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RECONSIDERING PRETRIAL MEDIA PUBLICITY: RACIALIZED CRIME NEWS, GRAND JURIES AND TAMIR RICE

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I. INTRODUCTION

It would be an understatement to describe former Cuyahoga County (Ohio) Chief Prosecutor Timothy McGinty's conduct toward the grand jury proceedings he initiated against Cleveland Police Officers Timothy Loehmann and Frank Garmback in the Tamir Rice killing as "unusual."¹ Rice was killed by Loehmann after he and Garmback responded to a dispatch saying that a man in a nearby park had a gun.² The "man" turned out to be a 12-year-old boy.³ The gun was fake.⁴

During the course of the grand jury inquiry, at a press conference, McGinty publicly questioned the motives of Tamir's mother Samaria Rice in her pursuit of pursuing civil rights charges against the Cleveland Police Department.⁵ McGinty also said the reason he saw no need to put certain information before the grand jury was because they could read about it in the newspaper.⁶ McGinty's comment was highly curious, if not unethical.⁷ First, what was clear was that Judge Adrine's Order was probative, and McGinty should not rely upon grand jurors to affirmatively seek out probative evidence in the media.⁸ Second, by assuming grand jurors would read media publicity about its investigation, he also directed that they *should*.⁹ His directive is the subject of this Article.

From the day of Rice's death to McGinty's announcement to accept the recommendations of the grand jury, 5,912 media items and broadcast reports

1. See Sean Flynn, *The Tamir Rice Story: How to Make a Police Shooting Disappear*, GENTLEMEN'S Q., (July 14, 2016), <http://www.gq.com/story/tamir-rice-story>.

2. The Reid Report, *Cleveland Police Release 911 Call and Video of Tamir Rice Shooting*, MSNBC (Nov. 26, 2014), <http://www.msnbc.com/the-reid-report/watch/police-release-video-of-tamir-rice-shooting-364068419777>; see also Los Angeles Times Staff, *Hear the 911 Call about Tamir Rice: Gun is 'Probably Fake,' Caller Says*, LA TIMES (Nov. 26, 2014), <http://www.latimes.com/nation/nationnow/la-na-nn-tamir-rice-911-call-20141126-htmstory.html>.

3. The Reid Report, *supra* note 2.

4. *Id.*

5. Hilary Golston, *McGinty Questions Rice Family Motives*, POUGHKEEPSIE JOURNAL, (Nov. 20, 2015), <http://www.poughkeepsiejournal.com/story/news/2015/11/07/exclusive--mcginty-questions-rice-family-motives/75319646/>.

6. Tom Meyer & Phil Trexler, *Affidavit: McGinty Angered over Rice Questions*, WKYC (Nov. 20, 2015), <http://www.wkyc.com/news/local/cleveland/investigator-affidavit-mcginty-angered-over-rice-questions/11858048>.

7. *Id.*

8. *Id.*

9. *Id.*

were published on the racially-charged killing.¹⁰ In addition, social media newsfeeds made these stories readily accessible through media sites or filtered and spun by news aggregators and friends within our social media networks.¹¹ The Loehmann- Garmback grand jury remained un-sequestered through the entire course of the 2-month inquest.¹² Indeed, they were not even grand jurors when Rice's killing and the subsequent protests took place. As a result, they were free to utilize information gained through their media sources to shape (or reinforce) their impressions, regardless of the information's probative value.¹³

10. Based upon Westlaw News Search of "Tamir Rice" and (date) 11-20-2014 - 12-30-2015 (search last conducted Dec. 12, 2016).

11. Jeffrey Gottfried & Elisa Shearer, *News Use Across Social Media Platforms 2016*, PEW RESEARCH CTR. (May 26, 2016), <http://www.journalism.org/2016/05/26/news-use-across-social-media-platforms-2016/>.

12. Matthew Green, *What's A Grand Jury And How Does It Work?*, KQED:THE LOWDOWN, (Dec.28, 2015), <http://ww2.kqed.org/lowdown/2014/12/10/everything-you-wanted-to-know-about-a-grand-jury-but-were-afraid-to-ask/>.

13. The grand jury transcript has not been released. Although the Cleveland Chapters of the NAACP requested as much, McGinty refused to release the grand jury transcript, citing Ohio law as controlling. See Jane Morice, *Response From Prosecutor McGinty To The [sic] Michael Nelson's Letter*, CLEVELAND.COM (Jan. 7, 2016), http://www.cleveland.com/court-justice/index.ssf/2016/01/prosecutor_mcginty_refuses_cle.html#incart_2box_news. Thus it cannot be known whether the presiding judge, McGinty, or his associates gave cautionary instruction to the grand jurors regarding the risks of reliance upon publicity. See *id.* Given McGinty's comments, it is likely that it never occurred. See *id.*

This Article examines pre-trial publicity or, more accurately, grand jury subject-matter relevant media publicity.¹⁴ It examines the Rice shooting and Loehmann-Garmback grand jury process to determine, from a legal and policy perspective, what should be done to safeguard the integrity of the grand jury process in which police officers are investigatory targets for alleged use of lethal force, when the controversy is racially-charged, and where the media demonstrates pro-law enforcement and anti-minority bias.

There are legitimate reasons to be concerned about the unmanaged access to news media on the part of grand juries—especially in racially-charged police lethal use of force cases such as the Rice tragedy. Time and time again, the media’s treatment of minorities in general, and African-Americans in particular, in crime news narratives has been shown to be racially biased.¹⁵ More than any other race, Blacks are more likely to be shown handcuffed, on “perp walks,” or have prejudicial information published about them.¹⁶ Concurrently, crime news media narratives show a demonstrative solicitude towards prosecutors and law enforcement officers. Whites are predominately portrayed as law enforcement members, or presented in more positive or benign roles (e.g., first responders, bystanders, or news readers).¹⁷

The media’s daily reliance upon law enforcement and courts systems in construction of crime news results in an inherent pro-law enforcement bias.¹⁸ Through police reports, rap sheets, arrest photographs, criminal and court records, and even press conferences, criminal and law enforcement

14. I chose this term because a grand jury inquiry is not a trial, and because publicity occurring in advance of and during proceedings can become salient, publicity in this context is best described as “grand jury-relevant” media publicity. Grand jury-relevant media publicity is that information conveyed through mass media. By referring only to mass media information, I intend to include information delivered through traditional print media, and electronic communication (broadcast, print, cablecast, internet) exclude face-to-face, interpersonally exchanged information, or information obtained by a grand juror’s own investigation. In advance of or during grand jury proceedings about alleged or actual crimes, suspects, victims objects, documents or other persons or matters related to issues or persons part of the grand jury inquiry. Cf. Michael Boicourt, *Pre-Trial Publicity*, 34 AM.U.L. REV. 538, 548 (1969); Robert Hardaway & Douglas B. Tumminello, *Pretrial Publicity in Criminal Cases of National Notoriety: Constructing a Remedy for the Remediless Wrong*, 46 AM. U. L. REV. 39 (1996).

15. See discussion *infra* at IVB.

16. See discussion *infra* at IVB.

17. See discussion *infra* at IVB.

18. See John Stoerh, *The Media Bias No One Talks About*, HUFFINGTON POST (Nov. 22, 2011), http://www.huffingtonpost.com/john-stoehr/media-bias-occupy-wall-street_b_1107959.html.

institutions “are the principal suppliers of these stories.”¹⁹ Overall, the inherent text and subtext of crime news perpetuates skepticism towards Black narratives and legitimacy toward majoritarian, law enforcement orthodoxies.²⁰ Those racialized narratives have been shown to have adverse impacts upon jurors and defendants.²¹ Without admonitions or limiting instructions, grand jurors in the Loehmann-Garmback proceedings were able to use media reports in any way they chose.

In Ohio, there is no requirement that such admonition or instruction be given.²² But regardless of the structure and nature of grand juries, such instruction should have been imperative in light of the racially charged nature of the inquiry’s subject matter and the fact that police officers were the target. Given that viewpoints about crime, race, and racial issues can be linked to the ability of news media to prime its viewers,²³ failure to manage its access by and influence upon grand jurors could result in faulty or questionable outcomes. The outcome here—in which Loehmann and Garmback were not charged—raised troubling questions about the grand jury process and access to media publicity.

To be sure, there is much about the Rice tragedy to be considered. This article does not, for example, address the tragic consequences of the 911 dispatcher not telling police officers that the gun was “probably fake.”²⁴ This article will not address the “adultifying” descriptors ascribed to Rice (he was a “guy” not a “kid,” according to the 911 caller) used to justify and even excuse the officers’ culpability, as McGinty did in his press conference,²⁵ and as has been the case for so many other Black men who were victims of

19. Vincent F. Sacco, *Media Construction of Crime*, 539 ANNALS 142, 144 (1995).

20. See Robert M. Entman & Kimberly A. Gross, *Race to Judgment: Stereotyping Media and Criminal Defendants*, 71 L. & CONTEMP. PROBS. 93 (2008).

21. *Id.* at 125.

22. *Cf.* Instructions to Grand Jury, 2 OJI-CR 301.07; Oath of Grand Jury, 2 OJI-CR 301.03.

23. David Domke, *Racial Cues and Political Ideology*, COMM’N RES. 772, 777 (2001).

24. See Brooke Baldwin, *Transcript of Tamir Rice Case Goes Before Grand Jury*, CABLE NEWS NETWORK (Dec. 28, 2015, 2:00 PM), <http://www.cnn.com/TRANSCRIPTS/1512/28/cnr.05.html>.

25. *Id.*

excessive force by law enforcement.²⁶ And while it is critical to explore the racially biased trend of engaging grand jury processes to effectively exonerate law enforcement officers under investigation, this article does not interrogate the possible motives behind McGinty's unique treatment of grand juries as, charitably, quasi-adjudicators in the wake of 20 use-of-deadly force cases in 3 years.²⁷

Part I sets forth the details of the day Rice was shot, the subsequent investigations, and the Loehmann-Garmback grand jury process. Part II describes grand jury structures and how those structures might warrant treatment of subject matter-relevant media publicity in ways different from petit juries. Part III describes the literature and conclusions on pre-trial publicity impacts on jurors before examining racial biases in media narratives on news about crime. After Part IV's discussion on those biases, the article concludes at Part V with recommendations on possible areas of future research and ways to improve the integrity of the grand jury process.

26. See, e.g., Gregory S. Parks & Danielle C. Heard, "Assassinate the Nigger Ape[]": Obama, Implicit Imagery, and the Dire Consequences of Racist Jokes, 11 RUTGERS RACE & L. REV. 259, 278 (2010) ("During the trial of the officers accused of beating Rodney King in 1992, these discourses helped to frame King as a big, black, brute who victimized the white police officers, despite the video evidence of the four officers beating King with clubs."); Sam Levine, *Peter King Says Eric Garner Would Not Have Died From Chokehold Were He Not Obese*, HUFFINGTON POST (Dec. 3, 2014), http://www.huffingtonpost.com/2014/12/03/peter-king-eric-garner_n_6265748.html (discussing the death of Eric Garner, who strangled to death in July 2014 in a police officer's chokehold).

27. Baldwin, *supra*, note 24.

II. TAMIR RICE'S DEATH

A. Cudell Center, November 22, 2014

Of the many police lethal use of force killings that have occupied the national attention in recent years,²⁸ few were more tragic and disturbing than the one which occurred in Cleveland, Ohio on November 22, 2014. On that Saturday, Rice and his 14-year-old sister were at the Cudell Recreation Center near their home on Cleveland's West Side.²⁹ At about 3:30 p.m. that afternoon, with a dusting of snow on the ground, Rice was in an outdoor space adjacent to the Center, playing with an airsoft toy gun that shoots non-lethal plastic pellets.³⁰ Someone saw him with the gun, which he had borrowed from a friend earlier that day, and called 911.³¹ The caller reported that there was an individual, "probably a juvenile," who had a gun that was probably a "fake."³²

28. See, e.g., Charles M. Blow, *The Shooting of Samuel DuBose*, N.Y. TIMES (Jul. 29, 2015), <http://www.nytimes.com/2015/07/30/opinion/charles-blow-the-shooting-of-samuel-dubose.html>; J. David Goodman & Al Baker, *Wave of Protests After Grand Jury Doesn't Indict Officer in Eric Garner Chokehold Case*, N.Y. TIMES (Dec. 3, 2014), http://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-staten-island-chokehold-death-of-eric-garner.html?_r=0; Michael S. Schmidt & Matt Apuzzo, *South Carolina Officer Is Charged With Murder of Walter Scott*, NEW YORK TIMES (Apr. 7, 2015), <http://www.nytimes.com/2015/04/08/us/south-carolina-officer-is-charged-with-murder-in-black-mans-death.html>; Lilly Workneh & Kate Abbey-Lambertz, *These Black Women Died in Police Encounters, and May Never Get Justice*, HUFFINGTON POST (Dec. 23, 2015), http://www.huffingtonpost.com/entry/these-black-women-died-in-police-encounters-and-they-may-never-get-justice_us_567971c4e4b014efe0d6ca0f.

29. Brandon Blackwell, *Tamir Rice, 12-Year-Old Boy Shot Dead by Cleveland Police Officer, Had No Juvenile Court Record*, CLEVELAND.COM (Nov. 24, 2014), http://www.cleveland.com/metro/index.ssf/2014/11/tamir_rice_12-year-old_boy_sho.html; *12-year-old Tamir Rice-Police were Responding to Reports of a Male with a Gun Outside Cudell Recreation Center*, THE CONSERVATIVE CHRONICLES 24/7 (Feb. 17, 2015), <http://theconservativethinkers.blogspot.com/2016/02/12-year-old-tamir-rice-police-were.html>.

30. Blackwell, *supra* note 29.

31. *Id.*

32. The Reid Report, *supra* note 2.

Critically, those two phrases were not communicated to the officers dispatched to the scene.³³ Garmback, with his then-rookie partner Officer Loehmann, sped their patrol car into the park toward a gazebo. It was all captured on videotape.³⁴ The only person anywhere nearby, in fact, was sitting at a concrete picnic table under the gazebo.³⁵ It was Rice. He was not fiddling with a gun. He was not doing anything at all.³⁶ The squad car slid on the wet grass. When it was even with Rice, before it had stopped, Loehmann got out and fired, fatally shooting Rice in the abdomen.³⁷ The muzzle of his gun was less than seven feet away.³⁸ Rice collapsed.³⁹ The elapsed time between the patrol car stop and Loehmann's shot – 1.7 seconds.⁴⁰

Once again—and in the midst of arguably one of the most racially charged times in recent U.S. history—a Black person's death at the hands of

33. *Cuyahoga County Prosecutor Timothy McGinty's Comments on the Tamir Rice Police Shooting Case*, THE NEWS-HERALD (Dec. 29, 2015), [http://www.news-herald.com/article/HR/20151229/NEWS/151229645;12-year-old Tamir Rice-Police Were Responding to Reports of a Male with a Gun Outside Cudell Recreation Center](http://www.news-herald.com/article/HR/20151229/NEWS/151229645;12-year-old-Tamir-Rice-Police-Were-Responding-to-Reports-of-a-Male-with-a-Gun-Outside-Cudell-Recreation-Center), *supra* note 29.

34. *See* The Reid Report, *supra* note 2.

35. *Id.*

36. *Id.*

37. *Id.*

38. *What Experts Say About Four Key Moments in the Tamir Rice Shooting*, CLEVELAND.COM (Dec. 1, 2015), http://www.cleveland.com/metro/index.ssf/2015/12/what_experts_say_about_four_ke.html.

39. The Reid Report, *supra* note 2.

40. *Id.* At the time of their approach, the patrol-car windows were up such that it would have been impossible for the police to issue any audible commands to Tamir. Letter from Jonathan S. Adaby, *et al.*, counsel for Rice's estate, to Loretta Lynch, United States Attorney General 2 (December 14, 2015) (on file with author), *.See id.* While the purpose of this paper is not to re-adjudicate the circumstances surrounding Rice's death, a few additional facts are important to note. At the time of their approach, the patrol-car windows were up such that it would have been impossible for the police to issue any audible commands to Tamir. *Id.* Moreover, recently available expert and scientific analysis demonstrates that Loehmann's gun had to have been un-holstered with his hand on the trigger as he exited the vehicle. *What Experts Say About Four Key Moments in the Tamir Rice Shooting*, *supra* note 38. Approximately one minute after the fatal shots were fired, Tamir's sister, T.R., ran towards him crying and screaming "my baby brother, they killed my baby brother." The Reid Report, *supra* note 2. Officer Garmback tackled her to the ground. *Id.* When she tried to crawl away, Officer Loehmann dragged her back down. The officers then put T.R.—who they knew was a child and the sister of the boy they had just shot—in handcuffs in their police car, right next to where her brother lay injured and dying on the ground. *Id.* Loehmann and Garmback waited almost four minutes to offer first aid to Rice. *Id.*

law enforcement under questionable circumstances was front and center of public consciousness. There was an enraged national and international outcry.⁴¹ There were mass protests.⁴² National and international leaders called for thorough investigations.⁴³

The timing of Rice's death, in the larger context, was also salient. Less than two weeks later, on December 4, the Department of Justice found that Cleveland Police Department officers systematically engaged in "a significant amount of deadly and less lethal force" that was "excessive and constituted an ongoing risk to the public[.]"⁴⁴ Months later, the City and its Police Department acceded to a consent decree that engaged measures to address the "systemic deficiencies [that] contribute[d] to the pattern or practice of excessive force,"⁴⁵ unreasonable searches and seizures, and racially biased policing tactics.⁴⁶ That consent decree was the result of a lengthy federal investigation prompted by another incident in which a former Cleveland Police Officer Michael Brelo—at the conclusion of a 22 minute car chase with 13 of his colleagues—climbed onto the hood of the car and shot 15 additional rounds into the vehicle and the unarmed bodies of Timothy

41. See, e.g., Simon Carswe, 'Our Kids Are Pre-Judged, and It Shouldn't Be That Way' Major Protests Are Continuing in the US Over Police Killings of Unarmed Black Men, IRISH TIMES (Dec. 15, 2014); *Thousands March Against Deaths*, CHINA DAILY (Dec. 15, 2014); *25,000 March in US for Justice*, THE ADVOCATE, Dec. 15, 2014; *UN Rights Chief Concerned Over Disproportionate Killings of Blacks by US Police*, RTT NEWS (Nov. 26, 2014).

42. See, e.g., Janelle Bouie, *Shoot First*, THE TACOMA NEWS TRIBUNE (Dec. 5, 2014), <http://www.thenewstribune.com/opinion/article25901182.html>; Sadie Gurman, *Protests, Peaceful and Violent, Continue in Streets for a Second Day*, BOSTON GLOBE (Nov. 26, 2014), <https://www.bostonglobe.com/news/nation/2014/11/26/police-across-prepare-for-more-ferguson-rallies/5Wp93JS9jffNsW0Ge4KYPK/story.html>; Lora Moftah, *US Attorney General Eric Holder in Ohio Amid Tamir Rice Protests*, INT'L BUS. TIMES (Dec. 4, 2014), <http://www.ibtimes.com/cleveland-police-investigation-update-eric-holder-ohio-amid-tamir-rice-protests-1733987>; *Cleveland Crowd Protests Over Boy Shot By Police*, WKYT (Nov. 26, 2014), <http://www.wkyt.com/home/headlines/Cleveland-crowd-protests-over-boy-shot-by-police-283910641.html>.

43. See, e.g., Moftah, *supra* note 42; *UN Rights Chief Concerned Over Disproportionate Killings of Blacks by US Police*, *supra* note 41.

44. Settlement Agreement at 2, *United States v. City of Cleveland*, No. 15-1046 (N.D. Ohio May 26, 2015), available at https://www.justice.gov/sites/default/files/crt/legacy/2015/05/27/cleveland_agreement_5-26-15.pdf.

45. *Id.*

46. *Id.*

Russell and Malissa Williams, after his fellow police officers had already fired 137 rounds into it.⁴⁷ Mere days after Rice was killed, Robert McCulloch, the St. Louis Prosecutor who had convened a grand jury to investigate the circumstances surrounding Michael Brown's death, announced that "no bill" would be issued against Officer Darren Wilson.⁴⁸ On December 3, it was announced that a grand jury would not indict the white police officer who choked Eric Garner to death.⁴⁹ Thus, about the time Rice was killed, issues of race, racism, policing, and the justice system saturated the media.

A team of Cuyahoga County Sheriff's Department detectives, led by Chief Deputy Clifford Pinkney, took control of the investigation of Rice's death on January 2, 2015, after the City agreed to let an outside agency probe the shooting.⁵⁰ The Cuyahoga County Sheriff's Department began its investigation on February 13, after prosecutors removed legally protected statements Cleveland police officers made to internal investigators from the police department's file.⁵¹ On May 12, in a 211-page report, Pinkney announced that his Department would not recommend charges against

47. *Protests, Arrests After Cleveland Cop Acquitted in Deadly Shooting*, CBS NEWS (May 24, 2015), <http://www.cbsnews.com/news/cleveland-police-officer-michael-brelo-not-guilty-shooting-deaths-unarmed-people/> (discussing that in 2014, prosecutors obtained an indictment charging white Cleveland patrolman Michael Brelo with voluntary manslaughter for his role in the deaths of two unarmed black people killed in a 137-shot barrage of police gunfire after a lengthy, high-speed chase. Brelo was the only one of 13 officers who fired their weapons the night of Nov. 29, 2012, to be charged criminally. Prosecutors argued that the car's occupants, Timothy Russell and Malissa Williams, no longer posed a threat when Brelo fired the final 15 rounds. A judge acquitted Brelo at trial in May 2015.); *see also* Settlement Agreement, *supra* note 44, at 2 (prompting a U.S. Justice Department investigation that concluded Cleveland police too often use excessive force and violate people's civil rights. Cleveland and the Department of Justice reached an agreement in May 2015 on a police department reform plan.).

48. Monica Davey & Julie Bosman, *Protests Flare After Ferguson Police Officer Is Not Indicted*, N.Y. TIMES (Nov. 24, 2014), http://www.nytimes.com/2014/11/25/us/ferguson-darren-wilson-shooting-michael-brown-grand-jury.html?_r=0.

49. Adam Chandler, *Eric Garner and Michael Brown: Deaths Without Indictments*, THE ATLANTIC (Dec. 3, 2014), <http://www.theatlantic.com/national/archive/2014/12/eric-garner-grand-jury-no-indictment-nypd/383392/>.

50. Cory Shaffer, *Sheriff's Department Completes Tamir Rice Investigation*, CLEVELAND.COM (June 3, 2015), http://www.cleveland.com/metro/index.ssf/2015/06/sheriffs_department_completes.html.

51. *Id.*

Loehmann and Garmback, but that his Report would be submitted to McGinty to present to a grand jury—which had not yet convened.⁵²

B. Judge Adrine’s Advisory Opinion on the Existence of Probable Cause to Indict Loehmann and Garmback

Dissatisfied with the pace of McGinty’s investigation and absence of any criminal charges against the police officers, a group of local activists and community leaders took action under a rarely-used Ohio statute.⁵³ Under Ohio Code Section 2935.09, private citizens who have “knowledge of the facts” may bring forward accusations to facilitate the arrest and prosecution of those who have allegedly violated the law.⁵⁴ Through a petition supported by affidavits, the group filed an action in the Cleveland Municipal Court, arguing that the statute allowed ordinary citizens to bypass the police and prosecutors, and compel arrests if they showed probable cause that a crime had been committed.⁵⁵ The group asserted that the videotape evinced probable cause that a crime had been committed.

After seeing the video, Judge Ronald B. Adrine wrote: “The video in question in this case is notorious and hard to watch. After viewing it several times, this court is still thunderstruck by how quickly this event turned deadly.”⁵⁶ Judge Adrine found probable cause for charges of murder, involuntary manslaughter, reckless homicide, negligent homicide, and dereliction of duty against Loehmann.⁵⁷ He also found probable cause for charges of negligent homicide and dereliction of duty

52. Press Release, Cuyahoga Cnty. Off. of the Prosecutor, Prosecutor Releases Sheriff’s Investigative Report on Death of Tamir Rice (June 13, 2015), *available at* <http://prosecutor.cuyahogacounty.us/en-us/Investigation-Into-Death-of-Tamir-Rice.aspx>.

53. Mark Gillispie, *Activists File Appeal to Get Cleveland Officers Arrested in Tamir Rice’s Shooting*, NEWS-HERALD (June 18, 2015), <http://www.news-herald.com/article/HR/20150618/NEWS/150619340>.

54. OHIO REV. CODE ANN. § 2935.09 (West 2006) (allowing a “private citizen having knowledge of the facts who seeks to cause an arrest or prosecution under this section may file a n affidavit charging the offense committed with a reviewing official for the purpose of review to determine if a complaint should be filed by the prosecuting attorney or attorney charged by law with the prosecution of offenses in the court or before the magistrate[.]”).

55. Gillispie, *supra* note 53.

56. *Id.* at 2.

57. *Id.* at 8-9.

against Garmback.⁵⁸ Because of a conflict between the law and the rules laid down by the Ohio Supreme Court, Judge Adrine did not feel he could legally issue arrest warrants without a prosecutor's complaint.⁵⁹ Judge Adrine forwarded his Order to McGinty.⁶⁰

C. *The Loehmann-Garmback Grand Jury*

Finally, on October 10, 2015, McGinty convened a 14-member grand jury. McGinty, per the prosecutors' office announced policy, committed to ensure that evidence would be gathered from any and all sources, "including defense attorneys and lawyers who may be representing the deceased's family in civil litigation against the city."⁶¹ McGinty described his intent to have "all evidence reviewed not just by the prosecutor or this office, but by the citizens of the Grand Jury sitting as an investigative panel."⁶² On December 28, 2015, McGinty announced at a press conference that he recommended that no charges be filed against Loehmann and Garmback, and

58. *Id.* at 9.

59. *Id.* at 7-8.

60. *Id.* at 9.

61. *Policy of The Cuyahoga County Prosecutor's Office Regarding Fatal Use of Deadly Force by Law Enforcement Officers*, CUYAHOGA CNTY. PROSECUTOR'S OFF. <http://prosecutor.cuyahogacounty.us/en-US/use-of-deadly-force-policy.aspx>. If at the conclusion of the grand jury presentation, the County Prosecutor's Office believes there is insufficient evidence to charge the officers with a crime or if it believes that use of deadly force was justifiable by law or necessary by duty, "the Grand Jury is informed that it has the final say." *Id.* If the Grand Jury disagrees, it can as for a "true bill- no bill opportunity or they can ask to hear additional witnesses and evidence." *Id.*

62. Statement from County Prosecutor Timothy McGinty on the Decision of the Grand Jury in the Tamir Rice Case (Dec. 28, 2015), available at <http://prosecutor.cuyahogacounty.us/en-US/SYN//68177/NewsDetailTemplate.aspx>.

the grand jury agreed.⁶³ At that press conference, McGinty asserted that the two officers were led to believe that they were entering an “active” shooter situation, and that surveillance video from another perspective “indisputably” showed Rice reaching to his waistband and pulling the gun out.⁶⁴ Rice’s death was caused by a “perfect storm of human error, mistakes and miscommunication by all involved that day,” but there was no evidence of criminal misconduct by police.⁶⁵ McGinty concluded that, “[w]e do not believe that any reasonable judge or jury would find criminal conduct[.]”⁶⁶

63. *Id.* McGinty’s assertion that he recommended and the grand jury agreed became a critical point of controversy. First, it appeared that the grand jury never voted on the question as to whether to indict, and McGinty’s statements infers as much. Experts agree that to not take a vote was highly unusual. When asked about a record of the vote, neither the Clerk’s Office, the prosecutor’s office, nor the presiding judge could produce such a record. It was only later ‘found,’ and filed after the inquiry. Eric Sandy & Vince Grzegorek, *The Grand Jury in the Tamir Rice Case Did Not Take a Vote on Charges* (Updated), CLEVELAND SCENE (Jan. 20, 2016), <http://www.clevescene.com/scene-and-heard/archives/2016/01/20/the-grand-jury-in-the-tamir-rice-case-did-not-take-a-vote-on-charges>; *but see*, Cory Shaffer, *Tamir Rice Grand Jury Did Vote Whether Shooting Was Justified*, CLEVELAND.COM (Jan. 20, 2016) http://www.cleveland.com/metro/index.ssf/2016/01/tamir_rice_grand_jury_did_vote.html.

64. McGinty’s report cites *Tennessee v. Garner*, 471 U.S. 1 (1985), and *Graham v. Connor*, 490 U.S. 386 (1989), two Fourth Amendment search and seizure cases that set the parameters for use of deadly force, and the use of a reasonableness standard in answering whether an officer was justified in his use of force. Cuyahoga Cnty. Prosecutor’s Report on the November 22, 2014 Shooting Death of Tamir Rice, at 35 (2015), <http://prosecutor.cuyahogacounty.us/en-us/Investigation-Into-Death-of-Tamir-Rice.aspx>. In its analysis, McGinty decided only to pay attention to the shooting to determine whether Loehmann should face a criminal charge for the shooting. *Id.* The Rice family disagreed with this position. Their contention was that the better case law on the reasonableness of the police officers’ behavior demanded examination of the “continuous flow” of actions that led up to the shooting. Letter from Jonathan S. Adaby et. al., to Prosecutor Timothy McGinty (Oct. 16, 2014) at 4, *available at* <http://www.chandralaw.com/Rice-Ltr-to-Prosecutor-McGinty-10-16-15-00229682x9CCC2.pdf> (citing *Kirby v. Duva*, 530 F.3d 475, 482 (6th Cir. 2008)). Rice’s attorneys contended that an officers’ actions leading up to a shooting — including any reckless conduct that put them in harm’s way — must be considered. *Id.*

65. Statement from County Prosecutor Timothy McGinty on the Decision of the Grand Jury in the Tamir Rice Case, *supra* note 61.

66. Cuyahoga Cnty. Prosecutor’s Report on the November 22, 2014 Shooting Death of Tamir Rice, *supra* note 65 at 70.

As the grand jury investigation continued, highly public and acrimonious conflicts between McGinty and his office, and representatives of Rice's mother and estate became the fodder of countless news reports.⁶⁷ Rice's family, and many others, felt that McGinty was abusing and manipulating the grand jury process to orchestrate a vote against indictment.⁶⁸ Critics saw McGinty's conduct as a ruse, the contortion of the grand jury proceedings from an *investigative* body into an *adjudicative* body, not one merely to decide upon the existence of probable cause.⁶⁹

Concerns of detractors were confirmed by a series of notable events. First, McGinty's office hired two experts who issued reports which concluded that the Rice shooting was justified. One of them, retired FBI Supervisory Special Agent Kimberly A. Crawford, concluded that, "Officer Loehmann's use of deadly force falls within the realm of reasonableness."⁷⁰ The other investigator, S. Lamar Sims—a prosecutor from Colorado—described Loehmann's shooting of Rice as "objectively reasonable."⁷¹

67. Richard A. Oppel Jr. & Mitch Smith, *Tamir Rice's Family Clashes With Prosecutor Over Police Killing*, N.Y. TIMES, Dec. 23, 2015, at A1; Joy-Ann Reid, *Lawyer for Tamir Rice's Mother Blasts Prosecutor's Remarks*, MSNBC (Nov. 7, 2015), <http://www.msnbc.com/msnbc/lawyer-tamir-rices-mother-blats-prosecutors-remarks>; Lauren C. Williams, *Prosecutor Smears Grieving Mother Whose 12-Year-Old Was Gunned Down By Police*, THINK PROGRESS (Nov. 7, 2015), <http://thinkprogress.org/justice/2015/11/07/3720278/mcginty-says-rice-family-has-economic-motives/>.

68. Erica Hellerstein, *Hundreds Demand Prosecutor in Tamir Rice Case Resign*, THINKPROGRESS (Jan. 2, 2016), <http://thinkprogress.org/justice/2016/01/02/3735532/tamir-rice-mcginty-protests/>; Kris Wernosky, *Cuyahoga County Prosecutor Responds To Criticism Over Reports Calling Tamir Rice shooting 'reasonable'*, CLEVELAND.COM (Oct. 12, 2015), http://www.cleveland.com/metro/index.ssf/2015/10/cuyahoga_county_prosecutor_res.html.

69. Letter from Jonathan S. Adaby, *et al.*, counsel for Rice's estate, to Loretta Lynch, United States Attorney General, *supra* note 40.

70. Crawford, *supra* note 61.

71. Memorandum from S. Lamar Sims, Esq., Investigation into the officer-involved shooting of Tamir Rice which occurred at Cudell Park, 1910 West Boulevard, Cleveland, Ohio, on Nov. 22, 2014 (OCT. 6, 2015).

On October 10, McGinty released reports of two outside investigators.⁷² Upon releasing the reports, McGinty said in a statement, “[w]e are not reaching any conclusions from these reports[.] We have invited attorneys for the Rice family to offer input and/or evidence[.]”⁷³ Many thought the solicitation of expert opinion was highly curious given that expert advice is hardly ever needed at the grand jury stage in which ‘only’ a finding of probable cause is necessary.⁷⁴ Moreover, news stories about the reports emerged on a Saturday October 10, 2015, at about the same time they were presented to the grand jury.⁷⁵

Secondly, the targets of the investigation, Loehmann and Garmback, were allowed to provide unsworn statements that they read to jurors.⁷⁶ They were not cross-examined, nor did their testimony waive their ability to invoke their Fifth Amendment right against self-incrimination.⁷⁷ Some felt that allowing Loehmann and Garmback to testify unmolested was additional indicia that McGinty had no intention of indicting them.⁷⁸

Finally, it was at a November 5, 2015 political forum that McGinty impugned Rice’s mother’s motives, and directed grand jurors to get evidence from the media.⁷⁹ At the forum, McGinty strongly implied that Rice’s mother was trying to make a buck off of her son’s death.⁸⁰ When he was asked about

72. See Kimberly A. Crawford, *Review of Deadly Force Incident: Tamir Rice*, at 7 (Oct. 10, 2015), available at <http://prosecutor.cuyahogacounty.us/en-us/Investigation-Into-Death-of-Tamir-Rice.aspx>; Lamar Sims, *Report on Use of Deadly Force* (Oct. 10, 2015), available at <http://prosecutor.cuyahogacounty.us/en-us/Investigation-Into-Death-of-Tamir-Rice.aspx>; Ken Katarsis, *Report and Opinions of W. Ken Katarsis Police Consultant and Trainer* (Nov. 12, 2015) available at <http://prosecutor.cuyahogacounty.us/en-us/Investigation-Into-Death-of-Tamir-Rice.aspx>.

73. Press Release, Cuyahoga Cnty. Off. Of the Prosecutor, Statement From Cuyahoga County Prosecutor Timothy J. McGinty on the Release of Three Additional Reports Regarding the Death of Tamir Rice (Oct. 10, 2015) (on file with author).

74. Eric Heisig, *Tamir Rice Family’s Expert Often Work for Plaintiffs in Civil Rights Lawsuits*, CLEVELAND.COM (Dec. 2, 2015), http://www.cleveland.com/court-justice/index.ssf/2015/12/tamir_rice_familys_experts_of.html.

75. Press Release, *supra* note 75.

76. Letter from Jonathan S. Adaby, et al., counsel for Rice’s estate, to Loretta Lynch, United States Attorney General, *supra* note 40.

77. *Id.*

78. *Id.*

79. Williams, *supra* note 67.

80. Flynn, *supra* note 1.

criticisms her attorneys and others had made of the Sims and Crawford reports, he answered, “[w]ell, isn’t that interesting. They waited until they didn’t like the reports they received. They’re very interesting people, let me just leave it at that. They have their own economic motives.”⁸¹ Later he said he did not mean to imply that Ms. Rice was a “gold digger,” but that her attorneys were.⁸² In any event, his subsequent statement was seen as equally offensive in that it implied Ms. Rice was too ignorant to realize that she was being manipulated by her attorneys.⁸³

Later during the same forum, local activist Rick Nagin asked McGinty whether he had presented Judge Adrine’s findings to the grand jury.⁸⁴ McGinty, inferring that Nagin was accusing him of withholding evidence, bristled.⁸⁵ In direct contradiction to reports and Judge Adrine’s assertion, McGinty said that “Judge Adrine has not presented me with anything[.]”⁸⁶ In any event, McGinty stated, if the grand jury wanted to know about the Judge’s findings, the grand jurors could “read the newspapers[.]”⁸⁷

D. Conclusion

The Loehmann-Garmback grand jury proceeding transcript has not been made public. Neither the presiding Judge Nancy McDonnell, McGinty nor his associates directly involved in the proceeding has said publicly that the grand jury was instructed on whether and how to treat media publicity related to matters that would arise in the proceedings.⁸⁸ What we do know is that McGinty at least, not only saw the grand jury’s use of media as a *fait accompli*, he did nothing to discourage it. The grand jury members could

81. *Id.*; Letter from Jonathan S. Adaby, et al., counsel for Rice’s estate, to Loretta Lynch, United States Attorney General, *supra* note 40; Reid, *supra* note 2.

82. Flynn, *supra* note 1.

83. *Id.*

84. Nagin Aff. ¶2, Nov. 10, 2016.

85. *Id.*

86. *Id.*

87. Tom Meyer & Phil Trexler, *Investigator Affidavit: McGinty Angered Over Rice Questions*, LANCASTER EAGLE-GAZETTE (Nov. 20, 2015), <http://www.lancastereaglegazette.com/story/news/local/cleveland/2015/11/11/investigator-affidavit-mcginty-angered-over-rice-questions/75576836/> (adding that McGinty did not present Professor Jonathan Witmer-Rich’s opinion to the grand jury regarding who is to decide the ultimate question).

88. *Id.*; Letter from Jonathan S. Adaby, et al., counsel for Rice’s estate, to Loretta Lynch, United States Attorney General, *supra* note 40.

watch or read about the countless news stories⁸⁹ that covered the demonstrations and public reactions to the Rice shooting. Grand jurors could see or read the news stories in which McGinty, Police Chief Calvin Williams, and other law enforcement officials discussed evidence supporting the police officers' conduct.⁹⁰ McGinty's statements, as well as news stories discussing evidence before the grand jury, pundit opinion-giving, and characterizations of Rice and his family members, the racism on display in the community could all be watched, read or discussed by grand jury members with impunity.⁹¹ Several incidents during grand jury deliberations raised important questions about the role of prosecutors in pre-indictment publicity and whether such publicity violates professional canons of conduct, and finally, whether pre-indictment publicity can or should be regulated.

III. GRAND JURIES AND MEDIA PUBLICITY

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."⁹² Explicitly incorporated into the Fifth Amendment, the grand jury system was one of several legal institutions adapted from England, where it was a fixture since the twelfth century.⁹³ In the States, however, the Framers endowed our grand jury systems with powers greater than investigation and reporting of

89. See, e.g., *Community Still Coping With Loss of 12-Year-Old Killed in Shooting*, CLEVELAND 19 NEWS (Nov. 24, 2014) <http://www.cleveland19.com/story/27472064/the-pulse-of-tamir-rices-neighborhood>; Ryllie Danylko, *Protests Break Out In Cleveland Over Tamir Rice Shooting, Ferguson Grand Jury Decision*, CLEVELAND.COM (Nov. 25, 2014) http://www.cleveland.com/metro/index.ssf/2014/11/protests_break_out_in_cleveland.html; *Video Shows Police Shooting 12-Year-Old*, N.Y. TIMES (Nov. 27, 2014), <http://www.nytimes.com/video/us/10000003258087/video-shows-police-shooting-12-year-old-.html>.

90. Timothy Williams & Mitch Smith, *Cleveland Officer Will Not Face Charges in Tamir Rice Shooting Death*, N.Y. TIMES (Dec. 28, 2015), http://www.nytimes.com/2015/12/29/us/tamir-rice-police-shooting-cleveland.html?_r=0; Press Release, Cuyahoga Cnty., Prosecutor Statement from Cnty. Prosecutor Timothy J. McGinty on the Decision of the Grand Jury in the Tamir Rice case (Dec. 28, 2015) (on file with author).

91. Cory Shaffer, *NAACP Unlikely To Get Tamir Rice Grand Jury Transcripts, Experts Say*, CLEVELAND.COM (Jan. 8, 2016), http://www.cleveland.com/metro/index.ssf/2016/01/naacp_push_for_tamir_rice_gran.html.

92. U.S. CONST. amend. V.

93. GRAND JURY LAW AND PRACTICE § 1:2 (2d ed.).

wrongdoing. Presentment and indictment were new powers bestowed upon the grand jury.⁹⁴

Grand juries serve both screening and investigative roles. As a screening body, a grand jury may assent to a prosecutor's request for an indictment, or decline to do so.⁹⁵ As an investigative body, a grand jury compiles evidence against targets.⁹⁶ In either capacity, grand juries have the power to issue subpoenas, grant immunity in exchange for testimony, and hold those refusing to comply with its lawful subpoenas in civil or criminal contempt.⁹⁷

Under Ohio Rules of Criminal Procedure 6 (A), a judge of the county court, the administrative judge of the general division of a multi-judge court, or a judge designated by the administrative judge may summon grand juries.⁹⁸ Ohio Revised Code Section 2939.02 governs the selection of grand juries, which is to be done from annual jury lists.⁹⁹ Nine jurors and up to five alternates may be empaneled.¹⁰⁰ Grand jurors are subject to the same selection procedures and regulations as petit trial jurors, prohibits exclusion on the basis of race or color,¹⁰¹ and "must be drawn from a fair cross-section of the community."¹⁰² An indictment requires the concurrence of seven jurors.¹⁰³ Largely as a result of the conduct in the Rice case, the Ohio grand jury system is under renewed scrutiny.¹⁰⁴

94. *Id.* at § 8:2 (regarding when indictment is required: State prosecutions).

95. *Id.* at § 3:21 (discussing bias or exposure to prejudicial publicity).

96. U.S. DEP'T OF JUSTICE, U.S. ATTORNEY'S MANUAL §§ 9-11.000 (Grand Jury), available at <https://www.justice.gov/usam/usam-9-11000-grand-jury>.

97. GRAND JURY LAW AND PRACTICE, *supra* note 93, at §§ 7.18, 8.3, 10.18.)

98. *Id.* at § 4.2. *See also* Lewis R. Katz, et. al., BALDWIN'S OHIO PRACTICE CRIMINAL LAW § 39:3 (2014).

99. OHIO REV. CODE ANN. §2939.02 (West 2006).

100. Ohio. R. Crim. P. 6(a) (requiring a grand jury to consist of nine members, including the foreman, plus not more than five alternates).

101. OHIO REV. CODE ANN. §2313.13.

102. *State v. Puente*, 6431 N.E.2d 987, 989 (1982). The "fair cross-section" requirement of the Sixth Amendment right to a jury trial does not directly apply to grand jury proceedings but is considered part of due process and equal protection rights. The concepts of bias and prejudice developed in connection with the trial jury.

103. Ohio R. Crim. P. 6(f) ("An indictment may be found only upon the concurrence of seven or more jurors.").

104. Robert Higgs, *Grand Jury Process In Ohio To Get Review*, CLEVELAND.COM (Jan. 27, 2016), http://www.cleveland.com/open/index.ssf/2016/01/grand_jury_process_in_ohio_to_get_review.html#incart_article_small. The Task Force completed its report in July 2016. *Report and Recommendations of the Task Force to Examine Improvements to the Ohio Grand Jury System* (July 2016), <http://www.sc.ohio.gov/Publications/grandJuryTF/report.pdf>.

Upon convening the grand jury, the presiding judge is required to instruct the jury regarding duty, process, secrecy, and its powers.¹⁰⁵ The jury is also to be instructed on the role of the prosecutor, who presents the importance of jury independence and the type and quantum of evidence it will see and hear.¹⁰⁶ No reference is made to pretrial publicity, and no instruction is directed to guide grand jurors on how to consider, and what weight to give, extrajudicial information such as that obtained through the media.

Grand juror exposure to potentially biasing subject-relevant media publicity has been raised with increasing frequency in recent years, particularly in federal prosecutions.¹⁰⁷ A number of states have statutory provisions disqualifying grand jurors for some forms of bias or prejudice.¹⁰⁸ However, the lower courts are divided on the question of whether an impartial grand jury is constitutionally required.¹⁰⁹ The Supreme Court has indicated no view on the question whether bias or prejudice on the part of the grand jurors would violate the grand jury clause of the Fifth Amendment or the due process clause of the Fifth and Fourteenth Amendments, and the lower courts are divided on this issue.¹¹⁰ Some of its recent decisions, however, cast doubt on the propriety of *dismissal* as a sanction for prosecutorial misconduct in the absence of prejudice, and several lower courts have concluded that dismissal is not the appropriate sanction.¹¹¹

Even if there is evidence of influence of non-evidentiary factors, judges do not always see this as significant enough to warrant setting aside a verdict or other adverse consequence.¹¹² *Irvin v. Dowd*,¹¹³ *Rideau v. Louisiana*,¹¹⁴ and *Sheppard v. Maxwell*,¹¹⁵ represent a line of Supreme Court cases in which the degree of prejudicial pre-trial publicity was so overwhelming so to deny the defendant's right to a fair trial. These cases represent the exception,

105. R.C. 2939.07; *see also* 2 OJI-CR 301.07 (Instructions to Grand Jurors).

106. *Id.*

107. GRAND JURY LAW AND PRACTICE, *supra* note 93, at § 3:21.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at § 14.04.

112. *See* *Murphy v. Florida*, 472 U.S. 794 (1975) (announcing the widely-applied “totality of the circumstances” test to assess claims of prejudicial pretrial publicity on a jurors).

113. 366 U.S. 717 (1961).

114. 373 U.S. 723 (1963).

115. 384 U.S. 333 (1966).

rather than the rule. In fact, it seems that judges are reluctant to invoke remedies for claims of prejudicial pretrial publicity influence absent a showing of prejudice from the totality of circumstances.¹¹⁶

Nor do judges seem to feel that internet use by jurors is a major problem.¹¹⁷ According to a recent Federal Judicial Report, judges are reportedly less concerned because of instructions that forbid access to cell phones during trials.¹¹⁸ That prohibition, however, does not solve the dilemmas inherent with grand jury service, during which they are used over weeks at a time, hear multiple cases, and are not sequestered.

Given the grand jury structure and tenure, challenges for bias or prejudice in particular cases are difficult to impose. A grand jury ordinarily hears a number of cases during its term. At the time a grand jury is impaneled, no one can say what cases will arise during its term, or who the defendants and witnesses will be. It is simply not possible to remove from the grand jury all persons who might have extrajudicial knowledge of some of the cases or parties that will eventually come before the grand jury.

Nor is it possible, absent a post-indictment motion, to object to juror bias based upon grand jury-relevant media publicity. As a matter of fact, the Supreme Court has explicitly sanctioned such information.¹¹⁹ In *United States v. Calandra*¹²⁰ the Supreme Court declined to extend the exclusionary rule to grand jury proceedings.¹²¹ At issue in *Calandra* was whether the rule would apply to exclude evidence obtained in violation of the Fourth

116. *United States v. Waldon*, 363 F.3d 1103 (11th Cir. 2004); *United States v. Burke*, 700 F.2d 70, 82 (2d Cir. 1983) (stating a facially valid indictment by legally constituted and unbiased grand jury is enough for trial on merits; pre-indictment publicity does not render a grand jury biased unless “actual prejudice” is shown). *See, e.g.*, *United States v. Eisenberg*, 711 F.2d 959, 962 (8th Cir. 1983) (requesting to have prosecutors instruct grand jurors to disregard publicity); *In re Grand Jury Investigation*, 610 F.2d 202, 209 (5th Cir. 1980) (instructing prosecutor to caution grand jurors not to disclose information; also, request to instruct grand jurors to disregard publicity).

117. *See* Neil Vidmar, *Media Impact of Trial By Jury*, in *MEDIA COVERAGE IN CRIMINAL JUSTICE CASES* (Andrew E. Taslitz ed., 2013).

118. *Id.*; *see also* MEGHAN DUNN, *Jurors’ Use of Social Media During Trials and Deliberations: Report to the Judicial Conference Committee on Court Administration and Case Management*, FED. JUD. CTR. (Nov. 22, 2011), available at [http://fjc.gov/public/pdf.nsf/lookup/dunnjuror.pdf/\\$file/dunnjuror.pdf](http://fjc.gov/public/pdf.nsf/lookup/dunnjuror.pdf/$file/dunnjuror.pdf).

119. *See* *United States v. Calandra*, 414 U.S. 338 (1974).

120. *Id.*

121. *Id.*

Amendment from a grand jury proceeding.¹²² In ruling that it would not, the Court explained that a grand jury proceeding is not an adversary proceeding.¹²³ Instead, it is an *ex parte* action to determine whether a crime has been committed, “whether criminal proceedings should be instituted against any person.”¹²⁴ The grand jury’s sources of information are “widely drawn,” and an indictment is “not affected by the character of the evidence considered.”¹²⁵ The *Calandra* court observed that a grand jury investigation “may be triggered by tips, rumors, evidence proffered by the prosecutor, or the personal knowledge of the grand jurors.”¹²⁶ Moreover, “[t]he grand jury’s sources of information are widely drawn, and the validity of an indictment is not affected by the character of the evidence considered.”¹²⁷

In *Calandra*, however, the Court even concedes grand juror use of incompetent and even improper influences: “[s]ince the concern over adverse publicity is its effect on the fairness of the ensuing *trial*, and not its effect on the grand jury,”¹²⁸ there is no error if an indictment is not dismissed on the basis of prejudicial publicity.¹²⁹ If it is true that “an indictment valid on its face is not subject to challenge on ground that grand jury acted on basis of inadequate or incompetent evidence,”¹³⁰ it is entirely plausible to conclude that grand juror reliance on extrajudicial information in reaching its decisions is plausible.

A. Conclusion

To prevent negative publicity from infecting juror impressions, deliberations, and decisions, courts have developed a host of remedies. Juror admonishments, limiting instructions, press exclusion, journalist cautions,

122. *Id.* at 354-55. The *Calandra* holding is most significant because, for the first time, the Supreme Court untethered the Fourth Amendment right to be free from unreasonable searches and seizures from the remedy of suppression. The Court “severed the applicability of the exclusionary rule from whether the police violated the Fourth Amendment.” Russell M. Gold, *Beyond the Judicial Fourth Amendment: The Prosecutor’s Role*, 47 U.C. DAVIS L. REV. 1591, 1593(2014).

123. *Calandra*, 414 U.S. at 343.

124. *Id.* at 344.

125. *Id.* at 344-45.

126. *Id.* at 344.

127. *Id.* at 344-45.

128. *Waldon*, 363 F. 3d at 1109.

129. *Id.*

130. *Calandra*, 414 U.S. at 345.

the adoption of bench-bar-press guidelines, and sequestration are some methods to prevent prejudicial information from reaching the public. Other remedies attempt to seek out unbiased jurors through change of venue or venire, continuances, or an exhaustive *voir dire* process. However, because grand juries operate under secrecy, remedies that may apply to a petit jury may be irrelevant or impracticable to mitigate the possibility of prejudicial media content reaching grand jurors.

IV. IMPACTS OF EXPOSURE TO PRE-INDICTMENT PUBLICITY

While there can be no specific determination of pre-indictment and concurrent publicity impact upon the Loehmann-Garmback grand jury's decline to indict decision, there is ample evidence that extra-legal media publicity does in fact impact decision making-and in many cases, does so in racially biased ways.¹³¹ What follows is an explication of the various types of influences upon individual juror decision making and jury decisions. But first, this Section begins with an overview of the extra-legal publicity research.

A. An Overview of Pre-Trial Publicity Research

Although pre-trial publicity has been a legal topic since the 19th century,¹³² it was not until the 1970s that empirical pretrial publicity research was performed. The research proceeded in two waves.¹³³ The first wave, exemplified by the work of researchers Dorothy Imrich, Charles Mullin and Daniel Linz,¹³⁴ focused on news about high-profile crimes, the volume of pre-trial media publicity, and how biasing it *could* be. However, much of the early empirical research conclusions were compromised by methodological shortcomings. For example, the survey instruments used in some studies failed to control for important variables, such as other influences on jurors' attentiveness (e.g., personal interest in crime), or geography (e.g., residing in the jurisdiction within which the crime took place) which might also cause decisional bias.¹³⁵

131. Nancy Merkhens Steblay et al., *The Effects of Pretrial Publicity on Juror Verdicts: A Meta-Analytic Review*, 23 L.& HUM. BEHAV. 219 (1999) (conducting a meta-analysis of 44 empirical tests of over 5700 subjects).

132. SARAH SUMMERS, FAIR TRIALS: THE EUROPEAN CRIMINAL PROCEDURAL TRADITION AND THE EUROPEAN COURT OF HUMAN RIGHTS 46 (2007).

133. See, Dorothy J. Imrich, et. al., *Measuring the Extent of Pretrial Publicity in Major American Newspapers: A Content Analysis*, 45 J. OF COMM'N. 94 (1995).

134. *Id.*

135. *Id.*

The second wave of pretrial publicity research sought to correct earlier methodological errors. Research in the 1990s sought to ascertain the precise effects pretrial publicity might have, and how those effects might be mitigated.¹³⁶ In addition to implementing controls for influencing factors other than media artifacts used in simulated jury trials, contemporary research took to make important distinctions between emotionally and factually resonant pretrial publicity.¹³⁷

Emotionally resonant information is that which may be unrelated to the core criminal issues or subjects, yet have an affective impact (for example, a vigil for a crime victim).¹³⁸ Factually resonant pretrial publicity is that which includes incriminating evidence against the defendant in question (e.g., a prior record).¹³⁹ While assuredly most pretrial publicity would have elements of both, coding pretrial publicity for distinctive influences enabled researchers to determine whether one type or another had any impact, or whether one had greater impact upon a finding of a defendant's guilt.¹⁴⁰

Contemporary pretrial publicity research also eschewed laboratory testing with undergraduates to better replicate judicial processes.¹⁴¹ Shadow juries—comprised of people actually part of an actual jury pool before the studied defendant's actual trial, but ultimately not selected for that jury—are now a feature of empirical research on pretrial publicity effects.¹⁴² Moreover, mock jurors were convened as control groups. Those mock jurors are comprised of individuals from outside of the crime jurisdiction who, consequently, are less likely to have been exposed to pre-trial publicity.¹⁴³

136. See Geoffrey P. Kramer et al., *Pretrial Publicity, Judicial Remedies, and Jury Bias*, 14 L. & HUM. BEHAV. 409 (1999); Imrich, *supra* note 135.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. See Brian H. Bornstein, et al., *Pretrial Publicity and Civil Cases: A Two-Way Street?* 26 L. & HUM. BEHAV. 3 (2002).

142. See, e.g., Tarika Daftary-Kapur et al., *Examining Pretrial Publicity in a Shadow Jury Paradigm: Issues of Slant, Quantity, Persistence and Generalizability*, 38 L. & HUM. BEHAV. 462 (2014).

143. Researchers Tarika Daftary-Kapur, Steven Penrod, Maureen O'Connor and Brian Wallace produced a prototypical example of the use of a shadow jury for pretrial publicity research. Tarika Daftary-Kapur et al., *Examining Pretrial Publicity in a Shadow Jury Paradigm: Issues of Slant, Quantity, Persistence and Generalizability*, 38 L. & HUM. BEHAV. 462 (2014).

Researchers Tarika Daftary-Kapur, Steven Penrod, Maureen O'Connor and Brian Wallace produced a prototypical example of the use of a shadow jury for pretrial publicity research.¹⁴⁴ They found that pretrial publicity does in fact influence jury deliberations and decisions.¹⁴⁵ Along with Daftary-Kapur's research, other findings found that the stronger pre-trial publicity effects obtained where:

- a) There was a long delay between pretrial publicity exposure and the verdict decision;¹⁴⁶
- b) Actual community members were used as study subjects (as opposed to, e.g., college students);¹⁴⁷
- c) Real media stories were used (as opposed to mock stories constructed by the researchers);¹⁴⁸
- d) Negative publicity was compounded and;¹⁴⁹
- e) The publicity was both video- and text-based;¹⁵⁰
- f) Potential jurors lived near an area where a crime was committed evince a pro-prosecution bias¹⁵¹--likely due to greater exposure to prejudicial information;
- g) Murder, sexual abuse, and drugs were at issue-as distinguished from other crimes,¹⁵² and;
- h) Jurors were death-penalty qualified and who were also most likely to deny being influenced by pretrial publicity.¹⁵³

A small number of studies have found no biasing effects of pretrial publicity on potential jurors.¹⁵⁴ However, the majority of studies indicate that pretrial publicity does in fact influence individual jurors, deliberations, and

144. *Id.* at 474.

145. *Id.*

146. Steblay, *supra* note 131, at 226.

147. *Id.*

148. *Id.*

149. *Id.* at 227.

150. *Id.*

151. *Id.* at 229.

152. *Id.* at 231.

153. Brooke Butler, *The Role of Death Qualification in Jurors' Susceptibility to Pretrial Publicity*, 37 J. APP'D SOC. PSYCHOL.115, 120 (2007). A death-penalty qualified juror is one who is legally permitted to serve after establishing to the satisfaction of the court that any concerns about the death penalty will not interfere with his/her ability to deliberate and render judgment in a capital case. *Id.* at 115.

154. *See, e.g.*, JON BRUSCHKE & WILLIAM E. LOGES, FREE PRESS VS. FAIR TRIALS: EXAMINING PUBLICITY'S ROLE IN TRIAL OUTCOMES 58-64 (2004).

outcomes.¹⁵⁵ It must be noted that none of the studies cited examine grand jury pre-indictment or concurrent grand jury proceeding publicity.¹⁵⁶ If we understand that such influence is undesirable, then it is important to know how it influences jurors (and deliberations) before assessing the most effective ways to mitigate such influence.

B. Prejudicial Publicity Influences Upon Jurors' Cognitive Processes

In processing information during the course of trial or hearing proceedings, jurors engage any host of cognitive processes.¹⁵⁷ To be sure, life experiences, real-world knowledge, and a juror's beliefs, attitudes, and values influence information processing and outcomes. However, cognitive capabilities and processes do as well. Moreover, during and after the process of consuming actual or potentially prejudicial pretrial publicity, those cognitive processes explain, in part, why it is difficult for jurors to set aside its biasing influences.¹⁵⁸ The ineffectiveness of safeguards against these biases may seem more understandable and even inevitable when examined in the context of the broader psychological literature involving both legal and non-legal settings.¹⁵⁹ Schema-based cognitive processing such as heuristic reasoning, narrative construction, and the induction and use of stereotypes or crime prototypes (e.g. schema based on a crime's elements) aid in processing trial information—particularly when it comes to creating a plausible and coherent story framework.¹⁶⁰

However, in constructing and evaluating the competing and often conflicting narratives inherent in all hearings or trials, those same cognitive processes render influence-limiting safeguards incapable of eliminating the potential biasing effects of advance or concurrent media publicity. The

155. See *infra* note 161 and 164.

156. See BRUSCHKE & LOGES, *supra* note 156.

157. Ryan J. Winter & Edith Greene, *Juror Decision-Making*, in HANDBOOK OF APPLIED COGNITION (Francis Durso, ed., 2d ed. 2007) 757.

158. Joel D. Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence*, 6 PSYCH. PUB. POL'Y & L. 677, 677-678 (2000).

159. *Id.* at 677-68.

160. Sara Gordon, *Through the Eyes of Jurors: The Use of Schemas in the Application of 'Plain-Language' Jury Instructions*, 64 HASTINGS L.J. 643, 648-651 (2013); Lieberman & Arndt, *supra* note 160, at 691.

backfire effect (the phenomenon in which jurors pay greater attention to information after it has been deemed inadmissible) makes admonitions futile.¹⁶¹ Cognitive tendencies such as belief perseverance,¹⁶² confirmation

161. Lieberman & Arndt, *supra* note 160, at 689.

162. Steven Fein et al., *Hype and Suspicion: The Effects of Pretrial Publicity, Race, and Suspicion on Jurors' Verdicts*, 53 J. OF SOC'L ISSUES 487, 489 (1997). Perseverance effects occur where the impact of newly created beliefs endures even after the evidence on which they were supposedly based is discredited. Lieberman & Arndt, *supra* note 160, at 691. When faced with information that might challenge their existing schemas, this perseverance effect is so strong that people tend to devote less attention to examining the contradictory information. Gordon, *supra* note 162, at 657-658.

bias,¹⁶³ source confusion,¹⁶⁴ hindsight bias,¹⁶⁵ correspondence bias,¹⁶⁶ and reactance theory¹⁶⁷ explain why jurors have difficulty ignoring extra-judicial information, even when given admonishing or limited-use instructions.

163. Confirmation bias is a cognitive process in which humans attend to new information that confirms what they already believe, and ignore, not look for, or disregard the information that contradicts what they believe. Maurice Godwin, *Reliability, Validity, and Utility of Criminal Profiling Typologies*, 17 J. OF POLICE & CRIM. PSYCHOL. 1, 14 (2002). This process of selective thinking has both positive and negative impacts. On one hand, it helps promote stability and guides decision making. On the other, confirmation bias hurts by sheltering faulty beliefs and conclusions, and inhibits a juror's ability to make a decision based only on the probative facts or information. Lorraine Hope et al., *Understanding Pretrial Publicity: Predecisional Distortion of Evidence by Mock Jurors*, 10 J. OF EXPERIMENTAL PSYCHOL. 111, 117 (2004).

164. Source confusion refers to errors when we remember what we have seen or heard, but not where we saw or heard it. In studies these errors have manifested themselves in courtrooms, and even with jurors, who lose track of where they got information about a court case. Christine L. Ruva & Cathy McEvoy, *Negative And Positive Pretrial Publicity Affect Juror Memory and Decision Making*, 14 J. OF EXPERIMENTAL PSYCH. 226 (2008) (showing mock jurors exposed to pretrial publicity before watching videotaped trial misattributed the source of information contained solely in the pretrial publicity to evidence within the trial). *See also* Imrich, *supra* note 135, at 109.

165. Hindsight bias posits that once an outcome is known, one tends to overestimate the likelihood of its occurrence and events supporting the outcome are remembered more accurately. This impedes the juror's ability to ignore information they may be aware of, but instructed not to use in decision making. Lieberman & Arndt, *supra* note 160, at 692-693.

The biasing effects of pretrial publicity upon jurors, jury deliberations, and jury decisions have been demonstrated time and again.¹⁶⁸ While none of the research models have been conducted in the grand jury context, there is no reason to think that grand jurors would be less vulnerable to media influences.¹⁶⁹ In fact, the opposite is potentially true: given the nature of their tenure as jurors and the fact that they are not explicitly prohibited from considering evidence from all sources allows jurors to include media-produced information into their evaluation and decision making upon indictment. This is especially problematic in light of the institutional and racialized biases of news media accounts—especially when it comes to crime stories.

C. Conclusion

What must be appreciated is that causality cannot be determined from the studies. For example, it may be that research subjects had pre-existing biasing attitudes and greater tendency to fear crimes. Moreover, the studies could not clearly rule out possible non-media influences upon subject

166. Correspondence bias occurs where individuals fail to discount information sufficiently when making inferences about others, even if they recognize that the information should be discounted. The correspondence bias or attribution error is the tendency to draw inferences about a person's unique and enduring dispositions from behaviors that can be entirely explained by the situations in which they occur. Consider the correspondence bias to be something of a misnomer inasmuch as several different psychological mechanisms can give rise to the same general effect (i.e., the inference of dispositions from situationally induced behaviors). Daniel T. Gilbert & Patrick S. Malone, *The Correspondence Bias*, 117 PSYCHOL. BULL. 21, 21 (1995). We tend to see someone else's conduct as being mostly or even exclusively determined by character (the kind of person she is) while overlooking the context in which the person is acting. This fundamental attribution error or correspondence bias is “[p]erhaps the most commonly documented bias in social perception” in Western cultures, and causes us to attribute another person's behavior to his or her enduring dispositional qualities (such as personality, beliefs, or attitudes) while overlooking the influence of situational factors (such as constraints or expectations introduced by the social context). Lu-in Wang, *Race as Proxy: Situational Racism and Self-Fulfilling Stereotypes*, 53 DEPAUL L. REV. 1013, 1023 (2004).

167. Reactance is the arousal produced by the threats to free behaviors and the attractiveness of the threatened behavior increase. It is manifested in the attempt to perform or aggress against the agent, *i.e.* understanding a limiting instruction or ignoring the judge's instruction. Lieberman & Arndt, *supra* note 160, at 693-697.

168. *See id.*; Fein et al., *supra* note 164.

169. *See supra* note 158. --.

impressions, deliberations, or verdicts.¹⁷⁰ In addition, because scholars have paid little attention to a crucial subject, the police officer as defendant, this area lays ripe for analysis and examination. That said, these general attitudes and beliefs towards defendants may be potentially relevant to the way a jury perceives and evaluates evidence presented or how the evidence is framed by the juror.¹⁷¹

V. THE INHERENTLY BIASED AND RACIALIZED NATURE OF MEDIA CRIME STORIES AND THE PROBLEMS IT POSES FOR GRAND JURY OUTCOMES

News is an amalgam of words, images, and sounds. Impacted by those organizational structures, norms, and influences, the newsgathering and framing processes result in stories that cultivate and prime audience perspectives. With particular regard toward crime news, such as that which flowed out of the Rice tragedy, police departments and courts have an outsized influence on news narratives.¹⁷² Cultivation and priming creates or reinforces adverse impressions of African-Americans vis-à-vis crime and positive impressions of officers and law enforcement.¹⁷³ Those news stories, consumed by potential jurors on a daily basis, have demonstrated impacts upon jury impressions, deliberations, and outcomes.¹⁷⁴

Prosecutors, police departments, police officers and court systems are primary sources for crime news content. Media relies heavily upon police departments, prosecutor offices, court systems and their agents for its news content.¹⁷⁵ Perhaps more than any other genre, crime is the media's predominant topic. To be sure, media institutions have reporters deployed in those institutions on a daily basis. Media institutions so rely upon those entities such that news organizations and policing agencies allow for the collection of news about crime to be routinized.¹⁷⁶

Simultaneously, law enforcement institutions co-act with mass media organizations to deliver their intended narratives for news consumption.

170. See Liberman & Arndt, *supra* note 160; Fein et al., *supra* note 164.

171. Fein et al., *supra* note 164.

172. Barry C. Feld, *Race, Politics, and Juvenile Justice: The Warren Court and the Conservative "Backlash,"* 87 MINN. L. REV. 1447, 1534 (2003).

173. Entman & Gross, *supra* note 20.

174. Hope et al., *supra* note 165.

175. Feld et al., *supra* note 175.

176. Entman & Gross, *supra* note 20, at 95; Gene Policinski, *Setting the Docket: News Media Coverage of Our Courts – Past, Present and an Uncertain Future,* 79 MO. L. REV. 1007, 1008 (2014).

Prosecutors, sheriffs, police chiefs, and their spokespeople readily and strategically leverage media in disseminating their preferred narratives.¹⁷⁷ McGinty's press conferences were paradigmatic examples on the use of media power to communicate and control a preferred narrative.¹⁷⁸ The interdependence renders the police and court system perspectives implicit in all crime news reporting.

Grand jurors are never sequestered nor monitored for their access to news which may cover topics, people, or information upon which they are deliberating.¹⁷⁹ On a daily basis, crime stories, mug shots, prior records, and character or reputational information of is used to construct narratives of actual or alleged criminal defendants.¹⁸⁰ The Rice saga illustrates how law enforcement officers and prosecutors were the most frequent sources of prejudicial information to the newspapers. It also demonstrates the concerns related to grand jurors' unqualified access to media.

A. Rice's Death, Local Media, and Racism

One day after the shooting, local news website Cleveland.com posted an article by the Northeast Ohio Media Group (NEOMG) reporter Brandon Blackwell. Blackwell wrote about of Rice's mother's criminal history.¹⁸¹

Then, days later, Blackwell, along with writer Bob Sandrick, wrote a piece on [Rice's] father's criminal history.

The story on Samaria Rice is ostensibly about the attorney the family hired to represent them in this tragedy. The headline: "Lawyer representing Tamir Rice's family defended boy's mom in drug trafficking case." Six of the nine paragraphs however, have nothing to do with the attorney, but everything to do with Samaria's criminal record and two sentences about its possible impact on her son. The story about [Rice's] father, Leonard Warner, is astounding in its bias,

177. Entman & Gross, *supra* note 20.

178. See Daniel Marans, *How a Prosecutor Managed to Blame a 12-Year-Old for Getting Killed by a Cop*, HUFFINGTON POST (Dec. 28, 2015, 11:22 PM), http://www.huffingtonpost.com/entry/tamir-rice-timothy-mcginty_us_5681d451e4b014efe0d91562.

179. Joseph F. Lawless, PROSECUTORIAL MISCONDUCT § 4.04 (2014).

180. Fein et.al., *supra* note 164 at 489.

181. Bryan L. Adamson, *Don't Understand the Connection Between Tamir Rice's Killing and His Parents' History? Join the Club*, HUFFINGTON POST BLACK VOICES (Dec. 4, 2014, 8:11 AM), http://www.huffingtonpost.com/bryan-l-adamson/tamir-rice-media_b_6265114.html.

making no attempt whatsoever to connect his father's history to why a police officer killed [Rice].

[NEOMG] editor Chris Quinn and other NEOMG writers made things worse with attempts to justify the reasons for and content of those articles. Blackwell updated his Warner article... [explaining] that “[p]eople from across the region have been asking whether Rice grew up around violence.” According to the Cleveland Scene, writer Mark Naymik tweeted Blackwell “[g]ives small window into this young boy’s life. A frame of reference, perhaps for why he had toy gun?” Quinn wrote that NEOMG ran with the stories about Samaria and Leonard because they “shed further light on why this 12 year old was waving a weapon around a public park.”¹⁸²

Set aside the absurd suggestion that a child playing with a toy gun is an unusual if not irresponsible. Samaria Rice would go on to say “It was almost like they were trying to blame me.”¹⁸³ She continued: “They were talking to me like I was a bad mother, like I gave him that BB gun.”¹⁸⁴ The Cleveland.com stories about Rice’s parents, and subsequent explanations were nothing less than an attempt to create an insidious “blame the victim narrative.”¹⁸⁵ That narrative presumes law enforcement reaction is justified when such killings occur: Rice was congenitally prone to violence; just look at his parents who let him play with a *toy gun*.¹⁸⁶ In the context of an African-American boy being killed by a white police officer, the narrative took on an even more noxious tone.

That Rice—or more precisely, his parents—were presumptively to blame for his death is precisely what “some” people want to believe, and, if the comments under the Blackwell stories are any indication, Cleveland.com articles reinforced the worst prejudices.¹⁸⁷ Yet, it is this type of storytelling around race and crime to which jurors and potential jurors were exposed. Moreover, the stories exemplify the reliance news media place upon court records. By constructing a criminal history of Rice’s parents, the news media

182. *Id.*

183. Flynn, *supra* note 1.

184. *Id.*

185. Adamson, *supra* note 182.

186. *Id.*

187. *Id.*

perpetuated an adversely racialized theme around Rice's death while diminishing law enforcement culpability.¹⁸⁸

The aftermath of Rice's death and the subsequent protests became the subject of daily reporting. That reporting elicited divisive if not racist views about Rice, his parents, and those participating in demonstrations.¹⁸⁹ Those views were expressed everywhere—and in particular—in comments below local news stories. Because “the Tamir Rice story [became] a magnet for haters,” and “overrun... by wickedness,” Cleveland.com took the unprecedented step to shutting off the ability to post comments to all articles related to tragedy.¹⁹⁰ The editor wrote:

“Just about every piece we published about Tamir immediately became a cesspool of hateful, inflammatory or hostile comments. Rather than discuss the facts of the case, many commenters debased the conversation with racist invective. Or they made absurd statements about the clothing and appearance of people involved in the story. Or they attacked each other for having contrasting viewpoints. In many cases, well over half of the comments on Tamir stories broke our rules and had to be deleted.”¹⁹¹

The risk with comment reading is the tendency for source confusion, that is, jurors could misattribute assertions from a generally untrusted source such as comments to the more trusted articles themselves and subsequently

188. See Brandon Blackwell, *Tamir Rice's Father Has History of Domestic Violence*, CLEVELAND.COM, (Nov. 26, 2014) http://www.cleveland.com/metro/index.ssf/2014/11/tamir_rices_father_has_history.html; Brandon Blackwell, *Lawyer Representing Tamir Rice's Family Defended Boy's Mom in Drug Trafficking Case*, CLEVELAND.COM (Nov. 24, 2014), http://www.cleveland.com/metro/index.ssf/2014/11/lawyer_representing_tamir_rice.html.

189. Chris Quinn, *Why We Turned Off Comments on Tamir Rice News Stories*, CLEVELAND.COM (Nov. 30, 2015), http://www.cleveland.com/opinion/index.ssf/2015/11/why_we_turned_off_comments_on.html.

190. For example, one commentator, “Embrace Diversity,” posted: “yeah she won the ghetto lottery, only cost her one kid! she [sic] has three more left!”

Elizabeth Bruenig, “Cleveland.com disables comments on all stories related to Tamir Rice to stem the ‘cesspool of hate,’” *New Republic* at <https://newrepublic.com/minutes/126688/clevelandcom-disables-comments-stories-related-tamir-rice-stem-cesspool-hate> (last visited Dec. 15, 2016).

191. Quinn, *supra* note 190.

misattribute them as evidence in trial.¹⁹² The other, more insidious (and likely) influence comment sections may have are the affective impacts that shape impressions and evaluations of people or evidence involved in the grand jury case.¹⁹³

B. African-Americans and Media Representation in Crime News

Ample empirical research exists which concludes that African-Americans are grossly misrepresented in news stories about crime.¹⁹⁴ Blacks in criminal “roles” outnumber Blacks in socially positive representations in newscast and daily papers.¹⁹⁵ Moreover, those portrayals, when compared to actual crime and labor statistics, are grossly disproportionate to reality.¹⁹⁶

Other studies of local news depict Blacks as more symbolically threatening and also more culpable than Whites accused of similar crimes.¹⁹⁷ Black and Latino youth in particular are susceptible in portrayals as ‘gang members’ or called ‘savage’ and ‘wild.’¹⁹⁸ Blacks of any age are more likely to be shown in mug shots,¹⁹⁹ doing perp walks,²⁰⁰ or shown in some form of

192. See generally, Adam Felder, *How Comments Shape Perceptions of Sites’ Quality – and Affect Traffic*, THE ATLANTIC, (June 5, 2014), <http://www.theatlantic.com/technology/archive/2014/06/internet-comments-and-perceptions-of-quality/371862/>.

193. *Id.*

194. John Wihbey, *Racial Bias and News Media Reporting: New Research Trends*, JOURNALIST RESOURCES (May 20, 2015), <http://journalistsresource.org/studies/society/news-media/racial-bias-reporting-research-trends>.

195. *Id.*

196. Travis L. Dixon & Cristina L. Azocar, *Priming Crime and Activating Blackness: Understanding the Psychological Impact of the Overrepresentation of Blacks as Lawbreakers on Television News*, 57 J. OF COMM. 2, 230, 231 (2007); Travis Dixon & Daniel Linz, *Overrepresentation and Underrepresentation of African Americans And Latinos As Lawbreakers On Television News*, 50 J. OF COMM. 2, 131, 147 (2000).

197. Entman & Gross, *supra* note 20, at 99-100.

198. *Id.* at 100.

199. ROBERT M. ENTMAN & ANDREW ROJECKI, *Violence, Stereotypes, and African-Americans in the News*, in THE BLACK IMAGE IN THE WHITE MIND: MEDIA AND RACE IN AMERICA 82 (2000) (basing their finding that crime stories about Blacks were four times more likely to include mug shots than Whites on a study of sample of televised news from 1993-1994).

200. Entman & Gross, *supra* note 20, at 100.

physical restraint by police than Whites,²⁰¹ and have prejudicial information reported about them (for example, as having a criminal record).²⁰² In fact, a content analysis of a newspaper showed that 27% of suspects identified in newspaper crime reports were described in stories that contained negative information that violated ABA standards regarding prejudicial pretrial information.²⁰³

Conversely, news stories under-depict Blacks in positive, benign, or neutral roles.²⁰⁴ On national news, blacks were disproportionately under-portrayed as both victims or police officers.²⁰⁵ Blacks were also underrepresented as newsreaders, reporters, and in otherwise benign roles in crime stories compared to real-world crime reports and labor records.²⁰⁶

In contrast, in local news, Whites are overrepresented as victims.²⁰⁷ They are also shown in more positive roles (for example, as bystanders, first responders, news readers, and reporters) in crime news.²⁰⁸ It appears that not much content analysis work has been explicitly done on specific depiction of law enforcement officers in the news. However, it has been shown that Whites are also disproportionately shown as police officers and/or in benign, authoritative, or even heroic roles.²⁰⁹

201. ENTMAN & ROJECKI, *supra* note 202, at 82.

202. See STEPHANIE GRECO LARSON, *MEDIA & MINORITIES: THE POLITICS OF RACE IN NEWS AND ENTERTAINMENT* (2005); ENTMAN & ROJECKI, *supra* note 202, at 46-59.

203. Lieberman & Arndt *supra* note 160, at 680.

204. Entman & Gross, *supra* note 20, at 99 (arguing that in some geographic areas, Latinos are worse off in the televised news treatment than Blacks).

205. In their 2003 content analysis of television network news, researchers Travis Dixon, Cristina Azocar and Michael Casas concluded as much. Travis L. Dixon et al., *The Portrayal of Race and Crime on Television Network News*, 47 J. BROADCASTING & ELECTRONIC MEDIA 498, 517 (2003); see also Dixon & Linz, *supra* 199, at 132.

206. Dixon et al., *supra* note 208, at 516.

207. *Id.*

208. Travis Dixon, *Black Criminals and White Officers: The Effects of Racially Misrepresenting Law Breakers and Law Defenders on Television News*, 10 MEDIA PSYCHOL. 270, 271 (2007). See also Dixon et al., *supra* note 208, at 499-500.

209. Dixon, *supra* note 211.

A prime example of this can be seen in the Cincinnati Enquirer and other news outlets' stories of Sam Debose's death on July 19, 2015.²¹⁰ "Samuel Dubose was a 43-year-old unarmed black man who was shot in the head and killed by a University of Cincinnati police officer, Ray Tensing, during a traffic stop a few blocks from campus."²¹¹ Tensing's initial story was that Dubose was trying to flee after being stopped for not having a front license plate.²¹² Tensing's account was that he was dragged by Dubose's car, and shot as a result.²¹³

Tensing's body camera video, however, showed a different story, viz., that the car rolled away only after Dubose was shot.²¹⁴ The footage left no doubt in the Hamilton County Prosecutor's mind that it was a murder.²¹⁵

In any event, on July 29, the Enquirer, CNN, BBC, UNIVISION, and NBC chose to juxtapose these two photographs.²¹⁶

210. Ralph Ellis et al., *Investigation Finished in Police Shooting in Cincinnati Traffic Stop*, CABLE NEWS NETWORK (July 29, 2015), <http://www.cnn.com/2015/07/21/us/cincinnati-police-shooting/>; Amber Hunt, *What Sam Dubose's Rap Sheet Tells Us About Him and the Police*, CINCINNATI.COM (Aug. 10, 2015), <http://www.cincinnati.com/story/news/2015/08/10/sam-duboses-rap-sheet-tells-us/31356367/>.

211. Charles M. Blow, Opinion, *The Shooting of Samuel Dubose*, N.Y. TIMES, July 29, 2015, available at http://www.nytimes.com/2015/07/30/opinion/charles-blow-the-shooting-of-samuel-dubose.html?_r=0.

212. *Body Camera Footage of Samuel Dubose Death Contradicts Indicted Cop's Claim*, PUBLIC BROADCASTING STATION (July 29, 2015), <http://www.pbs.org/newshour/bb/body-camera-footage-samuel-dubose-death-contradicts-indicted-cops-claim/>.

213. *Id.*

214. *Id.*

215. *Id.*

216. *A Flag Photo of a Murder Suspect, a Mugshot of a Victim*, CINCINNATI.COM (July 29, 2015), <http://www.cincinnati.com/story/news/2015/07/29/sam-dubose-social-media-reaction-photo/30858745/>.



What we have here is a mug shot of a *victim*, and a headshot photo of the murder *suspect* in his dress-blue and an American flag in the background.²¹⁷ The implicit racial bias is apparent. The text and subtext below police officer depictions communicate legitimacy, credibility, and trustworthiness. In contrast, Dubose's visage in a mug shot serves to reinforce negative stereotypes about Blacks. These impressions, when left unfiltered and unchecked, can influence juror impressions about race and crime in general, or the specific criminal Tensing inquiry.

Racism and racializing elements are often innate features of much crime news. The routines of news collection and construction make these elements both visible and invisible. They are presented in ways to frame stories which, over time, cultivate and prime news consumers.

217. *Media Blasted for Racial Bias in Cincinnati Shooting Coverage*, USA TODAY (July 30, 2015), <http://www.usatoday.com/story/news/nation-now/2015/07/30/ohio-police-shooting-victim/30872955/>.

C. The Framing, Cultivating and Priming Process of News

Framing is a routine device deployed by news content creators.²¹⁸ In news production, frames are used to present information in a way that most effectively resonates with the underlying cognitive schemas of an audience.²¹⁹ News stories are framed by content (e.g., “crime,”), organization (lead sentence content²²⁰), and themes (e.g., “human interest,” “conflict,” or “consequence”²²¹), which serve as slants and hooks.²²² Frames are also established in news production by words chosen, article placement, people interviewed, quotes used, and even the way photographs accompanying the story are presented.²²³

There are a litany of journalistic framing conventions: headlines and kickers (small headlines over the main headline); anchors (text below

218. Stephen D. Reese, *The Framing Project: A Bridging Model for Media Research Revisited*, 57 J. OF COMM. 148, 150 (2007). Frames are part of a “basic tool kit of ideas [that can be used] in thinking about and talking about” the news. Vincent Price et al., *Switching Trains of Thought the Impact of News Frames on Readers’ Cognitive Responses*, 24 COMM. RES. 481, 482 (1997). As a cognitive construct, framing is the intuitive method by which we naturally select, categorize, and process stimuli. ERVING GOFFMAN, *FRAME ANALYSIS: AN ESSAY ON THE ORGANIZATION OF EXPERIENCE* (1974). Goffman posits that in order to interpret life experiences and make sense of the world around us efficiently, individuals apply interpretive schemas, or “primary frameworks.” *Id.* at 24.

219. Frames act like plots or story lines, lending coherence to otherwise discrete pieces of information. Stereotypes are a kind of framing. Thomas E. Nelson et al., *Media Framing of a Civil Liberties Conflict and Its Effect on Tolerance*, 91 AM. POL. SCI. REV. 567, 568 (1997). The origins of cognitive framing concepts lie in the work of Kahneman and Tverskys, set forth in *Prospect Theory: Analysis of Decision Under Risk*, 47 ECONOMETRICA 263 (1979), and in *Choices, Values, and Frames* 39 AM. PSYCHOL. 341 (1984). There, Kahneman and Tverskys examine how different presentations of essentially identical decision-making scenarios influence people’s choices and evaluations of available options.

220. James W. Tankard, Jr., *The Empirical Approach to the Study of Media Framing* in *FRAMING PUBLIC LIFE: PERSPECTIVES ON MEDIA AND OUR UNDERSTANDING OF THE SOCIAL WORLD* 101-102 (Stephen D. Reese, et al. eds., 2003)

221. A “consequence” story is one that explicates an issue and its impact on the reader, e.g., “Gas Prices Set to Increase: What You Will Pay at the Pump.” Price et al., *supra* note 222, at 485.

222. *Id.* at 484-85.

223. James W. Tankard, Jr., *supra* note 222 at 101-102.

photographs); screen captions or crawls (text traveling across the screen, usually at the bottom); leads (the beginnings of print news stories) or lead-ins (spoken story openings in televisual news); logos or illustrations; statistics, charts, or graphs; source selection, or the naming of source affiliation (e.g., “R-NY,” or “D-UT”); quote selection; pull quotes (quotes placed in prominent font, usually alongside the story); news page compositions; concluding statements or even article paragraphs; the use of active or passive voice, personal pronouns, adjectives or metaphors; spin, jargon, or trigger words (e.g., “Thug”).²²⁴

How news stories are framed have a demonstrable impact on audience opinion about the news subject. A research study of print and television news stories on a Ku Klux Klan rally affirmed that audience reaction was strongly dependent on how the event was described.²²⁵ Researchers found public support to be significantly different when news stories framed the rally as an exercise of free speech (positive) versus a disruption of public order (negative).²²⁶

Cultivation theory posits that, in the aggregate, stories and images—cutting across all program types (news, fiction/non-fiction, entertainment, sports)—evinced consistent patterns in the portrayal of specific people, topics, and issues.²²⁷ For example, for heavy television viewers, long-term exposure to a relatively stable system of messages “cultivates” their perceptions on given subjects.²²⁸

Studies have found that frequent television viewing causes audiences to skew understandings of reality versus what they come to understand from television.²²⁹ Avid soap opera viewers, for example, overestimate the actual

224. *Id.* at 100-101.

225. *Id.*

226. Thomas E. Nelson et al., *supra* note 223 at 576 (examining how local television news outlets framed a demonstration and rally by the Ku Klux Klan (KKK) in a small Ohio city). They were able to demonstrate that the way news outlet textually framed the KKK activity had an effect on public opinion support for the event or the counter-protestors. *Id.*

227. Cultivation theory was developed by George Gerbner and Larry Gross in the early 1970s. George Gerbner & Larry Gross in *NEW DIRECTIONS IN CONTENT ANALYSIS: SYSTEM OF CULTURAL INDICATORS* 460 (1972). See also Michael Morgan & James Shanahan, *The State of Cultivation*, 54 *J. OF BROADCASTING & ELECTRONIC MEDIA*, 337 (2010); Narissara M. Punyanunt-Carter, *The Perceived Realism of African-American Portrayals on Television*, 19 *HOW. J. OF COMM.* 241, 244-45 (2008).

228. George Gerbner et al., *Growing Up With Television: The Dynamics of the Cultivation Process*, in *PERSPECTIVES ON MEDIA EFFECTS* 52 (J. Bryant & D. Zillman eds. 1986).

229. See Larson, *supra* note 205, at 88.

divorce rate in America.²³⁰ Cultivation effects have also been found to arise in subjects ranging from overestimations about life risks posed by lightning strikes,²³¹ floods,²³² the number of people over age 65,²³³ and terror attacks.²³⁴

For heavy television viewers—those who watched television 4 or more hours of television daily²³⁵—depictions of violence and criminal behavior also result in skewed realities.²³⁶ Persistent exposure to television news about violent crime over time increases the salience of crime even “independent [] of actual trends or rates of local crime and of viewer characteristics.”²³⁷ The media’s focus upon lawlessness and violence and, conversely, the lack of focus on peaceful protests and law-abiding Blacks could cultivate in heavy television viewers a jaundiced portrait of Rice, his parents, or Black protesters.²³⁸ Conversely, persistent viewing of news stories in which police officers are portrayed as heroic, credible and trustworthy can cultivate a positive, but skewed reality.²³⁹

Media *priming effects* refer to the short-term impact of exposure to a mass-mediated stimulus on subsequent judgments or behaviors.²⁴⁰ Priming

230. *Id.*

231. *Id.* at 134.

232. *Id.*

233. *Id.* at 141.

234. Mohammad Abid Amiri, *Muslim Americans and the Media After 9/11*, 5 ISLAM & MUSLIM SOC’IES: A SOC. SCI. J. 21 (2012).

235. Gerbner et al., *supra* note 232, at 55, Table 3.1. Today, the average adult spends 5 hours per day viewing television. Dana Mastro, *Why the Media’s Role in Issues of Race and Ethnicity Should Be in the Spotlight*, 71 J. OF SOC. ISSUES 1, 3 (2015) (citing Nielsen statistics from 2012). Thus the average adult is susceptible to the mean world phenomenon.

236. James Shanahan & Michael Morgan, TELEVISION AND ITS VIEWERS: CULTIVATION THEORY AND RESEARCH 64-65 (1st ed. 1999).

237. Daniel Romer et al., *Television News and the Cultivation of Fear of Crime*, J. OF COMM. 88, 89 (2003). An alternative theory of the public fear of crime is that people use their personal experience or the experience of others in their social networks to decide whether they should be concerned. *Id.* at 90.

238. Richard Busselle & Heather Crandall, *Television Viewing and Perceptions About Race Differences in Socioeconomic Success*, 46 J. OF BROADCASTING & ELECTRONIC MEDIA 265, 279 (2002).

239. *Id.*

240. Leonard Berkowitz & Karen Heimer Rogers, *A Priming Effect Analysis of Media Influences*, in MEDIA EFFECTS 58. *supra* note 232. See also Shanto Iyengar & Donald R. Kinder, NEWS THAT MATTERS: TELEVISION AND AMERICAN OPINION 63 (1987).

has a powerful influence on which schemas are activated in particular situations. Rooted in psychology and cognitive science,²⁴¹ priming is a heuristic by which we utilize the most accessible mental schema to help us make sense of new information.²⁴² Recently and frequently activated ideas will be more easily recalled than others. Once a schema is activated, it becomes more accessible for other purposes and is more likely to be used in organizing and interpreting subsequent information.²⁴³

In the processing of new information, words, sounds, and images have semantic associations with others in our memory, and like an activated network, spread to associated (i.e., cognitively accessible) information.²⁴⁴ In turn, the newly-applied information retains some residual activation potential, making it more likely to be accessed and used in making subsequent evaluations.²⁴⁵ Memory schemas or cognitive structures influence the interpretation of new information such that recently and/or frequently activated ideas come to mind more easily than ideas that have not been activated.²⁴⁶

241. In psychology, priming is an implicit memory effect in which exposure to a stimulus influences a response to a later stimulus. Berkowitz & Rogers, *supra* note 244, at 58-60.

242. *Id.* at 59.

243. *Id.*

244. Price et.al., *supra* note 222, at 486.

245. *Id.* at 486. *See also*, Roger Ratcliff & Gail McKoon, *A Retrieval Theory of Priming in Memory*, 95 PSYCHOL. REV. 385,-408 (1988) (discussing spreading activation as a part of priming); People do not and cannot pay attention to every stimulus that is encountered. Instead of making comprehensive analyses of encountered information, we tend to “routinely draw on those bits of information that are particularly salient at the time” we make a judgment. Maxwell McCombs & Amy Reynolds, *News Influence on Our Pictures of the World*, in MEDIA EFFECTS, *supra* note 232 at 14. Press-generated stories that depict violence or violence-related concepts, for example, have been shown to cognitively prime violence and violence-related concepts. David R. Roskos-Ewoldsen et al., *Media Priming: A Synthesis*, in MEDIA EFFECTS, *supra* note 232 at 98.

246. *Id.* at 98.

For example, stereotypes²⁴⁷ are activated by priming²⁴⁸—increasing the likelihood that the knowledge will be used in a subsequent judgment.²⁴⁹ Through the persistent overrepresentation of Black males in crime-related news stories, the cognitive association between Blacks and criminality in the audience’s mind is strengthened such that the connection (*i.e.*, Blacks and crime) becomes chronically accessible for use in race-related evaluations.²⁵⁰ Such stereotyping, in turn, may provoke a range of antisocial, intergroup responses including stereotyping, prejudice, discrimination, attribution errors, and generally punitive outcomes.²⁵¹

D. Social Media as Special Influences of Juror Impressions

There can be no denying our persistent need for media access; nor has our ability to readily do so ever been so easy. Although television remains the #1 news source for Americans,²⁵² 84% of American adults use the internet.²⁵³ Furthermore, 90% own cell phones, and 60% of them use their cell phone to access internet.²⁵⁴ As to news consumption, 40% of all

247. Stereotypes are cognitive structures or categories that affect the encoding and processing of information. DAVID L. HAMILTON & TINA K. TROLIER, *Prejudice, Discrimination, and Racism*, in STEREOTYPES AND STEREOTYPING: AN OVERVIEW OF THE COGNITIVE APPROACH 127-163 (John Dovidio & Samuel Gaertner eds., 1986). These structures direct attention to some stimuli and away from others, influence categorization of information, help us “fill in” missing information. Jeffrey W. Sherman et al., *Attention and Stereotyping: Cognitive Constraints on the Construction of Meaningful Social Impressions*, 11 EUR. REV. OF SOC. PSYCHOL., 145, 154 (2000).

248. LARSON, *supra* note 205, at 88-89.

249. Dixon et al., *supra* note 208, at 501; Dixon & Azocar, *supra* note 199, at 231; David Domke, *Racial Cues and Political Ideology*, COMM. REV. 772, 777 (2001).

250. Dixon & Azocar, *supra* note 199, at 231.

251. *Id.* at 245.

252. Lydia Saad, *TV Is Americans’ Main Source of News*, GALLUP (July 8, 2013), <http://www.gallup.com/poll/163412/americans-main-source-news.aspx>.

253. Andrew Perrin & Maeve Duggan, *Americans’ Internet Access 2000-2015*, PEW RES. CENTER (June 26, 2015) <http://www.pewinternet.org/2015/06/26/americans-internet-access-2000-2015/>.

254. Maeve Duggan, *Cell Phone Activities 2013*, PEW RES. CENTER (Sept. 19, 2013), <http://www.pewinternet.org/2013/09/19/cell-phone-activities-2013/>.

Americans get their news from online sources.²⁵⁵ Moreover, mobile or fixed technology allows Americans to more readily engage their social networks and news sources. Social media, messaging apps, texts and email provide a constant stream of news from people we are close to, as well as total strangers. News stories can now come piecemeal, as links or shares or personalized news portals that we create, comprised of our media preferences. Our social networks as well as our news preferences evince a preferential and ideological narrowing of information sources that could never have existed in the world of traditional radio, television or cable broadcast.²⁵⁶

Primary news sites, news aggregators, blogs, Facebook and Twitter are just some sources of news information electronically available. However, news interpretation by significant others plays an outsized influence on what we consider – and how we consider – news information. When news stories enter our electronic media networks, they do so in at least three forms: 1) unadulterated, as when news enters our network directly from the news source (e.g., Washington Post articles arrive in Facebook feed);²⁵⁷ 2) summarized and sent by a social network, or “in-group” member; or 3) rearticulated through a different rhetorical device, such as a summary or meme.²⁵⁸

In considering the cognitive and affective impact of news consumed through online networks, we must start with the premise that all people seek out congenial news sources—media that align with their personally relevant

255. Amy Mitchell et al., *The Modern News Consumer: News Attitudes and Practices in the Digital Era*, PEW RES. CENTER (July 7, 2016), <http://www.journalism.org/2016/07/07/the-modern-news-consumer/>.

256. Seth Flaxman et al., *Filter Bubbles, Echo Chambers, and Online News Consumption*, 80 PUB. OPINION Q., 298, 299 (2016); Michael A. Bean & Gerald M. Kosicki, *Personalized News Portals: Filtering Systems and Increased News Exposure*, 1 JOURNALISM & MASS COMM. Q. 59, 61 (2014).

257. Framing conventions used by media institutions in distributing news online perform important cognitive functions unique to that ecosystem. *Id.*

258. Caitlin Dewey, *6 In 10 of You Will Share This Link Without Reading It, a New, Depressing Study Says*, WASH. POST, June 16, 2016, Intersect Newsletter; Aja Romano, *The Harambe Meme Is Still Going Strong and It's a Lot More Than About a Dead Gorilla*, VOX (Sept. 16, 2016), <http://www.vox.com/2016/8/17/12457468/harambe-meme-social-commentary-explained>.

beliefs.²⁵⁹ When we rely on secondary sources for news information, the impact is unique. Audiences do not always receive news stories directly, but will get news through personalized news feeds, peers, significant or proximate (co-workers) others, and other members of our social media networks.²⁶⁰ Moreover, exposure to news and civic information is mediated through online social networks and electronically-enabled personalization now more than ever.²⁶¹ As citizens we re-tell or re-transmit news stories in quotidian behaviors, tending to construct our online social networks much in the same way we construct our networks based on face-to-face interactions.²⁶²

While we have always been able to choose which news sources to attend, the degree of political and ideological segregation in social media networks is in fact higher than that associated with mass media such as television and newspapers.²⁶³ In sum, our media selection evinces our general tendency toward confirmation bias—i.e., attentiveness to news sources whose stories tend to reinforce our predispositions and the discounting or exclusion of non-congenial sources and information.²⁶⁴

Bias is especially evident in the comment sections of news stories.²⁶⁵ Comment sections are typically spontaneous responses to a primary story or another's comment. Moreover, they incorporate factual evaluations. In one

259. Natalie Jomini Stroud, *Media Use and Political Predispositions: Revisiting the Concept of Selective Exposure*, 30 POL. BEHAV. 341, 342 (2008). For example, one study showed that those viewing Fox News were more likely to believe the link between Iraq and Saddam and the existence of weapons of mass destruction than those who watched PBS or listened to NPR. See Clay Ramsay et al., *Misperceptions, the Media, and the Iraq War*, 118 POL. SCI. Q. 569, 585 (2003).

260. Michael A. Bean & Gerald M. Kosicki, *Personalized News Portals: Filtering Systems and Increased News Exposure*, 1 JOURNALISM & MASS COMM. Q. 59, 61 (2014); Flaxman, *supra* note 260, at 299.

261. Eytan Bakshy & Solomon Messing, *Exposure to Ideologically Diverse News and Opinion on Facebook*, 34 SCIENCE 1130, 1130 (2015) (finding friends share less cross-cutting news from sources with opposing ideology and inter alia, political news and more selective exposure). While peers also share news information in face-to-face networks, this article does not delve into the framing conventions which occur in live interpersonal dialogues.

262. Flaxman et.al, *supra* note 260, at 299.

263. *Id.*

264. *Id.*

265. Merike Sisask et al., *Internet Comments Elicited by Media Portrayal of a Familicide-Suicide Case*, 33 CRISIS 222, 227 (2015) (finding the majority have a negative emotional tonality, in a content analysis of comments).

study of the reporting of a familicide-suicide, comment sections attending the stories were overwhelmingly negative in emotional tonality—angry, disapproving, contemptuous, blaming or disgusted.²⁶⁶

One investigation sought to assess the impact of reader comments upon prospective jurors for a real homicide. Elizabeth Crisman first performed a content analysis of 600 internet articles related to the case, and ascertained “overwhelmingly negative views of the suspect.”²⁶⁷ She next tested her hypothesis with 391 U.S. jury-qualified participants.²⁶⁸ She found that the individuals who read the comments attached to a real online article about a sexual assault case were significantly more likely to find the defendant guilty.²⁶⁹

But because comment sections allow anonymous posting, commentary favors acting out emotional reactions.²⁷⁰ Anonymity, as one can imagine (or has seen if one has ever read a comment section) can bring out the worst viewpoints—especially when it comes to race. This certainly proved to be the case in the Rice saga.

E. Conclusion

The influence criminal and law enforcement agents wield on crime coverage is not narrowly attitudinal or behavioral, but is broadly ideological. The symbiosis between media and law enforcement institutions dramatically restricts the parameters of discussion and debate about the problem of crime generally, and the implicit or explicit biases that influenced the Rice tragedy specifically.²⁷¹ With racist and racialized news coverage of crime and Black dissent, news stories reassert a socio-political orthodoxy under which a pro-prosecutor/law enforcement bias was evinced in media coverage.²⁷² The press conferences in particular invariably demeaned the grievances of victims such

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

270. See David Lat, *Comments are Making the Internet Worse. So We Got Rid of Them.*, WASH. POST (Apr. 21, 2016), https://www.washingtonpost.com/posteverything/wp/2016/04/21/comments-are-making-the-internet-worse-so-i-got-rid-of-them/?utm_term=.d6e60e424793; Christopher Wolf, *Anonymity May Have Killed Online Commenting*, N.Y. TIMES OPINION PAGES (Apr. 18, 2016), available at <http://www.nytimes.com/roomfordebate/2016/04/18/have-comment-sections-on-news-media-websites-failed/anonymity-may-have-killed-online-commenting>.

271. Sara Sun Beale, *The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 43 WM. & MARY L. REV. 397, 441-46 (2006).

272. *Id.*

as Rice's parents and protesters. McGinty's statements simultaneously legitimized law enforcement, the grand jury process, law enforcement agents such as Loehmann and Garmback.²⁷³

Framing in narrative constructions, cultivation and priming theories explain the possible influences news coverage can have on consumer evaluations and judgments. We saw that the first stories about Rice's killing were sourced out of the Cleveland Police Department. In addition, the stories about Rice's parents were developed through the journalist's review of the criminal records of Ms. Rice and Mr. Warner.²⁷⁴ News representations of Rice's parents, and Rice's own culpability for his death, demonstrations, and law enforcement and prosecutorial agents mattered "because they [were] a central component in a circular process by which racial and ethnic misunderstanding and antagonism" were reproduced possibly "influence[d] []the criminal justice process."²⁷⁵

Specifically, they could also influence grand jurors. Through framing, priming and cultivating, racist and racialized narrative treatments of Rice and the protests could potentially influence grand juror judgments and attitudes, and cause them to trend toward pro-prosecutorial biases in a proceeding that was only investigative in name.²⁷⁶ Moreover, unmitigated access to legitimate and illegitimate news sources, news comments and social networks makes grand jurors highly vulnerable to the influences of prejudicial media narratives—especially in emotionally-charged controversies.

VI. GRAND JURY PROCEEDINGS AND MEDIA PUBLICITY REFORM

Currently, there is no method by which to fully mitigate against the possible influences of publicity without considering the possible First Amendment impacts. The First Amendment edict that "Congress shall make no law abridging the freedom...of the press"²⁷⁷ applies to all media. Under the First Amendment, the gathering and dissemination of *news* in particular

273. Sisak, *supra* note 269, at 227.

274. Katherine Beckett & Theodore Sasson, *Crime in the Media*, DEFENDING JUSTICE: AN ACTIVIST RESOURCE KIT, http://www.publiceye.org/defendingjustice/overview/beckett_media.html (last visited Oct. 30, 2016).

275. Robert Entman, *Blacks In The News: Television, Modern Racism, and Cultural Change*, 69 JOURNALISM Q. 341,341–361 (1992).

276. *See generally*, Pamela A. Wilkins, *Confronting the Invisible Witness: The Use of Narrative to Neutralize Capital Jurors' Implicit Racial Biases*, 115 W.VA.L. REV. 305 (2012).

277. U.S. CONST. amend. I.

(as distinct from other content genre, e.g., advertisement) has historically been regarded with special solicitude.²⁷⁸ Thus, in general, any directives that purport to impose a prior restraint²⁷⁹ upon a publication or require editors or journalists to avoid or discuss certain topics from a particular viewpoint would scarcely withstand even rational basis scrutiny.²⁸⁰

However, not all mediums are treated the same for First Amendment purposes; nor does all speech—even in the context of news—enjoy absolute protection. Print media has traditionally had the benefit of the broadest First Amendment protections.²⁸¹ Internet content has joined print media's expansive First Amendment freedoms.²⁸² Regulatory measures which might be considered unlawful when the press or internet is the regulatory object would not necessarily be unconstitutional as applied to other media such as traditional television and radio, cable, or satellite programming. Broadcast doctrines such as the Fairness Doctrine²⁸³ and anti-distortion rules²⁸⁴ seek to

278. *See, e.g.*, *Near v. Minnesota*, 283 U.S. 697 (1931).

279. *Id.*

280. *Id.*

281. RESTATEMENT (THIRD) OF TORTS §564A (AM. LAW. INST.1977).

282. The FCC is authorized to regulate Internet communications as a source of “information services” or “enhanced services.” 47 U.S.C. §153(24). Consequently, the regulatory regime of Internet communication is distinct from satellite, cable, broadcast, and certainly print.

283. Under the Fairness Doctrine, broadcasters were to 1) provide coverage of vitally important controversial issues of interest in the community served by the station, and 2) afford a reasonable opportunity for the presentation of contrasting viewpoints. *See* General Fairness Doctrine Obligations of Broadcast Licensees, Report, 50 Fed. Reg. 35,418 (Aug. 30, 1985); Steve Randall, *The Fairness Doctrine: How We Lost It, and Why We Need It Back*, FAIR: FAIRNESS & ACCURACY IN REPORTING (Jan. 1, 2005), [http:// fair.org/extra-online-articles/the-fairness-doctrine](http://fair.org/extra-online-articles/the-fairness-doctrine).

284. The FCC, in *In Re Complaints Covering CBS Program “Hunger in America,”* 20 F.C.C.2d 143 (F.C.C. 1969), outlined the elements necessary for a finding of news distortion. First, the broadcasted news presented must be deliberately distorted or slanted. It is not enough for the distortion to occur accidentally. Second, there must be extrinsic evidence of the distortion. *Id.* at 150 For example, indications that a manager told a news reporter to lie about a fact, or proof that manager received a bribe to slant the news would amount to competent evidence. *Id.* Third, the licensee must be involved, which must include “principals, top management, or news management.” *Id.* Finally, the news distortion must be “significant,” not “incidental.” *In Re Applications of WPIX, Inc. (WPIX), New York, New York for Renewal of License Forum Comm., Inc., New York, New York for Constr. Permit for New TV Broad. Station*, 68 F.C.C.2d 381, 424 (F.C.C. 1978).

bring balance and measure to news and public affairs discussion, but stand defunct or unenforced due to their uncertain constitutional soundness.²⁸⁵

285. See Lindsey C. Bohl, *Unfair Consideration of Legislative History: Two Circuit Courts' Incomplete Legislative History Inquiries and the End of the Fairness Doctrine*, 12 GEO. J. L. & PUB. POL'Y 249, 251 (2014) (acknowledging the compelling interest the scarcity rationale afforded the FCC, legal scholars rightfully worried that the ever-expanding viewing options brought on by cable and satellite would diminish the persuasive force of the scarcity rationale and any correlating utility of the Fairness Doctrine); STUART MINOR BENJAMIN et al., TELECOMMUNICATIONS LAW AND POLICY 193 (3d ed. 2012) (explaining broadcasters maintained that the Doctrine not only unduly imposed upon their editorial judgments, but had a chilling effect, and caused them to avoid topics certain to trigger its obligations.).

Broadcasters and civil libertarians alike objected to the doctrine on the grounds that it imposed artificial constraints upon the marketplace in determining the most worthwhile or necessary speech. *Id.* In 1987, the FCC eliminated the Doctrine. See also Inquiry Into Section 73.910 for the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, 2 F.C.C. Rcd. 5272 (1987) (eliminating the doctrine); Syracuse Peace Council against Television Station WTVH Syracuse, N.Y., 2 F.C.C. Rcd 5043 (1987), *reh'g granted [denied]*, 3 F.C.C. Rcd 2035 (1988).

The goal of the anti-distortion rule was to ensure the quality of broadcast news reporting by holding content producers to the highest of ethical standards. However, as seen time and again in contested broadcasts, First Amendment and censorship concerns have caused the FCC to stand down. Currently, anti-distortion rules lie dormant and effectively unenforced. *New World Comm. of Tampa, Inc. v. Akre*, 866 So. 2d 1231 (Fla. 2d Dist. App. 2003). First Amendment and censorship concerns have caused the FCC to stand down. What seems clear is that only the most obvious, intentional staging, slanting, or news distortion sanctioned by management will warrant FCC investigation. See, e.g., In the Matter of Application for Renewal of Broadcast Station License of Capstar TX LLC, subsidiary of Clear Channel Communications, Inc., For Renewal of Station License KFI, Los Angeles, CA, Petition To Deny Application For Renewal Of Broadcast Station License, File No. BR-20130801AG. (rejecting National Hispanic Media Coalition's claims of hate speech broadcasts, pointing out that it "does not censor programming material under the First Amendment," and that "'hate speech' would be an issue only after a local court" ruled on or evaluated a claim.); *In Re Universal Communications Corp.* 27 F.C.C.2d 1022 (1971)(the FCC does not "sit to review the broadcaster's news judgments." *Id.* at 1026); *In re Hunger in America*, (stating that it is "not the national arbiter of the truth[,]") and would not find a station guilty of distortion merely upon the "dispute as to the truth of an event." *Id.* at 150). . Currently, anti-distortion rules lie dormant and effectively unenforced. See *Akre*, 866 So. 2d 1231.

Moreover while gag orders imposed upon the press and lawyers can be established under ethical rules, they may be challenged on First Amendment grounds.²⁸⁶ Moreover, to the extent that remedies may impact the gathering and content of news, they too give rise to First Amendment problems.²⁸⁷ That said, within constitutional, statutory and regulatory bounds, little can be done to legally restrain media from publishing news reports of crime and matters related to crimes.²⁸⁸

Nor can reforms be considered without acknowledging that even the most common mechanisms used to mitigate media impacts are not without flaws. The cognitive tendencies discussed above ensure that any reforms will fall short of perfection. Moreover, delays in grand jury proceedings may enhance publicity and potential influences.²⁸⁹ Alternatively, change of venue works, but is expensive and time-consuming. In addition, given the ability to access remote news information electronically, the odds of obtaining unbiased outcomes through re-location is less assured.

McGinty treated his grand jury as a trier of fact under the pretense of transparency.²⁹⁰ Instead of adhering to the relatively low standard of finding probable cause for any crime—not just a crime of murder or manslaughter—credible observers viewed McGinty’s approach as an attempt to not just adjudicate, but exonerate the officers.²⁹¹ If robust investigations involving expert testimony and target testimony who retain their Fifth Amendment rights going forward, then pretrial publicity edicts which apply to adjudicative bodies must be applied to grand jury proceedings.

Where law enforcement officers are investigated for lethal use of force, fresh grand jurors should be convened. Such a rule would diminish any potential lingering influences of a juror’s prior investigations, and enable *voir dire* upon a group of prospective jurors. However, there is evidence that even the most vigorous *voir dire* cannot capably mitigate any possible effects of

286. See Comm. On Prof’l Responsibility, Assoc. of the Bar of the City of New York, *The Need for Fair Trials Does Now Justify a Disciplinary Rule that Broadly Restricts an Attorney’s Speech*, 20 FORDHAM URB. L.J. 881, 889-90 (1993); LEE LEVINE, et al., *NEWSGATHERING AND THE LAW* § 8.01 (4th ed. 2015).

287. *Id.*

288. *Id.*

289. Steblay et.al., *supra* note 133, at 226.

290. *Tamir Rice Goes Before Grand Jury*, Transcript, CABLE NEWS NETWORK (Dec. 28, 2015) <http://www.cnn.com/TRANSCRIPTS/1512/28/cnr.05.html>.

291. Ashley Fantz et al., *Tamir Rice Shooting: No Charges for Officers*, CABLE NEWS NETWORK (Dec. 28, 2015) <http://www.cnn.com/2015/12/28/us/tamir-rice-shooting/>.

prejudicial media information,²⁹² and can sometimes even increase the negative effects of pretrial publicity.²⁹³ Nonetheless, if a *voir dire* process is implemented, it would be an improvement over the current situation where grand jury *voir dire* does not take place.

Reforms should also demand that grand jurors be given a document that sets forth the court's instructions that they can keep with them.²⁹⁴ Grand jurors should have to certify on a periodic basis (daily or weekly) that they have not done so.

Grand jury instructions to disregard potentially biased media information are not enough to eliminate the effects of publicity in jurors' verdicts.²⁹⁵ The instructions should do more than just urge jurors against viewing news stories, blogs, opining online with others about the case, or using cell phones or other forms of technology to investigate case-relevant information. Instructions should also cause jurors to be suspicious of the motives behind the sources producing potentially biased information.²⁹⁶ Suspicion about the ulterior motives underlying the introduction of related information into the media or in the hearing itself has been shown to have significant effects in diminishing jurors' cognitive reliance upon publicity,²⁹⁷ and can better protect jurors from being "manipulated by non-evidentiary factors."²⁹⁸

VII. CONCLUSION

By witnessing the wide racial cleaves the Rice tragedy exposed, the emotionally charged socio-political context, and the hyper-partisan and racialized accounts that animated news stories – from legitimate and dubious media outlets alike – juror exposure to media should have been of special concern. The risks for prejudicial influence were enhanced by McGinty's

292. Hedy Red Dexter et al., *A Test of Voir Dire as a Remedy for the Prejudicial Effects of Pretrial Publicity*, 22 J. OF APP. SOC. PSYCHOL. 819 (1992) (explaining extended *voir dire* did not qualify effects of prejudicial pretrial publicity).

293. Daftary-Kapur, et.al., *supra* note 144, at 474.

294. Higgs, *supra* note 106; *Report and Recommendations of the Task Force to Examine Improvements to the Ohio Grand Jury System*, *supra* note 106 at 11.

295. Steve Fein et al., *Can the Jury Disregard That Information? The Use of Suspicion to Reduce the Prejudicial Effects of Pretrial Publicity and Inadmissible Testimony*, 23 PERSONALITY & SOC. PSYCHOL. BULL. 1215, 1223-24 (1997).

296. *Id.*

297. *Id.* at 1223.

298. *Id.* at 1224.

comments impugning Ms. Rice's motives.²⁹⁹ Especially troubling were McGinty's inferences about what constituted competent evidence. Judge Adrine's Order was certainly probative, and a prosecutor should never concede—let alone encourage—grand jurors to rely upon media reports on evidence that he should be putting before them.

This article aimed to examine the possible effects of pretrial publicity in the context of grand jury proceedings, to determine whether unlimited access to such publicity is wise—especially under circumstances where there is a charge of lethal use of force and coupled with unprecedented public outcry, protest, and attention. As seen in the aftermath of the Rice shooting (and Michael Brown, Eric Garner, and Freddie Gray—just to name a few others), lethal use of force cases raises intense public and media attention, outcry and anger.³⁰⁰ Each incident evokes critical questions of criminal justice, race and public trust in our institutions and agents. When grand jury investigations take on such in matters of extraordinary attention and consequence, the interests of justice and the right to due process of the target and the public must be equitably balanced.

299. Richard A. Oppel, Jr. & Mitch Smith, *Tamir Rice's Family Clashes with Prosecutor Over Police Killing*, N.Y. TIMES, Dec. 23, 2015, at A1.

300. Zeba Blay, *Black Influencers Express Outrage Over Dropped Freddie Gray Charges*, HUFFINGTON POST (July 27, 2016), http://www.huffingtonpost.com/entry/black-influencers-express-outrage-over-dropped-freddie-gray-charges_us_5798d78be4b0d3568f856482; Dana Ford, et al., *Protests Erupt in Wake of Chokehold Death Decision*, CABLE NEWS NETWORK (Dec. 8, 2014), <http://www.cnn.com/2014/12/04/justice/new-york-grand-jury-chokehold/>; Samantha Storey, *Outrage Over Teenager's Death Erupts on Social Media*, N.Y. TIMES (Aug. 11, 2014), <http://www.nytimes.com/2014/08/12/us/mike-brown-shooting-social-media.html>.