Whatever Happened to Freedom of Speech? A Defense of "State Interest of the Highest Order" As a Unifying Standard for Erratic First Amendment Jurisprudence

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I. INTRODUCTION

On February 2, 1999, a federal jury in Oregon punished the authors of a web site with a judgment exceeding $100 million for *writing* provocative anti-abortion invectives.[1] The previous spring, the United States Supreme Court let stand a federal judge's bizarre perpetual gag order forbidding former jurors from *speaking* to the media — ever — about their jury deliberations, absent special permission from the judge herself.[2] In 1998, a state judge ordered a Greenville, Mississippi, newspaper reporter arrested and charged her with criminal contempt for disobeying the judge's order by *publishing* the juvenile record of a criminal defendant, even after the defendant's rec-

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[1] *See Jury Finds Web Site Threatened Doctors Who Perform Abortions*, AGENCE FRANCE PRESSE, Feb. 2, 1999, *available in* LEXIS, Wire Service Stories; *see also infra* notes 237-46 and accompanying text (discussing further the "Nuremberg Files" verdict).

[2] *See* United States v. Cleveland, 128 F.3d 267 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 1518 (1998); Ellen Alderman, *Gagging Jurors — After the Trial*, COLUM. JOURNALISM REV., May 1998, at 45 (calling the gag order issued in *United States v. Cleveland* "highly unusual" and a "surreal solution" to a "real problem," and arguing that the order is likely to produce "oddball" and "somewhat comical" results such as elevating a trial judge to the level of "super-editor" who would "review[] questions in advance" before journalists may speak with jurors even after a case is concluded); *see also infra* notes 247-65 and accompanying text (discussing the Louisiana gag order).

ord was read aloud in an open courtroom during sentencing.[3] In 1997, a federal district court judge ordered a Wilmington, North Carolina, newspaper and its bureau chief to pay more than $600,000 for *publishing* the truthful details of a secret environmental pollution settlement, although the bureau chief had received the information from the case file supplied by a court clerk, who had given the information to her in error.[4] In a rare case in which a judge's clamp on free speech actually hurt government prosecutors rather than the public or criminal defendants, the federal judge handling the Oklahoma City bombing case issued and enforced a gag order forbidding federal prosecutors from *communicating* in public or in private with state prosecutors regarding the case, for months beyond the conclusion of the trial.[5] And in a first for pop music, in the traditional civil liberties stronghold of northern California, an up-and-coming rap music artist was arrested and jailed for *singing* angry political lyrics that were less than kind to the traditional target of rebellious youth-oriented music: law enforcement authorities.[6]

As the twentieth century draws to a close and Americans contemplate the countless victories won for freedom during the past one hundred years, freedom of speech, the quintessential American civil liberty, has come under fire from the most unlikely of sources: the judiciary — the traditional defender of individual liberties against the censuring potential of government authorities. First Amendment liberties are under assault in ways that seemed virtually impossible just a few years ago. It is particularly shocking that these judicially enforced sanctions amount to restrictions on *the content* of speech, not merely time, place, and manner regulations. Civil libertarians may wonder if this is America at the close of the twentieth century, or if this is George Orwell's *1984*.

These and many other cases that have reached the courts in the past two decades demonstrate a waning commitment by courts to act

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[3] *See* Jane Kirtley, *Competing Interests, Assaults on Access Rights Keep Coming as Judges Continue to be Obstacles*, QUILL, Sept. 1, 1998, at 24; *see also infra* notes 266-68 and accompanying text (discussing the case further).

[4] *See* Kirtley, *supra* note 3, at 24; *see also infra* notes 269-72 and accompanying text (discussing the case further).

[5] *See* United States v. McVeigh, 931 F. Supp. 756, 760 (D. Colo. 1996); *see also infra* notes 273-80 and accompanying text (discussing the gag order issued in the *McVeigh* case).

[6] *See* Soren Baker, *Paroled Rapper's Fighting Words Land Him Back in Jail*, CHI. TRIB., Mar. 6, 1998, at 1 ("California rapper Shawn Thomas . . . appears to be the first musician arrested for what he said on a record."); *see also infra* notes 281-302 and accompanying text (discussing the arrest and parole revocation of the rap artist).

as the protectors of the speech liberties guaranteed to individuals and to the media by the First Amendment.[7] The courts only sporadically apply, and frequently ignore, clear and controlling precedent prohibiting the punishment or preclusion of free and open communication of truthful information lawfully obtained, even in cases that clearly merit application of such precedent. The strong speech-protective doctrine propounded in a pair of United States Supreme Court cases, *Smith v. Daily Mail Publishing*[8] and *Florida Star v. B.J.F.*,[9] prohibits the government from impairing such First Amendment liberties absent "a need to further a state interest of the highest order."[10] This doctrine clearly places the onus on the government to come forward with an exceedingly persuasive need in order to interfere with an individual's expressive liberties.

Why is this doctrine overlooked when a parole officer decides to have a rap artist arrested because the officer disapproves of *the content* of the singer's message? Where is this strong protection for the individual when blameless news reporters are arrested or fined for publishing *the truth* merely because litigants and a judge object to the publication of lawfully obtained information? Is a state interest of the highest order being served when a judge denies jurors the right *to speak about their experiences*, cuts off the media's access to willing speakers, or forbids communication among prosecutors long after the judge's control over these participants in the court system has terminated?

Far too often, lower federal and state courts are failing properly to apply the Supreme Court's state interest of the highest order doctrine and, thus, are failing to follow precedent that strongly protects individual civil liberties, particularly in the First Amendment context. Part of this dearth of application of the state interest of the highest order doctrine may stem from the confusion of lower courts when it comes to the application of the doctrine. Many courts confuse the doctrine with traditional strict scrutiny[11] and, because strict scrutiny is

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[7] *See* U.S. CONST. amend I. The full text of the First Amendment to the United States Constitution states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacefully to assemble, and to petition the government for a redress of grievances." *Id.*

[8] 443 U.S. 97 (1979).

[9] 491 U.S. 524 (1989).

[10] *Florida Star*, 491 U.S. at 541; *Daily Mail*, 443 U.S. at 103.

[11] *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-6, at 1451 (2d ed. 1988) (explaining strict scrutiny review).

often viewed as fatal to the governmental action under review,[12] choose not to apply the doctrine. Other courts apply the doctrine as if it were a mere balancing test, thereby according too little power to the doctrine and granting too much leeway to the government when it interferes with civil liberties. And far too many courts are hesitant to apply the state interest of the highest order doctrine beyond cases that are factually similar to *Daily Mail* and *Florida Star*, thereby failing to follow the Supreme Court's suggestion that the doctrine can be applied in a much broader array of civil liberties scenarios.

This Article explores the somewhat amorphous doctrine of state interest of the highest order first raised by United States Supreme Court Chief Justice Warren E. Burger in the landmark First Amendment free exercise of religion opinion *Wisconsin v. Yoder*.[13] Justice Thurgood Marshall invoked the doctrine again in his powerful dissent in *Regents of the University of California v. Bakke*.[14] The Court applied state interest of the highest order as the definitive protection of the media from punishment for publishing truthful information lawfully obtained in Justice Marshall's majority opinion in *Florida Star*. Chief Justice William H. Rehnquist has since applied the doctrine in opinions covering factually diverse situations.

Part II of this Article explores the evolution of the doctrine from its genesis in *Yoder* through its apotheosis as the majority's rule in *Daily Mail* and *Florida Star*. Part III breaks down the doctrine into its component parts in an effort to ascertain the meaning of "state interest of the highest order" by analyzing what interests have been found sufficient and insufficient to meet the doctrine's standards and by scrutinizing the requirements of the doctrine's narrow tailoring prong. Part IV chronicles the often inconsistent efforts of lower courts to apply the state interest of the highest order doctrine, which has been invoked as a variant on the rational basis test and as a euphemism for traditional strict scrutiny. Part IV also outlines a number of lower court decisions that prescribe the proper application of the doctrine as a strong due process standard to protect civil liberties, and discusses opinions of the Supreme Court that suggest ways in which the doctrine should be extended to safeguard First Amendment liberties. Part V explores the somewhat erratic jurisprudence and varying standards applied to justify restrictions on First Amendment speech in the courtroom in order to serve the govern-

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[12] *See* Fullilove v. Klutznick, 448 U.S. 448, 519 (1990) (Marshall, J., concurring) (characterizing strict scrutiny review as "strict in theory, but fatal in fact").

[13] 406 U.S. 205 (1972).

[14] 438 U.S. 265, 387 (1978) (Marshall, J., dissenting).

ment's interest in justice. Part VI explores in greater detail the recent unsettling court-enforced speech restrictions discussed above and contends that such decisions are unjustifiable intrusions on fundamental speech liberties protected by the First Amendment. Part VI also proposes, following the *Florida Star* rationale, that government actors should be held to a single, unifying due process standard — requiring a state interest of the highest order and no other means to serve that interest — before *any* impairment by the government of *the content* of speech may be justified. Part VII concludes that only by consistently applying the state interest of the highest order doctrine can courts assure that First Amendment liberties are adequately protected from impairment by any branch of the government.

II. STATE INTEREST OF THE HIGHEST ORDER: GENESIS AND EVOLUTION OF A DUE PROCESS STANDARD

The state interest of the highest order doctrine was born and developed through a series of opinions authored by Chief Justice Burger and Justice Marshall in the 1970s and 1980s. Although neither Justice defined precisely the meaning of the phrase, the manner in which they invoked and applied the doctrine suggests that they intended it to provide extraordinary protection of First Amendment liberties by putting a great onus on the government to justify any impairment of expressive liberties and thus requiring the government to demonstrate a need to further a state interest of the highest order addressed by the narrowest possible means to serve that interest. The context in which the doctrine was invoked also strongly suggests that it was intended as a unifying force to simplify judicial scrutiny of government behavior that implicates expressive liberty interests.

Chief Justice Burger coined the phrase "interests of the highest order" in the Supreme Court's landmark 1972 decision of *Wisconsin v. Yoder*,[15] in which the Court invalidated a state law that required all children to attend high school despite their parents' strong religion-based aversion to secondary school education.[16] The plaintiffs, Amish parents, contended that the state's compulsory education law resulted in an impairment of their constitutionally secured right to the free exercise of religion.[17] The Chief Justice, in writing that the law

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[15] 406 U.S. 205 (1972).

[16] *See Yoder*, 406 U.S. at 215.

[17] *See id.* at 208-09. The plaintiffs invoked the First Amendment's Free Exercise Clause as a bar to state-required secondary school education. *See id.* The Amish parents were charged, tried, and convicted of breaking the state's mandatory education law and were fined five dollars each as a result. *See id.* at 208. They contended

was unconstitutional, explained that only "interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[18]

The Court conceded that the interest in assuring public education of the young was a legitimate and substantial interest — one of "paramount responsibility" that "ranks at the very apex of the function of a State," yet the Court stopped short of declaring that interest to be one *of the highest order.*[19] Suggesting the magnitude that would be required before a state interest could trump free exercise of religion rights, the Court declared that "however strong the State's interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests."[20]

The Court found that the state's interest in education was already adequately served by requiring Amish youngsters to attend school through the eighth grade and allowing their further education to be assured through home schooling and vocational training within the Amish community, such that the children would be adequately educated and trained to become successful participants in their community.[21] Thus, the Court did not actually decide the magnitude of the state's asserted interest in education, but based its decision on a finding that the interest in education was "otherwise served" by allowing Amish teenagers to receive vocational education at home and within the Amish community.[22]

The language used in *Yoder* suggests that the First Amendment erects a powerful bar to state action that impairs the free exercise of religion even when the state's intentions are salutary, noble, and vital.[23] The state must show not only that it has a paramount interest

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at trial that forcing their children to attend high school offended their religious practices, which included home schooling and hands-on vocational education in the Amish community. *See id.* at 209-10. The insular Amish community maintained a separate existence from mainstream society and believed that this separateness was essential to their way of life, to practicing their faith, and to their salvation. *See id.* at 210.

[18] *Id.* at 215. The Court did not speak in terms of strict scrutiny or "compelling state interests." Rather, it announced a new standard for heightened scrutiny of governmental actions that impair the free exercise of religion and the prerogatives of parenthood. *See id.*

[19] *See id.* at 213, 215.

[20] *Id.* at 215.

[21] *See id.* at 236.

[22] *See Yoder*, 406 U.S. at 236.

[23] *See id.* at 220-21. The Court recognized the right and obligation of the state to exercise its police power where needed to assure the safety, health, and general welfare of the citizenry, but qualified that "there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the

that must be served regardless of any resulting impairment of religious liberty, but it must also demonstrate that it has no option but to impair religious liberty in order to serve that interest.

It is significant to note that Chief Justice Burger cited no authority for the state "interests of the highest order" standard he invoked.[24] Rather, he applied the terminology after having cited several of the Supreme Court's landmark cases addressing the religion clauses of the First Amendment.[25] The Chief Justice synthesized the various standards applied in the Court's religion clauses precedents into a sole, unified precept represented by the state interest of the highest order doctrine, stating: "The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[26] The Chief Justice clearly intended this standard to draw in and apply the spirit of those prior religion clauses cases and to simplify the analysis by putting the onus on the state to justify its impairment of protected liberties through demonstrating a state interest of the highest order that cannot be otherwise served without impacting a constitutional liberty.

The phrase "state interest of the highest order" was invoked in Justice Marshall's dissenting opinion in *Regents of the University of California v. Bakke*.[27] In *Bakke*, the Court invalidated a state university medical school's special minority set-aside admissions program that assured that seats in each entering class were reserved for minority students.[28] The Court examined the state's admissions policy under

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State to control, even under regulations of general applicability." *Id.* at 220. Regarding such laws of general applicability, the Court noted that a "regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." *Id.* The Court also rejected the state's assertion that its interest in assuring education of all youngsters until the age of 16 was "so compelling that even the established religious practices of the Amish must give way." *Id.* at 221. Because "fundamental claims of religious freedom" were implicated, the Court said it "cannot accept such a sweeping claim" by the state and must instead "searchingly examine the interests that the State seeks to promote by its requirement . . . and the impediment to those objectives that would flow from recognizing the claimed Amish exemption." *Id.*

[24] *See id.* at 215.

[25] *See id.* at 214-15 (citing Tilton v. Richardson, 403 U.S. 672 (1971); Lemon v. Kurtzman, 403 U.S. 602 (1971); Everson v. Board of Educ., 330 U.S. 1, 18 (1947)).

[26] *Id.* at 215.

[27] 438 U.S. 265, 387 (1978) (Marshall, J., dissenting).

[28] *See Bakke*, 438 U.S. at 272. Bakke, a white male, sought a declaration that the University of California at Davis's medical school admission procedure, which reserved 16 out of 100 seats for minority applicants, was a constitutionally invalid denial of equal protection of the laws after he was denied admission to the medical school. *See id.* at 276-79. The trial court declared the university's admission practice

strict scrutiny because the program made distinctions based on race and, therefore, was "inherently suspect."[29] The Court concluded that the university may consider the race of an applicant only as one of a number of factors considered in the admissions process, but not as the sole factor determining any applicant's acceptance or rejection for a seat in an incoming class.[30]

In his dissent, Justice Marshall argued that the Court was incorrect in applying strict scrutiny to the university's admissions policy aimed at eradicating racial discrimination against minorities.[31] Rather, the Justice argued that the university's policy should be analyzed under a slightly more deferential standard, akin to intermediate scrutiny, because of the remedial nature of the policy and the magnitude of the state's interest in erasing the nation's sorry history of governmental discrimination against African-Americans.[32] Characterizing that interest, Justice Marshall asserted that

> [i]n light of the sorry history of discrimination and its devastating impact on the lives of Negroes, bringing the Negro into the mainstream of American life should be a state interest of the highest order. To fail to do so is to ensure that America will forever remain a divided society.[33]

Because of the highest order magnitude of that state interest at stake, Justice Marshall believed that a race-conscious admissions pol-

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invalid, but did not require Bakke's admission. *See id.* at 279. The California Supreme Court affirmed, but ordered the university to admit Bakke. *See id.* at 279-81.

[29] *See id.* at 291 (citing Korematsu v. United States, 323 U.S. 214, 216 (1944)).

[30] *See id.* at 314-20. The majority recognized that diversity of the student body was a compelling interest, but ruled that the exclusion of Bakke due to the special admissions program was not necessary to achieve diversity. *See id.* The Court also ordered that Bakke be admitted because the university could not show that absent the special admissions program, Bakke would not have been admitted. *See id.* at 320.

[31] *See id.* at 396-97 (Marshall, J., dissenting). Justice Marshall recapped the history of official racial discrimination against blacks in the United States, from the days of slavery through the post-Reconstruction period, and up to the segregation of schools and public accommodations that lasted until the 1960s. *See id.* at 387-96 (Marshall, J., dissenting). The Justice remarked that the Equal Protection Clause was placed in the Constitution to combat the pernicious history of racial discrimination in America, not to prevent efforts to eradicate it through affirmative action. *See id.* at 396 (Marshall, J., dissenting). Justice Marshall stated:

> I do not believe that the Fourteenth Amendment requires us to accept that fate. Neither its history nor our past cases lend any support to the conclusion that a [state-owned] university may not remedy the cumulative effects of society's discrimination by giving consideration to race in an effort to increase the number and percentage of Negro doctors.

Id.

[32] *See id.* at 398-400 (Marshall, J., dissenting).

[33] *Id.* at 396 (Marshall, J., dissenting).

icy should be upheld under intermediate scrutiny, thus surviving an equal protection attack under the Fourteenth Amendment.[34]

From the context in which the phrase is used, it seems that Justice Marshall believed that government should make the uplifting of blacks to a level equal to that of whites a paramount state priority. To serve that paramount interest — a state interest of the highest order — then, the Justice would tolerate impairment of liberties such as the equal protection rights of whites.

The state interest of the highest order doctrine has seen its strongest application in cases involving efforts to sanction the media for disseminating sensitive information that the state endeavored to keep secret. In *Smith v. Daily Mail Publishing Co.*,[35] another opinion written by Chief Justice Burger, the Court invoked the doctrine to nullify a state's effort to punish a newspaper for publishing the name of a juvenile offender.[36] For the first time in the free speech context, the Court promulgated the doctrine that the state may not punish the publication of lawfully obtained truthful information "absent a need to further a state interest of the highest order."[37] The Court found that the state's interest in protecting the confidentiality of a juvenile offender and thereby fostering rehabilitation was "not sufficient to justify application of a criminal penalty" to the media.[38] In addition, the Court found that the state's chosen means of assuring its stated interest were constitutionally impermissible because the statute restricted its penal reach to print media and did not restrict the publication of the juvenile offender's name by the electronic media.[39] In sum, the Court concluded that "even assuming the statute served a state interest of the highest order, it does not accomplish its stated purpose."[40]

Interestingly, the Chief Justice did not cite his own prior invocation of the highest order language in *Yoder*, nor did he refer to Justice Marshall's dissent in *Bakke*. Rather, much like the analytical framework he employed in *Yoder*, the Chief Justice reviewed several cases tangentially related to the issue and synthesized from those cases as a general precept the jurisprudential conclusion that the

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[34] *See Bakke*, 438 U.S. at 402 (Marshall, J., dissenting).

[35] 443 U.S. 97 (1979).

[36] *See id.* at 102.

[37] *Id.* at 103.

[38] *Id.* at 104.

[39] *See id.* at 104-05. In fact, three radio stations had already broadcast the name of the suspected juvenile offender before the *Daily Mail* published the name. *See id.* at 105.

[40] *Id.* at 105.

state's action was constitutionally impermissible unless it was directed toward serving a state interest of the highest order.[41] After reviewing cases that invalidated state efforts to sanction the media's publication of information relating to judicial misconduct hearings,[42] a rape victim's identity,[43] and a juvenile offender's name after it had been revealed in an open public hearing,[44] the Chief Justice announced the general rule as follows: "None of these opinions directly controls this case; however, all suggest strongly that if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order."[45]

This mode of analysis is clearly reminiscent of the Chief Justice's prior analytic framework employed in deciding *Yoder*. In *Yoder*, the Chief Justice similarly cited a litany of cases that had come before and distilled their essential meaning into a single, unified standard that required the state to demonstrate a need to further a state interest of the highest order before it may justify impairing a constitutionally protected liberty.[46] While *Daily Mail* may fail to cite *Yoder* as its predecessor, the Chief Justice employed an identical approach to analyzing the relevant precedents in both cases and in each case invoked the state interest of the highest order doctrine as the unifying standard that incorporated the essence of the relevant case law. *Daily Mail*, and the unifying state interest of the highest order standard it invoked, is clearly the jurisprudential progeny of *Yoder*. The rule announced in the two cases is identical and it accomplishes the same function: it raises *the bar* that the state must meet in order to justify any impairment of constitutionally protected expressive liberties.

The strong protection afforded the media under the *Daily Mail* rule was reaffirmed a decade later in another opinion written by Justice Marshall. In his majority opinion in *Florida Star v. B.J.F.*,[47] Justice Marshall noted that "where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be im-

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[41] *See Daily Mail*, 443 U.S. at 103.

[42] *See id.* at 102 (citing Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 838 (1978)).

[43] *See id.* at 102-03 (citing Cox Broad. Corp. v. Cohn, 420 U.S. 469, 495 (1975)).

[44] *See id.* at 103 (citing Oklahoma Publ'g Co. v. District Court, 430 U.S. 308 (1977)).

[45] *Id.* at 103.

[46] *See supra* notes 25-26 and accompanying text (discussing Chief Justice Burger's analytic framework leading up to the enunciation of the highest order standard in *Yoder*).

[47] 491 U.S. 524 (1989).

posed, if at all, only when narrowly tailored to a state interest of the highest order . . . ."[48] At issue in *Florida Star* was a state statute that imposed criminal liability on the media for publishing the name of a rape victim.[49] The Court questioned the legitimacy of the state's asserted interest in protecting the anonymity of a rape victim, but based its decision invalidating application of the statute on its facial under-inclusiveness, since by punishing only media publication of the victim's name and not all other publications of it, such as word of mouth, the statute did not serve its own ends.[50] The Court also noted that the state clearly had alternative means to serve its stated purpose, since it was the state's own failure to police itself properly that led to the release of the sensitive information to the media.[51] Justice Marshall explained that allowing the state to punish the media for publishing certain truthful information could foster timidity and self-censorship by the media and impose an "onerous" obligation of requiring the media to sift through information released by the government to assure that nothing "arguably unlawful" is mixed in with the information released.[52]

Yoder, *Daily Mail*, and *Florida Star* all apply the state interest of the highest order standard as a strong protection of expressive liberties against governmental regulations that curtail those liberties. But none of these cases defines precisely the meaning of the doctrine, except through negative implication. *Yoder* states that the government's interest in compulsory education is not of a sufficiently high order to trump an individual's right to the free exercise of religious liberty. *Daily Mail* and *Florida Star* state that the government's interests in confidentiality of the names of juvenile offenders and rape victims are not sufficient interests to override the freedom of the press, and that even if they were, the statutes at issue were not adequately tailored to serve the state's interests so as to withstand constitutional scrutiny.

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[48] *Id.* at 541.

[49] *See id.* at 524. The *Florida Star* published the victim's full name in its weekly police blotter section after a sheriff's department had improperly released the name to the media in the form of an incident report describing the assault. *See id.* at 527. The newspaper sent a reporter-trainee to retrieve the police blotter information and the reporter wrote up the information fully identifying the victim. *See id.* Although the newspaper had an internal policy against publishing the names of sexual assault victims, it did not edit out the identifying information and it published an article bearing the victim's full name. *See id.* at 528.

[50] *See id.* at 541.

[51] *See id.* at 534-35.

[52] *See id.* at 535-36.

Both the *Daily Mail* and *Florida Star* Courts stressed that they were resolving narrow issues based on the facts before them, thus it is not surprising that the cases do not promulgate a broad rule or give helpful examples of what order of state concerns would qualify as interests of the highest order sufficient to justify impairment of First Amendment liberties.[53] Justice Marshall's dissent in *Bakke* suggests only what one state interest of the highest order could be, a view with which a majority of the Court eventually agreed in the context of public accommodations laws intended to eradicate discrimination.[54] Although Chief Justice Burger and Justice Marshall applied this terminology in rendering decisive judgments in the cases before them, neither defined precisely the ambit of the doctrine's reach and meaning.[55]

In *Yoder*, *Daily Mail*, and *Florida Star*, the Justices writing the majority opinions concluded that the asserted state interests were not interests of the highest order sufficient to justify impairment of protected expressive liberties. Yet beyond proclaiming that the govern-

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[53] *See Florida Star*, 491 U.S. at 541; Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 105-06 (1979). The *Florida Star* Court stated:

> Our holding today is limited. We do not hold that truthful publication is automatically constitutionally protected, or that there is no zone of personal privacy within which the State may protect the individual from intrusion by the press, or even that the State may never punish publication of the name of a victim of a sexual offense. We hold only that where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order, and that no such interest is satisfactorily served by imposing liability . . . under the facts of this case.

Florida Star, 491 U.S. at 541. The *Daily Mail* Court explained:

> Our holding in this case is narrow. There is no issue before us of unlawful press access to confidential judicial proceedings; there is no issue here of privacy or prejudicial pretrial publicity. At issue is simply the power of a state to punish the truthful publication of an alleged juvenile delinquent's name lawfully obtained by a newspaper. The asserted state interest cannot justify the statute's imposition of criminal sanctions on this type of publication.

Daily Mail, 443 U.S. at 105-06.

[54] *See infra* notes 145-52 and accompanying text (discussing Roberts v. United States Jaycees, 468 U.S. 609 (1984), and its progeny).

[55] *See* Shulman v. Group W Prods., Inc., 955 P.2d 469, 480 (Cal. 1998). The court lamented:

> [T]he *Florida Star* decision provides little general guidance as to what is, and is not, "a matter of public significance" — what is newsworthy, in other words — or as to when, if ever, the protection of private facts against public disclosure should be considered a sufficiently important state interest to justify civil liability pursuant to the common law tort.

Id.

ment's interests in education and protecting the privacy of juvenile offenders and rape victims did not meet the doctrine's standards, the Justices offered little in the way of instructive guidelines by which to gauge just what governmental interests are of such vitality as to qualify as state interests of the highest order.

III. FLESHING OUT THE STANDARD: CASE LAW APPLICATION ENDEAVORS TO DEFINE THE DOCTRINE

A. State Interests of the Highest Order: What They Are Not

An effort to put meat on the bare bones of the phrase "state interest of the highest order" requires an eye for jurisprudential implication and an ear for negative inferences. The jurisprudence of the state interest of the highest order doctrine has often produced a clearer picture of what a state interest of the highest order is *not*, rather than what it *is*.

Courts applying the state interest of the highest order doctrine have, like the *Yoder* and *Florida Star* Courts, provided negative definitions of the doctrine by declaring what governmental interests do not meet its standards. Protecting the integrity of the judiciary from false allegations[56] and preserving the confidentiality of attorney misconduct hearings involving judges and lawyers,[57] for example, are not

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[56] *See* Doe v. Florida Judicial Qualifications Comm., 748 F. Supp. 1520, 1528 (S.D. Fla. 1990). The plaintiff in this case filed a complaint under the fictitious name "Doe" with the Florida Judicial Qualifications Committee (FJQC) after he observed a judge openly discriminate against a person diagnosed with AIDS. *See id.* at 1522. The FJQC informed Doe that, pursuant to the Florida Constitution, the fact that the complaint was filed against a judge made it confidential. *See id.* Doe brought suit for a determination of whether the constitutional provision in question violated the Free Speech Clause of the First Amendment of the United States Constitution. *See id.* at 1523. The federal district court invalidated the confidentiality requirement of the Florida Constitution, noting that it was not a valid time, place, and manner restriction on speech, and found that the state's interest in protecting judges was not compelling enough to support the provision. *See id.* at 1525, 1529. The court found that the provision was overbroad because it applied to truthful complaints as well as to false ones. *See id.* at 1527. Citing *Florida Star*, the court declared that the FJQC could only support the provision by demonstrating a "state interest of the highest order." *Id.* at 1528; *see also* Butterworth v. Smith, 494 U.S. 624, 632 (1990) ("The publication of information relating to alleged governmental misconduct . . . has traditionally been recognized as lying at the core of the First Amendment."); Landmark Communications v. Virginia, 435 U.S. 829, 838 (1978) (finding that the publication of information about judicial disciplinary proceedings "lies near the core of the First Amendment").

[57] *See* Lence v. Hagadone Inv. Co., 853 P.2d 1230, 1235-36 (Mont. 1993), *overruled by* Sacco v. High Country Indep. Press, Inc., 896 P.2d 411 (1995). In *Lence*, a newspaper printed a story about the Montana Supreme Court's probe into allega-

state interests of the highest order sufficient to warrant closing all misconduct proceedings and impairing the public's and the media's First Amendment interests. Additionally, the justice system's interests in managing litigation and preserving a confidentiality agreement regarding pretrial materials are not state interests of the highest order sufficient to bar the litigants' disclosure of information obtained independent from the discovery process.[58]

Because *Daily Mail* and *Florida Star* concerned the media's right to publish truthful information lawfully obtained, much of the case law applying the state interest of the highest order doctrine has addressed the tension between the state's interest in restricting the flow of information it described as potentially harmful and the media's right to report information it deemed to be newsworthy. Courts have usually found that the asserted state interests were not great enough to trump the public's and the media's First Amendment rights to acquire and disseminate newsworthy information.

Among the governmental interests found not to rise to the level of a state interest of the highest order in this state-versus-the-media context are: compensating for the emotional distress caused by an inaccurate media report,[59] authorizing the selective prohibition of

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tions of fraud against an attorney, as well as a story regarding the summons issued to him for a violation of a building code. *See id.* at 1232-33. Lence sued, claiming that the newspaper intentionally and negligently inflicted emotional distress. *See id.* at 1232. Quoting *Florida Star*, the Montana Supreme Court held that the First Amendment shields the press from liability for publishing truthful information because the public's interest in learning about alleged attorney misconduct outweighed the state's interest in maintaining the confidentiality of the attorney misconduct commission's investigation. *See id.* at 1236, 1239.

[58] *See In re* PEPCO Employment Litig., No. 86-0603, 1992 WL 115611, at *8 (D.D.C. May 8, 1992) (finding that a court cannot prevent disclosure of information obtained from outside sources "absent a compelling state interest of the highest order").

[59] *See* Upchurch v. New York Times Co., 431 S.E.2d 558, 562 (S.C. 1993). The dispute in *Upchurch* stemmed from a newspaper report that police suspected a local resident's death was due to cocaine use. *See id.* at 560. Survivors of the decedent brought an action for intentional infliction of emotional distress and the trial court held that the newspaper enjoyed First Amendment immunity from such suits. *See id.* The South Carolina Supreme Court disagreed with the trial court's finding of absolute press immunity based on the First Amendment, but held that the paper was protected from liability in this instance. *See id.* at 561-62. Citing *Florida Star*, the court stated that "when a newspaper (1) lawfully obtains (2) truthful information about (3) a matter of public significance, liability may be imposed only if it serves a need to further a state interest of the highest order." *Id.* at 561 (citing *Florida Star*, 491 U.S. at 536-37). *But see* Miller v. National Broad. Co., 232 Cal. Rptr. 668, 685 (Ct. App. 1986) (holding that the media's potential liability for intentional infliction of emotional distress stemming from its lack of sensitivity in filming and broadcasting the dying moments of a man's life without regard to the decedent wife's protestations was a jury question).

indecent speech,[60] securing a public accident scene when a news photographer's presence would not interfere with police activity,[61] protecting the confidentiality of a rape victim's name,[62] protecting the

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[60] *See* Alliance for Community Media v. FCC, 10 F.3d 812, 831 (D.C. Cir. 1993), *judgment vacated*, 15 F.3d 186 (D.C. Cir. 1994) (en banc). The Alliance for Community Media, a group of cable programmers, challenged an FCC order regulating indecent programming on cable access channels. *See id.* at 814. The court held that the First Amendment neither permits the government to ban indecent programming nor allows it to empower cable operators to effect such a ban. *See id.* at 831. The court found that the Cable Communications Policy Act was under-inclusive because it prohibited indecent programming on leased channels while it failed to regulate commercial channels. *See id.* at 828-29. The court analogized the FCC's restrictions, which forced private cable operators to abdicate editorial control over cable access channels, to *Florida Star* — insofar as it considered the regulation to be a content-based regulation that it selectively applied to some speech while failing to consider others, thus punishing the cable operators while leaving similarly situated broadcasters alone. *See id.* at 826-27. The court concluded that the government may not do so absent a state interest of the highest order. *See id.* On rehearing, an en banc panel of the District of Columbia Circuit sustained the Act's provisions. *See* 56 F.3d 105, 110 (D.C. Cir. 1995).

[61] *See* Connell v. Town of Hudson, 733 F. Supp. 465, 471 (D.N.H. 1990) (finding that a public accident scene did not present the type of sensitive criminal information warranting safeguarding from public inspection and that the government may impair the media's news gathering "'only when narrowly tailored to a state interest of the highest order'") (quoting *Florida Star*, 491 U.S. at 541). In addition to its asserted interests in securing a crime scene, the Town of Hudson argued that its prohibition on media access was a justifiable attempt to protect the privacy interests of the accident victim. *See id.* The *Connell* court rejected that claim, noting, "The Court does not accept defendants' paternalistic views of police authority." *Id.*

[62] *See* Doe v. Berkeley Publishers, 496 S.E.2d 636, 636 (S.C. 1998) (reversing an appellate court's finding that a jury question existed under *Florida Star* as to the newsworthiness of publishing the name of a victim of prison rape); State v. Globe Communications, 648 So. 2d 110, 112 (Fla. 1994); Macon Tel. Publ'g Co. v. Tatum, 436 S.E.2d 655, 657-58 (Ga. 1993).

In a lawsuit connected to the much-publicized William Kennedy Smith rape trial, a newspaper was criminally charged with violating a Florida statute that prohibited the release of information identifying a rape victim. *See Globe Communications*, 648 So. 2d at 111. Unlike the situation in *Florida Star*, the media here did not obtain the victim's name from police, but rather through its own investigations. *See id.* Based on the *Florida Star* standard, the state supreme court held that prosecution of the media violated the press's freedom of speech under the First Amendment because the statute was not narrowly tailored to advance a state interest of the highest order. *See id.* at 112. The state interests asserted — protecting the privacy and safety of rape victims and encouraging rape victims to come forward — were determined not to be weighty enough to justify the automatic imposition of liability on the press without adopting a fact-sensitive, case-by-case analysis. *See id.* Ironically, strict application of the statute at issue and its automatic liability standard could have resulted in the prosecution of the rape victim herself because the victim, Patricia Bowman, publicly announced her identity as soon as the trial was complete in an effort to remove the sense of stigma that she believed stemmed from secretive treatment of her identity during the highly publicized trial. *See* Editorial, *What's-Her-Name*, N.J. L.J., Feb. 17, 1992, at 14 (quoting Patricia Bowman announcing her identity and proclaiming, "I am not a blue blob. I'm a person. I have nothing to be ashamed of," in

privacy of juveniles involved in the courts when identifying information had already been released prior to judicial confidentiality orders,[63] keeping secret the names or identities of jurors when the information is otherwise available,[64] protecting privacy interests of

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reference to the blue graphic CNN television used to mask the victim's face during trial coverage).

At issue in *Macon Telegraph* was a state rape shield statute similar to that at issue in *Florida Star*, which forbade publication of the name of a sexual assault victim. *See Macon Telegraph*, 436 S.E.2d at 657. Tatum had shot and killed an intruder in her home when he attempted to rape her. *See id.* The newspaper obtained her name from the police and ran a story that divulged her name and address. *See id.* Tatum sued for invasion of privacy under the rape shield law. *See id.* The trial court awarded Tatum damages under a common law privacy tort. *See id.* The appellate court affirmed, distinguishing *Florida Star* on the grounds that, here, police did not issue a news release containing Tatum's name, and liability was derived from the common law tort of invasion of privacy, not based on negligence per se for violation of Georgia's rape shield statute. *See id.* The Georgia Supreme Court invalidated the jury's damage award for Tatum, holding that, under *Florida Star*, a news organization that legally receives correct information may not be punished except to advance a state interest of the highest order. *See id.* at 657-58; *see also* Star Telegram Inc. v. Doe, 915 S.W.2d 471, 473 (Tex. 1995) (applying the *Florida Star* state interest of the highest order standard to conclude that a newspaper's publication of newsworthy identifying information that did not specifically name the victim was constitutionally protected and noting that requiring the press to contemplate every instance of burden on victims would have a chilling effect on its ability to inform the public); *cf.* Ross v. Midwest Communications, Inc., 870 F.2d 271, 275 (5th Cir. 1989) (finding that a rape victim had no invasion of privacy cause of action against a television station for using her first name and a picture of her home in a television documentary about rape when the information was newsworthy, but declining to apply *Daily Mail* to decide the media's claim of an absolute right to publish truthful information lawfully obtained from the public record).

[63] *See* Jacksonville Television, Inc. v. Florida Dep't of Health & Rehabilitative Servs., 659 So. 2d 316, 317-18 (Fla. Dist. Ct. App. 1994) (recognizing a state interest of the highest order in protecting the privacy rights of children, but finding that preventing the release of an interview recorded prior to the issuance of a protective order was an impermissible prior restraint on speech); *In re* M.B., 484 N.E.2d 1154, 1159-60 (Ill. App. Ct. 1985) (finding that although the protection of minors may be a state interest of the highest order, such interest does not justify imposing a prior restraint on the media's publication of a child offender's name when the identity and address of the juvenile had been released prior to the entrance of the court's protective order). *But see In re* Minor, 595 N.E.2d 1052, 1057-58 (Ill. 1992) (upholding a juvenile court's exclusion of a reporter from a juvenile hearing when the state's proceedings are closed as a rule, and finding that in this circumstance, the state's interest in protecting the rights of juveniles overrides the press's newsgathering rights under the First Amendment).

[64] *See* State *ex rel.* National Broad. Co. v. Court of Common Pleas of Lake County, 556 N.E.2d 1120, 1129-30 (Ohio 1990) (discussing state interest of the highest order and ruling that a court may not prohibit a television station from airing names and photographs of jurors when such information was available to anyone attending the trial absent imperative circumstances and no other recourse to serve the government's interest); Commonwealth v. Genovese, 487 A.2d 364, 369 (Pa. Super. Ct. 1985) (holding that a court's prohibition of the press's publication of the names of jurors was an impermissible prior restraint that did not serve a state interest of the

accident victims when the accident was of public interest,[65] safeguarding jury deliberations through a gag order on interviews well after conclusion of the trial,[66] protecting the confidentiality of a state bar association's evaluation of a potential judicial appointee,[67] and enforcing a wiretap statute when the media lawfully received information that was unlawfully obtained by another.[68]

The *Florida Star* analysis, which has not been limited to cases of media defendants, has been applied to find that protecting a tenant's right to obtain rental housing is an insufficient state interest to justify impairing a credit agency's right to speak the truth,[69] while a landlord's right to privacy is insufficient to justify punishing a neighborhood association for publishing the landlord's address and real estate holdings.[70] Several courts have found that a state's interest in eradicating discrimination in housing against unmarried cohabitants was not a state interest of the highest order sufficient to trump the religious free exercise of a landlord who denied them housing.[71]

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highest order when the names were available to anyone attending the trial).

[65] *See* Shulman v. Group W Prods., Inc., 955 P.2d 469, 480-81, 497 (Cal. 1998) (discussing but not applying *Florida Star*, and determining that auto accident victims who were trapped inside their overturned vehicle after it went off the highway had no invasion of privacy action against a television station that filmed their extrication, rescue, and helicopter transport to a hospital).

[66] *See* Indiana v. Heltzel, 552 N.E.2d 31, 34 (Ind. 1990) (finding that news reporters may not be charged with contempt of court for soliciting information regarding grand jury deliberations from jurors two years after the proceedings had ended, absent a need to further a state interest of the highest order).

[67] *See* Nicholson v. McClatchy Newspapers, 223 Cal. Rptr. 58, 62 (Ct. App. 1986). Of note, the information gained by the media and reported in *McClatchy* was not gleaned from public records, as was the information released in *Daily Mail* and *Florida Star*, but was secured from the media's own investigations. *See id.* at 59-60. The court applied the *Daily Mail* standard to protect the media's news-gathering process, noting that "a free press need not rely upon the sufferance of [the] government to supply it with information." *Id.* at 62 (citing Smith v. Daily Mail, 443 U.S. 97, 103-04 (1979)).

[68] *See* Boettger v. Loverro, 587 A.2d 712, 718 (Pa. 1991) (finding that publishing gambling-related information obtained from a wiretap was not protected by a state interest of the highest order).

[69] *See* U.D. Registry, Inc. v. California, 40 Cal. Rptr. 2d 228, 232 (Ct. App. 1995) (holding that a state statute that prohibited release of information about a potential tenant's history of detainer actions impermissibly infringed on the reporting agency's freedom of speech under the *Florida Star* test because it did not serve a state interest of the highest order by prohibiting disseminating publicly available information — especially where the information was made public by the state itself).

[70] *See* Near E. Side Community Org. v. Hair, 555 N.E.2d 1324, 1335 (Ind. Ct. App. 1990) (noting that the information regarding the landlord was in public records and applying the *Florida Star* standard to protect the neighborhood organization from liability for communicating such truthful information that was lawfully obtained).

[71] *See* Smith v. Fair Employment and Hous. Comm'n, 30 Cal. Rptr. 2d 395, 403-04

B. State Interests of the Highest Order: What They May Be

While the United States Supreme Court's instruction on state interest of the highest order has primarily been by indirection, telling us more frequently what do *not* qualify as state interests of the highest order rather than what *do*, there have been indications in the Court's case law of what magnitude of governmental interest is sufficiently vital to justify suppressing *the content* of speech. In *Florida Star*, for example, the Court left open the possibility that certain governmental interests may be of such a magnitude that suppression of the First Amendment's guarantee of a free press may be justified.[72] In so doing, however, the Court pointed to just one such example of a state interest of the highest order: national security in times of war.[73] Citing the Depression-era case of *Near v. Minnesota ex rel. Olson*,[74] in which the Court hypothesized that "publication of the sailing dates of transports or the number and location of troops" during wartime could constitutionally be blocked, notwithstanding the First Amendment,[75] Justice Marshall suggested that only those governmental interests that speak to *the continued existence of the government itself* rise to the level of state interests of the highest order such that they may constitutionally override expressive liberties. It is difficult to imagine a state interest of an order greater than preserving national security during wartime,[76] thereby preserving the existence of the state itself,

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(Ct. App. 1994) (applying *Yoder* and holding that eradicating discrimination in housing against unmarried cohabitants is not a state interest of the highest order sufficient to "overbalance" a landlord's religious free exercise justification for exclusion), *aff'd in part, rev'd in part*, 913 P.2d 909, 929 (1996) (holding that the landlord's free exercise rights were not substantially burdened because she was not obligated to rent her apartment). *But see* Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 282, 284 (Alaska 1994) (finding that eradicating discrimination in housing against unmarried couples is a state interest of the highest order justifying interference with a landlord's asserted free exercise of religion claim). The *Swanner* court waxed eloquently about what interests rose to the highest order level: "Substantial threat to the public safety, peace, or order, or where there are competing state interests of the highest order." *See id.* at 281; *see also* Metropolitan Dade County Fair Hous. & Employment Appeals Bd. v. Sunrise Village Mobile Home Park, Inc., 485 So. 2d 865, 866 (Fla. Dist. Ct. App. 1986) (finding no state interest of the highest order in eradicating age discrimination in housing such that the state could not force a mobile home park reserved for elderly residents to accept a 29-year-old prospective tenant).

[72] *See* Florida Star v. B.J.F., 491 U.S. 524, 532 (1989).

[73] *See id.* (citing Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 716 (1931)).

[74] 283 U.S. 697 (1931).

[75] *See id.* at 716.

[76] *Cf.* Korematsu v. United States, 323 U.S. 214, 219-20 (1944) (upholding under traditional strict scrutiny analysis the race-based internment policy directed against Japanese-Americans in order to serve the "compelling" governmental interest of national security during World War II).

and it is telling indeed that Justice Marshall cited *no other example* of a state interest of sufficient magnitude to override expressive liberties. Plainly, to Justice Marshall, "state interest of the highest order" meant the very highest type of governmental interest, one that speaks to the continued existence of the state itself and one that, if it were not served, would jeopardize the continued existence of the state itself.

Other Supreme Court Justices have found that restrictions of First Amendment liberties were justified by governmental interests that, similarly, spoke to the structural integrity and continued operation of the state itself. For example, the Court found that punishing a federal judge's illegal disclosure of a wiretap was justified in order to serve the government's interest in the administration of the justice system.[77] In an ambiguous admixture of terminology[78] from both the highest order doctrine and the strict scrutiny standard, the Supreme Court has reasoned that state civil rights laws aimed at eradicating discrimination in public accommodations "plainly serve[] compelling state interests of the highest order."[79]

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[77] *See* United States v. Aguilar, 515 U.S. 593, 605-06 (1995). Respondent Aguilar, a United States District Court judge, was convicted of illegally disclosing a wiretap in violation of 18 U.S.C. § 2232(c) and attempted obstruction of justice under 18 U.S.C. § 1503 because he lied to FBI agents during a grand jury investigation. *See id.* at 595. On appeal, the Ninth Circuit reversed both convictions, holding that the respondent's behavior was not covered by the statutory language. *See id.* The United States Supreme Court affirmed the reversal of the § 1503 charge, but reinstated the conviction on the § 2232(c) wiretap disclosure charge. *See id.* at 606. Quoting *Daily Mail*, the Court noted that the government may not generally prevent people from disclosing information lawfully obtained absent a "'state interest of the highest order.'" *See id.* at 605 (quoting Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 103 (1979)). Noting that § 2232(c) only restricts disclosure to the extent that it would "obstruct, impede, or prevent" the government's interception through the wiretap at issue, however, the Court found that the government's interest in nondisclosure by officials, such as federal judges, who are in sensitive, confidential positions, is a sufficient state interest to justify a broad statutory construction that criminalized the judge's wrongful disclosure without running afoul of the First Amendment. *See id.* at 605-06.

[78] *See infra* notes 125-52 and accompanying text (discussing confusion of the state interest of the highest order doctrine with other due process standards).

[79] Roberts v. United States Jaycees, 468 U.S. 609, 624 (1984). The *Roberts* Court upheld enforcement of a Minnesota civil rights law that prohibited the national Jaycees from requiring two local chapters to exclude women. *See id.* at 628-29. The Court found that impairment of the right of free association "may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.* at 623; *see also* New York State Clubs Ass'n v. City of New York, 487 U.S. 1, 18 (1988) (upholding an anti-discrimination law encompassing private membership groups); Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 549 (1987) (finding that any potential infringement of the expressive freedom of Rotary members caused by admission of female members would be justi-

Lower courts similarly have ruled that eradicating discrimination through public accommodations laws is a state interest of the highest order.[80] It is perhaps somewhat ironic that Justice Marshall's "state interest of the highest order" terminology, first articulated in his dissent in *Bakke*, calling for recognition of the vital state interest in eradicating discrimination through affirmative action programs, has been extensively cited by Supreme Court majorities and many lower courts in upholding anti-discrimination legislation.[81] Efforts to en-

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fied by the promotion of the state's compelling interest in ending discrimination against women); Hishon v. King & Spalding, 467 U.S. 69, 78 (1984) (permitting a discrimination lawsuit under Title VII of the Civil Rights Act of 1964 against a law firm that refused to consider a woman for partnership and noting that while the First Amendment may not outlaw some private invidious discrimination, the right to discriminate has never been given affirmative constitutional protection); United States Power Squadrons v. State Human Rights Appeal Bd., 452 N.E.2d 1199, 1205-06 (N.Y. 1983) (rejecting a free association challenge to a state civil rights law requiring admission of women as squadron members and noting that "the constitution places no value" on private discrimination as a form of association entitled to affirmative constitutional protection). *See generally* Michael M. Burns, *The Exclusion of Women from Influential Men's Clubs: The Inner Sanctum and the Myth of Full Equality*, 18 HARV. C.R.-C.L. L. REV. 321 (1983); Douglas O. Linder, *Freedom of Association after* Roberts v. United States Jaycees, 82 MICH. L. REV. 1878 (1984).

[80] *See* Kiwanis Int'l v. Ridgewood Kiwanis Club, 627 F. Supp. 1381, 1389 (D.N.J. 1986) (applying New Jersey's Law Against Discrimination (LAD) to require inclusion of women in a quasi-public membership organization as serving a state interest of the highest order), *rev'd*, 806 F.2d 468, 477 (3d Cir. 1986) (holding that the organization was not a "place of public accommodation" within the meaning of the statute, thereby avoiding the constitutional issue); *see also* Dole v. Shenandoah Baptist Church, 899 F.2d 1389, 1398-99 (4th Cir. 1990) (finding equal employment opportunity for women and minorities is a compelling state interest of the highest order, hence it justifies any interference with free religious exercise resulting from application of the Fair Labor Standards Act); Dale v. Boy Scouts of Am., 308 N.J. Super. 516, 540, 706 A.2d 270, 283 (App. Div.) (holding that the LAD, which prohibits discrimination in public accommodations on the basis of sexual orientation, applies to the Boy Scouts and trumps the Boy Scouts's asserted First Amendment claim of a freedom of association right to exclude), *certif. granted*, 156 N.J. 381, 718 A.2d 1210 (1998); Lloyd Lions Club of Portland v. International Ass'n of Lions Clubs, 724 P.2d 887, 892 (Or. Ct. App. 1986) (holding that eradicating discrimination is a state interest of the highest order).

[81] *Compare* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 396 (1978) (Marshall, J., dissenting) (arguing that eradication of racial discrimination against African-Americans and "bringing the Negro into the mainstream of American life should be a state interest of the highest order") *and* Aiken v. City of Memphis, 37 F.3d 1155, 1178 (6th Cir. 1994) (Jones, J., dissenting) (asserting that eradication of racial discrimination in society is a state interest of the highest order and arguing that remedial affirmative action legislation benefiting minorities should therefore be subjected to intermediate scrutiny rather than strict scrutiny) *with Roberts*, 468 U.S. at 624; *Rotary Club of Duarte*, 481 U.S. at 549; *New York State Clubs*, 487 U.S. at 18; *and Ridgewood Kiwanis*, 627 F. Supp. at 1389. *But see* Hurley v. Gay, Lesbian, and Bisexual Group of Boston, 515 U.S. 557, 566 (1995) (finding that the state's interest in eradicating discrimination in public accommodations based on sexual orientation is an insufficient interest to trump the First Amendment speech rights of parade organiz-

force anti-discrimination legislation as a means of serving a state interest of the highest order have caused successive generations of First Amendment challenges as groups finding themselves required by law to admit members in a nondiscriminatory manner have asserted their right of freedom of expressive association in an effort to fend off sequential statutes outlawing discrimination based on race, sex, and, most recently, sexual orientation.[82]

State courts and lower federal courts applying the state interest of the highest order doctrine have not always required the government to demonstrate an interest of the magnitude suggested by Justice Marshall. Rather, they have usually found that an interest rises to the level of a state interest of the highest order when the asserted interest speaks to the administration of the government itself or the protection of highly sensitive personal privacy rights. For example, the Pennsylvania Supreme Court suggested that assuring the contin-

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ers who wished to exclude a gay, lesbian, and bisexual marching contingent from the Boston St. Patrick's Day Parade); Young v. Northern Ill. Conference of United Methodist Church, 21 F.3d 184, 185 (7th Cir. 1994) (noting that eradicating discrimination is a state interest of the highest order, but that "in a direct clash of 'highest order' interests, the interest in protecting the free exercise of religion embodied in the First Amendment to the Constitution prevails over the interest in ending discrimination embodied in Title VII"). *Cf.* Wisconsin v. Yoder, 406 U.S. 205, 231 (1972) (leaving open the question of whether education is a state interest of the highest order, but holding that requiring Amish children to attend public high school against their religious objections was not the sole means of attaining the interest in assuring adequate education).

[82] *See generally* Eunice A. Eichelburger, Annotation, *Civil Rights Laws Prohibiting Organization's Membership Restrictions as Violating Organization's or its Members' Rights of Association Under Federal Constitution's First Amendment*, 82 L. Ed. 2d 1040 (1986) (recapping United States Supreme Court and state cases considering the free association implications of enforcing civil rights and public accommodations laws in the membership selection of private or quasi-public organizations); Donald T. Kramer, Annotation, *Construction and Application of § 201(e) of the Civil Rights Act of 1964, Excluding from the Act's Coverage Private Clubs and Other Establishments not in Fact Open to the Public*, 8 A.L.R. FED. 634 (1971); John E. Theuman, Annotation, *Exclusion or Expulsion from Association or Club as Violation of State Civil Rights Act*, 38 A.L.R. 4th 628 (1981). *See also generally* Dwight G. Duncan, *Parading the First Amendment Through the Streets of South Boston*, 30 NEW ENG. L. REV. 663, 679 (1996); William N. Eskridge Jr., Symposium, *A Jurisprudence of "Coming Out": Religion, Homosexuality and Collisions of Liberty and Equality in American Public Law*, 106 YALE L.J. 2411 (1997) (discussing anti-gay discrimination and likening it to religious discrimination, and reviewing cases involving application of statutes prohibiting discrimination based on sexual orientation that involved Georgetown University and the Boston St. Patrick's Day Parade); Sally Frank, *The Key to Unlocking the Clubhouse Door: The Application of Anti-Discrimination Laws to Quasi-Private Clubs*, 2 MICH. J. GENDER & L. 27 (1994); Lauren J. Rosenblum, Note, *Equal Access or Free Speech: The Constitutionality of Public Accommodations Laws*, 72 N.Y.U. L. REV. 1243 (1997) (tracing the application of public accommodations laws to serve compelling state interests and analyzing the City of Cleveland's effort to prohibit sex-segregated audiences at speaking engagements by Nation of Islam leader Louis Farrakhan).

ued operation of government emergency services was a state interest of the highest order sufficient to override individual liberties.[83] In Florida, the public's interest in monitoring governmental actions through open public meetings also has been adjudged a state interest of the highest order.[84] In the area of law enforcement — certainly one of the essential ingredients of preserving ordered liberty in a state — courts have found that facilitating apprehension of criminal suspects by preserving the confidentiality of sealed indictments prior to arrest or initiation of judicial proceedings served a state interest of the highest order,[85] as do government actions taken to protect witnesses and conduct criminal investigations,[86] to prohibit in-court pho-

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[83] *See* Masloff v. Port Auth. of Allegheny County, 613 A.2d 1186, 1191 (Pa. 1992). The Pennsylvania Supreme Court upheld a trial court's issuance of an injunction to end a labor union's work stoppage and enter into court-supervised negotiations with the city. *See id.* at 1187-88. The court found that the danger posed to the public police, fire, and emergency medical services because of the work cessation justified the trial court's issuance of an injunction. *See id.* at 1191. The court found that the strike posed a "clear and present danger" to the health, safety, or welfare of the public, thus justifying a restriction on the employment union's speech interests. *See id.* The dissent opined, however, that the injunction amounted to an unconstitutional prior restraint on the labor union's speech. *See id.* at 1196-97 (Larsen, J., dissenting). Citing *Daily Mail*, the dissent asserted that only a state interest of the highest order could justify stifling the union's ability to strike. *See id.* (citing Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 104 (1979)).

[84] *See* Turner v. Wainright, 379 So. 2d 148, 150 (Fla. Dist. Ct. App. 1980) (noting that enforcement of the Florida Open Public Meetings Act serves the public's interest in securing information about the operations of the government; thus, preserving democratic processes serves state interests of the highest order); Byron, Harless, Schaffer, Reid & Assoc. v. State *ex rel.* Schellenberg, 360 So. 2d 83, 97 (Fla. Dist. Ct. App. 1978) ("In general application, Florida's public records law and its companion, the open public meetings law, promote a state interest of the highest order. By promoting open government and citizen awareness of its workings . . . [they] enhance and preserve democratic processes.").

[85] *See* Worrell Newspapers of Ind., Inc. v. Weshafer, 570 F. Supp. 1447, 1449 (S.D. Ind. 1983) (upholding against a First Amendment challenge an Indiana statute that prohibited the release of information or indictments that were sealed by court order because it served a state interest of the highest order and was narrowly tailored to serve that interest with the least possible burden on the press), *rev'd*, 739 F.2d 1219, 1222 (7th Cir. 1984) (finding that the judge's order against the media was unconstitutional), *aff'd*, 469 U.S. 1200 (1985) (summarily affirming the Seventh Circuit's reversal of the trial court without hearing argument or drafting a formal opinion). *But see* Ronwin v. Dunham, 818 F.2d 675, 678 (8th Cir. 1987) ("Although criminal proceedings implicate state interests of the highest order, . . . the state interest at issue here is consistent with other kinds of interests the Court has found sufficient to invoke abstention [from interference with application of state law that impaired individual's constitutional rights].") (internal citation omitted); *see also* Younger v. Harris, 401 U.S. 37, 46-47 (1971) (discussing criteria to which federal courts should look when deciding whether to intervene or abstain when a state's criminal proceedings may interfere with constitutional liberties).

[86] *See* Times Mirror Co. v. Superior Court, 244 Cal. Rptr. 556, 564 (Ct. App.

tography absent the presiding judge's consent,[87] to assure public safety,[88] and to assure order and safety in prisons.[89]

In the area of privacy protection, courts have found that there may be state interests of the highest order in protecting child sex abuse victims,[90] safeguarding children through day care licensing re-

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1988) ("The interest of the state to protect witnesses and to conduct criminal investigations is sufficient to overcome the Times' First Amendment right to publish Doe's name."). The case at bar in *Times Mirror* involved the publication of the name of a witness to a crime. *See id.* at 558-59. The court expressed concern that a failure to protect the privacy of such witnesses through assuring the confidentiality of their names and identities would make witnesses reluctant to come forward to assist authorities in solving crimes, and could jeopardize the safety of witnesses when the suspect is still at large. *See id.* at 564.

[87] *See* Marin Indep. Journal v. Municipal Court, 16 Cal. Rptr. 2d 550, 555 (Ct. App. 1993). The *Marin Independent Journal*, a newspaper, brought an action challenging a court's seizure of film negatives as a prior restraint on speech. *See id.* at 552. The film was seized when a reporter snapped a photograph of a criminal defendant in violation of a court rule. *See id.* The court cited *Daily Mail* and *Florida Star* for the proposition that the media could only be punished for publishing legally obtained truthful information if such punishment furthered a state interest of the highest order, *see id.* at 554-55, yet found that the photos were unlawfully obtained and therefore outside of the protection of those cases. *See id.* at 555. The court noted, "It would make a mockery of [the law], and of the power and dignity of the court, to allow publication of photographs unlawfully obtained." *Id.*

[88] *See* State v. Miller, 538 N.W.2d 573, 578 (Wis. Ct. App. 1995) ("Public safety and the protection of human life is a state interest of the highest order.").

[89] *See* Allah v. Beyer, Civ. No. 92-0651, 1994 WL 549614, at *6-7 (D.N.J. Mar. 29, 1994) (holding that prison safety is a state interest of the highest order justifying any interference with religious free exercise caused by relocation of a Muslim prisoners' group leader who had allegedly planned substantial disruption of prison operations); Pollock v. Marshall, 656 F. Supp. 957, 962 (S.D. Ohio 1987) (holding that a prison regulation requiring an inmate to cut his hair contrary to his religious beliefs did not violate the First Amendment insofar as it contributed to prison safety and thereby served a legitmate state interest sufficient to outweigh the inmate's religious interests).

[90] *See In re* Minor, 595 N.E.2d 1052, 1057 (Ill. 1992). The majority upheld a trial court's prohibition of the publication of the names of child abuse victims and distinguished the case from *Daily Mail* on the grounds that *Daily Mail* involved an effort to forbid publication of juvenile criminal offenders whereas the case sub judice involved protection of child victims. *See id.* In a strong dissent, Chief Justice Miller argued that the First Amendment "prohibits the State from inviting journalists into a courtroom and simultaneously editing or censoring what they report about the proceedings." *Id.* at 1058 (Miller, C.J., dissenting). The dissent asserted that the government must demonstrate a state interest of the highest order to justify punishing the media for publishing truthful information lawfully obtained. *See id.* (citing Smith v. Daily Mail, 443 U.S. 97, 104 (1979)). The dissent found the difference between protecting privacy rights of juvenile offenders and adult rape victims — held to be insufficient interests to justify impairing the First Amendment in *Daily Mail* and *Florida Star*, respectively — and protecting the privacy rights of juvenile victims to be constitutionally insignificant. *See id.* at 1058-59 (Miller, C.J., dissenting). *But see* Jacksonville Television, Inc. v. Florida Dep't of Health & Rehabilitation Servs., 659 So. 2d 316, 318 (Fla. Dist. Ct. App. 1994) (finding the state's interest in protecting the privacy of children is a state interest of the highest order, but that interest is

quirements,[91] assuring adequacy of secular education programs offered at religious schools,[92] sanctioning the media for a knowing violation of federal wiretap statutes regarding information of purely private concern,[93] preventing the release of information unlawfully obtained by the media,[94] safeguarding residential privacy against the

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insufficient to justify a prior restraint on the media prohibiting airing of a television interview with the child's mother that was filmed prior to a judge's imposition of a gag order on discussion of case with media).

[91] *See* North Valley Baptist Church v. McMahon, 696 F. Supp. 518, 526 (E.D. Cal. 1988) (finding that although a state day care licensing statute burdened a church-run preschool, the statute served a state interest of the highest order, safeguarding children, and, therefore, withstood a Free Exercise Clause challenge by the church).

[92] *See* New Life Baptist Church Academy v. Town of East Longmeadow, 885 F.2d 940, 951 (5th Cir. 1989) (upholding a state statute that permitted the state to scrutinize the secular education of a religious group against a Free Exercise Clause challenge). In a case that purported to apply *Wisconsin v. Yoder* but reached the opposite result, the court found that the state's interest in education was a compelling interest sufficient to interfere with religious exercise. *See id.* at 944. The court refused, however, to consider less restrictive alternatives to the state's monitoring plan and spoke interchangeably of "compelling" state interests and state interests "of the highest order," making it unclear what level of scrutiny the court was applying. *See id.* at 946. The Fifth Circuit opted for a balancing test rather than a traditional strict scrutiny standard and found that application of a less restrictive means to assure educational quality was not required. *See id.* at 950.

[93] *See* Natoli v. Sullivan, 606 N.Y.S.2d 504, 510 (Sup. Ct. 1993), *aff'd*, 616 N.Y.S.2d 318 (App. Div. 1994). A newspaper used information that was unlawfully obtained from a wiretap to print a story about the plaintiffs who sued under a federal statute that provided criminal and civil penalties for unlawful wiretapping. *See id.* at 505-06. The trial court applied the federal law's sanctions against the newspaper and distinguished the case from *Florida Star* and *Daily Mail* on the ground that the newspaper had knowledge that the information in question was illegally obtained. *See id.* at 510. The court noted that the danger of chilling the press's speech rights was minimal and that "[t]he civil sanctions of 18 U.S.C. § 2520 [were] narrowly tailored to a federal (constitutional) interest of the highest order." *Id.* It should be noted that *Natoli* is an anomaly insofar as it punishes the media for publishing truthful information. *See* Peavy v. New Times, Inc., 976 F. Supp. 532, 538 n.23 (N.D. Tex. 1997) (declining to follow the reasoning of *Natoli*, noting that it is a "lone holding which offers no controlling precedent" and that the information revealed in violation of the federal wiretap statute was "purely private, with no public interest served by their revelation"). *Natoli*'s aberrant ruling thus seems to have no relevance when the information, such as the extreme racist statements by a school board member at issue in *Peavy*, pertains to information of interest to the public.

[94] *See* New York Times Co. v. United States, 403 U.S. 713, 719 (1971) (finding, in the infamous Pentagon Papers case, that the government had demonstrated an insufficient interest to justify a prior restraint enjoining the publication of a confidential study on Vietnam War policymaking secured by the media); Marin Indep. Journal v. Municipal Court, 16 Cal. Rptr. 2d 550, 555 (Ct. App. 1993) (acknowledging the *Daily Mail* rule that the media may be punished for publishing legally obtained truthful information only to further a state interest of the highest order, but finding that photos of a defendant taken in violation of a court order were unlawfully obtained).

persistent demonstrations of political protesters,[95] and possibly preserving the privacy interests of a murder victim's family.[96]

These varying applications of the state interest of the highest order doctrine suggest that the legitimate basis upon which the government elects to exercise its power to legislate, remedy, adjudicate, administer, or protect does not meet the standard of the state interest of the highest order doctrine. Rather, the standard requires a far greater state interest before it will constitutionally legitimate the government's interference with *the content* of an individual's First Amendment liberties.[97]

Looking to cases that have found the presence of such an interest, it is clear that the government must have an interest of paramount importance to justify its suppression of *the content* of an individual's speech. Such interests include preserving national security and preserving and defending the state itself through law enforcement, open public government, personal security, and privacy. These are interests that speak to the basic reasons for which people have formed political states in the first place,[98] interests of such mag-

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[95] *See* Frisby v. Schultz, 487 U.S. 474, 484 (1988) (declaring that the assurance of residential privacy is a state interest of the highest order); Murray v. Lawson, 138 N.J. 206, 235, 649 A.2d 1253, 1268 (1994) (upholding an injunction prohibiting anti-abortion protesters from picketing in front of a physician's residence because the injunction did not preclude the protesters from demonstrating and served the state interest in preserving residential privacy).

[96] *See* Green v. Chicago Tribune Co., 675 N.E.2d 249, 256, 257 (Ill. App. Ct. 1996) (finding that a plaintiff had adequately pleaded causes of action for public disclosure of private facts and intentional infliction of emotional distress when the media intruded into her son's hospital room and published photos taken of him as he was dying from a gunshot wound); Holtzscheiter v. Thomson Newspapers, Inc., 411 S.E.2d 664, 671 (S.C. 1991) (Toal, J., dissenting) (finding that whether a state's interest in preserving privacy was a state interest of the highest order sufficient to trump the media's right to report information of public interest regarding the private life and moral turpitude of a murder victim and her mother is a jury question).

[97] *See, e.g.*, Connell v. Town of Hudson, 733 F. Supp. 465, 471 (D.N.H. 1990) ("It is beyond dispute that government has, in extraordinary circumstances, a responsibility to protect highly sensitive information against public dissemination. But the principles enunciated in The Florida Star v. B.J.F. . . . do not apply as defendants contend they do . . . . Under the facts presented here, that balance plainly favors the plaintiff.") (internal citations omitted).

[98] *See* JOHN LOCKE, THE SECOND TREATISE ON CIVIL GOVERNMENT, § 124 (Prometheus Books 1986) (1690). Writing toward the end of the 17th Century, Locke theorized that protection of property, order, and individual liberty were the catalysts for the formation of civil government. *See id.* Locke wrote: "The great and chief end, therefore, of men uniting into commonwealths, and putting themselves under government, is the preservation of their property; to which in the state of Nature there are many things wanting." *Id.* Locke further argues that a person enters society and gives up the absolute freedom and autonomy enjoyed in the state of nature in order "better to preserve himself, his liberty and property." *Id.* § 131.

nitude that were they not served through legislation or other state action, the very existence of the state could be jeopardized. These interests are of such a magnitude that they arguably surpass the level of those interests traditionally considered worthy of the "compelling" state interest category under the traditional strict scrutiny analysis of government acts that impair individual liberty. Saving a human life,[99] combating espionage and protecting national security,[100] preventing war,[101] and protecting due process rights of an accused facing prosecution would likewise be state interests of such magnitude. Thus, these cases suggest that when *the content* of constitutionally protected expressive liberties is impaired by state action, the government should be put to the test of justifying its actions as designed to advance a more than compelling state interest, rather, one "of the highest order."

C. *Narrow Tailoring and Interests "Not Otherwise Served"*

The amorphous "highest order" standard first articulated in *Yoder* was paired with an even more elusive second prong requiring that the asserted state interest be one "not otherwise served" before the state's interest may "overbalance"[102] a protected expressive liberty interest.[103] Expounding upon what the "not otherwise served" prong

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[99] *See* State v. Miller, 538 N.W.2d 573, 578 (Wis. Ct. App. 1995) ("Public safety and the protection of human life is a state interest of the highest order.").

[100] *See* New York Times Co. v. United States, 403 U.S. 713, 733-37 (1971) (White, J., concurring); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 716 (1931) (theorizing that issues of national security such as shipment dates of armed forces may be information that the government may constitutionally prohibit the media from disseminating).

[101] *See* Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 849 (1978) (Stewart, J., concurring). Justice Stewart emphasized that the government may not constitutionally punish communication of information once it has lawfully fallen into the hands of the press. *See id.* The Justice argued that such punishment would be justified only if "the need for secrecy is manifestly overwhelming." *Id.* In a footnote elaborating on the meaning of that threshold, the Justice said, "National defense is the most obvious justification for government restrictions on publication. Even then, distinctions must be drawn between prior restraints and subsequent penalties." *Id.* (citing *New York Times*, 403 U.S. at 733-37 (White, J., concurring); *Near*, 283 U.S. at 716).

[102] The Court's use of this novel word, "overbalance," should not be taken to mean "balance" as in the quid pro quo sense of "outweigh." Rather, "overbalance" as used in *Yoder* can only mean "trump," "negate," or "defeat."

[103] *See* Wisconsin v. Yoder, 406 U.S. 205, 215 (1972). In assessing Wisconsin's desire to compel Amish children to attend public high schools rather than receive home schooling in vocational arts, the Supreme Court noted that the state's interest in education does not require that all other interests yield to it, particularly because compulsory education interfered with a competing liberty interest. *See id.* In articulating the standard, Chief Justice Burger stated that "only those interests of the

may actually mean, Chief Justice Burger wrote that "however strong the State's interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests."[104] Because it was satisfied that the tightly-knit, agrarian-oriented, and church-centered Amish society adequately served the educational needs of its own children by stressing hands-on vocational learning of the skills needed to contribute to the insular Amish society, the Court found that the state's interest in education was, thus, otherwise served.[105] Accordingly, the Court declined to address whether compulsory education was a state interest of the highest order, but rather rested its holding on the sui generis nature of the culture and traditions of the separatist Amish society; thus the Court found that the educational needs of Amish youngsters are met by public schooling in the early primary grades and vocational home-schooling in trades such that the youngsters will learn the skills necessary to become contributing members of their rather unique society.[106]

On its face, the second prong of *Yoder*'s version of the state interest of the highest order doctrine seems to require that before a state may interfere with *the content* of a First Amendment liberty, it must demonstrate a highest order interest that *cannot be served by any other means.* The Court's language regarding interests "not otherwise served" and an interest not "absolute to the exclusion or subordination of all other interests" suggests an even more stringent analysis of the state's means of meeting its interest than the "least restrictive alternative" standard required when the Court applies the strict scrutiny analysis to a governmental impairment of a constitutional liberty.[107] Rather than requiring that the government pursue merely the least restrictive means to achieve its interest, the highest order doctrine requires that there be *no other alternative* before the government

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highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Id.*

[104] *Id.* (citing Sherbert v. Verner, 374 U.S. 398 (1963); McGowan v. Maryland, 366 U.S. 420, 459 (1961) (separate opinion of Frankfurter, J.); Prince v. Massachusetts, 321 U.S. 158, 165 (1944)). The state had argued that its interest in educating youngsters was "so compelling that even the established religious practices of the Amish must give way." *Id.* at 221. The Court rejected such a suggestion, noting, "Where fundamental claims of religious freedom are at stake, however, we cannot accept such a sweeping claim. . . ." *Id.* Because of the religious liberty implicated, the Court said that "we must searchingly examine the interests that the State seeks to promote . . . ." *Id.*

[105] *See id.* at 229.

[106] *See id.*

[107] *See* TRIBE, *supra* note 11, § 16-7, at 1454 (explaining due process review of governmental impairment of fundamental rights).

may interfere with *the content* of expressive liberties. However, the *Yoder* free exercise standard was never as strong as it was on the day it was announced, for lower courts and the Supreme Court itself have surprisingly reduced the level of scrutiny to which they subject governmental actions that interfere with the free exercise of religion.[108]

The Court's application of the state interest of the highest order doctrine in *Florida Star v. B.J.F.*[109] holds the state to a similarly demanding second prong. Of note, however, the *Florida Star* opinion did not speak in terms of an interest "not otherwise served." Rather, the Court imposed a lower threshold in analyzing the state's chosen means to serve its goals, noting that the statute must be "*narrowly tailored* to a state interest of the highest order."[110] Despite this language, the Court's analysis was, in fact, exacting and the state's effort to punish the media had to fail because of the existence of at least *one* other alternative to meet the state's goals. The Court found that *the government itself* released the name of the rape victim to the newspaper and, therefore, *the government itself* possessed the means to serve the government's interest of protecting the privacy of the victim.[111] Accordingly, the state could not justify punishing the media for publishing truthful information which it received lawfully from *the government itself.*[112] In other words, the state's interest could be "otherwise served" through the government's own improved self-policing of the release of sensitive information to the media. The state's inability to meet this second standard of the doctrine doomed its effort to punish the media for its violation of the state statute forbidding publication of the name of a rape victim; thus, the impairment of the press's fundamental liberty could not be justified. The Court did not speak in terms of narrowing or tailoring the state's statute. Rather, the existence of *one alternative means* to serve the state's interest sufficed to decide the case. Thus, *Florida Star*'s "narrowly tailored" requirement actually operates in the exact same manner as does the "not otherwise served" prong applied in *Yoder.*

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[108] *Compare Yoder*, 406 U.S. at 221 ("[D]espite its admitted validity in the generality of cases, we must searchingly examine the interest that the State seeks to promote . . . and the impediment to those objectives that would flow from recognizing the claimed . . . exemption.") *with* Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 890 (1990) (finding that laws of general application still apply despite an incidental impact on a religious interest); *see also* TRIBE, *supra* note 11, § 14-13, at 1260 (suggesting that post-*Yoder* decisions have reduced the burden of persuasion imposed upon the state before it may interfere with religion).

[109] 491 U.S. 524 (1989).

[110] *Id.* at 541 (emphasis added).

[111] *See id.*

[112] *See id.*

Several of the lower court cases discussed above implicitly addressed the "not otherwise served" prong of the highest order doctrine by assessing whether the presence or absence of other means of serving the state's interest justified impairing speech liberties. For example, an injunction curtailing protests outside the home of a physician was realistically *the only* means by which the state's interest in preserving residential privacy could be served.[113] Most cases applying the state interest of the highest order doctrine, however, have found that there were alternate means available to serve the state's interest; therefore, suppression of expressive liberty was not justified.[114] In two cases that characterized protection of the privacy interests of juveniles to be state interests of the highest order, the courts nevertheless noted that the state's interest did not justify imposing a prior restraint on the media regarding information that had previously been lawfully obtained.[115] Additionally, courts have found that dissemination of information that is already publicly available from other sources may not lawfully be enjoined because the state had an alternative means to protect any privacy interests by preventing dissemination of the information to the public in the first place.[116]

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[113] *See* Murray v. Lawson, 138 N.J. 206, 234, 649 A.2d 1253, 1268 (1994).

[114] *See, e.g.*, Ross v. Midwest Communications, Inc., 870 F.2d 271, 275 (5th Cir. 1989) (holding that a television station could not be held liable for tortious interference with the privacy of a rape victim for publication of her first name, details of the rape, and a picture of her residence, because the rape was newsworthy; and noting alternatives to serve the state's interest in protecting the victim's privacy, such as imposing liability when the rape is not newsworthy or the information is unlawfully obtained or statutorily preserving the confidentiality of the state's records); Star-Telegram, Inc. v. Doe, 915 S.W.2d 471, 475 (Tex. 1995) (noting that a rape victim did not avail herself of a statutory right to have a pseudonym used in all records relating to her case and that the prosecutor had disclosed the victim's true identity several times during the case, thus demonstrating that alternate means were available to protect the victim's privacy short of impairing freedom of the press); State v. Globe Communications, 648 So. 2d 110, 112-13 (Fla. 1994) (likening a rape shield statute that punished the media to the statute at issue in *Florida Star* due to its broad sweep and underinclusiveness, which indicated that it was insufficiently tailored to serve the state's articulated purpose).

[115] *See* Jacksonville Television, Inc. v. Florida Dep't of Health & Rehabilitative Servs., 659 So. 2d 316, 317-18 (Fla. Dist. Ct. App. 1994) (preventing the release of an interview with a minor recorded prior to issuance of a protective order was an impermissible prior restraint on speech); *In re* M.B., 484 N.W.2d 1154, 1159-60 (Ill. App. Ct. 1985) (finding that the state's interest did not justify imposing a prior restraint on the media's publication of a child offender's name when the identity and address of the juvenile had been released prior to the entrance of the court's protective order).

[116] *See* U.D. Registry, Inc. v. California, 40 Cal. Rptr. 2d 228, 232 (Ct. App. 1995) (holding that a state statute that prohibited release of information about a potential tenant's history of detainer actions impermissibly infringed on the reporting agency's freedom of speech because it prohibited dissemination of information that

In a case reminiscent of *Florida Star*, the Georgia Court of Appeals in *Doe v. Board of Regents of the University System of Georgia*[117] properly applied the second prong of the highest order doctrine when it addressed the tension created by a state statute that prohibited publication of a rape victim's name and, thus, impaired the media's right to gather and report the news.[118] The court found that there was a means by which the state could otherwise serve its interest in protecting the rape victim's anonymity without impairing the press's freedom.[119] In a case in which a rape victim who was a state university employee sought a temporary restraining order and permanent injunction preventing the release by campus police of an incident report regarding her rape, the court held that the campus newspaper had an Open Records Act right to receive the report, but that the rape victim confidentiality statute precluded the campus police from releasing to the media the victim's name and identity.[120] The court stressed that a newspaper that legally obtained correct information could not be reprimanded without a need to further a state interest of the highest order,[121] but that the state's interest in protecting the victim's privacy and thereby not deterring future victims from coming forward could be adequately served by prohibiting the release of a victim's name by the police, i.e., by *the government itself.*[122] This is precisely the solution that the Florida lower court failed to perceive when it imposed liability on the media for violating the rape shield statute in *Florida Star.*[123]

D. What Level of Constitutional Scrutiny Is Intended?

Why did the Courts in *Yoder* and *Florida Star*, and Justice Marshall in his dissent in *Bakke*, not simply operate within the existing framework for analysis of impairment of a constitutional right or fundamental liberty: applying either a traditional balancing test in *Yoder*, intermediate scrutiny, with its requirement of a significant state interest and means substantially tailored to advancing that interest

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was made publicly available by the state itself); *Star-Telegram*, 915 S.W.2d at 475 (finding that a newspaper's publication of identifying information that did not specifically name a rape victim was constitutionally protected because requiring the press to contemplate every burden on victims would have a chilling effect on its ability to inform the public).

[117] 452 S.E.2d 776 (Ga. Ct. App. 1994).

[118] *See id.* at 777.

[119] *See id.* at 782.

[120] *See id.* at 782-83.

[121] *See id.* at 781 (citing Florida Star v. B.J.F., 491 U.S. 524, 533 (1989)).

[122] *See id.* at 782.

[123] *See supra* notes 47-52 and accompanying text (discussing *Florida Star*).

standard, in *Bakke*, or strict scrutiny, with its compelling state interest and least restrictive means standard, in *Florida Star*?

Applying a traditional balancing test in *Yoder* could easily have reached the same conclusion that a fundamental First Amendment interest in the free exercise of religion, and in the "salvation" of the human soul, as the defendants argued, outweighed the routine police power interest in education. (What *possible* state interest could trump the individual's interest in eternal salvation?) Since a simple balancing test could settle the dispute, why did Chief Justice Burger coin the "state interest of the highest order" standard if not *to ratchet up* the level of scrutiny? Were the Court to accept Justice Marshall's contention that the Fourteenth Amendment was not meant to impose complete colorblindness upon the government and that state efforts to compensate for past governmental discrimination should be subjected merely to intermediate scrutiny rather than to strict scrutiny, then the intermediate scrutiny standard itself could justify affirmative action programs because they serve a substantial governmental interest — eradicating government-endorsed racial discrimination — as long as they are substantially tailored to meeting that goal. If intermediate scrutiny itself is sufficient, what did Justice Marshall have in mind by invoking the language "state interest of the highest order" if not *to elevate* the weight that the government must give to the interests being advanced? If the Court in *Florida Star* felt that traditional strict scrutiny would have been sufficient to protect the First Amendment liberty at issue, why did it not simply apply strict scrutiny? Why instead did it apply the state interest of the highest order and no alternative means standard if not *to raise the bar* by providing the media with virtually impenetrable protection for the publication of truthful, lawfully obtained information?

Florida Star is the clearest indication that the Court must have felt that traditional levels of scrutiny were insufficient to safeguard the liberty interests at stake. The Court provided the media with rock-solid protection for the publication of truth, envisioning an exception to the media's near-absolute right to publish the truth only when there is a state interest of the highest order — which the Court likened to safeguarding the national security by proscribing publication of sensitive information such as the movement dates and numbers of troops of the armed forces engaged in military maneuvers[124] — and no other means feasible than what the government is proposing to serve that interest. Such an interest is one vital to the contin-

[124] *See Florida Star*, 491 U.S. at 532.

ued survival of the government, suggesting that interests meeting the highest order standard are only those that must be served *at the peril of the demise of the state itself* if they go unserved. *Florida Star* clearly suggests that the Court intended to set the bar so high that the impairment of First Amendment liberties — the government's suppression of speech *because of its content* — can be constitutionally justified only when the continued existence of the state itself is at risk *and* when the state's interest in self-preservation can be served by no other means.

Such an interpretation of the state interest of the highest order doctrine is indicated by the Court's opinions in *Yoder* and *Florida Star* and by Justice Marshall's dissent in *Bakke*. A refusal to read these opinions as justifying *an elevated level of scrutiny* beyond those normally applied by courts would be to render utterly superfluous the "state interest of the highest order" language that must have been deliberately used by the Justices. It would be impertinent to impute such extreme carelessness to the Justices such that their invocations of "state interest of the highest order" actually meant nothing new and were merely an alternative means of expressing the same old standards of scrutiny traditionally applied by the Court.

IV. HOW THE STATE INTEREST OF THE HIGHEST ORDER STANDARD HAS BEEN APPLIED AND MISAPPLIED

A. *Misapplications and Confusion with Traditional Strict Scrutiny Review*

As discussed above, the state interest of the highest order doctrine has most often been applied in First Amendment cases involving free exercise of religion claims or efforts to punish the media for publication of truthful yet sensitive information. As these cases most readily fall within the *Yoder* and *Florida Star* framework, this should not be surprising. But outside of the line of cases that are strictly on point, the history of the state interest of the highest order doctrine has been one of frequently inconsistent application in the lower courts, which have had varying success trying to distinguish whether it requires a balancing of constitutional interests, strict scrutiny of governmental actions that offend constitutional rights, or some other level of scrutiny.

Despite the strong language of *Yoder* regarding the need for the state to articulate an interest of the highest order to justify interference with an individual's right to religious free exercise, the Court in the same breath spoke of a balancing framework in which to perform

its analysis.[125] Chief Justice Burger noted that only government interests of the highest order, "and those not otherwise served," are sufficient to "overbalance" the individual's First Amendment right to the free exercise of religion.[126] That language has appeared in numerous cases applying the doctrine, particularly those involving claims of religious free exercise.[127] Some religious free exercise cases, nevertheless, invoke a strict scrutiny analysis even while they speak in terms of balancing competing interests.[128] Even in some cases that involve the rights of the media and that cite *Florida Star*, the courts applying the doctrine have nevertheless spoken in terms of balancing competing interests rather than applying heightened scrutiny due process protection to a fundamental liberty.[129] Some judges have failed to re-

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[125] *See* Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

[126] *See id.*

[127] *See, e.g.*, Dole v. Shenandoah Baptist Church, 899 F.2d 1389, 1398 (4th Cir. 1990); Pollock v. Marshall, 656 F. Supp. 957, 960 (S.D. Ohio 1987). The Fourth Circuit, in *Shenandoah Baptist Church*, upheld application of the federal Fair Labor Standards Act (FLSA) to a church-operated school against a free-exercise defense by the church. *See Shenandoah Baptist Church*, 899 F.2d at 1399. The court stated: "Against what is, at most, a limited burden to Shenandoah's free exercise rights, we must weigh the reasons for applying both the minimum wage and equal pay provisions of the FLSA to [the school]." *Id.* at 1398. The court concluded that the state's interest in assuring equal employment opportunity was a state interest of the highest order, and that because a failure to apply the law would undermine the goals of the statute, "the balance tips toward the application of the FLSA." *Id.* Considering a Native American prisoner's free exercise of religion claim seeking exemption from a prison haircutting requirement, the court in *Pollock* found that the prison system's concerns for prison security and inmate discipline "reasonably and substantially justified" the hair-length restriction. *See Pollock*, 656 F. Supp. at 962. The court said that "[b]alanced against these legitimate state interests, plaintiff's religious practice of wearing his hair longer than allowed . . . must yield." *Id.*

[128] *See* Allah v. Beyer, Civ. No. 92-0651, 1994 WL 549614, at *5 (D.N.J. Mar. 24, 1994). The *Allah* court found that the New Jersey State Prison system's transfer of a potentially disruptive prisoner was justified as a "compelling state interest" and was the "least restrictive means to satisfy the state's compelling interest." *Id.* at *7.

[129] *See, e.g.*, Connell v. Town of Hudson, 733 F. Supp. 465, 471 (D.N.H. 1990). The *Connell* court applied *Florida Star*'s standard to protect the First Amendment interests of a newspaper photographer who demanded access to an accident scene. *See id.* at 466, 471. The court stated, "The appropriate analysis balances plaintiff's rights against police authority to secure an accident scene. Under the facts presented here, that balance plainly favors the plaintiff." *Id.* at 471; *see also, e.g.*, Lence v. Hagadone Inv. Co., 853 P.2d 1230, 1235-36 (Mont. 1993), *overruled by* Sacco v. High Country Indep. Press, Inc., 896 P.2d 411 (1995). In a libel action for publication of information about an attorney misconduct investigation, the court, speaking in terms of balancing competing interests, invoked *Daily Mail* and *Florida Star* and concluded:

> If the public's interest in the dissemination of truth outweighs the state's interest in protecting the privacy of rape victims or juvenile offenders, then surely the public's interest in accurate information about attorney discipline outweighs the state's interest in preserving the con-

quire narrow tailoring of the state's means to effect its interest, stating solely that the state's means must advance a state interest of the highest order.[130]

Adding to the confusion surrounding the doctrine, the state interest of the highest order was discussed by Justice Marshall in his *Bakke* dissent within the context of his preference for the application of an intermediate scrutiny analysis of a state affirmative action program to which the majority had applied strict scrutiny.[131] Justice Marshall argued that intermediate scrutiny was the appropriate level of analysis for a reverse discrimination claim, in part because the eradication of pernicious and enduring effects of discrimination against African-Americans by the government is a state interest of the highest order.[132] In the *Bakke* mold, some courts have also spoken in terms of significant governmental interests and intermediate scrutiny virtually in the same breath as invoking the state interest of the highest order doctrine.[133]

More common, and perhaps fueling confusion most of all, is the application of the state interest of the highest order doctrine in place of the strict scrutiny analysis in cases that usually do receive such a heightened level of scrutiny from courts because fundamental liberties are implicated.[134] Among these are cases involving free exercise

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fidentiality of Commission on Practice investigations, where, as here, the press obtained the information lawfully.

Id. at 1236.

[130] *See* Holtzscheiter v. Thompson Newspapers, Inc., 411 S.E.2d 664, 671 (S.C. 1991) (Toal, J., dissenting) (stating that whether a matter was one of public interest posed a jury question and stating that a newspaper could only be penalized for publication of a truthful statement to *advance* a state interest of the highest order); Nicholson v. McClatchy Newspapers, 223 Cal. Rptr. 58, 62 (Ct. App. 1986) (stating that media may not be sanctioned for publishing the truth absent a need to *advance* a state interest of the highest order).

[131] *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 396 (1978) (Marshall, J., dissenting).

[132] *See id.*

[133] *See, e.g.*, Murray v. Lawson, 138 N.J. 206, 218-20, 649 A.2d 1253, 1259-60 (1994). In a case in which a physician brought an action seeking an injunction to deter anti-abortionists from picketing in front of his residence, the court noted that the United States Supreme Court had deemed the assurance of residential privacy to be a state interest of the highest order. *See id.* at 220, 649 A.2d at 1260 (citing Frisby v. Schultz, 487 U.S. 474, 484 (1988)). Applying a time, place, and manner analysis akin to intermediate scrutiny to analyze the injunction's impairment of speech interests, the court reasoned that the injunction, as the state's means of effecting its highest order interest, must "'burden no more speech than necessary to serve a significant government interest.'" *Id.* at 219, 649 A.2d at 1259 (quoting Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 754 (1994)).

[134] *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) (noting that strict scrutiny analysis applies when a state action tramples upon a citizen's fun-

of religion,[135] criminal proceedings,[136] freedom of association,[137] prior restraints,[138] and freedom of the press.[139] Often, courts seem to be careless in their articulation of terms, merely using "state interest of the highest order" and "compelling state interest" interchangeably.[140]

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damental constitutional rights).

[135] *See* Allah v. Beyer, Civ. No. 92-0651, 1994 WL 549614, at *5 (D.N.J. Mar. 24, 1994); Smith v. Fair Employment & Hous. Comm'n, 30 Cal. Rptr. 2d 395, 403-04 (Ct. App. 1994) (finding that a landlord's free exercise rights were violated when a state commission prohibited discrimination against unmarried couples), *aff'd in part, rev'd in part*, 913 P.2d 909, 929 (1996) (holding that the landlord's free exercise rights were not substantially burdened because she was not obligated to rent her apartment, thereby avoiding the constitutional question). The lower court in *Smith*, applying *Yoder*, said that "only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion" and found that the state "has no compelling interest in promoting the housing rights of unmarried couples such as would outweigh plaintiff's First Amendment free exercise rights." *Smith*, 30 Cal. Rptr. 2d at 403-04 (citing Thomas v. Review Bd. Ind. Employment Sec. Div., 450 U.S. 707, 718 (1981)).

[136] *See* Ronwin v. Dunham, 818 F.2d 675, 678 (8th Cir. 1987).

[137] *See* New York State Clubs Ass'n v. New York, 487 U.S. 1, 18 (1988); Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 549 (1987); Roberts v. United States Jaycees, 468 U.S. 609, 624 (1984); *see also infra* notes 145-52 and accompanying text (discussing *Roberts* and its progeny).

[138] *See* Minneapolis Star & Tribune Co. v. Schmidt, 360 N.W.2d 433, 435 (Minn. Ct. App. 1985). The court found that a juvenile court invalidly prohibited the media from printing information legally obtained from public records when it prohibited the press from releasing the names and photographs of the juveniles involved in the court matter or other particular information relating to their parents. *See id.* Quoting *Daily Mail*, the court reminded that the state was not permitted to punish the press for legally publishing truthful information without a need to advance a state interest of the highest order. *See id.* In scrutinizing the juvenile court's order, however, the court concluded that the possibility of a juvenile's increased anxiety over newspaper publications about the proceeding did not qualify as a compelling state interest sufficient to justify the restraint on speech gathered from public records. *See id.* at 435-36; *see also* Minneapolis Star and Tribune Co. v. Lee, 353 N.W.2d 213 (Minn. Ct. App. 1984). In a case vacating a trial court's gag order on the press during a juvenile dependency case, the court quoted the state interest of the highest order language in *Daily Mail* and held that the order was an unconstitutional prior restraint on speech. *See Minneapolis Star*, 353 N.W.2d at 215. In analyzing the gag order, however, the court also said that a restraint on free speech "must be 'necessitated by a compelling governmental interest, and . . . narrowly tailored to serve that interest.'" *Id.* (quoting Globe Newspapers Co. v. Superior Court, 457 U.S. 596, 607 (1982)).

[139] *See* Connell v. Town of Hudson, 733 F. Supp. 465, 471 (D.N.H. 1990).

[140] *See* Boehner v. McDermott, No. CIV. 98-594, 1998 WL 436897, at *4-7 (D.D.C. July 28, 1998) (giving consideration to varying levels of scrutiny that could be applied to a wiretap violation claim, considering diminished standards of First Amendment scrutiny and strict scrutiny, and finally concluding that "following *Florida Star*, the Court must examine the application of the wiretap statutes with strict scrutiny"); Michigan Dep't of Soc. Servs. v. Emmanuel Baptist Preschool, 455 N.W.2d 1, 6 (Mich. 1990) (Cavanaugh, J., concurring). In a judgment upholding a state's licensing requirements for a church-operated day care center, Justice Cavanaugh wrote a separate concurrence on the free exercise issue and stated that the

Other courts directly and unabashedly confuse the doctrine with strict scrutiny.[141] Very often, however, courts wed the phrase state interest of the highest order with language talismanic of strict scrutiny, requiring the state to demonstrate a "compelling state interest of the

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proper standard to apply to an impairment of the free exercise of religion requires the state to demonstrate a compelling governmental interest and that there are "no alternative, less drastic means" that could serve its ends. *See id.* In announcing this standard, though, the court immediately cited and quoted *Yoder*, noting "only state interests 'of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.'" *Id.* (quoting Wisconsin v. Yoder, 406 U.S. 205, 215 (1972)). In laying out the test it would apply, the court said:

> [T]he burden imposed on licensure of the day-care center must be analyzed under strict scrutiny .... Given the nature of the defendants' sincerely held religious objection to licensure, it is clear as a matter of constitutional fact that the burden imposed by licensure is both direct and coercive so that strict scrutiny must be applied to analyze the constitutionality of the state's restriction on defendants' religious practices ....

Id. at 10 (Cavanaugh, J., concurring) (citations omitted). In the very next paragraph, the court declared that the state had "met its burden of showing a compelling state interest" by demonstrating "its interest in licensing, which is 'of the highest order.'" *Id.* (quoting *Thomas*, 450 U.S. at 718). Not to be outdone in mixing and matching terms, Justice Griffin filed an opinion concurring and dissenting in which he proclaimed both that "the state's interest in protecting the health and safety of young children is of the highest order" and, in the same paragraph, that the state "[fell] short of identifying a recognized compelling state interest for the purposes of First Amendment jurisprudence." *Id.* at 26 (Griffin, J., concurring and dissenting).

In a case invalidating a lower court's prohibition on the publication of the names of potential jurors as an impermissible prior restraint on speech, the court quoted *Daily Mail* and stated that absent a state interest of the highest order, state officials could not prevent publication of legally obtained truthful information that was of public importance. *See* Commonwealth v. Genovese, 487 A.2d 364, 367 (Pa. Super. Ct. 1985). The court also noted that because the names of the jurors were available to any member of the public that attended the trial, there was no compelling state interest to protect the privacy of the jury and that a prior restraint on the media was not an appropriately tailored means of protecting the privacy of the jurors. *See id.* at 368-69.

[141] *See Minneapolis Star*, 360 N.W.2d at 435-36 (invoking strict scrutiny standard of *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982), and the highest order standard of *Daily Mail* to invalidate a prior restraint on publishing the name of a juvenile offender, noting that no "compelling" interest was served by the prohibition); State v. Miller, 538 N.W.2d 573, 577 (Wis. Ct. App. 1995) (invoking *Yoder* to find that "[a] compelling interest encompasses 'only those interests of the highest order and those not otherwise served ....'") (quoting *Yoder*, 406 U.S. at 215).

highest order"[142] or means that are the least restrictive alternative to serve the government's interest.[143]

In some cases, such as those involving claims of an impairment of religious free exercise, a confusion of state interest of the highest order and strict scrutiny is probably the result of the Supreme Court's own vacillations regarding the appropriate standard to apply, from *Yoder*'s original use of the "highest order" language to cases that apply a traditional strict scrutiny framework to religious exercise cases.[144] In the area of freedom of association, the joint use of the

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[142] *See* North Valley Baptist Church v. McMahon, 696 F. Supp. 518, 526 (E.D. Cal. 1988) ("[T]he licensure requirement of the Child Care Facilities Act is designed to protect the health and safety of children receiving care outside their home. Without hesitation, the court finds this to be a compelling state interest of the highest order."); People v. Hodges, 13 Cal. Rptr. 2d 412, 420 (Sup. Ct. 1992) (applying *North Valley*'s "compelling state interest of the highest order" standard).

[143] *See Miller*, 538 N.W.2d at 577-78. The *Miller* court applied *Yoder* and declared that "[p]ublic safety and the protection of human life is a state interest of the highest order." *Id.* at 578. The court went on, however, to speak in terms of traditional strict scrutiny analysis: "The existence . . . of a compelling state interest does not mean that no constitutional violation has occurred. To survive strict scrutiny, the State must also show that the . . . statute is the least restrictive alternative." *Id.*; *cf.* Worrell Newspapers of Ind., Inc. v. Westhafer, 570 F. Supp. 1447, 1448 (S.D. Ind. 1983) (holding that a state statute was constitutionally sound "if it, first, satisfies a state interest of the highest order and, second, is narrowly tailored to serve that interest in the manner least restrictive of a free press"), *rev'd*, 739 F.2d 1219 (7th Cir. 1984), *aff'd*, 469 U.S. 1200 (1985).

[144] *Compare Yoder*, 406 U.S. at 215 ("[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.") *with* Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 141-42 (1987) (applying strict scrutiny to a claimed impairment of religious free exercise), *Thomas*, 450 U.S. at 718 (same), *and* Sherbert v. Verner, 374 U.S. 398, 405 (1963) (same); *see also* Bowen v. Roy, 476 U.S. 693, 728-32 (1986) (O'Connor, J., concurring). *See generally* Stephen L. Pepper, *The Conundrum of the Free Exercise Clause — Some Reflections on Recent Cases*, 9 N. KY. L. REV. 265 (1982).

Many courts addressing religious free exercise claims have invoked a variety of phrases to describe the magnitude of the interest the state must assert before it may impair religious liberty and the level of scrutiny to which such actions will be held. *See, e.g.*, Young v. Northern Ill. Conference of United Methodist Church, 21 F.3d 184, 185 (7th Cir. 1994) (stating that eradicating discrimination was a "compelling state interest of the highest order" but refusing to apply Title VII to a church's hiring decisions regarding its minister as an "'inroad on religious liberty' [that was] too substantial to be permissible"); New Life Baptist Church Academy v. Town of E. Longmeadow, 885 F.2d 940, 946 (1st Cir. 1989) (stating that before it may impair the free exercise of religion, the government must demonstrate that "it is the least restrictive alternative means of achieving some compelling state interest;" that "it is essential to accomplish an overriding governmental interest;" and that it must have a "state interest of the highest order . . . not otherwise served") (internal quotations and citations omitted); Rayburn v. General Conference of Seventh Day Adventists, 772 F.2d 1164, 1169 (4th Cir. 1985) (noting that eliminating discrimination is a compelling state interest of the highest order, but refusing to intrude in the church's selection of spiritual leaders on First Amendment grounds); *North Valley*

seemingly disparate standards stems directly from the Supreme Court's own conflation of language in *Roberts v. United States Jaycees*.[145] In *Roberts*, the Court melded the phrases into a hybrid, proclaiming that state civil rights laws aimed at eradicating discrimination in public accommodations "plainly serve[] compelling state interests of the highest order."[146] This language, regrettably, has been repeated in a generation of post-*Roberts* cases that have similarly endeavored to resolve claims that imposition of state anti-discrimination legislation trammeled free-association rights and that have invoked the *Roberts* language and holding.[147]

Baptist Church, 696 F. Supp. at 526 (finding the state's interest to be "a compelling state interest of the highest order"); People v. Hodges, 13 Cal. Rptr. 2d 412, 420 (Sup. Ct. 1992) (applying *North Valley*'s "compelling state interest of the highest order" standard).

[145] 468 U.S. 609 (1984).

[146] *Id.* at 624. The *Roberts* Court recognized the right to expressive association, but said "[i]nfringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.* at 623. The Court concluded that the Minnesota Human Rights Act, which prohibited discrimination in public accommodations on the basis of sex, required admission of women to the chapters of the Jaycees within the state. *See id.* at 626. In characterizing the governmental interest implicated by such anti-discrimination legislation, the Court stated: "[T]he Act reflects the state's strong historical commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services. That goal, which is unrelated to the suppression of expression, plainly serves compelling state interests of the highest order." *Id.* at 624.

[147] *See* Hurley v. Gay, Lesbian, and Bisexual Group of Boston, 515 U.S. 557, 580 (1995); New York State Clubs Ass'n v. New York, 487 U.S. 1, 12 (1988); Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 549 (1987) (applying *Roberts* and finding that any infringement of expressive freedom is justified by the promotion of the compelling state interest of the highest order in ending discrimination against women); Welsh v. Boy Scouts of Am., 993 F.2d 1267, 1280 (7th Cir. 1993) (Cummings, J., dissenting) (citing *Roberts* and arguing that exempting the Boy Scouts from a public accommodations law as a private entity would allow indiscriminate discrimination and thereby fail to serve the state's compelling interest of the highest order); Kiwanis Int'l v. Ridgewood Kiwanis Club, 627 F. Supp. 1381, 1389 (D.N.J. 1986) (noting that eliminating sex discrimination is a state interest of the highest order such that a state law requiring the admission of women into an all-male club did not violate the members' freedom of association under the First Amendment), *rev'd*, 806 F.2d 468, 477 (3d Cir. 1986) (holding that the organization was not a "place of public accommodation" within the meaning of the statute, thereby avoiding the constitutional issue); Quinnipiac Council, Boy Scouts of Am., Inc. v. Commission on Human Rights and Opportunities, 528 A.2d 352, 358 (Conn. 1987) (noting that eradicating discrimination is a compelling state interest of the highest order, but failing to apply the public accommodations law to require the Boy Scouts to accept a woman as a scoutmaster); Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ., 536 A.2d 1, 32, 45 (D.C. 1987) (citing the "highest order" standards used in both *Yoder* and *Roberts* and concluding that "the District of Columbia's stake in eradication of sexual orientation discrimination is one such interest" such that it may, to a limited degree, trump the right to religious

But while *Roberts* does use the language "compelling state interests of the highest order," that is not actually the standard the Court applied in deciding the case. Rather, the Court concluded that enforcing a state civil rights law to require admission of women to the Jaycees did not unconstitutionally impair the expressive rights of the male members of the Jaycees because the law was unrelated to the suppression of ideas and was the least restrictive means to serve the state's interest in eradicating discrimination against women.[148] Accordingly, application of the law did not impair expressive liberties nor implicate First Amendment concerns. Since First Amendment scrutiny was not applied, the Court had no need to invoke a due process standard based on "compelling" or other governmental interests. Accordingly, the Court's mention of "compelling state interests of the highest order" is dicta that forms no essential part of the

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exercise); Metropolitan Dade County Fair Hous. & Employment Appeals Bd. v. Sunrise Village Mobile Home Park, Inc., 485 So. 2d 865, 869 (Fla. Dist. Ct. App. 1986) (Schwartz, C.J., dissenting) (quoting *Roberts* and opining that the state's concern for the elimination of discrimination was a goal that "'plainly serve[d] compelling state interests of the highest order'"); Lloyd Lions Club of Portland v. Int'l Ass'n of Lions Clubs, 724 P.2d 887, 892 (Or. Ct. App. 1986) (quoting *Roberts* and applying the state's public accommodations law to require admission of women into a local Lions Club chapter).

[148] *Roberts*, 468 U.S. at 628-29. In analyzing the right to intimate association, the Court reviewed the areas of personal autonomy and intimacy given constitutional protection from governmental intrusion, including marriage, childbirth, raising and educating children, and cohabitation with one's relatives. *See id.* at 619-20 (citing Zablocki v. Redhail, 434 U.S. 374 (1978); Carey v. Population Servs. Int'l, 431 U.S. 678 (1977); Smith v. Organization of Foster Families, 431 U.S. 816 (1977); Moore v. East Cleveland, 431 U.S. 494 (1977)). The court stressed that such associations are characterized by their small size and proximity to family matters and aspects of one's personal, private life. *See id.* at 620. Conversely, the court noted that large scale business operations or organizations operating in the public sphere are remote from these areas of privacy and personal intimacy. *See id.* The Court found that Jaycees was too large and non-selective an entity, with activities involving many nonmembers, for intimate association to be implicated by its policies and practices. *See id.* at 621.

Regarding expressive association, the court looked to the constitutional protection extended to group activities, such as the right to worship and the right to work collectively toward political, social, economic, educational, religious, or cultural goals. *See id.* at 622 (citing NAACP v. Clairborne Hardware Co., 458 U.S. 886 (1982); Larson v. Valente, 456 U.S. 228 (1982); *In re* Primus, 436 U.S. 412 (1978); Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977)). While recognizing the right to expressive association, the Court said the right "is not, however, absolute." *See id.* at 623. The Court found "[i]nfringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.* (citations omitted). The Court also found that the Jaycees's activities were not truly expressive in character and that, regardless, slight impairment by a content-neutral law not aimed at the suppression of expression was constitutionally permissible to serve vital governmental interests. *See id.* at 623.

Court's holding. Cases in the *Roberts* line that similarly have upheld imposition of civil rights laws against free association challenges have likewise upheld application of the statutes when the laws did not impair expressive activities and, therefore, did not implicate First Amendment concerns or require invocation of a due process review standard.[149]

While the mixing of phrases in the free exercise and free-association contexts may be explainable, the confusion of terms in many free speech cases involving the media's right to publish the truth, to be free from prior restraints, and to have access to public information is baffling. Whereas *Daily Mail* and *Florida Star* pronounced a clear rule forbidding punishment or restraint of the media's ability to publish the truth absent a means "narrowly tailored" to advancing "a state interest of the highest order," lower courts have often melded this standard with traditional strict scrutiny terminology. Many courts invoke both "compelling" and "highest order" language without regard to their possible differing meanings and without citation to any authority for the hybrid standard.[150] Most surprising is the careless manner in which some courts actually do cite authority for the fused "compelling state interest of the highest order" standard, yet the controlling cases to which those courts cite do not themselves invoke, apply, or stand for such a hybrid standard.[151] While it is certainly helpful for a judge to cite some authority

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[149] *See, e.g., New York State Clubs Ass'n*, 487 U.S. at 13 (finding that application of the state's anti-discrimination law would not significantly impair the free association rights of clubs and club members); Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987) (finding that Rotary is not engaged in political issues, but is dedicated to humanitarian service projects, which would not be impaired but might indeed be enhanced by the admission of women as members); Fraternal Order of Eagle, Inc., Tucson Aerie No. 180 v. Tucson, 816 P.2d 255 (Ariz. Ct. App. 1991) (upholding an anti-discrimination ordinance applied to a male-only fraternal organization where the organization's membership is large and non-selective, where it conducts primarily social activities in public, and where any infringement on the group's expressive freedom is slight in comparison to the state's interest in eradicating discrimination against women).

[150] *See, e.g.*, Alliance for Community Media v. FCC, 10 F.3d 812, 825-26, 828 (D.C. Cir. 1993) (analogizing to *Florida Star*, yet declaring that speech restrictions may be upheld only if, "at a minimum, [they] substantially advance the asserted compelling interest . . ."), *judgment vacated*, 15 F.3d 186 (D.C. Cir. 1994) (en banc); Doe v. Florida Judicial Qualifications Comm., 748 F. Supp. 1520, 1529 (S.D. Fla. 1990) (quoting *Daily Mail*'s "highest order" standard, but immediately thereafter invalidating the state's action for its failure to "set forth any compelling interests" sufficient to justify a restriction on protected speech).

[151] *See, e.g.*, State v. Heltzel, 552 N.E.2d 31, 34 (Ind. 1990). The *Heltzel* court announced that "the state may not punish or suppress the publication of truthful information without first demonstrating a compelling state interest of the highest order" and cited *Landmark Communications, Inc. v. Virginia* as the authority for this

for such pronouncements, it is quite troublesome when, as in these cases, the authority does not stand for the asserted proposition. Whether the result of carelessness, confusion, ignorance, or fabrication, many courts are not applying the standards of the state interest of the highest order doctrine in their pure form but, rather, are commingling them with the more familiar jurisprudential language of "compelling state interests" and "least restrictive means" that traditionally comprise the strict scrutiny model.[152]

B. Proper Applications and Extension of the Doctrine

Since the promulgation of the state interest of the highest order doctrine and since its strongest application in *Florida Star*, numerous courts — primarily in cases involving media defendants and efforts to punish them for reporting truthful, sensitive information whether through criminal or civil sanction — have properly applied the doctrine and required the state to demonstrate a means most narrowly tailored to serving a state interest of the highest order before First Amendment liberties may be impaired. In the free speech arena, courts also have extended the *Florida Star* doctrine beyond its quintessential applicability to media defendants to include organizations and even individuals engaged in constitutionally protected speech. These cases demonstrate the relevance and vitality of the doctrine beyond its traditional uses and may have elucidative implications for

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standard. *Heltzel*, 552 N.E.2d at 34 (citing Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 845 (1978)). *Landmark*, however, said nothing about "compelling state interests of the highest order." Rather, *Landmark* declared that a state's restriction of free speech can only be justified by demonstrating that the speech presents a "clear and present danger" to the administration of justice. *See Landmark*, 435 U.S. at 844; *see also* Lence v. Hagadone Inv. Co., 853 P.2d 1230, 1235 (Mont. 1993) (quoting *Landmark* as having used "the most urgent governmental importance" language, although *Landmark*, in fact, does not use this language). *Landmark* does not meld the words "compelling" and "highest order" when assessing the magnitude of the government's interest. *See Landmark*, 435 U.S. at 844; *see also In re* PEPCO Employment Litig., No. 86-0603, 1992 WL 115611 (D.D.C. May 8, 1992). In *PEPCO*, the court stated that a confidentiality order forbidding parties to discuss information obtained through the discovery process could not be applied to prevent disclosure of information obtained from outside sources "absent a compelling state interest of the highest order." *Id.* at * 8. In support of its invocation of this standard, the court cited Chief Justice Rehnquist's opinion in *Butterworth v. Smith*, 494 U.S. 624, 632 (1990) and *Seattle Times v. Rhinehart*, 467 U.S. 20, 34 (1984). *See id. Butterworth*, one of the major cases applying the state interest of the highest order standard, is quite clear in its invocation of just that standard, however, and the case does not speak of nor search for *compelling state interests of the highest order*. *See Butterworth*, 494 U.S. at 632. Likewise, *Seattle Times* did not speak in terms of state interests of the highest order, but did uphold a protective order refusing access to pretrial discovery materials. *See Seattle Times*, 467 U.S. at 37.

[152] *See* TRIBE, *supra* note 11, § 16-6, at 1451 (explaining strict scrutiny review).

other areas of First Amendment jurisprudence wherein the doctrine has not been traditionally applied. The doctrine could resolve conflicts between the government's regulatory interests and the fundamental civil liberties of individuals.

The most common applications of the state interest of the highest order doctrine are in cases involving media defendants, wherein the doctrine is invoked to protect the media from being punished for, or prohibited from, publishing truthful information lawfully obtained,[153] absent a need to further a state interest of the highest order[154] and a means most narrowly tailored toward that end.[155] Primarily, those cases are the direct progeny of *Daily Mail* and *Florida Star* and involve statutes or court orders that endeavor to protect confidentiality interests by prohibiting or punishing publication of the names or identities of juvenile offenders[156] or rape victims.[157] These

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[153] *Cf.* Natoli v. Sullivan, 606 N.Y.S.2d 504, 510 (Sup. Ct. 1993) (finding that a newspaper's publication of information obtained from a wiretap was not protected from civil sanctions under federal wiretap law because the statute was narrowly tailored to serve a governmental interest of the highest order and because the information was unlawfully obtained).

[154] *See, e.g.*, Connell v. Town of Hudson, 733 F. Supp. 465, 471 (D.N.H. 1990) (finding that barring media access to a public accident scene was not narrowly tailored to serving a state interest of the highest order); Upchurch v. New York Times Co., 431 S.E.2d 558, 561 (S.C. 1993) ("[W]hen a newspaper (1) lawfully obtains (2) truthful information about (3) a matter of public significance, liability may be imposed only if it serves a need to further a state interest of the highest order."); Fann v. City of Fairview, 905 S.W.2d 167, 172 (Tenn. Ct. App. 1994) (protecting the media's publication of truthful information it lawfully obtained against a privacy and tortious conduct lawsuit by a city official and finding that the suit demonstrated no "need to further a state interest of the highest order by sanctioning [the newspaper] for its receipt and subsequent publication of this information"); *In re* Hays v. Marano, 493 N.Y.S.2d 904, 906 (Sup. Ct. 1985) (holding that when a newspaper reported on a matter of public importance and obtained truthful information in a legal, albeit inadvertently released, manner, the state could not impose sanctions without a need to advance a state interest of the highest order).

[155] *See, e.g.*, Jacksonville Television, Inc. v. Florida Dep't of Health & Rehabilitative Servs., 659 So. 2d 316, 318 (Fla. Dist. Ct. App. 1994) (finding that the state's interest in protecting the privacy of children is a state interest of the highest order, but that prohibiting the broadcast of an interview filmed prior to a judge's imposition of a gag order was "simply too tenuous" a means of serving that interest to withstand First Amendment scrutiny); *In re* M.B., 484 N.E.2d 1154, 1159-60 (Ill. App. Ct. 1985) (holding that a protective order prohibiting press attendance and publication related to a juvenile's prosecution hearing was an unconstitutional prior restraint on speech because, although the protection of minors was a state interest of the highest order, the order was not narrowly tailored when the identity and address of the juvenile had been released prior to the entrance of the protective order).

[156] *See* KGTV Channel 10 v. Superior Court, 32 Cal. Rptr. 2d 181, 188 (Ct. App. 1994) (finding that the state's interest in rehabilitation of juvenile offenders did not justify restraining the media's right to publish the name of a juvenile offender that it already received and aired prior to the court's order); *M.B.*, 484 N.E.2d at 1159-60

are the easy applications of the doctrine because they are so directly and factually on point with clear Supreme Court precedents; however, courts have also extended the doctrine's protection to many different subjects of media scrutiny.[158] In cases involving media defendants, courts are more likely to invoke the state interest of the highest order doctrine and, thanks to the clearly analogous precedent, are apt to apply it correctly, requiring that the state must demonstrate a need to serve a state interest of the highest order and a

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(nullifying a protective order that precluded the press from attending prosecution hearings regarding a minor charged with abusing an infant and prohibited publication of the juvenile's name as an unconstitutional prior restraint); Minneapolis Star and Tribune Co. v. Schmidt, 360 N.W.2d 433, 435-36 (Minn. Ct. App. 1985) (invalidating a prior restraint on publishing the name of a juvenile offender because no "compelling" interest was served by the prohibition); Edward A. Sherman Publ'g Co. v. Goldberg, 443 A.2d 1252, 1257 (R.I. 1982) (finding that a court order barring a newspaper from attending a juvenile proceeding based on a prior publication of the minor's name was an unconstitutional punishment for the publication of legally obtained data of public concern absent a need to advance a state interest of the highest order); State *ex rel.* Times and Democrat, 274 S.E.2d 910, 911 (S.C. 1981) (invalidating a state law that prohibited the press from publishing the name or likeness of a juvenile charged with a crime because the state could not prohibit the publication of legally obtained truthful information without a need to further a state interest of the highest order). *But see In re* Minor, 595 N.E.2d 1052, 1057-58 (Ill. 1992) (upholding a juvenile court's exclusion of a reporter from a juvenile hearing when the proceedings were closed by court rules and thus the press had no absolute right to attend them — finding that, in this circumstance, the state's interest in protecting the rights of juveniles overrode the press's rights under the First Amendment).

[157] *See* Ross v. Midwest Communications, Inc., 870 F.2d 271, 275 (5th Cir. 1989) (holding that a television station could not be held liable for tortious interference with the privacy of a rape victim for publication of her first name, details of the rape, and a picture of her residence because the rape was newsworthy and the state's interest could be served by alternative means); Star-Telegram, Inc. v. Doe, 915 S.W.2d 471, 475 (Tex. 1995) (invalidating lower court's finding that whether the identity of a rape victim was a matter of public concern or was lawfully obtained was a jury question and invoking instead the *Florida Star* standard to protect the media from the chilling effect of having to contemplate the impact that each newsworthy truthful report could have on victims involved); State v. Globe Communications, 648 So. 2d 110, 112 (Fla. 1994) (invalidating application of state's rape shield statute to protect media from liability for publishing the name of the rape victim in the William Kennedy Smith trial when the media had lawfully obtained the name through its own investigations); Macon Tel. Publ'g Co. v. Tatum, 436 S.E.2d 655, 658 (Ga. 1993) (reversing, under *Florida Star* and the First Amendment, a damages award for a victim of attempted rape who shot and killed her assailant and whose name was reported in newspapers in contravention of the state rape shield statute).

[158] *See Connell*, 733 F. Supp. at 471 (access to accident site); Lence v. Hagadone Inv. Co., 853 P.2d 1230, 1236 (Mont. 1993) (ethics investigation of attorney), *overruled by* Sacco v. High Country Indep. Press, Inc., 896 P.2d 411 (1995); *In re Hays*, 493 N.Y.S.2d at 906 (trial of former New York Yankees baseball player Joe Pepitone); *Upchurch*, 431 S.E.2d at 561 (suspected cocaine-related death); *Fann*, 905 S.W.2d at 172 (investigation of city official).

means most narrowly tailored to effecting that interest.[159] The doctrine has even been extended to protect the media from liability when publishing information that may have originally been unlawfully obtained as long as the information came into the hands of the media lawfully.[160]

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[159] *Compare generally* Worrell Newspapers of Ind. v. Weshafer, 570 F. Supp. 1447 (S.D. Ind. 1983) (finding that an Indiana statute that prohibited the release of information or indictments that were sealed by court order served a state interest of the highest order and was narrowly tailored to serve that interest with the least possible burden on the press and thus withstood the media's challenge on First Amendment grounds), *rev'd*, 739 F.2d 1219 (7th Cir. 1984), *aff'd*, 469 U.S. 1200 (1985), *with* cases cited *supra* notes 153-58 (generally applying the doctrine correctly by finding that state efforts to sanction the media for publishing truthful information lawfully obtained were constitutionally invalid because they were not narrowly tailored to serving a state interest of the highest order).

[160] *See* Peavy v. New Times, Inc., 976 F. Supp. 532, 540 (N.D. Tex. 1997). At issue in *Peavy* were extreme racist and profane statements made by Peavy, a Dallas school board member, regarding his fellow board members, school officials, district parents, and schoolchildren of African-American descent. *See id.* at 533. The statements were illegally wiretapped by an unknown individual in violation of 18 U.S.C. § 2510 (Title III). *See id.* Audio tapes of Peavy's statements were anonymously delivered to school board members, who then read a transcript of the inflammatory tape into the record of a public school board meeting at which Peavy was not in attendance. *See id.* at 533-34. Thus, the statements made their way into the public transcripts of the meeting and a local weekly newspaper, *The Dallas Observer*, obtained a copy of the transcript and published it in full. *See id.* Portions of the information were subsequently republished in the *Dallas Morning News* and *The New York Times*. *See id.* at 535. Peavy sued the local newspaper and its editor, asserting claims of common law invasion of privacy, violations of two state codes, and violation of the federal wiretap statute, Title III. *See id.* at 536-37. The newspaper asserted a First Amendment defense to the wiretap claim. *See id.* at 537-38. The district court analyzed the wiretap cause of action within the *Daily Mail* and *Florida Star* framework, stating that the media could not be punished for publishing truthful information lawfully obtained absent a need to further a state interest of the highest order. *See id.* at 538 (citing Florida Star v. B.J.F., 491 U.S. 524, 530 (1989); Smith v. Daily Mail, 443 U.S. 97, 106 (1979)). The court reasoned that "the privacy interest at stake here is less than compelling, [while] the public interest in the publication of these transcripts, on the other hand, is great." *Id.* at 539. The court asserted that the privacy interests of public figures or private individuals involved in public issues frequently must give way to the public's right to know and the media's free press rights under the First Amendment. *See id.* at 539-40 (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 334 (1974) (private individuals); New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Garrison v. Louisiana, 379 U.S. 64, 72-73 (1964) ("[W]here the criticism is of public officials and their conduct of public business, the interest in private reputation is overborne by the larger public interest, secured by the Constitution, in the dissemination of truth.")). Additionally, the court found that even if the wiretapped information was originally obtained unlawfully, that unlawful taint was purged once the information was read into the public record at the school board meeting. *See id.* at 540. Thus, the information was lawfully obtained by the newspaper and the newspaper had a constitutional right to publish the information because it was clearly of public importance. *See id.*

Outside of the realm of media defendants, however, the state interest of the highest order doctrine has been invoked in a surprisingly small number of cases to safeguard First Amendment liberties. Of the few courts willing to mold the doctrine to protect analogous speech interests of non-media defendants, some have logically extended the doctrine's protective mantle to secure the speech interests of organizations engaged in communicating information of public concern, including a credit reporting agency[161] and a tenant's organization.[162] One dissenting state supreme court justice even argued that the standard should be applied to protect the expressive rights of a labor union engaged in a protest work stoppage.[163]

Only a handful of courts have made the reasonable extension of the doctrine to protect the First Amendment interests *of individuals* faced with governmental efforts to suppress or sanction the content of their speech.[164] Among those protected individuals were the plaintiffs in a class action discrimination lawsuit who opposed their employer's efforts to seal from public view all documents related to the case.[165] In a recent high profile case involving two United States con-

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[161] *See* U.D. Registry, Inc. v. California, 40 Cal. Rptr. 2d 228, 232 (Ct. App. 1995) (applying the doctrine to protect a credit reporting agency's freedom of speech about a potential tenant's history of detainer actions because the statute under scrutiny prohibited dissemination of information that was made publicly available by the state itself in court records).

[162] *See* Near East Side Community Org. v. Hair, 555 N.E.2d 1324, 1335-36 (Ind. Ct. App. 1990) (applying the *Florida Star* standard to protect a neighborhood tenants' association from liability for publicizing a landlord's address and property holdings since such information was truthful, lawfully obtained from public records, and of public concern).

[163] *See* Masloff v. Port Auth. of Allegheny County, 613 A.2d 1186, 1196-97 (Pa. 1992) (Larsen, J., dissenting) (faulting the majority for ordering an end to a labor union's work stoppage as an unconstitutional prior restraint on speech and declaring that only a state interest of the highest order can justify interference with the union's free speech interest in striking).

[164] *See, e.g.*, Coplin v. Fairfield Pub. Access Television Comm., 111 F.3d 1395 (8th Cir. 1997). In *Coplin*, the court analyzed an individual's First Amendment claim under the state interest of the highest order standard. *See id.* at 1404 (citing *Florida Star*, 491 U.S. at 541). Of note, however, Coplin was himself a media plaintiff as the host of a cable television call-in talk show, which was suspended in the wake of community complaints regarding the revelations on the program of sexual information about individuals who were not public figures. *See id.* at 1398-1400. The court invoked *Florida Star* and remanded the case to assure that the cable television access board, a government actor, was not censuring publication of private facts that were already in the public domain, hence assuring that the suspension was narrowly tailored to serve a state interest of the highest order. *See id.* at 1404.

[165] *See In re* PEPCO Employment Litig., No. 86-0603, 1992 WL 115611 (D.D.C. May 8, 1992). In *PEPCO*, the court stated that a confidentiality order forbidding parties to discuss information obtained through the discovery process could not be applied to prevent disclosure of information obtained from outside sources "absent a

gressmen, *Boehner v. McDermott*,[166] the United States District Court for the District of Columbia weighed the privacy interests of one congressman against the free speech interests of the other and ruled that expressive liberties won out over the privacy and governmental confidentiality interests protected by a federal wiretap statute.[167] The *Boehner* court applied *Florida Star*'s state interest of the highest order doctrine to protect the free speech interests of the congressman who disclosed information originally obtained through an illegal wiretap but legally obtained by him. The court held that the statute's privacy protection interests did not meet the highest order standard when the information was of public concern, was truthful, and was lawfully obtained by the defendant.[168]

The dearth of judicial opinions applying the state interest of the highest order standard to First Amendment free speech claims asserted by groups and individuals is surprising — indeed, inexplicable — because state and federal courts have clear guidance demonstrating the applicability of the standard to assess the free speech interests of individuals, guidance from none other than the highest court in

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compelling state interest of the highest order." *Id.* at *8.

[166] No. CIV. 98-594, 1998 WL 436897 (D.D.C. July 28, 1998).

[167] *See id.* at *7. At issue in *Boehner* was a tape made of a conversation involving several Republican congressmen regarding the House Ethics Committee's investigation of the activities of then-Speaker Newt Gingrich. *See id.* at *1. Two Florida residents intercepted a cellular telephone transmission involving Gingrich and Republican Reps. John Boehner and Dick Armey. *See id.* The couple discussed the potentially damaging tape with Rep. Kay Thurman, a Democrat, who in turn discussed it with Minority Whip David Bonior and eventually advised the interceptors to deliver the tape to Rep. James McDermott, a member of the House Ethics Committee. *See id.* McDermott forwarded copies of the tape to *The New York Times*, *The Atlanta Journal-Constitution*, and *Roll Call*. *See id.* *The Times* broke the story on January 10, 1997 on page one. *See id.* The couple was eventually charged with a misdemeanor violation of unlawful interception of a cellular transmission and each was fined $500. *See id.* at *2. Boehner filed suit against McDermott, alleging violation of a federal wiretapping statute for his allegedly having knowingly disclosed an illegally intercepted communication. *See id.* The court considered varying levels of scrutiny to apply to the competing privacy and free speech interests at issue and adopted *Florida Star* as the controlling precedent because the information in McDermott's hands was truthful, lawfully obtained, and of public interest, despite the unlawful genesis of the tape when in the hands of the Florida couple. *See id.* at *4-7.

[168] *See id.* at *7. The district court derided Rep. McDermott's choice "so eagerly [to] seek to capitalize on the skullduggery of would-be party operatives to win petty, partisan victories in the press," but nevertheless found that the Congressman's actions were constitutionally protected. *Id.* The court concluded: "The First Amendment is largely blind to motives, however, and it offers protection not only to the noble but also to the ignoble. Thus, Rep. McDermott's actions are protected under the Amendment, and the Court must grant his motion to dismiss." *Id.* Of interest, the court questioned the ethics of McDermott's actions and noted that when his use of the illicitly taped conversations became public, he resigned from the House Ethics Committee. *See id.* n.9.

the land. In two opinions written this decade by Chief Justice Rehnquist, the Supreme Court put government actors to the test of demonstrating a need to further a state interest of the highest order and a means most narrowly tailored toward advancing that interest before the government could justify impairment of *the content* of the free speech liberties *of an individual.*[169]

In one of these cases, *United States v. Aguilar,*[170] the Supreme Court reviewed the conviction of a federal judge for illegally disclosing the existence of an FBI wiretap and for obstruction of justice for lying to federal agents investigating an embezzlement conviction.[171] The Supreme Court affirmed the Ninth Circuit's dismissal of the obstruction of justice count, but reinstated the conviction for violating the federal wiretap statute.[172] In analyzing the wiretap conviction, the Court applied *Daily Mail* to Judge Aguilar's claimed First Amendment defense[173] and acknowledged that "the government may not generally restrict *individuals* from disclosing information that lawfully comes into their hands in the absence of a 'state interest of the highest order.'"[174] Chief Justice Rehnquist noted that the wiretap statute does not broadly sanction all those who disclose lawfully obtained knowledge of a wiretap, but is sufficiently narrowly tailored such that it imposes liability "only upon those who disclose wiretap information 'in order to obstruct, impede, or prevent'" interception of the communications that are the focus of the probe.[175] Beyond this narrow impingement on speech, Chief Justice Rehnquist applied the state interest of the highest order doctrine and reasoned that the government may at times impose "special duties of nondisclosure" upon "officials in sensitive confidential positions" such as federal judges, such that an impairment of a judge's First Amendment rights is justified even where it would not be so for the rights of "*a member of the general public* who happened to lawfully acquire possession of in-

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[169] *See generally* United States v. Aguilar, 515 U.S. 593 (1995); Butterworth v. Smith, 494 U.S. 624 (1990).

[170] 515 U.S. 593 (1995).

[171] *See id.* at 595. An en banc hearing of the Ninth Circuit reversed both convictions. *See id.*

[172] *See id.* at 606.

[173] *See id.* at 605. Aguilar urged a more narrow reading of the wiretap statute such that his conduct would not fall within its proscription since the wiretap had already expired at the time he disclosed it. *See id.* Chief Justice Rehnquist opined, "We see no necessity for such a restrictive construction of the statute." *Id.*

[174] *Id.* (quoting Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 103 (1979) (emphasis added)).

[175] *Id.* at 605 (quoting 18 U.S.C. § 2232(c) (1994)).

formation about the wiretap."[176] Citing the need to "preserve the integrity of the court" and to the higher duty imposed upon sensitive government officials who voluntarily assumed a position of confidentiality, Chief Justice Rehnquist concluded that "the Government's interest" in maintaining the secrecy of sensitive wiretap information "is quite sufficient to justify" application of the statute to a federal judge, "without any artificial narrowing because of First Amendment concerns."[177]

In the other opinion by Chief Justice Rehnquist in this vein, *Butterworth v. Smith*,[178] the Supreme Court considered the First Amendment rights of a former grand jury witness to speak about the subject matter of the grand jury investigation after the completion of the proceedings.[179] A Florida statute prohibited grand jury witnesses from ever disclosing their testimony,[180] and the witness sued to have the statute declared an unconstitutional impairment of free speech rights guaranteed by the First Amendment.[181] Chief Justice Rehnquist analyzed that claim within the *Daily Mail* framework and declared that a state may not sanction *an individual's* speech regarding lawfully obtained truthful information, viz., *the content* of speech, absent a need to further a state interest of the highest order.[182] Noting that the speech at issue in the case concerned alleged governmental improprieties — "speech which has traditionally been recognized as lying at the core of the First Amendment"[183] — the Court placed the onus on the state to justify its restriction on speech by requiring the state to meet the standards of the state interest of the highest order

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[176] *Aguilar*, 515 U.S. at 605-06 (emphasis added).

[177] *Id.*

[178] 494 U.S. 624 (1990).

[179] *See id.* at 626-28. The grand jury witness, Michael Smith, was a newspaper reporter for the *Charlotte Herald-News* in Charlotte County, Florida. *See id.* at 626. After completion of the grand jury proceedings, Smith decided to write a news story, and perhaps a book, about the subject matter of the grand jury investigation, including therein his own testimony and his experiences as a witness. *See id.* at 628. In the course of the investigation, he gained information regarding improprieties in the State Attorney's Office and County Sheriff's Office. *See id.* at 626.

[180] *See id.* at 626-27. With limited exceptions, the Florida statute at issue forever barred a grand jury witness from communicating the contents of the witness' own testimony. *See id.* at 627.

[181] *See id.* at 629. Smith sought a declaration of the statute's unconstitutionality plus an injunction to forestall his prosecution. *See id.*

[182] *See id.* at 632 (citing Florida Star v. B.J.F., 491 U.S. 524, 533 (1989); Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 103 (1979)).

[183] *Id.* (citing Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 838 (1978)).

doctrine.[184] Finding that the state's confidentiality interests regarding grand jury proceedings did not justify "a permanent ban" on disclosures even after completion of the grand jury proceedings, Chief Justice Rehnquist reasoned that the asserted state interests were not directly served by its statute and thus could not justify the impairment of the speech interests of grand jury witnesses.[185] Because the state was unable to demonstrate that its restriction on grand jury witnesses was narrowly tailored to advance a state interest of the highest order, the Court struck down the statute insofar as it operated to bar indefinitely the communication of truthful information lawfully obtained *by grand jury witnesses.*[186]

In both *Aguilar* and *Butterworth*, the Supreme Court made clear that the heavy state interest of the highest order doctrine stood as a protection of *the content* of the speech *of individuals*, not just of the media. It is puzzling that many lower courts have not frequently followed this jurisprudence and applied the doctrine to governmental efforts to impair the speech interests of individuals as well as the media.[187] The Supreme Court also has never indicated that the *Daily Mail* or *Florida Star* applications of the state interest of the highest order doctrine should not be extended beyond the context of juvenile offenders and rape victims to include speech involving other subject matters; quite the opposite, in fact. In *Easton Publishing Co. v. Boettger*,[188] for example, a case involving publication of gambling-related information obtained from a wiretap, the United States Supreme Court rejected the Pennsylvania Supreme Court's imposition of civil liability against a newspaper for publication of the information and remanded the case with explicit instructions that the state court reconsider its opinion in light of *Florida Star*.[189] The precedent is clear;

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[184] *See Butterworth*, 494 U.S. at 632.

[185] *See id.* The state had asserted interests in needing to preserve confidentiality in order to apprehend suspects still at large, to prevent subornation of witnesses expected to testify at later trials, to protect witnesses from later retribution, and to prevent intimidation of grand jury witnesses. *See id* at 633-34. The court found that such interests are not persuasive when the grand jury investigation is over, noting:

> [W]e do not believe those interests warrant a permanent ban on the disclosure by a witness of his own testimony once a grand jury has been discharged. Some of these interests are not served at all by the Florida ban on disclosure, and those that are served are not sufficient to sustain the statute.

Id. at 632.

[186] *See id.* at 635-36.

[187] *See infra* Part VI.

[188] 493 U.S. 885 (1989).

[189] *See* Boettger v. Loverro, 587 A.2d 712, 713 (Pa. 1991) (*Boettger II*) (noting that the United States Supreme Court vacated the state court's judgment and remanded

the indications from the Supreme Court are strong; the dearth of application among the lower courts is maddening. *Aguilar* and *Butterworth* are especially poignant because they both deal with individuals as participants in the judicial process and the tension that comes about when First Amendment speech issues arise within a judicial setting.

C. *Simplicity: The Promise of the State Interest of the Highest Order Doctrine*

The application of the state interest of the highest order doctrine offers excellent protection for expressive liberties in the face of routine governmental operations that may at times interfere with an individual's protected rights. As Part II of this Article demonstrates, the government must prove that it has a great need to interfere with an individual's liberty in a specific and focused manner before the individual's liberty gives way to the governmental interest. As the discussion in this Part demonstrates, the power of this doctrine has been thwarted in the past decade due to inconsistent and often inappropriate application of the doctrine. The state interest of the highest order doctrine is not strict scrutiny; it is not intermediate scrutiny; it is not a time, place, and manner analysis. What the doctrine offers is a strong alternative by which courts should judge government action that restricts *the content* of First Amendment expressive liberties. The state interest of the highest order doctrine is an ideal tool to serve the needs of individuals and government, because it not only endeavors to secure constitutional liberties, but it allows for an override in situations of the utmost state interest. When the government seeks to impair the content of an individual's expressive liberty in a particular environment, the doctrine requires the state to explain why that particular impairment of that particular individual's words in that particular environment is necessary to save the state's existence. Such a doctrine is the quintessence of the Bill of Rights, which

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the case for consideration in light of *Florida Star*). On remand, the Pennsylvania court in *Boettger II* found no liability against the media. *See id.* at 717-18. The court deemed that the information at issue, because it dealt with a crime — gambling — was not the sort of information protected by a state interest of the highest order. *See id.* at 718. The dissent faulted the majority's reliance on the nature of the communication as the determining factor regarding whether a state interest of the highest order existed. *See id.* at 723 (Zappala, J., dissenting). The dissent stated that the proper inquiry is not into the "content of the conversation" but into whether "interception and disclosure" of the conversation occurred. *See id.* The dissent rejected the majority's "hindsight" view of the character of the information and stated that the interception itself implicates a state interest of the highest order in protecting privacy. *See id.* at 722-24 (Zappala, J., dissenting).

secures and defends the rights of individuals against the government. The onus properly belongs on the government when its actions have negative consequences for the exercise of expressive liberties. This is the achievement of the state interest of the highest order doctrine.

More than this, the doctrine brings a promise of simplicity. By consistently requiring courts to force the government to justify its impairments of First Amendment liberties under the doctrine's standards, courts will be spared the increasingly tortured analyses that have weighed down First Amendment jurisprudence. As discussed in Part V of this Article, First Amendment jurisprudence is greatly in need of such a simplification, especially in areas such as media access to courtroom proceedings and the expressive rights of provocative speakers. The state interest of the highest order doctrine could prove to be the unifying agent that will end the erratic jurisprudence that has bogged down First Amendment law — giving courts and litigants, the media and individuals, the government and provocative speakers, consistent standards upon which they can rely in resolving clashes between governmental actions and individual constitutional liberties. As the discussions in Parts V and VI demonstrate, too often the First Amendment's protection of expressive liberties is sacrificed at the altar of the justice system when those interests clash with the government's interests in administering the justice system or in silencing unpopular or unwelcome speech. Such a state of affairs is an affront to the First Amendment and demonstrates the need to unify, simplify, and fortify First Amendment jurisprudence.

V. AN ERRATIC JURISPRUDENCE PROVIDES INSUFFICIENT PROTECTION FOR FIRST AMENDMENT LIBERTIES

The intended reach of the Constitution's protection of free speech has been debated by generations of scholars and jurists who have advanced competing jurisprudential theories to address the First Amendment's speech clause.[190] The Supreme Court has never held the First Amendment's protection of free speech to be an absolute guarantee,[191] but has carved out exceptions from its grasp and promulgated varying standards by which courts should assess its

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[190] *See generally* Kathleen M. Sullivan, *Free Speech Wars*, 48 SMU L. REV. 203 (1994) (chronicling the competing theories of free speech jurisprudence in the past century).

[191] *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) ("[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances.").

reach. Among the forms of speech falling outside the Amendment's realm of protection are obscenity,[192] defamation,[193] fighting words,[194] treason,[195] perjury,[196] and incitement to imminent lawlessness.[197] The analytic framework for speech cases includes different standards for public versus nonpublic forums,[198] as well as time, place, and manner rules,[199] imposition of laws of general application that may impact upon speech,[200] and balancing tests when speech interests and other rights clash.[201] The varying tests invoked and standards to be applied in speech cases can produce dramatically different results *depending on which test the reviewing court decides to use*, and the reasons underlying the choices are not always clear.[202] The Supreme Court's frac-

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[192] *See* Miller v. California, 413 U.S. 15, 24 (1973) (laying out a threshold test to determine whether speech is obscene and thus not protected by the First Amendment); United States v. Reidel, 402 U.S. 351, 354 (1971) (upholding the government's power to ban mailing of obscene materials); Roth v. United States, 354 U.S. 476, 485 (1957) (holding that obscene speech receives no constitutional protection).

[193] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974) (stating that defamation of purely private individuals may fall outside of the First Amendment's protection).

[194] *See Chaplinsky*, 315 U.S. at 572 (holding that "fighting words" that inflict harm by their very utterance receive no constitutional protection).

[195] *See* Scales v. United States, 367 U.S. 203, 228 (1961).

[196] *See* LaChance v. Erickson, 118 S.Ct. 753, 756 (1998) (citing Dennis v. United States, 384 U.S. 855, 866 (1966)).

[197] *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (finding that the government may sanction incitement of imminent lawless action that is likely to produce such action without offending the First Amendment).

[198] *See* Arkansas Educ. Television Comm'n v. Forbes, 118 S. Ct. 1633, 1641-43 (1998) (recapping the Supreme Court's forum analysis standards for speech rights in public, designated public, and nonpublic forums); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (laying out guidelines to analyze whether a public or designated public forum has been created versus a nonpublic forum).

[199] *See* United States v. O'Brien, 391 U.S. 367, 377 (1968) (allowing for reasonable time, place, and manner restrictions on speech and speech-related activities if the government's regulations are content-neutral, if they are necessary to advance a substantial governmental interest unrelated to the suppression of expression, and if the incidental burden on speech interests is no greater than absolutely necessary).

[200] *See* Cohen v. Cowles Media Co., 501 U.S. 663, 670 (1991) (holding that the First Amendment's guarantee of freedom of the press does not exempt the media from laws of general applicability, such as imposition of liability based on a promissory estoppel claim).

[201] *See* Roberts v. United States Jaycees, 468 U.S. 609, 624 (1984).

[202] *Compare, e.g., Cohen*, 501 U.S. 663, *with Florida Star*, 491 U.S. 524. Had the Cohen Court applied the rule from *Florida Star*, as the dissent urged, it is clear that the media would have been protected from liability. *See Cohen*, 501 U.S. at 676 (Blackmun, J., dissenting). *Compare also, e.g.*, Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 890 (1990), *with* Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) *and* Lee v. Weisman, 505 U.S. 577, 590 (1992). Had the *Employment Divi-*

tured speech jurisprudence has become increasingly tortured and confusing as a result of these many standards and differing modes of analysis.[203]

One of the most troublesome areas of speech-related litigation of late has been media access to judicial proceedings and court documents, as judges have become increasingly wary about the presence of the press in the courtroom and have curtailed media access in the name of protecting the fair-trial rights of defendants and the privacy of victims and juveniles, and — allegedly — promoting the efficient administration of justice.[204] Courts inexplicably utilize differing tests to analyze governmental efforts to punish the media for publishing lawfully obtained truth than for restrictions on media access to courtrooms and on the media's ability lawfully to gather truthful information.

When it comes to media access to courtrooms and court records, judges apply different standards for criminal and civil cases. The United States Supreme Court has ruled that in criminal trials, all documents and proceedings must be open to the public and to the press.[205] State efforts to close criminal proceedings, for example, in the interest of protecting privacy and rehabilitation interests regarding a juvenile sexual assault victim, have been stricken by the Court in the name of the media's First Amendment right to access.[206] The Court has also ruled that jury selection in criminal trials must be open to public scrutiny and to media coverage.[207] These rulings mandating press access to the courtroom may seem to augur well for recognition of the media's rights in the courtroom, but several other rulings do not bode well for media scrutiny of judicial proceedings. For example, a judge may elect to close certain documents or proceedings, such as pretrial proceedings, if the judge believes there is a

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sion Court applied the protection for free exercise of religion against state coercion as embodied in *Yoder* and, a generation later, in *Lee*, rather than holding that laws of general applicability that burden religious exercise only incidentally are constitutionally permissible, the Court would have reached a different result.

[203] *See generally* Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219 (1984).

[204] *See infra* Part VI.

[205] *See* Richmond Newspapers v. Virginia, 448 U.S. 555, 575-76 (1980).

[206] *See* Globe Newspapers Co. v. Superior Court, 457 U.S. 596, 607 (1982) (striking down a Massachusetts statute that permitted a judge to close court proceedings involving a juvenile sex assault victim and noting that such a restriction must be "necessitated by a compelling governmental interest, and . . . narrowly tailored to serve that interest").

[207] *See* Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 9 (1986).

substantial threat to the criminal defendant's right to a fair trial.[208] Additionally, if the safety of jurors is an issue, courts may elect to impanel the jury in secrecy and maintain the anonymity of jurors if the judge states the reasons for doing so on the record.[209] These decisions allow judges leeway to decide that proceedings must be closed, and the media only rarely will stomach the cost and delay required to litigate such matters.[210]

In civil cases, there is greater room for closure of proceedings, documents, and settlement terms, despite rather strong language from the Supreme Court assuring the media and the public their rights of access.[211] Judges and parties to civil cases tend to view publicity as a threat to settlement potential and thus seek to keep as much information secret as possible.[212] Even when the media has a full right of access to court proceedings, judges may refrain from allowing access to pretrial proceedings, leaving the media to report on a trial while ignorant of materials contained in pretrial discovery.[213]

Too many judges abuse the discretion they have to seal court documents and close court proceedings and end up sealing and closing more than is required for maintaining secrecy for the duration of the issue's public interest.[214] Beyond the instances in which courts

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[208] *See* Rosalind C. Truitt, *Court Watch; After O.J., Journalists Fight for Access to Sealed Court Documents and Closed Proceedings*, PRESSTIME, July/Aug. 1998, at 32 (noting that despite a high-profile victim, the trial stemming from the murder of entertainer Bill Cosby's son, Ennis, *People v. Markhasev*, in California Superior Court attracted little media attention and did not warrant restrictions on the media).

[209] *See* United States v. McVeigh, 931 F. Supp. 756, 760 (D. Colo. 1996) (impaneling an anonymous jury).

[210] *See* Truitt, *supra* note 208 (quoting *New York Times* assistant general counsel George Freeman as stating, "Unless the media is willing to spend a lot of time and money challenging each and every closure, a lot of this information is sealed.").

[211] *See* Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978) ("[T]he courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.").

[212] *See* United States v. Town of Moreau, 979 F. Supp. 129, 136 (N.D.N.Y. 1997) ("In a perfect world, the public would be kept abreast of all developments in the settlement discussions of lawsuits of public interest. In our world, such disclosure would . . . result in no settlement discussions and no settlements.").

[213] *See* Seattle Times Co. v. Rhinehart, 467 U.S. 20, 31 (1984) (upholding a trial court's order forbidding a newspaper from publishing information obtained through pretrial discovery in a civil proceeding).

[214] *See* Truitt, *supra* note 208. Truitt chronicles several recent cases in which judges have clamped down on free speech interests all in the name of the fair and efficient administration of justice. *See id.* For example, a Pennsylvania state court withheld court documents from the press during the duration of a criminal trial, and a review panel upheld the judge's order. *See id.* Moreover, the review panel refused three newspapers the right to appeal the ruling until after the criminal trial was over, when the material would be of diminished interest to the newspapers and

have been able to order proceedings closed and thereby prevent media access to information, there have been disturbing cases in which trial judges have endeavored, usually unsuccessfully, to proscribe publication of information the media had obtained through open proceedings[215] or otherwise from public records.[216] The Supreme Court has a long record of refusing to tolerate efforts to sanction the media by impeding their ability to report on matters learned at an open court proceeding or through lawful research means.[217] Courts have been overturned when they have tried to suppress publication of information such as the names or identities of jurors when that information was readily available in an open courtroom.[218]

There are certainly legitimate restrictions on speech in a courtroom setting that must be made to assure fair and facile adjudication and that do not run afoul of the First Amendment. For instance, bans on juror statements during a trial itself directly serve the signifi-

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their readers. *See id.* A Second Circuit panel upheld a trial court's order sealing transcripts in boxing promoter Don King's 1995 fraud trial that ended in a mistrial. *See id.* As a justification for the order, the trial judge cited "press excess." *See id.*

[215] *See* KGTV Channel 10 v. Superior Court, 32 Cal. Rptr. 2d 181, 188 (Ct. App. 1994) (invalidating a trial court's injunction preventing a newspaper from printing the name and likeness of a juvenile murder suspect after the suspect's name and identity were reported in an open courtroom at a public hearing, noting that the media has a statutory right to attend the hearing and a constitutional right to report what it learns there).

[216] *See In re* Hays v. Marano, 493 N.Y.S.2d 904, 906 (App. Div. 1985). In a case stemming from a narcotics trial involving former New York Yankees baseball player Joe Pepitone, the trial court ordered a *New York Daily News* reporter to refrain from printing grand jury testimony excerpts from the trial, after the testimony was inadvertently placed in the public record in order to avoid complications in the trial. *See id.* at 905-06. Citing to *Daily Mail*, the appellate court determined that when a newspaper reported on a matter of public importance and obtained truthful information in a legal manner, the state could not impose sanctions without a need to advance a state interest of the highest order. *See id.* at 906.

[217] *See, e.g.*, Craig v. Harney, 331 U.S. 367, 374 (1947) ("Those who see and hear what transpired can report it with impunity.").

[218] *See* State *ex rel.* National Broad. Co. v. Court of Common Pleas of Lake County, 556 N.E.2d 1120, 1129 (Ohio 1990). In the Ohio NBC case, the media appealed a court order that prohibited the publication of the names and photographs of jurors. *See id.* at 1121. The state supreme court found that the trial court's proscription of the media's ability to air the names and photographs of jurors in a murder trial was an unconstitutional prior restraint. *See id.* at 1130. The reviewing court noted that the trial judge failed to hold a hearing to determine the impact that reporting the information would have on the defendant or the trial and failed to consider any less restrictive alternatives. *See id.* at 1129. Because the names of jurors would be available to anyone who attended the trial, the court said that the judge was not permitted to proscribe the ability of the press to publish that information. *See id.* Quoting *Daily Mail*, the court held that state officials may not punish legally obtained truthful information of public importance unless the penalty advanced a state interest of the highest order. *See id.*

cant governmental interest in fairness. Court orders that silence ex parte statements by lawyers and judges are likewise justified by the need to assure fairness to the parties and efficiency in administration.[219] But secretive court proceedings regarding attorney or judicial discipline are not justified once the allegations have been part of a public record; and the American trend is now away from secrecy in such disciplinary proceedings.[220]

It is in criminal trials that the conflict between the press's and the public's First Amendment rights to know and the criminal defendant's Sixth Amendment right to a fair trial is most poignantly illustrated. The Supreme Court, in *Nebraska Press Association v. Stuart*,[221] endeavored to strike a balance between these competing rights in the context of a multiple murder trial, which had attracted immense media coverage in a small rural community.[222] To prevent prejudicial publicity that might taint the opinions of prospective jurors, the trial court issued a gag order prohibiting the media or anyone in attendance at oral arguments, pretrial hearings, or other proceedings — which were open to the public and attended by the press — from releasing or disseminating "in any form or manner whatsoever any testimony given or evidence adduced."[223] The Nebraska Supreme Court modified the lower court's order, but still prohibited the media from reporting on the existence and nature of any confessions made by the defendant to police or other parties, except any admissions made directly to the press, and other facts "strongly implicative" of the accused's role in the murders.[224]

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[219] *See* Gentile v. State Bar of Nev., 501 U.S. 1030, 1070 (1991). In *Gentile*, the Supreme Court upheld the Nevada Bar's rule prohibiting lawyers from making extrajudicial statements that a reasonable person would expect to be communicated in the press if the lawyer reasonably should know that the statement will have a substantial likelihood of materially prejudicing a court proceeding. *See id.* at 1075. However, the Court found that the state's application of the "substantial likelihood of prejudice" rule was void for vagueness in that attorneys could not be sure whether their conduct fell within the proscription. *See id.* at 1048.

[220] *See* Cynthia Gray, *AJS Adopts Policy on Confidentiality*, 17-4 JUD. CONDUCT REP. 10, 10 (1996). The American Judicature Society (AJS), a not-for-profit organization dedicated to promoting judicial ethics and efficiency, favors making public all judicial disciplinary proceedings once a formal charge has been filed against a judge. *See id.* According to information released by the AJS, only two states and the District of Columbia retain confidentiality of judicial disciplinary hearings until the time discipline is ordered. *See id.* app. A. New Jersey has recently joined the vast majority of states that end the confidentiality of judicial ethics proceedings once a formal complaint has been filed. *See id.*

[221] 427 U.S. 539 (1976).

[222] *See id.* at 542.

[223] *Id.*

[224] *See id.* at 545.

In reviewing the gag order, the United States Supreme Court considered the nature and extent of pretrial news coverage and its potential to cause prejudice, whether less restrictive means could serve to dull the prejudicial effect of unrestrained media coverage, and how effectively a restraining order would actually work to prevent prejudice caused by media coverage.[225] The Court found that a great potential for prejudice existed, but that the trial judge had not made any findings that alternative means would not suffice to serve the state's interest in preventing prejudice.[226] The Supreme Court noted that many alternate means could serve to deflect or diminish any prejudice caused by media coverage, such as a change of venue, delaying the proceedings until the media fervor has abated, a thoroughly searching voir dire of prospective jurors to screen out those who had prejudged the defendant, use of emphatic jury instructions regarding the jurors' need to base their decision solely on the evidence produced in court, and sequestration of jurors.[227] Finding that no less restrictive alternatives had been considered, the Court invalidated the trial court's ruling as a constitutionally impermissible prior restraint.[228] Although the trial court's order was infirm due to the failure to consider alternative means, the Court also noted that the injunction ordered may not actually have been effectively tailored to serve its own ends because in a very small rural community, word-of-mouth could be just as effective as the media in spreading the news of what happened in an open court proceeding. Thus, a trial court should not impose such a gag order; rather it should use the other available means.[229] The Court also questioned the enforceability of such an order against media outside of the territorial jurisdiction of the trial court.[230]

The *Nebraska Press* Court did not assess what possible means the trial court would have to enforce its order in the event the media violated it. Presumably, the media would be held in contempt of court, but the Supreme Court did not indicate that such a sanction could be maintained against the media. Applying the *Florida Star* standard, it is clear that the trial judge would not be justified in imposing punish-

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[225] *See id.* at 546.

[226] *See id.* at 565.

[227] *See Nebraska Press*, 427 U.S. at 563-65.

[228] *See id.* at 565. The Court took great pains to point out that the Bill of Rights does not place greater or lesser value on any one or another of its guarantees, such that its ruling should not be taken as a pronouncement that First Amendment rights necessarily trump Sixth Amendment rights. *See id.* at 570.

[229] *See id.* at 567.

[230] *See id.* at 568.

ment on the press for publishing the truth. Conceivably, a court could punish a violation of the order if the published information was not lawfully obtained, although it would require twisted logic to claim that information overheard as it was placed on the record in an open public courtroom was somehow unlawfully obtained. It is doubtful that maintaining the integrity of the court system and preserving the Sixth Amendment rights of an accused would qualify in this scenario as state interests of the highest order sufficient under the *Florida Star* framework to permit sanctioning the media, provided that the trial court could produce a gag order sufficiently narrowly tailored to serve its purposes. Nevertheless, application of the state interest of the highest order doctrine to the issue of judicial gag orders would be wholly consistent with the *Nebraska Press* ruling. Indeed, the highest order doctrine would be an effective alternative test to decide whether a gag order on speech overheard at a public trial was constitutional.

Restrictions on media access to the courtroom are, in truth, prior restraints on speech and should be recognized as such.[231] Gag orders, injunctions, imposing punishment or fines subsequent to publication, denying media access to otherwise public material, or otherwise impairing the media's ability to gather and report the news are all restraints on speech that, but for the timing of the action, are the functional equivalent of prior restraints.[232] Even though prior restraints on speech have always been accorded the most exacting judicial scrutiny,[233] there should be no semantic or jurisprudential difference between analysis of prior restraints on speech and governmental efforts to sanction speech subsequent to its articulation or publication.[234] The Supreme Court suggested as much in *Daily Mail*, stating: "Whether we view the statutes as a prior restraint or as a penal sanction for publishing lawfully obtained, truthful information is not dispositive[,] because even the latter action requires the *highest* form of *state interest* to sustain its validity."[235]

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[231] *Cf.* John Calvin Jeffries, Jr., *Rethinking Prior Restraint*, 92 YALE L.J. 409, 419 (1983) (asserting that the doctrine of prior restraint "purports to assess the constitutionality of government action by distinguishing prior restraint from subsequent punishment, but provides no coherent basis for making that categorization.")

[232] *See id.* at 427-28 (noting that but for timing, injunctions preventing speech and statutes punishing publication after the fact are alike).

[233] *See Nebraska Press*, 427 U.S. at 559; South E. Promotions, Ltd. v. Conrad, 420 U.S. 546, 558-59 (1975).

[234] *See* Gardner v. Bradenton Herald, Inc., 413 So. 2d 10, 11 (Fla.), *cert. denied*, 459 U.S. 865 (1982) (equating prior restraints and subsequent punishment on the media as having the same effect and similarly offending the First Amendment).

[235] Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 101-02 (1979) (emphases added).

Refusing to allow the media access to what otherwise would be public proceedings is a punishment of the media. Such governmental action should be subject to the standards of the highest order doctrine.[256] To justify impairing the media's ability to report the news and thereby exercise its First Amendment right to freedom of the press, a judge seeking to close a courtroom or to punish the media for reporting the truth must be satisfied that such action is *the only way* to advance a state interest of the highest order. The state interest of the highest order doctrine could provide the single, unifying test that is needed to rectify the increasingly fractured and erratic jurisprudence relating to media access to courtrooms and information relating to litigation.

VI. RECENT CASES DEMONSTRATE THE NEED FOR THE DOCTRINE TO PROTECT SPEECH LIBERTIES AGAINST GOVERNMENTAL INTRUSION

Sadly, constitutional liberties have come under assault in courtrooms throughout the nation. As the preceding Part of this Article suggests, courts are more and more frequently ready to impose restrictions on the speech rights of jurors, lawyers, litigants, and even the media. Such a state of affairs has come to exist because the Supreme Court has failed to promulgate a consistent, unified standard by which to assess governmental actions that impair the content of individual expressive liberties. The plethora of Supreme Court speech-related standards leads not to easy solutions when interests clash, but to more confusion, as reviewing courts try to ascertain whether a case should be analyzed under public forum principles, strict scrutiny, balancing of interests, time, place, and manner rules, or some other standard.

This Part of this Article will discuss several cases that have recently made their way through the courts or are still being litigated. In each case, speech liberties were sacrificed to a competing govern-

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But see Marin Indep. Journal v. Municipal Court, 16 Cal. Rptr. 2d 550, 554 (Ct. App. 1993) (quoting *Daily Mail* language regarding the dearth of difference between prior restraints and subsequent punishment, but finding that a trial court's confiscation of a news photographer's film negatives did not violate the First Amendment because the photos were unlawfully obtained in deliberate violation of a court rule).

[256] *See* State v. Globe Communications Corp., 622 So. 2d 1066, 1075 (Fla. Dist. Ct. App. 1993). The court said:

> It no longer makes any difference whether the restriction comes in the form of an injunction or in the form of a penal "subsequent punishment" under federal or state decisional law. Both forms of restraint are subject to careful review which requires the "highest form of state interest to sustain [their] validity."

Id. (quoting *Daily Mail*, 443 U.S. at 102) (alteration in original).

mental interest, ranging from the compelling governmental interest in preventing violence to the absurd governmental interest in protecting the emotional feelings of police officers. In each case, application of the state interest of the highest order doctrine would have been the appropriate means of determining whether the sanction on speech interests was constitutionally permissible. Yet, in each instance, the doctrine was ignored and the court either applied lesser standards to determine whether the speech interests must yield to governmental interests or failed seriously to consider the speech interests that were trammeled.

A. *Free Speech for Me, But Not for Thee*[237]

In a decision that alarmed many free speech advocates, who viewed it as a content-influenced restriction on free speech,[238] a federal district court jury in Oregon in early 1999 assessed $107 million in damages against the purveyors of "The Nuremberg Files," an anti-abortion web site, in a rebuke of the group's strident anti-abortion

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[237] *See* NAT HENTOFF, FREE SPEECH FOR ME — BUT NOT FOR THEE: HOW THE AMERICAN LEFT AND RIGHT RELENTLESSLY CENSOR EACH OTHER (1992).

[238] *See* Robyn E. Blumner, *ACLU Backs Free Speech for All — Except Pro-Lifers*, WALL ST. J., Feb. 10, 1999, at A22. Blumner, a former ACLU executive director for 10 years and former executive director of its Florida affiliate, decried the ACLU's support for the Oregon verdict, noting that it is inconsistent with the group's historical advocacy of free speech for all regardless of the offensiveness of the message. *See id.* For example, Blumner points out, the ACLU defended the rights of a neo-Nazi group to march through the streets of the heavily Jewish town of Skokie, Illinois. *See id.* Blumner points out that the founders of the web site, called "The Nuremberg Files," were not on trial for perpetrating violence, but merely for their speech, which the jury interpreted as provoking violence against abortion physicians. *See id.* The author contends that the ACLU propagates a double standard when it comes to anti-abortion speech and fails to stand up for the advocacy rights of pro-lifers. *See id.*; *see also* Don Feder, *Pro-lifers Denied First Amendment*, BOSTON HERALD, Feb. 8, 1999, at 27. *But see* Victoria Rivkin, *Strategy and Old Ties Bring Abortion Case to Paul Weiss*, N.Y. L.J., Feb. 4, 1999, at 1 (quoting Columbia University law professor and First Amendment scholar Michael Dorf defending the jury's verdict and stating, "I don't see any logical reason why [liability for incitement] should be confined to face-to-face communication"). *See also* Editorial, *Tough Call: Anti-Abortion Ruling Doesn't Appear Threat to Free Speech*, HOUSTON CHRON., Feb. 5, 1999, at A34. The article suggested:

> The ruling appears to be a narrow judgment about that context [of the speech], the facts of this particular case and whether it indeed crossed the line from just speech into actual threat, which does not enjoy the same constitutional protection.
>
> The ruling is expected to be appealed. We hope, however, that it stands as a reminder that political opposition is one thing, while violence and the threat and incitement of violence cross a serious line of illegality for which there are appropriate consequences.

Id.

messages.[239] The verdict was premised on a theory that the inflammatory images and content of the web site provoked violence against abortion physicians.[240] The plaintiffs sued under a federal statute prohibiting violence that blocks access to abortion clinics.[241] The defendants asserted a First Amendment defense, maintaining that their "Wanted" posters — depicting abortion providers alongside graphic images, including fetuses dripping with blood — were constitutionally protected free speech.[242] The jury, however, found that the web site's information could reasonably be construed as a "true threat" of violence to abortion providers and thus fell within the incitement to violence exception to the First Amendment's sphere of protection.[243]

The Oregon verdict resulted from an innovative interpretation of a federal law safeguarding access to abortion clinics and banning confrontational violence. The decision is as bizarre as it is innovative. The case, which produced no published opinion, does not appear to have been principally decided based on the Supreme Court's incitement jurisprudence. Had the trial court applied the now-standard test from *Brandenburg v. Ohio*,[244] it is highly likely that the court would have determined that there was certainly adequate time to rebut the inflammatory speech contained on the web site, thus rendering the speech innocuous and constitutionally protected.

Beyond the incitement standard, since the plaintiffs were seeking to use the court to punish the defendants because of *the content* of their speech, the court should have applied the state interest of the

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[239] *See Jury Finds Web Site Threatened Doctors Who Perform Abortions, supra* note 1.

[240] *See id.* The information regarding the physicians was presented in the form of "Wanted" posters along with the names, home and work addresses, and personal information about the physicians. *See id.* The web site also allegedly crossed out the name of a slain abortion physician within hours of his murder in his New York home last year. *See id.*

[241] *See id.* The Planned Parenthood plaintiffs sued under the 1994 Federal Freedom of Access to Clinic Entrances Act, which outlawed the use of "force or threat of force" to attempt to impede access by patients or staff to abortion clinics. *See id.* According to the National Abortion Federation, violence at abortion clinics has produced seven killings, 15 attempted murders, 15 bombings, 101 acts of arson, and 45 attempted arsons or bombings since 1988. *See id.*

[242] *See id.* The web site founders defended that the First Amendment protected their right to advocate against abortion and to agitate for political change on the legality of abortion. *See id.*

[243] *See* Rivkin, *supra* note 238, at 1.

[244] 395 U.S. 444, 447 (1969). The *Brandenburg* unanimous opinion stands for the proposition that all innocuous speech is protected by the First Amendment and all speech is innocuous when there is time to rebut it. *See id.* Given the profligate number of web sites on the Internet and the inevitable time lag between the time a web visitor reads information and acts on that information, there is certainly always time to rebut even the most inflammatory speech on the Internet.

highest order doctrine to assess whether the speech at issue could be subjected to punishment. If the court had determined that the web site's materials were truly an incitement to imminent, fatal lawlessness, and thus were a threat to the peace, perhaps the state's interest in preventing violence would qualify as a state interest of the highest order. Saving an individual human life may not technically meet the first standard of the state interest of the highest order doctrine — unless the life in question is one of such importance to the government, such as the President, that his or her death would imperil the existence of the government itself. However, there is an argument to be made that saving human life is perhaps the greatest good that the state can achieve.[245] Accordingly, punishing the web site's providers may meet the first prong of the highest order doctrine. But given the more than adequate time to rebut the inflammatory speech and the fact that the Supreme Court has held Internet speech to be "pure speech" worthy of the most strident First Amendment protection,[246] it is doubtful that the damages award against the web site would meet the no other alternative prong of the highest order doctrine.

B. Forever Hold Your Peace

In a case that has raised the ire of numerous journalists and media commentators,[247] the United State Supreme Court denied certio-

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[245] *See* State v. Miller, 538 N.W.2d 573, 578 (Wis. Ct. App. 1995) ("Public safety and the protection of human life is a state interest of the highest order.").

[246] *See* Reno v. ACLU, 117 S. Ct. 2329, 2344 (1997) (stating that "our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium").

[247] *See, e.g.*, Alderman, *supra* note 2, at 45 (calling the gag order issued in *United States v. Cleveland* "highly unusual" and a "surreal solution" to a "real problem" and arguing that the order is likely to produce "oddball" and "somewhat comical" results such as elevating a trial judge to the level of "super-editor" who would review questions in advance before journalists may speak with jurors even after a case); Editorial, *Gagging Former Jurors*, THE TENNESSEAN, Apr. 25, 1998, at 18A (arguing that there is "no conflict" between the First Amendment right to free speech and the Sixth Amendment right to a fair trial posed by allowing the media to interview jurors once a trial is over, and calling the *Cleveland* gag order "pointless" and a violation of the free speech rights of both jurors and the media); Jane Kirtley, *Keeping Jurors' Lips Sealed*, AM. JOURNALISM REV., Jan./Feb. 1998, at 50 (arguing that jurors have a First Amendment right to free speech that "doesn't vanish simply because they have served on a jury" and that that right and the freedom of the press are endangered by gag orders such as Judge Vance's); Wesley Pruden, *When a Judge Abuses the Lady in Blindfold*, WASH. TIMES, Dec. 2, 1997, at A4 (characterizing as excessively controlling and arrogant the efforts by judges to restrict access by reporters to jurors, especially when the jurors are no longer engaged in deliberations); *see also* Gary Boulard, *Limits on Juror Interviews*, EDITOR & PUBLISHER, Jan. 31, 1998, at 21 (noting that the "Reporters Committee for Freedom of the Press and several other journalism organizations" filed an amicus curiae brief supporting Capital City's appeal to the Fifth

rari in *United States v. Cleveland*,[248] thus allowing to stand the affirmance by the Fifth Circuit of a district court judge's order that barred jurors from discussing their deliberations with the media even after the conclusion of the trial.[249] The order, issued by United States District Court Judge Sarah S. Vance has the effect of forbidding the media — in perpetuity — from interviewing jurors regarding their deliberations, absent a special order from the judge herself permitting the given questions to be asked.[250]

The gag order challenged to the Supreme Court by Capital City Press, publisher of the *Baton Rouge Advocate*, and Joe Gyan, a reporter for the *Advocate*, was issued at the conclusion of the video poker racketeering and political corruption prosecution of two former Louisiana state senators and other defendants, a trial which attracted considerable local media attention.[251] Upon completion of the criminal trial,[252] Judge Vance directed the jurors that "absent a special order by me, no juror may be interviewed by anyone concerning the deliberations of the jury."[253] Capital City Press and Gyan challenged the judge's order in the district court as a violation of their First Amendment guarantee of freedom of the press and as unconstitutionally vague.[254] The judge refused to modify the gag order and the newspaper appealed to the Fifth Circuit.[255]

A Fifth Circuit panel upheld Judge Vance's restriction on juror interviews as "an appropriate measure" needed to protect the secrecy

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Circuit that stressed the public-information importance of post-verdict interviews with jurors regarding deliberations).

[248] 118 S. Ct. 1518 (1998).

[249] 128 F.3d 267, 270 (5th Cir. 1997).

[250] *See id.* at 269.

[251] *See id.* at 268. In addition to the public-figure defendants, the trial featured testimony from witnesses including a former New Orleans archbishop and a former governor of the state. *See id.* The trial attracted sustained media attention from its inception and Judge Vance issued several verbal directives to jurors in the course of the proceedings admonishing them not to speak with the media or anyone else about the case and urging jurors to call her "day or night" if anyone approached them about the case during their breaks. *See* Joe Gyan Jr., *Gambling Trial Nears Conclusion*, THE ADVOCATE (Baton Rouge), June 12, 1997, at 1A. Despite the case's high profile in the media and the judge's articulated concerns regarding juror silence, the jury was never sequestered during the course of the trial. *See id.*

[252] *See Cleveland*, 128 F.3d at 268. The jury fully acquitted two of the defendants and acquitted the remaining four on most charges and convicted them of one other. *See id.* The jury reached its verdict after six weeks of testimony and eight days of deliberations. *See id.*

[253] *Id.* at 269. The judge's order also instructed that "the lawyers and the parties are not to attempt to question [jurors] without an order from me." *Id.*

[254] *See id.*

[255] *See id.*

of jury deliberations from the threat posed by post-verdict interviews.[256] The court maintained that the order did not impair the media's ability to report on all proceedings that occurred in open court, and only restricted information that was "not available to the public at large."[257] The court said the gag order "was narrowly tailored to prevent a substantial threat to the administration of justice" and thus justified any impairment of the media's First Amendment right to gather the news.[258] The court also rejected the suggestion that the order was unconstitutionally vague in that ordinary jurors would most likely understand that "deliberations" encompassed only the private discussions and debates that occurred in the jury room.[259]

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[256] *See id.* at 270. Writing for a unanimous three-judge panel, Fifth Circuit Judge DeMoss opined that "the possibility of post-verdict interviews" threatened the reliability of jury verdicts because it could discourage free speech within the jury room if jurors feared their deliberations and opinions could later be revealed. *See id.* Quoting the late United States Supreme Court Justice Benjamin Nathan Cardozo, the court said that "'freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world.'" *Id.* (quoting Clark v. United States, 289 U.S. 1, 13 (1933)).

[257] *Id.* (citing United States v. Harrelson, 713 F.2d 1114, 1118 (5th Cir. 1983) ("[M]embers of the press, in common with all others, are free to report whatever takes place in open court but enjoy no special, First Amendment right of access to matters not available to the public at large. The particulars of jury deliberations fall into the latter class . . . .")).

[258] *Cleveland*, 128 F.3d at 270. The Fifth Circuit applied its own precedents regarding restrictions on the media's access to information. *See id.* at 269-70 (discussing *In re* The Express-News Corp., 695 F.2d 807 (5th Cir. 1982) (holding that a judge's order may not "restrict the journalistic right to gather news unless it is narrowly tailored to prevent a substantial threat to the administration of justice")). In *Express-News*, the Fifth Circuit reversed as overly restrictive a trial court's order that forbade the media from interviewing "any juror, relative, friends or associates" of jurors regarding the jury's deliberations or verdict absent permission of the court and "good cause." *See Express-News*, 695 F.2d at 808. The Fifth Circuit invalidated the court order as overly broad because it was unlimited in time and scope, applied to all jurors regardless of their desire to be interviewed, forbade welcome as well as unwelcome questions, reached to all information regarding the jury's vote, including general reactions, and implicitly encompassed jurors' conversations with their friends and family as well as the media. *See id.* at 810. The court found that Judge Vance's order was far more limited in scope since it applied only to the jurors themselves and restricted discussion only of the deliberations themselves, not of the verdict or general impressions of the case. *See Cleveland*, 128 F.3d at 269. The court said the intense level of media interest in the case justified these restrictions on the jurors' right to speak to the media. *See id.* The court said the judge's order still allowed jurors to make media comments regarding their general impressions of the case and the verdict, and did not inhibit their willing comments to friends and family. *See id.* at 270.

[259] *See Cleveland*, 128 F.3d at 271 (citing Kolender v. Lawson, 461 U.S. 352, 357 (1983)) (finding that the void for vagueness doctrine requires definition "with sufficient definiteness [such] that ordinary people can understand what conduct is pro-

By declining certiorari in *United States v. Cleveland*,[260] the United States Supreme Court has allowed federal trial courts in Louisiana, Mississippi, and Texas to impose restrictions on the speech rights of jurors and the media that are far more intrusive on expressive liberties, and are far less justified by governmental interest, than could withstand the scrutiny applied in *Florida Star* or *Boehner*. Of course, the press in *Florida Star* and the individuals in *Boehner* had already lawfully obtained the information that the state tried to punish them for disseminating, whereas the media in *Cleveland* was prevented from obtaining the information it sought to publish in the first place.

Yet the gag order at issue begs the question of what order of magnitude a governmental interest must meet to justify silencing individual speakers and the media. The Fifth Circuit in *Cleveland* said only that absent the order, there was a "substantial threat" to the secrecy and reliability of jury deliberations and to the "administration of justice."[261] Does this "substantial threat" serve a substantial governmental interest, a compelling governmental interest, or a governmental interest of the highest order? The court did not address the magnitude of the interest in protecting the administration of justice. One would not seriously dispute that the administration of justice is a compelling interest, yet it seems clear that there must come some moment when the magnitude of that interest dissipates: when the discussion of jury deliberations may not pose a "substantial threat" to the justice system. Judge Vance's order was *perpetual*. Absent an order granting permission from the judge herself, the jurors may *never* be interviewed regarding their deliberations.

The second standard of the state interest of the highest order doctrine requires that there be no other means by which the state's interest can be served. Imposing a blanket gag order on the entire jury — restricting the speech rights of each juror as well as the public's right to know — and impairing the media's right to gather news about truthful issues of consuming public interest are certainly not the only ways to safeguard open free speech in a jury room. Such a proposition is far too tenuous to withstand constitutional scrutiny.[262]

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hibited and in a manner that does not encourage arbitrary and discriminatory enforcement").

[260] 118 S. Ct. 1518 (1998).

[261] *See Cleveland*, 128 F.3d at 270.

[262] In an editorial decrying the *Cleveland* gag order, *The Tennessean* said of Judge Vance's explanation, how "some future juror somewhere, somehow might be influenced out of fear of a media interview stretches logic and defies justice." Editorial, *Gagging Former Jurors*, *supra* note 247. The newspaper argued: "[T]o deny all interviews about deliberations after the trial is over infringes on the free speech rights of both jurors and reporters. It also suppresses the public right to know." *Id.* The

For example, the judge could order that jurors may speak only about their own deliberations, but that the privacy of the jury room must be preserved to the extent that they may not divulge the comments or opinions of any other jurors. Thus, jurors who did not want their opinions regarding the evidence or the trial to come to light would have within their exclusive control the power to retain their privacy by refusing to grant interviews. Jurors who did want to share with the public and the media their thoughts and impressions regarding the evidence, the witnesses, and their own decision-making processes would have an absolute right to do so.

Judge Vance's order requires that any effort by such a juror to grant an interview must be subject to the judge's personal editorial discretion; thus, the media would virtually have to submit to the judge each question and each answer from the jurors interviewed for the judge to decide what answers may and may not be printed. Thus, the order effectively transfers from the media to the judge — a government actor — the power of editorial discretion, a bizarre state of affairs that is powerfully at odds with the First Amendment's guarantee of a free press.[263]

Court orders impairing media access to information regarding trials require consideration of the full panoply of alternatives before a restriction on speech may be applied.[264] It is sheer judicial arrogance — even lunacy — to maintain that a judge can sit in judgment of what questions the media may ask and, indeed, what members of the media may interview a given person, and that such a power can last *forever*, regardless of the remoteness of the trial. Taking Judge Vance's order to its logical, though absurd, conclusion, a juror in a

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newspaper argued that by allowing such gag orders to persist, the United States Supreme Court is impairing "public insight into trial[s]." *See id.*

[263] *See* Alderman, *supra* note 2, at 45. Alderman, co-author with Caroline Kennedy of *In Our Defense: The Bill of Rights in Action and the Right to Privacy*, wrote in the *Columbia Journalism Review* that the gag order at issue in *Cleveland* reaches too far in trying to resolve the problem of media over-saturation of trial coverage and the potential prejudice that may result. *See id.* The author acknowledged that a "trial as spectacular entertainment has become so alarming that something must be done," but claims that from a reporter's perspective, "Judge Vance's order falls into the category of real problem, surreal solution." *Id.* Alderman theorizes that gag orders such as Judge Vance's could lead to "oddball" results such as reporters having to run inside the courthouse to ask the judge permission for each specific question that they would like to address to a juror emerging from courthouse deliberations who wants to speak about the jury's deliberations. *See id.* The author said the judge then may "act as a super-editor," picking and choosing which questions may be asked and which may not, and perhaps even discriminating among the various media outlets, allowing some to interview jurors but refusing access to others. *See id.*

[264] *See generally* United States v. Aguilar, 515 U.S. 593 (1995); Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976).

high-profile case can be prohibited for life from discussing her thoughts about the deliberations. Even the posthumous publication of the juror's autobiography would violate the order unless the trial judge had herself approved the publication. There is no jurisprudential basis for this constitutional anomaly of a judge sitting as a super-editor-in-chief. Judge Vance's ruling is clearly at odds with cases that have applied the state interest of the highest order doctrine to gag orders placed on jurors.[265]

C. Florida Star redux?

In two very odd recent cases that clearly fall within the protection of *Florida Star*, trial judges meted out unduly harsh punishments against reporters and the newspapers for which they work in fact scenarios remarkably similar to *Florida Star*. In each case, the newspapers were harshly punished for the publication of truthful information that they lawfully obtained. In each case, the rationale behind the punishment was the same: A judge preferred that the newspapers not exercise their First Amendment right to publish the information.

In one case, Greenville, Mississippi, reporter Cynthia Jeffries was arrested and adjudged in criminal contempt for disobeying a judge's order not to publish a criminal defendant's juvenile record — even after the defendant's record was read aloud by a lawyer *for the government* in an open courtroom during sentencing.[266] This case is starkly reminiscent of the matter in dispute in *Florida Star*, when it was the government's own carelessness that led to the wrongful disclosure to the media of sensitive information. The media cannot be punished for the government's failure to police itself adequately. Such is the rationale behind the no other alternative prong of the state interest of the highest order doctrine. The Mississippi judge's sanction against the press for publishing truthful information that it lawfully

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[265] *See, e.g.*, State v. Heltzel, 552 N.E.2d 31, 34 (Ind. 1990) (finding that news reporters may not be charged with contempt of court for soliciting information regarding grand jury deliberations from jurors two years after the proceedings had ended absent a need to further a state interest of the highest order); State *ex rel.* National Broad. Co. v. Court of Common Pleas of Lake County, 556 N.E.2d 1120, 1129 (Ohio 1990) (holding that the court may not, absent a need to further a state interest of the highest order, prohibit a television station from airing names and photographs of jurors when such information was available to anyone attending the trial); Commonwealth v. Genovese, 487 A.2d 364, 368-69 (Pa. Super. Ct. 1985) (holding that a trial court's prohibition on the press's publication of the names of jurors was an impermissible prior restraint that did not serve a state interest of the highest order when the names were available to anyone attending the trial).

[266] *See* Kirtley, *supra* note 3, at 24.

obtained would certainly be found constitutionally invalid under the state interest of the highest order doctrine.[267]

The Mississippi contempt order against Jeffries was eventually dismissed, but only after the State Attorney General asked the Mississippi Supreme Court to reverse her conviction on the grounds that the presiding judge's order was unconstitutional and that the reporter was, therefore, correct to disobey it.[268] If a reporter has to rely on the state's highest prosecutor to defend her constitutional liberties, rather than on an independent judiciary, we have a constitutional anomaly rather than a reliable standard.

In the second case, the *Wilmington Morning Star* and its Raleigh, North Carolina, bureau chief, Kirsten Mitchell, were not so fortunate as to have an attorney general sensitive to civil liberties come to their defense when a federal district judge fined them more than $600,000 for publishing the details of a settlement reached in a civil environmental pollution case of consuming local interest.[269] The litigants agreed to keep the terms of the settlement agreement confidential, but a court clerk erroneously gave the information to Mitchell in a case file which should not have contained the settlement terms.[270] When Mitchell and the *Morning Star* exercised their First Amendment right to publish this truthful information that was lawfully, even if erroneously, obtained from a court clerk, United States District Court Judge Earl Britt held them in contempt and issued fines in excess of $500,000, and awarded $100,000 in attorneys' fees that the *Morning Star* was required to pay.[271]

The facts of this case are strikingly similar to those of *Florida Star*, wherein a reporter was erroneously given truthful information — the name of a rape victim that a sheriff's department should not have disseminated under the state statute. But because *the government itself* was at fault, the United States Supreme Court determined that the truthful information was lawfully obtained by the media and that the

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[267] *Cf. In re* Hays v. Marano, 493 N.Y.S.2d 904, 906 (Sup. Ct. 1985) (holding that when a newspaper reported on a matter of public importance and obtained truthful information, albeit inadvertently released, in a legal manner, the state could not impose sanctions without a need to advance a state interest of the highest order).

[268] *See* Kirtley, *supra* note 3, at 25.

[269] *See* Truitt, *supra* note 208. The newspaper was fined $500,000, ordered to pay attorneys' fees of $100,000, and Mitchell herself was fined $1,000 and held in contempt of court. *See id.*

[270] *See id.* The case involved an environmental pollution settlement after a federal jury had found Conoco, Inc. negligent in cleaning up gasoline spills. *See id.* The newspaper revealed that a $36 million settlement had been reached. *See id.*

[271] *See id.* Mitchell and the newspaper were actually convicted of contempt in December 1997. *See id.*

state had alternate means of enforcing its rape shield law, i.e., not disseminating the sensitive information in the first place. The *Florida Star* Court reasoned that the First Amendment protected the media's publication of the truthful information that it lawfully obtained absent a need to advance a state interest of the highest order, and, finding none, struck down the state's punishment of the media.

The North Carolina court's punishment of the *Morning Star* would collapse under the *Florida Star* standard. The federal district court judge ignored *Florida Star* in even attempting to punish the media for publishing truthful information that it lawfully obtained from a court clerk, especially given the fact that *the government itself* had the power to prevent dissemination of the sensitive information simply by policing its own files better. The obvious alternative means for the government to ensure the confidentiality of settlement proceedings is to assure that its own court clerks do not hand over protected information to the media.

As *Florida Star* pointed out, requiring the media to sift through every document released to it and screen out any sensitive or objectionable materials would foster timidity and self-censorship among the press, in direct contravention of the ideals embodied in the First Amendment. That the fine imposed was so heavy and that attorneys' fees were assessed as well makes this case all the more egregious. How can the media engage in open, robust speech regarding public issues when *the content* of its speech may expose it to six-figure liabilities? The newspaper and its bureau chief cannot constitutionally be punished for publishing truthful information that they lawfully received absent a state interest of the highest order and no other means to serve that interest. The *Morning Star* is contesting the fine[272] and should prevail if *Florida Star* is followed, but why should the newspaper have to spend the time and money contesting a judge's order that runs so clearly counter to Supreme Court precedent and is so plainly offensive to the First Amendment?

D. A Gag on the Government

Usually, private actors and the media are the parties hurt by judicially enforced gag orders that restrict access to or publication of

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[272] *See id.* The *Morning Star* is owned by *The New York Times* and *Times* assistant general counsel George Freeman said, "This is a strange case, but we are confident that the conviction will be overturned." *Id.* The *Times* appealed the ruling to the Court of Appeals for the Fourth Circuit, and the Fourth Circuit's ruling was pending at the time this Article went to press.

information regarding trial proceedings.[273] At times, however, it is the government itself that feels stymied by a judge's order restricting speech related to a trial, as was the situation with the Oklahoma City bombing case, *United States v. McVeigh*.[274] In that case, United States District Court Judge Richard P. Matsch was widely hailed for ruling his courtroom with an iron fist during the 1997 trials of Timothy McVeigh and Terry Nichols, and for avoiding the media bedlam that characterized the O.J. Simpson trial of the year before.[275] But whereas some praised Matsch as the "anti-Ito"[276] — a reference to California Superior Court Judge Lance Ito, who presided over the Simpson criminal trial — others have lamented a growing trend toward silencing participants in high-profile trials and restricting to private quarters judicial proceedings that have traditionally been held in public courtrooms.[277]

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[273] *See, e.g.*, Florida Star v. B.J.F., 491 U.S. 524 (1989); Smith v. Daily Mail, 443 U.S. 97 (1979); Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); United States v. Cleveland, 128 F.3d 267 (5th Cir. 1998).

[274] 157 F.3d 809 (10th Cir. 1998).

[275] *See* Judith Crosson, *Trial Showed that the System Can Work*, THE HERALD (Glasgow), June 3, 1997, at 10 ("The Oklahoma City bombing trial showed an increasingly skeptical American public that the justice system can move swiftly and smoothly, especially when a no-nonsense judge is in charge."); Lou Kilzer & Kevin Flynn, *Verdict Still Out on Matsch's Handling of Trial*, DENVER ROCKY MOUNTAIN NEWS, June 8, 1997, at 4A ("Judging by polls and instant analysis show that Denver U.S. District Judge Richard Matsch has restored Americans' faith in their judicial system . . . . Matsch was king of his court."); Gaylord Shaw, *Victor in Trial: The Justice System*, NEWSDAY, June 15, 1997, at A3 ("The near-consensus among legal experts and commentators was that the way Matsch conducted the first Oklahoma City bombing trial had helped rehabilitate the image of the American system of justice."); *see also* Editorial, *Stop Gagging*, NAT'L L.J., Feb. 23, 1998, at A18 (praising Judge Matsch for his "iron-hand" approach that prevented unauthorized leaks of information to the press and public and contrasting his style to that of federal Judge Susan Webber Wright's inability to control the myriad leaks that characterized Paula Jones's civil suit against President Clinton). *But see* Kirtley, *supra* note 3, at 24 (faulting a "Simpson trial backlash" and Judge Matsch's handling of the Oklahoma City Bombing cases for an upsurge in gag orders and restrictive "no-nonsense" administrative procedures adopted by trial judges).

[276] *See* Crosson, *supra* note 275 (noting that lawyers in the McVeigh case referred to Judge Matsch as the "anti-Ito" as a result of his heavy-handed control over the attorneys and witnesses involved in the case); *see also* Kirtley, *supra* note 3, at 24 ("[M]any judges seem to have taken to chanting a new mantra: 'I will not be another Lance Ito. I will be another Richard Matsch.'").

[277] *See* Kilzer & Flynn, *supra* note 275 (quoting Oklahoma City defense attorney Garvin Issacs calling the trial "go-go justice, where everybody gets caught up in speed and docket control, [that] has . . . come at the expense of the citizen and a fair trial"); Frank Santiago, *Judges Follow Suit, Issue Gag Orders*, DES MOINES REG., Jan. 3, 1998, at 1 ("Taking a cue from the Oklahoma City bombing case, federal judges are handing down gag orders that bar lawyers from discussing their cases with the public and media."); Shaw, *supra* note 275 (quoting media attorney Kelli Sager as saying

Among those frustrated by Judge Matsch's heavy-handed control over all participants in the case was, somewhat surprisingly, an Oklahoma District Attorney, who repeatedly petitioned the United States District Court for the District of Colorado seeking termination of Judge Matsch's gag order so that federal prosecutors and investigators might assist state officials with a state grand jury investigation of the Oklahoma City bombing.[278] Oklahoma officials had to wait a year from the June 1997 conclusion of the trial until Judge Matsch lifted his gag order on attorneys,[279] and another four months until the Tenth Circuit affirmed that order.[280] While Oklahoma state prosecutors may have been somewhat inconvenienced in their duplicative, and probably publicity-driven, attempt to mount a simultaneous prosecution of the Oklahoma City bombing suspects, Judge Matsch's orders had far more devastating implications for the media's right to report issues of public concern and the public's right to observe and comprehend judicial proceedings. Nevertheless, Judge Matsch's heavy-handed treatment shows that even the government's interests in openness and communication are sometimes impaired by overzealous judges who impose restrictions on the content of speech.

Had Judge Matsch applied the standards of the state interest of the highest order doctrine to analyze his own order, he would have asked what possible governmental interest is being served by tying the hands, and gagging the mouths, of government prosecutors months after the case had ended. If certain sensitive information

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Judge Matsch "ran a hell of a trial," but that his secretive procedures and gag orders were "frustrating and a disservice to the public"); Richard Willing & Kevin Johnson, *Effect of Oklahoma Trial Far Beyond Guilty Verdict*, USA TODAY, June 16, 1997, at 1A ("Oklahoma City may be remembered as the case in which press freedoms and defendants' rights clashed head on and press freedoms finished second.").

[278] *See* McVeigh, 157 F.3d at 812.

[279] The judge's gag order stated:

> A. None of the lawyers in this case or any persons associated with them . . . will release or authorize the release of information or opinion about this criminal proceeding which a reasonable person would expect to be disseminated by any means of public communication, if there is a reasonable likelihood that such disclosure will interfere with a fair trial of the pending charges or otherwise prejudice the due administration of justice.
>
> B. This duty to refrain from prejudicial disclosures requires all counsel to take reasonable precautions to prevent all persons who have been or are now participants in or associated with the investigations conducted by the prosecution and defense from making any statements or releasing any documents that are not in the public record and that are reasonably expected to be publicly disseminated which would be likely to materially prejudice the fairness of this criminal proceeding.

United States v. McVeigh, 931 F. Supp. 756, 760 (D. Colo. 1996).

[280] *See McVeigh*, 157 F.3d at 815.

must be protected, could it not be protected in another manner, rather than enforcing a blanket gag order on the prosecutors? A less restrictive alternative is certainly available, safeguarding specific information and allowing communication on other issues. Thus, Judge Matsch's order would not have passed even the traditional strict scrutiny test. The standards of the state interest of the highest order would obviously not be met because of the existence of *any* alternative.

Judge Matsch was much praised as the antidote to Judge Ito, but at what price? He ruled his courtroom with an iron fist, but he trammeled individual liberty in so doing. Such overbroad restrictions on speech are not permitted under the First Amendment and would likely be found invalid if subjected to the state interest of the highest order doctrine.

E. A Bad Rap for Free Speech

As the United States Supreme Court held in *Aguilar* and *Butterworth*, and as the federal district court demonstrated in *Boehner*, the state interest of the highest order doctrine and the holding of *Florida Star* are equally applicable to individuals whom the government attempts to punish for exercising constitutionally protected liberties as they are to the media.[281] Given that fact, what does one make of the constitutionally aberrant arrest last year of Shawn Thomas, a California rap artist who was jailed due to the controversial nature of his lyrics?[282] Thomas, who performs under the name C-Bo,[283] was taken from his home and confined in the Sacramento County Jail after California Corrections Department officials determined that the lyrics on his latest album, *Til My Casket Drops*, advocate violence against police and "promote[] the gang lifestyle."[284] Among Thomas's alleg-

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[281] *See* Boehner v. McDermott, No. CIV. 98-594, 1998 WL 436897 (D.D.C. July 28, 1998); *see also supra* notes 166-68 and accompanying text (discussing in detail the *Boehner* opinion).

[282] *See* Baker, *supra* note 6 ("California rapper Shawn Thomas . . . appears to be the first musician arrested for what he said on a record.").

[283] C-Bo is meant as an abbreviation of "Cowboy." *See id.*

[284] *See* Baker, *supra* note 6. Thomas was arrested on March 3, 1998, at his home. *See id.* California Department of Corrections Assistant Director of Communications Tipton Kindel issued his own review of C-Bo's album, stating,

> There are 17 songs on the album, and each one promotes the gang lifestyle, criminal behavior and violence against law-enforcement officers, public officials and parole agents . . . . After reviewing the lyrics and the entire file, it was considered that he was actually more of a danger to leave on the street, so it was decided to arrest him.

Id. Thomas's attorneys filed three appeals of his parole terms with the California

edly incendiary lyrics was a song that railed against then California Governor Pete Wilson for signing the state's "three strikes, you're out" law, under which minor violations such as shoplifting can land a repeat offender in jail for 50 years to life.[285] State officials justified this egregious impairment of Thomas's free speech and liberty interests as necessary to enforce the conditions of Thomas's parole for an earlier minor weapons-related incident.[286] Thomas's parole was subject to some very highly suspect conditions that implicate central First Amendment interests: He was told that he could not promote, i.e., *sing* about, violence against police officers, promote the "gang lifestyle," or "threaten" any public officials or he would find himself incarcerated.[287]

Department of Corrections, the maximum allowed. *See id.* Each appeal was rejected. *See id.*

[285] *See* Chris Vognar, *Rapper's Parole Violation Raises Free-Speech Issues*, DALLAS MORNING NEWS, Mar. 11, 1998, at 1C. In the song "Deadly Game," C-Bo exclaims, "You better swing batter, batter swing/'cause once you get your third felony 50 years you gotta bring/It's a deadly game of baseball, so when they try to pull you over/shoot 'em in the face y'all." *Id.* C-Bo's album also included a song naming the local sheriff by name and stating, "'They'll be gunnin' down Cooper 'cuz he want to send all niggers to the pen.'" Sharon Waxman, *Paroled Rapper's War of Words*, WASH. POST, Mar. 6, 1998, at D-2. C-Bo's *Casket* album debuted on *Billboard* magazine's rhythm and blues chart at number ten and on the pop album chart at number 41 in the week it was released. *See* Shawnee Smith, *The Rhythm & The Blues*, BILLBOARD, Dec. 26, 1998.

[286] *See* Baker, *supra* note 6. Thomas was arrested in 1993 after he fired a gun in the air during a video shoot in Sacramento, California. *See id.* Thomas's shot did not hit or injure anyone, but afterward another person on the set fired a gun and killed a man. *See id.* Although he was not implicated in the killing, Thomas was eventually prosecuted for recklessly firing a weapon and was sentenced to four years, 15 months of which he served before he was released on parole. *See id.*

[287] *See* Baker, *supra* note 6. Among the conditions of his parole, Thomas was ordered not to "engage in any behavior which promotes the gang lifestyle, criminal behavior and/or violence against law enforcement." *Id.* Police arrested him for "[t]raveling too far from home, failing to tell his parole office about traffic tickets . . . and rapping about the wrong things on his recent album, . . ." according to one commentator. Vognar, *supra* note 285. The California Board of Prison Terms eventually decided to drop the charges against Thomas stemming from his song lyrics, the sole reason for his arrest, yet he was kept in jail for 30 days because of the additional parole violations. *See* Steve Hochman, *Charges Against Rapper over Lyrics Dropped*, L.A. TIMES, Mar. 7, 1998, at A-15. Before Thomas was due to be released from prison on the remaining parole violations, however, he tested positive for marijuana use and was sentenced to an additional 90 days in jail. *See* Anita M. Samuels, *C-Bo Gets 90 More Days for Drug Use*, BILLBOARD, Mar. 28, 1998. Several months after his arrest in Sacramento, Thomas was back in court in Cincinnati, where he rapped a few lines for the judge in order to beat a rap on an unrelated drug and gun charge that occurred in Cincinnati in 1996. *See* Tanya Albert, *"Hearing is Believing. Why Don't You Give Me a Selection?" Rapper Sings for his Freedom on Gun, Drug Charges*, CIN. ENQUIRER, July 29, 1998, at B-1. To demonstrate that he no longer advocated the gang lifestyle, Thomas, at the judge's request, broke into song in the courtroom, rapping: "We don't commit crimes/We spit rhymes . . . Livin' life in hell hard for a

Thomas's parole conditions are constitutionally suspect in and of themselves, since they violate the doctrine against unconstitutional conditions,[288] are unconstitutionally vague,[289] and clearly contradict First Amendment jurisprudence regarding the state's ability to interfere with the advocacy of illegal conduct only when the speech presents a danger of "imminent lawless action" and where there is insufficient time to rebut the speech and thereby avoid the danger.[290] A

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young black male./Crime only pays the time you're doing in jail . . . You'll never see better days/runnin' around thinkin' that crime pays." *Id.* After listening approvingly to C-Bo's new, law enforcement-friendly rap and placing Thomas on parole until the year 2000, Judge Melba D. Marsh of the Hamilton County Common Pleas Court warned the rapper not to sing any more lyrics critical of law enforcement, adding, "If I hear something I don't like, you'll be back here." *Id.*

[288] *See* TRIBE, *supra* note 11, § 10-8, at 681; Darragh Johnson, *A Rap Album, an Arrest — and a Debate over Free Speech*, SACRAMENTO BEE, Mar. 5, 1998, at D1 (quoting Los Angeles First Amendment attorney Douglas Mirell as stating, "You cannot tell people not to exercise their First Amendment rights as a condition of being let out of jail. That's flabbergasting."). *But see id.* (quoting University of California at Berkeley constitutional law Professor Jesse Choper as stating that parolees sacrifice many of their constitutional rights, including the rights to vote, to bear arms, and to be free from warrantless searches and seizures, in exchange for being let out of jail).

[289] *See* TRIBE, *supra* note 11, § 10-8, at 684 (explaining the void for vagueness doctrine as a protection of due process interests). The precise definition of Thomas's parole condition prohibiting him from "promoting" a gang lifestyle leaves open the interpretation of the term "promote." The fact that local officials felt that C-Bo's lyrics protesting the state's "three strikes" law and encouraging violent resistance to the police demonstrates the inherently vague nature of the parole terms. Some have argued that rap musicians, who are predominantly African-American, face a double standard that is rooted in racism such that government officials are quicker to label their protest songs as illegal advocacy of crimes than they would the protest songs of white artists, such as folk musicians of the 1960s and 1970s who advocated resistance to authority. *See* Vognar, *supra* note 285. Noting that protest artists including Bruce Springsteen, whose *Nebraska* album included tales of impulsive murderers and corrupt cops, are hailed by critics, the public, and even, in Sprinsgteen's case, American presidents, Vognar asks why hip-hop musicians always get a bad rap for their angry protestations of society's inequities: "[W]hy categorize one type of music as a literal call to arms, and another as poetic expression? . . . [W]hy do we cheer when Arnold Schwarzenegger's Terminator wipes out an entire police station, but blanch when Ice-T writes a song called 'Cop Killer?'" *Id.* Vognar concludes that racism may be at the root of such a double standard: "Rap is held to a different set of standards than other forms of artistic expression, and a big reason is a fear of the unknown — in this case, young black rappers and their chosen medium for expressing anger — that hip-hop represents to the generally white establishment." *Id.*

[290] *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969). The unanimous *Brandenburg* Court held that

> the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

Id. California's punishment of C-Bo's lyrics is akin to Ohio's punishment of the Ku Klux Klan members prosecuted in *Brandenburg* in that the state "purports to punish

record album released for public consumption in the privacy of one's home or automobile, broadcast on public airwaves, or played at nightclubs or in concert halls is clearly not the type of "advocacy" of "imminent lawlessness" that justifies impairment because there is certainly adequate opportunity for rebuttal of such speech.[291]

Beyond the highly suspect nature of the terms placed on Thomas's parole, his subsequent punishment for voicing his opinions is an unforgivable assault on the First Amendment. While C-Bo's lyrics may be offensive to some, they are surely constitutionally protected speech, particularly the most objectionable of his songs, which represents his frustration with the state's harsh "three strikes" law.[292] When such political speech and advocacy of resistance to unjust, or even just, laws results in the speaker being hauled from his home and thrust into jail, the First Amendment has been assaulted in a manner that should incite the indignation of all Americans regardless of their opinions of C-Bo's lyrics in particular or rap music in general.

Holding the actions of the California Corrections Department to the standards of the state interest of the highest order doctrine, it is untenable to maintain that Thomas's arrest could be warranted. C-Bo's lyrics are obviously his own opinion on an issue of public importance, and in the realm of First Amendment analysis, there is no such thing as a false idea.[293] Accordingly, Thomas's expression is "truthful" information within the meaning of *Florida Star*.[294] His songs qualify as a "publication" of that truthful information.[295] Thus, the state may not punish Thomas's expression absent a state interest of the highest order that is not otherwise servable by any other means. What interest is being served by his arrest that could not be better served by educating the public against gang activity in order to counteract C-Bo's incendiary lyrics?[296] Is protecting the feelings and comfort of the

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the mere advocacy and to forbid, upon pain of criminal punishment, assembly with others merely to advocate the described type of action." *Id.* at 449. As the *Brandenburg* Court held, such state punishment of advocacy "falls within the condemnation of the First and Fourteenth Amendments." *Id.*

[291] *See id.* at 447 (holding that all innocuous speech is constitutionally protected, and all speech is innocuous when there is time to rebut it).

[292] *See* Baker, *supra* note 6 (quoting Thomas's attorney as saying, "This is the parole board getting into the content of his music. His music has a political message, and it's a political message that they don't like.").

[293] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974) ("Under the First Amendment there is no such thing as a false idea.").

[294] Presumably, Thomas "truthfully" conveyed his own thoughts regarding the wisdom of California's "three strikes" law.

[295] *See* Carey v. Piphus, 435 U.S. 247, 263 n.18 (1978) (noting that spoken words are a publication for purposes of slander and for First Amendment analysis).

[296] Interestingly, California parole administrator Henry Peralta characterized

police in the guise of discouraging songs about gang activity a state interest of the highest order, such that the state's continued existence would be at risk from a failure to sanction this rapper from rhyming in a way that suggests resistance to the police? Can such an interest ever justify preventing a person from speaking his mind when there is time to rebut the offensive speech with more speech?[297]

C-Bo's sanction is akin to the fine against "The Nuremberg Files." Speaking about gang violence does not, ipso facto, cause gang violence. As Justice William O. Douglas argued in his powerful dissent in *Dennis v. United States*,[298] the state may outlaw harmful activities such as bomb-making or violent overthrow of the government, but it may not outlaw teaching about groups that advocate such activities.[299] That spirit was echoed from a justice of a different ideological bent recently, as Justice Antonin Scalia pointed out in the Court's unanimous opinion in *R.A.V. v. St. Paul*[300] that murder can be sanctioned by the state, but speaking about murder cannot be.[301] Protecting police officers from unkind rap songs hardly rises to the level of a state interest of the highest order. Speaking about violence is only sanctionable when it is an incitement to likely imminent lawlessness. As with the web site, communication via a rap song that one listens to at home is certainly subject to ample time to rebut. Additionally, there are alternative means to serve the state's interest in combating Thomas's involvement with gang violence, such as restricting his parole such that he may not engage in actual involvement with gang violence or he will be forced to return to jail.[302] Sanctioning the rap art-

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Thomas's arrest as the state's effort to protect Thomas from *himself*, stating: "When it comes to a parolee, we have the responsibility to try to keep them from participating in the behavior that got them into trouble." *See* Baker, *supra* note 6.

[297] *See supra* note 290 (discussing the constitutional standard stemming from *Brandenburg v. Ohio*).

[298] 341 U.S. 494 (1951).

[299] *See id.* at 583 (Douglas, J., dissenting). The Justice wrote:

> The opinion of the Court does not outlaw [Communist] texts nor condemn them to the fire, as the Communists do literature offensive to their creed. But if the books themselves are not outlawed, if they can lawfully remain on library shelves, by what reasoning does their use in a classroom become a crime? It would not be a crime under the Act to introduce these books to a class, though that would be teaching what the creed of violent overthrow of the Government is.

Id.

[300] 505 U.S. 377 (1992).

[301] *See id.* at 387-88.

[302] *See* Baker, *supra* note 6. Baker quotes Ann Brock, staff attorney for the ACLU of Northern California, stating that Thomas "[i]s not being punished for anything he did. He is being punished for using music as a means of expressing his political views. The state is trying to put him in jail because they don't like what he said." *Id.*

ist for what he *says* rather than for what he *does* is judicial arrogance nonpareil, is patently offensive to the First Amendment, and could never have come about had the state interest of the highest order doctrine been applied.

F. Judges versus The First Amendment

The First Amendment should be read to compel all government actors, including members of the judiciary, to address the state interest of the highest order standard before impairing *the content* of free speech liberties; the government did not do so in any of the cases recounted thus far in this Part of this Article. In no case would the court-imposed restrictions survive the application of the doctrine. Judges are expected to be vigilant in scrutinizing the proper limits of governmental authority,[303] irrespective of how popular the government's behavior may be, and they should be loath to issue gag orders and other restrictions on the speech of persons brought before or watching them. Such orders must be justified by a need to further a state interest of the highest order addressable by no other alternative means.

Gag orders frequently do not serve their own purposes and can result in the dissemination of less reliable information to the press and public and less accountability for it.[304] As many courts have recognized, properly managing information flow can be more successful than imposing blanket restrictions; alternative proceedings work far better to secure the fair administration of justice than do gag orders. Delaying the dates of trials and changing venues serve to diminish the potential for prejudice caused by excessive pretrial publicity in notorious cases. Thorough voir dire, comprehensive instructions to all attorneys and parties regarding out-of-court statements, and, if need be, sequestering the jury, can all serve the interests of preventing prejudicial publication of sensitive, nonpublic, trial-related information. And once a trial is concluded, restricting juror comments to voluntary statements regarding *their own* impressions of the trial that do not reveal the identities of any other jurors adequately serves any concerns regarding protecting open, robust communication in

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[303] *See* LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 80 (1990) ("The whole *point* of an independent judiciary is to be "antidemocratic," to preserve from transient majorities those human rights and other principles to which our legal and political system is committed." (emphasis in original)).

[304] *See* Editorial, *Stop Gagging*, *supra* note 275 (arguing that the Office of the Independent Counsel's criminal investigation of President Clinton resulted in myriad leaks of non-attributed information to the press and worked against the goal of assuring a fair resolution of the disputes).

the jury room. When judges cause courtrooms to be closed, thus shutting the public out, they do violence to the First Amendment liberties of all.[305]

There are some bright spots on the constitutional horizon where justices of courts of last resort have restrained trial judges and given due regard to constitutional rights to access to information regarding public judicial proceedings. For example, the South Carolina Supreme Court recently rebuked two trial judges who closed pretrial hearings in a high-profile criminal case for failing to explore less restrictive alternatives that would still protect the defendant's right to a fair trial before ordering the proceedings closed.[306] The Rhode Island Supreme Court also struck down a policy that denied all access to court records related to child molestation cases — even when information identifying the victim had been purged from the records.[307] That court rightly found such a broad ban on access to be violative of the First Amendment-protected right of access to criminal proceedings[308] because such a ban was not narrowly tailored and was too restrictive.

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[305] *See* Kirtley, *supra* note 3, at 24. The author vigorously criticized President Clinton's attorneys in the Paula Jones civil suit for arguing that United States District Court Judge Susan Webber Wright should reconsider her order unsealing many of the records in the case. *See id.* Kirtley said that Clinton, a former professor of constitutional law, and his lawyers were demonizing the exercise of constitutionally protected First Amendment liberties in their effort to protect the President from embarrassment. *See id.* The author stated: "One might have hoped that the president of the United States would have suggested to his lawyers that this argument might be a tad overwrought, implying as it does that exercising constitutionally protected guarantees of free speech and press for monetary gain are somehow improper, ignoble and inappropriate." *Id.* Kirtley, the executive director of the Reporters Committee for Freedom of the Press, characterized President Clinton's anti-media, pro-suppression argument as follows:

> [T]he news media are in the business to make money. They have a lot of time and space to fill, and no significant international crisis to cover. They learned during the debacle that was the O.J. Simpson criminal trial that the public has an insatiable desire to watch and read about sensational court cases. Therefore, left to their own devices they will pluck the most salacious details out of any court case, will repeat them over and over again, and [will] haul in endless pundits to ponder what it all means. This not only will be embarrassing for the hapless litigants, but it will distort and degrade the judicial system itself. They must be stopped, at all costs.

Id.

[306] *See id.*

[307] *See id.*

[308] *See id.*

But the media should not be forced to litigate for the privilege of exercising rights they indisputably possess.[309] Why should either of these cases have had to make it to their states' highest court before the media was able to vindicate the constitutional rights that were guaranteed through landmark cases decades ago?[310] Why should the media or individual defendants have to bear the cost of litigating their cases to the highest court of a state — or of the land — when the Constitution and the controlling case law are so clearly already on their side? Why should not state and federal trial judges — who are on the front lines of First Amendment cases — have a constitutional, jurisprudential, recognized, and acknowledged *predisposition* in favor of openness to the media?[311] The United States Supreme Court should send a strong message to lower courts that they are bound by the clear precedent of cases such as *Florida Star.* Rather than denying certiorari and allowing to stand lower court orders that are so obviously at odds with First Amendment jurisprudence, the Court — the last resort for protection of our liberties — should remand offensive cases with a one sentence direction that they be decided in accordance with the controlling precedent.[312] Thus can the United States Supreme Court assure that expressive liberties are protected without the expense of ancillary litigation within the underlying case, and without delay.

VII. CONCLUSION

The United States Supreme Court fashioned the state interest of the highest order doctrine in order to synthesize and simplify the va-

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[309] *See* Kotlikoff v. Community News, 89 N.J. 62, 67-68, 444 A.2d 1086, 1088 (1982) (holding that courts should scrutinize the vitality of cases involving the First Amendment in the earliest stage of the case because the media should not be compelled to pay the expense of frivolous or baseless litigation as a pre-condition to the exercise of its First Amendment-protected newsgathering rights).

[310] *See* Kirtley, *supra* note 3, at 25 ("[T]hese victories are bittersweet, because they involve situations where the law vindicating the journalists' arguments was already well-established, but ignored by the trial judges involved. . . . [I]t is disheartening to realize that again and again judges must be re-educated to uphold access rights."); *see also generally* Florida Star v. B.J.F., 491 U.S. 524 (1989); Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976).

[311] *See* New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) ("[D]ebate on public issues should be uninhibited, robust, and wide-open . . . ."). How can there be open, robust, and wide-open debate on public issues when the media is stifled?

[312] *See, e.g.*, Boettger v. Loverro, 587 A.2d 712, 713 (Pa. 1991) (*Boettger II*) (complying on remand with the United States Supreme Court's explicit direction that the court decide a media liability case in accordance with the rule of *Florida Star*); Easton Publ'g Co. v. Boettger, 493 U.S. 885, 885 (1989) (remanding the case with a one sentence direction that it be decided under *Florida Star*).

riety of First Amendment standards and to provide an elevated level of scrutiny for governmental acts that impair *the content* of the exercise of expressive liberties. The state interest of the highest order doctrine has been applied to grant strident protection to the media and to individuals in a narrow category of cases wherein state actors in any of the three branches of government attempted to punish the publication of lawfully obtained truthful information.

There is no justification for restricting the application of the doctrine to media defendants or to cases that are factually on point with *Daily Mail* and *Florida Star*. As Chief Justice Burger articulated in *Yoder*, as Justice Marshall provided in *Florida Star*, and as Chief Justice Rehnquist demonstrated in *Aguilar* and *Butterworth*, the state interest of the highest order doctrine is applicable to provide due process protection to a diversity of First Amendment liberty interests that could be impaired by governmental action. Indeed, this heightened protection of constitutional liberties should translate into greater scrutiny of governmental actions whenever they impair *the content* of expressive rights such as religious exercise and freedom of speech.

The doctrine of state interest of the highest order — which means that the government may curtail *the content* of expressive liberties only when the interests that the government seeks to serve *must* be served at the peril of the demise of *the government itself* if they go unserved and only where the government's interest in self-preservation can be served by *no* other means — offers a consistent, predictable, unifying standard that puts the constitutionally mandated, appropriately burdensome, sine qua non onus of justifying state impairment of expressive liberties on the branch of the government that seeks the impairment. Courts should turn to the state interest of the highest order doctrine whenever a government act — in any branch and at any level of the government — implicates *the content* of First Amendment interests, and courts should put the government to the task of justifying its repressive actions as *absolutely necessary* for the survival of the state. Consistent application of the state interest of the highest order doctrine would grant all Americans the comforting guarantee that their expressive liberties are immune from unjustified interference and would assure that the First Amendment remains the crown jewel of our constitutional democracy.