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NOTES

A Prior Restraint by Any Other Name: The Judicial Response to Media Challenges of Gag Orders Directed at Trial Participants

In *New York Times Co. v. Sullivan*,¹ the Supreme Court identified the primary purpose of the first amendment as the protection and encouragement of an “unfettered interchange of ideas for the bringing about of political and social changes.”² By identifying public debate as the focus of first amendment protections,³ *New York Times* implied a conception of the first amendment that protects all elements of public debate: the speaker, the channel for the speaker’s message, and the listener.⁴

The Supreme Court has consistently extended first amendment coverage to speakers⁵ and channels for speech.⁶ First amendment protection of receivers’ rights, however, has been ambiguous.⁷ First amendment doctrines thus remain primarily communicator-oriented. In particular, prior restraint doctrine assumes restriction of speakers previous to the dissemination of their speech to be the primary evil at which the first amendment is directed.⁸ Thus, prior restraint doctrine is concerned only with restrictions directed at communicators, and only with those restrictions that are previous to the dissemination of the speaker’s message. The communicator orientation of this ap-

1. 376 U.S. 254 (1964).

2. 376 U.S. at 269 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

3. See Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 12 (1965); Kalven, *The New York Times Case: A Note on “The Central Meaning of the First Amendment,”* 1964 SUP. CT. REV. 191, 204-10.

4. See *infra* notes 111-12 and accompanying text.

5. The Court’s protective stance toward speakers is most evident in its protection of unpopular or offensive speakers. See, *Cohen v. California*, 403 U.S. 15 (1971) (jacket bearing message “fuck the draft” was protected by the first amendment); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (speech of Ku Klux Klan member could be restricted only when the danger of inciting a crowd to violence was substantial and imminent); see also *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978) (upheld right of Nazi group to march through the village of Skokie, Illinois); *Village of Skokie v. National Socialist Party of Am.*, 69 Ill. 2d 605, 373 N.E.2d 21 (1978) (same).

6. See, e.g., *Hague v. C.I.O.*, 307 U.S. 496, 515-16 (1939) (opinion of Roberts, J.) (invalidated ordinance forbidding public meetings in streets and public places without a permit) (“[S]treets and parks . . . have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thought between citizens, and discussing public questions.”).

7. See *infra* notes 115-33 and accompanying text.

8. See *infra* notes 20-26 and accompanying text.

proach becomes problematic when potential receivers of speech claim a right to receive the speech of willing speakers.

This problem is illustrated by recent efforts of media organizations to challenge judicial orders that restrict the speech of trial participants, including trial attorneys, witnesses, and the parties themselves.⁹ In such cases, the media assert a right to receive the potential speech of the trial participants, rather than a right to speak themselves. However, courts have responded to these challenges under traditional communicator-oriented prior restraint analysis. Several courts have characterized these orders as prior restraints in order to examine them under the prohibitive prior restraint analysis,¹⁰ while others have found that such orders do not constitute prior restraints upon the media, and thus need only be examined under a "reasonableness" test.¹¹ The result of this split among the courts is an "all-or-nothing" scenario, in which participant-directed gag orders are either struck down as prior restraints or upheld under a deferential standard of review.¹²

Restrictions directed at the media, on the other hand, such as restrictions prohibiting the media from publishing information it possesses, are virtually always found to be unconstitutional prior restraints.¹³ By directing orders at trial participants, rather than at the media, courts have found a back door for restricting communication about trial activities without incurring the prohibitive scrutiny of prior restraint doctrine.¹⁴ For example, during a particularly controversial murder trial, one Arizona trial court forbade the media from contacting any trial participants, including attorneys, jurors, or par-

9. A highly publicized example of such a restriction is the order forbidding Zsa Zsa Gabor from speaking to members of the press about her trial for assault of a police officer. *Zsa Zsa is Warned by the Judge: Hold Your Tongue*, L.A. Times, Sept. 16, 1989, § 2, at 1, col. 4.

A gag order restricting trial participant speech constitutes a governmental intrusion between a willing speaker (the trial participant) and a willing listener (the media). Challenges to orders are thus distinct from efforts by a willing listener to compel information from an unwilling speaker. The Supreme Court has declined to interpret the first amendment as a right to force speech from an unwilling speaker, particularly in the face of countervailing public policy concerns such as privacy and confidentiality guarantees. *Cf. Houchins v. KQED, Inc.*, 438 U.S. 1 (1978) (plurality holding that press had no right of access to government-controlled prison facilities). For further discussion, see *infra* notes 156-57 and accompanying text.

10. See, e.g., *Journal Publishing Co. v. Mechem*, 801 F.2d 1233, 1236 (10th Cir. 1986); *Columbia Broadcasting Sys. v. Young*, 522 F.2d 234, 238-42 (6th Cir. 1975); *Connecticut Magazine v. Moraghan*, 676 F. Supp. 38, 42-44 (D. Conn. 1987). For a discussion of these cases, see *infra* notes 49-61 and accompanying text.

11. See, e.g., *In re Dow Jones & Co.*, 842 F.2d 603, 610 (2d Cir. 1988). For a discussion of this line of cases, see *infra* notes 34-44 and accompanying text.

12. See *infra* note 67 and accompanying text.

13. See *Nebraska Press Assn. v. Stuart*, 427 U.S. 539 (1976).

14. If the participants themselves challenge the orders, courts must examine the orders as prior restraints. However, the courts' practice of imposing the orders on the participants may imply that courts assume that participants are less likely to challenge restraints than are media organizations, or perhaps that prior restraints on individuals are less disfavored than restraints upon the press. See *infra* notes 62-66 and accompanying text.

ties.¹⁵ Upon reconsideration, however, the court rewrote the order to prohibit those parties from "be[ing] in contact with the media."¹⁶ When a radio station challenged the order as a restraint of its right to receive the potential speech of the trial participants, the Arizona Supreme Court upheld the order under a "reasonableness" test.¹⁷ In contrast, the same decision applied the far more exacting prior restraint analysis to an order that prohibited the media from televising courtroom sketches without judicial approval.¹⁸ Thus, a mere semantic distinction — between an order facially directed at the media and an order facially directed at the participants — enabled the trial court to restrict pretrial publicity without incurring the prohibitive degree of scrutiny that would be warranted by a direct restriction of the media. Gag orders directed at trial participants do not directly intrude into the media's editorial process, but instead result in a reduction of the total communication available regarding trial proceedings. In this way, participant-directed gag orders are effective, albeit indirect, restraints upon the media. This Note examines the dynamics of these participant-directed restrictions and their consequent effect upon the media. Part I examines participant-directed gag orders in relation to traditional prior restraint doctrine. After discussing the history of prior restraint doctrine and the present standard of prior restraint analysis, Part I relates efforts by courts to apply prior restraint doctrine to media challenges of participant-directed gag orders. Part I demonstrates that judicial application of prior restraint doctrine to these challenges leads to arbitrary results: if the court characterizes the gag order as a prior restraint, it almost always strikes the order down; if the court holds that the gag order is not a prior restraint, it need only examine the order under a "reasonableness" test, a deferential standard that most judicially imposed gag orders can pass. Finally, Part I explores the rationales for prior restraint doctrine and examines their relevance to participant-directed gag orders. This Part concludes that participant-directed gag orders are not prior restraints of the media, but that such restraints pose many of the same first amendment problems that prior restraint doctrine was intended to alleviate.

15. *KPNX Broadcasting Co. v. Superior Court*, 139 Ariz. 246, 249, 678 P.2d 431, 434 (1984). The case involved one of a series of killings related to organized crime. 139 Ariz. at 249, 678 P.2d at 434.

16. 139 Ariz. at 249, 678 P.2d at 434 (emphasis omitted).

17. The court asked "whether the restrictions imposed are reasonable and whether the interests of the [state] override the very limited incidental effect of the [order] on First Amendment rights." 139 Ariz. at 256, 678 P.2d at 441 (alterations in original) (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 616 (1982) (Burger, C.J., dissenting)).

18. The court held the order to the "heavy presumption" against prior restraints, and examined "(1) the gravity of harm posed by media coverage; (2) whether other measures short of a prior restraint would have adequately protected the fair-trial right; and (3) how effectively the sketch order avoided the threat to a fair trial." 139 Ariz. at 251, 678 P.2d at 436.

Part II examines the rights on which media organizations base their challenges to participant-directed gag orders: a public right to receive information, the press' right to gather news, and a public right of access to trial. This Part concludes that the public's right to receive information may provide a basis for media challenges of participant-directed gag orders. Under a public debate conception of the first amendment, this right must be protected in order to provide the public with the information it needs to function as an institutional check upon the judiciary's performance.

Part III suggests two alternative approaches courts might employ to protect the public's right to receive information from trial participants. First, courts could continue to apply prior restraint analysis to media challenges of participant-directed gag orders, but could create an exception to traditional standing doctrine that would allow the media to assert the rights of the restrained speakers. Given the highly restrictive nature of prior restraint analysis, however, such an approach would likely prove overinclusive, foreclosing even those participant-directed orders that are necessary to preserve the administration of justice. Second, courts could recognize media claims based on a public right to receive information, and could accord standing to the media based on a financial injury caused by the information restriction. The court should examine such claims under a standard of "heightened" scrutiny, based on the functional utility of the speech at issue. This Note advocates that this second approach be applied regardless of whether the challenger is a speaker or a receiver. A single, standardized test would enable courts to protect the "public debate" envisioned in *New York Times Co. v. Sullivan*.¹⁹

I. PARTICIPANT-DIRECTED GAG ORDERS AND PRIOR RESTRAINT DOCTRINE

The majority of the courts that have faced media challenges to participant-directed gag orders have examined those orders under traditional prior restraint analysis. This Part explores the relationship between gag orders and prior restraint doctrine. Section A briefly relates the origin of prior restraint doctrine and the standard of review applicable to prior restraints. Section B details the judiciary's current application of prior restraint doctrine to media challenges of participant-directed gag orders. Section B concludes that prior restraint doctrine is inapplicable to media claims grounded in receivers' rights. The final section evaluates participant-directed gag orders in terms of the foundational assumptions of prior restraint doctrine. This section concludes that although participant-directed gag orders do not them-

19. 376 U.S. 254 (1964).

selves fit within the framework of prior restraints, they do implicate the foundational premises that underlie prior restraint doctrine.

A. *The Origin of Prior Restraint Analysis*

Prior restraint doctrine traces its origins to *Near v. Minnesota ex rel. Olsen*.²⁰ In *Near*, the Supreme Court struck down a statute that allowed the state to enjoin publication of "malicious, scandalous, and defamatory newspaper[s]." ²¹ The Court held that "it has been generally, if not universally, considered that it is the chief purpose of the [freedom of the press] guaranty to prevent previous restraints upon publication."²² After conducting a functional analysis of the statutory injunction, the Court concluded that the statute's "operation and effect"²³ was to suppress speech in the fashion of traditional prior licensing and injunction arrangements.²⁴ Accordingly, the Court struck down the order as an unconstitutional prior restraint. Although the Court claimed that prior restraints were not the sole concern of the first amendment,²⁵ it implied that characterizing the order as a prior restraint was a prerequisite to finding the law unconstitutional.²⁶

The Supreme Court set forth the current standard for review of prior restraints in *Nebraska Press Association v. Stuart*.²⁷ *Nebraska Press Association* held that a court order prohibiting publication of a criminal defendant's confession constituted an unconstitutional prior restraint. According to the Court, a prior restraint on the press may be employed to protect the integrity of criminal proceedings only if "the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."²⁸ In applying this test, a trial court must consider: "(a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely

20. 283 U.S. 697 (1931).

21. 283 U.S. at 701-02.

22. 283 U.S. at 713.

23. 283 U.S. at 713.

24. See 283 U.S. at 718-19. Critics argue that the statute at issue in *Near*, which enjoined publishers only from printing future malicious and defamatory speech, rather than enjoining publication altogether, was not particularly analogous to a historical licensing system. Facially, "it was a system for subsequent punishment by contempt procedure." Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648, 654 (1955). See also Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11, 16 (1981) (statute did not establish a licensing system because publishers were not required to seek approval prior to publication). Emerson argues that, in practice, publishers would clear doubtful material in advance, causing the judge to function essentially as a censor. Emerson, *supra*, at 654.

25. 283 U.S. at 716.

26. See Jeffries, *Rethinking Prior Restraint*, 92 YALE L.J. 409, 416 (1983).

27. 427 U.S. 539 (1976). The *Nebraska Press Assn.* opinion is famous for its statement that "[i]f it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for a time." 427 U.S. at 559.

28. 427 U.S. at 562 (quoting *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950), *aff'd.*, 341 U.S. 494 (1951)).

to mitigate the effects of unrestrained pretrial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger."²⁹ The *Nebraska Press Association* Court noted that previous restraints on publication come to the test bearing a heavy presumption against validity.³⁰ In application, this presumption has caused the prior restraint test to function as a virtual ban on prior restraint of the press.³¹

B. *Judicial Treatment of Media Challenges to Participant-Directed Gag Orders*

The Supreme Court in *Nebraska Press Association* suggested that means other than direct restraints of the press may be appropriate to restrict communication regarding trial proceedings. Among these alternative methods, the Court suggested that judges might restrict the communications of trial participants when necessary to avoid excessive or prejudicial pretrial publicity.³² Such orders are becoming increasingly common in the courts, and are thus subject to challenge by media organizations who assert that these orders restrict their ability to report on trial proceedings.³³ Despite the implication of the *Nebraska Press Association* Court that such restrictions are preferable to media-directed orders precisely because they are *not* prior restraints, courts have tended to examine media challenges of participant-directed restraints under traditional prior restraint doctrine. Because media organizations are grounding their claims in a right to *receive* information, rather than a right to *speak*, courts' attempts to deal with these challenges under a communicator-oriented standard have proved problematic.

One group of cases has recognized that the media's receiver-rights

29. 427 U.S. at 562. The Court modelled its standard on Learned Hand's version of the "clear and present danger" test as applied in *United States v. Dennis*, 183 F.2d 201 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951). 427 U.S. at 562.

30. 427 U.S. at 562.

31. See *Nebraska Press Assn.*, 427 U.S. at 570-71 (White, J. concurring); see also L. TRIBE, AMERICAN CONSTITUTIONAL LAW 858-59 (2d ed. 1989); Goodale, *The Press Ungagged; The Practical Effect on Gag Order Litigation of Nebraska Press Association v. Stuart*, 29 STAN. L. REV. 497, 498 (1977); cf. Schmidt, *Nebraska Press Association: An Expansion of Freedom and Contraction of Theory*, 29 STAN. L. REV. 431 (1977). Schmidt finds the fatality of the test inherent in the test itself. According to Schmidt, the degree of certainty required to meet the *Nebraska Press Assn.* test will never be met by the necessarily speculative determinations preceding gag orders. *Id.* at 465.

32. 427 U.S. at 564. The *Nebraska Press Assn.* Court rested its support on "[p]rofessional studies . . . recommending that trial courts in appropriate cases limit what the contending lawyers, the police, and witnesses may say to anyone." 427 U.S. at 564 (citing American Bar Association Project on Standards for Criminal Justice, Fair Trial and Free Press 2-15 (Approved Draft 1968)).

33. See, e.g., *State v. Williams*, 7 Media L. Rep. (BNA) 1852 (Ga. Super. Ct. 1981); *Ramsey v. Georgia Gazette*, 7 Media L. Rep. (BNA) 1658 (Ga. Super. Ct. 1981), *rev'd*, 248 Ga. 528, 284 S.E.2d 386 (1981); see also Sack, *Principle and Nebraska Press Association v. Stuart*, 29 STAN. L. REV. 411, 427-29 (1977).

claims do not fit coherently within the communicator-oriented prior restraint standard. These courts have held that participant-directed gag orders do not constitute prior restraints of the media and therefore need only meet a standard of reasonableness.³⁴ In these cases, the direction of the order is dispositive of the applicable level of review: if the order is not directed at the press, it cannot constitute a prior restraint on the press.³⁵

The Second Circuit adopted this position in *In re Dow Jones & Co.*³⁶ The trial at issue implicated public figures, including U.S. Representative Mario Biaggi, in a conspiracy with Wedtech Industries. In an effort to minimize pretrial publicity, the district court prohibited parties and attorneys from making extrajudicial statements to the media.³⁷ Media organizations challenged this order as a prior restraint on their right to gather news.³⁸

The Second Circuit held that the characterization of a gag order depends on the status of the challenging party: a gag order constitutes a prior restraint when challenged by the silenced individual, but not when challenged by a third party.³⁹ Although the court found that the restraint at issue "limit[ed] the flow of information readily available to the news agencies,"⁴⁰ it held that the order was less intrusive upon the media than an order threatening direct sanction of the news agencies.⁴¹ While an order directed at the media would be examined under the prior restraint standard, an indirect restriction need only be examined under a test of whether there existed "a 'reasonable likelihood' that pretrial publicity w[ould] prejudice a fair trial."⁴² The Second Circuit found that the district court's order was supported by evidence of a threat to the administration of justice, that the lower court had

34. See, e.g., *In re Dow Jones & Co.*, 842 F.2d 603 (2d Cir. 1988) (discussed *infra* at notes 36-44 and accompanying text); *Radio & Television News Assn. v. United States Dist. Court*, 781 F.2d 1443 (9th Cir. 1986); *KPNX Broadcasting Co. v. Superior Court*, 139 Ariz. 246, 678 P.2d 431 (1984).

35. If the orders were challenged by the participants themselves, they would generally be considered prior restraints. See *infra* notes 62-66 and accompanying text.

36. 842 F.2d 603 (2d Cir. 1988), *cert. denied*, 109 S. Ct. 377 (1988).

37. 842 F.2d at 606. The district court order prohibited all parties from making "[any] extrajudicial statement concerning this case (1) to any person associated with a public communications media, or (2) that a reasonable person would expect to be communicated to a public communications media." The court indicated that statements "without elaboration or characterization" of "(1) the general nature of an allegation or defense; (2) information contained in the public record; (3) the scheduling or result of any step in the proceedings;" or statements "[e]xplaining, without characterization, the contents or substance of any motion or step in the proceedings, to the extent such motion or step is a matter of public record" would not be included within this prohibition. 842 F.2d at 606.

38. 842 F.2d at 608.

39. 842 F.2d at 608-09.

40. 842 F.2d at 608.

41. 842 F.2d at 608.

42. 842 F.2d at 610 (citing *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966)).

adequately considered less restrictive alternatives,⁴³ and that a determination of the order's effectiveness was unnecessary, as "the restraining order being directed at trial participants is undisputably effective."⁴⁴

The *Dow Jones* opinion identifies a critical distinction between direct restriction of the press and similar restriction of trial participants. As the court noted, the participant-directed gag order lacks the "most offensive aspect of a prior restraint [—] the censorship involved by forbidding the dissemination of information already known to the press and therefore public."⁴⁵ Rather than merely depriving the press of information, direct restraints upon publication "are a direct interference with the constitutionally guaranteed structure of a free press."⁴⁶ A direct sanction of the media interferes with the editorial process, doing "violence . . . to the constitutional role of independent publishers."⁴⁷ In contrast, participant-directed orders restrict the total flow of communication, but do not carry the intrusive connotations of media-directed orders. For this reason, the Second Circuit held that media challenges to participant-directed gag orders need only be examined under a standard of "reasonableness."⁴⁸

A second line of cases, however, has held that participant-directed orders constitute prior restraints of the press.⁴⁹ *Columbia Broadcasting System v. Young*⁵⁰ involved a gag order imposed on all parties, as well as their "relatives, close friends, and associates," to a civil suit over police shootings of students at Kent State University.⁵¹ In response to a challenge by CBS, the Sixth Circuit held that the gag order constituted a prior restraint on CBS' right to gather news. Although the order was not directed at media organizations, the court held that

43. 842 F.2d at 611. The court listed several less restrictive alternatives, including "change of venue, trial postponement, a searching voir dire, emphatic jury instructions, and sequestration of jurors." 842 F.2d at 611.

44. 842 F.2d at 612 n.1.

45. 842 F.2d at 608. See, e.g., *Florida Star v. B.J.F.*, 109 S. Ct. 2603 (1989) (striking down statute prohibiting the press from publishing the names of victims of sexual assaults).

46. Sack, *supra* note 33, at 427.

47. *Id.* See BeVier, *An Informed Public, an Informing Press: The Search for a Constitutional Principle*, 68 CALIF. L. REV. 482, 499 (1980) ("Free political speech may well serve the value of informed debate, but the only inevitable consequences of permitting punishment or censorship of publication is loss of freedom. On the other hand, the only inevitable consequence of a denial of access to governmental information is less information.") (footnote omitted).

48. 842 F.2d at 609-10.

49. See, e.g., *Journal Publishing Co. v. Mechem*, 801 F.2d 1233 (10th Cir. 1986); *Columbia Broadcasting Sys. v. Young*, 522 F.2d 234 (6th Cir. 1975); *Connecticut Magazine v. Moraghan*, 676 F. Supp. 38 (D. Conn. 1987). The Second Circuit's opinion in *In re Dow Jones* explicitly rejects this line of cases. 842 F.2d at 608-09; see *supra* note 40-41 and accompanying text.

50. 522 F.2d 234 (6th Cir. 1975).

51. 522 F.2d at 236. The order specifically forbade "all counsel and Court personnel, all parties concerned with this litigation, whether plaintiffs or defendants, their relatives, close friends, and associates" from discussing the case "in any manner whatsoever" with the news media. 522 F.2d at 236.

"significant and meaningful sources of information concerning the case [were] effectively removed from them and their representatives."⁵² The court found that this curtailment of the press' right to gather news warranted application of strict scrutiny.⁵³ Although *CBS* preceded *Nebraska Press Association v. Stuart*,⁵⁴ it applied a standard similar to the prior restraint test ultimately established by the Supreme Court. First, the *CBS* court required that the speech must pose a "clear and present danger, or a serious or imminent threat" to the administration of justice, with due consideration for the "heavy presumption" against the constitutional validity of a prior restraint.⁵⁵ In addition, the restriction must be "narrowly drawn" and imposed only in the absence of "reasonable alternatives . . . having a lesser impact on first amendment freedoms."⁵⁶ The court found that the limited threat pretrial press coverage posed to the administration of justice failed to overcome the presumed invalidity of such an order.⁵⁷

Other courts have followed the Sixth Circuit in categorizing participant-directed gag orders as prior restraints upon media rights. For example, the Tenth Circuit, in *Journal Publishing Co. v. Mechem*,⁵⁸ sustained a publisher's challenge to an order prohibiting jurors from post-trial press interviews, on the ground that the order was an unconstitutional prior restraint of the publisher's first amendment right to gather news.⁵⁹ Similarly, in *Connecticut Magazine v. Moraghan*,⁶⁰ a district court applied *CBS*' strict scrutiny standard when a publishing company challenged a court order forbidding trial attorneys from discussing a controversial murder case with the media. The court con-

52. 522 F.2d at 239.

53. 522 F.2d at 240.

54. 427 U.S. 539 (1976).

55. 522 F.2d at 238.

56. 522 F.2d at 238.

57. 522 F.2d at 240.

58. 801 F.2d 1233 (10th Cir. 1986).

59. 801 F.2d at 1236-37. *Journal Publishing Co.* involved a controversial trial that ultimately found the City of Albuquerque and its police force guilty of civil rights violations. Following the trial, the judge admonished jurors: "You should not discuss your verdict after you leave here with anyone. If anyone tries to talk to you about it, or wants to talk to you about it, let me know. If they wish [to] take the matter up with me, why, they may do so, but otherwise, don't discuss it with anyone." 801 F.2d at 1235. The judge rejected a request by Journal Publishing Company to rescind or modify the order. 801 F.2d at 1235.

60. 676 F. Supp. 38 (D. Conn. 1987). The criminal defendant in *Connecticut Magazine* was charged with dismembering his wife and putting her head and limbs through a wood chipping machine. The court wryly noted, "Not surprisingly, the case has attracted some substantial attention in the media." 676 F. Supp. at 39. To curb media involvement, the court ordered:

No attorney involved in the prosecution or the defense of this case, under order of this court and under pain of the contempt powers the Court has, will be permitted to make any public statements to any member of the media about this trial while it is in progress. That means that from today on until such time as the case terminates and by that the Court means until a verdict is returned.

676 F. Supp. at 39.

cluded that the order constituted a "prior restraint on the right to gather news and derivatively on publication."⁶¹ Although the order was not a direct restraint on publication, the court held that its effect upon the press' right to publish warranted application of the prior restraint test to find the order unconstitutional.

Although this second line of cases recognized that the media has an interest in receiving the communications of trial participants, it did so under the communicator-oriented prior restraint standard. By applying prior restraint doctrine to receiver-oriented claims, these courts failed to recognize the distinction between restrictions that directly intrude into the editorial process and restrictions that limit the total amount of available communication without intervening in editorial decisions. Accordingly, the *CBS* line of cases is inherently inconsistent with prior restraint doctrine in its traditional form.

However, the first line of cases, which rejected prior restraint analysis of media challenges to participant-directed gag orders, made judicial review of gag orders dependent on the status of the challenging party. Although a participant-directed restraint is not a prior restraint of the challenging media, it is a prior restraint of the participant toward whom the order is directed.⁶² As a result, the same order may be subject to prior restraint analysis if challenged by the participant toward whom it is directed, and subject only to a "reasonableness" test when challenged by media organizations. For example, in *Radio and Television News Association v. United States District Court*,⁶³ a district court had forbidden trial attorneys from making extrajudicial statements to the press during the trial of a former FBI agent charged with passing classified documents to Soviet agents.⁶⁴ When the defendant's attorney challenged the order as a restraint of his rights as a communicator, the Ninth Circuit Court of Appeals labelled the order a prior restraint and struck it down under the *Ne-*

61. 676 F. Supp. at 42.

62. See *Rodgers v. United States Steel Corp.*, 536 F.2d 1001 (3d Cir. 1976) (sustained trial counsel's challenge to a gag order restricting counsel from disseminating information obtained through a deposition as an unconstitutional prior restraint); *Chase v. Robson*, 435 F.2d 1059 (7th Cir. 1970) (sustained challenge by counsel and defendants to an order restricting them from speaking to the press about the trial). In *In re Russell*, 726 F.2d 1007 (4th Cir.), cert. denied, 469 U.S. 837 (1984), the Fourth Circuit implied that prior restraints may be disfavored only when directed against the media. However, such a position would be inconsistent with the Supreme Court's edict that the media has no rights that are greater than those afforded the general public. Cf. *Houchins v. KQED, Inc.*, 438 U.S. 1, 10 (1978) (discussed *infra* at notes 156-58 and accompanying text). See *Freedman & Starwood, Prior Restraints on Freedom of Expression by Defendants and Defense Attorneys*, 29 STAN. L. REV. 607, 618-19 (1977) (Court's disfavor of prior restraint of the press is inconsistent with its holding in *Pell v. Procunier*, 417 U.S. 817 (1974), that the press merits no special first amendment privileges).

63. 781 F.2d 1443 (9th Cir. 1986).

64. 781 F.2d at 1444.

braska Press Association test.⁶⁵ When an organization of broadcast journalists later challenged a modified version of the same order, the court held the order was not a prior restraint, and upheld the order under a “reasonableness” test.⁶⁶ As *Radio and Television* illustrates, prior restraint doctrine does not accommodate receivers’ rights, and is accordingly insensitive to restriction of the communication process as a whole.

The present circuit split thus produces an “all-or-nothing” scenario for media challenges to participant-directed gag orders. If a court characterizes an order as a prior restraint, the order must survive a virtually prohibitive presumption against prior restraints. If the court does not characterize the order as a prior restraint, it need only examine the order under a “reasonableness” test, a standard that requires only a “reasonable likelihood” that pretrial publicity will endanger the administration of justice, and only that the order be “reasonable,” rather than “narrowly constructed.”⁶⁷

Neither standard adequately protects the media’s interest in receiving communication. Since participant-directed orders do not directly intrude into the editorial process, they do not appear to warrant the prohibitive degree of scrutiny of the prior restraint test. However, the restriction on communication available to the media implicates first amendment concerns to a greater extent than implied by the “reasonableness” standard. In order to accommodate the media’s interest in receiving information, courts must establish some middle ground.

C. *Application of the Prior Restraint Doctrine to Participant-Directed Gag Orders*

Media challenges to participant-directed gag orders represent a concern for the communication loss that results from such orders. This concern is the link between media challenges and prior restraint doctrine: both are concerned with a reduction of communication.

The heavy constitutional presumption against prior restraints assumes that prior restraints are inherently more speech-suppressive

65. *Levine v. United States Dist. Court*, 764 F.2d 590, 599 (9th Cir. 1985), *cert. denied*, 476 U.S. 1158 (1986).

66. The court examined “whether the restrictions imposed [were] reasonable and whether the interests [of the government] overr[ide] the very limited effects of the [order] on First Amendment rights.” *Radio and Television News Assn. v. United States District Court*, 781 F.2d at 1447 (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 616 (1982) (Burger, C.J., dissenting)).

67. The “reasonableness” test, although deferential, does require a court to make the minimal findings that pretrial publicity is likely and poses a threat to the administration of justice. See *In re New York Times*, 878 F.2d 67 (2d Cir. 1989) (gag order could not stand absent a finding that parties were likely to make extrajudicial statements to the press, or that such statements could be prejudicial to the proceedings).

than other forms of regulation.⁶⁸ Prior restraints allegedly endanger protected speech by inducing self-censorship,⁶⁹ increasing the coverage of regulation,⁷⁰ and delaying dissemination of speech.⁷¹ Prior restraint doctrine reflects the perception that these factors make prior restraints inherently more speech suppressive than subsequent restraints, and represents an attempt to limit their use for that reason.⁷² This section examines the three traditional prior restraint rationales and applies them in the context of media challenges to participant-directed gag orders. This section attempts to show that media challenges to participant-directed gag orders address the speech-suppressive concerns the prior restraint doctrine was intended to correct.

1. *Self Censorship*

Traditional prior restraint doctrine proceeds from assumptions about the behavior of the party toward whom the restraint is directed. If a party is subject to a speech restriction, she may refrain from even unrestricted speech in an effort to insure that she does not violate the restriction. Thus, the restriction results not only in the loss of the restricted speech, but also in the loss of unrestricted speech that the speaker herself censors. This self-censorship phenomenon, referred to as "chilling" speech, occurs "when individuals seeking to engage in activity protected by the first amendment are deterred from so doing by governmental regulation not specifically directed at that protected activity."⁷³ For example, trial participants are chilled from speaking if they respond to an order forbidding discussion of a defendant's testimony by refraining from media contact altogether. The participants' fear of sanction causes them to interpret the restraint broadly, and thus to abstain from speech that was not prohibited by the order.

Any chilling effect of a prior restraint is increased by the collateral bar rule.⁷⁴ Under the collateral bar rule, courts may initiate contempt proceedings upon a determination that the participant violated a gag order, without regard for the participant's good faith or the order's constitutionality.⁷⁵ The participant may lose her opportunity to pro-

68. See Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53 (1984).

69. Blasi, *supra* note 24, at 24-49.

70. *Id.* at 49-63; Emerson, *supra* note 24, at 657.

71. Blasi, *supra* note 24, at 30-33; Emerson, *supra* note 24, at 657.

72. It is a subject of continual debate whether or not prior restraints are inherently more speech-suppressive than subsequent restraints. See, e.g., Barnett, *The Puzzle of Prior Restraint*, 29 STAN. L. REV. 539 (1977); Redish, *supra* note 68; Sack, *supra* note 33; Schauer, *Fear, Risk and the First Amendment, Unravelling the "Chilling Effect,"* 58 B.U. L. REV. 685 (1978).

73. Schauer, *supra* note 72, at 693 (emphasis omitted).

74. Hunter, *Toward a Better Understanding of the Prior Restraint Doctrine: A Reply to Professor Mayton*, 67 CORNELL L. REV. 283, 286 (1982).

75. See *In re Halkin*, 598 F.2d 176, 184 n.15 (D.C. Cir. 1979); Blasi, *supra* note 24, at 20.

test the order's constitutionality if she chooses to violate the order rather than to challenge it through judicial channels.⁷⁶ Although some courts no longer adhere to the collateral bar rule, other jurisdictions continue to use it to deter participants from testing the boundaries of their orders.⁷⁷ Thus, the collateral bar rule discourages trial participants from testing the limits of gag orders for fear they will face contempt proceedings without an affirmative defense based on the order's unconstitutionality.

Respect or fear of judicial authority is likely to increase risk aversion among trial participants. First, a gag order is directed toward a small group of individuals involved in a specific trial. The personalized nature of the order may "bring[] the existence of a legal prohibition and the possibility of sanctions directly to the attention" of the participant.⁷⁸ Participants intimidated by the individualized nature of the order may become overly conscious of the need to comply with the order to avoid contempt proceedings. Second, participants may fail to understand the boundaries of the judicial restrictions. Particularly where orders lack specificity, participants may suppress unrestricted speech in order to reduce the risk of violation.⁷⁹ For example, a gag order might prohibit participants from discussing the contents of a criminal defendant's testimony with the media. Overlap of the defendant's testimony with other evidence may leave the participant unclear about the limitations of the restriction. Rather than risk contempt proceedings, the participant may refuse to discuss any related evidence, or may avoid media contact altogether. Finally, because contempt proceedings are heard by the same judge who imposes the gag order, participants may fear that the judge will be inclined harshly to enforce her own order.⁸⁰ Although the judge's accountability to an appeals court may temper this tendency,⁸¹ it is the participant's perception that chills participant speech. Thus, even in the absence of judicial bias, participants who perceive such bias may become excessively risk averse in complying with a gag order.

76. Court orders restricting trial participant speech thus shift the burden of action from the court to the trial participants. Rather than allowing the participant to speak, which would place the burden on the court to act consequent to that speech, the collateral bar rule requires a trial participant to challenge a gag order through judicial procedures before speaking, in order to preserve any constitutional challenges. Blasi, *supra* note 24, at 28-30.

77. See Blasi, *supra* note 24, at 20; Barnett, *supra* note 72, at 551-58.

78. Blasi, *supra* note 24, at 37; see also *In re Halkin*, 598 F.2d 176, 184 n.15 (D.C. Cir. 1979) ("[A] judicial order singles out particular individuals, increasing both the likelihood of punishment if the order is violated, and the probability that protected speech will be chilled regardless of the defenses which may ultimately be available in subsequent proceedings.").

79. Blasi, *supra* note 24, at 40.

80. *Id.* at 23.

81. *Id.* at 34. But cf. Emerson, *supra* note 24, at 658 ("A system of prior restraint usually operates behind a screen of informality and partial concealment that seriously curtails opportunity for public appraisal and increases the chances of discrimination and other abuse.").

Trial participants' perceptions of gag orders may cause them to suppress speech beyond the boundaries of an order. This risk of "chilling" trial participant speech inures regardless of whether the gag orders are challenged by the parties themselves or by media organizations. The result of such chilling is a reduction of the total communication on the part of trial participants.

2. Risk of Over-Regulation

Because prior restraints are imposed before the dissemination of a communication, they represent a speculative determination as to the potential harm of that speech. Advocates of prior restraint doctrine believe that the conjecture implicit in imposing prior restraints tends to "bring[] within the complex of government machinery a far greater amount of communication than a system of subsequent punishment."⁸² Gag orders, which are imposed upon a judge's estimation that pretrial publicity will endanger the administration of justice, incur this risk of over-regulation. The judge has a duty to ensure a fair trial, particularly where the sixth amendment rights of criminal defendants are involved,⁸³ and a typically risk-averse judge may overestimate the dangers of participant speech, causing her to err on the side of speech exclusion.⁸⁴ A judge may thus impose gag orders more frequently than necessary, or may impose overly inclusive orders. Although the judge also has a duty to act constitutionally, which arguably might provide a counterweight to a propensity to impose overzealous restrictions,⁸⁵ a judge is likely to perceive the harms risked by an unfair trial as greater than those posed by an unconstitutional gag order. Judges may justifiably believe that a criminal defendant is more likely to appeal an unfair conviction than most trial participants, particularly disinterested witnesses, are to challenge a gag order. Further, a conviction resulting from an unfair trial is likely to be reversed, neces-

82. Emerson, *supra* note 24, at 656.

83. See *Sheppard v. Maxwell*, 384 U.S. 333 (1966) (reversing a murder conviction on the ground that the effects of excessive pretrial publicity violated the defendant's right to a fair trial). Although a judge's duty to insure a fair trial is greatest in the context of a criminal trial, where the defendant's sixth amendment rights are implicated, judges have a duty to insure the fair administration of justice in civil proceedings as well. See, e.g., FED. R. CIV. P. 1 (courts shall construe the rules of civil procedure so as to "secure the just, speedy, and inexpensive determination of every action").

84. See Blasi, *supra* note 24, at 52-53 ("[J]udges tend to be unduly risk averse in ruling upon the claims of speakers. . . . The ideal of a 'balanced assessment of competing values' is unlikely to be achieved in the sterile, caution-inducing environment of adjudication prior to initial dissemination.").

85. See Mayton, *Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine*, 67 CORNELL L. REV. 245, 250-51 (1982) (asserting that the propensity for over-censorship among administrative censors is not shared by courts, which are more likely to be sensitive to free speech values).

sitating a retrial,⁸⁶ while an unconstitutional gag order will simply be repealed.⁸⁷ Based on her perception of the risks, a judge may tend to protect the integrity of her courtroom to the detriment of free speech considerations.

A judge's propensity for overregulating participant speech may be encouraged by the relative ease of imposing a gag order. As with other injunctions, a judge can issue a gag order "by a simple stroke of a pen."⁸⁸ The court may issue gag orders *sua sponte*, or upon a motion by the parties after only a limited hearing.⁸⁹ Gag orders may thus be imposed without the impediment of a full judicial proceeding. A judge has little to lose by imposing such orders; they require little judicial time or deliberation and fulfill the judge's responsibility of providing the criminal defendant with an unprejudiced trial. The comparable ease and potential benefits of restricting participant speech thus create a dynamic in favor of gag orders that may result in unwarranted restriction of participant speech.⁹⁰

C. Delay

Prior restraint systems cause a delay in the dissemination of speech that may result in the loss of the delayed speech. For example, under a licensing system, speech must be delayed until the speaker obtains a license. This delay may result in self-censorship: "[t]he speakers might decide not to apply for a permit because they anticipate that by the time the permit is issued the occasion for speaking will have passed."⁹¹ Alternatively, speakers may apply for the permit, "but lose their enthusiasm for speaking as a result of the delay to which they have been subjected."⁹²

Thus, although gag orders may be imposed only for the duration of a trial proceeding, they may delay trial participant speech until information about the trial is no longer valuable to either the speaker or the media. A trial participant may have some reason to believe the timing of her speech is particularly important. If she must refrain from such speech until after the trial is over, she may miss her only opportunity

86. See, e.g., *Sheppard v. Maxwell*, 384 U.S. 333 (1966) (criminal conviction reversed based on findings of excessive and prejudicial pretrial publicity).

87. See, e.g., *Columbia Broadcasting Sys. v. Young*, 522 F.2d 234 (6th Cir. 1975) (Sixth Circuit issued writ of mandamus requiring lower court to vacate participant-directed gag order.).

88. Emerson, *supra* note 24, at 657.

89. Hunter, *supra* note 74, at 289; see also Blasi, *supra* note 24, at 54-63.

90. Emerson asserts that "a system of prior restraint is so constructed as to make it easier, and hence more likely, that in any particular case the government will rule adversely to free expression." Emerson, *supra* note 24, at 657. Further, Emerson asserts that "personal and institutional forces inherent in the system nearly always end in a stupid, unnecessary, and extreme suppression." *Id.* at 659.

91. Blasi, *supra* note 24, at 30.

92. *Id.*

effectively to disseminate that speech, and perhaps lose her desire to disseminate the speech at all.⁹³ For example, in *United States v. Tijerina*,⁹⁴ the Tenth Circuit approved enforcement of contempt proceedings against a criminal defendant who violated a gag order by describing the injustice of his ongoing trial to a convention crowd in an attempt to incite a political uprising. The audience for his speech was likely available only at the convention, and his speech would doubtless have been less persuasive after the trial had already been completed. A trial participant's compliance with a gag order may thus cost her an opportunity for effective communication and may restrict her freedom to choose her preferred forum.

In addition, the public may no longer have an interest in the trial after the trial has been completed. The media consists primarily of profit-oriented institutions that have no use for "obsolete and unprofitable" speech.⁹⁵ If participant speech is delayed beyond the scope of public attention, the media may have little interest in obtaining and disseminating that information to an uninterested public. In other words, the media, rather than the trial participant, may lose their enthusiasm for speaking about the trial. As a result, delaying trial participant speech may effectively prevent that information from reaching the public.

Delaying participant speech until the trial's end may prevent the public from providing any check upon the judiciary until after the trial has become a *fait accompli*.⁹⁶ One of the primary goals of the first amendment has been to provide the public with the necessary information to act as an institutional check upon government activity, including activities of the judiciary.⁹⁷ Although judicial errors might be identified after the trial, they can then be corrected only on appeal. Given the expense and delay of the appellate process, the public's inability to observe judicial misconduct during the course of the trial may have tangible repercussions for parties involved in civil and criminal litigation. Thus, if information about a particular trial is not available while the trial is underway, the public loses the opportunity to respond to perceived judicial misconduct when that misconduct can be most easily remedied.

Whether through participant self-censorship, profit-motivated reporting, or judicial overuse of gag orders, participant-directed gag or-

93. See Blasi, *supra* note 24, at 33.

94. 412 F.2d 661 (10th Cir.), *cert. denied*, 396 U.S. 990 (1969).

95. Emerson, *supra* note 24, at 657. But see Blasi, *supra* note 24, at 65 ("important exposés regarding past events usually create their own topicality").

96. Prior restraint doctrine expresses concern that "speech relating to the behavior of public officials be disseminated soon enough to permit a checking process to operate." Blasi, *supra* note 24, at 65.

97. See Emerson, *supra* note 24, at 658. The public's review of the judiciary is discussed more fully *infra* notes 198-204 and accompanying text.

ders have the potential to suppress protected speech. As a result, such gag orders bring about a reduction of the total amount of communication available about a particular trial. As the preceding discussion indicates, prior restraint doctrine proceeds from the assumption that prior restraints are particularly speech-suppressive. Yet the amount of total speech reduction is not dependent on the status of the challenging party. When read in conjunction with *New York Times Co. v. Sullivan*,⁹⁸ prior restraint doctrine appears to be concerned with the total reduction of communication, a concern that is implicated by participant-directed gag orders whether challenged by the participants themselves or by third party media organizations.

II. RIGHTS IMPLICATED BY PARTICIPANT-DIRECTED GAG ORDERS

Although courts have recognized that media interests are affected by participant-directed gag orders, they have not agreed on the bases for those interests. This Part discusses the three different rights courts have found at issue in media challenges to participant-directed gag orders. Section A discusses the history and application of the public's right to receive information. Although no court has struck down a gag order as a prior restraint of the media's right to receive information, the Second Circuit in *In re Dow Jones & Co.*⁹⁹ found that the media's interests as potential recipients of the trial participants' speech were sufficient to support the media's standing to challenge participant-directed gag orders.¹⁰⁰ Section A asserts that the right to receive information is the most logical basis on which to ground media challenges to participant-directed gag orders. Section B reviews the right to gather news, on which both the Sixth Circuit, in *Columbia Broadcasting System v. Young*,¹⁰¹ and the Tenth Circuit, in *Journal Publishing Co. v. Mechem*,¹⁰² relied to strike down gag orders as prior restraints. Despite these courts' holdings, this section asserts that the right to gather news provides only illusory grounds for media challenges. Finally, section C discusses the right of access to trial. Two courts, the Arizona Supreme Court in *KPNX Broadcasting Co. v. Superior Court*¹⁰³ and the Ninth Circuit in *Radio and Television News Association v. United States District Court*,¹⁰⁴ have held that the right of access to trial is the appropriate framework through which to examine media claims of a "right of access" to trial participants. Both

98. 376 U.S. 254 (1964).

99. 842 F.2d 603 (2d Cir.), *cert. denied*, 109 S. Ct. 377 (1988).

100. 842 F.2d at 608.

101. 522 F.2d 234, 240 (6th Cir. 1975).

102. 801 F.2d 1233, 1236 (10th Cir. 1986).

103. 139 Ariz. 246, 252, 678 P.2d 431, 437 (1984).

104. 781 F.2d 1443, 1446 (9th Cir. 1986).

courts ultimately held that a right of access to trial does not contemplate a right of access to trial participants. While section C agrees with the conclusions of these courts, it asserts that the public needs the information trial participants can provide in order to serve as an institutional check upon the judiciary's activities. Thus, this Part concludes that the right to receive information is the most appropriate basis for media challenges, and that this right is particularly compelling in the context of participant-directed gag orders, which restrict information that the public needs to review judicial performance.

A. *The Public's Right To Receive Information*

The right to receive information, the right to gather news, and the right of access to trial share a common foundation in the Supreme Court's decision in *New York Times Co. v. Sullivan*.¹⁰⁵ In identifying the encouragement of public debate as the primary purpose of the first amendment, *New York Times* is credited with adopting Alexander Meiklejohn's "citizen as ruler" interpretation of the first amendment.¹⁰⁶ According to Meiklejohn, "All constitutional authority to govern the people of the United States belongs to the people themselves."¹⁰⁷ However, "[s]elf-government can exist only insofar as the [people] acquire . . . intelligence, integrity, sensitivity, and generous devotion to the general welfare."¹⁰⁸ Thus, the first amendment "protects the freedom of those activities of thought and communication by which we 'govern.'"¹⁰⁹ Accordingly, institutions such as the legislature, executive, and judiciary, which constitute the tools for self-government, may not abridge the public debate necessary to the maintenance of an informed citizenry.¹¹⁰

Both Meiklejohn and *New York Times* contemplate a model of public debate that includes the entire communication process.¹¹¹ Protected public debate implies not only a right to speak, but a corollary right to receive the speech of others; *i.e.*, a right to *communicate*.¹¹² In

105. 376 U.S. 254 (1964). The Court reversed an Alabama police official's libel award for an advertisement placed in the *New York Times* by civil rights organizations.

106. Brennan, *supra* note 3; Kalven, *supra* note 3.

107. Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 253 (1961).

108. *Id.* at 255.

109. *Id.*

110. *See id.*

111. *See* A. TAN, MASS COMMUNICATION THEORIES AND RESEARCH 53-73 (1985). Consider, for example, the watershed model of communication created by engineers Claude Shannon and Warren Weaver: "[A]n information source selects a message from a set of messages available to him or her. This message is changed by the transmitter into a signal, which is then sent over the channel to the receiver, which changes the transmitted signal back into the message and then sends it on to the destination." *Id.* at 55. Under this model, the communication process is not complete until the message has been successfully transferred from the information source, through the channel, to the destination.

112. *See* Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U. L.Q. 1, 2 ("[T]he

this sense, the right to receive information not only is implied, but is necessary, for the communication process is not complete until the receiver has received the sender's message. Thus, under Meiklejohn's theory, "the right of the citizen to receive and obtain information" becomes the "exclusive justification for according all persons freedom of speech and other First Amendment rights."¹¹³

Following *New York Times*,¹¹⁴ the Supreme Court tentatively embraced a right to receive information.¹¹⁵ For example, in *Lamont v. Postmaster General*,¹¹⁶ the Court struck down a statute requiring an addressee to submit a written request for postal delivery of Communist propaganda materials.¹¹⁷ Although the Court did not explicitly recognize a right to receive information, it found that the statute at issue was inconsistent with the "uninhibited, robust, and wide-open" debate and discussion that are contemplated by the First Amendment.¹¹⁸ In *Stanley v. Georgia*,¹¹⁹ the Court, in striking down a statute that prohibited possession of obscene matter, noted that constitutional protection of a "right to receive information and ideas" was "well-established."¹²⁰

The Court retreated in later cases, however, from full adoption of a right to receive information. For example, in *Kliendienst v.*

right to know serves much the same function in our society as the right to communicate. It is essential to personal self-fulfillment. It is a significant method for seeking a better answer. It is necessary for collective decisionmaking in a democratic society. And it is vital as a mechanism for effectuating social change without resort to violence or undue coercion."); see also *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 76 (1976) (Powell, J., concurring) ("The primary concern of the free speech guarantee is that there be full opportunity for expression in all its varied forms to convey a desired message. Vital to this concern is the corollary that there be full opportunity for everyone to receive the message.").

This theory is distinct from theories that identify communicators' self-realization as the primary purpose of the first amendment. See Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972). If first amendment protection were premised on theories of self-expression, it would not include listeners' rights because such rights diffuse first amendment protection among both speakers and listeners. Emerson, *supra*, at 4-5.

113. Emerson, *supra* note 112, at 4.

114. 376 U.S. 254 (1964).

115. *Martin v. City of Struthers*, 319 U.S. 141 (1943), is credited with the first articulation of a right to receive information. While *Martin* preceded *New York Times Co. v. Sullivan*, the Court based the right to receive information on a model of the first amendment in which public debate was "essential if vigorous enlightenment was ever to triumph over slothful ignorance." 319 U.S. at 143. See also *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) (upholding the fairness doctrine in broadcasting on the grounds that the public has a right to hear from both sides of a political debate); *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (right to receive information about contraceptives).

116. 381 U.S. 301 (1965).

117. 381 U.S. at 307 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)). Justice Brennan's concurrence asserted that the Court was upholding a right to receive information as established in *Martin v. Struthers*, 319 U.S. 141 (1943). 381 U.S. at 308 (Brennan, J., concurring).

118. 381 U.S. at 306-07.

119. 394 U.S. 557 (1969).

120. 394 U.S. at 564.

Mandel,¹²¹ the Court upheld the Attorney General's power to deny a lecturer's visa waiver without regard for other persons' interests in receiving the lecturer's speech.¹²² In *Procunier v. Martinez*,¹²³ the Court declined to deal with a "right to hear," even though it held that mail censorship in federal prisons violated the rights of expression of both prisoners and their addressees.¹²⁴ If a right to receive information was, as the *Stanley* Court had said, "well established," it is somewhat surprising that it was not applied to these cases where parties were asserting a right to receive verbal and written communications.

The Court followed these cases, however, with its strongest pronouncement of a right to receive information, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*¹²⁵ In *Virginia Pharmacy*, the Court struck down a regulation prohibiting pharmacists from advertising prescription medications.¹²⁶ When the statute was challenged by a consumers' group,¹²⁷ the Court extended "[first amendment] protection . . . to the communication, to its source and to its recipients both."¹²⁸ Accordingly, the Court held that the advertising prohibition violated consumers' first amendment right to receive information.

The Court has applied the *Virginia Pharmacy* right to receive information in other contexts. In affirming the fairness doctrine, which required broadcasters to provide equal air time to competing political viewpoints, the Court in *Red Lion Broadcasting Co. v. FCC*¹²⁹ held that the "right of the viewers and listeners, not the right of broadcasters, . . . is paramount."¹³⁰ In *First National Bank v. Bellotti*,¹³¹ the Court struck down a prohibition on corporate speech that "limit[ed] the stock of information from which members of the public may draw."¹³² Although the corporation itself challenged the statute at issue in *Bellotti*, the Court based its decision on the need to preserve speech because of its value to the public.¹³³ Beyond these few cases,

121. 408 U.S. 753 (1972).

122. 408 U.S. at 770.

123. 416 U.S. 396 (1974).

124. 416 U.S. at 409.

125. 425 U.S. 748 (1976).

126. 425 U.S. at 770. The statute at issue provided that a pharmacist's advertising of prices, rebates, or credit terms of prescription drugs constituted unprofessional conduct. A pharmacist could be subject to a civil monetary penalty or revocation or suspension of her license for violating professional standards. 425 U.S. at 752.

127. The statute was challenged by a Virginia resident, the Virginia Citizens Consumer Council, and the Virginia State AFL-CIO. 425 U.S. at 753 & n.10.

128. 425 U.S. at 756.

129. 395 U.S. 367 (1969).

130. 395 U.S. at 390.

131. 435 U.S. 765 (1978).

132. 435 U.S. at 783.

133. See 435 U.S. at 777 ("The inherent worth of the speech in terms of its capacity for

however, the Court has given little guidance as to the scope of a right to receive information.

The Court's inconstant reliance on a right to receive information may stem from a concern that "focus[ing] on the more indirect and diffuse rights of the listener would . . . tend to weaken the system [of first amendment protections]." ¹³⁴ In *Zemel v. Rusk*, ¹³⁵ the Court rejected a plaintiff's claim that his right to receive information entitled him to a passport for travel to Cuba, in order to gain information about that country. The Court commented that the right to receive information was not "unrestrained."¹³⁶ As the Court pointed out, "[t]here are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow."¹³⁷ The Court may thus be wary that a right to receive information would prove unadministrably broad in most contexts.

Despite the Court's concerns, recognizing a right to receive information need not lead to wholesale abandonment of traditional speech definitions. Recipients' rights may require protection only when the interests of the receiver do not coincide with the interests of the communicator,¹³⁸ or when the communicator is unable or unwilling to assert her rights.¹³⁹ In these situations, it may be desirable to allow the recipient to assert her interests in order to subject a communication restraint to judicial scrutiny. For example, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* ¹⁴⁰ the consumers' (recipients') economic interest in receiving prescription drug advertisements did not coincide with the interests of the pharmacists (communicators) in preventing price competition.¹⁴¹ Pharmacists, as a political coalition, were unlikely to challenge a restriction they had placed on their own communication. Consumers, however, were constrained in their ability to make intelligent decisions regarding prescription drugs because of the lack of available information about quality and price. The only effective means of challenging the restriction's constitutionality was to allow interested consumers to assert their right to receive the prescription advertising. This may also have

informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.").

134. Emerson, *supra* note 112, at 4-5.

135. 381 U.S. 1 (1965).

136. 381 U.S. at 17.

137. 381 U.S. at 16-17.

138. See Emerson, *supra* note 112, at 2.

139. See *id.* at 7.

140. 425 U.S. 748 (1976).

141. The Virginia State Board of Pharmacy argued, however, that in fact the interests of the two coincided because the price competition that would result from advertising would ultimately harm consumers by decreasing the quality of service and raising prices. 425 U.S. at 767-68. The Court rejected this argument.

been the case in *Lamont v. Postmaster General*,¹⁴² where the speech at issue was promulgated by foreign publishers, who lack full constitutional rights within U.S. courts,¹⁴³ and in *Kliendienst v. Mandel*,¹⁴⁴ where the speaker was an alien with limited constitutional rights.¹⁴⁵ These cases illustrate the necessity of allowing receivers to assert their rights as potential recipients of communication where the speakers cannot reasonably be expected to assert their right to speak.

Under this analysis, media challenges to restrictions on trial participants are necessary to prevent unwarranted restrictions on the participants' speech where the participants are unwilling or unable to protect their own right to speak. Although the public may have an interest in receiving information about the trial, the parties to a trial, particularly a defendant in a criminal trial, may have an interest in suppressing such speech. While some criminal defendants may have an interest in making a public appeal, pretrial publicity is often detrimental to criminal cases.¹⁴⁶ In such cases, a criminal defendant may be more likely to claim a right to suppress information than a right to speak. Thus, media challenges to restrictions on participant speech may be the only viable means of subjecting such restrictions to judicial review.

Similarly, the media may wish to challenge gag orders where the restrained trial participants lack the resources or the incentive to launch a court challenge to a gag order. Witnesses, for example, may have little at stake in the primary litigation at issue, and thus may have little motivation to spend time and effort challenging a restraint on their speech regarding that litigation. Likewise, litigants, who bear the cost of the primary litigation, may be unable to spare the resources necessary to challenge participant-directed gag orders. A media agency, on the other hand, is likely to have greater resources and a greater financial incentive to assert communication rights. Consider the situation presented in *Anderson v. Cryovac, Inc.*¹⁴⁷ Residents of Woburn, Massachusetts sued Cryovac, Inc., alleging that Cryovac had released toxic chemicals into the ground, contaminating the town's drinking water.¹⁴⁸ The court prohibited the parties, their counsel, consultants, and experts from making public statements about the suit. WGBH Education Fund and CBS challenged this order, seeking access to information about the trial for episodes of the television shows

142. 381 U.S. 301 (1965).

143. Emerson, *supra* note 112, at 7.

144. 408 U.S. 753 (1972).

145. Emerson, *supra* note 112, at 7.

146. See, e.g., *Sheppard v. Maxwell*, 384 U.S. 333 (1966) (excessive pretrial publicity impermissibly biased jury that convicted defendant of his wife's murder).

147. 805 F.2d 1 (1st Cir. 1986).

148. 805 F.2d at 3.

"NOVA" and "60 Minutes," respectively.¹⁴⁹ The First Circuit ultimately held that the order did not violate the first amendment and was entered upon an appropriate showing of "good cause." Given the litigation expenses involved in toxic tort suits,¹⁵⁰ it is conceivable that a local organization of community residents would lack the resources to pursue challenges to gag orders in addition to the primary litigation against the chemical company.¹⁵¹ Both public and network television producers, however, have a financial interest in obtaining information about such controversial topics.

Action by media organizations, which are likely to have greater assets as well as a greater financial incentive to challenge gag orders than most tort plaintiffs, may serve to protect the constitutional interests of both the media and the participants by challenging the restraint. Thus, media challenges based on a right to receive information may provide the most effective means of preventing undue restriction of trial participant communication.

B. *The Press' Right To Gather News*

When a media organization asserts a right to receive information, the right is often labelled a "right to gather news." Although several media challenges to participant-directed gag orders have rested on this right,¹⁵² the right to gather news has been interpreted to be only as broad as the public's right to receive information.

Suggestions of a right to gather news first appeared in the Supreme Court's decision in *Branzburg v. Hayes*.¹⁵³ Although the *Branzburg* Court held that a reporter had no privilege that would justify refusing to respond to a grand jury subpoena, it noted in dicta that "news gathering is not without its First Amendment protections."¹⁵⁴ After identifying this new right, the Court warned that such a right is not absolute, and "does not guarantee the press a constitutional right of special access to information not available to the public generally."¹⁵⁵

Since *Branzburg*, the Supreme Court has consistently declined to extend any special privileges to the press. For example, in *Houchins v.*

149. 805 F.2d at 3-4.

150. See generally P. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* (1986).

151. This argument becomes even more forceful if the restrained individuals are witnesses, rather than parties. In such a situation, the parties might have an incentive to challenge the orders, but cannot do so since they are not subject to the order, while the witnesses themselves may have little interest in fronting a challenge.

152. See *Journal Publishing Co. v. Mechem*, 801 F.2d 1233 (10th Cir. 1986); *Radio & Television News Assn. v. United States Dist. Court*, 781 F.2d 1443 (9th Cir. 1986); *Columbia Broadcasting Sys. v. Young*, 522 F.2d 234 (6th Cir. 1975).

153. 408 U.S. 665 (1972).

154. 408 U.S. at 707.

155. 408 U.S. at 684-85.

KQED, Inc.,¹⁵⁶ the Court rejected the media's claim that the public's right to receive information implies a special right of media access to prison facilities and other government controlled sources of information. The Court stated that a special privilege of access, unlike the public's right to receive information, is "not essential to guarantee the freedom to communicate or publish."¹⁵⁷ The Court's holding implies that the right to gather news is illusory, affording no privileges beyond a general public right to receive information.¹⁵⁸ Thus, for purposes of identifying a right on which to base the media's challenges to participant-directed gag orders, a public right to receive information appears to have more explicit support in the case law than a right to gather news.

C. *The Public's Right of Access to Trial*

In the context of trial proceedings, a public right to information about those proceedings is often discussed as a "right of access to trial." Because gag orders are issued in the context of trial proceedings, they implicate many of the concerns at issue in a right of access to trial. This section reviews the origin and scope of a right of access to trial, including the Arizona Supreme Court's attempt in *KPNX Broadcasting Co. v. Superior Court*¹⁵⁹ to determine whether the public's right of access to trial includes a right to interview trial participants. Because gag orders restrict the communications of private parties, rather than withholding government information, they do not fit squarely within the right of access to trial. However, participant speech may meet the same purposes as a right of access to trial, by providing the public with information it needs to review administration of justice.

The Supreme Court established a right of access to criminal trial proceedings in *Richmond Newspapers, Inc. v. Virginia*.¹⁶⁰ According to the Supreme Court, a right of access to a particular trial proceeding depends on an analysis of (1) the historical tradition of access to the

156. 438 U.S. 1, 7-8 (1978).

157. 438 U.S. at 12.

158. 438 U.S. at 12. See also *Herbert v. Lando*, 441 U.S. 153 (1979) (no first amendment immunity from civil discovery order in libel suit seeking information about reporters' thoughts and impressions); *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978) (first amendment did not provide newsroom with immunity from routine searches); *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974) (reporters had no greater constitutional right of access to prison facilities than that accorded the general public); *Pell v. Procunier*, 417 U.S. 817 (1974) (same); see Comment, *Newsgathering: Second-Class Right Among First Amendment Freedoms*, 53 TEXAS L. REV. 1440, 1445-46 (1975) ("*Branzburg*, *Saxbe*, and *Pell* dimmed for the foreseeable future the press' hope of convincing the Court that the first amendment grants to the press, as a representative of the public, a special right of access to information of public concern.").

159. 139 Ariz. 246, 678 P.2d 431 (1984).

160. 448 U.S. 555 (1980).

particular judicial proceeding at issue¹⁶¹ and (2) the functional utility of the information that access will provide to the public in its review of the administration of justice.¹⁶² A later case, *Press-Enterprise Co. v. Superior Court*,¹⁶³ interpreted the *Richmond Newspapers* test as creating a "qualified" first amendment right of public access that could only be restricted where the restriction was "essential to preserve higher values" and "narrowly tailored" to preserve those values.¹⁶⁴ While the test first appeared in the context of a criminal case, several courts have extended this right of access to trial to the civil context.¹⁶⁵

Prior to *Richmond Newspapers*, the public's right of access to criminal trial proceedings derived only from the criminal defendant's sixth amendment guarantee of a public trial.¹⁶⁶ The *Richmond Newspapers* plurality opinion, however, relied on a right to receive information as a corollary to the freedom to speak and publish.¹⁶⁷ Following the lead of *New York Times Co. v. Sullivan*,¹⁶⁸ the Court derived that corollary from a "common core purpose" of the first amendment to assure "freedom of communication on matters relating to the functioning of government."¹⁶⁹ Noting that such public debate is particularly desirable in the context of criminal trials,¹⁷⁰ the Court held that the first amendment prohibited the government "from summarily closing courtroom doors which had long been open to the public at the time that [a]mendment was adopted."¹⁷¹ The court held that criminal trial proceedings must be open for public attendance, "[a]bsent an overriding interest articulated in findings."¹⁷²

Justice Brennan's concurrence, in which he formulated the two-prong right of access analysis the Court later adopted, similarly rested

161. 448 U.S. at 564-69.

162. 448 U.S. at 575-76; see Note, *The First Amendment Right of Access to Civil Trials After Globe Newspaper Co. v. Superior Court*, 51 U. CHI. L. REV. 286, 290-98 (1984).

163. 478 U.S. 1 (1986).

164. 478 U.S. at 9, 13-14.

165. See *Westmoreland v. Columbia Broadcasting Sys.*, 752 F.2d 16, 22-23 (2d Cir. 1984), cert. denied, 472 U.S. 1017 (1985); *Publicker Indus. v. Cohen*, 733 F.2d 1059, 1067-71 (3d Cir. 1984); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1177-79 (6th Cir. 1983); see also *Wilson v. American Motors Corp.*, 759 F.2d 1568 (11th Cir. 1985); *In re Continental Ill. Sec. Litigation*, 732 F.2d 1302, 1308-09 (7th Cir. 1984). See generally Note, *supra* note 162.

166. See *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979) (upholding closure of pretrial proceeding in the face of a media challenge. The Court found that the public had no constitutional right of access to a pretrial judicial proceeding independent of the defendant's right to a public trial under the sixth and fourteenth amendments.).

167. 448 U.S. at 576.

168. 376 U.S. 254 (1964).

169. 448 U.S. at 575.

170. 448 U.S. at 575 ("Plainly it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted . . .").

171. 448 U.S. at 576.

172. 448 U.S. at 581.

on a public debate model of the first amendment.¹⁷³ Justice Brennan argued that the right of access "has special force" (1) "when drawn from an enduring and vital tradition of public entree to particular proceedings or information"; and (2) if "access to a particular government process is important in terms of that very process."¹⁷⁴ Brennan found the first prong of this test met by a history of public trials dating back to English common law.¹⁷⁵ Under the second prong, Brennan found that public access to court proceedings is part of the system of "checks and balances" providing "an effective restraint on possible abuse of judicial power."¹⁷⁶ Accordingly, Brennan found that the tradition and the importance of public access to the trial process "tip the balance strongly toward the rule that trials must be open."¹⁷⁷

Justice Brennan, writing for a majority of the Court, applied this two-prong test in *Globe Newspaper Co. v. Superior Court*¹⁷⁸ to strike down a statute summarily excluding the public from all trials involving sexual crimes inflicted upon juvenile victims. Brennan followed *Richmond Newspapers'* reliance on the "common understanding that 'a major purpose of [the first amendment] was to protect the free discussion of governmental affairs.'"¹⁷⁹ Brennan recognized the historical tradition of public trial,¹⁸⁰ and emphasized its functional utility in both judicial and governmental processes. "Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole."¹⁸¹ Accordingly, the Court found mandatory trial closure insufficiently supported where the necessity of closing a trial to safeguard a minor could be determined on a case-by-case basis.¹⁸²

Because the media is interested in interviewing trial participants in order to receive information about the trial, it may be possible to characterize the media's claim against participant-directed gag orders as a

173. 448 U.S. at 587-88 (Brennan, J., concurring).

174. 448 U.S. at 589 (Brennan, J., concurring).

175. 448 U.S. at 589 (Brennan, J., concurring).

176. 448 U.S. at 592 (Brennan, J., concurring) (quoting *In re Oliver*, 333 U.S. 257, 270 (1948)).

177. 448 U.S. at 598 (Brennan, J., concurring).

178. 457 U.S. 596 (1982).

179. 457 U.S. at 604 (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)). Brennan's opinion in *Globe* was the first majority expression of "first amendment political theory as the basis for a right of access to government information." Note, *What Ever Happened to "The Right To Know"? Access to Government-Controlled Information Since Richmond Newspapers*, 73 VA. L. REV. 1111, 1118 (1987).

180. 457 U.S. at 605. Chief Justice Burger's dissent argued that the majority opinion "ignore[d] the weight of historical practice." 457 U.S. at 614 (Burger, C.J., dissenting). Burger's criticism may imply that *Globe* rested its finding of a right of access to trial primarily on the functional prong. Note, *supra* note 162, at 294.

181. 457 U.S. at 606.

182. 457 U.S. at 607-08.

right of access to trial.¹⁸³ The Arizona Supreme Court thus characterized a radio station's challenge to a participant-directed gag order in *KPNX Broadcasting Co. v. Superior Court*.¹⁸⁴ Applying Justice Brennan's two-pronged test, *KPNX* held that the press did not have a right to interview trial participants. First, the court found that "[n]owhere in the extensive history of the public nature of criminal trials related in *Richmond Newspapers* can be found right of access protection for interviewing trial participants."¹⁸⁵ Next, applying the functional utility prong, the court found that "the significant role played by the media's exercise of its right of access does not depend on interviewing trial participants before or during the trial."¹⁸⁶ Accordingly, *KPNX* held that the media had no right of access to trial participants.

As the *KPNX* court found, the historical prong of the *Richmond Newspapers* test is the most problematic for media organizations challenging participant-directed gag orders. Restrictions on trial participant speech did not come into common usage until after the Supreme Court's decision in *Nebraska Press Association v. Stuart*¹⁸⁷ imposed a virtual ban on restrictions directed at the press.¹⁸⁸ Prior to that time, courts did not need to restrict participant speech because they could level speech restrictions directly against the media. Historical analysis may accordingly reveal little in the context of such a recent development.

The Court's application of the *Richmond Newspapers* test, however, indicates that the test's functional prong should receive greater emphasis than the historical prong. In finding a right of access to trial proceedings in both *Richmond Newspapers, Inc. v. Virginia*¹⁸⁹ and *Globe Newspaper Co. v. Superior Court*,¹⁹⁰ the Supreme Court emphasized the importance of public access to trial proceedings to the public's function of providing a check upon the judiciary. In *Richmond Newspapers*, the Court found public access to trial proceedings was necessary to allow the public to provide "an effective restraint on pos-

183. Hunter, *supra* note 74, at 288-89.

184. 139 Ariz. 246, 678 P.2d 431 (1984).

185. 139 Ariz. at 256, 678 P.2d at 441. The court determined that a right of access to trial was limited to a right to "sit, listen, watch, and report." 139 Ariz. at 256, 678 P.2d at 441; see also *Radio & Television News Assn. v. United States Dist. Court*, 781 F.2d 1443, 1446 (9th Cir. 1986). The *KPNX* court based its conclusion on dicta from *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) that stated: "It is not crucial whether we describe this right to attend criminal trials to hear, see, and communicate observations concerning them as a 'right of access,' or a 'right to gather information . . .'" 448 U.S. at 576.

186. 139 Ariz. at 256, 678 P.2d at 441.

187. 427 U.S. 539 (1976).

188. See *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 570-71 (1976) (White, J., concurring).

189. 448 U.S. 555 (1980).

190. 457 U.S. 596 (1982).

sible abuse of judicial power.”¹⁹¹ Again in *Globe*, the Court emphasized that “to the extent that the First Amendment embraces a right of access to criminal trials, it is to ensure that this constitutionally protected ‘discussion of governmental affairs’ is an informed one.”¹⁹² *Richmond Newspapers* and *Globe* thus establish the importance of the public’s checking function upon the judiciary.¹⁹³

The Court’s emphasis on the functional utility prong may indicate that it favors this prong over the historical prong. In *Waller v. Georgia*¹⁹⁴ the Supreme Court held that closure of a pretrial suppression hearing violated a defendant’s sixth amendment right to a public trial. Although the Court rested its decision on sixth amendment grounds, it impliedly relied on a corollary first amendment right of public access to trial proceedings.¹⁹⁵ The opinion made no mention of a traditional right of access, but instead relied heavily on the functional utility of opening pretrial hearings to the public.¹⁹⁶ *Waller*, in conjunction with the emphasis on functional analysis in both *Globe* and *Richmond Newspapers*, may indicate that the functional prong of the *Richmond Newspapers* test is the more dispositive of the two.¹⁹⁷

If emphasis is placed on the functional prong of the test, participant-directed gag orders are appropriately challenged as infringements of the media’s right of access to trial. The cases establishing a right of access assume that the public can check adequately the functioning of the judiciary only if it receives the necessary information about the trial. As the Supreme Court has noted, the press does not merely report the official version of the trial, but “guards against the miscarriage of justice by subjecting the police, prosecutors, and judi-

191. 448 U.S. at 592 (Brennan, J., concurring) (quoting *In re Oliver*, 333 U.S. 257, 270 (1948)).

192. 457 U.S. at 604-05.

193. See also *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492 (1975) (“With respect to judicial proceedings . . . the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice.”); cf. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 839 (1978) (“The operations of the courts and the judicial conduct of judges are matters of utmost public concern.”).

194. 467 U.S. 39 (1984).

195. See 467 U.S. at 46 (“[T]here can be little doubt that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public.”); see also Note, *supra* note 179, at 1120.

196. See 467 U.S. at 45-47.

197. Critics of the historical prong argue that it is of less importance because there is no logical link between a history of access and the rationale underlying the right of access. “There is no reason to believe that traditional openness is a useful proxy for the information’s capacity to promote self-governance. Indeed, information related to many of the most important public issues has historically been closed.” Note, *supra* note 179, at 1132 (footnote omitted). The Note cites to an example discussed in BeVier, *Like Mackerel in the Moonlight: Some Reflections on Richmond Newspapers*, 10 HOFSTRA L. REV. 311, 326 (1982) (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 n.11 (1980)): “Because prisons ‘do not share the long tradition of openness’ of trials, surely discussion of, and hence information about, prisons do not fall outside the first amendment’s core.” Note, *supra* note 179, at 1132 n.182.

cial processes to extensive public scrutiny and criticism.”¹⁹⁸ The press’ ability to check the judiciary’s performance is severely limited by restriction of its independent factfinding ability, including its ability to interview trial participants.

If the government can be permitted to erect a wall of secrecy by forbidding those with knowledge from talking to the press, then the right to attend and report what transpires is illusory; it becomes a method by which the government uses the press as a conduit to transmit the official line.¹⁹⁹

Trial participants can provide information to the media that has been excluded from the courtroom setting, including information a judge may find tangential but that the public still finds relevant. Further, the participants can present their own opinions, as interested parties, as to whether justice is being done. Restricting press coverage to the courtroom version of information eliminates the press’ ability to discover material that may contradict the courtroom version, or incriminate the judge who determines what information is relevant.

Restricting the press to a sanitized version of courtroom proceedings undermines the public’s confidence in both the press and the judiciary. Traditionally, the public has relied on the press to provide an independent version of judicial proceedings. The public may react less spontaneously to information about a trial “when [it] know[s] that the speech has already passed through a regulatory filter.”²⁰⁰ Audiences will wonder if the integrity of the speech has been compromised in order to receive a judicial “seal of approval.”²⁰¹ This can harm judicial efforts to maintain the appearance of integrity and justice.

This danger is increased in the context of the judiciary, where the judge herself controls the release of the information that will be used to evaluate her performance.²⁰² In *Nebraska Press Association v. Stuart*,²⁰³ Justice Brennan warned that

[r]ecognition of any judicial authority to impose prior restraints on the basis of harm to the Sixth Amendment rights of particular defendants, especially since that harm must remain speculative, will thus inevitably interject judges at all levels into censorship roles that are simply inappropriate and impermissible under the First Amendment. Indeed, the potential for arbitrary and excessive judicial utilization of any such power would be exacerbated by the fact that judges and committing magistrates might in some cases be determining the propriety of publishing informa-

198. *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966).

199. *KPNX Broadcasting Co. v. Superior Court*, 139 Ariz. 246, 259, 678 P.2d 431, 444 (1984) (Feldman, J., concurring in part, dissenting in part).

200. Blasi, *supra* note 24, at 64.

201. *Id.* at 67.

202. Note, *John Z. DeLorean v. The Media, The Right to a Fair Trial Without a Prior Restraint Upon the Media*, 15 GOLDEN GATE U. L. REV. 81, 96-97 (1985).

203. 427 U.S. 539 (1976).

tion that reflects on their competence, integrity, or general performance on the bench.²⁰⁴

A judge's power to impose speech restrictions may thus enable her to conceal judicial error or impropriety.

The court in *KPNX Broadcasting Co. v. Superior Court*²⁰⁵ recognized that the media needs guidance and analysis from various parties to present a coherent account of a trial proceeding, but stated that the courts are "not constitutionally mandated to provide such guidance."²⁰⁶ As the dissent noted, however, the court's assertion "misse[d] the mark."²⁰⁷ Participant-directed gag orders do not merely constitute a judicial failure to "provide guidance"; rather, such orders affirmatively "prohibit[] the press from gathering news."²⁰⁸ In the context of participant-directed gag orders, the government is suppressing private, rather than governmental, sources.²⁰⁹ Although trials, particularly criminal trials, involve governmental interests, the information remains in the hands of private parties. The media is not demanding access to governmental property to which it historically has no claim.²¹⁰ Rather, the press is seeking to interview independent

204. 427 U.S. at 607 (Brennan, J., concurring).

205. 139 Ariz. 246, 678 P.2d 431 (1984).

206. 139 Ariz. at 256, 678 P.2d at 441.

207. 139 Ariz. at 259, 678 P.2d at 444 (Feldman, J., concurring in part, dissenting in part).

208. 139 Ariz. at 259, 678 P.2d at 444 (Feldman, J., concurring in part, dissenting in part). Following the *KPNX* court, the Ninth Circuit, in *Radio and Television News Association v. United States Dist. Court*, 781 F.2d 1443 (9th Cir. 1986), similarly misconstrued the nature of the order's intrusion. The court pointed out that "the media has no recourse to relief based upon the first amendment" when an individual refuses to give an interview, and argued that therefore no right should accrue when the government, rather than the individual, restricts such interviews. 781 F.2d at 1447. This argument fails to distinguish private action from state action. Individual freedom to refuse to communicate is not analogous to a state-imposed prohibition of communication. For example, individuals remain free to choose not to discuss politics while state-imposed restrictions upon an individual's freedom to discuss politics run directly afoul of the first amendment. See, *L. TRIBE, supra* note 31, at 790. The participant-directed gag order is thus a bar to speech that is entirely private.

209. In *Butterworth v. Smith*, 110 S. Ct. 1376 (1990), the Supreme Court struck down the section of a Florida statute that prohibited witnesses to a grand jury proceeding from disclosing the contents of the witness' own testimony. The Court emphasized that the prohibition at issue was distinct from an order prohibiting a witness from disclosing information the witness learned only through the course of the grand jury proceeding: "[W]e deal only with respondent's right to divulge information of which he was in possession before he testified before the grand jury, and not information which he may have obtained as a result of this participation in the proceedings of the grand jury." 110 S. Ct. at 1381.

There is some overlap between government information and private information. For example, access to jurors has traditionally been denied during the course of trial proceedings in order to ensure unbiased administration of justice. Likewise, restrictions on attorney access to jurors following the trial have sometimes been found to further compelling governmental interests in maintaining the integrity of the judgment. See *Journal Publishing Co. v. Mechem*, 801 F.2d 1233, 1236 (10th Cir. 1986). However, the relevant information jurors can provide to the press is limited to the information they received through the trial proceeding. Since jurors obtain this information through government proceedings, it is more properly viewed as government information.

210. See *supra* notes 156-58 and accompanying text.

information sources. In essence, a media challenge to participant-directed gag orders is asserting the right of two private parties to communicate with each other.²¹¹

Because gag orders restrict only private information, the inclusion of the media's right to interview trial participants within a broader right of access to trial is inappropriate. A right of access to trial is generally conceived of as access to the trial proceedings and to the materials relied on by the courts and juries in making judicial decisions.²¹² This conception implies a right to materials in the control of the government, rather than a right to the speech of willing speakers, including the government.²¹³ Media challenges to participant-directed gag orders are not requesting the government to release information, but to discontinue intrusion into a private communication relationship. Accordingly, they do not fit into the traditional conception of a right of access to government proceedings.

A review of the public's right to receive information, the media's right to gather news, and a public right of access to trial thus indicates that the public's right to receive information provides the most tenable basis for media challenges to participant-directed gag orders. Although some media organizations have rested their challenges on a right to gather news, the Supreme Court's holdings indicate that the media's right to gather news is only as broad as the public's right to receive information. Neither does a right of access to trial support the media's challenges: participant-directed gag orders restrict private speech rather than access to government proceedings. However, analyzing media challenges through the framework of a right of access to trial shows the strong public need for trial participant information in order to provide public review of the administration of justice. Thus,

211. The dissent in *KPNX* asserted that "[t]he reporter and his informant have First Amendment rights to communicate with each other." 139 Ariz. at 259, 678 P.2d at 444 (Feldman, J., concurring in part, dissenting in part).

212. For example, the common law presumption of access to trial proceedings stems from a right of access to judicial records. This right has been limited to materials on which the court relies in determining the litigants' substantive rights. See *In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325, 1340, 1342 n.3 (D.C. Cir. 1985).

213. Consider, for example, the Supreme Court's response to media claims of access to discovery materials. In *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), the Supreme Court held that the first amendment right of access to trial did not include a right to discovery materials. The Court categorized discovery materials as the property of the government that the government is not willing to disclose:

As the rules authorizing discovery were adopted by the state legislature, the processes thereunder are a matter of legislative grace. A litigant has no first amendment right of access to information made available only for purposes of trying his suit. Thus, continued court control over the discovered information does not raise the same specter of government censorship that such control might suggest in other situations.

467 U.S. at 32 (citations omitted). See also *Tavoulareas v. Washington Post Co.*, 724 F.2d 1010, 1028 (D.C. Cir. 1984) (distinguishing restrictions on discovery materials from "infringements on speech independently obtained from non-governmental sources"), *aff'd. on rehearing*, 737 F.2d 1170 (D.C. Cir. 1984) ("[T]he government is in a very real sense the direct source of discovered materials since those materials are made available only through the processes of the court.").

it is important that the media be able to exert its public right to receive information from trial participants, in order to inform public debate regarding judicial performance.

III. A COMMUNICATION ORIENTED ANALYSIS OF PARTICIPANT-DIRECTED GAG ORDERS

As this Note has shown, participant-directed gag orders reduce the amount of communication and information available about trial proceedings. Although this reduction occurs regardless of the status of the challenging party, courts use status as the variable to determine the applicable level of review. If the challenging party is the restricted individual, the order is labelled a prior restraint and must survive the heavy presumption against prior restraints established in *Nebraska Press Association v. Stuart*.²¹⁴ If the challenging party is a media organization, the order is found not to be a prior restraint and is typically upheld under only a reasonableness standard. As a result, communication may be unnecessarily restricted when the media, rather than the restricted individual, is the only party to challenge a participant-directed restraint.

The traditional prior restraint doctrine was intended to alleviate this type of speech suppression by prohibiting restrictions directed at the media. This Note asserts that participant-directed gag orders implicate the same speech-suppressive concerns prior restraint doctrine was intended to alleviate.²¹⁵ By basing protection on the rights of the restricted parties only, however, prior restraint doctrine fails to protect adequately against speech suppression.²¹⁶

The result is a loss of the "public debate" that *New York Times Co. v. Sullivan*²¹⁷ indicated was the primary concern of the first amendment. According to the Supreme Court, the first amendment expresses a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."²¹⁸ If the goal of the first amendment is the protection of public debate, first amendment protection must extend to all elements of communication: the sender, the message, and the receiver.²¹⁹

This Part discusses two alternatives to the judiciary's present responses to media challenges of participant-directed gag orders. Section A argues that courts could continue to apply prior restraint standards to these orders, but could create an exception to traditional standing doctrine that would allow the media to assert the first amend-

214. 427 U.S. 539 (1976).

215. See *supra* notes 68-98 and accompanying text.

216. See *supra* notes 32-67 and accompanying text.

217. 376 U.S. 254 (1964).

218. 376 U.S. at 270.

219. See *supra* note 111 and accompanying text.

ment rights of the restrained speakers. As this section demonstrates, however, this approach may prove over-inclusive given the present constitutional presumption against prior restraints.

Section B asserts that a preferable alternative would be for courts to recognize media claims based on a public right to receive information, and to examine those claims under a level of intermediate or "heightened" scrutiny. Although the media may encounter some difficulties in establishing standing to assert a public right, these may be overcome by recognizing that the media suffers a financial injury from such restrictions that is not common to the general public.

A. Prior Restraint Analysis Applied to Media Challenges to Participant-Directed Gag Orders

In order to prevent unwarranted speech suppression, courts must recognize that gag orders result in the same loss of communication regardless of the status of the party challenging those orders. In its traditional form, prior restraint analysis prohibits speech restrictions only when they are challenged by the parties toward whom the restrictions are directed. As this Note has shown, this communicator-oriented standard is unable to protect adequately the communication process as a whole. Courts might, however, adapt the prior restraint doctrine to accommodate the claims of both speakers and potential receivers of speech. For example, courts might allow the media, as potential receivers of trial participant speech, to assert the speech rights of the restrained trial participants. In this way, the media could act to protect its interest in receiving communications in situations where the participants themselves are unwilling or unable to assert their right to disseminate these communications.²²⁰

Ordinarily, however, a party has no standing to assert the rights of third parties.²²¹ This approach would require the courts to create an exception to traditional standing doctrine in order to prevent unnecessary speech suppression. Such an exception would be analogous to the overbreadth doctrine. For purposes of challenging the constitutionality of statutory restrictions on speech, an overbreadth challenge allows "[a] litigant whose expression is admittedly within the constitutionally valid applications of a statute . . . to assert the statute's potentially invalid applications with respect to other persons not before the court and with whom the litigant stands in no special relationship."²²² Overbreadth doctrine represents a "conscious departure from conventional standing concepts" in an effort to preserve free speech, even the

220. See *supra* notes 138-51 and accompanying text.

221. See *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 80 (1978); *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

222. Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1-2 (footnote omitted).

speech of nonparties, from unconstitutional restriction.²²³ The overbreadth claimant bases her argument on the rights of third parties, but is herself “‘asserting [her] own right not to be burdened by an unconstitutional rule of law.’”²²⁴ In the context of participant-directed gag orders, the media is asserting its right not to be burdened by the resulting restriction of communication. Such challenges may be necessary to preserve the preference for freedom of speech expressed by both overbreadth analysis and prior restraint doctrine.

In extending standing to assert prior restraint claims, however, courts must recognize that the prior restraint standard is presently applied as a virtual ban on prior restraints of speech.²²⁵ Such broad application of this doctrine could result in the prohibition of all restraints on both the media and trial participants. This prohibition would allow the courts little flexibility in responding to pretrial publicity that threatens to prevent the administration of a fair trial.²²⁶ This result indicates that the pre-publication nature of a restriction should not be the sole determinant of constitutionality.

B. *Recognition of the Media's Ability To Assert a Public Right To Receive Information from Trial Participants*

A second alternative would be to apply a lesser degree of scrutiny to participant-directed gag orders, in response to challenges by either the restricted party or the media. This alternative abandons prior restraint analysis, not because it rejects the premise that prior restraints are inherently speech-suppressive, but because the standard protects only communicator interests. For example, a standard of heightened scrutiny — a standard not prohibitive of prior restraints, but more exacting than a “reasonableness” standard — would allow the imposition of some restraints, but would permit only those restrictions that least threaten to reduce the total amount of information available about the trial.

The standard of heightened scrutiny is a softer version of the prior restraint test. Under the standard of heightened scrutiny, a court must examine “the magnitude and imminence of the threatened harm, the effectiveness of the protective order in preventing the harm, the availability of less restrictive means of doing so, and the narrowness of

223. *Id.* at 1.

224. *Id.* at 4 (quoting Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 848 (1970)).

225. See *supra* note 31 and accompanying text.

226. See *Sheppard v. Maxwell*, 384 U.S. 333 (1966) (murder conviction reversed on the ground that excessive pretrial publicity had vitiated the possibility of a fair trial); see also *Florida Star v. B.J.F.*, 109 S. Ct. 2603, 2615 (1989) (White, J., dissenting) (noting that the privacy interests of the victim of a crime may sometimes be more compelling than similar interests on the part of the criminal defendant).

the order if it is deemed necessary.”²²⁷ This test is less restrictive than the prior restraint test because it lacks the presumption against constitutionality presently associated with that test. However, it is more restrictive than the “reasonableness” test.²²⁸ First, it requires the court to evaluate the magnitude and imminence of the harm, rather than simply its likelihood. Thus, trial participant speech must pose a significant harm to the trial process in order to warrant a measure that is as speech-restrictive as a gag order. Second, unlike the reasonableness test, the heightened scrutiny test requires an order to be narrowly tailored. This would eliminate broad gag orders, such as the one struck down in *Columbia Broadcasting System v. Young*²²⁹ which had restricted “all counsel and Court personnel, all parties concerned with this litigation, whether plaintiffs or defendants, their relatives, close friends, and associates” from discussing the case “in any manner whatsoever” with the news media.²³⁰ As a means of achieving some degree of consistency in review of participant-directed gag orders, the heightened scrutiny test approaches a middle ground between the prior restraint test and the reasonableness test.

The test itself resembles the intermediate level of scrutiny applied to statutes that make distinctions based on illegitimacy, gender, or other quasi-suspect classifications.²³¹ Like intermediate scrutiny, this softer prior restraint test eliminates the “all-or-nothing choice between minimum rationality and strict scrutiny” that presently exists under a communicator-oriented first amendment.²³² By striking this middle ground, and by applying the test to claims of receivers, as well as communicators, consistent application of a heightened scrutiny standard would protect the communication process as a whole, thus preserving public debate as it was conceived of in *New York Times Co. v. Sullivan*.²³³

However, media organizations may face standing difficulties in asserting a public right to receive information. In order to merit standing, a plaintiff must allege: (1) that the challenged action has caused

227. *In re San Juan Star Co.*, 662 F.2d 108, 116 (1st Cir. 1981). The First Circuit applied this standard to restriction of access to discovery materials before the Supreme Court set forth the “good cause” standard in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34 (1984). See *Anderson v. Cryovac*, 805 F.2d 1 (1st Cir. 1986) (upheld restriction of media access to discovery materials under heightened scrutiny standard).

228. See *supra* note 67.

229. 522 F.2d 234 (6th Cir. 1975).

230. 522 F.2d at 236.

231. See *Lalli v. Lalli*, 439 U.S. 259 (1978) (classifications based on illegitimacy must be “substantially related to permissible state interests”); *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982) (gender classifications must be “substantially related to an important objective”).

232. See *L. TRIBE*, *supra* note 31, at 1609-10 (discussing the intermediate standard of scrutiny in the context of equal protection claims).

233. 376 U.S. 254 (1964).

her to suffer injury in fact, and (2) that "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."²³⁴ As Part II discusses, the Supreme Court has recognized first amendment protection of a public right to receive information.²³⁵ However, courts may find that the media's claim to a public right to receive information may be only a "generalized grievance" that does not warrant standing.²³⁶ One solution would be for media organizations to argue that loss of information, particularly information about controversial current events, affects their ability to attract news consumers, and thus causes them to suffer a financial harm not shared by the general public.²³⁷ By basing their claims on a public right to receive information, but alleging financial injury peculiar to media organizations, the media may be able to show a sufficiently individualized injury to warrant standing.²³⁸ Such an injury would be caused by the restriction of information, and redressed by the repeal of that restriction.²³⁹

Allowing standing to media organizations, but not to individuals, would, however, appear inconsistent with the Supreme Court's decisions holding that the press has no privilege beyond that of the general public.²⁴⁰ Yet media organizations would not be asserting special privileges; rather, they would be representing the public in asserting a

234. *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 152-53 (1970).

235. See *supra* notes 113-33 and accompanying text. See also *In re Dow Jones & Co.*, 854 F.2d 603, 607 (2d Cir. 1988).

236. *Central S.C. Chapter v. Martin*, 431 F. Supp. 1182, 1187-88 (D.S.C.), *aff'd*, 556 F.2d 706 (4th Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978) (media had no standing to assert a right to receive information from trial participants where that right was "no greater nor lesser than the public's at large").

237. See *International News Serv. v. Associated Press*, 248 U.S. 215, 218 (1918) ("[N]ews matter, however little susceptible of ownership or dominion in the absolute sense, is stock in trade, to be gathered at the cost of enterprise, organization, skill, labor, and money, and to be distributed and sold to those who will pay money for it, as for any other merchandise."). One might counter that a particular media organization does not suffer financial loss if no media organizations have access to the information at issue. If profitability is determined relative to the circulation or popularity of other media forms or organizations, then no one is gaining a competitive edge from such restriction. Media organizations could argue, however, that circulation and sales for all media organizations increase in response to certain news items. Thus, a particular organization is not disadvantaged relative to other media organizations, but the media industry as a whole is disadvantaged.

238. In *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973), the Supreme Court allowed a group of law students to assert standing to challenge an increase in railroad freight rates that the students believed would result in a decrease in recycling. 412 U.S. at 685. The Court held that the students' injury, the loss of their personal enjoyment of the natural environment that would result if unrecycled materials were allowed to pollute the environment, was sufficient to warrant their standing to challenge the rate hike. Here, the media is similarly alleging that its use of information is being restricted.

239. The Supreme Court has established that the injury suffered must be "fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984).

240. See *supra* notes 156-58 and accompanying text.

privilege they share with the public. Media organizations might be considered representatives of the public for purposes of asserting the public's right to receive information.²⁴¹

By recognizing the media's public right to receive information, as a right separate and distinct from the trial participants' right to disseminate information, courts extend first amendment protection to the communication process as a whole. This interpretation of the first amendment is consistent with the public debate model developed by Alexander Meiklejohn and adopted by the Supreme Court in *New York Times*. Application of this interpretation is particularly appropriate in the context of trial participant speech, given the Supreme Court's efforts to inform public debate regarding the performance of the judiciary.²⁴² Thus, recognizing the media's right to receive information from trial participants is the logical result of the first amendment's protection of public debate and of an informed citizenry.

CONCLUSION

Despite the inherently reciprocal nature of communication, legal analysis generally affords first amendment protection only to communicators. Because the communication process is inherently reciprocal, a legal actor can currently achieve restriction of communication by restraining the receiver, rather than the communicator, without incurring any heightened level of judicial scrutiny. Thus, following *Nebraska Press Association v. Stuart*'s²⁴³ virtual ban of prior restraints directed at the media, courts began to achieve the same communication restriction by directing gag orders at the trial participants. When the media has challenged these orders, many courts have responded by applying a communicator-oriented prior restraint standard that is unable to accommodate claims based on receivers' rights. Although participant-directed gag orders do not intrude directly on the media's operation, they necessarily restrict the media's ability to gather information from independent sources. Unnecessary restriction of independent speech sources could undermine the public's ability to provide a structural check upon the judiciary's integrity. Accordingly, courts must apply a standard of review that can accommodate the public's interest in receiving trial participants' speech.

This Note provides two alternatives. First, the courts may continue to apply prior restraint analysis, but create an exception to traditional standing doctrine that allows the media to assert the free speech rights of the restricted trial participant. Given the prohibitive scrutiny of the prior restraint test, such an approach is likely to prove too rigid

241. See generally Note, *Divided We Fall: Associational Standing and Collective Interest*, 87 MICH. L. REV. 733 (1988).

242. See *supra* notes 189-93 and accompanying text.

243. 427 U.S. 539 (1976).

to accommodate competing interests in protecting both the administration of justice and a criminal defendant's sixth amendment right to a fair trial.

The preferable approach is to abandon the prior restraint doctrine for an intermediate level of scrutiny that applies to challenges by the restricted party or by a member of the media asserting a right to receive the potential speech of that party. This approach reaches a middle ground between the prior restraint test and the "reasonableness" test currently applied, resulting in a more predictable and equitable standard for review.

A drastic departure from prior restraint doctrine in this context poses serious questions to the doctrine in other contexts. For example, courts must determine if prior restraints imposed directly on the media should be examined under this intermediate standard as well. If the press' status is limited to that of the public's, a single standard would appear mandatory. However, such a solution might not adequately account for intrusion into the editorial process. The Supreme Court's adoption of a public debate model of the first amendment in *New York Times* implies that the first amendment should focus on the functional utility of the speech restricted, rather than on whether the restraint is prior to publication or in the form of a subsequent punishment. The focus of first amendment debate must shift to the total amount of speech that is restricted, rather than the direction of the restriction. Courts, as well as first amendment commentators, need to recognize that prior restraint doctrine is unable to protect speech adequately because it imposes a *communicator*-oriented standard on a *communication*-oriented first amendment.

— René L. Todd