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**PRE-TRIAL PREJUDICE 2.0: HOW YOUTUBE GENERATED  
NEWS COVERAGE IS SET TO COMPLICATE THE CONCEPTS OF  
PRE-TRIAL PREJUDICE DOCTRINE AND ENDANGER SIXTH  
AMENDMENT FAIR TRIAL RIGHTS**

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I. Introduction

Former United States Supreme Court Chief Justice Louis Brandeis once wrote, “[T]he progress of science, especially in the area of communication technology requires a shift from the letter to the spirit of the law.”<sup>1</sup> Justices Brandeis and Earl Warren discussed how traditional methods of Fourth Amendment analysis would have to be altered to ensure that the philosophical underpinnings of privacy could withstand the new challenges posed by new technology, such as the telephone and telegraph.<sup>2</sup> In recent years, traditional means of communication, including the advances of the telephone and telegraph, have been outpaced by the rising tide of new Internet based communications, presenting greater public access to unfiltered content than ever before.<sup>3</sup> As the technological advancements of the telephone and

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1. Samuel D. Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890).

2. *Id.* at 199.

3. Chris W. McCarty, *Blogging for Evidence*, 43 TENN. B.J. 26 (2007) (discussing unprecedented use of public forum in websites as replacement for traditional journals and diaries). See Wendy Davis, *Teen’s Online Postings are New Tool for Police*, BOSTON GLOBE, May 15, 2006, at A1 (discussing the lack of

telegraph prompted the beginnings of a change to the traditional analysis of the Fourth Amendment Constitutional protections, the unprecedented access, content, and coverage, provided by the Internet and in particular websites, such as YouTube, may necessitate a change to the traditional Sixth Amendment fair trial analysis.<sup>4</sup>

The right to a fair trial by an impartial jury is a fundamental constitutional right.<sup>5</sup> Pre-trial news coverage of criminal trials often undercut the guarantee of an impartial jury by exposing prospective jurors to prejudicial information concerning the defendant.<sup>6</sup> The court is charged with ensuring that the pretrial proceedings do not impair the defendant's right to an impartial jury.<sup>7</sup> The guarantee of a fair trial by an impartial jury is an old one and the remedies are traditional, but these remedies must take into account the new challenge of Internet driven media sources.

YouTube, and other video sharing websites cause many changes for the Fourth Amendment right assuring jury purity. YouTube's size and popularity has grown concurrently with the

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knowledge teens, the heaviest users of these sites, have about the extent of publicly available information provided on these sites). The article quotes author Danah Michele Boyd, an Internet researcher, who describes information left on the Internet as "super public" in that, unlike shouting something in a public square which has a temporal limit to access, information contained on the Internet can be stored and therefore viewed indefinitely. *Id.*

4. See Erika Patrick, *Protecting the Defendant's Right to Fair Trial in the Information Age*, 15 CAP. DEF. J. 71 (2002) (arguing attorneys should analyze net based media coverage when determining pre-trial prejudice against client).

5. See U.S. CONST. amend. VI ("[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed"); *Estes v. Texas*, 381 U.S. 532 (1965) (holding Sixth Amendment impartiality fundamental right); see also *United States v. Campbell*, 300 F.3d 202, 214 (2d Cir. 2002); *Wells v. Murray*, 831 F.2d 468, 472 (4th Cir. 1987); *United States v. Guzman*, 40 F.3d 627, 628-29 (6th Cir. 2006); *United States v. Medina*, 430 F.3d 869, 876-77 (7th Cir. 2005); *Moran v. Clarke*, 443 F.3d 646, 650-51 (8th Cir. 2006).

6. See *Sheppard v. Maxwell*, 384 U.S. 333, 340-42 (1966) (and cases cited therein) (discussing the negative effect that a very publicized pretrial can have on prejudicing potential jurors).

7. See *id.*

speed and dissemination of the internet itself.<sup>8</sup> First, easier, more affordable, and faster Internet access has allowed YouTube to supplement, and in some places replace, the public's use of traditional news media.<sup>9</sup> Second, unlike traditional news sources, there are no controls or procedures to ensure that the content distributed on websites like YouTube is accurate. Third, content provided on sites like YouTube has outpaced traditional avenues of regulation.

This note will address the development of the jurisprudence of the Supreme Court in analyzing the impact of the media access on fair trial, and how this development is being impacted by video sharing sites like YouTube. The next section

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8. See generally DAMIAN TAMBINI, DANILO LEONARDI & CHRIS MARSDEN, *CODIFYING CYBERSPACE: COMMUNICATIONS SELF-REGULATION IN THE AGE OF INTERNET CONVERGENCE* 1-18 (Routledge 2008) (2006) [hereinafter, TAMBINI & LEONARDI] (discussing extreme growth in Internet access and use at close of the 1990s); see TIM BERNERS-LEE, *WEAVING THE WEB: THE ORIGINAL DESIGN AND ULTIMATE DESTINY OF THE WORLD WIDE WEB BY ITS INVENTOR* 10-20 (1999) (discussing the evolution of Internet as a heavily used public medium for content); Larry Lessig, *Architecting Innovation*, THE INDUSTRY STANDARD, Nov. 14, 1999, archived at <http://www.webcitation.org/5ne5L4dHq>.

9. See TAMBINI & LEONARDI, *supra* note 8, at 1-18 (discussing rise in accessorially and speed of Internet with introduction of DSL and cable access); Mary Jo Patterson, *Opponents of Milburn's Redevelopment Plan Turn to YouTube*, N.Y. TIMES, Oct. 12, 2008, at 6 (discussing YouTube as replacement for town square activism); John Markoff, *Olympics Online, With a Hook*, N.Y. TIMES, Aug. 10, 2008, at 4, archived at <http://www.webcitation.org/5ne7j6Gxg> (discussing new technology that makes uploading video to YouTube easier and its ability to help better publicize Olympics); Tim Arango, *Far from Disney's Fold But at Home on the Web*, N.Y. TIMES, Nov. 23, 2008, at 1, archived at <http://www.webcitation.org/5ne7tHy77> (discussing former YouTube CEO Michael Eisner predicts YouTube will outpace television); Brian Stelter, *For Web T.V. a Handful of Hits But No Formula for Success*, N.Y. TIMES, Sept. 1, 2008, at 1, archived at <http://www.webcitation.org/5ne87eNF4> (discussing television's need to change to compete with Internet sources of media); Susan Decker, *A Comic Twist in YouTube Lawsuit; Site Wants Stewart, Colbert to Testify in Copyrights Trial*, WASHINGTON POST, Aug. 15, 2007, at D2 (discussing Viacom employees admit rise in popularity of their shows due to YouTube uploads of copy-written material); Phil Rosenthal, *CBS, NCAA Dunk Old Views of YouTube*, CHICAGO TRIB., Mar. 18, 2007, at 1 (discussing CBS use of YouTube to reach broader audience for NCAA tournament); Miguel Helft, *Contributors on YouTube May Share Advertising Revenue*, N.Y. TIMES, May 5, 2007, at 3 (discussing new business model allowing advertisers to share revenue from popular YouTube videos); Peter Edmonson, *In Web Traffic Tallies, Intruders Can Say You Visited Them*, N.Y. TIMES, Dec. 11, 2006, at C2 (discussing how heavy YouTube traffic is attracting advertisers).

will then analyze the unique challenges that video sharing websites present to fair trials. Finally, this note presents a discussion of possible solutions to this developing problem based on refocusing the traditional methods of jury control and suggests new regulatory schemes to attempt to put the Internet genie back into the lamp.

## II. HISTORY

The Sixth Amendment guarantees criminal defendants a fair trial by an impartial jury.<sup>10</sup> A defendant's right to a fair trial one of the "fundamental rights" guaranteed by the Constitution.<sup>11</sup> First, defendants are guaranteed a right to a trial by an impartial jury of their peers.<sup>12</sup> Second, defendants are guaranteed that these juries will only consider the evidence presented at trial, and not extraneous information gathered outside of the confines and evidentiary protections of the court.<sup>13</sup>

The possibility that pre-trial media publicity may create a prejudicial atmosphere, particularly in high profile trials, was a concept tested early on by the American court system.<sup>14</sup> Aaron Burr's trial for treason presented the young Supreme Court with the possibility that jurors would be unable to remove themselves from the public fervor concerning Burr's alleged actions.<sup>15</sup> Burr sought removal of his case from the district where he was being tried, arguing that he had been deprived his right to fair trial, since the pre-trial atmosphere in the district was charged due to

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10. U.S. CONST. amend. VI; *Irvin v. Dowd*, 366 U.S. 717, 722 (1961) (holding fair trial right effectuated by empanelling impartial jury of peers who render verdict based on evidence presented at trial).

11. *Estes*, 381 U.S. at 540; *Moran*, 443 F.3d at 650-51; *Guzman*, 40 F.3d at 628-29; *Medina*, 430 F.3d at 876-77; *Campbell*, 300 F.3d at 214; *Wells v. Murray*, 831 F.2d 468, 472 (4th Cir. 1987).

12. U.S. CONST. amend. VI; *Dowd*, 366 U.S. at 722 (holding fair trial right effectuated by empanelling impartial jury of peers who render verdict based on evidence presented at trial).

13. See *Dowd*, 366 U.S. at 722.

14. See *Opinion of Chief Justice Marshall (August 1807)*, archived at <http://www.webcitation.org/5nfK1KlO9> (reprinting Chief Justice Marshall's opinion in the Burr trial from J.J. COOMBS, *THE TRIAL OF AARON BURR FOR HIGH TREASON* 307-52 (W. H. & O.H. Morrison 1864) (1864)).

15. See *id.*

the notorious nature of the allegations against him and the nature of press coverage in his case.<sup>16</sup> Chief Justice Marshall denied Burr's challenge and allowed the case to go forward reasoning that Burr's rights to an impartial jury were preserved where the court could ascertain from voir dire that the jurors could set aside any pre-conceived notions before sitting at trial.<sup>17</sup> In many ways, Marshall developed an ad-hoc approach to preventing pre-trial prejudice from spilling into the jury, where the printed press and word of mouth were the primary means of communication.<sup>18</sup> Later courts made modifications where more modern and rapid means of communication are widely available, but have essentially followed Marshall's approach.<sup>19</sup>

The majority of federal courts recognized that pre-trial prejudice may be presumptive or actual.<sup>20</sup> To prove presumptive prejudice, the defendant must show that the coverage of his case in the district is so intense and biased that prejudice could be presumed in such a "circus-like" atmosphere.<sup>21</sup> The court considers the nature of media coverage, and its exposure to the

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16. *Id.*

17. *Id.*

18. See *Dobbert v. Florida*, 432 U.S. 282, 288 (1977) (discussing actual prejudice shown if juror sitting at trial cannot set aside prejudice); *Murphy v. Florida*, 421 U.S. 794, 797 (1975) (stating that because jurors could not reasonably set aside prejudice to sit at trial a change of venue was proper); *Sheppard*, 383 U.S. at 340 (holding jurors could not set aside prejudice before sitting at trial); *Dowd*, 366 U.S. at 727 (noting that voir dire of jurors determines whether juror can set aside prejudice); *Foley v. Parker*, 488 F.3d 377, 383 (6th Cir. 2007) (discussing that even in heavily publicized cases, juror's assertion of ability to set aside prejudice offers adequate protection); *United States v. Campa*, 459 F.3d 1121, 1125 (11th Cir. 2006) (stating that the defendant received fair trial because jurors all answered that they could set aside prejudice); *DeLisle v. Rivers*, 161 F.3d 370, 377 (6th Cir. 1998); *United States v. Rasco*, 123 F.3d 222, 226 (5th Cir. 1997) (reasoning that there is no need for juror to be a blank slate at trial only that juror may set aside possible bias).

19. See *id.*

20. *Dobbert*, 432 U.S. at 288 (discussing actual prejudice is shown if juror sitting at trial cannot set aside prejudice); *Dowd*, 366 U.S. at 722 (holding that if pretrial publicity jeopardizes chance at impartial jury, court should change venue); *Nevers v. Killinger*, 169 F.3d 352, 362 (6th Cir. 1999). See also 21A AM. JUR. 2D *Criminal Laws* § 994 (2008) (detailing court's affirmative duty to ensure jurors at trial may set aside possible prejudices).

21. See *Dobbert*, 432 U.S. at 288.

jury pool, when it is particularly close to the start of trial.<sup>22</sup> The Supreme Court in *Riedeau v. Louisiana* noted the possibility that

22. *Murphy*, 421 U.S. at 798-99 (stating that prejudice is presumed where a "trial atmosphere ... utterly corrupted by press coverage ... has pervaded the proceedings"); *Sheppard*, 384 U.S. at 340 (a circus like atmosphere when court could not control press coverage); *Dowd*, 366 U.S. at 727 (reasoning that jury pool's exposure to unfettered prejudicial news coverage certainly biased against defendant); *Foley*, 488 F.3d at 385 (holding press coverage which contained evidence that would have been inadmissible at trial created circus where prejudice assumed); *Daniels v. Woodford*, 428 F.3d 1181, 1211-12 (9th Cir. 2005) (emphasizing prejudice presumed because of extensive and continuous publicity about crime and prejudicial information about defendant, and majority of potential and actual jurors exposed to publicity); *United States v. Davis*, 60 F.3d 1479, 1485 (10th Cir. 1995) (holding prejudice presumed because court determined jurors watched television news reports of trial); *but see, e.g., Dobbert*, 432 U.S. at 302 (stating "prejudice not presumed in absence of trial atmosphere ... utterly corrupted by press coverage"); *United States v. Bailey*, 112 F.3d 758, 769-70 (4th Cir. 1997) (directing that prejudice not presumed despite pretrial publicity because case given no more exposure in media than other high profile cases and during voir dire court conducted thorough questioning and excused each juror whose opinion showed inability to render impartial verdict); *Foley*, 488 F.3d at 387 (noting that prejudice not presumed because pretrial publicity, though significant, did not create circus-like atmosphere necessary for presumption of prejudice); *Whitehead v. Cowan*, 263 F.3d 708, 721-22 (7th Cir. 2001) (clarifying prejudice not presumed though jurors' names and addresses published in local newspaper because no evidence of improper jury contacts or that publication would prejudice jury); *Pruett v. Norris*, 153 F.3d 579, 586 (8th Cir. 1998) (stating prejudice not presumed despite defendant's statements to newspaper and television implicating self as "mad-dog killer" because trial was 11 months after original crime, media coverage unexceptional, venue changed, and thorough voir dire conducted to remove those who said they could not be impartial because of media coverage); *Casey v. Moore*, 386 F.3d 896, 908-09 (9th Cir. 2004) (reasoning prejudice not presumed because publicity about case in town newspaper not inflammatory, factual in nature, and was printed 4-8 months before voir dire); *Goss v. Nelson*, 439 F.3d 621, 628-29 (10th Cir. 2006) (holding prejudice not presumed despite intense media coverage of small, rural town murder because press coverage predated trial by over seven months and local coverage geographically dispersed and non-inflammatory); *Campa*, 459 F.3d at 1148-50 (holding prejudice not presumed in espionage case from pretrial publicity, including newspaper articles in community with strong prejudice against defendant's government because judge took careful curative measures, including conducting detailed surveys, to establish lack of prejudice); *United States v. Williams-Davis*, 90 F.3d 490, 499-502 (D.C. Cir. 1996) (holding prejudice not presumed despite juror affidavits admitting more media exposure concerning trial than previously admitted in voir dire because exposure largely cumulative); *Ritchie v. Rogers*, 313 F.3d 948, 956 (6th Cir. 2002) (reasoning Presumptive prejudice from pretrial publicity occurs where an inflammatory, circus-like atmosphere pervades both the courthouse and the surrounding community); *DeLisle*, 161 F.3d at 382 (holding prejudice from pretrial publicity is rarely presumed); *but see Nevers*, 169 F.3d at 366-67 ("[M]ere prior knowledge of the existence of the case, or

the extent and nature of pre-trial media coverage created such an atmosphere as to sufficiently guarantee the likely threat that the jury-pool would be prejudiced.<sup>23</sup> Alternatively, the criminal defendant may show that he suffered actual prejudice, and may do so through the presentation of voir dire of the potential jurors as to their prior knowledge and impressions of the defendants and the case.<sup>24</sup>

The presumptive prejudice doctrine has developed out of the facts from some of the most sensational criminal trials, and utilizes rough guidelines for analysis.<sup>25</sup> The premiere case, in

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familiarity with the issues involved, or even some preexisting opinion as to the merits, does not in and of itself raise a presumption of jury taint.”); *DeLisle*, 161 F.3d at 382 (reasoning prospective juror must be able to lay aside presumptions and deliberate based on evidence); *Irvin*, 366 U.S. at 723 (reasoning no automatic presumption of prejudice with negative press); *Ritchie*, 313 F.3d at 962 (reasoning prejudice presumed by prior knowledge); see also 21A AM. JUR. 2D *Criminal Law* § 932 (2008) (describing an approach to pre-trial circus atmosphere: (1) The trial judge has an affirmative duty to guard against prejudicial pretrial publicity in a criminal case (2) The persuasiveness of the information getting out there is not weighted as heavily as the “inflammatory nature of that coverage” (3) There is no Constitutional guarantee that a juror’s mind is a clean slate when he comes to trial only that he is able to be objective).

23. 373 U.S. 723 (1963). In *Rideau*, the court found that the jurors must have had exposure to prejudicial media concerning the defendants and the case due to excessive weight of pervasive coverage. *Id.* at 730.

24. *United States v. Goins*, 146 Fed. App’x. 41, 47 (2005) (noting a defendant must show voir dire of juror presented actual prejudice); *United States v. Johnson*, 584 F.2d 148, 154 (6th Cir. 1978) (establishing merit of a change of venue motion is most likely to be revealed at the voir dire of the potential juror).

25. The decisions that revolve around the concept of pre-trial circus atmosphere revolve around the handling of particular nature of the pre-trial media coverage including the extent of coverage, the content of coverage, the timing of the coverage and the court’s ability or inability to screen coverage and media out of the jury selection and jury seating process. See *Mu’Min v. Virginia*, 500 U.S. 415, 420 (1991) (dismissing motion to change venue due to large region of news coverage and stop of coverage close to trial); *Murphy*, 421 U.S. at 805 (holding sensational nature of coverage prejudiced jury pool); *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966) (holding pre-trial prejudice substantial to create change of venue due to coverage focus on evidence not introduced at trial); *Dobbert*, 432 U.S. at 290 (holding pretrial coverage prejudiced defendant due to salacious nature of coverage); see also Christina Studebaker & Stephen Penrod, *Pretrial Publicity: The Media, The Law and Common Sense*, 3 PSYCHOL. PUB. POL’Y & L. 428, 435 (1997) (discussing the Oklahoma district court’s in depth survey of the media coverage concerning the Timothy McVeigh trial). The court handling the McVeigh trial approached

which the prejudicial impact against a defendant's fair trial rights due to the impact of pre-trial publicity through the media, was considered by the Supreme Court in *Sheppard v. Maxwell*.<sup>26</sup> The *Sheppard* case is well known because it was turned into a television series and motion picture.<sup>27</sup> Dr. Sheppard was accused and tried for the murder of his wife, although he maintained his innocence throughout the trial.<sup>28</sup>

Dr. Sheppard's criminal trial was quite a sensation because of the high profile nature of the defendant, and the details that were released by the court to the press as the case unfolded.<sup>29</sup> The press reported heavily on the details of the crime with many editorials on Dr. Sheppard's possible confession, infidelity, and likely guilt.<sup>30</sup> The coverage was so extensive that a majority of the jurors who sat at trial had admitted, under voir dire, to reading the stories about Dr. Sheppard. The Court still allowed the jurors to sit after they stated they would be able to put their prejudices aside and judge only based on the evidence presented at trial.<sup>31</sup> As the trial entered the courtroom, media

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the pre-trial media coverage of the case which had generated a huge amount of public attention. *Id.* at 437. The court in the McVeigh trial considered all of the local news reports in print and television and reviewed their content, publication in relation to the seating of the jurors and whether such news contained so-called inherently prejudicial elements such as discussions of the weight of evidence or possible confessions of the defendant. *Id.* at 452-53. Brian Coffey, "Mu'Min v. Virginia" *The Need for Content Questioning During Voir dire in High Profile Criminal Cases*, 13 PACE L. REV. 605, 638 (1993) (describing case by case approach and review of media in cases where defendant charges pre-trial prejudice).

26. 384 U.S. 333 (1966).

27. THE FUGITIVE (ABC Television Broadcast Sept. 17, 1963 – Aug. 29, 1967); THE FUGITIVE Warner Brothers (1993).

28. See *Dr. Sam Sheppard Trials*, archived at <http://www.webcitation.org/5owUrGvIK>, (detailing social impact of case in popular culture).

29. See *Dr. Sam Sheppard Trials*, archived at <http://www.webcitation.org/5owUrGvIK> at 336-39 (discussing the sensational nature of the case).

30. *Dr. Sam Sheppard Trials*, archived at <http://www.webcitation.org/5owUrGvIK> at 339-40 (court citing several articles and editorials where Sheppard's infidelity was described as evidence of his guilt).

31. *Dr. Sam Sheppard Trials*, archived at <http://www.webcitation.org/5owUrGvIK> at 343 (discussing jurors responses on voir dire).



coverage continued with further editorials about the guilt of the defendant and the ineptitude of the prosecution.<sup>32</sup>

On review, the Supreme Court overturned Dr. Sheppard's conviction.<sup>33</sup> In its opinion, the Court noted that a survey of the press material that had accumulated against Sheppard was both so pervasive as to reach the majority of any possible jury pool, and so filled with salacious information concerning the facts of the trial information as to prejudice such a pool.<sup>34</sup> The nature and extent of such coverage, as well as the court's failure to control it, created a "circus-like atmosphere" where the guarantee of fair trial could not honestly be described to exist.<sup>35</sup> The Court noted that in similar circumstances where "reasonable prejudice to the defendant was likely to occur" the court should proactively approach steps to control such prejudice, including extensive voir dire, sequestering, and likely change of venue.<sup>36</sup> The *Sheppard* Court articulated the basic premise for courts to analyze pre-trial coverage "legal trials are not like elections to be won through the use of the meeting-hall, the radio, and the newspaper."<sup>37</sup>

Courts have attempted to put into practice the general tenets of *Sheppard*, particularly the proactive stance that the Court urged in handling pre-trial media coverage.<sup>38</sup> When

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32. See *Dr. Sam Sheppard Trials*, archived at <http://www.webcitation.org/5owUrGvIK> at 345-47 (citing articles written from the court room commenting on strength of the prosecution case and criticizing states in getting a conviction on obviously guilty Sheppard). The court further noted that the jurors were directly exposed to the coverage of the trial while seated, since the court failed to sequester news information from sitting jurors. *Id.*

33. See *Sheppard*, 384 U.S. at 350.

34. See *id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. See *Mu'Min*, 500 U.S. at 420 (discussing applicability of *Sheppard* in applying news review); *Campa*, 459 F.3d at 1127 (and cases cited therein) (discussing applicability of *Sheppard* to encourage court's top review media and pre-trial coverage of case to protect defendant's right to fair trial); see also 21A AM. JUR. 2D *Criminal Laws* § 994 (2008) (detailing the court's affirmative duty to ensure jurors at trial may set aside possible prejudices.); Studebaker & Penrod, *supra* note 25, at 428, 435 (discussing the Oklahoma district court's in depth survey of the media coverage concerning the Timothy McVeigh trial).

presented with a challenge that the pre-trial publicity has created a circus-like atmosphere as in *Sheppard*, courts will routinely review all relevant press coverage.<sup>39</sup> In this review courts will consider the breadth of the publication, content, and its proximity to the trial both in time and location.<sup>40</sup> In 1983, the ABA released guidelines for information that lead to bias when revealed through the press, including opinions of guilt or innocence, comments on the strength of evidence, the prior record of the defendant, and character details of the defendant

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The court handling the McVeigh trial approached the pre trial media coverage of the case which had generated a huge amount of public attention. Studebaker & Penrod, *supra* note 25 at 437. The court in the McVeigh trial considered all of the local news reports in print and television and reviewed their content, publication in relation to the seating of the jurors and whether such news contained so-called inherently prejudicial elements such as discussions of the weight of evidence or possible confessions of the defendant. Studebaker & Penrod, *supra* note 25, at 452-53; Coffey, *supra* note 25, at 638 (describing case by case approach and review of media in cases where defendant charges pre-trial prejudice).

39. See *Dobbert*, 432 U.S. at 288 (reviewing the nature of pre-trial press coverage); *Murphy*, 421 U.S. at 798 (discussing particular nature of pre-trial coverage in relation to prejudice); *Sheppard*, 383 U.S. at 350; *Dowd*, 366 U.S. at 730 (reviewing coverage of crime and access by jury pool); *Foley*, 488 F.3d at 380 (discussing inherent prejudice in news coverage of inadmissible evidence); *Campa*, 459 F.3d at 1127 (allowing survey of potential jurors as well as review of media coverage to determine possible prejudice); *DeLisle*, 161 F.3d at 377 (reasoning inflammatory nature of coverage is point of consideration); *Rasco*, 123 F.3d at 228 (reasoning mandate by *Sheppard* to review media coverage and juror's exposure to coverage); see also 21A AM. JUR. 2D *Criminal Laws* § 994 (2008) (detailing court's affirmative duty to ensure jurors at trial may set aside possible prejudices.); see also 21A AM. JUR. 2D *Criminal Law* § 932 (2008) (describing approach to pre-trial circus atmosphere: (1) The trial judge has an affirmative duty to guard against prejudicial pretrial publicity in a criminal case (2) The pervasiveness of the information is not weighted as heavily as the "inflammatory nature of that coverage" (3) There is no Constitutional guarantee that a juror's mind is a clean slate when he comes to trial only that he is able to be objective); Studebaker & Penrod, *supra* note 25, at 435 (discussing the Oklahoma district court's in depth survey of the media coverage concerning the Timothy McVeigh trial). The court handling the McVeigh trial approached the pre-trial media coverage of the case which had generated a huge amount of public attention. See *id.* at 437. The court in the McVeigh trial considered all of the local news reports in print and television and reviewed their content, publication in relation to the seating of the jurors and whether such news contained so-called inherently prejudicial elements such as discussions of the weight of evidence or possible confessions of the defendant. *Id.* at 452-53; see Coffey, *supra* note 25, at 638 (describing case by case approach and review of media in cases where defendant charges pre-trial prejudice).

40. See *supra* notes 38 and 39 and related discussion.

including, but not limited to, refusals to submit to polygraph tests.<sup>41</sup> Courts note the different impact that the medium of coverage has upon the prejudicial nature of the press coverage. In particular, courts have noted that video makes a stronger impression on a possible jury member than the same information copied into a transcript.<sup>42</sup>

It is fair to note that while the courts continue to espouse the *Sheppard* standard, which requires the court to take preventative measures up to and including change of venue for the defendant if a review of the news coverage created the reasonable possibility of prejudice.<sup>43</sup> The Supreme Court in *Mu'Min v. Virginia* had another opportunity to apply the *Sheppard* standard and its proactive approach.<sup>44</sup> The defendant in *Mu'Min* was charged with a murder allegedly committed after he escaped a prison work detail.<sup>45</sup> The local media sensationalized the facts of the murder resulting in the publication of numerous articles concerning the defendant and his background.<sup>46</sup>

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41. See Joel D. Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions; Social Psychological Explanations for the Failures of Intrusions to Disregard Pre-Trial Publicity and Other Inadmissible Evidence*, 6 PSCYH. PUB. POL.'Y & L. 677, 680-81 (2000) (quoting the 1983 standards released by the ABA concerning the news media's publication of material the ABA found to be inherently prejudicial). The 1983 ABA Model Rules for Professional Conduct after a study determined that news coverage of a criminal trial could be considered inherently prejudicial if that content contained opinions of guilt or innocence, comments on the strength of evidence, prior record of the crime, details on the character of the defendant and information relating to the defendant's refusal to submit to investigatory procedures such as lie detector tests or breathalyzers. *Id.*

42. *United States v. Saunders*, 611 F. Supp. 45, 49 (S.D. Fla. 1985) (noting video transcripts of confession in press create a sensation different than written transcripts). The *Saunders* court reasoned that the presentation of video created a more indelible impact on the potential juror, lengthening its possible affect. *See id.* at 51; *Belo v. Clark*, 654 F.3d 423, 430 (5th Cir. 1981) (discussing impact of video in creating inflammatory coverage); *Studebaker & Penrod*, *supra* note 25, at 437-38 (discussing studies which show a longer retention time of media coverage when presented in video).

43. *Sheppard*, 384 U.S. at 350.

44. *See Mu'Min*, 500 U.S. at 420 (discussing applicability of *Sheppard*).

45. *See id.* at 416.

46. *See id.* at 416-18 (describing the breadth of coverage). The dissent notes that the coverage was far greater than the majority let on, describing the *Mu'Min* case as a weekly front-page news story. *Mu'Min*, 500 U.S. at 436. (Kennedy, J., dissenting) (noting local congressman made statement that

Prior to trial, the defendant filed a motion for change of venue arguing that the news coverage was so pervasive that he could not be guaranteed a fair trial before a neutral jury.<sup>47</sup> The defendant motioned that the court allow his attorney to question prospective jurors on the content of their pre-trial exposure to the media coverage.<sup>48</sup> To support his contention that the pretrial publicity was prejudicial, the defendant presented forty-seven newspaper articles that had all been published prior to jury selection.<sup>49</sup> The coverage included articles about the defendant's prior conviction, his possible confession, and speculation describing macabre details of the crime including the possible rape of the victim's body.<sup>50</sup> The lower court denied both the change of venue motion and the request to individually question potential jurors as to the exact media coverage they were exposed to pre-trial.<sup>51</sup> The lower court held that they need only question the jurors on whether they had been exposed to the pre-trial publicity, and if so whether they could put any possible prejudices aside at trial.<sup>52</sup> After the court's voir dire, eight of the twelve jurors who sat on the jury admitted to having viewed coverage of the case pre-trial, including reports concerning the criminal history of the defendant and unconfirmed details of the crime.<sup>53</sup> Notwithstanding these facts, the majority did not allow for a change of venue, finding that the defendant was sufficiently

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prison guard should be brought to justice).

47. *See id.* at 417.

48. *See id.* at 419. The court eventually decided that the questioning of jurors about the news coverage they were exposed to was unduly burdensome to the management of court time and costs. *See id.* at 430. The court held that the affirmative response of jurors that they could set aside any pre-conception of the case they gained through viewing news coverage was a sufficient protection of the defendant's fair trial rights. *See id.*

49. *See id.*

50. *See Mu'Min*, 500 U.S. at 418 (describing the nature of the articles presented by Mu'Min at pre-trial hearing). *See also id.* (Kennedy, J., dissenting) (noting number of articles discussing extremely prejudicial topics like a possible confession as well as salacious unfounded details close to start of trial).

51. *See id.* at 424.

52. *See id.* at 430.

53. *See id.* at 436.

protected by these jurors' statements that they could set aside their possible prejudice.<sup>54</sup>

Dissenting, Justices Kennedy and Marshall reasoned that the decision in *Mu'Min* conflicted with the holding in *Sheppard*.<sup>55</sup> The dissent reasoned that the coverage present in *Mu'Min's* case was the type of press discussed in cases like *Sheppard*, *Dowd* and *Murphy*, which reasoned that articles about possible confessions or the criminal background of the defendant are inherently prejudicial.<sup>56</sup> The dissenting opinion argued that content-based voir dire would have been an appropriate remedy in line with the tenets of *Sheppard* to ensure that jurors who sat at the trial were not prejudiced by the impact of the press coverage.<sup>57</sup> The dissenting opinion articulates three reasons as to why questioning jurors concerning the specific content they viewed

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54. *See id.* at 430.

55. *See id.* at 434 (Kennedy, J., dissenting) ("Today's decision turns a critical constitutional guarantee -- the Sixth Amendment's right to an impartial jury -- into a hollow formality). The dissent further argues that the demand of *Sheppard* was to allow for change of venue when there was a reasonable possibility of prejudice, and that the court has a duty to ensure that this reasonable possibility is avoided. *See id.* at 436. The dissent further notes that since claims of pre-trial prejudice are factually based, the decision not allowing change of venue when the facts seem so outrageous makes the standard of pre-trial prejudice unreachable. *See id.* at 440.

56. *See id.* at 436 (and cases cited therein) (noting several instances of press coverage detailing false allegations of confession and false details of the crime never presented at trial). The dissent questions the court's refusal to allow content questioning of jurors, based on what news they were exposed to. *Id.* at 438-39. "The question before us is whether, in light of the charged atmosphere that surrounded this case, the trial court was constitutionally obliged to ask the eight jurors who admitted exposure to pretrial publicity to identify precisely *what* they had read, seen, or heard. The majority answers this question in the negative. According to the majority, the trial court need ask no more of a prospective juror who has admitted exposure to pretrial publicity than whether that prospective juror views himself as impartial. Our cases on juror bias, the majority asserts, have never gone so far as to require trial courts to engage in so-called "content questioning," and to impose such a requirement would prove unduly burdensome to the administration of justice. I cannot accept this analysis." *Id.* at 430. The dissent argues that when presented with facts similar to *Mu'Min*, courts are essentially ordered by the Sixth Amendment to take reasonable precautions to prevent the spillover of pre-trial prejudice into the sitting jury at trial and that content questioning is a reasonable tool that courts should utilize. *See id.* at 441.

57. *See id.* at 440.

about the case would have better served to prevent actual prejudice.

First, content questioning is necessary to determine whether the type and extent of the publicity to which a prospective juror has been exposed would disqualify the juror as a matter of law... Second, even when pretrial publicity is not so extreme as to make a juror's exposure to it *per se* disqualifying, content questioning still is essential to give legal depth to the trial court's finding of impartiality. One of the reasons that a "juror may be unaware of" his own bias... Third, content questioning facilitates accurate trial court fact-finding. As this Court has recognized, the impartiality "determination is essentially one of credibility."<sup>58</sup>

The holding in *Mu'Min* seemed to take a step back from the "reasonable likelihood of prejudice standard" set forth in *Sheppard*.<sup>59</sup> The Court in *Sheppard* followed the drastic remedy of overturning a conviction based on similar circumstances of pre-trial publicity.<sup>60</sup> To prevent the imposition of such a remedy in the future, the *Sheppard* Court demanded that courts actively take all necessary steps to prevent the spillover of pre-trial prejudice into the trial.<sup>61</sup> With facts similar to *Sheppard* in terms of the spread pre-trial publicity, the decision in *Mu'Min* has seemed to cut back the ability of courts to find presumptive prejudice under the pre-trial "circus-like" atmosphere rationale for finding prejudice.<sup>62</sup> According to some, the decision muddies the requirements of *Sheppard* by allowing the jury in *Mu'Min* to

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58. *Id.* at 440-43 (citing *Patton v. Yount*, 467 U.S. 1025, 1031 (1985)).

59. *See Sheppard*, 384 U.S. at 350.

60. *See id.* (reasoning fundamental rights of defendant conviction must be overturned because of fundamental fairness).

61. *See id.*

62. *Mu'Min*, 500 U.S. at 444; *see Coffey, supra* note 25, at 638 (arguing *Mu'Min* decision made impossible standard for plaintiffs to show presumptive pre-trial prejudice).

sit even though there had been evidence of actual exposure to biased news coverage.<sup>63</sup>

Even prior to trial courts have a role in shaping the pre-trial coverage of cases under their jurisdiction, particularly when it comes to the release of court information to the press.<sup>64</sup> In the United States, the courts must balance the press's rights to report information to the public against the Sixth Amendment rights of a criminal defendant.<sup>65</sup> When the press seeks to report an aspect of an ongoing investigation or indictment, for example by publishing the results of a suspect's polygraph test, the general rule is biased towards the protection of the defendant.<sup>66</sup> However, the press is generally allowed to report on items that are part of the public record because they are created by a public agency. For example, the press can generally publish police reports under what has been deemed the "Fair Report Privilege."<sup>67</sup> While the press has a right to report on information generated by public sources as long as it serves the public interest, courts will still review such material to ensure that the particular form and content of such information will not be prejudicial to the defendant.<sup>68</sup>

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63. See *Mui'Min*, 500 U.S. at 444; Coffey, *supra* note 25, at 638.

64. See *Delisle*, 161 F.3d at 374.

65. See *id.*

66. See *id.* at 374; *Belo*, 654 F.2d at 428-29 (1981) (discussing press has no general right of access to courts); *United States v. Eaves*, 685 F. Supp. 1243, 1245 (N.D. Ga. 1998) (holding that it would be a bias towards a fair trial of the defendant unless there is an overwhelming public need for information; *United States v. Megahed*, 546 F. Supp. 2d 1299, 1300 (M.D. Fla. 2008) (reasoning courts ought to err generously on side of defendant when releasing information to press).

67. See *Reuber v. Food Chemical News, Inc.*, 925 F.2d 703, 712 (4th Cir. 1991). "[The] fair report privilege shields news organizations from defamation claims when publishing information originally based upon government reports or actions." *Id.* See also *Jones v. Garner*, 158 S.E.2d 909, 913 (S.C. 1968) (holding same); *White v. Wilkerson*, 493 S.E.2d 345, 348 (S.C. 1997) (holding same).

68. See *United States v. Megahed*, 546 F. Supp. 2d 1324, 1326 (M.D. Fla. 2008) (holding release of video tape of defendant traffic stop may be more prejudicial than transcript). The court in *Megahed* had been approached by the local television news station for the release of tapes of the traffic stop, which were not part of the evidence at trial, but were recorded by the police and were thus part of the public record. *Id.* The court weighted the possible

In *Nebraska Press Association v. Stuart*,<sup>69</sup> the Supreme Court dealt with the issues of court control over news media coverage prior to trial. In *Stuart*, the Court dealt with a pre-trial motion sought by the defendant in a murder case in the small town of Sutherland, Nebraska, which had a population of around 850 people.<sup>70</sup> The defendant was charged with murdering a family of five within the county and was arraigned in the district surrounding the town.<sup>71</sup> Due to the heinous nature of the crime and the size of the town where the crime occurred, the case became a sensation in the local press.<sup>72</sup> As the case advanced to trial, the defendant moved for the court to restrict the press's access to any information which the court had in its possession, including an alleged confession that the police collected from the suspect, medical testimony of experts at grand jury, and any evidence of the ongoing police investigation or facts of the crime scene.<sup>73</sup>

The defendant argued that the release of any of this information would damage his rights to a fair trial and would taint any possible jury pool.<sup>74</sup> The lower court allowed the pre-trial suppression order reasoning that the balancing of the defendant's Sixth Amendment fair trial rights outweighed the

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bias against the defendant due to the release of the tapes, noting the sensation that could be caused by the presentation of video of the defendant to the jury pool, so close to trial. *Id.*

69. 427 U.S. 539 (1976).

70. *See id.* at 540.

71. *See id.*

72. *See id.*

73. *See id.* at 544. The lower court allowed the defendant's pre-trial motion to prohibit news access to reporting on the case. *Id.* The motion "specifically applied only until the jury was impaneled, prohibited petitioners from reporting five subjects: (1) the existence or contents of a confession Simants (defendant) had made to law enforcement officers, which had been introduced in open court at arraignment; (2) the fact or nature of statements Simants (defendant) had made to other persons; (3) the contents of a note he had written the night of the crime; (4) certain aspects of the medical testimony at the preliminary hearing; and (5) the identity of the victims of the alleged sexual assault and the nature of the assault. It also prohibited reporting the exact nature of the restrictive order itself. Like the County Court's order, this order incorporated the Nebraska Bar-Press Guidelines. Finally, the order set out a plan for attendance, seating, and courthouse traffic control during the trial." *Id.* (parentheses added).

74. *See id.*



news media's first amendment right to report the facts. The court further reasoned that the press has no general right to report on the trial.<sup>75</sup> The prohibitive ruling was fairly broad and very restrictive, with the lower court holding that the nature of the coverage and the local hysteria would likely prejudice the jury pool unless the court could control the reporting.<sup>76</sup> In order to accomplish its goals in light of the facts of the case and the way the case was being reported, the court issued an extremely strict prohibition restricting the press from publishing any material that could inculcate the defendant.<sup>77</sup> Members of the press that sought the release of such information appealed the ruling as prior restraint on free speech which went to the Supreme Court.<sup>78</sup>

The Supreme Court held that the lower court applied the appropriate test in balancing the Sixth Amendment rights of the criminal defendant against the press's First Amendment right to report on public matters and further urged that that the test be biased in favor of protecting the defendant.<sup>79</sup> However, the Court found that the imposition of a strong press restriction was an improper restraint on free speech.<sup>80</sup> The Court erred on the side of the First Amendment reasoning that the danger of restraining the press is so great that courts should take procedures short of general prohibitions.<sup>81</sup> These procedures should include a

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75. *See Stuart*, 427 U.S. at 612.

76. *See id.* at 552 (reasoning nature of crime and size of town created reasonable possibility of prejudice particularly where accounts of reports contained prejudicial information such as possible confessions).

77. *See id.* at 546. The Supreme Court ruled that this language made the prohibition an unconstitutional prior restraint on the free speech rights of the press. *See id.* The ruling was not closed however, and only turned on the facts of this case in particular, while leaving open the possibility that such a broad ruling could be appropriate. *See id.* at 544 (reasoning broad prohibition inappropriate upon facts which lower court based decision).

78. *See id.* (describing procedural history of case).

79. *See id.* at 539-40.

80. *See id.* at 543-44. The Supreme Court held that the restriction was too broad so as to prevent the reporting of even legitimate stories within the public interest and domain. *Id.* at 545. The danger of pre-trial prejudice should be lessened by the imposition of other procedural safeguards like change of venue, voir dire or jury instructions to ensure a sitting jury that was not affected by the pre-trial prejudice. *See id.* at 546.

81. *See Stuart*, 427 U.S. at 544 (noting importance of procedural safeguards

change of venue, a delay of the trial, or strict jury instructions to prevent the pretrial media coverage from spilling over into jury deliberations.<sup>82</sup> The Court further held that if prohibition was necessary it must not be so broad as to create a prior restraint on free speech.<sup>83</sup> Instead, the prohibition should be narrowly directed to prohibit the presentation of facts and content that will more likely than not create prejudice.<sup>84</sup>

Although the majority of United States courts have described a weighted interest towards protecting the rights of the criminal defendant over the rights of the press, a comparison of the practice by U.S. and British courts reveals a greater bias towards the press.<sup>85</sup> While the American system allows for a balancing of the rights of the press to access information, the British system assumes prejudice resulting from press coverage of criminal trials and strictly sanctions and limits the press's access to any court information.<sup>86</sup> The decision in *Mu'Min* also indicate that in practice United States courts do not actually seek to limit jurors' access to news reports about the case by refusing to allow content based voir dire.<sup>87</sup> In observing the practice of the U.S. courts in comparison with how the British courts deal with pre-trial publicity, the United States balancing approach may actually allow more prejudicial press coverage of criminal trials than it claims.<sup>88</sup>

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to protect defendants' fair trial rights).

82. *Id.*

83. *See id.* at 561.

84. *See id.* at 566.

85. *See* Joanne Armstrong Brandwood, *You Say Fair Trial and I Say Free Press: British and American Approaches to Protecting Defendants Rights in High Profile Trials*, 75 N.Y.U. L. REV. 1412, 1414 (2000) (discussing different approaches by U.S. and British courts to allowing information to the press); *see also* *Stuart*, 427 U.S. at 346 (discussing high standard when retracing free press to protect defendants Sixth Amendment rights due to fear of prior restraint).

86. *Id.* at 1421-22.

87. *Id.* at 1427 (arguing court's only superficially guarantee defendant's freedom from pre-trial circus like atmosphere). Brandwood argues that if the facts of *Mu'Min* could not meet *Sheppard* standard of reasonable risk of pre-trial prejudice, argument for pre-trial prejudice by the press is an impossible claim to make. *See id.*

88. *Id.* at 1427-29 (discussing practical bias of U.S. courts to press access as

In the alternative to the “pre-trial circus” argument, the criminal defendant may argue that the jurors are actually prejudiced. Actual prejudice is proven through voir dire of potential jurors where the judge could reasonably conclude that the juror is unable to set aside his preexisting beliefs and assumptions and judge the case based upon its merits.<sup>89</sup> A finding of actual prejudice is based upon a case-by-case examination of the access the jury pool had to prejudicial media content, the nature of their own personal exposure to the media, and whether they formed any opinion on the case.<sup>90</sup> However, in practice the rule is rather loose in that it does not demand the potential juror be a “clean slate,” but only that he or she demonstrates the ability to reasonably set aside any preconceived conclusions on the case at bar.<sup>91</sup>

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opposed to protection of defendant’s rights).

89. See *Mu’Min*, 500 U.S. at 444 (noting that court could reasonably determine juror non prejudice if responds able to set aside preconceived notions even in case with massive publicity); *Dowd*, 366 U.S. at 722 (reasoning juror voir dire meant to ensure juror can reasonably set aside prejudice before trial); *Dobbert*, 432 U.S. at 310 (holding despite amount of coverage on trial jurors affirmative response of ability to set aside prejudice sufficient). Note that while these cases dealt in an age with significantly greater press access and press coverage, the basis of determining actual prejudice in almost exactly the same language was used by Chief Justice Marshall in the trial of Aaron Burr, *archived at* <http://www.webcitation.org/5owWIsQqs> (showing that Marshall reasoned jurors must be able to set aside preconceived notions determined on voir dire to protect trial integrity).

90. See *Sheppard*, 383 U.S. at 343 (encouraging review of news media); *Dowd*, 366 U.S. at 727 (actual prejudice is shown through a thorough voir dire of the jurors).

91. See *supra* note 89; *Mu’Min*, 500 U.S. at 426 (reasoning jurors ability to set aside preconceived notions protects fair trial right when shown on voir dire that juror had been exposed to coverage of trial); see, e.g., *Campa*, 459 F.3d at 1126; *Riley v. Taylor*, 277 F.3d 261, 300 (3d Cir. 2001) (noting no actual prejudice even if sitting jurors read news regarding defendant when on voir dire stated they could set aside pre-conceived notions); *Bailey*, 112 F.3d at 769-70 (identifying no actual prejudice despite jury’s exposure to pre-trial publicity because judge conducted thorough voir dire and excused each juror whose opinion or inclination showed inability to render fair and impartial verdict); *United States v. Smith-Bowman*, 76 F.3d 634, 637 (5th Cir. 1996) (stating no actual prejudice despite extensive pre-trial publicity because judge conducted voir dire and, of ten venire persons exposed, each denied bias); *Foley*, 488 F.3d at 387 (clarifying no actual prejudice in murder trial despite extensive media coverage linking defendant to crime because two years passed since initial investigation and juror responses to questioning reflected passage of time); *United States v. Gamboa*, 439 F.3d 796, 815 (8th Cir. 2006)

The reason why courts and lawyers agonize over the possibility of jurors being affected by pre-trial prejudicial material is a two-headed monster.<sup>92</sup> First, pre-trial media coverage has the possibility of undercutting the Constitutional protections of defendants. Second, whether pre-trial media influence prejudiced a trial is exceedingly difficult to ferret out post verdict.<sup>93</sup>

The first head of the monster is how pre-trial atmosphere undercuts the fundamental concepts and protections of the American criminal trial system. The cornerstone of the system is that the state has the burden of proving a defendant—who is assumed innocent—guilty by the evidence presented at trial.<sup>94</sup> The possibility that information and opinions generated pre-trial enter the court room undermines this key goal.<sup>95</sup> The deliberative process of the jury is meant to impress upon litigants the finality of the decision rendered. It is critical that litigants understand that the jury's decision depends only upon what was presented at trial.<sup>96</sup>

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(emphasizing no actual prejudice despite pretrial publicity because only one prospective juror had formed opinion and therefore was excused for cause whereas others exposed to publicity declared impartiality); *United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1263 (9th Cir. 1998) (holding no actual prejudice despite exposure to newspaper article relating to case because court polled entire jury and all jurors said article had not influenced decision to convict); *Mills v. Singletary*, 63 F.3d 999, 1009 (11th Cir. 1995) (finding no actual prejudice in capital murder case because defendant failed to show jurors formed opinion of defendant's guilt prior to hearing evidence despite pre-trial publicity including fifteen newspaper articles concerning case).

92. See *supra* note 5.

93. U.S. CONST. amend. VI (stating that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed"); see FED. R. EVID. 606(b). The statute prohibits inquiring into the validity of a jury verdict in a trial except in the circumstances where it is possible that the jury has been impacted by extraneous influences. See *id.*; GEORGE FISHER, *supra* note 93, at 30-36 (2d ed. 2007) (and cases cited therein) (discussing the importance of a valid jury deliberation to have the same effect of finality and fairness as old trials by ordeal).

94. See FISHER, *supra* note 93, at 30-36.

95. See FISHER *supra* note 93, at 30-36.

96. See FISHER, *supra* note 93, at 30-36.

The Supreme Court in *Remmer v. United States* addressed the problem of juries considering evidence not presented at trial by allowing the judge wide discretion in dealing with these issues as they arise prior to verdict.<sup>97</sup> The takeaway from the Supreme Court's ruling in *Remmer* was to allow the judge discretion to determine whether prejudice was created by the jurors having access to evidence not presented at trial.<sup>98</sup> However, courts have had differing approaches to this inquiry. Some automatically presume prejudice by the mere presence of such information, while others seek to determine whether the information in fact prejudiced the deliberative process.<sup>99</sup> When a trial court feels that there has been outside influence, it has the authority to order a post-trial examination of the jurors.<sup>100</sup> The purpose of such a hearing is to question jurors as to both the contact with outside information and to the possible impact of the information

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97. *Remmer v. United States*, 347 U.S. 227, 229 (1954).

98. *Id.* at 230.

99. *See* *Turner v. Louisiana*, 379 U.S. 466, 472 (1965) (holding any information presented to jurors by third parties automatically prejudicial deliberation must be based at information presented at trial); *United States v. Charles*, 94 F.3d 136, 140 (4th Cir. 1996) (announcing any contact of extraneous information is automatically deemed prejudicial); *State v. Boling*, 127 P.3d 740, 741-43 (Wash. App. Ct. 2006) (noting that once juror misconduct is found presumption of prejudice state must show specifically how extraneous evidence is non - prejudicial); *United States v. Williams-Davis*, 90 F.3d 490, 494 (D.C. Cir. 1996) (holding extraneous information must affect the facts of trial in context); *United States v. Warner*, 498 F.3d 666, 668 (7th Cir. 2007) (holding extraneous information must be in context with facts presented at trial to show prejudice result); *Commonwealth v. Rodriguez*, 828 N.E.2d 556, 559 (Mass. App. Ct. 2006) (holding extraneous information must contest issues presented at trial for prejudice); *Whiteside v. Hedge*, No. E2004-02598-COA-R3-CV, 2005 Tenn. App. LEXIS 312, at \*315 (Tenn. Ct. App. May 26, 2005) (holding court must conduct jury investigation to determine affect of extraneous information); *People v. Waddle*, 97 P.3d 932, 933 (Colo. 2004) (holding court must find "reasonable possibility" of improper juror influence with extraneous information); *State v. Howard*, 680 N.W.2d 832, 833-35 (Wis. App. Ct. 2004) (discussing three questions to focus on with jurors to determine prejudice on deliberation due to extraneous information). The court in *Howard* described the three areas to focus on in order to determine the actual prejudicial effect to the deliberative process: first, whether the actual information was in fact extraneous, unrelated to the issue or on point with the issue; two, was the information improperly presented to the jurors; three, was the information itself potentially prejudicial. *Howard*, 680 N.W. 2d at 833-35.

100. *See* FED. R. EVID. 606(b).

on the deliberative process.<sup>101</sup> These post-trial hearings reveal the second head of the monster, which is the difficulty in inquiring into possible juror influence after the verdict has been rendered.<sup>102</sup>

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101. *See id.*

102. *Compare* United States v. Rowe, 144 F.3d 15, 19-20 (1st Cir. 1998) (stating no abuse of discretion in failing to conduct hearing when juror was health care provider to grandmother of defendant's wife, because defendant knew this during trial but did not object until after) *Barry v. Bergen County Probation Dep't.*, 128 F.3d 152, 164-65 (3d Cir. 1997) (discussing no abuse of discretion in failing to conduct voir dire of jury regarding potential exposure to media coverage, because some reports did not refer directly to defendant, and others did not state that defendant convicted of any crime), *cert. denied*, 118 S. Ct. 1097 (1998); *United States v. Hall*, 152 F.3d 381, 421 (5th Cir. 1998) (emphasizing no abuse of discretion in failing to poll jury regarding possible exposure to television news broadcasts during deliberations in penalty phase, because broadcasts did little more than recount procedural posture of case and court repeatedly admonished jury to avoid media coverage); *United States v. Rigsby*, 45 F.3d 120, 125 (6th Cir.) (stating no abuse of discretion in failing to conduct hearing when only problem was possibility that juror knew one or more witnesses and defense did not consider acquaintance with witness serious enough to warrant questioning during voir dire); *United States v. Davis*, 15 F.3d 1393, 1412 (7th Cir. 1994) (holding no abuse of discretion in failing to conduct hearing when juror dismissed then recalled because defendant did not come forward with allegation of taint); *United States v. Cunningham*, 133 F.3d 1070, 1074-75 (8th Cir. 1998) (noting no abuse of discretion in failing to conduct hearing into allegation that juror's husband approached government witness and defense counsel when defendant failed to show that encounter occurred or that it was improper, because all husband allegedly did was tell government witness -- a police officer -- that he knew the officer's father and ask defense counsel when the jury would be finished as he was there to pick up juror wife), *cert. denied*, 118 S. Ct. 1823 (1998); *United States v. Old Chief*, 121 F.3d 448, 451 (9th Cir. 1997) (commenting no abuse of discretion in failing to conduct evidentiary hearing when one juror asked judge question and another juror whispered during jury poll, because question was innocuous and whispering did not imply any improper external influence on jury); *United States v. Davis*, 60 F.3d 1479, 1483 (10th Cir. 1995) (finding no abuse of discretion in failing to conduct hearing when hearing redundant and unnecessary because trial court provided with affidavit detailing alleged incident of jurors' exposure to information concerning trial on television); *and United States v. Quilca-Carpio*, 118 F.3d 719, 722 (11th Cir. 1997) (*per curiam*) (emphasizing no abuse of discretion in failing to conduct evidentiary hearing in drug case when alleged that juror revealed in subsequent voir dire in unrelated case he had friends charged with drug offenses and believed he might be biased, because speculative to assume juror was dishonest in first trial's voir dire), *cert. denied*, 118 S. Ct. 1887 (1998) (noting no abuse of discretion in failing to conduct voir dire of jury in aircraft piracy case when highly publicized commercial airliner crash occurred night after government's closing arguments and prompted media speculation of terrorist involvement because risk of prejudice sufficiently reduced by curative instruction from

With a view to protect the sanctity of deliberations and to prevent a “chilling effect” upon the open nature of juror deliberations, it is exceedingly difficult to inquire post-trial whether jurors were influenced by sources outside of the trial.<sup>103</sup> One of the barriers that a trial court faces in determining whether jurors have been unfairly prejudiced by exposure to extraneous evidence is the difficulty in actually ferreting out the influence.<sup>104</sup> Rule 606(b) of the Federal Rules of Evidence further underlies this difficulty by prohibiting post verdict inquiry into juror deliberations except in the most egregious of circumstances.<sup>105</sup>

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court), *cert. denied*, 119 S. Ct. 90 (1998) with *United States v. Gaston-Brito*, 64 F.3d 11, 13 (1st Cir. 1995) (stating abuse of discretion in failing to conduct investigation when government agent allegedly made hand gesture indicating defendant's involvement in threats against witness' family, because gesture could have been given significant weight by jury); *United States v. Herndon*, 156 F.3d 629, 637 (6th Cir. 1998) (finding abuse of discretion in failing to conduct hearing on whether juror actually knew defendant when foreman of jury sent note to court stating that another juror believed he had dealings with defendant four years prior) and *United States v. Tucker*, 137 F.3d 1016, 1032 (8th Cir. 1998) (holding abuse of discretion in failing to conduct hearing into possible prejudice when defendant, former governor of Arkansas, offered evidence that juror subject to outside influence of her husband—a former state prisoner denied clemency by defendant).

103. See FISHER, *supra* note 93, at 30-36 (discussing need for secret jury deliberations to allow full deliberation of evidence).

104. The court by its officers has no applicable tool for investigating every jury to ensure they have not been influenced by extraneous third-party information. Instead a number of cases show that the court only realizes this situation if a juror actually comes forward and speaks out about it, and, therefore, it is only by luck that this issue actually comes to the court's attention. Cases in which this influence is discussed and the seemingly random situations in which the court has been presented with this evidence show the difficulty of even determining whether a jury has actually been influenced. See *United States v. Warner*, 498 F.3d 509, 510 (7th Cir. 2008) (describing situation where defendant approached defense lawyer out of court to discuss research done by other juror); see also *Waddle*, 97 P.3d at 933 (discussing situation where juror left note on seat describing outside research by other juror); Rick Malwitz, *Mcguire Courtroom Was Fair Game For Up -Close and Personal Blogger*, NEWS TRIB., June 21, 2007 (discussing situation where juror left note in juror box describing research conducted on CourtTV blog).

105. See FED. R. EVID. 606(b). (“Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that of any other juror's mind or emotions as influencing the juror to assent or dissent from the verdict or indictment or concerning the juror's mental process in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information

was improperly brought to the jury's attention, (2) whether any outside influence was improperly brought to bear upon any juror...."); In *Tanner v. United States*, 483 U.S. 107 (1987), the Supreme Court held that juror testimony regarding drug and alcohol use by jurors during trial was barred by Rule 606(b) at a hearing to determine influences, and, moreover, an additional hearing at which jurors would testify as to their conduct was not required by the Sixth Amendment right to trial by a competent and unimpaired jury. *Id.* at 125-27. The Court found that the defendant's right to a fair trial was adequately protected by voir dire, the court personnel's observation of the jurors and the availability of a hearing to impeach the verdict based on non-juror testimony. *Id.* at 127. The Court concluded that substance use was "no more an 'outside influence' than a virus, poorly prepared food, or a lack of sleep." *Id.* at 122. Compare *United States v. Gilsenan*, 949 F.2d 90, 96 (3d Cir. 1991) (finding juror affidavit alleging prejudicial effect of media coverage admissible under Rule 606(b) because juror excused before deliberations), *Herndon*, 156 F.3d at 636 (holding juror's recollection during deliberations that juror may have had prior business dealings with defendant would have been admissible had court conducted inquiry under Rule 606(b) because it was evidence of extraneous influence on juror), *United States v. Berry*, 92 F.3d 597, 601 (7th Cir. 1996) (emphasizing juror testimony regarding exposure to unauthenticated transcript of telephone conversation admissible under Rule 606(b) because judge did not question jurors as to effect of extraneous evidence on their decisions), *United States v. Brown*, 108 F.3d 863, 867 (8th Cir. 1997) (stating juror testimony regarding codefendant's guilty plea and payment of fines admissible under Rule 606(b) to the extent it revealed extrinsic information considered by the jury), *United States v. Maree*, 934 F.2d 196, 201 (9th Cir. 1991) (noting juror declarations disclosing conversations with friends regarding evidence in case and their opinions as to correct outcome admissible under Rule 606(b) because they factually explained outside influence and information presented to juror), *United States v. Dempsey*, 830 F.2d 1084, 1092 (10th Cir. 1987) (discussing deaf juror testimony about interpreter's participation in deliberations admissible under Rule 606(b) because testimony limited to possible instance of improper behavior), and *United States v. Williams-Davis*, 90 F.3d 490, 501-02 (D.C. Cir. 1996) (stating juror affidavits alleging exposure to extrinsic influences admissible under Rule 606(b) because trial court did not examine jurors directly on issue of impartiality), *cert. denied*, 117 S. Ct. 986 (1997) with *Bibbins v. Dalsheim*, 21 F.3d 13, 15-17 (2d Cir. 1994) (finding juror affidavit recounting how another juror's disclosure of extra-record information affected thinking and voting of individual jurors not admissible under Rule 606(b) because affidavit related to effect on jurors' mental processes and jury's deliberations), *United States v. Acker*, 52 F.3d 509, 516 (4th Cir. 1995) (excusing juror's affidavit in support of defendant's claim that excused juror would have held out for acquittal not admissible under Rule 606(b) absent showing of any extraneous prejudicial influence on jury), *Pyles v. Johnson*, 136 F.3d 986, 992 (5th Cir.) (discussing juror affidavit that she made unauthorized visit to crime scene and only then was convinced of defendant's guilt not admissible under Rule 606(b) because affidavit strictly mental conclusions), *cert. denied*, 118 S. Ct. 2338 (1998), *United States v. Elder*, 90 F.3d 1110, 1130 (6th Cir. 1996) (holding juror notebooks not admissible under Rule 606(b) to determine whether jurors aware of extraneous evidence contained in exhibit list because notebooks contained juror thought processes, comments and calculations), *United States v. Muthana*, 60 F.3d 1217, 1223 (7th Cir. 1995)



Due to the danger of jurors not basing their deliberation upon evidence presented at trial and the difficulty of ferreting out such instances during the trial, the court is obligated to prevent such evidence from reaching jury.<sup>106</sup> The court is therefore obligated to observe the actual media coverage, including dates of publication, content, and its availability to the jury pool prior to trial.<sup>107</sup> The court may be empowered to take steps such as a polling of the district to determine exposure to the case along with other issues to determine prejudice.<sup>108</sup> The court also maintains the traditional methods of preventing extraneous evidence from entering trial including voir dire, jury instructions, change of venue, or sequestering.

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(concluding juror post-verdict comments expressing confusion over jury instruction not admissible under Rule 606(b) absent allegation that extraneous influence prejudiced jury), *United States v. Tran*, 122 F.3d 670, 673 (8th Cir. 1997) (finding juror affidavits that defendant's failure to testify discussed outside of court not admissible under Rule 606(b) because discussion between jurors cannot be labeled extraneous information), and *McDowell v. Calderon*, 107 F.3d 1351, 1367-68 (9th Cir. 1997) (noting juror declaration reflecting belief about consequences of death sentence and motive in voting for it inadmissible under Rule 606(b) because admission would authorize "constant attempts to undermine jury verdicts through the scrutiny of the juror's thoughts and deliberations" (quoting *Silagy v. Peters*, 905 F.2d 986, 1009 (7th Cir. 1990))).

106. See *supra* notes 25 and 38; see *Sheppard*, 383 U.S. at 333 (discussing court's affirmative duty to prevent pretrial prejudicial media coverage from spilling into trial); 21A AM.JUR.2D *Criminal Laws* § 994 (2008) (demanding judge actively seek to prevent prejudice from pretrial exposure to news from spilling into sitting jury).

107. See *Marshall v. United States*, 360 U.S. 310, 313 (1959) (reasoning court must review media coverage to ensure that evidence not presentable at trial did not reach the jurors through some other means); see also *Murphy*, 421 U.S. at 802; see also *Dowd*, 366 U.S. at 725-26 (reasoning examination of current common thought patterns in a district is indicated by a review of current news-media); see also *Sheppard*, 383 U.S. at 350 (holding court must review all media coverage); see also *Foley*, 488 F.3d at 381 (reasoning court must review all prevailing media); see *Studebaker & Penrod*, *supra* note 25, at 429-33 (reviewing all prevalent media coverage in the *McVeigh* case by the district court to determine possible jury exposure to prejudicial pre-trial media). In the *McVeigh* trial, the judge focused on the timing of the reports, the content of the report and whether the reports contained salacious material or possible discussions on the guilt or innocence of the defendant. *Studebaker & Penrod*, *supra* note 25, at 433.

108. See *Campa*, 459 F.3d at 1132-33 and cases therein cited (reasoning that professor conducted survey of jury pool district appropriate way to determine prejudice); see generally *Studebaker & Penrod*, *supra* note 25, (advocating polling of relevant jury pool districts).

A direct defense against pre-trial prejudice affecting the deliberation of a criminal jury is the voir dire of potential jurors to determine their exposure to the facts of the case and their ability to set aside any preconceived judgment prior to trial.<sup>109</sup> The process of voir dire varies from court to court, and there is no general set in stone requirement of questions that must be asked by any court.<sup>110</sup> An attorney may motion the court for a more extensive voir dire of the potential jurors, or motion to submit specific questions or for an attorney-led voir dire.<sup>111</sup> The

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109. See *supra* notes 89-91 (and related discussion discussing voir dire as protection against actual prejudice).

110. The trial court has broad discretion over the content and focus of voir dire, including whether the court or the lawyers conduct voir dire and what questions will be asked. See *United States v. Mislal-Aldarondo*, 478 F.3d 52, 60 (1st Cir. 2007) (finding no abuse of discretion when trial judge denied further expansion of voir dire when judge did thorough job of probing for bias and defendant failed to prove he was prejudiced by decision); *United States v. Lawes*, 292 F.3d 123, 130-31 (2d Cir. 2002) (stating no abuse of discretion during voir dire when trial judge refused to question jurors about biases favoring police officers because court's voir dire and jury instructions communicated inappropriateness of such bias); *Kontakis v. Beyer*, 19 F.3d 110, 118 (3d Cir. 1994) (holding no abuse of discretion for trial court to conduct voir dire by way of written questionnaire completed by prospective jurors out of presence of counsel and court, because trial court questioned potential jurors orally, defense counsel had ample opportunity to submit questions, and defense counsel failed to exhaust peremptory challenges); *United States v. You-Tsai Hsu*, 364 F.3d 192, 203-04 (4th Cir. 2004) (holding no abuse of discretion when judge refused to put specific question to potential jurors, because information question would elicit had already been obtained through jury examination form and 6 other questions asked by court); *Collier v. Cockrell*, 300 F.3d 577, 583-84 (5th Cir. 2002) (emphasizing no abuse of discretion when trial court refused to allow defendant in capital case to ask jurors about Texas parole laws, because defendants in capital cases have no right to ask about Texas parole law); *United States v. Guzman*, 450 F.3d 627, 629-30 (6th Cir. 2006) (reasoning no abuse of discretion when trial court questioned potential jurors about previous experiences with guilty criminal defendants, because not directly related to defendant and jurors affirmed ability to be impartial). Either the court or the attorneys are allowed to conduct voir dire. FED. R. CRIM. P. 24(a) (The court may examine prospective jurors or may permit the attorneys for the parties to do so).

111. See *Mu'Min*, 500 U.S. at 424 (stating the attorney petitioned court for voir dire questions to determine the exact coverage potential jurors saw in relation to trial); *Rosales-Lopez v. United States*, 451 U.S. 182, 189 (1981) (finding the attorney petitioned court to use questions based on potential racial bias presented in media) see also *Hamling v. United States*, 418 U.S. 87, 139-40 (1974) (holding the attorney petitioned court to ask specific questions submitted by defendants regarding possible effect of jurors' educational, political, and religious biases, because court's general inquiry into jurors' views concerning obscenity sufficient to uncover bias). The refusal issue of

standard for determining the sufficiency of voir dire is whether a reviewing court can reasonably find that the nature and extent of questioning was sufficient in the context of the case to let the lower court believe that jurors could and would set aside their possible prejudice.<sup>112</sup>

In a high profile trial with extensive media coverage, a court may, as it is encouraged to do by the holding of *Sheppard*, inquire as to the potential jurors' exposure to media concerning the trial.<sup>113</sup> It is further within the court's discretion to allow specifically worded questions directed at jurors to determine the nature of their exposure to such media coverage.<sup>114</sup> These questions, also known as "content questions," are meant to get not only at the general exposure of the witness to pre-trial media coverage, but more specifically at the nature of the coverage to which the jurors were exposed.<sup>115</sup> Content questioning has been argued to act as a better gauge for the likelihood of whether a particular juror, when exposed to the particular piece of information, can honestly deliberate on a case without prejudice.<sup>116</sup> Courts however, are at times unwilling to allow the length of court time required for such searching voir dire.<sup>117</sup> The Supreme Court's opinion in *Mu'Min* may be an indicator of a

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these particular questions prompted by the attorneys is within the wide discretion of the court and is reviewed only on an abuse of discretion. *Mu'Min*, 500 U.S. at 424; *Rosales-Lopes*, 451 U.S. at 189; *Hamling*, 418 U.S. at 139-140.

112. See *supra* notes 89-91 (and related discussion).

113. *Sheppard*, 383 U.S. 340 (holding that court must actively seek through voir dire the juror's exposure to pre-trial media coverage). The *Sheppard* court was so concerned about the future courts not utilizing procedural safeguards to prevent prejudicial effect of pre-trial media coverage that the court reversed *Sheppard's* conviction.

114. The court has wide discretion in voir dire in general, and in allowing or not allowing content based questions or other special questions asked for by the attorneys. See *supra* notes 110-111 and related discussion.

115. See *Mu'Min*, 500 U.S. at 425 (and cases there in cited describing the nature and precedent for content based voir dire questions); see *Coffey*, *supra* note 25, at 638 (describing precedent for content based voir dire questions).

116. See *Mu'Min*, 500 U.S. at 436 (discussing need for content questioning).

117. See *id.* at 430 (denying content based voir dire partially because the time constraints it imposed).

court's willingness to pull back from the processes of a searching voir dire.<sup>118</sup>

Once the jury is selected and is sitting at trial, the next safeguard a court may use to prevent pre-trial prejudice in the media from spilling over into the trial is a comprehensive jury instruction.<sup>119</sup> The judge is empowered to instruct the jury not only on the law they are to be considering, but also to command the jury to only consider the facts presented at trial, in the Internet age most courts encourage jurors not to conduct any Internet research on their own.<sup>120</sup> While instructions are given from the bench in an ad-hoc fashion, either proactively or reactively to issues that arise in the course of trial, pattern instructions have been developed as a guide for judges to promote uniformity in dealing with common trial issues.<sup>121</sup> In order to promote efficiency and to prevent post verdict inquiries, the Supreme Court has set out the rule that jury instructions are presumed to be followed unless there is an "overwhelming possibility" that the jury ignored those instructions.<sup>122</sup>

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118. *See id.*

119. *See supra* notes 102-103. The dissent in *Mu'Min* demonstrated three reasons for content based voir dire, as a valid and useful protection for the rights of criminal defendants:

First, content questioning is necessary to determine whether the type and extent of the publicity to which a prospective juror has been exposed would disqualify the juror as a matter of law.... Second, even when pretrial publicity is not so extreme as to make a juror's exposure to it *per se* disqualifying, content questioning still is essential to give legal depth to the trial court's finding of impartiality. One of the reasons that a "juror may be unaware of" his own bias.... Third, content questioning facilitates accurate trial court fact finding. As this Court has recognized, the impartiality "determination is essentially one of credibility.

*Mu'Min*, 500 U.S. at 344.

120. The following cases are examples where the court admonished jurors to generally not access the Internet to look up any law or facts alleged in the cases, but where that instruction was ignored. *United States v. Martinez*, 543 F.3d 509, 519 (7th Cir. 2008); *Commonwealth v. Rodriguez*, 832 N.E.2d 556, 559 (Mass. App. Ct. 2005); *Whiteside*, 2005 Tenn. App. LEXIS 312, at \*312; *Waddle*, 97 P.3d at 933; *Howard*, 680 N.W.2d at 834.

121. *See* HON. LEONARD B. SAND JOHN S. SIFFERT WALTER P. LOUGHLIN, STEVEN A. REISS, STEVEN W. ALLEN HON. JED S. RAKOFF, L. SAND, *ET AL.*, MODERN FEDERAL JURY INSTRUCTIONS-CRIMINAL. § 2.01 (1st ed. 2003) (describing emphasis jurors must have for considering evidence at trial).

122. *See e.g.*, *Penry v. Johnson*, 532 U.S. 782, 799 (2001); *Richardson v.*

The concept of jury instructions creates an intellectual hurdle that has been addressed by several authors who have combined social science based studies with legal procedure to determine the actual effectiveness of jury instructions.<sup>123</sup> These studies apply classic social science methods of polling and surveying, as well as exposing groups of people to “mock trial sessions” where the pre-trial information can be controlled, in order to determine the actual reach of pre-trial press, its impact and whether that impact creates prejudice.<sup>124</sup> Similar experiments done by polling and mock trials have been used to analyze the curative effects of instructions to jurors who had been exposed to pre-trial media.<sup>125</sup>

The results of such tests have first revealed that most potential jurors are at least aware of a case prior to seeing it at trial by virtue of pre-trial media.<sup>126</sup> Second, polls of potential jurors in areas where a trial is scheduled have revealed a general pro-prosecution if not pro-culpability bias which has been further supported by mock trial scenarios where researchers can control the nature and amount of press to which a potential juror is exposed.<sup>127</sup> Third, similar studies and tests revealed that, depending on whether the nature of the pre-trial coverage is “emotional” or “factual,” potential jurors may retain such prejudice generated by the coverage for differing lengths of time after exposure.<sup>128</sup> Finally, such tests reveal a fundamental contradiction between human thought formation and the effectiveness of court instructions.<sup>129</sup>

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Marsh, 481 U.S. 200, 211(1987); *see also* United States v. McClinton, 135 F.3d 1178, 1189 (7th Cir. 1998). This presumption is overcome only if there is an “overwhelming possibility” that the jury was unable to follow the instructions. Greer v. Miller, 483 U.S. 756, 767 n.8 (1987).

123. *See* Studebaker & Penrod, *supra* note 25, at 430.

124. *See* Studebaker & Penrod, *supra* note 25, at 430.

125. *See* Studebaker & Penrod, *supra* note 25, at 430.

126. *See* Studebaker & Penrod, *supra* note 25, at 430.

127. *See* Studebaker & Penrod, *supra* note 25, at 430.

128. *See* Studebaker & Penrod, *supra* note 25, at 428 (describing approaches to applying social science studies to determine effect of jury instructions and procedures).

129. *See* Studebaker & Penrod, *supra* note 25, at 430.

Authors Christina Studebaker and Stephen Penrod in their work, *Pretrial Publicity: The Media, The Law and Common Sense*, broadly review the history of polling and mock trial tests to determine whether a trend could be discerned as to what type of media reaches jurors pre-trial and how that media in fact effects these potential jurors.<sup>130</sup> A traditional method employed by a number of tests in this area is the polling of potential jurors within a potential jury pool in an area where a large criminal trial is scheduled to take place.<sup>131</sup> In general, these polling tests revealed that in areas where a large trial was scheduled to take place, a majority of potential jurors were exposed to and familiar with the facts of the case.<sup>132</sup> The further results of these polls were that those jurors who expressed familiarity with the case also expressed a general pro-prosecution bias or had some conviction about the culpability of the defendant.<sup>133</sup>

Polling results further showed a difference in the impact and retention time of media depending on whether such media could be classified as “emotional” or “factual.”<sup>134</sup> The studies analyzed by Studebaker and Penrod defined “emotional” media

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130. See Studebaker & Penrod, *supra* note 25, at 430.

131. See Studebaker & Penrod, *supra* note 25, at 433-35 (describing study by Simon and Menemnet used telephone polling to interview residents of the district where murder trial was to be held. See Studebaker & Penrod, *supra* note 25, at 433-35. The study showed over 80% of those polled had been exposed to and knew about the case and its issues due to pretrial media coverage. See Studebaker & Penrod, *supra* note 25, at 433-35. Studebaker and Penrod cited similar studies from 1970's to early nineties, where polled districts showed majority of residents were exposed to the facts of cases scheduled for trial. See Studebaker & Penrod, *supra* note 25, at 433-35.

132. See Studebaker & Penrod, *supra* note 25, at 433-35.

133. See Studebaker & Penrod, *supra* note 25, at 439 (noting phone study by Moran and Cutler showing that those jurors exposed to facts of case in media also likely to have pro culpability bias); see also Lieberman & Arndt, *supra* note 41, at 681 (describing pro culpability bias shown in interview studies of potential jury pools as a trend since mid-nineties). As a part of their analysis and rationale for the pro-culpability bias, Liberman and Arndt cite the spread of twenty-four hour cable news as increasing the exposure of individuals even remotely interested in a case to an enormous range of information. Lieberman & Arndt, *supra* note 41, at 682. The rehashing of such information leads to the creation of a pro-culpability bias. Lieberman & Arndt, *supra* note 41, at 682.

134. See Studebaker & Penrod, *supra* note 25, at 437-38 (describing difference in impact of emotional coverage vs. factual coverage of cases in pre-trial news media).

coverage as coverage focusing primarily upon the more human elements of the story surrounding the trial, such as the details of the crime, victim, or statements made by the victim's family.<sup>135</sup> "Factual" media coverage, on the other hand, would focus more on elements concerning the investigation of the crime and would include things such as possible confessions and discussions of the strength of evidence.<sup>136</sup> Polling and mock trial tests by researchers revealed that where jurors had been exposed to pre-trial emotional media coverage, their ability to recall such information lasted longer than when that information was factually based.<sup>137</sup> Furthermore, these tests revealed that the exposure to emotional or visceral pre-trial information was more likely to negatively affect the jurors' deliberative process at trial since it generally created a pro-culpability bias.<sup>138</sup>

Mock trial studies and an application of existing prevalent socio-psychological theories have also developed the study of whether court-enforced jury instructions are effective in limiting the effect of pre-trial prejudice.<sup>139</sup> The common setup of these mock trial studies is to expose the jurors to news reports created about the case.<sup>140</sup> These false reports contained factual

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135. See Studebaker & Penrod, *supra* note 25, at 437-38.

136. See Studebaker & Penrod, *supra* note 25, at 437-38.

137. See Studebaker & Penrod, *supra* note 25, at 439 (discussing results from mock trial studies and polling of jury pools months after presentation of emotionally based evidence).

138. See Studebaker & Penrod, *supra* note 25, at 440 (reasoning that factually based information gives jurors impression of certainty).

139. See Lieberman & Arndt, *supra* note 41, at 678-79 (discussing the nature of mock trials as an element of social study experimental approach to testing effectiveness of court procedures); see Studebaker & Penrod, *supra* note 25, 442-44 (discussing development of standards for mock trial based studies).

140. See Lieberman & Arndt, *supra* note 41, at 699-701 (discussing setup of mock trial studies). In a typical mock trial study, the test subjects are told basic facts about the case and then are exposed to fabricated reports which include elements of coverage known to cause prejudice, such as recommendations of guilt or innocence, gory details of crime, false facts or evidence that would not be introduced at trial. Lieberman & Arndt, *supra* note 41, at 699-701. The subjects are then subjected to voir dire about the information they received then allowed to sit at the mock trial. Lieberman & Arndt, *supra* note 41, at 699-701. A popular tactic is to exclude evidence that was included in the media coverage to the extent that the evidence presented at trial would not warrant conviction. Lieberman & Arndt, *supra* note 41, at 699-701. Post trial the juries can be interviewed as to what elements of the

information about the pending case and the defendant's prior criminal history. The false reports included assessments of the weight of evidence and the possibility of confession, as well as reports about the victim's family or the grisly nature of the crime.<sup>141</sup> At the outset of the trial, jurors were instructed by the court to ignore any of these reports and judge the case based on the facts presented at trial.<sup>142</sup> The mock trial jurors were presented with evidence that was detailed in pre-trial reports, but, being inadmissible in court, was not otherwise presented during trial.<sup>143</sup> These mock trial studies generally showed that instructions to disregard pre-trial publicity were ignored.<sup>144</sup>

The explanation that pervades many of these studies on the effectiveness of jury instructions is based on the psycho-sociological analysis of the way in which individuals process and react to information. Researchers and authors in this area have indicated that one of the chief difficulties with prejudicial pre-trial information is that the human beings are naturally inclined to pre-judge when processing information.<sup>145</sup> These researchers theorize that humans are naturally inclined to take small amount of information and make quick judgments; deliberation itself is an unnatural process; and therefore the impact of pretrial

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case swayed their deliberation at trial, to determine actual effect of pre-trial news coverage. Lieberman & Arndt, *supra* note 41, at 699-701

141. See Lieberman & Arndt, *supra* note 41, at 699-701.

142. See Lieberman & Arndt, *supra* note 41, at 699-701.

143. See Lieberman & Arndt, *supra* note 41, at 699-701.

144. See Lieberman & Arndt, *supra* note 41, at 683-85 (discussing trend in mock trial studies showing both the difficulty of jurors to understand or obey instructions).

145. See Lieberman & Arndt, *supra* note 41, at 601-07 (reasoning natural inclination for human psyche to pre-judge based on evolutionary progression). Lieberman also notes that jury instructions and traditional court procedures for limiting the impact of prejudicial out of court information, due to fundamental differences in jurors comprehension and reasoning skills based on age, gender, and education. *Id.* at 618; Lieberman & Arndt, *supra* note 41, at 683-85 (noting studies where most jurors in fact utilized prejudicial information after stating that they could judge impartially). The study by Lieberman and Arndt, focuses on the ways in which the modern twenty-four hour news – cycle and how that exacerbates natural inclination of individuals to pre-judge. *Id.* at 679-83; see Studebaker & Penrod, *supra* note 25, at 446 (discussing studies denoting difficulty of jurors to comprehend and adhere to jury instructions).



prejudice could never actually be eliminated.<sup>146</sup> The other prevailing theory is that jury instructions create a psychologically negative and combative reaction in the juror, therefore nullifying the effect of the instruction. This is known as the backfire effect.<sup>147</sup> The backfire effect suggests that individuals will react negatively when they feel that their freedom to act has been restricted.<sup>148</sup> Since jury instructions ask jurors to discard information that they have already processed, the juror may feel that his or her freedom to act on information they have received is restricted, thus resulting in backfire to the jury instructions.<sup>149</sup>

The criminal defendant has a right to make a motion for the transfer of trial.<sup>150</sup> In order to make a proper argument for a change of venue to a less prejudiced district, the defendant must show that there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial.<sup>151</sup> In this type of motion, the

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146. See Studebaker & Penrod, *supra* note 25, at 446; Lieberman and Arndt, *supra* note 41, at 683–85 (describing jurors insistence on ignoring prejudicial out of court information while having difficulty processing those concepts).

147. See Lieberman & Arndt, *supra* note 41, at 689–90 (describing backfire effect).

148. See Lieberman & Arndt, *supra* note 41, at 689–90. The study that underlies the “backfire” effect is a well known study from the 1960’s performed by Brehm and Brehm. See Lieberman & Arndt, *supra* note 41, at 689–90. The study concluded that when individuals feel their freedom to reason constrained, they will rebel against the constraint. See Lieberman & Arndt, *supra* note 41, at 689–90. Lieberman and Arndt reason that the court induced instructions limit the freedom of the juror to utilize all the information they have creates backfire which negates the goals of the limiting instruction. *Id.*; see Studebaker & Penrod, *supra* note 25, at 446–47 (discussing similar effect where mock trial and sociological studies show it impossible for curative instructions to make an individual actively suppress an existing thought or idea).

149. Lieberman & Arndt, *supra* note 41, at 689–90.

150. FED. R. CRIM. P. 21(a). “For Prejudice. Upon the defendant’s motion, the court must transfer the proceeding against that defendant to another district if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there.” *Id.*

151. *Rideau*, 373 U.S. at 726–27 (denying change of venue violation of due process because defendant’s murder confession broadcast via television on 3 consecutive nights to audiences of 24,000, 53,000, and 29,000). The court has wide discretion in demeaning whether district unfairly prejudiced. *United States v. Perez-Gonzalez*, 445 F.3d 39, 46 (1st Cir. 2006) (finding no error in denying change of venue because publicity not inflammatory, prejudicial, or pervasive); *United States v. Livoti*, 196 F.3d 322, 326 (2d Cir. 1999) (holding

criminal defendant may present examples of the media coverage claimed to be prejudicial, and may, if the court allows, present surveys or reports about the district specifically generated to determine the level of prejudice.<sup>152</sup> When viewing such media coverage to determine bias, courts generally focus on the amount of coverage, the nature and content of such coverage, and how much was produced close to trial.<sup>153</sup> The change of venue standard set forth by the *Sheppard* court states that if media coverage creates a reasonable likelihood of prejudice, then the defendant is entitled to a change of venue.<sup>154</sup> However, the decision in *Mu'Min* may have increased the burden on the defendant, as to the quantum and content of media coverage needed to be presented, to a level that criminal defendants may never be able to meet.<sup>155</sup>

The most severe protection that the court can provide against prejudice resulting from pretrial publicity, short of a change of venue, is the full or partial sequestration of the jury.<sup>156</sup>

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no error in denying change of venue motion despite pretrial publicity because no reasonable likelihood it would prevent fair trial); *Rock v. Zimmerman*, 959 F.2d 1237, 1252-53 (3d Cir. 1992) (stating no error in denying change of venue motion despite extensive adverse publicity because publicity reached peak levels four years before jury selection, publicity three months prior to trial consisted of only thirteen newspaper articles, and eleven news stories and publicity not unfair or sensational).

152. See *Dowd*, 366 U.S. at 725-26 (reasoning common patterns of thought in the district is determined by a review of that district's new-media); *Wells*, 831 F.2d at 800 (reviewing of media to determine prejudice in district); *Foley*, 488 F.3d at 383 (demanding courts review local television and printed media to understand level of prejudice in district); *Campa*, 459 F.3d at 1125 (reasoning court authorized to hear any research or material which may show pervasive prejudice in current district); see also *supra* notes 38-39 (and related discussion concerning review of media determining prejudicial aspect of district)

153. See *supra* note 39.

154. *Sheppard*, 383 U.S. at 341.

155. See *Mu'Min*, 500 U.S. at 436 (and related discussion concerning reasoning in the *Mu'Min* dissent determining that majority opinion overruled *Sheppard* without saying so); Coffey, *supra* note 25, at 644 (reasoning *Mu'Min* decision made "reasonable likelihood" of prejudice impossible and weakened Sixth Amendment Right)

156. *United States v. Conemi*, 957 F.2d 942, 945-46 (1st Cir. 1992) (reasoning court should review news coverage to determine whether sequestration of jury necessary to prevent prejudice); *United States v. Gotti*, 459 F.3d 296, 345 (2d Cir. 2006) (allowing partial sequester jury where judge had reason to believe jurors might be in danger because defendant part of

The court may also close the trial procedure to the public.<sup>157</sup> Sequestration of the jury or a closing of trial proceedings are procedures based on context and are fact-specific according to the discretion of the trial judge.<sup>158</sup> The court may issue warnings to the press as to the impropriety of publishing material not introduced at trial, or issue gag orders to any of the parties interested in the trial. It may also impose a ban on all reporting of the trial process.<sup>159</sup> If the prejudicial publicity continues even after these sequestering or closing processes have been utilized, the court may order a new trial.<sup>160</sup>

### III. Facts

The Internet is becoming an ever more pervasive element to the everyday lives of the typical American citizen.<sup>161</sup> While the

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powerful criminal family and trial expected to attract extensive media coverage); *United States v. Shiomos*, 864 F.2d 16, 17-18 (3d Cir. 1988) (holding no abuse of discretion to sequester jury *sua sponte* because of concern case concerning judicial corruption would generate significant amounts of publicity)

157. *See Stuart*, 427 U.S. at 544 and cases therein cited (discussing role of court in issuing gag orders to press and balancing performance between 1st amendment rights of press and 6th amendment rights of criminal defendants). The court may also completely ban any reporting on the case, if the pre-trial prejudice is overwhelmingly pervasive. *In re Application of Dow Jones & Co.*, 842 F.2d 603, 610-12 (2d Cir. 1988) (holding gag order on trial participants justified by reasonable likelihood of prejudice because judge considered less restrictive alternatives but found gag order only effective recourse); *United States v. Brown*, 218 F.3d 415, 423 (5th Cir. 2000) (holding gag order on attorneys, parties, and witnesses to refrain from discussing trial upheld because substantial likelihood comments would prejudice ability to conduct fair trial and less restrictive methods insufficient). *But see, e.g., United States v. Salameh*, 992 F.2d 445, 447 (2d Cir. 1993) (holding gag order restricting defense counsel from publicly discussing case violated First Amendment because less restrictive alternatives available); *United States v. Ford*, 830 F.2d 596, 598-600 (6th Cir. 1987) (holding gag order preventing congressman accused of corruption in controversial trial from defending himself through public statements violated 1st Amendment because less restrictive alternatives existed).

158. *See supra* note 156 (describing the discretion of the court).

159. *See supra* note 85.

160. *See Sheppard*, 383 U.S. at 344 (holding violation of fundamental due process not to close proceedings to public when such obvious prejudice was resulting due to sensation of trial).

161. *See supra* notes 8-9 (and related discussion over popularity of YouTube); *see also* TAMBINI & LEONARDI, *supra* note 8, at 64-80 (discussing the popularity of Internet generally for news and other content over traditional

popularity of the Internet has grown, the information and the content of the Internet has changed. The so called Internet 2.0 revolution that began with sites like YouTube, and the ease with which such sites allow the average user to present information have allowed and empowered anyone with an Internet connection to share themselves, their views, and information with others.<sup>162</sup> The content of such information more closely resembles a private journal or diary made accessible to the public.<sup>163</sup> Due to the ease of public access, these Internet 2.0 websites also serve as some of the increasingly popular sources of media that make up the non-traditional news media, including blogs or other private websites that provide the average Internet user with his or her news, and have in recent years outpaced traditional news sources.<sup>164</sup> These new non-traditional sources

media outlets)

162. See *supra* note 3 (and related discussion discussing “super public” nature of Internet content); TAMBINI & LEONARDI, *supra* note 8, at 1-28 (discussing access of the individual to post the content they choose online). The Internet posed a new problem for regulation since there are no barriers to the publication of content online, unlike in traditional outlets like television or the printed press. TAMBINI & LEONARDI, *supra* note 8, at 65-67.

163. See *supra* note 3. The nature of information presented on these social networking Internet 2.0 websites is also such that its presentation creates a conflict with the ban on the use of character evidence to show propensity with the facts alleged, and its availability to the average juror even if excluded at trial undercuts these traditional protections and the policies they support. See McCarty, *supra* note 3 (arguing lawyers should regularly comb opponents web site history in order to gather evidence of culpability). John E. Nowak, *Jury Trial and 1st Amendment Values in a “Cyber World,”* 34 U. RICH. L. REV. 1213, 1222 (reasoning perceptive lawyers could use websites in order to present juror challenges for cause based on membership in certain groups like the KKK, which is discoverable via online history research). See Justin Rebello, *Social Network Websites Prove Valuable to Rhode Island Prosecutors, Defense Lawyers*, RHODE ISLAND LAWYER’S WEEKLY, Sept. 8, 2008. This article details a Santa Barbara Prosecutor’s use of MySpace.com pictures of the defendant drinking and postings of her discussing partying during sentencing period in order to lobby for a harsher sentence. *Id.* The article also details a Rhode Island Prosecutor similarly presenting pictures of defendant drinking in a “jail bird” jumpsuit from defendant’s MySpace.com profile, to lobby for a harsher sentence. *Id.*; Joe Mozingo, *Long Beach Hate – Trial Lawyers Rest Their Cases*, L.A. TIMES, Jan. 12, 2007, at B5 (discussing prosecution using defendant MySpace profile pictures to show gang affiliation). Nancy, L. Othion, *Defense Seeks to Tap Victim’s MySpace Info; Man faces Murder Charge Over Death of Softball Player*, SUN SENTINEL, Jan. 8, 2008, at B3. *Id.* See TAMBINI & LEONARDI, *supra* note 8, at 1-10 (discussing the rapid growth of the Internet as use in the everyday lives of the average citizen).

164. For some examples of the popularity and size of YouTube and MySpace

of news media will provide a different challenge to the courts when dealing with the risk of pre-trial publicity.

The technical capabilities and reach of YouTube will present problems for the court. Created in 2005 by three former PayPal employees, YouTube took advantage of the news speed and storage capacity offered by the spread of high speed Internet and created a place where individual users could post and share video files that could be searched and directly streamed from the Internet.<sup>165</sup> In July 2006, only one year after launch, it was estimated that 100,000 videos were watched and 65,000 new videos added daily on YouTube.<sup>166</sup> In 2009, it was estimated that over thirteen hours of media are uploaded to YouTube every minute, and even with other competing and copycat websites, YouTube still corners a forty-three percent market share of all web based video, and is the third most searched site on the Internet behind Google and Yahoo.<sup>167</sup> Although the site's founders claim the intent of YouTube was to provide an easy-to-use space for friends to share and upload video content for one another, its commercial purposes were not lost on outside

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*see supra* note 1; Miguel Helft, *Google's Strong Quarter Widens Gap With Rivals*, N.Y. TIMES, Oct. 19, 2007, at 1 (discussing huge gain in users for YouTube); Richard Skilos, *Push Comes to Shove for Control of Web Video*, N.Y. TIMES, Apr. 1, 2007, at 8 (discussing huge profits involved in being able to harness user base of YouTube); Miguel Helft, *Young Internet Producers Bankrolled are Seeking Act III*, N.Y. TIMES, Sept. 25, 2007, at 1 (discussing growing push toward MySpace for marketers). *See generally* ANDREW KEEN, *THE CULT OF THE AMATEUR: HOW BLOGS, MYSPACE, YOUTUBE, AND THE REST OF TODAY'S USER-GENERATED MEDIA ARE DESTROYING OUR ECONOMY, OUR CULTURE, AND OUR VALUES* (007) (discussing how new Internet 2.0 sites drive news coverage).

165. *See* SARAH LACY, *THE STORIES OF FACEBOOK, YOUTUBE AND MYSPACE: THE PEOPLE, THE HYPE AND THE DEALS BEHIND THE GIANTS OF WEB 2.0* at 40 (2008), *archived at* <http://www.webcitation.org/5npypk696> (describing development of YouTube from concept to actualization).

166. *See YouTube Surpasses 100 Million U.S. Viewers for the First Time*, COMSCORE, *archived at* <http://www.webcitation.org/5npzNljFy>.

167. *See generally* LACY, *supra* note 165; Lewis Carrol, *Web Could Collapse as Video Demand Soars*, TELEGRAPH, 2008, *archived at* <http://www.webcitation.org/5npzlnV5T> (describing popularity of YouTube causing actual physical strain on world wide Internet bandwidth); *see* Calculation of Visitors on YouTube, ALEXA.COM, *archived at* <http://www.webcitation.org/5owc8MMMY>.

investors.<sup>168</sup> In October 2006, Google purchased YouTube for \$1.65 billion in Google stock options, with the goal of utilizing the popularity of YouTube and Internet video as an avenue for generating advertising revenue.<sup>169</sup> Forbes magazine further estimated that the popularity and recognition of YouTube generated \$200 million in advertising revenue in 2008.<sup>170</sup>

The following example is taken from one of the first cases to actually address the issue of YouTube generated coverage creating pre-trial prejudice. Several individuals in a small county are charged with carjacking and murdering two local college students. The crime became a local sensation and gained extensive coverage by the local mainstream news media.

Due to the violent nature of the crime and its growing media attention, details both true and fabricated began to spread regarding the crime and the perpetrators. The community, as well as others who had become aware of the crimes, began to engage in discussions in the non-traditional media by posting videos to YouTube. Many of these video posts contained partial facts and unconfirmed gruesome details of the commission of the crime and often direct accusations of the accused prior to trial. At the outset of trial the defendants made a motion to have the venue changed due to the inability to find an unbiased jury. At the motion hearing, the defendants presented evidence of news reports covering their alleged crimes, as well as YouTube videos ranging from copies of the main stream news reports to homemade attacks and speculation against the defendants.<sup>171</sup>

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168. See *supra* notes 3 and 8 (discussing development of YouTube and growth of internet media generally).

169. See *supra* notes 3 and 8 (discussing development of YouTube and growth of internet media generally).

170. See *supra* notes 3 and 8 (discussing development of YouTube and growth of internet media generally).

171. See *United States v. Boyd*, No. 3:07-CR-003, 2007 U.S. Dist. LEXIS 88493, at \*9-10 (E.D. Tenn. Nov. 30, 2007). The defendant had been accused along with several co-defendants for the violent carjacking and murder of two University of Tennessee Students. *Id.* The case became a local sensation due to the racial disparity between the defendants who were all African American and the victims who were both Caucasian. See Carol Sowers, *Fliers Decry 'Hate Crimes' Against Whites*, ARIZONA REPUBLIC, June 16, 2007, at 1. (describing

Although the defense in the *Boyd* case failed on their motion for a change of venue, the presentation of YouTube videos as a part of the pre-trial media coverage is an interesting milestone. It seems more likely than not to become the norm as such sites begin to surpass the main stream media in popularity. The ease of access to posting information to sites like YouTube, and the generally unregulated nature of the internet, create a greater likelihood for information and coverage contained therein to have a greater prejudicial impact.

The first challenge a court must face when reviewing news coverage on YouTube for pre-trial prejudicial impact, is that coverage presented on YouTube does not follow a typical news cycle moreover its coverage is world-wide. YouTube videos, unlike newspaper articles or television broadcasts, do not have a set life-cycle. This means that on the day of jury selection the videos are just as easily accessible to a potential juror as they

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nationwide outcry by white supremacist groups due to their perception of unfair media coverage of crime); Nicholas Stix, *Knoxville Horror: Trials Dates Set; MSM "Discovers" Case; Blogger Continue Spreading Rumors*, BLOGCRITICS.COM, May 29, 2007, *archived at* <http://www.webcitation.org/5nxfhb4W> (discussing unconfirmed rumors from Internet posters influencing coverage of case). At the hearing for motion to change venue, the defendant presented DVD containing twenty-four videos found on the YouTube Internet website and documents reflecting the results of "Google" searches for the search term "Channon Christian" (showing 76,500 results) and the search term "Channon Christian" and "mutilation", as evidence that the defendant could not get a fair trial within the District. *Id.* The videos on YouTube ranged from copied news reports to speculation regarding brutal unconfirmed facts of the mutilation of the victims to racially motivated rants regarding the defendants. *Id.* Inputting Channon Christian and Christopher Newsom into the YouTube search bar YouTube provides an enormous variety of video postings relating to the crime. *See* User ne0nsurf, YOUTUBE.COM, July 20, 2008, *archived at* <http://www.webcitation.org/5nxm3qrvY> (speculating on details of mutilation with conservative talk radio broadcast showing pictures of victims and defendants); *see* User MrRb2U, YOUTUBE.COM, May 30, 2008, *archived at* <http://www.webcitation.org/5nxmAhSW5> (replaying CNN broadcast of story previously broadcast on PAULA ZAHN NOW); *see* User GreatWhiteNorth, YOUTUBE.COM, July 8, 2008, *archived at* <http://www.webcitation.org/5nxmFAWC2> (noting homemade video posting pictures of defendants and victims with text reciting gruesome unconfirmed details of murder and racists rhetoric). The defendant's motion was ultimately denied, by the court holding that the presence of some circus type atmosphere on YouTube or nationally did not necessarily impute the same prejudice actually within the district. *Boyd*, 2007 U.S. Dist. LEXIS at 88493, at \*9.

were three months before. Further, due to the global nature of the Internet, trials that receive less attention locally may still receive vast attention on the Internet.

The second set of challenges comes from the fact that unlike traditional news outlets there are virtually no barriers to the introduction of media content on the web. There is little to no regulatory authority to control or limit the nature of content presented on websites sites like YouTube. In fact, YouTube now allows the individual user to present news coverage without any ties to the news outlet and therefore places news coverage outside of the controls that are generally applicable to a self-interested commercial news outlet.

When a court is presented with a claim by a criminal defendant that pre-trial news coverage has unfairly prejudiced his chances of a fair trial, the court will generally review the local newspapers and local television news coverage as well as the timing of the publications to determine the extent of the media coverage and how close it came to the trial.<sup>172</sup> YouTube has a different reach than traditional local or even national news outlets, and due to its nature, must be viewed differently in terms of the time period over which posted content has been accessible.

In her work *Protecting the Defendant's Right to Fair Trial in The Information Age*, author Erika Patrick argues that the Internet is more conducive to sustaining interest in a case over a long periods of time because of the unique self-selected nature of information the public gathers online.<sup>173</sup> Sites like YouTube can catalog uploaded information indefinitely and make it searchable

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172. See *supra* notes 39, 85 and 107 (and related discussion describing court's imperative to review prevailing media to determine possible pre-trial prejudice); *Dowd*, 366 U.S. at 725-26 (holding examination of current common patterns of thought to determine district prejudice is indicated by a review of the district's media); see Studebaker & Penrod, *supra* note 25, at 679 (discussing Federal District Court's review of news coverage in the Timothy McVeigh Case).

173. See Patrick, *supra* note 4, at 81-85 (discussing the lack of predictable news cycle with Internet and ability for information to remain permanently on the Internet) Patrick also discusses that local individuals will still utilize Internet to search out local crimes, even though local traditional press cycles on the subject have waned. *Id.*



by keywords or phrases.<sup>174</sup> Furthermore, sites like YouTube allow for the possibility that a case will gain national attention in an easily accessible format, which could create a circus-like atmosphere in the potential jury pool.<sup>175</sup> YouTube therefore both expands the reach of “local” news coverage and the relevant time period. Indeed, a search of YouTube for key words relating to the *Boyd* case conducted nearly one year after the trial still reveals newly uploaded videos covering the facts of the case.<sup>176</sup>

Of equal importance for a court reviewing media gathered from YouTube is the fact that there are no regulatory barriers or standards for publication of content, unlike traditional news media.<sup>177</sup> While a reviewing court could generally rely on the fact

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174. See *id.* (discussing permanent nature of information presented on Internet as opposed to limited time period when newspaper or television reports run); see also *supra* note 3; see Terms of Use, YOUTUBE.COM, archived at <http://www.webcitation.org/5nxnvVvuX> (discussing user posted videos and public access to those videos).

175. See *supra* note 170 (discussing extended time for local coverage due to the ability of parties outside of the district to continue to cover the story on web, even though traditional media coverage had subsided). See also *supra* note 170 at 81-85 (discussing possibility that Internet driven content will post more news coverage about a story than traditional news). Patrick also discusses the phenomenon that while the traditional news coverage of trials, in particular the Susan Smith trial, had died down, an Internet search still yielded hundreds of results. *Supra* note 170.

176. See *Boyd*, 2007 U.S. Dist. LEXIS 88493, at \*4-5. The *Boyd* defense argued that the intense local interest in the facts, which extended to interest parties outside of the district who utilized the Internet extended the local coverage of the case for local interested citizens. *Id.* A YouTube search utilizing terms “Channon Christian” and “Chris Newsom” illustrates that when the search is restricted to the last two months, the search presents re-posts of old news reports on the murders as well as individually posted editorials about the case and the guilt of the defendants and racially charged rhetoric. See YouTube Videos, YOUTUBE.COM, archived at <http://www.webcitation.org/5nxoYG368>.

177. See YouTube Community Guidelines, YOUTUBE.COM, archived at <http://www.webcitation.org/5nxoheN9g> [hereinafter YouTube Community Guidelines] (describing YouTube policy of allowing the posting of any content as long as such content is not patently illegal). The Community Guidelines allow generally for the posting of any content the individual user chooses. *Id.* The Community Guidelines are self-enforced by the users of the community, allowing the individual user to flag content that the user finds inappropriate, including sexually explicit content, illegal content and abusive content. *Id.* YouTube will then take those flags and make determinations as to whether such content should or should not be removed from the site. *Id.* The Community Guidelines recite: “You may not like everything you see. Some of the content here may offend you—if you find that it violates our Terms of Use, then click the button that says “Flag” under the video you’re watching to

that traditional media outlets like newspapers or television networks have standards for reporting stories, sites like YouTube allow the individual private user to post stories and content without any such standard.<sup>178</sup> Additionally, traditional news networks have commercial incentives to appear fair and objective, and will therefore employ people like ombudsmen or adhere to clearly delineated standards for the benefit of the public. However, the private user has no such incentive and therefore does not need to comport to any such standard.<sup>179</sup> Essentially, the lack of any consistent regulation of content, which is present in other news mediums, makes pre-trial review of YouTube news coverage difficult.<sup>180</sup> Even though it is becoming increasingly possible for large portions of the population get their news from either the reproduction of traditional broadcasts on YouTube or reports uploaded by independent reporters on

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submit it for review by YouTube staff. If it doesn't, then consider just clicking on something else—why waste time watching videos you don't like?" *Id.* See TAMBINI & LEONARDI, *supra* note 8, at 67-77 (discussing individual publication on Internet of news content skirts traditional regulation like news ombudsmen of press councils). Tambini and Leonardi also discuss the fact that the regulation of content presented on the Internet is only limited to the decisions and policing of the individual user. TAMBINI & LEONARDI, *supra* note 8, at 67-77.

178. See TAMBINI & LEONARDI, *supra* note 8, at 67-77.

179. See TAMBINI & LEONARDI, *supra* note 8, at 64-80 (reasoning individual news publishers like bloggers who utilize the Internet to post news stories are both unaccountable to a greater regulatory authority and have no incentive to voluntarily comply with fair and objective standards of reporting due to lack of financial stake in being seen as an honest reporter like a news paper or television news broadcasting service would). The authors mention that both in Europe through the introduction of press councils and in the United States through the use of ombudsmen, traditional news sources have adopted particular conditions for the reporting of criminal cases, including preventing the reporting of prejudicial information. *Id.* The ombudsmen and the press councils also provide repercussions when such media sources violate the established codes of reporting, which are simply non-existent when it comes to individuals utilizing the Internet cover trials. *Id.* See NEIL NEMETH, NEWS OMBUDSMEN IN AMERICA : ASSESSING AN EXPERIMENT IN SOCIAL RESPONSIBILITY, 127-30 (2003) (describing use of ombudsmen in traditional news media on order to provide accountability for non-objective or false news reporting); see *Code of Ethics for the American Society of Newspaper Editors*, archived at <http://www.webcitation.org/5owdMVhqQ>.

180. See TAMBINI & LEONARDI, *supra* note 8, at 30-36 (discussing convergence of all media on Internet while traditional regulations available for televised or printed press are incompatible with technical nature of Internet and low barriers of entry).

the site, governmental regulation or similar informal standards for objectivity in reporting adopted by traditional news sources are non-existent in the online arena.<sup>181</sup>

Internet regulation has occurred in fits and starts since the arrival of the public Internet in 1992, as some of the earliest proponents of an open Internet were and continue to be inimical to such regulation.<sup>182</sup> Many of the initial users and developers of the Internet have argued that the internet should be free from regulation, a sentiment which continues today.<sup>183</sup> Author John Perry Barlow described the early tenets of the first years of Internet self-regulation, writing:

You claim there are problems among us that you need to solve. You use this claim as an excuse to invade our precincts. Many of these problems don't exist. Where there are real conflicts, where there are wrongs, we will address them by our means. We are forming our own Social Contract. This governance will arise according to the conditions of our world, not yours.<sup>184</sup>

Even years into the wide-use of the public Internet, it is still up to each individual user to police the content that he or she decides to place on the Internet.<sup>185</sup> New sites like YouTube have continued in the same general path of self-regulation of content as the rest of the Internet.<sup>186</sup> While there has yet to be an overall

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181. TAMBINI & LEONARDI, *supra* note 8, at 30-36.

182. See GOULD, LOCATING INTERNET GOVERNANCE: LESSONS FROM THE STANDARDS PROCESS 200 (2000) (referring to chapter 10 which deals with regulating the global information society).

183. See TAMBINI & LEONARDI, *supra* note 8, at 1-4; see also John Perry Barlow and the Electronic Freedom Foundation, *A Declaration of the Independence of Cyberspace*, 1996, archived at <http://www.webcitation.org/5owdVHqAe> [hereinafter *A Declaration of the Independence of Cyberspace*].

184. *A Declaration of the Independence of Cyberspace*, *supra* note 183.

185. See *supra* 176-183 (discussing internet regulation); YouTube Community Guidelines (describing reliance on users for reporting offensive, illegal or copyright infringing content).

186. See *YouTube Community Guidelines* (noting the codes of conduct rely on the good judgment of the user when posting or flagging content).

regulatory system applied to the Internet and sites like YouTube, particular issues have prompted congressional attention and created regulation of Internet content in an *ad hoc* manner.<sup>187</sup>

The Digital Millennium Copyright Act (DMCA) is a good example of the *ad hoc* regulatory scheme applied to curb abuses occurring on the Internet.<sup>188</sup> The DMCA was created by Congress in 1998 as a response to new challenges that content hosting websites were creating for the holders of copy written information.<sup>189</sup> The DMCA is meant both to shield website content providers from liability, and to provide some protection for copyright owners.<sup>190</sup> The DMCA limits the civil liability that content hosting websites are exposed to when their users upload copy written material.<sup>191</sup> To obtain this immunity the site must implement clear procedures for the removal of copyright infringing material, at the owner's request.<sup>192</sup> The removal provisions in the DMCA are referred to generally as "notice and take down provisions."<sup>193</sup> The DMCA, "notice and take down procedures" require that the content hosting websites designate

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187. See TAMBINI & LEONARDI, *supra* note 8, at 112-28 (describing U.S. *ad hoc* approach); TAMBINI & LEONARDI, *supra* note 8 at 50-54 (describing Internet regulation). The authors note that the Digital Millennium Copyrights Act and the various statutes that protect the safety of children while online were not part of an overall goal to regulate the Internet, but were made specifically to respond to developing issues. See TAMBINI & LEONARDI, *supra* note 8, at 54.

188. See DIGITAL MILLENNIUM COPYRIGHT ACT 17 U.S.C. § 512 (1998); Digital Millennium Copyright Act, *U.S. Copyright Office Summary*, archived at <http://www.webcitation.org/5owdhLKNo> (describing need to update 1975 Copyright protection Act due to Internet content provides ability to host, display and encourage violation of copyrighted material).

189. See *id.*

190. See *id.*

191. See *id.* (stating notice and takedown procedure requires websites make reporting standards for users available to allow staff to respond to claims of presentation of material that infringes copyright). If websites which allow for the presentation of content do not adopt clear notice and takedown provisions, the statute allows for increased civil damages against the site. *Id.*; see TAMBINI & LEONARDI, *supra* note 8, at 50-54 (describing *ad hoc* remedy of DMCA).

192. See TAMBINI & LEONARDI, *supra* note 8, at 50-54.

193. See TAMBINI & LEONARDI, *supra* note 8, at 50-54 (describing notice and take down procedures historically available in website codes of conduct and terms of service).

an individual or group to respond to complaints from copyright holders and to initiate removal procedures.<sup>194</sup>

Due to a 2008 lawsuit with Viacom, YouTube was recognized as a content hosting website and had to integrate the notice and take down provisions of the DMCA into its user interface and operating procedure.<sup>195</sup> While any Internet user may search YouTube for videos and embed those videos in other web sites without signing in with a user profile; a profile is required to access functions like creating one's own YouTube channel or commenting on videos or the YouTube maintained message boards.<sup>196</sup> In signing up for a YouTube profile, the user

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194. DIGITAL MILLENNIUM COPYRIGHT ACT, 17 U.S.C. § 512(3) (detailing criteria for website groups to deal with reports of copyright violation and respond).

195. See *Viacom v. YouTube, Inc.*, 253 F.R.D. 256, 261 (S.D.N.Y. 2008) (finding YouTube is a content hosting site and must comply with the DMCA and notice and takedown provisions); YOUTUBE.COM, *YouTube DMCA*, [http://www.youtube.com/t/dmca\\_policy](http://www.youtube.com/t/dmca_policy), archived at <http://www.webcitation.org/5oweb0Giu>, [hereinafter YouTube DMCA]] (describing the ability for copyright holders to send notice to YouTube staff by flagging video). YouTube also set up an office specifically for dealing with and handling such complaints. *Id.* YouTube describes its procedures for dealing with copyright violation and its compliance with the criteria of the DMCA as a "physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed." *Id.* Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site. Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material. *Providing URLs in the body of an email is the best way to help us locate content quickly.* (emphasis added) Information reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address at which the complaining party may be contacted. A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law. A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed. *Id.*

196. YOUTUBE.COM, *Terms of Use*, <http://www.youtube.com/t/terms>, archived at <http://www.webcitation.org/5oweAr6lm> [hereinafter YouTube Terms of Use]. "An individual with a YouTube profile has the ability to create a channel. The channel serves much the same functionality as a MySpace profile page, including the user's name, profile information, space for personal comments, collected posted videos and links to other user's channels. The user's profile name may be searched to reach his channel page. Individual videos may also

agrees to the terms and conditions of the YouTube User policy, which includes rules and prohibitions concerning posting copyrighted, criminal, or content deemed “objectionable” by the YouTube community.<sup>197</sup> The terms and conditions of a YouTube account also subject the user to the privacy policies of YouTube, under which the user agrees that the operators of the website may collect personally identifiable information from his account.<sup>198</sup> The YouTube privacy policy states that user’s identifying information may be used for a variety of purposes including tracking the use of the site, tracking the community’s flagging of objectionable content and using portions of the personally identifiable information, such as regional location, sex, and age group, to provide resources to third party advertisers.<sup>199</sup>

The notice and take down provisions required by the DMCA and the ruling in the *Viacom* case have been integrated into the user-interface of YouTube. YouTube fulfills its requirement under the DMCA by providing a clear method for reporting material that infringes copyright in its “Flagging System.”<sup>200</sup> The flagging system includes a “flag icon” underneath

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be searched through the keyword tagging functionality where a user is allowed to assign key words to his video, which then are added to the searchable YouTube database. For example, if a user made a posted a video of a day at the beach, he may assign the key words ‘beach’ ‘day’ ‘sun’ etc. when a search is performed containing those keywords the user’s video will be displayed with all other videos containing those keywords. *Id.*

197. YOUTUBE.COM, *Community Guidelines*, [http://www.youtube.com/t/community\\_guidelines](http://www.youtube.com/t/community_guidelines), archived at <http://www.webcitation.org/5po3UXpUN>. [hereinafter YouTube Community Guidelines] YouTube allows its users to “self police” content by giving the YouTube user with a profile the ability to “flag videos” as objectionable. Videos may be flagged for a variety of reasons from copyright violation to racially abusive content. *Id.* Flagging is connected with the identifiable information connected with the account that has been flagged allowing YouTube.com the ability to investigate the use and possibly remove such content. *Id.*

198. YOUTUBE.COM, *Privacy Notice*, <http://www.youtube.com/t/privacy>, archived at <http://www.webcitation.org/5oweLs1f5> [hereinafter YouTube Privacy].

199. *See Id.*

200. *See* YouTube Community Guidelines, *supra* note 197. When a video is “flagged” the user has the option of selecting a reason for the flagging through a variety of set option, and the ability to fill in a form describing in particular the violation contained in the content. *See* YouTube Community Guidelines,

each posted video.<sup>201</sup> Registered users to the YouTube site may click on the flag if they feel that the video is inappropriate.<sup>202</sup> Once the video is flagged the user is linked to a complaint form in which he or she can describe why the video was inappropriate, offensive, showcased criminal behavior or violated a copyright.<sup>203</sup> YouTube provides a separate copyright complaint form which takes all users, registered or not, to a comment submission form on YouTube.<sup>204</sup> The copyright owners submit the complaint forms to YouTube staff, including in the form their superior copyright claims to the posted material.<sup>205</sup> These “flaggings” and reports are collected by YouTube staff and investigated.<sup>206</sup> If a violation is confirmed, notice is sent to the original poster of the content and the content removed from the site.<sup>207</sup>

#### IV. Analysis

The United States Supreme Court in *Nebraska Press Association vs. Stuart* encapsulated the struggle that courts face in protecting the criminal defendant’s Sixth Amendment right to a fair trial while dealing with a public that was becoming increasingly saturated with news coverage. In 1976, the *Stuart* court was struggling with the fact reporters from outside the court’s jurisdiction had the ability to cover the case, thereby expanding the review of the press required by the Court.

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*supra* note 197. The flagged videos are then sent to YouTube staff offices. See YouTube Community Guidelines, *supra* note 197.

201. See YouTube Community Guidelines, *supra* note 197.

202. See YouTube Community Guidelines, *supra* note 197.

203. See YouTube Community Guidelines, *supra* note 197.

204. See YouTube DMCA, *supra* note 195. YouTube has set aside a special office and form particularly for DMCA reported violations in order to support the DMCA criteria. See YouTube DMCA, *supra* note 195. There is a particular form as well for the reporting of copyright violations. YOUTUBE.COM, *Copyright Complaint Form*, [http://www.youtube.com/copyright\\_complaint\\_form](http://www.youtube.com/copyright_complaint_form), archived at <http://www.webcitation.org/5owf1bygs> (showing the form details and provides space for the user or poster to make formal complaints to YouTube staff for the removal of material that infringes copyright).

205. YouTube DMCA, *supra* note 195

206. YouTube DMCA, *supra* note 195 (describing the “flagging” system for copy written works placed on site without copyright owner’s consent).

207. YouTube DMCA, *supra* note 195.

Reporters from distant places are unlikely to consider themselves bound by local standards. They report to editors outside the area covered by the guidelines, and their editors are likely to be guided only by their own standards. To contemplate how a state court can control acts of a newspaper or broadcaster outside its jurisdiction, even though the newspapers and broadcasts reach the very community from which jurors are to be selected, suggests something of the practical difficulties of managing such guidelines.<sup>208</sup>

In 1976, the Supreme Court in *Stuart* described the difficulty of preventing prejudice from spilling over into trial when dealing with the spread of and growing access to modern news media.<sup>209</sup> This challenge became even more difficult a few short years later with the advent of the twenty-four hour news cycle and the spread of cable news.<sup>210</sup> Authors Studebaker and Penrod define the post *Stuart* struggle of balancing the fair trial rights of the criminal defendant and the new long reach and saturation of the modern twenty-four hour cable news.

The Fifth and Sixth Amendments were devised in an era profoundly different from the one in which we live. One need only consider the recent development and convergence of highly mobile broadcasting equipment, widespread access to cable television and satellite broadcasting, 24-hr news networks such as CNN and MSNBC, and specialized cable channels such as Court TV to recognize that the media environment in which Americans now live is profoundly different from the environment that prevailed 200 years ago. Not

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208. See *Stuart*, 427 U.S. at 580.

209. See *id.* (describing the spread of national newspapers and weekly national news magazine shows).

210. See Studebaker & Penrod, *supra* note 25, at 430 (discussing twenty-four hour news cycle not predicted by framers); see Brandwood, *supra* note 85, at 1412-23 (describing rabid coverage of criminal trials fueling public interest, in particular the Louise Woodward Trial).



only are the media different, but it is clear that at least some trials taking place in America in the late 20th century are also profoundly different (in part because of the media) from those of 200 years ago. The intense public interest and media coverage that accompany cases such as those involving O. J. Simpson, Timothy McVeigh and Terry Nichols, the Menendez brothers, and Ted Kaczynski (not to mention Pamela Smart, the Rodney King assailants, John Poindexter, Oliver North, Klaus von Bulow, Jean Harris, General William Westmoreland, Bernhard Goetz, Leona Helmsley, Imelda Marcos, Jim Baker, John DeLorean, and Zsa Zsa Gabor) raise the question of whether saturated levels of pretrial publicity make it impossible to find any “district” in America where a “fair and impartial” jury can be empanelled. Also, although the nationwide publicity devoted to these cases makes them instantly recognizable—just as it raises questions about possible media-induced biases—it is important to note that the presentation of prejudicial information may affect juror decision making in any case that receives substantial pretrial publicity, whether that pretrial publicity is at the local or national level.<sup>211</sup>

Over ten years into the twenty-four hour news cycle, courts now face the new challenge presented by the expanding access of unregulated news on sites like YouTube.<sup>212</sup> The *Boyd* case is an interesting indication of the way defense counsel and courts should begin considering a review of pre-trial media coverage, inclusive of the growing amount of coverage presented

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211. See Studebaker & Penrod, *supra* note 25, at 433.

212. See *supra* notes 165-166 (discussing popularity and functioning of YouTube); see *supra* note 167 (describing Boyd presentation showcased several reposted news reports from the trial online); YouTube Terms of Service (describing reliance on individual community to police content posted); see TAMBINI & LEONARDI, *supra* note 8, at 67-69 (discussing lack of regulation on Internet in general contrasted with printed and broadcast press).

on the Internet, outside of traditional broadcast and print cycles.<sup>213</sup>

On one hand, YouTube stops a court from relying on the beginning and end of a regular news cycle when reviewing coverage of the trial. The timing of publication of stories and the broadcast of reports and information concerning the trial is of great import to a court's review of the media coverage of the case in determining prejudice.<sup>214</sup> The closer coverage extends to trial the more likely a court will find that coverage as prejudicing the jury.<sup>215</sup> The reliability of a typical three to six week news cycle aided the court's review of pretrial coverage and limited the public's exposure to the story.<sup>216</sup> A court could expect heavy coverage during the initial period after arrest, then a waning of interest as the case moves to trial, and a brief mention of the case as the jury is empanelled.<sup>217</sup> A benefit of the traditional news media of television and print, is that they abide by essentially standard cycles of publication, allowing the court to review accurately when information was presented to the potential jury-pool.<sup>218</sup>

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213. See *supra* note 167 and related discussion (describing videos presented on YouTube concerning Boyd case and citing several videos that remain searchable).

214. See *supra* note 102 (referencing cases therein cites focus on length of time from publication to selection of jurors as important element in determining prejudice from news coverage); 21A AM. JUR. 2D *Criminal Law* § 932 (2008) (describing length of time between publication of stories to selection of jurors as vital factor for determining possibility of prejudice).

215. See 21A AM. JUR. 2D *Criminal Law* § 932 (2008).

216. See Patrick *supra* note 4, at 81-82 (describing typical traditional news cycle); see also McCarty, *supra* note 3, at 87, (discussing unprecedented use of public forum in websites as replacement for traditional journals and diaries). See Wendy Davis, *Teen's Online Postings are New Tool for Police*, BOSTON GLOBE, May 15, 2006, at A1. The article goes on to quote Internet researcher, Danah Michele Boyd, who describes information left on the Internet as "super public" in that unlike shouting something in a public square which has a temporal limit to access, information contained on the Internet can be stored and therefore viewed indefinitely.

217. See Patrick, *supra* note 4, at 82.

218. See *Mu'Min*, 500 U.S. at 430-32 (and cases therein cited describing court accessing broadcast records and publication records in review of pre-trial media); *Stuart*, 427 U.S. at 340 (describing court's communication with local television and news in review of news coverage of criminal trial).

However, there is no similar news cycle for reports and coverage based on YouTube.<sup>219</sup> Once a user posts content on the site it is essentially permanently stored, and due to Google's purchase of YouTube in 2005, the content is constantly accessible through any Google keyword search.<sup>220</sup> Further, unlike traditional commercial broadcast or print media, YouTube can *narrow cast*, allowing any user at any time access content on a pending case, without the court being able to know or predict.<sup>221</sup> While a court may assume that even large criminal trials only have a shelf-life of a few months in television and print, the court may not assume this when it comes to YouTube.<sup>222</sup> Also, unlike the traditional news media, which may refrain or be barred by court order from reporting heavily on a case or on particular aspects of the case during critical time stages, the YouTube poster has neither incentive to limit his or her postings, nor is he under the jurisdiction of a court gag order as a private individual.<sup>223</sup>

The court in *Sheppard* discusses the need for the court to be able to rely on an ethically responsible and objective press, as the best partner for a court trying to avoid pre-trial prejudice.

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219. See YouTube Terms of Service (describing YouTube staff's policy of allowing videos to remain online indefinitely).

220. See YouTube Terms of Service, *supra* note 196 (discussing keyword search ability via Google); see SARAH LACY, THE STORIES OF FACEBOOK, YOUTUBE AND MYSPACE: THE PEOPLE, THE HYPE AND THE DEALS BEHIND THE GIANTS OF WEB 2.0 40-50 (Crimson Publishing 2008) (describing YouTube's deal with Google increasing its reach to everyday Internet user); Professor Michael Wesch, *Kansas State University Working Group Study*, archived at <http://www.webcitation.org/5owfgJ3hl> [hereinafter *Kansas State University Working Group Study*] (describing YouTube's partnership with Google).

221. See *Video Results for Google Keyword Search of Channon Christian*, [http://www.google.com/search?source=ig&hl=en&rlz=&=&q=channon+christian&aq=0&aql=g10&aql=&oq=channon+&gs\\_rfai](http://www.google.com/search?source=ig&hl=en&rlz=&=&q=channon+christian&aq=0&aql=g10&aql=&oq=channon+&gs_rfai) (February 11, 2009), archived at <http://www.webcitation.org/5owfsu9DK> (YouTube video results about the murder victim in the Boyd case are the third hit down on the Google search).

222. See Patrick, *supra* note 4 (describing focused internet communities dragging on coverage of stories after they had where same stories received lesser circulation in traditional media).

223. See TAMBINI & LEONARDI, *supra* note 8, at 67-68 (describing lack of incentive or any regulation limit the content posted by the average Internet user).

A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.<sup>224</sup>

In a review of traditional coverage, the court may rely on the fact that the major outlets propounding such reports are bound by codes of objective and ethical standards for reporting and fact-checking.<sup>225</sup> Even if the traditional press oversteps the standards of fair reporting and objective fact finding the court has the authority to limit it.<sup>226</sup> Since traditional news media outlets are run by identifiable corporations, the courts may exercise elements of control to prevent the further dissemination of prejudicial information.<sup>227</sup>

First, there is no standard for objective reporting utilized by the hundreds of thousands of users who are able to post content on YouTube.<sup>228</sup> Users may post whatever they wish unless the community actively flags the videos as “inappropriate.”<sup>229</sup> A review of the YouTube videos concerning the *Boyd* case reveals that YouTube users and the YouTube community will allow the re-broadcast of traditional media

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224. See *Sheppard*, 384 U.S. at 350.

225. See *id.*; *supra* notes 104–108 (describing court’s review of pre-trial media).

226. See TAMBINI & LEONARDI, *supra* note 8, at 67-69.

227. See TAMBINI & LEONARDI, *supra* note 8, at 67-69.

228. See YouTube Community Guidelines, *supra* note 197 (describing no set definition of “objectionable” content, but leaving the determination to community standards).

229. See YouTube Community Guidelines, *supra* note 197 (describing YouTube policy to allow most content to be posted, so long as it is not wholly illegal, an infringement to someone else’s copyrights). Generally YouTube will allow the posting of most any material, and relies on the community to set the standards. See YouTube Community Guidelines, *supra* note 197.

reports blended with personal editorials about the defendant's guilt, the strength of evidence, and even demands that the jury convict and sentence the defendants to death.<sup>230</sup> YouTube is far from the "responsible press" described by *Sheppard*. While the courts have issued gag orders to local and national press outlets concerning the publication of particular facts revealed at trial, the individual YouTube poster may not be reached, because he or she is not part of the corporate news system.<sup>231</sup> Indeed the individual YouTube poster may even present the same exact news broadcasts on aspects of the case that traditional news counterparts have been prevented from showing, and has the ability to extend the time for publication of such materials deemed prejudicial by the court.<sup>232</sup>

There are a number of methods that courts can adapt to the new and different issues that news content on YouTube presents. Also, there are a number of techniques proactive lawyers interested in future technologies have at their disposal to deal with the issues presented by YouTube generated news coverage, so long as they take an open minded approach to those techniques. Lastly, there is a possible legislative solution following the vein of the DMCA which could allow for regulations and consistencies available in the traditional press to carry over to the media coverage on YouTube.

First and foremost, the court needs to clearly establish the standards originally set in *Sheppard* concerning the possibility of pre-trial prejudice due to media coverage. The standard set by *Sheppard* was clearly stated as the "reasonable likelihood that prejudice will result to the defendant."<sup>233</sup> The *Sheppard* standard

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230. See *supra* note 171 (and related discussion) (discussing content of videos posted on *Boyd* case from re-broadcasts of traditional news broadcasts alongside user posted commentary).

231. See YouTube Terms of Service, *supra* note 196 (describing anonymity for users and no control outside of community imposed guidelines and policing).

232. See *supra* note 171 (describing videos posted in the *Boyd* case re-broadcasting previously ran news reports).

233. *Sheppard*, 383 U.S. at 347.

is admittedly fact determinant.<sup>234</sup> The facts in *Sheppard* included in particular articles and editorials concerning the guilt of the defendant, and reports about the strength of evidence and salacious and unfounded details concerning the details of the crime which were disseminated right until empanelment of the jury and the trial itself.<sup>235</sup> One should therefore have been able to infer that facts similar to *Sheppard* would dictate a similar conclusion; however, the similar reporting and coverage of *Mu'Min* did not so result.<sup>236</sup> While *Mu'Min* did not overrule *Sheppard*, it significantly muddled the waters concerning what combination of facts and coverage would justify change of venue because of pre-trial prejudice due to media coverage.<sup>237</sup>

Both *Mu'Min* and *Sheppard* were decided before *Boyd* and before the growing wave of Internet 2.0 generated news coverage of cases. With the complication generated by YouTube, it is imperative that the federal courts create a clearer set of guidelines for the review of media coverage for prejudice. Perhaps a mechanical set of standards as articulated by the 1983 ABA will at least allow for a semblance of consistent results.<sup>238</sup> This framework may also deal with the growing tide and possibility that most of the public will get their news and information from the fairly unrestricted and unregulated Internet 2.0 websites like YouTube and sites that have not yet surfaced but likely will.

A proactive attorney is the best protection that a defendant has in this area by presenting courts with actual information concerning the coverage of criminal trials on YouTube.<sup>239</sup> If the attorney or criminal defendant is concerned

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234. See *supra* notes 26-33 (discussing media coverage of the *Sheppard* trial).

235. See *supra* notes 26-33 (discussing media coverage of the *Sheppard* trial).

236. See *Mu'Min*, 500 U.S. at 437.

237. See *id.* at 440 (identifying the dissent arguing that *Mu'Min* decision made standards for reasonable prejudice standard due to majority decision now impossible to reach); Coffey, *supra* note 25, at 640 (discussing same).

238. See Studebaker & Penrod, *supra* note 25, at 440-45 (describing 1983 ABA standard for exact type of coverage that is automatically deemed prejudicial).

239. See TAMBINI & LEONARDI, *supra* note 8, at 1-10 (discussing Internet's

that local news coverage of their case will result in prejudice at trial, the attorney may also want to do a keyword search of the case on YouTube.<sup>240</sup> Since YouTube consists solely of content posted by individual users, this search may be illustrative to the attorney in gauging the common thread of conscience regarding the trial.<sup>241</sup> A proactive attorney, in reviewing the media coverage of the trial on YouTube, may gain an effective argument for change of venue by giving the court wider insight as to the possible content that the jury pool may have been exposed to close to trial.<sup>242</sup>

The way in which YouTube catalogues videos uploaded to its site and the metadata attached to videos and posters may aid the attorney in making a presentation for change of venue. All videos on YouTube maintain a running tally of views.<sup>243</sup> Specifically, the tally catalogs “unique views,” which means it only counts the first time a viewer accesses a posting, as opposed to keeping track of every time the viewer returns to watch a video.<sup>244</sup> Therefore a presentation of the amount of times which a video has been viewed may give the court the ability to gauge the interest that the case is generating.<sup>245</sup> Since only a user with

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ability to appeal to like-minded communities); *see supra* notes 3-4; *see supra* note 166 (discussing popularity of YouTube as medium for news coverage and content outpacing traditional media sources).

240. *See supra* note 171 (listing videos available on YouTube after Google keyword search containing the victim’s names in the Boyd case).

241. *See supra* note 176 (describing videos on presented in the Boyd case, which focused directly on the district of the trial, some even commenting directly upon the trial as it proceeded).

242. *See Dowd*, 366 U.S. at 730 (reviewing coverage of crime and access by jury pool, placing emphasis on whether the coverage extended close to the date of trial); *DeLisle*, 161 F.3d at 377 (reasoning inflammatory nature of coverage and proximity to trial is important for prevention of pretrial prejudice).

243. *See* YouTube Terms of Service, *supra* note 196 (describing the tracking over views of posted videos).

244. *See id.*

245. *See Dowd*, 366 U.S. at 725-26 (reasoning examination of current common thought patterns in a district is indicated by a review of current news-media); *Foley*, 488 F.3d at 381 (reasoning court must review all prevailing media); *see* Studebaker & Penrod, *supra* note 25, at 429-33 (reviewing all prevalent media coverage in the *McVeigh* case by the district court to determine possible jury exposure to prejudicial pre-trial media). In the *McVeigh* case the judge focused on the timing of the reports, the content of

a profile may post videos, a simple viewing of the poster's profile may reveal if the poster is local to the area of the trial.<sup>246</sup> On an even more technical level, YouTube catalogs the ISP addresses of all of its users, which may reveal the exact geographic locations of video posters.<sup>247</sup> Such addresses may be obtained by special request through YouTube's staff.<sup>248</sup>

The proactive attorney may also utilize YouTube's own codes of conduct to enforce their own gag orders upon the dissemination of media coverage on the site. Although not reachable by a court decree or traditional gag order, YouTube allows any individual to create their own profile, and flag videos that they feel are inappropriate.<sup>249</sup> Reports of such "flaggings" are sent to YouTube to make the ultimate decision as to whether the video should be removed, but the generation of "flaggings" with a complaint form may spur the removal of such videos.<sup>250</sup>

Of course, following *Sheppard*, the court is obligated to take all necessary steps to prevent prejudice to the defendant due to media coverage occurring in its district.<sup>251</sup> The court should proactively utilize all available pre-trial remedies in the YouTube era, particularly where finding influence post trial in a Rule 606

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the report, and, in particular, whether the reports contained salacious material or possible discussions on the guilt or innocence of the defendant. *See* Studebaker & Penrod, *supra* note 25, at 433.

246. *See Estes*, 381 U.S. at 532 (seeking review of relevant news coverage pretrial); *Guzman*, 40 F.3d at 628-29; *Medina*, 430 F.3d at 876-77; *Moran*, 443 F.3d at 650-51; *see* YouTube Terms of Service (describing the ability of YouTube to track user ISP locations for uploads and views for focused advertising).

247. *See* YouTube DMCA, *supra* note 195 (YouTube stores ISP data in as a part of the DMCA requirements for tacking down users who violate copyright).

248. *See* YouTube Terms of Service, *supra* note 196 (describing procedure for obtaining user information).

249. *See* YouTube Community Guidelines, *supra* note 197.

250. *See* YouTube Community Guidelines (describing process for flagging videos, if user deems the video objectionable).

251. *See* U.S. CONST. amend. VI "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed"; *Estes*, 381 U.S. at 532-36 (holding Sixth Amendment impartiality fundamental right); *Sheppard*, 337 U.S. at 350 (discussing role of the court to review pre-trial news coverage).



hearing is exceedingly difficult.<sup>252</sup> The court's two main tools in this area are focused jury instructions and content questioning of potential jurors through voir dire.

The court is empowered to give any instructions to the jury it deems proper, with the general assumption that those instructions will be understood and followed.<sup>253</sup> In most cases where a judge is on notice that the defendant's case has garnered pre-trial media attention, the court will encourage jurors not to consult any newspapers or broadcast news reports concerning the case.<sup>254</sup> As a baseline to establish a procedure for dealing with the coming age of Internet powered news coverage, model jury instructions should contemplate judges instructing the jury to refrain from using keyword Internet searches to discover further information about the case.<sup>255</sup>

A court's instructions to the jury to disregard information gathered on the case through web searches and the viewing of material presented on YouTube, however presents particular susceptibility to the "backfire effect."<sup>256</sup> The ease of access to instantly available material, and the commonplace use of sites like YouTube, presents a thorny environment for the backfire of instructions.<sup>257</sup> Since the average individual has nearly constant access at any time to Internet content and will typically utilizes these resources daily, a court order that restricts the freedom of jurors to utilize such a common tool, may create a backfire.<sup>258</sup> Backing up this theoretical concept of backfire are several cases

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252. See *supra* note 105 (describing Rule 606 and the difficulty of 606 hearings post trial to determine improper influence on the jury).

253. See *supra* note 121 and related discussion (describing court's discretion in giving jury instructions).

254. See *supra* note 122 and related discussion (describing court's discretion in giving jury instructions).

255. See also *supra* notes 121 and 120 (referring to model criminal jury instructions are not specific as to jurors access of information on Internet).

256. See Studebaker & Penrod, *supra* note 25, at 433-435 at 435 (discussing backfire effect of jury instructions).

257. See *supra* notes 1-8 and 160 and related discussion (describing the immense spread of content and news coverage on YouTube, overcoming traditional press).

258. See Studebaker & Penrod, *supra* note 25, at 435 (discussing backfire effect).

in which jurors directly ignored the instruction to not research the facts of the case resulting in complex 606 hearings.<sup>259</sup>

It may be reasonable that in the face of this particular problem that courts change the way in which they normally instruct jurors. Researchers have noted that the typical jury instruction is meant to clearly explain the law imposed upon the jurors.<sup>260</sup> However, the clear exposition of the technical aspects of the law may in fact confuse jurors and not achieve the effect of convincing the juror to not consider evidence outside of trial.<sup>261</sup> Socio-legal researchers emphasize the importance of stressing the impact of the jury ignoring the instructions, and the jury's duty to deliberate the guilt or innocence of the Defendant by the facts presented at trial.<sup>262</sup> These researchers argue for simplified common-sense instructions, over technical explanations of the law.<sup>263</sup> These solutions for jury instructions, making the jury focus on the policy of the instruction, may be even more appropriate where Internet research and access to media content on YouTube are so commonplace.

A searching voir dire is the traditional and most used remedy for ensuring that the sitting juror is not actually prejudiced by the pre-trial media coverage.<sup>264</sup> The court has nearly complete discretion to determine the questions asked in voir dire, and whether or not to accept questions or questioning submitted by counsel.<sup>265</sup> A voir dire aimed at determining

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259. See *supra* note 120 (listing cases where jurors ignored instructions not to access Internet content).

260. See Studebaker & Penrod, *supra* note 25, at 440 (discussing confusing nature of most jury instructions and empirical tests showing jurors don't comprehend them); Lieberman & Arndt, *supra* note 41, at 683 (describing mock trial studies which show although most jurors say they will obey jury instructions they often do not).

261. See Lieberman & Arndt, *supra* note 41, at at 683.

262. See Lieberman & Arndt, *supra* note 41, at at 683.

263. See Studebaker & Penrod, *supra* note 25, at 441 (describing jurors feel more connected to process and more amenable to instruction when goals presented plainly).

264. See *supra* notes 107 (discussing need for voir dire to determine actual prejudice).

265. See *supra* notes 111 (describing the discretion of the court in exercising voir dire).

whether the jurors have been prejudiced by the presentation of pre-trial media coverage, involves two streams of inquiry. First, the court seeks to determine whether the potential juror had been exposed to pre-trial media coverage, and whether that coverage had prompted the juror to form an opinion concerning the case.<sup>266</sup> Second, the questioning seeks to determine whether the juror can set aside his pre-conceived notions of the case when he or she sits at trial.<sup>267</sup> The second aspect of this voir dire has been deemed the most significant aspect in determining whether or not there has been actual prejudice.<sup>268</sup> Generally courts have been willing to accept the juror's affirmation that he or she will set aside such prejudice as sufficient protection against prejudice.<sup>269</sup>

Due to their wide discretion with voir dire, courts are empowered to question the potential jurors as to the content of their media exposure.<sup>270</sup> A typical example of content questioning was described in the Sixth Circuit decision in *Ritchie*

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266. See *supra* note 25 (discussing loose standard holding only ability to set aside pre-conceived notions enough to satisfy protection from pre-trial prejudice due to media coverage). This *ad hoc* standard is the same as it was in the trial of Aaron Burr. See *Opinion of Chief Justice Marshall (August 1807)*, archived at <http://www.webcitation.org/5nfK1Kl09> (reprinting Chief Justice Marshall's opinion in the Burr trial from J.J. COOMBS, *THE TRIAL OF AARON BURR FOR HIGH TREASON* 307-52 (W. H. & O.H. Morrison 1864) (1864) (Marshall reasoning juror must be able to set aside preconceived notions determined on voir dire to protect trial integrity).

267. See *Dobbert v. Florida*, 432 U.S. 282, 288 (1977) (discussing actual prejudice shown if juror sitting at trial cannot set aside prejudice); *Murphy v. Florida*, 421 U.S. 794, 797 (1975) (stating that because jurors could not reasonably set aside prejudice to sit at trial a change of venue was proper); *Sheppard*, 383 U.S. at 340 (holding jurors could not set aside prejudice before sitting at trial); *Irvin v. Dowd*, 366 U.S. 717, 727 (1960) (noting that voir dire of jurors determines whether juror can set aside prejudice); *Foley v. Parker*, 488 F.3d 377, 383 (6th Cir. 2007) (discussing that even in heavily publicized cases, juror's assertion of ability to set aside prejudice offers adequate protection); *United States v. Campa*, 459 F.3d 1121, 1125 (11th Cir. 2006) (stating that the defendant received fair trial because jurors all answered that they could set aside prejudice).

268. See *id.*

269. See *id.*

270. See *Ritchie*, 313 F.3d at 960 (describing case facts involving mother murdering children covering crime up and a retracted confession that was videotaped by police and eventually released to press).

*v. Rogers*, although not directly stated as such.<sup>271</sup> In *Rogers*, both the court and defense counsel were concerned that the defendant's videotaped confession, which had been excluded from evidence but had run on local news broadcasts, had been seen by the jurors.<sup>272</sup> The *Rogers* court determined that the extreme prejudicial effect that would likely result upon the jurors viewing the video-taped confession of the criminal defendant could not reasonably be counterbalanced by the juror's affirmation that they would set aside any opinions they formed if they viewed it.<sup>273</sup> In order to avoid this possibility the court engaged in a two stage voir dire of jurors.<sup>274</sup> Jurors were first asked whether they had watched any news coverage of the facts of the case.<sup>275</sup> Those jurors that responded in the positive were then separately asked whether they had viewed the news special in which the defendant's confession was played and those who answered "yes" were dismissed from the jury pool.<sup>276</sup>

Although content questioning, as described in *Ritchie* is within the court's discretionary tool set, it received harsh treatment from the Supreme Court in *Mu'Min*.<sup>277</sup> The *Mu'Min* court reasoned the time and resources required by content questioning was too great, even where the juror's had been exposed to extensive coverage of the case.<sup>278</sup> Beyond the need to preserve court resources, the *Mu'Min* court justified its decision to forego content questioning based upon its ability to thoroughly review the media coverage, in the form of printed articles and television and radio broadcast news, to which the jury pool could have been exposed.<sup>279</sup> The Court could review the content as well as dates and times of printed news publications and televised broadcast news stories.<sup>280</sup> Through this review the

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271. See *id.* at 961-63 (describing questions asked in voir dire).

272. See *id.* at 961-63.

273. See *id.*

274. See *id.*

275. See *id.* at 962.

276. *Ritchie*, 313 F.3d at 960-63.

277. See *Mu'Min*, 500 U.S. at 436.

278. See *id.* (denying content questioning for in favor of judicial efficiency).

279. *Id.* at 437.

280. See *id.* at 440-43 (arguing court under-performed its duties to protect

*Mu'Min* court was able to conclude with a degree of certainty as to how many times jurors could have been exposed to certain information, and how close to trial these jurors were exposed, in order to find content questioning unnecessary where the breadth of coverage could be defined as limited.<sup>281</sup>

The dissent in *Mu'Min* reasoned that the majority erred in not utilizing its right to content question in a case that had garnered a significant amount of media attention. The dissent argued that the precedent in *Sheppard*, obligated the court to determine the credibility of a juror who had stated that he or she will be able to set aside any opinions formed due to exposure to pre-trial media coverage:

First, content questioning is necessary to determine whether the type and extent of the publicity to which a prospective juror has been exposed would disqualify the juror as a matter of law... Second, even when pretrial publicity is not so extreme as to make a juror's exposure to it *per se* disqualifying, content questioning still is essential to give legal depth to the trial court's finding of impartiality. One of the reasons that a "juror may be unaware of" his own bias... Third, content questioning facilitates accurate trial court fact-finding. As this Court has recognized, the impartiality "determination is essentially one of credibility."<sup>282</sup>

Indeed, although the *Mu'Min* court held that content questioning was not necessary, the court did not overrule the finding in *Sheppard* that they were obligated to determine the credibility of jurors' stating an ability to set aside possible prejudice.<sup>283</sup> While the *Mu'Min* court may have been reasonably

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trial from effects of pre-trial prejudice).

281. *See id.* at 437.

282. *Mu'Min*, 500 U.S. at 440-43 (citing *Patton v. Yount*, 467 U.S. 1025, 1031 (1985)).

283. *See supra* notes 85 and 171 (describing the impact of the press and

certain the it had a grasp of all of the media content to which the jury pool may have had access, it arrived at this conclusion in 1988, prior to the development and widespread use of the world-wide Internet and YouTube. In 2008, the court's review of the traditional local printed news and broadcast news may not encompass the total spectrum of information to which a juror could be exposed.<sup>284</sup> Indeed, as the *Boyd* case has shown, it's possible that a juror may be able to watch re-broadcasts of news reports concerning the case for which he or she was about to sit even if the initial broadcast was months earlier.<sup>285</sup> Further, the potential juror is possibly exposed to salacious and unfounded details of the crimes right beside these re-published reports, something unheard of when *Mu'Min* was decided.<sup>286</sup>

Currently, with only the *Boyd* case to directly review the issue, the possible impact YouTube on a jury pool remains unclear.<sup>287</sup> Content based questioning has the possibility to clear up uncertainties the court may have by at least providing information as to the full breadth of content and times that a juror has been exposed to in relation to the case.<sup>288</sup> This information will give the court valuable information to make a quick weighing decision as to the credibility of the juror by evaluating their ability to set aside any pre-conceived opinions of the case.<sup>289</sup> Content questioning may even be more appropriate

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news coverage of trials on jurors).

284. See *supra* note 171 (describing the videos available and presented to the court on the *Boyd* motion to change venue).

285. See *supra* note 171 (listing video content available on YouTube at time of *Boyd* hearing).

286. See *supra* note 171 (describing video content on the *Boyd* case presented and generated on YouTube).

287. See *supra* note 171 (describing the *Boyd* case in context with the media coverage).

288. See *Mu'Min*, 500 U.S. at 440 (describing the need for content questioning in similar fact situation); see Coffey, *supra* note 25, at 640-43 (and cases therein cited) (describing the benefits of content questioning).

289. See *Mu'Min*, 500 U.S. at 420 (allowing jurors to testify if they on voir dire indicted their ability to put aside prejudice, even if exposed to the case); but see Studebaker & Penrod, *supra* note 25, at 440 (describing jurors' negative reactions to jury instructions); Lieberman & Arndt, *supra* note 41, at 678-79 (describing psychological studies indicating a pro-culpability bias in most jurors).

where the case may be generating only coverage through online sources like YouTube when traditional press has waned on coverage.<sup>290</sup> A court certainly could not rely on survey of mainstream media sources, if significant portions of the pool were accessing unregulated news coverage and reiterating previously run reports on YouTube.<sup>291</sup> Content based voir dire will also prepare the court for the likelihood that the trend of Internet based media coverage that is exemplified today in YouTube will continue to outpace traditional media sources.<sup>292</sup>

YouTube is based on and supported by content uploaded by private individuals, therefore the court is limited in its ability to issue gag orders to block content even if that content concerns a pending criminal case.<sup>293</sup> Indeed, it is possible that even if a court issues a gag order against traditional media sources to block reports on a certain aspect of the trial.<sup>294</sup> YouTube posters may still circumvent the order by posting already existing broadcasts on the Internet.<sup>295</sup> Since the good sense of users remains nearly the only regulation of sites like YouTube, courts are partially de-clawed as to their ability to make headway in this area.<sup>296</sup>

The DMCA may provide a good paradigm for a limited co-regulatory *ad hoc* solution to this problem. The DMCA demands

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290. See Patrick, *supra* note 4, at 72-77 (discussing longer cycles for news coverage on Internet); YouTube Terms of Service, *supra* note 196 (informing users of the indefinite nature of content posted on the site).

291. See *supra* notes 3, 165 and 166 (discussing YouTube's ability to outpace traditional media outlets); see TAMBINI & LEONARDI, *supra* note 8, at 1-15 (describing ability of Internet to outpace conventional media).

292. See *supra* notes 1-9; see Patrick, *supra* note 4, at 84.

293. See YouTube Community Guidelines, *supra* note 197 (stating YouTube policy of relying on community of users only for regulation); see TAMBINI & LEONARDI, *supra* note 8, at 67 (describing difficulty in regulating news content on Internet unlike traditional news covering media); *Boyd*, 2007 U.S. Dist. LEXIS at 88493, at \*2 (discussing fact that Boyd case presented videos of re-broadcasted news coverage)

294. *Boyd*, 2007 U.S. Dist. LEXIS at 88493, at \*2 (presenting videos of YouTube re-broadcasted news coverage in a motion for change of venue).

295. See *id.*; TAMBINI & LEONARDI, *supra* note 8, at 67.

296. See TAMBINI & LEONARDI, *supra* note 8, at 67-70 (describing ad hoc approach to Internet regulation).

that content hosting websites provide the framework to allow copyright owners ease of reporting to protect their violations.<sup>297</sup> Authors Tambini and Leonardo argue that ad-hoc regulation of the internet is one of the only reliable means of regulation.<sup>298</sup> The authors reason that the nature of the Internet as a medium, with its extreme low barrier for the average individual to distribute content, as opposed to the limited ability and high barrier to the submission of content in traditional media, make large governmental regulations incompatible.<sup>299</sup> Further, since the technology of the Internet is constantly changing to provide new and different avenues for the presentation of content, traditional regulations are too slow to keep up.<sup>300</sup> The system created by the DMCA works because it places the burden of enforcement on the companies that host user generated content, to provide quick avenues for redress of injuries in the copyright context.<sup>301</sup> The public is reassured and the system is validated since it is the content website's best interest to protect the rights of the copyright holder.<sup>302</sup> The system is also successful since these content hosting sites are directly connected with the content and the technology in a way that a far away regulatory agency could not be.<sup>303</sup>

Development of an *ad hoc* co-regulatory scheme, similar to the DMCA, may be appropriate to solve some of the issues with pre-trial media coverage on sites like YouTube. Currently, the proactive attorney could utilize YouTube's flagging system to flag such content as objectionable.<sup>304</sup> However, according to

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297. See *supra* notes 183-188. See DIGITAL MILLENNIUM COPYRIGHT ACT, 17 U.S.C. § 512 (1998) (describing civil penalties for failure of content hosting websites who do not adopt clear reporting and notice and takedown procedures for material that violated copyright).

298. See TAMBINI & LEONARDI, *supra* note 8, at 50-54 (reasoning rapid changes in technology for content on Internet and low to no barrier of entry for distributing content make traditional large-scale regulatory schemes unfeasible).

299. See TAMBINI & LEONARDI, *supra* note 8, at 60-63.

300. See TAMBINI & LEONARDI, *supra* note 8, at 60-63.

301. See TAMBINI & LEONARDI, *supra* note 8, at 60-63.

302. See TAMBINI & LEONARDI, *supra* note 8, at 60-63.

303. See TAMBINI & LEONARDI, *supra* note 8, at 60-63.

304. See YouTube Community Guidelines, *supra* note 197 (describing ability for YouTube users to flag content they deem objectionable which is then



YouTube, the standard for defining content as objectionable is extremely vague and YouTube admits that the solution for such content is likely for the user to stop watching it.<sup>305</sup> Therefore, a court is essentially stuck with the possibility that inflammatory and prejudicial news coverage will be available and accessible to their jury pool throughout the length of the trial. The current lack of firm standards for removal of prejudicial content on YouTube has the possibility of damaging a criminal defendant's Sixth Amendment Rights.<sup>306</sup> However, if the complaint was for a copyright violation, the removal of the content would be facilitated by YouTube's clear and mandated response, by reporting, notice and takedown procedures adopted in relation to the DMCA.<sup>307</sup>

A similar system following in the example of the DMCA could be a quick solution which could be applied in situations like *Boyd*. Similar to the way in which YouTube has integrated the reporting function for violations of copyright as required by the DMCA, regulations could provide a framework for reporting the presence of unfairly prejudicial news broadcasts that are integrated into the functioning of the website.<sup>308</sup> This new form of co-regulation would not provide greater power to the court than it already has in these matters.<sup>309</sup> Following in the

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reviewed by YouTube staff prior to removal or any other action).

305. See YouTube Community Guidelines, *supra* note 197 (describing YouTube reliance on community flaggings to determine whether content should be removed).

306. See *Mu'Min*, 500 U.S. at 440 (referencing the dissent describing how decision based on facts of the case muddled the waters for how courts could consider pre-trial circus atmosphere, where the facts of the case seemed consistent with those found in *Sheppard*); Coffey, *supra* note 25, at 640-43 (describing impact of *Mu-Min* decision).

307. See YouTube DMCA, *supra* note 195 (describing rapid procedure for notice and take down in order to comply with DMCA); DIGITAL MILLENNIUM COPYRIGHT ACT, 17 U.S.C. § 512 (1998) (requiring "prompt" process of notification to notice and take down procedures for violation of copy right on content hosting websites).

308. YouTube DMCA, *supra* note 195 (utilizing a web-form for immediate reporting of copy right violations). A copy of the form is integrated into functioning of web site, and clearly lays out the system available to the user to report copyright violations. YouTube DMCA, *supra* note 195.

309. See *supra* note 25 (discussing discretion of court to undertake efforts to prevent pre-trial prejudice); *Sheppard*, 383 U.S. at 343 (discussing no general

framework of the DMCA this type of regulation could ensure compliance with only light governmental interference.<sup>310</sup> The most vital element of such regulation would be the establishment of clear standards as to when material could be deemed prejudicial, as the DMCA has created in making a clear structure for protecting copyright owners' rights.<sup>311</sup> Websites like YouTube would merely have to accept similar notice and take down procedures when such content has been reported as prejudicial, and would be encouraged to do so to avoid civil liability and government sanction.<sup>312</sup> This speculative regulation would merely provide the court the technical reach into the generally unreachable realm of Internet generated news.<sup>313</sup>

## V. Conclusion

It is more likely than not that Internet generated news coverage of criminal trials will continue to grow. As has been shown by the *Boyd* case, there is a growing possibility that news posted on sites like YouTube could violate a criminal defendant's Sixth Amendment Rights. Due to YouTube's technological capabilities, any citizen may access any content in relation to the criminal case long after traditional media reports end. Further,

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right for press to report on criminal trial). "[L]egal trials are not like elections to be won through the use of the meeting-hall, the radio and the newspaper."  
*Id.*

310. See *DIGITAL MILLENNIUM COPYRIGHT ACT*, 17 U.S.C. § 512 (1998); Digital Millennium Copyright Act, *U.S. Copyright Office Summary*, archived at <http://www.webcitation.org/5owdhLKNo> (describing the need to give incentive to individual policing of websites, as the best solution to preventing copyright violation on the vast expanse of the Internet); TAMBINI & LEONARDI, *supra* note 8, at 110-17 (describing a hybrid system for regulating the internet based on providing incentive to individual users, and content providers to self police resulting in a mutual effort to result in consistent standards).

311. See *DIGITAL MILLENNIUM COPYRIGHT ACT*, 17 U.S.C. § 512; Digital Millennium Copyright Act, *U.S. Copyright Office Summary*, archived at <http://www.webcitation.org/5owdhLKNo> (providing straightforward rules for implementing notice and takedown procedure for copyright).

312. See *id.*

313. See *Nebraska Press Ass'n. v. Stuart*, 427 U.S. 539, 540-41 (1976) (describing court's role in balancing Sixth Amendment rights of criminal defendant against the possibility of prior restraint on the press.); see *Brandwood*, *supra* note 85, at 1420 (and cases cited therein) (discussing long standing policy of balancing rights when seeking to limit press coverage).

due to a lack of regulatory controls similarly imposed on the traditional press, content presented on YouTube remains largely outside of any traditional court control. If this nascent problem is not addressed now, courts may be forced to devise rough and possibly problematic ad-hoc standards to deal with Internet generated pre-trial prejudice after a Sixth Amendment violation occurs.

Not only do the unique capabilities of YouTube present new challenges to the criminal defendant's Sixth Amendment Rights in avoiding pre-trial prejudice from media coverage, these new challenges must be addressed where the standards for such a determination have been made unclear. The inconsistencies of result between the *Sheppard* and *Mu'Min* decision, have clouded the issue of what level and types of media coverage will create the "reasonable likelihood of prejudice" described in *Sheppard*. With the growing tide of news coverage presented on YouTube and sites like it, there needs to be a clarification of the standard of "reasonable likelihood of prejudice." The content and coverage generated online by sites like YouTube will provide an even greater possibility for jury pool's exposure to a wider array of possibly prejudicial media coverage. Without clear standards, criminal defendants may be left with widely varying and possibly contrary results. Where this danger of contrary results is an injury to the defendant's fundamental Sixth Amendment Rights, the air must be cleared on the standards of *Sheppard* and *Mu'Min*, while Internet generated news coverage on website like YouTube is only in its nascent stages, before there is simply too much content for courts to wrap their arms around.

The best solutions against the foggy rules concerning reasonable possibility of prejudice and the advent of unregulated news coverage of criminal trials generated on the Internet by websites like YouTube are already available to the careful judge and the proactive attorney. Attorneys ought to scour YouTube for re-broadcasts of news reports concerning the defendant's case and individually created coverage of the case as a presentation to the court along with traditional media in a motion for change of venue. Courts should also engage in

carefully worded yet common sense jury instructions while taking into account the new paradigm of where jurors will likely get their information from. Further, courts should be encouraged to engage in content questioning voir dire as the most realistic review of a juror's ability to set aside his pre-conceived notions of the case. Proactive courts and attorneys reviewing Internet generated news coverage may result in increased familiarity and allow lawmakers to develop regulatory standards for such content, similar to the regulations already in place like the DMCA.

If these trends continue, it is likely that Internet generated news is going to be a greater part of the life of the average citizen and therefore the average jury pool. It is best to address these issues now in these very early stages, to experiment with solutions and explore the possibilities of their impact before they truly come to a head. The failure to adapt and begin thinking about these problems now may leave the criminal trial system and its actors unprepared to adapt to the new paradigm Internet generated news coverage will create in relation to the protection of the Sixth Amendment rights to fair trial.