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TRIAL BY MEDIA: WHERE FACT & FICTION CO-EXIST IN HIGH-PROFILE CASES

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I. INTRODUCTION

Imagine a scenario where the media captures your face and every word you say in a trial. Now imagine every social media platform consumes these images, videos, and words spoken and turns you into a meme, mocks you throughout the trial, challenges your testimony, and questions your credibility. Lastly, imagine your concern, knowing the jury is not sequestered and can access these same images and influences.

This real-life scenario occurred when over 3 million viewers turned in for the results of the *Depp v. Heard* verdict on June 1, 2022.² The world watched and cheered as the judge awarded Mr. Depp \$10.3

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² *A Defamation Case to Remember: Statistics from the Record-Breaking Depp v. Heard Trial*, PENNY & ASSOC. (June 16, 2022), <https://www.pennylawyers.com/news/a-defamation-case-to-remember-statistics-from-the-record-breaking-depp-v-heard-trial/>. (Hereinafter referred to as "PENNY & ASSOC.").

million in damages.³ Even though Ms. Heard received \$2 million in damages from her countersuit,⁴ Mr. Depp prevailed in court and worldwide with public opinion. After the verdict and constantly throughout the trial, memes and social media posts flooded the internet with displays of unwavering support for Mr. Depp. As many teased, “[t]his is the day you will always remember as the day you *almost* caught Captain Jack Sparrow!”⁵ Social media consumed the “highlights” of the trial and quickly created hashtags for supporters to follow along. Specifically, the internet blew up with belief for #JusticeForJohnnyDepp earning this hashtag 15 billion views.⁶ In comparison, #IStandWithAmberHeard only reached 8.2 million views.⁷ People formed most of these beliefs and opinions of the trial, witnesses, and parties to the suit by watching 60-second videos on TikTok, Instagram, and/or Twitter rather than viewing the trial themselves. As a result, it became apparent many individuals lacked knowledge of what the actual lawsuit covered and the governing law that accompanied it. The U.S. media involvement and public opinion varied significantly compared to Depp’s U.K. defamation suit concerning similar issues just two years prior.⁸ Specifically, the U.K. suit was not televised, had no jury, and did not involve videos or pictures of the parties or witnesses; in essence, the U.K. suit did not consider the court of public opinion.⁹

This real-life example poses an obvious and relevant question, “if the public was affected so greatly by the media’s involvement, was the jury affected too?” And if so, how can we curb the media’s

³ Associated Press, *Judge Makes Jury’s \$10.3M Award Official in Depp-Heard Trial*, U.S. NEWS & WORLD REP. (June 24, 2022, 4:40 PM), <https://www.usnews.com/news/entertainment/articles/2022-06-24/judge-makes-jurys-10-3m-award-official-in-depp-heard-trial#:~:text=The%20jury%20found%20Depp%20should,%24350%2C000%20under%20a%20state%20cap.>

⁴ *Id.*

⁵ Becky Burkett, *The Jury has Spoken! Captain Jack Sparrow has Won!*, DISDINING (June 1, 2022), <https://www.disneydining.com/breaking-johnny-depp-wins-jury-rules-in-favor-of-captain-jack-sparrow-bb1/> (emphasis added).

⁶ PENNY & ASSOC., *supra* note 2.

⁷ *Id.*

⁸ Ed Williams QC, *Depp v. Heard: A QC’s View on Why the UK and US Outcomes Were so Different*, LAW (June 10, 2022, 5:43 AM), <https://www.law.com/international-edition/2022/06/10/depp-v-heard-a-qcs-view-on-why-the-uk-and-us-outcomes-were-so-different/?slreturn=20221016135017>.

⁹ *Id.*

undesired and unnecessary influence on the jury's decision? Furthermore, considering Mr. Depp's loss in the United Kingdom ("U.K."), did the media storm of attention contribute to Mr. Depp's victory in the United States ("U.S.")?¹⁰

Media presence in any U.S. courtroom has long included a debate between the First and Sixth Amendments of the U.S. Constitution, especially in high-profile criminal trials;¹¹ however, even though less constitutionally protected, the media's presence remains felt in civil trials as well. In sum, the First Amendment protects people's right to free speech, *press*, assembly, and religion.¹² This constitutional right often serves as the crutch that members of the media and supporters of the press, specifically within the courtroom context, lean upon. On the other hand, the Sixth Amendment guarantees the defendant, "in all criminal prosecutions, . . . the right to a speedy and public trial, by an impartial jury of the State."¹³ To no surprise, the Sixth Amendment's promise of an impartial jury is often used as the opposition's argument for an overabundance of media presence in pretrial hearings and live-streamed trial coverage. Additionally, how does a court balance, whether it be in the civil or criminal context, these guaranteed rights through fair treatment set forth by the Fourteenth Amendment?¹⁴

In sum, the ultimate goal is to find a balance between these constitutional rights, yet the U.S. lacks a consistent approach across states. Instead, the application of rules regarding cameras in the courtroom continues to vary across states, while "most federal judges

¹⁰ Rajeev Syal, *Why Did the Depp-Heard Libel Outcomes Differ in the US and UK?*, GUARDIAN (June 2, 2022, 2:00 PM), <https://www.theguardian.com/law/2022/jun/02/johnny-depp-amber-heard-libel-outcomes-differ-us-uk#:~:text=Less%20than%20two%20years%20ago,he%20was%20a%20wife%20beater.>

¹¹ Ruth Ann Strickland, *Cameras in the Courtroom*, FIRST AMEND. ENCYCLOPEDIA, [https://www.mtsu.edu/first-amendment/article/989/cameras-in-the-courtroom.](https://www.mtsu.edu/first-amendment/article/989/cameras-in-the-courtroom)

¹² U.S. CONST. amend. I (emphasis added).

¹³ U.S. CONST. amend. VI.

¹⁴ Linda R. Monk, *Due Process Clause, Equal Protection Clause and Disenfranchising Felons*, PBS, <https://www.pbs.org/tpt/constitution-usa-peter-sagal/equality/due-process-equal-protection-and-disenfranchisement/#:~:text=The%20Fourteenth%20Amendment%20promises%20that,choices%20about%20what%20is%20lawful> (last visited Nov. 2, 2022).

have declined to permit cameras in their courts voluntarily.”¹⁵ This discrepancy, alongside the First and Sixth Amendments’ application to the states through the Due Process clause of the Fourteenth Amendment, creates inconsistent expectations about the media’s presence within state courtrooms. Furthermore, concerns about impacting potential jurors are even more evident when one compares the U.S.’s approach to balancing its Constitutional protections with media and how the U.K. handles media coverage in trials and judicial proceedings, especially within high-profile cases.¹⁶ This concern is analyzed globally when high-profile individuals are involved in multiple suits – one suit in one country and one in another.¹⁷ How do we balance fairness and impartiality promised by the Fourteenth Amendment’s Due Process when different states and even countries have different rules regarding media coverage, especially in a world that is not only consumed by technology but also made more accessible by its use? Part II of this note will explore the histories of the laws that govern courtroom media coverage in both the U.S. and the U.K. Part III will examine how these different approaches are manifested in case law and analyze various methods taken by U.S. states. Lastly, Part IV will scrutinize the approaches taken by some U.S. states and argue for a more consistent approach across the U.S. that limits exposure and influence to potential jurors, especially in high-profile cases. Given the importance the law and legal community place upon limiting prejudice, real-time media coverage of judicial proceedings, while often entertaining and dramatic, is counterproductive in effectuating fair, unsullied justice. This note does not argue for abolishing media coverage; instead, this note hopes to create a balance that promotes justice to all parties within judicial proceedings while maintaining rights protected by the First, Sixth, and Fourteenth Amendments.

II. WHICH LAWS GOVERN COURTROOM MEDIA COVERAGE?

The U.S. and U.K. “have fundamentally different starting points when it comes to the reporting of criminal trials.”¹⁸ The gaps between these two approaches become more evident as individuals

¹⁵ Strickland, *supra* note 11.

¹⁶ See Danya M. Chikamoto, *Trial by Media: The Risks to Defendants of Differing US and UK Approaches*, KRAMER LEVIN (Mar. 3, 2022), <https://www.kramerlevin.com/en/perspectives-search/trial-by-media-the-risks-to-defendants-of-differing-us-and-uk-approaches.html>.

¹⁷ *Id.*

¹⁸ Chikamoto, *supra* note 16.

post on social media to share thoughts and perceptions of trials captured by media coverage, especially when posts do not accurately capture the trial's facts.¹⁹ Furthermore, these approaches conflict when cases and technology transcend international borders and the protections afforded by one country are not afforded by another. However, to understand this ongoing battle better, one must first understand what each approach attempts to protect.

A. THE LONG-STANDING BATTLE BETWEEN THE U.S.'S FIRST & SIXTH AMENDMENTS

a. Freedom Settled in The First Amendment

Americans have long valued the right to express themselves. Even if taken for granted in today's world, the ability for someone to say what she wants, express what she wants, and share her thoughts on a given subject without government interference remains a fundamental right.²⁰ On the one hand, these sought freedoms are often challenged, especially as people's ideas of expression evolve and change throughout history.²¹ On the other hand, the U.S. Constitution provides a podium where Americans find footing to stand firm in these freedoms: The First Amendment.²²

The First Amendment states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."²³ Furthermore, throughout history, the Court has found that this amendment extends beyond the exact language of the text.²⁴ For example, in *Stanley v. Georgia*, an analysis of privacy rights and unspoken protections provided for by the First Amendment was made by Justice Thurgood Marshall; in his opinion, he stated that "it is now well established that the Constitution protects

¹⁹ See Erin Snodgrass, *Social Media Weaponizes Celebrity Defamation Trials Inside and Outside the Courtroom, Legal Expert Says*, INSIDER (May 23, 2022, 8:04 PM) <https://www.insider.com/social-media-weaponizes-celebrity-defamation-trials-expert-says-2022-5>.

²⁰ See U.S. CONST. amend. I.

²¹ *Freedom of Expression*, ACLU, <https://www.aclu.org/other/freedom-expression> (last visited Oct. 26, 2022).

²² U.S. CONST. amend. I.

²³ *Id.*

²⁴ See *Stanley v. Georgia*, 394 U.S. 557 (1969).

the *right to receive information* and ideas.”²⁵ The Court’s conclusion gave way to the argument that the public holds a right to receive public information, including what occurs in a courtroom.²⁶ In other words, the public’s right to public information and freedom of the press provides a constitutional footing for live media coverage.²⁷ Furthermore, the Court acknowledged in 2011 that First Amendment protections evolve alongside technological advances; in sum, “the basic principles of freedom of speech and the press, like the First Amendment’s command, do not vary’ when a new and different medium for communication appears.”²⁸ As a result, it makes sense that media presence in the courtroom, especially in high-profile cases, has increased alongside the ability to broadcast the contents of trials.

With the press’s ability to capture what goes on in a courtroom and the public’s right to public information, allowing cameras in the courtroom grants people a new level of insight, detail, and knowledge of the legal system. Additionally, in theory, it allows individuals “to see how justice is carried out.”²⁹ As a result, confidence in the courts and legal system may increase.³⁰ However, just because the public holds a right to receive public information does not mean there is a constitutional right for this information to be *televised*.³¹ Thus, states and state judges vary in their allowance of cameras in the courtroom,³² especially in weighing the need for media coverage against protections guaranteed under the Sixth Amendment of the U.S. Constitution.

b. Fairness is Grounded in The Sixth & Fourteenth Amendments

Alongside generally protecting peoples’ freedom of expression, the U.S. remains a strong advocate for protecting an individual’s civil liberties, no matter the status of the individual. In other words,

²⁵ *Id.* at 564 (emphasis added).

²⁶ David L. Hudson Jr., *Right to Receive Information and Ideas*, FIRST AMEND. ENCYCLOPEDIA, <https://mtsu.edu/first-amendment/article/1549/right-to-receive-information-and-ideas> (last visited Oct. 26, 2022).

²⁷ Strickland, *supra* note 11.

²⁸ *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 790 (2011) (citing *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952)).

²⁹ Strickland, *supra* note 11.

³⁰ *See id.*

³¹ Jake Rossen, *Why Are Cameras Allowed in Some Courtrooms and Not Others?*, MENTAL FLOSS (May 3, 2022) <https://www.mentalfloss.com/posts/why-some-courtrooms-allow-cameras> (emphasis added).

³² *Id.*

ratifying the Bill of Rights in 1791³³ guaranteed that an individual does not lose all fundamental rights because a state accuses him of a crime.³⁴ Specifically, the Sixth Amendment states:

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 where the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.³⁵

In essence, this amendment allows a defendant to participate in fair, unprejudiced judicial proceedings. In conjunction with balancing media involvement in trials, this protection continues to come up repeatedly.³⁶ For instance, the Court ruled on the first landmark case addressing prejudices of camera coverage in *Estes v. Texas*.³⁷ In this case, *Estes* appealed his judgment on the basis that he was denied due process under the Fourteenth Amendment “by excessive televising and broadcasting of his trial.”³⁸ The Fourteenth Amendment of the U.S. Constitution, ratified in 1868,³⁹ states, “nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.”⁴⁰ Thus, in *Estes*, the Court focused on the right of fairness that due process requires.⁴¹ In other words, “[e]very procedure [including televising and broadcasting] which would offer a possible temptation to the average man to forget the burden of proof required to convict a defendant, or which might lead him to not hold the balance nice, clear[,] and true . . . denies the [defendant] due process of law.”⁴² The

³³ *Bill of Rights (1791)*, NAT’L ARCHIVES, <https://www.archives.gov/milestone-documents/bill-of-rights> (last visited Oct. 26, 2022).

³⁴ See U.S. CONST. amend. VI.

³⁵ *Id.*

³⁶ Strickland, *supra* note 11.

³⁷ See *Estes v. Texas*, 381 U.S. 532 (1965).

³⁸ *Id.*

³⁹ U.S. CONST. amend. XIV.

⁴⁰ *Id.*

⁴¹ *Estes*, 381 U.S. at 543.

⁴² *Id.*

Court then reversed Estes's conviction on the basis Estes was "denied due process of law by the circus atmosphere at the trial."⁴³ Furthermore, though the Court emphasized the remaining right to freedom of the press, it described potential limitations on media and the public's access to this information when reporting begins to create injustice for the parties involved.⁴⁴

Shortly following *Estes*, the Court heard the case of *Sheppard v. Maxwell*, which involved a second-degree murder conviction of Sheppard after a jury decided he murdered his wife.⁴⁵ Similar to *Estes*, the Court analyzed the influence of publicity and media allowed in the courtroom and its potential effects on the jury.⁴⁶ Again, the Court emphasized that "due process requires that the accused receive a trial by an impartial jury free from outside influences."⁴⁷ Furthermore, as communications and forms of media evolve, a court retains a duty to protect the jury, and thus parties to the suit, from undue influence.⁴⁸ *Sheppard* also speaks on the likelihood of prejudice resulting from "news prior to trial" and the remedies a tribunal must take to combat bias, such as a change of venue.⁴⁹ After the Court granted Sheppard's writ of habeas corpus, the new jury in Sheppard's retrial acquitted him, showing that a limitation of reporters may indeed change the impact of a trial.⁵⁰

However, in 1981, the Court clarified that states retain the right to allow cameras in the courtroom regardless of its previous holdings.⁵¹ In other words, the U.S. Constitution does not completely bar the media from the courtroom; parties must still show that camera presence caused them prejudice.⁵² Risk of bias will always be present; thus, the Court held that "the appropriate safeguard against such prejudice is the defendant's right to demonstrate that the media's coverage of his case, be it printed or broadcast, compromised the ability of the particular jury that heard the case to adjudicate fairly."⁵³ In

⁴³ *Estes v. Texas*, 381 U.S. 532 (1965).

⁴⁴ *Id.* at 542.

⁴⁵ *Sheppard v. Maxwell*, 384 U.S. 333, 335 (1966).

⁴⁶ *Id.*

⁴⁷ *Id.* at 362.

⁴⁸ *Id.*

⁴⁹ *Id.* at 363.

⁵⁰ Martin Gruberg, *Sheppard v. Maxwell* (1966), FIRST AMEND. ENCYCLOPEDIA, <https://www.mtsu.edu/first-amendment/article/334/sheppard-v-maxwell> (last visited Nov. 16, 2022).

⁵¹ *Chandler v. Fla.*, 449 U.S. 560 (1981).

⁵² *Id.* at 573.

⁵³ *Id.* at 575.

essence, this case opened the door for different state tribunals to allow different levels of media streaming in the courtroom, depending on whether and at what point a court feels a defendant may be prejudiced because of the media's presence.

Ultimately, at this time, “[a]ll 50 state supreme courts in the United States allow video cameras under certain conditions.”⁵⁴ However, not all of these conditions are the same or are perceived in the same manner, and inconsistencies remain concerning how states treat media coverage and its role in prejudicing parties.⁵⁵ Additionally, while most federal courts do not allow cameras, a trend is forming wherein “a few federal courts and district courts do allow video recordings of their proceedings.”⁵⁶ Furthermore, alongside courts, Congress continues to address the issue of media coverage by introducing proposals that potentially expand media presence in the courtroom.⁵⁷ All in all, while inconsistencies remain across state levels, and changes may be approaching at the federal level, the laws used by those across the pond display a more restrictive yet consistent media monitoring method in the courtroom.

c. Monitoring Substantial Prejudice: A Stricter Approach Demonstrated by the U.K.

While the U.S.'s approach is more permissive, the U.K.'s law sets forth a more restrictive approach regarding how much media coverage is allowed in judicial proceedings. For example, the U.K. set forth limitations on media coverage roughly a century ago, dating back to 1925.⁵⁸ Specifically, in 1925, Parliament enacted the Criminal Justice Act.⁵⁹ While Parliament overturned some of this Act, Section 41,

⁵⁴ CONG. RSCH. SERV., VIDEO BROADCASTING FROM THE FEDERAL COURTS: ISSUES FOR CONGRESS (2019), <https://sgp.fas.org/crs/misc/R44514.pdf>.

⁵⁵ Specifically, Part III of this note will address this subject further.

⁵⁶ CONG. RSCH. SERV., *supra* note 54, at 1; *see also* Administrative Off. U.S. Courts, *Cameras in Court*, U.S. COURTS, <https://www.uscourts.gov/about-federal-courts/judicial-administration/cameras-courts> (last visited Nov. 16, 2022) (“The Ninth Circuit Judicial Council, in cooperation with the Judicial Conference, has authorized the three districts in the Ninth Circuit (District Court for the Northern District of California, the District Court of Guam, and the District Court for the Western District of Washington)” to permit cameras in their courtrooms).

⁵⁷ *Id.*; *see also* Sunshine in the Courtroom Act of 2021, S. 818, 117th Cong. (2021-2022).

⁵⁸ Criminal Justice Act § 41 (1925).

⁵⁹ *Id.*

governing the prohibition of photographs in court, remains mostly intact.⁶⁰ This Section states that “[n]o person shall take or attempt to take any photograph . . . of any person, being a judge . . . juror or a witness in or a party to any proceeding before the court, whether civil or criminal; or publish any photograph, portrait or sketch taken.”⁶¹

Furthermore, Parliament ruled even further on media coverage when it enacted the Contempt of Court Act of 1981, which further governs how the media may report on trials and the consequences that may result.⁶² Section 1 of the Act states, “it is a contempt to publish any matter which creates a substantial risk of serious prejudice or impediment to the court of justice in legal proceedings, irrespective of the intention behind the publication.”⁶³ Additionally, Section 4 gives the court power to control the timing of publications; in other words, if the court determines that publishing material immediately will result in substantial risk, serious prejudice, or impediment to justice, then the court may order postponement of publication.⁶⁴ However, the strict liability rule created by the Contempt of Court Act of 1981 is not without exceptions. For example, an exception is allowed for a “fair and accurate report of legal proceedings held in public, published contemporaneously and in good faith.”⁶⁵

Alongside the Contempt of Court Act of 1981, the U.K. holds laws in place that are specific to the reporting of pre-trial hearings.⁶⁶ Specifically, the Criminal Procedure and Investigations Act prohibits written reports about pre-trial hearings.⁶⁷ Similar to restrictions placed by the Contempt of Court Act, the sitting judge can overturn this prohibition “if it is the interests of justice to do so.”⁶⁸ In sum, the reasoning behind this law is to minimize the risk of potential jurors becoming biased or prejudiced before trial. Affecting potential jurors is the most significant risk of allowing media coverage, whether through

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Contempt of Court, Reporting Restrictions and Restrictions on Public Access to Hearings*, CPS (Sept. 9, 2022), <https://www.cps.gov.uk/legal-guidance/contempt-court-reporting-restrictions-and-restrictions-public-access-hearings#:~:text=Section%201%20of%20the%20Contempt,the%20intention%20behind%20the%20publication.>

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Contempt of Court Act § 4(1) (1981).

⁶⁶ Criminal Procedure and Investigations Act § 41 (1996).

⁶⁷ *Id.*

⁶⁸ Chikamoto, *supra* note 16.

print or online publication services. Thus, the U.K. public often remains unaware that pretrial hearings or motions are taking place.⁶⁹ As such, convincing a U.K. judge that pretrial hearings should be reported seems like a tall order, especially because potential jurors may watch or read a publication covering a topic that influences a juror's mindset, yet it may never be addressed at trial.

The U.K., while mostly retaining these restrictive laws, recently showed that sometimes the need for media coverage does exist. For example, since its inception in 2010, the Supreme Court in London allowed cameras, "and in 2013, the Court of Appeal followed."⁷⁰ Additionally, while technically part of the U.K., Scotland continues to have "its own legal system" and technically allows filming in criminal courts; however, this is not often applied, and courts rarely broadcast these cases.⁷¹ Furthermore, as of July 2022, the U.K. passed a law allowing cameras to be present for sentencing in criminal trials.⁷² While many may wonder why it's taken so long for cameras to be allowed in this type of setting, advocates for limited media coverage have voiced concern for "cameras . . . turning cases into the sort of media circus seen around high-profile U.S. trials such as . . . OJ Simpson or, albeit a civil case, . . . Johnny Depp v. Amber Heard."⁷³ However, this first viewing by the U.K.'s public of the sentencing of Ben Oliver by Judge Sarah Munro QC demonstrated the benefits of the public's ability to observe judicial proceedings when done in a more controlled manner.⁷⁴ The cameras focused solely on Judge Munro, not the defendant, and displayed how judges make their decisions.⁷⁵ The broadcast lacked emotional and entertaining factors often seen in U.S. trials and instead helped the public better understand the legal process, showing "how judges balance aggravating and mitigating factors and are bound by sentencing guidelines."⁷⁶

⁶⁹ *Id.*

⁷⁰ Dominic Casciani, *TV Cameras to Film in Criminal Courts for First Time in Major Law Change*, BBC NEWS (July 27, 2022), <https://www.bbc.com/news/uk-62323453>.

⁷¹ *Id.*

⁷² *Id.*

⁷³ Haroon Siddique, *Solemn Sentencing is No Circus as Cameras Enter English Courts*, GUARDIAN (July 28, 2022, 2:05 PM), <https://www.theguardian.com/law/2022/jul/28/solemn-sentencing-is-no-circus-as-cameras-enter-english-courts>.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

The U.K. approach demonstrates excluding all cameras is neither realistic nor fair to society.⁷⁷ However, it exemplifies the possibility of evolving with technology and the public's interest in judicial proceedings and balancing that with mitigating substantial risk, bias, and unwanted prejudice. Furthermore, the freedom of the press of U.K. citizens continues to exist while subject to conditions and restrictions,⁷⁸ which shows the possibility of doing the same in the U.S. However, finding this balance in the U.S. presents a more difficult barrier because state approaches remain inconsistent.

III. DIFFERING U.S. STATE APPROACHES TO COURTROOM MEDIA INVOLVEMENT

Many U.S. state laws regarding media in the courtroom look similar on paper. However, where things tend to differ is in applying these laws and interpreting fairness and impartiality regarding parties to lawsuits. Most media involvement in trials covers high-profile cases, whether because of the crime or the parties involved. Thus, state application becomes crucial in these scenarios because the public finds itself sometimes consumed and enamored, unable to look away from the television. This section attempts to showcase U.S. states that participated, or are still participating, in high-profile cases that allowed and received excessive media coverage, some of which also received attention in the U.K.

A. CALIFORNIA: THE BIRTHPLACE OF COURTROOM TV

As mentioned in Part II, the Supreme Court held in 1981 that states may allow cameras in their courtrooms because the U.S. Constitution does not completely bar media involvement.⁷⁹ However, in its holding, the Court detailed that camera involvement may violate due process if it unfairly prejudices the parties.⁸⁰ Today, California Rules of Court Rule 1.150 define California's law on broadcasting in court.⁸¹ It states:

- (a) The judiciary is responsible for ensuring the fair and equal administration of justice. [It] adjudicates controversies, both civil and criminal . . .

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Chandler v. Fla.*, 449 U.S. 560 (1981).

⁸⁰ *Id.*

⁸¹ CA. R. CT. 1.150.

photographing, recording, and broadcasting of courtroom proceedings may be permitted as circumscribed in this rule if executed in a manner that ensures that the *fairness* and *dignity* of the proceedings are *not adversely affected*.

...

- (e) ... The judge in his or her discretion may permit, refuse, limit, or terminate media coverage.⁸²

While California's law textually seems to protect against unfair prejudice in the courtroom, it received much criticism during the O.J. Simpson trial of June 1994 for the amount of media involvement allowed.⁸³ During this trial, which took place in Los Angeles County Superior Court, America participated in a new and exciting form of entertainment: courtroom TV. A once-expected two-week-long trial turned into an eight-month-long, dragged-out movie.⁸⁴ This type of media broadcast, the live-streaming coverage of a criminal trial, showed how much influence media holds in its ability to create narratives.⁸⁵ Not only did the judge lose control of his courtroom, but even the sequestered jury lacked impartiality, taking only two hours to reach a decision after the trial lasted almost a whole year.⁸⁶ The media demonstrated its ability to spin a tale as the case began as one "of the celebrated athlete, the Shakespearean idea of a great man thrown to the floor, bloodies. Then it became a story about spousal abuse and then race."⁸⁷

Accordingly, just because the court sequestered the jury does not mean it and the judicial process were not adversely affected.⁸⁸ It was no secret to the jury the amount of attention this trial received, nor was it a secret the racial division it created. And while racial

⁸² CA. R. CT. 1.150(a), (e) (emphasis added).

⁸³ Lilah Raptopoulos, *The OJ Simpson Case 20 Years Later: Making 'Trials into Television'*, GUARDIAN (June 17, 2014, 11:57 AM), <https://www.theguardian.com/world/2014/jun/17/oj-simpson-trial-cameras-court-justice-culture>.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

identity may very well have been part of the defense's strategy,⁸⁹ it resulted in jury members feeling the pressure of their decision, not because a man allegedly committed murder, but because any "incorrect" verdict would be broadcasted directly back to their communities.⁹⁰ As a result, "[i]ronically, a technology we incorporated into the courtroom to show us how justice works ultimately divided America."⁹¹

In 2021, almost thirty years later, taking a separate viewpoint from that shown in *Simpson*, the United States Northern District Court of California restricted live televising of the Elizabeth Holmes case.⁹² In this case, Holmes faced "12 counts of wire fraud and conspiracy to commit fraud," which resulted from how she ran her biotech company and how she and her partner, Ramesh "Sunny" Balwani, deceived her investors.⁹³ This type of high-profile case presents a different kind of conflict wherein news media outlets covered the case extensively, including details about Holmes, descriptions of her testimony, accounts of the case, and Balwani.⁹⁴ Additionally, while the court restricted live televising, "reporters on the scene live-tweeted highlights," keeping the public informed on all the details.⁹⁵ In this scenario, the issue presented is that Holmes's partner, Balwani, faced the same charges in the *same court* two months after the court convicted Holmes of four counts related to those listed above, and news outlets and social media made the details of the Holmes case available to

⁸⁹ Ronald Brownstein, *Simpson Defense's Focus on Racial Identity Further Divides a Nation*, L.A. TIMES (Oct. 9, 1995, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1995-10-09-mn-55038-story.html>.

⁹⁰ Raptopoulos, *supra* note 83; Thomas R. Romano, *Modern Media & its Effect on High-Profile Cases*, 32 SYRACUSE SCI. & TECH. L. REP. 136, 150 (2016) ("This caused many people to believe that if O.J. Simpson were found guilty, a race riot would occur."); Arthur Gross-Schaefer, et al., *Are Media Interference & Technical Complexities Crippling the Ability of Juries to Deliver Fair Verdicts?*, 20 J. L. BUS. & ETHICS 1, 11 (2014).

⁹¹ Raptopoulos, *supra* note 83.

⁹² Rachel Kraus, *Cosplayers and Courtroom Drama: The Elizabeth Holmes Theranos Trial is Underway*, MASHABLE (Sept. 8, 2021), <https://mashable.com/article/elizabeth-holmes-theranos-trial-begins>.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

millions around the world.⁹⁶ Thus, how does a court handle this type of scenario when information regarding a trial has been made available to potential jurors that may or may not create prejudice towards the defendant before these jurors ever step into the courtroom? While present any time co-defendants' trials are severed, critics still raised concerns that allowing these circumstances enable the prosecution to have a second go at conviction, using takeaways from the Holmes trial, including the jury's reactions and perceptions of the evidence.⁹⁷

Additionally, in her trial, "Holmes gave emotional testimony, accusing . . . Balwani of physical and psychological abuse," and reporters also shared this information with the public before Balwani's trial took place, which potentially influenced juror bias as well.⁹⁸ Ultimately, the jury found Balwani guilty on all 12 counts, eight more than Holmes.⁹⁹ While it's hard to know if such media exposure influenced Balwani's conviction, it's also hard to argue that the media's involvement in Holmes's case didn't influence impartiality towards Balwani before his trial began.

While the *Simpson*, *Holmes*, and *Balwani* cases all involved criminal trials, the presence of influential media took its strongest hold in a recent issue involving civil charges, first heard in the U.K. and later in the U.S.,¹⁰⁰ both of which presented different results.¹⁰¹

B. VIRGINIA: SOCIAL MEDIA'S TAKE OVER

The recent and highly publicized *Depp v. Heard* civil trial took place in Virginia; the law governing media's presence in Virginia's

⁹⁶ Kari Paul, *Former Theranos Exec Sunny Balwani Convicted of 12 Counts of Fraud*, GUARDIAN (July 7, 2022, 3:10 PM), <https://www.theguardian.com/technology/2022/jul/07/theranos-sunny-balwani-convicted-fraud-elizabeth-holmes>.

⁹⁷ Kari Paul, *Sunny Balwani Trial Starts Two Months After Elizabeth Holmes's Guilty Verdict*, GUARDIAN (Mar. 9, 2022, 6:58 PM), <https://www.theguardian.com/technology/2022/mar/09/theranos-sunny-balwani-trial-begins-elizabeth-holmes>.

⁹⁸ Yasmin Khorram, *Elizabeth Holmes Details Abusive Relationship with Theranos Ex-President Balwani Ahead of Cross-Examination*, CNBC (Nov. 29, 2021, 7:30 PM), <https://www.cnbc.com/2021/11/29/elizabeth-holmes-details-abusive-relationship-with-sunny-balwani.html>.

⁹⁹ Paul, *supra* note 96.

¹⁰⁰ Robin Levinson-King, *Depp-Heard Trial: Why Johnny Depp Lost in the UK but Won in the U.S.*, BBC NEWS (June 2, 2022), <https://www.bbc.com/news/world-us-canada-61673676>.

¹⁰¹ *Id.*

courtrooms looks similar to those in California. For instance, Virginia Code § 19.2-266 states:

A court may solely in its discretion permit the taking of photographs in the courtroom during the . . . broadcasting of judicial proceedings by radio or television and the use of electronic or photographic means . . . in criminal and civil cases, but only in accordance with the rules set forth hereunder.

. . .

The presiding judge shall at all times have authority to prohibit, interrupt, or terminate electronic media and still photography coverage of public judicial proceedings . . . for good cause, the presiding judge may prohibit coverage in any case and may restrict coverage *as he deems appropriate to meet the ends of justice*.¹⁰² The story of Johnny Depp and Amber Heard's relationship often graced the pages of tabloids and popular magazines; however, the view of their relationship changed after Heard made statements in an article published by Washington Post in 2018.¹⁰³ While Heard did not explicitly name Depp in the article, many took this to refer to Depp because he and Heard recently divorced.¹⁰⁴ Heard also questioned potential threats to her acting career

¹⁰² V.A. Code § 19.2-266 (emphasis added).

¹⁰³ Amber Heard, *Opinion | Amber Heard: I Spoke Up Against Sexual Violence*, WASH. POST (Dec. 18, 2018, 5:58 PM), https://www.washingtonpost.com/opinions/ive-seen-how-institutions-protect-men-accused-of-abuse-heres-what-we-can-do/2018/12/18/71fd876a-02ed-11e9-b5df-5d3874f1ac36_story.html. The following statements are those made by Heard in this article that the U.S. jury found Heard liable for defamation: (1) "I spoke up against sexual violence – and faced our culture's wrath. That has to change." (2) "Then two years ago, I became a public figure representing domestic abuse, and I felt the full force of our culture's wrath for women who speak out." (3) "I had the rare vantage point of seeing, in real time, how institutions protect men accused of abuse."

¹⁰⁴ Leonie Cooper, *What Did Amber Heard's Washington Post Op-ed Actually Say?*, YAHOO!SPORTS (June 1, 2022), https://sports.yahoo.com/did-amber-heard-washington-post-061332398.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xILmNvbS8&guce_referrer_sig=AQAAAFXq3nG2tUChfmbg04ZcZd0A8Qvutxyt8A6kXGviHA5vIXR_qK4zcO6zhbJgaOoZeylxTvjdy8luPnMwvpOpjnSeeREC-MXW9qHzajW5XfCfDwwBCRPLu5VI3HppECTOUphmI7BD20LBeWJ_G20

emotionally, judges view evidence rationally and are less likely to fall for a tactic such as this.¹¹⁴

Second, televising the trial considerably influenced the differing outcomes between the U.S. and U.K. trials.¹¹⁵ In today's world, individuals, including reporters, share news and other information through social media. During the Depp-Heard U.S. trial, society saw this forum explode and showed just how easily social media can create narratives.¹¹⁶ Through this newfound narrative, and "[d]espite Depp basically being declared a court-vetted wife-beater in another trial in England, [the U.S.] trial triggered public *celebration* of Johnny Depp" because people's opinions through social media and TikTok posts declared it so.¹¹⁷ For example, users receiving incredibly high view counts on TikTok found themselves camping outside the courthouse because their videos "may reach many times more readers than the newspaper staffer dutifully covering the trial."¹¹⁸ This type of communication poses the most concern towards juries, especially those that courts do not sequester and are always allowed to retain their cellphones, which were the circumstances found in the Depp-Heard U.S. trial, even though the jury was asked not to read about the case online.¹¹⁹ Again, under these circumstances, especially considering the holding found by Justice Nicol in the U.K.,¹²⁰ it's hard to believe that jurors remained unbiased and all parties were treated fairly under the eyes of the law when public opinion cast a wide net in favor of Depp, discrediting Heard's testimony and making fun of her reactions to events over and over again in 60-second videos available to be viewed by any jury member. Even though the court asked the jury not to read about the case online, how is this ensured when the average person spends two hours and 27 minutes on social media daily?¹²¹

¹¹⁴ *See id.*

¹¹⁵ *Id.*

¹¹⁶ Chaire Sicha, *The Mainstream Media Lost the Depp-Heard Trial and the Lifestyle Influencers Turned Correspondents Won*, INTELLIGENCER (June 3, 2022), <https://nymag.com/intelligencer/article/johnny-depp-amber-heard-trial-influencers.html>.

¹¹⁷ *Id.* (emphasis added).

¹¹⁸ *Id.*

¹¹⁹ Levinson-King, *supra* note 100.

¹²⁰ Sillito, *supra* note 106.

¹²¹ *How Much Time Does the Average Person Spend on Social Media? (2012-2022)*, OBERLO, <https://www.oberlo.com/statistics/how-much-time-does-the-average-person-spend-on-social-media#:~:text=your%20free%20trial-,Average%20time%20spent%20on%20social%20media,also%20the%20highest%20ever%20recorded> (last visited Nov. 16, 2022).

C. SOUTH CAROLINA: MEDIA & MURDAUGH'S

Like California and Virginia's laws, South Carolina allows media coverage in court proceedings but allows the presiding judge to limit the media under certain situations. For example, Rule 605(f) of South Carolina Judicial Branch states:

- (i) Subject to the requirements of this rule, representative of the media may use video, still camera or recorders to cover proceedings in the courts of this State.
- (ii) Media representative must give reasonable notice to the presiding judge of a request to cover a proceeding.
- (iii) The presiding judge may refuse, limit, or terminate media coverage . . . as may be required in the interest of justice.¹²²

The story of the Murdaughs and the small town of Hampton, South Carolina, already displays cinematic qualities. The Murdaugh family ran the "legal world in this corner of the state, by running the prosecutor's office and a large civil law firm"¹²³ and were rumored to be behind many Hampton scandals.¹²⁴ Having felt the Murdaugh's influence, "[m]ost of Hampton's 2,600 residents know Alex Murdaugh."¹²⁵ However, the town felt a massive shift when police found Paul and Maggie Murdaugh murdered, and the State accused Alex Murdaugh, husband and father of the victims, of the crime.¹²⁶

¹²² S.C. JUD. BRANCH 605(f).

¹²³ Associated Press, *In Murdaugh Family Scandal, Tiny South Carolina Town Shaken*, LIVE 5 WCSC (Sept. 28, 2021, 5:04 AM), <https://www.live5news.com/2021/09/28/murdaugh-family-scandal-tiny-south-carolina-town-shaken/>.

¹²⁴ Jeffrey Collins, *Missing Law Firm Money is 5th Investigation into Murdaughs*, AP NEWS (Sept. 13, 2021), <https://apnews.com/article/business-south-carolina-650585b8a6bb5291a11b7575fe3d5833>. Investigations against the Murdaughs include (i) the murders of Alex Murdaugh's wife and son, (ii) missing money from a law firm, (iii) Alex Murdaugh's report that someone tried to shoot him on the highway, (iv) obstruction of an investigation into a 2019 boating accident that involved Paul Murdaugh and resulted in a death, and (v) the death of a 19-year-old man from July 2015.

¹²⁵ Associated Press, *supra* note 123.

¹²⁶ *Id.*

While the murders occurred in June, Alex Murdaugh's trial will occur in January 2023 in South Carolina's Colleton County Courthouse.¹²⁷ Even though the trial has yet to begin, media coverage continues to flood the local community and country with information regarding the murders, pre-trial hearing details, and videos capturing Murdaugh in the courtroom.¹²⁸ Additionally, not only has the media swarmed the details of the case, exposing information to the public and potential jurors, but this was also done after both sides in the Murdaugh case "requested a gag order to keep motions that might include evidence sealed for the case[,] citing the media attention."¹²⁹ Judge Newman ultimately denied the gag order requests, which would have resulted in case details not being shared with the public if granted, supporting his decision by stating he "typically disfavors" these types of orders.¹³⁰ While it may be no surprise that Judge Newman saw no point in completely barring media coverage, it does pose questions regarding constitutional implications as pre-trial hearings are streamed and posted online for all viewers.¹³¹ For example, what happens if a potential juror sees something in a pre-trial hearing later ruled as prejudicial and kept out of trial? Under these circumstances, questions regarding a defendant's right to an impartial jury and due process begin to surface.

While the process of voir dire and change of venue is meant to protect prejudices such as these,¹³² these tools alone do not weed out all potentially partial jurors, especially those that grew up in a town controlled by the Murdaugh family and find themselves enamored by the details of the trial. Additionally, with technology's omniscient-like presence, I fear courts will potentially find themselves in a sticky situation where voir dire and venue changes no longer protect prejudices as the media stretches beyond physical boundaries.

¹²⁷ Dylan Leatherwood, *Murdaugh Murder Trial Set for January 2023*, LIVE 5 WCSC (Oct. 13, 2022, 7:14 PM), <https://www.live5news.com/2022/10/13/murdaugh-murder-trial-set-january-2023/>.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ See Julia Varnier, *Pre-Trial Hearing Takes Place as Murdaugh Defense Team Attacks State's Case*, WPDE (Oct. 20, 2022), <https://wpde.com/news/local/alex-murdaugh-murder-charge-evidence-former-attorney-paul-maggie-murdaugh-moselle-property-prominent-south-carolina-family-court-hearing-florence>.

¹³² Steven Senne, *Pretrial Publicity's Limited Effect on the Right to a Fair Trial*, REP. COMM.FREEDOM PRESS (last visited Nov. 9, 2022).

Ultimately, as the Murdaugh trial approaches in the new year, the voir dire process will prove ever-crucial in weeding out impartial jurors as the court system attempts to hold up fundamental rights protected by the U.S. Constitution.

IV. FINDING A BALANCE BETWEEN MEDIA COVERAGE AND JUROR IMPARTIALITY IN HIGH-PROFILE CASES

Today's world, and its technology, is one that no one, not even the law, could have anticipated. Technology makes the world smaller than we ever knew possible; it easily connects people thousands of miles apart. However, it threatens foundational rights grounded in the U.S. legal system. The previous overviews of *Simpson*, *Holmes*, *Depp v. Heard*, and *Murdaugh* exemplify different challenges that court systems and lawmakers face when a high-profile case exists. A case turns high-profile either because of the notoriety of the parties involved or the gravity of the alleged crime(s).¹³³

Furthermore, it is already well-known that once a case is known to be high-profile, it "attracts enough media or public attention that the court must or should make significant alterations to ordinary court procedures to manage it."¹³⁴ However, after analyzing these different scenarios, states have failed to make appropriate alterations to ensure jurors remain free from outside influence. While it is difficult to eliminate technology's influence, it is possible to limit it. On the one hand, that's not to say that media should not be present in a courtroom; the public retains the right to freedom of the press and the right to receive information. For example, knowing what charges an accused receives, how judicial proceedings take place, and how the judge decides are crucial in keeping the public informed. On the other hand, however, states can take steps to balance necessary media coverage and juror impartiality better. As a result, U.S. states should (i) pass a law regarding necessary venue changes or lapses in time when pre-trial publicity is too prejudicial, (ii) pass a law that eliminates streaming and broadcasting of pre-trial hearings, and (iii) insist courts weigh certain factors before allowing live-televising of high-profile cases to ensure U.S. judicial proceedings consistently maintain justice.

¹³³ GREG HURLEY, MANAGING HIGH-PROFILE CASES, NAT'L CTR. STATE CTS. 1 (2007), <https://nacmnet.org/wp-content/uploads/Managing-High-Profile-Cases.pdf>.

¹³⁴ *Id.*

A. NECESSARY VENUE CHANGES OR LAPSES IN TIME

A change of venue, gag order, and/or jury sequestration have often been the answer to mitigating any pre-existing court or juror prejudice. Specifically, gag orders are used “to control publicity and protect the right to a fair trial by prohibiting parties or their lawyers from speaking publicly about the case.”¹³⁵ While gag orders provide some protection, they sometimes raise free speech concerns; plus, the media retains the right to continue to capture videos and pictures of the trial. Thus, these orders do not do much to limit prejudices demonstrated in the Holmes/Balwani scenario. Additionally, jury sequestration, defined as “keeping all members of the jury away from the public and press,” is extremely rare.¹³⁶ Therefore, a change of venue or lapse in time between trials is most likely the most efficient way to mitigate the media’s prejudicial effects.

In a criminal trial, as defined by the Judicial Counsel of California, if “a change of venue is permitted . . . the court believes the defendant cannot receive a fair trial in a given county.”¹³⁷ As mentioned above, the necessary change of venue became most evident in the Balwani case, as he was prosecuted in the same court only two months after the court rendered the Holmes decision. Under these circumstances, i.e., when two high-profile defendants of different suits involve an overwhelming number of similar facts, the second trial should not be heard by the same court only two months later. Even without the first case being live-televised, this scenario poses prejudice because it introduces potential jurors from the same jury pool to information regarding the second defendant. For example, whether true or not, the media covered Holmes’s testimony about Balwani’s abuse and created a narrative about his character that jurors often find influential. As a result, his case was likely heard by an impartial jury, thus violating his constitutional rights to an impartial jury and equal protection under the law.

This type of prejudice is not combatted by limiting media coverage because, under these circumstances, the Holmes trial did not

¹³⁵ E.A. Gjelten, *Gag Orders: Balancing Free Speech and Fair Trials*, LAWYERS.COM (Jan. 19, 2021), <https://www.lawyers.com/legal-info/criminal/criminal-law-basics/criminal-trials-gag-orders-control-publicity.html>.

¹³⁶ Benson Varghese, *Jury Sequestration: What is it and What’s the Purpose?* [2023], VARGHESE & SUMMERSETT, <https://versustexas.com/jury-sequestration/> (last visited Jan. 23, 2023).

¹³⁷ JUD. COUNS. OF CAL., FACT SHEET: CHANGE OF VENUE IN CALIFORNIA 1 (2021), <https://www.courts.ca.gov/documents/chgofven.pdf>.

receive live-televising. However, this example shows that even without live-televising, media coverage of a high-profile case may lead a juror not to adjudicate fairly because they cannot distinguish between information learned before the second trial and evidence heard during the second trial. Of course, a necessary change of venue can't solve all these potential problems because, as previously stated, technology and trial reporting transcend boundaries; however, it is a good place to start.

On the other hand, if a court determines a change of venue is inappropriate, a lapse of time between the first and second trial allows for the media attention to "die down." In essence, less immediate media attention allows potential jurors to forget information they've previously read or heard from the media. For example, consider the DeLorean case from 1983; John DeLorean was charged with "conspiring to sell and distribute \$60 million of cocaine," and he chose Howard Weitzman to represent him.¹³⁸ During the time leading up to the trial, DeLorean and his case received extreme publicity because he was an international figure.¹³⁹ Specifically, a 60-minute episode containing highly prejudicial information regarding some facts of the case was set to air before the trial began.¹⁴⁰ In his efforts to defend his client, Weitzman requested a temporary restraining order on the 60-minute episode, which the court ultimately granted; however, CBS immediately protested it based upon First Amendment rights, appealed the order to the Ninth Circuit, and Weitzman attempted to combat the First Amendment rights with DeLorean's guaranteed right to a fair trial under the Sixth Amendment.¹⁴¹ Regardless of Weitzman's efforts, the Ninth Circuit allowed CBS to air the episode, which featured "DeLorean toasting the future over cocaine claiming 'it's better than gold!'"¹⁴² However, the presiding judge over the case, Judge Takasugi, disagreed with the Ninth Circuit's holding and found the airing of the 60-minute extremely prejudicial.¹⁴³ As a result, "in an attempt to lessen the negative impact on potential jurors, [he] postponed the trial until March the following year."¹⁴⁴ Following these events, between October and March, Weitzman worked tirelessly to weed out potential jurors that were heavily affected by watching the

¹³⁸ Greg Gorman, *Howard L. Weitzman in LADIES AND GENTLEMEN OF THE JURY: GREATEST CLOSING ARGUMENTS IN MODERN LAW* 79 (2000).

¹³⁹ *Id.* at 88.

¹⁴⁰ *Id.* at 96.

¹⁴¹ *Id.* at 94-95.

¹⁴² *Id.* at 96.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

60-minute episode; for example, he issued 42-question questionnaires and asked hypotheticals during the voir dire process that questioned what viewers saw in the 60-minute episode.¹⁴⁵ Ultimately, because of Weitzman's efforts to persuade jury members to have an open mind, the jury acquitted DeLorean.¹⁴⁶ Immediately after the airing of the 60-minute episode, 92% of potential jurors thought DeLorean was guilty, and more than 50% were "excused because they conceded they could not overcome their anti-DeLorean bias."¹⁴⁷ Thus, one may conclude that creating more distance between the episode air date and the actual trial assisted Weitzman in his persuasion that DeLorean was innocent. DeLorean demonstrates that one tactic that helps combat the prejudicial media effect is a lapse of time between the trial and the high volume of media attention a defendant receives. In other words, a lapse of time theoretically decreases the prejudicial effects that the media may have on potential jurors.

Thus, to mitigate potential juror bias based on extensive pre-trial media coverage, courts should consider changes to the venue and/or a lapse in time, specifically when considering high-profile cases. For example, states should pass a law that first defines what qualifies as a high-profile case, knowing the media reaches a level of influence in cases such as these, and restrict courts from too quickly hearing a defendant's trial that involves an overabundance of overlapping facts that would potentially lead to prejudice. Under these circumstances, the court is presented with two options: (i) wait to hear the case until an amount of time passes where media influence subsides or (ii) change the venue in the hope that a different county will have less coverage and thus less potential bias. The Balwani case demonstrates that two months is not enough time between the first and second suits to limit impartiality. However, there is no other measurement to define how much time is not enough or too much. Therefore, states must decide which timeline works best for limiting prejudice, at least starting at a bottom line of three months, considering the timeline in Balwani presents too short of time.

B. PROHIBITING BROADCASTS & STREAMING OF PRE-TRIAL HEARINGS

Currently, states do not differentiate between how courts should analyze pre-trial hearing media coverage and media coverage

¹⁴⁵ *Id.* at 97, 99.

¹⁴⁶ *Id.* at 81.

¹⁴⁷ *Id.* at 98.

during the actual trial. For example, as mentioned earlier, South Carolina's law governing media involvement is broad and only mentions "court proceedings" rather than implementing different standards regarding pre-trial hearing broadcasts and coverage during the trial.¹⁴⁸ On the other hand, the U.K., through its Criminal Procedure and Investigations Act, is specific to pre-trial hearings and completely prohibits any written reports about pre-trial hearings.¹⁴⁹ While a judge can overturn this restrictive law if he or she deems it necessary to promote justice, this U.K. law is presumably prohibitive because it's extremely important for potential jurors not to see information about a trial before actual trial involvement. In other words, restricting pre-trial hearing media coverage limits a potential juror's preconceived bias of the defendant or evidence that may be introduced at trial.

These concerns and risks are just as present, if not more so, in the U.S. Allowing a live-streamed broadcast of pre-trial hearings that are made available online potentially results in extremely prejudicial effects. In essence, allowing videos and recordings of pre-trial court proceedings can lead to a defendant not having a fair trial by an impartial jury, especially in the criminal context. The following dangers likely exist when pre-trial hearings are recorded by the media and posted online for potential jurors to view: (i) viewers may hear excluded evidence (e.g., a confession) that is never presented at trial, (ii) viewers may prejudge the case based upon what they watch or see, thus tainting the jury pool, and (iii) defense witnesses may be deterred from coming forward. The Murdaugh case is a real-life example of how these dangers are present today in judicial proceedings in U.S. court systems. Most of Murdaugh's pre-trial hearings were live-streamed or videoed and made available for the public to view on websites. As stated previously, this type of media coverage heightens the potential prejudicial effects, especially in high-profile cases, and even more so under the circumstances like Alex Murdaugh, wherein a community is enamored with the Murdaugh family and the information related to the trial. As technology continues to evolve and high-profile trials continue to exist, these potential dangers will continue to grow.

As a result, U.S. states should enact a law specific to pre-trial publicity similar to the U.K.'s existing law, the Criminal Procedure and Investigations Act, that limits media coverage. However, instead of the law prohibiting written reports and publications like the U.K., it should instead prohibit live-streaming and video broadcasts of pre-trial hearings. Video media has the largest potential for prejudice because

¹⁴⁸ S.C. JUD. BRANCH 605(f).

¹⁴⁹ Criminal Procedure and Investigations Act § 41 (1996).

potential jurors can view the court proceedings themselves. Additionally, limiting the law to the prohibition of live-streaming and video broadcasts ensures that First Amendment protections remain intact since the media is not completely barred from reporting and informing the public on information related to court proceedings. States should model a law focusing on pre-trial hearing publicity after the following language:

Restrictions on Pre-Trial Hearings

- (1) Except as otherwise provided by this section –
 - a. No pre-trial hearing shall be live-streamed and published by any media outlet.
 - b. No pre-trial hearing shall be video-recorded and broadcasted by any media outlet.
- (2) The judge dealing with a matter falling within subsection (1) may order that subsection (1) not apply if it is the representations of the accused that it is in the interests of justice to do so.¹⁵⁰

Adopting and enacting a law such as this allows for the protection of the First, Sixth, and Fourteenth Amendments. In sum, it provides for the freedom of the press, the right to receive information, a fair trial, an impartial jury, and the right to receive equal fairness and equal treatment to co-exist. Thereby, it further promotes justice and integrity within judicial proceedings without violating any constitutional rights.

C. LIMITING LIVE-TELEVISED TRIAL COVERAGE

Concerns about protecting First Amendment rights are raised when proposals about limiting live-televised trial coverage arise. Specifically, not only does the media serve as the ultimate conduit between the public and knowledge surrounding the news and global events, but it is also an essential function of involving the public in judicial proceedings. One of the media's main functions within this context is keeping the community involved and all viewers informed on judicial practices. As stated previously in *Stanley*, the public has a right to receive information, and the press retains the right to publicize

¹⁵⁰ This proposal of law is modeled after the U.K. law, Criminal Procedure and Investigations Act § 41 (1996).

it.¹⁵¹ Additionally, by reporting on judicial proceedings, the media holds courts accountable by publicizing their decisions and actions. Lastly, by including the public, the media coverage may aid in finding additional evidence through witness testimony of someone that watches the coverage and decides to come forward. In sum, media involvement in judicial proceedings is necessary; there is no doubt about that. However, the media's ability to report and the public's right to receive information must be balanced with the defendant's right to a fair trial and to be treated equally under the law. In other words, the media's involvement must be within reason. The Sixth and Fourteenth Amendments clearly emphasize the importance of equal treatment and fairness through judicial proceedings, and while courts should allow the reporting and media coverage of all public trials and public information, there is no constitutional footing always to allow live-televising of high-profile cases when it presents challenges for jurors to adjudicate fairly.

In today's technology-driven world, many argue social media is the problem that facilitates opinions that wrongfully taint the jury; however, social media does not do this alone. Specifically, the U.S. *Depp v. Heard* trial demonstrated that the social media posts that caused the most potential bias and influence were from *live* clips of the trial. For example, when Heard blew her nose during the trial, social media captured this and subsequently created a story that she snorted cocaine during the trial.¹⁵² However, news outlets did not report this or publish this; instead, TikTok served as the source of this false narrative, and users captured the video by directly live-streaming the trial at home.¹⁵³

Furthermore, live-streaming the trial gave way to the different results between the U.K. and U.S. trials involving Depp's defamation claims, especially since the U.S. trial involved a jury. The U.K. judge did not have to confront the media circus that erupted in the U.S.

¹⁵¹ See *Stanley v. Georgia*, 394 U.S. 557 (1969).

¹⁵² Amanda Hess, *TikTok's Amber Heard Hate Machine*, NY TIMES (June 1, 2022), <https://www.nytimes.com/2022/05/26/arts/amber-heard-tiktok-johnny-depp.html>.

¹⁵³ *Amber Heard Snorting on Stand*, TIKTOK, <https://www.tiktok.com/discover/amber-Heard-snorting-on-stand?lang=en> (last visited Nov. 21, 2022). The search results for "amber heard snorting on stand" produced videos that in total received 30.4 million views; Melody (@melodyboswell), TIKTOK (May 6, 2022), https://www.tiktok.com/@melodyboswell/video/7094591211062807814?is_from_webapp=v1&item_id=7094591211062807814&lang=en. This video alone received 267,600 views, and the user posed a question in the video, "wonder if the jury noticed her snorting."

because, as previously mentioned, stricter laws govern the U.K. press: The Criminal Justice Act § 41 and The Contempt of Court Act of 1981. For example, in the U.K. case, the law prohibited the press from capturing pictures of the parties or the judge in the courtroom, a live-streaming of the trial, and news outlets from publishing articles or photos, which create a substantial risk of serious prejudice or impediment to the court of justice in legal proceedings.¹⁵⁴ Thus, the U.K. laws in place presumptively limit the media's involvement, regardless of whether a jury is involved or not. Therefore, when examining the media's involvement in U.S. high-profile trials, even more caution should be exercised when a jury is entailed.

The ability for the public to view every inch of the U.S. trial through a live stream provided individuals the platform to post their interpretations of events, including perspectives and alternatives of the truth, which led to more "likes" and higher view counts. Thus, the live-streaming of the trial instigates overreaching social media involvement in high-profile cases. For instance, Depp's heart-throb status grew exponentially with fans viewing the trial on the screen.¹⁵⁵ Instead of the live-streamed event splitting up the public between Depp and Heard, it became apparent quickly that the public and a vast majority of social media supported Depp and sought to smear Heard.¹⁵⁶ As a result, viewers turned the trial into their own personal movie and chose Johnny Depp as their leading actor. This would not have been as dramatized or as all-consuming to the public or social media without viewers holding the ability to watch a live-streaming of the trial.

How can this type of live coverage, where hundreds of thousands of viewers discredit and attack each move or comment the defendant makes, promote unsullied justice or protect her right to equal treatment under the law? Although the court requested that the jury not look at media surrounding the case, how can the court strongly assert that no member of the jury saw any prejudicial social media post or became affected by the media circus when even members of the public contended that they "did not follow the defamation trial

¹⁵⁴ Criminal Justice Act § 41; Contempt of Court Act § 4(1) (1981).

¹⁵⁵ Hess, *supra* note 152; *see also* Katie (@deppheart), TIKTOK (Apr. 23, 2022), https://www.tiktok.com/@deppheart/video/7089871550270229766?is_from_webapp=v1&item_id=7089871550270229766. This video received 24 million views. Comments on the video include: "I would die for this man"; "She looks so guilty and she knows that he deserves so much better"; "Poor him if he doesn't get justice, it'd be an insolence"; "I literally want to give him a hug, I will admit he raised me through his movies, and to see him be treated like this by her is heartbreaking."

¹⁵⁶ Hess, *supra* note 152.

between Johnny Depp and Amber Heard – *it followed [them].*¹⁵⁷ In other words, there was no escaping the media’s presence during the U.S. Depp-Heard trial; social media users took to Facebook, Instagram, Snap Chat, and TikTok to post pictures/videos they took as they watched the trial.

Additionally, there are advanced algorithms designed to feed social media users videos similar in topic to the videos the user previously viewed.¹⁵⁸ For example, if someone views a social media post mocking Heard, the algorithms will then supply him or her with similarly biased posts regarding Heard. As a result, the court was erroneous in live-streaming this trial throughout its entirety. Even if the court allowed live-streaming coverage in the beginning, it made a mockery of the judicial process by allowing live-streaming to continue as social media continued to ridicule, sexualize, and discredit all involved parties in some way, specifically defendant Heard. It neither promoted justice nor allowed the jury to fairly adjudicate the trial. Rather, by live-streaming the trial, the court encouraged turning its courtroom into an entertainment circus.

Ultimately, it’s not appropriate to ask U.S. lawmakers to pass laws that greatly restrict the press and media involvement in trials because the media serves an essential function in providing the public with information. The U.K.’s Criminal Justice Act and Contempt of Court Act are too presumptively prohibitive for fundamental rights guaranteed by the U.S. Constitution. However, the analysis for allowing the live-streaming of high-profile trials should be determined on a case-by-case basis. Specifically, courts should use a greater amount of caution and hesitate to allow high-profile cases to be live-streamed. Accordingly, courts should consider the following factors before allowing the live-televising of a high-profile trial:

- (a) The “Star Power” of Involved Parties
 - a. This involves considering the celebrity status of the parties involved and/or the extent of the notoriety of the parties based on alleged crimes.
- (b) Nature of the Proceeding
- (c) Likelihood of Prejudice
 - a. A case may become more prejudicial as it goes on. During all stages of the trial, a court may decide that

¹⁵⁷ *Id.* (emphasis added).

¹⁵⁸ Filipino Menczer, *Here’s Exactly How Social Media Algorithms Can Manipulate You*, BIG THINK (Oct. 7, 2021), <https://bigthink.com/the-present/social-media-algorithms-manipulate-you/>.

prejudice becomes too great and discontinue live-streaming.

(d) Maintenance of Orderly Proceedings and Judicial Proceeding Integrity

After reviewing these factors, the court should analyze them like a balancing test. First, however, the court should consider that the greater the star power of the parties, the more likely the trial should not be live-streamed. This is because the extent of a party's celebrity status will likely affect all other factors. For example, because he is categorized as an A-list celebrity, Depp's fanbase already consisted of hundreds of thousands of people. These fans created narratives that cast him as the hero and Heard as the villain. This influence became extremely damaging to Heard's credibility and, if viewed by jurors, prejudicial to the outcome of the case. Furthermore, the amount of media attention the trial gained turned the courtroom into an entertainment circus, one that ultimately questioned the integrity of judicial proceedings, especially because legal experts were so stunned at the outcome of the case.¹⁵⁹ Lastly, while the nature of the proceeding involved defamation, it also involved domestic abuse allegations. As a result, since the U.S. trial, many advocates for addressing domestic violence continue to express concerns that victims won't feel comfortable coming forward after watching how the media picked Heard apart. Thus, like a domino effect, Depp's "star power" ultimately affected all other factors.

In sum, courts should use the abovementioned factors when determining whether live-streaming a high-profile trial promotes justice and equal treatment. While eliminating live-streaming of high-profile cases would quickly mitigate its prejudicial effects, we must also consider the importance of the freedom of the press, the right to receive information, and the freedom of speech. Therefore, encouraging courts to weigh these factors and the ultimate decision more intentionally will allow for appropriate limitations on a case-by-case basis in high-profile trials.

¹⁵⁹ Jenyne Donaldson, *Johnny Depp's Defamation Verdict Stuns Legal Experts: 'Complete and Total Vindication'*, WRAP (June 1, 2022, 6:53 PM), <https://www.thewrap.com/johnny-depp-amber-heard-verdict-analysis/>.

V. CONCLUSION

In conclusion, U.S. states should (i) pass a law regarding necessary venue changes or lapses in time when pre-trial publicity is too prejudicial, (ii) pass a law that eliminates streaming and broadcasting of pre-trial hearings, and (iii) insist courts weigh certain factors before allowing live-televising of high-profile cases. By enacting laws such as these, states will create more consistent expectations concerning the media's presence within state courtrooms. While the media's presence is necessary in judicial proceedings to inform the public and encourage the freedom of the press, states must make small yet significant changes to their laws that support juror impartiality in today's technology-consumed world, especially within high-profile cases. These changes would ensure that rights guaranteed by the First, Sixth, and Fourteenth Amendments successfully co-exist.