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## Speech Regulation: Why an Injunction Should be Permissible Under Workplace Discrimination but Is Problematic Under Defamation

Sarah Shyr

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# Speech Regulation: Why an Injunction Should be Permissible Under Workplace Discrimination but Is Problematic Under Defamation

Sarah Shyr\*

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### I. Introduction

"One of the prerogatives of American citizenship is the . . . freedom to speak foolishly and without moderation."<sup>1</sup> The First Amendment guarantees the freedom to speak the words one chooses.<sup>2</sup> This freedom is a fundamental right deeply ingrained in the American conception of a free society and is subject to strong legal safeguards.<sup>3</sup> This fundamental right, however, is not absolute and a state may punish its abuse.<sup>4</sup> Because "[a] free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand,"<sup>5</sup> states frequently impose subsequent punishments in the form of civil liabilities or criminal sanctions for abuses of speech.<sup>6</sup> This common law principle reflects the First Amendment's heavy presumption against the validity of prior restraints<sup>7</sup>—any judicial order forbidding speech before it occurs.<sup>8</sup> Permanent injunctions that actually forbid speech activities are "classic examples" of prior restraints.<sup>9</sup> Consequently, courts may issue injunctions in certain cases for extremely narrow, limited categories of speech.<sup>10</sup>

1. *Baumgartner v. United States*, 322 U.S. 665, 673–674 (1944).

2. *See* U.S. CONST. AMEND. I ("Congress shall make no law . . . abridging the freedom of speech . . .").

3. *See* Sonali Das, Comment, *Silencing Speech in the Workplace: Re-Examining the Use of Specific Speech Injunctive Relief for Title VII Hostile Environment Work Claims*, 34 J. MARSHALL L. REV. 321, 321 (2000) (striking down assumptions that one can forbid certain words without also running a significant risk of suppression of ideas) (citing *Cohen v. California*, 403 U.S. 15, 26 (1971)).

4. *See* *Near v. Minnesota*, 283 U.S. 697, 708 (1931) ("Liberty of speech and of the press is . . . not an absolute right, and the state may punish its abuse.").

5. *See* *Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558–59 (1975) (emphasis added).

6. *See id.* at 559 ("The presumption against prior restraints is heavier, and the degree of protection [is] broader, than that against limits on expression imposed by criminal penalties.").

7. *See* *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (stating that any system of prior restraints of expression bears a heavy presumption against its constitutional validity).

8. *See* *Alexander v. United States*, 509 U.S. 544, 550 (1993) ("The term prior restraint is used 'to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur.'" (quoting MELVILLE NIMMER, *NIMMER ON FREEDOM OF SPEECH* § 4.03, 4–14 (1984)).

9. *See Alexander*, 509 U.S. at 550 ("Temporary restraining orders and permanent injunctions— . . . court orders that actually forbid speech activities—are classic examples of prior restraints.").

10. *See* *Near v. Minnesota*, 283 U.S. 697, 708 (1931) (listing the limited categories of speech that are not absolutely protected by the doctrine of prior restraints: speech relating to national security in time of war, incitements to violence, and obscenity).

Despite the heavy presumption against the validity of prior restraints, two cases by the California Supreme Court, *Aguilar v. Avis Rent A Car System, Inc.*<sup>11</sup> and *Balboa Island Village Inn, Inc. v. Lemen*,<sup>12</sup> held that an injunction against specific speech is permissible after an adjudication finding the speech to be unlawful.<sup>13</sup> In *Aguilar*, the court held that a properly tailored injunction prohibiting the continued use of racial epithets in the workplace did not constitute an invalid prior restraint if there had been a judicial determination that the epithets would contribute to a hostile or abusive work environment resulting in employment discrimination.<sup>14</sup> More recently, *Balboa* held that an injunction prohibiting defamatory statements was not a prior restraint if there had been a judicial determination that the speech was defamatory.<sup>15</sup>

This Note examines the validity of the *Aguilar* and *Balboa* injunctions and the use of the injunction as a remedy for offensive speech targeted at homosexuals. Part II briefly reviews the doctrine of prior restraints. It next assesses the circumstances under which the government may regulate speech. Part III examines the California Supreme Court's reasoning in the *Aguilar* and *Balboa* cases and discusses the permissibility of the injunction as a remedy in each case. Several factors distinguish *Aguilar* from *Balboa* and substantiate the conclusion that the *Balboa* injunction is overly broad and is an invalid prior restraint.<sup>16</sup> The *Balboa* injunction is especially troubling due to the nature of defamation laws: The injunction may stigmatize homosexuals and increase anti-homosexual views because

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11. See *Aguilar v. Avis Rent A Car System, Inc.*, 980 P.2d 846, 858 (Cal. 1999) (plurality opinion) (holding that an injunction prohibiting a pattern of speech that had been previously found unlawful was not an unconstitutional prior restraint on speech).

12. See *Balboa Island Vill. Inn, Inc. v. Lemen*, 156 P.3d 339, 343 (Cal. 2007) (holding that "an injunction issued following a trial that determined that the defendant defamed the plaintiff that does no more than prohibit the defendant from repeating the defamation, is not a prior restraint and does not offend the First Amendment").

13. See *Aguilar*, 980 P.2d at 848 ("[A] remedial injunction prohibiting the continued use of racial epithets in the workplace does not violate the right to freedom of speech if there has been a judicial determination that the use of such epithets will contribute to the continuation of a hostile or abusive work environment and therefore will constitute employment discrimination."); *Balboa*, 156 P.3d at 342 (holding that "a properly limited injunction prohibiting [the] defendant from repeating to third persons statements about the [defendant] that were determined at trial to be defamatory would not violate [the] defendant's right to free speech").

14. See *Aguilar*, 980 P.2d at 848 (validating such an injunction).

15. See *Balboa*, 156 P.3d at 342 (validating such an injunction).

16. See *Balboa*, 156 P.3d at 257 (Kennard, J., dissenting) ("The injunction in this case serves no significant public interest, such as eliminating invidious racial discrimination in employment, preventing incitement of immediate violence, or protecting national security.").

statements imputing homosexuality are defamatory per se in certain states.<sup>17</sup> Finally, Part IV advocates the position that an injunction should be a permissible remedy for defamation only after a jury determination of defamation finding actual harm and after exhaustion of the remedy of damages.<sup>18</sup>

## II. *The First Amendment and Speech Regulations*

### A. *Doctrine of Prior Restraints*

The term "prior restraint" is a judicial or an administrative order that forbids certain communications before the communications occur.<sup>19</sup> The doctrine of prior restraints originated in the common law of England.<sup>20</sup> Under the English system of censorship in the sixteenth and seventeenth centuries, the government regulated all printing presses and printers by requiring prior government or church approval before publication.<sup>21</sup> These licensing laws were eventually abolished and "freedom of the press from licensing came to assume the status of a common law or natural right."<sup>22</sup> Accordingly, "[t]he elimination of prior restraints was a 'leading purpose' in the adoption of the First Amendment."<sup>23</sup>

17. *Cf.* *Albright v. Morton*, 321 F. Supp. 2d. 130, 139 (D. Mass. 2004) ("Defamation per se' should be reserved for statements linking an individual to the category of persons 'deserving of social approbation' like a 'thief, murderer, prostitute, etc.' To suggest that homosexuals should be put into this classification is nothing short of outrageous.") (citations omitted).

18. *See* *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 793 (1994) (Scalia, J., concurring in part and dissenting in part) ("The right to free speech should not lightly be placed within the control of a single man or woman.").

19. *See* *Near v. Minnesota*, 283 U.S. 697, 708 (1931) (listing the limited categories of speech that are not absolutely protected by the doctrine of prior restraints).

20. *See* *Alexander v. United States*, 509 U.S. 544, 553 n.2 (1993) ("The doctrine of prior restraint has its roots in the 16th- and 17th-century English system of censorship. Under that system, all printing presses and printers were licensed by the government, and nothing could lawfully be published without the prior approval of a government or church censor." (citing THOMAS EMERSON, *SYSTEM OF FREEDOM OF EXPRESSION* 504 (Random House 1971)).

21. *See id.* (explaining government censorship in the sixteenth and seventeenth centuries).

22. Thomas Emerson, *The Doctrine of Prior Restraint*, 20 *LAW & CONTEMP. PROBS.* 648, 651 (1955).

23. *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 181 n.5 (citing *Lovell v. Griffin*, 303 U.S. 444, 451-52 (1938)).

In a famous passage, William Blackstone proclaimed:

The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every free man has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity.<sup>24</sup>

Hence, prior restraints are the "most serious and the least tolerable infringement[s] on First Amendment rights."<sup>25</sup>

Injunctions actually forbidding future speech are classic examples of prior restraints.<sup>26</sup> Injunctions "carry greater risks of censorship and discriminatory application than do general ordinances"<sup>27</sup> and thus ought to be subjected to greater safeguards.<sup>28</sup> U.S. Supreme Court Justice Scalia has warned that injunctions are the "product of individual judges rather than of legislatures—and often of judges who have been chagrined by prior disobedience of their orders. The right to free speech should not lightly be placed within the control of a single man or woman."<sup>29</sup>

Violation of an injunction results in contempt of court proceedings.<sup>30</sup> Punishment for these proceedings is within the discretion of the court and may involve heavy fines and up to six months of incarceration without a jury trial.<sup>31</sup> The threat of criminal or civil sanctions after publication can be said to "chill" speech, whereas an injunction "freezes" it at least for the

24. *Alexander*, 509 U.S. at 567–68 (quoting WILLIAM BLACKSTONE, 4 COMMENTARIES \*151–152).

25. *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

26. *See Alexander v. United States*, 509 U.S. 544, 550 (1993) (noting that "court orders that actually forbid speech activities are classic examples of prior restraints").

27. *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 764 (1994).

28. *See id.* at 793 (Scalia, J., concurring in part and dissenting in part) ("[A] restriction upon speech imposed by injunction (whether nominally content based or nominally content neutral) is *at least* as deserving of strict scrutiny as a statutory, content-based restriction.").

29. *Id.*

30. *See Maness v. Meyers*, 419 U.S. 449, 458 (1975) ("Persons who make private determinations of the law and refuse to obey an order generally risk criminal contempt even if the order is ultimately ruled incorrect.").

31. *See Cheff v. Schnackenberg*, 384 U.S. 373, 379–80 (1966) (stating that the federal right to jury trial applicable to criminal contempt if punishment involves imprisonment for more than six months); *Cunningham v. State*, 349 So.2d 702, 704 n.2 (Fla. Dist. Ct. App. 1977) (noting that if the defendant is not afforded the right to a trial by jury, the maximum sentence of imprisonment is one day less than six months).

time.<sup>32</sup> As Erwin Chemerinsky has succinctly stated, "violations of an injunction, even as an unconstitutional injunction, are punishable by contempt, while violations of unconstitutional laws never can be punished."<sup>33</sup> Accordingly, this "most extraordinary remedy" may be imposed only where the "evil that would result from the reportage is both great and certain and cannot be militated by less intrusive measures."<sup>34</sup>

### B. Regulation of Offensive Speech

The First Amendment right to free speech protects derogatory and offensive speech, especially when speech concerns public figures or public issues.<sup>35</sup> No matter how thoroughly offensive or reprehensible the speech, "the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us."<sup>36</sup> The purpose of the First Amendment is to "assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."<sup>37</sup> The U.S. Supreme Court has explicitly stated:

No one will disagree that the fundamental, permanent and overriding policy of police and courts should be to permit and encourage utmost freedom of utterance. It is the legal right of any American citizen to advocate peaceful adoption of fascism or communism, socialism or capitalism. He may go far in expressing sentiments whether pro-semitic or anti-semitic, pro-negro or anti-negro, pro-Catholic or anti-Catholic. He is legally free to argue for some anti-American system of government to supersede by constitutional methods the one we have. It is our philosophy that the course of government should be controlled by a consensus of the governed. This process of reaching intelligent

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32. See *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) ("A prior restraint, by contrast and by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time." (citing Alexander Bickel, *THE MORALITY OF CONSENT* 61 (1975))).

33. Erwin Chemerinsky, *Injunctions in Defamation Cases*, 57 SYRACUSE L. REV. 157, 165 (2007). Erwin Chemerinsky served as counsel to Anne Lemen, the defendant in *Balboa*.

34. *CBS, Inc. v. Davis*, 510 U.S. 1315, 1317 (1994).

35. See *Carey v. Brown*, 447 U.S. 455, 467 (1980) ("The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system." (citing *Stromberg v. California*, 283 U.S. 359, 369 (1931))).

36. *Cohen v. California*, 403 U.S. 15, 25 (1971) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

37. *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964).

popular decisions requires free discussion. Hence we should tolerate no law or custom of censorship or suppression.<sup>38</sup>

Although offensive speech is generally protected, the government may impose regulations based upon the character of the forum where the speech is expressed.<sup>39</sup> The state's power to regulate speech is especially limited in public forums, areas traditionally devoted to assembly and debate such as streets and parks.<sup>40</sup> A court may impose reasonable, content-neutral time, place, or manner restrictions for speech expressed in a public forum.<sup>41</sup> Content-neutral regulations must be narrowly tailored to serve a significant government interest, and must leave open other, alternative channels of communication.<sup>42</sup> Content-based regulations—restrictions based on the subject matter of the speech—must be "necessary to serve a compelling state interest and narrowly drawn to achieve that end."<sup>43</sup> In a non-public forum, a state may impose reasonable restrictions unless the restriction is viewpoint-based.<sup>44</sup>

The U.S. Supreme Court has stated that prior restraints may be permitted for speech constituting a threat to national security, obscenity, and incitements to violence.<sup>45</sup> In the context of hate speech targeted at minorities, a court may enjoin such speech inciting imminent acts of violence.<sup>46</sup> A court may prohibit speech "directed to inciting or producing

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38. *Terminiello v. City of Chicago*, 337 U.S. 1, 32 (1949).

39. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983) ("The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue.").

40. *See id.* at 45 (stating that streets and parks "have immemorially been held in trust for the use of the public . . . for purposes of assembly, communicating thoughts between citizens, and discussing public questions" and that the government may not prohibit all communicative activity in these quintessential public forums (citing *Hague v. CIO*, 307 U.S. 496, 515 (1939))).

41. *See id.* ("The State may . . . enforce regulations of the time, place, and manner of expression which are content-neutral . . .").

42. *See id.* (stating that content-neutral time, place, and manner regulations of speech must be "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication").

43. *Id.*

44. *Cf. id.* at 49 (stating that if a restriction discourages one viewpoint while advancing another, it should be subject to strict scrutiny regardless of whether the forum is non-public).

45. *See Near v. Minnesota*, 283 U.S. 697, 716 (1931) (explaining that prior restraints have been allowed in the past to prevent utterances which might hinder a war effort, incite a riot or another type of violence, or offend the public due to their obscenity).

46. *See id.* ("The constitutional guaranty of free speech does not protect a man from an



imminent lawless action and is likely to incite or produce such action."<sup>47</sup> This test is a strict standard and difficult to meet; in nearly every case where it has been applied, the speech has been protected.<sup>48</sup> A court may also enjoin "fighting words," personally abusive epithets likely to provoke a violent reaction when directed at the ordinary citizen.<sup>49</sup> The California Supreme Court added two new exceptions under which speech may potentially be enjoined: (1) racial epithets after a judicial determination that such epithets amount to workplace discrimination<sup>50</sup> and (2) defamatory speech after a judicial determination finding the speech to be defamatory.<sup>51</sup>

### III. Injunctive Remedy in Two New Contexts

#### A. Enjoining Speech Under Workplace Discrimination: *Aguilar v. Avis Rent A Car System, Inc.*

Workplace discrimination claims are on the rise. In 2007, the U.S. Equal Employment Opportunity Commission received the highest volume of workplace discrimination complaints filed in the past five years.<sup>52</sup> It received 82,792 complaints from private sector workers in the United States, resulting in a nine percent increase from the number of complaints

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injunction against uttering words that may have all the effect of force.").

47. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

48. See Robert Firester & Kendall Jones, *Catchin' the Heat of the Beat: First Amendment Analysis of Music Claimed to Incite Violent Behavior*, 20 LOY. L.A. ENT. L. REV. 1, 11 (2000) (noting that from 1937 to 1951, the Supreme Court used the "clear and present danger test" only three times to restrict speech, and that the Court has never invoked the *Brandenburg* formulation to restrict speech (citing Tom Hentoff, Note, *Speech, Harm and Self-Government: Understanding the Ambit of the Clear and Present Danger Test*, 91 COLUM. L. REV. 1453, 1457 (1991))).

49. See *Cohen v. California*, 403 U.S. 15, 20 (1971) ("States are free to ban the simple use, without a demonstration of additional justifying circumstances, of so-called 'fighting words,' those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942))).

50. See *Aguilar v. Avis Rent a Car Sys., Inc.*, 980 P.2d 846, 848 (Cal. 1999) (plurality opinion) (validating such an injunction).

51. See *Balboa Island Vill. Inn, Inc. v. Lemen*, 156 P.3d 339, 342 (Cal. 2007) (upholding an injunction restricting speech previously determined to be unlawful).

52. See Jacqueline McManus, *Discrimination in the Workplace*, MONTEREY COUNTY HERALD, Mar. 21, 2008 ("It is the highest volume of complaints received by the commission in five years, and the largest increase since the early 1990s.").

in 2006.<sup>53</sup> The most frequent basis for the alleged discrimination involved race, retaliation, and gender.<sup>54</sup> Continuing the upward trend, for fiscal year 2008, all EEOC complaints were up by 15 percent over 2007.<sup>55</sup>

California and other states' statutes make it unlawful for an employer to discriminate against any individual with respect to their employment.<sup>56</sup> Under the Fair Employment Housing Act (FEHA), California has a duty to "protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without discrimination" on account of race, color, national origin, sex, or sexual orientation.<sup>57</sup> The express purpose of the FEHA is to eliminate discriminatory workplace practices by providing effective remedies.<sup>58</sup> Accordingly, under the FEHA, courts are authorized to redress past employment discrimination as well as prevent a recurrence of such misconduct.<sup>59</sup> In interpreting the FEHA, a court may consider other employment discrimination cases arising under Title VII of the Civil Rights Act of 1964,<sup>60</sup> the federal counterpart to the FEHA.<sup>61</sup> Consequently,

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53. *See id.* ("In 2007, it received 82,792 complaints from private sector workers in the United States, up from 75,768 in 2006, a 9 percent increase.")

54. *See id.* ("Race, retaliation and gender were the most frequently alleged bases of discrimination . . .").

55. U.S. EQUAL OPPORTUNITY EMPLOYMENT COMMISSION, CHARGE STATISTICS FY 1997 THROUGH FY 2009, <http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Jan. 28, 2010) on file with Washington and Lee Journal of Civil Rights and Social Justice).

56. *See, e.g.*, CAL. GOV'T CODE § 12940(a) (West 2005) (prohibiting discrimination in employment).

57. *See id.* § 12920 ("[I]t is necessary to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgment on account of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation.")

58. *See Aguilar v. Avis Rent A Car Sys., Inc.*, 980 P.2d 846, 850 (Cal. 1999) (plurality opinion) ("The express purpose of the FEHA is to provide effective remedies which will eliminate such discriminatory practices.") (internal quotation marks omitted).

59. *See id.* at 852 (explaining that if the FEHA finds an employer engaged in an unlawful practice, it may order the employer to cease and desist from the unlawful practice and further order affirmative or prospective relief to prevent the recurrence of the unlawful practice).

60. *See* 42 U.S.C. § 2000e-2(a) (1994) (making it unlawful for an employer to discriminate against any individual with respect to terms of employment on the basis of race, color, religion, sex, or national origin). Congress originally enacted Title VII to allow employees to seek injunctive relief to remedy past and to prevent future workplace discrimination. *See id.* § 2000e-5 (noting a court may grant any equitable relief it deems appropriate to eliminate workplace discrimination). Congress later expanded the remedies available under Title VII by authorizing courts to award damages in an effort to compensate injury to workers. *See* The Civil Rights Act of 1991 § 21, 42 U.S.C. § 2000e-5 (1994).

California courts have adopted the same standard in evaluating workplace discrimination claims under the FEHA.<sup>62</sup>

In *Aguilar v. Avis Rent A Car System, Inc.*, the California Supreme Court held that an injunction prohibiting the continued use of racial epithets directed at employees in the workplace did not violate the First Amendment after a judicial adjudication finding use of such epithets would contribute to employment discrimination in violation of state and federal statutes.<sup>63</sup> Plaintiffs, Latino drivers of Avis Rent A Car, filed suit against their employer, Avis, and ten individuals alleging employment discrimination in violation of the FEHA and other causes of actions.<sup>64</sup> They requested an injunction against their manager, Lawrence, prohibiting verbal harassment and an injunction against Avis prohibiting the allowance of such harassment.<sup>65</sup> The complaint alleged Lawrence "verbally harassed [plaintiffs] constantly. He routinely called *only* the Latino drivers 'motherfuckers' and other derogatory names, and continually demeaned them on the basis of their race, national origin and lack of English language skills."<sup>66</sup>

A jury verdict found the defendants' conduct had violated the FEHA and awarded plaintiffs money damages.<sup>67</sup> The trial court issued an injunction prohibiting Lawrence from using "any derogatory racial or ethnic epithets directed at, or descriptive of, Hispanic/Latino employees of Avis Rent A Car System, Inc. and . . . any uninvited intentional touching of said Hispanic/ Latino employees, as long as he is employed by Avis Rent A Car

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61. See *Aguilar*, 980 P.2d at 851 (plurality opinion) ("Verbal harassment in the workplace also may constitute employment discrimination under Title VII of the Civil Rights Act of 1964, the federal counterpart of the FEHA.") (citations omitted).

62. See *id.* (concluding that Title VII cases may be considered in interpreting the FEHA (citing *Beyda v. City of Los Angeles*, 76 Cal. Rptr. 2d 547, 550 (Cal. Ct. App. 1998))).

63. See *id.* at 848 (validating such an injunction).

64. See *id.* at 849 (stating that seventeen Latino employees of Avis Rent A Car System, Inc. sued Avis and ten named individuals alleging employment discrimination in violation of the FEHA, wrongful discharge in violation of public policy, as well as negligent and intentional infliction of emotional distress).

65. See *id.* at 849 (noting that the lower court issued an injunction prohibiting the manager from using derogatory speech descriptive of Hispanic or Latino employees and enjoining Avis from allowing the manager to continue using such language).

66. *Id.*

67. *Id.* at 848 (noting that the lower court awarded damages against Avis in the amount of \$15,000 each to Hernandez, Lazo, Ramirez, Reyes, and Serrano, and damages against Avis and Lawrence jointly and severally in the amount of \$ 25,000 each to Mojica, Peraza, and Recinos).

System, Inc. in California."<sup>68</sup> The California Court of Appeal directed the trial court to redraft the injunction to limit its scope to the workplace.<sup>69</sup> It also ordered the lower court to include in the injunction a list of derogatory racial or ethnic epithets that were actually used in the workplace by the defendants.<sup>70</sup> Defendants appealed, arguing that the injunction was an invalid prior restraint violating their right to free speech.<sup>71</sup>

The California Supreme Court, in a plurality decision, first established that Lawrence's racial epithets created a hostile or abusive work environment on the basis of race.<sup>72</sup> The court next determined that the government had a compelling interest in preventing acts of invidious discrimination wholly apart from the point of view such conduct may transmit.<sup>73</sup> Looking to two U.S. Supreme Court cases, the court suggested that unlawful conduct and the words that amount to this conduct are not constitutionally protected.<sup>74</sup> Certain types of speech can be "swept up incidentally within the reach of a statute directed at conduct rather than at speech and thus are not constitutionally protected."<sup>75</sup> These cases stand for the assertion that the First Amendment permits imposition of civil liabilities for speech that creates a hostile work environment.<sup>76</sup>

The California Supreme Court also established that the First Amendment permits the issuance of an injunction to prohibit discriminatory conduct.<sup>77</sup> Just as it is clear that "the First Amendment does not protect an individual's right to commit treason . . . through the use of the spoken word,

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68. *Id.* at 850.

69. *Id.*

70. *See id.* (ordering the lower court to provide "an exemplary list of prohibited derogatory racial or ethnic epithets, specifying epithets such as those actually used in the workplace by Lawrence" in the injunction).

71. *Id.* at 848.

72. *Id.* at 852.

73. *See id.* at 854 (stating that the state has a compelling interest in preventing spoken words, in conjunction with conduct, from causing employment discrimination).

74. *See id.* (reasoning that the holdings in two Title VII cases—*Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993) and *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 73 (1986)—are inconsistent with any suggestion that racial epithets amounting to workplace discrimination are constitutionally protected).

75. *Id.* (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992)).

76. *See id.* at 855 (reasoning that Supreme Court precedent supports the imposition of civil liability in such cases).

77. *See id.* at 856 (holding that "the injunction at issue is not an invalid prior restraint, because the order was issued only after the jury determined that defendants had engaged in employment discrimination, and the order simply precluded defendants from continuing their unlawful activity").

it is equally clear that the First Amendment does not protect an employer's or employee's right to engage in employment discrimination through the use of the spoken word."<sup>78</sup> Thus, an injunction against the use of future epithets was not an invalid prior restraint because "[u]nder well-established law . . . the order was issued only after the jury determined that defendants had engaged in employment discrimination."<sup>79</sup> After analyzing several U.S. Supreme Court decisions, the court determined that in each case, the court recognized "that once a court has found that a specific pattern of speech is unlawful, an injunctive order prohibiting the repetition, perpetuation, or continuation of that practice is not a prohibited 'prior restraint' of speech."<sup>80</sup> Thus, the court affirmed the judgment of the court of appeals and upheld the injunction.<sup>81</sup>

Justice Werdegar's concurring opinion stated the plurality should have addressed the issue of whether speech that creates a hostile work environment is protected by the First Amendment.<sup>82</sup> Concluding that the speech was not protected, she agreed with the plurality's holding because of the following factors: speech occurring in the workplace, an unwilling and captive audience, a compelling state interest in eliminating racial discrimination in private employment, and ample alternative speech venues for the speaker.<sup>83</sup>

The dissenting opinions characterized the injunction as a prior restraint violating both state and federal constitutions.<sup>84</sup> Justice Mosk argued that

78. *Id.* at 856 n.6.

79. *Id.* at 856.

80. *Id.* at 858 (quoting *Kramer v. Thompson*, 947 F.2d 666, 675 (3d Cir. 1991)).

81. *See id.* at 863 (remanding the case with instructions to redraft the injunction so as to limit its scope to the workplace and to provide an exemplary list of prohibited words).

82. *See id.* (Werdegar, J., concurring) (criticizing the plurality opinion for failing to ask "whether the First Amendment permits imposition of civil liability under FEHA for pure speech that creates a racially hostile or abusive work environment").

83. *See id.* at 875 (finding that "the several factors coalescing in this case—speech occurring in the workplace, an unwilling and captive audience, a compelling state interest in eradicating racial discrimination, and ample alternative speech venues for the speaker—support the conclusion that the injunction, if sufficiently narrowed on remand . . . , will pass constitutional muster").

84. *See id.* at 878 (Mosk, J., dissenting) ("Both the First Amendment of the United States Constitution and . . . the California Constitution restrict the use of content-based prior restraints on speech. The order at issue here . . . constitutes just such a prior restraint."); *id.* at 882 (Kennard, J., dissenting) ("[T]he particular content-based injunction at issue here . . . is invalid under the free speech guarantees of both the federal and state Constitutions . . ."); *id.* at 894 (Brown, J., dissenting) ("I would draw the line in the same place as the California Constitution and find the injunction at issue here to be an unconstitutional prior restraint of speech.").

the injunction prohibited protected speech; therefore, absent a real and immediate threat of future harm, it constituted an invalid prior restraint.<sup>85</sup> Justice Kennard found the injunction to be content and viewpoint-based.<sup>86</sup> The injunction was invalid because it was unnecessary and not properly tailored.<sup>87</sup> Justice Brown emphasized that the remedy of damages was sufficient to deter any racial discrimination.<sup>88</sup>

### *1. Injunction Under Employment Discrimination as Content-Neutral Restriction*

*Aguilar* sought to strike the appropriate balance between two constitutional rights: The right to be free from employment discrimination and the right to freedom of speech. The principle thrust of the court's reasoning was that an injunction was permissible because it prohibited speech that amounted to unlawful *conduct* prohibited by the FEHA.<sup>89</sup> Further, the concurring opinion emphasized that the holding was confined to a private forum with a captive audience that involved a compelling state interest.<sup>90</sup> These factors decreased defendants' constitutional protection to free speech so that the injunction did not violate the First Amendment.<sup>91</sup> Lastly, the injunction was issued after a judicial determination involving a

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85. *See id.* at 880 (Mosk, J., dissenting) ("I would hold that the injunction fails to overcome the heavy presumption against the constitutional validity of prior restraints on speech.").

86. *See id.* at 884 (Kennard, J., dissenting) (explaining that the injunction restricts speech based on content because it prohibits speech for its communicative impact, and restricts speech based on viewpoint because it prohibits the utterance of words that convey and embody a particular bias).

87. *See id.* at 882 (finding the injunction invalid "because the record fails to establish that an injunction restricting future speech is necessary to prevent recurrence . . . [and] because it is not narrowly drawn").

88. *See id.* at 893–94 (Brown, J., dissenting) ("There is a middle ground: employees can sue and recover damages.").

89. *See id.* at 856 (plurality opinion) ("Under well-established law . . . the injunction at issue is not an invalid prior restraint, because the order was issued only after the jury determined that defendants had engaged in employment discrimination and the order simply precluded defendants from continuing their unlawful activity.") (emphasis added).

90. *See id.* at 875 (Werdegar, J., concurring) ("I find that the several factors coalescing in this case—speech occurring in the workplace, an unwilling and captive audience, a compelling state interest in eradicating racial discrimination . . . support the conclusion that the injunction . . . will pass constitutional muster.").

91. *See id.* at 877–78 (concluding that a properly narrowed injunction will not violate the First Amendment).

jury trial and an award of damages, which provided sufficient procedural safeguards.<sup>92</sup>

Because of various fact-specific factors, *Aguilar's* holding is consistent with the First Amendment insofar as the injunction is viewed as a content-neutral regulation prohibiting unlawful conduct. An injunction under employment discrimination enjoins verbal harassment of any content that is discriminatorily directed at members of a protected class.<sup>93</sup> This injunction prohibits speech not on the basis of its content, but on the basis of unlawful harassment of a protected class.

This content-neutral approach allows an injunction to prohibit discriminatory epithets expressed in the private workplace, a private setting to which the U.S. Supreme Court has applied the reasonable time, place, and manner doctrine.<sup>94</sup> An injunction restricting epithets amounting to workplace discrimination is akin to a reasonable time, place, and manner restriction because the defendants remain free to hurl the same epithets at the plaintiffs anywhere and anytime outside the workplace.<sup>95</sup> Furthermore, the U.S. Supreme Court has stated the government may act as a censor for some kinds of speech on the grounds of their offensive nature only when a captive audience cannot avoid exposure.<sup>96</sup> Accordingly, a properly tailored injunction prohibiting epithets that have been judicially determined to contribute to unlawful workplace discrimination is not an invalid prior restraint.

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92. See *id.* at 857–58 (plurality opinion) (reasoning that judicial findings that the speech restricted is unlawful constitute sufficient procedural safeguards against invalid prior restraints on speech (citing *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 55 (1973))).

93. See CAL. GOV'T CODE § 12920 (West 2005) (stating that discrimination on the basis of one's membership in a protected class is illegal under FEHA); see also Charles R. Calleros, *Aguilar v. Avis Rent A Car System, Inc.: The California Supreme Court Takes a Divided Freeway to Content-Oriented Regulation of Workplace Speech*, 34 U.S.F. L. REV. 237, 270 (2000) ("Title VII stands ready to apply in a neutral fashion to verbal harassment of any content that is discriminatorily directed to members of a protected class.").

94. See *Aguilar*, 980 P.2d at 873 (Werdegar, J., concurring) (noting that the Supreme Court has at least once applied the time, place and manner doctrine to conduct occurring on private property).

95. See *id.* at 874 (reasoning that a restriction prohibiting racially hostile speech limited in scope to the workplace leaves a person free to speak anywhere outside the workplace).

96. See *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975) (stating that selective restrictions on some kinds of speech have been upheld when the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure).

*B. Enjoining Speech Under Defamation: Balboa Island Village Inn, Inc. v. Lemen*

In *Balboa Island Village Inn, Inc. v. Lemen*,<sup>97</sup> the California Supreme Court added another category of speech under which speech can be enjoined—defamatory speech.<sup>98</sup> The U.S. Supreme Court has yet to address the issue of whether an injunction is a permissible remedy for defamation.<sup>99</sup> However, *Balboa* held that if a plaintiff prevails on a defamation claim, then a court may issue an order forever prohibiting the repetition of the defamatory statements.<sup>100</sup> To prevail on a defamation claim, a plaintiff must demonstrate that the defendant published an unprivileged, false, and defamatory statement with the requisite degree of fault.<sup>101</sup> If the defendant is a public figure or the speech is a matter of public concern, then the plaintiff must also prove actual malice, meaning that the defendant acted with knowledge or reckless disregard of falseness.<sup>102</sup>

In *Balboa*, the California Supreme Court reasoned that once a court has adjudicated speech to be defamatory, the speech is no longer protected by the First Amendment.<sup>103</sup> Hence, an injunction does not constitute a prior restraint and is a permissible remedy.<sup>104</sup> Lemen, a neighboring property

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97. See *Balboa Island Vill. Inn, Inc. v. Lemen*, 156 P.3d 339, 342 (Cal. 2007) (deciding that the injunction was overly broad but that a properly limited injunction would not violate defendant's right to free speech).

98. See *id.* (stating that a "properly limited injunction prohibiting defendant from repeating to third persons statements about the Village Inn that were determined at trial to be defamatory would not violate defendant's right to free speech").

99. Cf. *Tory v. Cochran*, 544 U.S. 734, 738 (2005) (finding it unnecessary to address the merits of the case because the injunction had lost its underlying rationale upon the death of the defamation victim).

100. See *Balboa*, 156 P.3d at 342 (determining that an injunction prohibiting speech that was previously determined at trial to be defamatory would not violate the First Amendment).

101. See, e.g., Cal. Civ. Code Ann. §§ 44–47 (West 1982) (defining defamation as effected by libel or slander, and listing the elements).

102. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964) ("The constitutional guarantees require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice.'").

103. See *Balboa*, 156 P.3d at 353 (determining that an injunction prohibiting defendant from repeating statements determined to be defamatory at trial does not violate the defendant's right to free speech).

104. See *id.* at 342 (stating that an injunction prohibiting defamatory speech would not violate defendant's right to free speech).



owner of Balboa Island Village Inn, was perturbed by the noise and inebriated behavior of patrons of the Inn.<sup>105</sup> After complaining to the authorities, she began conducting various intrusive activities against the Inn.<sup>106</sup>

For over two years, Lemen videotaped and took various flash photographs of the Inn's customers and employees, and called them "drunks," "whores," and associated them with Satan.<sup>107</sup> While collecting signatures for a petition against the Inn, she told neighbors that the Inn sold drugs and alcohol to minors, that sex tapes were being filmed at the Inn, and that the Inn was involved with the mafia and encouraged lesbian activities.<sup>108</sup> Following these activities, the Inn's sales dropped more than twenty percent.<sup>109</sup> Plaintiff Aric Toll, the owner and manager of the Inn, filed a civil complaint against Lemen for defamation and other causes of action.<sup>110</sup> At a bench trial, twenty witnesses testified in person, or through deposition transcripts or videotapes, against Lemen who denied most of the activities and statements.<sup>111</sup> The court resolved the creditability issue in the Inn's favor and issued a permanent injunction against Lemen.<sup>112</sup>

The original injunction prohibited Lemen and persons acting on her behalf or acting in concert with her from contacting individuals known to be employees of the Inn.<sup>113</sup> It also prohibited Lemen from making certain defamatory statements about the Inn.<sup>114</sup> Lastly, it prohibited Lemen from filming within twenty-five feet of the premises of the Inn, unless Lemen was filming on her own property.<sup>115</sup> The court of appeals upheld the last part of the injunction precluding the defendant from filming within twenty-five feet of the Inn, but invalidated the other parts upon finding that those

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105. *See id.* at 341 (stating that Lemen complained of excessive noise and the behavior of inebriated customers).

106. *See id.* (stating that Lemen videotaped the Inn approximately fifty times).

107. *Id.*

108. *Id.* at 342.

109. *Id.*

110. *Id.*

111. *Balboa Island Vill. Inn, Inc. v. Lemen*, 17 Cal. Rptr. 3d 352, 357 (Cal. Ct. App. 2004).

112. *Id.* at 357–58.

113. *Balboa Island Vill. Inn, Inc. v. Lemen*, 156 P.3d 339, 342 (Cal. 2007).

114. *See id.* (prohibiting Lemen from expressing that plaintiff: (1) sells alcohol to minors, (2) stays open until 6:00 am, (3) makes sex videos, (4) is involved in child pornography, (5) distributes illegal drugs, (6) has mafia connections, (7) encourages lesbian activities, (8) participates in prostitution, and (9) serves tainted food).

115. *Id.*

portions of the injunction violated Lemen's free speech rights under the state and federal constitutions.<sup>116</sup>

The *Balboa* court first addressed Lemen's argument that an injunction prohibiting her from repeating statements already determined to be defamatory is an impermissible prior restraint on speech.<sup>117</sup> The court distinguished a restriction prohibiting the defendant's speech or publication before it was spoken or published from a restriction prohibiting a defendant from repeating a statement or republishing a writing that had been determined at trial to be defamatory and, thus, unlawful.<sup>118</sup> The court held that an injunctive remedy for the latter prohibition did not constitute a prior restraint.<sup>119</sup>

The court next addressed Lemen's argument that damages are the sole remedy for defamation because equity lacks jurisdiction to enjoin a defamation.<sup>120</sup> It noted that if damages were the sole remedy, then a defendant harmed by continuous defamation would have to bring a succession of lawsuits if an award of damages was an insufficient deterrence.<sup>121</sup> Hence, "a judgment for money damages will not always give the plaintiff effective relief from a continuing pattern of defamation."<sup>122</sup> This assertion was illustrated by the fact that plaintiff sought only injunctive relief and not money damages—the Inn just wanted Lemen to

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116. *Id.*

117. *See id.* at 343 ("Defendant in the present case objects to the imposition of an injunction prohibiting her from repeating statements the trial court determined were slanderous, asserting the injunction constitutes an impermissible prior restraint.").

118. *See id.* at 344–45 ("Prohibiting a person from making a statement or publishing a writing *before* that statement is spoken or the writing is published is far different from prohibiting a defendant from *repeating* a statement or *republishing* a writing that has been determined at trial to be defamatory and, thus, unlawful.").

119. *See id.* at 346 n.4 (reasoning that an injunction enjoining a defendant from distributing defamatory statements already in print is no more objectionable than punishment of defamation by punitive damage awards and criminal libel prosecutions).

120. *See id.* at 349 ("Lemen argues that damages are the sole remedy available for defamation, stating: 'The traditional rule of Anglo-American law is that equity has no jurisdiction to enjoin defamation.'").

121. *See id.* at 351 ("Accepting Lemen's argument that the only remedy for defamation is an action for damages would mean that a defendant . . . would be required to bring a succession of lawsuits if an award of damages was insufficient to deter the defendant from continuing tortious behavior.").

122. *Id.*

stop her activities.<sup>123</sup> Thus, the court held that damages are not the sole remedy for defamation.<sup>124</sup>

Finally, the court addressed Lemen's argument that a change in circumstances would render a statement that was once defamatory permissible.<sup>125</sup> The court's response was that defendant could move the court to modify or dissolve the injunction.<sup>126</sup> Conversely, the Inn could move to modify the injunction if Lemen repeated her defamatory statements in a manner not expressly covered by the injunction.<sup>127</sup> The concurrence further emphasized that California did not follow the collateral bar rule and, thus, Lemen could use the affirmative defense of truth for violating an injunction.<sup>128</sup>

The *Balboa* court modified the injunction so that it prohibited Lemen from stating the enumerated list of defamatory statements to third persons—other than governmental enforcement officials—and from filming within twenty-five feet of the Inn.<sup>129</sup> After affirming the lower court's ruling, the court held that a properly tailored injunction prohibiting speech already adjudicated to be defamatory did not violate the defendant's First Amendment rights under both state and federal constitutions.<sup>130</sup>

Justice Kennard's dissenting opinion held that the injunction was an unconstitutional prior restraint and that the appropriate remedy for

123. *See id.* ("The Village Inn did not seek money damages in its amended complaint. The Inn did not want money from Lemen; it just wanted her to stop.")

124. *Id.* at 351 n.10 (holding that an award of damages is not the sole remedy available for defamation).

125. *See id.* at 353 ("Lemen argues that she cannot be enjoined from repeating the same statements found to be defamatory, because a change in circumstances might render permissible a statement that was defamatory . . .").

126. *See id.* ("If such a change in circumstance occurs, defendant may move the court to modify or dissolve the injunction.")

127. *See id.* ("By the same token, the Village Inn could move to modify the injunction if Lemen repeated her defamatory statements in a manner not expressly covered by the injunction.")

128. *See id.* (Baxter, J., concurring) (adding that in addition to moving the court to modify or dissolve an injunction, a defendant may speak out and assert the truth of statements as a defense in a prosecution for violation of an injunction).

129. *See id.* at 352 (concluding the injunction cannot prevent Lemen from presenting her grievances to government officials because doing so would violate her constitutional right to petition the government for redress).

130. *See id.* at 353 ("[T]he injunction must be reversed in part because it is overly broad, but a properly limited injunction prohibiting defendant from repeating statements about plaintiff that were determined at trial to be defamatory would not violate defendant's right to free speech.")

defamation is damages.<sup>131</sup> He argued that the majority's argument was flawed because: (1) defamatory statements "cannot be determined by viewing the statement in isolation from the context in which it is made,"<sup>132</sup> (2) a change in circumstances could render unprotected speech into truthful, protected statements,<sup>133</sup> and (3) changes in wording could make it difficult to determine whether a particular statement fell within an injunction's prohibition.<sup>134</sup> Justice Kennard also found that the injunction was unnecessary to protect any compelling state interest.<sup>135</sup> Furthermore, because plaintiff had only asked for injunctive relief, there was no demonstration that monetary damages would have been an inadequate remedy.<sup>136</sup> Accordingly, he argued the injunction was unconstitutional as well as unnecessary.<sup>137</sup>

Justice Werdegar's dissenting opinion distinguished the facts in *Aguilar* with the facts in *Balboa*.<sup>138</sup> The following factors—an unwilling and captive audience, a compelling state interest, alternative speech venues, and two constitutional interests—supported her conclusion in *Aguilar*, but these factors were missing in *Balboa*.<sup>139</sup> "In the absence of any of the unusual factors present in *Aguilar* . . . or any compelling United States Supreme Court authority, it is inescapable that the injunction here is an

131. *See id.* at 354 (Kennard, J., dissenting) ("I agree with the Court of Appeal that an injunction permanently prohibiting defendant's future speech is an unconstitutional restraint. And . . . I would hold that the remedy for defamation is to award monetary damages.")

132. *Id.* at 356.

133. *See id.* (giving the example of an audience member falsely yelling "fire" in a crowded theater versus an actor yelling the same word in the same crowded theater during a performance to illustrate how context can affect First Amendment protection).

134. *See id.* (questioning whether or not Lemen's statement to a friend that the food at the Village Inn is "bad" would imply that the food is "tainted" in violation of the injunction).

135. *See id.* at 357 ("The injunction here is not necessary to protect any compelling state interest or any importance public policy.")

136. *See id.* at 358 ("Although plaintiff claimed it suffered a 20 percent loss in business revenue after Lemen circulated her petition among the residents of Balboa Island . . . plaintiff did not seek any monetary damages from Lemen. The only relief plaintiff sought was a permanent injunction.")

137. *See id.* at 359 ("[T]he injunction is a prior restraint on future speech; it is overbroad in prohibiting nondefamatory future speech; and it is unnecessary in the absence of proof that compensatory damages would not be an adequate remedy.")

138. *See id.* at 360 (Werdegar, J., dissenting) ("Unlike in *Aguilar*, where we were called on to balance countervailing constitutional concerns with the demands of the *First Amendment* free speech guarantee, the present case involves a garden-variety defamation under state law.") (emphasis added).

139. *See id.* at 361 (finding that none of the considerations that rendered *Aguilar* an unusual case are present in *Balboa*).

impermissible prior restraint on defendant's speech."<sup>140</sup> Further, the plaintiff neglected to show that damages or punitive damages would have failed to make the plaintiff whole or to deter future defamatory speech.<sup>141</sup>

### C. Distinguishing *Aguilar* from *Balboa*

*Balboa*'s holding created a new category of speech that falls outside the protective purveyance of the prior restraint doctrine.<sup>142</sup> It essentially allows a court to make law by using a one-size-fits-all rule to enjoin any type of defamation after a judicial determination. *Balboa* relied on *Aguilar* to support the contention that an injunction against defamation issued after an adjudication does not amount to a prior restraint.<sup>143</sup> However, *Aguilar* is distinguishable from *Balboa* in several ways that support the conclusion that *Balboa*'s holding was overly broad and its injunction constituted an invalid prior restraint.

#### 1. Required Showing of Actual Harm

First, victims of discriminatory epithets in hostile workplaces, unlike victims of defamatory speech, may prevail on a workplace discrimination claim only upon a sufficient showing that discriminatory conduct caused a harmful work environment.<sup>144</sup> The standard for epithets amounting to workplace discrimination under the FEHA is the same under Title VII claims.<sup>145</sup> Both statutes require harassment to be sufficiently severe or

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140. *Id.* at 364.

141. *See id.* ("Although plaintiff, a business operating a restaurant, claims it lost money as a result of a defendant's defamatory comments, it has not shown why it cannot be made whole by damages.").

142. *See id.* at 342 (majority opinion) (concluding that a properly limited injunction prohibiting statements previously determined at trial to be defamatory does not constitute a prior restraint).

143. *See id.* at 349 ("Accordingly, we hold that, following a trial at which it is determined that the defendant defamed the plaintiff, the court may issue an injunction prohibiting the defendant from repeating the statements determined to be defamatory." (citing *Aguilar v. Avis Rent A Car System, Inc.*, 980 P.2d 846, 858 (Cal. 1999))).

144. *See Aguilar v. Avis Rent A Car System, Inc.*, 980 P.2d 846, 851 (Cal. 1999) ("Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview." (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21–22 (1993))).

145. *See id.* ("Verbal harassment in the workplace also may constitute employment

pervasive so as "to alter the conditions of [the victim's] employment and create an abusive working environment"<sup>146</sup> and so as to create a "change in the terms and conditions of employment."<sup>147</sup> This standard requires a showing of harmful conduct strong enough to actually change the environment and conditions of employment.<sup>148</sup>

This standard was met in *Hope v. California Youth Authority*.<sup>149</sup> In *Hope*, Hope, a gay man who had worked as a cook at a correctional facility, brought a claim against his former employer for sexual orientation harassment under FEHA.<sup>150</sup> The court emphasized that acts of harassment may not be occasional or isolated, but instead, plaintiff must show a pattern of harassment of a repeated or routine nature.<sup>151</sup> Furthermore, acts of harassment must fulfill both an objective standard based on a reasonable person in the victim's position and a subjective standard based on how the victim perceives the work environment.<sup>152</sup>

Hope testified that his immediate supervisor and coworker repeatedly called him derogatory names such as "mother fuckin' faggot" and "homo" during his five years of employment at the correctional facility.<sup>153</sup> The security officer also instructed wards not to help Hope cook and clean while

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discrimination under title VII of the Civil Rights Act of 1964 . . . the federal counterpart of the FEHA." (citing *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986)).

146. *Id.* (quoting *Vinson*, 477 U.S. at 67 (1986)).

147. *Id.* (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 786 (1998)).

148. *See id.* (finding that the plaintiff must prove that the conduct would have interfered with a reasonable employee's work performance, seriously affected the psychological well-being of a reasonable employee, that she was actually offended, and that the harassment was repeated and of a routine nature) (citing *Fisher v. San Pedro Peninsula Hosp.*, 214 Cal. App. 3d 590, 608-10 (Cal Ct. App. 1989)).

149. *See Hope v. Cal. Youth Auth.*, 36 Cal. Rptr. 3d 154, 170 (Cal. Ct. App. 2005) (affirming the judgment of the trial court finding for the plaintiff in his sexual orientation harassment suit and awarding him economic and noneconomic damages).

150. *Id.* at 157.

151. *See id.* at 163 ("In determining what constitutes 'sufficiently pervasive' harassment, the courts have held that acts of harassment cannot be occasional, isolated, sporadic, or trivial, rather the plaintiff must show a concerted pattern of harassment of a repeated, routine or a generalized nature." (quoting *Fisher*, 214 Cal. App. 3d at 610 (Cal. Ct. App. 1989))).

152. *See id.* ("The harassment must satisfy an objective and a subjective standard. [T]he objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering "all the circumstances. And, subjectively, an employee must perceive the work environment to be hostile.") (internal quotation marks and citations omitted).

153. *Id.* at 165.

other cooks continued to have the wards' assistance.<sup>154</sup> One of Hope's supervisors even testified that the security officer treated Hope in a "cruel" manner.<sup>155</sup> When Hope complained to his manager, she responded, "everyone thinks you're gay."<sup>156</sup> The court found that the facts alleged by Hope had established that harassment was sufficiently severe or pervasive to create a hostile work environment.<sup>157</sup> The *Hope* case is an example of the high standard a plaintiff must meet to prevail on a harassment claim under the FEHA. This high standard ensures that the plaintiff meets the "heavy burden of justification"<sup>158</sup> before obtaining a prior restraint on free speech.

Defamation laws, on the other hand, allow a plaintiff to prevail without having to show actual harm or special damages for statements that are defamatory per se. Statements imputing homosexuality are defamatory per se in certain states, including California.<sup>159</sup> Although the California legislature has not pronounced homosexual conduct between two consenting adults to be illegal, the court in *Schomer v. Smidt* held that a false imputation that plaintiff engages in homosexual activities is slanderous per se because the charge of lesbianism implies unchastity and abnormal sexual behavior.<sup>160</sup>

In *Mazart v. State*,<sup>161</sup> the New York Court of Claims found it was libelous per se for a university newspaper to publish a student-written letter that falsely identified other students as members of the gay community.<sup>162</sup> The court emphasized that writing is defamatory per se if it exposes a person to hatred, contempt, or unsavory opinion in the minds of a

154. *Id.*

155. *Id.*

156. *Id.* at 166.

157. *See id.* at 164 ("The evidence supports the jury's implied finding that Hope was harassed and that the harassment was sufficiently severe or persuasive to alter the conditions of his employment and create a work environment that qualifies as hostile or abusive.").

158. *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971).

159. *See, e.g., Schomer v. Smidt*, 170 Cal. Rptr. 662, 666 (Cal. Ct. App. 1980) ("We find that a false imputation of the commission of a homosexual act is slanderous per se.").

160. *See id.* ("[T]o state that one carries on sexual conduct by it alone, with members of the opposite or similar sex imputes to them a 'want of chastity,' which in the eyes and minds of their peers might and could subject them to disgrace, ridicule, damage to reputation, lacking virtue or reliability.").

161. *See Mazart v. State*, 441 N.Y.S.2d 600, 604 (N.Y. Ct. Cl. 1981) (holding that university publication which published letter indicating that claimants were "members of the gay community" constituted libel per se).

162. *Id.* at 604 (concluding that the claimants were libeled and that the libel was not privileged).

substantial part of the community.<sup>163</sup> Because a number of acquaintances had questioned the students about their sexual orientation, the court concluded that the letter had a negative impact on a number of people in the university community.<sup>164</sup> Thus, the mere questioning of the students' sexual orientation was sufficient to establish that a substantial part of the community had formed a negative opinion of these students.<sup>165</sup>

The above views, "in effect, validate . . . [antihomosexual] sentiment[s] and legitimize relegating homosexuals to second-class status."<sup>166</sup> A judge could issue an injunction prohibiting all expressions imputing homosexuality to an individual that can be proven false.<sup>167</sup> In a state where the majority of the legislature presumes homosexuality to be harmful to an individual's reputation, an injunction such as this could, essentially, freeze all future expressions mentioning the homosexuality of this individual.<sup>168</sup> In this circumstance, the government would be "effectively driv[ing] certain ideas or viewpoints from the marketplace" based on the disfavored status of a minority group.<sup>169</sup>

Courts have repeatedly emphasized that anyone seeking a prior restraint on the right of free speech bears a heavy burden.<sup>170</sup> This heavy burden requires showing that harmful speech will "surely result in direct,

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163. *See id.* at 603 ("A writing is defamatory . . . if it tends to expose a person to hatred, contempt or aversion, or to induce an evil or unsavory opinion of him in the minds of a substantial number of the community, even though it may impute no moral turpitude to him." (quoting *Mencher v. Chesley*, 297 N.Y. 94, 100 (1947))).

164. *See id.* at 604 (noting that the fact that "[d]eviant sexual intercourse and sodomy were crimes in the State of New York at the time the letter was published" also colored the community's opinion of the students).

165. *See id.* ("[T]he Court finds that a substantial number of the University community would naturally assume that the claimants engaged in homosexual acts from such identification.").

166. *Albright v. Morton*, 321 F. Supp. 2d 130, 138 (D. Mass. 2004).

167. *Cf. id.* at 139 ("'Defamation per se' should be reserved for statements linking an individual to the category of persons 'deserving of social approbation' like a 'thief, murderer, prostitute, etc.' To suggest that homosexuals should be put into this classification is nothing short of outrageous.") (citations omitted).

168. *Cf. id.* at 137 ("[T]he large majority of the courts that have found an accusation of homosexuality to be defamatory per se emphasized the fact that such a statement imputed criminal conduct.").

169. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387 (1992) (quoting *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991)).

170. *See, e.g., Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) ("Any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity.").



immediate, and irreparable damage."<sup>171</sup> The mere adjudication of defamation may not provide sufficient procedural safeguards because a plaintiff can prevail on a defamation claim without having to show any actual injury suffered or any danger of future harm.

## 2. Different Sources of Law

Second, the *Aguilar* and *Balboa* courts derived their authority to issue injunctions from two different sources of law: a state statute (the FEHA) and the common law (defamation laws). The FEHA empowers courts to issue an injunction to prevent unlawful discriminatory conduct, and courts frequently impose injunctions as an effective remedy to prevent the recurrence of discriminatory practices in the workplace.<sup>172</sup> Defamation laws, on the other hand, developed from the common law where the traditional remedy is damages.<sup>173</sup> The principle derives from the maxim that equity will not enjoin a defamation because damages are an adequate remedy.<sup>174</sup> Damages seek to redress the reputational harm suffered by making the plaintiff whole and act to deter future defamatory speech.<sup>175</sup> In a concurring opinion, Justice Stewart stated, "an action for damages is the only hope for vindication or redress the law gives to a man whose reputation has been falsely dishonored."<sup>176</sup> Hence, the traditional remedy for defamation is damages whereas a workplace discrimination claim involves injunctive relief.<sup>177</sup>

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171. *New York Times Co. v. Sullivan*, 403 U.S. 713, 730 (1971).

172. *See Aguilar v. Avis Rent A Car Sys., Inc.*, 980 P.2d 846, 852 (Cal. 1999) (stating that under the FEHA, "courts can, and often do, issue injunctions prohibiting the recurrence or continuation of employment discrimination"). The California Legislature has directed the FEHA "to be construed 'liberally' so as to accomplish its purposes." *Id.* at 850.

173. *See, e.g.*, 50 AM. JUR. 2D *Libel & Slander* § 433 (2008) ("Under the common-law rule, damage is presumed from a defamation . . .").

174. *See* RODNEY A. SMOLLA, *LAW OF DEFAMATION* § 9:85 (2d ed. 1999) ("There is a traditional maxim that 'equity will not enjoin a libel.'").

175. *See Estella Gold, Does Equity Still Lack Jurisdiction to Enjoin a Libel or Slander?*, 48 BROOK. L. REV. 231, 259 (1982) (identifying three kinds of damages in defamation cases: compensatory, emotional, and punitive (citing RESTATEMENT (SECOND) OF TORTS § 623 (1977))).

176. *Rosenblatt v. Baer*, 383 U.S. 75, 93 (1966) (Stewart, J., concurring).

177. *See* 45C AM. JUR. 2D *Job Discrimination* § 2540 (2008) (listing workplace discrimination laws, the violation of which entitles the victim to injunctive relief).

### 3. Applicable Forums

Third, the *Aguilar* injunction against workplace discrimination was confined to the workplace whereas the *Balboa* injunction could prohibit any speech expressed in any type of forum. An injunction under *Aguilar* is analogous to a reasonable time, place, and manner restriction because the injunction is limited only to the workplace, a private setting where various restrictions on speech are permissible.<sup>178</sup>

The holding in *Balboa* did not limit the injunction in time, place, or manner.<sup>179</sup> Instead, the defendant is enjoined from uttering statements in any place and in any manner.<sup>180</sup> The *Balboa* injunction prohibited Lemen's speech, which was spurred by staunch religious beliefs, took place in a public forum, was expressed in a peaceful manner, and concerned a matter of widespread public interest.<sup>181</sup> In fact, "Lemen's lawyers point out that she made many of the disputed statements as part of her campaign against the bar's expanded license, a matter of widespread public interest."<sup>182</sup> *Balboa's* holding discounts the fact that even false and outrageous speech expressed in a public forum deserves some protection because it can assist political and social debates by challenging orthodoxies and enhancing understandings.<sup>183</sup> Furthermore, reliance on the temporal element of falseness is troubling because a change in circumstances could change unprotected, false statements into protected, true statements.<sup>184</sup>

178. See *Aguilar v. Avis Rent A Car Sys.*, 980 P.2d 846, 873 n.7 (Cal. 1999) (Werdegar, J., concurring) (stating that private employers often place various restrictions on speech of employees, including requirements that salespersons speak well of employer's products, restaurant wait staff not to speak negatively of food they are serving, and employees keep trade secrets confidential).

179. See *Balboa Island Vill. Inn, Inc. v. Lemen*, 156 P.3d 339, 361 (Cal. 2007) (Werdegar, J., concurring in part and dissenting in part) (concluding that "the injunction prohibiting Lemen from repeating her defamatory statements is not, as in *Aguilar*, akin to a time, place and manner restriction").

180. See *id.* at 356 (describing the majority's argument as a "syllogism: (1) Defamation is not constitutionally protected speech; (2) it has been judicially determined that Lemen defamed plaintiff . . . ; therefore (3) defendant may be enjoined from ever again making those statements . . . the argument has superficial appeal[, but l]ike many a syllogism, it is flawed.") (citations omitted).

181. See *id.* at 341–42 (describing Lemen's critical statements against the Inn).

182. Maura Dolan, *Free Speech Limits Tested Outside Inn*, L.A. TIMES, Jan. 29, 2007, at 1.

183. See Clive Walker, *Reforming the Crime of Libel*, 50 N.Y.L. SCH. L. REV. 169, 202 (2005–2006) ("Even false and ludicrous speech can assist a society's political and social debates by challenging orthodoxies and sharpening arguments and understandings.").

184. See *id.* (noting that "the designation of 'truth' assumes an . . . unconscionable

#### 4. Type of Restriction

Last, the injunctions in *Aguilar* and *Balboa* constitute different types of restrictions requiring different levels of judicial scrutiny. As previously discussed, the injunction in *Aguilar* prohibited harassment of any content directed at a protected class.<sup>185</sup> Hence, it is a content-neutral restriction prohibiting speech on the basis of unlawful conduct rather than on the basis of any viewpoint or opinion.<sup>186</sup> Content-neutral restrictions are subject to intermediate scrutiny where reasonable time, place, and manner restrictions are permitted.<sup>187</sup> Furthermore, a compelling state interest exists in eradicating invidious discrimination in the workplace.<sup>188</sup> Thus, even under the most exacting judicial scrutiny, a narrowly tailored injunction would not be an invalid prior restraint if necessary to prevent future discrimination.

Defamatory speech expressed in a public forum is a type of speech that is regulated because of its constitutionally proscribable content.<sup>189</sup> An injunction against defamation is content-based and thus must be necessary to serve a compelling state interest and narrowly drawn to achieve that end.<sup>190</sup> The U.S. Supreme Court has recognized a legitimate state interest in compensating reputational attacks.<sup>191</sup> But, it has never stated an injunction to enjoin defamatory speech constitutes a compelling state interest. *Balboa* would allow a court to issue a content-based injunction

degree of . . . infallibility").

185. See *Aguilar v. Avis Rent A Car Sys., Inc.*, 980 P.2d 846, 862–63 (Cal. 1999) (plurality opinion) ("The trial court found that John Lawrence's use of racial epithets was sufficiently severe or pervasive to constitute employment discrimination. The trial court further found that injunctive relief was necessary to prevent a continuation of the abusive work environment.").

186. See *id.* at 863 ("Because Lawrence's past use of such epithets in the workplace had been judicially determined to violate the FEHA, prohibiting him from continuing this discriminatory activity does not constitute an invalid prior restraint of speech.").

187. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (explaining that such restrictions must be narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication).

188. See *Aguilar*, 980 P.2d at 874 (Werdegar, J., concurring) (acknowledging that the elimination of racial discrimination has often been a government interest "of the highest order").

189. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992) (noting certain areas of speech, including defamation, can be regulated because of their constitutionally proscribable content).

190. *Perry Educ. Ass'n*, 460 U.S. at 45.

191. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) ("The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood.").

freezing specific speech without having to show it is necessary to further a compelling state interest. The *Balboa* injunction was an invalid prior restraint because the court failed to state a compelling state interest.<sup>192</sup> The court also failed to establish the injunction was necessary; there was no showing that the remedy of damages was inadequate to prevent further harm.<sup>193</sup> Furthermore, racially defamatory speech may express a certain viewpoint or bias.<sup>194</sup> Allowing a court to bypass strict judicial scrutiny to issue a content or viewpoint-based injunction is presumed to violate the First Amendment.<sup>195</sup> Accordingly, any such injunction would be an invalid prior restraint.

#### *IV. When an Injunction Should Be a Permissible Remedy for Defamation*

*Balboa's* bright-line rule for defamation is overinclusive. It allows courts to enjoin speech that is defamatory per se without finding that the speech has caused irreparable harm to the plaintiff.<sup>196</sup> It also permits courts to restrict speech based on its proscribable content without finding that the injunction is necessary to serve a compelling state interest.<sup>197</sup> This Note argues that in order to strike the appropriate balance between an individual's right to protect his reputation and an individual's right to free speech, an injunctive remedy should be granted only as a last resort—after a jury determination where plaintiff establishes actual harm and after exhausting the remedy of damages.

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192. See *Perry Educ. Ass'n*, 460 U.S. at 45 (requiring that restrictions based on the subject matter of the speech in question must be "necessary to serve a compelling state interest and narrowly drawn to achieve that end").

193. See *Balboa Island Vill. Inn, Inc. v. Lemen*, 156 P.3d 339, 358 (Cal. 2007) (Kennard, J., dissenting) (criticizing the majority for granting injunctive relief despite the lack of a showing "that the defendant's wrongful acts threaten to cause irreparable injuries, ones that cannot be adequately compensated in damages") (internal quotation marks omitted).

194. See, e.g., *R.A.V.*, 505 U.S. at 392 (cautioning against addressing "messages 'based on virulent notions of racial supremacy' . . . [by] silencing speech on the basis of its content") (citations omitted).

195. See, e.g., *id.* at 382 ("Content-based regulations are presumptively invalid.").

196. See *Balboa*, 156 P.3d at 358 (Kennard, J., dissenting) (criticizing the majority for bypassing the irreparable injury requirement in granting plaintiff injunctive relief).

197. See *id.* at 357 ("The injunction here is not necessary to protect any compelling state interest or any important public policy.").

Because "the injunction is a much more powerful weapon than a statute . . . [it] should be subjected to greater safeguards."<sup>198</sup> Accordingly, a court should issue an injunction only after finding that the plaintiff suffered actual harm from defamatory statements. A required showing of actual harm would ensure the prohibition of an individual's speech is not based solely on false statements of fact, which are "inevitable in free debate, and . . . must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'"<sup>199</sup>

A defamation action should also include a jury trial to determine the nature and extent of the harm.<sup>200</sup> Juries are an integral factor in tort claims because they check the government's power by diluting the power of the judge.<sup>201</sup> And noted previously, "[t]he right to free speech should not lightly be placed within the control of a single man or woman."<sup>202</sup> Because a jury is composed of more than one individual, it is more representative of the values of the community.<sup>203</sup> This aspect is especially important for defamation claims because an element of defamation for the jury to decide is whether the plaintiff suffered reputational harm so "as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."<sup>204</sup> Hence, a jury's decision is, ideally, more reflective of the community's estimation of whether speech actually lowered an individual's reputation than that of a single judge.

An injunction for defamation should be permissible after exhausting the traditional remedy of damages for defamation. Money damages may include punitive damages if the plaintiff can show the defendant defamed with actual malice.<sup>205</sup> Because compensatory damages may not deter a

198. *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 793 (1994) (Scalia, J., concurring in part and dissenting in part).

199. *New York Times Co. v. Sullivan*, 376 U.S. 254, 271 (1963) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

200. This Note suggests that the unique nature of a defamation action compels a jury trial to determine questions of fact. It does not address the issue of whether the distinctiveness of a defamation claim should preclude any right to waive a jury trial, as prescribed by state or federal statute.

201. See RANDOLPH N. JONAKAIT, *THE AMERICAN JURY SYSTEM* 27 (2003) ("[J]uries fit into an overall scheme of a government of checks and balances.").

202. *Madsen*, 512 U.S. at 793 (Scalia, J., concurring in part and dissenting in part).

203. See Jonakait, *supra* note 201, at 67 ("[T]he community[] is more representative of the diverse interests of the people than a judge.").

204. RESTATEMENT (SECOND) OF TORTS § 559 (1977).

205. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (suggesting that a public official plaintiff must prove that a statement was made with actual malice before recovering damages).

wealthy or persistent defendant, the plaintiff should pursue punitive damages if there is a possibility of proving actual malice.<sup>206</sup> Suing for punitive damages ensures that money damages are exhausted and that the defendant will be ineffective in the future if he continues to defame.<sup>207</sup> Because a public figure must always show actual malice to prevail in a defamation suit, a public figure must always pursue punitive damages first before a court will consider an injunctive remedy.<sup>208</sup> In some cases (for example, if the defendant is insolvent), judgments against him will not deter his defamatory behavior. However, regardless of the defendant's financial situation, a plaintiff should obtain a judgment for money damages before seeking an injunction. Otherwise, conditioning freedom of speech upon a defendant's wealth would be inconsistent with the First Amendment's guarantee.<sup>209</sup>

After exhausting the remedy of damages, if a defendant continues his tortuous, defamatory behavior, it is sufficient to show that an award of damages is ineffective relief and that an injunction is necessary to prevent future, irreparable harm. General equity principles state: "[A injunction issues only if there is a showing that the defendant has violated, or imminently will violate, some provision of statutory or common law, and that there is a 'cognizable danger of recurrent violation.'"<sup>210</sup> Accordingly, a plaintiff may move for an injunction to prevent recurring harm. At this point, after damages were proven to be inadequate and the likelihood of continuing harm is imminent, there is a compelling state interest to deter future, harmful defamation.<sup>211</sup> A properly tailored injunction for

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206. See, e.g., *Balboa Island Vill. Inn, Inc. v. Lemen*, 156 P.3d 339, 364 (Cal. 2007) (Werdegar, J., concurring in part and dissenting in part) ("If, after paying damages, defendant continues to utter defamatory statements and it is proved she did so intentionally and maliciously, the law provides for punitive damages.").

207. See *id.* at 351 (majority opinion) (noting that "money damages will not always give the plaintiff effective relief from a continuing pattern of defamation").

208. See *New York Times Co.*, 376 U.S. at 279–80 (declaring that a public official plaintiff must prove that a statement was made with actual malice before recovering damages).

209. See *Willing v. Mazzocone*, 393 A.2d 1155, 1158 (Pa. 1978) (stating that the constitutional right to freely express one's opinion should not be conditioned upon the economic status of the individual asserting that right).

210. *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 766 n.3 (1994) (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953)).

211. Cf. *CBS, Inc. v. Davis*, 510 U.S. 1315, 1317 (1994) ("[W]e have imposed this 'most extraordinary remed[y]' only where the evil that would result from the reportage is both great and certain and cannot be mitigated by less intrusive measures." (quoting *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976))).

defamation is necessary and is the only possible relief available to serve this compelling state interest.

#### *IV. Conclusion*

*Aguilar* and *Balboa* both sought to enjoin speech despite the First Amendment's heavy presumption against the validity of prior restraints. *Aguilar's* injunction, a content-neutral restriction on speech expressed in a private forum, was not an invalid prior restraint. However, *Balboa's* injunction was overly broad because it did not require the plaintiff to show evidence of harm suffered. Such an injunction could have negative effects on the status and views of homosexuals. The injunction in *Balboa* is essentially a content-based restriction, yet it allows a court to issue an injunction and bypass strict judicial scrutiny under the guise of preventing defamation. The heavy presumption against injunctions for defamation ought to be overcome only when a jury finds the plaintiff suffered actual harm from the defamatory statements and after the plaintiff has exhausted the remedy of damages.