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## The Media, the Jury, and the High-Profile Defendant: A Defense Perspective on the Media Circus

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### I. INTRODUCTION

Throughout American history, there has been tension between the Sixth Amendment right of a criminal defendant to receive a fair trial and the First Amendment right for freedom of the press to publish news about criminal trials. Over the last seventy-five years in particular, media coverage of trials has steadily increased as a result of rapid advancements in technology. The increase in media coverage has led to the use of the term “high-profile” to define cases and defendants subjected to heightened media scrutiny. Initially, the use of cameras, and then television, in the courtroom triggered the heated constitutional debate over the proper balance of the First and Sixth Amendments. Beyond the traditional types of mass media, including newsprint and television reports, the Internet is a phenomenon that has rapidly and immeasurably changed the way in which the general public accesses information; its relative speed and broad, global reach portend an age where media has an even greater effect on juries in high-profile cases.

Currently, when the public’s interest is sparked by a particular case, there are resources readily available. Such instantaneous availability is the cornerstone of the information age. The media extensively broadcasts pretrial coverage in high-profile cases, so much so that it becomes difficult for the public to avoid exposure to such information. Studies have sought to measure the degree to which continuous exposure to pretrial publicity prevents potential jurors from becoming fair and objective fact finders. Although there is disagreement as to the extent, social science research has shown a strong correlation between pretrial publicity and juror bias.<sup>1</sup>

Some of the most common types of publicly disseminated information include negative statements about the suspect that are typically not supposed to be considered by the jury in the courtroom. These statements regularly include prior arrest information, opinions of guilt, confessions, and information as to prior convictions. Among the most frequent disseminators of prejudicial information to the media are law enforcement officers and prosecutors.<sup>2</sup>

The American Bar Association’s Model Rules of Professional Conduct (the “Model Rules”) were written as a standard of ethics that could be adopted by state bars or used as a guide to draft their own.<sup>3</sup> In New York, the Model Rules were adopted in part and modified.<sup>4</sup> The modifications are evident in both New York’s rule pertaining to trial publicity, New York Rule of Professional Conduct 3.6,<sup>5</sup> and Local Criminal Rule 23.1, which is binding in the Southern and Eastern Districts of

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1. See, e.g., Nancy Mehrkens Steblay et al., *The Effects of Pretrial Publicity on Juror Verdicts: A Meta-Analytic Review*, 23 LAW & HUM. BEHAV. 219 (1999).
  2. Joel D. Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence*, 6 PSYCHOL. PUB. POL’Y & L. 677, 680 (2000).
  3. MODEL RULES OF PROF’L CONDUCT (2009).
  4. N.Y. RULES OF PROF’L CONDUCT (2009).
  5. N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.0, r. 3.6 (2009).

New York.<sup>6</sup> The variances in the New York and Southern and Eastern District rules from the Model Rules governing trial publicity have opened the door for New York prosecutors to infringe on the protections provided to defendants by the Sixth Amendment.

My perspective on the disadvantage of the defense and the high-profile criminal defendant is best articulated according to the following structure. In Part II, this article discusses the history of the media-trial relationship, dating back from the Norman Conquest in 1066 through present day, and will examine cases such as *United States v. Burr*, *United States v. Hauptmann*, and *People v. Simpson*. Part III of this article considers social science studies and research, as well as arguments on both sides of the debate over the effect of the media on juror impartiality. In Part IV, this article provides an analysis of how the ethical and local rules prevent defense attorneys in high-profile New York cases from effectively addressing the media bias that is faced before and during the courtroom trial. And, in Part V, this article provides a real-life example of how these issues arose during a high-profile trial: my representation of John A. Gotti III in his 2008 trial for conspiracy and murder under the Racketeer Influenced and Corrupt Organizations Act (RICO). In its entirety, this article seeks to advance, through an analysis of history, social science, and professional experience, the proposition that the defense, although protected in theory by explicit laws, remedies, and codes of conduct, is at an inherent disadvantage in the criminal justice system due to the greater protections afforded to the media and exploited by prosecutors.

## II. TRACING THE HISTORY OF THE MEDIA-TRIAL RELATIONSHIP

In England, prior to the Norman Conquest in 1066, cases were brought before moots, and all freemen were required to attend in order to decide the cases.<sup>7</sup> Over many years, the rules of the precursor to the jury system were relaxed; the moots remained open to freemen, but freemen were no longer compelled to attend.<sup>8</sup> Despite the changes in legal procedures and criminal laws, criminal trials remained open to the public. This tradition of open court proceedings continued in the American colonies.<sup>9</sup> Some of the colonies, such as New Jersey and Pennsylvania, explicitly declared that all trials must remain open to the public.<sup>10</sup> In both British and American

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6. S.D. & E.D. N.Y. Loc. Crim. R. 23.1.

7. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 565 (1980). A moot, also known as a “hundred court,” was “a larger court baron, held for all inhabitants of a particular hundred rather than a manor, in which the free suitors were the judges (jurors) and the steward the register.” BLACK’S LAW DICTIONARY 381 (8th ed. 2004). Freemen were the free landowners of the hundred. 2 FREDERIC WILLIAM MAITLAND, *Outlines of English Legal History, 560–1600*, in THE COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND 117, 426 (H.A.L. Fisher ed., 1911). A hundred was an ancient English geographical division with its own court, similar to a modern day county. BLACK’S LAW DICTIONARY 758 (8th ed. 2004). The last moot was abolished in 1971. *Id.* at 381.

8. *Richmond Newspapers*, 448 U.S. at 565.

9. *Id.* at 567.

10. *Id.* at 567–68.

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history, an open criminal trial has been treated as a presumptive, indispensable right.<sup>11</sup> However, the media saturation that exists in modern-day America certainly did not exist in the American colonies.

### A. United States v. Burr

It was only a few years after the signing of the U.S. Constitution that the young United States experienced its first “media circus” trial.<sup>12</sup> This early example of the media’s impact upon a criminal trial (and the court’s attempt to protect the defendant from such influence) occurred in the 1807 trial of former Vice President Aaron Burr.<sup>13</sup> Burr was charged with treason after his alleged plans to seize New Orleans and conquer Mexico were revealed to the public.<sup>14</sup> During the time leading up to the trial, Virginia newspapers covered in detail both the investigation and Burr’s alleged plan to build his own empire.<sup>15</sup> The press claimed that Burr had intended to form his own empire by invading Mexico and then joining it with what was then the southwestern United States.<sup>16</sup> Burr’s political status and the nature of the charges against him set the stage for massive media attention.<sup>17</sup> There developed a fear that the immense public exposure to potential evidence would prevent Burr from being tried by a fair and impartial jury in violation of his Sixth Amendment rights.<sup>18</sup> U.S. Supreme Court Chief Justice John Marshall presided over the case and struggled with this question.<sup>19</sup> Marshall understood that a person’s belief in his own ability to judge a set of facts in a fair and impartial manner should not be dispositive of the question as to whether media exposure compromised a sitting jury. Chief Justice Marshall explained:

[A juror] may declare that notwithstanding these prejudices he is determined to listen to the evidence, and be governed by it; but the law will not trust him. . . . Such a person may believe that he will be regulated by testimony, but the law suspects him, and certainly not without reason.<sup>20</sup>

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11. *Id.* at 569 (“[C]riminal trials both here and in England had long been presumptively open. This is no quirk of history; rather, it has long been recognized as an indispensable attribute of an Anglo-American trial.”).
  12. See Rich Curtner & Melissa Kassier, “*Not in Our Town*”: Pretrial Publicity, Presumed Prejudice, and Change of Venue in Alaska: Public Opinion Surveys as a Tool to Measure the Impact of Prejudicial Pretrial Publicity, 22 ALASKA L. REV. 255, 257 (2005).
  13. United States v. Burr, 25 F. Cas. 49 (C.C.D. Va. 1807) (No. 14,692g); see Curtner & Kassier, *supra* note 12, at 257–58.
  14. See Robert Hardaway & Douglas B. Tumminello, *Pretrial Publicity in Criminal Cases of National Notoriety: Constructing a Remedy for the Remediless Wrong*, 46 AM. U. L. REV. 39, 48–49 (1996).
  15. See Curtner & Kassier, *supra* note 12, at 257.
  16. *Id.*
  17. Hardaway & Tumminello, *supra* note 14, at 48–49.
  18. See *Burr*, 25 F. Cas. at 50–51.
  19. *See id.*
  20. *Id.* at 50.

In the end, Marshall ruled that mere exposure to the pretrial publicity was not, in and of itself, enough reason to dismiss a juror, but if that juror could not leave behind his “strong and deep impressions” in order to fairly “weigh the testimony” and evaluate the evidence presented during the trial, then that juror could be disqualified.<sup>21</sup> On the first day of *voir dire*, Marshall was forced to dismiss forty-four of forty-eight potential jurors, deeming them prejudicially influenced by the newspapers’ pretrial publicity.<sup>22</sup> Burr was eventually acquitted of treason but convicted on the charge of providing the means for a military expedition against a nation with which the United States was at peace.<sup>23</sup>

### B. State v. Hauptmann

Although Burr had to cope with the newspapers’ intense scrutiny, he was fortunate enough to not have been surrounded by cameras. Bruno Hauptmann, however, was not so lucky. The mass media’s infatuation with criminal trials first presented itself with his 1935 trial for the kidnapping and murder of Charles Lindbergh’s baby (commonly referred to as the Lindbergh baby case).<sup>24</sup> Lindbergh’s fame, the nature of the crime, and advances in camera and recording technology led to a trial controlled more by the media than by the judge. Prior to Hauptmann’s arrest, the media followed every break in the police investigation and consistently reported on its progress.<sup>25</sup> After Hauptmann’s arrest, approximately 700 reporters, including 120 cameramen, descended and converged upon the Flemington, New Jersey courthouse.<sup>26</sup> The photographers used blinding flashbulbs for pictures and climbed over defense and prosecution tables during the proceedings.<sup>27</sup> The unusually large number of reporters created an intense competition to get better pictures and stories. The judge had no choice but to order the prohibition of cameras in the courtroom.<sup>28</sup> In response, and in disregard of the judge’s order, photographers used

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21. *Id.* at 51.

22. See Curtner & Kassier, *supra* note 12, at 258.

23. *Burr*, 25 F. Cas. at 207.

24. David A. Harris, Essay, *The Appearance of Justice: Court TV, Conventional Television, and Public Understanding of the Criminal Justice System*, 35 ARIZ. L. REV. 785, 798 (1993).

25. See Oscar Hallam, *Some Object Lessons on Publicity in Criminal Trials*, 24 MINN. L. REV. 453, 460 (1940).

26. Kelli L. Sager & Karen N. Frederiksen, *Televising the Judicial Branch: In Furtherance of the Public’s First Amendment Rights*, 69 S. CAL. L. REV. 1519, 1521 n.7 (1996).

27. *Id.*

28. See Richard B. Kielbowicz, *The Story Behind the Adoption of the Ban on Courtroom Cameras*, 63 JUDICATURE 14, 18–19 (1979) (explaining that the judge presiding over Hauptmann’s trial initially allowed limited camera coverage of the proceedings but, after discovering multiple violations of his orders, revoked the right to photographic coverage of any type in the courtroom).

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concealed cameras to take pictures and news footage of witnesses and the proceedings while trial was in session.<sup>29</sup>

On appeal, Hauptmann raised the issues of pretrial prejudice due to media coverage and prejudice suffered from the “confusion and disorder ‘reigning’ in the court room, viz., running about of messenger boys and clerks employed by the press.”<sup>30</sup> First addressing the pretrial prejudice, the New Jersey Appellate Court found Hauptmann’s argument untenable: “If the result of an important murder trial is to be nullified by newspaper stories and radio broadcasts, few convictions would stand.”<sup>31</sup> It appears that the court agreed with Hauptmann’s claim that the pretrial publicity may have prejudiced his case, but then decided that a reversal on such ground was unwarranted and would lead to mass reversals of criminal cases.<sup>32</sup> The court also slightly acknowledged the chaos in the courtroom, but found both that the trial court judge handled it appropriately and that Hauptmann failed to preserve the issue for appeal:

Without doubt there were messengers going to and fro. Again, it was inevitable. The press and public were entitled to reports of the daily happenings, and it was quite proper for the trial judge to afford reasonable facilities for sending such reports. During the trial, the court seems to have taken proper action of its own motion to preserve order, and to have responded properly to any suggestions in that regard. No motion for mistrial or for a new trial on this or any other ground is claimed to have been made.<sup>33</sup>

However, the Appellate Court failed to specifically address both the reporters climbing over tables and the use of flashbulbs.<sup>34</sup>

The media circus created by the Lindbergh baby case prompted the American Bar Association (ABA) in 1937 to create Canon 35 of the ABA Canons of Judicial Ethics (“Canons”), recommending a ban on the use of all cameras in the courtroom.<sup>35</sup> A special committee was appointed to investigate the media’s interference with the Lindbergh baby trial and concluded that “photography . . . has a tendency to distract the attention of the participants in a trial from the single object of a trial, to wit, to do justice between the parties before the court.”<sup>36</sup> In 1952, Canon 35 was amended to

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29. See *id.*; Gregory K. McCall, Note, *Cameras in the Criminal Courtroom: A Sixth Amendment Analysis*, 85 COLUM. L. REV. 1546, 1547 (1985).

30. State v. Hauptmann, 180 A. 809, 827 (N.J. 1935).

31. *Id.* at 828.

32. See *id.* at 828–29.

33. *Id.* at 827.

34. See *id.*; see also Ruth Ann Strickland & Richter H. Moore, Jr., *Cameras in State Courts: A Historical Perspective*, 78 JUDICATURE 128, 130 (1994). Despite the media circus surrounding the trial, Hauptmann was convicted, sentenced to death, and eventually executed. 6 WEST’S ENCYCLOPEDIA OF AMERICAN LAW 329 (2d ed. 2005).

35. Sager & Frederiksen, *supra* note 26, at 1521 n.8.

36. *Report of the Special Committee on Cooperation Between Press, Radio and Bar, as to Publicity Interfering with Fair Trial of Judicial and Quasi-Judicial Proceedings*, 63 ANN. REP. A.B.A. 382, 385 (1938); McCall, *supra* note 29, at 1548.

bar television coverage of federal court proceedings and to ban photography and broadcasts of state trials.<sup>37</sup> When the Canons were replaced with the Model Code of Judicial Conduct in 1972, the ABA loosened the rule to allow photography and the recording of trials in limited circumstances for educational purposes only.<sup>38</sup> The restrictions were further relaxed in 1978 when the ABA allowed courtroom coverage by electronic media if it was conducted without interfering with the trial.<sup>39</sup> The ramifications of these restrictions are explored in greater detail in Part IV.

After the Lindbergh baby trial, there continued to be an increase in dissemination of information about criminal trials. Newspapers and radio stations increased their coverage of local trials, turning them into national news.<sup>40</sup> In my opinion, the rise of television placed substantial burdens on the courts' ability to empanel and maintain an impartial jury. It is standard for judges to instruct jurors not to watch or read the news or conduct any independent research about the trial at hand. Beyond the rapid distribution of print media reports of investigations and trials, television brought damaging footage (e.g., suspects in handcuffs, flashing police lights, and crime scene ribbon) into the living room. This imagery in motion presented a danger of prejudice distinct from the limited portrayals in newspapers and radio.

### C. Rideau v. Louisiana

In *Rideau v. Louisiana*, the defendant Wilbert Rideau was charged with robbing a bank, kidnapping bank employees, and killing one of those employees.<sup>41</sup> Rideau was arrested hours after the crimes were committed and detained in Calcasieu Parish jail in Lake Charles, Louisiana.<sup>42</sup> Shortly after his arrest, the Sheriff of Calcasieu Parish recorded a twenty-minute "interview" with Rideau wherein Rideau confessed to the crimes alleged against him.<sup>43</sup> Over the following days, a local television station broadcasted the footage of the confession on three separate occasions.<sup>44</sup> The total viewership of the three broadcasts was approximately 97,000 people; Calcasieu Parish had an approximate population of 150,000.<sup>45</sup> The trial court denied Rideau's motion for a change of venue, and he was subsequently convicted and sentenced to death.<sup>46</sup> On appeal, the U.S. Supreme Court held that the refusal to grant Rideau's motion

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37. Sager & Frederiksen, *supra* note 26, at 1521 n.8.

38. *Id.*

39. See *id.*; Book Note, 83 MICH. L. REV. 977, 978 (1985) (reviewing J. EDWARD GERALD, NEWS OF CRIME: COURTS AND PRESS IN CONFLICT (1983)).

40. See Curtner & Kassier, *supra* note 12, at 262–63.

41. 373 U.S. 723, 723–24 (1963).

42. *Id.* at 724.

43. *Id.*

44. *Id.*

45. See *id.*

46. *Id.* at 724–25.

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for a venue change constituted a denial of Rideau's due process rights because the jury pool from the parish had been repeatedly exposed to Rideau's confession of the crimes with which he was subsequently charged.<sup>47</sup> Rideau's "real" trial had occurred outside the courtroom, in the media and in the court of public opinion.<sup>48</sup> The Court reversed Rideau's conviction.<sup>49</sup> The dissenters agreed with the majority that a defendant can be "deprived of due process of law when he is tried in an environment so permeated with hostility that judicial proceedings can be 'but a hollow formality,'" but disagreed with the majority's application of the presumed prejudice.<sup>50</sup> The dissent instead would have required the defendant to demonstrate prejudice with proof of a "substantial nexus between the televised 'interview' and petitioner's trial" to warrant a reversal.<sup>51</sup>

### D. Estes v. Texas

The Court's decision in *Rideau* addressed only the issue of the prejudicial effect of publicity prior to any court proceeding. Two years later in *Estes v. Texas*, the U.S. Supreme Court tackled the issue of the prejudicial effect of media coverage in the courtroom.<sup>52</sup> Defendant Billy Sol Estes moved to bar photography, television broadcasting, and radio broadcasting from the trial proceedings.<sup>53</sup> The trial court denied his motion,<sup>54</sup> and the initial proceedings were broadcasted live via television and radio.<sup>55</sup> Estes was eventually convicted on charges of swindling. On appeal, the Supreme Court reversed the conviction in a 5-4 decision.<sup>56</sup> In Estes's motion to the Court, he cited Canon 35 of the Canons, not as law, but as evidence of the disapproval of the legal community of televised broadcasts.<sup>57</sup> The Court described the chaotic scene of the trial courtroom: "[A]t least 12 cameramen were engaged in the courtroom throughout the hearing taking motion and still pictures and televising the proceedings. Cables and wires were snaked across the courtroom floor, three microphones were on the judge's bench and others were beamed at the jury box and the counsel table."<sup>58</sup> The Court determined that these factors "led to considerable disruption of the

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47. *Id.* at 726.

48. *Id.*

49. *Id.* at 727.

50. *Id.* at 729–33 (Clark, J., dissenting); Hardaway & Tumminello, *supra* note 14, at 54–55.

51. *Rideau*, 373 U.S. at 729 (Clark, J., dissenting).

52. 381 U.S. 532, 534–35 (1965).

53. *Id.* at 535.

54. *Id.*

55. *Id.* at 536.

56. See *id.* at 532–35.

57. *Id.* at 535.

58. *Id.* at 536.

hearings.”<sup>59</sup> While the Court acknowledged that a claim of a violation of due process typically requires a showing of identifiable prejudice, it found that sometimes “a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process.”<sup>60</sup>

As in *Rideau*, the Court held that identifiable prejudice was not required to show a due process violation when a basis for appeal involved taint from the media and, specifically, television.<sup>61</sup> The Court expressed four specific concerns about televised proceedings: (1) the impact on the jurors, (2) the impairment of testimony, (3) the additional responsibilities placed upon the judge, and (4) the impact upon the defendant.<sup>62</sup> The Supreme Court was concerned that the jurors would not only be tainted by the negative publicity, but also distracted by all the media attention.<sup>63</sup> It explained that witnesses may behave differently when aware of the broadcast, thereby affecting their credibility and impeding their willingness to testify about embarrassing or painful information.<sup>64</sup> In addition, the Court held that the added distraction of the cameras and the extra responsibility of controlling their use would inhibit a judge from ensuring a fair trial.<sup>65</sup> Finally, the Justices wanted to avoid “[t]rial by television” and felt that a defendant may be unable to concentrate on his own trial if faced with intense in-court media scrutiny.<sup>66</sup> Notwithstanding the Court’s decision, it left open the possibility of a different outcome when technology had advanced: “When the advances in these arts permit reporting by printing press or by television without their present hazards to a fair trial we will have another case.”<sup>67</sup>

#### E. Sheppard v. Maxwell

A year later in the case of *Sheppard v. Maxwell*, in an 8-1 decision, the Supreme Court overturned the conviction of Sam Sheppard for second-degree murder in his wife’s death, based on the prejudice he suffered from the negative publicity surrounding the case.<sup>68</sup> Following the line of reasoning used in *Rideau* and *Estes*, the Court again did not require the defendant to show that he had suffered identifiable prejudice.<sup>69</sup> Instead, the Court explained that it could find, on a case-by-case basis

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59. *Id.*

60. *Id.* at 542–43. One could only imagine what the Court would have found if faced with the Lindbergh baby case after its decision here. *See* discussion *infra* Part II.B.

61. *Estes*, 381 U.S. at 542–43.

62. *Id.* at 545–50.

63. *Id.* at 545–46.

64. *Id.* at 547.

65. *Id.* at 548.

66. *Id.* at 549.

67. *Id.* at 540.

68. 384 U.S. 333, 335, 363 (1966).

69. *Id.* at 352.

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and when considering the totality of the circumstances, that prejudice probably existed—in such situations, the defendant need not prove identifiable prejudice.<sup>70</sup> The Court acknowledged the freedom of the press under the First Amendment, but found the trial court had taken insufficient steps to prevent and minimize the prejudicial effects of the media.<sup>71</sup> The Court listed nine “flagrant episodes” where the defendant was prejudiced by media exposure ranging from the media accompanying the jury on a visit to the crime scene to denials of motions for venue change and continuances.<sup>72</sup> Applying a totality-of-the-circumstances approach, the Court held that the *Sheppard* case was even more egregious than the *Estes* case and that the trial judge’s “suggestions” and “requests” in *Sheppard* that the jury avoid the publicity of the trial were woefully inadequate.<sup>73</sup> Furthermore, the Court held that the trial judge had made no attempt to protect the jury from the press, and as a result, the jury received anonymous letters to their home addresses and direct requests for statements regarding the trial from the press.<sup>74</sup>

### F. Chandler v. Florida

Fifteen years later, in *Chandler v. Florida*, the Supreme Court would fulfill its own prediction in *Estes* by finding that new advances in technology and changes in the public perception of television gave reason to no longer presume prejudice from the mere broadcasting of a trial.<sup>75</sup> At the time of the decision, twenty-eight states allowed for televised coverage of some court proceedings and twelve more states were taking the issue under consideration.<sup>76</sup> Gone were the blinding lights, bulky cameras, and long twisting cables that marred the *Estes* and *Hauptmann* trials. The Court limited the holding in *Estes* to its facts and held that there must be a showing of actual prejudice; it would no longer presume prejudice.<sup>77</sup>

The *Chandler* decision left open the possibility for increased television broadcasting of criminal trials. One of the flaws of television news coverage of trials was that they often “suffer from incompleteness. . . . [in that] the public seldom sees more than a fraction of actual trial proceedings.”<sup>78</sup> The founding of Court TV in 1991<sup>79</sup> provided

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70. *Id.* at 351–52.

71. *See id.* at 350, 361–63.

72. *Id.* at 345–49.

73. *Id.* at 353.

74. *Id.*

75. 449 U.S. 560, 576 & n.11 (1981).

76. *Id.* at 565 n.6; Sager & Frederiksen, *supra* note 26, at 1526.

77. *See Chandler*, 449 U.S. at 573–75, 581; *id.* at 583 (Stewart, J., concurring); *id.* at 587 (White, J., concurring).

78. Harris, *supra* note 24, at 811.

79. Court TV changed its name to truTV in 2008 and changed its format by adding shows beyond criminal trials. *See* Anne Becker, *Court TV to Ditch Name, Change Programming in Rebrand*, BROADCASTING & CABLE (Mar. 13, 2007, 5:05 AM), [http://www.broadcastingcable.com/article/108105-Court\\_TV\\_To\\_Ditch\\_Name\\_Change\\_Programming\\_in\\_Rebrand.php](http://www.broadcastingcable.com/article/108105-Court_TV_To_Ditch_Name_Change_Programming_in_Rebrand.php).

a more accurate examination of criminal trials by showing the cases almost in their entirety rather than selecting the most interesting and controversial segments and cutting them down to a twenty-second sound bite.<sup>80</sup> Court TV stated that it served two educational purposes: (1) inspiring confidence in the result of the trial broadcasted, and (2) educating the public about the inner workings of the legal process.<sup>81</sup> The network received an early break when, only a few months after its founding, it offered full coverage of the rape trial of William Kennedy Smith.<sup>82</sup> The combination of the nature of the crime and a Kennedy defendant created significant public interest, allowing the station to capitalize on its exclusive ability to broadcast the trial in full.<sup>83</sup> Five years later, Court TV was accessible to twenty million viewers and had broadcasted over 340 trials.<sup>84</sup> One trial in particular captured the attention of the country: the O.J. Simpson murder trial.<sup>85</sup>

#### G. People v. Simpson

The O.J. Simpson case in 1995 exhibited a perfect storm of factors to mark it as a notorious and high-profile criminal trial. The defendant was a celebrity athlete, the crime was a double murder, a high-speed chase captivated a nation, and there were racial undertones present.<sup>86</sup> Prior to the start of the trial, four out of five attorneys surveyed felt that the publicity surrounding the case would interfere with Simpson's right to a fair trial.<sup>87</sup> During the trial, it appeared that everyone involved with the case was influenced by the presence of television cameras, including the presiding judge, Judge Lance Ito.<sup>88</sup> Before the *Simpson* case, Judge Ito was a respected judge with a reputation for maintaining a control over his courtroom.<sup>89</sup> Yet during the trial, Judge Ito played to the cameras and allowed the proceedings to become a media circus, taking the focus off of the purpose of the trial proceeding—to seek the truth.<sup>90</sup>

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80. See Harris, *supra* note 24, at 788.

81. Christo Lassiter, *The Appearance of Justice: TV or Not TV—That is the Question*, 86 J. CRIM. L. & CRIMINOLOGY 928, 973 (1996).

82. See Harris, *supra* note 24, at 801.

83. *Id.*

84. Lassiter, *supra* note 81, at 928.

85. See Transcript of Verdict, People v. Simpson, No. BA097211 (Cal. Super. Ct. Oct. 3, 1995), 1995 WL 704381.

86. See Wayne J. Pitts et al., *The Legacy of the O.J. Simpson Trial*, 10 LOY. J. PUB. INT. L. 199, 199–201 (2009).

87. Nadine Strossen, *Free Press and Fair Trial: Implications of the O.J. Simpson Case*, 26 U. TOL. L. REV. 647, 647 (1995).

88. See, e.g., H. Patrick Furman, *Publicity in High Profile Criminal Cases*, 10 ST. THOMAS L. REV. 507, 526–27 (1998).

89. Ronald J. Allen, *The Simpson Affair, Reform of the Criminal Justice Process, and Magic Bullets*, 67 U. COLO. L. REV. 989, 1011 (1996).

90. See Frank Rich, Op-Ed., *Judge Ito's All-Star Vaudeville*, N.Y. TIMES, Oct. 2, 1994, § 4, at 17 (“Mr. Ito’s odd behavior in week one suggests a man who is not unmindful of the fact that his service in this trial is

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The lawyers seized on Judge Ito's lapse and used the media to their own advantages. For example, defense attorney Johnnie Cochran publically addressed rumors of plea negotiations.<sup>91</sup>

Arguably, the attorneys in the case should not have used the media and should have acted appropriately in front of the cameras, but it is up to the judge to control his courtroom and the proceedings. Zealous advocacy should be rewarded, not punished. Some have argued, however, that the attorneys were not zealous advocates, but were showing off because publicity would help their business.<sup>92</sup> Even if this is true, it is the responsibility of the judge to keep tight reigns on the attorneys before him. Judge Ito allowed the lawyers to make lengthy arguments and "to comment directly to the public."<sup>93</sup> The case needed a strong judge who could keep out of the proceedings any unnecessary use of the media. Instead, Judge Ito was "dramatically affected" by the cameras, and it showed through his lack of control over the trial.<sup>94</sup>

The most unusual aspect of the *Simpson* trial was the acquittal, despite the media attention and television cameras. Simpson's right to a fair trial was seemingly unaffected, at least as it pertains to jurors having a pre-disposition to convict when subjected to negative pretrial publicity.<sup>95</sup> Although Simpson was acquitted in the courtroom, he was found guilty in the court of public opinion.<sup>96</sup> His later conviction on unrelated robbery and kidnapping charges in 2008 may have been tainted by the perception by some that he had escaped a justly deserved punishment for the murders of Nicole Brown Simpson and Ronald Goldman thirteen years earlier.<sup>97</sup> During *voir dire* in the 2008 proceeding, jurors were questioned extensively about their opinions on the 1995 murder case.<sup>98</sup> Some of the audio recordings entered into evidence contained references to the previous case.<sup>99</sup> The defense team argued that the prosecution and law enforcement officials were not interested in the substance of the actual charges, but only in "getting" O.J. Simpson.<sup>100</sup> Further, they alleged that many

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more likely to render him ready for prime time than for the Supreme Court.").

91. Lassiter, *supra* note 81, at 974.
92. Angelique M. Paul, Note, *Turning the Camera on Court TV: Does Televising Trials Teach Us Anything About the Real Law?*, 58 OHIO ST. L.J. 655, 679 (1997).
93. Lassiter, *supra* note 81, at 975–76.
94. Allen, *supra* note 89, at 1015.
95. See Hardaway & Tumminello, *supra* note 14, at 64.
96. Lassiter, *supra* note 81, at 974.
97. See State v. Simpson, No. C237890, 2008 WL 5129099 (Nev. Dist. Ct. Dec. 5, 2008); see also Lena Jakobsson, *Notorious Past Tainted Robbery Trial, Simpson Appeal Claims*, CNN.com, June 11, 2010, <http://www.cnn.com/2010/CRIME/06/10/oj.simpson.appeal/index.html>.
98. Steve Friess, *O.J. Simpson Convicted of Robbery and Kidnapping*, N.Y. TIMES, Oct. 4, 2008, <http://www.nytimes.com/2008/10/04/world/americas/04iht-simpson.1.16687098.html>.
99. *Id.*
100. *Id.*

of the witnesses involved were influenced by the chance to receive media attention for themselves.<sup>101</sup>

The *Simpson* case had a great effect on the legal community and the public as a whole. It has forced many to reconsider the wisdom of allowing cameras in the courtroom.<sup>102</sup> Accordingly, a consideration of how media coverage and advancing technologies affect a defendant's constitutional right to a fair trial and juror impartiality is necessary.<sup>103</sup>

### III. TRIAL PUBLICITY AS IT AFFECTS JUROR IMPARTIALITY

One protection most fundamental to the American justice system is that of a trial by jury, where a group of the defendant's peers, drawn from the community, are called upon to render a fair and impartial verdict.<sup>104</sup> In practice, jurors, like any other person, are susceptible to various external influences—the news media and other informational sources made available through contemporary technology has been increasingly influential in the way the general public, the jury pool, perceive and evaluate the facts and evidence of a trial. In my experience, the media's dissemination of potentially inadmissible evidence, such as lie-detector results and prior criminal records, has a tendency to skew a juror's impartiality. In turn, the struggle continues between two most basic liberties—the right to a free press and the right to an impartial jury.

The Sixth Amendment protects the accused in a criminal proceeding by, among other things, guaranteeing the right to a speedy and public trial by an impartial jury in the state and district wherein the alleged crime was committed.<sup>105</sup> Simultaneously, the First Amendment guarantees the right to freedom of the press.<sup>106</sup> Historically, there has been a palpable tension between the two amendments, reflected in the earliest example of such conflict in the 1807 trial of Aaron Burr for treason and Chief Justice Marshall's opinion stating that, “[w]ere it possible to obtain a jury without any prepossessions whatever respecting the guilt or innocence of the accused, it would be extremely desirable to obtain such a jury; but this is perhaps impossible, and therefore will not be required.”<sup>107</sup> Two centuries later, as evidenced by the highly controversial debate over where to conduct the trial of Khalid Sheikh Mohammed for his alleged role in the September 11, 2001, terrorist attacks, U.S. courts clearly

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101. *See id.*

102. *See Paul, supra* note 92, at 674.

103. Looking into the future, the next topic of debate pertaining to advancing technology might be a discussion over the merits of broadcasting criminal trials over the Internet because “the mini-industry that lives on these [notorious] cases promotes a demand for coverage in order to justify its own existence.” *See Furman, supra* note 88, at 518.

104. U.S. CONST. amend. VI.

105. *Id.*

106. *Id.* amend. I.

107. *United States v. Burr*, 25 F. Cas. 49, 50–51 (C.C.D. Va. 1807) (No. 14,692g).

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still face the controversy created by the voluminous amount of information disseminated through the print, television, and electronic media.<sup>108</sup>

More than ever, the information age has considerably broadened the reach of the news media, making it nearly impossible for the high-profile criminal defendant and the public to avoid information regarding the case. Without ever truly reconciling the conflict between an impartial jury and the freedom of the press, the fair trial issue fiercely pervades the criminal justice system. While the efficiency and speed with which information is disseminated in our society is certainly valuable, the validity of such information is often questionable.<sup>109</sup> When the public is exposed to information that is incomplete, factually incorrect, or, even worse, purposefully manipulated, the knowledge gained is injurious to the judicial system. When jurors are selected from the same general public that is exposed to such tainted information, the defendant's liberty and the court's integrity are in jeopardy. As Chief Justice Marshall concluded in *Burr*, exposure to pretrial publicity may not affect every juror's ability to fairly render a verdict.<sup>110</sup> However, the quality and quantity of such pretrial publicity exposure is an issue that must be investigated before a person can be allowed to participate in the criminal justice system.

### A. An Analytical Review

Not all media coverage is created equal. Certain stories affect people and potential jurors in different ways. This occurs because pretrial publicity can be factually or emotionally oriented.<sup>111</sup> Publicity that is factually oriented is objective; it relates to facts such as a defendant's criminal record or evidence gathered from the crime scene.<sup>112</sup> Emotional publicity has a more subjective component and uses information that may arouse certain feelings toward the defendant, such as "hearing that a murder was carried out in a particularly violent and brutal manner."<sup>113</sup> Experimental research has also demonstrated the damaging effects of pretrial publicity. Studies have shown that both types of pretrial publicity are linked to a higher probability of conviction and cause a general biasing effect among jurors.<sup>114</sup> In 1990, one study exposed mock jurors to various types of pretrial publicity in the form of simulated newspaper articles regarding a bank robbery before presenting participants with a videotaped trial for

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108. See Kenneth R. Bazinet et al., *So Long, Terror Thug: White House Abandons Plan to Hold Khalid Trial in Manhattan*, N.Y. DAILY NEWS, Jan. 30, 2010, at 5.

109. See Anton Vedder & Robert Wachbroit, *Reliability of Information on the Internet: Some Distinctions*, 5 ETHICS & INFO. TECH. 211 (2003).

110. See *Burr*, 25 F. Cas. at 50–51.

111. See Lieberman & Arndt, *supra* note 2, at 679.

112. *Id.*

113. *Id.*

114. See *id.* at 679–80.

that robbery.<sup>115</sup> Participants were presented with either high or low factually oriented publicity and either high or low emotionally oriented publicity.<sup>116</sup> “Both types of pretrial publicity led to greater convictions, and judicial instructions to ignore the information were completely ineffective.”<sup>117</sup> In a 1998 study, Wilson and Bornstein obtained similar findings regarding the effects of emotional and factual pretrial publicity.<sup>118</sup> The study concluded that there was an overall biasing effect of pretrial publicity in written format.<sup>119</sup> Both types of pretrial publicity produced similar levels of publicity-based biases against the defendant.<sup>120</sup>

### B. Effects of Entertainment Media

While the news media provides jurors with information about particular criminal cases of newsworthy defendants, television dramatizations and other types of entertainment media also have the ability to mold the general public’s understanding of criminal law and the judicial process. As evidenced by the enduring popularity of television programs such as *NYPD Blue* and the *Law and Order* franchise, the public has an insatiable appetite for crime and trial dramas.<sup>121</sup> In many ways, these programs function as makeshift educational sources by exposing the public to some of the laws and procedures surrounding the criminal justice system—information that would otherwise be unfamiliar to a majority of the population. While art may, at times, authentically imitate life, television drama is clearly no substitute for real-life exposure to and education about the law. As a result, people bring preconceived, entertainment-based notions of the law and criminal investigations into the courtroom when chosen as jurors. This phenomenon, referred to as the “*CSI* effect” (named after the popular *CSI: Crime Scene Investigation* (*CSI*) television franchise), refers to the general effect of a fictionalized television program that causes the public to have distorted views and unrealistic expectations of forensic science and criminal evidence.<sup>122</sup> The term first appeared in the public lexicon in a 2002 *Time* article.<sup>123</sup> The phenomenon is not limited to those who watch *CSI*. Several other television shows “that center on

115. See Geoffrey P. Kramer et al., *Pretrial Publicity, Judicial Remedies, and Jury Bias*, 14 LAW & HUM. BEHAV. 409, 415–20 (1990).

116. *Id.* at 415.

117. Lieberman & Arndt, *supra* note 2, at 679.

118. See Jeffrey R. Wilson & Brian H. Bornstein, *Methodological Considerations in Pretrial Publicity Research: Is the Medium the Message?*, 22 LAW & HUM. BEHAV. 585, 595 (1998).

119. See *id.* at 595–96.

120. *See id.*

121. *NYPD Blue* (TV Series 1993–2005), THE INTERNET MOVIE DATABASE, <http://www.imdb.com/title/tt0106079/> (last visited Feb. 17, 2011); *Law & Order* (TV Series 1990–2010), THE INTERNET MOVIE DATABASE, <http://www.imdb.com/title/tt0106079/> (last visited Feb. 17, 2011). The original *Law & Order* first aired in 1990, and the show lasted through May 2010. *Id.*

122. See Simon A. Cole & Rachel Dioso-Villa, *Investigating the ‘CSI Effect’ Effect: Media and Litigation Crisis in Criminal Law*, 61 STAN. L. REV. 1335, 1337 (2009).

123. *Id.* at 1338 (citing Jeffrey Kluger, *How Science Solves Crimes*, TIME, Oct. 21, 2002, at 36, 45).

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forensic science” have a similar subject matter and effect, “including *Without a Trace*, *Numb3rs*, *Criminal Minds*, *N.C.I.S.: Naval Criminal Investigative Service*, *The Closer*, *Crossing Jordan*, *Bones*, and *The Evidence*.<sup>124</sup>

Research on the *CSI* effect describes the cumulative effect of all of these types of television programs. The underlying premise behind the *CSI* effect is that jurors are influenced by these fictionalized portrayals when rendering a verdict.<sup>125</sup> Whether this effect even exists, and if so, whether it renders more acquittals or convictions, is still debatable.<sup>126</sup> There are various degrees of alleged effects encompassed by this theory. The most frequently raised question about the *CSI* effect is whether it has caused jurors to raise their expectations of forensic science in criminal trials as a result of information gleaned from fictionalized crime dramas.<sup>127</sup> In my experience, and advanced by this article, the answer is an unequivocal “Yes.” Prosecutors may be adversely affected when this type of evidence is not admitted at trial. The *CSI* effect suggests that jurors are more likely to acquit defendants in cases where forensic evidence is lacking because they expect law enforcement to accomplish everything “as seen on TV.”<sup>128</sup> Prosecutors may actually face a higher burden of proof if jurors equate them with the fictionalized characters they view on television.<sup>129</sup> Conversely, this theory postulates that defendants are at a disadvantage because of the growing popularity of *CSI* and other crime dramas because they present the prosecutors and forensic scientists in a positive, heroic light and the defendants as the “villains.”<sup>130</sup> As a result, real-life prosecutors may be given greater deference.<sup>131</sup> Furthermore, if scientific evidence is in fact presented against a criminal defendant, the jurors might be apt to exaggerate its probative value.<sup>132</sup>

It is important to note that the *CSI* effect relies on little empirical data and is primarily supported by anecdotal stories and surveys from legal actors and jurors after the completion of a trial.<sup>133</sup> “For example, after the recent, well-publicized acquittal of Robert Blake, jurors complained about the lack of fingerprints, DNA, and gunshot residue—evidence not often available in criminal trials but frequently used on television.”<sup>134</sup> Various research findings have confirmed that many jurors have difficulty discounting inadmissible evidence and external information in the

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124. *Id.*

125. *See id.* at 1339.

126. *See id.* at 1342–43.

127. *Id.* at 1343; see, e.g., Tom R. Tyler, *Viewing CSI and the Threshold of Guilt: Managing Truth and Justice in Reality and Fiction*, 115 YALE L.J. 1050, 1054–55 (2006).

128. *See Cole & Dioso-Villa, supra* note 122, at 1336.

129. *See id.* at 1343. This effect is referred to as the “strong prosecutor’s effect.” *Id.*

130. *See id.* at 1344.

131. *Id.* This is referred to as the “defendant’s effect.” *Id.*

132. Tyler, *supra* note 127, at 1068.

133. *See id.* at 1052–53.

134. *Id.* at 1053.

context of a criminal trial.<sup>135</sup> Therefore, while lacking empirical data with respect to the *CSI* effect, it is still possible to conclude that this sort of entertainment media has an impact on jurors.

### C. Available Remedies and Their Effectiveness

There is great difficulty in determining whether jurors are capable of putting aside opinions formed by a media story to weigh a trial's evidence in a fair and impartial manner. Opinions are the underpinnings of what creates a rational, reasonable person, and therefore putting aside opinions is an arduous task. Asking a juror in a high-profile case—who is often exposed to the media's portrayal of a defendant before the trial begins—to render a verdict based exclusively on evidence presented at trial is a highly dubious task for the standard juror. In the words of one court, “[i]t is therefore quite proper, if not indeed required in some instances, to make the determination . . . [on a juror's impartiality] solely on the basis of the pre-trial publicity which has undoubtedly . . . created a dominant sentiment of prejudice in the community.”<sup>136</sup> However, research suggests that, without sacrificing the freedom of press or the right to a fair trial, the media's prejudicial effects on jurors may be limited.<sup>137</sup> Accordingly, an appraisal of the remedies available to combat the media's effect on juror impartiality is a necessary step in this article's analysis.

The *voir dire* process is the first step in ensuring that the most obviously biased jurors do not participate on the jury in a criminal trial. However, research suggests that many jurors are more affected by media coverage than they would admit.<sup>138</sup> Furthermore, another study has found that questioning potential jurors on their exposure to media coverage and the effects it may have on their ability or inability to render a fair verdict based solely on the evidence presented in court actually increases the damage of pretrial publicity.<sup>139</sup> The *voir dire* process serves as a self-measurement of one's own ability to be objective. Like all self-measurements, potential jurors may innocently or purposely alter their responses. Therefore, *voir dire* is best used to dismiss egregiously biased jurors, but does not prove helpful when deciphering less obvious effects of pretrial publicity.

Because *voir dire* does not eradicate all juror bias, there are other methods available to mediate the problem of pretrial publicity. Rule 21(a) of the Federal Rules of Criminal Procedure allows a defendant to transfer the venue of his trial if prejudice

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135. See, e.g., Linda J. Demaine, *In Search of an Anti-Elephant: Confronting the Human Inability to Forget Inadmissible Evidence*, 16 GEO. MASON L. REV. 99 (2008).

136. United States v. Marcello, 280 F. Supp. 510, 515 (E.D. La. 1968), aff'd, 423 F.2d 993 (5th Cir. 1970).

137. See discussion *infra* Part III.C.

138. See Norbert L. Kerr et al., *On the Effectiveness of Voir Dire in Criminal Cases with Prejudicial Pretrial Publicity: An Empirical Study*, 40 AM. U. L. REV. 665, 668–69 (1991).

139. See Jonathan L. Freedman et al., *Pretrial Publicity: Effects of Admonition and Expressing Pretrial Opinions*, 3 LEGAL & CRIMINOLOGICAL PSYCHOL. 255, 255 (1998).

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against him impedes his right to a fair trial.<sup>140</sup> To warrant change of venue under Rule 21(a), publicity must be “recent, widespread and highly damaging.”<sup>141</sup> The proper test to determine whether a motion for change of venue under Rule 21(a) should be granted is not whether a jury can be impaneled on which no juror has been exposed to pretrial publicity or formed a tentative opinion about the case; instead, the test asks whether the jurors are capable of putting aside any opinion formed on the basis of pretrial publicity and rendering “a verdict based solely on the evidence presented at trial.”<sup>142</sup> The rule implies a presumption that exposure to publicity is inherently damaging.

A venue change would be most useful in situations where media coverage of the defendant’s case is localized within his own community but is not as prevalent elsewhere. During the trial of Timothy McVeigh for the Oklahoma City bombing in 1995, the court granted his motion for a change of venue and ordered that the case be transferred out of Oklahoma City.<sup>143</sup> In consideration of the 168 Oklahoma citizens who had lost their lives in McVeigh’s bombing attack on the Alfred P. Murrah Federal Building, it would have been near impossible to find fair and impartial jurors anywhere in the country, much less in the city that was most affected by that tragedy.<sup>144</sup> Clearly, in situations where the case receives national or global coverage by the media, a venue change would prove useless because the risk of pretrial publicity bias is not just limited to the defendant’s local community. There are some criminal cases that captivate the nation’s attention (e.g., O.J. Simpson’s criminal trial<sup>145</sup>) and make it impossible for the average person to avoid exposure to media coverage. Also, the Internet allows more people to be exposed to cases not within their venue. Therefore, whether a venue change may remedy bias is dependent on the extent of a case’s pretrial publicity or the profile of the defendant.

Another available solution to combat pretrial publicity bias is to delay the trial by issuing a continuance. The objective is to delay the trial long enough for the publicity to subside and the bias to decline. Like a venue change, a continuance is warranted only if the pretrial publicity makes it impossible to obtain a fair and impartial jury.<sup>146</sup> One study has found that a twelve-day continuance is effective in remedying factually oriented pretrial publicity but has no effect on emotional publicity bias in potential jurors.<sup>147</sup> These results suggest that emotionally charged news stories are more

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140. FED. R. CRIM. P. 21(a) (“Upon the defendant’s motion, the court must transfer the proceeding against that defendant to another district if the court is 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.”).

141. Wansley v. Slayton, 487 F.2d 90, 93 (4th Cir. 1973) (quoting 1 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 343 (4th ed. 2010)) (internal quotation mark omitted).

142. United States v. Brown, 540 F.2d 364, 378 (8th Cir. 1976).

143. United States v. McVeigh, 918 F. Supp. 1467, 1474–75 (W.D. Okla. 1996).

144. *See id.* at 1474.

145. *See discussion supra* Part II.G.

146. United States v. White, 386 F. Supp. 882, 885 (E.D. Wis. 1974).

147. Kramer et al., *supra* note 115, at 431.

memorable, and as a result the eradication of their effects is more difficult. However, twelve days is a shorter time span than the usual duration of a continuance.<sup>148</sup> As such, the effectiveness of a continuance is still inconclusive.<sup>149</sup>

Once a trial has concluded and jury deliberations begin, there are precautions the court can take to minimize the influence of inadmissible evidence on the verdict. First, some reformers have suggested that courts should write more simplistic jury instructions when describing the law and other legal vernacular to the jury.<sup>150</sup> Studies have shown that simplified jury instructions have increased juror comprehension of the laws that they are instructed to apply.<sup>151</sup> In fact, jury instruction was a pivotal issue in the O.J. Simpson trial. Vincent Bugliosi, a former prosecutor in the Los Angeles County District Attorney's Office, claimed that one of the reasons Simpson was acquitted was due to the jury's misunderstanding of the law.<sup>152</sup> Bugliosi points out that the jury was led to believe that, if there was a reasonable doubt as to *any* fact presented, an acquittal was warranted.<sup>153</sup> The misunderstanding of such a basic legal principle exemplifies the importance of clarifying jury instructions, not only to avoid the outside influence of the media, but also to avoid the internal misunderstandings that might be prevalent within the courtroom.

Another reform concept is to instruct the jurors on the law before and after the trial. This would ensure that the jury understands the legal principles surrounding the case, not just during deliberations, but throughout the whole trial. Several studies have been conducted in connection with pre-instruction, but the results are arguably insignificant.<sup>154</sup>

Smith . . . found that subjects who were instructed before and after the evidence answered 70% of the abstract comprehension items correctly, whereas subjects instructed only afterward answered 68% correctly. Heuer and Penrod . . . found a small difference in criminal cases between jurors who received preinstruction (mean of 6.9 items correct out of 9 possible, or 77%) and those who did not (73%) . . . Finally, Elwork et al. . . . found that jurors instructed both before and after the evidence answered 69% of the items correctly (mean of 8.3 out of 12 possible), whereas after-only jurors had an accuracy rate of 67%.<sup>155</sup>

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148. Lieberman & Arndt, *supra* note 2, at 683.

149. *Id.* at 683–84.

150. *See id.* at 699.

151. Joel D. Lieberman & Bruce D. Sales, *What Social Science Teaches Us About the Jury Instruction Process*, 3 PSYCHOL. PUB. POL'Y & L. 589, 623 (1997).

152. *See VINCENT BUGLIOSI, OUTRAGE: THE FIVE REASONS WHY O. J. SIMPSON GOT AWAY WITH MURDER* 213, 216 (1996).

153. *See id.*

154. *See Lieberman & Sales, supra* note 151, at 628–31.

155. Phoebe C. Ellsworth & Alan Reifman, *Juror Comprehension and Public Policy: Perceived Problems and Proposed Solutions*, 6 PSYCHOL. PUB. POL'Y & L. 788, 802 (2000).

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Overall, while research does not strongly support pre-instruction of jurors, it does not explicitly render the practice meritless. It is of no risk to the administration of justice and could easily be implemented as a measure to somewhat minimize any outside influences.

Currently, trial courts handle the mention of inadmissible evidence and other outside information in the form of admonitions.<sup>156</sup> When the publicity surrounding a case is significant, the judge may caution the jurors to ignore the information completely.<sup>157</sup> While some research suggests admonitions can be useful in minimizing the media's effects, other more recent studies dispute that finding.<sup>158</sup> One such study exposed participants to either factually or emotionally oriented pretrial publicity before administering jury instructions that either admonished jurors to disregard the publicity or did not instruct them to do so.<sup>159</sup> The results demonstrated the instruction was ineffective at reducing the effects of both types of publicity.<sup>160</sup> By understanding the nuances of admissibility in a criminal trial, the jury may be more likely to see the benefit in disregarding certain kinds of evidence.<sup>161</sup>

Overall, the media, predominantly through information disseminated by the prosecution, not only provides factual information to the public but also preys on emotions, an effect which cannot be quantified. The intangibility of emotional and psychological effects makes it nearly impossible to completely diminish prejudice from society as a whole, much less eradicate it from jurors. As it appears from the research discussed, due to the intangible effects of emotionally charged pretrial publicity, the effectiveness of available counteracting procedures is difficult to quantify. As demonstrated, the social sciences have created a large body of work covering this subject; yet the conclusion remains that some questions surrounding the media's influences on juries will never be answered. While the actual effect of the available remedies is perhaps unquantifiable, prosecutors and defense attorneys believe advantages are to be gained through them, whether real or imagined. Thus, in practice, that perception of practitioners will ensure the continued use of these measures, despite questions surrounding their effectiveness. In other words, no matter any actual advantage a "remedy" may provide, the parties seemingly accept the remedies just as they are defined. Their mere availability in some way gives the remedies credibility as providing an advantage if awarded.

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156. In my experience, when inadmissible evidence is referred to in the presence of the jury, the court directly addresses the jurors and instructs them to disregard what they heard with respect to such inadmissible evidence.

157. Lieberman & Arndt, *supra* note 2, at 684.

158. *See id.* at 684–85.

159. *See* Kramer et al., *supra* note 115, at 409, 415–20.

160. *Id.* at 409.

161. Lisa Eichhorn, Note, *Social Science Findings and the Jury's Ability to Disregard Evidence Under the Federal Rules of Evidence*, 52 LAW & CONTEMP. PROBS. 341, 353 (1989).

#### IV. ETHICAL AND DISCIPLINARY RULES

An interesting dynamic in the debate over media coverage and juror influence is the interplay of the ABA's Model Rules of Professional Conduct, the New York Rules of Professional Conduct, and the Local Rules of the U.S. District Courts for the Southern and Eastern Districts of New York.<sup>162</sup> Although the ethical guidelines and rules, as set forth in each, might seek to mitigate any pretrial release of prejudicial information, in my experience they in fact set forth bodies of rules that open the door for such foul play on the part of the prosecution while effectively restricting the defense. Accordingly, as abused by the prosecution, the First Amendment protections of the media, in combination with the ethical rules, are detrimental to the liberty interests of the high-profile criminal defendant. All too common is the press statement made by an ambitious prosecutor announcing that a criminal defendant has been brought to justice. Such statements are made both at live press conferences and in print, containing information that, in my experience, is prejudicial to the defense. What then ensues is often irreversible prejudice, where the defense is forced to seek the conventional remedies discussed herein, as effective or ineffective as they may be; in some instances, no remedy exists to cure the damaging information.

The ABA's Model Rule of Professional Conduct 3.6 ("Model Rule 3.6") and the New York Rule of Professional Conduct 3.6 ("New York Rule 3.6"), each with respect to trial publicity, mirror each other in part, permitting a lawyer to make "a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client" in order to and only as much as is required to "mitigate the recent adverse publicity."<sup>163</sup> However, New York Rule 3.6 differs from the correlative Model Rule 3.6 in one area of particular significance.<sup>164</sup>

New York Rule 3.6 continues to identify the "character, credibility, [or] reputation . . . of a party" involved in the proceeding as subjects of statements that are likely to materially prejudice an adjudicative proceeding, where Model Rule 3.6 does not.<sup>165</sup> New York Rule 3.6 is more closely tailored with the correlative Local Criminal Rule 23.1 in the Local Rules of the U.S. District Courts for the Southern

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162. See MODEL RULES OF PROF'L CONDUCT R. 3.6 (2009); N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.0, r. 3.6 (2009); S.D. & E.D. N.Y. Loc. CRIM. R. 23.1.

163. MODEL RULES OF PROF'L CONDUCT R. 3.6(c) (2009).

164. N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.0, r. 3.6 (2009).

165. *Id.* § 1200.36(b). Please refer to the following real-life example for the operation of this statute: The Kings County District Attorney is quoted in a Tuesday, February 10, 2009, article in the *New York Daily News* saying, in reference to the defendant, "He gained a reputation as someone who would sell to any body builder, weightlifter or athlete," and "Dr. Lucente's greed resulted in the tragic death of two people." Scott Shifrel, *Dr. Roid's New Emergency Clinic Chief Tied to Finest RX Accused of Boosting Bodybuilders, Kickbacks*, N.Y. DAILY NEWS, Feb. 11, 2009, at 18 [hereinafter Shifrel, *Clinic Chief*]. Both quotations speak directly to those material prejudices identified in N.Y. Rule 3.6. Unfortunately, the binding nature of Local Criminal Rule 23.1 did not apply. However, redeeming for the defendant, and to illustrate the vindictiveness of the statements made to the press, the defendant was offered a plea deal three weeks into trial where he plead guilty to one count of conspiracy and received probation. Scott Shifrel, *No Jail Time for S.I. Doc Who Sold Steriods*, N.Y. DAILY NEWS, May 13, 2010, at 20. The

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and Eastern Districts of New York (“Local Criminal Rule 23.1”).<sup>166</sup> Both New York Rule 3.6 and Local Criminal Rule 23.1, in my opinion, preclude the defense from mitigating the adverse effect that the combination of press protection coverage and public accusation and ridicule of the defendant has on the public, judges, jurors, and an overall fair trial. While Local Criminal Rule 23.1 does not bind lawyers involved in state litigation, New York Rule 3.6 details the minimum standard which a practitioner’s conduct should not only meet, but exceed in order to ensure the “law will continue to be a noble profession.”<sup>167</sup>

Local Criminal Rule 23.1(a) states in pertinent part that a lawyer may not release or authorize the release of non-public information or opinion which a reasonable person would expect to be disseminated by means of public communication, in connection with pending or imminent criminal litigation with which they are associated, if there is a *substantial likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice.*<sup>168</sup>

The effective elements of the rule are those that restrict. But, the ineffective and prejudicial elements are those that permit. Local Criminal Rule 23.1(e) capriciously identifies subject matters that do not have substantial likelihood to interfere with a fair trial when disseminated, including announcements of the facts and circumstances of arrest, physical evidence seized, and the nature of the charge along with the text of the charge and a further description of the offense.<sup>169</sup> Inescapably, and in my experience, Local Criminal Rule 23.1 has an effect contrary to its stated purpose—the avoidance of interference with a fair trial and prejudice to the due administration of justice—when it is contemplated in the context of the damage caused by the dissemination of public information, particularly the information that is allowed to be disseminated under Local Criminal Rule 23.1.

The term “non-public” as used in Local Criminal Rule 23.1 qualifies the information precluded from release and further skews the rule in favor of the prosecution, which is permitted to release a public statement including allegations as mentioned above.<sup>170</sup> In my experience, investigative agencies and prosecutor’s offices take full advantage of their ability to use press releases by stating verbatim the text of the indictment. The text of an indictment is not restricted to a restatement of the law and, in my practice, I have encountered indictments containing very detailed accounts of the allegations, worsening the prejudicial effect on the criminal defendant. Prosecutors and law enforcement officials also make publicly televised statements.

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indictment contained seventy-six counts of criminal sale of a prescription for a controlled substance. Shifrel, *Clinic Chief, supra*.

166. S.D. & E.D. N.Y. Loc. CRIM. R. 23.1.

167. N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.0, r. 3.6 (2009).

168. S.D. & E.D. N.Y. Loc. CRIM. R. 23.1(a) (emphasis added).

169. *Id.* R. 23.1(e).

170. *Id.* R. 23.1(a).

Clearly, allegations are not equated with “opinions” that are prohibited from dissemination by lawyers in accordance with Local Criminal Rule 23.1.<sup>171</sup> However, the prosecution need not opine as to the merits and quality of their case in order to impair the defense, as the damage is done under the very clear authority provided by Local Criminal Rule 23.1(e) through their mere releasing of statements about the crime alleged.

Local Criminal Rule 23.1(e) does not, however, impose an absolute bar on comments from the defense. It permits “[a]n announcement, *without further comment*, that the accused denies the charges, and a brief description of the nature of the defense.”<sup>172</sup> That which Local Criminal Rule 23.1(d) identifies as information precluded from dissemination is the very same information that, if disclosed, would provide the defense a fair chance of combating the incriminating effect of the prosecution’s statements about the defendant in the media trial: specifically, “[t]he identity, testimony or credibility of prospective witnesses” and “[a]ny opinion as to the accused’s guilt or innocence or as to the merits of the case or the evidence in the case.”<sup>173</sup> A defendant’s protections under Local Criminal Rule 23.1 are *de minimis* when considered in terms of the protections it affords to the prosecution’s witnesses and the prosecution’s administration of justice free from prejudice.

Prosecutors have very little to gain from violations of Local Criminal Rule 23.1 because, as demonstrated above, their benefits come with compliance with the rule. However, the defense has much to gain by commenting within the scope of Local Criminal Rule 23.1 or even in defiance of its confines. The press itself is not confined by Local Criminal Rule 23.1, and if the defense were to divulge information in violation of the rule, the press would publish such violative disseminations.<sup>174</sup> However, in highly publicized trials, live television provides the only true outlet for the defense to effectively rebut any negative media attention and public accusation. Such statements are primarily made upon exit from the courthouse. Yet, if followed, Local Criminal Rule 23.1 bars the defense from using the same outlet (e.g., television) that is used by the prosecution to cause a deleterious effect on the defendant through the release of public information and denies the defense an opportunity to meaningfully rebut the allegations.

Recognizing there may be times when Local Criminal Rule 23.1 is violated, in my experience, sanctions for violation of Local Criminal Rule 23.1 are seemingly unevenly applied to prosecutors and defense counsels. Punishment for violation of Local Criminal Rule 23.1 falls under the Local Rule of the U.S. District Courts for the Southern and Eastern Districts of New York 1.5 (“Local Civil Rule 1.5”).<sup>175</sup> Local Civil Rule 1.5 articulates sanctions for a violation of Local Criminal Rule 23.1 that include letters of reprimand or admonition, censure, suspension, and even an

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171. *Id.* (precluding the release or authorization of the release of opinion).

172. *Id.* R. 23.1(e)(7) (emphasis added).

173. *Id.* R. 23.1(d)(4), (7).

174. *See id.* R. 23.1.

175. S.D. & E.D. N.Y. Loc. Civ. R. 1.5.

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order of disbarment.<sup>176</sup> Prosecutors, in what appears to be a façade of courtesy, are quick to send letters to defense lawyers at the first slip of the tongue by the defense, articulating the availability of the prosecutor's remedy for when defense counsel allegedly impairs the fair administration of justice—the filing of a sanctions motion for violation of Local Criminal Rule 23.1. Many times, the judge simultaneously receives that same letter from the prosecution, notifying the court that, although no motion has been made, a violation of Local Criminal Rule 23.1 has occurred nonetheless. The defense lawyer, in order to advocate for his high-profile client, potentially faces disbarment under the very same rules that both permit the prosecution to exploit the media's protections under the First Amendment and restrict the defendant's free speech. The damage caused by the dissemination of public information and information permissible under Local Criminal Rule 23.1 is essentially irreversible, leaving the defense to seek a conventional remedy, such as venue change, or no remedy at all.

### V. TRIAL PUBLICITY AND THE TRIAL OF JOHN A. GOTTI III, A.K.A. "JUNIOR"

The notoriety of criminal cases is affected by the celebrity of the defendant, the nature of the crime, and the underlying social issues; but sometimes the defendant's name alone is enough to generate a wall of photographers at the courthouse steps.<sup>177</sup> Some of the most prominent examples in recent history include the four trials of John A. Gotti III, commonly referred to by the government and the press as John Gotti, Jr., or simply "Junior."

Gotti's father, John J. Gotti, Sr., ("Gotti Sr.") rose to the position of boss of the Gambino crime family, one of the most powerful criminal syndicates in the country at the time, by assassinating its former boss, Paul Castellano, in front of Spark's Steakhouse on East 46th Street in Manhattan in 1985.<sup>178</sup> Gotti Sr. was flamboyant, charismatic, and a media sensation. He escaped conviction in three separate trials,

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176. See *id.* R. 1.5(c).

177. A recent instance of a defendant claiming prejudice due to the notoriety of the case and extent of media coverage is that of Jeffrey Skilling, the former CEO of Enron. In *Skilling v. United States*, 130 S. Ct. 2896 (2010), the Supreme Court held that pretrial publicity and community prejudice did not prevent Skilling from obtaining a fair trial. The Court found that Skilling did not establish that a presumption of juror prejudice or that actual bias infected the jury that tried him. *See id.* at 2920–25. Additionally, the Court held that the district court did not err in denying Skilling's requests for a venue transfer. *Id.* at 2917. Skilling, despite the notoriety of Enron, was not a household name like that of John Gotti. In my review of the approximately five hundred juror questionnaires during the Gotti trial, the number of prospective jurors who were unfamiliar with the Gotti name was nearly nil. Gotti was a true high-profile defendant, making the selection of an impartial jury all the more daunting. *Skilling* is a valuable test case in the ongoing tension between media trial prejudice and the defense because the defendant, in possibly the most highly publicized corporate criminal case in American history, sought a conventional remedy and was denied.

178. See Susan Heller Anderson & David W. Dunlap, *New York Day by Day: Seeking Castellano's Killers*, N.Y. TIMES, Dec. 30, 1985, at B3; Editorial, *John Gotti, Guilty at Last*, N.Y. TIMES, Apr. 3, 1992, at A28.

each time leading to a flurry of headlines and pictures.<sup>179</sup> It was not until 1992 when his underboss—the second-in-line in the Gambino family, Salvatore “Sammy the Bull” Gravano—became a cooperating witness, that the government was able to convict Gotti Sr. This act of treachery in itself was tabloid gold; so were the nine days of testimony that followed.<sup>180</sup>

Six years later, the Gotti name would again hit the front page when John A. Gotti III (“Gotti”) was arrested for various mafia-related crimes.<sup>181</sup> Gotti later pled guilty and served approximately five years at the Raybrook Federal Correction Institute.<sup>182</sup> Shortly before his release, Gotti was indicted once again for mob-related activities.<sup>183</sup> He decided to fight those new charges. Gotti’s defense was that he had withdrawn from the conspiracy, i.e., he had removed himself from the Gambino crime family, when he pled guilty in his prior case.<sup>184</sup> Since the statute of limitations for RICO conspiracy is five years,<sup>185</sup> Gotti could be acquitted if he could prove by a preponderance of the evidence his withdrawal from the mafia. The case ended in a hung jury. The government tried the case two more times, but both ended in mistrials as well.<sup>186</sup> Finally, on October 20, 2006, acting U.S. Attorney Michael Garcia announced that retrying Gotti “is not in the interests of justice in light of the three prior hung juries in the case.”<sup>187</sup>

However, two years later, in 2008, Gotti found himself under indictment yet again. This time, Gotti was indicted by the U.S. Attorney’s Office in Tampa, Florida.<sup>188</sup> The court granted the defense’s request for a venue change and the trial was moved to the Southern District of New York, explaining as follows:

Although no verdict or other adjudication has occurred in New York with respect to the charged RICO conspiracy and, therefore, the bar of double jeopardy is unavailable to Gotti to defeat the Florida charge, the “convenience” and “interests of justice” provisions of Rule 21(b) decisively command both

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179. See, e.g., Selwyn Raab, *After 2 Trials, a Third Unfolds for John Gotti*, N.Y. TIMES, Jan. 20, 1990, § 1, at 28; John J. Goldman, *Oft-Acquitted ‘Teflon Don’ Face Toughest Trial Crime*, L.A. TIMES, Feb. 9, 1992, at A4.

180. Arnold H. Lubasch, *Gravano Ends Testimony After 9 Exhaustive Days*, N.Y. TIMES, Mar. 14, 1992, § 1, at 29.

181. See Tracy Connor, *Not-So-Jolly Goodfellas Cram Court*, N.Y. POST, Jan. 22, 1998, at 16.

182. See Anemona Hartocollis, *Social Club Decor Plays Role in Gotti Racketeering Trial*, N.Y. TIMES, Mar. 3, 2006, at B2; Anemona Hartocollis, *Tape Shows Gotti Withdrawn from Mob Life, Defense Says*, N.Y. TIMES, Mar. 8, 2006, at B2 [hereinafter Hartocollis, *Tape Shows Gotti*].

183. See Hartocollis, *Tape Shows Gotti*, *supra* note 182.

184. See Patricia Hurtado, *In End, Charges Usually Stick; ‘Junior’ Spared for Now by Hung Jury but History Shows in Most Mob Cases Prosecutors Try Again—And Win*, NEWSDAY (New York), Sept. 26, 2005, at A12.

185. 18 U.S.C. § 3282(a) (2006).

186. Anemona Hartocollis, *A Second Mistrial for Gotti as the Jury Deadlocks*, N.Y. TIMES, Mar. 11, 2006, at A1; Timothy Williams, *For the Third Time, a Jury Fails to Convict Gotti*, N.Y. TIMES, Sept. 28, 2006, at A1.

187. E.g., Alan Feuer, *After 3 Tries to Convict Gotti, a Decision Not to Make It 4*, N.Y. TIMES, Oct. 21, 2006, at B3.

188. See United States v. Gotti, 593 F. Supp. 2d 1260 (M.D. Fla. 2008).

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the transfer of this prosecution to New York and the interruption of this attempt by the United States to pursue in Florida an indictment that results in material and unwarranted inconvenience and that stands athwart the manifest interests of justice.<sup>189</sup>

This trial, like the others, was heavily covered by the media and often marred by false or prejudicial information released by the press. Gotti was originally charged with only one count of RICO conspiracy;<sup>190</sup> yet the press reported that Gotti had been charged with three separate gangland-style murders.<sup>191</sup> It is difficult to imagine anything more prejudicial than claiming a defendant has been charged with multiple murders when in fact the indictment clearly reads only one count of RICO conspiracy.<sup>192</sup> Only a few weeks before the trial was to start, the indictment was superseded and two additional charges were added, both drug-related murders that, according to the press, Gotti had already been charged with; however he was charged with conspiracy to murder, not a substantive murder.<sup>193</sup> There was a strong probability that the grand jury that returned the superseding indictment believed that, as a result of media reports, Gotti had already been charged with murder counts. This presumably made it less difficult for the U.S. Attorney's Office to supersede the indictment.

The murders alleged in the superseding indictment did not occur within the jurisdiction of the Southern District, where the trial was to be conducted, but rather in the Eastern District.<sup>194</sup> Accordingly, and well within the scope of the federal rules, the defense moved to have the new charges tried in the appropriate jurisdiction—the Eastern District of New York.<sup>195</sup> Despite the previous judge's clear agreement with the legal argument presented by the defense in the initial venue change motion, the press put a negative spin on the new venue change motions filed in response to the prosecution's improper choice of venue: one headline read, *Team Gotti in Trial Hopscotch*.<sup>196</sup>

Before the trial began, it became clear that the media had determined Gotti's guilt and had elected to ignore any positive information that came to light. In late June 2009, Gotti moved for a second time for release on bail.<sup>197</sup> The memorandum

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189. *Id.* at 1271.

190. *Id.* at 1261 ("The indictment only charges one crime . . .").

191. See Elaine Silvestrini & Neil Johnson, *Gotti Accused of Murder Conspiracy; State Also Indicts Tampa Man*, TAMPA TRIB., Aug. 6, 2008, at 1.

192. See *Gotti*, 593 F. Supp. 2d at 1261.

193. Superseding Indictment, United States v. Gotti, 660 F. Supp. 2d 512 (S.D.N.Y. 2009) (No. S1-08-CR-1220 (PKC)), 2009 WL 5189884.

194. See Kirsten Fleming, *Team Gotti in Trial Hopscotch*, N.Y. Post, Sept. 2, 2009, at 27.

195. *See id.*

196. *Id.*

197. After the venue transfer, his first attempt to receive bail was denied in January of 2009. See Thomas Zambito, *No Bail, New Judge on Job as Feds Try Again to Nail Junior*, N.Y. DAILY NEWS, Jan. 16, 2009, at 26.

that accompanied the motion was over twenty pages long and had multiple exhibits.<sup>198</sup> The press chose to focus on two small parts of the memorandum: Gotti's grade point average in prison and his kidney problems.<sup>199</sup> Media articles reporting on the memorandum often included snide, sarcastic comments such as the headline, *He's Gone from the Most-Wanted List to the Dean's List*.<sup>200</sup> Missing were the extensive legal arguments and Gotti's full compliance with previous bail conditions and court orders. Throughout this short news cycle, reporters, when questioning Gotti's defense attorneys, focused their questions on Gotti's health and intelligence, and rarely strayed into the subject of the merits of the bail application.

Beyond the usual media publicity a high-profile criminal trial receives, various individuals used the Gotti trial to generate publicity through media controversy. Curtis Sliwa, a New York radio personality and founder of the Guardian Angels,<sup>201</sup> a nonprofit organization with a mission of advancing public safety, is one such individual. Sliwa has a tarnished past with respect to generating publicity for himself and his organization.<sup>202</sup> In previous trials, Gotti had been charged with ordering the kidnapping and shooting of Sliwa, but was never convicted.<sup>203</sup> Throughout the pretrial hearings in the 2009 trial, Sliwa and usually three or four other Guardian Angels were permanent fixtures in the back of the courtroom. Sliwa made himself a target for questioning by the press and created media attention on his own. After a hearing on June 17, 2009, Sliwa claimed Gotti "eye-fornicat[ed]" him, pointed directly at him, and then told Sliwa that he was "going down."<sup>204</sup> Sliwa then claims he "flipped [Gotti] the bird" and cursed him out before storming out of the courtroom.<sup>205</sup>

The reality of the matter is quite different. On the day in question, Sliwa was sitting in the last row of the courtroom and Gotti at the defense table. Gotti was surrounded by his attorneys, U.S. Marshals, court officers, an FBI agent, and Assistant U.S. Attorneys. None of these parties saw or were aware of any threat until after Sliwa made his statements to the press outside the courthouse.<sup>206</sup> Logically, with all those people watching Gotti's every move, especially the U.S. Marshals hired for that very reason, someone would have heard or seen the threat Sliwa

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198. Bail Memorandum, United States v. Gotti, 660 F. Supp. 2d 512 (S.D.N.Y. 2009) (No. 08-CR-1220 (PKC)).

199. See Bruce Golding, *Gotti an Honors Student*, N.Y. Post, June 30, 2009, at 21; Thomas Zambito, *Oh, Gotti's Aching Kidneys! Junior Sez Stone Agony Worse Than Childbirth*, N.Y. DAILY NEWS, July 8, 2009, at 21.

200. Golding, *supra* note 199.

201. See Laurie Goodstein, *Guardian Angels' Chief Clouds His Reputation; Sliwa Admits He Lied to Gain His Wings*, WASH. POST, Nov. 28, 1992, at A3.

202. See *id.*; Joe Treen & Maria Eftimiades, *Tarnished Angel; Halo Askew, Guardian Angel Leader Curtis Sliwa Admits He Lied for Publicity*, PEOPLE MAG., Dec. 14, 1992, at 133.

203. United States v. Gotti, 457 F. Supp. 2d 395, 400–01 (S.D.N.Y. 2006).

204. Bruce Golding, *Gotti's Evil Eye—Sliwa Claims Death Threat in Courtroom*, N.Y. Post, June 18, 2009, at 7.

205. *Id.*

206. John Riley, *Sliwa Accuses Gotti Jr. of Threatening Him, Again*, NEWSDAY (New York), June 17, 2009, available at 2009 WLNR 11597037.

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described. The FBI agent, the court officers, and the prosecutors said they could not hear what Gotti said;<sup>207</sup> but somehow, from a much greater distance, Sliwa claimed to hear perfectly and clearly. The defense attorneys explained that Gotti was telling his attorneys that he would meet them downstairs and had not addressed Sliwa at all.<sup>208</sup> Even though many of the articles included the explanation from Gotti's defense attorneys, the headlines and the majority of the content of the articles gave credence to Sliwa's claimed witness intimidation.<sup>209</sup>

Prejudicial media reports stemmed from and came during jury selection. Due to the notoriety of the case and the defendant, the *voir dire* process was arduous. Attorneys on both sides waded through over five hundred jury questionnaires. At the request of the government, the jury was anonymous, just like the three previous Gotti trial juries. The anonymous designation of the jury created an assumption that there was a potential danger to the jurors.<sup>210</sup> To further complicate the process, jurors quickly learned that saying something disparaging about the defendant would get them excused from the case. The newspapers reported on some of these comments from jurors, further prejudicing the defendant. One prospective juror, commenting on his lack of desire to serve, said in the presence of other prospective jurors—and to the media's delight—“[f]orget it, you'll get a bullet in the head.”<sup>211</sup> If the alleged necessity of anonymity was not enough to prejudice the jury, the comments from fellow potential jurors were.

After the jury was selected, along with six alternates, the *New York Daily News* released a profile of each of the twelve jurors.<sup>212</sup> The article published a chart that included each jurors' gender, race, and occupation.<sup>213</sup> The jury had already been warned about the importance of maintaining their anonymity throughout the trial, but after the publication of the *New York Daily News* article, their anonymity had been diminished. The need for anonymity may itself have intimidated the jurors; however, even if it had not, the removal of that protection may have triggered anxiety or intimidation.

Even the jurors themselves created headlines. At one point during the trial, a juror had to be removed from the jury after claiming a near car accident was an

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207. *Id.*

208. Priscilla Ilarrraza & Alice McQuillan, *Sliwa Claims Gotti “Eye Fornication” in Court*, NBC N.Y., June 18, 2009, <http://www.nbcnewyork.com/news/local/Sliwa-Claims-Gotti-Eye-Fornicaiton.html>; Bruce Golding, *Gotti’s Evil Eye—Sliwa Claims Death Threat in Courtroom*, N.Y. Post, June 18, 2009, at 7.

209. See, e.g., Golding, *supra* note 208; Riley, *supra* note 206.

210. For a brief discussion of anonymous juries, see Ronald Smothers, *A Mixed Verdict on Anonymous Jurors*, N.Y. TIMES, Oct. 13, 1985, at E6.

211. Alison Gendar & Larry McShane, *Judge of the Jury: Jr. Gotti’s Lawyers Listen When Boss Suggests Picks for Panel*, N.Y. DAILY NEWS, Sept. 17, 2009, at 4.

212. *Id.*

213. *Id.*

attempt by the mafia to intimidate her.<sup>214</sup> The juror claimed that a car nearly struck her after she exited a city bus, and that the incident was somehow related to the trial.<sup>215</sup> After a series of questions, the judge determined that it was very unlikely that foul play had occurred, but agreed with the defense that it would be “safe” to dismiss her.<sup>216</sup> While answering the judge’s questions and expanding upon her story, it was revealed that the juror was not injured, and had taken a bus route out of her ordinary course of travel—making it unlikely that there was any attempt to intimidate her.<sup>217</sup> To further contradict her alleged fear of intimidation, the person whose car almost hit her did not mention the trial and may have asked if she was all right.<sup>218</sup> During the trial, the juror had been seen with her eyes closed on more than one occasion and the news accounts seem to imply that her “mishap” may have just been an excuse to escape jury duty.<sup>219</sup> Although her fellow jurors claimed she did not share her account with them directly, it is not difficult to imagine that the media made them aware of the alleged jury intimidation. The court did not tell the remaining jurors why one of them had been dismissed, which may have caused them to create their own reasons, especially after listening to cooperating witnesses testify about how they had tampered with juries in previous organized crime trials.

Unfortunately, that was not the end of the jury-created headlines. Further into the trial, a letter to the judge from an anonymous juror claimed that juror number seven did not get along with the other jurors, was intending to intentionally delay deliberations, and was infatuated with one of the defense attorneys.<sup>220</sup> Two of New York City’s largest newspapers, the *New York Daily News* and the *New York Post*, made copies of the letter available on their websites.<sup>221</sup> Perhaps most disturbing about the letter was that the writer, allegedly a jury member, had confused one of the defense attorney’s names with that of a high-profile, recently convicted mafia hitman.<sup>222</sup> Gotti said, in an off-the-cuff comment to radio producer Frank Morano,

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214. Alison Gendar & Larry McShane, *Ya Gotti Go, Judge Tells Antsy Juror*, N.Y. DAILY NEWS, Oct. 14, 2009, at 3.

215. *Id.*

216. *Id.*

217. *Id.*

218. The author observed these statements by the juror firsthand during the trial proceedings.

219. See Gendar & McShane, *supra* note 214 (stating that juror number three was “jumpy” after the incident, and that, “[a]t several points during the trial, she was spotted with her eyes closed in the juror box—prompting Castel to instruct jurors to ‘get up and stretch’”).

220. See Alison Gendar & Larry McShane, *Junior’s Circus. Infighting Among Junior Gotti Jurors as Anonymous Snitch Reveals Chaos*, N.Y. DAILY NEWS, Oct. 28, 2009, at 2; Bruce Golding, *Diva Juror at Gotti Trial*, N.Y. POST, Oct. 28, 2009, at 5.

221. See Letter from A Concerned Juror to Hon. P. Kevin Castel, U.S. Dist. Ct. for the S. Dist. of N.Y. (Oct. 25, 2009), [http://www.nypost.com/r/nypost/2009/10/27/news/media/Gotti\\_juror\\_letter.pdf](http://www.nypost.com/r/nypost/2009/10/27/news/media/Gotti_juror_letter.pdf); *id.*, [http://www.nydailynews.com/news/ny\\_crime/galleries/gotti\\_jurors\\_letter\\_to\\_the\\_judge/gotti\\_jurors\\_letter\\_to\\_the\\_judge.html](http://www.nydailynews.com/news/ny_crime/galleries/gotti_jurors_letter_to_the_judge/gotti_jurors_letter_to_the_judge.html).

222. See letter cited *supra* note 221.

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an avid observer of Gotti's three prior trials, "The juror thinks the guy who represents me is a five-time murderer! What shot do I have?"<sup>223</sup> Apparently, either the juror thought that Gotti's attorney was a convicted murderer or the juror did not pay close attention to the trial testimony. Either way, the impact would have a negative effect on the juror's perception of Gotti. When questioned about any possible violations of juror number seven's oath, only one juror indicated that it was possible: "Maybe . . . I think if someone talks to her about it on the outside, they may bring information to her about what they heard."<sup>224</sup> After the judge individually questioned each juror, he declined to dismiss any at that time.

The infighting among the jurors did not end there. The anonymous letter to the judge appeared to further deteriorate the already acrimonious relationship among some of the jurors. Specifically, it seemed that juror number seven believed the letter was written by juror number eleven and made her disdain clear.<sup>225</sup> She taunted juror number eleven by singing, "hater, hater."<sup>226</sup> As a result, the judge replaced both jurors with alternates.<sup>227</sup> The removal of jurors, one accused of being sympathetic to the defense, caused Gotti's mother to lash out against the judge and the prosecutors: "They're railroading you! They're doing to you what they did to your father! . . . They're the gangsters, right there!"<sup>228</sup> As Gotti attempted to calm his mother, she was quickly escorted out of the courtroom by family and U.S. Marshals.<sup>229</sup> The jury had become a story unto itself. Apparently, some of the jurors were more concerned with each other and their public appearance than the actual trial and the media was more than willing to fuel the fire. The judge never mentioned the letter to the jurors, so presumably they were only made aware of its existence and contents through the media.

Although the trial had many interesting moments, the tensest was an argument between Gotti and the prosecution's cooperating witness, John Alite. Alite had just finished testifying about the strangling and murder of a young woman in a hotel room, claiming it was committed by one of Gotti's uncles.<sup>230</sup> During the cross-examination, defense attorneys implied that Alite had been the true perpetrator behind the murder. At that point, the judge stopped the trial for a lunch break. After the jury left the courtroom, the U.S. Marshals began to escort Alite off the witness

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223. See letter cited *supra* note 221.

224. See Gendar & McShane, *supra* note 220.

225. Bruce Golding, *Jury Mob Scene—Panelists Brawling Over Gotti*, N.Y. Post, Nov. 3, 2009, at 19.

226. *Id.*

227. See Bruce Golding, *Blowing Up Gotti! Ma in Court Rage*, N.Y. Post, Nov. 4, 2009, at 5; Alison Gendar & Larry McShane, *Mother of All Tirades Unleashed in Court 'F---- Animals! They're Railroading You . . . Trying to Do What They Did to Your Father!'*, N.Y. DAILY NEWS, Nov. 5, 2009, at 8.

228. See, e.g., Gendar & McShane, *supra* note 220; Jerry Capeci, *Mama Gotti Blows Her Stack; Mob Big OK'd Hit on Junior*, HUFFINGTON POST, Nov. 9, 2009, [http://www.huffingtonpost.com/jerry-capeci/mama-gotti-blows-her-stac\\_b\\_350005.html](http://www.huffingtonpost.com/jerry-capeci/mama-gotti-blows-her-stac_b_350005.html).

229. See Capeci, *supra* note 228.

230. Alison Gendar & Larry McShane, *'I'll Kill You!' Junior Mouths in Court Rant. Faces off with Star Witness and Former Best Pal John Alite at Racketeering Trial*, N.Y. DAILY NEWS, Oct. 9, 2009, at 7.

stand. Alite stopped right in front of Gotti and began to taunt him. Gotti responded by yelling, “You fag! . . . Did I kill little girls? . . . You’re a dog! You’re a dog! You’re a punk. You always were a dog your whole life, you punk dog. . . . You want to strangle little girls in a motel?”<sup>231</sup>

After lunch, the judge conducted a short hearing to get to the bottom of the incident. Alite claimed that Gotti mouthed to him, “I’ll kill you,” prompting Alite to say, “You got something to say to me?”<sup>232</sup> According to Alite, it was then that Gotti became vocal. Prosecutors told the judge that a U.S. Marshal witnessed Gotti mouth the threat to the witness.<sup>233</sup>

The next day, both the *New York Post* and the *New York Daily News* had Gotti on their front pages with the quotation “I’ll kill you,” reporting the alleged threat as having actually occurred.<sup>234</sup> Although the jury was consistently reminded not to read the papers or watch the news, it would have been very difficult for them to avoid the big picture of Gotti on every news rack in the city. A day later, a “knowledgeable source” leaked to the press that the prosecution was contemplating charging Gotti with witness intimidation,<sup>235</sup> further tainting the jury. Approximately one week after that, the judge stated that he had requested the U.S. Marshals to conduct their own investigation of the incident and that the investigation revealed that none of the U.S. Marshals present that day saw Gotti mouth anything to the witness,<sup>236</sup> casting serious doubt on the credibility of Alite and the prosecution. Unfortunately, few media outlets reported the judge’s findings, and those that did buried the articles deep within the paper; very different from the sensationalistic, front-page articles addressing the same occurrence. The damage had already been done. In the end, the case resulted in a mistrial, the fourth hung jury in five years.<sup>237</sup>

Due to the anonymous jury, it is impossible to fully determine the effect the media had on the jurors and their decisions. Would the jurors who voted guilty still have done so if the prejudice from the pretrial and trial publicity did not occur? One thing is certain: the Gotti name sold papers, drew viewers, and created a media frenzy. The Supreme Court recently reasoned in *Skilling v. United States*, where a presumption of juror prejudice was at issue, that “[i]t would be odd for an appellate

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231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*; Bruce Golding, Jr. Explodes at Court Canary; Tells Best Pal: I’ll Kill You!, N.Y. Post, Oct. 9, 2009, at 5. Please note that only headlines appear on the front page of the *New York Post* and the *New York Daily News*, and citations are to the text of each article found deeper within the newspaper.

235. Bruce Golding, Feds Eyeing ‘Junior’ over Court Curses—Gabby Gotti Talks His Way into Trouble, N.Y. Post, Oct. 10, 2009, at 8.

236. Alison Gendar & Larry McShane, Marshalls Didn’t Catch Junior Lipping Off. Judge Sez, N.Y. DAILY NEWS, Oct. 15, 2009, at 22; Bruce Golding, Didn’t See Nothin’ at the Gotti Trial, N.Y. Post, Oct. 16, 2009, at 22.

237. See, e.g., Alison Gendar, Kenny Porpora & Larry McShane, Stuck Jury Could Be Huge for Jr. Gotti. But Judge Tells ‘Em Keep Working, N.Y. DAILY NEWS, Nov. 20, 2009, at 4; Associated Press, ‘Junior’ Gotti Freed after 4th Mistrial, Bos. GLOBE, Dec. 2, 2009, at 2.

## THE MEDIA, THE JURY, AND THE HIGH-PROFILE DEFENDANT

court to presume prejudice in a case in which jurors' actions run counter to that presumption.”<sup>238</sup> The Court was referring to the fact that the jury in *Skilling* had acquitted the defendant on nine counts of insider trading.<sup>239</sup> Such an assertion neglects the fact that even when juror prejudice is present, the defense may nonetheless overcome meritless or weak allegations. The case of John A. Gotti is a perfect example of the power of the media to distort the facts of a criminal trial, influence the public, and infringe upon a defendant's right to a fair trial, even when the end result of the trial is favorable to the defendant.

### VI. CONCLUSION

History reflects the progression of press coverage in all mediums, in and out of the courtroom and before, during, and after a trial. And, as evidenced in part by the popularity of television dramas, the public has a seemingly insatiable appetite for crime stories. The grand stage of New York provides the ideal setting for the country to tune in, whether the story is real or fictitious. New York also provides the ideal setting for the prosecution to “chip away at” the high-profile criminal defendant's presumption of innocence by utilizing means of permissible press coverage, negative headlines, press releases, and public indictments. These practices inhibit the defense by creating a trial within the sphere of public sentiment, infringing upon constitutional protections fundamental to the American concept of a fair trial.

The general public's unfamiliarity with the intricacies of the criminal justice system unavoidably leads to its premature imposition of guilt on the defendant as a result of mere public accusation. Clearly, restrictions on what the defense lawyer is permitted to say publicly further exacerbate the issue and highlights the tension between two seemingly congruent First Amendment protections, press and speech, in so much as speech applies to adverse parties in litigation. Rare is the citizen who would argue that free press should not be just that—free reign to publish information the press deems newsworthy. But, as technology has advanced and press coverage of high-profile cases has increased to massive proportions, the prosecution's ability to disseminate prejudicial information, when coupled with the protections afforded to the press, unfortunately comes at the cost of the high-profile defendant's liberty.

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238. 130 S. Ct. 2896, 2916 (2010).

239. *Id.*