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BOUNCING "CHECKBOOK JOURNALISM": A BALANCE BETWEEN THE FIRST AND SIXTH AMENDMENTS IN HIGH-PROFILE CRIMINAL CASES

Legislation recently enacted in California attempts to preserve further the right of the accused to a fair trial and the integrity of judicial proceedings by allowing criminal prosecution of jurors and witnesses who would enter agreements for or accept payment, benefit, or other consideration in exchange for information pertaining to criminal trials. This note analyzes the constitutionality of this legislation through an evaluation and a balancing of the rights and interests of the accused, the jurors, the witnesses, the press, and the public implicated in criminal trials. Despite supporting compelling governmental interests, certain portions of the statutes are too broad, too vague, or not narrowly tailored to meet these governmental interests. This note then considers proposals to amend the statutes for the purpose of rectifying constitutional infirmities and withstanding future constitutional challenges.

* * *

"[F]ree speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them."¹

INTRODUCTION

As television and other media coverage of criminal trials has continued to expand, so has the public's access and exposure to the criminal trial process. Although this coverage has given the public greater opportunities to observe the workings of the American criminal trial process, it has been neither without its price nor its criticism. Most recently under attack is the practice of "checkbook journalism"²—paying sources for information—which may prejudicially effect the minds of jurors³ and undermine the credibility of witnesses lured by the opportunity to profit from their testimony.⁴

¹ Justice Hugo Black's remark in delivering the opinion of the Supreme Court of the United States in *Bridges v. California*, 314 U.S. 252, 260 (1941).

² The genesis of the term "checkbook journalism" is unknown, but it has been widely used in recent years. See, e.g., Richard Cohen, *Hitler's Diaries: Checkbook Journalism Again*, PHILA. INQUIRER, May 10, 1983, at A19; Elizabeth Mehren, *The Journalistic Rivalry Over a Juicy Murder Story: Charges and Countercharges Fly—Everything From Unethical Conduct to Checkbook Journalism*, L.A. TIMES, June 26, 1985, View, at 1; Tom Shales, *Nixon's Long Look Back: TV Preview: In CBS Interviews, He's More Relaxed and Direct*, WASH. POST, Apr. 6, 1984, at D1; Neil Singelais, *What Were WBZ's Terms?*, BOSTON GLOBE, Apr. 29, 1980, at 23.

³ See *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966).

⁴ In addressing the impact on a witness of merely knowing that he or she is being

Numerous recent high-profile criminal cases in California and elsewhere in the United States have given rise to concerns over jury-tampering and the tainting of witness credibility through checkbook journalism. Before the infamous double murder trial of former football star O.J. Simpson,⁵ the credibility of witnesses has been called into question in trials and investigations surrounding "Long Island Lolita" Amy Fisher,⁶ pop star Michael Jack-

viewed by the media, Justice Tom Clark claimed that "[t]he impact upon a witness of the knowledge that he is being viewed by a vast audience is simply incalculable. Some may be . . . cocky and given to overstatement." *Estes v. Texas*, 381 U.S. 532, 547 (1965). He further intimated that "a natural tendency toward overdramatization" may actually impede the search for truth. *Id.*

The fear of these risks exists with regard to witnesses approached by the press and others who would agree to pay for their testimony. Witnesses can be impeached on the stand by a showing that monetary or other rewards for favorable testimony have been offered or accepted. *See* JON R. WALTZ, *INTRODUCTION TO CRIMINAL EVIDENCE* 136-37 (3d ed. 1991). Such impeachment is based on the ability to prove a witness's bias, which is always relevant to credibility and subject to thorough examination on the stand. *Id.*; *see also* CAL. EVID. CODE § 780(f) (West 1995) (evidentiary rule allowing courts to determine witness credibility on any matter tending to prove or disprove the truthfulness of testimony such as bias, interest, or motive). While the Federal Rules of Evidence do not specifically mention bias, they have been observed as "clearly contemplat[ing] the use of [bias, prejudice, or corruption as] grounds of impeachment." *United States v. Abel*, 469 U.S. 45, 50 (1984) (quoting *MCCORMICK ON EVIDENCE* § 40, at 85 (Edward W. Cleary ed., 3d ed. 1984)).

With the knowledge that money is involved and that more sensational testimony would likely be worth more money, witnesses who make agreements to receive payment may display bias or be perceived as biased by judges and juries, thus undermining the efficacy and legitimacy of their testimony.

⁵ Simpson, a former running back for the Buffalo Bills and San Francisco 49ers football teams, was on trial in Los Angeles, California, for the double homicide of his former wife, Nicole Brown Simpson, and her friend, Ronald Goldman. Howard Witt, *Jury Acquits O.J. Simpson: Not Guilty; The Verdict; Judge Ito Orders Ex-Football Star Freed From Jail*, CHI. TRIB., Oct. 3, 1995, at 1. Simpson was acquitted of the charges on October 3, 1995. *Id.* The trial was so highly publicized that it was ubiquitously billed as the "trial of the century," a title previously reserved for the trial of Bruno Richard Hauptmann, the man convicted and executed for kidnapping the baby of Charles and Anne Morrow Lindbergh. Paula Fass, *Lindbergh: Real Trial of the Century*, L.A. TIMES, Jan. 29, 1995, at M1. The trial of Hauptmann attracted an estimated 700 reporters and photographers, 40 newswires, television (which was in its infancy at that point), and some 75,000 to 100,000 onlookers. *Id.*

⁶ Fisher was convicted of shooting the wife of Joey Buttafuoco, the man later indicted and convicted for the statutory rape of Fisher. Pete Dexter, *Scratch a 'Victim' and You May Find a Not-So-Good Kid*, DETROIT FREE PRESS, Nov. 30, 1993, at 11D. Prior to the conviction of Buttafuoco for statutory rape, Fisher had been videotaped telling a friend that she wanted to get enough money from selling her story to buy a Corvette. *Id.* at 11D. Fisher's former boyfriend was reportedly paid between \$50,000 and \$100,000 for the videotape. Craig Gordon & Sylvia Adcock, *Amy and Joey: Crime*

son,⁷ Olympic figure skater Tonya Harding,⁸ and William Kennedy Smith.⁹ In each of these cases or controversies, the credibility of witnesses was tarnished, and, in some cases, believed to be a strong factor in determining the outcome of the trial or untried controversy.¹⁰ The credibility of certain witnesses, real or potential, was scrutinized at various phases of the Simpson trial because they sold their stories to the media. Examples abound: two men who claim to have sold Simpson a knife six weeks before the murders received \$12,500 from the *National Enquirer*;¹¹ a woman who claims to have seen Simpson near the scene of the crime on the night of the murders sold her story to *Hard Copy*, a television tabloid, and the *Star*, a

Pays in Big Way; Their Saga Breeds Money for Many, N.Y. NEWSDAY, Nov. 22, 1993, at 5.

⁷ Jackson had been accused of molesting a juvenile, but the case was settled out of court. Henry Weinstein, *Free-Spending Tabloid Media Causing Judicial Concerns*, L.A. TIMES, July 2, 1994, at A1, A2. Jackson's attorney, Johnnie Cochran, who was also one of the defense attorneys in O.J. Simpson's murder trial, claimed that two witnesses against Jackson sold stories to tabloid TV shows that contradicted and were more sensational than what they said in sworn depositions for the civil suit. *Id.* at A2.

⁸ In 1994, U.S. Olympic figure skater Nancy Kerrigan was beaten in the knee by two assailants associated with competing Olympic skater Tonya Harding. During the resolution of the case, prominent figures for the defense allegedly received huge pay-offs for interviews with tabloid television programs. The two accused assailants reportedly received \$100,000 toward their legal defense fund by selling their version of the events to *Hard Copy*, a tabloid television show. Robin Clark, *Tabloids Are Paying, But at a Cost: Journalism by Checkbook Is a Big Problem in High-Profile Cases*, PHILA. INQUIRER, July 3, 1994, at C1. Likewise, Harding's ex-husband, Jeff Gillooly, reportedly received \$250,000 for his exclusive story from *A Current Affair*, another tabloid television show; Harding herself allegedly sold her story to the television tabloid *Inside Edition* for more than \$500,000. *Id.*

⁹ Defense attorneys in the 1991 William Kennedy Smith rape trial were successful in undermining the testimony of a key prosecution witness, Anne Mercer, after she acknowledged having been paid \$40,000 to appear on *A Current Affair*. Howard Kurtz, *Fees for Sleaze: When You Buy News, Do You Get Taken?*, WASH. POST, Jan. 27, 1994, at C1.

¹⁰ Mark Schnapp, a defense attorney in William Kennedy Smith's rape trial, claimed the \$40,000 sale of information by the key prosecution witness was a substantial factor in obtaining an acquittal. Clark, *supra* note 8, at C1. According to Schnapp, "[w]hen that came out [during the trial], there was an audible gasp from the jury." *Id.* Likewise, prosecutors in the statutory rape case against Joey Buttafuoco decided that Amy Fisher's videotaped comments regarding her desire for money in exchange for her story destroyed her credibility as a witness; the prosecutors believed this made impossible the prosecution of Buttafuoco for statutory rape. See Gordon & Adcock, *supra* note 6, at 5.

¹¹ Jim Newton & Andrea Ford, *Simpson Bought a Knife Weeks Before Slayings, Court Is Told*, L.A. TIMES, July 1, 1994, at A1. Allen Wattenberg, the store owner, and Jose Camacho, the sales clerk, claimed that Simpson bought a knife from their store and had them sharpen it. *Id.* On cross-examination by defense attorney Robert Shapiro, Camacho admitted to having sold the story to the highest bidder. *Id.*

newspaper tabloid, for an estimated \$7600;¹² and a friend of Simpson has been offered “‘up to \$1 million for his story.’”¹³ These examples are indicia of the spreading practice of checkbook journalism witnessed in this country since the Watergate scandal in the 1970s.¹⁴ The spread of this practice has led to yet another confrontation between, on the one hand, sensationalism engendered by free speech, the free press, and a free market, and on the other hand, the right of criminal defendants to a fair trial.

The Supreme Court has acknowledged that when a “‘case is a ‘sensational’ one[,] tensions develop between the right of the accused to trial by an impartial jury and the rights guaranteed others by the First Amendment.”¹⁵ Although freedom of speech and the press are important, the Court has found a fair trial to be the most fundamental of all freedoms and that the atmosphere essential to the preservation of fair trials must be maintained at all costs.¹⁶

The means by which the American judicial system attempts to maintain this proper atmosphere include the use of rules, contempt proceedings, and the reversal of convictions obtained under unfair conditions.¹⁷ The trial judge bears the duty of ensuring that defendants receive a fair trial by controlling the behavior of the media and trial participants both in and out of the courtroom.¹⁸ Nevertheless, besides the trial judge bearing the responsibility of managing the media and others, the Supreme Court has also point-

¹² Jill Shively, a neighbor of Nicole Brown Simpson, claimed to have seen Simpson speeding through the streets in his white Ford Bronco near his ex-wife's residence around the time of the murders. Clark, *supra* note 8, at C1. The Los Angeles District Attorney's office decided not to call Shively as a witness for fear that her receipt of payment would make her testimony suspect. See Jessica Seigel, *Testimony Bought, Sold—and Ruined: As in Other Trials, Checkbook Journalism in the Simpson Case Makes It Hard to Protect the ‘Integrity’ of Witnesses*, CHI. TRIB., June 29, 1994, at 1.

¹³ Weinstein, *supra* note 7, at A1 (quoting Donald M. Re, the attorney of Simpson's friend Al Cowlings). Cowlings declined that offer along with other offers, according to Re. *Id.*

¹⁴ In fact, mainstream media joined the fray of checkbook journalism back in the 1970s following the Watergate scandal. CBS paid former Nixon aide H.R. Haldemann \$25,000 in exchange for an interview on *60 Minutes* and paid Watergate burglar G. Gordon Liddy \$15,000. Kurtz, *supra* note 9, at C1. David Frost later set new heights for checkbook journalism when he paid former President Richard Nixon \$600,000 for a series of interviews. *Id.*

¹⁵ *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 551 (1976).

¹⁶ *Estes v. Texas*, 381 U.S. 532, 540 (1965).

¹⁷ *Id.*

¹⁸ This point was emphasized by the Supreme Court in *Sheppard v. Maxwell*, 384 U.S. 333 (1966). In *Sheppard*, the Court held that a failure of a state trial judge in a murder prosecution to protect the defendant from inherently prejudicial publicity and disruptive influences in the courtroom denied the defendant a fair trial consistent with due process. *Id.*

ed to the potential valuable contributions of legislators in "promulgat[ing] . . . regulation[s] with respect to dissemination of information about . . . case[s]." ¹⁹ In *Sheppard v. Maxwell*, ²⁰ the Court made a compelling argument in favor of the legislature enacting stricter laws to ensure the right of defendants to a fair trial, emphasizing that proper measures must be taken as early as possible to prevent both interference and the seeking of remedial justice in appellate courts. ²¹

On September 26, 1994, the California legislature enacted provisions of its penal and civil codes under which jurors and witnesses serving in criminal trials in California would be subjected to new constraints in publicizing their stories. The legislation, proposed by California Assembly Speaker Willie Brown ²² and California State Senator Quentin Kopp, ²³ was designed to prohibit jurors, ²⁴ anyone acting on a juror's behalf, ²⁵ and potential or actual witnesses ²⁶ from providing information in relation to any

¹⁹ *Id.* at 362.

²⁰ 384 U.S. 333 (1966).

²¹ *Id.* at 362. Justice Clark, delivering the opinion of the Court, confronted the concerns of the Court over modern communication technology, the prejudicial effect it may have on the minds of jurors, and the inadequacy of reversals of convictions as a remedy to the injustice of unfair trials:

Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. . . . [R]eversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff[,] nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.

Id. at 362-63.

²² CA. A.B. 501, 1993-94 Reg. Sess., CAL. PENAL CODE §§ 132.5, 1122.5 (West Supp. 1995).

²³ CA. S.B. 1999, 1993-94 Reg. Sess., CAL. PENAL CODE §§ 116.5, 132.5, 1122 (West Supp. 1995), CAL. CIV. CODE § 1669.7 (West Supp. 1995).

²⁴ CAL. PENAL CODE § 116.5(a)(3).

²⁵ *See id.* § 116.5(a)(1)-(2). Section 116.5 of the Penal Code also makes a person guilty of jury tampering who "[c]onfers, or offers or agrees to confer, any payment or benefit upon a juror or upon a third person who is acting on behalf of a juror in consideration for the juror or third person supplying information in relation to an action or proceeding." *Id.* § 116.5(a)(1).

²⁶ CAL. PENAL CODE §§ 132.5(a) (Senate), 132.5(b)-(c) (Assembly). Note that both California Senate Bill 1999 and California Assembly Bill 501, which created § 132.5 of the California Penal Code, were passed by the California legislature, and signed into law by the Governor on the same date. The two bills were never reconciled; accord-

criminal action or proceeding in return for payment.²⁷ The new laws, however, have already come under constitutional attack. In May 1995, California Penal Code Section 116.5, which is aimed at jurors, was successfully enjoined from specific application against plaintiffs Michael Knox, one of the original twelve jurors empaneled but later excused from the O.J. Simpson murder trial in Los Angeles, and Dove Audio, Inc., a California corporation which sought to enter into an agreement with Knox to publish a book concerning his experiences and impressions as a juror in the Simpson case.²⁸ Three months later, section 132.5 of the California Penal Code and section 1669.7 of the California Civil Code, both of which targeted witnesses who sell information, were permanently enjoined from enforcement following a challenge by the California First Amendment Coalition (CFAC).²⁹

The opinions issued in these cases by the United States district courts in Los Angeles and San Francisco respectively only partially analyzed the constitutional dimensions raised by these statutes. This Note more fully addresses the constitutionality of the new California Penal Code sections by analyzing the statutes with respect to the various rights and interests implicated in such legislation. Part I describes in greater detail the newly enacted sections to the California Penal Code, and Part II examines the sections' constitutionality. Specifically, Part II.A discusses the rights of criminal defendants under the Sixth Amendment of the United States Constitution,

ly, the current California Penal Code contains two §§ 132.5 that exist side by side despite significant differences in terms of penalties for violations. Under California law, when two or more statutes or amendments are enacted at the same session concerning the same section, the statute enacted last is conclusively presumed to prevail over those enacted earlier. CAL. GOV. CODE ANN. § 9605 (West 1992). This is known as the "highest chapter number test." 58 CAL. JUR. 3D (Statutes) § 44 (1980). Under this test, those provisions of the earlier-enacted statute (in this case, CAL. PENAL CODE § 132.5 (Senate)) that are consistent with the later-enacted statute (in this case, CAL. PENAL CODE § 132.5(b)-(c) (Assembly)) remain in effect, and those which are inconsistent are superseded by the later enacted provisions.

In this Note, the Senate- and Assembly-sponsored code sections will be distinguished by a parenthetical after the code section. *E.g.*, CAL. PENAL CODE § 132.5 (Senate); *id.* § 132.5 (Assembly).

²⁷ CAL. PENAL CODE §§ 116.5, 132.5.

²⁸ See *Dove Audio, Inc. v. Lungren*, No. CV 95-2570 RG (JRX), 1995 WL 432631, at *1 (C.D. Cal. June 14, 1995).

²⁹ *California First Amendment Coalition v. Lungren*, No. C 95-0440-FMS, 1995 WL 482066 (N.D. Cal. Aug. 10, 1995). CFAC is a non-profit organization composed of seven media professional associations, over two hundred individual news organizations, and other members who are dedicated to protecting the right to free expression of California's journalists and citizens. *Id.* at *1; see also Lynn Ludlow, *A Curse Worse Than the Disease: The First Amendment Coalition Rightly Asks the Court to Toss Out the State's New Checkbook Journalism Law as Unconstitutional*, S.F. EXAMINER, Feb. 21, 1995, at A16.

while Part II.B addresses the First Amendment rights, responsibilities, and interests of the public, and the media in the context of criminal trials. Part II.C addresses the First Amendment rights, responsibilities, and interests of jurors and witnesses in the context of criminal trials and argues that the newly enacted California statutes are constitutionally valid in their purpose but not in scope in balancing these competing rights. Suggestions are offered regarding the scope of limitations placed on criminal trial jurors and witnesses in order to rehabilitate the statutes and preserve them against future constitutional scrutiny.

I. LEGISLATIVE CONTROL OVER JUROR AND WITNESS CONTACT WITH THE MEDIA

The newly adopted California Penal and Civil Code sections were designed to preserve further the right of the accused to a fair trial, the right of the people to due process of law, and the integrity of judicial proceedings.³⁰ The objectives stated to reach these goals include preventing the loss of credible evidence in criminal trials, the erosion of reliability in verdicts, and the appearance of injustice that is destructive to public confidence.³¹

³⁰ CAL. PENAL CODE § 132.5(a) (Senate). The intent of the legislation was mentioned only in this version of § 132.5, which concerns witnesses supplying information, and is not actually mentioned in § 116.5, which concerns information supplied by jurors or their "agents." *Id.* §§ 116.5, 132.5(a) (Senate). Specifically, § 132.5(a) (Senate) states:

The Legislature supports and affirms the constitutional right of every person to communicate on any subject. This section is intended to preserve the right of every accused person to a fair trial, the right of the people to due process of law, and the integrity of judicial proceedings. This section is not intended to prevent any person from disseminating any information or opinion.

The Legislature hereby finds and declares that the disclosure for valuable consideration of information relating to crimes by prospective witnesses can cause the loss of credible evidence in criminal trials and threatens to erode the reliability of verdicts.

The Legislature further finds and declares that the disclosure for valuable consideration of information relating to crimes by prospective witnesses creates an appearance of injustice that is destructive of public confidence.

Id. § 132.5(a) (Senate). Having signed the two new bills into law, Governor Wilson was quoted as saying that the new laws would "ensure that witnesses and jurors are a force for justice, not fodder for tabloids, and that attorneys will represent their client, not lead a media circus." Carl Ingram, *Legislation Inspired by Simpson Case Signed*, L.A. TIMES, Sept. 27, 1994, at A21.

³¹ CAL. PENAL CODE § 132.5(a) (Senate). California Senator Quentin Kopp and Assembly Speaker Willie Brown, whose respective senate and assembly bills, *see supra* notes 22-23, collectively became § 132.5 of the Penal Code, were reported as saying that the sale of information contaminates the right to a fair trial by providing the incentive to lie. Ingram, *supra* note 30, at A21-A22. They further stated that a compensated

In order to achieve these goals, the California legislature has enacted legislation with two primary objectives. First, the legislature has targeted jury tampering by making unlawful any agreements for the conferral of payment or other consideration to jurors for information relating to criminal proceedings.³² Second, the legislature has targeted the tainting of potentially valuable evidence provided by witnesses in criminal cases by making unlawful any agreements for the conferral of payment or other consideration to witnesses in criminal trials for information pertaining to either their particular knowledge of facts or their witnessing of events or occurrences.³³

A. *Jury Tampering*

Jurors are expected to serve as impartial arbiters of justice in deciding whether to convict or acquit criminal defendants.³⁴ As a means of ensuring that jurors are able to evaluate objectively evidence brought to trial and to be free from external influence, the California legislature has enacted provisions to prohibit jury tampering. Prior to the enactment of Section 116.5 of the California Penal Code, California's statutory control over juror impartiality had been found exclusively in sections 95 and 1121.³⁵ Section 95 pun-

witness may lose credibility in the eyes of a jury, even if he or she tells the truth. *Id.*; see also WALTZ, *supra* note 4, at 132-33. According to Brown, the legislation is aimed "at those persons who are motivated by the lure of money to participate [in the event], sometimes accurately, sometimes not so accurately." Stephen Green & Jon Matthews, *Denying Witnesses a Quick Profit: Bills Would Outlaw Fast Sales of Stories*, SACRAMENTO BEE, Aug. 17, 1994, at A1.

³² CAL. PENAL CODE § 116.5(a).

³³ Under CAL. PENAL CODE § 132.5(b)-(c) (Assembly), unlawful witness contact is defined as follows:

(b) A person who is a witness to an event or occurrence that he or she knows is a crime or who has personal knowledge of facts that he or she knows or reasonably should know may require that person to be called as a witness in a criminal prosecution shall not accept or receive, directly or indirectly, any money or its equivalent in consideration for providing information obtained as result of witnessing the event or occurrence or having personal knowledge of the facts.

(c) Any person who is a witness to an event or occurrence that he or she reasonably should know is a crime shall not accept or receive, directly or indirectly, any money or its equivalent in consideration for providing information obtained as a result of his or her witnessing the event or occurrence.

Id. § 132.5(b)-(c) (Assembly).

³⁴ It is the responsibility of the legislatures and the courts to ensure that jurors are aware of the power that rests in their hands in serving the interests of justice. See, e.g., ALBERT S. OSBORN, *THE MIND OF THE JUROR* 1 (1937) ("Those responsible for the procedure and the surroundings are at fault if this juror is not in every way possible led keenly to realize that for the time being the interests of justice are in his control.").

³⁵ CAL. PENAL CODE § 95 (West 1988 & Supp. 1995); *id.* § 1121 (West 1985).

ishes any individual who corruptly attempts to influence a juror.³⁶ Section 1121 takes a broader aim of preventing jurors from discussing any information concerning their trial while in court custody or during periods of separation from the rest of the jury and court.³⁷

The definition of jury tampering is significantly broadened under California Penal Code Section 116.5(a), which states:

A person is guilty of tampering with a jury when, prior to, or within 90 days of, discharge of the jury in a criminal proceeding, he or she does any of the following:

(1) Confers, or offers or agrees to confer, any payment or benefit upon a juror or upon a third person who is acting on behalf of a juror in consideration for the juror or third person supplying information in relation to an action or proceeding.

(2) Acting on behalf of a juror, accepts or agrees to accept any payment or benefit for himself or herself or for the juror in consideration for supplying any information in relation to an action or proceeding.

(3) Acting on behalf of himself or herself, agrees to accept, directly or indirectly, any payment or benefit in consideration for supplying any information in relation to an action or proceeding.³⁸

The Penal Code makes such jury tampering a misdemeanor,³⁹ and a person convicted of violating section 116.5 must forfeit the compensation.⁴⁰ Although violations under the code apply at any time prior to or within ninety days of the jury's discharge,⁴¹ compensation paid to a juror within ninety days of discharge and not exceeding fifty dollars does not constitute a criminal violation.⁴²

As an additional tool to reinforce the effectiveness of this jury tampering statute, both California Senate Bill 1999 and California Assembly Bill 501 provided new sections to the Penal Code: sections 1122⁴³ and 1122.5.⁴⁴ These sections provide instructions and guidance to judges to facilitate their

³⁶ *Id.* § 95.

³⁷ *Id.* § 1121.

³⁸ *Id.* § 116.5(a) (West Supp. 1995).

³⁹ *Id.* § 116.5(b).

⁴⁰ *Id.* § 116.5(d). The forfeited compensation is then deposited in the Victim Restitution Fund. *Id.*

⁴¹ *Id.* § 116.5(a).

⁴² *Id.* § 116.5(c).

⁴³ *Id.* § 1122 (West Supp. 1995).

⁴⁴ *Id.* § 1122.5 (West Supp. 1995).

control over juror conduct and to promote justice and the appearance thereof.⁴⁵

Section 1122(a) explicitly requires judges, “[a]fter the jury has been sworn and before the people’s opening address,” to

instruct the jury generally concerning its basic functions, duties, and conduct . . . includ[ing], among other matters, admonitions that the jurors shall not . . . prior to, and within 90 days of, discharge, . . . request, accept, agree to accept, or discuss with any person receiving or accepting, any payment or benefit in consideration for supplying any information concerning the trial; and that they shall promptly report to the court any incident within their knowledge involving an attempt by any person to improperly influence any member of the jury.⁴⁶

Section 1122.5 of the Penal Code also authorizes courts, at their discretion, to admonish juries at each adjournment of the court and before submission of the case to the jury that “on pain of contempt of court, no juror shall, prior to discharge, accept, agree to accept, or benefit, directly or indirectly, from any payment or other consideration for supplying any information concerning the trial.”⁴⁷

B. *Witnesses*

Witness testimony is often subjected to harsh scrutiny in court during direct and cross-examination. The validity and veracity of a witness’s testimony may be challenged and impeached by questioning the witness herself or other witnesses concerning her character for truthfulness,⁴⁸ any prior criminal convictions,⁴⁹ or any bias, motive, or interest.⁵⁰ With the knowledge that money is involved and that more sensational testimony would likely be worth more money, witnesses who make agreements to receive payment for information pertaining to a trial may be perceived as biased by judges and juries,⁵¹ thus undermining the very efficacy and legitimacy of their testimony. Although prosecution and defense attorneys have the ability

⁴⁵ See *id.* § 1122.5(b).

⁴⁶ *Id.* § 1122.

⁴⁷ *Id.* § 1122.5(a).

⁴⁸ See, e.g., FED. R. EVID. 608(a); CAL. EVID. CODE § 780 (West 1995).

⁴⁹ See, e.g., FED. R. EVID. 609; CAL. EVID. CODE § 788 (West 1995).

⁵⁰ See *supra* note 4 and accompanying text.

⁵¹ See WALTZ, *supra* note 4, at 136-37.

to impeach witnesses who show such bias,⁵² the effect of the impeachment could be to discredit the testimony of the witness regardless of whether the testimony given was true. Taken to an extreme, the possibility exists that a witness could testify truthfully and still be impeached, resulting in the acquittal of a genuinely guilty defendant or the conviction of a genuinely innocent defendant. In such incidents, impeachment as a tool of direct examination and cross-examination would not serve the interests of justice.

The ability to impeach witnesses for such agreements should be viewed as a remedy whose effect is palliative and potentially detrimental to the interests of justice. Just as the Court in *Sheppard* found that "reversals [of convictions] are but palliatives" and that "the cure lies in those remedial measures that will prevent the prejudice at its inception,"⁵³ a mechanism should exist to discourage the ultimate injustice of the appearance of bias before it has a chance to occur. The California legislature has done just that by enacting section 132.5.

The California Senate and the California Assembly drafted separate versions of section 132.5.⁵⁴ Both houses of the California legislature passed *both* versions by a majority vote of each house,⁵⁵ and the Governor signed both versions into law on September 26, 1994.⁵⁶ Both versions of California Penal Code Section 132.5 address the same issue of witnesses accepting or receiving payment or benefit in return for information obtained as a result of witnessing events or holding personal knowledge in criminal trials.⁵⁷ The Assembly-sponsored section 132.5 explicitly outlines the purpose of the statute: to discourage "the disclosure for valuable consideration of information relating to crimes by prospective witnesses [that] can cause the loss of credible evidence in criminal trials and [that] threatens to erode the reliability of verdicts,"⁵⁸ thus possibly creating "an appearance of injustice that is destructive of public confidence."⁵⁹

Violations of section 132.5 are defined in terms of subjective and objective standards.⁶⁰ The following may be subject to prosecution under Section 132.5: A person who witnesses an event or occurrence that he or she knows, or reasonably should know, is a crime; or a person who has personal knowledge of facts that he knows, or reasonably should know, may require that

⁵² See *supra* note 4 and accompanying text.

⁵³ *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966).

⁵⁴ See *supra* note 26.

⁵⁵ As required under the CAL. CONST. art. IV, § 10.

⁵⁶ For an explanation of how to resolve which portions of the partially conflicting legislation are valid law, see *supra* note 26.

⁵⁷ See CAL. PENAL CODE §§ 132.5 (Senate), 132.5 (Assembly) (West Supp. 1995).

⁵⁸ *Id.* § 132.5(a) (Assembly).

⁵⁹ *Id.*

⁶⁰ See *supra* note 33.

person to be called as a witness.⁶¹ A violation occurs if that person accepts or receives, directly or indirectly, any payment or benefit in consideration for providing information obtained as a result of witnessing the event or occurrence or having personal knowledge of the facts.⁶² Note that in contrast to the jury-tampering provision in Penal Code Section 116.5, under which both the offering and accepting parties may be guilty of a violation, Penal Code Section 132.5 holds only the witness involved liable for violations.⁶³

A violation of Section 132.5 constitutes a misdemeanor punishable by a maximum of six months in a county jail, imposition of a fine, or both.⁶⁴ The Senate-sponsored version of section 132.5 states that "any compensation received in violation of this section shall be forfeited by the defendant and deposited in the Victim Restitution Fund."⁶⁵ The Assembly-sponsored version of section 132.5 allows two possible financial penalties to be imposed. First, a fine may be imposed equal to three times the amount requested, accepted, or received.⁶⁶ This allows a fine to be imposed even if payment was merely *requested*, regardless of whether payment was actually received.⁶⁷ Second, a person who violates section 132.5 may be held civilly liable.⁶⁸ The California Senate and Assembly included identical exceptions

⁶¹ CAL. PENAL CODE §§ 132.5(a) (Senate), 132.5(b)-(c) (Assembly).

⁶² *Id.* §§ 132.5(a) (Senate), 132.5(b)-(c) (Assembly). While the Senate-adopted version defines violations in terms of acceptance or receipt of payment or benefit, *id.* § 132.5(a) (Senate), the Assembly-adopted version defines violations in terms of acceptance or receipt of money or its equivalent in consideration, *id.* § 132.5(b)-(c) (Assembly).

⁶³ Compare *id.* § 116.5(a)(1)-(3) (West Supp. 1995) with *id.* § 132.5(a) (Senate) and *id.* § 132.5(b)-(c) (Assembly).

⁶⁴ CAL. PENAL CODE § 132.5(b) (Senate).

⁶⁵ *Id.* § 132.5(c) (Senate). This is consistent with the fine imposed on those persons who violate § 116.5 by jury tampering, which was also enacted based upon CA. S.B. No. 1999. See *id.* § 116.5(d).

Passage of California Senate Bill No. 1999 also enacted the new CAL. CIV. CODE § 1669.7, which voids contracts for payment of money or other consideration in violation of CAL. PENAL CODE § 132.5 as contrary to public policy. CAL. CIV. CODE § 1669.7 (West Supp. 1995). Section 1669.7 further states that "[t]he Attorney General or the district attorney of the county in which a violation of Section 132.5 of the Penal Code occurs may bring a civil action, or intervene in any civil action, to enjoin the enforcement of a contract that violates that section." *Id.*

⁶⁶ CAL. PENAL CODE § 132.5(e) (Assembly).

⁶⁷ See *id.* The Senate-sponsored § 132.5, which was superseded by the Assembly-sponsored version, would have imposed a financial penalty only on compensation *received*. See *id.* § 132.5(a) (Senate).

⁶⁸ *Id.* § 132.5(d) (Assembly). Specifically, the statute provides:

The Attorney General or the district attorney of the county in which an alleged violation of subdivision (c) occurs may institute a civil proceeding. Where a final judgment is rendered in the civil proceeding, the defendant shall be punished for

for acceptable circumstances of payment to witnesses.⁶⁹ Exceptions exist for the following circumstances:

- (1) Lawful compensation paid to expert witnesses, investigators, employees, or agents by a prosecutor, law enforcement agency, or an attorney employed to represent a person in a criminal matter.
- (2) Lawful compensation provided to an informant by a prosecutor or law enforcement agency.
- (3) Compensation paid to a publisher, editor, reporter, writer, or other person connected with or employed by a newspaper, magazine, or other publication or a television or radio news reporter or other person connected with a television or radio station, for disclosing information obtained in the ordinary course of business.
- (4) Statutorily authorized rewards offered by governmental agencies for information leading to the arrest and conviction of specified offenders.⁷⁰

These exceptions can be justified as being made for those individuals who are customarily or otherwise statutorily allowed to receive payment for their testimony in accordance with public policy rationales underlying evidentiary and procedural rules in trials.

For example, the Federal Rules of Evidence and the California Evidence Code countenance the use of expert witnesses in trials.⁷¹ Experts allowed by the rules are generally those whose specialized knowledge will assist the trier of fact understanding the evidence presented or to determine a fact in issue.⁷² These experts are traditionally compensated for their time spent studying the case or presenting testimony.⁷³ Despite the fact that public

the violation of subdivision (c) by a fine equal to 150 percent of the amount received or contracted for by the person.

Id. This raises the issue of whether double jeopardy should preclude the state from conducting both civil and criminal proceedings against violators of § 132.5. This issue is beyond the scope of this Note and will not be discussed.

⁶⁹ See *id.* §§ 132.5(e)(1)-(4) (Senate), § 132.5(g)(1)-(4) (Assembly).

⁷⁰ See sources cited *supra* note 69.

⁷¹ See FED. R. EVID. §§ 702-706; CAL. EVID. CODE §§ 720-723, 730-733 (West 1995).

⁷² See, e.g., FED. R. EVID. § 702; CAL. EVID. CODE § 720(a).

⁷³ In federal civil cases, parties who retain, regularly employ, or specially employ expert witnesses are required to disclose the identities of those experts and any compensation to be paid to the experts for their testimony or study. FED. R. CIV. P. 26(a)(2)(A)-(B). Under certain conditions, the Federal Rules of Civil Procedure even require that experts be compensated by adverse parties for their time in responding to dis-

policy may favor paying experts for their testimony, their compensation in exchange for their services is still a proper subject of inquiry in determining their credibility.⁷⁴

Compensation considered under exceptions (2) and (4) above need not take the form of monetary payment. For example, in order to obtain a conviction of one defendant, prosecutors may find it necessary to call witnesses who also happen to be codefendants in the same trial or who have charges pending in other cases. To obtain such testimony, prosecutors may exercise their discretion to reduce charges, reduce requested sentences, or offer prosecutorial immunity. While the weight of public policy may favor such offers, these offers may nonetheless be the subject of a proper inquiry during examination of the witnesses to show their bias or self-interest in the outcome of the trial.⁷⁵

II. CONSTITUTIONAL ANALYSIS

Although the purposes and objectives of newly enacted California Penal Code Sections 116.5, 132.5, 1122, and 1122.5 and California Civil Code Section 1669.7 are admirable, they have been subject to debate over their constitutionality both during the legislative process and since their passage. Specifically, their constitutionality has been questioned with respect to the rights of defendants under the Sixth Amendment as balanced against the

covery requests. FED. R. CIV. P. 26(b)(4)(C).

In some instances, courts will appoint and require the compensation of experts without the motion of trial participants. When courts determine that expert evidence is or may be required, courts may in certain instances appoint, *sua sponte*, experts to investigate, render reports to the courts, and testify. *See, e.g.*, CAL. EVID. CODE § 730. Furthermore, in California criminal and juvenile actions, courts may determine that compensation for the services of experts is justified and assign the costs of paying for those services to the jurisdiction in which the action is proceeding. *See, e.g., id.* § 731(a).

⁷⁴ California evidentiary rules specifically state that "the compensation and expenses paid or to be paid to an expert witness by the party calling him is a proper subject of inquiry by any adverse party as relevant to the credibility of the witness and the weight of his testimony." CAL. EVID. CODE § 722(b).

⁷⁵ *See, e.g.*, *Gordon v. United States*, 344 U.S. 414 (1953) (admitting evidence that witness was promised a reduced sentence via plea bargaining); *United States v. Musgrave*, 483 F.2d 327 (5th Cir.) (finding that witness's prior status as a co-inductee suggested personal interest in the litigation), *cert. denied*, 414 U.S. 1023, and *cert. denied sub nom.* *Womack v. United States*, 414 U.S. 1025 (1973); *Wheeler v. United States*, 351 F.2d 946 (1st Cir. 1965) (admitting evidence of potential bias against the defendant where witness was a paid informant); *People v. Dillwood*, 39 P. 439 (Cal. 1895) (admitting evidence that other charges were pending against the witness); *People v. Gibbs*, 255 Cal. App. 2d 739 (Cal. Ct. App. 1967) (admitting evidence where an informant hoped to escape prosecution).

rights of the press, public, jurors, and witnesses under the First Amendment. In May 1995, the Federal District Court in Los Angeles permanently enjoined enforcement of section 116.5 against dismissed Simpson juror Michael Knox and his publisher Dove Audio.⁷⁶ Nevertheless, the specificity of the injunction does not preclude future prosecution of jurors who violate section 116.5 while still serving on jury duty.⁷⁷ In August 1995, the CFAC waged a successful constitutional challenge by gaining a permanent injunction against any future enforcement of Penal Code section 132.5 and Civil Code Section 1669.7.⁷⁸ Thus, the new statutes have taken their place in the long history of unsuccessful attempts to balance Sixth Amendment rights against First Amendment rights under substantive due process analysis. The early fate of the statutes should not impugn the validity of attempting to control participants in criminal trials. The opinions of the two courts barely addressed the challenges laid by the United States Supreme Court for trial courts and local legislatures to control trial participants so as to preserve the rights of the criminally accused to a fair trial.⁷⁹

The prospective success of either the CFAC prevailing on appeal or of other future challenges to California's or other states' similar penal code sections will depend primarily on the identity of the party raising the challenge. The press, public, jurors, and witnesses each have varying rights and interests affected by the enactment of sections 116.5 and 132.5. The degree to which each is affected varies greatly. The following sections analyze the rights of the press, public, jurors, and witnesses, in addition to the effect on those parties' rights when balanced against the rights of a criminal defendant to a fair trial.

A. *A Defendant's Right to a Fair Trial*

Criminal defendants in the United States are guaranteed the right to a public trial by an impartial jury and the right to confront the witnesses testifying against them.⁸⁰ These requirements are enforced so strongly that in

⁷⁶ *Dove Audio, Inc. v. Lungren*, No. CV 95-2570 RG (JRX), 1995 WL 432631 (C.D. Cal. June 14, 1995).

⁷⁷ The defendants only were permanently restrained and enjoined from enforcing § 116.5 against the plaintiffs. *Id.* at *6. The court did not reach the issue of whether § 116.5 was otherwise unconstitutional as applied to other jurors. *See id.*

⁷⁸ *California First Amendment Coalition v. Lungren*, No. C 95-0440-FMS, 1995 WL 482066 (N.D. Cal. Aug. 10, 1995); Jim Doyle, *Ban on Pay to News Sources Is Attacked: 1st Amendment Group Calls It Unconstitutional*, S.F. CHRON., Feb. 8, 1995, at A4.

⁷⁹ *See supra* notes 16-21 and accompanying text.

⁸⁰ "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . to be confronted with the witnesses against him" U.S.

certain instances defendants who have experienced a deprivation of this right have had their convictions reversed on appeal.⁸¹

Although the new California statutes implicate the constitutional rights of the press, public, jurors, and witnesses, the statutes' status seems clear when balanced against the Sixth Amendment rights of criminal defendants. In *Estes v. Texas*,⁸² the United States Supreme Court stated that it has "always held that the atmosphere essential to the preservation of a fair trial—the most fundamental of all freedoms—must be maintained at all costs."⁸³ In an even broader statement concerning the criminal defendant's right to a fair trial, Justice Black stated:

A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. . . . [T]o perform its high function in the best way "justice must satisfy the appearance of justice."⁸⁴

The right to a fair trial is also considered essential to the preservation of all other rights, as a necessary means of safeguarding personal liberties against government oppression. In *In re Oliver*,⁸⁵ the Court enunciated the

CONST. amend. VI. The Sixth Amendment right to a public trial by an impartial jury has been made applicable to the States by way of the Fourteenth Amendment to the U.S. Constitution. *Duncan v. Louisiana*, 391 U.S. 145 (1968).

⁸¹ See, e.g., *Sheppard v. Maxwell*, 384 U.S. 333, 354-57, 363 (1966) (reversing denial of habeas petition where defendant's right to a fair trial was severely compromised by media circus surrounding his trial); *Estes v. Texas*, 381 U.S. 532, 540 (1965) (reversing and remanding conviction where defendant's Fourteenth Amendment due process right was violated by the televising of his notorious, publicized, and highly sensational criminal trial); *Rideau v. Louisiana*, 373 U.S. 723, 727 (1963) (reversing conviction and ordering a new trial following a denial of change of venue from a jurisdiction where the defendant's confession was repeatedly televised and from which the jurors were drawn); *Irvin v. Dowd*, 366 U.S. 717, 725-28 (1961) (reversing conviction and ordering a new trial where there was pervasive and hostile news coverage of a defendant's confession to several murders and burglaries); *Marshall v. United States*, 360 U.S. 310, 311-12 (1959) (setting aside federal conviction where jurors had been exposed via news accounts to information not available at trial).

⁸² 381 U.S. 532 (1965).

⁸³ *Id.* at 540; see also *In re Dow Jones & Co.*, 842 F.2d 603, 609 (2d Cir. 1988) ("When the exercise of free press rights actually tramples upon Sixth Amendment rights, the former must nonetheless yield to the latter."), *cert. denied sub nom.* *Dow Jones & Co. v. Simon*, 488 U.S. 946 (1988).

⁸⁴ *In re Murchison*, 349 U.S. 133, 136 (1955) (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)).

⁸⁵ 333 U.S. 257 (1948) (holding that the secrecy of a criminal contempt trial violat-

clear role of a public trial as a guarantee to the defendant of a fair trial.⁸⁶ The Court stated that the right to a public trial "has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution" and that "the forum of public opinion is an effective restraint on possible abuse of judicial power."⁸⁷

B. *Freedom of the Press: The Rights, Interests, and Roles of the Press and Public in Criminal Trials*

The Sixth Amendment guarantees the right of a public trial to the accused in a criminal process.⁸⁸ The requirement of a "public trial" serves an essential role in providing the accused with guarantees against unfairness or unjust condemnation.⁸⁹ According to the Court in *Oliver*, "[t]he knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power."⁹⁰

As a corollary to the accused's right to a public trial, the Court has also recognized the public's right to information pertaining to criminal trials. This is apparent from the Court's statements that "the public . . . has a right to every man's evidence,"⁹¹ except for evidence protected by a constitutional, common-law, or statutory privilege, and that "what transpires in the court room is public property."⁹² In its capacity of informing the public through dissemination of information, the free press plays a critical role. It should be remembered, however, that the interest of the public in information pertaining to criminal trials arises from the accused's *personal* right to a public trial guaranteed in the Sixth Amendment, *not* from a right held by the public.⁹³ This guarantee protects "all persons accused of crime—the

ed the accused's Fourteenth Amendment right to a public trial).

⁸⁶ *Id.*

⁸⁷ *Id.* at 270.

⁸⁸ "In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial . . ." U.S. CONST. amend. VI.

⁸⁹ *Estes v. Texas*, 381 U.S. 532, 538-39 (1965); *see also Gannett Co. v. DePasquale*, 443 U.S. 368, 380 (1979).

⁹⁰ *Oliver*, 333 U.S. at 270.

⁹¹ *United States v. Bryan*, 339 U.S. 323, 331 (1950) (quoting 8 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2192 (3d ed. 1940)); *see also Blackmer v. United States*, 284 U.S. 421, 438 (1932).

⁹² *Craig v. Harney*, 331 U.S. 367, 374 (1947).

⁹³ *Gannett Co.*, 443 U.S. at 379-80. Justice Stewart, writing for the Court, stated: The Constitution nowhere mentions any right of access to a criminal trial on the part of the public; its guarantee, like the others enumerated, is personal to the accused. . . . Our cases have uniformly recognized the public-trial guarantee as one created for the benefit of the defendant. . . . There is not the slightest sug-

innocently accused, that they may not become the victim of an unjust prosecution, as well as the guilty, that they may be awarded a fair trial.”⁹⁴

1. *The Right to Publish*

The Supreme Court repeatedly has recognized the importance of the press in the effective administration of justice. In their own words, the Court has found that “[a] responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting police, prosecutors, and judicial processes to extensive public scrutiny and criticism.”⁹⁵ Public scrutiny is often aroused by the free press, which acts as a “mighty catalyst in awakening public interest in governmental affairs, . . . public events, and . . . court proceedings.”⁹⁶

The important role of the press in informing the public and serving the interests of fairness and justice in criminal trials is embodied and preserved in the First Amendment guarantee of a free press.⁹⁷ Nevertheless, the Supreme Court has found that the First Amendment does not invalidate the enforcement of civil or criminal laws that may burden the press when such laws serve substantial public interests.⁹⁸ The press does not possess a right

gestion . . . that there is any correlative right in members of the public to insist upon a public trial.

Id. at 381; *see also* *Faretta v. California*, 422 U.S. 806, 848 (1975) (Blackmun, J., dissenting) (“[T]he specific guarantees of the Sixth Amendment are personal to the accused”); *Estes*, 381 U.S. at 588 (Harlan, J., concurring) (“Thus the right of ‘public trial’ is not one belonging to the public, but one belonging to the accused, and inhering in the institutional process by which justice is administered.”); *id.* at 583 (Warren, C.J., concurring) (“[T]he public trial provision of the Sixth Amendment is a ‘guarantee to an accused’ . . . [and] a necessary component of an accused’s right to a fair trial”).

⁹⁴ *Oliver*, 333 U.S. at 270 n.25 (quoting *People v. Morrey*, 50 N.W. 995, 998 (Mich. 1891)).

⁹⁵ *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966).

⁹⁶ *Estes*, 381 U.S. at 539. Because few citizens can attend trials on a regular basis and only a few citizens have the opportunity to serve as jurors in any given case, the public regularly relies on the media to serve as independent or surrogate auditors of the justice system. Marc O. Litt, “*Citizen-Soldiers*” or *Anonymous Justice: Reconciling the Sixth Amendment Right of the Accused, the First Amendment Right of the Media and the Privacy Right of Jurors*, 25 COLUM. J.L. & SOC. PROBS. 371, 372 (1992).

⁹⁷ “Congress shall make no law . . . abridging the freedom of speech, or of the press” U.S. CONST. amend. I. This portion of the First Amendment has been made applicable to the States by way of the Fourteenth Amendment to the Constitution. *See, e.g.,* *Schneider v. State*, 308 U.S. 147, 160 (1939); *Near v. Minnesota*, 283 U.S. 697, 707 (1931); *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

⁹⁸ *See* *Branzburg v. Hayes*, 408 U.S. 665, 682 (1972).

to "publish with impunity everything and anything it desires to publish."⁹⁹

The Court has addressed the necessity for limiting the freedom of the press in the context of judicial proceedings. Accordingly, the Court has favored trial publicity only to the extent that injustice is not done to persons immediately concerned, namely, the defendants and trial participants.¹⁰⁰

2. *The Right to Gather News*

The right of the press to publish necessarily implicates the right of the press to gather information or news.¹⁰¹ When combined, the First Amendment right of a free press and the Sixth Amendment right to a public trial imply that the press has a right of access to criminal proceedings. In fact, the Supreme Court held in *Richmond Newspapers, Inc. v. Virginia*¹⁰² that the right of the public and press to attend criminal trials is implicit in the First Amendment.¹⁰³ Nevertheless, like the right to publish, the right to

⁹⁹ *Id.* at 683. In *Branzburg*, the Court cited limitations on the freedom of the press including the fact that "the press may not circulate knowing or reckless falsehoods . . . without subjecting itself to liability for damages, including punitive damages, or even criminal prosecution." *Id.* (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964)); *see also* *Bridges v. California*, 314 U.S. 252, 284 (1941) (Frankfurter, J., dissenting) ("[T]he Bill of Rights is not self-destructive. Freedom of expression can hardly carry implications that nullify the guarantees of impartial trials. . . . The need is great that courts be criticized, but just as great that they be allowed to do their duty.").

¹⁰⁰ *Estes*, 381 U.S. at 542.

¹⁰¹ *See Branzburg*, 408 U.S. at 727 (Stewart, J., dissenting) ("A corollary of the right to publish must be the right to gather news.").

¹⁰² 448 U.S. 555 (1980).

¹⁰³ *Id.* at 581 (holding that "[a]bsent an overriding interest articulated in findings, the trial of a criminal case must be open to the public"). The Court determined:

From [the] unbroken, uncontradicted history [of granting public access to criminal trials in the United States], supported by reasons as valid today as in centuries past, we are bound to conclude that a presumption of openness inheres in the very nature of a criminal trial under our system of justice.

Id. at 573. Although recognizing that no such right is specifically enumerated in the First Amendment or elsewhere in the Bill of Rights or the Constitution, the Court explained:

The Bill of Rights was enacted against the backdrop of the long history of trials being presumptively open. . . . In guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees. . . . Free speech carries with it some freedom to listen. . . . What this means in the context of trials is that the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors

Id. at 575-76 (citations omitted). Although the opinion in *Richmond Newspapers* represented only a plurality, a majority of the Court was later able to find a constitutional right of access to criminal trials in *Globe Newspaper Co. v. Superior Court*, 457 U.S.

gather news and the right of access to the courtroom are not absolute.¹⁰⁴ The Supreme Court directly addressed this limitation by quoting from the *Estes v. Texas* amicus curiae brief of the National Association of Broadcasters and the Radio and Television News Directors Association:

“[N]either of these two amendments [First and Sixth] speaks of an unlimited right of access to the courtroom on the part of the broadcasting media” [T]he “primary concern of all must be the proper administration of justice.” . . . “[T]he life or liberty of any individual in this land should not be put into jeopardy because of actions of any news media.”¹⁰⁵

A delicate balance must be struck between preserving the right of criminal defendants to a fair trial and preserving the right of the press to publish and gather information.¹⁰⁶ “While maximum freedom must be allowed the press in carrying on this important function in a democratic society[,] its exercise must necessarily be subject to the maintenance of absolute fairness in the judicial process.”¹⁰⁷ The freedom of the press clearly must be counterbalanced by the fairness of the judicial process. By use of the words “absolute fairness,”¹⁰⁸ the Court further implied that, when threatened, the Sixth Amendment right of defendants necessarily outweighs or trumps the right to freedom of the press.¹⁰⁹

596 (1982). The Court in *Globe* regarded this right as a subset to the more general right to gather information that was recognized in *Richmond Newspapers*. *Globe*, 457 U.S. at 611; see also RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 13.02[2][b][i] (1994).

¹⁰⁴ *Zemel v. Rusk*, 381 U.S. 1, 17 (1965) (observing that “the right to speak and publish does not carry with it the unrestrained right to gather information”). In *Radio & Television News Ass’n v. United States Dist. Court*, 781 F.2d 1443 (9th Cir. 1986), the Ninth Circuit Court of Appeals characterized the right of access to criminal trials as nothing more than the “right to sit, listen, watch, and report.” *Id.* at 1446 (citing *Richmond Newspapers*, 448 U.S. at 576).

¹⁰⁵ *Estes v. Texas*, 381 U.S. 532, 539-40 (1965) (alteration in original) (quoting Amicus Brief of the National Association of Broadcasters and the Radio Television News Directors Association at 7, *Estes* (No. 256)).

¹⁰⁶ See *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972). “We do not question the significance of free speech, press, or assembly to the country’s welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated.” *Id.*

¹⁰⁷ *Estes*, 381 U.S. at 539.

¹⁰⁸ *Id.* at 539.

¹⁰⁹ See *id.* at 538-39; see also *In re Application of Dow Jones & Co.*, 842 F.2d 603, 609 (2d Cir.) (“When the exercise of free press rights actually tramples upon Sixth Amendment rights, the former must nonetheless yield to the latter.”), *cert. denied sub*

Despite the fact that the presence of a free press often preserves the fairness and effectiveness of judicial administration,¹¹⁰ there are instances where the public, and thus the press, has no right of access. As the United States Supreme Court noted, "[i]t has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally."¹¹¹ The limits on press access to information include their exclusion from, *inter alia*, grand jury proceedings and Supreme Court conferences.¹¹² "Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded, and they may be prohibited from attending or publishing information about trials *if such restrictions are necessary to assure a defendant a fair trial before an impartial tribunal.*"¹¹³ The manner in which the press goes about gathering news may also be restricted or even punished by courts.¹¹⁴

3. *The Effect of Sections 116.5 and 132.5 on the Press*

The press is not completely fettered by sections 116.5 and 132.5 from obtaining the stories of jurors and witnesses involved in criminal trials. Restrictions against conferring payment, benefit, or other consideration to jurors exist only through the first ninety days following discharge of the jury.¹¹⁵ Likewise, the press is limited only in making offerings to witnesses prior to the conclusion of the trial.¹¹⁶ Nevertheless, sections 116.5 and 132.5 ensure that prior to the conclusion of the trial, the press may only receive information from jurors and witnesses willing to forego remuneration. Depending on the news media, this serves as a substantial limit to the means of gathering information.¹¹⁷ The statutes effectively circumscribe the

nom. Dow Jones & Co. v. Simon, 488 U.S. 946 (1988).

¹¹⁰ See Sheppard v. Maxwell, 384 U.S. 333, 350 (1966).

¹¹¹ Branzburg v. Hayes, 408 U.S. 665, 684 (1972) (citing Zemel v. Rusk, 381 U.S. 1, 16-17 (1965); New York Times Co. v. United States, 403 U.S. 713, 728-30 (1971)); see also Estes, 381 U.S. at 589 (Harlan, J., concurring) (noting that "within [the courthouse door], a reporter's constitutional rights are no greater than those of any other member of the public").

¹¹² Branzburg, 408 U.S. at 684.

¹¹³ *Id.* at 684-85 (emphasis added).

¹¹⁴ "A newspaper or journalist may also be punished for contempt of court, in appropriate circumstances." *Id.* at 684 (citing Craig v. Harney, 331 U.S. 367, 377-78 (1947)).

¹¹⁵ CAL. PEN. CODE § 116.5(a) (West Supp. 1995).

¹¹⁶ CAL. PEN. CODE §§ 132.5(d) (Senate), 132.5(f) (Assembly) (West Supp. 1995). Witnesses are also prohibited from exchanging information for pay or benefit prior to one year from the date of the criminal act relating to their information. *Id.* §§ 132.5(d) (Senate), 132.5(f) (Assembly).

¹¹⁷ The tabloid sector of the news media is most clearly affected by the financial

means by which the press or others may obtain information from jurors and witnesses.

In *KPNX Broadcasting Co. v. Superior Court*,¹¹⁸ the Arizona Supreme Court reviewed the constitutionality of a court order limiting the means by which the press could interview trial witnesses. During a highly publicized murder trial, the Superior Court for the County of Maricopa ordered that “no . . . jurors or other participants in this matter are to be in contact with the media during the course of this matter.”¹¹⁹ The order also appointed a member of the county court administrator’s staff as “court media liaison” to handle media inquiries “so that there [would] be a unified and singular source for the media concerning [the] proceedings.”¹²⁰ Unlike the concern over tainting of jurors’ impartiality and witnesses’ testimony in sections 116.5 and 132.5, the court order in this case was instigated to protect trial participants from known organized crime and gang activity.¹²¹ The Arizona Supreme Court found:

The order in no way infringed upon [the press’s] First Amendment right to attend and report on criminal trials, but only collaterally affected [the press’s] ability to interview the trial participants, an interest outside the scope of protection of the First Amendment right to attend and report on criminal trials.¹²²

The court in *KPNX Broadcasting* relied heavily on *Sheppard v. Maxwell* and other cases in supporting the authority of the trial court to limit the means by which the media acquires information in order to preserve the defendant’s right to a fair trial.¹²³

The petitioners in *KPNX Broadcasting* cited *CBS, Inc. v. Young*¹²⁴ as supporting their claim to invalidate the gag order. In *Young*, the Sixth Circuit struck down an order entered by the trial judge enjoining all parties concerned with the litigation, including their relatives, close friends, and associates, from discussing in any manner the case with the news media or

limitations of §§ 116.5 and 132.5. Most reputable news organizations supposedly frown on “checkbook journalism.” Jesse Katz, *Participants in King Case Try to Cash In*, L.A. TIMES, Apr. 25, 1993, at A1. *But see supra* note 14 and accompanying text.

¹¹⁸ 678 P.2d 431 (Ariz. 1984).

¹¹⁹ *Id.* at 434.

¹²⁰ *Id.* The order also concluded that “no other source of information will come from participants in these proceedings.” *Id.*

¹²¹ *Id.* at 439.

¹²² *Id.*

¹²³ *Id.* at 439-40.

¹²⁴ 522 F.2d 234 (6th Cir. 1975).

public.¹²⁵ The federal court of appeals decided that the order was an invalid prior restraint.¹²⁶ The Arizona Supreme Court distinguished *Young* from its own holding in *KPNX Broadcasting*, noting that the order issued in *Young* was much broader in duration and scope as to the persons enjoined, and that the court in *Young* found the evidence did not justify a restraint of speech of trial participants.¹²⁷ Furthermore, the court found that the "news gathering right" in the context of criminal trials means nothing more nor less than the right to attend.¹²⁸

Under this rationale, the limitations placed on the media by sections 116.5 and 132.5 as to gathering information from jurors and witnesses seem minimal. The media may still gather information from witnesses by attending trials or by requesting information from witnesses without offering or conferring payment, benefit, or other forms of consideration. Furthermore, because the media does not necessarily have the right to interview jurors during the course of a trial,¹²⁹ media access to a juror's speech is not encumbered to any greater extent.

C. Freedom of Speech: Rights and Interests of Jurors and Witnesses

To some extent, California Penal Code Sections 116.5 and 132.5 encroach upon jurors' and witnesses' First Amendment rights to free speech.¹³⁰ By imposing potential financial burdens and criminal charges on jurors and witnesses based on the content of their speech, the statutes create a disincentive to speak.¹³¹

Any time prior to or within ninety days of discharge, a juror may not communicate information concerning the trial in exchange for payment.¹³² Likewise, a witness to an event or occurrence with personal knowledge of facts that may require him or her to be called as a witness may not relay

¹²⁵ *Id.* at 236.

¹²⁶ *Id.* at 240.

¹²⁷ *KPNX Broadcasting*, 678 P.2d at 440.

¹²⁸ *Id.* at 441 (citing *United States v. Hastings*, 695 F.2d 1278, 1280 (11th Cir.), *cert. denied, sub nom. Post-Newsweek Stations, Inc. v. United States*, 461 U.S. 931 (1983)).

¹²⁹ See *infra* Part II.C.4.a; see, e.g., CAL. PENAL CODE § 1121 (West 1985) (permitting sequestration of jurors and prohibiting their speaking or communicating with anyone concerning the trial).

¹³⁰ See CAL. PENAL CODE §§ 116.5, 132.5 (Senate and Assembly) (West Supp. 1995).

¹³¹ Cf. *United States v. National Treasury Employees Union*, 115 S. Ct. 1003, 1013 (1995) (noting that Ethics in Government Act prohibited receipt of honoraria by government employees); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (observing that New York statute prevented some accused and convicted criminals from profiting from speech relating to their crimes).

¹³² CAL. PEN. CODE § 116.5(a).

information concerning their observations or personal knowledge in exchange for pay or other consideration.¹³³ This moratorium is in place until one year from the date of the criminal act, or if prosecution has been instituted, until final judgment has been rendered.¹³⁴ In order to survive constitutional challenges, these content-based restrictions on the free speech rights of jurors and witnesses must serve a compelling governmental interest and be narrowly tailored—that is, employ the least restrictive means—to meet that interest.¹³⁵

This constitutional test of content-based speech regulation served as the basis for the Supreme Court's 1991 decision in *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*,¹³⁶ which overturned New York's "Son of Sam" law.¹³⁷ The "Son of Sam" law required that accused or convicted criminals' income from works describing their crimes be deposited in an escrow account, the funds of which were then made available to the criminals' victims and other creditors.¹³⁸ The statute effectively prohibited criminals or accused persons from profiting through sales of information or stories concerning their crimes. The Court found the "Son of Sam" law to be a content-based statute that served as a financial disincentive to speak.¹³⁹ Justice Sandra Day O'Connor, writing for a unanimous Court, held that the statute was presumptively inconsistent with the

¹³³ *Id.* §§ 132.5(a) (Senate), 132.5(b)-(c) (Assembly).

¹³⁴ CAL. PEN. CODE §§ 132.5(a), (d) (Senate), 132.5(b)-(c), (f) (Assembly).

¹³⁵ *See, e.g., National Treasury Employees Union*, 115 S. Ct. at 1013 (holding that the Act's prohibition did not serve the government's interest in assuring that federal officers not misuse or appear to misuse power by accepting compensation for their unofficial and nonpolitical writing and speaking activities); *Simon & Schuster*, 502 U.S. at 120-21, 123 (holding that state had a compelling interest in compensating crime victims but little interest in limiting the source of such compensation to the profits derived from the speech of criminals concerning their crimes); *see also* SMOLLA, *supra* note 103, § 3.03[1].

¹³⁶ 502 U.S. 105 (1991).

¹³⁷ N.Y. EXEC. LAW § 632-a (McKinney 1981 & Supp. 1991), *repealed by* 1992 N.Y. Laws ch. 618, § 10, *and replaced by* N.Y. EXEC. LAW § 632-a (McKinney 1992-93).

¹³⁸ *Id.* The statute arose out of the notorious "Son of Sam" serial murders that occurred in New York City in the summer of 1977. *Simon & Schuster*, 502 U.S. at 108. The rights to the story of killer David Berkowitz were worth a substantial amount by the time he had been identified and apprehended. *Id.* Seeing the opportunity for Berkowitz to profit from his notoriety, the New York legislature moved quickly to pass the law, which did not criminalize the receipt of payment by criminals in exchange for their stories, but merely required that the funds be redirected to the Crime Victims Board in those cases where the victims had moved for the funds. *Id.* at 108-10.

¹³⁹ *Simon & Schuster*, 502 U.S. at 116.

First Amendment and that the statute was not narrowly tailored to achieve the state's objective in compensating victims from the profits of crime.¹⁴⁰

Because *Simon & Schuster* involved "prior restraints" in the form of financial disincentives against speech, it serves as an appropriate backdrop for later discussion of the constitutionality of sections 116.5 and 132.5. Numerous key distinctions exist between New York's "Son of Sam" law, as analyzed by the Supreme Court, and the newly enacted sections to the California Penal Code. Those distinctions lie in the relationship between the compelling governmental interests and the scope of the statutes designed to meet those interests.

1. *Prior Restraints and Subsequent Punishments*

Sections 116.5 and 132.5 of the California Penal Code essentially forbid trading speech that concerns information pertaining to criminal trials in exchange for money before the trial concludes. In effect, the statutes serve as *de facto* content-based prior restraints on speech. Although the statutes are not forms of prior restraint in the traditional sense,¹⁴¹ the subsequent punishment threatened by these statutes has the same effect of "chilling speech."¹⁴²

¹⁴⁰ *Id.* at 123.

¹⁴¹ According to Professor Smolla in his treatise on freedom of speech, "prior restraint" refers to judicial orders or administrative rules which operate to forbid expression before it takes place. SMOLLA, *supra* note 103, § 8.01[1]. These rules can take the form of requirements for a license or permit before allowing individuals to engage in expressive activity; an example of another form would be a judicial order directing an individual not to engage in expression on pain of contempt. *Id.*

In contrast, "subsequent punishments" refer to the imposition of penalties on expression *after* it occurs. *Id.* Because §§ 116.5 and 132.5 provide only for punishment of speech by jurors and witnesses after the speech occurs, they are "subsequent punishments" rather than "prior restraints." Section 1122, however, requires judges to admonish jury members *after being sworn in and prior to the people's opening address* not to agree upon or accept payment in exchange for information; thus, § 1122 more closely resembles the traditional notion of a prior restraint. See CAL. PENAL CODE § 1122 (West Supp. 1985).

¹⁴² From the perspective of individuals wishing to engage in expressive activity, the effect of a court order (prior restraint) and a statute (subsequent punishment) is the same: both threaten criminal prosecution for their violations if individuals subsequently engage in speech activity. SMOLLA, *supra* note 103, § 8.02[1]. Nevertheless, in the abstract sense, subsequent punishments may be preferable to prior restraints because, unlike the immediate and irreversible sanctions imposed under prior restraints, subsequent punishment delays the regulation's impact until all harm caused by the expressive activity is known and all appellate review is exhausted. Michael E. Swartz, *Trial Participant Speech Restrictions: Gagging First Amendment Rights*, 90 COLUM. L. REV. 1411, 1430 (1990). This ultimately reduces the chance of erroneous speech suppression. *Id.* In

The Supreme Court has stated:

prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights. . . . The damage can be particularly great when the prior restraint falls upon the communication of news and commentary on current events. Truthful reports of public judicial proceedings have been afforded special protection against subsequent punishment.¹⁴³

Nevertheless, in spite of presumptions against their use, prior restraints can serve a valuable purpose in judicial proceedings. In certain circumstances, prior restraints used to protect a defendant's right to a fair trial are recognized as one of the few permissible exceptions to the presumption against their use.¹⁴⁴ The degree of permissible control of the speech of participants

the words of the Supreme Court, while "a threat of criminal or civil sanctions after publication [i.e., subsequent punishment] 'chills' speech, prior restraint 'freezes' it." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

¹⁴³ *Nebraska Press Ass'n*, 427 U.S. at 559; see also *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492-93 (1975); *Craig v. Harney*, 331 U.S. 367, 374 (1947). See generally *New York Times Co. v. United States*, 403 U.S. 713 (1971) (finding that the government had not met its burden of showing justification for injunctions preventing publication of the classified Pentagon Papers in the *New York Times* and *Washington Post*); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971) (lifting injunction against peaceful distribution of informational pamphlets); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936) (declaring unconstitutional a state tax imposed on publications that was designed to limit the circulation of information); *Near v. Minnesota*, 283 U.S. 697 (1931) (declaring unconstitutional a state statute that imposed a prior restraint on publication by those engaged in customarily publishing defamatory newspapers).

¹⁴⁴ See *SMOLLA*, *supra* note 103, § 8.01[1]; see, e.g., *Gentile v. State Bar*, 501 U.S. 1030 (1991) (stating that state interest in fair trials balanced against First Amendment rights of attorneys in pending cases allows prohibition of trial participants' extrajudicial statements when "substantial likelihood of material prejudice is shown"); *In re Application of Dow Jones & Co.*, 842 F.2d 603 (2d Cir.) (finding that "gag" order on trial participants restricting their public discussion pertaining to a third party was not a prior restraint and was justified given the pretrial publicity), *cert. denied*, 488 U.S. 946 (1988); *Radio & Television News Ass'n v. United States Dist. Court*, 781 F.2d 1443 (9th Cir. 1986) (upholding court order restraining trial counsel from making extrajudicial statements to the media); *In re Russell*, 726 F.2d 1007 (4th Cir.) (upholding "gag" order, issued due to tremendous trial publicity, potentially inflammatory and highly prejudicial statements, and lack of effective alternatives, which prohibited potential witnesses from speaking to the media), *cert. denied*, 469 U.S. 837 (1984). *But see, e.g., In re New York Times Co.*, 878 F.2d 67 (2d Cir. 1989) (overturning district court order enjoining state counsel from discussing case with defendant's customers and the press); *In re Express-News Corp.*, 695 F.2d 807 (5th Cir. 1982) (overturning district court rule prohibiting the interviewing of jurors concerning their deliberations or verdict).

in criminal proceedings may depend on such variables as the identity of the participant, the nature of the statements being controlled, and the actual degree of threat to the administration of justice posed by those statements.¹⁴⁵

As an example, premature disclosure and weighing of evidence may seriously jeopardize a defendant's right to an impartial jury.¹⁴⁶ In *Sheppard v. Maxwell*, the Court held that in a murder prosecution, a state trial judge's failure to protect the defendant from inherently prejudicial publicity that saturated the community deprived the defendant of a fair trial consistent with due process.¹⁴⁷ During the trial, the prosecution in *Sheppard* repeatedly made available to the media evidence that was never offered in trial, much of which was clearly inadmissible.¹⁴⁸ The Court maintained that the exclusion of such evidence from the trial court was rendered meaningless by the actions of the prosecution and subsequent publication by the media.¹⁴⁹

The Court found the trial court responsible for the prejudicial effects of the trial publicity in *Sheppard*:

Effective control of these sources . . . might well have prevented the divulgence of inaccurate information, rumors, and accusations that made up much of the inflammatory publicity, at least after Sheppard's indictment. . . . More specifically, the trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters¹⁵⁰

a. *Compelling Interest and Subsequent Punishment of Jurors*

California undeniably has a compelling governmental interest in protecting a defendant's right to a fair trial. Stemming from this compelling interest is the government's concern that those individuals selected for jury duty

¹⁴⁵ SMOLLA, *supra* note 103, § 8.04[4]. *But see* Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 117 (1991) (observing that "[t]he Government's power to impose content-based financial disincentives on speech surely does not vary with the identity of the speaker").

¹⁴⁶ *See* Sheppard v. Maxwell, 384 U.S. 333, 361 (1966).

¹⁴⁷ *Id.* at 363.

¹⁴⁸ *Id.* at 360.

¹⁴⁹ *Id.* Examples of "evidence" excluded from the trial but leaked to and published by the media in *Sheppard* include: publicity by the police detectives and the coroner of the accused's refusal to submit to a polygraph test; a prosecution witness's story that the accused had been called a "Jekyll-Hyde" personality by his wife; and a report that a "bombshell witness" was ready to testify as to the accused's "fiery temper." *Id.* at 360-61.

¹⁵⁰ *Id.* at 361.

must serve the interests of justice by remaining impartial and free from improper influences.¹⁵¹ Juror impartiality can be compromised either by consideration of information other than the evidence presented at trial¹⁵² or by disruptions that cloud a juror's objectivity in weighing the sufficiency of the evidence presented by the prosecution.¹⁵³

No requirement exists that a qualified juror be "totally ignorant of the facts" of a case.¹⁵⁴ Rather, a juror must merely be able to maintain impartiality and decide a case based on the evidence presented in court.¹⁵⁵ In high-publicity cases, the release of information by the news media before jury selection and trial can taint the ability of jurors to be impartial in weighing the evidence presented in court. To avoid the empanelment of biased jurors and their threat to a fair trial, a trial may be subject to a change of venue, or its potential jurors may be struck by prosecutors and defense attorneys during *voir dire*.¹⁵⁶ Journalists and civil libertarians who

¹⁵¹ See OSBORN, *supra* note 34, at 1. Jurors are vested with tremendous responsibility that determines not only the outcome of trials, but also in a greater sense the direction of society. As de Tocqueville observed:

The institution of the jury may be aristocratic or democratic, according to the class from which the jurors are taken; but it always preserves its republican character, in that it places the real direction of society in the hands of the governed, or of a portion of the governed, and not in that of the government. . . . The true sanction of political laws is to be found in penal legislation. . . . He who punishes the criminal is therefore the real master of society. Now, the institution of the jury raises the people itself, or at least a class of citizens, to the bench of judges. The institution of the jury consequently invests the people, or that class of citizens, with the direction of society.

1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 282 (Phillips Bradley ed., 1956) (1835).

¹⁵² FRANK W. MILLER ET AL., *PROSECUTION AND ADJUDICATION* 811 (4th ed. 1991).

¹⁵³ *Id.* The objectivity of a juror can be compromised or nullified by prejudice, whether in the form of sympathy, antipathy, or desire for profit. See OSBORN, *supra* note 34, at 16.

¹⁵⁴ *Murphy v. Florida*, 421 U.S. 794, 800 (1975).

¹⁵⁵ *Irvin v. Dowd*, 366 U.S. 717, 723 (1961) (observing that "[i]t is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court"). The test is "whether the nature and strength of the opinion formed are such as the law necessarily . . . raises the presumption of partiality." *Id.* (quoting *Reynolds v. United States*, 98 U.S. 145, 156 (1878)).

¹⁵⁶ A prosecutor or defense attorney may challenge an objectionable juror in any of three ways: "(1) to the array, if counsel feels that the entire panel has been irregularly selected; (2) *for cause*, when a juror is deemed unable to render an impartial verdict because of his experience, occupation, personal or financial interests, or preconceived bias; and (3) [under] *peremptory* [challenge, i.e., without stating cause], if counsel feels for any reason that the juror is undesirable." RITA J. SIMON, *THE JURY SYSTEM IN AMERICA: A CRITICAL OVERVIEW* 50 (1975) (emphasis removed and added).

The Supreme Court has suggested the use of a vast array of techniques to prevent

feel that "gag orders" violate the freedom of the press contend that an unbiased jury can be secured by these techniques.¹⁵⁷ These methods, however, are not foolproof, and they are aimed at preventing empanelment of jurors having impressions or opinions that disable them from rendering a verdict based solely on the evidence presented in court.

By singling out the act of agreeing upon or receiving payment for information relating to jury duty, California's newly enacted section 116.5 targets the financial motivations of jurors, not necessarily their impressions or opinions.¹⁵⁸ The trial of O.J. Simpson, concern for which contributed to the enactment of section 116.5, raised fears that potential jurors might be enticed to lie in order to get on the jury in the hopes of cashing in on trial publicity.¹⁵⁹ The jury foreman in the federal trial that convicted two police officers of beating Rodney King was reportedly able to cash in on his participation in the trial; he allegedly offered to sell his story to *A Current Affair* and was rejected but later appeared on the show's competitor *Inside Edition* for an undisclosed sum.¹⁶⁰

This behavior leads some to believe that a juror in a high-profile case "might try to play a role during deliberations that would whet the tabloids [sic] appetite later on."¹⁶¹ These concerns over jury dynamics are for the

empanelment of partial jurors and to prevent jurors already empaneled from developing biases. In addition to changes of venue and extensive *voir dire*, these suggestions have included brief stays, sequestration, and court admonitions not to read, watch, or listen to news reports. See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 563-65 (1976); *Sheppard v. Maxwell*, 364 U.S. 333, 362-63 (1966).

¹⁵⁷ See RESEARCH AND INFORMATION SERVICE, NATIONAL CENTER FOR STATE COURTS, FACETS OF THE JURY SYSTEM: A SURVEY 24 (1976).

¹⁵⁸ California Governor Pete Wilson claimed that enacting §§ 116.5 and 132.5 into law would "ensure that witnesses and jurors are a force for justice, not fodder for tabloids." Ingram, *supra* note 30, at A21. The governor argued that the immense trial publicity surrounding the Simpson trial demonstrated that the legal system has become a "clearinghouse for hearsay, idle gossip and rumor-mongering about the lifestyles of the rich and famous." *Id.*

¹⁵⁹ These suspicions were raised by the fact that so many prospective jurors seemed enthusiastic and willing to serve in a trial despite the fact that the trial could disrupt their lives for six months or more. See Andrea Ford & Jim Newton, *Jurors More Available Than Expected, Ito Says*, L.A. TIMES, Sept. 28, 1994, at A1, A34. According to Lois Haney, a trial consultant of the National Jury Project, prospective jurors in high-profile cases may perceive their service as "a ticket to fame or sequestration," and that although "many people will avoid service[,] . . . a very small group of people . . . will be attracted to the fanfare." Henry Weinstein & Tim Rutten, *Simpson Case Already Is Rewriting the Rule Book*, L.A. TIMES, June 11, 1995, at A1. The prospect of cashing in on a high-profile case is very real. According to *Publisher's Weekly*, five of the 15 or more books concerning the O.J. Simpson trial have become bestsellers. *Id.*

¹⁶⁰ Jesse Katz, *Money Helps Appease Memory of Misery from King Beating Case*, L.A. TIMES, Apr. 25, 1993, at A1.

¹⁶¹ Maura Dolan, *Impartial Jurors Can Be Found, Court Experts Say*, L.A. TIMES,

most part speculative because analysis of real juries in deliberations is illegal.¹⁶² In an attempt to prevent jurors with hidden agendas¹⁶³ from being empaneled in high-profile cases and tainting open and impartial deliberations, the threat of subsequent punishment under section 116.5 acts as a prior restraint on juror speech.

b. *Compelling Interest and Subsequent Punishment of Witnesses*

Section 132.5 effectively controls the release of information that may be prejudicial to defendants and therefore inadmissible at trial.¹⁶⁴ Journalists seeking increased sales of newspapers or increased shares of a television audience often report sensationalist stories to satisfy the seemingly insatiable curiosity of the public.¹⁶⁵ A vast difference can exist between information that meets the media's and public's threshold requirement of sensationalism and that which meets the requirements of admissibility in a court of law.

A valid concern exists for the veracity of statements made by criminal trial witnesses induced by the lure of profit. If the statements of witnesses under such circumstances are prone to hyperbole, overdramatization, or fabrication, then section 132.5 can only serve to limit the prejudicial effect of such statements on defendants in criminal trials. The effect of the statute

July 9, 1994, at A1, A19. Although a foreman may be selected to serve as the jury's representative leader in announcing the verdict, this person may not be the most influential jury member; other jurors may emerge as leaders or compete for control during the deliberation process, depending on group dynamics. See SIMON, *supra* note 156, at 81-82.

¹⁶² SIMON, *supra* note 156, at 86. The only means of ascertaining juror conduct is through post-trial interviews. For example, 18 U.S.C. § 1508 (1988) prohibits the recording of, listening to, or observing of actual grand or petit juries during deliberations or voting. *Id.* California also makes the act of recording, listening to, or observing of jury deliberations or voting a misdemeanor. CAL. PENAL CODE § 167 (West 1988); *id.* § 891 (West Supp. 1995). Similar statutes exist in other states. See, e.g., ARIZ. REV. STAT. ANN. § 21-235 (1990); ILL. ANN. STAT. ch. 705, para. 315/1 (Smith-Hurd Supp. 1995); LA. REV. STAT. ANN. § 14:129.2 (West 1986); MINN. STAT. § 631.09 (1983 & Supp. 1995); OKLA. STAT. ANN. tit. 21, § 588 (West 1983).

¹⁶³ See *supra* notes 158-60 and accompanying text. "A man may sit as a silent juror day after day and look quite human but in the first few minutes of a jury conference he may begin to show just what he is." OSBORN, *supra* note 34, at 163.

¹⁶⁴ Information that may be relevant to a case may be nonetheless held inadmissible at trial. For example, under Rule 403 of the Federal Rules of Evidence, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

¹⁶⁵ See Stuart Nagel et al., *Free Press-Fair Trial: An Introduction*, 20 ST. LOUIS U. L.J. 640, 641 (1976); Sheryl A. Bjork, Comment, *Indirect Gag Orders and the Doctrine of Prior Restraint*, 44 U. MIAMI L. REV. 165, 167 (1989).

would be to discourage witnesses from exchanging information for pay in the first place, thus better preserving the value of their testimony at trial by removing a means of impeaching it. In the rare case where a witness exchanged information for pay, benefit, or other consideration, prosecutors and defense attorneys might be discouraged from putting such impeachable witnesses on the stand, thus promoting trial efficiency.¹⁶⁶

2. *Imposing Financial Burdens*

The Supreme Court has found the statutory financial burdens imposed as a penalty to disfavored speech to be presumptively inconsistent with the First Amendment.¹⁶⁷ The Court has also considered government regulations that discriminate on the basis of content of the message to be intolerable.¹⁶⁸ According to the Court in *Leathers v. Medlock*:¹⁶⁹

The constitutional right of free expression is . . . intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely in the hands of each of us . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.¹⁷⁰

The Court has also voiced concern that "the Government's ability to impose content-based burdens on speech raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace."¹⁷¹ These concerns were central to the Supreme Court's decision in *Simon & Schuster*, overturning New York's "Son of Sam" law.

California Penal Code Sections 116.5 and 132.5 are analogous to the New York law because they prohibit jurors, witnesses, and others from profiting through sales of information concerning their roles in trials. Although this analogy might at first glance spell certain demise for California's recent legislation, there are significant differences in purpose and scope of the statutes that distinguish the California statutes from the failed New York legislation. These differences merit further examination to ascertain whether

¹⁶⁶ Naturally, there would be a corresponding risk that valuable, relevant evidence would be lost by non-presentation to the jury.

¹⁶⁷ *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991) (citing *Leathers v. Medlock*, 499 U.S. 439, 447 (1991)).

¹⁶⁸ *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984).

¹⁶⁹ 499 U.S. 439 (1991).

¹⁷⁰ *Id.* at 448-49.

¹⁷¹ *Simon & Schuster*, 502 U.S. at 116.

the statutes are narrowly tailored to meet the state's compelling interests and thus whether these financial burdens should better withstand constitutional scrutiny.

3. *Narrow Tailoring: A Comparison with Simon & Schuster*

a. *Overbreadth of Application*

In *Simon & Schuster*, the Court found that the "Son of Sam" law defined too broadly those persons to whom the statute applied.¹⁷² By definition, the statute applied to any "person convicted of a crime in [New York] either by entry of a plea of guilty or by conviction after trial and any person who has voluntarily and intelligently admitted the commission of a crime for which such person is not prosecuted."¹⁷³ Had the law been upheld it would have penalized those persons who sold stories based on crimes they claimed to have committed but for which they may not have even been tried. As a result of the overly broad definition of who had committed a crime, the statute would have enabled the Crime Victims Board to escrow payment for works by people such as Malcolm X, Henry David Thoreau, Saint Augustine, Martin Luther King, and Sir Walter Raleigh.¹⁷⁴

Conversely, under California's legislation, the persons to whom the restrictions would apply appear more clearly defined: jurors and crime witnesses, potential or actual; persons acting on behalf of jurors; and those individuals making offers to jurors.¹⁷⁵ At first glance the statutes appear to be more limited in scope than the New York "Son of Sam" law that was rejected in *Simon & Schuster*, because the California statutes apply only to those persons who would be involved, or who should reasonably believe that they would be involved, in actual criminal trials.¹⁷⁶ Nevertheless, even these definitions should fail on overbreadth grounds.

i. *Section 116.5 Should Not Apply to Excused Jurors*

According to section 116.5, violations occur "any time prior to, or within 90 days of, discharge of the jury."¹⁷⁷ Under this reading, even a *juror* discharged prior to deliberations would be subject to prosecution for a viola-

¹⁷² *Id.* at 115-16.

¹⁷³ N.Y. EXEC. LAW § 632-a(10)(b) (McKinney 1981 & Supp. 1991), *repealed by* 1992 N.Y. Laws ch. 618, § 10, *and replaced by* N.Y. EXEC. LAW § 632-a (McKinney 1992-93).

¹⁷⁴ *See Simon & Schuster*, 502 U.S. at 121-22.

¹⁷⁵ *See* CAL. PENAL CODE §§ 116.5(a)(1)-(3), 132.5(a) (Senate), 132.5(b)-(c) (Assembly) (West Supp. 1995).

¹⁷⁶ *See id.* §§ 116.5(a)(1)-(3), 132.5(a) (Senate), 132.5(b)-(c) (Assembly).

¹⁷⁷ *Id.* § 116.5(a) (emphasis added).

tion of section 116.5. Such a juror, however, would not present the same threats to the integrity of the judicial process because the act of agreeing to accept or accepting payment in exchange for her story would not have any bearing on the bias of those remaining jurors who will eventually deliberate the defendant's guilt or innocence. As the court observed in *Dove Audio, Inc. v. Lungren*, once a juror is excused from duty, the state no longer has an interest in ensuring that individual's objectivity and freedom from outside influences because that ex-juror will no longer play a role in deliberations.¹⁷⁸

In *Dove Audio*, plaintiffs Michael Knox and Dove Audio, Inc. had sought to enter into an agreement under which Michael Knox would write a book to be published by Dove Audio regarding his experiences and impressions as a juror in the O.J. Simpson double-murder trial.¹⁷⁹ Knox had been discharged from jury duty five weeks into the trial.¹⁸⁰ In early April, Los Angeles District Attorney Gil Garcetti informed the plaintiffs that they would be charged with a violation of section 116.5 if they proceeded to enter into an agreement concerning the publishing of Knox's book.¹⁸¹ Knox and Dove Audio sought an injunction against Garcetti and California State Attorney General Daniel Lungren to preclude their prosecution under section 116.5.¹⁸² The court found the statute to be unconstitutionally overbroad and vague as applied specifically to Knox because the state could no longer claim a compelling interest in a person that was no longer a participant in a criminal trial.¹⁸³

Furthermore, in addition to the court's rationale, the public may hold an interest in the information that an excused juror might have to offer based on that juror's perceptions of the trial process, its fairness, and expected outcome. The excusal of a juror from duty offers the public what may be a rare occasion to gain insight into the jury system prior to the conclusion of the trial. Although the state might assert an interest in shielding the remaining jurors from being influenced by the media's account of the discharged juror's opinion of the case, this concern can be more carefully attended to by shielding the remaining jurors from selective media reports, rather than barring an individual from speaking and thus inhibiting the public from gaining intermediate insight into the trial and the jury system.

¹⁷⁸ *Dove Audio, Inc. v. Lungren*, No. CV 95-2570 RG (JRX), 1995 WL 432631, at *2-3 (C.D. Cal. June 14, 1995).

¹⁷⁹ *Id.* at *1.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.* at *2-3. The court limited its ruling to the applicability of § 116.5 as against the particular plaintiffs and did not address the constitutionality of the section as applied to jurors not discharged from their duties. *Id.* at *3, *6.

ii. *Vagueness: Section 132.5 Should Not Apply to Witnesses Reaping De Minimis Benefits or Rewards*

The Supreme Court has found vague regulations of speech unconstitutional based partly on the need “to eliminate the impermissible risk of discriminatory enforcement.”¹⁸⁴ In order for a statute to be found impermissibly vague, it is not necessary to find that discriminatory enforcement actually occurred; rather, the *possibility* need only exist that the imprecise law could lead to discriminatory enforcement.¹⁸⁵ A statute that is subject to potential discriminatory enforcement fails to give proper notice to those against whom it can be enforced, leaving such individuals to guess at the contours of the law and its enforcement.¹⁸⁶

California Penal Code Section 132.5 is vague with regard to the terms of payment, benefit, money, or other consideration.¹⁸⁷ These terms are so broad that almost any form of benefit could be considered sufficient to trigger a prosecution under section 132.5. Benefits to those interviewed by journalists are not limited to payment of money and can take the form of providing transportation to bring the person to the journalist, buying lunch, promising the interviewee that his or her name will appear prominently in print or on television, or, conversely, promising to maintain the witness’s anonymity. Not all of these forms of benefit could have been a source of concern for the California legislature when it enacted section 132.5. As the court in *California First Amendment Coalition* observed, “[i]t is difficult to understand how such de minimis benefits would have a deleterious effect on a witness’ [sic] credibility at trial.”¹⁸⁸ Thus, section 132.5 should be recrafted to make exceptions for those individuals who are conferred with a benefit of anonymity or reasonable compensation in the form of travel or other accommodations reasonably necessary to impart their information.

Beyond the arguments set forth by CFAC and adopted in the court’s opinion, section 132.5 is problematic in that it was intended to thwart check-book journalism, yet it proscribes other forms of payment for information. For example, a defendant would be unable to post a reward for exculpatory

¹⁸⁴ *Gentile v. State Bar*, 501 U.S. 1030, 1051 (1991).

¹⁸⁵ *Id.* In *California First Amendment Coalition v. Lungren*, No. C 95-0440-FMS, 1995 WL 482066 (N.D. Cal. Aug. 10, 1995), the Court used this rationale to allow the plaintiffs, CFAC, to assert hypothetical and speculative applications of California Penal Code § 132.5 and California Civil Code § 1669.7. *See id.* at *3 (citing *United States v. National Treasury Employees Union*, 115 S. Ct. 1003, 1010 (1995); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 121-22 (1991)); *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947, 957-58 (1984).

¹⁸⁶ *See Gentile*, 501 U.S. at 1048-49.

¹⁸⁷ *See supra* note 62 and accompanying text.

¹⁸⁸ *California First Amendment Coalition*, 1995 WL 482066, at *8 (considering that such “benefits” as witness anonymity would be barred by the statute).

information. This result seems somewhat perverse considering the exceptions that allow the state to confer a benefit upon a witness bearing *inculpatory* information.¹⁸⁹ The benefits that the state can and does occasionally confer on witnesses bearing inculpatory information include not only monetary payment but also the fruits of plea bargaining and other agreements, such as immunity from prosecution, reduction of charges, or commuting of sentences. The jury has the ability to weigh the credibility of witnesses who have been put on the stand by the state and have received benefits from the state. This ability to assess the credibility of witnesses is safeguarded by California Evidence Code Sections 761, 780, and 785, which provide for the cross-examination of witnesses in all criminal cases.¹⁹⁰ If jurors are instructed on how to evaluate witness credibility,¹⁹¹ then there is no logic in shielding them from witnesses that section 132.5 seeks to eliminate based solely on the potential for bias; jurors are presumed to be able to identify witness bias and evaluate testimony accordingly.

b. *Time of Application*

With respect to the window of potential prosecution, the time restrictions of the California statutes should better withstand constitutional scrutiny than did the time restriction under New York's "Son of Sam" law. Under the "Son of Sam" law, criminals would *never* have been able to profit from any speech even hinting at their crime in any medium of communication so long as any victim recovered a money judgment within five years of establishing the escrow account.¹⁹² As a result, the Court found New York's "Son of Sam" law to be overinclusive in defining to whom and how long the statute applied.¹⁹³

In contrast, under the new California statutes, jurors and witnesses are not subjected to nearly as great a restriction in the time during which they may not profit. Jurors are only restricted prior to and within ninety days of

¹⁸⁹ Section 132.5 specifically makes exceptions for "[l]awful compensation provided to an informant by a prosecutor or law enforcement agency" or "[s]tatutorily authorized rewards offered by governmental agencies for information leading to the arrest and conviction of specified offenders." CAL. PENAL CODE §§ 132.5(e)(1), (4) (Senate), 132.5(g)(1), (4) (Assembly) (West Supp. 1995) (emphasis added).

¹⁹⁰ CAL. EVID. CODE §§ 761, 780, 785 (West 1995); see also *California First Amendment Coalition*, 1995 WL 482066, at *6.

¹⁹¹ See *California First Amendment Coalition*, 1995 WL 482066, at *6 (citing 1 CALJIC Nos. 2.13, 2.20-24 (5th ed. 1988 & Supp. 1995)).

¹⁹² N.Y. EXEC. LAW § 632-a(1) (McKinney 1981 & Supp. 1991), repealed by 1992 N.Y. Laws ch. 618, § 10, and replaced by N.Y. EXEC. LAW § 632-a (McKinney 1992-93).

¹⁹³ *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 121-22 (1991).

being discharged from their duties,¹⁹⁴ and witnesses are only restricted from profiting until one year after the commission of the crime or until final judgment has been entered against the defendant.¹⁹⁵ This time period is one in which the government's substantial interest is greatest in assuring that the accused receives a fair trial. Jurors and witnesses still have the ability to make profitable deals following the conclusion of the trial, provided no other court-ordered restrictions apply. Nevertheless, the burden of the time restrictions on the ability to profit varies between jurors and witnesses.

4. *Practical Considerations*

Consideration of the effect of the time restrictions placed on jurors and witnesses under sections 116.5 and 132.5, respectively, illuminates the potential impracticalities of the legislation. Specifically, does the legislation have the desired effect of preventing bias in jurors and witnesses in high-profile criminal cases? Also, what is the net effect on jurors and witnesses when subjected to possible prosecution for violations of sections 116.5 and 132.5 respectively?

a. *Section 116.5 Is Redundant and Ineffective in Its Application*

The restrictions that bar jurors from speaking until after the passage of ninety days from discharge are unnecessary and ineffective for three reasons. First, these restrictions may not curb the potential underlying motives of jurors empaneled in high-profile cases. Second, effective means already exist under California law to prevent jurors from speaking with others about their roles in criminal trials. Third, the point at which these jurors are allowed once again to profit from their speech is precisely the point at which their speech has its greatest value.

However noble, the ostensible goal of section 116.5 in preventing the empanelment of jurors with personal, ulterior, financial motives might not be served by this restraint on juror speech. Even though jurors may not accept, receive, or make agreements for payment relating to trial information until ninety days after being discharged, jurors could still conceivably reflect during deliberations on the potential financial gains awaiting them after that period expires, a point at which they have a stronger interest in speech and

¹⁹⁴ CAL. PENAL CODE § 116.5(a).

¹⁹⁵ *Id.* §§ 132.5(d) (Senate) (West Supp. 1995), 132.5(f) (Assembly).

contact with members of the media.¹⁹⁶ Thus, their behavior should not be significantly shaped or altered by section 116.5.

Additionally, the effect of a single juror's bias may be minimal or negated entirely when countered by the other members of the jury. As one commentator has noted, "certainly the more obvious cases of possible prejudice are eliminated during *voir dire* examination. An unfair juror who remains will, in a jury that is a true cross-section, be neutralized by a fair-minded majority."¹⁹⁷ This assumes, however, that one can achieve a true cross-section and that those jurors composing the remainder of this cross-section are not themselves motivated by potential financial or other gains. Arguably, personal interest in financial gain among jurors might increase in high-profile trials, especially those that are drawn out and therefore less desirable to a potential juror.¹⁹⁸

Furthermore, numerous means already exist under which a juror's speech may be limited before discharge from jury duty. Prior to rendering a verdict and being discharged, jurors kept in custody or sequestration are monitored by an officer of the court who guards against jurors coming into contact with others and communicating any aspect of the trial with those

¹⁹⁶ See CAL. CIV. PROC. CODE § 206(a) (West Supp. 1995) (stating that "[p]rior to discharging the jury from the case, the judge in a criminal action shall . . . inform the jurors that they have an absolute right to discuss or not to discuss the deliberation or verdict with anyone").

Federal courts around the country have held that, after rendering a verdict, jurors may not be restricted in making contact with others, including the media. The Ninth Circuit Court of Appeals has held unconstitutional a district court order forbidding any person, including members of the news media, from contacting jurors after the return of their verdict. *United States v. Sherman*, 581 F.2d 1358, 1361-62 (9th Cir. 1978). Similarly, in *Journal Publishing Co. v. Mechem*, 801 F.2d 1233 (10th Cir. 1986), the court held that a trial court's order restricting press contact with former jurors was impermissibly overbroad. *Id.* at 1236-37. Finally, in *In re Express-News Corp.*, 695 F.2d 807 (5th Cir. 1982), the court held that a local district court rule prohibiting any person from interviewing any juror concerning the deliberations or verdict of the jury, except by leave of court, was unconstitutional as applied to interviews proposed by the newspaper and its reporter. *Id.* at 811.

¹⁹⁷ LLOYD E. MOORE, *THE JURY: TOOL OF KINGS, PALLADIUM OF LIBERTY* 245 (2d ed. 1988). *But see* OSBORN, *supra* note 34, at 22-23 (arguing that "[i]f one or two unfit jurors can defeat justice, then, with a low average of mentality and general qualifications of the whole panel, a jury trial becomes a menace to justice if not an actual farce").

¹⁹⁸ Jury duty can be perceived as a penalty or great inconvenience that many prospective jurors would gladly evade. For example, one commentator has stated that "jury duty is considered to be a disagreeable penalty attaching to citizenship from which one can secure immunity in certain ways and only those serve who cannot escape." OSBORN, *supra* note 34, at 15.

persons.¹⁹⁹ Jurors who are allowed to separate—that is, neither sequestered nor kept in custody—when out of court are admonished of the same.²⁰⁰

In light of these other precautions already embodied in California law and the Professional Rules of Conduct, the limitations imposed by section 116.5 might seem redundant. Nevertheless, some merit to section 116.5 exists in removing the temptation to speak for pay prior to the conclusion of a trial, should the opportunity arise. Also, section 116.5 further circumscribes the contacts jurors may have during custody, sequestration, or separation²⁰¹ by expanding the meaning of “communicating any aspect of the trial” to include any agreement to provide information in exchange for money or other consideration.

The lingering hopes of gaining post-verdict fortune are not squelched by section 116.5 because jurors will no longer be restrained from exchanging information for pay ninety days after discharge from their duties. Theoretically, a juror’s monetary interest in selling her story would not reach its peak until after the rendering of a verdict.²⁰² Prior to the trial, even during *voir dire*, the value of the jurors’ speech is minimal because they have yet to begin the process of viewing and evaluating evidence at trial. During the trial, the value of jurors’ speech should increase as their trial experiences and interactions with the court increase. A juror dismissed from the jury should have less value placed on her partial knowledge of the trial than the jurors who successfully serve through the completion of their duties. Thus, a sliding scale could be visualized whereby the value of a juror’s speech would increase as she gets closer to completing her jury duty.²⁰³ The juror’s speech would achieve its maximum value after deliberation and delivery of the verdict. Some might even contend that the value of juror speech is further dependent upon the outcome of a trial.

b. *Section 132.5 Imposes a High Financial Burden on Witnesses’ Speech and May Be Superfluous and Only Partially Effective*

The restrictions that bar witnesses from selling their stories until completion of the trial or passage of one year from the date of the crime impose an excessive financial burden on witnesses unlike the one borne by jurors. Furthermore, California laws already in existence prior to the enactment of

¹⁹⁹ CAL. PENAL CODE § 1121 (West 1985).

²⁰⁰ *Id.* An additional measure preventing jurors from influential contact exists in regard to contact with attorneys. Regardless of whether they are connected with the trial, attorneys in California are prohibited from contacting jurors at any time during the course of the trial outside of official proceedings. CAL. PROF. CONDUCT RULE 5-320.

²⁰¹ CAL. PENAL CODE § 1121.

²⁰² See the Appendix at the end of this Note, which hypothesizes the value of jurors’ and witnesses’ speech based on timing with respect to the phases of a trial.

²⁰³ See Appendix.

sections 132.5 and 1669.7 may suffice to minimize the number of witnesses whose credibility is tainted by financial motivations. Finally, the threat of prosecution of witnesses who accept or agree to accept payment, benefit, or other consideration in exchange for information pertaining to criminal trials may not prevent the tainting of all witnesses' credibility.

Although section 132.5 does not prohibit witnesses from offering information without receiving money, benefit, or other consideration,²⁰⁴ witnesses are limited as to when they may profit from such acts.²⁰⁵ That notwithstanding, as discussed previously, the Supreme Court has determined that financial burdens on speech are presumptively inconsistent with the First Amendment.²⁰⁶ The financial burden imposed on witnesses by sections 132.5 and 1669.7 may well be greater than that imposed on jurors under section 116.5.²⁰⁷ In a practical sense, under section 132.5 the point at which witnesses are able to sell their stories is the point at which the value of the witnesses' information may well be at its lowest.²⁰⁸ Once a trial is over, a witness's information that qualifies as relevant and admissible evidence has already been revealed in court and is openly available to the press.

During the pre-trial phase, the information-gathering activities of law enforcement officials and the media are at their height, and the theory or strategy for prosecution has yet to unfold. The ensuing speculation and the media's frenzied efforts to get the "scoop" on competing news sources put a premium on the value of witnesses' speech as it concerns information or knowledge perceived by journalists to be potentially relevant to the trial.²⁰⁹ At this point, the value of a witness's speech might be based on various factors including, among others, the likelihood that the witness will be called to testify, the notoriety of the defendant, and the notoriety of the witness.²¹⁰

During the trial phase, the value of a witness's speech may be diminished if she is not called to testify or if she is impeached on the stand. Moreover, if the witness's testimony in open court is permitted to be published by the press, then the media's need to pay the witness for her infor-

²⁰⁴ See CAL. PENAL CODE §§ 132.5(d) (Senate), 132.5(f) (Assembly) (West Supp. 1995).

²⁰⁵ See *id.* §§ 132.5(d) (Senate), 132.5(f) (Assembly).

²⁰⁶ See, e.g., *United States v. National Treasury Employees Union*, 115 S. Ct. 1003, 1014 (1995); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991); see also *Leathers v. Medlock*, 499 U.S. 439, 448-49 (1991); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987).

²⁰⁷ The financial burden placed on jurors by § 116.5 is discussed in the text of *supra* Part II.C.4.a.

²⁰⁸ See Appendix.

²⁰⁹ See *id.*

²¹⁰ See *id.*

mation or knowledge is negated. This undermining of the value of a witness's testimony is extreme and amounts to a veritable bar on the witness's ability to reap a financial gain for her "fortune" of being "in the right place at the right time," or her knowledge of the right facts, events, or people. By limiting a witness's ability to speak to the press, section 132.5 may prevent the wasting of judicial and prosecutorial resources caused by calling impeachable witnesses, as well as minimizing one of many potential harms to a defendant's right to a fair trial. The court in *California First Amendment Coalition*, however, did not find the state's desire to avoid inconvenience compelling.²¹¹

With these burdens on witness speech in mind, could section 132.5 be amended to reduce the financial burden on witnesses imposed by time constraints and be narrowly tailored to meet the government's compelling interest? The only logical step is to amend the law as it currently stands so as to prohibit witnesses from receiving payment for information relevant to a trial up until such time as they have completed their testimony, rather than requiring them to wait until the end of the trial. Limiting the scope of section 132.5 in such a manner, however, would not improve the financial position of witnesses, and it would not preclude the possibility that witnesses could be impeached. If a witness were allowed to sell her story once she was excused from the stand, the value of her speech would be no greater than that which is currently imposed by section 132.5. The value of her speech would still be negated once delivered in court because the press would be able to obtain that witness's testimony merely by observing the trial. Finally, the witness may be recalled to the stand to testify despite having been excused once before. Consequently, limiting the scope of section 132.5 up to the point at which the witness is excused would be vague at the very least. The witness would have to wait until she had been permanently excused from the trial, which might not occur until well after she had presented her testimony. Thus, the modified statute would either not offer the protections against witness impeachment that it currently offers by permitting witnesses to discuss the case while still subject to recall, or it would be ineffective in permitting the witness to maximize the possible benefits of the speech, if the witness was not permitted to speak until after the possibility of recall had passed.

California already had considerable mechanisms in effect to curb potential witnesses from fabricating stories prior to the enactment of sections 132.5 and 1669.7. All witnesses take an oath when they take the stand to testify.²¹² Additionally, laws exist in California, as in other states, that prohibit perjury,²¹³ the subornation of perjury,²¹⁴ and the bribery of witness-

²¹¹ *California First Amendment Coalition v. Lungren*, No. C 95-0440-FMS, 1995 WL 482066, at *7 (N.D. Cal. Aug. 10, 1995).

²¹² CAL. EVID. CODE § 710 (West 1995).

²¹³ CAL. PENAL CODE § 118 (West 1988 & Supp. 1995).

es.²¹⁵ In addition to these laws, the court in *California First Amendment Coalition* recognized witness competency requirements²¹⁶ and the potential for cross-examination²¹⁷ as being sufficient to minimize and discourage witnesses from exaggerating or fabricating their testimony.²¹⁸

Under section 132.5, one of the exceptions carved out for witnesses in criminal trials includes "publisher[s], editor[s], reporter[s], writer[s], or other person[s] connected with or employed by a newspaper, magazine, . . . other publication or . . . a television or radio station, for disclosing information obtained in the ordinary course of business."²¹⁹ An editorial in the *Sacramento Bee* posed a humorous challenge to the effectiveness of the statute for those not employed by news organizations: "If you're not employed by a news organization, . . . you can call yourself a free-lance journalist, in which case the [statute is] meaningless . . ."²²⁰ Although perhaps contrived, there is a striking bit of truth to the proposition. The Supreme Court, in refusing to address which categories of journalists qualify for constitutional privileges, stated that "[f]reedom of the press is a 'fundamental personal right' which 'is not confined to newspapers and periodicals. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.'"²²¹ Thus, any future amendment to resurrect section 132.5 should consider this possible loophole.

There should also be some concern about the effect that section 132.5 would have on cases where the timely release of information to the media may have a profound and positive impact on the public. Suppose, for example, that section 132.5 had been in effect at the time of the beating of Rodney King. The person who recorded the footage on his home video camera of King's beating would have been left with the dilemma of releasing the tape to the media without payment, solely releasing the footage for moral reasons, or not releasing the footage at all. Had he chosen not to release the tape, charges of police brutality might never have been made, and the power of the police would have gone unchecked by public scrutiny. On the other hand, the tape could have been turned over to the authorities for use in prosecution for police brutality, yet the public may not have been able to see the gravity of the footage and thus gone uninformed until the trial had passed. At that point, the value of the tape to its owner would have

²¹⁴ *Id.* § 127 (West 1988).

²¹⁵ *Id.* § 138 (West 1988).

²¹⁶ CAL. EVID. CODE § 700-704.

²¹⁷ *Id.* § 761 (West 1966).

²¹⁸ *California First Amendment Coalition v. Lungren*, No. C 95-0440-FMS, 1995 WL 482066, at *6 (N.D. Cal. Aug. 10, 1995).

²¹⁹ CAL. PENAL CODE §§ 132.5(e)(1)-(4) (Senate), 132.5(g)(1)-(4) (Assembly).

²²⁰ *The Simpson Gag-Rule Bills*, SACRAMENTO BEE, Aug. 19, 1994, at B6.

²²¹ *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972) (quoting *Lovell v. City of Griffin*, 303 U.S. 444, 450, 452 (1938)).

been less than if he had been able to release the footage in exchange for money before the trial. In either case, the value of the video footage to the public in the context of current events and debate would have been reduced by its untimely release.

III. CONCLUSION

The newly enacted sections of the California Penal Code and Civil Code seek to promote justice and the appearance of justice by further ensuring the right of the accused to a fair trial. These statutes seek to do so by providing extra incentives to both prevent exposure of jurors to external influences and improper motives and to preserve the validity of witness testimony.

Under California Penal Code Section 116.5, jurors will be discouraged further from engaging in contacts that would be prejudicial to the Sixth Amendment rights of the defendant, the interests of justice, and the appearance of justice. Furthermore, the statutes, to a limited extent, would provide an extra limitation on, and incentive against, those individuals who might attempt to exert some sort of influence on juries.

The statutes prevent jurors from being influenced in their role as impartial arbiters of justice. By limiting undesired outside information or influence from reaching or being employed by jurors, the accused stands a better chance of receiving a fair trial. The one weakness of this argument is that, regardless of any delayed timing in making agreements with the press, opportunities for jurors to profit later from their duties may affect their attitude about performing those duties and the role which they hope to play during deliberations.

Once section 116.5 is properly amended to exclude the prosecution of former jurors who make agreements after being excused prior to the conclusion of a trial, the section should withstand any future constitutional challenges.

By requiring judges to inform jurors of their duty not to accept or agree to accept payment for information concerning the trial, California Penal Code Section 1122 should reinforce to jurors the expectations of their basic functions, duties, and conduct. California Penal Code Section 1122.5 will allow judges to further emphasize these expectations after each adjournment of the court by reminding the jurors of them before submission of the cause to the jury.

California Penal Code Section 132.5 sought to prevent witnesses from embellishing their testimony in order to increase the monetary value of their story before or during trial. Specifically, it aimed to prevent people from "becoming witnesses"—i.e., fabricating stories—in high-profile cases, where a potential monetary gain may exist in providing a story to those who would pay for such information. Without measures aimed at preventing witness behavior prejudicial to the defendant, the credibility of witnesses in general may be tarnished if jurors learn during direct or cross-examination that the

witness had already revealed his or her testimony in exchange for consideration. The legislature should work toward amending the statute to overcome its current constitutional infirmities. This would include creation of an exception for witnesses who receive a benefit, money, or other consideration from media and non-media sources for purposes other than the generation of financial gains and publicity. Exceptions should also be made for defendants who offer rewards for exculpatory information and journalists who offer anonymity in exchange for information.

There still exists the possibility that some witnesses will nevertheless give in to media pressure and provide information about their upcoming testimony. In this instance, the statutes provide no protection. As stated in *Sheppard*, however, a trial judge has broad discretionary powers to shape the behavior of the media and trial participants both in and out of the courtroom in order to effectuate a fair trial for the accused. If such were not the case—that a witness was not able to escape the media—then it would be possible that the trial judge had not performed his duties according to *Sheppard*.²²²

There should be no encroachment on the freedom of the press in gathering or publishing information regarding trials. Judges already have the means of encouraging the media to limit their contact and coverage during certain portions of a trial, based on the particular circumstances of notoriety, in order to ensure a fair and orderly trial. The press may have a more difficult time gathering information from witnesses who would rather wait to speak until they can be paid lawfully, but the interests of justice in the appropriate release of information outweigh this minor inconvenience.

The statutes give the media an extra incentive to obey the wishes of the court in regard to the obtaining of information from jurors. Judges have the added ability to assess fines against members of the media or the public if they attempt to solicit information from jurors in exchange for money prior to the termination of their duties. Thus, the present section 116.5 of the California Penal Code, as limited by the Federal District Court in Los Angeles, and an amended section 132.5, have the potential to clearly and constitutionally indicate that the rightful place of "checkbook journalism" in criminal trials should be limited.

JAMES R. CADY

²²² *Sheppard v. Maxwell*, 384 U.S. 333, 360-62 (1966).

APPENDIX

THE SLIDING SCALE OF INFORMATION VALUE IN A TRIAL

SPEAKER	VALUE OF INFORMATION TO SPEAKER		
	prior to trial	during trial	after trial
JURORS	low(1)	medium(2)	high(3)
WITNESSES	high(4)	medium(5)	low(6)

(1) Prior to the trial, even during *voir dire*, the value of jurors' speech is minimal because they have yet to begin the process of viewing and evaluating evidence in the trial.

(2) During the trial, the value of the speech increases as the jurors experience the trial process and interact with the court. Jurors dismissed from duty have less value placed on their information than the jurors who successfully serve through the end of their duties. Thus, a sliding scale could be visualized whereby the value of jurors' speech would increase the longer they remain on duty.

(3) Jurors' speech would achieve its maximum value after deliberation, delivery of the verdict, and dismissal from duty following completion of those duties. Some might even speculate that the value of the juror's speech would further depend on the verdict rendered.

(4) The value of witnesses' speech is at its height during the pre-trial phase where information gathering is also at its height and the theory or strategy for prosecution has yet to unfold. The value of the witnesses' speech would be based on various factors including among others:

- the likelihood that the witness will be called to testify
 - the credibility of the witness and her information
 - the admissibility of her potential testimony at trial
 - the critical nature of her potential testimony
- the notoriety of the defendant
- the notoriety of the witness

(5) The value of witnesses' speech can be diminished if they are not called to testify or are impeached on the stand. Furthermore, if witnesses' testimony is permitted to be published by the press, then the need for the media to pay the witnesses for the information is negated.

(6) Once the trial is over, the ability of witnesses to put a price on their information may be severely undermined unless the size and nature of their story is of such sensationalist value that it is nonetheless still marketable.

Thus it becomes evident that the financial burdens placed on the free speech of jurors and witnesses are unequal. Because sections 116.5 and 132.5 prohibit accepting payment or other consideration prior to the conclu-

sion of a trial, the burden is *de minimis* on jurors and heaviest on witnesses. Jurors are prohibited from making any agreements or receiving any payment or other consideration until ninety days after dismissal from juror duty, at which point the value of their speech is at its peak. In contrast, witnesses may not make agreements or receive payment or other consideration until after the trial, at which point the value of their speech is at its lowest.