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Maya Vazquez

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## COMMENT

### JOHNNY AND THE JUICE: HOW SENSATIONALIZING TRIALS DILUTES METHODS OF JURY INSULATION

MAYA VAZQUEZ\*

Although juror impartiality and insulation are established cornerstones of American litigation and democracy,<sup>1</sup> the current technological age has served as a catalyst for juror bias and misconduct.<sup>2</sup> Court TV, trial broadcasting on demand, and the rise of viral judicial proceedings stand to threaten the efficacy of the Sixth Amendment's promise of an impartial jury by sensationalizing trials and increasing the likelihood that jurors are exposed to extrinsic information during the trial.<sup>3</sup> In the interest of maintaining jury impartiality and guaranteeing parties their Constitutional rights, courts should begin implementing rules that address the heart of the problem: the sensationalizing of trials.<sup>4</sup>

Since America's earliest trials, courts have had to grapple with the balance of public access to court proceedings and the protection of parties'

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1. See U.S. CONST. art. III (providing for a separate branch of judges who are insulated from outside influence by lifetime tenure); U.S. CONST. amend. VI (providing the right to have criminal cases heard by an impartial jury who will decide a case based solely on the evidence permitted by a presiding judge); THE FEDERALIST NO. 78, at 380 (Alexander Hamilton) (Lawrence Goldman ed., 2008) ("The judiciary . . . may truly be said to have neither force nor will but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." (emphasis omitted)).

2. See, e.g., Nancy S. Marder, *Jurors and Social Media: Is a Fair Trial Still Possible?*, 67 SMU L. REV. 617, 617–18 (2014); John Schwartz, *As Jurors Turn to Web, Mistrials Are Popping Up*, N.Y. TIMES (Mar. 17, 2009), <https://www.nytimes.com/2009/03/18/us/18juries.html>%20.

3. E.g., *California Jurors Using Internet During Trial Could Be Fined*, CBS BAY AREA (Apr. 25, 2016, 11:47 AM), <https://www.cbsnews.com/sanfrancisco/news/california-juror-internet-social-media-fines/> (discussing instances in Arkansas, New Jersey, and California where jurors' internet use caused severe issues during trial).

4. See *infra* Part II.

rights to a fair and impartial jury.<sup>5</sup> As time has progressed, the U.S. Supreme Court has spoken on the issues of improper communications with jurors,<sup>6</sup> how lower courts should handle prejudicial pretrial publicity,<sup>7</sup> and when live broadcasting of trials should be permitted.<sup>8</sup> The methods of jury insulation intended to remedy these issues, however, have remained largely unchanged since the 1980s.<sup>9</sup>

Meanwhile, technology and the means by which jurors receive information have rapidly evolved.<sup>10</sup> Whether jurors deliberately ignore the court's instructions to refrain from using social media during trials,<sup>11</sup> or whether they passively consume and are affected by news media,<sup>12</sup> information on demand is currently impacting juries.<sup>13</sup> Despite these occurrences, research in the field is unable to capture the extent of juror internet use during trials as jurors are reluctant to admit when they have been exposed to, or have intentionally sought out, information during a trial.<sup>14</sup> Given the lack of data documenting juror misconduct, how can we determine the best way to insulate juries in the modern era?

Part I of this Comment will discuss the history and evolution of jury instructions, including a constitutional overview and an explanation of foundational cases.<sup>15</sup> It will examine the various mechanisms and guidelines

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5. See, e.g., *United States v. Burr*, 25 F. Cas. 49, 51 (C.C.D. Va. 1807) (No. 14,692g) (holding that “light impressions which may fairly be supposed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of that testimony, constitute no sufficient objection to a juror”).

6. *Remmer v. United States*, 347 U.S. 227, 229–30 (1954) (“The trial court should not decide and take final action *ex parte* on information such as was received in this case, but should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate.”).

7. *Sheppard v. Maxwell*, 384 U.S. 333, 358 (1966) (“[T]he presence of the press at judicial proceedings must be limited when it is apparent that the accused might otherwise be prejudiced or disadvantaged. Bearing in mind the massive pretrial publicity, the judge should have adopted stricter rules . . .”).

8. *Estes v. Texas*, 381 U.S. 532, 549 (1965) (“The television camera is a powerful weapon. Intentionally or inadvertently it can destroy an accused and his case in the eyes of the public.”).

9. See *infra* Section I.C.

10. See *infra* Section I.D.

11. In an especially egregious instance, a juror “posted comments about the evidence as it was being presented during the trial on his ‘Facebook Wall,’ inviting his ‘friends’ who have access to his ‘Facebook’ page to respond.” *Juror No. One v. Superior Court*, 142 Cal. Rptr. 3d 151, 154 (Ct. App. 2012) (quoting declaration by Juror No. 5).

12. The average American spends 127 minutes per day on social networks, increasing the chances of passively or accidentally being exposed to information related to the trials they are participating in. See Brian Dean, *Social Network Usage & Growth Statistics: How Many People Use Social Media in 2022?*, BACKLINKO (Oct. 10, 2021), <https://backlinko.com/social-media-users>.

13. See *infra* Section I.D.

14. Thaddeus Hoffmeister & Ann Charles Watts, *Social Media, the Internet, and Trial by Jury*, 14 ANN. REV. L. SOC. SCI. 259, 264 (2018).

15. See *infra* Section I.A.

used to insulate jurors.<sup>16</sup> Part I will also discuss the history of cameras in the courtroom and the state of the law regarding broadcasting trials today.<sup>17</sup> Finally, Part I will survey scholarly works discussing the impact of technology on the various methods of jury insulation.<sup>18</sup>

Part II of this Comment will analyze two highly publicized cases, *People v. Simpson*<sup>19</sup> and *Depp v. Heard*,<sup>20</sup> by discussing the methods of jury insulation used by the courts.<sup>21</sup> Further, Part II will compare the jury instructions used with the model jury instructions for their respective states.<sup>22</sup> Next, Part II will argue that courts should implement rules that allow recordings of court proceedings to be broadcasted only after the jury has deliberated.<sup>23</sup> It will discuss why current methods of jury insulation, in conjunction with live broadcasting of court proceedings, are ineffective and unsustainable in the modern technological era.<sup>24</sup> Finally, Part II will attempt to address potential counterarguments in favor of broadcasting trials.<sup>25</sup>

## I. BACKGROUND

As long as there has been litigation in the United States, so too there has been an impartial jury serving as a hallmark of American freedom.<sup>26</sup> However, some experts believe that finding impartial jurors in today's technological age is nearly impossible.<sup>27</sup> Although news and society have evolved to keep up with the age of information, jury insulation and selection practices have remained largely unchanged since the 1980s.<sup>28</sup> These changes raise questions regarding how the rapid dissemination of information is impacting jury impartiality,<sup>29</sup> and whether common methods of jury insulation are still enough to ensure unbiased juries.<sup>30</sup>

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16. *See infra* Section I.B.

17. *See infra* Section I.C.

18. *See infra* Section I.D.

19. 2 Cal. Rptr. 2d 589 (Ct. App. 1991).

20. No. CL-2019-0002911, 2022 WL 2342058 (Va. Cir. Ct. June 24, 2022), *appeal withdrawn* No. 1062-22-4 (Va. Ct. App. Dec. 27, 2022).

21. *See infra* Sections II.A.–B.

22. *See infra* Sections II.A.1–2; II.B.1–2.

23. *See infra* Section II.C.

24. *See infra* Section II.C.1.

25. *See infra* Section II.C.2.

26. *See infra* text accompanying notes 81–84.

27. *See supra* note 2.

28. *See infra* Section I.C.

29. *See infra* Section I.D.

30. *See infra* Part II.

This Section provides an overview of (1) the history and evolution of jury insulation;<sup>31</sup> (2) the mechanisms and guidelines used to insulate juries;<sup>32</sup> (3) the history and current state of the law of cameras in courtrooms;<sup>33</sup> and (4) data and studies discussing the impact of technology on methods of jury insulation.<sup>34</sup>

#### *A. History and Evolution of Jury Insulation in the U.S.*

The Sixth Amendment to the United States Constitution demonstrates that the right to an impartial jury is deeply embedded in this nation's history.<sup>35</sup> This right has been incorporated to the states, and thus, all defendants, both criminal and civil, expect to enjoy this right.<sup>36</sup> Through seminal cases, the Supreme Court has expanded on what it means to have an impartial jury and has articulated procedural safeguards necessary to ensure this right is protected.<sup>37</sup> These cases highlight the ways society and courts have viewed the Sixth Amendment as it relates to media presence in the courtroom.<sup>38</sup>

##### *1. Constitutional Overview*

Criminal defendants are guaranteed a right to “trial, by an impartial jury” in the Sixth Amendment to the United States Constitution.<sup>39</sup> This right is rooted in the “essential demands of fairness”<sup>40</sup> and is incorporated to the States by means of the Fourteenth Amendment's Due Process Clause.<sup>41</sup> Although the Seventh Amendment does not directly state that impartial juries are required for civil cases, “courts and scholars agree that such a requirement is implicit.”<sup>42</sup> Grand juries, according to the Fifth Amendment, must also be

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31. *See infra* Section I.A.

32. *See infra* Section I.B.

33. *See infra* Section I.C.

34. *See infra* Section I.D.

35. *See infra* Section I.A.1.

36. *See infra* Section I.A.1.

37. *See infra* Section I.A.2.

38. *See infra* Section I.A.2.

39. U.S. CONST. amend. VI.

40. *Aldridge v. United States*, 283 U.S. 308, 310 (1931).

41. *See Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (holding that the Sixth Amendment right to trial by jury in criminal cases, which is “fundamental to the American scheme of justice,” requires states to provide jury trials under the Fourteenth Amendment).

42. Richard Lorren Jolly, *The New Impartial Jury Mandate*, 117 MICH. L. REV. 713, 714 (2019); *see also* Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639 (1973). The Supreme Court has held that civil defendants have the right to an impartial jury. *See, e.g., McDonough Powers Equip., Inc. v. Greenwood*, 464 U.S. 548, 549 (1984) (holding that in civil cases, “respondents are not entitled to a new trial unless the juror’s failure to disclose denied respondents their right to an impartial jury.”); *see also* U.S. CONST. amend. VII (providing substantially similar protections to civil litigants).

impartial because of due process considerations.<sup>43</sup> Finally, the Supreme Court held in *Morgan v. Illinois*<sup>44</sup> that a jury must always, regardless of constitutional requirements, be “impartial and indifferent to the extent commanded by the Sixth Amendment.”<sup>45</sup> Thus, an impartial jury is deeply embedded in America’s judicial system.<sup>46</sup>

One method of safeguarding impartiality is the requirement that jurors may only use evidence developed during trial while they deliberate.<sup>47</sup> Jurors in federal courts are guided by a handbook which provides guidelines and rules intended to dissuade impartial or biased verdicts.<sup>48</sup> Further, jurors are purposely insulated throughout trials so as to allow the presiding judge to be the only permissible source of information.<sup>49</sup> They must swear to disregard their personal biases in order to return a verdict according to their best judgment.<sup>50</sup> Further, they may not rely on outside sources of information, including public opinion, news sources, or the media.<sup>51</sup> State courts vary in terms of specific court rules,<sup>52</sup> but in order to comport with the Sixth Amendment, all United States courts require impartial juries.<sup>53</sup>

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43. Jolly, *supra* note 42, at 714 n.4. See Scott W. Howe, *Juror Neutrality or an Impartiality Array? A Structural Theory of the Impartial Jury Mandate*, 70 NOTRE DAME L. REV. 1173, 1220 n.172 (1995) (noting that “[c]onstitutional requirements regarding the impartiality of grand juries are relatively unclear” partially because “the Fifth Amendment provides for the use of grand juries, which regulates the charging process in federal courts” but, the Fifth Amendment “does not expressly state that a grand jury be ‘impartial’”).

44. 504 U.S. 719 (1992).

45. *Id.* at 727; see also Jolly, *supra* note 42, at 714 (“Simply put: a partial jury is no jury at all.”).

46. See generally Jolly, *supra* note 42.

47. *United States v. Olano*, 507 U.S. 725, 738 (1993); see also *Turner v. Louisiana*, 379 U.S. 466, 472–73 (1965) (“[T]rial by jury in a criminal case necessarily implies at the very least that the ‘evidence developed’ against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant’s right of confrontation, of cross-examination, and of counsel.”).

48. See generally JUD. CONF. OF THE U.S., HANDBOOK FOR TRIAL JURORS SERVING IN THE UNITED STATES DISTRICT COURTS (2012), <https://www.uscourts.gov/sites/default/files/trial-handbook.pdf>.

49. *Id.* at 11.

50. *Id.* at 10.

51. *Id.* at 11–12.

52. See *infra* Section I.C.2.

53. See *supra* text accompanying notes 39–42.

2. *Foundational Cases Regarding the Sixth Amendment Demonstrate that the Right to an Impartial Jury Requires Continued Protection*

Although the importance of an impartial jury is commonplace today, this was not always the case.<sup>54</sup> In 1733, the trial of John Peter Zenger established the jury as an image of freedom in the colonies.<sup>55</sup> Zenger, an American journalist, published an essay criticizing New York's governor, resulting in a seditious libel trial.<sup>56</sup> This trial was highly publicized and Zenger's attorney, John Hamilton, successfully challenged the lists from which the jury was to be chosen in order to ensure that the jury was impartial.<sup>57</sup> In his closing argument, Hamilton stated that the jury's decision "may in its consequence affect every free man that lives under a British government on the main of America. . . . It is the cause of liberty."<sup>58</sup> The jury, very quickly, found Zenger not guilty,<sup>59</sup> establishing the necessity of an unbiased jury, free to "determine how and to what extent the letter and spirit of the law could and should be applied."<sup>60</sup>

In *United States v. Burr*,<sup>61</sup> John Marshall, who would later become a Supreme Court Justice, served as the trial judge in Aaron Burr's treason case.<sup>62</sup> In ruling on a request by Burr's attorney to preclude jurors exposed to pretrial publicity from serving, Marshall stated that individuals with "strong personal prejudices" must be excluded from the jury.<sup>63</sup> However, he noted that requiring that jurors have no opinions about the case "would exclude intelligent and observing men" from contributing to the judicial process.<sup>64</sup> Thus, the court held that "light impressions which may fairly be supposed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of that testimony, constitute no sufficient objection to

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54. See generally H.V. Kaltenborn, *Foreword* to VINCENT BURANELLI, *THE TRIAL OF PETER ZENGER* (Vincent Buranelli ed., 1957).

55. See *id.* at vi ("The record of the Zenger trial as it is developed in this book is one of the notable case histories of American jurisprudence," and is shown by virtue of Zenger's attorney being voted by New York as "the freedom of the city").

56. VINCENT BURANELLI, *THE TRIAL OF PETER ZENGER* 31–32 (Vincent Buranelli ed., 1957).

57. *Id.* at 90–92. The first jury pool was comprised entirely of individuals who were on the governor's payroll, and thus did not represent an impartial jury of Zenger's peers. *Id.* at 91.

58. *Id.* at 131.

59. *Id.* at 132.

60. See Kaltenborn, *supra* note 54, at vi.

61. 25 F. Cas. 49 (C.C.D. Va. 1807) (No. 14,692g).

62. *Id.* at 50.

63. *Id.*

64. *Id.* at 51.

a juror.”<sup>65</sup> These words, vastly ahead of their time, guided judges in the selection of jurors for nearly 150 years.<sup>66</sup>

In *Remmer v. United States*,<sup>67</sup> the Court established a procedure for addressing alleged communications with jurors during a trial. The Court stated that any form of direct communication with a juror regarding the case at hand was “for obvious reasons” considered “presumptively prejudicial.”<sup>68</sup> Thus, the Court continued to uphold the constitutional right to an impartial jury by safeguarding the type of information jurors may receive during trial.<sup>69</sup> However, the application of this right would continue to evolve in order to adapt to the changes in media coverage, news reporting, and public opinion.<sup>70</sup>

One of the most all-encompassing changes occurred in 1966 when the Supreme Court decided *Sheppard v. Maxwell*.<sup>71</sup> There, the Court found that a trial judge’s failure to reduce the prejudice caused by extensive pretrial publicity violated the defendant’s constitutional rights.<sup>72</sup> The defendant was charged with the murder of his pregnant wife and the media coverage surrounding the case was extensive, often “emphasiz[ing] evidence that tended to incriminate [the defendant].”<sup>73</sup> The State held the pretrial hearings in a school gym to accommodate spectators, and at trial, the State set up the courtroom specifically to accommodate reporters.<sup>74</sup> The trial judge denied several of the defendant’s requests for a continuance, change of venue, mistrial, and interrogation of the jurors as to their exposure to prejudicial publicity.<sup>75</sup>

The Supreme Court described the “carnival atmosphere”<sup>76</sup> at trial and found persuasive that there was extensive media coverage and that the trial court failed to sequester jurors, effectively allowing them to be exposed to the media during deliberation.<sup>77</sup> The Court stated that although the press may report pretrial events and events that transpired in the courtroom, “where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or

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65. *Id.*

66. *See infra* text accompanying note 71.

67. 347 U.S. 227 (1954).

68. *Id.* at 229.

69. *See id.*

70. *See infra* Section I.C.

71. 384 U.S. 333 (1966).

72. *Id.* at 335.

73. *Id.* at 340.

74. *Id.* at 354.

75. *Id.* at 348.

76. *Id.* at 358.

77. *Id.* at 363.



transfer it to another county not so permeated with publicity.”<sup>78</sup> Thus, the Court reversed and remanded, introducing various methods of jury insulation which are now often used by trial judges.<sup>79</sup>

Juries before, during, and after these developments have served as the sounding board for massively influential cases with widespread media attention.<sup>80</sup> From fugitive slave trials in the 1840s and 1850s,<sup>81</sup> to the trial of the Catonsville Nine<sup>82</sup> and the trial of the Chicago Seven,<sup>83</sup> juries have determined some of our nation’s most highly publicized and influential moments. Jurors continue to serve this purpose today. However, how do American courts insulate juries in an age where seven-in-ten Americans use social media,<sup>84</sup> and where on those sites, falsehoods are more likely to be shared and disseminated than the truth?<sup>85</sup>

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78. *Id.*

79. *Id.* at 362–63. Specifically, the Court described change of venue, sequestration, and continuances. *Id.*

80. See *infra* notes 81–83 and accompanying text.

81. Although the Fugitive Slave Act of 1793, ch. 7, § 3, 1 Stat. 302, 302–05, *invalidated by* U.S. CONST. amend. XIII, permitted magistrates alone to order the return of formerly enslaved individuals, some Northern states enacted personal liberty laws providing such individuals the right to trial by jury. Albert Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 890 n.119 (1994).

82. *United States v. Berrigan*, 283 F. Supp. 336 (D. Md. 1968). William Kunstler, the attorney for the defendants, “quoted Peter Zenger’s attorney’s exhortation that the jury ‘make use of their conscience’ to the Catonsville jury” in his closing arguments. Ronald Christenson, *A Political Theory of Political Trials*, 74 NW. U. J. CRIM. L. & CRIMINOLOGY 547, 563 (1983).

83. *United States v. Dellinger*, 472 F.2d 340, 387, 391 (7th Cir. 1972) (providing an example where the judge’s bias in the presence of the jury “telegraphed to the jury the judge’s contempt for the defense” and thus, “require[d] reversal if other errors did not”).

84. See Brooke Auxier & Monica Anderson, *Social Media Use in 2021*, PEW RSCH. CTR. (Apr. 7, 2021), <https://www.pewresearch.org/internet/2021/04/07/social-media-use-in-2021/> (“[R]oughly seven-in-ten Americans say they ever use any kind of social media site—a share that has remained relatively stable over the past five years, according to a new Pew Research Center survey of U.S. adults.”).

85. Soroush Vosoughi, Deb Roy & Sinan Aral, *The Spread of True and False News Online*, 359 SCIENCE 1146, 1146 (2018). In highly publicized trials, such as the *Simpson* case, the media often reports false information. See, e.g., David Shaw, *The Simpson Legacy*, L.A. TIMES (Oct. 9, 1995, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1995-10-09-ss-55106-story.html> (“CNN, KCBS, KNBC, and KTLA all reported that there was a possible second suspect in the case. Wrong. KCOP Channel 13 reported that a bloody ski mask had been found at the murder scene. Wrong. The Daily News of Los Angeles reported that police had found a ‘bloodstained military style entrenching tool . . . believed to have been the weapon used in the killings.’ Wrong. CNN quoted an anonymous source as saying bloody clothes had been found in the washing machine at O.J. Simpson’s home. Wrong. KCBS and NBC quoted sources as saying Simpson had his hand in a golf bag on the plane trip from Los Angeles to Chicago after the murders. Wrong. KCBS reported the ‘bombshell’ news that police had discovered potentially damaging evidence in Simpson’s golf bag. Wrong. Various news organizations reported that blood had been found on the golf bag that Simpson took to Chicago after the murders. Wrong.”). Whether such false reporting is accidental or intentional, it threatens the impartiality of juries by exposing them to false and biased information. See *infra* Section II.C.

*B. Various Mechanisms, Guidelines, and Legislation Meant to Insulate Juries*

The Supreme Court has articulated particular remedies intended to protect defendants' right to an impartial jury.<sup>86</sup> These remedies require courts to implement remedial measures to prevent juror misconduct rather than simply addressing the misconduct after the fact.<sup>87</sup> However, the remedies established by the Court could not entirely prevent juror bias and misconduct, and thus, additional remedies have been established by trial courts over time.<sup>88</sup> In conjunction, these remedies provide safeguards for civil and criminal defendants in order to ensure their Sixth Amendment rights.<sup>89</sup>

*1. Sheppard v. Maxwell Remedies*

The Court in *Sheppard v. Maxwell* established three mechanisms to mitigate the effects of public perception on jury impartiality<sup>90</sup>: change of venue,<sup>91</sup> sequestration,<sup>92</sup> and continuance.<sup>93</sup> The Court noted that the “cure” for jury bias from media exposure is not a reversal of the verdict, but rather, implementing “remedial measures that will prevent the prejudice at its inception.”<sup>94</sup>

The Supreme Court has cautioned that rules regarding venue, the appropriate place where a trial should be held, should not be treated lightly.<sup>95</sup> In *Sheppard*, the Court stated that when pretrial publicity will likely impact a defendant's right to a fair trial, the trial judge should “transfer [the case] to another county not so permeated with publicity.”<sup>96</sup> The Court has further held that in some cases, “only a change of venue [is] constitutionally sufficient to assure the kind of . . . impartial jury that is guaranteed by the Fourteenth Amendment.”<sup>97</sup> This is because a change of venue allows defendants to be

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86. *See infra* Section I.B.1.

87. *See infra* text accompanying notes 93–94.

88. *See infra* Section I.B.2.

89. *See infra* Section I.B.

90. *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966).

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *United States v. Johnson*, 323 U.S. 273, 276 (1961).

96. *Sheppard*, 384 U.S. at 363. For example, a change of venue has been necessary in instances where a Black defendant was bound to face an all-white jury who had obvious racial prejudices. *See, e.g., Irvin v. Dowd*, 366 U.S. 717, 727 (1961) (holding that *voir dire* was necessary when a “‘pattern of deep and bitter prejudice’ [was] shown to be present throughout the community” (citing *Stroble v. California*, 343 U.S. 181 (1952))).

97. *Groppi v. Wisconsin*, 400 U.S. 505, 510 (1971).

tried by a jury that has not been exposed to such pervasive information regarding the case at hand.<sup>98</sup>

Sequestration is the practice of isolating a jury from the public during the trial and or deliberation, and usually involves supervision of jurors by law enforcement officials.<sup>99</sup> The Court noted that trial judges should raise sequestration of the jury on their own when there is reason to expect that pretrial publicity will result in a biased jury.<sup>100</sup>

The right to issue a continuance, or, in other words, “the right to delay for good reasons,” stems from “the inherent power of courts to hear and determine cases.”<sup>101</sup> The Court instructed trial judges faced with the issue of jury bias to “continue the case until the threat abates.”<sup>102</sup>

## 2. *Additional Remedies Implemented by Courts to Prevent Juror Bias and Misconduct*

Further remedies intended to insulate juries include *voir dire*,<sup>103</sup> no-comment rules,<sup>104</sup> and jury instructions.<sup>105</sup> *Voir dire* is the process through which judges or attorneys determine whether potential jurors are suitable for jury service.<sup>106</sup> Throughout this process, judges and attorneys work to identify impartial jurors by asking questions about the jurors’ backgrounds, experiences, opinions, values, and beliefs that may impact the way they approach or view the case.<sup>107</sup> Methods of jury insulation also include no-comment rules, which allow judges to preserve impartiality by forbidding individuals—including attorneys, litigants, witnesses, and jurors—from

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98. *Id.* at 510–11.

99. *See Sequester*, CORNELL L. SCH.: LEGAL INFO. INST., <https://www.law.cornell.edu/wex/sequester> (last visited May 4, 2023).

100. *Sheppard*, 384 U.S. at 363.

101. ALFRED FRIENDLY & RONALD L. GOLDFARB, *CRIME AND PUBLICITY: THE IMPACT OF NEWS ON THE ADMINISTRATION OF JUSTICE* 97 (1967).

102. *Sheppard*, 384 U.S. at 363.

103. *See infra* note 106 and accompanying text.

104. *See infra* note 110 and accompanying text.

105. *See generally* JUD. CONF. COMM. ON CT. ADMIN. & CASE MGMT., *PROPOSED MODEL JURY INSTRUCTIONS: THE USE OF ELECTRONIC TECHNOLOGY TO LEARN OR COMMUNICATE ABOUT A CASE* (2020), [https://www.uscourts.gov/sites/default/files/proposed\\_model\\_jury\\_instructions.pdf](https://www.uscourts.gov/sites/default/files/proposed_model_jury_instructions.pdf) [hereinafter *PROPOSED MODEL JURY INSTRUCTIONS*].

106. *Voir Dire*, CORNELL L. SCH.: LEGAL INFO. INST., [https://www.law.cornell.edu/wex/voir\\_dire](https://www.law.cornell.edu/wex/voir_dire) (last visited Jan. 31, 2023).

107. *11 Must-Dos from a Voir Dire Master*, AM. BAR ASS’N. (Mar. 1, 2019), <https://www.americanbar.org/news/abanews/publications/youraba/2019/march-2019/11-tips-for-effectively-conducting-voir-dire/>; *see* MD. R. 2-512, 4-312 (2023) (governing the process of jury selection, including examination and challenges for cause).

discussing, writing, or sharing information around judicial matters.<sup>108</sup> No-comment rules, also referred to as “gag orders,” have been reviewed by the Supreme Court to ensure the adequate balance of First Amendment<sup>109</sup> and Sixth Amendment rights.<sup>110</sup> Finally, jury instructions may also be a means of jury insulation.<sup>111</sup> For example, the Judicial Conference Committee on Court Administration and Case Management produced model jury instructions regarding the use of technology by jurors to gain information about a case.<sup>112</sup> These instructions generally state that during all times of the trial (during *voir dire*, before trial, at the end of each day of the case, at the beginning of each day of the case, and at the close of the case) judges should instruct jurors about the restriction of using technology in any form to learn about the case.<sup>113</sup> While these methods of insulation have become commonplace, they have failed to properly safeguard the threat of another form of technology: broadcasting cameras.<sup>114</sup>

### C. Cameras in the Courtroom

In 1935, the media’s use of cameras in the courtroom to document and report on trials reached new heights.<sup>115</sup> Since then, in conjunction with the rapid growth of technology, the presence of cameras in courtrooms has continued to increase.<sup>116</sup> In response to this evolving phenomena, the Supreme Court has addressed the permissibility of cameras in the courtroom on multiple occasions, ultimately determining that broadcasting trials does not infringe on defendants’ Sixth Amendment rights.<sup>117</sup> Today, the laws

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108. Isabel Farhi, *When Silence Isn’t Golden: How Gag Orders Can Evade First Amendment Protections*, YALE L. SCH.: CASE DISCLOSED (Oct. 24, 2017), <https://law.yale.edu/mfia/case-disclosed/when-silence-isnt-golden-how-gag-orders-can-evade-first-amendment-protections>.

109. U.S. CONST. amend. I.

110. *See* *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 562 (1976) (creating a three-part test to evaluate the constitutionality of gag orders that asks (1) whether the publicity is likely to infringe on the defendant’s right to a fair trial, (2) whether the gag order is the least restrictive method of ensuring a fair trial, and (3) whether the gag order will effectively ensure a fair trial).

111. *See generally* PROPOSED MODEL JURY INSTRUCTIONS, *supra* note 105.

112. *Id.* “The Judicial Conference of the United States is the national policymaking body for the federal courts.” *About the Judicial Conference*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/governance-judicial-conference/about-judicial-conference> (last visited May 8, 2023).

113. *See generally* PROPOSED MODEL JURY INSTRUCTIONS, *supra* note 105. These instructions are typical of most state model jury instructions. *See, e.g., infra* notes 243–44; COMM. ON PATTERN JURY INSTRUCTIONS, ASS’N OF SUP. CT. JUSTICES, NEW YORK PATTERN JURY INSTRUCTIONS—CIVIL § 1:11, Westlaw (database updated Dec. 2022) (“[D]o not do any independent research on any topic you might hear about in this case, whether by consulting others, reading any material or conducting internet searches of any kind.”).

114. *See infra* Section I.C.2.

115. *See infra* Section I.C.1.

116. *See infra* Section I.C.1.

117. *See infra* Section I.C.1.

regarding cameras in the courtroom vary by state and jurisdiction and continue to develop according to the impact of technology on methods of jury insulation.<sup>118</sup>

*1. A Brief Overview of the Emergence and Evolution of Broadcasting Trials*

Before 1935, when the trial of Bruno Hauptmann occurred,<sup>119</sup> cameras in the courtroom were not widely challenged.<sup>120</sup> Hauptmann, who was charged with kidnapping and murdering Charles Lindbergh's son, faced nearly 700 members of the media, including 120 cameramen, during the trial, who regularly disrupted court proceedings.<sup>121</sup> "Messenger boys ran about, and unruly photographers climbed on witness tables to get shots, blinding witnesses with their flash bulbs."<sup>122</sup> His trial was perhaps the first to be sensationalized in this way.<sup>123</sup>

Thirty years later, in *Estes v. Texas*,<sup>124</sup> the Supreme Court addressed the issue of sensationalizing trials and overturned a conviction based on the presence of cameras in the courtroom.<sup>125</sup> Writing for the majority, Justice Clark indicated that the disruptions caused by the cameras denied the defendant his due process rights.<sup>126</sup> The Court found that just as a defendant's due process rights were violated when he was televised confessing to a crime, the defendant's due process rights were also violated when the empaneled jury had seen and heard the "bombardment" of prejudicial broadcasting prior

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118. See *infra* Section I.C.2.

119. *State v. Hauptmann*, 180 A. 809 (N.J. 1935).

120. For a more thorough overview of the history of cameras in courts, see *History of Cameras in Courts*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/judicial-administration/cameras-courts/history-cameras-courts> (last visited Jan. 31, 2023) ("Electronic media coverage of criminal proceedings in federal courts has been expressly prohibited under Federal Rule of Criminal Procedure 53 since the criminal rules were adopted in 1946."); see Mark Sableman, *The Evolving Story of Cameras in Court*, THOMPSON COBURN LLP (June 12, 2015), <https://www.thompsoncoburn.com/insights/blogs/internet-law-twists-turns/post/2015-06-12/the-evolving-story-of-cameras-in-court> ("In the early days of TV, cameras were allowed into several highly publicized criminal trials, and the problems from those trials led to an effective ban on courtroom photography for decades.").

121. Ruth Ann Strickland, *Cameras in the Courtroom*, FIRST AMEND. ENCYCLOPEDIA (2009), <https://www.mtsu.edu/first-amendment/article/989/cameras-in-the-courtroom>. "Although the New Jersey Court of Appeals rejected Hauptmann's allegation that the presence of courtroom cameras denied him a fair trial, the American Bar Association in 1937 and again in 1952 amended Canon 35 of its Canons of Judicial Ethics to forbid photographic, television, and other broadcast coverage of trials." *Id.*

122. *Id.*

123. See *id.* (noting that Hauptmann's trial was the first to spark "significant efforts to limit cameras in courtrooms").

124. 381 U.S. 532 (1965).

125. *Id.* at 532.

126. *Id.* at 538, 550.

to empanelment.<sup>127</sup> Justice Clark determined that the methods used by the media presented “hazards to a fair trial.”<sup>128</sup> In a concurring opinion, Chief Justice Warren stated that freedom of the press did not give the media the right to disrupt judicial proceedings.<sup>129</sup> He explained that so long as the media “is free to send representatives to trials and to report on those trials to its viewers, there is no abridgment of the freedom of press.”<sup>130</sup> In balancing the rights of the press and the rights of parties to a trial, he argued that the right of the media to report on trials “does not bring with it the right to inject themselves into the fabric of the trial process to alter the purpose of that process.”<sup>131</sup> Looking to the future, Justice Stewart, writing for four dissenters, argued that the Court should be hesitant of imposing rules which, “in the light of future technology,” might stifle First Amendment rights.<sup>132</sup> The dissenters were highly concerned with limiting the public’s access to judicial proceedings.<sup>133</sup> These concerns are echoed today by many members of the press.<sup>134</sup>

In 1981, the Supreme Court revisited the issue of cameras in the courtroom and unanimously held in *Chandler v. Florida*<sup>135</sup> that “[a]bsent a showing of prejudice of constitutional dimensions to . . . defendants, there is no reason . . . either to endorse or to invalidate” a pilot project for televising judicial proceedings.<sup>136</sup> The 1980s and 1990s bore witness to the repercussions of this decision, as cameras began regularly appearing in courtrooms.<sup>137</sup> The majority view at that time was that broadcasting “caused no harm . . . to the fair processes of justice.”<sup>138</sup> The *Simpson* trial changed the culture of trial broadcasting and created a new rise of television.<sup>139</sup> In response, federal and state courts began enacting laws regarding televising

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127. *Id.* at 538 (citing *Rideau v. Louisiana*, 373 U.S. 723, 729 (1963)).

128. *Id.* at 540.

129. *Id.* at 585 (Warren, C.J., concurring).

130. *Id.*

131. *Id.*

132. *Id.* at 604 (Stewart, J., dissenting).

133. *See id.*

134. *See, e.g.*, Nancy S. Marder, *The Conundrum of Cameras in the Courtroom*, 44 ARIZ. ST. L.J. 1489, 1495 (2012) (“Those who have advocated most vociferously for cameras in federal courtrooms are members of the media, including print, radio, and especially television . . .”).

135. 449 U.S. 560 (1981).

136. *Id.* at 582.

137. *See* Today in Focus, *Cameras in the Courtroom: The Spectacle of the Depp-Heard Trial*, GUARDIAN, at 07:20–07:56. (June 12, 2022, 10:00 PM), <https://www.theguardian.com/news/audio/2022/jun/13/depp-heard-trial-courtroom-cameras>.

138. *Id.* at 04:15–04:20.

139. *Id.* at 06:30–07:13.

trials, and today, the law regarding broadcasting court proceedings varies from state to state.<sup>140</sup>

## 2. *The State of the Law Regarding Camera's in the Courtroom*

States most receptive of cameras, such as Utah, have rules which presume that media coverage will be permitted.<sup>141</sup> Other states prohibit coverage in especially sensitive cases such as trials involving minors, sexual abuse cases, and cases where certain witnesses object.<sup>142</sup> In the most restrictive states, such as Alabama, all parties must give their written consent to broadcasting and the judge may only permit media presence so long as it will not “detract from the dignity of the court proceedings” or “degrade the court, or otherwise interfere with the achievement of a fair trial.”<sup>143</sup> Many state courts have provisions which require judges to consider how televising proceedings will impact the fairness and dignity of the trial.<sup>144</sup> Overall, nearly every state allows recording, televising, broadcasting, or still photography of trial court proceedings in some capacity.<sup>145</sup>

Federal courts, however, explicitly prohibit electronic media coverage of criminal proceedings.<sup>146</sup> Cameras may be allowed for federal civil cases, but most lower federal courts do not allow cameras to record or broadcast

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140. Douglas E. Lee, *Cameras in the Courtroom*, FREEDOM F. INST. (Feb. 1, 2010), <https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-the-press/cameras-in-the-courtroom/> [<https://web.archive.org/web/20221007164247/https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-the-press/cameras-in-the-courtroom/>].

141. UTAH CODE JUD. ADMIN. R. 4-401.01(2)(A) (“There is a presumption that electronic media coverage by a news reporter shall be permitted in public proceedings where the predominant purpose of the electronic media coverage request is journalism or dissemination of news to the public. The judge may prohibit or restrict electronic media coverage in those cases only if the judge finds that the reasons for doing so are sufficiently compelling to outweigh the presumption.”).

142. See, e.g., VA. CODE ANN. § 19.2-266 (2023) (prohibiting coverage of jurors and certain kinds of witnesses such as “police informants, minors, undercover agents and victims and families of victims of sexual offenses”).

143. *Canons of Judicial Ethics: Canon 3*, ALA. JUD. SYS., <https://judicial.alabama.gov/docs/library/rules/can3.pdf> (last visited Mar. 24, 2023).

144. See, e.g., *id.*; *Cameras in the Courtroom: Rule 1.150: The “Cameras Rule”*, CAL. CTS., <https://www.courts.ca.gov/10018.htm> (last visited Mar. 24, 2023); *Chapter 25: Rules for Expanded News Media Coverage*, IOWA LEGISLATURE, <https://www.legis.iowa.gov/docs/ACO/CR/LINC/04-30-2014.chapter.25.pdf> (last visited Mar. 24, 2023).

145. See *Cameras in the Courts*, RADIO TELEVISION DIGIT. NEWS ASS’N (Nov. 2022), <https://www.rtdna.org/cameras-in-the-courts>.

146. FED. R. CRIM. P. 53 (“Except as otherwise provided by a statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom.”).

from inside the courtroom.<sup>147</sup> Is this because technology has the potential to negatively impact the fair processes of trials?

*D. The Impact of the Current Technological Age on Methods of Jury Insulation*

Social media is an ever-growing beast<sup>148</sup> that has changed the way the world operates, the methods by which information (and misinformation) is shared, and the way jurors approach trials.<sup>149</sup> Today, more than 70% of Americans regularly use social media, with an average of 7.1 accounts per person.<sup>150</sup> The “social media penetration rate”<sup>151</sup> in the United States averages 70% but increases to 83% when analyzing individuals aged thirteen and older.<sup>152</sup> Moreover, the average American spends 127 minutes per day on social networks, with 74% using Facebook daily, 63% using Instagram daily, and 42% using Twitter daily.<sup>153</sup>

Perhaps most pertinent to social media in the context of juries is the fact that, despite “social media companies struggle[ing] to deal with misleading information on their platforms,” more than 50% of adults reported in 2020 that “they get news from social media ‘often’ or ‘sometimes.’”<sup>154</sup> This fact becomes significant when one considers what type of “news” is being shared online. An earlier 2017 study revealed that “[f]alsehood diffuse[s] significantly farther, faster, deeper, and more broadly than truth in all categories of information.”<sup>155</sup> Throughout the study, “the truth rarely diffused to more than 1000 people” while “the top 1% of false-news cascades routinely diffused to between 1000 and 100,000 people.”<sup>156</sup> It is important to note, however, that for the purposes of news accessed by jurors during trial, the validity of the information is technically inconsequential as jurors may not rely on *any* outside information and the presiding judge is the only

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147. SARAH J. ECKMAN, CONG. RSCH. SERV., R44514, VIDEO BROADCASTING FROM THE FEDERAL COURTS: ISSUES FOR CONGRESS 7 (2019), <https://sgp.fas.org/crs/misc/R44514.pdf>.

148. See Dean, *supra* note 12 (“Since its inception in 1996, social media has managed to infiltrate half of the 7.7 billion people in the world. Social network platforms almost tripled their total user base in the last decade, from 970 million in 2010 to the number passing 4.48 billion users in July 2021.”).

149. *Id.*

150. *Id.*; see also Auxier & Anderson, *supra* note 84.

151. This is measured by “active users vs. total population.” Dean, *supra* note 12.

152. *Id.*

153. *Id.*

154. Elisa Shearer & Amy Mitchell, *News Use Across Social Media Platforms in 2020*, PEW RSCH. CTR. (Jan. 12, 2021), <https://www.pewresearch.org/journalism/2021/01/12/news-use-across-social-media-platforms-in-2020>.

155. Vosoughi et al., *supra* note 85, at 1146.

156. *Id.* at 1148.



permissible source.<sup>157</sup> It is relevant to consider whether and how false information plays a role in the deliberation room, as jurors often (1) are unintentionally exposed to outside information while scrolling on social media or (2) intentionally fail to adhere to court instructions.<sup>158</sup>

Jurors' use of social media during trials has become an alarming issue over time as it either suggests that jurors are seeking out extrinsic information, or that the implicit osmosis of information while on social media is unintentionally causing them to consume extrinsic information.<sup>159</sup> Whatever the method by which jurors are exposed to extrinsic information, there is a real threat that jurors are being influenced by public opinion.<sup>160</sup> Jurors have been caught checking social media during trials,<sup>161</sup> posting about trials on social media,<sup>162</sup> researching counsel during trials,<sup>163</sup> and even sharing online research about the case with other jurors.<sup>164</sup> Despite such occurrences, there are few current studies on juror misconduct as relating to the exposure to public opinion via social media.<sup>165</sup>

Jurors have also been caught using online media during trial.<sup>166</sup> In a major federal drug trial in Florida, a juror admitted to referencing the Internet to conduct his own research on the case.<sup>167</sup> Federal Judge William Zloch proceeded to question the rest of the jury, and shockingly enough, learned that eight other jurors had also been engaging in impermissible research, directly violating their jury instructions.<sup>168</sup> Judge Zloch declared a mistrial, causing eight weeks of trial development to go to waste.<sup>169</sup> This instance

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157. JUD. CONF. OF THE U.S., *supra* note 48, at 10–12 (suggesting that judges inform jurors that all exposure to extrinsic information, including both intentional and accidental, must be revealed to the court).

158. *See infra* notes 160–164 and accompanying text.

159. *See generally* PROPOSED MODEL JURY INSTRUCTIONS, *supra* note 105.

160. *E.g.*, *California Jurors Using Internet During Trial Could Be Fined*, *supra* note 3 (discussing instances in Arkansas, New Jersey, and California where jurors' internet use caused severe issues during trial).

161. *See supra* note 11.

162. *See generally* N.Y. CNTY. LAWS. ASS'N, COMM. ON PRO. ETHICS, FORMAL OPINION NO. 743 (May 18, 2011), <https://nys-fjc.ca2.uscourts.gov/programs/10-23-19%20-%20NYCLA%20Formal%20Opinion%20743%20-%20Social%20Media%20Search%20of%20Jurors.pdf>.

163. *Id.*

164. *Id.*

165. *See Hoffmeister & Watts*, *supra* note 14, at 264–65 (quoting CHRISTOPHER J. DAVEY, KAREN SALAZ & REGINA KOEHLER, CONF. OF CT. PUB. INFO. OFFICERS, 2011 CCPIO NEW MEDIA SURVEY (2011), <http://ccpio.org/wp-content/uploads/2012/02/2011-ccpio-report.pdf> [<https://web.archive.org/web/20210118080607/http://ccpio.org/wp-content/uploads/2012/02/2011-ccpio-report.pdf>])).

166. Schwartz, *supra* note 2.

167. *Id.*

168. *Id.*

169. *Id.*

occurred in 2009, and since then, courts have neither been able to gain much information on how often misconduct occurs, nor have they established a method for successfully preventing it.<sup>170</sup>

In 2010, early studies relating to juror misconduct forecasted that “an especially troubling dilemma for courts” would exist regarding jurors’ use of social media.<sup>171</sup> As time progressed, surveys revealed that juror misconduct is often only noticed by judges when jurors come forward, and that such conduct is frequently willful.<sup>172</sup> The Federal Judicial Center determined that in 2011, only 6% of judges discovered jurors using the Internet and in 2013, 7% detected Internet use.<sup>173</sup> The same study determined that of the thirty-three instances of misconduct in 2013, twenty-seven occurred during trial while seven occurred during deliberations, with the preferred methods of Internet use being Facebook, instant messaging, and Twitter.<sup>174</sup> Furthermore, a survey revealed that jury instructions regarding the use of social media deterred jurors who identified themselves as “tempted” to use the Internet.<sup>175</sup> The National Center for Jury Studies (“NCJS”) conducted a similar survey and found that although a large number of jurors responded “yes” when asked whether they wanted to use the Internet during trial, none admitted to conducting online research, which is contradictory to other studies.<sup>176</sup> Thus, despite the early predictions of juror misconduct, and despite the many times jurors were found to be using the Internet, research in the field does not appear to fully capture the extent to which jurors use the Internet.<sup>177</sup>

The NCJS study<sup>178</sup> reveals an important issue regarding research and jury misconduct: jurors are reluctant to admit when they have conducted outside research during trial.<sup>179</sup> In worst case scenarios, such misconduct can be a criminal offense,<sup>180</sup> and in the best cases, such misconduct can result in

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170. See *infra* notes 171–176.

171. Hoffmeister & Watts, *supra* note 14, at 265.

172. Brooke Lovett Shilo, *Juror Internet Misconduct: A Survey of New Hampshire Superior Court Judges*, 12 U.N.H. L. REV. 245, 252, 262 (2014).

173. See Hoffmeister & Watts, *supra* note 14, at 266.

174. *Id.*

175. Amy J. St. Eve, Charles P. Burns & Michael A. Zuckerman, *More from the #Jury Box: The Latest on Juries and Social Media*, 12 DUKE L. & TECH. REV. 64, 80–85 (2014).

176. PAULA HANNAFORD-AGOR, DAVID B. ROTTMAN & NICOLE L. WATERS, JUROR AND JURY USE OF NEW MEDIA: A BASELINE EXPLORATION 6 (2012), [https://ncsc.contentdm.oclc.org/digital/api/collection/accessfair/id/249/page/0/inline/accessfair\\_249\\_0](https://ncsc.contentdm.oclc.org/digital/api/collection/accessfair/id/249/page/0/inline/accessfair_249_0).

177. See Hoffmeister & Watts, *supra* note 14, at 264; *supra* notes 161–162.

178. See St. Eve, et al., *supra* note 175, at 80–85.

179. See Hoffmeister & Watts, *supra* note 14, at 264.

180. E.g., *California Jurors Using Internet During Trial Could Be Fined*, *supra* note 3 (discussing instances in Arkansas, New Jersey, and California where jurors’ internet use resulted in severe repercussions).

finer from the court.<sup>181</sup> Thus, “many jurors are hesitant to report such conduct by themselves or others for fear of the consequences.”<sup>182</sup> Because there is insufficient data regarding juror misconduct due to the use of social media and the Internet, how can we determine the best way to insulate juries in the modern era?

## II. ANALYSIS

This Section argues that the trials courts in *People v. Simpson* and *Depp v. Heard* failed to impose effective and sustainable methods of jury insulation.<sup>183</sup> The court in *Simpson* faced intense public attention prior to today’s technological age, while the court in *Depp* was subject to the impact of social media.<sup>184</sup> Despite these cases occurring at distinctly different points in time, together they serve as a warning for current and future courts and suggest that the live-broadcasting of trials both facilitates and exasperates the harmful sensationalizing of trials.<sup>185</sup>

### A. *People v. Simpson’s Use of Sequestration Was Ineffective Then and Is Unsustainable Now*

In 1994, Orenthal James (“O.J.”) Simpson was arrested and charged with the murder of his estranged wife, Nicole Brown, and her friend, Ronald Goldman, who were found stabbed to death in the front yard of Brown’s condominium.<sup>186</sup> Simpson was a popular television personality, a Heisman Trophy winner, and a star running back with the Buffalo Bills.<sup>187</sup> The *Guinness Book of World Records* determined the Simpson trial to be the “most viewed trial” with an average of 5.5 million Americans tuning in to view the live broadcast each day.<sup>188</sup> Although this case occurred before the eruption of the Internet, the triumphs and pitfalls of the jury insulation

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181. U.S. DEP’T OF JUST., JUROR FINED \$11,000 FOR CONDUCTING OUTSIDE RESEARCH DURING CRIMINAL TRIAL AND CAUSING MISTRIAL (June 29, 2021), <https://www.justice.gov/usao-nj/pr/juror-fined-11000-conducting-outside-research-during-criminal-trial-and-causing-mistrial>.

182. See Hoffmeister, *supra* note 14, at 264.

183. See *infra* Sections II.A.1–2; II.B.1–2.

184. See *infra* Sections II.A; II.B.

185. See *infra* Section II.C.

186. *O.J. Simpson Acquitted*, HISTORY (Sept. 29, 2021), <https://www.history.com/this-day-in-history/o-j-simpson-acquitted>. This trial had far-reaching cultural impacts that are still discussed and felt today. See, e.g., *The O.J. Verdict: The Trial’s Significance and Lasting Impact*, PBS FRONTLINE (Oct. 4, 2005), <https://www.pbs.org/wgbh/pages/frontline/oj/themes/impact.html>. Since the close of the case, many television programs and movies have referenced, reenacted, and referred to the trial, see, for example, *The People v. O.J. Simpson: American Crime Story* (Amazon Prime 2016).

187. *O.J. Simpson Acquitted*, *supra* note 186.

188. Derek H. Alderman, *TV News Hyper-Coverage and the Representation of Place: Observations on the O.J. Simpson Case*, 79 GEOGRAFISKA ANNALER 83, 83 (1997).

methods used in the “most viewed trial” are beneficial in determining what is effective, what is ineffective, and what is unsustainable.<sup>189</sup>

### *1. Jury Instructions*

The first portion of the jury instructions used by the court prior to deliberations was nearly identical to the California model jury instructions.<sup>190</sup> The judge stated:

You must decide all questions of fact in this case from the evidence received in this trial and not from any other source. You must not make any independent investigation of the facts or the law or consider or discuss facts as to which there is no evidence. This means, for example, that you must not on your own visit the scene, conduct experiments or consult reference works or persons for additional information. You must not discuss this case with any other person, except a fellow juror, and you must not discuss the case with a fellow juror until the case is submitted to you for your decision and only when all twelve jurors are present in the jury room.<sup>191</sup>

However, the judge included language in later portions of the instructions that specifically addressed the unusual nature of the case:

During the course of their arguments, counsel for both sides argued that, quote, “The world is watching,” unquote. You are reminded that you must not be influenced by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling. Both the Prosecution and the Defendant have a right to expect that you will conscientiously consider and weigh all the evidence, apply the law as I have instructed you and reach a just verdict regardless of the consequences.<sup>192</sup>

This language deviated from the model jury instructions.<sup>193</sup> However, the judge’s inclusion of language related to the pressure of public opinion is significant. As mentioned above, jury instructions have deterred tempted

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189. *Id.*

190. *See infra* note 191.

191. JACK WALRAVEN’S SIMPSON TRIAL TRANSCRIPTS, <http://simpson.walraven.org/sep22.html> (last visited Dec. 15, 2022). Compare the instructions above with Aurelio Muñoz et al., West’s Comm. on Cal. Crim. Jury Instructions, *CALJIC 0.50 Pre-Trial Admonition (Spring 2018 Revision)*, in CALIFORNIA JURY INSTRUCTIONS—CRIMINAL, Westlaw (database updated Oct. 2022):

You must not independently investigate the facts or the law or consider or discuss facts as to which there is no evidence. This means, for example, that you must not on your own visit the scene, conduct experiments, or consult reference works or persons for additional information. You must not converse among yourselves, or with anyone else, conduct research, or disseminate information on any subject connected with the trial.

192. JACK WALRAVEN’S SIMPSON TRIAL TRANSCRIPTS, *supra* note 191.

193. *See supra* note 191 and accompanying text.

jurors from checking the Internet.<sup>194</sup> In this case, where Internet use was less prevalent, perhaps the judge was hoping to dissuade jurors from basing their decision on what they believed the public wanted them to do.<sup>195</sup> Whatever the judge's goal was, it is clear that due to the court's use of sequestration, the jury instructions were not intended to be the main method of insulating jurors from the media circus.<sup>196</sup>

## 2. *Additional Method of Jury Insulation and Its Efficacy and Sustainability Today*

Famously, the court used sequestration as a method of jury insulation.<sup>197</sup> The jury was sequestered from January 11, 1995, until October 4, 1995, when the verdict was announced.<sup>198</sup> The Simpson trial resulted in the longest sequestered jury in United States history, requiring an entire hotel floor to house jurors.<sup>199</sup> The sequestration was extreme as jurors "were under 24-hour surveillance, separated from family and friends, given a single 'conjugal' visit per week, and not allowed to consume any news or writing that had not been vetted first."<sup>200</sup> Further, the jurors' room keys were taken away in the evenings so that they could not visit one another.<sup>201</sup> The sequestration order also provided, among other things, that jurors could not tell relatives where they were staying, required jurors to attend all meals, visiting areas, and field trips as a group, and that jurors could only have fifteen minutes of phone time a day.<sup>202</sup>

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194. See St. Eve et al., *supra* note 175, at 80–85.

195. Beyond the normal publicity surrounding massively publicized trials, the O.J. Simpson trial brought forth intense and divided feelings regarding race. See, e.g., Kevin B. Blackstone, *The Intrigue of O.J. Simpson is Rooted in Race and Grace*, WASH. POST (June 17, 2016, 5:36 PM), [https://www.washingtonpost.com/sports/the-intrigue-of-oj-simpson-is-rooted-in-race-and-grace/2016/06/17/16241be2-3410-11e6-8ff7-7b6c1998b7a0\\_story.html](https://www.washingtonpost.com/sports/the-intrigue-of-oj-simpson-is-rooted-in-race-and-grace/2016/06/17/16241be2-3410-11e6-8ff7-7b6c1998b7a0_story.html). For more information on the racial tensions leading up to, and prevalent throughout the trial, see, for example, Wayne J. Pitts, David Giacompassi & K.B. Turner, *The Legacy of the O.J. Simpson Trial*, 10 LOY. J. PUB. INT. L. 199 (2009).

196. Andrea Ford & Jim Newton, *Ito Tells Jurors They Will Be Sequestered: Simpson Case: Panelists Will Be Taken to an Undisclosed Site Wednesday. Court Has List of Items to Bring and Those that are Forbidden. Judge Grants Seven Seats to Each Victim's Family.*, L.A. TIMES (Jan. 10, 1995, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1995-01-10-me-18325-story.html>.

197. *Id.*

198. Marcy Strauss, *Sequestration*, 24 AM. J. CRIM. L. 63, 66 n.7 (1996).

199. Mark Roth, *Juries in High-Profile Cases Like Cosby Trial Face Special Pressure*, N.Y. TIMES (June 12, 2017), <https://www.nytimes.com/2017/06/12/arts/television/bill-cosby-trial-jury-deliberations-oj-simpson.html?searchResultPosition=3>.

200. Nicole Jones, *The People v. O.J. Simpson Recap: Episode 8 Fact Check*, VANITY FAIR (Mar. 22, 2016), <https://www.vanityfair.com/hollywood/2016/03/people-v-oj-simpson-episode-8-recap>.

201. *Id.*

202. *Id.*

Although sequestration, on its face, may appear to be effective due to its sense of extremity, it is both ineffective and unsustainable.<sup>203</sup> Before delving into the benefits and dangers of sequestration, note that it is difficult to determine whether a jury's final verdict, even after being sequestered, has been influenced by the media, public opinion, or both.<sup>204</sup> Nevertheless, critiquing methods of jury insulation to ensure they are still effective during this technological era is critical.<sup>205</sup>

Jury sequestration requires the costly and inconvenient process of supervising and insulating jurors twenty-four hours a day.<sup>206</sup> Thus, judges are often reluctant to implement this method and reserve its use "for cases that attract substantial media attention and those in which there are other unique risks of outside influence."<sup>207</sup> However, the argument that sequestration is necessary to insulate juries in high-profile cases rests on the assumption that this method is effective. As discussed below, that assumption is wrong.<sup>208</sup>

Sequestration is most common in high profile cases that often take months to come to trial.<sup>209</sup> In these cases, the most dramatic, prejudicial, and inaccurate information is released prior to the selection of the jury.<sup>210</sup> In the Simpson case, for example, the media shared DNA "results" and leaked reports of domestic abuse prior to the beginning of trial.<sup>211</sup> Thus, sequestration is an inherently limited solution for preventing jurors from considering inaccurate and prejudicial information during trial.<sup>212</sup> One may argue that *voir dire* is effective in preventing individuals who are tainted by pretrial publicity from sitting on the jury, and thus sequestration is not ineffective.<sup>213</sup> Nevertheless, if this is true, "there may be no need for sequestration because a system of admonishments coupled with judicial questioning if prejudicial information is leaked by the press would successfully protect the defendant's rights."<sup>214</sup> Thus, sequestration is both ineffective and unnecessary in most cases.<sup>215</sup>

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203. See *infra* notes 206–233 and accompanying text.

204. See Hoffmeister & Watts, *supra* note 14, at 264.

205. See *supra* note 2 and accompanying text.

206. Daniel William Bell, Note, *Juror Misconduct and the Internet*, 38 AM. J. CRIM. L. 81, 87 (2010).

207. *Id.*

208. See *infra* notes 209–233 and accompanying text.

209. Strauss, *supra* note 198, at 94.

210. *Id.* at 95.

211. *Id.* at 94; see *supra* note 85.

212. See Strauss, *supra* note 198, at 95.

213. *Id.*

214. *Id.*

215. See *supra* notes 209–214 and accompanying text.

Further, based on the cost of paying, feeding, transporting, and housing the jurors and paying marshals to stay with the jurors, the total average cost of sequestration is around \$32,000 per jury.<sup>216</sup> It is speculated, however, that it cost Los Angeles County nearly three million dollars to sequester the *Simpson* jury.<sup>217</sup> Due to the high costs associated with sequestration, the practice is rarely used anymore.<sup>218</sup> The decline of the use of sequestration in Maryland serves as a prime example of this phenomena. Under common law principles, Maryland courts defaulted to sequestering jurors during trials.<sup>219</sup> Jury sequestration was so common that courts often had designated locations to house jurors such as a “jury dormitory” on the fifth floor of the Mitchell Courthouse in Baltimore City, or the firehouse on Main Street in Howard County.<sup>220</sup> By 1982, court rules finally made sequestration fully discretionary, and by the end of the 1980s, Maryland courts had essentially ended the practice, save for highly publicized cases.<sup>221</sup> Today, sequestration is rare in most courts,<sup>222</sup> largely due to its high costs.<sup>223</sup> Thus, sequestration is unsustainable, which is seen by virtue of its rare use by courts today.<sup>224</sup>

As the Internet and social media continue to increase the chances of highly publicized trials,<sup>225</sup> courts should not order and pay for sequestration each time there is a possibility that the jury is exposed to the prejudicial

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216. Ashley Perham, *What Sequestering a Jury Looks Like in 2021*, MAIN ST. NASHVILLE (June 29, 2021), [https://www.mainstreet-nashville.com/news/what-sequestering-a-jury-looks-like-in-2021/article\\_907814ba-d83f-11eb-a417-7729945ee436.html](https://www.mainstreet-nashville.com/news/what-sequestering-a-jury-looks-like-in-2021/article_907814ba-d83f-11eb-a417-7729945ee436.html); Bruce Vielmetti, *Sequestered Jury Expenses in Sherman Park Shooting Trial—\$32,000, and Counting*, MILWAUKEE J. SENTINEL (June 22, 2017, 6:10 PM), <https://www.jsonline.com/story/news/blogs/proof-and-hearsay/2017/06/22/sequestered-jury-expenses-sherman-park-shooting-trial-32-000-and-counting/421742001/>.

217. Jeff Welty, *Jury Sequestration*, N.C. SCH. OF GOV'T: N.C. CRIM. L. (Sep. 20, 2011, 10:08 AM), <https://nccriminallaw.sog.unc.edu/jury-sequestration/>.

218. Thomas MacMillan, *How the Psychological Toll of Isolation Might Be Affecting Bill Cosby Jurors*, CUT (June 15, 2017), <https://www.thecut.com/2017/06/sequestered-jury-psychological-toll-cosby-trial.html> (“Sequestration . . . has been on the decline for years, mostly because of the high cost of putting up jurors and alternates in a hotel, and paying for food and transportation and supervision.”).

219. Dennis M. Sweeney, *Jury Sequestration: No Meat, Drink, Fire or Candle*, DAILY REC. (Sept. 12, 2010), <https://thedailyrecord.com/2010/09/12/jury-sequestration-no-meat-drink-fire-or-candle/>.

220. *Id.*

221. *Id.*

222. *See, e.g., Jury Service Glossary*, CAL. CTS., <https://www.courts.ca.gov/3954.htm> (last visited May 9, 2023) (“Sequestration is extremely rare . . . .”); *Juror FAQ*, U.S. DIST. CT. N. DIST. OF N.Y., <https://www.nynd.uscourts.gov/juror-faq> (last visited May 9, 2023) (“Sequestration is very rare in this federal court.”); *Frequently Asked Questions—Jury Duty*, MD. CTS., <https://www.courts.state.md.us/clerks/calvert/faqsjuryduty> (last visited May 9, 2023) (“[I]n very rare circumstances . . . jurors may be ‘sequestered’ during the trial or during jury deliberations.”).

223. MacMillan, *supra* note 218.

224. *Id.*

225. *See supra* Section I.D.

media.<sup>226</sup> Moreover, sequestration is not feasible for many potential jurors who cannot take off work or find childcare.<sup>227</sup> Sequestration often limits the jury pool, as “prospective jurors are told on the front end that they will be isolated.”<sup>228</sup> This may alter the composition of the juries, as only individuals who can afford to take off work,<sup>229</sup> do not work, or are retired may be able to be sequestered.<sup>230</sup>

Finally, sequestering juries in the modern age may pose personal privacy issues.<sup>231</sup> A Tennessee court, for example, required that sequestered jurors turn in their phones with the understanding that jury guards would check jurors’ phones to ensure jury members were not unlawfully accessing their devices.<sup>232</sup> The circuit judge presiding over the case said that the court’s “biggest concern” was ensuring sequestered jurors did not “have a cellphone . . . that allow[ed] them to get online and do their own research.”<sup>233</sup> The court’s decision to collect and check jurors’ cell phones raises major privacy issues, as a cell phone stores personal and sensitive information that courts and jury guards should not have access to in the course of sequestration.<sup>234</sup>

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226. See Perham, *supra* note 217.

227. *Id.*

228. *Id.*

229. Illinois and South Carolina are the only states that do not provide a daily payment to those serving jury duty. *Jury Duty Pay by State 2023*, WORLD POPULATION REV., <https://worldpopulationreview.com/state-rankings/jury-duty-pay-by-state> (last visited May 8, 2023). Mississippi, New Jersey, Missouri, Texas, and New Mexico pay less than ten dollars per day. *Id.* The highest daily juror rate is fifty dollars per day. *Id.* This rate is offered only in Arkansas, Colorado, Connecticut, Georgia, Massachusetts, and South Dakota. *Id.* The average rate per state is \$21.96. *Id.* Federal jurors are paid fifty dollars per day, and can receive up to sixty dollars per day after serving ten days on a trial. *Juror Pay*, U.S. CTS., <https://www.uscourts.gov/services-forms/jury-service/juror-pay> (last visited May 8, 2023).

230. See sources cited *supra* note 229. White individuals have financial security in retirement more than any other racial or ethnic group in America. Mark Miller, *America’s Retirement Race Gap, and Ideas for Closing It*, N.Y. TIMES (Aug. 14, 2020), <https://www.nytimes.com/2020/08/14/business/retirement-inequality-racism.html>. Consider the potential impacts on verdicts reached by sequestered juries when those juries are made up of only those individuals who have the means to take off work, choose not to work, or those who are retired. See Neil Bhutta et al., *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances*, BD. OF GOVERNORS OF THE FED. RSRV. SYSTEM (Sept. 28, 2020), <https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.html#:~:text=White%20families%20have%20more%20wealth,in%20thousands%20of%202019%20dollars> (finding that “the typical White family has eight times the wealth of the typical Black family and five times the wealth of the typical Hispanic family”).

231. See Perham, *supra* note 216.

232. *Id.*

233. *Id.*

234. In *Riley v. California*, 573 U.S. 373 (2014), the Court held that because of the pervasive elements that characterize cell phones, a warrant is generally required before a government actor may search an individuals’ cell phone. *Riley*, 573 U.S. at 386, 395. If police and other government



Thus, a review of the *Simpson* case and the jury insulation methods used indicates that sequestration allows juror misconduct to occur,<sup>235</sup> is too costly to order regularly,<sup>236</sup> limits the jury pool,<sup>237</sup> and poses potential privacy concerns for jurors.<sup>238</sup> As a result, jury sequestration is ineffective and unfeasible for regular use in today's technological age.<sup>239</sup>

*B. The Depp v. Heard Court Harmed the Integrity of its Judicial Proceedings by Refusing to Insulate the Jury.*

Johnny Depp and Amber Heard, two celebrity actors, were married in 2015.<sup>240</sup> In 2016, Amber Heard filed for a divorce and requested a restraining order.<sup>241</sup> The pair reached an out-of-court divorce settlement that same year.<sup>242</sup> Following the settlement, Heard wrote an op-ed headlined *I Spoke Up Against Sexual Violence—and Faced Our Culture's Wrath. That Has to Change*.<sup>243</sup> Although Heard never mentioned Depp directly, Depp sued Heard for defamation in 2019, arguing that Heard implied in her op-ed that he abused her throughout their marriage.<sup>244</sup> The trial began in April 2022, and as of June 16, 2022, on TikTok, the hashtag #JusticeForJohnnyDepp had about 20.5 billion views and #JusticeForAmberHeard had about 97 million views.<sup>245</sup>

The media attention the case received was overwhelming.<sup>246</sup> John Marks, chief research officer of the network which owns Court TV,<sup>247</sup> stated

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actors are not permitted to have access to the information stored on a cell phone without a warrant, it is illogical to permit courts to have access to such information merely because an individual is performing a civic duty. *See id.*

235. *See Bell, supra* note 206, at 86–87.

236. *See Perham, supra* note 216.

237. *Id.*

238. *Id.*

239. *See supra* notes 206–233 and accompanying text.

240. Constance Grady, *Johnny Depp, Amber Heard, and Their \$50 Million Defamation Suit, Explained*, VOX (Nov. 3, 2022, 4:46 PM), <https://www.vox.com/culture/23043519/johnny-depp-amber-heard-defamation-trial-fairfax-county-domestic-abuse-violence-me-too>.

241. *Id.*

242. *Id.*

243. Amber Heard, *I Spoke Up Against Sexual Violence—and Faced Our Culture's Wrath. That Has to Change.*, WASH. POST (Dec. 18, 2018, 5:58 PM), [https://www.washingtonpost.com/opinions/ive-seen-how-institutions-protect-men-accused-of-abuse-heres-what-we-can-do/2018/12/18/71fd876a-02ed-11e9-b5df-5d3874f1ac36\\_story.html](https://www.washingtonpost.com/opinions/ive-seen-how-institutions-protect-men-accused-of-abuse-heres-what-we-can-do/2018/12/18/71fd876a-02ed-11e9-b5df-5d3874f1ac36_story.html).

244. Grady, *supra* note 240.

245. Waiyee Yip, *Juror in the Depp v. Heard Trial Says the Jury Wasn't Swayed by Social Media: 'We Followed the Evidence'*, INSIDER (June 16, 2022, 11:39 PM), <https://www.insider.com/johnny-depp-amber-heard-trial-jury-influenced-social-media-juror-2022-6>.

246. *Id.*

247. *About Us*, COURT TV, <https://www.courtvtv.com/about-us/> (last visited Dec. 17, 2022) (“Court TV is devoted to live gavel-to-gavel coverage, in-depth legal reporting, and expert analysis

that the network “more than doubled [their] daytime ratings due to [the *Depp v. Heard*] trial.”<sup>248</sup> The “biggest spike in viewers” occurred “the day Depp finished cross-examination and his team took back over for redirect, where he gave lengthy, uninterrupted explanations much as he had in his initial round of testimony.”<sup>249</sup> Marks also stated that the views from this trial were comparable to those of the Derek Chauvin trial,<sup>250</sup> which occurred a year prior.<sup>251</sup> The trial was so sensationalized that, only four months after jury deliberations occurred, a movie reenactment of the trial was released.<sup>252</sup> The film shows “the social-media circus that surrounded the Depp/Heard trial” by “intercutting staged versions of postings from [commentators] . . . who turned the trial into not just a riveting piece of reality theater but the most telling Warholian sideshow of the 21st century.”<sup>253</sup> Thus, this case provides an exceptional example of a highly publicized modern trial to analyze and determine the efficacy of jury insulation methods used by the court.

### *1. Jury Instructions*

Before the trial, the jury was “advised not to read or research the case, . . . [and] to turn off their cell phone notifications to prevent them from accidentally seeing a news alert.”<sup>254</sup> Throughout the trial, the judge

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of the nation’s most important and compelling trials. The network is available on cable, satellite, over-the-air and online at CourtTV.com. It is also carried on an expanding array of streaming services and apps, including YouTube TV, SiriusXM, Roku, Amazon Fire TV and Apple TV.”)

248. Kenzie Bryant, *How Court TV’s Wall-to-Wall Coverage Transformed the Johnny Depp-Amber Heard Story*, VANITY FAIR (May 2, 2022), <https://www.vanityfair.com/style/2022/05/how-court-tvs-wall-to-wall-coverage-transformed-the-johnny-depp-amber-heard-story>.

249. *Id.*

250. “Derek Chauvin was found guilty of two counts of murder . . . in the death of George Floyd, who[] [took his] final breaths . . . under the knee of Mr. Chauvin, a former Minneapolis police officer.” Nicholas Bogel-Burroughs & Tim Arango, *What to Know About the Trial of Derek Chauvin*, N.Y. TIMES (June 25, 2021), <https://www.nytimes.com/live/2021/derek-chauvin-trial-explained>. Floyd’s murder served as a catalyst for massive protests against the systemic abuse suffered by Black people at the hands of the police. *Id.*

251. *See* Bryant, *supra* note 248.

252. Owen Gleiberman, ‘Hot Take: The Depp/Heard Trial’ Review: A He Said/She Said Schlock ‘Rashomon’ That’s Really an All-Too-Standard TV-Movie, VARIETY (Oct. 1, 2022, 8:04 PM), <https://variety.com/2022/film/reviews/hot-take-the-depp-heard-trial-review-johnny-depp-amber-heard-1235390477/>.

253. *Id.*

254. Ted Johnson, *A Celebrity Trial Comes to Fairfax, VA: Johnny Depp-Amber Heard Jury Selection Gives a Glimpse of What Is to Come*, DEADLINE (Apr. 11, 2022, 5:16 PM), <https://deadline.com/2022/04/johnny-depp-amber-heard-trial-virginia-1235000402/>.

admonished<sup>255</sup> jury members every night.<sup>256</sup> Camille Vasquez, one of Depp's attorneys, stated that although news regarding the trial "[was] everywhere," the jury "had a tremendous amount of respect for the court and the process, and they were doing the best that they could."<sup>257</sup> Before the jury began deliberations, the judge instructed the jury by stating that:

You must consider and decide this case fairly and impartially. You are to perform this duty without bias or prejudice as to any party. All persons stand equal before the law and are entitled to the same treatment under the law. Our system of law does not permit jurors to be governed by sympathy, prejudice, or public opinion. Both the parties and the public expect that you will carefully and impartially consider all the evidence in the case, follow the law as stated by the court, and reach a just verdict, regardless of the consequences . . . You must not base your verdict in any way upon sympathy, bias, guesswork, or speculation. Your verdict must be based solely upon the evidence and instructions of the Court.<sup>258</sup>

With the media attention and passionate public views surrounding the case, it is questionable that the judge failed to discuss social media and news sources in the jury instructions.<sup>259</sup> The court's instructions diverged from the Virginia Model Jury Instructions, which direct judges to state:

You may not use any electronic device or media, such as a telephone, cell phone, smart phone, iPhone, Blackberry or computer; the Internet, any Internet device, or any text or instant messaging service; or any Internet chat room, blog, or Web site such as Facebook, MySpace, LinkedIn, YouTube, or Twitter, to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict.<sup>260</sup>

The Virginia Model Jury Instructions also discuss interacting with the media, stating that the jurors "should avoid reading newspaper accounts of

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255. An admonition is defined as "direction, warning or advice from a judge. A judge can admonish anyone in the courtroom, including defendants, prosecutors, witnesses and spectators . . . Failure to comply with an admonition can have various results, including being found in Contempt of Court or being removed from the courtroom." *Admonition*, STEPHEN G. RODRIGUEZ & PARTNERS, <https://www.lacriminaldefenseattorney.com/legal-dictionary/a/admonition/> (last visited Dec. 17, 2022).

256. Savannah Walsh, *Johnny Depp's Lawyers Say "Social Media Played No Role" in Amber Heard Defamation Case*, VANITY FAIR (June 8, 2022), <https://www.vanityfair.com/hollywood/2022/06/johnny-depps-lawyers-say-social-media-played-no-role-in-amber-heard-defamation-case>.

257. *Id.*

258. Jury Instructions at 10, 19, Depp v. Heard, No. CL-2019-0002911 (Va. Cir. Ct. June 24, 2022), 2022 WL 1772266.

259. See St. Eve et al., *supra* note 175, at 80–85.

260. RONALD J. BACIGAL & MARGARET IVEY BACIGAL, VIRGINIA PRACTICE SERIES: JURY INSTRUCTIONS § 7:7, Westlaw (database updated Dec. 2022).

the trial and such accounts are not to be considered as evidence.”<sup>261</sup> Because jury instructions may deter jurors from conducting outside research,<sup>262</sup> the court’s failure to address social media and news sources when the trial was so highly publicized<sup>263</sup> was a mistake.

2. *Additional Method of Jury Insulations and its Efficacy and Sustainability Today*

The court in this trial failed to implement other methods of jury insulation and received backlash for the media circus that ensued.<sup>264</sup> Heard’s legal team attempted to exclude any cameras from the trial while Depp’s team welcomed the media presence.<sup>265</sup> “In weighing the issue, [the judge] noted that she was getting a lot of media requests, and she had a responsibility to keep the proceedings open to observers. If cameras were not allowed, she worried that reporters would come to the courthouse, potentially creating a hazardous condition there.”<sup>266</sup> The judge ultimately decided to allow Court TV<sup>267</sup> to operate two pool cameras in the courtroom.<sup>268</sup>

Many critics have compared this case to the *Simpson* trial, even going so far as saying that “*Johnny Depp v. Amber Heard* is ‘the OJ Simpson case on steroids.’”<sup>269</sup> Such critics argue that both verdicts “provide a backdrop of sensationalism—white noise that allows detail and nuance to slip through the cracks and get lost among the churning, turbulent waters.”<sup>270</sup> However, as mentioned above, the *Depp v. Heard* court admonished the jury each night and provided jury instructions before deliberations.<sup>271</sup> However, do these methods alone insulate juries, especially during highly publicized cases? Very likely no.<sup>272</sup>

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261. *Id.* § 7:6.

262. See PROPOSED MODEL JURY INSTRUCTIONS, *supra* note 105.

263. See Yip, *supra* note 245.

264. See Today in Focus, *supra* note 137, at 08:10–08:40; Gene Maddaus, *Why Was Depp-Heard Trial Televised? Critics Call It ‘Single Worst Decision’ for Sexual Violence Victims*, VARIETY (May 27, 2022, 4:15 PM), <https://variety.com/2022/film/news/johnny-depp-amber-heard-cameras-courtroom-penney-azcarate-1235280060/>; Jen Chaney, *The Circus Was Televised*, VULTURE (June 3, 2022), <https://www.vulture.com/article/depp-v-heard-trial-outcome-jury-audience.html>.

265. See Maddaus, *supra* note 264.

266. *Id.*

267. See *supra* note 247.

268. See *supra* note 247.

269. Michael Gillis, *Is Johnny Depp v. Amber Heard the OJ Simpson Trial of Our Time?*, NEWS MEDIA FILMS (June 10, 2022), <https://newsmediafilms.com/entertainment/depp-v-heard-oj-simpson/>.

270. *Id.*

271. See *supra* notes 255–257 and accompanying text.

272. See *infra* text accompanying note 278.

When there is mass media exposure of a trial, and when public opinion regarding that trial is widely available on social media, there is an increased likelihood that juror misconduct will occur.<sup>273</sup> Scholars have suggested that improving jury instructions by specifically admonishing the use of social media, in conjunction with increased admonitions on social media use by the jury, will reduce juror misconduct.<sup>274</sup> Others have noted that “courts . . . need to improve jury instructions,”<sup>275</sup> and that “courts should, as a matter of course, employ specialized social media instructions at frequent intervals during trial.”<sup>276</sup> According to a survey conducted in 2011, thirty-five states use jury instructions that “mention the Internet generally, mention both the Internet and social media, or mention specific web and social media sites and services.”<sup>277</sup> Thus, these social media and Internet-specific jury instructions already exist, and have existed in most states for a decade; nevertheless, juror misconduct continues to occur.<sup>278</sup> So, what then should courts do to insulate jurors from the influence of public opinion and misinformation if sequestration is not feasible (nor 100% effective) and if jury instructions alone do not dissuade jurors from using social media?

*C. Restricting Broadcasting as a Method of Insulation for the Modern Age*

Paul Thaler, professor of journalism at Adelphi University in New York, explained that “the notion of a free press, free media, and open courtroom . . . is certainly paramount” to the issue of cameras in the courtroom, as media personnel and avid viewers often argue that the public has the right to see what goes on.<sup>279</sup> However, his position alone fails to consider that an open courtroom today might reach billions of viewers, and thus the right to receive courtroom updates on demand may impact a constitutional right of greater importance—the Sixth Amendment rights of the Defendant.<sup>280</sup> Although courts have begun creating harsh punishments for jurors who willfully ignore judicial admonitions and instructions, to truly

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273. See, e.g., David E. Aaronson & Sydney M. Patterson, *Modernizing Jury Instructions in the Age of Social Media*, 27 CRIM. JUST. 26, 26 (2013); Amy J. St. Eve & Michael A. Zuckerman, *Ensuring an Impartial Jury in the Age of Social Media*, 11 DUKE L. & TECH. REV. 1, 10 (2012); Frank J. Mastro, *Preventing the “Google Mistrial”: The Challenge Posed by Jurors Who Use the Internet and Social Media*, 37 LITIGATION, Spring 2011, at 23, 23–24.

274. HANNAFORD-AGOR, ROTTMAN & WATERS, *supra* note 176.

275. Thaddeus Hoffmeister, *Google, Gadgets, and Guilt: Juror Misconduct in the Digital Age*, 83 U. COLO. L. REV. 409, 468 (2012).

276. St. Eve & Zuckerman, *supra* note 273, at 29.

277. Eric P. Robinson, *Jury Instructions for the Modern Age: A 50-State Survey of Jury Instructions on Internet and Social Media*, 1 REYNOLDS CTS. & MEDIA L.J. 307, 310 (2011).

278. See *id.*

279. Today in Focus, *supra* note 137, at 04:58–05:09.

280. *Id.*

begin solving this issue, courts need to address the heart of the problem: the influence of the media and public opinion.<sup>281</sup>

### *1. Proposed Remedy*

This Comment does not propose that state courts should adopt the federal approach as it pertains to electronic media coverage and broadcasting of judicial proceedings from the courtroom.<sup>282</sup> Rather, in the interest of maintaining jury impartiality and guaranteeing parties their Sixth Amendment rights, this Comment argues that courts should implement rules allowing recordings of court proceedings to be broadcasted only after the jury has finished deliberating.<sup>283</sup> Specifically, the reading of verdicts may be broadcasted live, while all other recordings may be distributed only after the trial has concluded and the jury has deliberated. This rule would allow the public and the media to continue to have access to court proceedings. However, it would also ensure that media circuses and widespread public opinion on social media do not impact juries in the same way they likely have before.<sup>284</sup> Furthermore, this rule adheres closely to the goals of the Sixth Amendment in that this proposal, in conjunction with existing methods of jury insulation, gives each party the best chance at having a truly impartial trial without resorting to sequestration, violating jurors' privacy, or sensationalizing trials.<sup>285</sup>

Today, “[t]he news media has adopted a 24-hour news cycle,” that “provid[es] a constant flood of information.”<sup>286</sup> News stations and journalists are often focused on “what people are clicking on and how long they’re spending on an article.”<sup>287</sup> Thus, this proposal would force slow journalism<sup>288</sup> and require the media and social media users to wait until a

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281. *See infra* Section II.C.1.

282. Federal courts prohibit the taking of photographs and live broadcasting of all criminal judicial proceedings and most civil judicial proceedings. *See supra* notes 146–147 and accompanying text.

283. *See infra* Section II.C.1.

284. Previous impact may be seen in the 5.5 million people watching broadcasts of the Simpson trial, or the 20.5 billion views of clips and recordings from the live broadcasted Depp trial. *See Caldwell, supra* note 188; Yip, *supra* note 245.

285. *See supra* Section II.A.2.

286. Keenan Thomas, *24-Hour News, Information Cycle Gradually Changes Industry*, UNIV. OF TENN. DAILY BEACON (Mar. 22, 2021), [https://www.utdailybeacon.com/city\\_news/24-hour-news-information-cycle-gradually-changes-industry/article\\_dea5d932-86d8-11eb-8c6f-bb280c60c276.html](https://www.utdailybeacon.com/city_news/24-hour-news-information-cycle-gradually-changes-industry/article_dea5d932-86d8-11eb-8c6f-bb280c60c276.html).

287. *Id.*

288. Although there is “no simple consensus” as to the definition of slow journalism, it has been described as a critical theory that “encourag[es] journalists working in all fields and on all timescales to be mindful of the way journalism is changing.” Matt Norman, *What Is ‘Slow Journalism’?*, NAT’L GEOGRAPHIC (Feb. 20, 2017), <https://www.nationalgeographic.org/projects/out-of-eden-walk/blogs/lab-talk/2017-02-what-slow-journalism/>. This theory emerged in conjunction with the

verdict has been reached before sensationalizing the events of the trial. Under this proposed method, jurors are likely to be better insulated, allowing the Sixth Amendment to regain its power in the courtroom.

If one finds compelling the data suggesting that the current technological age is negatively impacting jury insulation,<sup>289</sup> then two possibilities follow: (1) a remedy is required, or (2) courts must accept that juror misconduct (either passive or intentional) is a side effect of the modern age. If courts accept that juror misconduct is just a part of reality, then courts are ignoring the Sixth Amendment's promise of impartial juries.<sup>290</sup> So long as courts continue to adhere to constitutional commands, it is impermissible to accept without remedy these issues as mere consequences of the technological era. Rather, courts should provide unwavering support for upholding the Sixth Amendment.<sup>291</sup> This Comment argues that ending the live broadcasting of courtroom proceedings is a sustainable and effective means of supporting the right to an impartial jury.<sup>292</sup>

Admittedly, banning the live broadcasting of trials may appear to be an extreme solution. However, once one considers the information (and lack thereof) available regarding juror misconduct, this remedy is a logical and reasonable method of ensuring jury impartiality.<sup>293</sup> Without proposing and implementing remedies to this issue, mistrials and trial disruptions will continue to occur due to jurors being influenced by outside information.<sup>294</sup> However, even with the information available regarding juror misconduct, one must presume that the misconduct that is occurring far outweighs the misconduct that is documented.<sup>295</sup> This presumption is logical as jurors are reluctant to share when they, or another juror, have passively or actively consumed extrinsic information.<sup>296</sup> Further, data specifically analyzing mistrials also suggests misconduct may be worse than it appears.<sup>297</sup> This is because “[t]he standard for what is required to constitute a mistrial based on

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rise of surface-level, on demand news, which some argue has “come[] at the cost of analysis, of context, of complexity.” *Id.*

289. See *supra* Section I.D.

290. U.S. CONST. amend. VI.

291. *Id.*

292. See *infra* Section II.C.1.

293. See *infra* notes 296–307 and accompanying text.

294. See Schwartz, *supra* note 2; Petition for Writ of Certiorari at 14–15, *Rodriguez v. FedEx Freight E., Inc.*, No. 10-1226 (U.S. Apr. 5, 2011), 2011 WL 1356669, at \*14–\*15 (discussing jurors use of Internet to find information about the lawyers in the case); Brian Grow, *As Jurors Go Online, U.S. Trials Go Off Track*, REUTERS (Dec. 8, 2010, 1:50 PM), <https://www.reuters.com/article/internet-jurors-idUKN0816547120101208>; see U.S. DEP'T OF JUST., *supra* note 181.

295. Hoffmeister & Watts, *supra* note 14, at 264.

296. *Id.*

297. *Id.*

juror misconduct where social media is concerned is in a state of flux because federal and state court judges have broad discretion to give their own instructions or rules regarding electronic communication by jurors during trials.”<sup>298</sup> For instance, in *Mathis v. State*,<sup>299</sup> a Texas appellate court determined that a juror’s Internet research of issues involved in the case did “not constitute outside influence, even if shared specifically to influence the other jurors’ votes.”<sup>300</sup> In *Wardlaw v. State*,<sup>301</sup> however, the Maryland Court of Special Appeals found that a juror who conducted outside research violated the defendant’s constitutional right to an impartial jury, and thus reversed and remanded the case for a new trial.<sup>302</sup> The information regarding juror misconduct, and the repercussions applied, fail to capture the extent of the constitutional violation.<sup>303</sup> Thus, in order to ensure that the Sixth Amendment’s constitutional guarantee is upheld, courts should take the issue of juror misconduct seriously and take affirmative steps to remedy the situation.<sup>304</sup>

## 2. *Similar Methods Successfully Employed to Balance the Need for Transparency with Countervailing Interests*

Withholding information for a period of time in order to balance the need for transparency with other countervailing interests has been used in various circumstances.<sup>305</sup> An embargoed press release (“EPRs”) is a “news release, announcement or media alert which is shared with the media prior to its publication.”<sup>306</sup> EPRs are regularly used in the world of public relations and “allow journalists to take their time when crafting complex or sensitive news stories, as well as protect[] the interests of the individual or business releasing the story.”<sup>307</sup> An example of a high-stakes use of an EPR is when former President George W. Bush surprised troops in Iraq in 2003 during Thanksgiving.<sup>308</sup> The visit “had been planned for almost six weeks but was

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298. Ahunanya Anga, *Jury Misconduct: Can Courts Enforce a Social Media and Internet Free Process? We “Tweet,” Not*, 18 J. TECH. L. & POL’Y 265, 274 (2013).

299. No. 05-05-01119-CR, 2006 WL 1479879 (Tex. Ct. App. May 31, 2006).

300. *Id.* at \*8.

301. 185 Md. App. 440, 971 A.2d 331 (2009).

302. *Id.* at 453–54, 971 A.2d at 339.

303. Hoffmeister & Watts, *supra* note 14, at 264.

304. *See supra* Section II.C.1.

305. *See infra* Section II.C.2.

306. Matias Rodsevich, *Embargoed Press Release: Meaning, How to Use and Examples*, PR LAB (Aug. 28, 2022), <https://prlab.co/blog/embargoed-press-release-meaning-examples-and-how-to-use/>.

307. *Id.*

308. Mike Allen & Robin Wright, *Bush Surprises Troops in Iraq*, WASH. POST (Nov. 28, 2003), <https://www.washingtonpost.com/archive/politics/2003/11/28/bush-surprises-troops-in-iraq/39bd2362-b6d9-40b4-bb05-5befaa24dccb/>.



tightly held, even by a small media pool traveling with him, until after Bush left Baghdad.”<sup>309</sup> Addressing the embargo, President Bush noted that Americans would “understand that had [they] announced this . . . it would have put [him] in harm’s way, it would have put others in harm’s way.”<sup>310</sup>

Similar to this proposed solution, EPRs balance the interests of the media and the public in receiving information while prioritizing and protecting the interests of the source releasing the story.<sup>311</sup> EPRs and the remedy advanced by this Comment prevent the release of information to the public before it is appropriate to do so.<sup>312</sup> In regard to trials, the right time to release recordings of trial is after the jury has finished deliberations, ensuring that the public does not sensationalize the proceedings and influence jurors.<sup>313</sup> This proposed method is strikingly similar in nature to EPRs. However, this remedy is less severe than EPRs, as it does not completely prevent journalists and members of the public from attending court proceedings, taking notes, recording audio, disseminating information, or commenting on the trial.<sup>314</sup> Rather, it merely prohibits the live broadcasting of trials so as to prevent juror bias. This method of withholding information is thus not unfounded.<sup>315</sup>

Indeed, the government employs a similar technique to the remedy proposed by this Comment when compiling, declassifying, and releasing foreign affairs documentation.<sup>316</sup> The Pell Amendment, enacted by Congress, mandates the Department of State to produce a “thorough, accurate, and reliable documentary record of major United States . . . diplomatic activity’ at a 30-year publication line.”<sup>317</sup> Congress understood the importance of promoting transparency, while also creating a delay for when sensitive

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309. *Id.*

310. *Id.*

311. *Id.*

312. *Id.*

313. *See supra* Section II.B.

314. Some may argue that courtrooms do not have the capacity, especially for popular trials, to seat every member of the public who wishes to view the proceedings; however, even when trials are broadcasted, courtrooms are incapable of seating every individual who wishes to view the trial live. *See* Emily Yahr, *Is this ‘Thunderdome’ or the Line to Get Into the Depp-Heard Trial?*, WASH. POST (May 26, 2022 1:00 P.M.), <https://www.washingtonpost.com/arts-entertainment/2022/05/26/johnny-depp-amber-heard-trial-line/> (“Only 100 spectators are allowed in [the Depp-Heard courtroom] each day, first-come, first-served, but many more show up to try to get a place in line, leading to confusion, shouting matches, online shaming and at least one physical altercation captured on video.”). Thus, under this proposal, members of the public who cannot view trials live from the courtroom must, as they already do, rely on media reporting of the trial.

315. *See supra* text accompanying notes 305–311.

316. JOSHUA BOTTS, *“Thorough, Accurate, and Reliable,” 1990–1991*, in WILLIAM B. MCALLISTER ET AL., *TOWARD “THOROUGH, ACCURATE, AND RELIABLE”: A HISTORY OF THE FOREIGN RELATIONS OF THE UNITED STATES* SERIES 277, 278 (2015).

317. *Id.* (quoting 22 U.S.C. § 4351(a)).

information may be shared with the public.<sup>318</sup> Legislators “recognized the ‘public’s absolute right to the authoritative disclosure of foreign affairs commitments and undertakings of government officials.’”<sup>319</sup> However, they also balanced the countervailing interest in national security, and thus require government agencies to wait thirty years before declassifying and releasing documents.<sup>320</sup> This method is similar to the remedy this Comment proposes. However, just as with EPRs, the proposed method is less severe.<sup>321</sup> The media and public would only be required to wait until the jury has finished deliberating to disseminate any recordings of the court proceedings but would still be allowed to comment on the trial and share information collected during the trial throughout the proceedings. This method, just as the government’s process of declassifying information, advocates for transparency while balancing another countervailing interest.<sup>322</sup> Here, the countervailing interest is the parties’ Sixth Amendment right to an impartial jury.

### 3. *The Benefits of Prohibiting the Broadcasting of Trials Unequivocally Outweigh the Alleged Costs*

Legal scholars have argued that ending broadcasting of court proceedings will cause a decrease in public confidence because “[p]ublic confidence in the court system is weakened when it cannot trust it to satisfy its onus; seeking justice.”<sup>323</sup> However, when trials are sensationalized, as was the case in the *Depp* and *Simpson* trials, the court is reduced to a circus-like atmosphere.<sup>324</sup> This itself weakens public confidence and infringes on parties’ rights to a fair and impartial jury.<sup>325</sup> Take, for example, reflections on the *Simpson* trial:

Unfortunately, the [Simpson] trial became a stage for the jury, lawyers and judge to pursue their own self-serving purposes. With the defense attorneys claiming their client was the real “victim,” the prosecution losing sight of its duty to present evidence fairly, a judge totally smitten with his own self-generated celebrity status, and jurors being discharged for a variety of problems, including

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318. *Id.*

319. *Id.* at 281.

320. *Id.*

321. See Rodsevich, *supra* note 306.

322. BOTTIS, *supra* note 316, at 281.

323. Regina Judge, *Cut! Arguments Against Televising Trials*, 32 N.E. J. LEGAL STUD. 133, 145 (2014).

324. See *supra* Sections II.A–B.

325. See *supra* Sections II.A–B.

misconduct, the whole proceeding became an embarrassing reflection of the American legal system.<sup>326</sup>

Further, studies have shown that in 2019, “[l]ess than two-thirds of Americans believe the jury system is the best way to resolve disputes.”<sup>327</sup> Thus, courts should attempt to rebuild public confidence and trust by focusing on providing an impartial, fair judicial process for all civil and criminal trials.

Scholars have also advanced the argument that televised trials allowed the media and public to review judicial proceedings and advocate for fairness in trials.<sup>328</sup> However, this argument fails because the presence of cameras in courtrooms has been determined to likely have adverse effects on jurors, such as feeling pressure to decide cases in a way that aligns with public opinion.<sup>329</sup> Further, the media and public under this proposal would continue to have access to real-time journalism and reporting. Consider the Menendez murder trial, where two brothers, Lyle and Erik, were convicted of murdering their parents in 1993.<sup>330</sup> The media in that case bears resemblance to that of the *Depp* trial in terms of the way the public and the media manipulated Court TV.<sup>331</sup> For example, “ABC took snippets of a witness’ testimony, police reports, and segments of a bail hearing to create a show that aired *before* the trial.”<sup>332</sup> The difference is that under this proposal, as opposed to the trials discussed above, recordings and snippets will not be manipulated and

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326. Andrew G.T. Moore II, *The O.J. Simpson Trial—Triumph of Justice or Debauchery?*, 41 ST. LOUIS U. L.J. 9, 10 (1996).

327. *Do Americans Have Confidence in the Courts?*, WILLOW RSCH. (Mar. 27, 2019), <https://willowresearch.com/american-confidence-courts/>.

328. See Shelly Rosenfeld, *Will Cameras in the Courtroom Lead to More Law and Order? A Case for Broadcast Access to Judicial Proceedings*, 6 AM. U. CRIM. L. BRIEF 12, 14 (2010) (advancing the argument that courts, particularly the Supreme Court, should not be making decisions “in secret” (quoting GRETA VAN SUSTEREN & ELAINE LAFFERTY, *MY TURN AT THE BULLY PULPIT: STRAIGHT TALK ABOUT THE THINGS THAT DRIVE ME NUTS* 93 (2003))).

329. Compare Anton R. Valukas, William A. Von Hoene, Jr. & Liza M. Murphy, *Cameras in the Courtroom: An Overview*, 13 COMM’NS LAW., Fall 1995, at 1, 20 (noting that Court TV conducted a poll and 60% of questioned judges found that “the presence of Court TV’s cameras and its reporting ‘helped convey the events of the trial in a way that contributed to public understanding of the legal system’”), with MARJORIE COHN & DAVID DOW, *CAMERAS IN THE COURTROOM: TELEVISION AND THE PURSUIT OF JUSTICE* 20, 87 (1998) (describing the public’s perception of its ability to decide the proper outcome of a case, and suggesting, that if a jury is aware of the public’s disposition in a case, the jury may then try to decide in accordance with public opinion).

330. “The Menendez murders became a national sensation when the new television network, Court TV, broadcast the trial in 1993.” *The Menendez Brothers Murder Their Parents*, HISTORY (Aug. 18, 2020), <https://www.history.com/this-day-in-history/the-menendez-brothers-murder-their-parents>.

331. See *infra* Section II.B.1.

332. Jacob Marvelley, *Lights, Camera, Mistrial: Conflicting Federal Court Local Rules and Conflicting Theories on the Aggregate Effect of Cameras on Courtroom Proceedings*, 16 SUFFOLK J. TRIAL & APP. ADVOC. 30, 49 n.140 (2011).

sensationalized for the public's consumption *before* the jury renders a verdict. Thus, this method would decrease the risk of "viral" public disposition regarding a case that put juries at risk of being influenced by public opinion and misinformation.

Jurors still may very well continue to be exposed, either intentionally or accidentally, to prejudicial information online under this proposed method. However, this remedy decreases the likelihood that the information jurors see will be manipulated viral videos or highly prejudicial and out-of-context recordings.<sup>333</sup> This is because, just as with the release of sensitive government documents, the public is less likely to sensationalize or have intense reactions to events when they are given access to certain materials only after the event has been resolved.<sup>334</sup> When trials are not sensationalized, jurors are less likely to see extrinsic, manipulated, or highly prejudicial information related to the trial while checking the news or scrolling on social media.<sup>335</sup>

Finally, advocates of broadcasting judicial proceedings have proffered that it is the public's right to attend trials, and thus, when they are unable to attend, they should have access to broadcasts.<sup>336</sup> The Sixth Amendment, in addition to guaranteeing an impartial jury, provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ."<sup>337</sup> However, to echo the words of Chief Justice Warren, the right of the press and the public to witness and report on judicial matters, "does not bring with it the right to inject themselves into the fabric of the trial process to alter the purpose of that process."<sup>338</sup> Opening trials, particularly criminal trials, to the public has been a tradition in the United States since the origins of the Anglo-American legal system.<sup>339</sup> Allowing the public to witness trials served as a safeguard against oppression by the judiciary.<sup>340</sup> However, this right is not absolute, and has not historically included the right

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333. See Gleiberman, *supra* note 252.

334. See BOTS, *supra* note 316, at 278–81.

335. See Shearer & Mitchell, *supra* note 154 (finding that about half of U.S. adults receive their news from social media); see also Vosoughi et al., *supra* note 85, at 1146–58 (finding that falsehoods are spread on social media faster and more often than the truth).

336. Erwin Chemerinsky & Eric J. Segall, *Cameras Belong in the Supreme Court*, 101 JUDICATURE, Summer 2017, at 14, 15 ("Governmental hearings that are open to some should be open to all . . .").

337. U.S. CONST. amend. VI.

338. *Estes v. Texas*, 381 U.S. 532, 585 (1965) (Warren, C.J., concurring).

339. *In re Oliver*, 333 U.S. 257, 266 (1948) ("This nation's accepted practice of guaranteeing a public trial to an accused has its roots in our English common law heritage. The exact date of its origin is obscure, but it likely evolved long before the settlement of our land as an accompaniment of the ancient institution of jury trial.")

340. *Id.* at 270 ("[T]he [public trial] guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.")

to live broadcasting.<sup>341</sup> The Court has held that the press has a right to attend criminal trials.<sup>342</sup> This proposal does not suggest that it is appropriate to ban the press or media from proceedings, but rather, that the media should be prohibited from broadcasting trials prior to the jury's reading of the verdict.<sup>343</sup> While judicial proceedings should continue to be open to the public, this right should not be permitted to continue interfering with parties' Sixth Amendment rights through the broadcasting of trials.<sup>344</sup> This proposal is a middle ground between the federal courts' practice of banning broadcasting<sup>345</sup> and the many states which have widespread acceptance of Court TV.<sup>346</sup> If implemented, it would allow individuals to watch the recordings after deliberations have concluded. Thus, the public would retain access to the courts in the same way that they always have,<sup>347</sup> without being able to sensationalize trials to the point of poisoning the jury with public opinion.

#### CONCLUSION

The promise of an impartial jury is, and always has been, a symbol of American liberty.<sup>348</sup> The Supreme Court has continuously upheld the importance of the Sixth Amendment and has adapted impartiality rules in order to keep up with changing technology.<sup>349</sup> However, methods of jury insulation have been largely stagnant since *Simpson*.<sup>350</sup> These unchanged methods, in conjunction with the modern technological age, are diluting the

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341. See *Waller v. Georgia*, 467 U.S. 39, 45 (1984).

342. *Press-Enter. Co. v. Superior Ct. Cal. Cnty. Riverside*, 478 U.S. 1, 8–10 (1986).

343. See *supra* Section II.C.1.

344. See *supra* Section I.A.1.

345. Federal courts prohibit the taking of photographs and live broadcasting of all criminal judicial proceedings and most civil judicial proceedings. See *supra* notes 146–147 and accompanying text.

346. See *supra* Section I.C.2.

347. See *supra* note 339. This right has not traditionally extended to broadcasting, as the first trial to be broadcasted was that of Ted Bundy's in 1979. Selme Angulo, *The Ten Most Followed Real-Life Criminal Trials in TV History*, LISTVERSE (Sep. 30, 2022), <https://listverse.com/2022/09/30/the-ten-most-followed-real-life-criminal-trials-in-tv-history/>. Thus, for 203 years, since the time of the founding of the United States in 1776, the right to a public trial for criminal defendants did not mean that the public should have immediate access to trial proceedings by means of broadcasting. See *id.* Rather, this right meant that the public had access to trial information by means of media reporting. See *Press-Enter. Co.*, 478 U.S. at 8–10.

348. See Kaltborn, *supra* note 55, at vi (“The record of the Zenger trial as it is developed in this book is one of the notable case histories of American jurisprudence” and is shown by virtue of Zenger's attorney being voted by New York as “the freedom of the city.”).

349. See *supra* Section I.A.

350. See *supra* Section I.C.1.

Sixth Amendment's promise.<sup>351</sup> If courts wish to retain parties' rights rather than accept this dilution as a side effect of modernity, a remedy is required.<sup>352</sup>

The *Depp* trial serves as a warning for courts and demonstrates how the presence of cameras in the courtroom facilitates the harmful sensationalizing of trials.<sup>353</sup> If the public and media are forced to wait, just as they often are with classified information or EPRs, the likelihood of publicity creating bias in the jury will decrease.<sup>354</sup> Although there is always a possibility that jurors may intentionally or passively consume extrinsic information, this remedy ensures the information jurors may be exposed to is not manipulated, dramatized, or highly prejudicial.<sup>355</sup>

Now is the time to end the broadcasting of trials. So long as courts continue to allow broadcasting, the Sixth Amendment will continue to lose its bite. An impartial jury is "the only anchor, ever yet imagined by man, by which a government can be held to the principles of it's [sic] constitution."<sup>356</sup> Without it, what will judicial processes become?

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351. See *supra* Part II.

352. See text accompanying notes 289.

353. See *supra* Section II.B.

354. See *supra* Section II.C.1.

355. See Thomas, *supra* note 286; Shearer & Mitchell, *supra* note 154.

356. Letter from Thomas Jefferson, U.S. Minister to Fr., to Thomas Paine (July 11, 1789), <https://founders.archives.gov/documents/Jefferson/01-15-02-0259>.