CAN THE FIRST AND SIXTH AMENDMENTS CO-EXIST IN A MEDIA SATURATED SOCIETY?

Leslie Renee Berger

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CAN THE FIRST AND SIXTH AMENDMENTS CO-
EXIST IN A MEDIA SATURATED SOCIETY?

Media plays such an important role in society today that it is difficult to find a prospective juror who has never heard of the defendant on trial. The shocking nature of certain crimes, coupled with the accused’s fame, play on society’s emotions. Sensationalized accounts by the press cause society to pre-form opinions as to the guilt of the defendant. Pretrial publicity can be so excessive as to violate a defendant’s Sixth Amendment right to a fair trial. Such intensive media coverage limits a defendant’s fundamental right to an impartial jury and thus, a fair trial. First Amendment rights of the press often conflict with the Sixth and Fourteenth Amendment rights of the defendant. In many cases,

1 See Roscoe C. Howard, Jr., Court System Panel: The Media, Attorneys, and Fair Criminal Trials, 4 KAN. J.L. & PUB. POL’Y 61 (1995) (stating that due to the inventions of increasingly new technology, information is disseminated as soon as it becomes available).

2 See Peter E. Kane, Murder, Courts, and the Press xi (1992) (indicating that the events surrounding a murder fascinate the public).

3 See Howard, supra note 1, at 61 (explaining that the ability of the media to influence the jurors before they enter a courtroom impacts the fairness and impartiality of the trial).

4 The Sixth Amendment states:
   In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and 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 defense.
   U.S. CONST. amend. VI.

5 See, e.g., Sheppard v. Maxwell, 384 U.S. 333 (1966) (stating that “the trial judge did not fulfill his duty to protect Sheppard from the inherently prejudicial publicity which saturated the community and to control disruptive influences in the courtroom . . .”).

6 Id. at 359 (stating that the court should have exerted effort to control gossip surrounding the trial which was inaccurate and led to unfounded rumors and confusion).

7 The First Amendment states: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I.

8 The Fourteenth Amendment states:
however, the unfettered freedom of the press overpowers the criminal
defendant’s ability to have a fair trial.¹⁰

Set forth below in Part I is the history of how the courts and
the American Bar Association have dealt with pretrial publicity in
setting the standard for news control over cases.¹¹ Part II discusses
how the Supreme Court, under Chief Justice Earl Warren (hereinafter
"Warren Court"), suggested guidelines for determining whether the
defendant received a fair trial in high profile criminal cases. Part III
discusses how the courts have successfully implemented these standards
in highly publicized trials. Part IV focuses on the questioning of
jurors during voir dire. Part V covers how the expansive role of the
press has made it hard to place limitations on the amount of
information that is exposed. While murder trials continue to hold
the public’s fascination, the expansive power of the press in covering
cases coupled with the many inaccuracies of the stories make it hard
to ensure a fair trial.¹² Part VI suggests measures that should be
implemented in order to uphold the Sixth Amendment.

All persons born or naturalized in the United States and subject
to the jurisdiction thereof, are citizens of the United States and
of the State wherein they reside. No State shall make or enforce
any law which shall abridge the privileges and immunities of
citizens of the United States; nor shall any State deprive any
person of life, liberty, or property, without due process of law;
nor deny to any person within its jurisdiction the equal
protection of the laws.

U.S. Const. amend. XIV, §1.

⁹ KANE, supra note 2 (stating the tension in the United States between the
First Amendment right of free press and a criminal defendant’s Sixth Amendment right to
a fair trial).

¹⁰ See Robert Hardaway, Pretrial Publicity in Criminal Cases of National
Notoriety: Constructing a Remedy for the Remediless Wrong, 46 Am. U.L. Rev. 39, 41
(1996) (stating “the press’ enhanced participation in the criminal trial process has resulted
in an increased number of appeals based on claims of unfair trials due to media-created
juror bias.”).

¹¹ J. EDWARD GERALD, NEWS OF CRIME 31 (1983) (summarizing the news
control standards as established by the courts and the ABA).

¹² KENNETH S. DEVOL, MASS MEDIA AND THE SUPREME COURT: THE LEGACY
protection to the press by expansively interpreting the First Amendment. Id.
I. HISTORY AND BACKGROUND

A. English History

After the American Revolution, the abuses of the English courts in administering trials were a primary concern in establishing the new American government.\(^\text{13}\) Trials conducted in England were closed to the public and the decisions were usually not announced.\(^\text{14}\) As recently as 1967, the British Criminal Justice Act of 1967 was enacted, closing preliminary hearings to the public.\(^\text{15}\) The Act provided that pretrial proceedings be on the basis of written rather than oral evidence.\(^\text{16}\) Anything more than the simple facts of the crime or the arrest were forbidden to be reported by the news media.\(^\text{17}\) Only information presented in court may be reported while covering a trial.\(^\text{18}\)

B. American History

The Sixth Amendment of the United States Constitution was written to protect against the abuses of the English system.\(^\text{19}\) The Sixth Amendment ensures a defendant’s right to a speedy and public trial by an impartial jury.\(^\text{20}\) In guaranteeing a defendant’s Sixth Amendment right, courts are concerned with prejudicial pretrial publicity.\(^\text{21}\) As far back as 1807, with the treason trial of Aaron Burr,

\(^{13}\) Kane, supra note 2, at 1 (documenting how the British government violated the fundamental rights of Englishmen claimed by the colonists).
\(^{14}\) Kane, supra note 2, at 3.
\(^{15}\) Gerald, supra note 11, at 32-33 (providing that pre-trial proceedings be based on writings rather than oral evidence).
\(^{16}\) Gerald, supra note 11, at 32 (indicating that the publication of such evidence was unlawful).
\(^{17}\) Kane, supra note 2, at 5 (explaining certain provisions of the British Criminal Justice Act of 1967).
\(^{18}\) Kane, supra note 2, at 5.
\(^{19}\) Kane, supra note 2, at 3 (stating it was a response to the injustice of the English system and listed specific requirements for a fair trial).
\(^{20}\) U.S. Const. amend. VI.
\(^{21}\) Gerald, supra note 11, at 3 (indicating that “in a case of a crime that attracts a great deal of public attention it may be difficult . . . to find an impartial jury.”).
the courts have been struggling with this issue. The trial of former Vice President Aaron Burr, who was accused of trying to make war in the Louisiana Territory against the United States, was covered extensively by the press. The alleged crime of treason coupled with the fact that he killed American hero Alexander Hamilton in a duel aroused public curiosity. Burr felt that he had no hope of obtaining a jury that had not read the published charges against him. Chief Justice John Marshall ruled that, “in a capital case, the court ought to obtain jurors with ‘perfect freedom from previous impression,’ but if that were impossible, the duty of the court was to obtain as large a portion of impartiality as possible.” The Chief Justice also stated,

I have always conceived, and still conceive, an impartial jury as required by the common law, and as secured by the Constitution, must be composed of men, 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. This is not to be expected, certainly the law does not expect it, where jurors, before they hear the testimony, have deliberately formed and delivered an opinion, that the person whom they are to try, is guilty or innocent of the charges alleged against him.

Burr was acquitted of treason. Chief Justice Marshall’s opinion continues to serve as a guide for dealing with extensive media coverage of a criminal case.

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22 GERALD, supra note 11, at 70 (documenting the history of the court’s concern with prejudicial pre-trial publicity).
23 GERALD, supra note 11, at 70 (citing the printing and circulation of information in the Aaron Burr case as an historic example of prejudicial pre-trial publicity).
24 GERALD, supra note 11, at 70.
25 GERALD, supra note 11, at 70.
26 GERALD, supra note 11, at 71.
27 GERALD, supra note 11, at 71.
28 GERALD, supra note 11, at 70 (stating the fact he was a lawyer and was supported by experienced counsel helped him secure an acquittal).
29 GERALD, supra note 11, at 72.
More recently, at the American Bar Association convention of 1966, the committee established standards in order to control the media. The committee established that once a suspect is identified or taken into custody, the lawyers, public officials and law enforcement employees are restricted as to what information can be released. For example, past criminal records and any alleged confessions are among the prohibitions. Information concerning the arrest and descriptions of the physical evidence are a part of the information that is allowed to be released. The standards even allow for closed hearings. Moreover, “pretrial hearings of several kinds can be moved to the judge’s chambers, thus excluding the public.” Also, evidence which is privately submitted or rendered inadmissible may not be released to the media. If any of this information is reported in the news during the trial and reaches the jury, it may be grounds for a motion for mistrial. Therefore, the committee’s mission is to ensure that the news media is restricted to reporting only information that is in the court record.

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30 Gerald, supra note 11, at 31 (mandating that the past criminal or arrest records of the accused must not be released).
31 Gerald, supra note 11, at 31.
32 Id. Before an arrest, and while the search for suspects is under way, the release of news is not greatly impeded unless the pursuing officers identify their quarry in terms that would impute guilt and create fear and prejudice among the people. But once a specific person is identified in a warrant or is arrested, the lawyer, the public official, and the law enforcement employees are told not to release: 1) past criminal or arrest records of the accused; 2) any purported confession or statement or to report that the suspect declined to give information; 3) any news of examinations or tests taken or refused; 4) any probability of a plea of guilty to the charge or to a lesser charge; or 5) any opinion as to guilt or innocence, as to the merits of the case or of the evidence. Id.
33 Gerald, supra note 11, at 32 (stating “information which can be freely released includes the following: 1) the fact and circumstances of the arrest; 2) resistance, pursuit, and use of weapons; 3) the identity of investigation and arresting officer(s) and the length of the search; 4) a description of the physical evidence taken, the charges filed, and the information about any stage in the investigation, including a denial of guilt by the persons held.”).
34 Gerald, supra note 11, at 32 (explaining that “the ABA standard assumes that the constitution permits a defendant to waive a public hearing in favor of a closed session in the judge’s chambers or elsewhere outside the view of the public.”).
35 Gerald, supra note 11, at 33; ABA standard, §8-3.2.
36 Gerald, supra note 11, at 33.
37 Gerald, supra note 11, at 33.
38 Gerald, supra note 11, at 33.
These standards were adopted in 1968 in order to deal with news proliferation and the problem of jury bias. The ABA later asked the courts to implement the standards because "the ethical rules of bar associations are part of the private sector, but are meaningless without sanctions from legislation or rules drawn by the courts." The committee's position was met with media opposition. However, the Chairman reassured the news media by rejecting charges that the rules gagged the press, and looked upon the First and Sixth Amendments as coequal, not incompatible.

Many judges began to seek "alternative solutions" before closing their courts. The members of the ABA Legal Advisory Committee on Fair Trial and Free Press began to recommend changes to the 1968 standard. In 1977, the ABA Standards were revised. The ABA standards now provide that "the presumption now is strongly in favor of open judicial proceedings and unsealed records."

II. THE WARREN COURT'S INFLUENCE ON PRETRIAL PUBLICITY CASES

A trial by a jury of one's peers has long been recognized as a safeguard against arbitrary governmental intrusion. However, the courts have had great difficulty in determining what exactly constitutes a biased jury. The Supreme Court has permitted jurors to serve even after having admitted to reading newspapers prior to a trial where such jurors believed they could remain impartial. In the

39 GERALD, supra note 11, at 30.
40 GERALD, supra note 11, at 30.
41 GERALD, supra note 11, at 35-36.
42 GERALD, supra note 11, at 40.
43 GERALD, supra note 11, at 41.
44 GERALD, supra note 11, at 43. This standard is provided in Part III, 8-3-8-3.7.
46 Id.
47 Id. at 43 (stating that in Reynolds v. U.S., Chief Justice Waite believed "impartiality didn't mean ignorant of the case... meant juror's mind was not completely closed to the evidence").
1960's the Warren Court began reversing criminal convictions based on adverse pretrial publicity. \(^{48}\)

**A. Irvin v. Dowd**\(^{49}\)

In 1961, the Warren Court became the first to reverse a state criminal conviction on grounds of adverse pre-trial publicity. \(^{50}\) In *Irvin v. Dowd*, petitioner brought a habeas corpus proceeding in order to test the validity of his conviction for murder and sentence of death. \(^{51}\) The publicity surrounding Irvin's case was substantial. \(^{52}\) Six murders were committed in Indiana and police officials issued press releases stating that Irvin confessed to these crimes. \(^{53}\) These statements were highly publicized, along with details of Irvin's past criminal record. \(^{54}\) Irvin was granted a change of venue to a neighboring town. All other requests for a change of venue were dismissed pursuant to Indiana law. \(^{55}\) The Supreme Court overturned Irvin's conviction holding that the adverse publicity surrounding Irvin's trial had led to a strong pattern of prejudice within the county, which carried over into the courtroom, thereby hindering Irvin's Sixth Amendment rights. \(^{56}\)

The Warren Court recognized that the "concepts of individual liberty and of the dignity and worth of every man," rooted in English law, are safeguarded by the trial by jury. \(^{57}\) The Sixth Amendment

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\(^{48}\) *Id.* at 54. In 1960, the United States Supreme court reversed a lower courts denial of habeas corpus relief because of prejudicial pretrial publicity in *Irvin v. Dowd*, 366 U.S. 717 (1961). *Id.*


\(^{50}\) DEVOL, supra note 12, at 389 (showing that a court opposed a criminal conviction on grounds of adverse pre-trial publicity).

\(^{51}\) *Irvin*, 366 U.S. at 717.

\(^{52}\) See *id.* at 719 (stating that the crimes were extensively covered by the news media and aroused great excitement and indignation in the area).

\(^{53}\) *Id.* at 720.

\(^{54}\) See *id.* at 725. The stories revealed the details of his background from more than 20 years ago, including references to crimes committed when he was a juvenile. *Id.*

\(^{55}\) *See Irvin*, 366 U.S. at 720. Indiana statute allows only for a single change of venue. *Id.*

\(^{56}\) *Id.* at 726.

\(^{57}\) *Id.* at 721.
“right to a jury trial guarantees to the criminally accused a fair trial by a panel of impartial, indifferent jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process.” 

The Court discussed the question of impartiality, and applied the test from *Reynolds v. United States*, which states “the question thus presented is one of mixed law and fact.” The Court also acknowledged Chief Justice Hughes’ observation in *United States v. Wood* that “impartiality is not a technical conception. It is a state of mind.” In finding that adverse publicity affected the jury, the Court pointed to the fact that 370 of the 430 prospective jurors admitted during voir dire that they believed Irvin to be guilty. This preconceived view of the defendant was reflected by eight out of the twelve jurors placed in the jury box. *Irvin* became a leading case for the lower courts to rethink their standards when prejudicial publicity threatens to deprive a defendant of his/her due process rights guaranteed by the Fourteenth Amendment. The courts were advised to “exert greater care and to be more receptive” to these types of cases.

**B. Rideau v. Louisiana**

The Supreme Court reversed another conviction based on adverse publicity in *Rideau v. Louisiana*. Rideau was arrested by the police for robbing a bank, kidnapping three employees, and killing one of them. While the Sheriff interrogated Rideau in jail, he confessed to the crimes. The twenty minute “interview” was

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58 Id. at 722.
59 98 U.S. 145 (1878).
60 *Irvin*, 366 U.S. at 723.
61 Id. at 724 (citing U.S. v. Wood, 299 U.S. 123, 145-46 (1936)).
62 Id.
63 Id. at 727.
64 Id.
65 GERARD, supra note 11, at 68 (indicating that it set new constitutional standards for continuance and change of venue in publicity cases).
66 GERARD, supra note 11, at 68.
68 Id. at 723.
69 Id. at 724.
televised over the next three days and a large portion of the 150,000 people in the community watched it on their television sets. Rideau’s attorneys filed a motion for a change of venue based on the violation of his Sixth Amendment rights guaranteed by the United States Constitution. The motion was denied and Rideau was convicted and sentenced to death. Of the twelve member jury, three of the jurors had seen Rideau on television, and two were deputy sheriffs. The Supreme Court stated that “it was a denial of due process of law to refuse the request for a change of venue, after the people (of Calcasieu Parish) had been exposed repeatedly and in depth to the spectacle of Rideau personally confessing in detail to the crimes with which he was later to be charged.”

The Court focused on how Rideau’s televised interview was really like a “trial.” During the interview, which was in front of the community, he pled guilty to the murders. Therefore, “any subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality.” The sheriff took advantage of the “talkative prisoner” and put Rideau on television, without a lawyer advising him of his rights. The Court stated that “the televising of a defendant in the act of confessing to a crime was inherently invalid under the Due Process Clause of the Fourteenth Amendment even without a showing of prejudice or a

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70 Id.
71 See id. Rideau’s lawyers stated that he would be deprived of his rights to force him to trial in Calcasieu Parish after the three broadcasts of his ‘interview’ with the sheriff. Id.
72 Rideau, 373 U.S. at 724-25.
73 Id. at 725.
74 Id. at 726.
75 Id. “For anyone who has ever watched television the conclusion cannot be avoided that this spectacle . . . in a very real sense was Rideau’s trial-at which he pleaded guilty to murder.” Id.
76 Id. at 724.
77 Rideau, 373 U.S. at 726.
78 See GERARD, supra note 11, at 68 (indicating that “the Supreme Court held that prejudice generated this way by an official is so conclusive that change of venue and continuance of trial are automatic.”). “No amount of care in jury selection could cure the prejudice.” Id.
demonstration of the nexus between the televised confession and the trial."

C. Estes v. Texas

In 1965, Estes was convicted of swindling. The Supreme Court ultimately granted certiori to determine whether the broadcast of Estes' trial had resulted in a violation of his due process rights under the Fourteenth Amendment. The Court responded in the affirmative and reversed his conviction. The pretrial hearing was televised live and repeated on tape the same evening, reaching approximately 100,000 viewers. Moreover, after a panel of prospective jurors was sworn in, the judge announced that the trial would be televised, thus increasing the notoriety of Estes and his crime. Justice Clark, delivering the opinion of the court, stated, "pretrial [publicity] can create a major problem for the defendant in a criminal case. Indeed, it may be more harmful than publicity during the trial for it may well set the community opinion as to guilt or innocence." The Court discussed how the use of television hinders the ascertainment of the truth in judicial proceedings, thereby causing actual unfairness. Moreover, the media stories concerning a highly publicized trial can have a negative impact on the jurors, the testimony of witnesses, etc.
the trial judge, and the defendant. Thus, the Court noted, “the television camera is a powerful weapon. Intentionally or inadvertently it can destroy an accused and his case in the eyes of the public.”

D. Sheppard v. Maxwell

Sheppard v. Maxwell is the classic case of “trial by newspaper.” After twelve years, the Supreme Court finally reviewed the case of Sam Sheppard. In July, 1954, Sheppard’s pregnant wife, Marilyn, was bludgeoned to death in the upstairs bedroom of their home, while Sam Sheppard slept downstairs. Sheppard claimed that he fell asleep downstairs and awoke to hear his wife cry out. When he went to their room, he saw a “form” standing by his wife’s bed. He attacked the “form” but was knocked unconscious. After regaining consciousness, he checked his wife’s pulse, “determined or thought that she was gone,” and ran outside after the form, where he was again knocked out. When Sheppard came to his senses, he called his neighbor, the Mayor, who in turn called the police and Sheppard’s brother. The police searched the house and checked

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88Estes, 381 U.S. at 547 (indicating that “the mere fact that the trial is to be televised might render witnesses reluctant to appear and thereby impede the trial as well as the discovery of the truth.”).
89See id. at 548. “[T]elecasting of a trial is particularly bad when the judge is elected, then the trial becomes a political weapon. This diverts the judge’s attention from the task at hand—the fair trial of the accused.” Id.
90 See id. at 549. “A defendant on trial for a specific crime is entitled to his day in court, not in a stadium, or a city or nationwide arena.” Id.
91 Id.
93 DEVOL, supra note 12, at 382.
94 DEVOL, supra note 12, at 382.
95 See Sheppard, 384 U.S. at 336 (indicating that Sheppard and his wife were watching television in the living room when Sheppard dozed off on the couch, and his wife went to sleep in the bedroom).
96 Id. at 336.
97 Id.
98 Id.
99 Id.
100 Sheppard, 384 U.S. at 356.
101 Id. at 336–37.
Sheppard’s alibi.\textsuperscript{102} From the very beginning of the investigation, officials focused their suspicions on Sheppard.\textsuperscript{103} Dr. Gerber, the coroner, is reported to have stated, “It’s evident the doctor did this, so let’s go get the confession out of him.”\textsuperscript{104}

The news media extensively covered the story. As the Ohio Supreme Court stated:

Murder, mystery, society, sex and suspense were combined in this case in such a manner as to intrigue and captivate the public fancy to a degree unparalleled in recent annals . . . circulation-conscious editors catered to the insatiable interest of the American public in the bizarre...in this atmosphere of a ‘Roman holiday’ for the news media, Sam Sheppard stood trial for his life.\textsuperscript{105}

The headlines and editorials of the newspapers guided the police investigation into the murder.\textsuperscript{106} When an editorial titled, \textit{Why No Inquest? Do It Now, Dr. Gerber?},\textsuperscript{107} was published, the coroner called an inquest that day and subpoenaed Sheppard.\textsuperscript{108} The televised three-day inquest was staged in a school gymnasium.\textsuperscript{109} Sheppard was searched in front of the spectators and his attorneys were not allowed to participate.\textsuperscript{110} When Sheppard’s chief counsel attempted to place a document into the record, the coroner forcibly ejected him from the room.\textsuperscript{111} Sheppard wrote articles and made public press

\textsuperscript{102} Id. at 337.
\textsuperscript{103} Id at 337.
\textsuperscript{104} Id.
\textsuperscript{105} Id.
\textsuperscript{106} Id.
\textsuperscript{107} Id. at 356.
\textsuperscript{108} See id. at 340 (showing that newspapers emphasized evidence which tended to incriminate Sheppard, although he wrote feature articles asserting his innocence).
\textsuperscript{109} Id. at 339.
\textsuperscript{110} Id.
\textsuperscript{111} Id. at 340 (stating further that the Coroner received cheers, hugs, and kisses from ladies in the audience).
Another headline asked, *Why Isn’t Sheppard In Jail?* That night Sheppard was arrested and charged with murder. There were enough articles published in the three Cleveland newspapers to fill five volumes.

The case came at a time when both the chief prosecutor and the judge were up for reelection. The judge allowed the media to set up a long temporary table inside the bar, and four rows of benches were also set aside for reporters and the press. Members of Sheppard’s family sat in the last half of the fourth row. Newspapers published the names and addresses of the seventy-five prospective jurors who received anonymous letters and phone calls, as well as calls from friends about the case. Prospective jurors were constantly bombarded by the press, and allowed to be photographed. This constant exposure led to all but one juror reading about the case in the papers, or hearing about it on television. Seven of the twelve jurors had daily newspapers delivered to their homes. While the jury was being selected, a two-inch headline asked: *But Who Will Speak For Marilyn?* Many stories regarding the evidence ran in the newspapers, although such stories were never actually brought up during the televised trial. Moreover, despite the extensive publicity to which the jury was exposed, the trial judge refused defense counsel’s requests to question

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112 *Id.*
113 *Id.* at 341 (stating this front page editorial was later titled *Quit Stalling—Bring Him In?*).
114 *Id.*
115 *Sheppard*, 384 U.S. at 342.
116 *Id.* (explaining that the chief prosecutor was a candidate for common pleas judge and the trial judge was a candidate to succeed himself).
117 *Id.* at 342-43.
118 *Id.* at 343.
119 *Id.* at 342.
120 *Sheppard*, 384 U.S. at 343.
121 *Id.* at 345
122 *Id.*
123 *Id.* at 346.
124 See *id.* at 356-57 (indicating that most of the material printed or broadcasted during the trial was never heard from the witness stand, such as, the charges that Sheppard had purposely impeded the investigation and must be guilty since he hired a prominent criminal attorney). He was depicted as a perjurer and an adulterer. *Id.*
jurors as to what they had seen or heard. Therefore, the Supreme Court concluded that some of the material did reach the jurors.

The Supreme Court distinguished Sheppard from Estes. At the outset of this case, the judge announced that he was not restricting prejudicial news stories. Sheppard was not granted a change of venue, the jury was not sequestered, and the Sheppard jury saw all the television broadcasts from the courtroom. The press coverage of the Sheppard trial was more intense and pervasive than the Estes trial. The judge’s lack of precautions concerning the pretrial publicity turned the trial into a “carnival atmosphere,” and clearly affected Sheppard’s right to a fair trial.

Suggestions were set forth by the Supreme Court on how the trial judge should have protected Sheppard from the prejudicial media. Strict rules should have been implemented by the judge in governing the use of the courtroom by reporters. Moreover, the witnesses should have been insulated from the news media to keep testimony from being disclosed. The trial court should have made some effort to control the release of leads, information, and gossip to the press by police officers, witnesses, and counsel for both sides.

125 Sheppard, 384 U.S. at 347. The trial judge stated, “Well, I don’t know, we can’t stop people, in any event, from listening to it.” Id. “It is a matter of free speech and the court can’t control everybody . . . we are not going to harass the jury every morning . . . I have confidence in the jury.” Id.
126 Id. at 357.
127 Id. at 352-53.
128 Id. at 353.
129 Id. at 354.
130 Id. at 358.
131 Id. at 358-59. Many of the suggestions concerned the way the trial was conducted. Id. Such as, the judge should have adopted stricter rules governing the use of the courtroom by the newsmen, as Sheppard’s counsel requested. Id. Id. at 358 (indicating that the number of reporters should have been limited and their conduct regulated at the first sign of disruption within the courtroom).
132 Id. at 359.
133 Sheppard, 384 U.S. at 359-60. Much of the information disclosed was inaccurate. Id. The defense counsel brought this problem to the attention of the judge, who should have at least warned the news reporters to check the accuracy of their stories. Id. The judge could have also controlled the statements made to the news media by the participants in the judicial proceeding. Id.
Another precautionary measure that could have been taken is the prohibition against extrajudicial statements by any lawyer, party, witness, or court official. Furthermore, the judge also could have asked a city or county official to promulgate a regulation concerning the dissemination of information about the case by their employees. Considering the totality of the circumstances the trial judge should have imposed stricter guidelines during the trial. All of these suggested methods for controlling pretrial publicity became known as the Sheppard Mandate.

The Supreme Court recognized the pervasiveness of modern communications in judicial proceedings and acknowledged that "the trial courts must take strong measures to ensure that the balance is never weighed against the accused." The Court suggested collaboration between counsel and the press as to information affecting the fairness of the trial. The Supreme Court reversed Sheppard's denial of habeas corpus holding that "the trial judge did not fulfill his duty to protect Sheppard from the inherently prejudicial publicity which saturated the community and to control the disruptive influences in the courtroom."

III. THE IMPLEMENTATION OF THE SHEPPARD MANDATE

A. People v. Manson

The California Court of Appeals, in People v. Manson, illustrated how to successfully use the Sheppard decision as a guideline for trial judges to guarantee a fair trial as required by the Sixth Amendment. Although the case received enormous publicity
the court established many safeguards to ensure that the jury was not unduly prejudiced.\(^{145}\)

In *Manson*, appellants lived in a commune under the leadership of Charles Manson.\(^{146}\) In the late 1960's, Manson became associated with many young runaways, and began traveling around the country with them in his bus.\(^{147}\) He eventually organized and led a commune in California, consisting of about twenty people who became known as the "Family."\(^{148}\) This group "rejected conventional organizations and values of society."\(^{149}\) The appellants were part of this Family.\(^{150}\) The Family members regarded Manson as "Christ" and believed that he "sees all and knows all."\(^{151}\)

In order to begin a racial war,\(^{152}\) which Manson called "Helter Skelter," he told the appellants to perform two multiple homicides.\(^{153}\) The first murder was of Sharon Tate and four other people at her house.\(^{154}\) They were stabbed, shot, and the word "Pig" was written in her blood on the door.\(^{155}\) The following night, Manson took appellants to the LaBianca house, where the husband and wife were

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\(^{145}\) *Manson*, 61 Cal. App.3d at 191 (stating the court implemented procedures to afford appellants a dignified and restrained trial atmosphere).

\(^{146}\) Id. at 102.

\(^{147}\) Id. at 126-27.

\(^{148}\) *Manson*, 61 Cal. App.3d at 127. This became the group’s name even though none of the members were related by blood or marriage except for the mothers and children. *Id.*

\(^{149}\) Id. at 127.

\(^{150}\) *Id.* By August 1969, the commune included Susan Atkins, Patricia Krenwinkel, Leslie Van Houten and two other co-indictees Charles Tex Watson and Linda Kasabian. *Id.*

\(^{151}\) *Id.* at 128. Members testified that they never question Manson because he was always right. *Id.*

\(^{152}\) *Id.* at 129.

\(^{153}\) *Manson*, 61 Cal.App.3d. at 129. ‘Helter Skelter’ was a song by the Beatles who Manson believed were speaking to him and warning of the imminent conflict between blacks and whites. *Id.*

\(^{154}\) *KANE, supra* note 2, at 23.

\(^{155}\) *Manson*, 61 Cal.App.3d. at 124-25.
The Court of Appeals held that massive pretrial publicity did not deprive defendants of a fair trial. The Court concluded that an "independent examination of the record and the voir dire proceeding reveal[ed] that appellants . . . received a fair and impartial trial." Therefore, the appellants Charles Manson, Patricia Krenwinkel, and Susan Atkins were found guilty of murder and conspiracy and sentenced to life imprisonment. The conviction of Leslie Van Houten was reversed for retrial because the disappearance of her counsel, Ronald Hughes, resulted in a denial of effective counsel.

The nature of the crime and the circumstances surrounding the Manson case were intensely covered by the media. The murders even received international notoriety. "Details of the Tate-LaBianca murders were laid before the public colorfully embroidered with the backgrounds, histories, and aberrant lifestyles of appellants and other members of the Family." The Court denied a change of venue, stating "[the] nature of modern communications media limits the effectiveness of both continuances and change of venue." Furthermore, the judge concluded that since the case was covered so extensively, the potential jury pool would be larger in Los Angeles,

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156 Kane, supra note 2, at 24.
157 Manson, 61 Cal.App.3d at 103.
158 Id. at 191.
159 Id. at 123-24. A jury found all appellants guilty as charged and further found the murders to be of the first degree. Id. After the death penalty the same jury imposed death sentences upon all appellants. Id. The resulting judgment was appealed directly to the California Supreme Court (Cal. Pen. Code, §1239(b)). Id. While this case was pending that Court decided People v. Anderson, 493 P.2d 880 (Cal. 1972), cert. denied, 406 U.S. 958, invalidating the death penalty. On that basis, these appeals were transferred to this court for determination. Id.
160 Manson, 61 Cal. App.3d at 217.
161 Id. at 173. "The media's revelations focused primarily on the savageness of the killings, the absence of clues revealing the identity of the perpetrators, and certain details about the private lives and relationships of the victims." Id.
162 Id. at 174.
163 Id.
164 Id. at 177 (stating Manson's refusal to waive a right to a speedy trial eliminated continuance as an available solution).
and nothing would be gained from changing the trial location.\textsuperscript{165} In addition to the massive news coverage, the participants of the trial also contributed their own accounts of the murders.\textsuperscript{166} The, appellant, Susan Atkins, was allowed to leave her jail cell to conduct a tape recorded interview, for which she received $80,000.\textsuperscript{167} These events persisted in spite of the judge’s clear order prohibiting all public discussion of the case by those involved.\textsuperscript{168}

The Supreme Court discussed precedent concerning a defendant’s right to a fair trial and the effect of the press.\textsuperscript{169} Moreover, it acknowledged that “the California Supreme Court ha[d] embraced the holding of Sheppard and taken its cue from the American Bar Association Project on Minimum Standards for Criminal Justice.”\textsuperscript{170} The Court had to decide during voir dire of each potential juror whether the media adversely affected the accused.\textsuperscript{171} The \textit{Manson} voir dire involved in depth discussion as to publicity, and the court permitted inquiry by each appellant’s counsel in order to screen for any impartial jurors.\textsuperscript{172} Any prospective juror who was familiar with Atkin’s published confession was excused.\textsuperscript{173} Also, the “court specifically admonished the prospective jurors to avoid all publicity.”\textsuperscript{174} Furthermore, the Court discussed the doctrine of

\textsuperscript{165}KANE, supra note 2, at 29 (indicating that change in venue would serve no purpose because of the publicity of the trial and that the jury pool was larger in the Los Angeles area).
\textsuperscript{166}Manson, 61 Cal.App.3d. at 177-78. A Deputy District Attorney gave an “off-the-record” interview with Rolling Stone magazine. \textit{Id.} at 178.
\textsuperscript{167}Id. at 27. This story was leaked to the L.A. Times. \textit{Id.}
\textsuperscript{168}See KANE, supra note 2, at 27-29. The post-Sheppard press guidelines developed by the American Bar Association stated that it was improper to publish stories discussing a defendant’s possible confession, any tests (lie detector or others) involved, past criminal record or character of the defendant, the credibility of witnesses, or anything else that might inflame public opinion against the defendant. \textit{Id.}
\textsuperscript{169}Manson, 61 Cal. App.3d. at 181-87. The court discussed \textit{Irvin, Rideau, Estes,} and \textit{Sheppard.} \textit{Id.}
\textsuperscript{170}Id. at 184.
\textsuperscript{171}Id. at 181-82 (explaining the \textit{Manson} Court cited \textit{Irvin} without fixing any determination of a high probability of prejudice).
\textsuperscript{172}Id. at 187-88 (showing that the careful examination by the court in screening jurors could possibly be contaminated).
\textsuperscript{173}Id. at 185 (showing that if jurors were aware of the Atkins’ confession, they would have been excused).
\textsuperscript{174}Manson, 61 Cal.App.3d at 188.
presumed prejudice. However, the Court distinguished Rideau, because the case at hand did not involve televised broadcasts of defendant confessing to the crime. The Court noted that the trial judge excluded any prospective juror who read Susan Atkin’s confession. Moreover, the trial judge conducting the Manson case imposed many safeguards such as sequestering the jury and strictly regulating the activity of the news media. Based upon the above precautions, the Court decided that “although the publicity surrounding this case was massive, it did not detract from ‘[t]he solemnity and sobriety to which a defendant is entitled.’”

The trial judge tried to the best of his ability to shield the jurors from the publicity, especially the stories that were orchestrated by the participants of the trial. Also, statements made by President Nixon were meant to be kept from the jury. The influence of the Sheppard Mandate was apparent. The judges involved with the trial “used the power available to them to protect the defendant’s Sixth Amendment right to a fair trial without violating the First Amendment rights of the news media.”

175 Id. at 182 (indicating that in Rideau, the Court looked to the due process requirement of a trial before a jury drawn from a population of people who had never seen the defendant confessing on videotape).

176 Id. at 185.

177 Id.

178 Id. at 186. The court distinguished Manson from Estes and Sheppard. Id.

179 Manson, 61 Cal.App.3d. at 186. Rideau, Estes, and Sheppard “cannot be made to stand for the proposition that juror exposure to information about a state defendant’s prior convictions or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process.” Id.

180 Kane, supra note 2, at 29 (showing how the judge attempted to protect the jurors by sequestering them).

181 Kane, supra note 2, at 30-31. Nixon observed that Manson was “guilty, directly or indirectly, of eight murders without reason.” Id. The next morning the Los Angeles times featured a large type banner headline that said, “MANSON GUILTY NIXON DECLARES.” Id. Extra precautions were taken to shield the jury, by painting the windows of the bus, however, defendant Manson brought a copy of the paper himself into the courtroom and showed it to the jury. Id.

182 Manson, 61 App.3d. at 183-84 (showing how the court in Manson had been coping with the media and how the court had looked to the mandate in Sheppard for guidance).

183 Kane, supra note 2, at 32.
Although the courts have been implementing guidelines for lawyers to follow during a specific trial, the media still plays a huge role in society today. \(^{184}\) The prevalence of the media makes it imperative that a judge consider ways to remedy the possible harm caused by media coverage to a case. \(^{185}\) Therefore, the judge can best determine how to properly ensure that the defendant will receive a fair and impartial jury.

Timothy McVeigh bombed a federal building in Oklahoma City on April 19, 1995, and was subsequently charged and convicted of the crime. \(^{186}\) One hundred and sixty eight people died in the blast, and eight hundred were injured. \(^{187}\) The court granted a change of venue to Denver, Colorado "because the entire state had become a unified community, sharing the emotional trauma of those who had been directly victimized." \(^{188}\) At the beginning of the criminal proceeding, an Order was issued regarding the disclosure of discovery materials. \(^{189}\) The court was later asked to make a decision regarding extrajudicial statements by attorneys and support personnel. \(^{190}\) This decision acknowledged the concerns of defense counsel as to the prejudicial effect of the press reporting. "The resources, creativity

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\(^{184}\) Gerald, supra note 11, at 73 (stating that "despite guidelines to regulate lawyers' roles during a trial; the media still has a huge influence on the trial").

\(^{185}\) Gerald, supra note 11, at 73 (stating that the court considered one or more of the following remedies: continuance, change of venue, voir dire, sequestration of the jury, cautioning of extrajudicial statements, screening prejudiced jurors during voir dire, and granting of a new trial).

\(^{186}\) U.S. v. McVeigh, 931 F. Supp 756, 758 (D. Col. 1996) (showing that McVeigh was arrested and convicted of the bombing).

\(^{187}\) Jo Thomas, News Article on Bombing Raises Fears for Trial, N.Y. Times, Mar 2, 1997, at A23 (stating that 168 people died in the blast).

\(^{188}\) McVeigh, 955 F. Supp. at 1282 (quoting the court's rationale for a change of venue).

\(^{189}\) Id. at 756-57. The Agreed Discovery Order was signed which included the following provision: Discovery materials may be disclosed only to the parties, their counsel and agents, except that such materials may be disclosed as necessary: (a) during court proceedings, including trial, hearings or legal filings in this case; or (b) to potential witnesses, provided that such witnesses are made aware of and agree to honor the terms of this protective order. Id.

\(^{190}\) Id. at 757 (showing how the court was asked by the prosecution to restrict any extra judicial statements).
and competitiveness of the news industry became evident in
exhaustive efforts to satisfy public curiosity about the accused.”\textsuperscript{191}

The defense counsel played an active role in trying to counter
negative publicity regarding the defendant.\textsuperscript{192} The court, however,
still needed to articulate standards to be adhered to during the trial.\textsuperscript{193}
The court ordered that: no lawyer will release information or opinion
about the criminal proceeding, all counsel must take reasonable
precautions to prevent the participants of the trial, including court
support staff, from releasing information that is not in the public
record, and no extrajudicial statements by the lawyers are allowed
before the jury is empanelled.\textsuperscript{194} These specific restrictions were
placed on the content of the extrajudicial statements in order to
decrease the adverse effects of the publicity surrounding the case.\textsuperscript{195}

News articles stated that Timothy McVeigh “told his lawyers
that he had driven the truck used in the bombing and that he decided
on a daytime attack to insure a ‘body count’.”\textsuperscript{196} This article was
printed the day the questionnaires to prospective jurors were due in
Federal District Court in Denver.\textsuperscript{197} There were also stories that
McVeigh, along with Michael Fortier, a witness, robbed the National
Guard Armory in 1994.\textsuperscript{198}

As a precaution, a letter enclosed in the jury summons stated
that the jurors would not be sequestered, but warned that they should
begin immediately being careful what they read and hear on the

\textsuperscript{191} Id. at 758.
\textsuperscript{192} Id. at 757. The government questioned the propriety of the defendants
lead counsel in generating publicity by his comments in news conferences, interviews,
and public statements. Id.
\textsuperscript{193} McVeigh, 931 F. Supp. at 760. “Concerning the following matters related
to the case: prior criminal record, the content of statements made by or refused by
defendant to law enforcement officers, examination performance or the refusal by
defendant to submit to any examination, information concerning prospective witnesses,
the possibility of guilty pleas, and any opinion as to the guilt or innocence of defendant,
or as to the merits of the case.” Id.
\textsuperscript{194} Id. at 760-61.
\textsuperscript{195} Id.
\textsuperscript{196} Thomas, supra note 187 (showing that McVeigh bombed the building
during the day to ensure a higher “body-count”).
\textsuperscript{197} Thomas, supra note 187.
\textsuperscript{198} Thomas, supra note 187.
After defense counsel reviewed the questionnaires, they requested that the start of the trial be delayed because pretrial publicity had tainted the jury pool. The court denied the request stating that “any consideration of the matter by this court would be premature and uninformed.”

“The trial court has broad discretion in gauging the effects of the allegedly prejudicial publicity, and in taking responsive measures to ensure a fair trial.”

Although the press is still a part of high profile cases, courts continue to apply the Sheppard Mandate to ensure a fair trial.

IV. VOIR DIRE

A. The Mind of the Juror

Attitudes concerning a juror’s knowledge of pretrial publicity have changed over the years. In the 1950’s and 1960’s, judges and lawyers sought jurors who were virtually ignorant of the facts surrounding the case. However, with the intensive media coverage of many high profile cases, it has become understood that complete ignorance is highly unlikely. Now the questioning of prospective jurors is relied on as a more dependable measure by judges and lawyers to determine whether a juror has preformed his or her opinion. “The rule is that [jurors must] be able to put whatever

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199 Thomas, supra note 187.
201 Id.
202 Id.
203 Id.
205 Id. Professor Harold Sullivan, an advocate of strict controls concerning publicity, stated, “the minds of a jury may be likened to 12 test tubes. What scientist would commence an experiment with 12 test tubes, soiled and discolored by the deposits of repeated experiments?” Id.
206 See generally id.
207 Id.
knowledge they have aside and be governed by the evidence and the instructions of the judge."\(^{207}\)

However, some believe it is a myth that the jury selection process is an effective instrument for identifying biases because there are not many opportunities to identify whether a person has a certain prejudgment about a case or if they have been exposed to pretrial publicity.\(^{208}\) It is also acknowledged that general media information that resembles the case on trial may have an adverse influence on a jury’s ability to effectively evaluate the trial evidence.\(^{209}\)

The ABA has also established a standard of juror acceptability.\(^{210}\) The rule promotes the identification and rejection of an impartial juror.\(^{211}\) It also recognizes that a juror should be evaluated in order to determine whether the person can be flexible and fair.\(^{212}\)

**B. Mu’Min v. Virginia**

The Supreme Court recently held that a defendant’s Sixth Amendment right to an impartial jury and his Fourteenth Amendment right to due process were not violated when the trial judge, during voir dire, refused to question prospective jurors about specific contents of news reports to which they had been exposed.\(^{213}\) Petitioner Dawud Majid Mu’Min was convicted of murdering a woman and was sentenced to death.\(^{214}\) Mu’Min was assigned to a supervised work

\(^{207}\) Id. (quoting David Kendall).

\(^{208}\) Leslie Boellstorff, *Professor Says Myth Surround Jury Trials Steven Penrod*, OMAHA WORLD HERALD, Oct. 28, 1996, at 1. Steven Penrod, Director of the Law and Psychology program at the University of Nebraska-Lincoln believes this point. Id.

\(^{209}\) Id.

\(^{210}\) See GERALD, supra note 11, at 77. Standard 8-3.5 of the 1979 approved text of *Standards Relating to the Administration of Criminal Justice: Fair Trial and Free Press* was influenced by Irvin and Sheppard.

\(^{211}\) See GERALD, supra note 11, at 77.

\(^{212}\) See GERALD, supra note 11, at 77. “By rule, some information in the mind of a prospective juror is deemed damaging beyond repair, such as reports of confessions.” Id. “[B]ut the effect of information that tends to indicate guilt has to be evaluated by the quite brief and intuitive selection process.” Id.


\(^{214}\) Id. at 417.
detail, but during his lunch break he escaped. He then murdered and robbed a female owner of a carpet store, and returned to his work crew. There was a considerable amount of pre-trial publicity regarding Mu'Min's case. The details of the crime were displayed on the front pages of local papers, and facts concerning Mu'Min's prior murder conviction, for which he was currently serving in prison, were revealed. The press also disclosed that the murder could have been avoided if the State was allowed to seek the death penalty in Mu'Min's prior murder case. Mu'Min was denied a motion for change of venue, as well as a motion for individual voir dire. Mu'Min also submitted a proposed list of voir dire questions. His list of questions concerning the content of the news items to which prospective jurors may have been exposed were also denied.

The majority refused to extend the right of the Fourteenth Amendment Due Process Clause to encompass questions specifically dealing with the content of each juror's knowledge. The Court relied upon the trial judge's discretion in determining whether the voir dire questions yielded impartial jurors. "Credibility determinations

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215 Id. at 418.
216 Id.
217 Id. (indicating that three months before the trial Mu'Min submitted 47 newspaper articles in a request for a change of venue).
218 Mu'Min, 500 U.S. at 436-37. Readers of the local papers learned that the victim had been discovered in a pool of blood, with her clothes pulled off and semen on her body. Id. Readers also learned that Mu'Min confessed to the crime. Id. A front-page story described the details of Petitioner's 1973 murder of a cab driver. Id.
219 Id. at 437. "In a story headlined 'Mu'Min avoided death for 1973 murder in Va.,' one paper reported that but for this Court's decision a year earlier in Furman v. Georgia, 408 U.S. 238 (1972), which temporarily invalidated the death penalty, the prosecutor at the earlier trial would have had a case of capital murder." Id.
220 Id. at 419 (summarizing the trial court's decision to begin voir dire with collective questioning of venire, but that venire could be broken into panels of four in order to deal with publicity).
221 Id. Some of the requested questions were, "Have you acquired any information about this case from the newspapers, television, conversations, or any other source?," and "Have you discussed the case with anyone?" Id.
222 Id. (listing questions that were not allowed such as, "When and where did you get this information?").
223 Mu'Min, 500 U.S. at 431-32.
224 Id. at 422 (quoting Rosalez-Lopez v. United States, 451 U.S. 182, 189 (1981)).
of this kind are entitled to 'special deference,'” because the trial judge is in the area of the population where the community is said to have been affected by pretrial publicity. Nevertheless, eight of the twelve jurors admitted to being exposed to the case through the press and media. They stated, however, that they had no preconceived opinion as to the guilt or innocence of Mu’Min.

Justice Thurgood Marshall, in his dissent, recognized this as the first time the Court had been called upon to address the procedures necessary to assure the protection of the right to an impartial jury under the Sixth Amendment. His disagreement with the majority opinion is apparent from the first sentence of his dissent which states, “today’s decision turns a critical constitutional guarantee—the Sixth Amendment’s right to an impartial jury—into a hollow formality.” To Justice Marshall, the majority’s conclusion that the trial court had no obligation to ask what the potential jurors knew about the case was unacceptable. “When a prospective juror has been exposed to prejudicial pretrial publicity, a trial court cannot realistically assess the juror’s impartiality without first establishing what the juror has already learned about the case.”

Justice Marshall set forth three reasons why content questioning should be required in cases where a prospective juror admits to pretrial publicity exposure. The first reason is that content questioning is necessary to determine whether the exposure to publicity was significant enough to disqualify the juror as a matter of law. The second reason refers to the fact that although publicity may not be significant enough to disqualify an individual, the court

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225 Id. at 433.  
226 Id. at 427.  
227 Id. at 421.  
228 Mu’Min, 500 U.S. at 417.  
229 Id. at 439.  
230 Id. at 433.  
231 Id. at 434.  
232 Id.  
233 Mu’Min, 500 U.S. at 441.  
234 Id. (citing Patton v. Yount, 467 U.S. 1038 (1984)) (“Our cases recognize that, under certain circumstances, exposure to particularly inflammatory publicity creates so strong a presumption of prejudice that the jurors’ claims that they can be impartial should not be believed.”).
still needs in-depth information as to whether the juror is impartial.\textsuperscript{235} The third reason relates to the promotion of accurate trial court fact finding.\textsuperscript{236} In accordance with the above reasons, Justice Marshall believed that content questioning should have been used during voir dire.\textsuperscript{237} The trial judge could have done more to ensure juror impartiality.\textsuperscript{238} Although the prospective jurors were questioned as to whether or not they had been exposed to the story, the jurors were not asked about the source or content of prior knowledge.\textsuperscript{239} Moreover, two-thirds of the jurors selected admitted to having been exposed to the publicity.\textsuperscript{240} The judge’s awareness of the media coverage should not be substituted for the knowledge of the potential jury’s awareness.\textsuperscript{241}

V. FREEDOM OF THE PRESS AND THE FIRST AMENDMENT

The courts need to balance the Sixth Amendment rights of the defendant with the First Amendment rights of the press in order to have a fair trial.\textsuperscript{242} At times these two groups may clash, and then the judge needs to decide whose rights will prevail.\textsuperscript{243} Two lines of cases that involve the court restraining free speech stemmed from the Sheppard Mandate and the ABA standards.\textsuperscript{244} The first line involves the court ordering journalists not to publish items of news heard in open court.\textsuperscript{245} The second involves orders closing courts or sealing

\textsuperscript{235} Id. at 442-43. By asking the prospective juror in addition to identify what he has read or heard about the case and what corresponding impressions he has formed, the trial court is able to confirm that the impartiality that the juror professes is the same impartiality that the Sixth Amendment demands. Id.
\textsuperscript{236} Id. at 443; see also Patton v. Yount, 467 U.S. at 1038 (stating that the impartiality “determination is essentially one of credibility”).
\textsuperscript{237} Id. at 444.
\textsuperscript{238} Mu Min, 500 U.S. at 445.
\textsuperscript{239} Id. at 419.
\textsuperscript{240} Id.
\textsuperscript{241} Id. at 445.
\textsuperscript{242} KANE, supra note 2, at xii.
\textsuperscript{243} GERALD, supra note 11, at 89. The courts have no unified voice, even the First Amendment cases have resulted in divided opinions in the Supreme Court. Id.
\textsuperscript{244} GERALD, supra note 11, at 89.
\textsuperscript{245} GERALD, supra note 11, at 89.
documents, including grand jury reports, which are not yet entered into evidence.²⁴⁶

A. Media Restraints

A prior restraint is a judicial order which prevents the media from publishing materials already in its hands.²⁴⁷ Many courts have been unwilling to issue such a direct restriction on the press.²⁴⁸ Courts are more likely to restrict the comments of the trial participants, through gag orders, than to impose direct restraints on the press.²⁴⁹ The strong presumption in the Supreme Court against the use of prior restraints has resulted in an almost universal rejection of restraints in lower federal criminal court cases.²⁵⁰ However, the courts have not settled on a consistent approach to balancing the interests.²⁵¹

In Near v. Minnesota,²⁵² a landmark decision, the Supreme Court struck down a Minnesota statute that allowed courts to enjoin a “malicious, scandalous and defamatory newspaper, magazine or other periodical.”²⁵³ Petitioner owned an anti-Semitic newspaper which regularly criticized city officials for being corrupt.²⁵⁴ The statute was declared unconstitutional under the First and Fourteenth Amendment.²⁵⁵ Chief Justice Hughes wrote that the statute impermissibly restrained speech because the publication was completely suppressed.²⁵⁶ Although the Court did not state any test as to when a prior restraint may be constitutional, it did note a few select circumstances under which a prior restraint would be held constitutional.²⁵⁷

²⁴⁶ GERALD, supra note 11, at 89.
²⁴⁷ BUNKER, supra note 45, at 65.
²⁴⁸ BUNKER, supra note 45, at 66.
²⁴⁹ BUNKER, supra note 45, at 66.
²⁵⁰ BUNKER, supra note 45, at 70.
²⁵¹ BUNKER, supra note 45, at 84.
²⁵² 283 U.S. 697 (1931).
²⁵³ BUNKER, supra note 45, at 66.
²⁵⁴ BUNKER, supra note 45, at 66.
²⁵⁵ BUNKER, supra note 45, at 66.
²⁵⁶ BUNKER, supra note 45, at 66.
²⁵⁷ BUNKER, supra note 45, at 66. These included publication of military information in wartime, obscenity, and incitement to overthrow the government. Id
In 1971, the Supreme Court held a prior restraint on the publication of a classified government study concerning Vietnam to be unconstitutional.\textsuperscript{258} Again the Court did not express any test to measure when the government might overcome the heavy presumption against its constitutional validity.\textsuperscript{259}

After the Sheppard Mandate, there was a steady increase in the issuing of gag orders in newsworthy cases.\textsuperscript{260} These orders fall into three general categories.\textsuperscript{261} First, orders seeking to limit statements made to the press by lawyer's, parties, witnesses and sometimes, outsiders;\textsuperscript{262} second, "orders that purport to tell the press directly what it may or may not publish;"\textsuperscript{263} and third, "orders sealing court records and proceedings from the press and public."\textsuperscript{264}

In 1976, the Supreme Court, in \textit{Nebraska Press Association v. Stuart},\textsuperscript{265} applied the prior restraint doctrine to a court order that silenced the press in a criminal trial.\textsuperscript{266} The Court struck down a state court's gag order on news coverage of a sensational murder trial in a small Nebraska town as failing to meet the heavy burden required by the First Amendment.\textsuperscript{267} The Court set forth a balancing test for judges to use in evaluating a prior restraint in a criminal trial context: (1) "the nature and extent of pretrial coverage," (2) whether some alternative judicial action could reduce the effect of coverage, and (3) whether a prior restraint would effectively protect the defendant's

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\bibitem{258} BUNKER, \textit{supra} note 45, at 67 (discussing New York Times Co. v. U.S., 403 U.S. 713 (1971)).
\bibitem{259} BUNKER, \textit{supra} note 45, at 66.
\bibitem{260} DEVOL, \textit{supra} note 12, at 404. Fred P. Graham conducted an informal, unscientific sampling composed of all reported cases, and all additional unreported cases cited in law review articles, and concluded that the problem with gag orders started in the late 1960's. \textit{Id.} Until 1966, the year Sheppard v. Maxwell was decided and the adoption of the ABA Standards on Fair Trials and Free Press, the sampling did not discover any gag orders. \textit{Id.}
\bibitem{261} DEVOL, \textit{supra} note 12, at 405.
\bibitem{262} DEVOL, \textit{supra} note 12, at 405.
\bibitem{263} DEVOL, \textit{supra} note 12, at 404.
\bibitem{264} DEVOL, \textit{supra} note 12, at 405.
\bibitem{265} Bunker, \textit{supra} note 45, at 68.
\bibitem{266} Bunker, \textit{supra} note 45, at 68.
\bibitem{267} Bunker, \textit{supra} note 45, at 68.
\end{thebibliography}
right to a fair trial under the Sixth Amendment. Moreover, the majority acknowledged a defendant’s right to a trial by an impartial jury as guaranteed by the Sixth Amendment, but stated that under the facts of the case, the First Amendment rights of the press outweighed those rights. The Court stated “commentary and reporting on the criminal justice system is at the core of First Amendment values, for the operation and integrity of that system is the crucial import to citizens concerned with the administration of government. Secrecy of judicial action can only breed ignorance and distrust of courts.”

U.S. v. Noriega is the only reported case in the federal courts to have upheld a prior restraint on a criminal justice related matter since Nebraska Press. The United States Court of Appeals for the Eleventh Circuit approved a temporary restraint on Cable News Network which forbid the network from broadcasting audiotapes of telephone conversations between deposed Manuel Noriega and his defense team. The Panamanian leader was brought by force to the United States to stand trial for drug-related charges. Regarding this conflict of interests, the court wrote “when the exercise of free press rights actually tramples upon Sixth Amendment rights, the former must nevertheless yield to the later.” However, the Court did state that some showing of immediate danger to the defendant’s trial is necessary to override First

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268 Bunker, supra note 45, at 68. (stating that after “examining these facts of the case[,] the court concluded that a prior restraint was not constitutionally permissible”).

269 Bunker, supra note 45, at 68. Chief Justice Burger stated that “[t]he authors of the Bill of Rights did not undertake to assign priorities as between the First Amendment and the Sixth Amendment rights,” and that the Nebraska Press Court would not do so either. Id.


271 917 F.2d 1543 (11th Cir. 1990).

272 BUNKER, supra note 45, at 75.

273 BUNKER, supra note 45, at 75.

274 BUNKER, supra note 45, at 75.

275 BUNKER, supra note 45, at 76.

276 BUNKER, supra note 45, at 76.
Amendment protections. These measures were unable to stop leaks and proved unavailing at the trial.

B. Closure of Hearings to the Press

The First Amendment states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances." The press' fight for a more expansive interpretation of the First Amendment has influenced the Supreme Court's decisions on how and when to limit this right. The freedom of expression is guaranteed to the citizens of the United States, including the press, in the First Amendment. Courts must strike a balance between the importance of a defendant's right to a fair trial and the press' right to report the trial and surrounding information.

History shows that public access to trials has long been regarded as an important aspect of the justice system. "The conduct of trials before as many people as choose to attend" was regarded as one of the inestimable advantages of a free English constitution of government. A recurring problem in American courts, however, has been whether or not to close the trial to the public. In response, the ABA adopted trial standards to help the courts deal with publicity. Trial Standard 3.1, in its original text, allowed the defendant to make a motion to move that "all or part of the hearing be

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277 BUNKER, supra note 45, at 76.
278 BUNKER, supra note 45, at 79.
279 U.S. CONST. amend. I.
280 DEVOL, supra note 12, at 371.
281 KANE, supra note 2, at 90-91.
282 See GERALD, supra note 11, at 108 (citing Richmond Newspapers v. Virginia).
283 DEVOL, supra note 12, at 398.
285 GERALD, supra note 11, at 87.
held in chambers, or otherwise closed to the public." For a brief period, this rule led to the closing of courts. It was never approved by the Supreme Court, however, because it was a substantial departure from custom. In 1979, the ABA acknowledged the press' First Amendment right and prohibited direct restraint on the media. Specifically, Standard 8-3.1 states, “no rule of court or judicial order shall be promulgated that prohibits representatives of the news media from broadcasting or publishing any information in their possession relating to a criminal case.” Although the First Amendment is written in absolutist language, the Supreme Court has never accepted the view that it prohibits all government regulation of expression. “The guarantees of the First Amendment are rights rather than privileges - rights that remain intact (with few exceptions) regardless of how they are used.”

In 1979, the Supreme Court held, in Gannett Co, Inc. v. DePasquale, that judges were allowed to close pretrial hearings and suggested the same for trials. “The Court made clear that the Sixth Amendment guarantees the accused a right to a public trial.” Exactly one year later, the Supreme Court decided Richmond

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286 Gerald, supra note 11, at 87. Standard 3.1, in the original text, states that in any preliminary hearing, bail hearing, or other pretrial hearing in a criminal case, including a motion to suppress evidence, the defendant may move that all or part of the hearing be held in chambers or otherwise closed to the public, including representatives of news media, on the grounds that dissemination of evidence or argument adduced at the hearing may disclose matters that will be inadmissible in evidence at the trial and therefore likely to interfere with his right to a fair trial by an impartial jury. Id. The motion shall be granted unless the presiding officer determines there is no substantial likelihood of such inference. Id.

287 Gerald, supra note 11, at 87.
288 Gerald, supra note 11, at 87.
289 See Gerald, supra note 11, at 65.
290 See Gerald, supra note 11, at 65.
292 Id.
293 See Kane, supra note 2, at 91.
295 Devol, supra note 12, at 397.
296 Devol, supra note 12, at 398.
Justice Burger wrote, “the right to attend criminal trials is implicit in the guarantees of the First Amendment; without freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and ‘of the press could be eviscerated.’” The Court held that the Constitution allowed for the closing of trials only in the most extraordinary circumstances.

VI. SOLUTIONS AND REMEDIES

Three solutions to the implication of “trial by newspaper” have been widely discussed. The first suggestion is voluntary adherence by the news media to a code that would demand restrained treatment of criminal coverage. However, this code is only as effective as the media wants it to be. The second method is to follow the lead of England by laying a heavy hand on the press through the contempt powers of the court. However, the Supreme Court has given the press great freedom in reporting cases before the bar. In 1941, Bridges v. California and Times-Mirror Co. v. Superior Court were jointly decided because they both dealt with out-of-court contempt cases. The Court adopted a more restrictive standard that a “clear and present danger to the administration of justice—not just a possible threat—would have to be established in order for a court to substantiate out-of-court contempt.”

297 DEVOL, supra note 12, at 397. Although, the decision was 7-1, there was no majority opinion because the seven justices wrote six different opinions. Id.
298 DEVOL, supra note 12, at 398 (quoting Branzburg v. Hanes, 408 U.S. 665 (1972)).
299 DEVOL, supra note 12, at 375.
300 DEVOL, supra note 12, at 375. The press would agree to turn to the more significant aspects of American justice and away from the sensational aspects which normally are used to boost circulation. Id. Voluntary media codes of restraint have not been particularly successful in the past. Id.
301 DEVOL, supra note 12, at 375.
302 DEVOL, supra note 12, at 376.
303 314 U.S. 252 (1941).
304 314 U.S. 252 (1941).
305 DEVOL, supra note 12, at 376-77.
306 DEVOL, supra note 12, at 376-77.
proposal of controlling pre-trial publicity is to govern the flow of information at the source, i.e.: at those legally under the jurisdiction of the court.  

Courts should control attorneys who make extrajudicial statements because these comments may sway public opinion, which could lead to a tainted jury pool.  

The Sheppard court stated that “where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial,” the trial court must take precautions to prevent such an occurrence.  

The prosecutor and the defense attorney are the two most likely sources of extrajudicial statements.

Courts may limit the speech of attorneys only if (1) the limitations further an important or substantial government interest unrelated to the suppression of expression by counsel, and (2) the restriction must be no greater than is necessary or essential to the protection of the particular government interest involved.  

In United States v. Simon, the government attorney refused to agree to a pretrial agreement limiting extrajudicial statements. In holding that the U.S. Attorney was not allowed to make any extrajudicial comments, the Court stated “to have the prosecutor himself feed the press with evidence that no self-restrained press ought to publish in anticipation of a trial is to make the State itself, through the prosecutor who wields power, a conscious participant in trial by newspaper.”  

The United States Department of Justice, in

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307 Devol, supra note 12, at 376-77. This method was approved by the ABA in 1968 with the adoption of the Reardon Report. Id. Under this standard the judge would limit the amount of information available to the press from the prosecutor, defense attorney, police and others directly involved in the case. Id.
308 Howard, supra note 1, at 67.
309 Howard, supra note 1, at 67.
310 Howard, supra note 1, at 67.
312 Id.
313 Howard, supra note 1, at 68 (quoting the powerful dissent of Justice Frankfurter in Stroble v. California).
fact, has a detailed guideline of what can and cannot be said to the press during a criminal trial. 314

Some lawyers use the “open” approach regarding the attorney’s relationship with the media before and during the criminal trial. 315 This “open” approach uses the media as a litigation tool to be used as part of the trial strategy, or even personal strategy. 316 Moreover, this approach enables the attorney to use the media to the client’s advantage. 317 When the attorney initiates communication with the media, the attorney controls what is being released. 318 Therefore, public information is often from the perspective of the client and not truly objective. 319

VII. CONCLUSION

The First and Sixth Amendments will continue to be at odds with one another in regard to highly publicized cases, unless a balance is struck between a criminal defendant’s right to a fair trial and the media’s right to freely report. 320 The press’s freedom to sensationalize information makes this goal very difficult to obtain. 321

The Warren Court set the standard for judges to ensure a fair trial. 322 These guidelines have been effectively implemented in

314 Howard, supra note 1, at 68. Extrajudicial statements by Department of Justice personnel cannot be made for the purpose of influencing the outcome of a criminal trial, must be limited to matters of public record that do not impinge on the defendant’s rights to a fair trial and uncontroverted facts, and should be strenuously avoided when possible during the period approaching and during the trial. Id.

315 Howard, supra note 1, at 64. The most prominent attorney using this approach is Robert Shapiro, who was one of O.J. Simpson’s defense attorneys. Id.

316 Howard, supra note 1, at 64.

317 Howard, supra note 1, at 65.

318 Howard, supra note 1, at 65.

319 Howard, supra note 1, at 65.

320 See Kane, supra note 2, at xvi. “A secure and free society must perceive that its legal system is operating fairly and that justice is in fact being done.” Id.

321 See Kane, supra note 2, at xvii. “In the drive to get the story that will attract listeners, readers, or viewers the interests of the accused are given little or no consideration.” Id.

322 Sheppard, 384 U.S. at 333.
current court decisions. \textsuperscript{323} Trial judges have an obligation to secure a trial free of adverse publicity for the defendant. \textsuperscript{324} Individuals often do not realize that they have pre-formed, biased opinions. Therefore, unless an attorney is able to adequately question potential jurors, their impartial views may not be apparent. \textsuperscript{325} Anything less than searching questions strips the defendant of the right to an impartial jury. \textsuperscript{326} Content questioning techniques enable an attorney to eliminate individuals that are unable to be fair and impartial. \textsuperscript{327} Jurors are expected to listen to the facts and then determine the guilt of the defendant based on their analysis of those facts. A defendant seems to be on trial when facts are published which may not be presented during trial. \textsuperscript{328} Therefore, when a juror steps into a jury box with a pre-formed opinion, the defendant may already be guilty and convicted as charged.

Although the First Amendment guarantees freedom of the press, this right is not absolute. \textsuperscript{329} As much as the press deserves the right to publish freely, when a criminal defendant’s life is at stake many measures and precautions need to be taken in order to ensure that a fair trial is achieved. News stories are printed not only to inform, but to excite and entertain the public. \textsuperscript{330}

Attorneys, as well as others involved in the trial, should have a good rapport with the press and openly communicate. \textsuperscript{331} However,
their statements should be limited to the facts of the case. No person involved with the trial should be able to make a statement that might sway public opinion. These statements of opinion may have an adverse effect on the impartiality of jurors and must be curbed. After all, an individual’s liberty may be at stake.

Leslie Renee Berger