COMMENTS

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

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I. INTRODUCTION

Even with the most protections as compared to any other criminal justice system in the world, the American criminal justice system is still plagued by wrongful convictions more frequently than one may expect. Without question, “[t]here is no worse error in American criminal justice than the wrongful prosecution, conviction, and incarceration of an innocent person . . . .” 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.”

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1 John A. Humphrey & Saundra D. Westervelt, Introduction, in WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE 1, 1 (Saundra 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.”).

2 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.”).

3 Richard A. Leo, False Confessions: Causes, Consequences, and Solutions, supra note 1, at 36, 47.

4 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. 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. Years later, William Blackstone echoed this when he infamously enunciated that “it is better that ten guilty persons escape than that one innocent suffer.”

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. The same is true when one who is perceived as innocent is incarcerated, or worse—executed. For possibility, no matter how improbable, that he’s innocent.”

1 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.”).


3 4 WILLIAM BLACKSTONE, COMMENTS ON THE LAW OF JUSTICE 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. 1243, 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.

4 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))).

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. What is disconcerting is that the public’s perception of justice is almost entirely shaped by the media, via the television. 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.” Former New York Court of Appeals Chief Judge Judith S. Kaye conceded 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.”

10 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. 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/.

11 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)).

12 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)).

13 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. 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. 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.”).

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.

See JAMES J. GORBERT & 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.*

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

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 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, but has recently erupted and is currently escalating at an alarming rate. 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,
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. 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.”

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.” 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 and the JonBenet Ramsey murder trial.
Notably, a few years ago the Duke Lacrosse incident also sparked an intense swarm of media attention.\textsuperscript{25} 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.\textsuperscript{26}

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.

\textit{A. Casey Anthony Case Facts}

Purported as the “social media trial of the century,”\textsuperscript{27} the Casey Anthony case illustrates the passion and emotion that erupts when

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\item 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. \textit{Id.} at 349–50 (citations omitted).
\item Ann Kibbey, \textit{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.’”).\textsuperscript{24}
\item 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.”).\textsuperscript{25}
\item Id. at 93–94 (citations omitted).
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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. 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].” Casey later called the police back and told the dispatcher that the babysitter had kidnapped her.

After speaking to and taking authorities on multiple false leads surrounding the disappearance of her daughter Caylee, Casey was arrested July 16, 2008 on charges of child neglect, obstructing a criminal investigation, and filing false statements. 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. 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.

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. A legal commentator expressed concern that without a body, it would be hard—but not impossible—for the prosecution to prove their case. However this concern was short lived. On December 11, 2008, the

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30 Id.
31 Huffington Post Timeline, supra note 28.
33 Id.
34 Id.
35 Sarah Landy 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/a-caylee15_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.”).
36 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.\textsuperscript{37} 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.”\textsuperscript{38}

Jury selection began on May 9, 2011, and the six-week trial started on May 24, 2011.\textsuperscript{39} The first week of the trial was characterized by both sides introducing their versions of the story and detailed timelines.\textsuperscript{40} 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.\textsuperscript{41} 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.\textsuperscript{42} 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.”\textsuperscript{43}

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.\textsuperscript{44} Essentially, the prosecution was laying the foundation for the

\textsuperscript{37} Walter Pacheco et al., Remains Identified as Missing Toddler Caylee Anthony, ORLANDO SENTINEL, Dec. 19, 2008, http://www.orlandosentinel.com/news/local/breakingnews/ord-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 December 11 are those of missing toddler Caylee Anthony.” Id.

\textsuperscript{38} Id.


\textsuperscript{40} Id.

\textsuperscript{41} Id.

\textsuperscript{42} Id.


\textsuperscript{44} 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. 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.” 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. 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. 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. 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. Moreover, Spitz undermined Dr. Garavaglia’s autopsy saying it was “shoddy” because she did not open Caylee’s skull to check for trauma. 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. Cindy testified that she feared her dogs were getting sick from eating the bamboo leaves in the backyard and wanted to know what

45 Id.
47 Look Back, supra note 39.
48 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.
49 Look Back, supra note 39.
50 Id.
51 Id.
52 Id.
would cause them to be “extremely tired all the time.”\textsuperscript{53} She made the jump from chlorophyll, the green pigment in plants, to chloroform, a general anesthetic and potential murder weapon.\textsuperscript{54} 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.\textsuperscript{55}

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.\textsuperscript{56} 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.\textsuperscript{57}

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.\textsuperscript{58} 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.\textsuperscript{59}

\textbf{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

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\item \textsuperscript{54} Id.; \textit{Look Back}, supra note 39.
\item \textsuperscript{56} \textit{Look Back, supra} note 39.
\item \textsuperscript{58} Jessica Hopper et al., \textit{Casey Anthony Trial: Not Guilty Murder Verdict}, \textsc{ABC News}, July 5, 2011, http://abcnews.go.com/US/casey-anthony_trial/casey-anthony-guilty-murder-caylles-death/story?id=13987918#Txd550ePshk. 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.”
\item \textit{Id.} (emphasis added).
\item \textsuperscript{59} \textit{Boston Herald Timeline, supra} note 32.
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chanting “[j]ustice for Caylee” and “[b]aby killer!”

Outrage also erupted online through social media and on television by reporters and analysts. Specifically, colorful analyst Nancy Grace—who made her position very clear that she believes Casey Anthony is guilty—infamously remarked after the not guilty verdict that “[s]omewhere out there tonight, the devil is dancing.” 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.”

Her demeanor even struck a chord with Cheney Mason, one of Casey Anthony’s defense attorneys, 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.”

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 then one innocent person to be incarcerated or suffer.


61 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.


64 Id.


66 LA Times’ Coverage of Grace, supra note 62 (emphasis added).

67 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. 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.” 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.” And this goes far beyond just financial damages or to the

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68 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)).


70 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,\textsuperscript{71} but also the torture during incarceration because “[w]hile in prison, the wrongfully convicted suffer considerable emotional, psychological, and physical harm.”\textsuperscript{72} Courts have also acknowledged all of these considerations, including the United States Supreme Court.\textsuperscript{73} 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.\textsuperscript{74}

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.\textsuperscript{75} 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.\textsuperscript{76} 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 injustices).\textsuperscript{77}

\textsuperscript{71} 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.”).

\textsuperscript{72} Kahn, \textit{supra} note 68, at 129.

\textsuperscript{73} 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)).

\textsuperscript{74} In re Jordan, 913 So. 2d 775, 786 (La. 2005) (Johnson, J., dissenting in part).

\textsuperscript{75} 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, \textit{supra} note 69.

arrested, arraigned, and sat in jail for a month awaiting the results of a DNA test which eventually cleared him. 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. Camacho says that every time he tries to explain this, employers do not seem to care and toss his application in the trash anyway. 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

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77 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.”).

78 Chivers, supra note 76. There were an additional twelve charges filed against him. Id.

79 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.80

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.81 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.”82 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.83 The only evidence at trial was a confession from

81 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. & POLY 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.”).
Sterling after twenty-four hours of police interrogation procured through questionable methods; he later recanted. 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. Sterling was officially exonerated April 28, 2010. He had never committed a crime before and now after serving over seventeen years he was again cleared.

However, Sterling was arrested again at the end of July 2011. Sterling is now charged with seven counts of sexual abuse in the second degree for inappropriately touching a young boy. Prior to his wrongful conviction, Sterling’s record was immaculate. 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

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85 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 Hedeen, 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 whose, instead of the first victim and perpetrator suffering, an additional victim and the wrongly convicted are dragged into the cesspool.
86 Know the Cases: Frank Sterling, supra note 83.
87 Id.
89 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-sternling-appears-in-court/.
90 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 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 who 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

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91 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.92

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.93 Therefore, the inherent biases of those reporting can be sowed into the American public’s thoughts.94 Particularly when the emotions and tensions are high,95 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

92 See discussion supra Part II.A.
93 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.”).
94 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.
95 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.”

The trial produced record-breaking ratings for Grace as she essentially led the charge to develop this “local case to a national spectacle.” “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.” 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.

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.” But, there is a difference between scrutiny and downright ridicule. The hostility generated by the media only magnified the public out lash in the Casey Anthony case and created other problems outside the realm of criticism. Moreover, there

96 Paul, supra note 11, at 679.
97 LA Times’ Coverage of Grace, supra note 62 (describing her as “tugg[ing] at heartstrings” of her viewers).
98 Rivet, supra note 27.
99 See discussion supra Part III.B (discussing the stigma of a wrongful exoneration imputed on the public).
100 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).
101 See Hopper et al., supra note 58 (describing the reactions of people outside the courtroom saying “[t]he verdict is going to make millions of people think they can get away with killing their child . . . [t]hat 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” while quoting one member of the public as saying “I’m sick, you know, she killed a little girl . . . [s]o she 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.\(^\text{102}\) to withhold the names until a three month cooling period elapsed.\(^\text{103}\) 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.”\(^\text{104}\) 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


\(^{103}\) Sunde Farquhar, Casey Anthony Jurors’ Names Made Public, PALM HARBOUR 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 “[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.

“continued and harassing” phone calls telling them and Jose Baez to “sleep with one eye open.”105 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.106 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.”107 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.”108 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.109 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.”110 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
ending, but to have all the actors in the system do the job to the best of their ability.” 111 Furthermore, “[t]rials are not the latest version of American Idol where the public gets to vote for their favorite verdict.” 112

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. 113 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. 114

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. 115 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. 116

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

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111 Casey Not Guilty, supra note 60.
112 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.”).
114 Id.
116 Shepard 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,\textsuperscript{117} 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,\textsuperscript{118} which also extends to the public and their right to receive information on the “functioning of government.”\textsuperscript{119} 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.”\textsuperscript{120} 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.\textsuperscript{121} But note that the media “has no greater or lesser right to information pertaining to criminal trials than does the public.”\textsuperscript{122}

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

\begin{footnotes}
\item[117] Meringolo, \textit{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.”).
\item[118] U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech, or of the press . . .”).
\item[120] \textit{Id.} (continuing that it functions as a “checks and balances” system); \textit{see also} \textit{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)).
\item[123] 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 . . .”).
\end{footnotes}
freedoms.” Making the jurors’ identities public ensures that the defendant and the public can verify the fairness of the trial. Moreover, the Sixth Amendment right trumps any other considerations and is the most pressing and important factor in a criminal trial. 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.” 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.’”

Lastly, the jurors are completing an important civic duty and are not volunteering but are forced to do so. This compulsion can cause harm in a wrongful exoneration, like the circumstances surrounding juror twelve in the Casey Anthony trial. 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.” Additionally, the ABA Model Rules of Professional Conduct default to allow the attorneys to contact the jurors after discharge, unless certain circumstances exist. However, there is no provision requiring the court to

125 Willis, supra note 119, at 1197.
127 Litt, supra note 122, at 374 (citing Estes, 381 U.S. at 539).
128 Id. at 375 (citing Sheppard v. Maxwell, 384 U.S. 333, 358 (1966)).
129 Julianna C. Chomos et al., Increasing Juror Satisfaction: A Call to Action for Judges and Researchers, 59 Duke 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).
131 See supra text accompanying note 100.
132 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)).
133 MODEL RULES OF PROF’L CONDUCT R. 3.5(c) (2011). Providing that “[a] lawyer shall not
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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. In addition to juror twelve who left her job and even her home state of Florida, another juror speaking under anonymity said that his “life has been a nightmare” after the trial. 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.

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. 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. 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. Most comprehensive

\ldots (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 . . . .”

Weinstein, supra note 130, at 28.

See supra text accompanying note 104.


Id.

See supra text accompanying notes 102–03.

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.”).

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,141 and the overall demeanor of the jury.142 She even expressed prior to the other jurors’ names being released how emotional it was for all the jurors.143 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.”144 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.”145 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”146 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.

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141 According to Ford, it was ten to two for not guilty. Id.
142 Id.
143 Id.
144 Id.
145 Weinstein, supra note 130, at 11 (citing Michael R. Glower, The Right to Privacy of Prospective Jurors During Voir Dire, 70 CALIF. L. REV. 708, 712 (1982)).
146 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.”147 Essentially, jury “[n]ullification reflects the jury’s power to acquit a culpable defendant when it concludes that the applicable law is immoral.”148 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.149 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 groups150 such as the Innocence Project151 and

148 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)).
149 See supra notes 141–44 and accompanying text.
150 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 both widely successful. 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.” 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.” 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).


152 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.

153 Jon B. Gould, THE INNOCENCE COMMISSION: PREVENTING WRONGFUL CONVICTIONS AND RESTORING THE CRIMINAL JUSTICE SYSTEM 2 (2009) (“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).

154 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.”).

their lives were destroyed.”  

The primary goals of the “Innocence Movement” are to exonerate those wrongfuly incarcerated from our prisons, seek compensation for them, educate the public and actors within the system, and promote policy reforms.  Further, the movement bifurcates the notion of innocence into either “actual” innocence or “legal” innocence for easier digestion by the players in the system that use it, but also for the public at large.  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.  

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.

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

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157 Zalman, supra note 5, at 1468–69.
158 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.”).
159 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.’”).
160 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)).
161 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.”