COURT-ORDERED RESTRICTIONS ON TRIAL PARTICIPANT SPEECH

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ABSTRACT

This Note considers court-ordered limitations on the extrajudicial speech of trial participants in high-profile cases. After providing a history of Supreme Court decisions, informative though not dispositive of the topic, it presents the divergent approaches lower courts take when faced with trial participants' extrajudicial speech. The Note highlights the extreme legal uncertainty facing trial participants who desire to speak publicly about court proceedings. Finally, it concludes that courts would better balance First Amendment and fair trial values by rejecting the reasonable likelihood of prejudice standard.

INTRODUCTION

The American justice system ushered in the new millennium by playing host to some riveting drama: fraud perpetrated by Enron executives, the murder of pregnant Laci Peterson, the Michael Jackson child molestation case, and allegations of rape against Kobe Bryant and Duke University lacrosse players. September 2007 accusations of a commando style raid[1] refreshed the public's memory of the O.J. Simpson "trial of the century" just a decade earlier. While the American fascination with wrongdoing and punishment continues unabated, the established news media remain willing, if not eager, to

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1. Steve Friess, *Simpson and Another Man Are Charged with Felonies in Taking of Sports Items*, N.Y. TIMES, Sept. 17, 2007, at A14.

wax knowledgeable about the acts and lives of those engaged in courtroom battles. CNN, Court TV, the twenty-four hour news cycle, and the Internet contribute to the quantity of information broadcast and published.

That this industry can fix its attention on legal proceedings is profoundly beneficial. Legal reporting increases public knowledge about the law and enhances deterrence. It may help marshal resources for an innocent but poor defendant or convince a reluctant witness to come forward. The freedom to speak about judicial proceedings enables criticism of government ineptitude, corruption, and malice, and it promotes a discussion about social change.[2]

> Secrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges; free and robust reporting, criticism, and debate can contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and public accountability.[3]

Widespread familiarity with the details of court cases, however, threatens to prejudice the proceedings, particularly by influencing potential jurors. Jurors too familiar with the arguments and facts may be so predisposed to one outcome or another as to undermine the trial itself, violating the Sixth Amendment's guarantee of an impartial jury.[4] "[F]ree speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose

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2. *See, e.g.*, Gentile v. State Bar of Nev., 501 U.S. 1030, 1035 (1991) (opinion of Kennedy, J.) ("Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account." (quoting *In re* Oliver, 333 U.S. 257, 271 (1948))); MODEL RULES OF PROF'L CONDUCT R. 3.6 cmt. 1 (2007) ("[T]here are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves."); Erwin Chemerinsky, *Silence Is Not Golden: Protecting Lawyer Speech Under the First Amendment*, 47 EMORY L.J. 859, 867–71 (1998) (emphasizing the value of attorney speech).

3. Neb. Press Ass'n v. Stuart, 427 U.S. 539, 587 (1976) (Brennan, J., concurring).

4. *See* U.S. CONST. amend. VI; Sheppard v. Maxwell, 384 U.S. 333, 362 (1966) (overturning a conviction because of extensive, prejudicial, and unmitigated publicity, and noting that "[d]ue process requires that the accused receive a trial by an impartial jury free from outside influences"); MODEL RULES OF PROF'L CONDUCT R. 3.6 cmt. 1 (2007) ("Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved.").

between them."[5] Yet courts must make determinations—about the influence of speech on trials and what to do about it.

With the First Amendment precluding almost all gag orders on the press,[6] many courts limit publicity by demanding that attorneys and trial participants refuse to engage the public through the media. In four of the five cases already mentioned—the Laci Peterson, Kobe Bryant, Michael Jackson, and Duke Lacrosse cases—the trial judge ordered parties, witnesses, or their counsel to refrain from making extrajudicial statements.[7] In the fifth case, the Enron trial, the judge twice refused requests to impose a gag order.[8] Similar restraints on speech are not unusual; trial participant gag orders are applied with increasing regularity.[9] The Supreme Court, however, has never decided the constitutionality of these orders,[10] and the lower courts are divided three ways: some courts allow speech restrictions when a judge identifies a reasonable likelihood of prejudice, others demand a substantial likelihood of prejudice, and a third group of courts proscribes all restrictions on speech absent a clear and present danger

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5. Bridges v. California, 314 U.S. 252, 260 (1941).

6. *See infra* Part I.C. "The First Amendment in conjunction with the Fourteenth, prohibits the government from "abridging the freedom of speech, or of the press; or the right of the people peacably to assemble, and to petition the government for a redress of grievances." Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575 (1980) (plurality opinion) (quoting U.S. CONST. amend. I).

7. *Judge Issues Gag Order in Peterson Case*, CHI. TRIB., June 13, 2003, at 16; Paul Pringle, *Judges Dim the Media Spotlight*, L.A. TIMES, Mar. 22, 2004, at A1 ("Gag orders have become a fairly regular feature in celebrity court dramas—the Jackson and Bryant cases among them."); John Stevenson, *Attorneys Want Gag Order Lifted; Lacrosse Players' Lawyers Say 'Court of Public Opinion' Is Necessary for Justice*, HERALD-SUN (Durham, N.C.), July 22, 2006, at A1.

8. *Request for Gag Order Declined by U.S. Judge in Fraud Case*, WALL ST. J., Dec. 19, 2005, at B4 ("The judge decided against a gag order for the second time this month, saying Mr. Lay's speech was a 'drop in the bucket' among [other forms of publicity].").

9. Chemerinsky, *supra* note 2, at 859; Pringle, *supra* note 7.

10. United States v. Brown, 218 F.3d 415, 426 (5th Cir. 2000) ("[N]either the Supreme Court nor this Court has articulated a standard to apply when evaluating gag orders directed at attorney or non-attorney trial participants."); United States v. Carmichael, 326 F. Supp. 2d 1267, 1293 (M.D. Ala. 2004) ("*Gentile* did not consider a 'gag order' at all."); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 1109 (2d ed. 2005).

Other Supreme Court cases approve gag orders to restrict attorney and trial participant speech in particular contexts in accordance with practice at common law. Seattle Times Co. v. Rhinehart, 467 U.S. 20, 33 (1984); Gannet Co. v. DePasquale 433 U.S. 368, 389 (1979). For instance, speech may be curtailed to protect confidential information obtained through the non-public discovery process. *Seattle Times*, 467 U.S. at 37. Also, speech may be "extremely circumscribed" inside the courtroom, Gentile v. State Bar of Nev., 501 U.S. 1030, 1071 (1991). This Note considers speech of a more general nature, recognizing that in certain limited instances different standards of review may be appropriate.

of prejudice.[11] With the October 2006 denial of certiorari in *Allred v. Superior Court*,[12] the division persists.[13]

Lacking Supreme Court precedent directly on point, the contours of the law are defined by related but not dispositive cases. In Part I, this Note focuses primarily on four of these cases, providing a historical perspective. Part II looks at the ways in which lower courts have conceived of court-ordered restrictions on trial participant speech, emphasizing the extent of the differences among them. Not only are lower courts applying different standards to similarly situated individuals, but many courts have expressed difficulty understanding what the standards mean and how they relate to one another. Part III argues that regardless of the confusion and the variety of approaches, institutional concerns encourage the rejection of the reasonable likelihood standard. It first suggests that the nature of the contempt power and the collateral bar rule dangerously chill speech, and it then focuses on the speculative nature of speech restrictions. Courts must guess how speech will affect a trial, and they should be careful to avoid elevating fair trial concerns over those of the First Amendment.

Within the legal community, the propriety of extrajudicial statements is contested. Some attorneys believe that representation of high-profile clients demands engaging the broader public.[14] Other attorneys reject this view, suggesting that they best serve their clients before the tribunal and the tribunal alone.[15] This Note concerns the speech of all trial participants, but it abstains from suggesting that attorneys should either speak publicly or not speak publicly—a decision involving considerations beyond the constitutional issues

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11. *See infra* Part II.B. Professor Erwin Chemerinsky has proposed a fourth approach yet more protective of speech—an approach that would prohibit only false speech and only after a finding of actual malice. Chemerinsky, *supra* note 2, at 884–87.

12. Allred v. Superior Court, 127 S. Ct. 80, 80 (2006).

13. *See infra* Part II.

14. According to one such attorney, "the publicity game has shifted into warp speed and it would be absolute incompetence for an attorney to not be as prepared for handling his client's case in the courtroom of public opinion as he or she would at trial." Terry Giles, *Foreword* to JON BRUSCHKE & WILLIAM E. LOGES, FREE PRESS VS. FAIR TRIALS: EXAMINING PUBLICITY'S ROLE IN TRIAL OUTCOMES, at vii, viii–ix (2004).

15. Brendan Sullivan of the law firm Williams & Connolly LLP explained his view in unambiguous terms: "Never deal with the press, ever, never. It's an absolute rule . . . . I know law, I know juries and I know judges. That's where my world is." Jonathan M. Moses, Note, *Legal Spin Control: Ethics and Advocacy in the Court of Public Opinion*, 95 COLUM. L. REV. 1811, 1856 & n.243 (1995).

presented here.[16] Instead, this Note addresses the standards by which courts measure trial participant speech, satisfied that the Constitution may protect more speech than a lawyer's social and professional circles would condone.

I. HISTORY AND RELATED FREE PRESS / FAIR TRIAL CASES

Although modern communications technology may give the press wide reach, the Supreme Court has called the free press / fair trial debate "almost as old as the Republic."[17] In fact, it is older than the Republic: the founders, wrote the Court, "were intimately familiar with the clash of the adversary system and the part that passions of the populace sometimes play in influencing potential jurors."[18] When British soldiers fired into a Boston crowd in 1770, their actions were met with revulsion. Paul Revere and Samuel Adams published images of the Boston Massacre, a "slaughter of the innocent, an image of British tyranny."[19] The soldiers' appointed attorney, John Adams, feared for his own life and that of his family against the "prejudices" of the people.[20] Despite the public outcry—and following a continuance to allow some cooling off—the trial took place locally in Boston; and the jury found the captain and most of his men not guilty.[21] A seminal event, the trial served as a "showcase [of] both community rights *and* defendant rights."[22]

Post-Revolution trials raised similar concerns. Nearly everyone held opinions leading up to the 1807 treason trial of Aaron Burr.[23] Chief Justice Marshall, presiding over the hearings, resorted to extensive voir dire before he was able to seat an impartial jury.[24] Early

16. *See generally* Beth A. Wilkinson & Steven H. Schulman, *When Talk Is Not Cheap: Communications with the Media, the Government, and Other Parties in High Profile White Collar Criminal Cases*, 39 AM. CRIM. L. REV. 203, 203 (2002) ("This article explores the risks and benefits of addressing the media . . . . [T]alking may serve your client's interest, but must be done carefully, paying attention to the potential pitfalls . . . .").

17. Neb. Press Ass'n v. Stuart, 427 U.S. 539, 547 (1976).

18. *Id.*

19. DAVID MCCULLOUGH, JOHN ADAMS 66 (2001).

20. *Id.*

21. *Id.* at 67–68.

22. AKHIL REED AMAR, AMERICA'S CONSTITUTION 237 (2005).

23. *See Neb. Press Ass'n*, 427 U.S. at 548 ("Few people in the area of Virginia from which jurors were drawn had not formed some opinions on the case, from newspaper accounts and heightened discussion both private and public." (citing United States v. Burr, 25 F. Cas. 30, 49 (C.C.D. Va. 1807) (No. 14,692g))).

24. *Id.*

in the twentieth century, newspapers and radio stations previewed the trial of Bruno Hauptmann for the kidnapping of the Lindbergh baby,[25] and the *Scopes* trial drew the attention of the nation.[26] This Part presents four Supreme Court cases that are part and parcel of the debate about freedom of speech and fairness of trials. These cases help stake out the boundaries of the debate over restrictions of trial participant speech.

A. Contempt of Court and Bridges v. California[27]

In 1941, the Supreme Court decided *Bridges v. California*. The petitioner was an officer of a prominent union, convicted of contempt when several California newspapers published a telegram he wrote concerning ongoing judicial proceedings.[28] Claiming a need to preserve the fairness of the adjudicatory process, the state court based its contempt conviction on inherent judicial power.[29] The Supreme Court, considering the extent of this power, "measur[ed] a power of all American courts, both state and federal" to limit speech by punishing its utterances.[30] Compared with the First Amendment, the Court found this inherent judicial power wanting and reversed the lower court's conviction.[31]

Contempt was "based on a common law concept of the most general and undefined nature," wrote the Court.[32] An act of a single judge, this means of punishment did "not come to [the Court] encased in the armor wrought by prior legislative deliberation."[33] Moreover, American constitutional history demanded caution before imposing speech restrictions.[34] Although English courts might have had the power to punish extrajudicial speech for contempt, the interposition of the First Amendment altered the judiciary's powers, precluding such punishment in the United States: "[T]he unqualified prohibitions laid down by the framers were intended to give to liberty of the

25. *Id.* at 548–49.

26. *See generally* EDWARD LARSON, SUMMER FOR THE GODS (1997) (discussing the controversy sparked by the *Scopes* trial).

27. Bridges v. California, 314 U.S. 252, 274 (1941).

28. *Id.* at 276.

29. *Id.* at 259.

30. *Id.* at 260.

31. *Id.* at 278.

32. *Id.* at 260 (quoting Cantwell v. Connecticut, 310 U.S. 296, 307–08 (1940)).

33. *Id.* at 261.

34. *Id.* at 263–68.

press . . . the broadest scope that could be countenanced in an orderly society."[35] The Supreme Court demanded that a trial court articulate a clear and present danger of prejudice before exercising the contempt power to punish extrajudicial speech.[36]

The *Bridges* reasoning would seem to require a clear and present danger of prejudice before trial courts can impose any order restricting trial participant speech. In the decades following the decision, however, this view has not been categorically endorsed.

B. Sheppard v. Maxwell[37] *and the Fair Trial Movement of the 1960s*

In 1966, the Supreme Court overturned the conviction of Dr. Sam Sheppard for lack of a fair trial.[38] Allegations that Dr. Sheppard murdered his pregnant wife sparked a firestorm of publicity, almost all harmful to the defendant.[39] Newspapers suggested that the accused was not cooperating even though he had made himself available for "extended questioning."[40] Reports implicated Dr. Sheppard for failing to submit to a lie detector test and take a "truth serum."[41] Prosecutors and police leaked stories to the press, including information about evidence that was inadmissible at trial.[42] In response to the demands of editorial boards, a county official held a "three-day inquest" in a packed high school gymnasium.[43] There, government officials questioned Dr. Sheppard for more than five hours even after his attorney had been "forcibly ejected from the room."[44]

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35. *Id.* at 265. The Court cited popular outrage against early American uses of contempt to punish speech. Included in their examples was the case of Judge Peck, *id.* at 266–67, who in 1826 sent an attorney to prison for a day and stripped him of his law license for eighteen months after the attorney published a criticism of Judge Peck's opinion in a newspaper, Walter Nelles & Carol Weiss King, *Contempt By Publication in the United States*, 28 COLUM. L. REV. 401, 428–29 (1928). Four years later, the House of Representatives voted 123–49 to present articles of impeachment against Judge Peck. *Id.* at 429. Although the Senate acquitted Peck by the close margin of 22–21, the impeachment served as a warning against judicial overreaching, and the acquittal prompted an immediate legislative response: within two weeks, Congress passed and the president signed a bill restricting federal judges' power to punish by contempt. *Id.* at 430.

36. *Bridges*, 314 U.S. at 263.

37. Sheppard v. Maxwell, 384 U.S. 333 (1966).

38. *Id.* at 356.

39. *Id.* at 335–42.

40. *Id.* at 338.

41. *Id.* at 339.

42. *Id.* at 360–61.

43. *Id.* at 354.

44. *Id.* at 340.

The trial judge refused to grant a continuance,[45] and the media circus invaded the courtroom, where the judge created space for news reporters within the bar.[46] So many reporters attended and were allowed so close to the defense table that counsel could not confer with the defendant confidentially.[47] During voir dire, the judge failed to ask potential jurors about their exposure to publicity, and he failed to demand that they avoid it.[48] Despite the utter mismanagement of the case, the trial judge refused to grant a new trial.[49]

In the face of this kind of "carnival atmosphere,"[50] the Supreme Court demanded that trial judges rein in their courtrooms:

> Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused.[51]

The opinion set forth several actions a judge might take when presented with a reasonable likelihood of prejudicial publicity. These options included a continuance, forceful jury instructions, a change of venue, and jury sequestration.[52] The Supreme Court lamented the trial judge's failure to conduct probative voir dire and to ask jurors about their exposure to publicity during trial.[53] Finally, the Court addressed the extrajudicial statements of police, witnesses, parties, and counsel: "[C]ollaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures."[54] The statement has a questionable status as operative law,

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45. *Id.* at 346.

46. *Id.* at 343.

47. *Id.* at 344.

48. *Id.* at 353.

49. *See id.* at 349 ("[The] defense counsel urged that [the failure to sequester the jury] alone warranted a new trial, but the motion was overruled and no evidence was taken on the question.").

50. *Id.* at 358.

51. *Id.* at 362.

52. *See id.* at 363 ("The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interference.").

53. *Id.* at 357.

54. *Id.* at 363.

and has engendered disagreement both within the Court and the bar.[55]

C. Nebraska Press Ass'n v. Stuart[56] *and the Acceptance of a Free Press*

Ten years after its *Sheppard* decision, the Supreme Court established an enduring standard for regulating the press. A small-town murder received considerable publicity, and the judge enjoined the news media from publishing or broadcasting information relating to either confessions or facts that might implicate the defendant. The state courts upheld the gag order, considering it an appropriate response to a clear and present danger of prejudicial publicity.[57] In *Nebraska Press Ass'n v. Stuart*, the Supreme Court agreed that the state court had adopted the appropriate legal standard—the clear and present danger standard—but it nonetheless reversed. Although extensive and almost sure to reach nearly every member of the small community, the publicity in the case, according to the Court, did not meet that standard.[58]

The *Nebraska Press* Court expressed deep misgivings about the use of prior restraints. By placing restrictions on the newspapers before their publication, the trial court imposed "an immediate and irreversible sanction."[59] This kind of restraint, wrote the Court, is "the most serious and the least tolerable infringement on First

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55. *Compare, e.g.*, Gentile v. State Bar of Nev., 501 U.S. 1030, 1074 (1991) (majority opinion of Rehnquist, C.J.) ("[T]he quoted statements from . . . *Sheppard v. Maxwell*[] rather plainly indicate that the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press . . . ." (citation omitted)), *with id.* at 1054 (opinion of Kennedy, J.) (characterizing the statements concerning the regulation of attorney speech in *Sheppard* as "obiter dicta" and grounding *Sheppard* on "police and prosecutorial irresponsibility and the trial court's failure to control the proceedings and the courthouse environment").

The ABA's 1968 report, *Fair Trial and Free Press*, adopted prohibitions on extrajudicial attorney speech presenting a "reasonable likelihood" of trial prejudice. ADVISORY COMM. ON FAIR TRIAL & FREE PRESS, ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS 80–95 (1968). As a constitutional matter, the ABA justified these standards based on the Supreme Court's opinion in *Sheppard v. Maxwell*. *Id.* at 93. Later, however, the standards were revised. MODEL RULES OF PROF'L CONDUCT R. 3.6 notes at 144–45 (Proposed Final Draft 1981) (finding that courts should not be able to restrict extrajudicial speech based on a mere reasonable likelihood of prejudice).

56. Neb. Press Ass'n v. Stuart, 427 U.S. 539 (1976).

57. *Id.* at 545.

58. *Id.* at 569–70.

59. *Id.* at 559.

Amendment rights."[60] Because these restraints are so antithetical to the First Amendment, the Court demanded that "[a]ny prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity."[61] Moreover, the *Nebraska Press* Court imposed an exacting standard, a "near absolutism" against court-ordered restrictions on the press.[62] Before enjoining publication or broadcast, the opinion directed trial courts to consider three factors: (1) the "nature and extent of pretrial [publicity]"; (2) whether other measures—such as jury instructions, a continuation, or voir dire—could mitigate the effects of the publicity; and (3) whether the restraining order itself would be effective.[63] But the expression of these factors does not fully capture the level of scrutiny the Court demanded. For a court to enjoin the news media, reports must be so pervasive and so prejudicial that "[twelve jurors] could not be found who would, under proper instructions, fulfill their sworn duty to render a just verdict exclusively on the evidence presented in open court."[64] The *Nebraska Press* standard has proved lasting, and it helped justify greater media access to court proceedings in subsequent years.[65]

Nebraska Press did not directly address the speech interests of attorneys and trial participants;[66] the Court's opinion expressly declined to confront the issue.[67] Other courts of the same era did consider prohibitions directed at trial participant speech. For example, in *Chicago Council of Lawyers v. Bauer*,[68] the Court of

60. *Id.* at 549.

61. *Id.* at 558 (quoting Org. for a Better Austin v. Keefe, 402 U.S. 415, 418–20 (1971)).

62. RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 246 (1992).

63. *Neb. Press Ass'n*, 427 U.S. at 562.

64. *Id.* at 569.

65. *See* Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 7 (1986) (extending public and press rights of access to preliminary hearings and the transcripts of those hearings); Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 513 (1984) (requiring open, public court proceedings during voir dire); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575 (1980) (plurality opinion) (opening criminal trials to the media).

66. Justice Brennan's concurring opinion referred to *Sheppard*, contemplating the possibility of such restrictions. His opinion, however, did not address the standard by which such restrictions might be imposed. *Neb. Press Ass'n*, 427 U.S. at 601 & n.27 (Brennan, J., concurring).

67. *Id.* at 564 & n.8 (majority opinion) ("At oral argument petitioners' counsel asserted that judicially imposed restraints on lawyers and others would be subject to challenge as interfering with press rights to news sources. We are not now confronted with such issues." (citations omitted)).

68. Chi. Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975).

Appeals for the Seventh Circuit considered an attorney "no-comment" rule, modeled on the American Bar Association's Disciplinary Rule 7-107.[69] The Seventh Circuit held that this rule, requiring only a reasonable likelihood of prejudice, did not sufficiently protect speech.[70] Heightened scrutiny was required before attorney speech could be so limited, and the court demanded a serious and imminent threat,[71] invoking the same level of scrutiny as clear and present danger.[72]

Acceptance of greater speech rights—both by the Supreme Court and the Seventh Circuit—prompted reconsiderations within the legal profession. The ABA's Task Force on Fair Trial and Free Press concluded in 1978 that the "reasonable likelihood test is too relaxed to provide full protection to the first amendment interests of attorneys."[73] Adopting the same serious and imminent threat standard required in *Chicago Council of Lawyers v. Bauer*,[74] the ABA Task Force valued speech about legal proceedings highly, calling it "pure speech."[75]

Despite the Task Force's unequivocal language, the review did not clarify the ABA's approach. Because the ABA maintained multiple guidelines through the 1970s, the Task Force's review created a confusing divergence in the ABA's ethical precepts: As revised after *Nebraska Press* and *Bauer*, Standard 8-1.1 required a

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69. *Id.* at 274.

70. *Id.* at 247–50. The *Bauer* court did not classify the restrictions as prior restraints. It noted, though, that the rules had "some of the inherent features of 'prior restraints'" including punishment by contempt. *Id.* at 249. They were thus deserving of greater scrutiny. *Id.* at 248–49. A more detailed discussion of the difficulty with labeling trial participant speech restrictions as prior restraints is included *infra* Part II.A.

71. *Bauer*, 522 F.2d at 249.

72. *See* Gentile v. State Bar of Nev., 501 U.S. 1030, 1068 & n.3 (1991) (majority opinion of Rehnquist, C.J.) (considering the serious and imminent threat standard equivalent to the clear and present danger standard); STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE Standard 8-1.1 cmt. at 3 (Tentative Draft 2d ed. 1978) ("As a first amendment formulation . . . the serious and imminent threat standard is substantively indistinguishable from clear and present danger[.]").

73. STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE Standard 8-1.1 cmt. at 3 (Tentative Draft 2d ed. 1978).

74. *See id.* at 4 ("[T]he serious and imminent threat terminology was and is a part of the judicial gloss on the clear and present danger test and is not distinct from it. In view of the apparent choice between equivalents, the clear and present danger language has been retained in this standard.").

75. *Id.* at 2 (citing Neb. Press Ass'n v. Stuart, 427 U.S. 539, 586–87 (1976) (Brennan, J., concurring)).

clear and present danger of prejudice before the curtailment of attorney speech. Meanwhile, the older, reasonable likelihood standard of Disciplinary Rule 7-107—which *Bauer* ruled unconstitutional within the Seventh Circuit—remained effective in many jurisdictions. These standards existed alongside one another until the release of the ABA's Model Rules of Professional Responsibility in the early 1980s.

D. A New Formulation and Gentile v. State Bar of Nevada[76]

In the early 1980s, the American Bar Association completed a reorganization of its Model Codes, incorporating the various disciplinary rules, standards, and ethical considerations into a single guide, the Model Rules of Professional Conduct.[77] The Model Rules addressed trial publicity in Rule 3.6, prohibiting speech that an attorney "knows or reasonably should know will have a *substantial likelihood* of materially prejudicing an adjudicative proceeding."[78] Within a decade, this language had been adopted by thirty-two states,[79] and it was the standard under which the State Bar of Nevada sanctioned Dominic Gentile.[80]

On the day of his client's indictment, after weeks of negative publicity, Mr. Gentile held a press conference.[81] He proclaimed his client's innocence, and he accused the Las Vegas Metropolitan Police Department of corruption—committing the crimes at issue and covering its trail by wrongly accusing an innocent man.[82] Mr. Gentile spoke out months before a jury would be chosen, and he selected his words carefully, acting with "considerable deliberation."[83] Before speaking, he reviewed the Nevada trial publicity rule, which was based on Model Rule 3.6,[84] and at the press conference, he declined to answer questions when he believed his responses might be prejudicial.[85] He did not discuss evidence, confessions, or the results

76. Gentile v. State Bar of Nev., 501 U.S. 1030 (1991).
77. MODEL RULES OF PROF'L CONDUCT chairman's intro. (Final Draft 1981).
78. MODEL RULES OF PROF'L CONDUCT R. 3.6 (Final Draft 1981) (emphasis added).
79. *Gentile*, 501 U.S. at 1068 (majority opinion of Rehnquist, C.J.).
80. *Id.* at 1033 (opinion of Kennedy, J.).
81. *Id.* at 1033, 1039–41, 1045.
82. *Id.* at 1045, 1059–60 app. A.
83. *Id.* at 1042, 1044.
84. *Id.* at 1076 (Rehnquist, C.J., dissenting).
85. *Id.* at 1044–47 (opinion of Kennedy, J.).

of polygraph tests, even though the prosecution had already discussed polygraph results publicly.[86] Rather, Gentile limited his comments to the broad strokes of the defense: his client was not guilty because he was not the perpetrator; the perpetrator was Detective Steve Scholl of the Las Vegas Police Department.[87] These allegations held up in court. Not only was Gentile's client acquitted but jurors later said that they would have convicted Detective Scholl had his name been on the verdict form before them.[88] Nonetheless, the State Bar of Nevada disciplined Gentile for his speech.[89]

On review, the Supreme Court issued a fractured set of opinions. Justice Kennedy's opinion disposed of the case, striking down Nevada's publicity rule as void for vagueness and accordingly setting aside the state bar's disciplinary measures.[90] Nonetheless, Chief Justice Rehnquist garnered a slim, five-Justice majority upholding the substantial likelihood standard.[91] Justice Rehnquist emphasized that attorneys are especially authoritative, and hence prejudicial, sources. As officers of the court, attorneys bear a special responsibility to limit the costs that extrajudicial speech imposes on court proceedings. "Lawyers representing clients in pending cases are key participants in the criminal justice system, and the State may demand some adherence to the precepts of that system in regulating their speech as well as their conduct."[92] *Gentile* permits state bar associations to regulate extrajudicial attorney speech based on a standard less protective than clear and present danger.[93] Neither Justice Kennedy's opinion nor Chief Justice Rehnquist's opinion addressed the standards to measure similar restrictions imposed by courts.

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86. *Id.* at 1046.

87. *Id.* at 1041–48.

88. *Id.* at 1047–48.

89. *Id.* at 1033.

90. *Id.* at 1048–51 (majority opinion of Kennedy, J.). On the void-for-vagueness issue, Justice Kennedy was joined by Justices Marshall, Blackmun, Stevens, and O'Connor. *Id.* at 1032, 1048–51.

91. *Id.* at 1068–76 (majority opinion of Rehnquist, C.J.). With Chief Justice Rehnquist on this question were Justices White, Scalia, Souter, and O'Connor. *Id.* at 1032, 1068–76.

92. *Id.* at 1074.

93. *See id.* ("[T]he speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press . . . ." (citation omitted)).

Bridges v. California presents a straightforward way to consider court restrictions on attorneys. It suggests that courts cannot use contempt to punish trial participant speech absent a clear and present danger of prejudice. As reiterated in a similar context in *Nebraska Press*, this is a high standard indeed, a "near absolut[e]"[94] ban on such orders. As this Part explained, however, the Supreme Court may have abandoned this approach without ever overruling it, and, as the next Part illustrates, lower courts have demonstrated a willingness to follow *Sheppard v. Maxwell* and *Gentile v. State Bar of Nevada*. *Sheppard* and *Gentile* present two other approaches to evaluate the relationship between First Amendment rights and fair trial rights. If applied to trial participant speech restrictions,[95] the disputed language in *Sheppard* would invite courts to limit trial participants' speech on the basis of a reasonable likelihood of prejudice. The substantial likelihood standard approved in *Gentile* would seem to establish intermediate scrutiny, splitting the difference between the strict scrutiny of clear and present danger and the deference to the judgment of trial courts embodied in the reasonable likelihood standard. Neither *Sheppard* nor *Gentile*, however, are directly on point. *Sheppard*'s application to speech restrictions is disputed,[96] and *Gentile* considered an after-the-fact punishment imposed by a state bar association rather than a prospective, court-ordered restriction on speech.

II. COURT-ORDERED SPEECH RESTRICTIONS: METHODS AND STANDARDS OF REVIEW

Although none of the Supreme Court cases discussed in Part I directly addressed court-ordered restrictions on extrajudicial speech, several lower court cases have considered the issue. This Part discusses the different standards applied by lower courts. Section A presents a typology of methods courts have used to restrain trial

94. SMOLLA, *supra* note 62, at 246.

95. Lower courts have noted the inapplicability of *Gentile* to court-ordered restrictions on speech. *E.g.*, United States v. Brown, 218 F.3d 415, 426 (5th Cir. 2000) ("[N]either the Supreme Court nor this Court has articulated a standard to apply when evaluating gag orders directed at attorney or non-attorney trial participants."); United States v. Carmichael, 326 F. Supp. 2d 1267, 1293 (M.D. Ala. 2004) ("*Gentile* did not consider a 'gag order' at all."); *see also In re* Morrissey, 168 F.3d 134, 139 (4th Cir. 1999) ("It cannot be said . . . that *Gentile* stands for the proposition that the 'substantially likely' standard is the only constitutionally permissible standard for restrictions on lawyer speech under the First Amendment.").

96. *See supra* note 55 and accompanying text.

participant speech. Section B demonstrates the discord in the standards courts use to evaluate these restrictions, noting divergences in both the standards themselves and the principles supporting the standards, both between circuits and within circuits. Section C underscores this uncertainty by discussing the confusion that several courts have expressed about the meaning of the substantial likelihood standard. Given the various methods courts can use to restrict speech, the uncertainty about the standards courts will apply to review those restrictions, and the confusion about the meaning of the standards, the jurisprudence provides courts and trial participants little, if any, guidance.

A. Five Types of Court-Ordered Restrictions on Speech

Judges can limit and restrict extrajudicial speech in at least five different ways. First, courts can issue an outright ban on speech related to the trial, enjoining participants from making any communications with the public about the case. Violation of the order is enforced through contempt, and the order bars all communication related to the pending proceedings. One example is the order barring the speech of Gloria Allred, an attorney for a witness in a high-profile criminal case, *People v. Dyleski*.[97] The California Superior Court ordered trial participants to "refrain from discussing this case, the evidence expected to be used in the case, or the issues in the case, the merits of the case, or trial tactics or strategy, with the media or in an otherwise public fashion."[98] The order contained no exceptions or limitations, banning all speech related to the case in any way.[99]

A second kind of court-ordered restriction functions in the same way, but its scope is expressly qualified. This type of injunction incorporates one of the standards used in contemporary or past versions of the ABA's Model Rules and Codes—reasonable likelihood, substantial likelihood, or clear and present danger.[100] This was the type of qualification included in the gag order issued in the Kobe Bryant rape case. The order banned speech the participant

97. People v. Dyleski, No. 3-219113-8 (Cal. Super. Ct. Oct. 27, 2005) (protective order), *aff'd sub nom.* Allred v. Superior Court, 2006 Cal. LEXIS 3495 (Mar. 15, 2006), *cert. denied*, 127 S. Ct. 80 (2006).

98. *Id.*

99. *Id.*

100. At least one such order adopted in full the local ethics rule governing trial publicity. Constand v. Cosby, 229 F.R.D. 472, 477–78 (E.D. Pa. 2005).

"knows or reasonably should know . . . will have a substantial likelihood of materially prejudicing an adjudicative proceeding in th[is] matter."[101] This second type of order is distinct from the first because, on its face, it is more narrowly tailored. It does not preclude all speech about the trial, but only speech sufficiently likely to prejudice the proceedings. The inclusion of this "likelihood standard" allows trial participants to gamble, risking punishment if the judge considers their speech more prejudicial than it was intended. In practice, though, this kind of order may be just as restrictive as a complete ban, precisely because the "likelihood standard" does not specifically define speech that is acceptable and speech that is not acceptable. Because of the collateral bar rule,[102] would-be speakers may avoid violating the order by not speaking at all.

The third and fourth methods rely on local rules of the court. Similar to bar association ethics rules, these court rules typically proscribe certain types of trial participant speech, often tracking the language of the ethics rules.[103] These court rules may incorporate one

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101. People v. Bryant, No. 03 CR 204, at 2 (Colo. Eagle County Ct. July 24, 2003) (order governing pretrial publicity).

102. *See infra* Part III.A.

103. *See, e.g.*, M.D.N.C. LOCAL CR. R. 57.2. These North Carolina rules prohibit statements concerning six categories of speech:

1. The character, reputation, or prior criminal record (including arrests, indictments, or other charges of crime) of the accused.
2. The possibility of a plea of guilty to the offense charged or to a lesser offense.
3. The existence or contents of any confession, admission, or statement given by the accused or his refusal or failure to make a statement.
4. The performance or results of any examinations or tests or the refusal or failure of the accused to submit to examinations or tests.
5. The identity, testimony, or credibility of a prospective witness.
6. Any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case.

M.D.N.C. LOCAL CR. R. 57.2(a)(2). This Rule also contains safe harbors, permitting speech about the identity of the victim and the accused, warnings to protect the public from danger, requests for assistance in obtaining evidence, the nature of the charge and denials of the charge, and scheduling information. M.D.N.C. LOCAL CR. R. 57.2(a)(3). This particular court rule, however, does not contain a safe harbor included in the Model Rules of Professional Conduct—the right to respond to a previous prejudicial dissemination against a client made by someone else. *Id.*; MODEL RULES OF PROF'L CONDUCT R. 3.6(c) (2007) ("[A] lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer's client."). As mentioned in Part I.D, the publicity rules at issue in *Gentile* were held unconstitutional as void for vagueness. This infirmity stemmed from an unclear relationship between one of the safe harbor provisions and the rest of the rule.

of the likelihood standards, or they may not.[104] The existence of court rules underlies two distinct methods of speech limitation. The existence of the rules themselves is one method. The other method of rule-based restriction arises when the judge puts the parties on notice. In some cases, a judge will issue an opinion reminding the parties of the rules.[105] By alerting them to the court rules, the judge turns regulations of a general nature into personal commandments and indicates a willingness to enforce them. Some judges express frustration with this suggestion—believing that the judge's reiteration of preexisting rules is legally irrelevant because trial participants are already on notice.[106] Others, however, argue that personal notice is one of the most chilling characteristics of prior restraints.[107] Personalized speech restrictions induce self-censorship by alerting those warned to the possibility of sanction and by increasing the likelihood the rules will be enforced.[108]

A fifth type of restriction involves no notice to the parties of any kind. This method allows a court to prosecute extrajudicial statements for contempt based only on the inherent powers of the court. Unlike a gag order or punishment by court rules, this judicial action bears no characteristics of prior restraint.[109] The speech of parties is not controlled in advance; the parties are not warned in advance. This kind of restriction, however, is not the central focus of this Note; it is a retrospective punishment, and *Bridges v. California* largely

104. *Compare* N.D. ILL. LOCAL R. 83.53.6 (barring extrajudicial statements presenting a serious and imminent threat of prejudicing the proceedings), *and* S.D.N.Y. LOCAL CR. R. 23.1 (using the substantial likelihood standard), *and* E.D. PA. LOCAL CR. R. 53.1(a)(1) (adopting the reasonable likelihood standard), *with* M.D.N.C. LOCAL CR. R. 57.2(a) (adopting no particular standard and instead only barring speech on specified subjects—such as character of a witness, the possibility of a plea, a request for assistance in obtaining evidence, and others).

105. *E.g.*, United States v. Grace, 401 F. Supp. 2d 1057, 1064–65 (D. Mont. 2005) (noting that the parties are "aware of the rules and of this Court's expectation that they be followed"); Rossbach v. Rundle, 128 F. Supp. 2d 1348, 1355 (S.D. Fla. 2000) (refusing to issue a "gag order" but noting that "[t]he United States is aware of the [local] rules and this court's expectation that they be followed").

106. *See, e.g.*, *Grace*, 401 F. Supp. 2d at 1064–65 (refusing to "micromanage the progression of th[e] case" and rejecting the necessity of filing "a motion seeking nothing more than the Court's affirmation of rules and orders already in effect").

107. *See* Vincent Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11, 35–43 (1981) (cautioning that considerable self-censorship occurs in the wake of personal injunctions or permit denials).

108. *Id.* at 37 ("[E]ven speakers who would have been informed in any event about the pertinent laws restricting speech might be more preoccupied by the threat of sanctions after receiving the [implicit] rebuke . . . .").

109. *See supra* notes 59–61 and accompanying text.

forecloses this use of the contempt power.[110] For a court to constitutionally assert inherent power to punish extrajudicial statements, it must meet strict scrutiny—acting only to avert clear and present danger.[111]

B. Extreme Divergences in the Lower Courts

The lower courts have divided over which constitutional standard to use when considering prospective, court-ordered restrictions on trial participant speech. The Second, Fourth, and Tenth Circuits have required only a reasonable likelihood of prejudice before allowing courts to regulate trial participant speech.[112] The Third and Fifth Circuits have approved regulations upon a substantial likelihood of prejudice,[113] and the Sixth, Seventh, and Ninth Circuits proscribe judicial action absent a clear and present danger of material prejudice or, equivalently, a serious and imminent threat of material prejudice.[114] State courts interpreting federal law have also diverged on the applicable standard.[115] The articulation of this split of authority, though, gives only a partial picture. In reality the divergences run deeper.

District courts in some circuits that have not yet spoken to the issue have used all three approaches. For instance, district courts in

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110. For a discussion of *Bridges*, see *supra* Part I.A. The case rejected "the contention that the criteria applicable under the [First Amendment of the] Constitution to other types of utterances are not applicable, in contempt proceedings, to out-of-court publications pertaining to a pending case." Bridges v. California, 314 U.S. 252, 263–68 (1941).

111. *See Bridges*, 314 U.S. at 263 (concluding that "the 'clear and present danger' cases [establish] a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished" and that the "First Amendment . . . must be taken as a command of the broadest scope").

112. *In re* Morrissey, 168 F.3d 134, 139–40 (4th Cir. 1999); *In re* Application of Dow Jones & Co., 842 F.2d 603, 610 (2d Cir. 1988); United States v. Tijerina, 412 F.2d 661, 666 (10th Cir. 1969).

113. United States v. Scarfo, 263 F.3d 80, 93 (3d Cir. 2001); United States v. Brown, 218 F.3d 415, 428 (5th Cir. 2000).

114. United States v. Ford, 830 F.2d 596, 600 (6th Cir. 1987); Levine v. U.S. Dist. Court for the Cent. Dist. of Cal., 764 F.2d 590, 595 (9th Cir. 1985); Chi. Council of Lawyers v. Bauer, 522 F.2d 242, 249 (7th Cir. 1975). The equivalence of these two standards is described *supra* notes 72, 74 and accompanying text.

115. *Compare* Kemner v. Monsanto Co., 492 N.E.2d 1327, 1336–37 (Ill. 1986) (requiring clear and present danger), *and* Twohig v. Blackmer, 918 P.2d 332, 335 (N.M. 1996) (same), *with* State v. Bassett, 911 P.2d 385, 387 (Wash. 1996) (per curiam) (applying the reasonable likelihood standard).

the Eleventh Circuit have decided cases under each standard.[116] Even when a court of appeals has decided a question about trial participant speech, subsequent decisions from other courts within that circuit sometimes follow the appellate court's lead and other times eschew its approach. For example, a deviation occurred in the Third Circuit when the District Court for the Western District of Pennsylvania looked to Fourth Circuit law rather than a more recently decided Third Circuit case.[117] Likewise, the Second Circuit has considered two different standards within two years of each other,[118] and a subsequent case in the Southern District of New York seems to apply the third.[119] Just as *Gentile* decided the permissibility of the substantial likelihood standard without mandating it or reaching the constitutionality of the other standards, the Fifth Circuit has approved the substantial likelihood standard for trial participant gag orders without approving

116. *Compare* United States v. Carmichael, 326 F. Supp. 2d 1267, 1293–94 (M.D. Ala. 2004) (adopting clear and present danger), *with* United States v. Scrushy, No. CR-03-BE-0530-S, 2004 U.S. Dist. LEXIS 6711, at *12 (N.D. Ala. Apr. 13, 2004) (substantial likelihood), *and* United States v. Hill, 893 F. Supp. 1039, 1041 (N.D. Fla. 1994) (declining to adopt a single standard, but approving a gag order under all three standards).

117. United States v. Wecht, No. 06-0026, 2006 U.S. Dist LEXIS 37612, at *17 (W.D. Pa. June 8, 2006) ("[u]sing the analysis set forth by the Fourth Circuit" in a 1999 opinion, *Morrissey*, 168 F.3d at 138–40, rather than the standard approved by the Third Circuit in *Scarfo*, 263 F.3d at 93). Subsequently, the Third Circuit considered *Wecht* on appeal, and required at least a substantial likelihood of prejudice before imposing a penalty. United States v. Wecht, 484 F.3d 194, 205 (3d Cir. 2007). The court intended to eliminate the multiplicity of standards within the Third Circuit. *Id.* at 206.

118. *Compare* United States v. Salameh, 992 F.2d 445, 447 (2d Cir. 1993) (per curiam) (substantial likelihood), *with* United States v. Cutler, 58 F.3d 825, 835 (2d Cir. 1995) (reasonable likelihood). Arguably, neither of these cases applied any standard relevant to this Note. In *Salameh*, the Second Circuit discussed the substantial likelihood standard but disposed of the case on alternate grounds, deciding that the trial court's order was not narrowly tailored—that the trial court should have considered alternatives to a "blanket prohibition." *Salameh*, 992 F.2d at 447. In *Cutler*, the Second Circuit dismissed the attorney's constitutional claim due to the collateral bar rule. *Cutler*, 58 F.3d 825, 832–33; *see also Wecht*, 484 F.3d at 204 n.8 (noting that the Second Circuit disposed of *Cutler* "[a]t the outset of its discussion," based on the collateral bar rule). Nonetheless, both *Salameh* and *Cutler* articulated different standards, with the *Salameh* court looking to the substantial likelihood standard and the *Cutler* court looking to the reasonable likelihood standard. The divergence at least suggests some confusion about the law or, in *Salameh*, possibly a willingness to deviate from the reasonable likelihood standard articulated in *In re Application of Dow Jones & Co.*, 842 F.2d 603 (2d Cir. 1988).

119. *See* United States v. Gotti, No. 04 Cr. 690 (SAS), 2004 U.S. Dist. LEXIS 24192, at *12–14 (S.D.N.Y. Dec. 3, 2004) (denying a request for a gag order and noting that "a court may abridge a witness's First Amendment rights only when absolutely necessary to ensure the accused's right to a fair trial").

or disapproving the reasonable likelihood standard.[120] One district court, the District Court for the District of Kansas, used two different standards in two different cases.[121] One of these standards followed the approach approved by the Tenth Circuit; the other did not.[122]

The justifications for these distinctions are equally dizzying. Citing the "officer of the court" rationale,[123] some courts differentiate between lawyers and parties, applying greater First Amendment scrutiny when a party contests the order than when a nonparty contests the order.[124] Other courts do not recognize this distinction.[125] Some courts require greater scrutiny before limiting speech of witnesses; other courts treat witnesses, parties, and attorneys the same.[126] Some courts apply greater scrutiny when a trial participant contests the restrictions and less scrutiny when the media contests the restrictions. As with the other divergences, this distinction has not been universally recognized.[127]

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120. United States v. Brown, 218 F.3d 415, 427 (5th Cir. 2000) ("We do not address whether a trial court may impose a . . . gag order based on a 'reasonable likelihood' of prejudice.").

121. *Compare* United States v. Walker, 890 F. Supp. 954, 957 (D. Kan. 1995), *aff'd*, 1996 U.S. App. LEXIS 8684 (10th Cir. Apr. 18, 1996) (substantial likelihood), *with* United States v. Pickard, No. 00-40104-01/02-RDR, 2002 U.S. Dist. LEXIS 21712, at *5 (D. Kan. Aug. 15, 2002) (reasonable likelihood).

122. In *United States v. Tijerina*, 412 F.2d 661, 666 (10th Cir. 1969), the Tenth Circuit adopted the reasonable likelihood standard.

123. Justice Rehnquist used the officer of the court rationale in the *Gentile* opinion to justify a lesser standard of scrutiny for bar association punishment of attorney speech. *See supra* note 92 and accompanying text.

124. *See* United States v. Carmichael, 326 F. Supp. 2d 1267, 1294 (M.D. Ala. 2004) ("This case is also different from most of the 'gag order' cases because the restraint would apply to Carmichael himself and not to his attorneys. Thus, the Supreme Court's conclusion in *Gentile* that attorneys are subject to greater restrictions on their speech is inapposite.").

125. *E.g.*, *Brown*, 218 F.3d at 427–28 ("[T]he interests of the lawyers and the parties in 'trying the case in the media' were (and continue to be) the same.").

126. *Compare* United States v. Gotti, No. 04 Cr. 690 (SAS), 2004 U.S. Dist. LEXIS 24192, at *6, *11–12 (S.D.N.Y. Dec. 3, 2004) (drawing distinctions between speech restrictions applied to witnesses and those applied to other parties), *with* People v. Dyleski, No. 3-219113-8 (Cal. Super. Ct. Oct. 27, 2005) (protective order), *aff'd sub nom.* Allred v. Superior Court, 2006 Cal. LEXIS 3495 (Mar. 15, 2006), *cert. denied*, 127 S. Ct. 80 (2006) (imposing and upholding a gag order on parties and witnesses alike).

127. *Compare* CBS Inc. v. Young, 522 F.2d 234, 240 (6th Cir. 1975) ("Although the news media are not directly enjoined from discussing the case, it is apparent that significant and meaningful sources of information concerning the case are effectively removed from them and their representatives. To that extent their protected right to obtain information concerning the trial is curtailed and impaired."), *with In re* Application of Dow Jones & Co., 842 F.2d 603, 609 (2d Cir. 1988) ("[T]here is a fundamental difference between a gag order challenged by the individual gagged and one challenged by a third party . . . .").

With so many different fault lines in this jurisprudence, it would be tempting to say that during the sixteen years following *Gentile*, the judiciary developed a set of approaches to trial participant speech that resembles a patchwork quilt. This, however, would belie the extent of the discord by implying that the differences are fixed and discernable. Instead, they are unpredictable and in some jurisdictions, they change.[128] The result for litigants is a profound uncertainty about which standards will be used to judge their out-of-court speech.

C. Substantial Likelihood Confusion: A Doctrinal Infirmity?

Uncertainty is not limited to questions about which standard will apply but extends to the meaning of those standards. This Note has thus far considered three constitutional standards for regulating attorney speech: reasonable likelihood, which is most permissive of speech restrictions; clear and present danger, which is least permissive of speech restrictions; and the intermediate standard approved in *Gentile*, substantial likelihood of material prejudice. The discussion has suggested that these imply three different levels of scrutiny; and writing for a *Gentile* majority, Chief Justice Rehnquist explicitly contemplated three distinct levels of First Amendment scrutiny. He described the reasonable likelihood standard as "less protective of lawyer speech" than the substantial likelihood standard.[129] He described substantial likelihood, in turn, as a "less demanding standard" than clear and present danger.[130] In the years since *Gentile*, other courts have also recognized three distinct levels of scrutiny.[131]

The three phrases are rhetorically distinct, and they seem to imply three levels of scrutiny: some, more, most. Courts, however, have expressed difficulty in distinguishing "substantial likelihood" from both its semantic neighbors.[132] As a matter of definition, their confusion is well founded: dictionary definitions do not provide clear

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128. *See supra* notes 116–22 and accompanying text.

129. Gentile v. State Bar of Nev., 501 U.S. 1030, 1068 (1991) (majority opinion of Rehnquist, C.J.).

130. *Id.* at 1074.

131. *E.g.*, United States v. Carmichael, 326 F. Supp. 2d 1267, 1293 (M.D. Ala. 2004) ("A three-way circuit split exists with respect to . . . the threshold standard for imposing a prior restraint."); *Cf.* Petition for Writ of Certiorari at 15, *Allred*, 127 S. Ct. 80 (No. 05-1505) ("[T]hree distinct, conflicting approaches have emerged Among [*sic*] the Federal Circuits.").

132. *Gentile*, 501 U.S. at 1036–37 (opinion of Kennedy, J.); United States v. Brown, 218 F.3d 415, 427 (5th Cir. 2000); United States v. Scrushy, No. CR-03-BE-0530-S, 2004 U.S. Dist. LEXIS 6711, at *12 (N.D. Ala. Apr. 13, 2004).

guidance. If "substantial" means "not illusive,"[133] it would seem to imply nontrivial and would approximate "reasonable." On the other hand, if "substantial" means "specified to a large degree or in the main,"[134] it would seem to suggest more than merely "reasonable" and be closer to "clear and present danger." Though the origins of the substantial likelihood standard suggest it is more akin to clear and present danger, since *Gentile*, courts have more often associated it with the reasonable likelihood standard.

1. *The Inception of "Substantial Likelihood."* In 1977 the American Bar Association initiated a "comprehensive" reconsideration of its ethical precepts.[135] Completed in 1981 by the Commission on Evaluation of Professional Standards, the revision included Model Rule 3.6, which governed trial publicity and included the "substantial likelihood" language.[136] The notes in the Proposed Final Draft are revealing. The Commission rejected the possibility that the substantial likelihood standard would resemble the reasonable likelihood standard.[137] When presented with a reasonable likelihood of prejudice, courts had other means to limit the damage of speech: voir dire, jury instructions, continuances, and others.[138]

The Commission sided with the holding of *Chicago Council of Lawyers v. Bauer* and with the late 1970s Task Force on Fair Trial and Free Press. Although it adopted the substantial likelihood language, it made clear that "[t]he formulation in this Rule incorporates a standard approximating clear and present danger."[139] The use of alternate language to approximate clear and present danger was not altogether unusual. Another formulation—a serious

133. WEBSTER'S THIRD NEW INT'L DICTIONARY 2280 (1993).

134. *Id.*

135. MODEL RULES OF PROF'L CONDUCT chairman's intro. at i (Proposed Final Draft 1981). *See supra* notes 77–79 and accompanying text.

136. MODEL RULES OF PROF'L CONDUCT R. 3.6(a) (Final Draft 1981). By the time *Gentile* was decided a decade later, thirty-two states had adopted the rule. *Gentile*, 501 U.S. at 1068.

137. *See* MODEL RULES OF PROF'L CONDUCT R. 3.6 cmt. at 144–45 (Proposed Final Draft 1981). The commentary notes that the reasonable likelihood standard is the proper "basis for limiting the *consequences* of anticipated speech" through measures that do not resrict speech, such as change of venue. *Id.* (emphasis added). The substantial likelihood standard is required, however, as "the basis for punishing speech." *Id.*

138. *See id.* (describing other possible "remedial measures" available when a court finds a reasonable likelihood of prejudice, including "continu[ing] the case until the threat abates . . . [or] transfer[ring] it to another county").

139. *Id.* at 144.

and imminent threat—was used contemporaneously, and is still used, to invoke clear and present danger.[140] Justice Kennedy noted much of this history in his opinion in *Gentile*.[141]

By upholding the substantial likelihood standard in *Gentile*, Justice Rehnquist's majority opinion approved a standard meant to "approximate" the speech protections of clear and present danger.[142] Yet in affirming its use, the Court approved what it considered a "less demanding standard,"[143] birthing a new level of scrutiny for attorney speech.[144]

2. *Post*-Gentile *Confusion.* In the years since *Gentile*, lower courts have imposed gag orders on attorneys and other trial participants based on the substantial likelihood standard. Though many courts conceive of this standard as a distinct form of intermediate scrutiny, others struggle to understand its independent meaning. Although the standard was originally conceived as "approximating" strict scrutiny,[145] these courts are easily divorcing substantial likelihood from clear and present danger.

The meaning of the term has changed, but it is not clear how much. Some courts express difficulty distinguishing substantial likelihood from the most deferential standard, reasonable likelihood. In *United States v. Brown*,[146] the Fifth Circuit wrote, "The difference

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140. *See supra* notes 71–72 and accompanying text.

141. *Gentile*, 501 U.S. at 1037 (opinion of Kennedy, J.).

142. MODEL RULES OF PROF'L CONDUCT R. 3.6(a) cmt. at 145 (Proposed Final Draft 1981); *see also Gentile*, 501 U.S. at 1036–37 (observing that, "[i]nterpreted in a proper and narrow manner . . . the phrase substantial likelihood of material prejudice might punish only speech that creates a danger of imminent and substantial harm" and that "the difference between . . . serious and imminent threat . . . and . . . substantial likelihood of material prejudice could prove mere semantics").

143. *Id.* at 1074 (majority opinion of Rehnquist, C.J.).

144. Ironically, the American Bar Association, whose commission had promulgated the rules, filed an amicus brief in *Gentile*, disavowing its earlier statements indicating that substantial likelihood was intended to "approximate" clear and present danger. *See* Brief of the ABA as Amicus Curiae in Support of Respondent at 12, *Gentile*, 501 U.S. 1030 (1991) (No. 89-1836) ("[T]he drafters stopped short [of] adopting the 'clear and present danger' test and endorsed instead a 'substantial likelihood of material prejudice' as the appropriate test. The drafters felt that the 'substantial likelihood test,' rather than the 'clear and present danger' test, struck the proper balance between fair trial and lawyers' free speech.").

145. *See* MODEL RULES OF PROF'L CONDUCT R. 3.6 cmt. at 145 (Proposed Final Draft 1981) ("The formulation in this Rule incorporates a standard approximating clear and present danger . . . .").

146. United States v. Brown, 218 F.3d 415 (5th Cir. 2000).

between these two standards is not clear. . . ."[147] The court "assume[d]" that substantial likelihood was somehow a more stringent test, but it never resolved its confusion between the two.[148] Four years later, the District Court for the Northern District of Alabama considered a gag order in the prosecution of Richard Scrushy, the former CEO of Healthsouth.[149] The court imposed an order under the substantial likelihood standard, but noted that it, too, "cannot determine whether 'reasonable likelihood' or 'substantial likelihood' makes much difference."[150]

This kind of confusion suggests that the meaning of substantial likelihood has shifted. Some individual judges may be able to distinguish substantial likelihood from reasonable likelihood, but for others, little or no difference may exist. The dictionary definition of "substantial" does not clearly distinguish it.[151] Though this possibility does not undermine the reasoning in *Gentile*, it does suggest an infirmity in the doctrine. At the very least, the confusion presents additional doubt about the limitations courts can place on trial participants' extrajudicial speech.

III. A CAUTION AGAINST REASONABLE LIKELIHOOD

When trial participants desire to speak publicly about court cases, their right to speak freely clashes with fair trial concerns.[152] "[F]ree speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them."[153] But courts must balance these interests, and as Part II described, the approaches taken have been haphazard and inconsistent. Mindful of the legal uncertainty facing trial participants, appellate courts should clarify the law. In doing so, they should be particularly mindful of two sets of considerations, each of which tends to discount speech interests: the chilling effect of the collateral bar rule and the inherently speculative nature of speech restrictions.

147. *Id.* at 427.

148. *Id.*

149. United States v. Scrushy, 2004 U.S. Dist. LEXIS 6711, at *1–3 (N.D. Ala. Apr. 13, 2004).

150. *Id.* at *12.

151. *See supra* notes 133–34 and accompanying text.

152. *See supra* notes 2–5 and accompanying text.

153. Bridges v. California, 314 U.S. 252, 260 (1941).

A. The Contempt Power and the Collateral Bar Rule

Enforcement of court-ordered restrictions on trial participant speech by use of the contempt power poses problems for would-be speakers. First, punishment by contempt does not provide any interinstitutional limitations, which are present for many other government speech restrictions. An administrative order refusing to grant a license for a parade or protest, for example, is a decision made by one branch of the government and enforced by another, the courts.[154] Likewise, when considering a statute that limits speech,[155] courts provide an independent check on the legislature. In this role, the courts review decisions already made by other institutions, checking those institutions' speech-restrictive powers.

In the case of court-ordered speech restrictions, no coordinate institution serves as a check on the court's order or rule. The court issues the command. When the court suspects a violation, it sets the prosecution in motion. Finally, it adjudicates the dispute and imposes a sentence.[156] The court will ensure compliance with the order for two reasons. First, the court has already determined in the original order that compliance is necessary for the administration of justice.[157] Second, a violation may be perceived as a rebuke to the power of the court, ensuring swift and sure enforcement.[158]

This power is checked to the extent that decisions of trial courts can be reviewed by appellate courts, but a limitation on appellate review of speech restrictions exists. The collateral bar rule precludes appellate courts from considering the validity of the underlying order once it has been violated. Famously applied in the case of *Walker v.*

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154. *Cf.* Carroll v. President of Princess Anne, 393 U.S. 175, 183 (1968) (ruling unconstitutional an injunction preventing a white supremacist rally because the court issued the injunction without a full adversarial hearing giving the white supremacist group the opportunity to advance its interests before the independent tribunal).

155. *See, e.g.*, Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 700 (1931) (considering a classical prior restraint in which a statute allowed lawsuits asking courts to enjoin publication of newspapers for the publication of scandalous material).

156. The United States Congress is expressly prohibited from this sort of self-enforcement. U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder . . . shall be passed.").

157. *See* Blasi, *supra* note 107, at 43–47, 61 (explaining that the same judge who ruled against the speaker in the original order is also often the one responsible for the order's enforcement).

158. *See id.* (observing that "contempt proceedings are streamlined, with the judge (who has ruled against the speakers at the issuance stage and who may have instigated the prosecution) not always assuming the role of impartial arbiter" and that "[t]he swiftness and sureness of sanctions" might therefore chill speech).

City of Birmingham,[159] the rule precluded civil rights protesters from challenging an order riddled with "substantial constitutional issues."[160] Because the protesters had ignored the trial court's order, the Supreme Court refused to reverse the contempt sanctions.[161] Out of respect for the rule of the trial court, the Supreme Court held that litigants must exhaust their claims *before* violating the order.[162] In *Walker*, the failure to proceed in this manner resulted in the forfeiture of the underlying constitutional claim.[163]

In this way, the collateral bar rule prevents a full adjudication of the speaker's claims after all the information has been aired and the facts have been presented: When a trial participant feels strongly enough to appeal the order, and refrain from speaking while doing so, the appellate court will consider the order without knowing how it is received by the public at large.[164] Trial participants who do not appeal a court order but choose to violate it, however, lose the ability to appeal altogether.[165]

In the context of speech restraints, this limitation on appeals cautions litigants to steer clear of speech that a judge could perceive as violative of a court order. Not only can the judge exact swift punishment through contempt, but the collateral bar rule will prevent the subsequent adjudication of the underlying court order.[166] Because of the probability of self-censorship caused by the contempt power

159. Walker v. City of Birmingham, 388 U.S. 307 (1967).

160. *Id.* at 316.

161. *Id.* at 315–17.

162. *Id.* at 317–21.

163. *Id.*

164. *See id.* at 318 ("This case would arise in quite a different constitutional posture if the petitioners, before disobeying the injunction, had challenged it in the Alabama courts . . . .").

165. *See id.* at 317–21 ("This Court cannot hold that the petitioners were constitutionally free to ignore all the procedures of the law and carry their battle to the streets.").

166. Some courts have refused to apply the collateral bar rule to violations of court rules. In *Chicago Council of Lawyers v. Bauer*, for example, the Seventh Circuit refrained from calling the local court "no-comment" rule at issue a prior restraint because it would not apply the collateral bar rule to a violation of the no-comment rule. Chi. Council of Lawyers v. Bauer, 522 F.2d 242, 247–49 (7th Cir. 1975) (citing *In re* Oliver, 452 F.2d 111 (7th Cir. 1971)). Other circuits, however, apply the collateral bar rule to violations of court rules. *E.g.*, United States v. Cutler, 815 F. Supp. 599, 610–11 (E.D.N.Y. 1993). Treating court publicity rules differently than judge-issued orders by refusing to apply the collateral bar rule may justify a different standard for this kind of speech restriction, but it may not. The effect of the collateral bar rule is one of several considerations at stake. Despite its refusal to recognize the applicability of the collateral bar rule, the Seventh Circuit nonetheless applied strict scrutiny in *Chicago Council of Lawyers v. Bauer*. *Bauer*, 522 F.2d at 252–59.

and the collateral bar rule, courts should be reluctant to impose this kind of restriction.

B. Speculation, Speech Benefits, and the Costs to Adjudication

Decisions to restrain the speech of trial participants are inherently speculative. Judges who issue gag orders or who remind trial participants that they will enforce court rules engage in a thought process that lacks certainty at a number of steps. First, they must speculate about whether the trial participants will speak about the case at all. Then, they must consider whether the content of the speech will be so prejudicial that anyone who hears it will be precluded from a jury. Finally, judges must presume that the media will communicate the statements to more than a trivial number of persons. Judges simply cannot know these things with certainty; they are not subject to proof. As the *Nebraska Press* Court wrote, "[T]he harm to a fair trial that might otherwise eventuate from publications which are suppressed pursuant to [court] orders . . . must *inherently remain speculative*."[167]

Inherent speculation by itself, however, demands no particular level of scrutiny. It is simply a condition of adjudication: courts must make decisions without full information. Rules that would have judges resolve this uncertainty always in favor of fair trials reflect important values; so do rules that would have judges always protect speech.[168] Consideration of the costs and benefits of speech helps complete the picture.

A judge contemplating speech restrictions will know well the costs that speech entails. The mechanisms available to remedy extrajudicial statements must be imposed by the judge. All these mechanisms, particularly voir dire and continuances, influence the court's docket—to which judges are necessarily attuned. Moreover, should a judge make the wrong choice, and an appellate court reverse the trial outcome, the costs in time and effort would increase on retrial, imposing an obvious toll on the administration of the court. The precise extent of these costs will not be known in any given case; the trial judge, however, will have no trouble understanding the ways in which these costs will add to an already crowded docket.

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167. Neb. Press Ass'n v. Stuart, 427 U.S. 539, 599 (1976) (Brennan, J., concurring) (emphasis added).

168. *See supra* notes 2–5 and accompanying text.

On the other side of the ledger, the benefits of speech are truly speculative. Even presuming the speech is received by a wide audience, the speech effects will depend on the persuasiveness of the arguments, the delivery of the speaker, and whether other contemporary events crowd out its effect, leading recipients to remember it or forget about it.[169] The value of the speech may be temporal, with the benefits not accruing for months or years as its message is revisited by future generations of litigants, voters, and others.[170] Finally, whereas the costs of speech are imposed on the court and a limited group of individuals associated with the court, the benefits are widely dispersed across many hundreds or thousands or millions of people.[171] No full accounting of the benefits of speech can be had, and no judge would be able to look far enough afield to come close.[172]

Not surprisingly, many judges would resolve the uncertainties by discounting the dispersed and unknowable benefits of speech and focusing instead on the relatively familiar and immediate costs.[173] To ensure that speech concerns receive sufficient consideration, the standards by which courts measure speech restrictions should account for these imbalances. Doing so does not elevate the First Amendment over the right to a fair trial.[174] To the contrary, it helps guarantee an even and fair consideration of the broader consequences of speech

169. *Cf.* Richard E. Petty, Gary L. Wells & Timothy C. Bock, *Distraction Can Enhance or Reduce Yielding to Propaganda: Thought Disruption Versus Effort Justification*, 34 J. OF PERSONALITY & SOC. PSYCHOL. 874–84 (1976) (describing the "disruption hypothesis" and its effects on persuasion).

170. *Cf.* Jeffrey K. Olick & Joyce Robbins, *Social Memory Studies: From "Collective Memory" to the Historical Sociology of Mnemonic Practices*, 24 ANNUAL REVIEW OF SOCIOLOGY 105, 115–27 (1998) (describing how society characterizes events differently over time).

171. *Id.*

172. Again, a distinction may appear between court rules and the other types of restrictions. With court rules, the dangers of speech are not immediate at the time the rules are being promulgated. This would seem to suggest that they may be different in kind from other restrictions. Court rules, however, are still promulgated by judges, taking into account their familiar concerns. Moreover, a judge, deciding whether to enforce the rule, will be faced with the choice of immediate, focused costs or distant, diffuse benefits.

173. *Cf.* ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 135 (D. D. Raphael & A. L. MacFie eds., Clarendon Press 1976) (1759) ("[T]he loss or gain of a very small interest of our own appears to be of vastly more importance, excites a much more passionate joy or sorrow, a much more ardent desire or aversion, than the greatest concern of another with whom we have no particular connexion.").

174. *See supra* note 4 and accompanying text.

bearing on these rights, "two of the most cherished policies of our civilization."[175]

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When coupled with the use of the contempt power and the collateral bar rule, the speculative nature of court-ordered restrictions on trial participant speech suggests that courts should impose restrictions on speech only with caution. Precluding regulation based only on a reasonable likelihood of scrutiny assures caution and properly regards free speech concerns along with fair trial concerns. This Note accepts that the substantial likelihood standard could sufficiently balance these interests if it is a distinct form of intermediate scrutiny.[176] Because some courts, however, have demonstrated an inability to differentiate the substantial likelihood standard from the reasonable likelihood standard,[177] distinguishing between the two is a challenge courts should undertake, to ensure that the reasonable likelihood standard is not adopted under a different name.

CONCLUSION

Court-ordered restrictions on trial participant speech are more visible than ever. In cases such as the Enron trial, the Laci Peterson murder trial, the Michael Jackson trial, the Kobe Bryant rape trial, and the Duke Lacrosse case, judges must decide whether to limit the speech of trial participants. When judges impose restrictions, they risk curtailing discussion and debate about important events of public concern. This Note illustrates why courts ought to reject the reasonable likelihood standard in favor of heightened scrutiny when considering restrictions on trial participants' extrajudicial speech. The

175. Bridges v. California, 314 U.S. 252, 260 (1941). For more general concerns about the speculative nature of First Amendment adjudication, consider Blasi, *supra* note 107, at 49–54. "It is the cancer of tidy doctrine, feeding on its internal logic, that is most to be feared in the ultrahazardous realm of speech regulation. Adjudication in the abstract, for which reality testing is at a minimum, can be a breeding ground for tidy doctrine." *Id.* at 53. Though the analysis presented here is not intended to track Professor Blasi's, it has been largely influenced by the section of his paper entitled "Adjudication in the Abstract." *Id.* at 49–54; *cf.* John Calvin Jeffries, *Rethinking Prior Restraint*, 92 YALE L.J. 409, 430 n.67 (1983) (calling the speculative nature of court-ordered injunction one of the "strongest" arguments for "special hostility to injunctions").

176. *See supra* notes 129–30 and accompanying text.

177. *See supra* Part II.B.

contempt power and the collateral bar rule dangerously chill speech, and the imposition of court-ordered speech restrictions engages courts in a purely speculative affair, the outcome of which is likely to favor the immediate and familiar costs to adjudication rather than unknown and diffuse benefits. Of equal importance, this Note demonstrates the extraordinary uncertainty facing trial participants who may want to speak about their cases. Lower courts are divided in the standards they apply and in the reasons they choose to apply those standards. They have expressed confusion about the meaning of the substantial likelihood standard by equating it with the reasonable likelihood standard that is most permissive of speech restrictions. Guidance from the courts would be helpful, to articulate how these two standards differ.