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THIS ISN'T A REALITY SHOW: HOW SOCIAL MEDIA LIVESTREAMS OF HIGH-PROFILE CRIMINAL TRIALS MAY VIOLATE ONE'S RIGHT TO A FAIR TRIAL

RYAN FENN[†]

INTRODUCTION

Since the invention of television in 1927,[1] the American legal system faced drastic changes.[2] In 1935, the first trial was broadcast to the public in the case of Bruno Hauptmann.[3] During the trial, "[e]laborate telegraph equipment" was installed in the courtroom, with "sound and motion picture equipment . . . plainly visible in the [courtroom] balcony."[4] From 1935 on, broadcasting technology has been utilized in the courtroom to convey the inner workings of certain courts to the public, which has stimulated debate over whether the use of this technology is conducive to a fair trial under the Sixth and Fourteenth Amendments.[5]

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[1] Sarah Pruitt, *Who Invented Television?*, HIST. (June 29, 2021), history.com/news/who-invented-television [https://perma.cc/MEP2-TNRP].

[2] *See generally History of Cameras in Courts*, U.S. CTS. [hereinafter *History of Cameras*], https://www.uscourts.gov/about-federal-courts/judicial-administration/cameras-courts/history-cameras-courts [https://perma.cc/4RAK-JLG8] (last visited Sept. 20, 2022).

[3] *See* Louis M. Seidman, *The Trial and Execution of Bruno Richard Hauptmann: Still Another Case That "Will Not Die"*, 66 GEO. L.J. 1, 13–14 (1977).

[4] *Id.* at 14.

[5] *See, e.g.*, Taffiny L. Smitch, *The Distortion of Criminal Trials Through Televised Proceedings*, 21 L. & PSYCH. REV. 257, 257–58 (1997); Floyd Abrams & Wendy Kaminer, *Cameras in the Courtroom—Should Judges Permit High-Profile Trials to be Televised*, 81 A.B.A. J. 36, 36–37 (1995); Shelley Byron Kulwin, Note, *Televised Trials: Constitutional Constraints, Practical Implications, and State Experimentation*, 9 LOY. U. CHI. L.J. 910, 910–13 (1978). Throughout this Note, broadcasting, in this context, will be defined as trials, proceedings, or other

The Supreme Court of the United States, in *Estes v. Texas*, initially found broadcasting within the courtroom to be unconstitutional under the Sixth and Fourteenth Amendments because it infringed on the defendant's right to a fair trial.[6] In a later case, *Chandler v. Florida*, the Court reversed its course, recognizing that technological conditions had changed to such an extent as to render the use of broadcasting technology in that case constitutional.[7] However, federal courts to this day remain cautious and refuse to permit cameras in the courtroom on a permanent basis, although a recent rule permits some courts to experiment with broadcasting in the courtroom.[8]

With the rise of social media, studies on fair trials have re-emerged to encompass these changing technological circumstances.[9] In particular, studies have examined how the jury and trial participants' use of social media platforms like Twitter alters the course of a trial.[10] However, one issue that has not been thoroughly addressed is how livestreaming trials on social media platforms, which consists of rewatchable videos and time-stamped commentary by news media and the public, might inhibit a criminal defendant's right to a fair trial.[11]

This Note argues that social media livestreaming involves trial coverage so pervasive that it threatens the constitutionality of the high-profile criminal trials involved, and thus is worthy of preventative measures. Part I will establish the background and

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programs sent out over television. *See Broadcast*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/broadcast (last visited Sept. 20, 2022).

[6] 381 U.S. 532, 552 (1965) (holding that the broadcasting of trials violated the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment).

[7] 449 U.S. 560, 575 (1981).

[8] FED. R. CRIM. P. 53 ("Except as otherwise provided by a statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom."); *History of Cameras*, *supra* note 2.

[9] *See generally, e.g.*, Thomas R. Romano, *Modern Media and its Effect on High-Profile Cases*, 32 SYRACUSE J. SCI. & TECH. L. 1 (2015–16).

[10] *See generally, e.g.*, *id.*; Leslie Y. Garfield Tenzer, *Social Media, Venue, and the Right to a Fair Trial*, 71 BAYLOR L. REV. 421 (2019); Mary-Rose Papandrea, *Moving Beyond Cameras in the Courtroom: Technology, the Media, and the Supreme Court*, 2012 BYU L. REV. 1901 (2012).

[11] Throughout the Note, livestreaming is defined as "transmit[ting] or receiv[ing] (video of an event, especially with commentary) on the internet [and social media platforms] while the event is taking place." *Livestream*, DICTIONARY.COM, https://www.dictionary.com/browse/livestream [https://perma.cc/F4K6-TSPA] (last visited Sept. 20, 2022).

history of broadcasting trials and court proceedings. Particularly, this Part will focus on examining the constitutional rights at issue, the Supreme Court decisions regarding broadcasting in the courtroom, and the subsequent federal and state court broadcasting policies. Part II will discuss the use of social media livestreaming capabilities in the courtroom during high-profile criminal trials and how these livestreaming capabilities prove problematic. This Part will also argue that livestreaming trials might be too burdensome on a defendant's right to a fair trial, and thus could be unconstitutional. Part III will outline and propose possible remedies that can be implemented at the state level to counterbalance the constitutional burdens livestreaming imposes so as to limit the prejudice a criminal defendant might experience at trial.

I. FROM CAMERAS TO BROADCASTING: CONSTITUTIONAL ISSUES AND RESPONSES

A. *The Constitutional Rights Surrounding Broadcasting Trials*

Criminal defendants are guaranteed certain rights under the Sixth Amendment.[12] This Amendment states, in part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State."[13] These clauses of the Sixth Amendment safeguard one's right to have one's liberty adjudicated in the form of a trial and aim to ensure that the trial is fair.[14]

Although the rights contained within the Sixth Amendment protect individuals against federal government action, the majority of these rights, including the right to a fair trial, are incorporated through the Fourteenth Amendment's Due Process Clause to protect against state action.[15] With respect to one's

[12] *See* U.S. CONST. amend. VI.

[13] *Id.*

[14] *See* Bullcoming v. New Mexico, 564 U.S. 647, 663 (2011) (quoting United States v. Gonzalez-Lopez, 548 U.S. 140, 145 (2006)).

[15] *See* Parker v. Gladden, 385 U.S. 363, 364–65 (1966) (incorporating the right to an impartial jury); Klopfer v. North Carolina, 386 U.S. 213, 222 (1967) (incorporating the right to a speedy trial); *see also* U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."). Note, while the Fourteenth Amendment only applies against state governments, there is a strong argument that not only has this issue been considered by the courts, but also that it is typically the prosecutors and state court judges who are facilitating the decisions on whether or not to televise or permit

right to a fair trial, there has been a plethora of instances in both the state and federal context where the Court has declared certain trial conditions unfair.[16] While internal conditions within a trial may render it unfair, external conditions that inevitably influence a trial might also render it unfair.[17] In particular, one condition previously discussed by scholars that has become prevalent once again is the broadcasting of trials.[18]

The broadcasting of trials involves the intersection of four particular constitutional rights that conflict with one another.[19] These rights, which must be balanced, are (1) the right of criminal defendants, witnesses, and jurors to privacy;[20] (2) the right of a criminal defendant to a public trial;[21] (3) the right to freedom of the press;[22] and (4) the right of a criminal defendant to a fair trial.[23] Of particular interest is the contrast between the freedom of the press and the right to a fair trial because these interests are discussed significantly in court decisions and are also prevalent to a greater extent when examining livestreamed trials.[24]

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media coverage with broadcasting capabilities in the courtroom. Thus, this is still a valid argument regarding constitutional rights that can be challenged, etc., by defendants against the government.

[16] *See, e.g.*, Ramos v. Louisiana, 140 S. Ct. 1390, 1400–02 (2020) (finding that a 10-2 jury verdict, rather than a unanimous verdict, was a violation of the Sixth and Fourteenth Amendments' right to a fair jury trial); Deck v. Missouri, 544 U.S. 622, 633 (2007) (finding that generally, "courts cannot routinely place defendants in shackles or other physical restraints visible to the jury during the penalty phase of a capital proceeding," as those actions violate one's right to a fair trial).

[17] *See* Moore v. Dempsey, 261 U.S. 86, 91–92 (1923) (finding public hostility, and more particularly those feelings instigated by a recent race-riot, might intimidate a jury, and thus may constitute a violation of due process). External circumstances like those in *Moore* result in courts instructing jurors and trial parties to avoid the temptations of external influences. *See* Sheppard v. Maxwell, 384 U.S. 333, 363 (1966) ("The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function.").

[18] *See generally* Estes v. Texas, 381 U.S. 532 (1965); Chandler v. Florida, 449 U.S. 560 (1981).

[19] *See Estes*, 381 U.S. at 550–52.

[20] *See* U.S. CONST. amends. IV–V, IX.

[21] *See* U.S. CONST. amend. VI; *see also* Kulwin, *supra* note 5, at 919 (referencing that some scholars have argued that a second purpose of the Sixth Amendment is "the public's right to be kept informed of what occurs in the courts.").

[22] U.S. CONST. amend. I.

[23] U.S. CONST. amend. VI. See generally Kulwin, *supra* note 5, for a discussion of the balancing of these rights.

[24] *See, e.g.*, *Estes*, 381 U.S at 539.

Several instances of unfairness might arise as a result of broadcasting trials.[25] Broadcasting trials might (1) "disrupt[ ] the proceedings and prevent[ ] the trial from acting as the 'quiet search for truth' ";[26] (2) "[have] an adverse psychological impact on some trial participants";[27] or (3) produce "widespread, prejudicial publicity about the defendant's case," thus "hamper[ing one's] ability to obtain an impartial proceeding."[28] Although prejudice or unfairness might arise in all these instances, maintaining an impartial jury should be the primary concern of the courts when addressing broadcasting's constitutionality because juries play a determinative role in adjudicating trials.

B. The Supreme Court's Approach to Media and Broadcasting in the Courtroom

Throughout the Court's jurisprudence, the Supreme Court has engaged in the balancing of constitutional rights regarding the broadcasting of trials.[29] Although the Court has not opined on this issue in the recent past, prior decisions offer significant insight on how to evaluate the constitutionality of the use of new technological capabilities in the courtroom.[30]

The seminal Supreme Court case on the broadcasting of trials was *Estes v. Texas* in 1965.[31] In *Estes*, the defendant, Billie Sol Estes, was a prominent businessman involved in a national fraud scheme that led to significant pre-trial publicity and recognition.[32] Estes's case was initially televised during a pre-trial hearing,[33] where over a dozen cameras, cables, and microphones were scattered throughout the courtroom, causing

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[25] Paul J. Yesawich, *Televising and Broadcasting Trials*, 37 CORNELL L.Q. 701, 708–11 (1952).

[26] Kulwin, *supra* note 5, at 924; *see Estes*, 381 U.S. at 550–51.

[27] Kulwin, *supra* note 5, at 924; *see Estes*, 381 U.S. at 551–52; Yesawich, *supra* note 25, at 708.

[28] Kulwin, *supra* note 5, at 924; *see Estes*, 381 U.S. at 552–53; Yesawich, *supra* note 25, at 710–11.

[29] *See, e.g.*, *Estes*, 381 U.S. at 539, 541–43; Chandler v. Florida, 449 U.S. 560, 570–71 (1981).

[30] *Estes*, 381 U.S. at 551–52; *Chandler*, 440 U.S. at 570–71, 582–83.

[31] *Estes*, 381 U.S. at 536–38.

[32] Robert D. McFadden, *Billie Sol Estes, Texas Con Man Whose Fall Shook Up Washington*, N.Y. TIMES (May 14, 2013), https://www.nytimes.com/2013/05/15/us/billie-sol-estes-texas-con-man-dies-at-88.html [https://perma.cc/W5MT-4BY2].

[33] *Estes*, 381 U.S. at 536.

significant disruptions.[34] Modifications were later made during the actual trial, with a booth "constructed at the back of the courtroom" and "[a]ll television cameras and newsreel photographers . . . restricted to the area of the booth when shooting film or telecasting."[35] With these modifications, openings and summations were broadcast repeatedly throughout the day with live sound.[36]

In *Estes*, the Court weighed maintaining a proper administration of justice against the freedom of the press, finding that trial publicity is favored as long as it "can be attained without injustice," or actual bias, to the defendant.[37] Applying this standard, a plurality of the Court found broadcasting trials to be problematic for several reasons,[38] including broadcasting's potential to (1) impair the quality of testimony,[39] (2) require the judge to take on additional responsibilities,[40] and (3) impact the defendant and paint them in a negative light.[41]

The *Estes* Court, however, primarily concerned itself with a fourth issue: broadcasting's impact on jurors.[42] In particular, the Court highlighted several issues that could amount to a tainting of the jury, including the failure to sequester the jury and the community's access to information regarding the facts and charges prior to trial, both of which could increase the potential for prejudice.[43] The Court opined on the fact that without sequestration, jurors might be pressured by neighbors who have developed their own conclusions on the case based on the media coverage offered.[44] It also noted that jurors might have the opportunity to review selected portions of the trial on television.[45] The Court thus declared the broadcasting of trials to be

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[34] *Id.* at 536–37.

[35] *Id.* at 537.

[36] *Id.* Also note that this was a notorious crime and trial, well known throughout the community. *Id.*

[37] *Id.* at 540–43 (finding that the media and public's rights exercised through televised trials could easily be attained by the public attending proceedings in person, as well as reporters attending and recording such results via pen and paper).

[38] *Id.* at 544–45.

[39] *Id.* at 547–48.

[40] *Id.* at 548.

[41] *Id.* at 549–50.

[42] *Id.* at 545–46.

[43] *Id.*

[44] *Id.* at 546.

[45] *See id.*

unconstitutional,[46] with the following limiting language in place to guide future courts:

> It is said that the ever-advancing techniques of public communication and the adjustment of the public to its presence may bring about a change in the effect of telecasting upon the fairness of criminal trials. But we are not dealing here with future developments in the field of electronics. Our judgment cannot be rested on the hypothesis of tomorrow but must take the facts as they are presented today.[47]

Thus, implicit in the Court's limiting language was the possibility that future advancements in technology might lead to different outcomes in subsequent cases questioning the constitutionality of broadcasting trials.[48]

Following the advancement of technology, the Supreme Court changed course in 1981 with the case of *Chandler v. Florida*.[49] Even with the trial court placing significant restrictions on the press within the courtroom during the trial,[50] the Supreme Court indicated that the Florida policy gave judges "discretionary power to *forbid* coverage whenever [they are] satisfied that coverage may have a deleterious effect on the paramount right of the defendant to a fair trial."[51] The Court, however, found the broadcasting of that trial to be constitutional, relying on a close reading of Justice Harlan's concurrence in *Estes* to discredit the proposition that *Estes* recognized a constitutional bar on broadcasting trials under all circumstances.[52]

To reach this decision, the Court reviewed the case as a matter of first impression, reasoning that to prevent the broadcasting of a trial, a defendant must "demonstrate that the

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[46] *See id.* at 534–35.

[47] *Id.* at 551–52.

[48] *Id.*

[49] *See generally* Chandler v. Florida, 449 U.S. 560 (1981).

[50] *See id.* at 566, 568 (detailing how broadcasting was only permitted briefly during the Prosecution's case in chief and closing arguments).

[51] *Id.* at 566 (emphasis added).

[52] *Id.* at 571–73 (detailing how Justice Harlan weighed considerations such as intimidating witnesses and "distorting the integrity of the judicial process" against the benefits of "educational and informational value to the public"). In Harlan's concurrence, he also indicates that while there is no absolute ban on broadcasting trials, in notorious criminal trials, "the considerations against allowing television in the courtroom so far outweigh the countervailing factors advanced in its support as to require a holding that [such broadcasting] infringed the fundamental right to a fair trial." *Estes*, 381 U.S. at 587–89 (Harlan, J., concurring).

media's coverage of his case . . . compromised the ability of the particular jury that heard the case to adjudicate fairly."[53] Applying this rule in conjunction with the limiting language of the plurality opinion in *Estes*, the Court noted that technology has improved to the point that many of the issues that concerned the Court in *Estes* were no more.[54] This reasoning allowed the Court to conclude that there is no absolute constitutional ban on broadcasting trials, and in the case of *Chandler*, the particular use of broadcasting was constitutional.[55]

These rules are important to weigh when approaching the issue at hand. In particular, the Court in *Estes* highlighted the possible impact on trial participants, placing specific emphasis on the potential tainting of the jury.[56] Thus, there is no doubt that the Supreme Court recognized that the broadcasting of these trials could have a negative impact on jurors deciding the case.[57] However, while relying on the possible issues with broadcasting laid out by the *Estes* plurality, the *Chandler* Court disregarded the remainder of the plurality opinion by creating a rule that placed the burden on the defendant to prove they suffered actual bias and by emphasizing technology's less burdensome and distracting characteristics as a relevant factor.[58] It is also important to note that *Chandler* did not hold that these trials could never be unconstitutional—only that they are not automatically unconstitutional.[59] Therefore, the potential

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[53] *Chandler*, 449 U.S. at 575.

[54] *Id.* Note that today, the physically burdensome nature of broadcasting is no more, with filming and livestreaming capabilities being almost seamless. *See infra* Part II.

[55] *Chandler*, 449 U.S. at 574–75. Note that the Court mentions how there is a procedural issue that requires an evidentiary hearing showing prejudice or unfair influence on the jury, and how the defendant did not request such a hearing nor offered any proof of such an effect. *Id.* at 577. It is also important to note that the court held that the defendant must prove with specificity that the acts tainted or biased the jurors, and that since jurors are instructed to not look at television, the media's presence would not have an impact. *Id.* at 575. However, this is not always plausible because jurors continuously ignore jury instructions. *See infra* Section III.A. Thus, where there is a hint of bias against the defendant, the court should be more willing to prevent an additional benefit conferred on the media, which in considering the big picture, does not interfere with the ultimate role of media.

[56] *Estes*, 381 U.S. at 545–46.

[57] *Id.*

[58] *See Chandler*, 449 U.S. at 575.

[59] *See id.* at 574–75 ("An absolute constitutional ban on broadcast coverage of trials cannot be justified simply because there is a danger that, in some cases,

prejudices that could arise from broadcasting trials as referenced in *Estes* are still valid considerations.

C. Broadcasting Policies and Courtroom Guidelines Post-Chandler

Following the Court's decision in *Chandler*, the federal courts' approach to broadcasting trials differed significantly from that of the state courts. In 1972, the Judicial Conference of the United States adopted a prohibition against "broadcasting, televising, recording, or taking photographs in [federal] courtroom[s] and areas immediately adjacent [to such courtrooms]."[60] In the recent past, federal courts have permitted some experimentation in this area, including what is known as its "pilot program."[61] In a three-and-a-half year window beginning in 2011, when the program was renewed, fourteen federal district courts posted on their websites hundreds of hours of proceedings ranging from status conferences to trials.[62] While no predicaments were evident from the pilot program, federal courts refused to implement the program expansively on a full time basis in 2016.[63]

By contrast, all fifty states, to some degree, permit broadcasting within their respective courtrooms.[64] The extent of such broadcasting, however, is highly dependent on specific state rules that weigh different factors and policy goals.[65] Changing

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prejudicial broadcast accounts of pretrial and trial events may impair the ability of jurors to decide the issue of guilt or innocence uninfluenced by extraneous matter.").

[60] *History of Cameras*, *supra* note 2.

[61] *Id.*; Jordan M. Singer, *Judges on Demand: The Cognitive Case for Cameras in the Courtroom*, 115 COLUM. L. REV. SIDEBAR 79, 80 (2015) (detailing how federal courts have experimented minimally with cameras in the courtroom since 1990).

[62] Singer, *supra* note 61, at 79.

[63] *History of Cameras*, *supra* note 2. *But see* Singer, *supra* note 61, at 92 (discussing that the advantages of the pilot program include not only allowing "future court participants . . . to better understand and anticipate the nature of federal district court activity," but also to "profitably refocus[ ] public attention from the unusual and sensational cases to the routine and important work the courts do every day").

[64] Ruth Ann Strickland, *Cameras in the Courtroom*, FIRST AMEND. ENCYCLOPEDIA (2009), https://www.mtsu.edu/first-amendment/article/989/cameras-in-the-courtroom [https://perma.cc/C93T-LYTH] (last visited Sept. 20, 2022).

[65] The Minnesota procedures for criminal televised trials are as follows:

> In criminal proceedings . . . a judge may authorize, with the consent of all parties in writing or made on the record prior to the commencement of the trial, the visual or audio recording and reproduction of appropriate court

societal factors may alter these policies, which in turn, might impose greater risks to a defendant's constitutional rights. For example, as a result of the recent COVID-19 pandemic, Minnesota, which is known for having one of the most restrictive broadcasting policies, permitted a more liberal understanding of its policy to expand the court's transparency and availability to the public.[66]

Where courts make the decision to livestream or broadcast trials, state judges must be constantly vigilant to ensure that the jury is not compromised by such media coverage.[67] In particular, the American Bar Association ("ABA") provides relevant guidance for judges on their responsibility and the role of the jury.[68] According to these guidelines, the trial judge is required to advise the jury that it is the sole judge of facts and witness credibility, and that jurors must base their conclusions on only the evidence heard and presented at trial.[69] Thus, jurors cannot

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> proceedings. Coverage under this paragraph is subject to the following limitations:
>
> (i) There shall be no visual or audio coverage of jurors at any time during the trial, including *voir dire*.
>
> (ii) There shall be no visual or audio coverage of any witness who objects thereto in writing or on the record before testifying.
>
> (iii) Visual or audio coverage of judicial proceedings shall be limited to proceedings conducted within the courtroom, and shall not extend to activities or events substantially related to judicial proceedings that occur [elsewhere].

See MINN. R. GEN. PRAC. 4.02. On the contrary, with the exception of party and witness testimony, New York's guidelines permit audio-visual coverage of court proceedings to the fullest extent possible so as to "maintain the broadest scope of public access to the courts, to preserve public confidence in the Judiciary, and to foster public understanding of the role of the Judicial Branch in civil society." *See* N.Y. COMP. CODES R. & REGS. tit. 22, § 131.1. Other states have each adopted their own policies regarding this. *See generally, e.g.*, *id.*

[66] Tami Abdollah, *They Need to be Watched: How Livestreaming the Derek Chauvin Trial Lets People of Color Monitor the Justice System*, USA TODAY (Mar. 29, 2021), https://www.usatoday.com/story/news/nation/2021/03/29/derek-chauvin-trial-how-livestream-lets-people-monitor-justice-system/4757702001/ [https://perma.cc/4NVY-CHVA] (detailing how this was Minnesota's first criminal trial broadcast and its first trial ever livestreamed and that the respective judge "made an exception because of the public interest and because the coronavirus pandemic . . . limited how many people can be in the courtroom").

[67] *See How Courts Work: Instructions to the Jury*, A.B.A. (Sept. 9, 2019) [hereinafter *Instructions to the Jury*], https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/juryinstruct/ [https://perma.cc/34NJ-ANTV].

[68] *Id.*

[69] *Id.*

base their judgment on anything heard or seen beyond the scope of the courtroom and their basic reason.[70] As a result, in most cases, judges will issue standard jury instructions recognizing the potential for external bias that jurors might be exposed to for the purpose of trying to prevent any possible tainting of the jury.[71] In particular, the ABA guidelines recommend instructing the jury "not to read or view reports of the case in the news" or to discuss or consider the case outside of the jury room.[72]

Recently, however, the rise of more advanced social media functions has threatened the possibility of juror compliance with these instructions. With society's dependence on technology and social media, along with the instantaneous access to livestreamed trials and commentary, the risk of tainting the jury is in tension with constitutional limits.

II. LIVESTREAMING TRIALS AND ITS CONSTITUTIONALITY

A. *The Current Problem with Livestreaming Trials*

With recent advancements in technology, social media has come to the forefront of society.[73] Social media use among adults—those eligible for jury duty—is most prevalent among eighteen to sixty-four year olds.[74] Moreover, social media platforms generally contain a news aspect that provides the public with access to national and global news instantaneously.[75]

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[70] *Id.*

[71] *How Courts Work: Jury Deliberations*, A.B.A. (Sept. 9, 2019) [hereinafter *Jury Deliberations*], https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/jurydeliberate/ [https://perma.cc/KB9P-6WA9].

[72] *Id.*

[73] *Social Media Fact Sheet*, PEW RSCH. CTR. (Apr. 7, 2021), https://www.pewresearch.org/internet/fact-sheet/social-media/ [https://perma.cc/9BTK-HZZ2] (indicating that as of February 8, 2021, seventy-two percent of Americans use some form of social media).

[74] *Id.* (noting that over eighty percent of adults aged eighteen to forty-nine use some social media, and that over seventy percent of adults aged fifty to sixty-four use social media).

[75] Nicole Martin, *How Social Media Has Changed How We Consume News*, FORBES (Nov. 30, 2018, 4:26 PM), https://www.forbes.com/sites/nicolemartin1/2018/11/30/how-social-media-has-changed-how-we-consume-news/?sh=40a926783c3c [https://perma.cc/B3ZV-NCWU]; Monica Anderson & Andrea Caumont, *How Social Media Is Reshaping News*, PEW RSCH. CTR. (Sept. 24, 2014), https://www.pewresearch.org/fact-tank/2014/09/24/how-social-media-is-reshaping-news/ [https://perma.cc/AX7Q-PLUK].

Consequently, recent studies have focused on social media's role in the broadcasting of trials, including how the public's increased use of social media might hinder criminal defendants' right to a fair trial.[76] Within this literature, however, courts and scholars have not addressed the impact that social media livestreams and playback options might have on one's constitutional right to a fair trial.

Livestreams on social media are a main source of updates on national news stories for the majority of the population.[77] Several different platforms utilize livestreaming technology, including Instagram, YouTube, Twitter, and most importantly, Facebook.[78] Facebook, whose platform has corollaries with other social media platforms, allows followers to view a livestream video instantaneously.[79] The platform also posts the video to the streamer's page and followers' news feeds immediately after the stream ends, allowing followers to rewatch the video.[80] Comments from the initial livestream are recorded and timestamped, so individuals rewatching the stream can view unfiltered commentary about a particular point in a livestream when rewatching that specific portion.[81] In the context of trials, this commentary might be read in conjunction with the portions of the trial being viewed so that they correspond with one

[76] *See, e.g.*, Nancy S. Marder, *Jurors and Social Media: Is a Fair Trial Still Possible*, 67 SMU L. REV. 617, 650–60 (2014) (detailing how the rise in social media has tainted juror impartiality and the right to a fair trial, while recommending that courts take a "process view of a juror's education" including polling, orientation videos, etc., to educate jurors on the harm of breaking protocol and turning to social media); Miland F. Simpler II, *The Unjust Web We Weave: The Evolution of Social Media and Its Psychological Impact on Juror Impartiality and Fair Trials*, 36 L. & PSYCH. REV. 275, 295–96 (2012) (discussing the difficulties present in conducting fair trials with the rise of social media and the indirect exposure to prejudicial or biased materials, while also informing on and recommending more thorough jury instructions to confine juror actions through punitive elements).

[77] Amber van Moessner, *Getting Started with Social Media Live Streaming Software: What You Need to Know*, LIVESTREAM, https://livestream.com/blog/social-media-streaming-livestream [https://perma.cc/2F5E-XXDD] (last visited Sept. 20, 2022).

[78] Stacey McLachlan, *The Ultimate Guide to Social Media Live Streaming in 2020*, HOOTSUITE: BLOG (Apr. 22, 2020), https://blog.hootsuite.com/social-media-live-streaming/ [https://perma.cc/6JPG-TV6G].

[79] James Parsons, *What Happens to Facebook Live Videos After You Stream?*, BOOSTLIKES (July 29, 2018), https://boostlikes.com/blog/2018/07/facebook-live-videos-stream [https://perma.cc/W3R8-5YHB].

[80] *Id.*

[81] *Id.*

another.[82] For several recent high-profile trials, major media outlets like CNN, Fox News, and MSNBC, which all have significant followings,[83] livestreamed the proceedings from their social media pages for the nation to observe.[84]

Where jurors are not sequestered, the issue with livestreaming trials arises.[85] Permitting jurors to return home after the trial each day leaves them potentially exposed to livestreams and accompanying commentary on the trial they are rendering a verdict for.[86] Such external influences may bias the jury and thus could threaten a defendant's right to a fair trial as discussed in *Estes*.[87]

B. Emanations of the Problem: Casey Anthony and Derek Chauvin

The issues arising from not sequestering the jury during a livestreamed trial are even more pronounced in high-profile criminal cases.[88] In recent high-profile cases, courts permitted social media and, in later cases, livestreaming within the

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[82] *See id.*

[83] *See, e.g.*, CNN, FACEBOOK, https://www.facebook.com/cnn/ [https://perma.cc/9PPB-5PWE] (last visited Sept. 20, 2022); FOX News, FACEBOOK, https://www.facebook.com/FoxNews/ [https://perma.cc/9GQQ-44XC] (last visited Sept. 20, 2022).

[84] Brian Steinberg, *TV News Prepares for Derek Chauvin Trial in Post-Trump Era*, VARIETY (Mar. 25, 2021, 1:45 PM), https://variety.com/2021/tv/news/tv-news-derek-chauvin-trial-coverage-george-floyd-1234938326/ [https://perma.cc/KUZ3-8X8Y].

[85] *See generally* Ralph Artigliere, *Sequestration for the Twenty-First Century: Disconnecting Jurors from the Internet During Trial*, 59 DRAKE L. REV. 621 (2011).

[86] *See* Nicholas Carr, *How Smartphones Hijack Our Minds*, WALL ST. J. (Oct. 6, 2017), https://www.wsj.com/articles/how-smartphones-hijack-our-minds-1507307811 [https://perma.cc/EJ55-UBD5].

[87] *See supra* Section I.B.

[88] Matt Sepic, *Televised Chauvin Trial Due to Pandemic Yields Wide Access—and Concern*, NPR (Mar. 29, 2021), https://www.npr.org/sections/trial-over-killing-of-george-floyd/2021/03/29/982234571/televised-chauvin-trial-due-to-pandemic-yields-wide-access-and-concern [https://perma.cc/NTQ5-YVKC]; Abdollah, *supra* note 66; John Cloud, *How the Casey Anthony Murder Case Became the Social-Media Trial of the Century*, TIME (June 16, 2011), http://content.time.com/time/nation/article/0,8599,2077969,00.html [https://perma.cc/3DJJ-RKUF]. In this Note, high-profile trials are generally those trials that involve either celebrities or extensive pre-trial media coverage as to make the nation aware of the facts and theories behind the case. *Id.*

courtroom to convey the events of the trial to the public.[89] In the trial of Casey Anthony, a mother was charged with murdering her daughter.[90] During the trial, commentary about the case was extensive on social media, with over 400 bloggers posting on the court's Twitter page and the hashtag "caseyanthony" being mentioned over 34,000 times after only two days of trial.[91] After Casey Anthony was found not guilty of first-degree murder and aggravated manslaughter of a child, there was significant public outrage, particularly because social media and broadcasting portrayed her as "unbothered" during selected portions of the trial.[92]

Similarly, in the trial of Derek Chauvin, there was significant Twitter commentary on the events of the trial.[93] This trial, however, was also livestreamed on the social media pages of major news outlets like CNN and Fox News.[94] During the trial, protests occurred outside the courthouse daily that were frequently mentioned by the media.[95] At these protests, both the public and politicians called for a guilty verdict using occasionally charged language.[96] Because the Chauvin jury was

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[89] Brian Stelter & Jenna Wortham, *Watching a Trial on TV, Discussing it on Twitter*, N.Y. TIMES (July 5, 2011), https://www.nytimes.com/2011/07/06/business/media/06coverage.html [https://perma.cc/9J6Z-AJPQ].

[90] Cloud, *supra* note 88.

[91] *Id.*; Walter Pacheco, *Casey Anthony Trial: Social Media Revolutionized Coverage*, ORLANDO SENTINEL (July 5, 2011, 9:01 PM), https://www.orlandosentinel.com/news/orange-county/os-casey-anthony-twitter-facebook-20110704-story.html [https://perma.cc/PCE7-QNR8].

[92] *See* Kristin R. Brown, *Somebody Poisoned the Jury Pool: Social Media's Effect on Jury Impartiality*, TEX. WESLEYAN L. REV. 809, 824–25 (2013).

[93] *See #DerekChauvinTrial*, TWITTER, https://twitter.com/search?q=%23DerekChauvinTrial&lang=en [https://perma.cc/XS3L-KVW4] (last visited Sept. 20, 2022); Peter Suciu, *Guilty Verdict in Derek Chauvin Trial Blows Up Twitter*, FORBES (Apr. 20, 2021), https://www.forbes.com/sites/petersuciu/2021/04/20/guilty-verdict-in-derek-chauvin-trial-blows-up-twitter/?sh=7644b6b79c06 [https://perma.cc/GY35-JVS4].

[94] Brooke Cain, *Verdict Expected in Derek Chauvin Murder Trial: Here's How to Watch*, NEWS & OBSERVER (Apr. 20, 2021, 6:13 PM), https://www.newsobserver.com/news/local/article250780049.html.

[95] *Id.*; Maureen Chowdhury, *Crowd Outside Courtroom Chants "Justice" and "Black Lives Matter" Following Guilty Verdict*, CNN (Apr. 20, 2021, 5:48 PM), https://www.cnn.com/us/live-news/derek-chauvin-trial-04-20-21/h_17315d217a7f4e20721c8a73d714dc82 [https://perma.cc/CM8Q-NJS8].

[96] *See* Clyde McGrady, *Outside the Courthouse, Minneapolis Weighs the Meaning of the Chauvin Trial*, WASH. POST (Mar. 31, 2021, 9:25 AM), https://www.washingtonpost.com/lifestyle/chauvin-floyd-trial-minneapolis-waits-for-justice/2021/03/31/19ce18b6-9184-11eb-9af7-fd0822ae4398_story.html [https://perma.cc/A8TQ-3ZLS] (detailing how a pastor said that if Chauvin is not convicted, "[l]et the whole damn

not sequestered throughout the trial, jurors might have been exposed to these protests, statements, and more importantly, livestreams.[97] Ultimately, Derek Chauvin was found guilty of the most serious charge brought, Second-Degree Murder.[98]

Although these cases came to different outcomes, there is no question that potential for unfair prejudice existed in both cases.[99] Jurors were possibly exposed to the livestreams and commentary on these trials through the constant news and social media coverage of the trials and the national protests surrounding them.[100] This potential for juror bias leads to a significant question: Do improved livestreaming capabilities produce trial conditions that threaten a defendant's right to a fair trial?

C. Permitting the Livestreaming of High-Profile Trials: Is it Constitutional?

Prosecutors and courts requesting or permitting the livestreaming of high-profile criminal trials could lead to an unconstitutional deprivation of a defendant's right to a fair trial. Even if the livestreaming of high-profile criminal trials is constitutional, certain actions should be taken to limit the extent of potential prejudice against the defendant.

It is first important to address the constitutional standard adopted in *Chandler*.[101] Although the Court in *Chandler* relied on Justice Harlan's opinion in *Estes*, it failed to recognize that Justice Harlan did not promulgate the constitutionality of

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city burn if that's what it takes"); Chandelis Duster, *Waters Calls for Protesters to "Get More Confrontational" If No Guilty Verdict Is Reached in Derek Chauvin Trial*, CNN (Apr. 19, 2021, 8:32 PM), https://www.cnn.com/2021/04/19/politics/maxine-waters-derek-chauvin-trial/index.html [https://perma.cc/DYN4-9U9R].

[97] Amudalat Ajasa, *The Protesters Who Gather Every Day to Demand Justice for George Floyd*, GUARDIAN (Apr. 8, 2021, 6:00 AM), https://www.theguardian.com/us-news/2021/apr/08/derek-chauvin-trial-minneapolis-george-floyd-protesters [https://perma.cc/RL97-QAJH]; Laurel Wamsley, *Chauvin Trial Judge Denies Request for Jury Sequestration After Police Shooting*, NPR (Apr. 12, 2021, 12:08 PM), https://www.npr.org/sections/trial-over-killing-of-george-floyd/2021/04/12/986444151/chauvin-trial-judge-denies-request-for-jury-sequestration-after-police-shooting [https://perma.cc/R8BP-PAND].

[98] John Eligon et al., *Derek Chauvin Verdict Brings a Rare Rebuke of Police Misconduct*, N.Y. TIMES, https://www.nytimes.com/2021/04/20/us/george-floyd-chauvin-verdict.html (June 25, 2021).

[99] Cloud, *supra* note 88; Abdollah, *supra* note 66.

[100] *See* Abdollah, *supra* note 66.

[101] *See generally* Chandler v. Florida, 449 U.S. 560 (1965).

broadcasting trials.[102] Rather, Justice Harlan's concurrence recognized that the broadcasting of notorious trials might be unconstitutional and require protections in favor of criminal defendants.[103] The *Chandler* Court's weighing of the rights discussed in Part I, however, appears to favor the rights of the media and the public over constitutional protections for criminal defendants by establishing a requirement that defendants prove actual jury bias.[104] This standard misconstrues Justice Harlan's opinion by wrongfully placing the burden on the prejudiced defendant, making it more challenging to prove a constitutional violation since juror bias is not easily detected.[105] Instead, Justice Harlan's opinion should be construed as assuring a defendant's right to a fair trial where any danger of unfair prejudice might taint the jury's reasoning so that they cannot fulfill the proper role of a jury in accordance with ABA Guidelines.[106]

It is also the case that protecting criminal defendants where their freedom might be taken away significantly outweighs the right that news media has to media coverage.[107] In the past, the Court has abided by the least burdensome option principle in different constitutional contexts on multiple occasions.[108] This principle reasons that if one's constitutional rights can be exercised in a manner that does not have the potential to interfere with, or is least burdensome to, another's constitutional rights, that least burdensome option should be implemented.[109]

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[102] *Id.*

[103] Estes v. Texas, 381 U.S. 532, 587 (1965) (Harlan, J., concurring) ("[T]he considerations against allowing television in the courtroom so far outweigh the countervailing factors advanced in its support as to require a holding that [such broadcasting] infringed the fundamental right to a fair trial.").

[104] *Chandler*, 449 U.S. at 575.

[105] Ryan Winter & Jon Vallano, *Lies During Jury Selection: What Are the Costs?*, AM. PSYCH. ASS'N (Sept. 2014), https://www.apa.org/monitor/2014/09/jn [https://perma.cc/RW7R-BU8Y].

[106] *See Estes*, 381 U.S. at 552; *Instructions to the Jury*, *supra* note 67; *Jury Deliberations*, *supra* note 71.

[107] *See* Alberto Bernabe, *Prior Restraints on the Media and the Right to a Fair Trial: A Proposal for a New Standard*, 84 KY. L.J. 259, 264–66 (1996).

[108] *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 874–75 (1992).

[109] *See, e.g.*, *id.*; Jack B. Swerling, *Right to Free Speech Versus the Right to a Fair Trial—Balancing Competing Constitutional Interests*, 42 S.C. L. REV. 901, 909 (1991) (discussing how no comment rules for attorneys require that the regulation occurring must concern a substantial government interest, and that the regulation is "narrowly tailored" to that interest); KATHLEEN ANN RUANE, FREEDOM OF SPEECH AND PRESS: EXCEPTIONS TO THE FIRST AMENDMENT 5, 6, 9 (2014). This standard

Where trials are not broadcast, reporters still have access to the courtroom and can notify the public of the events therein through pen and paper reporting.[110] While not providing a direct view into the court process, this method is sufficient to notify the public of the judiciary's actions without substantially infringing on a defendant's right to an impartial jury.[111] Although one might argue that prohibiting livestreaming infringes significantly on the freedom of the press, this is inconsequential because the media and public's right of access to the courtroom is not absolute,[112] especially where the court feels the need "to protect a defendant's right to a fair trial by an impartial jury."[113] Instead, one's right to have their liberty fairly adjudicated is always absolute, so the right to a fair trial must outweigh the media's rights where there is potential for jury bias, unless there are ways to limit this bias.[114] Therefore, because livestreaming has the potential to bias the jury where a criminal case is highly publicized, such livestreaming on its face could be unconstitutional.[115]

Court justifications behind using jury instructions to dissipate the taint of juror bias are not always accurate.[116] Jury instructions, especially those concerning social media, can be ineffective at times for various reasons.[117] Where sequestration is not implemented, courts typically play no supervisory function to ensure that jury instructions are followed.[118] Rather, courts

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should be extended to this sector of the law to ensure criminal defendants maintain their right to a fair trial through limiting the jurors' potential exposure to external factors and commentary.

[110] *See Estes*, 381 U.S. at 540–43.

[111] *See* Samuel S. Wilson, *Chaos in the Courtroom: Adequate Press Facilities for Highly Publicized Trials*, 36 U. CIN. L. REV. 210, 210–11 (1967).

[112] *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 557, 567 (1980).

[113] Emilie S. Kraft, *Access to Courtrooms*, FIRST AMEND. ENCYCLOPEDIA, https://www.mtsu.edu/first-amendment/article/1547/access-to-courtrooms [https://perma.cc/DTK9-BVV8] (last visited Sept. 20, 2022).

[114] *See id.*

[115] *Id.*

[116] *See* James M. Wicks, et al., *Social Media Jury Instructions Report*, N.Y. BAR ASS'N 1, 1–2, 7–11 (Dec. 8, 2015), https://nysba.org/app/uploads/2020/02/Final-Social-Media-Jury-Instruction-Report-12-14-15-00076680@x9DDAB.pdf [https://perma.cc/B3Z4-8CF5].

[117] *Id.* Because a juror accessing social media is difficult to identify, especially since judges do not always permit attorneys to track juror social media use, *id.* at 9, it is difficult to identify accurate statistics on whether jurors follow jury instructions, *id.*

[118] *See, e.g.*, *id.*

maintain a " 'presumption' that jurors understand and follow their instructions."[119] However, mistrials have occurred in many cases after jurors were caught disobeying the jury instructions.[120] While these instances were identified by judges, there are likely many other instances where this potential tainting was not identified.[121] Similarly, unlike researching a case, which involves a direct effort to look up facts, checking social media is instinctual, making it more likely that jurors will violate the jury instructions accidentally.[122] Therefore, if livestreaming high-profile criminal trials has the potential to be unconstitutional, it is essential for states to implement stricter guidelines limiting jury access beyond jury instructions to dissipate the taint of external media bias on the jury, which this next Part aims to address.[123]

III. REMEDIES TO DISSIPATE THE POTENTIAL FOR JURY BIAS

A. Available Remedies to Counteract Livestreaming's Constitutional Taint

Traditional remedies, such as jury instructions, are less effective in the context of social media livestreaming because of the almost automatic nature of the internet and social media.[124] Judges, legislators, and scholars must recognize the impact these changes might have on jurors during a criminal trial and the synergies between the public and social media to properly limit livestreaming's taint on the jury.[125] However, several past

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[119] Gacy v. Welborn, 944 F.2d 305, 313 (7th Cir. 1993).

[120] John Schwartz, *As Jurors Turn to Web, Mistrials are Popping Up*, N.Y. TIMES (Mar. 17, 2009), https://www.nytimes.com/2009/03/18/us/18juries.html (detailing different cases where judges found violations of jury instructions by jurors including scenarios of researching the case and using social media); Brian Grow, *As Jurors Go Online, U.S. Trials Go off Track*, REUTERS (Dec. 8, 2010), https://www.reuters.com/article/us-internet-jurors/as-jurors-go-online-u-s-trials-go-off-track-idUSTRE6B74Z8 20101208 [https://perma.cc/9ENM-A3YK].

[121] Brian Grow, *As Jurors Go Online, U.S. Trials Go off Track*, REUTERS (Dec. 8, 2010), https://www.reuters.com/article/us-internet-jurors/as-jurors-go-online-u-s-trials-go-off-track-idUSTRE6B74Z820101208 [https://perma.cc/9ENM-A3YK].

[122] *Id*.

[123] *See infra* Part III.

[124] *See* Carpenter v. United States, 138 S. Ct. 2206, 2220 (2018) ("[C]ell phones and the services they provide are 'such a pervasive and insistent part of daily life' that carrying one is indispensable to participation in modern society." (quoting Riley v. California, 573 U.S. 373, 385 (2014))). *See generally* Artigliere, *supra* note 85.

[125] *See id.* at 646–47.

remedies, including the sequestration of juries, transferring venue, voir dire, and delivering jury instructions, remain plausible solutions, but require further adjustments to properly reflect livestreaming capabilities.[126]

Sequestration is the physical isolation of jurors from the public.[127] How to sequester a jury is discretionary, but many judges opt to move jurors to hotels, where they are kept under twenty-four hour surveillance, "denied access to outside media such as television and newspapers, and allowed only limited contact with their families."[128] Sequestration serves two purposes.[129] It prevents jury tampering and protects against accidental jury tainting through external influences.[130] Significant challenges exist with sequestration however.[131] Sequestration is very expensive,[132] can negatively stress jurors and take a toll on their mental health,[133] and jurors "unduly upset by their ordeal" might "capitulate to the will of the majority in hopes of speeding up a verdict."[134] Thus, sequestration is rare and only "reserved for cases that promise to receive frenzied, inescapable media saturation."[135]

Another possible remedy is a transfer of venue, which occurs when the court moves the case to a different location or jurisdiction in an attempt to limit bias arising from the local jury pool.[136] Typically, a court will only transfer a case due to prejudice where it is clear that "so great a prejudice against the

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[126] *See* Romano, *supra* note 9, at 27–31.

[127] *See Sequestration*, AM. L. & LEG. INFO. [hereinafter *Sequestration*], https://law.jrank.org/pages/10160/Sequestration.html [https://perma.cc/N6X4-MPMY] (last visited Sept. 20, 2022).

[128] *Id.*

[129] *Id.*

[130] *Id.* While juror sequestration is rare, it is often used in high-profile cases, such as O.J. Simpson's trial in 1995, where the jury was sequestered for over eight months. *Id.*

[131] *Id.*

[132] James P. Levine, *The Impact of Sequestrations on Juries*, 79 JUDICATURE 266, 272 (1996); Romano, *supra* note 9, at 28–29 (detailing how the O.J. Simpson trial cost over three million dollars to sequester the jury for eight months).

[133] Levine, *supra* note 132, at 269–70 (detailing how the extensive time jurors might spend sequestered often can take its toll on jurors, influencing their behavior during trial and their perception of jury duty).

[134] *Id.* (discussing how the verdicts in the O.J. Simpson and Chicago Seven cases likely came about from jurors altering their mindsets after a split jury due to sequestration); Romano, *supra* note 9, at 28–29.

[135] Levine, *supra* note 132, at 272.

[136] *See* FED. R. CRIM. P. 21.

defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there."[137] Because the 24/7 news cycle coverage spans nationally, change of venue has recently been less effective, especially in the context of high-profile cases.[138] Thus, transfer is a less viable solution to address the livestreaming of high-profile criminal trials because those cases typically receive the most national news coverage.[139]

Similar challenges are present in a third available remedy: voir dire.[140] Voir dire is "[t]he process through which potential jurors . . . are questioned by either the judge or a lawyer to determine their suitability for jury service."[141] This process aims to "identify jurors who can be fair and impartial, rather than unfair and biased regarding a particular party or the entire criminal justice system."[142] Courts typically presume that jurors are impartial following voir dire.[143] However, voir dire is "not entirely effective when the media reports on a high-profile case" because finding a juror "who has not heard about or formed an opinion regarding a high-profile case that is featured on the news is very difficult, if not impossible."[144]

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[137] *Id.*

[138] Romano, *supra* note 9, at 29 ("[W]ith the increase in technological advances, particularly . . . Facebook and widespread coverage, changing the venue does not usually make a difference in high-profile cases. In fact, it [is] expensive to relocate the trial to only find . . . another pool of jurors . . . influenced by the extensive media coverage." (footnote omitted)); Joseph M. Capobianco, *Has Social Media Destroyed a Federal Rule? The False Promise of Transfer to Cure Prejudice in the Social Media Era*, 99 TEX. L. REV. 165, 191 (2020) (discussing how social media has "blunted the effectiveness" of transfer because those platforms spread media nationally, eliminating areas that are not biased by the information posted).

[139] Capobianco, *supra* note 138, at 180.

[140] Romano, *supra* note 9, at 27 ("While voir dire appears to be an adequate way to weed out biased jurors, it is not entirely effective when the media reports on a high-profile case.").

[141] *Voir Dire*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/voir_dire [https://perma.cc/P5ZQ-BGSJ] (last visited Sept. 20, 2022).

[142] *Voir Dire and Jury Selection*, JUD. EDUC. CTR., http://jec.unm.edu/education/online-training/stalking-tutorial/voir-dire-and-jury-selection [https://perma.cc/5A7L-CVEE] (last visited Sept. 20, 2022).

[143] Robert S. Stephen, *Prejudicial Publicity Surrounding a Criminal Trial: What a Trial Court Can Do to Ensure a Fair Trial in the Face of a "Media Circus"*, 26 SUFFOLK U. L. REV. 1063, 1087 (1992).

[144] Romano, *supra* note 9, at 27; *see* Charles H. Whitebread, *Selecting Juries in High-Profile Criminal Cases*, 2 GREEN BAG 191, 194–95 (1999), http://www.greenbag.org/v2n2/v2n2_articles_whitebread.pdf [https://perma.cc/FN8Q-M8CK].

A final, plausible solution to address jury bias is jury instructions.[145] Jury instructions involve advising the jury on background information and the jury's role in the trial, clarifying statements of substantive law, limiting the jury's use of evidence in trial, and instructing on additional issues arising throughout the proceeding.[146] As referenced above, jurors are typically instructed to avoid viewing external sources or using social media, television, and other technology to conduct basic research on the facts or law of the trial.[147] Many legal scholars, however, have criticized the effectiveness of jury instructions.[148] While some jurors may explicitly violate jury instructions by purposely viewing media coverage of the trial,[149] jurors are more likely to violate these instructions accidentally because of society's increased automatic reliance on technology.[150] With these consequences in mind, judges should be wary of using jury instructions alone as a tool to prevent or dissipate the tainting of a jury by the media.[151]

There are significant issues with the present use of these remedies. First, many states do not require any particular remedies to be implemented, even where media coverage and livestreaming are extensive.[152] These remedies are within the complete discretion of the judge, which fails to achieve a uniform response to combat potential juror bias.[153] Second, as discussed

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[145] *See* Romano, *supra* note 9, at 30–31.

[146] William H. Erickson, *Criminal Jury Instructions*, 1993 U. ILL. L. REV. 285, 286–90 (1993).

[147] *See supra* Section I.C; Levine, *supra* note 132, at 267–68.

[148] *See, e.g.,* Romano, *supra* note 9, at 31 ("[I]t can be nearly impossible for a juror to disregard something he or she may have heard from the media or any other source regarding the case . . . . Furthermore, as cases such as *Dimas-Martinez v. State* indicate, many jurors disregard the instructions.").

[149] *Id.*; Schwartz, *supra* note 120; *see* Saul M. Kassin & Samuel R. Sommers, *Inadmissible Testimony, Instructions to Disregard, and the Jury: Substantive Versus Procedural Considerations*, 23 PERSONALITY & SOC. PSYCH. BULL. 1046, 1050–51 (1997). *But see* Gacy v. Welborn, 944 F.2d 305, 313 (7th Cir. 1993) ("[C]ourts invoke a 'presumption' that jurors understand and follow their instructions.").

[150] *See supra* note 124 and accompanying text.

[151] *See supra* Section II.C (discussing how reliance on jury instructions is not always effective in preventing juror bias). *But see* Judith L. Ritter, *Your Lips Are Moving . . . But the Words Aren't Clear: Dissecting the Presumption That Jurors Understand Instructions*, 69 MO. L. REV. 163, 172 (2004); Parker v. Randolph, 442 U.S. 62, 73 (1979) ("A crucial assumption underlying [the] system [of trial by jury] is that juries will follow the instructions given [to] them by the trial judge.").

[152] *See generally supra* note 64 and accompanying text.

[153] *See, e.g.*, *Sequestration*, *supra* note 127.

above, these remedies are not entirely effective in the social media and technology era, and thus the implementation of more rigid policies is necessary to assure that a criminal defendant receives "an impartial jury."[154] Therefore, permitting ad hoc determinations of whether individual freedom is unduly at risk is highly inconsistent with the Sixth Amendment's guarantees of a right to a fair trial, and thus a more structured guideline-based approach is required.[155] Although some may argue that a mandatory or guideline approach might be over-protective, when constitutional liberties are at risk, especially those involving one's freedom, courts should favor over-protective restrictions more than under-protective ones.[156] The following Section details a plausible step towards protecting one's right to a fair trial in the livestreaming era.[157]

B. Recommendations

Livestreaming trials, without any required remedies or modifications in place, could be unconstitutional.[158] Therefore, two questions remain: (1) whether a scheme of remedies exists that might dissipate the risk of a constitutional violation and (2) whether it is more reasonable for states to implement these remedies to counteract the constitutional taint of livestreaming or to generally ban the livestreaming of high-profile criminal trials altogether. Below is a potential scheme of remedies that states can implement to alleviate any unconstitutional burdens on a criminal defendant.

The first question a judge should consider is whether the case is a high-profile case. Generally, a high-profile case can be described as one "that attracts enough media or public attention that the court must or should make significant alterations to ordinary court procedures to manage it."[159] Factors that can be considered include whether a celebrity is on trial, whether there is significant media coverage of the case, whether there are petitions to livestream or broadcast the trial, whether the case

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[154] U.S. CONST. amend. VI.

[155] *See* Romano, *supra* note 9, at 27–32.

[156] *See* *Preemption*, LEGAL. INFO. INST., https://www.law.cornell.edu/wex/preemption [https://perma.cc/CM98-3LJH] (last visited Sept. 20, 2022).

[157] *Infra* Section III.B.

[158] *See supra* Section II.C.

[159] GREG HURLEY, MANAGING HIGH-PROFILE CASES (2017).

involves a heinous crime or capital punishment, and whether the case involves a matter regarding politics.[160] In broad terms, if a case is significant enough that the public is aware of detailed facts and information about the case beyond its general existence, it is likely to be considered a high-profile case.[161]

Once a judge determines that a case is high-profile,[162] they should implement several remedies to alleviate any constitutional hindrances. First, as a necessary prerequisite, when a high-profile case is on trial, states should automatically require jury sequestration.[163] Sequestration is the most effective way to limit a jury's exposure to potentially tainting material, as judges can place jurors under supervision and bar access to devices beyond limited purposes, thus restricting the content viewed.[164] While it may be argued that sequestration is very expensive,[165] there should not be a price limit placed on one's inalienable right to liberty and constitutional right to a fair trial. Because sequestration is one of the only logical methods of limiting jury exposure to livestreaming and commentaries within the livestream, the state should allocate resources for sequestration to protect individual liberties in high-profile criminal cases—as those defendants are at the greatest risk of having their rights violated.[166] Although jury sequestration is rare, it is "[t]ypically ordered in sensational, high-profile criminal cases."[167] Thus, as sequestration occurs most often in high-profile criminal cases, there should be no harm in imposing a mandatory

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[160] *See Case Types*, NAT'L COUNCIL FOR STATE CTS., https://www.ncsc.org/hpc/case-type [https://perma.cc/4HQY-P8LE] (last visited Sept. 20, 2022).

[161] *See id.*

[162] As this Note focuses primarily on the unconstitutionality of high-profile trials, I will not extend into a discussion on what to do regarding livestreaming where it is not a high-profile case. However, since the media coverage on the residual cases would be little to none, the risks imposed with incidental exposure to the case are at a minimum, and thus, this practice might be more permissible. While true, the limitations discussed above would only help to protect criminal defendants.

[163] *See* Robbie Manhas, *Responding to Internet Juror Research in the Internet Age: Positive Rules, Negative Rules, and Outside Mechanisms*, 112 MICH. L. REV. 809, 815–17 (2014) ("[F]orbidding electronic devices leaves jurors with many opportunities to do their own research anyway. For this reason, forbidding electronic devices can be seen as a less effective (and less burdensome) version of sequestration . . . .").

[164] *Id.* at 816–17.

[165] *See supra* note 132 and accompanying text.

[166] *See* Romano, *supra* note 9, at 27–29.

[167] *Sequestration*, *supra* note 127.

rule for these cases.[168] Additionally, although there is the potential for some jurors to capitulate to the will of the majority when sequestered, judges can implement certain leeway with sequestration, like allowing familial visits and permitting limited access to media and entertainment, to make the sequestration process slightly less burdensome.[169]

It is also important to recognize that a jury cannot be completely unbiased because of society's reliance on technology and the court's difficulty in blocking media coverage prior to the initiation of a case.[170] Therefore, voir dire, while not fully effective, is still a plausible method of ridding cases of the most extreme jury bias.[171] Jury instructions are also likely to be more effective in the case of sequestration, as these instructions would reinforce the restrictions on researching and using media that are already in place.[172] Thus, there is no harm in instructing the jury throughout the trial of its duty to avoid external media sources.[173]

Therefore, this Note proposes that every state trial judge should first ascertain whether the case is a high-profile case, and if so, should require mandatory sequestration reinforced by voir dire and a version of the jury instructions recommended by the ABA. This proposal has the strongest likelihood to prevent the constitutional taints that might occur through livestreams and the extensive and sometimes charged commentary associated with those livestreams.

However, the question remains whether it is more plausible for states to impose these restrictions or ban livestreaming altogether. As discussed earlier, livestreaming criminal trials may raise a significant constitutional threat to a defendant's

[168] *Compare* Martha Neil, *Judge Plans to Sequester Out-of-County-Jury for 6-8 Weeks in Casey Anthony Murder Trial*, A.B.A. J. (May 10, 2011), https://www.abajournal.com/news/article/judge_plans_to_sequester_out-of-county_jury_for_6-8_weeks_in_casey_anthony_ [https://perma.cc/RH7B-YS96], *with* Wamsley, *supra* note 97.

[169] *See How Courts Care for Jurors in High-Profile Cases*, U.S. CTS. (Jan. 24, 2020), https://www.uscourts.gov/news/2020/01/24/how-courts-care-jurors-high-profile-cases [https://perma.cc/5GBG-9BQ6].

[170] *See supra* note 150 and accompanying text. Judges also have difficult times blocking media coverage for extensive periods of time because of Freedom of the Press concerns. *Id.*

[171] *Voir Dire and Jury Selection*, *supra* note 142.

[172] Romano, *supra* note 9, at 30–31.

[173] *Id.*

right to a fair trial.[174] Placing an absolute ban on broadcasting and livestreaming has its own challenges however because it conflicts with the right to freedom of the press.[175] Although a ban is more efficient in protecting a defendant's right to a fair trial, the Court in *Estes* indicated that "maximum freedom must be allowed [to] the press" in carrying out its essential and important function of informing the public about the judicial process, while still remaining "subject to the maintenance of absolute fairness in the judicial process."[176] Thus, when these two constitutional rights conflict, courts should restrict media in the least burdensome way to protect criminal defendants' right to a fair trial and permit maximum freedom of the press.[177] The proposal above recognizes that partially limiting the constitutional rights of the media to protect a criminal defendant's right to a fair trial is the more plausible solution in comparison to eliminating the media's right altogether.[178] An absolute ban is even less plausible in high-profile criminal cases because the public's interest in those cases is most significant, which would then also interfere with the public's right to know what occurs during a trial.[179] Therefore, while the livestreaming of trials appears unconstitutional on its face, the proposal laid out above provides an effective way for states to counteract the unconstitutional taints that might arise without overimposing on the freedom of the press and the public's right to know what occurs during a trial.

CONCLUSION

The emergence of livestreaming capabilities produced new risks for jurors to be potentially tainted by external media in high-profile criminal trials. These issues with livestreaming and social media are most evident in the recent trials of Casey Anthony and Derek Chauvin, where jurors and the public were potentially exposed to portions of the trial through social media and livestreaming coverage that could threaten a defendant's

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[174] *See supra* Section II.C.

[175] *See supra* Section I.A.

[176] Estes v. Texas, 381 U.S. 532, 539 (1965).

[177] *See id.*; *supra* Section II.C (recommending that the least burdensome option be imposed for an analysis on the broadcasting of criminal trials).

[178] *See supra* Section III.A.

[179] *See supra* Section I.A; *supra* Section II.B; *see also supra* note 21 and accompanying text.

right to an impartial jury. When examining the implementation of livestreaming and parallel commentary in the courtroom, it is evident that this use could violate the constitutional rights of a defendant if not supplemented with required remedies implemented by judges. However, to maintain the balance between absolute judicial fairness and maximum freedom of the press, where high-profile criminal cases are livestreamed on social media platforms, courts should automatically sequester the jury, while also reinforcing the protections through voir dire and jury instructions to limit violations of a defendant's right to a fair trial. Therefore, while livestreaming high-profile criminal trials may be unconstitutional, imposing these solutions to limit the potential unconstitutional taint is a more plausible response given precedent and the technological environment in which judges have to operate.