A NEW FRAMEWORK FOR ANALYZING GAG ORDERS AGAINST TRIAL WITNESSES

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I. INTRODUCTION

Imagine you are a judge with the "trial of the century" on your docket and local and national press converging on your courthouse to cover the proceedings. The case could be criminal or civil, but in either event, the media are relentless, and witnesses are starting to talk. You have a problem. The criminal defendant before you has a constitutional right to a trial by an impartial jury,[1] which is becoming less likely as time goes on and the newspapers fill up with quotations from those close to the original events. A civil litigant, also, is entitled to a trial where the jurors are able to render a fair verdict on the evidence without mental images from outside sources intruding to overwhelm the constraints imposed by attorneys and the court.[2]

But what to do? The parties' right to a fair trial is not going to go away.

[1] U.S. CONST. amend. VI.

[2] *See, e.g.*, Bailey v. Sys. Innovation, Inc., 852 F.2d 93, 97–98 (3d Cir. 1988) ("The sixth amendment, by its terms, is applicable only to criminal actions, but 'the right to trial by jury [is] preserved,' U.S. CONST. amend. VII, in civil cases by the seventh amendment. . . . [F]airness in a jury trial, whether criminal or civil in nature, is a vital constitutional right."); Chi. Council of Lawyers v. Bauer, 522 F.2d 242, 248 (7th Cir. 1975) (referring to "the right to a fair trial, guaranteed by the Sixth Amendment to criminal defendants and to all persons by the Due Process Clause of the Fourteenth Amendment").

Prohibiting publication of these news stories may seem like a simple way out, but that option runs into serious First Amendment problems.[3] Many lower courts have assumed, since *Nebraska Press Ass'n v. Stuart*[4] and *Sheppard v. Maxwell*,[5] that the next option is instead to cut the prejudicial material off at the source by gagging the witnesses and others who would provide material for news stories about the case. This possibility, though, is also problematic, as injunctions against speech of witnesses implicate their First Amendment rights as well.

While this issue arises infrequently,[6] it is not new.[7] Still, the Supreme Court has not squarely addressed gag orders on trial witnesses, and the question has received limited treatment from the lower courts.[8] The problem reaches at least as far back as 1807, when Aaron Burr faced trial for treason, and President Jefferson announced to the public that his guilt was beyond question.[9] Public passion about the results of trials in the first half of the twentieth century was often much more inflamed than for current trials.[10] And as time has passed, technological advances have inspired an increasing sense of hopelessness among judges charged with reconciling the competing demands of litigants and the news media.[11]

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[3] *See* U.S. CONST. amend. I; *see also* Neb. Press Ass'n v. Stuart, 427 U.S. 539, 556–62 (1976).

[4] 427 U.S. at 539.

[5] 384 U.S. 333 (1966).

[6] *See* Gentile v. State Bar of Nev., 501 U.S. 1030, 1054 (1991).

[7] *See* Report of the Comm. on the Operation of the Jury System on the "Free Press-Fair Trial" Issue, 45 F.R.D. 391, 394-95 (1968) (listing notorious trials throughout American legal history).

[8] While scholars have addressed gag orders on trial participants generally, specifically focusing on lawyers, witnesses have been largely left out of serious scrutiny. *See, e.g.*, C. Thomas Dienes, *Trial Participants in the Newsgathering Process*, 34 U. RICH. L. REV. 1107, 1131–33 (2001); Erwin Chemerinsky, *Silence is Not Golden: Protecting Lawyer Speech Under the First Amendment*, 47 EMORY L.J. 859, 867–87 (1998) [hereinafter *Silence is Not Golden*]; Erwin Chemerinsky, *Lawyers Have Free Speech Rights, Too: Why Gag Orders on Trial Participants Are Almost Always Unconstitutional*, 17 LOY. L.A. ENT. L.J. 311, 311–31 (1997) [hereinafter *Lawyers Have Free Speech Rights*]; Gerald F. Uelmen, *Leaks, Gags and Shields: Taking Responsibility*, 37 SANTA CLARA L. REV. 943, 950–56 (1997).

[9] United States Dist. Court v. Burr, 25 F. Cas. 49, 50 (C.C.D. Va. 1807) (No. 146926); ALAN M. DERSHOWITZ, INTRODUCTION TO J.J. COOMBS, THE TRIAL OF AARON BURR: FOR HIGH TREASON (1992) (describing prelude to the Burr trial).

[10] *See* Bernard Ryan, Jr., *Bruno Richard Hauptmann Trial: 1935*, *in* GREAT AMERICAN TRIALS VOL. I: 1637–1949 635, 636 (Edward W. Knappman ed., 2002) (describing Hauptmann's trial for the kidnapping and murder of Charles Lindbergh's baby as a trial where tourists were allowed to troop through the courtroom one Sunday: "the invading army of curiosity-seekers was estimated at 60,000"); *see also* Edward W. Knappman, *John Thomas Scopes Trial: 1925*, in GREAT AMERICAN TRIALS VOL. I: 1637–1949 545, 547 (Edward W. Knappman ed., 2002) (describing nine hundred spectators crammed into the sweltering courtroom of the "monkey trial." When big-city editors realized the opportunity, "[d]ozens of new telegraph lines had to be strung into Dayton to handle their cable traffic. In addition to the lawyers and reporters, the town was overrun with itinerant preachers, commercial hucksters, eccentrics of every stripe, and numerous chimpanzees accompanied by their trainers.").

[11] *See, e.g.*, Reynolds v. United States, 98 U.S. 145, 155–57 (1878) ("In these days of newspaper enterprise and universal education, every case of public interest is almost, as a matter

At times trial judges have seen a direct conflict between First Amendment rights to speak and publish news and, in criminal cases, defendants' Sixth Amendment right to a fair trial. That purported conflict is also not new, and it is something of a myth. While the Supreme Court noted in 1976 that the Constitution's framers did not write the Bill of Rights as a prioritized list,[12] courts since then have tried to impose just such a hierarchy by making the First Amendment subordinate to the Sixth.[13] But to protect a criminal defendant's (or other litigant's) right to a fair trial, such a blanket policy against trial witnesses is unnecessary and unsupported by case law. While citizens' interests in having those rights enforced may conflict, the rights themselves do not, because each amendment grants a claim on the government instead of on a private citizen.[14] This is to say that while asserting First Amendment rights may make ensuring a fair trial difficult, as the government official administering the proceedings, the trial court still maintains the responsibility to ensure that fairness without imposing unconstitutional restrictions on other private citizens.[15]

The Supreme Court has issued landmark decisions detailing the First Amendment rights of the media and lawyers in this arena.[16] Perhaps because witnesses come to the judicial process as temporary observers and have a less carefully defined role in that process, the lower courts have been

of necessity, brought to the attention of all the intelligent people in the vicinity . . . ."); Hon. William O. Douglas, *The Public Trial and the Free Press*, 33 ROCKY MTN. L. REV. 1, 9 (1960) ("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.").

[12] *See* Neb. Press Ass'n v. Stuart, 427 U.S. 539, 561 (1976); *cf.* Cantrell v. Forest City Publ'g Co., 484 F.2d 150, 156 (6th Cir. 1973) ("If there are preferred positions among the rights guaranteed by the Bill of Rights, certainly such priority attaches to freedom of speech and the press rather than to the less explicit and less well defined right of privacy.").

[13] *See, e.g.*, *In re* Application of Dow Jones & Co., Inc., 842 F.2d 603, 609 (2d Cir. 1988) (acknowledging the equality of rights but holding that "[w]hen the exercise of free press rights actually tramples upon Sixth Amendment rights, the former must nonetheless yield to the latter.").

[14] Hans A. Linde, *Fair Trials and Press Freedoms—Two Rights Against the State*, 13 WILLAMETTE L.J. 211, 216–18 (1977).

[15] *See, e.g.*, Hans A. Linde, *Courts and Censorship*, 66 MINN. L. REV. 171, 189 (1981) ("[D]oes the need to preserve the ignorance of a few allow the government to impose ignorance on all?"). Regarding pretrial publicity, prospective jurors seem to fall into three categories. In the first category are those who have been given an immutably jaundiced view of the case and will not be able to weigh the evidence fairly, whether they admit as much in voir dire or not. The second category includes people who have read and seen nothing about the case at all. While this group sounds like the ideal source of jurors, it is not a good choice if the jurors are not very good at sorting through what can be very complicated evidence presented at trial. In the third category are those who have been exposed to media coverage of the case, but who can honestly ignore that material and weigh the evidence fairly for both sides. This last group is the one courts and lawyers want to have. These categories are relevant in that the standards of First Amendment scrutiny applied to gag orders on trial witnesses go hand in hand with the danger courts are trying to prevent, *i.e.*, tainted juries that cannot weigh evidence impartially. *See infra* notes 231–54 and accompanying text.

[16] Gentile v. State Bar of Nev., 501 U.S. 1030, 1034–58 (1991); *Neb. Press Ass'n*, 427 U.S. at 539.

less tightly focused in dealing with their rights to speak freely on trials with which they are involved.[17]

This Article first outlines the background case law that has led to this point, delving particularly into Supreme Court treatment of the extrajudicial speech of media and lawyers and the limited lower court treatment of witnesses in this context. The Article then lays out a framework for analyzing the rights of witnesses to speak to the news media, and concludes that, unlike the current treatment granted by some lower courts, trial judges may restrict those rights only to the extent that witnesses' speech presents a clear and present danger to the fundamental fairness of a judicial proceeding.

The clear and present danger standard, in its current formulation (it has been repackaged several times since its inception in 1919), offers sufficient protection to the speech of trial witnesses and jurors and allows judges to protect the fairness of a trial in true emergencies. Judges should use this high standard for several reasons. First, the source of Supreme Court authority for many gag orders imposed on trial witnesses and others, *Sheppard v. Maxwell*,[18] is no authority at all, as it mentions gag orders only in dicta and the facts of that case do not lead to a conclusion that speech restrictions are the least restrictive option for preserving a trial's fairness. Second, the authority to restrict witnesses' speech outside the courtroom rests, at best, uneasily within a trial court's inherent powers, has no other statutory basis, and is likely ineffective in this context.

Third, the advent of the Internet and especially weblogs has erased the traditional split regarding First Amendment treatment of the media on one hand and ordinary trial participants on the other. News media have traditionally been accorded greater First Amendment protection with respect to reporting on judicial events than other speakers receive.[19] Now, because a witness's speech about a trial can easily take the form of a website post, the distinction between press and citizen-witness becomes much less significant, and the courts have less justification for granting lower protection to ordinary speakers than they do to the media. Finally, jurors do not have to know absolutely nothing about a case before trial in order to serve on a jury. Consistent with Supreme Court precedent, the jurors can have some knowledge and still be effective jurors. Many options

[17] *See, e.g.*, Radio & Television News Ass'n v. United States Dist. Court, 781 F.2d 1443, 1443–48 (9th Cir. 1986) (including witnesses, among others); CBS, Inc. v. Young, 522 F.2d 234, 238–42 (6th Cir. 1975) (including witnesses, among others).

[18] 384 U.S. 333, 359–62 (1966).

[19] *See Neb Press Ass'n*, 427 U.S. at 558 (incorporating the heavy presumption against the constitutional validity of prior restraints into the Court's analysis of an injunction against publication of a news story about criminal court proceedings).

less restrictive than gag orders are available to find fair and effective jurors for a trial.

II. BACKGROUND

A. Supreme Court Treatment of Media Coverage of Judicial Proceedings

The Supreme Court allows broad public access to trials and gives wide berth to publish information arising from trials and other court proceedings. Still, the roots of the Court's historically permissive approach to coverage of judicial proceedings do not run extremely deep. In the 1940s, three cases established the rule that trial courts may not hold the media in contempt for criticizing judicial actions, even when editorials or political cartoons contain some misstatements of fact.[20] In the first of these cases, Justice Black referred to the "sweeping constitutional mandate against any law 'abridging the freedom of speech or of the press.' "[21] He also reviewed the history of the law in this field and concluded that "the 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."[22] The question is whether today's orderly society can tolerate witnesses' speech about ongoing, upcoming, or recently completed trials. For Justice Black, the risk in not tolerating this speech and enforcing silence about the court system was engendering "resentment, suspicion and contempt much more than it would enhance respect."[23] In the latter two cases, Justices Reed and Douglas confirmed

[20] Craig v. Harney, 331 U.S. 367, 368–78 (1947) (including newspaper stories that called the judge's repeated attempts to direct a verdict against the jury's will "arbitrary action" and a "travesty on justice"); Pennekamp v. Florida, 328 U.S. 331, 333–50 (1946) (including statement by *Miami Herald* that freely flowing "technical safeguard[s]" for criminals "have set people to wondering whether their courts are being subverted into refuges for lawbreakers"); Bridges v. California, 314 U.S. 252, 258–78 (1941) (including statement by *L.A. Times* that trial judge would make serious mistake if criminal defendants were not sent to the jute mill).

[21] *Bridges*, 314 U.S. at 260. Justice Black took an absolutist position on the First Amendment, as many know. He "used to italicize '*no* law', [in writing out the text of the First Amendment] and he had a point: language that strong deserves to be taken seriously." JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 105 (1980). Justice Black's colleagues on the Court, with the sometime exception of Justice Douglas, were never ready to go quite that far. "The other words are less comforting . . . and more than the specific language and legislative history of the amendment is needed to get us very far at all." *Id.* Still, taking an extreme stand on the First Amendment was not critical to reaching the result Black did in this case.

[22] *Bridges*, 314 U.S. at 265. Robert Bork takes a more severe view of this part of history, suggesting that the Federalists proposed the Bill of Rights only as a political tactic to get the Constitution ratified, by which time the Anti-Federalists "lost interest in the subject." Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 22 (1971).

[23] *Bridges*, 314 U.S. at 270–71. *See also infra* notes 177–80 and accompanying text.

that judges needed to maintain a thick skin to survive their public roles and that the First Amendment would leave them open to some barbs from the press.[24]

With respect to criminal trials, the issue of media coverage of judicial proceedings exploded after President Kennedy's assassination in 1963, when the Warren Commission expressly doubted whether Lee Harvey Oswald could ever have received a fair trial.[25] Responding to this report and the Supreme Court's 1966 decision in *Sheppard v. Maxwell*,[26] the American Bar Association took the lead in developing cooperative statements of voluntary guidelines between state bar associations and the media.[27]

Cases in the ensuing decades provided the media with more guidance for the constitutional protection of newsgathering. In 1965 the Court held that the First Amendment does not protect the right to gather news without any restrictions at all.[28] Seven years later, though, Justice White noted that the First Amendment does provide *some* protection for newsgathering.[29] But requiring journalists to testify before grand juries is constitutional, he wrote, because that compulsion does not involve any prior restraints, intrusions on speech or assembly, commands to publish or suppress, taxes on publication, or civil or criminal penalties.[30]

During the 1970s, the Supreme Court further developed the First Amendment law regarding published information arising from court proceedings. Two cases established the principle that the press could publish lawfully-gathered information about matters of public significance, including court proceedings, without constraint from the government.[31]

The Supreme Court's stance toward public access to court proceedings took further shape throughout the same period. First, the Court established that a state's interest in protecting the reputations of its judges and the

[24] *Craig*, 331 U.S. at 376 ("[T]he law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate."); *Pennekamp*, 328 U.S. at 348 (stating that the law cannot adjust its tolerance of public criticism to fit the limited endurance of thin-skinned trial judges).

[25] Linde, *supra* note 14, at 212.

[26] 384 U.S. 333, 335–63 (1966).

[27] *See* Report of the Comm. on the Operation of the Jury System on the "Free Press-Fair Trial" Issue, 45 F.R.D. 391, 400–15 (1968).

[28] Zemel v. Rusk, 381 U.S. 1, 17 (1965).

[29] Branzburg v. Hayes, 408 U.S. 665, 681 (1972).

[30] *Id.*

[31] Smith v. Daily Mail Publ'g, 443 U.S. 97, 98–106 (1979) (holding state officials may not constitutionally punish the truthful publication of lawfully-obtained information absent a state interest "of the highest order"); Okla. Publ'g Co. v. Dist. Court, 430 U.S. 308, 308–10 (1977) (striking down injunction prohibiting news media from publishing the identity of a boy being tried before a juvenile court when the judge had permitted reporters to attend his hearing notwithstanding a state statute closing such proceedings to the public).

institutional integrity of its court system could not justify punishing a newspaper for reporting on a state judge's "confidential" disciplinary proceedings.[32] Reporting on such an investigation lies at the core of the First Amendment and cannot be restrained.[33] Next, it was determined that the public did not have a right to attend a pretrial evidence suppression hearing in a criminal case.[34] The publisher's claimed Sixth Amendment right to attend the hearing failed, as the Court held that that amendment guarantees a public trial to the defendant and not to the public at large.[35] The next year, the Court held that the public does have a right of access to criminal trials themselves.[36] That trials in Anglo-American legal history had traditionally been left open to the public weighed heavily in favor of finding a First Amendment right of access to criminal trials, as opposed to the pretrial hearings. Also, at the time of the Constitution's ratification public access to trials was regarded as an important aspect of the process itself.[37]

The baseline created by the Supreme Court is one of wide public access to trials and broad authority to publish information lawfully gathered from trials and other court proceedings. It is important to keep this backdrop in mind in evaluating whether trial witnesses should be allowed to speak outside of court on information they have obtained independently of any trial and which is relevant to open governmental proceedings.

B. Lower Court Treatment of Gag Orders on Trial Participants

1. Trial Participants Other Than Witnesses

Many courts have addressed the legitimacy of gag orders on trial attorneys, parties, and others. The Supreme Court itself, as explored more below,[38] has determined that attorneys can be enjoined from discussing a trial publicly if their speech presents a substantial likelihood of prejudicing the trial's integrity.[39] Lower courts before and after 1991 have fallen in line with that analysis, generally upholding gag orders on lawyers[40] and

[32] Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 841 (1978).
[33] *Id.* at 845.
[34] Gannett Co. v. DePasquale, 443 U.S. 368, 370–97 (1979).
[35] *Id.* at 391.
[36] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 563–81 (1980).
[37] *Id.* at 568.
[38] *See infra* notes 181-85 and accompanying text.
[39] Gentile v. State Bar of Nev., 501 U.S. 1030, 1033–58 (1991).
[40] *See, e.g.*, Radio & Television News Ass'n v. United States Dist. Court, 781 F.2d 1443, 1446 (9th Cir. 1986) (noting that while the media may question attorneys about the trial if they wished, the lawyers just may not be free to answer); Levine v. United States Dist. Court, 764 F.2d 590, 598 (9th Cir. 1985) (citing circus-like atmosphere that surrounds highly publicized trials

overturning them only when the injunction is too broad and when the trial court has not made adequate factual findings to justify the order.[41]

Gag orders on parties themselves have been subject to conflicting standards among the lower courts. Some courts have assumed broad discretion and granted parties little freedom to comment on their litigation.[42] Others have been more exacting and demanded more of the trial courts while protecting the litigants' rights to speak publicly about their cases.[43]

Jurors have also been the subject of judicial scrutiny in this area. The Fifth Circuit in particular has liberally allowed injunctions against jurors' discussion of the trials for which they have served, even extending well after the trial is completed.[44] At least one other court has recognized the distinction between the danger of jurors speaking about a case before a verdict is rendered, when the threat to the trial is quite high, and afterward, when little damage can be done by speaking to a press that is less interested in upsetting the verdict than in getting the story of the deliberations.[45]

and threatens integrity of the judicial system); People v. Buttafuoco, 599 N.Y.S.2d 419, 420–24 (N.Y. Co. Ct. 1993) (holding regulation of the attorneys' speech was constitutionally sanctioned).

[41] United States v. Salameh, 992 F.2d 445, 447 (2d Cir. 1993) (rejecting gag order on attorneys when the order was broader than necessary to protect the trial and the district court made no findings on alternatives to the injunction); N.Y. Times Co. v. Rothwax, 533 N.Y.S.2d 73, 74 (N.Y. App. Div. 1988) (holding gag order was overbroad because it was not limited to statements which might be likely to impugn the fairness and integrity of the trial); State v. Bassett, 911 P.2d 385, 388 (Wash. 1996) (rejecting gag order when trial court did not explore alternative remedies).

[42] *See, e.g.*, United States v. Brown, 218 F.3d 415, 428 (5th Cir. 2000) (holding that a gag order on the parties and others was the least restrictive alternative available to ensure a fair trial); United States v. Tijerina, 412 F.2d 661, 662–67 (10th Cir. 1969) (upholding conviction of criminal contempt when defendants violated gag order by making a speech about their case at a public convention); United States v. Davis, 904 F. Supp. 564, 568–69 (E.D. La. 1995) (holding that any alternatives could not safeguard the defendants' rights to a fair trial without preventing the defendants and others from speaking publicly about the case).

[43] Bailey v. Sys. Innovation, Inc., 852 F.2d 93, 99 (3d Cir. 1988) (declining to apply rule on attorneys' extra-judicial speech to litigants where government contractor was trying to use the rule to protect its business interests, not its right to a fair trial); United States v. Ford, 830 F.2d 596, 601 (6th Cir. 1987) (rejecting gag order applied to Congressman Harold Ford, a criminal defendant, because Ford was entitled to fight the prosecution's obvious damage to his political reputation in the press); CBS, Inc. v. Young, 522 F.2d 234, 238–39 (6th Cir. 1975) (rejecting gag order restraining all parties and their friends, associates and relatives as a prior restraint subject to the closest scrutiny); Chase v. Robson, 435 F.2d 1059, 1061 (7th Cir. 1970) (holding that trial court made no specific findings that the defendants' speech presented a serious and imminent threat to justice).

[44] United States v. Cleveland, 128 F.3d 267, 271 (5th Cir. 1997) (upholding order forever prohibiting interviews of jurors regarding deliberations without court approval); United States v. Harrelson, 713 F.2d 1114, 1115 (5th Cir. 1983) (allowing order preventing repeated requests of interviews with jurors after they rendered a verdict). *But see In re* Express-News Corp., 695 F.2d 807, 811 (5th Cir. 1982) (rejecting application of rule that would have prevented all media questioning of jurors after verdict).

[45] *See* Journal Publ'g Co. v. Mechem, 801 F.2d 1233, 1236–37 (10th Cir. 1986).

2. Witnesses

The courts have subjected witnesses to varying treatment. In *Butterworth v. Smith*, the Supreme Court addressed a grand jury witness's ability to disclose his testimony after the grand jury had dispersed.[46] The witness in that case was a reporter who hoped to write a book about improprieties he had uncovered in a district attorney's office.[47] The Court emphasized the tradition of secrecy surrounding grand jury proceedings and the function that tradition played in protecting against overreaching prosecutors by ensuring the impartiality of that body.[48] The Court also identified several interests served by grand jury secrecy, including (1) protection of witnesses who would be less likely to testify fully and frankly if they became open to retribution and inducements, (2) ensuring that defendants would not try to flee or influence grand jurors, and (3) protecting people eventually exonerated from ridicule.[49] Ultimately, however, grand juries must operate within the First Amendment. In *Butterworth*, unlike in *Seattle Times Co. v. Rhinehart*,[50] the witness already knew the information he hoped to write about before the grand jury convened and discovery had begun.[51] The Court noted that reputational interests alone could not justify the proscription of truthful speech, and that the drafters of the Federal Rules of Criminal Procedure found it unnecessary to impose this secrecy obligation on grand jury witnesses.[52] The reporter-witness was given leave to publish freely about the district attorney's improprieties.[53]

Butterworth did not address gag orders applied to regular trial witnesses. Whether trial courts may enjoin witnesses' speech has not reached the Supreme Court and has received limited and differing treatment in the lower courts. The Fourth Circuit addressed trial witnesses in 1984. In *In re Russell*, the district court issued an order prohibiting potential witnesses from discussing their proposed testimony with the media.[54] The court of appeals said that local and national publicity about the case had forced the district court to issue the order and that a change of venue and other options

[46] 494 U.S. 624, 626–35 (1990).

[47] *Id*. at 626.

[48] *Id*. at 629–30 (citing J. Robert Brown, Jr., *The Witness and Grand Jury Secrecy*, 11 AM. J. CRIM. L. 169, 170 (1983)).

[49] *Id*. at 630 (referring to Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 218–19 (1979)).

[50] 467 U.S. 20, 37 (1984) (prohibiting a newspaper's release of information gleaned from the civil discovery process).

[51] *Butterworth*, 494 U.S. at 626.

[52] *Id*. at 634–35.

[53] *Id*. at 636.

[54] 726 F.2d 1007, 1008 (4th Cir. 1984).

were simply "infeasible" alternatives to enjoining the witnesses' speech.[55] The court relied heavily on *Sheppard v. Maxwell*[56] and several professional studies for authority to limit what the witnesses should be able to say to the public.[57]

The Ohio Supreme Court went the other way six years later in *State ex rel. NBC, Inc. v. Court of Common Pleas*.[58] There, the trial court issued a gag order prohibiting all trial participants, including witnesses, from commenting publicly on the case.[59] The Ohio Supreme Court reversed, noting that if the state interest asserted to justify the gag order is a criminal defendant's right to a fair trial, the trial court must make three findings: (1) a substantial probability that the defendant's right to a fair trial would be prejudiced by publicity, (2) alternatives to the gag order would not work, and (3) the press and the public have been given a chance to be heard on the question.[60] No such findings were made here, so while the order stood as to court personnel, witnesses were free to discuss the case in public.[61]

Other courts have addressed orders applied to several different categories of participants, with witnesses caught in the wake, and have come out different ways.[62]

C. Different Standards That Have Been Applied to Gag Orders

In addressing gag orders on trial witnesses, courts have used different standards to evaluate the perceived danger of the speech to the trial's fairness. At the high end of this spectrum is the clear and present danger standard, which has a checkered past.[63] Today, the test is widely interpreted

[55] *Id*. at 1009.

[56] 384 U.S. 333, 335–63 (1966).

[57] *Russell*, 726 F.2d at 1009–10 & n.2. Recently, in *United States v. King*, 192 F.R.D. 527, 533–34 (E.D. Va. 2000), the district court followed the Fourth Circuit's lead. In that case, the court found that the cumulative effect of numerous interviews with government officials presented a high risk of prejudice to the defendants' right to a fair trial and that alternative measures could not prevent the jury from being tainted. *Id.*

[58] 556 N.E.2d 1120, 1131 (Ohio 1990).

[59] *Id*. at 1123.

[60] *Id*. at 1125 (citing Press-Enter. Co. v. Superior Court, 478 U.S. 1, 14 (1986) and Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 609 (1982)).

[61] *Id*.

[62] United States v. Brown, 218 F.3d 415, 431–32 (5th Cir. 2000) (affirming order gagging potential witnesses, among others); State *ex rel.* Missoulian v. Dist. Court, 933 P.2d 829, 842 (Mont. 1997) (reversing gag order applied to trial participants, including witnesses); United States v. Tijerina, 412 F.2d 661, 667 (10th Cir. 1969) (affirming a similar order).

[63] Justice Holmes first developed the test in 1919, when he wrote for the Court that "clear and present danger" of actual harm from a defendant's advocacy could override freedom of speech and of the press. Schenck v. United States, 249 U.S. 47, 52 (1919). Clear and present danger may sound like a high bar, but in its early days it was anything but. In fact, as Professor Ely notes, "[t]he . . . test has been the object of considerable liberal nostalgia. . . . The problem is that the defendants in the three cases in which it was introduced all ended up going to prison for quite tame and ineffectual expression. In fact they went to prison *for ten years*." JOHN HART ELY,

to be a very high standard for the government to meet, almost an insurmountable bar.[64] It requires a court to make its own inquiry into the imminence and magnitude of the danger said to flow from the utterance and then to balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression.[65] That is to say, a witness's potential speech must present a serious and immediate threat to a compelling state interest before the state can constitutionally gag the witness.[66] Also, under this standard, the gag order "must be narrowly drawn and cannot be upheld if reasonable alternatives are available having a lesser impact on First Amendment freedoms."[67]

Two other standards occupy the field.[68] The intermediate standard is whether the speech at issue presents a "substantial likelihood" of tainting the jury pool with prejudicial information. The Supreme Court held that this level of certainty was enough to proscribe attorneys' speech about an ongoing trial in 1991.[69] Lower courts have held that while the traditional

DEMOCRACY AND DISTRUST 107 (1980). Holmes himself retreated from his early view, however, and between the two world wars, he and Justice Brandeis used a series of dissents to put some teeth into the clear and present danger test. *Id*. at 108 (tacitly referring to dissents and concurrences from Abrams v. United States, 250 U.S. 616, 624–31 (1919), Gitlow v. New York, 268 U.S. 652, 672–73 (1925), and Whitney v. California, 274 U.S. 357, 372–80 (1927), *overruled by* Brandenburg v. Ohio, 395 U.S. 444 (1969)).

[64] Wood v. Georgia, 370 U.S. 375, 383–95 (1962) (holding out-of-court statements by a sheriff questioning advisability of a grand jury investigation into block voting by African Americans did not present a clear and present danger to administration of justice); United States v. Salameh, 992 F.2d 445, 447 (2d Cir. 1993) ("A prior restraint on constitutionally protected expression, even one that is intended to protect a defendant's Sixth Amendment right to trial before an impartial jury, normally carries a heavy presumption against its constitutional validity."); United States v. Ford, 830 F.2d 596, 599–600 (6th Cir. 1987); CBS, Inc. v. Young, 522 F.2d 234, 239 (6th Cir. 1975) (holding that the parties' potential speech would not present a clear and present danger to the fair administration of justice); Chi. Council of Lawyers v. Bauer, 522 F.2d 242, 249 (7th Cir. 1975) (stating that given the objectives of "clearness, precision, and narrowness" regarding injunctions against speech, the serious-and-imminent-threat standard is "more in keeping with the precepts announced by the Supreme Court" than the reasonable-likelihood standard); Breiner v. Takao, 835 P.2d 637, 642–43 (Haw. 1992) (holding a gag order impermissible when trial court did not find a serious and imminent threat to the defendant's right to a fair trial).

[65] Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 842–43 (1978).

[66] *Lawyers Have Free Speech Rights*, *supra* note 8, at 314-25 (equating the "clear and present danger" standard with strict scrutiny).

[67] *CBS*, 522 F.2d at 238.

[68] This statement is an oversimplification. One commentator contends that private citizens' speech should not be restrained without a need to further a "state interest of the highest order." Andrew P. Napolitano, *Whatever Happened to Free Speech? A Defense of "State Interest of the Highest Order" As a Unifying Standard for Erratic First Amendment Jurisprudence*, 29 SETON HALL L. REV. 1197, 1199–1218 (1999). Professor Chemerinsky has suggested that gag orders on lawyers should be upheld only if the attorneys' speech fails the test from *New York Times Co. v. Sullivan*, 376 U.S. 254, 267, 283–86 (1964). That is, if the lawyer speaks with actual malice, or knowing or reckless disregard for the truth, then restrictions on the attorney's speech should stand. *Silence is Not Golden*, *supra* note 8, at 884–87 (1998). His idea is interesting, but the problem for litigants in high profile cases does not seem to be the truth of what the lawyer is saying as much as the lack of a judicial screen that gets applied to other admissible evidence.

[69] Gentile v. State Bar of Nev., 501 U.S. 1030, 1075 (1991).

press may be constrained only under the more rigorous clear and present danger standard, trial participants' speech may be prohibited if it is substantially likely to prejudice the trial.[70] Finally, some courts hold that a mere reasonable likelihood of prejudice is enough to justify a gag order on trial participants' extrajudicial speech.[71]

III. *SHEPPARD V. MAXWELL* AND ITS HOLLOW DICTA

In this field, *Sheppard* shook the ground and continues to dictate results of cases involving media coverage of judicial proceedings today.[72] Anyone familiar with the fictitious story of *The Fugitive* knows at least a version of the facts underlying *Sheppard v. Maxwell*. The real life story was both gruesome and unbearably sad. On July 4, 1954, Dr. Sam Sheppard's pregnant wife Marilyn was found bludgeoned to death at the couple's suburban Cleveland home.[73] He claimed the killer was a large, bushy-haired man who broke into the house, possibly hoping to steal some morphine from the medical supplies he kept there.[74] Sheppard testified that he fought with the intruder and was knocked unconscious in the struggle.[75] Police could not find this intruder, however, and Sheppard was brought to trial and convicted.

The case attracted hordes of local and national publicity. The media coverage got out of control and developed almost into participation in the trial itself, which ended in Sheppard's conviction for second degree murder. Writing for the Court, Justice Clark held that the trial judge's arrangements with the news media had deprived Sheppard of the "judicial serenity and calm to which [he] was entitled."[76] He said "bedlam reigned at the courthouse"[77] and that the trial had a "carnival atmosphere."[78] In state proceedings, the Ohio Supreme Court called it a " 'Roman holiday' for the news media."[79]

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[70] United States v. Brown, 218 F.3d 415, 428 (5th Cir. 2000); State *ex rel*. Missoulian v. Dist. Court, 933 P.2d 829, 841 (Mont. 1997); State *ex rel.* NBC, Inc. v. Court of Common Pleas, 556 N.E.2d 1120, 1125 (Ohio 1990).

[71] *In re* N.Y. Times Co., 878 F.2d 67, 68 (2d Cir. 1989); *In re* Application of Dow Jones & Co., Inc, 842 F.2d 603, 610 (2d Cir. 1988); Sigma Delta Chi v. United States Dist. Court, 551 F.2d 559, 562 n.3 (4th Cir. 1977); United States v. Tijerina, 412 F.2d 661, 666 (10th Cir. 1969); Sioux Falls Argus Leader v. Miller, 610 N.W.2d 76, 86 (S.D. 2000); S. Bend Tribune v. Elkhart Circuit Court, 691 N.E.2d 200, 202 (Ind. Ct. App. 1998); People v. Fioretti, 516 N.Y.S.2d 422, 423 (N.Y. App. Div. 1987); State v. Bassett, 911 P.2d 385, 387 (Wash. 1996).

[72] Sheppard v. Maxwell, 384 U.S. 333, 335–63 (1966).

[73] *Id*. at 335–36.

[74] *Id*. at 336.

[75] *Id*.

[76] *Id.* at 355 (quoting Estes v. Texas, 381 U.S. 532, 536 (1965)).

[77] *Id*.

[78] *Id.* at 358.

[79] State v. Sheppard, 135 N.E.2d 340, 342 (Ohio 1956).

But even these phrases do not quite capture the outrageous events that preceded and carried on throughout Sheppard's first trial. If it is true that lawyers should not worry about the law until they understand the facts,[80] we should understand the facts that led Justice Clark to reverse the denial of Sheppard's habeas corpus petition twelve years later. Here was the situation facing Dr. Sheppard after the murder on July 4, 1954: Suspicions of the police and community immediately turned to him.[81] Police interrogated him at the crime scene and then while he was in the hospital and under sedation for treatment of his injuries.[82] Sheppard agreed to take a lie detector test if it was reliable; an officer told him it was "infallible."[83] Dr. Sheppard made himself available for frequent and extended questioning without the presence of an attorney.[84]

On July 7, a newspaper story appeared in which Sheppard's chief prosecutor sharply criticized his family's refusal to allow his immediate questioning.[85] A drumbeat of media coverage—described by Justice Clark as "editorial artillery"—ensued.[86] On July 21 one newspaper aimed its sights at the coroner and titled its front-page editorial, "Why No Inquest? Do It Now, Dr. Gerber."[87] The coroner complied, and scheduled an inquest[88] into Marilyn Sheppard's death for the next day in a school gymnasium.[89] A long table occupied by print and broadcast reporters and recording equipment sat in the front of the room.[90] Several hundred spectators watched as police brought Sheppard into the gym and searched him.[91] Dr. Sheppard's lawyers were present during the three-day inquest, but they were not allowed to participate.[92] When his chief counsel did try to introduce documents into the record, "he was forcibly ejected from the room by the Coroner, who received cheers, hugs, and kisses from ladies in the audience."[93] The result was an explosive and bizarre mix of a Salem

[80] *See* Garrett Epps, *Uncle Billy's Boy: The Fourth Circuit Court of Appeals is Losing a Star*, *available at* http://www.law.uoregon.edu/faculty/gepps/unclebilly.html (last visited Mar. 8, 2004) (describing former Fourth Circuit Judge John D. Butzner's advice to his law clerks).

[81] *Sheppard*, 384 U.S. at 337–41.

[82] *Id.* at 337–39.

[83] *Id.* at 337.

[84] *Id.* at 338.

[85] *Id.*

[86] *Id.* at 339.

[87] *Id.*

[88] An inquest is "an inquiry by a coroner or medical examiner, sometimes with the aid of a jury, into the manner of a death of a person who has died under suspicious circumstances, or who has died in prison." BLACK'S LAW DICTIONARY 796 (7th ed. 1999).

[89] *Sheppard*, 384 U.S. at 339.

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.* at 340 (emphasis added).

witch trial and reality television. Editorials demanding Sheppard's indictment continued and intensified, and they were gratified on August 17.[94]

Sheppard's trial started two weeks before the November general election, in which the chief prosecutor was running for common pleas judge, and the trial judge, Edward Blythin, was a candidate for re-election.[95] The venire for the trial included seventy-five candidates, all of whose names and addresses were published by the three Cleveland newspapers.[96] Predictably, all of the prospective jurors received letters and telephone calls regarding the upcoming trial.[97] About twenty reporters were assigned seats at a table inside the courtroom bar and immediately behind the single counsel table.[98] Reporters also occupied three of the four rows of benches behind the bar railing, with the last row left for Sheppard's family.[99] The public was permitted to fill vacancies on this row only by using special passes.[100]

Reporters and editors used every room on the courtroom floor.[101] Private phone lines and telegraph equipment were installed in these rooms so reports could be sent to newsrooms more quickly.[102] The judge even allowed one television station to set up broadcasting facilities next door to the jury room, where newscasts were made throughout the trial and while the jury deliberated to reach its verdict.[103] During the trial itself, the courtroom remained crowded to capacity with reporters, whose movements in and out of the room made it difficult for counsel and witnesses to be heard, even with a loud-speaker system.[104] Reporters at the long table behind counsel made confidential discussions among Sheppard and his lawyers almost impossible.[105] Sidebars had to be held in the judge's chambers to stay out of the jury's hearing in the small courtroom, yet reporters crammed into the judge's anteroom often printed the substance of *in camera* discussions in newspapers accessible to the jury.[106]

[94] *Id*. at 341.
[95] *Id*. at 342.
[96] *Id*.
[97] *Id*.
[98] *Id*. at 342–43.
[99] *Id* at 343.
[100] *Id*.
[101] *Id*.
[102] *Id*.
[103] *Id*.
[104] *Id*. at 344.
[105] *Id*.
[106] *Id*.

Every juror but one testified at voir dire to reading about Dr. Sheppard's case in the Cleveland papers or to hearing broadcasts about it.[107] Photographs of jurors appeared during the trial over forty times in the Cleveland papers alone.[108] The day before the verdict was rendered bailiffs separated the jurors into two groups to pose for photographs that appeared in the newspapers.[109]

When the jurors visited the murder scene on the first day of the trial, hundreds of reporters, camera operators, and random onlookers accompanied them.[110] A newspaper helicopter hovered overhead, taking pictures of the jurors on their tour.[111] Two jurors heard television and radio reports that a New York City robbery suspect had borne Dr. Sheppard a child, but claimed that the report would not affect their ability to judge the case's facts fairly.[112] Judge Blythin, seemingly overwhelmed by events in his court, contended that he could do nothing to avoid infecting the jury this way.[113] "How would you ever, in any jury, avoid that kind of a thing?" he asked Sheppard's lawyer.[114]

The judge sequestered the jury during their deliberations, yet jurors made phone calls to their homes every day while they were supposedly sealed off at their hotel.[115] Although phones had been removed from the jurors' rooms, phones in the bailiffs' rooms were available.[116] With no instructions to the contrary, the bailiffs sat in their rooms while the jurors called their families.[117] After five days, the jury convicted Sheppard of second degree murder.[118] Shortly after the first trial, Dr. Sheppard's mother killed herself, and his father died a week later.[119]

The Supreme Court told Judge Blythin exactly what he could do to "avoid that kind of thing."[120] To provide some guidance to judges further down the road, Justice Clark suggested a number of possibilities to prevent the three-ring circus that Sam Sheppard's trial had become.[121] First, continuing the trial until the flood of publicity abated would be one option,

[107] *Id*. at 345.
[108] *Id*.
[109] *Id*.
[110] *Id*. at 347.
[111] *Id*.
[112] *Id*. at 348.
[113] *Id*. at 348–49.
[114] *Id.* at 349.
[115] *Id*.
[116] *Id*.
[117] *Id*.
[118] *Id*.
[119] 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, 393 (1977).
[120] *Sheppard*, 384 U.S. at 349.
[121] *Id*. at 358–62.

as would transferring the case to another county where news coverage was not as intense.[122] Effectively sequestering the jury at an earlier point could also prevent the jury from being overwhelmed by prejudicial images and accusations.[123] As a last resort the trial judge could wipe the slate clean and order a new trial.[124] Justice Clark warned, though, that "reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception."[125]

In dictum, the Court also suggested cutting off the problem at the source.[126] Judge Blythin should "at least" have warned the press to check the accuracy of its stories.[127] He also should have "impos[ed] control over the statements made to the news media by counsel, witnesses, and especially the Coroner and police officers."[128] Specifically, he "might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters . . . ."[129] Because Judge Blythin tried none of these alternatives, the Court's only recourse was to grant Dr. Sheppard's habeas corpus petition and remand the case to the district court for a new trial.[130] Only Justice Black, a First Amendment absolutist to the end, dissented, and even he could not muster enough indignation to accompany his dissent with an opinion.[131]

It is hard to divine what Justice Black intended to say when he dissented from *Sheppard* precisely because he did not include any explanatory comments.[132] But there is a good reason Justice Black was as muted as he was in his opposition to Justice Clark's majority opinion: the underlying trial in *Sheppard v. Maxwell* was an intolerable situation. An orderly court system simply could not exist under the conditions Judge Blythin allowed. But saying that and agreeing that *Sheppard*'s holding was sound need not mean a wholesale endorsement of all of *Sheppard*'s dicta. I do not suggest that *Sheppard* was wrongly decided. Indeed, Sam Sheppard's conviction could hardly have been upheld after the chaos that amounted to his trial. But some of the dicta in the Court's decision lacked a sound basis in the First Amendment and was swayed more by the outrageousness of his trial and the pathetic spectacle Sheppard's life had become.[133]

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[122] *Id*. at 363.
[123] *Id.*
[124] *Id*.
[125] *Id.*
[126] *See id*. at 358–59.
[127] *Id*. at 360.
[128] *Id.*
[129] *Id.* at 361.
[130] *Id*. at 363.
[131] *See id*. at 363 (Black, J., dissenting).
[132] *Id*. (Black, J., dissenting).
[133] As sad and broken as Dr. Sheppard was at the end of his trial, things got worse. Sheppard

Of course, not everyone agrees that the alternative measures suggested in Justice Clark's majority opinion were dicta. The Tenth Circuit noted in 1969 that the criminal defendant's counsel had argued they were dicta and had no binding force, and that court disagreed.[134] It is difficult to see where counsel went wrong. If the measures enumerated by Justice Clark were "not presented as an issue, [and] hence . . . not refined by the fires of adversary presentation," one of many definitions of dicta presented by Judge Posner in 1988, the lawyers were right and the court was wrong.[135]

The Court had no choice but to grant Dr. Sheppard's petition for habeas corpus. And some of the precautionary measures it recommended to trial judges who found themselves in Judge Blythin's place were right on the mark. Delaying the trial to let an initial furor settle down and transferring the case to a different venue to guard against predisposing jurors to a particular verdict are excellent choices for a judge facing prejudicial media coverage.[136] However, suggesting that the trial judge "might well have proscribed extrajudicial [and prejudicial] statements by any lawyer, party, witness or court official" is not such a good choice, especially when the suggestion is made with limited legal authority.[137]

As support for this line, Justice Clark cited a New Jersey Supreme Court case, *State v. Van Duyne*.[138] *Van Duyne* was a criminal case where the defendant had been convicted of first degree murder.[139] The defendant did not point to particular facts or inferences appearing in the voir dire examination regarding pretrial media coverage that would have justified rejecting the jurors' disavowal of prejudice against him.[140] Among other challenges on appeal, however, the defendant argued that pretrial media

moved to Columbus, Ohio, in the years after his release from prison and tried to restart his medical practice there. An investigative reporter posing as a patient found his office without basic medical equipment and his examination superficial. He believed Dr. Sheppard was drunk at the time of his visit. Richard G. Zimmerman, *The Sad Story of Samuel Sheppard*, WASH. POST, Oct. 16, 1993, at A20. Sheppard became involved in medical malpractice charges and his second marriage ended amid charges of spousal abuse. He finally tried his hand as a professional wrestler, posing as the good guy in matches in Ohio. His scripted performances were "so inept and clumsy that even the most credulous among notoriously guileless . . . wrestling fans seemed embarrassed." *Id.* Sheppard's third marriage was to the teenage daughter of his wrestling manager; the two lived with her parents. He was drinking at least a fifth of vodka each day when he died on a vomit-covered mattress on their kitchen floor. *Id.*

[134] *See* United States v. Tijerina, 412 F.2d 661, 667 (10th Cir. 1969).

[135] *See* United States v. Crawley, 837 F.2d 291, 292–93 (7th Cir. 1988).

[136] This is not to say that these options do not carry problems, even constitutional problems, of their own. These and other tools to protect the integrity of the courts, including sequestration, are discussed more fully in Part VI.C.4. *See infra* notes 279–81 and accompanying text.

[137] *See Sheppard*, 384 U.S. at 361.

[138] *Id.* (citing State v. Van Duyne, 204 A.2d 841, 852 (N.J. 1964)).

[139] 204 A.2d at 841.

[140] *Id*. at 850. Jurors' claims of impartiality do not have to be taken for granted and can be rejected by the trial court. *See* Patton v. Yount, 467 U.S. 1025, 1036–37 & n.12 (1984).

coverage prejudiced the jury and required reversal of his conviction.[141] But it is important to emphasize here exactly what Mr. Van Duyne was and was not asking the court to do when he asked for reversal. His appeal demanded reversal of his conviction after he was convicted.[142] He did not demand that a gag order be placed on the media or counsel or witnesses involved in the case. He certainly did not invoke canons of professional ethics to argue for punishment of anyone participating in the case.

Still, the New Jersey Supreme Court took the opportunity to lay down some dictum of its own. That court was especially bothered that the police had apparently supplied the inflammatory factual material for the news stories in question.[143] While one district attorney had adopted an office rule prohibiting the release of confessions to newspapers before trial ten years before,[144] the court would have gone much further. It interpreted Canon 20 of the American Bar Association's Canons of Professional Ethics to "ban statements to news media by prosecutors, assistant prosecutors and their lawyer staff members, as to alleged confessions or inculpatory admissions by the accused, or to the effect that the case is 'open and shut' against the defendant, and the like, or with reference to the defendant's prior criminal record, either of convictions or arrests."[145] From this proscription against comments by lawyers and their staffs, Justice Clark found support for banning extrajudicial statements by parties and witnesses regarding "any belief in guilt or innocence; or like statements concerning the merits of the case."[146]

This Article does not mean to comment on the constitutionality of Canon 20 in particular.[147] I do mean to say that Justice Clark's inference that trial courts have authority to ban out-of-court statements by non-lawyers is unsupportable, or at least is not supported by his sole authority, *State v. Van Duyne*. It follows that the legions of cases that cite *Sheppard* for this proposition stand on hollow ground.[148]

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[141] *Van Duyne*, 204 A.2d at 850.

[142] *Id.* at 845–50.

[143] *Id*. at 852.

[144] *Id.*

[145] *Id.*

[146] Sheppard v. Maxwell, 384 U.S. 333, 361 (1965).

[147] After *Gentile v. State Bar of Nevada*, it appears that such a rule would be constitutional to the extent it was applied to attorneys. At any rate, the Canons of Professional Ethics were replaced in 1969 by the ABA Model Code of Responsibility, and that by the Model Rules of Professional Conduct in 1983. *See* Richard W. Painter, *Rules Lawyers Play By*, 76 N.Y.U. L. REV. 665, 668 (2001).

[148] *See, e.g.*, United States v. Brown, 218 F.3d 415, 425 (5th Cir. 2000); News-Journal Corp. v. Foxman, 939 F.2d 1499, 1505 (11th Cir. 1991); *In re* Application of Dow Jones & Co., Inc., 842 F.2d 603, 610 (2d Cir. 1988); Levine v. United States Dist. Court, 764 F.2d 590, 595 (9th Cir. 1985); *In re* Russell, 726 F.2d 1007, 1009–10 (4th Cir. 1984); Chi. Council of Lawyers v. Bauer, 522 F.2d 242, 248 (7th Cir. 1975); United States v. Tijerina, 412 F.2d 661, 667 (10th Cir. 1969); United States v. King, 192 F.R.D. 527, 533 (E.D. Va. 2000), *aff'd*, No. 02-4845, 2003

IV. TRIAL COURTS DO NOT HAVE AUTHORITY TO IMPOSE GAG ORDERS ON TRIAL WITNESSES

Following *Sheppard*, many trial courts will not hesitate to impose gag orders on anyone whose speech seems like a realistic threat to a fair trial. Because violations of those orders can be followed with findings of contempt,[149] trial witnesses will ignore them at their peril. One question that is rarely raised by witnesses faced with gag orders, however, is the trial court's authority to issue the orders in the first place. Some commentators have noted this issue with respect to trial participants generally and found that judges have no power to enjoin speech outside the courtroom.[150]

Many courts, of course, are reluctant to cede this ground and when they address the issue they contend that inherent power is, in fact, the source of authority for gag orders on witnesses and others.[151] This answer is too convenient, though. Inherent judicial authority is substantial, and courts do require considerable flexibility in managing their cases, as Congress has consistently recognized.[152] The Supreme Court itself has long asserted the trial courts' equitable power to manage their own affairs.[153] But this power stops at the courthouse door. For example, a court clearly can compel a witness to testify in court.[154] Even a witness's fear for his own, or his family's, safety is not a valid excuse in the face of this authority.[155] But a

U.S. App. LEXIS 14842 (4th Cir. July 25, 2003) (unpublished decision).

[149] Walker v. City of Birmingham, 388 U.S. 307, 320–21 (1967); United States v. Marquardo, 149 F.3d 36, 42 (1st Cir. 1998); United States v. Cutler, 58 F.3d 825, 831 (2d Cir. 1995); Harris v. City of Philadelphia, 47 F.3d 1333, 1338 (3d Cir. 1995); *see also* 18 U.S.C. § 401 (2000) (granting a court of the United States the power to punish contempt, including failure to obey a court order, by fine or imprisonment).

[150] Linde, *supra* note 14, at 219 ("I find it striking that no one seems to ask what law authorized issuance of a gag order, before reaching the question of its constitutionality."); Linde, *supra* note 15, at 205; Note, *Protective Orders Against the Press and the Inherent Powers of the Courts*, 87 YALE L.J. 342, 344–45 (1977) [hereinafter *Protective Orders*] (*Sheppard v. Maxwell* discusses the need for fair trials, but does not support the authority of trial courts to gag trial participants.); *cf.* N.Y. Times Co. v. United States, 403 U.S. 713, 721–22 (1971); *Id*. at 727–30 (Stewart, J., concurring); *Id.* at 740–48 (Marshall, J., dissenting) (stating no law authorized suppression in that case).

[151] United States v. Schiavo, 504 F.2d 1, 28 (3d Cir. 1974) (Aldisert, J., dissenting) (stating that court's inherent powers to take strong measures to provide fair trial form basis of protective order); State *ex rel* Dayton Newspapers, Inc. v. Phillips, 351 N.E.2d 127, 145–46 (Ohio 1976) (Celebrezze, J., dissenting) (stating inherent power to close courtroom); Younger v. Smith, 106 Cal. Rptr. 225, 237 (Cal. Ct. App. 1973) ("The jurisdiction of courts to make pretrial protective orders rests squarely on their implied and inherent powers.").

[152] Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 764 (2001).

[153] Link v. Wabash R.R. Co., 370 U.S. 626, 629–31 (1962); Landis v. N. Am. Co., 299 U.S. 248, 254 (1936).

[154] 28 U.S.C. § 1826(a) (2000) (granting courts power to imprison a witness who refuses to testify before a grand jury).

[155] *See, e.g.*, Piemonte v. United States, 367 U.S. 556, 559 n.2 (1961); United States v. Winter, 70 F.3d 655, 665–66 (1st Cir. 1995).

wide array of cases holds that trial judges may not compel witnesses to speak outside of court.[156] The real trouble with inherent power is that it is not precisely defined anywhere,[157] and relying on it too heavily can lead to running over the rights of those who get in the court's way.

Ultimately, trial courts lack power to impose gag orders on witnesses for three reasons: First, courts' inherent authority, without basis in statute, is powerful but narrow and does not allow injunctions against witnesses' speech outside of courtrooms. Second, trial witnesses do not come to court with the same obligations as other trial participants. They are essentially free agents in the judicial process. They are not officers of the court, and they are not bound to a particular code of conduct that others might be. Finally, criminal defendants' Sixth Amendment rights rank no higher than First Amendment rights of trial witnesses. The Sixth Amendment right to a fair trial is a protection from the state, not a protection from other private individuals. The state, in the form of the trial court, is obligated to guarantee a fair trial to defendants, but witnesses unconnected to the state are not similarly obligated.

A. A Trial Court's Inherent Authority is Powerful but Narrow and Does Not Encompass Gag Orders on Witnesses

It is possible that trial courts' inflated sense of their own inherent authority derives from the contempt power the American court system inherited from the English common law. The English courts had essentially untrammeled contempt powers at the time of the Revolution, and the Supreme Court has suggested that that authority was basically imported into American courts by Section 17 of the First Judiciary Act, which provided that the federal courts "shall have power to . . . punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same."[158] But the contempt power is not the

[156] *See* United States v. Troutman, 814 F.2d 1428, 1453 (10th Cir. 1987); United States v. Scott, 518 F.2d 261, 268 (6th Cir. 1975); Byrnes v. United States, 327 F.2d 825, 832 (9th Cir. 1964); Portalatin v. Hernandez, No. CV-87-3630, 1989 U.S. Dist. LEXIS 10325, at *4 (E.D.N.Y. Sept. 1, 1989) (unpublished decision); McCabe v. North Carolina, 314 F. Supp. 917, 921 (M.D.N.C. 1970); State v. Williams, 581 P.2d 1290, 1294 (N.M. 1978); State v. Chaney, 428 P.2d 1004, 1009 (Ariz. Ct. App. 1967); State v. Lampp, 155 So. 2d 10, 13 (Fla. Dist. Ct. App. 1963); Walker v. Superior Court, 317 P.2d 130, 134 (Cal. 1957). *But see* Wisniewski v. State, 138 A.2d 333, 338 (Del. 1957) (stating that defendant should have been allowed to speak with witness before trial).

[157] Daniel J. Meador, *Inherent Judicial Authority in the Conduct of Civil Litigation*, 73 TEX. L. REV. 1805, 1805 (1995) (citing *Eash v. Riggins Trucking, Inc.*, 757 F.2d 557, 561 (3d Cir. 1985)).

[158] Earl C. Dudley, Jr., *Getting Beyond the Civil/Criminal Distinction: A New Approach to the Regulation of Indirect Contempts*, 79 VA. L. REV. 1025, 1070–71 (1993) (citing Green v. United States, 356 U.S. 165, 169 (1958) and Michaelson v. United States ex rel. Chi., St. Paul, Minn. & Omaha Ry. Co., 266 U.S. 42, 65–66 (1924)).

same as the power to create the conditions on which contempt can arise, particularly in the case of an injunction against speech outside of court.

In *Chambers v. NASCO, Inc.*, the Supreme Court defined inherent powers as those which "cannot be dispensed with . . . because they are necessary to the exercise of all others."[159] In that case, the trial court imposed sanctions of almost $1 million (the total of the opponent's litigation expenses) on a party after a series of attempts to shift property around to make the party judgment proof.[160] While the authority for this penalty lay just beyond the grasp of the Federal Rules of Civil Procedure and the U.S. Code, the Court held that it fit within the district court's inherent powers. Justice White noted that "[c]ourts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates."[161]

Commanding decorum and respect in the courtroom is one thing; enjoining speech outside of it is quite another. As the Court has long acknowledged, the constitutional basis of inherent power is indispensable necessity rather than convenience, so such powers should be exercised sparingly.[162] To the extent that since 1812, the Supreme Court has allowed lower courts to exercise inherent power that is not truly necessary,[163] or relied on shaky authority for that power,[164] witnesses' First Amendment rights should trump that tendency to stretch inherent powers beyond their proper limits.

The Third Circuit broke down inherent powers more precisely, highlighting three categories courts use to justify actions that are not based in statute. In *Eash v. Riggins Trucking, Inc.*,[165] the issue was whether a district court could order an attorney to pay to the government the cost of impaneling a jury for one day as a sanction for the attorney's abuse of the judicial process.[166] This authority did not fall into the first category, which the court defined as those powers "so fundamental to the essence of a court as a constitutional tribunal that to divest the court of absolute command within this sphere is really to render practically meaningless the terms

[159] Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991) (citing United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812)).

[160] *Id.* at 40.

[161] *Id*. at 43 (quoting Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 227 (1821)).

[162] *See* Hudson & Goodwin, 11 U.S. at 34.

[163] Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 783 (2001).

[164] *Id*. at 779–81 (citing McNabb v. United States, 318 U.S. 332, 340–47 (1943), as a case that itself authorized a broad grant of inherent power, rested on unsteady authority, yet which has served as ballast for lower courts to justify their own overreaching).

[165] 757 F.2d 557 (3d Cir. 1985).

[166] *Id.* at 559.

'court' and 'judicial power.' "[167] The second *Eash* category encompassed "those powers sometimes said to arise from the nature of the court, but more often thought to be the powers 'necessary to the exercise of all others.' "[168] The court assumed the contempt power, for example, was within this group, but also noted that the contempt authority was substantially different from the power at issue in this case.[169] Instead, the power to fine an attorney as a sanction for the attorney's abuse of the judicial process fell into a third category, which "implicates powers necessary only in the practical sense of being useful."[170]

Witness gag orders certainly do not fall into the first *Eash* category. The power to enjoin witnesses' speech outside the courtroom is not so fundamental to the trial court that to take it away would render the court impotent.[171] Those orders also do not fit into the second category, as they are not " 'necessary to the exercise of all [the court's] others [powers].' "[172] While the contempt power is critical to ensure that court orders are obeyed, and a trial court could hardly function without that assurance, trials can go on without witness gag orders.[173]

The power to issue injunctions against witnesses' speech must exist, if at all, within the third category of inherent powers listed by *Eash v. Riggins Trucking*, which includes those powers "necessary only in the practical sense of being useful."[174] The third category is not as ironclad as the first two. Given the courts' traditional emphasis on the essential nature of inherent judicial power, one commentator wonders if the third category is really inherent power at all.[175] The *Eash* court itself said that "courts may exercise this kind of inherent power only in the absence of contrary legislative direction."[176] This provisional authority is even weaker in the face of contrary constitutional direction, as the First Amendment provides here. It would certainly be *useful* to courts to have no outside influences on

[167] *Id*. at 562. The *Eash* court did not provide examples of what would fall into this category, but they would likely include, for example, the power to say what the law is, or declare statutes unconstitutional. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[168] Eash, 757 F.2d at 562 (internal citations omitted).

[169] *Id*. at 563, 565–66.

[170] *Id*. at 563.

[171] For gag orders to fall into the first category, the court's very status as a court would have to become meaningless if the power to issue the orders was taken away.

[172] Eash, 757 F.2d at 562.

[173] To the extent one argues that fair and effective trials cannot happen without the power to enjoin witnesses' speech, that is not the case. The alternative measures discussed above can ensure fair trials without those orders. *See supra* notes 158–70 and accompanying text.

[174] 757 F.2d at 563.

[175] Daniel S. Meador, *Inherent Judicial Authority in the Conduct of Civil Litigation*, 73 TEX. L. REV. 1805, 1819 (1995).

[176] Eash, 757 F.2d at 563; s*ee also* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 259 (1975) ("These exceptions are unquestionably assertions of inherent power in the courts to allow attorneys' fees in particular situations, unless forbidden by Congress . . . .").

a trial at all. It would be *useful* to silence the world for the short time necessary for a jury to be impaneled and a case tried in a vacuum. But silencing witnesses is not necessary for the court to function, and it is not necessary to administer a fair trial for all litigants.

Finally, "[b]ecause of their very potency, inherent powers must be exercised with restraint and discretion."[177] Courts always rest on a slightly unsteady balance with the hope that citizens will respect their judgments,[178] and their misuse of inherent authority could lead to disrespect of all judicial power.[179] Given the seeming arbitrariness of injunctions against people who are officially unconnected to the judicial system and bear no obligations toward it beyond what they carry as citizens, witness gag orders are exactly the sort of powers that smack of tyranny and a positivist image of governmental bodies that act simply because they can. Ultimately, this lack of respect could bring about less order to the court system instead of more.[180]

B. Trial Witnesses Do Not Carry the Same Obligations to the Courts as Do Attorneys

The authority that trial courts have to silence the extrajudicial speech of attorneys practicing before them—the only category of trial participants squarely addressed by the Supreme Court—does not extend to witnesses who are not part of the judicial system. In 1991 the Court held that attorneys involved in a case could be sanctioned for making extrajudicial comments that carried a substantial likelihood of prejudicing the fairness of

[177] Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991); *see* Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980); Walter Nelles & Carole Weiss King, *Contempt by Publication in the United States*, 28 COLUM. L. REV. 401, 423–30 (1928) (stating the Judiciary Act of 1789's grant of discretion to punish contempts by fine or imprisonment was abused when Judge James Peck held a lawyer in contempt for publishing an article criticizing the judge's handling of a trial that was no longer before the court).

[178] RONALD A. CASS, THE RULE OF LAW IN AMERICA 34 (2001) (Judicial power "rests solely on the respect it is accorded by those who occupy the coordinate branches and by the populace at large").

[179] *See* Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 451 (1911) (holding contempt power must be used cautiously so courts do not assume excessive powers).

[180] Louis S. Raveson, *Advocacy and Contempt—Part Two: Charting the Boundaries of Contempt: Ensuring Adequate Breathing Room for Advocacy*, 65 WASH. L. REV. 743, 794 (1990) ("[B]ecause the unnecessary use of contempt sanctions is as likely to engender disrespect as respect for the court, less restrictive alternatives may at times *more* effectively control a trial than the use of the contempt power."). Some even suggest in the context of gag orders against the media that the courts encroach on the authority of the legislature and create a separation of powers problem. *Protective Orders*, *supra* note 150, at 367-69. To the extent, though, that the order looks more like legislation when it purports to bind anyone (any publisher), rather than a discrete group of people (a particular trial witness), Douglas Rendleman, *Free Press-Fair Trial: Review of Silence Orders*, 52 N.C. L. REV. 127, 153 (1973), that is less of a problem for gag orders against witnesses.

a trial.[181] The Court in *Gentile v. State Bar of Nevada* relied heavily on the notion that attorneys practicing before courts are officers of those courts and maintain a fiduciary duty not to create chaos for the judicial system.[182] Because they are officers of the courts and highly educated, attorneys also carry dangerously excessive credibility among laypeople who might assume that they present a neutral viewpoint in a dispute instead of an advocate's slanted perspective.[183] In a sense, lawyers bargain away some of their First Amendment rights in exchange for the privilege of practicing before the courts.

This rationale does not hold for injunctions against trial witnesses, however, and the same power cannot be stretched to include them. The witnesses are not officers of the court and operate entirely outside the judicial system, only coming to the courtroom as private citizens to aid resolution of others' disputes.[184] They are also especially vulnerable to being brought into the court system without real justification, as litigants are given wide leeway to call to court all those who conceivably have any knowledge about a case.[185] Gag orders on witnesses could thus suppress a wide range of public commentary.

Also, in some circumstances, witnesses will have their own reputations to consider and should not be bound by injunctions that prevent them from protecting themselves.[186] One case in particular stands out in this respect. In *United States v. King*, the criminal defendants (law enforcement officers indicted in a sex-for-crack cocaine trading scandal) moved for an order enjoining the government's witnesses from making statements about their case to the press or others.[187] One witness was incarcerated on unrelated

[181] Gentile v. State Bar of Nev., 501 U.S. 1030, 1075 (1991). The Supreme Court said the substantial likelihood standard was constitutional in addressing gag orders on lawyers, but it did not address whether a lower bar, like reasonable likelihood, would be sufficient to withstand constitutional scrutiny.

[182] *Id.* at 1056–57, 1074–75.

[183] *See id.* at 1074–75.

[184] *See* ABA Standards for Criminal Justice: Fair Trial and Free Press, Standard 8-3.6 & cmt. at 48–51 (1992) (distinguishing between First Amendment rights of witnesses on the one hand and jurors and court personnel on the other, because parties and witnesses "are not serving the trial process as agents of the state"); ABA Standards for Criminal Justice, Standard 8-3.6 & cmt. at 8-54 to 8-55 (Supp. 1986); *see also* United States v. Ford, 830 F.2d 596, 599 (6th Cir. 1987) ("Once parties and witnesses in a criminal case are outside the courtroom, they have the full prerogatives of any private citizen to question, criticize, or condemn the actions of government even though they may be swept up on its processes at the time.").

[185] FED. R. CIV. P. 45(a)(1)(C), (e) ("Every subpoena shall . . . command each person to whom it is directed to attend and give testimony . . . ." "Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued."); *see also* Michael E. Schwartz, Note, *Trial Participant Speech Restrictions: Gagging First Amendment Rights*, 90 COLUM. L. REV. 1411, 1422 (1990).

[186] *See, e.g.*, United States v. King, 192 F.R.D. 527, 533 (E.D. Va. 2000), *aff'd*, No. 02-4845, 2003 U.S. App. LEXIS 14842 (4th Cir. July 25, 2003) (unpublished decision).

[187] *Id.* at 530.

charges and was prepared to discuss her role in the events that led to the defendants' indictment.[188] A witness in this situation is in a far different, and much more vulnerable, position than an attorney trying to carry out a public relations effort for a client. Speaking to protect a private citizen's reputation (that is at considerable risk when criminal defendants do everything possible to protect their interests) is core speech that is protected by the First Amendment and which trial courts have no power to overwhelm with a gag order.

C. In Criminal Cases, the Sixth Amendment Right to a Fair Trial Cannot Legitimately Trigger an Abridgement of a Private Individual's First Amendment Rights

In criminal cases, a defendant's Sixth Amendment interest in a fair trial often conflicts with the First Amendment interests of witnesses and the media. The defendant's interest is to be tried before jurors who have not read or seen extrajudicial information that would make them more likely to convict. At times, the witness's interest is to say things to the media or others that might make a jury more likely to convict. The conflict seems paralyzing to many, and causes some to throw up their hands at the prospect of reconciling the two.[189] But "collisions between these interests [are] not cause for panic,"[190] because the constitutional rights under both amendments do not conflict.[191] If witnesses have a right under the First Amendment not to be censored, the government may not censor. If the defendant has a right to a fair trial, the government cannot act on a prejudiced conviction. But the defendant does not have the right to compel private individuals to do anything in particular.[192]

To argue otherwise is to contend that private citizens carry the burden of providing a fair trial to the defendant.[193] The Due Process Clause, for example, does not grant individuals rights against other individuals.[194]

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[188] *Id*.

[189] David B. Sentelle, *The Courts and the Media*, 48 FED. LAW. 24, 40 (2001) ("Diplomats like to say that, in international affairs, there are 'problems,' and there are 'situations.' The difference is that problems have solutions. The free press versus fair-trial dilemma in the law—now that is a situation.").

[190] Robert A. Ainsworth, Jr., Fair Trial-Free Press, Address Before the Eighth Circuit Judicial Conference (May 22, 1968), *in* 45 F.R.D. 417, 418 (1968).

[191] Alexander Meiklejohn, THE CONSTITUTIONAL POWERS OF THE PEOPLE 29 (1965) ("The principles of our Constitution are not, I think, contradictory of each other. And yet they are certainly beset, if not by contradiction, at least by the appearance of it.").

[192] *See* Linde, *supra* note 14, at 219; *cf.* United States v. Ford, 830 F.2d 596, 600 (6th Cir. 1987) ("To the extent that publicity is a disadvantage for the government, the government must tolerate it. The government is our servant, not our master.").

[193] *Protective Orders*, *supra* note 150, at 347.

[194] Chi. Joint Bd. v. Chi. Tribune Co., 307 F. Supp. 422, 425 (N.D. Ill. 1969) (citing United States v. Guest, 383 U.S. 745, 755 (1966)), *aff'd*, 435 F.2d 470 (7th Cir. 1970).

Lawsuits also cannot be brought for deprivations of constitutional rights under 42 U.S.C. § 1983 without state action.[195] But saying that the government must answer the commands of the Bill of Rights is not a radical notion. Justice Brennan noted in his *Nebraska Press Association v. Stuart* concurrence that the obligation to provide fair trials rests on the government and not on private citizens,[196] and commentators agree.[197]

Furthermore, the Supreme Court has generally declined to rank the individual amendments of the Bill of Rights.[198] Still, litigants' attempts to argue that the assertion of one constitutional right should not obliterate another have not always worked.[199] The Supreme Court itself has at times placed the Sixth Amendment above all other constitutional rights.[200] Some lower courts even flatly assert that the Sixth Amendment right to a fair trial is the most fundamental of all constitutional rights and must take precedence over any others.[201] To the extent that prioritizing the Bill of Rights, in defiance or ignorance of the Supreme Court's holdings in *Nebraska Press* and *Bridges*, purports to extend trial courts' authority to issue gag orders on witnesses, that ranking should be rejected. The provisions of the Bill of Rights, specifically the First and Sixth Amendments, are equal in the eyes of the Court. Also, they guarantee protection against the government, not against individuals, and they are

[195] Monroe v. Pape, 365 U.S. 167, 172 (1961).

[196] Neb. Press Ass'n v. Stuart, 427 U.S. 539, 588 n.15 (1976) (Brennan, J., concurring).

[197] Andrew M. Schatz, Comment, *Gagging the Press in Criminal Trials*, 10 HARV. C.R.-C.L. L. REV. 608, 613 (1975) ("[B]ecause the relationship in the gag order case is between two private parties, the sixth amendment is irrelevant"); *cf.* Robert D. Sack, *Principle and* Nebraska Press Association v. Stuart, 29 STAN. L. REV. 411, 419 n.42 (1977) (stating that the Constitution prohibits enforcing a duty on the media to act responsibly).

[198] *Neb. Press Ass'n*, 427 U.S. at 561 ("The authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other."); Bridges v. California, 314 U.S. 252, 260 (1941) ("[F]ree speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them.").

[199] *See* Chi. Council of Lawyers v. Bauer, 522 F.2d 242, 247–48 (7th Cir. 1975) (rejecting an argument that there was no need to balance the First and Sixth Amendments because the two rights contained therein did not compete).

[200] *See* Estes v. Texas, 381 U.S. 532, 540 (1965); Pennekamp v. Florida, 328 U.S. 331, 346–47 (1946).

[201] *See, e.g.*, *In re* Application of Dow Jones & Co., Inc., 842 F.2d 603, 609 (2d Cir. 1988) ("When the exercise of free press rights actually tramples upon Sixth Amendment rights, the former must nonetheless yield to the latter."); United States v. Harrelson, 713 F.2d 1114, 1116 (5th Cir. 1983) ("[T]he First Amendment right to gather news . . . must yield to an accused's right to a fair trial . . . ."); United States v. Tijerina, 412 F.2d 661, 667 (10th Cir. 1969) (stating that "the atmosphere essential to the preservation of a fair trial—the most fundamental of all freedoms—must be maintained at all costs.") (quoting *Estes*, 381 U.S. at 540–41); Sioux Falls Argus Leader v. Miller, 610 N.W.2d 76, 89 (S.D. 2000) (same as *Dow Jones*). *But see* People v. Fioretti, 516 N.Y.S.2d 422, 425 (N.Y. Sup. Ct. 1987) ("The apparent reality is that the Supreme Court has indicated a preference of the First Amendment over the Sixth Amendment as they apply herein . . . .").

powerless to compel action by private citizens, namely the witnesses who wish to speak about a trial outside a courtroom.

V. WEBSITES ARE BREAKING DOWN THE TRADITIONAL BARRIERS BETWEEN MEDIA AND NON-MEDIA AND WILL SOON RENDER THE CONSTITUTIONAL DISTINCTION MEANINGLESS

On October 18, 1975, local police found six family members in Sutherland, Nebraska dead in their home.[202] The crime immediately drew widespread news coverage from local and national media.[203] Within days of the murders, the trial judge assigned to the case entered an order restraining the press from publishing or broadcasting accounts of confessions or admissions made by the defendant or facts strongly implicating his guilt.[204] The Supreme Court treated the order as a prior restraint of publication and held it to be invalid, citing the "heavy burden of demonstrating, in advance of trial, that without prior restraint a fair trial will be denied."[205] Justice Powell wrote separately to emphasize that burden, noting that prior restraints may issue only when they are "shown to be necessary to prevent the dissemination of prejudicial publicity that otherwise poses a high likelihood of preventing, directly and irreparably, the impaneling of a jury meeting the Sixth Amendment requirement of impartiality."[206] Justice White also wrote separately to say that he found "grave doubt in [his] mind whether orders with respect to the press such as were entered in this case would ever be justifiable."[207]

The standard of threat to a fair trial envisioned by the majority and concurring opinions in *Nebraska Press* is essentially equal to the clear and present danger standard. Members of the traditional press, therefore, are adequately protected in this area. The challenge for trial courts after *Nebraska Press* is to cut off the problem at its root by gagging the media's sources. *Nebraska Press*, after all, does not leave trial participants with similar protection.[208] Many courts have found the standard necessary to issue injunctions against trial participants to be much lower than the high likelihood of prejudice or the heavy burden of demonstrating that a fair trial might be denied. Some of these courts have held that a mere reasonable likelihood of prejudice—"greater than 'merely possible,' but less than

[202] *Neb. Press Ass'n*, 427 U.S. at 542.
[203] *Id*.
[204] *See id*. at 541.
[205] *Id*. at 569; s*ee also* Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) (noting the heavy presumption against constitutional validity of a prior restraint on publication).
[206] *Neb. Press Ass'n*, 427 U.S. at 571 (Powell, J., concurring).
[207] *Id*. at 570–71 (White, J., concurring).
[208] *See* C. Thomas Dienes, *Gagging Trial Participants*, COMM. LAW., Spring 2001, at 3.

'more likely than not' "[209]—is enough to justify silencing witnesses and other trial participants.[210] Other courts have gone further and found a substantial likelihood of prejudice to be necessary before trial participants can be ordered to stop speaking about a case.[211] The Sixth Circuit may be the only court that goes as far as saying that trial participants should receive as much protection as the press.[212]

With the current profusion of websites and weblogs, or "blogs,"[213] the split between traditional media and trial participants is being erased. Easy access to the Internet now gives trial witnesses an opportunity to give their stories wide dissemination on the web, without going through traditional media outlets. As a result, the distinction between media members and non-media members is collapsing, and once that happens, the justification for treating media with greater deference falls away.

Martha Stewart's case of insider trading and obstruction of justice offers a good example. In June 2003 Stewart was charged by the Securities and Exchange Commission and indicted by federal prosecutors for allegedly dumping thousands of dollars worth of ImClone stock after being tipped off that her friend and ImClone CEO Sam Waksal had done the same.[214] She also took a beating in the press for the mere fact of being Martha Stewart, a homemaking expert and television personality, and having found herself

[209] *In re* Willon, 55 Cal. Rptr. 2d 245, 257 (Cal. Ct. App. 1996).

[210] *See, e.g.*, *In re* N.Y. Times Co., 878 F.2d 67, 67–68 (2d Cir. 1989) (per curiam) (discussing gag order on attorneys); People v. Fioretti, 516 N.Y.S.2d 422, 423 (N.Y. Sup. Ct. 1987) (discussing gag order on witnesses); United States v. King, 192 F.R.D. 527, 533 (E.D. Va. 2000) (discussing gag order on witnesses) *aff'd*, No.02-4845, 2003 U.S. App. LEXIS 14842 (4th Cir. July 25, 2003) (unpublished decision); State v. Bassett, 911 P.2d 385, 387–88 (Wash. 1996) (per curiam) (discussing gag order on witnesses).

[211] *See, e.g.*, United States v. Brown, 218 F.3d 415, 428 (5th Cir. 2000) (involving order issued to parties, lawyers, and potential witnesses); State *ex rel*. NBC, Inc. v. Court of Common Pleas, 556 N.E.2d 1120, 1123–25 (Ohio 1990) (per curiam) (involving gag order issued to trial participants).

[212] United States v. Ford, 830 F.2d 596, 598 (6th Cir. 1987) ("We see no legitimate reason for a lower threshold standard for individuals, including defendants, seeking to express themselves outside of court than for the press."); CBS Inc. v. Young, 522 F.2d 234, 238 (6th Cir. 1975) (per curiam) (treating order restraining parties and their friends and family from discussing the case with the media as a prior restraint with the accompanying heavy burden against its constitutionality).

[213] *See* Gary O'Connor & Stephanie Tai, *Legal and Appellate Weblogs: What They Are, Why You Should Read Them, and Why You Should Consider Starting Your Own*, 5 J. APP. PRAC. & PROCESS 205, 205–07 (2003). Some insightful weblogs devoted to legal topics include: HOW APPEALING, http://appellateblog.blogspot.com, THE VOLOKH CONSPIRACY, http://volokh.com, and IS THAT LEGAL?, http://www.isthatlegal.org.

[214] Press Release, Securities and Exchange Commission, SEC Charges Martha Stewart, Broker Peter Bacanovic with Illegal Insider Trading (June 4, 2003), *available at* http://www.sec.gov/news/press/2003-69.htm (last visited Mar. 8, 2004); Stewart Indictment, *available at* http://www.thesmokinggun.com/archive/marthaindict1.html marthastewart_indictment.pdf (last visited Mar. 9, 2004). Stewart was ultimately convicted of four counts of conspiracy, obstruction, and lying to federal investigators about the stock sale. Brooke A. Masters & Ben White, *Stewart Guilty on All Charges*, WASH. POST, Mar. 6, 2004, at A1.

caught up in the mess.[215] But Stewart did not wait for the media to shape her image entirely. Shortly after her indictment, she spoke out for herself, in the form of a website.[216] Stewart's site, www.marthatalks.com, received 1.7 million hits in the first seventeen hours after it launched in early June 2003.[217]

Martha Stewart's website is especially interesting in the context of gag orders on witnesses because it blurs the line between media and non-media. Was Stewart a trial participant? Is she a member of the media commenting on her own case? If the trial court had decided the website held material that could prejudice the venire, it is not entirely clear whether the site should have been evaluated under the extremely high standard of *Nebraska Press* for prior restraints applied to the media, or under the more relaxed standards many courts have applied to trial participant speech.[218]

A trial court, though, would have little justification in denying complete First Amendment protection to a website in this context.[219] Under *Branzburg v. Hayes*, the size or editorial might of a publication presents no issue when it comes to constitutional rights.[220] In declining to define clearly the parameters of a reporter's privilege to protect his or her sources from disclosure to a grand jury, the Supreme Court in *Branzburg* determined that making such a definition would require defining the types of reporters who qualified for the privilege:

> [This would be a] questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods. Freedom of the press is a "fundamental personal

[215] *See, e.g.*, Amy Finnerty, *Far from Tidy: Our Feelings about Martha*, WALL ST. J., June 5, 2003, at D8; Justin Gillis, *ImClone CEO, Chairman Step Down*, WASH. POST, Apr. 30, 2003, at E1; Thomas S. Mulligan, *U.S. Charges Stewart With Lying, Securities Fraud and Obstruction*, L.A. TIMES, June 5, 2003, at A1.

[216] http://www.marthatalks.com (last visited Mar. 8, 2004).

[217] Bruce Horovitz, *Stewart Uploads Her Cause to Website*, USA TODAY, June 6, 2003, at B1.

[218] Stewart's site is only an example. Other high-profile defendants, including Michael Jackson and 1999's Mrs. Minnesota, have established websites to burnish their reputations in light of criminal charges against them. *Net Defense: High-Profile Defendants Are Using Web Sites to Plead Their Cases*, ABA JOURNAL EREPORT, Dec. 19, 2003, available at http://www.abanet.org/journal/ereport/dec19webdef.html (last visited Mar. 8, 2004) (quoting criminal defense attorney Alex Landon as saying, "As the Stewart case indicates, courts and prosecutors are likely to police defendants in this regard quite carefully, and in addition to new charges, a Web site like this could result in other measures such as gag orders.").

[219] Martha Stewart herself presents a slightly odd case in that she is the head of a massive media company, although not one that has made a practice of covering securities fraud matters or other legal issues.

[220] 408 U.S. 665, 703–04 (1972).

> right" which "is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." The informative function asserted by representatives of the organized press in the present cases is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists. Almost any author may quite accurately assert that he is contributing to the flow of information to the public . . . .[221]

A website providing information about the workings of government, including trials, would certainly qualify for First Amendment standing as "the press" under this definition, and thus for the media's more deferential standard in publishing information it has gathered about a particular trial. The Supreme Court said as much in 1997, when it addressed the constitutionality of provisions of the Communications Decency Act, which purported to prohibit transmission of patently offensive communications over the Internet to people under age eighteen.[222] In analyzing the Internet as a communications medium, Justice Stevens wrote that "[t]hrough the use of webpages . . . and newsgroups, [any person with a phone line] can become a pamphleteer . . . . [O]ur cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium."[223] If the *New York Times* can publish information subject only to the heavy burden of demonstrating that a prior restraint is necessary to prevent a trial from being derailed, then under *Branzburg*[224] and *Reno v. ACLU*[225], it becomes exceedingly difficult to prevent Martha Stewart, or another web publisher, from doing the same.

This issue is starting to surface in other areas as well. For example, the D: All Things Digital conference last year hosted a series of luminaries from the technology industry, including Bill Gates, Steve Jobs, and others, for discussions and interviews by *Wall Street Journal* reporters.[226] The conference claimed to be open only to actual attendees, and a gag rule was in effect for traditional media, which is to say that typical press outlets were not allowed to file reports as they might for any other newsworthy event.[227]

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[221] *Id.* at 704–05 (internal citations omitted).

[222] *See* Reno v. ACLU, 521 U.S. 844, 860 (1997).

[223] *Id.* at 870.

[224] *Branzburg*, 408 U.S. at 703–05.

[225] 521 U.S. at 870.

[226] D: All Things Digital, The Wall Street Journal Executive Conference, *available at* http://d.wsj.com (last visited Mar. 8, 2004).

[227] Leander Kahney, *Gag Rules? Bloggers Report Anyway*, Wired, ¶ 4 (June 5, 2003) *at* http://www.wired.com/news/culture/0,1284,59116,00.html (last visited Mar. 8, 2004).

The gag rule did not mention bloggers, however, and two of them took the opportunity to report on the conference happenings on their websites.[228]

The bloggers' reports created something of a stir in the technological community, given that some of the conference participants said things they otherwise might not have if they had known their comments were going to be reported publicly.[229] One newspaper columnist who would have been prevented from reporting any of the interviews in his column suggested the distinction between reporters and audience members no longer served any useful purpose, explaining that "[c]onference organizers cannot make an event off-the-record only for the official journalists anymore . . . . The rules of 'journalism,' whatever that is, are changing. This is just one more example."[230]

For his part, *Wall Street Journal* technology reporter and conference organizer Walter Mossberg was sanguine about the bloggers' reports, saying, "We're not upset. We've not complained. We knew there would be a good chance there would be someone blogging . . . . It's an interesting issue. You just have to have a better definition next time. Maybe we'll change the rules. We don't know."[231] And Mossberg obviously may change the rules to exclude bloggers or anyone else from reporting events at his own private conference. Given the Supreme Court's pronouncements about the standards applicable to restraining the media in *Nebraska Press*[232] and *Branzburg*,[233] the standard will have to shift the other way for covering public trials. Instead of excluding traditional media along with bloggers, the courts will have to include bloggers along with the conventional press to bring them under the same tent. A witness-blogger, therefore, will be much more difficult to silence than witnesses under current standards.

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[228] David Hornik, *Great Executives Don't Have All The Answers*, Venture Blog, *at* http://www.ventureblog.com/articles/2003_05.html (May 30, 2003); David Hornik, *Bill Gates At D*, Venture Blog, *at* http://www.ventureblog.com/articles/2003_05.html (May 30, 2003); David Hornik, *Wall Street Journal Live*, Venture Blog, *at* http://www.ventureblog.com/articles/2003_05.html (May 28, 2003); Denise Howell, *D: Interview With Steve Jobs*, Baby and Baggage, *at* http://bgbg.blogspot.com/2003_05_25_bgbg_archive.html (May 30, 2003).

[229] Kahney, *supra* note 226, ¶ 5 (noting Steve Jobs's uncharacteristically candid denial that Apple had any plans to make a PDA).

[230] Dan Gillmor, *'Off the Record' Gates/Jobs Comments Posted Online*, eJournal, ¶ 3, ¶ 5, *at* http://weblog.siliconvalley.com/column/dangillmor/archives/001058.shtml (May 31, 2003).

[231] Kahney, *supra* note 226, ¶ 12-14.

[232] 427 U.S. 539, 569–70 (1976).

[233] 408 U.S. 665, 703–05 (1972).

VI. JURORS NEED NOT BE BLANK SLATES, AND JURORS WITH SOME, BUT NOT PREJUDICIAL, KNOWLEDGE CAN BE GATHERED BY USING THE ALTERNATIVES REFERRED TO IN *SHEPPARD*, *NEBRASKA PRESS*, AND OTHER SOURCES

A. Jurors Are Not Wholly Susceptible to Pretrial Publicity and Can Make Distinctions Between Admissible Evidence and Uninformed Media Coverage

How much a juror can know before beginning service is crucial to evaluating gag orders on trial witnesses. No matter which standard the court applies—clear and present danger, substantial likelihood, or reasonable likelihood—one critical question is what is likely to happen if the witness is allowed to speak freely outside of court. The danger courts are trying to prevent is not, and should not be, simply the likelihood that the jurors will know anything at all about a case, but instead the likelihood that the jurors will be partial and unable to weigh the evidence fairly. Many options are available to trial courts to ensure that the jury is comprised of people who can dispassionately evaluate the evidence in a case.

The Supreme Court has shifted over the years in what it will allow jurors to know before serving on a jury. On one hand, a juror's assurance during voir dire that he can remain impartial throughout the proceedings despite having been exposed to some publicity about the case may be unreliable if deep and bitter prejudice is found.[234] On the other hand, the Supreme Court will uphold the trial court's reliance on jurors' individual assurances that they can be fair and impartial.[235]

To ensure impartiality, venire members exposed to media coverage of a case should be questioned carefully about what they have seen and read before they are allowed to serve on a jury.[236] Stories in the media leading up to a trial will sometimes influence jurors beyond the point where they can weigh evidence fairly.[237] While such publicity is not *automatically* prejudicial, it is often difficult to discern exactly how much publicity is too much.[238] In many high profile criminal cases, media coverage that has seemed irredeemably prejudicial to the defendant[239] has been followed by

[234] Irvin v. Dowd, 366 U.S. 717, 727 (1961).

[235] Mu'Min v. Virginia, 500 U.S. 415, 431–32 (1991).

[236] Newton N. Minow & Fred H. Cate, *Who is an Impartial Juror in an Age of Mass Media?*, 40 AM. U. L. REV. 631, 650–54 (1991) (exploring a number of common problems with carelessly executed voir dire).

[237] Norbert L. Kerr, *The Effects of Pretrial Publicity on Jurors*, 78 JUDICATURE 120, 120–21 (1994) (explaining that pretrial publicity is sometimes prejudicial).

[238] *See* Stroble v. California, 343 U.S. 181, 201 (1952) (Frankfurter, J., dissenting).

[239] Robert M. Takasugi, *Jury Selection in a High-Profile Case:* United States v. Delorean, 40 AM. U. L. REV. 837, 838 (1991) ("In a status conference among counsel [before John DeLorean's

acquittals or convictions where appellate courts found no prejudice.[240] When properly instructed by the court and guided through voir dire by the judge and the attorneys, jurors in many cases can put prejudicial material behind them and weigh the facts of a case only on its evidence.[241]

B. Jurors Can Have Some Pretrial Knowledge About a Case

Members of the venire need not walk into jury selection as completely blank slates to be legitimate candidates for service. Chief Justice Marshall laid the groundwork in 1804 for a permissive standard regarding what jurors may know before the trial actually begins, holding that an impartial jury must be composed of those who would fairly hear the testimony and base their verdict on that testimony and the law.[242] The Supreme Court made the concept more explicit in 1961, noting:

> It is not required . . . that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case.[243]

In the ensuing decades, the Court has reaffirmed that total unawareness of a case is not a prerequisite to jury service,[244] and commentators agree with the Court's assessment.[245]

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cocaine trafficking trial], all agreed that the intense media coverage would deny Delorean a trial before an impartial jury.").

[240] *See* CBS, Inc. v. United States Dist. Court, 729 F.2d 1174, 1183 (9th Cir. 1983) (DeLorean acquitted); People v. Sirhan, 497 P.2d 1121, 1132–36 (Cal. 1972) (appellate court found no prejudice), *overruled by* Hawkins v. Superior Court, 586 P.2d 916 (Cal. 1978); People v. Manson, 132 Cal. Rptr. 265, 307–10 (Cal. Ct. App. 1976) (appellate court found no prejudice); s*ee also Lawyers Have Free Speech Rights*, *supra* note 8, at 312; Kelli L. Sager, *First Amendment Issues in the O.J. Simpson Trial*, COMM. LAW., Winter 1995, at 3, 4; Daniel Waggoner, *CNN v. Noriega: Gagging the Messenger*, COMM. LAW., Winter 1991, at 3, 30.

[241] Michael Bromwich, *The Roles of Juries and the Press in the Modern Judicial System*, 40 AM. U. L. REV. 597, 602 (1991) ("[I]n my observation, . . . the more high profile the case is, the more careful the jury is. In such cases, jurors feel more responsibility rests on their shoulders to give both the government and, particularly the defendant, a fair shake."); Neil Vidmar, *The Roles of Juries and the Press in the Modern Judicial System*, 40 AM. U. L. REV. 597, 599 (1991) ("Evidence matters. You can have a great deal of prejudicial publicity in some instances; yet when the jurors get into the trial, the actual evidence at the trial has the effect of extinguishing what went on before.").

[242] United States Dist. Court v. Burr, 25 F. Cas. 49, 50 (C.C.D. Va. 1807) (No. 146926).

[243] Irvin v. Dowd, 366 U.S. 717, 722 (1961) (reversing conviction for actual prejudice to the criminal defendant, because eight of twelve jurors thought he was guilty before the trial started).

[244] Patton v. Yount, 467 U.S. 1025, 1029, 1035 (1984) (stating the relevant question as whether the jurors had such fixed opinions that they could not judge the defendant's guilt impartially—finding no bias—even though all but two of the 126 people in the venire had heard

The question is, how does a court get these jurors? Simple, perfunctory voir dire is not the answer, as a prospective juror's assurances of her own impartiality may be unreliable if "deep and bitter prejudice" is found.[246] Misleading courts to get out of jury service is at least a 125-year-old practice, if the Supreme Court was right in *Reynolds v. United States*.[247] After *Mu'Min v. Virginia*, though, the Court will uphold a trial court's reliance on individual jurors' assurances that they can be fair and impartial.[248] There, the Court held that the Due Process Clause of the Fourteenth Amendment does not require a judge in a well-publicized case to inquire about the amount and content of the media reports that each potential juror may have observed.[249] Because jurors can have some prior knowledge about a case, the Court held that the trial judge can simply ask jurors whether they have formed an opinion about the conclusion.[250]

However, the dissenting opinions in *Mu'Min* suggest a more realistic approach to gathering the most effective jurors from the venire. Justice Marshall, joined by Justices Blackmun and Stevens, dissented because he thought unfairly prejudicial material might have been read by the eight jurors who admitted having heard about the case.[251] This group of justices would have required questioning regarding the content of the material exposed to the jurors, as part of the voir dire, for three reasons: (1) to

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of the case); Murphy v. Florida, 421 U.S. 794, 799, 803 (1975) (distinguishing *Irvin*, because no actual prejudice was shown in this case, and jurors need not be totally ignorant of reported facts before trial).

[245] Bromwich, *supra* note 240, at 602 ("I do not think there is any requirement under the law, nor should there be, that jurors be utterly uninformed about all of the underlying facts of the case."); Takasugi, *supra* note 238, at 839 (noting that in John DeLorean's criminal case, neither side desired the totally unaware or unexposed juror); Vidmar, *supra* note 240, at 600 ("[W]hat we should strive to achieve is the selection of intelligent individuals who can come in and develop individual stories; in deliberations when they bring those stories and try to reconcile them, hopefully the truth will emerge."); Stephen Wermiel, *The Roles of Juries and the Press in the Modern Judicial System*, 40 AM. U. L. REV. 597, 604 (1991) ("I am not convinced that what we ought to be striving for is a neutralized jury that has no knowledge, that is in a vacuum, or that that would somehow give us a jury that would produce the best results."); Charles H. Whitebread, *Selecting Juries in High Profile Criminal Cases*, 2 GREEN BAG 191, 195 (1999) ("Even if it were possible to locate individuals who had not heard the publicized reports and formed an opinion, such individuals, acting as ostriches with their heads buried in the sand, should not be on a jury at all.").

[246] *Irvin*, 366 U.S. at 727.

[247] 98 U.S. 145, 156–57 (1878) (reviewing the issue and noting that often jurors will claim to have a preconceived opinion of the case to avoid jury service).

[248] Mu'Min v. Virginia, 500 U.S. 415, 431 (1991).

[249] *Id*.

[250] *Id*. at 431–32. Professor Whitebread would stop the analysis here. He argues that the *Mu'Min* standard for juror knowledge plus gag orders on trial participants allowed by *Sheppard v. Maxwell* can create the atmosphere necessary for a fair trial. 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, 1603 (1996).

[251] *Mu'Min*, 500 U.S. at 443–44 (Marshall, J., dissenting).

determine the "type and extent of the publicity," (2) to "give legal depth to the trial court's finding of impartiality," and (3) to facilitate the trial court's fact-finding on the issue.[252]

Justice Kennedy saw the relevant precedents as breaking down into two categories. In the first category, the Court was concerned that individual jurors might have been biased due to pretrial publicity.[253] In the second category of cases, the Court was more concerned that the case was "tried in an atmosphere so corruptive of the trial process that [the Court] [would] presume a fair trial could not be held, nor an impartial jury assembled."[254] Justice Kennedy placed the trial underlying *Mu'Min* in the first group.[255] He was concerned that the voir dire in that case may have been inadequate to determine if the jurors were unbiased.[256] Exposure to publicity alone would not be enough to disqualify a juror. Some additional evidence would be required, because "a juror's acknowledgment of exposure to pretrial publicity initiates a duty to assess that individual juror's ability to be impartial."[257] In an era when a national press can flood the national consciousness, a rule that a juror automatically had to be disqualified from service because of mere exposure to pretrial publicity could disqualify everyone.[258]

C. Alternatives

The *Sheppard* court was right in at least one respect: alternative measures to avoid the chaos Judge Blythin allowed are always available. What the *Sheppard* dicta missed is that these alternatives can almost always prevent tainted juries and simultaneously avoid gag orders on witnesses. These alternatives are the trial court's bread and butter—according to one court, "like words to a writer."[259] They are also the backdrop against which

[252] *Id.* at 441–43.

[253] *See id.* at 448 (Kennedy, J., dissenting) (citing *Patton v. Yount*, 467 U.S. 1025, 1036–40 (1984) and *Murphy v. Florida*, 421 U.S. 794, 799–803 (1975)).

[254] *See id.* (citing *Patton*, 467 U.S. at 1031–35, *Murphy*, 421 U.S. at 797–99, *Sheppard v. Maxwell*, 384 U.S. 333, 362–63 (1966), *Rideau v. Louisiana*, 373 U.S. 723, 726–27 (1963) and *Irvin v. Dowd*, 366 U.S. 717, 727–29 (1961)).

[255] *Id.* at 449.

[256] *Id.* at 450.

[257] *Id.*; *see also* David M. Fragale, *Influences on the Jury*, 88 GEO. L.J. 1367, 1384 & n.1674 (2000) (stating that a court must at least make an inquiry to determine the existence of actual exposure).

[258] Mu'Min v. Virginia, 500 U.S. 415, 450 (1991) (Kennedy, J., dissenting); *see also* John A. Walton, *From O.J. to Tim McVeigh and Beyond: The Supreme Court's Totality of the Circumstances Test as Ringmaster in the Expanding Media Circus*, 75 DENV. U. L. REV. 549, 551 (1998).

[259] *In re* Application of Dow Jones & Co., Inc., 842 F.2d 603, 611 (2d Cir. 1988) (citing LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS ¶¶ 11–14 (G.E.M. Anscombe trans., 3d ed. 1958)).

every court must consider the necessity of a gag order on witnesses. The Supreme Court commands that before issuing gag orders, courts must determine "(a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger."[260]

To comply with the second item on this list, trial courts must consider more than a few measures in a cursory manner. At times, these possibilities will require creativity and skill by judges and lawyers involved with high-profile cases. In almost any situation, these options will create an atmosphere in which litigants can receive a trial untainted by extra-judicial evidence.[261] Still, many courts do not seem to realize the extent to which the alternatives are available and tend to dismiss them out of hand without giving them real consideration.[262] What follows is a complete exploration of the options that are available to a trial judge attempting to preserve a trial's integrity while imposing restrictions on witnesses' speech only when the situation presents a clear and present danger to a compelling state interest.[263]

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[260] Neb. Press Ass'n v. Stuart, 427 U.S. 539, 562 (1976).

[261] Of course, it is possible to envision a scenario where even these alternatives would not prevent a clear and present danger to a trial and other compelling state interests. Take the case of Zacarias Moussaoui, the alleged co-conspirator of the September 11 hijackers. His shadow attorneys have requested access to a number of high-level al Qaeda operatives, including former operations chief Khalid Sheik Mohammed and Ramzi Binalshibh, the self-described planner of the attacks. Jerry Markon, *Moussaoui Granted Access to Witnesses; Government Likely to Appeal Ruling*, WASH. POST, Aug. 30, 2003, at A12, *available at* http://www.washingtonpost.com/ac2/wp-dyn/A2568-2003Aug29? (last visited Mar. 8, 2004). Allowing these two to speak freely to the international media could severely damage national security if they chose to broadcast coded messages to al Qaeda members poised to make another terrorist strike. Allowing Mohammed and Binalshibh to make unfiltered statements to the media also might do no favors to Moussaoui himself, whose trip through the criminal justice system has veered farther from normalcy and closer to a date with a military court the longer it has progressed. *See* Dahlia Lithwick, *Moussaoui Hijacks the Legal System: An Accused Terrorist Puts the U.S. Courts on Trial*, SLATE, May 1, 2002, *at* http://slate.msn.com/id/2065191 (last visited Mar. 8, 2004). If these witnesses' statements about the United States generated even more public hatred for Moussaoui than already exists, it could conceivably become impossible to draw an impartial jury no matter what measures the trial court used to mitigate the publicity. Mohammed and Binalshibh really could present a clear and present danger both to national security and to Moussaoui's waning hope for a fair trial.

[262] *See, e.g.*, S. Bend Tribune v. Elkhart Circuit Court, 691 N.E.2d 200, 203 (Ind. Ct. App. 1998) ("The trial court analyzed the appropriateness of each alternative and found that they would not effectively mitigate the prejudicial effect of the pretrial publicity."); United States v. Davis, 904 F. Supp. 564, 568 (E.D. La. 1995) (calling change of venue a drastic measure and extremely inconvenient); United States v. King, 192 F.R.D. 527, 534 (E.D. Va. 2000) ("Evidence of this particular ilk tends to be of the sort that is difficult to dislodge from the minds of jurors once heard and the greater the volume there is of it, the greater the task will be to assure the defendant's fair trial rights by voir dire . . . ."), *aff'd*, No. 02-4845, 2003 U.S. App. LEXIS 14842 (4th Cir. July 25, 2003) (unpublished decision).

[263] Curiously, most courts go through only a few of these, and do not make serious efforts to see that all alternative measures have truly been explored as the Supreme Court commands. *See, e.g.*, *Neb. Press Ass'n*, 427 U.S. at 563–65.

1. Voir Dire

Among the alternatives available to judges and lawyers to ensure trial fairness, voir dire is probably the most discussed and least exploited option. Some commentators highlight the difficulty of rooting out jurors with preconceived notions of guilt that will not be changed by actual evidence, and then leave their analysis there.[264] Others acknowledge that attorneys and courts can do more to ensure that people chosen to serve on a jury have not been overloaded with images and stories about a case to the extent that the juror cannot weigh the evidence fairly.[265] Meanwhile, the execution of effective voir dire has been the subject of numerous articles and empirical studies.[266] These studies should be heeded because, to the extent gag orders can be avoided if prejudiced members of the venire are kept off of juries, any lack of skill possessed by courts and attorneys in conducting voir dire should not and cannot be a legitimate excuse for abridgement of First Amendment rights.

Also, jury questionnaires can be extremely useful for learning about a juror's negative experience without tainting the rest of the jury pool.[267] Along the same lines, if anyone on the jury panel has seen or heard anything about the case in the media, that person should be questioned individually at the bench to avoid tainting the other jurors.[268] Courts also should encourage jurors to request in camera voir dires regarding confidential matters.[269]

[264] Joel D. Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions*, 6 PSYCHOL. PUB. POL'Y & L. 677, 682 (2000) (explaining that "existing research indicates that attorneys are generally unable to successfully use voir dire to achieve this goal").

[265] Bromwich, *supra* note 240, at 602–03 ("[I]n a case where there is high publicity, where lots of facts or non-facts have been written in the media, it becomes an even greater duty on the part of the judge to conduct a careful voir dire, maybe in partnership with the lawyers in the case, to get underneath the initial layer of recognition."); Norbert L. Kerr et al., *On the Effectiveness of Voir Dire in Criminal Cases with Prejudicial Pretrial Publicity: An Empirical Study*, 40 AM. U. L. REV. 665, 683 (1991) (finding voir dire to be ineffective but acknowledging that more experienced judges were better at it than less experienced ones).

[266] *See generally*, Cynthia R. Cohen, *Effective Defense Voir Dire: Making Sense of Jurors' Experiences*, 68 DEF. COUNS. J. 348 (2001); *Views from the Bar—Attorneys on Voir Dire: Interviews with John R. Edwards and Joseph B. Cheshire V*, TRIAL BRIEFS, Summer 1996, at 12 [hereinafter *Views from the Bar*]. For example, using empirical techniques to test hypotheses or hunches can be cumbersome, but can save resources in the long run, and can more effectively avoid the selection of jurors with insurmountable prejudice caused by pretrial publicity. Cohen, *supra*, at 351. These techniques can include mock trials to learn which issues are most explosive and to focus questioning on those issues. Cohen, *supra*, at 351.

[267] Cohen, *supra* note 265, at 352.

[268] Ruth E. Pillar, *Dealing with the Press During Trial: A Primer*, 37 HOUS. LAW. 42, 43 (2000).

[269] *See* Press-Enter. Co. v. Superior Court, 464 U.S. 501, 510–13 (1984); Gerald T. Wetherington et al., *Preparing for the High Profile Case: An Omnibus Treatment for Judges and Lawyers*, 51 FLA. L. REV. 425, 473 (1999).

Voir dire is not a cure-all for pretrial media coverage, but used carefully and skillfully, it can be an effective screen to catch jurors who fall into the first category listed above: those exposed to pretrial publicity about a case and prejudiced by that coverage.

2. Change of Venue

Changing the venue of a trial can short-circuit the need for restraints on trial witnesses' speech by moving the trial to an area where the jury pool has not received the media coverage that has overwhelmed the original setting.[270] If the prospective jury members have not heard the media reports about the trial, it does not matter what the witnesses have said in the weeks and months leading up to the trial.[271] However, this alternative is often only briefly considered by courts and then summarily dismissed. Some courts call the option infeasible without explaining why.[272] Others say a venue change would deprive a criminal defendant of the right to a trial by jurors in the vicinage in which the crimes occurred, and that gag orders are the only reasonable option for preserving the fairness of a trial.[273] However, these courts do not explain why the right to a trial where the crimes occurred trumps the right to speech under the First Amendment and ignore the Supreme Court's presumption that the Bill of Rights are not ranked by order of importance.[274]

Finally, courts also rule out changes of venue as expensive to the litigants and to the public. Judicial efficiency and economy simply are not furthered by a venue change.[275] If they were, courts would have much less trouble choosing this option. A change of venue is not a reasonable choice for its low cost, but rather is a viable option for courts faced with competing constitutional interests that are extremely difficult to reconcile.[276]

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[270] Norbert Kerr, *The Roles of Juries and the Press in the Modern Judicial System*, 40 AM. U. L. REV. 597, 617–18 (1991) ("I think that [venue change] is a remedy that is not used enough.").

[271] *See, e.g.*, Patton v. Yount, 467 U.S. 1025, 1031–33 (1984); Murphy v. Florida, 421 U.S. 794, 798–99 (1975); Groppi v. Wisconsin, 400 U.S. 505, 508–11 (1971).

[272] *See In re* Russell, 726 F.2d 1007, 1009 (4th Cir. 1984).

[273] United States v. King, 192 F.R.D. 527, 533 (E.D. Va. 2000) (mem.), *aff'd*, No. 02-4845, 2003 U.S. App. LEXIS 14842 (4th Cir. July 25, 2003) (unpublished decision).

[274] *See, e.g.*, Neb. Press Ass'n v. Stuart, 427 U.S. 539, 547 (1976).

[275] *King*, 192 F.R.D. at 533–34.

[276] It is important in considering changes of venue to distinguish between publicity concentrated in a local area and publicity sweeping the whole country. *See, e.g.*, Stephen Jones & Holly Hillerman, *McVeigh, McJustice, McMedia*, 1998 U. CHI. LEGAL F. 53, 56–57 & n.17 (1998) (describing coverage in Oklahoma decidedly unlike coverage outside the state). Cases involving only local publicity far outnumber cases drawing national attention. *See* Danny J. Boggs, *The Right to a Fair Trial*, 1998 U. CHI. LEGAL. F. 1, 9 (1998). Even in a case where the whole country is seemingly fixated on the outcome of a particular trial, though, a venue change could still relieve pressure on a small community that has become overwhelmed with media coverage. *See, e.g.*, T.R. Reid, *A Mountain of Intrigue*, WASH. POST, Aug. 6, 2003, at D1 (describing the effects of national publicity on the 3,500-resident town of Eagle, Colorado, where

3. Change of Venire

Closely related to a change of venue—in effect, a reverse venue change—is a change of venire. The notion underlying this option is that if the trial cannot go to the untainted jury, the jury will come to the trial. In a change of venire, a pool of prospective jurors is brought from a county that has received none or significantly less of the publicity associated with a trial to the site of the trial itself.[277] This alternative is almost never considered because it combines (1) the significant expense involved with transferring a large pool of jurors to another county for at least long enough to select a jury with (2) sequestration of the actual jury. Sequestration is discussed below, and is not a good option by itself for a number of reasons.[278] Still, change of venire is not an entirely lost cause. Some states even provide expressly for the possibility.[279]

4. Sequestration

The courts almost never favor sequestering juries from the rest of society for a trial's duration. It is expensive,[280] it can breed resentment among jurors who are separated from their families,[281] and sequestered jurors can still get outside information about media coverage through family visits. While these are reasonable objections, courts can be unnecessarily hostile to the idea of sequestration. For example, sequestration could be a viable option for a trial that faces especially intense media coverage but could last for a relatively short time, say, a week or less. Even then, however, trial courts may dismiss the alternative as drastic and infeasible.[282]

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500 reporters requested credentials to cover a pre-trial proceeding in Kobe Bryant's sexual assault case).

[277] Wetherington, *supra* note 268, at 478; Martha White, *Fair Trial, Free Press: Can They Coexist?*, HUM. RTS. Q., Fall 1995, at 6.

[278] *See* discussion *infra* Part VI.C.4.

[279] *See generally*, Fisher v. County of Roanoke, 522 S.E.2d 392, 393 (Va. Ct. App. 1999), *vacated on other grounds by* 542 S.E.2d 22 (Va. Ct. App. 1999) (Virginia Constitution "does not prohibit the enactment of statutes authorizing a change of venire or venue"); 42 PA. CONS. STAT. § 8702 (2003) (stating that "as an alternative to issuing an order for a change of venue the court may direct that jurors be impaneled from another county."); FLA. STAT. ANN. § 710.03(3) (West 1997).

[280] *See, e.g.*, United States v. Bermea, 30 F.3d 1539, 1561 (5th Cir. 1994); United States v. Greer, 806 F.2d 556, 557 (5th Cir. 1986) (per curiam).

[281] *See, e.g.*, Jim Newton & Andrea Ford, *Transfer of Deputies Provokes Boycott by 13 Simpson Jurors*, L.A. TIMES, Apr. 22, 1995, at A1 (describing sequestered O.J. Simpson jurors' temporary refusal to consider further evidence after the 100th day of trial and the judge's decision to request the transfer of three sheriff's deputies assigned to monitor the panel).

[282] *See, e.g.*, United States v. King, 192 F.R.D. 527, 535 (E.D. Va. 2000) (mem.) (dismissing five-day sequestration with no analysis), *aff'd*, No. 02-4845, 2003 U.S. App. LEXIS 14842 (4th Cir. July 25, 2003) (unpublished decision).

5. Court-Provided Transportation for Jurors

One way to gain some of the benefits of sequestration while avoiding all of the negative effects is to provide for the jurors' transportation to and from the courthouse.[283] In doing so, trial courts would maintain a significant amount of control over the outside media allowed to reach jurors. Headlines in newspaper boxes along the way home could be easily avoided, along with the temptation or opportunity for jurors to learn more than the evidence at trial would disclose. This alternative is not foolproof, however, and obviously would not account for media outlets such as television and the Internet at home.[284] But it would provide some measure of control over the information reaching jurors during trial and none of the inconvenience associated with sequestration. Still, courts almost never raise this possibility as a reasonable alternative to reconciling the free press-fair trial dilemma.

6. Continuance

Delaying a trial can sometimes effectively mute the effects of otherwise prejudicial media coverage.[285] If jurors cannot shake news images from their minds a month before trial, perhaps critical details will be less prominent six months later. Some courts still maintain a naturally hostile stance toward continuances. One district court in the Eastern District of Virginia held that postponement can actually increase the risk of prejudice, because more time can easily translate to more coverage and more opportunity to taint the venire.[286] Still, some evidence suggests that delays can be effective to mitigate the effects of factually biasing publicity, such as a confession to a crime, as opposed to emotionally biasing material, such as especially vivid and gruesome photographs.[287]

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[283] Wetherington, *supra* note 268, at 435.

[284] At least one commentator has written that technology ultimately will be the undoing of fair trials, as jurors will be able to use Internet connections to conceal their membership in subversive hate groups and even groups devoted to jury nullification. His is an interesting point, but this commentator does not explain why normal questioning in voir dire would be wholly ineffective in exposing such prejudiced jurors. John E. Nowak, *Jury Trials and First Amendment Values in "Cyber World,"* 34 U. RICH. L. REV. 1213, 1222 (2001).

[285] *See, e.g.*, Commonwealth v. Carter, 643 A.2d 61, 69 (Pa. 1994) (finding no error in trial court's denial of gag order on the press when a cooling off period between the pretrial publicity and impaneling the jury dissipated the publicity's effect).

[286] *King*, 192 F.R.D. at 534.

[287] Kerr, *supra* note 236, at 125. Another commentator has suggested that jurors exposed to emotionally gripping material are likely to return erratic verdicts, but not necessarily ones that will especially favor one side or another. *See* Eric A. Posner, *Law and the Emotions*, 89 GEO. L. J. 1977, 2000 (2001).

7. Additional Peremptory Challenges

One frequently overlooked option for trial judges to avoid drawing tainted jurors is to grant additional peremptory challenges to each side of a case. While not often considered by courts,[288] some reasonable commentators have suggested this measure as a way to keep all parties comfortable with the jury ultimately selected.[289] Peremptory challenges are by no means a cure-all.[290] Applying them without skill could lure attorneys into thinking they have drawn an untainted jury when they really have not. Still, extra strikes after a deft and careful voir dire can provide another line of defense in selecting jurors who have not been prejudiced by pretrial publicity.[291]

8. Limiting Instructions

Courts can also use admonitions and limiting instructions to warn jurors to consider only the admissible (and admitted) evidence in working toward a verdict. The Supreme Court assumes that jurors follow judges' instructions,[292] and while this assumption might be unrealistic, some research has shown that judicial admonitions have worked to overcome the effects of pretrial publicity.[293] The key is understanding that limiting instructions are affected by many factors, including the strength of the evidence, jury deliberations, and extra-legal biases.[294]

Courts have several options to make their limiting instructions more effective. First, instructions that emphasize presumption of innocence at the beginning of a trial have been clinically proven to be useful.[295] Perhaps the mere reminder that jurors are not to consider extra-judicial information is enough warning for many jurors. Second, judges can use a "soft-sell" approach to prevent jurors from reacting against the instruction instead of simply following it.[296] Finally, courts can provide an explanation as part of the instruction to bring the jury into the legal side of the process and help

[288] *Cf.* Takasugi, *supra* note 238, at 839 (describing use of this option, to good effect, in John DeLorean's cocaine trafficking trial).

[289] Charles Garry & Dennis Riordan, *Gag Orders: "Cui Bono?,"* 29 STAN. L. REV. 575, 584–86 (1977) ("[P]eremptory challenges must carry a concomitant right to voir dire of a scope sufficient to make their exercise meaningful."); White, *supra* note 276, at 6 (listing this as one of a number of options for trial judges).

[290] *See* Cohen, *supra* note 265, at 351 (emphasizing need for jury research).

[291] *Views from the Bar*, *supra* note 265, at 12.

[292] Weeks v. Angelone, 528 U.S. 225, 234 (2000) (citing *Richardson v. Marsh*, 481 U.S. 200, 211 (1987)).

[293] Lieberman & Arndt, *supra* note 263, at 684–85.

[294] Lieberman & Arndt, *supra* note 263, at 687.

[295] Lieberman & Arndt, *supra* note 263, at 705.

[296] Lieberman & Arndt, *supra* note 263, at 704.

them understand why they are being told to do this or that.[297] Judge Warren Wolfson of the Illinois Court of Appeals has written this instruction as a model:

> There is a reason why this hearsay evidence is not admissible. The words you heard are not trustworthy or reliable. You did not see the person who said the words. He was not under oath when he said them. And he is not here to be cross-examined. Disregarding the words you heard is the fair and just thing to do. I ask you to put aside and give no weight or meaning to those words.[298]

It seems obvious that learning the reasons behind instructions instead of being forced to follow seemingly arbitrary fiats would encourage greater compliance, and thus help judges mitigate pretrial publicity.

9. Judicial Strength

Above all, judges have to give all trial participants, perhaps especially jurors, the sense that they are in control of the proceedings and will guide them in arriving at a just result. To that end, judges should meet with all of the key players at the beginning of a trial to let them know the objectives and priorities for the case, i.e., arriving at a fair result with an untainted jury.[299] Some even suggest that a fair trial begins with the selection of the judge, and that only some judges will carry the respect necessary to protect the litigants' rights in a case that has received significant pre-trial media coverage.[300] If they do so, the jurors will follow with their best efforts in disregarding previous media coverage and conducting fair deliberations

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[297] Lieberman & Arndt, *supra* note 263, at 704 (noting, however, that explanations are not helpful to erase the effects of prior conviction evidence).

[298] Judge Warren Wolfson, Mythology of the Law: What We Really Don't Know, Address at the 2003 Spencer-Grimes Appellate Judges Seminar Series (July 26, 2003).

[299] Tijani R. Cole, *The Courts & the Media Bench Book*, 35 NEW ENG. L. REV. 853, 858 (2001).

> A trial judge beginning a high profile case needs to understand that organization and clear objectives will go a long way in protecting the integrity of the case. To achieve this end, the judge should meet with all of the key players and establish the objectives and priorities for the case.

Id.; *see also* Thomas Penfield Jackson, *A Judicial Cynic's View of Why this Topic is Always Presented as Fair Trial Versus Free Press*, FED. LAW., Oct. 1998, at 29 (suggesting judges should have a plan going into the trial to protect its integrity). However, such meetings may be seemingly daunting at the start of a trial.

[300] Wetherington, *supra* note 268, at 432 (emphasizing that court systems must choose the right judge for a high profile case); *see also, e.g.*, H. Patrick Furman, *Publicity in High Profile Criminal Cases*, 10 ST. THOMAS L. REV. 507, 526 (1998) (discussing Timothy McVeigh's trial and how Judge Matsch "simply refused to let the coverage become more important than the event.").

based on admitted evidence.[301] Others warn, though, that an overdeveloped sense of power within the trial judge can lead to the very censorship problems that make full exploration of judicial alternatives to gag orders necessary.[302]

10. Minor, but Significant, Alternatives

Trial courts have other simple options that will not have as much effect as those just discussed, but can contribute to an overall calm atmosphere that will give the parties a better chance at a fair trial. Judges should be sure, for example, to call enough people from the venire to have a fair chance at selecting a jury that can fairly weigh the evidence involved.[303] The courts should encourage media compliance with any applicable bar-press compacts governing reporters' trial coverage.[304] Court systems in general can expand the voter roles to include social service lists, which would draw a broader cross-section of the community and possibly result in the selection of jurors who are less likely to have read about a particular case. In criminal cases with multiple defendants, dual juries can be used to minimize the exposure of potential jurors from one trial to media reports of the other.[305] Finally, trial judges should keep their courtrooms comfortable and quiet, free of cellular telephones and with enough space between reporters and trial participants that private conversations cannot be overheard.[306]

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[301] Takasugi, *supra* note 238, at 840.

> It has been my experience that jurors take their cues from the judge. If the judge conveys a feeling of genuine concern for the trial, as well as for the welfare and comfort of the jurors, the jurors respond with their finest effort to achieve the goal of true justice, regardless of the verdict.

Id.

[302] *See, e.g.*, Napolitano, *supra* note 68, at 1268 ("Judge Matsch was much praised as the antidote to Judge Ito, but at what price? He ruled his courtroom with an iron fist, but he trammeled individual liberty in so doing.").

[303] Wetherington, *supra* note 268, at 436.

[304] This notion may be something of a fantasy. Still, judges should not shrink from shaming media without compulsion into treating story subjects with respect and not hounding them with repeated interview requests. *See* Potter Stewart, Or of the Press, Address at the Yale Law School Sesquicentennial Convocation (Nov. 2, 1974), *in* 26 HASTINGS L. J. 631, 631 (1975) (noting public opinion polls that indicate a public view of the media as arrogant and irresponsible); William H. Erickson, *Fair Trial and Free Press: The Practical Dilemma*, 29 STAN. L. REV. 485, 491–92 & n.41 (1977); Wetherington, *supra* note 268, at 437. For another fantasy, see Uelmen, *supra* note 9, at 974–78 (dreaming about the possibility of "O.J." chips that could be installed on jurors' televisions to screen news about a particular case).

[305] *See* Wetherington, *supra* note 268, at 478 (citing use of dual juries in Velez v. State, 596 So. 2d 1197, 1199–200 (Fla. Dist. Ct. App. 1992) (per curiam)). This option has the added benefit of avoiding the time and expense of multiple trials. *Id*.

[306] *See* Wetherington, *supra* note 268, at 434. While this idea seems obvious and perhaps irrelevant, the carnival atmosphere in the courtroom is one of the factors that led the *Sheppard*

Not all commentators agree about the efficacy of these alternatives.[307] However, the length of the list of alternatives should demonstrate the wide array of options available to trial courts when faced with a high profile case receiving significant media coverage.

VII. CONCLUSION

The courts are often seen as reliable and natural protectors of constitutional freedoms in the United States. After all, it is typically the executive and legislative branches that try to encroach on liberties protected in the Bill of Rights,[308] while the judges rein them in and explain when the other branches have gone past constitutional bounds.[309] Alexander Hamilton even famously called the judiciary the "weakest of the three departments of power" when measuring governmental threats to the people of the early republic.[310] Lulled into dropping their guard by such pronouncements, free expression enthusiasts forget that courts were the original censors.[311] And once the courts turn on the Constitution, the only refuge is better and more thoughtful courts.

Trial courts cannot escape the free press or fair trial conundrum by pretending that the witnesses' rights are insignificant. *Sheppard v. Maxwell* does not provide support for gagging witnesses, as commonly assumed.[312] Speech about the inner workings of government, including trials, lies at the core of the First Amendment,[313] as it ultimately will make the voters in a democracy more savvy and wise.[314] In any event, a judge's power to enjoin witnesses outside the courtroom is extremely narrow. While the contempt power is broad and crucial for courts to carry out their business, the underlying authority to prevent witnesses' discussion about goings-on inside and outside the courts is beyond the First Amendment line. Also, as the Internet and weblogs proliferate, it will become clearer that witnesses are no different from traditional media in the deference they must be accorded in regulating their statements. It does not seem to have happened yet, but the day when a trial witness comments about a high-profile case on

Court to suggest gag orders on the media as an acceptable alternative to safeguard the fairness of a trial. *See* Sheppard v. Maxwell, 384 U.S. 333, 344 (1966).

[307] *See* Minow & Cate, *supra* note 234, at 646–54 (1991) (discussing problems with these alternative options).

[308] For example, commission of an unreasonable search in violation of the Fourth Amendment or elicitation of an involuntary confession in violation of the Fifth.

[309] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177–78 (1803).

[310] THE FEDERALIST NO. 78, at 465–66 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[311] Linde, *supra* note 14, at 172.

[312] *See* Sheppard v. Maxwell, 384 U.S. 333, 362–63 (1966).

[313] *See* Burson v. Freeman, 504 U.S. 191, 198 (1992).

[314] MEIKLEJOHN, *supra* note 190, at 27 (arguing that the final aim of democracy is the voting of wise decisions).

a weblog cannot be far away. At that point, it will become terribly difficult in terms of First Amendment scrutiny for courts to distinguish between one kind of printed statement (a regular news story) and another (the self-published weblog).

Fortunately, there are many options for trial courts to consider that evade both unfairness to litigants arising from a tainted jury and injunctions that trample witnesses' right to speak freely. These alternatives require skill and creativity on the part of courts and practicing attorneys, but they are more widely available than courts often acknowledge~~d~~. From seriously considered and executed voir dire to increased peremptory challenges to court-provided transportation for jurors, the trial courts have more options at their disposal than is currently assumed. The real challenge for courts is to grapple with these possibilities and devise a solution that that will work for a particular case.