Reconsidering Pre-Indictment Publicity: Racialized Crime News, Grand Juries and Tamir Rice

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I. INTRODUCTION ............................................. 2
II. TAMIR RICE’S DEATH ........................................ 7
   A. Cudell Center, November 22, 2014 ......................... 7
   B. Judge Adrine’s Advisory Opinion on the Existence of Probable
      Cause to Indict Loehmann and Garmback .................. 11
   C. The Loehmann-Garmback Grand Jury .................. 12
   D. Conclusion ............................................... 16
III. GRAND JURIES AND MEDIA PUBLICITY .................... 17
     A. Conclusion ............................................. 21
IV. IMPACTS OF EXPOSURE TO PRE-INDICTMENT PUBLICITY .... 22
    A. An Overview of Pre-Trial Publicity Research .......... 22
    B. Prejudicial Publicity Influences Upon Jurors' 
       Cognitive Processes .................................. 25
    C. Conclusion ............................................. 28
V. THE INHERENTLY BIASED AND RACIALIZED NATURE OF MEDIA CRIME
   STORIES AND THE PROBLEMS IT POSES FOR GRAND JURY OUTCOMES 29
    A. Rice’s Death, Local Media, and Racism .................. 30
    B. African-Americans and Media Representation in Crime News ... 33
    C. The Framing, Cultivating and Priming Process of News .... 37
    D. Social Media as Special Influences of Juror Impressions ..... 41
    E. Conclusion ............................................. 44
VI. GRAND JURY PROCEEDINGS AND MEDIA PUBLICITY REFORM .......... 45
VII. CONCLUSION ............................................. 49

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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.”

Rice was killed by Loehmann after he and Garmback responded to a dispatch saying that a man in a nearby park had a gun. The “man” turned out to be a 12-year-old boy. The gun was fake.

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. McGinty also said the reason he saw no need to put certain information before the grand jury was because jurors could read about it in the newspaper. McGinty’s comment was highly curious, if not unethical. First, it was clear that Judge Adrine’s Order was probative, and McGinty should not rely upon grand jurors to affirmatively seek out probative evidence in the media. Second, by assuming grand jurors would read media publicity about its investigation, he also directed that they should. 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

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3. The Reid Report, supra note 2.
4. Id.
7. Id.
8. Id.
9. Id.
were published on the racially-charged killing.\textsuperscript{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.\textsuperscript{11} The Loehmann- Garmback grand jurors remained un-sequestered through the entire course of the 2-month inquest.\textsuperscript{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.\textsuperscript{13}

\begin{itemize}
  \item Based upon Westlaw News Search of “Tamir Rice” and (date) 11-20-2014 - 12-30-2015 (search last conducted Dec. 12, 2016).
  \item 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, \textit{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 \textit{id}. Given McGinty’s comments, it is likely that it never occurred. See \textit{id}.
\end{itemize}
This Article examines pre-indictment publicity or, more accurately, grand jury subject-matter relevant media publicity. 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. More than any other race, Blacks are more likely to be shown handcuffed, on “perp walks,” or have prejudicial information published about them. 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).

The media’s daily reliance upon law enforcement and courts systems in construction of crime news results in an inherent pro-law enforcement bias. 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.
institutions "are the principal suppliers of these stories." Overall, the inherent text and subtext of crime news perpetuates skepticism towards Black narratives and legitimacy toward majoritarian, law enforcement orthodoxies. Those racialized narratives have been shown to have adverse impacts upon jurors and defendants. 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. 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, 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." 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, and as has been the case for so many other Black men who were

21. Id. at 125.
22. Cf. Instructions to Grand Jury, 2 OJI-CR 301.07; Oath of Grand Jury, 2 OJI-CR 301.03.
25. Id.
victims of excessive force by law enforcement. 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.

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.


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, 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. 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. Someone saw him with the gun, which he had borrowed from a friend earlier that day, and called 911. The caller reported that there was an individual, “probably a juvenile,” who had a gun that was probably a “fake.”


31. Id.

32. The Reid Report, supra note 2.
Critically, those two phrases were not communicated to the officers dispatched to the scene.\textsuperscript{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.\textsuperscript{34} The only person anywhere nearby, in fact, was sitting at a concrete picnic table under the gazebo.\textsuperscript{35} It was Rice. He was not fiddling with a gun. He was not doing anything at all.\textsuperscript{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.\textsuperscript{37} The muzzle of his gun was less than seven feet away.\textsuperscript{38} Rice collapsed.\textsuperscript{39} The elapsed time between the patrol car stop and Loehmann’s shot – 1.7 seconds.\textsuperscript{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

\begin{itemize}
  \item \textsuperscript{34} See The Reid Report, supra note 2.
  \item \textsuperscript{35} Id.
  \item \textsuperscript{36} Id.
  \item \textsuperscript{37} Id.
  \item \textsuperscript{39} The Reid Report, supra note 2.
  \item \textsuperscript{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, \textit{et al.}, counsel for Rice’s estate, to Loretta Lynch, United States Attorney General 2 (December 14, 2015) (on file with author), \textit{See id.}
\end{itemize}
law enforcement under questionable circumstances was front and center of
public consciousness. There was an enraged national and international
outcry. There were mass protests. National and international leaders
called for thorough investigations.

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[.]” 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,” unreasonable searches and seizures, and
racially biased policing tactics. 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., Jamelle Bouie, Shoot First, THE TACOMA NEWS TRIBUNE (Dec. 5,
2014), http://www.thenewstribe.com/opinion/article25901182.html; Sadie
Gurman, Protestes, Peaceful and Violent, Continue in Streets for a Second Day,
2014/11/26/police-across-prepare-for-more-ferguson-rallies/5Wp93JS9jff
NsW0Ge4KYPK/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-
amic-tamir-rice-protests-1733987; Cleveland Crowd Protests Over Boy Shot By
Police, WKYT (Nov. 26, 2014), http://www.wkty.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
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. 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. On December 3, it was announced that a grand jury would not indict the white police officer who choked Eric Garner to death. 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. The Cuyahoga County Sheriff’s Department began its investigation on February 13, after prosecutors removed legally protected statements Cleveland police officers had made to internal investigators from the police department’s file. 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.).


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.

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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.\textsuperscript{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.\textsuperscript{59} Judge Adrine forwarded his Order to McGinty. \textsuperscript{60}

\textbf{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.”\textsuperscript{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.”\textsuperscript{62} On December 28, 2015, McGinty announced at a press conference that he recommended that no charges be filed against Loehmann and Garmback, and

\begin{flushleft}
\textsuperscript{58} \textit{Id.} at 9.
\textsuperscript{59} \textit{Id.} at 7-8.
\textsuperscript{60} \textit{Id.} at 9.
\textsuperscript{61} \textit{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.” \textit{Id.} If the Grand Jury disagrees, it can ask for a “true bill-no bill opportunity or they can ask to hear additional witnesses and evidence.” \textit{Id.}
the grand jury agreed. 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. 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. McGinty concluded that, “[w]e do not believe that any reasonable judge or jury would find criminal conduct[].”

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.


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. Rice’s family, and many others, felt that McGinty was abusing and manipulating the grand jury process to orchestrate a vote against indictment. 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.

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.” The other investigator, S. Lamar Sims—a prosecutor from Colorado—described Loehmann’s shooting of Rice as “objectively reasonable.”

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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 those investigators. 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[.]" 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. 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.

In addition, the targets of the investigation, Loehmann and Garmback, were allowed to provide unsworn statements that they read to jurors. They were not cross-examined, nor did their testimony waive their ability to invoke their Fifth Amendment right against self-incrimination. Some felt that allowing Loehmann and Garmback to testify without legal conditions was additional indicia that McGinty had no intention of indicting them.

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. At the forum, McGinty strongly implied that Rice’s mother was trying to make a buck off of her son’s death. When he was asked about...


75. Press Release, supra note 75.


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." \(^8\) Later he said he did not mean to imply that Ms. Rice was a "gold digger," but that her attorneys were. \(^8\) 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. \(^8\) 

Later during the same forum, local activist Rick Nagin asked McGinty whether he had presented Judge Adrine’s findings to the grand jury. \(^8\) McGinty, inferring that Nagin was accusing him of withholding evidence, bristled. \(^8\) In direct contradiction to reports and Judge Adrine’s assertion, McGinty said that “Judge Adrine has not presented me with anything[.]” \(^8\) In any event, McGinty stated, if the grand jury wanted to know about the Judge’s findings, the grand jurors could “read the newspapers[.]” \(^8\)

**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. \(^8\) What we do know is that McGinty 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 watch or read

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\(^8\) *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.

\(^8\) Flynn, *supra* note 1.

\(^8\) *Id.*

\(^8\) *Id.*

\(^8\) *Id.*

\(^8\) *Id.*

\(^8\) *Id.*


\(^8\) *Id.*; Letter from Jonathan S. Adaby, et al., counsel for Rice’s estate, to Loretta Lynch, United States Attorney General, *supra* note 40.
about the countless news stories\(^ {89}\) 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

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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, cannot be selected 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).
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).
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.”).
Upon convening the grand jury, the presiding judge is required to instruct the jury regarding duty, process, secrecy, and its powers. 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. 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 mandated 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. A number of states have statutory provisions disqualifying grand jurors for some forms of bias or prejudice. However, the lower courts are divided on the question of whether an impartial grand jury is constitutionally required. 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. 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.

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. Irvin v. Dowd, Rideau v. Louisiana, and Sheppard v. Maxwell 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, rather than the rule. In fact, it seems that judges are reluctant to invoke

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).
remedies for claims of prejudicial pretrial publicity influence absent a showing of prejudice from the totality of circumstances.\footnote{116}  

Nor do judges seem to feel that internet use by jurors is a major problem.\footnote{117} According to a recent Federal Judicial Report, judges are reportedly less concerned because of instructions that forbid access to cell phones during trials.\footnote{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.\footnote{119} In 

\textit{United States v. Calandra} the Supreme Court declined to extend the exclusionary rule to grand jury proceedings.\footnote{121} At issue in 

\textit{Calandra} was whether the rule would apply to exclude evidence obtained in violation of the Fourth

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\footnote{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).


\footnote{120} Id.

\footnote{121} Id.

\end{footnotesize}
Amendment from a grand jury proceeding. In ruling that it would not, the Court explained that a grand jury proceeding is not an adversary proceeding. Instead, it is an *ex parte* action to determine whether a crime has been committed, "whether criminal proceedings should be instituted against any person." The grand jury’s sources of information are "widely drawn," and an indictment is "not affected by the character of the evidence considered."

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." 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."

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," there is no error if an indictment is not dismissed on the basis of prejudicial publicity. 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," it is entirely plausible to conclude that grand jurors may rely upon extrajudicial information in reaching decisions.

**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).

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.*
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 venue, 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.\(^ {135}\)


\(^{134}\) 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. 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.

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). Factually resonant pretrial publicity is that which includes incriminating evidence against the defendant in question (e.g., a prior record). 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.

Contemporary pretrial publicity research also eschewed laboratory testing with undergraduates to better replicate judicial processes. 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. Moreover, mock jurors were convened as control groups. Those mock jurors are comprised of individuals from outside of the trial jurisdiction who, consequently, are less likely to have been exposed to pre-trial publicity.

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.
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. They found that pretrial publicity does in fact influence jury deliberations and decisions. 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;
b) Actual community members were used as study subjects (as opposed to, e.g., college students);
c) Real media stories were used (as opposed to mock stories constructed by the researchers);
d) Negative publicity was compounded;
e) The publicity was both video- and text-based;
f) Potential jurors lived near an area where a crime was committed evince a pro-prosecution bias—likely due to greater exposure to prejudicial information;
g) Murder, sexual abuse, and drugs were at issue—as distinguished from other crimes, and;
h) Jurors were death-penalty qualified and were also most likely to deny being influenced by pretrial publicity.

A small number of studies have found no biasing effects of pretrial publicity on potential jurors. 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.
outcomes.\textsuperscript{155} It must be noted that none of the studies cited examine grand jury pre-indictment or concurrent grand jury proceeding publicity.\textsuperscript{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.

\textit{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\begin{itemize}
\item\textsuperscript{155} See infra note 161 and 164.
\item\textsuperscript{156} See BRUSCHKE \& LOGES, \textit{supra} note 156.
\item\textsuperscript{158} Joel D. Lieberman \& Jamie Arndt, \textit{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).
\item\textsuperscript{159} Id. at 677-68.
\item\textsuperscript{160} Sara Gordon, \textit{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, \textit{supra} note 160, at 691.
\end{itemize}
backfire effect (the phenomenon in which jurors pay greater attention to information after it has been deemed inadmissible) makes admonitions futile.\textsuperscript{161} Cognitive tendencies such as belief perseverance,\textsuperscript{162} confirmation

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162. Steven Fein et al., \textit{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, \textit{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, \textit{supra} note 162, at 657-658.
\end{flushright}
Reconsidering Pre-Indictment Publicity

bias, source confusion, hindsight bias, correspondence bias, and reactance theory 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 Psychol. 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. 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. 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. 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.

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. Cultivation and priming creates or reinforces adverse impressions of African-Americans vis-à-vis crime and positive impressions of officers and law enforcement. Those news stories, consumed by potential jurors on a daily basis, have demonstrated impacts upon jury impressions, deliberations, and outcomes.

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. 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.

Simultaneously, law enforcement institutions co-act with mass media organizations to deliver their intended narratives for news consumption. Prosecutors, sheriffs, police chiefs, and their spokespeople readily and

170. See Liberman & Arndt, supra note 160; Fein et al., supra note 164.
171. Fein et al., supra note 164.
173. Entman & Gross, supra note 20.
174. Hope et al., supra note 165.
175. Feld et al., supra note 175.
strategically leverage media in disseminating their preferred narratives. McGinty’s press conferences were paradigmatic examples on the use of media power to communicate and control a preferred narrative. 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. 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. 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. 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.
180. Fein et.al., supra note 164 at 489.
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.”

Setting aside the absurd notion that a child playing with a toy gun is unusual, Samaria Rice would go on to say “It was almost like they were trying to blame me.” She continued: “They were talking to me like I was a bad mother, like I gave him that BB gun.” 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.” 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. 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 wanted to believe, and, if the comments under the Blackwell stories are any indication, Cleveland.com articles reinforced the worst prejudices. 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

182. Id.
183. Flynn, supra note 1.
184. Id.
185. Adamson, supra note 182.
186. Id.
187. Id.
media 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


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 athttps://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.\textsuperscript{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.\textsuperscript{193}

\textbf{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.\textsuperscript{194} Blacks in criminal "roles" outnumber Blacks in socially positive representations in newscast and daily papers.\textsuperscript{195} Moreover, those portrayals, when compared to actual crime and labor statistics, are grossly disproportionate to reality.\textsuperscript{196}

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

\begin{itemize}
\item \textsuperscript{193} Id.
\item \textsuperscript{195} Id.
\item \textsuperscript{197} Entman & Gross, \textit{supra} note 20, at 99-100.
\item \textsuperscript{198} \textit{Id.} at 100.
\item \textsuperscript{199} Robert M. Entman & Andrew Rojecki, \textit{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).
\item \textsuperscript{200} Entman & Gross, \textit{supra} note 20, at 100.
\end{itemize}
form of physical restraint by police than Whites, and have prejudicial information reported about them (for example, as having a criminal record). In fact, a content analysis of one 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.

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

In contrast, in local news, Whites are overrepresented as victims. They are also shown in more positive roles (for example, as bystanders, first responders, news readers, and reporters) in crime news. 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.

201. ENTMAN & ROJECKI, supra note 202, at 82.
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).
206. Dixon et al., supra note 208, at 516.
207. Id.
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

213. Id.
214. Id.
215. Id.
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. 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.

C. The Framing, Cultivating and Priming Process of News

Framing is a routine device deployed by news content creators. In news production, frames are used to present information in a way that most effectively resonates with the underlying cognitive schemas of an audience. News stories are framed by content (e.g., “crime”), organization (lead sentence content), and themes (e.g., “human interest,” “conflict,” or “consequence”), which serve as slants and hooks. 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.

There are a litany of journalistic framing conventions: headlines and kickers (small headlines over the main headline); anchors (text below the main headline); and pictures and sound bites that dramatize the news.

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.


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.

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. 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).

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

Studies have found that frequent television viewing causes audiences to skew understandings of reality versus what they come to understand from television. 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.*
divorce rate in America.\textsuperscript{230} Cultivation effects have also been found to arise in subjects ranging from overestimations about life risks posed by lightning strikes,\textsuperscript{231} floods,\textsuperscript{232} the number of people over age 65,\textsuperscript{233} and terror attacks.\textsuperscript{234}

For heavy television viewers—those who watched television 4 or more hours of television daily,\textsuperscript{235}—depictions of violence and criminal behavior also result in skewed realities.\textsuperscript{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."\textsuperscript{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.\textsuperscript{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.\textsuperscript{239}

Media priming effects refer to the short-term impact of exposure to a mass-mediated stimulus on subsequent judgments or behaviors.\textsuperscript{240} Priming
has a powerful influence on which schemas are activated in particular situations. Rooted in psychology and cognitive science, priming is a heuristic by which we utilize the most accessible mental schema to help us make sense of new information. 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.

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. In turn, the newly-applied information retains some residual activation potential, making it more likely to be accessed and used in making subsequent evaluations. 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.

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, stereotypes are activated by priming—increasing the likelihood that the knowledge will be used in a subsequent judgment. 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. Such stereotyping, in turn, may provoke a range of antisocial, intergroup responses including stereotyping, prejudice, discrimination, attribution errors, and generally punitive outcomes.

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, 84% of American adults use the internet. Furthermore, 90% own cell phones, and 60% of them use their cell phone to access internet. As to news consumption, 40% of all


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


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

251. Id. at 245.


Americans get their news from online sources. 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.

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); 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.

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

257. Framing conventions used by media institutions in distributing news online perform important cognitive functions unique to that ecosystem. Id.
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. Moreover, exposure to news and civic information is mediated through online social networks and electronically-enabled personalization now more than ever. 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.

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. 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.

Bias is especially evident in the comment sections of news stories. 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).


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, disproving, 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.
272. Id.
as Rice’s parents and protesters. McGinty’s statements simultaneously legitimized law enforcement, the grand jury process, and 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

277. U.S. CONST. amend. I.
(as distinct from other content genre, e.g., advertisement) has historically been regarded with special solicitude. Thus, in general, any directives that purport to impose a prior restraint 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.

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. Internet content has joined print media's expansive First Amendment freedoms. 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 Doctrine and anti-distortion rules seek to

279. Id.
280. Id.
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.
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

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.
While gag orders imposed upon the press and lawyers can be established under ethical rules, they may be challenged on First Amendment grounds. Moreover, to the extent that remedies may impact the gathering and content of news, they too give rise to First Amendment problems. 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.

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. Alternatively, change of venue work, but are 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. 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. If robust investigations involving expert testimony and target testimony who retain their Fifth Amendment rights will continue, 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


287. Id.

288. Id.

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


prejudicial media information, and can sometimes even increase the negative effects of pretrial publicity. 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 which includes cautions on media access and use. Grand jurors should have to certify on a periodic basis (daily or weekly) that they have not violated any admonitions.

Grand jury instructions to disregard potentially biased media information are not enough to eliminate the effects of publicity in jurors' verdicts. 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. 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, and can better protect jurors from being "manipulated by non-evidentiary factors."

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

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.
296. Id.
297. Id. at 1223.
298. Id. at 1224.
comments impugning Ms. Rice’s motives. 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’ reliance upon media reports for 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. 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.