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Social Media, Venue and the Right to a Fair Trial

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SOCIAL MEDIA, VENUE AND THE RIGHT TO A FAIR TRIAL

Leslie Y. Garfield Tenzer*

Judicial failure to recognize social media's influence on juror decision making has identifiable constitutional implications. The Sixth Amendment right to a fair trial demands that courts grant a defendant's change of venue motion when media-generated pretrial publicity invades the unbiased sensibility of those who are asked to sit in judgment. Courts limit publicity suitable for granting a defendant's motion to information culled from newspapers, radio, and television reports. Since about 2014, however, a handful of defendants have introduced social media posts to support their claims of unconstitutional bias in the community. Despite defendants' introduction of negative social media in support of their claims, these same courts have yet to include social media in their evaluation of pretrial publicity bias. But social media is media, and as this article demonstrates, trial court judges faced with deciding change of venue motions have a constitutional obligation to include social media in their evaluations.

The collective refusal to treat social media the same as biased television, radio, or print media, suggests an erroneous assumption on the part of lower courts that social media is somehow different. This article identifies three reasons as justification for dismissing social media: social media is too recent a medium to fully understand and analyze, social media is not a legitimate news source, and social media is opinion based. Application of pretrial social media publicity to long-standing Supreme Court change of venue doctrine, coupled with its exploration of scientific and social research on social media influence, debunk these lower court rationalizations.

This article demonstrates that the reluctance of courts to consider social media evidence when deciding whether to grant a motion for a change of venue is a violation of any defendant's Sixth Amendment right to a fair trial. On a larger scale, the article demands that courts embrace our new reality.

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Social media intersects with criminal justice, and our daily lives, in ways that demand judicial recognition.

I.	Introduction.....	420
II.	The Sixth Amendment Right to a Fair Trial	422
	A. Negative Pretrial Publicity and the Early Days of Television	425
	B. A Formalized Totality of Circumstances Test.....	433
III.	Lower Courts' Disinterest in Pretrial Social Media Publicity	439
IV.	The Constitution Demands That Courts Consider Pretrial Social Media Publicity	445
	A. The Parallels Between Social Media and the Media of the Fourth Estate	446
	1. Social Media Is Not "Dangerous Because It Is New"	447
	2. Social Media Has a Degree of Credibility	451
	3. Social Media Informs Users	456
	B. The Totality of Circumstances Test Properly Contemplates Social Media Bias	461
V.	Conclusion	463

I. INTRODUCTION

Social media is media. The Sixth Amendment right to a fair trial demands that courts grant a defendant's change of venue motion when media-generated pretrial publicity invades the unbiased sensibility of those who are asked to sit in judgment. Courts limit publicity suitable for granting a defendant's motion to information culled from newspapers, radio, and television reports.¹ Despite defendants' introduction of negative social media in support of their claims, these same courts have yet to include social media in their evaluation of pretrial publicity bias.² But social media is media and, as this article demonstrates, trial court judges faced with deciding change of

¹*See, e.g.*, *Sheppard v. Maxwell*, 384 U.S. 333, 358 (1966).

²*See generally In re Dan Farr Prods.*, 874 F.3d 590 (9th Cir. 2017); *United States v. Tsarnaev*, 157 F. Supp. 3d 57, 67 (D. Mass. 2016); *Commonwealth v. Pal*, No. 207 MDA 2015, 2015 WL 7253650 at *4 (Pa. Super. Ct. Nov. 17, 2015).

2019]SOCIAL MEDIA, VENUE, AND THE RIGHT TO A FAIR TRIAL 421

venue motions have a constitutional obligation to include social media in their evaluations.

The Sixth and Fourteenth Amendments guarantee defendants the right to be judged by a fair and impartial jury.³ Where pretrial publicity has created a demonstrable negative impact on a jury pool, a judge, upon a defendant's motion, may move a trial to a new venue. The Supreme Court has interpreted the Constitution to permit changes of venue where the "totality of circumstances" created by newspaper, television, and radio demonstrates either actual prejudice among venirepersons or where the likelihood of bias among members of the community is so high, the trial judge can presume prejudice to the degree that it would make it unlikely to find a fair jury.⁴

Since about 2014, a handful of defendants have introduced social media posts to support their claims of unconstitutional bias in the community.⁵ Lower courts, arguably concluding that Facebook, Instagram, Twitter and the like are different from the traditional media, have refused to include negative social media evidence in their constitutionally-mandated evaluations.⁶ Their collective refusal to treat social media the same as biased television, radio, or other traditional news media, suggests an erroneous assumption that social media is somehow different. By ignoring social media bias, these courts create a constitutional threat to defendants' due process rights.

This article proves that courts must consider social media evidence when evaluating whether to grant a defendant's change of venue motion. Part I of this article details courts' consistent responses to cases where pretrial

³U.S. CONST. amend. VI; *id.* amend. XIV, § 1. The Constitution's Seventh Amendment governs the right to trial by jury in civil cases, and although impartiality is not mentioned explicitly therein, courts have treated it as an implicit guarantee. *Id.* amend. VII. As recently as 2016, the U.S. Supreme Court addressed the issue in *Dietz v. Bouldin*, ruling that a civil jury may be recalled after dismissal as long as its impartiality has not been compromised. 136 S. Ct. 1885, 1897 (2016). On behalf of the Court, Justice Sonia Sotomayor wrote, "Immediately after discharge, a juror could text something about the case to a spouse, research an aspect of the evidence on Google, or read reactions to a verdict on Twitter. Prejudice can come through a whisper or a byte." *Id.* at 1895.

⁴*See* Reynolds v. United States, 98 U.S. 145, 154–55 (1878); *see also* Stroud v. United States, 251 U.S. 15, 18–19 (1919); United States *ex rel.* Darcy v. Handy, 351 U.S. 454 (1956); Irvin v. Dowd, 366 U.S. 717, 727–28 (1961); Rideau v. Louisiana, 373 U.S. 723, 726 (1963); Estes v. Texas, 381 U.S. 532, 545 (1965).

⁵*See, e.g.,* Pittman v. Commonwealth, No. 2013-CA-000124-MR, 2014 WL 3548250, at *3 (Ky. Ct. App. July 18, 2014); Commonwealth v. Hernandez, BR CR2013-00983, 2014 WL 6601958, at *5 (Mass. Sup. Ct. Nov. 10, 2014).

⁶*See, e.g.,* Tsarnaev, 157 F. Supp. 3d at 59, 67; *Pal*, 2015 WL 7253650 at *4; Dering v. State, 465 S.W.3d 668, 671 (Tex. App.—Eastland 2015, no pet.).

publicity threatens to challenge a defendant's Sixth Amendment rights. Part II of this article details the pattern among lower courts to disregard social media evidence that defendants offer in support of their motions. This part delineates three reasons for dismissing social media evidence: social media is too recent a medium to fully understand and analyze,⁷ social media is not a legitimate news source,⁸ and social media is opinion based.⁹ Part III debunks each of the three myths that lower courts rely on when excluding social media evidence and explains why the courts' longstanding "totality of circumstances" test is well suited to test whether pretrial social media evidence threatens a defendant's constitutional rights. This article concludes by proving that the reluctance of courts to consider social media evidence when deciding whether to grant a motion for a change of venue is a violation of any defendant's constitutional rights.

II. THE SIXTH AMENDMENT RIGHT TO A FAIR TRIAL

The Constitution, through the Sixth and Fourteenth Amendments, guarantees every citizen a right to trial by an impartial jury in the district in which the defendant committed the crime.¹⁰ In some instances, the crime with which defendant is charged creates an abundance of media attention.¹¹ This attention is at times so pervasive that it corrupts the ability of the defendant's peers to evaluate the charges impartially. As a result, the defendant may request that a court move the trial to a different venue. A trial judge must grant the request if, either the publicity surrounding the prosecution creates a presumption of prejudice or *voir dire* reveals an inability of the court to impanel an unbiased jury.¹²

The idea of the need for a change of venue to guarantee an impartial jury dates back to 1807, before television, 24/7 news cycles, and any thought of

⁷See *Estes*, 381 U.S. at 544, 546.

⁸See *United States v. Browne*, 834 F.3d 403, 412 (3d Cir. 2016). See also *Tienda v. State*, 358 S.W.3d 633, 646 (Tex. Crim. App. 2012); *Dering* 465 S.W.3d at 671; *Commonwealth v. Mangel*, 181 A.3d 1154, 1162 (Pa. Super. Ct. 2018).

⁹See *Skilling v. United States*, 561 U.S. 358, 380 (2010); *Patton v. Yount*, 467 U.S. 1025, 1033 (1984); *State v. Cordoba*, No. F-16-001, 2017 WL 5629604, at *3 (Ohio Ct. App. Nov. 22, 2017).

¹⁰U.S. CONST. amend. VI.

¹¹See *infra* Part I.A.

¹²See *Skilling*, 561 U.S. at 380; *United States v. Tsarnaev*, 157 F. Supp. 3d 57, 59 (D. Mass. 2016); *Commonwealth v. Pal*, No. 207 MDA 2015, 2015 WL 7253650 at *4 (Pa. Super. Ct. Nov. 17, 2015).

2019]SOCIAL MEDIA, VENUE, AND THE RIGHT TO A FAIR TRIAL 423

the internet.¹³ At that time, Chief Justice Marshall found that the intense newspaper accounts and heightened public and private discussions surrounding the Aaron Burr-Alexander Hamilton duel made it difficult to impanel an unbiased jury for Aaron Burr's murder trial.¹⁴ In 1878, bigamist George Reynolds unsuccessfully argued that the court should move his trial following intense media scrutiny about his misdeeds.¹⁵ Chief Justice Waite denied Reynolds's request writing:

In these days of newspaper enterprise and universal education, every case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely anyone can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits.¹⁶

From the American judicial system's start, courts recognized the powerful effect of an omnipresent media and the difficult task of keeping it at bay for purposes of guaranteeing the defendant's Sixth Amendment rights.

Courts interpreting the issue of change of venue must strike the delicate balance between the traditional media's First Amendment rights and the defendant's rights under the Sixth and Fourteenth Amendments. Sometimes considered the Fourth Estate,¹⁷ the press reports on matters of import, including government actions. The media, however, is also a business, and often this reporting is tinged with the kind of sensationalism and bias that is guaranteed to sell.¹⁸

¹³Irvin v. Dowd, 366 U.S. 717, 722 (1961) (citing United States v. Burr, 25 F. Cas. 49, 51 (C.C.D. Va. 1807)).

¹⁴Burr, 25 F. Cas. at 49, 52.

¹⁵Reynolds v. United States, 98 U.S. 145, 168 (1878).

¹⁶Id. at 155-56.

¹⁷See *infra* Part III.A. The Fourth Estate is the term given to the news as a branch of government charged with overseeing the other three constitutional branches. See *infra* text accompanying note 31.

¹⁸Today, the line between hard news and information is blurred, to the point of creating "infotainment," a type of reporting that is not fully objective. See, e.g., Alessandra Stanley, *George Stephanopoulos and the Line Between News and Entertainment*, N.Y. TIMES, (May 15, 2015), <https://www.nytimes.com/2015/05/16/arts/television/george-stephanopoulos-and-the-line-between-news-and-entertainment.html>; Clay Calvert, *What is News?: The FCC and the New Battle Over the Regulation of Video Releases*, 16 COMMLAW CONSPPECTUS 361 (2008).

In the enjoyment of their constitutional rights, however, “[the media] may not deprive accused persons of their right to a fair trial.”¹⁹ In deciding to grant a change of venue in the case of a participant in the celebrated Brinks Heist case, New York’s Second Department considered, among other things, the local paper’s attempt to increase circulation at newsstands by carrying the headline, “FRESHEST NEWS OF THE BRINKS CASE.”²⁰ Such manipulative journalism evidenced “intensive, localized, continuing and prejudicial publicity.”²¹ In *Sheppard v. Maxwell*, a case referred as the “trial of the century,” the Supreme Court reversed the trial court’s denial of a change of venue in light of the media’s persistent coverage of the trial and “carnival-like atmosphere.”²²

In light of the tension between the competing First and Sixth Amendments, the Supreme Court has, in several instances, guided lower courts faced with change of venue challenges. Beginning before television became a household staple, and through the advent of the internet, the Court adopted and refined the test that trial judges must apply when deciding whether to grant defendants’ motions. This test, called the “totality of circumstances” test, asks trial judges to employ broad considerations as to whether newspaper, radio and television reports are so biased that there is evidence that jurors are either actually prejudiced by the reporting or, given the weight of negativity, a judge can presume that it would be impossible to impanel an unbiased jury.²³

Whether pretrial publicity justifies a change of venue remains in the hands of the trial judge.²⁴ The Supreme Court has provided constitutional guidelines to those charged with the task. Although it has not drawn any clear lines, the more subjective and biased news reporting may be, the more justified a trial judge is in granting the change of venue.

¹⁹*People v. Boudin*, 457 N.Y.S.2d 302, 307 (1982) (citing *Shepherd v. Florida*, 341 U.S. 50, 53 (1951) (Jackson, J., concurring)).

²⁰*Id.* at 306.

²¹*Id.*

²²384 U.S. 333, 358 (1966).

²³*See Reynolds v. United States*, 98 U.S. 145, 154–55 (1878); *Stroud v. United States*, 251 U.S. 15, 18–19 (1919); *United States ex rel. Darcy v. Handy*, 351 U.S. 454, 463 (1956); *Irvin v. Dowd*, 366 U.S. 717, 727–28 (1961); *Rideau v. Louisiana*, 373 U.S. 723, 726 (1963); *Estes v. Texas*, 381 U.S. 532, 545 (1965).

²⁴*Estes*, 381 U.S. at 535.

2019]SOCIAL MEDIA, VENUE, AND THE RIGHT TO A FAIR TRIAL 425

A. *Negative Pretrial Publicity and the Early Days of Television*

The Supreme Court first took issue with the media's ability to permeate juror impartiality in 1919 when, in *Stroud v. the United States*, it found that news articles which "printed and commented upon" the defendant's previous trials were sufficient to justify the exclusion of jurors in the county in which the articles appeared.²⁵ It was not until the mid-twentieth century, a time when most homes were beginning to buy their first television sets, that the Court turned serious attention to the matter. Over six years, the Court considered four cases, *Irvin v. Dowd*,²⁶ *Rideau v. Louisiana*,²⁷ *Estes v. State*,²⁸ and *Sheppard v. Maxwell*,²⁹ which together set forth the boundaries of pretrial publicity concerning its infringement on a defendant's constitutional rights.

At the time the Court heard these cases, the idea of a negative press was not novel. In *Irvin*, the earliest of the three cases, Justice Frankfurter noted in his concurrence that "not a Term passes without this Court being importuned to review convictions . . . in which substantial claims are made that a trial has been distorted because of inflammatory newspaper accounts."³⁰ These "claims," to which Justice Frankfurter refers, were in large part the exception rather than the rule, as the public revered the traditional press, thinking it an impartial body charged with informing the public on matters of concern.³¹ The Court decided these cases against the backdrop of a healthy respect for news media. *Irvin v. Dowd* concerned a series of murders that took place in Evansville, Indiana from 1954-1955.³² Police arrested Leslie Irvin, an African American man, for the crimes and announced that he had confessed

²⁵251 U.S. at 18.

²⁶See generally 366 U.S. 717.

²⁷See generally 373 U.S. 723.

²⁸See generally 381 U.S. 532.

²⁹See generally 384 U.S. 333.

³⁰*Irvin*, 366 U.S. at 730 (Frankfurter, J., concurring).

³¹See *infra* Part III.A. The press is often referred to as the Fourth Estate, charged with checks and balances on the other three branches of government. THOMAS CARLYLE, ON HEROES, HERO-WORSHIP, AND THE HEROIC IN HISTORY 257–58 (4th ed. 1852):

Burke said there were Three Estates in Parliament; but, in the Reporters' Gallery yonder, there sat a Fourth Estate more important far than they all. It is not a figure of speech or a witty saying; it is a literal fact . . . Whoever can speak, speaking now to the whole nation, becomes a power, a branch of government, with inalienable weight in law-making, in all acts of authority.

See also Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 633–34 (1975).

³²*Irvin*, 366 U.S. at 719.

to the murders. What followed was a “barrage of newspaper headlines, articles, cartoons and pictures”³³ about the defendant and the crimes, including interviews with potential jurors who made such comments such as “My mind is made up,” “I think he is guilty,” and “He should be hanged.”³⁴ According to defendant’s motion papers, the newspaper reached 95% of the dwellings in the Indiana county of 30,000 people.³⁵

The trial court overruled the defendant’s motion for a change of venue. A jury convicted the defendant of murder and sentenced him to death.³⁶ The Indiana Supreme Court affirmed the conviction.³⁷ Irvin sought a writ of habeas corpus from the Supreme Court.³⁸

Justice Clark wrote the unanimous opinion reversing Irvin’s conviction based on a failure to impanel an impartial jury.³⁹ The Court concluded that the jury pool’s collective view expressed during *voir dire*, demonstrated an actual prejudice towards Irvin.⁴⁰ Justice Clark’s opinion centered on evidence of the biased newspaper reports, including the coerced confession, and the

³³*Id.* at 725.

³⁴*Id.* at 727. The court illustrated the information provided in the news reports:

These stories revealed the details of his background, including a reference to crimes committed when a juvenile, his convictions for arson almost 20 years previously, for burglary and by a court-martial on AWOL charges during the war. He was accused of being a parole violator. The headlines announced his police line-up identification, that he faced a lie detector test, had been placed at the scene of the crime and that the six murders were solved, but petitioner refused to confess. Finally, they announced his confession to the six murders and the fact of his indictment for four of them in Indiana. . . . [O]n the second day devoted to the selection of the jury, the newspapers reported that “strong feelings, often bitter and angry, rumbled to the surface,” and that “the extent to which the multiple murders—three in one family—have aroused feelings throughout the area was emphasized Friday when 27 of the 35 prospective jurors questioned were excused for holding biased pretrial opinions.” A few days later the feeling was described as “a *pattern of deep* and bitter prejudice against the former pipe-fitter.” Spectator comments, as printed by the newspapers, were “my mind is made up”; “I think he is guilty”; and “he should be hanged.”

Id. at 725–27 (emphasis added).

³⁵*Id.* at 719, 725.

³⁶*Id.* at 718.

³⁷*Id.*

³⁸The Supreme Court originally denied direct review by certiorari without prejudice. *Id.* at 718–19.

³⁹*Id.* at 718, 728–29.

⁴⁰*Id.* at 728.

2019]SOCIAL MEDIA, VENUE, AND THE RIGHT TO A FAIR TRIAL 427

newspaper headlines that caused “a sustained excitement and fostered a strong prejudice among the people of Gibson County.”⁴¹

In reaching its decision, the Court set a somewhat high standard for defendants to meet in support of a change of venue. Recognizing that “in these days of swift, widespread and diverse methods of communication . . . scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. . . .”⁴² and the Court held that “[i]t is not required . . . that jurors be totally ignorant of the facts and issues involved.”⁴³ The test, therefore, is not whether a potential juror has learned of the case through negative reporting, but instead, whether the juror “can lay aside his impression or opinion and render a verdict based on the evidence presented by the court.”⁴⁴ Absent proof of the “actual existence” of a juror’s ability to remain impartial, the trial court need not grant defendant’s request. According to *Irvin*, a trial court must grant the defendant’s motion for change of venue upon proof that media reports caused actual prejudice among venirepersons.⁴⁵ A reviewing court cannot set aside the decision absent proof of manifest error on the part of the judge hearing the motion.⁴⁶

Four years after *Irvin*, the Court considered the case of Wilbert Rideau.⁴⁷ Rideau robbed a bank in Lake Charles, Louisiana, and took three employees hostage, killing one.⁴⁸ After his arrest, officers took him to a parish jail where the county sheriff interviewed him for twenty minutes.⁴⁹ The sheriff’s office videotaped the interview.⁵⁰

During the taped interrogation, Rideau confessed to the bank robbery, kidnapping, and murder.⁵¹ The taped confession made its way to a local television station, which broadcast the image of “Rideau in jail, flanked by the sheriff and two state troopers, admitting in detail the commission of the robbery, kidnapping, and murder, in response to leading questions by the

⁴¹*Id.* at 726.

⁴²*Id.* at 722.

⁴³*Id.*

⁴⁴*Id.* at 723.

⁴⁵*Id.* at 728.

⁴⁶*Id.* at 723.

⁴⁷*See generally* Rideau v. Louisiana, 373 U.S. 723 (1963).

⁴⁸*Id.* at 723–24.

⁴⁹*Id.* at 724.

⁵⁰*Id.*

⁵¹*Id.*

sheriff.”⁵² By the time the television station aired the taped confession for the third time, it had reached 64% of the residents in the parish from which the court would draw its jury pool.⁵³

Upon appointment of counsel, Rideau’s lawyers promptly filed a motion for change of venue.⁵⁴ The court denied the motion, and a parish court convicted Rideau, sentencing him to death.⁵⁵ The Supreme Court of Louisiana affirmed the conviction.⁵⁶ Rideau appealed to the United States Supreme Court, which granted certiorari.⁵⁷

The *Rideau v. Louisiana* United States Supreme Court opinion, which reads as a stern rebuke to the sheriff’s office, the television station, and the trial court, reversed Rideau’s conviction.⁵⁸ Justice Stewart, who wrote for the

⁵²*Id.* at 725. Footnote Two reads:

The Supreme Court of Louisiana summarized the event as follows: “[O]n the morning of February 17, 1961, the defendant was interviewed by the sheriff, and the entire interview was filmed (with a soundtrack) and shown to the audience of television station KPLC-TV on three occasions. The showings occurred prior to the arraignment of a defendant on the murder charge. In this interview, the accused admitted his part in the crime for which he was later indicted [sic].”

Id. at n.2.

⁵³The Court described the number of viewers reached:

Some 24,000 people in the community saw and heard it on television. The sound film was again shown on television the next day to an estimated audience of 53,000 people. The following day the film was again broadcast by the same television station, and this time approximately 29,000 people saw and heard the “interview” on their television sets. At the time of the broadcast, Calcasieu Parish has a population of approximately 150,000 people.

Id. at 724.

⁵⁴*Id.*

⁵⁵*Id.* at 724–25.

⁵⁶*Id.* at 725.

⁵⁷*Id.*

⁵⁸*Id.* Explaining the Court’s final thoughts:

The record shows that such a thing as this never took place before in Calcasieu Parish, Louisiana. Whether it has occurred elsewhere, we do not know. But we do not hesitate to hold, without pausing to examine a particularized transcript of the *voir dire* examination of the members of the jury, that due process of law, in this case, required a trial before a jury drawn from a community of people who had not seen and heard Rideau’s televised “interview.” Due process of law, preserved for all by our

2019]SOCIAL MEDIA, VENUE, AND THE RIGHT TO A FAIR TRIAL 429

majority, called the taped confession in a sheriff's office, without the presence of counsel, a "kangaroo court proceeding" which allowed prospective jurors to reach an opinion before the defendant could receive due process in a court of law.⁵⁹ In this instance, the Court found that because the twenty-minute broadcast reached such a large population of the potential jury pool, it was likely that an examination of the *voir dire* would show prejudice.⁶⁰ In such an instance, prejudice is presumed.⁶¹

The *Rideau* Court extended the circumstances upon which a trial court must grant a change of venue. Whereas *Irvin* demanded proof of actual prejudice—a showing that media reports infected the particular venireperson's impartiality—*Rideau* allowed judges to grant a defendant's change of venue motion and allowed a defendant to presume that the media surrounding the case makes it impossible to assemble an impartial jury. *Rideau* permits judges to grant a change of venue motion even before polling members of the jury pool. The Court looked to proof of both actual and presumed evidence in the cases that followed *Rideau*. In the mid-1960s, with television becoming a household item, the Court considered a pair of cases "obtained in a trial atmosphere that [were] utterly corrupted by press coverage."⁶² In 1965, the Court heard *Estes v. Texas*.⁶³ The issue in *Estes* was similar to *Rideau*. The Court considered whether televised news stories could prejudice a jury pool to the extent that it prohibited a court from impaneling an impartial jury.⁶⁴

Billy Sol Estes was a well-known Texas oilman and a close friend of then Vice President Lyndon Johnson.⁶⁵ The State charged Estes with a fraud scheme concerning the Texas ammonia business.⁶⁶ His ties to a high-ranking

Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death.

Id. at 727.

⁵⁹*Id.* at 726.

⁶⁰*See id.* at 727.

⁶¹*See, e.g., id.*

⁶²*Skilling v. United States*, 561 U.S. 358, 380 (2010) (quoting *Murphy v. Florida*, 421 U.S. 794, 798 (1975)) (Justice Ginsburg in *Skilling* reflecting on *Estes* and *Sheppard*).

⁶³381 U.S. 532 (1965).

⁶⁴*Id.* at 544.

⁶⁵Michael Carlson, *Billie Sole Estes obituary*, THE GUARDIAN (May 17, 2013), <https://www.theguardian.com/world/2013/may/17/billie-sol-estes>.

⁶⁶*Estes*, 381 U.S. at 534 n.1.

government official, combined with the breadth of his alleged crime, made for a media frenzy and national news.⁶⁷

The State allowed both television and still photography cameras at Estes' pretrial hearing.⁶⁸ The result was overwhelming. "At least 12 cameramen were engaged in the courtroom throughout the hearing taking motion and still pictures and televising the proceedings. Cables and wires were snaked across the courtroom floor. . . ."⁶⁹ The State also allowed cameras at Estes' trial, but the state took precaution to limit the effects of their presence by assembling a small filming booth in the back of the courtroom painted to blend in with its surroundings.⁷⁰ Estes' challenged his conviction on constitutional grounds, arguing that the presence of media at his pretrial hearing violated his Fourteenth Amendment right to due process.⁷¹ The *Estes* Court considered the presence of cameras in the courtroom, as opposed to the pretrial media with which *Irvin* and *Rideau* were concerned. While the media timeline was different, the Court's analysis was the same.⁷²

In reaching its 5-4 decision, the Court focused on then-recent technological advances of the broadcast medium.⁷³ "At the outset," Justice Clark wrote, "the notion should be dispelled that telecasting is dangerous because it is new."⁷⁴ In this instance, however, the presence of the television medium was a distraction to everyone in the courtroom. For the defendant, the presence of television is "a form of mental—if not physical—harassment, resembling a police line-up or the third degree."⁷⁵ For jurors, the presence of

⁶⁷*Id.* at 535.

⁶⁸*Id.*

⁶⁹*Id.* at 536. The Court described the layout of the courtroom:

A booth had been constructed at the back of the courtroom which was painted to blend with the permanent structure of the room. It had an aperture to allow the lens of the cameras an open view of the courtroom. All television cameras and newsreel photographers were restricted to the area of the booth when shooting film or telecasting.

Id. at 537.

⁷⁰*Id.*

⁷¹*Id.* at 535.

⁷²*Id.* at 544.

⁷³*Id.* at 549–52.

⁷⁴*Id.* at 541. The Court noted that forty-five states and the federal rules ban television in the courtroom. *Id.* at 544.

⁷⁵*Id.* at 549.

2019]SOCIAL MEDIA, VENUE, AND THE RIGHT TO A FAIR TRIAL 431

television places on them the added burden of knowing “friends and neighbors have their eyes on them.”⁷⁶

The *Estes* Court reviewed the trial court’s decision to deny the defendant’s change of venue motion.⁷⁷ The Court found that the broadcasting that happened during the pretrial hearing tainted the jury pool to such a degree that a trial court should have presumed that prejudice had occurred to the extent that it could never impanel an impartial jury.⁷⁸ The Majority seemed less concerned with the cameras during the defendant’s trial, which were hidden or otherwise obscured. Upon concluding presumed prejudice existed, the Court concluded there was no need to also find proof of actual prejudice.⁷⁹

Despite the majority’s tacit sanction of the cameras during defendant’s trial (as opposed to the pretrial hearing), the Court’s dissenters read the ruling to mean that televisions in a courtroom are per se unconstitutional. Justice Stewart, writing for the dissent,⁸⁰ noted that while “the introduction of television is . . . an extremely unwise policy . . . [i]t invites many constitutional risks, and it detracts from the inherent dignity of a courtroom,” there are instances where its presence can rest within constitutional boundaries.⁸¹

The Court took a more nuanced approach to the presence of televisions in the courtroom when it decided *Sheppard v. Maxwell*.⁸² The State of Ohio charged Dr. Samuel Sheppard with the murder of his then-pregnant wife, Marilyn.⁸³ The respected neurosurgeon claimed that he was asleep on a daybed on the first floor of his home while Marilyn was bludgeoned upstairs.⁸⁴ Perhaps, because of the doctor’s status, the media clung to both the pretrial and trial activities. Television, newspaper, and radio reports dubbed Dr. Sheppard’s case “the trial of the century.”⁸⁵

⁷⁶*Id.* at 545.

⁷⁷*Id.* at 532.

⁷⁸*Id.* at 550–51.

⁷⁹*Id.* at 542.

⁸⁰Justices Stewart, Black, Brennan, and White joined the dissent. *Id.* at 601.

⁸¹*Id.* at 601 (Stewart, J., dissenting).

⁸²*See generally* 384 U.S. 333 (1966).

⁸³*Id.* at 335.

⁸⁴*Id.* at 336.

⁸⁵Kenneth Jost, *Cameras in the Courtroom: Should TV be allowed in federal courts?*, 21 CQ RESEARCHER 25, 34 (2011); It is worth noting that there was a second “trial of the century,” the trial of O.J. Simpson, a famous ex-football player turned sportscaster and actor, who was charged with killing his ex-wife and her friend in 1994. Nell Henderson & Marc Fisher, *O.J. Simpson*

The trial was held in Bay Village, Ohio, a small suburb of Cleveland.⁸⁶ From the start, the media portrayed Sheppard in a negative light, publishing front-page editorials about his refusal to cooperate in the investigation and leading with editorials about Dr. Sheppard including, “[S]omebody is getting away with murder.”⁸⁷ To accommodate spectators, the State held the pretrial hearings in a school gym.⁸⁸ At trial, the State set up the courtroom to meet the needs of television and news reporters.⁸⁹

The trial court convicted Sheppard of second-degree murder.⁹⁰ Sheppard sought habeas relief from the Federal District Court for the Southern District of Ohio, which voided the conviction.⁹¹ The government appealed, and the Sixth Circuit reversed.⁹² Sheppard then appealed to the Supreme Court which reversed and remanded the case back to the Sixth Circuit, holding that the trial judge failed “to protect Sheppard sufficiently from the massive, pervasive and prejudicial publicity that attended his prosecution.”⁹³

Acquitted, WASH. POST (October 3, 1995) https://www.washingtonpost.com/archive/politics/1995/10/03/oj-simpson-acquitted/3307d174-cbe2-46c5-80c6-0d0b90a0d889/?noredirect-on&utm_term=.959d162f40f4. A “white Bronco chase,” in which Simpson engaged the police in a slow-speed chase along the California freeways, was nationally televised for approximately three hours. *O.J. Simpson white Bronco chase: How it Happened, Minute by Minute*, THE LOS ANGELES TIMES (Jun. 17, 2014) <https://www.latimes.com/local/lanow/la-me-ln-oj-simpson-white-bronco-chase-20140617-story.html>. The subsequent trial in 1995 was televised daily. Nell Henderson & Marc Fisher, *O.J. Simpson Acquitted*, WASH. POST (October 3, 1995) (“The decision brings to a halt ‘the trial of the century.’”).

⁸⁶*Sheppard*, 384 U.S. at 341.

⁸⁷*Id.* at 339. Other headlines reported that Sheppard had refused to take a lie detector test and had refused to be injected with truth serum. *Id.* Articles reported that Sheppard had a motive to kill his wife because he was having an affair. *Id.* at 340.

⁸⁸*Id.* at 339. The hearing was created by the local Coroner. *Id.* The Coroner presided over the inquest, along with the County Prosecutor as his advisor. *Id.* A long table was set up in the front of the room to accommodate the press; there were several hundred spectators. *Id.* Sheppard’s counsel was allowed to be present during the inquest, but his counsel was not allowed to participate. *Id.* at 340. In fact, when Sheppard’s counsel did attempt to participate, the Coroner had him removed from the inquest, receiving cheers from the crowd. *Id.* The inquest lasted five and a half hours. *Id.*

⁸⁹*Id.* at 342–43. A table, which ran the length of the courtroom, was set up behind the counsel table specifically for reporters. *Id.* at 343. Also, the first three and a half rows in the courtroom were reserved for television and newspaper reporters. *Id.* Only the second half of the fourth row was reserved for Sheppard’s family. *Id.*

⁹⁰*Id.* at 335.

⁹¹*Id.*

⁹²*Id.*

⁹³*Id.* at 335, 363.

2019]SOCIAL MEDIA, VENUE, AND THE RIGHT TO A FAIR TRIAL 433

The *Sheppard* Court evaluated the prejudice of a carnival-like atmosphere that lasted the duration of Sheppard's criminal case.⁹⁴ Given the high probability that the extraordinary media attention swayed most members of the community, the Court did not concern itself with learning of individual bias during *voir dire*.⁹⁵ Instead, it evaluated whether, based on the totality of circumstances, presumed prejudice existed.⁹⁶ The extensive newspaper, radio, and television coverage that the case received, the fact that the courtroom was arranged to maximize television recording, and that the trial court did not sequester jurors, thereby exposing them to television, radio, and other news reports at the same time they were deciding the case, led the Court to find that the judge's failure to grant a change of venue violated Sheppard's constitutional right to a fair trial, reversing and remanding his case.⁹⁷

After 1966, the issue of whether pretrial publicity justified a change of venue lay dormant for over a decade. In the cases that followed, the Court continued to apply *Sheppard*'s "totality of the circumstances" test to Sixth and Fourteenth Amendment challenges based on motions for change of venue.⁹⁸ The burden remained on the defendant to prove that the publicity either caused actual prejudice, which occurs when a *voir dire* reveals a community-wide sentiment against a defendant,⁹⁹ or presumed prejudice, which happens when the news coverage has been so pervasive and prejudicial to a defendant that a court cannot expect to find an unbiased jury pool in the community prior to the performance of *voir dire*.¹⁰⁰

B. A Formalized Totality of Circumstances Test

Despite the breadth of inquiry the totality of circumstances encouraged, securing a change of venue remained elusive for most defendants. A trial court judge could only grant a defendant's motion for change of venue if he or she either learned upon *voir dire* that the pretrial publicity had prejudiced too many venirepersons or that the publicity was so manifestly prejudicial

⁹⁴*Id.* at 358.

⁹⁵*Id.* at 357.

⁹⁶*Id.* at 352.

⁹⁷*Id.* at 363. Much of the information reported was never brought into trial. *Id.*

⁹⁸*Malone v. Crouse*, 380 F.2d 741, 744 (10th Cir. 1967); *Walker v. People*, 458 P.2d 238, 239 (1969); *State v. Beason*, 506 P.2d 1340, 1347 (Idaho 1973).

⁹⁹*Welch v. United States*, 371 F.2d 287, 290 (1966).

¹⁰⁰*Weekly v. State*, 222 A.2d 781, 785–86 (Del. 1966); *see also* *Estes v. Texas*, 381 U.S. 532 (1965) (finding that defendant's due process rights were violated when his trial was televised).

that the judge could only presume that it would be impossible to impanel an impartial jury.¹⁰¹ The Supreme Court granted such wide latitude to reviewing courts when making this inquiry that reviewing courts could only reverse trial decisions upon a showing that the trial judge made a manifest error.¹⁰²

The Supreme Court considered the issue of whether pre-trial publicity bias delivered through traditional media—newspapers, television, and radio—only four times between 1975 and 2010. In each instance, despite widespread notoriety, a divided Court rejected the defendant’s claim. The benches of *Murphy v. Florida*,¹⁰³ *Patton v. Yount*,¹⁰⁴ *Mu’Min v. Virginia*,¹⁰⁵ and *United States v. Skilling*¹⁰⁶ each acknowledged that given the state of present-day media, it was impossible to find potential jurors who had not been exposed to a “barrage of publicity” regarding a sensational trial.¹⁰⁷ The ability of jurors to set aside the media’s message,¹⁰⁸ the objectivity of reporting,¹⁰⁹ the depth of a jury pool,¹¹⁰ and the focus of media attention,¹¹¹ however, were factors in support of the judges’ rejections of defendants’ claims.

In *Murphy v. Florida*, the Court rejected the defendant’s petition for habeas corpus relief despite national attention to the defendant’s previous crimes.¹¹² Jack Roland Murphy¹¹³ was a notorious thief who, before his arrest for the present offense, was nationally recognized for stealing the “Star of

¹⁰¹*Welch*, 371 F.2d at 290; *Weekly*, 22 A.2d at 785–86.

¹⁰²*See Irvin v. Dowd*, 366 U.S. 717, 724 (1961); *Estes*, 381 U.S. at 551–52.

¹⁰³421 U.S. 794, 799, 803 (1975).

¹⁰⁴*See generally* 467 U.S. 1025 (1984).

¹⁰⁵*See generally* 500 U.S. 415 (1991).

¹⁰⁶*See generally* 561 U.S. 358 (2010).

¹⁰⁷*Murphy*, 421 U.S. at 798–99.

¹⁰⁸*Id.* at 800. The Court stated:

To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror’s impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Id. (quoting *Irvin v. Dowd*, 366 U.S. 717, 723 (1961)).

¹⁰⁹*Patton*, 467 U.S. at 1028–29.

¹¹⁰*Id.* at 1028.

¹¹¹*Mu’Min v. Virginia*, 500 U.S. 415, 429 (1991).

¹¹²421 U.S. 794, 795 (1975).

¹¹³Murphy was also known as “Murph the Surf” because he was also a surfing champion. *Id.*

2019]SOCIAL MEDIA, VENUE, AND THE RIGHT TO A FAIR TRIAL 435

India” sapphire from the American Museum of Natural History in New York City,¹¹⁴ and for his involvement in what the national news dubbed the “Whisky Creek Murders.”¹¹⁵ A Florida court convicted Murphy for breaking and entering with intent to commit burglary.¹¹⁶

The Court acknowledged that it was unlikely to find jurors unfamiliar with a case as sensational as this one, given the state of the media.¹¹⁷ However, Justice Marshall wrote that evidence of juror exposure to pre-trial publicity, even a barrage of publicity, is insufficient “if [a] juror [is able to] lay aside his [or her] impression or opinion and render a verdict based on the evidence presented in court.”¹¹⁸ In evaluating whether the trial judge erred in refusing a change of venue motion, the court will consider “the length to which the trial court must go in order to select jurors who appear to be impartial.”¹¹⁹ In instances where most jurors admit to some degree of influence, the trial court may presume community-wide hostility. Seven justices found that the totality of the circumstances supported the trial judge’s ruling finding that only twenty of the seventy-eight potential jurors were dismissed for prejudging the defendant, and that the remaining jurors were not persuaded by news of Murphy’s past crimes, seven justices found that the totality of the circumstances supported the trial judge’s ruling.¹²⁰

In *Patton v. Yount*, a Court by a 6-2 majority, ruled that the objective nature of reporting that took place while the court conducted *voir dire*, and the length of time that passed since the initial “barrage” four years earlier, was sufficient to support the trial judge’s conclusion denying defendant’s

¹¹⁴On October 29, 1964, Murphy, and three others, stole more than 20 gems, including the Star of India, a 563.35-carat star sapphire, from the American Museum of Natural History in New York City. *John Rowland Murphy*, BIOGRAPHY.COM, (April 2, 2014), <https://www.biography.com/people/jack-rowland-murphy-17169618>. Murphy was arrested two days later. *Id.* Murphy’s involvement in the robbery at the Museum of Natural History—which has been credited as “the greatest jewel heist of the 20th century”—landed him in prison for almost two years, and also immortalized his name in the hall of infamy. *Id.*

¹¹⁵Two Los Angeles women were found dead, weighted down in “Whisky Creek Canal” near Hollywood Florida. BIOGRAPHY.COM, *supra* note 114.

¹¹⁶*Murphy*, 421 U.S. at 795.

¹¹⁷*Id.* at 796.

¹¹⁸*Id.* at 800.

¹¹⁹*Id.* at 802–03.

¹²⁰Justice Brennan dissented. *Id.* at 804–08 (Brennan, J., dissenting). Justice Burger agreed with the result, but on procedural grounds, noting he would have otherwise overturned the ruling. *Id.* at 803–04 (Burger, J., concurring).

change of venue motion.¹²¹ In 1966, Jon Yount, a high school mathematics teacher, confessed to the gruesome killing of an 18-year-old high school student.¹²² At the time, both newspapers and radios sensationalized the story, including details of an alleged written confession.¹²³ Due to a series of procedural errors, both before and during the trial, the court overturned Yount's conviction.¹²⁴ The court convened a new trial four years later.¹²⁵

Yount argued that the extensive pretrial publicity surrounding his arrest and first trial unconstitutionally prejudiced the jury pool of his second trial. Both the Pennsylvania and U.S. Supreme Courts rejected his claim.¹²⁶ In denying habeas relief, Justice Powell, writing for the majority of the Supreme Court, noted that "the lapse in time [between trials] had a profound effect on the community and, more important[ly], on the jury, in softening or effacing opinion."¹²⁷ Contemporary news reports, of which there were few, were descriptive rather than biased.¹²⁸ Consequently, *voir dire* revealed that the jurors at the second trial lacked any "prior or present fixed opinion."¹²⁹ In addition, the deep jury pool provided a sufficient dilution of fixed ideas.¹³⁰ In

¹²¹467 U.S. 1025, 1025 (1984). Justice Marshall had recused himself. *Id.* "That time soothes and erases is a perfectly natural phenomenon, familiar to all." *Id.* at 1034.

¹²²*Id.* at 1027.

¹²³*Id.*

¹²⁴*Id.* at 1032.

¹²⁵*Id.* In Yount's first trial he was convicted of first-degree murder and rape and sentenced to life imprisonment. *Id.* at 1027. However, the appeals court found that police had given Yount inadequate notice of his right to an attorney under *Miranda*, so the appeals court remanded Yount's case for a new trial. *Id.* The second trial court suppressed Yount's written confession to the murder, as well as part of his oral confession taken while he was in custody. *Id.* Yount was convicted of first-degree murder a second time. *Id.* at 1028. Yount argued that he was prejudiced during the second trial because the potential jurors had already heard about his confession and prior conviction from the first trial due to media reports. *Id.*

¹²⁶*Commonwealth v. Yount*, 256 A.2d 464 (1969), *cert. denied*, 397 U.S. 925 (1970); *see also Commonwealth v. Yount*, 314 A.2d 242 (1974); *Yount v. Patton*, 537 F. Supp. 873 (W.D. Pa. 1982), *aff'd in part, vacated in part*, 710 F.2d 956 (3d Cir. 1983), *rev'd*, 467 U.S. 1025 (1984), *aff'd*, 744 F.2d 17 (3d Cir. 1984).

¹²⁷*Yount*, 467 U.S. at 1033 (Stevens, J. dissenting) (Justice Stevens, joined by Justice Brennan, took issue with the majority's characterization of the news articles, noting they were extremely detailed).

¹²⁸*Id.* at 1027–28.

¹²⁹*Id.* at 1028.

¹³⁰The jury pool consisted of 163 venirepersons. *Id.* at 1029. 292 venirepersons were initially chosen. *Id.* at 1027. Of those, 125 were dismissed for being improperly chosen, and four were dismissed for cause; leaving 163. *Id.* 1029 n.2.

2019]SOCIAL MEDIA, VENUE, AND THE RIGHT TO A FAIR TRIAL 437

reaching its conclusion, the Court reaffirmed the need for great deference to the trial judge on the issue.¹³¹

In *Mu'Min v. Virginia*, the Court again looked at the totality of the circumstances surrounding the pretrial publicity of a convict who murdered a woman while out on work detail.¹³² While the event garnered significant news coverage, the media focused much of its aim at the criminal justice system rather than the defendant.¹³³ By a vote of 6-3, the Court denied Mu'Min's appeal.¹³⁴ Justice Rehnquist distinguished the circumstances of this case from previous cases, noting that it lacked "the wave of public passion" against the defendant that occurred in *Irvin*,¹³⁵ and that the jurors lacked the fixed ideas expressed about Mu'Min's guilt that jurors in *Patton v. Yount* had expressed.¹³⁶ In this instance, the defendant was able to show actual prejudice against the system that granted his work detail, but such a showing did not demonstrate actual prejudice against him, despite eight of the twelve jurors admitting they had heard about the case before trial.¹³⁷

The most recent case in which the Court considered the issue of pretrial publicity and its effects on constitutional rights, came in 2010, in *Skilling v. United States*.¹³⁸ *Skilling* represents the first—and to date the only—case considering pretrial publicity against the backdrop of the internet. The Court was not concerned with the internet's power to easily reach the desks of

¹³¹*Id.* at 1038. There are good reasons to apply the statutory presumption of correctness to the trial court's resolution of these questions. *Id.* First, the determination has been made only after an often-extended *voir dire* proceeding designed specifically to identify biased veniremen. *Id.* It is fair to assume that the method we have relied on since the beginning, e.g., *United States v. Burr*, 25 F. Cas. 49, 51 (Va. Cir. 1807), usually identifies bias. *Id.* Second, the determination is essentially one of credibility, and therefore largely one of demeanor. As we have said on numerous occasions, the trial court's resolution of such questions is entitled, even on direct appeal, to "special deference." *Id.*; see also *Marshall v. Lonberger*, 459 U.S. 422, 434–35 (1983); see, e.g., *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 500 (1984). The respect paid such findings in a habeas proceeding certainly should be no less. *Id.*

¹³²500 U.S. 415, 417 (1991).

¹³³*Id.* at 429.

¹³⁴*Id.* at 421–22.

¹³⁵*Id.* at 429 (quoting *Irvin v. Dowd*, 366 U.S. 717, 728 (1961)).

¹³⁶*Id.* at 430 (quoting *Patton v. Yount*, 467 U.S. 1025, 1035 (1984)).

¹³⁷Justice Marshall, in his dissent, criticized the majority for failing to ask the empaneled jurors exactly what they had learned from the pretrial publicity. See *id.* at 438 (Marshall, J., dissenting). "The question before us is whether, in light of the charged atmosphere that surrounded this case, the trial court was constitutionally obliged to ask the eight jurors who admitted exposure to pretrial publicity to identify precisely *what* they had read, seen, or heard." *Id.*

¹³⁸See generally 561 U.S. 358 (2010).

jurors, relegating it to a series of footnoted cites quoting an article concerning Skilling's alleged crimes.¹³⁹

Jeffrey Skilling was the CEO of Enron, which was, at the time, "the seventh highest-revenue-grossing company in America."¹⁴⁰ With Skilling at the head, the company "crashed into bankruptcy,"¹⁴¹ and the federal government charged him with several counts of fraud, insider trading, and other crimes.¹⁴² As a consequence of his actions, thousands of employees lost both their jobs and their pensions, and countless more investors lost significant investment and retirement funds.¹⁴³ The news was of such vital import to the United States and its economy that every major news organization carried stories on the matter for over two years.¹⁴⁴

Relying heavily on the precedent announced in *Rideau*, *Estes*, and *Sheppard*, the majority announced a more formalized iteration of its "totality of circumstances" test. The Court stated that any appellate courts considering constitutional infringement on individual rights as a consequence of pretrial publicity should weigh four factors: (1) the size and character of the community in which the crime occurred; (2) whether the stories contained confessions of other "prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight;" (3) the time that elapsed between initial reporting of the crime and the trial; and (4) the fact that the jury acquitted the defendant of some of the charged offenses.¹⁴⁵

¹³⁹*Id.* at 370 n. 3.

¹⁴⁰*Id.* at 367. Enron was major conglomerate with revenues over \$101 billion dollars. *Wrestling with Reform: Financial Scandals and the Legislation They Inspired*, SECURITIES AND EXCHANGE COMMISSION: HISTORICAL SOCIETY, <http://www.sechistorical.org/museum/galleries/wwr/wwr06a-scandals-enron.php>. (last visited Mar. 6, 2019).

¹⁴¹*Skilling*, 561 U.S. at 367.

¹⁴²*Id.* at 369. Conspiracy to commit securities and wire fraud, securities fraud, wire fraud, making false representations to Enron's auditors, and insider trading. *Id.* Fastow, Enron's CFO; Lay, Enron's founder; Causey, Enron's former CAO; and dozens of others were prosecuted for this scandal. *Id.* at 368–69.

¹⁴³*See id.* at 375–76.

¹⁴⁴Compare date of Richard A. Opper, Jr., & Andrew Ross Sorkin, *Enron's Collapse: The Overview; Enron Collapses as Sutor Cancel's Plans for Merger*, N.Y. TIMES (Nov. 29, 2001) <https://www.nytimes.com/2001/11/29/business/enron-s-collapse-the-overview-enron-collapses-as-sutor-cancels-plans-for-merger.html>. with date of David Gay Johnston, *Tax Moves by Enron Said to Mystify the I.R.S.*, N.Y. TIMES (Feb. 13, 2003), <https://www.nytimes.com/2003/02/13/business/tax-moves-by-enron-said-to-mystify-the-irs.html>.

¹⁴⁵*Skilling*, 561 U.S. at 382–83.

2019]SOCIAL MEDIA, VENUE, AND THE RIGHT TO A FAIR TRIAL 439

The Court cited the fourth factor as most important.¹⁴⁶ Concerning the other factors, the majority concluded that the lapse of four years and the lack of a confession, which is *most damning* to readers, did not support the defendant's motion.¹⁴⁷ Finally, because the trial took place in Houston, "the fourth most populous city in the nation," the jury pool was both large and diverse enough to ensure at least twelve impartial jurors.¹⁴⁸

Justice Sotomayor took exception to the majority opinion.¹⁴⁹ Reviewing the body of precedent on the matter, Justice Sotomayor noted that the "totality of circumstances test" is case specific and the generic test that the majority announced should give way to a more particularized scrutiny.¹⁵⁰ "The devastating impact of Enron's collapse and the relentless media coverage demanded exceptional care on the part of the District Court to ensure the seating of an impartial jury."¹⁵¹

Although fractured in its conclusion, all nine members of the Court agreed that a reviewing court must apply the totality of circumstances test when evaluating whether pretrial publicity justifies a change of venue. *Skilling* provided clear guidelines to frequent change of venue motions that followed.¹⁵² Post-*Skilling* a court may consider a range of factors, including those enunciated in *Skilling*. In reviewing the decision, an appellate court can set aside the trial court's decision only upon a finding of manifest effort.¹⁵³

III. LOWER COURTS' DISINTEREST IN PRETRIAL SOCIAL MEDIA PUBLICITY

For the past few years, defendants filing change of venue motions have included social media posts in their basket of adverse pretrial publicity

¹⁴⁶ *Id.* at 383. Justice Ginsburg cited it as "of prime significance." *Id.*

¹⁴⁷ *Id.* at 382–83.

¹⁴⁸ *Id.* at 382. The court contrasted this with the 150,000 residents living in Calcasieu Parish at the time *Rideau* was tried. *Id.*

¹⁴⁹ *See id.* at 440 (Sotomayor, J., concurring in part and concurring in judgment).

¹⁵⁰ *Id.* at 439.

¹⁵¹ *Id.* at 447. Justice Sotomayor agreed that it was hard to conclude *Skilling* received a fair trial in light of the publicity surrounding the case citing the movie and a book that followed. *Id.* at 431 n.3, 442 n.8, 455 n.17.

¹⁵² *See, e.g.,* *Luong v. State*, 199 So. 3d 139, 146 (Ala. 2014); *State v. Hadden*, 271 P.3d 1227, 1235 (Idaho Ct. App. 2012); *Commonwealth v. Toolan*, 951 N.E.2d 903, 913–14 (Mass. 2011); *State v. Kingman*, 264 P.3d 1104, 1110 (Mo. 2011).

¹⁵³ *See Irvin v. Dowd*, 366 U.S. 717, 726 (1961); *Estes v. Texas*, 381 U.S. 532, 543 (1965).

proof.¹⁵⁴ Defendants are justified in their claim, in light of continually growing empirical findings on the influence that social media posts have on forming personal opinions.¹⁵⁵ To date, however, many courts have chosen to place evidence of unfavorable social media outside the bundle of pretrial publicity when they weigh choosing to grant or deny change of venue motions.¹⁵⁶ The reluctance to value negative Facebook, Twitter, Instagram posts, and the like, reflect a greater reluctance on the part of courts to apply traditional constitutionally-defining tests to new media problems.

In *Dering v. State*, a Texas appellate court refused to consider negative social media postings in support of the defendant's motion for a change of venue.¹⁵⁷ The victim's relatives created a Facebook memorial page that negatively implicated the defendant. Despite proof that many members of the small community read the page, the court rejected the social media evidence.¹⁵⁸ The court cited two general concerns with the authentication of Facebook: (1) that there was no way of knowing whether the proliferation of negative posts came from one person who created several different profiles (suggesting a small number of persons in the community evincing hostility towards the defendant); and (2) persons viewing a profile had no way of knowing whether the profile was real or not.¹⁵⁹ Consequently, the court did not include Facebook posts in its totality of circumstances review.

In 2015, the Superior Court of Pennsylvania heard *Commonwealth v. Pal*, a case of first impression for the court.¹⁶⁰ Pal lured his friend Frank Bonacci

¹⁵⁴ See, e.g., *United States v. Tsarnaev*, 157 F. Supp. 3d 57, 60 (D. Mass. 2016) (Twitter and Facebook posts); *Commonwealth v. Pal*, No. 207 MDA 2015, 2015 WL 7253650, at *4 (Pa. Super. Ct. 2015) (*In Memoriam Facebook* page); *Dering v. State*, 465 S.W.3d 668, 670 (Tex. App.—Eastland 2015, no pet.) (Facebook posts); *Pittman v. Commonwealth*, No. 2013-CA-000124, 2014 WL 3548250, at *3 (Ky. Ct. App. 2014) (“social media outlets”).

¹⁵⁵ See *In re Dan Farr Prods.*, 874 F.3d 590, 593 (9th Cir. 2017) (citing trial court's conclusion that social media influenced potential jurors' opinion of the case); Mark J. Feaster, Jr., *Blogging and the Political Case: The Practice and Ethics of Using Social Media to Shape Public Opinion in Anticipation of High-Profile Litigation*, 29 GEO. J. LEGAL ETHICS 1013, 1030 (2016) (“Social media platforms, like blogs, are particularly adept at influencing public opinion”); Thaddeus Hoffmeister, *Google, Gadgets and Guilt: Juror Misconduct in the Digital Age*, 83 COL. L. REV. 409, 409 (2012).

¹⁵⁶ See, e.g., *Tsarnaev*, 157 F. Supp. 3d at 67; *Pal*, 2015 WL 7253650, at *4; *Dering*, 465 S.W.3d at 671.

¹⁵⁷ 465 S.W.3d at 668.

¹⁵⁸ *Id.* at 670.

¹⁵⁹ *Id.* at 671.

¹⁶⁰ 2015 WL 7253650.

2019]SOCIAL MEDIA, VENUE, AND THE RIGHT TO A FAIR TRIAL 441

to take a ride with him and a third friend, Jason Dominick.¹⁶¹ The trip ended when Dominick shot Bonacci in the head.¹⁶² The incident happened in the small county of Lackawanna, Pennsylvania, where all three parties lived.¹⁶³

Following the incident, the community shared in a tremendous outpouring of emotion. Bonacci's family created a Facebook memorial page dedicated to Bonacci's death.¹⁶⁴ Websites became forums for both love and outrage. Pal and Dominick were vilified in the posts, which reached a large segment of the small community.¹⁶⁵

At trial, Pal introduced evidence that almost every person called to sit on the jury had either read news accounts, spoke about, or heard of Pal's involvement in the crime.¹⁶⁶ Much of this information was culled from social media sites.¹⁶⁷ Despite this, the trial judge rejected Pal's motion, and a jury convicted him of murder.¹⁶⁸ Pal appealed arguing, among other things, that the court violated Pal's due process rights in denying his motion.¹⁶⁹

On appeal, the Superior Court of Pennsylvania considered "[w]hether . . . the trial court abused its discretion in refusing to grant a change of venue/venire in light of the inflammatory and widespread pretrial publicity, . . . particularly [because of] the social media[,] including a Facebook page dedicated to the victim."¹⁷⁰ The appellate court excluded the social media posts from consideration as to whether the pretrial publicity in the case so affected the impaneled jurors as to render them unable to reach a

¹⁶¹ *Id.* at *1.

¹⁶² *Id.*

¹⁶³ *See Id.* At the time of the crime, the population of Lackawanna County was 21,000. U.S. CENSUS BUREAU, *Lackawanna County, PA*, <https://www.census.gov/quickfacts/fact/table/lackawannacountypennsylvania/PST045218#PST045218> (last visited Jan. 3, 2019).

¹⁶⁴ *Pal*, 2015 WL 7253650, at *3–4.

¹⁶⁵ *Id.*

¹⁶⁶ 98 out of 101 potential jurors. *Id.* at *2.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at *3.

¹⁶⁹ *Id.* at *4.

¹⁷⁰ *Id.* at *3. Here, Appellant argued that the media coverage in newspapers, television, internet media, relevant Facebook pages, and websites devoted to the Bonacci murder was inflammatory, pervasive, and undeniably prejudicial. *Id.* at *4. Appellant argued that in addition to conventional media coverage of the murder and trial, the social media generated by the victim's family, in particular, was "highly emotionally-charged, moving, sensationalistic, pervasive, accessible to and accessed by literally thousands and thousands of viewers in the area, slanted toward [Appellant's] conviction, and ultimately presumptively prejudicial to his right to a fair trial by a fair and impartial jury." *Id.*

fair and unbiased conclusion.¹⁷¹ Applying the “totality of circumstances test” to the conventional news media reports, the Pennsylvania Superior Court concluded that the traditional media publicity surrounding the case did not constitutionally harm the defendant.¹⁷² It cited the fact that at least 22% of those considered for jury duty said during *voir dire* that they were not impacted by what they read.¹⁷³

An Ohio court similarly rejected the notion that inflammatory Facebook *In Memoriam* pages vilifying the defendant were sufficiently prejudicial.¹⁷⁴ In *State v. Cordoba*, an Ohio appellate court rejected the defendant’s claim for a change of venue when he supplied the inflammatory Facebook posts accompanied with primarily objective news reports of the crime.¹⁷⁵ The State charged the defendant with involuntary manslaughter for shooting a good Samaritan, former U.S. Marine Josh McJilton, who had come between the defendant and his wife during a fight.¹⁷⁶ The crime took place in the small town of Wauseon, Ohio, population 7,342.¹⁷⁷ Family and friends created a Facebook site, “Remembering Josh McJilton.”¹⁷⁸ Despite labeling the comments to the articles on the Facebook page as “full of enmity and contempt, displaying a desire for complete vengeance,” the court was unwilling to subject social media posts to the Court’s *Skilling* test.¹⁷⁹

¹⁷¹The court explained its rationale:

[E]ven if social media constituted pretrial publicity for the purposes of a change of venue request, Appellant still did not establish that a change of venue was required because the information from social media was not ‘so extensive, sustained, and pervasive that the community must be deemed to have been saturated with it.

Id. at *5 (quoting *Comm. v. Tharp*, 830 A.2d 519, 529 (Pa. 2003)).

¹⁷²*Id.*

¹⁷³*Id.*

¹⁷⁴*State v. Cordoba*, No. F–16–001, 2017 WL 5629604, *2 (Ohio Ct. App. Nov. 22, 2017).

¹⁷⁵*Id.* at *2–3.

¹⁷⁶*Id.* at *1–2. Alexis Means, *Veteran gunned down trying to help woman*, 13ABC, Apr 27, 2015, <https://www.13abc.com/home/headlines/A-former-marine-is-gunned-down-trying-to-help-someone—301481861.html>.

¹⁷⁷US CENSUS BUREAU, *Wauseon, Ohio*, <https://www.census.gov/search-results.html?q=wauseon%2C+ohio&page=1&stateGeo=none&searchtype=web&cssp=SERP> (last visited Jan. 3, 2019).

¹⁷⁸*Remembering Josh McJilton*, FACEBOOK, https://www.facebook.com/search/top/?q=Remembering%20Josh%20McJilton&epa=SEARCH_BOX (removed after Jan. 3, 2019); *see also* David Coehrs, *Attorney Says Fair County Trial Impossible*, SWANTON ENTERPRISE (July 20, 2015), <https://www.swantonenterprise.com/news/388/cordoba-wants-change-of-venue>.

¹⁷⁹*Cordoba*, 2017 WL 5629604, at *2–3.

2019]SOCIAL MEDIA, VENUE, AND THE RIGHT TO A FAIR TRIAL 443

Federal courts are equally unwilling to consider social media posts as sufficient to justify changes of venue, even in the most notorious of cases. Dzhokhar Tsarnaev, the Boston Bomber, faced court reluctance when he relied on social media to support a change of venue.¹⁸⁰ Tsarnaev's attorneys sought to move his trial from Boston to Washington, D.C. based on bias generated by traditional and social media coverage.¹⁸¹ The court dismissed any negative social media coverage, even social media in which potential jurors participated.¹⁸² Simply "friending" or "liking" a post, according to the *Tsarnaev* court did not translate into bias.¹⁸³ The court ignored any demonstrated influence on persons engaged in social media.¹⁸⁴

As recently as November 2018, a trial court, unwilling to grant a change of venue based on social media postings, reversed its position upon proof of one negative newspaper article.¹⁸⁵ The State of Indiana, Allen County, charged Amber Garrett with felony neglect for the death of her two-year-old son, who was beaten by his caregiver.¹⁸⁶ Garrett's attorney originally moved for a change of venue based, in large part, on the pretrial publicity that arose

¹⁸⁰United States v. Tsarnaev, 157 F. Supp. 3d 57, 58 (D. Mass. 2016); *see also In re Tsarnaev*, 780 F.3d 14, 15 (1st Cir. 2015).

¹⁸¹*Tsarnaev* focused on media coverage about the anniversary of the bombing, articles about the 2015 Marathon itself, and publicity about the victims. 157 F. Supp. 3d at 60. There was heavy coverage about the anniversary of the event and the Marathon itself; the coverage was international. *Id.* About 1,000 media credentials were issued to over 80 news organizations. *Id.* at 61. Coverage could be found in the newspaper, on television, and over the internet. *Id.* The court noted the multitude of reported statements:

Both local and national media reported on statements of victims' family members, elected officials, religious leaders, and other organizations opposing the imposition of the death penalty for the defendant's crimes. For example, during the penalty phase of the trial, the parents of Martin Richard, the eight-year-old boy killed by the bomb placed by the defendant, urged the prosecution not to pursue imposition of the death penalty in a letter published on the front page of the Boston Globe.

Id. at 62.

¹⁸²*Id.* at 67.

¹⁸³*See* 780 F.3d at 28.

¹⁸⁴*Id.* at 18. The government conducted an analysis, which assumed that each juror's Facebook "friend" generated one case related "story" per day. *Tsarnaev*, 157 F. Supp. 3d at 67. For example, 12 jurors each with 12 friends equals 144 case-related stories per day.

¹⁸⁵Matthew Leblanc, *Judge: Jurors From Outside County Will Hear Neglect Case In 2-Year-Old's Death*, J. GAZETTE (Nov. 1, 2018), <http://www.journalgazette.net/news/local/courts/20181101/judge-jurors-from-outside-county-will-hear-neglect-case-in-2-year-olds-death>.

¹⁸⁶*Id.*

from a Facebook page dedicated to the victim, and chalk messages that activists wrote outside the courtroom including “Charge Amber With Murder.”¹⁸⁷ The Court refused to grant the change of venue.¹⁸⁸ Garrett’s attorney, John Bohdan, sought a change of venue in the case in February, and Allen Superior Court Judge Fran Gull rejected it in June, saying Bohdan had not shown that pretrial publicity would potentially bias jurors in the case.¹⁸⁹ Following one newspaper article, which summarized a release of the documents relating to the case, Judge Gull, changed her mind.¹⁹⁰

Civil cases have wrestled with this issue, and similarly dismissed the relevance of social media to support a change of venue.¹⁹¹ In *In re Dan Farr Productions*, the Ninth Circuit considered whether an abundance of opinionated Facebook and Twitter posts about an infringement case supported defendant’s motion for a change of venue under the Federal Rules of Civil Procedure.¹⁹² The court dismissed the vast number of posts as indicia of bias among jurors and went a step further concluding that there was no causal link between posts and juror bias.¹⁹³

The unwillingness of courts to consider evidence of bias from Facebook, Twitter, and other social media in the totality of the circumstances test, reflects an unwillingness by courts to recognize social media as a medium

¹⁸⁷Matthew Leblanc, *Judge, Hears From Malakai Supporters*, J. Gazette (May 23, 2018), <http://www.journalgazette.net/news/local/courts/20180523/judge-hears-from-malakai-supporters>; see also Jamie Duffy, *Report Sheds Light On Death Of 2-Year-Old Mother, Boyfriend Charged In Fatal Beating Of Young Boy*, J. Gazette (Oct. 28, 2018), <http://www.journalgazette.net/news/local/police-fire/20181028/report-sheds-light-on-death-of-2-year-old>; Jamie Duffy, *2-Year-Old’s Family Says Authorities Failed Them*, J. Gazette (Dec. 9, 2017), <http://www.journalgazette.net/news/local/police-fire/20171209/2-year-olds-family-says-authoritiesfailed-them>; Leblanc, *supra* note 185.

¹⁸⁸Leblanc, *supra* note 187.

¹⁸⁹*Id.*

¹⁹⁰*Id.*

¹⁹¹As recently as 2016, the U.S. Supreme Court addressed the issue in *Dietz v. Bouldin*, ruling that a civil jury may be recalled after dismissal as long as its impartiality has not been compromised. 136 S. Ct. 1885, 1895 (2016). On behalf of the Court, Justice Sonia Sotomayor wrote, “Immediately after discharge, a juror could text something about the case to a spouse, research an aspect of the evidence on Google, or read reactions to a verdict on Twitter. Prejudice can come through a whisper or a byte.” *Id.*

¹⁹²874 F.3d 590, 591 (9th Cir. 2017).

¹⁹³*Id.* at 593–94. The Ninth Circuit held that even though the petitioner had 5,200 Twitter followers, the convention had more than 30,000 Twitter followers, and there were more than 200,000 media articles concerning the case; the court found that there was no causal link between the number of posts and potential bias among San Diego jurors. *Id.*

2019]SOCIAL MEDIA, VENUE, AND THE RIGHT TO A FAIR TRIAL 445

akin to the traditional media of newspapers, radio, and television when deciding change of venue motions.

Rejecting social media bias in calculating the effect of pretrial publicity—much like traditional media—denies defendants their constitutional right to a fair trial. As this next section explains, social media is merely another form of media. Courts refusing to calculate social media pre-trial publicity in their decisions of whether to grant a change of venue fail to provide defendants with a full and meaningful review, thereby, violating their constitutional rights.

IV. THE CONSTITUTION DEMANDS THAT COURTS CONSIDER PRETRIAL SOCIAL MEDIA PUBLICITY

Social media is just another form of communication. Its potential to reach mass audiences, coupled with its potential to persuade, demand that courts include social media in its group of media scrutinized for purposes of deciding whether pretrial publicity warrants a change of venue. To date, courts have discounted social media content because it is too new,¹⁹⁴ lacks legitimacy,¹⁹⁵ or is opinionized rather than objective.¹⁹⁶ Quite the contrary, social media is more established than was television when courts began to scrutinize broadcasts for pretrial publicity. The medium has become an integral part of communication, used by governments and heads of state to communicate matters of import, and by traditional journalists to share their stories. While social media is, to a degree, filled with opinions and thoughts, those opinions take on the same quality as the biased news reports that courts ruled were persuasive enough to justify changes of venue. Social media presents information in much the same way as does “traditional news media” comprised of newspapers, radio, and television. An exploration of their similarities makes clear that courts must include social media evidence when applying the totality of circumstances standard to pretrial publicity review.

Social media, while akin to “traditional news media” in so many ways, does have a uniqueness seen by the courts who have been faced with considering the newest medium. Lower courts have cited issues of

¹⁹⁴ See *Estes v. Texas*, 381 U.S. 532, 538–40 (1965).

¹⁹⁵ See *United States v. Browne*, 834 F.3d 403, 412 (3d Cir. 2016); *Tienda v. State*, 358 S.W.3d 633, 641–42 (Tex. Crim. App. 2012); *Dering v. State*, 465 S.W.3d 668, 672 (Tex. App.—Eastland 2015, no pet.); *Commonwealth v. Mangel*, 181 A.3d 1154, 1164 (Pa. Super. Ct. 2018).

¹⁹⁶ See *Skilling v. United States*, 561 U.S. 358, 380 (2010); *Patton v. Yount*, 467 U.S. 1025, 1039–40 (1984); *State v. Cordoba*, No. F-16-001, 2017 WL 5629604, *3 (Ohio Ct. App. 2017).

authentication, interpretation, and questionable influence as reasons to discard social media evidence.¹⁹⁷ The totality of circumstances, as articulated most recently in *Skilling*, is flexible enough to minimize any credibility concerns that may arise from the uniqueness of social media.¹⁹⁸ For these reasons, courts must include social media evidence in their due process review.

A. *The Parallels Between Social Media and the Media of the Fourth Estate*

There is little explanation, yet some speculation, as to why courts discount social media. Social media has not been in existence long enough for courts to consider it part of the “traditional media.”¹⁹⁹ The information people read on social media is not revered in the same way as The Fourth Estate, the term used for traditional journalism.²⁰⁰ Social media is a network of individualized opinions, not necessarily reporting.²⁰¹ A comparison of

¹⁹⁷ See *Skilling*, 561 U.S. at 380; *Sheppard v. Maxwell*, 384 U.S. 333, 361 (1966); *Estes*, 381 U.S. at 539; *Stroud v. United States*, 251 U.S. 15, 18 (1919); *Browne*, 834 F.3d at 412; *United States v. Vayner*, 769 F.3d 125, 127 (2d Cir. 2014); *Tienda*, 358 S.W.3d at 641; *Dering*, 465 S.W.3d at 672; *Mangel*, 181 A.3d at 1164.

¹⁹⁸ 561 U.S. at 380.

¹⁹⁹ See *infra* Part III.A.1.

²⁰⁰ See *supra* note 18.

²⁰¹ “Fake News” is a serious issue that many social media platforms are facing today. Soroush Vosoughi et al., *The Spread of True And False News Online*, 359 *SCIENCE* 1146 (2018). A recent study found that falsehoods consistently dominates the truth on Twitter. *Id.* at 1150. The study analyzed contested news story since Twitter’s inception in 2006; approximately 126,000 stories, tweeted by three million users, over more than ten years. *Id.* at 1146. The study found that fake news traveled faster and reached more people than accurate news stories. *Id.* at 1150. A false story reached 1,500 people six times quicker, on average, than a true story did. *Id.* at 1148. Fake news was also seventy percent more likely to be retweeted than accurate news. *Id.* at 1149. However, the problem is not limited to Twitter. “[A]ny platform that regularly amplifies engaging or provocative content runs the risk of amplifying fake news along with it;” this includes platforms like Facebook and YouTube. Robinson Meyer, *The Grime Conclusions of the Largest-Ever Study of Fake News*, *ATLANTIC* (Mar. 8, 2018), <https://www.theatlantic.com/technology/archive/2018/03/largest-study-ever-fake-news-mit-twitter/555104/>.

From 2006 to 2016, Twitter bots, autonomous programs capable of interacting with computer systems, amplified true stories as much as they amplified false ones. *Id.* However, most of the stories were spread by human beings, rather than bots. *Id.* Fake news prospers “because humans, not robots, are more likely to spread it.” *Id.* “The massive differences in how true and false news spreads on Twitter cannot be explained by the presence of bots.” *Id.* Soroush Vosoughi, the author of the research paper on the proliferation of spreading true and false news online, states that his paper does

2019]SOCIAL MEDIA, VENUE, AND THE RIGHT TO A FAIR TRIAL 447

social media to traditional news media, however, reveals that they are not different at all. Today, social media is another thread in the comprehensive fabric of news media and, therefore, courts must include it when evaluating pretrial publicity.

1. Social Media Is Not “Dangerous Because It Is New”²⁰²

Social media is a relatively new medium. In 1997, the first recognized social media site, Six Degrees, allowed users to connect to other “friends” through the internet.²⁰³ In the mid-2000’s, social media gained Main Street popularity; and today, a plethora of social media sites exist. Facebook, Instagram, and Twitter are among the most popular sites, each of which allows individuals to share with those connected to them information ranging from status updates to personal opinions to news stories.²⁰⁴

The relative newness of social media has led to a healthy dose of skepticism across the legal landscape. Courtrooms are grappling with

not determine whether the use of botnets changed around the 2016 election. Vosoughi et al., *supra*, at 1146.

The stories concerning politics were the most prevalent but, unfortunately, fake news stories affected every topic from business to entertainment. Meyer, *supra*. Fake news spreads quickly for two reasons: (1) fake news seems to be more “novel” than real news, and (2) fake news evokes much more emotion than the average tweet. *Id.* Fake tweets tended to elicit words associated with surprise and disgust, while accurate tweets summoned words associated with sadness and trust. *Id.* “False information online is often really novel and frequently negative.” *Id.* “We know those are two features of information generally that grab our attention as human beings and that cause us to want to share that information with others—we’re attentive to novel threats and especially attentive to negative threats.” *Id.* “The key takeaway is really that content that *arouses strong emotions* spreads further, faster, more deeply, and more broadly on Twitter.” *Id.* “This particular finding is consistent with research in a number of different areas, including psychology and communication studies. It’s also relatively intuitive.” *Id.*

“In short, social media seems to systematically amplify falsehood at the expense of the truth, and no one—neither experts nor politicians nor tech companies—knows how to reverse that trend. It is a dangerous moment for any system of government premised on a common public reality.” *Id.*

²⁰² *Estes*, 381 U.S. at 541.

²⁰³ Keith Merrell, *The History of Social Media: Social Networking Evolution!*, HISTORY COOPERATIVE (Jan. 10, 2019), <https://historycooperative.org/the-history-of-social-media/>.

²⁰⁴ Kevin Murnane, *Which Social Media Platform is the Most Popular in the US?*, FORBES (Mar. 3, 2018), <https://www.forbes.com/sites/kevinmurnane/2018/03/03/which-social-media-platform-is-the-most-popular-in-the-us/#68491f4e1e4e>; see also STATISTA, *Most Popular Mobile Social Networking Apps in the United States as of July 2018, by Monthly Users (In Millions)*, <https://www.statista.com/statistics/248074/most-popular-us-social-networking-apps-ranked-by-audience/> (last visited Jan. 19, 2019).

introducing social media evidence.²⁰⁵ Judges are contemplating ideal jury instructions limiting juror social media access while sitting on trials.²⁰⁶ State courts are divided regarding the authentication of social media evidence.²⁰⁷ Some courts are contemplating service of process through social media sites.²⁰⁸ Social media has slipped with ease into the practice of law. Courts use social media to establish personal jurisdiction.²⁰⁹ And e-discovery is now the norm.²¹⁰ Many courts even have their own Facebook pages and Twitter accounts.²¹¹

Courts met television with the same sense of healthy skepticism it now applies to social media. A 1951 California court noted that the sensational exploitation of television as a medium was likely to influence juror neutrality.²¹² A 1951 Oklahoma court, contemplating cameras in the courtroom, found it necessary to single out televisions as a new medium for inclusion in the bundle of media granted First Amendment free speech rights.²¹³ Justice Clark, writing for the Court in *Estes*, made clear that

²⁰⁵ See *Commonwealth v. Pal*, No. 207-MDA-2015, 2015 WL 7253650, at *4 (Pa. Super. Ct. Nov. 17, 2015); *United States v. Tsarnaev*, 157 F. Supp. 3d 57, 60 (D. Mass. 2016); *Dering v. State*, 465 S.W.3d 668, 672 (Tex. App.—Eastland 2015, no pet.).

²⁰⁶ See *United States ex rel. Darcy v. Handy*, 351 U.S. 454, 463 (1956); *Tsarnaev*, 157 F. Supp. 3d at 67.

²⁰⁷ See *State v. Hannah*, 151 A.3d 99, 105 (N.J. Super. Ct. App. Div. 2016) (“Defendant argues that Texas follows the Maryland approach to authentication and that [New Jersey] should adopt the Maryland approach with its ‘three non-exclusive methods’ of authentication. We reject any suggestion that the three methods of authentication suggested in *Griffin* are the only methods of authenticating social media posts. We also reject *Griffin*’s suggestion that courts should apply greater scrutiny when authenticating information from social networks.”) (citations omitted).

²⁰⁸ See, e.g., *Fortunato v. Chase Bank USA N.A.*, No. 11-CIV-6608-(JFK), 2012 WL 2086950, at *1 (S.D.N.Y. June 7, 2012); Angela Upchurch, “*Hacking*” *Service of Process: Using Social Media to Provide Constitutionally Sufficient Notice of Process*, 38 U. ARK. LITTLE ROCK L. REV. 559 (2016).

²⁰⁹ See, e.g., *Fortunato*, 2012 WL 2086950, at *1; Upchurch, *supra* note 208.

²¹⁰ *The Importance of eDiscovery*, WATERFORD TECH., <https://www.waterfordtechnologies.com/the-importance-of-ediscovery/> (last visited Jan. 13, 2019).

²¹¹ See Andrew Henderson, *The High Court and the Cocktail Party from Hell: Can Social Media Improve Community Engagement with the Courts?*, 25 J. JUDICIAL ADMIN. 175, 175 (2016); US Attorney SDNY, TWITTER, https://twitter.com/SDNYnews?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor (last visited Jan. 10, 2019).

²¹² *People v. Stroble*, 226 P.2d 330, 334 (Cal. 1951), *aff’d sub nom.*, *Stroble v. State of Cal.*, 343 U.S. 181 (1952).

²¹³ *Lyles v. State*, 330 P.2d 734, 739 (Okla. Crim. App. 1958); see also *Stahl v. State*, 665 P.2d 839, 842 (Okla. Crim. App. 1983).

2019]SOCIAL MEDIA, VENUE, AND THE RIGHT TO A FAIR TRIAL 449

newness is not a bar to constitutional consideration when he wrote, the notion “should be dispelled that telecasting is dangerous because it is new.”²¹⁴

In 1946 less than 0.5% of the US households had a television.²¹⁵ That number grew to 28% by 1952²¹⁶ when appellate courts first began considering change of venue cases based on influential television reporting.²¹⁷ Social media, originating in 1997, is significantly more mature than was television at the time courts first considered whether it could influence a jury pool. If the length of society’s familiarity with a medium were the determinate of jury impact, then by jurisprudential standards, it is time for courts to acknowledge social media’s ability to both inform and persuade.

The Court has repeatedly recognized social media’s entrenchment into our daily lives. In *Packingham v. North Carolina*, a unanimous Court acknowledged, while speaking of the First Amendment, that “the law applies . . . to social networking sites ‘as commonly understood’—that is, websites like Facebook, LinkedIn, and Twitter.”²¹⁸ The Court, in *Trump v.*

²¹⁴381 U.S. 532, 541 (1965) (the Court noted that 48 states and the federal rules ban television in the courtroom. *Id.* at 544); *see also* Graham Zellick, *Spies, Subversives, Terrorists and the British Government: Free Speech and Other Casualties*, 31 WM. & MARY L. REV. 773, 778 (1990) (arguing that the newness of television aroused fear and anxiety among the British Government).

²¹⁵Mitchell Stephens, *History of Television*, GROLIER ENCYCLOPEDIA, <https://www.nyu.edu/classes/stephens/History%20of%20Television%20page.htm> (last visited Jan. 10, 2019).

²¹⁶*Compare* Robert Jay, *Number of Television Sets in 1952*, TELEVISION OBSCURITIES (Aug. 6, 2009), <https://www.tvobscurities.com/2009/08/number-of-television-sets-in-1952/> (citing 16,939,100 number of television sets in 1952), *with* US CENSUS BUREAU, *Table HH-1. Households by Type: 1940 to Present* (Nov. 2018), <https://www.census.gov/data/tables/time-series/demo/families/households.html> (45.54 million households in 1952).

²¹⁷*See, e.g.*, *United States v. Moran*, 194 F.2d 623, 625 (2d Cir. 1952) (noting potential for an unfavorable jury based on radio and television reporting); *United States v. Florio*, 13 F.R.D. 296, 299 (S.D.N.Y. 1952) (granting change of venue based on radio and television reports); *see also* *State v. Scales*, 87 S.E.2d 916, 920 (N.C. 1955) (upholding motion denying change of venue based on television and radio reports).

²¹⁸137 S. Ct. 1730, 1737 (2017). North Carolina enacted a statute making it a felony for a registered sex offender to gain access to a number of social networking websites where the offender knows that minors can become members. *Id.* The issue was whether that law was allowed under the First Amendment’s Free Speech Clause. *Id.* at 1733. The Court held that the law was too broad and a violation of the First Amendment because “to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights.” *Id.* at 1732. Social media allows users to know “current events, check ads for employment, speak and listen in the modern public square, and otherwise explore the vast realms of human thought and knowledge.” *Id.*

Hawaii,²¹⁹ considered presidential tweets when interpreting the intent of a Presidential Executive Order which banned citizens from specific countries whose interests appeared “detrimental to the United States.”²²⁰ In *Carpenter v. the United States*, it a case concerning the use of cell phone records to obtain personal locations, the Supreme court noted the regularity with which the general population obtains social media updates.²²¹ Individuals look at social media with more regularity than any other traditional news medium.²²² It is no surprise that, as Justice Kennedy wrote in *Packingham*, “Social media offers ‘relatively unlimited, low-cost capacity for communication of all kinds.’”²²³

²¹⁹ 138 S. Ct. 2392, 2403 (2018).

²²⁰ Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017) (In June 2017, President Trump tweeted, “People, the lawyers and the courts can call it whatever they want, but I am calling it what we need and what it is, a TRAVEL BAN!” He added: “That’s right, we need a TRAVEL BAN for certain DANGEROUS countries, not some politically correct term that won’t help us protect our people!” In September 2017, President Trump tweeted that “[t]he travel ban into the United States should be far larger, tougher and more specific—but stupidly, that would not be politically correct!” On September 24, 2017, President Trump issued Presidential Proclamation No. 9645, 82 Fed. Reg. 45161 (2017), which restricted entry of certain nationals from six Muslim-majority countries. On November 29, 2017, President Trump “retweeted” three anti-Muslim videos, entitled “Muslim Destroys a Statue of Virgin Mary!”, “Islamist mob pushes teenage boy off roof and beats him to death!”, and “Muslim migrant beats up Dutch boy on crutches!” The Court analyzed the President’s actions to determine if the primary purpose of the “Travel Ban” was to disfavor Islam by preventing its adherents from entering the country; the court answered “yes.”); *see also* Aguiar v. Recktenwald, No. 3:13-2616, 2016 WL 145259, at *4 (M.D. Pa. Jan 1, 2016) (the Court that prisoners have no constitutional rights to use or maintain a social media account.); *Keefe v. Adams*, 44 F. Supp. 3d 874, 882 (D. Minn. 2014), *aff’d*, 840 F.3d 523 (8th Cir. 2016) (the Court applied traditional First Amendment free speech test to a case where the defendant was dismissed from nursing school based on Facebook posts he made, which the school deemed “unbecoming of the profession and a transgression of professional boundaries”).

²²¹ 138 S. Ct. 2206, 2220 (2018).

²²² *Id.*

²²³ *Packingham*, 137 S. Ct. at 1735 (quoting *Reno v. American Civil Liberties Union*, 521 U.S. 844, 870 (1997)). Relying on principles of Free Speech, the Supreme Court struck down a North Carolina Law that makes it a felony for a registered sex offender “to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages.” *Id.* at 1733. Defendant posted on Facebook about his positive experience in traffic court. The Court observed that “Social media ‘offers ‘relatively unlimited, low-cost capacity for communication of all kinds.’” *Id.* at 1735. The Court analogized this case to *Bd. of Airport Comm’rs of City of Los Angeles v. Jews for Jesus, Inc.*, which regulated types of speech at Los Angeles Airport. 482 U.S. 569 (1987). “If a law prohibiting ‘all protected expression’ at a single airport is not constitutional, it follows with even greater force that

2019]SOCIAL MEDIA, VENUE, AND THE RIGHT TO A FAIR TRIAL 451

Social media is not “dangerous because it is new.”²²⁴ Well past its adolescence, courts on all levels have acknowledged its presence and incorporated it into the way law is practiced.²²⁵ On a constitutional level, as *Packingham* demonstrates, the Supreme Court has granted social media constitutional protection under the First Amendment.²²⁶ Given its maturity, social media is no longer so new that courts are justified in excluding it from constitutional consideration on the basis of unfamiliarity.

2. Social Media Has a Degree of Credibility

In the context of Sixth Amendment challenges to fair trials, justices acknowledge the power of traditional media to persuade.²²⁷ This ability, it seems, is reserved mostly for mainstream journalists, and the medium through which they report, who are often collectively referred to as the Fourth Estate, for their role in serving checks and balances on the three other branches of government.²²⁸ Social Media, in contrast, is generally considered to lack the accountability of the Fourth Estate, perhaps because many of the opinions and ideas expressed on social media sites like Twitter and Facebook are not part of the organic journalism process.²²⁹ Social media posts are not subject to the same type of editorial scrutiny or held to the same verification process as are articles appearing in traditional media outlets.²³⁰ Singling out

the State may not enact this complete bar to the exercise of First Amendment rights on websites integral to the fabric of our modern society and culture.” *Packingham*, 137 S. Ct at 1738.

²²⁴ *Estes v. Tex.*, 381 U.S. 532, 541 (1965).

²²⁵ *Id.*

²²⁶ *See also* *Grutzmacher v. Howard Cty.*, 851 F.3d 332, 336 (4th Cir. 2017) (overruling fire department’s regulation on firefighters’ social media use, since social media posts are protected speech); *United States v. Wheeler*, 776 F.3d 736, 738 (10th Cir. 2015) (government must prove social media posts are intended to be threatening in order to suppress defendant’s First Amendment rights).

²²⁷ *See In re Dan Farr Prods.*, 874 F.3d 590, 591 (9th Cir. 2017). The traditional news media includes television, radio, and newspaper. *See, e.g.*, *Serv. Emps. Int’l Union Local 5 v. Prof’l Janitorial Serv. of Hous., Inc.*, 415 S.W.3d 387, 390 (Tex. App.—Houston [1st Dist.] 2013, no pet.) (traditional news outlets include newspaper articles, television, and radio broadcasts).

²²⁸ Kathy Gill, *What is the Fourth Estate?*, THOUGHT CO. (updated Jan. 3, 2019), <https://www.thoughtco.com/what-is-the-fourth-estate-3368058>.

²²⁹ *Id.*

²³⁰ Adam Cohen, *The Media That Need Citizens: The First Amendment and the Fifth Estate*, 85 S. CAL. L. REV. 1, 1 (2014); Dallas Flick, *Combating Fake News: Alternatives to Limiting Social Media Misinformation and Rehabilitating Quality Journalism*, 20 SMU SCI. & TECH. L. REV. 375, 375 (2017).

social media, however, is not appropriate, given its role in delivering the news.

Labeled “The Fourth Estate,”²³¹ news reporting institutions are considered the check and balance on the three other branches of government.²³² Of the Fourth Estate, Adam Cohen wrote, it provides “information in a democracy, checking government abuses, checking the private sector, encouraging interest in group formation and promoting self-expression.”²³³ The Seventh Circuit noted that the free press worked to preserve the independence of each branch.²³⁴ The Supreme Court similarly acknowledged the importance a free press has to democracy.²³⁵ Both courts and commentators acknowledge newspaper, radio, and television as having a “significant . . . social influence”²³⁶ and its role in keeping checks and balances on the democratic state.²³⁷

²³¹Thomas Carlyle attributed the origin of the term to Edmund Burke, who used it in a parliamentary debate in 1787 on the opening up of press reporting of the House of Commons of Great Britain. Delbert Tran, *The Fourth Estate As The Final Check*, MFIA (Nov. 22, 2016), <https://law.yale.edu/mfia/case-disclosed/fourth-estate-final-check>; Fourth Estate (n.d.), *Merriam-Webster's collegiate dictionary*, <https://www.merriam-webster.com/dictionary/fourth%20estate#note-1> (last visited Jan. 10, 2019). Earlier writers have applied the term to lawyers, to the British queen's consort (acting as a free agent, independent of the king), and to the proletariat. *Id.*; Gill, *supra* note 228

²³²Gill, *supra* note 228. The earliest use in this sense described by Thomas Carlyle in his book *On Heroes and Hero Worship*. THOMAS CARLYLE, ON HEROES, HERO-WORSHIP, AND THE HEROIC IN HISTORY 392 (1908), <http://www.gutenberg.org/files/20585/20585-h/20585-h.htm> (ebook). “Burke said there were Three Estates in Parliament; but, in the Reporters' Gallery yonder, there sat a Fourth Estate more important far than they all.” Gill, *supra* note 228.

²³³Cohen, *supra* note 230, at 1.

²³⁴United States v. Isaacs, 493 F.2d 1124 (7th Cir. 1974).

²³⁵N.Y. Times Co. v. U.S., 403 U.S. 713, 717 (1971) (“In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy.”).

²³⁶Gregory P. Magarian, *Forward into the Past: Speech Intermediaries in the Television and Internet Ages*, 71 OKLA. L. REV. 237, 247 (2018) (citing the deference and power granted to media in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975)); see also Derry Ridgway, *Innocent of Empirical Rigor*, 14 ST. THOMAS L. REV. 165 (1995) (citing the influence of the Fourth Estate on pediatric and custody cases); C. Edwin Baker, *Media Structure, Ownership Policy, and the First Amendment*, 78 S. CAL. L. REV. 733 (1991) (“Like the Constitutional separation of powers provisions, the fourth estate role of the press is designed in part to reduce the risk of abuses of power.”).

²³⁷See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 559–60 (1980). One of the best examples of the acknowledging respect for the press and the information it imparts occurred in when the court decided *Richmond Newspapers, Inc. v. Richmond Newspapers, Inc.* concerned the fourth murder trial of John Paul Stevenson. *Id.* at 559. As a consequence of various procedural flaws,

2019]SOCIAL MEDIA, VENUE, AND THE RIGHT TO A FAIR TRIAL 453

Courts early on recognized the ability of the Fourth Estate to persuade those who revered it.²³⁸ In 1807, Chief Justice Marshall raised concerns about intense newspaper accounts of the duel between Alexander Hamilton and Aaron Burr.²³⁹ In 1919, the Court more formally recognized the power that the traditional media has to both persuade and inform, ruling that printed news articles were sufficient to bias potential jurors in a murder trial.²⁴⁰ In both *Estes* and *Sheppard*, the Court suggested that the mere presence of television was enough to sway venirepersons.²⁴¹

Reverence for traditional news outlets is generated, in part, by the code of ethics that binds journalists to their craft.²⁴² Members of the Society of Professional Journalists are obliged to promote the free exchange of information that is accurate, fair, and thorough.²⁴³ In contrast, the sense that information posted on social media is immune from ethics requirements excludes it from reliable and hence influential status.

The perception of social media as a collection of individualized opinions and ideas is much different from the reality that it is also a purveyor of news.

Stevenson's first three convictions were dismissed. *Id.* Due to the constant and high publicity surrounding this murder, which occurred in a small Virginia County, the defendant requested the court to bar cameras from the courtroom. *Id.* The government did not object, and the court accepted the Defendant's request. *Id.* at 560. That same day, Richmond Newspapers, dissatisfied with being barred from the courtroom, requested "a hearing on a motion to vacate the closure order" citing their First Amendment Right to be present. *Id.* The trial court rejected the newspaper's request. *Id.* at 561. Richmond Newspaper appealed, and the case made its way to the Supreme Court. *Id.* at 562. The Court overturned the trial judge's decision to ban the press from the courtroom. *Id.* at 580. Justice Burger wrote that the goal of the Constitution is to assure "freedom of communication on matters relating to the functioning of government." *Id.* at 575. "It is difficult for [the general populace] to accept what they are prohibited from observing." *Id.* at 572. This case makes clear that the role of the press is to serve as society's conduit of information. *See generally* Patrick M. Garry, *Anonymous Sources, Libel Law, and the First Amendment*, 78 TEMP. L. REV. 579 (2005); RonNell Andersen Jones, *Justice Scalia and Fourth Estate Skepticism*, 15 FIRST AMEND. L. REV. 258, 284 (2017).

²³⁸Consider, too, the famous story about Virginia O'Hanlon whose father told her that if *The Sun*, a New York Newspaper, confirmed the existence of Santa Claus then Santa Claus must be real. Editorial, *Is There A Santa Claus?*, N.Y. SUN, (Dec. 21, 2012), <https://www.nysun.com/editorials/yes-virginia/68502/> (reprinted from Sept. 21, 1897).

²³⁹*See supra* Part II; *United States v. Burr*, 25 F. Cas. 49, 52 (C.C.D. Va. 1807).

²⁴⁰*Stroud v. United States*, 251 U.S. 15, 20 (1919).

²⁴¹*Sheppard v. Maxwell*, 384 U.S. 333, 352 (1966); *Estes v. Texas*, 381 U.S. 532, 547 (1965).

²⁴²SOCIETY OF PROFESSIONAL JOURNALISTS, SPJ Code of Ethics, <https://www.spj.org/ethicscode.asp> (revised Sept. 6, 2014).

²⁴³*Id.*

To be sure, today the traditional press remains the means by which most community members learn the news.²⁴⁴ However the medium is changing. In 1996, people got their news exclusively through newspaper reporting, television, and radio broadcasts. By 2016, a Pew Research Center study found that 62% of American adults got their news through social media.²⁴⁵ Eighty-five percent of topics discussed on social media platforms, such as Twitter, are related to events in the news.²⁴⁶

Social media sites have surpassed print media as a news source for Americans.²⁴⁷ A study in the *Harvard Journal of Law and Technology* found “that close to 35% of tweets sent as Hurricane Sandy made landfall and pummeled its way up the East Coast in October 2012 were news related.”²⁴⁸ Individuals using social media platforms quite often repost stories generated by traditional news journalists.²⁴⁹ RonNell Anderson Jones calls this “repeatage” over “reportage.”²⁵⁰ Many members of the same community see

²⁴⁴Amy Mitchell et al., *Trust, Facts and Democracy*, (July 7, 2016) (available at <http://www.journalism.org/2016/07/07/pathways-to-news/>) (finding that 57% of Americans get their news from television, 25% from radio and 20% from print newspaper; 38% of Americans get their news online).

²⁴⁵Jeffrey Gottfried & Elisa Shearer, *News Use Across Social Media Platforms 2016*, PEW RESEARCH CENTER 2, (May 26, 2016), http://www.journalism.org/files/2016/05/PJ_2016.05.26_social-media-and-news_FINAL-1.pdf [<https://perma.cc/8QCG-9KGT>] (representing an increase from 49% in 2012.); Haewoon Kwak et al., *What is Twitter, a Social Network or a News Media?*, in WWW '10: PROCEEDINGS OF THE 19TH INT'L CONF. ON WORLD WIDE WEB 591-600 (2010); see also Robinson Meyer, *The Grime Conclusions of the Largest-Ever Study of Fake News*, THE ATLANTIC (Mar. 8, 2018 <https://www.theatlantic.com/technology/archive/2018/03/largest-study-ever-fake-news-mit-twitter/555104/>); See discussion *supra* note 169.

²⁴⁶Kwak, *supra* note 245; see also Meyer, *supra* note 245; see *supra* note 169.

²⁴⁷Elisa Shearer, *Social Media Outpaces Print Newspapers in the U.S. as a News Source*, PEW RESEARCH CENTER (Dec. 10, 2018), <http://www.pewresearch.org/fact-tank/2018/12/10/social-media-outpaces-print-newspapers-in-the-u-s-as-a-news-source/>.

²⁴⁸Louis W. Tompros et al., *The Constitutionalality of Criminalizing False Speech Made on Social Networking Sites in a Post-Alvares, Social Media-Obsessed World*, 31 HARV. J.L. & TECH 65, 72 (2017) (“Social media likewise played an important role as a source of information during the 2007 fires that raged across Southern California; the 2008 New England ice storm that wiped out power for 400,000 homes and businesses in the region; the 2008 Sichuan earthquake, which killed almost 70,000 people; and the 2008 cyclone in Myanmar, which caused major destruction and nearly 150,000 fatalities. Additionally, more than 27 million tweets were sent during the April 2013 Boston Marathon bombings, when an intense three-day manhunt ensued after twin explosions at the Boston Marathon killed three people and injured 264 others.”).

²⁴⁹*Id.* at 68.

²⁵⁰RonNell Andersen Jones, *Litigation, Legislation, and Democracy in a Post-Newspaper America*, 68 WASH. & LEE L. REV. 557, 569–70 (2011) (“A recent report from the Project for

2019]SOCIAL MEDIA, VENUE, AND THE RIGHT TO A FAIR TRIAL 455

the same stories on different platforms.²⁵¹ In many ways, social media is merely a vehicle for publications by the Fourth Estate. Under this analysis, courts should not treat social media any differently. Social media is not unique; it is merely another medium from which jurors learn of pretrial publicity.

What social media lacks in “legitimacy,” it gains in human influence. A 2018 M.I.T. study conducted by sixteen political scientists and legal scholars noted that news spread through social media has a profound ability to manipulate individual thought.²⁵² Hunt Allcott and Matthew Gentzkow, studying the effect of social media on voting patterns during the 2016 Presidential election conclude that social media posts influence decision making.²⁵³ Other studies similarly recognize that social media can persuade an individual’s viewpoint.²⁵⁴ Social media has become a powerful persuasion technique.²⁵⁵

Media, as it exists today, does not distinguish between print, broadcast, and wired. Courts, therefore, should not discount social media evidence because it lacks the historical import of the Fourth Estate. To the extent juror influence comes from social media sites, quite often those sites are just repeating news radio or television reporting, meaning it is as credible as it was when it came from the “traditional” news media.²⁵⁶ Moreover, to the

Excellence in Journalism states that for all the robust activity in social media and blogs, ‘these new media are largely filled with debate dependent on the shrinking base of reporting that began in the old media.’ The Project’s ongoing analysis of more than a million blogs and social media sites finds that 80% of the links are to mainstream, legacy media, which are themselves dying out at alarming rates. Separate studies confirm that new media platforms do not yet serve as a primary source of local news. Rather, they are more devoted to ‘repeatage’ than to reportage. Some have even suggested, in the wake of these developments, that the plural of ‘anecdote’ is “blog.”

²⁵¹David M. J. Lazer et al., *The Science of Fake News*, SCI., 1095 (Mar. 9, 2018), <http://science.sciencemag.org/content/359/6380/1094> (The Atlantic praised it as the most influential of its kind).

²⁵²*Id.* at 1094.

²⁵³Hunt Allcott & Matthew Gentzkow, *Social Media and Fake News in the 2016 Election*, 31 J. ECON. PERSPECTIVES, 211, 232 (2017).

²⁵⁴Jan H. Kietzmann et al., *Social Media? Get Serious! Understanding the Functional Building Blocks of Social Media*, 54 BUSINESS HORIZONS 241, 241–51 (2011), https://www.researchgate.net/publication/227413605_Social_Media_Get_Serious_Understanding_the_Functional_Building_Blocks_of_Social_Media; See discussion *supra* note 169.

²⁵⁵See Cohen, *supra* note 230.

²⁵⁶See *How News Happens*, PEW RESEARCH CENTER (Jan. 11, 2010), <http://www.journalism.org/2010/01/11/how-news-happens/>.

extent that Sixth Amendment due process concerns require an evaluation of actual and presumed prejudice, the empirically identified social media persuasiveness demands its inclusion in any constitutional challenge.²⁵⁷ The science is clear, “hits,” “likes” and “retweets” influence the human mind.²⁵⁸

3. Social Media Informs Users

For purposes of communicating information, one can divide social media into two rough categories. One category is the quasi-reporting function. This category includes not only reposts of credible, newsworthy stories but also blogs, vlogs, and e-zines, none of which readers find in traditional broadcast or print medium.²⁵⁹ The other category is pure sentiment and belief. Social media in this type includes Facebook *In Memoria* posts, tweets and the like.²⁶⁰ Each category can produce media sufficient to taint a jury.

Social media, in its reporting function, is akin to the type of media courts have weighed when choosing whether to grant a change of venue. News reports, television broadcasts of live confessions, and local opinion editorials have all sufficed to support changes of venue.²⁶¹ Social media has yielded

²⁵⁷United States v. Fumo, 655 F.3d 288, 332–33 (2011); Marcy Zora, Note, *The Real Social Network: How Jurors’ Use of Social Media and Smart Phones Affects A Defendant’s Sixth Amendment Rights*, 2012 U. ILL. L. REV. 577, 583–84 (2012).

²⁵⁸Simon McCarthy Jones, *Are Social Networking Sites Controlling Your Mind?*, SCI. AM. (Dec. 8, 2017), (available at <https://www.scientificamerican.com/article/are-social-networking-sites-controlling-your-mind/#googDisableSync>); Susan Weinschenk, *Why We’re All Addicted to Texts, Twitter and Google*, PSYCHOLOGY TODAY (Sept. 11, 2012), (available at <https://www.psychologytoday.com/us/blog/brain-wise/201209/why-were-all-addicted-texts-twitter-and-google>).

²⁵⁹See Manning, J. (2014.) *Social media, definition and classes of*. In K. Harvey (Ed.), *Encyclopedia of social media and politics* (pp. 1158–62), https://www.researchgate.net/publication/290514612_Definition_and_Classes_of_Social_Media; See Garima Kakkar, *What are the Different Types of Social Media*, DIGITAL VIDYA, Sept. 12, 2018, <https://www.digitalvidya.com/blog/types-of-social-media/>.

²⁶⁰Kakkar, *supra* note 259.

²⁶¹See, e.g., Patton v. Yount, 467 U.S. 1025, 1032 (1984); Sheppard v. Maxwell, 384 U.S. 333, 352–53 (1966); Rideau v. La., 373 U.S. 723, 726 (1963); Irvin v. Dowd, 366 U.S. 717, 726–28 (1961); Marshall v. U.S., 360 U.S. 310, 312–13 (1959); Stroud v. U.S., 251 U.S. 15, 18 (1919); Wilson v. State, 480 So. 2d 78, 81 (Ala. Crim. App. 1985) (editorial regarding defendant’s request for a change of venue sufficient to sustain the motion).

2019]SOCIAL MEDIA, VENUE, AND THE RIGHT TO A FAIR TRIAL 457

new types of editorials, blogs and vlogs. Blogs²⁶² and vlogs²⁶³ are personally made pieces that express the opinion of the blogger or vlogger.²⁶⁴ RonNell Anderson Jones argues that blogs are just “a new delivery mechanism” for traditional opinion pieces.²⁶⁵ A study of more than one million blogs revealed that mainstream media was the impetus for 80% of the blogs’ discussions.²⁶⁶

Thus, the line between social media blogs and traditional op-ed pieces is blurred. Both journalists and legal scholars argue that blogs are replacing traditional news.²⁶⁷ Anne Flanagan points out that courts grant bloggers broader journalistic privilege.²⁶⁸ Most major newspapers publish multiple blogs online.²⁶⁹

When considering news reports, courts have never distinguished their origin. In other words, courts deem biased reports arising from town papers equal in value to a television program repeating the same information.²⁷⁰ The

²⁶² Full name is weblog. Blog, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY, <https://www.merriam-webster.com/dictionary/blog#h1> (last visited Jan. 10, 2019).

²⁶³ Full name is video log. Vlog, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY, <https://www.merriam-webster.com/dictionary/vlog> (last visited Jan. 10, 2019).

²⁶⁴ Gary Dekmezian, *Why Do People Blog? The Benefits of Blogging*, HUFFINGTON POST, Sept. 23, 2015, https://www.huffingtonpost.com/gary-dekmezian/why-do-people-blog-the-be_b_8178624.html.

²⁶⁵ Jones, *supra* note 250.

²⁶⁶ *Id.* (citing Project for Excellence in Journalism).

²⁶⁷ *Id.*; Mercedes Bunz, *How Social Networking is Changing Journalism*, THE GUARDIAN (Sept. 18, 2009), <https://www.theguardian.com/media/pda/2009/sep/18/oxford-social-media-convention-2009-journalism-blogs>; Alp Mimaroglu, *How the Blog Post Op-Ed is Changing News*, CONVINC & CONVERT, <https://www.convinceandconvert.com/digital-marketing/blog-post-op-ed/> (last visited Jan. 11, 2019); Roy Morejon, *How Social Media is Replacing Traditional Journalism as a News Source [Infographic]*, SOCIAL MEDIA TODAY (June 28, 2012), <https://www.socialmediatoday.com/content/how-social-media-replacing-traditional-journalism-news-source-infographic>.

²⁶⁸ Anne Flanagan, *Blogging: A Journal Need Not a Journalist Make*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 395, 411 (2005).

²⁶⁹ *See, e.g.*, WASH. POST, https://www.washingtonpost.com/opinions/?nid=top_nav_opinions&utm_term=.8e28ede19ee2 (last visited Jan. 11, 2019); N.Y. TIMES, <https://archive.nytimes.com/www.nytimes.com/interactive/blogs/directory.html?8qa> (last visited Jan. 11, 2019); THE GUARDIAN, <https://www.theguardian.com/tone/blog> (last visited Jan. 11, 2019).

²⁷⁰ *See Skilling v. United States*, 561 U.S. 358, 393 (2010) (“[N]ewspapers in which the[se] stories appeared were delivered regularly to approximately 95% of the dwellings in” the county where the trial occurred, which had a population of only 30,000; “radio and TV stations, which likewise blanketed that county, also carried extensive newscasts covering the same incidents.”); *Sheppard v. Maxwell*, 384 U.S. 333, 344 (1966) (the proceedings were televised, and the daily record and testimony of witness was printed verbatim in the local newspapers.); *Estes v. Texas*, 381

same must be true for pretrial publicity stemming from social media that falls into the quasi-reporting category. Today the line is too blurred to parse out where news comes from before considering it as evidence strong enough to sway a potential juror's opinion.

The concern judges have with considering social media evidence is that it is purely opinionated in nature.²⁷¹ Examples include *In Memoriam* pages similar to the one that Ohio court dismissed in *Cordoba*,²⁷² or the Facebook likes that the court *In re Tsarnaev* refused to consider.²⁷³ To be fair, these posts are purely emotional and opinionated in nature. They lack the force of a Fourth Estate or the credibility of an editor.

However, courts have found the power to persuade jurors in contexts outside of media outlets. In *Norris v. Risley*, the Ninth Circuit held that the presence of women spectators in the courtroom where the defendant was tried for rape, wearing buttons inscribed with words "Women Against Rape" deprived the defendant of a fair trial.²⁷⁴ The presence of the spectators, and the buttons themselves, according to the court, "tainted [defendant]'s right to a fair trial both by eroding the presumption of innocence and by allowing extraneous, prejudicial considerations to permeate the proceedings without subjecting them to the safeguards of confrontation and cross-examination."²⁷⁵ In *Long v. State*, a Florida district court ruled that courtroom observers wearing jackets embroidered with "Bikers Against Child Abuse" created an inherent prejudice among jurors considering the accused trial for child molestation and sexual battery.²⁷⁶ In each instance, a showing of public

U.S. 532, 540–42 (1965) (comparing the privilege of newspaper reporters and television reports to both be present in the courtroom, then later report what they observed. "[R]eporters of all media, including television, are always present if they wish to be and are plainly free to report whatever occurs in open court through their respective media.").

²⁷¹ See Denise G. Callahan, *Social Media Posts Admissible in Court*, JOURNAL-NEWS, Oct 8, 2012, <https://www.journal-news.com/news/social-media-posts-admissible-court/3QDTMfoPdGGAZ4VBW1bFXN/>.

²⁷² *State v. Cordoba*, No. F-16-001, 2017 WL 5629604, at *3 (Ohio Ct. App. 2017).

²⁷³ *In re Tsarnaev*, 780 F.3d 14, 15 (1st Cir. 2015); Laurel J. Sweet, *Feds, Tsarnaev defense battle over jurors' Facebook pages*, BOSTON HERALD, Oct. 1, 2015, <https://www.bostonherald.com/2015/10/01/feds-tsarnaev-defense-battle-over-jurors-facebook-pages/>.

²⁷⁴ 918 F.2d 828, 834 (9th Cir. 1990).

²⁷⁵ *Id.*

²⁷⁶ 151 So. 3d 498, 499 (Fla. Dist. Ct. App. 2014). *But see* *Nguyen v. State*, 977 S.W.2d 450, 457 (Tex. App.—Austin 1998, pet. granted), *aff'd*, 1 S.W.3d 694 (Tex. Crim. App. 1999) (the court found that spectators who wore large buttons portraying a color photograph of the deceased while they were in the courtroom where the jurors could see the buttons during the trial did not result in

2019]SOCIAL MEDIA, VENUE, AND THE RIGHT TO A FAIR TRIAL 459

opinion, much like that shared on group chat pages, was sufficient to find infringement on the defendant's constitutional right to a fair trial.²⁷⁷

Although it is opinion based, those opinions, perhaps even more than the traditional news media, tends to carry the day.²⁷⁸ A study published in the International Journal of Public Opinion Research suggests a high degree of personal influence through social media.²⁷⁹ A more recent study found "individuals are becoming increasingly reliant on others in their online social networks for news recommendations and political information, and that their knowledge, opinions, and behaviors are affected by the information stream and social dynamics within these sites."²⁸⁰ Social media has the same power to influence as traditional print and broadcast media.

Social media is content based. In many instances, its content is merely a republishing of traditional news media reports. It is not sensible for courts to distinguish between the potential prejudices of a report depending on the medium in which it is broadcast. Ignoring social media pretrial publicity violates the defendant's constitutional rights.

Courts are incorrect in their assumptions as to why they should not subject pretrial social media publicity to constitutional scrutiny. The Supreme Court has held that courts may not discount the threat of technology because it is new.²⁸¹ While there is a healthy sense of skepticism associated to social media, there is a significant amount of published content to which society ascribes a degree of credibility. And finally, today many users get their news

external influence that affected the outcome of the trial.); In *People v. Ziesch*, the defendant's right to a fair trial was not violated by allowing courtroom spectators to wear buttons displaying a photograph of the victim, a state highway patrolman, because buttons were not unduly suggestive of guilt, and the trial court instructed jurors to disregard the buttons, not to allow sympathy for victim to influence their decision, and to base their decision solely on the evidence. 101 Cal. Rptr. 3d 628, 742 (Cal. Ct. App. 2009).

²⁷⁷ See Leblanc, *supra* note 187 (where signs outside the courtroom that read "charge Amber with Murder" were not sufficient to grant a change of venue).

²⁷⁸ See, e.g., John G. Browning, *Digging for the Digital Dirt: Discovery and Use of Evidence from Social Media Sites*, 14 SMU SCI. & TECH. L. REV. 465, 468 (2011) (citing examples of attorneys using Facebook statements to incriminate defendants in a criminal case, Twitterpics or YouTube videos to sway the court in a child-custody case, and LinkedIn testimonials to influence the outcome in employment litigation).

²⁷⁹ Brian Weeks et al., *Online Influence? Social Media Use, Opinion Leadership, and Political Persuasion*, 29 INT'L J. OF PUB. OPINION RES. 214, 214 (2017).

²⁸⁰ *Id.*

²⁸¹ See *Vieth v. Jubelirer*, 541 U.S. 267, 312 (Kennedy J., concurring); see also *Estes v. Texas*, 381 U.S. 532, 541 (1965).

from social media, and to exclude social media content from consideration would result in a clear violation of constitutional rights.

There are identifiable concerns with social media. Briefly noted, it is often difficult to identify the source of published information.²⁸² “Repeatage” can result in a game of “telephone,” diluting facts with each repost,²⁸³ and in

²⁸²In 2018, there has been concern about Russian bots being used on social media to influence American society. Sheera Frenkel & Daisuke Wakabayashi, *After Florida School Shootings, Russian ‘Bot’ Army Pounced*, N.Y. TIMES (Feb. 19, 2018), <https://www.nytimes.com/2018/02/19/technology/russian-bots-school-shooting.html>. One of the earliest known examples of a large-scale Russian bot attack came on February 14, 2018, one hour after the Florida, Parkland school shooting. *Id.* An “army” of suspected Russian bots helped amplify debate about gun control. *Id.* The fake accounts addressed the situation just as quickly as the local cable news networks. *Id.* Prior to the school shooting, those fake accounts made posts concerning Robert Muller’s investigation into the Russian influence on the 2016 presidential election. Jonathon Morgan, chief executive of New Knowledge, a company that tracks online disinformation campaigns, stated, “This is pretty typical for [bots], to hop on breaking news like this. The bots focus on anything that is divisive for Americans. Almost systematically.” *Id.*;

Russian bots have long been suspected of interfering in the 2016 election. Scott Shane, *The Fake Americans Russia Created to Influence the Election*, N.Y. TIMES (Sept. 7, 2017), <https://www.nytimes.com/2017/09/07/us/politics/russia-facebook-twitter-election.html?action=click&contentCollection=Technology&module=inline®ion=Marginalia&pgtype=article>). Hundreds of Russian-linked accounts promoted false stories about Hillary Clinton and spread articles based on leaked emails from Democratic operatives that had been obtained by Russian hackers. *Id.* The bots would often support issues that President Trump tweeted about. *Id.* For example, the accounts promoted hashtags that centered around attacking NFL players who kneeled during the national anthem to protest racial injustice. *Id.* J. M. Berger, a researcher in Cambridge, Mass., found that often the accounts posted replies to President Trump’s tweets. *Id.* “Mr. Trump ‘received more direct replies than anyone else.’ Clearly this was an effort to influence Donald Trump. They know he reads tweets.” *Id.*

Twitter is not the only social media platform affected. *Id.* Facebook officials disclosed that they had shut down several hundred Russian-bot accounts. *Id.* Those accounts were used to push divisive issues during the 2016 campaign. *Id.* However, according to Facebook, the fake accounts are not as prevalent as everyone believes. “Facebook officials estimated that of all the “civic content” posted on the site in connection with the United States election, less than one-tenth of one percent resulted from ‘information operations’ like the Russian campaign.” *Id.*; See discussion *supra* at note 170.

²⁸³Jones, *supra* note 250. The internet is like playing a giant game of “telephone,” except you are playing with hundreds of millions of people, not just your friends on game night. With so many people contributing their individual thoughts, opinions, and understanding of any given situation, there are bound to be mistakes made and false information thrown into the mix. At this point, almost every major news organization has an online presence. “Even print, online, and television journalists have turned to social networks for both news content and sources.” Lili Levi, *Social Media and the Press*, 90 N.C. L. REV. 1531, 1548 (2012). “Facebook is being used to report news. Twitter has become indispensable in the dissemination of information about breaking news.” *Id.* “Mainstream

2019]SOCIAL MEDIA, VENUE, AND THE RIGHT TO A FAIR TRIAL 461

many instances the news people learn their news from a group of like-minded individuals leading to a skewed perception of opinion.²⁸⁴ The Supreme Court's totality of circumstances test accounts for misperceptions and misinterpretation.²⁸⁵ This next section will explain how the constitutional evaluation for whether pretrial publicity demands a change of venue can effectively sift out the inherent flaws in social media publicity, thereby allowing courts to appropriately weigh its potential to cause actual or presumed prejudice among jurors.

B. The Totality of Circumstances Test Properly Contemplates Social

journalists have also used social media to gather background, ask questions, solicit story ideas, and crowdsource information for their reports." *Id.* "Newsgathering now includes receiving and disseminating reports and video from people not affiliated with professional news organizations, sometimes without editing or fact checking." *Id.* at 1548–49. If there is a lack of fact checking, it is likely that mistaken information will be published, then disseminated as truth. That mistaken information will continue to be passed along until the story is so far from the truth that it is hardly recognizable. For example, "there are stories of news reporters repeating Twitter hoaxes" as though they were truth. *Id.* at 1557. Anyone hearing those stories, who are unfamiliar with the correct story on Twitter, will assume that what they just heard from the reporter is the truth. Those individuals will then spread the mistaken story to others. "[L]arge communities are not necessarily self-correcting," which should come as no surprise to anyone who has played telephone. *Id.* at 1558. Just playing with a few people inevitably leads to mistakes, imagine playing with hundreds of millions of people. "Given the amplifying character of the Internet and social media, and in light of the decline in authority of the institutional press, there is good reason to be concerned about the impact of uncorrected inaccuracy." *Id.* at 1559.

²⁸⁴Lili Levi, *Real "Fake News" and Fake "Fake News"*, 16 *FIRST AMEND. L. REV.* 232, 317 (2017) (discussing how fake news can spread so rapidly because people trust their Facebook "friends" more than traditional news media); Levi, *Social Media*, *supra* note 283 ("Readers do not automatically rely on the editorial judgment of professional newspaper editors even to create the front page. Instead, they depend on their friends and social media networks to recommend what news to follow."). *Id.* at 1550–51. People are more likely to become friends with individuals who they have things in common with, and who share common interest. For example, people may become friends because they share a common political affiliation; they may be members of the Young Democrats or Republicans Club. This can cause potential danger when it comes to the spread of "fake news." If Friend A posts a false story about a Presidential candidate that was unknowingly generated by a Russian bot, Friend B will see that story appear on their "wall" and may take it as true. Friend B may then repost that story so Friend C sees it. The cycle will continue until dozens of people now believe "fake news" to be the truth.

²⁸⁵*See Skilling v. United States*, 561 U.S. 358, 398–99 (2010) (quoting *Irvin v. Dowd*, 366 U.S. 717, 723 (1960)).

Media Bias

Four decades of Supreme Court precedent make clear that judges deciding motions to change venues must apply the totality of circumstances test to pretrial publicity.²⁸⁶ Under the test a court must look at: (1) the size and character of the community in which the crime occurred; (2) whether the stories contained confessions of other “prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight;” (3) the time that elapsed between initial reporting of the crime and the trial; and (4) the fact that the jury acquitted the defendant of some of the charged crimes.²⁸⁷ This test can easily contemplate social media evidence.

Courts can easily apply the totality of circumstances test to claims of unfair pretrial publicity resulting from social media exposure. The relative newness of the medium is of little consequence in deciding whether to grant a change of venue. Given that a growing segment of the population gathers journalistic news from social media, social media is no different from the type of traditional news media the Court considered in previous constitutional challenges.

Social media as a medium is most distinct from traditional media in that a segment of the content is opinion-based, rather than news oriented. Opinion-based Facebook quotes and tweets are examples of the kind of opinion-based pieces that have been problematic for judges. The totality of the circumstances test however, is prepared to accommodate and inevitably dismiss, this type of evidence.

Consider *State v. Cordoba*, the case in tiny Wauseon, Ohio, where the victim’s family ran two Facebook *In Memoria* pages that were as the judge said “full of enmity and contempt” for the defendant.²⁸⁸ Absent proof of actual prejudice, these Facebook pages would probably not be sufficient to support a change of venue motion. Prong two requires that the judge ask whether the stories contained confessions or other “prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight.”²⁸⁹ Understanding that typically, members of an emotionally charged community generate Facebook *In Memoria*, the court stated that they are not likely to prejudice the viewer or reader.²⁹⁰ It would be difficult, under the

²⁸⁶ *See Id.* at 382–84.

²⁸⁷ *Id.* at 382.

²⁸⁸ No. F-16-001, 2017 WL 5629604, at *2 (Ohio Ct. App. Nov. 22, 2017).

²⁸⁹ *Skilling*, 561 U.S. at 382.

²⁹⁰ *Cordoba*, 2017 WL 5629604, at *3.

2019]SOCIAL MEDIA, VENUE, AND THE RIGHT TO A FAIR TRIAL 463

circumstances, to prove presumed prejudice. If, however, upon *voir dire*, a judge discovers that *In Memoria* or similar posts do prejudice enough of a jury pool that the court cannot impanel an impartial jury, then the judge has properly identified social media evidence that has challenged defendant's right to a fair trial. Under the latter circumstances, a review is necessary because a court must consider any evidence that threatens the defendant's Sixth Amendment right.

V. CONCLUSION

Social media content poses a constitutional threat to defendants' rights equal to that of the traditional news media, and courts are violating defendants' Sixth Amendment rights by failing to consider it. Concerns about social media's features that are distinguishable from traditional media are misguided. Furthermore, the totality of circumstances test grants judges wide latitude to dismiss prejudicial social media pretrial publicity that lacks credibility or persuasiveness.

Biased reporting and juror perception were of paramount importance to the Supreme Court considering whether pretrial publicity justified a change of venue. Bias is inherent in social media and, therefore, warrants its consideration in change of venue motions. Juror perception is an integral factor in the totality of the circumstances test and demands that judges inquire into whether those called to sit on a jury can neutralize the social media information to which they were exposed.

Since the days of Alexander Hamilton and Aaron Burr, courts have recognized the media's threat to justice. Along the way, the Supreme Court has contemplated new technology—first radio, then television. Today, the latest media—social media—poses the same threat to due process as does the “traditional media.” Ignoring social media evidence when deciding change of venue motions invades the unbiased sensibility of those who are asked to sit in judgment.