The Rule of Law and the Media:
The Thirteenth Juror in the American Criminal Justice System

Laura Alexander
1651 Camden Ave, Apt.4
Los Angeles, CA 90025
alexanderl2016@lawnet.ucla.edu
(724) 650-5486

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Executive Summary

Respect for the rule of law is central to American legal and political traditions, as well as our sense of national identity.[1] Indeed, the Supreme Court has recognized that the rule of law requires courts to decide cases by neutral principles unaffected by social or political pressures, ensuring a system of justice based on fairness to the individual. In the context of criminal trials, defendants are guaranteed such fairness through the Sixth Amendment's right to be tried by an impartial jury as well as the presence of a vigorous press, assuring the transparency and accountability of the court. However, in the modern age of instantaneous communication, tension arises between these two core principles of the rule of law, and a vigorous press may threaten, rather than guaranty, the defendant's right to a fair trial.

The history of the First Amendment's free press clause and the Sixth Amendment's right to a fair trial, as well as the Supreme Court's interpretation of these rights, is instructive. With respect to the former, the Founders recognized that a free press is essential to any democratic system because it promotes government transparency and spurs debate through the open exchange of information and ideas. The Supreme Court has granted broad deference to the media, holding that criminal trials could be closed to the public and press only if absolutely necessary. Further, the Supreme Court has limited press sanctions to the rare circumstances where a publication presents a "clear and present danger" to the administration of justice. As Justice Douglas wrote in *Craig v. Harney*, "A trial is a public event. What transpires in the courtroom is public property."[2]

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[1] *See* Frank I. Michelman, *Law's Republic*, 97 YALE L.J. 1499, 1503 (1988); *United States v. Nixon*, 418 U.S. 683, 708 (1974) (noting "our historic commitment to the rule of law").
[2] *Craig v. Harney*, 331 U.S. 367, 374 (1947).

With respect to the latter, due process requires state and federal justice systems to ensure "fundamental principles of liberty and justice."[3] The Supreme Court recognized in *Estes v. Texas* that, "the atmosphere essential to the preservation of a fair trial—the most fundamental of all freedoms—must be maintained at all costs."[4] An element of due process, which appeals specifically to the criminally accused, is the right to a trial by an impartial jury as set forth by the Sixth Amendment. The Supreme Court has reversed several criminal convictions because heavy media coverage threatened the impartiality of jurors.[5] Nevertheless, the Court has yet to set a clear standard for when media coverage crosses the line, and consistency in application of the law has suffered as a result.

Although it is difficult to measure the impact of media coverage, lessons can be learned from two criminal trials that have, in the past and very recently, captured the attention of America—*People v. O.J. Simpson* and the *State of Wisconsin v. Steven Avery*. Although exclusion of the press from criminal proceedings is contradictory to principle of accountability and transparency under the rule of law except in rare circumstances, courts can effectively control the media by limiting their sources of information —namely, trial participants. Moreover, limiting live television coverage to appellate court proceedings would reduce the risk of unfair exposure to both jurors and witnesses. Finally, extrajudicial speech by prosecutors for the purpose of political posturing can be eliminated by legislation prohibiting prosecutorial elections. The adoption of these reforms will not only ease the tension between the First Amendment and the Sixth Amendment in criminal trials, but it will also bring the American criminal justice system closer to the rule of law and by extension, our Founders' intentions.

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[3] *Buchalter v. New York*, 319 U.S. 427, 429 (1943).
[4] *Estes v. Texas*, 381 U.S. 532, 540 (1965).
[5] *Id., see also Marshall v United States*, 360 U.S. 310, 313 (1959); *Irvin v. Dowd*, 366 U.S. 717, 729 (1961); *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966).

I. Introduction

On March 16, 2016, the White House published a video introducing Chief Judge Merrick Garland of the D.C. Court of Appeals as President Obama's most recent nominee to the Supreme Court of the United States.[6] In the video, Chief Judge Garland stated,

> [T]he rule of law is what distinguishes our country from most other countries… It's peoples willingness to trust that they don't have to take justice into their own hands… that the law will treat people fairly, impartially, without regard to politics or religion or race … [I]f people trust that, we have a decent society.[7]

In order for people to trust that they don't have to take justice into their own hands, the people must place their faith in the American judicial system as a government institution. This faith derives from two sources: (1) the belief that all litigants are treated fairly and impartially and (2) the belief that the court, as a public institution, is accountable to the people. These two core principles of the rule of law—though seemingly compatible—create friction in the context of the criminal justice system. In today's age of instantaneous communications, a vigorous press guarantees the accountability of the courts while simultaneously threatening a defendant's right to be tried by an impartial jury. American interest in criminal law is at an all time high and the scope of publicity surrounding modern criminal cases has correspondingly reached unprecedented levels. Although the Supreme Court has recognized this tension between the First Amendment's free press clause and the Sixth Amendment's due process clause, the Court has yet to delineate a clear standard balancing these two core principles of the rule of law.

This paper seeks to examine the history of the free press clause and the due process clause as fundamental precepts of the rule of law and how they have clashed in practice. Part I will address the rule of law as it relates to criminal trials. Part II will address the historical

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[6] The White House, *The President Announces Chief Judge Merrick Garland As His Supreme Court Nominee* (March 16, 2016), https://www.youtube.com/watch?v=gGS4a18tKQI.
[7] *Id.*

importance of the freedom of the press and the defendant's right a fair trial, as well as the Supreme Court's evolving treatment of each principle. Part III will further examine this issue in practice in two case studies: *People v. O.J. Simpson* and *People v. Steven Avery*. Finally, Part IV will address reforms necessary to strengthen the rule of law in the American criminal justice system, including practical and enforced professional guidelines, unambiguous Supreme Court guidance, and the elimination of elected prosecutorial and judicial positions.

I. The Rule Of Law and the Criminal Justice System

The question of when exactly the concept of the rule of law originated elicits several answers. Some have traced the modern ideal to Ancient Greece, where Plato claimed that "if the law is the master of the government and the government is its slave, then… men enjoy all the blessings that the gods shower on a state."[8] Others to Ancient Rome, where Cicero declared, "We are all servants of the laws in order that we may be free."[9] Although the first uses of the English phrase "rule of law" can be traced to the early 1600s, A.C. Dicey, a British jurist, is credited with popularizing the phrase with his publication of the *Study of the Law of the Constitution* in 1885.[10]

And just as the origins of the rule of law are often the subject of debate, so too is the definition and value of the phrase.[11] Nonetheless, some certainties emerge by first addressing the

[8] John Cooper et al, *Complete Works By Plato*, 1402 (Hackett Publishing, 1997).
[9] Herbet J. Muller, *Freedom in the Ancient World*, 58, 265 (1961).
[10] Richard H. Fallon, Jr., *"The Rule of Law" As a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1 (1997); A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 181, 205 (2d ed. 1959).
[11] *See* Mark Ellis, *Toward a Common Ground Definition of the Rule of Law Incorporating Substantive Principles of Justice*, 72 U. PITT. L. REV. 191, 194 (2010)(critiquing a formalistic definition of the rule of law as rhetoric lacking in guidance).

primary purposes of the rule of law. [12] First, the rule of law protects against anarchy and a reality where people feel that they must take justice into their own hands.[13] Second, the rule of law allows people to plan their affairs with reasonable confidence that they can know in advance the legal consequences of their actions. [14] Third, the rule of law guarantees against official arbitrariness.[15]

Against the background of these purposes, leading modern scholars generally emphasize five elements that constitute the Rule of Law.[16] To the extent that these elements exist, the Rule of Law is realized.

(1) *Fair, publicly promulgated laws*. Legal rules, standards, or principles should be made public in order to guide people in the conduct of their affairs. People must be able to understand the law in order to comply with it.
(2) *Fair application of the laws.* Laws should be fairly enforced and administered.
(3) *Legal certainty*. The law should be reasonably stable in order to facilitate planning and coordinated action over time.
(4) *Supremacy of legal authority*. All persons, institutions and entities, public and private, including the State itself, are accountable to laws.
(5) *Courts as instrumentalities of impartial justice*. Courts should be available to all and courts should employ fair and efficient procedures.

Respect for these elements of the rule of law is central to American legal and political traditions, as well as our sense of national identity. [17] In justifying the separation of powers and the creation of a government system of checks and balances, founding father James Madision explained, "If men were angels, no government would be necessary. In framing a government

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[12] *See, e.g.*, Joseph Raz, *The Rule of Law and Its Virtue, in The Authority of Law: Essays on Law and Morality*, 210, 219 (1979)(examining reasons to value the rule of law).
[13] John Rawls, *A Theory of Justice* 235, 240 (1971).
[14] *Id.* at 235.
[15] *See* Dicey, supra note 6, at 193.
[16] *See* Lon L. Fuller, *The Morality of Law* 42 44 (rev. ed. 1964); WJP Rule of Law Index: Preface, WORLD JUSTICE PROJECT (2015). http://worldjusticeproject.org/sites/default/files/files/introduction_key_findings.pdf.
[17] *See* Frank I. Michelman, *Law's Republic*, 97 YALE L.J. 1499, 1503 (1988); *United States v. Nixon*, 418 U.S. 683, 708 (1974) (noting "our historic commitment to the rule of law").

which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."[18]

Although the Supreme Court has discussed the competing interests between the free press clause and the administration of justice in criminal trials, this discussion has taken place in dicta and only within the framework of the Constitution.[19] Indeed, the Supreme Court has recognized the rule of law and its importance, yet it has not directly discussed the rule of law in the context of these two competing principles.[20]

These interests, however, directly implicate the rule of law in several unique ways. First, when courts limit the ability of the press to report on criminal pre-trial proceedings and trials, accountability of the American judiciary is threatened. Moreover, debate is stultified and the open exchange of ideas suffers. Yet, when the power of the media is unchecked, the process by which the law is enforced is not fair. In this circumstance, the defendant is tried, not by an impartial jury, but by a jury including and influenced by the "thirteenth juror." Indeed, where the prosecutor and the judge fail to preserve the defendant's right to a fair trial and an impartial jury, fairness of the court as well as fairness of the administrative branch is at risk. Before addressing potential solutions to this imbalance, it is first necessary to examine the very foundations of the principles at issue, as well as how those principles have been applied by the Supreme Court throughout in the last century.

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[18] Madison, James. Federalist Paper No. 51 (1788).
[19] *Pennekamp v. Florida*, 328 U.S. 331, 347 (1946) ("Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice.").
[20] *Planned Parenthood v. Casey*, 505 U.S. at 864 69 (explaining that Rule of Law requires courts to decide cases by neutral principles unaffected by social or political pressures); *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 319 n.53 (1978) (defending limits on race-based admissions preferences as necessary to maintain fair, individualized decision procedures, on the ground that "an underlying assumption of the rule of law is the worthiness of a system of justice based on fairness to the individual").

II. Constitutional Tensions: Freedom of the Press v. The Right to a Fair Trial

1. The Freedom Of Press & The Right To A Public Trial

In 1791, the First Amendment to the U.S. Constitution declared, "Congress shall make no law … abridging the freedom of… the press."[21] Why was this freedom so important to the Founders of the Constitution? The congressional debate record concerning the meaning of the First Amendment is thin and unavailing.[22] The First Continental Congress, however, answered this question more than a decade before adopting the First Amendment in *Appeal to the Inhabitants of Quebec*:

> The importance of [the freedom of speech] consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated into more honorable and just modes of conducting affairs.[23]

The Founders recognized that a free press is essential to any democratic system because it promotes government transparency and spurs debate through the open exchange of information and ideas. As Justice Louis Brandeis wrote in his concurrence in *Whitney v. California*, "freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth."[24] By exposing political truth, a vigorous press holds government institutions accountable to the people. More specifically, the Supreme Court has recognized that media scrutiny of judicial proceedings encourages accountability in the judicial system.[25]

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[21] U.S. Const. amend. I.
[22] *See* Const. of the United States: Analysis & Interpretation, S. Doc. No. 82, 92d Cong., 2d Sess. 936 (1973).
[23] Journal of the Continental Congress (1904 Ed.) vol. I, pp. 104, 108; *see also Near v. State of Minnesota ex rel. Olson*, 283 U.S. 697, 717 (1931).
[24] *Whitney v. California*, 274 U.S. 357, 375 (1927).
[25] *See Press-Enterprises Co. v. Superior Court of California*, 478 U.S. 1, 9 (1986) (explaining public access to courtroom proceedings is necessary in order to maintain both fairness of

First, the remedy of closing trial proceedings or pre-trial proceedings by judicial order so as to prevent the media from gaining access has been ruled out on grounds of freedom of speech and open justice, except in very exceptional circumstances.[26] Moreover, the Supreme Court has broadly ruled as unconstitutional any statute authorizing restraint, in advance, on the press' ability to report, publish and circulate. [27] In *Near v. Minnesota*, the Supreme Court reversed a state court judgment against a publisher who critiqued a local chief of police.[28] The Court reasoned that the potential for abuse of the freedom of the press by publishers does not affect, in any way, the principle that the press should be free to report on official misconduct.[29] Such prior restraints could lead to a complete system of censorship – a reality opposite to the intensions of the Founders.[30]

The Supreme Court further recognized broad deference to the press in criminal trials by limiting post-publication contempt orders to circumstances where publication results in a "clear & present danger" to the administration of justice. In *Bridges v. California*, the president of a union, Bridges, published a copy of a telegram while he awaited the court's ruling on his motion for a new trial. [31] The telegram stated that if the court's adverse decision were enforced, his union would strike.[32] The trial court found Bridges in contempt of court.[33] The Supreme Court

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criminal trial system and essential appearance of fairness); *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966) ("A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field.... The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.").

[26] *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581 (holding that trials could be closed to the public and press only if absolutely necessary to preserve defendants' fair trial rights).

[27] *Near v. Minnesota*, 283 U.S. 697,732 (1931).

[28] *Id.*

[29] *Id.* at 719.

[30] *Id.* at 711.

[31] *Bridges v. California*, 314 U.S. 252, 301 (1941).

[32] *Id.*

reversed, reasoning that the words used by Bridges were not "of such a nature as to create a clear and present danger that they [were likely to] bring about… substantive evils."[34]

The Sixth Amendment right to a public trial further underscores the importance of the media's access to the American criminal justice system. The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal proceedings the accused shall enjoy the right to a… public trial…."[35] This public-trial right reflects, among other things, the Founders' hostility toward secret proceedings reaching back to the Star Chamber.[36] The public-trial right thus demonstrates that the Founders' belief in an open, public trial derives not only from their desire to hold the judiciary accountable to the people as a government institution, but also from their desire to guarantee defendant's the right to a fair trial.

2. The Right To A Fair Trial

Although guaranteed by both the Fifth and Fourteenth Amendments to the Constitution, "due process of law," like the rule of law, is not easily defined, and has historically been the subject of a great deal of controversy.[37] Throughout its varied existence, however, one major theme has always survived: the right to due process requires state and federal justice systems to ensure "fundamental principles of liberty and justice."[38]

An element of due process, which appeals specifically to the criminally accused, is the right to a trial by an impartial jury. Guaranteed by the Sixth Amendment, this right is vital to the

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[33] *Id.* at 259.
[34] *Id.* at 263.
[35] U.S. Const. amend. VI.
[36] *Moran v. Burbine*, 475 U.S. 412, 434 n. 1 (1986)(Stevens, J., dissenting) (discussing the notorious Star Chamber in which an accused often was "interrogated in secret for hours on end.").
[37] *Groppi v. Leslie*, 404 U.S. 496, 585 (1972) ("[T]he requirements of due process cannot be ascertained through the mechanical application of a formula.")
[38] *Buchalter v. New York*, 319 U.S. 427, 429 (1943).

tenet that all defendants are innocent until proven guilty.[39] In the American criminal justice system, the jury is entrusted to assess all the evidence presented in open court to determine the guilt or innocence of the accused. The Founders were aware of the dangers posed by local partiality to the accuracy of verdicts, and they believed that they might ensure impartial jurors through measures such as voir dire, continuances, and sequestration of juries. [40] What the Founders didn't anticipate, however, is that instantaneous media coverage can threaten the impartiality of the jury. Measuring this impact, however, is difficult, if not impossible.

Between 1959 and 1965, the Supreme Court for the first time reversed several criminal convictions because the defendants had been unfairly prejudiced by heavy media coverage. In 1959, the Court reversed a federal district court conviction in *Marshall v. United States* because the jury had been exposed to newspaper accounts revealing the defendant's previous convictions where such convictions were not admitted as evidence.[41] The Supreme Court reasoned that prejudice to a defendant is just as great when disallowed evidence reaches the jury through the newspapers as when it is introduced by the prosecution.[42]

Two years later, in *Irvin v. Dowd*, the Supreme Court vacated the defendant's murder conviction and remanded the case.[43] The Court reasoned that the "barrage of newspaper headlines, articles, cartoons, and pictures" unleashed against the defendant preceding the trial reflected a community with "a pattern of deep and bitter prejudice" against the defendant.[44] The

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[39] *See* Otis H. Fisk, *Presumptions*, 11 CORNELL L. Q. 37 (1926)(advocating the presumption of innocence as a substantive right rather than merely a standard of proof).
[40] *See* 3 Legal Papers of John Adams, supra note 131, at 17-19, 24-25 (describing extensive voir dire of jurors in Boston Massacre trials).
[41] *Marshall v United States*, 360 U.S. 310, 313 (1959).
[42] *Id.*
[43] *Irvin v. Dowd*, 366 U.S. 717, 729 (1961).
[44] *Id.* at 725.

Court thus concluded that under these circumstances a finding of impartiality would not meet constitutional standards.[45]

Similarly, in 1965, the Supreme Court overturned the conviction of Billie Estes, a high-rolling swindler.[46] The issue on appeal was whether the petitioner was deprived of his Fourteenth Amendment right to due process because of the televising and broadcasting of his trial.[47] The Supreme Court agreed and reversed, holding that trial witnesses and the original jury had been tainted by the actions of the press.[48] Despite the frequency of criminal conviction reversals as a result of media coverage impairing defendants' right to a fair trial, the Supreme Court has yet to enunciate a clear standard, leading to inconsistent application of the law by lower courts. How the principles of free press and due process have applied in cases garnering attention today, however, is instructive.

III. Principles in Practice: Case Studies Of The Thirteenth Juror In America

The murder trials of O.J. Simpson and Steven Avery are useful illustrations of the thirteenth juror in America because the defendants, their circumstances, and their trials are incredibly distinct. O.J. Simpson was a wealthy football star living in Brentwood, California; Steven Avery was the poor operator of a salvage yard living in Manitowoc County, Wisconsin. One commonality between the two men, however, is that the media and the American public have, years after their verdicts, taken great interest in their trials.

1. The People v. O.J. Simpson

The series of events leading to the arrest and trial of former football star O.J. Simpson captured the attention of the American public. Simpson was charged with killing his ex-wife

[45] *Id.* at 729.
[46] *Estes v. Texas*, 381 U.S. 532, 552 (1965).
[47] *Id.* at 534-535.
[48] *Id.* at 552.

Nicole Brown Simpson and an acquaintance of hers.[49] After a trial lasting nine months, Simpson was acquitted of all charges on October 3, 1995.[50] Twenty years after the verdict, the Simpson case is yet again the topic at American dinner tables; FX's premiere of "People v. O.J. Simpson: American Crime Story" in February 2016 is officially the most-watched original scripted series premiere in FX's twenty-two-year history.[51]

Simpson's defense counsel and the prosecution notoriously utilized the media in order to gain strategic advantages prior to trial.[52] Defense counsel Robert Shapiro faxed copies of a letter Shapiro wrote to reporters challenging the integrity of blood samples used for DNA testing before it was delivered to the judge, Lance Ito, or the prosecutor, Marcia Clark.[53] At about the same time, the defense suggested to several media outlets that initial DNA tests were favorable to Simpson. On the other hand, District Attorney Gil Garcetti suggested on television that Simpson would use a "Menendez-type defense" to charges he murdered his former wife Nicole Simpson and her friend Ronald Goldman.[54] Further, the prosecution speculated, through public statements, that Simpson would try to plea bargain; the Simpson defense responded with leaks

[49] Ronald Goldman, *O.J. Simpson is Charged with Ex-Wife's Murder and Death of Companion*, CHI. TRIB., June 17, 1994, at 1.
[50] Adam Pertman, *"Not Guilty": Simpson Free After Acquittal*, BOSTON GLOBE, Oct. 4, 1995, at 1, 22.
[51] Joe Otterson, *'People v OJ Simpson' Kills It in Delayed Viewing*, THE WRAP, February 8, 2016.
[52] Nina Burleigh, *Preliminary Judgments*, 80 A.B.A. J. 55, 56 (1994).
[53] *Id.*
[54] *Id.* (referring to the defense of Erik and Lyle Menendez, who admitted killing their parents but said they feared for their lives after years of sexual and psychological abuse).

suggesting that Simpson was framed for racist reasons.[55] Even Judge Ito made media appearances.[56]

Besides trial participants' communication with of the media, the Simpson case is noteworthy because of the live television coverage of pretrial and trial proceedings. This exposure resulted in a specter of witnesses selling their stories to the media.[57] Prosecutor Clark decided not to call one witness at a preliminary hearing, a woman who alleges she saw Simpson driving in the area of his former wife's home about the time of the murders, because the witness lied about taking money from tabloid television.[58] Although jurors were sequestered during every phase of the trial, they were not sequestered during the pretrial proceedings – and they were thus exposed to this coverage – including a memorable audio tape of a 911 call by Nicole Simpson on October 25, 1993.[59] Despite the Simpson trial's reputation as "the trial of the century," it is unclear whether the jury's verdict was prejudiced by the pervasive publicity.

2. State of Wisconsin v. Steven Avery

On October 31, 2005, photographer Teresa Halbach was scheduled to meet with Steven Avery at his home on the grounds of Avery's Auto Salvage to photograph his sister's minivan for a sales ad in Auto Trader Magazine.[60] She went missing the same day.[61] On November 11, Avery was charged with the murder of Halbach after her car and charred bone fragments were

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[55] B. Drummond Ayres, Jr., Simpson Case Has California Debating Muzzles for Lawyers, N.Y. TIMES, Aug. 21, 1994.
[56] Joel Achenbach, *Ito Blinks In Spotlight Judge's Blunder Brings Long Week of Intense Publicity and Criticism*, WASH. POST, Nov. 19, 1994, at A1 (criticizing Judge Ito, presiding in O.J. Simpson trial, for his own media appearances, viewed by prospective jury members after Ito reprimanded press for excessive coverage of trial).
[57] Burleigh, supra note 48, at 56.
[58] *Id.*
[59] *Id.*
[60] "Making a Murderer." NETFLIX. Archived from the original on December 22, 2015. Retrieved March 1, 2016.
[61] *Id.*

found at the salvage yard.[62] On December 18, 2015, Netflix released "Making a Murderer," a ten-episode original documentary series exploring Avery's trial in 2007.[63]

While Steven Avery's guilt is still a matter of mainstream public debate, the *way* he was tried for the murder of Teresa Halbach was improper. First, the special prosecutor leading the case, Ken Kratz, frequently made statements to the press implicating Avery as well as Avery's nephew, who was cooperating with the government. On March 2, 2006, Kratz revealed details to the public at a press conference:

> The evidence that we've uncovered establishes that Steven Avery at this point invites his 16-year-old nephew to sexually assault this woman that he has bounded to the bed. During the rape, Teresa is begging for help, begging 16-year-old Brendan to stop, if he could stop this. Sixteen year old Brendan under the instruction of Steven Avery, cuts Teresa Halbach's throat, and she still doesn't die... Brendan watches Steven Avery take a butcher knife from the kitchen and stab Teresa Halbach in the stomach. What Steven Avery does then, while Teresa is still begging for her life, is hand the knife to the sixteen-year-old boy and instructs him to cut her throat. Sixteen-year-old Brendan, under the instruction of Steven Avery, cuts Teresa Halbach's throat, but she still doesn't die.[64]

The evidence of alleged torture and rape derived from Brendan Dassey's pretrial confession was not admitted in Avery's actual trial.[65]

After the release of "Making a Murderer," several news outlets investigated the case. InTouch conducted a weeks-long investigation in Wisconsin, where the publication met and spoke to 13 of the 16 jurors in Avery's trial.[66] When InTouch asked one juror, who requested to remain anonymous, what he or she thought Avery did to photographer

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[62] *Id.*
[63] *Id.*
[64] John Ferek, *Legal experts blast Avery prosecutor's conduct*, USA-TODAY NETWORK-WISCONSIN, January 24, 2016.
[65] "Making a Murderer", supra at note 56.
[66] *'InTouch' Exclusive: 'Making a Murderer" Bombshell – New Evidence From Jurors Could Free Steven Avery*, INTOUCH WEEKLY, January 13, 2016. http://www.intouchweekly.com/posts/steven-avery-making-a-murderer-87155.

Teresa Halbach, they responded, "Torture and rape. Then he shot her in the head. He cut her up and put her in a burn barrel."[67]

The traditional device of voir dire was also seemingly ineffective as a tool to ensure that Steven Avery would be tried by an impartial jury. In January 2016, People reported on the makeup of the trial's jury, revealing that one of the jurors in Avery's trial was the father of a Manitowoc County Sheriff's deputy, and another juror's wife was a Manitowoc County clerk.[68]

IV. Rediscovering the Rule of Law: Easing Constitutional Tensions

Because the media operates as a check on the integrity and competence of the judicial system, trial courts should be extremely cautious in closing legal proceedings and restraining reporters. Yet traditional devices to ensure a fair trial like voir dire, change of venue, change of venire, and jury instructions are often ineffective where a trial is highly publicized. To restore the rule of law in publicized criminal trials, trial courts should more actively control trial participants vis-à-vis the media through judicial restraining orders and the elimination of prosecutorial elections. Additionally, rather than censuring the media through closed courtroom doors, live television coverage should be strictly limited to appellate courts proceedings.

a. Judicial Restraining Orders

Although the American Bar Association has set forth Model Rules governing when attorneys and prosecutors may communicate with the media, these rules are simply not sufficient to protect a defendant's constitutional right to a fair trial.[69] Rather, judicial restraining orders

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[67] *Id.*

[68] Tara Fowler, *Dismissed Steven Avery Juror Tells PEOPLE Jury Members Were Related to a Local Cop and a County Employee*, PEOPLE, January 5, 2016.

[69] B. Drummond Ayres, Jr., *Simpson Case Has California Debating Muzzles for Lawyers*, N.Y. TIMES, Aug. 21, 1994, at 40 (most states do not enforce ethical rules regarding pretrial publicity);

against trial participants are a more effective tool to limit the potential for extrajudicial speech to threaten the fairness of a trial, and as such, they should be used more frequently.

The *Sheppard* Court indicated that a "gag order" may be employed to restrain trial participants from making extrajudicial statements where there is a reasonable likelihood that prejudicial publicity may prevent a fair trial.[70] When appropriate, a trial court may prohibit lawyers, witnesses, jurors, court personnel and others directly involved with the trial from making any harmful extrajudicial statements.[71] Such an order has withstood constitutional attack where the trial court has determined the traditional devices would be insufficient due to the nature of the case.[72]

Restraint on trial participant speech is effective because, although not directly restraining the media, it severely limits their information sources.[73] This indirect effect on the media often renders a judicial restraining order the trial court's most valuable resource in high-profile cases.[74] When a trial is in jeopardy of becoming a media circus, therefore, the court should immediately place a judicial restraining order on trial participants, and thereafter should employ any other necessary devices to maintain fairness to the defendant.

Burleigh, supra note 48, at 56 (disciplinary rules on pretrial publicity are "notoriously under enforced").

[70] *Sheppard v. Maxwell*, 384 U.S. 333, 356 (1966)

[71] *Id.* at 367 (trial participant speech may be proscribed when necessary).

[72] *See, e.g.*, *Levine v. United States Dist. Court*, 764 F.2d 590, 595 (9th Cir.1985) (judicial order restraining participant speech appropriate where no less restrictive alternatives available).

[73] Robert P. Isaacson, *Fair Trial and Free Press: An Opportunity for Coexistence*, 29 STAN. L. REV. 561, 567 (1977) (denying press access to sources of information effective deterrent).

[74] *See* Mark R. Stabile, *Free Press-Fair Trial: Can They Be Reconciled in a Highly Publicized Criminal Case?*, 79 GEO. L. J. 337, 338 (1990) (gag order usually best alternative to solve conflict between rights under First and Sixth Amendment).

b. Limited Live Television Coverage

In 1994, the U.S. Judicial Conference voted overwhelmingly to bar cameras from federal courts.[75] However, a recent development in media coverage of legal proceedings is the trend toward allowing live television coverage of state courtroom proceedings. Presently, forty-seven states allow live television coverage of pretrial and trial proceedings, subject to the trial court's discretion.[76] Proponents of live television coverage argue that such coverage is not disruptive of judicial proceedings and is consistent with the function of the media to educate the public.[77] While this may be true in many cases, live coverage poses an added burden on the trial court to guarantee that the coverage does not impair the defendant's right to fairness.[78]

Two of the many problems associated with live television coverage are the distraction it causes to witnesses testifying, and the effect it has on witnesses who observe the testimony of others on television, prior to their own testimony.[79] To properly balance the need to educate with the need to ensure fairness, courts should consider televising only appellate proceedings.[80] The trend toward live television coverage is growing, however, and it therefore appears that alternatively, a solution lies with the trial court to properly exercise its discretion and disallow live coverage in high-profile proceedings where an imminent threat to fairness exists. Such a

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[75] Nadine Strossin, *Free Press and Fair Trial: Implications of the O.J. Simpson Case*, 26 U. TOL. L. REV. 647, 653 (1995).
[76] *See Chandler v. Florida*, 449 U.S. 560, 582 (1981)(recognizing trial court discretion regarding live television coverage).
[77] Nat Hentoff, *The Courts: Not for Judges Only*, WASH. POST, Oct. 15, 1994, at 15 ("The [televised] pretrial proceedings in the O.J. Simpson case… resulted in a particularly remarkable advance in many people's interest in [and understanding of] the justice system.")
[78] *See Estes*, 381 U.S. at 548 (televising trials places additional responsibilities on trial judge).
[79] *See* Judge Jack G. Day, *The Case Against Cameras in the Courtroom*, JUDGE'S J., Winter 1981, at 18, 20 (rule separating witnesses may be impaired when witnesses view each others' testimony).
[80] *See* Fred W. Friendly, *Order in the Court-Freedom in the Newsroom: Ending the Fair Trial/Free Press Controversy*, JUDGE'S J., Winter 1981, at 14, 16 (televising appellate proceedings educational).

practice will give the appellate court one less factor to consider when a convicted defendant in a media circus case inevitably appeals.[81]

c. Justice by Appointment

Just as the ABA and the Supreme Court can act to maintain the rule of law in American criminal justice system, so too can Congress. Policymakers have historically worked to ensure that the rule of law is respected in criminal trials. For example, the Fair Sentencing Act of 2010 reduced the disparity between sentencing for crack and powder cocaine, and policymakers are currently addressing ways to end mass incarceration under the Sentencing Reform and Corrections Act of 2015. In the context of balancing the interests of an accountable courtroom and trial by an impartial jury, Congress should act to prohibit prosecutorial positions by election.

Extrajudicial prosecutorial speech made for the primary purpose of political posturing should not be permitted.[82] Elected prosecutors may be tempted to release information, sometimes relating to an ongoing proceeding, in an attempt to garner more votes among their constituents – to demonstrate they are performing well in their positions and "prosecuting to the full extent of the law." Although this practice seeks to support transparency and the free flow of information by recognizing the elected prosecutor's free speech rights, it fails to consider that such speech is tainted by political motives.[83] Rather than promoting accountability, the election of prosecutors simply reduces the likelihood that a criminal defendant will receive a fair trial.

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[81] *See* Judge Peter D. O'Connell, *Pretrial Publicity, Change of Venue, Public Opinion Polls—A Theory of Procedural Justice*, 65 U. DET. L. REV. 169, 172 (1988) (discussing tendency of appellate courts to affirm where various devices utilized).

[82] *See generally* Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581 (2009) (arguing that prosecutor elections fail because they do not engender the political accountability that is the hallmark of democratic elections).

[83] *Cf. Republican Party of Minn. v. White*, 536 U.S. 765, 792 (2002) (O'Connor, J., concurring) (stating that the choice to elect rather than appoint--thereby forfeiting the ability to restrict speech--is voluntary).

V. Conclusion

The tension between the First Amendment's free press clause and the Sixth Amendment right to an impartial jury threatens the rule of law in the American criminal justice system. Although it is difficult to measure the impact of media coverage, lessons can be learned from two criminal trials that have, in the past and very recently, captured the attention of America - *People v. O.J. Simpson* and the *State of Wisconsin v. Steven Avery*. Although exclusion of the press from criminal proceedings is contradictory to principle of accountability and transparency under the rule of law except in rare circumstances, courts can effectively control the media by limiting their sources of information – namely, trial participants. Moreover, limiting live television coverage to appellate court proceedings would reduce the risk of unfair exposure to both jurors and witnesses. Finally, extrajudicial speech by prosecutors for the purpose of political posturing can be eliminated by legislation prohibiting prosecutorial elections. The adoption of these reforms will not only ease the tension between the First Amendment and the Sixth Amendment in criminal trials, but it will also bring the American criminal justice system closer to the rule of law and by extension, our Founders' intentions.

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