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From O.J. to Tim McVeigh and Beyond: The Supreme Court's Totality of Circumstances Test as Ringmaster in the Expanding Media Circus

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Imagine what could happen if the latent local passions were aroused through channels provided by radio and television. Then there might be no place to which the trial could be transferred to protect the accused.

INTRODUCTION

When Justice Douglas spoke these words nearly forty years ago, he probably intended to make a rhetorical, rather than a prophetic, statement. Nonetheless, on March 14, 1997, the attorneys for Timothy McVeigh attempted to make prophecy of Douglas’s speculation. McVeigh was one of two men accused of bombing the Alfred P. Murrah Federal Office Building in Oklahoma City. One hundred sixty-eight people died in the explosion, which caused an estimated $651,594,000 in total incidental costs. Emotionally intense news coverage in Oklahoma was of such magnitude that a United States District Court held that widespread prejudice among the citizens of the state prevented the defendants from receiving a fair and impartial trial. As a result, the case was transferred to Denver, Colorado.

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1. Justice Douglas, The Public Trial and the Free Press, 33 ROCKY MTN. L. REV. 1, 9 (1960). This article is based on an address delivered by Justice William O. Douglas at the University of Colorado Law School on May 10, 1960. See id. at 1 n.*.

2. See Motion to Dismiss, or in the Alternative, Request for Abatement or Other Relief, with Supporting Memorandum of Law at *1, United States v. McVeigh, No. 96-CR-68-M, 1997 WL 17366 (D. Colo. Mar. 14, 1997) (Motion of Defendant Timothy McVeigh) [hereinafter Defendant’s Motion to Dismiss] (claiming that national media coverage of his alleged confession made it impossible for him to receive a fair trial).

3. For a brief factual and procedural history of the early stages of the McVeigh case, see United States v. McVeigh, 918 F. Supp. 1467, 1469 (W.D. Okla. 1996). McVeigh and his codefendant, Terry Lynn Nichols, were charged with using a truck bomb and completely destroying the Alfred P. Murrah Federal Office Building in Oklahoma City, Oklahoma. Id.

4. Id.
5. Id. at 1469-74.
6. Id. at 1474-75.
On February 28, 1997, just one month before the beginning of his trial, the *Dallas Morning News* announced via the Internet that defendant Timothy McVeigh had confessed to the bombing.\(^7\) The news spread quickly, and by March 1, 1997, the story was being broadcast nationwide.\(^8\) Two weeks before his trial, McVeigh filed a motion to dismiss the entire prosecution based on this prejudicial pretrial publicity.\(^9\) The federal district court dismissed it in short order.\(^10\) McVeigh responded with a writ of prohibition that he filed in the Tenth Circuit, seeking review of the District Court's ruling.\(^11\) The court denied the writ with similar dispatch.\(^12\)

The fact that McVeigh experienced prejudicial pretrial publicity shortly before the beginning of his trial is nothing new.\(^13\) The fact that the story received national coverage is similarly familiar.\(^14\) Also common in high profile trials is the defendant's request for a change of venue.\(^5\)

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7. Defendant's Motion to Dismiss, *supra* note 2, at *1. For discussion of the McVeigh Motion to Dismiss, see *infra* notes 197-210 and accompanying text.


9. *Id.*


13. See, e.g., *Sheppard v. Maxwell*, 384 U.S. 333, 338-42 (1966) (beginning of prejudicial pretrial publicity occurred when the Assistant County Attorney, who became Sheppard's chief prosecutor, publicly criticized the refusal of the Sheppard family to permit his immediate questioning); *Rideau v. Louisiana*, 373 U.S. 723, 727 (1963) (holding that, considering the nature of the media coverage, the Court could find juror bias without review of the jurors voir dire testimony, and that due process of law required a trial before a jury drawn from a community of people who had not seen and heard Rideau's television interview); *Irvin v. Dowd*, 366 U.S. 717, 728 (1961). In *Irvin*, existing intensive pretrial publicity made it impossible for jurors to set aside opinions or impressions and render a verdict based on evidence presented in court. *Id.* This pretrial publicity consisted, in part, of press releases issued by the prosecutor stating that the defendant had confessed to six murders. *Id.* at 719.


15. See *Sheppard*, 384 U.S. at 346; *Estes*, 381 U.S. at 535; *Rideau*, 373 U.S. at 724; *Irvin*, 366 U.S. at 720; Charles H. Whitebread & Darrell W. Contreras, *Free Press v. Fair Trial: Protecting the Criminal Defendant's Rights in a Highly Publicized Trial by Applying the Sheppard.—Mu'Min Remedy*, 69 S. CAL. L. REV. 1587, 1615-18 (1996) (noting that the McVeigh trial's change of venue to another state, though unusual, was of little value in reducing the risk of bias resulting from pretrial publicity).
is uncommon, however, was McVeigh’s attempt to have his indictment dismissed because of prejudicial pretrial publicity, such that he would be insulated from federal prosecution. This has been labeled unprecedented. Interestingly, McVeigh’s motion came on the heels of another criminal prosecution considered unprecedented—the double murder trial of O.J. Simpson. In contrast to McVeigh’s procedural move, commentators labeled the Simpson case as unprecedented because of the media coverage it received.

A peculiar link exists between Simpson and McVeigh. Prior to the O.J. Simpson trials, neither the courts, nor the country, had witnessed pretrial coverage so pervasive that it could provide a basis for the motion McVeigh filed, to dismiss an indictment on the basis that an entire nation of potential jurors had been contaminated by media coverage of pretrial events. Throughout the Simpson prosecution, media coverage of events was so extensive that an entire nation of prospective jurors were aware of, and apparently held strong opinions about, the defendant’s guilt or innocence.

Moreover, there is reason to believe that those who concluded Simpson was guilty before or during the trial were not persuaded by his acquittal. It is startling to consider, for example, that a prominent law professor such as Ronald Allen would acknowledge that, while unable to observe the evidence presented to the jury, he knew Simpson was guilty based on what he had heard from the media. Allen reasoned that one

16. Brief of the United States in Opposition to McVeigh’s Motion for Dismissal or “Abatement” at *1, United States v. McVeigh, No. 96-CR-68-M, 1997 WL 117368 (D. Colo. Mar. 14, 1997) (stating that McVeigh’s motion to dismiss the indictment and his attempt to insulate himself from federal prosecution was unprecedented).


18. Id. at 56 (referring to the estimated seventy million people who viewed the low-speed highway chase that preceded Simpson’s arrest, and quoting University of California law professor Peter Arenella who noted, “we have never seen a case like [Simpson’s]”).

19. See Defendant’s Motion to Dismiss, supra note 2, at *2; infra notes 195-208 and accompanying text; see also 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, 97 (1995) (stating that “the scope of publicity surrounding certain criminal cases has now reached unprecedented levels”).

20. See Minnefor, supra note 19, at 97-99. Minnefor suggests that trials like the Simpson trial have received unprecedented national media coverage largely due to the expanding coverage of cable television, which she attributes to a rise in tabloid-style programs. Id. at 107-08. She believes that the mainstream press has begun to offer a similar style of coverage in order to compete with these tabloid-type shows. Id. The result is “pervasive publicity both before and during the trial which impacts the jury’s view of the case.” Id. at 99.


22. Id.
need not go around the world to know it is "a sphere of some kind and not flat." Applying this in the context of Simpson, this is similar to saying, "he is guilty of something ('a sphere of some kind'), and not innocent ('flat')." Though the press provides neither the standard, nor the appropriate source, of proof in criminal trials, media coverage was apparently sufficient to support a conviction of Simpson in some courts of public opinion.

Professor Allen observed that

the citizens of the country saw with their own eyes the acquittal of an obviously guilty man of a vicious crime of violence, and they—we—realize that the primary point of all the political rhetoric about rights is the protection of innocent people from false convictions, . . . not the protection of violent criminals from the consequences of their actions.

This statement is indicative of precisely the type of fixed opinions the Supreme Court has condemned when considering the effect of pretrial publicity—publicity that would fix the venire's, or empanelled jurors', opinions such that they would be unaffected by the evidence presented at trial. If the "citizens of the country" were not persuaded by a not guilty verdict, could they be less resistant to its underlying evidence? Even those who believe that Simpson's acquittal indicates a working jury system must acknowledge widespread opinion that Simpson's verdict was simply the result of jury nullification and racial bias. The critical point for this discussion is not that perceptions of guilt or innocence in the

23. Id. at 990.
24. Id.
25. Id.
26. See Irvin v. Dowd, 366 U.S. 717 (1961). In Irvin, the trial court excused over half of the prospective jurors for holding biased pretrial opinions based on extensive media coverage. Id. at 727. The Supreme Court emphasized that with preconceptions of guilt, "[t]he influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man." Id. Justice Frankfurter's concurring opinion also addressed pretrial publicity's impact on jurors' opinions, asking, "How can fallible men and women reach a disinterested verdict based exclusively on what they heard in court when, before they entered the jury box, their minds were saturated by press and radio for months preceding by matter designed to establish the guilt of the accused." Id. at 729-30.
27. Allen, supra note 21, at 990.
28. See, e.g., Robert J. Cottrol, Through a Glass Diversely: The O.J. Simpson Trial as Racial Rorschach Test, 67 U. COLO. L. REV. 909, 913 (1996). Professor Cottrol noted that, following the Simpson criminal verdict, the public concluded that jury nullification had occurred, and "[f]ew public commentators were willing to consider whether a good case might be made in support of the jury's verdict." Id. Professor Cottrol sees the Simpson trial putting at issue the fact that racism has penetrated, and is tolerated, in the nation's police departments. Id. at 914; see also Richard A. Boswell, Crossing the Racial Divide: Challenging Stereotypes About Black Jurors, 6 HASTINGS WOMEN'S L.J. 233, 235-36 (1995) (noting the widely held stereotype that the jury's decision in the Simpson trial was motivated by race, rather than evidence); John Leo, The Color of the Law, U.S. NEWS & WORLD REP., Oct. 16, 1995, at 24 (citing the Wall Street Journal's report of racial nullification among jurors "humming right along").
Simpson case were often dismissed as racially motivated. It is whether those perceptions, nationwide, were a result of the media circus that preceded Simpson’s trial.

The arguable impact of the Simpson-type pretrial circus—nationwide bias—was tested by McVeigh’s motion to dismiss. This is odd because the McVeigh prosecution, while forced from its forum state by early media coverage, has been described as a “circus-free” example of judicial control over a high-publicity trial. It is interesting, therefore, to consider the theoretical viability of McVeigh’s motion to dismiss if it had been based on Simpson’s pretrial coverage instead of McVeigh’s.

The position taken in this article is that, after years of steady increases, the media coverage of high profile trials went overboard in the Simpson criminal case. This is noteworthy because Supreme Court precedent since the 1960s holds that, at some ambiguous level, media coverage of a criminal proceeding may be sufficient to create a presumption of bias against the defendant in all who witnessed it. Such fixed opinions render prospective jurors unfit to serve. Thus, national media coverage, like that exemplified by the Simpson trial, could result in precluding an entire nation of potential jurors. The result of this preclusion would be the success of a motion to dismiss, like that filed by McVeigh. With that in mind, this article examines the test applied by the Supreme Court to determine whether a particular venire of prospective jurors is presumptively biased. It also evaluates the Court’s voir dire requirements for the trial court identifying media based bias in individual potential jurors. The article concludes that, by applying the test as currently construed, the Court can indefinitely evade a presumption of nationwide jury bias. In the case of coverage like that in the Simpson trial, however, the Court risks jeopardizing the defendant’s constitutional right to an impartial jury by using current voir dire requirements. The suggested solution to this problem requires trial courts to consider the elements of pretrial publicity that the Supreme Court has evaluated when holding that bias could be presumed, in order to determine when extensive voir dire is constitutionally mandated.

Part I recounts the historical conflict between the media’s unfettered rights in generating pretrial publicity and the protection of the venire

29. See Cottrol, supra note 28, at 915 (stating “it was . . . the way the press framed the trial and the issues surrounding the public reaction to it that helped transform the trial of O.J. Simpson . . . into a presumed arena of racial confrontation”).

30. See Minnefor, supra note 19, at 99 n.15 (reporting empirical evidence results showing jurors’ attitudes to be affected by “extreme exposure” to pretrial publicity) (citing Symposium, What Empirical Research Tells Us, and What We Need to Know About Juries and the Quest for Impartiality, 40 AM. U. L. REV. 547, 551 (1991)).


32. See Ryan Ross, McVeigh’s Trial Lean and Trim, A.B.A. J., July 1997, at 24 (lauding the “circus-free” atmosphere of the McVeigh trial, and describing U.S. District Court Judge Richard Matsch’s control over the proceedings as a “model of judicial efficiency”).
from pretrial publicity bias. Part II discusses the tests the Supreme Court has employed to evaluate the impact of media based bias, and the Court's attempts to diminish or prevent that impact. This part notes the apparent change in the tenor of the Court's decisions following Sheppard v. Maxwell. Part III considers the factual elements of pretrial events to which those tests have been applied. Part IV discusses the "totality of circumstances" test, as construed by Murphy v. Florida and subsequent cases, and finds that the level of national jury bias alleged in the McVeigh motion could not sustain a dismissal under the current test. Part IV concludes that, under current voir dire requirements, the Court's refusal to presume bias may jeopardize defendants' fair trial rights in high profile cases. Part V proposes a solution, suggesting that certain types of pretrial publicity should trigger constitutionally mandated questions during voir dire about what publicity prospective jurors specifically witnessed.

In conclusion, this article finds that under the current test, there is no amount of coverage sufficient to establish a presumption of bias for the entire national venire. Therefore, a case like McVeigh will be analyzed in accord with the Supreme Court's holding in Mu'Min v. Virginia, which upholds the trial court's reliance on individual jurors' assurances that they can be fair and impartial. Moreover, the article suggests that the magnitude of the Simpson media coverage puts at issue the level of trial coverage required before the court can presume bias. Applying the totality of circumstances test, arguably, the Court can use the Simpson trial coverage as a basis for holding that a new standard of pretrial publicity is the appropriate test for national bias; that what was sufficient to prove or presume bias under the circumstances examined in, for example, Sheppard v. Maxwell, is not enough for McVeigh and that what might satisfy the test for McVeigh, will not satisfy the test for a subsequent high profile defendant like McVeigh's alleged co-conspirator, Terry Nichols.

I. THE HISTORICAL CONFLICT BETWEEN FREE PRESS AND FAIR TRIALS

The right of a criminal defendant to a fair trial and impartial jury is guaranteed by the United States Constitution. The free press guarantee has equally substantial underpinnings. There is, however, a long history of conflict between the two, rooted in the fact that the framers did not
prioritize constitutional rights. Accordingly, the 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. For example, in acknowledging the historical primacy of the rights guaranteed to the press by the First Amendment, the Court has stated, "[T]he unqualified prohibitions laid down by the framers were intended to give to liberty of the press, as to the other liberties, the broadest scope that could be countenanced in an orderly society." While the Supreme Court has recognized the need to balance an individual's right to a fair trial with the "passions of the populace" impact of the press in influencing potential jurors, it has at times appeared willing to risk potential jury bias in the interests of preserving a free press.

that the dichotomy between an unbiased jury and free press is not new. See Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 548 (1976).

37. See, e.g., Douglas, supra note 1, at 2 (concluding that the Constitution puts no qualification on the freedom of the press).

38. See, e.g., Irvin v. Dowd, 366 U.S. 717, 729 (1961). Justice Frankfurter, in his concurrence, found the influence of the press in jeopardizing fair trials as violative of the decencies guaranteed by the Constitution, though the press was constitutionally protected in its reporting. He acknowledged the Court's dilemma in this constitutional conflict, stating:

This Court has not yet decided that the fair administration of criminal justice must be subordinated to another safeguard of our constitutional system—freedom of the press, properly conceived. The Court has not yet decided that, while convictions must be reversed and miscarriages of justice result because the minds of jurors or potential jurors were poisoned, the poisoner is constitutionally protected in plying his trade.

Id. See also Nebraska Press, 427 U.S. at 547-48 (finding that neither the Constitution nor contemporaneous writings addressed the conflict between freedom of the press and the right to a fair trial); Pennekamp v. Florida, 328 U.S. 331, 336 (1946) (noting that courts must balance between freedom of the press and the right to a fair trial).


40. See Nebraska Press, 427 U.S. at 559, 570. The Court held that a prior restraint on speech is the most serious and least tolerable infringement on First Amendment rights, necessitating a heavy burden to secure that in this case had not been met. Id. The Court stated that pretrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial. Id. at 554. Furthermore, the tone and extent of the publicity affecting an impaneled jury may be shaped by the actions of attorneys, police, other officials, and, most importantly, the trial judge. Id. at 555; see also Murphy v. Florida, 421 U.S. 794, 802-03 (1975) (finding that a defendant on trial for armed robbery was not denied a fair trial regardless of the extensive news coverage of defendant's past crimes and jurors' knowledge of defendant's criminal record); Stroble v. California, 343 U.S. 181, 194-95 (1952) (finding that despite the district attorney's premature release of the defendant's murder confession, and inflammatory newspaper accounts, the defendant was not deprived of his constitutional right to a
Notwithstanding the Court's broad interpretation of free press rights, it has simultaneously endeavored to balance defendants' rights to fair trials, expressing a need to protect fair trial rights when they are threatened by the media's overzealous exercise of its First Amendment privileges. In *Estes v. Texas*, the Court acknowledged the press as "a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees, and generally informing the citizenry of public events and occurrences, including court proceedings." The Court, however, continued by stating that "[w]hile maximum freedom must be allowed the press in carrying on this important function in a democratic society, its exercise must necessarily be subject to the maintenance of absolute fairness in the judicial process."

The historical dichotomy between free press and fair trials predates television as the dominant medium of trial coverage. But the Court recognized the potential hazards associated with televised trials when television was still in its relative infancy. Moreover, television commentary outside the courthouse, and its implications, was not unanticipated. Yet fair trial because of absence of affirmative showing that any community prejudice ever existed, or even affected, the jury).

41. See, e.g., *Estes v. Texas*, 381 U.S. 532, 534-35 (1965). Estes's conviction for swindling was overturned after the Court concluded that he was deprived of his Fourteenth Amendment right to due process because of the televising and broadcasting of his pretrial hearings. *Id.* In *Estes*, the pretrial publicity accumulated to eleven volumes of press clippings, illustrating the case's national notoriety. *Id.* at 535. Furthermore, the hearings were carried live by radio and television. *Id.* The Court noted that "[p]retrial . . . publicity may be more harmful than publicity during the trial for it may well set the community opinion as to guilt or innocence." *Id.;* *Turner v. Louisiana*, 379 U.S. 466, 471-72, 474 (1965) (holding that due process guarantees the criminally accused a jury trial by a panel of impartial, indifferent jurors, and was violated when two deputy sheriffs giving key testimony that led to defendant's conviction had charge of the jury, and while discharging their duties, fraternized with them outside the courtroom); *Rideau v. Louisiana*, 373 U.S. 723, 724, 726 (1963) (reversing the conviction of a defendant whose staged, highly emotional confession had been filmed with the cooperation of local police, and subsequently broadcasted on television for three days while awaiting trial, the Court stating "[a]ny subsequent court proceeding 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) (holding that intensive pretrial publicity, which included a statement by the prosecutor that defendant had confessed to six murders, made it impossible for jurors to lay aside opinions or impressions and render a verdict based on the evidence presented in court). *But see, e.g.,* *Stroble v. California*, 343 U.S. 181, 191-93 (1952) (holding that newspaper accounts of petitioner's murder conviction did not cause such prejudice in the community as to deprive him of that "fundamental fairness" essential to the concept of justice and a fair trial, when the majority of the publicity was immediately prior or subsequent to arrest and not during the trial itself).

42. *Estes*, 381 U.S. at 539. 43. *Id.* 44. See, e.g., *United States v. Burr*, 25 F. Cas. 49 (C.C.D. Va. 1807) (No. 14,692G); *supra* note 37 and accompanying text. 45. See, e.g., *Estes*, 381 U.S. at 541. The Court quoted Justice Douglas's article, which argued against televising court proceedings because of "the insidious influences which [televising] puts to work on the administration of justice." *Id.;* see Douglas, *supra* note 1, at 9. 46. *Estes*, 381 U.S. at 540. Justice Douglas's article was in response to actions by the Colorado Supreme Court in 1956, which adopted the report of a referee that recommended televising or broadcasting trials at the discretion of the trial judge, provided this would not "detract from the
fair trial rights, though often touted as supreme in the federal courts, 49 have not enjoyed a clear mandate of supremacy in cases where free press and fair trial rights have been in conflict. 50 The manifestations of this ambiguous demarcation between free press and fair trial are evident in several areas, and have perplexed the Supreme Court for decades. 51 For example, that the freedom of the press is broadly protected by the First Amendment is further demonstrated by the Court’s historical antipathy towards orders restraining the press. 52 And, while the power of the courts to protect themselves from media related disturbances has long been recognized, 53 attempts to expand the contempt power have, at times, evoked popular reaction favoring the free press. 54 One ramification of this dichotomy is the regular attempts by the Court to balance the media’s rights to pretrial reporting and the defendant’s rights to a fair trial. 55 At dignity thereof, distract the witness in giving his testimony, degrade the court, or otherwise materially interfere with the achievement of a fair trial . . . .” In re Hearings Concerning Canon 35 of the Canons of Judicial Ethics, 296 P.2d 465, 472 (Colo. 1956).

47. See, e.g., Sheppard v. Maxwell, 384 U.S. 333, 362 (1966) (declaring that courts must take “strong measures” to ensure trials by impartial juries); Estes, 381 U.S. at 540 (stating that “[w]e have always held that the atmosphere essential to the preservation of a fair trial—the most fundamental of all freedoms—must be maintained at all costs,” and that the court accomplishes this good “through rules, contempt proceedings and reversal of convictions obtained under unfair conditions”); Toledo Newspaper Co. v. United States, 247 U.S. 402, 419 (1918), overruled by Nye v. United States, 313 U.S. 33 (1941) (upholding contempt convictions of two newspapers on grounds they prejudiced a pending judicial action).

48. See Nebraska Press Ass’n v. Stuart, 427 U.S. 539 (1976) (reversing order restraining the media from publishing or broadcasting admissions and information which implicated the defendant).

49. See Irvin v. Dowd, 366 U.S. 717, 729 (1961) (Frankfurter, J., concurring) (noting that, every term, the Court reviewed claims that a trial had been distorted by inflammatory news coverage affecting potential jurors).

50. See, e.g., Nebraska Press, 427 U.S. at 539; 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, 288-89 (1996) (indicating that only two restraining orders have survived constitutional attack since Nebraska Press).

51. Compare Patterson v. Colorado, 205 U.S. 454, 462-63 (1907) (dismissing petitioner’s contempt proceeding for lack of jurisdiction, while stating that “the propriety and necessity of preventing interference with the course of justice by premature statement, argument, or intimidation hardly can be denied”), with In re Oliver, 333 U.S. 257, 257-59 (1948). In Oliver, the Court granted petitioner’s writ of habeas corpus because he was sentenced to jail in haste and secrecy by a one-man judge/grand jury in Michigan. Id. The Court found that the defendant had been denied his Sixth Amendment right to a public trial, as well as his Fourteenth Amendment due process rights. Id. at 267. It noted, however, that “[t]he narrow exception to these due process requirements includes only charges of misconduct, in open court, in the presence of the judge, which disturbs the court’s business . . . .” Id. at 275.

52. Bridges v. California, 314 U.S. 252, 266-67 (1941). The Court cited the case of Judge Peck, who had impeachment proceedings brought against him as a result of his summary punishment of a lawyer for publishing a comment on a case that was on appeal. This case led to legislation; Congress enacted a statute concerning the power of federal courts to inflict summary punishment for contempt, and specified that the contempt power “shall not be construed to extend to any cases except the misbehaviour of . . . persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice . . . .” Act of March 2, 1831, 4 Stat. 487, 488 (1831).

53. See Irvin, 366 U.S. at 730. In his concurrence, Justice Frankfurter states that Not a Term passes without this Court being importuned to review convictions, had in States throughout the country, in which substantial claims are made that a jury trial has
such times, the Court applied several standards and tests, addressing issues ranging from prior restraint of the press in order to preserve trial integrity, to reversal of convictions when unrestrained press coverage compromised a fair trial.\textsuperscript{34}

II. THE TESTS FOR BALANCING FREE PRESS AND FAIR TRIAL RIGHTS

Reviewing the Supreme Court decisions addressing the conflict between fair trials and free press reveals a history punctuated with various tests for determining when the scales tip for, or against, the defendant, or the media. In evaluating whether pretrial publicity has caused bias, the Court appears to be searching for a test (or at least a way of describing the test it selected) that would provide the appearance of a concrete standard, with the flexibility to contend with the unpredictable future of pretrial, and trial, media coverage.

Early standards adopted by the Court evaluated the authority of the trial court to punish, through contempt proceedings, publicity that might influence a trial.\textsuperscript{35} One such test, or standard, was whether the publication at issue had the "reasonable tendency" to influence matters of law pending before the court.\textsuperscript{36} In \textit{Patterson v. Colorado} and \textit{Toledo Newspaper v. United States}, for example, the issue was the trial courts' ability to issue contempt orders punishing these types of publications.\textsuperscript{37} The standard applied by the Court was whether the publication had the "reasonable tendency" to impact the judge's decision.\textsuperscript{38}

One year after its decision in \textit{Toledo Newspaper} to adopt the "reasonable tendency" standard, the Court decided \textit{Schenck v. United States}\textsuperscript{39} and applied a "clear and present danger" test, raising the issue of the limitations on free speech rights.\textsuperscript{40} In \textit{Schenck}, the defendants were convicted of violating the Espionage Act by distributing leaflets calculated

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\textsuperscript{34} \textit{Id.}

\textsuperscript{35} \textit{Id.} See \textit{infra Part II.}

\textsuperscript{36} \textit{See Toledo Newspaper Co. v. United States, 247 U.S. 402 (1918), overruled by \textit{Nye v. United States, 313 U.S. 33, 52 (1941) (sustaining the trial court's contempt authority when publication had a "reasonable tendency" to impact the judge's decision); Patterson v. Colorado, 205 U.S. 454, 460 (1907) (stating that publications about matters pending before a court that tended toward interference with the court's administration of the law were punishable by contempt).}

\textsuperscript{37} \textit{Toledo, 247 U.S. at 421; Patterson, 205 U.S. at 462-63.}

\textsuperscript{38} \textit{Toledo, 247 U.S. at 410 ("[T]he situation is controlled by the reasonable tendencies of the acts done [to influence matters pending before the court] . . . ."); Patterson, 205 U.S. at 462-63 (noting that a publication concerning a matter of law pending before the court is punishable if it is "tending toward . . . interference" with that matter).}

\textsuperscript{39} \textit{Patterson, 205 U.S. at 462-63 (noting that the publication at issue was no less subject to contempt because the matter was before a judge instead of a jury).}

\textsuperscript{40} \textit{249 U.S. 47 (1919).}

\textsuperscript{50} \textit{Schenck, 249 U.S. at 52.}
to cause insubordination by military service recruits during war time.\textsuperscript{61} Applying the clear and present danger test to the defendants' speech, the Court stated: "The question in every case is whether the words used are in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."\textsuperscript{62} The Court noted that whether the test was satisfied depended not only upon the words spoken, but the circumstances in which they were said.\textsuperscript{63} Because the defendants in \textit{Schenck} were not members of the press, the Court did not consider whether the "clear and present danger" test was applicable to limit the First Amendment freedoms guaranteed the press. Yet, the Court in \textit{Schenck} articulated a test which set the stage for protecting free press rights in the future when it linked the stricter standards of the clear and present danger test with the flexibility of considering the surrounding circumstances to evaluate whether speech was constitutionally protected.

During the 1940s, however, the Court took strides to better protect the First Amendment rights of the press. In \textit{Nye v. United States},\textsuperscript{64} for example, the Court overturned \textit{Toledo Newspaper}, holding that it had improperly enlarged the contempt authority of the trial court.\textsuperscript{65} That same year, in \textit{Bridges v. California},\textsuperscript{66} the Court applied the "clear and present danger" test to speech by the press, to determine whether a publication should be deprived of constitutional protection.\textsuperscript{67} In doing so, the Court simultaneously rejected the "reasonable tendency" standard, finding that a reasonable tendency to interfere with the court's administration of justice was not sufficient to justify restriction of free speech.\textsuperscript{68} The Supreme Court reversed the contempt order,\textsuperscript{69} holding that the clear and present danger test mandates that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished.\textsuperscript{70} Responding to the state's assertion that the substantive evil

\begin{itemize}
\item 61. \textit{Id.} at 48-49.
\item 62. \textit{Id.} at 52.
\item 63. \textit{Id.} (noting that many constitutionally protected statements made in times of peace may be stripped of such protection in times of war).
\item 64. 313 U.S. 33 (1941).
\item 65. \textit{Nye}, 313 U.S. at 52.
\item 66. 314 U.S. 252 (1941).
\item 67. \textit{Bridges}, 314 U.S. at 261-62. The \textit{Bridges} Court used the clear and present danger test, stating that "there must be a determination of whether or not the words . . . used in such circumstances . . . are of such a nature as to create a clear and present danger that they will bring about the substantive evils." \textit{Id.} at 261 (quoting \textit{Schenck}, 249 U.S. at 52). The \textit{Bridges} Court also noted that even when there is a likelihood of substantive evil, the evil itself must be substantial. \textit{Bridges}, 314 U.S. at 362 (quoting Whitney v. California, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring)); \textit{see also} Craig v. Hamey, 331 U.S. 367, 377-78 (1947) (holding that the trial court had no power to punish for contempt when reporting is inaccurate on cases pending before it and awaiting disposition, unless that reporting causes an imminent threat to the administration of justice).
\item 68. \textit{Bridges}, 314 U.S. at 272-73. \textit{Bridges} involved two California newspapers adjudged guilty of contempt for publishing comments pertaining to pending labor union litigation. \textit{Id.} at 271.
\item 69. \textit{Id.} at 278.
\item 70. \textit{Id.} at 263.
\end{itemize}
feared by publication is the disorderly and unfair administration of justice, the Court noted that "[l]egal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspapers." Nevertheless, the Court found it inappropriate to initially assume that publications dealing with pending cases threaten fair trials. The Court reasoned that, rather than grant the judiciary a contempt power to close communications on pending matters, a study of the circumstances that surround the particular utterance is a more appropriate way to determine the likelihood that the feared evils will occur. Though the Court in Bridges did not enunciate a totality of circumstances standard, it was consistent with Schenck, focusing on the particular nature of the words spoken and the circumstances of their publication, when evaluating the constitutional protection afforded trial-related press coverage. Yet, the Court in Schenck articulated a test which set the stage for protecting free press rights in the future when it linked the stricter standards of the clear and present danger test with the flexibility of considering the surrounding circumstances to evaluate whether speech was constitutionally protected.

The Supreme Court affirmed the "clear and present danger" standard in Pennekamp v. State of Florida, a case against the Miami Herald, and an individual editor, for publishing two editorials. These defendants were charged with being contemptuous of the circuit court and its judges, on the grounds that they were unlawfully critical of the court's administration of criminal justice in certain cases pending before it. The Supreme Court stated that public comment about pending cases may not be as free as similar comment on cases after complete disposal. Moreover, the Court was not insensitive to the risks some publicized comments pose for trials, stating that in borderline cases, "the specific freedom of public comment should weigh heavily against a possible tendency to influence pending cases. Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice." The Court, in agreement with the Flor-

71. Id. at 271.
72. Id.
73. Id.
74. Id. at 270 (affirming the clear and present danger standard).
75. 328 U.S. 331, 335 (1946).
76. Pennekamp, 328 U.S. at 333. The editorials at issue criticized the Florida circuit judges specifically for not accepting the eight indictments for rape from the grand jury, stating, "[W]hen judicial instance and interpretative procedure recognize and accept, even go out to find, every possible technicality of the law to protect the defendant, to block, thwart, hinder, embarrass and nullify prosecution, then the people's rights are jeopardized and the basic reason for courts stultified." Id. at 336 n.4.
77. Id. at 346. In his concurring opinion, Justice Frankfurter noted "that in a particular controversy pending before a court," people should not be swayed from impartiality by extraneous influences. Id. at 366. A pending controversy is a proceeding that has been put at issue in the court and is still there. Id. at 369.
78. Id. at 347.
ida courts, found that the editorials in question did not report the full truth about the pending cases, and failed to objectively state the attitude of the judges. Nonetheless, it held that such comment could not create a clear and present danger to the administration of justice.

The Supreme Court has reiterated the strong position favoring the media's First Amendment freedoms while covering trials which it stated in cases like *Bridges v. California* and *Pennekamp v. Florida*. While maintaining this position, however, the Court also began to consider the ability of unrestricted publicity to bias prospective jurors, and the concomitant risk of that bias affecting the defendant's ability to obtain a fair trial. In *Stroble v. California*, for example, the Court held that, despite the District Attorney's premature release of the defendant's confession to murder, and inflammatory newspaper accounts, the defendant had not been deprived of his constitutional right to a fair trial because he failed to make an affirmative showing that any community prejudice existed, or affected, the jury. Justice Frankfurter dissented, stating that the decision contravened the requirement that guilt be assessed on evidence adduced at trial. His theory gained momentum in *Marshall v. United States*, when the Court granted the defendant a new trial on the grounds of jury exposure to evidence in newspaper articles that had been ruled inadmissible at trial. In *Marshall*, the Court did not reach the constitutional issues regarding free press and fair trials because it granted the new trial under its supervisory authority to establish and apply standards for proper enforcement of criminal law in federal courts.

The Court took a significant step toward better protecting criminal defendants' fair trial rights in *Irvin v. Dowd*. In *Irvin*, the defendant was charged with having committed six murders in the vicinity of a rural Indiana community. Intense publicity in the county in which the defendant was to be tried included reports that he had confessed to the murders. As a result, defendant's counsel sought, and was granted, a change

79. *Id.* at 344-45.
80. *Id.* at 348.
81. See, e.g., *Estes v. Texas*, 381 U.S. 532, 541-42 (1965) (reaffirming *Bridges v. California*, 314 U.S. 252 (1941); *Pennekamp*, 328 U.S. at 331 (stating that "reporters of all media, including television, are always present if they wish to be and are plainly free to report whatever occurs in open court through their respective media").
82. See *Irvin v. Dowd*, 366 U.S. 717, 727 (1961) (finding that, despite a change of venue, defendant failed to receive an impartial trial, since voir dire examination of the final jurors reflected a "pattern of deep and bitter [community] prejudice" created by adverse pretrial publicity); *Marshall v. United States*, 360 U.S. 310, 312-13 (1959) (reversing conviction that was based on prejudicial information jurors received through news reports); *Stroble v. California*, 343 U.S. 181, 193 (1952).
83. *Stroble*, 343 U.S. at 194-95.
84. *Id.* at 200 (Frankfurter, J., dissenting).
86. *Id.* at 313.
89. *Id.*
of venue, but the court moved the trial to the adjoining rural county, which had seen similarly inflammatory coverage. The defendant was denied further changes of venue pursuant to an Indiana statute that allowed only one venue change. During voir dire the trial court judge individually questioned members of the jury panel whom the defendant had challenged for cause on the basis that they had been biased by pretrial media coverage. When questioned, each of the challenged jurors indicated he or she could be impartial despite any preconceived opinions.

On review, the Supreme Court said that "[t]o hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror’s impartiality would be to establish an impossible standard." The Court, however, examined the trial court’s voir dire transcript and found that the defendant did not receive an impartial trial because, notwithstanding their oaths to the contrary, the juror’s voir dire testimony reflected a pattern of deep and bitter community prejudice created by adverse pretrial publicity. The Court applied a standard of clear and convincing evidence to the question of whether the voir dire evidenced prejudice. While it did not expressly adopt a “totality of circumstances” test to find jury bias, it did conduct a detailed review of all of the media-related incidents occurring before defendant’s trial, and concluded that, “in the light of the circumstances here, the finding of [juror] impartiality does not meet constitutional standards.

Two years after Irvin, in Rideau v. Louisiana," the Supreme Court held that certain types of press coverage and content are so inherently prejudicial as to create the presumption that a fair trial is impossible. In Rideau, the defendant, while in the sheriff’s custody, confessed to par-

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90. Id. at 720.  
91. Id.  
92. Id. at 724.  
93. Id.  
94. Id. at 723.  
95. Id. at 727.  
96. Id. at 725.  
97. Id. at 727. The clear and convincing evidence standard is less strict than the clear and present danger test. The Court, however, applied the lower standard not to evaluate the constitutionality of a contempt order against the press (akin to prior restraint), but to determine whether the media coverage had caused provable bias.  
98. Id. at 725-28.  
100. Rideau, 373 U.S. at 726; see also Estes v. Texas, 381 U.S. 532, 541-43 (1965) (addressing the State’s contention that televising portions of a criminal trial does not constitute a denial of due process). In Estes, the Court acknowledged the public’s right to be informed about events which transpire in a courtroom. Id. at 541-42. In holding that bias could be presumed based on the television coverage of a trial, however, the Court stated that a showing of actual prejudice was not a prerequisite to a finding that the defendant was denied a fair trial. Id. at 542.
ticipating in a robbery and homicide. The confession was filmed and broadcast several times on the local television station, before the defendant's arraignment for the crimes. He was tried, convicted, and sentenced to death for the murder charge, and ultimately appealed to the Supreme Court for a reversal, arguing that his due process rights had been denied. The Court, in reversing the conviction, stated "that due process of law in this case required a trial before a jury drawn from a community of people who had not seen and heard Rideau's televised 'interview.'" The Court did not state that it was presuming bias, but the presumption is indicated by the fact that the Court established no nexus between those jurors who viewed the confession, and their actual opinion as to defendant's guilt. Indeed, the Court stated that it did not need to examine the jurors' voir dire transcripts to conclude that due process had been denied.

In contrast to Irvin, in which the Court considered all of the circumstances of pretrial publicity, the Rideau Court focused exclusively on defendant's broadcast confession as a basis for finding presumed or inherent bias. The Court identified the presumed bias of Rideau as inherent prejudice in Estes v. Texas. In Estes, the Court overturned the defendant's conviction for swindling, concluding he was deprived of his Fourteenth Amendment right to due process by the televising and broadcasting of his pretrial hearings. The Court applied the inherent prejudice rule established by Rideau, at the same time distinguishing its analysis therein from the detailed examination of circumstances conducted in Irvin and Stroble, to determine if prejudice was the actual result of the media coverage, as opposed to a presumption of bias based on the nature of the coverage. Nonetheless, the Estes Court conducted a thorough evaluation of the pretrial publicity circumstances before concluding that

102. Id. at 724.
103. Id. at 724-26.
104. Id. at 727.
105. Id. This failure to link the broadcast interview to the bias of prospective jurors was the basis of Justice Clark's dissent. Justice Clark stated that "[u]nless the adverse publicity is shown by the record to have fatally infected the trial, there is simply no basis for the Court's inference that the publicity, epitomized by the televised interview, called up some informal and illicit analogy to res judicata, which made petitioner's trial a meaningless formality." Id. at 729 (citing Beck v. Washington, 369 U.S. 541, 558 (1962)).
106. Id. at 727. The Court also stated that For anyone who has ever watched television the conclusion cannot be avoided that this spectacle, to the tens of thousands of people who saw and heard it, in a very real sense was Rideau's trial—at which he pleaded guilty to murder. Any subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality.
Id. at 726.
107. Id. at 726-27.
110. Id. at 543-44.
a presumption of prejudice was appropriate." The Court implied that a broad view of circumstances was necessary when confronting the impact of televised court proceedings, stating that "one cannot put his finger on [television's] specific mischief and prove with particularity wherein he was prejudiced."111

While these cases offered some relief to defendants subjected to extraordinary pretrial publicity, the relief was purely retrospective—reversing a conviction rendered defective by the prejudicial publicity—as opposed to a prospective attempt to protect the defendant's fair trial rights at the trial court level. In these cases the Supreme Court imposed no limits on the press, nor suggested the ways in which the trial courts might prevent, limit, or control the types of extreme coverage that had resulted in reversible convictions.112 In the 1966 case of Sheppard v. Maxwell,113 however, the Supreme Court acknowledged the inadequacy of reversals,114 and suggested means to contemporaneously deal with prejudicial publicity during pretrial and trial.115 The Court overturned Sheppard's conviction on the grounds that media coverage of the events surrounding his wife's murder, and his arrest and trial for that murder, deprived him of his Fourteenth Amendment due process rights.116 In re-

111. Id. at 550-52.
112. Id. at 544.
113. See Sheldon Portman, The Defense of Fair Trial from Sheppard to Nebraska Press Association: Benign Neglect to Affirmative Action and Beyond, 29 STAN. L. REV. 393, 405 (1977) (noting that Supreme Court decisions for the twelve years preceding Sheppard made no suggestions as to how prejudicial pretrial publicity could be prevented); see also Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 556 (1976) (noting that none of the Court's previous cases addressing prior restraint involved orders restricting publicity in an effort to protect a defendant's right to an unbiased jury).
115. Sheppard, 384 U.S. at 362-63. The Court stated, "[W]e must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences." Id. at 363.
116. Id. at 358-63 (suggesting limiting the number of reporters in the courtroom; insulating the trial witnesses from the press; controlling leads, statements, and gossip by police, court personnel, witnesses, and attorneys; warning reporters of the impropriety of publishing information not introduced in the proceeding; continuations; sequestration; and reversal).
117. Id. at 362-63. On July 9, 1954, Sheppard, at the coroner's request, re-enacted the crime for the coroner, newsmen invited by him, and police officers. Id. at 338. The news media reported, in detail, this re-enactment. Id. On July 21, in response to a news editorial entitled: "Why No Inquest? Do It Now, Dr. Gerber," the coroner called an inquest beginning July 22. Id. at 339. The coroner, the county prosecutor, and two detectives as bailiffs presided over the inquest, which lasted three days and was broadcast live by television and radio personnel. Id. Sheppard's counsel was present, but when he attempted to place documents in the record, he was forcibly ejected amidst cheers and hugs from ladies in the audience. Id. at 340. Furthermore, the Court found that much of the material printed or broadcast during the trial was never heard from the witness stand, such as the charges that Sheppard had purposely impeded the ... investigation and [that he] must be guilty [because] he had hired a prominent ... lawyer; that Sheppard was a perjurer; that he had sexual relations with numerous women; that his slain wife had characterized him as a 'Jekyll-Hyde'; ... ; and ... that a woman convict claimed Sheppard to be the father of her illegitimate child.

Id. at 356-57.
versing, the Court, quoting Estes, said that convictions could be set aside in the "absence of any showing of prejudice." It applied the inherent prejudice standard of Estes, noting that application of this standard to Sheppard was warranted by the "totality of circumstances" in his case.

When applying the inherent prejudice standard, the Court initially took the position that the rights of criminal defendants in highly publicized cases must be protected through strong measures that would not favor the press. Within ten years, however, the Court appeared to retreat from these precedents, possibly evidencing a concern that these opinions provided too broad a basis for challenging criminal convictions in an atmosphere where trials were receiving increasing media attention. In Murphy v. Florida, the Court, enunciating the "totality of the circumstances" test, reviewed its prior decisions in Irvin, Rideau, Estes, and Sheppard, and said that those decisions could not "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." This statement indicates a significant turnabout from the Court's totality of circumstances reference in Sheppard. In Sheppard, the Court referenced its holding in Estes and stated that the "totality of circumstances" in Sheppard warranted that it be treated like Estes even though the circumstances in the two cases were different (the Sheppard case being the more compelling). In contrast, the Court in Murphy, interpreted the totality of circumstances test as if it excluded cases that contained factors indicating presumed prejudice resulting from pretrial

118. Id. at 352. The Court stated, "It is true that in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process." Id. (quoting Estes v. Texas, 381 U.S. 532, 542-43 (1965)).

119. Id.

120. See Sheppard, 384 U.S. at 362. The Court stated, "Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused." Id.

121. See Alfredo Garcia, Clash of the Titans: The Difficult Reconciliation of a Fair Trial and a Free Press in Modern American Society, 32 SANTA CLARA L. REV. 1107, 1120-21 (1992) (discussing how the presumed (inherent) prejudice standard was diluted by the Court's decisions in Murphy v. Florida and Patton v. Yount); Newton N. Minow & Fred H. Cate, Who is an Impartial Juror in an Age of Mass Media?, 40 AM. U. L. REV. 631, 643 (1991) (noting that, with the decision in Murphy v. Florida, the Court had withdrawn reliance on presumed prejudice and began to insist on proof of actual prejudice).


123. Murphy, 421 U.S. at 799. These cases overturned the defendants' state court convictions because the "trial atmosphere . . . had been utterly corrupted by press coverage." Id. at 798.

124. Compare Sheppard v. Maxwell, 384 U.S. 333, 352 (1966) (adopting the "totality of circumstances" test), with Murphy, 421 U.S. at 799-803 (applying the "totality of circumstances" test more narrowly than the Sheppard Court).

125. Sheppard, 384 U.S. at 352-54.
III. RIDEAU, ESTES AND SHEPPARD AS THREE CARD MONTE: PICK ANY PRECEDENT BUT THE DEFENDANT STILL LOSES

After Murphy, the totality of circumstances test became a sort of shell game, in that—due to ever changing circumstances—high publicity defendants could rarely find the appropriate totality of circumstances needed to establish presumed bias.

A. The Recurring Factors Which Provide Proof or Presumption of Bias to the Venire

In Irvin, Rideau, Estes, and Sheppard, the Supreme Court focused on several elements of pretrial and trial related media coverage that appeared to be the cornerstones of proving or presuming bias to the venire or individual jurors. In Murphy, the focus changed and the Court’s position was that all, rather than certain critical or pivotal circumstances are considered for determining bias. On the one hand, this latter position can be criticized because, if there is to be any consistency in the totality of circumstances test, it rests in the recurrence of certain factors essential to the Court’s determination. On the other hand, under a Rideau analysis, a fixed set of factors might tie the Court’s hands, with the result being the success of a McVeigh-type motion.

The following discussion considers the factors that the Court considered critical in the quadrant of 1960s cases, from Irvin through Sheppard. Though not the only factors now considered in the totality of circumstances test, they are the ones that were initially considered threatening to fair trials. This article suggests that these factors have a continuing role in protecting the high-profile defendant’s rights in the contemporary media circus. The critical factors were identified as follows: 1) exposure of jurors or the venire to information that was not admissible, or presented as evidence, at trial; 2) the existence of a community pattern of thought, or unified opinion, among members of the venire; 3) widespread media coverage and replay of an alleged or actual confession by the defendant; 4) the media circus (denial, due to media attention, of a defendant’s privilege to have judicial serenity or calmness and solemnity in the courtroom); and 5) media saturation of the venire with prejudicial pretrial publicity.

126. Murphy, 421 U.S. at 799.
127. See infra notes 160, 170 and accompanying text.
128. See infra Part IV.A.
1. Exposure of Jurors or the Venire to Information Which Was Not Admissible or Presented as Evidence at Trial

A long time companion to a defendant's constitutional right to a jury trial is the Supreme Court's position that the jury's verdict must be the result of evidence developed and presented at trial. Consistent with this position, many courts have deemed media exposure of jurors or prospective jurors to be highly prejudicial and inadmissible information as significant in evaluating whether unfair bias exists. The risk of bias is substantial because the media often reports the inadmissible information as "evidence" of the defendant's guilt.

Exposure to persuasive influences outside of the courtroom proceedings has also been a significant basis for the courts finding presumed juror bias. In Rideau, the Supreme Court set a landmark precedent in its treatment of pretrial publicity when it held that trying the defendant in the geographic region where prospective jurors had seen a television broadcast of the defendant's confession was presumptively unfair. The Court stated that, having aired the confession to the venire, "[a]ny subse-

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129. See United States v. Burr, 25 F. Cas. 49, 50 (C.C.D. Va. 1807) (No. 14,692G) (requiring jurors to be open-minded to testimony presented during trial). Likewise, in Patterson v. Colorado, 205 U.S. 454, 462 (1907), the Supreme Court stated, "[C]onclusions 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." This position has been reiterated in subsequent cases. See, e.g., Estes v. Texas, 381 U.S. 532, 540, 544 (1965) (stating that the "atmosphere essential to the preservation of a fair trial . . . must be maintained at all costs" and the use of television "inject[s] . . . an irrelevant factor into court proceedings"); Irvin v. Dowd, 366 U.S. 717, 722 (1961) (stating that the "verdict must be based upon the evidence developed at the trial"); Thompson v. City of Louisville, 362 U.S. 199, 204, 206 (1960) (reversing defendant's convictions for loitering and disorderly conduct because there was no evidence in the record to support any of the charges, and stating that it is "a violation of due process to convict and punish a man without evidence of his guilt"); Marshall v. United States, 360 U.S. 310, 312-13 (1959) (stating that news accounts that the trial judge refused to admit into evidence were prejudicial, and jurors' exposure to them entitled defendant to a new trial).

130. See, e.g., Sheppard, 384 U.S. at 356-57. During trial, the unsequestered jurors were exposed to claims that the defendant was a perjurer and bare-faced liar, a womanizer, and the father of an illegitimate child. Id. There was also publicity equating his hiring of a prominent lawyer to an admission of guilt. Id. None of these published claims, however, were ever presented as evidence at trial. Id. at 356; see also Estes, 381 U.S. at 535-44. In Estes, massive pretrial publicity consisted of 11 volumes of press clippings, live radio television broadcasts, and news photographs. Id. According to the Court, this extensive publicity destroyed the atmosphere necessary in order for the accused to receive a fair trial. Id.

131. Sheppard, 384 U.S. at 359 n.13. The Court noted that the prosecution released much "evidence" to the media that was never offered at trial or became part of the record and stated that "[t]he exclusion of such evidence in court is rendered meaningless when news media make it available to the public." Id. at 360. The Court found that premature release and weighing of evidence by the media could "jeopardize a defendant's right to an impartial jury." Id. at 361 n.15 (citing Report of the President's Commission on the Assassination of President Kennedy, at 239).

132. See, e.g., Turner v. Louisiana, 379 U.S. 466 (1965) (finding that extreme prejudice resulted from contacts between jurors and key prosecution witnesses during the trial); Rideau v. Louisiana, 373 U.S. 723 (1963) (finding that repeated televised coverage of defendant's confession made fair trial impossible without change of venue).

133. Rideau, 373 U.S. at 726-27.
quent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality."

Similarly, in *Turner v. Louisiana*, the Supreme Court overturned a conviction on the basis of presumed juror prejudice which was caused by influences external to the trial evidence. Unlike the jury in *Rideau*, the *Turner* jury panel was sequestered. On several occasions, however, the panel was under the care of two deputy sheriffs who were also key prosecution witnesses at Turner's trial. Though the deputies denied discussing the case with the jury, the Court held that their continued contact with the jurors during meals, and at other times throughout the trial, allowed them to establish and renew acquaintances with the jurors that would significantly enhance the jurors' perception of the deputies' credibility as key witnesses in a trial where the defendant received a death sentence.

The Court noted that the jury verdict must be based on evidence developed at trial, and observed that the credibility of key witnesses was an integral part of that evidence. The Court stated, "Any judge who has sat with juries knows that, in spite of forms they are extremely likely to be impregnated by the environing atmosphere."

The Court concluded that, notwithstanding the deputies' assurance that they had not discussed the case directly with the jury, "it would be blinking reality not to recognize the extreme prejudice inherent in this continual association throughout the trial between the jurors and these two key witnesses for the prosecution." The Court reversed Turner's conviction even though no actual prejudice had been shown, noting that his "fate depended upon how much confidence the jury placed in these two witnesses."

In contrast to *Rideau*, the *Turner* case did not involve media influence on jurors or the venire. Nonetheless, the Court's conclusion in *Turner*, that bias could be presumed, demonstrated its sensitivity to external influences on jurors. Moreover, among external influences, the Court has indicated that the media is among the most suspect and perva-

134. *Id.* at 726.
137. *Id.* at 467.
138. *Id.* at 469.
139. *Id.* at 473-74.
140. *Id.*
141. *Id.* at 472 (quoting *Frank v. Mangum*, 237 U.S. 309, 349 (1915) (Holmes, J., dissenting)).
142. *Id.* at 473.
143. *Id.* at 474.
144. *Id.* at 467-70.
Therefore, the existence of media-based influence on the jury or
the venire resulting from information, or other influences which are not
part of proper evidentiary development in court, could play a significant
role in a defendant’s assertion of denial of due process.\textsuperscript{146}

2. The Existence of a Community Pattern of Thought or Unified
Opinion Among Members of the Venire

The existence of a widespread opinion among the members of the
community from which the jurors will be selected has, on several oc-
casions, been a significant factor in the Court’s analysis of undue jury
bias.\textsuperscript{147} The Court has said that the impaneling of impartial, “indifferent”
jurors is essential to protecting the criminal defendant’s constitutional
right to a fair trial.\textsuperscript{148} The necessity of “indifferent” jurors may be traced
to the oft quoted words of Lord Coke, who stated that the fair juror must
be as “indifferent as he stands unsworn.”\textsuperscript{149} Over the years, courts have
used differing terms to describe the hazards arising from a lack of indif-
ference within a community. The underlying concern, however, has con-
sistently been the need for impartial jurors.\textsuperscript{150} In \textit{Irvin v. Dowd}, the Court,
while assessing defendant’s claim of juror bias, referred to the “commu-
nity pattern of thought” existing in the area from which the jurors were
selected.\textsuperscript{151} The Court noted that this demonstrated “a pattern of deep and
bitter prejudice against the [defendant],”\textsuperscript{152} and held that, under these cir-

\textsuperscript{145} See, e.g., \textit{Estes v. Texas}, 381 U.S. 532, 544 (1965). The Court stated that “[t]elevision in
its present state and by its very nature, reaches into a variety of areas in which it may cause prejudice
to an accused.” \textit{Id.} Of greatest significance was “[t]he potential impact of television on the jurors.”
\textit{Id.} at 545.

\textsuperscript{146} See \textit{Sheppard v. Maxwell}, 384 U.S. 333, 356-57 (1966) (finding that although broadcast
material was not presented as evidence at trial, it undoubtedly reached the jury); \textit{Rideau v. Louisiana}, 373 U.S.
723, 726 (1963) (emphasizing the prospective jurors’ repeated exposure to a broadcast
film of the defendant’s irregular confession).

\textsuperscript{147} See, e.g., \textit{Murphy v. Florida}, 421 U.S. 794, 803 (1975); \textit{Sheppard}, 384 U.S. at 351; \textit{Estes},

\textsuperscript{148} See \textit{Turner}, 379 U.S. at 471-72 (the right to a jury trial requires a trial by a panel of indif-
“the right to a jury trial guarantees to the criminally accused a fair trial by a panel of impartial,
‘indifferent’ jurors”); \textit{Tumey v. Ohio}, 273 U.S. 510, 535 (1927) (holding that the defendant has the
right to have an impartial judge, regardless of the evidence against him).

\textsuperscript{149} See \textit{Murphy}, 421 U.S. at 799; \textit{Groppi v. Wisconsin}, 400 U.S. 505, 509 (1971); \textit{Turner}, 379
155a} (1853)).

\textsuperscript{150} See, e.g., \textit{Murphy}, 421 U.S. at 803 (“[T]o select jurors who appear to be impartial is . . . [a]
factor relevant in evaluating [the] jurors’ assurances of impartiality.”); \textit{Irvin}, 366 U.S. at 724-25
(stating that “[i]mpartiality is not a technical conception”).

\textsuperscript{151} \textit{Irvin}, 366 U.S. at 725; see also \textit{Rideau}, 373 U.S. at 731 (Clark, J., dissenting). In his
dissent, Justice Clark compared the circumstances surrounding \textit{Rideau’s} trial with those in \textit{Irvin}. He
characterized \textit{Irvin} as a case involving media coverage causing “complete permeation, imbedd-
ing opinions of guilt in the minds of 90% of the veniremen . . . .” \textit{Id.}

\textsuperscript{152} \textit{Irvin}, 366 U.S. at 727. The Court cited newspaper reports of uniform community bias,
noting that the voir dire record revealed that 90% of the prospective jurors had indicated some opinion
of guilt, as did two-thirds of the impaneled jurors. \textit{Id.}
cumstances, a finding that the jurors were impartial did not meet constitutional standards. Though the Irvin Court did not hold that bias could be presumed, it easily discounted the jurors’ oaths, and other indications of impartiality.

In Estes v. Texas and Sheppard v. Maxwell, the existence of a community pattern of thought was a significant factor in the Court’s holding that juror bias, and its accompanying denial of due process, could be presumed. The Estes Court indicated the presence and potential hazards of a community pattern of thought, noting that “intense public feeling” created by pretrial publicity is aggravated when jurors realize they must return to a community “hostile to an accused.” In Sheppard, the Court quoted Irvin, stating that an accused was entitled to be “tried in an atmosphere undisturbed by so huge a wave of public passion . . . .”

The Supreme Court has discussed the concept and impact of community opinion or patterns of thought in the context of trials being decided on the basis of evidence presented in court, free of external influences. It is also significant, however, when considering the likelihood that prospective jurors will mirror the widespread opinions of the community.

3. Widespread Media Coverage and Replay of an Alleged or Actual Confession by the Defendant

Rideau v. Louisiana is a landmark opinion. It is the first time the Supreme Court ruled that media coverage of pretrial events could so bias the venire that a jury selected from that venire would deny the defendant a fair trial, without demonstrating actual bias among the empanelled jurors. Critical to the Court’s finding of a due process violation was the

153. Id. at 728.
154. Id. The Court dismissed jurors’ statements that, notwithstanding their opinions, they would be fair and impartial in their deliberations, stating, “Where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight.” Id.
157. See supra notes 15, 108 and accompanying text.
158. Estes, 381 U.S. at 545.
159. Sheppard, 384 U.S. at 351 (quoting Irvin, 366 U.S. at 728).
160. See, e.g., Sheppard, 384 U.S. at 351 (requiring that “the jury’s verdict be based on evidence received in open court, not from outside sources”); Irvin, 366 U.S. at 725 (noting the existence of a community bias or pattern of thought as proof of prejudice).
161. See, e.g., Sheppard, 384 U.S. at 351; Irvin, 366 U.S. at 725.
163. Rideau, 373 U.S. at 726-27. The Court stated:
[W]e do not hesitate to hold, without pausing to examine a particularized transcript of the voir dire examination of the members of the jury, that due process of law in this case required a trial before a jury drawn from a community of people who had not seen and heard Rideau’s televised ‘interview.’
Id. at 727. In his dissent, Justice Clark condemned the majority opinion for failing to establish “any substantial nexus between the televised ‘interview’ and petitioner’s trial . . . .” Id. at 729.
fact that the venire "had been exposed repeatedly and in depth to the spectacle of Rideau personally confessing in detail to the crimes with which he was later to be charged."164

The broadcast of a confession has been a significant issue in other cases165 when the Supreme Court has held media coverage of trial events resulted in a denial of due process.166 With the exception of its significant weight in Rideau, however, this factor alone has not been enough to carry the charge of juror bias and has sometimes existed in cases where convictions were upheld.167

4. The Media Circus: Denial, Due to Media Attention, of a Defendant's Privilege to Have Judicial Serenity, or Calmness and Solemnity, in the Courtroom

The Supreme Court has frequently expressed its position that, to be proper and fair, a trial must be conducted in an atmosphere of calmness and solemnity.168 Consistent with that position, the Court has expressed concern that the presence of the media in or around the courtroom might disrupt or destroy the solemn air needed for a fair trial.169 The Court has taken a strong position that due process is in jeopardy when the media's presence causes the solemnity of the courtroom to deteriorate to a media circus or "Roman holiday."170 Indeed, in the three pivotal cases where the Supreme Court ruled that juror bias could be presumed without proof of actual bias, the Court noted that media coverage had somehow infringed on the proper air of the trial proceeding.171

The Supreme Court's bristly reaction to the media in these 1960s era cases was apparently not attributable to the relative newness of tele-

164. Id. at 726. The Court stated that, following the spectacle, the trial would be no more than a "hollow formality." Id.
165. See, e.g., Rideau, 373 U.S. at 727.
166. See, e.g., Irvin, 366 U.S. at 725-28 (describing the effect of broadcasting defendant's irregular confession).
168. See, e.g., Estes v. Texas, 381 U.S. 532, 536 (1965) (entitling the defendant to "judicial serenity and calm"); Cox v. Louisiana, 379 U.S. 559, 583 (1965) (Black, J., dissenting) (noting that "calmness and solemnity of the courtroom" is necessary for proper adjudication); Sinclair v. United States, 279 U.S. 749, 765 (1878) (finding that the "exercise of calm and informed judgment [by the jury] is essential to proper enforcement of the law").
169. Cox, 379 U.S. at 583 (stating that freedom of discussion should not be allowed to hamper the solemnity of the courtroom); see also Turner v. Louisiana, 379 U.S. 466, 472 (1965) (emphasizing the importance of calmness to the proper enforcement of the law).
170. Sheppard v. Maxwell, 384 U.S. 333, 355-58 (1966). In discussing the trial atmosphere, the Court in Sheppard characterized it with terms like "bedlam reigned," "Roman holiday," and "carnival atmosphere." Id. The Court recounted nine examples of what it called "flagrant episodes of pretrial and trial publicity." Id. at 345-49; see also Estes, 381 U.S. at 549 (stating that the defendant is "entitled to his day in court, not in a stadium, or a city or nationwide arena"); Rideau, 373 U.S. at 726 (referring to pretrial media coverage as a "spectacle").
171. Sheppard, 384 U.S. at 355-58; Estes, 381 U.S. at 549; Rideau, 373 U.S. at 726.
vision coverage of trials. It is not surprising, therefore, that after many years, the media circus still seems to raise the ire of the courts. Perhaps this is where judges can more clearly see a need, and exercise the power, to restrict the media without impinging on its First Amendment rights. Historically, the courts have distinguished between the press's right to report versus its right to influence trial proceedings, and have no reluctance prohibiting the latter, stating that interference is not a protected right. The lesson is that a media circus, which likely contains attributes of other critical factors discussed above, may be the factor that triggers—at minimum—the acknowledgment that prejudice to the venire may occur.

5. Media Saturation of the Venire with Prejudicial Pretrial Publicity

In addition to focusing on the nature and content of the publicity and the behavior of the press in reporting trial events, courts have considered the sheer amount of pretrial coverage to be a significant factor in finding presumed bias. The Supreme Court has described saturation press coverage in terms that indicate the frequency and number of the reports. The Court has also described saturation in terms of the percentage of households in the venire which received the prejudicial coverage. The courts have considered saturation in conjunction with other factors to conclude that prejudice to the venire could be presumed.

172. See Estes, 381 U.S. at 541 (indicating that the Court's reservations about broadcasting trials were not attributable to the newness of television, but rather its potential to impact the administration of justice); Douglas, supra note 1, at 1 (stating that the photographing or broadcasting of trials "is not dangerous because it is new" but "dangerous because of the insidious influences which it puts to work in the administration of justice").

173. See, e.g., Coleman v. Kemp, 778 F.2d 1487, 1491-1537 (11th Cir. 1985).

174. See, e.g., Sheppard, 384 U.S. at 357-59 (disagreeing with the trial judge's perceived lack of power to control trial publicity, and giving several measures the judge should have taken to limit the press's presence). The Court found that the judge should have warned reporters against publishing materials not introduced at the proceedings. Id. at 362. This would have given added protection to the defendant's right to a fair trial without further restricting the news media. Id.

175. See, e.g., Sheppard, 384 U.S. at 349-51; Estes, 381 U.S. at 538-39.

176. See Sheppard, 384 U.S. at 357; Estes, 381 U.S. at 538; Rideau, 373 U.S. at 726; Irvin, 366 U.S. at 725; Coleman, 778 F.2d at 1490.

177. See, e.g., Estes, 381 U.S. at 538 (describing the coverage as a "bombardment of the community"); Irvin, 366 U.S. at 725 (describing a "barrage of newspaper headlines, articles . . .").

178. See, e.g., Irvin, 366 U.S. at 725.

179. Coleman, 778 F.2d at 1490 (considering whether pretrial publicity is sufficiently prejudicial and inflammatory).
B. Why the Sum of Rideau, Estes, and Sheppard Equals a Criminal Defendant Without a Jury

Though Justice Douglas may have seemed like an alarmist in 1960, following the Supreme Court's reasoning in *Rideau*, we might envision circumstances in which a criminal defendant could claim a due process violation based on jury bias, before voir dire, that could not be corrected. Under *Rideau* and its progeny, the Court has considered and evaluated the nature, content, and extent of saturation of the media coverage of the defendant's case. Once the coverage reached a certain level, juror bias against the defendant was presumed. Thus, no proof of actual bias was necessary in order for the defendant's conviction to be overturned. Indeed, in some cases, no nexus between the coverage and bias was even evaluated. Therefore, there existed what can be interpreted as a dual presumption. First, at a certain level of media coverage, it was presumed that all members of the particular venire had been exposed to the prejudicial publicity. Second, presumed bias was the result of presumed exposure. The conclusion stemming from these presuppositions was that due process had been denied.

180. Douglas, *supra* note 1; see also infra note 310 and accompanying text.
181. See Defendant's Motion to Dismiss, *supra* note 2, at *16. This was precisely the claim made by Timothy McVeigh's attorneys during a review of questionnaires received from members of the venire, prior to their live voir dire. *Id.* at *9-12.
183. See *Sheppard* v. Maxwell, 384 U.S. 333, 353-55 (1966) (coverage consisted of extensive newspaper, radio and television broadcasts of the trial, in addition to a live inquest of Sheppard televised at a high school gymnasium, which seated hundreds of people); *Estes* v. Texas, 381 U.S. 532, 536, 554 (1965) (coverage consisted of live radio and television broadcasts, news photographs, cameramen taking live and still pictures during the proceedings, and microphones on the judge's bench); *Rideau*, 373 U.S. at 725, 727 (coverage included a local televised broadcast of the jailed defendant, who admitted details of the commission of robbery, kidnapping and murder in the presence of the sheriff and two state troopers).
184. See, e.g., *Estes*, 381 U.S. at 542 (showing of actual prejudice is not necessary for the court to reverse); *id.* at 613 (Stewart, J., dissenting) (noting that "there is no indication anywhere in the record of any disturbance whatever of the judicial proceeding").
188. See *Mu'Min*, 500 U.S. at 442 n.3 (Marshall, J., dissenting) (interpreting *Irvin* as standing for the proposition that a community exposed to unrelenting publicity is presumed prejudiced, thereby entitling the defendant to a new trial); *Rideau*, 373 U.S. at 727 (holding that the process required selecting a jury from a community that had not been exposed to certain pretrial publicity).
189. *Estes*, 381 U.S. at 543 (1965) (citing *In re Murchison*, 349 U.S. 133 (1955), and *Turney* v. Ohio, 273 U.S. 510 (1927), for the proposition that, at times, a state may engage in procedures that result in prejudice, which are inherently lacking in due process).
presumptions in a case attracting the requisite amount of national pretrial publicity would arguably equal a presumption that the entire nation had witnessed the coverage and was thereby prejudiced.

Though the Supreme Court has paid little more than lip service to the presumed bias standard since *Murphy v. Florida*, there is some research that supports the presumed bias standard. For example, significant research confirms that negative media coverage taints a juror's perception against the defendant.\(^\text{190}\) Moreover, the authors of one study found that only by delaying the trial could they obtain any statistically significant reduction in the impact of some types of negative coverage.\(^\text{191}\) This research conflicts with court holdings that bias can be overcome by juror voir dire or jury instruction.\(^\text{192}\) However, the courts' focus on assessing the amount of bias affecting individual jurors may be the answer to claims of nationwide juror bias, because finding impartial jurors through individual voir dire would be the best response to allegations of presumed, rather than actual, bias. Moreover, focusing on the individual jurors better addresses the problem of prejudicial media coverage, which frequently occurs before the trial begins, or, indeed, as the crime itself is reported.\(^\text{193}\) Conversely, limiting pretrial and trial coverage in an effort to

190. Amy L. Otto et al., *The Biasing Impact of Pretrial Publicity on Juror Judgments*, 18 LAW & HUM. BEHAV. 453 (1994). These authors conducted a survey of 262 psychology students to test the differential impact of several types of pretrial publicity on decision making in a trial simulation, both before and after the subjects viewed the trial, and to determine whether the evidence presented at trial would have the effect of either accenting or diminishing the negative impact of pretrial publicity. *Id.* at 464. The study found that negative character publicity about the defendant had the greatest effect on initial judgment. *Id.* The authors concluded that trial evidence generally reduces the effects of pretrial publicity manipulations on the final verdict. *Id.* at 465; see John S. Carroll et al., *Free Press and Fair Trial: The Role of Behavioral Research*, 10 LAW & HUM. BEHAV. 187 (1986). The authors cited studies, including one by Constantini and King, which indicated that respondents with greater knowledge about a case were more likely to be pro-prosecution. *Id.* at 191. The more media sources a respondent accessed, the greater his or her knowledge of the case. *Id.* Pretrial knowledge was the best predictor of prejudgment, and was relatively independent of other attitudinal and demographic predictors of case bias. *Id.* The authors further noted that attempts to relate publicity to actual verdicts are more difficult than attempts to show prejudice in the public. *Id.*

191. Geoffrey P. Kramer et al., *Pretrial Publicity, Judicial Remedies, and Jury Bias*, 14 LAW & HUM. BEHAV. 409 (1990). The authors suggest that a continuance of several days between exposure to publicity and viewing the trial effectively remedies factual publicity (containing incriminating information about the defendant), but not emotional publicity (containing information arousing negative emotions, but not incriminating information). *Id.* The authors found that judicial instructions not to base verdicts on the news were minimally effective, especially in highly emotional or heinous cases. *Id.* at 413. But see Carroll et al., *supra* note 190, at 192 (finding judges, prosecutors, and reporters generally of the opinion that existing remedies work, including jury instruction, sequestration, continuation, additional preemptory challenges, and gag orders). Judges believe voir dire to be an effective remedy for news coverage, and the authors seem to agree. *Id.* at 192, 197.


193. See Minow & Cate, *supra* note 121, at 633 (noting that an impediment to judicial control over media reporting of information related to a case is the fact that "increasingly, the most dramatic revelations occur at the time of the crime itself, long before there is a trial, much less a judge se-
address the prejudicial impact of prior media coverage of the crime in progress is akin to slamming the barn door behind the escaping horse.

Courts applying the presumed prejudice standard have held that a trial before a jury selected from the adversely affected venire is void. The arguable consequences of a defendant establishing that the affected venire is the entire nation of potential jurors would be dismissal of the criminal prosecution or extended delay of the trial to abate the impact of adverse media coverage. Most recently, the attorneys for convicted Oklahoma City bomber Timothy McVeigh, took this position in seeking to dismiss charges against him following the publication of his alleged confession. The main argument presented in McVeigh's motion was that pretrial publicity was so devastating, prejudicial, and widespread that there was no reasonable possibility that the defendant could receive a fair trial. His indictment, therefore, should be dismissed. The motion

lected to oversee the trial”). In Estes, Sheppard, Rideau, and other cases, the damaging prejudicial reporting occurred before jury selection. In Sheppard, the defendant was convicted for the second-degree murder of his wife. Sheppard v. Maxwell, 384 U.S. 333, 335 (1966). Pretrial publicity consisted of newspaper articles emphasizing the defendant's guilt, capitalizing on the defendant's affair with another woman, and delving into the defendant's personal life. Id. at 340-42. The newspaper clippings alone filled five volumes, and there were radio and television broadcasts. Id. at 342. In Estes, the defendant was convicted for swindling. Estes v. Texas, 381 U.S. 532, 534 (1965). Pretrial publicity included radio and television broadcasts, and live news photographs. Id. at 533-36. At the defendant's pretrial hearing, all the seats in the courtroom were filled, with at least twelve cameramen present at all times to take motion and still pictures. Id. Pretrial publicity totaled eleven volumes of press clippings. Id. at 535. In Rideau, the defendant was convicted for the murder of a bank employee. Rideau v. Louisiana, 373 U.S. 723, 725 (1963). The pretrial publicity consisted of three television broadcasts of the defendant's "interview" with the sheriff. Id. at 724. In these "interviews," the defendant admitted in detail to committing robbery, kidnaping, and murder. Id. at 725.

194. Rideau, 373 U.S. at 725; Coleman v. Kemp, 778 F.2d 1487, 1490 (11th Cir. 1985) (holding that prejudice could be presumed, since the small community was so overwhelmed and saturated with pervasive pretrial publicity).

195. Defendant's Motion to Dismiss, supra note 2, at *5. The motion argues that the defense seems like a lie "at worst," when jurors hear negative opinions and commentary in the press, and then hear a different story from the defense at trial. The "real trial" has already occurred with potential juror exposure to purported confessions; the defense can do nothing more than "score debater's points." Id. Because the entire nation had been exposed to the negative publicity, arguably due process could not be obtained, thus counsel argued that the case should be dismissed. Id. at *10-11; see also United States v. Davis, 60 F.3d 1479, 1485 (10th Cir. 1995) (presuming prejudice when the court determines that jurors had watched news reports of a trial).

196. Defendant's Motion to Dismiss, supra note 2, at *13 (arguing that a substantial continuance will make the details of the publicity less memorable). According to defense counsel, "[a] continuance is [the] favored remedy when the prejudicial publicity complained of will abate within a foreseeable period." Id. at *14 (citing United States v. Morales, 815 F.2d 725, 737 (1st Cir. 1987)); see Delaney v. United States, 199 F.2d 107, 114 (1st Cir. 1952) (holding that a new trial was the remedy for failure to grant a continuance because a change in venue would not have provided relief for national publicity).

197. Defendant's Motion to Dismiss, supra note 2, at *1. According to the newspaper, it had lawfully obtained internal defense documents in which Timothy McVeigh confessed to his defense team that he alone bombed the Alfred Murrah Federal Building in Oklahoma City, and that he did so during the day because he needed a "body count" in order to make his point to the government. Id. at *3.

198. Id. at *9-12.
began by describing the prejudicial publicity, which started with a *Dallas Morning News* story.

On February 28, 1997, thirty-one days before trial was scheduled to begin, the *Dallas Morning News* published an article on its Internet home page which stated that the defendant, Timothy McVeigh, had confessed to a defense team member that he had driven the truck containing explosives to the Alfred P. Murrah Building in Oklahoma City, and detonated the explosives. This article immediately sparked additional stories about the McVeigh "confession." The defendant contended that publication of his "confession" harmed him because it "violate[d] the sanctuary of the attorney-client privilege" and eviscerated "[his] right to plead not guilty." Furthermore, the defendant emphasized that because of the extensive publicity given to this "confession," any doubt about his guilt based on the evidence at trial would "invariably be resolved against [him] . . . ."

Next, the defendant presented his main argument, namely that the indictment should be dismissed because the prejudicial, inflammatory, pretrial publicity destroyed any reasonable possibility that he could receive a fair trial anywhere in the nation. As support for this argument, he relied on the cornerstones of our criminal justice system—the presumption of innocence, and the Sixth Amendment guarantee of a fair trial. Citing case law, the defendant concluded that prejudice to him

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199. *Id.* at *3. The trial was scheduled to begin on March 31, 1997. *Id.* The article also cited "confidential defense documents" which were "obtained legally." *Id.*

200. Following the *Dallas Morning News* story, publicity included televised stories about the alleged "confession," newspaper articles, and radio broadcasts relaying the "confession." *Id.* at *4. Moreover, the *Dallas Morning News* story triggered a similar story on *Playboy* magazine's Internet home page, and, in turn, interviews of its author, Mr. Ben Fenwick, on all three major television networks. *Id.*

201. *Id.* at *5. The defendant stressed that the attorney-client relationship "is the central place where counsel's assistance can be had—where there is a right to communicate without fear of the consequences . . . ." *Id.* As a result of the numerous publications of McVeigh's "confession," the defendant contended that *Dallas Morning News* and *Playboy* had intruded into the sacred attorney-client relationship because they were not "invited" in by the accused; thus, they were trespassers. *Id.* at *2.*

202. *Id.* at *5. Although the defendant acknowledged that he could still plead not guilty, he emphasized that jurors cannot simply be uninfluenced by the content of the publicized stories, regardless of whether they honestly believe they can listen and evaluate the evidence at trial without considering the pretrial disclosures. *Id.*

203. See *Id.* at *6.*

204. See *Id.* at *9-12.*

205. *Id.* McVeigh bases his argument on the idea that to presume innocence, jurors must lay aside all suspicion and the conclusions they have formed in order to reach their final conclusion solely on legal evidence. See *Id.* The Sixth Amendment provides in part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State . . . ." U.S. CONST. amend. VI.

206. Rideau v. Louisiana, 373 U.S. 723, 726-27 (1963) (presuming prejudice when defendant's confession was televised prior to trial); United States v. Davis, 60 F.3d 1479, 1485 (10th Cir. 1995) (presuming prejudice when jurors had watched television reports prior to trial).
was presumed. Finally, in the alternative, he moved that the court abate his trial for at least one year to allow the lethal effects of prejudicial and inflammatory publicity to subside, in order to assure him of his constitutional rights.

The court denied McVeigh's motion on the basis that it did not "accept the assumptions necessary to support the defense position . . . ." The court concluded, noting past experience with jurors and general awareness of public attitudes but without referring to specific content or amount of media coverage, that the stories about McVeigh's alleged confession lacked the impact necessary to create the alleged type and magnitude of bias to the venire. The court acknowledged that the pretrial proceedings had been extensively reported and furthermore, that the future coverage could be expected to increasingly slant toward the sensational aspects of the trial as the media competed for public attention. In so concluding, the court did not address the impact and implications of an alleged confession on the venire that, according to McVeigh's motion, the Court considered to be a critical issue in Irvin and Rideau.

While the court addressed the issue of foundational and fundamental fairness with respect to the defendant's trial, it concluded that such fairness could be protected by the skill of the defense attorneys, pretrial measures by the court, and the voir dire process for the jury panel. The court found that "there is no reason to believe that fair-minded persons would be so influenced by anything contained in this recent publicity that they would not be ready, willing, and able to perform the duty to follow the law and decide according to the evidence presented in a vigorously contested trial." Apparently the court attributed this ability to jurors, notwithstanding the coverage of McVeigh's alleged confession, because of a presumed "healthy skepticism about what they are told."

207. Defendant's Motion to Dismiss, supra note 2, at *10.
208. Id. at *12-15. The motion stated that "[o]nly with a substantial, meaningful continuance will recall fade to the point where a fair trial may become possible." Id. at *14. The motion estimated that one year would probably be sufficient for memories about the reports to become less specific, and would allow jurors the ability to listen without thoughts clouded by improper, inflammatory information. Id.
210. Id. Chief Judge Matsch of the U.S. District Court of Colorado stated that "[p]ast experience with jurors and a general awareness about pretrial publicity in criminal cases suggest that these stories have had neither the wide exposure nor general acceptance that the defendant's lawyers presume." Id.
211. Id.
212. Defendant's Motion to Dismiss, supra note 2, at *11.
216. Id. at *3.
217. Id. at *2-3.
Following the trial court's decision, McVeigh's attorneys filed a petition for writ of prohibition with the Tenth Circuit, in essence appealing the court's ruling. The court of appeals denied the petition as premature, and McVeigh proceeded to trial. At trial, he was convicted and sentenced to death.

The actual and potential impact of media coverage on the judicial system is notable in this case; a case which had already been transferred to a different state to address the issue of statewide bias to potential jurors. Noteworthy is the fact that the bias existed prior to any trial proceedings, notwithstanding the fact that, because the trial was in federal court, no cameras were permitted in any of the pretrial proceedings. In transferring the case from Oklahoma to Colorado, the federal court acknowledged that McVeigh could not receive a fair trial anywhere in the original forum state. Yet, when national juror bias became the issue, the district court and the court of appeals made quick work of disposing of McVeigh's claims. For its part, the court of appeals held that McVeigh must await the outcome of voir dire. This essentially eliminated the presumed bias analysis of Rideau and led to the court's review of McVeigh's arguments under an Irvin or Mu'Min type of analysis, where proof of bias to the actual jurors is at issue. If the "totality of circumstances" test was confined to applying specific critical elements, like the classic factors cited in Irvin, Rideau, Estes, and Sheppard, and if proving the existence of those factors was sufficient to presume bias, the court

218. Defendant's Petition for Writ of Prohibition, supra note 11, at *1.
219. See Order, supra note 12, at *1. The court stated that, though delay and an unnecessary trial might result, the relief sought could be obtained through direct appeal following final judgment. Id. It also deferred to the trial judge and voir dire for a determination of whether the alleged unfair pretrial publicity was merely speculation or "demonstrable reality," citing United States v. Halderman, 559 F.2d 31, 60 (D.C. Cir. 1976). Id.
221. See Memorandum Opinion, supra note 10, at *1. According to Judge Matsch, the court changed venue from Oklahoma to Colorado because the entire state of Oklahoma had become a unified community that shared the emotional trauma of those who had been victimized. Id.
222. Rule 53 of the Federal Rules of Criminal Procedure states, "[T]he taking of photographs in the court room during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the court room shall not be permitted by the court." Fed. R. Crim. P. 53; see also United States v. McVeigh, 918 F. Supp. 1467, 1469 (W.D. Okla. 1996) (finding that existing bias was sufficient to warrant a change of venue nearly six weeks before the beginning of the trial). The court ordered the transfer of trial on February 19, 1996. Id. at 1475. It was scheduled to proceed on March 31, 1996. Memorandum Opinion, supra note 10, at *3.
223. McVeigh, 918 F. Supp. at 1473-74 (stating that the extensive publicity which evoked strong emotional responses from those living in the united community of Oklahoma City presented so great a prejudice to the defendant that a change of venue to Denver, Colorado was appropriate).
225. McVeigh's argument used a Rideau-type analysis, claiming that, due to media coverage of his confession, bias could be presumed without reference to voir dire. The court of appeals ruled against that position, stating that voir dire testimony would be used to prove individual juror bias. Id.
could have been painted into a corner by the McVeigh motion and forced to choose between setting him free, or denying him his constitutional right to an unbiased jury. The court, however, was spared this dilemma, because the "totality of circumstances" test under *Murphy* is flexible enough to defeat virtually any claim of presumed national bias.

IV. *THE TOTALITY OF CIRCUMSTANCES TEST HAS BECOME A GELATIN-LIKE STANDARD GIVING WAY TO THE DON'T ASK-DON'T TELL STANDARD OF *MU'MIN*

In adopting the "totality of the circumstances" test, courts have rejected the use of specific limited elements—the classic factors—of pretrial publicity when wrestling with conflicting First and Fourteenth Amendment rights.\(^226\) This is consistent with the Supreme Court's position that measuring the attitudes which underlie strong opinions is not subject to any particular test.\(^227\) The Supreme Court has also noted that generalizations with respect to attitudes of bias are not profitable because each case must turn on special facts which are unique to each case.\(^228\) As a result, the "totality of circumstances" test has only the appearance of a firm standard.

A. *The Gelatin-Like Standard*

After *Murphy*, the "totality of the circumstances" test can be viewed as the Court's Jell-O\(^229\) remedy for the unknown future of pretrial publicity. Like Jell-O, it appears solid in that it requires a court, in evaluating the impact of pretrial publicity on a defendant's due process rights, to look "to any indications in the totality of the circumstances that petitioners' trial was not fundamentally fair."\(^230\) Yet because the test 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.\(^231\) Each new case presents, in "totality," a new

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227. See United States v. Wood, 299 U.S. 123, 145-46 (1936) ("Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula.").
228. Marshall v. United States, 360 U.S. 310, 312 (1959); see also, e.g., McVeigh, 918 F. Supp. at 1473 ("The possible prejudicial impact of this type of publicity is not something measurable by any objective standards."). The court noted that determination of juror prejudice was not subject to "scientific methodology" or "laboratory experiments," and indeed part of the genius of the American jury system was the presence of so many variables, such that no two trials could be compared, regardless of their apparent similarities. *Id.*
229. See WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 648 (9th ed. 1986) (defining "Jell-O" as a trademark for a gelatin dessert usually having the flavor and color of fruit).
231. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1177 (1989). In discussing the totality of the circumstances test, Justice Scalia referred to it as a "discretion-conferring approach," rather than one establishing a general rule of law. *Id.* To Scalia, this type
set of circumstances. Since the totality of circumstances, as opposed to a predetermined set of factors, are determinative, any one factor from prior cases and precedents may be discounted or offset by another.

Justice Antonin Scalia, while providing an illustration of how the test works, said, "Today we decide that these nine factors sustain recovery. Whether only eight of them will do so—or whether the addition of a tenth will change the outcome—are questions for another day." Criticizing the test in certain applications, he stated, "When one is dealing, as my Court often is, with issues so heartfelt that they are believed by one side or the other to be resolved by the Constitution itself, it does not greatly appeal to one's sense of justice to say: 'Well, that earlier case had nine factors, this one has nine plus one.'" Scalia's criticism of the approach can be summarized as discomfort with the lack of uniformity that a "totality of circumstances" test provides for legal decisions. This allows for inconsistent verdicts and a conclusion that there is "no single 'right' answer." In the context of pretrial publicity and especially in a McVeigh-type motion, however, it allows the courts the luxury of continually moving the bar that a defendant must hurdle to prove or establish a presumption of bias according to current societal standards. Under such a "totality of circumstances" test, the level of media coverage needed to presume bias in 1966, when Sheppard was decided, would never be sufficient in 1997, when McVeigh was decided. So, while the McVeigh coverage exceeded that in Sheppard, other factors that can be weighed in the totality of the circumstances might be counted to offset the impact of publicity. Moreover, under the "totality of circumstances" test, new circumstances can be added to the mix. For example, the magnitude of the coverage in the Simpson trial, combined with the widespread dissatisfaction with the Simpson criminal verdict, may be found to have conditioned the venire such that after Simpson, prospective jurors would be skeptical about the media coverage of trials of approach had the advantage in that "all generalizations (including, I know, the present one) are to some degree invalid, and hence every rule of law has a few corners that do not quite fit." Id. of approach had the advantage in that "all generalizations (including, I know, the present one) are to some degree invalid, and hence every rule of law has a few corners that do not quite fit." Id.

232. Id.
233. Id.
234. Id.
235. Id. at 1178.
236. Id. at 1181.
237. See id. at 1188 (suggesting that even the rule of law may change over time). Justice Scalia quotes Justice Cardozo, who stated that "[s]tandards of prudent conduct are declared at times by courts, but they are taken over from the facts of life." Id.
238. See Patton v. Yount, 467 U.S. 1025, 1031-32 (1984). The court of appeals, in focusing on the factors in Irvin substantiating a finding of bias, failed to give adequate weight to factors presented in the case at bar that undercut, or diminished, the impact of the prejudicial publicity. Id.
239. Scalia, supra note 231, at 1178; see also infra notes 249-71 and accompanying text (discussing Mu'Min v. Virginia, 500 U.S. 415 (1991), in which the Court, while comparing defendant's circumstances to those in Irvin, considered that factors not address by Irvin mitigated the impact of pretrial publicity in Mu'Min).
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and, therefore, more receptive to actual trial evidence. This is confirmed,
at least in part, by poll results following the media coverage of the Simpsons
criminal pretrial events indicating that 86% of those surveyed said they
were more aware that media intrusion could affect a defendant’s
ability to get a fair trial and 56% said they have less respect for the me-
dia.240

B. The Demise of Presumed Bias? Alas Poor Rideau—I Knew It Well

“Murder and mystery, society, sex and suspense were combined in
this case in such a manner as to intrigue and captivate the public fancy ..
..”241 This quote, from Sheppard, sounds like it might have been a de-
scription of the O.J. Simpson case. Indeed, when comparing the Simpson
trial coverage with the coverage in Irvin, Rideau, Sheppard, and Estes,
every element of prejudicial pretrial publicity in those cases, except an
alleged confession, can be found in the Simpson coverage.242 Then again,
none of these earlier cases contained footage so dramatic as the famous
“slow-speed car chase,” which was seen by an estimated seventy million
television viewers.243 The McVeigh trial coverage, when compared to its
early predecessors, includes most of the classic elements, including the
coup de grace last-minute release of an alleged confession.244 When con-

(listing Gallup Organization poll results).
340, 342 (Ohio 1956)).
Texas, and Sheppard v. Maxwell, see supra Part III.A.
on Trial, 67 U. COLO. L. REV. 727, 730 (1996); Burleigh, supra note 17, at 56 (estimating the num-
ber of people who watched the Los Angeles police pursuing Simpson at low speed on the freeway
just prior to his arrest).
244. McVeigh contended that extensive pretrial publicity essentially destroyed his right to a fair
trial. Specifically, he asserted that his Fifth Amendment rights to due process and against self-
incrimination were violated because the devastating “confessions” he made to his defense counsel
were so widely publicized. Defendant’s Motion for New Trial, supra note 220, at *1; see also U.S.
CONST. amend. V (“No person ... 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.”). Pretrial publicity
consisted of extensive newspaper and electronic media coverage. Defendant’s Motion for New Trial,
supra note 220, at *3. Newspaper coverage of the McVeigh “confession” began with the Dallas
Morning News’ Internet home page publication on February 28, 1997. Id. On March 1, the “confes-
sion” appeared in print media, after which the publicity continued relentlessly for eleven days. Id.
Following Playboy’s home page reiteration of McVeigh’s “confession,” several newspapers carried
articles with headlines such as “McVeigh Wanted a Body Count,” “Timothy McVeigh’s Purported
Admission That He Committed the Oklahoma City Bombing May Be Inadmissible at His Trial . . . ,”
and “Paper Suspect timed Blast to Boost Deaths.” Id. Television news coverage consisted of several
reports of McVeigh’s “confession” carried by major networks such as ABC, CBS, and CNN. Id. at
*4. These were broadcast in the weeks before McVeigh’s trial, from February 28 to March 12, 1997.
Id. Furthermore, the trial had the element of a consistent community pattern of thought, which re-
sulted in removal of the trial from Oklahoma City to Denver. United States v. McVeigh, 918 F.
Supp. 1467, 1471 (W.D. Okla. 1996). As the court noted, “Oklahomans are united as a family with a
spirit unique to the state.” Id. at 1471.
considering the elements of media coverage in these cases, and comparing them to Supreme Court precedent, one could draw the conclusion that, following the lead of Sheppard, Irvin, Estes, or Rideau, a court could easily sustain a finding that prejudicial pretrial publicity might deny McVeigh or Simpson a fair trial. Moreover, because of the expansive coverage of these two cases, as compared to other cases in recent history, it is not a long stretch to argue that the prejudicial impact would be nationwide. The natural result of combining these two factors is the success of a motion like that made by McVeigh, which contended that his entire prosecution should be dismissed for lack of a venue that could supply an impartial jury. It appears, however, in reviewing recent precedents, that the Supreme Court has positioned itself to always be the ringmaster at the media circus rather than the clown painted into a corner. It has done this by adopting the "totality of circumstances" test and then applying the test in such a way that new factors and circumstances continually change the mix necessary to prove or presume bias.

For example, in Mu'Min, the Court considered not only the size of the population, the saturation of the media coverage, the extent and content of the coverage, and the airing of the defendant's alleged confession, but it also tossed in the number of murders in the area, and the fact that the defendant's crime was only one of nine murders occurring that

245. Though Simpson was acquitted, his trial is relevant in terms of the publicity that it received.

246. Compare Sheppard, 384 U.S. at 340, and Rideau v. Louisiana, 373 U.S. 723 (1963), with Defendant's Motion for New Trial, supra note 220, and Irvin v. Dowd, 366 U.S. 717 (1961). The newspaper coverage in Sheppard tended to emphasize the defendant's guilt, and pointed out discrepancies in his statements to authorities. Sheppard, 384 U.S. at 340. The Court granted defendant's motion for a new trial, because of the massive pretrial publicity that had saturated the community, the "carnival atmosphere of the courtroom," the failure to insulate the witnesses, and the lack of effort by the court to control the flow of information to the press. Id. at 357-63. In Rideau, the defendant's request for change of venue was granted because three televised interviews of the defendant's "confession" had been broadcast within the community. Rideau, 373 U.S. at 727-28. After acknowledging the probability that tens of thousands of people watched the televised "confession," the Court stated that "subsequent court proceedings . . . could be but a hollow formality." Id. at 726. Pretrial publicity of McVeigh's "confession" received national coverage via television and even world-wide coverage, due to publication on Internet home pages. Defendant's Motion for New Trial, supra note 220, at *1-3. Finally, in Irvin, the defendant's conviction for murder was reversed because the Court found that despite a change of venue, the current community pattern of thought revealed a deep and bitter prejudice. Irvin, 366 U.S. at 725; see Estes v. Texas, 381 U.S. 532, 545-50 (1965) (noting that the use of television does not contribute materially to ascertaining truth, but rather impacts the opinions of jurors, impairs the quality of testimonies, places additional responsibilities on the trial judge, and tends to harass the criminal defendant).

247. See Burleigh, supra note 17 (indicating that the coverage of the Simpson trial was unlike any in history).

248. See Defendant's Motion to Dismiss, supra note 2, at *11.

249. See id. at *12.

250. See Mu'Min v. Virginia, 500 U.S. 415, 428-29 (1991) (distinguishing the factors in Mu'Min from those in Irvin).
Putting aside the life-cheapening implications of this analysis, it suggests that with more murders, there is less sensitivity to a single murder, and therefore less impact on the venire as a result of pretrial publicity directed at a single murder suspect. That same logic can be applied to the media coverage itself. As the media creates bigger, more nationally-saturating coverage (a bigger circus), the nation as part of the venire is desensitized. Thus, after Simpson, the courts could arguably move the bar for McVeigh, claiming that the Simpson coverage desensitized the nation's media consumers to a point where they expect that level of circus atmosphere in trial coverage. This lack of sensitivity would undercut a defendant's claim that the prospective jurors who received that coverage would be impacted by, or biased as a result of, having seen or heard it.

Arguably, then, the presumed or inherent prejudice standard articulated in Rideau, Estes, and Sheppard could never be met again, or at least could always be rebutted by simply shifting the factors to be considered in the totality of media coverage circumstances. For the courts, the beauty of this is that there will never be national jury bias, and there will always be a place to send the defendant for a fair trial with an "impartial" jury. With the presumed prejudice test out of the way, a court can focus on the standards established in Mu'Min, which allow the judge to determine that individual jurors are sufficiently impartial to be impaneled without a specific inquiry into the types of pretrial publicity they encountered. This is also good for the media, which is less likely to be restrained if the courts perceive that the defendant will receive a fair trial regardless of the press coverage. While the effective elimination of presumed prejudice permits the courts and the media to evade the trap of national jury bias, it leaves the nationally notorious, and even the locally notorious, defendant at substantial risk of being denied a fair trial.

C. The Mu'Min Alternative—Don't Ask Don't Tell

In Mu'Min v. Virginia, the Court held that in criminal cases having prejudicial pretrial publicity, the defendant does not have a constitutional right to question the prospective jurors about the specific content of the

251. Id. at 429. The Court expanded this discussion to include the number of murders in the surrounding area even though there was no indication that residents of that area were part of the venire. Id.
252. Id.
253. This situation does not apply to state criminal defendants, who unlike McVeigh, cannot be tried anywhere in the country under federal jurisdiction. This issue is unfortunately, but intentionally, omitted from this discussion.
254. Mu'Min, 500 U.S. at 427 (acknowledging that prior cases have recognized the wide discretion granted to trial judges in conducting voir dire). The Court determined that despite the trial judge's failure to question individual jurors about the content of the publicity they were exposed to, the voir dire examination was sufficient to allow the court to select an impartial jury. Id. at 431-32.
pretrial publicity they observed. The defendant in *Mu'Min* was a convicted murderer who was alleged to have robbed and killed a shop owner after escaping from a prison work detail. The case received substantial news coverage due, in part, to the controversy surrounding allegations of lax security on the work detail at the time of the murder. At trial, the defendant asked the court to include several questions in voir dire about the specific content of pretrial reports that the jurors had heard. The court denied the request, and conducted a voir dire of the general jury panel, and jurors, in groups of four, but did not ask the jurors the content questions the defendant had submitted. The jury convicted the defendant and sentenced him to death. He then sought relief from the Supreme Court, claiming that his Sixth and Fourteenth Amendment rights had been denied.

The Court affirmed the defendant's conviction, stating that there was no constitutional requirement that the trial court ask the specific content voir dire questions submitted. The Court noted that trial judges have been given broad discretion in deciding how to conduct voir dire. Reviewing its earlier decisions, it compared the judge's function during voir dire to that of the jury during trial, stating "[b]oth must reach conclusions as to impartiality and credibility by relying on their own evaluations of demeanor evidence and of responses to questions."

The Court acknowledged that content questions during voir dire might be helpful to the trial court's assessment of juror impartiality. It concluded, however, that to be constitutionally compelled, the failure to ask the questions had to "render defendant's trial fundamentally unfair." The Court quoted its opinion in *Irvin v. Dowd*, noting that in that case, it had acknowledged that pretrial publicity can create such a presumption of bias that jurors' claims of impartiality should not be believed. It even conceded that content questions might be constitutionally required if the media coverage of *Mu'Min*’s trial had been equivalent to that in *Irvin*. The Court then distinguished the two cases, noting differences in the magnitude of media coverage, and the sizes of the

257. *Id.* at 418.
258. *Id.* at 434-35 (Marshall, J., dissenting).
259. *Id.* at 419.
260. *Id.* at 420.
261. *Id.* at 421.
262. *Id.* at 417.
263. *Id.* at 425.
264. *Id.* at 423.
265. *Id.* at 424 (quoting Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981)).
266. *Id.*
267. *Id.* at 425-26 (citing Murphy v. Florida, 421 U.S. 794, 799 (1975)).
268. *Id.* at 429 (citing Patton v. Yount, 467 U.S. 1025, 1031 (1984)).
269. *Id.*
communities in which the cases occurred. Though the Court concluded that the Irvin coverage was more substantial, it considered factors never discussed therein to support its conclusion that Mu'Min did not face the "wave of public passion" that occurred in Irvin. For example, the Court considered the fact that the murder in Mu'Min occurred in a large metropolitan area where the defendant’s case was only one of nine murders in the particular county, and one of hundreds in the metropolitan area that year.

One problem with the Court’s analysis in Mu'Min is that a court has the difficult task of determining a juror's individual sensitivity to pretrial publicity. The impact on impartiality cannot be generalized. In the Court’s estimation, there was insufficient media coverage in Mu'Min to presume bias to the whole venire. That conclusion does not, however, warrant the additional presumption of the absence of bias in any of the individual jurors. In his dissent in Mu'Min, Justice Marshall put his finger on another problem when he stated that "an individual juror may have an interest in concealing his own bias... [or] may be unaware of it." Moreover, inquiry into the content of the media coverage an individual juror was exposed to certainly ought to be required so the trial court can check the believability and credibility of the juror’s statement of impartiality. The judge’s task in evaluating juror bias is analogous to what jurors do with respect to witness testimony during trial. The anomaly in the Supreme Court’s subsequent conclusion that content questions are not required is thus apparent when one considers a jury panel having to evaluate a witness’s credibility based on nothing more than the witness’s promise to tell the truth. Finally, jurors may honestly believe they can be impartial because they do not fully understand the implications of what impartiality entails. Only the trial judge would be in a position, through questioning a juror, to recognize the juror’s erroneous conclusion.

270. Id. at 429-30.
271. Id.
272. Id. at 429.
273. See Irvin v. Dowd, 366 U.S. 717, 724-25 (1961) (citing United States v. Wood, 299 U.S. 123, 145-46 (1936)). The Court stated: "Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula." Id.
275. Id. at 424.
276. Irvin, 366 U.S. at 728 (recognizing that although jurors say they will be fair and impartial, they cannot forget what they see and hear); see also Mu'Min, 500 U.S. at 443 (Marshall, J., dissenting) (stating that a prospective juror may be "confused" as to what constitutes impartiality). Justice Marshall refers to the example of a juror who insisted she was impartial despite exposure to news articles but who, upon further questioning, stated, "Well, we all know what she has done... we all know the girl went in and held up the bank and the policeman was shot there." Id. at 443 n.4.
Notwithstanding the anomalies in the Court’s reasoning, there are several issues in the *Mu’Min* opinion that are particularly relevant in the context of massive pretrial publicity creating national jury bias. First, the Court never referred to the “totality of circumstances” test. Yet, it referenced *Murphy* for the proposition that to be constitutionally deficient, the failure to ask content questions must render the defendant’s trial fundamentally unfair. The *Mu’Min* Court failed to point out that, in *Murphy*, the Court held that fundamental unfairness must be determined through examining the totality of circumstances. The Court, however, in *Murphy* applied the “totality of circumstances” test to determine that the defendant’s case was not one in which bias to all the veniremen could be presumed without reference to voir dire. In contrast to *Mu’Min*, the Court in *Murphy* then examined a detailed voir dire while acknowledging that, if the circumstances warranted, the jurors’ assurances of impartiality would not be dispositive.

Second, the Court distinguished *Mu’Min* from *Irvin*, noting that the coverage in *Irvin* might have necessitated content questions before the jury could pass constitutional standards of impartiality. It introduced, however, new factors not considered in *Irvin*. Moreover, the Court used the magnitude of coverage in *Irvin* as a sort of litmus test for *Mu’Min*, concluding that, because *Mu’Min*’s coverage did not meet or exceed the coverage in *Irvin*, no content questions were required. This comparison is a bit misplaced since in *Irvin*, the Court held that the magnitude of coverage supported its conclusion that it should not trust the jurors’ statements regarding their ability to be impartial at the conclusion of voir dire. The Court did not hold that, absent that magnitude of coverage, only a general voir dire was needed.

Third, as previously noted, this freedom to move the bar in a totality of circumstances analysis, as evidenced in *Mu’Min*, is the Supreme Court’s escape hatch from the corner of national jury bias. No case will ever be identical to any of those in which bias was presumed without reference to voir dire. If a case comes to the Court that looks similar, such as the *McVeigh* case, the Court can simply introduce new factors, such as more people, or number of murders per year, to undercut a presumed bias argument. If that fails, the Court can look to prior media coverage and conclude that the current case did not have sufficient coverage.

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279. Id. at 800.
280. Id. at 800-01.
282. Id. (including the number of murders in the area, and the fact that the defendant’s crime was one of only nine murders occurred in the jurisdiction that year).
283. Id.
to impact the venire. This presents the prospect that the Court could use the Simpson criminal trial coverage as a future litmus test for bias-producing coverage, given that the unprecedented (unsurpassable?) coverage in that case did not prevent his acquittal.

Under the foregoing analysis, it may be concluded that presumed bias as it was established in Rideau is dead. But the lessons learned in Irvin should not be. There are times when media coverage may be insufficient to presume bias, but substantial enough to presume exposure to media coverage and content that is inherently prejudicial. At that point, content questions, if requested, should be obligatory because only through that inquiry can the court determine whether the totality of circumstances to which an individual juror was exposed renders that juror biased and, thereby, makes that juror's jury service a violation of the defendant's constitutional fair trial rights.20

V. THE NEW RING MASTER AT THE MEDIA CIRCUS

In the current media atmosphere, high profile and otherwise curious or unique trials are likely to attract a media "circus" or at least a "carnival."206 Under the Sixth and Fourteenth Amendments, however, courts should not sit by and juggle the constitutional rights of defendants whose cases attract excessive attention. Some precedents, while still good law, have the appearance of clowns when thrust into the spotlight of the contemporary media circus. Rideau supports the proposition that, under extreme circumstances of media coverage, bias can be presumed to all who witness the coverage.207 Applying Rideau, if the entire nation witnessed sufficiently damaging coverage, the defendant could paint a court into a corner, allowing a McVeigh-type scenario to result in the dismissal of a defendant's prosecution before voir dire of a single juror. Murphy, as currently interpreted, converts the totality of circumstances test into a juggling act—tossing in new circumstances and eliminating old ones, like trading balls for bowling pins.208 Mu'Min is the classic clown with a bucket of confetti that everyone believes is water. With the standard of

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205. This is also consistent with the interpretations some courts have adopted in applying Mu'Min v. Virginia. See, for example, People v. Jendrzejewski, 197 WL 422515, at *2 (Mich. 1997) (citing Mu'Min v. Virginia, 500 U.S. 415, 442 n.3 (1991) (Marshall, J., dissenting), where the Court concluded that Irvin presents a dual presumption: first, that a certain level of media coverage creates a presumption of exposure and, second, that the exposure creates a presumption of bias. Id. Even though the Court may now be able to undercut the second presumption through introduction of new factors in the totality of circumstances, it is safe to presume that, at a certain level, media coverage would reach every individual in the nation.

206. See Murphy v. Florida, 421 U.S. 794, 799 (1975) (referring to the trial in Estes as being conducted in a "circus atmosphere"); Sheppard v. Maxwell, 384 U.S. 333, 358 (1966) (referring to the "carnival atmosphere at trial" created by the presence of the press); Rideau v. Louisiana, 373 U.S. 723, 726 (1963) (referring to the proceedings in the case as "kangaroo court proceedings").

207. See Rideau v. Louisiana, 373 U.S. 723, 727 (1963). The Rideau Court held that due process required the defendant to be tried by a jury who had not witnessed his televised confession. Id.

208. See Mu'Min, 500 U.S. at 425-26.
presumed prejudice virtually eliminated, a trial court’s reliance on the jurors’ statements that they can be impartial is sustainable even without the detailed voir dire called for by other Supreme Court precedent. In the circumstance of a media circus large enough to actually impact a venire, Mu’Min tosses confetti, not water, on the flame of injustice by allowing a court to seat jurors who could take their prejudices to the jury room undetected by the filter of extended voir dire designed to identify bias.

The media circus that appears at so many trials these days needs a ringmaster to balance the rights of the media and the accused. It does not need more clowns. Some suggest that the court should take control of the spectacle. Indeed, the court in McVeigh was quite aggressive and successful in its efforts to control the circus. Notwithstanding the precautions the court took in pretrial, however, a single media event spiraled into a spectacle that threatened or, according to McVeigh, destroyed the defendant’s chance for a fair trial. Moreover, the Simpson trial demonstrated that a big enough circus can turn even a competent, respected judge into a performer in center ring. Judge Ito was not the first judge to be overwhelmed by the media onslaught, as other judges have appeared, or felt, powerless to restrain the press.

The release of the alleged confession in the McVeigh trial demonstrated the explosive potential of pretrial coverage, even under controlled circumstances. Indeed, McVeigh’s defense counsel complimented the manner in which the court had managed the pretrial and minimized the impact of the publicity prior to the confession incident. Unfortunately, such media incidents in high visibility trials cannot be anticipated or

289. See Patton v. Yount, 467 U.S. 1025, 1038 (1984) (resolving any questions of juror impartiality through an extensive voir dire); cf. Mu’Min, 500 U.S. at 431 (holding that due process does not require jurors to be asked specifically about their exposure to pretrial publicity).

290. See Mu’Min, 500 U.S. at 445 (Marshall, J., dissenting) (criticizing the majority for failing to fault the trial judge’s decision to seat jurors without first inquiring into their exposure to publicity).

291. See Hardaway & Tumminello, supra note 14, at 78-84 (proposing that courts actively restrain the press and lawyers, and close voir dire/trial proceedings); Whitebread & Contreras, supra note 15, at 1619-25 (proposing that courts impose a gag order on all trial participants, and utilize a voir dire patterned after the considerations discussed in Mu’Min).


293. Defendant’s Motion to Dismiss, supra note 2, at *9.

294. See Sheppard v. Maxwell, 384 U.S. 333, 358-59 (1966) (noting that the trial court’s fundamental error was compounded by the judge, who held that he could not control or restrict the prejudicial pretrial coverage).

295. See Defendant’s Motion to Dismiss, supra note 2, at *3-5 (describing the extensive media coverage of the alleged confession that the Dallas Morning News published a month before the scheduled commencement of trial).

296. Id. at *3 (noting that the court had gone to great lengths to balance free press and fair trial rights).
controlled. Therefore, the ultimate ringmaster would be a precedent that provides the trial court with solid guidance and allows the court to balance the competing interests of the press and the accused, even after an uncontrollable media outburst appears to make a fair trial impossible. This article suggests that the Court already has the necessary precedent in the form of *Irvin*, as it was interpreted by the Court in *Patton v. Yount*, with a little help from *Rideau, Estes, Sheppard, Murphy*, and Justice Marshall’s dissent in *Mu'Min*. The net result would be a “totality of circumstances” test that considers and evaluates the impact of media coverage, and other circumstances, on each individual juror. The rationale for applying the test in this manner, and the method for application, can be found in the above mentioned precedents.

Starting with the Court’s interpretation of *Irvin* is unconventional because, in *Patton*, the Court appeared to put it out to pasture. The Court’s reference to the *Irvin* decision as “a leading one at the time” indicates its perception that the decision was past its prime. The Court read the holding in *Irvin* to say “that adverse pretrial publicity can create such a presumption of prejudice in a community that the jurors’ claims that they can be impartial should not be believed.” The Court also noted that, in *Irvin*, a number of factors had been reviewed to determine whether the totality of circumstances raised such a presumption. This reading of *Irvin* indicates that the Court in *Patton* believed that the former case had reviewed the totality of circumstances to evaluate presumed bias to the *community*, which was sufficient to undercut an individual juror’s statement of impartiality. This reading requires that, when a case is accompanied by a certain level of pretrial publicity, the court cannot believe the juror’s statements of impartiality. Rather, it must make the determination of juror bias based on the totality of circumstances encountered by the juror.

Here is where *Rideau, Estes*, and *Sheppard* enter the analysis. The court’s initial inquiry should be guided by the critical factors identified by the Supreme Court in those cases. If the pretrial publicity contains

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298. Id. at 1031.
299. Id.
300. Id.
301. Id.
302. See *Irvin v. Dowd*, 366 U.S. 717, 723 (1961). The Court imposed on the defendant the burden of proving bias, and stating that

Unless [defendant] shows the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality, the juror need not necessarily be set aside... If a positive and decided opinion had been formed, [the juror] would have been incompetent even though it had not been expressed.

Id. (quoting *Reynolds v. United States*, 98 U.S. 145, 157 (1878)).
303. See supra Part III.A.
these factors, as Justice Marshall suggested, the court should be required to engage in detailed individual voir dire of the prospective jurors, which would include questions about the content of publicity witnessed. At that point, nonclassic elements can be considered in the totality of circumstances, such as whether the case arises in a community that is more or less likely to be sensitive to, and thereby biased against, a particular kind of crime or defendant. This two-step inquiry serves two purposes. First, it sorts out the source and strength of attitudes that assist in determining whether a juror can put aside impressions and render a fair verdict. This determination is for the judge, not the juror, to make. Second, in the event that the judge cannot find impartial jurors, the information received may assist the decision to transfer or delay the trial.

Applying this process has several benefits. It prevents the court from getting painted into a corner because the presumption of bias to the entire venire is, in effect, left to rest in peace. Simultaneously, it creates a fixed set of standards for initial inquiry into bias, but allows the flexibility to deal with societal changes that impact the community composing the venire. Finally, this two-step process requires content questions when a certain level of pretrial coverage occurs, but not for every case that makes the evening news. Thus, courts are not burdened in the way the majority feared in *Mu'Min*, but a defendant in a high publicity case is not left to trust his fate to the superficial and unexamined promise of impartiality by a potentially biased juror.

**CONCLUSION**

Courts have wrestled with the impact of pretrial publicity on local prospective and empanelled jurors for nearly two hundred years. In retrospect, Justice Douglas sounded almost prophetic when he said,

> Think, too, of the times when a community is thoroughly aroused about some heinous crime—so aroused as to generate an atmosphere in which a fair trial cannot be had. Imagine what could happen if the latent local passions were aroused through channels

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304. The defendant would still have the burden of raising the issue of bias, and establishing the presence of certain factors. Consistent with precedent, however, not all factors would be required. Rather, the defendant would argue those which appear in his case.


306. See id. at 429.


308. See id. at 724; see also Reynolds v. United States, 98 U.S. 145, 156 (1878).

309. See *Mu'Min*, 500 U.S. at 446 (1991) (Marshall, J., dissenting) (rejecting the majority's claim that content questions would unduly burden trial courts).

310. See generally supra note 37.
provided by radio and television. Then there might be no place to which the trial could be transferred to protect the accused.\textsuperscript{311}

Now, nearly forty years later, Douglas’s words are timely when considering the McVeigh trial, which was moved to a different state on the basis that the entire state of Oklahoma was considered a unified community in terms of its bias against the bombing suspect.\textsuperscript{312}

The McVeigh court’s treatment of the Oklahoma City bombing’s media coverage demonstrates a shifting focus from local and regional bias to a more expansive presumed statewide bias.\textsuperscript{313} Is nationwide bias far behind? Worse yet, what if nationwide bias already exists and is simply undetected? Consider again the Simpson criminal trial coverage. What if, as Professor Allen suggested, the “citizens of the country” believed, as he did, what they saw in the media coverage of Simpson’s trial, and subscribe to the notion that procedural protection of the criminally accused is just “political rhetoric” when the citizens believe the media instead of the evidence?\textsuperscript{314} If Professor Allen’s view, that the citizens of this nation believe Simpson is guilty, actually reflects national sentiment, we may have already witnessed the arrival of media-based national jury bias, but simply failed to recognize it behind the veil of Simpson’s criminal acquittal.\textsuperscript{315}

It is difficult to imagine this diverse nation of prospective jurors both unified and galvanized in their opinions about a defendant’s guilt or innocence. Yet the challenge to the nation’s ability to remain impartial while engulfed in the media circus has now been issued—and initially answered with a conviction—in the McVeigh trial. Regardless of the ultimate resolution in that case, we have not likely seen the last of the criminal trial media circus. Thus, we have not likely seen the last allegation of national jury bias, which, for the purpose of this research, raises two questions. First, is a motion to dismiss a prosecution because pretrial publicity tainted the national jury pool viable after the Simpson trial coverage exceeded every prior trial spectacle? Second, has the Court anticipated a Simpson-like media circus and raised the bar so high that all media coverage will fall below the standards required by the Court’s post-

\textsuperscript{311} Id.
\textsuperscript{312} United States v. McVeigh, 918 F. Supp. 1467, 1474 (W.D. Okla. 1996) (finding, without proof of actual juror bias, that media coverage of the Oklahoma City explosion was so comprehensive and profound that the defendants could not receive a fair and impartial trial anywhere in the state).
\textsuperscript{313} See id. (focusing on statewide media-based bias).
\textsuperscript{314} Allen, supra note 21, at 990 (stating that the “citizens of the country” saw an obviously guilty Simpson acquitted, and that these “citizens” believe constitutional protection is intended for the falsely accused innocent, not the [media-convicted] guilty).
\textsuperscript{315} This conclusion would, according to one poll, necessarily exclude approximately 70% of black and 30% of white people from Professor Allen’s definition of “citizen.” Burleigh, supra note 17, at 61 (noting poll results).
An affirmative answer to either of these questions is troubling. As to the first, it would mean that a Timothy McVeigh or O.J. Simpson-type suspect, given sufficient prejudicial publicity, could escape prosecution on the federal constitutional ground that no venue in the country could supply an impartial jury. Even those who accept the Simpson verdict should reject the prospect of not being able to put a suspect on trial. Answering yes to the second question is equally distressing. It suggests that even when the media coverage has interfered with a trial and thereby compromised a defendant's constitutional rights, the court can juggle the standard and hold a trial with a biased jury.

This article concludes that the first question is answered in the negative. A motion to dismiss a prosecution because of pretrial publicity, as made by McVeigh, is not viable. But the Simpson trial coverage as a new litmus test may be part of the reason such a motion is doomed. Thus, the second question gets an affirmative answer. Under the totality of circumstances test, as applied in Murphy, the Court could arguably use the magnitude of coverage in Simpson—as well as any number of other factors—to evaluate the potential for bias caused by media coverage in a later case, like McVeigh. Under the test, as applied to evaluate the biasing impact of media coverage on the national venire, national coverage of one case—and its impact—could become a factor for evaluating national coverage of another case, no matter where it occurs.

This raises the final issue—the prospect that, with the flexibility to consider an infinite number of factors in the totality of circumstances, a court could conclude that no level of pretrial publicity is sufficient to create a presumption of bias. The court could then affirm the conviction rendered by a biased jury. Some argue that such a step was taken by the Supreme Court when it decided Mu'Min. Mu'Min, however, did not reject the Court's earlier precedents in which convictions were vacated on the basis of widespread bias to the venire resulting from extraordinary pretrial publicity. This article suggests that the critical elements of

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317. As a state court criminal case that cannot be revisited due to Simpson's acquittal, the Simpson trial is discussed here because the coverage of the case was extraordinary. Burleigh, supra note 17. Its impact on the nation is illustrative. The Simpson case also presents issues not addressed in this article, specifically the implications for state criminal defendants facing bias in the only state with original jurisdiction to prosecute them.
318. Mu'Min v. Virginia, 500 U.S. 415, 431 (1991) (holding that a defendant was not deprived of his Sixth or Fourteenth Amendment rights when the trial judge refused to question prospective jurors about the contents of the pretrial publicity they encountered).
319. See id. at 439 (Marshall, J. dissenting) (recognizing that precedent indicates that exposure to pretrial publicity may deprive a defendant of his constitutional rights, but stating that this case was one of first impression because it dealt with the actual procedures necessary to protect the defendant's Sixth Amendment right to an impartial jury after its exposure to pretrial publicity). The Su-
prejudicial pretrial publicity, which were the basis for the Court finding presumed bias in the 1960s, should become a standard for determining when contemporary trial publicity presents a sufficient probability of juror bias so as to support constitutionally mandated content questioning during voir dire.

Clearly, we do not want to face the prospect of a guilty, or even potentially guilty, suspect going free without any trial on a procedural technicality. If a motion like McVeigh's could succeed, due process would be denied to all by the failure to hold a trial. Simultaneously, the inverse is no more attractive—an innocent person convicted by jurors tainted by biased media coverage. The *Irvin* and *Murphy* era cases must, therefore, be read together to stand for the proposition that while no totality of circumstances could bias the entire national venire, the national media circus raises a presumption of exposure to bias such that a juror's mere statement of impartiality—in the midst of the circus—is not sufficient to overcome the prospect of bias.