NOTES

YOU SAY "FAIR TRIAL" AND I SAY "FREE PRESS": BRITISH AND AMERICAN APPROACHES TO PROTECTING DEFENDANTS' RIGHTS IN HIGH PROFILE TRIALS

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The United States and Britain share a deep commitment to guaranteeing fair trials, but Joanne Brandwood argues in this Note that neither country effectively protects the rights of criminal defendants from the dangers posed by prejudicial publicity. She maintains that in Britain, because of loopholes in the law and pressures from modern media technology, harsh restrictions on the press unacceptably impinge on freedom of expression without adequately protecting defendants' rights. In the United States, courts have powerful tools with which to guarantee fair trials without sacrificing First Amendment values; but trial courts often fail to deploy these protective measures, and appellate courts are extremely reluctant to challenge trial judges' assessments of prejudice. Brandwood concludes that the most effective strategy for reconciling the conflict between the right to a fair trial and the right to freedom of expression combines British presumptions about publicity and American jury controls with effective restrictions on extrajudicial statements made by those most likely to prejudice criminal trials: attorneys and law enforcement officials.

INTRODUCTION

When Louise Woodward, a young British au pair living in Massachusetts, was charged with murdering the baby she had been hired to care for, many in England felt that the overwhelming publicity surrounding the case made a fair trial all but impossible.[1] British critics decried the creation of a "separate, parallel public trial with material

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[1] See Sarah Lyall, Au Pair's Hometown Celebrates Release, N.Y. Times, Nov. 11, 1997, at A22 (noting that Britons felt that vast pretrial publicity "irreparably prejudiced the jury").

which would have been considered grossly prejudicial in Britain,"[2] and Ms. Woodward complained that prosecutors had used the media to convict her before the real trial began.[3] After Ms. Woodward was convicted of second degree murder, the British media reflected the popular shock in Ms. Woodward's homeland, lashing out at the American criminal justice system.[4] Ms. Woodward's trial reinforced the British public's view that American courts often fail to protect the rights of criminal defendants against prejudicial media influence.[5] While Ms. Woodward was eventually set free as the result of an extraordinary intervention by the trial judge, to English critics the fact remains that a seemingly innocent girl was convicted after a trial which, by English standards, was irreparably tainted by unrestricted publicity.[6] As Jonathan Caplan, a leading English criminal lawyer, remarked: "'The more you see of these trials, they show you what a shambles the American criminal justice system is.'"[7]

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2 Kim Sengupta, Nanny Trial, Sharp Contrast in US Justice Style, Independent (London), Nov. 1, 1997, at 5, available in Lexis, News Library, Indpnt file. The British were particularly outraged by the emotional television interview with the victim's parents conducted during deliberations. One lawyer commented: "Louise Woodward's fate should be decided by 12 people influenced only by the evidence they heard in court. It is grotesque to think it could be decided by 30 minutes of prime time television." Martin Cruddace, Mirror Lawyer's Verdict: Mirror Lawyer Martin Cruddace Comments on Louise Woodward Guilty Verdict, Mirror (London), Oct. 31, 1997, at 5, available in Lexis, News Library, Mirror file.

3 See Sarah Lyall, Au Pair Tells BBC She Was U.S. Scapegoat, N.Y. Times, June 23, 1998, at A15 (recounting television interview Woodward gave after her return home).

4 See Warren Hoge, Never in England, Britons Say of Verdict, N.Y. Times, Nov. 1, 1997, at A10 (reporting headlines in British tabloids such as "Louise's Torture" and "Louise Was Treated Just Like a Slave"); Lyall, supra note 1, at A22 (noting that, in England, "it was not just Louise Woodward who was on trial but the American criminal justice system").

5 Media coverage of the U.S. legal system is dramatically different from that in Britain. The contrasts were especially evident during the O.J. Simpson murder trial. Simpson was accused of murdering his former wife, Nicole Brown Simpson, and her friend, Ron Goldman, in what was probably the most publicized murder trial in American history. As one commentator noted, "most [Britons] were appalled by the media circus that surrounded [the O.J. Simpson murder trial]." Ray Moseley, Free Press vs. Fair Trial, Chi. Trib., Oct. 11, 1995, § 1, at 4; see also John A. Walton, From O.J. to Tim McVeigh and Beyond: The Supreme Court's Totality of Circumstances Test as Ringmaster in the Expanding Media Circus, 75 Denv. U. L. Rev. 549, 551 (1998) (noting that extensive publicity accompanied all aspects of Simpson's trial); Hoge, supra note 4, at A10 (contrasting sober British justice with judicial "carnivals" possible in United States).

6 See Lyall, supra note 1, at A22 ("To many Britons, there has never been any doubt that Louise Woodward . . . is innocent."). Branding Ms. Woodward's conviction a "miscarriage of justice," Commonwealth v. Woodward, No. Crim. 97-0433, 1997 WL 694119, at *7 (Mass. Super. Ct. Nov. 10, 1997), Judge Hiller B. Zobel reduced the conviction to involuntary manslaughter. See Carey Goldberg, In a Startling Turnabout, Judge Sets Au Pair Free, N.Y. Times, Nov. 11, 1997, at A1 (reporting Judge Zobel's highly unusual ruling).

7 Hoge, supra note 4, at A10 (referring to Woodward trial). Another British lawyer, commenting after the Simpson trial, maintained that "most thoughtful Americans" would

The British approach to protecting defendants' rights in high-profile criminal trials, however, is also problematic. Recognizing the potential danger posed by unrestricted publicity, the British impose harsh restrictions on the press that limit freedom of expression and that ultimately fail to control the flow of information surrounding criminal trials.[8] This Note examines the conflict between the right to a fair trial and the freedom of expression in both America and Britain,[9] and concludes that American law endorses strategies that can safeguard both fair trial rights and freedom of the press.[10] Unfortunately, these strategies are both underutilized and inconsistently applied.[11] This Note argues that the best approach to reconciling this conflict would combine British presumptions regarding the danger posed by unrestricted publicity, American methods of controlling juries, and meaningful restrictions, not on the press, but on extrajudicial statements made by those most likely to prejudice criminal trials: attorneys and law enforcement officials. Part I examines whether the United States criminal justice system fails to protect the rights of criminal defendants whose trials are endangered by unrestricted publicity. Part II evaluates the effectiveness of the English approach to ensuring fair trials in high-profile cases, an approach that is currently under pressure from both the European Court of Human Rights[12] and the global nature of the modern media. Part III argues that both the English and American legal systems need to adapt in order to ensure that

agree that "America's legal system is losing all its credibility." Keith Evans, The Publicity Is the Problem, 145 New L.J. 992, 992 (1995) (internal quotation marks omitted); see also id. at 1004 (noting further that "constitutional right [to free speech] allied with an untrammeled free market economy is bringing other constitutional rights—trial by jury, due process *et al*—into disrepute and, consequently, into peril"). The United States' treatment of potential conflicts between fair trial rights and the freedom of expression differs from that of other western democracies. See David C. Kohler & Rupert Lewin-Smith, The Coverage of O.J. Simpson—Only in America?, Comm. Law., Spring 1995, at 3, 3 ("The American commitment to largely unfettered press coverage is quite unusual from an international perspective . . . ."); see also Neil Vidmar, Pretrial Prejudice in Canada: A Comparative Perspective on the Criminal Jury, 79 Judicature 249, 252-53 (1996) (noting how America's approach differs from Canada's); Moseley, supra note 5, § 1, at 4 ("American law gives pre-eminence to 1st Amendment rights to free speech, while British law puts more emphasis on a defendant's rights to a fair trial.").

8 See infra Part II.

9 As one commentator noted, it is useful when seeking reform to compare U.S. and foreign legal systems in order to "attempt to gain some perspective on our trial system." William T. Pizzi, Discovering Who We Are: An English Perspective on the Simpson Trial, 67 U. Colo. L. Rev. 1027, 1028 (1996).

10 See Sheppard v. Maxwell, 384 U.S. 333, 358-63 (1966) (outlining strategies for protecting defendants' rights without impinging on freedom of press).

11 See infra Part I.B.

12 See infra Part II.B.2.

a criminal defendant's right to a fair trial is not sacrificed on the altar of free expression.

I
DO AMERICAN COURTS FAIL TO PROTECT CRIMINAL DEFENDANTS' FAIR TRIAL RIGHTS?

A. American Reluctance to Recognize the Danger of Prejudicial Publicity

Any alleged failure of the American legal system to ensure fair trials stands in stark contrast to its rhetoric. Fair trial guarantees are enshrined in the United States Constitution,[13] and the Supreme Court has referred to the right to a fair trial as the "most fundamental of all freedoms."[14] Nevertheless, critics charge that the United States neglects its commitment to fair trial values out of deference to First Amendment principles of freedom of speech and freedom of the press.[15]

Other Western democracies guarantee freedom of speech, but with reservations, reflecting their determination that expressive rights must, at times, yield to competing democratic values.[16] The United

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[13] See U.S. Const. amend. V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law . . . ."); U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."); U.S. Const. amend. XIV ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .").

[14] Estes v. Texas, 381 U.S. 532, 540 (1965); see also Irvin v. Dowd, 366 U.S. 717, 721 (1961) ("England, from whom the Western World has largely taken its concepts of individual liberty and of the dignity and worth of every man, has bequeathed to us safeguards for their preservation, the most priceless of which is that of trial by jury.").

[15] The First Amendment to the United States Constitution states that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. Const. amend. I. Nevertheless, as one American commentator noted, "[p]roblems arising from how lawyers and the criminal justice system handle high profile criminal cases . . . reveal tensions, *sub rosa*, in our democracy . . . which must be addressed if we are to avoid further erosion of public trust in our criminal justice system." H. Patrick Furman, Publicity in High Profile Criminal Cases, 10 St. Thomas L. Rev. 507, 508 (1998). Furman notes further that "[w]e worry that publicity surrounding high profile criminal cases is tainting the jury pool which may eventually try the case, giving false impressions of the criminal justice system to the general public, and sometimes impacting the day-to-day work of the attorneys involved in the litigation." Id. at 524.

[16] For example, "Canada has chosen to limit the freedom of the press when doing so is necessary to protect individual freedoms such as the right of an individual to a fair and unprejudiced trial." Tammy Joe Evans, Fair Trial vs. Free Speech: Canadian Publication Bans Versus the United States Media, 2 Sw. U. J. L. & Trade Am. 203, 225 (1995). In Sweden, "the news media voluntarily refrain from publishing names of defendants until they have been convicted." Stephen J. Krause, Punishing the Press: Using Contempt of Court to Secure the Right to a Fair Trial, 76 B.U. L. Rev. 537, 551 n.118 (1996). In Austra-

States Constitution, in contrast, does not even acknowledge the potential for friction,[17] and, without a clear rationale with which to resolve inevitable conflicts, U.S. trial courts are forced to juggle rather than balance competing rights.[18]

In fact, the most striking aspect of the American approach to the fair trial/free press debate may not be American deference to First Amendment values, but rather American skepticism regarding the potential prejudicial effect of publicity.[19] Studies show that, despite strong social science evidence to the contrary,[20] many American judges doubt that publicity can prejudice criminal trials.[21] In the infamous nineteenth century treason trial of Aaron Burr, Chief Justice Marshall noted that the defendant's rights are not threatened if a juror possesses "light impressions which may fairly be supposed to yield to the testimony."[22] The difficult task has been to determine exactly when a juror's impressions are "light" enough to "yield to the testimony," ensuring that guilt is adjudged solely on what transpires in

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lia, fair trials generally have primacy over claims by the media, and "the media . . . may be subject to penal sanctions for publishing material which threatens to prejudice the fairness of a current or forthcoming criminal trial." Michael Chesterman, O.J. and the Dingo: How Media Publicity Relating to Criminal Cases Tried by Jury Is Dealt With in Australia and America, 45 Am. J. Comp. L. 109, 116 (1997).

17 See Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 562 (1976) ("[T]he authors of these guarantees, fully aware of the potential conflicts between them, were unwilling or unable to resolve the issue by assigning to one priority over the other . . . .").

18 See Walton, supra note 5, at 555 ("[T]he Supreme Court has declined to take a position regarding conflicting free press and fair trial rights, instead wavering between the two, and championing whichever is threatened at a given time.").

19 Of course, a strong predisposition in favor of a free press may enhance this skepticism.

20 See Christina A. Studebaker & Steven D. Penrod, Pretrial Publicity: The Media, the Law and Common Sense, 3 Psychol. Pub. Pol'y & L. 428, 433 (1997) (describing studies indicating that pretrial publicity does prejudice juries). It has been observed that "judicial common sense often reflects a misappraisal or misunderstanding by the courts of the capabilities and weaknesses of human inference and decision making. The courts' assumptions and expectations about jurors' decision-making processes and ability to disregard pretrial publicity are not consistent with social science findings concerning these matters." Id. at 455.

21 See 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) (detailing study indicating that judges simply do not view prejudicial publicity as major problem).

22 United States v. Burr, 25 F. Cas. 49, 51 (C.C.D. Va. 1807) (No. 14,692g) ("[T]hose strong and deep impressions which will close the mind against the testimony that may be offered in opposition to them, which will combat that testimony, and resist its force, do constitute a sufficient objection to [a juror]."); see also Irvin v. Dowd, 366 U.S. 717, 722 (1961) ("[A juror's] verdict must be based upon the evidence developed at the trial. . . . It is not required, however, that the jurors be totally ignorant of the facts and issues involved.").

open court.[23] Unfortunately, trial judges may underrate the potential effects of pretrial publicity,[24] and appellate courts often do not invalidate convictions without actual proof that publicity prejudiced the jury,[25] proof that is often difficult, if not impossible, to obtain.[26] English courts, in contrast, presume that publicity will prejudice a jury and readily stay criminal proceedings when a defendant's fair trial rights are threatened.[27]

Social science research strongly suggests that pretrial publicity does indeed prejudice juries. Several studies have established that pretrial publicity can "influence evaluations of the defendant's likability, sympathy for the defendant, perceptions of the defendant as a typical criminal, pretrial judgments of the defendant's guilt, and final

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23 See Patterson v. Colorado, 205 U.S. 454, 462 (1907) ("The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."); cf. Leslie Renee Berger, Can the First and Sixth Amendments Co-Exist in a Media Saturated Society?, 15 N.Y.L. Sch. J. Hum. Rts. 141, 146 (1998) ("[T]he courts have had great difficulty determining what exactly constitutes a biased jury.").

24 See Joseph R. Mariniello, Note, The Death Penalty and Pre-Trial Publicity: Are Today's Attempts at Guaranteeing a Fair Trial Adequate?, 8 Notre Dame J.L. Ethics & Pub Pol'y 371, 374 (1994) (noting that judges often fail to take effective steps to counteract potential prejudice). Often courts do not have enough information to assess the impact of pretrial publicity. See Walter Wilcox, The Press, the Jury, and the Behavioral Sciences, in Free Press and Fair Trial 49, 50-51 (Fred S. Siebert ed., 1970) ("Empirical evidence bearing directly on the effects of pretrial publicity upon the jury verdicts is sparse .... The ultimate test—whether the publicity actually did create prejudice—was beyond the scope of the facts available to the court ....").

25 See Estes v. Texas, 381 U.S. 532, 542 (1965) ("[I]n most cases involving claims of due process deprivations [based on publicity] we require a showing of *identifiable prejudice* to the accused." (emphasis added)); see also Patton v. Yount, 467 U.S. 1025, 1029-30, 1040 (1984) (finding that district court did not err in refusing change of venue since no actual prejudice was proven, despite fact that "eight of fourteen jurors and alternates actually seated admitted that at some time they had formed an opinion as to [defendant] Yount's guilt"); Mayola v. Alabama, 623 F.2d 992, 1002 (5th Cir. 1980) (holding that, despite highly prejudicial publicity, including references to confessions and defendant's prior convictions, reversal was not required "absent some proof that such . . . publicity actually prejudiced [defendant's] right to a fair trial").

26 For example, the Supreme Court of Ohio, when considering an appeal from a murder conviction on the basis of prejudicial publicity, noted the following about the trial: "Murder and 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 perhaps unparalleled in recent annals ... [creating an] atmosphere of a 'Roman holiday' for the news media ...." Ohio v. Sheppard, 135 N.E.2d 340, 342 (Ohio 1956). Nevertheless, the court held that it did not "appear[ ] affirmatively from the record that the defendant was prejudiced thereby," id. at 345, and refused to overturn the conviction. The Supreme Court ultimately reversed. See Sheppard v. Maxwell, 384 U.S. 333 (1966); see also infra notes 61-68 and accompanying text.

27 See, e.g., infra note 121 and accompanying text.

verdicts."[28] Furthermore, individuals with greater knowledge about a case tend to favor the prosecution.[29] Not all publicity is equally harmful, however.[30] While inaccurate facts or gruesome details about a crime initially may prejudice jurors against the defendant, evidence presented at trial may dispel that prejudice.[31] On the other hand, revelations of prior convictions, recanted confessions, or other evidence inadmissible at trial potentially create a much more persistent bias in the minds of prospective jurors.[32] Indeed, knowledge of a defendant's prior criminal record has been shown to be even more potentially prejudicial than racial identification.[33]

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[28] Studebaker & Penrod, supra note 20, at 433 (citing 11 studies conducted between 1966 and 1994). But see Steven Helle, Publicity Does Not Equal Prejudice, 85 Ill. B.J. 16, 18 n.23 (1997) (challenging social science research on prejudicial publicity because of its artificial nature); Eileen A. Minnefor, Looking for Fair Trials in the Information Age: The Need for More Stringent Gag Orders Against Trial Participants, 30 U.S.F. L. Rev. 95, 112 (1995) ("There is currently no effective way to measure the impact of pervasive publicity given our inability to recreate the actual trial experience with and without it.").

[29] See Studebaker & Penrod, supra note 20, at 434 (noting that researchers concluded "that pretrial knowledge was the best predictor of prejudice"). One study, in which subjects were given mock newspaper accounts of a crime with differing degrees of favorable and unfavorable information, provided strong evidence that "potential jurors may be influenced by the kinds of facts that are frequently found in pretrial publicity (the fact of arrest, previous convictions, authoritative assertions as to guilt, etc.) and that the more such information is given the more likely it will lead to belief in guilt." Wilcox, supra note 24, at 68-69.

[30] See Chesterman, supra note 16, at 140-41 (noting that confessions and prior convictions for similar or especially heinous crimes are particularly prejudicial to criminal defendants); Norbert L. Kerr et al., On the Effectiveness of Voir Dire in Criminal Cases with Prejudicial Pretrial Publicity: An Empirical Study, 40 Am. U. L. Rev. 665, 695 (1991) ("[E]xposure to certain types of highly prejudicial pretrial publicity . . . did bias mock jury verdicts.").

[31] Empirical studies on the ability of trial evidence to attenuate the impact of pretrial publicity have yielded conflicting results. See Studebaker & Penrod, supra note 20, at 443-44 (noting results of two studies, one showing that trial evidence may offset prejudice and one showing that trial evidence "did not significantly diminish the impact of pretrial publicity"). The recent acquittal of four police officers in New York City for the shooting death of Amadou Diallo is an example of a case where trial evidence successfully may have counteracted potentially prejudicial pretrial publicity. Despite overwhelming publicity surrounding the case, there was "little direct evidence, and the four officers were consistent in their testimony and credible in their demeanor." Stephen Gillers, A Weak Case, but a Brave Prosecution, N.Y. Times, Mar. 1, 2000, at A23.

[32] See Wilcox, supra note 24, at 70 (stating that "confession loomed as the most potent prejudicial element, particularly in combination with criminal record"); see also Studebaker & Penrod, supra note 20, at 436 (noting that one study showed that "[m]ore than 72% of jurors exposed to . . . stories containing inadmissible information voted to convict, whereas less than 44% of the jurors not exposed to this information voted to convict").

[33] See Studebaker & Penrod, supra note 20, at 436 (noting that greatest prejudicial impact is found when potential jurors are exposed to combination of defendant's prior criminal record, confession, and lie detector results).

Nevertheless, many in America remain skeptical that publicity can impinge on fair trial rights,[34] a skepticism bolstered by the fact that extensive pretrial publicity does not always lead to criminal convictions.[35] For example, John Mitchell,[36] Sergeant Stacey Koon,[37] William Kennedy Smith,[38] O.J. Simpson,[39] and the four New York City policemen who shot Amadou Diallo[40] were all acquitted of the charges against them, notwithstanding the widespread media attention that preceded and accompanied their criminal trials. However, there are several reasons why high-profile acquittals do not justify skepticism regarding the potentially prejudicial effect of pretrial publicity. First, individual defendants may be acquitted despite adverse publicity if the cases against them are weak or badly presented.[41] Changes of venue, when granted, successfully may combat prejudice.[42] Further-

[34] See, e.g., Bruce W. Sanford, No Contest, in Covering the Courts: Free Press, Fair Trials & Journalistic Performance 3, 3 (Robert Giles & Robert W. Snyder eds., 1999) (describing any purported clash between "two Anglo-American ideals" as "trumped-up 'conflict'").

[35] See Helle, supra note 28, at 18-19 (citing examples of notorious criminal defendants who were acquitted despite extensive publicity).

[36] See id. at 18 ("Former Attorney General John Mitchell insisted publicity prejudiced his case, a spin-off of the Watergate debacle—until he and Maurice Stans were acquitted.").

[37] See id. at 19 (noting that protective measures, including change of venue, enabled police officers accused of beating Rodney King to prevail at trial despite repeated broadcasting of videotape of beating).

[38] Smith, nephew of Senator Edward Kennedy and the late President John F. Kennedy, was accused of raping an acquaintance outside his family's home in Florida. See Minnefor, supra note 28, at 99 n.13; see also Alberto Bernabe-Riefkohl, Prior Restraints on the Media and the Right to a Fair Trial: A Proposal for a New Standard, 84 Ky. L.J. 259, 291 (1995-96) (noting that Smith was acquitted despite fact that his trial was nationally televised).

[39] See supra note 5.

[40] See Gillers, supra note 31, at A23.

[41] See Studebaker & Penrod, supra note 20, at 432 (some high-profile defendants may be acquitted because judges have taken protective measures, while others may be acquitted because "the evidence against defendants—or the prosecution presentation of that evidence—was poor"); Goldberg, supra note 6, at A1 (arguing that "money [for a good defense] changes everything").

[42] The change of venue in the Rodney King and Amadou Diallo cases sparked heated opposition. See Marvin Zalman & Maurisa Gates, Rethinking Venue in Light of the "Rodney King" Case: An Interest Analysis, 41 Clev. St. L. Rev. 215, 271, 274 (1993) (arguing that other values besides impartiality sometimes must be considered by courts making venue decisions, and suggesting that trials should be moved, if at all, to venue that matches racial makeup of original venue); Amy Waldman, Protest and Justice: Diallo Trial Move at Issue, N.Y. Times, Dec. 20, 1999, at B1 (noting that protests erupted when Appellate Division of New York Supreme Court moved trial of four white police officers accused of shooting unarmed black man, Amadou Diallo, from Bronx to Albany in response to widespread publicity and public demonstrations, and that widely different racial makeup of different venues was one key issue). Despite these legitimate concerns, a change of venue remains a powerful weapon in ensuring fair trials. See Mariniello, supra note 24, at 377

more, when assessing the impact of pretrial publicity, it is important to consider not only the amount, but also the nature of the publicity involved. Publication of recanted confessions, prior criminal records, failed lie-detector tests, or other key evidence inadmissible at trial can be far more damaging than other forms of publicity.[43]

The press's role as "handmaiden of effective judicial administration"[44] further complicates its relationship with the legal system, since a vigorous press can be both an ally and an enemy of fair trial guarantees. The media help to ensure fair trials, revealing law enforcement excesses and providing the most effective constraint on potential abuses of judicial power.[45] Some argue that, because the press acts as a judicial watchdog, there is simply no conflict between freedom of the press and fair trial rights.[46] On the other hand, Justice Brennan, while lauding the "cleansing effects of exposure and public accountability,"[47] nevertheless asserted that "[n]o one can seriously doubt . . . that uninhibited prejudicial pretrial publicity may destroy the fairness of a criminal trial."[48] Even the press, on occasion, has acknowledged

("[S]tudies show that a change in venue will, in many cases, lessen the amount of prejudice considerably.").

43 See Jerome M. Lewine, What Constitutes Prejudicial Publicity in Pending Cases?, in Selected Readings: Fair Trial—Free Press 55, 63 (Glenn R. Winters ed., 1971) ("A fair verdict is more endangered by a juror's knowledge of facts never introduced at the trial than from his knowledge of facts introduced at the trial but known to him beforehand.").

44 Sheppard v. Maxwell, 384 U.S. 333, 350 (1966) (noting further that "[t]he press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism").

45 See In re Oliver, 333 U.S. 257, 270-71 (1948) ("The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power. . . . Without publicity, all other checks are insufficient . . . ."). Indeed, one of the strongest criticisms of the British law of contempt of court is that it cripples the press, interfering with its ability to guard against the arbitrary or unjust use of government authority. See infra Part II.A.

46 See Helle, supra note 28, at 18, 21 (noting that "[t]he supposed conflict between fair trial and free press is false" and "[j]ournalism offers a view of the functioning of the legal institution with an eye . . . toward ensuring proper conduct—the watchdog role"). Helle advocates for greater publicity surrounding criminal trials, not less, and maintains that there is no danger to fair trial rights since courts have a "substantial arsenal" with which to combat potential prejudice. See id. at 18-21 (noting that arsenal includes voir dire, sequestration, changes of venue, and attorney gag orders).

47 Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 587 (1976) (Brennan, J., concurring).

48 Id. When the press compromises the impartiality of criminal juries, it undermines its own role as a guarantor of justice. See Lance R. Peterson, Note, A First Amendment—Sixth Amendment Dilemma: Manuel Noriega Pushes the American Judicial System to the Outer Limits of the First Amendment, 25 J. Marshall L. Rev. 563, 564 (1992) ("[T]he very purpose that public criminal proceedings are meant to serve is often obstructed when pretrial publicity threatens to prejudice a criminal defendant's fair trial.").

that publicity can interfere with a defendant's right to a fair trial.[49] Thus, American attitudes towards conflicts between fair trial rights and expressive freedoms reflect a deep ambivalence, encompassing both enthusiastic support for freedom of the press and wary recognition of the potential of the press to undermine Sixth Amendment values. As Justice Black observed, "free speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them."[50]

B. Inconsistent Judicial Response to Publicity

Supreme Court decisions regarding pretrial publicity clearly illustrate this ambivalence. In a series of cases in the 1960s,[51] the Court vigorously defended Sixth Amendment rights against encroachment by the press, holding that "the life or liberty of any individual in this land should not be put in jeopardy because of actions of any news media."[52] The Court also set seemingly powerful guidelines for dealing with prejudicial publicity, and urged trial judges to take strong measures to protect defendants' rights whenever there was a "reasonable likelihood" that publicity would taint a criminal trial.[53] Unfortunately, this ringing assertion has proved in practice to be regarded as little more than a mere suggestion: The Supreme Court since has granted trial courts such wide discretion in assessing potentially prejudicial publicity[54] that it has not reversed a single conviction because of prejudicial publicity in over twenty years.[55]

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[49] See, e.g., The Courts and the Press, N.Y. Times, Nov. 18, 1964, at A46 (editorial) ("No individual can receive a truly fair trial if before it is held the minds of the jury have been influenced or inflamed by one-sided, incomplete, prejudicial or inaccurate public statements.").

[50] Bridges v. California, 314 U.S. 252, 260 (1941).

[51] See Sheppard v. Maxwell, 384 U.S. 333 (1966); Estes v. Texas, 381 U.S. 532 (1965); Rideau v. Louisiana, 373 U.S. 723 (1963); Irvin v. Dowd, 366 U.S. 717 (1961); see also infra notes 60-68 and accompanying text.

[52] *Estes*, 381 U.S. at 540 (citation omitted) (adding that "the atmosphere essential to the preservation of a fair trial—the most fundamental of all freedoms—must be maintained at all costs").

[53] See *Sheppard*, 384 U.S. at 363 ("[W]here there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity.").

[54] See, e.g., Patton v. Yount, 467 U.S. 1025, 1040 (1984) (noting "presumption of correctness owed to the trial court's findings").

[55] See United States v. McVeigh, 153 F.3d 1166, 1182 (10th Cir. 1998) ("[D]espite the proliferation of the news media and its technology, the Supreme Court has not found a single case of presumed prejudice . . . since the watershed case of *Sheppard*."), cert. denied, 526 U.S. 1007 (1999).

1. U.S. Courts as Guardians of Defendants' Rights

The presence of potentially prejudicial publicity is not a recent phenomenon. Widespread publicity, including President Jefferson's public declaration of his guilt, surrounded Aaron Burr's treason trial in 1807.[56] A veritable media circus accompanied the 1935 trial of Bruno Hauptmann for the kidnapping and murder of Charles Lindbergh's son. In fact, the presence of spectators and reporters in the courtroom made the scene so chaotic that the clerk of the court was unable to poll the jurors after the verdict because he could not hear their responses.[57] In the 1960s, the Supreme Court responded to flagrant abuses by reversing convictions when pretrial publicity clearly interfered with criminal defendants' rights to fair trials[58] or when the atmosphere within the courts threatened the integrity of the judicial process.[59] As Justice Clark noted, "[t]he failure to accord an accused a fair hearing violates even the minimal standards of due process. . . . This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies."[60]

In *Sheppard v. Maxwell*,[61] the Supreme Court overturned the conviction of a respected Cleveland doctor who was accused of bludgeoning his pregnant wife to death while their seven-year-old son lay sleeping.[62] The publicity surrounding Sam Sheppard's trial was truly extraordinary: The press saturated the community with highly inflammatory, inaccurate, and inadmissible information. The Court noted that "[t]he exclusion of such evidence in court is rendered

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[56] See Furman, supra note 15, at 513 (recounting President Jefferson's statement "that the guilt of Burr was 'beyond question'"); see also United States v. Burr, 25 F. Cas. 2, 2-3 n.1 (C.C.D. Va. 1807) (No. 14,692a) (detailing proceedings in which Burr was eventually acquitted); Matthew D. Bunker, Justice and the Media: Reconciling Fair Trials and a Free Press 41-42 (1997) (recognizing Burr trial as early famous case dealing with prejudicial publicity).

[57] See Furman, supra note 15, at 516.

[58] See Rideau v. Louisiana, 373 U.S. 723, 726 (1963) (reversing conviction of man whose confession to robbery, kidnapping, and murder was repeatedly broadcast on local television, finding that "[a]ny subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality"); Irvin v. Dowd, 366 U.S. 717, 725-28 (1961) (reversing conviction after holding that jury pool was so tainted by inflammatory pretrial publicity that defendant was entitled as matter of federal constitutional law to change in venue, and noting that eight of twelve jurors admitted before testimony began that they felt defendant was guilty).

[59] See Estes v. Texas, 381 U.S. 532, 536 (1965) (noting that "the picture presented was not one of that judicial serenity and calm to which petitioner was entitled").

[60] *Irvin*, 366 U.S. at 722.

[61] 384 U.S. 333 (1966).

[62] See id. at 335-36.

meaningless when news media make it available to the public."[63] At times, the press even seemed to be dictating the course of the investigation. The coroner called an inquest the same day he was exhorted to do so by the press,[64] and Sheppard was ultimately arrested on the night that front page editorials appeared asking "Why Isn't Sam Sheppard in Jail?" and "Quit Stalling—Bring Him In."[65] The *Sheppard* Court, holding that extensive pretrial publicity, coupled with the courtroom's "carnival atmosphere,"[66] was inherently prejudicial, reversed his conviction.[67] Sheppard was subsequently acquitted in a new trial, but not before he spent over a decade in jail.[68] He lost his medical license,[69] became an alcoholic, and died within four years of his acquittal at the age of forty-six.[70]

The *Sheppard* Court, recognizing that "reversals are but palliatives,"[71] endorsed remedial measures designed to prevent prejudice from tainting criminal trials without impinging on First Amendment rights.[72] According to the *Sheppard* Court, acceptable methods of mitigating harmful effects of publicity include, inter alia, controlling the atmosphere of the courtroom, insulating witnesses from publicity, controlling leaks from law enforcement personnel, changing the venue, granting a continuance, and sequestering the jury.[73] These measures, when employed, have proven effective in lessening the impact of publicity in even the most notorious trials. For example, the judge in Charles Manson's multiple murder trial was credited with protecting the defendants' fair trial rights, despite overwhelming media attention, through use of "extensive voir dire, absolute sequestration of jurors . . . [,] court ordered silence imposed upon officers of the court, and tight security about the courtroom."[74] Chief Judge Richard Matsch was also widely praised for his handling of the trial of Timothy

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63 Id. at 360.

64 See id. at 339.

65 Id. at 341.

66 Id. at 358.

67 See id. at 363 (criticizing trial judge for failing to "fulfill his duty to protect Sheppard from the inherently prejudicial publicity which saturated the community").

68 See Dermot Purgavie, Bad Blood, Observer (London), Dec. 21, 1997, at 5, available in 1997 WL 16667665 (discussing history of Sheppard case and recent attempts of Sheppard's son to have his father declared innocent).

69 See Helle, supra note 28, at 17.

70 See Purgavie, supra note 68, at 5.

71 *Sheppard,* 384 U.S. at 363.

72 See id. at 353-55, 357-63 (outlining procedures by which judge could have guaranteed fair trial for Sheppard).

73 See id.

74 Matt Henneman, Public Interest v. Private Justice, 21 Am. J. Crim. L. 335, 336 (1994).

McVeigh for the Oklahoma City bombing,[75] which "has been described as a 'circus free' example of judicial control over a high-publicity trial."[76] Unfortunately, many judges refuse to recognize that publicity poses a threat to defendants' fair trial rights and consequently choose not to employ the remedies the *Sheppard* Court sanctioned.[77]

2. *Abandoning* Sheppard

When judges are not willing to use publicity control measures, criminal defendants' fair trial rights may be jeopardized. Nevertheless, reviewing courts rarely reverse convictions because of excessive publicity. In *Murphy v. Florida,*[78] nine years after *Sheppard,* the Supreme Court set an extremely high threshold for challenging a trial judge's assessment of the detrimental effects of pretrial publicity,[79] adopting a "totality of the circumstances" test that it did not fully explain.[80] Five years later, in *Mayola v. Alabama,*[81] the Fifth Circuit interpreted this standard, holding that prejudice will not be presumed without "evidence of inflammatory, prejudicial pretrial publicity that

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[75] See Sanford, supra note 34, at 9-10 (noting that Matsch was "widely credited with pulling off a serious and successful trial" and remarking that "[Matsch] showed how he could work within the existing free press/fair trial framework"). Judge Lance Ito, the judge in O.J. Simpson's double murder trial, has not earned similar praise. See Andrew P. Napolitano, Whatever Happened to Freedom of Speech? A Defense of "State Interest of the Highest Order" as a Unifying Standard for Erratic First Amendment Jurisprudence, 29 Seton Hall L. Rev. 1197, 1266 (1999) (noting that "some praised Matsch as the 'anti-Ito'"); see also Murray Richtel, The Simpson Trial: A Timid Judge and a Lawless Verdict, 67 U. Colo. L. Rev. 977, 982 (1996) (noting that Ito "was not the leader in the courtroom that he should have been. . . . [H]e was an ineffective advocate for justice.").

[76] Walton, supra note 5, at 553. But see Jane Kirtley, Lessons from the Timothy McVeigh Trial I, in Covering the Courts, supra note 34, at 11 (arguing that Judge Matsch's restrictions were excessive).

[77] See supra Part I.A. In *Sheppard*, the Court criticized the trial judge, who had allowed "bedlam [to reign] at the courthouse during the trial [as] newsmen took over practically the entire courtroom," *Sheppard,* 384 U.S. at 355, and found that the trial judge's "fundamental error [was] compounded by the holding that [he] lacked power to control the publicity about the trial," id. at 357.

[78] 421 U.S. 794 (1975).

[79] See id. at 799 ("To resolve this case, we must turn . . . to any indications in the totality of circumstances that petitioner's trial was not fundamentally fair.").

[80] See Michael Jacob Whellan, What's Happened to Due Process Among the States? Pretrial Publicity and Motions for Change of Venue in Criminal Proceedings, 17 Am. J. Crim. L. 175, 182 (1990) (arguing that "the *Murphy* Court kept the burden of proof a mystery to all"). The *Murphy* Court distinguished the precedents from the 1960s by noting that those "proceedings . . . were entirely lacking in the solemnity and sobriety to which a defendant is entitled," *Murphy,* 421 U.S. at 799, and went on to state that *Sheppard*, *Estes*, and *Rideau* "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.

[81] 623 F.2d 992 (5th Cir. 1980).

so pervades or saturates the community as to render *virtually impossible* a fair trial."[82] Confusingly, trial courts are encouraged under *Sheppard* to deploy protective mechanisms when publicity is "reasonably likely" to prevent a fair trial, but higher courts will only reverse trial court determinations if publicity has rendered a fair trial "virtually impossible."[83]

Given the nature of the publicity surrounding the *Mayola* case, the Fifth Circuit's reluctance to find that publicity had tainted the proceedings is extremely troubling. *Mayola* involved the murder of an eleven-year-old boy. The publicity at issue included accounts of the defendant's confession, his prior criminal record, and erroneous rumors that the young victim had been assaulted sexually and his body mutilated.[84] Furthermore, news coverage in the small rural community was "permeated with exploitative allusions to [Mayola's] alleged sexual 'perversion.'"[85] There is little doubt that an English court would have determined that a fair trial was not possible in the face of such notoriety.[86] In contrast, while acknowledging that the publicity was prejudicial and "may very well have been sufficiently so [prejudicial] as to have satisfied *Rideau*,"[87] the Fifth Circuit nevertheless was unwilling to presume prejudice without circulation figures or other data conclusively illustrating the degree to which the community had been exposed to prejudicial information.[88]

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[82] Id. at 997 (emphasis added) (noting that "principle of presumptive prejudice is only 'rarely' applicable").

[83] Id. Some courts nevertheless have adopted *Sheppard*'s standard of review. See, e.g., State v. Jerrett, 307 S.E.2d 339, 347 (N.C. 1983) (reversing conviction because of failure to grant change of venue, based on "reasonable likelihood that the defendant will not receive a fair trial"). Nevertheless, "it has been argued that when appellate courts apply the 'presumption of prejudice standard,' the threshold showing required to presume prejudice is so high that any rebuttal is virtually inconceivable." Judge Peter D. O'Connell, Pretrial Publicity, Change of Venue, Public Opinion Polls—A Theory of Procedural Justice, 65 U. Det. L. Rev. 169, 172 (1988).

[84] See *Mayola*, 623 F.2d at 997-98 (noting also recurring references to defendant's prior conviction for sodomy).

[85] Id. at 998.

[86] See infra notes 119-22 and accompanying text (describing English approach to detrimental trial publicity).

[87] *Mayola*, 623 F.2d at 998.

[88] See id. at 998 ("Mayola has failed to prove that the prejudicial newspaper coverage so saturated and tainted the Blount County populace that any subsequent proceeding in that county would have been unavoidably poisoned by it."). Although a defendant seeking a change of venue traditionally documents the nature and extent of publicity surrounding the case, it is extremely difficult to prove prejudice in this fashion. See John W. Kinch, The Jury Survey: Improved Social Science Input in Change of Venue Decisions, 10 Glendale L. Rev. 69, 74 (1991) ("Except in a few extreme cases, this is an impossible task."). Increasingly, courts rely on social science data to determine whether local prejudice makes a fair trial impossible. See Studebaker & Penrod, supra note 20, at 450 (citing trials of Timothy McVeigh and Terry Nichols for employing "the use of a media analysis and public opinion

Although it is incredibly difficult to meet the standard for presumed prejudice,[89] it is not impossible. In *Coleman v. Kemp*,[90] the Eleventh Circuit overturned a conviction based on the impact of overwhelming publicity, which included the release of official pronouncements of the defendants' guilt, information about the defendants' prior criminal records and escape from prison, and one defendant's confession to another murder.[91] The court found that the "small rural county [was] barraged with prejudicial publicity continuing up to the time of the trial . . . inescapably reflecting an atmosphere of predisposition as to the guilt and sentence."[92] The court went on to note that "[i]f there were no constitutional right to a change in venue in the instant case, then one can conceive of virtually no case in which a change of venue would be a constitutional necessity."[93] The district court's failure to recognize what the circuit court saw as obviously prejudicial provides an example of a trial judge's reluctance to admit the possibility of prejudice.[94]

If a criminal defendant fails to prove presumed prejudice, he or she can attempt to prove that there was actual prejudice by showing that it was unreasonable for the trial judge to determine that a particular jury was impartial.[95] In *Mu'Min v. Virginia*,[96] however, a sharply divided Supreme Court undermined this strategy by upholding the defendant's capital murder conviction despite the fact that the trial judge "refused to question . . . prospective jurors about the specific contents of the news reports to which they had been exposed,"[97] effectively

surveys quite well"). To support their motion for a change of venue, lawyers for the police officers accused of shooting Amadou Diallo spent $20,000 for a poll of members of the Bronx jury pool. See Amy Waldman, A Lawyer's Legal Victory Goes Against an Old Haunt, N.Y. Times, Dec. 18, 1999, at B2 (noting that 81% of prospective jurors polled "believed [that] there was 'no justification possible' for the police officers' firing 41 shots at Mr. Diallo"). But see O'Connell, supra note 83, at 174 ("Most judges do not like public opinion polls and refuse to acknowledge that polls can assist in the jury selection process.").

89 See United States v. McVeigh, 153 F.3d 1166, 1182 (10th Cir. 1998) ("[T]he bar facing the defendant wishing to prove presumed prejudice from pretrial publicity is extremely high."), cert. denied, 526 U.S. 1007 (1999).

90 778 F.2d 1487 (11th Cir. 1985).

91 See id. at 1538.

92 Id. at 1540 n.23.

93 Id. at 1538.

94 See id. at 1543 (holding that district court's determination was "clearly erroneous").

95 See United States v. McVeigh, 153 F.3d 1166, 1183 (10th Cir. 1998), cert. denied, 526 U.S. 1007 (1999) ("In reviewing for actual prejudice, we examine the circumstances of the publicity and the voir dire, and merely determine 'whether the judge had a reasonable basis for concluding the jurors selected could be impartial.'" (quoting United States v. Abello-Silva, 948 F.2d 1168, 1177-78 (10th Cir. 1991))).

96 500 U.S. 415 (1991).

97 Id. at 417.

making it impossible to ascertain whether the jury was biased.[98] In *Mu'Min*, though eight of the twelve jurors admitted to reading or hearing something about the case,[99] the defendant was not permitted to determine exactly what they had learned. Publicity surrounding the case included inflammatory "reports of Mu'Min's confession, . . . statements by prominent public officials attesting to Mu'Min's guilt, . . . and reports of Mu'Min's unsavory past,"[100] none of which was admissible at trial. The majority held that since there was no constitutional right to peremptory challenges, the failure to allow specific questioning of jurors (in order to determine if any should be challenged) did not impinge on a defendant's rights.[101] The Court failed to acknowledge, however, that even if peremptory challenges are not required by the Constitution, impartial juries are. Justice Marshall's vigorous dissent proclaimed that "[t]oday's decision turns a critical constitutional guarantee—the Sixth Amendment's right to an impartial jury—into a hollow formality."[102]

Fair trial guarantees are further undermined when courts seat jurors who have been exposed to evidence inadmissible at trial. In *Marshall v. United States,*[103] while exercising its supervisory jurisdiction over the federal courts, the Supreme Court noted that "prejudice to the defendant is almost certain to be as great when [inadmissible

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98 See Brian P. Coffey, *Mu'Min v. Virginia*: Reexamining the Need for Content Questioning During Voir Dire in High Profile Criminal Cases, 13 Pace L. Rev. 605, 638 (1993) ("The Supreme Court holds Mu'Min to a seemingly impossible standard. It requires him to demonstrate that his jury was biased, but fails to guarantee him the procedural device necessary to meet that burden."); see also Alfredo Garcia, Clash of the Titans: The Difficult Reconciliation of a Fair Trial and Free Press in Modern American Society, 32 Santa Clara L. Rev. 1107, 1129 (1992) (arguing that "the effect of *Mu'Min* is to leave a criminal defendant virtually powerless in the quest to select an impartial jury").

99 See *Mu'Min*, 500 U.S. at 421.

100 Id. at 444 (Marshall, J., dissenting).

101 See id. at 424-25.

102 Id. at 433 (Marshall, J., dissenting); see also Janet M. Branigan, Right to Trial by Impartial Jury in High Publicity Cases Requires an Extensive Voir Dire to Sufficiently Determine the Extent and Content of a Juror's Exposure to Pretrial Publicity, 72 U. Det. Mercy L. Rev. 701, 718 (1995) (noting that Utah and Michigan have "rejected the lower threshold of questioning for hidden bias" established by *Mu'Min*). Moreover, *Mu'Min* is not easily squared with other Supreme Court cases. One year after deciding *Mu'Min*, the Supreme Court held that a capital defendant was entitled to inquire of potential jurors whether they automatically would vote for the death penalty without regard to mitigating evidence, noting that any juror who failed to follow instructions and consider mitigating circumstances could not be impartial. See Morgan v. Illinois, 504 U.S. 719, 738-39 (1992) (recognizing that, in this situation, justice demands that such jurors be excused). An earlier case held that a defendant, accused of an interracial crime, was entitled to question prospective jurors regarding their racial biases. See Turner v. Murray, 476 U.S. 28, 36-37 (1986).

103 360 U.S. 310, 312-13 (1959) (holding that exposure to inadmissible information regarding defendant's prior criminal record was prejudicial).

evidence] reaches the jury through news accounts as when it is a part of the prosecution's evidence . . . . It may indeed be greater for it is then not tempered by protective procedures."[104] In *Murphy v. Florida*,[105] however, the Court refused to extend *Marshall* to state courts,[106] failing to explain why exposure so damaging in federal courts should not be viewed as equally prejudicial on the state level. Often judges attempt to mitigate the effect of extrajudicial exposure to inadmissible evidence by instructing jurors to disregard the prejudicial information, but such instructions are rarely effective.[107] According to Judge Learned Hand, to comply with instructions to disregard key evidence would require "a mental gymnastic which is beyond, not only [the jurors'] powers, but anybody else's."[108]

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104 Id. Federal courts do not permit admission of evidence that unduly would prejudice the proceedings. See, e.g., Fed. R. Evid. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ."); Fed. R. Evid. 404(b) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith."); see also Victor J. Gould, Federal Rule of Evidence 403: Observations on the Nature of Unfairly Prejudicial Evidence, 58 Wash. L. Rev. 497, 528 (1983) ("Evidence of other crimes or acts of . . . a defendant in a criminal prosecution, has great potential to induce inferential error.").

105 421 U.S. 794 (1975).

106 See id. at 800 n.4 (evaluating record for evidence that jurors entertained "an actual predisposition against [the defendant]").

107 See United States v. Davis, 904 F. Supp. 564, 569 n.3 (E.D. La. 1995) ("When one is told, 'Don't think about elephants,' the immediate image in the mind is an elephant. So goes the effectiveness of instructions to disregard."); see also Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) ("The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction."); *Davis*, 904 F. Supp. at 569 ("It is difficult, if not impossible, to 'unring a bell.'"); Studebaker & Penrod, supra note 20, at 446 ("[P]eople find it very difficult to actively suppress a thought upon instruction, particularly when that thought is vivid or emotionally arousing. Indeed, the harder people try to control a thought, the less likely they are to succeed."). A recent study of the effectiveness of curative instructions found them to be ineffective at removing bias. See id. at 446 (noting that both factual and emotional publicity retained their power to prejudice despite curative instructions). Nevertheless, faith in jury instructions persists. See Robert S. Stephen, Note, Prejudicial Publicity Surrounding a Criminal Trial: What a Trial Court Can Do to Ensure a Fair Trial in the Face of a 'Media Circus,' 26 Suffolk U. L. Rev. 1063, 1090 (1992) (arguing that because of low cost involved, "trial courts in high-profile cases should continuously admonish the jury with regard to their obligation to provide an impartial verdict"). But see Mark R. Stabile, Note, Free Press-Fair Trial: Can They Be Reconciled in a Highly Publicized Criminal Case?, 79 Geo. L.J. 337, 345 (1990) (maintaining that repeated admonitions to forget merely may highlight prejudicial details in jurors' minds).

108 Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932). Recognizing the difficulty jurors have in disregarding information considered inadmissible at trial, some courts seek jurors who are completely unaware of the facts of the case; critics charge that this wastes valuable court time while limiting the jury pool to uninformed, often undereducated, people. See Newton N. Minow & Fred H. Cate, Who Is an Impartial Juror in an Age of Mass Media?, 40 Am. U. L. Rev. 631, 633-34 ("[The] search for 'unaware' jurors diverts the court's attention from its constitutional obligation to seat an 'impartial' jury."); see also

The Supreme Court's decision in *Sheppard v. Maxwell* established fair procedures for coping with publicity surrounding criminal trials without sacrificing First Amendment values. However, the foregoing cases show that American courts since the 1960s often have retreated from the robust protections advocated by the *Sheppard* Court. The Supreme Court defers to the discretion of trial judges while offering very little guidance for the exercise of that discretion;[109] it even upheld a conviction in a case where over half of the jurors and alternates seated admitted that at one point they had formed an opinion regarding the defendant's guilt.[110] States have adopted widely divergent standards regarding changes of venue,[111] and, despite Justice Marshall's urging to the contrary, the Supreme Court has not stepped in to provide guidance.[112] Chief Justice Burger has asserted that "[i]n the most extreme cases [of prejudicial publicity], like *Sheppard* and

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Krause, supra note 16, at 567-68 ("[C]ourts, in attempting to ensure a fair trial, will choose ignorant jurors over those with even the slightest opinion in the case[;] . . . critics argue that the jurors finally selected by the court generally lack the wherewithal to deal with the complex issues often involved in criminal cases.").

109 See Walton, supra note 5, at 579 ("[B]ecause the test [for determining prejudice] grants the Court discretion to rule based on individual factors in each case, like Jell-O, it wiggles or changes when a defendant attempts to grab hold of an opinion as precedent."); see also Whellan, supra note 80, at 175 ("Confusion. This word describes the Supreme Court's standards that should guide state judges confronted with prejudicial publicity . . . .").

110 In Patton v. Yount, 467 U.S. 1025 (1984), the Court upheld the second conviction of a math teacher who had confessed to murdering his 18-year-old student, holding that the time that had elapsed between the two trials dulled the effects of the original publicity. See id. at 1026, 1033. During the first trial, Yount's confessions were admitted into evidence and highly publicized. See id. at 1027. The trial court suppressed Yount's written confession and portions of his oral statements prior to the second trial, but refused to grant a change of venue. See id. The Supreme Court deferred to the decision of the trial judge, see id. at 1040, who had seated a jury despite the fact that 77% of the veniremen "admitted they would carry an opinion into the jury box," id. at 1029, and "8 of the 14 jurors and alternates actually seated admitted that at some time they had formed an opinion as to Yount's guilt," id. at 1029-30.

111 See Whellan, supra note 80, at 183-91 (describing wide variations among states in proscribing standards for granting changes of venue).

112 Justice Marshall repeatedly protested this lack of guidance. See, e.g., Swindler v. Lockart, 495 U.S. 911, 911 (1990) (denying cert.) (Marshall, J., dissenting) ("I would grant the petition for certiorari to provide much needed guidance regarding the minimal due process requirements for state change of venue rules."); Crawford v. Georgia, 489 U.S. 1040, 1042 (1989) (denying cert.) (Marshall, J., dissenting) ("In my view, Georgia's standard for change of venue is so hard to satisfy that it violates any conceivable notion of due process."); Hale v. Oklahoma, 488 U.S. 878, 879 (1988) (denying cert.) (Marshall, J., dissenting) ("I can only conclude that petitioner . . . was denied his constitutional right to a fair trial . . . because of Oklahoma's strong presumption against venue changes."); Brecheen v. Oklahoma, 485 U.S. 909 (1988) (denying cert.) (Marshall, J., dissenting) ("In my view, Oklahoma's strong presumption against venue change fails to accommodate properly the concerns expressed in our due process precedents."); see also Whellan, supra note 80, at 193 ("[T]he Supreme Court should announce standards to protect an accused

Estes, the risk of injustice was *avoided* when the convictions were reversed."[113] Of course, as Dr. Sheppard's case illustrates, injustice is often not avoided even when a conviction eventually is reversed.[114] Nonetheless, extraordinary deference to trial judges further threatens fair trial guarantees. By retreating from *Sheppard*'s mandate, American courts fail to insulate criminal trials from the damaging effects of unrestrained publicity and are susceptible to the kinds of criticisms lodged by Britons after Louise Woodward's conviction.

II
IS THE ENGLISH APPROACH MORE SUCCESSFUL AT PROTECTING DEFENDANTS' RIGHTS?

A. Contempt of Court: A Vigorous but Flawed Attempt to Ensure Fair Trials

While British criticism of the American judicial system appears valid, it must be asked whether the British legal system is any better equipped to handle conflicts between expressive and fair trial rights. The British law of contempt of court provides a striking contrast to the American approach to these conflicts.[115] Fair trials are integral to the British system of justice; one English judge has noted that "the right to a fair trial . . . is as near to an absolute right as any which I can envisage."[116] For over 200 years, the English have employed procedures designed to protect the integrity of their trial system.[117] Spectacles like that surrounding the double murder trial of O.J. Simpson are unheard of.[118] Therefore, it is not surprising that people in England find American media coverage of criminal trials excessive, and Ameri-

person from inflammatory pretrial publicity that, because of disparate standards, would justify a change of venue in one state but not in another state.").

113 Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 555 (1976) (emphasis added).

114 See supra notes 61-70 and accompanying text.

115 While this Note refers to the British law of contempt, and while the general framework of contempt law is uniform, it is important to note that the approach taken to contempt of court is not precisely the same for all jurisdictions within Great Britain (which is made up of the three principal jurisdictions of England and Wales, Scotland, and Northern Ireland). See Alistair J. Bonnington, Cross Borders: Cross Purposes, 146 New L.J. 1312, 1312 (1996) (noting that Scottish courts enforce law of contempt more strictly than do English courts). This Note focuses mainly on cases from England and Wales.

116 Regina v. Lord Chancellor ex parte Witham, [1998] Q.B. 575, 585-86 (Q.B. Div'l Ct. 1997).

117 While the roots of British contempt law lay in the twelfth century, see Krause, supra note 16, at 539, contempt procedures were first developed in the eighteenth century, see John Scripp, Controlling Prejudicial Publicity by the Contempt Power, in Selected Readings, supra note 43, at 75, 75-76.

118 See supra note 5.

can laws permitting widespread publicity surrounding criminal trials troubling.

Unlike many courts in America, English courts recognize the potential threat to justice posed by unrestrained publicity. Certain information, especially reports of confessions made by criminal defendants[119] and details of defendants' prior convictions,[120] is considered inherently prejudicial. Courts tend to halt prosecutions when detrimental publicity interferes with criminal trials.[121] In one case, a court dismissed criminal charges against suspected forgers because of the presumed prejudicial effect of a single article that had been published ten months before the trial.[122] If rules of evidence preclude the production of particular facts during trial, and members of the jury are exposed to those same facts, British courts simply assume that justice has been compromised.[123] Obviously this approach differs greatly from that employed by American courts, which have held that pretrial exposure to inadmissible evidence is not necessarily prejudicial.[124]

Having determined that juries can be tainted by extrajudicial sources of information, British legal authorities have two alternatives for protecting the integrity of the judicial system: control the jury or restrict the flow of information. While the United States attempts to control prejudice by controlling juries, the British have chosen the latter course, imposing strict limitations on the ability of the press to

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119 See Rex v. Clarke (Ex parte Crippen), 27 T.L.R. 32 (K.B. 1910). But see Attorney-General v. Unger, [1998] 1 Crim. App. 308, 319 (Q.B. Div'l Ct. 1997) (dismissing contempt proceedings against editor who published account of alleged thief's confession while trial was pending because overwhelming evidence, including videotape of thief, negated prejudicial power of articles).

120 See The King v. Davies, [1906] 1 K.B. 32, 34-35 (1905); see also John Robertson, Newspapers Fined for Contempt over Sex Attacker, The Scotsman, May 21, 1997, at 10 (detailing contempt conviction of editors for publishing details of defendant's prior criminal record while defendant's case was pending).

121 See Damian Paul Carney, The Accused, the Jury and the Media, 145 New L.J. 12, 12 (1995) ("Where newspapers have published inadmissible evidence [in England] or made allegations of hearsay which would have affected the trial[,] they have been prosecuted." (footnote omitted)); see also Unappealing Ideas: Nos 467 and 468, 149 New L.J. 189, 189 (1999) (editorial) (noting "the propensity of [English] judges to stop trials" when faced with prejudicial publicity).

122 See Publicity and the Press, 147 New L.J. 1089, 1089 (1997) (editorial) (noting that judge never tried to empanel jury and publisher was later fined £50,000 for contempt).

123 See Regina v. Evening Standard Co., 1 Q.B. 578 (1954) (punishing newspaper for publishing inadmissible evidence).

124 See, e.g., Murphy v. Florida, 421 U.S. 794, 799 (1975) (holding that earlier precedents "cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions . . . alone presumptively deprives the defendant of due process"); see also supra Part I.B.2.

report on criminal cases.[125] Consequently, American-style jury controls are considered unnecessary in England:[126] There is no voir dire of prospective jurors,[127] juries are rarely sequestered,[128] and changes of venue are practically nonexistent.[129] This Note argues, however, that English restrictions on the press are both too severe and, ultimately, ineffective, and that adoption of American jury controls would enable English courts to preserve defendants' rights without unnecessarily limiting freedom of speech.[130]

Under the common law doctrine of contempt of court, English courts have the power "to prevent or punish conduct which tends to obstruct, prejudice or abuse the administration of justice."[131] Since the late nineteenth century, however, critics charged that enforcement of the law of contempt was both arbitrary and unduly harsh.[132] In 1981, Parliament enacted the Contempt of Court Act,[133] which sought to liberalize the common law of contempt.[134] The 1981 Act estab-

125 See Kohler & Lewin-Smith, supra note 7, at 4 (noting that British law of contempt of court imposes "a potentially dizzying array of restrictions").

126 See Pizzi, supra note 9, at 1031 (noting that because of tight restrictions on press, "there is much less need to lock up jurors"). Some commentators prefer to view this another way, claiming that Britain *needs* the law of contempt because voir dire and sequestration are not available. See Kohler & Lewin-Smith, supra note 7, at 5.

127 See id. (noting that "juries are not screened through extensive voir dire under English procedure"); Pizzi, supra note 9, at 1034 ("In England, peremptory challenges are not permitted today and I have never seen questioning of prospective jurors at any trials I have observed.").

128 See Stephen A. Metz, Justice Through the Eye of a Camera: Cameras in the Courtrooms in the United States, Canada, England, and Scotland, 14 Dick. J. Int'l L. 673, 686 ("The primary reason contempt of court rules must be so rigid in England is because juries are rarely sequestered. Consequently, in order to prevent prejudicing the jury panel, strict rules governing the conduct of the media are necessary."); see also Kohler & Lewin-Smith, supra note 7, at 5 (noting that jurors "cannot be wholly protected from the media influence by sequestration").

129 See Attorney-General v. Birmingham Post & Mail Ltd., [1999] 1 W.L.R. 361, 361 (Q.B. Div'l Ct. 1998) (explaining that defendants published article that caused judge to delay trial and change venue and were later convicted of contempt).

130 Of course, American jury controls are both complex and time consuming, and there are those who argue that they should be curtailed. See Pizzi, supra note 9, at 1034 (advocating cutting back on number of peremptory challenges permitted in American courts).

131 Sunday Times v. United Kingdom, 30 Eur. Ct. H.R. (ser. A) at 14-15 (1979) (citing "Phillimore report" of Committee on Contempt of Court appointed by British government in 1974 to consider reforms).

132 See Krause, supra note 16, at 539-40 (arguing that earlier attempts at reform, beginning with Administration of Justice Act of 1960, 8 & 9 Eliz. 2, ch. 65 (Eng.), had not gone far enough).

133 Contempt of Court Act, 1981, ch. 49 (Eng.).

134 Parliament enacted the Contempt of Court Act partly in response to the decision of the European Court of Human Rights in *Sunday Times*, 30 Eur. Ct. H.R. at 42 (finding that prosecution for contempt of court violated European Convention on Human Rights). See infra note 171 and accompanying text; see also Sally Walker, Freedom of Speech and Contempt of Court: The English and Australian Approaches Compared, 40 Int'l & Comp.

lished strict liability[135] for any publication "addressed to the public at large . . . [which] creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced."[136] Because proceedings must be "active" for statutory strict liability to apply,[137] press restrictions are only in force from the time a suspect is arrested (or a warrant is issued) until the proceedings end (with an acquittal, conviction, or administrative termination).[138] The motivation of the publisher is irrelevant, and the statutory defense of "innocent publication" is available only if the publisher was unaware that proceedings were active.[139]

Acknowledging the value of freedom of speech in a democracy, the Act permits an exception for a "discussion in good faith of public affairs or other matters of general public interest."[140] This exception only applies, however, if authorities deem the risk to the proceedings to be "merely incidental to the discussion."[141] The media may publish contemporary reports of court proceedings unless the court has issued a gag order,[142] but courts may prohibit the publication of names of people connected with court proceedings.[143] For example, the Act "has been used occasionally to enjoin the media from publishing the name of or any information regarding a criminal defendant until conviction."[144] Interestingly, the 1981 Act actually may impede criminal investigations by preventing publication of the names or photographs

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L.Q. 583, 585 (1991) (noting that 1981 Act "was designed to facilitate greater freedom of speech than it was thought was permitted by the common law").

135 See Contempt of Court Act, § 1.

136 Id. § 2(1)-(2); see also Walker, supra note 134, at 595 (emphasizing that "remote risks to the administration of justice are excluded").

137 See Contempt of Court Act, § 2(3).

138 See id. § 2(3), sched. 1 (describing when criminal proceedings are concluded for purposes of Contempt of Court Act); see also Carney, supra note 121 (outlining timing of contempt of court restrictions).

139 See Contempt of Court Act, § 3; see also Walker, supra note 134, at 593 (noting that this defense is extremely narrow, taking into account neither motivation nor public interest concerns).

140 Contempt of Court Act, § 5.

141 Id.

142 See id. § 4.

143 See id. § 11. In America, because publication bans have been found unconstitutional, sexual assault victims and juvenile offenders have no right to keep their identities out of the media. See Florida Star v. B.J.F., 491 U.S. 524, 541 (1989) (holding that rape victim could not receive compensation for disclosure of her identity, since "where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order"); Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 105-06 (1979) (upholding right to publish identity of alleged juvenile delinquent).

144 Krause, supra note 16, at 551 n.114.

of fugitives.[145] Violations of the Act can trigger heavy sanctions: Under the statute, superior courts may impose unlimited fines and prison sentences of up to two years.[146] In assessing whether there has been a violation, courts must determine whether the risk of prejudice from the publication is both immediate and serious,[147] and must consider the "timing of the publication, the likelihood of its coming to the attention of jurors or potential jurors, the likely impact on the jury and the ability of the jury to abide by any judicial directions which seek to neutralise any prejudice."[148]

Because the British legal system has no procedure for questioning prospective jurors about exposure to potentially prejudicial publicity, when such publicity threatens the integrity of a criminal trial, that trial must be halted.[149] This action may lead to the filing of contempt charges against the offending journalist, but, as was illustrated by the case of Geoffrey Knights, contempt convictions are not inevitable. Knights was charged with assault, but his prosecution was cancelled in light of what the judge regarded as "'misleading, scandalous and malicious'"[150] reporting that included, among other potentially prejudicial information, details of the defendant's previous criminal convictions.[151] The High Court refused to hold five tabloid newspapers liable for contempt, however, because the information in the articles had been published previously.[152] As this case demonstrates, the law of contempt cannot protect adequately against all forms of prejudicial publicity; while defendants' rights are protected when courts stay

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145 See Simon Houston, Bombing Suspect Picture Farce Drags On, Scottish Daily Rec. (Glasgow), May 12, 1998, at 1, available in 1998 WL 27929415 (describing law enforcement frustrations as contempt law forced media to delay publishing fugitive bomber's photograph). In a particularly absurd case, police warned citizens not to approach an escaped prisoner but refused to identify the dangerous escapee for 24 hours. See id.

146 See Contempt of Court Act, 1981, ch. 49, § 14 (Eng.). Inferior court sanctions are limited under the Act to sentences of one month and fines of £500. See id. Under the earlier common law regime, "a member of the press found guilty of contempt faced limitless exposure to strict sentencing." Krause, supra note 16, at 549.

147 See Attorney-General v. Guardian Newspapers Ltd., 7 Ent. & Media L. Rep. 904, 913 (Q.B. Div'l Ct. 1999).

148 Id. at 914.

149 See Clare Dyer, Papers Cleared of Eastenders Trial Contempt, Guardian (London), Aug. 1, 1996, at 11, available in 1999 WL 4037096 (noting that judges "have been increasingly ready to stop prosecutions due to adverse publicity").

150 Grania Langdon-Down, Trial by Media: Watching for Prejudice, Independent (London), Oct. 11, 1995, at 12, available in 1995 WL 10806671.

151 See Bonnington, supra note 115, at 1312 ("On the face of it, it would be difficult to envisage a more prejudicial package than that which the tabloids compiled in the days immediately following Mr. Knights's arrest.").

152 Mr. Knights was the former boyfriend of a famous English actress, and their acrimonious relationship had been the subject of tabloids for a considerable time before the alleged assault. See Dyer, supra note 149, at 11.

prosecutions, "[t]o have a case which is untriable is almost anarchy."[153]

B. *The Effectiveness of English Contempt Law*

The Contempt of Court Act was designed to moderate the harshness of the common law of contempt, but the results have been mixed. In practice, the 1981 Act has proven, at times, both stiflingly strict and woefully ineffective. While it is clear that British contempt law does prevent the dissemination of a great deal of prejudicial publicity, generally avoiding American-style "trial by newspaper,"[154] critics charge that both the definition of contempt and the extent of the public affairs exemption are unworkably vague.[155] Wide discretion granted to authorities increases both the uncertainty for publishers and the dangers of selective enforcement.[156] This has a chilling effect on free speech, and, not surprisingly, the amount of information published in Britain about the courts and criminal cases noticeably has declined since 1981.[157] One commentator proposes that the United States enact an American version of Britain's Contempt of Court Act in order

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153 Langdon-Down, supra note 150, at 12.

154 Krause, supra note 16, at 550 (arguing that 1981 Act largely was successful at avoiding trial by newspaper); see also Carney, supra note 121, at 30 ("The law of contempt does seem . . . to have deterred the excesses which have occurred in the United States in the O.J. Simpson case.").

155 See A Pipe Blown by Surmises, 146 New L.J. 1497, 1497 (1996) (editorial) (questioning "whether any newspaper lawyer could now properly advise where the line on contempt was drawn"). The fact that courts in Scotland interpret the Act far more strictly than do those in England provides further evidence that the Act's provisions are unduly vague. See Bonnington, supra note 115, at 1312 ("In the brave new world of pan-European harmonisation of laws, it would appear that on this island we can't even agree on the interpretation of a domestic statute.").

156 See Walker, supra note 134, at 588 (arguing that "publishers should be able to know in advance whether they will be prosecuted"). Questions of special treatment arose when a judge issued a court order (made under the Contempt of Court Act, 1981, ch. 49, § 11 (Eng.)) forbidding the publication of the identity of a crime victim who was the relative of some important people. See Regina v. Central Criminal Court ex parte Crook, Times (London), Nov. 7, 1984, at 16 (Q.B. Div'l Ct.). Similar allegations were made when the Attorney General, who had never before intervened in such a case, enjoined the publication of a young drug offender's name—the child's father was Cabinet Minister Jack Straw. See The Black Farce of Gagging the Press, Daily Mail (London), Jan. 2, 1998, at 8, available in Lexis, News Library, Mail file; see also infra note 192 (discussing Straw case).

157 See Publicity and the Press, supra note 122, at 1089 ("Over the years there has been a very substantial increase in the amount of information which has been withheld from the public."); see also The Courts and the Media, 146 New L.J. 541, 541 (1996) (editorial) (stating:

> Many years ago, there was much more reporting of court cases than there is at present, without . . . too much prejudice to the prosecution or the defence. Now . . . many cases seem to be happening in a vacuum . . . . [T]here is often a complete black-out until, if we are fortunate, we find a note in an early edition to say there has been a conviction.).

to "place the responsibility of monitoring the harmful consequences of pretrial publicity on those who can do something about it: the members of the media."[158] Obviously, such a law would not withstand American constitutional scrutiny;[159] regardless, as another writer noted, it is doubtful that Americans would accept such restrictions, even if they were constitutional.[160]

From an American perspective, the British law of contempt unnecessarily and inadvisably restricts freedom of the press. While the media might interfere with criminal defendants' fair trial rights, it also has an important role in securing those rights.[161] According to the United States Supreme Court, a "responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field."[162] The British law of contempt limits the effectiveness of the press as a guarantor of individual liberties, thereby potentially compromising the very values it seeks to protect.[163] British commitment to the preservation of the right to a fair trial is commendable, but the heavy club of contempt of court may not be the wisest tool with which to secure that right.

1. Free Speech Concerns: Pressure from Europe

Increasingly, English courts have had to balance fair trial concerns against the interests of free speech given the pressure felt from

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158 Krause, supra note 16, at 571.

159 First Amendment protection of press freedom is quite stringent, and courts almost never permit prior restraints on publication such as those imposed by the Contempt of Court Act. See Bridges v. California, 314 U.S. 252, 263 (1941) (holding that "substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished"); see also Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 558 (1976) ("Any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity." (quoting Austin v. Keefe, 402 U.S. 415, 419 (1971))).

160 See Furman, supra note 15, at 524-25 (noting that press restrictions that are acceptable in England and Canada "clearly serve the fair trial interest but violate fundamental American notions about freedom of the press").

161 As one reporter in England noted: "[J]ournalists sometimes pursue stories precisely *because* 'the system' or 'British justice' has let down the very people they ought to be protecting." Roger Cook, Free Speech—Use It or Lose It, The Times (London), Feb. 26, 1997, at 23 (emphasis in original).

162 Sheppard v. Maxwell, 384 U.S. 333, 350 (1966) ("The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism."); see also Helle, supra note 28, at 21 ("Trials will only be fair so long as the press is free.").

163 See, e.g., Moseley, supra note 5, at 4 (suggesting that threat of bringing contempt charges "may have inhibited newspapers from learning how [publisher Robert Maxwell] had illegally raided the pension fund of one of his businesses to cover operating losses"); see also Ann Riehle, Comment, Canada's "Barbie and Ken" Murder Case: The Death Knell of Publication Bans?, 7 Ind. Int'l & Comp. L. Rev. 193, 214 (1996) (noting that "[t]he 'watchdog' function [of the press] was eliminated" when strict publication bans prevented Canadians from learning about plea proceedings in sensational murder case).

the European Court of Human Rights in Strasbourg, France.[164] As a member of the Council of Europe,[165] the United Kingdom is subject to the European Court, which, in enforcing the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),[166] protects both the right to a fair trial under article 6[167] and the freedom of expression under article 10.[168] Unlike the expressive freedoms guaranteed in the First Amendment to the U.S. Constitution,[169] the article 10 right to freedom of expression is explicitly qualified; the exercise of this right carries with it duties and responsibilities and may be limited by "formalities, conditions, restrictions or penalties as are *prescribed by law* and are *necessary in a democratic society*."[170]

The English common law of contempt ran afoul of article 10 when the British government enjoined publication of an article regarding the civil litigation surrounding the drug thalidomide, which was alleged to have caused severe birth defects when prescribed as a

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164 The European Court is the "largest full-time international tribunal in the world with jurisdiction over 800 million people." Les P. Carnegie, Privacy and the Press: The Impact of Incorporating the European Convention on Human Rights in the United Kingdom, 9 Duke J. Comp. & Int'l L. 311, 329 (1998).

165 The Council of Europe is an international organization representing 41 member states. It has set up a system of human rights protection that has been called "the most advanced international human rights structure in the world today." Peter Leuprecht, Innovations in the European System of Human Rights Protection: Is Enlargement Compatible with Reinforcement?, 8 Transnat'l L. & Contemp. Probs. 313, 314 (1998).

166 See Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR]. The ECHR, modeled after the Universal Declaration of Human Rights, established the European Court in order to provide a mechanism for the practical enforcement of human rights. See id. preface (stating resolution to "take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration [of Human Rights]"). The ECHR, like the Universal Declaration, was adopted in response to the atrocities committed during World War II. See Stephen P. Marks & Burns H. Weston, International Human Rights at Fifty: A Forward, 8 Transnat'l L. & Contemp. Probs. 113, 114, 117 (1998) (noting that memories of gross human rights violations spurred governments to accept self-imposed limitations on sovereignty).

167 Article 6 states: "[E]veryone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal . . . ." ECHR art. 6, § 1. The right to a fair trial is one of the cornerstones of the ECHR, and article 6 has prompted more applications to Strasbourg than has any other article. See John Wadham & Helen Mountfield, Blackstone's Guide to the Human Rights Act 1998, at 77 (1999).

168 Article 10 of the Convention provides: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority . . . ." ECHR art. 10, § 1; see also Oberschlick v. Austria, 204 Eur. Ct. H.R. (ser. A) at 6 (1991) (stating that freedom of expression is "a condition for [a democratic society's] progress and for each individual's self-fulfillment").

169 See supra note 15 and accompanying text.

170 ECHR art. 10, § 2 (emphasis added).

sedative for pregnant women.[171] The British government defended the injunction, maintaining that its law of contempt struck the correct balance between freedom of speech and the needs of justice.[172] The European Court in *Sunday Times v. United Kingdom*,[173] however, held that the British contempt action could not be justified under article 10, section 2, because the interest in freedom of expression in this case simply outweighed any potentially prejudicial effect on the thalidomide proceeding.[174] Under the Convention, though freedom of expression is subject to a number of exceptions,[175] these exceptions must be "narrowly interpreted,"[176] giving freedom of expression the broadest scope possible.[177]

The *Sunday Times* Court was deeply divided, finding a breach of article 10 by a bare majority of eleven to nine.[178] It is also significant that this case involved *civil* litigation, for the balance would probably have swung more toward fair trial rights had Distiller's Company, the marketers of thalidomide, faced criminal penalties.[179] In a recent criminal case, *Worm v. Austria*,[180] the Court was less protective of expressive rights, upholding the conviction of a journalist who had written a scathing article before criminal proceedings were concluded,

171 See Sunday Times v. United Kingdom, 30 Eur. Ct. H.R. (ser. A.) at 42 (1979) (finding that injunction violated article 10 of ECHR). As part of a campaign to inform the public about issues in the litigation, the *Sunday Times* ran an article critical of the settlement proposals and of various aspects of British law on recovery and assessment of damages. The article described the settlement offer as "grotesquely out of proportion to the injuries suffered" and appealed to the marketers of thalidomide, Distiller's Company (Biochemicals) Ltd., to make a more generous offer. See id. at 9. The *Sunday Times* planned to publish a second article about the controversy, but the British Attorney General obtained an injunction forbidding its publication on the grounds that it would constitute contempt of court: Under the pressure principle, one should not attempt to influence the settlement of a pending litigation; under the prejudgment principle, one should not publish material that prejudges the issues raised in a pending litigation. See id. at 20-25.

172 See id. at 40 (noting that British government had stressed that injunction was temporary).

173 30 Eur. Ct. H.R. (ser. A.) (1979).

174 See id. at 41 (stressing need of families of thalidomide victims to have access to all relevant facts).

175 See id.

176 Id.

177 See Krause, supra note 16, at 543; see also Walker, supra note 134, at 605 (identifying Court's mandate to "weigh the interests involved and assess their respective force" (quoting *Sunday Times*, 30 Eur. Ct. H.R. at 42)).

178 See *Sunday Times*, 30 Eur. Ct. H.R., at 45.

179 See Stephanos Stavros, The Guarantees for Accused Persons Under Article 6 of the European Convention on Human Rights 158 (1993) ("[T]he value of the *Sunday Times* case as precedent for criminal proceedings is considerably undermined by the fact that this was a civil action before a professional judge which lay dormant for years.").

180 25 Eur. H.R. Rep. 454, 456-57 (Eur. Ct. H.R. 1997) (holding that article could have prejudiced trial's outcome, even though it was being tried before judges, not jurors).

declaring that a former Vice-Chancellor and Minister of France was guilty of tax evasion.[181] The *Worm* Court reaffirmed the centrality of article 6 rights, holding that "the limits of permissible comment may not extend to statements which are likely to prejudice, whether intentionally or not, the chances of a person receiving a fair trial."[182] Nevertheless, the Court has established clearly that, where freedom of expression potentially conflicts with the right to a fair trial, governments may only restrict expressive rights in response to a legitimate threat to the administration of justice.[183] Of course, European standards governing what would constitute a "legitimate threat to the administration of justice" are much lower than those in America, where publication of neither the *Sunday Times* article nor the *Worm* article could have been enjoined.[184]

The full effect of the European Court's jurisprudence on English contempt of court law has not been determined. The British Contempt of Court Act of 1981 was enacted partly in response to the European Court's ruling in *Sunday Times,*[185] and courts have held that,

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181 See id. at 454. In another recent case, the Court overturned a civil defamation judgment against an editor and journalist who had published five articles critical of four judges who had awarded custody of minor children to their father, despite the fact that the father had been accused of incest and child abuse. See De Haes v. Belgium, 25 Eur. H.R. Rep. 1, 5, 44 (Eur Ct. H.R. 1997) (holding that article 10 was violated, since defamation judgment was not necessary for ordered society).

182 *Worm*, 25 Eur. H.R. Rep. at 456.

183 The European Court has not outlined expressly means by which states legitimately might protect article 6 rights without violating article 10, choosing to leave the bulk of enforcement to national courts. This is consistent with the general position of Convention institutions, which "have always insisted that the primary responsibility for the protection of human rights lies with the national legal systems." Colin Warbrick, Rights, the European Convention on Human Rights and English Law, 19 Eur. L. Rev. 34, 35 (1994). Given its immense workload, the European Court is unable to accept the responsibility of primary enforcement. See Colin McLean, The European Convention on Human Rights: A System That Works, in To Secure the Blessings of Liberty: Rights in American History 173, 177 (Josephine F. Pacheco ed., 1993) (noting that in 1989, out of 4900 potential files containing complaints about 21 of 22 contracting states, only 95 cases were declared admissible and only 80 reports were issued); see also Warbrick, supra, at 35 (noting problems exacerbating delays in Strasbourg).

184 In the 1940s, the Supreme Court adopted the strict "clear and present danger" standard when dealing with conflicts between the judiciary and the media, holding that without a definite, imminent threat to society, no restrictions could be placed on the press. See Bridges v. California, 314 U.S. 252, 261 (1941) (citing Schenck v. United States, 249 U.S. 47, 52 (1919)). In Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976), the Court explicitly held that "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights."

185 See Attorney-General v. Guardian Newspapers Ltd., 7 Ent. & Media L. Rep. 904, 916 (Q.B. Div'l Ct. 1999) (stating that

> [T]he statutory purpose behind the Contempt of Court Act 1981 was to effect a permanent shift in the balance of public interest away from the protection of the administration of justice and in favour of freedom of speech. Such a shift

in applying the 1981 Act, "due weight must be given to the protection of freedom of speech."[186] European Council member states have a positive obligation to guard both article 6 and article 10 liberties,[187] and England has recently incorporated the ECHR into English law.[188] The harmonization of ECHR and English common law principles is therefore likely to accelerate. It will be interesting to see if the Contempt of Court Act withstands review under the new regime.[189]

2. *Effect of Modern Media in a Small World: The "Futility Principle"*

Ironically, although the Contempt of Court Act significantly restricts speech regarding legal proceedings in Britain, these burdensome restrictions do not protect criminal proceedings fully from the undesirable effects of publicity. The Act neither can prevent publication of potentially inflammatory material before legal proceedings have begun[190] or before appeals are initiated,[191] nor can it forestall release of restricted information in foreign newspapers that are available in England. In a particularly farcical episode, in December 1997, the English Attorney General sought and obtained an injunction restricting the publication of the names of a Cabinet Minister, Jack Straw, and his seventeen-year-old son, William, after the boy had been arrested on a drug charge. Everyone in Britain knew the boy's

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was forced upon the United Kingdom by the decision of the European Court in *The Sunday Times v. United Kingdom*.

(internal quotation marks omitted) (internal citation omitted)).

186 Id.

187 See Stavros, supra note 179, at 157 ("It is within the obligations of the States Parties to take positive measures to ensure the absence of bias in the tribunal.").

188 See Human Rights Act, 1998 (Eng.) (entitled "An Act to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights"); see also Lammy Betten, Introduction to The Human Rights Act 1998: What It Means 1, 2 (Lammy Betten ed., 1999) ("The Act will require judges to review legislation and acts by public authorities in light of the substantial provisions of the Convention as incorporated in the Act . . . [but,] United Kingdom judges will not be bound by the interpretation of those provisions by the European Court on Human Rights.").

189 See Walker, supra note 134, at 584 n.6 (noting controversy regarding hypothetical effect of Act on *Sunday Times* case). But see *Guardian Newspapers*, 7 Ent. & Media L. Rep. at 18 ("[I]f they are applied as I believe they should be, the provisions of section 2(2) [of the Contempt of Court Act] will not contravene the [ECHR].").

190 See Contempt of Court Act, 1981, ch. 49, § 2(3) (Eng.). A newspaper, for example, can publish inadmissible details about a likely suspect's prior criminal record so long as that suspect has not been charged formally. See Carney, supra note 121 (detailing case where press reported husband of murder victim had been jailed for attempted murder as teenager, but where newspaper was not charged with contempt even though husband was later charged in wife's death because no charges had been filed at time of publication).

191 See Contempt of Court Act, § 2, sched. 1 (detailing times when proceedings are active); see also Walker, supra note 134, at 590 (noting that this significant loophole provides publishers some protection against contempt charges).

identity—the names were available on the Internet and in foreign papers available in England—but English newspapers were forbidden to "reveal" his identity.[192] The Straw debacle clearly illustrates that "electronics have made an anachronism of the contempt laws;"[193] the law simply has not kept pace with advances in computer and satellite technology.[194] The ban on reporting on the committal proceedings of mass murderer Rosemary West was easily circumvented by Internet publications, causing one newspaper to proclaim: "Reporting restrictions have been lifted—by the Internet."[195] Without any effective procedures to identify and remove jurors who have been exposed to prejudicial information, the British legal system cannot guarantee an impartial trial by relying solely on the contempt power. The American legal system, on the other hand, through its jury selection procedures and grants of changes of venue, has mechanisms designed to ensure that impartial juries can be chosen; the American system, however, fails to protect defendants' rights when those mechanisms are not employed effectively.[196]

It is not just the electronic media that can frustrate publication bans. For example, the European Court of Human Rights held that the United Kingdom violated article 10 of the ECHR when it continued injunctions preventing publication of the book *Spycatcher,* an exposé by a former employee of the British Secret Service.[197] While the initial injunction preventing publication was justified in the name of national security, the Court held that once the book was published in America and its contents were available around the world, the British government no longer had legitimate reasons for banning publication in the United Kingdom.[198] An American commentator, writing on First Amendment jurisprudence and using the *Spycatcher* case as an example, has posited what he calls the "Futility Principle," which says

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192 See Marcel Berlins, Law: What's in a Name?, Guardian (London), Jan. 6, 1998, at 17, available in 1998 WL 3072376; Steve Doughty, The Ruling That Has Split the Legal World in Two, Daily Mail (London), Jan. 2, 1998, at 4, available in Lexis, News Library, Mail file; Patrick Wintour et al., Named, But Not Shamed, Observer (London), Jan. 4, 1998, at 15, available in 1998 WL 6623658.

193 A Pipe Blown by Surmises, supra note 155, at 1497.

194 See Langdon-Down, supra note 150, at 12 ("The development of computer networks and satellite TV news are accentuating concern that the law is lagging behind technology."); see also Carney, supra note 121, at 30 ("The global village threatens the ability of the legal system to ensure that the famous or the notorious are given a fair trial.").

195 Brian Cathcart, Reporting Restrictions Have Been Lifted—By the Internet, Independent (London), Feb. 19, 1995, at 3, available in 1995 WL 7625193 (reporting one lawyer's comment that "legislation in this field dates from the early 1980s.... How far has the computer come in that time? It's just not the same world.").

196 See supra Parts I.A, I.B.2.

197 See Observer v. United Kingdom, 216 Eur. Ct. H.R. (ser. A) at 39 (1991).

198 See id. at 78-79.

that "government action to suppress speech must be effective to be valid."[199] Under this analysis, the validity of English contempt of court law has become increasingly questionable, both because international electronic and traditional media can ignore English publication bans, and, as the *Knights* case illustrates,[200] because contempt law itself is not broad enough to prevent publication of all detrimental publicity.[201]

III

PROTECTING DEFENDANTS' RIGHTS IN THE TWENTY-FIRST CENTURY: RECOMMENDATIONS FOR CHANGE IN ENGLAND AND THE U.S.

As this Note has shown, legitimate criticisms have been leveled at the American criminal justice system: Because of unrestrained publicity, certain criminal defendants simply do not receive fair trials in U.S. courts.[202] This Note also has shown, however, that the British system, while vigorously guarding defendants' rights, tramples on freedom of speech without actually ensuring that trial rights are adequately protected.[203] Jonathan Caplan, the British attorney who labeled the American criminal justice system a "shambles,"[204] had little better to say about his own country's law of contempt, calling it "unclear and increasingly unworkable."[205] By learning from each other, both Britain and the United States could improve their approaches to fair trial/

199 Eric B. Easton, Closing the Barn Door After the Genie Is Out of the Bag: Recognizing a "Futility Principle" in First Amendment Jurisprudence, 45 DePaul L. Rev. 1, 35 (1995).

200 See supra notes 150-52 and accompanying text.

201 Similar concerns have prompted Canadian courts to limit reliance on publication bans. In 1993, the Ontario Court of Justice granted a publication ban in a sensational murder trial. Because American journalists covered the trial, Canadians easily circumvented the ban by using electronic media: "Canadians, barred from passing pieces of paper to one another in the real world, shifted to the virtual world to learn information of the Homolka case. The police attempted in vain to shut down discussions of the case which were occurring on the Internet. This proved impossible . . . ." Riehle, supra note 163, at 218; see also Rene Nuñez, Note, Calibrating the Scales of Justice: Balancing Fundamental Freedom in the United States and Canada, 14 Ariz. J. Int'l & Comp. L. 551, 561 (1997) (noting enforcement problems in Canada since "many Canadians had access to the American media"). The following year, the Supreme Court of Canada restricted the use of publication bans. See Dagenais v. Canadian Broad. Corp. [1994] 120 D.L.R.4th 12, 44 (Can.) ("In this global electronic age, meaningfully restricting the flow of information is becoming increasingly difficult. Therefore, the actual effect of bans on jury impartiality is substantially diminishing.").

202 See supra Part I.

203 See supra Part II.

204 See Hoge, supra note 4, at A10.

205 See A Pipe Blown by Surmises, supra note 155, at 1497 (calling for "a Royal Commission to inquire into all aspects of the media and the courts").

free press conflicts, offering significant protections to criminal defendants while preserving fundamental freedoms of speech and of the press.

A. Targeted Jury Controls

Since the English law of contempt neither covers all circumstances in which damaging information might be released to the public, nor provides effective controls on international media that can circumvent contempt rules,[206] several commentators have suggested that England should adopt jury controls similar to those used in the United States.[207] As one media expert noted: "'Under our system the whole of the public is deprived of information so that 12 jurors are not influenced .... The internet breaks that down. Eventually we are going to have to put more emphasis on jury selection.'"[208] American jury control procedures, however, often do not successfully weed out biased jurors. United States courts rely heavily on the jury selection process to protect criminal trials from the taint of pretrial publicity,[209] but studies show that neither judges nor attorneys are capable of accurately assessing juror prejudice.[210] Prospective jurors may attempt to hide their prejudices, or they may even be unaware of them.[211] Ask-

206 See supra Part II.B.2.

207 See, e.g., Stavros, supra note 179, at 158-59 (urging adoption of American-style jury controls); The Courts and the Media, supra note 157, at 541 (arguing that jurors inadvertently exposed to prejudicial publicity could be weeded out by "[a] few questions properly put by the trial judge"); A Pipe Blown by Surmises, supra note 155, at 1497 (advocating return of peremptory challenges that enable lawyers to excuse jurors thought unlikely to favor their case); see also Riehle, supra note 163, at 220 (noting that "[c]onducting a voir dire ... may be a solution" but that "[a] gag order on trial participants is an effective alternative to a publication ban"). But see Peter Duff, The Scottish Criminal Jury: A Very Peculiar Institution, Law & Contemp. Probs., Spring 1999, at 173, 180-82 (arguing in favor of Scotland's refusal to permit voir dire, given potential for abuse).

208 Cathcart, supra note 195 (quoting media expert Nick Braithwaite).

209 See Kerr, supra note 30, at 699-700 ("Jury selection appears to be the first and primary line of defense against pretrial publicity.").

210 In one study, researchers found that "causal challenges were completely unrelated to juror verdicts," id. at 695, and that the "bias created by the publicity survived voir dire unscathed," id. at 697; see also Studebaker & Penrod, supra note 20, at 441 (noting that there is "little evidence that peremptory challenges are reliably related to jurors' verdict preferences").

211 See Studebaker & Penrod, supra note 20, at 442 (noting that jurors may not remember or report prejudicial publicity). One survey found as follows:

> Regardless of the amount of knowledge about the case, a significant proportion of individuals thought they could be fair and impartial. In fact, the group that most strongly endorsed the proposition that there was "a lot of evidence" against the defendant also had the highest proportion of respondents who thought they could be fair and could set aside the knowledge gleaned from the news.

Id. at 435.

ing a potential juror whether he or she can be impartial "is a little like asking a practicing alcoholic if he has his drinking under control; we are asking the person who has the prejudice to determine if the prejudice will affect his decision."[212] Furthermore, the process of voir dire itself may be prejudicial, since the defense is forced to ask questions that highlight the very issues it wants to suppress.[213]

Nevertheless, England could enhance its protection of criminal defendants while relaxing onerous publication bans if it adopted jury selection procedures that do not rely on either attorney or juror appraisals of prejudice. The weakness in the American model is that it is difficult for anyone—legal professional or lay person—to assess bias accurately. If English courts were to conduct individual oral interviews or written questionnaires in order to determine whether jurors had been exposed to inadmissible evidence, potentially biased jurors could be dismissed without engaging in a possibly inaccurate assessment of the degree of actual prejudice. English law already recognizes that jurors who have been exposed to inadmissible evidence are presumptively prejudiced.[214] By questioning prospective jurors to determine the extent of their exposure, British courts could avoid staying prosecutions whenever there is widespread exposure by the media of information that would prejudice a criminal trial.[215]

American courts, on the other hand, should adopt the English presumption that jurors exposed to inadmissible evidence are necessarily prejudiced by that exposure. This would extend the holding in *Marshall v. United States*[216] to all categories of inadmissible evidence in both state and federal courts and would explicitly reject the Court's

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Judges are rarely provided with training in detecting bias. See O'Connell, supra note 83, at 178 n.69. Judge O'Connell further notes that voir dire examinations are expensive, time consuming, and usually unsuccessful at removing prejudice from juries. See id. at 173-74.

212 O'Connell, supra note 83, at 183 ("The pressure of the voir dire examination sometimes causes jurors to temporarily forget their own names."); see also Studebaker & Penrod, supra note 20, at 440-41 (suggesting that assertions of impartiality cannot be trusted because "jurors who claimed that they could disregard the pretrial publicity simply did not—despite their apparent belief that they could").

213 See Studebaker & Penrod, supra note 20, at 442 (noting that defense is "forced to detect bias by asking prospective jurors about the very pretrial publicity and underlying facts that give rise to prejudice").

214 See supra notes 121-23 and accompanying text.

215 See A Pipe Blown by Surmises, supra note 155 (noting that increasing circumvention of contempt rules has led to increasing requests for stays of prosecution, and predicting that "the end result would be that no high profile case could ever come to court").

216 360 U.S. 310, 312-13 (1959) (holding that, in federal courts, exposure to defendant's prior criminal record is presumptively prejudicial); see also supra notes 103-06 and accompanying text.

holding in *Mu'Min v. Virginia*[217] that content-specific questioning is not required to determine prejudice.[218] The American Bar Association standards endorse this presumption,[219] recognizing that exclusionary laws of evidence become pointless when jurors have learned of inadmissible information from the press.[220] In addition, recognizing that in some situations the bulk of the jury pool could become tainted by exposure to inadmissible evidence, the Supreme Court should follow Justice Marshall's suggestion and "provide much needed guidance regarding the minimum due process requirements for state change of venue rules,"[221] preferably by adopting a liberal standard that would mirror the British commitment to ensuring the integrity of criminal trials.[222] In order to determine whether a change of venue is appropriate, courts also could make use of social science

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217 500 U.S. 415 (1991); see also supra notes 96-102 and accompanying text.

218 The Court in *Mu'Min* held that a defendant did not have the right to question jurors about what they had learned prior to trial. See *Mu'Min*, 500 U.S. at 431-32. If American courts accepted British presumptions regarding the prejudicial effect of pretrial exposure to inadmissible evidence, they would recognize a defendant's need to question jurors so as to determine whether they had been exposed to presumably prejudicial information.

219 American Bar Association standards require individual questioning of prospective jurors and dismissal of any juror who has been exposed to inadmissible evidence, regardless of his or her assessment of prejudice. See ABA Standards for Criminal Justice Fair Trial and Free Press Standard 8-3.5(a) (3d ed. 1992) (stating:

> If there is a substantial possibility that individual jurors will be ineligible to serve because of exposure to potentially prejudicial material, the examination of each juror with respect to exposure should take place outside the presence of other chosen and prospective jurors . . . . The questioning should be conducted for the purpose of determining *what the prospective juror has read and heard about the case* and how any exposure has affected that person's attitude . . . .

(emphasis added)).

220 Trial judges are free to follow this standard. See, e.g., People v. Manson, 132 Cal. Rptr. 265, 315 (Ct. App. 1976) (noting that judge in Charles Manson's trial excluded any juror who was exposed to confessions by any defendant).

221 Swindler v. Lockart, 495 U.S. 911, 911 (1990) (denying cert.) (Marshall, J., dissenting).

222 The standards set by the American Bar Association strongly favor changes of venue. See ABA Standards for Criminal Justice Fair Trial and Free Press Standard 8-3.3(b) (3d ed. 1992) (stating that change of venue "should be granted whenever it is determined that, because of . . . potentially prejudicial material, there is a substantial likelihood that . . . a fair trial . . . cannot be had"). Some people object to changes of venue because of the cost involved, but such objections should not be entertained in light of the fact that the Sixth Amendment and the Due Process Clause of the Fifth Amendment establish a positive obligation on the part of the government to guarantee fair trials by impartial juries. See Garcia, supra note 98, at 1133 (noting that "objection [about expense] is unwarranted in light of the miniscule number of criminal cases which engender substantial pretrial publicity and thereby endanger the prospect of selecting an impartial jury").

research to determine the extent of prejudice, as was done in the Timothy McVeigh and Terry Nichols trials.[223]

B. Participant Gag Orders

In addition to controlling juries, courts can lessen the effect of potentially prejudicial publicity by preventing the dissemination of the most damaging information. The British law of contempt attempts to do this by restricting the material that the media can publish;[224] however, this not only impinges on valuable press freedoms, but also increasingly is ineffective in the face of global electronic media.[225] American courts, on the other hand, are almost never free to regulate what the media may report.[226] Given that publication bans cannot be utilized successfully to protect fair trial rights on either side of the Atlantic, one powerful alternative is to prohibit trial participants from releasing potentially damaging information to the press in the first place. In America, such restraints take two forms: general regulations on attorneys[227] and specific "gag orders" applicable to participants in high-profile cases.[228] While both methods are controversial,

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223 See Studebaker & Penrod, supra note 20, at 453 (proposing combination method: using surveys and experimental techniques to establish bias and its links to pretrial publicity); see also O'Connell, supra note 83, at 194 (noting that "[i]n massive pretrial publicity cases, the only method available to rebut the *presumed prejudice* standard may be the public opinion poll").

224 See supra Part II.A (describing Contempt of Court Act).

225 See supra Part II.B (arguing that contempt law fails to protect defendants while unacceptably impinging on press freedoms).

226 See supra note 184 and accompanying text.

227 See, e.g., Model Rules of Professional Conduct Rule 3.6(a) (1983) (establishing guidelines governing extrajudicial statements by attorneys participating in "the investigation or litigation of a matter"). Rule 3.6(a), adopted in various forms by all 50 states, prohibits any "extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter." Id. Certain factual statements are permitted, see id. Rule 3.6(b), as are statements necessary to "protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client," id. Rule 3.6(c), the so-called "reply rule." In Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991), a deeply divided Supreme Court endorsed the "substantial likelihood" standard and upheld a state rule modeled after Rule 3.6. See id. at 1063 (concluding that "the 'substantial likelihood of material prejudice' standard applied by Nevada and most other States satisfies the First Amendment," but nevertheless striking down application of rule as void on vagueness grounds).

228 Gag orders can apply to all participants in a case: to witnesses and jurors as well as attorneys. See Avern L. Cohn, Fair Trial—Free Press: A Trial Judge's View, 71 Mich. B.J. 190, 192 (1992) (noting that jurors and court personnel, as agents of state, are subject to heightened speech restrictions). Some courts have struck down sweeping gag orders for being too broad, however. See CBS Inc. v. Young, 522 F.2d 234, 236, 240-42 (6th Cir. 1975) (overturning gag order in Kent State civil trial that made "no effort to limit the ban on extrajudicial statements to matters which might prejudice the trial, but enjoin[ed] any dis-

some lower courts have read *Sheppard v. Maxwell*[229] and *Nebraska Press Ass'n v. Stuart*[230] as "invitation[s]—if not directive[s]—to impose greater restrictions on extrajudicial statements by trial participants."[231] If, as this Note argues, the English law of contempt becomes increasingly ineffective because of changes in information technology, England also will need to enforce restrictions on extrajudicial attorney speech consistently in order to ensure that the rights of criminal defendants are protected.

Some commentators claim that restrictions on attorney speech violate the U.S. Constitution.[232] In *Gentile v. State Bar of Nebraska*,[233] however, the Supreme Court held that a rule prohibiting attorneys from making "an extrajudicial statement . . . if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding"[234] did not run afoul of the First Amendment.[235] Furthermore, the *Sheppard* Court

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cussions of the cases in any manner whatsoever by the persons or classes specified"). A court may be more willing to uphold a gag order when the challenge comes from a third party rather than from one of the litigating parties. See, e.g., Dow Jones & Co. v. Simon, 842 F.2d 603, 608 (2d Cir. 1988) (upholding gag order imposed on participants in Wedtech trial, finding "a substantial difference between a restraining order directed against the press—a form of censorship which the First Amendment sought to abolish from these shores—and the order here directed solely against trial participants and challenged only by the press"). Voluntary bench-bar-press agreements were tried but abandoned after the Washington Supreme Court attempted to coerce media representatives into agreeing to the "voluntary" guidelines. See Cohn, supra, at 191 (noting that willingness of press to agree to restriction was "blunted" by decision in Federated Publications, Inc. v. Sandberg, 633 P.2d 74 (Wash. 1981)); see also Drechsel, supra note 21, at 36 ("It is at best questionable whether voluntary guidelines are widely known or followed.").

229 384 U.S. 333, 361-62 (1966) (noting that court could have limited damage caused by publicity by taking control of public officials—through regulations, adherence to Canons of Professional Ethics, and warnings to reporters about "impropriety of publishing material not introduced in the proceedings .... [T]he news media would have soon learned to be content with the task of reporting the case as it unfolded in the courtroom—not pieced together from extrajudicial statements.").

230 427 U.S. 539, 563-64 (1976) (noting suggestion to impose limitation on "what the contending lawyers, the police, and witnesses may say to anyone").

231 Minnefor, supra note 28, at 128; see also *Dow Jones*, 842 F.2d at 612 ("It is altogether fitting that the solution should restrict those at the source of the problem: counsel who serve as officers of the court .... A focus on the source of potentially prejudicial statements rather than the publisher of such statements has been endorsed by the courts ....").

232 See generally Erwin Chemerinsky, Lawyers Have Free Speech Rights, Too: Why Gag Orders on Trial Participants Are Almost Always Unconstitutional, 17 Loy. L.A. Ent. L.J. 311 (1997) (arguing that restrictions on attorney speech violate First Amendment principles); Erwin Chemerinsky, Silence Is Not Golden: Protecting Lawyer Speech Under the First Amendment, 47 Emory L.J. 859 (1998) [hereinafter Chemerinsky, Silence] (same).

233 501 U.S. 1030 (1991).

234 Id. at 1033 (internal quotation marks omitted).

235 See id. at 1063. The Court's assessment has been subject to criticism. See Chemerinsky, Silence, supra note 232, at 887 ("[C]urrent restrictions on lawyer speech, both through rules of professional conduct and gag orders, are unconstitutional."). A strong argument

endorsed restrictions on attorney speech, stating that the "[e]ffective control of [leaks from prosecutors and defense counsel]—concededly within the court's power—might well have prevented the divulgence of inaccurate information, rumors, and accusations that made up much of the inflammatory publicity."[236] Because England has no First Amendment, gag orders would not be problematic there, and, because the European Court has mandated such restrictions in defense of fair trial rights,[237] they would not violate article 10 of the ECHR.

Research shows that the press receives much of its information regarding criminal trials from law enforcement sources and prosecutors,[238] suggesting that plugging government leaks could dramatically ease the problem of prejudicial publicity.[239] Interestingly, the Su-

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can be made, however, that attorneys can be subject to greater regulation because of their position as officers of the court. See *Gentile*, 501 U.S. at 1066 ("[C]ourts have historically regulated admission to the practice of law . . . . 'Membership in the bar is a privilege burdened with conditions.'" (quoting "the oft-repeated" statement of In re Rouss, 116 N.E. 782, 783 (N.Y. 1917) (Cardozo, J.))); see also United States v. Salameh, 992 F.2d 445, 446-47 (2d Cir. 1993) (stating:

> Though the speech of an attorney participating in judicial proceedings may be subjected to greater limitations than could constitutionally be imposed on other citizens . . . the limitations on attorney speech should be no broader than necessary to protect the integrity of the judicial system and the defendant's right to a fair trial . . . .).

But see Scott M. Matheson, Jr., The Prosecutor, the Press, and Free Speech, 58 Fordham L. Rev. 865, 881 (1990) (arguing that "attorneys retain first amendment rights despite their positions as officers of the court").

236 Sheppard v. Maxwell, 384 U.S. 333, 361 (1966).

237 In Allenet de Ribemont v. France, 308 Eur. Ct. H.R. (ser. A) at 17, 24 (1995), the Court awarded two million French francs to a former suspect after senior police officials and a cabinet minister held a press conference accusing him of complicity in the murder of a popular member of Parliament. Allenet de Ribemont was eventually released and charges against him were dropped. See id. at 10. The Court stated that authorities are not restricted from "informing the public about criminal investigations in progress, but [they are required to] do so with all the discretion and circumspection necessary if the presumption of innocence is to be respected." Id. at 17.

238 See Drechsel, supra note 21, at 35 ("[D]ata showing the heavy reliance of journalists on law enforcement sources and prosecutors confirms the appropriateness of focusing attention on those sources when attempting to control pre-trial publicity."); see also Mariniello, supra note 24, at 374 ("The source of information for the media is generally either the police or the prosecution, which is why newspapers tend to report the prosecution's side of the case rather than the defendant's."). Furthermore, behavioral research shows that "the majority of post-arrest publicity comes out of the office of the prosecutor." Mariniello, supra note 24, at 385.

239 See Lewine, supra note 43, at 55 ("Preventing disclosures of highly prejudicial material by attorneys and police officers would deprive the press of probably its principal source of information and significantly reduce the possibilities of interference with a trial."). Interestingly, although the prosecution and police are the sources of the majority of prejudicial publicity surrounding criminal trials, "[m]any defense attorneys feel that . . . gag orders are more frequently enforced upon defense attorneys than upon prosecutors." Mariniello, supra note 24, at 385.

preme Court noted in *Gentile* that the American Bar Association had presented "not a single example where a defense attorney [had] managed by public statements to prejudice the prosecution of the State's case."[240] Often, the motives behind such prosecutorial disclosures are highly self-serving.[241] Attorneys for Michael and Lowell Milken charged that strategic leaks from then-United States Attorney Rudolph Giuliani's office "resulted from decisions by some in the government to use publicity as a prosecutorial weapon, carefully timing the disclosures to 'pressure' defendants, witnesses, and those under investigation."[242] Understandably, the effects of prejudicial disclosures can be devastating to a criminal defendant or to the target of an investigation.[243] While some argue that silencing officials and attorneys merely would provide uninformed 'sources' with an enlarged forum,[244] uninformed sources have little damaging information to disclose.

Professor Erwin Chemerinsky argues that "lawyers should be prohibited only from making statements that they know to be false or that are made with reckless disregard for the truth."[245] However,

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240 *Gentile*, 501 U.S. at 1055.

241 See Milton R. Wessel, Controlling Prejudicial Publicity in Criminal Trials, in Selected Readings, supra note 43, at 70, 70 (noting that "motives in generating public comment may be political ambition or the craving for a good 'public image'").

242 Memorandum of Law in Support of Motion of Michael R. Milken and Lowell J. Milken for Contempt Sanctions and Other Relief Based upon the Government's Numerous Unlawful Leaks to the Press at 2, United States v. Milken, 759 F. Supp. 109 (S.D.N.Y. 1990) (No. S 89 Cr. 41 (KMW)) (on file with the *New York University Law Review*). The Memorandum of Law further stated:

> The newspapers have revealed with startling frequency supposedly confidential matters such as the identities of the targets of the investigation, the names of those who received subpoenas, the questions asked of grand jury witnesses and the testimony given in response, details concerning the immunization and "cooperation" of witnesses, and detailed overviews of the government's evidence and legal theories.

Id. at 3.

243 When the FBI leaked the fact that Richard Jewell was a suspect in the bombing of Atlanta's Centennial Park during the Olympic Games in 1996, Jewell became subject to intense media scrutiny that he claimed permanently damaged his reputation. See Kevin Sack, Atlanta Papers Are Sued in Olympic Bombing Case, N.Y. Times, Jan. 29, 1997, at A12. Two years later, the FBI charged the fugitive Eric Robert Rudolph with the Centennial Park bombing along with two other bomb attacks in Atlanta. See David Johnston, Elusive Fugitive Is Charged with Bombing at Olympics, N.Y. Times, Oct. 15, 1998, at A18. Jewell has sued several news organizations and has settled with most of them; however, the *Atlanta Constitution*, the newspaper that broke the initial story, has refused to settle, claiming that it did nothing wrong in releasing the story. See Roger S. Kintzel, The Call of Duty, N.Y. Times, Feb. 27, 1997, at A23.

244 See, e.g., Evelle J. Younger, Fair Trial, Free Press, and the Man in the Middle, in Selected Readings, supra note 43, at 48, 51 ("The muzzling of responsible sources of information creates a vacuum that will be filled by irresponsible sources.").

245 Chemerinsky, Silence, supra note 232, at 861.

what he fails to recognize is that it is precisely *accurate* information that is the most dangerous. If someone publicized the fact that the defendant in an upcoming murder trial was already a convicted murderer, that publicity would be much more prejudicial if, in fact, it were true. As was noted earlier, information that often only can be released by law enforcement personnel, such as publicity detailing a defendant's criminal record, confessions, or failed lie detector tests, is particularly prejudicial.[246]

Therefore, in order to protect criminal defendants' fair trial rights, regulations restricting attorney speech strictly and consistently should be enforced, and effective methods of curbing prosecutorial and law enforcement leaks to the media should be devised.[247] New regulations should prohibit so-called "speaking indictments," through which prosecutors evade no-comment rules by including highly prejudicial information in official court documents that are accessible by the press.[248] When prejudicial information is released to the press, disciplinary actions should be instigated against violators,[249] sending a clear signal that the legal system no longer will tolerate unauthorized leaks of inflammatory material.[250] Of course, practical difficulties arise when press reports cite the ubiquitous "unnamed source."[251]

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246 See supra notes 30-33 and accompanying text.

247 In Rideau v. Louisiana, 373 U.S. 723 (1963), the defendant's notorious televised confession "was carried out with the active cooperation and participation of the local law enforcement officers." Id. at 725. As one author has noted:

> Most commentary on extrajudicial lawyer speech has focused on criminal defense counsel . . . [but] it is the *prosecutor's* extrajudicial publicizing, not defense counsel's, that might imperil the defendant's fair trial right. The prevailing view is that . . . prosecutors, more than defense lawyers or lawyers in other settings, may more readily violate no-comment rules.

Matheson, supra note 235, at 868-69 (emphasis added).

248 See Matheson, supra note 235, at 891 ("A prosecutor could also evade no-comment rules by putting information intended for press dissemination in a court document—a motion or pretrial brief—and filing it with the court. Unless the defense can secure an order sealing the document, it is fair game for press review.").

249 See Sheppard v. Maxwell, 384 U.S. 333, 363 (1966) ("Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.").

250 See Matheson, supra note 235, at 872 ("Another regulatory possibility is disqualification of the prosecutor from the case."). While it would be impossible to identify all sources of unauthorized leaks, courts have held that by its very nature certain disclosed information can "establish a prima facie case of a . . . violation by the attorneys conducting the investigation . . . . The nature of the discourse is such that it discloses the likely source." Lance v. United States Dep't of Justice (In re Grand Jury Investigation), 610 F.2d 202, 216 (5th Cir. 1980).

251 See Chemerinsky, Silence, supra note 232, at 868-69 ("In the World Trade Center bombing case there were leaks that clearly came from the police. The judge brought each police officer on the case to the witness stand and each denied, under oath, being the source of the leaks. The identity of the source was never discovered.").

Nevertheless, restrictions on extrajudicial statements of trial participants and law enforcement officials may prove the most powerful and cost-effective tool in the effort to protect the integrity of criminal trials.

CONCLUSION

America and England share a deep commitment to protecting the integrity of their criminal justice systems, but currently neither country effectively protects the rights of criminal defendants from the dangers posed by prejudicial publicity. In England, the strong commitment to impartial justice causes unacceptable limitations on freedom of speech; furthermore, the nature of global media technology undermines even vigorous efforts to contain prejudicial information, ultimately leaving ever greater numbers of criminal defendants unprotected. With the rise of online media, England likely will have to adopt American-style jury controls coupled with gag orders on trial participants (rather than publication bans) in order to honor its obligation to provide fair trials for individuals accused of crimes. While America, on the other hand, has powerful remedies with which to combat potentially prejudicial publicity without betraying First Amendment values, it lacks the political and judicial will to deploy the remedies effectively.[252] The United States should adopt England's unwavering support of fair trial rights, apply available jury controls to assure that no juror is seated who has been exposed to evidence inadmissible at trial, and rigorously enforce restrictions on trial participants, especially law enforcement personnel, in order to prevent the release of highly prejudicial information in the first place. In this way, both countries can guarantee that the right to a fair trial, "the most fundamental of all freedoms,"[253] will not be subverted.

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252 See supra Part I; see also Mariniello, supra note 24, at 395 ("What is called for is not an overhaul of the current system but rather a greater commitment to the integrity of our court system.").

253 Estes v. Texas, 381 U.S. 532, 540 (1965).