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THE DEATH PENALTY AND PRE-TRIAL PUBLICITY: ARE TODAY’S ATTEMPTS AT GUARANTEEING A FAIR TRIAL ADEQUATE?

JOSEPH R. MARINIELLO*

In these days of newspaper enterprise and universal education, every case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits.¹

From the beginning of recorded history people have been put to death for their crimes. While the curiosity of the general public and media coverage of the crimes committed has since increased, the protections afforded capital defendants against the dangers of prejudicial publicity remain largely ineffective. The battle between the First Amendment’s “freedom of the press”² provision and the Sixth Amendment’s “fair trial”³ provision continues to wage.⁴ The numerous Supreme Court cases on the topic have left trial judges with too much discretion to deny protections from bias and publicity and not enough power to

¹ Reynolds v. United States, 98 U.S. 145, 155-56 (1878).
² U.S. CONST. amend. I, in relevant part: “Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .”
³ Id. amend. VI, in relevant part: “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 . . . .” (emphasis added).
⁴ This article primarily concerns what types of judicial processes are available to trial judges today to remedy the effects of prejudicial publicity. For information on the ongoing conflict between the Sixth Amendment and the First Amendment in the “free press” - “fair trial” context see AMERICAN SOCIETY OF NEWSPAPER EDITORS, FREE PRESS & FAIR TRIAL (1987); DONALD M. GILMORE, FREE PRESS AND FAIR TRIAL (1966); PETER E. KANE, MURDER, COURTS, AND THE PRESS (1992); REPORT OF THE TWENTIETH CENTURY TASK FORCE ON JUSTICE, PUBLICITY AND THE FIRST AMENDMENT, RIGHTS IN CONFLICT (1976); FRED S. SIEBERT ET AL., FREE PRESS AND FAIR TRIAL (1970).
grant the proper relief.\textsuperscript{5} There are questions left unanswered and the current standards provide for ineffective protection for a defendant's right to life guaranteed by the Constitution. This battle's casualties are capital defendants, fighting for their lives, and trial and appellate courts, left with the burden of entertaining endless appeals based fundamentally on prejudicial pre-trial publicity and abuse of discretion when entertaining pretrial motions.

The potential for pretrial publicity to affect a verdict cannot be overlooked.\textsuperscript{6} Perhaps the most documented capital punishment case in history was a case in which "pretrial" publicity led directly to the death of the defendant. The death of Jesus Christ nearly two thousand years ago could very well be attributed to the overwhelming public opinion that he was guilty.\textsuperscript{7} While Jesus did not enjoy the limited protections available to today's defendants, his death shows the power of public opinion and its prejudicial effect upon factfinders which the courts cannot ignore.

Today, capital defendants, literally fighting for their "right to life," often appeal based on prejudicial pretrial publicity and appellate courts must continually address these cases. Most recently, the Supreme Court decided the case of \textit{Mu'min v. Virginia}.\textsuperscript{8} In that case, David Mu'min was convicted and sentenced to death for killing a woman in Prince William County, Virginia. Eight of the twelve jurors who convicted Mu'min admitted to

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\textsuperscript{6} The Supreme Court recognized over one hundred years ago that pretrial publicity can effect a trial's fairness. See \textit{generally Reynolds v. United States}, 98 U.S. 145 (1878).
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\textsuperscript{7} \textit{St. Matthew} 27:15-23. ("Now at festival time the procurator used to release to the crowd a prisoner, whomever they would. Now he had at that time a notorious prisoner called Barabbas. Therefore, when they had gathered together, Pilate said, 'Whom do you wish I release to you? Barabbas or Jesus who is called Christ?' For he knew that they had delivered him up out of envy... The chief priests and the elders persuaded the crowds to ask for Barabbas and to destroy Jesus. But the procurator addressed them, and said to them 'Which of the two do you wish that I release to you?' And they said, 'Barabbas.' Pilate said to them, 'What then am I to do with Jesus who is called Christ?' They all said, 'Let him be crucified!' The procurator said to them, 'Why, what evil has he done?' But they kept crying out the more, saying, 'Crucify him!').
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\textsuperscript{8} 111 S. Ct. 1899 (1991).
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being exposed to the case in one way or another. Three months prior to trial, Mu'min submitted, in support of his change of venue motion, forty-seven newspaper articles discussing the murder as well as information about Mu'min's criminal record, his failure to gain parole six times, alleged prison infractions and details about the murder for which Mu'min was already serving time. The trial court denied Mu'min's motion for change of venue and motion for individual voir dire. The United States Supreme Court, upholding the earlier decision of the Virginia Supreme Court, determined that the Due Process Clause of the Fourteenth Amendment does not require that prospective jurors be screened about the specific content of the pre-trial publicity they have been exposed to during voir dire. In so doing, the Supreme Court affirmed Mu'min's conviction and death sentence.

The Mu'min decision, along with other modern Supreme Court decisions, have left trial courts guessing as to whether or not pretrial publicity will affect the jury's decisions. "Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of jurors..." the court stated in Sheppard v. Maxwell, the trial courts must take strong measures to ensure that the balance is never weighed against the accused." With the media attention given to high-profile cases, "the main question centers around the conduct of the trial judge toward the prospective and chosen jurors, in taking precautions against the effect of publicity." If this is true, trial court judges must minimize the role pre-trial publicity plays in the capital cases. In what ways can judges do so? The more common remedies available to judges such as change of venue, continuances, sequestration, gag orders, jury voir dire, and jury instructions, are generally ineffective. Moreover, all too frequently judges are reluctant to issue them.

9. Id. at 1911; Among the various newspaper articles were articles with headlines reading: Murderer Confesses to Killing Woman; Inmate Said to Admit to Killing; Accused Killer Says He Stabbed Dale City Woman After Argument; Mu'min Says He Decided Against Raping Nopwasky. Id.
10. Id. at 1908.
12. Id. at 362.
14. Studies of jury behavior are divided as to whether jurors pre-exposed to information of a murder can put aside what they have heard and form an opinion based merely on what they hear during the trial. These studies will be referred to throughout this paper.
Where, then, does this leave us today? This article will demonstrate that: 1) the remedies available to judges are ineffective and under-utilized; 2) the standards set by the Supreme Court's decisions on pre-trial publicity related motions are ineffective; and, 3) most importantly, capital defendants should be afforded greater protection. It will show how both proponents and opponents of the death penalty would benefit from greater pre-trial protections for capital defendants.

I. **Why Today's Judicial Remedies Protecting Against Juror Bias Are Ineffective**

In this media-dominated age, the remedies trial judges have at their disposal to rid juries of bias are often not enough to protect defendants from the prejudicial effect of pretrial publicity. Moreover, studies have found that the reluctance of trial judges to use the available mechanisms and to rely on voir dire, jury instructions, and deliberations to rid jury biases is inappropriate and ineffective. These studies have also found that jurors with greater knowledge of a case are more likely to be pro-prosecution. The source of information for the media is generally either the police or the prosecution, which is why newspapers tend to report the prosecution's side of the case rather than the defendant's. This, combined with the recent finding that death penalty qualified jurors are conviction prone to begin with, is very troubling. The media and the judiciary have made attempts at cooperation with regard to the reporting of criminal cases; however, the competition to sell papers or to attract television audiences often renders these agreements futile.

16. Id. at 411.
18. See Frank P. Williams III & Marilyn D. McShane, *Psychological Testimony and the Decisions of Prospective Death-Qualified Jurors*, in *The Death Penalty in America: Current Research* 71, 72 (Robert M. Bohm ed., 1991). This study continued research on the effect of psychological testimony on juries in death penalty cases. The study contrasted the effect of such testimony on "death-penalty excludables" (defined as those potential jurors opposed to capital punishment to the extent that their feelings interfere with their ability to grant a death sentence and are thus excluded from jury service on death penalty cases) and those "death-qualified" (defined as jurors willing to consider the death penalty should the defendant be convicted). The study concluded that death-qualified jurors are predisposed to favor the prosecution. Id. at 92-97.
When should the remedial mechanisms available be used? Why aren’t they used more often? These are important questions when the defendant is facing the death penalty. The reluctance of appellate courts to overturn cases on the basis of pre-trial publicity combined with the trial court’s denial of pre-trial publicity related motions makes the application of such mechanisms much more critical when a person’s life is at stake.

The remedies available today for judges to ensure that a jury is as unbiased as possible include continuances, sequestration of the jury, change of venue, jury voir dire, instruction, deliberation, and gag orders on participants. Each of these remedies is under-used, and in many cases insufficient to guarantee a fair trial even when issued.

A. Continuances

One of the more effective ways of decreasing pretrial bias is to diminish the effect of publicity through the use of continuances. A continuance is simply an order postponing the trial to a later date. Studies have shown that a continuance can be an effective remedy to reduce the effect of publicity.

There are two reasons, in particular, why continuances are not used more often. First, a judge grants a continuance upon his or her discretion. The general theory behind issuing a continuance is that one should be granted when it will further the cause of justice. Vesting the discretion to grant such a motion with the trial judge is important; however, it is also problematic because, in the appeal of such motions, appellate courts review
the record to find an abuse of discretion,\textsuperscript{22} perhaps the toughest standard of review for appellants to overcome.

A second reason for denying a motion to continue is grounded in the Constitution itself. The Sixth Amendment provides that "[i]n all criminal prosecutions the accused shall enjoy the right to a \textit{speedy} and public trial."\textsuperscript{23} The delay caused by a continuance, it is argued, is an abridgement of the accused's Sixth Amendment right to a speedy trial.\textsuperscript{24} This argument is easily refuted when the accused, for whom this provision is included in the Constitution, is the party making the motion. Opponents also argue that granting continuances does more to impede justice because continuances allow the memories of witnesses to fade and increase the potential for lost evidence.\textsuperscript{25}

All these arguments lose their luster when the issue is the life or death of a person. The abuse of discretion standard leaves defendants too much room for appeal and judges too much room for denial. Continuing to use the abuse of discretion standard when reviewing motions to continue will produce two natural consequences. First, there will be continued injustice for defendants, who must suffer through a trial in the media before entering a courtroom. Second, the standard results in greater economic burdens on the judicial system due to the countless appeals brought by defendants who hope their case will show sufficient abuse of discretion to warrant a new trial.

**B. Change of Venue**

Change of venue motions, above all others, are under-utilized by trial judges. A change of venue allows a trial judge to move the trial to another county where the publicity has not been so great as to have tainted the jury pool.\textsuperscript{26} Change of venue, like a continuance, is also granted at the discretion of the trial court judge,\textsuperscript{27} and an appellate court will reverse only when the trial court's ruling is clearly an abuse of discretion.\textsuperscript{28} Appealing

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\textsuperscript{23} U.S. CONST. amend. VI (emphasis added).
\textsuperscript{25} \textit{Id.} at 648.
\textsuperscript{26} \textit{See} 28 U.S.C. § 1404 (1988) (this allows judges to change trial sites "in the interest of justice").
\textsuperscript{27} \textit{See} United States v. Dickie, 775 F.2d 607 (5th Cir. 1985); United States v. Alvarado, 647 F.2d 537, 539 (5th Cir. 1981) (a district court judge has "broad discretion in determining whether transfer is warranted"); \textit{cf.} Fed. R. CRIM. P. 18 (venue); Speedy Trial Act, 18 U.S.C. § 3161 to 3174 (1993).
\textsuperscript{28} Kersten v. United States, 161 F.2d. 337 (10th Cir. 1947).
}
the denial of a motion to change venue presents the same problems which arise when appealing a motion to continue. The vague standard of review supports many appeals, yet allows for few reversals. This causes inefficiency and injustice. There is also a reluctance on the part of judges to admit that the defendant cannot receive a fair trial in their jurisdictions.29

In some cases today, merely moving a case out of the county in which the crime was committed will not reduce prejudice arising from widespread media attention. However, some studies30 show that a change of venue will, in many cases, lessen the amount of prejudice considerably. These same studies conclude that occupants of the county in which a crime was committed are more likely to be pro-prosecution.31 In some instances the difference in bias from the county in which the crime was committed and a neighboring county is large enough to substantially affect the degree of "fairness" a defendant receives.32

Changing the venue can cause a Constitutional conflict as well. The Sixth Amendment calls for a trial before a "jury of the State and district wherein the crime shall have been committed."33 Again, the fact that the case involves the defendant's right to life and to an impartial jury,34 as provided for in the Constitution, should override any conflict within the Sixth Amendment. Our society's value of justice would seem to mandate changes of venue to ensure a fair trial, but it often appears the opposite.

Among the many Supreme Court cases addressing change of venue "standards," for lack of a better word, is Irvin v Dowd.35 In Irvin, the court stated:

It is not required that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the

29. Minow & Cate, supra note 24, at 647.
31. Carroll et al., supra note 17, at 191.
32. Id. Professor Carroll's article reports one example where "two-thirds of the venue county knew about a previous conviction of the defendant's but only 2% knew in a county preferred by the defense."
33. U.S. CONST. amend. VI.
34. Id.
vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of the accused, without more, is sufficient to rebut the presumption of a juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.\textsuperscript{36}

This standard allows for a judge to deny a motion for change of venue despite the existence of preconceived notions of guilt held by jurors sitting on the case. The court states that to hold otherwise is "to establish an impossible standard."\textsuperscript{37} It is this standard society must require when a case involves the possible death of the defendant.

The Court next addressed the standard for granting change of venue in \textit{Sheppard v. Maxwell}.\textsuperscript{38} In \textit{Sheppard}, the Court determined that a trial judge should grant a defendant's change of venue motion upon a showing that there is a "reasonable likelihood" that juror prejudice will prevent a fair trial.\textsuperscript{39} This standard became increasingly more difficult to attain with the Court's decisions in \textit{Murphy v. Florida}\textsuperscript{40} and \textit{Patton v. Yount}.\textsuperscript{41} In \textit{Murphy} and \textit{Patton}, the Court adopted a standard more easily classified as "substantial likelihood" of prejudice rather than "reasonable likelihood."\textsuperscript{42}

In \textit{McReynolds v. State of Indiana},\textsuperscript{43} the trial court denied a change of venue motion despite what they admitted was a "substantial amount of publicity."\textsuperscript{44} The record included evidence

\textsuperscript{36} \textit{Id.} at 722-23 (emphasis added).
\textsuperscript{37} \textit{Id.}
\textsuperscript{38} 384 U.S. 333 (1966).
\textsuperscript{39} \textit{Id.} at 363.
\textsuperscript{40} 421 U.S. 794 (1975).
\textsuperscript{41} 467 U.S. 1025 (1984).
\textsuperscript{42} The ABA itself has addressed the requisite standard in its Standards for Criminal Justice. The 1980 revision of the Standards for Criminal Justice adopt a "substantial likelihood of prejudice" standard for the granting of change of venue motions as well as continuance motions:
\textit{A motion for change of venue or continuance will be granted whenever it is determined that, because of the dissemination of potentially prejudicial material, there is a substantial likelihood that, in the absence of such relief, a fair and impartial jury cannot be had.} ABA \textit{STANDARDS FOR CRIMINAL JUSTICE} 8-3.3 (2d ed. 1980).
\textsuperscript{43} \textit{Id.} at 363.
\textsuperscript{44} \textit{Id.} at 961.
that prior to voir dire at least twenty-four newspaper articles were printed about the murder, the accused, and a related murder in which the accused was the prime suspect.\textsuperscript{45} In addition, several radio and television reports were broadcast about the murder.\textsuperscript{46} The court further admitted that, consistent with \textit{Irvin}, "during voir dire, all those eventually serving as jurors stated they remembered hearing something about the incident."\textsuperscript{47} While the record contains no statistics regarding the knowledge of potential jurors outside the county in which the case was heard, it can be inferred from the defendant's requested motion that there was less potential prejudice in neighboring counties. Nevertheless, the Indiana Supreme Court upheld the trial court's denial of this motion.\textsuperscript{48}

Change of venue also can be supported by those who argue that other options are poor ways of ridding juries of bias, insofar as these options strip juries of intelligent, informed citizens. The argument works on two assumptions about our society: 1) that "good" citizens care about the crime and prevention of crime going on around them; and 2) citizens who don't know about crimes reported by the media are "bad" citizens and thus "bad" jurors. If, then, all informed jurors are stripped from juries in capital cases, only the ignorant will remain. The argument concludes from the foregoing that no good citizens will serve as jurors in capital cases. Surely this conclusion presents a situation all those concerned with justice wish to avoid. While there are flaws in the argument's reasoning, the reasoning is rebuffed when the cure for bias is change of venue. Change of venue is a convenient way to eliminate bias and still have informed, intelligent citizens from whom to select a jury.

\textbf{C. Jury Voir Dire, Instruction, \& Deliberation}

The standards established by the Supreme Court allow jurors to sit even if they have been exposed to substantial media reports of the case so long as they can state, as honestly as possible, that any predisposition of guilt or innocence will be set aside during the trial.\textsuperscript{49} What then is required of the trial judge when determining if a juror is fit to serve? The answer, simply put, is not much.

\begin{itemize}
\item \textsuperscript{45} \textit{Id.}
\item \textsuperscript{46} \textit{Id.}
\item \textsuperscript{47} \textit{Id.}
\item \textsuperscript{48} \textit{Id.}
\item \textsuperscript{49} 366 U.S. at 722-23.
\end{itemize}
1. Voir Dire

Extensive jury voir dire is the most commonly used approach for determining juror bias.\(^{50}\) However, the determination of what is actually extensive voir dire is determined by the trial judge on a case by case basis and is subject to the “actual prejudice” standard.\(^{51}\) This standard presumes that the trial judge sits in the best position to determine the amount of bias and prejudice from local news coverage.\(^{52}\) The “actual prejudice” standard requires the defendant to prove prejudice against a presumption of non-prejudice.\(^{53}\) This is an extremely difficult task since defendants and their counsel have such limited access to juror deliberations. This standard neither reduces the amount of pretrial publicity nor the number of appeals. The voir dire in *Murphy v. Florida*,\(^{54}\) a case in which the petitioner was convicted of robbery, exemplifies a typically permissive voir dire. The fact that the case does not involve a capital offense does not affect the standard applied, because the standard established in *Murphy* applies to all voir dire examinations. An example of the questions asked of venirepersons in *Murphy* follows:

Q. (defense attorney) Now, when you go into that jury room and you decide upon Murphy’s guilt or innocence, you are going to take into account the fact that he is a convicted murderer; aren’t you?
A. (potential juror) Not if we are listening to the case, I wouldn’t.
Q. But you know about it?
A. How can you not know about it?
Q. When you go into the jury room, the fact that he is a convicted murderer, that is going to influence your verdict; is it not?
A. We are not trying him for murder.
Q. The fact that he is a convicted murderer and jewel thief, that would influence your verdict?
A. I didn’t know he was a jewel thief.
Q. Oh. I am sorry to put words in your mouth.

Now sir, after two or three weeks of being locked up in a downtown motel, as the court determines, and after hearing the State’s case, and after hearing no case on behalf of Murphy, and hearing no testimony from Murphy saying, ‘I

\(^{50}\) Kramer et al., *supra* note 15, at 413.
\(^{52}\) *Mu’min*, 111 S.Ct. at 1906.
\(^{54}\) 421 U.S. 794 (1975).
am innocent' - when you go into the jury room, sir, all these facts are going to influence your verdict?
A. I imagine it would be.
Q. And in fact, you are saying if Murphy didn't testify, and if he doesn't offer evidence, 'My experience of him is such that right now I would find him guilty.'
A. I believe so.\(^{55}\)

This examination smacks in the face of two fundamental principles of American justice: that criminal guilt be proven beyond a reasonable doubt, and, that a defendant is innocent until proven guilty. Therein lies the difference between burden of proof and presumption of innocence as theories and their practical applications in an age of pervasive media coverage.

The jury system relies on the presumption that venirepersons are honest and candid before the court.\(^{56}\) However, studies indicate that voir dire is ineffective in ridding the jury of bias.\(^{57}\) Jurors tend not to speak out during voir dire. It is not uncommon for jurors to lie so as to disguise their prejudices and preconceptions.\(^{58}\)

\(^{55}\) Id. at 802 n.5.

\(^{56}\) While jurors generally have good intentions, it has been found that jurors may not always have the ability to recognize their prejudices. See JEFFREY T. FREDERICK, The Psychology of the American Jury 27 (1987), in which the author notes:

A study specifically addressing the question of whether jurors recognize their own biases indicates that jurors are generally unaware of their own prejudices. Only 26% of those exposed to damaging pretrial publicity recognized their biases, while the remaining supposedly "neutral" jurors who were exposed to damaging pretrial publicity still convicted the defendant at a 2-to-1 rate as compared to jurors not exposed to such publicity.

Id. (citing Stanley Sue et al., Authoritarianism, Pretrial Publicity, and Awareness of Bias in Simulated Jurors, 37 PSYCHOL. REP. 1299 (1975)).

\(^{57}\) Ellsworth, Are Twelve Heads Better Than One?, 52 LAW & CONTEMP. PROBS. 205, 206 (1989); see also NATIONAL JURY PROJECT: SYSTEMATIC TECHNIQUES § 2.03 (2d ed. 1991). Most jurors portray themselves as honest and fair. However, jurors tend to give way to what is termed evaluation apprehension, defined as a concern for the way their performance is evaluated. This leads to a awareness of the consequences of their answers to an attorneys questions in voir dire. Id. at § 2.03[2]. This awareness is aggravated by the social status of the interviewer. In other words, the status of the interviewer as judge or attorney may heighten the apprehension the juror feels. Id. at § 2.03[3]. This pressure, along with a "person's natural reaction to stress, embarrassment, group pressure, and public exposure" affects juror responses during voir dire. Id. at § 2.03[2]. These influences leave the juror's responses less reliable despite his or her honest and fair intentions.

\(^{58}\) Minow & Cate, supra note 24, at 650-51.
It is, therefore, imperative that lawyers and judges ask the right questions to bring out these biases if we are to rely on voir dire to combat the effects of pretrial publicity. "Even when the judge or attorneys wish to ask the right questions, they find that voir dire questions are difficult to frame ...," says Newton Minow, "[j]urors often do not understand what information is prejudicial or improper or know that they possess such information. In fact the very act of questioning about bias may induce a counter bias."59

In 1991, the Supreme Court permitted substantial limitations on the amount and content of voir dire into a jurors exposure to pre-trial publicity in *Mu'min v. Virginia.*60 In *Mu'min,* the Court addressed the issue of whether the Due Process Clause of the Fourteenth Amendment requires the trial judge to ask or allow questions to potential jurors regarding their knowledge about the case as a result of pre-trial publicity.61 Over a strong dissent by Justice Marshall, the Court held that a trial court is not required to allow questions concerning the specific content of the pre-trial publicity to which venirepersons have been exposed. It permitted the questioning to be limited to the venirepersons ability to remain impartial.62 The dissent in *Mu'min* concluded that such a ruling leaves the Sixth’s Amendments guarantee of a fair trial as a mere "hollow formality."63

What difference does this really make to those facing execution? The difference between life and death. The *Irvin* standard,

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59. *Id.* at 652-53.
61. *Id.* at 1901.
62. *Id.* at 1903. It should be noted that several state courts have held that such questions are permissible to assess juror bias. The *Mu'min* decision only determines that such questions are not constitutionally compelled under the U.S. Constitution. See Tennessee v. Claybrook, 736 S.W.2d 95 (Tenn. 1987); New Jersey v. Bey, 112 N.J. 45 (1987); Illinois v. Taylor, 101 Ill. 2d 377 (1984); Hawaii v. Pokini, 55 Haw. 640 (1974).

It should also be noted that the courts in *Tennessee v. Claybrook* and *New Jersey v. Bey* discussed and gave great weight to the fact that the defendants were sentenced to death in their original trials.

63. *Id.* at 1909 (Marshall, J., dissenting). Justice Brennan, who joined Justice Marshall on the dissent, voiced his opinion on the extent to which a trial judge should inquire into exposure to publicity in *Nebraska Free Press Ass’n v. Stuart,* 427 U.S. 539 (1976):

[A] judge should broadly explore such matters as the extent to which prospective jurors had read particular news accounts or whether they had heard about incriminating data such as an alleged confession or statements by purportedly reliable sources concerning the defendant’s guilt.

427 U.S. 539 at 602.
allowing jurors who have preconceived notions of guilt to sit, is very dangerous. Studies indicate that jurors admitting some degree of bias are more likely to convict than those who are unbiased.\textsuperscript{64}

Clearly, voir dire is an improper place for judges to expect jury bias to be eliminated, not only because of the reluctance of jurors to admit bias, but also because of the inability of judges and attorneys to show bias during voir dire.\textsuperscript{65} The tendency on the part of judges and attorneys to rush through voir dire so as to continue along with the trial, along with the difficulty of framing questions likely to elicit bias, makes voir dire unreliable as protection against bias.\textsuperscript{66}

2. Jury Instructions

The second remedy that judges use during the trial process to diminish the effects of publicity is jury instructions. Judicial instructions ask jurors to disregard inadmissible evidence or notice of prior criminal record of the defendant. In reality, they do little to reduce bias and are largely ignored.\textsuperscript{67} A recent study published determined that judicial instructions asking jurors to decide only on the facts heard at trial had no effect on jury verdicts.\textsuperscript{68} The conclusion was that "reliance upon standard cautionary instructions as a remedy for prejudicial pre-trial publicity appears to be unwarranted."\textsuperscript{69}

3. Deliberation

Lastly, some judges rely on the deliberation process to eliminate bias from pre-trial publicity. Studies differ on the effects of pre-trial publicity on the quality and content of deliberation.\textsuperscript{70} There is a large body of research, however, concluding that group discussion tends to polarize individual viewpoints and that a small amount of publicity-induced bias can magnify in group
deliberation.\textsuperscript{71} This suggests that deliberation is yet another process that is inherently unreliable. The differing studies provide for interesting reading, but offer few definitive conclusions. The only conclusion that can be made from the examinations is that, in instances where execution is the penalty, responsible judges should not rely on deliberations to diminish the effects of pre-trial publicity.

A fair and just society can conclude from the large body of studies done on jury voir dire, instruction, and deliberation only that the present attempts to negate jury bias arising from pre-trial publicity are ineffective, especially in highly publicized capital cases. Circuit Court Judge Calvert Magruder said:

One cannot assume that the average juror is so endowed with a sense of detachment, so clear in his introspective perception of his own mental processes, that he may confidently exclude even the unconscious influence of his preconceptions as to probable guilt, engendered by pervasive pre-trial publicity.\textsuperscript{72}

One would think that, in the face of such clear evidence, the use of other, more effective remedies, such as change of venue and continuances, would be employed. However, this is not the current situation. Jury voir dire, deliberations, and instructions are still the remedies which judges rely upon most when attempting to combat pre-trial jury bias, even in death penalty cases.\textsuperscript{73}

D. \textit{Gag Orders}

A judicial directive to all parties to abstain from discussing the case in public, commonly called a "gag order," is another method used to dilute the affects of pre-trial publicity. Nowhere is the battle between the First Amendment and the Sixth Amendment more evident then in issuance of gag orders on parties to trials. Chief Justice Rehnquist recognized this conflict in \textit{Gentile v. State Bar of Nevada}.\textsuperscript{74} Rehnquist stated, "Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by impartial jurors, and an outcome affected by extra-judicial statements would violate that fundamental right."\textsuperscript{75} This remedy directly confronts the First Amendment’s free speech provision and is subject to constitutional attack from both the

\textsuperscript{71} Kramer et al., \textit{supra} note 15, at 413.

\textsuperscript{72} Delaney v. United States, 199 F.2d 107, 112-13 (1st Cir. 1952).

\textsuperscript{73} Kramer et al., \textit{supra} note 15, at 409-11.

\textsuperscript{74} \textit{Gentile}, 111 S. Ct. 2720.

\textsuperscript{75} \textit{Id.} at 2745.
prosecutor and the defendant as a prior restraint on speech.\textsuperscript{76} The First Amendment is guarded as if it was the crown jewel of the Constitution and thus any judicial order limiting the content of speech will be subject to the strictest scrutiny. However, it is evident that the majority of post-arrest publicity comes out of the office of the prosecutor.\textsuperscript{77} If, then, the amount of information released by the prosecutor's office was diminished by court order, there would be less prejudicial information for the press to publish.

"Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function . . ." stated the court in \textit{Sheppard v. Maxwell},\textsuperscript{78} "Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation but is highly censurable and worthy of disciplinary measures."\textsuperscript{79}

Despite this apparent endorsement of so called "gag orders" judges are unlikely to issue them. This is primarily because their issuance presents three problems. First, there are the overwhelming constitutional questions regarding the restraint on speech. Second, the enforcement of such orders against the parties to the trial is a difficult task. Finally, judges are reluctant to issue gag orders because some of the more prejudicial information given to the press does not always come from parties under the control of the court.\textsuperscript{80}

Many defense attorneys feel that such gag orders are more frequently enforced upon defense attorneys than upon prosecutors.\textsuperscript{81} Yet, it appears that defense attorneys often knowingly and directly violate these orders to counter the unprosecuted leaks to the press coming from the prosecutor's office. "We live in an era where there are tremendous amounts of leaks to the press . . .," states Frederick Hafetz,\textsuperscript{82} "[t]here is also a huge amount of infor-

\begin{footnotesize}
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\item U.S. Const. amend. I.
\item Carroll et al., \textit{supra} note 17, at 190.
\item 384 U.S. 333 (1966).
\item \textit{Id.} at 362-363.
\item "It is apparent that neither the Supreme Court, not any legislature can shut off access to all the legitimate sources of information without revoking the freedom of speech of friends, neighbors, fellow employees, teachers, wives, (etc.) . . ." HOWARD FLESHER, \textit{JUSTICE U.S.A.?} 10 (1967).
\item Andrew Blum, \textit{Left Speechless, Out of Court Defense Lawyers Feel a Chilling Breeze}, \textit{Nat'l L.J.}, Jan. 18, 1993, at 1, 26, 27.
\item \textit{Id.} at 26; Mr. Hafetz is a partner at New York's Goldman & Hafetz and is currently representing Mr. Bruce Cutler against accusations that he violated a court order by speaking to the press while representing mob boss John Gotti in a well publicized case.
\end{enumerate}
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mation reported in a way that prejudices defendants, so defense lawyers feel a need to talk to the media.\footnote{83}{Id.} This was precisely the case in the recent Supreme Court case \textit{Gentile v. State Bar of Nevada\footnote{84}{Gentile v. State Bar of Nevada, 111 S. Ct. 2720 (1991).}}. In \textit{Gentile}, the Supreme Court reversed a decision by the Nevada Supreme Court to disbar a defense attorney for statements he made purposely to combat the publicity against his client disseminated from the prosecutor's office. The attorney explained that he made his statements due to his concern that "... unless some of the weaknesses in the State's case were made public, a potential jury venire would be poisoned by repetition in the press of information being released by the police and prosecutors."\footnote{85}{Id. at 2728.}

\textit{Gentile} illustrates the problems attorneys have in complying with local guidelines. In \textit{Gentile}, the defense attorney had not violated a court order but rather Nevada Supreme Court Rule 177 through comments issued during a press conference. The rule, modeled after the ABA's Model Rules of Professional Conduct, is violated when an attorney makes statements prior to trial that have a "substantial likelihood of materially prejudicing an adjudicative proceeding."\footnote{86}{Id. at 2737. The Nevada rule is substantially similar to the MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6. The Rule states in part: Rule 3.6 Trial Publicity

(a) A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

Part (b) provides a partial list of what types of comments will be considered to be violative of the rule. Part (c) provides a list of what types of comments are not violative of the rule. Neither list is considered exhaustive, only illustrative. Part (b) provides a partial list of what types of comments will be considered to be violative of the rule. Part (c) provides a list of what types of comments are not violative of the rule. Neither list is considered exhaustive, only illustrative.\footnote{87}{This standard is developed from the CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107. It has been adopted in some form in eleven states as of the decision in \textit{Gentile}. 111 S. Ct. at 2741.}} While most state bars have rules similar to Nevada's, some states provide less protection for attorney speech by applying a "reasonable likelihood of prejudice" standard.\footnote{88}{MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 cmt. (1992).} The rules promulgated can only guide attorneys to a limited extent. In fact, the comments to the ABA Model Rules of Professional Conduct themselves admit "[n]o body of rules can simultaneously satisfy all interests of fair trial and all those of free expression."\footnote{89}{Id.}

If it is difficult to gag the parties, why then not silence the press? Again Constitutional issues guard against such orders.
Nebraska Press Ass'n v. Stuart\(^9\) effectively eliminates the option of gagging the press. In *Stuart*, the defendant was accused of the murder of six members of a family in their home in Sutherland, Nebraska. At that time, the town wherein the murders had been committed had only 850 residents. The trial court issued an order prohibiting those in attendance at court hearings and such from "releasing or authorizing the release for public dissemination in any form or manner whatsoever any testimony given or evidence adduced."\(^9\) The motion for restrictive order had been brought by both the defendant and the County Attorney, recognizing the difficulty in finding an impartial jury in such a small community.\(^9\)

The Supreme Court did not explicitly hold, in *Stuart*, that trial court orders can never gag the press from reporting events. Rather, the Court said that, under the facts of that particular case, it was not proper to gag the press, but that there may be instances where it would be tolerable.\(^9\) However, if the facts surrounding the trial in *Stuart* did not merit an order gagging the press, then it is difficult to envision when such an order would be justified on the basis of pretrial publicity. In essence, prior restraint of the press is simply unacceptable to the courts.\(^9\)

The result in *Stuart* cannot be overlooked as insignificant. When faced with a direct confrontation between the First and Sixth Amendments, the Court decided in favor of protecting speech over protecting the integrity of trials. Whether one believes this case to be correctly decided is largely irrelevant, since that decision is likely to be based on how one personally feels about the battle between the two Constitutional provisions. However, what is most relevant about the impact of *Stuart* on future cases is the precedent the case sets regarding which of the two competing Constitutional provisions the Court favors. The true effect of *Stuart* cannot be measured in numbers, but is cer-

\(^89\) 427 U.S. 539 (1976).
\(^90\) Id. at 542.
\(^91\) Id.
\(^92\) Id. at 569-70; Mr. Chief Justice Burger writing for the court stated, "However difficult it may be, we need not rule out the possibility of showing the kind of threat to fair trial rights that would possess the requisite degree of certainty to justify restraint. This Court has frequently denied that First Amendment rights are absolute and has consistently rejected the proposition that a prior restraint can never be employed." Id.
\(^93\) Carroll v. Princess Anne, 393 U.S. 175 (1968); Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963); 393 U.S. 175, 181 ("Any prior restraint on expression comes to this Court with a 'heavy presumption' against its Constitutional validity").
tainly felt each time an inflammatory media story is broadcast or printed.

II. The Supreme Court's Response to the Growing Problem

So where does this leave today's capital defendants? Continuances, changes of venue, sequestration of juries, jury voir dire, deliberation, instructions and gag orders are all for one reason or another either denied, inappropriate or ineffective. Do capital defendants "deserve" greater protection? After all, the crimes these defendants are accused of are usually the most heinous crimes our system encounters. Would more judicious use of the existing remedies lead to greater justice? To find the answer we must look beyond each individual defendant to the overall effect of capital punishment on our society.

Despite society's general acceptance of capital punishment as a punishment for the guilty, the history of death penalty cases show a Supreme Court that has wrestled with the moral and societal impact the death penalty imparts. The great objection to the death penalty is the idea that execution is violative of the "cruel and unusual punishment" clause of the Eighth Amendment. This argument concerns the idea that our society has a conscience and will not tolerate "cruel and unusual" penalties. The arguments presented in this article are simply extensions of that conscience. Simply stated, because of the intense media coverage of death penalty cases, which causes the increased exposure of venirepersons to the publicity, greater protections should be afforded to capital defendants whose "right to life" is at stake. A society that rules with a conscience should mandate such protections.

A. The Importance of Having our Trial Verdicts Based on Evidence Heard at Trial

What remains a concern throughout any discussion of the effects of prejudicial publicity is, how can we control juries so that the decisions they render will be based on only the information they hear at trial? The studies suggest that trial court reliance on voir dire, instruction, and deliberation to control prejudicial publicity is misplaced. However negative the studies

94. Throughout the modern history of death penalty cases, Justice Marshall and Justice Brennan addressed these issues beginning with their opinions in Furman v. Georgia, 408 U.S. 238 (1972).
95. U.S. Const. amend. VIII: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."
are regarding the effectiveness of today’s mechanisms to control pre-trial publicity, the procedures can be useful tools to eliminate bias if used less arbitrarily. The Supreme Court has not been helpful as it has set up standards that leave trial judges few clear guidelines when determining the levels of excessive publicity. Mr. Justice Clark wrote that:

England, from whom the Western World has largely taken the concepts of individual liberty and of the dignity and worth of every man, has bequeathed to us safeguards for their preservation, the most priceless of which is that of trial by jury. This right has become as much American as it was once the most English. In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, “indifferent” jurors. The failure to accord an accused a fair hearing violates even the minimal standards of process.

The juries in capital cases have the power to strip defendants not only of their liberty but also of their lives. The importance of this cannot be overlooked as insignificant. Justice Clark echoed the sentiments of previous courts when he stated that an accused criminal’s guilt or innocence must be based solely on the evidence presented at trial. “The theory of the law is that a juror who has formed an opinion cannot be impartial.”

B. Standards of Review of Pretrial Publicity Motions

The vague standards which “guide” trial court judges have led to several different, and equally vague standards of appellate review of pre-trial publicity based motions. The first standard established for appellate courts when reviewing pre-trial publicity motions was established in Reynolds v. United States. In Reynolds, the defendant, charged with bigamy, complained when several jurors acknowledged that they formed an opinion about the case from reading newspaper articles before being impanelled. Reynolds established that a trial court’s finding should not be set aside unless the “error is manifest.” The Court later, in Sheppard,
reduced the requisite standard to a showing of "reasonable likelihood" of prejudice. This standard essentially requires identifiable prejudice to the accused need not be proven by a convicted defendant seeking reversal of his or her conviction if the totality of the circumstances raises the probability of prejudice.\textsuperscript{103} Justice Clark, writing for the Court stated: "[W]here there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or move it to another county not so permeated with publicity."\textsuperscript{104} However, the Court changed its mind only ten years later in \textit{Murphy v. Florida}, stating that defendants must show either "inherent prejudice" or "actual prejudice" in order to show abuse of discretion.\textsuperscript{105}

The concept of "inherent prejudice" was first developed in \textit{Estes v. Texas}.\textsuperscript{106} This concept presumes prejudice to the defendant when the courtroom is essentially turned into a media circus. In \textit{Estes}, the courtroom was transformed into a broadcast center. The courtroom was overrun with cameras, wires, and other media equipment.\textsuperscript{107} The trial judge and other court personnel were harassed by the interference the media caused.\textsuperscript{108} In fact, the media coverage was so extensive that, at one point, the judge continued the case for a month so that a booth could be constructed to confine the media inside the courtroom.\textsuperscript{109} As if this was not enough, the court allowed the entire pre-trial hearing and much of the trial itself to be televised live to the community.\textsuperscript{110} The Supreme Court determined in \textit{Estes} that this type of atmosphere denies the defendant due process and is inherently prejudicial.\textsuperscript{111}

While the Court has not since had occasion to consider similar situations, the circus-like atmosphere surrounding trials such as that in \textit{Estes} has been significantly controlled. The courts have found better ways of dealing with television interference since 1965, when \textit{Estes} was decided. Court orders and agreements with the media have led to less chaotic courtrooms.

\textsuperscript{102} 384 U.S. 333 (1966).  
\textsuperscript{103} \textit{Id.} at 352-55.  
\textsuperscript{104} \textit{Id.} at 363.  
\textsuperscript{105} 421 U.S. 794, 803 (1975).  
\textsuperscript{106} 381 U.S. 532 (1965).  
\textsuperscript{107} \textit{Id.} at 536.  
\textsuperscript{108} \textit{Id.} at 551.  
\textsuperscript{109} \textit{Id.} at 537.  
\textsuperscript{110} \textit{Id.} at 535-38.  
\textsuperscript{111} \textit{Id.} at 550-53.
The second way of showing abuse of discretion is by demonstrating "actual prejudice."\textsuperscript{112} To do so, one must show that the circumstances surrounding the voir dire and trial permit an inference of actual prejudice.\textsuperscript{113} As one would assume, this is a difficult standard to meet. Nevertheless, because "inherent" prejudice is already being addressed and combatted by the courts, "actual" prejudice, as developed in \textit{Murphy}, has become a common defendant's attack, most of which are unsuccessful.

The pendulum-like swaying of the Court with regard to the standard required to show prejudice does nothing to advance a trial judge's decision whether to accept a juror or excuse him or her based on preconceived notions. Changing the standard leaves defendants hopeful that a court will find their case to be the type which should be reversed and, therefore, encourages numerous appeals. Also, what one judge deems prejudicial another judge in the same jurisdiction may not. This leads to a difference in the degree of protection against bias from one courtroom to another.

Some critics argue that, for the sake of consistency in the system, the level of "fairness" should be no different in capital cases than in other criminal cases.\textsuperscript{114} Proponents of this argument note that it seems odd, or at least illogical, that those accused of the most atrocious crimes should be afforded greater protections. This argument fails to recognize, however, the fundamental difference between capital and other criminal trials. Capital cases require greater due process protections because not only is the accused's liberty at stake, but his or her life as well. "With his life at stake, . . .," stated Justice Clark in \textit{Irvin}, ". . . it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion and by a jury other than one in which . . . members admit, before hearing testimony, to possessing a belief in his guilt."\textsuperscript{115} It is clear from the Court's opinion in \textit{Irvin}, that the fact that the defendant was facing the death penalty did affect the Court's decision on the Constitutional protections afforded the accused.\textsuperscript{116} The fact that the

\textsuperscript{112} \textit{Murphy}, 421 U.S. at 803.

\textsuperscript{113} \textit{Id}.

\textsuperscript{114} This paper does not truly address the question of whether other types of cases should be afforded similar protections, although the author recognizes the applicability of this article to other cases, such as many rape cases, where community rage and media attention can effect jury bias and no capital penalty is inflicted.

\textsuperscript{115} \textit{Irvin}, 366 U.S. at 728.

\textsuperscript{116} \textit{Id} at 727-28: "Where one's life is at stake - and accounting for the frailties of human nature - we can only say that in the light of the circumstances here the finding of impartiality does not meet constitutional standards."
defendants face the death penalty cannot be overlooked as insignificant. It is this reality which led to the greater protections granted by state supreme courts in *Tennessee v. Claybrook* 117 and *New Jersey v. Bey.* 118 In both cases the fact that the defendant faced the death penalty was a important factor driving the court to grant greater due process protections. 119

III. WHERE DO WE GO FROM HERE?

To begin with, today's available remedies against pretrial publicity induced bias need to be used more frequently. In order to do this, the standard used by trial court judges to assess the effect of that publicity must be more salient and easier to achieve than the "actual prejudice" standard established in *Murphy.* 120 Demonstrating actual prejudice when counsel has little, if any, access to the beliefs of jurors or their deliberations is virtually impossible. Requiring that counsel show there was a "reasonable likelihood" of prejudice is a preferable test, especially in the capital punishment context. If trial court judges understood that their administration of a capital trial would be reviewed under this more stringent standard, they would be significantly more inclined than they are now to take action to protect against bias when the totality of the circumstances suggest pretrial bias. The defendant facing execution should be assured that his or her trial will be as "fair" as is the trial of a defendant facing drug possession charges whose case is never reported in the newspaper or on television. Today's standards for pretrial publicity motions deny this "fairness."

A. "Death is different"

The idea that capital punishment cases should be and are treated differently with regard to certain situations is not a new

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117. 736 S.W.2d 95 (Tenn. 1987).
119. In *Claybrook,* the court, reviewing the denial of defense counsel’s motion to inquire into the prejudicial reports each juror had been exposed to, stated: "This Court cannot sanction the denial of the procedure . . . in a death penalty case such as this; so-called curative instructions and admonitions to the jurors who are subjected to prejudicial information . . . are not enough." *Tennessee v. Claybrook,* 736 S.W.2d 95, 100 (Tenn. 1987).
120. 421 U.S. 794, 803.
concept. At the very outset of our current capital punishment regime, the Court recognized that cases involving capital punishment may be treated differently, procedurally speaking, than other criminal cases. This is due primarily to the "uniqueness of the death penalty." In Furman, the Court examined sentencing procedures and found them violative of the cruel and unusual punishment clause. Also, in Eddings v. Oklahoma, the Court continued its discussion of the use of mitigating factors during the sentencing phase of capital trials. In Spiziano v. Florida, the Court required that fact-finding procedures in capital cases aspire to a higher standard of reliability. These cases reveal the Court's recognition of "a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different."

However, the courts are not the only avenue in which death has been treated differently. Procedurally speaking, some courts and legislatures have taken measures specifically to protect defendants in capital cases. Some states have successfully found ways to reduce the adverse impact of publicity during trial through mandatory sequestration of juries in capital cases. In these instances, the courts, including the United States Supreme Court, have seen a distinction between capital cases and others recognizing that the defendant's right to life requires greater protection. Perhaps the rationale accepted by the Court in the mandatory sequestration context could be extended when considering other judicial remedies. All these examples suggest that it is not unreasonable nor, practically speaking, impossible for courts and legislatures to make special rules to preserve the guarantee of a fair trial for those facing the death penalty.

123. Furman, 408 U.S. at 314.
125. See also Woodson v. North Carolina, 428 U.S. 280 ("the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual defender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death"); Lockett v. Ohio, 438 U.S. 586 (1978).
127. Id. at 456.
129. See supra note 20.
B. How Can the Methods Available Be Used More Effectively?

Continuances and changes of venue, if used more often, would be the most effective remedies for reducing pretrial bias. As things currently stand, however, they are granted at the discretion of trial judges; this allows for an intolerable level of injustice and inefficiency. A lesser showing than "actual prejudice" is necessary in capital cases when reviewing change of venue and continuance motions. Courts should issue continuances and changes of venue upon a showing that there is a reasonable likelihood of prejudice, when looking at the totality of the circumstances, so as to protect defendants facing death. If, in fact, the granting of continuances and changes of venue motions were mandatory upon a showing of "reasonable likelihood" of prejudice, as Sheppard required, the burden of proof would not be so high as to lead to the denial of such motions in cases where a real possibility of prejudicial information abounds.

With regard to jury voir dire, deliberations and instructions, two realizations must occur. First, trial court judges must put reality ahead of ego, and the fairness of the trial ahead of their own wishes to preside over provocative cases. Judges must acknowledge the studies showing that these methods rarely cure the jury of bias. Misplaced reliance on these remedies only leads to injustice. This is compounded by the fact that, on appeal from the denial of such remedies, defendants are still held to the "actual prejudice" standard of Murphy.

Second, voir dire practices which allow the admission of jurors who have preconceived notions as to the guilt or innocence of the defendant should be discontinued. Voir dire, such as that in Murphy v. Florida, where jurors admit to having preconceived notions of guilt derived from pretrial publicity, is simply too ineffective in capital punishment cases. However, one wonders how defense attorneys are to determine bias when courts are free to prohibit inquiry into a juror's exposure to pretrial publicity, as held in Mu'min. Our society, which places a great value on justice, cannot continue to tolerate such abuses.

130. Some state courts have recognized the distinction between capital cases and other criminal cases by discussing the obligation of appellate courts in reviewing motions in death penalty cases. See New Jersey v. Bey, 112 N.J. 45 (1987). "We believe that in death penalty cases an appellate court must subject the record to intense scrutiny. The stark fact that a litigant's life is at stake intensifies the obligation of judicial review." Id. at 92-93.

131. Kramer et al., supra note 15, at 413; see also Minow & Cate, supra note 24, at 649.


While the concept of "innocent until proven guilty" must be applied in all criminal cases, it must be religiously adhered to in cases where the State intends to execute the defendant upon conviction. It is morally and ethically reproachable for courts first to deny change of venue motions and continuances and then to allow on a jury people who openly state that, based on their current pretrial ideas, they would convict rather than acquit a defendant. The fundamental precept of American justice, that a defendant is innocent until proven guilty, requires precisely the opposite. Given that either granting another remedy or impaneling more venirepersons would provide simple methods of eliminating the presence of "influenced" jurors, one or the other should be mandatory.

The problems of gag orders will not go away. Leaks are bound to continue despite judicial scrutiny. In order to avoid the inequity of gag order enforcement, judges must patrol prosecutors as they do defense attorneys. Failure to do so may very well lead to the purposeful violation of gag orders on the part of defense attorneys simply to "balance" out the harmful publicity.

The press, furthermore, needs to be more discreet in what it deems publishable and must remember that their communities will eventually be called upon to decide the life or death of the accused. While the press has made attempts at organized rules for protecting defendants, these regulations must be more closely adhered to. The regulations would be effective if they were not abandoned every time a "hot" story came along. The fact that there is no body to enforce these rules frequently renders them ineffective as well.

IV. Conclusion

What is called for is not an overhaul of the current system but rather a greater commitment to the integrity of our court system. Again, a reader of this article may validly ask, why should we give those accused of the most heinous crimes in society the benefit of greater protections? The obvious reasons abound for opponents of the death penalty to support such change. Why, however, should those favoring the imposition of the death penalty to those so sentenced favor greater protections for the accused? To find the answer one must look beyond the individ-

134. The ABA has appointed a committee to review the sanctions for violations of Model Rule 3.6 on extrajudicial statements. Some of the proposed revisions allow attorneys greater latitude when speaking to the press and others make the provisions narrower. Blum, supra note 81, at 27.
ual case to the greater effect such protections would have on the judicial and penitentiary systems.

In cases where death is to be the punishment, courts should return to the "reasonable likelihood" of prejudice standard as applied in Sheppard and Estes. Such a change would give judges an easier standard to apply and would authorize granting pretrial publicity motions on a showing of a likelihood of prejudice rather than actual prejudice. Today's "actual prejudice" standard may require judges to deny motions when the defense can not meet the actual prejudice standard, but where the judge feels prejudice may influence the trial. A more salient standard would allow appellate courts to take a closer look at trial court decisions against granting a remedy, insofar as their review would no longer be seeking actual prejudice but only the likelihood of prejudice.

Proponents of the death penalty would likely support the change in standard. Assuming that such proponents believe in the constitutional idea of a "fair" trial, and do not wish to put to death those whose trials were tainted by biased juries, the change provides for greater certainty of a fair trial. When all such remedies are exhausted, the court can do no more to guarantee a fair trial. The seemingly endless appeals flow in part from the trial court's reluctance to use the methods available for reducing the effect of pretrial publicity. By lowering the standard for granting such motions, and thereby granting more pretrial publicity motions, courts would, in effect, be reducing the amount of appeals on the basis of prejudicial juries. Allowing only jurors with no preconceived notions of guilt or innocence to sit on capital cases would eliminate some of these appeals as well. The reduction in the number of appeals would, in many cases, lead to lower appeal costs (something both proponents and opponents of the death penalty would welcome) and quicker execution.

Even some of the more optimistic studies conclude that bias can never truly be extinguished. Because jurors are not born on the day of the trial, jurors are bound to take into trial with them their life experiences, which undoubtedly effect their decisions.

138. Felscher, supra note 80, at 11: "One does not set aside opinions of a lifetime, prejudices etched in a brain, because one steps into a courtroom to determine the fate of a defendant. It is impossible to ignore facts (or purported facts) about a case about to be tried. The brain has an infinite capacity to absorb. Much of what is absorbed is subject to recall."
the weight of the evidence before them at trial the primary determinant when deciding on a verdict.\textsuperscript{139}

To what extent can we permit the execution of defendants whose guarantee of a fair trial has not been satisfactorily adhered to? The precise value of "life" is something no one can ever truly access. The affinity Americans feel for justice can be inferred from the fact that we pride ourselves in our adherence to the principles found in the Constitution. However, because of today's media-dominated age, the freedom of the press in the First Amendment can often conflict with the guarantee of a fair trial from the Sixth Amendment.

Recent Supreme Court decisions leave no doubt that the Court lines up on the side of the First Amendment when confronted with a conflict between it and the "fair trial" provision of the Sixth Amendment. The decisions of the court in \textit{Murphy}, \textit{Stuart}, and, most recently, \textit{Mu'min} show that the court is willing to make sacrifices on the side of the Sixth Amendment. In so doing, the Court has diluted the guarantee of a fair trial even to those sentenced to the ultimate penalty, execution.

There is potential to harmonize the First and Sixth Amendments with just a little extra effort on the part of trial courts. Even in today's society, where newspapers and television cover all sensational murders, the guarantee of a fair trial can still be provided. The use of continuances and changes of venue appear to be the most effective at combating the growing problem of prejudicial publicity. Trial courts must be willing to move or continue a case when the prosecutor has stated he intends to seek the death penalty and the media coverage has been prejudicial. The fact that society has become more communicative should not reduce its goal to have both a free press and fair trials.

A divided Court in \textit{Gregg v. Georgia}\textsuperscript{140} reluctantly recognized execution as a viable penalty that does not violate the "cruel and unusual" punishment clause of the Eighth Amendment. Nevertheless, it is cruel and unusual to put to death those persons whose trial is tainted with avoidable prejudice.

\textsuperscript{139} \textsc{Hans & Vidmar}, supra note 137, at 245.
\textsuperscript{140} 428 U.S. 153 (1976).