

## Maintaining Impartiality: Does Media Coverage of Trials Need to Be Curtailed?

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# MAINTAINING IMPARTIALITY: DOES MEDIA COVERAGE OF TRIALS NEED TO BE CURTAILED?

## INTRODUCTION

Media coverage of trial proceedings and its potential effect on the impartiality of the American jury system has invoked tremendous debate.<sup>1</sup> Intense publicity of trials and trial participants challenges our judicial system's ability to ensure protection of constitutional rights.<sup>2</sup> The barrage of information surrounding certain trials presents the possibility that jurors will base their verdicts on external influences rather than on the evidence presented at trial.<sup>3</sup> An outright limitation upon the right of the press to cover trials, however, runs contrary to constitutionally guaran-

<sup>1</sup> See generally PATRICK M. GARRY, SCRAMBLING FOR PROTECTION: THE NEW MEDIA AND THE FIRST AMENDMENT 75 (1994) (explaining history of fair trial/free press debate); TIMOTHY W. GLEASON, THE WATCHDOG CONCEPT: THE PRESS AND THE COURTS IN NINETEENTH CENTURY AMERICA 110 (1990). It has been asserted that both professional news reporters and private citizens have equivalent rights to act as "watchdog" of the public interest, so long as they fulfill "a duty to gather and report information about the operation of government and other matters of public interest." *Id.*

<sup>2</sup> See, e.g., *Gannett Co. v. Depasquale*, 443 U.S. 368, 378 (1979) (stating danger of excess publicity is effect on fairness of trial); *Irvin v. Dowd*, 366 U.S. 717, 730 (1961) (Frankfurter, J., concurring). "Not a term passes without this Court being importuned to review convictions . . . in which substantial claims are made that a jury trial has been distorted because of inflammatory newspaper reports." *Id.* at 730; see also *United States v. Cutler*, 840 F. Supp. 959, 971 (E.D.N.Y. 1994) (holding John Gotti's attorney in contempt of court for speaking to press when he was explicitly ordered not to do so). The attorney's claim, that the atmosphere was so contaminated with publicity that counsel's statements were not "reasonably likely" to have an effect on prospective jurors, does not absolve the attorney of his wilful misconduct after the fact. *Id.* at 966. See generally *United States v. Antar*, 38 F.3d 1348, 1354 (3d Cir. 1994) (affirming district court decision instituting gag order to avoid affect of outside sources on jury); Bruce D. Drucker, *Let's Stop the Courthouse Circus*, N.Y. NEWSDAY, Jan. 20, 1995, at A37. The American judicial system has operated in the shadow of trials such as that of Bruno Hauptman, who was found guilty and sentenced to death for the kidnapping and murder of Charles Lindbergh's son in what was termed "the crime of the century." *Id.* Public outcry and disapproval over the unprecedented amount of publicity the trial received prompted the American Bar Association in 1935 to remark: "To treat a . . . trial as a public show is to cheapen life itself by causing people . . . to undervalue the life of the criminal and to increase the morbid desires of sensation seekers . . ." *Id.*

<sup>3</sup> See *Estes v. Texas*, 381 U.S. 532, 536 (1965) (noting impact of media on jury's verdict). "Pretrial [coverage] can create a major problem for the defendant . . . Indeed, it may . . . set the community opinion as to guilt or innocence." *Id.*; Michael E. Swartz, Note, *Trial Participant Speech Restrictions: Gagging First Amendment Rights*, 90 COLUM. L. REV. 1411, 1444 (1990) (asserting that in pretrial period available remedies such as continuance or jury instructions will not eliminate effects of community bias). But see Joseph F. Flynn, Note, *Prejudicial Publicity in Criminal Trials: Bringing Sheppard v. Maxwell Into the*

teed freedoms enjoyed by the media.<sup>4</sup> The defendant's right to an impartial jury versus the media's right of free press sets the stage for a familiar courtroom battle.<sup>5</sup> A casualty of this struggle should not be the media's access to trial information.

One of the basic principles embedded in the United States Constitution is the right of Due Process of Law.<sup>6</sup> Although guaranteed by both the Fifth and Fourteenth Amendments to the Constitution, Due Process of Law is not easily defined, and has historically been the subject of a great deal of controversy.<sup>7</sup> Throughout its varied existence, however, one major theme has always survived: the right to Due Process requires state and federal justice systems to ensure "fundamental principles of liberty and justice."<sup>8</sup> It is a

*Nineties*, 27 NEW ENG. L. REV. 857, 880 (1993) (asserting once jury has been impaneled judges' instructions will dissipate prejudicial effect of media).

<sup>4</sup> U.S. CONST. amend. I. The amendment provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press"; see also *infra* notes 17-21 and accompanying text (detailing rights of press to cover trials unless strong contrary reasons exist).

<sup>5</sup> See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 555 (1976). The Supreme Court analyzed a great deal of earlier case law to determine whether measures the trial judge took or failed to take in this trial affected the determination of whether a fair trial was achieved. *Id.*; see also Joseph R. Maraniello, *The Death Penalty and Pre Trial Publicity: Are Today's Attempts At Guaranteeing a Fair Trial Adequate?*, 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 371, 371-72 (1994) (discussing dilemma court faces in assuring fair trials and arguing that too much discretion is in hands of judges with insufficient power to grant proper relief).

<sup>6</sup> See U.S. CONST. amend. V. The amendment provides in pertinent part: "No person shall be . . . deprived of life, liberty, or property, without due process of law." *Id.*; U.S. CONST. amend. XIV. The amendment provides in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . ." *Id.* See generally HERMINE HERTA MEYER, *THE HISTORY AND MEANING OF THE FOURTEENTH AMENDMENT* 125 (1977) (describing wording of Fourteenth Amendment, which restricts state action, as copied from Fifth Amendment, which restrains Congress). These Amendments recognize that "no power [exists] in either the State or the national Government to deprive any person of . . . life, liberty and property, except by due process of law; that is, by an impartial trial according to the laws of the land." *Id.* at 126 (quoting CONG. GLOBE, 42nd Cong., 1st Sess. 153 (1871)).

<sup>7</sup> See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 147-69 (1968) (holding Sixth Amendment right to trial by jury applicable to states through Fourteenth Amendment). The detailed analysis for determining what rights are embodied in the Due Process Clause is not easily applied. *Id.* at 148. The Supreme Court noted that:

In resolving conflicting claims concerning the meaning of this spacious language the Court has looked increasingly to the Bill of Rights for guidance; many of the rights guaranteed by the first eight Amendments to the Constitution have been held to be protected against state action by the Due Process Clause of the Fourteenth Amendment.

*Id.* These rights have included freedom of press, free speech, right to counsel, right to be free from unreasonable searches and seizures, and right to a speedy and public trial. *Id.* But see MEYER, *supra* note 6, at 127 (noting that wording of Fourteenth Amendment did not provide support for application of Federal rights to states, only that all rules must be same for all persons).

<sup>8</sup> See *Duncan*, 391 U.S. at 148 (quoting *Powell v. Alabama*, 287 U.S. 45, 67 (1945)). The determination of the case depends upon whether a right is "among those fundamental principals of liberty and justice which lie at the base of all our civil and political institutions."

natural progression that these fundamental principles have grown to be synonymous with the Bill of Rights.<sup>9</sup> Indeed, the Privileges and Immunities Clause of the Fourteenth Amendment<sup>10</sup> supports the application of basic constitutional rights to citizens of all states.<sup>11</sup>

An element of due process which appeals specifically to the criminally accused is the right to a trial by an impartial jury.<sup>12</sup> Guaranteed by the Sixth Amendment,<sup>13</sup> this right is vital to the tenet that all defendants are innocent until proven guilty.<sup>14</sup> In the

*Id.* at 149; *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963) (holding right to counsel for all criminal prosecutions is "fundamental and essential to fair trial"); *In re Oliver*, 333 U.S. 257, 273 (1948) (analyzing whether asserted right is basic in our system of jurisprudence); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (determining whether right was "of the very essence of a scheme of ordered liberty"). One such provision is the presumption that trials should be open to the public as a constitutional guarantee. *Id.* See Judge Roger J. Miner, *Eye on Justice*, N.Y. Sr. B.J., Feb. 1995, at 9 (establishing history, rather than law or U.S. Constitution, is "*ratio decidendi*" behind opening trial to all of mankind); see also *Richmond Newspapers v. Virginia*, 448 U.S. 555, 575 (1980) (deciding trial should be open based upon historical precedent of promoting fairness).

<sup>9</sup> See *Duncan*, 391 U.S. at 155-56 (incorporating Sixth Amendment guarantee of jury trial in state criminal trials as reflecting "profound judgment about ways laws should be enforced and justice administered"); cf. MEYER, *supra* note 6, at 126 (use of identical Fifth Amendment language supports imputing Bill of Rights to States as well as to Federal Government).

<sup>10</sup> See U.S. CONST. amend XIV. The Amendment provides in pertinent part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." *Id.*

<sup>11</sup> See *Adamson v. California*, 332 U.S. 46, 74-75 (1947) (establishing Fourteenth Amendment protections). The Court stated that "history conclusively demonstrates that the language of the first section of the Fourteenth Amendment . . . was thought . . . sufficiently explicit to guarantee that thereafter no state could deprive its citizens of the privileges and protections of the Bill of Rights." *Id.*; see also, e.g., *Duncan*, 391 U.S. at 170 (discussing view that federalism does not support rights of states to experiment with protection afforded citizens through Bill of Rights); MEYER, *supra* note 6, at 112-18 (describing Supreme Court's willingness to interpret privileges or immunities clause broadly to incorporate the Bill of Rights). *But see id.* at 124. "Only one provision of the Federal Bill of Rights was incorporated into the text of the Fourteenth Amendment and made applicable to the states, namely the Due Process Clause of the Fifth Amendment." *Id.*

<sup>12</sup> See *Gannett Co. v. DePasquale*, 443 U.S. 368, 368-79 (1979) (holding there is no constitutional right of public or press permitting access to pretrial suppression hearings). The Court stated: "The Sixth Amendment, applicable to the States through the Fourteenth [Amendment], surrounds a criminal trial with guarantees. Among the guarantees that the Amendment provides to a person charged with the commission of a criminal offense . . . is the 'right to a speedy and public trial, by an impartial jury.'" *Id.* at 379 (quoting U.S. CONST. amend. VI); see also *Duncan*, 391 U.S. at 169 (supporting notion that all Americans enjoy "right to be tried by independent and unprejudiced courts using established procedures and applying valid pre-existing laws").

<sup>13</sup> See U.S. CONST. amend. VI. "In all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury of the State and district wherein the crime shall have been committed." *Id.*

<sup>14</sup> See, e.g., *Barnes v. United States*, 412 U.S. 837, 852 (1973) (Douglas, J., dissenting). Justice Douglas noted, "[t]here is a presumption of innocence" and therefore "proof beyond a reasonable doubt is necessary." *Id.*; see also *Gannett*, 443 U.S. at 389-90. To safeguard the Due Process rights of the accused, a trial judge has an affirmative constitutional duty to

United States justice system, the jury is entrusted with the task of assessing all the evidence presented in open court to determine the guilt or innocence of the accused.<sup>15</sup> Media coverage of trials increases the potential for extraneous information to impact the jury's decision.<sup>16</sup> Measuring this impact, however, is difficult, if not impossible.<sup>17</sup> Therefore, when a defendant challenges a verdict on the basis that a tainted jury will impair his interest in justice, judges are obligated to take action.<sup>18</sup> Courts respond with calculated measures designed to combat identifiable prejudice.<sup>19</sup>

These protective measures are limited by the powerful First Amendment right of Freedom of Speech.<sup>20</sup> The Supreme Court has

minimize the effects of prejudicial pretrial publicity. *Id.* at 390. "If anything is more important than another in the administration of justice, it is that jurymen should come to the trial of those persons on whose guilt or innocence they are to decide, with minds pure and unprejudiced." *Id.* at 389 n.20 (quoting *King v. Fisher*, 170 Eng. Rep. 1253, 1255 (N.P. 1811)). "This Court has long recognized that adverse publicity can endanger the ability of a defendant to receive a fair trial." *Id.* at 378. Pretrial "[p]ublicity . . . may influence public opinion against a defendant and inform potential jurors of inculpatory information wholly inadmissible at the actual trial." *Id.* at 369.

<sup>15</sup> U.S. CONST. amend. VI. "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 . . ." *Id.*; see also *Gannett v. DePasquale*, 443 U.S. 368, 383 (1978). The Supreme Court recognized that in our adversarial system of justice the right to a jury trial as the preferred mode of factfinding is so important that a defendant "cannot waive a jury trial without the consent of a prosecutor and a judge." *Id.* (citations omitted); *Taylor v. Louisiana*, 419 U.S. 522, 530 (1974) (assessing role of jury in trial as guaranteed by Sixth Amendment is both to guard against exercise of arbitrary power of judiciary and make common sense judgment of community available in deciding future of accused).

<sup>16</sup> See, e.g., *Estes v. Texas*, 381 U.S. 532, 543-45 (1965) (noting conscious and unconscious effect coverage may have on jurors' judgment indicates it is highly probable it will directly bear on vote of guilt or innocence). "Every juror carries with him into the juror box [an interest in all the morbid details surrounding the case] and thus increases the chance of prejudice that is present in every criminal case." *Id.* at 545.

<sup>17</sup> *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 554-56, 570 (1976) (contending decision of court below that publicity may impair preserving defendant's rights was by necessity speculative); *United States v. Hastings*, 695 F.2d 1278, 1284 (11th Cir. 1983) (upholding federal court ban on coverage of trials and conceding it is very difficult to detect the adverse impact of television coverage on trial participants).

<sup>18</sup> See *Estes*, 381 U.S. at 545-47 (holding that television coverage negatively affected jury's search for truth and diminished judge's ability to guarantee fair trial). The Court envisioned the possibility that television coverage would impair the testimony and credibility of witnesses and cause distractions to both the defendant and his counsel, thereby, depriving the defendant of effective counsel. *Id.*

<sup>19</sup> See, e.g., Norbert L. Kerr, *The Effects of Pretrial Publicity on Jurors*, 78 JUDICATURE 120, 124-27 (1994) (discussing remedies employed by judges to combat biasing effects of pretrial publicity).

<sup>20</sup> U.S. CONST. amend. I. The amendment states in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press." *Id.*; see also *Richmond Newspapers v. Virginia*, 448 U.S. 555, 569 (1979) (quoting 1 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 524 (1827)). "Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account." *Id.*

applied this right of expression<sup>21</sup> equally to citizens as well as the press.<sup>22</sup> The public, in essence, is party to every trial and thus has the right to full disclosure,<sup>23</sup> as well as the right to an uninterrupted flow of information from the courtroom.<sup>24</sup> Only in extraordinarily rare instances has the Supreme Court allowed media presence to be completely barred from the courtroom.<sup>25</sup> Therefore,

<sup>21</sup> See Nina Burleigh, *Preliminary Judgments*, A.B.A. J., Oct. 1994, at 58 (statement of Professor Monroe Freedman, of Hofstra University). "One can hardly imagine a time when a citizen's First Amendment right to speak publicly is more necessary than when one has been accused of a serious crime." *Id.*; see also *CBS, Inc. v. Young*, 522 F.2d 234, 239-40 (6th Cir. 1975) (holding broad court order forbidding all parties whether plaintiffs or defendants, their relatives close friends or associates from discussing Kent State killings with media unconstitutional). See generally *Gag Orders: An Infringement Upon Constitutional Rights*, 133 CONG. REC. H 3381 (daily ed. Aug. 7, 1987) (statement of Rep. Conyers, defending Rep. Ford, upon whom "no-comment" order was issued, saying Rep. Ford's right of free speech was being violated). But see *Sheppard v. Maxwell*, 384 U.S. 333, 361 (1986) (suggesting trial court could have proscribed extrajudicial statements by any lawyer, party, witness, or court official about matters which might prejudice trial, but did not).

<sup>22</sup> See GARRY, *supra* note 1, at 107. "In comparison with the speech clause, the press clause has often seemed like a little brother—always in the shadow of the speech clause and often without a separate identity." *Id.*; see also *Gannett v. DePasquale*, 443 U.S. 368, 401 (1979) (discussing trial court's balancing of "[c]onstitutional right of the press and public" against the "defendant's right to a fair trial"). *Id.*; *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 562 (1976) (quoting Judge Learned Hand establishing that courts must determine whether "the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger" (citing *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951)); *Estes v. Texas*, 381 U.S. 532, 539-40 (1965) (deciding television and radio reporters have same rights as general public).

<sup>23</sup> See Swartz, *supra* note 3, at 1420-24 (stating public has right to know and through coverage of litigation public gains information about operations of government and law enforcement); see also *Richmond Newspapers v. Virginia*, 448 U.S. 555, 569-79 (1980) (explaining historical openness of courts provides therapeutic value and faith in system); *Nebraska Press Ass'n*, 427 U.S. at 587 (noting that "[c]ommentary and reporting on the criminal justice system is at the core of the First Amendment values, for the operation and integrity of that system is of crucial import to citizens concerned with the administration of government"). But see *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (holding national security interest in protecting secrecy of troop movement during wartime outweighs public interest in knowing).

<sup>24</sup> See *Wrong Answer for the Simpson Case*, N.Y. TIMES, Oct. 21, 1994, at A30 (arguing news station and talk show host were correct in not giving attention to Judge's request not to interview author of book notorious for sensational coverage of murder victim's relationship with defendant); see also *Sheppard v. Maxwell*, 384 U.S. 333, 349 (1966). "A responsible press has always been regarded as the handmaiden of effective judicial administration . . . . This Court has . . . been unwilling to place any direct limitations on the freedom traditionally exercised by the news media for 'what transpires in the courtroom is public property.'" (citing *Craig v. Harney*, 331 U.S. 367, 374 (1947)); *In re Oliver*, 333 U.S. 257, 268-70 (1948) (arguing there is inherent distrust for secret trials in United States); *Estes*, 381 U.S. at 542 (quoting 2 COOLEY'S CONSTITUTIONAL LIMITATIONS 931-932 (Carrington ed. 1927)) (noting that public should be allowed to attend judicial inquiries and setting forth reasons why they should be allowed to see printed reports of trials as fully as exhibited in court); cf. *Gannett v. DePasquale*, 443 U.S. 368, 378-79 (1979) (asserting that closure of pretrial suppression hearing was proper because judge has affirmative constitutional duty to minimize prejudicial pretrial publicity).

<sup>25</sup> See, e.g., *Sheppard*, 384 U.S. at 361 (holding prejudicial news items, like divulgence of inaccurate information, rumors, and accusations are within range of things judge should have controlled); *Estes v. Texas*, 381 U.S. 532, 578 (1965) (holding that "in no sense did the

a reduction in media coverage beyond the current measures utilized by courts, presumably, would be unconstitutional.<sup>26</sup>

Although media coverage of trials needs to be controlled, the rationale for further restricting media coverage is flawed.<sup>27</sup> It is submitted that it was never the intent of the Framers of the Constitution to impanel jurors who are oblivious to the facts of a case.<sup>28</sup> Indeed, the United States Constitution does not stipulate that jurors should be unaware, only impartial.<sup>29</sup> Since the jury is entrusted with deciding the defendant's fate, the focus should not be on curtailing media coverage but on improving the jury's ability to make a just decision.<sup>30</sup>

dignity and integrity of the trial process shield this petitioner from the prejudicial publicity to which he had been exposed because the publicity marched right through the courtroom door and made itself at home"); *Irvin v. Dowd*, 366 U.S. 717, 728 (1961) (holding in capital cases "it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion and by a jury other than one in which . . . members admit, before hearing testimony, to possessing a belief in his guilt").

<sup>26</sup> See Maraniello, *supra* note 5, at 397 (discussing conflict between First and Sixth Amendment provisions for capital defendants); see also *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 547 (1976). The Court noted that "[t]he unusually able lawyers who helped write the Constitution and later drafted the Bill of Rights . . . were intimately familiar with the clash of the adversary system and the part that passions of the populace sometimes play in influencing jurors . . . [b]ut they recognized that there were risks to private rights from an unfettered press." *Id.*

<sup>27</sup> See *Waller v. Georgia*, 467 U.S. 39, 46 (1984) (asserting First and Sixth amendments provide equal protection). The Court explained that "explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public." *Id.* But see Maraniello, *supra* note 5, at 397 (making observation that courts are willing to line up on side of First Amendment and are willing to make sacrifices on side of Sixth Amendment).

<sup>28</sup> See *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1035 (1991). The Court focused on the media attention given to the trial and recognized that publication of trial proceedings serves as a check and balance system for the criminal justice system. *Id.*; *Richmond Newspapers v. Virginia*, 448 U.S. 555, 574-81 (1980) (analyzing evolution of criminal trials from historical perspective and assessing jurors' importance to trial proceedings before concluding that jurors should be well informed members of community); Francis T. Murphy, *A Case Against Cameras in the Courtroom*, N.Y. L.J., June 30, 1994, at 2. The Presiding Justice of the First Department expressed the fear that the right to a fair trial is not being considered with the rights of the defendant in mind. *Id.*; see also Judge Roger J. Miner, *Eye on Justice*, N.Y. St. B.J., Feb. 1995, at 9 (discussing historical development of open trial and jurors' role therein).

<sup>29</sup> U.S. CONST. amend. VI. The amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ." *Id.*

<sup>30</sup> See *Nebraska Press Ass'n v. Stuart* 427 U.S. 539, 549-56 (1976) (analyzing previous reversals attributable to mishandling of jury which prevented impartiality).

"Due Process requires that the accused receive a trial by an impartial jury . . . [and] the trial courts must take strong measures to ensure that the balance is never weighed against the accused . . . reversals are but a palliative; the cure lies in those remedial measures that will prevent the prejudice at its inception"

*Id.* at 553 (quoting *Sheppard v. Maxwell* 384 U.S. 333, 362-63 (1966)).

This Note details why media coverage of trials does not need to be reduced in order to maintain jury impartiality. Specifically, it addresses why media coverage presents a problem to the United States justice system, how it impacts a citizen's rights, and why media coverage is justified. Part One outlines the Sixth Amendment right of impartiality, as defined by the Supreme Court, barring the media from reporting courtroom proceedings only when prejudice is apparent. Part Two analyzes how courts have balanced the competing constitutional rights of the First and Sixth Amendments to ensure that a defendant is guaranteed a fair trial. Part Three explores whether further restrictions on the media's access to trial information is needed to maintain impartial juries. The Note concludes with suggestions of measures courts can employ to mitigate the effect of excessive media coverage on the jury's neutrality.

### I. IDENTIFYING PREJUDICE

The Federal and State judiciaries go to great lengths to secure fairness so that truth may be ascertained and verdicts justly determined.<sup>31</sup> Unregulated media coverage of a trial has the potential to negatively impact these objectives.<sup>32</sup> Fewer rights are more precious to the accused than to be informed of the accusations against him and have the opportunity to counter with a defense.<sup>33</sup> The true injustice of exaggerated publicity is its ability to present

<sup>31</sup> See, e.g., FED. R. EVID. 102. The purpose of evidence rules is "to secure fairness in administration [so] that truth may be ascertained and proceedings justly determined." *Id.*; see also 62 WIGMORE ON EVIDENCE § 1766, at 250 (3d ed. 1985). The theory behind rules such as hearsay is that, when a human utterance is offered as evidence of truth of the matter asserted, the credibility of the assertor becomes the basis of inference, therefore the assertion can be received only when made upon the stand, subject to the test of cross-examination. *Id.*; see also N.Y. CIV. PRAC. L. & R. 4519 (McKinney 1994) (testimony relating to personal transaction or communication between witness and decedent or mentally ill person is barred as uncontestable).

<sup>32</sup> See *infra* notes 64-83 and accompanying text (noting views ascertained from news coverage has potential to be evidence against accused which is not challengeable by defense); see also *Turner v. Louisiana*, 379 U.S. 466, 471 (1964) (holding violation of Fourteenth Amendment when two deputy sheriffs who were also lead witnesses for prosecution were in charge of handling jury); Joel Achenbach, *Ito Blinks In Spotlight Judge's Blunder Brings Long Week of Intense Publicity and Criticism*, WASH. POST, Nov. 19, 1994, at A1 (criticizing Judge Ito, presiding in O.J. Simpson trial, for his own media appearances, viewed by prospective jury members after Ito reprimanded press for excessive coverage of trial).

<sup>33</sup> See *Chandler v. Florida*, 449 U.S. 560, 570-75 (1980). "Trial courts must be especially vigilant to guard against any impairment of the defendant's right to a verdict based solely upon the evidence and the relevant law." *Id.* at 574. The Court found that the risk of juror prejudice was present in any publication of a trial, but that such risk does not warrant an



unsupported views which may affect the trial in unchallengeable ways.<sup>34</sup>

Sixth Amendment challenges to a jury verdict which are based upon allegedly prejudicial media coverage traditionally assert that a defendant has not been tried by an impartial jury.<sup>35</sup> It is difficult to prove, however, except in the most extreme displays of prejudicial activity, that media coverage actually does result in bias.<sup>36</sup> In fact, while the Supreme Court has overturned convictions on the basis of prejudicial media coverage, they have restricted this extreme measure to instances when there is clear evidence of a specifically identifiable bias.<sup>37</sup>

The Supreme Court addressed the importance of the right to an impartial jury when it overturned the 1965 conviction of Billie Sol Estes, a high-rolling swindler who gained national notoriety in *Estes v. Texas*.<sup>38</sup> The issue on appeal was whether the petitioner was deprived of his Fourteenth Amendment right to Due Process be-

"absolute ban." *Id.* at 575. The legal remedy for the defendant is to demonstrate that the media coverage had compromised a particular jury's ability to be fair and impartial. *Id.*

<sup>34</sup> See *id.* at 574-75 (agreeing defendant had right to limit press coverage if juror prejudice was demonstrated to compromise ability of case to be adjudicated fairly); see also Murphy, *supra* note 28, at 2. The Presiding Justice of New York's Appellate Division, First Department, argued that "since it is the defendant who stands uniquely to suffer from excessive, intrusive or skewed publicity, surely it should be [his] interests that are uppermost in any consideration of [media] coverage." *Id.* But see Tony Perry, *Rape Victim Fights Back and Takes Story Public*, L.A. TIMES, Jan. 1, 1995, at 1 (emphasizing particular danger rape victim puts self in through media attention and contrasts with defendant's lawyer maintaining client's right to fair trial not infringed by media exposure of plaintiff).

<sup>35</sup> Sheppard v. Maxwell, 384 U.S. 333, 363 (1966) (asserting community from which jury was chosen had been inundated by publicity adverse to defendant); *Estes v. Texas*, 381 U.S. 532, 551 (1961) (overturning lower court decision where telecast of trial inherently prevented search for truth) *Id.*; *Irvin v. Dowd*, 366 U.S. 717, 728 (1961) (holding change of venue insufficient to permit choosing impartial jury unexposed to damaging publicity).

<sup>36</sup> See *Chandler*, 449 U.S. at 570-74 (stating that *Estes* should not be interpreted as announcing constitutional rule that all media coverage of criminal trials is inherent denial of due process); see also *Gannett Co. v. DePasquale*, 443 U.S. 368, 379 n.6 (1979). The Court noted that failure to close a pretrial hearing, or take other protective measures to minimize the impact of prejudicial publicity, [does not necessarily] warrant the extreme remedy of reversal of a conviction. *Id.*

<sup>37</sup> *Waller v. Georgia*, 467 U.S. 39, 48 (1984) In order to avoid reversal of the decision in the future, even a party seeking to close a trial must advance a specific, overriding interest that the trial is likely to be prejudiced and the court must consider reasonable alternatives to closure. See *Sheppard v. Maxwell*, 384 U.S. 333, 352 (1966) (conceding totality of circumstances warrant careful examination of facts of case before decision made to reverse). After deciding the refusal of judge to take precautions against the influence of pretrial publicity alone was not sufficient to warrant reversal, the court examined the rulings against the setting in which the trial was held. *Id.* at 354; see also *Estes v. Texas* 381 U.S. 532, 550 (1965). Only after a careful examination of the facts of the case, including the judge's decision to telecast the proceedings, the decision was made to reverse. *Id.*

<sup>38</sup> 381 U.S. 532 (1965).

cause of the televising and broadcasting of his trial.<sup>39</sup> The defendant argued that the activities of the television crews and news photographers in the courtroom led to considerable disruptions of the trial.<sup>40</sup> The Supreme Court agreed and decided to reverse, holding that trial witnesses and the original jury had been tainted by the actions of the press.<sup>41</sup> The Court squarely rejected the contention of the State that prejudice due to media coverage was not apparent, and noted that the legal system endeavors to prevent "even the probability of unfairness."<sup>42</sup>

The following year, in considering *Sheppard v. Maxwell*,<sup>43</sup> the Supreme Court was again presented with an appeal alleging denial of an impartial jury.<sup>44</sup> This time the Court had little difficulty specifically identifying the unfairness of the media's coverage.<sup>45</sup> The press coverage surrounding Dr. Sheppard's trial, for allegedly bludgeoning his pregnant wife to death, was overwhelming.<sup>46</sup> The

<sup>39</sup> *Id.* at 534-35.

<sup>40</sup> *Id.* at 536 (noting that videotapes of trial clearly illustrated judicial serenity and calm was not maintained). "[T]welve cameramen were engaged in the courtroom throughout the hearing taking motion and still pictures and televising the proceedings. Cables and wires were snaked across the courtroom floor, three microphones were on the judge's bench and others were beamed at the jury box and the counsel table." *Id.* In addition, the absence of some witnesses led to a continuance which was utilized to permit construction of a booth to house media personnel and equipment within the courtroom. *Id.* at 537.

<sup>41</sup> *Id.* at 536-37.

<sup>42</sup> *Id.* at 543 (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). Although the Court agreed that the normal requirement of prejudice be specifically identified, they noted the facts of the case involved such a probability of prejudice it was inherent. *Id.* at 542. "A fair trial in a fair tribunal is a basic requirement of due process . . ." *Id.* at 543 (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)). "To perform its high function in the best way 'justice must satisfy the appearance of justice.'" *Id.* (quoting *In re Murchison*, 349 U.S. at 136).

<sup>43</sup> 384 U.S. 333 (1966).

<sup>44</sup> See *id.* at 335. The Court posed the defendant's appeal as whether "[Dr.] Sheppard was deprived of a fair trial in his state conviction for the second degree murder of his wife due to the trial judge's failure to protect [him] from the massive, pervasive, and prejudicial publicity that attended his prosecution." *Id.*

<sup>45</sup> See *id.* at 335-39 (holding accused in murder case was denied due process and fair trial by judge's failure to protect accused from prejudicial publicity and to control disruptive influences in courtroom). Throughout the hearings, held to determine whether there was enough evidence for trial, the newspapers ran stories and editorials that tended to incriminate the defendant and point out discrepancies in his statements to authorities. *Id.* at 337. These articles focused on everything from Mr. Sheppard's extramarital affairs to evidence that was never found. *Id.* at 340-41. The jurors' names were published in the local papers. *Id.* at 342. Every juror, except one, admitted during voir dire to reading newspaper accounts of the case in the papers or to having heard broadcasts about the case. *Id.* at 345. Additionally, jurors, although sequestered, were allowed to make unsupervised telephone calls on a daily basis. *Id.* at 349.

<sup>46</sup> See *id.* at 341 (demonstrating publicity Sam Sheppard was subjected to prior to his arraignment). Numerous newspaper articles reporting on the case presented a one-sided view through headlines such as: "Why Isn't Sam Sheppard in Jail?" and "Quit Stalling—Bring Him In." *Id.*

pervasiveness of the communications and the difficulty of effacing prejudicial publicity from the minds of the jurors prompted the Court to reverse the lower court's decision.<sup>47</sup> Since the trial court did not meet its duty of protecting the accused from the prejudicial publicity which had saturated the community, and the judge did not institute procedures to control the disruptive influences in the courtroom, Dr. Sheppard was granted a new trial.<sup>48</sup>

In its 1986 landmark decision *Press-Enterprises Co. v. Superior Court of California*,<sup>49</sup> however, the Supreme Court made it clear that a heightened standard of proof would be required to limit the media's access to courtroom proceedings.<sup>50</sup> This case involved media coverage of a murder trial in which a nurse was accused of administering lethal doses of a heart drug known as lidocaine to twelve patients.<sup>51</sup> The Supreme Court overturned the District Court's decision to close the preliminary hearings to the public and to seal the transcripts of the proceedings.<sup>52</sup> The Court established that it is necessary to show a "substantial probability of prejudice" before media coverage may be limited.<sup>53</sup> This standard replaced the previous requirement of merely proving a "reasonable likelihood of prejudice."<sup>54</sup>

<sup>47</sup> See *Sheppard*, 384 U.S. at 363 (reasoning that state trial judge did not protect defendant from prejudicial effects resulting from publicity). The Court noted that where a reasonable likelihood that pretrial news could prejudice the proceedings and prevent a fair trial, the trial judge should continue the case, change venue, or order a new trial. *Id.*

<sup>48</sup> *Id.* (remanding case to district court with instructions to issue writ ordering release of defendant from custody unless state sought timely new trial).

<sup>49</sup> 478 U.S. 1 (1986).

<sup>50</sup> *Id.* at 9 (explaining public access to courtroom proceedings is necessary in order to maintain both fairness of criminal trial system and essential appearance of fairness).

<sup>51</sup> See *id.* (reporting defendant had administered lethal doses of lidocaine to twelve patients which resulted in their deaths).

<sup>52</sup> *Id.* The transcript was eventually released and the issue regarding whether the release of the transcript may deny the defendant the right to a fair and impartial trial was decided pursuant to *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 620 (1982). *Id.* The Court found the issue was not moot on the grounds that the controversy is "capable of repetition yet evading review." *Id.* (Stevens, J., dissenting). See *Press Enterprises*, 478 U.S. at 6 (quoting *Globe Newspapers*, 457 U.S. at 603, 607-09) (finding lower court acted prematurely in closing proceeding and should have explored options less severe than closure to protect defendant's interests).

<sup>53</sup> See *Press Enterprises*, 478 U.S. at 14 (stating that "substantial probability" standard is required test under First Amendment).

<sup>54</sup> See *Press Enterprises v. Superior Court of California*, 478 U.S. 1, 14 (1986) (enunciating Supreme Court assertion that "reasonable likelihood" standard failed to consider First Amendment access to criminal proceedings).

## II. GUARDING AGAINST PREJUDICIAL PUBLICITY

Determining whether courts are taking adequate steps to ensure that only impartial juries are being seated requires a clear understanding of the prejudice created by media coverage.<sup>55</sup> Some commentators have advanced the premise that, at times, media coverage is not prejudicial and may work in the defendant's favor.<sup>56</sup> In fact, the media's attention to the justice system strengthens public interest<sup>57</sup> and knowledge of the trial system,<sup>58</sup> and shields the accused from the potential injustice of secret trials.<sup>59</sup> Cases of extreme and outrageous prejudice such as *Estes* and *Sheppard*, although denoting the potential negative impact of media coverage, are rare examples.<sup>60</sup> Constitutional scholars maintain that no clear evidence exists that media coverage is in-

<sup>55</sup> See *Nebraska Press Ass'n v. Stewart*, 427 U.S. 539, 547-48 (1976) (describing historical developments leading up to implementation of Bill of Rights); Newton Minow & Fred Cate, *Who is an Impartial Juror in an Age of Mass Media?*, 40 AM. U. L. REV. 631, 637-46 (1991) (discussing justice system's historical efforts to reduce media-caused juror bias).

<sup>56</sup> See *Sheppard v. Maxwell*, 384 U.S. 333, 349-50 (1966) (supporting theory that press helps guard defendant's rights). "The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism." *Id.* at 350; Burton B. Roberts, *Cameras in the Courts: A Rebuttal*, N.Y. L.J., July 13, 1994, at 2 (discussing potential for technology to serve as check on court system). "[T]echnology now is available to expose judicial folly . . . to a far greater number of citizens." *Id.*; Andrea Ford & Greg Braxton, *Ito To Rule On TV Use In Courtroom*, L.A. TIMES, Oct. 4, 1994, at B1 (advancing theory that media coverage promotes investigative reporting and perhaps dispositive evidence); James F. McCarty, *Fair or Foul?; Press Coverage May Help, May Hurt Defendant*, Oct. 9, 1994, at C1 (arguing that trial publicity can help defendant's case more than hurt).

<sup>57</sup> See GLEASON, *supra* note 1, at 109 (detailing affect of media on public view of judiciary).

<sup>58</sup> See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572-73 (1980) (quoting *State v. Schmidt*, 139 N.W.2d 800, 807 (Minn. 1966)). The Court noted that in earlier times attendance at trials was a way of passing time but now "[i]t is not unrealistic . . . to believe that public inclusion affords citizens a form of legal education and . . . promotes confidence in the fair administration of justice." *Id.*; see also Todd Piccus, Note, *Demystifying the Least Understood Branch: Opening the Supreme Court to Broadcast Media*, 71 TEX. L. REV. 1053, 1088 (1993) (quoting Justice Felix Frankfurter, who joked that he "longed for the day when the news media would cover the Supreme Court as thoroughly as it did the World Series"). *Id.* Justice Frankfurter explained that public confidence in the courts hinges on the public's perception of them, which in turn hinges on the media's portrayal of the legal system. *But cf.* *Estes v. Texas*, 381 U.S. 532, 536 (1965) (arguing televisions in courtroom distract jury).

<sup>59</sup> See *In re Oliver*, 333 U.S. 257, 268-70 (1947) (explaining historical background of secret trials and reasons for public mistrust of secret trials today).

<sup>60</sup> See *Sheppard v. Maxwell*, 384 U.S. 333, 349, 356 (1966) (asserting that although media coverage guards against abuses of justice by police, prosecutors and courts by exposure to extensive public scrutiny and criticism, access does have limits); *Estes*, 381 U.S. at 532 (allowing reversal in case where media abuse was characterized by absurdities such as continuing case for one month so sound booth could be erected within courtroom to accommodate camera crews). See generally Minow & Cate, *supra* note 55, at 663 (alleging some courts mistake "unaware" for "impartial" in impaneling a jury and therefore are unable to reach just decision); Flynn, *supra* note 3, at 880 (demonstrating difficulties courts face in trying to balance First Amendment and Sixth Amendment rights).

herently prejudicial, or that restricting media coverage from trials is presumptively favored.<sup>61</sup> Indeed, the standard for proving the prejudice of media coverage, as enunciated in the series of cases following *Sheppard*, has become significantly more stringent.<sup>62</sup> Thus, the measures adopted by courts have become increasingly permissive and discretionary.<sup>63</sup>

### A. *The Potential Prejudicial Effects of Media Coverage*

An accused party may be denied an impartial jury<sup>64</sup> unless a close analysis of the effect of publicity on a trial is undertaken.<sup>65</sup> Jurors, subjected to intense media coverage, could potentially impute opinions of the public and media into their determination of the guilt or innocence of the accused.<sup>66</sup> Some critics contend that

<sup>61</sup> *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 554 (1976) (reasoning of Chief Justice Burger that pretrial publicity even pervasive, adverse publicity does not inevitably lead to unfair trial) *Id.*; see *Chandler v. Florida*, 449 U.S. 560, 568 (1981). Chief Justice Burger also determined that state courts maintain supervisory powers and therefore there is no constitutional right to broadcast trial live, case later determined cameras were allowed in Florida State Courts since there is no supervisory power over state courts. *Id.*; see also Robert S. Stephen, *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, 1083-104 (1992) (outlining elements of trial court's alternatives in maintaining atmosphere of fairness during trial while still maintaining balance between First and Sixth Amendment rights); see also Howard Rosenberg, *Smith v. Courtroom T.V.; No-one Advocated Barring Print Reporters*, L.A. TIMES, Aug. 2, 1991, at F1. Floyd Abrams, a prominent First Amendment attorney while representing Courtroom Television Network emphasized that courtrooms should be open to the press with the statement that "[t]he way to get [the] story out straight and clear and honorably and true is for the public to have more good solid information, not less." *Id.*

<sup>62</sup> See *supra* notes 50-55 (discussing post *Sheppard* media analysis).

<sup>63</sup> See *United States v. Antar*, 38 F.3d 1348, 1363 (3d Cir. 1994) (discussing challenges facing courts in fashioning proper orders against excessive publicity). A central problem faced by courts is that they must balance the concerns of public awareness and the desire to prevent the trial from becoming a carnival, while keeping in mind that the jurors must justify their decisions after the trial. *Id.*

<sup>64</sup> See *Chandler v. Florida*, 449 U.S. 560, 574 (1980). "Any criminal case that generates a great deal of publicity presents some risks that the publicity may compromise the right of the defendant to a fair trial." *Id.*; see also *Estes*, 381 U.S. at 587 (Harlan, J., concurring). "Permitting television in the courtroom undeniably has mischievous potentialities for intruding upon the detached atmosphere which should always surround the judicial process." *Id.*

<sup>65</sup> See U.S. CONST. amend. VI. The amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence." *Id.*; see also *Estes*, 381 U.S. at 551 (quoting Justice Oliver W. Holmes in *Patterson v. Colorado*, 205 U.S. 454, 462 (1907)). "The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." *Id.*

<sup>66</sup> *Sheppard v. Maxwell* 384 U.S. 333, 345-49 (1966) (asserting jury was subjected to media coverage which could not be ignored because it was so pervasive and outrageous); see *Estes v. Texas*, 381 U.S. 536, 543-45 (1965). The Court recognized the potential for jurors

trial publicity is the worst detriment to the impartiality of the juror pool.<sup>67</sup> They argue that the media's response to demands for information within the community provides the jury pool with a vast amount of pretrial knowledge, which is not easily distinguished from the evidence presented at trial.<sup>68</sup> In addition, psychological pressures stemming from media scrutiny could possibly taint verdicts to conform with public opinion rather than with the evidence offered at trial.<sup>69</sup>

The testimony offered by the parties to support their contentions is intended to be the foundation for the jury's verdict.<sup>70</sup> Media coverage of trials may jeopardize the accuracy of testimony.<sup>71</sup>

to bring facts learned through the media into the jury box with "not only [a] possible but highly probable [result] that it will have a direct bearing on [juror's] vote as to guilt or innocence." *Id.*

<sup>67</sup> See, e.g., *Estes*, 381 U.S. at 543-45. The potential impact of the media is greatest to the jurors, as they are the key to the factfinding process. *Id.* at 545. Information not fitting into a particular preconceived story has the potential of being disregarded and denies the accused the right to present a complete defense. *Id.* See generally Symposium, *The Selection and Function of The Modern Jury: What Empirical Research Tells Us*, 40 AM. U. L. REV. 547, 558 (1991) (hereinafter Symposium) (statement of Dr. Valerie Hans, Division of Criminal Justice and Department of Psychology, University of Delaware). Scholars believe that juries form a story with the evidence given to them at trial. *Id.* Further jurors will look for any evidence that appears consistent with the particular story formed. *Id.* Once pretrial publicity has been integrated with their story, then it is virtually impossible to remove. *Id.*

<sup>68</sup> See *Gannett v. DePasquale*, 443 U.S. 368, 378 (1979) (expressing danger of publicity concerning pre-trial suppression hearings is particularly acute because of difficulty in measuring with any degree of certainty effects of such publicity on fairness of trial); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 563 (1976). Courts still maintain the "clear and present danger" standard in determining that pretrial publicity could impinge upon defendants right to a fair trial but this is not a correct usage of Justice Holmes' original "clear and present danger" language. *Id.*; see also MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 (Supp. 1994). The rule states in relevant part:

A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

*Id.*; see also ABA STANDARDS FOR CRIM. JUSTICE FAIR TRIAL AND FREE PRESS (3d ed. 1992) (explaining generally application of selected rules of CODE OF PROFESSIONAL RESPONSIBILITY).

<sup>69</sup> See *Estes*, 381 U.S. at 543-45. Distractions are attributable to both the presence of media in the courtroom and the awareness that friends and neighbors have their eyes on them. *Id.* "Human nature being what it is, not only will a juror's eyes be fixed on the camera, but also his mind will be preoccupied with the telecasting rather than with the testimony." *Id.*

<sup>70</sup> See WIGMORE, *supra* note 31, § 1766 (supporting theory of testimony as basis for jury decision).

<sup>71</sup> See *Estes v. Texas*, 381 U.S. 536, 543-47 (1965). "Whether they do consciously or subconsciously, all trial participants act differently in the presence of television cameras." *Id.* at 570; see also Norbert L. Kerr, *The Effects of Pre-trial Publicity On Jurors*, 78 JUDICATURE 120, 122-23 (1994). Research on the effects of general publicity on the juror pool comparing three groups of jurors: those who read articles about a defendant mistakenly identified and convicted of rape; a group of jurors who read articles describing how the testimony of an

Witnesses, required to testify in highly publicized trials, have the added concern of personal safety, loss of anonymity, and stress.<sup>72</sup> These factors directly influence a key element of testimonial evidence: the demeanor of the witness.<sup>73</sup> Jurors, faced with the task of weighing evidence, may interpret nervousness on the part of a witness as indicative of questionable character.<sup>74</sup> In addition, witnesses who are intimidated by the media attention may be deterred from testifying, and thus deprive the accused of the full complement of evidence.<sup>75</sup> Admittedly, there is a certain level of intimidation inherent in testifying in any court of law, and intensified media coverage may further compromise the ability of a witness to give unbiased testimony.<sup>76</sup>

The defendant's demeanor, however, could be the greatest element of a trial affected by media presence.<sup>77</sup> Although not tangible evidence, the defendant's appearance at trial has been noted as a

eyewitness led to the arrest and conviction of a mass murderer; and a group of jurors who were exposed to no pretrial publicity. *Id.* The first group of jurors was found to be more likely to acquit than the other two groups. *Id.* See generally Linda Greenhouse, *Disdaining a Sound Bite, Federal Judges Banish TV*, N.Y. TIMES, Sept. 25, 1994, § 4, at 4 (discussing concerns of federal judges that witnesses at televised trials felt chilled and intimidated by presence of cameras).

<sup>72</sup> See *Estes*, 381 U.S. at 545-47 (noting incalculable impact of witness' knowledge that he is being viewed by vast audience). "Embarrassment may impede the search for the truth, as may a natural tendency toward overdramatization." *Id.* at 547; see also Gregory K. McCall, *Cameras in the Criminal Courtroom: A Sixth Amendment Analysis*, 85 COLUM. L. REV. 1546, 1551-53 (1985). "Data from some socio-psychological studies tend to support the proposition that the increase in publicity and resultant loss of anonymity due to the broadcast of the witness' testimony make it more likely that the testimony will be altered to conform to widely-held beliefs in order to 'avoid public ostracism.'" *Id.* at 1551.

<sup>73</sup> See 3A JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 946 (1974) (demeanor of witness is always assumed to be in evidence). "The demeanor of the witness on the stand may always be considered by the jury in their estimation of his credibility." *Id.*

<sup>74</sup> See McCall, *supra* note 72, at 1553. "These camera-induced alterations in demeanor may, in turn, affect the factfinder's evaluation of the witness' testimony." *Id.* at 1554 (citing H. Barish, Remarks at the Proceedings of Judicial Conference on Cameras in the Courtroom, 93 F.R.D. 157, 215-16 (1981)).

<sup>75</sup> See, e.g., *Estes*, 381 U.S. at 547 (noting that televised trial may result in reluctant witness impeding trial as well as discovery of truth). *Id.*; see also McCall, *supra* note 72, at 1553-54 (noting presence of cameras at trial may not only deprive defendants of voluntary and accurate testimony of witness, but also may deter people from coming forward).

<sup>76</sup> See *Estes v. Texas*, 381 U.S. 536, 547 (1965) (supporting general notion that presence of media in courtroom increases tension of witnesses); see also McCall, *supra* note 72, at 1554 (noting witnesses are generally fearful of vigorous cross-examination because it will be on television). Coverage that reaches acquaintances plainly distinguishes testifying in court from the "mundane encounters" a witness may have with video cameras. *Id.*

<sup>77</sup> See 2 WIGMORE, *supra* note 73, § 274 (2), at 119-20 (demeanor of defendant during trial as evidence). Although it has been determined to be too elusive to be justifiably considered as evidence, the defendant's demeanor is an inevitable part and parcel of the factors considered by the jury. *Id.* It would be an impossible task to blind the jury to its mental notes regarding the actions of the defendant during the trial. *Id.*

key factor in the jury's decision making process.<sup>78</sup> Public exposure adds an even higher degree of pressure to an already stressful situation.<sup>79</sup> This pressure affects the accused's personal sensibilities, dignity, and ability to concentrate on the proceedings.<sup>80</sup> These factors present barriers to the jury's ability to judge the defendant as they would without the unrelenting glare of the public eye.<sup>81</sup>

In this same regard, media coverage of lawyers and judges may affect their impartiality.<sup>82</sup> Attention to concerns of the public and commentary by the press may alter the disposition of both the judge and lawyers.<sup>83</sup> The members of a jury could mistakenly interpret these distractions as an inference of guilt.<sup>84</sup> Again, although not evidence, these factors play a key role in the jury's trial analysis and thus may taint the jury decision.<sup>85</sup>

<sup>78</sup> See *id.*

<sup>79</sup> See generally George Gerbner, *Too Harsh a Spotlight*, THE RECORDER, July 27, 1994, at 8 (noting most defendants worry about effect on appearance to public). The ability to become instant celebrities may affect the way the defendant acts in the courtroom. *Id.*

<sup>80</sup> See *Estes*, 381 U.S. at 547-49 (noting that presence of cameras during trial was form of mental and physical harassment, which would affect ability of accused to focus on defense). The court noted that television and radio broadcasts will inevitably result in prejudice because they are powerful weapons that could destroy a defendant before the public. *Id.* But see *Chandler v. Florida*, 449 U.S. 560, 573 (1981) (concluding that *Estes* does not announce constitutional rule barring television in all circumstances because of limited nature).

<sup>81</sup> See McCall, *supra* note 72, at 1553-54 (noting socio-psychological studies support contention witness will be more likely to alter testimony to conform to public opinion where faced with broadcast of testimony). Television removes all shields of protection from a witness because the public sees them in their own voice and image. *Id.* at 1553. "On those occasions where camera coverage of a trial silences a witness or distorts his testimony, the defendant may be deprived of a constitutionally guaranteed access to evidence." *Id.* at 1555 (quotation omitted).

<sup>82</sup> Bernice Donald & Timothy Dyk, *Cameras in the Supreme Court; Should Supreme Court Proceedings be Televised?* A.B.A. J., Mar. 1989, at 35 (reporting views of some lawyers that cameras put tremendous pressure on attorneys, affecting efforts to argue effectively); see McCall *supra* note 72, at 1557 (suggesting that trial judge has power to indirectly intimidate witness through his discretionary control over camera thus influencing testimony jury will hear).

<sup>83</sup> See *Estes v. Texas*, 381 U.S. 536, 547 (1965) (recognizing that attention of judge is seriously affected by television in courtroom for several reasons: judge must maintain order at trial, supervise television operation, ignore distractions of television crews, and remain politically impartial in public eye).

<sup>84</sup> *Id.* at 549 (finding media distractions can have direct negative effect on lawyers and judges by intruding into attorney-client relationship and encouraging posturing in front of cameras by trial participants). See generally Henry Weinstein, *Rough and Tumble Trial in Court of Public Opinion*, L.A. TIMES, Mar. 15, 1993, at A1 (discussing effect of media coverage on attorney's concentration, especially when they seem to be exposed to media coverage themselves); see also Murphy, *supra* note 28, at 2 (arguing news commentators distract jurors from acting normally).

<sup>85</sup> See McCall, *supra* note 72, at 1555-56 (explaining trial participants are judges and attorneys affected by how they appear to public); see also *Estes*, 381 U.S. at 591 (Harlan, J., concurring) (asserting potential for jurors, ambitious prosecutor, or conscientious judge to prepare themselves for satisfactory television performances); Achenbach, *supra* note 32, at



## B. Judicial Measures for Controlling Prejudice

Notwithstanding the free speech guarantee of open trials,<sup>86</sup> there are some measures courts have implemented to protect the right of the accused to a fair judicial assessment.<sup>87</sup> These devices are at the discretion of the trial judge and vary depending on the prejudice a court is trying to avoid.<sup>88</sup> Complete secrecy, however, is not tolerated by the public<sup>89</sup> and therefore these devices are only limitations, rather than absolute restrictions, on coverage.<sup>90</sup>

A1 (criticizing Judge Lance Ito for appearing in television interview while simultaneously berating journalists for media's role in *People v. O.J. Simpson* trial).

<sup>86</sup> See *Press-Enter. Co. v. Superior Court of California*, 478 U.S. 1, 9 (1986) (noting some limited circumstances maintain overwhelming over-riding interest providing justification for closing trial to public, even where public right to access attaches it is not absolute); *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 378 (1979) (suggesting publicity at pretrial hearing influences jurors interpretation of inculpatory information which would be inadmissible at trial); see also N.Y. JUD. LAW § 218(3)(b), (3)(c) (McKinney 1993) (statute which meets the constitutional requirement). The statute provides in pertinent part:

Permission for news media coverage shall be at the discretion of the presiding trial judge . . . [who] shall . . . take into account . . . (i) the type of case involved; (ii) whether such coverage would cause harm to any participant in the case or otherwise interfere with the fair administration of justice; (iii) whether any order directing exclusion of witness from courtroom could be rendered substantially ineffective; (iv) whether such coverage would interfere with any law enforcement activity; or (v) involve lewd or scandalous matters.

*Id.* But see *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 610 (1982) (holding state statute which barred press and general public from courtroom during testimony of minor sex victims unconstitutional).

<sup>87</sup> See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 562-65 (1976) (listing alternatives to closure for promoting fair trial: venue change, postponement, intensive juror questions, clear jury instructions (citing *Shepard v. Maxwell*, 389 U.S. 333, 357-62 (1966)); see also, e.g., Kenneth B. Noble, *Judge Restricts Simpson Coverage*, N.Y. TIMES, Oct. 21, 1994, at A1 (discussing closing jury selection proceedings by judge in *O.J. Simpson* trial). The author reasoned that this action would violate First Amendment rights of news organizations and would not resolve concerns of jury contamination since potential jurors had all received the same admonition not to watch television, read newspapers, or go to book stores. *Id.* See generally Maraniello, *supra* note 5, at 371, 397 (concluding that fair trials still can be provided most effectively through continuances and venue changes).

<sup>88</sup> See, e.g., *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966). The Court noted Due Process requires that the accused receive a trial by an impartial jury, free from outside influences, because the pervasiveness of the modern media can imprint the minds of jurors, thus requiring trial courts to use strict methods to determine that the balance is not weighed against the defendant. *Id.*

<sup>89</sup> See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980). "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Id.*; *State v. Schmit*, 139 N.W.2d 800, 807 (Minn. 1966). "It is not unrealistic even in this day to believe that public inclusion affords citizens a form of legal education and hopefully promotes confidence in the fair administration of justice." *Id.*; *State v. Haskins*, 38 N.J. Super. 250, 255 (1955) (noting that public trials provide restraint on abuses of judicial power and arbitrariness).

<sup>90</sup> *Waller v. Georgia*, 467 U.S. 39, 45, 48-49 (1984) (applying standards carved out of *Press Enterprises I*). The Supreme Court established a four part test to determine whether a courtroom should be closed to the public: (1) the party seeking to close hearing must advance an overriding interest likely to be prejudiced; (2) closure must be no broader than necessary to protect that interest; (3) the trial court must consider reasonable alternatives

One of the strictest devices available to curtail potentially prejudicial media coverage is the gag order.<sup>91</sup> Judges use gag orders to restrict the press from reporting on the proceedings and events surrounding certain trials.<sup>92</sup> The issuance of gag orders is an extreme action since it conflicts with First Amendment rights<sup>93</sup> and presents enforcement problems.<sup>94</sup> These attempts at silencing the

to closing proceedings; (4) the court must make findings adequate to support closure. *Id.*; accord *Richmond Newspapers*, 448 U.S. at 580-81 (acknowledging alternatives to closure are difficult for trial courts to deal with but are not unmanageable). The Supreme Court has repeatedly held that of the several rights implicitly guaranteed through the Bill of Rights the trial of a criminal case must be open to the public unless an "over-riding interest" can be shown to interfere. *Id.*; see also *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 402 n.4 (1979) (Powell, J., concurring). The Court construed the Sixth Amendment to exclude the general public during the pre-trial period in narrowly defined circumstances when there was "no alternative means of remedying that problem . . . of prejudicial publicity." *Id.*

<sup>91</sup> See *Breiner v. Takao*, 835 P.2d 637, 642 (Haw. 1992) (finding gag order constitutionally impermissible unless serious threat to fair trial is shown and alternatives are exhausted); see also *New York Times Co. v. United States*, 403 U.S. 713, 723 (1971). "Any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity". *Id.* (quoting *Organization For A Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)); *Sheppard*, 384 U.S. at 362-63. The Court noted, however, that "there is nothing that proscribes the press from reporting events that transpire in the courtroom." *Id.* at 363. The Court further recognized need for some action to be taken early in trial proceedings to avoid possibility of prejudicial news adversely affecting trial proceedings. *Id.* at 363.

<sup>92</sup> See *Swartz*, *supra* note 3, at 1411. "Judges increasingly issue injunctions against public comment in their effort to protect defendants from media trials." *Id.* The Supreme Court has imposed prior restraints on parties on the basis that First Amendment rights are not an absolute guarantee, but require demonstrating in advance of trial that without prior restraint a fair trial will be denied. See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 569 (1976).

<sup>93</sup> *Nebraska Press Ass'n*, 427 U.S. at 570. The Court recognized that the First Amendment freedom to speak and publish, although not absolutely guaranteed in all circumstances, did mandate barriers against prior restraints. *Id.* "[P]rior restraints on speech and publications are the most serious and the least tolerable infringement on First Amendment rights." *Id.*; accord *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 396 (1973) (Burger, C.J., dissenting); *Carroll v. Princess Anne*, 393 U.S. 175, 181 (1968); see also *George DeWan, The Bill of Rights*, N.Y. *NEWSDAY*, Nov. 21, 1991, at 20. (quoting Justice Hugo Black's comment that "[b]oth the history and the language of the First Amendment support the view that the press must be left free to publish news, whatever the sources without censorship, injunctions or prior restraint").

<sup>94</sup> See also *Press-Enter. Co. v. Superior Court of California*, 464 U.S. 501, 510 (1989); *Richmond Newspapers*, 448 U.S. at 581; *Gannett Co. v. DePasquale*, 443 U.S. 368, 378-80 (1979); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 569 (1976) (deciding court cannot conclude whether prior restraint would serve purpose because managing and enforcing such orders will be always present). See Arthur R. Miller, *Confidentiality, Protective Orders and Public Access to the Court*, 105 *HARV. L. REV.* 427, 493 (1991) (explaining right of public access to information elicited on discovery would require judges become experts in all subjects before them and reach decision outside confines of adversarial dispute). This system would adversely impact on the courts widened by a recent report that revealed "a strong and disturbing pattern . . . [that] courts are experiencing difficulty in keeping up with the inflow of new cases." *Id.* (citing CONFERENCE OF STATE COURT ADM'RS, *STATE STATISTICS: ANNUAL REPORT 1988* (1990)). Adding access requirements to a judge's caseload would be unwise and unrealistic. *Id.*

media have met with considerable resistance,<sup>95</sup> as there is a presumption in the American legal system against restraining the press prior to the publication of information.<sup>96</sup> In *Nebraska Press Ass'n v. Stuart*,<sup>97</sup> the Supreme Court explicitly renounced prior restraints on the press as unconstitutional censorship.<sup>98</sup> The Court determined that the trial judge presiding over the murder case had improperly speculated about the effect of pretrial publicity on a jury when the gag order was issued.<sup>99</sup> Essentially, courts are required to allow the media to report except in the most extreme circumstances.<sup>100</sup>

Some courts use a different approach by using gag orders to restrain trial participants.<sup>101</sup> This method attempts to reduce pub-

<sup>95</sup> *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971). "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Id.* (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)); see also *Near v. Minnesota*, 283 U.S. 697, 718 (1930) (holding statute permitting suppression by injunction of business publishing malicious, scandalous and defamatory newspaper void as infringement of liberty of press). The Court stated: "Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press." *Id.* But see *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969) (holding employer's free speech right cannot outweigh right of employees to freely associate with union organizations or threaten reprisal or promise benefit).

<sup>96</sup> *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 565 (1976). "There is no finding that alternative measures [to closing the courtroom] would not have protected [the defendant's] rights, and the Nebraska Supreme Court did no more than imply that such measures would not be adequate." *Id.* The alternative methods the court referred to are: (1) changing venue; (2) continuance; (3) searching questions of jurors; (4) instructing jurors of their sworn duty to decide issues based on evidence presented in court; and (5) sequestration. *Id.* at 563 (citing *Sheppard*, 384 U.S. 333, 357-62 (1966)); see also *supra* notes 90-95 (discussing extent of presumption against prior restraints on media publication).

<sup>97</sup> 427 U.S. 539 (1976).

<sup>98</sup> *Id.* at 570 (holding heavy burden to secure prior restraints not met).

<sup>99</sup> *Id.* at 562. The Court presented a three prong test following Learned Hand's "gravity of evil" theory to justify an invasion of the right to free press. *Id.* The Court must consider the evidence when the order was entered into in order to determine "(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 threshold danger." *Id.*

<sup>100</sup> See generally Swartz, *supra* note 3, at 1444 (concluding various interpretations of First and Sixth Amendments resulted in presumption favoring media unless clear and present prejudice to fair trial is established); see also *Menendez v. Fox Broadcasting Co.*, 22 Media L. Rep. (BNA) 1702 (C.D. Cal. 1994). Defendants were unable to the enjoin broadcast of a television docudrama entitled "Honor Thy Father and Mother: The True Story of the Menendez Murders" on the grounds that the request was a prior restraint on speech, and the court could not find any of the three factors required by Supreme Court in *Nebraska Press* before prior restraint was upheld. *Id.*; see JOSEPH F. SCHUSTER, *THE FIRST AMENDMENT IN THE BALANCE* 102-03 (1993). The focus is on explaining differing rationale in government control over trial process between Chief Justice Burger's opinion in *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980) which advocated opening court proceedings to press on historical grounds and Justice Brennan's opinion in *Globe Newspapers*, 457 U.S. 596 (1982) advocating opening courtroom to press on First Amendment grounds.

<sup>101</sup> *Nebraska Press Ass'n v. Stuart* 427 U.S. 539, 570 (1976) (reversing lower court decision gagging press because restraint was too broad, conflicting with First Amendment Pro-

licity by controlling the statements made by defendants and their attorneys.<sup>102</sup> In *Gentile v. Nevada*,<sup>103</sup> the Supreme Court held that courts could prevent lawyers from making statements that are materially prejudicial to an adjudicative proceeding.<sup>104</sup> Although gag orders on trial participants may decrease the potential prejudice resulting from publicity, the defendant may also suffer from the inability to refute media stories.<sup>105</sup>

Judges may postpone proceedings to a later date in order to decrease pretrial bias caused by persistent media coverage.<sup>106</sup> This discretionary method supports the theory that stalling the trial

vision); see 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING; A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* §§ 3.6-101-301 (2d ed. 1994) (explaining *Gentile v. Nevada* as impetus for change of previous restrictions as incorporated into MODEL CODE OF PROFESSIONAL RESPONSIBILITY to more permissive standard precluding most pernicious statements only).

<sup>102</sup> See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107 (1982). The rule states in relevant part: "A lawyer who is participating or has participated in the investigation or litigation . . . shall not make an extrajudicial statement that a reasonable person would expect . . . [to] have a substantial likelihood of materially prejudicing an adjudicative proceeding . . ." *Id.*

<sup>103</sup> 501 U.S. 1030 (1991).

<sup>104</sup> See *id.* at 1074 (Rehnquist, C.J., dissenting in part). "[T]he speech of lawyers representing clients . . . may be regulated under a less demanding standard than that established for regulation of the press in *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976)." *Id.* The Court decided that since lawyers are key participants in the criminal justice system, the state can require them to adhere to its precepts by regulating their speech and conduct. *Id.* at 1037; see also MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6(a) (1993). "A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding." *Id.* See HAZARD & HODGES, *supra* note 101, § 3.6-101-301 (explaining language was changed after *Gentile* since lawyers speaking out for their clients may be doing so to redress wrongs); see also Jonathan Rabinovitz, *County Seeks Gag Order for Lawyers in Rail Shooting Trial*, N.Y. TIMES, Apr. 2, 1994, § 1, at 25. Mr. Kuby, defense attorney for New York's Long Island Railroad shooting suspect Colin Furgeson, expressed surprise at being accused of prejudicing the proceedings after a press conference. *Id.*

<sup>105</sup> See Swartz, *supra* note 3, at 1422. "The criminally accused have an interest in promptly and publicly responding to charges so they may counter injury to themselves, their families, or their friends. Waiting until acquittal to clear their names may not fully salvage their reputations." *Id.* (citations omitted).

<sup>106</sup> See Symposium, *supra* note 67, at 561-62 (explaining continuance is effective remedy for factual publicity but may be less effective where publicity resurges after trial); see also ABA STANDARDS FOR CRIMINAL JUSTICE § 8-3.3(c) (2d ed. 1980). "A motion for . . . [a] continuance shall be granted whenever it is determined that, because of the dissemination of potentially prejudicial material, there is a substantial likelihood that, in the absence of such relief, a fair trial cannot be had." *Id.*; Ted W. Lieu, *Influences On The Trial*, 81 GEO. L.J. 1321, 1336 (1993) (explaining continuance is appropriate where there is reasonable likelihood prejudicial news will prevent fair trial). The standard to meet for a continuance to exist is quite high, as seen by several cases. See, e.g., *Washington v. Cane*, 840 F.2d 443, 446-47 (7th Cir. 1988) (determining newspaper articles appearing four days after incident occurred were not evidence of magnitude of community prejudice necessary to overcome jury presumption of impartiality).

will decrease the effect of prejudicial coverage.<sup>107</sup> The goal of a continuance is frustrated, however, if it is likely that the media will resume intense coverage once the postponement period lapses.<sup>108</sup> Thus, a defendant's right to a speedy trial under the Sixth Amendment may be impaired.<sup>109</sup>

The grant of a motion for either a change of venue<sup>110</sup> or venire<sup>111</sup> also can combat prejudicial publicity.<sup>112</sup> A change of venue allows the judge to move the trial to a jurisdiction where the media has had less of an effect,<sup>113</sup> while a change of venire imports jurors into the present jurisdiction in order to supersede local community prejudice.<sup>114</sup> To grant such a motion, trial judges must determine that the defendant cannot receive a fair jury trial in their own jurisdiction.<sup>115</sup> In light of recent advances in worldwide com-

<sup>107</sup> Maraniello, *supra* note 5, at 375 (noting that continuances are infrequently used because of their discretionary burden and Sixth Amendment implications of preventing speedy trials).

<sup>108</sup> See generally Robert P. Isaacson, *Fair Trial and Free Press: An Opportunity for Coexistence*, 29 STAN. L. REV. 561, 562-63 (1977) (suggesting postponement is least effective remedy available for pretrial publicity). When the proceedings resume, it is likely that the media will continue its onslaught of publicity, effectively negating any beneficial effects of the continuance. *Id.*; Stephen, *supra* note 61, at 1085 (noting it is unlikely public interest will fade in highly prejudicial trials).

<sup>109</sup> See U.S. CONST. amend. VI. (providing in pertinent part "the accused shall enjoy the right to a speedy and public trial"); Mariniello, *supra* note 5, at 376 (indicating accused's Sixth Amendment right to speedy trial is not violated by granting of continuance if accused made motion).

<sup>110</sup> See 28 U.S.C. § 1404 (1988) (allowing federal courts discretion to transfer civil action to another district). See generally N.Y. CRIM. PROC. LAW § 230.20 (McKinney 1993) (providing for change of venue in criminal case upon showing of good cause).

<sup>111</sup> See Stephen, *supra* note 61, at 1086 (importing jurors into locale may be reasonable way to rectify effects of local prejudice).

<sup>112</sup> 28 U.S.C. §§ 1404, 1406. The availability of transfer for purposes of fairness and convenience under § 1404 balances federal Due Process requirements of "fair play and substantial justice" with jurisdiction provisions. *But see* Paul Hoffman, *Double Jeopardy Wars: The Case For A Civil Rights "Exception"*, 41 UCLA L. REV. 649, 682 (1994) (asserting grant of change of venue request provides no assurance that decision was not made simply to protect four policemen rather than neutral principles of law); Laurie L. Levenson, *The Future of State and Federal Civil Rights Prosecutions: The Lessons of the Rodney King Trial*, 41 UCLA L. REV. 509, 524-27 (1994) (explaining scenario where defendants successfully argued for change of venue and later were reassigned to jurisdiction where jury pool tended to identify with defendant officers, thus hampering trial fairness and resulting in violence).

<sup>113</sup> See *supra* notes 111-12 and accompanying text (discussing ability to obtain change of venue ruling). *But see* Stephen, *supra* note 61, at 1087 (asserting national awareness does not necessarily result in national prejudice). Trial courts must impanel jurors who show impartiality regardless of awareness of case. *Id.*

<sup>114</sup> See *supra* notes 111-12 and accompanying text; see also *Odle v. Superior Court of Contra Costa Cty.*, 654 P.2d 225, 242 (Cal. 1982) (Mosk, J., dissenting) (noting change of venire is simple and less costly solution to bias than change of venue), *cert. denied*, 488 U.S. 917 (1988).

<sup>115</sup> See Symposium, *supra* note 67, at 563 (noting statement of Dr. Norbert L. Kerr, Department of Psychology, Michigan State University). "[J]udges seem to be reluctant to use

munication,<sup>116</sup> however, it is questionable whether a grant of these motions would be beneficial in impaneling an untainted jury.<sup>117</sup>

Prior to seating a jury, the judge may choose to direct potential jurors<sup>118</sup> not to expose themselves to prejudicial information.<sup>119</sup> In making these admonishments, courts are hoping to impress upon the jurors the fact that outside information may inadvertently damage their impartiality.<sup>120</sup> But these orders are discretionary, and even if granted, there is no guarantee that jurors will comply.<sup>121</sup>

[change of venue] because it is so expensive . . . [and because] judges hate to admit that they cannot get a fair trial in their jurisdiction." *Id.*

<sup>116</sup> *Tuning in the Global Village; How TV is Transforming World Culture and Politics*, L.A. TIMES, Oct. 20, 1992, at 1. Satellite television exerts its greatest influence through its ability to spread lasting images in a matter of seconds. *Id.* Not only is television the way most people experience history, but history is being shaped by television. *Id.*; Raymond W. Smith, *The Global, Interactive, Human Network: Life in the Information Age*, Speech delivered at the World Future Society Annual Conference, Washington D.C. (July 1, 1993), in 59 VITAL SPEECHES, Sept. 1, 1993, at 691. As a representative from AT&T, closely involved in developing technology, Mr. Smith described progress on the global network as "[a] multimedia network that will provide information and communication in all its forms . . . and do it all in a way that's so intuitive—so user friendly—that the technology behind it will go virtually unnoticed." *Id.* Judith H. Dobrzynski, *Giant Steps Toward the Global Village—Or An Ego Trip?*, BUSINESS WEEK, Mar. 20, 1989, at 36. Marshall McLuhan's prediction in the mid 1960s that better communications would turn the world into a global village has manifested itself today through technological advances and deregulations. *Id.*

<sup>117</sup> Floyd Abrams, *Recent Developments in Prior Restraints*, in COMMUNICATIONS LAW 1994, at 427 (PLI Patents, Copyrights, Trademarks, and Lit. Prop. Handbook Series No. 400, 1994) (questioning whether Manuel Noriega could impanel jury of people unfamiliar with United States invasion of Panama).

<sup>118</sup> See *Sheppard v. Maxwell*, 384 U.S. 333, 353 (1966). The Court noted the trial judge's remarks to the jury: "I would suggest to you and caution you that you do not read any newspapers during the progress of this trial, that you do not listen to radio comments nor watch or listen to television comments, insofar as this case is concerned." *Id.* at 353 (quoting *Estes v. Texas*, 381 U.S. 532, 545-46 (1965)).

<sup>119</sup> Official Transcript Voir Dire of Prospective Jurors, *People v. Simpson*, (No. BAU97211) 1994 WL 577691, at \*2 (Cal. Super. Trans. Oct. 20, 1994) [hereinafter Voir Dire Transcript] (describing Judge's admonishment to prospective jurors not to discuss case with anyone and to avoid reading or watching any information regarding case); see also *Nebraska v. Stuart*, 427 U.S. 539, 564 (1976) (citing *Sheppard*, 384 U.S. at 357-62) (holding clear instructions to the jury may be effective); Symposium, *supra* note 67, at 564. The Court stated that "emphatic and clear instructions on sworn duty of each juror to decide issues only on evidence presented in open court." *Id.* (citations omitted).

<sup>120</sup> See Nancy Kornmick et al., *Control of the Jury*, 71 GEO. L.J. 339, 623 (1982) (stating presumption of prejudice exists where jury is in contact with parties outside trial); see also Kerr, *supra* note 19, at 122-24 (explaining results of psychological studies emphasizing effect of reading newspaper articles on jurors' attitude toward trial proceedings).

<sup>121</sup> Melissa Sheridan & Bradford S. Delapena, *Individual Liberties Claims: Promoting A Healthy Constitution For Minnesota*, 19 WM. MITCHELL L. REV. 683, 733-35 (1993) (discussing damaging effect of admitting confessions into evidence improperly). Since no matter how emphatically the court has admonished the jury, it is impossible to determine what credit and weight the jury gave to the confession, there is an extreme psychological effect on the trier of fact. *Id.* at 734; see also *Cruz v. New York*, 481 U.S. 186, 195 (1987) (White, J., dissenting) (asserting defendants confession is most "probative and damaging" evidence

Next, courts may implement the cumbersome but effective individual voir dire.<sup>122</sup> Voir dire is utilized by courts to identify those jurors whose prior knowledge of the case would disable them from rendering an impartial verdict.<sup>123</sup> Specifically, courts may employ individualized voir dire to promote more relaxed and candid responses.<sup>124</sup> This procedure requires more court time than traditional voir dire, but the additional time may provide increased insight into jury members' beliefs.<sup>125</sup>

Based on the voir dire, attorneys may eliminate potentially undesirable jurors by utilizing challenges.<sup>126</sup> These challenges are the primary device by which attorneys may eliminate members of the jury pool due to their lack of impartiality.<sup>127</sup> Attorneys rely

against him); *Bruton v. United States*, 391 U.S. 123, 140 (1968) (explaining no jury member should be expected to ignore confession even when admonished to do so).

<sup>122</sup> See *Stuart*, 427 U.S. at 565 (suggesting individually directed probing questions as way of filtering out potential jurors with fixed opinions as to innocence or guilt of accused); see also *Symposium*, *supra* note 67, at 564.

<sup>123</sup> See *Press-Enter. Co. v. Superior Court of California*, 478 U.S. 1, 15 (1986); see also *FED. R. CIV. P. 47(a)* (granting courts authority to allow attorneys or court to examine prospective jurors); see also *ABA STDS. FOR CRIMINAL JUSTICE, FAIR TRIAL AND FREE PRESS* § 8-3.5 (1991). "The questioning should be conducted for the purposes of determining what the prospective juror has read and heard about the case and how any exposure has affected that person's attitude toward the trial . . ." *Id.* § 8-3.5(a). Additionally, "[t]he court should exercise extreme caution in qualifying a prospective juror who has either been exposed to highly prejudiced material or retained a recollection of any prejudicial material." *Id.* § 8-3.5(b); Tracy L. Treger, *One Jury Indivisible: A Group Dynamics Approach to Voir Dire*, 68 *CHI.-KENT L. REV.* 549, 551 (1992) (defining term voir dire as literally speaking truth and emphasizing goal of voir dire to ensure jury is composed of jurors who are capable of judging witness without bias, prejudice, or partiality).

<sup>124</sup> See *Stephen*, *supra* note 61, at 1086 (noting change of venue may be viable option to ensure fairness at trial even though media coverage may permeate the country); see also *Mu'Min v. Virginia*, 500 U.S. 415, 425-26 (1991) (demonstrating that although voir dire does not need to be thoroughly exhaustive, it does need to be thorough enough to show impartial jury was impeached); *Voir Dire Transcript*, *supra* note 119, at \*16 (demonstrating extent of court instructions to prospective jurors to avoid media coverage of trial). The court, however, did recognize the serious challenge these instructions created: "Can you tell me from your heart of hearts that you will be able to follow all of my orders to avoid any media poisoning in this case? I truly mean that it is poison in this case. Can you stay away from it?" *Id.*

<sup>125</sup> Barbara A. Babcock, *Voir Dire; Preserving "Its Wonderful Power"*, 27 *STAN. L. REV.* 545, 547-48 (1975) (discussing effect of open court voir dire questioning and potential negative effect on jury panel responses due to shyness or fear of disclosing personal feelings). *But cf.* *Mu'Min v. Virginia*, 500 U.S. 415, 430 (1991) (acknowledging importance of voir dire although court refused to allow motion for individual voir dire in this instance).

<sup>126</sup> See *FED. R. EVID. 24(b)* (establishing guidelines for number of peremptory challenges based on length of imprisonment); 28 U.S.C. § 1870 (1994) (allowing each party three peremptory challenges in civil cases). *But cf.* *Batson v. Kentucky*, 476 U.S. 79, 89 (1986) (prohibiting discrimination in selection of jurors by prosecutors in criminal case on basis of race); *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1426 (1994) (prohibiting use of peremptory strikes to exclude potential jurors on basis of gender).

<sup>127</sup> See William G. Kastin, *Presumed Guilty: Trial By The Media The Supreme Court's Refusal To Protect Criminal Defendants In High Publicity Cases*, 10 *N.Y.L. SCH. J. HUM. RTS.* 107, 115 (1992). Justice Harlan spoke on behalf of a unanimous Court when he stated

primarily on demographics, personality traits, and information about potential jurors' attitudes when making their selection judgments.<sup>128</sup> Courts generally limit these challenges by establishing the maximum number permitted and by requiring specific reasons for the challenge.<sup>129</sup>

Once the trial has begun, the jury may be secluded from society in order to protect them from damaging media influences.<sup>130</sup> Courts commonly sequester the jury in order to eliminate the prejudicial effect of daily media coverage and commentary.<sup>131</sup> Since the jury evaluates the evidence presented at trial, the potential for the jury to mirror media opinions is sufficient justification for separation from society.<sup>132</sup> Although sequestering the jury may meet the objective of shielding jurors from media coverage during the

the right to challenge was "one of the most important of the rights secured to the accused" and that "[a]ny system for the impaneling of a jury that prevents or embarrasses the full, unrestricted exercise by the accused of that right, must be condemned". *Id.*; see also *Mu'Min*, 500 U.S. at 415 (holding courts are not required to probe extent of pretrial publicity only to determine whether jurors are able to be impartial).

<sup>128</sup> See Reid Hastie, *Is Attorney-Conducted Voir Dire An Effective Procedure For The Selection of Impartial Juries?*, 40 AM. U. L. REV. 703, 710 (1991) (concluding that attorney conducted voir dire is ineffective process to select impartial juries and inefficient way of rejecting impartial jurors).

<sup>129</sup> See Kerr, *supra* note 19, at 125-26 (discussing restrictions on peremptory strikes).

<sup>130</sup> See Swartz, *supra* note 3, at 1439. "Sequestration is the most drastic of . . . alternatives and should be employed as a last resort . . . sequestration . . . goes one step further by depriving jurors' freedom of movement and constitutes, in effect, a form of imprisonment." *Id.* (citations omitted); see also Patricia Davis, *Local Courts, Citing Hardships on Jurors, Shun Sequestering*, WASH. POST, Oct. 14, 1985, at C1. Statement of D.C. Superior Court Judge Fred B. Ugast: "The test is not whether [the jurors have] heard about the trial . . . but whether they'll be fair." *Id.*

<sup>131</sup> See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 553 (1976) (holding judge should continue case, transfer venue, or sequester jury when reasonable likelihood exists that pre-trial publicity will result in unfair trial); William G. Ross, *The Questioning of Supreme Court Nominees At Senate Confirmation Hearings: Proposals For Accommodating The Needs Of The Senate And Ameliorating The Fears Of The Nominees*, 62 TUL. L. REV. 109, 159-60 (1987) (citing Justice Sandra Day O'Connor's suggestion that one way of alleviating prejudicial media coverage would be to sequester jury); see also Flynn, *supra* note 3, at 876-79. In light of the fact there is no way to substantively measure just how pervasive media coverage must be before being considered inherently prejudicial, defendants should avail themselves of remedial measures available to them including moving to sequester the jury. *Id.* at 878-79; Terri A. Belanger, Note, *Symbolic Expression In The Courtroom: The Right To A Fair Trial Versus Freedom Of Speech*, 62 GEO. WASH. L. REV. 318, 353 (1993) (asserting sequestration as one of most common and least restrictive measures available to courts to ensure fair trial).

<sup>132</sup> Richard K. Sherwin, *The Narrative Construction of Legal Reality*, 18 VT. L. REV. 681, 684 (1994). The Rodney King affair as presented by the media contrasted sharply with the jury's interpretation which had been skillfully contextualized and restructured with an altered soundtrack which emphasized the sound of the stun-dart being fired rather than the sound of a police baton striking Rodney King. *Id.*



trial, the most damaging information, arguably, is presented in the pre-trial period.<sup>133</sup>

Lastly, courts have allowed jurors to be impaneled anonymously, by withholding jurors' names from the public, and controlling media coverage of the jury members.<sup>134</sup> These methods may reduce the likelihood of a juror's decision being influenced by the fear of retaliation or harassment outside the courtroom.<sup>135</sup> Jurors may not be relieved of their concerns, however, simply because their faces and names are withheld.<sup>136</sup> Furthermore, restricting access to the jurors' identities may prompt the jury to question the need for such secrecy and potentially infer guilt as a result of

<sup>133</sup> See *Voir Dire Transcript*, *supra* note 119, at \*14 (noting that new panel of jurors could not be called because they would not have received judge's admonition).

<sup>134</sup> *United States v. Scarfo*, 850 F.2d 1015, 1023 (3d Cir. 1988) (permitting anonymous jury to be impaneled to protect jurors from hostility generated by public reaction to trial and further holding use of anonymous jury did not infringe on presumption of innocence); see also Jose Maldonado, *Anonymous Juries: What's The Legislature Waiting For?*, 66 N.Y. St. B.J. 40, 42-43 (1994) (contrasting view of those in favor of anonymous juries who say jurors must be protected from harassment in order to ensure impartiality and those opposed who maintain jurors will attribute their anonymous status to danger of defendant and undermine presumption of innocence).

<sup>135</sup> See *United States v. Barnes*, 604 F.2d 121, 143-44 (2d Cir. 1979), *cert. denied*, 446 U.S. 907 (1980) (allowing anonymous jury to be impaneled to protect jurors from retaliation against themselves or their families). There are cases in which sequestration would have been "no protection in the event of a guilty verdict". *Id.* at 141; see also *Sheppard v. Maxwell*, 384 U.S. 333, 342-45 (1966) (accenting publication of names and addresses of prospective jurors led to anonymous letters and telephone calls, as well as calls from friends being made to prospective jurors regarding trial); *Jury Pool Small For Beating Trial*, N.Y. TIMES, Jan. 5, 1993, at A8 (reporting on judges ruling in Rodney King trial that in order to prevent harassment of jurors names of jurors would be kept confidential).

<sup>136</sup> See *United States v. Melendez*, 743 F. Supp. 134, 138 (E.D.N.Y. 1990) (refusing to allow anonymous jury instead withholding only the jurors first names street addresses and specific names and addresses of places of employment); see also *United States v. Hurley*, 920 F.2d 88, 97 (1st Cir. 1990). The court concluded that jurors fearful of retaliation by vengeful or unbalanced persons could protect themselves by flatly refusing press interviews when approached and by balancing their "unfocused" fears against possible loss of public confidence in the justice system if anonymous juries were utilized on a regular basis. *Id.* Jurors may be likened to soldiers who may be asked to perform distasteful duties. *Id.* For jurors this includes appearing in the limelight against their wishes in highly publicized trials. *Id.*

these requirements.<sup>137</sup> Accordingly, some jurisdictions have refused to allow courts to impanel anonymous jurors.<sup>138</sup>

Judges continue to struggle with protective measures, designed to provide the accused with a fair trial, while respecting the media's access to trials.<sup>139</sup> Indeed, courts in a highly publicized trial face unique problems in securing justice.<sup>140</sup> Nervous judges, lawyers, and witnesses, unchallengeable evidence, and biased commentary each require special attention.<sup>141</sup> The actions of the

<sup>137</sup> See Maldonado, *supra* note 134, at 44 (reiterating opponents fear of undermining fair trial by eliminating presumption of innocence); see also Marc O. Litt, "Citizen Soldiers" or Anonymous Justice: Reconciling the Sixth Amendment Right of the Accused, *The First Amendment Right of the Media and the Privacy Rights of Jurors*, 25 COLUM. J.L. & SOC. PROBS. 371, 407-14 (1992) (asserting opinion that if judges or jurors could choose to maintain secrecy of jurors important information about equity, efficiency, and human effect of court system would be suppressed). When jurors agree to participate in a trial they must expect to lose some personal privacy in furtherance of the "higher values served" by open administration of justice and freedom of the press. *Id.*; see also Barnes, 604 F.2d at 138-45 (setting forth standards to govern Court's determination of whether to use anonymous jury). The court in *Barnes* said: "There must be, first, strong reason to believe that the jury needs protection and, second, reasonable protection must be taken to minimize the effect that such a decision might have on the juror's opinions of the defendants." *Id.*

<sup>138</sup> See, e.g., N.Y. CRIM. PROC. LAW § 270.15(a) (McKinney 1994) (providing jurors may be asked to complete questionnaire concerning personal information); CAL. CIV. PROC. CODE § 237(b) (West 1994) (allowing courts to seal juror identification); *United States v. Paccione*, 949 F.2d 1183, 1192 (2d Cir. 1991) (determining factors to apply when considering motion for anonymous jury), *cert. denied*, 112 S. Ct. 3029 (1992). The court should evaluate: (1) whether there are sufficient allegations that defendants have been engaged in dangerous and unscrupulous activities; (2) whether defendants have engaged in past attempts to interfere with the judicial process; and (3) whether there has been extensive pre-trial publicity. *Id.* at 1192; see also Litt, *supra* note 137, at 386 (explaining courts may be reluctant to conduct secret and anonymous trial due to emphasis placed on open access to all criminal trials).

<sup>139</sup> See Stephen, *supra* note 61, at 1105 (noting trial courts can use various protective measures to provide defendants with fair trial). The trial court must maintain the integrity of the judicial system while balancing the defendant's right to a fair trial with the media's constitutionally protected rights. *Id.*

<sup>140</sup> See *United States v. Koury*, 901 F.2d 948, 955-56 (11th Cir. 1990) (demonstrating actual bias is necessary to overcome judge's refusal to strike juror or entire jury); see also, Don J. DeBenedictis, *Anonymity Now Shields Jurors' Identities*, A.B.A. J., Nov. 1994, at 16 (stating that anonymity tells jurors that defendant is untrustworthy, dangerous, and cannot be trusted with jurors' names).

<sup>141</sup> See Murphy, *supra* note 28, at 2 (establishing nervous trial participants, unfavorable television, and media reporting as well as pressure on jurors to discuss case outside courtroom could create defendant's nightmare in trying to attain equal justice under law); Henry Weinstein, *Rough and Tumble Trial in Court of Public Opinion*, L.A. TIMES, Mar. 15, 1993, at A1. Loyola Law professor Laurie Levenson was quoted as saying, "[t]he more the prosecutors are worried about what is happening outside the courtroom, the less they're concentrating on what's going on inside." *Id.*; see also Judy P. Evans, *Judge Erred in Torching Trial*, MIAMI HERALD, Feb. 17, 1994, at 1B (reporting suggestion by court that judges cannot prevent media from photographing jurors outside courthouse but nervous jurors should not be subjected to cameras within the courtroom).

courts, the press, and the public are continually challenging the delicate balance needed to ensure justice.<sup>142</sup>

### III. ARE COURTS DOING ENOUGH TO MAINTAIN IMPARTIALITY?

It is questionable whether the judiciary's attempt to balance competing constitutional rights through protective measures guarantees complete fairness in our justice system.<sup>143</sup> Indeed, the furtherance of one set of rights over another may fall short of providing complete support for a just application of the law.<sup>144</sup> Perfection, although a noble goal, has never been the guiding force of our legal system.<sup>145</sup> Rather, case law supports the premise that the judiciary can ensure the defendant a fair trial by fashioning proper measures.<sup>146</sup> A completely unaware jury, therefore, is not necessary to maintain impartiality.<sup>147</sup> Thus, the focus of criticism that the judiciary is unable to impanel an impartial jury is mis-

<sup>142</sup> See, e.g., Howard Felsher, *A Universal Constitutional Gag Law*, N.Y. TIMES, Sept. 29, 1994, at A25 (concluding legislation is needed to resolve problem of excess media coverage).

<sup>143</sup> See Maraniello, *supra* note 5, at 397 (stating recent court decisions have been willing to sacrifice Sixth Amendment rights in favor of First Amendment rights); see also *Mu'Min v. Virginia*, 500 U.S. 415, 429-30 (1991) (demonstrating defendants still do not feel justice is being done when they are subject of high profile media coverage).

<sup>144</sup> See *United States v. Antar*, 38 F.3d 1348, 1359 (3d Cir. 1994) (weighing public right to access against defendant's right to fair trial). The court noted that the benefit from public access and awareness of the duties and obligations of jury process are weighed against concerns that trials may become carnivals. *Id.* The court balanced this concern with the concerns of the public that jurors will be forced to justify their decisions after trial. *Id.*; see also *supra* notes 87-143 and accompanying text (discussing discretionary actions judges may take to avoid bias); see *Nebraska Press Ass'n. v. Stuart*, 427 U.S. 539, 561 (1976). "The authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other." *Id.* But see *Palko v. Connecticut*, 302 U.S. 319, 327 (1937) (analogizing First Amendment rights to freedom of thought and speech as the "matrix, the indispensable condition, of nearly every other form of freedom").

<sup>145</sup> See generally *Estes v. Texas*, 381 U.S. 532, 562 (1965) (emphasizing purpose of public trial is to guarantee accused will be dealt with fairly and not unjustly condemned, but not that courts guarantee perfectly fair trial); see also Flynn, *supra* note 3, at 880 (asserting opinion that defendants in high publicity cases must be mindful of repeated Supreme Court decisions holding that fair trial does not necessarily mean a perfect trial).

<sup>146</sup> See *Chandler v. Florida*, 449 U.S. 560, 574-75 (1981). The Court provided persuasive arguments for not imposing an absolute ban on television coverage of trials in an exaggerated response to the alleged danger that some piece of evidence might affect the jurors' determination of the defendant's guilt or innocence. *Id.*; see also THE JURY PROJECT; REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 57 (Mar. 31, 1994). One of the suggestions for improving the efficient elimination of biased jurors in the civil arena was to utilize the same type of questionnaire containing basic information regarding their ability to serve as fair and impartial jurors. *Id.*

<sup>147</sup> See Minow, *supra* note 55, at 638 (describing historical development of juries as always being composed of jurors who were familiar with situation in community and able to make fair adjudication of justice).

placed and should be redirected at differentiating between juror impartiality and awareness.<sup>148</sup>

There is little support for the contention that an uninformed jury leads to a fairer trial.<sup>149</sup> Historically, the justice system was not intended to include juries oblivious to facts surrounding the alleged crime.<sup>150</sup> The Framers of the Constitution had a very different understanding of impartiality in comparison with today's standard.<sup>151</sup> At that time, communities were small and jurors knew many of the details of the crimes in their communities.<sup>152</sup> The aim was not necessarily to find jurors who were unaware of the innuendos and community gossip, but to impanel people who would base their decision on the facts presented at trial.<sup>153</sup> Moreover, the Constitution does not require that jurors be totally ignorant of the information surrounding a particular case,<sup>154</sup> only that they be fair and impartial.<sup>155</sup>

<sup>148</sup> See *Turner v. Louisiana*, 379 U.S. 466, 471-72 (1965). The Court found, in addressing the nature of the jury trial which the Fourteenth Amendment commands, that it is controlled by the precedent established in *Irwin v. Dowd*, 366 U.S. 717, 722 (1961). In *Irwin* the Court held the right to a jury trial guarantees a fair trial by impaneling "indifferent" jurors. *Id.*

<sup>149</sup> See *Chandler v. Florida*, 449 U.S. 560 *passim* (1981) (holding that jurors were not inherently tainted by education of current events).

<sup>150</sup> *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 547-48 (1976) (noting drafters of Constitution were well aware of jurors ability to remain impartial prior to trial); See Minow, *supra* note 55, at 654 (arguing that if impartial juror is someone without bias, then courts are wasting taxpayers money by conducting voir dire, as it is impossible to assemble 12 people without any bias).

<sup>151</sup> See *Nebraska Press Ass'n*, 427 U.S. at 547-48 (quoting 9 Papers of Thomas Jefferson 239 (J. Boyd ed. 1954)). The Court stated that framers of the Constitution were concerned that jurors would have information surrounding a trial, but it was an "evil for which there is no remedy . . . our liberty depends on the freedom of the press . . ." *Id.* at 548; see generally Rita Ciolli, *Can a Jury Be Fair Amid Media Overload?*, N.Y. NEWSDAY, July 24, 1994, at A18 (advancing that original juror pool was meant to consist of local community members who were abreast of trial information prior to being seated).

<sup>152</sup> See *Nebraska Press Ass'n*, 427 U.S. at 548 (rating difficult for early trial judges in finding members of community who were unaware of proceedings); see Ciolli, *supra* note 151, at A18 (discussing modern jury pool as expansion on original theories, resulting in a "global jury pool").

<sup>153</sup> *Cf. Estes v. Texas*, 381 U.S. 532, 541-43 (1965) (quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)). In general, the Court found too many possibilities for the average person to forget the burden of proof required to convict the defendant. *Id.* See generally Gary Gorman, *Cameras in the Court are Again Focus of Debate*, L.A. TIMES, Nov. 3, 1991, at B1 (advancing theory that public does not necessarily jump to the conclusion that arrest means person is automatically guilty). Seeing and hearing does not equal believing. *Id.*

<sup>154</sup> See Robb M. Jones, *The Latest Empirical Studies On Pretrial Publicity, Jury Bias, and Judicial Remedies—Not Enough to Overcome the First Amendment Right of Access to Pre Trial Hearings*, 40 AM. U. L. REV. 841, 843 (1991) (discussing use of pretrial closure). Traditional wisdom and empirical data are flawed as to the proposition that pretrial publicity can never be overcome. *Id.*

<sup>155</sup> See *id.* at 874 (noting that recent studies indicate that courts can control factually biasing publicity and that jurors are affected by emotionally biased publicity).

Some members of the legal community have advanced the argument that, instead of maintaining the current openness of the United States judicial system, courts should use universal gag orders to close all proceedings to media coverage.<sup>156</sup> Advocates of this method find solace in placing the rights of the defendant above the rights of the press.<sup>157</sup> For instance, this approach is taken by the Canadian courts,<sup>158</sup> which use a blanket order of secrecy<sup>159</sup> on all criminal trials from the time of indictment until a verdict is reached.<sup>160</sup> The Canadian press may attend the trial, but only a bare minimum of information may be reported until the trial is complete.<sup>161</sup> In the United States, however, this type of "prior restraint" was ruled unconstitutional by the Supreme Court in *Nebraska Press Ass'n v. Stuart*.<sup>162</sup> Although there are com-

<sup>156</sup> See, e.g., Stephen Bindman, *Supreme Court to Consider Setting New Rules for Media Gag Orders*, MONTREAL GAZETTE, Jan. 24, 1994, at A9 (noting debate on gag orders issued by Canadian courts).

<sup>157</sup> See generally Debby Waldman & Mary McIntash, *Understanding Canadian Bans on Trial Coverage*, INFORMATION ACCESS CO., May 7, 1994, at 18 (noting that Canadian courts are afforded greater liberty to close trials).

<sup>158</sup> See Darren Schuettler, *Canada Gag Orders Spark Debate Over Press Freedom*, Reuters Info. Svcs., Sept. 22, 1993, available in LEXIS, Nexis Library, INT-NEWS File (reiterating statement by University of Alberta professor Gerald Gall that freedom of speech is considered more precious constitutionally enshrined protection in United States than in Canada); see also Craig Turner, *Trial's Secrecy Contrasts U.S., Canadian Values Grisly Cases' Details Can't Be Reported North of the Border*, DALLAS MORNING NEWS, May 22, 1994, at A42 (defending hierarchy of rights by Canadian journalist). "The right to a fair trial has to come first over the public's right to know every detail of what happened whenever they want to hear it." *Id.*; see also *United Kingdom: This Justinian Article Reports in Detail on the Implications of Thames Television's Programme on the Gibraltar Killings*, FIN. TIMES (London), May 3, 1988, available in LEXIS, Nexis Library, INT-NEWS File (reporting on television program which portrayed killings in Gibraltar and newspaper states question is not whether free press is inherently inconsistent with fair trial system but whether media coverage prejudices juries and asserts that politicians over react to revelations about sensitive nature).

<sup>159</sup> See CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 2(b). Unlike the First Amendment of the American Constitution, the Charter of Rights and Freedoms has been construed to protect not "speech" but "expression" instead. *Id.*; see also Steven Bindman, *Court Rulings Are Muzzling the Freedom of the Press*, OTTAWA CITIZEN, Mar. 12, 1993, at A11 (discussing use of discretionary gag orders on press). "The guarantee of freedom of the press in the Charter of Rights and Freedoms . . . may have actually given judges . . . a new tool to muzzle the free flow of information." *Id.*

<sup>160</sup> See, e.g., Ontario Court of Justice Act, R.S.O., ch. C-43 § 135(2) (1990) (granting court discretion to exclude public from hearings); see also CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 2(b) (guaranteeing freedom of press). The Charter guarantees "freedom of thought, belief, opinion and expression," and specifically mentions "freedom of the press," but nowhere does the Charter mention "speech." *Id.*

<sup>161</sup> See Waldman & McIntash, *supra* note 157, at 18 (describing effect of prior restraint on media coverage in Canadian trials).

<sup>162</sup> 427 U.S. 539, (1976). "The thread running through all these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Id.* at 559; see also Waldman, *supra* note 157, at 18 (noting restrictions on media in Canadian trials).

elling benefits to such a system,<sup>163</sup> it runs contrary to the presumptive openness of the American judiciary system, and is unnecessary.<sup>164</sup>

It appears that recently, there is diminished faith in the public's ability to discern and refine information presented by the media.<sup>165</sup> The ability of judges to discount media coverage, however, is rarely questioned.<sup>166</sup> It is presumed that judges are able to ignore what they see in the press and assign the appropriate weight to the media's coverage.<sup>167</sup> Justification for this dichotomy appears to arise from public expectations of the judiciary.<sup>168</sup> Critics generally assume that judges, possessing heightened knowledge of the requirement that their decisions be based strictly on the evidence presented in court, have the ability to discount information publicized by the media.<sup>169</sup> Whether a case is tried before a judge

<sup>163</sup> See *Estes v. Texas*, 381 U.S. 532, 543-45 (1965) (describing how media coverage of trials makes Judges' jobs more difficult); see, e.g., Murphy, *supra* note 28, at 2 (expressing fear that defendant's rights may be infringed upon when media coverage of the trial is allowed).

<sup>164</sup> U.S. CONST. amend. I (guaranteeing right to free press); see generally *Talk Back Live* (CNN television broadcast, Oct. 21, 1994) (discussing effect of judicial bans on media coverage). Television programs go unpunished with reference to adherence to judicial orders requesting that they do not interview or broadcast information about the defendant or trial. *Id.*; see also Sarah Edmonds, *Canadians Arrested for Carrying Buffalo News*, REUTER, Nov. 29, 1993, available in LEXIS, Nexis Library, INT-NEWS File (describing arrest of drivers in Canada for transporting United States newspapers with information concerning banned material).

<sup>165</sup> See Maraniello, *supra* note 5, at 396-97 (noting judicial system depends heavily upon juror's ability to make evidence presented at trial the primary determinant when deciding on verdict); see, e.g., Don J. DeBenedictis, *The National Verdict*, A.B.A. J., Oct. 1994, at 52, 54 (citing poll finding 86% of those people questioned thought media had some effect on trial fairness).

<sup>166</sup> See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 555 (1976) (stating that it is the trial judge's major responsibility to mitigate effects of pretrial publicity); see Minow, *supra* note 55, at 658 (noting that regular media exposure may increase ability of public to evaluate conflicting reports and thus increase impartiality). *Id.*

<sup>167</sup> See HENRY J. ABRAHAM, *THE JUDICIAL PROCESS* 317 (6th ed. 1993) (discussing fact that law deals with human conduct and therefore, in order to grasp its nature, it should only be necessary to distinguish it from other factors relating to that conduct). "I have never known any judges, no difference how austere of manner, who discharged their judicial duties in an atmosphere of pure unadulterated reason . . . we are all the 'common growth of Mother Earth,' even those of us who wear the long robe." *Id.* (quoting John H. Clarke, J.).

<sup>168</sup> See *id.* (asserting belief that law is beyond grasp of general citizenry).

<sup>169</sup> See *Evolution of Lay Judges: From Kitchens to Courts*, N.Y. TIMES, Oct. 17, 1994, § 1, at 44 (discussing theory that law degree is not necessary to qualify as judge). The system of lay judges dates back to the original colonies when structured legal training was available for most judges. *Id.* The attributes that make good judges are patience, willingness to devote oneself, and intelligence, but not necessarily a ton of knowledge about penal law since that information is readily available. *Id.* These same qualities are essential for a good juror. *Id.*

or jury,<sup>170</sup> the key to maintaining impartiality is improving the ability of the trier of fact to make a just decision.<sup>171</sup> Increasing the awareness of the jury as to their important role in our justice system and the requirement that they base their decisions on evidence presented at trial, will ensure that impartiality is maintained.<sup>172</sup> The focus of the judiciary, therefore, needs to be on impaneling jurors who clearly are able to discern the issues of a particular case, despite the extraneous information to which they may have been exposed.<sup>173</sup>

From the outset of the trial, the importance of the jury should be emphasized.<sup>174</sup> Specifically, courts should routinely voir dire prospective jurors individually in order to promote more relaxed and candid responses.<sup>175</sup> Meeting privately with the attorneys and judge will allow jurors to clearly understand their importance in the trial.<sup>176</sup> Furthermore, although this procedure will require more court time than the traditional voir dire in open court, the

<sup>170</sup> See *id.* (exploring criteria for good judges; patience and willingness to contribute, but not strict legal background).

<sup>171</sup> See, e.g., *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966) (explaining "reversals are but palliative; the cure lies in those remedial measures that will prevent prejudice at its inception"); *Estes v. Texas*, 381 U.S. 536, 539-40 (1965) (noting that freedom of press is subordinate to constitutional guarantee of fair trial).

<sup>172</sup> See *Minow*, *supra* note 55, at 632 (discussing ways of heightening importance of jury duty). Limiting the availability of jury duty deferrals for professionals such as doctors, lawyers, and clergy would result in a better educated jury. *Id.* Society does not expect to thrive without the valuable input of these individuals and likewise the jury pool should not lose their insights in adjudicating criminal and civil cases. *Id.* But see *Estes v. Texas*, 381 U.S. 536, 543 (1965) (quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)). "The requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice." *Id.*

<sup>173</sup> See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 554-55 (1976) (explaining that information about trial does not inevitably taint prospective jurors); see *Minow*, *supra* note 55, at 641 (quoting *Reynolds v. United States*, 98 U.S. 145, 156 (1878)). "[J]urors not infrequently seek to excuse themselves on the ground of having formed an opinion when . . . it turns out that no real disqualification exists." *Id.*

<sup>174</sup> See *Minow*, *supra* note 55, at 632 (focusing on judges role in "identifying, remedying, and avoiding, rather than preventing partiality among potential jurors").

<sup>175</sup> See *Chandler v. Florida*, 449 U.S. 560, 581 (1981) (citing use of individual voire dire as one way of identifying potential juror bias from media coverage); Leonard B. Sand & Steven A. Reiss, *A Report on Seven Experiments Conducted by District Court Judges in The Second Circuit*, 60 N.Y.U. L. REV. 423, 426 (1985) (advancing use of individual voir dire as way to improve impartiality of jury); Symposium, *supra* note 67, at 564 (quoting C.J. Mikva's statements regarding usefulness of personal voire dire and his support for its ability to identify bias).

<sup>176</sup> See *Mu'Min v. Virginia*, 500 U.S. 415, 430 (1991) (noting usefulness of asking jurors individual questions). But, the Court found that the Due Process clause did not require "questions specifically dealing with the content of what each juror read." *Id.*; see Sand & Reiss, *supra* note 175, at 426 (noting opinions of survey participants that individual voir dire increased identification of certain bias).

additional time will allow for a more thorough exploration of damaging biases.<sup>177</sup>

Once seated, the jurors should be given specific instructions of the principles of law that govern the case and which they should apply in evaluating the evidence.<sup>178</sup> Questions should be encouraged so that the pretrial instructions are clear to all parties.<sup>179</sup> This practice will allow jurors to be cognizant of the issues in the trial and to link respective evidence.<sup>180</sup> The result will be to enhance the jurors' understanding of their function and increase their attentiveness.<sup>181</sup>

During the trial, the jurors should be allowed to ask questions to the witnesses and to take notes during the proceeding.<sup>182</sup> Both suggestions will focus the jury's attention on important issues and keep them alert by increasing their involvement in the proceedings.<sup>183</sup> These procedures will have the greatest impact on complex and lengthy trials, which inevitably attract high publicity.<sup>184</sup> At the conclusion of the charge to the jury, the judge should pro-

<sup>177</sup> See Sand & Reiss, *supra*, note 175, at 436 (attributing usefulness to open-ended questions which are rarely asked in open courtroom questioning); Kerr, *supra* note 19, at 127 (commenting on usefulness of underutilized voir dire procedure). "Careful and extensive voir dire is quite effective in identifying and eliminating jurors who might be tainted by exposure to pretrial publicity." *Id.*

<sup>178</sup> See Sand & Reiss, *supra* note 175, at 437-42 (explaining how use of pre-instruction give jurors maximum guidance of issues at trial). Use of instructions allows for jurors to understand where a potential bias may affect the outcome of the trial. *Id.* at 438.

<sup>179</sup> See *id.* at 438 (discussing rationale for explaining legal principles to jury). Participants should be informed of the legal principles in question with particular direction as to the ones whose applicability to the case at hand could not reasonably be questioned. *Id.* The judge should meet with attorneys prior to giving instructions in order to exclude unnecessary charges. *Id.*

<sup>180</sup> See *id.* (noting that preinstruction provides juries with relevant issues and thus allows them to evaluate evidence in effective manner).

<sup>181</sup> See *id.*, at 438-42 (noting advantages from use of juror instructions). The use of instructions at the outset of the trial leads to an increase in juror attentiveness throughout the proceedings. *Id.* at 442.

<sup>182</sup> See *id.* at 446. Careful attention must be given to instructing note taking jurors that their notes are only for their personal recollection. *Id.* They should be informed that their notes are not conclusive, should not be given precedence over their independent recollection of the facts, should not distract them from the ongoing proceedings, and they should not be influenced by another jurors' notes. *Id.* at 447; see, e.g., United States v. Bush, No. 90-266C, 1995 WL 53167 (2d Cir. Feb. 8, 1995) (examining use of jury questions). "Direct questioning by jurors is a 'matter within the Judge's discretion . . .'" *Id.* at \*2 (quoting United States v. Witt, 215 F.2d 580, 584 (2d Cir. 1954)).

<sup>183</sup> See Sand & Reiss, *supra* note 175, at 446-49 (noting that questions allow judge and attorneys to facilitate jury concerns, rather than guessing at them). Judges in two experiments felt that juror attentiveness increased. *Id.*

<sup>184</sup> See *id.* at 450 (noting that benefits increased in proportion to length and complexity of trial). But see United States v. Bush, No. 90-266C, 1995 WL 53167, at \*3 (2d Cir. Feb. 8, 1995) (strongly discouraging use of juror questions). "The most troubling concern is that the practice is turning jurors into advocates, compromising their neutrality." *Id.*



vide jurors with a copy of the charge to be used during deliberations.<sup>185</sup> This would alleviate the need for the jurors to rely wholly on their memories for the applicable legal principles.<sup>186</sup> Providing a copy of the charge to the jury will enhance their understanding of the instructions and increase their knowledge of the trial.<sup>187</sup>

#### CONCLUSION

In conclusion, it is asserted that media coverage of trials does not need to be curtailed. The litany of Supreme Court cases addressing the issue of jury impartiality has developed a standard which requires that courts specifically identify prejudice before allowing the media to be barred from proceedings. Although certain media prejudices may escape the Court's substantial probability standard, the protective measures employed by courts are assuring fair trials. While the First and Sixth Amendments will continue to juxtapose each other, this heated debate forces the public, the judiciary, and the media to maintain impartiality. The integration of our suggested procedures into current trial practice will enable more prepared juries to fill the vital role initially envisioned by the Framers of the Constitution.

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<sup>185</sup> See Sand & Reiss, *supra*, note 175, at 453. Although generally allowed by most court systems, this method is rarely used, but it lends itself to the increase in jurors' ability to address the legal issues. *Id.*

<sup>186</sup> See *id.* at 453 (advancing usefulness of providing copy of charge to jury).

<sup>187</sup> See *id.* at 456 (respondents attributed the juror's enhanced understanding to their ability to examine a copy of the charge).