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Analyzing the Conflict Between the First and Sixth Amendments in High-Profile Criminal Cases

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Within the United States, technology is ever emerging in daily life. Nearly all Americans have access to the internet and smartphones, and one tweet can rival CNN and FOX's viewership. However, this new era of technology where folks in Newark can view an incident in Minneapolis almost instantaneously has its disadvantages.[1] Those drawbacks from having immediate access to information come at the cost of a criminal defendant's right to a fair trial. The tensions between the free press and the rights of a criminal defendant to have a fair trial are not new to American history.[2] As case law demonstrates, the press has always been fascinated with high-profile criminal cases, going as far back as Vice President Aaron Burr's treason trial in 1807.[3]

The Sixth Amendment protects the accused by guaranteeing them the right to an impartial jury and a speedy public trial.[4] At the same time, the First Amendment prohibits Congress from making laws abridging the freedom of speech and press.[5] Therefore, the public's right to access and the media's right to unfettered coverage of a case has caused concern regarding a high-profile defendant's right to a fair trial. In an age where every potential jury has seen the evidence either on television or their smartphone, it is challenging for high-profile criminal defendants to exercise their Sixth Amendment rights.[6] Criminal defendants must survive their trial by media before entering the courtroom. For instance, it was nearly impossible to find jurors who neither heard of nor saw the gut-wrenching video of the former police officer, Derek Chauvin, kneeling on George

[1] Robert Hardway and 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).
[2] John C. Meringolo, *The Media, the Jury, and the High-Profile Defendant: A Defense Perspective on the Media Circus*, 55 N.Y.L. SCH. L. REV. 981, 983 (2010-2011).
[3] H. Patrick Furman, *Publicity in High Profile Criminal Cases*, 10 ST. THOMAS L. REV. 507, 513 (1998).
[4] U.S. Const. amend. VI.
[5] *Id.* amend. I.
[6] Hardway and Tumminello, *supra* note 1, at 41-2.

Floyd's neck.[7] In the wake of the video, the Black Lives Matter Movement successfully used social media to inspire social change and facilitate nationwide protests, specifically by utilizing the hashtag #BlackLivesMatter.[8] The use of social media and hashtags to spread awareness and create social movements is only increasing.[9] Despite all the good social media does, it makes it more difficult for high-profile criminal defendants to have a fair trial.[10]

Thus, the expansive rights of the First Amendment in the twenty-first century are diluting the Sixth Amendment's guarantee of a fair trial by an impartial jury. The mass media's infatuation with high-profile criminal trials adds the pressure of the public on the prosecutor's back like never before, encouraging them to win even at the cost of justice. Defense attorneys face an uphill battle from the moment the evidence goes viral. They not only have to compete with prosecutors but an increasingly intrusive press.

This paper examines the conflict between the First and Sixth Amendments, given the rapid technological and communication changes over the years. Together the First and Sixth Amendments protect fairness and uphold accountability in our criminal justice system.[11] Jointly, both rights broadly safeguard the right to a fair trial by eliminating the unfairness of secret proceedings, yet they are fundamentally different.[12] The First Amendment protects the public's right to access a criminal proceeding, whereas the Sixth Amendment protects the criminal defendant's right to have a fair trial with a public audience.[13] This paper will first explore the

[7] Amy Forliti and Steve Karnowski, *Jury selection paused for ex-cop charged in Floyd's death*, AP NEWS, March 8, 2021, https://apnews.com/article/derek-chauvin-trial-jury-e4acea4516571b9c2af8cce685e221f2.
[8] Jamillah Bowman Williams, Naomi Mezey, and Lisa Singh, *# BlackLivesMatter--Getting from Contemporary Social Movements to Structural Change*, 12 CALIF. L. REV. Online 1, 2 (2021).
[9] *Id.*
[10] Meringolo, *supra* note 2, at 982.
[11] Jocelyn Simonson, *The Criminal Court Audience in a Post-Trail World*, 127 HARV. L. REV. 2173, 2176 (2014).
[12] *Id.* at 2196.
[13] *Id.*

history of the Supreme Court's interpretation of the First Amendment pertaining to high-profile criminal proceedings. Second, this paper will analyze the case law regarding pretrial publicity in the United States and explore how technology and the media have changed the Court's interpretation of the Sixth Amendment. Next, it will evaluate how the high-profile nature of a case affects the prosecution and defense. This section will also discuss how both sides take advantage of extrajudicial statements. Lastly, section four examines the available remedies to pretrial publicity, particularly focusing on the British and American approaches to controlling pretrial bias. Overall, the paper points out the many issues of litigating a high-profile criminal case, ultimately arguing that the American approach of jury controls coupled with actively discouraging attorneys from making prejudicial statements to the press is preferable to England's restrictions on free speech.

I. HISTORY OF THE MEDIA AND PUBLIC'S RIGHT TO ACCESS UNDER THE FIRST AMENDMENT

The Supreme Court has guaranteed the media and the public's right to access through a combination of freedom of speech, press, and assembly, characterizing this as the "freedom to listen."[14] Before the Norman Conquest of 1066, parties brought cases before moots in England, and all freemen were required to attend.[15] A moot is a local or county court where the freemen acted as jurors.[16] Over the years, the common law relaxed these mandatory attendance rules, but the moots remained open to freemen.[17] England brought their traditions of public criminal trials to the United States during the colonial period.[18] For instance, New Jersey, one of the original

[14] *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576-77 (1980).
[15] Meringolo, *supra* note 2, at 983.
[16] *Richmond Newspapers, Inc.*, 448 U.S. 555 at. 565.
[17] Meringolo, *supra* note 2, at 983.
[18] *Id.*

colonies, unambiguously proclaimed that all criminal trials must remain open to the public.[19] In England and the United States, public criminal trials were a presumptive, indispensable right throughout the centuries.[20] However, social media and other technologies have allowed the media to cover cases in ways that the Founding Fathers could not have fathomed.[21]

The common law has always considered public criminal trials as a check on the government.[22] In the United States, the media, protected by the First Amendment, satisfies this historical role and acts on the people's behalf by monitoring the government.[23] The reporters and journalists enter the courtroom to stay informed and ensure the government does not overstep its bounds.[24] However, the media's coverage of criminal trials has expanded dramatically in the last few decades.[25] This expansion and increased reporting of criminal trials have resulted in an increased number of appeals.[26] Criminal defendants argue that the media tainted their trials by increasing juror bias in these appeals. Thus, the media's insatiable appetite to access criminal proceedings has increased the difficulty for trial judges in guaranteeing that high-profile criminal defendants receive fair trials.[27] This section explores the case law that expanded the First Amendment's right to access criminal proceedings, much to the chagrin of high-profile criminal defendants.

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[19] *Richmond Newspapers, Inc.*, 448 U.S. 555 at. 565.
[20] *Id.* at 569.
[21] Meringolo, *supra* note 2, at 984.
[22] Hardway and Tumminello, *supra* note 1, at 63.
[23] *Id.* at 40.
[24] Raleigh Hannah Levine, *Toward a new Public Access Doctrine*, 127 CARDOZO L. REV. 1739, 1740 (2006).
[25] Hardway and Tumminello, *supra* note 1, at 41.
[26] *Id.*
[27] *Id.*

A. The Media and Public's Right to Access Criminal Trials

The seminal First Amendment case revolving around criminal trials is *Richmond Newspapers, Inc. v. Virginia*.[28] In this murder case, the defendant was on his fourth trial, as the first three ended in mistrials.[29] In particular, the third resulted in a mistrial because a prospective juror read about the previous trials in a newspaper and told other potential jurors about the case.[30] Subsequently, the defense counsel brought a motion to close the court to the public in the present case, and the prosecution did not object.[31] The trial judge complied and closed the proceedings to the press and public.[32] Reporters covering the case objected to the closure order arguing that it violated the First Amendment.[33] In a plurality opinion, the Supreme Court sided with the reporters, holding that the public and press have a First Amendment right to access criminal trials.[34]

The plurality opinion relied heavily on historical evidence to demonstrate that Anglo-American criminal trials have long been presumptively open.[35] Further, such openness was critical to the "proper functioning of a trial" since it assured the government conducted criminal proceedings fairly.[36] The Court reasoned that a courtroom's openness discourages perjury, participant misconduct, and decisions based on secret bias or partiality.[37] Open trials also give the perception of fairness, thus enhancing public confidence in American jurisprudence while discouraging vigilantism.[38] Significantly, the plurality opinion did note that the right was not

[28] *Richmond Newspapers, Inc.*, 448 U.S. 555 at. 558.
[29] *Id.* at. 559.
[30] *Id.*
[31] *Id.* at 560-61.
[32] *Id.*
[33] *Id.*
[34] *Id.* at 580-81
[35] *Id.* at 569.
[36] *Id.*
[37] *Id.*
[38] *Id.* at 569-71.

absolute.[39] The Chief Justice concluded the opinion by stating, "[a]bsent an overriding interest articulated in findings, the trial of a criminal case must be open to the public."[40] In *Richmond Newspapers*, the Supreme Court held for the first time that the press and public have a right to access criminal trial proceedings and standing to challenge the denial of access under the First Amendment.[41]

Additionally, Justice Brennan's concurring opinion in *Richmond Newspapers* outlined a two-part test to determine which government activities the public should be able to access.[42] First, a historical prong, where courts consider whether there exists "an enduring and vital tradition of public entry to particular proceedings or information."[43] Second, courts evaluate the instrumental value of the press and the public's access to specific government activities.[44] Later, this test became dubbed the "experience and logic" or "history and function" test.[45] The First Amendment right of access attaches if a trial or proceeding passes the history and function test.[46] The press and public's right to access is not absolute, and a judge can close a court if the closure survives strict scrutiny.[47] Chief Justice Burger's plurality opinion and Justice Brennan's concurrence represented a majority for the proposition that the public and press have an implicit right under the First Amendment to attend criminal trials.[48]

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[39] *Id.* at 581.
[40] *Id.*
[41] Simonson, *supra* note 11, at 2200.
[42] *Richmond Newspapers, Inc.*, 448 U.S. 555 at 589.
[43] *Id.*
[44] *Id.*
[45] Levine, *supra* note 24, at 1740.
[46] *Id.* at 1741.
[47] *Id.*
[48] *Id.* at 1749.

Two years later, in *Globe Newspaper Co. v. Superior Court*, the Supreme Court reaffirmed but refined *Richmond Newspapers'* holding.[49] The majority in *Globe* adopted Justice Brennan's two-part history and function test.[50] At issue in *Globe* was a Massachusetts statute that barred the public and press from the courtroom while a child victim testified in rape, incest, or sexual offense cases.[51] The purpose of the mandatory closure was to protect the victims from trauma, embarrassment, or humiliation brought on by media coverage.[52] Citing the Court's decision in *Richmond Newspapers*, the appellant, a newspaper, moved that the Court revoke the closure order, arguing that it had a right to attend the entire criminal trial.[53] The Supreme Court agreed with the newspaper and reversed the trial court on appeal.[54] This time in the majority, Justice Brennan relied on his history and function test to hold the statute invalid.[55] The majority explained that "...the criminal trial historically has been open to the press and general public," and "...access to criminal trials plays a particularly significant role in the functioning of the judicial process and the government as a whole."[56] The Court reasoned that underlying the First Amendment right of access to criminal trials is the understanding that a critical purpose of that Amendment is to protect the free discussion of governmental affairs.[57] The media and public's access to criminal trials is another check on the judicial process, leading to fairness and the perception of fairness.[58]

Since *Richmond Newspapers* already established criminal trials meet the history and function pre-test, there was no need to apply the same test to the particular sub-category, criminal

[49] *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603-06 (1982).
[50] *Id.* at 605-06.
[51] *Id.* at 598.
[52] *Id.* at 618.
[53] *Id.* at 601.
[54] *Id.* at 605-06.
[55] *Id.*
[56] *Id.*
[57] *Id.* at 604.
[58] *Id.* at 604-05.

rape trials.[59] The burden then shifted to the State to demonstrate that their closure law met the demanding standard of strict scrutiny by proving "the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest."[60] The majority found that although the closure served a compelling government interest by protecting minor victims from the humiliation of testifying during sex crimes trials, a mandatory closure was not necessary.[61]

B. The Media and Public's Right to Access Pretrial Criminal Proceedings

Per the holdings in *Richmond Newspapers* and *Globe*, the First Amendment protects the public's right to access criminal trials.[62] It was not until a few years later, in the two *Press-Enterprise Co. v. Superior Court of California* cases of 1984 and 1986, that the Supreme Court extended the First Amendment to pretrial proceedings.[63] Beginning with the earlier of the two cases, *Press-Enterprise Co. v. Superior Court of California* (*Press-Enterprise* I) involved the openness of the voir dire examination of potential jurors.[64] The underlying facts are quite gruesome, involving the rape and murder of a teenage girl.[65] The petitioner, a newspaper company, moved the Court to open the voir dire examinations to the public and press.[66] The Press outlet argued that they had an absolute right to attend the trial and reasoned that the trial began with jury selection.[67] The prosecution objected, claiming that the press's presence would interfere with the candidness of the jury's responses.[68] The trial court judge ruled against the newspaper company

[59] Levine, *supra* note 24, at 1751.
[60] *Globe Newspaper Co.*, 457 U.S. 596 at 607.
[61] *Id.* at 607-09.
[62] *Id.*
[63] Levine, *supra* note 24, at 1752-56.
[64] *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 503 (1984).
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *Id.* at 503-04.

and only opened the general voir dire to the public, approximately three days of the six-week voir dire process.[69] The judge also denied the press's motion to release the voir dire transcripts.[70]

On appeal, the Supreme Court reversed the trial judge, reasoning that historically jury selection, both in the United States and England, has presumptively been public with exceptions only for a good cause shown.[71] The majority traced the roots of public jury trials to the days before the Norman conquest of England, stressing the importance of the public's presence.[72] The Court explained that the public's right to attend criminal voir dire promotes fairness and the appearance of fairness which is critical for public confidence in our legal system.[73] Public proceedings have a "community therapeutic value" in heinous criminal trials, reassuring the public that "the law is being enforced and the criminal justice system is functioning."[74] People in a free democratic society would find it difficult to accept results they could not see.[75] Thus, the Supreme Court held that both prongs of the history and function test satisfied and found a presumptive right to access criminal voir dire proceedings.[76] The closure did not survive strict scrutiny either because the trial judge had alternatives to a total closure, such as offering limited public access or partial suppression.[77]

Finally, the last of the Court's major First Amendment public access cases came in 1986 in *Press-Enterprise Co. v. Superior Court* (*Press-Enterprise II*).[78] *Press-Enterprise II* extended

[69] *Id.*
[70] *Id.* at 503-04.
[71] *Id.* at 505.
[72] *Id.* at 508.
[73] *Id.*
[74] *Id.* at 508-09.
[75] *Id.*
[76] *Id.* at 508-10.
[77] *Id.* at 510-11.
[78] Levine, *supra* note 24, at 1754.

the First Amendment right to access to preliminary hearings in criminal prosecutions.[79] At issue was the trial court's decision to seal the transcripts from the infamous defendant Robert Diaz's forty-one-day preliminary hearing, which determined probable cause.[80] Diaz, nicknamed by the media the Angel of Death, was a nurse accused of murdering twelve of his patients by administering massive doses of heart medication.[81] Per a California statute, the defendant moved to exclude the public from the preliminary hearing.[82] The Magistrate granted the unopposed motion, reasoning that the closure was necessary since the case had attracted national publicity.[83] After the hearing, the petitioner, a newspaper company, requested the court release the preliminary hearing transcripts.[84] The defendant opposed the motion arguing that the transcript would cause prejudicial pretrial publicity, and the trial judge agreed.[85] On appeal, the Supreme Court once again relied upon Justice Brennan's two-prong test and determined that the hearing should be open to the press and public.[86]

Citing the previous cases and others, the Court concluded that criminal hearings and proceedings were historically open to the public.[87] For instance, Chief Justice Marshall held the probable cause hearing for Aaron Burr's treason trial in the Hall of the House of Delegates in Virginia because the courtroom was too small to accommodate the interested public.[88] Over two hundred years later, there has been a near-uniform practice of conducting preliminary hearings in open courts for federal and state cases.[89] Moreover, the Court held that public access plays a

[79] Simonson, *supra* note 11, at 2207.
[80] *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 5 (1986).
[81] *Id.* at 3.
[82] *Id.*
[83] *Id.* at 3-4.
[84] *Id.* at 4-5.
[85] *Id.* at 5.
[86] *Id.* at 10.
[87] *Id.*
[88] *Id.*
[89] *Id.*

significant positive role in the functioning of the preliminary hearing.[90] California's preliminary hearings share many of the same features as full-blown criminal trials.[91] Like trials, "[t]he accused has the right to personally appear at the hearing, to be represented by counsel, to cross-examine hostile witnesses, to present exculpatory evidence, and to exclude illegally obtained evidence."[92] Therefore, Chief Justice Burger's majority held that the First Amendment right of access applies to criminal trials and preliminary hearings that function as a full-scale trial.[93]

C. The Media and Public's Right to Access Limited

Press-Enterprise II noted that not every criminal proceeding should be public.[94] For example, *Douglas Oil Co. v. Petrol Stops Northwest* clarifies that the grand jury system depends upon secrecy to function appropriately.[95] Although *Petrol Stops Northwest* is a civil case, it is still pertinent to this paper's analysis of the First Amendment pertaining to criminal trials. *Petrol Stops Northwest* gives several reasons why a grand jury proceeding should be kept private.[96] First, it encourages prospective grand jury witnesses to testify fully and honestly, without fear of retaliation.[97] Also, the secrecy reduces the risk of the potential defendant fleeing or trying to persuade or intimidate potential grand jurors.[98] Finally, the private nature of the grand jury proceeding protects those persons who were accused but exonerated from public mockery and

[90] *Id.* at 12.
[91] *Id.*
[92] *Id.*
[93] Levine, *supra* note 24, at 1754-1755.
[94] *Press-Enterprise Co*, 478 U.S. at 9.
[95] *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 218 (1979).
[96] *Id.* at 218-19.
[97] *Id.* at 219.
[98] *Id.*

humiliation.[99] However, the Federal Rules of Criminal Procedure 6(e) allow for the disclosure of grand jury transcripts under limited exceptions.[100]

Furthermore, the Supreme Court has not extended the First Amendment's right of public access to juvenile proceedings.[101] Lower courts split on the issue of whether the First Amendment access right applies to juvenile court proceedings under Justice Brennan's two-part test.[102] Typically, courts have found no right to access juvenile delinquency or dependency proceedings, reasoning that they fail the history prong of Justice Brennan's Test.[103]

II. THE SIXTH AMENDMENT AND PREJUDICIAL PRETRIAL PUBLICITY

As previously noted, the Anglo-American history of criminal trials exhibits a presumption of openness.[104] One can trace this history back to before the Battle of Hastings in 1066.[105] However, the presumption of openness often causes conflicts between the First and Sixth Amendments, pitting the press against the criminal defendant.[106] Addressing the conflict, Chief Justice Burger stated: "some criminal cases characterized as 'sensational' have been subjected to extensive coverage by news media, sometimes seriously interfering with the conduct of the proceedings and creating a setting wholly inappropriate for the administration of justice."[107] Advances in technology have only exacerbated the issue, enabling the media to cover criminal trials more thoroughly and feed the public's growing appetite for them.[108]

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[99] *Id.*
[100] FED. R. CRIM. P. 6
[101] Levine, *supra* note 24, at 1779.
[102] *Id.*
[103] *Id.*
[104] Hardway and Tumminello, *supra* note 1, at 46.
[105] *Id.*
[106] *Id.* at 40.
[107] *Chandler v. Florida*, 449 U.S. 560, 562 (1981).
[108] Hardway and Tumminello, *supra* note 1, at 41.

For example, before the trial of O.J. Simpson, four out of five lawyers surveyed believed that the case's intense publicity would interfere with Simpson's right to a fair trial.[109] Even though the jury acquitted O.J. Simpson of the double murder, the media and public found him guilty in the court of public opinion.[110] In his unrelated robbery charge, Simpson's defense team alleged that the prosecution and law enforcement were more interested in getting justice for Nicole Brown Simpson and Ronald Goldman than in the present case.[111] Therefore, this section will examine the progression of Sixth Amendment case law, evaluating the effects of the public and media on a high-profile criminal defendant's right to a fair trial.

A. History of Prejudicial Pretrial Publicity in the United States

In the United States, the constitutional clash between the First and Sixth Amendments came to a head for the first time during Aaron Burr's treason trial.[112] Former Vice President Burr faced treason charges after allegedly making plans to conquer New Orleans and invade Mexico.[113] Due to Burr's notoriety and the political nature of the crime, newspapers across the country extensively covered the proceedings leading up to trial.[114] For the first time, a young America questioned the judiciary's ability to provide a high-profile criminal defendant with a fair trial per the Sixth Amendment.[115] The Circuit Court of Virginia was perplexed with the problem of prejudicial pretrial publicity and juror disqualification.[116] Chief Justice Marshall, who presided over the trial, explained: "Were it possible to obtain a jury without any prepossessions whatever respecting the

[109] Nadine Strossen, *Free Press and Fair Trial: Implications of the O.J. Simpson Case*, 26 U. TOL. L. REV. 647, 647 (1995).
[110] Meringolo, *supra* note 2, at 992.
[111] *Id.*
[112] Hardway and Tumminello, *supra* note 1, at 48.
[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *Id.*

guilt or innocence of the accused, it would be extremely desirable to obtain such a jury; but this is perhaps impossible, and therefore will not be required."[117] Marshall reasoned that being exposed to pretrial publicity was not enough to warrant dismissal.[118] A court was only to disqualify a potential juror if they could not put their biases to the side.[119] The Chief Justice dismissed forty-four of forty-eight potential jurors on the first day of voir dire because of the newspapers' prejudicial influence on them.[120]

Over one hundred and twenty years later, the issue of prejudicial media coverage on legal proceedings resurfaced with Bruno Hauptmann's trial.[121] Bruno Hauptmann was on trial for the kidnapping and murder of the baby of famed aviator and former presidential candidate Charles Lindbergh.[122] Charles Lindbergh's fame, coupled with the shocking nature of the crime and advances in camera and recording technology, made this case a perfect storm for a media extravaganza.[123] Before the arrest, the media obsessively reported every break in the case and saturated the news with the police's progress.[124] When the police finally arrested Hauptmann, nearly seven hundred reporters, including one hundred and twenty camera operators, invaded the tiny New Jersey courthouse.[125] Competing with one another to get better pictures, photographers climbed over the defense and prosecution's tables during proceedings.[126]

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[117] *United States v. Burr*, 25 F. Cas. 49, 50-51 (C.C.D. Va. 1807).
[118] *Id.* at 51.
[119] *Id.*
[120] Rich Curtner & Melissa Kassier, *"Not in Our Town": Pretrial Publicity, Presumed Prejudice, and Change of Venue in Alaska: Public Opinion Surveys as a Tool to Measure the Impact of Prejudicial Pretrial Publicity*, 22 ALASKA L. REV. 255, 258 (2005).
[121] Hardway and Tumminello, *supra* note 1, at 49.
[122] *State v. Hauptmann*, 115 N.J.L. 412, 413 (N.J. 1935).
[123] Meringolo, *supra* note 2, at 985.
[124] Oscar Hallam, *Some Object Lessons on Publicity in Criminal Trials*, 24 MINN. L. REV. 453, 460 (1940).
[125] Kelli L. Sager & Karen N. Frederiksen, *Televising the Judicial Branch: In Furtherance of the Public's First Amendment Rights*, 69 S. CAL. L. REV. 1519, 1521 n.7 (1996).
[126] *Id.*

On appeal, Hauptmann unsuccessfully raised the issue of pretrial prejudice, arguing that the media frenzy in the courtroom interfered with his case.[127] The Appellate Court exclaimed: "If the result of an important murder trial is to be nullified by newspaper stories and radio broadcasts, few convictions will stand."[128] In response to the media circus, the American Bar Association (A.B.A.) in 1937 recommended a ban on cameras in the courtroom in Canon 35 of the A.B.A. Canons of Judicial Ethics.[129] Due to the advances in technology that allowed the media to cover criminal trials more extensively, American legal scholars became acutely more aware of the conflict between the defendant's right to a fair trial and the media's right of access.[130] Thus, local trials became national news throughout the twentieth and twenty-first centuries.[131] For instance, the trial of George Zimmerman, arising out of the killing of Trayvon Martin in Sanford, Florida, captured the attention of the nation.[132] Media outlets from Fox News to Oprah Winfrey's daytime talk show covered the case.[133] Even the President of the United States, Barack Obama, commented on the case: "If I had a son, he'd look like Trayvon."[134] With the help of the media and technological advances, local trials and issues have become national news.[135]

B. Modern Age of Media and Prejudicial Pretrial Publicity

Almost two decades after Hauptmann's unsuccessful appeal, the United States Supreme Court heard one of its first cases balancing a defendant's right to a fair trial with the media's right

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[127] *Hauptmann*, 115 N.J.L. 412 at 443-44.
[128] *Id.* at 444.
[129] Meringolo, *supra* note 2, at 986.
[130] Hardway and Tumminello, *supra* note 1, at 50.
[131] Curtner & Kassier, *supra* note 120, at 262–63.
[132] Mark S. Brodin, *The Murder of Black Males in a World of Non-Accountability: The Surreal Trial of George Zimmerman for the Killing of Trayvon Martin*, 59 HOW. L.J. 765, 765-66.
[133] Angela Onwuachi-Willig, *Policing the Boundaries of Whiteness: The Tragedy of Being "Out of Place" from Emmett Till to Trayvon Martin*, 102 IOWA L. REV. 1113, 1114.
[134] Brodin, *supra* note 132, at 766.
[135] Curtner & Kassier, supra note 120, at 262–63.

to access.[136] In *Stroble v. California*, the State convicted the defendant of the heinous murder of a six-year-old girl.[137] To the defendant's frustration, he confessed the murder after his arrest,[138] and the Los Angeles District Attorney's Office released excerpts of his confession to newspapers.[139] The office announced their belief that the defendant was both sane and guilty to the media.[140] Following the release of the excerpts, the media's headlines and in-text articles described the defendant as a werewolf, fiend, and a sex-mad killer.[141] The defendant argued that the inflammatory media reports made it impossible for him to have a fair trial.[142]

Writing for the majority, Justice Clark rejected the defendant's claim that a fair trial in Los Angeles was impossible because of the media's prejudicial accounts of him and the trial.[143] The majority reasoned that the defendant never made an affirmative showing that the press prejudiced any jurors, and the Court required more proof than a mere declaration that the trial was not fair.[144] The majority stated that: "...at no stage of the proceedings has petitioner offered so much as an affidavit to prove that any juror was in fact prejudiced by the newspaper stories."[145]The Court was unsympathetic, noting the defendant never moved for a change of venue nor complained about the public until after the conviction.[146] Therefore, a defendant had to prove that the media prejudiced the jury for a court to reverse a conviction.[147]

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[136] Hardway and Tumminello, *supra* note 1, at 50.
[137] *Stroble v. California*, 343 U.S. 181, 183-84 (1952).
[138] *Id.* at 186-87.
[139] *Id.* at 193.
[140] *Id.* at 192.
[141] *Id.*
[142] *Id.* at 193.
[143] *Id.*
[144] *Id.* at 195.
[145] *Id.*
[146] *Id.* at 193-94.
[147] Hardway and Tumminello, *supra* note 1, at 51.

The Supreme Court changed its tune in *Marshall v. United States* only seven years later.[148] In *Marshall,* the Supreme Court made its first notable stand against trials by the media.[149] At issue was that several jury members read about the defendant's prior convictions in newspapers.[150] The newspapers told stories about how the defendant prescribed restricted drugs to the famed country singer Hank Williams before his death.[151] The defendant was convicted because the trial judge refused to grant the defendant's motion for a mistrial despite knowing the newspaper articles prejudiced the jury.[152] In a short opinion, the Court reversed and remanded the case for a new trial, reasoning that "the prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is a part of the prosecution's evidence."[153] The Court attempted to balance and remedy the defendant's right to a fair trial and the media's right to freedom of the press for the first time.[154]

In 1963, in *Rideau v. Louisiana,* the Supreme Court further distanced itself from its prior decision in *Stroble,* which required a defendant to show actual prejudice before succeeding on a Sixth Amendment claim.[155] In *Rideau,* the Court adopted *Marshall's* implied rationale that allowed for reversals when there was presumed prejudice.[156] The defendant in *Rideau* was arrested and convicted of bank robbery, kidnapping, and murder.[157] The defendant also confessed to the crimes following his arrest.[158] A sheriff recorded the defendant's confession, and over the next few days,

[148] *Marshall v. United States*, 360 U.S. 310, 312-13 (1959).
[149] *Id*.
[150] *Id.* at 311-12.
[151] *Id*. at 312.
[152] *Id*.
[153] *Id.* at 312-13.
[154] Hardway and Tumminello, *supra* note 1, at 52.
[155] *Id.* at 53.
[156] *Id.* at 54.
[157] *Rideau v. Louisiana*, 373 U.S. 723, 723-24 (1963).
[158] *Id.* at 724.

television stations repeatedly broadcasted the footage.[159] The Court estimated that of the town's 150,000 people, approximately 29,000 people saw and heard the interview.[160] Despite this egregious example of pretrial prejudice, the trial court denied the defendant's motion for a change of venue, and the defendant was subsequently convicted and sentenced to death.[161]

The Supreme Court reversed the defendant's conviction explaining the trial court's refusal to change venue violated the defendant's due process rights because the media coverage repeatedly exposed the potential jurors to the defendant's confession.[162] The Court claimed that the television broadcast "...was Rideau's trial -- at which he pleaded guilty to murder. Any subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality."[163] The televised confession was enough to create a presumption of juror bias.[164] The trial judge exacerbated the situation when he did not grant the change of venue motion.[165] Therefore, *Rideau* loosened the standard for presumed prejudice.[166]

Two years later, the Supreme Court addressed the issue of prejudicial pretrial publicity in the physical courtroom in *Estes v. Texas*.[167] The defendant unsuccessfully moved to prevent the media from broadcasting the trial proceedings.[168] Consequently, the initial proceedings were broadcast live across the country via television and radio.[169] Later, the State convicted the defendant of swindling.[170] On appeal, the Supreme Court reversed the conviction by a narrow

[159] *Id.*
[160] *Id.*
[161] *Id.* at 724–25.
[162] *Id.* at 726.
[163] *Id.*
[164] *Id.* at 728.
[165] *Id.*
[166] Hardway and Tumminello, *supra* note 1, at 54.
[167] *Estes v. Texas*, U.S. 381 U.S. 532, 534–35 (1965).
[168] *Id.* at 535.
[169] *Id.* at 536.
[170] *Id.* at 534.

margin.[171] The Court held that the televising of the defendant's pretrial proceedings warranted a reversal because the publicity violated his due process rights.[172] The media made the courtroom look like a poorly made movie set. At least twelve different cameramen were in the courtroom televising the proceedings, wires slithered across the floor, and microphones littered the benches.[173] The Court stated most due process deprivation claims "...require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process."[174] The majority listed four different ways in which televised court proceedings can cause unfairness to criminal defendants.[175] These included: "(1) the impact on the jurors, (2) the impairment of testimony, (3) the additional responsibilities placed upon the judge, and (4) the impact upon the defendant."[176]

One year later, in *Sheppard v. Maxwell*, the doctrine of presumed prejudice reached its pinnacle when the Supreme Court reversed Dr. Sam Sheppard's second-degree murder conviction because of the prejudice he suffered from negative publicity.[177] The case resulted from the murder of Sam Sheppard's pregnant wife in their home.[178] The media was drawn to the gory case from the beginning, constantly accusing Sheppard of the murder.[179] The case drenched the media, and sensationalist headlines portrayed Sheppard in a negative light.[180] For example, the headlines boldly claimed that Sheppard refused to cooperate with police and refused to take a lie detector

[171] *Id.* at 532–35.
[172] *Id.* at 542-44.
[173] *Id.* at 536.
[174] *Id.* at 542-43.
[175] *Id.* at. at 545-50.
[176] Meringolo, *supra* note 2, at 989.
[177] *Sheppard v. Maxwell*, 384 U.S. 333, 335, 363 (1966).
[178] *Id.* at 335.
[179] *Id.* at 340.
[180] *Id.* at 338.

test.[181] On the day of his wife's funeral, the chief prosecutor of the case even went so far as to publicly criticize Sheppard and his family for alleged lack of cooperation.

Further, at the Coroner's request, Sheppard "… reenacted the tragedy at his home before the Coroner, police officers, and a group of newsmen, who apparently were invited by the Coroner… Sheppard's performance was reported in detail by the news media along with photographs."[182] Not to mention, the trial took place only a few weeks before the election of the trial judge and the chief prosecutor.[183] The media also photographed and televised the jurors every time they walked in or out of the courtroom, adding to the media circus.[184] Unsurprisingly, the jury convicted Shepherd with the media's attention fixated on them.[185]

In an 8-1 decision, the Supreme Court reversed Shepherd's conviction and remanded the case for a new trial.[186] Like *Rideau* and *Estes*, the majority did not require the defendant to demonstrate that he suffered identifiable prejudice.[187] The Court opined that it could use the totality of the circumstances to determine on a case-by-case basis that prejudice likely existed.[188] The majority scolded the lower Court by stating, "legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper."[189] The Court concluded the trial court did not attempt to protect the jury from the media.[190] The Shepherd Court listed a few acceptable methods of mitigating harmful effects of pretrial publicity, such as "controlling the atmosphere of the courtroom, insulating witnesses from publicity, controlling leaks from law enforcement

[181] *Id.* at 338-42.
[182] *Id.*
[183] *Id.* at 342.
[184] *Id.* at 343-44.
[185] *Id.* at 335.
[186] *Id* at. 345-49.
[187] *Id.* at 352.
[188] *Id.* at 351–52.
[189] *Id.* at 350 (quoting *Bridges v. California*, 314 U.S. 252, 271 (1941)).
[190] *Id.* at 353.

personnel, changing the venue, granting a continuance, and sequestering the jury."[191] Thus, based on the totality of the circumstances, the Court presumed there was a reasonable likelihood of prejudice.[192]

C. The Court's Current Approach to Pretrial Publicity

In 1975, in *Murphy v. Florida*, the Supreme Court altered their previous analysis and demonstrated a reluctance to presume prejudice in high-profile criminal trials.[193] In *Murphy*, the defendant was convicted of assault with intent to commit robbery and breaking into a home while armed with intent to commit robbery.[194] The defendant appealed his conviction arguing that he was denied a fair trial due to the media's extensive reporting on his prior convictions.[195] Previously, the defendant earned notoriety in the press for participating in the 1964 stealing of the Star of India Sapphire and a handful of other crimes.[196] The media was so enthralled with his previous life of crime that they nicknamed him "Murph the Smurf."[197] As a result of the media's obsessive coverage, multiple jurors were aware of the defendant's past charges and convictions.[198] Despite that fact, the majority upheld the defendant's conviction, reasoning that jurors need not "be totally ignorant of the facts and issues involved."[199]

The Supreme Court distinguished the present case from their prior decisions by stating that the prior case law cannot "...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

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[191] Joanne Armstrong Brandwood, *You Say "Fair Trail" and I say "Free Press": British and American Approaches to Protecting Defendants' Rights in High Profile Trials*, 75 N.Y.U.L. REV. 1412, 1423 (2000).
[192] *Sheppard*, 384 U.S. 333 at 351-52.
[193] Hardway and Tumminello, *supra* note 1, at 58.
[194] *Murphy v. Florida*, 421 U.S. 794, 795 (1975).
[195] *Id.*
[196] *Id.* at 795-96.
[197] *Id.* at 795.
[198] *Id.* at 800-02.
[199] *Id.* at 800.

presumptively deprives the defendant of due process."[200] Notably, the Court found that *Marshall's* holding has no application beyond the federal courts.[201] In the present case, the voir dire demonstrated no hostility to the defendant from the jurors and did not indicate that they were incapable of laying aside their partiality.[202] Justice Marshall, writing for the majority, concluded that under the totality of the circumstances, the defendant failed to demonstrate that he faced prejudice during the voir dire process or the trial.[203] The Court did not provide much guidance on the totality of the circumstances test.[204] Nonetheless, *Murphy* established a new precedent that resulted in appellate courts reversing fewer convictions because of pretrial publicity.[205]

Furthermore, in *Chandler v. Florida*, the Court reasoned that there would no longer be a presumption of prejudice from televised criminal proceedings broadcast because of new technological advancements.[206] At the time of the decision, more and more states allowed the press to cover their criminal proceedings via television.[207] The majority made clear in *Murphy* and reaffirmed in the present case that "[t]o demonstrate prejudice in a specific case a defendant must show something more than juror awareness that the trial is such as to attract the attention of broadcasters."[208] The Court stated there would no longer be a presumption of prejudice.[209] The defendant must make an actual showing that the media compromised his ability to have a fair trial.[210] For instance, if the defendant could show that a juror watched television accounts of the

[200] *Id.* at 799.
[201] *Id.* at 798.
[202] *Id.* at 800.
[203] *Id.* at 799-803.
[204] Brandwood, *supra* note 191, at 1429.
[205] *Id.*
[206] *Chandler*, 449 U.S. 560 at 576 & n.11.
[207] *Id.* at 565 n.6.
[208] *Id.* at 581.
[209] *Id.*
[210] *Id.*

trial in violation of a judge's instruction, the defendant could show prejudice.[211] Therefore, the defendant on appeal must demonstrate that the media's coverage hindered the jury's power to judge his trial fairly or that the media's coverage adversely affected the participants in such a way that it resulted in a denial of the defendant's due process rights.[212] The previous cases illustrate that the Supreme Court has walked back the strong Sixth Amendment protections endorsed by the *Sheppard* Court.[213]

III. THE MEDIA AND PUBLIC'S EFFECT ON THE COURT AND ITS OFFICERS

When the American public becomes infatuated with a high-profile criminal case, the roles of the prosecutor and defense counsel seemingly change.[214] A criminal trial, as opposed to a civil trial, is already a high-stakes affair.[215] All parties involved are aware that what is at stake is not merely a change of money but the potential deprivation of an individual's liberty or life.[216] When the media and public become involved, the stereotypical criminal trial becomes more akin to a spectacle one would see on a screen.[217] Therefore, scholars often criticize lawyers in high-profile criminal trials, as seen in *People v. Simpson*.[218] They complain that the attorneys become obsessed with the camera and allow the public's attention to affect their expected roles as officers of the Court.[219]

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[211] *Id*.
[212] *Id*.
[213] Brandwood, *supra* note 191, at 1429.
[214] Judith L. Maute, *"In Pursuit of Justice" in High Profile Criminal Matters*, 70 FORDHAM L. REV. 1745, 1747 (2002).
[215] *Id*.
[216] *Id*.
[217] Furman, *supra* note 3, at 507.
[218] *Id*.
[219] *Id*.

A. The Media and Public's Effect on the Prosecutor

Prosecutors have heightened pressure to make a conviction when a high-profile crime, usually heinous or politically charged, captures the public's attention.[220] In these cases, prosecutors' offices will dedicate excessive resources to obtain a conviction, even when the evidence is weak or nonexistent.[221] For example, throughout Kyle Rittenhouse's trial, legal experts made clear that an acquittal would not be a surprising verdict based on the facts of his case.[222] Nonetheless, the Kenosha prosecutors still dedicated their resources to a trial that ultimately resulted in the jury acquitting defendant Kyle Rittenhouse of all charges.[223] Although the cost of the prosecution is not yet known, reports estimate that Kenosha County taxpayers paid hundreds of thousands, if not millions of dollars, just for the case to end in an acquittal.[224] For reference, the trial of Derek Chauvin cost Hennepin County taxpayers an estimated 3.7 million dollars.[225]

Additionally, the nation's attention on a criminal case can cause a prosecutor to become overzealous.[226] Prosecutorial misconduct can cause irreparable harm to the system and the lives of the individuals involved in the case, including prosecutors themselves.[227] For instance, the Durham County District Attorney Mike Nifong chose to continue prosecuting a case against three young men on Duke University's lacrosse team despite knowing the evidence was weak, and the rape

[220] Maute, *supra* note 214, at 1747.
[221] *Id.*
[222] Becky Sullivan, *Why the Kyle Rittenhouse 'not guilty' verdict is not a surprise to legal experts*, NPR, November 19, 2021, https://www.npr.org/2021/11/19/1057422329/why-legal-experts-were-not-surprised-by-the-rittenhouse-jurys-decision-to-acquit.
[223] *Id.*
[224] Rebecca Klopf, *Comparing costs of high profile cases: How much Kenosha County taxpayers could pay for Rittenhouse trial*, TMJ4, Nov 18, 2021, https://www.tmj4.com/news/local-news/comparing-costs-how-much-derek-chauvin-trial-cost-and-what-the-kenosha-county-taxpayers-bill-could-look-like.
[225] *Id.*
[226] James S. Liebman, *The Overproduction of Death*, 100 COLUM. L REV. 2030, 2079-94 & nn.138-56 (2000).
[227] *Id.*

allegations were most likely false.[228] Nifong refused to "...disclose potentially exculpatory information regarding male DNA on items in the accuser's rape examination kit; he did not comply with discovery and disclosure requirements; and he made false statements to opposing counsel, the court, and the bar regarding the DNA."[229] Nifong set aside his public and ethical duties and continued pushing the complainant's allegations forward despite knowing they were false.[230] North Carolina Attorney General Roy Cooper ended the criminal prosecution, proclaimed the mens' innocence, and branded Nifong as a rogue prosecutor.[231] Cooper described the case as "…the tragic result of a rush to accuse and a failure to verify serious allegations."[232]

In North Carolina, as in many other places across the country, prosecutors and district attorneys like Nifong are elected.[233] Some legal scholars argue the elections motivate prosecutors to rush to judgment to please their constituents.[234] When Nifong became involved in the Duke lacrosse case, he was also engaged in a bitter primary campaign.[235] His competitor led the polls after successfully prosecuting a high-profile case herself.[236] Nifong's campaign manager at the time quoted him as stating, in reference to the Duke lacrosse case, "I'm getting a million dollars of free advertisements."[237] Nifong's self-interest resulted in his disbarment and a minor jail sentence.[238] Prosecutors must be careful not to be overzealous, like Nifong, when trying high-

[228] Robert P. Mosteller, *The Duke Lacrosse Case, Innocence, and False Identifications: A Fundamental Failure to "Do Justice*, 76 FORDHAM L. REV. 1337,1337-38 (2007).
[229] *Id.* at 1358.
[230] *Id.*
[231] *Id.*
[232] *Id.*
[233] *Id.* at 1355.
[234] Maute, *supra* note 214, at 1747.
[235] Mosteller, *supra* note 228, at 1355.
[236] *Id.*
[237] *Id.* at 1356.
[238] *Id.* at 1337.

profile cases.[239] Any mistakes they make can result in public resentment and disappointment in the American legal system and democracy.[240]

B. The Media and Public's Effect on Defense Council

Criminal defense attorneys owe a primary duty to their clients to ensure the administration of justice is served by bravely and effectively advocating for their clients so that their constitutional and legal rights are protected.[241] Theoretically, the adversarial system weighs in favor of criminal defense attorneys as the prosecution bears the burden of proving their case beyond a reasonable doubt.[242] However, in reality, the prosecution has the advantage due to the number of resources when trying a case.[243] There are other disadvantages to representing high-profile criminal clients other than lack of resources.[244] For example, advocating for a defendant in a high-profile case can be frightening and dangerous for the defense attorney and their families.[245] For instance, Chris Darden received death threats almost immediately via Instagram, Facebook, and by phone upon the public discovering he was representing Eric Holder, the man accused of killing beloved rapper Nipsey Hussle.[246] This is not to say that prosecutors do not face similar hostilities when prosecuting high-profile clients.[247] No stranger to high-profile cases, Darden also received death threats while working as a co-prosecutor on the O.J. Simpson murder trial.[248]

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[239] Maute, *supra* note 214, at 1747.
[240] *Id.* at 1747-48.
[241] ABA Standards for Criminal Justice: Prosecution Function and Defense Function § 4-1.2(b) (2017).
[242] Maute, *supra* note 214, at 1751.
[243] *Id.*
[244] *Id.*
[245] *Id.*
[246] Alene Tchekmedyian, *Chris Darden Got Death Threats During Nipsey Hussle Case. They Come with The Territory*, LOS ANGELES TIMES, May 21, 2019, https://www.latimes.com/local/lanow/la-me-ln-nipsey-hussle-chris-darden-attorney-threats-20190521-story.html.
[247] *Id.*
[248] *Id.*

Furthermore, criminal defense attorneys receive fame and notoriety from working on criminal cases that captivate the public's interest.[249] However, with fame comes feuds. The egos of the criminal defense attorneys collide, which causes rifts and drama in their defense teams, diverting the public's attention away from legal arguments and directing it towards the lawyers themselves.[250] Notably, throughout the O.J. Simpson murder trial, the "Dream Team" fought amongst themselves both privately and publicly.[251] In particular, Johnnie Cochran and Robert Shapiro competed over who would lead Simpson's defense team, with Cochran eventually winning out.[252] After the trial, Cochran commented on their internal competition, stating: "We did not realize the damage it would do to [Shapiro's] ego not to be lead attorney."[253] Despite the "Dream Team's" success, Shapiro publicly stated he would never work with Cochran again.[254] Although Simpson received an acquittal, criminal defense attorneys should nonetheless be cautious not to allow their egos to dominate the case.[255] Not only is it distracting, but it adds fuel to the fire that is the media circus.[256]

C. Extrajudicial Statements to the Press and Public

As previously discussed, the First Amendment protects the public's access to information and limits efforts to control the flow of information coming from a court.[257] With that said, many legal scholars suggest that both the prosecution and criminal defense attorneys should limit their

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[249] Maute, *supra* note 214, at 1757.
[250] Joel Achenbach, *Lawyers' Sniping Destroys Illusion of Defense Team Unity*, THE WASHINGTON POST, October 5, 1995, https://www.washingtonpost.com/archive/politics/1995/10/05/lawyers-sniping-destroys-illusion-of-defense-team-unity/a19cd578-3fa5-4077-9f51-9d352634f1c2/.
[251] *Id*.
[252] *Id*.
[253] Eric Malnic, *The Simpson Verdicts: Shapiro Trades Criticism with Cochran and Bailey*, THE LOS ANGELES TIMES, October 4, 1995, https://www.latimes.com/archives/la-xpm-1995-10-04-mn-53182-story.html#:~:text=Shapiro%20traded%20barbs%20with%20co,never%20work%20with%20Cochran%20again.
[254] *Id*.
[255] Maute, *supra* note 214, at 1757.
[256] *Id*.
[257] *Id*. at 1756.

interactions with the media and public during an ongoing trial.[258] In high-profile criminal cases, attorneys tend to turn to the press to try and get an advantage over their adversaries.[259] However, these extrajudicial statements "can seriously jeopardize the right to a fair trial, distract attention from the matters properly at hand, and create a carnival atmosphere that undermines confidence in the legal system furthering public distrust in the legal profession."[260] For instance, before Shapiro became involved in the *People v. Simpson* litigation, he published an article, *Using the Media to Your Advantage,* teaching lawyers how to manipulate the press.[261] His essay argues that attorneys should take advantage of the press in any way possible to further their client's interests.[262]

Simpson's defense team wholeheartedly adopted Shapiro's philosophy of taking advantage of the press through manipulation by extrajudicial statements.[263] From the onset, Simpson's attorneys publicly floated the idea that Los Angeles police detective Mark Fuhrman was a racist who planted evidence to implicate Simpson in the murders of Nicole Simpson and Ronald Goldman.[264] The former pro football player's "Dream Team" went so far as to cast doubt on the trial procedures and safeguards themselves.[265] Shapiro exclaimed to the press that the prosecution participated in: "an insidious effort to try to get black jurors removed for cause because they [were] black, because they [had] black heroes, and because O.J. Simpson [was] one of them."[266] The prosecution responded in kind, making their own prejudicial statements to the media.[267] For example, the prosecution claimed Simpson's defense team was trying to make the case about race

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[258] *Id.*
[259] *Id.*
[260] *Id.*
[261] Kevin Cole & Fred C. Zacharias, *The Agony of Victory and the Ethics of Lawyer Speech*, 69 S. CAL. L. REV. 1627, 1627 (1996).
[262] *Id.*
[263] *Id.* at 1630-34.
[264] *Id.* at 1630-31.
[265] *Id.*
[266] *Id.* at 1633.
[267] *Id.*

in "just the latest in a series of efforts to try to manipulate public opinion."[268] The attorneys litigated two trials simultaneously, one in the courtroom for the jurors and one in the media for the public.

California had not adopted Rule 3.6 of the A.B.A. Model Rules of Professional Conduct, which warns lawyers not to make extrajudicial statements that a reasonable person would expect to prejudice the preceding.[269] The Golden State opted to leave the issue of attorney speech to the discretion of trial judges like Judge Ito, the trial judge presiding over Simpson's case. [270] Yet, scholars criticize Ito for his lack of control over the attorneys and their comments to the press.[271] Despite threatening the prosecution and defense with a gag order, Ito opted not to issue one to the media's delight.[272] Ito's idleness allowed both the prosecution and defense to make whatever public statements they saw fit, only held back by their perceptions of public opinion and the possible threat of sanctions if they went too far.[273] As a direct result of the Simpson case and the failings of Ito to effectively control the attorneys, California adopted a rule of professional conduct similar to Rule 3.6.[274]

Due to spectacles like O.J. Simpson's trial, legal scholars suggest that lawyers should say as little as possible to the media before and during a high-profile case to maintain a professional atmosphere.[275] As the legal profession regulates itself, both the prosecution and defense should take it upon themselves to avoid making prejudicial extrajudicial statements despite their First Amendment right to do so.[276] Every extrajudicial statement made to the press during a high-profile

[268] *Id.*
[269] *Id.* at 1639.
[270] *Id.*
[271] *Id.*
[272] *Id.*
[273] *Id.*
[274] *Id.* at 1641.
[275] Maute, *supra* note 214, at 1758.
[276] *Id.*

criminal case adds to the carnival atmosphere and interferes with a criminal defendant's sacred right to a fair trial.[277]

IV. CONTROLLING PRETRIAL PUBLICITY

In the United States and England, there is a debate over whether jurors can be impartial when faced with the tidal wave of media coverage that comes along with a high-profile criminal defendant's trial.[278] It is quite an arduous task to ask a juror in a criminal case that invokes intense public interest to put aside their biases.[279] The task becomes more onerous when the judge asks the jurors to ignore everything they may have heard about the case in the news and decide the facts solely on the evidence presented at trial.[280] In the United States, the legal community believes that courts can uphold the Sixth Amendment's right to a fair trial without sacrificing the fundamental rights of the First Amendment.[281] Therefore, American judges utilize a handful of remedies to combat pretrial publicity that do not involve censoring free speech.[282] However, in England, they take the opposite approach and limit freedoms of expression to ensure high-profile criminal defendants receive a fair trial.[283] This section will discuss the British and American approaches to protecting defendants' rights in high-profile criminal cases noting the numerous flaws in both and ultimately finding the American remedies preferable to censorship.

A. British Approach

The United States and England face similar difficulties in protecting criminal defendants' rights from the dangers of pretrial publicity.[284] These two common-law juggernauts share the same

[277] *Id*.
[278] Meringolo, *supra* note 2, at 997.
[279] *Id*.
[280] *Id*.
[281] *Id*.
[282] *Id*.
[283] Brandwood, *supra* note 191, at 1412.
[284] *Id*.

goal of guaranteeing fair trials.[285] However, they utilize different approaches.[286] English jurisprudence relies on the common law doctrine of contempt of court to regulate the mass media.[287] The British, understanding the potential dangers that come along with the United States' seemingly unlimited First Amendment guarantees, impose restrictions on their press to control the media's coverage of criminal trials.[288] People in Great Britain "find American media coverage of criminal trials excessive, and American laws permitting widespread publicity surrounding criminal trials troubling."[289]

Hollywoodesque trials, like O.J. Simpson's murder trial, do not happen in England due to stricter media restrictions.[290] In England, "[c]ertain information, especially reports of confessions made by criminal defendants and details of defendants' prior convictions, is considered inherently prejudicial."[291] While American jurisprudence focuses on controlling the jury, the British have chosen to limit the rights of the press in covering criminal trials.[292] As a result, "American-style jury controls are considered unnecessary in England. There is no voir dire of prospective jurors, juries are rarely sequestered, and changes of venue are practically nonexistent." [293] Americans would likely reject England's restrictions on the media because of their passionate devotion to the First Amendment.[294]

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[285] *Id.*
[286] *Id.* at 1431-1432.
[287] *Id.* at 1432.
[288] *Id.* at 1414.
[289] *Id.* at 1430-1431.
[290] *Id.* at 1430.
[291] *Id.* at 1431.
[292] *Id.* at 1431-1432.
[293] *Id.* at 1432
[294] *Id.* at 1415.

The Queen's Courts have halted prosecutions and gone so far as to dismiss charges when newspapers detrimentally interfered with a defendant's right to a fair trial.[295] English courts have even punished newspaper editors for prejudicially interfering in criminal proceedings by making false reports.[296] For instance, in the 1949 murder trial of English serial killer John G. Haigh, commonly known as the Acid Bath Murderer, a newspaper falsely reported that Haigh had been charged with several murders and even listed names of other victims.[297] In reality, the prosecution had only charged Haigh with the murder of one woman.[298] Therefore, the Lord Chief Justice of England, Lord Goddard, denounced the tabloid paper's actions as sensational pandering and sentenced the editor to three months imprisonment, and fined his newspaper £10,000.[299] Lord Goddard concluded his opinion by warning the newspaper that if "... they should again venture to publish such matter as this, the directors themselves might find that the arm of the Court was long enough to reach them and to deal with them individually."[300] Americans may find the British approach draconian, but it nonetheless minimizes the spread of misinformation and centralizes the focus on the trial at hand.[301]

B. American Approach

Although the Sixth Amendment of the United States Constitution guarantees the right to a trial by an impartial jury, the internet makes that increasingly difficult.[302] With the growth of the internet, it seems to be quite tricky, if not impossible, to have a jury that limits itself entirely to the

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[295] *Id.* at 1431.
[296] John Scripp, *Controlling Prejudicial Publicity by the Contempt Power: The British Practice and Its Prospect in American Law*, 42 NOTRE DAME L. REV. 957, 959-60 (1967).
[297] *Id.*
[298] *Id.*
[299] *Id.*
[300] *Rex v. Bolam*, 93 SOL. J. 220 (1949). (An account of the English case appears in Justice Frankfurter's opinion concerning the denial of certiorari in *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 930-32 (1950)).
[301] Scripp, *supra* note 296, at 960.
[302] J. Brad Reich, *Inexorable Intertwinement: The Internet and The American Jury System*, 51 IDAHO L. REV. 389, 407 (2015).

testimony heard at trial.[303] To combat pretrial publicity, American judges use a variety of remedies that do not censor free speech.[304] Notably, American jurisprudence relies on the voir dire process to vet potentially biased jurors.[305] Voir dire is the "preliminary examination of prospective jurors to determine their qualifications and suitability to serve on a jury, in order to ensure the selection of a fair and impartial jury."[306] American courts heavily rely on the voir dire process to impanel an impartial jury free from bias.[307] For American judges, the voir dire process is their first line of defense against bias.[308] For example, legal scholars credit the trial judge's extensive use of the voir dire process, coupled with sequestration in Charles Manson's murder and conspiracy trial, as a key factor in protecting Manson's right to a fair trial in the face of a media frenzy.[309]

Unfortunately, many American judges refuse to recognize the true threat that media and publicity can have on a criminal trial and doubt the severity of which pretrial publicity influences jurors.[310] For instance, voir dire in high-profile cases incorrectly assumes potential jurors know nothing about well-known defendants.[311] Studies also indicate that jurors are not always honest when answering questions regarding their biases.[312] Exclusionary evidence rules are worthless when jurors have already seen the evidence via the media.[313] One can even view the voir dire process itself as prejudicial, "since the defense is forced to ask questions that highlight the very

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[303] *Id*.
[304] Meringolo, *supra* note 2, at 997.
[305] Reich, *supra* note 302, at 396.
[306] *Id*.
[307] *Id*.
[308] Meringolo, *supra* note 2, at 997.
[309] Matt Henneman, *Public Interest v. Private Justice*, 21 AM. J. CRIM. L. 335, 336 (1994).
[310] 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).
[311] Laurie Nicole Robinson, *Professional Athletes-Held to a Higher Standard and Above the Law: A Comment on High-Profile Criminal Defendants and the Need for States to Establish High-Profile Courts*, 73 IND. L.J. 1313, 1334 (1998).
[312] *Id*.
[313] Brandwood, *supra* note 191, at 1445.

issues it wants to suppress."[314] Still, when taken seriously, the process results in the dismissal of biased jurors more often than not.[315]

In addition, voir dire can be very expensive for taxpayers in high-profile cases.[316] Their bill only increases when courts sequester juries.[317] The longer the case drags on, the more expensive it is for taxpayers.[318] Notably, the trial judge sequestered the jury in the O.J. Simpson murder case.[319] The jurors' expensive sequestration contributed to the trial's $9,000,000 price tag.[320] Sequestration is literally "the physical isolation of a trial jury from the public."[321] Either party or the court may move to sequester the jury.[322] The Supreme Court has even endorsed sequestration as a potential cure for the effects of prejudicial pretrial publicity.[323] For instance, in *Sheppard v. Maxwell*, the Supreme Court criticized the trial judge for not sequestering the jury from the media's intrusive coverage of the case.[324] Sequestration relies on judicial orders and physical restrictions to isolate the jury to prevent the media and public from prejudicially influencing their thought process.[325] Despite its effectiveness, scholars argue that the internet negates the strength of sequestration.[326]

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[314] Christina A. Studebaker & Steven D. Penrod, *Pretrial Publicity: The Media, the Law and Common Sense*, 3 PSYCHOL. PUB. POL'Y & L. 428, 442 (1997).
[315] Meringolo, *supra* note 2, at 997.
[316] Norbert L. Kerr, *On the Effectiveness of Voir Dire in Criminal Cases with Prejudicial Pretrial Publicity: An Empirical Study*, 40 AM. U. L. REV. 665, 668–69 (1991).
[317] Robinson, *supra* note 311, at 1337.
[318] *Id.*
[319] *Id.*
[320] *Id.*
[321] Reich, *supra* note 302, at 407.
[322] *Id.*
[323] Charles H. Whitebread & Darrell W. Contreras, *Perspectives On The Implications For The Criminal Justice System: Free Press V. Fair Trial: Protecting The Criminal Defendant's Rights In A Highly Publicized Trial By Applying The Sheppard-Mu'minremedy*, 69 S. Cal. L. Rev. 1587, 1604 (1996).
[324] *Id.*
[325] Reich, *supra* note 302, at 412.
[326] *Id.*

However, there are other methods available to judges to alleviate juror bias.[327] Under Rule 21(a) of the Federal Rules of Criminal Procedure, a defendant can motion the court to transfer the venue of the proceeding if there is such prejudice that prohibits a defendant from receiving a fair and impartial trial.[328] Courts will not change venue simply because a juror has been exposed to pretrial publicity or formed a preliminary opinion regarding the case.[329] The proper inquiry is "...whether a juror has been exposed to pretrial publicity and, if so, whether he or she can set aside any impression or opinion resulting from that exposure and render a verdict based solely on the evidence presented at trial."[330] A prominent example of a change of venue case is Timothy McVeigh's trial for the Oklahoma City bombing in 1995.[331] The judge granted McVeigh's motion to change the venue out of Oklahoma City, where the bombing occurred, to the District of Colorado.[332] It would have been highly unlikely for McVeigh to have had a fair trial in Oklahoma City, after the attack on the Alfred P. Murrah Federal Building resulted in 168 deaths and hundreds of injuries.[333]

Moreover, a change of venue would be futile in cases where the defendant's notoriety has spread well beyond the local community.[334] The internet renders change of venue motions all but pointless in cases that make national or international headlines because individuals in all venues are only one click away from harmful pretrial publicity.[335] For example, Kyle Rittenhouse's defense team did not seek a change of venue because they knew that potential jurors all over the

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[327] Meringolo, *supra* note 2, at 997.
[328] FED. R. CRIM. P. 21(A) ("Upon the defendant's motion, the court must transfer the proceeding against that defendant to another district if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there.").
[329] Meringolo, *supra* note 2, at 998.
[330] *United States v. Brown*, 540 F.2d 364, 378 (8th Cir. 1976).
[331] Meringolo, *supra* note 2, at 998.
[332] *United States v. McVeigh*, 918 F. Supp. 1467, 1474–75 (W.D. Okla. 1996).
[333] *Id.* at 1474.
[334] Meringolo, *supra* note 2, at 998.
[335] *Id.*

country were already familiar with the case.[336] The case gained national notoriety when videos of Rittenhouse shooting multiple victims went viral on social media.[337] Both mainstream and social media provided the case "…a constant stream of intrigue, outrage and propaganda."[338] Nonetheless, the change of venue motion is still a valuable tool to combat pretrial publicity when a defendant's case has attracted the attention of local media, and the case's notoriety has not spread beyond the initial community.[339]

Furthermore, at the request of either party, a judge may issue a continuance or postponement to delay the trial and ward off the effects of pretrial publicity.[340] A postponement's purpose is to delay the trial long enough for the media storm to subside.[341] A judge will only grant a continuance when the pretrial publicity makes it impossible for a defendant to have a fair and impartial jury trial.[342] In *Sheppard v. Maxwell*, the Supreme Court cited continuance as a potential remedy for prejudicial pretrial publicity.[343] However, legal scholars debate whether a continuance violates a defendant's Sixth Amendment right to a speedy trial.[344] Nevertheless, a continuance allows high-profile criminal defendants an opportunity to have a trial in which the media's attention has subsided, allowing the high-profile defendant to have a better chance of receiving a fair trial.[345]

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[336] Bruce Vielmetti, *Jury seated on first day of Kyle Rittenhouse trial in Kenosha, Wisconsin: What to know about the case*, USA TODAY, November 1, 2021, https://www.usatoday.com/story/news/nation/2021/11/01/kyle-rittenhouse-trial-what-we-know/6229065001/
[337] *Id*.
[338] *Id*.
[339] Meringolo, *supra* note 2, at 998.
[340] *Id*.
[341] *Id*.
[342] *Id*.
[343] Whitebread & Contreras, *supra* note 323, at 1605.
[344] *Id*. at 1606.
[345] *Id*.

V. CONCLUSION

Undeniably, there is a constitutional clash between the First and Sixth Amendments regarding high-profile criminal cases. Individually the First and Sixth Amendments strengthen American liberties. However, in practice, the two Amendments weaken the critical rights of a high-profile criminal defendant. Since the founding of the United States of America, this conflict has been raging to the vexation of criminal defense attorneys in high-profile cases. The seemingly omnipotent First Amendment overpowers the right to a fair trial provided by the Sixth. Technological advancements in the early twenty-first century have only exacerbated the issue, making it even more difficult for a high-profile criminal defendant to utilize his Sixth Amendment rights. Other common-law nations censor their press and public to remedy this constitutional issue. The American people would never tolerate such censorship. Although the American system is not perfect, this paper finds American jury controls preferable to restricting freedom of speech and the press. Therefore, American jury controls, coupled with actively discouraging extrajudicial statements to promote a professional environment, give high-profile criminal defendants their best chance at a fair trial in today's modern world.