PRETRIAL PUBLICITY IN CRIMINAL CASES OF NATIONAL NOTORIETY: CONSTRUCTING A REMEDY FOR THE REMEDILESS WRONG

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INTRODUCTION

Our common law history and constitutional heritage mandate public criminal trials. The Sixth Amendment guarantees the accused the right to a public trial,[1] and the First Amendment protects the media's role as the people's monitor of the government.[2] The Sixth Amendment also guarantees the accused the right to a trial before an impartial jury.[3]

Prior to the Norman Conquest, criminal cases in England were brought before "moots" and attended by the freemen of the town. A moot refers to the local or county court[4] and the freemen acted as the jurors.[5] After the Norman Conquest, criminal trials remained open even though the freemen's attendance no longer was compulsory.[6] According to Chief Justice Burger, the function of such openness is to reassure the public that fair procedures are followed, but it also serves the "prophylactic purpose [of] providing an outlet for community concern, hostility and emotion."[7] These overlapping provisions set the stage for a clash of constitutional proportions.[8]

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1. The Sixth Amendment to the United States Constitution states: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. CONST. amend. VI.

2. The First Amendment to the United States Constitution states: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I.

3. *See* U.S. CONST. amend. VI.

4. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 565 (1980).

5. *See id.* at 565-75.

6. *See id.*

7. *Id.* at 571.

8. The framers of the Constitution and the Bill of Rights were aware of the potential clash between the First and Sixth Amendments. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 547 (1976) ("[I]t is inconceivable that the authors of the Constitution were unaware of the potential conflicts between the right to an unbiased jury and the guarantee of freedom of the press.").

The lawyers who helped write the Constitution and the Bill of Rights were familiar with the episode in which John Adams defended British soldiers charged with homicide for firing on a crowd of Boston demonstrators. This situation highlighted the clash between the adversary

Media coverage of criminal trials has expanded dramatically in the past thirty years,[9] giving the public insight and information about specific trials in finely-tuned detail.[10] The press' enhanced participation in the criminal trial process has resulted in an increased number of appeals based on claims of unfair trials due to media-created juror bias.[11]

Rapid technological advancement, enhanced public expectations, and the institutional growth of the media have created another commonplace phenomenon, namely, the trial of national notoriety.[12] Satellites, mobile broadcasting equipment, cable television, and other new technologies have led to an explosion in coverage of the criminal justice system. The popularity of CNN, the intense interest in the O.J. Simpson trial, and the demand for shows such as *Court T.V.* and *Hard Copy* demonstrate the public's insatiable curiosity. Since the 1960s when the press began covering the civil rights demonstrations and the Vietnam War protests, the public's expectations about news coverage have heightened. In a high profile trial, no county escapes media

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system and the inflamed passion of the public. *See id.* In addition, in 1786, Thomas Jefferson wrote about press attacks on John Jay, and stated, "'[I]n truth it is afflicting that a man who has passed his life in serving the public . . . should [be arraigned] in a newspaper. It is however an evil for which there is no remedy . . . .'" *Id.* (quoting 9 PAPERS OF THOMAS JEFFERSON 239 (J. boyd ed. 1954)). The framers declined, however, to assign priorities between the two amendments. *See Nebraska Press Ass'n*, 427 U.S. at 561 (refusing to assign priority to either First or Sixth Amendment because authors of Constitution understood potential conflicts between amendments and still were unable or unwilling to resolve them).

9. *See* Roscoe C. Howard, Jr., *The Media, Attorneys, and Fair Criminal Trials*, 4 KAN. J.L. & PUB. POL'Y 61, 61 (1995) (noting that advent of sophisticated technology enables media to report contemporaneously on criminal investigations and trials); Eileen A. Minnefor, *Looking for Fair Trials in the Information Age: The Need for More Stringent Gag Orders Against Trial Participants*, 30 U.S.F. L. REV. 95, 96 (1995) (addressing increased presence of media in criminal trials); Newton N. Minow & Fred H. Cate, *Who is an Impartial Juror in an Age of Mass Media?*, 40 AM. U. L. REV. 631, 635 (1991) (acknowledging proliferation of media covering criminal trials).

Some examples of criminal trials in which there was increased media coverage include the trials of Erik and Lyle Menendez for murdering their parents, *see* Alan Abrahamson, *Lyle Menendez Case Ends in a Mistrial*, L.A. TIMES, Jan. 29, 1994, *available in* 1994 WL 2129087; the trial of Lorena Bobbitt for cutting off her husband's penis with a kitchen knife, *see Strong Reactions to Bobbitt Verdict*, HOUSTON POST, Jan. 22, 1994, at A1; and the murder trial of O.J. Simpson, *see* Adam Pertman, *"Not Guilty": Simpson Free After Acquittal*, BOSTON GLOBE, Oct. 4, 1995, at 1.

10. *See* Alberto Bernabe-Riefkohl, *Prior Restraints on the Media and the Right to a Fair Trial: A Proposal for a New Standard*, 84 KY. L.J. 259, 259-60 (1995) (discussing detailed reporting of criminal trials by media); Brian V. Breheny & Elizabeth M. Kelly, Note, *Maintaining Impartiality: Does Media Coverage of Trials Need to be Curtailed?* 10 ST. JOHN'S J. LEGAL COMMENT. 371, 371 (1995) (addressing barrage of information presented by media covering criminal trials); Robert S. Stephen, Note, *Prejudicial Publicity Surrounding a Criminal Trial: What a Trial Court Can Do to Ensure a Fair Trial in the Face of a "Media Circus,"* 26 SUFFOLK U. L. REV. 1063, 1066 n.11 (1992) (citing well-publicized criminal trials involving Marion Barry, William Kennedy Smith, and Mike Tyson).

11. *See* Minow & Cate, *supra* note 9, at 636 & n.22 (asserting that national media carried reports of more than 3100 claims during 1980s).

12. *See id.*

coverage; publicity saturates the nation before the trial begins.[13] The nature of such notorious trials is such that the most effective technique available to eliminate the effects of pretrial publicity—the change of venue—is ineffective as a remedy.[14] This Article explores the effects of pretrial publicity in criminal cases of national notoriety and recommends a remedy for the "remediless wrong" of prejudicial publicity in such cases.

Historically, trial judges have had wide discretion in their management of pretrial publicity.[15] Accordingly, appellate courts currently give trial judges the greatest benefit of the doubt when defendants appeal their convictions claiming Sixth Amendment or Fourteenth Amendment[16] due process violations.[17] The presumption is that

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13. *See supra* note 10 and accompanying text (examining pervasive role of media in criminal trials).

14. *See* Minow & Cate, *supra* note 9, at 647 (describing why change of venue is ineffective remedy); Mark R. Stabile, *Free Press-Fair Trial: Can They Be Reconciled in a Highly Publicized Criminal Case?*, 79 GEO. L.J. 337, 344 (1990) (criticizing efficacy of venue change as remedy for pretrial publicity). Courts also attempt to remedy the effects of pretrial publicity through voir dire of the venire. Judge Takasugi's control over John DeLorean's trial for drug charges is a good example. In that case, all the parties agreed that pretrial publicity would deny DeLorean a fair trial. *See* Robert M. Takasugi, *Jury Selection in a High-Profile Case:* United States v. DeLorean, 40 AM. U. L. REV. 837, 838 (1991). After granting a continuance to allow media coverage to subside, Judge Takasugi held a conference with representatives of the media to establish rules of courtroom decorum. *See id.* The court then called eight panels of 35 prospective jurors each of whom was pre-screened for availability for a long trial. *See id.* at 839. The prospective jurors were given a questionnaire aimed at ascertaining media exposure. The court then gave additional peremptory challenges to each party. *See id.* Each side conducted voir dire on each prospective juror's exposure to media, and on their present state of mind resulting from the exposure. *See id.* Finally, during the trial the court frequently admonished the jurors to avoid news relating to the trial. *See id.*

15. In one early case, the Supreme Court stated:

> [A] suitable inquiry is permissible . . . to ascertain whether the juror ha[s any] bias, opinion, or prejudice that would affect or control the fair determination by him of the issues to be tried. That inquiry is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion. This is the rule in civil cases, and the same rule must be applied in criminal cases.

Connors v. United States, 158 U.S. 408, 413 (1895); *see also* Rosales-Lopez v. United States, 451 U.S. 182, 182 (1981) ("Because the obligation to impanel an impartial jury lies in the first instance with the trial judge, and because he must rely largely on his immediate perceptions, federal judges have been accorded ample discretion in determining how best to conduct the voir dire."); Sheppard v. Maxwell, 384 U.S. 333, 358 (1966) (asserting judicial control over reporters' presence in courtrooms); Marshall v. United States, 360 U.S. 310, 312 (1959) (observing that trial judge has broad discretion in ruling on prejudice resulting from pretrial publicity (citing Holt v. United States, 218 U.S. 245, 251 (1910))).

16. The Fourteenth Amendment to the United States Constitution states: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1. The right to a jury trial was applied to the states through the Due Process Clause of the Fourteenth Amendment. *See* Duncan v. Louisiana, 391 U.S. 145, 148 (1968).

17. *See* Patton v. Yount, 467 U.S. 1025, 1031 (1984) (holding that trial court's finding of juror impartiality may "be overturned only for 'manifest error'" (quoting Irvin v. Dowd, 366 U.S. 717, 723 (1961))); Holt v. United States, 218 U.S. 245 (1910); Spies v. Illinois, 123 U.S. 131 (1887); Hopt v. Utah, 120 U.S. 430 (1887); Reynolds v. United States, 98 U.S. 145 (1878).

juries are impartial[18] and that trials are fair absent proof of prejudice.[19]

The United States Supreme Court currently uses a "totality of the circumstances" test to assess claims of prejudicial pretrial publicity.[20] Under this test, the Court examines the atmosphere of the trial and the voir dire transcript, as well as other "indicia of impartiality"[21] to determine if the defendant did indeed have a fair trial.[22] In recent years the Court has appeared less willing to acknowledge juror bias,[23] deferring instead to trial judges' factual findings of juror impartiality.[24]

In addition, the Court recently held that there is no constitutional requirement that a trial judge allow a defendant to question the venire on the content of pretrial publicity to which the potential jurors have been exposed.[25] Because juror challenges are based on the possibility of juror bias, this ruling has the effect of limiting a defendant's ability to measure the actual bias a juror might have.[26] A defendant must take at face value a juror's claim that she has no preconceived opinions about either the defendant's guilt or the outcome of the trial.[27]

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18. *See* Murphy v. Florida, 421 U.S. 794, 799 (1975) (assuming unbiased jury based on jurors' professions of impartiality); *Irvin*, 366 U.S. at 723 (articulating presumption of juror impartiality if juror can render verdict based solely on evidence presented in court and not on pretrial notion of guilt or innocence); *see also* Alfredo Garcia, *Clash of the Titans: The Difficult Reconciliation of a Fair Trial and a Free Press in Modern American Society*, 32 SANTA CLARA L. REV. 1107, 1123-24 (1992) (describing great burden of proof placed on defendants when attempting to prove juror bias, in part because of jurors' inability to recognize prejudice or unwillingness to admit it).

19. *See Irvin*, 366 U.S. at 723 (suggesting that juror impartiality is presumed unless challenger demonstrates prejudice (citing Reynolds v. United States, 98 U.S. 145, 157 (1878))); *see also* Garcia, *supra* note 18, at 1120-25 (tracing evolution of "presumed prejudice" standard, whereby prejudice is presumed only in extreme situations when media circus saturates community and taints potential jury pool); Judge Peter D. O'Connell, *Pretrial Publicity, Change of Venue, Public Opinion Polls—A Theory of Procedural Justice*, 65 U. DET. L. REV. 169, 170 (1988) (asserting that courts presume prejudice only in rare instances in which massive pretrial publicity renders fair trial impossible).

20. *See* Murphy, 421 U.S. at 799.

21. *Id.* at 802.

22. *See id.* at 799-802.

23. *See* Patton v. Yount, 467 U.S. 1025, 1038 (1984) (according special deference to trial court's determination of juror impartiality).

24. *See id.* (applying statutory presumption of correctness to trial court finding of juror impartiality).

25. *See* Mu'min v. Virginia, 500 U.S. 415, 425-26, 431-32 (1991).

26. *See* Garcia, *supra* note 18, at 1129-30 (likening search for impartial jury to game of chance in wake of *Mu'min* holding that failure to ask content-based questions about type of publicity to which potential jurors were exposed does not impinge on defendant's guarantee of fair trial); Stephen, *supra* note 10, at 1088 nn.160 & 165 (stating that *Mu'min* decision does not require exhaustive voir dire, even though such examination could reveal juror bias).

27. *See supra* notes 18-19 and accompanying text (assuming juror impartiality absent contrary proof).

Such a standardless approach to pretrial publicity is problematic because it creates deference by a court to a point of neglect of a serious and growing problem. The absence of a rule of law designed to test trial judges' ability to nullify the prejudicial effects of publicity in notorious trials, combined with the evisceration of the defendant's ability to ascertain effectively the extent of juror bias, eliminates meaningful review. As a result, this approach creates an underlying doubt about the actual fairness of such trials.[28]

A notorious national trial is one in which there is pervasive and continuous national media treatment in newspapers, magazines, radio, and television for the duration of the investigatory and pretrial proceedings.[29] This Article identifies four kinds of trials that attract media and national attention to such an extent that they become nationally notorious: (1) "tabloid-type" cases typically involving unusually sordid facts appealing to the nation's voyeuristic tendencies, such as the Pamela Smart murder trial;[30] (2) cases in which the nature of the crime is so heinous or shocking that the nation's media follow it closely, such as Charles Manson's murder trial,[31] Jeffrey Dahmer's murder trial,[32] and the Oklahoma City Federal Center bombing;[33] (3) cases in which the defendants are celebrities, such as O.J. Simpson's double-murder trial;[34] and (4) cases in which the

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28. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178-79 (1989) (criticizing standards-based "totality of the circumstances" approaches to legal issues as disregarding need for uniformity in law).

29. *See* Stephen, *supra* note 10, at 1066 (defining notorious and well-publicized criminal trials as those involving well-known defendant or bizarre set of circumstances or both).

30. *See* State v. Smart, 622 A.2d 1197, 1200 (N.H. 1993) (reporting conspiracy and murder trial of New Hampshire woman convicted of persuading teen-aged lover to kill husband).

31. *See* People v. Manson, 132 Cal. Rptr. 265, 274 (App. Dep't Super. Ct. 1976) (reporting conspiracy and murder trial for gruesome Tate-LaBianca killings).

32. In 1991, Jeffrey Dahmer confessed to murdering and dismembering up to 16 young men in the Milwaukee, Wisconsin area. *See Grisly Details Emerge of Murder and Mutilation*, ST. LOUIS POST-DISPATCH, July 25, 1991, at 1A; Debbie Howlett, *Nightmare in Milwaukee; Up to 15 People Slain and Dismembered*, USA TODAY, July 24, 1991, at 3A; Edward Walsh, *Milwaukee Man Said to Admit 11 Killings*, WASH. POST, July 25, 1991, at A1. Dahmer's attorneys claimed prior to jury selection that the heavy pretrial publicity in the Milwaukee area would make it difficult to seat a jury. *See Dahmer Trial Will Be Live on Local TV Cable System*, CAP. TIMES, Jan. 30, 1992, at 3A; *Jurors Drawn from Extra-Large Pool*, USA TODAY, Jan. 27, 1992, at 3A. Because Dahmer plead guilty to 15 counts of first-degree intentional homicide, his trial dealt solely with the issue of insanity. *See Dahmer Examinations to Be Sealed Before Trial*, UPI, Jan. 3, 1992, *available in* LEXIS, Nexis Library, Omni File.

33. On April 19, 1995, suspected Oklahoma City bombers Timothy McVeigh and Terry Nichols allegedly blew up the Alfred P. Murrah federal building, killing 168 men, women, and children inside. *See* James Brooke, *New Site for Bomb Trial Brings Burdens, Experts Say*, N.Y. TIMES, Feb. 22, 1996, at A22; *Most Say They'd Be Fair Jurors*, DENV. POST, Feb. 21, 1996, at A12; *Oklahoma City Bombing Trial to Denver: Federal Judge Grants the Change of Venue*, CHI. TRIB., Feb. 20, 1996, at C1.

34. Former football star O.J. Simpson was accused of murdering his ex-wife, Nicole Brown Simpson, and her friend, Ronald Goldman. *See O.J. Simpson Is Charged with Ex-Wife's Murder and*

victims are celebrities, such as the trial of the assassination of Robert F. Kennedy.[35]

Regardless of the reasons a trial might become nationally notorious, pretrial publicity becomes a more difficult issue for the trial court judge to resolve when the media and the nation are watching.[36] Otherwise ordinary crimes that would receive nominal local treatment become subjects of national engrossment when they involve "'[m]urder and mystery, society, sex, and suspense.'"[37] Accordingly, media treatment of the crime is more widespread, and the resultant publicity about the crime reaches a larger population of potential jurors than in less notorious cases.[38] In addition, potential jurors are more likely to have been exposed to more in-depth, all-encompassing publicity about the crime, the defendant, or the victim.[39] In short, the increased scope and detailed nature of pretrial publicity in nationally notorious cases sets such cases apart from cases of purely local interest.[40]

The trial court must examine the scope and nature of pretrial publicity to measure its prejudicial effect.[41] If potential jury members are biased because of exposure to publicity that, by its scope and nature, is prejudicial (or if future jurors could be biased by the publicity but merely have not been picked yet), the trial court must take the necessary remedial measures to nullify the impact of the publicity and to ensure a fair trial.[42] Those measures, however, must

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Death of Companion, CHI. TRIB., June 17, 1994, at 1. After a nine-month trial, with much attention and publicity, jurors acquitted him in less than four hours. *See* Adam Pertman, *"Not Guilty": Simpson Free After Acquittal*, BOSTON GLOBE, Oct. 4, 1995, at 1, 22.

35. *See* People v. Sirhan, 497 P.2d 1121, 1124 (Cal. 1972).

36. *See supra* note 10 and accompanying text (analyzing difficulties in obtaining fair trials in age of mass media).

37. Sheppard v. Maxwell, 384 U.S. 333, 356 (1966) (quoting State v. Sheppard, 135 N.E.2d 340, 342 (Ohio 1956)).

38. *See* Minnefor, *supra* note 9, at 97-100 (noting that cable television coverage of criminal trials transforms local scandals into international news stories in which media actively participates to increase entertainment value).

39. *See generally* James R. Cady, Note, 4 WM. & MARY BILL RTS. J. 671, 671-72 (1995) (recounting media's purchase and exposure of minute details concerning O.J. Simpson murder trial); Scott C. Pugh, Note, *Checkbook Journalism, Free Speech, and Fair Trials*, 143 U. PA. L. REV. 1739, 1739-40 (1995) (detailing sale of information about O.J. Simpson to tabloid television); Stephen, *supra* note 10, at 1064-65 & nn.1-6 (describing intense media circus surrounding Pamela Smart murder trial).

40. *See* Minnefor, *supra* note 9, at 97-99 (asserting that expanded and more intense media coverage of criminal trials involving well-known defendant or heinous crime transforms local scandals into national and international media circuses designed to "titillate and entertain").

41. *See Sheppard*, 384 U.S. at 357-60 (denouncing trial judge for not considering prejudicial effect of pretrial publicity).

42. *See id.* at 358-61 (ruling that in widely publicized criminal cases, trial court must take all necessary measures to ensure fair trial including limiting number of reporters in courtroom and closely regulating their conduct, insulating witnesses from media, and controlling release

not violate other constitutional requirements. Specifically, the First Amendment's guarantee of freedom of the press and the Sixth Amendment's guarantee of a speedy and public trial limit the measures a trial judge may take to ensure a fair trial.[43]

Because the change of venue does nothing to lessen the impact of publicity in nationally notorious trials,[44] the trial judge must find alternative measures. But by what test should those measures be reviewed? This Article suggests that in criminal cases of national notoriety, if the trial judge uses the proposed procedures reasonably calculated to nullify the prejudicial effects of pretrial publicity, an appellate court should presume that the defendant has received a fair trial despite claims that the jury was actually or was inherently prejudiced.

Part I of this Article examines the history of pretrial publicity in American courts and explores the values that the Sixth Amendment seeks to protect. Part II criticizes the Supreme Court's current approach to the pretrial publicity problem. Part III analyzes case studies of nationally notorious trials. Part IV explores remedial measures reasonably calculated to nullify the effects of prejudicial publicity and cases in which a trial judge's omission of those measures constitutes reversible error. Finally, this Article concludes by setting forth a proposed standard that should be applied in order to ensure the defendant's right to a fair trial in cases of national notoriety.

I. HISTORY OF PRETRIAL PUBLICITY

A. Historical Background

The history of criminal trials in both England and in the United States reveals a presumption of openness. The origin of the open criminal trial can be traced back to English prehistory.[45] The moot,

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of information to press by witnesses, police officers, and counsel).

Although the *Sheppard* opinion listed these various techniques for limiting the effects of pretrial publicity, they have not been adopted by the courts as requirements. In the years following *Sheppard*, the Supreme Court retreated from these specifics for the more general "totality of the circumstances" test.

43. *See* Breheny & Kelly, *supra* note 10, at 373-74 (laying out tension between Sixth Amendment's guarantee of fair trial and First Amendment's right to freedom of press); Scott Kafker, Comment, *The Right to Venue and the Right to an Impartial Jury: Resolving the Conflict in the Federal Constitution*, 52 U. CHI. L. REV. 729, 730-31 (1985) (considering constitutional conflict between First and Sixth Amendments).

44. *See supra* note 14 and accompanying text (analyzing change of venue as ineffective tool against pretrial publicity because information often is disseminated nationally in highly-publicized criminal cases).

45. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 565-67 (1980).

mentioned in the Kentish laws of the eighth century, was of prehistoric origin and was, in form, an open air assembly of the freemen of the local population that discussed local affairs.[46] It was not a decision-making body.[47] If the parties before it could not make a "loveday" to settle their dispute, the dispute would be put to a supernatural test, such as to an Oath or an Ordeal.[48]

The Ordeal was especially common in criminal cases.[49] For example, a piece of hot iron would be placed in the defendant's hand for a short time and then the hand would be bandaged. After a few days, the hand would be inspected for blistering. If there were no blisters, the defendant was declared innocent.[50]

More than 600 years ago the trial by jury became the principal method of criminal trials in England.[51] Although the early juries acted essentially as witnesses, the decision in the English *Case of the Imprisonment of Edward Bushell*[52] transformed the jury into a true fact-finding body.

However, as English law developed, the presumption of the open criminal trial did have at least one historical exception. For instance, in fourteenth-century England's Star Chamber, a strong presumption in favor of closed proceedings existed, and public access to any type of legal proceedings was not unusual.[53] The Star Chamber arose as a means of providing remedies for offenses beyond the scope of the common-law system.[54] The Star Chamber was an extension of the government;[55] it was not unusual, therefore, for the sovereign to attend, and his prerogative on administering justice regularly prevailed.[56]

Originally associated with acts of treason,[57] the Star Chamber later

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46. *See* J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 10 (1971).
47. *See id.*
48. *See id.*
49. *See id.*
50. *See id.* at 11.
51. *See* Singer v. United States, 380 U.S. 24, 27 (1965).
52. 6 How. St. Tr. 999 (C.P. 1670) (holding that jurors may not be fined or imprisoned for their verdicts).
53. *See* GEOFFREY RADCLIFFE & GEOFFREY CROSS, THE ENGLISH LEGAL SYSTEM 106 (1977).
54. *See id.* at 110, 112 (positing that Star Chamber's greatest legacy was supplementing English criminal law to include various misdemeanors, such as libel and forgery, that were punished inadequately at common law).
55. *See* BAKER, *supra* note 46, at 50.
56. *See id.*
57. *See id.* at 51. Although the court became known as the Star Chamber, the star chamber actually was the room in which the Council met when it was at Westminster. *See id.* The chamber was so named due to the gilded stars decorating the roof. *See id.* The sessions that the Council held there eventually became known as the Court of the Star Chamber. *See id.* The Council itself was an appointed group of nobles who met on the king's behalf to consider petitions in equity for extraordinary relief. *See id.* at 38. By the sixteenth century the Court of

became the predominant forum for criminal jurisdiction, particularly for those criminal issues that either could not be tried at common law or involved punishment unsuitable for common jury.[58] Vast abuses of authority eventually resulted in the Star Chamber's abolition in 1641.[59]

In the newly-formed United States, the most significant advancement in the debate over access to legal proceedings came on the heels of Aaron Burr's treason trial.[60] The former Vice President was indicted for treason after he formulated plans to seize New Orleans and to conquer Mexico in spite of President Jefferson's proclamation warning against rebellion.[61] In the midst of this infamous trial, the issue of jury contamination erupted.[62] Driven by the public's curiosity and by Burr's political stance, the events and proceedings leading up to the trial saturated the newspapers, and the possibility of a fair trial was in question.[63] Given the nature of the crime and the notoriety of Burr himself, it is easy to see why the trial became the center of media attention.[64] As a result, the Circuit Court of Virginia grappled with the central problem of prejudicial publicity and juror disqualification.[65] Supreme Court Chief Justice Marshall, who presided over the trial as a circuit judge,[66] concluded that the mere fact that a juror was exposed to pretrial publicity was not dispositive of his ability to act impartially.[67] Marshall ruled that a

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the Star Chamber was associated with the criminal jurisdiction of the Council. *See id.* at 51. Ironically, the court was noted for its severity of punishment. *See id.* Enacted in 1487, the Star Chamber Act originally was thought to be the source of power for the English Star Chamber Court. *See id.* In fact, this Act established a tribunal to resolve issues of subversive activities in the royal household. *See id.* The Act placed a popular seal of approval on the Star Chamber's work in serving as the instrument of discipline for the Tudor monarchy. *See* C.H.S. FIFOOT, ENGLISH LAW AND ITS BACKGROUND 86 (1993).

58. *See* FIFOOT, *supra* note 57, at 87 (noting that libel, forgery, perjury, riot, and conspiracy were common issues addressed by Star Chamber).

59. *See id.*

60. *See* United States v. Burr, 25 F. Cas. 2, 3 (C.C.D. Va. 1807) (No. 14,692a).

61. *See* JEFFREY ABRAMSON, WE THE JURY 28 (1994).

62. *See id.* at 38-39. From the convening of the grand jury, the impartiality of the process was questioned. *See id.* at 38 (surmising that Burr immediately recognized difficulty of receiving fair trial from grand jury, many of whom were Thomas Jefferson's allies). The original grand jury consisted of many people who opposed Burr, and the process for selecting substitutes was disobeyed in favor of handpicking by the federal marshall. *See id.* at 38-39. The presiding judge, Chief Justice John Marshall sitting as a circuit judge, recognized the potential impartiality and ordered the substitutes removed. *See id.*

63. *See id.* at 38.

64. *See id.*

65. *See* United States v. Burr, 25 F. Cas. 49, 50 (C.C.D. Va. 1807) (No. 14,692g).

66. *See* ABRAMSON, *supra* note 61, at 38.

67. *See Burr*, 25 F. Cas. at 51 (observing that disqualification of all jurors who formed opinions prior to trial would exclude many intelligent jurors capable of rendering impartial verdict); ABRAMSON, *supra* note 61, at 41-43.

juror can be disqualified only if the juror has a strongly-held opinion about the defendant's guilt or innocence that cannot be set aside.[68]

Although the Burr trial set the tone for the standard regarding pretrial publicity and juror bias, it was not until seventy years later in *Reynolds v. United States*[69] that the Supreme Court announced the standard for reviewing a trial court's finding of jury prejudice.[70] The Court ruled that a finding of bias must be based on evidence that the juror clearly formed an opinion warranting the conclusion that he was biased, and that "[t]he finding of the trial court . . . ought not to be set aside by a reviewing court, unless the error is manifest."[71]

Eventually, the effect of the media on legal proceedings gained recognition,[72] and in 1935, with the trial of Bruno Hauptmann for the kidnapping and murder of the Lindbergh baby,[73] the issue exploded. Hauptmann's trial triggered the mass media age in trial coverage because of the nature of the crime and the accessibility of information surrounding the case.[74] In fact, the case generated so much media exposure that it came to epitomize the "media circus" that later Court decisions condemned.[75] As a consequence of the extensive media coverage at the Hauptmann trial, the American Bar Association enacted Canon 35 of the Code of Judicial Conduct, a provision aimed specifically at controlling press coverage in criminal trials.[76] With the advancements in media technology and media

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68. *See Burr*, 25 F. Cas. at 51. "The question must always depend on the strength of and nature of the opinion which has been formed." *Id.*

69. 98 U.S. 145 (1878).

70. *See* United States v. Reynolds, 98 U.S. 145, 155-56 (1878).

71. *Id.* at 156.

72. *See, e.g.*, People v. Feld, 86 P. 1100, 1104-05 (Cal. 1906) (dismissing claim of unfair trial resulting from newspaper publicity); People v. Stokes, 37 P. 207, 209 (Cal. 1894) (holding that in situation in which jury read newspaper stories about case during deliberations, subsequent guilty verdict was reversed); People v. McCoy, 12 P. 272, 273 (Cal. 1886) (holding that jurors' reading of newspapers that contained matters in connection with trial constituted grounds for new trial).

73. *See* State v. Hauptmann, 180 A. 809, 813 (N.J. 1935).

74. *See* Stephen, *supra* note 10, at 1068 (asserting that Hauptmann case triggered mass media coverage of criminal trials).

75. *See infra* note 100 and accompanying text (citing cases in which media circus prevented fair trial).

76. *See* 62 A.B.A. Rep. 1123, 1134-35 (1937). The Canon read:

> Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the courtroom, during sessions of the court or recesses between sessions, and the broadcasting of court proceedings are calculated to detract from the essential dignity of the proceedings, degrade the court and create misconceptions with respect thereto in the mind of the public and should not be permitted.

Id. Today, pretrial publicity is regulated by Rule 3.6 of the Model Rules of Professional Responsibility. The rule applies to statements by lawyers, however, and does not control the role of the media in criminal trials. Rule 53 of the Federal Rules of Criminal Procedure, on the other hand, states that taking photographs or broadcasting judicial proceedings in a federal

access to newsworthy stories, the legal community became more concerned with guiding trial procedures to comport with fairness and decorum.[77]

B. Modern Court Treatment

1. Stroble v. California

In 1952, the Court confronted the problem of prejudicial publicity in light of burgeoning media participation in the criminal trial process in *Stroble v. California*,[78] a case in which the defendant was convicted of the brutal murder of a six-year-old girl.[79] The investigation immediately focused on the defendant, who quickly confessed when arrested, three days following the murder.[80] Between the time of the murder and the arrest, Los Angeles newspapers headlined the manhunt for the defendant.[81] On the day of his arrest, the papers printed excerpts from his confession, which had been released by the district attorney's office.[82] In the following days, the papers continued to report on the story, describing the defendant as "a 'werewolf', a 'fiend', and a 'sex-mad killer,'"[83] and on the district attorney's contention that the defendant was sane and guilty.[84]

On appeal, the Supreme Court rejected the defendant's claim that the newspaper accounts of his arrest and confession were so inflammatory that they had made a fair trial in Los Angeles impossible.[85]

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courtroom is prohibited. *See* FED. R. CRIM. P. 53. Congress recently passed legislation that carves out an exception to Federal Rule of Criminal Procedure 53, without specifically amending the rule. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1246. Section 235 of the Act, Closed Circuit Televised Court Proceeding for victims of crime, provides for non-public coverage of criminal trial proceedings when the venue of the trial has been changed, and the new venue is greater than 350 miles from the location where the trial normally would have taken place. The law gives the court discretion to designate who may view the proceedings. The broadcast signal is the property of the court and therefore any tapes or recordings made of the proceedings also are the property of the court and must be kept under seal. The law gives the Judicial Conference of the United States the authority to promulgate rules or to amend existing rules, to carry out the intent of the legislation, and upon such an occurrence the force of the section ceases. The law applies retroactively to all cases filed after January 1, 1995. This legislation will give the victims of the Oklahoma bombing trial access to closed circuit television broadcast of the trial proceedings in Denver, Colorado.

77. *See* FED. R. CRIM. P. 53 (proclaiming that media should not be allowed in courtrooms).

78. 343 U.S. 181 (1952).

79. *See* Stroble v. California, 343 U.S. 181, 183-84 (1952).

80. *See id.* at 186-87.

81. *See id.* at 192.

82. *See id.*; *see also* Steve Harvey, *Only in L.A.*, L.A. TIMES, May 2, 1995, at 2B (stating that during Stroble trial, *Times* printed names and home addresses of jurors as well as their photographs).

83. *Stroble*, 343 U.S. at 192 (quoting text from various newspaper accounts of case).

84. *See id.*

85. *See id.* at 193.

The Court simply noted that the defendant never made an "affirmative showing" by "so much as an affidavit" that any juror actually was prejudiced by the stories,[86] and that a simple declaration of a violation of due process was insufficient to prove it.[87] The Court also examined four other factors. It noted that the confession printed in the papers was read into the record four days later at the preliminary hearing, at which time it would have been available to the public,[88] and that the confession was made voluntarily and was introduced into evidence during the trial.[89] The Court also considered the fact that the defendant never moved for a change of venue and that he never complained of the publicity until after being convicted.[90]

2. Marshall v. United States

The requirement that a defendant prove actual juror prejudice before a conviction can be reversed was challenged implicitly by a subsequent Supreme Court decision that took the first step to halt "trial by newspaper."[91] In 1959 the Court reversed a federal district court conviction in *Marshall v. United States*[92] because the jury had been exposed to newspaper accounts revealing the defendant's previous convictions.[93]

During the defendant's trial for unlawfully dispensing a controlled drug, the prosecutor asked to be allowed to introduce the defendant's prior conviction of practicing medicine without a license to rebut the defendant's attempted defense of entrapment.[94] The trial judge refused the request as unduly prejudicial.[95] In the meantime, however, two newspapers published stories about the defendant's prior conviction, which several members of the jury read.[96] Upon learning of the possible jury contamination, the trial judge denied a defense motion for mistrial after the jurors stated that they could

86. *See id.* at 195.
87. *See id.*
88. *See id.* at 193.
89. *See id.* at 195.
90. *See id.* at 193-94. The Court also considered a fifth factor when ruling against the defendant. *See id.* at 195. It rejected the petitioner's claim that ineffective counsel inhibited an insanity defense because the petitioner openly waived a jury trial on the insanity issue. *See id.* at 195-96.
91. People v. Manson, 132 Cal. Rptr. 265, 312 (App. Dep't Super. Ct. 1976) (citing Marshall v. United States, 360 U.S. 310, 312-13 (1959)).
92. 360 U.S. 310 (1959).
93. *See Marshall,* 360 U.S. at 313.
94. *See id.* at 311.
95. *See id.*
96. *See id.* at 311-12.

remain impartial even though they had read the articles,[97] and the defendant was convicted. In a two paragraph opinion, the Supreme Court reversed and remanded for a new trial stating that prejudice to a defendant is just as great when disallowed evidence reaches the jury through the newspapers as when it is introduced by the prosecution.[98]

For the first time, the Court hinted that a trial might be unfair when a juror is exposed merely to possibly prejudicial publicity.[99] This hint would become the dominant theme in subsequent cases as the Court tried to remedy the "media circus" created by a press aggressively pursuing its First Amendment rights.[100]

3. Irvin v. Dowd

Just two years later, the Supreme Court handed down the opinion in *Irvin v. Dowd*,[101] a case in which the defendant appealed his murder conviction and sentence of death, claiming a violation of the Fourteenth Amendment.[102] The police had arrested the defendant for six murders committed near a small Indiana community.[103] Shortly after the arrest, the county prosecutor released a press report stating that the defendant had confessed to the murders.[104] Local papers publicized the murders, arrest, and confession for the six months prior to the trial.[105] In response, the trial court granted a

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97. *See id.* at 312. One of the articles identified the defendant, Howard R. Marshall, as the man who acted as the "doctor" for country singer Hank Williams, prescribing "restricted drugs" for the singer prior to his death. *See id.*

98. *See id.* at 312-13.

99. *See id.* The Court limited its holding in *Marshall*, however, by stating that it had reversed Marshall's conviction "expressly '[i]n the exercise of [its] supervisory power to formulate and apply proper standards for enforcement of the criminal law in federal courts,' and not as a matter of constitutional compulsion." Murphy v. Florida, 421 U.S. 794, 797 (1975) (quoting *Marshall*, 360 U.S. at 313). "In the face of so clear a statement, it cannot be maintained that *Marshall* was a constitutional ruling now applicable, through the Fourteenth Amendment, to the States. . . . We cannot agree that *Marshall* has any application beyond the federal courts." *Id.* at 797-98.

100. *See* Sheppard v. Maxwell, 384 U.S. 333, 358 (1966) (reversing murder conviction because of "carnival atmosphere at trial" created by trial judge's accommodation of media's excesses); Estes v. Texas, 381 U.S. 532, 550-52 (1965) (reversing conviction because live broadcasting of two days of pretrial hearings to more than 100,000 viewers and potential jurors violated constitutional guarantees of fair trial); Rideau v. Louisiana, 373 U.S. 723, 726-27 (1963) (reversing murder conviction and death sentence because of pretrial televising of police station "interview" in which defendant confessed to bank robbery, kidnapping, and murder).

101. 366 U.S. 717 (1961).

102. *See* Irvin v. Dowd, 153 F. Supp. 531 (N.D. Ind. 1957), *aff'd*, 251 F.2d 548 (7th Cir.), *rev'd*, 359 U.S. 948 (1958), *remanded for reconsideration*, 271 F.2d 552 (7th Cir. 1959), *vacated*, 366 U.S. 717 (1961).

103. *See Irvin*, 366 U.S. at 725.

104. *See Irvin*, 359 U.S. at 396-97.

105. *See Irvin*, 366 U.S. at 725-26. The media thoroughly detailed the defendant's criminal history, including references to offenses committed as a juvenile. *See id.* at 725. The stories

change of venue—but only to the neighboring county.[106] Three further motions for another change of venue, as well as eight motions for continuances, were denied.[107]

In vacating the conviction and remanding the case,[108] the Supreme Court acknowledged that a juror need not be totally ignorant of the facts and issues involved, but that a juror is sufficiently impartial if he can "lay aside his impression or opinion and render a verdict based on the evidence presented in court."[109] Quoting Lord Coke, the court stated that "a juror must be as 'indifferent as he stands unsworne,'"[110] and held that the proper inquiry is whether the "nature and strength of the opinion formed"[111] is such that the actual existence of partiality can be presumed.[112]

Noting that "a barrage of newspaper headlines, articles, cartoons, and pictures was unleashed"[113] against the defendant during the months preceding the trial, the Court found that the community reflected "'a pattern of deep and bitter prejudice'"[114] against the defendant. A searching examination of the voir dire showed that ninety percent of the 430-person venire entertained an opinion that the defendant was guilty,[115] and that eight of the twelve jurors finally seated thought that the defendant was guilty, with some admitting that it would take evidence to overcome their opinion.[116] The Court concluded that under these circumstances a finding of impartiality would not meet constitutional standards.[117]

4. Rideau v. Louisiana

In 1963, the Supreme Court, impatient with permissive trial judges and an exploitative media,[118] departed significantly from its prior requirement that a defendant show actual prejudice before succeed-

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provided step-by-step accounts of his police line-up identification, lie detector test, and ultimate confession to the slayings. *See id.* On the day before the trial, the newspapers reported that the defendant admitted to the murders of six people. *See id.* at 726.

106. *See Irvin*, 359 U.S. at 397.

107. *See id.* at 398.

108. *See Irvin*, 366 U.S. at 729.

109. *Id.* at 723 (citing Holt v. United States, 218 U.S. 245, 248 (1910); Spies v. Illinois, 123 U.S. 131, 133 (1887); Reynolds v. United States, 98 U.S. 145, 157 (1878)).

110. *Irvin*, 366 U.S. at 722 (quoting language of Lord Coke).

111. *Id.* at 723 (citing *Reynolds*, 98 U.S. at 156).

112. *See id.*

113. *Id.* at 725.

114. *Id.* at 727.

115. *See id.*

116. *See id.* at 727-28.

117. *See id.*

118. *See* Rideau v. Louisiana, 373 U.S. 723, 726-27 (1963) (denigrating media for trying defendant in press and for turning trial into "kangaroo court proceedings").

ing on a Sixth Amendment claim,[119] and adopted the implied rationale of *Marshall*,[120] which allowed for reversal in the face of presumed prejudice.[121] The defendant in *Rideau v. Lousiana*[122] was arrested for robbing a bank, kidnapping three bank employees, and killing one of them.[123] Following the arrest, the parish sheriff filmed an "interview" in which the defendant confessed to the crimes.[124] During the next three days, television stations broadcast the film, which was seen by approximately 97,000 of the parish's 150,000 residents.[125] The trial judge refused a motion for change of venue, and the jury quickly convicted the defendant and sentenced him to death.[126]

The Supreme Court did not conduct a detailed examination of the voir dire transcript and held that the denial of the change of venue request violated due process.[127] The Court held that the possibility that some of the jurors had seen the televised confession was enough to create a presumption of juror bias because the trial judge did not take the remedial action of granting the change of venue.[128] This loosened standard of presumed prejudice became the theory upon which appeals were based during the following decade.[129]

The dissenters in *Rideau* agreed "that one is deprived of due process of law when he is tried in an environment so permeated with hostility that judicial proceedings can be 'but a hollow formality.'"[130] They did not agree with the majority's application of presumed prejudice, however, and would have affirmed the conviction because

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119. *See* Stroble v. California, 343 U.S. 181, 195 (1952) (stating that mere assertion of unfair trial, without any affidavits to prove jurors actually were prejudiced by pretrial newspaper stories, is insufficient claim of due process violation).

120. 360 U.S. 310 (1959).

121. *See Rideau*, 373 U.S. at 727 (impliedly following decision in *Marshall*, whereby presumed prejudice warrants reversal).

122. 373 U.S. 723 (1963).

123. *See Rideau*, 373 U.S. at 723-24.

124. *See id.* at 724. The "interview" between the defendant and the sheriff was taped and parts were replayed on television.

125. *See id.*

126. *See id.* at 724-25.

127. *See id.* at 728.

128. *See id.*

129. *See, e.g.*, United States v. Macino, 468 F.2d 750, 752 (7th Cir. 1973) (stating that "prejudice . . . must, at some point, be presumed to result from an inordinate delay in bringing a defendant to trial"); United States v. DeTienne, 468 F.2d 151, 156 (7th Cir. 1972) (determining that 19-month post-indictment delay in prosecution gave rise to certain amount of presumed prejudice); United States v. Canty, 469 F.2d 114, 125 (D.C. Cir. 1972) ("One significant form of prejudice is the prolonged detention which can be imposed on a defendant . . . .").

130. *Rideau*, 373 U.S. at 729 (Clark, J., dissenting). The dissent justified the result in *Irvin* by noting that the voir dire record demonstrated "the complete permeation, imbedding opinions of guilt in the minds of 90% of the veniremen and two-thirds of the actual jury." *Id.* at 731 (citing Irvin v. Dowd, 366 U.S. 717 (1961)).

the record did not show that publicity actually infected the trial.[131] Without proof of "any substantial nexus" between the publicity and the trial, the dissenters argued, the majority's inference failed for lack of support.[132]

5. Estes v. Texas

Two years later, the Supreme Court again approached the issue of pretrial publicity in *Estes v. Texas*.[133] In a 5-4 decision,[134] the Court held that the televising of a defendant's pretrial and trial proceedings was sufficient to warrant reversal on grounds that such publicity violated the defendant's due process rights.[135] The majority took great care to establish authority for the doctrine that a due process violation does not require the showing of actual, identifiable prejudice, but could be presumed from the procedures employed by the state during the adjudicative process.[136]

Acknowledging that deprivation of due process requires, in most cases, a showing of identifiable prejudice to the accused, the Court found that "at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process."[137] The Court listed four ways in which

131. *See id.* at 729 (Clark, J., dissenting).

132. *See id.* (Clark, J., dissenting).

133. 381 U.S. 532 (1965).

134. *See* Estes v. Texas, 381 U.S. 532, 532 (1965). Justices Stewart, Black, Brennan, and White dissented.

135. *See id.* at 542-44. Sixteen years later, the Supreme Court clarified that *Estes* does not mandate a per se ban on television coverage. *See* Chandler v. Florida, 449 U.S. 560, 582 (1981). The Court held that states are free to allow television coverage if the trial court recognizes no threat to the fairness of the trial. *See id.*

136. *See Estes*, 381 U.S. at 541-44. The Court stated that "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.'" *Id.* at 543 (quoting *In re* Murchison, 349 U.S. 133, 136 (1955)). In addition, the Court stated that "[e]very procedure which . . . might lead [the average person] not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law." *See id.* (citing Tumey v. Ohio, 273 U.S. 510, 523 (1927)); *see, e.g.*, Sheppard v. Maxwell, 384 U.S. 333, 352, 353-54 (1966) (explaining probability of prejudice from "totality of circumstances" when (1) defendant is not granted change of venue away from heated publicity; (2) judge has not sequestered jury; (3) anonymous letters are sent to prospective jurors; (4) charges and countercharges are aired in media; and (5) three-day inquest examination of defendant without counsel was aired live on television before trial); Turner v. Louisiana, 379 U.S. 466, 473 (1965) (discussing "extreme prejudice inherent" in allowing deputies, who were key prosecution witnesses, to drive jurors to meals and lodgings during trial); *Rideau*, 373 U.S. at 727 (finding refusal to grant request for change of venue after local community has been affected by repeated exposure to accused's television confession denial of due process); *cf.* Gideon v. Wainwright, 372 U.S. 335, 342 (1963) (holding that right of indigent defendant to counsel in criminal trial is fundamental right); White v. Maryland, 373 U.S. 59, 60 (1963) (finding that absence of counsel when entering plea before court is violation of Fourteenth Amendment).

137. *Estes*, 381 U.S. at 542-43.

allowing the televising of court proceedings would cause unfairness to the accused.[138] These include the potential negative impact on jurors, witness testimony, judicial responsibility, and the defendant himself.[139]

6. Sheppard v. Maxwell

The doctrine of presumed prejudice reached its zenith in the nationally notorious trial of *Sheppard v. Maxwell*.[140] The case arose when Marilyn Sheppard, Dr. Sam Sheppard's pregnant wife, was brutally bludgeoned to death in their home.[141] From the outset, the investigation focused on Dr. Sheppard.[142] The media leaped on the story, demanding action against Dr. Sheppard, who professed his innocence throughout.[143]

Sensationalist headlines announced that Sheppard refused to take a lie-detector test and that his family was throwing a "protective ring" around him.[144] These headlines repeatedly stressed Sheppard's lack of cooperation with the police and demanded that he confess.[145] Stories stated that the police had cleared other suspects after they had passed lie-detector tests and urged that Sheppard be arrested.[146]

Upon a search of the house by the police, the county coroner told his men that "it is evident that the doctor did this, so let's go get the confession out of him."[147] He then interrogated Sheppard, who was under sedation, in his hospital room.[148] On the day of Mrs. Sheppard's funeral, the future chief prosecutor of the case was quoted

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138. *See id.* at 545-50. The dissent argued that *Estes* involved a different problem than that presented in *Rideau* because in *Estes* the Court refused to review petitioner's claim that pretrial publicity had a prejudicial effect on the jurors and because the issue on appeal was whether the Fourteenth Amendment prohibited television and still cameras from criminal trials. *See id.* at 610, 614 (Stewart, J., dissenting) (citing *Rideau*, 373 U.S. at 723). The dissent also noted that the jurors themselves never saw the broadcasts of the trial, and were sequestered from anyone who had seen the broadcasts. *See id.* at 613 (Stewart, J., dissenting).

139. *See id.* at 545-50. Televising court proceedings may cause jurors to be affected by community pressure, preoccupation with television rather than testimony, and criticism from friends and relatives. *See id.* at 545-48. Witnesses conscious of being viewed by a vast audience may become frightened, cocky, embarrassed, or given to overstatement. *See id.* at 547. Elected judges utilize the trial as a political weapon to enhance their chances of re-election. *See id.* at 548. The defendant may be mentally harassed knowing that the trial is televised. *See id.* at 549.

140. 384 U.S. 333 (1966).

141. *See Sheppard*, 384 U.S. at 335.

142. *See id.* at 337.

143. *See id.* at 340.

144. *See id.* at 338.

145. *See id.* at 338-42.

146. *See id.* at 341.

147. *Id.* at 335.

148. *See id.* at 338.

criticizing Sheppard's lack of cooperation with the police.[149] The coroner later held a public "inquest" at which he questioned Sheppard.[150] Sheppard's lawyers were not allowed to participate and were, in fact, thrown out by the coroner to "cheers, hugs and kisses from the ladies in the audience."[151] The newspapers began speculating on rumors of Sheppard's extramarital affairs.[152] He then was arrested.[153]

The publicity, which grew in intensity throughout Sheppard's indictment and trial, was encouraged, no doubt, by the trial judge who was up for re-election.[154] The judge reserved most of the courtroom for the press, including a table that ran the width of the courtroom inside the bar railing.[155] The media used all of the rooms on the courtroom floor, broadcasting newscasts from them throughout the trial.[156] Reporters continuously photographed witnesses, counsel, and jurors, and published the pictures.[157] News media movement in and out of the courtroom caused so much commotion that the jury often could not hear witnesses testify.[158] Reporters eavesdropped on conversations between Sheppard and his lawyer and reported the conversations in papers accessible to the jury.[159] The jury, not surprisingly, convicted Sheppard.[160]

The Supreme Court listed nine episodes of "flagrant" judicially encouraged press abuses in an 8-1 decision[161] reversing Sheppard's conviction and remanding the case for a new trial.[162] Noting that "'[l]egal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper,'"[163] the Court followed the totality of the circumstances approach used in *Estes* and *Rideau*, and presumed a reasonable likelihood of prejudice resulting from the extensive publicity without requiring a showing that prejudice actually

149. *See id.*
150. *See id.* at 339.
151. *Id.* at 340.
152. *See id.* at 340.
153. *See id.* at 341.
154. *See id.* at 342 (stating that case came to trial two weeks before November general election in which chief prosecutor was candidate for common pleas judge and trial judge was up for re-election).
155. *See id.* at 343.
156. *See id.*
157. *See id.* at 343-44.
158. *See id.* at 344.
159. *See id.*
160. *See id.* at 335.
161. *See id.* at 345-49. Three of the dissenting Justices in *Estes* voted with the majority in *Sheppard*.
162. *See id.*
163. *Id.* at 350 (quoting Bridges v. California, 314 U.S. 252, 271 (1941)).

existed.[164] The Court concluded that the real cure is to prevent any prejudicial influence by taking steps, through rule and regulation, to protect the processes from outside interference.[165] In other words, the taint of prejudicial publicity could have been avoided or removed if the trial court had taken certain measures. As the trial court did not do so, the Court presumed the jury was prejudiced against Sheppard.

C. The Current Approach

1. Murphy v. Florida

Estes and *Sheppard* indicated a willingness by the Supreme Court to reverse convictions in the event of sensationalist publicity, which, because of its inflammatory nature and extensive scope, led to a presumption of unfairness in the trial process.[166] In 1975, the Court, apparently less willing to presume prejudice than in the past, modified its analysis in *Murphy v. Florida*.[167] In *Murphy*, the defendant was convicted in state court of assault with the intent to commit robbery and breaking and entering of a home with intent to commit robbery.[168] On appeal, he contended that he was denied a fair trial because jurors had learned, from news accounts, of his prior felony convictions.[169] The defendant was notorious, having played a role in the 1964 theft of the Star of India sapphire from a museum in New

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164. *See id.* at 351-52; *see also* Estes v. Texas, 381 U.S. 532, 538-44 (1965) (finding that defendant's due process rights were violated by high degree of pretrial publicity despite fact that no isolated prejudice could be demonstrated); Rideau v. Louisiana, 373 U.S. 723, 723-26 (1963) (finding that defendant's due process rights were violated because trial court refused to change venue even after local community opinion was prejudiced due to repeated and in-depth exposure to spectacle of defendant's confession to crimes). The totality of the circumstances test is derived from the Supreme Court's opinion in *Irvin v. Dowd*, 366 U.S. 717 (1961). In *Irvin*, the Court defined the totality of the circumstances test as consisting of three parts: (1) an examination of the voir dire for juror hostility; (2) an examination of the general atmosphere surrounding the courtroom at the time of the trial; and (3) an examination of the length to which the trial court must go to obtain impartial jurors. *See id.* at 720-25.

165. *See Sheppard*, 384 U.S. at 363. Noting that "[t]he [trial] court's fundamental error is compounded by the holding that it lacked power to control the publicity about the trial," the Court listed seven remedies that would have guaranteed a fair trial: (1) limiting the presence of the press at judicial proceedings when it is apparent that the accused might otherwise be prejudiced; (2) insulating the witnesses from the press; (3) exercising control over the release of leads, information, and gossip to the press by police, witnesses, and counsel; (4) continuing the case when there is a reasonable likelihood that prejudicial news prior to the trial will prevent a fair trial; (5) changing the venue to a county not so permeated with publicity; (6) sequestering the jury; and (7) ordering a new trial if it is apparent that the accused cannot get a fair trial. *See id.* at 357-59, 363.

166. *See supra* note 164 and accompanying text.

167. 421 U.S. 794 (1975).

168. *See* Murphy v. Florida, 421 U.S. 794, 795 (1975).

169. *See id.* at 795.

York.[170] He also had been indicted for murder and for the interstate transportation of stolen securities.[171] His flamboyant lifestyle made him a media favorite; the press nicknamed him "Murph the Surf."[172]

Murphy's trial drew extensive media coverage, and the press reported on all of his previous "trials and tribulations."[173] The voir dire indicated that some of the jurors knew of his past convictions from press accounts, and one juror admitted that he might be predisposed to find against the defendant.[174] The jury convicted Murphy, and the Supreme Court upheld the conviction despite *Marshall*'s implication that juror exposure to unduly prejudicial information raises a presumption of juror bias.[175]

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170. *See id.*

171. *See id.* at 796.

172. *See id.* at 795. Defendant's nickname originated from fact that he once won a Florida state surfing championship and later started a surfboard company. *See* Jay Horning, *Murph the Surf Finds Salvation*, ST. PETERSBURG TIMES, Dec. 27, 1992, at 4A.

173. *Murphy*, 421 U.S. at 796.

174. *See id.* at 800-02. During voir dire, the following exchange occurred between defense counsel and a juror:

> Q. Now, when you go into that jury room and you decide upon Murphy's guilt or innocence, you are going to take into account [the] fact that he is a convicted murderer; aren't you?
>
> A. Not if we are listening to the case, I wouldn't.
>
> Q. But you know about it?
>
> A. How can you not know about it?
>
> Q. Fine, thank you.
>
> When you go into the jury room, the fact that he is a convicted murderer, that is going to influence your verdict; is it not?
>
> A. We are not trying him for murder.
>
> Q. The fact that he is a convicted murderer and jewel thief, that would influence your verdict?
>
> A. I didn't know he was a convicted jewel thief.
>
> Q. Oh, I see.
>
> I am sorry I put words in your mouth.
>
> Now, sir, after two or three weeks if being locked up in a downtown hotel, as the Court determines, and after hearing the state's case, and after hearing no case on behalf of Murphy, and hearing no testimony from Murphy saying, "I am innocent, Mr. (juror's name),"—when you go into the jury room, sir, all these facts are going to influence your verdict?
>
> A. I imagine it would be.
>
> Q. And in fact, you are saying if Murphy didn't testify, and if he doesn't offer evidence, "My experience of him is such that right now I would find him guilty."
>
> A. I believe so.

Id. at 801-02 n.5.

175. *See id.* at 798; Marshall v. United States, 360 U.S. 310, 312-13 (1959). The Court did not decide *Marshall* on constitutional grounds, but based its holding on "the exercise of [its] supervisory power to formulate and apply proper standards for enforcement of the criminal law in the federal courts." *Marshall*, 360 U.S. at 313; *see also* McNabb v. United States, 318 U.S. 332, 339-40 (1943) (emphasizing need for violation of fundamental right to reverse conviction); Bruno v. United States, 308 U.S. 287, 293-94 (1939) (articulating that technical errors, defects, or exceptions that do not affect substantive rights should be disregarded). Interestingly, Chief Justice Burger, in his concurrence in *Murphy*, agreed "that the circumstances of petitioner's trial

The Court, in formulating a new two-part test, interpreted the *Irvin*, *Rideau*, *Estes*, and *Sheppard* line of cases.[176] In the first part of the test, the Court found that prejudice will be presumed "where there is an apparent and flagrant departure from fundamental due process and decorum and an intrusion of external influences."[177] In both *Estes* and *Sheppard* the Court allowed uncontrolled media access to the entire trial process, including access to the courtroom itself.[178] The press' unconstrained activities and sensationalist conduct made those trials, and any subsequent court proceedings in those saturated communities, "but a hollow formality."[179] In both *Irvin* and *Rideau*, the press repeatedly published the accused's confessions, creating a presumption of jury bias.[180] In all four cases, the press' lack of restraint gave the trials a carnival feeling, dooming the defendants from the beginning.[181]

Holding that Murphy's trial did comport with restraint and judicial control over external influences enough to raise the presumption of impartiality,[182] the Court then looked to the second part of the test: whether there were "any indications in the totality of [the] circum-

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did not rise to the level of a violation of the Due Process Clause of the Fourteenth Amendment, [but] I would not hesitate to reverse petitioner's conviction in the exercise of our supervisory powers, were this a federal case." *Murphy*, 421 U.S. at 804 (Burger, C.J., concurring).

176. *See Murphy*, 421 U.S. at 797-99.

177. People v. Manson, 132 Cal. Rptr. 265, 315 (App. Dep't Super. Ct. 1976). With respect to *Irvin*, *Rideau*, *Estes*, and *Sheppard*, the Court in *Murphy* stated:

> The proceedings in these cases were entirely lacking in the solemnity and sobriety to which a defendant is entitled in a system that subscribes to any notion of fairness and rejects the verdict of a mob. They cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process.

Murphy, 421 U.S. at 799; *see also* Goldsmith, *supra* note 164, at 297-98 (discussing *Murphy* as retreat from opinions of 1960s that were more harsh on press and more lenient on defendant, and suggesting that pretrial prejudice will not be presumed in state cases unless outrageous facts are presented).

178. In reviewing the *Estes* trial, the Supreme Court wryly noted that as the defendant's counsel argued that cameras should be excluded from the courtroom, a photographer wandered behind the bench and "snapped his picture." Estes v. Texas, 381 U.S. 532, 536 (1965). In *Sheppard*, the Court found "that bedlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom, hounding most of the participants in the trial, especially Sheppard." Sheppard v. Maxwell, 384 U.S. 333, 335 (1966).

179. *See* Rideau v. Louisiana, 373 U.S. 723, 726 (1963) (describing *Estes* and *Sheppard* trials).

180. *See id.* at 724 (admitting into evidence 20-minute film of Rideau's confession that had been broadcast three times to roughly 50,000 people in local community); Irvin v. Dowd, 366 U.S. 717, 728 (1961) (acknowledging that two-thirds of jurors were of opinion that defendant was guilty and that those beliefs were based on knowledge of previous murders).

181. *See* State v. Sheppard, 135 N.E.2d 340, 342 (Ohio 1956). "Throughout the preindictment investigation, the subsequent legal skirmishes and the nine-week trial, circulation-conscious editors catered to the insatiable interest of the American public in the bizarre. . . . In this atmosphere of a 'Roman holiday' for the news media, Sam Sheppard stood trial for his life." *Id.*

182. *See Murphy*, 421 U.S. at 799.

stances that petitioner's trial was not fundamentally fair."[183] The Court examined the circumstances of the trial to determine if any "indicia of impartiality" existed that would indicate impermissible jury prejudice.[184]

The Court first noted that juror impartiality did not demand juror ignorance of the facts and issues.[185] Rather, if a juror could put aside any personal impressions or opinions and render a verdict based on evidence presented in court, the juror could be considered impartial.[186] In particular, the Court: (1) examined the voir dire record, searching for juror hostility; (2) considered the atmosphere of the community at the time of the trial; and (3) considered the length to which the trial court had to go to select impartial jurors.[187] Accordingly, although the jurors had been exposed to possibly prejudicial publicity about the defendant, the Court found them sufficiently impartial to fulfill the task.[188] The lone dissent in *Murphy* highlighted the Court's apparent shift away from a willingness to reverse convictions by noting that four of the seated jurors explicitly indicated that they would hold against the defendant his past convictions, which the jurors had learned of through press accounts against him.[189]

2. Patton v. Yount

In 1984, the Court again signaled its hesitance to reverse convictions possibly tainted with pretrial publicity. In *Patton v. Yount*[190] the Court accepted the *Irvin* premise that intense adverse publicity can create such a presumption of prejudice in a trial that a juror's claim of impartiality should not be believed.[191] The Court, however, focused its analysis on the premise that a trial court's finding of juror

183. *Id.*
184. *See id.* at 802.
185. *See id.* at 799-800.
186. *See id.* at 800 (citing Irvin v. Dowd, 366 U.S. 717, 723 (1961)). "We must distinguish between mere familiarity with petitioner . . . and an actual predisposition against him. To ignore the real differences in the potential for prejudice would not advance the cause of fundamental fairness, but only make impossible the timely prosecution of persons who are well known in the community . . . ." *Id.* at 801 n.4.
187. *See id.* at 802-03.
188. *See id.* at 803; *see also* People v. Manson, 132 Cal. Rptr. 265, 316-18 (App. Dep't Super. Ct. 1976) (failing to find any appreciable hostility in voir dire when less than one-fourth of potential jurors admitted to any disqualifying prejudices).
189. *Murphy*, 421 U.S. at 804-08 (Brennan, J., dissenting).
190. 467 U.S. 1025 (1984).
191. *See* Patton v. Yount, 467 U.S. 1025, 1031 (1984); *see also Irvin*, 366 U.S. at 728 (stating that although "each juror was sincere when he said that he would be fair and impartial to petitioner . . . such a statement of impartiality can be given little weight").

impartiality could be overturned only when there was manifest error,[192] a very difficult standard for a defendant to meet.

The Pennsylvania Supreme Court had remanded the defendant's conviction for a second trial after finding that his confession had been secured improperly.[193] The Pennsylvania Supreme Court then found, after a second conviction, that the publicity between the first trial and the second trial had subsided significantly.[194] On appeal, the United States Supreme Court found that the passage of time between the two trials had a softening effect on the community, allowing the inflamed public passion to cool.[195] The Court held that this passage of time rebutted any presumption of bias and found that there was abundant support for the trial court's conclusion that publicity had little effect on the second trial.[196] The Court also found that the question of whether jurors have disqualifying opinions is a question of fact, and that the trial court's findings of impartiality were thus afforded a presumption of correctness under 28 U.S.C. § 2254(d).[197]

The dissent, focusing on the nature of the voir dire, noted that publicity had reached all but one of the twelve jurors as well as two of the alternates who eventually were impaneled.[198] One of the seated jurors and two of the alternates testified that they had opinions that

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192. *See Patton*, 467 U.S. at 1031, 1035; *see also* Reynolds v. United States, 98 U.S. 145, 156 (1878) (finding manifest error when after consideration of all evidence, it was clear that juror formed opinion that could not, in law, be deemed impartial).

193. *See* Commonwealth v. Yount, 256 A.2d 464, 466 (Pa. 1969).

194. *See* Commonwealth v. Yount, 314 A.2d 242, 247-48 (Pa. 1974).

195. *Patton*, 467 U.S. at 1032-34. Adverse publicity and community outrage were at their height prior to Yount's first trial in 1966. *See id.* at 1032. Jury selection for Yount's second trial occurred four years later in 1970. *See id.*

196. *See id.* at 1035.

197. *See id.* at 1036-37. In a federal habeas corpus case in which the partiality of an individual juror is at issue, the question is not one of mixed law and fact, but rather one of historical fact: "Did a juror swear that he could set aside any opinion he might hold and decide the case on the evidence, and should the juror's protestation of impartiality have been believed." *Id.* at 1036. The federal habeas corpus statute creates a presumption of correctness in a trial court's finding of juror impartiality. *See* 28 U.S.C. § 2254(d) (1994). The presumption may be overcome if the appellant can establish by convincing evidence in a federal court evidentiary hearing that the factual determination by the state court was erroneous and "not fairly supported by the record." *Id.* § 2254(d)(8). Reasons for this presumption of correctness include respecting the extended voir dire proceedings designed specifically to identify biased venirement and trusting the trial judge's judgment regarding the demeanor of prospective jurors. *See Patton*, 467 U.S. at 1038. *But cf.* Groppi v. Wisconsin, 400 U.S. 505, 508 (1971) (holding that state law, which prevents change of venue for jury trial in criminal case, regardless of extent of local prejudice against defendant, violates right to impartial jury guaranteed by Fourteenth Amendment); Sheppard v. Maxwell, 384 U.S. 333, 362 (1966) (asserting that appellate courts have duty to make independent examination of circumstances in light of pervasiveness of modern communications and difficulty of effacing prejudicial publicity from jurors' minds).

198. *See Patton*, 467 U.S. at 1040 (Stevens, J., dissenting).

would change only if the defendant could convince them to do so.[199] Five other jurors stated that they had opinions, but that they would not carry them into the jury box.[200]

II. CRITIQUE OF THE CURRENT TEST

The Supreme Court, by applying a totality of the circumstances test to judge the merits of a petitioner's claim of a biased jury, has recognized the difficulties inherent in managing pretrial publicity. The most effective way to ensure an unbiased jury is through complete closure to the press and public. Of course, our common-law history provides for public criminal trials as a method of government accountability, and the presumption of openness now is a constitutional guarantee.[201] Closely related is the inevitable clash between the First Amendment and the Sixth Amendment whenever pretrial publicity becomes an issue.[202] With neither Amendment reigning supreme, courts must satisfy the often opposing interests each amendment protects.[203] Significantly, the Sixth Amendment requires impartial jurors, not ignorant jurors,[204] thus accepting that jurors might know inadmissible or irrelevant facts and issues at trial.[205] Finally, publicity is itself an insidious phenomenon because

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199. *See id.* at 1045-47 (Stevens, J., dissenting).

200. *See id.* (Stevens, J., dissenting).

201. *See* U.S. CONST. amend. VI. The Sixth Amendment states: "In all criminal prosecutions, the accused shall enjoy the right to a public trial . . . ." *Id.*; *see* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 603-07 (1982) (finding that right of public access to criminal trials is protected by First Amendment to help ensure proper functioning of judicial process and government as whole, but that government may limit access by showing narrowly tailored compelling governmental interest); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 573 (1980) (concluding that presumption of openness to public to attend trial is inherent in nature of criminal trial system and in First and Fourteenth Amendments unless some other overriding consideration requires closure); *see also Sheppard*, 384 U.S. at 349-50 (enunciating principle that American courts long have distrusted trials conducted behind wall of secrecy). *But see* Press Enter. Co. v. Superior Court, 464 U.S. 501, 510 (1984) ("The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.").

202. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 539 (1976) (holding it unnecessary to establish priority between First and Sixth Amendment rights to fair trial in all circumstances, but noting that protection against prior restraint should have particular force when applied to criminal case reporting); *see also* New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (holding that government had not met its heavy burden of showing justification for prior restraint to restrict publication of excerpts of study of Vietnam War and Pentagon Papers).

203. *See supra* notes 201 and 202 (citing cases showing conflict arising between First and Sixth Amendments when pretrial publicity becomes issue).

204. *See* U.S. CONST. amend. VI ("[T]he accused shall enjoy the right to a . . . public trial, by an impartial jury . . . .").

205. *See* Patton v. Yount, 467 U.S. 1025, 1035 (1984) (concluding that relevant question is not juror memory of case, but whether jurors have fixed opinions preventing impartial judgment); Murphy v. Florida, 421 U.S. 794, 799-800 (1975) (holding that jurors need not be totally ignorant of facts and issues at trial); Rideau v. Louisiana, 373 U.S. 723, 733 (1963)

it spreads rapidly and often creates unrealized biases in those exposed.[206]

Jurors who may believe themselves to be unaffected by pretrial publicity may be mistaken. Although the empirical research still is limited, it appears that jurors who are exposed to factual pretrial publicity are significantly more likely to convict a defendant than those not exposed when there has been no delay between the exposure and the trial.[207] In addition, judicial admonitions appear to have no real effect on jury verdicts.[208] The reality is that even judges find it difficult to mark the degree to which a potential juror's opinions are fixed as a result of pretrial publicity.[209]

The competing constitutional interests and the necessarily fact-specific inquiry into a juror's possible bias makes a totality of the circumstances test attractive. Such an approach gives the trial judge great discretion in administering justice by allowing him to tailor a fact-specific "fair result."[210] Increasing a judge's independence, however, likely will result in diminished uniformity in the law.[211] Equal treatment under the law thus suffers, predictable results become uncertain, and judicial restraint, a hallmark in a democratic system subject to the "rule of laws," is ignored.[212]

The "totality of the circumstances" test presumes that the law will develop case-by-case. The Supreme Court, in accepting some facts as dispositive while rejecting others in specific factual settings, has moved toward a fully articulated "form" of law.[213] This approach, however,

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(stating that jurors' claims that they can discount influence of external factors should not be easily discarded); Irvin v. Dowd, 366 U.S. 717, 723 (1961) (noting that to require juror ignorance would be to establish "impossible standard").

206. Although the empirical research on the subject is limited, studies strongly suggest that prejudicial pretrial publicity affects juror verdicts and is not cured by current voir dire techniques or by challenges. Thus, judicial confidence in those techniques might be unfounded. *See* Norbert L. Kerr et al., *On the Effectiveness of Voir Dire in Criminal Cases with Prejudicial Pretrial Publicity: An Empirical Study*, 40 AM. U. L. REV. 665, 695 (1991) (noting that effects of pretrial publicity survive exclusion of jurors who admit difficulty in disregarding publicity); Stanley Sue et al., *Authoritarianism, Pretrial Publicity, and Awareness of Bias in Simulated Jurors*, 37 PSYCHOL. REP. 1299, 1299-1300 (1975) (finding that in experiment examining influence of pretrial publicity on ability of individuals to disqualify themselves for being biased, results indicated, after omitting self-excusals, that jurors who were exposed to prejudicial publicity were more likely to convict than those not exposed).

207. *See* Kerr et al., *supra* note 206, at 675.

208. *See id.*

209. *See* Yount v. Patton, 710 F.2d 956, 972 (3d Cir. 1983), *rev'd*, 467 U.S. 1025 (1984).

210. *See* Scalia, *supra* note 28, at 1176 (contrasting manner in which Louis IX of France and King Solomon dispensed case-by-case justice using their personal discretion with writings of Thomas Paine and Aristotle, who espoused "general rule of law").

211. *See id.* at 1179.

212. *See id.*

213. *See id.* at 1178 (determining that common-law approach is "ill suited to our legal system because the idyllic notion of 'the court' gradually closing in on a fully articulated rule of law by

ignores the reality that the Court visits a particular issue infrequently, resulting in long periods of silence between Court clarifications.[214]

The *Murphy/Patton* approach gives the widest discretion to trial courts to develop remedial measures. In reviewing the trial court's exercise of discretion, the appellate court examines the atmosphere of the trial for any presumed due process violations and for indicia of impartiality in the venire process.[215] However, this approach provides little guidance for future trial courts to apply; the appellate court simply compares the current factual situation on review with past factual situations to determine if there is a close enough fit between the two to warrant a similar result.[216] Such an approach is necessarily backward looking, yet pretrial publicity requires that trial judges employ proactive measures to combat it. Just as a person cannot avoid being assaulted by running away after getting punched, once prejudicial publicity is in the community, the punch is thrown. The current approach allows trial courts to use whatever techniques they may choose, in hopes that, on review, they got it right. Appellate court review of many cases in the aggregate may provide clarification, but it may provide an unwanted (and unnecessary) result of reversals as well.[217]

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deciding one discrete fact situation after another until (by process of elimination, as it were) the truly *operative* facts become apparent").

214. The Supreme Court generally hears approximately one-twentieth of one percent of all the cases decided by the federal district courts and less than one-half of one percent of all cases decided by the federal courts of appeal. *See id.* at 1179. In light of this statistic, a standards-based approach that examines the specific facts of each case, cannot lead to an effective articulation of the law that is meaningful. *See id.* at 1179.

215. *See supra* notes 177-89 and accompanying text (noting that impartiality was not found in voir dire process after analyzing voir dire transcript using *Murphy* totality of circumstances test, and that jury as whole in *Patton* was impartial because prejudicial publicity was greatly diminished in second trial that transpired four years later).

216. *See* Murphy v. Florida, 421 U.S. 794, 797-99 (1975) (comparing fact pattern with four other cases: Sheppard v. Maxwell, 384 U.S. 333 (1966); Estes v. Texas, 381 U.S. 532 (1965); Rideau v. Louisiana, 373 U.S. 723 (1963); Irvin v. Dowd, 366 U.S. 717 (1961)).

217. *See* Scalia, *supra* note 28, at 1179 (noting that when "totality of circumstances" test is used, 13 courts of appeal and 50 state supreme courts, rather than Supreme Court, will decide what standard to use, and this approach will weaken uniformity in law). Justice Scalia suggests that "when an appellate judge comes up with nothing better than a totality of the circumstances test to explain his decision, he is not so much pronouncing the law in the normal sense as engaging in the less exalted function of fact finding." *Id.* at 1180. Accordingly, the resultant product of such a test is of limited utility; although it resolves the question at issue, it has little value for future applications. *See id.* at 1181. Professor Thomas Monaghan argues that there are three aspects in the relationship between law and fact. *See* Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 234 (1985). "Law declaration" yields conclusions about the content of governing legal rules and is general in character. *See id.* at 235. "Fact identification" is case specific and does not implicate legal rules. *See id.* "Law application" relates the legal rule to the facts adduced to give a legal conclusion. *Id.* at 236. Constitutional fact review is the doctrine whereby appellate courts engage in law application of constitutional issues to ensure uniformity in the law. *See id.* at 238. Professor Monaghan argues that the duty of appellate courts is limited to law declaration, and that when law application needs further

Predictability, an essential attribute of law is the major casualty of a totality of the circumstances approach. When the Court utilizes this approach, it becomes difficult to determine which facts may tip the balance.[218] Would the Court have upheld Rideau's conviction if the media had broadcast his confession only once or late at night?[219] Would Estes' conviction, reversed because the trial was televised, be upheld today?[220] What if a defendant does not exercise all of his peremptory challenges during voir dire or fails to request a change of venue—does that indicate an acceptance that the jury is impartial and equate a waiver on review of the fairness issue (even though a defendant cannot waive his right to a fair trial)?[221] Justice is best served when the law is both specific and predictable.[222]

Equal treatment under the law, the goal of the Fourteenth Amendment, suffers without certainty. One state's circus is another state's solemn proceeding. The *Murphy/Patton* approach provides, essentially, that if due process is violated, the trial is unfair.[223] What type of trial behavior constitutes a due process violation, however, is left to the trial judge to decide.[224] A test this wide (in fact, it is so

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clarification, the appellate court's duty is to elaborate the norms, by further declaring the law. *See id.* at 229-39. Norm elaboration thus occurs when the court has the power to consider fully a closely related series of situations involving a claim of constitutional privilege. *See id.* at 273.

218. *See* Scalia, *supra* note 28, at 1180 ("It is no more possible to demonstrate the inconsistency of two opinions based upon a 'totality of the circumstances' test than it is to demonstrate the inconsistency of two jury verdicts.").

219. *See supra* notes 118-32 and accompanying text (describing how Wilbert Rideau's 20-minute confession to bank robbery, kidnapping, and murder was broadcast on television on three separate occasions throughout local community to more than two-thirds of population).

220. *Cf.* Estes v. Texas, 381 U.S. 532, 536-52 (1965) (holding that televising of courtroom proceedings in which there is widespread public interest likely to result in prejudice to accused is violation of fundamental right to fair trial guaranteed by Due Process Clause of Fourteenth Amendment); Douglas E. Mirell, *O.J. Fallout IV: The Wrong Remedy for Solving a Non-Problem*, 1996 WL 87041 (O.J. Comm.) (listing proposed changes to California's rules governing photography, radio, and television coverage of all state court proceedings). *See generally* PAUL THALER, THE WATCHFUL EYE, AMERICAN JUSTICE IN THE AGE OF THE TELEVISED TRIAL (Prager 1994) (giving history of age of televised trial and case study of televised *Steinberg* trial in 1988). Although the law inevitably changes as technology changes or becomes more accepted, a standards-based approach detracts from the predictability of that change by replacing the Rule of Law with the Rule of Change. *See* Scalia, *supra* note 28, at 1187.

221. *See* Stroble v. California, 343 U.S. 181, 193-94 (1952) (upholding defendant's first-degree murder conviction despite failure to request change of venue because public defenders saw no need to transfer action on grounds that prejudicial newspaper accounts made it impossible for fair trial); State v. Smart, 622 A.2d 1197, 1205 (N.H. 1993) (finding defendant satisfied with jury at time of trial, reflected by his failure to exercise all peremptory challenges available).

222. *See Stroble*, 343 U.S. at 201 (Frankfurter, J., dissenting).

223. *See supra* notes 177-89 and accompanying text (discussing *Murphy* and *Patton* as two cases finding due process violation and presumed prejudice when there is apparent and flagrant departure from fundamental due process and decorum and intrusion of extreme influences).

224. *See supra* notes 177-89 and accompanying text (discussing holding in *Murphy* as permitting judge to use supervisory power to decide exactly when jurors' exposure to defendant's prior convictions or to news accounts of alleged crime will constitute violation of constitutional rights and discussing holding in *Patton* as allowing judge to use supervisory power to decide whether

wide it is circular) leads to unequal results within a jurisdiction, and among the jurisdictions.[225] Moreover, standardization is unlikely to occur considering the futility of appeal.[226]

One advantage of a totality of the circumstances test is its flexibility.[227] Such an approach confers the greatest amount of discretion on the trial judge because there is no bright-line rule limiting the application of justice.[228] If a trial judge abuses that discretion, the appellate review process works to cure the apparent arbitrariness, encouraging overall judicial restraint.[229] This argument relies on the availability of judicial review to constrain lower court indiscretions.

The *Murphy/Patton* approach reveals, however, a structural weakness. In *Patton*, the Court held that it would reverse a trial court's finding of impartiality only in the event of plain error on the part of the trial judge.[230] The Court ignored substantial indicators of juror bias apparent in the voir dire record.[231] The Court gave little justification for its analysis.[232] This oversight is strange because the role of the Court under a totality of the circumstances approach is to analyze the specific facts of the case.[233] With no curative review from the higher court, a lower court is not encouraged to exercise judicial restraint,[234] and arbitrariness, therefore, actually is encouraged.[235]

This approach not only fails to restrain the lower courts; it fails to restrain the Supreme Court itself. With no established rule upon which to base its decisions, the Court is less likely to adhere to the governing principles behind the law and more likely to impose arbitrary distinctions.[236] Only by restricting itself with self-imposed

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publicity concerning case had resulted in prejudicial information that could not be eradicated from potential jurors minds).

225. *See* Scalia, *supra* note 28, at 1179 (noting that if every federal and state court were to take "totality of circumstances" approach, there would be very little uniformity in law).

226. *See id.* at 1186 (noting that "totality of circumstances" approach to judicial decision-making allows courts to grant judgment solely on circumstances of case, which will result in opinions that lack guidance and law that lacks standardization).

227. *See id.* at 1177.

228. *See id.*

229. *See id.*

230. *See* Patton v. Yount, 467 U.S. 1025, 1032 (1984).

231. *See id.* at 1031-35.

232. *See id.* at 1035 (citing Murphy v. Florida, 421 U.S. 794 (1975), and Irvin v. Dowd, 366 U.S. 717 (1961), as basis for finding no presumption of partiality or prejudice existing at time of initial trial or between two trials).

233. *See* Scalia, *supra* note 28, at 1180-81.

234. *See id.* at 1179.

235. *See id.* at 1180.

236. *See id.* at 1185.

discipline in the form of a rule can the Court succeed in establishing true rule of law.[237]

A pretrial publicity "rule of law," will have the desired opposite effect—it will provide a structured framework within which the law can develop. Certainty, predictability, and clarity will result, giving appellate courts an intellectually honest standard with which they can evaluate claims of juror bias. Such a rule will moderate potentially harmful exercises of judicial discretion by providing a common guideline within which judges can tailor proactive approaches to pretrial publicity problems.

III. CASE STUDIES: "NATIONALLY NOTORIOUS" TRIALS

A. "Tabloid" Crimes: State v. Smart

On May 1, 1990, Pamela Smart reported to police that she found the dead body of her husband in their home, the apparent victim of a homicide.[238] The young couple had been married for less than a year during which time Pamela Smart had worked at a local high school.[239] As the police investigated, a sordid story came to light. The murderers, high school youths, bragged about committing the murder to a friend, who informed the police.[240] It became evident that Smart had been involved in a sexual relationship with one of the fifteen-year-old killers and had persuaded him to kill her husband.[241] A jury found her guilty of first degree murder, conspiracy to commit murder, and tampering with a witness.[242]

Smart's arrest and trial immediately gained the attention of the national media, which publicized the story at a level unprecedented in New Hampshire's history.[243] Smart appealed her conviction to the New Hampshire Supreme Court, claiming that the trial court erred in not granting her motion for change of venue and in not

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237. *See id.* at 1184-85. Justice Scalia notes:

> Just as that manner of textual exegesis facilitates the formulation of general rules, so does, in the constitutional field, adherence to a more or less originalist theory of construction. . . .
>
> It is, of course, *possible* to establish general rules, no matter what theory of interpretation or construction one employs. . . . But when one does not have a solid textual anchor or an established social norm from which to derive the general rule, its pronouncement appears uncomfortably like legislation.

Id. (footnote omitted).

238. *See* State v. Smart, 622 A.2d 1197, 1200 (N.H. 1993).

239. *See id.*

240. *See id.* at 1201.

241. *See id.* at 1200.

242. *See id.*

243. *See id.* at 1203-04.

ordering a continuance.[244] She based her claim on both the New Hampshire and U.S. Constitutions, arguing that the publicity was so pervasive and prejudicial that it was presumptively impossible to seat an impartial jury.[245]

The New Hampshire Supreme Court affirmed the convictions.[246] The court began its analysis by noting that the Constitution's guarantee of a trial before a fair and impartial jury did not require a trial before a jury ignorant of the facts and issues at trial.[247] The court noted that pretrial publicity can cause presumptive prejudice or actual prejudice.[248] According to the court, presumptive prejudice can be found only when the adverse pretrial publicity is of such a nature that it creates a presumption of prejudice, and accordingly, juror claims of impartiality cannot be believed.[249] The court also stated that a trial court's finding of juror impartiality should be reviewed for manifest error.[250]

The court then analyzed the voir dire transcript and found that no member of the jury had expressed the opinion that Smart was guilty and that no juror sat on the jury over Smart's objection.[251] Another significant problem with Smart's claim concerned the nature of the publicity. The court acknowledged that there was an "avalanche" of pretrial publicity, and that some of it was hostile and accusatory toward Smart, but found that the bulk of the material consisted of "'straightforward, unemotional factual accounts of events.'"[252] The court also rejected Smart's contention that the jury's possible exposure to evidence not presented at trial contaminated it, by holding that "[e]xposure to inadmissible evidence . . . is not sufficient

244. *See id.* at 1202.

245. *See id.*

246. *See id.* at 1216.

247. *See id.* at 1203 (noting that "'it is not required . . . that the jurors be totally ignorant of the facts and issues involved'" (quoting Irvin v. Dowd, 366 U.S. 717, 722 (1961))); *see also* Dobbert v. Florida, 432 U.S. 282, 303 (1977) (stating that "one who is reasonably suspected of murdering [her husband] cannot expect to remain anonymous").

248. *See Smart*, 622 A.2d at 1202-03 (citing Patton v. Yount, 467 U.S. 1025, 1031 (1984)).

249. *See id.*

250. *See id.* at 1203 (citing *Patton*, 467 U.S. at 1031-32). Although the state supreme court applied the holding of *Patton* correctly, its statement of the current test reveals the circular reasoning courts use in their analysis of pretrial publicity. Essentially, the court defined presumptive prejudice as that which is presumptively prejudiced, reasoning that is not very helpful in application. The definition provides no external guidelines to help determine which publicity is prejudicial.

251. *See id.*

252. *Id.* at 1204 (finding no presumption of prejudice created by publicity about Watergate defendants (quoting United States v. Haldeman, 559 F.2d 31, 61 (D.C. Cir. 1976))).

to presume jury prejudice."[253] The fact that the jury was drawn from a community exposed to intensive pretrial publicity resulting in familiarity with the case was not enough to presume prejudice.[254]

The court then examined the trial atmosphere using the totality of the circumstances test developed in *Sheppard*[255] to determine if Smart "'was deprived of that judicial serenity and calm to which [she] was entitled.'"[256] Comparing the courtroom spectacle of *Sheppard* to Smart's trial, the court held that the two were not similar.[257] The court stated that the judge at Smart's trial had instructed the press on how to behave by barring pictures of the jurors, by limiting the number of cameras in the courtroom, and by limiting the number of seats available to the media.[258] The appellate court also found that the trial judge had given the jury explicit instructions to avoid all publicity in relation to the trial, to avoid the press, and to report any contacts made by the press to the sheriff.[259] Finally, the appellate court actually reviewed videotape of thirty hours of the trial to determine whether the trial judge conducted the trial in the "calm, dignified manner to which the defendant was entitled."[260]

Two problems undermine the New Hampshire Supreme Court's approach. The first lies in the court's definition of "presumptively prejudicial publicity" as that kind of publicity from which prejudice can be presumed.[261] This circular definition indicates that the court was unclear about the facts to be examined to determine whether prejudice existed, and that the court did not understand the insidious nature of publicity that can cause prejudice. These conclusions are evidenced by the court's holding that juror exposure to inadmissible

253. *Id.*; *see also Patton*, 467 U.S. at 1027 (finding no presumption of prejudice despite news articles reporting defendant's written confession even though confession was inadmissible at trial); Murphy v. Florida, 421 U.S. 794, 797-99 (1975) (finding no presumption of prejudice despite juror exposure to news articles detailing defendant's prior convictions). *But cf.* Rideau v. Louisiana, 373 U.S. 723, 726-27 (1963) (reversing conviction after inflammatory publication of defendant's confession even though confession was introduced later at trial); Irvin v. Dowd, 366 U.S. 717, 726-27 (1961) (holding that inflammatory publication of confession later ruled admissible at trial is one factor to be considered when reversing due to jury impartiality); Marshall v. United States, 360 U.S. 310, 313 (1959) (using supervisory power over federal courts to reverse conviction after juror exposure to inadmissible evidence).

254. *See Smart*, 622 A.2d at 1205.

255. *See id.* at 1207-09 (quoting Sheppard v. Maxwell, 384 U.S. 333, 355 (1966)).

256. *Id.* at 1207 (quoting *Sheppard*, 384 U.S. at 355).

257. *See id.* at 1216.

258. *See id.* at 1207-08.

259. *See id.* at 1208.

260. *Id.* at 1209.

261. *See id.* at 1203.

evidence alone is not enough to create a presumption of prejudice.[262]

This holding does not give any clear guidance as to the nature and scope of potentially prejudicial publicity that will create a presumption of prejudice.[263] Without stating the indicia of impartiality that are sufficient to overcome a presumption of impartiality, the New Hampshire Supreme Court left its trial courts with no clear guidance.[264]

In addition, post-*Murphy* appellate courts will review the voir dire record as the primary tool for determining whether the jury was indeed prejudiced.[265] The problem with this approach is that it is unlikely to give an accurate portrayal of the real level of juror bias. Jurors often have no idea of their biases, and even if they do, they are often unwilling to admit them to the trial judge.[266] Following *Mu'Min v. Virginia*,[267] judges are not constitutionally required to allow defendants to inquire into the content of publicity to which jurors have been exposed, thereby making the jurors' own assertions of impartiality dispositive.[268] In most cases, this precludes any further inquiry.

B. "Heinous" Crimes: People v. Manson

In 1969, the Manson "family" made international headlines for the Tate-LaBianca murders it committed under the direction of Charles Manson.[269] Manson was charged with seven counts of first-degree murder and one count of conspiracy to commit murder for his role in the killings.[270] The victims were well known in Los Angeles, and their violent, gruesome deaths gave the Manson cult instant notoriety.[271] A California jury convicted Manson on all

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262. *See id.* at 1205 ("The jury *voir dire* . . . demonstrates that specific reference to the defendant's case in the [jury service] notice to prospective jurors was not prejudicial and may even have had a salutary effect.").

263. *See id.*

264. *See id.* (stating that adverse nature of publicity and not merely its quantity is critical in finding presumptive prejudice).

265. *See* Murphy v. Florida, 421 U.S. 794, 803 (1975) (finding that petitioner received fair trial after applying "totality of circumstances" test to conclude that fact that 20 venire persons of 78 were excluded did not suggest community sentiment poised against petitioner).

266. *See supra* note 206 and accompanying text.

267. 500 U.S. 415 (1991).

268. *See* Mu'Min v. Virginia, 500 U.S. 415, 422 (1991).

269. *See* People v. Manson, 132 Cal. Rptr. 265, 275 (App. Dep't Super. Ct. 1976).

270. *See id.* at 274.

271. *See id.* at 275-76. Sharon Tate Polanski, a well-known actress, was one of the victims, along with four others present at her home. One victim was shot to death in his car, two were found on the lawn, and two were found in the house, tied together. The killers had shot and stabbed the victims numerous times, spraying blood throughout the premises. The word "Pig"

counts.[272] The California Court of Appeals affirmed, holding that neither a change of venue nor a continuance would have affected the outcome of the trial because the publicity permeated the entire state and was not likely to subside, even with a continuance.[273]

The California Court of Appeals began its analysis by stating that it had the duty to make an independent examination of the facts to determine if Manson had been granted a fair trial.[274] It then applied the two-part *Murphy* test[275] by first examining whether the trial court had allowed any "apparent and flagrant departure from fundamental due process and decorum and an intrusion of external influences" that would raise a presumption of prejudice.[276] The appellate court noted that the trial judge had excluded a single prospective juror who had read about one of the defendant's confessions,[277] and that there was no evidence that any of the seated jurors knew that any of the defendants had confessed.[278] Moreover, the *Manson* jury was sequestered throughout the trial,[279] and the trial judge strictly controlled the media during the trial.[280]

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was written in blood on the front door. At the LaBianca murder scene, the victims' son found the victims' hands tied behind their backs and bloody pillowcases over their heads. Mrs. LaBianca had been stabbed 41 times, and Mr. LaBianca had a carving fork protruding from his stomach and another knife protruding from his neck. On his stomach was carved the word "War." "Death to the Pigs," "Rise," and "Helter Skelter" were written in blood throughout the house. *See id.* at 275-76.

272. *See id.* at 274.

273. *See id.* at 310. In its analysis of whether a change of venue would have been appropriate, the appellate court made "general acknowledgment that adversities of publicity are considerably offset if trial is conducted in a populous metropolitan area." *Id.* at 317.

274. *See id.* at 315 ("'[G]iven the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors (that) trial courts must take strong measures to ensure that the balance is never weighed against the accused. And appellate tribunals have the duty to make an independent evaluation of the circumstances.'" (quoting People v. Sirhan, 497 P.2d 1121, 1134 (1972))).

275. *See* Murphy v. Florida, 421 U.S. 794, 799-81 (1974) (defining first part of test as deviation from due process to such degree that presumptively deprives defendant of fair trial and second part of test as totality of circumstances approach examining record and court's voir dire for signs of actual juror prejudice).

The review of the court's voir dire examination considers the general community atmosphere at the time of the trial, and although not requiring that jurors be ignorant of facts and circumstances of the crime, the process must select jurors sufficiently impartial and indifferent to the crime to satisfy constitutional standards of fairness. *See id.* at 799-800.

276. *Manson*, 132 Cal. Rptr. at 315.

277. *See id.*

278. *See id.*

279. *See id.*

280. *See id.*

In holding the "presumed prejudice" test inapplicable,[281] the appellate court applied the second half of the *Murphy* test[282] by examining the totality of the circumstances of the voir dire record, the courtroom and community atmosphere, and the measures that the trial court took to select an impartial jury.[283] On review, the voir dire record revealed that the venire had a general familiarity with the case, but that less than one-fourth of the entire pool of potential jurors admitted to any disqualifying prejudices.[284] The appellate court noted with approval the trial court's use of gag orders on trial participants, juror admonishments, and a security order regulating the media,[285] concluding that Manson received a fair and impartial trial.[286]

Manson was the first case in which a California state appellate court applied the test developed in *Murphy*.[287] There can be no doubt that the trial judge took great pains to neutralize the effects of publicity.[288] The appellate court was correct when it applied the first half of the *Murphy* test, the "decorum test," to the *Manson* facts. *Manson* was different from the *Irvin* line of cases in that there were no apparent transgressions by the state authorities throughout the proceedings that could raise a presumption that the trial was

281. *See id.* (distinguishing *Manson* from cases in which appellate court found pretrial publicity presumptively prejudicial by citing lower court's restraint and dignity during pretrial and trial proceedings).

282. *See* Murphy v. Florida, 421 U.S. 794, 799 (1975).

283. *See Manson*, 132 Cal. Rptr. at 316.

284. *See id.* at 317. *Compare* Irvin v. Dowd, 366 U.S 717, 727 (1961) (finding that 90% of potential jurors had disqualifying prejudices), *with Manson*, 132 Cal. Rptr. at 316-17 (approving of trial court's voir dire techniques, which included individual questioning of each potential juror and interrogation with respect to publicity by defendant's counsel).

285. *See Manson*, 132 Cal. Rptr. at 315, 319.

286. *See id.* at 319. As in *State v. Smart*, 622 A.2d 1197 (N.H. 1993), the appellate court noted, "The fact that a case receives enormous publicity does not by itself establish error nor does conceded 'massive' publicity automatically translate into prejudice." *Id. Smart* is indicative of those cases that are essentially local in nature but that take on national notoriety due to facts such as taboo sex, gruesome murder, or cases involving celebrities. Other examples are the assault and mutilation trial of abused wife Lorena Bobbitt for cutting off her husband's penis, and the sexual assault trial of boxer Mike Tyson.

287. *See* Constance M. Jones, *Appellate Review of Criminal Change of Venue Rulings: The Demise of California's Reasonable Likelihood Standard*, 71 CAL. L. REV. 703, 715-16 (1983) (arguing that *Manson* appellate court incorrectly equated state "reasonable likelihood" standard derived from Maine v. Superior Court, 438 P.2d 372 (Cal. App. Ct. 1968), with federal "totality of the circumstances" standard in Murphy v. Florida, 421 U.S. 794, 799 (1974)).

288. *See Manson*, 132 Cal. Rptr. at 316 n.82 (conducting individual voir dire on jurors to rule out potential prejudicial effect of Manson co-appellant's courtroom outbursts that taunted jurors to find them guilty based on media coverage).

unfair.[289] The trial judge's strict orders over trial participants and the press ensured this result.[290]

However, when the appellate court examined the voir dire record to determine whether, under the totality of the circumstances, the trial had been fair, it made generalizations about the character of the venire as a whole.[291] Under this analysis, because the majority of the venire stated that they were impartial, the court found that the jury itself must have been impartial.[292]

This forced generalization, inherent in the *Murphy* test, does not answer the difficult question of who is an impartial juror. Likewise, it gives little certainty to the law. The trial judge applied certain remedial measures that were approved by the appellate court, but does such action mean that the next judge must use those same measures? Under the "totality of the circumstances" it is difficult to determine which facts are conclusive in determining impartiality.

C. *The Famous Defendant:* United States v. Hearst

In 1974 a federal grand jury indicted Patricia Hearst for armed bank robbery and for using a firearm to commit a felony.[293] Although earlier in the year members of the Symbionese Liberation Army had kidnapped her at gunpoint, two months after her kidnapping she released a tape renouncing her former lifestyle and vowing to stay and fight beside her captors.[294] Shortly thereafter, she participated in the armed bank robbery, during which bystanders were wounded, and in a shoplifting incident, during which she covered her comrades' escape by spraying a store with semi-automatic weapons fire.[295]

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289. *Compare* Estes v. Texas, 381 U.S. 532, 550-51 (1965) (finding prejudice when courtroom demeanor was lost due to mass of cameras, microphones, and reporters in courtroom); *Irvin*, 366 U.S. at 725 (finding prejudice by overwhelming impact of defendant's publicized offer to plead guilty and his publicized confessions to several murders and burglaries); Turner v. Louisiana, 379 U.S. 466, 473 (1965) (finding presumptive prejudice when key prosecution witness served as jury shepherd during trial); *and* Rideau v. Louisiana, 373 U.S. 723, 727 (1963) (finding prejudice when local television station broadcast live pretrial coverage of defendant's confession), *with Manson*, 61 Cal. App. 3d at 185-86 (finding that absence of these transgressions and court's jury sequestration and limited jury press exposure ensured fair trial).

290. *See Manson*, 132 Cal. Rptr. at 315.

291. *See id.* at 316-17 (discussing biases of jury panel).

292. *See id.* at 317 (noting that small percentage of jury panel indicating bias against *Manson* defendants was not "appreciable hostility").

293. *See* United States v. Hearst, 466 F. Supp. 1068, 1071 (N.D. Cal. 1978), *aff'd in part, denied in part*, 638 F.2d 1190 (9th Cir. 1980).

294. *See id.*

295. *See id.*

Before her eight-week trial, the judge allowed extensive *in camera* voir dire,[296] after which the jury remained sequestered.[297] After the jury found her guilty and the court sentenced her to seven years in prison, Hearst made two motions for a new trial and then appealed her conviction.[298] In her first two appeals, Hearst challenged evidentiary rulings made by the trial court, but did not claim that her trial was prejudiced by pretrial publicity.[299] The court of appeals affirmed her conviction,[300] and the Supreme Court denied her petition for a writ of certiorari.[301] With new counsel, Hearst then moved the district court for an order vacating her sentence or, alternatively, for an order reducing her sentence, claiming she had received an unfair trial.[302] Among other claims, she asserted that the massive pretrial publicity had made it impossible to pick an impartial jury, which led to the presumption that her trial was unfair.[303] The court denied her motion, finding that she had received a fair trial.[304]

The district court began its analysis of Hearst's motion by stating that her failure to raise the pretrial publicity issue at trial or on appeal precluded relitigation of the issue in a new trial.[305] Accordingly, Hearst should have requested a change of venue prior to her trial, which would have enabled the trial judge to assess the impact of news

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296. *See id.* The trial judge examined the jurors individually, *in camera*, and out of the view of the rest of the venire, the public, and the press. The defense submitted 75 questions, of which the judge used almost all in his voir dire. The judge also allowed the defense to submit additional questions. The judge asked the jurors about their reading habits, television and radio exposure to the story, and recollection of the events at trial. The judge also asked about conversations the jurors had had with family and friends about the issues at trial. *See id.* at 1076-77. The voir dire took nearly a week, and nearly 60 potential jurors were called. *See id.* at 1071.

297. *See id.*

298. *See id.* at 1072; United States v. Hearst, 435 F. Supp. 29, 31 (N.D. Cal. 1977) (denying motion for reconsideration of new trial due to untimely filing); United States v. Hearst, 424 F. Supp. 307, 318 (N.D. Cal. 1976) (denying motion for new trial on ground government did not constitutionally deprive Hearst of exculpatory evidence).

299. *See Hearst*, 424 F. Supp. at 309.

300. *See* United States v. Hearst, 563 F.2d 1331 (9th Cir. 1977) (affirming trial court conviction and affirming District Court denial of new trial and reconsideration of new trial motions).

301. *See* United States v. Hearst, 435 U.S. 1000 (1978).

302. *See Hearst*, 466 F. Supp. at 1072-73 (making renewed unsuccessful appellate challenge on grounds of pretrial publicity prejudice).

303. *See id.*

304. *See id.* at 1088.

305. *See id.* at 1074. The court reasoned that Hearst should have moved for a change of venue and that her failure to do so constituted a waiver under the Federal Rules of Criminal Procedure. *See id.* (citing FED. R. CRIM. P. 12(b), (f)). The purpose of the waiver, the court found, is to ensure that constitutional defects that can be remedied at trial are not used subsequently by the defense as a purely tactical measure to overturn a guilty verdict and essentially to void the proceedings. *See id.* at 1074-75.

coverage to her trial.[306] As Hearst had made no such request, the trial judge had proceeded in its voir dire and had allowed the trial to continue.[307]

The court did, however, analyze the merits of Hearst's claim, stating that she submitted no evidence sufficient to show actual juror prejudice.[308] Although she did submit evidence of extensive publicity throughout the United States, the court reasoned that it would be speculation to conclude that the evidence was proof of an unfair trial.[309] Furthermore, the national attention the trial received made it unlikely that any jurisdiction would be unfamiliar with the story, thus obviating the need for a change of venue at the original trial.[310] The trial court also used a rigorous voir dire to ensure that the jury seated was not prejudiced.[311] Finally, the court rejected the contention that the atmosphere of the proceedings made the trial unconstitutionally unfair.[312] The location of the press box during the trial, judicial remarks about the bank robbery, and juror awareness of extraneous, prejudicial information were found to be "insignificant details" when considered cumulatively.[313]

D. The Famous Victim: People v. Sirhan

In 1968, a jury in a California state court found Sirhan Sirhan guilty of assassinating Senator Robert F. Kennedy and sentenced him to death.[314] After sentencing, Sirhan moved for a new trial, contending that he had been denied a fair trial as a result of pretrial publicity and that certain evidence had been admitted improperly.[315] The trial court denied the motion, and the California supreme court heard the automatic appeal.[316] The supreme court overturned the death penalty sentence as cruel and unusual punishment, but upheld the conviction and sentenced Sirhan to life imprisonment.[317]

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306. *See id.* at 1075.
307. *See id.*
308. *See id.* at 1076.
309. *See id.* Hearst submitted newspaper clippings from three major cities and argued that because coverage was heavier in San Francisco where the trial was held, one of the other cities would have offered a better opportunity to find an impartial jury. *See id.*
310. *See id.*
311. *See id.* (citing Silverthorne v. United States, 400 F.2d 627, 638-39 (9th Cir. 1968)).
312. *See id.* at 1076-77.
313. *See id.* at 1077.
314. *See* People v. Sirhan, 497 P.2d 1121, 1124 (Cal. 1972).
315. *See id.* at 1124-25.
316. *See id.* at 1124.
317. *See id.* at 1125 (explaining that after Sirhan's trial, but before California supreme court heard Sirhan's case, supreme court of California held in People v. Anderson, 493 P.2d 880, 883 (Cal. 1972), that capital punishment violated California's constitutional provision against cruel or unusual punishment).

The California supreme court found that before the trial, the jury was sworn but not sequestered.[318] The trial judge did admonish them, however, to avoid any publicity about the trial.[319] Subsequently, Sirhan made a motion in chambers to enter a guilty plea to first-degree murder in return for life imprisonment, which the court denied.[320] The press learned about the attempt to plead guilty, and covered it in numerous newspaper articles and in radio and television broadcasts.[321] Sirhan then moved for a mistrial on account of the publication of his attempted plea, which the judge also denied after questioning the jurors individually about their exposure to the publicity.[322] The judge found that practically all of the jurors stated that they could set aside anything they had heard or read and could decide the case solely on the evidence presented at trial.[323]

The California supreme court held that the record did not show actual or probable prejudice even if the jurors were unable to disregard what they had read or heard.[324] At trial defense counsel made it clear to the jury that they were not seeking an acquittal, but that the issue was whether Sirhan was guilty of first-degree murder or of a lesser offense.[325] Thus, the supreme court found the publicity to be consistent with the evidence heard at trial.[326] The California supreme court compared *Rideau*,[327] in which the Supreme Court overturned a conviction after the press had broadcast repeatedly the defendant's confession,[328] and stated that in Sirhan's case the

318. *See id.* at 1133.
319. *See id.*
320. *See id.*
321. *See id.* The California supreme court cited stories in the *Los Angeles Times* stating that there had been discussion in chambers among the judge and the defense and prosecution lawyers, and that a plea arrangement had been discussed. *See id.* The court also acknowledged radio broadcasts that had discussed the probability of Sirhan pleading guilty to avoid the death penalty. *See id.*
322. *See id.* at 1134. At least four jurors had read the *Los Angeles Times*' headlines, had heard on television or radio that Sirhan was pleading guilty, or had talked to acquaintances who had heard the broadcasts. *See id.* Other jurors indicated that they had heard statements suggesting that Sirhan was pleading guilty to first degree murder. *See id.* at 1134 n.8.
323. *See id.* at 1134.
324. *See id.*
325. *See id.* at 1135.
326. *See id.* Sirhan's counsel had made it clear to the jurors during voir dire that they were "not seeking an acquittal, but that they had to determine whether it was murder in the first degree, murder in the second degree or manslaughter; that's the only issue." *Id.* at 1135 n.10. During closing arguments, defense counsel again stated that the issue was not one of guilt, but whether Sirhan was guilty of first degree murder. *See id.* Furthermore, during cross-examination, Sirhan admitted to having stated, "I killed Robert Kennedy willfully, premeditatively, with twenty years of malice aforethought." *Id.* at 1135.
327. Rideau v. Louisiana, 373 U.S. 723, 727 (1963).
328. *See id.* (finding due process violation in not granting venue change when local television station broadcast 20-minute confession prior to jury selection).

publicity had a less damaging impact on the jurors.[329] Because the news stories were consistent with the evidence, the trial was not "but a hollow formality."[330]

IV. PROPOSED REMEDIAL MEASURES TO NEUTRALIZE THE PREJUDICIAL EFFECTS OF PRETRIAL PUBLICITY

A. Restraining the Press

Restraining the press from publishing details of a crime, investigation, and judicial proceedings is presumptively unconstitutional.[331] In *Nebraska Press Ass'n v. Stuart*,[332] the Supreme Court directly considered this issue in the context of a state trial court's order temporarily restricting publication of details prejudicial to the defendant.[333] The order restricted publication of accounts of the defendant's confession, as well as of the identity of the victims[334] in an effort to ensure the fairness of what was sure to be a "sensational" murder trial in a small Nebraska town.[335]

Noting that "prior restraints" on the press were the evils the First Amendment drafters desired to remedy,[336] the Court stated that prior restraints bear an initial presumption of unconstitutionality.[337] To determine whether the presumption was rebutted, the Court examined: "(a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger."[338] The Court held the restrictive order unconstitutional.[339] The concurring Justices opined that they doubted whether a prior restraint would ever

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329. *See Sirhan*, 497 P.2d at 1135-36.

330. *Id.* at 1136 (quoting *Rideau*, 373 U.S. at 726).

331. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 566-60 (1976); *see also* Landmark Comms. Inc. v. Virginia, 435 U.S. 829, 846 (1978); ABA STANDARDS FOR CRIMINAL JUSTICE, FAIR TRIAL AND FREE PRESS 21-34 (3d ed. 1992) (discussing press' increased First Amendment rights of access in light of Supreme Court decisions following *Nebraska Press Ass'n*).

332. 427 U.S. 539 (1976).

333. *See Nebraska Press Ass'n v. Stuart*, 427 U.S. at 543.

334. *See id.* at 543-44. The order applied only until the jury was impaneled, and prohibited the publication of the existence or content of any confessions or statements made by the defendant to other persons, of notes written by the defendant, of details of medical testimony, and of the identity of the victims. *See id.*

335. *See id.* at 542. The defendant, Erwin Simants, was convicted and sentenced to death for the murders of six members of a family in a rural Nebraska town. *See id.* at 546. He murdered the victims during the commission of a sexual assault. *See id.* at 542, 546.

336. *See id.* at 556.

337. *See id.* at 559.

338. *Id.* at 562.

339. *See id.* at 570.

pass constitutional muster, thus making it unlikely that a current Court would sustain a restrictive gag order under constitutional attack.[340]

B. Restraining Lawyers

The limits imposed by *Nebraska Press Ass'n* may result in the increasing use of restraining orders on those under the court's control, especially the parties' attorneys. As *Nebraska Press Ass'n* makes it virtually impossible for a court to combat pretrial publicity through prior restraints on the press, a court's alternative is to limit what the parties' attorneys may say to the press. This can be accomplished through strict enforcement of attorney ethics rules restricting extrajudicial statements by attorneys.[341] Orders silencing attorneys will be upheld, however, only if an attorney's statements cause a substantial likelihood of material prejudice to the proceeding. This "substantial likelihood" test is the result of *Gentile v. State Bar of Nevada*.[342]

Attorney Dominic P. Gentile held a press conference several hours after his client's indictment in Nevada.[343] Gentile outlined his client's defense, stated that Nevada sought the conviction of an innocent man as a "scapegoat," accused the state of being dishonest, and called the police officers "crooked."[344] A jury subsequently acquitted Gentile's client.[345]

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340. *See id.* at 570-71 (White, J., concurring) ("[T]here is grave doubt in my mind whether orders with respect to the press such as were entered in this case would ever be justifiable."); *id.* at 571; (Powell, J., concurring) ("In my judgment a prior restraint properly may issue only when it is shown to be necessary to prevent the dissemination of prejudicial publicity that otherwise poses a high likelihood of preventing, directly and irreparably, the impaneling of a jury meeting the Sixth Amendment requirement of impartiality."); *id.* at 612 (Brennan, J., concurring) ("There is . . . clear and substantial damage to freedom of the press whenever a temporary restraint is imposed on reporting of material concerning the operations of the criminal justice system . . . .").

341. *See* ABA MODEL RULES OF PROFESSIONAL CONDUCT 3.6 (1995) (prohibiting lawyer from making public commentary when lawyer knows or should know information would have substantial likelihood of materially prejudicing adjudicative proceeding and approving release of specific information including claim, offense, information in public record, and result of any step of litigation).

342. 501 U.S. 1030 (1991); *see also* Ronald D. Rotunda, *Can You Say That?*, 30 TRIAL MAG., Dec. 1994, at 18 (discussing ABA's amendments to Rule 3.6 and general reaction to *Gentile*). Several lower courts anticipated that some state ethics rules raised First Amendment problems. *See* Hirschkop v. Snead, 594 F.2d 356, 369 (4th Cir. 1979) (per curiam) (concluding that prior restraint is predetermined judicial prohibition on speech that cannot constitute subject of litigation in disciplinary proceeding against attorney); Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 248 (7th Cir. 1975).

343. *See* Gentile v. State Bar of Nev., 501 U.S. 1030, 1033 (1991).

344. *Id.* at 1034.

345. *See id.* at 1033.

The Nevada State Bar then filed a complaint, claiming that Gentile had violated Nevada's Supreme Court Rule 177,[346] which governs pretrial publicity.[347] Rule 177(1) prohibits a lawyer from making "an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows . . . that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding."[348] Following a hearing, the Disciplinary Board of the Nevada State Bar found that Gentile's comments violated Rule 177.[349] The board recommended a private reprimand. Gentile appealed to the Nevada Supreme Court, which affirmed the decision of the board, and Gentile then appealed to the Supreme Court.[350] Chief Justice Rehnquist's portion of the opinion approved Rule 177's general test, prohibiting lawyers from publicly disseminating information that one reasonably knows will materially prejudice a proceeding.[351]

This rule, like ABA Model Rule 3.6,[352] allows an attorney to state publicly what already is contained in a public record.[353] This "public record exception" is an important exception due to the nature of indictments and pleadings. An indictment, which is a public record, need not be limited to bare facts. In it, the prosecution may tell a story by describing the alleged crime and what unindicted co-conspirators might have said or done, and so forth.[354] Likewise, the defense counsel may file pleadings and other papers with the court that tell the story from the defendant's perspective.[355] These detailed stories, allegations, and explanations become part of the public record that an attorney may reveal.[356]

The result of *Gentile* is that it is harder for attorneys to use publicity tactics to sway public opinion in their client's favor, but it is not impossible. Attorneys still may make public comments about their

346. NV. ST. S. CT. R.P.C. 177(1)-(2)(a).
347. *See Gentile*, 501 U.S. at 1033.
348. NV. ST. S. CT. R.P.C. 177(1)-(2)(a).
349. *Gentile*, 501 U.S. at 1033.
350. *See id.*
351. *See id.* at 1062-63.
352. *See* MODEL RULES OF PROFESSIONAL CONDUCT RULE 3.6 (1995).
353. *See* NV. ST. S. CT. R.P.C. 177(1)-(2)(a); *see also* MODEL RULES OF PROFESSIONAL CONDUCT RULE 3.6 (1995); STANDARDS FOR CRIMINAL JUSTICE 8-1.1 (modifying ABA standard 1.1 regarding extrajudicial statements by attorneys in criminal proceedings by adopting "substantial likelihood" test of Model Rule 3.6).
354. *See Gentile*, 501 U.S. at 1056 (recognizing government officials' power in pretrial information release).
355. *See* Joel H. Swift, *Model Rule 3.6: An Unconstitutional Regulation of Defense Attorney Trial Publicity*, 64 B.U. L. REV. 1003, 1031-39 (1984) (questioning need for restrictions on defense publicity).
356. *See Gentile*, 501 U.S. at 1056.

case and justify the comments by arguing the public record exception. In addition, the disciplinary rules from which the *Gentile* standard was developed apply to lawyers. Other people involved in a case, such as the police, are not affected by *Gentile* though they may be controlled by their own ethical standards.

C. Closure of Judicial Proceedings

1. Closure of pretrial proceedings

At times, courts have sought to close portions of proceedings to the public in an effort to control pretrial publicity.[357] Such tactics are intended to stop the press from gaining access to the proceedings, which curtails their efforts to publish potentially prejudicial information. In *Gannet Co. v. DePasquale*,[358] the Supreme Court upheld this practice under the narrow circumstances of that case.[359] The Court held, by a five to four vote,[360] that neither the public nor the press has an independent constitutional right to insist on access to a pretrial suppression hearing if the accused, the prosecutor, and the trial judge all agree that the proceeding should be closed to ensure a fair trial.[361]

Gannet, however, must be read narrowly. The majority opinion emphasized that the denial of public access was temporary, because the trial court did make a transcript of the suppression hearing available once the danger of pretrial publicity had passed.[362] Throughout its opinion, the majority concentrated on the dangers of pretrial publicity in that particular case.[363] Three of the five-member majority wrote separate concurring opinions.[364] Chief

357. *See* Smith v. Daily Mail Pub. Co., 443 U.S. 97, 98 (1979) (favoring newspaper's First Amendment right to publish information lawfully obtained from police scanner and eyewitness accounts, including name of juvenile, over state interest in protecting juvenile); Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 849 (1978) (overruling Virginia Supreme Court ruling criminalizing release of otherwise truthful information when petitioner newspaper was convicted for publishing story concerning pending disciplinary commission review of judge's conduct).

358. 443 U.S. 368 (1979).

359. *See* Gannet Co. v. DePasquale, 443 U.S. 368, 394 (1978).

360. *See id.* at 370. Justice Stewart delivered the opinion of the Court and was joined by Justices Powell, Rehnquist, and Stevens. Chief Justice Burger, and Justices Powell and Rehnquist filed concurring opinions. Justice Blackmun filed an opinion concurring in part and dissenting in part, and was joined by Justices Brennan, Marshall, and White.

361. *See id.*

362. *See id.* at 392-93.

363. *See id.* at 370-94.

364. *See id.* at 394 (Burger, C.J., concurring); *id.* at 397 (*Powell*, J., concurring); *id.* at 403 (Rehnquist, J., concurring).

Justice Burger emphasized that what was involved was "not a *trial*; it was a *pre*trial hearing."[365]

Additionally, the scope of *Gannett*'s holding was unclear. Initially, the majority distinguished between pretrial proceedings and the actual trial, stating that pretrial publicity could have a prejudicial effect on potential jurors and that the Sixth Amendment did not grant the public the right to attend pretrial hearings.[366] However, in its holding the majority abandoned the distinction between pretrial and trial proceedings.[367] Later in *Richmond Newspapers v. Virginia*,[368] the Court limited its holding to pretrial proceedings.

The media criticized *Gannett* for leading to courtroom closures throughout the nation without regard for the public interest.[369] *Gannett* has not been met with a warm reception in at least one jurisdiction. In *New York Times v. Demakos*,[370] the court addressed the issue of media access to plea proceedings and determined that the media should be allowed access to them. The court stated that closed proceedings were permissible only in rare instances in which the defendant presented clear and compelling evidence for closure.[371]

2. Closure of voir dire proceedings

Gannet notwithstanding, the Supreme Court consistently has noted a presumption in favor of open legal proceedings.[372] Once faced with a widely-publicized trial, the trial judge may wish to impose a ban on media coverage to limit the venire's exposure to potentially influential information.[373] Given the presumption of openness, however, a party petitioning to close pretrial voir dire has a high burden to meet to succeed.[374]

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365. *Id.* at 394 (Burger, C.J., concurring).
366. *See id.*
367. *See id.* at 391.
368. 448 U.S. 555, 575-81 (1980).
369. *See* Richard M. Schmidt, Jr., *The* Gannett *Decision: A Contradiction Wrapped in an Obfuscation Inside an Enigma*, THE JUDGE'S J. 13 (Fall 1979).
370. 529 N.Y.S.2d 97 (App. Div. 1988).
371. *See* New York Times v. Demakos, 592 N.Y.S. 2d 97, 100 (App. Div. 1988).
372. *See* Waller v. Georgia, 467 U.S. 39, 46 (1984) (referring to public trial as benefit conferred on defendant to ensure fair treatment, as means by which to encourage witnesses to come forward, and as method of discouraging perjury (citing *Gannet*, 443 U.S. at 380; *In re* Oliver, 333 U.S. 257, 270 n.24 (1948)); *see also* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606 (1986) (noting that state justification in denying access to press and public must be "weighty").
373. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 570 (1976) ("This court has frequently denied that First Amendment rights are absolute and has consistently rejected the proposition that a prior restraint can never be employed.").
374. *See* Press-Enter. Co. v. Superior Court, 464 U.S. 501, 510 (1984) (establishing presumption of openness that "may be overcome only by overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest").

The test for closed voir dire, as established in *Press Enterprise Co. v. Superior Court*,[375] requires "an overriding interest that is likely to be prejudiced [by an open proceeding], the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure."[376] In applying the *Press Enterprise* test, a court considers the petitioning party's interest in protecting the privacy of individuals not before the court and how carefully this interest can be accommodated without sacrificing the Sixth Amendment guarantee of a fair trial.[377] A petitioning party must demonstrate with specificity the privacy interest to be protected, how the interest would be infringed, what evidence would infringe the interest, and what percentage of the overall evidence is objectionable.[378] Without the requisite showing of these factors, a petitioning party is unlikely to meet the closure test.[379]

3. Trial closure

A narrow interpretation limiting *Gannet* to pretrial proceedings is supported by the decision in *Richmond Newspapers, Inc. v. Virginia*.[380] A fragmented plurality of the Supreme Court, with only Justice Rehnquist dissenting, rejected the asserted power of a state judge to close a criminal trial.[381] In *Richmond Newspapers*, the trial judge relied on a state statute that granted broad discretion for trial closure and that had received the consent of the prosecutor and the defendant.[382]

Chief Justice Burger, joined by Justices White and Stevens, relied on the First and Fourteenth Amendments to give the public the right of access to criminal trials.[383] Specifically, the Court found that there is a "presumption of openness" in all criminal trials[384] and that

375. 464 U.S. 501 (1994).
376. *Waller*, 467 U.S. at 48 (citing *Press Enterprise* test).
377. *See id.*
378. *See id.*
379. *See id.* at 48-49.
380. 448 U.S. 555 (1980).
381. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 581 (1980) (plurality opinion). Chief Justice Burger filed an opinion for the Court and was joined by Justices White and Stevens. *See id.* at 558. Justice Brennan filed an opinion concurring in the judgment and was joined by Justice Marshall. *See id.* at 584.
382. *See id.* at 560.
383. *See id.* at 558.
384. *See id.* at 573.

"[a]bsent an overriding interest articulated in findings, the trial of a criminal case must be open to the public."[385]

Justice Brennan, joined by Justice Marshall, concurred in the judgment, but did not join in the opinion, although he did not appear to disagree with any of it.[386] Justice Brennan noted that mere agreement of the trial judge and the parties cannot constitutionally close a trial to the public in light of the First Amendment guarantees.[387] Justice Stewart, concurring in the judgment, also relied on a First Amendment right of access.[388] Justice Blackmun, concurring in the judgment, relied principally on the Sixth Amendment, but also acknowledged the First Amendment as the source of a right to access.[389]

In *Globe Newspaper Co. v. Superior Court*,[390] the Court elaborated on the meaning of *Richmond Newspapers* and produced a majority opinion while invalidating a state statute that required trial judges to exclude the press and the public from the courtroom during the testimony of the victim in cases involving certain specified sexual offenses.[391] The Court left open the possibility that in certain cases the trial court could exclude the press and the public during the testimony of minor victims of sex crimes.[392]

Justice Brennan explained that under *Richmond Newspapers* the First Amendment grants to the press and to the general public "a right of access to criminal trials"[393] because historically such trials have been open, and such openness aids in the functioning of the judicial process and of the government as a whole.[394] The Court then adopted a strict scrutiny test to determine whether closure of the courtroom merits constitutional mandates.[395] Under the *Globe Newspaper* rule, states may deny access only if denial serves "a compelling governmental interest, and is narrowly tailored to serve

385. *Id.* at 581 (Stevens, J., concurring). This case was the first in which the Court found constitutional protection for a right of access—the right to acquire newsworthy information. *See id.* at 583 (Stevens, J., concurring).

386. *See id.* at 584 (Brennan, J., concurring).

387. *See id.* at 598 (Stewart, J., concurring).

388. *See id.* at 599 (Stewart, J., concurring).

389. *See id.* at 603-04 (Blackmun, J., concurring).

390. 457 U.S. 596 (1982).

391. *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 598, 611 (1982).

392. *See id.* at 609. The Court suggested a "totality of the circumstances" approach, stating that "among the factors to be weighed are the minor victim's age, psychological maturity and understanding, the nature of the crime, the desires of the victim, and the interests of parents and relatives." *Id.* at 608.

393. *Id.* at 604-05.

394. *See id.* at 607-08.

395. *See id.* at 607.

that interest."[396] The Court rejected the state's mandatory closure rule for not serving a compelling interest and for not being narrowly tailored.[397]

CONCLUSION

This Article proposes the adoption of a specific constitutional standard that clearly sets forth procedures that must be applied by a court in a criminal case of national notoriety.

That a judicial, or even a constitutional standard might include relatively specific directions is not, of course, without precedent. In the well known case of *Miranda v. Arizona*,[398] for example, the Supreme Court replaced a body of ad hoc constitutional decisions applying the Fifth Amendment privilege against self-incrimination with a set of precise procedural directives, which if followed, would ensure a finding of voluntariness. Under *Miranda*, a violation of these directives would, absent the promulgation by Congress or the States of directives deemed by the Court to be equally effective in ensuring voluntariness of a confession, require a finding of violation of the privilege against self-incrimination.

In *Miranda*, the Court expressed dissatisfaction with applications of vague standards of voluntariness in Fifth Amendment cases.[399] All such decisions were ad hoc in the sense that each trial court reviewed the circumstances in a particular case and then made a subjective assessment as to whether a particular statement or confession was "voluntary." At the time of the Court's decision in *Miranda*, the Fifth Amendment standard for compulsion still was based on the holding of an 1897 case: "[T]he proof . . . must be adequate to establish that the making of the statement was voluntary."[400] The standard's subjective factor was not reduced appreciably by Justice Brandeis' 1924 announcement in *Wan v. United States*[401] that "a confession is voluntary in law if, and only if, it was, in fact, voluntarily made."[402]

The result of these ad hoc applications of a vague general standard was, according to the Court in *Miranda*, a "process of in-custody interrogation . . . [that] contains inherently compelling pressures

396. *Id.*
397. *See id.* at 607-08 (reasoning that mandatory closure rule could prohibit publication in cases in which juvenile's name already is in public record or in which juvenile or parents make no request for closure).
398. 384 U.S. 436 (1966).
399. *See* Miranda v. Arizona, 384 U.S. 436, 467 (1966).
400. Bram v. United States, 168 U.S. 532, 549 (1897).
401. 266 U.S. 1 (1924).
402. Wan v. United States, 266 U.S. 1, 14 (1924).

which work to undermine the individual's will to resist,"[403] and therefore was a failure to protect the privilege. In other words, ad hoc enforcement of a general standard of voluntariness had not been adequate to ensure enforcement of the privilege.

The problem of ad hoc enforcement of Fifth Amendment standards faced by the Court in *Miranda* is analogous to the problem facing the courts today in the ad hoc enforcement of the right to a fair trial in cases of national publicity and notoriety. Prior to *Miranda*, courts adjudicating claims of denial of the privilege against self-incrimination subjectively applied the general voluntariness standard.[404] In the same way, courts enforcing the constitutional right to a fair trial in cases of national notoriety enforce similarly vague and subjective standards, such as a determination of whether the "totality of the circumstances" are such as to render the trial "fundamentally unfair,"[405] or of whether pretrial publicity "involves such a probability that prejudice will result that it is deemed inherently lacking in due process."[406]

After *Miranda*, courts were required to apply the simple, though relatively objective and specific, procedures set forth by the Court—namely to advise a suspect in custody of (1) the right to remain silent; (2) that anything said can be used against her in a court of law; (3) the right to have an attorney present; and (4) the right, if indigent, to have an attorney appointed.[407] The *Miranda* Court concluded that only by the creation of such specific guidelines and directives could the privilege against self-incrimination be applied uniformly in a meaningful way.[408]

Similarly, it is submitted in this Article that a defendant's right to a fair trial in cases of national notoriety can be protected in a meaningful way only by the promulgation of the following simple, although relatively objective and specific, procedures, which if followed, would, as in the case of Fifth Amendment privilege, be presumed to satisfy the requirements of fairness:

> I. A case shall be certified as a case of national notoriety if it is one in which there is pervasive and continuous national media treatment in newspapers and magazines, radio, and television, or any other mass medium. In addition to considering the actual

403. *Miranda*, 384 U.S. at 467.
404. *See id.* at 506-08 (Harlan, J., dissenting) (noting that federal courts used voluntariness 'in fact' as test of admissability).
405. Murphy v. Florida, 421 U.S. 794, 799 (1975).
406. Estes v. Texas, 381 U.S. 532, 542-43 (1965).
407. *See Miranda*, 384 U.S. at 478-79.
408. *See id.* at 467.

extent of media attention, the following factors shall be considered in determining notoriety:

(1) the extent to which the crime is so heinous and shocking that the circumstances of the crime command national media attention;

(2) the status of the victim as a public figure;

(3) the status of the defendant as a public figure; and

(4) the extent to which the sordid or voyeuristic characteristics of the crime are such as to command national media attention.

II. In a case certified as one of national notoriety, but in which the extent of publicity is significantly lower in an alternative judicial district, a trial court in which a criminal case certified as one of national publicity and notoriety shall:

(1) consider a defendant's request for a change of venue when:

(a) there exists a risk that the pretrial publicity in a case will lead to a contamination of the potential jury pool by:

(i) widely disseminating material inculpatory evidence that would be inadmissible in a court of law and excluded from jury consideration, including but not limited to inadmissible statements and confessions or privileged information; or

(ii) widely disseminating opinions and commentaries that are hostile toward the defendant, presume the guilt of the defendant, stir passions against the defendant, or create an inflammatory environment hostile to the defendant; and

(2) Grant such a request for a change of venue to any alternative judicial district where the extent and degree and publicity is significantly less than in the forum court.

III. In all cases of national notoriety, the forum court shall:

(1) upon motion of the defendant, utilize the full extent of its contempt powers to restrain all trial participants subject to the court's contempt powers, including but not limited to parties, counsel, and court personnel, from divulging any information about the case to any unauthorized person, and in particular to any agent or representative of the media. Said powers shall be exercised to the full extent permitted by law and shall be limited only by existing First Amendment constitutional restrictions upon such use of the contempt power; and

(2) upon the motion of the defendant, close all court proceedings to the public to ensure that no inculpatory evidence, which would be inadmissible to jurors in a court of law, shall be revealed to any person outside the court. Such judicial closure at the request of the defendant shall be subject only to existing constitutional First Amendment restrictions on such closures.

> IV. (1) Any motion made by a defendant under Section III shall be heard immediately upon its filing with the court.
> (2) A court shall make any orders that it deems necessary under Section III to protect the defendant's right to a fair trial; it shall, upon the request of the defendant, dissolve any such orders.
> (3) A defendant's request for dissolution, or a failure by the defendant to move for an order under Section III shall constitute a constitutional waiver of the defendant's right to a fair trial based upon a claim of unfair or prejudicial pretrial or trial publicity.
> (4) A defendant's request for an order under Section III may be made at any time before or during the trial proceedings. A defendant shall be deemed to have waived any claim of unfair or prejudicial publicity for that period of time prior to the date of filing of the motion under Section III.

Some may object that precise and detailed standards are not the proper solution to constitutional questions. This was the position of *Miranda*'s critics, who objected that the Court's setting forth of such detailed requirements for voluntariness constituted judicial legislation of the worst sort, more appropriate for a police manual than for a constitutional decision.[409] Yet the Court in *Miranda* recognized that vague and subjective standards easily were sidestepped and avoided, and resulted in inconsistent adjudications that provided little predictive guidance to judges and police officers alike.[410] Although the application of the exclusionary rule as the exclusive sanction for violations of the Fifth Amendment privilege has continued to be controversial, it is clear that the specific standards set forth in *Miranda* at least have provided the basis for stricter responses to constitutional violations and a predictability not previously enjoyed. It is submitted that this proposed standard would have the same effect on the application of the right to a fair trial in cases of national notoriety.

The proposed standard takes into account the potential clash of a defendant's Sixth and Fifth Amendment right to a fair trial, and the First Amendment's guarantee of freedom of speech and the press. Most important, however, the standard recognizes the realities of a modern society in which there is instantaneous dissemination of information by the mass media. When the First Amendment was established, the notion that inculpatory evidence against an accused

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409. *See, e.g.*, Stephen J. Schulhofer, *Reconsidering* Miranda, 54 U. CHI. L. REV. 435, 436 (1987); Louis Michael Seidman, Brown *and* Miranda, 80 CAL. L. REV. 673, 678 (1992); George C. Thomas III, *An Assault on the Temple of* Miranda, 85 J. CRIM. L. & CRIMINOLOGY 807, 824 (1995).

410. *See Miranda*, 384 U.S. at 449-54.

in a local judicial proceeding might be transmitted instantaneously across the country in a way that might create mass hysteria and passion was beyond any comprehension.

The standard also recognizes that the law cannot permit pre-trial publicity protected by the First Amendment to immunize a defendant from all criminal liability. Because cases of national notoriety often involve crimes of horrendous cruelty and barbarity, any claim that pretrial publicity precludes all possibility of a fair trial, and therefore any possibility of conviction and punishment, would undermine any civilized notion of justice. To pose the question on a scale of international justice: Would any civilized citizen or jurist of the world community have contended at Nuremberg in 1945 that history's greatest mass murderers should have gone free because of "prejudicial" pre-trial publicity? Had Hitler been apprehended, would justice have demanded that he not be prosecuted because his crimes were so horrendous that they generated considerable media attention in the form of distributed films of concentration camps and the like?

Fairness and justice long have been considered the cornerstones of due process.[411] Certainly the law cannot hold that due process and a fair trial can be provided only by violating the First Amendment. It is true, therefore, that the proposed standard is an imperfect constitutional solution. It rejects the kind of absolutism that would make a mockery of the law and justice. It does, however, provide a defendant with every tool and mechanism for a fair trial that a free society can provide, consistent with a constitutional standard of free speech and press.

There is ample precedent for such imperfect constitutional solutions, even in the area of cherished constitutional liberties and due process. In *Mullane v. Central Hanover Trust*,[412] for example, the Supreme Court was faced with an equally "insoluble" constitutional dilemma.[413] In that case, trustees petitioned a New York court to approve a final settlement of a trust account.[414] Although such a settlement would affect the interests of a number of beneficiaries who could not be located for purposes of service of process, the trustees chose to proceed under the minimum requirements of New York law by giving constructive notice through publication to unknown

411. *See, e.g.*, Jessica N. Cohen, *The Reasonable Doubt Jury Instruction: Giving Meaning to a Critical Concept*, 22 AM. J. CRIM. L. 677, 692 (1995); Lee Ann Dean, *Due Process*, 24 RUTGERS L.J. 1177, 1184 (1992); Danford H. Kadish, *Methodology and Criteria in Due Process Adjudication*, 66 YALE L.J. 319, 321 (1957).

412. 339 U.S. 306 (1950).

413. *See* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

414. *See id.* at 307.

beneficiaries in a local newspaper.[415] In determining whether such "constructive" notice complied with Due Process, the Court was asked to reconcile two conflicting interests. On one hand, due process appeared to require that actual notice be provided to those who might lose their property as a result of the settlement proceeding.[416] On the other hand, the imposition of such a due process requirement would bar New York from adjudicating title to property within its jurisdiction in cases in which beneficiaries could not be located or identified after the exercise of due diligence.[417] Over time, the Court believed, such a requirement would result in a large percentage of property within the state being placed in "limbo" with no clear title.[418]

In *Mullane*, the Court adopted a constitutional compromise that approved constructive notice in cases in which best efforts were made and due diligence was exercised to identify and to personally serve beneficiaries whose property interests would be affected.[419] It is submitted that a similar constitutional compromise must be made in criminal cases of national notoriety. Once a trial court has followed certain standards designed to minimize the prejudicial effects of pretrial publicity, due process must be deemed to be presumptively satisfied, just as it was deemed presumptively satisfied in *Mullane* when best efforts and due diligence were made to give actual notice to those who faced deprivation of their property without an opportunity to be heard.

As in *Mullane*, the proposed standard for cases of national notoriety provides an imperfect constitutional solution. Adherence to the proposed standard, however, would be far superior to current practice.

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415. *See id.* at 309.

416. *See id.* at 314 ("'The fundamental requisite of due process of law is the right to be heard.'" (quoting Grannis v. Ordean, 234 U.S. 385, 394 (1914))).

417. *See id.* at 313-14.

418. *See id.* at 317-18.

419. *See id.* at 319-20 (explaining that sending notice to last-known address constituted minimum requirement of constructive notice and rejecting publication in local newspaper as sufficient notice).