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MEDIA IMPACT AND THE RIGHT TO AN IMPARTIAL JURY IN DEATH PENALTY TRIALS

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I. TRIAL BY MEDIA

In the early morning hours of November 13, 2022, four University of Idaho students were found brutally murdered in their off-campus home in Moscow, Idaho.¹ One of the earliest public announcements came from the University, informing students that classes would be canceled on November 14th to honor the victims.² This seemingly simple message struck a

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¹ Aya Elamroussi & Veronica Miracle, *Police Work Through Grief and 'Complex' Details in University of Idaho Killing, Official Says*, CNN (Nov. 18, 2022, at 22:10 ET), <https://www.cnn.com/2022/11/18/us/university-of-idaho-killings-friday/index.html> (on file with LMU Law Review).

² Anna Velasquez, *University of Idaho Cancels Classes to Honor Student Victims*, KLEW (Nov. 14, 2022, at 9:01), <https://klew.com/news/local/university-of-idaho-cancels-classes-to-honor-student-victims> (on file with LMU Law Review).

national nerve and quickly sparked a media wildfire.³ Long before Bryan Kohberger was ever named a suspect, the case had already been tried in the headlines.⁴ By the time of his arrest, he was not just a man accused, he was a man convicted in the court of public opinion, long before he would ever stand before a jury.⁵

In the United States, the Sixth Amendment to the Constitution expressly guarantees criminal defendants the right to trial by an impartial jury.⁶ Protecting this right is both vital and increasingly difficult, especially in high-profile cases that draw extensive media attention. In today's digital age, twenty-four-hour news networks and social media platforms flood the public with sensational coverage, fueling public curiosity and shaping perspectives of guilt or innocence well before the trial commences.⁷ This note explores how media saturation undermines a defendant's right to an impartial jury and the constitutional challenges that arise when public opinion threatens to overshadow the role of a neutral trier of fact.

This note contends that while the Constitution deliberately ensures public participation in the administration of justice through the jury system, today's sensationalist media environment threatens the impartiality of that system. By embedding bias, amplifying prejudice, and influencing both the selection and decision-making of jurors, particularly in death penalty cases, modern media challenges the role of the

³ Brianda Perez, *University of Idaho Holds Vigil for 4 Students Killed in Moscow*, KREM (Nov. 15, 2022, at 16:21 PST), <https://www.krem.com/article/news/crime/university-of-idaho-students-killed/university-of-idaho-vigil-for-dead-students/293-80185b98-777c-40cf-a0e9-94b1699eaeab> (on file with LMU Law Review); Angela Palermo, *University of Idaho Students Flee, Seek Information on Stabbing Deaths*, SEATTLE TIMES (Nov. 15 2022, at 18:17), <https://www.seattletimes.com/seattle-news/law-justice/university-of-idaho-students-flee-seek-information-on-stabbing-deaths/> (on file with LMU Law Review); Elamroussi & Miracle, *supra* note 1.

⁴ Perez, *supra* note 3.

⁵ Perez, *supra* note 3.

⁶ U.S. CONST. amend. VI.

⁷ Garth Sundem, *How Have 24-Hour News Stations Affected Society?*, HOWSTUFFWORKS, <https://people.howstuffworks.com/culture-traditions/tv-and-culture/24-hour-news-stations-affected-society.htm> (on file with LMU Law Review) (last visited Apr. 5, 2025).

jury as the neutral trier of fact.⁸ Through the examination of relevant academic research, legal precedent, and real-world examples, this note concludes that while existing safeguards such as change of venue and voir dire provide some protection, courts must reform how these tools are applied.

The Idaho murders case presents a single contemporary example of the challenges courts face in securing an impartial jury in a world saturated by instant news and social media speculation.⁹ Capital punishment cases have historically been magnets for public fascination and sensationalism, fueling debates about crime, punishment, and whether justice is truly being served.¹⁰ This note begins by tracing the historical roots and modern realities of media coverage, examining how sensationalism threatens the constitutional promise of an impartial jury.

II. THE CONSTITUTIONAL FOUNDATION OF THE AMERICAN JURY SYSTEM

To understand how media influences juror impartiality, it is first necessary to examine the foundational principles underlying the American jury system. While the Constitution guarantees the right to an impartial jury, a right firmly rooted in the nation's legal tradition, that guarantee is not static. Rather, it has evolved over time, and the jury system now faces new challenges as modern media reshapes how the public perceives justice.¹¹

The Sixth Amendment guarantees the right to a ". . . speedy and public trial, by an impartial jury. . . ."¹² Since before the nation's founding, the jury has served as a crucial bulwark against potential government abuse in England and its colonies.¹³ The U.S. Supreme Court later affirmed this principle

⁸ Sheppard v. Maxwell, 384 U.S. 333 (1966).

⁹ Priscilla DeGregory, *Bryan Kohberger Trial to Be Moved Out of Idaho College Town Where Killings Took Place, Judge Rules*, N.Y. POST (Sept. 9, 2024, at 12:22 EST), <https://nypost.com/2024/09/09/us-news/bryan-kohberger-trial-to-be-moved-out-of-idaho-college-town-where-killings-took-place-judge-rules/> (on file with LMU Law Review).

¹⁰ *Id.*

¹¹ U.S. CONST. amend. VI.

¹² *Id.*

¹³ 4 WILLIAM BLACKSTONE, COMMENTARIES 349-50.

on American soil, emphasizing that the jury trial is fundamental to the justice system and essential for maintaining public confidence in verdicts when the right was indoctrinated in the Sixth Amendment.¹⁴

a. THE ROLE AND FUNCTION OF THE JURY

The fundamental right to trial by jury originates in English common law, which was eventually woven into the U.S. Constitution through both federal and state application.¹⁵ In *The Federalist* No. 83, Hamilton emphasizes that jury trials promote civic engagement and heighten public trust in the administration of justice.¹⁶ According to the National Judicial College, jury trials play an important role in a democratic society because they reflect the collective conscience of the community and provide a buffer between the defendant and the disciplinary power of the state.¹⁷

At its core, the jury serves as a neutral fact-finder by evaluating the evidence presented in court and rendering a verdict based solely on the evidence published to them at trial.¹⁸ Jurors are expected to make determinations of guilt or innocence based solely on trial evidence and judicial instructions as opposed to external pressures.¹⁹ The presumption of innocence is a cornerstone of the criminal justice system, making it critical for jurors to enter the process without preconceived notions of guilt.²⁰ However, media coverage can compromise this neutrality by injecting opinions, rumors, and inflammatory narratives into jurors' minds before

¹⁴ *Duncan v. Louisiana*, 391 U.S. 145, 149–51 (1968).

¹⁵ *Id.* at 151.

¹⁶ THE FEDERALIST NO. 83 (Alexander Hamilton).

¹⁷ *Why Jury Trials Are Important to a Democratic Society*, NAT'L. JUD. COLL., at 1 <https://www.judges.org/wp-content/uploads/2020/03/Why-Jury-Trials-are-Important-to-a-Democratic-Society.pdf> (on file with LMU Law Review).

¹⁸ *Why Trial by Jury? The History of the Jury System*, ADMIN. OFF. OF THE U.S. CTS., <https://www.uscourts.gov/file/2802/download> (on file with LMU Law Review).

¹⁹ *Id.*

²⁰ *Coffin v. United States*, 156 U.S. 432, 458-49 (1895).

they ever enter the courtroom.²¹ The Supreme Court has affirmed that outside influences or premature exposure to prejudicial information may violate due process and undermine the fairness of the proceeding.²²

b. JURY COMPOSITION AND SELECTION

Under the Sixth Amendment and subsequent precedent, the venire should, in theory, represent a fair cross-section of the community.²³ In *Taylor v. Louisiana*, the Court held that limiting jury service in criminal cases to certain special groups, or excluding identifiable segments of the community who play significant roles, conflicts with the Constitutional principles of a jury trial.²⁴ The right to a trial by jury assumes that jurors are selected from a pool that is both broadly representative of the community and impartial in the particular case.²⁵ The Jury Selection and Service Act of 1968, codified as 28 U.S. Code Section 1861, enshrined these principles at the federal level and mandates random selection from voter registration lists or other inclusive sources.²⁶ These rules are intended to foster the inclusion of a wide range of backgrounds and viewpoints in the venire.²⁷

After a petit jury is selected from a venire, the jury selection process begins with voir dire.²⁸ During this phase, judges and attorneys question prospective jurors, evaluate their ability to serve impartially, and determine their suitability for participation in the trial.²⁹ Federal Rule of Criminal Procedure 24 allows parties to raise unlimited challenges for cause and raise a limited number of preemptory challenges.³⁰ These

²¹ *Blind Justice: Juries Deciding Life and Death with Only Half the Truth*, PRISON POLY INITIATIVE, at 8-10 <https://www.prisonpolicy.org/scans/deathpenaltyinfo/blindjustice-report.pdf> (on file with LMU Law Review).

²² *Taylor v. Louisiana*, 419 U.S. 552, 530 (1975).

²³ *Id.* at 529.

²⁴ *Id.* at 530.

²⁵ *Id.*

²⁶ Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861-1878.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ FED. R. CRIM. P. 24

provisions allow parties to dismiss jurors based on suspicions of bias or conflicts of interest.³¹

In capital cases, the process of jury selection introduces a unique layer of complexity through the requirement of "death qualification."³² During the voir dire process, where the defendant is facing a possible life sentence, potential jurors are questioned on their view regarding capital punishment and whether they will be able to follow the law in imposing an appropriate sentence.³³ To be eligible to serve in such a case, a juror must be "death-qualified."³⁴ A "death-qualified" juror must be willing to consider all of the sentencing options, usually death and life.³⁵ If a juror's opinion prevents them from considering any of the sentencing options, they "they are not 'death-qualified' and are stricken from serving on the jury."³⁶ Problems arise when attorneys and judges assemble the jury piecemeal by selectively striking jurors to achieve "death qualification," resulting in a jury pool that reflects a narrow mindset vastly different from the broader³⁷ Research by Professor Craig Haney of the University of California, Santa Cruz, and others found that death qualification:

1. Compromised the representative-ness of capital juries because higher levels of death penalty opposition among minorities and women meant they were more likely to be excluded from participation,
2. Created juries that were composed of persons who were "prosecution-prone" in their general criminal justice beliefs and points of view,
3. Resulted in juries consisting of persons who were "conviction-prone," or more likely to convict than nondeath-qualified juries on the basis of the same facts and circumstances, and

³¹ *Id.*

³² *Death Qualified, Capital Punishment in Context*, DEATH PENALTY INFO CTR., <https://capitalpunishmentincontext.org/resources/deathqualification> (on file with LMU Law Review) (last visited Sept. 23, 2025).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

4. Exposed all jurors to a process of selection that further increased their likelihood of convicting capital defendants by, among other things, implicitly suggesting that the defendant was guilty.³⁸

In the dissenting opinion of *Lockhart v. McCree*, Justices Marshall, Brennan, and Stevens acknowledge that while death qualification is constitutionally permissible, it creates a jury that unanimously carries out the state's interest rather than allowing for diverse viewpoints.³⁹

Understanding the jury system is essential to analyzing how citizen involvement reinforces the constitutional structure of the legal system. However, the increasing influence of modern media threatens this foundation by shaping jurors' perspective before venire.⁴⁰ This preconceived notion of guilt often undermines the defendant's right to a fair and impartial trial.⁴¹

III. FROM FACT TO FEAR: HOW MEDIA COVERAGE SHAPES CRIME NARRATIVES

Media outlets are driven by market demands and often prioritize sensationalist stories that capture public attention, especially when reporting crime.⁴² This genre is highly profitable due to its dramatic and emotional appeal, which plays on the fear that anyone, even one's neighbor, could be a hidden threat. The public's fascination with understanding the

³⁸ *Blind Justice: Juries Deciding Life and Death with Only Half the Truth*, *supra* note 22 (citing C. Haney & D. Logan, *Broken Promise: The Supreme Court's Response to Social Science Research on Capital Punishment*, 50 J. OF SOC. ISSUES 75, 91 (1994)).

³⁹ *Lockhart v. McCree*, 476 U.S. 162, 175-76 (1986).

⁴⁰ *The Presumption of Innocence and the Media Coverage of Criminal Cases*, CTR. FOR THE STUDY OF DEMOCRACY, at 32 (2021) https://csd.eu/fileadmin/user_upload/publications_library/files/2021_05/The-Presumption-of-Innocence_EN_WEB.pdf (on file with LMU Law Review).

⁴¹ *Id.* at 76.

⁴² Sara Sun Beale, *The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397, 426-27 (2006).

motive behind violent crimes further fuels this media focus, often at the expense of objective coverage.⁴³

a. HISTORICAL ROOTS AND MODERN TRENDS OF CRIME REPORTING

Crime journalism in America traces back to the roots of sensationalism, historically termed "yellow journalism."⁴⁴ Yellow journalism emerged in the late nineteenth century as a sensationalist approach to news reporting that emphasized eye-catching headlines, exaggerated narratives, and emotional appeal, often at the expense of factual accuracy and balanced coverage.⁴⁵ Originating primarily in the United States, this style of journalism aimed to attract readers and boost newspaper circulation through provocative and dramatic content.⁴⁶ It marked a clear shift away from traditional journalistic standards, as newspapers competed for audience attention in a growing media market.⁴⁷ Defined by bold headlines and scandal-driven stories, yellow journalism thrived on crime, controversy, and human interest pieces.⁴⁸ The era of yellow journalism highlighted the power of the press in shaping public opinion.⁴⁹

Sensationalism continued to evolve with the rise of television.⁵⁰ The 24-hour news cycle, initiated by networks such as CNN in the 1990s, substantially increased the impact of crime coverage on the public's perception.⁵¹ The O.J. Simpson trial in 1995 exemplified this trend through live broadcasts, expert commentaries, and around-the-clock updates, which effectively turned the trial into a serialized drama.⁵² A few years earlier,

⁴³ Ken Dowler, et al., *Constructing Crime: Media, Crime, and Popular Culture*, 48 CAN. J. CRIMINOLOGY & CRIM. JUST. 837, 839 (2006).

⁴⁴ SUPATRO GHOSE & DR. SHAMBHOO SHARAN GUPTA, HISTORY OF JOURNALISM 24 (2023).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 25.

⁴⁹ *Id.* at 31.

⁵⁰ Sundem, *supra* note 7.

⁵¹ *Id.*

⁵² Stephen Battaglio, *How O.J. Simpson's Murder Trial Changed the TV News Business*, L.A. TIMES (Apr. 11, 2024, at 16:06 PT),

CNN and Court TV saw a surge in viewership during their gavel-to-gavel coverage of the Menendez brothers' first trial for the murder of their parents, but the O.J. Simpson trial became the genre's first blockbuster.⁵³ From Simpson's arraignment to the acquittal that left him a free man, an estimated 150 million viewers watched that trial live.⁵⁴ The O.J. Simpson case marked a turning point and demonstrated the media's power to shape public perceptions of guilt or innocence.⁵⁵

Today, digital media platforms have further transformed crime reporting by shifting away from traditional television toward instant news accessible from virtually anywhere.⁵⁶ Social media amplifies public fascination with crime by creating a space where users immediately share stories, opinions, and theories.⁵⁷ This wide-open access turns major cases into crowd-driven narratives.⁵⁸

With new forms of access to smartphones and [the] internet, [the] opportunities for news to be reported unfiltered [bypassing] major news outlets, circumventing editors, factcheckers and other historical gatekeepers of information has increased. This is specifically because of the loose use of the term "media," which can be applied to a wide range of actors: from major news networks such as CNN or the BBC, to citizen journalists, who can be individuals with little more than a cell phone and a selfie-stick, to anyone with a social media account and [an] opinion. . . [w]orst of all, platforms such as Twitter, Facebook, WhatsApp and Reddit provide an interactive medium allowing users to

<https://www.latimes.com/entertainment-arts/business/story/2024-04-11/how-oj-simpson-changed-the-tv-news-business> (on file with LMU Law Review).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *The Presumption of Innocence and the Media Coverage of Criminal Cases*, *supra* note 40, at 26, 119-22.

⁵⁷ *Id.* at 119-22.

⁵⁸ *Id.* at 76.

share their opinions on issues being discussed including court cases.⁵⁹

Online communities dedicated to true crime often dissect cases with little to no regard for procedural or evidentiary rules.⁶⁰ These communities create situations in which social media users publicly "try" a suspect and deem them guilty before any formal judicial proceedings have begun.

b. CRIME REPORTING IN THE DIGITAL ERA

In the digital era, media coverage of crime goes beyond traditional journalism and newspaper clippings.⁶¹ Popular podcasts like *Serial* and streaming documentaries like Netflix's *Making a Murderer* draw in massive audiences by presenting true crime stories through emotional narratives.⁶² These consumer driven productions often use storytelling techniques designed to promote sympathy, suspense, and even outrage.⁶³ While this type of media coverage addresses important questions about justice and fairness, its popularity often hinges more on emotional engagement rather than on narrative accuracy.⁶⁴

Additionally, social media's "armchair detectives" actively engage in high-profile criminal cases by spreading misinformation or forming narratives disconnected from verified facts.⁶⁵ The recent case of Bryan Kohberger illustrates how quickly speculative theories can circulate online, often

⁵⁹ *Id.* at 77.

⁶⁰ Kami Griffith, *Telling the Whole Truth Behind the Mic: Applying the Rules of Evidence to True Crime Podcasts*, KY. L. J. (Apr. 19, 2021), <https://www.kentuckylawjournal.org/online-originals/telling-the-whole-truth-behind-the-mic-applying-the-rules-of-evidence-to-true-crime-podcasts> (on file with LMU Law Review).

⁶¹ David Costello, *Un-Making a Murderer: New True Crime Sensationalism and the Criminal Justice System*, 55 AM. CRIM. L. REV. 77, 78-82 (2018).

⁶² DIANA RICKARD, *THE NEW TRUE CRIME: HOW THE RISE OF SERIALIZED STORYTELLING IS TRANSFORMING INNOCENCE* 7 (2023).

⁶³ *Id.*

⁶⁴ *Id.* at 239-41.

⁶⁵ Carson McCullough, *The Pitfall of the Armchair Detective*, COURTHOUSE NEWS SERV. (Sept. 8, 2023), <https://www.courthousenews.com/the-pitfalls-of-the-armchair-detective/> (on file with LMU Law Review).

based on unofficial evidence, or no evidence at all.⁶⁶ Platforms like TikTok, Reddit, and YouTube serve as hubs where users dissect every detail and share viral content that shapes the public's perception of a defendant's guilt—like Kohberger—well before formal charges are filed or trial proceedings begin.⁶⁷

The unchecked spread of misinformation places attorneys and judges in a difficult position during the voir dire process because they must ensure that any potential juror has not encountered biased narratives or formed predetermined opinions about the case.⁶⁸ The invasive nature of these online theories challenges the court's ability to select an impartial jury, which in turn raises questions about the integrity of the judicial process in an era dominated by instant digital communication.⁶⁹

C. THE NATURE OF SENSATIONAL CRIME COVERAGE IN DEATH PENALTY CASES

Media outlets tend to promote sensationalism by the way they cover and market high profile cases.⁷⁰ They use terms like "monster," "predator," or "evil" to describe accused individuals.⁷¹ This language hooks the consumer by pulling at their moral strings rather than relying on evidentiary facts.⁷²

⁶⁶ Solcyre Burga, *The University of Idaho Murders Show the Hidden Cost of America's True Crime Addiction*, TIME (Jan. 25, 2023, at 10:08 EST), <https://time.com/6250031/idaho-murders-true-crime-addiction/> (on file with LMU Law Review).

⁶⁷ *Id.*

⁶⁸ Ryan P. Deane & Jade N. Tran, *Strategies for Overcoming Challenges Presented by the Impact of Social Media on Juries*, WSHB, at 2 (Feb. 6, 2025), <https://www.wshblaw.com/printpilot-news-strategies-for-overcoming-challenges-presented-by-the-impact-of-social-media-on-juries.pdf?1744328853> (on file with LMU Law Review).

⁶⁹ *Id.*

⁷⁰ Beale, *supra* note 42.

⁷¹ Julie B. Wiest, *Casting Cultural Monsters: Representing of Serial Killers in U.S. and U.K.*, NEWS MEDIA, at 1 (July 25, 2016), <https://cdn.cocodoc.com/cocodoc-form-pdf/pdf/279939595--Casting-Cultural-Monsters-Media-Representations-of-Serial-inter-disciplinary-.pdf> (on file with LMU Law Review).

⁷² *Id.* at 1.

"[T]rial by media" [is] describe[d] as

...

[A] phrase popular in the late 20th century and early 21st century to describe the impact of television and newspaper coverage on a person's reputation by creating widespread perception of guilt or innocence before, or after, a verdict in a court of law. In recent times there have been numerous instances in which media has conducted the trial of an accused and has passed the verdict even before the court passes its judgement.⁷³

This emotional framing of criminal cases can significantly impact juror impartiality. An LSU research report shows that jurors who view highly gruesome photographic evidence are more likely to decide on the death sentence than jurors who view less gruesome evidence.⁷⁴ In capital cases, jurors must not only determine the defendant's guilt but must also decide whether the ultimate punishment, the death penalty, is warranted.⁷⁵ Sensationalist media coverage that features graphic or emotionally charged images reinforces the perception that "a picture is worth a thousand words," thereby heightening the risk of juror bias. This becomes particularly problematic in death penalty cases, which require the presence of aggravating factors for sentencing.⁷⁶ These aggravating

⁷³ *Crime and the Media*, SCOTTISH CTR. FOR CRIME & JUST. RSCH., at 5 (2022), <https://www.sccjr.ac.uk/wp-content/uploads/2022/03/17-Crime-and-Media-2022.pdf> (on file with LMU Law Review) (citing Suresh, N., & George, L.S. (2021) *Trial by Media: An Overview*: <https://www.ijlmh.com/paper/trial-by-media-an-overview/#>).

⁷⁴ Robert J. Nemeth, *The Impact of Gruesome Evidence on Mock Juror Decision Making: The Role of Evidence Characteristics and Emotional Response*, at 83 (2002) (Ph. D. dissertation, Louisiana State University), https://repository.lsu.edu/cgi/viewcontent.cgi?article=1130&context=gradschool_dissertations (on file with LMU Law Review).

⁷⁵ *Id.* at 84.

⁷⁶ Shana L. Maier et al., *Mock Jurors' Comprehension of Aggravating and Mitigating Factors: The Impact of Timing and Type of Sentencing Phase Instructions*, 16(1) APPLIED PSYCH. IN CRIM. JUST. 65 (2021), https://dev.cjcenter.org/_files/apcj/16-1-4Maier.pdf_1615504358.pdf (on file with LMU Law Review).

factors, such as the cruelty of the crime, are precisely the type of details most likely to be emphasized and distorted in sensationalized reporting.⁷⁷

IV. HOW MEDIA EXPOSURE COMPROMISES IMPARTIAL JURY DECISION-MAKING

A fundamental function of the American criminal justice system is to fulfill a defendant's Sixth Amendment rights and guarantee a trial by an impartial jury.⁷⁸ However, in an age dominated by pervasive and sensationalist media coverage, that inherent guarantee is increasingly compromised. Media exposure, whether through traditional outlets or digital platforms, can significantly influence jurors' perception of guilt and their attitude towards sentencing.⁷⁹ These influences become particularly heightened in high-profile or capital cases, where emotionally charged narratives tend to dominate public opinion.⁸⁰

a. COGNITIVE BIAS AND PREJUDICIAL PRETRIAL PUBLICITY

Pretrial publicity has damaging effects on jurors' decision-making processes.⁸¹ Psychological studies demonstrate that individuals exposed to negative, sensationalist media are more likely to perceive defendants as guilty before hearing any courtroom testimony.⁸² This phenomenon is often referred to as "confirmation bias."⁸³

⁷⁷ *Id.* at 65.

⁷⁸ U.S. CONST. amend. VI.

⁷⁹ RICKARD, *supra* note 62, at 239–41; Maier et al., *supra* note 76.

⁸⁰ RICKARD, *supra* note 62, at 239–41.

⁸¹ Kara Cato, *Pressing the Verdict: The Social Influence of Pretrial Publicity on Juror Biases* 35 (2023) (Senior Thesis, Claremont McKenna College), https://scholarship.claremont.edu/cgi/viewcontent.cgi?article=4229&context=cmc_theses (on file with LMU Law Review).

⁸² Nancy Mehrkens Steblay et al., *The Effect of Pretrial Publicity on Juror Verdicts: A Meta-Analytic Review* 23(2) L. & HUM. BEHAV. 228 (1999).

⁸³ *Confirmation Bias: The Science Behind its Impact on Jury Selection and Litigation*, JURY ANALYST (Aug. 7, 2024), <https://juryanalyst.com/confirmation-bias-the-science-behind-its-impact-on-jury-selection-and-litigation/> (on file with LMU Law Review).

Confirmation bias significantly affects jury selection and trial outcomes by leading jurors to favor evidence that supports their pre-existing beliefs, regardless of whether that information is true or false.⁸⁴ According to *Jury Analyst*, confirmation bias skews jurors' interpretation of evidence, which in turn causes them to place greater value on their initial judgment rather than the actual evidence placed before them at trial when assessing the validity of the charges.⁸⁵

In *Skilling v. United States*, the Supreme Court addressed concerns related to the impact of pervasive media coverage on juror impartiality.⁸⁶ Jeffery Skilling argued that extensive negative pretrial publicity created a prejudicial presumption that threatened his right to an impartial trier of fact.⁸⁷ While the jury claimed to be impartial, the Court acknowledged that subconscious biases resulting from widespread media exposure can subtly influence how jurors evaluate the evidence and testimony.⁸⁸ This decision highlights the growing challenge courts face in balancing the defendant's right to an impartial trier of fact against the jury's exposure to prejudicial pretrial publicity.⁸⁹

b. LIMITS OF VOIR DIRE IN MEDIA-DRIVEN CASES

Courts are aware that media exposure leads jurors to form opinions before trial begins. Despite this recognition, many courts continue to place considerable confidence in traditional safeguards like voir dire, judicial instructions, and change of venue. This pattern of judicial inaction is troubling, and historical precedent shows that courts have grappled with pretrial publicity for decades, yet there is still no concrete solution.

In 2016, the Federal Defenders of San Diego published *Defending a Federal Criminal Case*, a treatise that addresses the voir dire process in relation to the dangers of pretrial publicity.⁹⁰ Section 12.03.02.11 emphasizes that substantial

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Skilling v. United States*, 561 U.S. 358 (2010).

⁸⁷ *Id.* at 359–61.

⁸⁸ *Id.*

⁸⁹ *Id.* at 358.

⁹⁰ FED. DEFS. OF SAN DIEGO, *DEFENDING A FEDERAL CRIMINAL CASE* §12.03.02.11 (2016).

pretrial publicity creates an inherent risk of juror prejudgment.⁹¹ As the Supreme Court explains in *Irvin v. Dowd*, once a juror forms an opinion, he or she subconsciously resists detaching from that opinion.⁹² The Ninth Circuit echoes this concern in *Lincoln v. Sunn*, stating that courts should disqualify jurors who hold such strong impressions that they cannot listen with an open mind.⁹³ Judges must therefore ask prospective jurors about potential bias caused by pretrial publicity.⁹⁴ In *Marshall v. United States*, the Court reversed a conviction where jurors read newspaper articles about the defendant's prior convictions, evidence of which the lower court had excluded at trial.⁹⁵ This decision highlights the need for focused voir dire to uncover the effects of media exposure.⁹⁶ Sometimes, as the Fifth Circuit notes in *United States v. Beckner*, even voir dire cannot cure the damage caused by pervasive publicity.⁹⁷

Although some appellate courts require questions about pretrial publicity and permit attorney-conducted voir dire, the Constitution does not grant defendants the right to explore the specific content of that publicity.⁹⁸ In *Mu'Min v. Virginia*, the Supreme Court held that defendants have no constitutional right to demand detailed voir dire regarding media coverage.⁹⁹ This limitation creates a significant risk: without a constitutional safeguard allowing inquiry into the nature and scope of media exposure, potentially prejudicial jurors may enter the jury pool undetected.¹⁰⁰

Nevertheless, courts have maintained that mere exposure to pretrial publicity does not, by itself, disqualify a juror.¹⁰¹ In *State v. Keating*, the Ninth Circuit clarifies that a defendant must show actual prejudice to succeed on a claim of juror bias.¹⁰² The Seventh, Ninth, and Eleventh Circuits

⁹¹ *Id.*

⁹² *Id.* (citing *Irvin v. Dowd*, 366 U.S. 717, 727 (1961)).

⁹³ *Id.* (citing *Lincoln v. Sunn*, 807 F.2d 805, 815 (9th Cir. 1987)).

⁹⁴ *Id.*

⁹⁵ *Id.* (citing *Marshall v. United States*, 360 U.S. 310 (1959)).

⁹⁶ *Id.*

⁹⁷ *Id.* citing *United States v. Beckner*, 69 F.3d 1290 (5th Cir. 1995)).

⁹⁸ *Id.* (citing *Silverthorne v. United States*, 400 F.2d 627 (9th Cir. 1968); *Mu'Min v. Virginia*, 500 U.S. 415 (1991)).

⁹⁹ *Id.* (citing *Mu'Min v. Virginia*, 500 U.S. 415 (1991)).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* (citing *States v. Keating*, 147 F3d 895 (9th Cir. 1998)).

¹⁰² *Id.*

consistently reinforce this principle, holding that a juror meets the constitutional standard of impartiality – which they can be if they set aside prior impressions and base their verdict solely on the evidence presented at trial.¹⁰³ For example, in *United States v. Guerrero*, the court rejected the argument that widespread media coverage alone creates inherent prejudice.¹⁰⁴

Courts have tried to develop precedent aimed at protecting jury impartiality, as the Federal Defenders of San Diego highlight, but trial courts still struggle to shield jurors from the influence of pervasive media coverage.¹⁰⁵ As a result, media influences continue to infiltrate the jury box and shape outcomes, particularly in high-profile capital cases.¹⁰⁶

c. CHANGE OF VENUE FOR DEATH PENALTY CASES

Traditionally, a method employed by courts is to transfer the trial to a different jurisdiction, away from where the crime was committed, to limit juror bias that may arise from local media exposure. However, in today's age, digital platforms dominate the media and allow for instant national reach, rendering, geographic remedies like change of venue insufficient to protect against pervasive bias.¹⁰⁷

In the case of Bryan Kohberger, debates emerged over the best avenue for obtaining an impartial trier of fact.¹⁰⁸ Kohberger's defense team sought a change of venue, stating that strong emotion in a tight-knit community and constant media coverage make it impossible to find an impartial jury in

¹⁰³ *United States v. Beniach*, 825 F.2d 1207, 1213 (7th Cir 1987); *Irvin v. Dowd*, 366 U.S. 717, 723 (1961); *United States v. Garza*, 664 F.2d 135, 138 (7th Cir. 1981) (citing *Dobbert v. Florida*, 432 U.S. 282, 302 (1977)). See also *United States v. Guerrero*, 756 F.2d 1342 (9th Cir. 1984).

¹⁰⁴ FED. DEFS. OF SAN DIEGO, *supra* note 90 (citing *United States v. Guerrero*, 756 F.2d 1342 (9th Cir. 1984)).

¹⁰⁵ FED. DEFS. OF SAN DIEGO, *supra* note 90.

¹⁰⁶ FED. DEFS. OF SAN DIEGO, *supra* note 90.

¹⁰⁷ Paula Hannaford-Agor & Nicole L. Waters, *Jury News*, 27 THE COURT MANAGER, <https://www.hks.harvard.edu/sites/default/files/centers/wiener/programs/pcj/files/ES-StateCourts-JurorandJuryUse.pdf>.

¹⁰⁸ *Judge in Idaho Murders Trial Orders Change of Venue for Bryan Kohberger*, CBS NEWS (Sept. 9, 2024, at 18:36 ET), <https://www.cbsnews.com/news/idaho-murders-trial-bryan-kohberger-change-of-venue/> (on file with LMU Law Review).

such a small town.¹⁰⁹ On the other side, prosecutors asserted that they can resolve any concerns with potential jury bias by calling for a larger pool and carefully questioning them.¹¹⁰ The prosecution of Dzhokhar Tsarnaev for the 2013 Boston Marathon Bombing provides a notable example of the complete suite of challenges associated with change of venue as a comparison to how the Kohberger case progressed through the pretrial stage.

Leading up to Tsarnaev's trial, his defense counsel filed three separate motions requesting a change of venue, arguing that the Boston community was so deeply affected by the Boston Marathon bombing that a fair and impartial jury could not be assembled locally.¹¹¹ As counsel noted, "the crimes charged inflicted actual injury on the entire local population," and "Greater Boston was itself a victim."¹¹² The defense further emphasized the ongoing nature of prejudicial media coverage, stating that "adverse pre-trial publicity and leaks continue unabated" and cautioned that media saturation was likely to intensify as both the trial and the anniversary of the bombing approached.¹¹³ Despite these concerns, U.S. District Judge George O'Toole denied the motions and assured confidence in the voir dire process to screen for bias and select impartial jurors.¹¹⁴ Consequently, the trial remained in Boston.

While the court denied those requests before jury selection in 2015, their significance echoed years later. In 2024, concerns resurfaced regarding the impartiality of the jury, particularly in light of new evidence that at least two jurors may

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Dzhokhar Tsarnaev's Lawyers Say Jury Pool Biased in Boston Bombing Trial*, GUARDIAN (Dec. 22, 2014, at 13:51 ET), <https://www.theguardian.com/us-news/2014/dec/22/dzhokhar-tsarnaev-boston-bombing-trial-defense-claims-bias> (on file with LMU Law Review).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ Thomas Farragher, *Tsarnaev Trial Should Be Moved to Another Venue*, BOSTON GLOBE (Feb. 7, 2015), <https://www.ca1.uscourts.gov/sites/ca1/files/citations/Tsarnaev%20trial%20should%20be%20moved%20to%20another%20venue%20-%20Metro%20-%20The%20Boston%20Globe.pdf> (on file with LMU Law Review).

have harbored undisclosed biases.¹¹⁵ The defense argued that the court should have stricken these jurors for cause and that the failure to do so should result in vacating Tsarnaev's death sentence and ordering a new penalty-phase trial.¹¹⁶ This controversy follows the 2020 ruling by the First Circuit Court of Appeals, which initially overturned Tsarnaev's death sentence after finding that the trial court failed to adequately question prospective jurors about their exposure to extensive pretrial publicity.¹¹⁷ Nevertheless, in a 6-3 decision issued in 2022, the United States Supreme Court reversed the ruling and held that the First Circuit erred in granting relief.¹¹⁸

During the jury selection process – that still resulted in two biased jurors – the defense administered a questionnaire to over 1,300 potential jurors.¹¹⁹ The questionnaire results indicated that 94 percent of jurors had been exposed to "moderate" or "a lot" of media coverage regarding the bombing.¹²⁰ These figures strongly suggest that juror impartiality was compromised from the start. Further issues arose post-selection, when it was revealed that one juror had retweeted a post referring to Tsarnaev as a "piece of garbage," despite previously claiming to have made no online comments about the case.¹²¹ Another juror stated that none of his Facebook friends had commented on the trial, yet a friend had encouraged him to "play the part" to secure a seat on the jury and ensure that Tsarnaev received a harsh sentence.¹²² Although Tsarnaev's defense counsel raised these issues during

¹¹⁵ *Boston Marathon Bomber's Death Sentence Up in Air as Court Orders Juror Bias Probe*, CBS NEWS (Mar. 22, 2024, at 11:10 ET), <https://www.cbsnews.com/boston/news/boston-marathon-bombing-dzhokhar-tsarnaev-appeals-court-juror-bias/> (on file with LMU Law Review).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ David Uberti, *Why Moving Dzhokhar Tsarnaev's Trial Won't Nullify Pretrial Media Coverage*, COLUM. JOURNALISM REV. (Jan. 26, 2015), https://www.cjr.org/behind_the_news/why_moving_dzhokhar_tsarnaevs.php (on file with LMU Law Review).

¹²⁰ *Id.*

¹²¹ *Boston Marathon Bomber's Death Sentence Up in Air as Court Orders Juror Bias Probe*, *supra* note 115.

¹²² *Boston Marathon Bomber's Death Sentence Up in Air as Court Orders Juror Bias Probe*, *supra* note 115.

voir dire, the trial judge declined to investigate the claims further.¹²³

In 2015, during the jury selection process for Tsarnaev's capital case, TikTok had not yet launched, and the most streamed crime podcast, *Crime Junkie*, was still three years away from its first broadcast.¹²⁴ Even then, courts struggled to find impartial juries despite procedural safeguards rooted in precedent. This raises a critical question about whether the current legal system is fundamentally flawed, or whether existing safeguards, such as voir dire and change of venue, need to be reformed and strengthened to preserve the integrity of the jury system.

V. SOLUTIONS AND POLICY CONSIDERATIONS

Modern media presents challenges to courts that existing judicial safeguards were never designed to address. While courts historically used tools like voir dire and change of venue to limit juror bias, these measures have often proved inadequate in today's media-saturated environment. Rather than investing in entirely new procedures, courts should focus on reinforcing and adapting existing safeguards to preserve juror impartiality.

a. STRENGTHENING VOIR DIRE

Voir dire only works when jurors can recognize and disclose their own bias.¹²⁵ Yet studies show that unconscious bias, particularly stemming from pretrial publicity, often

¹²³ *Boston Marathon Bomber's Death Sentence Up in Air as Court Orders Juror Bias Probe*, *supra* note 115.

¹²⁴ Deborah D'Souza, *TikTok: What It Is, How It Works, Why It's Popular*, INVESTOPEDIA (Jan. 20, 2025), <https://www.investopedia.com/what-is-tiktok-4588933#:~:text=TikTok%2C%20released%20in%20September%202016,on%20mobile%20devices%20or%20webcams> (on file with LMU Law Review); *Crime Junkie*, WIKIPEDIA, https://en.wikipedia.org/wiki/Crime_Junkie#:~:text=She%20felt%20that%20there%20weren,posted%20weekly%20episodes%20since%20then (on file with LMU Law Review) (last visited Oct. 13, 2025).

¹²⁵ *Mu'Min v. Virginia*, 500 U.S. 415, 443–45 (1991)(Marshall, J., dissenting).

escapes detection during the voir dire process.¹²⁶ To address this issue, courts should adopt more rigorous voir dire protocols that incorporate scientifically validated questionnaires and implicit bias testing.¹²⁷ In capital cases, judges should appoint jury consultants and psychologists that have expertise in recognizing cognitive and confirmation bias to weed out jurors who may subconsciously lean towards or against the death penalty.¹²⁸

Courts must make attorney-led voir dire standard practice, rather than the exception. In an era dominated by sensationalist media, where headlines shape public opinion before a single piece of evidence is presented in court, voir dire remains one of the most critical tools to preserve impartiality. Attorneys, unlike judges, are in a unique position: they can ask case-specific and open-ended questions that uncover subtle forms of bias,¹²⁹ particularly those forms rooted in pretrial publicity. Jurors exposed to constant media speculation may unconsciously form opinions about the guilt or appropriate punishment of the accused, especially in capital cases where public emotions run high and the stakes are life or death.¹³⁰ Judges often rely on closed-ended or formulaic questions that fail to bring these biases to light.¹³¹ In contrast, attorney-led voir dire encourages a conversational approach that creates a space for jurors to reflect on and reveal how media narratives have influenced their thinking. As scholars note, open-ended questions invite disclosure, while yes-or-no questions often lead jurors to deny bias they may not fully recognize.¹³² Courts

¹²⁶ *Confirmation Bias: The Science Behind its Impact on Jury Selection and Litigation*, *supra* note 84.

¹²⁷ *Confirmation Bias: The Science Behind its Impact on Jury Selection and Litigation*, *supra* note 83.

¹²⁸ *Confirmation Bias: The Science Behind its Impact on Jury Selection and Litigation*, *supra* note 83.

¹²⁹ Christopher T. Karounos, *It's Time for Attorney-Led Voir Dire Everywhere*, NAT'L L. REV., (Mar. 21, 2025), <https://natlawreview.com/article/its-time-attorney-led-voir-dire-everywhere> (on file with LMU Law Review).

¹³⁰ *Id.*

¹³¹ Brian J. McKeen & Phillip B. Toutant, *The Case for Attorney-Conducted Voir Dire*, 44 MICH. B.J. 24, at 31 (Nov. 2011), <https://www.michbar.org/journal/pdf/pdf4article1936.pdf> (on file with LMU Law Review).

¹³² *Id.* at 30-32.

do not need to reinvent the legal system to address media-driven threats to impartiality; they simply need to better utilize existing procedural safeguards like attorney-led voir dire to confront the modern realities of jury selection.

b. IMPACT OF GEOGRAPHICAL LOCATION

Additionally, the change of venue doctrine must evolve to meet the realities of today's media influence. Traditionally, courts treat change of venue as a last resort and are shy to use it, as seen in Tsarnaev's trial.¹³³ But in this digital era, the assumption that juror bias is geographically limited is no longer believable. High-profile cases like the Boston bombing and the Idaho murders received instant and widespread coverage which rendered it virtually impossible to find an untouched jury pool within the county where the crime occurred. Viral headlines, commentary, and algorithms that push the most viewed content ensure that potential jurors encounter prejudicial material regardless of where they live. Despite this new access to instant media, courts continue to rely on outdated standards such as those set forth in *Skilling v. United States*, which presumes impartiality unless the defendant can show actual or presumed bias through overwhelming evidence.¹³⁴ That burden is too high, especially in capital cases where the risk of irreversible harm warrants greater caution.

To strengthen change of venue as a viable safeguard, courts should consider adopting a more responsive approach that reflects how media exposure actually spreads in today's digital environment. For example, courts can apply a rebuttable presumption of prejudice when there are clear indicators of media saturation. These indicators can include national coverage within the first twenty-four hours of the crime, consistent pretrial publicity, or significant engagement across social media platforms. Especially in high-profile cases that potentially involve the death penalty, courts should be required to expand venue options beyond neighboring counties and explore out-of-state or federal districts where media exposure is less likely to taint the jury pool. Changes like these will not require courts to rewrite constitutional law; rather, it would simply require interpreting the existing venue doctrine in a way

¹³³ Uberti, *supra* note 119.

¹³⁴ *Skilling v. United States*, 561 U.S. 358, 381-99 (2010).

that addresses the speed and reach of modern information. By bolstering the existing change of venue process, courts can better protect juries from public bias and reinforce the Sixth Amendment's guarantee of an impartial trier of fact.

VI. CONCLUSION

The Constitution promises every defendant the right to a fair trial by an impartial jury, but that promise grows increasingly fragile in the era of sensationalist media. In high profile cases, such as those that involve the death penalty, emotionally charged narratives and speculations now reach potential jurors before the court ever has a chance to intervene. As in the case of Bryan Kohberger, the court of public opinion often delivers its verdict long before the jury is sworn in. Modern media does not simply report crime, it dramatizes it, frames it, and spreads it at a speed and scale that our existing legal procedures were never designed to encounter.

Yet it is not necessary for courts to invent new rights or tear apart the existing jury system to fix the problem. The solution lies in rethinking how courts apply the tools already in the toolbox. Attorney-led voir dire offers a method to detect bias by facilitating an opportunity for jurors to disclose how media exposure has shaped their thinking. Similarly, courts must reform the doctrine of change of venue by adopting a framework that accounts for the viral nature of modern media. Geographic relocation must reflect where the bias is spreading, not just where the crime occurred.

Protecting the right to an impartial trier of fact remains one of the most fundamental duties of the judicial system. In the digital age, this duty requires more than tradition and precedent, it requires adaptation. If courts fail to evolve, they risk allowing headlines and viral outrage to corrupt the core of what a fair trial means. The Sixth Amendment was not drafted with TikTok, Reddit, or twenty-four-hour news in mind, but futility is not an option for constitutional protection. It is up to the courts to bring those principles forward, to address modern threats with modern solutions, and to ensure that justice lives in the courtroom, not on the internet.