LAWYERS HAVE FREE SPEECH RIGHTS, TOO: WHY GAG ORDERS ON TRIAL PARTICIPANTS ARE ALMOST ALWAYS UNCONSTITUTIONAL

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I. INTRODUCTION

Media coverage of trial proceedings is nothing new. There have been a series of "trials of the century" over the last hundred years.[1] The O.J. Simpson criminal trial received more media attention than any other legal proceeding in American or world history. The Simpson case will likely mean more media coverage of more court proceedings in the future because it has shown that there is a large audience interested in the real life drama of the courtroom. The Simpson case also focused attention, more than ever before, on the issue of publicity and its effects on a fair trial.

As judges have struggled with the media in high profile cases, one technique has become increasingly common: gag orders precluding lawyers and parties from speaking with the press. In the civil suit against Simpson, Judge Hiroshi Fujisaki imposed a broad order prohibiting the attorneys and parties from discussing the case in public, even though Judge Lance Ito had refused to impose such a gag order in the earlier criminal prosecution. Similarly, in the Oklahoma City bombing case, United States District Court Judge Richard Matsch imposed an order preventing the lawyers from speaking with the media about the pending litigation.

These court orders undoubtedly are motivated by the laudable goal of trying to ensure a fair trial. In recent years, a number of scholars have urged courts to increase use of gag orders so as to uphold the constitutional value of fair and impartial trial proceedings.[2] The Supreme Court's

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1. GERALD F. UELMEN, LESSONS FROM THE TRIAL: THE PEOPLE V. O.J. SIMPSON, 1–8 (1996).

2. *See, e.g.*, Eileen A. Minnefor, *Looking for Fair Trials in the Information Age: The Need for More Stringent Gag Orders Against Trial Participants*, 30 U.S.F. L. REV. 95 (1995); Mark R. Stabile, *Free Press-Fair Trial: Can They Be Reconciled in a Highly Publicized Criminal*

decision in *Nebraska Press Ass'n v. Stuart*[3] has virtually precluded gag orders on the press as a way of preventing prejudicial pretrial publicity.[4] Trial courts have thus responded in a manner not precluded by the Supreme Court: gag orders on lawyers and parties. The restrictions on lawyer speech are further justified by the claim that attorneys are officers of the court and thus are more subject to court-imposed limits to preserve a fair trial.[5]

I strongly disagree with this trend towards gagging trial participants' speech and believe that such court orders are virtually always unconstitutional. The imposition of these gag orders is based on several assumptions that are, at the very least, unproven and more likely untenable. First is the assumption that publicity jeopardizes a fair trial. In one high profile case after another—the McMartin preschool case, the rape trial of William Kennedy Smith, the two trials of the officers for beating Rodney King, the trial of Damion Williams and Henry Watson for beating Reginald Denny, the murder trials of the Menendez brothers, and the O.J. Simpson prosecution—there was speculation that the extensive publicity would make a conviction of the defendant a certainty. Yet, most of these cases resulted in acquittals, thus raising serious questions as to whether publicity hurts criminal defendants. Moreover, even assuming the prosecution has a "right" to a fair trial, there is no reason to believe that publicity accounted for the outcomes.

Second, even if publicity is detrimental to a fair trial, there is the assumption that statements by lawyers and parties cause or exacerbate the harm. As the Simpson civil case demonstrates, gag orders on the attorneys and parties do not decrease media coverage but merely limit the sources of information. The assumption is that by limiting one source of information a fairer trial would likely result.

Case?, 79 GEO. L.J. 337 (1990).

3. 427 U.S. 539 (1976).

4. *See* RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH 8-4 (1994) (*Nebraska Press* has been treated as an almost complete bar to gag orders on the press); *see id.* at n.12 (collecting cases rejecting such prior restraints). One of the few cases in which a lower court imposed a prior restraint was *United States v. Noriega*, 752 F. Supp. 1032 (S.D. Fla.), *aff'd sub nom.* In re *Cable News Network*, 917 F.2d 1543 (11th Cir. 1990), where a federal district court enjoined CNN from broadcasting tapes of conversations between deposed Panamian dictator Manuel Noriega and his attorneys. For a persuasive argument that the district court erred in granting this prior restraint because the *Nebraska Press* requirements were not met, see SMOLLA, *supra*, at 8-53. *See also* Procter & Gamble Co. v. Bankers Trust Co., 78 F.3d 219 (6th Cir. 1996) (holding unconstitutional a prior restraint on *Business Week* to prevent publication of material that had been produced during discovery and was sealed pursuant to a court order).

5. *See, e.g.*, Levine v. United States, 764 F.2d 590 (9th Cir. 1985); Stabile, *supra* note 2, at 346.

Indeed, if such gag orders have an effect, it likely is counterproductive to the goal of fair judicial proceedings. Gag orders on trial participants cause the media to rely on less accurate sources of information. Instead of having statements on the record from the most knowledgeable individuals, the attorneys and parties in a case, the media must accept off-the-record statements or second- and third-hand accounts. Furthermore, attorneys and parties might respond to inaccuracies in media stories or in statements by others and thereby increase the chances of a fair trial.

Third, even if it is accepted that pretrial publicity is prejudicial and that gag orders on lawyers and parties make a positive difference, the assumption is that these benefits outweigh the enormous burden on First Amendment rights. The court orders are content-based restrictions on speech and therefore subject to strict scrutiny.[6] Moreover, the court orders are prior restraints on speech and the Supreme Court has declared that "prior restraints on speech . . . are the most serious and least tolerable infringement on First Amendment rights."[7] The Supreme Court frequently has stated that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."[8] Court orders preventing speech are classic forms of prior restraint.[9] Thus, gag orders on lawyers and parties should be allowed only if no other alternative would suffice. The Supreme Court has held that attorneys may be disciplined for speech that poses a substantial likelihood of materially prejudicing an adjudicatory proceeding.[10] The assumption underlying gag orders is that such disciplinary proceedings are insufficient and that a prior restraint is necessary.

Unless and until these three assumptions are justified, gag orders on attorneys and parties should be regarded as unconstitutional. This Article goes further than merely identifying the unproven assumptions underlying gag orders; it also examines the appropriate constitutional standard to be used in evaluating such court orders and explains why it is a standard that virtually never will be met. Part II of this Article argues that strict scrutiny is the test that must be met before a court can impose an order restricting the speech of attorneys and parties. Section A of Part II identifies the current uncertainty in the law regarding the standard for evaluating such

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6. *See infra* text accompanying notes 57–82.

7. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976).

8. New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963)).

9. *See* Near v. Minnesota, 283 U.S. 697 (1931).

10. *See* Gentile v. State Bar, 501 U.S. 1030 (1991).

gag orders.[11] Section B of Part II explains why gag orders on lawyers and parties should be regarded as content-based prior restraints and thus subject to strict scrutiny. Finally, Section C responds to the arguments for a lower standard of review, especially to the claim that lawyers are officers of the court and thus should be accorded less First Amendment protection.

Part III considers how strict scrutiny should be applied. Section A argues that gag orders on lawyers and parties should be governed by the same test that is used in evaluating prior restraints on the press to prevent prejudicial pretrial publicity. In *Nebraska Press*, the Supreme Court articulated a test for when gag orders may be placed on the press.[12] The same standard should be used in evaluating prior restraints on attorneys and parties. Section B concludes by explaining why this test will virtually never be met.

A fair trial is undoubtedly one of the Constitution's most important guarantees, but so too are freedom of speech and freedom of the press. The need to ensure a fair trial should not be a talismanic incantation that justifies sacrificing First Amendment values. Gag orders on lawyers and parties should be tolerated only if there is proof that a fair trial is unlikely without such a prior restraint, that no other alternatives can succeed, and that the gag order will significantly enhance the likelihood of a fair trial. It is almost impossible to imagine a situation in which all of these requirements will be satisfied.

II. WHY STRICT SCRUTINY MUST BE MET BEFORE GAG ORDERS CAN BE IMPOSED ON ATTORNEYS AND PARTIES

A. The Uncertainty in the Current Law

No Supreme Court case has addressed the constitutionality of gag orders on lawyers and parties. As mentioned above, in *Nebraska Press*, the Court considered the constitutionality of prior restraints on the *press* to protect a fair trial.[13] The only mention in *Nebraska Press* of gag orders on attorneys was a passing reference in a long list of alternatives to prior restraints on the press. The Court recited many alternatives to gag orders on the press, including changing venue, postponing the trial to allow public attention to subside, probing interrogation of prospective jurors to screen

11. There is no Supreme Court case on point, and lower courts are split as to the applicable standard.

12. 427 U.S. 539 (1976).

13. *Id.*

out those with fixed opinions as to guilt or innocence, providing clear instructions to the jury as to what may be considered in reaching a verdict, and sequestering jurors.[14] One item on this list of alternatives was the possibility of orders limiting speech by attorneys. However, this last alternative is merely dicta because *Nebraska Press* did not involve such a gag order and the Court did not appraise its constitutionality.

The primary Supreme Court decision concerning attorney speech in pending cases, *Gentile v. State Bar*,[15] did not consider a prior restraint. In *Gentile*, the Court held that attorney speech involving pending cases is protected by the First Amendment, but that it can be punished if it poses a substantial likelihood of materially prejudicing an adjudicatory proceeding.[16] Criminal defense attorney Dominic Gentile gave a press conference in which he said that his client was an innocent "scapegoat" who was the victim of "crooked cops."[17] After the client was acquitted, Nevada brought disciplinary proceedings against Gentile for violating the state's code of professional responsibility.[18] Nevada had adopted a provision based on the American Bar Association's Model Rules of Professional Conduct, which prohibits attorney speech that has a "substantial likelihood of materially prejudicing an adjudicatory proceeding."[19]

Gentile argued that an attorney should be subjected to discipline only if there is a "clear and present danger" to the fair administration of justice.[20] He contended that the "substantial likelihood" test did not sufficiently protect speech.[21] The Supreme Court, in a five-four decision, rejected this argument and upheld Nevada's ethics rule. The Court explained that attorneys are officers of the Court and thus are more subject to regulation of their speech than others.[22] The Court also noted that speech by attorneys could pose a greater risk to the fair administration of justice.[23] Writing for the Court, Chief Justice Rehnquist stated: "Because lawyers have special access to information through discovery and client communications, their extrajudicial statements pose a threat to the fairness

14. *Id.* at 563–64.
15. 501 U.S. 1030 (1991).
16. *Id.*
17. *Id.* at 1034.
18. *Id.* at 1033.
19. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6(a) (1995).
20. *Gentile*, 501 U.S. at 1069.
21. *Id.* at n.4.
22. *Id.* at 1031.
23. *Id.*

of a pending proceeding since lawyers' statements are likely to be received as especially authoritative."[24] The Court thus concluded: "We agree with the majority of the States that the 'substantial likelihood of material prejudice' standard constitutes a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State's interest in fair trials."[25] However, *Gentile* only involved the standard for after-the-fact punishment on lawyer speech, not prior restraints.

In the absence of guidance from the Supreme Court, lower courts have adopted several different standards in determining when gag orders on lawyers and parties are constitutionally permissible. For example, some courts have said that such gag orders are allowable so long as they seem reasonably related to achieving a fair trial. In *In re Russell*,[26] the court of appeals approved a district court gag order on potential witnesses in a criminal case against alleged members of the Ku Klux Klan. The defendants were implicated in the shooting deaths of five individuals and the judge felt that the "proscription of certain extrajudicial communications by prospective witnesses was necessary in order to protect the rights of the defendants to a fair trial 'based solely on admissible evidence.'"[27] The court of appeals approved the gag order because of the "reasonable likelihood that prejudicial news prior to trial will prevent a fair trial."[28] The court concluded that "[t]he tremendous publicity attending this trial, the potentially inflammatory and highly prejudicial statements that could reasonably be expected from petitioners . . . and the relative ineffectiveness of the considered alternatives, dictated the 'strong measure' of suppressing the speech of potential witnesses to ensure a fair trial."[29]

Likewise, the Tenth Circuit has approved gag orders on trial participants based on this relaxed reasonable likelihood standard. In

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24. *Id.* at 1074.

25. *Id.* at 1075. However, the Court also found that a particular provision in the Nevada rule was unconstitutional. The Court voted five-four to uphold the substantial likelihood test. Justice O'Connor, who was part of the majority on that issue, joined with the dissenters to comprise a majority to declare that the "safe harbor" provisions of the law were impermissibly vague. For example, one exception said that lawyers could make statements about the nature of the defense. Justice Kennedy, writing for the Court on this issue, found that this safe harbor provision did not provide sufficient guidance as to what speech was allowed and what was protected.

26. 726 F.2d 1007 (4th Cir. 1984).

27. *Id.* at 1009.

28. *Id.* at 1010.

29. *Id.*

United States v. Tijernia,[30] the court of appeals held that a gag order on trial participants is constitutional if there is "a 'reasonable likelihood' of prejudicial news which would make difficult the impaneling of an impartial jury and tend to prevent a fair trial."[31] The district court had issued an order that prohibited the attorneys, defendants and witnesses from:

> mak[ing] or issu[ing] any public statement, written or oral, either at a public meeting or occasion or for public reporting or dissemination in any fashion regarding the juror or jurors in this case, prospective or selected, the merits of the case, the evidence, actual or anticipated, the witnesses or the rulings of the Court.[32]

The court of appeals upheld this order and expressly rejected use of the clear and present danger test. The court stated that the reasonable likelihood standard was appropriate in order to ensure a fair trial.[33]

At the opposite end of the continuum, some courts of appeals have articulated strict scrutiny as the appropriate test for gag orders on trial participants. For instance, in *CBS v. Young*,[34] the Sixth Circuit stated that such a court order "must be subjected . . . to the closest scrutiny."[35] In the consolidated legal proceedings arising from the killing of students by the National Guard during the demonstration at Kent State University on May 4, 1970, the district court entered a gag order that prohibited all parties to the litigation, as well as their relatives, friends, and associates, from discussing "in any manner whatsoever these cases with the news media or the public."[36] The court of appeals found that the order was an "extreme example of a prior restraint upon freedom of speech and expression."[37]

The court explained that the gag order sealed the lips of "all parties concerned with this litigation, whether plaintiffs or defendants, their relatives, close friends, and associates . . . from discussing in any manner whatsoever these cases with members of the news media or the public."[38] In addition to expressing concern for the First Amendment rights of these individuals, the court also explained that the order impaired the First

30. 412 F.2d 661 (10th Cir. 1969).
31. *Id.* at 666.
32. *Id.* at 667.
33. *Id.* at 666.
34. 522 F.2d 234 (6th Cir. 1975).
35. *Id.* at 238.
36. *Id.* at 236.
37. *Id.* at 240.
38. *Id.* at 236.

Amendment right of the press to gather information.[39] The court thus concluded that to meet judicial approval, statements "must pose a clear and present danger, or a serious and imminent threat to a competing protected interest" and "must be narrowly drawn and cannot be upheld if reasonable alternatives are available having a lesser impact on First Amendment freedoms."[40]

The Sixth Circuit reaffirmed this test in *United States v. Ford*.[41] In this highly publicized case involving mail and bank fraud charges against United States Congressmember Harold Ford of Tennessee, the district court entered an order that prohibited Ford from making any "extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication."[42] The court stated that the *Nebraska Press* test, which concerns gag orders on the press, should apply to gag orders on trial participants. The court explained that "any restrictive order involving a prior restraint upon First Amendment freedoms is presumptively void and may be upheld only on the basis of a clear showing that an exercise of First Amendment rights will interfere with the rights of the parties to a fair trial."[43] In order to validate such a prior restraint against speech, the speech must pose a "'serious and imminent threat' of a specific nature, the remedy for which can be narrowly tailored in an injunctive order."[44] The court also noted that there must be a finding that "less burdensome alternatives of voir dire, sequestration, or change of venue" will not suffice to protect a fair trial.[45]

The Second Circuit applies a similar test when gag orders are challenged by trial participants.[46] The court in *United States v. Salameh*[47] considered a gag order in the prosecutions arising from the bombing of the World Trade Center in New York City. To avoid the feared prejudicial effects of expected extensive pretrial publicity, the trial court judge issued

39. *Id.* at 239 (citation omitted).

40. *CBS*, 552 F.2d at 238.

41. 830 F.2d 596 (6th Cir. 1987).

42. *Id.* at 597.

43. *Id.* at 599 (quoting CBS v. Young, 522 F.2d 234, 241 (6th Cir. 1975)).

44. *Id.* at 600.

45. *Id.*

46. Interestingly, the Second Circuit has ruled that the less protective reasonable likelihood test should be applied when the challenge to a gag order is brought by the media rather than by an individual covered by the court's order. *See In re* Dow Jones & Co., 842 F.2d 603 (2d Cir. 1988).

47. 992 F.2d 445 (2d Cir. 1993).

an order barring counsel for all parties to the action from publicly discussing any aspect of the case.[48]

The court of appeals recognized that the gag order was a prior restraint and stated that three conditions had to be met for such an order to be constitutional. First, "the limitations on attorney speech should be no broader than necessary to protect the integrity of the judicial system and the defendant's right to a fair trial."[49] Second, the trial court must explore "whether other available remedies would effectively mitigate the prejudicial publicity."[50] Third, the trial court must give proper notice to all parties restrained and give each party the opportunity to be heard.[51]

The Ninth Circuit has adopted an approach similar to the one articulated by the Second Circuit. In *Levine v. United States*,[52] the court of appeals upheld a gag order that the trial court had imposed on lawyers and the defendant in the Richard Miller spying case. The court found that a prior restraint on speech by parties may be upheld only if three requirements are met. First, the activity restrained must pose a clear and present danger or a serious and imminent threat to a protected competing interest.[53] Second, the order must be narrowly drawn.[54] Finally, less restrictive alternatives must not be available.[55] However, the Ninth Circuit, like the Second Circuit, uses a less protective test if the challenge to the gag order is brought by the press rather than by the participants covered by the court's order.[56]

Thus, the law is unsettled as to when gag orders on trial participants are constitutional. This uncertainty is likely to remain until the Supreme Court addresses the issue and articulates a standard.

B. Strict Scrutiny as the Appropriate Test

Gag orders on lawyers and parties are unquestionably content-based restrictions on speech. The Supreme Court has declared that "[c]ontent-based regulations are presumptively invalid."[57] In *Turner Broadcasting*

48. *Id.* at 446.

49. *Id.* at 447 (citation omitted).

50. *Id.*

51. *Id.*

52. 764 F.2d 590 (9th Cir. 1985).

53. *Id.* at 595 (citation omitted).

54. *Id.*

55. *Id.*

56. *See* Radio & Television News Ass'n v. United States Dist. Court, 781 F.2d 1443, 1447 (9th Cir. 1986).

57. R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).

System v. Federal Communication Commission,[58] the Court held that the general rule is that content-based restrictions on speech must meet strict scrutiny, while content-neutral regulations need only meet intermediate scrutiny.[59] Justice Kennedy, writing for the Court, explained "[g]overnment action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential [First Amendment] right."[60] Justice Kennedy noted: "For these reasons, the First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals."[61] Thus, the Court endorsed a two-tier system of review using "the most exacting scrutiny to regulat[e] [burdens] that suppress, disadvantage, or impose differential burdens upon speech because of its content . . . . In contrast, regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny."[62]

Court issued gag orders are content-based because their application depends entirely on the topic of the speech. Further, restrictions are imposed only on the ability of the trial participants to speak about the pending case. Attorneys and witnesses are free to speak about any other subject except the litigation. It is firmly established that content-based restrictions on expression must meet strict scrutiny.

There is no doubt that a restriction on the ability of individuals to discuss specific topics is a content-based restriction on speech. For example, in *Carey v. Brown*,[63] Chicago adopted an ordinance prohibiting all picketing in residential neighborhoods except labor picketing connected to a place of employment.[64] The Supreme Court held this regulation unconstitutional. The Court explained the law imposed an impermissible content-based restriction because it allowed speech about the subject of labor, yet prohibited all other forms.[65] Likewise, court orders on trial participants restrict their ability to speak about the subject matter of the case, but not otherwise.

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58. 114 S. Ct. 2445 (1994).
59. *Id.* at 2459.
60. *Id.* at 2458.
61. *Id.*
62. *Id.* at 2459.
63. 447 U.S. 455 (1980).
64. *Id.* at 457.
65. *Id.*

Simon & Schuster v. Members of the New York State Crime Victims Board[66] represents another illustration of the unconstitutionality of content-based restrictions on speech, one more closely related to limits on trial participants.[67] In *Simon & Schuster*, the Court declared unconstitutional a state law that prevented an accused or convicted criminal from profiting from selling the story of his or her crime to any media.[68] The so-called "Son of Sam" law placed any funds received from works describing the crime into an escrow account that was used for restitution to victims of the crime and for paying the criminal's other creditors.

The New York law did not prohibit any speech; it only prevented individuals from keeping profits from selling the tales of their criminal activity. Nonetheless, the Supreme Court found the law violated the First Amendment. The Supreme Court stressed that the state law was content based: "[i]t singles out income derived from expressive activity for a burden the State places on no other income, and it is directed only at works with a specified content."[69] The Court applied strict scrutiny and concluded that although compensating crime victims was a compelling interest, the state could achieve its goal through less restrictive means.

Thus, strict scrutiny is the appropriate test in evaluating restrictions on the ability of trial participants to discuss a pending case because court orders are content-based limitations on expression. Moreover, the gag orders merit strict scrutiny because they are prior restraints on speech. The Supreme Court has stated that "prior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights."[70] The First Amendment was, in part, a reaction against the licensing requirements for publication that had existed in England. This legacy prompted Blackstone to declare that "[t]he liberty of the press is indeed essential to the nature of a free state: but this consists in laying no *previous* restraints upon publication, and not in freedom from censure for criminal matter when published."[71] Although it is clear that "the prohibition of laws abridging the freedom of speech is not confined to

66. 502 U.S. 105 (1991).

67. *Id.* at 115.

68. *Id.*

69. *Id.* at 116.

70. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976).

71. 4 WILLIAM BLACKSTONE, COMMENTARIES 151–52 (London, Dawsons of Pall Mall 1966).

previous restraints,"[72] there is no doubt that prior restraints are regarded as a particularly undesirable way of regulating speech.

Prior restraints are regarded as particularly undesirable because they prevent speech from ever occurring. The Court in *Southeastern Promotions, Ltd. v. Conrad*[73] explained that "[b]ehind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand."[74] Inevitably, prior restraints could be imposed based on predictions of danger that would not actually materialize and thus would not be the basis for subsequent punishments.[75] Moreover, prior restraints are worse than other forms of regulating speech because of the collateral bar rule: a person violating an unconstitutional law may not be punished, but a person violating an unconstitutional prior restraint generally may be punished. Specifically, the collateral bar rule provides that "a court order must be obeyed until it is set aside, and that persons subject to the order who disobey it may not defend against the ensuring charge of criminal contempt on the ground that the order was erroneous or even unconstitutional."[76]

There is no doubt that court orders limiting speech are a classic form of prior restraint. In *Alexander v. United States*,[77] the Court stated that "[t]he term prior restraint is used 'to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communication are to occur.'"[78] In cases such as *Near v. Minnesota*,[79] *New York Times v. United States*,[80] and *Nebraska Press Ass'n v. Stuart*,[81] the Court unequivocally held that court orders prohibiting speech are prior restraints and must meet the highest level of scrutiny.

Thus, gag orders on trial participants should meet strict scrutiny because they are both content-based restrictions on expression and prior

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72. Schenck v. United States, 249 U.S. 47, 51 (1919).

73. 420 U.S. 546 (1975).

74. *Id.* at 559.

75. *See, e.g.*, Vincent Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11, 49–54 (1982).

76. Stephen Barnett, *The Puzzle of Prior Restraint*, 29 STAN. L. REV. 539, 552 (1977); *see also* Walker v. City of Birmingham, 388 U.S. 307 (1967) (applying and articulating the collateral bar rule).

77. 509 U.S. 544 (1993).

78. *Id.* at 550 (quoting M. NIMMER, NIMMER ON FREEDOM OF SPEECH § 4.03 p. 4–14 (1984)).

79. 283 U.S. 697 (1931).

80. 403 U.S. 713 (1971).

81. 427 U.S. 539 (1976).

restraints on speech. Gag orders also impair freedom of the press and the public's ability to be fully informed. Although the Supreme Court generally has not protected a First Amendment right for the press to gather information, it has observed that "without some protection for seeking out the news, freedom of the press could be eviscerated."[82] Gag orders on trial participants limit the ability of the media to obtain accurate information and thus to inform the public about pending court proceedings.

For all of these reasons, court orders limiting speech of attorneys and parties should be allowed only if strict scrutiny is met. Content-based prior restraints are always subjected to the most exacting judicial review and are permissible only under the most limited and compelling circumstances.

C. Is Less Than Strict Scrutiny Warranted Because Attorneys Are Officers of the Court?

The primary argument for applying less than strict scrutiny is that attorneys are officers of the court and, therefore, are entitled to less free speech protection than others in society. Mark Stabile has argued, for example, that gag orders are "particularly justified when applied to lawyers and court personnel."[83] He argues that officers of the court have a fiduciary responsibility not to prejudice fair trials because they have special access to information and a professional responsibility not to thwart a fair judicial process.[84] Stabile finds support for his view in the Supreme Court's statement in *Sheppard v. Maxwell*[85] that "[c]ollaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures."[86]

The argument that gag orders on lawyers should receive less than strict scrutiny also has support in the language of some Supreme Court opinions. For instance, Justice Brennan, in a concurring opinion in *Nebraska Press* said that "as officers of the court, court personnel and attorneys have a fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice."[87] Likewise, Chief Justice Rehnquist stated in

82. Branzburg v. Hayes, 408 U.S. 665, 681 (1972).
83. Stabile, *supra* note 2, at 346.
84. *Id.*
85. 384 U.S. 333 (1966).
86. *Id.* at 363.
87. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 601 n.27 (1976) (Brennan, J.,

Gentile that "[t]he State has a substantial interest in preventing officers of the court, such as lawyers, from imposing such costs [referring to the adverse effects of pretrial publicity] on the judicial system and on the litigants."[88]

However, there are many serious problems with the argument that less than strict scrutiny is required for gag orders on trial participants because attorneys are officers of the court. First, this would justify a lower level of scrutiny for gag orders on attorneys, but not on parties or witnesses because in no sense are they officers of the court.[89]

Second, the descriptive statement that attorneys are officers of the court does not justify the normative conclusion that a lesser standard of constitutional review should be used in reviewing restrictions on attorney speech. Even accepting the characterization that lawyers are officers of the court, that says nothing about the duties that are attendant to this role. The assumption that lawyers have a duty to refrain from publicity that may prejudice a jury does not explain why a lower level of scrutiny is appropriate in evaluating content-based prior restraints. At best, it may explain the standard adopted by the Court in *Gentile* for after-the-fact punishments against lawyers for speech that has a substantial likelihood of materially prejudicing an adjudicatory proceeding.

In other words, the descriptive role of attorneys in a judicial system does not resolve the normative constitutional question as to when prior restraints on speech should be allowed. In fact, Justice Kennedy argued that the unique position of lawyers, if anything, justifies more protection for their speech. In *Gentile*, Justice Kennedy wrote:

> To the extent the press and public rely upon attorneys for information because attorneys are well informed, this may prove the value to the public of speech by members of the bar. If the dangers of their speech arise from its persuasiveness, from their ability to explain judicial proceedings, or from the likelihood the speech will be believed, these are not the sort of dangers that can validate restrictions. The First Amendment

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concurring).

88. Gentile v. State Bar, 501 U.S. 1030, 1075 (1991).

89. An argument may be made that parties waive some of their speech rights by consenting to the court's jurisdiction. This argument, however, can only be applied to those who invoke the court's jurisdiction: plaintiffs in civil cases and the government as prosecutor in criminal cases. Defendants are involuntarily present and thus cannot be said to consent to a restriction on their speech. Moreover, conditioning access to the courts on relinquishing First Amendment freedoms is an impermissible unconstitutional condition. The unconstitutional conditions doctrine is discussed in text accompanying notes 91–97.

> does not permit suppression of speech because of its power to command assent.[90]

Third, applying a lower level of scrutiny to prior restraints against attorneys would be an impermissible unconstitutional condition on bar membership. Lawyers would be forced to relinquish their First Amendment rights in exchange for their ticket to practice law.[91] The unconstitutional conditions doctrine is the principle that the government cannot condition a benefit on the requirement that a person forego a constitutional right. The central idea is that the "government may not deny a benefit to a person because he exercises a constitutional right."[92]

Speiser v. Randall[93] is a classic example of the application of the unconstitutional condition doctrine. A California law provided that in order to receive a veterans' property tax exemption, the individual had to sign a declaration disavowing a belief in overthrowing the United States government by force or violence.[94] The Court said that "[t]o deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech."[95]

Conditioning a benefit on a requirement that individuals give up their First Amendment rights pressures individuals to forego constitutionally protected speech. The *Speiser* Court explained that the condition "will have the effect of coercing the claimants to refrain from the proscribed speech."[96] The unconstitutional conditions doctrine prevents the government from penalizing those who exercise their constitutional rights by withholding a benefit that otherwise would be available.[97] In *Perry v. Sindermann*,[98] the Court, in explaining that the government could not deny employment to a person for exercising First Amendment rights, declared: "For if the government could deny a benefit to a person because of his

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90. 501 U.S. at 1056–57.

91. *See* Michael E. Swartz, *Trial Restrictions: Gagging First Amendment Rights*, 90 COLUM. L. REV. 1411, 1426–27 (1990) (arguing that the officer of the court rationale constitutes an impermissible unconstitutional condition).

92. Regan v. Taxation with Representation, 461 U.S. 540, 545 (1983) (quoting Perry v. Sindermann, 408 U.S. 593, 597 (1972)).

93. 357 U.S. 513 (1958).

94. *Id.* at 515.

95. *Id.* at 518.

96. *Id.* at 519.

97. There is large and rich literature on the unconstitutional conditions doctrine. *See, e.g.*, Richard Epstein, *Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988); Seth Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293 (1984); Kathleen Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989).

98. 408 U.S. 593 (1972).

constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.'"[99]

Applying a lower level of scrutiny to content-based prior restraints on attorney speech, as compared with the standard applied to content-based prior restraints on everyone else's speech, would create an unconstitutional condition on the practice of law. Attorneys would be required to relinquish their speech rights in exchange for the ability to practice law.

In sum, strict scrutiny should be applied to gag orders on all trial participants, just as strict scrutiny is applied to all content-based prior restraints. Prior restraints on speech by lawyers, parties, and witnesses should be upheld only if the most exacting scrutiny is met.

III. APPLYING STRICT SCRUTINY: WHY GAG ORDERS ARE ALMOST ALWAYS UNCONSTITUTIONAL

A. The Nebraska Press *Test*

In considering gag orders on the press to prevent prejudicial pretrial publicity, the Supreme Court was not content to announce strict scrutiny as the standard. The Court instead articulated a more specific test that must be met in order for such prior restraints to be permissible. In *Nebraska Press*, the Supreme Court ruled that the strong presumption against prior restraints means that such gag orders on the press will be allowed only if a three-part test is met.[100] *Nebraska Press* involved a defendant who was tried for committing six murders in a small town in Nebraska. The trial court issued an injunction restraining the media from publishing or broadcasting accounts of confessions or admissions made by the accused or facts strongly implicating him.[101]

Chief Justice Burger's opinion for the Court began by reviewing the historical conflict between a free press and ensuring a fair trial.[102] The Court determined that these rights cannot be ranked in relationship to one another.[103] Both rights are fundamental, and, as the Court articulated, one

99. *Id.* at 597 (citation omitted).

100. 427 U.S. 539 (1976); *see infra* text accompanying notes 101–112.

101. 427 U.S. at 540.

102. *Id.* at 551–56.

103. *See generally id.*

cannot be achieved at the expense of the other.[104] The Court concluded that there was a very strong presumption against court orders preventing pretrial publicity as a way to protect a fair trial because the "barriers to prior restraint [must] remain high."[105]

In reviewing the case before the Court, Chief Justice Burger indicated three requirements that had to be met to justify a gag order on the press to protect a defendant's right to a fair trial.[106] First, there has to be a showing of extensive publicity without a prior restraint that will jeopardize the ability to select a fair and impartial jury.[107] The Court found that this requirement was met in the case. Chief Justice Burger said that "the trial judge was justified in concluding that there would be intense and pervasive pretrial publicity . . . [and] [h]e could also reasonably conclude, based on common human experience, that publicity might impair the defendant's right to a fair trial."[108] Second, to justify a prior restraint, it must be determined which "measures short of an order restraining all publication would [not] have insured the defendant a fair trial."[109] The Court provided a long list of alternatives to gag orders on the press, including changing venue, postponing the trial to allow public attention to subside, probing interrogation of prospective jurors "to screen out those with fixed opinions as to guilt or innocence,"[110] providing clear instructions to the jury as to what may be considered in reaching a verdict, and sequestering jurors. The Court found that in *Nebraska Press* there was not a finding that these alternatives would have been insufficient to protect the defendant's right to a fair trial.[111]

Finally, even if the first two requirements are met, a prior restraint is permissible only if it is determined that the restraint would be a workable and effective method of securing a fair trial.[112] For example, there is a significant likelihood that media outlets outside the scope of the court's order will cover the case and that this will reach prospective jurors.

The *Nebraska Press* standard also should be applied to gag orders on speech by trial participants. As discussed in Part II, content-based prior restraints on speech by attorneys and witnesses should be required to meet

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104. *Id.*
105. *Id.* at 561.
106. *Id.*, at 562–63.
107. *Nebraska Press*, 427 U.S. at 562–63.
108. *Id.*
109. *Id.* at 563.
110. *Id.* at 564.
111. *Id.*
112. *Id.* at 565.

the most strict standard of review, which is used for gag orders on the press. The same three-part test is appropriate when considering gag orders on trial participants.

B. Applying Nebraska Press *to Gag Orders on Trial Participants*

In *Nebraska Press*, the Court indicated that it was not creating an absolute ban on prior restraints to protect a defendant's right to a fair trial,[113] but from a practical perspective, the Court did just that.[114] It is difficult to imagine a case in which all three requirements can be met. Even assuming that extensive pretrial publicity threatens a defendant's right to a fair trial, it is difficult to see how a court could conclude that all alternatives to a gag order would fail or that a prior restraint would be successful in keeping prospective jurors from receiving information. Indeed, as Professor Smolla observed, "[l]ower courts have treated *Nebraska Press* as tantamount to an absolute prohibition on such prior restraints, consistently refusing to permit orders limiting press coverage of judicial proceedings."[115]

The Supreme Court has never approved a prior restraint to protect a defendant's right to a fair trial since *Nebraska Press*. For example, in *Oklahoma Publishing Co. v. District Court*,[116] the Court declared unconstitutional a judge's order enjoining the news media from publishing, broadcasting, or disseminating the name or picture of an eleven-year-old boy accused of murder. In a brief per curiam opinion, the Court said that the media had lawfully obtained the information and thus there could be no injunction to prevent its truthful reporting.[117]

For the same reasons, gag orders on trial participants virtually always should be unacceptable and deemed unconstitutional. First, it is extremely unlikely that it ever can be shown that lawyers' statements will pose a serious risk to a fair trial. There is little evidence that pretrial publicity actually jeopardizes fair trials and even less that attorney speech endangers

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113. *Nebraska Press*, 427 U.S. at 570.

114. It should be noted that Justices Brennan, Stewart, and Marshall took the position that prior restraints never could be justified to protect a defendant's right to a fair trial. *Id.* at 572 (Brennan, J., concurring). Justice White expressed "grave doubt" that such a prior restraint ever would be justified. *Id.* at 570 (White, J., concurring).

115. SMOLLA, *supra* note 4, at 8-4; *see id.* at 8-5 n.4 (collecting cases rejecting such prior restraints); *see also* sources cited and discussion *supra* note 4.

116. 430 U.S. 308 (1977).

117. *Id.* at 310–11. The case is consistent with a body of decisions holding that the government may not create liability for the invasion of privacy for the truthful reporting of information lawfully obtained from government records.

fair judicial proceedings. Justice Kennedy observed that "[o]nly the occasional case presents a danger of prejudice from pretrial publicity. Empirical research suggests that in the few instances when jurors have been exposed to extensive and prejudicial publicity, they are able to disregard it and base their verdict upon the evidence presented in court."[118]

Although empirical studies of various sorts have been attempted in measuring the impact of publicity on juries, it likely will never be possible to prove that media coverage prevents a fair trial.[119] It is impossible to try the same case before two juries, one that has been exposed to publicity and one that has been totally shielded. Thus, it is difficult to see how it ever can be demonstrated that attorney speech in a particular case will threaten a fair trial.

The experience of recent high profile cases belies the conclusion that the extensive publicity makes an acquittal more difficult for the defense. In many recent cases that received extensive publicity, defendants were acquitted despite predictions that media coverage would prejudice the jurors against the defendant. For instance, there was pretrial publicity in the McMartin preschool case, the William Kennedy Smith rape trial, and the O.J. Simpson prosecution. In all of these cases, juries acquitted the defendants. It cannot be assumed that publicity precludes convictions. The prosecutions of Oliver North, Stacey Koon and Lawrence Powell for beating Rodney King, and the Menendez brothers all ended in convictions despite extensive media coverage. The cases might be seen as indicating that juries decide based on what occurs at the trial and not what is reported in the press. At a minimum, the cases show the difficulty in drawing any conclusions about the effects of pretrial publicity on the outcome of cases.

I have three main disagreements with commentators and judges who endorse gag orders on trial participants. First, I do not share their perception that publicity is likely to endanger a fair trial. Eileen A. Minnefor, for instance, argues for gag orders by concluding: "[T]he potential harm from a gag order's temporary limit on trial participants' free speech rights is much less serious than the immediate injury resulting from the denial of a criminal defendant's right to a fair trial, which may lead to an unwarranted deprivation of the defendant's liberty or even his or

118. Gentile v. State Bar, 501 U.S. 1030, 1054 (1991).

119. *See, e.g.*, Robert E. Dreschel, *Judges' Perceptions of Fair Trial-Free Press Issue*, 62 JOURNALISM Q. 388 (1985); Thomas E. Eimermann & Rita James Simon, *Newspaper Coverage of Crimes and Trials: Another Empirical Look at the Free Press-Fair Trial Controversy*, 47 JOURNALISM Q. 142 (1970); Norbert L. Kerr, *The Effects of Pretrial Publicity on Jurors*, 78 JUDICATURE 120 (1994).

her death."[120] The unsupported assumption in this statement is that lawyers' statements pose a risk of denying a criminal defendant's right to a fair trial. First Amendment rights should not be compromised based on such conjecture.

Second, under the *Nebraska Press* test, to justify a prior restraint, it must be determined that no alternatives short of the gag order will succeed in providing a fair trial. The Court has recognized that there are countless alternatives to gag orders on the press, including changing venue, postponing the trial to allow public attention to subside, probing interrogation of prospective jurors, providing clear instructions to the jury as to what may be considered in reaching a verdict, and sequestering jurors. It is difficult to imagine the situation where all of these alternatives to the gag order will be inadequate.

Third, even if there is a showing of substantial likelihood of prejudice without a gag order and even if it is demonstrated that no alternative will suffice, a prior restraint is permissible only if it is a workable and effective method of securing a fair trial. Initially, it must be questioned whether gag orders are enforceable. The reality is that leaks seem inevitable and there will be no way to identify the source of statements, especially in states that have reporter shield laws that protect confidential sources for the press.

More importantly, if there is such extensive publicity as to warrant a gag order, it is questionable whether the additional statements by the lawyer would make any difference. For example, in the civil suit against O.J. Simpson, after all that has been said and written about the case, it is unthinkable that anything new could be said by the lawyers that would jeopardize a fair trial. In fact, in a case receiving extensive media coverage, a gag order on lawyers might be counterproductive in that it deprives the press of an accurate source of information.

IV. CONCLUSION

Gag orders on lawyers and parties are virtually always unconstitutional and thus should not be imposed. Many, including some trial judges, have uncritically assumed that increased media coverage of trial proceedings is an undesirable threat to fair trials. The Supreme Court has limited the tools available to trial courts in controlling publicity. The press cannot be excluded from court proceedings[121] and gag orders on the press are virtually always unconstitutional. Therefore, judges seeking to

120. Minnefor, *supra* note 2, at 139–40.

121. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).

exercise control have relied on a tool not yet precluded by the Supreme Court: gag orders on lawyers and witnesses.

Courts imposing such prior restraints are guided by one of the noblest of constitutional objectives: preserving the constitutional right to a fair trial. But these orders sacrifice equally important constitutional values, freedom of speech and of the press, without any indication that such restrictions are necessary. In this Article, I have argued that strict scrutiny is the appropriate standard for evaluating gag orders on trial participants and that this standard virtually never will be met.

Twenty years of experience with the *Nebraska Press* test yields no evidence that the prohibition of gag orders on the press has compromised fair trials. Limiting gag orders on lawyers and parties will pose no greater danger.