Presumed Guilty: An Examination of the Media's Prejudicial Effect on the Boston Marathon Bombing Trial

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The Sixth Amendment guarantees that a criminal defendant is entitled to a trial by an impartial and indifferent jury, capable of issuing a verdict based solely on the evidence presented at trial. In the 1960s, the United States Supreme Court issued a trio of landmark decisions that have come to be recognized as the leading cases with respect to the doctrine of the presumption of prejudice. Collectively, these cases address the rights of a criminal defendant when prejudicial pretrial publicity has so permeated a charging venue that an impartial jury cannot be empaneled. This doctrine, however, has been plagued by a series of inconsistent later decisions by the Court, resulting in confusion among lower courts and often severe deprivations of fundamental constitutional rights. The courts' misplaced reliance on traditional voir dire methods and reluctance to grant change of venue motions, even when prejudicial pretrial publicity is pervasive, further hinders criminal defendants' access to constitutional protections.

I. INTRODUCTION

"[J]ustice must satisfy the appearance of justice."[1]

At 2:49 p.m. on April 15, 2013, two bombs exploded near the finish line of the Boston Marathon, killing three and injuring more than two hundred sixty.[2] Over the next four days, a massive manhunt for those

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[1] Offutt v. United States, 348 U.S. 11, 14 (1954).

[2] *See* Diantha Parker & Jess Bidgood, *Boston Marathon Bombing: What We Know*, N.Y.

responsible ensued.[3] On April 18, brothers Tamerlan and Dzhokhar Tsarnaev carjacked a sports utility vehicle attempting to flee Boston, and then killed their fourth victim, Officer Sean A. Collier.[4] That night, police "engaged in a ferocious gun battle with the two men suspected of setting the bombs," leaving one of the suspects dead.[5] Law enforcement authorities embarked on a massive manhunt to find the remaining surviving suspect, Dzhokhar Tsarnaev.[6] A lockdown was enforced for the Greater Boston Area on April 19.[7] Shortly after the shelter-in-place advisory was lifted, Tsarnaev was found hiding inside of a boat in Watertown, Massachusetts.[8] He faced thirty charges related to the Boston Marathon bombing and ensuing incident in Watertown,[9] seventeen of which carried the possibility of death.[10]

The events surrounding the Boston Marathon bombing left a deep emotional scar on many.[11] This, combined with a barrage of pretrial publicity, led Tsarnaev's defense team to argue that it was impossible for a fair trial to be conducted in the District of Massachusetts.[12] An

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TIMES (Jan. 1, 2015), http://www.nytimes.com/2015/01/02/us/boston-marathon-bombings-trial-what-you-need-to-know.html?d-nav; *see infra* Part IV.

[3] *See* Sara Morrison & Ellen O'Leary, *Timeline of Boston Marathon Bombing Events*, BOSTON.COM (Jan. 5, 2015, 9:01 AM), http://www.boston.com/news/local/massachusetts/2015/01/05/timeline-boston-marathon-bombing-events/qiYJmANm6DYxqsusVq66yK/story.html.

[4] Wendy Ruderman et al., *Officer's Killing Spurred Pursuit in Boston Attack*, N.Y. TIMES (Apr. 24, 2013), http://www.nytimes.com/2013/04/25/us/officers-killing-spurred-pursuit-in-boston-attack.html?pagewanted=all&_r=0.

[5] Bob Salsberg, *Patrick Reflects on Decision to Shut Down Boston for Manhunt*, BOS. GLOBE (Apr. 19, 2014), http://www.bostonglobe.com/metro/2014/04/19/patrick-reflects-decision-shut-down-boston-for-manhunt/HXbsrtnzSKxRDTIyMFWrMM/story.html.

[6] *Id.*

[7] *Id. See generally* Alexander J. Blenkinsopp, *A Different Perspective on the Boston Lockdown*, 48 NEW ENG. L. REV. ON REMAND 1 (2013), http://newenglrev.com/on-remand-2/volume-48-on-remand/blenkinsopp-a-different-perspective/ (commenting on the economic, legal, and public policy concerns raised following the lockdown).

[8] *See* Katherine Q. Seelye, *2nd Bombing Suspect Caught After Frenzied Hunt Paralyzes Boston*, N.Y. TIMES (Apr. 19, 2013), http://www.nytimes.com/2013/04/20/us/boston-marathon-bombings.html?pagewanted=all.

[9] Eric Levenson, *The Charges Against Dzhokhar Tsarnaev Explained in Plain English*, BOSTON.COM (Feb. 12, 2015), http://www.boston.com/news/local/massachusetts/2015/02/12/the-charges-against-dzhokhar-tsarnaev-explained-plain-english/CkoC7HiL8NPLAoiXdsm5aP/story.html.

[10] *See id.*

[11] *See* Mark Arsenault & Andrew Ryan, *Emotional Impact of Attack Runs Deep, Wide in Boston*, BOS. GLOBE (Apr. 15, 2014), http://www.bostonglobe.com/metro/2014/04/14/year-after-marathon-bombings-signs-trauma-persists/TzkXZPyrLNyo1R3Y0QEFZM/story.html.

[12] Katharine Q. Seelye, *Boston Bombing Suspect Seeking Change of Trial Venue*, N.Y.

overwhelming presumption of guilt existed in Massachusetts, especially with regard to the penalty to be imposed: death; and an extraordinarily high number of individuals in the potential jury pool either attended or participated in the Boston Marathon themselves, or knew someone who had.[13] Citing prejudicial patterns in the media coverage, the defense filed various change of venue requests[14] to transfer the trial outside of Massachusetts.[15] They "assert[ed] that pretrial publicity and public sentiment require[d] the Court to presume that the pool of prospective jurors . . . [was] so prejudiced against him that an impartial trial jury [was] virtually impossible [to empanel]."[16] All four motions were denied.[17]

The Sixth Amendment to the United States Constitution secures to an accused the right to a trial in the state where the crime has been committed.[18] It is intended to protect criminal defendants from the unfairness and hardship that arises from prosecution in a foreign venue,[19] thereby guaranteeing the right to a trial by an impartial jury.[20] This fundamental element of due process[21] requires a change of venue when

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TIMES (June 18, 2014), http://www.nytimes.com/2014/06/19/us/boston-bombing-suspect-Dzhokhar-Tsarnaev-seeking-change-of-trial-venue.html.

13 *Id.*

14 *See* Milton J. Valenica, *Dzhokhar Tsarnaev's Defense Team Again Seeks New Venue*, BOS. GLOBE (Jan. 22, 2015), http://www.bostonglobe.com/metro/2015/01/22/jan-start-tsarnaev-trial-unrealistic-court-says/LoDtgttxLSOSXTNEqarECO/story.html.

15 United States v. Tsarnaev, No. 13–CR–10200–GAO, 2014 WL 4823882, at *1 (D. Mass. Sept. 24, 2014). *See generally* U.S. CONST. amends. V, VI, VIII; FED. R. CRIM. P. 21(a) (requiring a court to transfer proceedings to another district, upon defendant's motion, when the court finds that prejudice against the defendant will prevent a fair and impartial trial).

16 *Tsarnaev*, 2014 WL 4823882, at *1.

17 *See* Fourth Motion for Change of Venue, United States v. Tsarnaev, No. 13–CR–10200–GAO (D. Mass. Sept. 24, 2014); *see also The Challenges of Jury Selection in the Boston Marathon Bombing Trial*, NPR (Feb. 28, 2015, 4:56 PM), http://www.npr.org/2015/02/28/389796950/the-challenges-of-jury-selection-in-the-boston-marathon-bombing-trial.

18 U.S. CONST. art. III, § 2, cl. 3; *see also* FED. R. CRIM. P. 18; United States v. Johnson, 323 U.S. 273, 275 (1944) ("Questions of venue in criminal cases . . . are not merely matters of formal legal procedure. They raise deep issues of public policy. . . .").

19 United States v. Cores, 356 U.S. 405, 407 (1958); *Johnson*, 323 U.S. at 275 (observing that the vicinage clause is intended to protect criminal defendants from the inherent prejudice usually associated with prosecution in a remote venue).

20 U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .").

21 United States v. Crow Dog, 532 F.2d 1182, 1187 (8th Cir. 1976).

"extraordinary local prejudice will prevent a fair trial."[22]

The United States Supreme Court has long held that when the community from which potential jurors are drawn is sufficiently affected by adverse publicity or the effects of the events at issue, there arises a presumption of prejudice such that voir dire cannot perform the usual function of securing a fair and impartial jury.[23] A series of 1960s Supreme Court cases involving prejudicial pretrial publicity developed two competing standards for determining the requisite level of bias and publicity necessary to trigger a presumption of prejudice.[24] This confusing precedent led to a doctrinal split amongst lower courts over which standard to apply.[25] The Supreme Court had an opportunity to rule on this issue and clarify the antiquated presumption of prejudice doctrine in *United States v. Skilling*, but unfortunately failed to do so.[26] Instead, the majority "further exposed the vagueness and inconsistencies" within the presumption of prejudice doctrine.

This Note focuses on the flaws within the presumption of prejudice doctrine. The doctrine developed from Supreme Court case law dating back to the 1960s,[27] and therefore is now outdated and unfit to protect a criminal defendant's constitutional rights to a fair trial by an impartial jury in a media-saturated society. Though the nation has changed in unimaginable ways, the rights of criminal defendants that the Framers "sought to protect in the venue provisions of the Constitution are neither outdated nor outmoded."[28] To effectuate a defendant's constitutional guarantee to an impartial jury, there must be an adequate voir dire to identify inadequate

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[22] Skilling v. United States, 561 U.S. 358, 378 (2010).

[23] *See* Sheppard v. Maxwell, 384 U.S. 333, 362–63 (1966); Estes v. Texas, 381 U.S. 532, 550–51 (1965); Rideau v. Louisiana, 373 U.S. 723, 726–27 (1963); Irvin v. Dowd, 366 U.S. 717, 725–28 (1961).

[24] Christina Collins, Comment, *Stuck in the 1960s: Supreme Court Misses an Opportunity in* Skilling v. United States *to Bring Venue Jurisprudence into the Twenty-First Century*, 44 TEX. TECH L. REV. 391, 393 (2012). *Compare Sheppard*, 384 U.S. at 363 (introducing the "reasonable likelihood" standard, later to be adopted by some circuit courts), *with Irvin*, 366 U.S. at 722–24 (applying the "virtual impossibility" standard).

[25] Collins, *supra* note 24.

[26] *See infra* notes 127–30 and accompanying text. *Compare Skilling*, 561 U.S. at 377–99 (comparing *Skilling* to foundational precedents, the majority held the circumstances surrounding Skilling's trial were not so extreme as to warrant a presumption of prejudice), *with Skilling*, 561 U.S. at 446–64 (Sotomayor, J., concurring in part and dissenting in part) (concluding that "the majority understates the breadth and depth of community hostility toward [the defendant] and overlooks significant deficiencies in the District Court's jury selection process").

[27] *See Sheppard*, 384 U.S. at 362–63; *Estes*, 381 U.S. at 550–51; *Rideau*, 373 U.S. at 726–27; *Irvin*, 366 U.S. at 725–28.

[28] United States v. Passodelis, 615 F.2d 975, 977 (3d Cir. 1980).

jurors.[29] However, current jury selection procedures do not mitigate juror prejudice.[30] This is especially true for high-profile criminal defendants.[31] The lack of clarity within the doctrine,[32] combined with its intolerably high threshold,[33] leaves many defendants without meaningful due process of law. Contemporary jurisprudence must produce a consistent and attainable standard to remedy this confusing split in doctrinal authority.

Part II of this Note introduces the origins of the presumption of prejudice doctrine, analyzing the background to foundational Supreme Court precedents. Part III discusses the jury selection process and its various inefficiencies in combating juror prejudice. Part IV utilizes the prevailing prejudice surrounding the Boston Marathon Bombing trial to illustrate these inefficiencies and the inconsistency with which the doctrine is applied. Part V concludes this Note by proposing a return to foundational precedent and amending voir dire to be an efficient mechanism designed to safeguard a criminal defendants' right to a fair trial.

II. THE PRESUMPTION OF PREJUDICE DOCTRINE

In the 1960s, the Supreme Court decided a trio of cases that have become the leading cases with respect to the doctrine of presumption of prejudice.[34] Read together, these three cases hold that "media coverage, or other factors that inflame a community, can create a presumption that strong prejudice exists and that a fair trial cannot be obtained in that community";[35] thereby constitutionally requiring a court to "change venue where prejudice in the charging venue threatens a defendant's right to an

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[29] Morgan v. Illinois, 504 U.S. 719, 729–30 (1992).

[30] Mark J. Geragos, *The Thirteenth Juror: Media Coverage of Supersized Trials*, 39 LOY. L.A. L. REV. 1167, 1169 (2006).

[31] *See generally id.* at 1175–79 ("[D]uring jury voir dire . . . predisposition towards guilt is even more pronounced where the accused is despised and demonized by the media. When that notoriety is combined with saturation coverage, the presumption of innocence is reduced to a meaningless concept . . . . In effect, the burden of proof is shifted to the accused.").

[32] *Compare Sheppard*, 384 U.S. at 363 (introducing the "reasonable likelihood" standard, later to be adopted by some circuit courts), *with Irvin*, 366 U.S. at 722–24 (applying the virtual impossibility standard).

[33] Skilling v. United States, 561 U.S. 358, 399 n.34 (2010).

[34] *See* Jordan Gross, *If Skilling Can't Get a Change of Venue, Who Can? Salvaging Common Law Implied Bias Principles from the Wreckage of the Constitutional Pretrial Publicity Standard*, 85 TEMP. L. REV. 575, 585 (2013); *see also* Neil Vidmar, *When All of Us Are Victims: Juror Prejudice and "Terrorist" Trials*, 78 CHI. –KENT L. REV. 1143, 1146 (2003).

[35] Vidmar, *supra* note 34; *see also* Collins, *supra* note 24, at 397.

impartial jury."[36] In each case, pervasive media coverage centered on the defendant's presumed guilt permeated the community while the defendant awaited and sat trial.[37]

A. A Wave of Public Passion

In *Irvin v. Dowd*, the defendant appealed his murder conviction and sentence of death, arguing that he did not receive a fair trial by an impartial jury.[38] Subsequent to the defendant's arrest, the local prosecutor issued a widely publicized press release stating that Irvin had confessed to six murders and twenty-four burglaries.[39] Appointed counsel immediately sought a change of venue, which was granted, albeit to an adjoining county.[40] Defense counsel sought a second motion to change venue, but this motion was denied.[41]

"[A] barrage of newspaper headlines, articles, cartoons and pictures [were] unleashed" against the defendant prior to trial.[42] Local papers distributed to ninety-five percent of the homes in the county publicized the defendant's past criminal record, "offered prejudicial characterizations of the defendant," reported that he had confessed to the murder, and other crimes as well.[43]

In vacating the conviction, the Supreme Court recognized that jurors need not be "totally ignorant of the facts and issues involved."[44] The Court found that a "pattern of deep and bitter prejudice" was shown throughout the community; a pattern that was "clearly reflected in the sum total of the voir dire examination of a majority of the jurors finally placed in the jury box."[45] Two-thirds of the seated jurors thought the defendant guilty prior to hearing any testimony.[46] In assessing jurors' assurances that they could be

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[36] Gross, *supra* note 34.

[37] *Sheppard*, 384 U.S. at 338–42; *Rideau*, 373 U.S. at 724; *Irvin*, 366 U.S. at 725–26.

[38] *Irvin*, 366 U.S. at 718–19.

[39] *Id.* at 719–20, 726; *see* Robert Hardaway & Douglas B. Tumminello, *Pretrial Publicity in Criminal Cases of National Notoriety: Constructing a Remedy for the Remediless Wrong*, 46 AM. U. L. REV. 39, 52 (1996).

[40] *Irvin*, 366 U.S. at 720.

[41] *Id.*

[42] *Id.* at 725.

[43] Janet M. Branigan, *Criminal Procedure -- Sixth and Fourteenth Amendments -- Right to Trial by Impartial Jury in High Publicity Cases Requires an Extensive Voir Dire to Sufficiently Determine the Extent and Content of a Juror's Exposure to Pretrial Publicity,* People v. Tyburski, *518 N.W.2d 441 (Mich. 1994)*., 72 U. DET. MERCY L. REV. 701, 708 (1995); *see also Irvin*, 366 U.S. at 725–26; Hardaway & Tumminello, *supra* note 39.

[44] *Irvin*, 366 U.S. at 722, 729; Hardaway & Tumminello, *supra* note 39, at 53.

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

[46] *Id.*; Gross, *supra* note 34, at 587; Hardaway & Tumminello, *supra* note 39, at 53.

impartial, the Court noted:

> No doubt each juror was sincere when he said that he would be fair and impartial . . . but psychological impact requiring such a declaration before one's fellows is often its father. Where so many . . . admitted prejudice, such *a statement of impartiality can be given little weight*. As one of the jurors put it, "You can't forget what you hear and see." With his life at stake, 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 two-thirds of the members admit, before hearing any testimony, to possessing a belief in his guilt.[47]

In light of all the circumstances, the Court held that the finding of impartiality did not pass constitutional muster.[48] *Irvin* thus marked the creation of the presumption of prejudice doctrine.[49]

B. But a Hollow Formality

Two years later, the Court decided *Rideau v. Louisiana*.[50] Rideau stood accused of robbing a bank, kidnapping three bank employees, and killing one of them.[51] The morning after his arrest, Rideau was interrogated in jail by the sheriff.[52] The interrogation contained admissions by Rideau that he had committed the crimes charged.[53] The interview was broadcast via television that same day to an audience of twenty-four thousand.[54] The film was shown again the next day to an estimated audience of fifty-three thousand.[55] On the final day the film was shown, some twenty thousand people watched.[56] At the time, the Parish of Calcasieu had a population of one hundred fifty thousand.[57]

The defense filed a motion for a change of venue, contending the defendant would be deprived of a fair and impartial trial in the Parish of Calcasieu.[58] The motion was denied, and the defendant was subsequently

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[47] *Irvin*, 366 U.S. at 728 (emphasis added).

[48] *Id.* at 729.

[49] Charles H. Whitebread, *Selecting Juries in High Profile Criminal Cases*, 2 GREEN BAG 2D 191, 194 (1999).

[50] *See generally* Rideau v. Louisiana, 373 U.S. 723 (1963) (reversing murder conviction and death sentence because of pretrial broadcasting of jailhouse interrogation in which defendant confessed to bank robbery, kidnapping, and murder).

[51] *Id.* at 723–24; Gross, *supra* note 34, at 588–89.

[52] *See Rideau*, 373 U.S. at 724.

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *See id.*

[58] *Id.* at 724.

sentenced to death.[59] Three members of the convicting jury answered in response to voir dire questioning that they had seen the televised interview at least once; "[t]wo members of the jury were deputy sheriffs of Calcasieu Parish."[60]

The Supreme Court reversed, holding that it was a deprivation of due process to deny the change of venue after the people of Calcasieu Parish were repeatedly exposed, and "in depth[,] to the spectacle of Rideau personally confessing in detail" to the crimes for which he was accused.[61] "[T]his spectacle . . . in a very real sense was Rideau's trial—at which he pleaded guilty to murder. Any subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality."[62] Due process required a trial before a jury that had not been exposed to the film in which the defendant was shown to be confessing.[63] The *Rideau* Court found the circumstances surrounding the trial so egregious,[64] that it did not pause to examine the voir dire record or to determine whether voir dire had been adequately conducted.[65] Whereas the *Irvin* Court "considered all of the circumstances of pretrial publicity, the *Rideau* Court focused exclusively on [the] . . . broadcast confession as a basis for finding presumed or inherent bias."[66]

C. Editorial Artillery: A Reasonable Likelihood?

Three years later, the Court was confronted with *Sheppard*, a case that gained national notoriety.[67] Dr. Sam Sheppard's pregnant wife was found brutally murdered in the upstairs bedroom of their home.[68] The

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[59] *Id.* at 724–25.

[60] *Id.* at 725.

[61] *Id.* at 726.

[62] *Id.*

[63] *See id.* at 727; Gross, *supra* note 34, at 589.

[64] Gross, *supra* note 34, at 589.

[65] *See Rideau*, 373 U.S. at 727. ("[W]e do not hesitate to hold, without pausing to examine a particularized transcript of the voir dire examination of the members of the jury, that due process of law in this case required a trial before a jury drawn from a community of people who had not seen and heard Rideau's televised 'interview.'"); John A. Walton, *From O.J. to Tim Mcveigh and Beyond: The Supreme Court's Totality of Circumstances Test as Ringmaster in the Expanding Media Circus*, 75 DENV. U. L. REV. 549, 563 (1998).

[66] Walton, *supra* note 65; *see Rideau*, 373 U.S. at 726–27. *See generally* Irvin v. Dowd, 366 U.S. 717, 725–26 (1961) (analyzing the strong community pattern of hostility and thought indicated by popular news media).

[67] *See* Sheppard v. Maxwell, 384 U.S. 333, 354 n.8 (1966); Hardaway & Tumminello, *supra* note 39, at 56.

[68] *See Sheppard*, 384 U.S. at 335–36.

investigation immediately focused on Dr. Sheppard.[69] The local media opened fire with "editorial artillery," reporting stories of Dr. Sheppard's alleged refusal to take a lie detector test;[70] scientific evidence linking him to the crime scene; and reports of his extramarital affairs.[71] The defense filed for a change of venue, but the motion was denied.[72]

The *Sheppard* Court held that the defendant was deprived of a fair trial consistent with due process.[73] The Court found the defendant was denied due process by both the "judge's refusal to take precautions against the influence of pretrial publicity,"[74] and the trial court's failure to control the news media, depriving the defendant of the "judicial serenity and calm to which (he) was entitled."[75]

The *Sheppard* Court placed upon the trial courts an affirmative duty to take all actions necessary to ensure the defendant is provided a fair trial free of outside influences:[76]

> Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused.[77]

Thus, where there appears a reasonable likelihood that prejudicial pretrial publicity will prevent a fair trial, the judge should either "continue the case until the threat abates, or transfer it to another county not so permeated with publicity."[78] However, the Court did not clearly articulate what constitutes a reasonable likelihood of presumed prejudice, setting the grounds for future confusion among lower courts.[79]

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[69] *Id.* at 337.

[70] Robert S. Stephen, Note, *Prejudicial Publicity Surrounding a Criminal Trial: What a Trial Court Can Do to Ensure a Fair Trial in the Face of a "Media Circus,"* 26 SUFFOLK U. L. REV. 1063, 1072 (1992); *see Sheppard*, 384 U.S. at 339 ("More stories appeared when Sheppard would not allow authorities to inject him with 'truth serum.'").

[71] *See Sheppard*, 384 U.S. at 340–41.

[72] *Id.* at 348.

[73] *Id.* at 363.

[74] *Id.* at 354–55.

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

[76] *See id.* ("[C]ourts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences."); Stephen J. Krause, Note, *Punishing the Press: Using Contempt of Court to Secure the Right to a Fair Trial*, 76 B.U. L. REV. 537, 557–58 (1996); *see also* Gross, *supra* note 34, at 591.

[77] *Sheppard*, 384 U.S. at 362.

[78] *Id.* at 363.

[79] Collins, *supra* note 24, at 400; *see, e.g.*, United States v. Maldonado-Rivera, 922 F.2d 934, 966–67 (2d Cir. 1990) (applying the reasonable likelihood standard); Pamplin v.

D. 'Murph the Surf' Strikes: In the Totality of the Circumstances

Almost ten years later, the Supreme Court abandoned the reasonable likelihood standard and decided that, in the totality of the circumstances, Murphy received a fair trial despite his claim that prejudicial pretrial publicity deprived him of one.[80] The defendant was a flamboyant jewel thief who first gained notoriety and extensive press coverage for his part in the 1964 theft of the Star of India sapphire from the American Museum of Natural History.[81] The trial drew continuous widespread press coverage as prior and current convictions started to come to light, as well as issues of mental competency.[82] The defendant filed for a change of venue based on prejudicial pretrial publicity, but the motion was denied.[83] Relying on *Irvin*, *Rideau*, and *Sheppard*, the defendant appealed.[84]

The Court found nothing to suggest juror hostility toward the defendant based on an examination of the voir dire record.[85] The publicity had appeared seven months prior to voir dire and was "largely factual in nature."[86] The Court explained that while a juror's assurance of partiality is

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Mason, 364 F.2d 1, 5 (5th Cir. 1966) (applying *Irvin* with a "gloss of *Rideau*, *Estes*, and *Sheppard*"); *see also* Michael Jacob Whellan, Note, *What's Happened to Due Process Among The States? Pretrial Publicity and Motions for Change of Venue in Criminal Proceedings*, 17 AM. J. CRIM. L. 175, 181 (1990) (explaining that the reasonable likelihood standard "prescribes a more liberal approach to motions for change of venue" than subsequent Supreme Court cases but because *Sheppard* "failed to correctly mandate the reasonable likelihood standard, state courts were allowed to aimlessly formulate standards").

80 Murphy v. Florida, 421 U.S. 794, 796, 799 (1975); *see* Constance M. Jones, *Appellate Review of Criminal Change of Venue Rulings: The Demise of California's Reasonable Likelihood Standard*, 71 CALIF. L. REV. 703, 704 n.9 (1983); Whellan, *supra* note 79, at 181–82.

81 *Murphy*, 421 U.S. at 795 ("His flamboyant lifestyle made him a continuing subject of press interest; he was generally referred to—at least in the media—as 'Murph the Surf.'").

82 *See Murphy*, 421 U.S. at 795–96 (noting the petitioner did not put forth any evidence at trial nor cross-examine any witnesses in protest of the eight-member jury).

83 *Id.* at 796.

84 *Id.* at 798.

85 *Id.* at 800. *See generally* Skilling v. United States, 561 U.S. 358, 442–43 (2010) (Sotomayor, J., concurring in part and dissenting in part) ("So long as the trial court conducts a reasonable inquiry into extrajudicial influences and the ability of prospective jurors to presume innocence and render a verdict based solely on the trial evidence, we . . . generally have no reason to doubt the jury's impartiality.").

86 *Murphy*, 421 U.S. at 800 n.4, 802; *see also* United States v. Chagra, 669 F.2d 241, 251 (5th Cir. 1982) (defining publicity as largely factual in nature when it is straightforward and unemotional "rather than a long harangue condemning" the defendant); Symposium, *Panel One: What Empirical Research Tells Us, and What We Need to Know About Juries and the Quest for Impartiality*, 40 AM. U. L. REV. 547 (1991) [hereinafter *Panel One*] (differentiating between "emotional publicity," which is terribly damaging in nature but has

not "dispositive of an accused's rights," the burden rests on the defendant to prove "the actual existence of such an opinion" so as to raise a "presumption of partiality."[87] In the circumstances presented, the defendant had received a fair trial.[88] Moreover, the defendant had failed to show that the "general atmosphere in the community or courtroom [was] sufficiently inflammatory."[89]

E. No Content

In *Mu'Min*, the Supreme Court considered the extent to which a defendant has a constitutional right to explore the content of acquired information during voir dire questioning.[90] The defendant was convicted of murdering a woman while out of prison on a work detail.[91] The case attracted substantial publicity, including reports disclosing details of the murder and investigation, the defendant's prior criminal record, his rejection for parole six times, alleged prison infractions, details of the prior murder for which the defendant was currently serving his sentence at the time of this murder, and indications that the defendant had confessed to the current murder.[92] The defense filed a motion for individual voir dire, seeking "to have content questions posed to prospective jurors who acknowledged" exposure to the case through the media.[93] The trial court denied the motion and instead began collective voir dire.[94]

Though almost two-thirds of prospective jurors admitted to having acquired information pertaining to the case from the media or other sources,[95] the trial judge declined to inquire into the content of this prior knowledge.[96] Of the sixteen venirepersons who affirmatively answered to having acquired prior knowledge, only one admitted that he could not be

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no factual bearing on the case with "factual publicity," examples of which include a prior record and inadmissible but damaging evidence). *But see* Irvin v. Dowd, 366 U.S. 717, 725 (1961) (holding adverse media six to seven months prior to trial sufficient to raise prejudice).

[87] *Murphy*, 421 U.S. at 800 (quoting *Irvin*, 366 U.S. at 723).

[88] *Id.*

[89] *Id.* at 802.

[90] Mu'Min v. Virginia, 500 U.S. 415, 422 (1991).

[91] *Id.* at 417.

[92] *Id.* at 417–18.

[93] *See id.* at 419; Gross, *supra* note 34, at 598.

[94] *See Mu'Min*, 500 U.S. at 419. *See generally* John H. Blume et al., *Probing "Life Qualification" Through Expanded Voir Dire*, 29 HOFSTRA L. REV. 1209, 1250 (discussing accepted research indicating individual questioning is effective in promoting candor whereas collective questioning is ineffective).

[95] *Mu'Min*, 500 U.S. at 419.

[96] *See id.*

impartial and was thus dismissed for cause.[97] "All swore that they could enter the jury box with an open mind and wait until the entire case was presented before reaching a conclusion as to guilt or innocence."[98]

The *Mu'Min* Court struck down the defendant's attempt to analogize his case to *Irvin*.[99] The Court reasoned that, though the crime had gained substantial pretrial publicity, such publicity differed in kind and extent from that in *Irvin* because it did not contain the "same sort of damaging information."[100] Further, because each juror denied having formed an opinion as to guilt or that the information obtained would impair their ability to render a verdict based solely on the evidence presented at trial, the Court dismissed the defendant's constitutional arguments.[101]

Despite recognizing the logic in the defendant's argument that "content questions would materially assist in obtaining a jury less likely to be tainted by pretrial publicity,"[102] the Supreme Court nonetheless held that the defendant's rights to due process and an impartial jury were not violated when the trial judge on voir dire refused to question prospective jurors about specific contents of news reports to which they had been exposed.[103] The Court found that the circumstances surrounding Mu'Min's case did not amount to a "wave of public passion" engendered by pretrial publicity.[104] Thus, "there was no reason to presume that a juror's self-assessment of bias should not be believed," and "no necessity for a more in-depth examination into the content of media exposure of each juror."[105] While there are cases in which a juror's self-assessment of bias should not be believed, according to the Court, this was not such a case.[106]

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97 *See id.* at 420.

98 *Id.* at 421.

99 *Id.* at 429.

100 *Id.* at 429–30.

101 *Mu'Min*, 500 U.S. at 427–28.

102 *Id.* at 424.

103 *See* U.S. CONST. amends. VI, XIV; *Mu'Min*, 500 U.S. at 431–32.

104 *See Mu'Min*, 500 U.S. at 429; David Edsey, Note, Mu'Min v. Virginia: *The Supreme Court's Failure to Establish Adequate Judicial Procedures to Counter the Prejudicial Effects of Pretrial Publicity*, 23 LOY. U. CHI. L.J. 557, 568 (1992); *see also* Irvin v. Dowd, 366 U.S. 717, 728 (1961).

105 Branigan, *supra* note 43, at 710. *Contra Irvin*, 366 U.S. at 728 (cautioning that a juror's self-assessment of bias and declaration of impartiality should be given little weight).

106 *See generally Mu'Min*, 500 U.S. at 429–30 ("Had the trial court in this case been confronted with the 'wave of public passion' engendered by pretrial publicity that occurred in connection with *Irvin's* trial, the Due Process Clause of the Fourteenth Amendment might well have required more extensive examination of potential jurors than it undertook here.").

F. Virtually Impossible, Maybe

In 2001, Enron Corporation crashed into bankruptcy.[107] On August 14, 2001, just six months after his appointment to Chief Executive Officer, Jeffrey Skilling abruptly announced his resignation.[108] This prompted an investigation uncovering an intricate scheme to "deceive investors about the state of Enron's fiscal health."[109] The United States Department of Justice formed an Enron Task Force, paving the way for the defendant's subsequent grand jury indictment.[110] The indictment alleged the defendant had engaged in an elaborate scheme to deceive both company shareholders and the investing public by "manipulating Enron's publicly reported financial results," and making false public statements and misrepresentations about Enron's financial performance.[111]

Skilling moved for a change of venue, "contend[ing] that hostility toward him in Houston, coupled with extensive pretrial publicity, had poisoned potential jurors."[112] Potential jurors described Skilling as "the devil," "a cheater," "brash, arrogant, conceited," "dishonest," and "without a moral compass."[113] Despite the enormous impact of Enron's fall, the district court denied the change of venue motion, concluding that most of the media coverage had been objective and unemotional.[114] The Fifth Circuit disagreed:[115]

> [I]f an appellant can demonstrate that prejudicial, inflammatory publicity about his case so saturated the community from which his jury was drawn as to render it *virtually impossible* to obtain an impartial jury, then proof of such poisonous publicity raises a presumption that appellant's jury was prejudiced, relieving him of the obligation to establish actual prejudice by a juror in his case. . . . [T]his presumption is rebuttable. . . and the government may demonstrate from the *voir dire*

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107 Skilling v. United States, 561 U.S. 358, 367–68 (2010).

108 Alejo Sison, *Enron—Pride Comes Before the Fall*, *in* CORP. ETHICS AND CORP. GOVERNANCE 129, 131 (Walther C. Zimmerli et al. eds., 2007).

109 United States v. Skilling, 554 F.3d 529, 534 (5th Cir. 2009).

110 *Skilling*, 561 U.S. at 368–69.

111 *Id.* at 369.

112 *Id.*; *see also* Andrew Mayo, Note, "*Non-Media" Jury Prejudice and Rule 21(A): Lessons from Enron*, 30 REV. LITIG. 133, 145–46 (2010); Andrew Cohen, *Can Enron's Jeff Skilling Get a New Trial?*, ATLANTIC (Feb. 28, 2010), http://www.theatlantic.com/national/archive/2010/02/can-enrons-jeff-skilling-get-a-new-trial/36778/.

113 *Skilling*, 554 F.3d at 559 n.42 (quoting an Enron victim: "I'm livid, absolutely livid . . . I have lost my entire friggin' retirement to these people. They have raped all of us."); Cohen, *supra* note 112.

114 *Skilling*, 561 U.S. at 370; *see also Skilling*, 554 F.3d at 559.

115 *Skilling*, 554 F.3d at 559.

> that an impartial jury was actually impaneled.[116]

The Fifth Circuit found the defendant was entitled to a presumption of prejudice due to the immense volume and inflammatory nature of the pretrial publicity.[117]

Significantly, the district court had overlooked that prejudice towards the defendant resulted from not just adverse publicity, but also from the number of victims of Enron's collapse.[118] A court's "evaluation of the volume and nature of [media] reporting is merely a proxy for the real inquiry: whether there could be a 'fair trial by an impartial jury' that was not 'influenced by outside, irrelevant sources.'"[119] Countless people within the Houston area were affected by Enron's demise;[120] one in three Houston citizens personally knew someone harmed by the Enron tragedy.[121] The defendant had sufficiently demonstrated that the inflammatory pretrial material required a finding of presumed prejudice.[122] Yet, deferring to the district court's "exemplary" voir dire, and because the government had met its burden of rebutting any presumption of prejudice, the Fifth Circuit declined to reverse his conviction.[123]

The Supreme Court affirmed, though on different grounds.[124] In a fractured opinion, the Court disagreed with the Fifth Circuit's finding that the defendant had raised a presumption of prejudice, but agreed that the district court's voir dire record established no actual prejudice.[125] Applying a totality of the circumstances test, the Court relied on a number of factors to reject the defendant's claim that the "vitriolic media treatment" of him had impassioned the community, that it was impossible to select impartial jurors in Houston, and that the district court's "truncated voir dire" inadequately identified and defused juror bias.[126]

Skilling is perhaps most remarkable for what it failed to do—the Court declined to "resolve the split among federal courts as to the correct legal standard for determining that prejudice will prevent a fair trial."[127] *Skilling*

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[116] *Id.* at 558 (quoting United States v. Chagra, 669 F.2d 241, 250 (5th Cir. 2009)) (internal quotations omitted) (emphasis added).

[117] *Id.* at 559; Mayo, *supra* note 112, at 147.

[118] *Skilling*, 554 F.3d at 560.

[119] *Id.* at 560 (quoting *Chagra*, 669 F.2d at 249).

[120] *See id.*

[121] *See id.* at 560 n.47.

[122] *Id.* at 559.

[123] *Id.* at 562, 564–65.

[124] *See* Skilling v. United States, 561 U.S. 358, 385, 399 (2010).

[125] Gross, *supra* note 34, at 612.

[126] *Skilling*, 561 U.S. at 377, 385–86.

[127] Hillary Cohn Aizenman, *Pretrial Publicity in a Post-Trayvon Martin World*, 27 FALL

further revealed the already apparent vagueness and inconsistencies of the presumption of prejudice doctrine. Opting instead to allow ad-hoc review, the Supreme Court granted excess deference to a trial courts' assessment of jury bias, "a deference that, in practice, allows individual judges to develop and impose a standard of jury impartiality informed by their own norms, values, and interests, completely unchecked by any meaningful appellate review."[128] Moreover, *Skilling* raised the bar for successful venue challenges.[129] The Court's failure to implement a practical legal standard, applicable in presumption of prejudice cases, deprives criminal defendants of the Sixth Amendment right to trial by an impartial and indifferent jury, a deprivation which is wholly inconsistent with fundamental notions of due process.[130]

III. INADEQUACY OF VOIR DIRE IN HIGHLY PUBLICIZED TRIALS

A. Voir Dire

For a criminal defendant in a highly publicized trial who has been denied a change of venue, voir dire is the next and perhaps only step in combating juror prejudice.[131] The importance of voir dire cannot be understated—conventional wisdom suggests that most trials are either won or lost in jury selection.[132] The term "voir dire" is defined as "a preliminary examination of a prospective juror by a judge or lawyer to decide whether the prospect is qualified and suitable to serve on a jury."[133] Voir dire is based on the assumption that prospective jurors will self-report bias and respond truthfully to questions signaling any prejudicial preconceptions resulting from outside influences so that bias can be identified in jurors

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CRIM. JUST. 12, 15 (2012); *see Skilling*, 561 U.S. at 385 n.18 (declining to reach the issue of whether a presumption of prejudice can be rebutted by the government by showing that voir dire adequately rooted out any prejudice).

128 Gross, *supra* note 34, at 615.

129 *See Skilling*, 561 U.S. at 399 n.34; *see also* Aizenman, *supra* note 127, at 13; Gross, *supra* note 34, at 615.

130 *See* U.S. CONST. amend. VI; *see also* United States v. Cores, 356 U.S. 405, 407 (1958) (providing that the vicinage clause "should be given that construction which will respect" its foundational considerations); *supra* notes 18–22 and accompanying text.

131 *See* Alfredo Garcia, *Clash of the Titans: The Difficult Reconciliation of a Fair Trial and a Free Press in Modern American Society*, 32 SANTA CLARA L. REV. 1107, 1126 (1992); Charles H. Whitebread & Darrell W. Contreras, *Free Press v. Fair Trial: Protecting the Criminal Defendant's Rights in a Highly Publicized Trial by Applying the* Sheppard-Mu'min *Remedy*, 69 S. CAL. L. REV. 1587, 1600 (1996).

132 John H. Blume et al., *supra* note 94, at 1210 (observing that voir dire in capital cases is woefully ineffective at weeding out unqualified jurors).

133 *Voir Dire*, BLACK'S LAW DICTIONARY (10th ed. 2014).

when present.[134] The process itself varies among jurisdictions as there is no specific requirement of how voir dire must be conducted and what must be asked of the venire.[135] In this vein, the trial judge is accorded great discretion over the content and focus of voir dire,[136] and a judgment may be overturned only for manifest error.[137]

The jury selection process is one by which the jury is selected from a larger pool of prospective jurors.[138] Examination of prospective jurors may be conducted by the court, the attorneys, or both.[139] The process consists of an unlimited number of challenges for cause, in which the court must determine whether the prospective juror is biased; and a limited set of peremptory challenges.[140] The purpose is to root out potential venirepersons who would be incapable of deciding the case solely on the merits.[141]

B. Prejudicial Publicity and Voir Dire

Prejudicial pretrial publicity jeopardizes the sanctity of the voir dire

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134 Christina A. Studebaker & Steven D. Penrod, *Pretrial Publicity: The Media, the Law, and Common Sense*, 3 PSYCHOL. PUB. POL'Y & L. 428, 439 (1997).

135 *See* Skilling v. United States, 561 U.S. 358, 386 (2010) ("No hard-and-fast formula dictates the necessary depth or breadth of voir dire."); *see also* William P. Barnette, *Ma, Ma, Where's My Pa? On Your Jury, Ha, Ha, Ha!: A Constitutional Analysis of Implied Bias Challenges for Cause*, 84 U. DET. MERCY L. REV. 451, 455–56 (2007) ("The principle underlying this 'broad discretion' is . . . based on observing the person's demeanor and assessing their credibility, areas 'that are peculiarly within a trial judge's province.'").

136 *See* Mu'Min v. Virginia, 500 U.S. 415, 451 (1991) (Kennedy, J., dissenting) ("Our willingness to accord substantial deference to a trial court's finding of juror impartiality rests on our expectation that the trial court will conduct a sufficient voir dire to determine the credibility of a juror professing to be impartial.").

137 *See Skilling*, 561 U.S. at 396.

138 Marvin Zalmand & Olga Tsoudis, *Plucking Weeds from the Garden: Lawyers Speak About Voir Dire*, 51 WAYNE L. REV. 163, 170 (2005).

139 Whitebread & Contreras, *supra* note 131. *See generally* David Hittner & Eric J.R. Nichols, *Jury Selection in Federal Civil Litigation: General Procedures, New Rules, and the Arrival of* Batson, 23 TEX. TECH L. REV. 407, 424 (1992) (commenting on the ongoing debate over whether voir dire is best conducted by judges or attorneys and to what extent judges permit attorneys to participate).

140 Zalmand & Tsoudis, *supra* note 138; *see also* Swain v. Alabama, 380 U.S. 202, 218–21 (1965) ("While challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality, the peremptory . . . is often exercised upon the 'sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another,' upon a juror's 'habits and associations,' or upon the feeling that 'the bare questioning (a juror's) indifference may sometimes provoke a resentment.'").

141 *See* Kenneth J. Melillia, Batson *in Practice: What We Have Learned About* Batson *and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 447 (1996).

process.[142] In the 1960s, the Supreme Court held that, due to the advent of television communications, outside "influences may be so pernicious in the charging venue wherein a presumption of community bias will arise that cannot be overcome by . . . careful questioning in voir dire . . . ."[143] Nonetheless, fifty years later voir dire remains the trial courts' preferred method for detecting and eliminating juror bias.[144] Particularly in highly publicized criminal trials, voir dire demands an extended approach, aided by the effective use of jury questionnaires, and individual, content-based questioning.[145]

1. Assessing Juror Prejudice

Although United States courts continue to rely on voir dire as a mechanism to safeguard criminal defendants from the "taint of pretrial publicity," research demonstrates that "neither judges nor attorneys are capable of accurately assessing juror prejudice."[146] While jurors are required to answer truthfully in response to voir dire questioning,[147] "[o]rdinary voir dire leaves a person free to refuse to disclose intimate details; [one] need simply not answer the questions."[148] A prospective juror may attempt to hide their bias, or simply be unaware of it.[149] If a juror knows that he or she is biased, very rarely will that individual be capable of admitting this fact— let alone make this admission to an authority figure

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[142] *See generally* Studebaker & Penrod, *supra* note 134, at 428 (examining social science research exposing the inadequacies of voir dire as a safeguard against juror bias).

[143] Gross, *supra* note 34, at 578; *see also* Rideau v. Louisiana, 373 U.S. 723, 727 (1963) (holding that voir dire is ineffective in ferreting out impartiality).

[144] *See* Geragos, *supra* note 30, at 1187 (stating voir dire has ceased to adequately guarantee a fair and impartial jury).

[145] *See* Garcia, *supra* note 131, at 1126–31 (arguing content-based questions are necessary in order to meaningfully effectuate peremptory challenges); Matthew Mastromauro, *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*, 10 J. HIGH TECH. L. 289 (2010) (noting judicial discretion to permit content-based questions to determine the nature of juror exposure to media coverage); Gerald T. Wetherington et al., *Preparing for the High Profile Case: An Omnibus Treatment for Judges and Lawyers*, 51 FLA. L. REV. 425, 436, 472 (1999).

[146] Joanne Armstrong Brandwood, Note, *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, 1443 (2000).

[147] Kristin R. Brown, *Somebody Poisoned the Jury Pool: Social Media's Effect on Jury Impartiality*, 19 TEX. WESLEYAN L. REV. 809, 828 (2013).

[148] Dov Fox, *Neuro-Voir Dire and the Architecture of Bias*, 65 HASTINGS L.J. 999, 1019 (2014).

[149] Aizenman, *supra* note 127, at 16; Brandwood, *supra* note 146, at 1443–44.

such as the "trial judge in the black robe."[150] It is the "tantamount" of announcing to the world that one has decided before "hearing any facts," arguments or evidence, and thus is "close-minded" and "judgmental," easily influenced by what one reads or hears in the media.[151] Alternatively, a juror may be completely unaware that he or she harbors bias.[152] "The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man."[153] In such instances, it is necessary to disregard a juror's statement of impartiality.[154]

The jury serves to represent the conscience of the community on the ultimate question in the case through the penal system.[155] Jurors are, however, not constitutionally required nor desired to be wholly ignorant of the facts and issues involved in a given case.[156] In light of advances in communications technology, high-profile cases are naturally expected to arouse public interest within the community.[157] Were it even possible to locate a prospective juror who had not been exposed to prejudicial media reports of a highly sensationalized case, such a juror would be equally unqualified to serve.[158] It thus remains incumbent upon the trial courts to ensure, throughout the voir dire process and in cooperation with the litigants, that the venire is both informed and impartial.[159]

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[150] Aizenman, *supra* note 127, at 16 (observing that jurors are likely to be embarrassed to disclose that they are incapable of being fair and impartial and might find it easier to succumb to peer pressure instead); William H. Farmer, *Presumed Prejudiced, but Fair?*, 63 VAND. L. REV. EN BANC 5, 8 (2010); Vidmar, *supra* note 34, at 1150.

[151] Farmer, *supra* note 150.

[152] *See* Smith v. Phillips, 455 U.S. 209, 231 (1982) (Marshall, J., dissenting) ("Bias or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible, to always recognize its existence . . . ." Crawford v. United States, 212 U.S. 183, 196 (1909))) (internal quotations omitted); *see also* Aizenman, *supra* note 127, at 16 ("Jurors themselves may be incapable of recognizing their own impairment."); Fox, *supra* note 148, at 1012 (asserting that prospective jurors cannot be trusted to disclose nor identify their biases).

[153] Irvin v. Dowd, 366 U.S. 717, 727–28 (1961) ("As one of the jurors put it, 'You can't forget what you hear and see.'").

[154] *Id.* at 728 ("[S]tatement[s] of impartiality can be given little weight."); *see supra* note 47 and accompanying text.

[155] Witherspoon v. Illinois, 391 U.S. 510, 519 (1968).

[156] *Irvin*, 366 U.S. at 722–23 ("[S]carcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case."); *see also* Whitebread & Contreras, *supra* note 131, at 1611.

[157] *See Irvin*, 366 U.S. at 722; *see also* Newton N. Minow & Fred H. Cate, Symposium, *Who is an Impartial Juror in an Age of Mass Media?*, 40 AM. U. L. REV. 631, 663 (1991).

[158] Whitebread, *supra* note 49, at 195.

[159] *See* Sheppard v. Maxwell, 384 U.S. 333, 363 (1966) (placing affirmative duty on

An additional factor contributing to the inadequacy of voir dire is when an attorney must attempt to detect bias in potential jurors by asking questions related to the "very pretrial publicity and underlying facts that give rise to prejudice."[160] When the defense is compelled to highlight the very same issues it seeks to suppress, the process of voir dire turns into a prejudicial exercise.[161] If voir dire is not individualized, questions must be carefully constructed to avoid prejudicing individuals who would otherwise not have previous knowledge of the case.[162]

2. Community Bias

When an entire community has been affected by a crime, voir dire is even less capable of achieving its stated goal of producing a fair and impartial jury.[163] Where a defendant has been repeatedly vilified within a community, serving on his or her jury could produce a "hero effect."[164] In ordinary trials, prospective jurors might not want to serve on a jury due to its inconvenience.[165] Whereas in high profile trials, the "hero effect" affords misguided citizens the perverse opportunity to avenge their community and "boast to their friends and neighbors that they played a part in bringing the 'evildoers' to justice."[166]

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lower courts to institute rules and regulations protecting their proceedings when there exists a reasonable likelihood of prejudicial publicity); *supra* notes 78–80 and accompanying text. *See generally Panel Three: The Roles of Juries and the Press in the Modern Judicial System*, 40 AM. U. L. REV. 597, 602–05 (1991) (discussing the extent to which exclusion of jurors who have heard about a trial or an issue prior to trial results in ignorant juries).

160 Studebaker & Penrod, *supra* note 134, at 442 (casting the litigants into this awkward situation often highlights the very bias the attorney is intending to isolate).

161 Brandwood, *supra* note 146, at 1444.

162 *See* Studebaker & Penrod, *supra* note 134, at 442.

163 Farmer, *supra* note 150; Fox, *supra* note 148, at 1032. *See generally* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 569–73 (1980) (discussing the history of public trials in the United States).

164 Farmer, *supra* note 150; Vidmar, *supra* note 34, at 1150 (positing that biased jurors are likely to claim they can be impartial solely because doing so "is consistent with socially learned values that people should be impartial, a phenomenon that psychologists call 'socially desirable' responses").

165 Farmer, *supra* note 150.

166 *Id.* at 9 (observing that these vigilantes can easily answer voir dire questioning in such a way as to fulfill their fifteen minutes of fame); Geragos, *supra* note 30, at 1188 (noting that in high-profile trials, the "stealth-juror" is one who "auditions" to be on the jury for their own "self-serving reasons"). *See generally Richmond Newspapers, Inc.*, 448 U.S. at 571 (explaining that after a shocking crime occurs within a community, the "open process of justice," particularly "[t]he accusation and conviction or acquittal," combined with the punishment, operate to restore the imbalance which was created by the offense or public charge, to reaffirm the temporarily lost feeling of security and, perhaps, to satisfy that latent

Crimes impacting an entire community create two similar but distinct interests in which a juror will be prone to deciding a case out of broader concern for one's locality.[167] A juror who identifies with the community often "feel[s] pressure to conform to its perceived norms or welfare" independent of media exposure.[168] A related interest arises where the juror does not necessarily identify with the community's values or goals but nonetheless succumbs to its outside influence.[169] This situation results when a juror, due to community popular opinion, feels obligated to produce a certain verdict to conform to public demand.[170] "These interests cave to, rather than identify with, concern for the welfare of one's community."[171]

In the face of such mounting research indicating that voir dire is an inadequate anti-bias remedy, even supporters of voir dire "concede that its reliance on the assessment of jurors' voluntary responses and demeanor leaves judges and lawyers bound to miss many of the 'biases and opinions that will inevitably influence their decisions and perceptions.'"[172] Still, judges continue to rely on voir dire as the predominant method in prejudicial pretrial publicity cases through which to seat an impartial jury.[173] Criminal cases plagued by unusually high prejudicial publicity necessarily demand an extensive, comprehensive voir dire, even more so when the defendant's life is at stake.[174] The defendant who is subjected to such publicity suffers from a tremendous disadvantage—short of candid responses from prospective jurors, the defendant will find it difficult to ensure that his Sixth Amendment right to an impartial jury remains undisturbed.[175]

'urge to punish.'" (quoting Gerhard O. W. Mueller, *Problems Posed by Publicity to Crime and Criminal Proceedings*, 110 U. PA. L. REV. 1, 6 (1961)).

167 Fox, *supra* note 148, at 1030.

168 *See id.* at 1031–32 (examining the community interests in *Skilling*).

169 *See id.* at 1032.

170 *See id.* (acknowledging the need to withstand community pressure, the court in *Skilling* expressed that it would take courage for jurors to acquit).

171 *Id.*

172 *Id.* at 1020.

173 Geragos, *supra* note 30, at 1187; *see supra* note 144 and accompanying text.

174 *See* Irvin v. Dowd, 366 U.S. 717, 728 (1961) ("With his life at stake, 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 two-thirds of the members admit, before hearing any testimony, to possessing a belief in his guilt.").

175 *See* U.S. CONST. amend. VI; Garcia, *supra* note 131, at 1129.

IV. *TSARNAEV*: A CASE STUDY

A. Background

The highly publicized trial of Dzhokhar A. Tsarnaev led many to question whether it was possible for a fair trial to be conducted in the District of Massachusetts.[176] Tsarnaev's case is the most significant terrorism trial to take place in the United States since the Oklahoma City bombing trials in 1997 and 1998.[177] The Boston Marathon bombing was the "worst terrorist attack on American soil" since September 11, 2001.[178] The Boston Marathon Bombing events killed four and wounded more than two hundred sixty,[179] requiring upwards of twenty amputations.[180] The City of Boston would be forever changed.

The phrase "Boston Strong" quickly emerged as the city's unofficial

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[176] *See* Andrew Cohen, *Can Tsarnaev Get a Fair Trial in Boston? Of Course Not.*, BRENNAN CTR. FOR JUST. (Jan. 9, 2015), http://www.brennancenter.org/analysis/can-tsarnaev-get-fair-trial-boston-course-not; *supra* notes 12–17 and accompanying text. *But see* Kevin Cullen, *Fair Trial is More than Possible for Dzhokhar Tsarnaev*, BOS. GLOBE (Jan. 4, 2015), http://www.bostonglobe.com/news/nation/2015/01/04/fair-trial-for-tsarnaev-realistic/O42MDLgd6CJ3QLLoFjKkPO/story.html.

[177] *See* Cohen, *supra* note 176; *see also* United States v. McVeigh, 153 F.3d 1166, 1176 (10th Cir. 1998) (sentencing Timothy J. McVeigh, a co-conspirator in the Oklahoma City bombing to death for, *inter alia*, first degree murder and the use of a weapon of mass destruction resulting in the deaths of 168 people); Wendy Ruderman et al., *Officer's Killing Spurred Pursuit in Boston Attack*, N.Y. TIMES (Apr. 24, 2013), http://www.nytimes.com/2013/04/25/us/officers-killing-spurred-pursuit-in-boston-attack.html?pagewanted=all (reporting the death of the fourth victim, three days after the attack).

[178] Sean D. Murphy, *Terrorist Attacks on World Trade Center and Pentagon*, 96 AM. J. INT'L L. 237, 237 (2002); *see also* Katharine Q. Seelye & Richard A. Oppel Jr., *Opposing Pictures of Tsarnaev at Boston Marathon Bombing Trial*, N.Y. TIMES (Mar. 4, 2015), http://www.nytimes.com/2015/03/05/us/boston-bombing-trial-opens-almost-two-years-after-attack.html?_r=0.

[179] *See supra* note 2 and accompanying text. *Compare* Adam Gabbat, *Boston Marathon Bombing Injury Toll Rises to 264*, GUARDIAN (Apr. 23, 2013), http://www.theguardian.com/world/2013/apr/23/boston-marathon-injured-toll-rise (according to the Boston Public Health Commission, 264 people were injured in the Boston bombing, despite varying reports), *with* Kay Lazar & Sarah Schweitzer, *A Year Since Marathon Attacks, Many of Wounded Struggle*, BOS. GLOBE (Apr. 15, 2014), http://www.bostonglobe.com/metro/2014/04/14/year-after-marathon-bombings-survivors-struggle-with-invisible-injuries/NOJ8kKRewvPxjK7LZ3tjJP/story.html (reporting 275 wounded).

[180] Jennifer Levitz & Jon Kamp, *Struggles of Boston Amputees Mount*, WALL ST. J. (Sept. 20, 2013), http://www.wsj.com/articles/SB10001424127887324492604579083040654421528.

motto in response to the senseless tragedy.[181] The first tweet featuring "Boston Strong" originated two hours after the explosions and more than five hundred miles away in Cleveland, Ohio.[182] Simultaneously, two Emerson College students created "Boston Strong" t-shirts for sale, donating one hundred percent of the profits to the One Fund—the main marathon charity.[183] The slogan has become a mark of solidarity;[184] "Boston Strong" reflects a community in itself, a symbol of patriotism and survival.[185]

The heinous crimes with which Tsarnaev was charged struck at the heart of one of Boston's most cherished events – Marathon Monday – and transformed it into a bloody massacre.[186] Residents soon found themselves in a state of lockdown.[187] On April 19, 2013, then Massachusetts Governor Deval L. Patrick announced before television cameras an "unsettling message to residents of Boston…: Stay inside, lock the door, and don't open it for anyone but properly credentialed law enforcement officers. 'There is a massive manhunt underway.'"[188] As the manhunt continued and people waited anxiously inside their homes, residents turned to their

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[181] Tovia Smith, *A Year After Bombings, Some Say 'Boston Strong' Has Gone Overboard*, NPR (Apr. 10, 2014), http://www.npr.org/2014/04/10/300989561/a-year-after-bombings-some-say-boston-strong-has-gone-overboard; *see also* Philip S. Brenner et al., *Safety and Solidarity After the Boston Marathon Bombing: A Comparison of Three Diverse Boston Neighborhoods*, 30 SOC. FORUM 1, 55–56 (2015).

[182] *See* Noelle Swan, *'Boston Strong': Has the Motto Run its Course? (+video)*, CHRISTIAN SCI. MONITOR (Apr. 19, 2014), http://www.csmonitor.com/USA/2014/0419/Boston-Strong-Has-the-motto-run-its-course-video; *see also* Robert Burgess, *Where Did the Term Boston Strong Come From?*, BOSTON.COM (Apr. 15, 2014), http://www.boston.com/2014/04/15/bdcbostonstrongstart/paU4PMYxb4ayBUwcvBKAQK/story.html (reporting that as of April 15, 2014, the hashtag "BostonStrong" had been used more than 1.5 million times).

[183] *See* Smith, *supra* note 181.

[184] *See In re Tsarnaev*, 780 F.3d at 32 ("[O]ne could not go anywhere in Boston in the bombing's aftermath without seeing the slogan on a car, t-shirt, bracelet, tattoo, or even mowed into the outfield of Fenway Park."); Swan, *supra* note 182.

[185] *See* Smith, *supra* note 181; *see also* Brenner et al., *supra* note 181.

[186] Cohen, *supra* note 176; *see* Ian Crouch, *Boston in Lockdown*, NEW YORKER (Apr. 19, 2013), http://www.newyorker.com/news/news-desk/boston-in-lockdown (describing the scene as a "war zone").

[187] *See supra* note 7 and accompanying text.

[188] Scott Helman & Jenna Russell, *How the Marathon Bombing Manhunt Really Happened*, BOS. GLOBE (Mar. 28, 2014), http://www.bostonglobe.com/magazine/2014/03/28/how-marathon-bombing-manhunt-really-happened/Fyv99o2D4WqT9my9BAYZDJ/story.html; Crouch, *supra* note 186 ("Robocalls went out across the city, reminding people to stay inside.").

televisions, social media websites, and radios for news and updates.[189] Thus, the media circus began.[190]

B. To Presume or Not to Presume

On June 18, 2014, the defense moved for a change of venue,[191] arguing the sheer volume of news coverage and the obvious impact of the offenses had so permeated public attitudes that prejudice must be presumed within Massachusetts.[192] The defense pointed to survey data revealing: an "overwhelming presumption of guilt" within Massachusetts; "prejudgment as to the penalty that should be imposed"; and an "extraordinarily high number of individuals" in the prospective jury pool who either "attended or participated in the 2013 Boston Marathon" or "personally kn[e]w someone who did."[193]

1. Motion Denied

The first motion for a change of venue was denied by District Court Judge George A. O'Toole Jr., relying extensively, almost exclusively, on *Skilling*.[194] The defense subsequently moved for a change of venue a total of four times[195]—each motion was denied.[196] Additionally, the defense filed

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189 *See* Crouch, *supra* note 186 ("[S]ome [residents] tweeted photos of law-enforcement officers lying flat on neighboring houses, with machine guns drawn.").

190 *See id.* ("Locked down, we turned to the television . . . . [H]osts on CNN were reporting that Dzhokhar was considered 'armed and extremely dangerous,' and warned that he might be contemplating 'going out in a blaze of glory . . . .'").

191 United States v. Tsarnaev, No. 13–10200–GAO, 2014 WL 4823882, at *1 (D. Mass. September. 24, 2014); Katharine Q. Seelye, *Boston Bombing Suspect Seeking Change of Trial Venue*, N.Y. TIMES (June 18, 2014), http://www.nytimes.com/2014/06/19/us/boston-bombing-suspect-Dzhokhar-Tsarnaev-seeking-change-of-trial-venue.html?_r=0.

192 *Tsarnaev*, 2014 WL 4823882, at *1; *see supra* notes 12–17 and accompanying text.

193 Motion for Change of Venue at 1, United States v. Tsarnaev, No. 13–10200–GAO, 2014 WL 4823882, at *1 (D. Mass. Sept. 24, 2014).

194 *See Tsarnaev*, 2014 WL 4823882, at *1–4; *see also* Milton J. Valencia, *Judge Denies Tsarnaev Request for Change of Venue*, BOS. GLOBE (Sept. 24, 2014), http://www.bostonglobe.com/metro/2014/09/24/judge-denies-tsarnaev-change-venue-request/aC2a16m58kDs9a8easmIrJ/story.html (reporting that in denying Tsarnaev's change of venue, the judge cited to *Skilling*, which had set a higher standard for change of venue requests). *See generally* United States v. Skilling, 561 U.S. 358 (2010) (holding that pretrial publicity did not raise presumption of prejudice so as to require change of venue).

195 *See* Fourth Motion for Change of Venue, United States v. Tsarnaev, No. 13–CR–10200–GAO (D. Mass. Mar. 2, 2015), http://thebostonmarathonbombings.weebly.com/uploads/2/4/2/6/24264849/fourth_change_of_venue_motion.pdf.

196 *See In re* Tsarnaev, 780 F.3d 14, 48 (1st Cir. 2015) ("[T]he district court has repeatedly refused to grant Tsarnaev's motions for change of venue. Not only that, it often

two writs of mandamus[197] to the First Circuit, but those petitions for relief were also denied.[198]

In denying the first motion for change of venue, it is unclear whether the district court applied the virtual impossibility test or the totality of the circumstances test.[199] The court began its analysis by framing the issue as whether pretrial publicity and public sentiment require the presumption "that the pool of prospective jurors in Massachusetts is so prejudiced against him that an impartial trial jury is *virtually impossible*."[200] Though the court clearly identified the virtually impossible standard, it proceeded to apply the totality of the circumstances test from *Skilling*.[201]

The *Skilling* Court loosely analyzed four factors, in the totality of the circumstances, to determine whether Skilling had demonstrated a presumption of prejudice sufficient to require a change of venue:

> 1) the size and characteristics of the community in which the crime occurred and from which the jury would be drawn; 2) the quantity and nature of media coverage . . . whether it contained "blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight"; 3) the passage of time between the underlying events and the trial and whether prejudicial media attention had decreased in that time; and 4) in hindsight, an evaluation of the trial outcome to consider whether the jury's conduct ultimately undermined any possible pretrial presumption of prejudice.[202]

Applying these factors, the district court methodically concluded that *Tsarnaev* shared many characteristics with *Skilling* and likewise did not raise a presumption of prejudice.[203]

Comparing the facts to *Skilling*, the court reasoned that the Eastern

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refuses to act at all."); *The Challenges of Jury Selection in the Boston Marathon Bombing Trial*, *supra* note 17.

[197] *See In re Tsarnaev*, 780 F.3d at 14.

[198] *See id.* at 15; Carol Rose, *Tsarnaev Trial Will Test What It Means to Be 'Boston Strong,'* WBUR (Jan. 5, 2015), http://cognoscenti.wbur.org/2015/01/05/why-the-tsarnaev-trial-represents-the-antithesis-of-due-process; *see also* Cullen, *supra* note 176; Milton J. Valencia, *Appeals Court to Hear Dzhokhar Tsarnaev Trial Relocation Arguments*, BOS. GLOBE (Feb. 12, 2015), http://www.bostonglobe.com/metro/2015/02/12/appeals-court-hear-defense-request-stop-jury-selection-dzhokhar-tsarnaev-bombing-trial/umi5tON6qc2UlQBmQPGP7L/story.html.

[199] *See generally* United States v. Tsarnaev, No. 13–10200–GAO, 2014 WL 4823882, at *1–4 (D. Mass. Sept. 24, 2014) (holding the defendant was not entitled to a presumption of prejudice).

[200] *Id.* at *1 (emphasis added).

[201] *Id.* at *1–2.

[202] *Id.* at *1. *See generally Skilling*, 561 U.S. at 381–99 (articulating and applying the factors).

[203] *See Tsarnaev*, 2014 WL 4823882, at *2.

Division of Massachusetts is comprised of approximately five million people—whereas the Houston area at the time had a population of four-and-a-half million.[204] Because Boston is one of the largest cities in the country, "it stretche[d] the imagination" too far to suggest that an impartial jury could not be empaneled here.[205] Thus, sheer size and volume alone satisfied the court that impartiality could be sustained.[206] But of the 1373 prospective jurors summoned,[207] 68% of the jury pool already believed that the defendant was guilty "before hearing a single witness or examining a shred of evidence at trial."[208] Moreover, 69% had a connection to the case or "expressed allegiance to the people, places and/or events at issue."[209] Sample responses to official juror questionnaires during voir dire included: "They shouldn't waste the bulits [sic] or poison; hang them"; "I am set in my ways and this kid is GUILTY"; "Everyone thinks he is guilty," "We all know he's guilty so quit wasting everybody's time with a jury and string him up."[210]

The impact of the intense and sustained media coverage of the chain of events surrounding the bombing was pervasive and widespread. Both the prosecution and defense acknowledged that media coverage of the case had been extensive.[211] This was evident from the "Boston Strong" social media response,[212] and when Tsarnaev's picture made the cover of Rolling Stone magazine.[213] Combining both the media and community response to the Boston Marathon Bombing indeed rendered it virtually impossible to empanel a jury in Massachusetts for Tsarnaev's trial.[214] Media reports

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[204] *See id.* at *2.

[205] *See id.*

[206] *See id.*

[207] Katharine Q. Seelye, *Jurors Chosen for Dzhokhar Tsarnaev's Trial in Boston Marathon Bombings*, N.Y. TIMES (Mar. 3, 2015), http://www.nytimes.com/2015/03/04/us/boston-marathon-bombing-trial.html.

[208] Milton J. Valencia, *Dzhokhar Tsarnaev's Defense Team Again Seeks New Venue*, BOS. GLOBE (Jan. 22, 2015), http://www.bostonglobe.com/metro/2015/01/22/jan-start-tsarnaev-trial-unrealistic-court-says/LoDtgttxLSOSXTNEqarECO/story.html; *see also* Ann O'Neill, *The 13th Juror: When Picking a Jury Turns into a Marathon*, CNN (Feb. 6, 2015), http://www.cnn.com/2015/01/29/us/dzhokhar-tsarnaev-trial-13th-juror/ (reporting on the difficult task of empaneling a jury for the *Tsarnaev* trial).

[209] Valencia, *supra* note 208.

[210] O'Neill, *supra* note 208.

[211] *See Tsarnaev*, 2014 WL 4823882, at *2.

[212] *See supra* notes 181–85 and accompanying text.

[213] *See* Janet Reitman, *Jahar's World*, ROLLING STONE (July 17, 2013), http://www.rollingstone.com/culture/news/jahars-world-20130717; *see also* Leti Volpp, *The Boston Bombers*, 82 FORDHAM L. REV. 2209, 2218 (2014).

[214] *See* O'Neill, *supra* note 208.

varied from human-interest stories reporting on individual victim rehabilitation, to graphic images of the defendant arising out of the bullet-pocked boat at the scene of his arrest, to themes of global jihad.[215] Contrary to the district court's findings, these news stories were so blatantly prejudicial that readers and viewers could not reasonably be expected to ignore them.[216]

Arguably, the lapse of time between the actual event and the trial did little to diminish the decibel level of media attention.[217] The Boston Marathon Bombings highlighted the sensationalistic combination of contemporary media with domestic and foreign terrorism concerns.[218] During the critical week immediately following the bombings, social media, combined with traditional media outlets, played a crucial role in maintaining an open dialogue between law enforcement and the public.[219] After the event, contemporary media continued to report on the victims, updating the public with news of their progress.[220] The one-year anniversary of the attack was a solemn reminder of what the city had lost, as well as a celebration of strength and endurance.[221] And when the defense filed their first motion for a change of venue, media attention quickly

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[215] *See* Travis Andersen & Nikita Lalwani, *Angry Sergeant Releases Tsarnaev Photos*, BOS. GLOBE (July 19, 2013), https://www.bostonglobe.com/metro/2013/07/18/state-police-photographer-releases-bloody-tsarnaev-photos-boston-magazine/ovcUYNQil2ivoGmPo4YsTK/story.html; Tim Rohan, *Beyond the Finish Line*, N.Y. TIMES (July 7, 2013), http://www.nytimes.com/2013/07/08/sports/beyond-the-finish-line.html?pagewanted=all; Scott Shane, *Phone Calls Discussing Jihad Prompted Russian Warning on Tsarnaev*, N.Y. TIMES (Apr. 27, 2013), http://www.nytimes.com/2013/04/28/us/jihad-discussions-led-to-warning-on-tamerlan-tsarnaev.html.

[216] *See Tsarnaev*, 2014 WL 4823882, at *2. *See generally* Skilling v. United States, 561 U.S. 358, 382 (2010) (observing that new stories about Skilling were not of the smoking-gun variety)

[217] *See generally* Katharine Q. Seelye, *Celebrating Boston Marathon, While Honoring Victims' Memory*, N.Y. TIMES (Apr. 15, 2015), http://www.nytimes.com/2015/04/16/us/a-marathon-thats-far-more-than-a-rite-of-spring.html (reporting that two years later, "[f]rom the finish line to talk radio, from social media to everyday conversations in bars and offices, Boston is brimming with opinions of anger, vengeance and mercy").

[218] *See* Kevin Crews, *New Media, New Policies: Media Restrictions Needed to Reduce the Risk of Terrorism*, 7 PHOENIX L. REV. 79, 80 (2013).

[219] *See The Boston Marathon Bombings, One Year On: A Look Back to Look Forward Hearing Before the H.R. Comm. on Homeland Sec.*, 113th Cong. 30–31 (2014).

[220] *See* Rohan, *supra* note 215.

[221] Katharine Q. Seelye, *Tribute and Mourning Year after Boston Bombings*, N.Y. TIMES (Apr. 15, 2014), http://www.nytimes.com/2014/04/16/us/anniversary-of-boston-marathon-bombings.html.

turned to the impending trial.[222]

2. Prejudice Presumed

The First Circuit opinion denying Tsarnaev mandamus relief is perhaps most illustrative of the injustice that arises out of prejudicial pretrial publicity.[223] Circuit Judge Juan R. Torruella "vehemently" dissented, opining that the district court's decision to repeatedly deny Tsarnaev's motions for a change of venue was a "clear abuse of discretion."[224] Asserting that a presumption of prejudice had been established, Judge Torruella maintained that *Tsarnaev* is comparable to *McVeigh*, *Irvin*, and *Rideau*, not *Skilling*.[225]

The City of Boston itself had been victimized.[226] Coverage of the attack and ensuing four-day manhunt was broadcast live on television and the Internet.[227] Due to the shelter-in-place advisory, most within the Greater Boston Area did little but follow such coverage intently.[228]

> The spectacle of seeing a bloodied Tsarnaev taken out of the boat and arrested is not something a potential juror in the Eastern Division of the District of Massachusetts can easily forget or put aside; nor can one easily forget Tsarnaev's subsequently released alleged "confession," claiming that all of the victims were collateral damage.[229]

This "spectacle" was repeatedly shown in Massachusetts.[230] "For anyone who has ever watched television the conclusion cannot be avoided that this spectacle, to the tens of thousands of people who saw and heard it, in a very real sense" was Tsarnaev's trial.[231]

In *Irvin*, *Rideau*, and *Sheppard*, "persistent media exposure alone" was

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[222] *See* Seelye, *supra* note 12.

[223] *See In re* Tsarnaev, 780 F.3d 14 (1st Cir. 2015).

[224] *Id.* at 30, 39 (Torruella, J., dissenting).

[225] *See id.* at 39.

[226] *See id.* at 34 (defining Boston to include surrounding neighborhoods and suburbs encompassing the greater metropolitan area from which the jury pool was drawn).

[227] *Id.*

[228] *Id.*

[229] *In re* Tsarnaev, 780 F.3d 14, 34 (1st Cir. 2015).

[230] *See, e.g.*, Paul Geitner & Bart Ziegler, *2013 Year in Review: Tragedy, Transition, Triumph*, WALL STREET J. (Jan. 14, 2014, 1:47 PM), http://www.wsj.com/articles/SB10001424052702304475004579276751433735152; William J. Kole, *Marathon Bombing Aftermath Was Top Massachusetts Story of 2014*, MASSLIVE (Dec. 26 2014, 11:53 AM), http://www.masslive.com/news/index.ssf/2014/12/marathon_bombing_aftermath_was.html.

[231] Rideau v. Louisiana, 373 U.S. 723, 726 (1963) (holding repeated airing of jailhouse "interview" to a community of one hundred fifty thousand was, in a sense, defendant's trial at which he pled guilty); *see supra* Part II.B.

insufficient to presume prejudice.[232] All three cases necessarily relied on an additional factor: a publicized confession of guilt by the defendant, or a "circus atmosphere" inside the courtroom.[233] In denying Skilling's fair trial claim, the Supreme Court noted that news stories about him "contained no confession or other blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight."[234] However, news stories about Tsarnaev did contain a confession.[235] This confession contained themes of global jihad and revealed his desire to avenge the deaths of Muslims at "the hands of the United States" in order to reach "heavenly paradise."[236] This confession, combined with blatantly prejudicial pretrial media exposure, entitles a defendant to a presumption of prejudice.[237] "Any subsequent court proceedings" in the District of Massachusetts, "a community so pervasively exposed to such a spectacle[,] could be but a hollow formality."[238]

Tsarnaev's case is perhaps most comparable to that of Timothy J. McVeigh, the Oklahoma City bomber.[239] The publicity, sensational local impact, and galvanizing community reaction required a change of venue in

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[232] *See* Sheppard v. Maxwell, 384 U.S. 333, 363 (1966) (holding trial judge failed to protect defendant from the inherently prejudicial publicity that saturated the community and did not control disruptive influences in the courtroom); *Rideau*, 373 U.S. at 726; Irvin v. Dowd, 366 U.S. 717, 725 (1961).

[233] *See* Collins, *supra* note 24, at 397.

[234] Skilling v. United States, 561 U.S. 358, 382 (2010); *see supra* note 216.

[235] *See Boston Bombing Jury Sees Photos of Writing in Boat*, WALL ST. J. (Mar. 10, 2015, 4:45 PM), http://www.wsj.com/articles/boston-bombing-jury-sees-photos-of-writing-in-boat-1426013381; Richard A. Oppel, Jr., *Boston Marathon Bombing Jury Sees a Bullet-Pocked Message*, N.Y. TIMES (Mar. 10, 2015), http://www.nytimes.com/2015/03/11/us/boston-marathon-bombing-jury-sees-a-bullet-pocked-message.html.

[236] Oppel, Jr., *supra* note 235; Milton J. Valencia & Patricia Wen, *Tsarnaev's Own Words from Inside Boat Shown in Court*, BOS. GLOBE (Mar. 10, 2015), https://www.bostonglobe.com/metro/2015/03/10/fbi-agent-expected-continue-twitter-testimony-marathon-bombing-trial/nLnZIzfc1qmkGuyLdV7tSO/story.html (reporting the "confession," disclosed in complete form at trial, became central to the prosecution's case in establishing a clear motive for the attacks and that the defendant was lucid in the hours leading up to his capture).

[237] *See Rideau*, 373 U.S. at 726; *Irvin*, 366 U.S. at 725–29.

[238] *Rideau*, 373 U.S. at 726; *see In re* Tsarnaev, 780 F.3d 14, 34 (1st Cir. 2015) (Torruella, J., dissenting).

[239] *Compare In re Tsarnaev*, 780 F.3d at 39 (Torruella, J., dissenting) ("It is extremely disappointing that both the district court and the majority fail to appreciate the similarities to *United States v. McVeigh* . . . ."), *with* United States v. McVeigh, 918 F. Supp. 1467, 1470 (W.D. Okla. 1996) (holding defendant had established a presumption of prejudice and therefore a change of venue was warranted).

the Oklahoma City bombing trial.[240] The community impact in Boston is arguably even greater than that present in *McVeigh*. This is due to the fact that the attack occurred at the Boston Marathon on Patriot's Day, a day where thousands of Bostonians and tourists alike gather to celebrate, the "indelible fear that friends and family could've been killed," the "trauma experienced" by those in the region while police sought the perpetrators, and the "hundreds of thousands" who "sheltered in place during the climatic final day" of the search.[241]

In *McVeigh*, the District Court relied on three factors to find that a fair and impartial trial could not take place in Oklahoma.[242] After the initial and "extremely comprehensive" national media coverage dwindled, local media persisted for months, focusing coverage on "victims and their families," sharing "individual stories of grief and recovery."[243] Second, "Oklahomans were united as a family with a spirit unique to the state."[244] The "Oklahoma family" became a common theme within local media coverage.[245] Finally, the "prejudicial impact" of this publicity was immeasurable by any "objective standard."[246]

Identical considerations were present in *Tsarnaev*.[247] Massachusetts' coverage focused on stories of grief, recovery, personal loss, and triumph.[248] As in Oklahoma, Bostonians united "with a spirit unique to the state,"[249] rallying together in a show of civic resiliency and solidarity under the slogan, "Boston Strong."[250] Lastly, prospective juror questionnaires

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[240] *See McVeigh*, 153 F.3d at 1179–80; Stephen Jones & Holly Hillerman, McVeigh, *McJustice, McMedia*, 1998 U. CHI. LEGAL F. 53, 106 (1998) ("Long before the first witness was summoned, the presumption of innocence had been replaced by the assumption of guilt. The defense lacked adequate resources to combat the overwhelming media prejudice.").

[241] *See* First Motion for Change of Venue at 5, United States v. Tsarnaev, No. 13–10200–GAO, 2014 WL 4823882, at *4 (D. Mass. Sept. 24, 2014).

[242] *In re Tsarnaev*, 780 F.3d at 40 (Torruella, J., dissenting). *See generally McVeigh*, 918 F. Supp. at 1470–74 (concluding prejudice precluded a fair and impartial trial in Oklahoma).

[243] *In re Tsarnaev*, 780 F.3d at 40 (Torruella, J., dissenting) (quoting *McVeigh*, 918 F. Supp. at 1470–71).

[244] *Id.* (quoting *McVeigh*, 918 F. Supp. at 1471–72).

[245] *Id.*

[246] *Id.* (quoting *McVeigh*, 918 F. Supp. at 1473).

[247] *Id.* at 40.

[248] *See* Mark Berman, *A Year After the Boston Marathon Bombings, Remembrances of Strength, Pain and Courage*, WASH. POST (Apr. 15, 2014), http://www.washingtonpost.com/news/post-nation/wp/2014/04/15/boston-marathon-survivors-biden-to-speak-at-ceremony/; Rohan, *supra* note 215.

[249] *McVeigh*, 918 F. Supp. at 1471; *see supra* notes 181–85 and accompanying text.

[250] *See In re Tsarnaev*, 780 F.3d at 36, 49 (Torruella, J., dissenting) ("It does [affect my ability to be fair and impartial]. The Boston Strong bumper sticker . . . represents to me the way the city came together and helped, and just show[s] the unity of Boston . . . .").

revealed a strong and prevalent subjective prejudice resulting from the media:

> "[H]ow could I possibly find the defendant not guilty with all the news information"; "I read the paper every day, and I watch the news two hours every day. So over the course of the past year, I've obviously seen and read and heard quite a bit"; "I don't know that I would be able to erase my memory of everything that I've read, seen, and heard"; "[h]ow could you not [have followed events during the week of the bombing]"; "I remember seeing some raw footage that day which I'll never forget"; "from . . . seeing all the evidence that was publicly available, . . . yes, I feel that he is guilty, and I think the punishment should be death, because personally I think that this is something that takes a greater weight as 9/11"; "[i]n terms of the feelings on guilt, I think that just comes from the initial things in the news when the event happened and seeing all that. So that's kind of formed that perspective."[251]

Given the immense "wave of public passion" towards Tsarnaev provoked by the media, it was virtually impossible to measure the amount of prejudicial publicity by any objective standard.[252]

In contrast to *Tsarnaev*, McVeigh was granted a change of venue.[253] The "repetition of emotionally intense stories of loss and grief," coupled with "valiant efforts to overcome the consequences" of the bombing developed a common belief among Oklahomans that they must take the "necessary last step on the road to recovery—participation in the trial" of the accused.[254] In the minds of many, only a death sentence could produce a just result.[255] Again, identical fair trial considerations plagued Tsarnaev's case.[256]

The dissent next argued that *Tsarnaev* was incompatible with *Skilling*, which involved "neither terrorism nor murder," and certainly not the death penalty.[257] With respect to the first factor of the *Skilling* test, Houston ranks

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[251] *See id.* at 35–37 (Torruella, J., dissenting). *See generally* Irvin v. Dowd, 366 U.S. 717, 725–26 (1961) (analyzing the strong community pattern of hostility indicated in the media by way of curbside interviews reporting what punishment defendant should receive).

[252] *See In re Tsarnaev*, 780 F.3d at 40 (Torruella, J., dissenting); *see also* United States v. Wood, 299 U.S. 123, 145 (1936) ("Impartiality is not a technical conception. It is a state of mind."); *In Matters of Justice, It's Personal*, BOS. GLOBE (Feb. 6, 2015), http://www.bostonglobe.com/opinion/2015/02/05/matters-justice-personal/1HXYIwyRx22d4Pvtxh2SOJ/story.html.

[253] *McVeigh*, 918 F. Supp. at 1474.

[254] *Id.* at 1472; *see supra* notes 163–66 and accompanying text.

[255] *McVeigh*, 918 F. Supp. at 1472.

[256] *See In re Tsarnaev*, 780 F.3d at 40 (Torruella, J., dissenting); *supra* note 251 and accompanying text.

[257] *See In re Tsarnaev*, 780 F.3d at 42 (Torruella, J., dissenting) (describing the comparison to *Skilling* as "inapposite"). *But see* Skilling v. United States, 561 U.S. 358,

among the top five most populous cities in the nation, while "Boston is not even in the top twenty."[258] Second, unlike *Skilling*, there was massive amounts of prejudicial pretrial publicity relating to Tsarnaev.[259] The media showed footage of Tsarnaev with a backpack moments before the bombing,[260] and broadcast live the bloody scene of him being hunted and found in the boat, along with his subsequent arrest.[261] Law enforcement leaks to the media coupled with reports of failed plea agreement talks further added to the obstacles the defendant faced in his quest for a fair trial.[262] In addition, more than four years elapsed between the time of Enron's bankruptcy and Skilling's subsequent trial, leading to a fairly diminished decibel level of media attention.[263] Tsarnaev trial's occurred less than two years after the bombing and remains fresh in the mind of many, despite a somewhat diminished national media attention.[264] The fourth factor of the *Skilling* analysis considers whether "the jury's conduct ultimately undermined any possible pretrial presumption of prejudice."[265] The *Skilling* jury acquitted the defendant of nine counts of insider-trading.[266] In marked contrast, Tsarnaev was charged with thirty counts, seventeen of which carried the possibility of the death penalty, and was found guilty on all thirty counts.[267] Tsarnaev's trial, in short, shared little in

448–49 (2010) (Sotomayor, J., concurring in part and dissenting in part) (arguing that economic crimes are just as capable of inciting widespread community outrage).

[258] *In re Tsarnaev*, 780 F.3d at 43 (Torruella, J., dissenting).

[259] *See id.* at 44.

[260] *Id.* at 43.

[261] *See id.*; Damien McElroy, *Police Video Shows Boston Bomb Suspect Dzhokhar Tsarnaev Hiding in Boat*, TELEGRAPH (Apr. 21, 2013), http://www.telegraph.co.uk/news/worldnews/northamerica/usa/10008391/Police-video-shows-Boston-bomb-suspect-Dzhokhar-Tsarnaev-hiding-in-boat.html.

[262] *See In re Tsarnaev*, 780 F.3d at 43–44 (Torruella, J., dissenting) ("[O]n the morning jury selection began, the media reported that Tsarnaev offered to plead guilty in exchange for the government removing the death penalty but that the government rejected the offer."); John Wolfson, *The Real Face of Terror: Behind the Scenes Photos of the Dzhokhar Tsarnaev Manhunt*, BOS. MAG. (July 18, 2013, 4:29 PM), http://www.bostonmagazine.com/news/blog/2013/07/18/tsarnaev/.

[263] *See Skilling*, 561 U.S. at 383; *In re Tsarnaev*, 780 F.3d at 44 (Torruella, J., dissenting); *supra* Parts II.F, IV.B.1.

[264] *In re Tsarnaev*, 780 F.3d at 44 (Torruella, J., dissenting) ("The emotional salience of these ongoing reports cannot be overstated."); *see* Kole, *supra* note 230.

[265] United States v. Tsarnaev, No. 13–10200–GAO, 2014 WL 4823882, at *1 (D. Mass. Sept. 24, 2014); *see Skilling*, 561 U.S. at 384–85.

[266] *Skilling*, 561 U.S. at 361, 383.

[267] *See* Adam Goldman, *Tsarnaev Found Guilty on all Counts in Boston Marathon Bombing Trial*, WASH. POST (Apr. 8, 2015), http://www.washingtonpost.com/world/national-security/jury-weighs-verdict-for-second-

common with *Skilling*.[268]

Tsarnaev was repeatedly denied a fair trial.[269]

> With his life at stake, 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 two-thirds of the members admit, before hearing any testimony, to possessing a belief in his guilt.[270]

This wave of public passion cannot be overcome by voir dire, no matter how extensive or carefully conducted.[271] The trial should have been conducted in a venue outside of the District of Massachusetts, where a strong presumption of prejudice towards Tsarnaev clearly exists.[272] Failure to uphold a fundamental American principle, such as the right to a fair trial by an impartial jury—a constitutionally guaranteed right—severely "damages the credibility of the American judicial system."[273]

V. A REASONABLE APPROACH

Social science suggests that the "single most effective remedy" for eliminating jury bias is either through a change of venue or through a change of venire.[274] Regrettably, this is the remedy that the law employs the least.[275] Trial judges are reluctant to grant change of venue motions for a variety of reasons.[276] They may resist granting a change of venue because doing so is an admission that the defendant cannot receive a fair trial in their jurisdiction, or out of fear that it would undermine the community interest in attaining justice.[277] Venue changes are also judicially inefficient and exceedingly expensive.[278] In addition, it is argued that the effectiveness

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day-in-boston-marathon-bombing-trial/2015/04/08/11755a56-ddf0-11e4-a500-1c5bb1d8ff6a_story.html.

[268] *Compare Skilling*, 561 U.S. 358, *with In re Tsarnaev*, 780 F.3d 14.

[269] *In re Tsarnaev*, 780 F.3d at 48 (Torruella, J., dissenting) (characterizing the district court as slow in acting on defense motions and repeatedly criticizing defense attorneys for zealously advocating on their client's behalf).

[270] Irvin v. Dowd, 366 U.S. 717, 728 (1961).

[271] *See In re Tsarnaev*, 780 F.3d at 30 (Torruella, J., dissenting) ("No amount of *voir dire* can overcome this pervasive prejudice, no matter how carefully it is conducted.").

[272] *See id.*

[273] *Id.*; *see also Irvin*, 366 U.S. at 729 (Frankfurter, J., concurring) ("[T]he quality of a civilization is its treatment of those charged with crime, particularly with offenses which arouse the passions of a community.").

[274] *See* Gross, *supra* note 34, at 606–07.

[275] Vidmar, *supra* note 34, at 1173.

[276] *See* Gross, *supra* note 34, at 607.

[277] *See id.*; *Panel One*, *supra* note 86 ("[J]udges hate to admit that they cannot get a fair jury in their jurisdiction.").

[278] Gross, *supra* note 34, at 607; *Panel One*, *supra* note 86; *see* Whitebread & Contreras,

of a change of venue has been diminished due to advances in communication.[279] However, given the inadequacies of voir dire in effectively eliminating juror bias,[280] courts must give meaning to the change of venue proscription in order for the criminal defendant to effectuate his Sixth Amendment right to an impartial jury.[281]

Though the Supreme Court has since departed from the "reasonable likelihood" test, fifty years later it remains the most sensible method by which to safeguard the criminal defendant from trial by media.[282] The *Sheppard* Court placed an affirmative duty upon lower courts to ensure that the trial process is insulated from impermissible outside influence.[283] This duty works in conjunction with the reasonable likelihood standard and effective voir dire to ensure that the defendant is provided a meaningful opportunity to demonstrate a presumption of prejudice and petition for a change of venue. Trial judges must be willing to consider change of venue motions despite concerns over cost, efficiency, and reluctance to admit bias within their jurisdiction.[284]

Establishing that a presumption of prejudice exists is a mountainous task.[285] Since the reasonable likelihood standard carries a lower threshold, it affords defendants greater protection from a biased jury,[286] protections that, at the moment, while constitutionally mandated, have proven ineffective.[287] Under the reasonable likelihood standard, "the defendant does not have to prove that seated jurors [are] biased, or that the trial setting [is] so inflammatory as to render a fair trial impossible."[288] Instead, the trial court

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supra note 131, at 1615 (discussing the exorbitant costs associated with the venue transfer granted in the trial of the Los Angeles officers accused of beating Rodney King).

[279] Whitebread & Contreras, *supra* note 131, at 1615. *But see* United States v. McVeigh, 918 F. Supp. 1467, 1470 (W.D. Okla. 1996) (granting a change of venue despite national prejudicial publicity because local reporting was different-in-kind).

[280] *See supra* Part III.

[281] *See supra* notes 18–22 and accompanying text.

[282] *See* Sheppard v. Maxwell, 384 U.S. 333, 363 (1966); *see also supra* Part II.C.

[283] *See supra* notes 76–78 and accompanying text.

[284] *See infra* notes 291–92 and accompanying text.

[285] Studebaker & Penrod, *supra* note 134, at 431 (observing that the Supreme Court has not overturned a conviction on the grounds of prejudicial publicity since *Sheppard*); Whellan, *supra* note 79, at 181 ("The overall language of the *Sheppard* opinion prescribes a more liberal approach to motions for change of venue in state court proceedings than the language of subsequent cases such as *Murphy*.").

[286] Hardaway & Tumminello, *supra* note 39, at 57–58.

[287] *See supra* Part III.

[288] Karen A. Cusenbary, Note, *Constitutional Law--Voir Dire--A Trial Court's Refusal to Question Prospective Jurors About the Specific Contents of Pretrial Publicity Which They Had Read or Heard Did Not Violate a Defendant's Sixth Amendment Right to an Impartial*

must look to the totality of the circumstances with the knowledge that a juror's self-assessment is not necessarily to be believed.[289] "There is a broad range of application of the 'reasonable likelihood' test," leaving states free to adopt a more liberal standard when necessary.[290] Due to the fact-specific inquiry behind the reasonable likelihood standard,[291] courts should be required to pose content-based questions to jurors to ascertain the nature and extent of any prejudicial media exposure. The ability to ask content-based questions provides for a targeted approach, custom-tailored to the nature of the publicity affecting each trial. "Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude . . . the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula."[292] The rigid and highly unattainable threshold embodied in the virtually impossible standard is incompatible with the doctrine of presumption of prejudice, which relies so heavily on subjective human behavior.[293]

While the efficacy of ordinary voir dire in high publicity trials remains questionable,[294] an extensive, attorney conducted voir dire aided by individual content-based questioning would assist in determining whether the "type and extent of the publicity to which a prospective juror has been exposed" disqualifies the juror.[295] Rejecting a constitutional right to content questioning, the *Mu'Min* Court paradoxically acknowledged that content-based questions would materially assist in empanelling a partial jury.[296]

Jury, or Fourteenth Amendment Right to Due Process Mu'Min v. Virginia, *500 U.S. 415, 111 S. Ct. 1899, 114 L. Ed. 2d 493 (1991)*, 23 ST. MARY'S L.J. 541, 550 (1991).

[289] *Id.*

[290] *Id.* at 550–51 (explaining that content questions "are promulgated more frequently in jurisdictions using a 'reasonable likelihood' standard"). *See generally* Peter G. Guthrie, *Pretrial Publicity in Criminal Case as Ground for Change of Venue*, 33 A.L.R.3d 17 (2015) (providing list of criminal cases dealing pretrial publicity to illustrate how different states handle the matter).

[291] Mastromauro, *supra* note 145.

[292] Irvin v. Dowd, 366 U.S. 717, 724–25 (1961) (quoting United States v. Wood, 299 U.S. 123, 145–46 (1936)).

[293] *See generally* Studebaker & Penrod, *supra* note 134, at 35–39 (surveying scientific studies that explore the subjective nature of juror decisions following exposure to pretrial publicity).

[294] *See* Norbert L. Kerr, *The Effects of Pretrial Publicity on Jurors*, 78 JUDICATURE 120 (1994) (maintaining that there exists an "unfounded confidence" amongst attorneys and judges that voir dire effectively recognizes and eliminates juror bias); *see also supra* Part III.

[295] Mu'Min v. Virginia, 500 U.S. 415, 424, 441 (1991) (acknowledging that counsel participation in voir dire is beneficial); Mastromauro, *supra* note 145, at 356 (questioning of this nature is the most realistic way to reveal a juror's bias).

[296] *Mu'Min*, 500 U.S. at 424–25; *see supra* Part II.E.

Dissenting Justice Marshall further added the fact that the burden of disproving juror partiality falls to the defendant "makes it all the more imperative that the defendant be [constitutionally] entitled to meaningful examination at jury selection in order to elicit potential biases possessed by prospective jurors."[297]

Beginning with *Irvin*, courts have been instructed to exert great care and be more receptive to "these types of cases."[298] *Irvin* stands for the proposition that, under certain circumstances, a juror's declaration of impartiality is to be given "no credence."[299] A court's determination of a juror's ability to disregard any bias resulting from prejudicial pretrial publicity must then often turn on judicial common sense.[300] Alas, "judicial common sense often reflects a misappraisal or misunderstanding of the capabilities and weaknesses of human inference and decision making."[301] The courts' high expectation of a juror's ability to disregard prejudicial pretrial publicity is wholly inconsistent with social science data on the matter.[302] This failure to employ judicial common sense is compounded by the courts' continued reliance on traditional methods in detecting juror bias, such as voir dire and collective questioning during voir dire, despite findings establishing their inadequacy.[303]

Instead of adapting the law to conform to changing technological times, the *Skilling* Court made it harder for defendants to demonstrate a presumption of prejudice.[304] The Court should return to the powerful guidelines set forth in the 1960s embodied in *Sheppard* and ensure that strong measures are taken to protect defendants' rights when there is a reasonable likelihood that publicity will taint a criminal trial.[305] An unrebuttable, reasonable likelihood standard would preserve existing case

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297 *Id.* at 441 (Marshall, J., dissenting).

298 *See* Leslie Renee Berger, *Can the First and Sixth Amendments Co-Exist in a Media Saturated Society?*, 15 N.Y.L. SCH. J. HUM. RTS. 141, 163 (1998). *See generally* Irvin v. Dowd, 366 U.S. 717 (1961) (creating the presumption of prejudice doctrine); *Rideau*, 373 U.S. at 724.

299 *Irvin*, 366 U.S. at 728; Garcia, *supra* note 131, at 1119.

300 *See* Studebaker & Penrod, *supra* note 134, at 455; *see also* Skilling v. United States, 561 U.S. 358, 439 (Sotomayor, J., concurring in part and dissenting in part) (rejecting the majority's formalistic approach to the presumption of prejudice doctrine and arguing for a return to foundational precedents' "commonsense understanding that as the tide of public enmity rises, so too does the danger that the prejudices of the community will infiltrate the jury").

301 *See* Studebaker & Penrod, *supra* note 134, at 455.

302 *Id.*

303 *See id.*

304 *See* Aizenman, *supra* note 127, at 13.

305 Brandwood, *supra* note 146, at 1421; *see supra* Parts II.A–C.

law, maintain the lower courts' discretion, and better protect the criminal defendants' constitutional rights to a fair trial.

VI. CONCLUSION

In an era defined by the pervasive influence of mass media in daily life, an inevitable clash is bound to evolve between a criminal defendant's right to a fair trial by an impartial jury and the "media's liberty [and responsibility] to report on matters . . . worthy of public interest."[306] The right to a fair trial by an impartial and indifferent jury is a fundamental, constitutionally guaranteed right.[307] Indeed, the Sixth Amendment right to a trial by an impartial jury is the "most precious of the safeguards for 'individual liberty and the dignity and worth' of every person."[308]

When a defendant establishes that a reasonable likelihood exists that blatantly prejudicial pretrial publicity will prevent a constitutionally guaranteed fair trial, a change of venue motion must be granted. Failure to do so is in contravention of the criminal defendants' Sixth Amendment guarantee to an impartial jury, as well as due process rights pursuant to the Fifth and Fourteenth Amendments.[309] Quite often, a defendant's right to a fair trial will hinge on honest responses from the jury pool and the jury's ability to render a verdict based solely on the evidence presented at trial.[310] However, it is the judiciary's role to ensure that the defendant's rights are observed and that constitutional guarantees remain intact.[311] The basic requirement of due process is a fair trial in a fair tribunal—a system in which even the probability of unfairness must be endeavored against.[312]

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[306] Garcia, *supra* note 131, at 1107; *see also* Mastromauro, *supra* note 146 ("[T]he majority of United States courts have described a weighted interest towards protecting the rights of the criminal defendant over the rights of the press . . . .").

[307] *See* U.S. CONST. amend. VI.

[308] Ann M. Roan, *Reclaiming Voir Dire*, THE CHAMPION , July 22, at 22 (2013) (quoting Irvin v. Dowd, 366 U.S. 717, 721 (1961)); *see also* Gentile v. State Bar of Nevada, 501 U.S. 1030, 1075 (1991) ("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 extrajudicial statements would violate that fundamental right.").

[309] *See* U.S. CONST. amends. V, VI, XIV, § 1; *see also* Aizenman, *supra* note 127, at 13.

[310] Thomas B. Kelley & Steven D. Zansberg, *Free Press and the Illusion of Prejudice*, 29 No. 3 LITIG. 42, 46 (2003) (quoting Chief Judge Matsch during voir dire in *McVeigh*).

[311] *See generally* U.S. CONST. art. III, § 2, cl. 3.

[312] *In re Murchison*, 349 U.S. 133, 136 (1955).