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# Commentary: Pre-Trial Publicity: Can There Be a Fair Trial When the Press and the Prosecutor Join Hands?

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The comment published by Ruth Allen on pretrial publicity began as an advanced legal research paper under my supervision. This is a particularly timely piece in light of the O.J. Simpson murder trial, which may provide the single best forum ever for examining the issues presented by this comment. Ms. Allen begins her examination of the topic by taking her reader back to *Sheppard v. Maxwell*, the “O.J. Simpson case” of its day, and the first opportunity for the Supreme Court to thoroughly address the constitutional implications of pretrial publicity. Ms. Allen carefully analyzes the overlapping and frequently conflicting constitutional and policy considerations among the defendant’s Sixth Amendment right to a fair trial and Fourteenth Amendment right to due process, particularly as the later relates to the presumption of innocence, when weighed against the First Amendment rights of the press and the public. She does a superb job of reflecting the balance among these rights and examining the methods available to insure that the First Amendment rights can be honored, while in no way detracting from the defendant’s Sixth and Fourteenth Amendment rights. The remedies Ms. Allen discusses in her commentary are restraining orders and disciplinary rules. She shows her reader how to apply her analysis to any current “crime of the century.”

*Professor Byron L. Warnken*

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## **Pre-Trial Publicity: Can There Be A Fair Trial When The Press And The Prosecutor Join Hands?**

**Ruth G. Allen**

**“Murder and mystery, society, sex and suspense were combined in such a manner as to intrigue and captivate the public fancy to a degree perhaps unparalleled in recent annals. Throughout the preindictment investigation, the subsequent legal skirmishes and the nine week trial, circulation conscious editors catered to the insatiable interest of the American public in the bizarre . . . In this atmosphere of a ‘Roman Holiday’ for the news media, Sam Sheppard stood trial for his life.”<sup>1</sup>**

Sam Sheppard was convicted in 1954 for the bludgeoning death of his wife. During the entire pre-trial period, “virulent and incriminating publicity about Sheppard and the murder made the case notorious.”<sup>2</sup>

**Before the jury began deliberations they were not sequestered and had access to all news media though the court made “suggestions” and “requests” that the jurors not expose themselves to comment about the case. . . Pervasive publicity was**

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**About the Author:** Ruth Allen is in her final semester at the University of Baltimore School of Law and is a member of the *Law Forum* staff. She is presently employed as a judicial law clerk for the Honorable Paul A. Smith on the Circuit Court for Baltimore City. The author gratefully acknowledges the encouragement and support of Professor Byron L. Warnken throughout her enrollment at the University of Baltimore School of Law.

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given to the case throughout the trial, much of it involving incriminating matter not introduced at trial... At least some of the publicity deluge reached the jurors.<sup>3</sup>

Sheppard's conviction was upheld on appeal, and the United States Supreme Court denied certiorari.<sup>4</sup> He filed a writ of habeas corpus and ultimately, the Supreme Court granted certiorari and held that Sheppard did not receive a fair trial consistent with the Due Process Clause of the Fourteenth Amendment. The court's decision was based on the trial judge's failure to fulfill his duty to protect Sheppard from the inherently prejudicial publicity, which saturated the community, and his failure to control the disruptive influences in the courtroom.<sup>5</sup> The Court remanded the case to the district court with instructions to issue the writ and release Sheppard from custody.<sup>6</sup>

It can be argued that Sam Sheppard would have been convicted in spite of the deluge of sensational news reporting before his indictment and during his trial. However, the fair trial right is violated when potential jurors are allowed open access to inflammatory information about the accused, when the media reports incriminating allegations not entered into evidence, and when the press disrupts a trial in progress to the extent that the defense is irreparably damaged.<sup>7</sup> While this setting may appear extreme, it is arguable that such sensationalism could exist today in a court of law.

One need only reflect upon the extensive pre-trial publicity surrounding the O.J. Simpson case to confirm that such media events occur forty years after *Sheppard v. Maxwell*. Today, the media impact is more pervasive and more likely to reach and influence an overwhelming number of potential jurors. As a result, the court is faced with a delicate but highly important balancing act between the fair trial rights of the accused and the public's right to be informed of what transpires inside the courtroom. The Supreme Court has cautioned that this sort of delicate balancing should be undertaken reluctantly; but when provoked by attorneys, whether

prosecutors or defenders, who use the press to obtain as partial a jury as possible, courts should respond.<sup>8</sup> Few courts, however, are willing to challenge the protection of the First Amendment and restrain trial participants as a remedy to minimize the effects of prejudicial pre-trial publicity. Consequently, they focus on reducing the prejudicial effect by relying on lesser measures to protect the rights of an accused to a fair and impartial trial.

Voir dire is a remedy frequently used by the courts even when the case has been saturated with pre-trial publicity.<sup>9</sup> In *Mu'Min v. Virginia*,<sup>10</sup> the Supreme Court held that the Sixth Amendment right to an impartial jury

and the Fourteenth Amendment right to due process do not require that prospective jurors be questioned regarding the specific nature of the pre-trial publicity surrounding the case for which they are being selected. The fair trial right is not implicated merely because jurors have been exposed to publicity; rather, the standard is whether "the jurors had such fixed opinions that they could not judge impartially the guilt or innocence of the defen-

dant."<sup>11</sup> The existence of bias is irrelevant, as long as the jurors' opinions are not so fixed that they cannot put bias aside and judge the guilt or innocence of the defendant impartially.<sup>12</sup>

Today, communities are often inundated with sensational news reporting. Often, prosecutors zealously pursue high profile suspects with an eye toward publicity. In fact, it might prove impossible to bring certain cases to trial without some imposition on the fair trial rights of the accused. Consequently, restraint of the trial participants may arguably be the only effective measure in preventing prejudice to the criminal defendant.

The Sixth Amendment ensures a criminal defendant the right to a speedy and public trial by an impartial jury of the state and district where the crime was committed.<sup>13</sup> The Due Process Clause of the Fourteenth Amendment requires an impartial judge.<sup>14</sup> Along with

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the rights of the accused is the public's right to be informed of what transpires in the court system in order to judge whether the system of criminal justice is fair and right.<sup>15</sup> The judiciary has the responsibility of protecting the due process rights of the accused while maintaining the interests of society.<sup>16</sup> Yet in recent years, it has become increasingly evident that the due process rights of the accused have been seriously threatened by dramatic and prejudicial publicity.<sup>17</sup>

In a highly publicized trial, saturation of the community with news about the case can be a factor in determining whether the publicity might prevent a fair trial.<sup>18</sup> Excessive publicity may interfere with the due process requirement that the burden of proof with respect to each element of the crime, must be borne by the prosecution.<sup>19</sup> When pre-trial publicity shifts the burden to the defendant by reducing the possibility of obtaining an untainted jury and requiring him to overcome the effects of prejudicial and sometimes erroneous publicity, the community is denied its opportunity to participate in the judicial process, and the accused is denied his right to a fair trial.

In many cases, the prosecutor is the best source of extrajudicial statements.<sup>20</sup> He is viewed as the most informed party to the case, and he interacts with law enforcement personnel, judges, court employees, defense counsel, and interested citizens.<sup>21</sup> More importantly, he has access to the government's evidence. Inside the courtroom, there are procedural safeguards to restrict the prosecutor and protect the accused.<sup>22</sup> Outside the courtroom, however, a lawyer's comments may be protected by the First Amendment.

Usually, the prosecutor's primary purpose for making a statement to the press about a pending indictment or an ongoing trial in a criminal action is to inform the public. Too frequently, however, this is not the only reason for releasing information to the press. The prosecutor's objective may be an attempt to enhance his public image or status in the community with an eye toward employment in the private sector or future political considerations.<sup>23</sup> More likely, the purpose for releasing incriminating statements to the press is to increase the probability of indictment or conviction of the accused at trial by influencing future grand jurors and trial jurors.<sup>24</sup>

Similarly, there is an incentive for the prosecutor to gain an advantage over the defendant in any plea bargaining negotiations. A prosecutor has more lever-

age during plea negotiations if the defendant fears that he will be unable to obtain an impartial jury as a result of pre-trial publicity. To have the prosecutor feed the press evidence in anticipation of a trial is to make the state itself, through the prosecutor, a conscious participant in trial by newspaper.<sup>25</sup>

The prosecutor represents a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all, and whose interest in a criminal prosecution is not that it shall win a case, but that justice shall be done.<sup>26</sup> The prosecutor as a representative for the state has a duty to protect the interest of both the accused and the state. The twofold aim of which is that guilt shall not escape nor innocence suffer.<sup>27</sup>

Protecting the integrity of the adversarial criminal litigation process from external influences is a state concern parallel to, but independent of, the interest in protecting the individual rights of the accused.<sup>28</sup> While statements from both prosecutor and defense counsel can affect this interest,<sup>29</sup> the prevailing view is that the statements of the prosecutor are more likely to influence jurors,<sup>30</sup> and that prosecutors may more readily violate the "no comment" rules.<sup>31</sup>

Pre-trial publicity may be challenged as interfering with the presumption of innocence that characterizes the criminal justice system. The theory of the criminal justice system is that the decisions to be reached are to be adduced only by evidence and argument in open court, and not by external influences, whether private talk or public print.<sup>32</sup> The primary characteristic of the system is the constitutional requirement that the prosecution establish the defendant's guilt by proof beyond a reasonable doubt.<sup>33</sup>

The presumption of innocence thus refers to a burden of proof, and not a determination by the justice system that the accused is either guilty or innocent. It has been defined as "that bedrock 'axiomatic and elementary' principle whose enforcement lies at the foundation of the administration of our criminal law,"<sup>34</sup> a basic component of a fair trial under our criminal justice system;<sup>35</sup> an assumption that in the absence of facts to the contrary, assumes that a person's conduct was lawful.<sup>36</sup>

Both the presumption of innocence instruction and the beyond a reasonable doubt instruction must be given to the jury.<sup>37</sup> In *Taylor v. Kentucky*,<sup>38</sup> the Supreme Court raised the presumption of innocence jury instruction to

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a constitutional dimension when it held that a criminal defendant's right to a fair trial was violated under the due process guarantee of fundamental fairness whenever the trial judge failed to give a requested presumption of innocence jury instruction.<sup>39</sup>

The majority opinion in *Taylor* asserted in dicta that the primary function of the presumption of innocence concept is to serve as a warning to lay jurors. While the legal scholar may understand that the presumption of innocence and the prosecutor's burden of proof are logically similar, the ordinary citizen may well draw significant additional guidance from the presumption of innocence instruction.<sup>40</sup> The

Court emphasized that this instruction serves a "special purpose" beyond that covered by a reasonable doubt instruction, "in that it cautions the jury to consciously eliminate from their minds all the suspicion that arises from the arrest, indictment, and the arraignment, and to reach their conclusions solely from the legal evidence introduced at trial."<sup>41</sup> Standing alone, the pre-

sumption of innocence instruction is an inadequate safeguard against exposure to extensive pre-trial publicity. The "special purpose" would be served by this instruction only in an ideal world with ideal jurors. The burden placed on the juror with this instruction is evident. Jurors are asked to consider only evidence and argument introduced in the courtroom and to disregard what they have seen, heard, or read outside the courtroom. After repeated exposure, it is doubtful whether jurors can limit the decisionmaking process solely to evidence presented at trial. Even with a presumption of innocence jury instruction, biases may be taken into the jury room and resurface during deliberations.

The Supreme Court has referred to an accused's right to a fair trial as the most fundamental of all freedoms.<sup>42</sup> It is this fundamental right that led the Court to suggest that a state can restrict an attorney's speech due to his unique role in the judicial process, even when the same restrictions would violate First Amendment rights if imposed upon the press or individuals.<sup>43</sup>

The central purpose of restricting an attorney's

speech is to shield the factfinder from influences other than evidence and argument presented in the courtroom.<sup>44</sup> Lawyers cannot communicate with jurors outside the courtroom either before or during trial; they should not be able to champion their case publicly through extrajudicial comments which might influence prospective jurors either directly or through the resulting public opinion.<sup>45</sup>

The counter argument to restricting an attorney's speech is that the prosecutor does not lose his right of free speech when he becomes an attorney. Those who espouse this view rely on the fact that the prosecutor is

publicly accountable,<sup>46</sup> and the public has a First Amendment right to judicial proceedings.<sup>47</sup> Consequently, the same standard that applies to both press and public should apply to the prosecutor.

The Supreme Court has held that a state must find a clear and present danger of actual prejudice or imminent threat before it may limit the press's right to

publish reports about pending judicial proceedings.<sup>48</sup> However, in *Gentile v. State Bar of Nevada*,<sup>49</sup> the Court held that a state can regulate attorney speech under a lesser standard of review than that reserved to the press and individuals, advocating a "substantial likelihood" standard to protect a state's legitimate interest in guarding the integrity and fairness of the judiciary.<sup>50</sup> Additionally, this standard closely corresponds with the ABA Model Rules of Professional Responsibility.

ABA Model Rule 3.6(a) prohibits an attorney from making any "extrajudicial statement . . . that will have a substantial likelihood of materially prejudicing an adjudicative proceeding."<sup>51</sup> This provision is broadly interpreted to include statements relating to "the character, credibility, reputation or criminal record of a party, suspect . . . or witness, the expected testimony of a party or witness," . . . the "possibility of a plea of guilty, . . . the performance or results of any examination or test, and . . . any opinion as to . . . guilt or innocence."<sup>52</sup> The rules specifically permit an attorney to furnish only a description of the charges and defenses, the schedule of proceedings, and the identity of the

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defendant and the victim.<sup>53</sup> Additionally, Model Rule 3.8 requires prosecutors to exercise reasonable care to ensure that law enforcement personnel do not make the type of extrajudicial comments which they are prohibited from making under Model Rule 3.6.

The primary concern of Disciplinary Rule 7-107, commonly referred to as the “no comment” rule, is to curb an attorney’s improper comments and not to safeguard his free speech rights.<sup>54</sup> The Supreme Court has endorsed the “substantial likelihood” standard and the right to restrict an attorney’s speech.<sup>55</sup> A violation of the no comment rule could subject a lawyer to disciplinary action, which can result in sanctions ranging from private reprimand to disbarment. A responsible attorney must recognize that extrajudicial statements can cause harm not only to the defendant, but also to the attorney and the judicial process.

The disciplinary rules, standing alone, would serve to protect fair trial rights from the prejudicial effect of extrajudicial statements if lawyers exercised self-restraint or if the rules were strictly enforced. Complications would still exist, however, between the attorney’s constitutional right to speak outside the courtroom and the defendant’s constitutional right to a fair trial.

At best, restricting attorney speech under the rules is problematic. The no comment rule and the Model Rule on pre-trial publicity can be construed as prior restraints on the speech of attorneys because they enjoin the lawyer’s right to speak freely. The no comment rule is content-based and ordinarily violative of the First Amendment. Additionally, it has been argued that both rules are either vague or overbroad and therefore unconstitutional under the First Amendment. A rule that a lawyer shall not comment on a pending case when that comment threatens to prejudice a trial or the fair administration of justice is vague because it does not provide notice about what may or may not be said.<sup>56</sup> Arguably, a rule that lawyers may not comment about the character of a witness is overbroad because it includes speech that often does not threaten the fairness of a trial.<sup>57</sup>

The Model Rules and the Disciplinary Rules are in place because the legal community saw a need to police itself. As a result, restrictions which do not apply to either the public or the press are enforceable against officers of the court. Both prosecutors and defense attorneys have a duty to protect the interests of the accused and the rights of the public. To engage in

conduct to the contrary is a violation of an ethical duty and subject to sanctions. It is unethical for an officer of the court to release inflammatory and prejudicial statements with the potential to violate the fair trial rights of the defendant and seek refuge behind the First Amendment. Courts must prevent such incriminating statements before they are communicated.

Ethical restrictions are not the only means of regulating an attorney’s public statements. Trial judges have the power to inhibit or prevent media reporting and access to the criminal process when they believe that unrestricted public statements might prevent a fair trial. The restraining order is a form of regulation that enjoins both the lawyer and the press from commenting publicly on a pending case. Even if a fair trial can ultimately be ensured through voir dire, disciplinary rules, or some other device, there are serious costs to the judiciary system.<sup>58</sup> The state has a substantial interest in preventing officers of the court from imposing such costs on the judicial system and on the litigants.<sup>59</sup>

The restraint of an attorney’s speech, under the Model Rules and *Gentile*, is narrowly tailored to achieve these governmental objectives. The regulation of speech is limited as it applies only to that speech that is substantially likely to have a prejudicial effect; it is neutral as to points of view, applying equally to all attorneys participating in a pending case, and it merely postpones the attorneys’ comments until after the trial.<sup>60</sup>

The First Amendment does not immunize trial counsel from discipline for public statements which might affect the fairness of a pending case.<sup>61</sup> When the prosecutor speaks publicly about a pending criminal case, he does so with a due process limitation that does not constrain the press or the public,<sup>62</sup> he may not violate the due process rights of the accused.<sup>63</sup> If the rights of the accused are violated by the effects of the prosecutor’s public comments about the case, the standard of review is whether there is a substantial likelihood that the statements will prejudice the adjudicative process.<sup>64</sup>

At its best, the press has traditionally been regarded as the handmaiden of effective judicial administration, especially in the criminal law field.<sup>65</sup> Its function is documented by an impressive record of service over several centuries.<sup>66</sup> The press does not simply publish information about trials, but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and

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criticism.<sup>67</sup> At its worst, a sensationalistic media can substantially prejudice the fair trial rights of the defendant.

*United States v. Simon*,<sup>68</sup> fully acknowledged that the public has a First Amendment right of access to judicial proceedings, while criticizing the press for failing its duty to act responsibly when exercising this right. The court in *United States v. Abrahams*<sup>69</sup> did not question the First Amendment rights of the press, even though the exercise of free speech from the media made it impossible for the defendant to receive a fair trial anywhere in Massachusetts, the rest of New England, or the Northeastern section of the United States, including New York, New Jersey or Pennsylvania.<sup>70</sup> Habitually, the Supreme Court has been unwilling to place any direct limitations on the freedom traditionally exercised by the news media for “[w]hat transpires in the courtroom is public property.”<sup>71</sup>

It has long been recognized that there is a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.<sup>72</sup> On the other hand, Justice Black argued forcefully in the dissenting opinion in *Cox v. Louisiana*<sup>73</sup> that “[f]reedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice, but it must not be allowed to divert the trial from the very purpose of a court system . . . to adjudicate controversies in the calmness and solemnity of the courtroom according to legal procedures.”<sup>74</sup>

The *Sheppard v. Maxwell* Court emphasized that the trial court “should have made some effort to control the release of leads, information, and gossip to the press . . . and recommended the gagging of trial participants where there is a reasonable likelihood that prejudicial news . . . will prevent a fair trial.” The Supreme Court has stressed that the cure lies in those remedial measures that will prevent the prejudice at its inception<sup>75</sup> and emphasized the trial judge’s “major responsibility for acting to mitigate the effects of pre-trial publicity.”<sup>76</sup> Courts upholding prior restraints have used the reasonable likelihood standard to evaluate whether the activity restrained might result in an unfair trial.<sup>77</sup> Case law suggests that judges take seriously the responsibility of restraining trial participant’s extrajudicial comments.<sup>78</sup> State appellate courts have encouraged trial courts to use the publicity precautions set forth in *Sheppard* to prevent the effects of intensive pre-trial publicity.<sup>79</sup>

Unfortunately, some courts still consider this remedy extreme.

In *Journal Newspapers Inc. v. State*,<sup>80</sup> the Court of Appeals of Maryland vacated orders having the effect of enjoining certain classes of individuals from making public comments about various aspects of the prosecution and restricting public access to certain documents that were to become part of the proceedings.<sup>81</sup> The trial judge recognized the competing interests and attempted to strike a fair balance, however, the appellate court emphasized that the balance should have been struck closer to the First Amendment than to the Sixth Amendment.<sup>82</sup>

This ruling conformed to the 1976 Supreme Court decision in *Nebraska Press Assoc. v. Stuart*,<sup>83</sup> wherein the Court held that “prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights.”<sup>84</sup> The test laid out in *Nebraska Press* requires that before placing a prior restraint on publications, a trial court must examine “(a) the nature and extent of pre-trial news publicity; (b) whether other measures would be likely to mitigate the effects of unrestrained pre-trial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger.”<sup>85</sup>

*Nebraska Press* involved the constitutionality of a gag order issued by the trial judge as the result of widespread publicity. While the trial judge could reasonably have assumed that the publicity reached potential jurors, the Supreme Court found that he could only speculate as to whether the jurors had a fixed opinion making it impossible for them to decide the guilt or innocence of the accused impartially.<sup>86</sup> The restraining order, therefore, was defective because the state court had failed to determine if other measures would have mitigated the effects of the publicity.

While the *Sheppard v. Maxwell* Court focused on a remedy that would prevent the prejudice at its inception and endorsed the gag order for trial participants, *Nebraska Press* established that a prior restraint should be the last remedy considered and not the first.

## CONCLUSION

Courts must take such steps as are necessary by rule and regulation that will protect the accused and the judicial process from prejudicial outside interferences. These same protective measures, however, may collide with other constitutional rights of the accused and the

speaker. Premature disclosure and weighing of the evidence in the news media can seriously jeopardize a defendant's right to a fair and impartial jury, and neither the press nor the public has a right to be contemporaneously informed by the police, prosecuting attorney, or informed police sources of the details of the evidence being accumulated against the defendant. Trial courts should take strong measures to ensure that the balance is never weighed against the accused. While there is nothing that proscribes the press from reporting events that transpire in the courtroom, where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, a trial judge should employ any effective remedy to minimize the prejudicial effect.

Trial by newspaper is unfortunate, but it is a reality. Unless the courts accept the responsibility of restraining trial participants -- the most effective remedy to curtail the effects of extrajudicial statements -- the right to a fair trial in the criminal justice system may well prove impossible to protect. Inflammatory and prejudicial statements can and do influence the conduct and behavior of the public and the trial participants.

All parties to the judicial process have a duty to protect the constitutional rights of the accused and the rights of the community. The press must recognize its duty to act responsibly. Attorneys must recognize that obedience to ethical rules may require abstention from what, in other circumstances, might be constitutionally protected speech. Finally, courts should sequester juries and restrain trial participants when necessary to prevent pre-trial publicity from prejudicing the fair trial rights of the accused.

When the constitutional rights of two competing interests collide, the court is faced with a difficult decision in protecting one and abridging the other. Both require protection because we all lose when the constitutional rights of any one individual are violated. But most important are the fair trial rights of the individual faced with the loss of life or liberty. When life, liberty, reputation, and privacy are at stake, the public's right to know should become secondary and postponed, without challenge, until the completion of the trial.

## ENDNOTES

<sup>1</sup>*Sheppard v. Ohio*, 135 N.E.2d 340, 342 (Ohio 1956).

<sup>2</sup>*Sheppard v. Maxwell*, 384 U.S. 333 (1956).

<sup>3</sup>*Id.*

<sup>4</sup>*Id.* at 335 n.1.

<sup>5</sup>*Id.* at 334.

<sup>6</sup>*Id.* at 363.

<sup>7</sup>*Id.* at 358.

<sup>8</sup>*United States v. Simon*, 664 F. Supp. 780 (S.D.N.Y. 1987).

<sup>9</sup>*See, e.g., United States v. Haldeman*, 559 F.2d 31, 59-70 (D.C. Cir. 1976) (upholding conviction in the Watergate cover-up in spite of extensive pre-trial publicity because the publicity was not inflammatory and probing voir dire allowed the removal of jurors with prejudice), *cert. denied*, 431 U.S. 933 (1977).

<sup>10</sup>*Mu'Min v. Virginia*, 500 U.S. 415, 431 (1991).

<sup>11</sup>*See id.* *See also* *Murphy v. Florida*, 363 F. Supp. 1224 (1973); *Irvin v. Dowd*, 366 U.S. 717, 722-23 (1961) (it is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court).

<sup>12</sup>*Mu'Min v. Virginia*, 500 U.S. 415 (1991); *Patton v. Yount*, 467 U.S. 1025 (1984).

<sup>13</sup>U.S. Const. amend. VI.

<sup>14</sup>*See, e.g., Bridges v. California*, 314 U.S. 252 (1941).

<sup>15</sup>U.S. Const. amend. I.

<sup>16</sup>*Chicago Council of Lawyers v. Bauer*, 371 F. Supp. 689, 691 (7th Cir. 1974).

<sup>17</sup>*Id.*

<sup>18</sup>*Rideau v. Louisiana*, 373 U.S. 723, 726 (1963) ("any court proceedings in community so pervasively exposed to such a spectacle could be but a hollow formality").

<sup>19</sup>*See In Re Winship*, 397 U.S. 358 (1970); *Mullaney v. Wilbur*, 421 U.S. 58 (1975).

<sup>20</sup>*See People v. Dupree*, 88 Misc. 2d 780, 785 (1976) (lawyers acquire information not as general members of the public, but through their status and employment).

<sup>21</sup>*Dupree*, 88 Misc. 2d at 785.

<sup>22</sup>In *Bridges v. California*, 314 U.S. 252, 266 (1941), the Court imposed strict limitations on the trial judge's authority to punish by contempt the out-of-court speech of non-parties, but strongly reaffirmed the constitutional power of trial judges "to protect themselves from disturbances and disorder in the courtroom by use of contempt proceedings."

<sup>23</sup>*See* Goldstein, *Odd Couple: Prosecutors and the*

- Press*, Colum. Journalism Rev. 23, 26 (Jan./Feb. 1984).
- <sup>24</sup>See J. Lawless, *Prosecutorial Misconduct* 194 (1985).
- <sup>25</sup>*Stroble v. California*, 343 U.S. 181, 201 (1952) (J. Frankfurter, dissenting).
- <sup>26</sup>*Berger v. United States*, 295 U.S. 78, 88 (1935).
- <sup>27</sup>*Id.*
- <sup>28</sup>*Levine v. United States Dist. Court for C. Dist. of Cal.*, 764 F.2d 590, 596-97 (9th Cir. 1985).
- <sup>29</sup>*Id.* at 600-01 (approving a District Court order to restrict extrajudicial speech of attorneys participating in criminal case).
- <sup>30</sup>See, e.g., *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 253 (7th Cir. 1975) (prosecutors “are a prime source of damaging statements”), *cert. denied*, 427 U.S. 912 (1976); *In Re Rachmiel*, 90 N.J. 646, 658 (1982) (prosecutor’s statements “particularly telling”).
- <sup>31</sup>Model Code of Professional Responsibility DR 7-107(B) (1993) (a lawyer or law firm associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest warrant, or arrest until the commencement of the trial or disposition without trial, make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication . . .); See, e.g., *United States v. Troutman*, 814 F.2d 1428, 1444-55 (10th Cir. 1987); *Hughes v. State*, 437 A.2d 559, 575-76 (Del. Super. Ct. 1981); *In Re Rachmiel*, 90 N.J. 646, 652-62 (1982).
- <sup>32</sup>*Patterson v. Colorado*, 205 U.S. 454, 462 (1907) (Holmes, J.).
- <sup>33</sup>*In Re Winship*, 397 U.S. at 364.
- <sup>34</sup>*Id.* at 363 (1970) (requiring the use of the reasonable doubt standard in juvenile proceedings for violations which would be crimes if the juvenile were tried as an adult).
- <sup>35</sup>*Estelle v. Williams*, 425 U.S. 501, 503 (1976).
- <sup>36</sup>McCormick, *Law of Evidence* § 342 (2d. ed. 1972).
- <sup>37</sup>*Coffin v. United States*, 156 U.S. 432, 460-61 (1895) (The Court reversed the conviction of a bank president on embezzlement charges because the court had refused to charge the jury as to the presumption of innocence. The Court noted that an instruction that there could not be a conviction unless the proof showed guilt beyond a reasonable doubt did not so embody the presumption of innocence as to justify the court in refusing to instruct the jury concerning such presumption).
- <sup>38</sup>436 U.S. 478, 487 (1978).
- <sup>39</sup>*Id.* (J. Brennan concurring) (the instruction is a basic component of a fair trial under our system of criminal justice) (quoting *Estelle v. Williams*, 425 U.S. 501, 503 (1976)).
- <sup>40</sup>*Id.* at 483-85.
- <sup>41</sup>*Id.* at 485.
- <sup>42</sup>*Id.*
- <sup>43</sup>*Sheppard v. Maxwell*, 384 U.S. at 363 (“collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures”); *In Re Sawyer*, 360 U.S. 622, 635 (1958) (“[w]hile it may be proper for an attorney to say the law is unfair or that judges are in error as a general matter, it is wrong to say so during a pending case”).
- <sup>44</sup>*Irvin v. Dowd*, 366 U.S. 717, 722 (1961).
- <sup>45</sup>The ethical rules prohibit such contact. Disciplinary Rule 7-108(A) provides that “[b]efore the trial of a case a lawyer . . . shall not communicate with . . . anyone he knows to be a member of the venire.” Model Code of Professional Responsibility DR 7-108(B) provides that during the trial of a case a lawyer connected with the case “shall not communicate with . . . any member of the jury.” Model Code of Professional Responsibility DR 7-108(B) (1993). Model Rule 3.5 provides that a lawyer shall not “seek to influence a judge, jury, prospective juror or other official by means prohibited by law or communicate ex parte with such a person except as permitted by law.” Model Rules of Professional Conduct Rule 3.5 (1993).
- <sup>46</sup>*In Re Sawyer*, 360 U.S. 622, 668 (1959).
- <sup>47</sup>See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575-76 (1980) (press has standing to challenge gag orders restraining extrajudicial statements and raising the issue of impeding the news gathering process).
- <sup>48</sup>*Bridges v. California*, 314 U.S. 252 (1941); *Pennekamp v. Florida*, 328 U.S. 331 (1946); *Craig v. Harney*, 331 U.S. 367 (1947).
- <sup>49</sup>501 U.S. 1030 (1991).
- <sup>50</sup>*Id.* at 1075.
- <sup>51</sup>Model Rules of Professional Conduct Rule 3.6(a) (1993).
- <sup>52</sup>Model Rules of Professional Conduct Rule 3.6(a)-(b) (1993); Model Code of Professional Responsibility DR 7-1-7(D) (1993).
- <sup>53</sup>Model Rules of Professional Conduct Rule 3.6(c) (1993).

<sup>54</sup>Model Code of Professional Responsibility DR 7-107 (1993).

<sup>55</sup>*Gentile*, 501 U.S. at 1075.

<sup>56</sup>See *Hirschkop v. Snead*, 594 F.2d 356, 371 (4th Cir. 1979) (en banc) (holding that "other matters that are reasonably likely to interfere with a fair trial" is too vague (quoting Rule 7-107(D) of the Virginia Code of Professional Responsibility)).

<sup>57</sup>In *Chicago Council of Lawyers v. Bauer*, 371 F. Supp. 689, 692-93 (1974), the court found that the no comment rule was not overbroad even though it failed to draw a distinction between comments favorable to criminal defendant and those which are hostile.

<sup>58</sup>Consider, for example, the cost and delay when the trial court must grant a change in venue or a continuation as a result of pre-trial publicity.

<sup>59</sup>*Gentile*, 501 U.S. at 1075.

<sup>60</sup>*Id.* at 1076 (C.J. Rehnquist, dissenting).

<sup>61</sup>*Chicago Council of Lawyers*, 371 F. Supp. at 695.

<sup>62</sup>See *In Re Lasswell*, 673 P.2d 855, 857 (1983).

<sup>63</sup>*Id.*

<sup>64</sup>*Gentile*, 501 U.S. at 1030.

<sup>65</sup>*Sheppard v. Maxwell*, 384 U.S. at 350.

<sup>66</sup>*Id.*

<sup>67</sup>*Id.*

<sup>68</sup>664 F. Supp. at 780.

<sup>69</sup>453 F. Supp. 749 (1978).

<sup>70</sup>*Id.* at 753.

<sup>71</sup>*Sheppard v. Maxwell*, 384 U.S. at 350 (quoting *Craig v. Harney*, 331 U.S. 367-74 (1947)).

<sup>72</sup>*New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

<sup>73</sup>*Cox v. Louisiana*, 379 U.S. 559 (1965) (Black, J., dissenting).

<sup>74</sup>*Id.*

<sup>75</sup>*Sheppard v. Maxwell*, 384 U.S. at 351.

<sup>76</sup>*Nebraska Press Ass'n*, 427 U.S. at 555.

<sup>77</sup>*United States v. Simon*, 664 F. Supp. at 791.

<sup>78</sup>See, e.g., *Levine v. United States Dist. Ct.*, 764 F.2d 590, 597 (9th Cir. 1985) (upholding a restraining order prohibiting attorneys from communicating with the media because publicity posed "a serious and imminent threat to the administration of justice"), *cert. denied*, 476 U.S. 1158 (1986).

<sup>79</sup>See, e.g., *Commonwealth v. Pierce*, 303 A.2d 209, 215 (1993) (prohibiting policemen and District Attorneys from releasing certain information to the news media), *cert. denied*, 414 U.S. 878 (1973).

<sup>80</sup>456 A.2d 963 (Md. App. 1983).

<sup>81</sup>*Id.* at 964.

<sup>82</sup>*Id.* at 971.

<sup>83</sup>427 U.S. at 555.

<sup>84</sup>*Nebraska Press Ass'n*, 427 U.S. at 542-43.

<sup>85</sup>*Id.* at 562.

<sup>86</sup>*Id.*

