

# HEINONLINE

Citation: 75 Alb. L. Rev. 1579 2011-2012



Content downloaded/printed from  
HeinOnline (<http://heinonline.org>)  
Mon Feb 9 14:06:40 2015

-- Your use of this HeinOnline PDF indicates your acceptance  
of HeinOnline's Terms and Conditions of the license  
agreement available at <http://heinonline.org/HOL/License>

-- The search text of this PDF is generated from  
uncorrected OCR text.

-- To obtain permission to use this article beyond the scope  
of your HeinOnline license, please use:

[https://www.copyright.com/cc/basicSearch.do?  
&operation=go&searchType=0  
&lastSearch=simple&all=on&titleOrStdNo=0002-4678](https://www.copyright.com/cc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=0002-4678)

## COMMENTS

### THE CASEY ANTHONY TRIAL AND WRONGFUL EXONERATIONS: HOW “TRIAL BY MEDIA” CASES DIMINISH PUBLIC CONFIDENCE IN THE CRIMINAL JUSTICE SYSTEM

*Nicholas A. Battaglia\**

#### I. INTRODUCTION

Even with the most protections as compared to any other criminal justice system in the world,<sup>1</sup> the American criminal justice system is still plagued by wrongful convictions more frequently than one may expect.<sup>2</sup> Without question, “[t]here is no worse error in American criminal justice than the wrongful prosecution, conviction, and incarceration of an innocent person . . . .”<sup>3</sup> Judge Learned Hand acknowledged this in *United States v. Garsson*, when he famously proclaimed that “[o]ur procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream.”<sup>4</sup>

---

\* J.D. Candidate, Albany Law School, 2012; Marist College, B.A., Psychology, Criminal Justice, 2009. My sincerest thanks to Professor Peter H. Halewood for his invaluable advice in the drafting of this article.

<sup>1</sup> John A. Humphrey & Sandra D. Westervelt, *Introduction*, in *WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE* 1, 1 (Sandra D. Westervelt & John A. Humphrey eds., 2001) (“Arguably, the American system of criminal justice is armed with more safeguards against wrongful conviction than those of any other nation in the world.”).

<sup>2</sup> Kathryn M. Campbell, *The Fallibility of Justice in Canada: A Critical Examination of Conviction Review*, in *WRONGFUL CONVICTION: INTERNATIONAL PERSPECTIVES ON MISCARRIAGES OF JUSTICE* 117, 117 (C. Ronald Huff & Martin Killias eds., 2008). Further, the author notes “that not only do wrongful convictions and wrongful imprisonments occur far more frequently than expected, but several specific, systematic factors clearly contribute to their occurrence.” *Id.*; accord D. KIM ROSSMO, *CRIMINAL INVESTIGATIVE FAILURES* 269 (2009) (“The notion of a balanced criminal justice system capable of weeding out false testimony, mistaken identifications, poorly collected or processed scientific evidence, and other errors is, in practice, far less successful than it should be.”).

<sup>3</sup> Richard A. Leo, *False Confessions: Causes, Consequences, and Solutions*, *supra* note 1, at 36, 47.

<sup>4</sup> *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923). It is only fitting to couple Judge Learned Hand’s renowned quote with the equally powerful declaration by the world’s most popular fictional attorney, Atticus Finch, who argued “in the absence of eyewitnesses there’s always a doubt, sometimes only the shadow of a doubt. The law says ‘reasonably doubt,’ but I think a defendant’s entitled to the shadow of a doubt. There’s always the

Currently, the United States is in the midst of what some scholars call an “Innocence Movement” focused on freeing those wrongfully incarcerated, educating the public, and lobbying for change.<sup>5</sup> Yet, this disdain for wrongful convictions is not new. Eighteenth-century philosopher Voltaire acknowledged that it is better to risk saving a guilty person than to condemn an innocent one.<sup>6</sup> Years later, William Blackstone echoed this when he infamously enunciated that “it is better that ten guilty persons escape than that one innocent suffer.”<sup>7</sup>

But sometimes when a guilty person—or one who the public perceives to be guilty—goes free, the public admonishes our criminal justice system for it.<sup>8</sup> The same is true when one who is perceived as innocent is incarcerated, or worse—executed.<sup>9</sup> For

possibility, no matter how improbable, that he’s innocent.” HARPER LEE, *TO KILL A MOCKINGBIRD* 252 (HarperCollins ed., 1988) (1960). The Casey Anthony case also lacks eyewitnesses, which draw parallels to Finch’s concern.

<sup>5</sup> Marvin Zalman, *An Integrated Justice Model of Wrongful Convictions*, 74 ALB. L. REV. 1465, 1468 (2010/2011) (“The innocence movement refers to a related set of activities by lawyers, cognitive and social psychologists, other social scientists, legal scholars, government personnel, journalists, documentarians, freelance writers, and citizen-activists who, since the mid-1990s, have worked to free innocent prisoners and rectify perceived causes of miscarriages of justice in the United States.”).

<sup>6</sup> VOLTAIRE, *ZADIG; OR, THE BOOK OF FATE: AN ORIENTAL HISTORY* 53 (John Brindley 1749) (1747), available at <http://www.gutenberg.org/files/18972/18972-h/18972-h.htm>.

<sup>7</sup> 4 WILLIAM BLACKSTONE, *COMMENTARIES* \*357 (known as “Blackstone’s ratio”); but see James R. Acker & Catherine L. Bonventre, *Protecting the Innocent in New York: Moving Beyond Changing Only Their Names*, 73 ALB. L. REV. 1245, 1246 (2010). The authors discuss that even a 95.5% accuracy of New York’s criminal justice system would still yield a thousand wrongful convictions, yet “[t]he tragedy is compounded because not only do innocent people suffer the devastating consequences of wrongful convictions, but actual offenders escape justice, perhaps to prey on additional victims.” *Id.*

<sup>8</sup> This commonly happens with plea bargaining. See, e.g., R. Michael Cassidy, *Some Reflections on Ethics and Plea Bargaining: An Essay in Honor of Fred Zacharias*, 48 SAN DIEGO L. REV. 93, 103 (2011) (“Public criticism of plea bargaining seems to run the gamut from a perception that the state sometimes steamrolls innocent citizens to the perception that plea bargaining is a form of ‘bargain-basement justice’ that lets the guilty off too lightly.”); Nancy Albert-Goldberg, *Los Angeles County Public Defender Office in Perspective*, 45 CAL. W. L. REV. 445, 473–74 (2009) (“[T]he public’s perception of fairness in the criminal justice system is damaged by ‘assembly line justice’ in the lower courts where millions of citizens have their first encounter with a system that affords inadequate attention to the individual defendant.” (citing PRESIDENT’S COMM’N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 128 (U.S. Government Printing Office 1967))).

<sup>9</sup> See generally Susan A. Bandes, *Framing Wrongful Convictions*, 2008 UTAH L. REV. 5, 6 (2008) (“The galvanizing power of the claim that the wrongfully convicted are sent to death row has stemmed mainly from the public perception that innocent people might be executed.”). In late September 2011, the events leading up to the execution of Troy Davis sparked outcry not only across the United States, but across the world. *Troy Davis Executed Despite International Outcry: Prison*, STRAITS TIMES, Sept. 22, 2011, [http://www.straitstimes.com/BreakingNews/World/Story/STIStory\\_715459.html](http://www.straitstimes.com/BreakingNews/World/Story/STIStory_715459.html); Colleen Curry & Michael S. James, *Troy Davis Executed After Stay Denied by Supreme Court*, ABC NEWS, Sept. 21, 2011, <http://abcnews.go.com/US/troy-davis-executed-stay-denied-supreme->

instance, take the trial of Casey Anthony. It generated a maelstrom of media which infected the public's perception with the biases from the sources reporting about it.<sup>10</sup> What is disconcerting is that the public's perception of justice is almost entirely shaped by the media, via the television.<sup>11</sup> This is because so "few individuals have direct experience with the system, [therefore] the overwhelming number of citizens get their knowledge of the courts and crime through the media."<sup>12</sup> Former New York Court of Appeals Chief Judge Judith S. Kaye concededly agrees that actual judges are undermined by the law portrayed on the television, such as Judge Judy, because "she is in their living rooms every single day. [The public] actually experience[s] her formidable personality. They know her because they see her."<sup>13</sup>

---

court/story?id=14571862. Laura Cox, executive director of Amnesty International, stated "[m]illions of people around the world now know of Troy Davis and see the fallibility of the U.S. justice system." *Id.* Many believed that Troy Davis was innocent, particularly in light of the fact that seven out of the nine original witnesses who testified at Davis' recanted their stories and some of the jurors also changed their minds during the years leading up to his execution. Andy Coghlan, *Troy Davis Execution Highlights Witness Unreliability*, NEWS SCIENTIST, Sept. 22, 2011, <http://www.newscientist.com/article/dn20956-troy-davis-execution-highlights-witness-unreliability.html>.

<sup>10</sup> For example, analyst Nancy Grace's propensity to call Casey Anthony "Tot Mom" can be perceived as a clear bias and sign of disrespect, even though Grace adheres to the story that it was just a "generic nickname." Chris Rovzar, *Nancy Grace Explains What the Heck 'Tot Mom' Means*, N.Y. MAG., July 12, 2011, [http://nymag.com/daily/intel/2011/07/nancy\\_grace\\_explains\\_what\\_the.html](http://nymag.com/daily/intel/2011/07/nancy_grace_explains_what_the.html). The principle remains the same for other labels, such as "Obamacare" by opponents of President Obama's Affordable Care Act. John R. Parkinson & Matthew Jaffe, *What's in a Word? The Debate Over "ObamaCare": The Name & the Law*, ABC NEWS, Feb. 18, 2011, <http://abcnews.go.com/blogs/politics/2011/02/whats-in-a-word-the-debate-over-obamacare-the-name-the-law/>.

<sup>11</sup> Angelique M. Paul, *Turning the Camera on Court TV: Does Televising Trials Teach Us Anything About the Real Law?*, 58 OHIO ST. L.J. 655, 655 (1997) ("So what influences the public's perception of justice? Television. For the majority of Americans, television is the most important source of information, and for many it is the only source of information. This is particularly true when it comes to gathering information about the law. Because the majority of Americans have had no personal experience with the legal system, and because the majority of Americans get their information about the world solely from television, the portrayal of justice on television is extremely important not only to the continued viability of the legal system, but also to the individual's understanding of that system." (citations omitted)); see also Kimberlianne Podlas, *Please Adjust Your Signal: How Television's Syndicated Courtrooms Bias Our Juror Citizenry*, 39 AM. BUS. L.J. 1, 2-3 (2001) ("Most individuals, however, have little direct contact with the justice system and its rules. Consequently, they learn about the law and courts through the media, such as portrayals in film, newspaper coverage, and television broadcasts of trials." (citations omitted)).

<sup>12</sup> David A. Harris, *The Appearance of Justice: Court TV, Conventional Television, and Public Understanding of the Criminal Justice System*, 35 ARIZ. L. REV. 785, 786 (1993) ("This information comes through television in the form of news, entertainment programming with crime-oriented themes, and so-called 'infotainment.'" (citations omitted)).

<sup>13</sup> Judith S. Kaye, *Rethinking Traditional Approaches*, 62 ALB. L. REV. 1491, 1491 (1999). The Chief Judge continues to explain that the real lesson is that "knowledge and direct experience play a huge role in public perceptions of the justice system. Put most simply, the

This is a dangerous predicament. Particularly when the media converts the public into an “armchair jury” and such jury reaches a different verdict than the real jury because this shift in public perception has the potential to generate a negative stigma on the entire American criminal justice system.<sup>14</sup> And the Casey Anthony trial did just this. The majority of the public and media forcefully condemned Casey Anthony and were utterly flabbergasted when she was acquitted. In a sense, this created a “wrongful exoneration” of the defendant because the “armchair jury” had convicted her when the actual jury acquitted. Therefore, this “wrongful exoneration” created the perception that the criminal justice system is not working, it is too soft on crime, and there are incompetent participants in our system such as judges, prosecutors, defense attorneys, and jurors, even though Blackstone’s ratio suggests otherwise.

This article argues that the phenomenon of a “wrongful exoneration” is birthed primarily through a “trial by media,” and imputes on our criminal justice system the same stigma that one would experience through another miscarriage of justice, such as a wrongful conviction. This is a new theory and advanced by this article in parallel to the problem of wrongful convictions. Moreover, this broader stigma is dangerous not only for the perception of the criminal justice system as a whole, but also for the individual jurors who are merely fulfilling their civic duty. Further, it jeopardizes the defendant’s Sixth Amendment right to a fair trial.<sup>15</sup> Yet, the

---

take-home lesson is that the public knows effective justice when the public sees effective justice.” *Id.*; see also Kimberlianne Podlas, *Impact of Television on Cross-Examination and Juror “Truth,”* 14 WIDENER L. REV. 479, 479 (2009) (“Consequently, television’s legal narratives can cultivate assumptions and expectations about law.”).

<sup>14</sup> See discussion *infra* Part III.B. The notion of an “armchair jury” is neither unique to American jurisprudence nor a new concept. The infamous “dingo ate my baby” case is where a mother’s baby was allegedly snatched away from a family’s tent in the Australian outback by a dingo. Kristen Gelineau, *Australia Asks Again: Did a Dingo Kill the Baby?*, YAHOO! NEWS, Feb. 19, 2012, <http://news.yahoo.com/australia-asks-again-did-dingo-kill-baby-125428983.html>. Initially, the mother was convicted but her conviction was overturned three years into her prison sentence when new evidence was found outside of a dingo’s den. *Id.* Similarly to the Casey Anthony trial, “[t]he daily details of the trial were picked over in pubs and debated around dinner tables, breeding a generation of *armchair cops* who analyzed every piece of evidence described in the morning papers and on the nightly news.” *Id.* (emphasis added). After the exoneration, the mother “began receiving death threats[,] [p]eople spat at her, howled like a dingo” in her presence, and called her nasty names. *Id.*

<sup>15</sup> See JAMES J. GOBERT & WALTER E. JORDAN, *JURY SELECTION: THE LAW, ART AND SCIENCE OF SELECTING A JURY* § 5:7 (2010) (explaining that “[a] defendant in a criminal case is entitled to a fair trial and is presumed innocent until proven guilty beyond a reasonable doubt.”); see also U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district

media still has an inherent right to cover the trial under the First Amendment, which would include obtaining the jurors' names.

Therefore, this article also argues that there is the potential to detrimentally affect other participants in the criminal justice process, such as the jurors, and impute the same stigma that is placed upon defendants in the criminal justice system to the inarguably innocent participants. However, this article does not argue to keep the media and public out of the legal court system, nor that the wrongful convictions or exonerations should be cloaked from the public. It merely seeks to establish the existence of a stigma generated by a wrongful exoneration through the growing influence of high-profile criminal cases, resulting in the "trial by media" phenomena.

To achieve this, Part II will evaluate the "trial by media" notion and how the Casey Anthony case illustrates the dangers which could result from aggressive media tactics. Part III discusses the stigma of actual injustice and perceived injustice in the criminal justice system generated by wrongful convictions and wrongful exonerations. Further, this section will manufacture a definition for a wrongful exoneration and highlight issues from the Casey Anthony case supporting that definition. Part IV addresses the inherent tension among the media's First Amendment right, a defendant's Sixth Amendment right, and a juror's right to privacy. Part V explains the "Innocence Movement" and how its ebb and flow contribute to the public's perception of miscarriages of justice; whether it is a wrongful conviction or a wrongful exoneration. This section also acknowledges that this contribution can have positive and negative impacts on the overall perception. Part VI serves as the conclusion.

## II. "TRIAL BY MEDIA"

Public relations has a lot to do with . . . the litigation process. Whenever the outcome of that process, what happens in the media will affect [the parties] for the rest of their lives. *I've had clients that have been so terribly smeared and killed in the media and never recovered from it, even though they were judged innocent or in a civil matter they won.*<sup>16</sup>

---

wherein the crime shall have been committed, which district shall have been previously ascertained by law . . .").

<sup>16</sup> Howard J. Rubenstein, Remarks at the Annual Judicial Conference Second Judicial Circuit of the United States (Sept. 6, 1991), in 141 F.R.D. 573, 577, 600 (1991) (emphasis

The media and litigation are so intimately intertwined, it would be impossible to separate the two at this point, at least within the parameters of the United States Constitution. The concept of a “trial by media” is a growing quandary and affects civil litigation<sup>17</sup> as much as criminal matters. It creates another level of hazard for attorneys, courts, jurors, and other parties who have to navigate through the criminal justice system. A “trial by media” is not a new concept by any means,<sup>18</sup> but has recently erupted and is currently escalating at an alarming rate.<sup>19</sup> Basically, this concept is that the media provides extensive coverage of a legal case through repeated news reports, analyst reports, and expert interviews. As a result,

---

added).

<sup>17</sup> Steven B. Hantler et al., *Extending the Privilege to Litigation Communications Specialists in the Age of Trial by Media*, 13 COMM.LAW CONSPECTUS 7, 7 (2004) (“High-profile civil litigation is not just decided in the courts; it also is decided in the court of public opinion.”).

<sup>18</sup> See, e.g., *United States v. Burr*, 25 F. Cas. 49, 49 (1807). The trial of Aaron Burr drew concerns that:

[T]he constitutional guaranty that every criminal shall be tried by an ‘impartial jury,’ required that the jurors should be perfectly indifferent and free from prejudice. . . . [the prosecutor] argued that Colonel Burr was not to be denied a fair trial because the public mind had been so filled with prejudice against him that there was some difficulty in finding impartial jurors. He referred to the inflammatory articles which had been published against Colonel Burr in the Alexandria Expositor and other newspapers . . . .

*Id.*; see also *Shepherd v. Florida*, 341 U.S. 50, 51 (1951) (Jackson, J., concurring) (“But prejudicial influences outside the courtroom, becoming all too typical of a highly publicized trial, were brought to bear on this jury with such force that the conclusion is inescapable that these defendants were prejudged as guilty and the trial was but a legal gesture to register a verdict already dictated by the press and the public opinion which it generated.”); Stuart H. Perry, *The Courts, the Press, and the Public*, 30 MICH. L. REV. 228, 234 (1931/1932) (quoting famous trial lawyer Clarence Darrow proclaiming “[t]rial by jury is rapidly being destroyed in America by the manner in which the newspapers handle all sensational cases.”); Jonathan M. Moses, *Legal Spin Control: Ethics and Advocacy in the Court of Public Opinion*, 95 COLUM. L. REV. 1811, 1817 (1995) (discussing the Sacco and Vanzetti murder trial and the Lindbergh kidnapping trial).

<sup>19</sup> Hantler et al., *supra* note 17, at 7–8 (“Courts and legal commentators are increasingly recognizing that the media, through the way it covers litigation, has a very real impact on the resolution of individual lawsuits.”); see also Peter A. Joy & Kevin C. McMunigal, *Trial by Media: Arguing Cases in the Court of Public Opinion*, 19 A.B.A. SEC. CRIM. JUST. 47, 49 (Summer 2004) (describing how celebrity-criminals such as Martha Stewart use “media campaigns to influence the government and to sway public opinion.”); John C. Meringolo, *The Media, the Jury, and the High-Profile Defendant: A Defense Perspective on the Media Circus*, 55 N.Y.L. SCH. L. REV. 981, 982 (2010/2011) (“Over the last seventy-five years in particular, media coverage of trials has steadily increased as a result of rapid advancements in technology. The increase in media coverage has led to the use of the term ‘high-profile’ to define cases and defendants subjected to heightened media scrutiny.”); Jeffrey S. Johnson, Comment, *The Entertainment Value of a Trial: How Media Access to the Courtroom is Changing the American Judicial Process*, 10 VILL. SPORTS & ENT. L.J. 131, 131 (2003) (“Recent interest by the American public in high profile court cases has led to an increased media presence in the courtroom. At the time of the O.J. Simpson trial, every American had the power to turn on their televisions . . .”).

such coverage also has the potential to turn the public into an “armchair jury” who now acts as a second jury and decides another trial vicariously argued through the media.

Since the information is provided by the media, there is a potential for a substantial bias. Particularly in criminal trials, this is significant because there is generally a strong pro-prosecution bias.<sup>20</sup> Notwithstanding a general lack of media support, a defense attorneys needs to find ways to counteract this effect, and to persuade the public in their favor or at least to protect the reputations of their clients. For instance, Chief Justice William H. Rehnquist stated that the defense attorney’s job certainly continues outside of the courthouse because the attorney “cannot ignore the practical implications of a legal proceeding for the client. . . . [And] may take reasonable steps to defend a client’s reputation and reduce the adverse consequences of indictment, especially in the face of a prosecution deemed unjust or commenced with improper motives.”<sup>21</sup> Moreover, the Chief Justice continued by saying that “[a] defense attorney may pursue lawful strategies to obtain dismissal of an indictment or reduction of charges, including an attempt to demonstrate in the court of public opinion that the client does not deserve to be tried.”<sup>22</sup> Therefore, to a degree, the Supreme Court has acknowledged the interplay of the media in litigation and essentially the notion of a “trial by media,” but here appears to have endorsed its utility from a defense oriented point of view.

Possibly the two all-time best known “trial by media” cases are the O.J. Simpson trial<sup>23</sup> and the JonBenet Ramsey murder trial.<sup>24</sup>

---

<sup>20</sup> Robert M. Entman & Kimberly A. Gross, *Race to Judgment: Stereotyping Media and Criminal Defendants*, 71 LAW & CONTEMP. PROBS. 93, 96 (Fall 2008) (“Thus, news of crime generally exhibits a pro-prosecution bias, rooted most importantly in this dependence of reporters on official and, therefore, purportedly credible sources.” (citation omitted)). Entman and Gross discuss the Duke lacrosse incident, stating that “critics wondered why coverage failed to direct more attention to the weakness of the prosecution’s case.” *Id.* at 93.

<sup>21</sup> *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1043 (1991); see also MODEL RULES OF PROF’L CONDUCT R. 3.6(c) (2011) (“[A] lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer’s client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.”); *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971) (“Where a person’s good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.”).

<sup>22</sup> *Gentile*, 501 U.S. at 1043.

<sup>23</sup> Laura Hock, *What’s in a Name? Fred Goldman’s Quest to Acquire O.J. Simpson’s Right of Publicity and the Suit’s Implications for Celebrities*, 35 PEPP. L. REV. 347, 348 (2008). Hock recounts that:

On October 3, 1995, an estimated 150 million people watched as Simpson was acquitted of the murders of Nicole Brown and Ron Goldman in one of the twentieth century’s most

Notably, a few years ago the Duke Lacrosse incident also sparked an intense swarm of media attention.<sup>25</sup> But the Duke case also provoked extreme backlash from critics:

What happened to these young men was indubitably a travesty of justice, and there are important lessons to be drawn regarding how standard media routines and practices can undermine the presumption of innocence. However, these lessons do not support critiques that trace media derelictions to “liberal bias” or “political correctness.” Nor should coverage as a whole be characterized as consistently slanted against the defendants. Just as it was unfair to jump to the conclusion that the prosecutor’s emphatic insistence on the defendants’ guilt meant they were guilty, so it is wrong to assess the media by relying on unsystematic impressions and inevitably flawed memories filtered through stereotypes of, and generalized dissatisfaction with, U.S. journalism.<sup>26</sup>

More recently, the Casey Anthony case revitalized the controversy a “trial by media” can generate, especially when the “armchair jury” finds differently than the actual jury. The Casey Anthony case also highlights the tension between the First Amendment right of the media and the Sixth Amendment right of the defendant, while also needing to protect the privacy rights of the jurors.

### A. Casey Anthony Case Facts

Purported as the “social media trial of the century,”<sup>27</sup> the Casey Anthony case illustrates the passion and emotion that erupts when

---

highly publicized cases. This “trial of the century,” as it was dubbed, was the longest trial ever held in California, lasting nine months and costing an estimated \$15 million to fight and defend.

*Id.* at 349–50 (citations omitted).

<sup>24</sup> Ann Kibbey, *Trial by Media: DNA and Beauty-Pageant Evidence in the Ramsey Murder Case*, 43 N.Y.L. SCH. L. REV. 691, 691 (1999/2000) (“The Ramsey murder case of December, 1996, is noted for succumbing to ‘trial by media.’”).

<sup>25</sup> See Entman, *supra* note 20, at 93 (“[C]ritics suggested that the media mistreated the accused, rushing to judge them, abandoning the credo of innocent until proven guilty.”).

<sup>26</sup> *Id.* at 93–94 (citations omitted).

<sup>27</sup> John Cloud, *How the Casey Anthony Murder Case Became the Social-Media Trial of the Century*, TIME, June 16, 2011, <http://www.time.com/time/nation/article/0,8599,2077969,00.html> (recounting how hundreds of people showed up each day to watch the murder trial); see also Anthony Colarossi, *Why Did Casey Anthony Case Rivet Us?*, ORLANDO SENTINEL, July 9, 2011, <http://www.orlandosentinel.com/news/local/orange/os-casey-anthony-what-it-means-20110708,0,6862889.story> [hereinafter *Rivet*] (“This was the O.J. Simpson case of the computer and social-media age.”).

the public disagrees with the jury in a criminal trial. Casey Anthony's two-year-old daughter, Caylee Anthony, was last seen alive on June 16, 2008 at the home of her grandparents; she was leaving with her mother.<sup>28</sup> Thirty-one days later Caylee's grandmother, Cindy Anthony, reported to police that Caylee had been missing and that the car which Casey had taken from her "smells like there's been a dead body in [it]."<sup>29</sup> Casey later called the police back and told the dispatcher that the babysitter had kidnapped her.<sup>30</sup>

After speaking to and taking authorities on multiple false leads surrounding the disappearance of her daughter Caylee,<sup>31</sup> Casey was arrested July 16, 2008 on charges of child neglect, obstructing a criminal investigation, and filing false statements.<sup>32</sup> She was released on \$500,000 bail and ordered to wear an electronic monitoring device on August 21, 2008, but she was re-arrested eight days later on charges of check fraud and theft; these charges were unrelated to the disappearance of Caylee.<sup>33</sup> Again, after being released under the same conditions on September 5, 2008, ten days later Casey was arrested for a third time on more theft charges, also unrelated to Caylee.<sup>34</sup>

On October 14, 2008, Casey Anthony was indicted on charges of murder in the first degree, aggravated manslaughter, aggravated child abuse, and four counts of lying to police.<sup>35</sup> A legal commentator expressed concern that without a body, it would be hard—but not impossible—for the prosecution to prove their case.<sup>36</sup> However this concern was short lived. On December 11, 2008, the

---

<sup>28</sup> *Timeline in the Casey Anthony Case*, HUFFINGTON POST, July 5, 2011, [http://www.huffingtonpost.com/2011/07/05/casey-anthony-case-timeline\\_n\\_890699.html](http://www.huffingtonpost.com/2011/07/05/casey-anthony-case-timeline_n_890699.html) [hereinafter *Huffington Post Timeline*].

<sup>29</sup> Barbara Liston, *On 911 Call, Casey Anthony Said Tot was Missing for 31 Days*, REUTERS, May 31, 2011, <http://www.reuters.com/article/2011/05/31/us-crime-anthony-idUSTRE74U5W720110531>. Casey Anthony's father is George Anthony. *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Huffington Post Timeline*, *supra* note 28.

<sup>32</sup> *Timeline in the Casey Anthony Case*, BOSTON HERALD.COM, July 17, 2011, <http://www.bostonherald.com/news/national/south/view.bg?articleid=1352436&format=&page=2&listingType=natsouth> [hereinafter *Boston Herald Timeline*].

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> Sarah Lundy et al., *Caylee's Mother Casey Anthony Indicted on 1st-Degree Murder Charge*, ORLANDO SENTINEL, Oct. 15, 2008, [http://articles.orlandosentinel.com/2008-10-15/news/a1casey15\\_1\\_case-against-casey-casey-anthony-aggravated-child-abuse](http://articles.orlandosentinel.com/2008-10-15/news/a1casey15_1_case-against-casey-casey-anthony-aggravated-child-abuse) ("[The] grand jury heard some details . . . as a half-dozen witnesses, including an FBI lab technician and an Orange County sheriff's computer expert, testified behind closed doors about the investigation into what happened to Anthony's daughter, Caylee Marie.").

<sup>36</sup> *Id.*

remains of a young child were found near the Anthony home and it was later confirmed, by renowned medical examiner Dr. Jan Garavaglia, to be the remains of Caylee.<sup>37</sup> Dr. Garavaglia further reported that “[t]he manner of death in this case is homicide . . . [t]he cause of death will be listed as homicide by undetermined means.”<sup>38</sup>

Jury selection began on May 9, 2011, and the six-week trial started on May 24, 2011.<sup>39</sup> The first week of the trial was characterized by both sides introducing their versions of the story and detailed timelines.<sup>40</sup> The prosecution outlined Casey’s activities *after* Caylee was reported missing, such as partying, getting a tattoo, and ultimately showing that “Caylee’s death allowed Casey to live a good life, at least for those 31 days” until her arrest.<sup>41</sup> The defense then shocked the courtroom when they introduced “dark secrets” of the Anthony family, including that Casey was subjected to sexual abuse from her father and brother when she was a child.<sup>42</sup> The defense further advanced that Caylee had drowned in the family pool and this whole situation has become “a tragedy that snowballed out of control.”<sup>43</sup>

During the second week of the trial, the jury heard witness accounts from Casey’s mother, brother, and father; they heard recordings such as police interviews, jailhouse visits, and the 911 call, and finally testimony that Casey had been avoiding her parents during the thirty-one days Caylee was missing.<sup>44</sup> Essentially, the prosecution was laying the foundation for the

---

<sup>37</sup> Walter Pacheco et al., *Remains Identified as Missing Toddler Caylee Anthony*, ORLANDO SENTINEL, Dec. 19, 2008, <http://www.orlandosentinel.com/news/local/breakingnews/orl-bk-caylee-anthony-body-dna-121908,0,1859200.story>. The medical examiner, Dr. Jan Garavaglia, announced that “[w]ith regret, I am here to inform you that the skeletal remains found on Dec[ember] 11 are those of missing toddler Caylee Anthony.” *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Boston Herald Timeline*, *supra* note 32; *Florida v. Casey Anthony: A Look Back at Evidence and Testimony*, CNN, July 5, 2011, <http://news.blogs.cnn.com/2011/07/05/florida-v-casey-anthony-a-look-back-at-evidence-and-testimony/> [hereinafter *Look Back*]. Casey Anthony is represented by Jose Baez. *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> Ashley Hayes, *Defense: Caylee Drowned in her Grandparents’ Pool*, CNN, May 24, 2011, [http://articles.cnn.com/2011-05-24/justice/florida.casey.anthony.trial\\_1\\_george-anthony-casey-anthony-caylee-anthony?\\_s=PM:CRIME](http://articles.cnn.com/2011-05-24/justice/florida.casey.anthony.trial_1_george-anthony-casey-anthony-caylee-anthony?_s=PM:CRIME) (“Casey Anthony and her father, George Anthony, panicked upon finding the child, Jose Baez said. Anthony found her father cradling Caylee’s body the morning of June 16, 2008, he said, and George Anthony yelled at his daughter, ‘Look what you’ve done. Your mother will never forgive you.’ He told [Casey] she would go to jail for child neglect.”).

<sup>44</sup> *Look Back*, *supra* note 39.

following week's major testimony to prove their case. This became one of the most dramatic weeks of the trial.

The third week involved graphic forensic testimony.<sup>45</sup> At the start of the week, there was testimony that someone accessed the Anthony home computer to search for terms such as "chloroform," "inhalation," "neck-breaking," "shovel," "household weapons," and "death."<sup>46</sup> Later in the week, forensic testimony recounted the graphic details surrounding Caylee's remains, such as the bones, decomposition, odor in the car, and location where her body was found.<sup>47</sup> This also included the images of Caylee's skull with duct tape—what the prosecutor called the murder weapon—superimposed over a picture of her smiling face, possibly covering her nose and mouth.<sup>48</sup> Unquestionably, this week spurred the media's involvement with the case due to the high emotional appeal of the testimony.

The defense began their case in the fourth week and started with forensic anthropologist Werner Spitz.<sup>49</sup> He testified that the duct tape placed over Caylee's skull was likely placed there long after decomposition began, maybe during transportation of the body.<sup>50</sup> Moreover, Spitz undermined Dr. Garavaglia's autopsy saying it was "shoddy" because she did not open Caylee's skull to check for trauma.<sup>51</sup> The defense's week was essentially spent debunking the foundation that the prosecution had created in the prior three weeks and paving the way for rebuttal testimony in the week to follow.

In week five, the defense introduced that it was Cindy, and not Casey, who searched for "chloroform" on the family computer.<sup>52</sup> Cindy testified that she feared her dogs were getting sick from eating the bamboo leaves in the backyard and wanted to know what

---

<sup>45</sup> *Id.*

<sup>46</sup> Sarah Lundy et al., *Googled on Anthonys' Computer: "Neck Breaking," "Shovel,"* ORLANDO SENTINEL, Nov. 27, 2008, [http://articles.orlandosentinel.com/2008-11-27/news/casey27\\_1\\_casey-anthony-anthony-lazzaro-anthony-was-arrested](http://articles.orlandosentinel.com/2008-11-27/news/casey27_1_casey-anthony-anthony-lazzaro-anthony-was-arrested).

<sup>47</sup> *Look Back*, *supra* note 39.

<sup>48</sup> Barbara Liston, *Casey Anthony Prosecutor Says Duct Tape "Murder Weapon,"* REUTERS, June 10, 2011, <http://www.reuters.com/article/2011/06/10/us-crime-anthony-idUSTRE75956Z20110610>. Dr. Garavaglia testified that she was confident that she could rule out drowning because "a systematic review of all drowning deaths handled by her office showed that '100 percent of the time when a person finds a (drowned) child they call 911.'" *Id.* Further, Dr. Garavaglia passionately announced that "[t]here is no child that should have duct tape on its face when it dies." *Id.*

<sup>49</sup> *Look Back*, *supra* note 39.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

would cause them to be “extremely tired all the time.”<sup>53</sup> She made the jump from chlorophyll, the green pigment in plants, to chloroform, a general anesthetic and potential murder weapon.<sup>54</sup> Next, forensic botanist Dr. Jane Bock testified that, by judging of surrounding plant and root growth, Caylee’s body could have been in the woods for as little as two weeks before it was found, but, on cross, conceded it could have been longer.<sup>55</sup>

The sixth and final week is when the defense called Anthony’s mother, father, and brother to the stand again; Casey declined testifying in her own defense.<sup>56</sup> Then both sides emotionally dueled in closing arguments by poking holes in the other’s case: Casey thought her life was more important than Caylee’s versus she was a loving mother; Caylee was chloroformed then suffocated by duct tape versus she accidentally drowned; the smell in the truck was of human decomposition versus there was no abnormal smell.<sup>57</sup>

On July 5, 2011, the jury found Casey Anthony not guilty of first degree murder or manslaughter but did find her guilty on four counts of providing false information to the authorities.<sup>58</sup> Two days later she was sentenced and, after considering good behavior time, only had ten more days to serve and was released on July 17th.<sup>59</sup>

### B. Public Reaction: Harbinger to a Stigma

Immediately after being declared not guilty for killing Caylee, the majority of five-hundred people outside of the courtroom began

---

<sup>53</sup> David Lohr, *Casey Anthony’s Mom: I Googled ‘Chloroform,’* HUFFINGTON POST, June 23, 2011, [http://www.huffingtonpost.com/2011/06/23/casey-anthony-cindy-anthony-chloroform-google-wikipedia\\_n\\_883541.html#s294277&title=Casey\\_Anthony\\_Personal](http://www.huffingtonpost.com/2011/06/23/casey-anthony-cindy-anthony-chloroform-google-wikipedia_n_883541.html#s294277&title=Casey_Anthony_Personal).

<sup>54</sup> *Id.*; *Look Back*, *supra* note 39.

<sup>55</sup> Camille Mann, *Casey Anthony Trial Update: Caylee’s Remains in Woods Just 2 Weeks, Says Botanist*, CBS NEWS, June 21, 2011, [http://www.cbsnews.com/8301-504083\\_162-20072961-504083.html](http://www.cbsnews.com/8301-504083_162-20072961-504083.html).

<sup>56</sup> *Look Back*, *supra* note 39.

<sup>57</sup> Ashley Hayes, *Prosecution, Defense Offer Closing Arguments in Casey Anthony Trial*, CNN JUST., July 3, 2011, [http://articles.cnn.com/2011-07-03/justice/florida.casey.anthony.trial\\_1\\_casey-anthony-caylee-jurors?\\_s=PM:CRIME](http://articles.cnn.com/2011-07-03/justice/florida.casey.anthony.trial_1_casey-anthony-caylee-jurors?_s=PM:CRIME).

<sup>58</sup> Jessica Hopper et al., *Casey Anthony Trial: Not Guilty Murder Verdict*, ABC NEWS, July 5, 2011, [http://abcnews.go.com/US/casey\\_anthony\\_trial/casey-anthony-guilty-murder-caylees-death/story?id=13987918#.Tsx50eP9hk](http://abcnews.go.com/US/casey_anthony_trial/casey-anthony-guilty-murder-caylees-death/story?id=13987918#.Tsx50eP9hk). Defense attorney Jose Baez was quoted saying “[w]hat my driving force has been for the past three years has been always to make sure that there has been justice for Caylee and Casey because Casey did not murder Caylee. It’s that simple . . . [a]nd today, *our system of justice has not dishonored her memory by a false conviction.*”

*Id.* (emphasis added).

<sup>59</sup> *Boston Herald Timeline*, *supra* note 32.

chanting “[j]ustice for Caylee” and “[b]aby killer!”<sup>60</sup> Outrage also erupted online through social media and on television by reporters and analysts.<sup>61</sup> Specifically, colorful analyst Nancy Grace—who made her position very clear that she believes Casey Anthony is guilty<sup>62</sup>—infamously remarked after the not guilty verdict that “[s]omewhere out there tonight, the devil is dancing.”<sup>63</sup> Further, when interviewed if she regretted her “character assassination” of Casey Anthony, Grace vehemently denied any assassination attempt and denounced the case as a “bad verdict” by “some kooky jury.”<sup>64</sup> Her demeanor even struck a chord with Cheney Mason, one of Casey Anthony’s defense attorneys,<sup>65</sup> who commented after the verdict was announced and “slammed what he called the media’s rush to judgment, not naming Grace but pointedly saying some anchors and talking heads crossed a line and *convicted Casey Anthony long before trial*. He said he hoped they learned a lesson from the acquittal.”<sup>66</sup>

While it is arguable that Grace assassinated the character of Casey Anthony, what she really contributed to was assassinating the American criminal justice system itself. The devil who was dancing was actually Nancy Grace herself, and she was dancing on William Blackstone’s ratio that it is better for ten guilty to go free than one innocent person to be incarcerated or suffer.<sup>67</sup>

---

<sup>60</sup> *Casey Anthony Found Not Guilty of Murdering Daughter*, MSNBC.COM, July 5, 2011, [http://www.msnbc.msn.com/id/43636855/ns/us\\_news-crime\\_and\\_courts/t/casey-anthony-found-not-guilty-murdering-daughter/#.Tsxw0eP9hk](http://www.msnbc.msn.com/id/43636855/ns/us_news-crime_and_courts/t/casey-anthony-found-not-guilty-murdering-daughter/#.Tsxw0eP9hk) [hereinafter *Casey Not Guilty*].

<sup>61</sup> Cloud, *supra* note 27. Salient Facebook users posted messages online after the verdict was read and

Hundreds of more sober posts on various pages weigh whether Cindy Anthony is a victim of her daughter’s duplicity or a grandmother who didn’t do enough. . . . If it’s true that Facebook and Twitter provide forums for a rich abundance of perspectives, the Casey Anthony trial shows they can also be arenas for mass, lip-licking bloodlust.

*Id.*

<sup>62</sup> *Nancy Grace Says ‘the Devil is Dancing’ at Casey Anthony Verdict*, L.A. TIMES, July 5, 2011, <http://latimesblogs.latimes.com/showtracker/2011/07/nancy-grace-says-the-devil-is-dancing-at-casey-anthony-verdict.html> [hereinafter *LA Times’ Coverage of Grace*].

<sup>63</sup> John Hudson, *Nancy Grace Under Fire: ‘The Devil is Dancing,’* ATLANTIC WIRE, July 6, 2011, <http://www.theatlanticwire.com/politics/2011/07/nancy-grace-under-fire-devil-dancing/39616/>.

<sup>64</sup> *Id.*

<sup>65</sup> David Zurawik, *Are Nancy-Grace-Led Media as Vile as Casey Anthony Lawyer Claims?*, BALT. SUN, July 5, 2011, <http://www.baltimoresun.com/entertainment/tv/z-on-tv-blog/bal-casey-anthony-defense-attorney-nancy-grace-blasts-tv-talking-heads-in-verdict-wake-20110705,0,4850429.story>.

<sup>66</sup> *LA Times’ Coverage of Grace*, *supra* note 62 (emphasis added).

<sup>67</sup> See discussion and accompanying text *supra* note 7.

### III. THE STIGMAS OF ACTUAL INJUSTICE AND PERCEIVED INJUSTICE: A COMPARISON

When the American criminal justice system acts, the public takes notice and forms an opinion. If the media attaches to a trial, it will only amplify the public's opinion, likely influenced by the media's bias. But when the criminal justice system acts incorrectly, the media and, subsequently the public, will react with disdain for the mistake. This is justified if that "incorrect act" resulted in a wrongful conviction of an innocent individual. However, when that "incorrect act" is what the public perceives as a "wrongful exoneration," the public will act with great disdain even though, according the legal scholars such as Voltaire and Blackstone, that reaction is completely unjustified.

#### A. *Stigma of a Wrongful Conviction*

Whether or not the individual is innocent, *any* conviction will bring about a deafening stigma to that person: physically, psychologically, and socially.<sup>68</sup> Because "[a]ny time that anyone has been in prison, even if you are exonerated, there is still a stigma about you, and you are walking around with a scarlet letter."<sup>69</sup> If the individual was in fact *innocent*, "the most damaging injury inflicted upon the wrongly convicted is not necessarily the time lost behind bars, but the stigma that follows them for the rest of their lives."<sup>70</sup> And this goes far beyond just financial damages or to the

---

<sup>68</sup> Daniel S. Kahn, *Presumed Guilty Until Proven Innocent: The Burden of Proof in Wrongful Conviction Claims Under State Compensation Statutes*, 44 U. MICH. J.L. REFORM 123, 130 (2010) ("As if the physical and psychological impact were not enough, the social stigma associated with being imprisoned—even if wrongfully—makes it difficult for wrongfully convicted persons to regain their reputation. This can wreak havoc on their daily lives after prison, from tasks as basic as retrieving their driver's license from the state after being released, to dealing with child support payments that accumulated while incarcerated, to being unwelcomed into the new neighborhood into which they move." (citations omitted)).

<sup>69</sup> Janet Roberts & Elizabeth Stanton, *A Long Road Back After Exoneration, and Justice is Slow to Make Amends*, N.Y. TIMES, Nov. 25, 2007, <https://www.nytimes.com/2007/11/25/us/25dna.html?pagewanted=2>.

<sup>70</sup> Alberto B. Lopez, *\$10 and a Denim Jacket? A Model Statute for Compensating the Wrongly Convicted*, 36 GA. L. REV. 665, 720–21 (2002). Unfortunately, this is not a rare phenomenon. See Jonathan Simon, *Recovering the Craft of Policing: Wrongful Convictions, the War on Crime, and the Problem of Security*, in WHEN LAW FAILS: MAKING SENSE OF MISCARRIAGES OF JUSTICE 115, 115 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2009) ("In recent years there have been few more poignant examples of miscarriages of justice than the scores of prisoners exonerated by DNA tests that disprove key aspects of the prosecution's case against them . . . . Often these involve terrible crimes, frequently rape, [are] followed by the conviction and imprisonment of the wrong person. Years (typically 10 or more) are spent languishing in America's harsh and often overcrowded prisons and with expectations of

stigma on the individual *after* being exonerated,<sup>71</sup> but also the torture during incarceration because “[w]hile in prison, the wrongfully convicted suffer considerable emotional, psychological, and physical harm.”<sup>72</sup> Courts have also acknowledged all of these considerations, including the United States Supreme Court.<sup>73</sup> The Supreme Court of Louisiana was particularly vocal and descriptive in their discussion:

Persons wrongfully convicted lose time during incarceration that cannot be retrieved. Furthermore, inmates, generally, leave prison with no savings, dismal employment prospects, and oftentimes medical and mental issues. Wrongful conviction can also cause significant stress on family relationships including the financial pressure that may have been created by legal fees associated with the wrongful conviction.<sup>74</sup>

The truth of the matter is that the public generally does not understand what an “exoneration” actually is or more broadly how the criminal justice system works.<sup>75</sup> Likely due to either a want of understanding of the terminology or because of a general distaste for prison and prisoners, but maybe because of the fact that an individual who was in prison will always have a negative connotation about them, even exonerees carry a post-release stigma. Particularly in tough economic times, an innocent individual thrust into the criminal justice system is at a steep disadvantage when it comes to securing employment afterwards.

For example, take the case of Miguel Camacho.<sup>76</sup> In 2000, he was

---

spending decades more, while the real criminals remain free (perhaps committing new crimes) and the victim is subjected to a new and terrible relationship with pain and violence (now as an unintentional instrument of injustice).”).

<sup>71</sup> See Frederick Lawrence, *Declaring Innocence: Use of Declaratory Judgments to Vindicate the Wrongly Convicted*, 18 B.U. PUB. INT. L.J. 391, 396 (2009) (“It is beyond question that criminal accusations are harmful to one’s reputation. Wrongly accused or convicted persons may lose credibility and trustworthiness in the eyes of their community and of the general public.”).

<sup>72</sup> Kahn, *supra* note 68, at 129.

<sup>73</sup> *Spencer v. Kemna*, 523 U.S. 1, 8 (1998) (“In recent decades, we have been willing to presume that a wrongful criminal conviction has continuing collateral consequences (or, what is effectively the same, to count collateral consequences that are remote and unlikely to occur.”) (citing *Sibron v. New York*, 392 U.S. 40, 55–56 (1968)).

<sup>74</sup> *In re Jordan*, 913 So. 2d 775, 786 (La. 2005) (Johnson, J., dissenting in part).

<sup>75</sup> For example, arrests, arraignments, grand jury indictments, plea bargains, exonerations, etc. One such exoneree lost his job after his employer watched a new report about his case and his exoneration on the television. Roberts & Stanton, *supra* note 69.

<sup>76</sup> C.J. Chivers, *Long Wait for DNA Result Can Be Justice Delayed*, N.Y. TIMES, Nov. 19, 2000, <http://www.nytimes.com/2000/11/19/nyregion/long-wait-for-dna-result-can-be-justice-delayed.html?src=pm>.

arrested, arraigned, and sat in jail for a month awaiting the results of a DNA test which eventually cleared him.<sup>77</sup> But now, every time he seeks employment, he has to check off that he has been arrested before and list the litany of charges including rape, robbery, and criminal possession of a weapon; all which he was innocent of.<sup>78</sup> Camacho says that every time he tries to explain this, employers do not seem to care and toss his application in the trash anyway.<sup>79</sup> Spending a mere month in jail for these charges, none which were viable, generated this stigma attached to Camacho.

This stigma is only magnified on those who actually serve time in prison. Courts have recognized this particularly for child molesters, including the New York Court of Claims which provided an illustrative narrative of one wrongfully convicted individual:

In prison, convicted child molesters were raped or murdered or both, and claimant was acutely aware of what he might face. He was "afraid for his life" from the day he arrived in prison until the day he left. He slept with his head next to the metal toilet in his cell to avoid being attacked from outside the bars. That claimant's sentence presented this

---

<sup>77</sup> *Id.* Granted, this is a case of "wrongful prosecution" where the police aggressively pursued an individual for very serious offenses that he had nothing to do with. See Lawrence, *supra* note 71, at 396 ("Nor is it a fluke that stigma results from wrongful convictions and even wrongful prosecutions. Criminal stigma is not an accidental byproduct of the criminal justice system. It is precisely what the criminal justice system is supposed to provide."). Additionally, the Supreme Court has acknowledged that this stigma can also apply to administrative agency decisions. See Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring) ("This Court is not alone in recognizing that the right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.").

<sup>78</sup> Chivers, *supra* note 76. There were an additional twelve charges filed against him. *Id.*

<sup>79</sup> *Id.*; see Kahn, *supra* note 68, at 129 ("For example, many job applications contain a question about the criminal history of the applicant. The wrongly convicted person must at least admit to being arrested and may have to reveal that he was convicted . . . . Even if an explanation is articulated and accepted by a potential employer, the wrongly convicted person faces a competitive workplace with no employment history, no recent references, and a lack of technical skills frequently required to perform many jobs in our computerized society." (quoting Lopez, *supra* note 70, at 720)); see also Lee TT. v. Dowling, 664 N.E.2d 1243, 1249 (N.Y. 1996) (acknowledging the stigma generated by a child abuse registry regarding "loss of employment or the foreclosure of future employment opportunities") (citations omitted); Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 573 (1972) (holding constitutionally protected liberty interest implicated if an employee was terminated on charges that generated "on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities"); *c.f.* Paul v. Davis, 424 U.S. 693, 701 (1976) (holding damage to one's reputation is not "by itself sufficient to invoke the procedural protection of the Due Process Clause."). The Paul decision birthed the "stigma plus" doctrine which, in order to raise the damage to one's reputation to a protectable liberty interest, that damage must be paired with another tangible harm. *Id.*

innocent man with the prospect of having to endure 8-1/3–25 years of this mental torture compounded the anguish he was made to experience. The court also recognizes the toll the heinous nature of these crimes of moral turpitude has taken on claimant's reputation.<sup>80</sup>

Consequently, the crime that an individual is wrongfully convicted of can exponentially magnify the stigma they suffered during and after their wrongful incarceration. For example, if individual X is wrongfully convicted of larceny then exonerated, the psychological stigma will likely be less than individual Y who was wrongfully convicted of rape and murder then exonerated.

One report provided that one-sixth of those who were wrongfully convicted ended up back in prison or suffer from alcohol or drug addictions *specifically* because of their time spent behind bars.<sup>81</sup> This results from the "prisonization" process that occurs, which "erodes prisoners' self-worth, erases their ability to trust others, makes them more willing to exploit others, triggers post-traumatic stress disorder, or has other damaging effects."<sup>82</sup> The fact is that an innocent person is being declared guilty by his peers and a judge—essentially the entire criminal justice system as he or she knows—and is forced into a dreadful place where he or she does not belong is traumatizing to his or her physical and emotional state. There is this opportunity for this stigma to take the wrongly convicted and convert the innocent person today into a criminal tomorrow.

One such potential case is that of Frank Sterling. He spent over seventeen years in prison after being convicted for murder of a seventy-four-year-old woman in Rochester, New York that he did not commit.<sup>83</sup> The only evidence at trial was a confession from

---

<sup>80</sup> *Baba-Ali v. State*, 878 N.Y.S.2d 555, 561 (N.Y. Ct. Cl. 2009), *rev'd in part*, 907 N.Y.S.2d 432, 432 (App. Div. 2d Dep't 2010) (adjusting compensation because lower court's "nonpecuniary damages deviated materially from what would be considered reasonable compensation").

<sup>81</sup> Roberts & Stanton, *supra* note 69; see Scott J. Krischke, Note, *Absent Accountability: How Prosecutorial Impunity Hinders the Fair Administration of Justice in America*, 19 J.L. & POL'Y 395, 419 (2010) ("Despite their innocence, most exonerees face the same challenges as the guilty when they are released from prison, including chronic unemployment, lack of health care, drug addiction, homelessness, and the social stigma associated with the formerly incarcerated.").

<sup>82</sup> Lynn S. Branham, "The Mess We're In": *Five Steps Towards the Transformation of Prison Cultures*, 44 IND. L. REV. 703, 725 (2011) (citing Craig Haney, *The Psychological Impact of Incarceration: Implications for Postprison Adjustment*, in PRISONERS ONCE REMOVED: THE IMPACT OF INCARCERATION AND REENTRY ON CHILDREN, FAMILIES, AND COMMUNITIES 33, 40–46 (Jeremy Travis & Michelle Waul eds., 2003)).

<sup>83</sup> *Know the Cases: Frank Sterling*, INNOCENCE PROJECT, [http://www.innocenceproject.org/Content/Frank\\_Sterling.php](http://www.innocenceproject.org/Content/Frank_Sterling.php) (last visited Mar. 20, 2012).

Sterling after twenty-four hours of police interrogation procured through questionable methods; he later recanted.<sup>84</sup> After being convicted by the jury in 1992, it was not until January of 2010—after six years of DNA testing—that the actual perpetrator fully confessed.<sup>85</sup> Sterling was officially exonerated April 28, 2010.<sup>86</sup> He had never committed a crime before and now after serving over seventeen years he was again cleared.<sup>87</sup>

However, Sterling was arrested again at the end of July 2011.<sup>88</sup> Sterling is now charged with seven counts of sexual abuse in the second degree for inappropriately touching a young boy.<sup>89</sup> Prior to his wrongful conviction, Sterling's record was immaculate.<sup>90</sup> Granted, he is currently innocent until proven guilty. But now that he has wrongly toured the criminal justice system which labeled him as a murderer, treated him as a murderer, and feared him as a murderer, Frank Sterling was socialized as a criminal through the "prisonization" process. While it is impossible to know whether or not he would have ever committed the crime if he was not wrongfully convicted, it is likely that his time spent in prison—just as others before him—increased his propensity to commit future crimes.

Whether innocent or guilty of these allegations, any part of the stigma that had evaporated following his exoneration has been

---

<sup>84</sup> *Id.*; Rachel Barnhart, *Frank Sterling Cleared of 1988 Manville Murder; Mark Christie Confesses*, 13 ABC WHAM, April 28, 2010, [http://www.13wham.com/mostpopular/story/Frank-Sterling-Cleared-of-1988-Manville-Murder/xbDIlk9\\_302jBR23eKmlVw.csp](http://www.13wham.com/mostpopular/story/Frank-Sterling-Cleared-of-1988-Manville-Murder/xbDIlk9_302jBR23eKmlVw.csp).

<sup>85</sup> *Know the Cases: Frank Sterling*, *supra* note 83; Barnhart, *supra* note 84. The actual perpetrator, Mark Christie, confessed to the murder but was already serving twenty years to life in prison for killing a four-year-old in 1994. Mike Hedeon, *Christie Gets 20 Years to Life for Manville Murder*, YNN: YOUR NEWS NOW, Oct. 28, 2011, <http://rochester.ynn.com/content/561960/christie-gets-20-years-to-life-for-manville-murder/>. Thus, it logically flows that if Sterling was not wrongfully convicted and Christie was correctly apprehended, he would not have been on the streets and able to murder the young girl. Her death is just another collateral harm caused by a miscarriage of justice to an innocent person where, instead of the first victim and perpetrator suffering, an additional victim and the wrongly convicted are dragged into the cesspool.

<sup>86</sup> *Know the Cases: Frank Sterling*, *supra* note 83.

<sup>87</sup> *Id.*

<sup>88</sup> Christine VanTimmeren, *Man Cleared of Murder Now Charged With Sex Abuse*, WHEC.COM (July 25, 2011), <http://www.whec.com/news/stories/s2213082.shtml>.

<sup>89</sup> *Id.* Even though Sterling was scheduled to appear in court September 22nd, there has been no news update as to the status of his case. *Id.* He has publically denied these charges, and his attorney released a statement that "[i]t's kind of a nightmare, as you can imagine. He's been through the system before, and not had such a good result so he maybe doesn't have a lot of confidence in the system working." *Frank Sterling Appears in Court*, YNN: YOUR NEWS NOW, July 28, 2011, <http://rochester.ynn.com/content/551536/frank-sterling-appears-in-court/>.

<sup>90</sup> *Know the Cases: Frank Sterling*, *supra* note 83.

reconstituted by the new allegations. Thus, Frank Sterling is another individual that the criminal justice system has failed not only through the wrongful conviction, but also from the stigma forever attached to that conviction. Yet, this stigma can attach in other ways as well; it does not need to be from a wrongful conviction.

### *B. Stigma of a Wrongful Exoneration*

The stigma of a wrongful exoneration is imputed not only on that individual, but more broadly on the entire American criminal justice system. It undermines the reliability of the system's delicate framework, which is particularly vulnerable when a case is magnified under the media's combing lens. There is no definition for a wrongful exoneration other than its axiomatic construction. Thus, this article manufactures its own, in a narrow meaning, to fit with the argument that a "trial by media" implants into the public's eyes this broader stigma that the criminal justice system is failing.

This article defines a wrongful exoneration as a legal exoneration in which the defendant<sup>91</sup> is acquitted for the allegations brought against him or her at or prior to trial by the criminal justice system, but to the disagreement of the public at large whom believe he or she is guilty. Simply put, the public (armchair jury) has judged the defendant as guilty through a "trial by media" even though the criminal justice system has not. There are two simple conditions that must be present. The first condition is that the defendant has been acquitted by the actual jury and criminal justice system. The second condition is that the public at large—including the media—believes the defendant to have been guilty of the charges.

This construction nullifies the inherent problem that could arise as to whether the defendant was in fact guilty or not and therefore not "wrongfully exonerated." Because without the defendant affirmatively admitting his or her crime, or through the advent of more exact forensic technology to unquestionably affirm or denounce proof of the defendant's actions, it would be difficult to gauge whether or not they *actually* committed this crime in the first place. Further, arguing that the defendant likely did or did not

---

<sup>91</sup> I consider the term "defendant" to be broad enough to encompass one who is accused of a crime, including periods prior to charges being brought against a suspect or an arrest being made. This broadness specifically contemplates when allegations are spread publically against an individual and authorities are investigating whether or not to make an arrest and press charges.

commit the crime would just be duplicative of what the public at large thinks because I, as a member of the public, am also subjected to the bias infected by the media. Consequently, this article broadly assumes that a wrongful exoneration does not rely on actual innocence or guilt of the defendant, but merely whether those two conditions exist.

The stigma generated from a wrongful exoneration is that the criminal justice system is not working to protect the public, and that the system is too soft on crime. A wrongful exoneration can lead the public to believe that there are procedural loopholes and extraordinarily high prosecutorial burdens of proof, which allow criminals to escape justice. A pure example of this is the Casey Anthony case.<sup>92</sup>

#### IV. STIGMA OF A WRONGFUL EXONERATION IN THE CASEY ANTHONY CASE

The stigma that a wrongful exoneration creates is fostered and exacerbated by the "trial by media" notion. As technology advances, so does the media's ability to report newsworthy developments. The media's ability to gather information becomes quicker and more efficient and their ability to project stories to a wider audience will only continue to grow.<sup>93</sup> Therefore, the inherent biases of those reporting can be sowed into the American public's thoughts.<sup>94</sup> Particularly when the emotions and tensions are high,<sup>95</sup> the ability for the media to manipulate us is only heightened. Criminal trials, such as the Casey Anthony trial, are ripe stories for the media to attach themselves to. Consequently, the phenomenon of "trial by media" will grow prolifically, creating extra-judicial trials that have the potential to detrimentally affect all of those involved in the litigation. Some have even argued that "[h]aving cameras in the

---

<sup>92</sup> See discussion *supra* Part II.A.

<sup>93</sup> Meringolo, *supra* note 19, at 982 ("Over the last seventy-five years in particular, media coverage of trials has steadily increased as a result of rapid advancements in technology.").

<sup>94</sup> For example, the influence Nancy Grace had on the public's perception is considered to be one of the most significant of any reporters or analysts during the Casey Anthony trial. See discussion *infra* Part V.B.

<sup>95</sup> See Jonathan Bernstein, 35 ARIZ. ATT'Y 20, 20 (June 1999). Further, reporting that a partner at a criminal defense firm:

[S]ays that his worst "trial by media" experiences occur "when I am representing someone facing emotion-eliciting charges, such as vehicular manslaughter or breaching the public trust." In those situations, he notes, "the media tends to editorialize in the guise of reporting, pandering to the emotionalism of the public. There is no balance, and constitutional issues of due process and fair trial get pushed aside."

*Id.*

courtroom . . . create[s] the possibility that officers of the courts may be playing more to the cameras than acting in the best interests of their clients or in the best interest of justice.”<sup>96</sup>

The trial produced record-breaking ratings for Grace as she essentially led the charge to develop this “local case to a national spectacle.”<sup>97</sup> “The trial’s signature tweets and chats brought the public’s interaction with media covering the case to a new level, but other dramatic elements were in place long before the trial started in May.”<sup>98</sup> As the trial went on, Grace’s beliefs and biases infected the public and contributed to creating that broader stigma generated by a wrongful exoneration.<sup>99</sup>

This level of outward aggression towards the American criminal justice system did not exist in other trials, not even the O.J. Simpson trial. The outrage could be attributed to the fact that the victim was a young girl who possibility suffered at the hands of her own mother. But scrutiny of the trial is not unwarranted or necessarily bad. Pointedly, former Supreme Court Justice Oliver Wendell Holmes remarked that “[w]hen a case is finished courts are subject to the same criticism as other people; but the propriety and necessity of preventing interference with the course of justice by premature statement, argument, or intimidation hardly can be denied.”<sup>100</sup> But, there is a difference between scrutiny and downright ridicule. The hostility generated by the media only magnified the public outlash in the Casey Anthony case and created other problems outside the realm of criticism.<sup>101</sup> Moreover, there

---

<sup>96</sup> Paul, *supra* note 11, at 679.

<sup>97</sup> *LA Times’ Coverage of Grace*, *supra* note 62 (describing her as “tugg[ing] at heartstrings” of her viewers).

<sup>98</sup> *Rivet*, *supra* note 27.

<sup>99</sup> See discussion *supra* Part III.B (discussing the stigma of a wrongful exoneration imputed on the public).

<sup>100</sup> *Patterson v. Colorado*, 205 U.S. 454, 463 (1907) (citations omitted). *But see* MODEL RULES OF PROF’L CONDUCT R. 3.6(a) (2012) (“A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.”). The ABA rules provide under subdivision (b) for various exceptions to that rule, all germane to the administration and context of the trial but nothing of specific detail. *Id.* R. 3.6(b).

<sup>101</sup> See Hopper et al., *supra* note 58 (describing the reactions of people outside the courtroom saying “[the verdict] is going to make millions of people think they can get away with killing their child . . . [.] That isn’t a good depiction of what our justice system is like or should be.”). Additionally, describing the reaction at New York’s Times Square as “emotional” whiling quoting one member of the public as saying “I’m sick, you know, she killed a little girl . . . [s]he gets off and goes home and maybe has another baby that she can abuse and hurt.” *Id.*

are other charges pending regarding check fraud allegations; the media's post-trial reaction may have interfered with Casey Anthony's right to a fair trial on those charges. One thing for certain is that the media exacerbated the public's reaction, even post-verdict, by continuing to discount the jury's decision and arguing to the armchair jury that Casey Anthony was wrongfully exonerated of the charges.

This, of course, brings the stigma against the jurors that they failed in their civic duty. Threats began to surface and were particularly directed at jurors, which prompted Chief Judge Belvin Perry Jr.<sup>102</sup> to withhold the names until a three month cooling period elapsed.<sup>103</sup> In fact, the public's reaction was so hostile that juror twelve left Florida in hiding, quit her job mere months away from retirement, and told her husband that she'd "rather go to jail than sit on a jury like this again."<sup>104</sup> That is, this juror would rather violate her civic duty to her country—which she just faithfully served, at an inconvenience to her because she was sequestered away from loved ones for six weeks—then to serve on another jury and do it all over again *purely* because of the public and media's reaction. This should not be. Our system should keep the *criminals* from entering the criminal justice system again, not the jurors. Here lies the power of this stigma developed by the wrongful exoneration driven by a "trial by media." Their blessing or condemnation of the jury's actions controls future participation in the criminal justice system.

It also affected other players in the system. Threats began to be focused on the defense attorneys, particularly Cheney Mason who reported to authorities that he and his family were receiving

---

<sup>102</sup> Chief Judge Perry's laudable efforts kept this trial from being an absolute circus. He handled it with respect to both parties, fairness, and with indefatigable poise. For an excellent write-up on Chief Judge Perry, see Anthony Colarossi, *Casey Anthony Trial: Judge Belvin Perry Faces Media Glare*, ORLANDO SENTINEL, Apr. 10, 2011, [http://articles.orlandosentinel.com/2011-04-10/news/os-casey-anthony-trial-belvin-perry-20110410\\_1\\_anthony-case-casey-anthony-bias-claim](http://articles.orlandosentinel.com/2011-04-10/news/os-casey-anthony-trial-belvin-perry-20110410_1_anthony-case-casey-anthony-bias-claim).

<sup>103</sup> Sunde Farquhar, *Casey Anthony Jurors' Names Made Public*, PALM HARBOR PATCH (Oct. 28, 2011), <http://palmharbor.patch.com/articles/casey-anthony-juror-names-made-public; Casey Anthony Jurors' Identities to be Revealed>, WESH.COM (Oct. 25, 2011), <http://www.wesh.com/casey-anthony-extended-coverage/29570666/detail.html> (quoting Chief Judge Perry "[i]t is time that . . . steps be taken to examine whether the laws are too broad and whether the release of certain information is causing more harm or whether the public's and media's right to know outweighs the harm" (alteration in original)). The names of the jurors are now public information and available online.

<sup>104</sup> Kerry Sanders, *The Miserable Postscript for a Casey Anthony Juror*, MSNBC.COM (July 10, 2011), [http://usnews.msnbc.msn.com/\\_news/2011/07/10/7055601-the-miserable-postscript-for-a-casey-anthony-juror](http://usnews.msnbc.msn.com/_news/2011/07/10/7055601-the-miserable-postscript-for-a-casey-anthony-juror).

“continued and harassing” phone calls telling them and Jose Baez to “sleep with one eye open.”<sup>105</sup> The escalation of media coverage even concerned the attorneys before and during the trial. At the onset, the prosecution was worried that the publicity would taint the jury pool.<sup>106</sup> However, the first judge assigned to the case ruled even though “this argument has some appeal, it does not rise to the level of being a serious and imminent threat to the administration of justice.”<sup>107</sup> But after Grace heated up her own public admonishment of Casey Anthony, the prosecution’s initial fear likely transferred to the defendant. Particularly as Grace gained support and was successful in *her* “case” to the armchair jury.

But lawyers and legal scholars have fired back in defense. It has been acknowledged that a case like the Casey Anthony trial and the way in which it is discussed are the reasons why the public image of lawyers ranks so low because they “undermine[ the] faith in our system and in the public’s perception of attorneys.”<sup>108</sup> This is particularly true when the jury is labeled as incompetent and their verdict incorrect, because it makes the legal profession—and more broadly the American criminal justice system—look like it is not functioning properly.<sup>109</sup> This is dangerous because “[i]f the public has a misleading picture of the criminal justice system, this means that decisions concerning accountability and the governance of our courts may be based on faulty information.”<sup>110</sup> Moreover, while the armchair jury found Casey Anthony guilty, the actual jurors need to be held to a higher standard and, “[i]n some sense, it’s a sign that the system worked well” when the jury found Casey not guilty because “[t]he job of the system is not to turn this into a Hollywood

---

<sup>105</sup> Susan Jacobson, *Casey Anthony: Cheney Mason’s Wife Reports Harassing Phone Calls Threatening Her Family*, ORLANDO SENTINEL, July 20, 2011, <http://www.orlandosentinel.com/news/local/caylee-anthony/os-casey-anthony-cheney-mason-calls-20110720,0,7987066.story>.

<sup>106</sup> Lundy et al., *supra* note 46.

<sup>107</sup> *Id.*

<sup>108</sup> Danny Van Horn, *If You Don’t Have Something Nice to Say . . .*, 47 TENN. B.J. 3, 3 (Sept. 2011).

<sup>109</sup> *Id.* (“Perhaps the easiest thing that we can do to improve the image of attorneys and bolster confidence in our system is to stop talking poorly about our system and each other. In the wake of the Casey Anthony trial, I was deeply disappointed to see so many ‘legal experts’ proclaim that the system failed. Most of those making that statement were not in the court for even a tenth of the testimony. They prejudged Anthony to be guilty and failed to really talk about the role of a jury, which was to decide whether the state had proven guilt beyond a reasonable doubt. Anthony may be guilty but the question is did the state prove it beyond a reasonable doubt? Rather than praising the jury for doing exactly as they were instructed, these talking heads derided the jury as a bunch of idiots. That type of commentary is shameful and out [sic] to be roundly rejected by our profession.”).

<sup>110</sup> Harris, *supra* note 12, at 822 (citation omitted).

ending, but to have all the actors in the system do the job to the best of their ability.”<sup>111</sup> Furthermore, “[t]rials are not the latest version of American Idol where the public gets to vote for their favorite verdict.”<sup>112</sup>

However the legal profession coming to its own defense will never get far with the media still denouncing the verdict, and, essentially, the American criminal justice system as a whole. To add further to the frustration, the cooling off period has now expired and the jurors’ names are public information.<sup>113</sup> Thus the debate of “what are they thinking” has just been refreshed. However, the jurors—outside of the alternatives who did not deliberate—have generally avoided the media.<sup>114</sup>

A Florida-regional poll found that the public is split almost fifty-fifty, with a slight plurality in favor of keeping the juror names private.<sup>115</sup> Keeping them private would help to alleviate the stigma imposed on the jurors, such as the attribution it waged on juror twelve. In fact, the juror’s names *should* have been sealed in the Casey Anthony trial. However, permanently sealing the jurors’ names could violate two powerful constitutional amendments.

#### V. LEGAL TENSIONS AND RAMIFICATIONS FOR KEEPING JURORS’ NAMES SEALED

Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused.<sup>116</sup>

There is a three-way tension between the First Amendment right

---

<sup>111</sup> *Casey Not Guilty*, *supra* note 60.

<sup>112</sup> P. Mars Scott, *Six Ways to Foster Public Trust in the Legal System*, 36 MONT. L. 10, 11 (Aug. 2011); *see also* *Bridges v. California*, 314 U.S. 252, 271 (1941) (“Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper.”).

<sup>113</sup> Nina Mandell, *Casey Anthony Jurors’ Names Released; Judge had Withheld Them for 3 Month ‘Cooling Period,’* N.Y. DAILY NEWS, Oct. 25, 2011, <http://www.nydailynews.com/news/national/casey-anthony-jurors-names-released-judge-withheld-3-month-cooling-period-article-1.967777>.

<sup>114</sup> *Id.*

<sup>115</sup> Sunde Farquhar, *Poll: Casey Anthony Jurors’ Names Should Have Been Kept Private*, PALM HARBOR PATCH, Nov. 1, 2011, <http://palmharbor.patch.com/articles/poll-casey-anthony-juror-names-should-have-been-kept-private>.

<sup>116</sup> *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966) (recognizing that judges have a duty to assure defendants a fair trial by controlling the media).

of the press, the Sixth Amendment right of the defendant,<sup>117</sup> and the privacy rights of the jury. In the Casey Anthony trial, the rights of the jurors should have taken priority over the press and the defendant because the jurors were most burdened by the outcome of the trial, not the press nor the acquitted defendant. Outcome means more than just the verdict, but also refers to the swarm of media attention, public interest and involvement, and the volatile emotions of essentially the entire country.

The media has a First Amendment right of press,<sup>118</sup> which also extends to the public and their right to receive information on the “functioning of government.”<sup>119</sup> The purpose of this is that “[b]y subjecting governmental bodies such as the judiciary to public scrutiny, the First Amendment ensures that justice is administered honestly and efficiently.”<sup>120</sup> The United States Supreme Court confirms “that the press and general public have a constitutional right of access to criminal trials” under the First Amendment.<sup>121</sup> But note that the media “has no greater or lesser right to information pertaining to criminal trials than does the public.”<sup>122</sup>

But the defendant has a Sixth Amendment right to a fair trial, and this includes an impartial jury.<sup>123</sup> The United States Supreme Court has even labeled this as “the most fundamental of all

<sup>117</sup> Meringolo, *supra* note 19, at 982 (“Initially, the use of cameras, and then television, in the courtroom triggered the heated constitutional debate over the proper balance of the First and Sixth Amendments.”).

<sup>118</sup> U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech, or of the press . . .”).

<sup>119</sup> David S. Willis, Note, *Juror Privacy: The Compromise Between Judicial Discretion and the First Amendment*, 37 SUFFOLK U. L. REV. 1195, 1200 (2004).

<sup>120</sup> *Id.* (continuing that it functions as a “checks and balances” system); see also *In re Oliver*, 333 U.S. 257, 270–71 (1948) (“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. One need not wholly agree with a statement made on the subject by Jeremy Bentham over 120 years ago to appreciate the fear of secret trials felt by him, his predecessors and contemporaries. Bentham said: ‘. . . suppose the proceedings to be completely secret, and the court, on the occasion, to consist of no more than a single judge,—that judge will be at once indolent and arbitrary: how corrupt soever his inclination may be, it will find no check, at any rate no tolerably efficient check, to oppose it. Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account.’ (citations omitted)).

<sup>121</sup> *Globe Newspaper Co. v. Superior Court for Cnty. of Norfolk*, 457 U.S. 596, 603 (1982) (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980)).

<sup>122</sup> Marc O. Litt, Comment, “*Citizen-Soldiers*” or *Anonymous Justice: Reconciling the Sixth Amendment Right of the Accused, the First Amendment Right of the Media and the Privacy Right of Jurors*, 25 COLUM. J.L. & SOC. PROBS. 371, 377 (1992).

<sup>123</sup> U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . .”).

freedoms.”<sup>124</sup> Making the jurors’ identities public ensures that the defendant and the public can verify the fairness of the trial.<sup>125</sup> Moreover, the Sixth Amendment right trumps any other considerations and is the most pressing and important factor in a criminal trial.<sup>126</sup> Particularly, “[i]n highly publicized cases . . . this right may be endangered by the pre-trial dissemination of information that may have a prejudicial effect on the pool of potential jurors, or by media activities which deprive defendants of the ‘judicial serenity and calm’ to which they are entitled.”<sup>127</sup> Thus, the Supreme Court has said “that the defendant’s Sixth Amendment right to a fair trial outranks the media’s First Amendment right of access to criminal trials when there is a ‘reasonable likelihood’ that such access will lead to ‘prejudicial outside interferences.’”<sup>128</sup>

Lastly, the jurors are completing an important civic duty<sup>129</sup> and are not volunteering but are forced to do so.<sup>130</sup> This compulsion can cause harm in a wrongful exoneration, like the circumstances surrounding juror twelve in the Casey Anthony trial.<sup>131</sup> Courts are placing an additional burden on jury service by disclosing jurors’ private information, such as their names, to the public. With technology today, looking up individuals by their name through the internet creates a propensity for harassment. Particularly after the verdict in a trial as unpopular with the public as the Casey Anthony case, “[m]edia groups often seek out jurors . . . to gain insight into the reasoning behind their decision.”<sup>132</sup> Additionally, the ABA Model Rules of Professional Conduct default to allow the attorneys to contact the jurors after discharge, unless certain circumstances exist.<sup>133</sup> However, there is no provision requiring the court to

---

<sup>124</sup> *Estes v. Texas*, 381 U.S. 532, 540 (1965).

<sup>125</sup> Willis, *supra* note 119, at 1197.

<sup>126</sup> *Press-Enter. Co. v. Superior Court of Cal.*, 464 U.S. 501, 508 (1984) (“No right ranks higher than the right of the accused to a fair trial.”).

<sup>127</sup> Litt, *supra* note 122, at 374 (citing *Estes*, 381 U.S. at 536).

<sup>128</sup> *Id.* at 375 (citing *Sheppard v. Maxwell*, 384 U.S. 333, 358 (1966)).

<sup>129</sup> Julianna C. Chomos et al., *Increasing Juror Satisfaction: A Call to Action for Judges and Researchers*, 59 *DRAKE L. REV.* 707, 711 (2011) (advocating for the courts and government to better educate the American public regarding this important civic duty in hopes of increasing juror satisfaction).

<sup>130</sup> David Weinstein, *Protecting a Juror’s Right to Privacy: Constitutional Constraints and Policy Options*, 70 *TEMP. L. REV.* 1, 2–3 (1997).

<sup>131</sup> See *supra* text accompanying note 100.

<sup>132</sup> Litt, *supra* note 122, at 393–94 (citing Robert Lloyd Raskopf, *A First Amendment Right of Access to a Juror’s Identity: Toward a Fuller Understanding of the Jury’s Deliberative Process*, 17 *PEPP. L. REV.* 357, 358 (1990)).

<sup>133</sup> MODEL RULES OF PROF’L CONDUCT R. 3.5(c) (2011). Providing that “[a] lawyer shall not

prevent the media or public from contacting jurors.

This adds to the prospect of threats and harassment to the jurors not only by the media but also, more dangerously, from the public.<sup>134</sup> In addition to juror twelve who left her job and even her home state of Florida,<sup>135</sup> another juror speaking under anonymity said that his “life ‘has been a nightmare’” after the trial.<sup>136</sup> He continued saying that:

I live in fear that someone will find me. I Google my name every day to see if anyone has figured out who I am. The few people that do know haven’t said anything, but one of my friends told me that his wife forbid him to talk to me. My own sister cussed me out. It has ruined my life.<sup>137</sup>

Even before jurors’ names were released they were subjected to unbearable harassment by their own family and friends. It is reasonable to assume that the public would be more aggressive to a juror as opposed to their own family or friends; and Chief Judge Perry even recognized that there needed to be a cooling off period.<sup>138</sup> Actually, the Sixth Amendment rights were not even at play here and should not have been a consideration. Casey Anthony had her fair trial—she was acquitted of the main charges and cannot be retried because of double jeopardy.<sup>139</sup> She is not prejudiced in the slightest by withholding the juror’s names *after* the trial, she got what she wanted. Granted, she had other charges pending against her such as the false reporting and, moreover, additional crimes of check fraud. But her main defense was for the murder and manslaughter charges; both of which were resolved in her favor.

What was really at play here was the media’s First Amendment rights. Thus, the balance needs to be struck between the jurors’ rights of privacy and the media’s First Amendment right. But again, a few jurors *did* speak to the press.<sup>140</sup> Most comprehensive

. . . (c) communicate with a juror or prospective juror after discharge of the jury if: (1) the communication is prohibited by law or court order; (2) the juror has made known to the lawyer a desire not to communicate; or (3) the communication involves misrepresentation, coercion, duress or harassment . . .” *Id.*

<sup>134</sup> Weinstein, *supra* note 130, at 28.

<sup>135</sup> See *supra* text accompanying note 104.

<sup>136</sup> Steve Helling, *Casey Anthony ‘Seems Like a Horrible Person,’ Says Juror*, PEOPLE (Aug. 22, 2011), <http://www.people.com/people/article/0,,20521892,00.html>.

<sup>137</sup> *Id.*

<sup>138</sup> See *supra* text accompanying notes 102–03.

<sup>139</sup> U.S. CONST. amend. V (“[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb.”).

<sup>140</sup> One juror was the anonymous male quoted in footnotes 136–37. The second was Jennifer Ford, a thirty-two-year-old nursing student. Mary Kate Burke et al., *Casey Anthony*

was Jennifer Ford who provided the details of why the jury voted the way they did, what the vote count was,<sup>141</sup> and the overall demeanor of the jury.<sup>142</sup> She even expressed *prior* to the other jurors' names being released how emotional it was for all the jurors.<sup>143</sup> Ford said that the jurors did not speak with the media right away because of how upset they all were as well as not wanting to "contribute to the sensationalism of the trial."<sup>144</sup> One can infer that if the jurors wanted to discuss the trial with the media, they could have done so; but they did not.

In addition to subjecting this jury to the stigma of the wrongful exoneration, it creates a problem for future juries on similar cases. This "failure to respect juror privacy rights may diminish the willingness of individuals to serve on juries, and ultimately the vigor of the jury system."<sup>145</sup> Such invasions only contribute *more* to the stigma affecting the American criminal justice system: not only do they not work, but they harm innocent. We want to have a public policy of inviting individuals to serve on juries and not avoiding or failing to complete this civic duty. Aggressive media participation in trials where jurors are bashed as "kooky"<sup>146</sup> will frustrate this policy. It will manufacture individuals who, frankly, will not serve on juries. Further, this could create juries who will just convict the defendant simply out of fear for their own well-being, regardless of the defendant's actual innocence or guilt. And sequestering a jury will not solve any of these problems.

Even though a jury is sequestered and does not comprehend the magnitude of a media-driven trial through mediums such as television, radio, newspaper, social media, or from other individuals not on the jury, the sequestered jurors will *still* pick up on the importance on the case. Whether from the packed public section, the people standing in the back of the courtroom, the sounds and chants from outside, or from outbursts during the trial, the jurors will still be able to deduce the enormity of the trial and their verdict.

---

*Juror: 'Sick to Our Stomachs' Over Not Guilty Verdict*, ABC NEWS, July 6, 2011, [http://abcnews.go.com/US/casey\\_anthony\\_trial/casey-anthony-juror-jury-sick-stomach-guilty-verdict/story?id=14005609](http://abcnews.go.com/US/casey_anthony_trial/casey-anthony-juror-jury-sick-stomach-guilty-verdict/story?id=14005609).

<sup>141</sup> According to Ford, it was ten to two for not guilty. *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> Weinstein, *supra* note 130, at 11 (citing Michael R. Glover, *The Right to Privacy of Prospective Jurors During Voir Dire*, 70 CALIF. L. REV. 708, 712 (1982)).

<sup>146</sup> See *supra* note 64 and accompanying text.

Moreover, juries have the power to nullify the evidence presented at trial. This “legal concept . . . typically becomes the topic of conversation and heated debate whenever an intensely publicized jury trial does not render the verdict that the public anticipates.”<sup>147</sup> Essentially, jury “[n]ullification reflects the jury’s power to acquit a culpable defendant when it concludes that the applicable law is immoral.”<sup>148</sup> Therefore, it is accepted for them to reject evidence presented to them by either party as applied to the law and deduce their own finding, notwithstanding what the court instructs them to do. This has the potential to create added controversy when the media disagrees with the jury’s decision to nullify because the media can easily label the jury as rogue. However, the jurors’ ability to defend their verdict is only possible by reaching out to the media who will, inevitably, slant or dilute the jurors’ arguments. Moreover, as the case with Jennifer Ford, her explanation for the jury’s verdict to acquit Casey Anthony was easily overshadowed by the myriad of other media coverage denouncing the jury’s decision.<sup>149</sup> In a sense, even though the jury has nullification as a tool at their disposal, it would just backfire on the overall perception of the American criminal justice system because it would create inconsistencies that the media will exploit and convert into ineffectiveness.

## VI. INFLUENCES FROM THE “INNOCENCE MOVEMENT”

Similarly, other laudable functions such as the Innocence Movement inadvertently create apprehension regarding our system. The popularity and impetus of the Innocence Movement has been credited to national groups<sup>150</sup> such as the Innocence Project<sup>151</sup> and

---

<sup>147</sup> James M. Keneally, *Jury Nullification, Race, and the Wire*, 55 N.Y.L. SCH. L. REV. 941, 942 (2010/2011).

<sup>148</sup> *Id.* at 943 (citing Jack B. Weinstein, *Considering Jury “Nullification”: When May and Should a Jury Reject the Law to Do Justice?*, 30 AM. CRIM. L. REV. 239, 244 (1993)).

<sup>149</sup> See *supra* notes 141–44 and accompanying text.

<sup>150</sup> Robert Carl Schehr, *The Criminal Cases Review Commission as a State Strategic Selection Mechanism*, 42 AM. CRIM. L. REV. 1289, 1293 (2005). “[T]he innocence movement did not formally appear until the late 1990s, arguably with the first national conference [at Northwestern University in 1998,] dedicated to unraveling the nature and extent of wrongful convictions in the United States.” *Id.* There are in fact innocence projects established in thirty-five states, including some with multiple ones. *Id.* For further information, see *Innocence Network Member Organizations*, INNOCENCE NETWORK, <http://www.innocencenetwork.org/members.html> (last visited Mar. 20, 2012). But note that some scholars believe the innocence movement really began in “1987, when [Professors] Hugo Bedau and Michael Radelet published data on wrongful convictions.” Samuel Wiseman, *Innocence After Death*, 60 CASE W. RES. L. REV. 687, 715–16 (2010); Bruce P. Smith, *The History of Wrongful*

Northwestern University's Center on Wrongful Convictions,<sup>152</sup> both widely successful.<sup>153</sup> These innocence projects are still at the heart of the movement, and are generally "created for the purpose of investigating cases of wrongful conviction and, in some cases, correcting miscarriages of justice."<sup>154</sup> Such projects contribute to the overall "Innocence Movement," which "is characterized by innocence consciousness—the idea that innocent people are convicted in sufficiently large numbers as a result of systemic justice system problems to require efforts to exonerate them, and to advance structural reforms to reduce such errors in the first place."<sup>155</sup> Most importantly, the movement has converted the shapeless, numerical figure of exonerations into the tangible, pedagogical form of "names and faces" allowing us to "learn[] how

---

*Execution*, 56 HASTINGS L.J. 1185 (2005). But I respectfully disagree. While shocking and authoritative, the 1987 movement did not carry the energy of the innocence projects of recent years, which have possibly been perked by advanced technology facilitating the informational transfers through the media better. For professors Bedau and Radelet's work, see Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987).

<sup>151</sup> *Mission Statement*, INNOCENCE PROJECT, <http://www.innocenceproject.org/about/Mission-Statement.php> (last visited Mar. 20, 2012). Barry C. Scheck and Peter J. Neufeld founded the Innocence Project in 1992 at the Benjamin N. Cardozo School of Law at Yeshiva University primarily "to assist prisoners who could be proven innocent through DNA testing." *Id.*

<sup>152</sup> *Center on Wrongful Convictions: About Us*, NORTHWESTERN LAW, <http://www.law.northwestern.edu/wrongfulconvictions/aboutus/> (last visited Mar. 20, 2012). The Center "was one of the first university-based innocence projects to accept non-DNA cases as well as DNA cases" and has been operating since 1998. They are responsible for the exoneration of at least twenty-three innocents, but the project particularly focuses on legislation aimed at improving the criminal justice system with great past success. *Id.*

<sup>153</sup> JON B. GOULD, THE INNOCENCE COMMISSION: PREVENTING WRONGFUL CONVICTIONS AND RESTORING THE CRIMINAL JUSTICE SYSTEM 2 (2008) ("These groups have been frighteningly successful in their investigations, frightening only in the number of innocent defendants found to be sentenced to prison or worse."). This movement has even caught up in popular culture with the movie *Conviction*, recounting the story of Kenny Waters who was exonerated with the help of Barry Scheck and the rest of the Innocence Project. *CONVICTION* (Fox Searchlight Pictures, 2010).

<sup>154</sup> Schehr, *supra* note 150, at 1293 ("Innocence projects typically manifest in one of four ways: 1) they are university-based and operate within a law school; 2) they are university-based and combine social science and/or liberal arts departments with law school students and faculty; 3) they are university-based but have no law school affiliation; or 4) they are community-based and draw on available resources.").

<sup>155</sup> Zalman, *supra* note 5, at 1468 (citing Marvin Zalman, *Cautionary Notes on Commission Recommendations: A Public Policy Approach to Wrongful Convictions*, 41 CRIM. L. BULL. 169, 170–71 (2005)); accord Rhiannon M. Hartman, Comment, *An Ounce of Prevention: Why the Innocence Movement Should Focus on Proscriptive Pre-Conviction Measures Instead of Abolition of the Death Penalty*, 12 RICH. J.L. & PUB. INT. 163, 177 (2009) ("It will be more constructive for the innocence movement to shift its focus to pre-conviction matters that, if effectuated properly, will decrease the number of wrongful convictions . . .").

their lives were destroyed.”<sup>156</sup>

The primary goals of the “Innocence Movement” are to exonerate those wrongfully incarcerated from our prisons, seek compensation for them, educate the public and actors within the system, and promote policy reforms.<sup>157</sup> Further, the movement bifurcates the notion of innocence into either “actual” innocence or “legal” innocence<sup>158</sup> for easier digestion by the players in the system that use it, but also for the public at large.<sup>159</sup> Yet, there is still push-back in what prominent scholar Keith A. Findley identifies on the macro level, that wrongful convictions are not a problem, and also on a micro level, the prosecutors and judges resisting claims of innocence.<sup>160</sup> Notwithstanding this push back:

The innocence movement made our collective responsibility palpable; and it did so in large part by evoking concern and empathy for those falsely accused and convicted by our fallible system. The tremendous achievement of the narratives of the innocence movement is that they bridged the gaping empathetic divide between the general populace and the death-row inmate.<sup>161</sup>

Therefore, the Innocence Movement has been extraordinarily beneficial to the criminal justice system in identifying problem areas, providing education through case studies of individual

---

<sup>156</sup> Samuel R. Gross, *Convicting the Innocent*, 4 ANN. REV. L. & SOC. SCI. 173, 174 (2008).

<sup>157</sup> Zalman, *supra* note 5, at 1468–69.

<sup>158</sup> See Stephanie Roberts & Lynne Weathered, *Assisting the Factually Innocent: The Contradictions and Compatibility of Innocence Projects and the Criminal Cases Review Commission*, 29 OXFORD J. LEGAL STUD. 43, 49 (2009) (“A person is innocent if he or she did not commit the crime. Innocence in the legal context is considerably more complex because there are a myriad of ways in which innocence could be defined. In the criminal justice system, a person may be considered to have been wrongly convicted if there were procedural or legal errors upon which he or she can found a successful appeal. But, whilst this may qualify as wrongful conviction in the broader sense, it would generally not be understood as innocence outside the legal arena. There is a natural tension between the commonly held notions of ‘innocence’ (which are also usually utilized by the media) and the concept of ‘innocence’ or ‘wrongful conviction’ as it applies in the legal system. Whilst the public and the media’s perception of terms such as ‘wrongful conviction’ and ‘miscarriage of justice’ may appear to relate more to actual innocence than to cases in which procedural errors have been made, the legal system has adopted much broader definitions that include both.”).

<sup>159</sup> See Emily Hughes, *Innocence Unmodified*, 89 N.C. L. REV. 1083 *passim* (2011). *But see* Joshua Marquis, *The Myth of Innocence*, 95 J. CRIM. L. & CRIMINOLOGY 501, 508 (2005) (“To call someone ‘innocent’ when all they managed to do was wriggle through some procedural cracks in the justice system cheapens the word and impeaches the moral authority of those who claim that a person has been ‘exonerated.’”).

<sup>160</sup> Keith A. Findley, *Defining Innocence*, 74 ALB. L. REV. 1157, 1158 (2010/2011) (“At both levels, the debate inevitably raises a fundamental definitional question: what counts as an ‘exoneration,’ or when is a convicted offender counted as an ‘innocent?’” (footnote omitted)).

<sup>161</sup> Bandes, *supra* note 9, at 12.

exonerees, and rectifying those fallacies. However, inadvertently, in raising awareness of wrongful convictions, it has also contributed to making the public hypersensitive to other legal developments in our system—such as wrongful exonerations. Particularly coupled with the aggressive criticisms from media personalities such as Nancy Grace, such powerful forces like the Innocence Movement could backfire and undermine the American criminal justice system. The whole purpose is to right the wrong and if the public believes there was a wrongful exoneration, they might seek to right the wrong extralegally.

## VII. CONCLUSION

This article recognizes the dangers that the media can conjure when their coverage coverts a criminal trial decided by the legal system into a court of public opinion decided by an armchair jury. The stigma that a “trial by media” can create on the American criminal justice system is a powerful and dangerous problem. It is only exacerbated by the media when they believe that a defendant was wrongfully exonerated, such as Casey Anthony.

The same potent stigma that attaches to an exoneree who was wrongfully convicted is attached to the entire justice system when the “trial by media” finds a defendant wrongfully exonerated. It undermines public perception of the entire legal system down to the very actors, such as jurors. Jurors are forced to fulfill their civic duty, yet their rights are not only secondary to those of the defendant but *even* to those of the media. Jurors should not be dissuaded from serving on a jury, which is already a tough act to sell because their friends, family, and fellow citizens are hypercritical of jury verdicts. Moreover, jurors should not be forced out of their job and home because the decision they rendered was contrary to that of the armchair jury.

While the Innocence Movement has generated laudable results when freeing those wrongfully convicted of crimes, it has also put the entire criminal justice system under a microscope. When combined with the media’s insatiable lust for information, the stigma of a wrongful exoneration is multiplied ten-fold and the system may even be undermined as broken or not working due to the large amount of wrongful convictions being uncovered.

Therefore, greater protections to extinguish the stigma imputed on the criminal justice system are needed to combat the growing force the media is and will continue to become. When the public

receives their information siphoned through another medium, such as the media reporting on the trial, as opposed to watching the trial, there is great potential for misleading perceptions of the justice system. There will never be a way to prevent a “trial by media,” but we should attempt to limit their invasiveness in the judicial system. Cases such as the Casey Anthony trial serve as an illustration of how to protect future juries from being rewarded for their jury service with death threats, demeaning labels, and overall harassment.

We have forgotten that one of the benchmarks of our great democracy is the jury—not the media—and we need to not only better protect them, but cherish them: “The first will be a heartfelt tribute to the glory of the American jury, its role as a bulwark of American democracy, and the honor and civic virtue of those individuals who serve without ambition through their participation as jurors in the administration of justice.”<sup>162</sup>

---

<sup>162</sup> Paula L. Hannford-Agor & G. Thomas Munsterman, *Ethical Reciprocity: The Obligations of Citizens and Courts to Promote Participation in Jury Service*, in *JURY ETHICS* 21, 21 (John Kleinig & James P. Levine eds., 2006) (citation omitted).

