

THE MEDIA AND CRIMINAL TRIAL COVERAGE: LIMITING PRESS¹ PROTECTION
IN THE UNITED STATES

By: Algeria R. Ford

I. INTRODUCTION

On July 4, 1954, a woman was found murdered and her husband was charged with the crime.² During the pretrial period, the husband faced incriminating publicity in the media.³ For example, some media outlets aired charges besides those for which he was being tried; he was examined for more than five hours without counsel in front of a large audience and that interview was televised; and weeks before trial, newspapers published the names and addresses of prospective jurors causing them to receive letters and telephone calls about the case.⁴ During the actual trial things were not much better. For instance, reporters' close proximity to the jury and counsel precluded privacy between the defendant and his counsel; jurors had access to all news media; and it was common knowledge that the chief prosecutor and the trial judge were candidates for judgeships.⁵ At the end, the case was such a media circus that although the

¹ Although the term "press" can refer to an organization that disseminates information and the term "media" can refer to the mode by which that information is transmitted, note that this paper will use the terms "media" and "press" interchangeably to refer to any group that disseminates speech by any mode.

² *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

defendant was found guilty, the Supreme Court of the United States decided to reverse the conviction in 1966, saying that the defendant did not get a fair trial.⁶

Those familiar with courtroom behavior know that the above case, although troubling and strange, is not at all unique. In fact, several years ago a case involving the murder of a California woman and man was just as bad.⁷ Police identified a celebrity they believed to be responsible for the murders and the press was in a frenzy.⁸ The defendant in this case was Orenthal James Simpson (O.J.) and his criminal trial, for the murders of his ex-wife and her friend, has been described as the most publicized murder trial in history.⁹

Some have suggested that the media tried to influence the public to get a particular verdict.¹⁰ One way this was done was by deliberately saturating the airwaves with a 911 call by the victim.¹¹ In fact, one of Mr. Simpson's attorneys indicated that before the calls were aired, public opinion polls were reporting that more than 60 percent of the American population thought

⁶ *Id.*

⁷ Doug Linder, *The Trial of Orenthal James Simpson*, <http://www.law.umkc.edu/faculty/projects/ftrials/Simpson/Simpsonaccount.htm>, (last accessed August 26, 2009).

⁸ *Id.*

⁹ Richard Price and Jonathan T. Lovitt, *Confusion for Simpson kids 'far from over'*, <http://www.usatoday.com/news/index/nns224.htm> (February 12, 1997).

¹⁰ *State v. Williams*, 623 N.W.2d 126, 127 (Wis. 2001) (Prosser, J., concurring) (quoting Gerald Uelman, *Lessons From The Trial* 21 (1996)).

¹¹ *Id.*

Simpson was probably innocent.¹² However, after the 911 tapes were released, polls showed that 60 percent thought that he was probably guilty.¹³ Luckily for Mr. Simpson, incompetence and racism by the police department enabled him to overcome the negative public perception.¹⁴ Still, many believe that the publicity associated with that case negatively affected the results of his later civil case.

Ultimately, what these two examples illustrate is that at least to some extent, the outcomes of cases are often influenced and guided by the media. In a country that prides itself on the notion of an unbiased and fair trial system, this media-guided affect is unacceptable.

This note first explores the evolution of the First Amendment, protection of the press, and trial coverage rights generally. It then examines a defendant's rights and the impact of the press on court proceedings and trial fairness; discussing the common approaches to deal with these problems. The final section rejects these approaches, explains why a defendant's right to a fair trial is contingent on limiting press protection and examines the application of this more appropriate remedy in other countries.

¹² *Id.*

¹³ *Id.*

¹⁴ See Michelle Caruso and Jere Hester, *Cop as a Racist: O.J. Witness Sez he's not*, Bailey Rips, http://www.nydailynews.com/archives/news/1995/03/15/1995-03-15_cop_as_a_racist_o_j_witness.html (March 15, 1995).

II. HISTORY

Perhaps no other right is valued more in the United States than freedom of expression. The colonists declared their independence from England and this country was founded partly because the early inhabitants were not represented in the English government. Later a civil war ravaged the nation, in some views, because the southern states were being denied representation. The following sections will explore the history of freedom of expression in the United States and discuss how it impacted media protection. This history provides a background and justification for why protections for the press are so powerful in the United States today.

A. Development of Freedom of Expression

An examination of freedom of the press in the United States must begin with a history of freedom of expression. This is because freedom of the press is basically a narrow form of freedom of expression.¹⁵ Freedom of expression is the notion that people should be free to express themselves via their words or conduct.¹⁶ Historically unaccepted, in the 1600's England punished those who openly criticized the government.¹⁷ Further,

¹⁵ *First Natl Bank v. Bellotti*, 435 U.S. 765, 800 (1978) (Burger, C.J., concurring).

¹⁶ Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L.J. 877 (1963).

¹⁷ See William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 Colum. L. Rev. 91 (1984).

as the English government premised this crime on the idea that government could not be wrong, truth was no defense.¹⁸ England also censored publishers; granting licenses only to those whose ideas it agreed with.¹⁹ When the colonists fled to America, one would think that they would've ended many of these prohibitive tactics employed against them by the English. However once in America, the colonists, like England, discouraged the concept of freedom of expression and imposed punishments for conflicting ideas.²⁰ It wasn't until the colonists wanted to ratify their Constitution that freedom of expression became an issue; due in part to ratification being stalled because of the absence of speech and other protections.²¹ Ultimately, the drafters added the Bill of Rights with a First Amendment that protected expression.²²

Although freedom of expression was now an enumerated right under the First Amendment, because the drafters never clearly defined its parameters, specific application and meaning were left to interpretation. For instance, in 1798 Congress enacted the Alien and Sedition Act, punishing ideas adverse to the

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Leonard W. Levy, *Legacy of suppression: Freedom of speech and press in early American history* (Belknap Press 1960); Leonard W. Levy, *The Legacy Reexamined*, 37 *Stan. L. Rev.* 767 (1985).

²¹ Charles J. Cooper, *Limited Government and Individual Liberty: The Ninth Amendment's Forgotten Lessons*, 4 *J.L. & Pol.* 63 (Summer 1987).

²² *Id.*

State.²³ Then in 1942, the Court rejected the idea that the right to freedom of expression was absolute and held that lewd, obscene, profane, and libelous speech was not protected.²⁴ Later, the Court held that “fighting words” were not protected speech.²⁵ Although these cases indicate that the Court often employed a categorical approach to speech expression, affording different types of speech different levels of protection, that distinction has been largely abandoned. Today, laws can only restrict political expression if that expression directly advocates or incites lawless action and is likely to produce such action.²⁶ Further, the modern approach to expression is that if the State discriminates on the basis of content or viewpoint, the law is presumptively invalid and strict scrutiny applies.²⁷ Thus, now, the only significance of expression falling into certain “unprotected” categories is that “time, place, manner” restrictions and “neutral” restrictions may be presumptively valid.

There are four justifications for protecting expression in this manner. The “market place of ideas” justification suggests that all ideas should get in because they will compete and the

²³ Federal Judicial Center, *The Alien and Sedition Act*, http://www.fjc.gov/history/sedition.nsf/autoframe?openform&header=/history/sedition.nsf/page/header&nav=/history/sedition.nsf/page/nav_documents&content=/history/sedition.nsf/page/sedition_act (Retrieved August 29, 2009).

²⁴ *Chaplinski v. N.H.*, 315 U.S. 568 (1942).

²⁵ *Va. v. Black et al.*, 538 U.S. 343 (2003).

²⁶ *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

best will win.²⁸ The “safety valve” justification says if people feel they can speak, they will do so instead of resorting to violence.²⁹ The “self-fulfillment” justification says in a free society, people should be free to say what they think.³⁰ Finally, the “democratic process” justification is premised in the notion that speech is important to the democratic process.³¹ Accepting this premise, it says we must reject the idea that government can tell people what to say or think because we acknowledge that in a democracy, the people not the State make the choices.³² This may be the most important reason why today the U.S. is very protective of expression even when it infringes on other rights.

B. Freedom of the Press

As stated, freedom of the press is a narrower form of expression protection. It is essentially the right to not only have ideas and opinions but to transmit those ideas and opinions through the media, without interference.³³ Like the broader “expression” protection, the more narrow “press” protection was identified by the founding fathers as one of the liberties that

²⁷ *Am. Booksellers Assn., Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

²⁸ Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. Rev. 964 (1978).

²⁹ Emerson, *supra* n. 16, at 877.

³⁰ *Bose Corp. v. Consumers Union of U.S.*, 466 U.S. 485 (1984).

³¹ Emerson, *supra* n. 16, at 877.

³² *Id.*

³³ *First Natl Bank* at 800.

the new, independent nation should have.³⁴ For instance, George Mason, one of the original signers of the U.S. Constitution, helped draft the 1776 Virginia Declaration of Rights which states "the freedom of the press is one of the greatest bulwarks of liberty and can never be restrained but by despotic governments."³⁵ Similarly, when addressing officers of the army at Newburgh, another signer and the first President of the United States, George Washington stated "if men are to be precluded from offering their sentiments on a matter which may involve the most serious and alarming consequences that can invite the consideration of mankind, reason is of no use; the freedom of speech may be taken away, and dumb and silent we may be led, like sheep to the slaughter."³⁶ However, despite its advancement by the founding fathers and its inclusion into various constitutions, freedom of the press has always been a controversial concept because it calls for more than a balancing of rights, it fashions a hierarchy. The case law is indicative of the point.

For example, in *Near v. Minnesota*, a seminal case involving the press, the Court had to determine whether local law enforcement, acting under state law, could protect its citizens

³⁴ U.S. Const. Amend. I.

³⁵ Constitution.org, *The Virginia Declaration of Rights*, http://www.constitution.org/bcp/virg_dor.htm#001 (last accessed August 31, 2009).

by preempting newspapers from publishing periodicals that it had labeled "malicious, scandalous and defamatory."³⁷ The facts indicated that a newspaper made accusations against the mayor, the county attorney, and several other public officials, blaming them for the prevalence of crimes and the failure to expose and punish them.³⁸ The county attorney obtained a permanent injunction against the newspaper and this was affirmed by all of the courts in the state.³⁹ However, the Supreme Court of the United States reversed, holding prior restraints were unconstitutional and only allowed in "exceptional cases."⁴⁰ It was obvious the Court did not believe this to be an exception case and it's position was best articulated by Chief Justice Hughes: "[t]he fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct."⁴¹

Then in *N.Y. Times Co. v. U.S.*, the Court had to determine whether freedom of press over-rode national security.⁴² In that case, the government attempted to prevent the New York Times and the Washington Post from publishing a classified study of U.S.

³⁶ George Washington, Speech to the Officers of the Army at Newburgh, http://www.pbs.org/georgewashington/collection/other_1783mar15.html (last accessed September 06, 2009).

³⁷ *Near v. Minn.*, 283 U.S. 697 (1931).

³⁸ *Id.* at 704.

³⁹ *Id.* at 705-707.

⁴⁰ *Id.* at 716.

⁴¹ *Id.* at 720.

decision-making in Vietnam.⁴³ Although Chief Justice Burger argued that there should be a detailed study on the effects of releasing the papers, and thus dissented, the majority again ruled in favor of press protection.⁴⁴ More specifically, the Supreme Court held that even against possible harm to the nation, press prohibition is not justified unless immediate negative impacts are shown.⁴⁵ The difficulty with the Court's position in *New York Times* is that on the one hand, it says harmful effects cannot be speculative, while on the other hand, it admits that a defendant cannot prove the case for injunction without speculation.⁴⁶

Finally, in *Landmark Communications v. Virginia*, the Court was asked to determine whether the state could prohibit a newspaper's reporting on a pending investigation.⁴⁷ In that case, a newspaper reported that a Virginia judge was under investigation by a judicial fitness panel.⁴⁸ Under Virginia law, disclosing that type of inquiry could result in criminal penalties.⁴⁹ Thus, as expected, those responsible for the publishings were tried, convicted, and fined.⁵⁰ The Supreme Court

⁴² *N.Y. Times Co. v. U.S.*, 403 U.S. 713 (1971).

⁴³ *Id.* (note that the study was called the "pentagon Papers" but it was entitled "History of U.S. Decision-Making Process on the Vietnam Policy").

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ See generally, *id.*

⁴⁷ *Landmark Communications v. Va.*, 435 U.S. 829 (1978).

⁴⁸ *Id.* at 831.

⁴⁹ *Id.*

⁵⁰ *Id.* at 832.

of the state affirmed.⁵¹ However, the Supreme Court of the United States over-ruled that decision because it said that there was no finding of a clear and immediate danger.⁵²

Overall, although the founding fathers may have originally only intended to prevent the State government from engaging in thought control, idea prohibition, and truth definition, today's press protections go far beyond that. In each of the previously discussed cases, the Court was asked to weigh the press's right to disseminate information against other similarly important rights. As indicated, in each case the Court concluded that freedom of the press was more important. These cases set the foundation for what has become the Court's treatment of the press. They also provided precedent for powerful protections that were eventually afforded to media coverage of trials.

C. Press Coverage of Trials

The right of the press to engage in trial coverage is a judicially-accepted and well-established principal in the United States. One of the earliest cases standing for that proposition was *Craig v. Harney*.⁵³ In that case, the Court stated "[a] trial is a public event. What transpires in the courtroom is public property."⁵⁴ The Court then ultimately set-aside contempt of

⁵¹ *Id.*

⁵² *Id.* at 834.

⁵³ *Craig v. Harney*, 331 U.S. 367 (1947).

⁵⁴ *Id.* at 374.

court punishments that were instituted against a publisher, an editorial writer, and a news reporter for discussing a case.⁵⁵ The take-a-way rule was that a court has no right to “suppress, edit, or censor events which transpire in proceedings before it.”⁵⁶

Another case addressing the media’s right to talk about case information was *Pennekamp v. Florida*.⁵⁷ In that case a newspaper published criticisms about the way a trial court administered “justice”.⁵⁸ At the time of the publications, the newspaper criticisms focused on three cases; two had been dismissed while a third was pending.⁵⁹ The publisher and associate editor of the newspaper were held in contempt of court.⁶⁰ The reasoning was that the publications interfered with the administration of justice in a pending case and other future cases.⁶¹ However, the Supreme Court of the United States held that while the publications criticized the judge they did not discuss the rulings during a jury trial.⁶² Thus, any effect that they might have on juries, which could influence justice, was too remote to be considered a clear and present danger.⁶³ This

⁵⁵ *Id.* at 378.

⁵⁶ *Id.*

⁵⁷ *Pennekamp v. Fla.*, 328 U.S. 331 (1946).

⁵⁸ *Id.*

⁵⁹ *Id.* (note that although it was pending, an earlier indictment had failed but the pending case was based on a new indictment).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 349.

⁶³ *Id.* at 349.

case established the notion that for strict remedies to be justified, there must be a clear and present danger.⁶⁴

Approximately thirty years later, the Court confronted the issue of whether an order, which restrained the media from releasing confessions by an accused, was unconstitutional.⁶⁵ Even against prejudice to the accused, it held that prior restraint of information was unconstitutional.⁶⁶

Trials involving children and victims were also not protected from media reports. In *Daily Mail Publishing Co.*, the Court allowed newspapers to publish a child-defendant's name over a state law.⁶⁷ Then in *Cox Broadcasting*, a television station released the name of a rape victim and the Court held that publishing legally acquired information was a constitutional right, despite state statutes prohibiting it.⁶⁸

Still, the Court did not stop at mere dissemination rights. In the *Press-Enterprise* cases, the Court held that the press has the right to attend jury selection⁶⁹ and to attend preliminary hearings in criminal cases.⁷⁰

These cases instituted broad protections for the press in the realm of dissemination and access. In each one of them, the

⁶⁴ See generally, *id.*

⁶⁵ *Nebraska Press Assn. v. Stuart*, 427 U.S. 539 (1976).

⁶⁶ *Id.*

⁶⁷ *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979).

⁶⁸ *Id.*

⁶⁹ *Press-Enterprise Co. v. Super. Ct.*, 464 U.S. 501 (1984).

⁷⁰ *Press-Enterprise Co. v. Super. Ct.*, 478 U.S. 1 (1986).

Court justified its result as necessary and in the public interest.

D. Why Press Protection is Necessary

Although this paper takes an opposing view, there are legitimate reasons for courts providing powerful protections for the press to be able to cover trials. First, coverage and access allows the public to scrutinize the trial. Public scrutiny is considered important because as tax payers and citizens the public has an interest in ensuring that those involved in administering our system of justice are competent. Further, scrutiny helps ensure that our system of justice itself is in fact fair and just. Second, coverage educates the public. On the one hand, it informs them about what really goes on in court and educates them about the legal system. An understanding about how the system works the public can come to trust the system. On the other hand, it informs them about rules obtained from case results. These case results ultimately affect the public and therefore, information about them is critical to the public obeying the laws produced. Third, access is necessary for purposes of accountability. Accountability provides a protection for everyone involved in a trial. A defendant may be protected because the public will be watching and holding the prosecutor and the judge accountable for their actions or lack thereof. A

judge and a prosecutor may be protected because their actions will be on display and no claims of secret misconduct can be advanced. Finally, access and coverage is necessary because some closed trials have historically been unfair. Thus, today if trials are closed, the perception that injustice is occurring persists, whether true or not, and there is a lack of public trust in the system.

Based on this legitimate reasoning, the Court has developed rules which state that the press will typically have access to a trial, the press can only be kept out in extreme circumstances, and the press can report on whatever matters the public has a right to know. These rules are based in large part on the public's right to know in order to ensure safety. However, it should be noted that public attendance has not always guaranteed fairness. For instance, trials held by Stalin, called show trials, were held with the public watching and in those cases the media propagated the injustice.⁷¹ It should also be noted that while the right of the public to be informed is important, so is the court's duty to protect a defendant's right to a fair trial. Unfortunately, when the court has been asked to balance expression protection versus this right to a fair trial, it has typically weighed more favorably on the side of expression.

⁷¹ Fran E. Smitha, *Purges and Hysteria in the Soviet Union*, <http://www.fsmitha.com/h2/ch20.htm> (last accessed September 22, 2009).

Thus, an analysis should be conducted of the competing interests involved.

III. THE FIRST AMENDMENT vs. THE RIGHT TO A FAIR TRIAL

Although the media has been afforded the right to be present at trials, this right often seriously conflicts with a defendant's right to a fair a trial. For example, potential jurors can be prejudiced by things they hear from the media; defense attorneys and prosecutors can leak damaging information to the press in advance of a trial; or the release of the identities of witnesses to the media can influence the way they testify later. The following sections will discuss a defendant's right to a fair trial, the impact of the media on trials, and how courts have tried to deal with any media affect.

A. The Right to a Fair Trial

The Sixth Amendment to the United States' Constitution guarantees a defendant the right to a fair trial in criminal proceedings.⁷² The text says:

"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 where in the crime shall have been committed, which district shall have been previously ascertained by law, and to be

⁷² U.S. Const. Amend. VI.

informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.”⁷³

As it relates to the topic of this paper, the most important idea to take from the text of the Sixth Amendment is that jurors must be impartial.⁷⁴ This idea is so important that a violation of it cannot be considered harmless error.⁷⁵ By default, impartiality is usually determined two ways: production of a representative jury panel from the community and voir dire.

Jury panels, called venires, are chosen by randomly selecting members from the community.⁷⁶ The panels must be comprised of a fair representation of all the members and the selection process cannot be discriminatory.⁷⁷ Voir dire, on the other hand, is the process for weeding out potentially biased jurors after the panel has been chosen.⁷⁸ Lawyers for both sides are allowed to ask questions that reveal whether a particular person is appropriate for the current case.⁷⁹ Again, the process

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Golden v. State*, 127 P.3d 1150 (Okla. App. 2006), cert. denied, 548 U.S. 906 (2006).

⁷⁶ law.jrank.org, *Jury: Legal Aspects - Assembling the Venire*, <http://law.jrank.org/pages/1436/Jury-Legal-Aspects-Assembling-venire.html> (last accessed September 12, 2009).

⁷⁷ *Taylor v. Louisiana*, 419 U.S. 522 (1975).

⁷⁸ *State v. Murray*, 744 S.W.2d 762 (Mo. 1988).

⁷⁹ *State v. Anderson*, 513 S.E.2d 296 (N.C. 1999).

cannot be discriminatory.⁸⁰ Although combined these processes help to ensure a fair trial, the inquiry into whether a trial was actually fair does not end with an initially unbiased jury.

Fairness also requires judges to be impartial because fairness includes the right of a defendant to due process of the law.⁸¹ A biased judge would hinder due process because judges play an integral role in trials.⁸² A judge is allowed to clarify testimony and assist the jury in understanding the evidence.⁸³ A judge may also participate in the examination of witnesses to clarify evidence, confine counsel to evidentiary rulings, ensure the orderly presentation of evidence, and prevent undue repetition.⁸⁴ Thus, section 455(a) of the Judicial Code requires any justice, judge, or magistrate judge of the United States to recuse him or herself "in any proceeding in which his impartiality might reasonably be questioned."⁸⁵ The Supreme Court of United States, through its decisions, has ultimately developed a two-part test that judges should apply when determining whether recusal is proper. First, considering the totality of the circumstance, the judge must determine whether a

⁸⁰ *Batson v. Ky.*, 476 U.S. 79 (1986).

⁸¹ *McMurrin v. State*, 156 Tex. Crim. 434 (1951), *cert. denied*, 342 U.S. 874 (1951).

⁸² Theodore A. McKee, *Judges as Umpires*, 35 Hofstra L. Rev. 1709 (Summer 2007) (standing for the proposition that judges often act as more than umpires).

⁸³ *U.S. v. De Sisto*, 289 F.2d 833, 834 (2d Cir. 1961).

⁸⁴ *U.S. v. Laurins*, 857 F.2d 529, 537 (9th Cir. 1988).

⁸⁵ 28 U.S.C.A. § 455.

reasonable person would question his or her impartiality.⁸⁶ Second, the judge must determine whether his or her opinion about a case or a party has been obtained from an extra-judicial source and is sufficient to require recusal.⁸⁷ Applying this standard, the United States Supreme Court has held in one case, that where a State Supreme Court judge was hearing a matter involving a corporation that helped to elect him, that judge should have recused himself as matter of due process.⁸⁸ Justice Kennedy noted that the question is not “whether the judge is actually, subjectively biased, but whether the average judge in his position is “likely” to be neutral, or whether there is an unconstitutional “potential for bias.””⁸⁹

Finally, if a fair trial is to be the goal, then implicit in that notion is the right to have a trial free from prosecutorial misconduct. Thus, when a prosecutor engages in deliberate, unfair conduct that prejudices a defendant, an adverse verdict that was rendered can be overturned.⁹⁰ One example of misconduct would be deliberate attempts to get excluded information in front of a jury.⁹¹

⁸⁶ *Sao Paulo State of Federative Republic of Brazil v. Am. Tobacco Co., Inc.*, 535 U.S. 229 (2002).

⁸⁷ *Liteky v. U.S.*, 510 U.S. 540 (1994).

⁸⁸ *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S. Ct. 2252 (2009).

⁸⁹ *Id.* at 2262.

⁹⁰ See, e.g. *John Demjanju v. Petrovsky*, 10 F.3d 338 (6th Cir. 1993).

⁹¹ See *Berger v. U.S.*, 295 U.S. 78, 84-85 (1935) (giving examples of prosecutorial misconduct).

A violation of any one of the aforementioned things could cause a mistrial. This is why the impact of the press must be analyzed to determine how it affects them.

B. The Impact of the Media on Court Proceedings

United States Supreme Court Justice Hugo Black once said “[l]egal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper.”⁹² Interestingly, Justice Black did not comment on whether trials should be “lost” through the use of the media.⁹³ Despite this omission, Justice Black better summarized his position regarding the justice system later on: “[t]he very word ‘trial’ connotes decisions on the evidence and arguments properly advanced in open court.”⁹⁴ But trials are stories and as one online site for journalists said “[t]he way that media covers a big story can have as much influence as the event itself.”⁹⁵ This is because “[s]ociety's understanding of an unfolding drama – as filtered through the media – directly impacts the outcome of that story, and has lasting political and cultural effects.”⁹⁶ It is no secret that in modern society, both media access and media reporting influence the outcome of trials.

⁹² *Bridges v. Ca.*, 314 U.S. 252, 271 (1941).

⁹³ *Bridges*, 314 U.S. at 271 (note the absence in Justice Black's opinion of any discussion of the negative impacts of the media).

⁹⁴ *Id.*

⁹⁵ TheBigStory.com, *Mission*, <http://thebigstory.org/mission.html> (April 30, 2002).

⁹⁶ *Id.*

Justices have long noted that the exposure of jurors to prejudicial aspects of the case can be a problem. As explained by Chief Justice Marshall: “[a juror] may declare that notwithstanding these prejudices he is determined to listen to the evidence, and be governed by it; but the law will not trust him. . . Such a person may believe that he will be regulated by testimony, but the law suspects him, and certainly not without reason. He will listen with more favor to that testimony, which confirms, than to that which would change his opinion; it is not to be expected that he will weigh evidence or argument as fairly as a man whose judgment is not made up in the case.”⁹⁷ The problem is that much of the “news” available to the public is biased.⁹⁸ Therefore, the issue becomes not which news outlet a juror is exposed to but instead whether they are exposed to any news media at all.

But juror biased isn't the only potential problem. Cases can involve non-jury trials⁹⁹ and many judges are elected by the public.¹⁰⁰ Faced with this truth it is idealistic to pretend that

⁹⁷ *U.S. v. Burr*, 25 F. Cas. 49, 50 (Va. Cir. Ct. 1807) (No. 14,692).

⁹⁸ Seth Ackerman, *The Most Biased Name in News: Fox News Channel's extraordinary right-wing tilt*, <http://www.fair.org/index.php?page=1067> (last accessed September 12, 2009); Meg Sullivan, *Media Bias is Real, Finds UCLA Political Scientist*, <http://www.newsroom.ucla.edu/portal/ucla/Media-Bias-Is-Real-Finds-UCLA-6664.aspx?RelNum=6664> (last accessed September 12, 2009).

⁹⁹ *Jones v. Barnes*, 463 U.S. 745, 751 (1983).

¹⁰⁰ NCSC, *Judicial Selection and Retention*, <http://www.ncsconline.org/WC/CourTopics/FAQs.asp?topic=JudSel#FAQ628> (last accessed September 12, 2009).

judges are above being impacted by the media.¹⁰¹ A consequence of being an elected official is that like politicians, judges must appease constituents. As one judge stated, the result is that in some cases, in particular those involving interests that the media and the public are preoccupied with, at least sentencing is impacted by the media.¹⁰² In other words, judges who want to appear tough on crime may apply disproportionate sentences due to pressure from the media and the public.

The media may also have a negative impact on potential witnesses. In a study evaluating the effects of the media in courtrooms, one finding was that the media can have a negative influence on some witnesses in a number of ways.¹⁰³ First, the media can be a distraction.¹⁰⁴ If witnesses are distracted then they are not paying attention to the questions being asked and the answers they are giving. This can result in inaccurate information being espoused. Second, the media can cause witnesses to be nervous.¹⁰⁵ Once again, nervousness can affect the quality and accuracy of a witness's answers. Third, the media can cause witnesses to distort or modify their

¹⁰¹ This is to be distinguished from the impact on judges when there is a jury trial because there, the judge is not the fact finder and may not determine sentence.

¹⁰² Avirama Golan, *When the Pen is Mightier than the Gavel*, <http://www.haaretz.com/hasen/spages/1110622.html> (last accessed September 12, 2009).

¹⁰³ Molly Treadway Johnson and Carol Krafka, *Electronic Media Coverage of Federal Civil Proceedings: An Evaluation of the Pilot Program in Six District Courts and Two Courts of Appeals*, FJC-MISC-94-2 (1994).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

testimony.¹⁰⁶ This is likely the biggest danger. Whether positive or negative for a defendant, if a witness is not testifying truthfully, there is a negative impact on the entire trial.¹⁰⁷ Finally, depending on the case, revealing witness's identities can cause them to fear they will be harmed.¹⁰⁸ Although admittedly the results from this study indicated that the above may only occur in a small number of cases or affect a small number of witnesses, any adverse result in any case taints the entire system justice as a whole.

The conduct of the prosecutor or the defense can also impact the trial when the attorneys use the media to bias the jurors (seated or potential) or the judge. For instance, as stated earlier, one thing that some attorneys try to do is get information that was excluded pre-trial to potential jurors by releasing it to the media.¹⁰⁹ Another thing they may try to do is inflame public opinion about a judge, by using the media,¹¹⁰ so that the judge becomes pressured by the public.¹¹¹

If it is known that all of these dangers exist, the real question is why we don't just prohibit the media from reporting until after the trial, and even then in a limited fashion. The

¹⁰⁶ *Id.*

¹⁰⁷ Consider that jurors may equate witness dishonesty with attorney or client dishonesty.

¹⁰⁸ Johnson, n. 103.

¹⁰⁹ See *Berger* at 84-85.

¹¹⁰ Note that this is a way to effectively manipulate the public, who believe they are getting "news".

¹¹¹ Johnson, *Supra* n. 103.

answer lies in the fact that the Supreme Court has largely defined the limitations that can be placed on the press and elevated the media to an almost untouchable position. Thus, lower courts have been left with the sometimes impossible task of balancing the rights of the press with the rights of a defendant.

C. Addressing the Problem

Although the Supreme Court considers it to be an extreme remedy, it said that a court is allowed to issue gag orders if no other methods were adequate.¹¹² Gag orders are orders issued by the court hearing the case, which can prevent all those directly involved with a case (including the media) from commenting on it outside the courtroom.¹¹³ They can be helpful before a trial, during a trial, or even post trial (for pending matters).

In *Gannett*, the Court also offered the option of having closed courtrooms.¹¹⁴ When courts close the proceedings, typically only those who are involved in the case are let in to view them. However, courts are only allowed to do this if there is a compelling reason.¹¹⁵ One benefit of having a closed court

¹¹² *Neb. Press Assn. v. Stuart*, 427 U.S. 539 (1976).

¹¹³ Peter Finn, *Judge's Order Could Keep Public from Hearing Details of 9/11 Trials*, <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/06/AR2009010603374.html?hpid=moreheadlines> (January 7, 2009).

¹¹⁴ *Gannett Co. v. Depasquale*, 443 U.S. 368 (1979).

¹¹⁵ *Cohen v. Everett City Council*, 85 Wash. 2d 385, 387-388 (1975).

is that the court can monitor what information is released and pinpoint who actually released it.

Courts can also change the location of the trial.¹¹⁶ A court has the discretion to grant a change of venue if it finds that individuals in one area have been biased or will act with prejudice in a particular case.¹¹⁷

Another method that has been employed is jury sequestration. Jury sequestration is a statute-governed remedy and what it does is place "all the jurors together in a location separate from their normal abodes, under the care of court authorities, throughout some or all of the trial."¹¹⁸ Mr. Gerald Uelmen, a professor of law at SCU and former co-counsel for O.J. Simpson's defense team, stated in an article written after the O.J. trial, "[b]ecause our jurors were sequestered, they didn't see the press conferences of the lawyers and the families of the victims. They didn't hear the spin of the commentators. They only heard the evidence in the courtroom. Thus, they had a perspective no one else had."¹¹⁹ In other words, jury sequestration can be a great way to isolate the jurors, during a trial, from prejudice.

¹¹⁶ Judicial Council of California, *Change of Venue in California*, <http://www.courtinfo.ca.gov/reference/documents/factsheets/chgofven.pdf> (last accessed September 13, 2009).

¹¹⁷ *Id.*

¹¹⁸ American Judicature Society, *Sequestration*, http://www.ajs.org/jc/juries/jc_privacy_sequester.asp (last accessed September 13, 2009).

Courts can also try severance. Sometimes the media may focus on one defendant to the detriment of another or the issues may be so confusing that the media intertwines them and thus, so does the public. When this happens a court may decide that separation may be best. Severance is the process of splitting issues in a case or splitting parties who are on the same side of a case.¹²⁰ It is justified when the defendant can muster substantial defenses both on the merits and on the question of criminal responsibility which cannot be presented in the same proceeding without confusing the issues or without prejudice to the defendant.¹²¹

A final remedy that courts have employed is trial delay.¹²² Trial delay is basically continuing the trial at a later date.¹²³ It is premised on the notion that media interest in the verdict of a trial will abate after a while or else that the public will not be inflamed after a cooling off period.¹²⁴ It is important to note, however, that a court's imposition of trial delay cannot override a defendant's right to a speedy trial.¹²⁵ Regardless, this may provide a remedy before a trial begins.

¹¹⁹ Gerald F. Ulemen, *The Five Hard Lessons from the O.J. Trial*, <http://www.scu.edu/ethics/publications/iie/v7n1/lessons.html> (last accessed August 26, 2009).

¹²⁰ *U.S. v. Winchester*, 407 F. Supp. 261 (D. Del. 1975).

¹²¹ *Id.*

¹²² Note that this is different than the idea of delay of trial done by attorneys. That is a negative act, which is punishable by the court.

¹²³ See *Sheppard*, 384 U.S. at 363.

¹²⁴ See *Sheppard*, 384 U.S. at 363-64.

¹²⁵ U.S. Const. Amend. VI.

IV. CURRENT SOLUTIONS REJECTED AND THE ARGUMENT FOR LIMITING PRESS PROTECTION

At the outset, it should be noted that under our system of justice everyone charged with a crime is supposed to be presumed innocent until proven guilty.¹²⁶ Today, that idea is largely an illusory promise.¹²⁷ To start with, before a trial even begins many defendants are detained as if they were already convicted felons.¹²⁸ Further, in some trials, the prosecutors, not the court, swear in witnesses.¹²⁹ Finally, common perception is that a person in handcuffs is likely guilty; otherwise there wouldn't be the need for cuffs.¹³⁰ It cannot be denied that all of these things prejudice a defendant. But, coupled with these prejudices is the current reality that a defendant now has to also contend with a potentially biased media. Today, when a defendant, whose guilt is yet determined, walks out to meet his or her potential jurors, many times the media has already decided the case and the jurors have heard it's "evidence." As one attorney put it

¹²⁶ *Taylor v. Ky.*, 436 U.S. 478, 485 (1978).

¹²⁷ LeRoy Pernell, *The Reign of the Queen of Hearts: The Declining Significance of the Presumption of Innocence--A Brief Commentary*, 37 Clev. St. L. Rev. 393, 403 (1989).

¹²⁸ *Id.*

¹²⁹ Department of Defense, *Military Commission Instruction No. 3*, <http://www.defenselink.mil/news/Feb2006/d20060217MCI3.pdf> (last accessed September 13, 2009) (this can give jurors the incorrect impression that the prosecutor is in control or is elevated to the same status as the court).

¹³⁰ Note that courts have surprisingly found that this is not necessarily prejudicial. See *State v. Bleau*, 649 A.2d 215, 219 (R.I. 1994) (the mere fact a jury may have observed a defendant in handcuffs does not necessarily prejudice him); See also *State v. Palmigiano*, 309 A.2d 855, 861 (R.I. 1973) ("one juror who sees a defendant in handcuffs is as apt to be filled with compassion as another juror who might feel the defendant's guilt has been established.").

"[o]ur rights are being compromised because the same people who read the tabloids and follow the coverage for the latest tidbits on the investigation and prosecution of [a defendant] will make up a part of the jury pool for [a defendant's] trial."¹³¹ As it stands, a defendant's only hope is that a court's remedies will work.

A. Current Solutions are Inadequate

Gag orders are insufficient to resolve the problem of potential bias. The first reason is because they are hard to obtain. The second reason is because gag orders do not restrict the ability to report things independently gathered. The third reason is because they do not prevent the media from talking about a defendant's past; which was exactly what happened in *Sheppard*. In essence, prejudice is not averted.

Closed courtrooms are also an insufficient method because of Court-imposed limitations. Although the Supreme Court in *Gannett* held that aspects of a trial can be closed, it later narrowed that decision in *Richmond Newspapers*. In *Richmond Newspapers*, the Court held that the right to attend criminal trials was guaranteed by the First Amendment and further that it was a public right and not solely a defendant's right, as was

¹³¹ Terence Lenamon, *Media Zap Right to Fair Trial: To wit, Casey Anthony, et al.*, [http://www.orlandosentinel.com/news/opinion/orl-edpoplenamon08040809apr08,0,7234456 .story](http://www.orlandosentinel.com/news/opinion/orl-edpoplenamon08040809apr08,0,7234456.story) (April 8, 2009).

inferred from *Gannett*.¹³² It then later added that to get over this default "right of access", judges should use a strict scrutiny analysis and determine whether an "overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."¹³³ One can speculate that while closed courtrooms are possible in theory, in practice, they are allowed only in very limited circumstances.

Voire dire is another method that seems to work only in theory. It is ineffective to remove prejudice because while it is predicated on the belief that jurors will not have prior knowledge, in reality it can be impossible to find jurors deplete of all knowledge about a case. Then once a juror has been exposed to bias prior to trial, it is hard to conclude that the bias brought in will not have an effect on their perception of the actual trial.

Sequestration is inadequate because it comes too late in the process. Potential jurors will already have been prejudiced prior to being selected. Further, jurors sequestered may make quick decisions or agree with the majority just so they can be done with the trial and return to their normal lives.¹³⁴

¹³² *Richmond Newspapers, Inc. v. Va.*, 448 U.S. 555 (1980).

¹³³ *Press-Enterprise Co. v. Super. Ct.*, 478 U.S. 1 (1986).

¹³⁴ Note that juries can be sequestered for very long periods of time. The jury in the O.J. Simpson case was sequestered for almost nine months. See

Severance is unrealistic because the burden on a defendant to prove that severance is justified is too great. A defendant must argue more than simply that conflicting theories of the case mandate a separate trial,¹³⁵ combining trials or issues may be prejudicial,¹³⁶ or that a jury may negatively judge a defendant who is charged with more than one crime.¹³⁷

Change of venue has become irrelevant in our technological society because the media reaches so many people it is often hard to find individuals who are not informed. For instance, in *Irvin v. Dowd*, the court found that media reporting had reached so many people that despite the venue change, almost ninety percent of the new potential jurors had formed an opinion as to the defendant's guilt before the trial even began.¹³⁸

Every remedy currently employed fails to adequately address the negative impact that the media has on the implementation of justice. The only logical option seems to be prohibition and this is the remedy this paper proposes.

USATODAY, *The Simpson Timeline*, <http://www.usatoday.com/news/index/nns053.htm> (last accessed September 14, 2009).

¹³⁵ *Zafiro v. U.S.*, 506 U.S. 534 (1993) (risk of prejudice to co-defendants from their contradictory defenses could be cured with proper jury instructions).

¹³⁶ *U.S. v. Jordan*, 602 F.2d 171 (8th Cir. 1979) (defendant must not show some prejudice but rather substantial prejudice).

¹³⁷ *U.S. v. Werner*, 620 F.2d 922 (2d Cir. 1980) (“[t]he mere fact that juries are apt to regard with a more jaundiced eye a person charged with two crimes than a person charged with one does not call for relief under the rule relating to prejudicial joinder”).

¹³⁸ See *Irvin v. Dowd*, 366 U.S. 717, 727 (1961).

B. The Argument

The only way to ensure that a defendant has a right to a fair trial is to limit media access and media coverage. This is not unconstitutional because the Sixth Amendment is a defendant's remedy not a press protection and further because the First Amendment does not guarantee the press the right to access trials. On top of this, even if one interprets the First Amendment as granting rights that the public has, if courts preempt a public right of access, then a media right can be denied also as media rights flow from public rights. Next, as it relates to rights of dissemination, media content nowadays typically qualifies as entertainment and is therefore arguably low value expression that can be regulated. Notwithstanding this last statement, even if one concludes that in some cases it qualifies as political speech, prohibition survives a strict scrutiny analysis and thus is constitutional. Finally, speech should not outweigh justice because the Constitution provides for no hierarchy of rights. In sum, under any of these arguments limitation is justified.

1. No Right to Access Exists

The Court cannot claim, that implicit in the Sixth Amendment lies the media's right to be present. This is first because the Court has admitted that members of the public have

no constitutional right under the Sixth Amendment to attend criminal trials.¹³⁹ Since the media's rights flow from the public's rights, if the public is stopped, then the media is also precluded. Further, the Sixth Amendment is intended to protect a defendant, not the press. Thus, it logically follows that if something argued for under the Sixth Amendment harms the defendant, it would be unconstitutional. Therefore, the right must somehow exist in the First Amendment.

Expectedly, this is exactly where the Supreme has found that a constitutional right to access exists.¹⁴⁰ The word "found" is appropriate because the language of the constitution, more specifically, the First Amendment text itself, does not mention access; it instead concerns the right of the press to disseminate information, not collect it.¹⁴¹ Thus, there is no indication that the founding fathers ever intended to grant such a right. The Court has even admitted as much.¹⁴² Still, despite the admission in *Branzburg* the Court expanded the words of the Constitution and ultimately created a right to gather information.¹⁴³ The Court seemed to base its decision on a public right to know.¹⁴⁴ This position is misguided because even if the

¹³⁹ *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 391 (1979).

¹⁴⁰ See *Craig v. Harney*, 331 U.S. 367 (1947); *Press-Enterprise Co. v. Super. Ct.*, 464 U.S. 501 (1984); *Press-Enterprise Co. v. Super. Ct.*, 478 U.S. 1 (1986).

¹⁴¹ *Id.*

¹⁴² See *Zemel v. Rusk*, 381 U.S. 1, 17 (1965)

¹⁴³ *Branzburg v. Hayes*, 408 U.S. 665 (1972).

¹⁴⁴ *Id.*

framer's intent and the First Amendment were construed so that the public's right to know was the ultimate goal, it would arguably still only include a right to receive information; a right that can be distinguished from gathering information. The problem the Court encounters when it confuses the two is that there are many situations where the right to gather is not appropriate even though the right to receive information is. However, on its face the distinction between two, in terms of the Court's understanding of the ideas, seems to have collapsed on itself. It is clear that this has been why the Court has not been able to be consistent with its treatment of this newly created right. For example, in *Pell v. Procunier*, Justice Stewart who was the biggest proponent of a First Amendment right to gather in the *Branzburg* case, was a big opponent and joined the Court in rejecting that very same right (the alleged First Amendment right to gather information) when it applied to information controlled by the government.¹⁴⁵ Although the public and the press had a right to know, the Court did not agree that the press had a right to gather.¹⁴⁶ Here the Court recognized the difference. However, it still maintains the right to know as the rule. The results obtained from this line of reasoning are disastrous to jurisprudence. Our system of justice is frail indeed if the rule of law is subject to both inconsistency and

¹⁴⁵ *Pell v. Procunier*, 417 U.S. 817 (1974).

the whim of the Court, rather than what the law says. It would be pointless to have a written Constitution if the Supreme Court were allowed to create law and ignore it.

This brings up the next argument: it is a basic tenet of our system of government that the legislative branch creates the law, the executive branch enforces the law, and the judiciary branch interprets the law.¹⁴⁷ The Court admitted its own constitutional limitation Court in *Marbury* when it stated “[i]t is emphatically the province and duty of the Judicial Department to say what the law is.”¹⁴⁸ In other words, the Constitution does not empower the Court to create law.¹⁴⁹ Thus, by inventing this right and thereby exercising a power not granted to it, the Supreme Court has overstepped its authority. If there is a conflict between something a branch of government does and the constitution, the constitution must govern.¹⁵⁰ On this basis alone, the press-access right should not be allowed to stand.

Stopping short of accusing the Court of acting unconstitutionally, the First Amendment still only guarantees the public and the press equal access once government has opened its doors.¹⁵¹ Thus, if the government, through the courts,

¹⁴⁶ *Id.*

¹⁴⁷ U.S. Const. art. I; U.S. Const. art. II, U.S. Const. art. III.

¹⁴⁸ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 171 (1803) (emphasis on “say”).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Houchins v. KQED, Inc.*, 438 U.S. 1, 16 (1978) (Stewart, J., concurring).

decides to keep out the media, then First Amendment protection should not apply.

Finally, limiting the press's coverage of trials does not abridge the freedom of the press. First amendment press protection does not prevent all prohibitions regarding the press but only those laws that abridge the freedom.¹⁵² Since under this paper's argument the press would still be able to talk about the trial later on, the freedom is not abridged.

2. Media Speech Should Not Receive Absolute Protection

The next issue is whether even if the media does not have the right to access trials it still maintains the absolute right to disseminate based on the First Amendment right to freedom of speech. The answer is arguably no.

First, even if ranked as political speech, prohibition would likely still be allowed. Although the Court provides the most protection for political speech, if prohibition survives a strict scrutiny analysis it is not unconstitutional.¹⁵³ To get over the strict scrutiny bar, the State must show (1) it has used the least restrictive means, (2) there was a compelling governmental interest, and (3) the law was narrowly tailored to meet that interest.¹⁵⁴ It has been shown that the other remedies

¹⁵² U.S. Const. Amend. I.

¹⁵³ Anonymous Author, *Making Sense of Hybrid Speech: A New Model for Commercial Speech and Expressive Conduct*, 118 Harv. L. Rev. 2836 (June 2005).

¹⁵⁴ *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

used to ensure a fair trial are inadequate; the government has a compelling interest in ensuring that the system of justice is just; and limiting dissemination to trial finality still allows the public to receive information while protecting a defendant. Thus, prohibitions would survive strict scrutiny.

The threat of an unfair trial is a danger beyond the speech itself and state can enact laws to protect its citizens.¹⁵⁵ Further, the declining accuracy of the news¹⁵⁶ and the fact that is has arguably become mere entertainment¹⁵⁷ suggests that the argument that media coverage should be highly protected is tenuous at best. Ultimately, whether political or lower, dissemination about information in trials can be limited.

3. The Constitution does not Create a Hierarchy of Rights

The text of the Constitution does not provide for a ranking of rights. Therefore, when weighing the freedom to disseminate against the right to fairness or due process the Court should not have an absolute rule that speech wins. Consideration should be given to the harm, both real and possible, that could result from the speech and then a decision should be made. In short, it is dangerous policy to hold that speech trumps all other rights because it neutralizes those affected by the speech while

¹⁵⁵ See generally, U.S. Const. amend. X.

¹⁵⁶ Paul A. Logli, *The Media: Our New Judge and Jury*, http://www.ndaa.org/ndaa/about/president_message_july_aug_2006.html (last accessed September 14, 2009).

empowering those who would do harm with words. In this case, the potential harm to the media or public is outweighed by the loss of freedom, life, or property that could result from bias against a defendant. Thus, prohibition as a policy should be a consideration.

C. Remedies In Other Countries

An English judge once noted "the right to a fair trial...is as near to an absolute right as any which I can envisage."¹⁵⁸ This statement is indicative of the stance that both England and Canada take on protecting a defendant during a trial. Although England has stronger protections, both countries circumvent the problems faced in the United States by prohibiting the press from disseminating information relating to trials that can be potentially damaging so as to interfere with justice.¹⁵⁹ Although this remedy does not go as far as the solution proposed in this paper, it is indeed an effective first step solution.

In both countries, the remedy for dealing with media prejudice or rather, the means to prohibit the press, is the doctrine of contempt of court.¹⁶⁰ This doctrine allows courts to set prohibitions on trial information dissemination and then

¹⁵⁷ *Id.*

¹⁵⁸ Joanne Armstrong Brandwood, *You Say "Fair Trial" and I Say "Free Press": British and American Approaches to Protecting Defendants' Rights in High Profile Trials*, 75 N.Y.U. L. Rev. 1412 (2000) (Quoting *Regina v. Lord Chancellor ex parte Witham*, [1998] Q.B. 575, 585-86 (Q.B. Div'l Ct. 1997)).

¹⁵⁹ Neil Vidmar, *The Canadian Criminal Jury: Searching for a Middle Ground*, 62 Law & Contemp. Probs. 141 (1999).

punish those who violate the prohibition.¹⁶¹ It is often used in both Canada and England because in these countries the concepts of fair trial and justice take precedent over temporarily inconveniencing the media.¹⁶² They believe that limiting press protections in criminal trials is not just an option, but instead an obligation, because it goes towards ensuring that a defendant has a fair trial.¹⁶³

Despite being a move in the right direction, the flaws in both countries' approaches are that the remedies do not go far enough.

The English contempt remedy is based on two different types of laws: the Contempt Act of 1981 and the common law of contempt. The Act is flawed first because innocent publishers are not held in contempt¹⁶⁴ and second, because the Act only covers active proceedings.¹⁶⁵ In essence, under the act intent must be shown for punishment to be justified and even then, it does not apply to some stages of pending trials.¹⁶⁶ The common law is inherently flawed because it relies on the notion that fines will detract the press from releasing information. Wealthy media outlets may not care about the fines. A further problem is

¹⁶⁰ *Supra* n. 158; *Supra* n. 159.

¹⁶¹ *Supra* n. 158; *Supra* n. 159.

¹⁶² *Supra* n. 158; *Supra* n. 159.

¹⁶³ *Supra* n. 158; *Supra* n. 159.

¹⁶⁴ Office of Public Sector Information, *Contempt of Court Act 1981*, http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1981/cukpga_19810049_en_1 (last accessed September 15, 2009).

¹⁶⁵ *Id.*

that in England, the common law has largely been preempted. In *The Sunday Times v. United Kingdom*, the European Commission held that although a prior restraint was lawful under the common law contempt of court, it was not justified by a “pressing social need” and could not therefore be regarded as “necessary” within the meaning of Article 10(2) of the European Convention on Human Rights.¹⁶⁷ Therefore, they reversed the English decision.¹⁶⁸ Since England is a member of the European Union, that decision is binding on it.¹⁶⁹ In response, it enacted the Contempt of Court Act, which is more limited in nature as described above.¹⁷⁰

Canada also has contempt of court but it is less severe than that in England.¹⁷¹ Canada lies somewhere between the pro speech stance of the United States and the pro fair trial position taken in England.¹⁷² Its laws guarantee an accused the right “to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal,” while also providing for “freedom of the press and other media of communication.”¹⁷³ However, while Canada does not have the same bias towards speech that the United States has, by not providing stronger defendant protection it finds itself in

¹⁶⁶ *Id.*

¹⁶⁷ *Sunday Times v. U.K.*, 1979 WL 68905 (ECHR 1979).

¹⁶⁸ *Id.*

¹⁶⁹ *Supra* n. 158 at 1439-1440.

¹⁷⁰ *Id.*

¹⁷¹ *Supra* n. 159 at 151.

¹⁷² *Supra* n. 159 at 151.

¹⁷³ *Supra* n. 159 at 151.

the same position as the United States; in other words, at some point it has to choose which right is more important.

V. CONCLUSION

Freedom of expression is an important right. In a democratic society, members must be free to express their ideas and opinions. However, this freedom should not come at the expense of the right to a fair trial. Prohibiting the press from accessing or commenting on all the stages of a trial seems to be the only way to guarantee that justice is served. Ultimately, under this system everyone wins because the public can ultimately gain access once the trial is completely over with. If the Court continues to posit that freedom to access and disseminate is a right, it should make that right contingent on a defendant's choice to waive their right to a public trial. Until this happens, the notion of justice will continue to be just that in the United States . . . a notion.