 (2d Cir. 1995).

229. *Id.* at 837-38.

230. *Id.* at 833.

231. 416 U.S. 396, 413 (1974).

232. *Morrissey*, 168 F.3d at 140.

233. In *Gentile*, the Court used its commercial speech precedent to characterize the First Amendment protection accorded attorney speech.

> Even in an area far from the courtroom and the pendency of a case, our decisions dealing with a lawyer's right under the First Amendment to solicit business and advertise, contrary to promulgated rules of ethics, have not suggested that lawyers are protected by the First Amendment to the same extent as those engaged in other businesses.

Gentile v. State Bar, 501 U.S. 1030, 1073 (1991) (Rehnquist, C.J.) (citing Bates v. State Bar, 433 U.S. 350 (1977); Peel v. Attorney Registration and Disciplinary Comm'n, 496 U.S. 9 (1990); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978)). "In each of these cases, we engaged in a balancing process, weighing the State's interest in the regulation of a specialized profession against a lawyer's First Amendment interest in the kind of speech that

There is no doubt, as the *Morrissey* court held, that "the right to a fair criminal trial by an impartial jury" is a compelling state interest.[234] The real issues are whether there is a "reasonable likelihood" of prejudice and whether a restraint is "narrowly tailored enough to be no greater than necessary to protect the government interest involved."[235] This sounds like the language of the *O'Brien* test.[236] The Fourth Circuit purported to use the same criteria of narrow tailoring adopted by the Supreme Court in *Gentile*, suggesting that there is no real constitutional difference between the two standards.[237] But certainly one of the factors cited by the *Gentile* Court which the reasonable likelihood standard does not satisfy is that there exists a "*substantial* likelihood of *material* prejudice."[238]

The Supreme Court in *Gentile* expressly recognized that the reasonable likelihood test provides less protection to speech than does the substantial likelihood test.[239] Similarly, in *Press-Enterprise II*, the Court held that a reasonable likelihood standard is constitutionally inadequate to satisfy the constitutionally mandated substantial likelihood standard.[240] *Morrissey* provides no justification for the diminished standard. That Rule 57 might have been *applied* to Morrissey in a way that would satisfy the *O'Brien* standard does not establish its *facial* validity.

The reasonable likelihood standard is, I believe, inadequate to satisfy the First Amendment mandate. All of the reasons leading me to reject the more demanding *Gentile* constitutional analysis apply more forcefully to the deferential reasonableness standard. Subjecting a content-based regulation of political speech to, at best, an ad hoc balancing regimen is inadequate to satisfy First

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was at issue." *Id.* The commercial speech precedent reflects a form of intermediate scrutiny akin to *O'Brien*. In recent cases, the Court has enhanced the protection accorded to commercial speech. *See* Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173 (1999); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996).

234. *Morrissey*, 168 F.3d at 140.

235. *Id.*

236. *See supra* notes 80-84 (discussing the *O'Brien* test).

237. *See Morrissey*, 168 F.3d at 140.

238. Gentile v. State Bar, 501 U.S. 1030 *passim* (1991) (emphasis added). The Fourth Circuit stated that "Local Rule 57 is narrow in that it prohibits only the statements that are likely to threaten the right to a fair trial and an impartial jury." *Morrissey*, 168 F.3d at 140.

239. *Gentile*, 501 U.S. at 1068.

240. Press-Enterprise II, 478 U.S. 1, 14 (1986) (striking down a California statute that allowed courts to prohibit access by the public if the defendant established a "reasonable likelihood of substantial prejudice").

Amendment requirements, especially given the affirmative value of lawyer speech to the speaker, her client, and the public.

IV. JUDICIAL RESTRAINING (GAG) ORDERS

A. *Participant Gag Orders As Prior Restraints*

Even if standing disciplinary rules are constitutional using less speech protective standards of review, this should not be determinative of the validity of judicial gag orders on trial participants that adopt the same formulation. Even if *Gentile* is accepted, a gag order embodying a "substantial likelihood" standard should not withstand First Amendment scrutiny. Finally, even if *Morrissey* is correct that a "reasonable likelihood" standard in a disciplinary rule is constitutional, this should not mean that a similar judicial gag order is constitutional. A content-based gag order on political speech, unlike the standing disciplinary rule, should be subject to the prior restraint doctrine.

As I indicated above, a judicial restraining order based on speech content is generally a prior restraint subject to "a 'heavy presumption' against its constitutional validity."[241] It might seem, at least after *Nebraska Press*, that a judicial gag order on trial participants is clearly subject to the prior restraint doctrine. In form, the gag order is a judicial injunction restraining speech on the basis of its content.[242] In purpose, operation, and effect, a restraint on trial participants suppresses speech before it enters the marketplace of ideas. It is based on speculation concerning possible future harm that will flow from extrajudicial commentary

241. Neb. Press Ass'n v. Stuart, 427 U.S. 539, 558 (1976) (quoting Carroll v. Princess Anne, 393 U.S. 175, 181 (1968); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963)); *see supra* Part II.B.1 (discussing treatment of judicial gag orders as prior restraints).

242. While the Court in *Alexander v. United States*, 509 U.S. 544 (1993), held that a forfeiture order in an obscenity case was not a prior restraint, the Court stated:

> The term "prior restraint" is used "to describe administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur." Temporary restraining orders and permanent injunctions—i.e., court orders that actually forbid speech activities—are classic examples of prior restraints. This understanding of what constitutes a prior restraint is borne out by our cases, even those on which petitioner relies.

Id. at 550 (quoting M. NIMMER, NIMMER ON FREEDOM OF SPEECH § 4.03, at 4-16 (1984) (emphasis added)); *see also* State v. Bassett, 911 P.2d 385, 387 (Wash. 1996) (en banc) ("The trial court's order forbids future communications [by counsel] and is therefore a prior restraint on the exercise of free speech.").

that has not yet occurred. As the Court stated in *Near v. Minnesota*: "This is the essence of censorship."[243]

The presumptive invalidity of prior restraints is based, in part, on the chilling effect of such restraints.[244] Gag orders on trial participants are more likely to chill speech than standing orders. Even when gag orders use standards based on the disciplinary rules, they often do not include the particular statements in the rules used to guide attorneys. The threat of judicial contempt sanctions is real, concrete, particularized, and immediate. For lawyers who may well appear in the future before the same judge who issues the gag order, the restraint is especially likely to pose a formidable obstacle to speech.

The gag order is an inviting tool for the trial judge charged with an affirmative duty of preserving the fairness of the judicial proceedings. Just as a censor's job is to censor, the trial judge's job is to protect the administration of justice. With other methods of controlling potentially harmful publicity generally unavailable, a restraint on extrajudicial speech, especially by the lawyer, that offers a much greater likelihood of withstanding appellate scrutiny is an attractive alternative.[245] Justice Nelson of the Montana Supreme Court, in a dissenting opinion, captured this impetus to play the censor:

> Gag orders are simply too easy to impose. . . .
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> . . . .
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> . . . [A] court anxious to maintain the appearance of tight control over the case and counsel, fearful that its rulings may be publicly criticized, concerned over the threat of adverse pretrial publicity, determined to preemptively head off change of venue problems and the possibility of having to sequester the jury with the attendant impact on the local treasury, and set on making sure that the case is tried locally, will find little difficulty in gagging at least some of the trial participants. I greatly fear that although we have not allowed the "primrose path that leads to destruction of those societal values that open, public trials promote" to advance into courtroom, we have now

243. Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 713 (1931).

244. *See, e.g.*, City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 759 (1988); N.Y. Times Co. v. United States, 403 U.S. 713, 718-19 (1971); Org. for a Better Austin v. Keefe, 402 U.S. 415, 418-19 (1971); Blount v. Rizzi, 400 U.S. 410, 416-17 (1971); Freedman v. Maryland, 380 U.S. 51, 57-58 (1965); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 723 (1931).

245. *See* Levenson, *supra* note 10, at 306 ("For the trial court faced with a complicated trial surrounded by immense and intense public and media interest, the temptation to rely on gag orders can be overwhelming.").

> effectively paved precisely such a route from the courthouse door to the reporter's desk.[246]

Further, the gag order is subject to the collateral bar doctrine.[247] Standing orders can be tested when they are enforced. But trial participants cannot simply talk about a case to the media and then challenge the constitutionality of a gag order when a show cause order is issued. Even if the judicial order is patently frivolous, it must be obeyed, at least if expedited appellate review is available.[248]

It is not surprising, then, that the prior restraint doctrine generally is used when trial participants, other than lawyers, challenge a gag order on their speech. For example, in *United States v. Ford*,[249] the Sixth Circuit applied prior restraint analysis to a broad gag order restraining Congressman Harold Ford, the defendant in a federal mail and bank fraud case, from making extrajudicial comments concerning the case.[250] The court rejected the government's argument that the order should be upheld under a "reasonable likelihood" test.[251] The appellate court, stressing the political context of the case and the mandate of *Nebraska Press*, used the clear and present danger test and strict scrutiny: "In the instant case, no facts were found which would suggest 'a serious and imminent threat,' and the order was neither narrowly tailored nor directed to any specific situation. Nor was there any specific consideration of the less burdensome alternatives of voir dire, sequestration or change of venue."[252]

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246. Montana *ex rel.* Missoulian v. Mont. Twenty-First Judicial Dist. Court, 933 P.2d 829, 843-44 (Mont. 1997) (Nelson, J., dissenting) (citation omitted) (quoting Great Falls Tribune v. Dist. Court, 608 P.2d 116, 121 (Mont. 1980)).

247. *See supra* note 65 and accompanying text (providing examples of application of the collateral bar doctrine in the context of media publication). *See generally* SMOLLA, *supra* note 2, §§ 15:72–15:76; Richard Labunski, *The "Collateral Bar" Rule and the First Amendment: The Constitutionality of Enforcing Unconstitutional Orders*, 37 AM. U. L. REV. 323 (1998); Richard Labunski, *A First Amendment Exception to the "Collateral Bar" Rule: Protecting Freedom of Expression and the Legitimacy of Courts*, 22 PEPP. L. REV. 405 (1995).

248. *See In re* Providence Journal Co., 820 F.2d 1342, 1352 (1st Cir. 1986), *modified on reh'g en banc*, 820 F.2d 1354 (1st Cir. 1987) (holding that a publisher who is subject to a transparently unconstitutional prior restraint may make a good faith effort to seek emergency relief from an appellate court before publishing).

249. 830 F.2d 596 (6th Cir. 1987); *see also* McBryde v. Comm. to Review Circuit Council Conduct and Disability Orders, 83 F. Supp. 2d 135 (D.D.C. 1999) (holding that a confidentiality clause in a statute providing for judicial misconduct proceedings was a prior restraint as applied to the judge who was the subject of the proceeding and wanted to speak about the concluded proceedings to give his perspective and attempt to vindicate his reputation).

250. *Ford*, 830 F.2d at 598-600.

251. *Id.* at 598.

252. *Id.* at 600.

B. *Litigating the Prior Restraint Doctrine*

The applicability of the prior restraint doctrine and its operation, however, does appear to be less certain and more ambivalent when it is trial participants, and especially lawyers, who are bound. Further, the courts are sharply divided on whether the doctrine even applies when it is the nonparty media that is challenging the constitutionality of the gag order.

In *Levine v. United States*,[253] a former FBI agent was charged with espionage, and his attorneys sought a writ of mandamus to compel the district court to dissolve its gag order prohibiting attorneys in the case from communicating with the media concerning the merits of the case.[254] The Ninth Circuit initially noted that the order did not directly restrain the press and that the litigants lacked third party standing to raise the newsgathering rights of the media.[255] The court agreed, however, that the trial court's order did constitute a prior restraint on the attorneys' speech.[256] Therefore, the restraint was subject to a heavy presumption of invalidity and strict scrutiny applied "because of the peculiar dangers presented by such restraints."[257] Such an order could be upheld only if the clear and present danger test was satisfied, the order was narrowly tailored, and no less restrictive means were available.[258]

Surprisingly, in light of *Nebraska Press* and its progeny, the Ninth Circuit held that the record did support the district court's finding that extrajudicial commentary by counsel posed a serious and imminent threat to the administration of justice, that the restraint on trial participants would be highly effective in curbing the extensive prejudicial publicity, and that the various alternatives to a gag order "would be either ineffective or counterproductive."[259] Nevertheless, the court granted mandamus because the order was not narrowly drawn; it was overbroad.[260] The order failed to identify the types of extrajudicial statements that would satisfy the clear and present danger doctrine.[261]

253. 764 F.2d 590 (9th Cir. 1985).
254. *Id.* at 591.
255. *Id.* at 594.
256. *Id.* at 595.
257. *Id.*
258. *Id.*
259. *Id.* at 600.
260. *Id.* at 599.
261. *Id.*

While the appellate court in *Levine* invoked strict scrutiny, its application of the standard differed remarkably from the rigorous scrutiny appellate courts used in reviewing trial court gag orders on the press after *Nebraska Press*. The Ninth Circuit's analysis in *Levine* was driven by the fact that it was trial participants, especially lawyers, who were the subjects of the gag order. Citing dicta from *Sheppard*, *Nebraska Press*, and other precedent indicating that trial counsel have reduced speech rights, the court stressed the need to evaluate the trial court's order "in light of the relationship between the petitioners and the court system."[262] While "it is appropriate to impose greater restrictions on the [participants'] free speech rights," the court added that trial participants "do not lose their constitutional rights at the courthouse door."[263] *Levine* suggests that, even when trial participants, especially lawyers, assert their own rights in challenging a gag order and the prior restraint doctrine formally applies, the rigor of the judicial scrutiny may be diminished because of the identity of the parties. As my criticism of *Gentile* suggests, I reject this approach.

Following the issuance of the mandamus in *Levine*, the district court held a hearing and issued a new amended gag order prohibiting extrajudicial commentary regarding six identified subjects.[264] The press filed for mandamus claiming that the amended order was an unconstitutional prior restraint.[265] In *Radio & Television News Association v. United States District Court*, the Ninth Circuit rejected the applicability of the prior restraint doctrine and upheld the gag order.[266] While acknowledging that the press had *constitutional* standing to challenge the gag order based on injury to its ability to gather the news, the appellate court held that the press "lacks standing to assert the free speech constitutional rights of the nonparty trial counsel in challenging this order."[267] The third party standing doctrine, which bars a litigant from litigating the legal rights of nonparties, removed the prior restraint doctrine from the case.

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262. *Id.* at 595-96.

263. *Id.* at 595. The courts have used similar language in restrictive environment cases involving students, prisoners, and the military, where diminished First Amendment protections apply. *See supra* notes 87-89 and accompanying text.

264. *See* Radio & Television News Ass'n v. United States Dist. Court, 781 F.2d 1443, 1444 (9th Cir. 1986).

265. *Id.*

266. *Id.* at 1446-48.

267. *Id.* at 1448.

The third party standing rule is a prudential rule based on judicial self-restraint that competing interests can override. The court in *RTNA*, however, never balanced the competing interests to determine whether the press *should* be allowed to assert the First Amendment right of the trial participants. I would argue that the third party standing rule should not be used to bar the press from litigating the right of trial participants to be free of prior restraint. First, there is the public interest in preventing censorship of the speech of trial participants. Second, there is the very real possibility that the parties, especially lawyers who must litigate this case and future cases before the trial judge imposing the order, might be chilled in protecting their rights. If the media is prevented from raising the prior restraint doctrine, the censorship may well go unchallenged. Third, consideration should be given to the public interest in speech involving the operation of our justice system. Finally, the values underlying the prior restraint doctrine itself suggest that the prudential values underlying the third party rules be set aside.

The appellate court in *RTNA* dismissed summarily the "tenuous"[268] constitutional rights of the press as representative of the public: "[T]he media's collateral interest in interviewing trial participants is outside the scope of protection offered by the [F]irst [A]mendment."[269] The press remained free to attend the trial, gather what news it could, and publish what it chose.[270] Indeed, reporters could ask the gagged attorneys questions, but the lawyers "may not be free to answer."[271] Gag orders on trial participants are therefore distinguishable, said the court, from cases in which the courts are closed or press publication is restrained.[272] Because the First Amendment rights of the press were, at best, only indirectly or incidentally burdened and the restraint was reasonably related to the government interest in limiting prejudicial publicity, the Constitution was satisfied.[273]

In *In re Application of Dow Jones & Co.*,[274] a case involving defense contract fraud charges against Wedtech Co. and bribery

268. *Id.* at 1445.
269. *Id.* at 1447.
270. *Id.* at 1446.
271. *Id.*
272. *Id.*
273. *See id.* at 1447-48.
274. 842 F.2d 603 (2d Cir. 1988).

charges against Congressman Mario Biaggi and others,[275] the Second Circuit also held that the prior restraint doctrine is inapplicable in a challenge to a participant gag order brought by the media.[276] While the media was held to have constitutional standing "as recipients of speech"[277] (the court avoided press injury to engage in newsgathering on behalf of the public), the gag order was not a prior restraint.[278] The media could not assert the defendants' First Amendment rights when the defendants themselves failed to challenge the restraining order.[279]

In *Dow Jones*, the court argued that the gag order was not a prior restraint on the press because it was not bound by the order.[280] If a trial participant spoke in violation of the order, the press could not be sanctioned.[281] In short, there was no censorship of the press.[282]

> Although the restraining order in this case limits the flow of information readily available to the news agencies—and for that reason might have an effect similar to that of a prior restraint—the fact that the order is not directed at the news agencies and that they therefore cannot be haled into court for violating its terms deflates what would otherwise be a serious concern regarding judicial censorship of the press.[283]

While press freedom was implicated, the gag order did so only "indirectly."[284] Borrowing from local disciplinary rules on attorneys, the *Dow Jones* court held that the gag order was constitutional if "there [was] a 'reasonable likelihood' that pretrial publicity [would] prejudice a fair trial."[285] Surprisingly, the court

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275. *Id.* at 604-05.
276. *Id.* at 609.
277. *Id.* at 608.
278. *Id.* at 609.
279. *Id.*
280. *See id.* at 608.
281. *See id.*
282. *See id.*
283. *Id.*; *see* Sioux Falls Argus Leader v. Miller, 610 N.W.2d 76, 80 (S.D. 2000) (finding that the media has standing to challenge a gag order on trial participants because the order restricts its rights as a recipient of speech, but declining to apply the prior restraint doctrine because the order does not gag the media, and holding that the order did not violate the media's limited First Amendment right to gather and report the news).
284. *Dow Jones*, 842 F.2d at 609; *see also Sioux Falls Argus Leader*, 610 N.W.2d at 85 ("Since the gag order does not directly restrain the press, it is not held to the same level of scrutiny as prior restraints and will be upheld if 'reasonable.'").
285. *Dow Jones*, 842 F.2d at 610 (citing Sheppard v. Maxwell, 384 U.S. 333, 363 (1966)); *see also Sioux Falls Argus Leader*, 610 N.W.2d at 86 (citing *Dow Jones*).

cited *Nebraska Press* (a prior restraint case) for the principle that less restrictive alternatives had to be considered.[286] Unsurprisingly, in *Dow Jones*, the appellate court found the trial judge had carefully considered alternatives and found them inadequate.[287] Again, gag orders on press publication seldom survive the demand that there be no effective alternative for avoiding prejudice.

There is, however, an alternative line of precedent. In *CBS, Inc. v. Young*,[288] the media successfully challenged a gag order on trial participants issued in a civil action arising from the Ohio National Guard's killing of students at Kent State University.[289] Even though the media was not a party to the underlying civil action, the media was held to have standing to challenge the order because "its ability to gather the news concerning the trial [was] directly impaired or curtailed. The protected right to publish the news would be of little value in the absence of sources from which to obtain it."[290]

Invoking the prior restraint doctrine and the clear and present danger test, the appellate court invalidated the gag order.[291] The restrictive character of the gag order was compounded by its vagueness and sweeping character.[292]

> We find the order to be an extreme example of a prior restraint upon freedom of speech and expression and one that cannot escape the proscriptions of the First Amendment, unless it is shown to have been required to obviate serious and imminent threats to the fairness and integrity of the trial.[293]

The presumptive invalidity of the gag order was not overcome.[294]

Similarly, the Tenth Circuit in *Journal Publishing Co. v. Mechem*[295] applied the prior restraint doctrine to a press challenge to a post-trial gag order preventing jurors from discussing

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286. *Id.* at 611.
287. *Id.*
288. 522 F.2d 234 (6th Cir. 1975).
289. *Id.* at 242.
290. *Id.* at 237-38. The Sixth Circuit added that "this order affected [CBS's] constitutionally guaranteed right as a member of the press to gather news." *Id.* at 238.
291. *Id.* at 238-42 (citing Chase v. Robson, 435 F.2d 1059, 1061 (1970)).
292. *See id.* at 239.
293. *Id.* at 240.
294. *Id.* at 241-42.
295. 801 F.2d 1233 (10th Cir. 1986).

their verdict with the press.[296] The court held that "any inhibitions against news coverage of a trial carry a heavy presumption of an unconstitutional prior restraint."[297] Citing *Young* and cases involving the right of public access to court proceedings, the court applied the clear and present danger doctrine and strict scrutiny.[298] The court held the sweeping order, prohibiting all post-trial interviews, to be impermissibly overbroad.[299]

Again, in *Connecticut Magazine v. Monaghan*,[300] a federal district court, in an action brought by the press, enjoined enforcement of a gag order in a state criminal proceeding.[301] Because the trial court order impaired the press's ability to gather the news and thereby implicated freedom of the press, the press had standing to challenge the order even though it was not a party or subject to the order.[302] The federal court, using the prior restraint doctrine, stated: "An order prohibiting extrajudicial comments by counsel constitutes a prior restraint on the right to gather news and derivatively on publication."[303] Applying *Nebraska Press*, the federal court enjoined the use of the gag order because the state court did not hold hearings and make on-the-record findings that less restrictive means were unavailable.[304] Further, the gag order was overbroad because it was not narrowly tailored to statements that raised a reasonable likelihood of prejudice.[305]

I find the position of courts in such cases as *RTNA* and *Dow*

296. *Id.* at 1235.
297. *Id.* at 1236.
298. *Id.* at 1236-37.
299. *Id.* at 1237.
300. 676 F. Supp. 38 (D. Conn. 1987).
301. *Id.* at 39.
302. *Id.* at 40.
303. *Id.* at 42.
304. *Id.* at 43.
305. *Id.* at 43-44. Similarly, in *Dow Jones & Co. v. Kaye*, 90 F. Supp. 2d 1347 (S.D. Fla. 2000), the court issued a preliminary injunction against a state court that prevented enforcement of a gag order barring parties in a tort action against tobacco companies from communicating about the case. *Id.* at 1363. The court noted that there is a split on the appropriate standards when the media seeks to challenge restraints on trial participants. *Id.* at 1359-60. While not clear on which position it adopted, the court held that the gag order was "not supported by the record and [was] therefore unconstitutional on its face." *Id.* at 1361. The court cited *Nebraska Press* and stated that "[t]he record fails to show that the gag order . . . was necessary to ensure a fair trial." *Id.* at 1360. There was no finding that publicity "seriously threatened the fairness of the trial" or "whether measures short of a gag order would suffice to combat the perceived threat." *Id.* The court found that the gag order was "overbroad in scope and of indefinite duration." *Id.* In short, the court applied a demanding standard of review similar to that applied in *Nebraska Press*.

Jones that reject use of the prior restraint doctrine for media challenges to gag orders on trial participants formalistic and unrealistic. They ignore the underlying rationale of the prior restraint doctrine to prevent government censorship, to assure that speech is expressed in the marketplace of ideas, and to assure that the citizen-critic receives information and ideas vital to his or her role in democratic society. The *purpose* and *effect* of the judicial gag order on trial participants is to curtail such speech regardless of the identity of the challenging party. Even though *RTNA* and *Dow Jones* involved matters of vital concern to the public, the trial courts were allowed to gag broadly the speech of those most directly involved in the controversy; the speech of those in the best position to inform the public was gagged. The fact that the content-based restraint significantly burdened the First Amendment right to gather the news was denigrated.[306] As Judge Nelson of the Montana Supreme Court, dissenting in *Montana ex rel. Missoulian v. Montana Twenty-First Judicial District Court*,[307] which adopted *Dow Jones*, said: "[T]he distinction between a direct prior restraint (where the media is gagged) and an indirect prior restraint (where the media's sources are gagged) is one without a substantive difference. An indirect prior restraint is, de facto, a prior restraint, nonetheless."[308]

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306. In *United States v. Playboy Entm't Group, Inc.*, 120 S. Ct. 1878 (2000), the Court stated: "When the purpose and design of a statute is to regulate speech by reason of its content, special consideration or latitude is not accorded to the Government merely because the law can somehow be described as a burden rather than outright suppression." *Id.* at 1893.

307. 933 P.2d 829 (Mont. 1997).

308. *Id.* at 844 (Nelson, J., dissenting). Judge Nelson added the following:

> [I]t seems to me that if we tell the press "you can edit and publish what you know" and then, in the next breath, allow those sources of information from which the media traditionally gathers its information to be silenced on any but the most serious and compelling grounds which clearly prejudice the defendant's fair trial right, we have effectively precluded the press from "knowing," and, therefore, being able to "edit" or "publish" much of anything....
>
> Furthermore, making prior restraint analysis dependent upon the status of the party bringing the challenge is simply smoke and mirrors. It is purely a legal fiction with no foothold in reality. If the court imposes a gag order on trial participants—no matter what the level of scrutiny or what sort of test it uses—the end result is precisely the same and is equally intrusive and offensive: the media is prohibited from gathering and publishing the news and the public is prohibited from receiving it. The fundamental rights of both are denied. It is for precisely this reason that I would require the highest level of scrutiny and the imposition of the clear and present danger standard—tradi-

It may be true that a gag order on press publication or a closure of judicial proceedings may be a more significant and serious burden on First Amendment rights. That does not denigrate, however, the significance and seriousness of the burden on First Amendment rights that the gag order on trial participants imposes. Trial participants are a vital source of information and perspective on the proceedings. Deprived of this source of news, the press will look elsewhere. It may well be that such alternative sources will lack the understanding of the issues and proceedings that the participants have. It is likely that the alternative sources will have the fervor to present a particular point of view on such matters. The press may well turn to sources having less obvious biases than the participants. In short, the restraint skews the newsgathering process and impacts what the press publishes and what is communicated to the public.[309]

C. *Participant Gag Orders in Lower Courts*

The Supreme Court has not addressed the issue of the constitutionality of participant gag orders. In the absence of a definitive Court ruling, it is not surprising that the lower courts are sharply divided and that there are few agreed-upon governing principles. The above discussion of the differences among the courts on whether the prior restraint doctrine applies to media challenges to participant gag orders is indicative of the disagreement. *Young*, *Mechem,* and *Monaghan* stress the importance of freedom of speech and media newsgathering, apply the prior restraint doctrine, invoke strict scrutiny, and invalidate the gag order.[310] *RTNA* and *Dow Jones* stress the incidental, indirect nature of the burden on press newsgathering and the reduced speech protection of trial participants, especially lawyers, reject use of the prior restraint doctrine, apply more deferential standards of review, and uphold the gag order.[311]

Even prior to *Nebraska Press*, there was little consensus. The

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tional prior restraint analysis—before I would allow a trial participant gag order to be imposed.

Id.

309. *See supra* notes 9-11 and accompanying text.

310. *See supra* notes 288-305 and accompanying text.

311. *See supra* notes 264-87 and accompanying text.

Tenth Circuit, in *United States v. Tijerina*,[312] upheld a broad gag order on extrajudicial commentary by attorneys, defendants, and witnesses, stating: "The Supreme Court has never said that a clear and present danger to the right of a fair trial must exist before a trial court can forbid extrajudicial statements about the trial."[313] The court then engaged in a one-sided balancing of interests and held that "reasonable likelihood" of harm to the integrity of the trial justified the gag order.[314] In *Chase v. Robson*,[315] on the other hand, the Seventh Circuit held that a gag order on trial participants would be constitutional only if there was "'a serious and imminent threat to the administration of justice.'"[316] The gag order in the case, the court concluded, could not even satisfy the "lesser standard" requiring a reasonable likelihood of harm.[317]

As I indicated earlier, after *Nebraska Press*, courts hearing cases such as *Ford* and *Levine* employed the prior restraint doctrine and strict scrutiny to invalidate gag orders when trial participants challenged them.[318] In civil cases and state cases as well, courts used the prior restraint doctrine to impose demanding standards of First Amendment scrutiny and invalidate gag orders.[319] Yet in *In re Russell*,[320] a murder trial involving Nazis and KKK members, the Fourth Circuit used the "reasonable likelihood" standard to affirm a gag order forbidding potential trial

312. 412 F.2d 661 (10th Cir. 1969).

313. *Id.* at 666.

314. *Id.* at 667.

315. 435 F.2d 1059 (7th Cir. 1970).

316. *Id.* at 1061 (quoting Craig v. Harney, 331 U.S. 367, 373 (1947)).

317. *Id.*

318. *See supra* notes 249-63 and accompanying text (discussing *Ford* and *Levine*).

319. *See* Bailey v. Sys. Innovation, Inc., 852 F.2d 93, 101 (3d Cir. 1988) (holding that a trial court order barring extrajudicial statements by litigants and counsel in a civil proceeding constituted an unconstitutional prior restraint under *Nebraska Press*); McBryde v. Comm. to Review Circuit Council Conduct & Disability Orders, 83 F. Supp. 2d 135, 174-75 (D.D.C. 1999) (holding that a confidentiality clause in a statute providing for judicial misconduct proceedings was a prior restraint as applied to the judge who was the subject of the proceeding and wanted to speak about the concluded proceeding to give his perspective and attempt to vindicate his reputation); Sherrill v. Amerada Hess Corp., 504 S.E.2d 802, 808 (N.C. Ct. App. 1998) (reviewing gag order on trial participants in civil environmental pollution case and finding that the order was a presumptively unconstitutional prior restraint because there were no record findings of prejudice and no findings that alternatives would be insufficient); *see also* Davis v. Capital City Press, 78 F.3d 920, 928-29 (5th Cir. 1996) holding that "[t]here is no possibility that publicity will prejudice potential jurors," while avoiding the issue of whether an order prohibiting trial participants from publicly discussing drafts of a proposed desegregation plan would be a prior restraint. *See generally* DIENES, *supra* note 1, at 308-10.

320. 726 F.2d 1007 (4th Cir. 1984).

witnesses from discussing their proposed testimony with the press.[321] The gagged witnesses argued that the order was an unconstitutional prior restraint, that there had been no evidentiary hearing or specific findings made to justify the restraint, and that the order was vague and overbroad.[322] Nevertheless, the Fourth Circuit concluded:

> The tremendous publicity attending this trial, the potentially inflammatory and highly prejudicial statements that could reasonably be expected from petitioners (and had indeed been openly forecast by their counsel in proceedings before the trial judge), and the relative ineffectiveness of the considered alternatives dictated the "strong measure" of suppressing the speech of potential witnesses to ensure a fair trial.[323]

Since the 1990s, following *Gentile* and the sharp controversy over the trial judge's handling of the O.J. Simpson murder trial, the confused state of the law on participant gag orders continues.[324] Let me return to the three gag orders discussed in the

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321. *Id.* at 1010. In *United States v. King*, 192 F.R.D. 527 (E.D. Va. 2000), the district court restrained government witnesses from discussing their opinions and future testimony with the press or in any way that might lead to their dissemination. *Id.* at 533. The court found that such future news coverage is reasonably likely to prevent a fair trial. *Id.* The court denied defendant's motion to prevent the broadcast of an already-taped interview of a government witness because such an order would be a prior restraint and the defendant could not show a clear and present danger that the interview would adversely affect his ability to receive a fair trial. *Id.* at 531-33. The court found, however, that the cumulative effect of such interviews, more of which were sure to follow unless witnesses were enjoined, "present[ed] a high risk of prejudice to the defendants' right to a fair trial by an impartial jury," *id.* at 533, that was unlikely to be mitigated by other measures such as change of venue, postponement, or a searching voir dire. *Id.* at 533-35.

322. *Russell*, 726 F.2d at 1008.

323. *Id.* at 1010.

324. After this article was completed, the Fifth Circuit decided *United States v. Brown*, 218 F.3d 415 (5th Cir. 2000), upholding a participant gag order challenged by the defendant in a criminal proceeding. *Id.* at 418.

Brown, a newly reelected insurance commissioner, was one of the figures indicted in the politically charged prosecution of former Louisiana Governor Edwin W. Edwards. *Id.* The district court entered sua sponte a participant gag order barring discussions "with 'any public communications media' [concerning] anything about the case 'which could interfere with a fair trial,' including statements 'intended to influence public opinion regarding the merits of [the] case,' with exceptions for matters of public record and matters such as ascertions of innocence." *Id.*

While acknowledging that the case involved a "close call," the Fifth Circuit held "that the gag order is constitutionally permissible because it [was] based on a reasonably found substantial likelihood that comments from the lawyers and parties might well taint the jury pool, either in the present case or one of the two related cases, is the least restrictive corrective measure available to ensure a fair trial, and is sufficiently narrowly drawn." *Id.* at 423.

Noting that other circuits had applied some version of the clear and present dan-

introduction.[325]

Judge Hiroshi Fujisaki issued the extremely broad order in the O.J. Simpson civil case at a pretrial status conference, sua sponte, without public notice, a hearing, or any record findings or justification, and the record of the chamber proceedings was sealed.[326] The media, intervening, and one of the plaintiffs, Fredric Goldman, moved to have the trial court vacate or modify its order.[327] Judge Fujisaki heard arguments and almost immediately read a modified order indicating a list of subjects that could

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ger test to participant gag orders that the participants themselves challenged, the Fifth Circuit instead cited *In re Russell*, 726 F.2d 1007, 1010 (4th Cir. 1984) and *United States v. Tijerina*, 412 F.2d 661, 666-67 (10th Cir. 1969), stating: "We decline to adopt the more stringent tests advocated by the Sixth, Seventh, and Ninth Circuits because *Gentile* appears to have foreclosed the applicability of those tests to the regulation of speech by trial participants." *Id.* at 427. *Gentile* involved, however, a standing disciplinary rule, not a judicial gag order subject to the prior restraint doctrine. Further, *Gentile* involved *attorney* extrajudicial commentary, not speech of the criminal defendant. But the Fifth Circuit decided that the special fiduciary obligations on lawyers were not dispositive—"The mischief that might have been visited upon the three related trials—primarily, jury tainting—would have been the same whether prejudicial comments had been uttered by the parties or their lawyers." *Id.* at 428. This is the same "mischief," however, that the Court in *Nebraska Press* held would not justify the use of a prior restraint on the media. Further, the Court in *Gentile* had stressed the fiduciary obligations of lawyers as the basis for distinguishing *Nebraska Press* and applying the less demanding substantial likelihood of material prejudice.

Applying its diminished standard of review, the appellate court in *Brown* affirmed the trial court order. *Id.* at 432. Lest any doubt remain that *Brown* represents a marked departure from the usual, more demanding standards of review, the appellate court held that, while the district court had not followed "the good judicial practice" of making specific record findings about whether there were less restrictive means, the record was sufficient to justify the district court's "clearly implied conclusion that . . . other measures . . . would be inappropriate or insufficient to adequately address the possible deleterious effects of enormous pretrial publicity on this case and the two related cases." *Id.* at 431. While the court cited *Nebraska Press*, its deferential procedural and substantive review of the trial court's order is in marked contrast to that opinion and its progeny.

325. *See supra* notes 16-18 and accompanying text (discussing the gag orders issued in the O.J. Simpson civil case as well as the cases involving the World Trade Center bombing and the Oklahoma City bombing). In addition to the three cases discussed in the text, see Yuan, *supra* note 132 (discussing the gag order issued in the case of Amy Grossberg, who pled guilty to manslaughter in the death of her newborn son).

326. Notice of Motion, *supra*, note 16, at *3. *Compare* Paul L. Hoffman, *The Gag Order in the O.J. Simpson Civil Action: Lessons to Be Learned?*, 17 LOY. L.A. ENT. L. REV. 333, 333 (1997) ("[t]he gag order was issued for reasons that do not withstand First Amendment scrutiny and, given the unique nature of the Simpson case, should not be used as precedent for issuing such orders in future civil cases."), *with* Robert A. Pugsley, *This Courtroom Is Not a Television Studio: Why Judge Fujisaki Made the Correct Call in Gagging Lawyers and Parties, and Banning the Cameras from the O.J. Simpson Civil Case*, 17 LOY. L.A. ENT. L. REV. 369, 381 (1997) ("Judge Fujisaki's orders . . . produced a business-like, legally focused trial.").

327. Memorandum and Order, CNN v. Superior Court, No. B104967, 1996 WL 536864, at *2 (Cal. App. Ct., Sept. 17, 1996) (per curiam); Notice of Motion, *supra* note 16, at *1-2.

not be discussed publicly.[328] The list included not only commentary on the evidence and the merits but also commentary on "the court, including the trial proceedings."[329] The media and Goldman sought review.[330]

The state appellate court in *CNN v. Superior Court* vacated those portions of the order that extended the ban to "'witnesses under control of counsel'" as well as the court's restrictions on extrajudicial commentary regarding the court and its proceedings.[331] The court, however, reasoning that the media was not restrained, rejected application of the prior restraint doctrine.[332] Even though Goldman was a participant challenging the order, the appellate court cited *Gentile* for the principle that increased restrictions of the speech of trial participants are permitted.[333] Because the present case involved a gag order, I cannot see how *Gentile* is controlling on the applicability of the prior restraint doctrine. Because Goldman is not an attorney, *Gentile* is of doubtful relevance. The court reasoned further that, because the scope of the order had been modified, the absence of findings and record evidence justifying the order was not fatal.[334] Judge Fujisaki's concerns over the harmful effects of publicity on the defendant were confirmed by the pervasive "circus atmosphere" in the *Simpson* criminal proceedings, by "common human experience," by the absence of effective alternatives for controlling prejudice, and by the fact that the jury would be unsequestered.[335] The reference to counsel in the order was interpreted as limited to counsel in the civil proceedings, allowing counsel from the criminal proceeding, who were fully familiar with all the evidence and witnesses, to serve as "talking heads" in the civil proceeding.[336] It is difficult to understand what significantly greater prejudice

328. Memorandum and Order, *CNN*, 1996 WL 536864, at *3-4 (per curiam).
329. *Id.* at *3.
330. *Id.* at *2.
331. *Id.* at *10.
332. *Id.* at *6.
333. *Id.* at *7.
334. *Id.*
335. *Id.*
336. *Id.* at *10 ("We believe [this language] may reasonably be construed to apply only to an attorney's employee, agent or representative acting as such in this litigation."). *See generally* Stephen Jones & Holly Hillerman, *McVeigh, McJustice, McMedia*, 1998 U. CHI. LEGAL F. 53 (providing defense counsel's analysis of fair trial-free press issues in *McVeigh* case); John A. Walton, *From O.J. to Tim McVeigh and Beyond: The Supreme Court's Totality of Circumstances Test As Ringmaster in the Expanding Media Circus*, 75 DENV. U. L. REV. 549 (1998).

would come from extrajudicial commentary by the attorneys and participants in the civil proceeding than from the attorneys in the criminal case.

Judge Matsch entered his April 16, 1997, gag order in the Oklahoma bombing trial of Timothy McVeigh after a conference with counsel in chambers.[337] Again, the press was not provided with notice or an opportunity to be heard. As indicated above,[338] this order was extremely sweeping as to subject matter, parties, and duration, but there was no showing made as to why this broad gag order, which replaced an earlier more limited restraint, was needed. The absence of findings on harm and record evidence is especially troublesome because the jury had been impaneled and there already had been extensive publicity before the judge issued the order. Nevertheless, efforts by counsel for McVeigh, joined by two media groups and counsel for Nichols, to vacate or modify the order were rejected. Judge Matsch stated: "This case calls for a blanket bar on out of court comments because no lesser restriction would adequately protect against a substantial likelihood of prejudicing the proceedings."[339] The media was not restrained and restraints on trial counsel and their associates were justified, he said, because "[t]hey are officers of the court with an obligation to the system of justice."[340]

Following the convictions of McVeigh and Nichols, but while their appeals were still pending, the district court, on the government's motion, limited some of its restrictions in order to allow federal authorities to cooperate with Oklahoma authorities investigating the bombing.[341] The Tenth Circuit, affirming the order, declared that Judge Matsch had made "a very careful and deliberate examination of the issues involved" and dismissed possible prejudice to the defendant's rights on appeal and in any new trial as "speculative."[342]

In the third gag order discussed in the introduction, emanating from the World Trade Center bombing, the appellate process produced an opinion more consistent with First Amendment jurisprudence. In *United States v. Salameh*,[343] the Second Circuit

337. United States v. McVeigh, 1997 WL 202537, at *1 (D. Colo. Apr. 16, 1997) (No. 96-CR-68-M) (order prohibiting out of court comments).

338. *See supra* text accompanying note 18.

339. United States v. McVeigh, 964 F. Supp. 313, 316 (D. Colo. 1997).

340. *Id.* (citing Gentile v. State Bar, 501 U.S. 1010, 1075 (1991)).

341. United States v. McVeigh, 157 F.3d 809, 812 (10th Cir. 1998).

342. *Id.* at 811-12, 814.

343. 992 F.2d 445 (2d Cir. 1993).

overturned Judge Duffy's sweeping gag order as an overbroad intrusion on freedom of speech.[344] The appellate court expressly invoked the prior restraint doctrine.[345] While accepting *Gentile's* premise that attorney speech can be subjected to greater limitations than other citizens, the Second Circuit stressed that "the limitations on attorney speech should be no broader than necessary to protect the integrity of the judicial system and the defendant's right to a fair trial . . . ."[346] The trial court must consider the availability of less restrictive remedies as well as the probable effectiveness of the gag order.[347] Finally, the *Salameh* court indicated the need for "proper notice to the parties and an opportunity to be heard."[348] This is the only one of the three cases that approximates the kind of First Amendment analysis that I am urging.

V. THE NEED FOR STRICT SCRUTINY

The analysis of the judicial handling of disciplinary rules in Part Three and gag orders in Part Four convinces me of the need to return to basic First Amendment principles in dealing with restraints on trial participants. First, such restraints are content-based regulations of political speech normally subject to strict scrutiny. Second, gag orders on trial participants are content-based prior restraints on speech subject to a heavy presumption of invalidity. Such restraint is constitutionally permissible only if strict scrutiny or its functional equivalent, the clear and present danger doctrine, is satisfied. Third, the fact that the party restrained is a trial participant, even an attorney, should not denigrate these First Amendment principles. Fourth, the press should have standing to raise the First Amendment rights of trial participants and challenge the participant gag order as a prior restraint. Further, in such media challenges, gag orders on trial participants should be treated as prior restraints on the First Amendment right of newsgathering. In short, the press should be able to challenge such censorship in order to ensure the flow of information to the public.

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344. *Id.* at 447.
345. *Id.* at 446-47.
346. *Id.* at 447.
347. *Id.*
348. *Id.*

These doctrinal principles are sufficient to establish the need for strict scrutiny of restraints on trial participants. Nevertheless, I want to conclude this analysis by stressing again the vital First Amendment values that such restraints put at risk.

First, consideration should be given to the free speech rights of trial participants as persons and as citizens. While the courts regularly recite the mantra that trial participants, even lawyers, do not lose their First Amendment rights when they become involved in a trial, it is often no more than words. When the gag order includes witnesses, arbitrarily caught up in the litigation, free speech values sometimes gain added emphasis. For trial participants, especially lawyers, however, the value of being able to speak on subjects of their choice and the social value of furthering comment on matters of public concern are denigrated. I am not suggesting that free speech rights are absolute, but there should be a meaningful standard of justification before they are sacrificed.

A person charged with a crime is immediately at a disadvantage. The government's charges are communicated to the public; officials, having established lines of communication to the press, can build the case for his or her guilt. But the legally educated, probably more articulate, legal representative of the defendant is subject to standing disciplinary restraints limiting extrajudicial commentary. The courts can impose sweeping and vague gag orders restraining counsel and parties alike. Lawyers, however, have a fiduciary duty to represent zealously, consistent with the law, their client's interest. It does not seem excessive to allow a lawyer to explain and to argue the merits of his or her client's case and to reply to charges communicated in the media.

While restraints often are justified as necessary to prevent prejudicial publicity violative of a defendant's fair trial rights, most restraints are more likely to handicap the defense. It is unlikely that restraints actually will seriously curtail publicity. Where will the news come from if restraints on trial participants are imposed, and how will the restraints affect the accuracy of the news information? There is no sure answer, but many journalists have a long-term relationship with government sources. Defense lawyers are an intermittent source of information. Leaks from the government may well produce publicity adverse to a defendant who is restrained from responding. Inaccurate publicity may go unanswered. It would seem far better to provide for a more bal-

anced, fairer, more accurate communication process by allowing only narrow restraints where there is a threat of serious harm and no alternative to restraint is available.

We must also consider the First Amendment right of the public to receive information and ideas, which is realized by the right of the press to gather the news. In cases establishing a First Amendment-based right of public access, the courts stressed these rights as a predicate for imposing demanding standards of justification before public proceedings could be closed.[349] The First Amendment values relied upon in the access cases also apply to restraints on trial participants. For example, the courts have stressed that the public needs to be assured that justice is being administered fairly. Media publicity is important to counter abuses of the public's trust. Trial participants are in a unique position to provide information, commentary, and perspectives relevant to such functional values. When judges have sought to avoid press criticism by silencing the press critics, the courts protected the critics. If participants and lawyers seek to criticize the fairness of the proceedings or to criticize officials, they should be allowed to use the press to make their case.

Justice Brennan, in *Richmond Newspapers*, stressed the role of access in assuring accurate factfinding.[350] Allowing trial participants to state their theory of the case, to defend their position to the public, and to question the adequacy of the case against them can help to restore balance to what is often an uneven playing field. For example, Gentile sought to tell the public that his client was being used as a scapegoat to cover up the actions of a corrupt police department.[351] Such trial participant commentary may even elicit additional information useful to the fair disposition of the case.

Trial participants often have reform goals that transcend the immediate dispute. For example, Margaret Sanger saw her trials as an opportunity to educate the public on birth control.[352] Similarly, Dr. Jack Kevorkian sought to use his trials as a forum to

349. *See supra* notes 103-29 and accompanying text (discussing the right of public access).

350. *See supra* notes 119-24 and accompanying text (discussing Justice Brennan's concurrence in *Richmond Newspapers*).

351. Gentile v. State Bar, 501 U.S. 1010, 1034 (1991).

352. *See* C. THOMAS DIENES, LAW, POLITICS AND BIRTH CONTROL (1972).

stimulate public discussion of the right to die.[353] Public interest groups often use civil suits to expose public and private abuses.[354] To silence such trial participants denies them a historic forum for airing their causes.

More generally, there is the need to educate the public concerning the workings of our justice system. Almost all states allow for some televising of legal proceedings.[355] As in the context of participant restraints, there are expressions of concern that such media coverage will produce prejudice; but numerous empirical studies, however, have suggested that such concerns are exaggerated and are far outweighed by the benefits of using the media to expose the public to the courtroom.[356] Similar social benefits can result from allowing media access to those most directly involved and informed, the trial participants.

I am not arguing for the elimination of restraints. Indeed, I do not agree with the argument of Professor Erwin Chemerinsky that the actual malice standard of *New York Times Co. v. Sullivan* should be applied to restraints on trial participants.[357] Adoption of the actual malice standard would prevent restraint of any truthful speech; only calculated falsehoods could be regulated. I believe there are times, however, when potential harm outweighs even the values of truthful participant speech. I believe it is possible that extrajudicial disclosure of confidential discovery evidence, for example, might seriously damage the fair administration of justice. I am not prepared to adopt such an absolutist position at this time. Stringent standards of review such as those used in *Press-Enterprise I & II*, strict scrutiny, and the clear and present danger test accommodate the concerns underlying the use of participant speech restraints while protecting the free speech interests of the speaker, the fair trial rights of the parties, and the First Amendment interests of the public.

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353. *See* Chemerinsky, *supra* note 22, at 870-71.

354. *See* Swartz, *supra* note 11, at 1423 ("Civil litigation is often used to raise and debate many important social and political issues.").

355. *See* DIENES, *supra* note 1, at ch. 4.

356. *See* FEDERAL JUDICIAL CENTER, ELECTRONIC MEDIA COVERAGE OF FEDERAL PROCEEDINGS, (1994); N.Y. STATE COMM. TO REVIEW AUDIO-VISUAL COVERAGE OF COURT PROCEEDINGS, AN OPEN COURTROOM: CAMERAS IN NEW YORK COURTS (1997).

357. *See* Chemerinsky, *supra* note 22.

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