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TIPPING THE SCALES OF JUSTICE: AN ATTEMPT TO BALANCE THE RIGHT TO A FAIR TRIAL WITH THE RIGHT TO FREE SPEECH

Freedom of speech[1] and the right to a fair trial[2] are fundamental rights guaranteed by the United States Constitution.[3] Ensured by the First and Sixth Amendments, respectively, these essential rights inevitably breed conflict.[4] Increasing media coverage of

[1] U.S. CONST. amend. I. The First Amendment provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .". *Id.*; *see* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-2, at 785 (2d ed. 1988) (describing freedoms guaranteed by First Amendment as "Constitution's most majestic guarantee."). Tribe also characterizes free speech as a basic "element of our fundamental law." *Id.*; *see also* Griswold v. Connecticut, 381 U.S. 479, 487 (1965) ("[F]reedom of speech and of the press . . . are protected by the First Amendment . . . [and] are among the fundamental personal rights and 'liberties' . . . ." (quoting Gitlow v. New York, 268 U.S. 652, 666 (1925))). *See generally* Donald E. Lively, *The First Amendment at Its Third Century: Reckoning with the Ravages of Time*, 18 HASTINGS CONST. L.Q. 259, 259 (1991) (noting that freedoms of speech and of press "have been explicit constitutional commands for . . . two hundred years").

[2] U.S. CONST. amend. VI. The Sixth Amendment states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Id.; *see, e.g.*, Lockhart v. Fretwell, 506 U.S. 364 (1993). The *Fretwell* Court noted that a long line of cases has firmly established that "the Sixth Amendment right to counsel exists in order to protect the fundamental right to a 'fair trial.'" *Id.* (quoting Strickland v. Washington, 466 U.S. 668, 684 (1984)); *see* Scott C. Pugh, Note, *Checkbook Journalism, Free Speech, and Fair Trials*, 143 U. PA. L. REV. 1739, 1746 (1995) ("The central value served by the Sixth Amendment is fairness."); Alfredo Garcia, *Clash of the Titans: The Difficult Reconciliation of a Fair Trial in Modern American Society*, CHAMPION, July 1994, at 4, 5-6 ("[F]airness is the preeminent value advanced by the Sixth Amendment's safeguard of a fair trial by an impartial jury.").

[3] *See* California First Amendment Coalition v. Lungren, No. C 95-0440-FMS, 1995 WL 482066, at *9 (N.D. Cal. Aug. 10, 1995) (incorporating into holding well-settled principle that state laws which infringe upon any federal constitutional right may rightfully be rejected on basis that such laws are subject to Due Process Clause of Fourteenth Amendment); *see also* Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring). Explaining that states are subject to constitutional restraints by virtue of the Fourteenth Amendment, Justice Brandeis stated that "all fundamental rights compromised within the term liberty are protected by the federal Constitution from invasion by the states. The right of free speech, [is], of course, [a] fundamental right . . . ." *Id.*; First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 780 (1978) ("Freedom of speech and the other freedoms encompassed by the First Amendment always have been viewed as fundamental components of the liberty safeguarded by the Due Process Clause . . . .") (citations omitted).

[4] *See generally* Rideau v. Louisiana, 373 U.S. 723, 726 (1963) (broadcasting of defendant's confession before trial led to jury prejudices and eventual reversal of defendant's con-

criminal trials has exposed the conflict between these two constitutional guarantees.[5]

In an attempt to resolve the tension between the two guarantees, the California State Legislature recently enacted a statute prohibiting potential witnesses in criminal prosecutions from selling their stories to the media.[6] Although the law was designed to curtail "checkbook journalism"[7] and preserve the right of criminal defendants to a fair trial,[8] opponents of the statute argue

viction); Irvin v. Dowd, 366 U.S. 717, 727 (1961) (reversing conviction because 8 of 12 jurors admitted prejudice resulting from pre-trial publicity); Pugh, *supra* note 2, at 60-61 (noting that pre-trial publication of information could prevent obtaining impartial jury).

[5] *See, e.g.*, Greg Braxton, *The Race to Get "Lethal Lolita" Case on TV*, L.A. TIMES, Dec. 22, 1992, at F1 (describing competition between ABC and CBS over airing television movies about shooting of Mary Jo Buttafucco by Amy Fisher); Conor O'Clery, *OJ Packs Court for "Trial of the Century": Simpson Outshines Heidi Fleiss and the Menendez Brothers*, IR. TIMES (Washington, D.C.), Jan. 24, 1995, at 1 (reporting O.J. Simpson case as commanding "biggest media coverage for any courtroom drama ever in the United States"); David Shaw, *The Simpson Legacy; Obsession: Did the Media Overfeed a Starving Public? Chapter One: The Shaping and Spinning of the Story that Hijacked America*, L.A. TIMES, Oct. 9, 1995, at S1 (noting that media competition "immediately enveloped the O.J. Simpson murder case"); Bruce Vielmetti, *Susan Smith Attorney Found Spotlight Glaring*, ST. PETERSBURG TIMES (Fla.), Oct. 16, 1995, at 3 (noting how attorney for Susan Smith described pressure to answer media questions: "[t]here is no such thing as the Fifth Amendment in dealing with the media"). *See generally* David A. Harris, *The Appearance of Justice: Court TV, Conventional Television, and Public Understanding of the Criminal Justice System*, 35 ARIZ. L. REV. 785, 812 (1993) (criticizing media as inaccurately portraying criminal justice system).

[6] CAL. PENAL CODE § 132.5 (West Supp. 1995). A person who is or reasonably should know that they may be called as a witness in a criminal proceeding is targeted by the statute. *Id.* at (b). Such persons are prohibited from accepting compensation for such information. *Id.* Those in violation of this provision may be fined up to 150% of the amount of compensation. *Id.* at (d). A violation is considered a misdemeanor. *Id.* at (e). The statute has a tolling time of either the duration of the respective trial or one year from the occurrence if no prosecution has commenced. *Id.* at (f). The statute does not apply to compensation paid to expert witnesses, informants, reward monies or information obtained in ordinary course of business by the media. *Id.* at (g); *see* Pugh, *supra* note 2, at 1743 (describing enactment of statute in 1994, primarily in response to witness misconduct which occurred during the O.J. Simpson trial).

[7] *See* Nina Burleigh, *The Strategy to Try O.J. Simpson First in the Court of Public Opinion Makes his Scheduled Murder Trial More than a Search for Truth*, A.B.A. J., Oct. 1994, at 55 (1994). "Checkbook journalism," also known as "cash for trash," refers to the process of media representatives acquiring stories by paying people to provide them. *Id.*; *see also* Vanessa Atkins, *Bill Would Bar Trial Witnesses From Profiting: Legal Experts Split on Constitutionality of any Gag Law*, S.F. EXAMINER, July 26, 1994, at A4; Thomas Farragher, *California Bill Intends to Crack Down on "Checkbook Journalism"*, HOUS. CHRON., July 31, 1994, at 14; Mike Kennedy, *When Media Buy News Does Justice Pay?*, KAN. CITY STAR, Aug. 16, 1994, at A1.

[8] *See* CAL. PENAL CODE § 132.5(a) (declaring that compensating potential witnesses for their stories can "erode the reliability of verdicts" and "create . . . an appearance of injustice"); *Bouncing Checkbook Journalism*, HOLLYWOOD REPORTER, July 27, 1994, at 7 (reporting California Assembly Speaker Willie Brown's contention that bill does not bar witnesses' free speech, just payment for story); Willie L. Brown, Jr., *Money Taints Trial Process: Witnesses Who Sell Their Stories Can Compromise Trial*, U.S.A. TODAY, Sept. 30, 1994, at A10; *see also* Pugh, *supra* note 2, at 1743-44 (contending that right to fair trial justifies statute); Jerry Gillam, *Brown Says Courts Would Uphold Bill on Paid Interviews*, L.A. TIMES, July

that the legislation infringes upon witnesses' right of free speech.[9]

Recently, the United States District Court for the Northern District of California struck down the statute as unduly restrictive of free speech.[10] The statute's enactment and subsequent invalidation illustrates the ongoing search for ways to protect a criminal defendant's constitutional right to a fair trial while simultaneously safeguarding the right to free speech enjoyed under the United States Constitution.[11]

This Note analyzes the conflicting guarantees of the First and Sixth Amendments and examines possible resolutions of the conflict. Part One examines the underlying theories supporting the First Amendment right of free speech and the methodology used

27, 1994, at A3 (stating that Speaker Brown proposed bill because defendants' right to fair trial should outweigh right of witnesses to profit from their stories).

[9] *See, e.g.*, Farragher, *supra* note 7, at 14 ("The First Amendment doesn't talk about Congress not making a law to abridge the freedom of the press except that freedom to pay for people's stories . . . .") (quoting Terry Francke, executive director of the California First Amendment Coalition); Lynn Ludlow, *Paying For Free Speech*, S.F. EXAMINER, July 28, 1994, at A14 ("Once again the First Amendment is threatened by well-meaning legislators who want to 'balance' its free-speech guarantee with the Sixth Amendment's promise of a fair trial. It's not a balance. It's an unconstitutional gag law."); *see also* Note, *California Enacts a Ban on Receipt of Money for Information*, 108 HARV. L. REV. 1214, 1214 (1995) [hereinafter *California Enacts Ban*] (stating that legislation "implicates serious First Amendment concerns"); Pugh, *supra* note 2, at 1758 (arguing that statute constitutes "restriction on free expression").

[10] *See* California First Amendment Coalition v. Lungren, No. C 95-0440-FMS, 1995 WL 482066, at *1 (N.D. Cal. Aug. 10, 1995); The statute was subjected to "strict scrutiny," which requires that a restriction on free speech must serve a compelling state interest and be narrowly tailored to meet that interest. *Id.* at *5. The court granted a permanent injunction against the statute's enforcement. *Id.* at *9; *see also* Mercy Hermida, Note, *Trial by Tabloid*, 7 ST. THOMAS L. REV. 197, 213-15 (1994) (suggesting possible alternatives to remedy constitutional conflicts created by perpetuation of checkbook journalism); *California Enacts Ban*, *supra* note 9, at 1219 n.28 (concluding that California's checkbook journalism statute does not properly balance First and Sixth Amendment rights and proposing alternatives to strike this balance); Pugh, *supra* note 2, at 1765-80 (outlining alternative approaches for achieving Sixth Amendment goals of California's checkbook journalism statute while preserving media's First Amendment rights). *See generally* Robert S. Stephen, Note, *Prejudicial Publicity Surrounding a Criminal Trial: What a Trial Court Can Do to Ensure a Fair Trial in the Face of a "Media Circus"*, 26 SUFFOLK U. L. REV. 1063, 1080-92 (1992) (analyzing how trial courts in highly publicized criminal cases are responsible for balancing defendants' right to fair trial with media's right to report news to general public).

[11] *Lungren*, 1995 WL 482066, at *9. The *Lungren* court rejected defendant's argument that CFAC's facial challenge to the statute prevented the court from relying on hypothetical applications of the statute as evidence. *Id.* at *3. The court noted precedential decisions such as United States v. National Treasury Employees Union, 115 S. Ct. 1003, 1010 (1995) which relied upon evidence showing how statutes impacted members of plaintiff's class in invalidating ban on fees received by federal employees for making speeches and writing articles. *Id.* It also relied upon Simon & Schuster v. New York State Crime Victims Bd., 502 U.S. 105, 121-22 (1991) which noted that a law prohibiting convicted criminals from profiting from their crime would have affected authors such as Malcolm X, Henry Thoreau and Martin Luther King, Jr. *Id.*

to determine whether a restriction on an individual's speech is constitutionally permissible. Part Two focuses on judicial actions that seek to curtail prejudicial trial publicity which results from the increased media coverage of criminal prosecutions. Part Three explores allowable restrictions on speech and sets forth the criteria for successfully restricting prejudicial speech in an attempt to ensure a fair trial. Part Four sets forth viable alternatives to restricting witness speech, including invoking codes detailing the professional responsibility of trial attorneys and imposing "gag orders" on trial participants. This Note concludes that, although restrictions on witness speech may foster a defendant's ability to receive a fair trial, such restrictions may violate the fundamental right to free speech of disinterested parties and, therefore, are unconstitutional.

I. THE FIRST AMENDMENT RIGHT OF FREE SPEECH

Any analysis of the First Amendment's right of free speech requires a through examination of the Supreme Court's two-tiered approach to analyzing restrictions on speech.[12] The Supreme Court has promulgated a complex standard of review regarding government restrictions on speech.[13]

A. *Characterization Can Be Conclusory*

The level of scrutiny applied to a government restriction on free speech depends upon the character of the restriction.[14] At the out-

[12] *See generally* CONGRESSIONAL RESEARCH SERV., THE CONSTITUTION OF THE UNITED STATES: ANALYSIS & INTERPRETATION, S. Doc. No. 82, 92d Cong., 2d Sess., 936-938 (1973) (discussing detailed analysis of policies underlying First Amendment). There were no significant House or Senate debates regarding the meaning that Member's ascribed to freedom of speech or of the press. *Id.* at 936 n.5.

[13] *See* TRIBE, *supra* note 1, § 12-1, at 785-89 (describing Supreme Court standard of review under First Amendment); *see also* Thomas M. Fisher, Note, *Republican Constitutional Skepticism and Congressional Reform*, 69 IND. L.J. 1215, 1223 (1993) (recognizing two-tiered review of First Amendment challenges).

[14] Turner Broadcasting Sys., Inc. v. F.C.C., 114 S. Ct. 2445, 2458 (1994) (discussing precedential Supreme Court decisions that have determined level of scrutiny based on content); Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 502 U.S. 105, 125 (1991) (Kennedy, J., concurring) (concluding that content-based restrictions are subject to strictest scrutiny); Arkansas Writers' Project v. Ragland, 481 U.S. 221, 230 (1987) (noting different scrutiny applied to commercial speech); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 66 (1983) (finding that Supreme Court has consistently applied highest scrutiny to content-based restrictions); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776-777 (1978) (differentiating between speech made by individuals and that made by corporations).

set of the analysis, the distinction between content-neutral and content-based restrictions must be addressed.[15]

1. Content-Neutral

A restriction is content-neutral when the government seeks to avoid some evil unconnected with the speech's content, and when the restriction is merely incidental to government regulation.[16] Once the Court characterizes the speech as content-neutral, it utilizes a balancing test,[17] which weighs the limitation of the communication against the government interest the restriction serves.[18] If the Court determines that the government interest rationally justifies the restriction, the Court must then inquire whether a less restrictive alternative could serve the government's purpose resulting in the validation or condemnation of the challenged restriction.[19]

2. Content-Based

A restriction is considered content-based when the government regulation restricts speech based on the ideas or information contained in the speech.[20] Once the court decides that the govern-

[15] *See* Paul B. Stephan III, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203, 214-231 (1982) (tracking development of content-neutral/content-based dichotomy).

[16] *See* TRIBE, *supra* note 1, § 12-23, at 977-78 (discussing two ways that government "might" abridge speech); *see also* Alison M. Barbarosh, *Undressing the First Amendment in Public Schools: Do Uniform Dress Codes Violate Students' First Amendment Rights?*, 28 LOY. L.A. L. REV. 1415, 1426-1427 (1995) (addressing content-neutral categorization).

[17] *See, e.g.*, Schad v. Borough of Mount Ephraim, 452 U.S. 61, 67-77 (1981) (invalidating ordinance that banned commercial live entertainment because of insufficient evidence to satisfy First Amendment requirements); NAACP v. Button, 371 U.S. 415, 437 (1963) (striking down ordinance that prohibited leaflet distribution on public streets after balancing public interest in clean streets against First Amendment liberties); Schneider v. State, 308 U.S. 147, 161 (1939) (employing rigid form of balancing).

[18] *See* United States v. O'Brien, 391 U.S. 367, 377 (1968) (requiring that speech regulation serve important government interest and be narrowly tailored to achieve that interest); *see also* Cass R. Sunstein, *The First Amendment in Cyberspace*, 104 YALE L.J. 1757, 1771 (1995) (discussing balancing test employed in analyzing content-neutral regulations).

[19] *Schad*, 452 U.S. at 70.

[20] *See, e.g.*, Widmar v. Vincent, 454 U.S. 263, 278 (1981) (holding that University's content-based regulation prohibiting use of facilities by religious groups to be unconstitutional); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 544 (1980) (holding that New York Public Service Commission's order prohibiting appellant from using inserts discussing controversial public issues in appellant's bills to customers to be impermissible content-based restriction of speech); Carey v. Brown, 447 U.S. 455, 460 (1980) (holding that Illinois statute's prohibition of peaceful picketing on public streets was an unconstitutional content-based regulation of expressive conduct); Erznoznik v. City of Jacksonville, 422 U.S. 205, 217-218 (1975) (striking down Florida ordinance that penalized drive-in movie theaters for exhibiting films containing nudity); Police Dep't v. Mosley, 408 U.S. 92, 101-

ment restriction is "content-based," the restriction is presumptively unconstitutional.[21]

Furthermore, the constitutionality of any regulation could depend on whether the speech is considered "high value" or "low value." Speech considered to be of "low value" receives limited protection,[22] requiring that the restriction serve a sufficient state interest.[23] For example, the state may regulate, to an extent, a citizen's right to see sexually explicit materials in theaters of ones choosing.[24] When the court finds the restricted speech to be of

102 (1972) (invalidating city ordinance that prohibited picketing except for peaceful, labor-related picketing in proximity of schools); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 189 (1983). These were all decisions of the Burger Court that brought this content-neutral/content-based doctrine to the forefront of modern day First Amendment analysis today. *Id.*

[21] City of Ladue v. Gilleo, 114 S. Ct. 2038, 2047 (1994) (O'Connor, J., concurring) ("With rare exceptions, content discrimination in regulations of the speech of private citizens on private property or in a traditional public forum is presumptively impermissible, and this presumption is a very strong one."); R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2542 (1992) (asserting that content-based regulation of speech is presumptively invalid); Simon & Schuster, Inc. v. New York Crime Victims' Bd., 502 U.S. 105, 115 (1991) (stating that statute is presumptively unconstitutional if it imposes financial burden based on content of speech); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (presuming content-based regulations to be unconstitutional unless they pass strict scrutiny analysis); Police Dep't v. Mosely, 408 U.S. 92, 95 (1972) (asserting that government has "no power" to restrict expression based on content); *see* TRIBE, *supra* note 1, § 12-2, at 581 (setting forth presumption of invalidity for content-based regulations). *See generally* Stone, *supra* note 20, at 190 (recognizing different standards applied by United States Supreme Court in analyzing content-based and content-neutral restrictions).

[22] *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1948) (classifying profanity, libel and "fighting words" as communications not safeguarded by Constitution); *see also* New York v. Ferber, 458 U.S. 747, 764 (1982) (finding child pornography to be "low value"); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 761 (1976) (concluding that commercial speech is "low value"); Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) (holding that false statements of fact are "low value"); Miller v. California, 413 U.S. 15, 23 (1973) (recognizing that obscenity is "low value"); Dennis v. United States, 341 U.S. 494, 544-546 (1951) (determining that express incitement is "low value").

[23] *See* City of Cincinnati v. Discovery Network, 113 S. Ct. 1505, 1516 (1993) (noting that reasonable restrictions on speech are permissible if related exclusively to time, place or manner of dissemination of speech); *see also* Cynthia G. Bowman, *Street Harassment and the Informal Ghettoization of Women*, 106 HARV. L. REV. 517, 545 (1993) (stating that "low value" speech is subject to minimal scrutiny); Fred H. Case, *The First Amendment and the National Information Infrastructure*, 46 WAKE FOREST L. REV. 1, 50 (1995) (setting forth standard for scrutinizing "low value" speech as requiring sufficient state interest); Harry T. Edwards & Mitchell N. Berman, *Regulating Violence on Television*, 89 Nw. U. L. REV. 1487, 1521 (1995) (assigning lesser standard of scrutiny to "low value" speech); Craig B. Anderson, Comment, *Political Correctness on College Campuses: Freedom of Speech v. Doing the Politically Correct Thing*, 46 SMU L. REV. 171, 197 (1992) (recognizing that "low value" speech has received intermediate scrutiny requiring substantial, rather than compelling, state interest). *See generally* Jeffery M. Shaman, *The Theory of Low-Value Speech*, 48 SMU L. REV. 297, 329 (1995) (discussing levels of scrutiny given to restrictions on speech).

[24] Young v. American Mini Theaters, 427 U.S. 50, 72-73 (1976) (holding that city's interest in character of neighborhoods was sufficient to survive strict scrutiny).

"high value,"[25] the restriction must serve a compelling state interest and be narrowly tailored to achieve that end.[26] Political speech falls within this category and thus may be regulated to a lesser extent than forms of "low value" speech.[27]

B. *Witness Speech: Where Does it Fall?*

The United States District Court for the Northern District of California, in holding that the statue unduly restricted statements made by witnesses, labeled witness speech as content-based.[28] In *California First Amendment Coalition v. Lungren*,[29] the court held that the California statute singled out and placed an unjustified burden on expressive activity with a specific content: witnesses' expressions relating to criminal activity.[30] Concluding that the statute was content-based, the *Lungren* court categorized witness speech as "high value."[31] The court asserted that

[25] *See* Anderson, *supra* note 23, at 197 (stating that all "high value" speech is deserving of strict scrutiny); *see also* David Cole & William N. Eskridge, Jr., *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 HARV. C.R.-C.L. L. REV. 319, 346 (1994) (recognizing that it is high value that society places on certain speech that justifies strict scrutiny); Edward J. Eberle, *Hate Speech, Offensive Speech and Public Disclosure in America*, 29 WAKE FOREST L. REV. 1135, 1145 (1994) (demonstrating connection between strict scrutiny and "high value" speech); Edwards & Berman, *supra* note 23, at 1528 (indicating that regulations of "high value" speech receives strict scrutiny by Supreme Court); Bradford J. Roegge, Note, *Survival of the Fittest: Hunters or Activists? First Amendment Challenges to Hunter Harassment Laws*, 72 U. DET. MERCY L. REV. 437, 445 (1995) (noting that almost every content-based statute or "high value" speech regulation has been invalidated by Supreme Court).

[26] *See* Police Dep't v. Mosley, 408 U.S. 92, 94-102 (1972) (striking down Chicago ordinance that distinguished between permissible and impermissible picketing based on content of ideas expressed by picketers); *see also* Widmar v. United States, 454 U.S. 263, 278 (1981) (invalidating university policy of excluding religious groups from university's open forum policy).

[27] *See* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 37 (1993) (defining "political speech" and asserting that it is "high value" speech); *see also* David E. Steinberg, *Alternatives to Entanglement*, 80 KY. L.J. 691, 714 (1992) (exploring implications of placing high value on political speech); Anderson, *supra* note 23, at 197 (using political speech as example of high value speech deserving of strict scrutiny when restricted); Jon A. Soderberg, Note, *Son of Sam Laws: A Victim of the First Amendment?*, 49 WASH. & LEE L. REV. 629, 645 (1992) (discussing Supreme Court protection of high value political speech); *cf.* Ashutosh Bhagwat, *Of Markets and Media: The First Amendment, The New Mass Media, and the Political Components of Culture*, 74 N.C. L. REV. 141, 186-187 (1995) (positing that although political speech is "high value" and deserving of highest First Amendment protection, it has been problematic to define "political speech").

[28] California First Amendment Coalition v. Lungren, No. C 95-0440-FMS, 1995 WL 48206, at *4 (N.D. Cal. Aug. 10, 1995) (finding statute to be content-based following Supreme Court analysis in Simon & Schuster, Inc. v. New York Crime Victims Bd., 502 U.S. 105, 115 (1991)).

[29] No. C 95-0440-FMS, 1995 WL 482066 (N.D. Cal. Aug. 10, 1995).

[30] *Id.* at *4.

[31] *Id.* at *5.

the speech targeted by the California legislature is at the "core of protected expression."[32]

Witness speech is a matter of public concern.[33] On a practical level, it must be disseminated to the public through the media because the press acts as a surrogate for the public at judicial proceedings.[34] Moreover, the *Lungren* court determined that the restriction amounted to a prior restraint on speech,[35] an intolerable infringement on rights protected by the First Amendment.[36] Based on these two fundamental principles, the court applied a strict scrutiny analysis to evaluate the statute.[37] Because the statute unduly infringed upon rights protected by freedom of speech[38] and freedom of press,[39] the statute did not survive this scrutiny.[40]

C. *The Doctrine of Prior Restraint in the Eyes of the Supreme Court*

Although there is little difference between the fundamental rights guaranteed by freedom of speech and freedom of press,[41] one important distinction is that freedom of press encompasses the right to be free from prior restraints.[42] A prior restraint is

[32] *Id.* at *5.

[33] Erwin Chemerinsky, *Should Witnesses Be Allowed To Sell Their Stories Before Trial*, L.A. TIMES, Aug. 22, 1994, at A7 (stating that "public is informed when witnesses talk to the press").

[34] California First Amendment Coalition v. Lungren, No. C 95-0040-FMS, 1995 WL 480206, at *5 (N.D. Cal. Aug. 10, 1995).

[35] *Id.*

[36] *Id.* (citing Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 564 (1976)).

[37] *Id.* at *5-7.

[38] BLACK'S LAW DICTIONARY 664 (6th ed. 1990). Black defines "freedom of speech" as the "right guaranteed by [the] First Amendment of the U.S. Constitution to express one's thoughts and views without governmental restrictions." *Id.*

[39] *Id.* "Freedom of press" has been defined as the "right to publish and distribute one's thoughts and views without governmental restriction as guaranteed by [the] First Amendment of the U.S. Constitution." *Id.*

[40] California First Amendment Coalition v. Lungren, No. C 95-0440-FMS, 1995 WL 482066, at *9 (N.D. Cal. Aug. 10, 1995).

[41] *See* David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 456 (1983) (noting that freedom of press and freedom of speech have often been used interchangeably); Randall P. Bezanson, *The New Free Press Guarantee*, 63 VA. L. REV. 731, 740 (1977) (acknowledging that press receives distinct freedom under First Amendment); Melville Nimmer, *Introduction—Is Freedom of the Press a Redundancy: What Does It Add to Freedom of Speech?*, 26 HASTINGS L.J. 639, 647-658 (1975) (discussing distinction between freedom of press and freedom of speech); Potter Stewart, *"Or of the Press"*, 26 HASTINGS L.J. 631, 632 (1977) (recognizing difference in interests protected by freedom of speech and of press). *But see* David Lange, *The Speech and Press Clauses*, 23 UCLA L. REV. 77, 115-116 (1975) (finding no distinction between these rights).

[42] *See* New York Times, Co. v. Sullivan, 376 U.S. 254, 270 (1964) (recognizing that debate on public issues should be encouraged by press); Grosjean v. American Press Co., 297 U.S. 233, 250 (1936) (espousing value of press in shedding light on public issues); Near v.

"any scheme which gives public officials the power to deny use of a forum in advance of its actual expression."[43] This is a related, but separate, consideration to the classification of the content of the speech and the requisite constitutional scrutiny.[44] Prior restraints, whether content-neutral or content-based, have almost always been deemed to be void as against the liberties enjoyed by free speech.[45] The underlying rationale of the prohibition on prior restraints is to prevent the government from placing restrictions on speech before utterance or publication.[46] The Supreme Court has stated that a major purpose of the First Amendment is to prevent pre-publication restraints.[47] Prior restraints are more hazardous to the ideal of free speech than the imposition of punishment subsequent to publication.[48] A prior restraint mutes speech preemptively and, therefore, the speech never becomes part of the

Minnesota, 283 U.S. 691, 713 (1931) (stating that freedom of press clause was created to prevent prior restraints and censorship); *see also* LEONARD LEVY, THE EMERGENCE OF A FREE PRESS 272-273 (1988) (noting importance of freedom of press in prohibiting prior restraints).

[43] BLACK'S LAW DICTIONARY 1194 (6th ed. 1990).

[44] Madsen v. Women's Health Center, Inc., 114 S. Ct. 2516, 2524 (1994) (making distinction between prior restraint and content analysis of speech regulation); Alexander v. United States, 113 S. Ct. 2766, 2779 (1993) (recognizing relationship between prior restraints on speech and restrictions based on content); Greer v. Spock, 424 U.S. 828, 866 (1976) (noting permissive prior restraints based on time, place, and manner considerations).

[45] *See* New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (stating that presumption of unconstitutionality attaches to any prior restraint) (citing Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963))); *see also* TRIBE, *supra* note 1, § 12-34, at 1040 (asserting that prior restraint doctrine has been used to invalidate variety of restrictions on speech); James Gray Pope, *Labor and the Constitution: From Abolition to Deindustrialization*, 65 TEX. L. REV. 1071, 1116 (1987) (noting presumption against prior restraints on picketing regardless of whether restriction is content-based).

[46] Patterson v. Colorado, 205 U.S. 454, 462 (1907) (discussing prior restraints on publications); *see* Nichelle Frelix, Turner Broadcasting v. FCC: *Modern Communications Development and the Evolving First Amendment*, 16 WHITTIER L. REV. 685, 703 (1995) (discussing doctrine of prior restraint as being prohibition on publication before act of speech has taken place); Steve Helle, *Prior Restraint By the Backdoor: Conditional Rights*, 39 VILL. L. REV. 817, 829 (1994) (asserting that doctrine prevents government from achieving security through suppression of prose); Douglas J. Fryer, Note, *Bearing the Burden of Strict Scrutiny In the Wake of* Simon & Schuster, Inc. v. Members of the New York Crime Victims' Board*: A Constitutional Analysis of Michigan's "Son of Sam" Law*, 70 U. DET. MERCY L. REV. 191, 202 (1992) (describing doctrine as "seeking to enjoin government from imposing a restraint on a publication before it is published"); Kate Mishkin, Note, Ward v. Rock Against Racism*: Reasonable Regulations and State Sponsored Sound*, 10 PACE L. REV. 633, 639 (1990) (reciting historical roots of prior restraint doctrine in 16th century English licensing systems).

[47] Near v. Minnesota, 283 U.S. 691, 713 (1931) (pondering whether concept of restraint of publication is consistent with what was historically perceived and guaranteed).

[48] *See* JOHN E. NOWAK AND RONALD D. ROTUNDA, CONSTITUTIONAL LAW, *supra* note 48, § 16.16, at 992-93 (addressing distinction between prior restraints and subsequent punishment of speech).

"marketplace of ideas."[49] Consequently, prior restraints are presumptively unconstitutional and, generally, have been invalidated.[50] The press has almost absolute immunity from pre-publication restraints.[51]

No matter what the underlying rationale, the First Amendment guarantee of freedom of speech and of the press commands near-absolute protection.[52] Any regulation of speech involving the press must overcome a presumption of invalidity, placing a burden on

[49] *See* TRIBE, *supra* note 1, § 12-1, at 785-789. Tribe discusses theories of free speech: the marketplace of ideas theory; the self-governance theory; and the self-fulfillment theory. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 15-16 (1948) [hereinafter FREE SPEECH AND SELF-GOVERNMENT]. The self-governance theory is based on the idea that the Constitution delegated the control of common actions to "the people." *Id.* Applying this theory to the First Amendment, free speech is necessary to promote decision making by the masses. *Id.*; JOHN MILTON, *Areopagitica, A Speech for the Liberty of Unlicensed Printing To the Parliament of England* (1644) *in* MILTON'S PROSE WRITINGS 145 (J.M. Dent & Sons Ltd. ed., 1958). The marketplace-of-ideas rationale is premised upon the belief that "truth" can be determined only through a free and open discussion of competing ideas. *Id.*; JOHN E. NOWAK AND RONALD D. ROTUNDA, CONSTITUTIONAL LAW, § 16.6, at 991-993 (5th ed. 1995). Such discourse, which increases the likelihood of discovering the "truth" is necessarily facilitated by the right to free speech. *Id.*; THOMAS EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 7 (1970). This theory posits that free expression fosters the individual's ability to effectively participate in society. *Id.*; Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982). The self-fulfillment rationale derives its strength from the proposition that individual contribution to public debate will result in individual self-fulfillment. *Id.*; *see also* Rankin v. McPherson, 483 U.S. 378, 386 (1987) (providing near absolute protection for public employees speaking on matters of public concern); Brandenberg v. Ohio, 395 U.S. 444, 447 (1969) (citing principle that free speech and free press do not permit government to prohibit use of force or violence unless amounting to imminent lawless action thus allowing such expressions near absolute protection); Griswold v. Connecticut, 381 U.S. 479, 483 (1965) (allowing near absolute protection for privacy laws under First Amendment); New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964) (concluding that full protection is permitted under First Amendment for expression by newspaper qualified only by lawful procurement of information); *cf.* Masson v. New Yorker Magazine, 501 U.S. 496, 520 (1991) (concluding that allowing near absolute protection for practice of libel would ill serve values of First Amendment).

[50] *See* Near v. Minnesota, 283 U.S. 697, 702 (1931) (striking down statute that allowed for injunctions against publication of "malicious, scandalous and defamatory newspaper[s]"); *see also New York Times Co.*, 403 U.S. at 714 (refusing to grant injunction against newspaper that sought to publish classified government study); Redish, *supra* note 48, at 70.

[51] *New York Times Co.*, 403 U.S. at 713-714 (establishing that press has almost absolute immunity from pre-publication restraints).

[52] McDaniel v. Paty, 435 U.S. 618, 627 n.7 (1978) (noting danger in allowing absolute protection under First Amendment); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 777 (1976) (offering that false statements do not receive absolute protection under First Amendment); *see also* David A. Logan, *Of "Sloppy Journalism," "Corporate Tyranny," and Mea Culpas: The Curious Case of* Moldea v. New York Times, 37 WM. & MARY L. REV. 161, 167 (1995) (recognizing near-absolute protection afforded journalists); Karen Rhodes, Note, *Open Court Proceedings and Privacy Law: Re-Examining the Bases For the Privilege*, 74 TEX. L. REV. 881, 891 (1996) (describing strength of First Amendment protection in courtroom proceedings).

the government to prove that the restriction will survive strict scrutiny under the Constitution.[53]

II. THE SIXTH AMENDMENT RIGHT TO A PUBLIC TRIAL

The Sixth Amendment to the United States Constitution guarantees the right of a criminal defendant to a public trial.[54] This fundamental right is commonly referred to as a defendant's right to a fair trial because it is believed that a trial conducted in a public forum is protected from abuses otherwise hidden.[55] Additionally, the Sixth Amendment's guarantee of a public trial has been interpreted to include the right of the public to be informed regarding criminal proceedings.[56] In fact, public scrutiny of the judicial process has been favored as an effective check on the judicial system.[57] Although public scrutiny may produce social benefits,

[53] Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 582 (1983) (applying strict scrutiny to restriction on freedom of press); Saxbe v. Washington Post Co., 417 U.S. 843, 863 (1974) (Powell, J., dissenting) (considering heavy governmental burden justifying ban on prisoner-press interviews); *see also* Gregory S. Asciolla, Note, *Leathers v. Medlock: Differential Taxation of the Press Survives Under the First Amendment*, 41 CATH. U. L. REV. 507, 508 (1992) (noting established Supreme Court strict scrutiny standard in regulating press with burden of persuasion on government).

[54] *See* U.S. CONST. amend. VI (stating that criminal defendants "shall enjoy the right to a speedy and public trial, by an impartial jury. . . .").

[55] *See* Murphy v. Florida, 421 U.S. 794, 799-800 (1975) (stating constitutional fairness dictates trial by "unpartial, indifferent juror[s]") (quoting Irvin v. Dowd, 366 U.S. 717, 722 (1961)); *see also* Estes v. Texas, 381 U.S. 532, 538-39 (1965) (noting that purpose of Sixth Amendment requirement of public trial is to ensure that defendant will be dealt with fairly, not condemned unjustly); *In re* Murchison, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process."); ALFREDO GARCIA, THE SIXTH AMENDMENT IN MODERN AMERICAN JURISPRUDENCE 208-22 (1992) (discussing Sixth Amendment jurisprudence); Pugh, *supra* note 2, at 1745-50 (noting Sixth Amendment function is to ensure fairness).

[56] *See* Craig v. Harney, 331 U.S. 367, 374 (1947) ("What transpires in a courtroom is public property."); *see also* Globe Newspaper Co. v. Superior Ct., 457 U.S. 596, 603 (1982) (upholding press and public's constitutional right of access to criminal trials); *Estes*, 381 U.S. at 541 (indicating that public has right to information concerning courtroom proceedings). *But see In re* Oliver, 333 U.S. 257, 271 (1948) (stating that right to public trial was granted to accused primarily as safeguard against unjust prosecution and any other benefits conferred were incidental). The Court, in *Oliver*, also stated that "the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution." *Id.* The *Oliver* Court, however, goes on to recognize that a public trial is an effective tool to guard against judicial abuses. *Id.*

[57] *See Globe Newspaper Co.*, 457 U.S. at 606 (recognizing value of public access to criminal proceedings for judicial process, government and society); *see also* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 572 (1980) (stating open criminal trials produce opportunity for understanding judicial system); Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 587 (1976) (Brennan, J., concurring) (suggesting secrecy breeds ignorance and distrust of judicial system while unfettered reporting improves system itself); Sheppard v. Maxwell, 384 U.S. 333, 350 (1966) ("The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors and judicial processes to extensive public scrutiny and criticism.").

the question of how broadly "public" should be defined remains unanswered.[58]

In addition to being construed as the right of a defendant to have his case heard in a public forum, the Sixth Amendment allows members of the public to remain informed through media coverage of courtroom activities.[59] The Supreme Court, however, has held that while a defendant has no constitutional right to a secret trial,[60] the presence of the media is not mandated by the Constitution.[61] As a result of varying levels of publicity, there are numerous ways to satisfy the Sixth Amendment requirement of a public trial. Generally, as long as the public is allowed to attend, the trial is considered to be in compliance with the Sixth Amendment, regardless of whether the public is interested in attending.[62]

Although it is clear that the Framers were aware of the potential ramifications of trials conducted in the public eye,[63] they could

[58] *See Richmond Newspapers*, 448 U.S. at 581 n.18 (refusing to define all circumstances under which criminal trial may be closed while stating that judge may impose reasonable restrictions on public access to trial).

[59] *See id.* at 578 (finding presence of media and people in courtroom has been thought to enhance integrity and quality of proceedings); *Nebraska Press*, 427 U.S. at 568 (acknowledging precedent that press is not proscribed from courtroom reporting); Sheppard v. Maxwell, 384 U.S. 333, 362-63 (1966) ("Of course, there is nothing that proscribes the press from reporting events that transpire in the courtroom."); Estes v. Texas, 381 U.S. 532, 538-39 (1965) (stating that journalists are free to report what they witness while present in courtroom); Craig v. Harney, 331 U.S. 367, 374 (1947) ("Those who see and hear what transpired can report it with impunity. There is no special prerequisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it.").

[60] *See Richmond Newspapers*, 448 U.S. at 591 (Brennan, J., concurring) (noting "universal rule" against secret trials); *Estes*, 381 U.S. at 539 ("History has proven that secret tribunals were effective instruments of oppression."); *In re* Oliver, 333 U.S. 257, 270-273 (1948); *see also* Phoenix Newspapers v. Jennings, 490 P.2d. 563, 565 (Ariz. 1971) (holding that defendant has no right to secret trial and cannot prevent people from freely discussing and printing what transpired in open court).

[61] Nixon v. Warner Communications, Inc., 435 U.S. 589, 610 (1978) (holding Sixth Amendment does not require trial to be broadcast to public live or on tape, rather, public trial occurs when public given opportunity to attend trial); *see also* Cembrook v. Sterling Drug, 231 Cal. App. 2d 52, 60 (1964) ("As long as the doors of a courtroom are open, so that a reasonable proportion of the public is allowed to attend, the right to a public trial is satisfied."); *In re* Post-Newsweek Stations, 370 So. 2d 764, 774 (Fla. 1979) (allowing that First and Sixth Amendments do not mandate that electronic media cover proceedings).

[62] *See generally* TRIBE, *supra* note 1, § 12-11, at 860 (stating that risk that trial will be prejudiced by publicity is slight because only handful of criminal cases reach juries and most cases receive little or no publicity).

[63] *See* United States v. Burr, 25 F. Cas. 49, 52 (1807) (discussing impossibility of obtaining totally impartial jury for trials resulting from English rebellions of 1715 and 1745; advocating bending rule against partial juries due to necessity); *see also* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 547 (1976) (noting proposition that Framers of Constitution were ignorant of "potential conflicts between right to an unbiased jury and the guarantee of

not have envisioned the type of media coverage that would pervade the justice system 200 years later, bringing trial publicity beyond the community surrounding the courthouse.[64] Today, as publicity surrounding certain trials increases, courts struggle to comply with the constitutional guarantee of a public tribunal[65] without infringing upon an accused's right to an impartial jury.[66]

The United States Supreme Court traditionally has recognized that adverse publicity may potentially jeopardize a defendant's ability to receive a fair trial.[67] The constitutional guarantees of freedom of speech[68] and of the press,[69] however, hinder the Court's ability to limit prejudicial trial publicity.[70] To safeguard a

freedom of the press" was inconceivable); Reynolds v. United States, 98 U.S. 145, 1555-56 (1878) (noting that newspaper reporting causes burden to be on trial court to determine when asked whether opinion of juror raises to level of partiality). *See generally* GARCIA, *supra* note 55, at 205 (discussing difficult reconciliation of First and Sixth Amendments).

[64] *See, e.g.*, *Nebraska Press*, 427 U.S. at 548 (noting advances in communication and ubiquitousness of press have hindered right to fair trial).

[65] *See* Richmond Newspapers v. Virginia, 448 U.S. 555, 581 (1980) (finding implicit constitutional guarantee of openness of court proceedings to public absent overriding factors); *see also* Globe Newspaper Co. v. Superior Ct., 457 U.S. 596, 606-07 (1982) (noting state denial of access to criminal trials in order to prevent disclosure of sensitive information must pass strict scrutiny); *Nebraska Press*, 427 U.S. at 570 (noting "settled principle" that nothing prevents press from reporting courtroom proceedings (citing Sheppard v. Maxwell, 384 U.S. 333 (1966))).

[66] *See* Irvin v. Dowd, 366 U.S. 717, 728 (1961) (vacating conviction and death sentence because change of venue to nearby county which experienced as much adverse publicity as original county was not sufficient to render defendant "trial atmosphere undisturbed by so huge a wave of public passion . . . "); *see also Nebraska Press*, 427 U.S. at 554-55 (noting jury's ability to decide trials fairly is affected by publicity which is shaped largely by attorneys, police and officials); Sheppard v. Maxwell, 384 U.S. 333, 362 (1966) (holding that trial court must utilize "strong measures" to control prejudicial publicity and supply accused with fair trial); Estes v. Texas, 381 U.S. 532, 552 (1965) (holding televising of defendant's "highly sensational" criminal trial denied defendant due process); Rideau v. Louisiana, 373 U.S. 723, 725 (1963) (holding denial of change of venue after defendant's filmed confession was televised denied defendant due process).

[67] *See* Gannett Co. v. DePasquale, 443 U.S. 368, 378 (1979) (indicating adverse publicity endangers right to fair trial (citing *Sheppard*, 384 U.S. at 363)); *Estes*, 381 U.S. at 544 (noting principle that reversal may be warranted even when no specific prejudice is shown because circumstances are inherently suspect as result of use of television in and surrounding courtroom); *Irvin*, 366 U.S. at 728 (reversing murder conviction because pervasive media coverage influenced jury into believing in defendant's guilt prematurely); Marshall v. United States, 360 U.S. 310, 313 (1959) (reversing conviction and granting new trial because jury was exposed to prejudicial information printed in newspapers even though not admissible in court).

[68] *See* discussion *supra* part I (addressing First Amendment concerns).

[69] *See Sheppard*, 384 U.S. at 350 (notwithstanding sensationalism, press should have "free hand"); *see also* Craig v. Harney, 331 U.S. 367, 374-77 (1947) (allowing reports concerning what was seen and heard at trial); Bridges v. California, 314 U.S. 252, 265 (1941) (stating intention of Framers was to give to press broadest freedom tolerable by orderly society).

[70] *See generally* New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (stating that prior restraint on publication contains presumption of unconstitutionality); Near v. Minnesota, 283 U.S. 691, 713 (1931) (stating that freedom of press was intended to prevent

criminal defendant's right to a fair trial, the Court has stated that trial courts must take "strong measures" to prevent a "media circus."[71]

A. *Closure of Proceedings*

Closure of courtroom proceedings to the public is one controversial way trial judges attempt to maintain order in and surrounding the courtroom.[72] There is, however, a strong presumption of public access to criminal proceedings.[73] Consequently, any closure of courtroom proceedings raises questions of constitutionality and invokes strict scrutiny analysis.[74]

When attempting to pass strict scrutiny, if the compelling governmental interest asserted is the right to a fair trial, closure is only appropriate when three criteria are met. First, there must be a "substantial probability" that publicity would compromise a

censorship and prior restraints); TRIBE, *supra* note 1, § 12-34, at 1040 (discussing use of prior restraint doctrine to invalidate speech restrictions).

[71] Sheppard v. Maxwell, 384 U.S. 333, 362 (1966) ("Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused."); Press-Enterprises Co. v. Superior Ct., 478 U.S. 1, 15 (1986) (stating that voir dire is viable alternative to closing proceedings to public); Patton v. Yount, 467 U.S. 1025, 1032 (1984) (finding that delay of trial eradicated effect of prejudicial publicity); Rideau v. Louisiana, 373 U.S. 723, 726 (1963) (holding that due process required defendant's request for change of venue be honored, in light of prejudicial pre-trial publicity); Irvin v. Dowd, 366 U.S. 717, 728 (1961) (overturning murder conviction where defendant's right to receive fair trial was prejudiced by extensive pre-trial media activity); People v. Manson, 61 Cal. App. 3d 102, 174 (1976) (finding prejudice overcome by extensive voir dire and sequestration of jury), *cert. denied*, 430 U.S. 986 (1977); Stephen, *supra* note 10, at 1085-86; Pugh, *supra* note 2, at n.25 (describing change of venire as enlarging, replacing or importing juror panel to avoid prejudice) (citation omitted); *see also* BLACK'S LAW DICTIONARY 678 (6th ed. 1990). A "gag order" is defined as a court order directing, among others, reporters, not to report on court proceedings. *Id. See generally* Rene L. Todd, *A Prior Restraint By Any Other Name: The Judicial Response to Media Challenges of Gag Orders Aimed at Trial Participants*, 88 MICH. L. REV. 1171, 1172 (1990) (describing court use of gag orders).

[72] *See Press-Enterprises*, 478 U.S. at 14 (holding that state must show "substantial probability" that right to fair trial will otherwise be prejudiced by publicity and that reasonable alternatives to closure would not prevent prejudice); Globe Newspaper Co. v. Superior Ct., 457 U.S. 596, 606-07 (1982) (holding that in order to justify closure state must show compelling governmental interest and that closure order is narrowly tailored to meet that interest); Newman v. Graddick, 696 F.2d 796, 803-04 (11th Cir. 1983) (holding that court must articulate reasons for closure and hold hearing giving opponents of closure chance to be heard); Barron v. Florida Freedom Newspapers, Inc., 531 So. 2d 113, 118 (Fla. 1988) (stating that closure will be justified when Constitution, laws, and statutes allow it).

[73] *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 569 (1980) (declaring Anglo-American tradition of public trials indispensable); In re *Oliver*, 333 U.S. 257, 266 (1948) (affirming that right to public trial is rooted in our nation's heritage).

[74] *Globe Newspaper Co.*, 457 U.S. at 606-07 ("But the circumstances under which the press and public can be barred from a criminal trial are limited; the state's justification in denying access must be a weighty one.").

fair trial.[75] Second, closure must be proven to prevent such a risk.[76] Finally, it must be shown that reasonable alternatives would not adequately prevent the prejudicial publicity.[77]

B. *Contempt of Court*

Another tool trial judges may use to exercise control over prejudicial trial publicity is the contempt proceeding.[78] However, only published material that results in a substantial, serious and imminently dangerous evil to the fair administration of justice is punishable by contempt of court.[79] In order to regulate trial publicity in this manner, there must be a likelihood of prejudice to defendant's trial, not merely a possibility of prejudice.[80] This requirement protects freedom of public comment when there is no clear danger of unfair prejudice to the criminal defendant.[81]

It appears that the contempt remedy is an ineffective method of preventing prejudicial publicity for at least two reasons. First, contempt is a tool that can be used only after publication, at which point a defendant's right to a fair trial may already have been adversely impacted.[82] Second, adjudication of contempt can only be

[75] *See Press-Enterprises*, 478 U.S. at 14 (setting forth these special circumstances that are prerequisites to closing hearing to public); *Richmond Newspapers*, 448 U.S. at 581 (holding that where trial court made no findings to support closure, made no inquiry into alternatives, and made no recognition of public right to attend, closure was not appropriate).

[76] Press-Enterprises v. Superior Ct., 478 U.S. 1, 14 (1986).

[77] *Id.*

[78] *See* In re Murchison, 349 U.S. 133, 139 (1955) (holding that accused may not be charged and tried summarily); In re Oliver, 333 U.S. at 274-75 (holding that judge must observe contemptuous conduct in order to punish); Craig v. Harney, 331 U.S. 367, 378 (1947) (finding publication of jury verdict before sentencing did not constitute contempt); Pennekamp v. Florida, 328 U.S. 331, 335 (1946) (holding that contempt determination by state court will be given respect but not final authority); Bridges v. California, 314 U.S. 252, 253 (1941) (holding contempt proceeding to constitutional scrutiny); Hughes v. Territory, 85 P. 1058, 1060 (Ariz. 1906) (holding that truth or falsity is immaterial in contempt proceeding).

[79] *Bridges*, 314 U.S. at 263 (declaring that due to liberty granted free speech and press, in order to punish utterance for contempt substantive evil must be "extremely serious and the degree of imminence extremely high").

[80] *Id.*; *see also Craig*, 331 U.S. at 376 ("The vehemence of the language used is not alone the measure of the power to punish for contempt. The fires which it kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil.").

[81] *Pennekamp*, 328 U.S. at 347 (reversing contempt convictions because danger to fair administration of justice not shown). "Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice." *Id.*

[82] *See* Near v. Minnesota, 283 U.S. 697, 716 (1931) (noting unconstitutionality of prepublication restraints except in "exceptional circumstances"); *see also* New York Times Co.

used under very serious circumstances.[83] Therefore, only very few prejudicial publications will be punishable by contempt.

III. CONFLICT BETWEEN TWO FUNDAMENTAL GUARANTEES

Generally, the constitutional guarantees of a free press and a fair trial advance the common goal of an effective judiciary.[84] Upholding the media's First Amendment freedoms, however, may interfere with a defendant's Sixth Amendment right to a fair and impartial jury.[85] The Supreme Court has held that when these two constitutional rights conflict, neither right is more deserving of constitutional protection.[86] Therefore, trial courts are faced daily with the difficult task of preserving a criminal defendant's right to a fair trial while safeguarding the constitutional mandate of a public tribunal.[87]

v. United States, 403 U.S. 713, 730 (1971) (Brennan, J., concurring) (declaring that in order to have allowable prior restraint, there must be inevitable, direct and immediate danger).

[83] *See generally* TRIBE, *supra* note 1, § 12-11, at 856-60 (discussing use of contempt power by trial court in attempt to maintain defendant's right to fair trial).

[84] *See* Press-Enterprises Co. v. Superior Ct., 464 U.S. 501, 508 (1984) (reiterating that open proceedings bolster "basic fairness" of trial and give citizens "confidence in the system"); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606 (1982) (observing that allowing public to have access to criminal proceedings "heighten[ed] public respect for the judicial process"); Sheppard v. Maxwell, 384 U.S. 333, 350 (1966) (referring to press as "handmaiden of effective judicial administration, especially in the criminal field"); *In re* Oliver, 333 U.S. 257, 270 (1948) (stating that fact that trial is subject to review by public opinion effectively restrains potential judicial abuses).

[85] *See* Rideau v. Louisiana, 373 U.S. 723, 726 (1963) (reversing defendant's conviction due to pre-trial broadcast of defendant's confession which prejudiced jury); Irvin v. Dowd, 366 U.S. 717, 727 (1961) (reversing state conviction due to prejudicial pre-trial publicity that amounted to admitted bias of 8 of 12 members of jury); *see also* Pugh, *supra* note 2, at 60-61 (noting that extensive publication of information could make it impossible to have impartial jury); Stephen, *supra* note 10, at 1078-79 (expressing need for increased judicial control of trials).

[86] Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 561 (1976). Justice Burger stated that "[t]he authors of the Bill of Rights did not undertake to assign priorities as between the First Amendment and Sixth Amendment rights, ranking one as superior to the other." *Id.* Justice Brennan stated in his concurrence that choosing one of the rights over the other one is not only troublesome but also a choice that need not be made. *Id.* at 611-12; *see, e.g.*, Bridges v. California, 314 U.S. 252, 260 (1941) (addressing difficulty in prioritizing constitutional rights); *see also Nebraska Press*, 427 U.S. at 611-12 (Brennan, J., concurring) (noting trouble in making choice between these guarantees and asserting that choice need not be made).

[87] *See Press-Enterprises Co.*, 478 U.S. at 14 (holding that there must be "substantial probability" that fair trial will be prejudiced by publicity); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 581 (1980) (holding that criminal trial must be public unless state has overriding interest in closure); *Nebraska Press*, 427 U.S. at 565 (noting that not all pretrial publicity, even if widespread, leads automatically to unfair trial); Murphy v. Florida, 421 U.S. 794, 803 (1975) (holding that defendant received fair trial, even in face of media publicity); Times-Picayne Publishing Corp. v. Schulingkamp, 419 U.S. 1301, 1307 (1974) (recognizing difficulty of reconciling First Amendment rights with defendant's right to impartial jury); Estes v. Texas, 381 U.S. 532, 539 (1965) (recognizing press function of

Unfortunately, there is no single solution to the problem confronting courts regarding how to balance effectively conflicting rights within the framework of the Constitution.[88] Although publicity generated by a trial may sometimes lead to a prejudiced jury pool, it is constitutionally impermissible, absent a compelling governmental interest, to restrict both individual speech and media publication of information.[89] As a result, state legislatures, and ultimately trial judges, are left to their own devices to fashion reasonable solutions.[90]

A. The California Statute and New York's 'Son of Sam' Law

1. The California Statute and *Lungren*

Responding to the effects of a media circus surrounding the events of the O.J. Simpson murder trial,[91] the California Legislature enacted a statute prohibiting potential witnesses in a criminal proceeding from selling their stories to the media.[92] The pur-

awakening public interest, exposing corruption and informing citizens of public events while cautioning that press role must be subject to fair judicial process); Irvin v. Dowd, 366 U.S. 717, 728 (1961) (requiring that defendant be tried in forum "undisturbed by so huge a wave of public passion").

[88] *See generally Nebraska Press*, 427 U.S. at 561 ("But if the authors of these guarantees, fully aware of the potential conflicts between them, were unwilling or unable to resolve the issue by assigning to one priority over the other, it is not for us to re-write the Constitution by undertaking what they declined to do."); Bridges v. California, 314 U.S. 252, 260 (1941) (stating that both First and Sixth Amendment guarantees are fundamental and it would be "trying task to choose between the two."); GARCIA, *supra* note 55, at 206 ("The Supreme Court has emphatically asserted that no hierarchy of values inheres in the safeguards enumerated in the Bill of Rights.").

[89] *See* TRIBE, *supra* note 1, § 12-3, at 798-99 (discussing use of "most exacting scrutiny" on content-based regulations); *see also* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (noting prohibition on government from regulating communicative activities in public forums absent regulation that is narrowly tailored to meet compelling state interest); Widmare v. Vincent, 454 U.S. 263, 276 (1981) (prohibiting religious speech in public forum does not pass strict scrutiny).

[90] *See* Sheppard v. Maxwell, 384 U.S. 333, 362 (1966) (declaring that trial courts must take "strong measures" to ensure mass communications do not endanger rights of accused). *See generally* Press-Enterprises v. Superior Ct., 478 U.S. 1, 15 (1986) (utilizing voir dire as alternative to closing proceeding to public); Patton v. Yount, 467 U.S. 1025, 1032 (1984) (delaying trial effective way to ebb tide of prejudicial publicity); Rideau v. Louisiana, 373 U.S. 723, 726 (1963) (issuing change of venue in hopes of reducing trial publicity).

[91] *See* Michael Fleeman, *Defense to Grill L.A. Detective: Jurors Return After Sideshow With Maid*, THE PHOENIX GAZETTE, Mar. 8, 1995, at A8 (referring to treatment given to Rosa Lopez as applied to subsequent witnesses who may sell their stories to media); *Rosa Lopez to Return to Stand at O.J. Simpson Trial* (NBC television broadcast, Feb. 28, 1995) (noting potentially damaging testimony of Rosa Lopez).

[92] CAL. PENAL CODE § 132.5 (West Supp. 1995); *see Checkbook Law 'Unconstitutional'*, VANCOUVER SUN, Aug. 9, 1995, at A10 (reporting on invalidation of statute); *Death of a Bad Law—The Legislatures Criminalization of Checkbook Journalism is Discarded When a Federal Judge Calls it Unconstitutional*, SAN FRANCISCO EXAMINER, Aug. 11, 1995, at A18 (describing California legislature's attempt to curb checkbook journalism); Bob Egelko,

poses of the statute were to uphold a criminal defendant's right to a fair trial, to ensure the people's right to due process of law, and to preserve the integrity of the judicial process.[93] Under this new law, a potential witness in a criminal proceeding is prohibited from receiving any compensation for information as a result of witnessing the underlying criminality.[94]

In *Lungren*, the California First Amendment Coalition (the "Coalition") challenged the validity of the statute on the ground that it violated the First Amendment.[95] In considering the validity of the statute, the district court agreed with the Coalition that the restriction was content-based because it was directed at speech with a particular content, *i.e.*, speech about an alleged crime.[96] The court applied strict scrutiny and determined that the legislation did not serve a compelling state interest nor was it narrowly tailored.[97] Additionally, the court found the statute overbroad because it forbade a potential witness from accepting compensation from a media source for even cab fare,[98] which arguably may be related to the reporting of the crime.[99] The court held that prohibiting a potential witness from disclosing crime-related information places an indirect restriction on the media.[100] Thus, after *Lungren*, questions remain regarding how to meet California's noble

O.J. Simpson Trial: Judge Annuls Ban on Paying News Sources, S. D. UNION & TRIB., Aug. 8, 1995, at A3 (outlining effect of California statute).

[93] California First Amendment Coalition v. Lungren, No. C 95-0440-FMS, 1995 WL 482066, at *2 n.4 (N.D. Cal. Aug. 10, 1995) (citing to legislative findings of CAL. PENAL CODE § 132.5).

[94] CAL. PENAL CODE § 132.5(a) (West Supp. 1995).

[95] *Lungren*, 1995 WL 482066, at *1 (1966).

[96] *Id.* at *4.

[97] *Id.* at *5-8. The court looked to each enumerated state interest when applying this strict scrutiny test to determine whether the interest was sufficiently compelling and, if so, whether the statute was narrowly tailored to meet such state interests. *Id.* In addition, the court found that there were several alternatives already in place that would serve the same end. *Id.* The court pointed to remedies available in cases of perjury, subordination of perjury, bribing of witnesses, witness competency requirements, the process of cross-examination and jury instructions that are accessible under the current judicial system that would also met these ends without restricting speech. *Id.* at *6; *see id.* at *9. The court held that the regulation "is neither necessary nor narrowly tailored to serve a compelling state interest." *Id.* at *9; *see also* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938). The Court engendered the strict scrutiny standard. *Id.*

[98] California First Amendment Coalition v. Lungren, No. C95-0440-FMS, 1995 WL 482066, at *8 (N.D. Cal. Aug. 10, 1995) (listing seemingly *de minimis* expenses that would qualify persons for punishment under statute).

[99] *Id.* (detailing statute's unjust effect on media).

[100] *Id.* at *3 (recognizing that Coalition's challenge was based on actual effect statute has on its members' First Amendment rights).

goals without infringing upon constitutional protections of speech and the press.[101]

2. Attempts by Other Jurisdictions

Freedom of the press[102] has been threatened in other jurisdictions through statutory measures that, when challenged, were deemed void as inconsistent with the First Amendment.[103] These jurisdictions have attempted to regulate media publications by imposing restrictions that appear to abridge speech incidentally.[104] Minnesota attempted one such restriction by imposing a tax on paper and ink used in newspaper production.[105] The Supreme Court struck down the tax holding that it placed an undue financial burden on interests of the media protected by the First Amendment and that the government's interest was not compelling.[106]

Subsequent to the invalidation of the Minnesota tax, the Court was faced with a challenge to the imposition of another state tax on the media.[107] In *Arkansas Writers' Project, Inc. v. Ragland*,[108] members of the press challenged an Arkansas statute that allegedly taxed certain media publications based on content.[109] After determining that the statute was content-based, the Court applied a strict scrutiny analysis and held the statute unconstitutional.[110] The Court found that this kind of selective taxation placed a bur-

[101] *Id.* The California statute was challenged by an organization dedicated to protecting freedom of press rights. *Id.* at *1. In addition to the threat of impinging on the media's rights, freedom of speech rights were also at issue. *Id.* at *5.

[102] BLACK'S LAW DICTIONARY 664 (6th ed. 1990). Freedom of press has been defined as the "[r]ight to publish and distribute one's thoughts and views without governmental restriction . . . ." *Id.*

[103] Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 233 (1987) (concluding that State's selective application of sales tax to certain media publications violated First Amendment); Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 592 (1983) (holding that Minnesota legislature infringed upon right of press protected by First Amendment).

[104] *See Arkansas Writers' Project*, 481 U.S. at 228 (recognizing that generally applicable economic regulations on press do not raise constitutional issues); *Minneapolis Star*, 460 U.S. at 581 (positing that government can permissibly enact economic regulations on newspapers if generally applied, not selectively).

[105] *Minneapolis Star*, 460 U.S. at 577 (outlining applicable state tax scheme).

[106] *Minneapolis Star*, 460 U.S. at 592-93 (holding that Minnesota offered insufficient justification for imposing tax on media).

[107] *Arkansas Writers' Project*, 481 U.S. at 223 (revisiting similar issue as Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 578 (1983)).

[108] 481 U.S. 221 (1987).

[109] *Id.* at 229 (finding that restricting expression based on content runs counter to First Amendment principles).

[110] *Id.* at 230 (laying down strict scrutiny standard).

den on the freedoms enjoyed by the press similar to that of the Minnesota statute.[111]

These restrictions did not withstand First Amendment challenges because they unduly discriminated against the press.[112] It is submitted that New York has formulated a statute that will survive a strict scrutiny analysis if challenged on First Amendment grounds.

3. New York's "Son of Sam" Law, Past and Present

New York's "Son of Sam" law,[113] enacted in 1977 and revised in 1992, attempts to remedy a system of justice that allows for criminals to be unjustly enriched.[114] In both its original and revised forms, the law prohibits convicted criminals from profiting from a crime before the victims are compensated.[115] Under the original statute, monies payable to the criminal that were obtained through expressions relating to the crime, such as book advances or profits from sales, movie rights, or an interview fee, were placed in escrow and made available to satisfy civil judgments brought by the victims of the crime.[116] In *Simon &*

[111] *Id.* (discussing similarities and differences between *Arkansas Writers' Project* and *Minneapolis Star*).

[112] *Arkansas Writer's Project*, 481 U.S. at 227 (establishing that discriminatorily taxing press violates First Amendment); Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 585 (1983) (asserting that government may not single out press for unfavorable treatment).

[113] N.Y. EXEC. LAW § 632-a(2) (a) (McKinney 1995); *see* Mark Schorr, (book review) *Confessions of Son of Sam*, LA TIMES, Oct. 13, 1985, at 16. "David Berkowitz, the 'Son of Sam,' killed six young people and crippled two others during the yearlong shooting spree that ended with his capture in August, 1977. [He] terrorized New Yorkers with his .44-caliber revolver by attacking couples in parked cars." *Id.*; *see also* Laura Landro, *Who Can Profit From a Criminal's Story? Court Cases to Test Limit of New Laws*, WALL ST. J., Oct. 31, 1985 (explaining that New York "Son of Sam" statute was enacted after convicted murderer David Berkowitz, known as Son of Sam killer, entered into book contract).

[114] Simon & Schuster, Inc. v. New York Crime Victims' Bd., 502 U.S. 105, 108 (1991) (recognizing purpose of New York's "Son of Sam" law).

[115] *See* Kelly Franks, Note, *"Son of Sam" Laws After* Simon & Schuster, Inc. v. New York Crime Victims' Board*: Free Speech Versus Victims' Rights*, 14 HASTINGS COMM/ENT L.J. 595, 611-14 (1992) (discussing measures taken to constitutionalize New York's "Son of Sam" law).

[116] N.Y. EXEC. LAW § 632-a (McKinney 1982). This statute provides in relevant part:

> 1. Every person, firm, corporation, partnership, association or other legal entity contracting with any person or the representative or assignee of any person, accused or convicted of a crime, by way of a movie, book, magazine article, tape recording, phonograph record, radio or television presentation, live entertainment of any kind, or from the expression of such accused or convicted person's thoughts, feelings, opinions or emotions regarding such a crime, shall submit a copy of such contract to the board and pay over to the board any monies which would otherwise, by terms of such contract, be owing to the person so accused or convicted or his representatives. The board shall deposit such monies in an escrow account for the benefit of and payable to any victim

Schuster, Inc. v. New York Crime Victims' Board,[117] the United States Supreme Court ruled that the "Son of Sam" law violated the First Amendment because it placed a financial burden on expressions based on their content.[118] The Court determined that the statute was content-based because it could "effectively drive certain ideas or viewpoints out of the marketplace."[119] Although the statute did not impose an outright ban on the convicts' speech,[120] the Court acknowledged that restricting the profits derived from this type of speech is a "financial disincentive."[121] In invalidating the statute, the Court held that where a statute places a financial burden on speech because of its content, it is presumed unconstitutional.[122] The Court noted that allowing economic restrictions on speech would result in an effective government method of suppressing such speech.[123] Moreover, the Court found that, as originally worded, the statute was overinclusive.[124] First, it applied to works by persons merely accused of criminal activity, in addition to those convicted of a crime.[125] Second, the restriction applied to profits from works that merely mentioned the crime, even where such mention was not the focal point of the expression.[126] In the end, the Court held that New York's statute was not narrowly tailored to advance the State's compelling interest in ensuring victims just compensation from the fruits of crime.[127]

or the legal representative of any victim of crimes committed by: (i) such convicted person; or (ii) by such accused person, but only if such accused person is eventually convicted of the crime and provided that such victim, within five years of the date of the establishment of such escrow account, brings a civil action in a court of competent jurisdiction and recovers a money judgement for damages against such person or his representatives.

Id.

117 502 U.S. 105 (1991).

118 *Simon & Schuster*, 502 U.S. at 115 (asserting that statutes that place financial burden on speaker are presumptively unconstitutional).

119 *Id.* at 115 (citing Leathers v. Medlock, 499 U.S. 439, 447 (1991) (discussing threat to suppression of expression of viewpoints)).

120 N.Y. EXEC. LAW § 632-a(2) (a) (McKinney 1995) (designating only profit-making ventures as prohibited activity).

121 *Simon & Schuster*, 502 U.S. at 116 (stating that statute "plainly imposes" financial burden on speech).

122 Simon & Schuster v. New York Crime Victim's Bd., 502 U.S. 105, 115 (1991) (citing the case of Leathers v. Medlock, 499 U.S. 439, 447 (1991)).

123 *Id.* at 115.

124 *Id.* at 121 (stating that "Son of Sam law is significantly overinclusive").

125 N.Y. EXEC. LAW § 632-a(10) (b) (McKinney 1982).

126 *Simon & Schuster*, 502 U.S at 121 (discussing well-known authors and their works that would have been subjected to New York statute).

127 Simon & Schuster v. New York Crime Victims Bd., 502 U.S. 105, 122 (1991).

In the aftermath of *Simon & Schuster*, New York amended the "Son of Sam" statute to comport with the strict standards enumerated by the Court.[128] By narrowly tailoring the content-based provision, New York has saved its statute from constitutional condemnation.[129]

Under the current New York law, a convict may publish without restriction, provided that the primary subject matter of the work is not the crime for which the author was convicted.[130] The statute, as revised, is an example of an allowable restriction on speech.[131] It is adequately tailored to meet the state interests without unduly restricting the First Amendment rights of a criminal.[132] If challenged, it appears that the statute will likely withstand a strict scrutiny analysis.

4. Can the California Statute Be Saved?

Although it may be argued that the successful reformation of the New York "Son of Sam" law indicates that the California statute could undergo a similar metamorphosis, there are fundamental differences that diminish the probability of such a result.[133] Concerns of unduly hampering the free speech rights of an individual, coupled with historical presumptions against prior restraints, create a seemingly insurmountable burden for the Cali-

[128] N.Y. EXEC. LAW § 632-a (McKinney 1995). The legislature no longer requires the monies to be placed in escrow, as the statute originally required, but calls for immediate notification of the victims that such profits have been realized. *Id.* § 632-a(2) (b). In addition, the amended statute applies only to the "convicted" not the "accused." *Id.* § 632-a(1) (b). Most importantly, the legislature re-tailored the definition of the term "profits from the crime" to include "any property" obtained through the commission of a crime as potential compensation for victims. *Id.* Previously, the statute required that the profits derived from the crime were limited to compensation from *expression* of the crime, like a movie or book deal. *Id.* § 632-a(1). *Id.*; *see* Franks, *supra* note 115, at 618. Although the statute is still content-based after the above-mentioned changes, as applied to expressions of the crime, it is less overinclusive. *Id.*

[129] *See* N.Y. EXEC. LAW § 632-a, 1(b) (McKinney 1995) (amending statute to be narrowly tailored). It is submitted that, in redrafting the statute, the legislature did little more than provide a codification of remedies already available under New York law.

[130] *See* Children of Bedford, Inc. v. Petromelis, 77 N.Y.2d 713, 726, 573 N.E.2d 541, 547-48, 570 N.Y.S.2d 453, 458-59 (1991) (discussing effect of "Son of Sam" law).

[131] *See* Jennifer L. Dauer, Comment, *Political Boycotts: Protected By the Political Action Exception to Antitrust Liability or Illegal Per Se?*, 28 U.C. DAVIS L. REV. 1273, 1289 (1995) (noting allowable restrictions on speech such as obscene, commercial, and expressive speech).

[132] California First Amendment Coalition v. Lungren, No. C 95-0440-FMS, 1995 WL 482066, at *9 (N.D. Cal. Aug. 10, 1995).

[133] *See* CAL. PENAL CODE § 132.5 (West Supp. 1995); N.Y. EXEC. LAW § 632-a (McKinney 1995).

fornia legislature.[134] Even if the statute is revised to be "narrowly tailored," it must be shown that the governmental interests are sufficiently compelling so as to outweigh the incidental impact on free speech.[135] According to *Lungren*, not only did the California statute place an undue financial burden on potential witnesses,[136] but the state interests served by the statute[137] were not compelling.[138] The *Lungren* court noted other methods to attain these goals, such as witness competency requirements[139] and the prospect of cross-examination.[140] These methods, however, only indirectly address the true concerns of the California legislature—preventing the unfair prejudice that stems from witnesses *selling* their stories to the media.[141]

As currently drafted, the statute is not narrowly tailored.[142] Furthermore, the legislation burdens speech relating to criminal proceedings that may never occur.[143] Even if the statute in *Lungren* was found to be content-neutral,[144] the availability of alternatives to satisfy the state's asserted interests would have invalidated the statute.[145] In particular, the provisions under California law addressing perjury would uphold the state's interests in promoting truth and justice in the courtroom.[146] The Court is likely to hesitate before allowing a restriction that may lead to a "slippery

134 *See* Near v. Minnesota, 283 U.S. 691, 713 (1931) (discussing presumptive unconstitutionality of prior restraints).

135 Simon & Schuster, Inc. v. New York Crime Victims' Bd., 502 U.S. 105, 118 (1991) (establishing that regulations must be narrowly tailored to serve compelling state interest); *see also* Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 591-92 (1983) (recognizing deficiency in Minnesota statute as not being narrowly tailored).

136 *Lungren*, No. C 95-0440-FMS, 1995 WL 482066, at *4 (1966).

137 California First Amendment Coalition v. Lungren, No. C 95-0440-FMS, 1995 WL 482026 (1991).

138 *Id.* at *6 (enumerating state's interests in enacting its checkbook journalism statute while deeming them insufficient).

139 CAL. PENAL CODE § 138 (West 1995).

140 CAL. EVID. CODE § 761 (West 1995).

141 *Lungren*, 1995 WL 482066, at *6. The court listed current provisions in California's law that serve similar state interests as alternatives to restricting speech. *Id.* Probative voir dire, closure proceedings, gag orders, change of venue, sequestration of the jury and specific jury instructions are viable alternatives to the abridgement of speech that the court recognized. *Id.*

142 California First Amendment Coalition v. Lungren, No. C 95-0440-FMS, 1995 WL 482026, at *9 (illustrating overly restrictive power of California statute).

143 CAL. PENAL CODE § 132.5 (West Supp. 1995).

144 *See* United States v. O'Brien, 391 U.S. 367, 377 (1968) (discussing Court made standard for scrutinizing content-neutral regulations).

145 See *Lungren*, 1995 WL 482066, at *6-7 (enumerating many viable alternatives to restricting speech).

146 *See* CAL. PENAL CODE §118 (West 1995) and CAL. PENAL CODE §127 (West 1995).

slope," restricting more and more speech, thus blurring an otherwise clear line of near absolute protection of speech under the First Amendment.[147] It is well-settled that the First Amendment prohibits the government from freely regulating speech because of its message, ideas, subject matter, or content and, therefore, the California statute cannot survive.

IV. VIABLE ALTERNATIVES

A. *Regulating Attorney Speech: Invoking Rules of Professional Conduct*

In an attempt to prevent extrajudicial statements that may prejudice a defendant's right to a fair trial, the American Bar Association has adopted regulations that restrict the right of attorneys to speak publicly about pending litigation.[148] ABA Model Rule 3.6 has been adopted in various forms by many states.[149]

[147] *See generally* Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 537-39 (describing free speech exceptions as "slide down the proverbial 'slippery slope'").

[148] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1994). Model Rule 3.6(a) states:

> A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a *substantial likelihood of materially prejudicing* an adjudicative proceeding in the matter.

Id. (emphasis added). Subsection (b) provides a number of different categories upon which an attorney may communicate about such as information in public record and general information about the claim, offense or defense involved. *Id.* In addition, a 1994 amendment to Model Rule 3.6 provides that an attorney may make an extrajudicial statement that is not otherwise allowed to rebut public statements that unduly prejudice her client. These rebuttals are limited to include only what is "necessary to mitigate the recent adverse publicity." *Id.* at (c); *see also* Robert E. Drechsel, *An Alternative View of Media-Judiciary Relations: What the Non-Legal Evidence Suggests about the Fair Trial—Free Press Issue*, 18 HOFSTRA L. REV. 1 (1989) (analyzing media-judiciary relations from social scientific perspective regarding fair trial-free press issues); Kelly A. Hardy, *Order in the Courtroom, Silence on the Courthouse Steps: Attorneys Muzzled by Ethical Disciplinary Rules*, 22 SETON HALL L. REV. 1401, 1402 (1992) (contrasting harmful impact of speech limitations with negligible evidence speech affects juries and proposing alternative methods of protecting fair trials without inhibiting expression); H. Morley Swingle, *Warning: Pretrial Publicity May Be Hazardous to Your Bar License*, 50 J. OF MO. B. 335, 335 (1994) (discussing Missouri's adoption of ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY regarding extrajudicial statements of attorneys). *See generally* SUSANNE ROSCHWALB & RICHARD A. STACK, LITIGATION PUBLIC RELATIONS: COURTING PUBLIC OPINION 40-41 (1995) (examining behind-the-scenes litigation public relations).

[149] *See, e.g.*, NEW YORK CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107 (substantially adopting ABA Model Rule 3.6); *see* Swingle, *supra* note 148, at 335 n.5 (stating that approximately 32 states have adopted ABA's MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6); *see also* Gentile v. State Bar, 501 U.S. 1030, 1068 n.1-3 (1991) (discussing states adoption of ABA Model Rules).

These restrictions, however, have raised questions concerning attorneys' First Amendment rights.[150]

The ABA proposed regulation of attorney speech has been criticized because restrictions on attorney comment are subject to a lesser standard of constitutional review than are restrictions on the speech of non-attorneys.[151] Furthermore, critics of the regulations argue that placing restrictions on attorney speech is unnecessary because there are reasonable alternatives to such restrictions.[152] Court split over whether to apply strict scrutiny or a lesser standard of review when analyzing the regulations.[153]

[150] *See In re* Sawyer, 360 U.S. 622, 631 (1959) (stating that attorney is free to criticize law); *see also Gentile*, 501 U.S. at 1031 (holding that "substantial likelihood of material prejudice" test satisfied First Amendment); Standing Comm. on Discipline v. Yagman, 55 F.3d 1430, 1430 (9th Cir. 1995) (applying "reasonable attorney" standard rather than subjective malice standard); Chicago Council of Law. v. Bauer, 522 F.2d 242, 249 (7th Cir. 1975) (finding "reasonable likelihood" test too broad to restrict First Amendment rights of attorney and positing that standard should be whether there is "serious and imminent threat "to administration of justice); *In re* Hinds, 449 A.2d 483, 494-95 (N.J. 1982) (adopting "reasonable likelihood" standard); Markfield v. Bar Ass'n, 49 A.D.2d 516, 517, 370 N.Y.S.2d 82, 85 (1st Dep't 1975) (holding that attorney speech may only be restricted if proven that extrajudicial statements present "clear and present danger" to administration of justice).

[151] *See Gentile*, 501 U.S. at 1069 (detailing petitioner-attorney's argument that First Amendment requires imposition of "clear and present danger" of "actual prejudice or imminent threat" standard when restricting attorney speech, not merely "substantial likelihood of materially prejudice" test); *see also* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 570 (1976) (asserting that restrictions on press' free expression must be subject to strict scrutiny); Pennekamp v. Florida, 328 U.S. 331, 335 (1946) (citing need to examine statements in issue and circumstances under which they were made to determine whether or not they represented threat of "clear and present danger"); Bridges v. California, 314 U.S. 252, 263 (1941) (stating for clear and present danger to be found, "substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished"); Schenck v. United States, 249 U.S. 47, 52 (1919) (establishing clear and present danger test). "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." *Id. See generally* Hardy, *supra* note 148, at 1440 (indicating trial participation does not render attorney's extrajudicial comments more censurable, but, in light of importance of governmental scrutiny, effective criticism of abuse must inform lay person as well as professional).

[152] *See* Press-Enterprises v. Superior Ct., 478 U.S. 1. 15 (1986) (using voir dire as tool to combat prejudicial trial publicity); Patton v. Yount, 467 U.S. 1025, 1032 (1984) (using delay of trial to lessen prejudicial effect of pre-trial publicity); Rideau v. Louisiana, 373 U.S. 723, 726 (1963) (granting change of venue in order to avoid prejudicial publicity); *see also* Hardy, *supra* note 148, at 1450-55 (arguing several alternatives combat pretrial publicity and preserve jury impartiality more effectively than disciplinary rules); Pugh, *supra* note 2, at n. 25 (describing change of venire as viable option in fight against prejudicial pre-trial activity).

[153] *Compare Chicago Council*, 522 F.2d at 248 (finding proper standard to be "serious and imminent threat of interference with fair administration of justice."), *and Markfield*, 370 N.Y.S.2d at 84-85 (restricting disciplinary rule to situations when extrajudicial statements presented clear and present danger to administration of justice), *with* Hirschkop v. Snead, 594 F.2d 356, 370 (4th Cir. 1979) (establishing "reasonable likelihood" of prejudice

In *Gentile v. State Bar*,[154] the Supreme Court reviewed the application of Nevada Supreme Court Rule 177 which, like ABA Model Rule 3.6, prohibited an attorney participating in an on-going litigation from making an out-of-court statement that would have a "substantial likelihood of materially prejudicing" the proceeding.[155] The Court held that the less-exacting standard of "substantial likelihood of material prejudice" is a constitutionally permissible level of review to apply to attorney comment.[156] This less-exacting standard represents the view that attorney speech may potentially seem more authoritative because of their special skills and increased access to privileged trial information as officers of the court.[157]

The *Gentile* Court further held that the Nevada rule was impermissibly vague.[158] In response to the Court's finding of vagueness, the ABA amended it's parallel rule, Model Rule 3.6, in 1994.[159] By setting forth certain statements on which an attorney may comment without violating her ethical responsibilities,[160] the ABA clarified the ethical duty of the attorney while maintaining the restrictions on extrajudicial statements of attorneys.[161] Although restricting attorney speech on pending litigation is, arguably, a con-

to fair administration of justice test), *and In re* Hinds, 449 A.2d at 494-95 (adopting reasonable likelihood standard).

154 501 U.S. 1030 (1991).

155 *See Gentile*, 501 U.S. at 1033.

156 *Id.* at 1075 (agreeing with majority of states that "substantial likelihood of material prejudice" standard constitutes constitutionally permissible balance between First Amendment rights of attorneys in pending cases and states' interest in fair trials).

157 *Id.* at 1074 (stating attorneys may be subjected to restrictions that ordinary citizens may not); *In re* Hinds, 449 A.2d 483, 483, 496 (N.J. 1982) (resulting from attorney's unique access to information, attorney statements "are likely to be considered knowledgeable, reliable and true").

158 *See Gentile*, 501 U.S. at 1051 (stating that Nevada Supreme Court Rule 177 was vague, creating "a trap for the wary as well as the unwary.").

159 *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1994).

160 *See* id. at (b).

161 *See id.* at cmt.5 (1994) (listing certain subjects likely to materially prejudice trial).

tent-based restriction,[162] it is allowable because it does not arbitrarily or entirely limit an attorney.[163]

Restricting the speech of attorneys privy to a criminal proceedings is one plausible way to promote a defendant's Sixth Amendment right to a fair trial.[164] Although, an attorney enjoys the same First Amendment freedom of speech as does a layperson, an attorney's speech may be restricted because she is held to a higher standard imposed by professional responsibility.[165] Further, it seems likely that restricting attorney speech will reduce prejudicial trial publicity, thereby reducing the likelihood that jurors will be tainted by out-of-court statements made by an attorney privy to the case.

B. Imposition of "Gag Orders"

In addition to regulating attorneys' comments, a trial judge may attempt to reduce prejudicial publicity by imposing a "gag order" on trial participants.[166] Essentially, in order to constitutional

[162] *See, e.g.*, City of Ladue v. Gilleo, 114 S. Ct. 2038, 2047 (1994) (O'Connor, J., concurring) ("With rare exceptions, content discrimination in regulations of the speech of private citizens on private property or in a traditional public forum is impermissible, and this presumption is a very strong one"); Widmar v. Vincent, 454 U.S. 263, 278 (1981) (prohibiting use of University's facilities by religious group held to be content-based discrimination and, therefore, unconstitutional); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 544 (1980) (declaring order prohibiting use of inserts in appellant's bills to customers to be unconstitutional because content-based).

[163] *See* Gentile v. State Bar, 501 U.S. 1030, 1073 (1991) (noting that restraint on attorney speech has narrow objectives because it only applies to those statements that will have substantial likelihood of materially prejudicing proceeding, it is neutral as to point of view and merely delays comment until after trial).

[164] *See Gentile*, 501 U.S. at 1074 (noting that attorney comment is likely to be perceived as more authoritative because of attorney access to information); Roscoe C. Howard, Jr., *The Media, Attorneys, And Fair Criminal Trials*, 4 KAN. J.L. & PUB. POL'Y 61, 70 (1995) (concluding that criminal attorneys should refrain from commenting to media during ongoing trial in order to deter prejudicial trial publicity); *see also* Philip Hager, *Crackdown on Commentary: Is the Solution to Out-of-Court Comment Worse than the Problem?*, 15 CAL. LAW. 35, 36-37 (1995) (quoting State Senator and attorney Quentin L. Kopp as saying that rule restricting attorney comment will inevitably prevent prejudicial comment by non-lawyers).

[165] *See Gentile*, 501 U.S. at 1071.

> Of course, a lawyer is a person and he too has a constitutional freedom of utterance and may exercise it to castigate courts and the administration of justice. But a lawyer actively participating in a trial, particularly an emotionally charged criminal prosecution, is not merely a person and not even merely a lawyer. . . . He is an intimate and trusted and essential part of the machinery of justice, an 'officer of the court' in the most compelling sense.

Id. (quoting *In re* Sawyer, 360 U.S. 622, 666, 668 (1959) (Frankfurter, J., dissenting)).

[166] *See* Sheryl A. Bjork, *Indirect Gag Orders and the Doctrine of Prior Restraint*, 44 U. MIAMI L. REV. 165, 167 (1989) (noting primary purpose of gag order is to guarantee integrity of jury system). *See generally* BLACK'S LAW DICTIONARY 678 (6th ed. 1990) (defining "gag order" as "an order by the court, in a trial with a great deal of notoriety, directed to

challenge, a gag order must meet the standard set forth by the Supreme Court in *Nebraska Press Association v. Stuart*.[167] *Nebraska Press* established that a trial judge must examine the extent of possible prejudicial publicity,[168] explore reasonable alternatives to the restriction of speech,[169] and determine the potential effectiveness of a restraining order in the context of the particular case.[170] An order prohibiting trial participants from commenting on pending litigation does not violate freedom of the press,[171] as long as the order is not aimed directly at the press[172] and there is a "clear and present danger" to the fair administration of justice.[173] Therefore, a properly applied gag order can effectively limit the speech of trial participants and, perhaps, increase a de-

attorneys and witnesses, to not discuss the case with reporters — such order being felt necessary to assure the defendant of a fair trial."); 75 AM. JUR. 2D *Trial* § 203 (1991) (noting that trial judge may proscribe out-of-court statements of lawyers, parties to proceeding, witnesses or court officials [herein "trial participants"]).

167 427 U.S. 539, 562 (1976). The Court applied a "tripartite" test "to determine whether, as Learned Hand put it, 'the gravity of the 'evil', discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." *Id.* (quoting United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950). *See generally* Bjork, *supra* note 166, at 172-73. The *Nebraska Press* Court's "tripartite" test consisted of the following factors: (1) "The nature and extent of pre-trial news coverage"; (2) The availability of less restrictive alternatives; and (3) The effectiveness of the disputed restraining order. *Id.* at 173.

168 *Nebraska Press*, 427 U.S. at 562 (establishing need for judge to determine nature and extent of trial publicity).

169 *Id.* at 563-65 (finding no evidence in record to indicate alternatives to gag order would fail to protect right to fair trial).

170 *Id.* at 565-67 (examining likelihood of effective restraint).

171 *See* Sigma Delta Chi v. Martin, 431 F. Supp. 1182, 1182 (D.S.C. 1977) (stating journalists' First Amendment rights are not directly violated); *see also In re* Dow Jones & Co., 842 F.2d 603, 608-09 (2d Cir. 1988) (indirect gag order not prior restraint of media's First Amendment liberties); Radio & Television News Ass'n v. United States Dist. Ct., 781 F.2d 1443, 1445 (9th Cir. 1986) (finding media's right to interview trial participants outside scope of First Amendment); Florida Freedom Newspapers, Inc. v. McCrary, 520 So. 2d 32, 35-36 (Fla. 1988) (holding that prohibition on comment of state attorney's office and sheriff's department not prior restraint on publication or broadcast).

172 *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 568-69 (1976) (holding gag order aimed at press to be unconstitutional prior restraint). *See generally* Bjork, *supra* note 166, at 171-72 (discussing demise of direct gag orders against press).

173 *In re* New York Times Co. v. Regan, 878 F.2d 67, 68 (2d Cir. 1989) (holding absent finding prejudice would result from statements made to press by counsel, gag order could not stand); Journal Publishing Co. v. Mechem, 801 F.2d 1233 (10th Cir. 1986) (stating court could not issue sweeping restraint forbidding all contact between press and former jurors without compelling reason); CBS v. Young, 522 F.2d 234, 239 (6th Cir. 1975) (holding that when "significant and meaningful sources of information concerning the case" are removed from press, their First Amendment right to obtain information is impaired); Connecticut Mag. v. Moraghan, 676 F. Supp. 38, 42-43 (D. Conn. 1987) (noting order prohibiting extrajudicial comments by counsel constitutes unconstitutional prior restraint on right to gather news and, derivatively, on publication); Breiner v. Takao, 835 P.2d 637, 642-43 (Haw. 1992) (holding gag order constitutionally impermissible because trial judge failed to find serious threat to defendant's right to fair trial and failed to consider reasonable alternatives).

fendant's right to fair trial by preventing potentially prejudicial trial publicity.

CONCLUSION

The sometimes conflicting guarantees of the First and the Sixth Amendment to the United States Constitution safeguard the individual's right to free speech, the right of the press to publish without prior restraint and the right of the accused to a public and fair trial. These fundamental freedoms limit the ability of the government to censor the dissemination of ideas into the "marketplace." As evidenced by the *Lungren* decision, it is constitutionally impermissible to restrict the speech of potential witnesses in a criminal prosecution absent a statute which is narrowly tailored to meet a compelling governmental interest. Potential witnesses are not convicts. They have not forfeited any of their constitutional rights through the commission of illegal acts. Further, most witnesses are not officers of the court who have a professional responsibility to remain silent in order to protect an accused's Sixth Amendment rights. Although California's most recent attempt to foster a defendant's ability to receive a fair trial does not pass constitutional muster, it is plausible, and perhaps necessary, to place restrictions on the First Amendment freedoms of some in order to protect the Sixth Amendment right of the accused. Specifically, restrictions on the speech of attorneys involved in criminal proceedings are constitutionally desirable limits on the amount of prejudicial publicity surrounding trials. In addition, courts should employ the "strong measures" available to them, such as the closure of proceedings to the public, the contempt power of a trial judge, and the use of gag orders, in an concentrated effort to guarantee a fair trial. Although restrictions on witness speech may improve a criminal defendant's opportunity to receive a fair trial, it is constitutionally impermissible to restrict the right of witnesses in criminal prosecutions to sell their stories to the media. In the end, perhaps the *Lungren* decision should not be viewed as a failure, but rather as a reaffirmance of the critical importance of the rights guaranteed by both the First and Sixth Amendments.

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