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"Facts Are Stubborn Things": Protecting Due Process from Virulent Publicity

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“FACTS ARE STUBBORN THINGS”: PROTECTING DUE PROCESS FROM VIRULENT PUBLICITY

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Figure 1

Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passions, they cannot alter the state of facts and evidence[.]
- John Adams, Boston Massacre Trial Summation (See Figure 1¹)

I. INTRODUCTION

American jurisprudence has long struggled to balance the freedom of the press with our freedom from its sometimes-harmful influence on the administration of criminal justice, and the Founders appear to have wanted it that way. Indeed, at the heart of our founding precepts, countervailing mandates from the First² and Sixth Amendments³ juxtapose irrevocable tensions upon our trial court system. As a result, criminal litigators must be particularly vigilant and well equipped in their efforts to protect the sanctity of due process from virulent publicity.

¹ Photograph of John Adams, WORDPRESS, <https://jrbenjamin.files.wordpress.com/2014/03/john-adams2.jpg> (last visited Mar. 20, 2017).

² U.S. CONST. amend. I.

³ U.S. CONST. amend. VI.

Further compounding the complexities involved, the public record of American jurisprudence is inextricably intertwined with the news media documenting it, and there can be no doubt that media spin influences the public's perception of that record. However, while it may be in vogue to vilify the media for its apparent tendency to sensationalize public tragedies, or for its seeming penchant for focusing on the most gruesome or salacious aspect of any given news story, perhaps the media's treatment of high profile litigation speaks more to American societal predilections than it does to the nature of the press. After all, even before declaring independence from Britain, the colonies displayed a particular fascination with news of crime and punishment.⁴ One notable example was the public hysteria in Salem, Massachusetts, in 1692, which led to a series of highly publicized trials and the execution of 19 defendants convicted of practicing witchcraft.⁵ (Figure 2⁶) Much later, but still before becoming a nation, America was riveted by the March 1770 grand jury indictment of Captain Thomas Preston and eight soldiers of the twenty-ninth British regiment



Figure 2

for firing upon a crowd of colonists.⁷ Even then, the power of the press was strong in America, and publishers rushed to condemn the soldiers in pamphlets and broadsheets—propaganda that included an engraving by the midnight rider himself, Paul Revere.⁸ As a result of the extensive publicity, no lawyer in Boston was willing to represent Captain Preston.⁹ That

⁴ Jack Lynch, *Cruel & Unusual: Prisons & Prison Reform*, COLONIAL WILLIAMSBURG, <https://www.history.org/Foundation/journal/Summer11/prison.cfm> (last visited Mar. 18, 2017).

⁵ DAVID C. BROWN, *A GUIDE TO THE SALEM WITCHCRAFT HYSTERIA OF 1692* 92-96 (1984).

⁶ *The Boston Massacre Trials*, JOHN ADAMS HIST. SOC'Y, <http://www.john-adams-heritage.com/boston-massacre-trials/> (last visited Mar. 18, 2017).

⁷ DAVID MCCULLOUGH, *JOHN ADAMS* 65-67 (2001); see also Thomas Preston, *Captain Thomas Preston's Account of the Boston Massacre*, AMDOCS DOCUMENTS FOR THE STUDY OF AM. HIST., <http://www.vlib.us/amdocs/texts/preston.html> (last visited Mar. 19, 2017).

⁸ MCCULLOUGH, *supra* note 6, at 65-66.

⁹ *The Bloody Massacre Perpetrated in King Street Boston on March 5th, 1770 by a Party of the 29th Regt.*, LIBR. OF CONGRESS, <https://www.loc.gov/resource/ppmsca.01657/> (last visited Mar. 20, 2017).

is, until future Founding Father, John Adams, took up the defense and secured Captain Preston's acquittal, along with many of the other soldiers of the twenty-ninth.¹⁰

Captain Preston's trial was a landmark case for several reasons. First, it was the first time in the history of Massachusetts that a criminal trial took longer than one day to complete.¹¹ Second, the trial is believed to be the first in which a judge employed the term "reasonable doubt."¹² Third, and excepting the implications the representation had on John Adams's political career, perhaps the most profound legacy of the trial was that it marked the inception of a hostile media's power to alter public perception and influence court decisions.¹³ After all, even though Captain Preston was acquitted, his exoneration has largely been forgotten, and the incident is still taught in classrooms as "The Boston Massacre" after Revere's incendiary title, "The Bloody Massacre."¹⁴

Later in his life, then-former President Adams remarked that his part in securing Captain Preston's acquittal was

one of the most gallant, generous, manly and disinterested actions of [his] whole life, and one of the best pieces of service [he] ever rendered to [his] country. Judgment of death against those soldiers would have been as foul a stain upon this country as the executions of the Quakers or [W]itches, anciently. As the evidence was, the verdict of the jury was exactly right.¹⁵

But, imagine for a moment that John Adams had not agreed to the representation and handled it so expertly. Given the thrust of popular opinion, the fate of Captain Preston and his soldiers may have been very different indeed.

Throughout history, from Captain Preston to the Lincoln conspirators, and from the Rosenbergs to O.J. Simpson, pretrial

¹⁰ McCULLOUGH, *supra* note 6, at 68 (noting six of the eight soldiers were acquitted; two soldiers were convicted of manslaughter, for which they were branded on their thumbs).

¹¹ HILLER B. ZOBEL, *THE BOSTON MASSACRE* 248 (1971).

¹² Stephen C. O'Neill, *The Summary of the Boston Massacre Trial*, BOS. MASSACRE HIST. SOC'Y, <http://www.bostonmassacre.net/trial/trial-summary1.htm> (last visited Mar. 19, 2017).

¹³ *The Boston Massacre Trials*, *supra* note 8.

¹⁴ See, e.g., THERESE SHEA, *THE BOSTON MASSACRE* (2014) (illustrating just one in a series of historically factual accounts of the Boston Massacre in juvenile literature).

¹⁵ JAMES SPEAR LORING, *THE HUNDRED BOSTON ORATORS* 19 (1852); see also *John Adams* (HBO Films 2008) (exploring in part one of the mini-series, *Join or Die*, the role John Adams played in securing Captain Preston's acquittal).



Figure 3

publicity has had a profound impact on shaping the course of high-profile litigation in America. Now, the impact of the press is stronger than ever—affecting not only procedural decisions, but substantive aspects as well. (See Figure 3¹⁶) This article highlights decidedly American criminal controversies and landmark cases whose outcomes were affected by pervasive publicity, then traces the evolution of the United States Supreme Court’s approach to remedying trial

prejudice while maintaining transparency and public access. Finally, this article considers the efficacy of various procedural strategies from a criminal defense attorney’s perspective and discusses some potential pitfalls on the horizon for practitioners.

II. THE RISE OF MODERN MEDIA AND ITS IMPLICATIONS

A. Press Influence in the Age of the Printed Word – Dr. Sam Sheppard

On Independence Day in 1954, an American wife and mother named Marilyn Sheppard was bludgeoned to death in her Ohio home.¹⁷ Her husband, Dr. Sam Sheppard, a prominent local osteopathic physician, was immediately targeted as the “only viable suspect” by several publishers in the area.¹⁸ The investigation created a firestorm of attention, and many newspapers, most notably *The Cleveland Press*, abandoned objectivity to take an active role in accusing and condemning Dr. Sheppard, even before his indictment.¹⁹ A federal

¹⁶ *Photograph of the Rosenbergs*, OVER PASSES FOR AMERICA, <https://overpassesforamerica.com/wp-content/uploads/2016/01/rosenbergs1.jpg> (last visited Mar. 20, 2017).

¹⁷ F. LEE BAILEY & JEAN RABE, WHEN THE HUSBAND IS THE SUSPECT 13-14 (2008).

¹⁸ *Criminal Justice on the Docket: Sheppard v. Maxwell*, 384 U.S. 333 (1966), ACLU AM. CIV. LIBERTIES UNION OF OHIO, <http://www.acluohio.org/archives/cases/sheppard-v-maxwell> (last visited Mar. 20, 2017).

¹⁹ See generally Keith Sanders, *The Cleveland Press Coverage of the Sheppard Murder Case in Relation to Sensational News Treatment* (Aug. 22, 1964) (unpublished M.S. dissertation, Cleveland State University), http://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=1000&context=sheppard_news_thesis (analyzing the role of the media in the Sheppard case while it was still ongoing).

appellate judge who later reviewed the media scrutiny stated, “[i]f ever flagrant and tolerated interference of news media in a criminal trial served to deprive a defendant of his constitutional rights to due process and a fair trial, this must surely be a case.”²⁰ (See Figure 4²¹)

Sheppard’s jury trial itself was no less scandalous than the news coverage that preceded it. The United States Supreme Court would later characterize the trial as having a “carnival atmosphere.”²² After denying a change of venue motion, the trial court presided over a lengthy jury selection; only one of the selected jurors said he or she had not read or heard about the case.²³ With the prosecution’s theory of the case resting on Dr. Sheppard’s infidelity as his motive for murder, a popular radio show, piggybacking off the trial’s

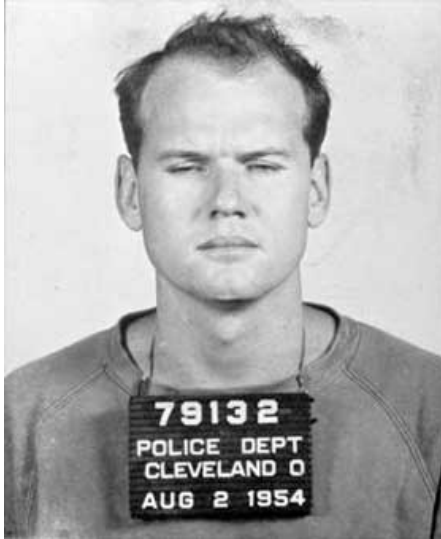


Figure 4

notoriety, broadcasted reports of a woman convict who claimed to be Dr. Sheppard’s mistress and the mother of his illegitimate child.²⁴ Two sitting jurors admitted to hearing the broadcast, as Sheppard’s jury was not sequestered.²⁵ Nevertheless, the Ohio trial court judge failed to dismiss them and even refused to issue an instruction for the jury to disregard media reports.²⁶ After all, as the presiding judge remarked to one reporter just before the trial began, “[i]t’s an open and shut case . . . he is guilty as hell.”²⁷

²⁰ Sheppard v. Maxwell, 346 F.2d 707, 738 (6th Cir. 1965) (Edwards, J., dissenting), *rev’d*, 384 U.S. 333 (1966).

²¹ *Sam Sheppard’s Mugshot from the Cleveland Police Department*, WHO 2 BIOGRAPHIES, <http://www.who2.com/bio/sam-sheppard/sam-sheppard-3/> (last visited Mar. 20, 2017).

²² Sheppard v. Maxwell, 384 U.S. 333, 358 (1966).

²³ *Id.* at 345, 348.

²⁴ *Sheppard*, 384 U.S. at 348.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 358 n.11.

Still, a number of inconsistencies at trial undermined the case against Dr. Sheppard.²⁸ The crime scene was extremely bloody; it had been spattered everywhere.²⁹ Dr. Sheppard, who was home at the time of the murder, had only a small bloodstain on his trousers and injuries consistent with his account that he had received a concussive blow to the head.³⁰ Next, two of Marilyn Sheppard's teeth were broken and torn out during her murder, suggesting that she had vigorously bitten her assailant.³¹ Dr. Sheppard's body was thoroughly inspected and he displayed no bite marks or open wounds.³² Sheppard also took the stand in his own defense and testified that a bushy-haired intruder had committed the crime.³³

Two witnesses for the defense corroborated this, stating that they had also seen a man fitting this description near Sheppard's home on the day of the murder.³⁴ Finally, the murder weapon was never recovered and there was, in



Figure 5

fact, no direct evidence against Dr. Sheppard.³⁵ Nevertheless, after four days of deliberations, the jury convicted him on December 21, 1954.³⁶

²⁸ Douglas O. Linder, *Dr. Sam Sheppard Trials: An Account*, FAMOUS TRIALS, <http://www.famous-trials.com/sam-sheppard/2-sheppard> (last visited Mar. 20, 2017) [hereinafter *Dr. Sam Sheppard Trials*].

²⁹ *Sheppard v. Maxwell*, 231 F. Supp. 37, 39 (S.D. Ohio 1964), *rev'd*, 346 F.2d 707 (6th Cir. 1965), *rev'd*, 384 U.S. 333 (1966).

³⁰ Linder, *Dr. Sam Sheppard Trials*, *supra* note 28.

³¹ Kathleen Kernicky, *The Lies That Bind*, SUN SENTINEL (Mar. 2, 1997), http://articles.sun-sentinel.com/1997-03-02/lifestyle/9702250317_1_sam-sheppard-dr-sheppard-young-sam.

³² *Id.*

³³ Douglas O. Linder, *Selected Testimony of Sam Sheppard in his 1954 Murder Trial*, FAMOUS TRIALS, <http://www.famous-trials.com/sam-sheppard/12-excerpts-from-the-trial-transcripts/26-samsheppardtestimony> (last visited Mar. 20, 2017).

³⁴ Trial Transcript of Testimony of Leo Stawicki, 231 F. Supp. 37 (S.D. Ohio 1954) (Civ. No. 6640), http://engagedscholarship.csuohio.edu/sheppard_transcripts_1954/12/; Trial Transcript of Testimony of Richard E. Knitter, 231 F. Supp. 37 (S.D. Ohio 1964) (Civ. No. 6640), http://engagedscholarship.csuohio.edu/sheppard_transcripts_1954/12/.

³⁵ Linder, *Dr. Sam Sheppard Trials*, *supra* note 28.

³⁶ *Maxwell*, 231 F. Supp. at 40.

Nearly a decade later, Dr. Sheppard's conviction was overturned as a result of F. Lee Bailey's petition for *habeas corpus*, a petition that was ultimately granted by the United States Supreme Court.³⁷ (See Figure 5³⁸). Bailey also represented Dr. Sheppard when he was retried in 1966, and expertly discredited each of the same twelve prosecution witnesses that had testified during Sheppard's first trial.³⁹ Once again, media coverage was extensive.⁴⁰ It arguably "made" F. Lee Bailey's career. This time, however, the jury was sequestered.⁴¹ Also, with Bailey as counsel, Dr. Sheppard did not testify in the second trial.⁴² As a result, it took just twelve hours for the jury to reach a verdict of not guilty.⁴³

After his ordeal, Sam Sheppard attempted to regain some semblance of his former life. He was remarried, later divorced, and married again; he resumed practicing medicine, and was twice sued for malpractice; he wrote his memoirs; and even did a stint as a professional wrestler under the moniker, "Killer" Sam Sheppard.⁴⁴ However, the decade of his life lost in prison had already taken a hefty toll. Sheppard's mother and stepfather both committed suicide; his father died of a bleeding gastric ulcer; and Sheppard himself was voluntarily injected with live cancer cells for science, all while he was imprisoned.⁴⁵ He drank heavily after being acquitted and died a scant four years later, in May 1970, of liver failure.⁴⁶

Despite his ignominious death, and once again proving America's love for trial drama, Dr. Sheppard's story became the stuff of legend in Hollywood. *The Fugitive*, a 1960's television series about

³⁷ *Sheppard*, 384 U.S. at 335.

³⁸ *Photograph of F. Lee Bailey and Sam Sheppard*, CRIME FEED, <http://crimefeed.com/wp-content/uploads/2015/12/f-lee-bailey-and-sheppard-ap.jpg> (last visited Mar. 20, 2017).

³⁹ Linder, *Dr. Sam Sheppard Trials*, *supra* note 28.

⁴⁰ Stefanie A. Sparks, *Marriage of Media and Law: A Doomed Relationship Under Current Ethics Rules*, 22 GEO. J. LEGAL ETHICS 1151, 1151 (2009) (stating, "[t]hroughout American legal history, the media has undoubtedly played a role in trials including . . . the second trial of Dr. Sam Sheppard . . .").

⁴¹ BAILEY & RABE, *supra* note 17, at 21.

⁴² Douglas O. Linder, *The Dr. Sam Sheppard Trial*, UMKC L. (2006), <http://law2.umkc.edu/faculty/projects/ftrials/sheppard/sheppardaccount.html>.

⁴³ DAVID W. NEUBAUER & HENRY F. FRADELLA, *AMERICAN COURTS AND THE CRIMINAL JUSTICE SYSTEM* 365 (10th ed. 2009).

⁴⁴ BAILEY & RABE, *supra* note 17, at 22-23; Brent Larkin, *Speaking up for Marilyn in the 60-Year-Old Sam Sheppard Murder Case*, CLEVELAND.COM (July 03, 2014, 6:00 AM), http://www.cleveland.com/opinion/index.ssf/2014/07/speaking_up_for_marilyn_in_the.html.

⁴⁵ BAILEY & RABE, *supra* note 17, at 28-29.

⁴⁶ BAILEY & RABE, *supra* note 17, at 28-29.

a doctor wrongly convicted of murdering his wife, was inspired by Sheppard's story.⁴⁷ The 1993 feature film adaptation earned \$400 million at the box office, and was nominated for an Academy Award for Best Picture.⁴⁸ A sequel, *U.S. Marshalls*, was released in 1998, and Warner Bros. is currently rumored to be planning a remake of *The Fugitive*.⁴⁹

B. United States Supreme Court's Response to Ever-Evolving Tensions Among the Amendments

Much has changed since the days of Sam Sheppard, and American jurisprudence has attentively, if not always successfully,



Figure 6

sought to evolve with the changes. A survey of this evolution is not the focus of this piece; nevertheless, it behooves the competent litigator of newsworthy cases to be familiar with seminal United States Supreme Court decisions that delineate the metes and bounds of constitutional guarantees today. Thus, consider this review a starting point from which to explore the high court's static approach to balancing fundamental rights from the time of the printed word to the advent of the personal computer.

Even before final disposition of the Sheppard case, the 1960's witnessed a remarkable decision in *Irvin v. Dowd*.⁵⁰ (See Figure 6⁵¹). Though largely concerned with venue issues, this case laid the fundamental groundwork for the proposition that a verdict influenced by media coverage violates the Sixth Amendment right to an impartial

⁴⁷ BAILEY & RABE, *supra* note 17, at 13.

⁴⁸ Germain Lussier, 'The Fugitive' Will Return to the Big Screen, /FILM (May 12, 2015), <http://www.slashfilm.com/the-fugitive-remake>.

⁴⁹ *Id.*

⁵⁰ 366 U.S. 717 (1961).

⁵¹ *Photograph of the Wanted Poster for Leslie Irvin*, PINTEREST, <https://s-media-cache-ak0.pinimg.com/736x/89/b6/04/89b604059236f943365b40b22e67a7c6.jpg> (last visited Mar. 21, 2017).

jury.⁵² Unlike Dr. Sam Sheppard, Leslie Irvin really was a “fugitive” of sorts, in that he actually did escape police custody after being convicted.⁵³ However, instead of one victim, Irvin was accused of killing six people around the hub of Southwestern Indiana.⁵⁴

Prosecutors and police officials issued several press releases, which were highly publicized by local newspapers and radio broadcasters, claiming that “Mad Dog” Irvin had confessed to all six murders.⁵⁵ On motion, and pursuant to an Indiana statute, Irvin was granted a venue change to the adjoining county.⁵⁶ However, it soon became clear that the jury pool in the adjoining county was biased as a result of the intense media scrutiny surrounding the case.⁵⁷ Nevertheless, since the governing statute only allowed a single change of venue, the trial court denied defense counsel’s subsequent two motions to reconvene in a different part of the state, and similarly denied eight continuance requests.⁵⁸

Of 355 potential jurors questioned at voir dire, 233 stated outright that Irvin was guilty; four of whom were ultimately empaneled, as defense counsel had already exhausted its twenty peremptory challenges.⁵⁹ Eight of the twelve jurors were convinced of Irvin’s guilt before the trial even began.⁶⁰ After his quick conviction and death sentence, defense counsel motioned for a new trial, alleging 415 grounds of error.⁶¹ But, because Irvin escaped from custody the night before the motion was filed, the Supreme Court of Indiana denied it, stating that by “plac[ing] himself beyond the jurisdiction and control of the court, [Irvin] forfeited his right to ask the court for a new trial.”⁶² Eventually, the United States Supreme Court vacated Leslie Irvin’s conviction, declaring judgment of sentence was constitutionally void because jurors had been unduly prejudiced by the intense media coverage and, “[w]ith his life at stake, it is not requiring too much that

⁵² *Id.* at 726-28.

⁵³ *Irvin v. Indiana*, 139 N.E.2d 898, 899 (Ind. 1957).

⁵⁴ *Irvin v. Dowd*, 359 U.S. 394, 396 (1959).

⁵⁵ *Id.* at 396-97.

⁵⁶ *Id.* at 397.

⁵⁷ *Id.*

⁵⁸ *Id.* at 397-98.

⁵⁹ *Dowd*, 359 U.S. at 398.

⁶⁰ *Irvin*, 366 U.S. at 727.

⁶¹ *Dowd*, 359 U.S. at 399-400.

⁶² *Indiana*, 139 N.E.2d at 899.

[Mr. Irvin] be tried in an atmosphere undisturbed by so huge a wave of public passion”⁶³

In the 1970’s, Judge Hugh Stuart, a state trial judge, entered a restraining order preventing news media from publishing accounts of the vicious murder of six Nebraskans—family members killed in their home.⁶⁴ In light of already widespread media coverage, the prosecution and defense had jointly motioned for a protective order to reduce the risk of prejudicing the yet-to-be-empaneled jury.⁶⁵ Specifically, the order Judge Stuart finally issued prohibited “the release for public dissemination [of] . . . any testimony given or evidence adduced” at trial.⁶⁶ However, the Nebraska Press Association intervened, claiming the court’s order abrogated freedoms of the press.⁶⁷ When the case eventually reached the United States Supreme Court, the majority opinion discussed lessons of the Boston Massacre trials, stating:

The unusually able lawyers who helped write the Constitution and later drafted the Bill of Rights were familiar with the historic episode in which John Adams defended British soldiers charged with homicide for firing into a crowd of Boston demonstrators; they were intimately familiar with the clash of the adversary system and the part that passions of the populace sometimes play in influencing potential jurors [T]heir chief concern was the need for freedom of expression in the political arena But they recognized that there were risks to private rights from an unfettered press.⁶⁸

Impugning the speed of modern communications and the pervasiveness of news media for exacerbating preexisting constitutional dilemmas, the *Stuart* Court referenced in particular the infamous Charles Lindbergh baby kidnapping and murder trial as being emblematic of the inequities that can result when a court is not vigilant in protecting the defendant’s right to a fair trial.⁶⁹ The Court

⁶³ *Irvin*, 366 U.S. at 728.

⁶⁴ *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 542 (1976).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 543.

⁶⁸ *Id.* at 547.

⁶⁹ *Stuart*, 427 U.S. at 548-49.

even discussed the injustices faced by Leslie Irvin, and went on at length about Dr. Sam Sheppard.⁷⁰ Ultimately, though, it concluded Judge Stuart's order was an unconstitutional prior restraint on the freedom of speech because strict scrutiny applied and there was no evidence a less restrictive method could not have been used to accomplish the same goal.⁷¹ Thus, after *Stuart*, a trial judge may not suppress speech, unless it is shown the criminal defendant will otherwise endure irreparable prejudice.⁷² The court must balance Sixth and First Amendment guarantees before imposing a prior restraint, which carries a heavy presumption of unconstitutionality.⁷³ Ultimately, as per *Stuart*, a court can only restrain the press when: 1) there is, or is likely to be widespread prejudicial publicity; 2) no other method of ensuring a fair trial, *i.e.*, *voir dire*, change of venue, continuance, etc., will adequately mitigate prejudice to the defendant; and 3) the prior restraint will effectively stop the flow of prejudicial publicity.⁷⁴

In the 1980s, at the dawn of the personal computing age, another high court decision vividly displayed the Court's evolving approach to balancing tensions between the First and Sixth Amendments. Prior to it, the Supreme Court had expressly held the right to a public trial was personal to the accused; it did not belong to the public, or the press.⁷⁵ However, that stance would soon change. The controversy spurring this momentous change began when John Paul Stevenson was indicted for the stabbing death of a hotel manager in Virginia.⁷⁶ Stevenson was tried and promptly convicted of second-degree murder, but the Virginia Supreme Court reversed and remanded, holding a blood-soaked shirt was erroneously admitted into evidence.⁷⁷ Stevenson was retried in the same court, but a mistrial was declared because a juror asked to be excused after the trial had begun and no alternates had been selected.⁷⁸ The third trial similarly ended

⁷⁰ *Id.* at 551-52.

⁷¹ *Id.* at 569.

⁷² *Id.* at 562.

⁷³ *Id.* at 561.

⁷⁴ *Stuart*, 427 U.S. at 562.

⁷⁵ *See, e.g.*, *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 379-80 (1979) ("The Constitution nowhere mentions any right of access to a criminal trial on the part of the public; its guarantee, like the others enumerated, is personal to the accused.").

⁷⁶ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 559 (1980).

⁷⁷ *Id.*

⁷⁸ *Id.*

in a mistrial, apparently because one of the jurors tainted the prospective jury pool by discussing media coverage of the case before the trial began.⁷⁹ At the start of the fourth trial, defense counsel moved to close the courtroom to the public.⁸⁰ The prosecution did not object, nor did two reporters from Richmond Newspapers, Inc., who were sitting in the gallery.⁸¹ However, later that day, the two reporters requested a hearing to vacate the closure order.⁸² The trial court agreed to a hearing but ruled it was a part of the ongoing trial and, as such, the reporters were excluded from it.⁸³ At the hearing, the court considered issues ranging from the size of the town to the layout of the courtroom, and eventually denied the motion to vacate, after concluding that the criminal defendant's right to a fair trial was paramount to any right of access by the public.⁸⁴

In closed proceedings the following day, defense counsel successfully moved to strike the prosecution's evidence, and to declare mistrial; with the jury having been excused, the court issued a bench ruling that Stevenson was not guilty and he was "allowed to depart."⁸⁵ Although the trial was over, the controversy was just beginning.

Richmond Newspapers, Inc., was granted the right to intervene *nunc pro tunc* in Stevenson's case.⁸⁶ Richmond Newspapers, Inc. appealed the trial court closure order and petitioned for writs of prohibition and mandamus before the Virginia Supreme Court; however, the writs were dismissed and the appeal was denied because Virginia's high court discerned no reversible error.⁸⁷ The newspaper then sought to invoke the jurisdiction of the United States Supreme Court.⁸⁸ The Court initially postponed the case.⁸⁹ The Court ruled that it lacked appellate jurisdiction to hear the merits of the appeal because the newspaper failed to explicitly challenge the constitutionality of the Virginia statute that conferred the trial court with authority to exclude

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Richmond Newspapers, Inc.*, 448 U.S. at 560.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 561.

⁸⁵ *Id.* at 561-62.

⁸⁶ *Richmond Newspapers, Inc.*, 448 U.S. at 562.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

anyone who might impair a criminal defendant's right to a fair trial.⁹⁰ Nevertheless, the Court later granted *certiorari* to determine whether the First and Fourteenth Amendments guaranteed the public's right to attend trials.⁹¹

Framing its analysis in *Richmond Newspapers, Inc.*, the Supreme Court harkened back to *Stuart* and *Sheppard*, acknowledging that competing tensions among the constitutional amendments "are almost as old as the Republic."⁹² After discussing everything from the Norman Conquest to Sir William Blackstone's *Commentaries*, the Court averred that history conclusively demonstrated that criminal trials were meant to be open to the public.⁹³ The Freedom of Assembly Clause of the First Amendment, incorporated through the Fourteenth Amendment, gave journalists and the public at-large equal right to attend criminal trials.⁹⁴ While the right of transparency is not absolute, it does give the public or press standing to argue against a motion to close a criminal trial, or any part of it.⁹⁵ Further, the Supreme Court concluded that the Sixth Amendment does not give a criminal defendant the guaranteed right to a private trial.⁹⁶ The Court admonished the Virginia trial court's closure hearing for failing to thoroughly determine whether some less restrictive method, like sequestration, could not have guarded defendant against prejudicial media publicity.⁹⁷ Accordingly, after *Richmond Newspapers, Inc.*, the governing principle is that "[a]bsent an overriding interest articulated in findings, the trial of a criminal case must be open to the public."⁹⁸

Still, while *Richmond Newspapers, Inc.* was considered a "watershed" decision, the diverse and complex reasoning of the

⁹⁰ *Id.* at 562-63 n.4 (refusing to assess the validity of Va. Code § 19.2-266 (Supp.1980), and noting that an attack on the lawless exercise of authority invokes the Court's *certiorari* jurisdiction, whereas an attack on the statute conferring such authority is invoked by way of its appellate jurisdiction).

⁹¹ *Richmond Newspapers, Inc.*, 448 U.S. at 562-64 ("[H]ere for the first time the Court is asked to decide whether a criminal trial itself may be closed to the public . . . without any demonstration that closure is required to protect the defendant's superior right to a fair trial, or that some other overriding consideration requires closure.").

⁹² *Id.* at 565 (quoting *Stuart*, 427 U.S. 539, 547 (1976)); see generally *Sheppard*, 384 U.S. 333 (1966).

⁹³ *Richmond Newspapers, Inc.*, 448 U.S. at 565.

⁹⁴ *Id.* at 580.

⁹⁵ *Id.* at 581.

⁹⁶ *Id.* at 580 (citing *Gannett*, 443 U.S. at 382).

⁹⁷ *Richmond Newspapers, Inc.*, 448 U.S. at 581.

⁹⁸ *Id.*

justices who heard the case has become a wellspring for robust debate about privacy protection and public access.⁹⁹ Far from delivering a cohesive rationale for the holding, seven justices in the majority issued six different opinions, with no concurrence garnering support from more than two other justices.¹⁰⁰ As a result, related issues, such as the right of public access in civil trials, remain the focus of legal scholarship and litigation at state and federal levels even after the United States Supreme Court's ruling.¹⁰¹

C. News Media Treatment of the First and Last “Trials of the [Twentieth] Century”

Dubbed the “first tabloid phenomenon in American history,”¹⁰² the prosecution of eccentric millionaire Harry K. Thaw was arguably the 1900s’ original “trial of the century.”¹⁰³ (See Figure 7¹⁰⁴). The victim, Stanford White, was not only the premier American architect of his time, having designed such marvels as Manhattan’s Washington Square Arch and the Tiffany Building, but he was also an architect of revelry, staging elaborate parties and spectacles for the members of his elite social circle, which included financial titans William Whitney and Frederick Vanderbilt.¹⁰⁵ Along with some of his aristocratic colleagues, White was alleged to have a penchant for seducing teenage chorus girls, in an age where “seduction” often constituted sexual assault.¹⁰⁶ In 1901, Stanford White’s attention focused on Evelyn Nesbit, a model and aspiring actress who, at just 16 years old, was

⁹⁹ *Id.* at 582 (Stevens, J., concurring).

¹⁰⁰ See *Richmond Newspapers, Inc.*, 448 U.S. 555; see also THE SAGE GUIDE TO KEY ISSUES IN MASS MEDIA ETHICS AND LAW 213-14 (William A. Babcock & William H. Freilvogel eds. 2015) [hereinafter KEY ISSUES IN MASS MEDIA] (providing an in-depth discussion of two arguments used to justify the holding—namely, the historical tradition of opening trials to the public and the functional benefits of transparency).

¹⁰¹ KEY ISSUES IN MASS MEDIA, *supra* note 100, at 215.

¹⁰² *What History Forgot: Secrets and Scandals* (AHC television broadcast Mar. 26, 2016) [hereinafter *What History Forgot*].

¹⁰³ Douglas O. Linder, *The Trials of Harry Thaw for the Murder of Stanford White*, UMKC. L. (2009), <http://law2.umkc.edu/faculty/projects/ftrials/thaw/Thawaccount.html> [hereinafter *Trials of Harry Thaw*].

¹⁰⁴ *Photograph of The Washington Times Cover Page*, PBS, https://pbs.twimg.com/media/Clj_ACVWMAABqEq.png (last visited Mar. 21, 2017).

¹⁰⁵ See *What History Forgot*, *supra* note 102 (asserting that White was the creator of the “pie-girl incident” routine, in which a scantily-clad young woman jumps out of an oversized cake or pie); see also Linder, *Trials of Harry Thaw*, *supra* note 103.

¹⁰⁶ See Linder, *Trials of Harry Thaw*, *supra* note 103.

already the most photographed female face in America.¹⁰⁷ After showering young Evelyn Nesbit with gifts, White seduced her and ultimately made her his mistress.¹⁰⁸ However, White's infatuation with the young model faded, and he soon discarded Nesbit and moved on to other paramours.¹⁰⁹

Nevertheless, Evelyn Nesbit's career continued to flourish and she soon became the object of affection for another aristocrat, railroad baron Harry Kendall Thaw.¹¹⁰ Known for lighting his cigars with \$100 bills, "Mad" Harry had a reputation for extravagant wealth and bad behavior.¹¹¹ The two were eventually married, and Thaw sought to avenge his new bride's reputation from the besmirchment caused by her prior affair with Stanford White.¹¹² Thus, with Nesbit in tow, Thaw confronted White at the old Madison Square Garden, a building that had, in fact, been designed by White.¹¹³ It



Figure 7

was a short confrontation on that day in June 1906; Thaw produced a

¹⁰⁷ See Linder, *Trials of Harry Thaw*, *supra* note 103 (noting that Evelyn Nesbit was a cover model for Harper's Bazaar, Vanity Fair, and Cosmopolitan).

¹⁰⁸ Linder, *Trials of Harry Thaw*, *supra* note 103.

¹⁰⁹ *Murder at Madison Square Garden: Evelyn Nesbit, Stanford White, and Harry Kendall Thaw Made Headlines in 1906* (Jan. 17, 2013), KEITH YORK CITY BLOG <https://keithyorkcity.wordpress.com/2013/01/17/murder-at-madison-square-garden-evelyn-nesbit-stanford-white-and-harry-kendall-thaw-made-headlines-in-1906/>.

¹¹⁰ Linder, *Trials of Harry Thaw*, *supra* note 103.

¹¹¹ *What History Forgot*, *supra* note 102 (stating that Thaw was ejected from the exclusive Union Club for entering the clubhouse on horseback); Cory Van Brookhoven, *Original Playboy the Twisted Life of Harry K. Thaw and his Connection to Lititz*, LITITZ RECORD EXPRESS (Aug. 14, 2013), <http://lititzrecord.com/news/original-playboy-the-twisted-life-of-harry-k-thaw-and-his-connection-to-lititz/>.

¹¹² Linder, *Trials of Harry Thaw*, *supra* note 103.

¹¹³ Linder, *Trials of Harry Thaw*, *supra* note 103.

pistol and shot White three times from behind—once in the arm and twice in the head, all at close range.¹¹⁴

”Mad” Harry Thaw’s ensuing trials created a media circus, with tabloid journals competing to produce some of the most sensational headlines of the era.¹¹⁵ The case so immediately captivated the public consciousness that, just a week after the murder, Thomas Edison released the nickelodeon film, *Rooftop Murder*, dramatizing the already infamous incident.¹¹⁶ After his first trial ended in a hung jury, Thaw was retried and found not guilty by reason of insanity.¹¹⁷

”Mad” Harry was committed to an insane asylum for seven years before being declared sane and living out the remainder of his life in wealth and luxury.¹¹⁸ Once again abandoned, Evelyn Nesbit was not so fortunate; she faded into poverty and obscurity, as the scandalous media publicity had thoroughly tarnished her reputation and ruined her professional career.¹¹⁹ Today, all the figures in this tragedy appear to have been forgotten by history. Yet, in their time, the public likely believed that Stanford White’s murder would remain the most infamous and highly publicized crime of the century.

Much later in the twentieth century, however, California prosecutors argued that another celebrity’s jealous rage led to an even more infamous double murder. Although the defendant’s case did not reach the United States Supreme Court, news cycles in the 1990s were dominated by him and, from a societal perspective, the verdict in his case was arguably the most impactful decision of the decade in America. That man, of course, is Orenthal James Simpson, and any discussion of trial



Figure 8

¹¹⁴ Linder, *Trials of Harry Thaw*, *supra* note 103.

¹¹⁵ Ciaran Conliffe, *Harry Thaw, Millionaire Murderer*, HEADSTUFF (April 11, 2016), <http://www.headstuff.org/2016/04/harry-thaw-millionaire-murderer/>.

¹¹⁶ *Id.*

¹¹⁷ Linder, *Trials of Harry Thaw*, *supra* note 103.

¹¹⁸ Linder, *Trials of Harry Thaw*, *supra* note 103.

¹¹⁹ *What History Forgot*, *supra* note 102; *see also* Conliffe, *supra* note 114.

publicity would be remiss in omitting his murder trial.¹²⁰ (See Figure 8¹²¹).

Facts surrounding the gruesome deaths of Nicole Brown and Ronald Goldman have been analyzed from every perspective imaginable, including by way of a “hypothetical autobiography,” purportedly written by O.J. Simpson himself, entitled “If I Did It.” For instant purposes, revisiting them is unnecessary; however, there are several important lessons to be learned from the media’s role in the ensuing prosecution, which was dubbed the modern “trial of the 20th century.”¹²² First, in the case of a true “celebrity” such as O.J. Simpson, prejudice caused by media coverage can take an extraordinary amount of time to dissipate.¹²⁴ Now, more than twenty years after the case began, Simpson’s murder trial is still garnering headlines and is itself the subject of a star-studded hit television drama series.¹²⁵ Second, pre-formed biases from one criminal trial can be so extensive as to carry over to an unrelated criminal trial.¹²⁶ For example, counsel for O.J. Simpson’s co-defendant in the 2008 armed robbery and kidnapping case, in which Simpson attempted to re-acquire his sports memorabilia, argued that “[t]he only explanation that is even conceivable” for co-defendant’s conviction on multitudinous counts “[wa]s the spillover prejudice from sitting next to Mr.

¹²⁰ See Doug Linder, *The Trial of Orenthal James Simpson*, UMKC. L. (2000), <http://law2.umkc.edu/faculty/PROJECTS/FTRIALS/Simpson/Simpsonaccount.htm>.

¹²¹ See generally O.J. SIMPSON, *IF I DID IT: CONFESSIONS OF THE KILLER* (2006).

¹²² *Photograph of the Mugshot of Orenthal James Simpson*, ABC NEWS, http://a.abcnews.com/images/US/gty_oj_simpson_11_jc_160203_8x11_1600.jpg (last visited Mar. 21, 2017).

¹²³ OJ: TRIAL OF THE CENTURY (Investigation Discovery 2014), <http://thetvdb.com/?tab=episode&seriesid=250148&seasonid=599391&id=5318409&lid=7> (chronicling O.J. Simpson’s trial in a television format that “allows viewers to relive every moment of the investigation first-hand.”); *Is O.J. Innocent? The Missing Evidence* (Discovery television broadcast Jan. 15, 2017).

¹²⁴ See Ned Martel, *The Media and Race in O.J. Trial*, N.Y. TIMES (Oct. 4, 2005), http://www.nytimes.com/2005/10/04/arts/television/the-media-and-race-in-o-j-trial.html?_r=0.

¹²⁵ *The People v. O.J. Simpson: American Crime Story* (FX Networks television broadcast Feb. through Apr. 2016) (featuring A-list celebrity actors such as Cuba Gooding, Jr., John Travolta, Sarah Paulson, and David Schwimmer); see Robert Lloyd, *‘The People v. O.J. Simpson’ on FX Focuses on the Lawyers and the Lawyering*, L.A. TIMES (Feb. 2, 2016, 3:00 AM), <http://www.latimes.com/entertainment/tv/la-et-st-oj-simpson-american-crime-review-20160202-column.html>.

¹²⁶ *Id.*

Simpson.¹²⁷ Third, as evidenced by the Brown and Goldman families' \$33.5M wrongful death judgment, a celebrity defendant's acquittal in a criminal trial does not preclude a finding of civil liability, which can ultimately bankrupt the client.¹²⁸ Therefore, advocates must be mindful that public statements about the case may affect the outcome of a subsequent civil trial, in which the defendant may be subject to liability under the more liberal "preponderance of the evidence" standard.¹²⁹ Fourth, in highly publicized cases, the defendant is not the only person that is "on trial." At any given time, the media spotlight may focus on prosecutors, defense attorneys, key witnesses, or even the trial judge, any of whom can be swiftly tried in the court of public opinion in the same way that Marcia Clark, Johnnie Cochran, Kato Kaelin, and Judge Lance Ito were during O.J. Simpson's trial.¹³⁰

Finally, in certain extraordinary high profile cases, the trial itself may come to represent something larger than the crimes at issue. In the case of O.J. Simpson, defense counsel invoked the theme of racial inequality in the American criminal justice system.¹³¹ Analogously, notwithstanding vast differences in time and subject matter, the Boston Massacre trials likewise became emblematic of broader social and political issues: the colonies' struggle against inequality in the administration of British justice.¹³² Thus, although the trials of Captain Preston and O.J. Simpson are distinguishable in almost every other way, both represent watershed moments for America's ever-shifting consciousness as a nation that played out in the news media of their respective eras. Indeed, in this sense, O.J. Simpson's case arguably surpasses the case of Harry K. Thaw as the true trial of the twentieth century.

¹²⁷ Paul Vercammen, *O.J. Simpson Guilty of Armed Robbery, Kidnapping*, CNN, <http://www.cnn.com/2008/CRIME/10/04/oj.simpson.verdict> (last updated Oct. 4, 2008, 2:17 PM).

¹²⁸ *Id.*

¹²⁹ *Simpson Civil Trial Explainer*, CNN INTERACTIVE (Sep. 16, 1996), <http://www.cnn.com/US/9609/16/simpson.case/>.

¹³⁰ See generally Sara Sun Beale, *The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397 (2006).

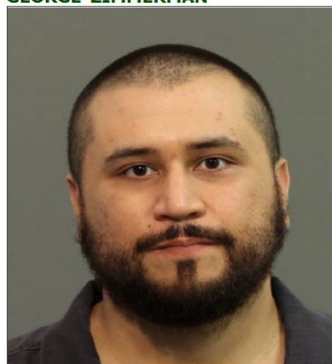
¹³¹ Jim Moret, *The O.J. Verdict: Nobody Won*, HUFFINGTON POST (June 12, 2014, 1:09 PM), http://www.huffingtonpost.com/jim-moret/the-oj-verdict-nobody-won_b_5484771.html.

¹³² See *The Boston Massacre Trials*, *supra* note 8.

D. Media Expansion in the Internet Age – George Zimmerman

The exponential growth of social media and networking sites—such as Facebook and Twitter—has changed not only the way we interact with one another, but also the way we participate in society. Social media and networking have helped give birth to, and berth for, social experiments ranging from the Tea Party to the #blacklivesmatter movement.¹³³ Yet, despite astounding social and technological progress in the new millennium, some pervasive themes from decades past linger on, none maybe more prevalent, or more toxic, than the

GEORGE ZIMMERMAN



INMATE INFORMATION

Booking #: 201300012785
 Name: GEORGE ZIMMERMAN
 DOB: 10/05/1983
 Location: I
 Arrested by: Seminole County Sheriff's Office
 Arrest Date: 11/18/2013 01:43:00 PM

Inmate may not be bailed.

Figure 9

theme of racial inequality in America. Trayvon Martin's death in 2012 sparked a powder keg that exploded in the social stratosphere,¹³⁴ enflaming racial tensions that had never been doused in the years following O.J. Simpson's criminal acquittal.

Details as to exactly what happened that night in Sanford, Florida, when George Zimmerman shot Trayvon Martin, are still a matter of public dispute.¹³⁵ It is undisputed that 28-year-old Zimmerman, a Neighborhood Watch volunteer, had been following the 17-year-old Martin, a Miami resident who was briefly staying nearby with his father.¹³⁶ The two exchanged invectives and a struggle ensued, portions of which were captured by 911 calls.¹³⁷ At the end of the altercation, Zimmerman was bloodied, and Martin was dead.¹³⁸

¹³³ See Jen Schradie, *Bringing the Organization Back in: Social Media and Social Movements*, BERKELEY J. OF SOC. (Nov. 3, 2014), <http://berkeleyjournal.org/2014/11/bringing-the-organization-back-in-social-media-and-social-movements/>.

¹³⁴ Greg Botelho, *What Happened the Night Trayvon Martin Died*, CNN, <http://www.cnn.com/2012/05/18/justice/florida-teen-shooting-details> (last updated May 23, 2012, 10:48 AM).

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

News reports of the violent tragedy quickly garnered national attention, and though Zimmerman was Hispanic, the coverage was criticized for portraying the incident as a black-versus-white racial dispute.¹³⁹ Authorities released seven 911 calls from the night of the shooting, the publication of which later became the subject of another litigation.¹⁴⁰ That is, Zimmerman brought a defamation suit against NBC Universal for using what his attorney, Mark O'Mara, called "the oldest form of yellow journalism," doctoring a recording of the 911 call Zimmerman made that night to sound as though Zimmerman's suspicions were racially motivated.¹⁴¹

Specifically, when Zimmerman called 911 that February day, he said, "[t]his guy looks like he's up to no good, or he's on drugs or something. It's raining, and he's just walking around, looking about."¹⁴² The dispatcher responded, "OK, and this guy, is he black, white or Hispanic?"¹⁴³ Zimmerman answered, "[h]e looks black."¹⁴⁴ However, when NBC News ran the call, they edited down the dialogue, juxtaposing his statements: "This guy looks like he's up to no good. . . . He looks black."¹⁴⁵ Accordingly, Zimmerman's defamation suit sought damages for NBC's slanted editing, as well as for its misrepresentation of his remark: "f----- punks," alleging The Today Show maliciously broadcasted that Zimmerman had instead said "f--- coons."¹⁴⁶ Regardless, the suit ultimately failed, as Zimmerman could not prove NBC Universal acted with actual malice.¹⁴⁷

¹³⁹ Suzanne Gamboa, *Florida Shooter's Race a Complicated Matter*, BOSTON.COM (Mar. 29, 2012), http://archive.boston.com/news/nation/articles/2012/03/29/florida_shooters_race_a_complicated_matter/?page=full.

¹⁴⁰ *Trayvon Martin Shooting Fast Facts*, CNN, <http://www.cnn.com/2013/06/05/us/trayvon-martin-shooting-fast-facts> (last updated Feb. 28, 2017, 2:20 PM).

¹⁴¹ Michael Martinez, *George Zimmerman Sues NBC Universal Over Edited 911 Call*, CNN, <http://www.cnn.com/2012/12/06/us/florida-zimmerman-nbc-lawsuit/index.html> (last updated Dec. 7, 2012, 9:55 AM).

¹⁴² Doug Stanglin, *Court Rules for NBC in George Zimmerman Defamation Case*, USA TODAY (June 30, 2014, 9:58 AM), <http://www.usatoday.com/story/news/nation/2014/06/30/george-zimmerman-trayvon-martin-nbc-news/11759123>.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ Michael Martinez, *George Zimmerman Sues NBC Universal Over Edited 911 Call*, CNN (Dec. 7, 2012, 9:55 AM), <http://www.cnn.com/2012/12/06/us/florida-zimmerman-nbc-lawsuit>.

¹⁴⁷ Stanglin, *supra* note 142.

The special prosecutor assigned to the Trayvon Martin case postponed indicting George Zimmerman and refused to initiate grand jury proceedings, which, incidentally, Florida only requires for a first-degree murder charge.¹⁴⁸ However, with public pressure mounting and cries of outrage coming from across the country on social media, prosecutors eventually charged him with second-degree murder.¹⁴⁹ With jury selections pending, a significant number of social media users living within the vicinity of the potential jury pool began posting profile updates about what they would do if selected, which were then published by traditional media outlets.¹⁵⁰ (See Figure 9¹⁵¹). The weight of public opinion weighed heavily against George Zimmerman. One Facebook user wrote, “I’m for a life sentence without hearing any evidence. . . . [B]ut I’m not the right guy for this case.”¹⁵² Another posted advice to potential black jurors on how not to get disqualified, stating: “Don’t get eliminated before you even get a chance to be questioned. We definitely don’t want it to the point that all blacks are eliminated because we got over excited and blew our chances. At least give us a chance. Give yourself a chance.”¹⁵³ Of course, intense traditional media scrutiny roused attention from both sides of the political spectrum, and social media then further reduced the chances of empaneling an impartial jury.

In response to perceived media bias against their client, George Zimmerman’s attorneys did more than just file a defamation claim against NBC, they took their case to the court of public opinion in an unprecedented way—using a website, Facebook page, and Twitter account to advocate their side of the “unusual case.”¹⁵⁴ Defense

¹⁴⁸ *No Grand Jury for Zimmerman: What Does it Mean?*, THE WEEK (Apr. 9, 2012), <http://theweek.com/articles/476587/no-grand-jury-george-zimmerman-what-does-mean>.

¹⁴⁹ Matt Gutman, Candace Smith & Pierre Thomas, *George Zimmerman Charged with 2nd Degree Murder in Trayvon Martin’s Death*, ABC NEWS (Apr. 11, 2012), <http://abcnews.go.com/US/george-zimmerman-charged-murder-trayvon-martin-killing/story?id=16115469>.

¹⁵⁰ Jeff Allen, *Buzz Builds Over Jury Notices for George Zimmerman Trial*, BAY NEWS 9 (May 10, 2013, 1:55 PM), http://www.baynews9.com/content/news/baynews9/news/article.html/content/news/articles/cfn/2013/5/10/buzz_builds_over_jur.html.

¹⁵¹ *Photograph of George Zimmerman*, LEGAL INSURRECTION, <http://legalinsurrection.com/wp-content/uploads/2013/11/George-Zimmerman-Mug-Shot-11-18-2013.jpg> (last visited Mar. 20, 2017).

¹⁵² *Id.*

¹⁵³ Allen, *supra* note 150.

¹⁵⁴ *Why Social Media for George Zimmerman?*, GEORGE ZIMMERMAN LEGAL CASE, <http://gzlegalcase.com/index.php/8-press-releases/7-why-social-media-for-george->

counsel justified the tactic, as a preliminary matter, on their website's homepage: "First, we contend that social media in this day and age cannot be ignored. . . . [I]t is going to be an unavoidable part of high-profile legal cases, just as traditional media has been and continues to be."¹⁵⁵ Communicating to the media through website updates, Facebook posts, and tweets, defense counsel bolstered their client's image and portrayed him as a sympathetic character to the public.¹⁵⁶ But, Zimmerman's attorneys did not use social media just to advocate their position; they also used it to raise money for their own legal fees—a practice known as crowdfunding.¹⁵⁷ The strategy was effective. When Zimmerman's defense coffers dwindled, a social media appeal raised \$22,000 in a single day,¹⁵⁸ and Zimmerman's earlier-posted website had a PayPal account that generated contributions in excess of \$200,000.¹⁵⁹

George Zimmerman waived his right to a pretrial immunity hearing under Florida's "Stand Your Ground" law, choosing instead to proceed to trial to assert an affirmative self-defense claim.¹⁶⁰ The trial court ultimately ruled on a dozen pretrial motions at the start of the

zimmerman (last visited Feb. 19, 2017) ("We understand that it is unusual for a legal defense to maintain a social media presence on behalf of a defendant, but we also acknowledge that this is a very unusual case.").

¹⁵⁵ *Id.*

¹⁵⁶ Adam Hochberg, *George Zimmerman's Lawyers Hope to Win Trial by Social Media in Trayvon Martin Case*, POYNTER (May 7, 2012), <http://www.poynter.org/news/mediawire/172840/george-zimmermans-lawyers-hope-to-win-trial-by-social-media-in-trayvon-martin-case>.

¹⁵⁷ *Why Social Media for George Zimmerman?*, *supra* note 154.

¹⁵⁸ *George Zimmerman Raises \$22,000 in One Day After Money Plea*, NEWS 13 (May 30, 2013, 2:42 PM), http://www.mynews13.com/content/news/cfnews13/news/article.html/content/news/articles/cfn/2013/5/30/zimmerman_raises_22k.html.

¹⁵⁹ See Richard Fausset, *George Zimmerman had \$200,000 Support Fund, Attorney Acknowledges*, L.A. TIMES (Apr. 27, 2012), <http://articles.latimes.com/2012/apr/27/nation/la-na-nn-zimmerman-reveals-support-fund-2012-0427> (explaining that George Zimmerman and his wife, Shellie, initially claimed indigent status at his bail hearing and Zimmerman was granted bail in the amount of \$150,000; however, upon learning of the PayPal account that had generated more than \$200,000, the court raised Zimmerman's bail to \$1 million). Zimmerman's wife would later plead guilty to perjury for her statements during the initial bail hearing. See Seni Tienabeso, *George Zimmerman's Wife Admits to Perjury, Apologizes to Judge*, ABC NEWS (Aug. 28, 2013), <http://abcnews.go.com/US/george-zimmermans-wife-takes-perjury-plea-deal/story?id=20093385> (reporting the plea deal Shellie Zimmerman negotiated on the perjury charge).

¹⁶⁰ *Trayvon Martin Shooting Fast Facts*, *supra* note 140 (noting Zimmerman's counsel waived this right on his behalf, despite prior assertions that he would seek immunity under the *Stand Your Ground* law).

action; it denied, *inter alia*, defense motions for a continuance and to sequester the jury pool, and granted the state's motion to exclude evidence of Martin's prior altercations and marijuana use.¹⁶¹ Five hundred people were summoned for jury selections and a six-person, all female jury was empaneled.¹⁶²

With the trial underway, prosecutors took exception to defense counsel's proactive engagement of the press and social media strategies.¹⁶³ On two occasions, the prosecution moved to institute a gag order, citing "inordinate" media coverage and criticizing Zimmerman's attorneys in its second motion: "Unless defense counsel stops talking to the media about the case, in person or by use of the defendant's website, it will be more difficult to find jurors who have not been influenced by media accounts of the case."¹⁶⁴ However, a coalition of more than a dozen media organizations, including *The New York Times* and *The Wall Street Journal*, joined together to oppose the motion, which would have prevented attorneys from publicly commenting on the case.¹⁶⁵ Following a hearing, the trial court refused to issue any prior restraint on Zimmerman's attorneys, ruling the state failed to show their actions, or the media coverage, had any unfair prejudicial effect; further, the court denied the prosecution's motion to seal Facebook and Twitter accounts of Trayvon Martin and the teenage girl he was speaking with just before he was killed.¹⁶⁶

Although press access remained largely unimpeded, the trial court sequestered the jury.¹⁶⁷ Jurors were restricted in accessing media and receiving visitors, and all their activities were logged, but they enjoyed somewhat less-than-modest accommodations and the state

¹⁶¹ *Trayvon Martin Shooting Fast Facts*, *supra* note 140.

¹⁶² Greg Botelho & Holly Yan, *George Zimmerman Found Not Guilty of Murder in Trayvon Martin's Death*, CNN (July 14, 2013, 11:50 AM), <http://www.cnn.com/2013/07/13/justice/Zimmerman-trial/>.

¹⁶³ Barbara Liston, *Prosecutors Seek Gag Order in Trayvon Martin Murder Case*, REUTERS (Oct. 19, 2012, 5:45 PM), <http://www.reuters.com/article/2012/10/19/us-usa-florida-shooting-trial-idUSBRE89I0ZH20121019>.

¹⁶⁴ *Id.*

¹⁶⁵ Lilly Chapa, *Media Organizations Challenge Gag Order in Zimmerman Case*, REP. COMMITTEE FOR FREEDOM OF THE PRESS (Oct. 24, 2012), <https://www.rcfp.org/browse-media-law-resources/news/media-organizations-challenge-gag-order-zimmerman-case>.

¹⁶⁶ Liston, *supra* note 163.

¹⁶⁷ Amy Pavuk, *George Zimmerman Trial: Jury Will Be Sequestered, Judge Rules*, ORLANDO SENTINEL (June 13, 2013), http://articles.orlandosentinel.com/2013-06-13/news/os-george-zimmerman-trial-jury-sequestered-20130613_1_jurors-george-zimmerman-zimmerman-second-degree-murder-case.

even footed the bill for recreational activities.¹⁶⁸ The State of Florida ultimately spent \$33,000 in sequestration costs and, all tolled, the trial cost the Seminole County Sheriff's Office \$320,000, including overtime and equipment.¹⁶⁹

After hearing nearly three weeks of testimony, the jury found George Zimmerman not guilty of second-degree murder; the jury also acquitted him of the lesser offense of manslaughter.¹⁷⁰ The verdict did little to quell shouts on social media from both sides of the political aisle and many celebrities weighed in with their opinions, from Miley Cyrus¹⁷¹ and Nicki Minaj,¹⁷² to Russell Simmons,¹⁷³ and the man who would then be the next President of the United States, Donald J. Trump, though few would have imagined so at that time.¹⁷⁴ Even the jurors went public, via traditional media—some to discuss the reasons behind the decision, and others to express lingering doubts, which further exacerbated public insecurity with the case's final disposition.¹⁷⁵ For example, one juror said that, although she “fought to the end” to convict Zimmerman, the evidence did not support a conviction under Florida law.¹⁷⁶ Yet, despite having the benefit of their

¹⁶⁸ Mike Schneider, *\$33,000 Spent on Sequestered Jurors*, MY DAYTON DAILY NEWS (July 17, 2013, 6:25 PM), <http://www.mydaytondailynews.com/news/national/000-spent-sequestered-jurors/xQ6aYwbzW8gbfngtdPt1RJ/> (“During their three weeks of sequestration, jurors took an excursion to St. Augustine, Fla.; watched the movies ‘The Lone Ranger’ and ‘World War Z;’ went on bowling excursions; and saw Fourth of July fireworks. . . . Jurors ate most of their breakfast and dinner meals at the Marriott hotel where they stayed during sequestration. They dined out twice.”).

¹⁶⁹ *Id.*

¹⁷⁰ Erin Donaghue, *George Zimmerman Verdict: Former Neighborhood Watch Leader Not Guilty in Death in Fla. Teen Trayvon Martin*, CBS NEWS (July 14, 2013, 3:21 AM), <http://www.cbsnews.com/news/george-zimmerman-verdict-former-neighborhood-watch-leader-not-guilty-in-death-of-fla-teen-trayvon-martin>.

¹⁷¹ Miley Ray Cyrus (@MileyCyrus), TWITTER (July 13, 2013, 8:10 PM), <https://twitter.com/mileycyrus/status/356249393848004608>.

¹⁷² Nicki Minaj (@NICKIMINAJ), TWITTER (July 13, 2013, 7:25 PM), <https://twitter.com/nickiminaj/status/356238054933020673?lang=en>.

¹⁷³ Russell Simmons (@UncleRUSH), TWITTER (July 13, 2013, 7:05 PM), <https://twitter.com/UncleRUSH/status/356232990344482816>.

¹⁷⁴ Andrea Mandell, *Celebs React to George Zimmerman Verdict*, USA TODAY (July 14, 2013, 2:05 PM), <http://www.usatoday.com/story/life/people/2013/07/13/celebs-react-to-george-zimmerman-verdict/2515113> (listing tweets by celebrities responding to the Zimmerman verdict; including, Judy Blume, Richard Dreyfuss, Mia Farrow, Whoopi Goldberg, and Alec Baldwin).

¹⁷⁵ Alyssa Newcomb, *George Zimmerman Juror Says ‘In Our Hearts, We Felt He Was Guilty,’* ABC NEWS (July 25, 2013), <http://abcnews.go.com/US/george-zimmerman-juror-murder/story?id=19770659>.

¹⁷⁶ *Id.*

subsequent remarks, it is impossible to truly know what shaped the jurors' respective thought processes during deliberations. However, commentators speculate that social media and dogged press coverage played a pivotal role.¹⁷⁷

III. PRETRIAL STRATEGIC CONSIDERATIONS

A. Attorney Statements to News Media

The United States Supreme Court has affirmed the conditional validity of gag orders imposed on trial participants, such as those requested in the Trayvon Martin case, as a way to balance Sixth Amendment guarantees to a fair trial against First Amendment speech rights.¹⁷⁸ Still, as a prior restraint, gag orders are subject to strict scrutiny and courts are generally limited in their ability to stifle speech, particularly as to the speech of non-participants.¹⁷⁹ Therefore, more often than not, attorneys are at liberty to engage the press in America, subject to the limits of confidentiality and the attorney-client privilege.¹⁸⁰ The issue, then, is whether engaging the media is a good idea, and whether the publicity would help or hurt the client. For George Zimmerman's defense counsel, a proactive strategy proved successful. However, that case may be the exception, and not the rule.

In the past, judicial consideration of pretrial publicity extended little beyond the question of whether a juror read or heard about the case when the crime was first reported by newspapers or on television, which may have occurred as much as one to two years before the trial.¹⁸¹ Today, however, in this hyper-digital age, every juror has the technological capability to access virtually all news media coverage of a particular case in an instant, with a single Google search, in the privacy of the juror's own home. Moreover, with the advent of social media, jurors have the additional ability to participate in discussions of

¹⁷⁷ Dylan Matthews, *How the Media Might Have Helped George Zimmerman Go Free*, WASH. POST (July 15, 2013), <https://www.washingtonpost.com/news/wonk/wp/2013/07/15/how-the-media-might-have-helped-george-zimmerman-go-free>.

¹⁷⁸ *Stuart*, 427 U.S. at 548-49.

¹⁷⁹ *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971).

¹⁸⁰ See MODEL RULES OF PROF'L CONDUCT r. 1.6(a) (AM. BAR ASS'N 2016) ("A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent.").

¹⁸¹ *Sheppard*, 384 U.S. at 352-53.

the case, via blogs, posts, and comments. As a result, counsel must be cognizant of the role of social media, both before and during a highly publicized trial, and must address all related concerns with the trial judge. In turn, the court must fashion remedies to address those concerns with prospective jurors, including the issuance of strict pretrial instructions during the jury selection process.

Generally speaking, the judiciary recognizes that it is now more difficult than ever to empanel an impartial jury because access to modern technology renders every prospective juror a potential private investigator, to the degree that an individual is willing to ignore court instructions.¹⁸² Previously, a court needed only to advise jurors that they “are not to read, listen to or watch” any media coverage about the case; today, counsel must ensure that the court issues stern instructions, both during the selection process and during the trial itself, admonishing jurors that they are not permitted to use the internet or other social media platforms to seek information about the case, or any of its participants, as such actions may prejudice them against one side or the other. Specifically, defense counsel should ask the court to advise the jury against: (1) using social media to contact anyone involved in the trial, including other jurors, during the trial; and (2) engaging in any independent research about the case, the defendant, or even the lawyers on trial.

Ultimately, the justice system must rely on the integrity of the jurors. However, that reliance must be founded upon the assurance that courts will provide firm guidance to jurors, persuading them that it is in society’s best interest to avoid seeking extrinsic information, even when that research is done from the privacy and security of the jurors’ respective homes. The concern for imbuing a sense of civic duty is so imperative that at least one federal trial judge, sitting in the Southern District of New York, requires jurors to sign a personal “pledge” that they will not use any form of social media during the trial that impacts or touches upon any aspect of the case or any of the litigants involved in the proceeding in any way.¹⁸³ While many other trial judges have not taken this step, it is nevertheless emblematic of the extensive measures courts may increasingly have to take, to

¹⁸² Amy J. St. Eve & Michael A. Zuckerman, *Ensuring an Impartial Jury in the Age of Social Media*, 11 DUKE L. & TECH. REV. 1, 2-14 (2012).

¹⁸³ *Ligon v. City of New York*, 736 F.3d 118, 164-65 (2013) (speaking about Hon. Shira A. Scheindlin).

prevent media bias from interfering with the sanctity of the trial process.

B. Efficacy of Procedural Strategies

Early in 2015, lawyers for Eddie Ray Routh announced that they were appealing his conviction for murdering Chris Kyle, the Navy SEAL marksman whose autobiography inspired the movie “American Sniper,” on the ground that pretrial publicity prevented Routh from getting a fair trial.¹⁸⁴ (See Figure 10¹⁸⁵). Claiming that more than half of the twelve jurors had seen the motion picture, which was released three weeks prior to jury selection, one of Routh’s lawyers argued that the verdict was squarely the result of improper influence: “It’s because of the publicity, and the movie came out right then, and the governor right before we started the trial had a ‘Chris Kyle Day.’”¹⁸⁶

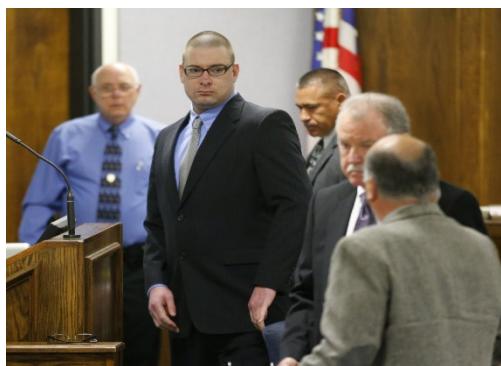


Figure 10

Routh’s defense team had tried several strategies to offset the impact of pretrial publicity, including a motion for a change of venue and a request to postpone the trial.¹⁸⁷ However, Texas’s Erath County District Court denied these attempts and proceeded to trial.¹⁸⁸ Jury deliberations took about two hours before the unanimous guilty

¹⁸⁴ Manny Fernandez, ‘Sniper’ Case is Headed to Appeal, Lawyers Say, N.Y. TIMES (Feb. 26, 2015), http://www.nytimes.com/2015/02/27/us/ex-marine-convicted-in-american-sniper-trial-plans-to-appeal.html?_r=0.

¹⁸⁵ Photograph of Eddie Ray Routh, TIME, <https://timedotcom.files.wordpress.com/2015/02/eddie-ray-routh1.jpg?quality=85&w=1012> (last visited Mar. 20, 2017).

¹⁸⁶ *Id.*

¹⁸⁷ James Nye, Chris Kyle’s Widow Breaks Down on the Stand Describing the Last Time She Saw Him – as Trial Hears How ‘Insane’ PTSD Marine Killed American Sniper with Five Shots to the Back and One to the Head, DAILY MAIL (Feb. 11, 2015, 10:44 AM), <http://www.dailymail.co.uk/news/article-2949393/Chris-Kyle-s-widow-prepares-stand-trial-American-Sniper-killer-begins.html>.

¹⁸⁸ *Id.*

verdict.¹⁸⁹ The employment of procedural strategies, such as those used by defense counsel in the American Sniper case, have had mixed results over the course of American jurisprudential history. To gauge the efficacy of currently available ameliorative measures, it behooves the competent litigator to consider each procedural tool individually.

C. Motions for a Change of Venue

When four white LAPD officers were tried for the roadside beating of an unarmed black motorist—Rodney King—in 1991, a California appellate court vacated the trial court's denial of a change of venue motion.¹⁹⁰ Because local passions were enflamed by incendiary video footage of King's savage beating at the hands of police—footage that had been picked up by national media—the appellate court ruled a transfer was necessary for the officers to obtain a fair trial.¹⁹¹ Accordingly, the docket was transferred from the ethnically diverse and urban Los Angeles, to a comparatively homogenous suburb in Ventura County, where the officers were ultimately cleared of all charges.¹⁹² Commentators have since speculated the venue change essentially brought about the officers' acquittal, as well as the 45 deaths and \$550 million in property damage that occurred during riots spurred in reaction to the verdict.¹⁹³ Consequently, it was argued the L.A. riots underscored the need to better administer change of venue motions in America, as a general matter, going forward.¹⁹⁴

In contrast, before his 2015 conviction and death sentence, counsel for the Boston Marathon bomber—Dzokhar Tsarnaev—argued for a postponement and made several motions to change

¹⁸⁹ Ed Payne, Dana Ford & Jason Morris, *Jury Finds Eddie Ray Routh Guilty in 'American Sniper' Case*, CNN (Feb. 25, 2015, 12:30 PM), <http://www.cnn.com/2015/02/24/us/american-sniper-chris-kyle-trial>.

¹⁹⁰ *Powell v. Superior Court*, 283 Cal. Rptr. 777, 788 (Cal. Ct. App. 1991).

¹⁹¹ *Id.*

¹⁹² See Seth Mydans, *Los Angeles Policemen Acquitted in Taped Beating*, N.Y. TIMES (Apr. 29, 1992), <http://www.nytimes.com/learning/general/onthisday/big/0429.html> (discussing the acquittal of three of the four officers, and the subsequent dismissal of charges against the fourth officer); *but see* *United States v. Koon*, 833 F. Supp. 769, 774 (C.D. Cal. 1993) *aff'd in part, vacated in part*, 34 F.3d 1416 (9th Cir. 1994) *aff'd in part, rev'd in part*, 518 U.S. 81 (1996) (sentencing two officers after being convicted on federal charges).

¹⁹³ See, e.g., Vineet R. Shahani, *Change the Motion, Not the Venue: A Critical Look at the Change of Venue Motion*, 42 AM. CRIM. L. REV. 93, 94 (2005).

¹⁹⁴ *Id.*

venue.¹⁹⁵ While a Massachusetts federal district court agreed to a two-month postponement, it refused to transfer the case to Washington D.C. because the story had already been covered by national media and the court opined that potential jurors would have been influenced regardless of where the case was tried.¹⁹⁶ As demonstrated by this refusal, trial courts have arguably become more circumspect in their willingness to grant a change in venue since the days of Rodney King. However, the United States Supreme Court has firmly established that it is constitutionally impermissible for a trial court to make a change of venue entirely unavailable to a criminal defendant; rather, the defendant must be allowed an opportunity to show that a transfer is warranted under the circumstances of that particular case.¹⁹⁷

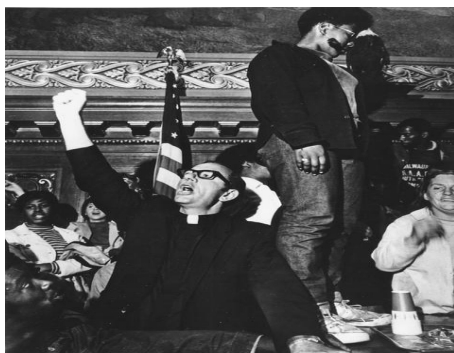


Figure 11

In *Groppi*, a Roman Catholic priest was charged with resisting arrest—a misdemeanor offense—following a civil disturbance in Milwaukee, Wisconsin.¹⁹⁸ (See Figure 11¹⁹⁹). In a pretrial motion, Father James Groppi requested a change of venue on the ground of community prejudice; however, the motion was denied pursuant

to a Wisconsin statute that permitted venue transfers only in felony matters.²⁰⁰ Consequently, Father Groppi was convicted in the jurisdiction for the offense, and the Supreme Court of Wisconsin affirmed, concluding the statutory prohibition against misdemeanor criminal case venue transfers for prejudice was constitutionally permissible.²⁰¹ On review, the United States Supreme Court vacated the Wisconsin high court's decision, ruling Father Groppi should have

¹⁹⁵ Katharine Q. Seelye, *Change of Venue Denied for Boston Marathon Bombing Suspect*, N.Y. TIMES (Jan. 3, 2015), <http://www.nytimes.com/2015/01/04/us/change-of-venue-denied-for-boston-marathon-bombing-suspect.html>.

¹⁹⁶ *Id.*

¹⁹⁷ *Groppi v. Wisconsin*, 400 U.S. 505, 510-11 (1971).

¹⁹⁸ *Id.* at 505-06.

¹⁹⁹ *Photograph of Father James Groppi*, WIS. HIST. SOC'Y, <http://www.wisconsinhistory.org/Content.aspx?dsNav=N:4294963828-4294955414&dsRecordDetails=R:IM4934> (last visited Mar. 21, 2017).

²⁰⁰ *Groppi*, 400 U.S. at 506.

²⁰¹ *State v. Groppi*, 164 N.W.2d 266, 272 (Wis. 1969), *vacated*, 400 U.S. 505 (1971).

been afforded an opportunity to establish that the community was irrevocably biased against him.²⁰² In so ruling, the Court quoted its prior decision in *Irvin*, concluding that the same issue regarding the precise nature of trial by jury demanded by the Fourteenth Amendment was presented in *Groppi*.²⁰³ Citing the Sam Sheppard case, the Court enumerated available procedures for mitigating the effects of prejudicial publicity—namely, postponement and individual juror challenges during the jury selection process.²⁰⁴ However, the Court reasoned, as displayed by *Irvin*, such protections are not always adequate in effectuating constitutional guarantees.²⁰⁵ Therefore, even though public animus is more typically aroused in felony cases, a criminal defendant may not be precluded from arguing that a particular community's bias prevents that defendant from securing an impartial trial, even in misdemeanor cases.²⁰⁶

Although the United States Supreme Court vacated Father Groppi's conviction, the Court has nevertheless set a high bar for challenging a trial court's denial of a change in venue motion based on prejudicial pretrial publicity.²⁰⁷ Ordinarily, the defendant must demonstrate on the record that the publicity at issue caused one or more of the seated jurors to form a fixed opinion that was prejudicial to the defense²⁰⁸—a demanding task, given it requires proof of the subjective mental processes of jurors.²⁰⁹ The defendant's burden may be relieved, however, where pretrial publicity has been so inflammatory or inculpatory in nature, and so prevalent in the community, that a reviewing court may presume prejudice, despite the empaneling of jurors who averred they could perform fact-finding duties fairly and impartially.²¹⁰ This pronouncement stemmed from a case in which a jailhouse interrogation of a defendant—Wilbert Rideau, who was accused of bank robbery and kidnapping—had been aired multiple

²⁰² *Groppi*, 400 U.S. at 512.

²⁰³ *Id.* at 508-09 (quoting *Irvin*, 366 U.S. at 722) (noting that failure to accord a fair hearing to a criminal defendant violates even minimal due process requirements).

²⁰⁴ *Id.* at 509-10 (citing *Sheppard*, 384 U.S. at 357-63).

²⁰⁵ *Id.* at 510.

²⁰⁶ *Id.* at 511.

²⁰⁷ *Murphy v. Florida*, 421 U.S. 794, 799 (1975).

²⁰⁸ *Id.* at 799-800 (quoting *Irvin*, 366 U.S. at 728) (noting “jurors need not, however, be totally ignorant of the facts and issues” to qualify for service).

²⁰⁹ *Id.* at 800 (quoting *Irvin*, 366 U.S. at 723).

²¹⁰ *Rideau v. Louisiana*, 373 U.S. 723, 727 (1963).

times by a local television station.²¹¹ During the interrogation, which had been published to large portions of the community as an *interview*, Rideau admitted to committing the crimes at issue and detailed his actions.²¹² The Supreme Court vacated Rideau's conviction, explaining that:

For anyone who has ever watched television[,] the conclusion cannot be avoided that this spectacle, to the tens of thousands of people who saw and heard it, in a very real sense was Rideau's trial—at which he pleaded guilty to murder. Any subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality.²¹³

Later, when deciding *Gropi*, the Supreme Court revisited this holding, noting “[Rideau's] message echoes more than 200 years of human experience in the endless quest for the fair administration of criminal justice.”²¹⁴ Accordingly, contemporary American trial courts are obliged to consider the merits of a motion for a change in venue based on community bias before issuing a ruling.²¹⁵ Yet, before a motion for change of venue can be granted—as stated in the language of the Federal Rules of Criminal Procedure—the trial court must be “satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there.”²¹⁶

A motion for change of venue is uniquely available to the defendant; it does not extend to the state, as a criminal defendant has a constitutional right to be tried in the district where the offense was committed.²¹⁷ Of course, in making the motion, the defendant necessarily waives this right.²¹⁸ Defense counsel should make a timely motion to transfer a case before trial, reiterate the request at the

²¹¹ *Id.* at 724.

²¹² *Id.* at 726.

²¹³ *Id.*

²¹⁴ *Gropi*, 400 U.S. at 511 n.12 (quoting *Rex v. Harris* (1762) 97 Eng. Rep. 858, 859 (K.B.)) (“Notwithstanding the locality of some sorts of actions, or of informations for misdemeanors, if the matter can not be tried at all, or can not be fairly and impartially tried in the proper county, it shall be tried in the next adjoining county.”).

²¹⁵ *Id.* at 510.

²¹⁶ FED R. CRIM. P. 21.

²¹⁷ U.S. CONST. art. III, § 2, cl. 3; U.S. CONST. amend. VI; FED R. CRIM. P. 21 advisory committee's note 3 on 1944 rule 21.

²¹⁸ FED R. CRIM. P. 21 advisory committee's note 3 on 1944 rule 21.

commencement of trial, and again note it for the record immediately after the jury has been empaneled.²¹⁹ Application for a change of venue must generally be supported by affidavits—preferably authored by the defendant and third parties, as opposed to defense counsel—referring to specific instances of prejudicial media publicity and alleging that the referred-to publications render it impossible for the defendant to receive an impartial trial in the community.²²⁰

For instant purposes, *high profile* criminal cases can be bifurcated into two general categories. The first category involves cases in which the defendant is a true celebrity, *e.g.*, an actor, professional athlete, or public official.²²¹ These cases will attract media attention regardless of the nature of the charges or the location of the trial.²²² The second category involves a defendant who is not known to the general public, but the crime in question is so heinous, or the surrounding circumstances so bizarre, that the defendant becomes the focus of substantial media attention.²²³ With respect to this category, the notoriety of the crime creates intense and lingering media attention. Jury selection considerations vary for each of the two categories, as do concerns about venue.²²⁴

In cases involving true *celebrities*, arguments for a change in venue are generally not likely to succeed.²²⁵ Media attention can be expected to be pervasive when a celebrity is tried in a criminal case, regardless of venue. Thus, factors such as location and the ability to select impartial jurors do not vary significantly based on geography. However, venue is an important issue to consider when a non-celebrity is accused of committing a heinous crime.²²⁶ In such a case, where the horrific nature of the crime has captivated and implacably prejudiced the local community, it behooves defense counsel to argue that a fair trial cannot be attained in the same venue. After all, jurors tend to feel more sympathy for individuals, including crime victims, to whom they can relate. As a result, when jurors are members of the same

²¹⁹ Peter G. Guthrie, Annotation, *Pretrial Publicity in Criminal Case as Ground for Change of Venue*, 33 A.L.R.3d 17 § 2(c) (1970); *see also* State v. Morris, 245 La.175 (1963).

²²⁰ Guthrie, *supra* note 219, at § 2(c).

²²¹ Paul R. Wallace, *Prosecuting in the Limelight*, 22 WTR DEL. LAW. 20 (2004-05).

²²² *Id.*

²²³ *Id.*

²²⁴ James N. Morris, Note, *The Anonymous Accused: Protecting Defendants' Rights in High Profile Criminal Cases*, 44 B.C. L. REV. 901, 913-14 (2003).

²²⁵ *Id.* at 903.

²²⁶ *Id.* at 913-14.

community as the victim, trying a defendant in the venue where a heinous crime occurred makes it exceedingly difficult to secure a trial on the merits.²²⁷

As an extreme hypothetical case, consider the gruesome events that took place during the school massacre in Newtown, Connecticut.²²⁸ Had the gunman survived and been brought to trial, it seems patently unlikely that a juror living in or near Newtown would have been able to keep an open mind. In light of the high probability that potential jurors would have either been personally affected by the tragedy, or known another person who had been affected, conducting a criminal trial in such a venue would have been inappropriate. Similarly, a fair prosecution of the terrorists responsible for the September 11, 2001 attacks on the World Trade Center would likely have been impossible in Manhattan, as virtually every person in the area was personally impacted on that terrible day, through their own experiences or those of their friends or relatives. Thus, despite that fact that New York City may have been the most appropriate jurisdiction, and may have contained the most experienced law enforcement personnel available to facilitate those hypothetical prosecutions, constitutional considerations would nevertheless have militated in favor of a venue transfer. As a matter of further complexity, in the case of the 9/11 tragedies, given the national impact of the events, an unbiased jury would have been difficult to empanel in any venue.

D. Requests for a Postponement or Continuance

When a trial court denies a venue transfer, defense counsel should consider motioning for a continuance. In fact, in some jurisdictions, motioning for a postponement is a prerequisite to the defendant's right of appeal on the basis of prejudicial publicity.²²⁹ Although the terms are often used interchangeably, technically speaking, "continuance" and "postponement" have distinct

²²⁷ *Media Organizations Were Not Entitled to Immediate Disclosure of Jurors Names in High-Profile Criminal Prosecution*, 24 No. 21 CRIM PRAC. REP. 1 (Nov. 1, 2010).

²²⁸ See Susan Candiotti & Sarah Aarthun, *Police: 20 Children Among 26 Victims of Connecticut School Shooting*, CNN (Dec. 15, 2012, 12:19 AM), <http://www.cnn.com/2012/12/14/us/connecticut-school-shooting>.

²²⁹ Guthrie, *supra* note 219, at § 2(c).

meanings.²³⁰ Whereas a continuance is an adjournment to some unspecified later date, a postponement is generally limited to delays within the current term of the court.²³¹ Contrastingly, “stay” is an adjournment of all proceedings until the happening of a specified event, regardless of court term.²³²

A motion for continuance on the basis of publicity operates under the theory that, if a trial is adjourned for a sufficient length of time, public fervor will abate and the defendant will have a better chance of obtaining a trial before an unbiased jury.²³³ While there are undoubtedly situations in which pretrial publicity has aroused such antipathy to the defendant that a continuance would do little to ameliorate bias, continuance motions are a useful technique when hostility can be expected to abate within a reasonable timeframe, or when an exacerbating event occurs on the eve of trial.²³⁴

As noted *supra*, in *Sheppard*, the United States Supreme Court listed postponement as a remedy for bias caused by pretrial publicity.²³⁵ Specifically, the Court questioned the trial court’s decision to deny a continuance motion and empanel jurors—all but one of whom stated they had read about the case in newspapers—two weeks before a hotly-contested election in which the chief prosecutor and presiding judge were campaigning for judgeships.²³⁶ While it held short of ruling the trial court’s actions reversible error, the *Sheppard* Court asserted that a short continuance would have at least alleviated the problem regarding judicial elections, and indicated, “if assurance of a fair trial would necessitate that the trial of the case be postponed until after the election, then we think the law required no less than that.”²³⁷ However, the Supreme Court also noted, in another case, that there is no mechanical test for determining when the denial of a continuance is so arbitrary as to constitute a due process violation.²³⁸

The power to grant a continuance rests within the sound discretion of the trial court and, unfortunately, judges seldom grant

²³⁰ 17 AM. JUR. 2D *Continuance* § 1 (2017).

²³¹ *Id.*

²³² *Id.*

²³³ W.E. Shipley, Annotation, *Hostile Sentiment or Prejudice as Grounds for Continuance of Criminal Trial*, 39 A.L.R.2d 1314 § 2 (1955).

²³⁴ WAYNE R. LAFAYE ET AL., CRIMINAL PROCEDURE § 23.2(d) (4th ed. 2016).

²³⁵ *Sheppard*, 384 U.S. at 354 n.9.

²³⁶ *Id.* at 361-62.

²³⁷ *Id.* at 354.

²³⁸ *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964).

continuances because of extensive publicity.²³⁹ Instead, trial judges tend to adopt a wait-and-see approach—the same approach adopted by the court in Sam Sheppard’s first trial—reserving their ruling as to postponement until after some effort has been made to select a jury.²⁴⁰

As a strategic consideration, requesting a lengthy continuance should be seen as a last resort; it rarely works to alleviate prejudicial publicity and comes with potentially serious consequences.²⁴¹ In rare instances, temporarily inflamed passions will be so intense that the only recourse is for defense counsel to seek a continuance and a significant delay of trial. However, practically speaking, criminal cases do not quickly proceed to trial in any event.²⁴² Significant portions of time may be spent on forensic testing, discovery, and pretrial motion hearings, to name just a few tasks to be completed before the trial commences. Accordingly, the intense and, potentially, highly prejudicial publicity triggered by a particularly heinous crime often subsides, at least to some degree, with the passage of time. Furthermore, defense counsel must also factor other issues, such as bail and custody, into the equation. For example, a client who is in the government’s custody may prefer not to request a continuance, especially if there is a viable defense to the charges, as the delay would equate to an additional period of incarceration.

Even when emotions are still running hot as the trial begins, tensions often cool after the initial public outrage has been vented. This phenomenon is aptly reflected by the frequency of public demonstrations that tend to follow events such as the commission of a racially charged murder or the rendering of a controversial verdict. Ranging from civil protests to rioting and looting, these forms of public outcry are often initially deafening, but usually ebb to substantially more tempered tones with the passage of time.²⁴³ That trend has arguably increased with the advent of the “24-hour news cycle,” in which breaking news is transmitted to the public almost instantaneously upon discovery. As a result, our collective attention span wanes to such a degree that trending stories become old news

²³⁹ LAFAVE ET AL., *supra* note 234, at § 23.2(d).

²⁴⁰ LAFAVE ET AL., *supra* note 234, at § 23.2(d).

²⁴¹ Mary Lee Luskin & Robert C. Luskin, *Why so Fast, Why so Slow: Explaining Case Processing Time*, 77 J. CRIM. L. & CRIMINOLOGY 190, 208 (1986).

²⁴² *Id.*

²⁴³ See, e.g., Holly Yan, ‘Black Lives Matter’ Cases: What happened After the Protests?, CNN, (Jul. 27, 2016, 10:31 AM), <http://www.cnn.com/2016/07/13/us/black-lives-matter-updates>.

much more rapidly than ever before in American history. Therefore, lengthy continuances are rarely understood to be a realistic remedy, and defense litigators must often establish their clients' need for a continuance during jury selections, by way of *voir dire*.

IV. STRATEGIC CONSIDERATIONS FOR EMPANELING AN IMPARTIAL JURY

The year 2015 marked a new record for juror summonses, as a 9,000-member jury pool was summoned for the trial of James Eagan Holmes, who stood accused of murdering 12 and injuring seventy more in 2012 at a movie theater in Aurora, Colorado.²⁴⁴ By comparison, 3,000 potential jurors were summoned for Boston Marathon bomber Dzhokar Tsarnaev's trial, and only 1,000 potential jurors were tapped for O.J. Simpson's murder trial in 1994.²⁴⁵ To narrow down the pool, groups of 250 potential jurors at a time were required to appear and answer seventy written questions.²⁴⁶ Based partly on those questionnaires, the remaining candidates were further screened by individual *voir dire* until a group of only 120 to 150 remained.²⁴⁷ From that number, the final jury of 12, with 12 alternates, was impaneled.²⁴⁸ Among the criteria for selection, jurors had to be "death qualified," meaning they would be willing to impose the death penalty, if warranted.²⁴⁹ Perhaps part of the reason for ordering such a large pool was the trial court's refusal to grant the defense's motion for a change of venue.²⁵⁰ Regardless, attorneys on both sides were forced to roll up their sleeves and take on the difficult task of whittling down the unprecedented number of prospective jurors, which they did.

Although it is arguably impossible to find jurors who will not have been exposed to at least some media coverage prior to a highly publicized criminal trial, it is possible to find jurors who, despite what they may have heard or read about the case, can render a verdict, as

²⁴⁴ Faith Mangan, Alicia Acuna & Kelly David Burke, *Largest Jury Pool in US History Gathered as Colo. Movie Gunman James Holmes' Trial Begins*, FOX NEWS (Jan. 20, 2015), <http://www.foxnews.com/us/2015/01/20/jury-selection-to-begin-in-colorado-theater-shooting-trial>.

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ Mangan, Acuna & Burke, *supra* note 244.

²⁵⁰ Mangan, Acuna & Burke, *supra* note 244.

instructed by the courts, based solely on the evidence presented at trial. Indeed, in the trials of Sean “P. Diddy” Combs,²⁵¹ in New York, and O.J. Simpson²⁵² and Michael Jackson,²⁵³ respectively, in California, the defendants were all “A-list” celebrities whose cases were the subject of massive and highly prejudicial pretrial media coverage. Yet, in all three cases, the defendants were acquitted, illustrating the possibility of impaneling a jury that makes its decisions on the basis of the evidence, rather than relying on any preconceived impressions of the case. While these examples are in many ways highly distinguishable, each involving a discrete and fact-specific acquittal, collectively, they stand for the proposition that, despite even extraordinarily prejudicial pretrial publicity, careful selection and *voir dire* techniques may be employed to produce a panel that will base its verdict on what happens inside the courtroom, and not outside of it. Notably, the issue of venue was not particularly relevant in these cases, as the defendant-celebrities would have received as much, or arguably greater, media interest had the trials been transferred elsewhere.

A. Jury Selection Strategies Prior to Venire

Under federal law, jury selections are conducted pursuant to the Jury Selection and Service Act of 1968.²⁵⁴ The Act stands for the proposition that jurors should be selected from a random cross-section of the community, as determined by voter registration rolls.²⁵⁵ It also codifies requisite juror qualifications, excuses, exemptions, and objective exclusions.²⁵⁶ State laws regarding jury selection largely mirror federal statutes, and, together, they serve as a reflection of our core constitutional values as to the character of the “ideal” juror.²⁵⁷

Beyond merely seeking adherence to the statutory requirements, defense counselors have developed jury selection

²⁵¹ Katherine E. Finkelstein, *Hip-Hop Star Cleared of Charges in Shooting at a Manhattan Club*, N.Y. TIMES (Mar. 17, 2001), <http://www.nytimes.com/2001/03/17/nyregion/hip-hop-star-cleared-of-charges-in-shooting-at-a-manhattan-club.html>.

²⁵² *Full Coverage: The O.J. Simpson Case*, L.A. TIMES (Mar. 4, 2016), <http://www.latimes.com/local/la-oj-simpson-stories-storygallery.html>.

²⁵³ Bryan Robinson, *Michael Jackson Acquitted of Child Molestation Charges*, ABC NEWS (Jun. 13, 2005), <http://abcnews.go.com/Entertainment/LegalCenter/story?id=816439>.

²⁵⁴ 28 U.S.C. §§ 1861-1878 (1992).

²⁵⁵ 28 U.S.C. § 1863 (1992).

²⁵⁶ 47 AM. JUR. 2D *Jury* § 104 (2016).

²⁵⁷ *Id.*

strategies, using the science of human behavior to further refine their search for a favorable jury.²⁵⁸ Today, trial research consists of a plethora of techniques, including: pretrial investigations, focus groups, mock juries, and online surveys of past verdicts in the trial venue.²⁵⁹ Among these methods, the proliferation of focus groups is particularly noteworthy. Conventional focus groups often involve the use of electronic voting devices, which allow participants to instantaneously record their reactions to discrete arguments made by litigators—rating their degree of approval on a scale from one to ten.²⁶⁰ Electronic voting also allows defense attorneys to assess potential juror evaluations of witness sincerity, credibility, and likability.²⁶¹ In this way, litigators cannot only gage their presentations of evidence as a general matter, but can also develop data regarding the potential reactions of a given type of juror,²⁶² e.g., a married black female over fifty making in excess of \$100,000 annually, or a single white male under thirty making under \$50,000 per year. While such data does not create dispositive indicia of how a trial jury will ultimately react, it is arguably better than commencing the juror selection process with no data at all, or by relying on societal stereotypes to determine how a jury will react to evidence and arguments. Thus, focus groups may be considered a viable pretrial strategy for the litigator preparing to try a highly publicized case.

Often referred to as one of the most critical junctures in a criminal case, jury selection has been categorized as both an art and a science, depending on the commentator. As a result, so-called “experts” in the field have developed lucrative practices throughout the United States, marketing their jury selection skills.²⁶³ Most of these experts are selling psychological evaluations, not the advice or experience of a veteran trial lawyer.

²⁵⁸ See Matthew Hutson, *Unnatural Selection*, PSYCHOL. TODAY (Mar. 1, 2007), <https://www.psychologytoday.com/articles/200703/unnatural-selection>.

²⁵⁹ Robert Gordon, *Trial Research in the Age of Technology*, 36 TRIAL 64, 64 (2000).

²⁶⁰ *Id.* at 65.

²⁶¹ *Id.* at 65.

²⁶² Hutson, *supra* note 258.

²⁶³ Hutson, *supra* note 258.

B. Focus Groups

Much has been written about the use of focus groups and mock trials to assist trial lawyers in impaneling a jury.²⁶⁴ Some theorize that, through the use of effective profiling, counsel may more readily be enabled to select a jury that is predisposed to view a given issue from a perspective favorable to the client.²⁶⁵ Similarly, it has been argued that such techniques may facilitate the ability to isolate key issues upon which a specific case may hinge, allowing counsel to focus attention on the controlling issues in that case.²⁶⁶ Although many veteran trial lawyers dismiss this proffered assistance as akin to “junk science,” others put great effort into the process of working with paid jury consultants to develop a profile of the ideal juror for a particular case.²⁶⁷ Ultimately, the decision of whether or not to adopt such techniques rests in the sound discretion of the individual trial attorney, who must decide if such expenditures are a good investment of the finite resources at the attorney’s disposal for the case.

C. Polling

In extreme cases, where prejudicial publicity has virtually dominated airwaves and saturated the location in which the trial is to be held, jury consultants often employ methods of random polling, designed to expose strong biases within the community, which may in turn prove vital for an evidentiary showing that the trial should either be moved or delayed.²⁶⁸ Polling has also been employed to gauge the public’s perception of a case, or of a particular defendant.²⁶⁹ Thus, in the rare cases where polling is both necessary and appropriate, the technique can effectively shape trial defense and strategy.

²⁶⁴ Hutson, *supra* note 258.

²⁶⁵ Gordon, *supra* note 259, at 64.

²⁶⁶ Michael T. Pulaski & Douglas A. Green, *Jury Research Comes of Age*, 37 LA. B.J. 83, 84 (1989).

²⁶⁷ Peter Huber, *Junk Science in the Courtroom*, 26 VAL. U. L. REV. 723, 742-43 (1992); Steven C. Serio, *A Process Right Due? Examining Whether a Capital Defendant has a Due Process Right to a Jury Selection Expert*, 53 AM. U. L. REV. 1143, 1150 (2004).

²⁶⁸ Kate Early, *The Impact of Pretrial Publicity on an Indigent Capital Defendant’s Due Process Right to a Jury Consultant*, 16 ROGER WILLIAMS U. L. REV. 687, 688, 692-93 (2011).

²⁶⁹ *Using Juror Surveys in Trial Preparation*, NAT’L LEGAL RES. GROUP, INC., <http://www.nlrg.com/our-services/jury-research-division/jury-research-publications/using-juror-surveys-in-trial-preparation> (last visited Mar. 22, 2017).

While many defense attorneys tout the importance and effectiveness of professional jury consultants, the authors of this piece—including a veteran trial lawyer with significant experience in litigating high profile cases—are not convinced that jury consulting and polling are part of a greater “science” that should be factored into the strategic equation. Instead, visceral instinct and other interrelated, intangible, and inherently internal mechanisms, which are unique to each attorney, remain better guides. No consultant can replace the vital combination of instinctive ability and trial experience necessary in the quest for impaneling a jury that, despite unavoidable exposure to media coverage, will hear facts and argument with an open mind, and will instead be swayed by reason and forceful, vociferous advocacy.

D. Voir Dire Considerations

Voir dire is one of the most important safeguards to ensuring a fair and impartial jury selection.²⁷⁰ A defense attorney may cull the pool of potential jurors individually, by way of, either, a challenge for cause or via a peremptory challenge, or through request to dismiss an entire panel for bias.²⁷¹ In order to preserve the issue of prejudicial publicity on appeal, it is advisable for defense counsel to exhaust all for-cause and peremptory challenges during the jury selection process; otherwise, the defendant may be estopped from claiming the jury was not impartial absent proof of actual bias on the part of a specific juror.²⁷² However, as peremptory challenges are considered a matter of trial strategy, a criminal defendant generally may not lodge an ineffective assistance of counsel claim based solely on the attorney’s failure to exercise peremptory challenges.²⁷³ While this is beneficial to litigators from a liability perspective,²⁷⁴ the American practice of showing deference to trial strategy further emphasizes the importance

²⁷⁰ Brian J. McKeen & Phillip B. Toutant, *The Case for Attorney Conducted Voir Dire*, 90 MICH. B.J. 30, 30-31 (2011).

²⁷¹ 1 AM. JUR. 303 *Controlling Trial Publicity* § 30 (2017).

²⁷² Guthrie, *supra* note 219, at § 2(c).

²⁷³ Steven Gard, *Ineffective Assistance of Counsel—Standards and Remedies*, 41 MO. L. REV. 483, 485-86, 488-89, 491-92 (1976).

²⁷⁴ Emily M. West, *Court Findings of Ineffective Assistance of Counsel Claims in Post-Conviction Appeals Among the First 255 DNA Exoneration Cases*, INNOCENCE PROJECT 1 (2010), https://www.innocenceproject.org/wp-content/uploads/2016/05/Innocence_IAC_Report.pdf.

of using all available challenges during *voir dire* to preserve the defendant's rights through the course of a criminal trial.²⁷⁵

Although it is preferable to exhaust all available juror challenges for purposes of preserving the issue of prejudicial publicity on appeal, attorneys must remain cognizant of the United States Supreme Court's prohibition against the use of peremptory challenges for discriminatory purposes, as suspect-status discrimination in selection of the *venire* violates a defendant's right to equal protection.²⁷⁶ As articulated in *Batson v. Kentucky*,²⁷⁷ when a defendant believes peremptory challenges have been used in an improperly discriminatory manner, the defendant may establish a *prima facie* case "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose."²⁷⁸ Upon establishing a *prima facie* case of discrimination, the burden shifts onto the state to adequately justify disputed juror strikes and to demonstrate the state's use of neutral selection criteria; the state may not rely on bald assertions that it did not discriminate or that it followed protocol.²⁷⁹ The so-called "*Batson* challenge" has become an abundantly-utilized tool for preventing improper discrimination against a criminal defendant. However, there exists no analog to challenge improper discrimination caused by prejudicial publicity. Thus, defense attorneys must bring such juror animus to light by compelling illustrative discussion from prospective jurors on *voir dire*.

In identifying the paramount issues to explore during *voir dire*, commentators often list exploring prejudices as a top priority.²⁸⁰ Additionally, strategists suggest asking open-ended, ambiguous questions during *voir dire*; engaging in dialogue with prospective jurors to allow jurors to do the bulk of the talking; identifying as many for-cause juror strikes as possible; and rehabilitating only those jurors the opposition has lined up for cause-based challenges.²⁸¹ Of course,

²⁷⁵ Douglas M. Bates, Jr., *Voir Dire Examination in Criminal Jury Trials: What is the Proper Scope of Inquiry?*, 70 FLA. B.J. 64, 64 (1996).

²⁷⁶ *Swain v. Alabama*, 380 U.S. 202, 203-04 (1965).

²⁷⁷ 476 U.S. 79 (1986).

²⁷⁸ *Id.* at 93-94.

²⁷⁹ *Id.* at 94.

²⁸⁰ See, e.g., Sarah E. Hornbrook & Jill M. Leibold, *Critical for Success: Top Strategies for Voir Dire and Jury De-Selection*, 50 FOR THE DEF. 46, 46 (2008), <http://www.larsonking.com/files/Top%20Strategies%20for%20Voir%20Dire%20and%20Jury%20De-Selection.pdf>.

²⁸¹ *Id.* at 48-50.

each litigation is different, and compounded by style variations among attorneys, there is an abundance of viable *voir dire* techniques. Therefore, *voir dire* strategy is largely a matter of personal preference exercisable by the litigator, and it is important for the competent attorney to map out that strategy prior to jury selection.

In high profile cases, courts are generally sensitive to the challenges faced by defense counsel and, accordingly, will take affirmative measures to enhance the quality of the *voir dire* process. For example, in jurisdictions where defense counsel is permitted to orally question prospective jurors,²⁸² courts may allow greater latitude in the exploration of potential biases and may even provide additional peremptory challenges when the potential for prejudice is heightened.²⁸³ Alternatively, when a high-profile case is tried in federal court, where defense counsel is typically not permitted to address prospective jurors personally, judges will often permit the use of extensive written questionnaires prior to jury selection, or, pursuant to Rule 24 of the Federal Rules of Criminal Procedure,²⁸⁴ will accept applications to add specific areas of inquiry for examining prospective jurors. Thus, whatever the specific tribunal or the corresponding remedial measure, on the whole, American courts have recognized the critical importance of vouchsafing the defendant's right to an impartial trial and have taken substantial steps toward accomplishing that goal, even though evolving communication technologies continue to challenge the sufficiency of these steps.

²⁸² Merle L. Silverstein, *The Limitations on Voir Dire Examination of Jurors in Criminal Prosecutions*, 1950 WASH. U. L. Q. 381, 381-82 (1950).

²⁸³ Hornbrook & Leibold, *supra* note 280, at 46-47.

²⁸⁴ FED. R. Crim. P. 24(b).

V. UNFORESEEN PITFALLS IN THE FUTURE OF HIGH PROFILE LITIGATION

As demonstrated by the enormous public response to the Netflix docu-series, “Making a Murderer,” evolving communication technologies have enabled ordinary citizens to participate in and comment on the administration of justice in new and previously unparalleled ways.²⁸⁵ (See Figure 12²⁸⁶).



Figure 12

In the twenty-first century, news media platforms and social media, in particular, will continue to have a profound impact on the course of litigation in high profile cases. Perceptive and vigilant lawyers must accept this paradigm and work within it to safeguard their clients' right to a fair trial. Instead of seeking to exclude the press, litigators must utilize the tools at their disposal to ensure a fair trial notwithstanding media coverage.

At the same time, attorneys must also be cognizant of the unforeseen dangers associated with practices made possible by the development of the Internet and social media. For example, attorneys in the digital age are no longer compelled to accept *pro bono* cases of insolvent criminal defendants. Instead, modern attorneys need only post a GoFundMe or Kickstarter campaign, for example, to publicly source a client's fee by way of “crowdfunding.”²⁸⁷ To date, ethics

²⁸⁵ *Making a Murderer* (Netflix television streaming broadcast 2015) (documenting the potentially wrongful convictions of Steven Avery and his nephew, Brendan Dassey, for the 2005 murder of Theresa Halbach); see also Daniel Victor, *No ‘Making a Murderer’ Pardon from Obama, White House Says*, N.Y. TIMES (Jan. 8, 2016), <http://www.nytimes.com/2016/01/09/arts/television/no-making-a-murderer-pardon-from-obama-white-house-says.html> (noting that 479,000 signatures were gathered in two petitions to President Obama to pardon Steven Avery and Brendan Dassey).

²⁸⁶ *Photograph of Steven Avery*, NETFLIX, <http://www.thewrap.com/wp-content/uploads/2016/01/making-murd.jpg> (last visited Mar. 20, 2017).

²⁸⁷ See *Crowdfunding*, ENTREPRENEUR, <https://www.entrepreneur.com/topic/crowdfunding> (last visited Mar. 22, 2017) (defining “crowdfunding” as “the process of raising money to fund

experts have not reached a consensus on the propriety of this practice; however, a lack of guidance has not prevented crowdfunding from flourishing.²⁸⁸ Furthermore, even assuming that crowdfunding a client's fee is not unethical, attorneys should recognize that it may constitute an unsound business practice in that starting such a campaign essentially amounts to a public declaration that defense counsel needs online funding assistance, and leaves open the question of what happens to the remainder of funds when crowdfunded revenue exceeds earned attorney's fees.

Attorneys must consider for themselves whether to use social media as a tool to communicate their clients' positions, but should proceed with extreme caution because an advocate's use of social media raises a number of ethical concerns and exposes clients to scrutiny that could potentially damage trial or settlement prospects.²⁸⁹ As John Adams perceptively asserted, facts are stubborn things, so an attorney must be aware that everything he or she posts online has the potential to later be established as fact before a tribunal. The competent litigator's primary objective should always be protecting his or her client, so erring of the side of caution is the safest and best course when considering whether to make an appeal to the community via social media. Ultimately, litigators should make trial proceedings their primary focus and avoid to the greatest extent possible trying their cases in the court of public opinion.

VI. CONCLUSION

American jurisprudence should and likely will continue to struggle and adapt in its effort to balance the rights of a free press with the rights of a criminal defendant. The precarious balance of individual rights that was forged in the crucible of pre-revolutionary America now faces new, critical challenges in this post-fact era, with

what is typically a project or business venture through many donors using an online platform"). As discussed earlier, this strategy proved to be successful for George Zimmerman's defense counsel. *See supra* text accompanying notes 154-59.

²⁸⁸ See Carolyn Elefant, *Dewey Really Want to Say that Crowdfunding is Unethical Fee Splitting? The Biglaw/SmallLaw Double Standard*, MYSHINGLE (Mar. 24, 2014), <http://myshingle.com/2014/03/articles/ethics-malpractice-issues/dewey-really-want-say-crowdsourcing-unethical-fee-splitting-biglawsmalllaw-double-standard> (opining that the practice of crowdfunding attorney's fees has expanded, despite constituting a possible violation of ABA Model Rule 5.4's ban on splitting fees with non-lawyers).

²⁸⁹ Nicola A. Boothe-Perry, *Friends of Justice: Does Social Media Impact the Public Perception of the Justice System?* 35 PACE L. REV. 72, 73, 86-89 (2014).

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ever-burgeoning communication technologies and exploding media saturation exacerbating already formidable intrinsic stress. As a result, criminal defense attorneys must work harder than ever to protect their clients from the dangers of virulent media publicity.

By considering the efficacy of available litigation strategies and examining their use in a small selection of landmark American criminal controversies, the authors of this article hope to have inspired its readers to seek out and gauge the efficacy of approaches used in other high profile cases, of which there are an abundance, and to employ the lessons learned in their own respective litigation practices.