



# Can Tsarnaev, Hernandez, Holmes get fair trials?

By [Danny Cevallos](#), CNN Legal Analyst

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## Story highlights

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Major trials are about to begin after heavy pretrial publicity

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Danny Cevallos says a barrage of pretrial publicity doesn't necessarily prejudice a jury trial

**Editor's Note:** *Danny Cevallos is a CNN legal analyst, criminal defense attorney and partner at [Cevallos & Wong](#), practicing in Pennsylvania and the U.S. Virgin Islands. Follow him on Twitter: [@CevallosLaw](#). The opinions expressed in this commentary are solely those of the author.*

**(CNN)**—The start of 2015 has yielded a macabre bumper crop of high-profile cases, and they are all going to trial.

Though the facts differ wildly in each case, there is a common issue running through them: Is it possible to guarantee a defendant's right to a fair trial if there is a deluge of unfavorable media coverage before a jury is even selected?

Four trials are beginning at roughly the same time: [Dzhokhar Tsarnaev](#), [Aaron Hernandez](#), [Eddie Ray Routh](#), [James Holmes](#).

This is quite a fusillade of high-profile trials.

By way of example last year, one high-profile case captivated viewers: The trial of a disabled world-class sprinter we'd mostly never heard of, in a sport that is newsworthy for exactly half an hour every four years during the Olympics. Plus, this all happened some 10,000 miles away from American shores in South Africa, which meant that by the time most (unemployed) Americans woke up, most of the trial was already over. Yet, the interminable murder trial of Oscar Pistorius occupied much of the media during its intermittent installments.

Any one of this year's infamous trials have the potential to spark comparable, if not greater, coverage. Compare Aaron Hernandez with Pistorius: Hernandez was a multimillion dollar superstar in the media juggernaut NFL, a sport that is newsworthy year-round, 24 hours a day -- and his might not even be the highest-profile trial this season. In fact, Hernandez's might not even be the most notorious trial in Massachusetts this year.

That title goes to the young man the media dubbed the "Boston Bomber," Dzhokhar Tsarnaev, who, along with his brother Tamerlan, allegedly terrorized not only the city's marathon but a large swath of the surrounding neighborhoods. The only reason this case isn't commanding more attention is because federal courts do not allow cameras, so even the most compelling federal trials involving multiple killings and terrorism generate less interest than the sordid details of the televised state court murder trial of [Jodi Arias](#) - - even though it featured only one victim.

Then there's James Holmes, the "Colorado Shooter" who in July 2012 allegedly shot and killed 12 people and wounded 58 others in [a crowded movie theater](#) in Aurora, Colorado. The judge in this case ruled that the

trial [could be televised](#). This will be an interesting experiment: Will the Holmes trial garner more attention than the other cases simply because it's going to be aired?

Most Americans only recently became familiar with Eddie Ray Routh because of the spate of interest generated by the blockbuster hit film "American Sniper." Chris Kyle, the author of the book of the same name and who was portrayed by Bradley Cooper in the film, was shot and killed February 2, 2013. A Marine Corps veteran, Routh, 25, now faces murder charges as a result. This is also an interesting case because, while there was coverage beforehand, the release of the Bradley Cooper movie has made Routh more likely to be a household name.

The issue of pretrial publicity and fairness brings two constitutional principles head to head. Courts must balance the freedom of expression guarantee of the First Amendment against the Sixth Amendment, without infringing upon that guarantee of a fair trial by an impartial jury. Pretrial publicity may be pervasive, but exposure to publicity by itself is insufficient to establish an unfair trial. A constitutional violation instead requires proof of actual or presumed prejudice as a result. This is not an easy standard to meet.

Yet studies confirm what defense attorneys have insisted for years: pretrial publicity [can fatally taint](#) a jury. One famous study in 1975 showed that 80% of jurors exposed to prejudicial articles convicted while only 39% of control jurors did likewise.

Perhaps the most famous case about pretrial publicity is the 1954 trial of physician [Sam Sheppard](#) for the murder of his wife. If you don't remember the case, you remember "The Fugitive," the TV show and the blockbuster film believed to be loosely based on it.

Ultimately the [Supreme Court reversed](#) Sheppard's second degree murder conviction because of the overwhelming negative news coverage, which published extensive details about extramarital affairs and other incriminating evidence.

In reversing the murder conviction, the Supreme Court chastised the trial court judge's "fundamental errors" in conducting the trial and failing to protect the defendant's due process, "compounded by the holding that it lacked power to control the publicity about the trial."

And that was in 1966!

That was all long before the Internet; before Facebook and tweeting from the courtroom. It was more than a decade before the start of the 24-hour news cycle of cable TV!

The holding in the Sheppard case that media coverage can violate the fair trial requirement is an exception and not the rule. Courts will rarely find a Sixth Amendment violation for pretrial publicity after the fact. Similarly, courts are hesitant to impose free expression restraints prior to trial, too.

In *Nebraska Press Assoc. v. Stuart*, the Supreme Court [stopped short](#) of banning prior restraints, but warned that restricting coverage is usually going to be held unconstitutional.

Under the test applied by the Supreme Court, other courts considering restraining orders should examine: A) the extent of pretrial news coverage; B) whether other measures could mitigate the effects of the publicity; and C) whether a restraining order would actually prevent the threat of publicity.

Ultimately, however, the court recognized that pretrial publicity -- even pervasive, adverse publicity -- does not inevitably lead to an unfair trial. The capacity of the jury eventually impaneled to decide the case fairly is influenced by the tone and extent of the publicity, which is in part, and often in large part, shaped by what

attorneys, police and other officials do to precipitate news coverage.

In other words: For the most part, publicity is part of the price of doing business in the courthouse.

Defense lawyers have to think creatively to zealously protect their clients' fair trial rights in these high-profile cases. Judges and attorneys must carefully examine and test potential jurors' prejudices through a process called voir dire. Sequestering juries is an option, but a costly one, avoided by courts whenever possible.

James Holmes' defense attorneys have sought a number of remedies against the prosecution and law enforcement for allegedly leaking information about a package Holmes sent to his psychiatrist at the University of Colorado. In [its motion](#), the defense argues that what it describes as the government's violations of the pretrial publicity order and the accompanying law require the court to impose severe consequences, such as appointing a special prosecutor to investigate the leak, precluding the death penalty, or excluding the officers from testifying in the case.

It's understandable why courts are reluctant to find a Sheppard-like constitutional violation: leaks or publicity usually come well after the charged crime occurred and have nothing to do with the underlying facts of the charges.

The coverage of the Sheppard trial pales in comparison to the extent of coverage of modern cases. After all, back then there were a finite set of newspapers and television channels, and in the 1950s, once the TV news broadcast signed off for the night, that was the end of any publicity at all, until the morning paper the next day. Today, cable news and the Internet is the very essence of pervasive. The Internet is like the city of Las Vegas or a diner in New Jersey: open 24 hours a day, perpetually buzzing with activity, and the real oddballs show up after 2 am.

One wonders how the Sheppard court would have decided that case today. The judicial opinion might instead have been only one sentence: "Maybe this Sheppard situation wasn't as bad as we originally thought ..."

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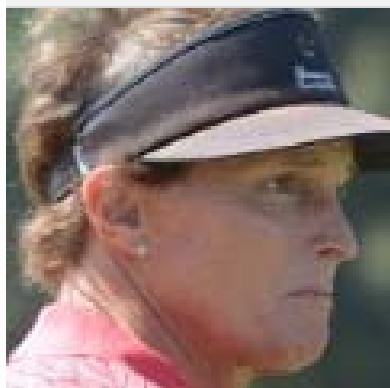
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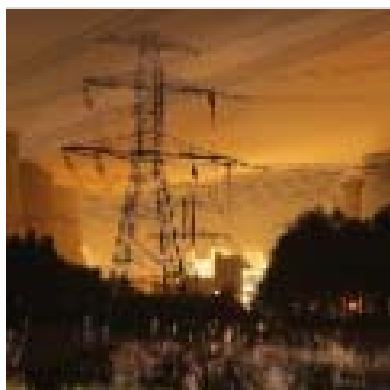
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Dick Eastman Mar 23, 2015

Suppose he was innocent. Wouldn't that mean the government that presented the evidence and the legal system that appointed his defenders were likely part of the crime? The proof of Dzhokhar's innocence is not being presented by Miriam Conrad and Judy Clarke.

There is no evidence that a white backpack with black trim was involved in the Boston Bombing in any way. There is no evidence that a white backpack with black trim exploded or that a white backpack with black trim every contained a pressure cooker device. On the contrary the Special Agent in Charge of the Joint Task Force, Richard Deslauriers on the day after the bombing (April 16, 2013) stated that "pieces of black nylon" had been sent to the FBI laboratory and then he read the finding, "this morning it has been determined that both of the explosives were placed in dark colored nylon bag or backpack." Furthermore pictures of the send bombing location within minutes of the blast show the nylon remains of the blasted backpack in the street not far from the green mailbox that was very near the blast. This black backpack fits the description given by the Joint Task force of the bomb backpack. Furthermore this bag matches perfectly the black backpack carried by one of the Craft International paramilitary personnel as shown in many different pictures before the blast. This man's backpack matches the tattered bomb backpack in many particulars, a small square white label, side straps, a gray stripe running down the center of the otherwise black shoulder straps. [Note: Dzhokhar's backpack had a black trim strip running down the center of the otherwise white shoulder straps of his white backpack. On April 18, 2013 Special Agent in Charge DesLauriers addressed another press conference. In this conference he showed pictures of Tamerlan Tsarnaev and Dzhokhar Tsarnaev talking on Bolyston Street and identifying them as Subject #1 and Subject #2. One of those pictures shows Dzhokhar with his white backpack in full view, two of the others show the white shoulder straps with black trim. The only reason given during that press conference for considering either of these to young men suspects was the following 20 words by DesLauriers: "Suspect Two set down a backpack at the site of the second explosion just in front of the Forum Restaurant.." There were many people with backpacks at the marathon. Backpacks can be seen stashed here and there, supplies for runners when they return, or lunch, or school books for college students needing to study after



watching friends finish after the game. Did I mention that there is no picture of a black backpack exploding and no determination that a white backpack was the source of explosion.

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brianphamty Feb 6, 2015

Now US under investigation about this tragedy , I do care all of the victim, and what he did he have to tell to US authority what is the reason?

I must believe on that morning I have a very much stranger one the way back from work that morning I am on e bus and I wonder and asking you why someone look at me like that

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JMaster1970 Jan 30, 2015

Give them a fair trial and then FRY THEM ALL!!! I care more about the victims than a convicted murderer.

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oiyhbkkk Jan 30, 2015

"Great"

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paul1960 Jan 29, 2015

When there is a preponderance of publicly available evidence like in the Boston marathon I would be good with dropping the need for a trial to determine guilt or innocence. It's a waste of time at a minimum and a chance for a miscarriage of justice in the worse case if he gets really good lawyers.

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oiyhbkkk Jan 30, 2015

Absolutely correct.

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LeeSw Jan 30, 2015

[@paul1960](#) Making a determination of how much public evidence would be required to bypass a trial would be a slippery proposition; however, it might be worthwhile in cases where the accused can't get a fair hearing from a jury to have the trial decided by a tribunal of judges (non-elected) instead of a jury. Since judges have seen all the defense B S tactics before they would be more likely to render verdicts on the law alone. This would also likely result in more guilty

pleas if the defence knew there was no chance of tactics like jury nullification and hail-Mary insanity pleas to work.

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**ImFromEarth** Jan 29, 2015

Leave it to the left to paint these people as the victims.

The next thing you'll know, the Obama administration will release terrorist leaders from Gitmo, side with Iran in it's 'wipe Israel from the map' efforts, and subvert the constitution.

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**CarterDeSoto** Jan 29, 2015

[@ImFromEarth](#) Do you feel the "left" is plotting against you.. a) some of the time, b) most of the time, c) all of the time?

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**ImFromEarth** Jan 29, 2015

[@CarterDeSoto](#) [@ImFromEarth](#)

Based on this administration's track record, they can't 'plot' a thing. Look at the healthcare.gov rollout, or the efficacy of their foreign policy as proof.

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**Devon Baker** Jan 30, 2015

[@CarterDeSoto](#) [@ImFromEarth](#)

C) all of the time. Because the left used to fight for liberty, now they beg for a nanny state. I used to be a liberal, Now the party has changed. They have become their worst enemies.

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**Gary Kennedy** Jan 29, 2015

"Sequestering juries is an option, but a costly one ..." I believe sequestration is unacceptable regardless of the cost. People who actually show up for jury duty are already giving up their time to do their civic duty. They receive virtually no compensation, while in many cases the lawyers have every incentive to stretch it

out, thus piling up "billable hours". In an extreme case, "... the [O.J.] Simpson jury was sequestered for eight and a half months—half as long as the period Simpson was imprisoned while under arrest and on trial. The experience provoked protest from the jurors ..." I recall a defense attorney complaining about getting the "evil eye" from jurors every time he started talking again.

If the judge does not trust me to follow instructions regarding media reports, then he should get somebody else. Depriving me of my freedom should not be an option.

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tochris Jan 29, 2015

[@Gary Kennedy](#)

"...They receive virtually no compensation". - this is not so true.

Quote from online:

"Question: Does an employer have to pay an employee for jury duty service?

Answer: The Fair Labor Standards Act (FLSA), a federal law, does not require employers to pay employees for jury duty service. Consequently, unless provided by state law or company policy, an employer does not have to pay an employee for serving on a jury. However, according to the Employee Benefits Survey conducted by the Bureau of Labor Statistics (BLS), 87 percent of employers in the U.S. offered paid leave for jury duty. "

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tochris Jan 29, 2015

[@Gary Kennedy](#)

continue from above

"...While the majority of states do not mandate paying employees for jury duty, a few states do. In Connecticut, for instance, full-time workers are entitled to regular pay for the first 5 days of jury duty and after the fifth day, the employee can receive up to \$50 per day from the state. Separate from employers, courts often pay jurors a modest amount each day for jury service."

If you didn't get compensation when you served as a jury, that doesn't mean that other people serve in jury duty in other states receive no compensation.

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Gary Kennedy Jan 29, 2015

[@tochris](#) [@Gary Kennedy](#) From the Harris County (Houston) Jury Duty website:

"You will be paid a minimum of \$6.00 for each day you actually serve on the jury. ... Your employer is not required to pay you while on jury duty; however, employers are prohibited by law from firing an employee for serving as a juror."

I am retired, so my effort to drive into downtown each day, find parking and then drive home nets me \$6, which won't cover the parking, much less the gas. I strongly suspect the lawyers are making more than that, and thus have an incentive to drag it out. Still, I do believe jury duty is a civic duty.

I don't disagree with your point, my point is that, money aside, sequestration is an unacceptable action by a judge who will not trust citizens to follow his directions.

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Immoralthang Jan 29, 2015

The most offensive thing is the victims' families of Boston and Aurora pay taxes to keep these criminals alive. The justice system is a joke.

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Elisabeth King Jan 29, 2015

@Immoralthang It's far less expensive to keep them alive and in prison for life than to execute them. On average about ten times more expensive due to the appeals process.

California, for example, paid 4 BILLION to execute 13 inmates since 1978 -that's about 318 MILLION each. vs. about 45K a year per prisoner to keep them in prison for life. So the taxpayer's money argument is moot.

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WatersWet Jan 29, 2015

@Elisabeth King @Immoralthang I am hoping Texas will pass the (1 appeal and you're out) rule.

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Gordon Freeman Jan 29, 2015

"Then there's James Holmes, the "Colorado Shooter" who in July 2012 allegedly shot and killed 12 people and wounded 58 others in a crowded movie theater in Aurora, Colorado."

James Holmes is guilty. We don't need the expense of a long, drawn out trial. There were many witnesses to his crimes that night. There's absolutely no doubt about his guilt.

There was no 'alleged' crime. It was a crime, and he committed it. It's sad that you cannot see that, mostly for those of us who have to listen to your nonsense.

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Elisabeth King Jan 29, 2015

@Gordon Freeman Well, one is presumed innocent in this country until convicted by a jury of one's peers. That being said, I wish his lawyer had just convinced him to plead guilty and save us all the time and money for his trial because the outcome is a foregone conclusion.

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Picturamadoj Jan 29, 2015

@Elisabeth King @Gordon Freeman Holmes may really not want to plead.

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peterkguitar . Jan 29, 2015

The Tsaerevs lived in the People's Republic of Cambridge, as many call it here in MA. Along with Paul Krugman, Elizabeth Warren, and Ben Affleck - defender of Islam, silencing atheist Sam Harris for telling the truth. Presumably the defense will play the "pooh widdle oppressed Muswims" defense.

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ErichZann Jan 29, 2015

The answer seems to be that ~75% of Journalists should be fired. They provide no information, and in fact make the country dumber every time they write or speak to an audience.

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oiyhbkkk Jan 29, 2015

Truthful

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oiyhbkkk Jan 29, 2015

Great

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