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GENTILE V. STATE BAR OF NEVADA: IMPLICATIONS FOR THE MEDIA

In *Gentile v. State Bar of Nevada*¹ a narrowly divided United States Supreme Court held that while a state supreme court's rule that restricted attorney speech was void for vagueness, the standard employed by the rule did not violate the First Amendment.² The rule in question, Nevada Supreme Court Rule 177,³ states that a lawyer involved in pending litigation cannot

1. 111 S. Ct. 2720 (1991).

2. *Gentile v. State Bar of Nevada*, 111 S. Ct. 2720, 2731 (1991).

3. NEV. SUP. CT. R. 177. Nevada Supreme Court Rule 177 is based on the ABA Model Rule of Professional Conduct 3.6. Courts in the vast majority of states have adopted Model Rule 3.6 in part or in whole. Model Rule 3.6 reads as follows:

Rule 3.6 Trial Publicity

a) A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

b) A statement referred to in paragraph (a) ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense, or the existence or contents of any confession, admission, or statement given by a defendant or suspect or any person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial likelihood of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

(c) Notwithstanding paragraph (a) or (b) (1-5), a lawyer involved in the investigation of litigation of a matter may state without elaboration:

(1) the general nature of the claim or defense;

(2) the information contained in a public record;

(3) that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except where prohibited by law, the identity of the persons involved;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when

make statements to the press that the lawyer knows or should reasonably know will have a substantial likelihood of materially prejudicing an adjudicative proceeding.⁴ The question of whether such a restriction is a form of prior restraint, subject to strict constitutional scrutiny, has divided lower courts.⁵ In upholding the "substantial likelihood" test, a majority of the Court, led by Justice Rehnquist, resolved this division and found that the speech restriction at issue in *Gentile* does not constitute a prior restraint on the press.⁶ Because the restriction was not a prior restraint, the Court held that strict constitutional scrutiny, embodied in the clear and present danger test, was not the appropriate standard of review for these restrictions.⁷

In characterizing the *Gentile* restriction, the Rehnquist majority distinguished between restrictions that limit attorneys' speech and restrictions that limit the media's dissemination of information.⁸ The Court in *Gentile* acknowledged that any restriction of the press' First Amendment rights would constitute a prior restraint on the press and would therefore be subject to the strict scrutiny of the clear and present danger test.⁹ However, the Court refused to protect attorney speech within the context of pending litigation to the same degree as the Court protected the media.¹⁰ Instead, the Rehnquist majority concluded that attorney speech is subject to greater regulation because of both an attorney's relationship to the judicial process and the significant dangers that attorney speech poses to the trial process.¹¹ Accordingly, the Court in *Gentile* held that Rule 177's substantial likelihood of material prejudice standard strikes an acceptable balance between preserving both the attorney's First Amendment rights and the state's interest in fair trials.¹²

While restrictions on an attorney's speech in pending litigation do not fall under the traditional model of a prior restraint, in many circumstances,

there is reason to believe that there exists the likelihood of substantial harm to any individual or to the public interest; and

- (i.) the identity, residence, occupation and family status of the accused;
- (ii.) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
- (iii.) the fact, time and place of arrest; and
- (iv.) the identity of investigation and arresting officers or agencies and the length of the investigation.

MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.6 (Approved Draft 1983).

4. *See id.*

5. *See infra* notes 195-223 and accompanying text (comparing courts' different treatments of *Gentile* rules).

6. *Gentile*, 111 S. Ct. at 2747.

7. *Id.* at 2745; *see infra* notes 74-95 and accompanying text (discussing clear and present danger test).

8. *Gentile*, 111 S. Ct. at 2743.

9. *Id.* at 2742-43.

10. *Id.* at 2744.

11. *Id.* at 2744-45. Justice Rehnquist stated that an attorney's speech is especially dangerous because of an attorney's privileged access to judicially discovered information and also because the public perceives attorneys' statements as especially authoritative. *Id.* at 2735.

12. *Id.* at 2745.

such restrictions may achieve the same effect and entail the same dangers.¹³ Prior restraints "freeze" speech and the dissemination of information by prohibiting the publication or broadcast of information by the media.¹⁴ Similarly, restrictions on attorney speech freeze both the speech and the dissemination of information by prohibiting a potential source from contacting the press and supplying the public with valuable information.¹⁵ Such a restriction invariably creates a categorical bar on the release of information about the judicial system to the press.¹⁶

In theory, a *Gentile* rule¹⁷ is a restriction aimed at irresponsible attorneys who exploit the press; in reality, a *Gentile* rule inhibits the ability of all attorneys to comment on judicial, political and executive abuses, speech that is undisputedly at the core of First Amendment protection.¹⁸ Traditionally, the heavy presumption against the constitutional validity of prior restraints maintained a media free from government censorship for the purpose of checking political abuses, informing the public and ensuring the free exchange of ideas.¹⁹ However, the Supreme Court's decision in *Gentile* thwarts this constitutional ideal. The Court's validation of the substantial likelihood standard makes prosecution of an attorney's speech increasingly probable; this, in turn, creates a substantial incentive for attorneys involved in pending litigation to refrain from discussing judicial proceedings with the media.

In analyzing the effect of *Gentile v. State Bar of Nevada* on the First Amendment guarantee of a free press, this Note will explore the reasoning underlying the Court's decision in *Gentile* and will determine whether the outcome is consistent with traditional First Amendment jurisprudence. Part I outlines the evolution of judicial protection of the press from government restriction and discusses the judicial treatment of prior restraints, indirect restraints and finally, *Gentile* rules. This section will examine the various standards of review that are applicable to the different types of restrictions on the press and the policies that underlie these standards of review. By comparing both indirect restraints and *Gentile* rules to prior restraints, it will become apparent that both restraints seek to accomplish the same

13. See *infra* note 198 and accompanying text (discussing similarities of *Gentile* rules and prior restraints).

14. See *infra* note 61 and accompanying text (describing freezing effect of prior restraints).

15. See *infra* notes 169-79 and accompanying text (discussing chilling effect of sanctions on attorney's speech).

16. See *infra* notes 169-84 and accompanying text (describing effects of *Gentile* rule).

17. For purposes of simplicity and to distinguish it from both prior restraints and participant-directed gag orders, a judicially enforced restriction on an attorney's speech will hereafter be referred to as a *Gentile* rule. A *Gentile* rule is a disciplinary or court-enforced rule regulating extrajudicial attorney speech. See generally *Gentile v. State Bar of Nevada*, 111 S. Ct. 2720 (1990).

18. See *infra* note 25 and accompanying text (discussing speech denouncing political abuses and press' checking function).

19. See Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 634 (1975) (describing intention of framers to create "fourth institution" to check against political abuses).

objective and share many constitutional foibles. Part II analyzes the Court's holding in *Gentile v. State Bar of Nevada* and contrasts the majority's approach with the constitutional treatment advocated by the dissent. Part III comments on the Supreme Court's endorsement of the substantial likelihood test and measures the degree to which this less demanding test can be reconciled with prior restraint doctrine and First Amendment jurisprudence. Finally, Part IV considers the possible ramifications of *Gentile* to First Amendment jurisprudence and, more specifically, to the media's ability to gather information relating to the judicial system and subsequently to disseminate that information to the public. The *Gentile* decision arguably weakens the ability of the press to report on the judicial system and decreases the public's access to information about the variety of public functions that courts review within that system.

I. PRESS PROTECTION UNDER THE FIRST AMENDMENT

A. *The Prior Restraint Doctrine*

The framer's chief purpose in adopting the First Amendment's Press Clause²⁰ was to protect the press against a system of government censorship and prior restraints on publication.²¹ The guarantee distinguished the emerging American press system from the English system, where prior licensing of all publications temporarily had prevailed.²² The American judicial system has been demonstrably more protective of an uncensored press and increasingly disinclined to grant judicial approval of any restriction resembling a prior restraint upon publication.²³ Moreover, American First Amendment

20. U.S. CONST. amend. I. The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." *Id.*

21. See *New York Times Co. v. United States*, 403 U.S. 713, 724 (1971) (stating that framers adopted First Amendment to prevent use of seditious libel and prior restraint to punish dissemination of information embarrassing to government); *Carroll v. Comm'rs of Princess Anne*, 393 U.S. 175, 181 n.5 (1968) (noting that chief purpose behind adoption of First Amendment was elimination of prior restraints); *Times Film Corp. v. City of Chicago*, 365 U.S. 43, 53-54 (discussing purpose behind adoption of First Amendment), *reh'g denied*, 365 U.S. 856 (1961); *Near v. Minnesota*, 283 U.S. 697, 713 (1931) (remarking that Press Clause has meant principally freedom from prior restraints); see also Michael E. Swartz, Note, *Trial Participant Speech Restrictions: Gagging First Amendment Rights*, 90 COLUM. L. REV. 1411, 1419 (1990) (stating that rejection of prior restraints forms First Amendment's core). Compare LEONARD LEVY, *THE EMERGENCE OF A FREE PRESS* 233-36, 236 n.38 (1988) (arguing that freedom of press meant solely freedom from prior restraint) with David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 534-35 (1983) (rejecting contention that Press Clause protected only against prior restraint).

22. See Thomas Irwin Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648, 650-52 (1955) [hereinafter *Prior Restraint*] (noting that doctrine of prior restraint had roots in sixteenth century English licensing systems, which required government approval of written material prior to publication); see also John Calvin Jeffries, Jr., *Rethinking Prior Restraint*, 92 YALE L.J. 409, 412-14 (1983) (same).

23. See *Near v. Minnesota*, 283 U.S. 697, 714-15 (1931) (stating that First Amendment protection extended beyond freedom from prior restraint).

jurisprudence has been unwilling to limit its protection of the press to Blackstonian notions and has extended its protection beyond freedom from prior restraint.²⁴ The Supreme Court has continued to respect the framers' commitment to a free press and has repeatedly emphasized the press' ability to check against political and judicial abuses by subjecting the government to public scrutiny and criticism.²⁵

While the government did not impose prior restraints during early American history, the twentieth century revived the debate over the scope of press protection under the First Amendment. In *Near v. Minnesota*²⁶ the Supreme Court for the first time examined the prior restraint doctrine.²⁷ In *Near* the Court considered the constitutional validity of a state statute that permitted the suppression by injunction of any defamatory publication.²⁸ Considering the constitutional interaction of the press and the government, the Court stated that the fundamental purpose underlying the Press Clause was to prevent prior restraints on the press.²⁹ Acknowledging that the statute at issue was not an administrative licensing scheme of traditional form, the *Near* Court found that the statute, nevertheless, functioned like the English system of prior administrative censorship.³⁰ While the statute, at first glance, appeared to involve subsequent punishment, the Court recognized that the statute perpetually enjoined publication in a manner that would force an enjoined publisher to seek judicial approval for future publications or face a contempt charge.³¹ The *Near* Court, therefore, held that the Minnesota

24. 4 WILLIAM BLACKSTONE, COMMENTARIES 151-52 (Robert Malcolm Kerr ed., 1962). Blackstone wrote that:

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

Id. See *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 101 (1979) (stating that First Amendment protection extends beyond freedom from prior restraints); *Grosjean v. American Press Co.*, 297 U.S. 233, 248 (1936) (stating impossibility of accepting that framers intended to adopt narrow view of English law); MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH § 4.02, at 4-11 (1984) (recognizing modern divergence from Blackstonian acceptance of subsequent punishments).

25. See *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966) (recognizing checking function of press); see also *Stewart*, *supra* note 19, at 634 (describing importance of Free Press Clause and suggesting that framers intended Press Clause to create fourth institution outside of government as additional check on three official branches); Alexander Meiklejohn, *The First Amendment Is An Absolute*, 1961 SUP. CT. REV. 245, 256 (arguing that self-government requires freedom of speech and press).

26. 283 U.S. 697 (1931).

27. *Near v. Minnesota*, 283 U.S. 697, 713 (1931).

28. *Id.* at 709.

29. *Id.* at 713.

30. *Id.*

31. *Id.* at 711-12. The *Near* Court also reasoned that the restriction on publication of defamatory material was too broad and that a validation of the law would move one step toward a complete system of censorship. *Id.* at 712-13.

statute, by its operation and effect, functioned as a prior restraint.³² *Near* illustrates a judicial willingness to expand the ban against prior restraints to prevent not only the government licensing schemes eschewed by Blackstone³³ but also to prevent injunctions on speech and publication that had a similar effect.³⁴ This doctrinal expansion, which the Supreme Court based on a determination of the operation and effect of the statute—concern over function rather than form—would become the touchstone of modern prior restraint analysis.³⁵

Following the *Near* decision, subsequent cases firmly entrenched the modern notion that prior restraint doctrine encompasses judicial injunctions on publication and speech, as well as administrative licensing schemes, and that the First Amendment's protection extends beyond prior restraints.³⁶ However, these cases failed to define what forms of restraints constituted a prior restraint and, instead, merely reiterated the presumption against prior restraints.³⁷ In *Bantam Books, Inc. v. Sullivan*,³⁸ the Supreme Court reaffirmed that any system of prior restraints on expression comes to the Court bearing a "heavy presumption" against the system's constitutional-

32. *Id.* at 712. See Sheryl A. Bjork, Comment, *Indirect Gag Orders and the Doctrine of Prior Restraint*, 44 U. MIAAMI L. REV. 165, 171 (1989) (acknowledging that *Near's* broad interpretation, and willingness to examine statute's operation and effect, has served as cornerstone of prior restraint analysis).

33. See *supra* note 24 and accompanying text (capsulizing Blackstone's interpretation of First Amendment).

34. See Bjork, *supra* note 32, at 170-71 (stating that *Near* expanded doctrine beyond traditional licensing schemes to injunctions on speech and publication).

35. See *id.* at 171-72 (discussing Court's doctrinal "leap" in *Near*).

36. See *Craig v. Harney*, 331 U.S. 367, 378 (1947) (striking down contempt order prohibiting press from publishing judicial criticism); *Pennekamp v. Florida*, 328 U.S. 331, 349-50 (1946) (same); *Bridges v. California*, 314 U.S. 252, 278 (1941) (same); see also *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 101 (1979) (stating that First Amendment's protection extends beyond prior restraints); *Near v. Minnesota*, 283 U.S. 697, 712 (1931) (invalidating state statute because, although it was not classic prior restraint in form, statute operated and had effect of imposing judicial censorship); *Jeffries*, *supra* note 22, at 419 (detailing extension of prior restraint doctrine beyond traditional administrative licensing schemes); *Emerson*, *Prior Restraint*, *supra* note 22, at 655-56 (describing four potential categories of prior restraints).

37. See *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 82 (1963) (invalidating state statute that allowed interruption of circulation of designated publications); *Organization for a Better Austin, v. Keefe*, 402 U.S. 415, 419 (1971) (holding that government carries heavy burden of justifying restraint).

38. 372 U.S. 58, 70 (1963). In *Bantam Books*, the Supreme Court considered a Rhode Island law that created a state commission that had the power to investigate and prosecute the distribution of obscene publications. *Id.* at 61. Several publishers and book distributors challenged the constitutionality of the commission. *Id.* The Supreme Court held that the activities of the commission were indeed unconstitutional for several reasons. *Id.* at 64. First, the commission had stopped the circulation of several publications. *Id.* at 68. Second, while the state had the power to regulate obscene materials, the commission had obviated the use of criminal sanctions and had eliminated the safeguards afforded by the criminal process. *Id.* at 69-70. The Court concluded that the activities of such a commission amounted to a system of administrative preclearance that constituted the most suspect form of prior restraint. *Id.* at 70-72.

ity.³⁹ The Supreme Court has affirmed this presumption repeatedly and has relied on this presumption to justify the quick disposal of prior restraints.⁴⁰ Historically, the government has attempted to justify prior restraints in two limited contexts: national security concerns and fair trial-free press dilemma.⁴¹ While the Supreme Court has never absolutely barred a prior restraint in either context, the government has never satisfied the heavy burden required to rebut the presumption against prior restraints.⁴²

*New York Times Co. v. United States*⁴³ demonstrates the difficulty that the government faces in justifying the imposition of a prior restraint.⁴⁴ In *New York Times* the Supreme Court weighed the countervailing interests of national security and uncensored publication and held that the government had failed to meet the heavy burden required to justify a prior restraint.⁴⁵ The Supreme Court rejected the government's contention that the executive branch had the inherent power to protect national interests by restraining the publication of information that threatened national security.⁴⁶ Relying on *Bantam Books* and *Near*, the Court in *New York Times* stated that prior restraints bear a heavy presumption against constitutional validity and held that the government had not met this burden.⁴⁷ While a consistent rationale for analyzing prior restraints did not emerge from the nine separate opinions in *New York Times*,⁴⁸ the failure of the government to meet its

39. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

40. *See, e.g., Vance v. Universal Amusement Co.*, 445 U.S. 308, 317 n.16 (invalidating prior restraint), *reh'g denied*, 446 U.S. 947 (1980); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 558 (1976) (same); *Southeastern Promotions v. Conrad, Ltd.*, 420 U.S. 546, 558 (1975) (same).

41. *See generally Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976) (examining prior restraint doctrine in context of fair trial-free press controversy); *New York Times Co. v. United States*, 403 U.S. 713 (1971) (considering prior restraint doctrine in national security context).

42. *See, e.g., Nebraska Press*, 427 U.S. at 570 (holding that government did not meet heavy burden in fair trial-free press controversy); *New York Times*, 403 U.S. at 714 (holding that government did not meet heavy burden in national security context).

43. 403 U.S. 713 (1971). In *New York Times* the Supreme Court granted certiorari and expedited review to hear argument on the question of whether the government could obtain an injunction restraining the *New York Times* and the *Washington Post* from publishing a classified study entitled "History of U.S. Decision-Making Process on Viet Nam Policy." *Id.* at 714. The Court stated that the government was required to meet a heavy burden of showing justification for the imposition of the restraint. *Id.* The Supreme Court held, six to three, that the government had not met this heavy burden and vacated the two lower courts' temporary restraining orders. *Id.* *See infra* note 48 (describing divergent opinions filed in *New York Times*).

44. *New York Times, Co. v. United States*, 403 U.S. 713, 714 (1971).

45. *Id.*

46. *Id.*

47. *Id.* at 714.

48. *See Roger W. Pincus, Press Access to Military Operations: Grenada & the Need for a New Analytical Approach*, 135 U. PA. L. REV. 813, 826 (1987) (noting lack of coherent approach to national security exception to prior restraint doctrine). The *New York Times* Court held that the lower court should lift the injunction, and even the dissenters noted that

burden where the state interest was arguably at its most compelling level—during wartime—demonstrates that exceptions to the bar against prior restraints are difficult to imagine.⁴⁹

Similarly in *Nebraska Press Association v. Stuart*,⁵⁰ the government also failed to overcome the heavy presumption against prior restraints in the fair trial-free press controversy.⁵¹ While acknowledging the seemingly opposing

prior restraints are typically constitutionally invalid. *New York Times*, 403 U.S. at 714. The disagreement in the majority opinion in large part relates to its members' disagreement over whether the government could have invoked a subsequent punishment, such as the Espionage Act, in response to the *Times* publication. See Frederick Schauer, *Parsing the Pentagon Papers*, Joan Shorenstein Barone Center of Press, Politics & Public Policy Research Paper R-3, at 2 (1991) (recognizing that, while all members of majority agreed that prior restraints were unconstitutional, two members were unwilling to conclude that subsequent punishment would have also violated First Amendment). Although the Justices in *New York Times* disagreed over the acceptability of applying subsequent punishments to the newspapers, the disagreement in the majority relates more to the Justices' different conceptualizations of the First Amendment. Justices Stewart's and White's concurrences seemed to mark the centrist position on the Court. Both Justices made it clear that the government would have to meet an exceptional burden to justify a prior restraint. *Id.* at 728-30 (Stewart, J. concurring, joined by White), *Id.* at 731 (White, J., concurring, joined by Stewart, J.). The government would have to show that the disclosure of the Pentagon Papers would result in a "direct, immediate, and irreparable harm" to the Nation or its people. *Id.* at 728-30 (Stewart, J., concurring, joined by White, J.).

49. *New York Times*, 403 U.S. at 714. *But cf.* *United States v. Progressive, Inc.*, 467 F. Supp. 991 (W.D. Wis.) (involving attempt to enjoin magazine from publishing article detailing assembly of nuclear bomb pursuant to Atomic Energy Act), *appeal dismissed*, 610 F.2d 819 (7th Cir. 1979).

50. 427 U.S. 539 (1976). In *Nebraska Press* the Supreme Court granted certiorari in order to consider the constitutionality of a lower court's injunction; the injunction restrained the media from disseminating information that could threaten the defendant's Sixth Amendment right to fair trial. *Id.* at 541-42. The Court held that the barriers to prior restraint remain high and the presumption against such a restraint remains intact. *Id.* at 561. The Court also recognized the importance of reporting a criminal proceeding. *Id.* at 559. The Court stated that the heavy burden imposed as a condition to securing a prior restraint was not met by the lower court in *Nebraska Press*. *Id.* at 570. The Court established a three-pronged test that a court must meet in order to justify the imposition of a prior restraint. *Id.* at 562. See *infra* notes 55-58 and accompanying text (discussing *Nebraska Press*' three-pronged test).

51. *Nebraska Press*, 427 U.S. at 570. See generally *United States v. Noriega*, 917 F.2d 1543 (11th Cir.), *cert. denied*, 111 S. Ct. 451 (1990) (reviewing trial court's injunction of broadcast until it could review information and weigh defendant's Sixth Amendment fair trial claim). In *Noriega* Cable News Network (CNN) obtained tape recordings of phone conversations between a criminal defendant and his attorneys, made while he was awaiting trial. *Id.* at 1545. Prior to CNN's broadcast of the tapes, the defense counsel obtained an injunction prohibiting CNN from broadcasting any portion of the tapes. See *United States v. Noriega*, 752 F. Supp. 1032, 1036 (1990). CNN refused to turn the tapes over to the judge so that an evaluation of the threat posed to Noriega's Sixth Amendment right to a fair trial could be made. *Noriega*, 917 F.2d at 1546-47. Because the district court judge was unable to review the tapes due to CNN's refusal, the Eleventh Circuit denied CNN's appeal of the injunction. *Id.* at 1552. The Supreme Court denied certiorari even though two Justices criticized the Court's refusal to resolve the lower court holdings which seemed in conflict with the *Nebraska Press* standards. See *Cable News Network, Inc. v. Noriega*, 111 S. Ct. 451, 451 (1990) (Marshall, J., and O'Connor, J., dissenting from the denial of certiorari); see also RODNEY A. SMOLLA, NIMMER ON FREEDOM OF SPEECH § 4.05-4-28 (Supp. 1991).

demands of the media's First Amendment rights and the defendant's Sixth Amendment right to a fair trial, the Court rejected the establishment of a general hierarchy within the Bill of Rights that would favor one right over another.⁵² The Court stated that First Amendment rights were not absolute and that a court could constitutionally maintain a prior restraint on the press only if the "gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."⁵³ The Supreme Court devised a three-pronged test to apply this amorphous standard to the fair trial-free press controversy.⁵⁴

The first prong of the *Nebraska Press* test requires a court to assess the nature and extent of pretrial news coverage.⁵⁵ To satisfy the first prong, a court must find that a risk of pervasive publicity exists that could prejudice prospective jurors.⁵⁶ The second prong of the test requires a court to consider whether other alternative methods would likely mitigate the effects of any pretrial publicity.⁵⁷ The third prong requires a court to ascertain whether a prior restraint would be effective in preventing the threatened danger. Many commentators have concluded that satisfying all three-prongs of *Nebraska Press*, and thereby justifying the imposition of a prior restraint, is impossible.⁵⁸ Yet the Supreme Court has steadfastly maintained that courts should

52. *Nebraska Press*, 427 U.S. at 561.

53. *Id.* at 562. This formula is Learned Hand's reformulation of the clear and present danger test that the Supreme Court adopted in *Dennis v. United States*, 341 U.S. 494 (1951). See Rene L. Todd, Note, *A Prior Restraint by Any Other Name: The Judicial Response to Media Challenges of Gag Orders Directed at Trial Participants*, 88 MICH. L. REV. 1171, 1176 n.29 (1990) (stating that *Nebraska Press* modeled its test on Learned Hand's version of clear and present danger test).

54. *Nebraska Press*, 427 U.S. at 562. See Tom Hentoff, Note, *Speech, Harm and Self-Government: Understanding the Ambit of the Clear and Present Danger Test*, 91 COLUM. L. REV. 1453, 1488 (1991) (noting that, although Court decided *Nebraska Press* during *Brandenburg* era, Court used *Dennis* formulation of clear and present danger standard); see also Benno C. Schmidt, Jr., *Nebraska Press Association: An Expansion of Freedom and Contraction of Theory*, 29 STAN. L. REV. 431, 464 (1977) (recognizing Court's use of ad hoc balancing). While the *Nebraska Press* three-pronged test employed ad hoc balancing, it also seemed to demand a strict scrutiny level of review. See *infra* note 301 (discussing narrowly tailored requirements of strict scrutiny review).

55. *Nebraska Press*, 427 U.S. at 562.

56. *Id.* See also James C. Goodale, *The Press Ungagged: The Practical Effect on Gag Order Litigation of Nebraska Press Association v. Stuart*, 27 STAN. L. REV. 497, 498 (1977) (observing that first prong of *Nebraska Press* test may require showing of actual prejudice, which may be impossible because court could only satisfy showing of *voir dire*, and prior restraints would be imposed prior to *voir dire*).

57. *Nebraska Press*, 427 U.S. at 562. See also Goodale, *supra* note 57, at 500 (arguing that it would be impossible for court to meet second prong of *Nebraska Press* test in light of Justice Clark's admonition that alternative means, falling short of prior restraint, would have been sufficient to guarantee fair trial in *Sheppard*, where prejudice and inflammatory character of publicity were arguably at apex).

58. See SMOLLA, *supra* note 51, § 4.05, 4-28 (remarking that concurring opinions following majority opinion justified critics' conclusion that *Nebraska Press* resulted in absolutism); Todd, *supra* note 53, at 1176 (concluding that presumption against prior restraints, manifested in

not deem prior restraints per se unconstitutional.⁵⁹

Whether a court extends protection to the press hinges on whether the court categorizes a restriction as a prior restraint or a subsequent punishment.⁶⁰ Historically, valid reasons for distinguishing between the two types

three-pronged test, functions as virtual ban); Goodale, *supra* note 56, at 513 (arguing that court could not possibly meet three-pronged test). Goodale states that while the Supreme Court stated that exceptions to the presumption against prior restraints exist, the Court created a test for those exceptions that is impossible to meet. *Id.* See also Scott A. Hagen, Note, *KUTV v. Wilkinson: Another Episode in the Fair Trial/Free Press Saga*, 1985 UTAH L. REV. 739, 754 (arguing that court could not possibly satisfy *Nebraska Press* test and that Supreme Court should adopt absolute rule in order to avoid unnecessary litigation, overuse of gag orders and temporary delay of publication while order is appealed). *But see* Cable News Network, Inc. v. Noriega, 917 F.2d 1543, 1552 (11th Cir. 1990) (upholding injunction where network's failure to produce tapes for court inspection prevented district court's required balancing of First and Sixth Amendment rights); Stephen R. Barnett, *The Puzzle of Prior Restraint*, 29 STAN. L. REV. 539, 541 (1977) (positing that *Nebraska Press* standard probably is least protective standard to appear in Court's opinions since development of modern First Amendment law); Monroe H. Freedman & Janet Starwood, *Prior Restraints on Freedom of Expression by Defendants & Defense Attorneys: Ratio Decidendi v. Obiter Dictum*, 29 STAN. L. REV. 607, 609, 619 (1977) (noting differing opinions of justices as to how high courts should make barriers to prior restraint and noting that analysis ironically may advocate imposition of prior restraints trial participants).

59. *Cf.* *Nebraska Press*, 427 U.S. at 561 (stating that barriers to prior restraint remain high but inferring that barriers could conceivably be overcome); *Chicago Council of Lawyers v. Bauer*, 522 F.2d. 242, 248 (7th Cir. 1975) (stating that prior restraints are not per se unconstitutional under Supreme Court's rulings), *cert. denied*, 427 U.S. 912 (1976). However, at least two courts have applied the *Nebraska Press* three-pronged test and upheld a gag order. See *KPNX Broadcasting Co. v. Arizona Super. Ct.*, 459 U.S. 1302, 1308 (1982) (denying media application for stay based on trial judge's adequate *Nebraska Press* findings); *KUTV, Inc. v. Wilkinson*, 686 P.2d 456, 462 (Utah 1984) (affirming trial judge's indirect restraint because requisite *Nebraska Press* findings were made).

60. See *infra* notes 61-62 and accompanying text (discussing advantages of subsequent punishment and disadvantages of prior restraint). If the court determines that a restriction is a prior restraint, the restraint will be presumptively invalid. See *supra* notes 43-49 and accompanying text (discussing *New York Times*). If the court determines that a restriction is a subsequent punishment, the court will typically determine whether the restriction shares any characteristics of a prior restraint. A determination that the restriction resembles a prior restraint would likely cause the court to invalidate the restriction. See *supra* notes 26-34 (discussing *Near*). If the court determines that the restriction is a subsequent punishment, the court will weigh the state interest against the individual's liberty interest to determine if the restriction is constitutionally acceptable. See *infra* note 77 (discussing briefly *Landmark Communications*). However, the preceding analysis depends on the courts' ability to clearly identify and discern the two forms of First Amendment restriction.

While the doctrine of prior restraint is largely defined by contrasting these restraints from subsequent punishments, courts have found that distinguishing prior restraints from subsequent punishments often is difficult. This difficulty stems from the failure of restrictions on expression to conform to their historical definitions. The traditional definition of a prior restraint is an "official restriction imposed on speech or other forms of expression in advance of actual publication," as opposed to a subsequent punishment which occurs "after the communication has been made as a punishment for having made it." Emerson, *Prior Restraint*, *supra* note 22, at 648. The most common manifestation of a system of subsequent punishment is a criminal statute punishing "illegitimate" speech or publication. See generally *Smith v. Daily*

of restrictions may exist.⁶¹ In the past, courts predicated their categorical rejection of prior restraints on the existence of a more palatable form of speech restriction—subsequent punishment.⁶² However, courts have quietly deemphasized the distinction between prior restraints and subsequent punishments in modern First Amendment jurisprudence.⁶³ Most modern com-

Mail Publishing Co., 443 U.S. 97 (1979) (examining West Virginia statute which criminalized newspaper's publication of names of juveniles involved in juvenile proceedings); Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978) (reviewing Virginia statute that penalized dissemination of information relating to ongoing judicial impropriety investigation).

61. See THOMAS IRWIN EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 506 (1971) [hereinafter SYSTEM] (remarking that prior restraints censure wider range of expression, do not include safeguards of criminal process and dynamics of system tend toward excess). Subsequent punishments are thought to have numerous advantages over prior restraints. Subsequent punishments punish expression after its dissemination, allowing the idea or expression to be placed into the marketplace of ideas. See Swartz, *supra* note 21, at 1430 (stating that subsequent punishment delays punishment until punished speaker exhausts appellate review and court knows contested expression's impact, thereby reducing possibility of erroneous suppression). Courts impose prior restraints, on the other hand, before expression, erecting an insurmountable barrier between the expression and the marketplace of ideas and placing the burden of demonstrating the validity of the expression on the speaker. See Martin H. Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53, 55-57 (1984) (noting that prior restraints are constitutionally dangerous because of delay that occurs while enjoined party waits for adversary hearing). Alternatively, prior restraints freeze a wider range of expression for the following reasons: A court enforces the restraints through a court's contempt power; prior restraints provide a more accessible form of censorship; and prior restraints provide less opportunity for public appraisal of the expression. See Marin Scordato, *Distinction Without a Difference: A Reappraisal of the Doctrine of Prior Restraint*, 68 N.C. L. REV. 1, 18-21 (1989) (noting that traditionally courts disfavor prior restraints partially because ease of imposition leads to greater censorship).

62. See Swartz, *supra* note 21, at 1419 (noting that subsequent punishments are preferable to prior restraints); Jeffries, *supra* note 22, at 410-11 (recognizing that presumption against prior restraints relates to existence of less restrictive systems of subsequent punishment); LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 12-31, at 725 (1978) (noting that prior restraints are especially dangerous because restraint occurs prior to adequate judicial determination of whether restrained expression falls within scope of First Amendment protection); Barnett, *supra* note 58, at 543 (stating that courts should invalidate prior restraints because subsequent punishments are less restrictive alternative); Emerson, *Prior Restraint*, *supra* note 22, at 648 (noting that state can impose speech restrictions in form of subsequent punishment that would be invalid if imposed through prior restraint).

63. See *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 101 (1979) (minimizing distinction between subsequent punishments and prior restraints); *Worrell Newspapers of Indiana, Inc. v. Westhafer*, 739 F.2d 1219, 1222 (7th Cir. 1984) (same), *aff'd. without opinion*, 469 U.S. 1200 (1985). In both *Daily Mail* and *Worrell Newspapers*, the Supreme Court appeared to deemphasize the distinction between prior restraints and subsequent punishments. In *Daily Mail*, the Supreme Court considered the constitutionality of a West Virginia statute that criminalized the publication, without approval from the court, of the names of juveniles involved in criminal proceedings. *Daily Mail*, 443 U.S. at 101. The Court held that the case did not turn on whether or not the statute was a prior restraint because the First Amendment's protection extended beyond prior restraints. *Id.* The Court stated that "whether we view the statute as a prior restraint or as a penal sanction . . . is not dispositive because even the latter action [subsequent punishment] requires the highest form of state interest to sustain its validity." *Id.* at 101-02. The Court struck down the statute because the state interest did not outweigh

mentators agree that the differences between prior restraints and subsequent punishments are no longer significant,⁶⁴ particularly in light of the decreased application of the collateral bar rule.⁶⁵ Critics argue that the distinction between prior restraints and subsequent punishments inadequately addresses the modern dilemmas of press restrictions and that prior restraints are preferable to subsequent punishments.⁶⁶ In light of this criticism, whether

the newspaper's First Amendment interest. *Id.* at 104.

In *Worrell Newspapers*, a reporter challenged an Indiana statute that provided a criminal punishment for anyone publishing the name of an individual against whom the state had filed a sealed criminal indictment. *Worrell Newspapers*, 739 F.2d at 1221. The Seventh Circuit rejected the State's argument that the statute was not a prior restraint but rather a subsequent punishment. *Id.* at 1222. The Seventh Circuit cited *Daily Mail* for the contention that the prior restraint-subsequent punishment dichotomy "is a distinction without a difference, and the Supreme Court has recently eliminated this semantic distinction." *Id.* The Seventh Circuit's contention is supported by the fact that the Supreme Court affirmed *Worrell Newspapers* without opinion. 469 U.S. 1200 (1985). *But see* Schauer, *supra* note 48, at 3-4 (noting that, despite broad academic attack on distinction, neither Supreme Court or press has been willing to dismiss distinction).

64. See Scordato, *supra* note 61, at 2 (noting that term prior restraint has become legal misnomer and source of controversy and confusion); TRIBE, *supra* note 62, §§ 12-34, at 1040 (stating that distinction between subsequent punishments and prior restraints is not valid).

65. See Jeffries, *supra* note 22, at 431 (stating that injunctions are more restrictive due to collateral bar rule); Todd, *supra* note 53, at 1182-84 (discussing collateral bar rule's impact on trial-participant directed gag orders); Goodale, *supra* note 58, at 504-12 (discussing collateral attacks on prior restraints). The injunctive powers of the court are particularly threatening because of the collateral bar rule. See generally Christine Hasiotis, *Transparently Invalid Exception to the Collateral Bar Rule Under the First Amendment in the Federal Courts—In re Providence Journal*, XXI SUFFOLK U. L. REV. 265 (1987) (discussing collateral bar rule); Richard E. Lubunski, *The "Collateral Bar" Rule and the First Amendment: The Constitutionality of Enforcing Unconstitutional Orders*, 37 AM. U. L. REV. 323 (1988) (same). Courts have held that the validity of a judicial contempt order is determined by the court imposing the order. See Hasiotis, *supra* at 268. Thus, individuals who violate a court order cannot appeal an ensuing contempt charge by contesting the order's constitutionality. *Id.* This prohibition against collateral attack on a contempt charge is called the collateral bar rule. *Id.* The Supreme Court has acknowledged limitations on the collateral bar rule that have led many courts to revise their application of the collateral bar rule. *Id.* at 268; see *Walker v. City of Birmingham*, 388 U.S. 307, 315 (holding that contested injunction was not transparently invalid but acknowledging existence of exception), *reh'g denied*, 389 U.S. 894 (1967); *In re Providence Journal*, 820 F.2d 1342, 1353 (1st Cir. 1986) (holding challenged injunction was transparently invalid), *cert. granted*, 484 U.S. 814 (1987), *cert. dismissed*, 485 U.S. 693 (1988) (applying transparently invalid exception).

66. See L. A. Powe, Jr., *The H-Bomb Injunction*, 61 U. COLO. L. REV. 55, 64 (1990) (discussing advantages that prior restraints have over subsequent punishments); Vincent Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11, 47 (1981) (rejecting contention that prior restraints engender more self-censorship); Jeffries, *supra* note 22, at 419-20 (arguing that doctrine of prior restraint is no longer needed); LEVY, *supra* note 21, at 13 (noting that subsequent punishments have effect similar to prior restraints); Barnett, *supra* note 58, at 551 (noting that narrow freeze of gag order may produce less chilling effect overall than broader chill of threatened subsequent penalties). Critics have also pointed to other inconsistencies in the dichotomy. Punishments under a system of subsequent punishment are typically harsher than those imposed under a system of prior restraint. See Blasi, *supra* at 26-27 (discussing subsequent punishments greater potential for severe sanctions). Whereas the

the prior restraint-subsequent punishment dichotomy can actually identify when restrictions on the press violate the First Amendment is questionable.⁶⁷

Although this dichotomy seems unable to address the realities of the modern media, there remains one other viable component of the Supreme Court's traditional analysis of free press controversies: the application of strict scrutiny review. The Supreme Court's long standing reliance on a categorical approach to free press cases,⁶⁸ embodied in the prior restraint-subsequent punishment dichotomy, at first may seem at odds with a standard of strict scrutiny review.⁶⁹ Admittedly, courts' inveterate reliance on this categorical approach has resulted in a schizophrenic analysis of the two

punishment for a prior restraint is criminal contempt, subsequent punishments typically result in criminal fines, damages, or imprisonment. *Id.* Both forms of restraint inevitably threaten punishment prior to expression. Jeffries, *supra* note 22, at 427 (noting that under both systems threat of punishment precedes expression). Critics also have argued that the distinction focuses erroneously on the method, and not the nature, of the restriction, is logically inconsistent in application, and that the "chilling" effect produced by subsequent punishments is arguably equal to, if not greater than, the effect of a prior restraint. See Scordato, *supra* note 61, at 28-29 (criticizing prior restraint doctrine's focus on desired result rather than identifying characteristics and noting similarity of prior restraint's and subsequent punishment's chilling effects); Robert D. Sack, *Principle and Nebraska Press Association v. Stuart*, 29 STAN. L. REV. 411, 415-16 (1977) (stating that logically inconsistent results occur from application of different standards).

67. See Barnett, *supra* note 58, at 540 (arguing that reliance on prior restraint-subsequent punishment dichotomy may lead to constitutionally unacceptable results). If the dichotomy, and the resulting different treatment given to prior restraints and subsequent punishments, is not appropriate, continued reliance on prior restraint doctrine as an indicator of what standard of review is warranted could deny protection to restrictions on the press that do not fit under the prior restraint umbrella, although they may be equally restrictive in effect. See Scordato, *supra* note 61, at 30-31 (calling for revision of prior restraint doctrine to include all governmental actions that result in physical interception and suppression of speech prior to its expression).

68. See generally T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987) (discussing Supreme Court's changing use of categorical and balancing analytical approaches). It is possible that the prior restraint-subsequent punishment dichotomy was one holdover from the nineteenth century Supreme Court's reliance on categorical, rather than balancing, analysis. *Id.* at 949-52.

69. *Id.* at 943-44 (describing evolution of Supreme Court jurisprudence from nonbalancing to balancing approaches). Aleinikoff argues persuasively that the Court's opinions of the nineteenth and early twentieth centuries did not employ balancing as a method of constitutional argument. *Id.* at 949-52. The author argues that early Supreme Court analysis concentrated foremost on categorizing the state interest at issue in any given case. *Id.* at 951. The Supreme Court resolved controversies in a categorical manner; early decisions generally acknowledged differences in form and not degree. *Id.* at 949. Instead of balancing the state interest against the liberty interest of the individual, the Court considered the reasonableness of the state action based upon identifiable characteristics of the action and categorized it as either legitimate or illegitimate. *Id.* Early Supreme Court analysis focused on the strength of the state interest rather than on a balance of competing interests. *Id.* The Court's singular reliance on the prior restraint-subsequent punishment dichotomy reflects this same form of analysis; the Court categorizes the restriction as either a prior restraint or subsequent punishment based upon characteristics carried over from English common law. The resulting categorization necessarily dictates the strength of the state's interest and the ability of the restriction to pass constitutional muster.

identifiable forms of press restrictions. While the Supreme Court has applied the clear and present danger test in other First Amendment contexts as part of a strict scrutiny analysis,⁷⁰ the Court has been reluctant to apply the test consistently to both the prior restraint and the subsequent punishment restrictions on the press' freedom. Although the potent early twentieth century *Abrams-Whitney*⁷¹ version of the clear and present danger test initially seems well-suited as a surrogate to the strong presumption against prior restraints,⁷² the Supreme Court never utilized the clear and present danger test in a prior restraint case.⁷³ The fact that the Court did not apply

70. See, e.g., *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) (applying clear and present danger test to restriction on publication of information relating to ongoing judicial investigation); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (applying clear and present danger test to restrictions on speech which advocates criminal activity); *Bridges v. California*, 314 U.S. 252 (1941) (applying clear and present danger to restrictions on judicial criticism). The prototypical standard for review of restrictions of expression in many First Amendment contexts is the clear and present danger test. The test allowed for the restriction of speech if "the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree." *Schenck v. United States*, 249 U.S. 47, 52 (1919). While *Schenck* did not involve a prior restraint, *Schenck* is important as the origin of Holmes' articulation of the clear and present danger standard. *Id.* See also Frank R. Strong, *Fifty Years of "Clear and Present Danger": From Schenck to Brandenburg and Beyond*, 1969 SUP. CT. REV. 41, 44 (recognizing that importance of *Schenck* stems from first appearance of Holmes' test).

71. *Abrams v. United States*, 250 U.S. 616, 627-28 (1919) (Holmes, J., dissenting) (stating potent formulation of clear and present danger test); *Whitney v. California*, 274 U.S. 357, 371-80 (1927) (Brandeis, J., concurring) (stating invigorated articulation of clear and present danger test). See Strong, *supra* note 70, at 46-47 (discussing Holmes-Brandeis potent articulation of clear and present danger test).

72. See Strong, *supra* note 70, at 46-47 (discussing evolution of clear and present danger test after *Schenck*). The clear and present danger test is an amorphous formulation that courts have applied in a variety of ways. See generally *id.*

73. *But see Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 562 (1976) (stating *Dennis* formulation of clear and present danger test). While the Court in *Nebraska Press* did invoke the *Dennis* formulation of the clear and present danger test, many commentators have denied that this formulation is really a version of the clear and present danger test because of the formulation's abandonment of an imminence requirement. See *infra* note 82 and accompanying text (describing critics' reactions to *Dennis* formula). While the Court in *Nebraska Press* did rely on the prior restraint-subsequent punishment dichotomy, the Court did not hinge its analysis on the distinction between the two types of restraints and instead, formulated a balancing test to weigh the competing interests of free press and fair trial. *Nebraska Press*, 427 U.S. at 562.

The Court's hollow invocation of the prior restraint-subsequent punishment dichotomy and creation of a balancing test seem to reflect the modern Court's increased confidence in balancing. See Aleinikoff, *supra* note 68, at 963-72 (discussing increased use of balancing in the twentieth century). Aleinikoff states that the Court has increasingly relied on balancing formulations, such as the clear and present danger test, during the twentieth century. *Id.* at 964 (noting that during balancing approach's formative years, Supreme Court never considered balancing exclusive method of constitutional interpretation). While both the categorical and balancing tests continue to exist concurrently, ad hoc balancing gradually has superseded categorical analysis. *Id.* The author also notes that Oliver Wendell Holmes, the author of the clear and present danger test, was one of the leading academic proponents of balancing. *Id.* at 955.

the clear and present danger test in early press cases, such as *Near*,⁷⁴ may be due to the Court's satisfaction with a categorical approach, which in many ways resembles the *Abrams-Whitney* version of the clear and present danger test applicable at the time of these cases. While not used for the review of prior restraints, the Supreme Court did use the clear and present danger formula as a strict scrutiny balancing test⁷⁵ appropriate for the review of prior restraint's less suspect, fraternal twin, subsequent punishment.⁷⁶

The Court relies consistently on the clear and present danger test's two components, seriousness and imminence, to gauge the constitutionality of subsequent punishments on the press.⁷⁷ Courts have also applied the clear and present danger test to other cases relating to restrictions on the press, including the attempted restraint of the press' right to publish commentary critical of judges.⁷⁸ Given this wide application, the clear and present danger test might seem ideally suited for widespread use in the free press context; however, members of the Court have been dissatisfied with the test for different reasons.⁷⁹ Much of this dissatisfaction crystallized in *Dennis v. United States*,⁸⁰ in which the Court distorted the clear and present danger

74. 283 U.S. 697 (1931).

75. See Strong, *supra* note 70, at 54-55 (describing changing use of test).

76. See *infra* note 88 and accompanying text (reviewing application of clear and present danger test to subsequent punishments). *Contra* Hentoff, *supra* note 54, at 1461 (labelling *Nebraska Press* test clear and present danger test and noting its application to prior restraints). *Id.*

77. See *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 105-06 (1979) (reversing conviction under statute because it could not satisfy constitutional standards announced in *Landmark*); *Landmark Communications v. Virginia*, 435 U.S. 829, 842 (1978) (questioning relevance of clear and present danger test before applying it to subsequent punishment). Although the Burger Court initiated its analysis in *Landmark* by calling into question the relevance of the clear and present danger test, the Court relied on the test to invalidate a Virginia statute that penalized the dissemination of information relating to confidential judicial investigations. *Id.* at 845. *Cf.* Hentoff, *supra* note 54, at 1461 (noting that *Landmark* Court applied clear and present danger test). *But see* Schauer, *supra* note 48, at 7 n.62 (arguing that "no canonical formulation" of prior restraint standard exists).

78. See *Wood v. Georgia*, 370 U.S. 375, 382 (1962) (applying clear and present danger test to restrictions on speech critical of judges); *Craig v. Harney*, 331 U.S. 367, 375 (1947) (same); *Pennkamp v. Florida*, 328 U.S. 331, 336 (1946) (same); *Bridges v. California*, 314 U.S. 252, 263 (1941) (same).

79.

See Strong, *supra* note 70, at 53 (stating that, after *Dennis*, clear and present danger test became "largely or wholly unsatisfactory because [it was] either too virile or overly weak").

80. *United States v. Dennis*, 341 U.S. 494 (1951). The Supreme Court in *Dennis* reviewed the conviction of Eugene Dennis and several other alleged communists who the government accused of advocating the overthrow of the government in violation of the Smith Act. *Id.* at 499. The Court held that the Smith Act was not facially invalid under the First Amendment's free speech and free press guarantees because the Act penalized advocacy and not mere discussion. *Id.* at 502. The Court approved the formulation of the clear and present danger announced by the lower court judge, Learned Hand, that abandoned the clear and present danger test's imminence component. *Id.* at 510. The Court applied this formulation and upheld the convictions of all the defendants. *Id.* at 510-16.

test beyond recognition by abandoning the test's imminence requirement.⁸¹ Commentators have extensively criticized the *Dennis* test because of its failure to adequately protect First Amendment interests,⁸² and many do not consider the *Dennis* test to be a form of the clear and present danger test because of its less exacting scrutiny.⁸³ The Supreme Court eventually abandoned the *Dennis* formula in *Brandenburg v. Ohio*,⁸⁴ causing analysts to find agreement in the Court with this criticism of the weakened *Dennis* formula.⁸⁵ While some commentators have suggested that *Brandenburg* symbolized the revival of the strongly protective clear and present danger test,⁸⁶ the Supreme Court used the test less frequently after *Brandenburg* as

81. See *Dennis*, 341 U.S. at 510 (stating clear and present danger formula without imminence requirement). After *Dennis*, the Court continued to employ the clear and present danger test with the imminence requirement intact in other contexts to provide strict standard of review. See *Wood*, 370 U.S. at 383 (applying pre-*Dennis* formulation in contempt of court controversy); *Kingsley Int'l Pictures Corp. v. Regents of the Univ. of the State of N.Y.*, 360 U.S. 684, 689 (1959) (applying pre-*Dennis* test to content restriction on motion picture); see also Hentoff, *supra* note 54, at 1456 n.20 (stating that Court continued to use strong formulation of clear and present danger test, with imminence component intact, under *Dennis* regime).

82. See Schmidt, *supra* note 54, at 459-66 (noting inconsistency of *Dennis* balancing approach and prior restraint doctrine). Schmidt notes that the *Dennis* Court advanced Learned Hand's test not to evaluate the validity of a prior restraint but to determine the validity of a subsequent punishment. *Id.* Schmidt further points out that the choice of a standard applied previously only to subsequent punishments is odd in light of Judge Hand's emphatic differentiation between the disparate interests implicated by prior restraints and subsequent punishments. *Id.* More notably, Schmidt has joined other commentators in criticizing the test as amorphous. *Id.*; see, e.g., Hentoff, *supra* note 54, at 1457 (noting that *Dennis* convinced First Amendment scholars that clear and present danger test was either dead or no longer capable of adequately protecting speech interests); Paul Freund, *The Great Disorder of Speech*, 44 AM. SCHOLAR 541, 545 (1975) (describing *Dennis* test as sliding scale). But see Joel H. Swift, *Restraints on Defense Publicity in Criminal Jury Cases*, 1984 UTAH L. REV. 45, 54 [hereinafter DEFENSE PUBLICITY] (noting that there are reasonable explanations for *Nebraska Press* Court's use of Hand formula).

83. See Scott M. Matheson, Jr., *The Prosecutor, the Press, and Free Speech*, 58 FORDHAM L. REV. 865, 927 n.382 (1990) (describing Burger's use of *Dennis* test as doctrinal aberration); David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1207, 1349-50 (1983) (noting that *Dennis* marked both apex and turning point of reliance on danger test' because phrase could no longer bear pressure of inconsistent interpretations).

84. 395 U.S. 444 (1969).

85. See *Brandenburg v. Ohio*, 395 U.S. 444, 451 (1969) (Douglas, J., concurring) (acknowledging departure from *Dennis* clear and present danger test). The Court in *Brandenburg* quietly reintroduced the imminence component into its formula and added an intent formula that resulted in the most protective version of the clear and present danger standard since the Holmes-Brandeis application. *Id.* at 447. See Hentoff, *supra* note 54, at 1456-57 (discussing evolution of clear and present danger test). However, not all members of the Court allowed the *Dennis* formulation to pass quietly. See *Brandenburg*, 395 U.S. at 454 (Douglas, J., concurring) (describing *Dennis* test as distorting, twisting, and perverting clear and present danger test). After *Brandenburg* many critics echoed Justice Douglas' calls for abandoning the test. See Strong, *supra* note 70, at 43-44 (noting commentators repudiation of test as weak and of no assistance).

86. See Louis S. Ravenson, *Advocacy & Contempt: Constitutional Limitations on the Judicial Contempt Power*, 65 WASH. L. REV. 477, 510 n.13 (1990) (stating that *Brandenburg*

a standard of review due to these misgivings.⁸⁷

After *Brandenburg*, the Supreme Court hesitantly applied the clear and present danger test as the standard of review in several cases involving subsequent punishments.⁸⁸ Additionally, some members of the Court attempted to incorporate the test into prior restraint analysis.⁸⁹ For example, Justice Stewart's opinion in *New York Times*, with which two other Justices concurred, advocated applying a variation of the test.⁹⁰ In addition to Justice Stewart's use of the test, some commentators have equated the three-pronged test set forth in *Nebraska Press* with the clear and present danger test.⁹¹ The continued appearance of the test may be explained, in part, because of the Court's inability to identify another test that imposes the exacting scrutiny required by the First Amendment and that is adaptable to the free press context. While few members of the Supreme Court believe that either the clear and present danger test or the prior restraint-subsequent punishment dichotomy can accurately serve as a constitutional test, none of the Justices has been able to create a constitutional test acceptable to a majority of the Court. The question that remains is whether any underlying principle of Press Clause jurisprudence exists that can effectively guide future free press cases.

is primary articulation of modern clear and present danger test). *But see* Rabban, *supra* note 83, at 1351 (noting that *Brandenburg* standard remains uncertain and that, because standard was neither accompanied by serious analysis nor necessary to resolution of case, Supreme Court may not have intended to create new formulation of test).

87. *Cf.* Hentoff, *supra* note 54, at 1464 n.85 (suggesting possibility that *Brandenburg* narrowed test's application). Hentoff argues persuasively that *Brandenburg* may have narrowed the test's ambit by emphasizing the test's applicability to advocacy of law breaking. *Id.* Many other commentators have suggested that the Court made narrow use of the clear and present danger test after *Brandenburg*. *See* Rabban, *supra* note 83, at 1352 (questioning whether *Brandenburg* test can ever be applied outside of advocacy context); William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 8 (1965) (recognizing clear and present danger test's limited utility for contempt and subversive action controversies).

88. *See* *Landmark Communications Co. v. Virginia*, 435 U.S. 829, 845 (1978) (holding that statute did not satisfy clear and present danger test); *cf.* *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 101 (1979) (holding that statute did not satisfy constitutional standards established in *Landmark*).

89. *See infra* note 90 (noting Justices Stewart's, White's and Brennan's approval of clear and present danger test in *New York Times*).

90. *See* *New York Times Co. v. United States*, 403 U.S. 713, 730 (Stewart, J., concurring, joined by White, J.), 726-27 (Brennan, J., concurring) (1971) (alluding to clear and present danger formulations). Both Justices White's and Stewart's opinions rely directly on language extracted from previous formulations of the clear and present danger test. Justice Stewart alluded to the test when he determined that disclosure of the the Pentagon Papers would not "surely result in direct, immediate, and irreparable damage to our Nation or its people." *Id.* at 730 (Stewart, J., concurring). Similarly, Justice Brennan states that "only government allegation and proof that publication must inevitably, directly and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support the issuance of an interim restraining order." *Id.* at 726-27.

91. *See* Bernard James, *Justices Still Seeking a Consistent Voice on First Amendment*, NAT'L L.J., Aug. 19, 1991, at S4 (recognizing *Nebraska Press* use of clear and present danger test).

One principle that underlies First Amendment jurisprudence and that appears capable of satisfying a consensus of the Supreme Court members is the Court's adherence to strict judicial scrutiny for the review of any speech restriction imposed on the press.⁹² Both the prior restraint-subsequent punishment dichotomy and the clear and present danger test employ exacting judicial scrutiny by requiring both a compelling state interest and that the statute be narrowly tailored.⁹³ For example, in *Nebraska Press*, although the Court cited to the *Dennis* formulation, the Court's three-pronged test more closely resembles strict scrutiny review than the emasculated, intermediate scrutiny embodied in the *Dennis* standard.⁹⁴ The Supreme Court's use of the Hand formula demonstrates the Court's determination to return to a balancing approach and to forsake the categorical approach embodied in the prior restraint-subsequent punishment dichotomy.⁹⁵ Additionally, the

92. Cf. Nimmer, *supra* note 24, § 2.05(B)(4)-2-39 (acknowledging need for threat to be imminent and substantial to satisfy exacting scrutiny and including *Brandenburg* in discussion of strict scrutiny standard). Both the clear and present danger test and ad hoc balancing can be applied using a strict scrutiny standard. See Joel H. Swift, *Model Rule 3.6: An Unconstitutional Regulation of Defense Attorney Trial Publicity*, 64 B.U. L. REV. 1003, 1014 (1984) [hereinafter *Unconstitutional Regulation*] (discussing use of strict scrutiny standard). The Supreme Court's reliance on strict scrutiny has been especially evident in context of restrictions on the media's access to judicial proceedings. See, e.g., *Press-Enterprise Co. v. Sup. Ct.*, 478 U.S. 1, 14 (1986) (applying strict scrutiny review); *Press-Enterprise Co. v. Sup. Ct.*, 464 U.S. 501, 510 (1984) (same); *Waller v. Georgia*, 467 U.S. 39, 48 (1984) (same); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581 (1980) (same).

93. See NIMMER, *supra* note 24, § 2.05(B)-2-39-40 (discussing need to demonstrate that speech is regulated in least restrictive manner, that threatened harm is imminent and grave, and that state interest is compelling). The prior restraint-subsequent punishment dichotomy required such exacting judicial scrutiny that a prior restraint would only be approved in the most compelling circumstances. See *New York Times*, 403 U.S. at 726 (Brennan, J., concurring) (describing that narrow exception to prohibition on prior restraints is limited to national security); *Near v. Minnesota*, 283 U.S. 697, 716 (1931) (stating that prior restraints could only be allowed in narrowest of circumstances, such as when speech threatens nation's military security or involves incitements to acts of violence). This need for the state's interest in restricting speech to be extremely important, and in the case of clear and present danger also imminent, is the equivalent of the compelling state interest requirement of strict scrutiny.

94. See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 562 (1976) (establishing three-pronged test). There seems to be much confusion concerning what type of test the Supreme Court employed in *Nebraska Press*. Various commentators have labelled the *Nebraska Press* three-pronged test as a strict scrutiny test. See Swift, *Unconstitutional Regulation*, *supra* note 92, at 1014-15 (stating that *Nebraska Press* employed strict scrutiny, clear and present danger test); Hentoff, *supra* note 54, at 1461 (stating that *Nebraska Press* used *Dennis* version of clear and present danger test); NIMMER, *supra* note 24, (describing *Nebraska Press*'s use of ad hoc balancing). This author describes the test as one employing the strict scrutiny standard of review through ad hoc balancing. See also Richard M. Schmidt, Jr. and Ian D. Volner, *Nebraska Press Association: An Open and Shut Decision*, 29 STAN. L. REV. 529, 536-37 (1977) (equating *Nebraska Press* standard with serious and imminent threat standard). The *Nebraska Press* test contained the requirements of strict scrutiny review, including precision, means-end nexus, and least restrictive alternative inquiry. Swift, *Unconstitutional Regulation*, *supra* note 96, at 1028.

95. See Schmidt, *supra* note 54, at 464 (discussing Court's use of ad hoc balancing). But see *Nebraska Press*, 427 U.S. at 595 n.21 (Brennan, J., concurring) (stating that Court's

Court's creation of a three-pronged test that contains the narrowly tailored requirements demonstrates the Court's commitment to strict scrutiny review. While the utility of the *Nebraska Press* approach seems limited to the fair trial-free press context, courts could apply the test to other types of free press cases. Absent the creation of another First Amendment litmus test, an underlying, though often neglected, theme of modern free press analysis is the requirement of strict judicial scrutiny of any abridgement of the media's constitutional rights. This requirement of strict scrutiny review is consistent with free speech jurisprudence that demands strict scrutiny of all speech restrictions, except those that regulate "low-value" speech.⁹⁶

Although the Supreme Court has required strict judicial scrutiny of any prior restraints on the press, the Court has not addressed the question of whether exacting scrutiny is appropriate for participant-directed gag orders which constitute an indirect restraint on the press.⁹⁷ The Court has repeatedly

language does not sanction ad hoc balancing). The ramifications of choosing an ad hoc balance to preserve the guarantee of free press are substantial. For example, the use of ad hoc balancing will inevitably, given a determination that a real threat exists, hinge largely on the Court's assessment of the facts and corresponding value judgment in each particular case. See NIMMER, *supra* note 24, § 2.05(B)-2-29 (noting that both definitional and ad hoc balancing eventually requires court to make value judgment). However, the Supreme Court appears to have resolved indirectly the question of whether the Sixth Amendment right to fair trial may trump the First Amendment right of freedom of the press in a *direct* and *unavoidable* conflict. See *Nebraska Press*, 427 U.S. at 569-70 (suggesting that First Amendment would yield to Sixth Amendment if true conflict existed). The mere accommodation, however narrowly, of the Sixth Amendment by the First Amendment suggests that the Sixth Amendment does hold a preferred spot in the Bill of Rights. See Mark R. Stabile, Comment, *Free Press-Fair Trial: Can They Be Reconciled in a Highly Publicized Criminal Case?*, 79 GEO. L.J. 337, 357 (1990) (suggesting accommodation of seemingly competing Sixth and First Amendment values); see also *Estes v. Texas*, 381 U.S. 532, 539 (1965) (holding that paramount concern for court must be preservation of trial integrity and that defendant's life or liberty may not be jeopardized by media actions). Therefore, when applying the *Nebraska Press* test, the only determination that a court must ultimately make is whether there *is* an actual conflict between the competing interests. The requirements of strict scrutiny review assist a court in making this determination.

96. See Hentoff, *supra* note 54, at 1464-65 (discussing Burger Court's development of low-value speech doctrine). The Court has used the low-value doctrine to deny full constitutional protection to commercial and obscene speech and may be relying implicitly on the doctrine in denying attorney speech full protection. *Id.* See generally Larry Alexander, *Low Value Speech*, 83 Nw. U. L. REV. 547 (1989) (discussing low-value doctrine).

97. See *infra* note 118 and accompanying text (describing Court's failure to grant certiorari to indirect restraint controversy). Participant-directed gag orders are judicial injunctions which seek to restrain the speech of any trial participant, ie. lawyers, witnesses or other parties to litigation, for the purpose of preventing communication between the gagged participant and the media. See Todd, *supra* note 53, at 1172-73 (describing participant-directed gag orders). Such communication could threaten either the defendant's Sixth Amendment right to a fair trial or the more general right of the state to protect the integrity of the trial process. Gag orders directed at any trial participants will hereafter be referred to as participant-directed gag orders or indirect restraints. The term indirect restraints reflects the author's belief that the sole purpose of these injunctions is to prevent the press' publication of arguably prejudicial information, thus achieving indirectly what a court can not achieve directly by means of a prior restraint. Cf. NIMMER, *supra* note 24, § 4.08-4-33-34 (referring to indirect abridgement

denied certiorari in cases that involve indirect restraints, leading to inconsistency in state and federal courts' treatment of indirect restraints.⁹⁸ Some courts consider the indirect restraints to be de facto prior restraints on the press that require strict scrutiny.⁹⁹ Other courts treat the indirect restraints as restrictions on speech entailing negligible effects on media freedom and requiring only intermediate scrutiny.¹⁰⁰ While courts have made convincing arguments for either approach, the key to determining which approach is more accurate lies in the legal origin of indirect restraints.

B. *Indirect Restraints on the Media*

The origin of participant-directed gag orders can be tied exclusively to a trail of *obiter dicta* beginning with the Supreme Court's opinion in *Sheppard v. Maxwell*.¹⁰¹ In *Sheppard*, the Supreme Court reviewed a habeas corpus proceeding by a convicted murderer who claimed that the publicity surrounding his trial had violated his Sixth Amendment right to a fair

of freedom of speech). Some commentators have referred to these restrictions as prior restraints, rejecting any differentiation between injunctions on the media and private citizens. See *Swift, Defense Publicity*, *supra* note 54, at 70-71 (rejecting distinction between injunctions on media and on speakers' communications with media).

98. See *infra* note 117 and accompanying text (describing inconsistency in federal courts' treatment of gag orders).

99. See *infra* notes 127-34 and accompanying text (discussing Sixth Circuit's analysis in *CBS*).

100. See *infra* notes 120-26 and accompanying text (discussing Second Circuit's analysis in *Dow Jones*).

101. 384 U.S. 333 (1966). This trail of *obiter dicta* primarily consists of four Supreme Court cases, each of which relies on the original dicta asserted by the *Sheppard* Court. See *infra* note 104 and accompanying text (labelling *Sheppard* dicta). *Nebraska Press* was the second link in the chain; the Court cited to *Sheppard's* suggestion that restrictions on trial participants were probably a constitutionally acceptable means of protecting a defendant's Sixth Amendment right to fair trial. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 553-54 (1976). The Supreme Court never diluted the *Sheppard* dicta after *Nebraska Press* and lower courts have relied heavily on the dicta. *Stabile*, *supra* note 95, at 348. The third link in the chain is *Landmark Communications v. Virginia*, 435 U.S. 829, 837 (1978). In *Landmark*, the Court rejected the application of a subsequent punishment to nonparticipants in a confidential judicial investigation for the dissemination of information. *Id.* at 845-46. The Court stated, in dicta, that the state had more reliable means of securing confidential information and, in support of this contention, cited to the *Sheppard* dicta embraced in *Nebraska Press*. *Id.* at 837, 845 n.12. The final link in the *obiter dicta* trail is *Gentile*, where the Court held that attorney's speech could constitutionally be subjected to more regulation than the average citizen's. See *Gentile v. State Bar of Nevada*, 111 S. Ct. 2720, 2745 (1991). This effectively resolves the question, left unanswered by the Court in *Nebraska* and dodged by the Court for many years, whether trial-participant gag orders can be constitutionally imposed. See *infra* note 309 and accompanying text (evaluating constitutional requirements applicable to indirect restraints). However, the resolution seems highly questionable given the lack of precedent for the holding and the Court's evasive reasoning. *Gentile*, 111 S.Ct. at 2741-45 (reasoning that precedent supports imposition of speech restraints on trial participants but failing to substantiate this conclusion besides cursory reference to dicta).

trial.¹⁰² The Supreme Court held that the inordinate publicity surrounding the case had violated Sheppard's Sixth Amendment right and ordered the release of Sheppard unless the state granted him a new trial.¹⁰³ In what later commentators universally acknowledged as dictum,¹⁰⁴ the Court recognized the constitutional possibility of restraining trial participants' speech in order to ensure a defendant's Sixth Amendment right to fair trial.¹⁰⁵

If the door to indirect restraints was partially opened by *Sheppard*, *Nebraska Press* marked the official first step through the door. Both the majority and dissent in *Nebraska Press* were willing to exclude restrictions on trial participants from the protection of the prior restraint doctrine.¹⁰⁶ *Nebraska Press* thereby established the central dichotomy in prior restraint analysis.¹⁰⁷ While injunctions that limited the press' freedom to publish information were impermissible, courts could gag the press' sources if an

102. *Sheppard v. Maxwell*, 384 U.S. 333, 335 (1966). Sheppard argued that the publicity-marred trial environment made it impossible for him to gain a fair trial with an unbiased jury. *Id.*

103. *Id.* at 363.

104. See, e.g., Stabile, *supra* note 95, at 342 (describing *Sheppard* dicta); Swift, *Defense Publicity*, *supra* note 82, at 51 (same); Max D. Stern, *The Right of the Accused to a Public Defense*, 18 HARV. C.R.-C.L. L. REV. 53, 84 (1983) (same); Freedman & Starwood, *supra* note 58, at 610-11 (same).

105. *Sheppard*, 384 U.S. at 361. Justice Clark, writing for the majority, concluded that the trial judge should resort to several means to relieve the effects of prejudicial publicity on the defendant's right to fair trial. *Id.* at 363. Justice Clark further stated that if none of these alternatives would prove effective in preserving a defendant's right to a fair trial, the trial judge could proscribe extrajudicial statements by any trial participant who had divulged prejudicial matters. *Id.* at 361. Justice Clark instructed courts to take steps to protect the judicial processes from prejudice by regulating the actions of all participants in the judicial processes. *Id.*

106. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976). See Freedman & Starwood, *supra* note 58, at 607, 610 (pointing out that Court's opinions in both *Sheppard* and *Nebraska Press* that approved of restrictions on defendants and attorneys were dicta). *Nebraska Press'* approval of the use of alternative means short of a prior restraint, as well as the explicit approval of gag orders in a leading concurrence, surreptitiously transposed the *Sheppard* dictum into law. *Nebraska Press*, 427 U.S. at 564. Chief Justice Burger implied that indirect restraints would be a constitutionally valid alternative to prior restraints. *Id.* at 564 n.8. Chief Justice Burger noted that the Court has outlined other measures short of prior restraints on publication tending to blunt the impact of pretrial publicity, one of which was the use of indirect restraints. *Id.* at 563-64. Justice Brennan's concurrence, joined by Justices Stewart and Marshall, explicitly approved of gag orders. *Id.* at 572. Brennan stated that "judges may stem the flow of prejudicial publicity at its source, before it is obtained by representatives of the press." *Id.* at 601. In a footnote, Brennan stated that a majority of prejudicial publicity could be traced to the public commentary of law enforcement officials, court personnel and attorneys involved in the case. *Id.* at 601 n.27. Justice Brennan reasoned that trial participants have a fiduciary duty not to engage in commentary that will prejudice the judicial processes. *Id.* Further, the courts have the power to regulate the speech of these individuals by using the court's disciplinary powers. *Id.*

107. *Nebraska Press*, 427 U.S. at 539. In opening the door to indirect restraints on individuals, while invalidating those same restraints on the press, the Court has adopted an approach previously argued by Justice Stewart in *Pell v. Procunier*, 417 U.S. 817 (1974) (examining state prison regulation restricting media access to prisoners).

important state interest mandated such restrictions.¹⁰⁸ Courts thereby could use indirect restraints to achieve the same result as a prior restraint: control of the dissemination of information to the public.¹⁰⁹ This seeming inconsistency is largely the result of courts' reliance on a highly formalistic understanding of prior restraints.¹¹⁰ While commentators generally considered *Nebraska Press* to be a victory for the media because of its reaffirmation of the invalidity of prior restraints on the press,¹¹¹ *Nebraska Press* ironically provided trial judges with an alternative means to do indirectly, through participant-directed gag orders, what they could not do directly, through the use of prior restraints.¹¹² *Nebraska Press'* approval of indirect restraints raised several questions that the Court left unanswered, such as when indirect restraints would be a constitutionally appropriate means to control extensive publicity.¹¹³

Although courts did not commonly employ indirect restraints prior to *Nebraska Press*,¹¹⁴ trial judges responded to *Nebraska Press'* lesson and

108. *Nebraska Press*, 427 U.S. at 539.

109. *Id.*

110. See *infra* notes 136-40 and accompanying text (discussing formalistic approach to First Amendment analysis).

111. See Goodale, *supra* note 56, at 513 (stating that *Nebraska Press* is "extremely important victory" for press); 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) (determining that media should embrace *Nebraska Press* decision); see also JOHN LOFTON, *THE PRESS AS GUARDIANS OF THE FIRST AMENDMENT* 271 (1980) (stating that all of twenty-two papers whose editorials were reprinted in *Editorials on File* applauded *Nebraska Press* decision as victory).

112. Cf. *Nebraska Press*, 427 U.S. at 601 n.27 (Brennan, J., concurring). Whereas under *Near*, prior restraints were held to violate the First Amendment, a judge could achieve the same results, stopping the dissemination of information, by enjoining trial participants discussion of the case with the press. See JOHN J. WATKINS, *THE MASS MEDIA AND THE LAW* 275 (1990) (stating that after *Nebraska Press*, judges attempted to do indirectly what they could not have done directly, by issuing gag orders on trial participants). By enjoining the trial participants, the judge may deny the press valuable information that it would have published, without actually enjoining publication. *Id.*; see also Schmidt and Volner, *supra* note 94, at 470 (pointing out that although *Nebraska Press* liberated press from direct suppression, Court offered an alternative method of achieving the same end by imposing gags on press sources); Freedman & Starwood, *supra* note 58, at 607-13, 618 (stating that Court's members in *Nebraska Press* denounced prior restraints but then overlooked applicability of all their arguments to indirect restraints).

113. See *infra* notes 146-55 and accompanying text (discussing media challenges to indirect restraints). The Court left at least three questions unanswered in *Nebraska Press*. First, the Court failed to explain why indirect restraints are legitimate if in fact they achieve the same suspect end, preventing the press from publishing information. Second, the Court did not address the question, that if gag orders are a constitutionally valid alternative to prior restraints on the press, at what point does an indirect restraint become so restrictive that it would become constitutionally questionable. Finally, the Court also failed to answer whether, if indirect restraints limit the press' access to information and ability to gather news, the media has standing to sue for removal of an indirect prior restraint on a third party trial participant. While the first two questions remain largely unresolved, lower courts have been fairly uniform in their answer to the third question. See *infra* notes 146-56 and accompanying text (discussing whether media has standing to challenge indirect restraints imposed on trial participants).

114. See generally *CBS Inc., v. Young*, 522 F.2d 234 (6th Cir. 1975) (reviewing restraint

began to use indirect restraints with increasing frequency.¹¹⁵ In using indirect restraints, however, courts fashioned different tests in an attempt to determine when resort to indirect restraints was tolerable; this led to significant division over the appropriate constitutional standard of review for indirect restraints.¹¹⁶ For example, several federal courts of appeals are split on whether indirect restraints require the higher standard of a clear and present danger or a more deferential standard.¹¹⁷ Much of this analytical disparity

of all participants in litigation—parties, attorneys, relatives, close friends, and associates—from discussing cases with members of news media or public); *Chase v. Robson*, 435 F.2d 1059 (7th Cir. 1970) (reviewing indirect restraint imposed on defendants and defense counsel); *United States v. Tijerina*, 412 F.2d 661 (10th Cir.) (same), *cert. denied*, 396 U.S. 990 (1969); *United States v. Mandel*, 408 F. Supp. 673 (Md. 1975) (denying government motion for gag order on trial participants); *United States v. Anderson*, 356 F. Supp. 1311 (D. N.J. 1973) (ordering all participants to refrain from extrajudicial comment); *State ex rel. Miami Herald Publ. Co. v. McIntosh*, 340 So. 2d 904 (Fla. 1977) (reviewing lower court's indirect restraint); *State v. Carter*, 363 A.2d 366 (N.J. 1976) (same); *People v. Dupree*, 388 N.Y.S.2d 203 (Sup. Ct. 1976) (same); *Younger v. Smith*, 30 Cal. App. 3d. 138 (1973) (same); *People v. Watson*, 15 Cal. App. 3d. 28 (same), *cert. denied*, 404 U.S. 850, *reh'g denied*, 404 U.S. 961 (1971); *Hamilton v. Mun. Ct.*, 270 Cal. App. 2d 797 (same), *cert. denied*, 396 U.S. 985 (1969). According to the Reporters Committee for Freedom of the Press, courts issued approximately 174 judicial gag orders between 1967 and 1975 with the number increasing each year. Robert Trager and Harry W. Stonecipher, *Gag Orders: An Unresolved Dilemma*, 55 JOURNALISM QUARTERLY 231, 231 (1978). This frequent use of gag orders occurred despite the Supreme Court's advice in *Sheppard* to use these means of ensuring an impartial jury as a last resort. See also LOFTON, *supra* note 111, at 270 (noting overuse of orders despite *Sheppard* language).

115. See, e.g., *KPNX Broadcasting Co. v. Arizona Sup. Ct.*, 459 U.S. 1302, 1308 (1983) (denying application for stay of indirect order); *Gulf Oil Co. v. Bernhard*, 452 U.S. 89, 104 (1981) (same); *News-Journal Corp. v. Foxman*, 939 F.2d 1499, 1516 (11th Cir. 1991) (denying media challenge to indirect restraint for lack of standing); *In re Dow Jones & Co.*, 842 F.2d 603 (2d Cir.) (rejecting gag order imposed by court in employment discrimination suit because record did not show order was necessary), *cert. denied*, 488 U.S. 946 (1988) (rejecting media challenge to indirect restraint); *Radio & Television News Ass'n v. United States Dist. Ct.*, 781 F.2d 1443, 1443 (9th Cir. 1986) (holding that indirect restraint did not infringe media First Amendment rights); *Levine v. United States Dist. Ct.*, 764 F.2d 590, 601 (9th Cir.) (granting gagged participants petition to dissolve indirect restraint because of overbreadth), *reh'g denied*, 775 F.2d 1054 (1985), *cert. denied*, 476 U.S. 1158 (1986); *In re Russell* 726 F.2d 1007, 1011 (4th Cir.) (denying gagged witness' petition for relief from indirect restraint), *cert. denied sub. nom.*, 469 U.S. 837 (1984); *In re Hakin*, 598 F.2d 176, 200 (D.C. Cir. 1979) (rejecting indirect restraint of trial participants); *Connecticut Magazine v. Moraghan*, 676 F. Supp. 38, 43 (1987) (granting magazine's challenge to indirect restraint); *United States v. Marcano Garcia*, 456 F. Supp. 1354, 1357 (D. P.R. 1978) (ordering indirect restraint to be imposed); *KPNX Broadcasting Co. v. Sup. Ct.*, 678 P.2d 431, 441 (Ariz. 1984) (denying television station and reporter's petition for relief from indirect restraint gagging trial participants).

116. See *infra* note 117 and accompanying text (discussing different approaches adopted by circuit courts of appeals); see also Swartz, *supra* note 21, at 1414-15 (discussing conflicting standards for issuing indirect restraints); Swift, *Defense Publicity*, *supra* note 82, at 46 n.4 (same).

117. See *supra* notes 114-15 and accompanying text (discussing courts' use of indirect restraints). Because of the Supreme Court's failure to resolve the controversy over what standard is constitutionally permissible for the review of indirect restraints, there exists significant conflict in the Circuit Courts' holdings. The Second, Fourth, Ninth and Tenth Circuit Courts of Appeals apply the "reasonable likelihood" standard. See generally *Dow*

stems from the lack of guidance provided by the Supreme Court on this issue.¹¹⁸

The Second Circuit's and Sixth Circuit's treatments of indirect restraints illustrate the disparity that exists in the accepted standards of review.¹¹⁹ In *In re Dow Jones & Co.*,¹²⁰ the Second Circuit Court of Appeals adopted a more deferential standard of review, the substantial likelihood test, to affirm a lower court's imposition of an indirect restraint on the press.¹²¹ In *Dow Jones*, after a highly publicized investigation and corresponding indictment of numerous public officials, a federal district judge entered an order forbidding the trial participants from making extrajudicial comments to the media.¹²² Several news agencies, including Dow Jones & Co., NBC, CBS and the New York Times, challenged the order as an unconstitutional prior restraint on the press in violation of *Nebraska Press*.¹²³ The Second Circuit considered the news agencies' appeal and held that the order was not a prior restraint due to its indirect effect.¹²⁴ The court in *Dow Jones* stated that the restriction did not prevent the news agencies from publishing, but instead only prevented the attorneys from speaking to the media during the trial.¹²⁵ Because the order was not a prior restraint, the Second Circuit,

Jones, 842 F.2d at 603 (applying reasonable likelihood standard); *Russell*, 726 F.2d at 1007 (same); *Levine*, 764 F.2d at 590 (same); *Tijerina*, 412 F.2d at 661 (same). The Fifth, Sixth and Seventh Circuit Courts of Appeals apply either the "clear and present danger" or, equivalent, "serious and imminent" standard. See generally *Bernhard*, 619 F.2d at 459 (applying clear and present danger standard); *Sigma Delta Chi v. Martin*, 551 F.2d 559 (4th Cir. 1977) (same); *CBS, Inc. v. Young*, 522 F.2d 234 (6th Cir. 1975) (same); *Chase*, 435 F.2d at 1059 (same). Other Circuit Courts have either refused to choose between the two standards or have adopted unique approaches. See *News-Journal*, 939 F.2d at 1575 (refraining from deciding applicable standard); *Bailey v. Systems Innovation, Inc.*, 852 F.2d 93, 99 (3rd Cir. 1988) (applying *Nebraska Press* test); *In re San Juan Star Co.*, 662 F.2d 108, 116 (1st Cir. 1981) (recommending sliding scale approach); *Hakin*, 598 F.2d at 193 (refraining from deciding applicable standard).

118. The Supreme Court repeatedly has denied certiorari in cases involving gag orders, displaying its unwillingness to resolve the many questions surrounding the review of gag orders. See, e.g., *Dow Jones*, 488 U.S. at 946 (denying certiorari); *Levine*, 476 U.S. at 1158 (same); *Tijerina*, 396 U.S. at 990 (1969) (same). In a dissenting opinion in *Dow Jones* accompanying the denial of certiorari, Justice White, joined by Justices Brennan and Marshall, acknowledged the conflicting holdings of the Ninth and Sixth Circuits Courts of Appeals and the resulting need for the Court to address their conflicting resolutions. *Dow Jones*, 488 U.S. at 947 (White, J., dissenting).

119. *Dow Jones*, 842 F.2d 603 (2d Cir.), cert. denied, 488 U.S. 946 (1988); *CBS*, 522 F.2d 234, 239 (6th Cir. 1975).

120. 842 F.2d 603 (2d Cir.), cert. denied, 488 U.S. 946 (1988).

121. *In re Dow Jones & Co.*, 842 F.2d 603, 611 (2d Cir.), cert. denied, 488 U.S. 946 (1988).

122. *Id.* at 605. The order prohibited the defendants, defense counsel, the US Attorney, and any assistants from making any extrajudicial statement concerning the case or from making any comment that a reasonable person could expect to be communicated to the media. *Id.* at 605-06.

123. *Id.* at 606.

124. *Id.* at 608-09.

125. *Id.* Although the court admitted that the gag order may have had an effect similar

applied the more deferential standard and stated that the pertinent question was whether there was a reasonable likelihood that pretrial publicity would prejudice a fair trial.¹²⁶

Adopting the opposite approach, the Sixth Circuit Court of Appeals in *CBS v. Young*¹²⁷ struck down a lower court's gag order that failed to satisfy the clear and present danger standard.¹²⁸ Relying on the extensive precedent established by the Supreme Court's invalidation of prior restraints on the press, the Sixth Circuit emphasized that courts must review prior restraints with the closest of scrutiny.¹²⁹ The court in *CBS* concluded that this scrutiny included applying the clear and present danger test, as well as ensuring that the court narrowly tailored its order and that the court had exhausted all reasonable alternatives to speech restrictions.¹³⁰ Applying the clear and present danger test, the Sixth Circuit found that the articles and publicity surrounding the case were innocuous and that the fair trial threat was minimal.¹³¹ The court held that the order constituted a prior restraint upon expression.¹³² While the lower court had not directly enjoined the media from publishing, the court had effectively eliminated the media's sources of meaningful information regarding the case.¹³³ Consequently, the indirect restraint impaired the media's constitutionally protected right to gather information on the judicial process.¹³⁴

The different results at which courts have arrived in reviewing indirect restraints, evidenced by cases such as *Dow Jones* and *CBS*, primarily relate to the courts' varied approaches to prior restraint doctrine.¹³⁵ Courts that reject the application of prior restraint doctrine to participant-directed gag

to a prior restraint, the court stated that the indirect nature of the gag order distinguished it from a prior restraint on the press. *Id.*

126. *Id.* at 611. The lower standard that courts typically apply is the substantial or reasonable likelihood test. See *United States v. Tijerina*, 412 F.2d 661, 666 (10th Cir. 1969) (holding that reasonable likelihood standard was appropriate standard for imposition of indirect restraint).

127. 522 F.2d 234, 242 (6th Cir. 1975).

128. *CBS, Inc. v. Young*, 522 F.2d 234, 242 (6th Cir. 1975). *CBS* involved a civil action arising out of a wrongful death suit brought on behalf of several students who were slain in the Kent State incident. *Id.* at 236. In reaction to the extensive publicity surrounding the litigation, the trial judge had imposed a gag order on all of the trial participants, including counsel, court personnel, and "all relatives, close friends, and associates" of the parties, prohibiting any discussion of the case with the press. *Id.* at 260.

129. *Id.* at 238.

130. *Id.*

131. *Id.* at 240.

132. *Id.* at 239. While the Sixth Circuit in *CBS* did not describe the order as a prior restraint on the press but on freedom of expression, the court dismissed the distinction in its analysis. *Id.* The court subjected the order to an identical analysis as that warranted by a prior restraint. *Id.* at 239-42.

133. *Id.* at 239.

134. *Id.*

135. See Bjork, *supra* note 32, at 181 (stating that "[r]esolution of the issue of whether an indirect gag order constitutes a First Amendment infringement of the media's rights turns on one's perspective of the underlying purpose of the prior restraint doctrine").

orders rely on a formalistic perspective.¹³⁶ Courts that reject the more demanding clear and present danger standard usually stress whom the court enjoins and distinguish those parties who actually possess information from those parties who do not.¹³⁷ Because the press does not yet have the information, the restraint on the trial participant does not directly affect the press.¹³⁸ This formal analysis accurately demonstrates that the order does not prevent the press from publishing, attending the trial, reporting, or questioning the gagged parties,¹³⁹ and relies heavily on the fact that an indirect restraint does not literally prevent the press from publishing any information.¹⁴⁰

Alternatively, the realistic approach focuses on the actual effect that the indirect restraint has on the media and dissemination of news.¹⁴¹ The effect of an indirect restraint is that the restriction removes from the press its most valuable source of information on the judicial system; consequently, this inability to gather information effectively retrains the press from publishing.¹⁴² The realistic approach is more consistent with the communications theory, which recognizes that communication is not merely the act of speaking but also the related acts of receiving and disseminating speech.¹⁴³

136. *Id.* at 181-85 (discussing differences between formalistic and realistic perspectives of prior restraint doctrine). The formalistic approach relies heavily on form and identifies a prior restraint as a speech restriction which occurs prior to the expression by judicial injunction. *Id.* at 182. Thus, any expression restriction which does not resemble this form is not a prior restraint and is less constitutionally suspect. *Id.* However, continued reliance upon this type of formalism is questionable in light of the Supreme Court's quiet departure from the prior restraint-subsequent punishment dichotomy. *See supra* note 63 (discussing modern Supreme Court's reluctance to rely on prior restraint-subsequent punishment dichotomy in *Smith v. Daily Mail Publishing, Co.*).

137. *See Bjork, supra* note 32, at 181-85. For an example of formalism see *In re Dow Jones & Co.*, 842 F.2d 603, 609 (2d Cir.), *cert. denied*, 488 U.S. 946 (1988). The Court noted that "there is a fundamental difference between a gag order challenged by the individual gagged and one challenged by a third party; an order objected to by the former is proper characterized as a prior restraint, one opposed solely by the latter is not." *Id.*

138. *See Bjork, supra* note 32, at 181-85.

139. *Id.* However, this formal approach is inherently at odds with the marketplace notion of First Amendment protection because its narrow focus considers only the effect on the individual desiring to disseminate information. *Id.* The marketplace theory focuses more on collective expression and would recognize that indirect restraints illegitimately curtail the free exchange of valuable information. *Id.* at 184.

140. *Id.* *See also Stabile, supra* note 95, at 346 (stating that indirect restraints do not directly restrain media or their coverage of courtroom events).

141. *See Bjork, supra* note 32, at 182-85 (describing realistic perspective of analyzing indirect restraints). In order to avoid formalism's superficial analysis, the realistic approach demands that a court consider the practical effect of a restraint, which results in protection for any speaker whose speech has in fact been suppressed. *Id.* at 183-84.

142. *Id.* at 183. Indirect gag orders muzzle a valuable source of information, invariably preventing the media from gathering information that is necessary to informed reporting. *Id.* If the media can not gather enough information to produce an intelligible account of judicial activity, then courts have effectively silenced the media. *Id.* The gag order is a poorly disguised "de facto prior restraint." *Id.*

143. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980) (Brennan, J.,

The realistic perspective also attacks formalistic arguments as defensible only through the use of straw arguments and semantic distinctions.¹⁴⁴ The realistic approach instead recognizes that the underlying purpose of a judge imposing a gag order is the same as a judge imposing a prior restraint—to prevent the publication of any information that possibly could compromise trial integrity.¹⁴⁵

While trial participants raise many challenges to participant-directed trial orders themselves, the media also have standing to challenge these indirect restraints.¹⁴⁶ Courts typically base the media's interest in contesting a gag order on either the right to gather news or the right to receive information.¹⁴⁷ In *CBS*, for example, the Sixth Circuit based the media's standing on its First Amendment right to gather news.¹⁴⁸ The court held that the media's interest does satisfy the traditional two-pronged test for standing when the media contests a participant-directed gag order.¹⁴⁹ The media's interest meets the first requirement, a showing of "injury in fact," because gag orders injure the media's access to information and, therefore, cause economic harm.¹⁵⁰ The media's interest also meets the second prong

concurring) (emphasizing that First Amendment protects communication as well as "indispensable conditions of meaningful communication"); *NIMMER*, *supra* note 24, § 4.09-4-41 (noting that freedom to communicate is meaningless shibboleth if its accompanying rights are not recognized also); William J. Brennan, Jr., *Address at S. I. Newhouse Center for Law & Justice*, in 32 *RUTGERS L. REV.* 173, 177 (Oct. 17 1979) (stating that First Amendment's protection extends to entire process of gathering and disseminating news). Justice Brennan states that the First Amendment protects not only self-expression but "also forbids the government from interfering with the communicative processes through which we citizens exercise and prepare to exercise our rights of self-government . . . the press is not only shielded when it speaks out, but when it performs all the myriad tasks necessary for it to gather and disseminate the news." *Id.* at 176-77.

144. See *Bjork*, *supra* note 32, at 182-85 (contrasting realistic approach to formalistic approach). The formalistic approach focuses on who, the speaker or the publisher, the gag order literally restrains and on whether the order restrains the act of speech or the act of publication. *Id.*

145. *Id.* at 183. *Bjork* observes succinctly that "the real and intended casualty of an indirect gag order is undeniably the press. If the saving distinction turns on whom the order affects, then the media, as the true victim of such an order, should be saved." *Id.*

146. See *CBS, Inc. v. Young*, 522 F.2d 234, 238 (6th Cir. 1975) (holding that owner and operator of television and radio network had standing to challenge indirect restraint because it affected media's constitutional right to gather news).

147. See *EMERSON, SYSTEM*, *supra* note 61, at 463 (noting that the right to gather and to receive information, the inverse of the right to speak freely, are strands of the more general right of freedom of expression. *Id.* See also *Bjork*, *supra* note 32, at 185-94 (discussing right to gather and right to receive information). The author reasons that "[b]y affording a legal right to know, the recipient of information may assert a first amendment right entirely independent of the speaker. This concept is of obvious import in the indirect gag order context where, in the absence of a right to know, the media's right to communicate is arguably derived from the trial participants' right to speak." *Id.* at 186.

148. *CBS*, 522 F.2d at 237-38.

149. *Id.* at 237-38 (applying standing test announced by Supreme Court in *Data Processing Serv. v. Camp*, 397 U.S. 150 (1970)).

150. *Id.* at 239.

of the standing test, that the interest sought to be protected must be arguably within the zone of interests protected by statute or constitution, because the First Amendment protects the media's right to gather news.¹⁵¹ Thus, although the court did not impose the gag order directly on the media, the order did affect the media's constitutionally guaranteed rights.¹⁵²

Other federal and state courts similarly have held that the media may contest indirect restraints.¹⁵³ Contrarily, at least one court has held that gagged trial participants do not have standing to assert the media's right to gather news.¹⁵⁴ The same court has held that the media do not have standing to assert the First Amendment rights of restricted trial participants.¹⁵⁵ Although the Supreme Court has never addressed the issue of whether the media have standing to contest a participant-directed trial order, the Court has held that the media have standing to contest trial-access restrictions.¹⁵⁶ This establishes a rather amorphous set of ground rules for the media.¹⁵⁷

151. *CBS, Inc. v. Young*, 522 F.2d 234, 237-38 (6th Cir. 1975).

152. *Id.* at 238. The Sixth Circuit stated that the order affected CBS' constitutional right to gather news. *Id.*

153. See *Connecticut Magazine v. Moraghan*, 676 F.Supp. 38, 40 (D. Conn. 1987) (holding that media has standing to challenge gag order); *United States v. Simon*, 664 F. Supp. 780, 786 (S.D.N.Y. 1987) (same), *aff'd sub. nom* *In re Dow Jones & Co.*, 842 F.2d 603 (1988), *cert. denied*, 488 U.S. 946 (1988); *In re Gannett River States Publishing Co. v. Hand*, 571 So. 2d 941, 944 (Miss. 1990) (holding that media had standing to contest order restricting public access); *Ex rel. NBC v. Court of Common Pleas*, 556 N.E.2d. 1120, 1124 (Ohio 1990) (holding that media had standing to contest indirect restraint on trial participants). *But see News-Journal Corp. v. Foxman*, 939 F.2d 1499, 1516 (11th Cir. 1991) (denying media standing to challenge gag order); *Radio & Television News Ass'n v. United States*, 781 F.2d 1443, 1448 (9th Cir. 1986) (same).

154. See *Levine v. United States*, 764 F.2d 590, 594 (9th Cir.) (holding that restricted trial participants did not have standing to assert media's interest in unabridged right to gather news), *reh'g denied*, 775 F.2d 1054 (9th Cir. 1985), *cert. denied*, 476 U.S. 1158 (1986).

155. See *Radio*, 781 F.2d at 1445 (holding that news organization did not have standing to assert free speech rights of restrained party); *Simon*, 664 F. Supp. at 788 (same).

156. See *Press-Enterprises Co. v. Superior Ct. of California*, 464 U.S. 501, 513 (1984) (holding that guarantees of open criminal proceedings apply to voir dire examination); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580-81 (1980) (holding that, absent overriding state interest supported by findings, criminal proceedings must be open to public); see also *Todd*, *supra* note 53, at 1194-202 (discussing public right of access to trial).

Arguably, these Supreme Court holdings that acknowledge the media's interest in gathering news within the courtroom access context support a finding that the media also has a constitutional interest in gathering news from trial participants. Such an outcome is not assured, however. If the Court were to adopt a formalistic rationale which focused on the form of the restriction, the Court could distinguish between the two contexts. In the context of courtroom access, the media has a right to gather news where it has been expressed publicly. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. at 580-81 (holding that criminal proceedings must be open to public). Yet, in the context of restrictions on trial-participants, after *Gentile v. State Bar of Nevada*, 111 S. Ct. 2720 (1991), it appears that the media may not have a right to gather news which speakers have not yet expressed in public. See *supra* notes 136-45 and accompanying text (discussing formalistic and realistic approaches to prior restraint doctrine).

157. *Cf. In re State-Record Co.*, 917 F.2d 124, 127-28 (4th Cir. 1990) (noting that

While the media clearly have access to the criminal process,¹⁵⁸ once a court imposes a gag order on trial participants, the media cannot receive information directly from the trial participants and must, instead, rely on the media's own ability to interpret the information it can glean from the actual judicial proceedings. This places the modern media in a difficult situation, forcing them to interpret, without assistance, the highly complicated legal dialogue that unfolds before them.¹⁵⁹ Prior to the adoption of *Gentile* rules, the disruption of the communicative process would only have occurred in limited situations, such as following a specific threat to a defendant's right to a fair trial. However, with the adoption of *Gentile* rules, the inability of the media to interview counsel has become the rule, rather than the exception.

C. Codification of the Gag Order—Gentile Rules

Although still restricting attorneys' speech as participant-directed gag orders primarily did, the speech restriction in *Gentile v. State Bar of Nevada*¹⁶⁰ is quite different in form from a gag order. This new type of restriction seeks to regulate attorneys' speech in pending litigation through the judicial adoption and enforcement of professional disciplinary regulations.¹⁶¹ Many state, district and federal courts have adopted rules similar to the rule at issue in *Gentile*.¹⁶² The rule that courts usually adopt, in whole or in large part, is the American Bar Association's Model Rule of Professional Conduct 3.6 or its forerunner, Disciplinary Rule (DR) 7-107 of the Code of Professional Responsibility.¹⁶³ The result of this new formulation is a speech regulation that may more closely resemble a subsequent punishment than a prior restraint, because the punishment does not occur until after the expression.

From a First Amendment perspective, therefore, this new formulation initially seems less dangerous than either indirect restraints or prior restraints on the press for several reasons. First, a *Gentile* rule initially appears less constitutionally suspect than an indirect restraint because, as a system of

requiring reasonable likelihood standard of review for indirect restraints on trial participants while requiring substantial probability standard to deny press access to public documents relating to case is logically inconsistent).

158. See *supra* note 156 (discussing briefly access to criminal process).

159. See Swift, *Unconstitutional Regulation*, *supra* note 92, at 1013 (noting media's need for assistance in interpreting legal events and technicalities).

160. 111 S. Ct. 2720 (1991).

161. See *supra* note 3 (demonstrating example of judicially-enforced bar disciplinary rule based on Model Rule 3.6).

162. See Revised Report of the Judicial Conference Committee on the Operation of the Jury System on the "Free Press-Fair Trial" Issue, 87 F.R.D. 519, 525-28 (1980) (examining fair trial-free press controversy). For additional discussion on the American Bar Association and other groups attempts to resolve the fair trial-free press conflict see Swift, *Unconstitutional Regulation*, *supra* note 92, at 1003-06 (discussing history of Model Rule 3).

163. See Matheson, *supra* note 83, at 872-77 (describing development of judicially-enforced disciplinary rules).

subsequent punishment, the rule seems to avoid many of the negative attributes condemned by the prior restraint doctrine.¹⁶⁴ As a penalty imposed subsequent to speech, the chilling effect of a *Gentile* rule may be less substantial according to prior restraint doctrine because it assumedly gives more notice than an indirect restraint gives.¹⁶⁵ Second, because the rule provides considerable guidelines that set forth what speech is protected or unprotected, the attorney is forewarned of the type of speech that may be punishable.¹⁶⁶ The rule provides an attorney with a warning that a court may punish her speech prior to actual expression, a safeguard absent in prior restraint and indirect restraint cases. Such a rule, in addition, may not proscribe the same quantum of speech in the marketplace of ideas as proscribed by prior restraints or indirect restraints, since the rule allows some nonprejudicial information to reach the press and public.¹⁶⁷ Finally, if the attorney does violate the rule, a court will evaluate her expression after the threat of prejudice becomes clearly known. Theoretically, the less hasty review results in a fairer determination of guilt, because a reviewing court, rather than the court mired in the original controversy, reviews the speech at issue.¹⁶⁸ In light of these factors, the regulation of attorney speech through judicial adoption of rules of professional conduct seems especially appealing.

However, many of the advantages of *Gentile* rules are, in fact, illusory. *Gentile* rules pose unique problems to both the speaker's and the media's First Amendment rights. One of the most significant problems that this new type of speech restriction presents is that a *Gentile* rule chills the overall quantum of speech to a greater extent than would an indirect restraint.¹⁶⁹

164. See *supra* notes 61-62 (describing negative attributes of prior restraints). But see *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 248 (7th Cir. 1975) (finding *Gentile* rule has many similarities to prior restraint because courts can punish both by the judicial contempt power and neither activates criminal safeguards); Swift, *Unconstitutional Regulation*, *supra* note 92, at 1054 (concluding that *Gentile* rule is not subsequent punishment but is "particularly pernicious form of prior censorship").

165. See *supra* notes 61-62 and accompanying text (discussing negative attributes of prior restraints). But cf. *Bauer*, 522 F.2d at 248 (noting that *Gentile* rules can be punished by contempt power and that full criminal procedural safeguards, including right to jury trial, would not be available).

166. See Matheson, *supra* note 83, at 900 (stating that combination of threat of harm standard with specific statements offers guidance about what lawyers cannot say to press).

167. See *supra* note 61 and accompanying text (stating that subsequent punishment restricts overall communication in marketplace less than prior restraint). But see NIMMER, *supra* note 24, § 1.02-1-18 (questioning appropriateness of marketplace metaphor).

168.

See Swift, *Defense Publicity*, *supra* note 82, at 52 (discussing inability of judges considering prior restraint to determine consequences of suppression of speech). But see *United States v. Bingham*, 769 F. Supp. 1039, 1044 (N.D. Ill. 1991) (noting that courts can enforce professional disciplinary rules with judicial contempt power).

169. See Swift, *Unconstitutional Regulation*, *supra* note 96, at 1053 (noting that chilling effect of *Gentile* rule is greater than that of prior restraint). The author notes that while a prior restraint freezes the speech that it prohibits, all other unrestrained speech is declared implicitly as protected; however Model Rule 3.6 chills all attorney speech and does not offer a determination of what falls within its scope until after self-censorship has taken its toll. *Id.*

Because the *Gentile* rule applies generally to all pending civil or criminal litigation, the First Amendment chill is broader than that imposed by a participant-directed gag order.¹⁷⁰ Any lawyer who has litigation pending will surely be aware of the rule and its punishments.¹⁷¹ The rule's threat of sanction may cause a lawyer to restrict his speech in cases where there is no substantial likelihood of harm, merely because of the lawyer's fear of sanction or disbarment.¹⁷² A *Gentile* rule forces a lawyer to be his own censor and judge, invariably second-guessing his statements and sacrificing the power of zealous advocacy.¹⁷³ Under such a rule, a court can seek punishment for an attorney's expression for any supposed infringement, regardless of the merits of the claimed potential prejudice.¹⁷⁴ Furthermore, a *Gentile* rule is imposed categorically, blanketing all forms of litigation

170. See *id.* (discussing chilling effect of *Gentile* rule). Swift's analysis also demonstrates that a *Gentile* rule chills more speech than an indirect restraint. *Id.* Whereas an indirect restraint freezes speech in one particular setting after lengthy judicial determination, a *Gentile* rule applies categorically to all cases and chills the speech in these cases regardless of whether or not a threat of prejudice exists. *Id.* See also *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 251 (7th Cir. 1975) (stating that *Gentile* rule creates blanket prohibition and that restriction's breadth is unconstitutional).

171. See *infra* notes 227-38 and accompanying text (discussing facts at issue in *Gentile*). The contention that a *Gentile* rule entails greater chill than a gag order is borne out by the facts in *Gentile*. *Id.* *Gentile* consulted and deliberated over Rule 177 prior to his press conference in an attempt to determine the rule's ambiguous boundaries. *Id.*

172. See Swift, *Unconstitutional Regulation*, *supra* note 92, at 1029 (suggesting that attorney does not personally gain from publicity and will compromise zealous advocacy when faced with risk of substantial penalty). See also Stuart Taylor, Jr., *First Amendment Peril: Bad Issues Making Worse Law*, N.J.L.J., Aug. 29, 1991, at 66 (discussing threat *Gentile* poses to lawyers). The author concludes that "after *Gentile*, the bottom line seems to be that . . . any defense lawyer who goes to the press to say his client was framed, or to fight back against prejudicial pretrial publicity orchestrated by the prosecution, will act at his own peril." *Id.*

173. See Swift, *Unconstitutional Regulation*, *supra* note 92, at 1055 (noting that rule "presents an almost insurmountable incentive to all but the most courageous of attorneys to err on the side of silence."). By threatening a defense counsel with sanctions and disbarment, a *Gentile* rule decreases the defense counsel's willingness and ability to embrace unrestrained advocacy. A defense counsel who fears sanctions and does not know what comments will result in disciplinary action will remain silent in the face of allegations disseminated prior to indictment by the prosecution. The defense counsel may refrain from her duty to provide a fair and balanced portrayal of the defendant in the media. See generally Stuart W. Gold, *Litigators and the Press*, 13 *LITIG.* 36 (Winter 1987).

174. See *Hirschkop v. Snead*, 594 F.2d 356, 362 (4th Cir. 1979) (noting that complaint filed against Hirschkop with Virginia State Bar alleged only that Hirschkop explained to media that he represented indicted prison official because official was "a good guy"); see also *Bauer*, 522 F.2d at 251 (noting broad sweep of *Gentile* rule). The Seventh Circuit in *Bauer* also recognized this potential for overbreadth in enforcement. *Id.* at 251. The Seventh Circuit also stated that "these rules establish such a blanket prohibition whereby even a trivial, totally innocuous statement could be a violation. The First Amendment does not allow this broad a sweep." *Id.* The *Bauer* court also acknowledged that the provisions of the *Gentile* rule at issue were overly restrictive. *Id.* at 252-53. The court noted that the rules would not even allow an attorney to deny his clients involvement in the charged criminal indictment or to allege abusive use of the grand jury. *Id.*

without the safeguard of an adversary hearing where a court can make individualized determinations of the threat of prejudice.¹⁷⁵

A *Gentile* rule also poses extensive dangers to the media's ability to communicate meaningful information concerning the judicial system to the public.¹⁷⁶ While a *Gentile* rule's post-expression evaluation appears more fair to an attorney charged with violating a bar rule, the rule's mere existence chills an undetermined number of speakers into quiet submission. The rule stifles a valuable number of potential sources of information on whom the media rely to interpret the significance of legal developments and stratagems.¹⁷⁷ Post-expression evaluation of the speech cannot restore the free marketplace of ideas, nor can such a rule provide the expedient review afforded to prior restraints. These negative attributes demonstrate a *Gentile* rule's propensity for dramatically reducing the free exchange of information and the media's ability to gather information.¹⁷⁸ Without an attorney's assistance and commentary, the media's ability to communicate to the public becomes compromised and results in the media's inability to perform many of the functions justifying traditional First Amendment protection.¹⁷⁹

In addition to these stifling effects on both the speakers' and the media's communicative abilities, *Gentile* rules also are inherently vague and fail to fully equip attorneys with clear guidelines for acceptable speech and prohibitions on specific types of speech. The Supreme Court's holding in *Gentile* that Rule 177 was void-for-vagueness demonstrates that this is the case.¹⁸⁰ At best, any guidelines drafted by a court or bar association can only cover generalities and will not be able to provide a yardstick capable

175. See NIMMER, *supra* note 24, § 4.05-4-28 (discussing constitutional requirement of adversary hearing prior to imposition of prior restraint).

176. See Swift, *Defense Publicity*, *supra* note 82, at 74 (noting that indirect restraint is government interruption of communicative act). Swift states that the situation involved "is one where the speaker is willing to speak and the press is interested in hearing and publishing what the speaker has to say, but the government is asserting an interest that in some way interferes with that otherwise open line of communication and distribution." *Id.*

177. See Swift, *Unconstitutional Regulation*, *supra* note 92, at 1012-14 (discussing value of attorney insight on pending litigation).

178. *Cf.* *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) (recognizing value of media coverage of judicial system). The Supreme Court has not been totally insensitive to the importance of protecting the media's ability to report about the criminal justice system. *Id.* In *Nebraska Press*, the Court, in considering the danger of prior restraints, noted that the damage caused by such a restraint is especially troublesome when the restraint curtails the dissemination of news. *Id.* The Court stated that it has given the reporting of open judicial proceedings increased protection in prior cases and that this heightened protection should also extend to prior restraints on the reporting of criminal proceedings. *Id.* While these comments attest to the importance of protecting the media from direct restraint, they may be equally valid to justify protection of the media from indirect restraints.

179. See Swift, *Defense Publicity*, *supra* note 82, at 71-75 (discussing societal interest in preserving unfettered attorney speech).

180. See *Gentile v. State Bar of Nevada*, 111 S. Ct. 2720, 2731 (1991) (declaring safe harbor provision void for vagueness). See *infra* note 315 (discussing implications of Court's rejection of portion of rule as unconstitutionally vague).

of separating protected and unprotected expression.¹⁸¹ Also, a *Gentile* rule, by punishing the speaker subsequent to expression, creates the false impression that the expression will be subject to a more level-headed review.¹⁸² Presumably, a court measures the speaker's culpability by the actual threat of prejudice, which has either materialized or been proven false. However, this presumption is not necessarily accurate because most *Gentile* rules contain a subjective standard of actual prejudice—the mind of the speaker—rather than an objective standard.¹⁸³ While the reviewing court may find in retrospect that no actual threat of prejudice existed, the court will not be able to take this into account because the rule does not require actual prejudice.¹⁸⁴

While relatively few courts have considered a *Gentile* rule's failings or even addressed the rule's constitutionality, the courts that have examined such a rule have reached different conclusions as to the desirability of using a blanket rule to regulate attorney speech.¹⁸⁵ In part, the disparity in these courts' conclusions results from the question of what level of scrutiny to adopt, an issue that remains unresolved for both *Gentile* rules and partici-

181. See MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.6, cmt. (recognizing difficulty in striking balance between protecting the right to fair trial and safeguarding right of free speech).

182. EMERSON, SYSTEM, *supra* note 61, at 464 (noting strict scrutiny's need to determine potential for actual prejudice). Emerson, in considering the constitutionality of *Gentile* rules, concludes that strict scrutiny demands a determination of the potential for actual prejudice. *Id.* He reasons that any restriction on an attorney's speech that is not targeted at comments engendering specific prejudice in a particular case violates the attorney's right to free speech. *Id.*

183. See James, *supra* note 91, at S4 (stating that substantial likelihood test allows state to punish statements even if resulting prejudice is unintended or never realized). The reasonable likelihood test measures whether the speaker knew or should have known the potential threat resulting from his speech instead of focusing on the actual danger created by the speech. See *supra* note 3 (stating Model Rule 3.6 and its substantial likelihood standard).

184. See *supra* note 3 (stating Model Rule 3.6 and substantial likelihood standard). Because of the standard's failure to consider the imminence of the harm, the standard in many ways is similar to the heavily criticized Learned Hand formulation applied in *Dennis*. The Hand formula concentrated disproportionately on the gravity of the evil, so that even if the evil was remote, the independent gravity component could still tip the balance. The substantial likelihood standard focuses strongly on the speaker's intent, and in doing so, ignores the fact that even if the threat of prejudice was remote, as demonstrated by the lack of actual prejudice, the standard would still demand punishment be imposed on the speaker.

185. See, e.g., *Hirschkop v. Snead*, 594 F.2d 356, 370 (4th Cir. 1979) (rejecting facial challenge to *Gentile* rule's incorporation of reasonable likelihood standard); *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 251 (7th Cir. 1975) (invalidating *Gentile* rule that did not contain serious and imminent threat standard); *In re Oliver*, 452 F.2d 111, 115 (7th Cir. 1971) (invalidating *Gentile* rule that did not require determination of whether attorney comment is, or even could be, prejudicial); *In re Keller*, 693 P.2d 1211, 1213 (Mont. 1984) (invalidating *Gentile* rule as violative of First Amendment without approving of either reasonable likelihood or serious and imminent standard); *Markfield v. Ass'n of the Bar of the City of N.Y.*, 370 N.Y.S.2d 82, 85 (rejecting per se application of *Gentile* rule to attorney who appeared on radio talk show during trial because court found there was no showing of clear and present danger), *appeal dismissed*, 37 N.Y.2d 794 (1975).

pant-directed gag orders.¹⁸⁶ The courts' disparate analyses also result, however, from their different conceptualizations of a *Gentile* rule and of the role that an attorney plays in the modern judicial system.¹⁸⁷ A comparison of *Chicago Council of Lawyers v. Bauer*¹⁸⁸ with *Hirschkop v. Snead*¹⁸⁹ best exemplifies the different treatment that courts have given to *Gentile* rules. In these cases, two Circuit Courts of Appeals subjected the judicially enforced rules to different standards of review.¹⁹⁰

In *Bauer*, the Court of Appeals for the Seventh Circuit reviewed an action in which an association of attorneys and several of its members sought injunctive and declaratory relief from a *Gentile* rule that a local district court had adopted.¹⁹¹ The attorneys argued that Model Rule 7-107, adopted as the local rule, and its "reasonable likelihood of material prejudice" standard were unconstitutionally vague and overbroad.¹⁹² The attorneys also argued that the *Gentile* rule violated a lawyer's First Amendment rights, because courts do not restrict the rule to situations presenting a clear and present danger of harm to the administration of justice.¹⁹³ The plaintiffs in *Bauer* conceded that the rule would be constitutional if the rule incorporated the serious and imminent threat standard.¹⁹⁴ The plaintiffs posited the view that fair trials were not even at issue in the case, because the rule did not limit its regulation to lawyers' comments that *actually* impaired the ability of the court to assure fair trials.¹⁹⁵

The Seventh Circuit Court of Appeals began its analysis in *Bauer* by examining the relationship between the First and Sixth Amendments.¹⁹⁶ The court stated that the two amendments do conflict realistically, and that in this circumstance, the attorney's First Amendment rights must yield in favor of the defendant's right to a fair trial.¹⁹⁷ While the court acknowledged that

186. See *Keller*, 693 P.2d at 1214 (citing three different standards that courts have applied to *Gentile* rules and abstaining from standard).

187. See *supra* note 170-71 and accompanying text (discussing whether *Gentile* rules are constitutional equivalent of prior restraints).

188. 522 F.2d 242 (7th Cir. 1975).

189. 594 F.2d 356 (4th Cir. 1979).

190. See *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 249 (7th Cir. 1975) (applying serious and imminent harm standard); *Hirschkop v. Snead*, 594 F.2d 356, 370 (4th Cir. 1979) (validating reasonable likelihood of prejudice standard).

191. *Bauer*, 522 F.2d at 247.

192. *Id.*

193. *Id.*

194. *Id.*

195. *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 247 (7th Cir. 1975). The plaintiffs in *Bauer* contended that there is no need to balance attorneys' First Amendment rights against litigants' rights to fair trials, because these two rights do not compete. *Id.* There may be considerable support for this argument see *infra* notes 222, 309 (discussing threat media publicity poses to defendant's Sixth Amendment right to fair trial).

196. *Bauer*, 522 F.2d at 248.

197. *Id.* The *Bauer* court missed a logical step in its analysis of the competing interests of the attorney's and media's First Amendment rights and the defendant's Sixth Amendment right to a fair trial. While the attorney's First Amendment right to speak must yield when in

the rule shared some similarities with a prior restraint,¹⁹⁸ the court concluded that the rule differed from a prior restraint because of its form.¹⁹⁹ Because of these differences in form, the court held against treating the rules as prior restraints but also stated that, because the rules shared some of the inherent features of prior restraints, the court would apply strict scrutiny review.²⁰⁰

The Seventh Circuit in *Bauer* stated that constitutional scrutiny of the rules required both a review based upon the rule's clearness, precision, and narrowness, and also a determination that the rules be neither vague nor overbroad.²⁰¹ In light of these constitutional standards, the Seventh Circuit held that the proper test for evaluation of a *Gentile* rule was the "serious and imminent threat of interference with the fair administration of justice."²⁰² In requiring the higher standard, the Seventh Circuit applied the same test that courts impose upon prior restraints on the press to indirect restraints on trial participants.²⁰³ The court in *Bauer* also stated that the imposition of the standard itself was not sufficient to ensure constitutional validity.²⁰⁴ While this standard would eliminate overbreadth, courts must consider the vagueness of each individual provision.²⁰⁵ Following its own mandate, the Seventh Circuit proceeded to review each provision of the rule

conflict with defendant's Sixth Amendment right to a fair trial, the Seventh Circuit failed to consider whether the First Amendment still loses the balance if the conflicting right at stake is not the defendant's right to a fair trial but rather the government's general right to preserve trial integrity. *Id.* at 248. The Sixth Amendment does not guarantee a State the right to a fair trial. *See infra* note 257 and accompanying text (discussing state's interest in jury impartiality). The framers did not articulate a governmental right to preserve trial integrity in any specific constitutional provision. *But cf.* Matheson, *supra* note 83, at 883 ("Protecting the integrity of the adversarial criminal litigation process from external influences is a state concern complementary to but independent of the interest in protecting the individual rights of the accused.").

198. *Id.* The *Bauer* court noted that

[a] violation of the rules can be punished by the contempt power just like a failure to obey an injunction. The full criminal procedural safeguards, including the right to trial by jury, would not necessarily be available. Punishment by contempt is an important attribute of "prior restraint" that distinguishes it from a criminal statute that forbids a certain type of expression.

Id.

199. *Id.* The rule at issue in *Bauer* was not a "predetermined judicial prohibition restraining specified expression" that would be immune to violation if opportunities for appeal existed. *Id.* The court rules, on the other hand, could be challenged by one who had violated them.

Id.

200. *Id.* at 248-49.

201. *Id.*

202. *Id.* at 249 (relying on test formulated in *Chase v. Robson*, 435 F.2d 1059, 1061-62 (7th Cir. 1970)). Because of the constitutional need for precision and the most narrow restriction, the Seventh Circuit in *Bauer* held that the serious and imminent standard was most consistent with prior Supreme Court holdings. *Id.* The serious and imminent threat standard gives an attorney stricter notice and is less restrictive than the amorphous reasonable likelihood standard. *Id.*

203. *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 249 (7th Cir. 1975).

204. *Bauer*, 522 F.2d at 249-50.

205. *Id.* at 251.

at issue and subsequently struck down the rule's applicability to several areas of the judiciary²⁰⁶ and the rule's prohibition of speech on several subjects.²⁰⁷

While the Seventh Circuit in *Bauer* had held that *Gentile* rules demanded the heightened scrutiny of the clear and present danger standard, the Fourth Circuit arrived at a different conclusion in *Hirschkop*.²⁰⁸ In *Hirschkop* the court considered the constitutionality of a rule based on DR 7-107 that was similar to the *Gentile* rule questioned in *Bauer*.²⁰⁹ After a cursory examination of the threat that prejudice poses to criminal jury trials,²¹⁰ the *Hirschkop* court determined that the need to preserve a fair jury trial justifies a properly drawn rule to regulate lawyers' extrajudicial comments about pending criminal prosecutions.²¹¹ The court concluded that the rule

206. *Id.* at 253-55. The *Bauer* court struck down several provisions restricting various comments, including those relating to the attorney's opinions about the unconstitutionality or injustice of a statute and about character (particularly supportive statements involving defendant's character). *Id.* at 253-54.

207. *Id.* at 255-59.

208. See *Hirschkop v. Snead*, 594 F.2d 356, 370 (4th Cir. 1979) (approving of *Gentile* rule that incorporated reasonable likelihood standard).

209. *Id.* at 365. The plaintiff, an attorney, argued that because there was a less restrictive alternative to the *Gentile* rule—an indirect restraint—the rule consequently violated his First Amendment rights. *Id.*

210. *Id.* at 365-66. The Fourth Circuit's examination of the threat posed by pretrial publicity to a fair trial is conclusory because it contains little factual support. *Id.* at 365. The court cites to the same sources repeatedly (ABA, Standards Relating to Fair Trial and Free Press (1968) and Report of the Committee on the Operation of the Jury System on the "Free Press-Fair Trial" Issue, 45 F.R.D. 391 (1968)) and relies on dicta from several Supreme Court decisions (*Nebraska Press* and *Sheppard*), which did not even consider the validity of indirect restraints, much less the validity of *Gentile* rules. *Id.* at 364-66. Further, the Fourth Circuit cited to three cases where pretrial publicity undermined the defendant's right to fair trial but fails to acknowledge the score of cases in which courts held that prolific coverage was insufficient to undermine the defendant's right to fair trial. See *infra* note 296 (discussing Supreme Court precedent on threat of publicity to defendant's Sixth Amendment right to fair trial).

The court in *Hirschkop* rejects the applicability of Virginia's rule to bench trials and civil trials, solely for lack of evidence. *Id.* at 372-73. The court could not find sufficient support that a threat to these proceedings actually exists. *Id.* But, is the evidence offered to establish the threat to fair trials in the criminal setting any more convincing? In contrast, there is substantial evidence to suggest that the threat that media coverage of an attorney's commentary poses to a fair trial is insignificant. See generally Robert E. Dreschel, *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 (1989) (analyzing social scientific research on fair trial-free press controversies and determining that issue is overblown); Simon, *supra* note 111, at 528 (describing examining abundant empirical evidence and concluding that threat to fair trial is negligible).

211. *Hirschkop*, 594 F.2d at 367. The Fourth Circuit (while quoting *Nebraska Press*, which required a court to find no less restrictive alternatives prior to resorting to speech) fails to examine alternatives short of a *Gentile* restraint which would alleviate the threat of prejudice. In both *Sheppard* and *Nebraska Press*, the Supreme Court listed numerous alternatives that must be explored. *Sheppard*, 384 U.S. at 363; *Nebraska Press*, 427 U.S. at 563-65. In *Hirschkop*, however, the Fourth Circuit fails to explore these options and, therefore, violates the *Nebraska*

furthered a substantial state interest.²¹²

The Fourth Circuit in *Hirschkop* then focused on the constitutionality of the standard employed in the rule, the reasonable likelihood of prejudice standard.²¹³ The court initially reviewed the use of the clear and present danger standard in prior restraint and judicial criticism cases and found the standard too strict to protect the judicial processes.²¹⁴ The court then, also examined the relationship between the attorney and the court.²¹⁵ While holding that an attorney did not have diminished First Amendment rights,²¹⁶ the court concluded that an attorney did owe a special duty to the court and to the public.²¹⁷ This duty required the attorney to protect the courtroom from extraneous influences that could compromise its fairness and not to subvert the trial process by intentionally misrepresenting the facts or disseminating prejudicial information.²¹⁸

The *Hirschkop* court noted, however, that the judiciary can only enforce the attorney's duty if the judiciary has the power to punish an attorney's failure to live up to this duty.²¹⁹ The clear and present danger standard would not allow the court to enforce this duty in some circumstances due to the necessary showing of actual prejudice.²²⁰ Moreover, the Fourth Circuit in *Hirschkop* could find no basis for the conclusion that the Constitution mandates the utilization of the tighter standard in the state rule.²²¹ The court, applying a formalistic approach, dismissed out of hand the contention that the rule was a prior restraint.²²² Based upon these findings, the *Hirschkop* court held that the reasonable likelihood of prejudice test was constitutionally acceptable.²²³

Press standards. *Hirschkop*, 594 F.2d at 370. This requirement of exploring less restrictive alternatives also would require a court to consider the various types of speech restrictions at its disposal and to choose the least restrictive one that could mitigate the threat to fair trial. See *infra* note 301 and accompanying text (describing less restrictive alternative requirement).

212. *Hirschkop v. Snead*, 594 F.2d 356, 370 (4th Cir. 1979).

213. *Id.* at 369.

214. *Id.* The Fourth Circuit stated that the standards based upon the clear and present dangers test were unable to adequately protect the judicial processes from the extraneous influence of media publicity that decreased impartiality and objectivity and created an appearance of unfairness. *Id.* at 365. However, the threat from an appearance of unfairness hardly seems substantial enough to warrant the abridgement of First Amendment rights. Moreover, the court failed to provide adequate support for this point, relying only on a brief reference to *Sheppard. Id.*

215. See *id.* at 366 (discussing attorney's duty to court).

216. See *id.* ("Lawyers have First Amendment rights of free speech. They are not second class citizens.")

217. *Hirschkop v. Snead*, 594 F.2d 356, 366 (4th Cir. 1979).

218. *Id.* at 366.

219. *Id.* at 368.

220. *Id.*

221. *Hirschkop v. Snead*, 594 F.2d 356, 368 (4th Cir. 1979).

222. *Id.* at 368. The Fourth Circuit relied on a highly formalistic approach in determining that the *Gentile* rule was a prior restraint and ignored many of the practical effects of such a rule. *Id.* at 368-69.

223. *Id.*

In *Gentile v. State Bar of Nevada* the United States Supreme Court agreed to hear the appeal of an attorney disciplined under a rule similar to that at issue in both *Bauer* and *Hirschkop*.²²⁴ The Court presumably granted certiorari to resolve the conflicting holdings of federal and state courts over what type of standard of review was appropriate for *Gentile* rules.

II. GENTILE V. STATE BAR OF NEVADA

The United States Supreme Court considered the constitutional validity of a judicially enforced rule regulating attorneys' extrajudicial speech in *Gentile v. State Bar of Nevada*.²²⁵ In *Gentile*, the Supreme Court reviewed an appeal by a defense attorney, Dominic P. Gentile, whose violation of Nevada Supreme Court Rule 177 had been upheld by the Nevada Supreme Court.²²⁶ Rule 177 prohibits extrajudicial speech to the media that a lawyer knows or reasonably should know would have a substantial likelihood of materially prejudicing an adjudicative proceeding.²²⁷ After analyzing the rule at length in order to determine the scope of permissible speech, Gentile held a press conference the day after the state indicted his client on criminal charges.²²⁸ He stated that the evidence presented at trial would demonstrate his client's innocence.²²⁹ Gentile also stated that the most likely suspect in the case was a police detective and that the witnesses testifying against his client, Sanders, lacked credibility and had dubious motivations for testifying.²³⁰ Approximately six months later, a jury acquitted Sanders of all criminal charges.²³¹

Following the acquittal, the State Bar of Nevada filed a complaint against Gentile that alleged a violation of Rule 177.²³² After a hearing, the Southern Nevada Disciplinary Board of the State Bar decided that Gentile's statements at the press conference had indeed violated the provisions of the rule and consequently recommended a private reprimand.²³³ Gentile appealed the case to the Nevada Supreme Court, which affirmed the Board's finding in a *per curiam* decision.²³⁴ After a *de novo* review, the Nevada Supreme Court found that the Board had met the heightened standard of proof,

224. 111 S. Ct. 2720 (1991).

225. *Gentile v. State Bar of Nevada*, 111 S. Ct. 2720 (1991).

226. *Id.* at 2723.

227. See *supra* note 3 and accompanying text (setting forth provisions of Model Rule 3.6 on which Rule 177 is based).

228. *Gentile*, 111 S. Ct. at 2728. For a more detailed account of Gentile's opening remarks at the press conference and his answers in response to media questioning see *id.* at 2736-37 (Appendix A), 2739 (quoting Gentile's responses to questions).

229. *Id.* at 2728.

230. *Id.* at 2736-37. During Sanders trial, the Court admitted into evidence before the jury all of the information stated by Gentile at the press conference. *Id.*

231. *Id.* at 2731.

232. *Id.* at 2723.

233. *Id.*

234. See *Gentile v. State Bar of Nevada*, 787 P.2d 386, 388 (1990) (affirming Board decision).

clear and convincing evidence, that disciplinary matters required.²³⁵ The court held that Gentile should have reasonably known that his comments were "substantially likely" to prejudice the proceedings because of the timing of his statements and the evidentiary content that he disclosed.²³⁶ The court also rejected Gentile's First Amendment challenges for lack of merit.²³⁷ Gentile subsequently filed a writ of certiorari, which the Supreme Court granted.²³⁸

The Supreme Court, in a judgment marked by its shifting majority,²³⁹ held that Rule 177, as interpreted by the Nevada Supreme Court, was void for vagueness.²⁴⁰ However, the Court also held, in an opinion written by Chief Justice Rehnquist, that the substantial likelihood of material harm test incorporated in the rule satisfied the First Amendment.²⁴¹ Although Gentile's counsel, as well as several amici,²⁴² argued that the clear and

235. *Id.* at 387 (relying on *In re Miller*, 482 P.2d 326, 330 (1947)).

236. *Id.* The Court concluded that Gentile planned the timing of his comments to have the maximum impact on the jury venire and included commentary relating to witness' character, credibility and their criminal records. *Id.*

237. *Id.*

238. *Gentile v. State Bar of Nevada*, 111 S. Ct. 669, 669 (1991) (granting certiorari).

239. *See generally* *Gentile v. State Bar of Nevada*, 111 S. Ct. 2720 (1991). Justice Kennedy delivered the opinion of the Court with respect to Parts III and VI (holding that rule is void for vagueness) which Justices Marshall, Blackmun, Stevens and O'Connor joined. *Id.* at 2731-32, 2736. Justice Kennedy dissented from the Court's holding that the substantial likelihood standard passed constitutional muster. *Id.* at 2724-31, 2732-36 (arguing that clear and present danger standard is appropriate First Amendment test). Justice Rehnquist delivered the opinion of the Court with respect to Parts I and II (holding that rule's substantial likelihood standard is constitutional) which Justices Scalia, White, and Souter joined. *Id.* at 2738-45. Justice Rehnquist dissented from the Court's holding that Rule 177 was void for vagueness. *Id.* at 2745-48 (arguing that rule provided fair notice). Justice O'Connor provided the critical swing vote for both majorities. *Id.* at 2748-49.

240. *Id.* at 2731. In the portion of the majority opinion written by Justice Kennedy, the Court held that the Nevada Supreme Court's application of Rule 177(3) was void for vagueness because of its poorly constructed safe harbor provision. *Id.* The safe harbor provision outlines several types of statements that are not punishable *notwithstanding* the prohibition stated in provisions one and two. *See supra* note 3 and accompanying text (setting forth provisions of Model 3.6 on which Rule 177 is based). The Court held that because of the rule's grammatical structure, absent any clarifying interpretation, the rule did not provide fair notice to those whose speech it proscribes. *Gentile*, 111 S. Ct. at 2731. The Court stated that a lawyer seeking to decide what type of speech is proscribed would have to guess at the rule's contours because of the ambiguous wording of the rule. *Id.* The Court found that their conclusion that the rule failed to give adequate notice was supported by the facts at issue in *Gentile*; Gentile had read and studied the rule the night before his press conference and believed that his comments fell within the rule's safe harbor. *Id.* at 2732. The Court also stated that the imprecision inherent in the rule could lead to a real possibility of discriminatory enforcement. *Id.* The Court in *Gentile* noted that the potential for discriminatory enforcement was a genuine concern, where the target of the regulation is the criminal defense bar which has a professional duty to challenge routinely the State's actions. *Id.*

241. *Id.* at 2745.

242. *See generally* Brief Amicus Curiae of American Newspaper Publishers Ass'n, et. al., in Support of Petitioner, *Gentile v. State Bar of Nevada*, 111 S. Ct. 2720 (1990) (No. 89-1836).

present danger test was the only appropriate constitutional standard for regulation of speech, the Court declared that attorney speech was highly regulable and that the lower standard constituted a permissible balance between attorneys' First Amendment rights and a state's interest in fair trials.²⁴³

Chief Justice Rehnquist, relying heavily on the historical regulation of the admission and discipline of attorneys by the courts, stated that the practice of the bar is a privilege that is burdened with conditions.²⁴⁴ The *Gentile* Court noted that the Supreme Court had regulated attorneys' speech inside the courtroom in the past.²⁴⁵ Similarly, an attorney's conduct outside the courtroom is subject to restrictions on speech that the court could not impose on ordinary citizens.²⁴⁶ The Court stated that these precedents stood for the larger proposition that the speech of trial participants, especially lawyers, is more regulable than the speech of nonparticipants.²⁴⁷ The Court supported this proposition by referring to its decision in *Seattle Times v. Rhinehart*,²⁴⁸ where the Court stated that it may subordinate litigants' First Amendment rights to other concerns that arise in the judicial setting.²⁴⁹

243. *Gentile*, 111 S. Ct. at 2745.

244. *Id.* at 2740 (quoting Justice Cardozo in *In re Rouss*, 116 N.E. 782, 783 (1917)).

245. *Id.* at 2743.

246. *Id.* (citing ability of courts to sanction attorneys for criticism of judges). The Court further supported the regulation of an attorney's speech by pointing out that the Court has regulated attorneys' First Amendment right to solicit business and advertise. *Id.* at 2744 (citing *Peel v. Attorney Registration and Disciplinary Comm'n of Illinois*, 496 U.S. 91 (1990) (holding that regulation of attorney advertising that is misleading is constitutionally permissible), *Bates v. State Bar of Ariz.*, 433 U.S. 350 (same), *reh'g denied*, 443 U.S. 881 (1977), and *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (holding that regulation of attorney's commercial solicitation did not violate First Amendment), *reh'g denied*, 439 U.S. 883 (1978)).

247. *Id.* at 2743-44.

248. 467 U.S. 20 (1984). In *Seattle Times* the Supreme Court considered a lower court's protective order that prohibited a newspaper from publishing information obtained exclusively through court-ordered discovery in litigation in which the newspaper was involved as a party. *Seattle Times v. Rhinehart*, 467 U.S. at 20. In considering the constitutionality of the order, the Court stated that the relevant inquiry was whether the regulation at issue furthers an important state interest unrelated to the suppression of expression and whether the restriction of First Amendment rights is no greater than is necessary for the protection of the state interest. *Id.* at 31. The Court stated that the state's interest in protecting against abuse of its judicial processes was substantial. *Id.* at 34. The Court also noted that a litigant has no First Amendment right of access to information gained solely because of his status as a litigant. *Id.* at 32. Further, the Court added that continued court control over discovered information does not involve the same type of censorship that offends the First Amendment and that a protective order is not a classic prior restraint. *Id.* at 32-33. The Court in *Seattle Times* noted that heightened scrutiny of this type of order was not required by the First Amendment. *Id.* at 36. Therefore, the Court held that where a protective order is entered on a showing of good cause, is limited to the context of pretrial civil discovery, and does not restrict the dissemination of the information if gained from other sources, it does not offend the First Amendment. *Id.* at 37.

249. *Gentile*, 111 S. Ct. at 2744. Justice Rehnquist cites to a footnote in *Seattle Times* in order to support his contention that the Court has previously approved of the restriction on the communication of trial participants. *Id.* The footnote in *Seattle Times* to which

In *Gentile*, the Court adopted the *Seattle Times* balancing approach that required a court reviewing a protective injunction to balance the substantial government interest against the individual's First Amendment rights.²⁵⁰ The *Gentile* Court's adoption of a more deferential balancing test demonstrates the Court's belief that an attorney's speech is more regulable than that of the ordinary citizen.²⁵¹ Chief Justice Rehnquist, writing for the majority in *Gentile*, rejected the plaintiff's contention that the standard applied in *Nebraska Press* to restraints on the press should also be applied to a restraint on an attorney's speech relating to pending litigation.²⁵² In justifying the lower standard, Rehnquist noted that attorneys have a fidu-

Rehnquist cites states that "on several occasions [we have] approved restriction on the communications of trial participants where necessary to ensure a fair trial for a criminal defendant." *Seattle Times*, 467 U.S. at 32 n.18. However, the footnote is factually incorrect in that it cites to four cases in which the Supreme Court did not ratify speech restrictions directed at trial-participants. *Id.* The *Seattle Times* note relies on *Nebraska Press*, *Oklahoma Press*, *Sheppard* and *Gulf Oil v. Bernhard*. *Id.* In none of these cases did the Court approve speech restrictions imposed on a trial participants. In *Nebraska Press*, while the majority opinion did not expressly approve of the use of injunction aimed at trial participants, in a concurring opinion, joined by Justices Stewart and Marshall, Justice Brennan stated that these injunctions would be an acceptable way of ensuring defendant's right to fair trial if *Nebraska Press*' three-pronged test was met. See *Nebraska Press*, 427 U.S. at 604 n.27 (considering lower court's prior restraint on press). See *supra* note 104 and accompanying text (discussing *Nebraska Press* dicta). In *Oklahoma Press* the Court rejected a lower court's restriction on publication of a juvenile's name and picture after noting that the speech restrictions that the court imposed on counsel were not at issue. See *Oklahoma Press*, 430 U.S. at 310 n.1, 312 (stating that gagged participants did not contest indirect restraints and rejecting contention that indirect restraints were prior restraint on press). In *Sheppard*, a habeas corpus proceeding, the Court did not consider the validity of participant speech restrictions and mentioned in dicta that the restriction against counsel might be permissible. *Sheppard v. Maxwell*, 384 U.S. at 361 (suggesting potential of gagging trial participants). Finally, in *Gulf Oil* the Court rejected a gag order imposed by a lower court because there was no basis for finding the order necessary. See *Gulf Oil v. Bernhard*, 452 U.S. at 103 (holding that imposition of order was abuse of discretion).

250. *Gentile*, 111 S. Ct. at 2744. See *Seattle Times*, 467 U.S. at 32 (employing balancing approach).

251. *Gentile*, 111 S. Ct. at 2744.

252. *Id.* at 2740. The Court stated that prior precedent (specifically, *In re Sawyer*, 360 U.S. 622 (1959) and *Sheppard v. Maxwell*, 384 U.S. 333 (1966)) demonstrated that attorneys' speech can be regulated under a more deferential standard than that mandated by *Nebraska Press* and other earlier prior restraint cases. *Id.* at 2744. The Court adopts a highly formalistic approach to the First Amendment that differentiates between restraints imposed upon the press and restraints imposed upon press sources. See *supra* notes 145-54 and accompanying text (describing formalistic analysis of restraints on press). Given the majority's endorsement of this formalistic approach in *Gentile*, the Court assumedly would employ a similar analysis to determine when resort to an indirect restraint is constitutional. See *supra* note 113 (mentioning questions left unresolved by *Nebraska Press*). Applying this formalistic analysis, the Supreme Court would distinguish a participant-directed gag order from a prior restraint and apply an intermediate level of review similar to the test approved by the Second Circuit in *Dow Jones*. See *supra* notes 120-26 (describing Second Circuit's analysis in *Dow Jones*). But see *Swift, Defense Publicity*, *supra* note 82, at 70 (arguing that there is no basis for drawing distinction between imposition of prior restraint on media and imposition of prior restraint on individual).

ciary duty not to participate in public debate that will obstruct the fair administration of criminal justice.²⁵³ This duty arises from attorneys' special access to information through discovery and client contact, and the threat that the public will view the attorneys' statements as especially authoritative.²⁵⁴ The Court, therefore, held in *Gentile* that, because of an attorney's special duty, the substantial likelihood of material prejudice standard strikes a constitutionally acceptable balance between the First Amendment rights of attorneys involved in pending litigation and the state's interest in fair trials.²⁵⁵

In analyzing the substantial likelihood of material prejudice standard under the *Seattle Times* balancing approach, the Supreme Court in *Gentile* stated that the lower standard protects the integrity of a state's judicial system while imposing only narrow and necessary limitations on attorneys' speech.²⁵⁶ In examining the state's interest, the Court noted that the right to a fair trial, unaffected by extrajudicial statements, is one of the most fundamental rights assured by the Constitution.²⁵⁷ The rule's limitations on

253. *Gentile v. State Bar of Nevada*, 111 S. Ct. 2720 (1991).

254. *Id.* at 2745. The contention that attorneys' speech will be construed as especially authoritative denotes a simplistic understanding of the average citizen's perception of attorneys. The average citizen understands that attorneys are paid advocates and that their statements may or may not represent the truth. See Swift, *Defense Publicity*, *supra* note 82, at 95 (dismissing claim that attorney speech is more authoritative). Swift suggests that attorney speech does not create a genuine threat because the public understands a defense attorney's partisan role. *Id.* argues that the public recognizes that defendants generally claim innocence and views information generated by the defense as being biased and less authoritative. *Id.* See also Leonard E. Gross, *Judicial Speech: Discipline and the First Amendment*, 36 SYRACUSE L. REV. 1181, 1239 (1986) (arguing that public does not perceive attorneys' comments, made in role of advocate, as especially truthful).

255. *Gentile*, 111 S. Ct. at 2745.

256. *Id.*

257. *Id.* (relying on *Sheppard v. Maxwell*, 384 U.S. at 350-51 and *Turner v. Louisiana*, 379 U.S. 466, 473 (1965)). Justice Rehnquist is correct in asserting that the defendant's right to fair trial is one of the most fundamental of constitutional interests. *Turner*, 379 U.S. at 473. However, the Court in *Gentile* fails to distinguish between a defendant's Sixth Amendment right to fair trial and the state's right to ensure a fair trial. *Gentile*, 111 S. Ct. at 2745. The threat of trial publicity posed by a defense attorney's extrajudicial statements more directly involves a state's interest in an impartial jury and in preserving the integrity of the adversarial system. See Tony Mauro, *Judicial Dignity More Pressing than Free Speech*, CONN. LAW TRIB., Apr. 29, 1991, at 21 (discussing Justices' concern during *Gentile* oral arguments for dignity of trial process); Swift, *Defense Publicity*, *supra* note 82, at 66 (noting that interests involved are state's interest in criminal justice system rather than defendant's Sixth Amendment interest). There is little support for finding that the State's right to ensure fair trial or trial integrity rises to the constitutional level of a defendant's Sixth Amendment right. See *supra* note 207 (comparing defendant's Sixth Amendment to fair trial to state's right to preserve trial integrity). For a thorough discussion of the state's interest in an impartial jury see Swift, *Defense Publicity*, *supra* note 82, at 66, 87 (stating that government's right to impartial jury is not constitutionally mandated and may be considered less crucial than concurrent defendant's right). A state's right to protect trial integrity is not of constitutional magnitude. *Id.* Therefore, applying the Court's *Seattle* balancing approach, it is highly questionable whether a state's right to protect trial integrity outweighs an individual's explicit constitutional right to free

lawyer's speech punish comments likely to influence the actual outcome of the trial and comments likely to prejudice the jury venire, even if an untainted jury ultimately can be impaneled.²⁵⁸ Additionally, the numerous remedies available to a trial judge to alleviate massive media coverage may be ineffective in nullifying the effects of prejudice and will entail serious costs to the criminal justice system.²⁵⁹ The Court also examined the limitations on First Amendment rights and found that the restrictions are limited, are neutral as to points of view and merely postpone comment until after the trial.²⁶⁰ Because the Court found that the restrictions are narrowly tailored and the state's interest especially important, the Court held that the substantial likelihood standard was a constitutionally permissible balance of the state's and attorneys' rights.²⁶¹

Justice Kennedy, in an opinion joined by Justices Marshall, Blackmun and Stevens, dissented from the Court's holding that the substantial likelihood standard struck a constitutionally permissible balance between the state's interest in trial integrity and attorneys' First Amendment rights.²⁶² Justice Kennedy noted that the Court had previously only applied the more deferential balancing test to commercial speech or to the release of information obtained exclusively through judicial discovery.²⁶³ Further, the dissent argued that neither of these two categories, nor the policy reasons behind their creation, are implicated in *Gentile*.²⁶⁴ Rather, the dissent argued that the speech at issue was core political speech and that a balancing test was inappropriate in this context.²⁶⁵

The dissent took issue with the majority's underlying assumption that a court can regulate an attorney's speech to a greater extent than a court can regulate an ordinary citizen's speech.²⁶⁶ Justice Kennedy noted that the speech at issue in *Gentile*, and that within the scope of Rule 177, did not originate from either judicial discovery or any special access that *Gentile* enjoyed.²⁶⁷ The speech was, therefore, not subject to restriction under the

speech even if there is a genuine threat to trial integrity. *See id.* at 66 (noting that effects of defense publicity may not outweigh First Amendment invasion). It has even been suggested that restricting an attorney's right to speak constitutes a greater invasion of free speech than does a restraint on the press. *See id.* (noting possibility that defense attorney's First Amendment interest is stronger than media's interest).

258. *Gentile v. State Bar of Nevada*, 111 S. Ct. 2720, 2733 (1991).

259. *See id.* (questioning effectiveness of alternatives to gag orders).

260. *Id.*

261. *Id.*

262. *Gentile v. State Bar of Nevada*, 111 S. Ct. 2720, 2733 (1991). Justice Kennedy accurately points out that the question of whether the standard was constitutionally acceptable did not have to be decided in *Gentile* since the Court had already struck down Rule 177 for vagueness. *Id.*

263. *Id.* at 2733.

264. *Id.*

265. *Id.*

266. *Id.* at 2732.

267. *Gentile v. State Bar of Nevada*, 111 S. Ct. 2720, 2733 (1991).

Seattle Times rationale.²⁶⁸ Justice Kennedy also accurately pointed out that the proposition that the regulation of an attorney's speech is necessary to preserve the integrity of judicial proceedings emerges only from dicta.²⁶⁹ Additionally, Kennedy stated that several Supreme Court cases recognize that disciplinary rules governing the legal profession cannot punish activity within the scope of the First Amendment's protection.²⁷⁰

The dissent in *Gentile* also argued that, even if the Rehnquist majority was correct and that the appropriate test is the *Seattle Times* balance, Rule 177 still failed to meet the inquiry required by that precedent.²⁷¹ First, the dissent pointed out that there was little evidence to support the contention that the danger of prejudice resulting from media coverage was anything but rare.²⁷² Second, the dissent argued that *Seattle Times* recognizes that the restriction on speech must be as narrow as possible and that there cannot be any effective alternatives available.²⁷³ According to Justice Kennedy, the majority failed to offer convincing reasons that demonstrate why a lower standard of review was necessary and why alternatives to speech limitations could not alleviate the rare instance when a real danger of prejudice existed.²⁷⁴

III. ANALYSIS AND COMMENTARY

The Supreme Court's opinion in *Gentile v. State Bar of Nevada* is unsatisfactory because the majority's analysis failed to adopt a strict scrutiny approach consistent with the First Amendment jurisprudence on freedom of the press and speech.²⁷⁵ Instead, the Court applied a lesser standard of review embodied in a wide open balance that neither demands that the restriction be narrowly tailored nor demands that the state's interest be compelling.²⁷⁶ The *Gentile* majority could justify the imposition of this less

268. *Id.* Justice Kennedy comments that the press could have obtained much of the information in *Gentile's* remarks to the press "by explicit reference or fair inference in earlier press reports." *Id.* Further, because *Gentile's* press conference occurred prior to his formal participation in the criminal proceeding (before discovery), *Gentile* did not acquire any of his information through judicial processes. *Id.* Thus, Kennedy accurately concludes that Rule 177 is not limited to preventing the release of information gained through discovery or any other special access afforded an attorney. *Id.*

269. *Id.* at 2733-34 (attributing proposition to *obiter dicta* from *In re Sawyer, Sheppard and Nebraska Press*).

270. *Id.* at 2734.

271. *Id.*

272. *Gentile v. State Bar of Nevada*, 111 S. Ct. 2720, 2734 (1991).

273. See *supra* note 250 (discussing test set forth in *Seattle Times*).

274. *Id.* at 2735.

275. *Gentile*, 111 S. Ct. at 2745 (adopting substantial likelihood of material prejudice standard).

276. *Id.* at 2733. Justice Kennedy notes that the Court employs a "wide-open" balancing of interests that is appropriate only for commercial speech or speech pertaining to the dissemination of judicially acquired information. *Gentile*, 111 S. Ct. at 2733. Kennedy argues that this "wide-open" balancing is inappropriate for speech concerning political and prosecutor abuse, speech traditionally at the core of the First Amendment. *Id.*

exacting standard only through an inaccurate characterization of an attorney's constitutional right to freedom of speech²⁷⁷ and by a complete dismissal of both the media's right to gather information and the public's right to receive information.²⁷⁸ The Rehnquist opinion bases its application of a lesser standard of review on unsupportable conclusions about the facts at issue, First Amendment law and the constitutional interests of freedom of speech and freedom of the press.²⁷⁹

The Court in *Gentile* concluded that the substantial likelihood of harm test strikes a constitutionally permissible balance between the First Amendment rights of attorneys and the state's interest in fair trials.²⁸⁰ The Court's conclusion that a lower standard of review is supportable, however, only if one accepts the Court's seemingly inaccurate characterization of the primary interests involved.²⁸¹ First, the Rehnquist majority deliberately ignored the

277. This note will leave extensive discussions of the speech interests implicated by restrictions on attorney speech to others and will instead focus on the Court's failure to consider the media rights at issue in *Gentile*. For a brief discussion of the speech interests implicated by restrictions on attorney speech, see Swartz, *supra* note 21, at 1421-24 (discussing speech interests of gagged trial participants).

278. See generally Lillian R. BeVier, *An Informed Public, an Informing Press: the Search for a Constitutional Principle*, 68 CAL. L. REV. 482 (1980) (discussing public right to receive information). The scope of the public's right to receive information has been a subject of much debate. Many commentators acknowledge a limited public right to receive information. If such a right did exist, it would obviously add to the magnitude of the First Amendment interests at stake in *Gentile*. For a thorough discussion of the relevance of a public right to receive information on indirect restraints see Todd, *supra* note 53, at 1188-93 (discussing public right to receive information and indirect restraints).

279. *Gentile*, 111 S. Ct. at 2740-45.

280. *Id.* at 2745.

281. See *id.* at 2740-45 (weighing state interest and attorneys' interests). The interests involved on the state interest side of the balance are: the state's interest in preserving the integrity of the adversary system and ensuring an impartial jury for the prosecution. In *Gentile*, the Court inaccurately lumped the state's interest together with the defendant's Sixth Amendment interest in a fair trial. The interests involved on the First Amendment side of the balance are: the attorney's right to speak; the media's right to gather news and retaining access to public information; and the public's right to know information about the judicial system. This note will focus primarily on the media's interest in gathering news and retaining access to information not subject to government control and will not rely on the added constitutional weight of a public right to know. See *supra* note 278 and accompanying text (discussing briefly public right to know). Yet, even excluding the public right to know, the media's constitutional interests, in combination with the attorney's constitutional right to free speech, are sufficient to outweigh the government interest in preventing prejudicial pretrial publicity. In addition, it is apparent that many of the court's assumptions about the speech at issue in *Gentile* are highly questionable. For instance, the Court's imposition of a fiduciary duty on an attorney forms the basis for its regulation of attorney speech. See Swift, *Unconstitutional Regulation*, *supra* note 92, at 1023-28 (discussing potential for regulation of attorney speech based on imposition of fiduciary duty). Could the Court likewise impose a fiduciary duty and thereby regulate the speech of a teacher in a state school, a doctor in a state clinic, a librarian in a state library? The result of such reasoning could lead to the regulation of a wide array of state actors. See *Rust v. Sullivan*, 111 S. Ct. 1759, 1772 (1991) (rejecting "unconstitutional privilege" doctrine's application to abortion counseling based on similar reasoning). For added discussion of an attorney's speech interest see Swartz, *supra* note 21, at 1427 (stating that fiduciary duty rationale may constitute an unconstitutional conditioning of privilege).

media's First Amendment interest in gathering news and maintaining access to public information.²⁸² While this right is not without limit, the Supreme Court has acknowledged that a qualified right to gather news exists.²⁸³ Courts typically restrict the scope of this right to access to information acquired lawfully or access to information within the public realm.²⁸⁴ Within the context of judicial proceedings and the legal system, the Supreme Court has, in fact, firmly established the right of access to information divulged in trial proceedings.²⁸⁵

The Supreme Court implied that the information restricted by a *Gentile* rule is information obtained due to an attorney's privileged access to the

282. *Gentile*, 111 S. Ct. at 2743-45 (discussing First Amendment interests without mentioning media's right to gather and disseminate speech of willing speaker). While the media's right to gather news and disseminate it is not without limit, the process of obtaining information does receive qualified protection under the First Amendment. See Bjork, *supra* note 32, at 188-94 (discussing media's right to gather information); NIMMER, *supra* note 24, § 4.09(A)-4-41 (stating that media's right to gather information and disseminate it receives qualified protection).

283. See *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982) (recognizing right of access to criminal trials as one of several rights, "that, while not unambiguously enumerated . . . , are nonetheless necessary to the enjoyment of other First Amendment rights"); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980) (holding that press has First Amendment right to gather information in the context of criminal trials); *Pell v. Procunier*, 417 U.S. 817, 834 (1974) (noting that media has right of access to public information equal to public right); *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972) (same). But see *Zemel v. Rusk*, 381 U.S. 1, 17 (noting that "the right to speak and publish does not carry with it the unrestrained right to gather information"), *reh'g denied*, 382 U.S. 873 (1965).

284. See *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979) (holding that information lawfully obtained can not be punished absent state interest of highest order); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 568 (1976) (stating that information in public domain can not be restricted); *Richmond Newspapers*, 457 U.S. at 556 (suggesting public forum standard in which press has access to forums or institutions that are public in nature); *Oklahoma Publishing Co. v. District Ct.*, 430 U.S. 308, 310 (1977) (stating that once information is in public domain its dissemination can not be constitutionally restrained); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 495 (1975) (noting that states can not punish dissemination of information in public records); see also NIMMER, *supra* note 24, § 4.09(B)-4-45 (noting that Supreme Court's limits right to gather information based upon perceived distinction between non-speech and speech restrictions). Nimmer states that a restriction on the right to gather information is presumptively valid if the feared injury that causes the restriction is incurred for reasons other than the dissemination of the information thus gathered. *Id.* at 4-46. Thus, restrictions on gathering information in a prison are presumptively valid if the discussion and questioning of inmates threatens the state's interest in internal security within prisons. *Id.* Alternatively, if a court imposes a restriction primarily to prevent the dissemination of the information gathered, the restriction will be presumptively invalid if the information to be disseminated constitutes speech and if its dissemination is protected by the First Amendment. *Id.* at 4-50. Under this analysis, it would appear that a *Gentile* restriction is presumptively invalid because a court imposes the restraint solely to prevent media dissemination of the information gathered because this dissemination will threaten the integrity of the adversary system.

285. See *Swift, Unconstitutional Regulation*, *supra* note 92, at 1007 (noting that access to information about legal system and judicial proceedings is unequivocally established).

processes under the judiciary's control.²⁸⁶ However, a *Gentile* rule does not limit its circumscription to material gained because of an attorney's privileged access but instead restricts the dissemination of information obtained through an attorney's own investigation and from client communications.²⁸⁷ The information restricted in *Gentile* was, in fact, public, because the information was beyond the scope of government control.²⁸⁸ A *Gentile* rule, under these circumstances, allows a court to effectively disrupt a communicative act between a willing speaker conveying information outside of government control to the media; this disruption violates both the media's constitutional interest in gathering information and the attorney's constitutional right to free speech.²⁸⁹ In reviewing the constitutionality of restrictions on gathering news, the Supreme Court has established strict scrutiny as the appropriate standard of review.²⁹⁰

Moreover, the Court's approval in *Gentile* of the substantial likelihood test and the use of intermediate level balancing were based upon the obfuscation of the defendant's Sixth Amendment right to a fair trial and the state's interest in preserving the adversarial system and guaranteeing the prosecution an impartial jury.²⁹¹ The Rehnquist majority muddled these two

286. *Gentile v. State Bar of Nevada*, 111 S. Ct. 2720, 2744-45 (1991). The Court analogizes the circumstances in *Gentile* to those in *Seattle Times*, where a litigant disseminated information obtained exclusively through court-ordered discovery, and to the circumstances in *Sheppard* and *Nebraska Press* where a court controlled trial participants because the judicial procedure has begun. *Id.* at 2744. The Court stated that "[b]ecause lawyers have special access to information through discovery and client communications, their extrajudicial statements pose a threat to the fairness of a pending proceeding since lawyers' statements are likely to be received as especially authoritative." *Id.* at 2745.

287. *Gentile*, 111 S. Ct. at 2733 (Kennedy, J., dissenting).

288. *See id.* Justice Kennedy also stresses this point in his dissenting opinion. *Id.* Kennedy argues that the cases relied upon to support intermediate balancing involve either commercial speech by attorneys or court control of information acquired solely through the discovery process. *Id.* He accurately points out that neither category, nor the underlying reasons justifying their creation, is involved in *Gentile*. *Id.* *See also* Swift, *Unconstitutional Regulation*, *supra* note 92, at 1007-08 (stating that in *Bridges v. California Supreme Court* explicitly rejected state's contention that trial judge could restrict out-of-court publicity).

289. *See* NIMMER, *supra* note 24, § 4.09(B)-4-43 (discussing right to gather information). Nimmer, in defining the right to gather information, categorizes the right as:

narrower in scope than the general audience interest in speech in that it assumes that the speech has either already occurred . . . , or that it will occur in that a willing speaker will engage in speech without interference. The consent of the actual or putative speaker to permit the content of his speech to be disseminated is assumed. So is the lawfulness of the communication. The only issue posed is as to the right of press or public to be in such physical propinquity with a setting of event, or with a document of speaker, so as to make possible the gathering of the "information."

Id.

290. *See* Swift, *Unconstitutional Regulation*, *supra* note 92, at 1015 (relying on Court's use of strict scrutiny review in *Globe Newspapers*).

291. *See Gentile*, 111 S. Ct. at 2745 (obfuscating defendant's right to fair trial and state's interest in trial integrity). While the state's interest at stake will occasionally be in preserving defendant's Sixth Amendment right to fair trial rather than its own right to an impartial jury, it is evident that courts will usually invoke the *Gentile* rule to discipline a defense attorney

distinct interests primarily by relying on *Sheppard* and *Nebraska Press*, two cases that implicated the defendant's, and not the state's, right to a fair trial.²⁹² Although the state does have an important interest in maintaining the integrity of the adversary system and jury impartiality,²⁹³ this government right is not of the same magnitude as a defendant's absolute Sixth Amendment right to fair trial.²⁹⁴ Thus, where the defendant's Sixth Amendment

for comments related to pending litigation. See Robert P. Isaacson, *Fair Trial and Free Press: An Opportunity for Coexistence*, 29 STAN. L. REV. 561, 569-70 (arguing that gag order will apply mainly to defense attorneys). Courts will typically invoke a *Gentile* rule primarily against defense counsel because the restriction applies to comments related to pending litigation. *Id.* While the prosecutor and state will have carte blanche to establish a public record and leak information to the press before an indictment is pending, a defense counsel will attempt to reply to the state's allegations only after the state has indicted the attorney's client. *Id.* Thus, courts most often will enforce *Gentile* rules to restrict a defense attorney's communications with the media made on the defendant's behalf. *Id.*; see also Nat Hentoff, *Muzzling Defense Attorneys*, WASH. POST, June 8, 1991, at A21 (noting prominent prosecutors disregard of ethical restrictions on speech). Hentoff notes that when Attorney General Richard Thornburgh announced the indictment of a failed savings and loan executive, he described the defendant to the press as "one of the biggest savings and loan bandits in Texas." *Id.* Hentoff concludes that "when the chief legal officer of the United States so cavalierly jettisons the presumption of innocence, one might expect that the American Bar Association or some other guardian of the ethics of the profession would reprimand him. It didn't happen." *Id.*

Where a court invokes a *Gentile* rule to discipline a defense attorney, there is no Sixth Amendment right to fair trial at stake. While it is evident that a *Gentile* rule's silencing effect on prosecutors also implicates the media's right to gather information, restrictions on prosecutors are less problematic for several reasons. See Swift, *Unconstitutional Regulation*, *supra* note 92, at 1005-06 n.13 (discussing implications of restrictions on prosecutors). First, evidence suggests that threat of prejudicial publicity most often results from leaks by prosecutors and other state agents. *Id.* Secondly, unlike defense attorneys, prosecutors are employees of the state whose speech can be limited because of this relationship. *Id.* Finally, prosecutors do not bear the same burden as defense attorneys for protecting the public against political and judicial abuses. *Id.* See also Marcia Coyle & Fred Strasser, *Split Rulings on Speech Puzzle Many*, NAT'L L.J., July 8, 1991, at 5 (arguing for different standards for prosecutors and defense attorneys).

292. *Gentile*, 111 S. Ct. at 2744-45. The Court obfuscated these two distinct interests: "few, if any, interests under the Constitution are more fundamental than the right to a fair trial by 'impartial' jurors, and an outcome affected by extrajudicial statements would violate that fundamental right." *Id.* at 2745.

293. See Swift, *Defense Publicity*, *supra* note 82, at 86-100 (discussing government right to control adversary system and preserve jury impartiality). The Supreme Court has consistently held that the government has a right to control the adversary system and maintain jury impartiality. *Cf.* *Singer v. United States*, 380 U.S. 24, 36 (1965) (recognizing that government has interest in trying cases by jury); *Patton v. United States*, 281 U.S. 276, 312 (1930) (noting that maintenance of jury is important); *Hayes v. State of Missouri*, 120 U.S. 68, 71 (1887) (stating that impartiality requires freedom from any prejudice to prosecution, as well as freedom from any bias against accused). *But see* *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 509 (1989) (stating that Sixth Amendment guarantees defendant certain fair trial rights not extended to prosecution).

294. See Swift, *Defense Publicity*, *supra* note 82, at 87-88 (stating that government right to ensure jury impartiality is of lesser constitutional magnitude than defendant's Sixth Amendment right to fair trial); Stern, *supra* note 104, at 101 (stating that government interest is not of constitutional magnitude).

right to a fair trial conflicts with the media's and attorneys' First Amendment rights, the First Amendment rights may have to give way to the Sixth Amendment right.²⁹⁵ On the other hand, it is unlikely that the nonconstitutional state's interest in preserving the adversary system or in maintaining jury impartiality outweighs the express constitutional mandates that guarantee an attorney's right to free speech and the media's right to gather information. It is even more unlikely that the state right will outweigh two express constitutional guarantees where the state has failed to produce evidence of a genuine threat to jury impartiality.²⁹⁶

The Supreme Court's failure in *Gentile* to consider the media's interest in news gathering, and its conspicuous mischaracterization of the attorney's speech interest at stake, led the Court to underestimate the First Amendment rights at stake in that case. Simultaneously, the Court's failure to distinguish between a defendant's constitutional right to fair trial and a state's non-constitutional right to maintain jury impartiality caused the Court in *Gentile* to overestimate the countervailing interest. These two mistakes resulted in a balance that led the Court to erroneously conclude that the state's interest in ensuring jury impartiality outweighs both the attorneys' and the media's First Amendment rights. Additionally, the Court applied what Justice Kennedy referred to as a wide-open balancing test, previously reserved for low-value speech.²⁹⁷ This wide-open balancing, or intermediate scrutiny, does not contain a narrowly tailored means component and allows the Court to validate what amounts to a perpetual gag restriction on all attorneys involved in any pending litigation. This type of blanket restriction of speech is unprecedented, as is the *Gentile* Court's application of a less-than-strict scrutiny standard to speech that is traditionally at the core of the First Amendment's protection.²⁹⁸

295. See *Estes v. Texas*, 381 U.S. 532, 540 (noting that "primary concern of all must be the proper administration of justice; that the life of liberty of any individual in this land should not be put in jeopardy because of actions of the news media"), *reh'g denied*, 382 U.S. 875 (1965).

296. See *supra* notes 169-79 and accompanying text (discussing chilling effect of *Gentile* rule). A *Gentile* rule chills attorney speech in all litigation, civil and criminal, and does so without any evidence of a genuine threat to jury impartiality. In fact, evidence suggests that a genuine threat to jury impartiality is relatively rare. See *Swift, Defense Publicity, supra* note 82, at 94 (concluding that occasions where government right to impartial jury will be threatened are extremely rare); *Stern, supra* note 104, at 101 (same). There is a long line of Supreme Court cases, including one reviewed in the same term as *Gentile*, that support the contention that cases where extensive publicity will violate defendant's right to fair trial are extremely rare. See, e.g., *Mu' Min v. Virginia*, 111 S. Ct. 1899 (rejecting defendant's appeal for violation of right to fair trial because of pretrial publicity), *reh'g denied*, 112 S. Ct. 13 (1991); *Davis v. Florida*, 473 U.S. 913 (1985) (denying certiorari to defendant's appeal for violation of Sixth Amendment right to fair trial caused by pretrial publicity); *Murphy v. Florida*, 421 U.S. 794 (1975) (holding that juror exposure to prejudicial information, by itself, did not violate due process); *Patton v. Yount*, 467 U.S. 1025 (1964) (holding that adverse publicity did not violate defendant's right to fair trial); *Beck v. Washington*, 369 U.S. 541 (same), *reh'g denied*, 370 U.S. 965 (1962).

297. See *Gentile v. State Bar of Nevada*, 111 S. Ct. 2720, 2733 (1991).

298. See *James, supra* note 91, at S4 (arguing that prior to *Gentile*, stricter standard of

The application of a strict scrutiny standard in *Gentile*, on the contrary, would have necessarily resulted in the invalidation of the speech restriction. A strict scrutiny standard demands that the state show a compelling interest, that the interest outweigh the countervailing interest that the state seeks to restrict, and, finally, that the means by which the state seeks to preserve its compelling interest be the least restrictive means available.²⁹⁹ The state interests at stake in *Gentile*, the preservation of jury impartiality and the maintenance an effective adversary system, are indeed compelling.³⁰⁰ The jury system is at the very roots of the American judicial system and courts must consider any risk to this system to be of the highest magnitude. However, the countervailing interests at stake in *Gentile*, a private citizen's right to speak freely and the media's right to gather public information, are both of an even higher magnitude, and their sum far outweighs the state's interest.

Even if the the weight of two express constitutional rights is discounted, the narrowly tailored requirement in a strict scrutiny standard assures that a court could not possibly uphold a restriction as broad as a *Gentile* rule.³⁰¹ First, courts and bar associations have created the *Gentile* rule to provide a comprehensive guide for a myriad of situations.³⁰² The unavoidable generality inherent in such a guide will necessarily cause the rule to be overbroad.³⁰³ Second, a *Gentile* rule is not effective in alleviating prejudicial

review seemed to mandate application of maximum First Amendment protection for any state attempt to control statements about judicial proceedings to press); Swartz, *supra* note 21, at 1435-36 (arguing that highest standard of review is in accord with First Amendment principles).

299. See NIMMER, *supra* note 24, § 2.05(B)(4)-2-39-40, n.89 (discussing strict scrutiny review).

300. See *supra* notes 197, 257 (describing state interest in trial integrity).

301. See Swartz, *supra* note 21, at 1438-41 (discussing less restrictive alternative requirement); Swift, *Unconstitutional Regulation*, *supra* note 92, at 1015-20 (discussing narrowly tailored requirement). Swift divides the narrowly tailored requirement of strict scrutiny into three separate requirements: specificity; empirically-demonstrable means-ends nexus; and less restrictive alternative. *Id.* at 1015. Swift determines that Model Rule 3.6, the prototypical *Gentile* rule, fails all three of the requirements. *Id.* at 1016-1020. See also EMERSON, SYSTEM, *supra* note 61, at 463-64 (discussing attorneys' First Amendment rights to be free of extrajudicial restrictions on speech). Emerson notes that "[t]o limit unduly the role of attorneys in discussing the administration of justice, including pending matters, would thus encroach seriously upon the system of freedom of expression." *Id.* at 464.

302. *But see Gentile*, 111 S. Ct. at 2745-28 (Rehnquist dissenting) (arguing that *Gentile* rule is not overbroad). The contention that *Gentile* rules will be overbroad is supported by the Supreme Court's holding in *Gentile* that the safe harbor provision of Rule 177 was void-for-vagueness. *Gentile*, 111 S. Ct. at 2731. The safe harbor, because of its deficient language, did not provide lawyers with sufficient notice. *Id.* This stricken provision is identical to that used by Model Rule 3.6 which is the prototype for most state's *Gentile* rules. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1991 ed.). The inability of the ABA to develop an adequate guide to when an attorney's speech will not be subject to punishment, demonstrates the overbreadth of any rule which tries to serve as a guide for an infinite number of situations.

303. See Swift, *Unconstitutional Regulation*, *supra* note 92, at 1016 (stating that underlying rationale of specificity requirement is that broadly worded regulations restrict speech even where no harm is likely). Swift points out that the Supreme Court has struck down professional attorney regulations which are overbroad. *Id.* at 1017.

publicity because, as a disciplinary rule, it can restrict only an attorney; the media can still obtain information from attorneys off the record or from a defendant speaking without counsel.³⁰⁴ Consequently, a *Gentile* rule is an ineffective means of achieving the state's desired end. Third, the Supreme Court precedent itself suggests that the threat to jury impartiality resulting from extensive media publicity is extremely rare.³⁰⁵ Therefore, a *Gentile* rule is not necessary in the majority of instances.³⁰⁶ Finally, where a genuine threat to trial integrity exists, the state has a less restrictive method for alleviating the threat available to it.³⁰⁷ The state can impose a participant-directed gag order of limited scope that will only abridge First Amendment rights in a particular case based on concrete findings.³⁰⁸ Thus, the use of a narrow indirect restraint is preferable to the use of a blanket rule that restricts First Amendment rights in all litigation without regard to the authenticity of a threat to trial integrity.³⁰⁹

304. See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 562 (1976) (requiring showing that means of alleviating threat to fair trial will be effective). The inability of an attorney to speak to the media on behalf of his client may create undesirable results in many cases. An innocent defendant, faced with a long delay for potential acquittal, may want to respond to a negative record established prior to indictment by the prosecution and police in order to dispel suspicion or opprobrium. The defendant will have to face the media without the advice of counsel which could lead to disastrous consequences to the defendant. See *United States v. Garsson*, 291 F. Supp. 646, 649 (S.D.N.Y. 1973) (stating that "indictments are calamities to honest men"); Swartz, *supra* note 21, at 1422 (stating that after indictment public opinion mounts against accused and accused's interest in responding to charges is at peak). For a insightful discussion of the accused's interest in preserving the attorney's freedom of speech see Stern, *supra* note 104, at 98-101 (describing accused's interest in attorney speech).

305. See *supra* note 296 and accompanying text (discussing Court's reluctance to find publicity resulted in violation of defendant's Sixth Amendment right to fair trial). See also *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 551, 554, 565 (1976) (stating that threat to defendant's Sixth Amendment right to fair trial from extensive publicity is extremely rare).

306. See *id.* at 1018-19 (discussing means-ends nexus requirement). Swift notes that in *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609 (1982), the Court "made clear that the test could not be satisfied where the connection between the means and the ends was speculative." *Id.* at 1019.

307. See *supra* note 301 and accompanying text (describing narrowly tailored requirement).

308. See *id.* at 1020 (arguing that even where state interest is compelling, if state can preserve its interest through ad hoc application of restrictions tailored to particular circumstances instead of general rule, ad hoc application is constitutionally required). See also Matheson, *supra* note 83, at 932 (stating that court should employ indirect restraints before *Gentile* rules because they are less restrictive).

309. See Swift, *Unconstitutional Regulation*, *supra* note 92, at 1051 (recognizing that indirect restraint is preferable to *Gentile* rule and that pre-*Gentile* Supreme Court precedent supports this). As of yet, discounting the ramifications of *Gentile* to indirect restraints, the Supreme Court has yet to resolve the question of when an indirect restraint can be imposed constitutionally. See *supra* note 118 (noting Supreme Court's reluctance to consider constitutionality of resort to indirect restraint). The Supreme Court should address the question in order to resolve longstanding confusion and inconsistency among state and federal courts' use of gag orders. See *supra* notes 113-15 (recognizing state and federal courts' differing uses of indirect restraints). While this author agrees with Swift that indirect restraints are a more preferable means of alleviating the threat to a defendant's Sixth Amendment right to a fair

IV. IMPLICATIONS FOR A FREE PRESS

Justice Stewart once stated that the purpose of the free press guarantee was to "create a fourth institution outside the Government as an additional check on the three official branches."³¹⁰ This notion that freedom of the press is inextricably tied to the prevention of political abuses and the maintenance of an informed democracy has prevailed virtually unchallenged for two hundred years and has been well grounded in Supreme Court jurisprudence.³¹¹ The Supreme Court has held that the importance of the press' checking function is especially meaningful in the context of the judicial process where society airs and debates so many modern social and political controversies.³¹² In light of this strong commitment to a free press, it seems especially strange that on the two hundredth birthday of the First Amendment, the Supreme Court in *Gentile v. State Bar of Nevada* would disable so perfunctorily the press' ability to act as a check on the judicial system.³¹³

The Supreme Court's decision in *Gentile* strikes a significant blow to the freedom long enjoyed by the press in the United States. The *Gentile* decision installs as current doctrine a highly formalistic interpretation of the Free Press Clause.³¹⁴ The Court's analysis in *Gentile* fails to acknowledge that the imposition of a blanket speech restriction on the media's potential sources is a deliberate circumvention of the well-established prohibition on

trial, the author emphasizes that courts should resort to an indirect restraint or gag order only when the court determines that all other means of alleviating the threat are ineffective. See *supra* note 301 and accompanying text (describing least restrictive alternative requirement). In order for a court to determine that this least restrictive means inquiry has been made, the court should satisfy the *Nebraska Press* three-pronged test prior to the imposition of an indirect restraint. See *Nebraska Press*, 427 U.S. at 562 (describing three-pronged test). The application of the *Nebraska Press* requirements to the indirect restraint context would reflect accurately the fact that a court's purpose in imposing either a prior restraints or an indirect restraints is the same, regulation of the dissemination of information about the judicial process. See *supra* notes 141-45 and accompanying text (discussing realistic approach to analysis of press restraints). An equally satisfactory alternative to the invocation of the *Nebraska Press* test is the adoption of the "serious and imminent threat" standard. See *supra* notes 127-34 and accompanying text (describing Sixth Circuit's approach in *CBS*).

310. Stewart, *supra* note 19, at 634.

311. See ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 75 (1960) (discussing press' checking function on political and judicial abuses).

312. See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559-60 (1976) (noting that presumption against prior restraints is particularly important in context of judicial reporting).

313. See James, *supra* note 91, at S4 (reacting to *Gentile* decision). The author concludes that:

It is difficult to avoid the conclusion that the Rehnquist majority in *Gentile* is advancing a judicial philosophy that has less to do with the actual issues in the case than with the larger issue of the role of a lawyer in the judicial system. It is particularly troublesome because this outcome, based on a broad and general rule, leaves so many practical concerns unanswered.

Id.

314. See *supra* notes 136-40 and accompanying text (discussing formalistic analysis of speech restrictions).

prior restraints on the press.³¹⁵ Although *Gentile* rules do not directly enjoin the dissemination of information by the media, they achieve the same result by effectively limiting the media's ability to gather public information about the judicial processes.³¹⁶ Further, the *Gentile* decision provides judges with an extremely broad and heavy-handed means of alleviating the seemingly rare occurrence of a threat to a defendant's right to a fair trial or an abuse of the trial processes.³¹⁷

The consequences of the *Gentile* decision have not yet manifested themselves. However, after states complete the minor revisions of their *Gentile* rules to eliminate vague safe harbor provisions, courts will enforce *Gentile* rules more routinely, leading to a marked reduction in the communications between attorneys and the media.³¹⁸ Attorneys have little to gain personally from exposing themselves to potential disciplinary proceedings and possible sanctions and will refrain from any contact with the media during litigation.³¹⁹ The consequences of this First Amendment chill will be a noticeable diminution in the ability of the media to report meaningfully on the judicial processes and, concurrently, a decline in the ability of the public to remain informed about and to participate in the judicial system.³²⁰

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315. See *supra* notes 141-45 and accompanying text (discussing realistic analysis of speech restrictions).

316. See *supra* notes 142-43 and accompanying text (discussing effect of indirect restraints on news gathering process).

317. See James, *supra* note 95, at S4 (stating that *Gentile* rule creates limitation of First Amendment protection "greater than is necessary or essential to the protection of the particular government interest at stake . . .").

318. See generally *News-Journal Corp. v. Foxman*, 939 F.2d 1499 (1991); *United States v. Bingham*, 769 F. Supp. 1039 (1991).

319. See Coyle & Strasser, *supra* note 291, at 5 (noting that *Gentile* decision leaves lawyers uncertain about their ability to speak).

320. See NIMMER, *supra* note 24, § 1.02(H)-1-44-45 (discussing First Amendment self-government and enlightenment functions).

