Twitter Taint: Content Questioning Voir Dire in the Modern Age of Social-Media-Addled Venires

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Abstract. The Supreme Court, in Mu'Min v. Virginia, 500 U.S. 415 (1991)*, left open the question of when pretrial publicity becomes so extensive that a trial court must allow the criminal defendant to ask venirepersons the content of the pretrial publicity they consumed. The Court alluded, without answering, that a trial, at some point, can be "fundamentally unfair" if a criminal defendant cannot engage in content questioning. If any case would have seemingly forced the Court to answer this question, it was Dzhokhar Tsarnaev's—the Boston Bomber. The Court did no such thing despite how much more media—and thus pretrial publicity—exists in our internet age and despite new studies showing how damaging pretrial publicity can be for fair trial rights.*

This Comment will dig into the Court's remedies for pretrial publicity, primarily venue change, to determine when a trial is "fundamentally unfair," as suggested in Mu'Min*. When does the Constitution mandate content questioning? To answer that question, this Comment will propose a test lurking beneath the Supreme Court's pretrial publicity jurisprudence that considers the extensiveness of the publicity and how prejudicial it is to the defendant.*

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> The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.[1]

Introduction

Boom! Chaos. In the middle of the Boston Marathon, a bomb has gone off. "Blood and body parts [are] everywhere . . . as if 'people had just been dropped like puzzle pieces onto the sidewalk.'"[2] A five-year-old boy is crying "mommy, mommy, mommy."[3] Every moment of this tragedy is spread nationwide, worldwide,[4] and the Boston Bomber is born. Of course, Dzhokhar Tsarnaev did not work alone; in fact, his entire mitigation defense was that his brother, the violent mastermind of the operation, coaxed and coerced him into the terrorist attack.[5] And yet Dzhokhar Tsarnaev is *the* Boston Bomber,[6] a title bestowed upon him from the zeitgeist of modern media. But even the Boston Bomber, for as many deaths on his hands, deserves a fair trial and an impartial jury.

We live in a media-saturated landscape. In 2016, fifty-six percent of U.S. adults used their smartphones or tablets to retrieve their news, and they were more likely to use social media than any other individual traditional news source like newspapers or television.[7] In 2012, the George Zimmerman case received more coverage than the presidential election, resulting in social media outrage that likely pressured the prosecution to charge Zimmerman.[8] By 2018, ninety percent of American adults were online and likely to retrieve their news from the world wide web.[9] Thirty-six percent of American young adults retrieved their news primarily from social media the same year.[10] With numbers rising year-to-year, the

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1 Patterson v. Colorado, 205 U.S. 454, 462 (1907).

2 United States v. Tsarnaev (*Tsarnaev I*), 968 F.3d 24, 36 (1st Cir. 2020) (quoting a witness's trial testimony), *rev'd*, (*Tsarnaev II*) 595 U.S. 302 (2022).

3 *Id.*

4 *Id.* at 48.

5 *Id.* at 34, 66–67.

6 *See id.* at 113 n.96 (citing Allison Kopicki, John Lapinksi & Phil Helsel, *Americans Divided Over Death For Boston Bomber Dzhokhar Tsarnaev, Poll Finds*, NBC NEWS (Apr. 8, 2015, 7:47 PM), https://perma.cc/PCD4-U8BP (calling Tsarnaev the "Boston Bomber" in its headline)).

7 Claire C. Kates, Comment, *Protecting the Impartial Jury: A Solution of Questions*, 35 ST. LOUIS U. PUB. L. REV. 415, 426 (2016).

8 Christine L. Ruva, *From the Headlines to the Jury Room: An Examination of the Impact of Pretrial Publicity on Jurors and Juries*, *in* ADVANCES IN PSYCH. & L. 1, 7 (M.K. Miller & B.H. Bornstein eds., 2018).

9 *See id.* at 23.

10 Elisa Shearer, *Social Media Outpaces Print Newspapers in the U.S. as a News Source*, PEW RSCH. CTR. (Dec. 10, 2018), https://perma.cc/T6MF-5L39. The general average for all American adult age

number of Americans using online social media to retrieve news will likely only continue to grow.[11]

So, can spotlighted criminal defendants plead their cases before impartial juries in a media landscape like this? The problem here discussed—that of pretrial publicity—is hardly new.[12] The Court in *Patterson v. Colorado*[13] discussed this very issue over a century ago.[14] But most recently, the Supreme Court had to confront this issue with the Boston Bomber.[15] Could the Boston Bomber expect a fair and impartial jury in Boston? What about in Washington, D.C., New York, or even Alaska?[16]

In 1991, the Supreme Court toyed with the idea that criminal defendants could question specific venirepersons during voir dire on the content of the pretrial publicity they had consumed.[17] At least on the facts of the case, the Constitution did not mandate "content questioning" for a fair trial.[18] The Court left the door open that in some cases, however, the Constitution may mandate content questioning during voir dire.[19]

Although the Supreme Court did not explain when the Constitution might mandate content questioning, the Court's jurisprudence elsewhere reveals when that might be. This Comment argues defendants have the right to individually question venirepersons on the pretrial publicity they have personally consumed. This right is triggered when (1) the pretrial publicity has become nationwide such that the potential of a change of venue motion is devalued, (2) that publicity contains emotional facts that prejudice venires against the defendant to such a level that (3) the published content would be "blatantly prejudicial" were it adduced at trial. Part I of this Comment discusses the history of the constitutional right to an impartial jury. It further discusses the Court's history with pretrial publicity and its various remedies. Part II continues with scholars' analyses

groups using social media for their news is twenty percent, but all online sources total fifty-three percent. *Id.*

11 *See id.* (showing that social media as a news source is growing year-to-year).

12 This Comment focuses on the effects of publicity that potential jurors consume before trials. For a better grasp of publicity jurors might wrongly consume during trial, see B. Samantha Helgason, Note, *Opening Pandora's Jury Box*, 89 FORDHAM L. REV. 231, 231 (2020).

13 205 U.S. 454 (1907).

14 *Id.* at 462.

15 *See* United States v. Tsarnaev (*Tsarnaev II*), 595 U.S. 302, 305 (2022).

16 *See Tsarnaev I*, 968 F.3d 24, 48 (1st Cir. 2020), *rev'd*, (*Tsarnaev II*) 595 U.S. 302 (2022).

17 Mu'Min v. Virginia, 500 U.S. 415, 431 (1991).

18 *Id.* at 428–29, 438.

19 *See id.* at 425–26.

of *Skilling v. United States*,[20] *Mu'Min v. Virginia*,[21] and the Court's current jurisprudence on pretrial remedies, focusing on the various criticisms thereof. This Comment further discusses scholars' proposed solutions that, while worthwhile, ultimately treat pretrial publicity remedies as subservient to one another. Part III concludes with a solution that instead considers these pretrial publicity remedies individually, each designed to cure a defendant's specific publicity. Here, content questioning is triggered as a last resort. This Comment proposes a solution that will protect the rights of criminal defendants from an ever-expanding, pernicious, and unrestrained social media.

I. Trial by an Impartial Jury

The jury trial system grew slowly in high Medieval England, starting first as a system of *frithborh*, or "peace-pledge."[22] "[T]welve lawful men of the neighborhood" would bear witness and accuse the defendant before the local bishop "to declare the truth thereof according to their conscience."[23] These lawful men bound themselves to an oath and cloaked themselves in the titles of *jurata patriae* or *juratores.*[24] In theory, the idea was that only those men closest to the accused could truly know his character, but in practice, *juratores* often determined guilt off "vague and indefinite" "public rumors."[25] The practice eventually morphed into a system whereby an accused could seek a new jury—twelve individuals chosen by the justices—separate from his accusers.[26]

Roughly half a millennium later, the United States ratified its Bill of Rights, in part thanks to George Mason.[27] The Sixth Amendment of the Bill of Rights guarantees, among other things, a defendant's right to (1) "a speedy and public trial"; (2) a trial "by an impartial jury"; and (3) a trial in "the State and district wherein the crime shall have been committed."[28] To

20 561 U.S. 358 (2010).

21 500 U.S. 415 (1991).

22 William Forsyth, *The Origins of Trial by Jury*, *in* THE RIGHT TO A FAIR TRIAL 17, 20 & n.2 (Enid W. Langbert ed., 2005).

23 *Id.* at 20.

24 *Id.* at 22.

25 *Id.* at 20.

26 *Id.* at 23, 25.

27 R. Carter Pittman, *George Mason: The Architect of American Liberty*, *in* 21 VITAL SPEECHES OF THE DAY 925, 927 (1954) (stating the Bill of Rights "was a monumental attempt to satisfy with Mason's own proposed amendments some of Mason's *Objections* to the Constitution").

28 U.S. CONST. amend. VI.

Mason, the impartial jury was "essential to freedom" whereas the "partial . . . jur[y] [is] essential[ ] to despotism."[29]

A. *The Impartial Jury and Who Is Entitled to It*

Thanks to Mason, the Sixth Amendment entitles criminal defendants to impartial juries.[30] The federal government protects these impartial jury determinations, mandating that parties may not impeach jury decisions absent outside influence.[31] But once the jury makes its determination, the Federal Rules of Evidence restrict even criminal defendants from seeking to set aside jurors' findings.[32]

Moreover, the Sixth Amendment's protections sometimes war with other constitutional rights. The First Amendment declares that "Congress shall make no law . . . abridging the freedom of speech, or of the press," and through the Fourteenth Amendment, states may not abridge these rights either.[33] In *Nebraska Press Ass'n v. Stuart*,[34] the Supreme Court held that barriers to the free press are strictly scrutinized even when courts attempt to protect criminal defendants from the press publishing prejudicial information.[35] Other common-law countries take a different view; English judges, for example, maintain strong control over the press to protect a criminal defendant's right to a fair and impartial jury.[36] While, in theory, not impossible to overcome in the United States, the press's right to cover a trial weighs heavily, allowing the press to publish prejudicial information.[37]

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29 R. Carter Pittman, *The Creation of the Sixth Amendment Right to a Fair Trial*, *in* THE RIGHT TO A FAIR TRIAL 27, 29 (Enid W. Langbert ed., 2005).

30 U.S. CONST. amend. VI.

31 FED. R. EVID. 606(b). The only exception here being if the juror exposes any extreme racial bias during deliberations. *See* Peña-Rodriguez v. Colorado, 580 U.S. 206, 217–18, 227 (2017).

32 *Peña-Rodriguez*, 580 U.S. at 217, 223–25 (citing COLO. R. EVID. 606 and its federal counterpart).

33 U.S. CONST. amend. I; Neb. Press Ass'n v. Stuart, 427 U.S. 539, 556 (1976).

34 427 U.S. 539 (1976).

35 *Id.* at 568–70.

36 Leslie Renee Berger, Note, *Can the First and Sixth Amendments Co-Exist in a Media Saturated Society?*, 15 N.Y.L. SCH. J. HUM. RTS. 141, 172 (1998) (stating that the English government "lay[s] a heavy hand on the press through the contempt powers of the court").

37 At least insofar as "fair and impartial" means completely uninformed. *See Nebraska Press*, 427 U.S. at 569–70 ("However difficult it may be, we need not rule out the possibility of showing the kind of threat to fair trial rights that would possess the requisite degree of certainty to justify restraint."). When this judicial restraint is justified or even required is less than clear, *see id.*, and further discussion is outside the scope of this Comment.

Freedom of the press, however, does not mean the defendant is left to weather all prejudicial publications. In *Irvin v. Dowd*,[38] the criminal defendant was subjected to heavy pretrial publicity.[39] In and around a small community in Indiana, six gruesome murders occurred; extensive pretrial publicity abounded in the community and the surrounding communities.[40] Convicting—and executing, presumably—the defendant had become the town's "*cause célèbre*" once the police fingered him as the culprit.[41] Adverse publicity waterfalled from the news as media sources called the defendant a "remorseless" killer "without conscience"; covered Irvin's former run-ins with the law such as arson, burglary, dealings in juvenile court, and court martial; and published his lie detector test, plea bargain, and confession.[42] The press event went so far as to attack his court-appointed attorney for daring to defend him.[43] The Court vacated Irvin's conviction, seeing that with all the publicity—including sixty-two percent of the original venire having already formed an opinion on the case—Irvin had not been afforded a fair trial.[44]

The key phrasing there is "having already formed an opinion on the case"; a venireperson is not biased just because he or she has already heard about the case beforehand.[45] In *Patton v. Yount*,[46] for example, more than ninety-eight percent of the venire heard about the case before voir dire, yet the Supreme Court still upheld the defendant's conviction.[47] Just because jurors "remembered the case" after the four years since the original trial is irrelevant; "[t]he relevant question," instead, is "whether the jurors . . . had such fixed opinions that they could not judge impartially the guilt of the defendant."[48] Pretrial publicity's danger is not that it informs jurors about a case before trial but rather biases jurors against the defendant and solidifies juror opinions before trial evidence is adduced.[49] But, within that, trial judges will allow venirepersons to self-assess their

38 366 U.S. 717 (1961).

39 *Id.* at 725–27.

40 *Id.* at 719.

41 *See id.* at 725–26.

42 *Id*.

43 *Id* at 726.

44 *Irvin*, 366 U.S. at 726–29 (discussing how 268 of the 430-person venire made comments such as "my mind is made up," "I think he is guilty," and "he should be hanged").

45 Patton v. Yount, 467 U.S. 1025, 1035 (1984); *see also* Newton N. Minow, *Informed Jurors Can be Impartial*, *in* THE RIGHT TO A FAIR TRIAL 92, 92–94 (Enid W. Langbert ed., 2005) (discussing how juries were not historically ignorant of the fact of the case).

46 467 U.S. 1025 (1984).

47 *Id.* at 1029 (noting only two members of a 163-person venire had not heard of the case).

48 *Id.* at 1035.

49 *See id*.

own biases as to whether the venirepersons' opinions are fixed, and judges often believe these self-assessments with little to go on but the venireperson's word.[50]

B. *Pretrial Publicity and Its Remedies*

The Supreme Court recognizes the pretrial publicity prejudice problem but still hesitates to weigh the rights of criminal defendants against freedom of the press.[51] Perhaps the Court weighs rights this way because it has other remedies for curing pretrial publicity. The three primary remedies to cure extensive pretrial publicity are voir dire and the challenges that come with it, changes of venue, and continuances.[52]

1. Voir Dire, Let the Venire Do the Talking

"Voir dire" comes from the French, meaning "to speak the truth," and is a practice by which "'a judge or lawyer' examines [venirepersons] to see if the 'prospect is qualified and suitable to serve on a jury.'"[53] Each jurisdiction handles voir dire differently.[54] Some require judges to conduct the examination,[55] some allow both the judge and counsel to conduct voir

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[50] David Suggs & Bruce D. Sales, *Juror Self-Disclosure in the Voir Dire: A Social Science Analysis*, 56 IND. L.J. 245, 246 (1980); *see also* Ruva, *supra* note 8, at 11.

[51] Neb. Press Ass'n v. Stuart, 427 U.S. 539, 570 (1976).

[52] *See* Haley Loquercio, Comment, *How* Free *is Free Speech: Media Bias, Pretrial Publicity, and Defendants' Need for a Universal Appellate Rule to Combat Prejudiced Juries*, 126 PENN. ST. L. REV. 875, 885–88 (2022). Loquercio lists seven pretrial publicity remedies, including waiving jury trial, severance, sequestration, and judicial instructions. *Id.* at 885–86. However, many of these remedies waive the right to an impartial jury completely, matter only during trial to avoid jury taint, or are highly situational. *Id.* at 886–87. These remedies will not be relevant in this Comment's discussion which focuses on nationwide pretrial publicity while maintaining the right to an impartial jury.

[53] United States v. Parker, 872 F.3d 1, 3 n.1 (1st Cir. 2017) (citing *Voir Dire,* BLACK'S LAW DICTIONARY (10th ed. 2014)). This Comment uses "venireperson" throughout to differentiate between a seated juror and the panel of potential jurors. While the terms can technically be used interchangeably—*see Veniremember*, BLACK'S LAW DICTIONARY (11th ed. 2019)—to lessen confusion, this Comment will only refer to those seated on the jury as jurors and those not yet seated as venirepersons. Similarly, this Comment will use "venire" to refer to the as-yet unchosen panel of potential jurors and "jury" to refer to the chosen panel of jurors. *See Venire*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[54] Suggs & Sales, *supra* note 50, at 250–51.

[55] *See, e.g.*, State v. Morales, 915 A.2d 1090, 1090–91 (N.J. Super Ct. App. Div. 2007) (discussing the New Jersey Supreme Court's jury instructions which the trial court must ask the venire when empaneling the jury).

dire,[56] and others leave it to the judge's discretion.[57] To expedite this process, some jurisdictions require venirepersons to fill out questionnaires before a more searching voir dire.[58] Regardless of who conducts the voir dire, the Supreme Court affords vast discretion to trial judges over how voir dire is conducted.[59]

"[W]hile impaneling a jury the trial court has a *serious* duty to determine the question of actual bias."[60] Voir dire serves a vital purpose of excusing jurors who would otherwise be too biased for the government to provide litigants their right to a fair trial.[61] Thus, if a trial court's methods of voir dire are insufficient to uncover any bias hiding in the venire, the trial court has abused its discretion.[62] Yet the Supreme Court also affords wide deference to trial judges' decisions in believing self-assessments because trial judges are present to observe the venirepersons' demeanors.[63]

Thanks to voir dire, counsel has two powers to potentially strike venirepersons from the jury. The first power is striking venirepersons for cause when a venireperson displays some legally cognized deficiency such as refusal or inability to be impartial, relation to the defendant, or even harboring "conscientious opinions" on the death penalty.[64] Colorado, for example, sustains challenges for cause against venirepersons with "a state of mind . . . manifesting a bias for or against the defendant, or for or

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[56] *See, e.g.*, CAL. CIV. PROC. CODE § 223(a) (West 2023) (stating parties may submit voir dire questions to the court, but "the trial judge shall conduct an initial examination of [venire]").

[57] *See* TEX. CODE CRIM PROC. ANN. art. 35.17 (West 2023) (stating the court has discretion if "the state and defendant shall conduct the voir dire examination").

[58] *See, e.g.*, COLO. REV. STAT. ANN. § 13-71-115(1) (West 2014); *see also* Mu'Min v. Virginia, 500 U.S. 415, 425 (1991) (discussing how questionnaires could not give a trial judge access to the venirepersons' demeanor like voir dire); United States v. Tsarnaev (*Tsarnaev I*), 968 F.3d 24, 46–47 (1st Cir. 2020) (detailing the trial court's questionnaires and how both sides agreed to excuse many of the potential jurors, with the judge calling back less than twenty percent of them based solely on these questionnaires), *rev'd*, (*Tsarnaev II*) 595 U.S. 302 (2022).

[59] United States v. Tsarnaev (*Tsarnaev II*), 595 U.S. 301, 312–13 (2022); *see* William H. Farmer, *Presumed Prejudiced, but Fair?,* 63 VAND. L. REV. EN BANC 5, 7 (2010).

[60] Dennis v. United States, 339 U.S. 162, 168 (1950) (emphasis added) (first citing United States v. Wood, 299 U.S. 123, 133–34, 150 (1936); then citing Frazier v. United States, 335 U.S. 497, 511–12 (1948)).

[61] *See* United States v. Dellinger, 472 F.2d 340, 367 (7th Cir. 1972) (stating that trial courts have a duty "to explore the backgrounds and attitudes of jurors to some extent in order to discover actual bias, or cause").

[62] *See id.* ("We recognize . . . that the court's discretion is 'subject to the essential demands of fairness.'" (quoting Aldridge v. United States, 283 U.S. 308, 310 (1931))).

[63] *See Dennis*, 339 U.S. at 168, 172.

[64] *See, e.g.*, N.Y. CRIM PROC. LAW § 270.20(b)–(c), (f) (McKinney 2014); MO. ANN. STAT. § 494.470 (West 2011); COLO. R. CRIM. P. 24(b)(1)(I), (VI) (West 2022).

against the prosecution, or the acknowledgement of a previously formed or expressed opinion regarding the guilt or innocence of the defendant."[65]

Second, courts grant defendants the power to strike venirepersons from the jury based not on a venireperson's legal deficiency but on the gut feelings of the defendant.[66] Although not required by the Constitution, the peremptory challenge "is 'one of the most important of the rights secured to the accused'" and that "'[t]he denial or impairment of the right is reversible error without a showing of prejudice.'"[67] Moreover, a trial court's failure to pursue a searching voir dire denies litigants the chance to exercise this right to peremptory challenges fruitfully.[68]

But do the requirements of voir dire heighten in cases with heavy pretrial publicity? The Supreme Court had the opportunity to consider this in *Mu'Min v. Virginia*. Mu'Min, an inmate, stood accused of robbing and murdering a shopkeeper after escaping from a prison work detail.[69] Before trial, Mu'Min introduced forty-seven articles that covered his case; these articles mentioned facts such as Mu'Min's criminal record, that the state rejected his petition for parole, and that Mu'Min confessed to the crime.[70] The trial judge did not allow counsel to question the

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[65] COLO. R. CRIM. P. 24(b)(1)(X) (West 2022) ("[U]nless the court is satisfied that the [venireperson] will render an impartial verdict based *solely* upon the *evidence . . . of the court*." (emphasis added)). Presumably, this may include instances where a juror expresses the opinion online, which has gotten jurors into trouble previously when they did not seem to recall their vitriol. *See* John G. Browning, *Should Voir Dire Become Voir Google? Ethical Implications of Researching Jurors on Social Media*, 17 SMU SCI. & TECH. L. REV. 603, 606 (2014) (discussing an Oklahoma case where a juror had made, and was struck from the jury for, a Facebook post that the defendant "needs to do sometime [sic]!!" half a year before *voir dire*) (alteration in original). Notably, Oklahoma's statutory language is also less strict than Colorado's on challenging venirepersons for cause. *See* OKLA. STAT. tit. 12, § 572 (West 2015) ("[A]ny [venireperson] . . . may, nevertheless, be challenged on suspicion of prejudice.").

[66] Scott W. Howe, *Deselecting Biased Juries,* 2015 UTAH L. REV. 289, 289–90 (2015) ("The essence of the peremptory [challenge] is that it requires no good reason . . . allowing parties to excuse venire members whom they fear may be secretly unqualified or biased.").

[67] United States v. Dellinger, 472 F.2d 340, 368 (7th Cir. 1972) (quoting Swain v. Alabama, 380 U.S. 202, 219 (1965). *Batson v. Kentucky* and its progeny narrowed this view by stating that lawyers could not use a peremptory challenge to strike a venireperson because the venireperson was a member of a protected class such as race, ethnicity, and sex. 476 U.S. 79, 96, 100 (1986) (overruling *Swain* only in its stricter requirements to make a prima facie case that the prosecution is excluding African Americans using peremptory challenges). *See also* Howe, *supra* note 66, at 308 (discussing how *Batson* extends to gender and ethnicity); Jeffrey Bellin & Junichi P. Semitsu, *Widening* Batson*'s Net to Ensnare More Than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1091–96 (2011) (listing various excuses lawyers have used to escape *Batson* challenges such as "'over-intellectualize' the case"; "[N]ot smart enough"; "Graduated with a Theatre Arts degree"; and even "[H]ad considerable sympathy for [b]lack people on trial." (alterations in original)).

[68] Kiernan v. Van Schaik, 347 F.2d 775, 778–79 (3d Cir. 1965).

[69] Mu'Min v. Virginia, 500 U.S. 415, 418 (1991).

[70] *Id.*

venirepersons on the content of the pretrial publicity they had consumed and refused to strike venirepersons just for hearing about the case.[71] Thus, eight of the twelve jurors (sixty-seven percent) had previously heard of the case but had allegedly not formed an opinion.[72] When the case reached the Supreme Court, the Court worried that questions about the content of pretrial publicity the venirepersons had consumed—specific content questioning—would result in venirepersons feeling as though "they themselves were on trial."[73] Weighing interests, the Court said the Constitution would require the trial judge to ask content questions only if "the trial court's failure to" do so would "render the defendant's trial fundamentally unfair."[74] On these facts, Mu'Min's trial was not fundamentally unfair, in part because the content of the publicity was not sufficiently severe.[75]

The content of the pretrial publicity, however, can make a trial fundamentally unfair. For example, the Supreme Court held that publicity containing a defendant's forced confession rendered a trial fundamentally unfair in *Rideau v. Louisiana*.[76] There, a small-town police force filmed then broadcasted themselves "interview[ing]" the defendant, Rideau, and getting him to confess to kidnapping three bank tellers and to murdering one of them.[77] Three venirepersons heard the televised confession, but the trial court refused to strike them for cause and sat them on the jury.[78] In "[t]he kangaroo court proceedings" resulting from the televised confession, jurors were exposed to the confession "not once but three times" before the trial had begun.[79] Under this analysis, Louisiana had denied Rideau a fair trial and impartial jury, and Rideau was allowed to change venues.[80]

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71 *Id.* at 419–20.

72 *Id.* (explaining that only one venireperson unequivocally said he could not be impartial). One venireperson waivered on if she could impartially enter the jury box given Mu'Min's Islamic faith and her distrust of defense counselors. The trial court struck both venirepersons for cause. *See id.*

73 *Id.* at 425.

74 *Id.* at 425–27 (stating the "Federal Courts of Appeals" below holding otherwise do so explicitly not "on constitutional grounds").

75 *Mu'Min*, 500 U.S. at 428–29; *see also id.* at 435–36 (Marshall, J., dissenting).

76 373 U.S. 723, 727 (1963).

77 *Id.* at 723–24.

78 *Id.* at 725 (noting that two members of the jury were also deputy sheriffs).

79 *Id.* at 726–27 ("Any subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality.").

80 *Id.* at 727.

2. Changes of Venue and Continuances

Some defendants cannot fully cure their pretrial publicity with basic voir dire. The district charged with trying a defendant is often the district exposed to the most publicity.[81] Sometimes, then, to seek an impartial jury, defendants may waive one of their Sixth Amendment rights—that of being tried in the district in which the crime is committed—and remove the case to another venue.[82] Similarly, defendants may waive a different Sixth Amendment right, the speedy trial, and request a continuance.[83]

Often, crimes are inherently personal to the district where the crime occurred. In *United States v. McVeigh*,[84] for example, the defendant bombed Oklahoma's Alfred P. Murrah federal building, killing and injuring the people inside.[85] Publicity was high in Oklahoma; the media humanized the victims "in sharp contrast with the prevalent portrayals of the defendant[ ]" and "[t]elevision stations" even "conducted their own investigations."[86] Outside the Oklahoma courthouse (the one where the trial was being held, not the one McVeigh bombed), someone was selling T-shirts saying:

> Those Lost Will Never
> Leave Our Hearts
> Or be Forgotten
> April 19, 1995
> United States Court
> Western District of Oklahoma.[87]

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[81] *See, e.g.*, Skilling v. United States, 561 U.S. 358, 375–76 (2010); United States v. Tsarnaev (*Tsarnaev I*), 968 F.3d 24, 48 (1st Cir. 2020), *rev'd*, (*Tsarnaev II*) 595 U.S. 302 (2022); United States v. McVeigh, 918 F. Supp. 1467, 1474 (W.D. Okla. 1996).

[82] *Skilling*, 561 U.S. at 369–70, 372; *see also* Scott Kafker, Comment, *The Right to Venue and the Right to an Impartial Jury: Resolving the Conflict in the Federal Constitution*, 52 U. CHI. L. REV. 729, 746, 749–50 (1985) (proposing that the trial court should find a district with an impartial jury to avoid government "jury-shopping"). In other circumstances, the Court has found "it intolerable that one constitutional right should have to be surrendered in order to assert another." Simmons v. United States, 390 U.S. 377, 394 (1968) (asserting Fourth Amendment rights against unreasonable searches and seizures cannot force a defendant to surrender the Fifth Amendment right against self-incrimination). The right of being tried in the district in which the crime was allegedly committed, then, is not as strong as other rights.

[83] *See Skilling*, 561 U.S. at 372; Loquercio, *supra* note 52, at 885–86.

[84] 918 F. Supp. 1467 (W.D. Okla. 1996).

[85] *Id.* at 1469.

[86] *Id.* at 1471–73. The court here was hostile to how the media conducted these investigations, using scare quotes to portray the "investigative journalism" that the media employed. *Id.* at 1471.

[87] *Id.* at 1472.

With the severe negative publicity in Oklahoma, the trial court granted a change of venue to the neighboring district of Colorado.[88]

Fifteen years later, the Supreme Court clarified its jurisprudence over changes of venue in *Skilling v. United States*.[89] Skilling—a former Enron executive—was charged with securities and wire fraud after Enron folded.[90] The district in which Skilling was tried was the Southern District of Texas, where Enron's fall caused the most economic damage and job loss.[91] One-third of the original trial's venirepersons revealed in voir dire questionnaires that they had lost money or jobs due to Enron's collapse, and two-thirds expressed "a potential predisposition to convict."[92] The Court distilled three factors for district courts to consider on pretrial change of venue motions: (1) size of the venire; (2) prejudicial nature of the publicity; and (3) duration of the publicity.[93]

Under this test and compared to *Rideau*, Skilling's trial was not particularly unfair nor was his jury partial, so the trial court did not err in denying Skilling's motion for a change of venue.[94] First, Houston's potential venire is much larger—thirty times—than the small town in *Rideau*, so the Court considered the publicity less concentrated and thus less damaging.[95] Second, although the media was "not kind" to Skilling, his publicity mostly contained neutral or unemotional facts, and the media did not disseminate "blatantly prejudicial information" such as a "staged" confession or a "smoking-gun" as was the case in *Rideau*.[96] The Court did not, however, define what "blatantly prejudicial information" meant nor what "blatantly prejudicial information" includes and excludes. Finally, Skilling's arrest and conviction spanned four years, letting the "decibel level" of the publicity—and thus the fervor—wear down.[97]

88 *See id.* at 1474.

89 561 U.S. 358, 377 (2010).

90 *Id.* at 368–69.

91 *Id.* at 375–77 (noting that the trial court denied a motion for transfer).

92 *Id.* at 431–32 (Sotomayor, J., concurring in part and dissenting in part) (describing how some venirepersons called the defendant "guilty as sin," "smug," "greedy," and "totally unethical and criminal").

93 *See id.* at 382–83 (majority opinion). The Court also considered a fourth factor: the actual jury verdict. In Skilling's case, he was acquitted of two of his charges but not all. This verdict indicated that the pretrial publicity had not had a completely damning effect on the partiality of his trial given his partial acquittal. *Id.* However, this factor is important only for appellate review and motions for new trial as, before trial, a trial judge cannot exactly weigh in on a verdict the jury has not yet been given.

94 *See id.* at 382–84, 415.

95 *See Skilling*, 561 U.S. at 382 ("Given this large, diverse pool of potential jurors, the suggestion that 12 impartial individuals could not be empaneled is hard to sustain.").

96 *See id.* at 382–83; *see also id.* at 445 (Sotomayor, J., concurring in part and dissenting in part) (characterizing the publicity as "inflammatory").

97 *See id.* at 383 (majority opinion).

The third *Skilling* factor considers another remedy for pretrial publicity: the continuance.[98] The trial court had already granted Skilling one continuance, curing the negative publicity somewhat of its bite.[99] In matters of pretrial publicity, over time, the decibels of an individual case's coverage are likely to decrease and sap the prejudice from the publicity.[100]

3. Pretrial Publicity Outside of the Venue

Most pretrial publicity likely comes from the surrounding venue. But with social media, even local crimes can balloon into questions of national intrigue.[101] Under *Skilling*'s lens, it would seem as though no case could truly have national publicity so prejudicial as to create an issue of unfairness.[102] After all, if the size of the potential venire dilutes publicity considerably enough to bar a defendant from a change of venue, nationwide publicity will never be sufficiently concentrated to be unfair.

The Court of Appeals for the First Circuit considered this issue among others in *United States v. Tsarnaev*[103] ("*Tsarnaev I*").[104] Tsarnaev sought a change of venue from Boston's District Court of Massachusetts, but the trial court noted that the nearby venues in New York and Washington, D.C., had been just as exposed to publicity as Boston had.[105] Sixty-eight percent of Massachusetts's original venire had already formed an opinion as to Tsarnaev's guilt.[106] But, with the post-bombing hashtag that Boston rallied under, #BostonStrong, the shelter-in-place order the Massachusetts government sent out while it pursued Tsarnaev, and the continuing fervor of media attention, the Court of Appeals for the First Circuit remanded Tsarnaev's case, mandating content questioning of the venirepersons.[107] The government contended otherwise, relying on *Mu'Min* and believing that questioning the jury would only bring out prejudice and spread it from one venireperson to the other.[108] The court instead first held that the trial court's reliance on *Mu'Min* came from a misunderstanding of the Supreme Court's constitutional ability to impose

98 *Id.*

99 *See id.* at 372, 383.

100 *See* Patriarca v. United States, 402 F.2d 314, 317 (1st Cir. 1968).

101 *See* Ruva, *supra* note 8, at 7.

102 *See Skilling,* 561 U.S. at 382.

103 968 F.3d 24 (1st Cir. 2020).

104 *See generally id.*

105 *Id.* at 48.

106 *Id.*

107 *Id.* at 38–39, 58, 63.

108 *Id.* at 61.

standards on state trial courts and, thus, their voir dire procedures. The court then held that

> [f]ar from "reinforc[ing] potentially prejudicial information," content-specific questioning would have brought such material front and center. The parties and the judge could then assess the publicity's effect on the [venirepersons'] ability to reach a fair verdict, thus putting the judge in a position to take any necessary measures to protect Dzhokhar's fair-trial rights.[109]

The Supreme Court, however, reversed, stating the Court of Appeals for the First Circuit had no right to "supplant" the discretion of a lower court absent some "manifestly erroneous" abuse of that discretion.[110] Indeed, the Supreme Court focused less on the merits of the case and instead on a federal court of appeal's ability to force procedural standards onto a district court.[111] Still, to the Supreme Court, "Dzhokhar Tsarnaev committed heinous crimes. The Sixth Amendment nonetheless guaranteed him a fair trial before an impartial jury. He received one."[112]

II. Criticisms of the Supreme Court's Standards

Scholars heavily criticize the Supreme Court's jurisprudence on pretrial publicity.[113] The psychological sciences assert that the purely damaging effect of any media people consume severely hampers their ability to be impartial during trial.[114] Legal scholars treat this jurisprudence no better, often criticizing the Court's standards and how it applies facts to these standards.[115]

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109 *Tsarnaev I*, 968 F.3d at 60–61 (first alteration in original).

110 United States v. Tsarnaev (*Tsarnaev II*), 595 U.S. 302, 316, 323 (2022) (internal references omitted).

111 *See id.* at 1036; *see also id.* at 1041–42 (Barrett, J., concurring) (questioning if the Supreme Court should revisit the question of how much authority the federal courts of appeal have in determining lower courts' procedural standards).

112 *Id.* at 1041; *see also id.* at 1050–51 (Breyer, J., dissenting) (considering that the additional "judicial care" comes with any death penalty case). Justice Breyer's opinion denotes a key facet of this case when it comes to pretrial publicity. Dzhokhar Tsarnaev's trial was less about guilt generally and more about if his guilt rose to the level that required the death penalty. That should color some of the discussion of this case and how it differs from cases like *Mu'min*, *Skilling*, etc.

113 *See, e.g.*, Jordan Gross, *If Skilling Can't Get a Change of Venue, Who Can? Salvaging Common Law Implied Bias Principles from the Wreckage of the Constitutional Pretrial Publicity Standard*, 85 TEMP. L. REV. 575, 578, 615 (2013).

114 *See* Ruva, *supra* note 8, at 5.

115 Gross, *supra* note 113, at 578, 615.

A. *Psychologists Disagree with the Supreme Court's Jurisprudence*

Human beings, generally, are not built to be impartial and not built to change their minds; jurors are thus likely to harbor biases gained from pretrial publicity.[116] The more negative and emotional the pretrial publicity, the more prejudiced jurors will be and the longer their opinions will remain unchanged or unchangeable.[117]

People cannot force themselves to be unbiased.[118] The human brain does not work the way the Supreme Court assumes it does.[119] Time, rather than healing opinions created by pretrial publicity, only cements opinions in people's minds.[120] Jurors will often ignore newer testimony or evidence that contradicts older testimony or evidence, and this extends to pretrial publicity as news sources are the first "evidence" that jurors will consume.[121] Jurors will even mistake information they learned from pretrial publicity as evidence brought up at trial in an effect known as "source memory error[]."[122] And through the internet, jurors may easily access publicity again and again well after initial publication in stark contrast to traditional news sources.[123] Even more neutral publicity tends to increase convictions regardless of how extensively defendants use voir dire.[124]

But the more emotional the facts, the more dangerous the facts are to maintaining impartial juries.[125] Emotional facts stay lodged in a juror's brain longer than neutral facts.[126] Jurors exposed to negative pretrial

116 Ruva, *supra* note 8, at 10–11, 15 (cautioning that its study is limited).

117 *Id.* at 10, 18; Geoffrey P. Kramer, Norbert L. Kerr & John S. Carroll, *Pretrial Publicity, Judicial Remedies, and Jury Bias,* 14 L. & HUM. BEHAV. 409, 432 (1990).

118 Ruva, *supra* note 8, at 15.

119 *See generally id.*

120 *See id.* at 16.

121 *Id.*

122 *Id.* at 22.

123 *See id.* at 6. This concern is hardly new. Scholars have been concerned about the effect of online publicity staying accessible since it was "on-line" publicity. *See generally* Erika Patrick, *Protecting the Defendant's Right to a Fair Trial in the Information Age*, 15 CAP. DEF. J. 71 (2002). However, newspapers may well have also been kept rather than thrown away; in theory, someone may save an article well after initial publication to reread. Libraries may also have kept newspapers and other periodicals for jurors to potentially retrieve, but even still, looking up a defendant's name on Google is significantly easier than searching for a specific article from an older, physical newspaper.

124 Kramer et al., *supra* note 117, at 411.

125 *Id.* at 432; Ruva, *supra* note 8, at 18.

126 Kramer et al., *supra* note 117, at 432.

publicity are "significantly more likely" to view neutral evidence at trial in favor of the prosecution.[127]

Even news about other trials can prejudice a juror against a defendant. Major social movements like #MeToo may well have attributed to higher conviction rates and negative feelings towards defendants accused of sexual assault.[128] On the other side, jurors who are exposed to "rape myths" on social media—such as the idea that a promiscuous woman is "asking for it"—are more likely to find a defendant not guilty in a sexual assault case.[129] A victim's sexual history is often inadmissible as evidence at trial, yet jurors may well unwittingly leak this inadmissible evidence into their decisions and deliberations.[130]

Moreover, jurors cloak their decisions—whether they realize it or not—in legal language, justifying their convictions and acquittals with standards like "beyond a reasonable doubt" when the true decision was the pretrial publicity-born bias.[131] Similarly, implicit biases against other classes, like race, may worm their way into jurors' minds, unbidden and unknown, despite the jurors having honestly self-assessed during voir dire that they are completely unbiased.[132]

A major point of some scholars' ire centralizes on the Supreme Court's idea that a venireperson can accurately self-assess for impartiality and that trial judges can tell if a venireperson is able to remain impartial through this self-assessment.[133] The Court is unlikely to change direction on its self-assessment jurisprudence,[134] so scholars theorize that lowering a trial's oppressive, formal atmosphere would allow venirepersons to feel safer and more comfortable to more accurately self-assess.[135]

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127 Ruva, *supra* note 8, at 14; *see also* Lauren Belyea & Julie Blais, *Effect of Pretrial Publicity via Social Media, Mock Juror Sex, and Rape Myth Acceptance on Juror Decisions in a Mock Sexual Assault Trial*, *in* PSYCH., CRIME & L. 1, 15 (2021).

128 Belyea & Blais, *supra* note 127, at 15.

129 *See id.* at 4.

130 FED R. EVID. 412(a)–(b); *see also* Ruva, *supra* note 8, at 21–22.

131 Belyea & Blais, *supra* note 127, at 9, 14. Although with the inexactness of the standard, the jurors may be justified in their faux convictions, something the studies take for granted was impossible.

132 Note, *Black Lives Discounted: Altering the Standard for Voir Dire and the Rules of Evidence to Better Account for Implicit Racial Biases Against Black Victims in Self-Defense Cases*, 134 HARV. L. REV. 1521, 1529–31 (2021). This may occur despite the promises from *Aldridge* that in certain cases—such as a black-on-white homicide—questions about racial bias are constitutionally required. *See* Aldridge v. United States, 283 U.S. 308, 309–10, 313–14 (1931).

133 Suggs & Sales, *supra* note 50, at 246, 267, 269; Ruva, *supra* note 8, at 11; *see also Voir Dire on Content, Not Effect: Lessons from the Tsarnaev Appeal,* JD SUPRA, LLC (Aug. 12, 2020), http://perma.cc/Z7BG-GTWL.

134 *See* Dennis v. United States, 339 U.S. 162, 168, 172 (1950).

135 Suggs & Sales, *supra* note 50, at 268–70.

B. *Legal Scholars Propose Media Control and Criticize Voir Dire*

Other scholars have proposed, contrary to Supreme Court jurisprudence, alternative solutions to this pretrial publicity problem. Some say the United States should address the near-free rein it has given news media in covering trials.[136] The United States should look to the United Kingdom, where judges have tighter control over the news media during trials.[137] After all, the Court admits that "reversals are but palliatives; the cure [to pretrial publicity] lies in those remedial measures that will prevent the prejudice at its inception."[138] Others call upon the Court to craft a standard from cases like *Sheppard v. Maxwell*,[139] *Irvin*, and *Rideau* for when trial judges should know to control media attention.[140]

This solution misses some of the bigger picture. Not only is the Supreme Court already reluctant to charge the news media with contempt,[141] but social media complicates the problem further. Is a court expected to place a gag order on all news stations and all social media pundits? Should courts send out charges of contempt for every tweet, YouTube video, Facebook post, or TikTok? This seems an unlikely solution. Although, with ever-improving algorithms, perhaps a solution exists to have social media companies like Twitter carry out court orders.[142]

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136 Berger, *supra* note 36, at 172–73.

137 *Id.* (positing this solution among others and ultimately deciding that controlling the source is a better solution to avoid prejudicial pretrial publicity); *see also* Neil Vidmar, *The Canadian Criminal Jury: Searching for a Middle Ground*, 62 L. & CONTEMP. PROBS. 141, 151–52 (1999) (considering similar issues in Canadian juries and suggesting a middle ground between England's stricter contempt controls and America's use of, among other things, peremptory challenges).

138 Sheppard v. Maxwell, 384 U.S. 333, 345–46, 363 (1966) (explaining that the media also impugned defense counsel's honor when counsel sought to fight against the wave of negative publicity with positive publicity). The media, ironically, accused counsel of "mass jury tampering" worthy of review by the bar association. *Id.* at 346.

139 384 U.S. 333 (1966).

140 John A. Walton, *From O.J. to Tim McVeigh and Beyond: The Supreme Court's Totality of the Circumstances Test as Ringmaster in the Expanding Media Circus*, 75 DEN. U. L. REV. 549, 592–93 (1998).

141 *See* Neb. Press Ass'n v. Stuart, 427 U.S. 539, 557 (1976); *see also* Vidmar, *supra* note 137, at 151.

142 Or perhaps social media platforms could be called upon to moderate this content on their own. Although far outside the scope of this Comment, these platforms could use their content moderation processes—those already in place—to also moderate pretrial publicity. For an example of how this could work, see other sources that discuss political content moderation through the Communications Decency Act, Section 230, such as Edward Lee, *Moderating Content Moderation: A Framework for Nonpartisanship in Online Governance*, 70 AM. U. L. REV. 913 (2021). Perhaps this same content moderation could one day extend to pretrial publicity with legislation. *Cf. id.* "[I]nternet platforms must think more systematically about their powers of governing people—and how they can wield those powers in ways consonant with democratic principles, including . . . due process . . . and . . . protections of individual rights on their platforms." *Id.* at 931.

But even this solution is imperfect. Take the Dzhokhar Tsarnaev case for example. Much of the media attention arose during the initial bombings.[143] Should the trial judge—who had not yet been chosen—have stopped the #BostonStrong movement, which was designed to bring together a community ravaged by a massive terror attack?[144] Moreover, when Tsarnaev was on the run, Boston was under protective lockdown.[145] A defendant's right to a fair trial should not trump the government's need to protect everyone else from dangerous, on-the-run terrorists.[146]

Impartial jurors can be found through extant methods, like voir dire, even if they are methods not yet perfected or sufficiently protective. And courts prefer curing pretrial publicity through voir dire anyway.[147] Scholars, however, lampoon how courts and counsel conduct voir dire.[148] As more and more of the venire is dismissed for admitting to a lack of impartiality, the remaining venirepersons tend to clam up, refusing to admit the same.[149] Jurors may also be downright dishonest. They may take on hero complexes as "stealth-juror[s]" who "audition[ ]" to be the one who convicts a defendant by lying to the court, trying everything to seat themselves on the jury.[150]

Some scholars even blame counsel for these partial juries, focusing on the lazy and lethargic way counsel conducts voir dire.[151] "The jury selection process is such a crucial step in ensuring a fair jury trial, yet it is often one of the poorest utilized segments. This is attributed to the adequacy of

143 *See* United States v. Tsarnaev (*Tsarnaev I*), 968 F.3d 24, 39 (1st Cir. 2020) (implying the media coverage died down over time even if the #BostonStrong movement did not), *rev'd*, (*Tsarnaev II*) 595 U.S. 302 (2022).

144 *Id.* ("And the Boston Strong movement remains vibrant to this very day.").

145 *Id.* at 49.

146 *See* Walton, *supra* note 140, at 588 (relating how Timothy McVeigh's defense team praised the trial court's anticipation of the inevitable pretrial publicity to how the judge "minimized the impact of the publicity prior to the confession").

147 Newton N. Minow & Fred H. Cate, *Who is an Impartial Juror in an Age of Mass Media?*, 40 AM. U. L. REV. 631, 649–50 (1991).

148 *See, e.g.*, Rachel Harris, *Questioning the Questions: How Voir Dire is Currently Abused and Suggestions for Efficient and Ethical Use of the Voir Dire Process*, 32 J. LEGAL PROF. 317, 320–22 (2008).

149 Irvin v. Dowd, 366 U.S. 717, 728 (1961) ("No doubt each juror was sincere when he said that he would be fair and impartial . . . but the psychological impact requiring such a declaration before one's fellows is often its father."); Minow & Cate, *supra* note 147, at 651–52 (citing Edward Bronson, *The Effectiveness of Voir Dire in Discovering Prejudice in High-Publicity Cases: An Archival Study of the Minimization Effect* 29 (1989) (writing for the 25th anniversary meeting of the Law and Society Association)).

150 Ana P. Moretto, Note, *Presumed Guilty: An Examination of the Media's Prejudicial Effect on the Boston Marathon Bombing Trial*, 42 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 65, 83 n.166 (2016) (quoting Farmer, *supra* note 59, at 9).

151 Harris, *supra* note 148, at 321.

attorney performance, the reluctant disappointment of federal judges, and the distaste of the process by [venirepersons]."[152] Additionally, some charge that counsels' peremptory challenges create partial juries.[153] With peremptory challenges and the ease of escaping *Batson v. Kentucky*,[154] counsels whittle venires and eventually juries down to nubs of bias that, in theory, favor their side.[155] Still, if the solution in high-publicity cases is just telling lawyers, "do better at your jobs," that is not much of a solution. Frankly, a defendant's rights should not rest on the immense skill of his or her counsel to conduct painfully long and searching voir dires to remove all questions of bias, especially when trial judges may limit the voir dire.

Some scholars propose improving the efficacy of voir dire through "Voir Google" or "Facebooking the Jury" to weed out venirepersons who are inaccurate (knowingly or otherwise) in their answers and vows of impartiality during voir dire.[156] Voir Google is essentially using social media to see what sort of biases venirepersons have, thus letting counsel strike them from the jury.[157] But the issue with this solution is twofold. First, not all courts allow counsel to Voir Google the venire.[158] The Supreme Court is loath to force standards on trial courts for jury selection as it is—especially to state courts—so it is unlikely to hold that the Constitution requires Voir Google any time soon.[159] Second, venirepersons may find serving on a jury even more onerous and distasteful knowing their online presence (e.g., Facebook posts, tweets, or comments on news stories) is just a transcript for counsel to judge them and kick them from a jury.[160]

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152 Kates, *supra* note 7, at 433 (citing Harris, *supra* note 148, at 320–22).

153 Howe, *supra* note 66, at 291–92.

154 476 U.S. 79 (1986).

155 Howe, *supra* note 66, at 310, 330 (arguing that evading *Batson* "require[s] the skills of an average eighth grader" and stating that "[a]s a . . . Public Defender . . . before *Batson*, I exercised peremptories disproportionately against white persons, and prosecutors in my cases exercised them disproportionately against black persons"); Bellin & Semitsu, *supra* note 67, at 1091–96. *But see* Howe, *supra* note 66, at 330 (stating the racially-motived, but *Batson*-avoiding, challenges often resulted in a "racially mixed" jury).

156 *See, e.g.*, Browning, *supra* note 65, at 606–07; Zachary Mesenbourg, Note, *Voir Dire in the #LOL Society: Jury Selection Needs Drastic Updates to Remain Relevant in the Digital Age*, 47 J. MARSHALL L. REV. 459, 469–70 (2013).

157 Browning, *supra* note 65, at 606–07; Mesenbourg, *supra* note 156, at 469–70.

158 Browning, *supra* note 65, at 604–05.

159 United States v. Tsarnaev (*Tsarnaev II*), 595 U.S. 302, 314–16 (2022); *see also* United States v. Tsarnaev (*Tsarnaev I*), 968 F.3d 24, 60 (1st Cir. 2020) (stating that the decision in *Mu'Min* came more from the Supreme Court's hesitance to impose standards on state courts than the facts of the case).

160 *See* Browning, *supra* note 65, at 614; *see also* Howe, *supra* note 66, at 308 (arguing one reason *Batson* exists is not just for the defendant but to protect jurors from the "stigma[tizing] or "dishonor[ing]" effects of being kicked from a jury for prejudicial reasons).

C. *Scholars' Thoughts on Content Questioning*

The final potential remedy for curing pretrial publicity is content questioning. Out of the gate, the Supreme Court faced heavy criticism for its ruling in *Mu'Min v. Virginia*.[161] "The Court in *Mu'Min* chose judicial economy over fairness."[162] Scholars said that without content questioning, the defendant has no basis for using his or her peremptory challenges.[163] To these scholars, however, hope was stored in *Mu'Min*'s language: content questioning may well be constitutionally required if the defendant's trial would otherwise be "fundamentally unfair."[164]

But when is a trial "fundamentally unfair"? Professor John Walton believes this standard is triggered when a defendant's opportunity for a change of venue is destroyed by nationwide publicity.[165] If a case were to reach national infamy, the trial court should individually question venirepersons on the content of the pretrial publicity they consumed.[166] Defendants could use this content questioning to determine, in a "totality of [the] circumstances" test, if a venue change or continuance is needed and, if not, seat the jurors from those remaining unbiased venirepersons.[167] Judges, not a venireperson, would decide if a venireperson were too partial.[168] The alternative would be courts dismissing any case with such nationwide pretrial publicity, and if the defendant was guilty, he or she could evade justice altogether.[169]

The two major problems with articles contemporary to *Mu'Min* boil down to one central issue: today's landscape has changed from that of the nineties. First, these articles could not have anticipated that the Supreme Court would clarify its venue change and thus pretrial publicity jurisprudence in *Skilling*, granting an insight into how the Court views pretrial publicity remedies. Second, these articles could hardly have

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161 *See, e.g.*, Walton, *supra* note 140, at 582–83 (characterizing the *Mu'Min* decision as "life-cheapening"); Brian P. Coffey, Note, Mu'min v. Virginia: *Reexamining the Need for Content Questioning During Voir Dire in High Profile Criminal Cases*, 13 PACE L. REV. 605, 606–07 (1993); David Edsey, Note, Mu'Min v. Virginia*: The Supreme Court's Failure to Establish Adequate Judicial Procedures to Counter the Prejudicial Effects of Pretrial Publicity*, 23 LOY. U. CHI. L.J. 557, 558 (1992).

162 Edsey, *supra* note 161, at 573.

163 Coffey, *supra* note 161, at 639–40.

164 Walton, *supra* note 140, at 584 (quoting Mu'Min v. Virginia, 500 U.S. 415, 425–26 (1991) (citing Murphy v. Florida, 421 U.S. 794, 799 (1975))).

165 *See id.* at 591–92.

166 *See id.* at 585, 589–90.

167 *Id.* at 585, 590.

168 *See id.*

169 *See id.* at 591–92.

guessed how online media— specifically social media—would explode the potential for pretrial publicity.[170]

When the Court in *Skilling* created a test for change of venue, it finally gave trial courts standards.[171] Not that the *Skilling* decision was without its detractors.[172] "The Supreme Court bases its test on facts from cases with extremely outdated media technology . . . focus[ing] on cases from the 1960s, when only a few television channels and newspapers were available in most communities."[173] After all, social media—and the population of American adults who use it to retrieve their news—has grown since the early to late nineties.[174] The power of adverse pretrial publicity is not just in the hands of news media who, in theory, have strict standards of journalistic integrity to avoid poisoning venires.[175] The nationwide pretrial publicity issues that Professor Walton discussed have increased: the extent of the publicity for McVeigh's bombing pales in comparison to Tsarnaev's bombing just twenty years later.[176] And yet, McVeigh killed significantly more people.[177]

III. Content Questioning: The Ultimate Remedy for Pretrial Publicity

Whereas before, the Supreme Court was hesitant to lay too heavy a hand on the press, now the proliferation of social media would render such a solution potentially moot. Thus, while the remedies crafted in the

170 *See* Ruva, *supra* note 8, at 6–7.

171 *See* Skilling v. United States, 561 U.S. 358, 382–84 (2010).

172 *See* Christina Collins, Note, *Stuck in the 1960s: Supreme Court Misses an Opportunity in* Skilling v. United States *to Bring Venue Jurisprudence into the Twenty-First Century*, 44 TEX. TECH L. REV. 391, 393, 418–19 (2012); Gross, *supra* note 113, at 579, 615.

173 Collins, *supra* note 172, at 418. Professor Walton meanwhile uses these 1960s cases, stating the precedence created in cases like *Irvin* and *Rideau* will ultimately be a guide for courts. *See* Walton, *supra* note 140, at 589.

174 Shearer, *supra* note 10 (noting how social media recently overtook print media as the number one source of news for all adults).

175 How much journalists actually abstain from publishing unfairly inflammatory material to avoid damaging individuals is contested. Berger, *supra* note 36, at 172 (news media is only as restrained in covering criminal cases as "[it] wants . . . to be" (citing KENNETH S. DEVOL, MASS MEDIA AND THE SUPREME COURT: THE LEGACY OF THE WARREN YEARS 375 (4th ed. 1989))).

176 *Compare* United States v. McVeigh, 918 F. Supp. 1467, 1469–73 (W.D. Okla. 1996) (discussing how nationwide coverage died over time), *with* United States v. Tsarnaev (*Tsarnaev I*), 968 F.3d 24, 48 (1st Cir. 2020) (noting that the bombings made international and national coverage), *rev'd*, (*Tsarnaev II*) 595 U.S. 302 (2022). Moreover, a March 2024 search on Google of "Timothy McVeigh" results in about 1,270,000 hits, "Dzhokhar Tsarnaev" only about 560,000 hits, but "The Boston Bomber" about 31,000,000 hits, and even "Oklahoma City Bombing" reveals less than 5,000,000 hits. *Cf.* United States v. Costello, 666 F.3d 1040, 1044 (7th Cir. 2012).

177 *Compare McVeigh,* 918 F. Supp. at 1469 (168 deaths), *with Tsarnaev I*, 968 F.3d at 34 (3 deaths).

1960s no longer maintain the same strength in curing pretrial publicity,[178] the ultimate concern from then remains: courts cannot easily control the media so they must control the effects thereof.

The focus on curing pretrial publicity must adapt to the new reach of modern media not present in the 1960s. Pretrial publicity remedies should consider this reach and its content rather than focus on the source.[179] Essentially, courts should focus on "blatantly prejudicial" content as considered in *Skilling*.[180] Content questioning may well serve how trial courts determine when a change of venue is, in fact, needed.[181] But if the Supreme Court was unwilling to force content questioning by itself in *Mu'Min*, it is unlikely to force content questioning to serve changes of venue, which also requires "blatantly prejudicial" publicity.[182] Regardless, the Court reveals that it takes a more holistic approach to pretrial publicity cures. The third *Skilling* change of venue factor contemplates that a sufficient time between the publishing of prejudicial information and trial will cure the publicity of its bite.[183] What is the third *Skilling* factor then but an express consideration of a continuance and how—when a continuance may be untenable—a motion to change venue is required?[184] These remedies do not serve one another; they work for whichever is most necessary for the defendant's rights and publicity.

Thus, the Supreme Court considers the cure for any defendant's pretrial publicity by focusing on three questions. First, how prolific and concentrated is the publicity?[185] Second, how prejudicial is the publicity by revealing inadmissible, blatantly prejudicial information?[186] Third, considering the first two elements, what is the appropriate remedy for the specific pretrial publicity's negative effect?[187]

178 *See* Collins, *supra* note 172, at 418–21.

179 *See* Skilling v. United States, 561 U.S. 358, 382–83 (2010).

180 *Id.*

181 *See* Walton, *supra* note 140, at 592–93.

182 *Skilling*, 561 U.S. at 382–83.

183 *Id.* at 383.

184 *See id.*

185 *Cf. id.* at 382–83. The first two factors consider how the size of a venire and extent of the publicity could affect the concentration of negative publicity; the larger the pool the venire can be drawn from, the less likely individuals will have heard the publicity and the less prejudiced the individual venirepersons. *Id.*

186 *Id.*; *see, e.g.*, Marshall v. United States, 360 U.S. 310, 312–13 (1959) (per curiam) (noting how jurors were exposed to evidence that was otherwise inadmissible at trial).

187 *Compare* United States v. McVeigh, 918 F. Supp. 1467, 1469–73 (W.D. Okla. 1996) (stating that publicity was less severe in neighboring state of Colorado), *with* United States v. Tsarnaev (*Tsarnaev I*), 968 F.3d 24, 54–55 (1st Cir. 2020) (discussing how publicity was just as severe in neighboring New York and Washington, D.C.), *rev'd*, (*Tsarnaev II*) 595 U.S. 302 (2022).

Thus, determining when content questioning should be triggered requires courts to look at the general publicity first: both its reach and its content. The Constitution requires content questioning when:

(1) the publicity is nationwide so much so that it devalues a change of venue;[188]

(2) the content of the publicity is prejudicial towards the defendant;[189] and

(3) the publicity itself reveals information that would be otherwise inadmissible as evidence at trial and is so severe as to be "blatantly prejudicial."[190]

Once the need for content questioning is triggered, the trial court and counsel would then individually question venirepersons on the content of the publicity each venireperson has consumed.

After all, pretrial publicity is essentially an injury without remedy against the injurer. Defendants often cannot seek injunctive relief against news sources,[191] so the remedy lies not in the source of the pretrial publicity but in the audience. The cure to pretrial publicity "lies in those remedial measures that will prevent the prejudice" from infecting the jury.[192]

A. *Content Questioning—When and How*

The purpose and effect of a remedy cannot be known without a full understanding of the injury. So, to know when the remedy of content questioning is necessary, the trial court must understand the injury. And

188 *See generally* Walton, *supra* note 140.

189 *See generally* Ruva, *supra* note 8.

190 *Compare Skilling*, 561 U.S. at 382–83 (noting that pretrial media coverage being unkind was "less memorable and prejudicial"), *with* Rideau v. Louisiana, 373 U.S. 723, 723–27 (1963) (discussing the defendant's admission of guilt in an interview broadcast on television), *and* Irvin v. Dowd, 366 U.S. 717, 725–28 (1961) (recounting six months of a barrage of headlines, including a confession of guilty, ahead of trial).

191 Neb. Press Ass'n v. Stuart, 427 U.S. 539, 557–69 (1976). However, depending on if the media is intentionally dishonest, news sources may well be liable for defamation. *See* RESTATEMENT (SECOND) OF TORTS § 571 (AM. L. INST. 1977). Whether individuals subjected to such adverse pretrial publicity have much of a case for defamation is another matter entirely and thus outside the scope of this Comment. These individuals may be involuntary public figures, potentially requiring these pundits to act with "actual malice" for any sort of recovery. *See* N. Y. Times Co. v. Sullivan, 376 U.S. 254, 281–82 (1964); Marcone v. Penthouse Int'l Mag. for Men, 754 F.2d 1072, 1084 & n.9 (3d Cir. 1985).

192 Sheppard v. Maxwell, 384 U.S. 333, 345–46, 363 (1966).

as not all pretrial publicity renders a trial fundamentally unfair,[193] publicity alone is meaningless without an audience to consume it. While courts may not yet know the specific content of what individual venirepersons have consumed before content questioning, trial judges should still be aware of the general tone and concentration of the publicity.[194] Judges should be aware of the publicity just by their existence in the venue and awareness of local gossip and news stories.[195] Other than that, counsel and voir dire would supplement the judges' knowledge. The first question courts must ask, however, is who, in general, has consumed the publicity in question.

1. When Everybody Knows Your Name

Changes of venue and continuances will not always be sufficient to cure the original venire of prejudice in the modern age of social media. As *Tsarnaev I* reveals, sometimes changes of venue just do not work as publicity becomes nationwide; Boston, New York, and Washington, D.C., were all prejudiced against Tsarnaev.[196] Similarly, continuances can only do so much to remedy emotional facts that stay lodged in jurors' minds, and even the longest of continuances may not reasonably cure prejudice as publicity is now more than ever re-accessible.[197] So content questioning becomes the final remedy, albeit only alongside other triggers, in these situations as courts seek to seat a jury untainted by prejudicial pretrial publicity.

But trial courts may have some difficulty determining when publicity has become "nationwide." In *Tsarnaev I*, publicity extended to nearby venues, but that does not automatically mean all venues were

193 Patton v. Yount, 467 U.S. 1025, 1035 (1984); Minow, *supra* note 45, at 93–94.

194 Mu'Min v. Virginia, 500 U.S. 415, 432–33 (1991) (O'Connor, J., concurring) (explaining that Mu'Min presented forty-seven articles detailing Mu'Min's alleged crimes). Thus, the trial court was aware of the general tone and extent of the publicity without being aware of what specific venirepersons were familiar with. *Id.*

195 *Id.* at 433 (stating that trial judges are "familiar with the potentially prejudicial publicity to which the jurors might have been exposed").

196 United States v. Tsarnaev (*Tsarnaev I*), 968 F.3d 24, 54–55 (1st Cir. 2020) (noting that publicity was just as severe in neighboring New York and Washington, D.C.), *rev'd*, (*Tsarnaev II*) 595 U.S. 302 (2022).

197 Ruva, *supra* note 8, at 7, 10, 18; Kramer et al., *supra* note 117, at 432. The alternative would be to hold criminal defendants indefinitely until all publicity is likely forgotten. But then when the venire is finally called, venirepersons may still look up a case beforehand thanks to modern internet and social media keeping news stories more readily accessible. Similarly, once trial nears, stories may begin to flare up again.

prejudiced.[198] Like Tsarnaev's defense team, counsel could survey surrounding venues to see how widespread the publicity has become.[199] Similarly, counsel may also present the nearby and far away venues' local articles detailing what publicity has reached said venues.[200]

Nonlocal publicity will be more difficult to prove on social and online media. Although potentially localized, online sources are not always local the way a city newspaper might be. Even if an online post or article is local, the viewers may well span the country or the globe. To prove the reach of the publicity, counsel may present both nonlocal sources and nonlocal social media interactions of any source. For example, a post that says, "We at the University of Montana stand with the victims of the Las Vegas shooting" indicates a Nevada crime has reached to at least Montana. Or nationwide publicity could well be assumed given the traction individual online posts or articles receive. For example, when an article or post receives fifty thousand interactions, a trial court may safely assume that not all fifty thousand of those interactions are from the local venue. And if that fifty thousand likely includes nonlocal interactions, so would five hundred thousand, five million, and so on to whatever number of interactions could be considered per se nationwide. While some of these sources or interactions may be bots or otherwise artificial, courts can still presume nationwide publicity after enough instances of nonlocal sources. The more evidence counsel finds of nonlocal sources engaging with the story in some way, the more likely publicity has become nationwide.

The first requirement for content questioning must be triggered in these circumstances. After all, with publicity this extensive, a change of venue only displaces the defendant into another publicity-addled venire, albeit potentially one with less personal connection to the case.[201] An alternative would be to require trial courts to find a venue without such substantial pretrial publicity. For example, would Tsarnaev have had a fair

198 *Tsarnaev I*, 968 F.3d at 54–55.

199 *Id.* The defense team's "own survey" revealed the nearby prejudiced venues. *Id.*

200 Mu'Min attempted to do something similar with his own venue. *See Mu'Min*, 500 U.S. at 418. For example, Tsarnaev's counsel potentially could have shown that publicity had even reached across the country to Colorado, California, and Alaska. *See, e.g.*, Colleen Long & Jennifer Peltz, *NYC Mayor: Boston Suspect Said NY was Next Target,* GAZETTE (Apr. 25, 2013), https://perma.cc/R4PH-BELJ (a local newspaper from Colorado Springs, Colorado); *Marathon Bombing Suspect's Lawyer Invoke McVeigh*, TIMES-STANDARD (Aug. 29, 2018, 12:00 AM), https://perma.cc/A7X2-SF9c (a local newspaper from Humboldt County, California); Dermot Cole, *Boston Cop Who Shot Bomb Suspect Has Brothers in Fairbanks,* DAILY NEWS MINER (Apr. 28, 2013), https://perma.cc/TY2Z-4EB7 (a local newspaper from Fairbanks, Alaska).

201 *See Tsarnaev I,* 968 F.3d at 51–52 (describing the #BostonStrong movement, which clearly focuses on Boston over other venues, and which was an issue during trial as followers of the movement would clearly be biased against Tsarnaev were they on the jury); *see also* Skilling v. United States, 561 U.S. 358, 375–76, 379 (2010).

trial in the District for the Northern Mariana Islands or District of Guam? Potentially, but as one of the Supreme Court's fears for content questioning is wasting a court's time,[202] querying every other potential venue seems less expeditious than just allowing content questioning of individual venirepersons. Thus, when a change of venue becomes pointless, a fair trial requires courts to seek an alternative remedy. Such publicity would be fundamentally unfair because the defendant has no remaining remedies to cure the nationwide pretrial publicity other than content questioning.

This is just the first step. Neutral publicity is not nearly as dangerous as emotional publicity and requires fewer procedural protections;[203] dry stories of corporate corruption are not emotional enough to warrant a change of venue.[204] So, how do courts know when the publicity is emotional enough? Voir dire and the publicity itself reveal the driving emotion—and the extent of the emotion—behind the press's narrative.

2. Everybody Knows Your Name and Hates You

Voir dire is the best guide for when trial courts should know that the general content the venire has consumed was blatantly prejudicial. Courts already use voir dire extensively to determine when venirepersons will be constitutionally incapable of fulfilling their duties as jurors, and counsel use it to determine when venirepersons will be unlikely to rule favorably towards their clients for peremptory challenges. Since the venire is, in theory, drawn from a cross-section of the community, venirepersons are a wealth of information about the biases of that community.

In *Irvin*, the trial court dismissed sixty-two percent of the venirepersons who had already formed opinions of guilt based on written questionnaires alone.[205] The court in *Sheppard* did the same, revealing all but one venireperson having consumed some form of pretrial publicity.[206] The venire reveals its own exposure absent clear misconduct like stealth

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202 *See Mu'Min*, 500 U.S. at 446 (Marshall, J., dissenting) (criticizing the majority's concerns of overburdening trial courts and choosing to weigh the defendant's rights as less worthy of protection than judicial expediency).

203 Ruva, *supra* note 8, at 10, 18; Kramer et al., *supra* note 117, at 432.

204 *See Skilling*, 561 U.S. at 382–83 (differentiating the "not kind" stories surrounding Skilling and those dramatic stories that "imprinted indelibly in the mind of" *Rideau*'s jury).

205 Irvin v. Dowd, 366 U.S. 717, 727 (1961) (noting that the court dismissed 268 of the 430-person venire).

206 Sheppard v. Maxwell, 384 U.S. 333, 342, 345, 363 (1966) (finding 74 of the 75-person venire read about the case or heard broadcasts about it).

jurors.[207] A trial court can find which remedy is appropriate and which one is inappropriate from these venirepersons' answers.

Moreover, how the venire reacts to pretrial publicity is something they reveal during voir dire. Take the community in *Irvin*, who were frank about their view of the defendant: a "remorseless" killer that "should be hanged."[208] When the trial court dismissed sixty-two percent of the venire for having formed similar opinions,[209] the trial judge was on notice that something was inherently wrong with the venire itself thanks to the pretrial publicity. Compare this to *Mu'Min*, where much of the negative publicity was not directed at the defendant but at the lax prison security and where the venirepersons claimed their opinions were not fixed.[210] When most of the original venire has formed an opinion as to the case and that opinion is negative towards the defendant, trial judges are on notice that the pretrial publicity is prejudicing the community and, thus, the jury against the defendant. After all, even those venirepersons who did not admit to wanting to see the victim strung up may well have been exposed to such publicity and harbor similar feelings whether they realize it or not.

Comparing *Irvin* to *Skilling* is informative. The original *Skilling* voir dire resulted in the court dismissing only fifty percent of the venirepersons, and the trial court did not remove many of those venirepersons for pre-existing opinions about Enron or Skilling but rather for hardship to the jurors.[211] Now, this Comment does not suggest a raw number calculation for when the venire is clearly prejudiced. The caselaw clearly supports, however, that as the number of venirepersons with unalterably closed minds increases towards two-thirds or more, the Supreme Court is more likely to hold that the pretrial publicity was unfairly prejudicial.[212] Clearly, when prejudice is this widespread, the prejudicing effect of the publicity reaches far and has staying power. The Court in *Skilling* noted that such a concentration—using a rough ratio of the size of the venire to the amount of publicity—was an element for

207 Farmer, *supra* note 59, at 8–9.

208 *Irvin*, 366 U.S. at 726–27.

209 *Id.* at 727.

210 Walton, *supra* note 140, at 584 (citing Mu'min v. Virginia, 500 U.S. 415, 434–35 (1991) (Marshall, J., dissenting)); *see* Mu'Min v. Virginia, 500 U.S. 415, 418–20 (1991).

211 Skilling v. United States, 561 U.S. 358, 372 (2010). The opinion is less than clear about how many jurors were dismissed for what reasons, however. For example, of the original 400 venirepersons, roughly twenty-two percent were dismissed (90 individuals) for hardship. One hundred nineteen were removed for "cause, hardship, or physical disability," but the Supreme Court does not break down these categories into smaller percentages. *Id.* Regardless, Skilling's venire was not nearly as predisposed towards convicting him as Irvin's venire was.

212 *See, e.g.*, *Irvin,* 366 U.S. at 726–27; Silverthorne v. United States, 400 F.2d 627, 635 (9th Cir. 1968) (sixty-six percent).

constitutionally requiring a change of venue.[213] Concentration is a valid consideration when courts determine if content questioning is required as well. Trial courts can use the concentration of already-biased-to-allegedly-unbiased venirepersons, using voir dire to poll such metrics. When two-thirds of the venirepersons have formed a negative opinion, as was the case in *Irvin*[214] or an even larger proportion, as was in the case *Sheppard*,[215] trial courts should take that as a good sign that the publicity is severe, and the content of that publicity is damaging to the defendant's fair trial rights.

The Supreme Court only partially challenged this analysis in *United States v. Tsarnaev* ("*Tsarnaev II*").[216] Although the Court decided this case on a federal appellate procedural standard, it was also frank about how Dzhokhar Tsarnaev received a fair trial.[217] Yet *Tsarnaev I* is a case wherein sixty-eight percent of the original voir dire questionnaires revealed already formed opinions of guilt,[218] and only five percent of the original venire remained after individual voir dire.[219] *Tsarnaev I* does not defeat this analysis for two reasons. First, sixty percent of the sixty-eight percent who claimed to have formed an opinion also claimed they could set those opinions aside.[220] Second, the Court of Appeals for the First Circuit noted that "the nature of the publicity . . . was, as discussed, largely factual and the untrue stuff was *no more inflammatory than the evidence presented at trial*."[221] Thus, it is a necessary but not sufficient condition that the publicity be widespread and well known, prejudicing the venire against the defendant. Publicity is prejudicial when the venire is unwavering in its opinions and the content in the publicity is more inflammatory than the evidence admissible at trial.[222]

3. Twitter Taint: The Poison of "Blatantly Prejudicial" Publicity

Articles are also evidence for determining how prejudicial the publicity is. Before any specific content questioning, defense can bring

213 Skilling v. United States, 561 U.S. 358, 382–84 (2010).

214 *Irvin,* 366 U.S. at 728–29.

215 Sheppard v. Maxwell, 384 U.S. 333, 345, 363 (1966).

216 595 U.S. 302 (2022).

217 *Id.* at 324.

218 United States v. Tsarnaev (*Tsarnaev I*), 968 F.3d 24, 48 (1st Cir. 2020), *rev'd*, (*Tsarnaev II*) 595 U.S. 302 (2022).

219 *Id.* at 50.

220 *Id.* at 48.

221 *Id.* at 48, 55–56 (emphasis added).

222 *See id.* at 48.

forward articles—and prosecution can rebut—showing what kind of content these articles contain. Do these articles contain blatantly prejudicial information such as a forced confession or otherwise inadmissible evidence?[223] Do these articles craft a grand narrative of bringing justice to an evil defendant?[224] Or is the content merely "not kind"?[225] Trial courts should consider both the venire's answers and the actual publicity before having to query what exact publicity the individual venirepersons have consumed.

But what content is "blatantly prejudicial" rather than just "not kind"? Televised, forced confessions are a good way to start. The Court in *Skilling* looked at the forced confession in *Rideau* as an example of blatant prejudice.[226] Thus, evidence is blatantly prejudicial if it would be eventually inadmissible at trial due to its how unfairly prejudicial its admission would be.[227] After all,

> the exposure of jurors to information of a character which the trial judge [would rule] so prejudicial it could not be directly offered as evidence . . . is almost certain to be as great when that evidence reached the jury through news accounts as when it is part of the prosecution's evidence.[228]

This bears out in how psychologists view evidence as well. The "source memory error" defect in the human brain indicates that jurors exposed to evidence through publicity, though inadmissible trial, may bring such evidence with them into the jury deliberation room.[229] What would be the point of creating entire standards of what evidence is and is not admissible at trial only to allow jurors to smuggle in that same evidence regardless? Considering how strictly protective courts are of jury deliberation post-verdict,[230] content questioning voir dire before seating a jury may well be the only opportunity defendants have to root out whether this "evidence" has reached the jury.

This leaves one of the most important rules of evidence that courts consider on every witness, document, and deposition: Rule 403 (and its state equivalents). Trial courts understand that some evidence, although relevant, may "unfair[ly] prejudice . . . [or] mislead[ ] the jury."[231] This rule

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223 Skilling v. United States, 561 U.S. 358, 382–83 (2010); Rideau v. Louisiana, 373 U.S. 723, 727 (1963).

224 Irvin v. Dowd, 366 U.S. 717, 726 (1961).

225 *Skilling*, 561 U.S. at 382–83.

226 *Id.*; *see also Rideau*, 373 U.S. at 727.

227 *See* Marshall v. United States, 360 U.S. 310, 311–13 (1959); *Skilling*, 561 U.S. at 382–83; *see also Rideau*, 373 U.S. at 727.

228 *Marshall*, 360 U.S. at 312–313 (citing Michelson v. United States, 335 U.S. 469, 475 (1948)).

229 *See* Ruva, *supra* note 8, at 22.

230 *See* FED. R. EVID. 606(b); *see also* Peña-Rodriguez v. Colorado, 580 U.S. 206, 217, 226 (2017).

231 FED. R. EVID. 403.

creates a workable standard for trial courts to adhere to. "[B]latantly prejudicial," from *Skilling*, however, indicates something worse than merely "unfair[ly] prejudic[ial]" from the federal rules and state equivalents.[232] This standard of prejudice would guide trial courts into understanding the prejudicial nature of the publicity; if the publicity were evidence, would it survive the Rule 403 balancing test?[233] Would it even be close? If the trial judge would consider the evidence substantially unfair at trial, that same evidence is substantially unfair in the jurors' minds during deliberations. And if the publicity is worse than just that, it is "blatantly prejudicial."

This final question of blatantly prejudicial content considers whether the publicity contains "emotional" facts rather than legal or neutral facts. These emotional facts are inadmissible at trial for fear jurors may well let their emotional sides overbear their logical sides.[234] Psychologists also say such emotional evidence is (1) more likely to stick in jurors' heads than neutral evidence and (2) more likely to prejudice jurors against defendants unfairly.[235] Thus, not only is this evidence more likely to devalue a continuance, it is also more likely to prejudice the venire against the defendant.

Emotional facts are the sort that tend to pit the venue's community against the defendant. For example, the media in *Irvin* pitted the community and a selfless sheriff who "devote[d] his life to securing [the defendant]'s execution" against a "remorseless" killer "without a conscience"—the defendant.[236] Clearly these facts create an emotional

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232 *See Blatant,* MERRIAM–WEBSTER.COM, https://perma.cc/L82H-M9LT (defining the term as "completely obvious, conspicuous, or obtrusive especially in a[n] . . . offensive manner" and listing "blatant disregard for the rules" as an example sentence). This language seems to indicate that for the publicity to be too prejudicial, it would need to be "obvious[ly], conspicuous[ly] . . . or offensive[ly]" unfair to the defendant. Compare this to the weaker language of merely "unfair" for "unfairly prejudicial." *Unfair,* MERRIAM–WEBSTER.COM, https://perma.cc/C5XR-MHY (defining the term as "marked by injustice, partiality, or deception").

233 *See, e.g.*, United States v. McVeigh, 153 F.3d 1166, 1221 (10th Cir. 1998) (detailing how the government did not attempt to introduce any gruesome post-mortem photographs of McVeigh's bombing, which hints that, like testimony of the same, such evidence would have been rightfully excluded); *see also* Strozier v. United States, 991 A.2d 778, 784–85 (D.C. 2010) (considering that autopsy photos are only admissible in this instance because the addition probative value of corroborating expert testimony).

234 *See* FED. R. EVID. 403 advisory committee's notes on proposed rules ("'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly . . . an emotional one.").

235 Ruva, *supra* note 8, at 18 (citing Kramer, et al., *supra* note 117); Kramer, et al., *supra* note 117, at 432.

236 Irvin v. Dowd, 366 U.S. 717, 725–26 (1961) (stating further that the awaited trial of the defendant was the "*cause celebre*" of the town).

narrative likely to stick in jurors' minds even though, at trial, the defendant's conscience and remorse are not, strictly speaking, relevant to the mens rea, causation, or actus reus of the crimes. These were emotional facts. Compare this to *Tsarnaev I*, where the defendant's publicity was "largely factual" rather than focusing on the death, pain, and destruction he caused, in other words the emotional facts of the case.[237] Consider instead if the publicity had focused on the "[b]lood and body parts [being] everywhere . . . as if 'people had just been dropped like puzzle pieces onto the sidewalk,'" and then consider if the trial judge would have allowed that same evidence adduced through publicity to be adduced at trial.[238] If admitting the footage would have been reversible error at trial, that same evidence should also be blatantly prejudicial when published, requiring content questioning.

Framing pretrial publicity completely through a lens of evidence law will also assist trial courts in ruling on pretrial publicity cases.[239] Trial courts handle evidentiary questions all the time, so their understanding of the rules of evidence allows them to make reasoned decisions on what sort of publicity is prejudicial. This Comment is neither suggesting courts import all of evidence law into pretrial publicity analyses nor suggesting trial courts determine if every anchor's every statement falls into a hearsay exception. It would be absurd to suggest that publicity is "blatantly prejudicial" because it fails to follow the strict evidentiary standards of courts.

Irvin and *Marshall v. United States*[240] provide the answer here. While the media introduced evidence of the defendant's plea bargain, which would have been likely inadmissible and unfairly prejudicial evidence at trial, the plea agreement alone is likely not blatantly prejudicial.[241]

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237 United States v. Tsarnaev (*Tsarnaev I*), 968 F.3d 24, 55–56 (1st Cir. 2020), *rev'd*, (*Tsarnaev II*) 595 U.S. 302 (2022); *but see id.* at 36–37.

238 *Id.* at 36.

239 Framing pretrial publicity content questioning this way may well also implicate a completely different constitutional concern: the Confrontation Clause. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. Couching it this way may well lower the bar for when content questioning is required. However, these considerations are outside the scope of this Comment.

240 360 U.S. 310 (1958) (per curiam).

241 *See Irvin*, 366 U.S. at 725–26 (including also otherwise inadmissible evidence like former convictions including a juvenile conviction); FED. R. EVID. 410 (plea agreements); *see also* FED. R. EVID. 404(b), 609(d) (inadmissibility of crimes, wrongs, and other acts to prove propensity to commit crimes, especially juvenile crimes against a criminal defendant). This Comment is not suggesting that all these pieces of information would have been blatantly prejudicial alone, but they do exemplify how news media has nowhere near the same level of concern over what evidence it adduces than to do courts. Therefore, trial courts need to weigh all the publicity's "evidence" itself while considering the actual prejudice it would produce.

However, the *Irvin* case saw much worse publicity than just the plea agreement.[242] News media called the defendant a "remorseless" killer "without conscience" with a long rap sheet. [243] The blatantly prejudicial publicity must be substantial in either volume (what the court in *Skilling* called "decibel level"[244]) or in severity. Similarly in *Marshall*, the Supreme Court held evidence of the defendant's prior bad acts were inadmissible at trial, but this same information was also published before trial, creating reversible prejudice in the jury.[245] Trial courts, thus, already have standards by which they may judge the content of publicity, which are the evidence standards they use already.

4. Considerations of this Comment's Approach

Still, the fears that plagued the Court in *Mu'Min* can rear their heads. Of course, the additional procedural hurdle of individually asking jurors what pretrial publicity they have consumed will add time to trial proceedings. When a trial reaches this level of publicity, however, courts and counsel should already be anticipating additional procedural hurdles regardless. This solution may sound like just one more complication, but a defendant's rights should trump judicial expediency when publicity becomes this severe and prejudicial. And luckily these large publicity cases likely exist as more of an exception than a rule.

Additionally, this Comment does not suggest that all venirepersons must remain completely ignorant of the facts of a case to sit on a jury and that courts should strike all venirepersons who have heard of the defendant. It merely suggests that venirepersons should not sit on juries if they have been exposed to certain material that—through no fault of the venireperson's—are prejudicing them against the defendant. The worry that jurors who are excused face some sort of indignity[246] lessens when the blame lies not on the venireperson but on the media. It is the media and its effects that are being excused, not the venireperson.

After all, trial judges are afforded discretion when determining if venirepersons are biased,[247] and the content questioning will not

242 *See Irvin*, 366 U.S. at 725.

243 *Id.* at 726.

244 Skilling v. United States, 561 U.S. 358, 383 (2010); *see also* Patriarca v. United States, 402 F.2d 314, 317 (1968) (referring to the amount of media coverage as "decibels").

245 *Marshall*, 360 U.S. at 311–13.

246 Minow & Cate, *supra* note 147, at 651–52 (discussing how venirepersons want to avoid being struck).

247 Dennis v. United States, 339 U.S. 162, 168, 172 (citing United States v. Wood, 299 U.S. 123, 133–34, 150 (1936) and Frazier v. United States, 335 U.S. 497, 511–12 (1948)).

automatically invalidate a venireperson. It will, however, raise red flags for judges to determine (and counsel to argue) if venirepersons truly can be as impartial as they claim.[248] While the venirepersons may not remember every article, they are likely to retain the prejudicial facts they learned from those articles. Venirepersons will then still have to self-assess before the trial judge, but now the trial judge knows exactly what facts the venireperson has been exposed to. Will a judge be likely to believe a venireperson's assurances of impartiality knowing that the venireperson saw multiple articles involving what a monster the defendant was?[249] Most likely not. Will a judge be more likely to believe a venireperson's assurances of impartiality knowing the venireperson saw a televised confession? Most likely not. Trial judges may implicitly trust self-assessments because, in part, the trial judge knows very little about the venireperson beyond his or her demeanor. But when the question is less about knowing the venireperson and more about knowing what that venireperson has consumed, trial judges can make informed decisions.

Moreover, the concern that jurors would "feel that they themselves [are] on trial"[250] would lessen when the questioning (1) occurs out of the hearing of other venirepersons and (2) focuses on the content of the media rather than the venirepersons. Additionally, these individual questionings undercut the traditional worry that venirepersons will clam up as they see the judge dismiss other venirepersons.[251] The questioning should instead focus on what content was produced and seen, which would save venirepersons from feeling as though their media consumption was somehow inherently wrongful.[252]

Finally, this test raises a possibly unsettling consequence: a defendant's fair trial rights rest on the media. If the media decides to focus on one fact over another, their decisions alter a defendant's rights at trial. The remedies for pretrial publicity are meant to be cures for the media's less-than-restrained hand in publishing prejudicial information. In so doing, the media is not controlling a defendant's fair trial rights. Instead, courts are just reacting to the media's publishing decisions. Yes, this proposed standard ultimately puts some power in the press's hands. But

248 Venireperson self-assessment is not likely to drop from the Supreme Court's jurisprudence; it has been distrusted for years yet always wins out. *See* Silverthorne v. United States, 400 F.2d 627, 638–39 (9th Cir. 1968); JD SUPRA, *supra* note 133.

249 *See* Loquercio, *supra* note 52, at 888 ("Judicial instructions are not only ineffective, but they can be harmful because instructions to avoid specific publicity . . . inadvertently call attention to that publicity.") (citing *Prejudicial Publicity in Trials of Public Officials*, 85 YALE L.J. 123, 124 n.9 (1975)).

250 *See* Mu'Min v. Virginia, 500 U.S. 415, 425 (1991).

251 Minow & Cate, *supra* note 147, at 651–52.

252 However, this is only for pretrial publicity. Obviously when jurors consume media after the judge instructs them otherwise, that is a separate issue. *See* Helgason, *supra* note 12, at 233–34.

the press will likely be more concerned with ad or subscription revenue and journalistic fervor and integrity rather than gaming a defendant's fair trial rights. Meanwhile, nothing can control the vindictive caprices of social media users, most of whom will likely be unaware that they could even alter defendants' rights at trial.

B. *Testing the Test*

So, in what sort of case does the content questioning requirement arise?

Take a hypothetical where the defendant, Mason Doe, is accused of bombing a town in Texas. The death toll is at nearly fifty people and the emotional facts the crime creates are severe. Unlike the McVeigh trial, however, the trial court did not control the publicity.[253] Instead, like the Zimmerman trial, Twitter was alight.[254] Doe's alleged attack—some say racially motivated—garnered negative publicity in the Western District of Texas before the negativity spread online. Soon, social media pundits were calling for Doe's head as more traditional news sources began sharing images of the dead bodies resulting from what was allegedly his bombing. These images include a photo of a child's last moments, his corpse clutched tightly in his mother's bloody, sooty arms.

Defense finds out that not only was Doe's name on Twitter's trending tab at least ten times, but each time his name was trending, that trending tab garnered upwards of fifty thousand interactions and ten times that in views each time. The tweets in question call Doe a "heartless" and disgusting "murderer" and a racist. Similar interactions happen with posts on Facebook and videos on YouTube, all detailing Doe's "remorseless, psychotic nature." TikTok influencers call for the death penalty. In the Eastern District of Louisiana and Northern District of Mississippi, local newspapers run stories after the bombing; Doe's defense team manages to pull together nearly three hundred different articles from around the surrounding districts and beyond, all gruesomely detailing the pain and suffering Doe allegedly caused.

Here, any motion for change of venue or continuance would be fruitless. Although less personally affected, many potential jurors around the country saw the bloody bodies and destruction of Doe's terrorist attack. These horrific images are burned into the minds of many who read the newspapers and Twitter feeds. No continuance will be helpful with these emotional facts either. During the first round of voir dire questionaries, the trial judge sends away sixty-five percent of the venire

253 Walton, *supra* note 140, at 549–51, 553.

254 Ruva, *supra* note 8, at 1, 7.

for having formed steadfast opinions as to Doe's guilt. Here, Doe's fair trial rights would require content questioning of the remaining venire to ensure that individual venirepersons were not exposed to "blatantly prejudicial" publicity such as photos of the mutilated bodies. The extent, fervor, decibels, and content of the publicity reached a "blatantly prejudicial" level because (1) its reach is national, (2) the publicity is negative towards Doe, and (3) the publicity contains much content that is more than just unfairly prejudicial and would be inadmissible at trial.[255] The trial court would need to handle content questioning individually, with each venireperson's voir dire out of hearing of the others.[256]

Compare Doe with Jan George. George stands accused of a school shooting, and George's publicity is just as widespread as Doe's, making a change of venue pointless. In contrast, both social media and traditional media pundits focused on more than just the death toll. In fact, most of the country's ire was reserved for the federal agents who, aware of George's plans, failed to stop George and state officers who sat around doing nothing while George rampaged in the school.[257] While not exactly kind to George, most of the emotional publicity is not directed at George; the hatred is directed towards the federal and state officers. How dare they fail to stop this horror? George's publicity was not "blatantly prejudicial" because a continuance may well remove the bite from the prejudice. Even now, George's name is fading into the background as parents seek to sue the officers for their failure to save the children inside the school. Although the reach of the publicity is large, a continuance would help solve the prejudice because the publicity is not prejudicial towards the defendant; the zeitgeist is against the government instead. No doubt defense counsel can find some vitriol directed at George. Nevertheless, in an adversarial system, the trial court should be unimpressed by the weight of evidence. The prosecution proves that most of the wider-reaching publicity is not prejudicial toward George, so content questioning is not required. A continuance will properly remedy the publicity because George's less prejudicial publicity will fade with time.

Similarly, compare George with Alan Smithee. Smithee, like Doe and George, is accused of a heinous, heart-rending crime. Smithee, an alleged

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255 Strozier v. United States, 991 A.2d 778, 784–85 (D.C. 2010); FED. R. EVID. 403 advisory committee's notes on proposed rules.

256 United States v. Tsarnaev (*Tsarnaev I*), 968 F.3d 24, 61 (1st Cir. 2020) (acknowledging but disagreeing with the trial court's determination that content questioning would "reinforc[e] potentially prejudicial information" not just in individual venirepersons but the rest of the venire who overhear), *rev'd*, (*Tsarnaev II*) 595 U.S. 302 (2022); *see also* Suggs & Sales, *supra* note 50, at 269.

257 Similar to how much of the public outcry in *Mu'Min* was also reserved for the laxer prison security. *See* Walton, *supra* note 140, at 584 (citing Mu'Min v. Virginia, 500 U.S. 415, 434–35 (1991) (Marshall, J., dissenting)).

arms trafficker, massacred most of a town in remote Alaska. What publicity emerges is vitriolic and emotional and is directed at Smithee just like Doe's. Smithee is painted as a remorseless monster. But the rest of the nation is mostly unconcerned; the publicity stopped in the Alaska town and a few surrounding communities. Twitter, the national press organizations, and other social media sources worry about other outrages for the most part. The federal government chooses to prosecute the crime, saying Smithee acted just to cover up his arms tracking operation, thus acting in interstate commerce. Here, however, using the *Skilling* factors, Smithee has every ability to change venue because (1) the size of the town in Alaska is small and the publicity concentrated around that same area, (2) the publicity was more than just "not kind," (3) and the publicity lasted quite some time.[258] Like George, then, Smithee is not entitled to content questioning because his right to seek a change of venue was not destroyed by nationwide publicity. Although the content of his publicity was just as negative as Doe's, thus devaluing a continuance, Smithee could safely change venue to another district court in the Ninth Circuit like California or Washington.

C. *Potential Issues of Implementation*

With the Supreme Court's recent reluctance to implement additional protections in cases with extensive pretrial publicity,[259] how likely is the Court to accept that the Constitution requires content questioning during voir dire at any point despite *Mu'Min*'s hints to the contrary? Perhaps not likely.

Instead, the right to content questioning may stem from the same nebulous pool of rights from which the peremptory challenge arises rather than directly from the Constitution.[260] The right to question venirepersons' "backgrounds and attitudes" on the case are the only way a defendant may intelligently use a peremptory challenges; otherwise the peremptory challenge is to be an "empty" right.[261] In cases with heavy, blatantly prejudicial pretrial publicity, content questioning may be the only way to uncover these backgrounds and attitudes. Thus, content

258 *See* Skilling v. United States, 561 U.S. 358, 382–84 (2010).

259 United States v. Tsarnaev (*Tsarnaev II*), 595 U.S. 302, 324 (2022); *Skilling*, 561 U.S. at 399–400; Mu'Min v. Virginia, 500 U.S. 415, 431–32 (1991).

260 *See* United States v. Dellinger, 472 F.2d 340, 368 (1972) (stating peremptory challenges are "one of the most important of the rights secured to the accused" (quoting Swain v. Alabama, 380 U.S. 202, 219 (1965))).

261 *Id.* (first citing United States v. Esquer, 459 F.2d 431, 434 (7th Cir. 1972); then citing United States v. Lewin, 467 F.2d 1132 (7th Cir. 1972); and then citing Spells v. United States, 263 F.2d 609, 611 (5th Cir. 1959)).

questioning would query these background attitudes born originally from the media. Even still, the federal Supreme Court may not buy such an argument.

Instead, state supreme courts may be the best grounds for creating standards in their own constitutions. Not only is the federal Supreme Court unlikely to waggle its finger at state courts for crafting additional constitutional standards,[262] state supreme courts are the masters of their own constitutions.[263] Although unsatisfying for those who want a uniform federal standard, state courts also provide a lower bar for required publicity. Although this Comment so far suggests that content questioning is required only in cases of nationwide publicity, this comes from the U.S. Constitution's federal district requirements.[264] State constitutions provide similar venue protections for criminal defendants, but they do so on a state, rather than national, level.[265] Under this theory, the standard to prove a change of venue is fruitless would lower for criminal defendants if the power to create a content questioning right is left to state supreme courts. Instead, criminal defendants need not provide nationwide publicity but rather statewide publicity.

Conclusion

Courts already have the tools they need to truly cure this paradox of the Sixth Amendment.[266] Trial judges need to understand the extent and vitriol publicity subjects a defendant to. Venirepersons reveal this prejudice in their answers during voir dire as does the publicity itself. This Comment's measured solution protects the efficacy of voir dire without turning every trial into a media investigation because the right to content questioning is triggered only when the general publicity is extensive and prejudicial.

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262 United States v. Tsarnaev (*Tsarnaev I*), 968 F.3d 24, 60 (1st Cir. 2020) (stating that *Mu'Min*'s ruling was only because the Supreme Court was hesitant to apply standards on state court proceedings), *rev'd*, (*Tsarnaev II*) 595 U.S. 302 (2022).

263 Stearns v. Minnesota, 179 U.S. 223, 232 (1900) ("The general rule of this court is to accept the construction of a state constitution placed by the state Supreme Court as conclusive. One exception . . . is . . . contract[s].").

264 U.S. CONST. amend. VI.

265 *See, e.g.*, ME. CONST. art. I, § 6 ("[T]he accused shall have a right . . . [t]o have . . . a jury of the vicinity."); FLA. CONST. art. I, § 16 ("[T]he accused shall . . . have the right . . . to have a speedy and public trial by impartial jury in the county where the crime was committed."); ARIZ. CONST. art. II, § 24 ("[T]he accused shall have the right . . . to have a . . . trial by an impartial jury of the county in which the offense is alleged to have been committed."); COLO. CONST. art. II § 16 ("[T]he accused shall have the right to . . . an impartial jury of the county or district in which the offense is alleged to have been committed.").

266 Kafker, *supra* note 82, at 746, 749–50; *see generally* FED. R. EVID.

Consider also how political certain cases can become. As just a single example in the time since the first draft of this Comment, an altercation between two people on a New York City subway became national news.[267] In the court of public opinion, guilt was decided, in part, on political lines. Left-leaning commentators demanded criminal charges in yet another case of White-on-Black violence.[268] Right-leaning commentators declared the actions to be a heroic example of how necessary self-defense and defense-of-others rights are in cities with liberal soft-on-crime policies.[269] Politicians exacerbate this problem, commenting on pending matters before all facts come to light and, more importantly, before a jury has seen the facts with the procedural protections of trial.[270] Will the venirepersons go into the jury box with their political affiliations in mind?

"A trial is either fair or not. There is no gray area."[271] This Comment's test provides courts a tool to uncover evidence during voir dire to prevent prejudice from infecting the jury. Modern jurors must be impartial; we should not return to a system of *frithborh.* The Bill of Rights is not a list of empty promises, and the judicial system's duty is to ensure this is so.

267 Rebecca Falconer, *Former Marine Indicted in New York Subway Death of Jordan Neely*, AXIOS (June 14, 2023), https://perma.cc/PY4Y-SSRV.

268 *See, e.g.*, Brittany Packnett Cunningham, *The Cost of White Discomfort*, CUT (May 12, 2023), https://perma.cc/8CPC-RCWC ("It's near impossible to find language visceral enough for the rage I feel about the *murder* of Jordan Neely. . . . A man was lynched yesterday. . . . choked to death by a *white* former marine . . . [and] Black people know the many manifestations of supremacy well." (emphasis added)).

269 *See, e.g.*, Paul du Quenoy, Opinion, *Oppressed New Yorkers Have a Right to Self-Defense,* NEWSWEEK (May 10, 2023, 6:30 AM), https://perma.cc/P3X2-9DPP.

270 *See id.* (referring to U.S. Rep. Alexandria Ocasio-Cortez's tweets on the Jordan Neely incident).

271 Farmer, *supra* note 59, at 5.