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Freeing the Prop 8 Tape: Perry v. Brown, The Presumption of Access to Civil Proceedings, and the Preservation of Judicial Integrity

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NOTE

FREEING THE PROP 8 TAPE: *PERRY V. BROWN*, THE PRESUMPTION OF ACCESS TO CIVIL PROCEEDINGS, AND THE PRESERVATION OF JUDICIAL INTEGRITY

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INTRODUCTION

"People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."[1]

The California ballot initiative known as "Proposition 8" was placed on the state's ballot in 2008. Its intention was to amend California's Constitution so as to legally recognize only heterosexual marriages.[2] The controversy and debate surrounding Proposition 8, which began well before the election, continued after the Proposition was approved by California voters on November 4, 2008.[3] The national attention the ballot initiative received was only exacerbated on August 4, 2010, when former Chief Judge Vaughn Walker of the Northern District Court of California overturned Proposition 8 as a violation of the U.S.

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1. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 572 (1980). This quote was also referenced by Former Chief Judge Vaughn Walker in response to a motion by Proposition 8 proponents compelling Judge Walker to return a recording of the Proposition 8 trial in his possession. *See* Letter from Vaughn Walker, Former Chief Judge, Northern District of California, to Molly Dwyer, Clerk, U.S. Ninth Circuit Court of Appeal (Apr. 14, 2011) [hereinafter Letter from Chief Judge Vaughn Walker], *available at* http://www.ca9.uscourts.gov/datastore/general/2011/04/14/10-16696_vaughn_walker_resp_motion.pdf

2. *See* Strauss v. Horton, 46 Cal. 4th 364, 385 (Cal. 2009) ("Proposition 8, an initiative measure approved by a majority of voters at the November 4, 2008 election, added a new section—section 7.5—to article I of the California Constitution, providing: 'Only marriage between a man and a woman is valid or recognized in California.'").

3. *See In California, Protests Over Gay Marriage Vote*, N.Y. TIMES, Nov. 10, 2008, at A18, *available at* http://www.nytimes.com/2008/11/10/us/10protest.html?ref=californiaspropo sition8samesexmarriage (finding that "[r]eaction[s] to the passage of a measure banning same-sex marriage" were mixed across California); *see also* Mike Wakefield, Note, *Compelled Disclosure in the Wake of California's Proposition 8: Exploring the Applicability of Buckley's Minor Party Exemption to the Majority*, 25 J.L. & POL. 375, 375 (2009) ("[No other] proposed constitutional amendments attracted national media attention like the campaign surrounding California's Proposition 8 . . . ."); Jesse McKinley, *Across U.S., Big Rallies for Same-Sex Marriage*, N.Y. TIMES, Nov. 16, 2008, at A25, *available at* http://www.nytimes.com/2008/11/16/us/16protest.html?pagewanted=all (reporting that just weeks after the 2008 approval of Proposition 8, "one of the nation's largest displays of support for gay rights" had "tens of thousands of people in cities across the country turn[ing] out in support of same-sex marriage").

Constitution's Due Process and Equal Protection Clauses.[4] Since then, much legal ink has been spilled regarding the numerous legal and societal issues raised by the Proposition 8 initiative. These topics include issues of federalism,[5] judicial recusal conflicts,[6] and of course, the substantive constitutional rights afforded to homosexual couples.[7] One issue in particular that had the potential to be just as significant and influential went relatively unnoticed compared to the others at stake. Many First Amendment scholars and media entities paid close attention to how the Proposition 8 controversy would unfold, especially as to whether the public would ever be able to get a glimpse of the now infamous Proposition 8 trial recording. The Ninth Circuit answered that question with a resounding "no"—or at least a "not yet." A closer look, however, as to why the trial recording is still not public has raised some valid concerns.

As this Note demonstrates, the Proposition 8 trial recording controversy has forged a complex judicial path. The campaign to constitutionally invalidate gay marriage in California had gained national attention before and after the 2008 election, so it was no surprise that many media outlets were interested in having the Proposition 8 trial broadcasted live.[8] After the District Court of Northern California quickly amended its local rules to allow for the broadcast,[9] the Supreme Court of the United States stepped in and issued a permanent stay because of the lower court's failure to

4. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 992–1003 (N.D. Cal. 2010) ("Plaintiffs have demonstrated by overwhelming evidence that Proposition 8 violates their due process and equal protection rights and that they will continue to suffer these constitutional violations until state officials cease enforcement of Proposition 8."). While this decision would later be appealed by Proposition 8 proponents to the Ninth Circuit Court of Appeals, *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), the Supreme Court would hold that the proponents did not have proper standing. Hollingsworth v. Perry, 133 S. Ct. 2652, 2659 (2013).

5. *See, e.g.*, Charles M Cannizzaro, Comment, *Marriage in California: Is the Federal Lawsuit Against Proposition 8 About Applying the Fourteenth Amendment or Preserving Federalism?*, 38 PEPP. L. REV. 161, 205–09 (2010) (arguing that federal courts redefining marriage "would be interfering with the established principle that domestic relations, as an area of traditional state concern, should be regulated on a local level so long as that regulation does not violate a constitutional right").

6. *See, e.g.*, Donald R. Lundberg, *The Zone of Personal Privacy for Judges and Lawyers*, RES GESTAE, May 2011, at 27–29 (reviewing the arguments made by Proposition 8 Proponent's to vacate the district court's decision because of Judge Walker's failure to disclose his homosexual relationship).

7. *See, e.g.*, Clifford J. Rosky, Perry v. Schwarzenegger *and the Future of Same-Sex Marriage Law*, 53 ARIZ. L. REV. 913 (2011) (arguing that the *Perry* decision could have a significant impact on the future constitutional challenges concerning gay rights in areas such as discrimination and child rearing).

8. *See* Hollingsworth v. Perry, 558 U.S. 183, 186 (2010) (per curiam) (stating that Judge Walker's eagerness to broadcast the trial was in part due to the "prominence" of the case).

9. *Id.* at 188.

adequately amend its local rules in accordance with statutory requirements.[10] The story did not end there, however, as the district judge ordered that the trial would be recorded for "use only in chambers" and would also be added into the judicial record under seal.[11] Two years later, a request by news affiliates to release the Proposition 8 trial recording to the general public was granted.[12] The Ninth Circuit, falling back to the earlier promises made by the district court, reversed the decision.[13] In its rationale, the Ninth Circuit concluded "there [was] a compelling reason in this case for overriding the common law right [of access to court records.]"[14] Citing to the district court's earlier promises, the Ninth Circuit held it was reasonable for the Proposition 8 proponents to believe the district court as stating "there was no possibility that the recording would be broadcast to the public in the future."[15] While the Ninth Circuit had made clear its denial on releasing the trial recording was "narrow" and based on the "unique circumstances" of the case,[16] the court determined that the "grave threat to the integrity of the system" was a compelling enough reason to overcome the common law right of public access.[17]

This decision, however, is a curious one. Open access to judicial proceedings has been an extensive part of this country's history.[18] The idea of a constitutional right of access to criminal trials, for instance, has derived from the First Amendment's inherent constitutional rights.[19] Lower courts have extended this First Amendment right to civil judicial records,[20] and many others have relied on the common law presumption of access to the judiciary.[21] The courts are unique because they are one

10. *Id.* at 197–99.

11. Perry v. Brown, 667 F.3d 1078, 1081–84 (9th Cir. 2012).

12. Perry v. Schwarzenegger, No. C 09-02292JW, 2011 WL 4527349, at *6 (N.D. Cal. Sept. 19, 2011), *rev'd, Perry*, 667 F.3d at 1078.

13. *Perry*, 667 F.3d at 1088–89.

14. *Id.* at 1084.

15. *Id.* at 1081.

16. *Id.*

17. *Id.* at 1087–89.

18. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 565–69 (1980) (describing the history and tradition of criminal proceedings and finding "[i]n some instances, the openness of trials was explicitly recognized as part of the fundamental law of the Colon[ies]").

19. *Id.*; *see also* Globe Newspaper Co. v. Super. Ct., 457 U.S. 596, 603–04 (1982).

20. *See, e.g.*, Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1070 (3d Cir. 1984) (holding that the First Amendment embraces a right of access to civil trials); Rushford v. N.Y. Magazine, 846 F.2d 249, 253 (4th Cir. 1988) ("We believe that the more rigorous First Amendment standard should also apply to documents filed in connection with a summary judgment motion in a civil case.").

21. *E.g.*, Wilson v. Am. Motors Corp., 759 F.2d 1568, 1570 (11th Cir. 1985) (stating that "absent some exceptional circumstances, trials are public proceedings"); *see also* Zenith Radio

of the few locations in which citizens hold a constitutional right of access to many of its forums and records.[22] This right deserves a court's fullest attention and consideration, especially when involving cases of national importance such as the Proposition 8 trials. While "the integrity of the judicial process," as the Ninth Circuit proclaimed, may be a value that deserves attention when faced with the issue of releasing court records, what is of equal, if not greater importance is the execution of judicial policies and procedures that "permit[] the public to participate in and serve as a check upon the judicial process."[23] This poses the question: Should the promises of a trial judge concerning the disclosure of a nationally influential, nonjury civil trial video recording be enough to overcome the presumptive openness of the judiciary? If so, what response, if any, should be made in order to balance our societal need of information with the possible damage that might come from an overpromising judiciary?

This Note argues that the common law presumed right of access, in conjunction with First Amendment values, should have tipped the scales to compel the release of the Proposition 8 trial recordings. This presumed right, equally weighed against the narrow circumstances of Judge Walker's remarks and an overall concern for "judicial integrity" should have outweighed any minimal consequences that might have occurred upon the Proposition 8 trial recording's release.

Part I delves deeper into the facts and circumstances surrounding the Proposition 8 trial recording controversy, from the actual recording of the Proposition 8 trial in 2010 to the Ninth Circuit's decision to prevent the public release of the recording in 2012. Part II examines the competing values at issue in the Ninth Circuit's decision to deny the release of the Proposition 8 trial recording: the right of access to judicial records and the integrity of the judiciary. It looks at the common law and First Amendment influence of the ever-expanding approach to constitutional disclosure of judicial proceedings, followed by an examination of how courts have analyzed the importance of judicial integrity in other judicial contexts. Part III argues that, based upon the statements made by Judge Walker, the Ninth Circuit mischaracterized the promises made to the parties after the Supreme Court stayed the live broadcasting of the Proposition 8 federal district trial. The Part will also analyze the broad competing values of judicial integrity and the

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Corp. v. Matsushita Electric Indus. Co., 529 F. Supp. 866, 895–96 (E.D. Pa. 1981) ("It is beyond dispute that in this country judicial proceedings and records are presumptively open to the public.").

22. *Cf.* Houchins v. KQED, Inc., 438 U.S. 1, 9 (1978) (finding no constitutional right of access to government-run prison facilities).

23. *Globe Newspaper*, 457 U.S. at 606 (explaining the particular features that serve to justify a First Amendment right of access to criminal trials).

presumption of access to judicial proceedings, arguing that the presumption of access should prevail. Finally, this Part discusses the impact that the Ninth Circuit's decision may have on the right of access to judicial proceedings.

I. *HOLLINGSWORTH V. PERRY*, *PERRY V. SCHWARZENEGGER*, AND *PERRY V. BROWN*: THE PROPOSITION 8 TRIAL RECORDING'S WINDING ROAD

The resolution by the Ninth Circuit to deny public disclosure of the Proposition 8 trial recording is only one segment of these somewhat complex proceedings. As this Note demonstrates, the courts' struggle with whether to allow the broadcast of the Proposition 8 trial and the compromises that would follow are what ultimately shaped the definitive decision to deny public release of the recording in *Perry v. Brown*. To place the Ninth Circuit's decision in context, it is best to understand some of the background concerning the Proposition 8 trials.

A. Hollingsworth v. Perry*: The Issue of Broadcasting the Trial*

The plaintiffs, Kristin Perry and Sandra Stier, had applied for a marriage license at the Alameda County Clerk's office in Oakland, California, but were denied their license because of Proposition 8's constitutional amendment.[24] Shortly thereafter, Perry and Stier filed suit against the State of California for infringing on their constitutional rights to due process and equal protection.[25] After the suit was filed, multiple organizations, entities, and individuals that rallied support to place Proposition 8 on the ballot (the "proponents") intervened as the "official proponents" of the ballot initiative.[26]

Before the Proposition 8 federal trial,[27] the Ninth Circuit was contemplating a rule that would allow district court judges the discretion, under limited circumstances, to broadcast civil trials to the public.[28] At the time, and still to this day, it is generally federal district

24. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 953 (N.D. Cal. 2010). Paul Katami and Jeffrey Zarrillo were also named plaintiff's and were denied a marriage license in Los Angeles due to the Proposition 8 amendment. *Id.*

25. *Id.* at 927.

26. *Id.* at 954. Specifically, the named official proponents were Dennis Hollingsworth, Gail Knight, Martin Gutierrez, Hak-Shing William Tam, and Mark Jansson. *Id.*

27. There was a state case concerning the constitutionality of Proposition 8; however, this case is not the focus of this Note. *See generally* Strauss v. Horton, 207 P.3d 48 (Cal. 2009) (affirming Proposition 8 under state constitutional grounds).

28. Hollingsworth v. Perry, 558 U.S. 183, 186–88 (2010) (per curiam).

court practice to deny the recording and broadcasting of civil trials.[29] The Judicial Conference of the United States, the principal policymaking body of U.S. courts,[30] had generally disapproved any recommendations to alter its policy prohibiting the broadcasting or recording of civil proceedings.[31] At its September 2010 conference, however, the Judicial Conference approved a limited pilot program that would grant courts the discretion to record proceedings in order to "evaluate the effect[s] of cameras in federal district courtrooms and the public release of digital video recordings of some civil proceedings."[32] The Ninth Circuit, following suit, "appointed a three-judge committee to evaluate the possibility of adopting a Ninth Circuit Rule regarding the recording and transmission of district court proceedings."[33] After the committee's recommendation, the Ninth Circuit Judicial Council "voted unanimously to allow the 15 district courts within the Ninth Circuit to experiment with the dissemination of video recordings in civil non-jury matters."[34] The program approved by the Ninth Circuit would give the discretion to the chief judge in each district court to determine which cases would be considered for the program.[35]

It was only a few days after the blessing by the Ninth Circuit that a media coalition contacted Chief District Judge Vaughn Walker, who was also assigned the Proposition 8 trial, to request that the trial be available for live broadcast.[36] Media powerhouses ABC, CNN, and Fox

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29. *See History of Cameras in the Federal Courts*, U.S. COURTS, http://www.uscourts.gov/Multimedia/Cameras/history.aspx (last visited Apr. 30, 2013) (explaining that, while fourteen courts are currently participating in a pilot program to evaluate the effects of cameras during trial, the majority of courts still prohibit the use of cameras at civil trials).

30. *Judicial Conference of the United States*, U.S. COURTS, http://www.uscourts.gov/FederalCourts/JudicialConference.aspx (last visited Apr. 30, 2013).

31. *See* JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 35, 47 (denying a policy recommendation by the Court Administration and Case Management Committee to expand the authorization of broadcasting and recording civil proceedings, stating that "the intimidating effect of cameras on some witnesses and jurors was cause for concern").

32. David Sellers, *Judiciary Approves Pilot Project for Cameras in District Courts*, U.S. Courts, Sept. 14, 2010, *available at* http://www.uscourts.gov/News/NewsView/10-09-14/Judiciary_Approves_Pilot_Project_for_Cameras_in_District_Courts.aspx; *see also History of Cameras in the Federal Courts*, *supra* note 29.

33. *Hollingsworth*, 558 U.S. at 186.

34. Press Release, Pub. Info. Office of the U.S. Courts for the Ninth Cir., *Ninth Circuit Approves Experimental Use of Cameras in District Courts* (Dec. 21, 2009), *available at* http://www.scotusblog.com/wp-content/uploads/2009/12/137-Dec17_Cameras_Press-Release.pdf.

35. *Id.*

36. *See* Letter from Thomas R. Burke, Attorney for the Media Coal., to C.J. Vaughn Walker, N.D. Cal. (Dec. 21, 2009). The Media Coalition also filed a formal memorandum to the Court in support of the broadcast. *See* Non-Party Media Coalition's Memorandum of Points and Authorities in Support of Request for Order Permitting Televised Coverage of the Trial, Perry v. Schwarzenegger, 704 F. Supp. 2d 921, Case No. 09-2292, at *2 (Dec. 31, 2009).

News, among others, expressed their willingness "to provide gavel to gavel 'pooled' coverage" of the proceedings.[37] In order to accommodate a trial broadcast, Judge Walker announced his intentions to amend the district's local rules, and five days later, amended Civil Local Rule 77-3 to allow the recording and broadcasting of civil trials in the Northern District "for participation in a pilot or other project authorized by the Judicial Council of the Ninth Circuit."[38] Judge Walker announced that the sudden amendment to the Local Rule was authorized under the "immediate need" exception to the district court's rulemaking power.[39] Absent the exception, the statute requires a district court to conduct public notice and comment before amending its local rules.[40]

The proponents of Proposition 8 were understandably opposed to any open broadcasting of the trial.[41] Countless stories of harassment to supporters of Proposition 8 had been reported,[42] and many expert witnesses had made it clear that "they [would] not testify if the trial [was] broadcast[ed]."[43] The proponents issued formal letters through their lead counsel, Charles Cooper, arguing that the amendment to the Civil Local Rules violated the proponents' due process rights for failing to adhere to the notice and comment requirements.[44] Additionally, the proponents argued that given the immense national attention of the case, any live broadcast or recording could chill the willingness of expert witnesses to participate and could potentially place the proponents in a negative light.[45]

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37. *See* Letter from Thomas R. Burke, *supra* note 36.

38. *Hollingsworth*, 558 U.S. at 187 (quoting CIV. C.R. 77-3 (amended in 2011)). Originally, Civil Local Rule 77-3 had "banned the recording or broadcast of court proceedings." *Id.*

39. *Id.*

40. *See* 28 U.S.C. § 2071 (2012) ("If the prescribing court determines that there is an immediate need for a rule, such court may proceed [in proscribing its rules] without public notice and opportunity for comment, but such court shall promptly thereafter afford such notice and opportunity for comment.").

41. *See Hollingsworth*, 558 U.S. at 186; *see also* Letter from Charles J. Cooper, Attorney for Proponents, to C.J. Vaughn Walker, N.D. Cal. (Dec. 28, 2009) [hereinafter Letter from Charles J. Cooper], *available at* http://docs.justia.com/cases/federal/district-courts/california/candce/3:2009cv02292/215270/324/.

42. *See Hollingsworth*, 558 U.S. at 195 (citing to proponents submission of "71 news articles detailing incidents of harassment related to people who supported Proposition 8").

43. *Id.*

44. Letter from Charles J. Cooper, *supra* note 41, at 2–6.

45. *Id.* at 7 ("[P]otential witnesses have already expressed to [p]roponents' counsel their great distress at the prospect of having their testimony televised. Indeed, some potential witnesses have indicated that they will not be willing to testify at all if the trial is broadcast or webcast.").

The district court ordered the broadcasting, despite the proponent's objection.[46] Once their formal requests were denied, the proponents attempted to prevent the broadcast "by requesting a stay from the District Court for the Northern District of California and a writ of mandamus from the Court of Appeals for the Ninth Circuit."[47] Finally, the Supreme Court of the United States agreed to hear the proponents' petition, and the Court ultimately agreed that the broadcast should be stayed because of the district court's failure to adhere to its rulemaking policies.[48] The Supreme Court was clear that its review would be "confined to a narrow legal issue: whether the District Court's amendment of its local rules to broadcast [the] trial complied with federal law."[49] The Court granted the stay, however, stating that "[t]here is substantial merit to the argument that [five days] was not 'appropriate' notice and an opportunity for comment."[50]

B. Perry v. Schwarzenegger: *The Recording of the Trial and the Release of the Recording Two Years Later*

With the Supreme Court's decision in place, Judge Walker was prohibited from broadcasting the Proposition 8 trial.[51] By this point, the Proposition 8 trial was under way and the first few days had already been recorded pending the Supreme Court's decision.[52] Despite the ruling, Judge Walker informed the parties the "digital recording" of the trial would continue for "use in chambers."[53] The recording in its entirety was entered into the judicial record on August 4, 2010, and was used by the parties and Judge Walker "in preparing the findings of fact and conclusions of law."[54] The proponents would eventually yield to Judge Walker's decision to record the trial only after the judge assured the parties that the recording would only be used in chambers and would not, under the order of the Supreme Court, be used for

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46. *Hollingsworth*, 558 U.S. at 188.

47. On Application for Immediate Stay of the Dist. Court's Order Permitting Pub. Broad. of Trial Proceedings, at *Hollingsworth*, 558 U.S. 183 (No. 09-A648), 2010 WL 181579, at *1.

48. *See Hollingsworth*, 558 U.S. at 198–99.

49. *Id.* at 189.

50. *Id.* at 192.

51. *Id.* at 199.

52. Perry v. Brown, 667 F.3d 1078, 1082 (9th Cir. 2012). The trial began on January 11, 2010, with the first two days recorded "on the basis that the Supreme Court might decide to lift the temporary stay." *Id.* The Supreme Court, however, would grant the stay on January 13, 2010. *Hollingsworth*, 558 U.S. at 183.

53. Perry v. Schwarzenegger, No. C 09-02292JW, 2011 WL 4527349, at *2 (N.D. Cal. Sept. 19, 2011).

54. *See* Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 929 (N.D. Cal. 2010).

broadcasting or televising.[55] In addition to adding the recording to the record, Judge Walker entered his final order of the Proposition 8 trial in favor of Perry and Stier.[56] Judge Walker also retained a copy of the recordings for himself as part of his judicial papers upon retirement,[57] and had used portions of the recording in his endeavors as a professor and public speaker.[58]

One year after the final ruling on the Proposition 8 case, and two years after the stay of the live broadcast, the Proposition 8 case had made its way to the Ninth Circuit for appeal.[59] Meanwhile, the proponents became aware of (now former) Judge Walker's public use of the recording and petitioned the district court's new Chief Judge, Judge James Ware, to "order . . . [J]udge Vaughn Walker cease further disclosures of the video recordings . . . and that all copies of the trial recordings in the possession, custody, or control of any party to this case . . . be returned."[60] Perry, along with a non-party coalition of media companies, not only objected to the proponents' request, but also moved to completely unseal the Proposition 8 trial recording.[61] The new media coalition, consisting of some of the entities who had initially requested the broadcasting of the trial, along with some prominent print media organizations,[62] argued the First Amendment and the common law presumption of access should allow for the recording to be unsealed and available to the public.[63]

On September 19, 2011, the district court lifted the protective order, entered the trial recording into the public record and ordered Judge Walker was entitled to maintain his copy of the trial recording.[64] Judge Ware first recognized the common law presumption of access applied to the trial recording.[65] The court determined "transparency 'is pivotal to

55. *Perry*, 667 F.3d at 1082.

56. *Schwarzenegger*, 704 F. Supp. 2d at 1003–04.

57. *Schwarzenegger*, 2011 WL 4527349, at *2.

58. *See* John Schwartz, *Proposition 8 Hearing Video Is Ordered Released by Judge*, N.Y. TIMES, Sept. 20, 2011, at A20, http://www.nytimes.com/2011/09/20/us/judge-orders-release-of-video-of-proposition-8-hearing.html.

59. *See* Perry v. Brown, 671 F.3d 1052 (9th Circ. 2012), *rev'd*, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

60. Appellants' Motion for Order Compelling Return of Trial Recording, Perry v. Brown, 667 F.3d 1078, No. 09-CV-2292JW, at *1 (Apr. 13, 2011).

61. *Schwarzenegger*, 2011 WL 4527349, at *2.

62. The Coalition consisted of the *L.A. Times*, *CNN*, the *New York Times*, *FOX News*, *NBC News*, and the *Associated Press*, among others. *See* Schwarzenegger, 2011 WL 4527349, at *2 n.7.

63. Plaintiff-Appellees' Opposition to Appellants' Motion Regarding Trial Recordings and Plaintiff-Appellees' Motion to Unseal, Perry v. Brown, 667 F.3d 1078, No. CV-09-02292JW, at *1–3 (Apr. 15, 2011).

64. *Schwarzenegger*, 2011 WL 4527349, at *6.

65. *Id.* at *3 (quoting United States v. Aref, 533 F.3d 72, 82 (2d Cir. 2008)).

public perception of the judiciary's legitimacy and independence,'"[66] and found courts should only prevent such transparency when "the damage that would be caused by making public certain aspects of judicial proceedings is so significant that it must override the public's interest in being able to freely scrutinize those proceedings."[67] The court recognized two principle arguments presented by the proponents that failed to overcome the presumption of access: first, the conditions under which the digital recording was created; and second, the chilling effect on expert witnesses and other public policy considerations.[68]

The proponents' primary argument was that the recording should not be made public "because it was originally created on condition that it not be publicly disseminated outside the courthouse."[69] The court found, first, the order by Judge Walker did not confine the records to the court only.[70] The court reasoned because both parties had obtained copies of the recording during the course of the trial, and because segments of the recording were used during closing arguments, any argument that the recording was limited to the court was not a compelling reason to overcome the recording's release.[71] Additionally, the court stated that "no authority" was offered "in support of the proposition that the conditions under which one judge places a document under seal are binding on a different judge."[72]

Finally, the court found the "chilling effect" that might occur because of the "detrimental consequences" that broadcasting federal proceedings might have could not overcome the particular recording of the Proposition 8 trial.[73] Finding the proponents' argument as "mere 'unsupported hypothesis or conjecture,'" the court found the strong presumption in favor of access outweighed the proponents' fear that public dissemination of the recording could have a chilling effect on expert witness' willingness to cooperate in future proceedings.[74] The

66. *Id.*

67. *Id.*

68. *Id.* at *4. The Court also addressed two other issues presented by the proponents: (1) the injunction issued by the U.S. Supreme Court, and (2) the effect of Civil Local Rule 77-3. *Id.* The court did not find the Supreme Court's stay as a compelling argument, as the Court's decision to stay the broadcast was confined to "whether the District Court's amendment of its local rules to broadcast the trial complied with federal law." *Id.* (quoting Hollingsworth v. Perry, 558 U.S. 183, 189 (2010)). As to the Civil Local Rule, the court found that Rule 77-3 only effected the "creation" of digital records, and "at the time the digital recording at issue was made, there was no objection that Local Rule 77-3 prohibited its creation." *Id.* at *5.

69. *Id.* at *4 (internal quotations omitted).

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at *5–6.

74. *Id.* at *5.

district court ordered the recording be unsealed.[75]

C. Perry v. Brown: *Integrity of the Judicial Process as a Compelling Reason to Deny Access*

Following the district court's order to unseal the record, the proponents appealed to the Ninth Circuit.[76] In *Perry v. Brown*, the court was faced with "whether there [was] a sufficiently compelling reason to override [the presumption of public access]."[77] The court determined the district court had abused its discretion by releasing the recording, finding that the "[p]roponents reasonably relied on Chief Judge Walker's specific assurances . . . that the recording would not be broadcast to the public."[78] According to the Ninth Circuit, Judge Ware had "contravene[d] the very notion of judicial integrity" by holding that "no . . . assurances had been given" that the recording would remain sealed.[79]

The Ninth Circuit first found that there were "unequivocal assurances that the video recording at issue would not be accessible to the public."[80] The court pointed to two statements made by Judge Walker after the Supreme Court's permanent stay to make such a conclusion.[81] First, Judge Walker stated he was "going to continue 'taking the recording for purposes of use in chambers,' but that the recording was 'not going to be for purposes of public broadcasting or televising.'"[82] The court stated it would be "unreasonable" after hearing Judge Walker's comments and reading the Supreme Court decision "to foresee that a recording made for such limited purposes might nonetheless be released for viewing by the public, either during or after the trial."[83] Second, Judge Walker stated, as a criticism of the proponents' reluctance to provide more witnesses during trial, that "the potential for public broadcast . . . had been eliminated."[84] Again, the court pointed to these comments as "unequivocal statement[s]" that "the recording would not be made available for public viewing."[85] The Ninth

75. *Id.* at *6.

76. *See* Perry v. Brown, 667 F.3d 1078 (9th Cir. 2012).

77. *Id.* at 1084. The court assumed "for purposes of this case only," that the common law presumption of public access did apply to the Proposition 8 trial recording. *Id.*

78. *Id.* at 1084.

79. *Id.* at 1084–85.

80. *Id.* at 1085.

81. *See id.* (finding that, "[i]nterpreted in their full context, at least two of Chief Judge Walker's statements" assured that there would be no public release of the recording).

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

Circuit concluded the "record clearly show[ed] that Chief Judge Walker did make a commitment not to permit the public broadcast of the recording."[86]

At the heart of the Ninth Circuit's reasoning was the district court's failure "to appreciate the importance of preserving the integrity of the judicial system."[87] To revoke Judge Walker's promises, the Ninth Circuit reasoned, "would cause serious damage to the integrity of the judicial process—damage that under any plausible, logical application of the 'compelling reason' standard would have caused [the district court] to keep the recording sealed."[88] The court emphasized the importance of judicial integrity by stating, "[l]itigants and the public must be able to trust the word of a judge if our justice system is to function properly."[89]

The court also assumed that a First Amendment right to judicial records in civil proceedings existed.[90] For the sake of argument, the court proffered that even if the First Amendment applied, "the integrity of the judicial process is a compelling interest that in these circumstances would be harmed by the nullification of the trial judge's express assurances, and that there are no alternatives to maintaining the recording under seal that would protect the compelling interest at issue."[91] Under the common law presumption, and an assumed First Amendment right, the Ninth Circuit reasoned that the integrity of the judicial system was enough to prevent the disclosure of the Proposition 8 trial recording.[92]

II. FREEDOM OF INFORMATION, THE RIGHT OF ACCESS, AND THE VALUE OF JUDICIAL INTEGRITY

At the heart of the Ninth Circuit's argument is the balancing of two perceived counter-values: the right of access to judicial records and the integrity of the judicial process. However, the court gives little emphasis as to how these two values contribute to the judicial branch as a whole, and more specifically why the narrow circumstances of this case weigh in favor of preserving the integrity of the judicial process over the public's right to view the Proposition 8 trial recording. To better understand the interplay between these two values in relation to

86. *Id.* at 1086.
87. *Id.* at 1087.
88. *Id.*
89. *Id.* at 1087–88.
90. *Id.* at 1088.
91. *Id.*
92. *Id.* at 1088–89.

the Proposition 8 trial, a closer look at each is warranted.

A. *The Right and Presumption to Judicial Access*

1. The Historical Background of an Open Judiciary

Dating back to the age of the Roman Empire, the idea of an open judiciary has been a "longstanding" practice.[93] While seen more today as an "obligation of the state," the openness of early judicial actions and procedures "[were] to impress on viewers the power of the state."[94] Philosophers, however, would later have a different understanding of the role of public disclosure, based in part on the idea that "[b]ecause knowledge was so frail and truth unknowable . . . it would be best to put all ideas before the public."[95] This argument, accredited to philosopher John Locke, exhibited a broad libertarian belief that the role of government was to protect the fundamental liberties of its citizens.[96] The development of this libertarian ideal, and others like it, would eventually evolve into one of the main focal points of the "colonists' revolutionary rhetoric."[97]

This country's founders understood the necessity of government access as a requirement for an informed society.[98] As James Madison stated, "A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy."[99] Early colonial customs would soon follow and develop traditions that supported an open judiciary.[100] For instance, early versions of many state constitutions, including Delaware, Kentucky, and Vermont, would proclaim that "all courts shall be open."[101] In *Richmond Newspapers, Inc. v. Virginia*, the Supreme Court observed that, based upon its research, there was "nothing to suggest that the presumptive openness of the trial, which English courts were later to call 'one of the essential

93. Judith Resnik, *Bring Back Bentham: "Open Courts," "Terror Trials," and Public Sphere(s)*, 5 LAW & ETHICS HUM. RTS. 2, 6–9 (2010).

94. *Id.* at 7 (emphasis omitted).

95. Sigman L. Splichal, *The Right to Know*, *in* ACCESS DENIED: FREEDOM OF INFORMATION IN THE INFORMATION AGE 5 (Charles N. Davis & Sigman L. Splichal eds., 2000) [hereinafter ACCESS DENIED] (discussing the arguments set forth by philosopher John Locke).

96. *Id.* at 4–5.

97. *Id.* at 5–6.

98. *Id.* at 6.

99. *Id.* (quoting Letter from James Madison to W.T. Barry (Aug. 4, 1822), pertinent portion *reprinted in* THE COMPLETE MADISON 337 (Saul Padover, ed., 1953)).

100. *See, e.g.*, Resnik, *supra* note 93, at 8 (describing the 1676 Fundamental Laws of West New Jersey, an early charter of the colony which held that "in all publick [sic] courts of justice for tryals [sic] of cause . . . any person . . . may freely come into, and attend the said courts . . . .").

101. *Id.* at 9–10.

qualities of a court of justice,' was not also an attribute of the judicial systems of colonial America."[102]

Under modern legal doctrine, the Supreme Court has recognized a "constitutional right of the press to publish information it gathers about public issues" but has scarcely extended such a constitutional right to the "compelled disclosure" of government-held information.[103] Legal theories of the twentieth century, falling back to the words and influences of the Founding Fathers, "support[ed] the role of a free and vigorous press in American society and its need for public information."[104] However, this need for information would not evolve into a general "right of access." The U.S. Supreme Court has "never recognized a constitutional right of access to government information, or a right to gather information."[105]

In *Houchins v. KQED*, the Court stated that while prior decisions "emphasized the importance of informed public opinion and the traditional role of a free press as a source of public information," these cases did not require that "the Constitution *compel*[] the government to provide the media with information or access to it on demand."[106] What seems to be a small exception to this lack of constitutional protection would be the right of access to the court system.[107] While "the law of access to court proceedings and records is still a work in progress,"[108] judicial proceedings have continued to grow into one of the few fora, if not the only forum, in which compelling government disclosure is constitutionally protected under certain circumstances.[109]

2. Access to Judicial Proceedings: A Common Law Presumption and a First Amendment Value

The development of a constitutional right of access to judicial proceedings has only been addressed by the Supreme Court in matters

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102. 448 U.S. 555, 567 (1980) (quoting Daubney v. Cooper, 109 Eng. Rep. 438, 440 (K.B. 1829)).

103. Splichal, *supra* note 95, at 11, 13.

104. *Id.* at 7.

105. *Id.* at 12.

106. 438 U.S. 1, 9 (1978).

107. Matthew D. Bunker, *Closing the Courtroom: Judicial Access and Constitutional Scrutiny After* Richmond Newspaper, *in* ACCESS DENIED, *supra* note 95, at 155–57.

108. *Id.* at 156.

109. *See, e.g.*, Barry P. McDonald, *The First Amendment and the Free Flow of Information: Toward a Realistic Right to Gather Information in the Information Age*, 65 OHIO ST. L.J. 249, 251–52 (2004) (explaining that the Supreme Court has held that there is no First Amendment right of access to information controlled by the government "unless the information concerns the conduct of criminal trials (in which case the strictest form of First Amendment scrutiny does apply to any governmental interference)").

concerning criminal trials.[110] The Court faced the question of whether the right to attend criminal trials is guaranteed under the U.S. Constitution in *Richmond Newspapers, Inc. v. Virginia.*[111] John Paul Stevenson was indicted for murdering a hotel manager, and three of his previous proceedings for the murder had ended in mistrials.[112] In Stevenson's fourth trial attempt, the judge decided to prevent any other miscues and ordered that the courtroom "be kept clear of all parties except the witnesses when they testify."[113] Two reporters with Richmond Newspapers, Inc. were present when the order was handed down and were removed from the courtroom.[114]

No majority opinion was issued in *Richmond Newspapers, Inc.*, but a majority of the Justices agreed the press had a constitutional right to attend the trial.[115] Chief Justice Warren Burger found that "[t]he Bill of Rights was enacted against the backdrop of the long history of trials being presumptively open,"[116] and that "the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning [to the explicit guarantees of freedom of speech and press]."[117] Justice William Brennan, also finding that the First Amendment protected the right of access to the trial, opined, "[o]pen trials assure the public that procedural rights are respected, and that justice is afforded equally."[118]

The Supreme Court would reaffirm the *Richmond Newspapers, Inc.* majority in *Globe Newspaper Co. v. Superior Court.*[119] At the time, Massachusetts law required trial judges to exclude the public from the courtroom during the testimony of young victims of sexually related crimes.[120] During one such sexual assault criminal trial, members of the Globe Newspaper Co. were denied access.[121] The Court began by

110. Bunker, *supra* note 107, at 156–62 (2000).

111. 448 U.S. 555, 558 (1980). The Supreme Court, however, did consider whether the public was afforded the right to attend a public criminal trial in the earlier case of *Gannet Co. v. Depasquale*, but limited its rationale to the Sixth Amendment. *See* 443 U.S. 368, 382 (1979); *see also* Matthew E. Feinberg, *The Prop 8 Decision And Courtroom Drama in the Youtube Age: Why Camera Use Should Be Permitted in Courtrooms During High Profile Civil Cases*, 17 CARDOZO J.L. & GENDER. 33, 40–41 (2010).

112. *Richmond Newspapers*, 448 U.S. at 559.

113. *Id.* at 560.

114. *Id.*

115. *See* Newman v. Graddick, 696 F.2d 796, 800 (11th Cir. 1983) ("Although no opinion commanded a majority [in *Richmond Newspapers*], seven justices agreed that the public has such a right.").

116. *Richmond Newspapers*, 448 U.S. at 575.

117. *Id.* at 556.

118. *Id.* at 595 (Brennan, J., concurring).

119. 457 U.S. 596, 598, 602 (1982).

120. *Id.*

121. *Id.*

reaffirming *Richmond Newspapers, Inc.*, stating that the case "firmly established for the first time that the press and general public have a constitutional right of access to criminal trials."[122] In finding that the First Amendment protected the right of open access, the Court required only a compelling government interest, narrowly tailored so as to not infringe upon more constitutional rights than is necessary to protect that interest, would survive constitutional scrutiny.[123] While the Court found that "safeguarding the physical and psychological well-being of a minor" was a compelling interest, requiring the mandatory closure of trial courts could not ensure that the "constitutional right of the press and public to gain access to criminal trials [would] not be restricted except where necessary."[124] The scope of a right of access to criminal trials has been litigated on occasion after *Globe Newspaper Co.* and *Richmond Newspaper, Inc.*,[125] but a consistent understanding could be concluded from the Court's holdings: the openness of the judiciary is a principle foundation to the constitutional rights inherent within the First Amendment.

While some circuit courts have interpreted the holding in cases like *Globe Newspaper Co.* and *Richmond Newspapers, Inc.* to extend the First Amendment's right of access to civil proceedings as well,[126] other courts have simply relied on the common law presumption of public access when faced with a question of whether to disclose civil judicial records.[127] The common law rule has been expressed as such, "[E]very person is entitled to the inspection . . . of public records, including legislative, executive, and judicial records, provided he has an interest therein which is such as would enable him to maintain or defend an action for which the document or record sought can furnish evidence or necessary information."[128] The modern understanding of the common

122. *Id.* at 603.

123. *Id.* at 606–07.

124. *Id.* 609.

125. *See, e.g.*, Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 821–22, 823 n.8 (1984) (First Amendment right of access extends to *voir dire* proceedings).

126. *See, e.g.*, Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1067–71 (3d Cir. 1984) (finding that the "[p]ublic access to civil trials, no less than criminal trials, plays an important role in the participation and the free discussion of governmental affairs"). Additionally, other circuits have found that a First Amendment right exists, but "it does not exceed. . . the traditional common law right." *In re* Reporters Comm. for Freedom of the Press, 773 F.2d 1325, 1339 (D.C. Cir. 1985).

127. *See, e.g.*, Zurich Am. Ins. Co. v. Rite Aid Corp., 345 F. Supp. 2d 497, 503 (E.D. Penn. 2004) (applying the common law presumption of access to the unsealing of documents related to an arbitration proceeding); Hagestad v. Tragesser, 49 F.3d 1430, 1434 (9th Cir. 1995) (applying the common law presumption of access to pleading documents in the court record related to a civil proceeding).

128. Fayette Cnty. v. Martin, 130 S.W.2d 838, 843 (Ky. Ct. App. 1939), *overruled on other grounds by* City of St. Matthews v. Voice of St. Matthews, Inc., 519 S.W.2d 811 (Ky. Ct.

law right includes "a general right to inspect and copy public records and documents, including judicial records and documents."[129] The burden typically falls on the party seeking to prevent disclosure to provide a "compelling reason" why the right should be overcome.[130]

The Supreme Court recognized the common law presumption of access to records in *Nixon v. Warner Communications, Inc.*[131] During the aftermath of the Watergate scandal, several Nixon advisers were charged with conspiring to obstruct justice.[132] After their indictment, the prosecution filed a subpoena with former President Richard Nixon, requesting the audio recordings of several meetings and telephone conversations the President had while in office.[133] Warner Communications, Inc. requested the tapes, now entered into evidence, so they could "copy, broadcast, and sell to the public the portions of the tapes played at trial."[134] The Court recognized a common law right to copy and inspect public records, but noted that the right "is not absolute."[135] The Court did not decide the case on the merits of the common law presumption,[136] but stated the application of the common law presumption "is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case."[137]

Since *Nixon*, the circuits have varied as to their application of the common law presumption to access judicial records.[138] In *United States v. Graham*, for instance, the Second Circuit Court of Appeals was faced with Darryl Graham's request to prevent the broadcast media from copying and inspecting the audio and video tapes played during his

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App. 1974).

129. Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597 (1978).

130. Kamakana v. City and County of Honolulu, 447 F.3d 1172, 1178 (9th Cir. 2006).

131. 435 U.S. at 597.

132. *Id.* at 592.

133. *Id.* at 592–93.

134. *Id.* at 594.

135. *Id.* at 598. Specifically, the court recognized the common law presumption could be overcome if the information sought were to be used for "private spite," to "promote public scandal," or "as sources of business information that might harm a litigant's competitive standing." *Id.*

136. *Id.* at 603 ("We need not decide how the balance [of interests advanced by the parties] would be struck . . . . There is in this case an additional, unique element that was neither advanced by the parties nor given appropriate consideration by the courts below.").

137. *Id.* at 599.

138. *See, e.g.*, M.P. v. Schwartz, 853 F. Supp. 164, 168–69 (D. Md. 1994) (holding that the "concern in preserving the confidentiality of . . . minor[s]" required the redaction of named juvenile defendants, but still allowed access to a forty-nine page complaint filed within a juvenile hearing). Due to the complexity and volume of state and federal cases discussing the common law presumption of access to civil proceedings, any generalizations of the presumption are beyond the scope of this Note.

detention hearing, arguing that Graham's right to a fair trial would be prejudiced.[139] Graham was arrested for and charged with conspiracy to possess and distribute cocaine.[140] After his arrest, the court ordered a partially open detention hearing,[141] in which audio and video recordings were presented by the government and entered into the record.[142] The court determined Graham's "right to a fair trial" was not sufficiently adversely affected to overcome the presumption of access.[143] While the court stated the "right . . . to a fair trial is of the utmost importance," the court disagreed that "the likelihood of such enhanced awareness of the tapes poses the kind of risk to fair trials for [the] defendants that justifies curtailing the public's right of access to courtroom evidence."[144] As shown by cases like *Nixon* and *Graham*, the common law presumption of access has been a useful tool in protecting the transparency and openness of the country's judicial system.[145]

B. *The Integrity of the Judicial Process*

1. A Brief History and Understanding of Judicial Integrity

While the term is a bit subjective, the "integrity" of the judiciary has been a consistent presence in the English common law and American jurisprudence, if not for all democratic societies.[146] During the colonial era, judges served at the pleasure of the English Crown. This was quite frustrating to colonial lawmakers whose attempts to enact laws that would reauthorize the judiciary to the colonies were being consistently rejected by the monarch.[147] What resulted in the colonists' eyes was a

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139. United States v. Graham, 257 F.3d 143, 145 (2d Cir. 2001).

140. *Id.*

141. Due to the fact that some of the evidence would "create a substantial probability of prejudice to the defendants" if released, portions of the detention hearing were closed to the public. *Id.* at 146.

142. *Id.* at 147. The tapes played by the government were "excerpts from a number of audio and video tapes featuring conversations between and among [Graham, his co-conspirators,] and a confidential informant." *Id.*

143. *Id.* at 154–56.

144. *Id.* at 154–55 (quoting United States v. Myers, 635 F.2d 945, 953 (2d Cir. 1980)).

145. With that being said, "[t]he types of materials which comprise the judicial record and to which the common law right to inspect and copy therefore attaches have not been thoroughly catalogued." Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 529 F. Supp. 866, 897 (E.D. Penn. 1981).

146. The role of the judiciary is, no doubt, a very broad, complex, and multifaceted topic. To the extent possible, this paper limits the discussion of the judiciary as it was used by the court in *Perry*. More specifically, this paper is limited to the view of the judiciary as upholding the integrity of the legal system.

147. CHARLES GARDNER GEYH, WHEN COURTS AND CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA'S JUDICIAL SYSTEM 24 (2008). This frustration was an added

"lesson that . . . the integrity of the judicial branch and the separate power it exercises can and will be undermined unless the judiciary is afforded a measure of institutional independence."[148] Thus, leading up to the Constitutional Convention, it was clear that in order to adequately enforce the laws of a new country, judges would need to be "independent individually as decision makers and collectively as a separate branch of government."[149]

With the country's newly established independent judicial branch, coupled with the development of judicial review and the evolution of the English common law, the judiciary quickly became a very powerful and authoritative branch of government.[150] Many judges began to recognize the immense power they now controlled and determined that self-abnegation within the position was an absolute necessity.[151] Some of the most influential judges in American history, including Justice Oliver Wendell Holmes, Justice Benjamin Cardozo, and Justice Felix Frankfurter, all recognized that judges must maintain a consistent adherence to the "taught tradition of the law."[152] Judge Cardozo stated that "a jurist 'is not to innovate at pleasure . . . . He is to draw his inspiration from consecrated principles. . . . He is to exercise a discretion informed by tradition, methodized by analogy, [and] disciplined by system."[153] The principles that form the foundation of judicial practice include:

> [The] abiding sense of judicial integrity that comes with the robe; a consciousness of precedent; rule of procedure; recognition of the Court's threefold role as a governmental, political, and legal institution; . . . an awareness of membership in the body politic, of the responsibility of not being too far out of step with
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> consciences . . . ; [and] the concept of equality before the law and

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grievance to the Declaration of Independence, indicting King George III as "obstruct[ing] the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary Powers." THE DECLARATION OF INDEPENDENCE para. 10 (U.S. 1776).

148. GEYH, *supra* note 147, at 24.

149. *Id.* at 27.

150. NATIONAL CONFERENCE OF STATE TRIAL JUDGES OF THE JUDICIAL ADMINISTRATION DIVISION OF THE AMERICAN BAR ASSOCIATION & THE NATIONAL JUDICIAL COLLEGE, THE JUDGE'S BOOK 5 (10th ed. 1996) [hereinafter THE JUDGE'S BOOK].

151. *See* HENRY J. ABRAHAM, THE JUDICIARY, THE SUPREME COURT IN THE GOVERNMENTAL PROCESS 79–82 (1996).

152. *Id.* at 82.

153. *Id.* (quoting BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 141 (1921)).

at the bar of the Supreme Court.[154]

Today, the judicial branch continues to take its perception of integrity and honesty as a founding principle of the profession. The Code of Conduct for U.S. Judges, for instance, adopted as its first canon the following: "An independent and honorable judiciary is indispensable to justice in our society. A judge should maintain and enforce high standards of conduct and should personally observe those standards, so that the integrity and independence of the judiciary may be preserved."[155] The American Bar Association's (ABA) Model Code of Judicial Conduct has also adopted as its first canon that "a Judge shall uphold and promote the independence, integrity, and impartiality of the Judiciary, and shall avoid impropriety and the appearance of impropriety."[156] Under the ABA canon, a judge is required to act at all times in a manner that reflects the independent integrity of the court so as to not "undermine[] public confidence in the judiciary."[157] The Judicial Administration Division of the ABA, in offering guidance to newly-minted judges, has advocated that "[r]espect for the Rule of Law and respect for the judiciary are the greatest guarantors of order and constitutional democracy."[158]

2. The Value of Judicial Integrity and Its Application in Judicial Decision Making

The "abiding sense of judicial integrity" articulated by Justice Cardozo and developed over generations of judicial progress does not stop at simply providing background for judicial history. As the Ninth Circuit demonstrated in *Perry*, the idea of "judicial integrity" can shape the way in which judicial discretion is effectuated. The idea that a court must maintain and preserve the integrity of the judiciary has played a significant part in shaping judicial doctrine. Two of the most fundamental examples of judicial integrity influencing doctrine, which will help place the Ninth Circuit's decision into context, are found within the application of *stare decisis* and the exclusionary rule.

Stare decisis et non quieta movere ("*stare decisis*"), or "to stand by the things decided," is a doctrine in which a court is required to follow earlier judicial decisions when the same points arise again in later

154. *Id.*

155. *See* 2 GUIDE TO JUDICIARY POLICY 2–3 (2011), *available at* http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/RulesAndPolicies/conduct/Vol02A-Ch02.pdf.

156. MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2001). Every state has since adopted its own form of Judicial Canons. THE JUDGE'S BOOK, *supra* note 150, at 303.

157. *See* MODEL CODE OF JUDICIAL CONDUCT R. 1.2 cmt. 3 (2011).

158. THE JUDGE'S BOOK, *supra* note 150, at 301.

litigation.[159] The rule developed as a "rule of etiquette or conventional decorum" in which judges would defer to the opinion of other judges as a means of "certainty, stability and propriety in the law."[160] Under the doctrine, prior court decisions that have the potential for affecting future cases are taken as precedential.[161]

The defining rationales of "certainty and predictability" that support the doctrine of *stare decisis* stem from the court's adherence to judicial integrity.[162] By upholding the doctrine of *stare decisis*, the theory goes, judges maintain certainty in the law and to society in general.[163] This rationale has been around for quite some time, as one early nineteenth-century English Lord opined that "certainty is often equated with finality of litigation, itself a desirable feature of the system."[164] The Supreme Court itself has also expounded on the doctrine's intent, as noted by the Ninth Circuit in *Perry*, holding the doctrine as "promot[ing] the evenhanded, predictable, and consistent development of legal principles, foster[ing] reliance on judicial decisions, and contribut[ing] to the actual and perceived integrity of the judicial process."[165]

As stated by Raimo Siltala as part of the "criteria of justice" ideology that justifies the use of *stare decisis*, "[f]ormal predictability corresponds to the uniformity of judicial adjudication, giving priority to the 'transparency' and foreseeability of future litigation at the cost of the content-bound considerations in subsequent cases."[166] In other words, trust in a predictable system benefits society by giving potential litigants the foresight of success or potential failure. Whether it was the doctrine that brought about the judicial systems' reliance on certainty and predictability, or vice versa, the importance of integrity has become a defining characteristic of one of the law's most cherished doctrines.

Outside of the uniform applicability of *stare decisis*, the concept of judicial integrity is often cited as one of the founding rationales for the application of the exclusionary rule. The exclusionary rule is a discretionary remedy in which judges exclude evidence from trial when

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159. BLACK'S LAW DICTIONARY 1537 (9th ed. 2009).

160. J. DAVID MURPHY & ROBERT RUETER, STARE DECISIS IN COMMONWEALTH APPELLATE COURTS 2 (1981) (quoting Marconi Wireless Tel. Co. of Canada v. Canadian Car & Foundry Co. (1918), 44 D.L.R. 378, per Audette J. at 379).

161. RAIMO SILTALA, A THEORY OF PRECEDENT: FROM ANALYTICAL POSITIVISM TO A POST-ANALYTICAL PHILOSOPHY OF LAW 66 (2000).

162. MURPHY & RUETER, *supra* note 160, at 93.

163. *Id.* at 93–96.

164. *Id.* at 94 (citing to the words of Lord Halsbury in *London Street Tramsway*).

165. Payne v. Tennessee, 501 U.S. 808, 827 (1991); *see also* Perry v. Brown, 667 F.3d 1078, 1087 (9th Cir. 2012).

166. SILTALA, *supra* note 161, at 74 (describing the "criteria of justice" ideology of precedent-following).

the evidence was procured in violation of the Fourth Amendment's protection against unreasonable searches and seizures.[167] The use of the exclusionary rule is not a constitutional necessity,[168] but has been found to be an adequate judicial tool in certain situations, such as instances of objectively unreasonable law enforcement behavior.[169] While the use of the exclusionary rule has been hotly debated, the origins and inception of the rule derived in part from the Supreme Court's attempt to preserve judicial integrity.[170]

The Supreme Court's original approach to the exclusionary rule, as held in *Weeks v. United States*, was that the exclusion of illegally obtained evidence was a requirement of the Constitution.[171] In making its ruling, the Court articulated one of the fundamental rationales for the exclusion of evidence via the exclusionary rule: "the interest in judicial integrity requires that the courts not sanction illegal searches by admitting the fruits of illegality into evidence."[172] The Court found the ability of "those who execute the criminal laws of the country" to utilize evidence obtained in violation of constitutional protections "should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights."[173]

Weeks' constitutional mandate of the exclusionary rule has since been overruled,[174] but the application of the rule through judicial discretion has been used as a necessary and adequate remedy in part because of its protection of judicial integrity.[175] Indeed, "judicial

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167. *See* Hudson v. Michigan, 547 U.S. 586, 591–95 (2006) (discussing the court's inception of the exclusionary rule).

168. *See* United States v. Leon, 468 U.S. 897, 906 (1984) ("The Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands, and an examination of its origin and purposes makes clear that the use of fruits of a past unlawful search or seizure 'work[s] no new Fourth Amendment wrong.'"(quoting United States v. Calandra, 414 U.S. 338, 354 (1974))).

169. *Id.* at 922–25 (detailing the circumstances in which exclusion would be appropriate despite an issuance of a constitutionally required warrant).

170. Robert M. Bloom & David H. Fentin, *"A More Majestic Conception": The Importance of Judicial Integrity in Preserving the Exclusionary Rule*, 13 U. PA. J. CONST. L. 47, 48–50 (2010).

171. 232 U.S. 383 (1914), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961).

172. STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE INVESTIGATIVE: CASES AND COMMENTARY 494 (8th ed. 2007).

173. *Weeks*, 232 U.S. at 392.

174. *See* Mapp v. Ohio, 367 U.S. 643 (1961).

175. *See, e.g.*, Adamson v. C.I.R., 745 F.2d 541, 545–46 (9th Cir. 1984) ("We believe that implicit in [*United States v. Leon*] is a recognition that had the police unreasonably violated the defendant's [F]ourth [A]mendment rights, the integrity of the courts would be implicated."); State v. Hess 785 N.W.2d 568, 555–84 (Wis. 2010) (stating that the Supreme Court has

integrity" as the main rationale to the exclusionary rule has recently started "to recede into footnotes," as the "deterrence" rationale has become the more favorable justification used by courts to exclude evidence.[176] Still, some legal scholars have argued for the "judicial integrity" rationale to once again become the primary focus on whether courts should apply the exclusionary rule.[177] Overall, the protection of judicial integrity has, at least in part, influenced the court's decision to exclude evidence from judicial proceedings when such action would call into question the rectitude of the judiciary.[178]

III. FREEING THE PROP 8 TAPE: A RE-EXAMINATION OF *PERRY V. BROWN*

After a closer look at the circumstances leading up to the Proposition 8 trial recording, and a better understanding of the competing interests addressed by the Ninth Circuit, this Note argues that *Perry v. Brown* should have upheld Judge Ware's decision to unseal the Proposition 8 trial recording. Looking at the issue narrowly, there is an argument that the Ninth Circuit mischaracterizes, or at least overemphasizes, the "promises" made by Judge Walker. A breakdown of the "unequivocal assurances" made by the judge shows a somewhat questionable interpretation by the Ninth Circuit and, under an abuse of discretion standard, should have resulted in the court deferring to Judge Ware's decision to unseal the recording.

Despite the questions surrounding Judge Walker's statements, the Ninth Circuit is clear that, regardless of "whether [Judge Ware] failed to recognize that Chief Judge Walker's statements were solemn assurances to the parties, or whether he believed that he could set those assurances aside because they were made by another judge,"[179] the inconsistency in judicial discretion created by unsealing the record questioned the credibility of the judiciary and was enough to overcome the

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"preserve[d] judicial integrity as a secondary consideration when applying the exclusionary rule.").

176. Bloom & Fentin, *supra* note 170, at 53 (explaining that "a balancing test emerged listing deterrence as the sole benefit and highlighting the substantial social costs of exclusion, specifically the obstructions to conviction and suppression of reliable evidence being suppressed, as weighing strongly against application of the disfavored remedy").

177. *See id.* at 47–50 (outlining the argument that "the exclusionary rule [should] be returned to its previous prominence by reinstating judicial integrity as its primary purpose.").

178. *Id.* at 80 ("[W]hile the majority of the Supreme Court is willing to let the relevance of judicial integrity fade into historical obscurity, it appears that this rationale may remain a powerful force in constitutional law and help retain the exclusionary rule as a necessary adjunct to the Fourth Amendment right.").

179. Perry v. Brown, 667 F.3d 1078, 1088 (9th Cir. 2012).

presumptive right of access. However, the determination that judicial integrity is a compelling means of preventing a judge from unsealing judicial records sets in play a policy that can have significant consequences for the future of accessing the records of civil proceedings. While the Ninth Circuit assures in its opinion the protection of judicial integrity in this case was one of narrow scope,[180] the ramifications could stifle the recent trend toward a more open judiciary, and could result in a persuasive stance for other courts looking to prevent the transparency of controversial proceedings like the Proposition 8 trials. By focusing on the interplay between two district judges as to whether the recording could be released, the Ninth Circuit systematically avoided answering some of the more fundamental questions related to the First Amendment and the question of whether the public has a right to view the recording of one of the most influential nonjury civil trials in recent memory.

A. *A Narrow Approach: The Statements of Judge Walker and the Scope of a Promise*

In order to place such significance on the integrity of the judicial process, the Ninth Circuit made two important conclusions: (1) Judge Ware had, "without 'support in inferences that may be drawn from the facts in the record,'" determined that the original promises made by Judge Walker had no relation to whether the recording could be disclosed to the public one year later;[181] and (2) by failing to make the logical determination that Judge Walker had promised the sealing of the record indefinitely, Judge Ware had stifled the integrity of the judicial process to a point in which the court abused its discretion when deciding to release the recording.[182] Before the issue of preserving judicial integrity as a means of overcoming the presumed right of access is discussed, a closer look at the assumed "unsupported inferences"[183] discussed by the Ninth Circuit is warranted.

In finding that Judge Ware misinterpreted Judge Walker's statements, the Ninth Circuit focused on two of Judge Walker's statements that were believed to have formed "unequivocal assurance" that the Proposition 8 trial recording was not to be released to the public: (1) the statements by Judge Walker that he was "going to continue 'taking the recording for purposes of use in chambers,' but that

180. *Id.* at 1081 ("We resolve the narrow question before us on a narrow basis when we conclude that the district court abused its discretion by ordering the unsealing of the recording.").

181. *Id.* at 1085.

182. *Id.* at 1087–88.

183. *Id.* at 1085.

the recording was 'not going to be for the purposes of public broadcasting or televising;'"[184] and (2) the statements by Judge Walker that he believed "the potential for public broadcast . . . had been eliminated."[185] However, relying on these statements to hold that an "unequivocal assurance" had been made to the parties poses a concern for two reasons. First, there is a significant difference between a promise not to live "broadcast" a trial, and a promise to prevent the dissemination of the "recording" of the trial years down the road. Second, even without a clear distinction between the usage of the terms "broadcasting" and "recording," enough ambiguity arises which should have, at the very least, required the Ninth Circuit to defer to Judge Ware. Such ambiguity diminishes any argument that an "*unequivocal* assurance" was made that could be reasonably, objectively relied upon by the proponents. With a closer look at the facts in this case, the argument that judicial integrity is a credible and "compelling interest" to overcome the First Amendment or the common law presumption of access is questionable.

The context in which Judge Walker made his statements against the broadcasting of the Proposition 8 trial could be reasonably limited to the live broadcasting of the trial. Judge Walker's first statement—that the recordings were not for public broadcasting or televising—were made in the backdrop of the Supreme Court's permanent stay.[186] With the Supreme Court's focus on whether to affirm the district court's decision to permit the live broadcast of the trial,[187] it would be logical to conclude Judge Walker's promises were limited to just that—the live broadcasting of the trial. For all practical purposes, the Ninth Circuit was correct. Judge Walker assured the parties the possibility for public broadcast had been eliminated and the recording was not going to be used for the purposes of public broadcasting and televising. Indeed, these promises were kept. Judge Walker himself was a bit hesitant to return his copy of the trial recording,[188] providing some indication that he never intended his statement to extend to protecting the recording years later.

Additionally, much can be said about the plain meaning of

184. *Id.*

185. *Id.*

186. In fact, the court in *Perry* recognized that Judge Walker's statements were "following the Supreme Court's issuance of a stay against the public broadcast of the trial." *Id.* at 1085.

187. *See* Hollingsworth v. Perry, 558 U.S. 183, 184–89 (2010) (per curiam) (explaining the circumstances leading up to the decision to stay the live broadcast of the Proposition 8 trial).

188. *See* Letter from Chief Judge Vaughn Walker, *supra* note 1 (noting that Judge Walker would abide by the court's directive, but noted that the video "was made available to the parties in that case" and that the "[t]he *Perry* case involved a public trial"). It is also important to note that Judge Walker concluded his letter with the words of Chief Justice Berger in *Richmond Newspapers*, which appears at the beginning of this paper. *See supra* text accompanying note 1.

"broadcasting" or "televising," which was the focus of Judge Walker's statements, and the Proposition 8 trial "recording," which was at issue in this case. A clear distinction between the two terms is made in the rule that formed the catalyst to this litigation, Civil Local Rule 77-3, which states that "[u]nless allowed by a Judge or a Magistrate Judge with respect to his or her own chambers . . . the taking of photographs, public *broadcasting or televising, or recording* . . . is prohibited."[189] A common principle of statutory interpretation is that every clause and word of a statute has a specific meaning, and courts should "avoid rendering superfluous" a rule's language.[190] While this is not a pure question of statutory interpretation, using the text of Civil Local Rule 77-3 as guidance lends some support that Judge Walker's promise to continue "recording" the trial, but not to continue "broadcasting or televising" the trial, was not broken by Judge Ware when he unsealed the record.

The backdrop of the district court's Local Civil Rule 79-5(f) also lends some peculiarity to the Ninth Circuit's decision. Rule 79-5(f) states that "[a]ny document filed under seal in a civil case shall be open to public inspection without further action by the Court [ten] years from the date the case is closed."[191] Parties are only allowed to circumvent the ten-year rule if "upon showing good cause at the conclusion of the case," they "seek an order that would continue the seal until a specific date beyond the [ten] years."[192] It is important to note this rule was in effect at the time that Judge Walker made his assurances that the trial recording would be sealed from public broadcasting.[193] With such a local rule in place, no judge could ever faithfully promise that a sealed trial record would never be released to the public without further action.[194] It would also seem logical that Judge Walker's statements would be made with this rule in mind and at least give some support to the argument that his decision to seal the recording was not one that contemplated future attempts to access the recordings.

Even taking these arguments with reservations—as they are by no

189. CIV. C. R. 77-3 (amended in 2011) (emphasis added), *available at* http://www.cand.uscourts.gov/localrules/civil#DISTRICT.

190. YULE KIM, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 12 (2008) (quoting Astoria Federal Savings & Loan Ass'n v. Solimino, 501 U.S. 104, 112 (1991)).

191. CIV. C. R. 79-5(f), *available at* http://www.cand.uscourts.gov/localrules/civil#DISTRICT.

192. *Id.*

193. Perry v. Brown, 667 F.3d 1078, 1085 n.5 (9th Cir. 2012).

194. The Ninth Circuit passively acknowledges that the proponents could have reasonably made this conclusion as well, stating that "[the p]roponents reasonably relied on Chief Judge Walker's specific assurances . . . that the recording would not be broadcast to the public, *at least in the foreseeable future*." *Id.* at 1084–85 (emphasis added).

means irrefutable[195]—the Ninth Circuit was faced with whether the lower court abused its discretion in concluding Judge Walker did not promise that the recording would remain sealed.[196] Generally, the decision of whether the common law presumption of access to the judicial record has been overcome by a party is "one best left to the sound discretion of the trial court."[197] In order for Judge Ware's decision to have been an abuse of discretion, the decision must have been "without support in inferences that may be drawn from the facts in the record."[198] It seems that an argument could be made either way as to the interpretation of Judge Walker's promises, but one should be skeptical of the Ninth Circuit determining that Judge Ware's decision was "implausible" or "without support."[199] To claim that "[n]o other inference" can be plausibly drawn from the record misrepresents the context in which the statements were made and the distinction between the live broadcasting of a trial and releasing a previous recording.[200]

B. *A Broad Approach: The Right of Access vs. Judicial Integrity*

Upon its conclusion, the Ninth Circuit was ultimately faced with a choice between two competing values that can be summed up into one question: is protecting judicial integrity by avoiding inconsistent orders by district judges compelling enough to shut out the public from the presumptive access to a judicial record? With the court answering this question in the affirmative, it is society that is left with the consequences of the decision. Even though the trial's written transcript is available,[201] the public is still deprived of the more telling visual

195. The Ethics and Public Policy Center, for instance, would no doubt disagree with the propositions this Note suggests. In their Amicus Curie brief to the Supreme Court on the substantive issues related to Proposition 8, the Center cites to Judge Walker's "egregious course of misconduct," including his "defiance" of the Court's January order, as a demonstration of why the Court "should be especially wary of accepting at face value any assertion made by [Judge Walker]." Amicus Curie Brief of the Ethics and Public Policy Center in Support of Petitioners and Supporting Reversal or Vacatur, Hollingsworth v. Perry, No. 12-144 (Jan. 29, 2013) 2013 WL 416202, at *1–8.

196. *Perry*, 667 F.3d at 1081.

197. Perry v. Schwarzenegger, No. C 09-02292JW, 2011 WL 4527349, at *3 (N.D. Cal. Sept. 19, 2011) (quoting Hagestad v. Tragesser, 49 F.3d 1430 (9th Cir. 1994); *see also* Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 598 (1978) ("Every court has supervisory power over its own records and files.").

198. *Perry*, 667 F.3d at 1084 (citing United States v. Hinkson, 585 F.3d 1247 (9th Cir. 2008) (internal quotations omitted).

199. *Scwarzenegger*, 2011 WL 4527349, at *4 (holding that "the record [did] not support the contention that Judge Walker limited the digital recording").

200. *Perry*, 667 F.3d at 1085.

201. *See Transcripts*, AMERICAN FOUNDATION FOR EQUAL RIGHTS, http://www.afer.org/our-work/hearing-transcripts/ (last visited Oct. 31, 2012).

depiction of the proceedings.[202] The ability for academics, professors, and judges to learn from the "more interesting, informative, compelling, and . . . realistic" portrayal of a nationally controversial civil trial is eliminated.[203] Sealing the tape also diminishes an individual's ability to use the recording of this heated controversy as a form of artistic outlet through reenactments and theatrical interpretations,[204] all in the name of "preserving judicial integrity." Such an impact could be significant.

The First Amendment right and the common law presumption of an open judiciary is in itself a protection of judiciary integrity that went unrecognized by the Ninth Circuit. Judicial integrity, as discussed above,[205] is a conceptual value that takes many forms in order to protect the judiciary. The reliance on judicial integrity has been used to protect the consistency of the court system and also to protect the administration of justice, as demonstrated by its use as a founding principle of the exclusionary rule. Important to this case, and overlooked by the Ninth Circuit, is the importance of preserving transparency in the judiciary as a protection of judicial integrity.[206] The importance of transparency was made clear by Justice Brennan in *Richmond Newspapers, Inc.*:

> Secrecy is profoundly inimical to this demonstrative purpose of the trial process. Open trials assure the public that procedural rights are respected, and that justice is afforded equally. Closed trials breed suspicion of prejudice and arbitrariness, which in turn spawns disrespect for law. Public access is essential, therefore, if trial adjudication is to achieve *the objective of maintaining public confidence in the administration of justice.*[207]

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202. Plaintiffs' lawyer Theodore Boutrous, for instance, claimed that the proponents "[knew] the videotape would expose their baseless campaign of fear and [would have] let the public see the powerful evidence [the plaintiffs'] submitted." Bob Egelko, *Court Orders Prop. 8 Trial Video to Remain Sealed*, S.F. GATE (Feb. 3, 2012, 4:00 A.M.), http://www.sfgate.com/news/article/Court-orders-Prop-8-trial-videos-to-remain-sealed-2959499.php.

203. Judge Walker himself stated that the he had used segments of the tape after his retirement during lectures on "cameras in the courtroom." Letter from Chief Judge Vaughn Walker, *supra* note 1.

204. Use of the trial transcript has been used to reenact the trial by celebrities and supporters, and a play, *8*, has been in production in order "to spread the word about this historic trial." Adam Bink & Jacob Combs, *Why the 9th Circuit Decision on the Prop. 8 Tape Undermines Our Democracy*, HUFFPOST GAY VOICES (FEB. 3, 2012, 1:08 PM), http://www.huffingtonpost.com/adam-bink/prop-8-tapes_b_1252816.html.

205. *See supra* Part II.B.

206. *See* Bunker, *supra* note 107, at 157–58 (citing that one of the Justices in *Richmond Newspapers, Inc.* "noted that access to trails encouraged public perception that trials were fair").

207. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 595 (1980) (Brennan, J., concurring in judgment) (citing Gannett Co., Inc. v. DePasquale, 443 U.S. 368, 428–29 (1979)

By pointing only to "credibility" as the defining characteristic of judicial integrity relevant to whether the Proposition 8 trial recording should be released, the Ninth Circuit insufficiently framed the value of judicial integrity in the context of this case.[208]

By placing such a high emphasis on protecting the promises of district judges, the continued growth of a common law or constitutional right of access to civil proceedings might be stunted. The right of access is an innovation of the First Amendment that is still in its infancy.[209] With a strong history in favor of an open judiciary, along with a majority of circuits recognizing its First Amendment value, the constitutional right of access to civil proceedings should not be too far off from recognition by the Supreme Court.[210] But to find that vague assurances by a lower court judge are compelling reasons to overcome this First Amendment protection, as the Ninth Circuit did in *Perry*,[211] sets the stage for a weak, or severely limited, constitutional right. While the Ninth Circuit is, obviously, not binding outside of its own jurisdiction, the tendency of circuit courts to rely on one another for the sake of consistency could result in the spread of judicial integrity as a means to deny disclosure.[212]

Above all else, by relying on the preservation of judicial integrity as the "compelling" reason to prevent access to the Proposition 8 trial recording, the Ninth Circuit ignored some pivotal legal issues surrounding whether, and to what extent, the public has a right of access to civil proceedings. The Ninth Circuit was quick to "simply assume, without deciding" that a common law presumption and a First Amendment right of access to civil proceedings existed.[213] Questions such as whether the common law presumption of access apply or whether a First Amendment right of access to civil proceedings exist are extremely influential[214] and can provide answers that support and

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(Blackmun, J., concurring and dissenting)) (emphasis added).

208. *See* Bink & Combs, *supra* note 204 ("In choosing to keep the recordings under seal, the 9th Circuit has unfortunately dealt a blow to transparency in the courtroom.").

209. *Supra* notes 107–10 and accompanying text.

210. *See* Bunker, *supra* note 107, at 167 (stating that, while some lower courts have "mixed reactions to First Amendment access claims in civil proceedings . . . most have recognized some form of presumptive access right").

211. Perry v. Brown, 667 F.3d 1078, 1088 (9th Cir. 2012).

212. *See* Chad Flanders, *Toward a Theory of Persuasive Authority*, 62 OKLA. L. REV. 55, 76–79 (2009) (arguing that circuit courts rely heavily on other Circuits as persuasive authority).

213. *Perry*, 667 F.3d at 1084, 1088.

214. When addressing the constitutional right of access to criminal trials, the Supreme Court was apt to opine that the right of access "plays a particularly significant role in the functioning of the judicial process and the government as a whole" and "enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole." Globe Newspaper Co. v. Super. Ct., 457 U.S. 596, 606 (1982).

expand the ideals of an open government.[215] Another issue, the chilling effect to expert witness testimony, also went untouched by the Ninth Circuit. By escaping these more complex issues, the court neglected the importance that having a resolution to these questions might have provided for many journalists, bloggers, and even curious citizens.[216] By quickly shutting the door to these more controversial discussions, the Ninth Circuit ignored issues that could have had a tremendous effect on how society interacts with its government, and more specifically, its judiciary.

C. *Where We Go From Here: Observations From* Perry v. Brown

A few brief observations are warranted given the Ninth Circuit's decision to deny disclosing the Proposition 8 trial recording. First, it is clear only a few subtle phrases were needed by Judge Walker in order to satisfy the Ninth Circuit's belief that a promise was made to seal the trial recording indefinitely. The result is that judges could be potentially shackled to their previous discretionary determinations, even when faced with a possible constitutional infringement, so as not to disrupt "judicial integrity." Again, the extent of the Ninth Circuit's decision was expressed in narrow terms, but how this ruling will really affect future Ninth Circuit cases, or sister circuits for that matter, is yet to be seen and should be cause for concern. Regardless of where the burden falls, more communication on behalf of all parties and judges during the Proposition 8 trials would have at least more properly set the case up for a determination on one of the proponents' more arguable First Amendment challenges.[217]

Second, the value of judicial integrity is so multifaceted that while it is important to uphold, it should be used sparingly as a means of determining whether judicial records should be disclosed. While the Ninth Circuit relied on consistency and predictability to justify its decision, the court could just as easily have relied on transparency to

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215. *See supra* Part II.A.1.

216. *See* Roy Peled & Yoram Rabin, *The Constitutional Right to Information*, 42 COLUM. HUM. RTS. L. REV. 357, 361 (2011) ("The ability of individuals, interest groups, and organizations to actively participate in political debates deciding issues on the public agenda, as well as the very possibility of placing issues on that agenda, is tightly linked to their ability to obtain relevant information."). The right of access to the judiciary can "represent[] . . . an initial condition for the public's participation in the democratic game," protect citizens through the oversight of government processes, and allow for the exercise of other constitutional rights. *Id.* at 360–70.

217. Instead of focusing on judicial integrity, the Ninth Circuit could have, for example, focused on the proponents' "chilling" expert witness's argument that the district court found mere "unsupported hypothesis or conjecture." Perry v. Schwarzenegger, No. C 09-02292JW, 2011 WL 4527349, at *5 (N.D. Cal. Sept. 19, 2011).

reach the opposite conclusion—all of which are recognized traits of judicial integrity.[218] Judicial integrity, thus, should not be a tool that encourages selectivity among its many traits. Courts should either formulate all of the traits that encompass the interest of "judicial integrity" and weight the interest accordingly, or avoid using the interest of "judicial integrity" in the context of judicial access. To continue to use individualized aspects of judicial integrity of the court's choosing could, ironically, allow for unpredictable, ambiguous, and inconsistent discretionary rulings by judges.

Finally, now may be the time for the Supreme Court to finally answer whether the First Amendment affords individuals the right of access to civil proceedings as it does for criminal proceedings. Both the Supreme Court and the Ninth Circuit were quick to avoid the issue of a First Amendment right altogether. However, with a definitive answer as to the right of access to civil proceedings, the circumstances of this case might have been drastically different. At the writing of this Note, the Supreme Court had vacated the Ninth Circuit's substantive ruling in *Perry v. Brown* and remanded the case due to issues related to standing.[219] While the door seems to be closed for the *Perry* decision to bring the right of access issue to the Supreme Court, the move by the Judicial Conference of the United States to experiment with video recording nonjury civil trials may make the issue more suitable for resolution.

CONCLUSION

The controversy surrounding Proposition 8 and the legal proceedings that followed will no doubt continue to capture the nation's attention. However, because of the Ninth Circuit's ruling, those of us not present at the Proposition 8 district court hearings will have to continue to wait to see what occurred during the trial. While both the presumption of access to judicial proceedings and the integrity of the judiciary are fundamental aspects of our country's court system, the importance of our society to have a right of access to the Proposition 8 trial recording cannot be stressed enough. Looking at the facts leading up to the decision, a sound argument could be made that Judge Walker's

218. *Compare supra* Part II.B.2 (consistency and predictability), *with* Part III.B (transparency). The Model Code of Judicial Conduct includes a few more nouns in its definition, defining "integrity" as "probity, fairness, honesty, uprightness, and soundness of character." MODEL CODE OF JUDICIAL CONDUCT Terminology (2007).

219. *See* Hollingsworth v. Perry, 133 S. Ct. 2652 (2013), *available at* http://www.supremecourt.gov/opinions/12pdf/12-144_8ok0.pdf (holding that the Proponent-Petitioners did not have standing, and therefore the Court had no authority to decide the case on the merits).

"unequivocal assurances" are not unequivocal at all. In a broader sense, the protections of society's right of access to civil proceedings, based on either common law tradition or through a First Amendment right, could in and of itself protect the integrity of the judiciary that the Ninth Circuit seems so fearful in diminishing. Despite the arguments, the criticisms, and the observations, it seems that society can do nothing more but wait in order to one day free the Prop 8 tape.

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EDITOR'S NOTE

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The issue concludes with a case comment, awarded the Huber C. Hurst award, analyzing the United States Supreme Court's missed opportunity for a categorical rule against life imprisonment without the possibility of parole for juveniles. The case comment analyzes the Supreme Court's 2012 case *Miller v. Alabama*, which held that mandatory life sentences, not discretionary life sentences, for juveniles are impermissible under the Eighth Amendment's prohibition of cruel and unusual punishments.

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The *University of Florida Journal of Law and Public Policy* would like to sincerely thank the staff, faculty and student members who worked so diligently in bringing this issue together. The Journal appreciates all subscribers and readers.

Stephanie Moncada
Editor-in-Chief

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