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Volume 39
Number 4 *Symposium: Celebrity Prosecutions*

Article 2

12-1-2006

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Recommended Citation

Mark J. Geragos, *The Thirteenth Juror: Media Coverage of Supersized Trials*, 39 Loy. L.A. L. Rev. 1167 (2006).
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THE THIRTEENTH JUROR: MEDIA COVERAGE OF SUPERSIZED TRIALS

Mark J. Geragos[*]

I. INTRODUCTION

I am a criminal defense attorney. That is almost all I have done my entire adult life. My job is to zealously defend persons the government accuses of committing crimes. As part of that process, my job is also to ensure that my clients receive the fair trial, by an impartial jury, guaranteed to them by the United States Constitution.[1]

In fact, I view the protection of this guarantee as more a calling than a job. The constitutional entitlement to a fair and unbiased trial and jury is an essential element of our Constitution's allocation of power between government and its citizens and is, in my view, fundamental to who we are as a nation. As I look back now, I can see that my belief in the importance of this right in every criminal case—no matter how unpopular or apparently guilty the defendant might be—is what led me to become a defense attorney in the first place.

At the same time, I am a legal commentator on television and I treasure the constitutional guarantees of unrestricted speech and a free press.[2] These too, in my opinion, are essential components of a free society which will have the backbone to support a criminal defendant's right to a fair trial.

However, in recent years, while representing clients in many high-profile criminal trials, I have become increasingly concerned about the effect of the mass media on the ability of criminal

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1. *See* U.S. CONST. amend. VI.
2. *See* U.S. CONST. amend. I.

defendants to obtain the fair trial they are constitutionally guaranteed. I have experienced firsthand an insidious degradation of the Sixth Amendment right to a fair trial and jury, created by a commercially-motivated press capitalizing on the insatiable public appetite for sensational criminal trials. My fear is that the right to a fair trial has become subordinate to TV ratings and copy sales which, in turn, reflect the public's voyeuristic obsession with real-life courtroom soap operas.

In a time when reality television, myriad cable networks, and supermarket tabloids regularly captivate millions, a high-profile case involving "[m]urder and mystery, society, sex and suspense"[3] easily becomes the subject of national engrossment. And so, as America has "supersized" its food portions,[4] it has also done so to those courtroom dramas selected and inflated by the media. The "supersize" nature of these cases is created by the media rather than reflected by it, as journalists—invoking First Amendment protections but abdicating social responsibility—capitalize on the public's apparently insatiable appetite for all things sensational.

The result, from where I sit as a criminal defense attorney, is the degradation of critical components of a defendant's right to a fair trial by an impartial jury, not the least of which is the presumption of innocence.

This Article explores the modern-day tension between saturation media coverage and a criminal defendant's right to a fair trial and jury, between the First Amendment's freedom of the press and the Sixth Amendment's fair trial rights. These rights are not necessarily incompatible. Indeed, media scrutiny of criminal proceedings can help ensure their fairness. However, I question whether the media has now gone too far under a cloak of First Amendment protection, placing criminal defendants' constitutional rights at risk through irresponsible journalism. The potential harm to such defendants is unwarranted loss of liberty and, in some cases, even death. This Article concludes that the tools traditionally employed by courts to balance the rights of free press and fair trial are no longer effective

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

4. *See* Alice Henneman, *Sizing Up Food Portion Sizes*, FOOD REFLECTIONS, Oct. 2002, http://lancaster.unl.edu/food/ftoct02.htm.

(if indeed they ever truly were). I propose a new solution that places responsibility on the media while honoring its First Amendment right.

This Article reveals that the existing techniques for minimizing the impact of juror bias do not effectively protect the rights of criminal defendants from the dangers posed by prejudicial publicity. Although these judicial "remedies" were well intentioned when they first came into use, they are outmoded—and actually quaint—in an age of mass communications. Furthermore, with the increasing discovery of "stealth jurors"[5] in high-profile trials and the media's ability to establish itself as a voice in the proceedings, these methods have proven to be particularly ineffective when there is a high level of prejudice against the defendant. Britain addressed the problem with its Contempt of Court Act of 1981.[6] The Act ultimately allows courts to effectively curb the dissemination of prejudicial information by the news media by authorizing civil or criminal punishments against journalists who publish stories that present a danger of compromising the fairness of a trial.[7]

Part II of this Article addresses the constitutional requirement of fairness and impartiality in all criminal trials, and explains how saturation coverage inflames the tension between free press and fair trial rights. Part III explores the relationship between media coverage, jury bias, and the presumption of innocence. Part IV discusses the effects of pretrial publicity on jury selection and trial fairness, contending that media manipulation distorts the facts and taints the jury pool. Part V discusses the less-than-adequate judicial responses to prejudicial publicity, namely the ineffectiveness of change of venue and jury voir dire, and explains why these tools have ceased to protect defendants' fair trial rights in high-profile cases. Part VI of this Article proposes that the United States adopt a system modeled after the British Contempt of Court Act of 1981 to "elevate the Sixth Amendment from the second-class status it

5. Bennett L. Gershman, *Contaminating the Verdict: The Problem of Juror Misconduct*, 50 S.D. L. REV. 322, 345 (2005) (defining stealth jurors as those who secretly work their way onto a jury venire with the intent to convict the defendant or for personal fame and wealth).

6. Contempt of Court Act, 1981, c. 49 (Eng.).

7. Stephen J. Krause, *Punishing the Press: Using Contempt of Court to Secure the Right to a Fair Trial*, 76 B.U. L. REV. 537, 538–39 (1996).

currently occupies."[8]

II. TRIAL FAIRNESS AND JURY IMPARTIALITY

A. The Requirement of an Impartial Jury

The Sixth Amendment states that "[i]n 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."[9] Furthermore, the Due Process Clauses of the Fifth and Fourteenth Amendments require fundamental fairness in the prosecution of crimes and, therefore, support the requirement of an impartial jury.[10]

Central to this right is the assurance that a jury's verdict will be based only on evidence admitted at trial and will not be swayed by outside influences.[11] Chief Justice John Marshall explained that "[t]he great value of the trial by jury certainly consists in its fairness and impartiality. Those who most prize the institution, prize it because it furnishes a tribunal which may be expected to be uninfluenced by an undue bias of the mind."[12]

B. How Saturation Coverage Inflames the Tension Between Free Press and Fair Trial Rights

The problems generated by intense media coverage of criminal trials "are almost as old as the Republic."[13] Time has only exacerbated these problems. During my career alone, I have

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8. *Id.* at 563.

9. U.S. CONST. amend. VI.

10. *See* U.S. CONST. amends. V & XIV, § 1.

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

12. *Id.*

13. Neb. Press Ass'n v. Stuart, 427 U.S. 539, 547 (1976). More specifically, such conflicts can be traced as far back as Aaron Burr's treason trial in 1807. *See Burr*, 25 F. Cas. at 50. At the time of Burr's trial, few people in the area had not formed opinions about the case from newspaper accounts and heightened public discussion. *Neb. Press Ass'n*, 427 U.S. at 548. A substantial portion of Chief Justice Marshall's opinion explains the need to select an unbiased jury and sets forth the standards to be applied. *See Burr*, 25 F. Cas. at 50.

witnessed a marked expansion of the media in covering criminal trials. Almost ten years ago, I represented Susan McDougal in a federal trial charging her with obstruction of justice and criminal contempt for refusing to testify about the Clintons before a grand jury.[14] At the time, the competition in the cable television arena was just heating up. An upstart Fox News Channel and MSNBC were vying to compete with CNN for viewership. I remember thinking then that the coverage of the case could not be any more pervasive. I was wrong. This competition, along with the advent of outlets such as Court TV and hundreds of other cable channels and programming, has led to more widespread and pervasive coverage of sensational criminal trials,[15] resulting in saturation coverage. Saturation coverage provides up-to-the-minute reports of all aspects of the case, from "live, exclusive" coverage of police executing search warrants, made for TV perp walks, or even in some cases drive-bys in front of crowds screaming for blood, to the analysis of inadmissible evidence and pundits commenting on and predicting the turnout. In this way, the media often try supersized cases long before those cases are tried in the courtroom. I believe this is not the criminal justice system the Framers envisioned when they mandated a presumption of innocence, strict evidentiary requirements, and a high standard of proof in all criminal trials.

The Framers constitutionally protected both the right to a fair trial[16] and freedom of speech and of the press.[17] Although normally these fundamental rights are compatible, intense media coverage of a crime and of the accused can jeopardize the impartiality of the jury and bring both of these significant rights into direct conflict.[18]

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14. *See* Stephen Labaton, *Susan McDougal Indicted for Refusing to Answer Grand Jury's Questions*, N.Y. TIMES ONLINE, May 5, 1998, http://partners.nytimes.com/library/politics/050598whitewater-mcdougal.html.

15. *See* Robert Hardaway & Douglas B. Tumminello, *Pretrial Publicity in Criminal Cases of National Notoriety: Constructing a Remedy for the Remediless Wrong*, 46 AM. U. L. REV. 39, 41 (1996) (explaining that "new technologies have led to an explosion in coverage of the criminal justice system"); Newton N. Minow & Fred H. Cate, *Who Is an Impartial Juror in an Age of Mass Media?*, 40 AM. U. L. REV. 631, 635 (1991) (discussing the proliferation of the mass media in the coverage of criminal trials).

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

17. *See* U.S. CONST. amend. I.

18. Krause, *supra* note 7, at 562.

Because the Framers did not prioritize rights,[19] the Constitution creates a challenging tension when the exercise of one right threatens to interfere or actually interferes with another.[20] Which should prevail?

Courts trying to harmonize the constitutional mandates of free press and fair trial must "balance the two interests, attempting to give each its fullest force."[21] In doing so, however, courts cannot ignore "the realities of a modern society in which there is instantaneous dissemination of information" on a massive scale.[22] When the Framers wrote the First Amendment, the only means of mass communication was the printing press.[23] "[T]he notion that inculpatory evidence against an accused in a local judicial proceeding might be transmitted instantaneously across the country in a way that might create mass hysteria and passion was beyond any comprehension."[24]

When confronted with the seemingly irreconcilable tension between the First and Sixth Amendments, I have observed that the usual response by the "First Amendment first in right" adherents is to suggest that any pretrial contamination of the jury pool can be remedied by a change of venue or through the jury voir dire process. My experience has been, however, that these solutions are no longer feasible in supersized cases. With the advent of 24-hour national cable coverage and the relatively new phenomenon of "stealth jurors,"[25] it has become increasingly apparent that a more drastic solution is necessary in these cases where the Sixth Amendment right to a fair trial is under siege.

A free press is essential to any democratic system because it spurs debate and helps make government institutions more

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19. *See* Neb. 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.").

20. *See id.* at 551.

21. Krause, *supra* note 7, at 563.

22. Hardaway & Tumminello, *supra* note 15, at 88.

23. *See* U.S. Info. Agency, *A Free Press*, ISSUES OF DEMOCRACY, Feb. 1997, at 3, http://usinfo.state.gov/journals/itdhr/0297/ijde/ijde0297.pdf.

24. Hardaway & Tumminello, *supra* note 15, at 88–89.

25. *See, e.g.*, Gershman, *supra* note 5, at 345.

accountable.[26] More specifically, our system recognizes that media scrutiny of judicial proceedings helps ensure fairness by keeping the spotlight on the judicial system.[27] However, when pretrial publicity undermines an accused's right to a fair trial, "a decision must be made as to whether our system of government is best served by favoring publicity or sacrificing it."[28]

This tension in the area of freedom of expression is currently being played out in the Scooter Libby prosecution and the investigation of Barry Bonds for steroid use. In both cases on opposite coasts, prosecutors have successfully sought court orders imprisoning reporters for not revealing their sources.[29] The reasoning is that in certain instances, freedom of expression must give way to other fundamental principles.[30] If the freedoms associated with media coverage, in effect, destroy the protections afforded by the judicial process, the criminal defendant loses the

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26. *See, e.g.*, Roth v. United States, 354 U.S. 476, 484 (1957) ("The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."); Associated Press v. United States, 326 U.S. 1, 20 (1945) ("[A] free press is a condition of a free society."); Stromberg v. California, 283 U.S. 359, 369 (1931) ("The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.").

27. *See, e.g.*, Sheppard v. Maxwell, 384 U.S. 333, 350 (1966) ("A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. . . . The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.").

28. Mark R. Stabile, *Free Press-Fair Trial: Can They Be Reconciled in a Highly Publicized Criminal Case?*, 79 GEO. L.J. 337, 337 (1990).

29. *See In re* Grand Jury Subpoena, Judith Miller, 438 F.3d 1141 (C.A.D.C. 2006); *States Side with SF Chronicle Reporters on Protecting Sources*, YAHOO SPORTS, Dec. 11, 2006, http://www.sports.yahoo.com/mlb/news?slug=ap-bonds-steroids&prov=ap&type=lgns.

30. *See, e.g.*, Branzburg v. Hayes, 408 U.S. 665, 690-91 (concluding that the public interest in "[f]air and effective law enforcement" outweighed the consequential burden on the press).

benefit of our criminal justice system.[31]

"Just as one does not have the freedom to falsely shout 'fire' in a crowded theater, one should not have the right to proclaim 'guilty' in the arena of public opinion, trampling the fair trial rights of the accused in the ensuing stampede."[32] Indeed, courts have never defined freedom of expression as an absolute right.[33] Rather, the Supreme Court has held that freedom of expression should be restrained in some circumstances to protect a defendant's right to a fair trial.[34] In essence, under current jurisprudence there is a legal basis for restraining the media, since "[w]hen the exercise of free press rights actually tramples upon Sixth Amendment rights, the former must . . . yield to the latter."[35] In other words, the press should have no role in the determination of a defendant's guilt or innocence.

The ultimate goal in resolving the tension between free press and fair trial rights should be to minimize the effects of the prejudicial publicity that surrounds a criminal trial without unconstitutionally chilling that speech. But "[g]iven the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of . . . jurors," trial courts must take whatever measures are necessary to ensure that—no matter what—"the balance is never weighed against the accused."[36]

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31. *See* Stabile, *supra* note 28, at 340.

32. *Id.* at 339 (footnote omitted).

33. *Id.*; *see, e.g.*, Am. Commc'ns Ass'n v. Douds, 339 U.S. 382, 394 (1950) ("Although the First Amendment provides that Congress shall make no law abridging the freedom of speech, press or assembly, it has long been established that those freedoms themselves are dependent upon the power of constitutional government to survive. . . . Freedom of speech thus does not comprehend the right to speak on any subject at any time.").

34. Stabile, *supra* note 28, at 339–40 (citing Shepherd v. Florida, 341 U.S. 50, 53 (1951)).

35. *Id.* at 340 (quoting *In re* Dow Jones & Co., 842 F.2d 603, 609 (2d Cir. 1988); *see also* Pennekamp v. Florida, 328 U.S. 331, 347 (1946) ("In the borderline instances where it is difficult to say upon which side the alleged offense falls, we think the specific freedom of public comment should weigh heavily against a possible tendency to influence pending cases. Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice.").

36. Sheppard v. Maxwell, 384 U.S. 333, 362 (1966).

More specifically, courts must make sure that the presumption of innocence is not, however subtly, turned into a presumption of guilt.

III. THE RELATIONSHIP BETWEEN MEDIA COVERAGE, JURY BIAS, AND THE PRESUMPTION OF INNOCENCE

American courts have long struggled to determine whether exposure to pretrial publicity biases potential jurors.[37] The 1807 treason trial of Aaron Burr is considered "the earliest and most often quoted case" to specifically address this issue.[38] Because of the press coverage of that sensational trial, Burr's attorneys made a motion to disqualify citizens from the jury who were aware of the facts of the case, even though they had formed no opinion as to the guilt or innocence of Burr.[39] In denying the motion, Chief Justice Marshall explained that the impartial jury required by the common law, and secured by the Constitution, need only be "composed of [jurors] who will fairly hear the testimony which may be offered to them, and bring in their verdict according to that testimony, and according to the law arising on it."[40] Thus, the mere fact that a juror had been exposed to pretrial publicity was not dispositive of his ability to act impartially.[41]

The standard regarding pretrial publicity and juror bias set by the Court in *Burr* continues to guide trial courts today. Awareness of the case and of certain facts does not automatically render a juror unfit for jury service.[42] Accordingly, since jurors can come into the courtroom having been exposed to media coverage of the case, the

37. Minow & Cate, *supra* note 15, at 639.

38. *Id.* (citing United States v. Burr, 25 F. Cas. 201, 202 (C.C.D. Va. 1807) (No. 14,694a)).

39. *Id.* (citing United States v. Burr, 25 F. Cas. 49, 49 (C.C.D. Va. 1807) (No. 14,692g)).

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

41. *See id.* at 51-52.

42. *See, e.g.*, Irvin v. Dowd, 366 U.S. 717, 722–23 (1961) ("It is not required . . . that the jurors be totally ignorant of the facts and issues involved. . . . To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard.").

relationship between such media exposure and jury bias is crucial in evaluating whether a defendant has been denied the right to a fair trial.

A. The Media's Effect on Jury Bias

Sociological studies have linked pretrial publicity to the likelihood of a biased jury.[43] One such study found that the more pretrial coverage a person is exposed to, the more likely that the person will know about a given case, and that the more a person knows about a given case, the greater the likelihood that the person will form a biased opinion about the defendant.[44] More significantly, the study revealed that although other factors may play a role,[45] "pretrial publicity is the most serious cause of juror bias."[46] In light of "strong and consistent" evidence that a clear nexus exists between information level and a person's propensity to prejudge, the study concluded that "indeed . . . the best jurors are uninformed jurors."[47]

For many decades now, those intimately involved in our legal system have complained about the detrimental effect of media exposure on the proper functioning of our jury system.[48] I can

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43. Krause, *supra* note 7, at 560. *But see* Minow & Cate, *supra* note 15, at 663–64 (distinguishing between "impartial" jurors and "unaware" jurors and concluding that jurors' exposure to media does not necessarily create an inappropriate bias).

44. Krause, *supra* note 7, at 560 (citing Edmond Costantini & Joel King, *The Partial Juror: Correlates and Causes of Prejudgment*, 15 LAW & SOC'Y REV. 9, 21-24 (1981)).

45. *Id.* Other factors include gender, education, social background, demographic characteristics, and general attitudes toward crime and punishment. Edmond Costantini & Joel King, *The Partial Juror: Correlates and Causes of Prejudgment*, 15 LAW & SOC'Y REV. 9, 36–37 (1981).

46. Krause, *supra* note 7, at 560.

47. Costantini & King, *supra* note 45, at 24.

48. *See, e.g.*, Stuart H. Perry, *The Courts, the Press, and the Public: An Address Delivered Before the Michigan State Bar Association*, 30 MICH. L. REV. 228, 234 (1931) ("Trial by jury is rapidly being destroyed in America by the manner in which the newspapers handle all sensational cases. . . . As the law stands today there is no important criminal case where the newspapers are not guilty of contempt of court day after day.") (quoting Clarence Darrow); Irvin v. Dowd, 366 U.S. 717, 730 (1961) (Frankfurter, J., concurring) ("Not a Term passes without this Court being importuned to review convictions, had in

certainly relate. I have tried cases where material was excluded from evidence because it was too prejudicial for the jury to hear, only to have this same material broadcast and printed so often that jurors later actually thought it was presented as evidence. In one such case I was involved with, the appellate court reversed a conviction because evidence made its way into the jury room that was never presented in the courtroom but was pervasively discussed in the media. I have also been involved in trials where jurors lied to get seated on the jury either to convict my client or in expectation of cashing a check in a book deal.

As a result of the vast expansion of the media in recent years, the public today is given supposed insight and highly inflammatory information about certain criminal trials "in finely-tuned detail."[49] The prejudicial effects of the press's heightened participation in the criminal trial process are substantiated by the growing number of appeals alleging deprivation of a fair trial "due to media-created juror bias."[50]

Although some observers argue that "the extraordinary conditions necessary for media coverage to actually prejudice jurors are so rare that the problem occurs only in a few exceptional cases,"[51] this conclusion—even assuming it is correct—nonetheless does not "foreclose the need for adequate remedies."[52] As one

States throughout the country, in which substantial claims are made that a jury trial has been distorted because of inflammatory newspaper accounts . . . .").

49. Hardaway & Tumminello, *supra* note 15, at 41.

50. *Id.*; *see also* Minow & Cate, *supra* note 15, at 636 (explaining that in the 1980s, the national newspapers and wire services alone carried over 3,100 of these claims); *id.* at 636–37 n.22 (explaining why this figure underestimates the actual number of reports).

51. Krause, *supra* note 7, at 561 (citing Ralph Frasca, *Estimating the Occurrence of Trials Prejudiced by Press Coverage*, 72 JUDICATURE 162 (1988)). "Despite widespread fears of prejudicial coverage, the conditions necessary for media coverage to prejudice jurors to the extent that they are unable to decide a case based on courtroom evidence are likely to occur in only one of every 10,000 cases." Ralph Frasca, *Estimating the Occurrence of Trials Prejudiced by Press Coverage*, 72 JUDICATURE 162, 162 (1988).

52. Krause, *supra* note 7, at 561 (citing Robert E. Drechsel, *An Alternative View of Media-Judiciary Relations: What the Non-Legal Evidence Suggests About the Fair Trial-Free Press Issue*, 18 HOFSTRA L. REV. 1, 16 (1989) (explaining that although media-induced jury bias is infrequent, it is still a

commentator noted, "The problem is qualitative, rather than quantitative: Even if the conflict between free press and fair trial occurs only in a small number of cases, how we choose to deal with those exceptional cases is what truly defines the fairness of our judicial system."[53]

B. High-Profile People and the Presumption of Innocence

"Justice principles" inform our most basic understanding of the criminal justice system.[54] Paramount among these is the maxim that in all criminal trials, an accused is presumed innocent until proven guilty by the prosecution.[55] This principle is based upon a controlling belief that "an individual's liberty interest outweighs the government's interest in punishing criminals."[56] American jurisprudence has long treated the presumption of innocence as a constitutional guarantee with a significance and content of its own. Though this doctrine requires *all* criminal defendants to be presumed innocent until a prosecutor proves guilt beyond a reasonable doubt, extensive media coverage can render the presumption of innocence meaningless.

I experienced this phenomenon firsthand during the Scott Peterson capital murder trial, in which I represented Mr. Peterson. Most potential jurors, even after being instructed on the law by Judge DeLucchi, the presiding judge, admitted during jury selection that they thought the accused was probably guilty, but that they looked forward to hearing his side of things. This predisposition towards

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problem worthy of attention)).

53. *Id.*

54. Damien P. DeLaney, Article, *Better to Let Ten Guilty Men Live: The Presumption of Life—A Principle to Govern Capital Sentencing*, 14 CAP. DEF. J. 283, 285 (2002).

55. *See, e.g.*, Coffin v. United States, 156 U.S. 432, 453 (1895) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."); Lilienthal's Tobacco v. United States, 97 U.S. 237, 266 (1877) ("[I]n criminal trials the party accused is entitled to the legal presumption in favor of innocence, which, in doubtful cases, is always sufficient to turn the scale in his favor.").

56. DeLaney, *supra* note 54, at 285 (citing Scott E. Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 HASTINGS L.J. 457, 458 (1989)).

guilt inverted both the presumption of innocence and the burden of proof in one fell swoop.

Of course, my experience has been that, in prosecutions where the defendant was a celebrity *before* being accused of a crime, the presumption of innocence may be able to withstand media onslaught because the public—and hence the jurors—equate the defendant with the character upon which he or she obtained celebrity. Fans view their idols through the media prism by which they are known. Therefore, the public's approval of and commitment to celebrities can often balance out a barrage of negative publicity, leaving the presumption of innocence intact. In contrast, most defendants in the criminal justice system, including those who are infamous (as opposed to famous), are vulnerable to a media-generated presumption of guilt.

I have also observed that during jury voir dire in cases that do not involve high-profile people, jurors often admit that they believe in the old adage that where there is smoke, there is fire. This predisposition towards guilt is even more pronounced where the accused is despised and demonized by the media. When that notoriety is combined with saturation coverage, the presumption of innocence is reduced to a meaningless concept, merely mouthed. In effect, the burden of proof is shifted to the accused.

IV. PRETRIAL PUBLICITY AND ITS EFFECT ON TRIAL FAIRNESS

A. Media Manipulation and Juror Taint

In my view, the media's reflexive invocation of the First Amendment has, in effect, hijacked our criminal justice system. Media producers follow and shadow jurors offering them inducements. Media outlets go to court seeking access to autopsy and coroner's photos and reports, purportedly in the name of the "public interest." I have even seen TV show hosts start campaigns to have jurors removed for "pro-defense" bias and actually publish information as to their jobs, home addresses, and where their children go to school. In many high-profile cases, the unrelenting media saturation essentially preordains a verdict in the case.

Like the infamous gossip tabloids in England, the supermarket tabloids in America will print virtually any rumor, negative

innuendo, or outright falsity.[57] Unfortunately in high-profile cases, these stories jump rather quickly into the mainstream media.[58] In my experience, the process develops as follows. Whereas most media require at least two or three credible sources in order to report content,[59] tabloids like the National Enquirer do not have such a rule; they will essentially print a rumor even if from an anonymous source.[60] Once a story gets published in the tabloids, different journalists start discussing the story, and it soon jumps from the National Enquirer onto cable networks such as Court TV or Fox Cable News. Then the mainstream media pick up the story, explaining that "published reports state . . ." or "according to sources . . ." Once legitimate mainstream media cover the story, morning shows start commenting on it, and newspapers and magazines begin printing it. The Internet further perpetuates this chain of reporting, as websites and blogs continually publish unverified information by anonymous sources, rendering such information accessible to millions. Thus, a piece of information that may have started off as no more than a whispered rumor by an unidentifiable source will have morphed into an established "fact" spread by media outlets around the country and the world.

Furthermore, unlike lawyers who are regulated by strict professional codes and guidelines enforced by their state bars,[61] the press's code of ethics is voluntarily followed with no formal enforcement mechanism. The press is not externally constrained. Quite the opposite. For example, California has incorporated a broad

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57. *See* Andie Tucher, *Through the Grapevine*, COLUM. JOURNALISM REV., July–Aug. 2000, at 66–67 (reviewing JEANNETTE WALLS, DISH: THE INSIDE STORY ON THE WORLD OF GOSSIP (2000)), *available at* http://archives.cjr.org/year/00/2/2/tucher.asp (describing common tabloid tactics including the write-around, the anonymous source, the innuendo, and the half-truth).

58. *See, e.g.*, *id.* at 66 (noting that the O.J. Simpson case made "tabloid values, tabloid techniques, and tabloid standards . . . become the values, techniques, and standards accepted by the mainstream media").

59. *See* Lori Robertson, *A Source of Embarrassment*, AM. JOURNALISM REV., Apr. 1997, at 11, 11, *available at* http://www.ajr.org/article_printable.asp?id=2314 (explaining that the two source rule is standard procedure at many newspapers).

60. *See* Tucher, *supra* note 57, at 66-67.

61. *E.g.*, CAL. RULES OF PROF'L CONDUCT R. 5-120 (2006).

shield law into the California Constitution which provides that members of the press may not be "adjudged in contempt by a judicial, legislative, or administrative body . . . for refusing to disclose the source of any information procured while so connected or employed for publication in a newspaper, magazine or other periodical publication."[62] With this added layer of protection of its sources, there is little in the way of external constraints to deter the media from relaying erroneous information to the public.

As the actual criminal proceedings begin, the media continues to communicate the news to the public. Since there is a 24-hour news cycle to fill, media outlets "report" a seemingly endless flow of information. During trial, wire reporters cover the proceedings like a sporting event. They discuss the case as if they observe minute-by-minute action. The news story begins to take on the ESPN sports model, where journalists report that the prosecution had a good day, the defense is playing catch up, the witness took a beating, etc.

But a trial is nothing like a sporting event. In fact, a trial is rarely even a consecutive series of events at all. Trial events may make no sense at all unless viewed in the wider context of the trial itself. Yet that is rarely done unless someone like Greta Van Susteren—that is, a former practicing trial lawyer who on occasion actually attends the proceedings—places the information in context.

Moreover, the reason an attorney does or does not do something in court is often not apparent to the press. A lawyer, for instance, will often ask a witness a question simply to set up that witness—or some other witness—for a later question. But because the press fails to realize this, it will often misrepresent the significance of the colloquy.

While the media pretends to be simply an agent or surrogate of the public,[63] news has ceased to be neutral because reporters have ceased to simply report. Objective reporting has given way to a new journalism—a subjective form of fact-telling known to participants as "advocacy journalism"—which blurs the line between fact and opinion.[64] It seems that this erosion in objectivity has led reporters

62. CAL. CONST. art. I, § 2(b).

63. *See, e.g.*, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 572–73 (1980) (explaining why media claims that they are functioning as surrogates for the public are validated).

64. *See* Sherry Ricchiardi, *Over the Line?*, AM. JOURNALISM REV., Sept.

to take a position, to either praise or bash, because confrontation is what sells. And I believe it is this subservience to commercial objectives which has skewed the free press, fair trial calculus.

B. Protective Orders: Who Do They Really Protect?

Courts commonly use a protective order, also frequently called a gag order, to, in theory, regulate the potential impact of media coverage in a given case.[65] Although courts originally designed gag orders as a means to protect the defendant from unrelenting prejudicial pretrial publicity,[66] they no longer effectively serve that purpose. Instead of acting as a prophylactic shield protecting the defendant, such orders have actually become a weapon in the prosecution's arsenal. This is typically a result of the now obligatory press conference that accompanies almost all charging announcements by the prosecutor. The press conference is stereotypically choreographed with a photo opportunity usually emphasizing the most prejudicial evidence—which, in my experience, is often inadmissible—accompanied by pronouncements that "the crime has been solved" or "the public can rest easy tonight," as a result of the arrest of some person. That "photo op" becomes the B roll for endless loops of television coverage of the case and, from that point forward, defines the public perception of the defendant.

Ironically, it is usually soon after this press show that the prosecutor races into court seeking a gag order against the defense in order to protect the public from "undue prejudicial pretrial publicity." In actuality, by that point, the request is just a disingenuous way of muzzling the defense from responding to the prosecution's poisoning of the well.[67]

1996, at 25, 27 (noting that "[a]dvocacy journalism lets reporters off the hook by allowing them to fill gaps in knowledge with emotional opinion" (quoting Bill Kovach)).

65. *See* Gabriel G. Gregg, *ABA Rule 3.6 and California Rule 5-120: A Flawed Approach to the Problem of Trial Publicity*, 43 UCLA L. REV. 1321, 1363–64 (1996).

66. *See* Jaime N. Morris, Note, *The Anonymous Accused: Protecting Defendants' Rights in High-Profile Criminal Cases*, 44 B.C. L. REV. 901, 906 n.44 (2003).

67. *See, e.g.*, Matt Dozier, *DA to Move for Gag Order in Trial*, DAILY

Furthermore, leaks often occur despite the gag order, largely due to the very shield laws, discussed above, that protect journalists from citing their sources.[68] In many cases the police leak inadmissible and prejudicial information to the media.[69] Prosecution witnesses who are covered by the gag order are routinely offered the "services" of lawyers who then parlay their "representation" into constant media appearances pronouncing the guilt of the accused.[70] Thus, even though the gag order's intent was to shut down the publicity,[71] as a practical matter it ends up compounding misinformation and rumor. I have experienced this anomaly firsthand.

C. Ethical Rules That Muzzle the Defense

Even in the absence of a gag order, certain ethical rules can restrict attorneys from making extrajudicial statements that may be prejudicial to a fair trial.[72] In *Gentile v. State Bar of Nevada*,[73] the Court considered whether Nevada's interpretation of a State Bar rule governing lawyers' extrajudicial statements violated the First

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NEXUS ONLINE, Apr. 29, 2005, http://www.dailynexus.com/news/2005/9604.html. In the Jarrod Davidson homicide case, Public Defender James Egar opposed the prosecution's motion for a gag order, explaining that "[t]he prosecution has made inflammatory comments to the media, and now they are trying to keep the defense from getting a fair chance to respond." *Id.*

68. *See, e.g.*, *D.A. Miffed by Leak of Laci Peterson Autopsy*, NBC4, May 29, 2003, http://www.nbc4.tv/news/2235898/detail.html. After parts of an autopsy report had been leaked to the media in the Scott Peterson double murder case, Stanislaus County District Attorney James Brazelton commented: "Evidence in this case should be presented in court through the testimony of witnesses and not selectively leaked to the news media by unknown persons whom the press will not identify." *Id.*

69. *See, e.g.*, Mary Mostert, *Do the Levys and the Media Owe Gary Condit an Apology?*, CONSERVATIVETRUTH.ORG, May 29, 2002, http://www.conservativetruth.org/archives/marymostert/05-29-02.shtml (explaining that the media "did a real hatchet job on Congressman Gary Condit, based *entirely* on an unidentified leak from the . . . police department").

70. *See, e.g.*, *The Scott Peterson Murder Trial: Gloria Allred, Amber Frey's Attorney, Discusses the Case* (Court TV television broadcast Sept. 24, 2004); *On the Record with Greta Van Susteren: Scott Peterson's Ex-Girlfriend Hires a New Lawyer* (Fox News Channel television broadcast May 19, 2003).

71. *See* Morris, *supra* note 66, at 918-19.

72. *See, e.g.*, CAL. RULES OF PROF'L CONDUCT R. 5-120 (2006).

73. 501 U.S. 1030 (1991).

Amendment.[74] In balancing the First Amendment rights of attorneys in pending cases and the State's legitimate interest in maintaining the integrity and fairness of trials, a divided Court held that a state may constitutionally restrict attorney speech upon a showing of "substantial likelihood of material prejudice" to a fair trial.[75] Nonetheless, the Court also held that the rule, as written, was void for vagueness.[76]

Several years later, following the media coverage of the double murder trial of O.J. Simpson, California enacted Professional Conduct Rule 5-120.[77] The Rule allows the State Bar to impose disciplinary sanctions against attorneys who make extrajudicial statements about cases in which they are involved.[78] However, the Rule provides a limited exception. 5-120(C) allows an attorney to protect his client from the "substantial undue prejudicial effect of recent publicity not initiated by the member or the member's client" by authorizing a statement by the attorney "limited to such information as is necessary to mitigate the recent adverse publicity."[79] Justice Kennedy had articulated the reasoning underlying this exception in *Gentile*:

> An attorney's duties do not begin inside the courtroom door. He or she cannot ignore the practical implications of a legal proceeding for the client. Just as an attorney may

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74. *Id.* at 1034.

75. *Id.* at 1075.

76. *Id.* at 1048.

77. Douglas E. Mirell, *Gag Orders & Attorney Discipline Rules: Why Not Base the Former upon the Latter?*, 17 LOY. L.A. ENT. L. REV. 353, 357 (1997). California State Senator (now Superior Court Judge for the County of San Mateo) Quentin L. Kopp (I-San Francisco) introduced and later amended Senate Bill 254 which became a directive requiring the State Bar of California to submit to the California Supreme Court for its approval a rule of professional conduct "governing trial publicity and extrajudicial statements made by attorneys concerning adjudicative proceedings." *Id.* at 358 (quoting S. 254, § 1 (Cal. 1994) as amended in Assembly on Aug. 16, 1994). Kopp explained that the measure was inspired by "the staggering excesses of lawyers and witnesses in the O.J. Simpson criminal case." *Id.* (citing Henry Weinstein, *Limits on Attorney Comments Loudly Opposed*, L.A. TIMES, Nov. 29, 1994, at A3).

78. *See* CAL. RULES OF PROF'L CONDUCT R. 5-120 (2006).

79. *Id.* R. 5-120(C).

> recommend a plea bargain or civil settlement to avoid the adverse consequences of a possible loss after trial, so too an attorney may take reasonable steps to defend a client's reputation and reduce the adverse consequences of indictment, especially in the face of a prosecution deemed unjust or commenced with improper motives.[80]

Thus, although gag orders and ethical rules ostensibly seek to protect defendants from prejudicial publicity, they often achieve just the opposite. Without the ability to seek comment from the lawyers, the media ends up being reduced to nothing more than a conduit for leaks, spins, and attacks, leading to misinformation and resulting in irreparable jury taint. Hence, since the media is often used to drive a prosecution theory and defense attorneys are gagged from responding, the result is a skewed, one-sided version of the alleged facts. All the while the public's opinion becomes set and in many cases inflamed. It is against this backdrop that jurors are selected.

D. Pretrial Publicity and Jury Selection

"[E]ven in the absence of actual prejudice, pervasive pretrial publicity can" severely taint the jury pool so as to deny the accused the right to a fair trial.[81] In *Irvin v. Dowd*,[82] the Supreme Court, for the first time, struck down a state conviction solely on the ground of prejudicial pretrial publicity.[83] About ninety percent of prospective jurors that were examined on the point had "entertained some opinion as to guilt—ranging in intensity from mere suspicion to absolute certainty."[84] In reversing the conviction, the Court noted that "[w]here one's life is at stake—and accounting for the frailties of human nature—we can only say that in the light of the circumstances here the finding of impartiality does not meet constitutional standards."[85]

The impact of pretrial publicity was equally if not more pervasive in the more recent Scott Peterson capital murder trial. A

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80. *Gentile*, 501 U.S. at 1043.

81. Alberto Bernabe-Riefkohl, *Prior Restraints on the Media and the Right to a Fair Trial: A Proposal for a New Standard*, 84 KY. L.J. 259, 278 (1996).

82. 366 U.S. 717 (1961).

83. Morris, *supra* note 66, at 914.

84. *Irvin*, 366 U.S. at 727.

85. *Id.* at 727–28.

jury consultant for the defense in that case noted that this was by far the highest prejudgment rate she had ever seen.[86] Due to the spectacular amount of pretrial publicity surrounding the case, I expected some juror taint. However, nobody could have imagined the extent to which pretrial publicity had polluted the jury pool, and in my opinion, effectively preordained a guilty verdict. Prospective jurors came to jury selection not only with a presumption of Scott Peterson's guilt, but actually convinced of it. From about 1,600 jury questionnaires, one of the most notable was filled out by an illiterate man. Although he could barely write his own name, he was able to scratch out a single word on the 23-page form—"g-u-t-y." The other questionnaires revealed equally committed convictions of guilt. Two practicing Buddhists who opposed the death penalty were willing to make an exception for Scott Peterson and three potential jurors actually volunteered to pull the switch. It bears reemphasis that this was all before one iota of evidence had been presented in a court of law.

The danger of pretrial publicity is that it reaches inside the jury box, whether as a singular impact such as a juror's intention to sell his story in a lucrative book deal, or as the more benign yet pernicious influence of community sentiment inflamed by the media. In both cases, the impartial fact-finders envisioned and guaranteed by the Constitution[87] have been replaced by biased advocates sitting in the jury box.

V. THE LESS-THAN-ADEQUATE JUDICIAL RESPONSES TO PRETRIAL PUBLICITY

Courts recognize that pretrial publicity may be prejudicial to a defendant.[88] Accordingly, judges are equipped with an arsenal of

86. Diana Walsh, *The Peterson Trial: The Art of High-Stakes Jury Picking: 2 Seasoned Consultants Compete in Courtroom*, S.F. CHRON., Apr. 4, 2004, at A1 (quoting Jo-Ellan Dimitrius).

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

88. *See, e.g.*, *Irvin*, 366 U.S. at 729–30 (Frankfurter, J., concurring) ("How can fallible men and women reach a disinterested verdict based exclusively on what they heard in court when, before they entered the jury box, their minds were saturated by press and radio for months preceding by matter designed to establish the guilt of the accused."); Sheppard v. Maxwell, 384 U.S. 333, 356 (1966) ("[E]very court that has considered this case, save the court that tried it,

tools to help achieve impartiality in the courtroom.[89] The techniques used to minimize the impact of bias include using the voir dire process to exclude biased jurors, moving the trial to a venue not so permeated with publicity, granting a continuance until the publicity dies down, imposing a gag order on trial participants, sequestering the jury to reduce their exposure to publicity, and admonishing the jury to ignore publicity surrounding the trial.[90] However, these remedies have proven to be demonstrably ineffective when there is a high level of prejudice against the defendant.[91] Even the two most commonly used techniques, voir dire and change of venue, have ceased to adequately guarantee that a fair and impartial jury will be impaneled.[92]

A. Ineffectiveness of Voir Dire

Judges prefer the voir dire process as a remedy for pretrial publicity and the primary means through which to seat an impartial jury.[93] Although there is a lack of social science research on the general effectiveness of voir dire, the research that exists suggests that voir dire is ineffective as a means of identifying prejudice by jurors.[94] A major criticism of this technique is that potential jurors often offer inaccurate or dishonest responses.[95] Studies have shown that not only do jurors often hide their true prejudices and preconceptions during voir dire, but that jurors also sometimes lie outright during open court questioning.[96] I have actually had jurors during voir dire admit, when confronted, that they, in fact, were not honest in either trying to get on or off of a jury panel. I often seat

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has deplored the manner in which the news media inflamed and prejudiced the public.").

89. Morris, *supra* note 66, at 903; *see also* Neb. Press Ass'n v. Stuart, 427 U.S. 539, 555 (1976) (stating that the trial judge has a major responsibility to mitigate the effects of pretrial publicity); *Sheppard*, 384 U.S. at 358–62 (delineating protective measures that the trial court could have taken to minimize the prejudicial impact of the media).

90. Morris, *supra* note 66, at 903.

91. *See* Krause, *supra* note 7, at 563–69.

92. *See* Minow & Cate, *supra* note 15, at 654.

93. *Id.* at 649–50.

94. *Id.* at 650.

95. *Id.*

96. *Id.*

jurors who admit to a bias, as opposed to those who, after hearing a laundry list of heinous crimes that my client is accused of, claim to have absolutely no reaction whatsoever.

Furthermore, as voir dire questioning progresses fewer jurors admit to potential bias, suggesting that prospective "jurors learn from their colleagues' [in court responses] the 'right' answers to the voir dire questions."[97] Jurors that want to give the "right" answer are also likely to desire approval from the judge and to be in the majority.[98] Such jurors hide their potential biases to pass the fair and impartial juror test.[99]

High-profile trials also present the special challenge of weeding out those jurors "who are 'auditioning' to be on the jury."[100] These jurors, known as "stealth jurors" in the legal community, are people who dissemble their way onto the jury in a high-profile case for their own self-serving reasons.[101]

Given the extraordinary media attention that high-profile trials attract, it is not surprising that people want to be part of these cases.[102] In these highly publicized trials, "[t]he enticement of possible celebrity status [or] monetary gain" is often the motive of stealth jurors.[103] Some jurors who have served in high-profile trials have, in fact, "garnered momentary fame in the aftermath of the

97. *Id.* at 651.

98. *Id.*

99. *See id.*

100. Rachel Hartje, Comment, *A Jury of Your Peers?: How Jury Consulting May Actually Help Trial Lawyers Resolve Constitutional Limitations Imposed on the Selection of Juries*, 41 CAL. W. L. REV. 479, 499 (2005).

101. *Id.* at 499–500; *see also* Dan Abrams, *Can 'Runaway Jury' Be Real?: So-Called "Stealth Jurors" Could Be Sabotaging the Justice System*, MSNBC.COM, Apr. 2, 2004, http://www.msnbc.msn.com/id/4653700/. According to DecisionQuest, a jury consulting firm specializing in jury research, trial consulting, and jury selection, 25% of 1,000 people surveyed said they could envision a situation where they would want to serve on a jury. *Id.* About 14% said they would be willing to hide information about themselves to get on a jury. *Id.* From 163 lawyers surveyed, 60% believed there are more stealth jurors, and 66% said this phenomenon has increased over the past 5 years. *Id.*

102. Gershman, *supra* note 5, at 345.

103. Hartje, *supra* note 100, at 500.

verdict."[104] Others have capitalized on the experience through movie or book deals, appearances or interviews on television, or even by posing in Playboy magazine.[105]

Sometimes, though, a stealth juror's goal is to get on the jury strictly to convict the defendant.[106] During the Peterson trial, three stealth jurors were removed from the jury venire. In each instance, the defense received a tip about a specific juror who had a firmly rooted desire to convict and "fry" Mr. Peterson before the prosecution called the first witness. These three jurors were caught from about 1,600 that were called for jury duty,[107] and they were unveiled only by happenstance. They had seemed sincere, honest, and impartial during questioning, proving that even the most rigorous voir dire is unable to weed out all stealth jurors. However, it should come as no surprise that stealth jurors are capable of outsmarting a method that decides impartiality on the "honor system."[108] I believe that other stealth jurors made it onto the Peterson jury, just as stealth jurors have surely sat on juries in other high-profile trials.

Whether their goal is to affect the outcome of the case or to make a profit from it, stealth jurors' presence on the jury manipulates jury selection and undermines the integrity of the entire criminal justice system. In as much as voir dire has its shortcomings in detecting partiality among prospective jurors, the inadequacy of voir dire in identifying prejudice is most explicitly demonstrated by the phenomenon of stealth jurors.

B. Ineffectiveness of Change of Venue

If there has been extensive pretrial publicity and if remedial

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104. Gershman, *supra* note 5, at 345; *see also* Joel Cohen, *Celebrity Jurors*, N.Y. L.J., Apr. 7, 2004, at 2, *available at* http://www.stroock.com/SiteFiles/Pub264.pdf.

105. Hartje, *supra* note 100, at 500; *see, e.g.*, Cohen, *supra* note 104, at 2; Lisa Sweetingham, *Peterson Jury Has Plenty of Troubled Role Models*, COURTTV.COM, Nov. 11, 2004, http://www.courttv.com/trials/peterson/juror_mischief_ctv.html.

106. Gershman, *supra* note 5, at 345.

107. *See* Louis Sahagun & Mark Arax, *Peterson Found Guilty of Killing Pregnant Wife*, L.A. TIMES, Nov. 13, 2004, at A1.

108. *See generally* Minow & Cate, *supra* note 15, at 650 (stating that voir dire fails to elicit accurate or honest responses from potential jurors and as such is ill-suited as a means of identifying prejudice).

measures have proven to be an inadequate method of ensuring a fair trial in the venue where the crime occurred, the Supreme Court has held that a defendant is constitutionally entitled to a change of venue to secure an impartial jury.[109]

But in high-profile cases that fascinate the public, "no county escapes media coverage; publicity saturates the nation before the trial begins."[110] Furthermore, given the current state of electronic media in which information is instantaneously transmitted nationwide,[111] the likelihood of finding unbiased jurors in an alternate venue is diminished and sometimes impossible. In supersized trials with widespread appeal, it is unrealistic to think that the adjoining county, not to mention the entire state and perhaps even the whole country, is any more immune to saturation coverage of the case than the place where the crime occurred. Thus, the change of venue to an adjoining county is increasingly of no consequence in terms of jury selection.[112]

VI. USING CONTEMPT OF COURT TO SECURE THE RIGHT TO A FAIR TRIAL

Given the detrimental impact modern media is having on criminal trials in this country, and given the demonstrably ineffective

109. *See* Rideau v. Louisiana, 373 U.S. 723, 726 (1963) ("[I]t was a denial of due process of law to refuse the request for a change of venue, after the people of [the] Parish had been exposed repeatedly and in depth to the spectacle of [the defendant] personally confessing in detail to the crimes with which he was later to be charged); *see also* Groppi v. Wisconsin, 400 U.S. 505, 511 (1971) (vacating defendant's conviction because he was denied his constitutionally guaranteed opportunity to show that a change of venue was required in his case due to massive media coverage).

110. Hardaway & Tumminello, *supra* note 15, at 41–42.

111. *See supra* Part II.B.

112. Depending on the extent of the publicity, change of venue to a much larger metropolitan county distant from the site of the crime may have the effect of diluting the impact of prejudicial media reporting. *See, e.g.*, People v. Manson, 132 Cal. Rptr. 265, 318 (Ct. App. 1976) ("A metropolitan setting with its diverse population tends to blunt the penetrating effect of publicity."). *But see* Lansdown v. Superior Court, 89 Cal. Rptr. 154, 157 (Ct. App. 1970) ("Population, qua population, is not alone determinative; it is but one factor and it must be shown how size, whether of area or of population, neutralizes or dilutes the impact of adverse publicity.").

remedies available to courts, some other solution is necessary to protect defendants' Sixth Amendment and due process rights in supersized cases. Since there are currently no external restrictions or deterrents imposed on the media,[113] "there is little incentive for the press to refrain from sensationalist reporting."[114] A properly crafted statute, however, would "effectively remove the media's incentive to publish material that could endanger an accused's right to a fair and impartial trial, while still allowing public debate to continue on the important issues of the day."[115]

A. English Common Law of Contempt

In order to fully understand our legal institutions today, it is important to know how they developed and have come to be what they are.[116] Many aspects of American law have their roots in early English common law.[117] The principle that courts possess inherent contempt power is one such example.[118] The Supreme Court has explained that the Constitution "cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted."[119] Accordingly, it has held that "the English common law of contempt was adopted by the United States upon [the] establishment of the United States

113. *See supra* Part IV.A.

114. Krause, *supra* note 7, at 574.

115. *Id.*

116. Harold J. Berman, *The Western Legal Tradition in a Millennial Perspective: Past and Future*, 60 LA. L. REV. 739, 740 (2000); *see generally id.* at 739-52 (discussing broad historical and philosophical underpinnings of the Western legal tradition and explaining their importance in understanding our legal institutions).

117. *See id.* at 740-41; *see also* Gompers v. United States, 233 U.S. 604, 610 (1914) (noting that "the provisions of the Constitution . . . are organic living institutions transplanted from English soil").

118. *See* Fatema E. Fallahnejad Burkey, *The* Prosecutor v. Aleksovski, *30 May 2001, Judgment on Appeal by Anto Nobilo Against Finding of Contempt: A Critical Analysis of the ICTY Appeals Chamber's Abandonment of Witness Protection Measures*, 82 WASH. U. L.Q. 297, 300-01 (2004); William F. Chinnock & Mark P. Painter, *The Law of Contempt of Court in Ohio*, 34 U. TOL. L. REV. 309, 318 (2003) (describing the source of contempt authority as the "inherent power of the court").

119. Chinnock & Painter, *supra* note 118, at 318 (quoting *Ex parte* Grossman, 267 U.S. 87, 108–09 (1925)).

Constitution."[120] Legislatures can supplement the inherent contempt power of courts with specific contempt statutes,[121] as England has done.[122]

B. The Difference Between the English and American Approaches to Free Press-Fair Trial

Although in the United States, virtually "nothing spoken outside the courtroom is punishable as contempt,"[123] in England the importance of a fair trial wins out over free press as English legislators have passed severe contempt of court laws for those who report court proceedings.[124]

English courts have long recognized "the potential threat to justice posed by unrestrained publicity,"[125] and people in England are troubled by both the excessive media coverage of American trials and by American laws that permit widespread publicity surrounding these trials.[126] British criticism of the American judicial system is valid in this regard. Leading criminal lawyers in England have commented that high-profile trials in the United States demonstrate that the American criminal justice system is in shambles.[127] Furthermore, one English supporter of the current laws in England remarked that "[s]trict contempt of court rules are supposed to prevent British justice [from] sliding into U.S.-style 'trial by media'

120. *Id.*

121. "[A]lthough some states have by statute or decision expressly repudiated the power of judges to punish publications as contempts on a finding of mere tendency to interfere with the orderly administration of justice in a pending case, other states have sanctioned the exercise of such a power." Bridges v. California, 314 U.S. 252, 267 (1941).

122. *See infra* Part VI.C.

123. Stephen A. Metz, *Justice Through the Eye of a Camera: Cameras in the Courtrooms in the United States, Canada, England, and Scotland*, 14 DICK. J. INT'L L. 673, 686 (1996).

124. Neil Vidmar, *The Canadian Criminal Jury: Searching for a Middle Ground*, 62 LAW & CONTEMP. PROBS. 141, 151 (1999); *see also* Joanne Armstrong Brandwood, *You Say "Fair Trial" and I Say "Free Press": British and American Approaches to Protecting Defendants' Rights in High Profile Trials*, 75 N.Y.U. L. REV. 1412, 1430 (2000).

125. Brandwood, *supra* note 124, at 1431.

126. *Id.* at 1430–31.

127. *See id.* at 1413.

where freedom of expression takes precedence even over the right to a fair trial."[128]

C. *Britain's Contempt of Court Act of 1981*

Britain's Contempt of Court Act of 1981 was passed following the sensational trial of Jeremy Thorpe, the former leader of the English Liberal Party, who was accused, along with others, of conspiracy to commit murder.[129] Until then, the courts had relied on the common law doctrine of contempt of court, which allowed English courts "to prevent or punish conduct which tends to obstruct, prejudice or abuse the administration of justice."[130] Because the enforcement of that law had been attacked as both arbitrary and unduly harsh, the Contempt of Court Act of 1981 was enacted to liberalize the common law of contempt.[131]

The 1981 Act provides that the media will be strictly liable for any publication or broadcast "addressed to the public at large . . . which creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced."[132] However, strict liability only applies to "active" proceedings; therefore, the Act applies only from the time a suspect is arrested, or a warrant issued, until the proceedings conclude, whether by acquittal, conviction, or administrative termination.[133]

Courts assessing whether there has been a violation of the Act must consider when the piece was published, the likelihood that jurors saw the piece, whether the piece affected the opinions of the jurors, and the likelihood that jury members will be able to follow directions aimed at neutralizing the prejudicial impact of the piece.[134]

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128. Grania Langdon-Down, *Law: Trial by Media: Watching for Prejudice; After the Geoff Knights Fiasco, Can We Trust the Press to Allow the Accused a Fair Hearing? After OJ, Can We Trust the Jury?*, INDEPENDENT, Oct. 11, 1995, at 12.

129. Eugene R. Sullivan, *The Great Debate V: A Debate on Judicial Reform, England v. United States*, 38 AM. CRIM. L. REV. 321, 341 (2001).

130. Brandwood, *supra* note 124, at 1432 (quoting Sunday Times v. United Kingdom, 30 Eur. Ct. H.R. (ser. A) at 14 (1979)).

131. *Id.*

132. *Id.* at 1433 (quoting Contempt of Court Act, 1981, c. 49, § 2(1)-(2) (Eng.)).

133. *Id.* (citing Contempt of Court Act, c. 49, § 2(3), sched. 1).

134. *Id.* at 1434.

Courts must then "determine whether the risk of prejudice from the publication is both immediate and serious" and, if so, courts may impose the appropriate sanctions.[135]

Although the Act, on its face, may favor Sixth Amendment fair trial rights over the current American understanding of free speech guarantees, several defenses are available under certain circumstances.[136] For publications where the risk of prejudice is only incidental to a broader discussion addressing issues beyond the particular proceeding, a public interest defense is available.[137] The Act also includes an innocent distribution defense that can be raised if the distributor neither knew nor had reason to know that the material was contemptuous.[138] Moreover, it includes an innocent publication defense that may be raised if the publisher neither knew nor had reason to know that the proceedings were active when it published the material.[139] Finally, a "fair and accurate report of legal proceedings held in public, published contemporaneously and in good faith" is an absolute defense to any contempt charge.[140]

American commentators have begun to urge that similar legislation be enacted in the United States to give trial judges the discretion to use their contempt powers in appropriate cases.[141] As one commentator noted,

> Permitting judges to use common sense and a realistic view of the impact of an unchecked media on judicial proceedings may indeed be a more effective alternative than merely relying on the current rigid First Amendment standards which romanticize a media which, arguably, no longer adequately fulfills its role as the promoter of an

135. *Id.* Under the statute, courts may impose fines and prison sentences for fixed terms not to exceed two years. *See* Contempt of Court Act, c. 49, § 14(1)-(2).

136. Philip L. Judy, *The First Amendment Watchdog Has a Flea Problem*, 26 CAP. U. L. REV. 541, 590 (1997).

137. *Id.*; *see* Contempt of Court Act, c. 49, § 5.

138. Judy, *supra* note 136, at 590; *see* Contempt of Court Act, c. 49, § 3(2).

139. *See* Contempt of Court Act, c. 49, § 3(1).

140. Judy, *supra* note 136, at 590 (quoting Contempt of Court Act, c. 49, § 4(1)).

141. *See, e.g.*, Krause, *supra* note 7, at 574; Judy, *supra* note 136, at 592.

informed citizenry.[142]

As far back as 1907, in *Patterson v. Ex rel. Attorney General of Colorado*,[143] the Supreme Court "explicitly endorsed a revitalized contempt doctrine."[144] There, Justice Holmes wrote that courts retain "an inherent right to impose sanctions against outside influences that 'would tend to obstruct the administration of justice' during a pending trial."[145] In the decades that followed, however, this judicial power has been largely ignored in the context of the free press versus fair trial debate.

Using Britain's Contempt of Court Act of 1981 as a model, both Congress and state legislatures should enact legislation that mirrors Britain's "commitment to impartial justice" and its "unwavering support of fair trial rights."[146] As one proponent of this idea has urged, to do so would "place the responsibility of monitoring the harmful consequences of pretrial publicity on those who can do something about it: the members of the media . . . ."[147] Until then, the fair trial rights of criminal defendants—particularly those who find themselves in supersized cases—will fall prey to the mass media's sensationalism. This is hardly the function of a free press envisioned by the Framers.

VII. CONCLUSION

High-profile cases and their increasing media coverage have forced courts to confront the impact of prejudicial saturation coverage on a defendant's fair trial rights. In an age of mass communications, the conventional remedies used to minimize the impact of juror bias no longer effectively protect the rights of criminal defendants from the dangers posed by prejudicial publicity.

As other commentators have likewise concluded, when faced

142. Judy, *supra* note 136, at 592.

143. 205 U.S. 454 (1907).

144. Judy, *supra* note 136, at 591. *See Patterson*, 205 U.S. at 463 ("[I]f a court regards, as it may, a publication concerning a matter of law pending before it, as tending toward such an interference, it may punish it as in the instance put.").

145. Judy, *supra* note 136, at 591 (quoting *Patterson*, 205 U.S. at 462).

146. Brandwood, *supra* note 124, at 1451. *See, e.g.*, Krause, *supra* note 7, at 570-73 (providing suggested elements of an "American Contempt Statute").

147. Krause, *supra* note 7, at 571.

with escalating media coverage of these supersized trials, courts cannot continue resting the constitutional rights of criminal defendants—not to mention those defendants' liberty and, in some cases, lives—on the current ineffective remedies used to identify and "remedy" jury bias.[148] Ultimately, the solution to this growing problem may lie in importing the English "contempt" model for dealing with irresponsible press coverage of active criminal proceedings.

148. Minow & Cate, *supra* note 15, at 663.