OPEN TRIALS IN THE SOCIAL MEDIA AGE

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Open trials have a long and important history in the United States. For many years, they provided judicial accountability as well as entertainment through virtually compulsory attendance for members of a community. But while the roots of this tradition are extensive, the media landscape today threatens to undermine the very goals that open trials support. In 2022, when the chief judge of the Fairfax County (Va.) Circuit Court accepted actor Johnny Depp's request for an open trial in Depp v. Heard*, social media content providers curated clips of the open hearings to reap a profit. The public, in turn, formed strong snap judgments about the case based on viewing these curated clips, which failed to provide a full view of the court proceedings. The public's vehement response coupled with an inescapable onslaught of media attention has drawn criticism for potentially influencing the jury's ultimate verdict in the case. In light of the development of social media consumption, the events of the* Depp v. Heard *case exemplify a larger problem. They beg the question: Do open trials really provide society with the same benefits that justify their continuance? The answer may rest in the public's conduct. Open trials have historically been justified on the basis that the public will hear matters in full, weigh all evidence, and hold the judicial system accountable for its rulings. But today, the public's apparent preference for viewing singular, easily accessible content gleaned from court openness but riddled with bias and driven by profits undercuts the effectiveness of open courts. This Article argues that while the goals of open courts are laudable, judges today should carefully consider and weigh the risks of media distortion for non-sequestered juries in cases that are likely to spark media attention before allowing complete press coverage of any trial.*

INTRODUCTION

The United States has a longstanding tradition of courts presumptively opening trials to the public and the media. This principle is rooted in the idea that by giving the public access to such proceedings, they will keep watch over the administration of justice and hold courts accountable for the fair treatment of litigants under the law. Opening trials allows the public to actively observe court hearings and the media to report on and analyze ongoing cases. While a few exceptions to the general rule of granting access exist, Part I of this Article details the way in which the United States has historically determined that opening trials in nearly all circumstances provides more benefit than harm.

Despite this traditional view, new considerations regarding the development of technology and social media threaten the ultimate goals of open trials. The presumption of open trials contemplates a society that actively attends full hearings or reads reports thoroughly detailing the nuances presented during the entire course of a trial. But today, the reality is that many members of the public consume information about case proceedings[1] via short and sensationalized video reels on social media apps curated specifically to generate profits rather than provide fulsome information. Part II of this Article discusses the way in which the public's consumption of trial proceedings has evolved over the past century. From in-person attendance to radio broadcasts, television specials, Internet streaming, and finally to social media apps like TikTok and Instagram, the mode and type of information the public receives from open trials has changed significantly over the last few decades. This Article contemplates whether these drastic changes in how society consumes information and how coverage of open trials is curated butts up against the existing presumption that open trials necessarily result in a better-informed public that will hold the judiciary accountable. Furthermore, to the extent that the goals and justifications for open trials are undermined by developing social media coverage and the public's resultant reaction, this Article considers whether judges ought to be more willing to use their discretion to keep trials closed in more circumstances.

For example, the open[2] *Depp v. Heard* defamation lawsuit that took place during the summer of 2022 received extensive social media coverage. Data adduced from the viewership of that case indicates that the public — particularly social media users — largely consumed only snippets of curated video clips about the court proceedings. Nonetheless, those short, incomplete, and often biased clips — which were frequently generated on a for-profit basis — persuaded many viewers to take strong positions about how the case should come out. In a matter where, as with this case, a jury is not sequestered, the extent to which a bombardment of curated social media content, coupled with a vehement public response based on snap judgments, could influence a verdict is troubling. Part III of this Article considers the public's reaction to the *Depp v. Heard* trial as a case study in arguing that the existence of certain case circumstances may no longer support the historical idea that trials should remain presumptively open to members of the public and media. Alternatively, this Article suggests that to the extent a presumption remains, it should be

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[1] Widespread public consumption of news relating to global affairs via short and sensationalized social media posts also poses new and serious challenges, but those are beyond the scope of this Article.

[2] Gene Maddaus, *Why Was Depp-Heard Trial Televised? Critics Call It 'Single Worst Decision' for Sexual Violence Victims*, VARIETY (May 27, 2022), https://variety.com/2022/film/news/johnny-depp-amber-heard-cameras-courtroom-penney-azcarate-1235280060/.

more easily defeated in situations where social media coverage is likely to be extensive.

Part IV provides additional guidance on this point and considers the circumstances that warrant judges utilizing their discretion to close courtroom doors in certain matters. The discussion and dissemination of open trials on social media pose a risk of influencing the public and non-sequestered juries with biased content that only represents a fraction of the available information. As a result, it is critical for judges to recognize this risk and carefully evaluate the potential impact of media influence on case outcomes, particularly in high-profile or controversial cases. Indeed, cases that attract intense public interest and media response, like *Depp v. Heard*, may be particularly vulnerable to the negative consequences of open courtrooms. While this does not necessarily merit a presumption of closing such trials, it raises concerns about the automatic presumption of openness. Judges should carefully balance the competing interests of public access, judicial accountability, and the risk of bias in each case. While court rules already often give judges some degree of discretion in making these decisions, the longstanding tradition of open courts within the judicial system frequently overrides new considerations brought forth by the evolving media landscape. Accordingly, it is essential to reevaluate the justification behind this tradition in relation to the public's reaction to new media and its potential impact on jury verdicts.

I. HISTORY OF OPEN TRIALS

In the late 1970s and early 1980s, the U.S. Supreme Court laid the groundwork to formalize the tradition of open court proceedings. In *Gannett Co. v. DePasquale* (1979),[3] the Court considered a criminal case that had been the subject of significant media attention. The case concerned the disappearance of a man during a boat trip. The two men charged with the missing person's murder made pre-trial motions to suppress evidence and sought to bar the press and public from attending the pre-trial hearing evaluating their request. Specifically, the defendants argued that "the unabated buildup of adverse publicity had jeopardized the ability of the defendants to receive a fair trial."[4] Neither the prosecutor nor the members of the press present in the courtroom at the time the request was made objected to the motion.[5] The trial court accepted the defendants' argument and closed the pre-trial hearing on the motion to suppress evidence. Subsequently, however, mass media company Gannett[6] moved the court to set aside its exclusionary order. The challenge made its way up to the U.S.

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[3] Gannett Co. v. DePasquale, 443 U.S. 368 (1979).

[4] *Id.* at 375.

[5] *Id.*

[6] Gannett Co., Inc. is an American mass media holding company. *See Meet Gannett*, GANNETT, https://www.gannett.com/about/ (last visited Oct. 17, 2023).

Supreme Court and, upon review, the Court issued a fractured decision that upheld the closure decision.

In the majority opinion, Justice Stewart explained that "a trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity."[7] Citing *Estes v. Texas,* — a case from five years earlier that stands in part for the idea that reporters ought to maintain proper courtroom decorum — Justice Stewart rejected the argument that the Sixth Amendment right to a public trial gave the press a right to object to the closure of pre-trial proceedings.[8] In so doing, he still recognized that "there is a strong societal interest in public trials."[9] Openness in court proceedings, he acknowledged, "may improve the quality of testimony, induce unknown witnesses to come forward with relevant testimony, cause all trial participants to perform their duties more conscientiously, and generally give the public an opportunity to observe the judicial system."[10] Nonetheless, the Court found that the Sixth Amendment right to a public trial was not a right given to the public at large. Instead, it determined that such a right was held by and personal to the defendant.[11] This right, the Court explained, was more akin to the guarantee that a defendant be tried by a jury of his peers if he so desired; while the public may have an interest in having a criminal case heard by a jury, the ultimate decision on whether to proceed in such a fashion rests with the defendant.[12] But a four-justice dissent written by Justice Blackmun and joined by Justices Brennan, White, and Marshall argued otherwise. They took the view that the Sixth Amendment guaranteed public and media access to trials.[13] The dissent opined that before closure could be ordered, a defendant must be required to show that there was a "substantial probability" that irreparable damage would occur if the hearings were open to the public, and also that no alternatives to closure would protect against that harm.[14] This position, however, failed to sway the majority of the Court.

The aftermath of *Gannett* was extraordinary. Dozens of judges around the country granted requests to close pre-trial hearings and entire trials within weeks of its issuance.[15] Facing severe media criticism, Chief

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[7] *Gannett Co.*, 443 U.S. at 378.

[8] *Id.* (citing Estes v. Texas, 381 U.S. 532 (1965)).

[9] *Id.* at 383.

[10] *Id.*

[11] *Id.* at 380.

[12] *Id.* at 383-84.

[13] DAVID KOHLER ET AL., MEDIA AND THE LAW 948 (2d ed. 2014).

[14] *Id.*; *see Gannett Co.*, 443 U.S. at 441.

[15] Stephen Wermiel, *Gannett Co. v. DePasquale*, The First Amendment Encyclopedia, Free Speech Center at Middle Tennessee State University, https://firstamendment.mtsu.edu/article/gannett-co-v-depasquale-1979/ (last visited Apr. 19, 2023); KOHLER ET AL., *supra* note 13, at 948 (citing an August 1979 American Newspaper Publishers Association report that "judges all over the

Justice Burger and Justices Blackmun, Powell, and Stevens all engaged in public commentary off the bench in attempts to clarify and explain the scope of the ruling in the subsequent months.[16] Less than a year later, the Court granted review in *Richmond Newspapers, Inc. v. Virginia* (1980),[17] which appears, in part, to have been a reaction to lower courts' reading of *Gannett*.

In *Richmond Newspapers, Inc. v. Virginia*, Richmond Newspapers sought certiorari over the closure of a criminal murder trial that occurred one year before *Gannett* was decided. The underlying case had been through several mistrials before its relevant iteration. The defendant had requested, and the prosecutor did not oppose, closing the trial to the public.[18] The trial judge articulated several considerations that led him to grant the closure motion, including the layout of the courtroom rendering media presence a jury distraction; the small community in which the hearing was taking place; and the lack of objections from counsel coupled with the potential for infringing on the defendant's right to a fair trial.[19] After granting the defense's motion, two reporters for Richmond Newspapers, Inc. who had been prevented from attending the murder trial challenged the closure order.[20] Specifically, they argued that the trial judge should have considered the constitutional guarantees to members of the press pursuant to the First Amendment before exercising his discretion to close the hearing.[21] It was not enough, in their view, that the parties themselves did not object to the closure; members of the public, including the press, had a right that ought to have been considered.[22]

The Supreme Court granted certiorari just months after the *Gannett* decision was rendered and ruled in favor of Richmond Newspapers exactly one year to the day from the release of the *Gannett* opinion. In his ruling, Chief Justice Burger maintained that the cases were different, and that *Richmond* presented a question of first impression as *Gannett* concerned pre-trial hearings while this matter related to open criminal trials.[23] Relying on historical and precedential considerations, the Court explained that "criminal trials both here and in England ha[ve] long been presumptively open. This is no quirk of history; rather, it has long been recognized

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United States have closed or upheld the closing of more than 21 courtrooms in the five weeks since the U.S. Supreme Court's July 2 decision in *Gannett*.").

[16] *Id.*

[17] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).

[18] *Id.* at 564.

[19] *See id.* at 561.

[20] *See id.* at 559-62.

[21] *Id.* at 560.

[22] *See id.*

[23] Lawrence J. Morris, *Constitutional Law - Closure of Trials - The Press and the Public Have a First Amendment Right of Access to Attend Criminal Trials, Which Cannot Be Closed Absent an Overriding Interest*, 64 MARQ. L. REV. 717, 723 (1981).

as an indispensable attribute of an Anglo-American trial."[24] Concurring Justices Brennan and Marshall further proclaimed that "[o]pen trials play a *fundamental role* in furthering the efforts of our judicial system to assure the criminal defendant a fair and accurate adjudication of guilt or innocence."[25] A far step away from pre-trial oriented *Gannett*, the *Richmond* Court ultimately concluded that there is a constitutional right of public access to criminal trials that is "implicit in the guarantees of the First Amendment[]."[26]

Two years later, the Court stood by *Richmond* when it considered *Globe Newspaper Co. v. Superior Court* (1982).[27] Like its predecessor, *Globe* concerned the right of the press to access a criminal trial. The case began when reporters from Globe Newspaper Company unsuccessfully attempted to enter hearings in a rape trial.[28] The criminal defendant had been charged with the forcible rape and forced unnatural rape of three minor girls who were expected to testify in the trial.[29] The trial judge closed the court during preliminary motions, concluding that a Massachusetts statute required the exclusion of the press and general public during the testimony of a minor victim in a sex offense trial.[30] In analyzing whether the reporters' constitutional rights were violated, the Supreme Court emphasized the rationale for presumptively open criminal trials as laid out in *Richmond*: (1) the criminal trial historically has been open to the press and general public, and (2) the right of access to criminal trials plays a particularly significant role in the functioning of the judicial process and the government as a whole.[31] Having noted this, the Court subsequently also acknowledged that the right of access to criminal trials "is not absolute" and does have some narrow limitations.[32] For example, criminal trials may be closed, in the Court's view, if necessitated by a compelling government interest and the closure is narrowly tailored to serve that interest.[33] The Court then considered whether any such interest necessitated closure in this case.

The state asserted two interests in support of closure. First, that closure was necessary to protect minor sex crimes from further trauma and embarrassment.[34] Second, that closure helped to encourage these victims

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[24] *Richmond Newspapers*, 448 U.S. at 569.
[25] *Id.* at 593 (emphasis added).
[26] *Id.* at 556.
[27] Globe Newspaper Co. v. Superior Ct., 457 U.S. 596 (1982).
[28] *Id.* at 598.
[29] *Id.*
[30] *Id.* at 602.
[31] *Id.* at 605-06.
[32] *Globe Newspaper Co.*, 457 U.S. at 606.
[33] *Id.* at 606-07.
[34] *Id.* at 607.

to come forward and testify in a truthful and credible manner.[35] Neither argument, however, convinced the Court that a *mandatory* closure rule was justified.[36] Instead, the Court agreed that at least the first interest *could* constitute a compelling reason for closing a criminal trial, but a trial court should determine whether closure is necessary to advance that interest and protect the welfare of a minor victim on a case-by-case basis depending on the circumstances and parties themselves.[37] Accordingly, the *Globe* Court found that the Massachusetts statute that the trial judge relied on in closing the underlying rape trial violated the First Amendment to the Constitution and struck it down.[38]

Two years after the *Globe* case, the Court again revisited the parameters of court closures, returning to pre-trial proceedings. *Press-Enterprise Co. v. Superior Court of California, Riverside* (1984)[39] concerned access to the voir dire examination of potential jurors in a criminal rape trial with a female teenage victim, where the defendant faced a potential death sentence. Press-Enterprise Co. asked the trial court to open voir dire proceedings to the public and the press, but the State vigorously opposed that request. The prosecutors raised concern that "if the press were present, juror responses would lack the candor necessary to assure a fair trial."[40] In agreement, the trial judge permitted the petitioning news organization to attend only the "general voir dire," iterating an intention to close off all parts of voir dire proceedings that dealt with "death qualifications and any other special areas the counsel may feel some problem with regard to in private."[41] Ultimately, only three days of the six-week voir dire questioning process were opened to the press and the public.[42] Press-Enterprise Co., frustrated with this ruling, subsequently moved the trial court to release a complete transcript of the voir dire proceedings. Both the defendant and the prosecutor opposed the motion, arguing that releasing the transcript would violate the juror's right of privacy and that the prospective jurors had answered the questions under an "implied promise of confidentiality."[43] The trial court denied the request, and the petitioner sought review by the high court.

After granting certiorari, the Supreme Court considered again the extent to which pre-trial proceedings may operate in a closed manner. In a call more to *Richmond* and *Globe* than to *Gannett*, the Court began its opinion with a reminder of the country's rich history of open trials: "The

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[35] *Id.* at 607.
[36] *Id.* at 607-08.
[37] *Globe Newspaper Co.*, 457 U.S. at 608-09.
[38] *Id.* at 610.
[39] *See* Press-Enterprise Co. v. Superior Ct., 464 U.S. 501 (1984).
[40] *Id.* at 503.
[41] *Id.*
[42] *Id.*
[43] *Id.* at 504.

roots of open trials reach back to the days before the Norman Conquest when cases in England were brought before 'moots,' a town meeting kind of body such as the local court . . . . Attendance was virtually compulsory of the part of the freemen of the community."[44] Chief Justice Burger then explained that the presumption of openness espoused in the prior cases may only be overcome "by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."[45] Turning to whether the presumption of openness had been rebutted in the case at hand, the Court considered whether the right of the defendant to a fair trial or the right of prospective jurors to privacy supported the trial court's closure order and order denying a transcript.[46] The Court found that neither right justified the limitations on press access because the trial court never considered whether alternatives to closure would support these interests.[47] For instance, the trial court might have served these interests just as well, the Court postulated, had it merely required prospective jurors to make an affirmative request to respond to sensitive questions *in camera* with just counsel and the judge present.[48] Indeed, certain questions may raise privacy concerns (*e.g.*, "a prospective juror might privately inform the judge that she, or a member of her family, had been raped but had declined to seek prosecution because of the embarrassment and emotional trauma from the very disclosure of the episode.").[49] But a near-complete closure of all voir dire questioning in a criminal case and the total suppression of a transcript (as opposed to sealing only parts of the transcript necessary to present the anonymity of the individuals sought to be protected)[50] extended beyond what the Court deemed constitutionally permissible.

In subsequent decades, the judicial system has continued to build on the its tradition of open hearings.[51] For example, in 1997 the United States

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[44] *Press-Enterprise Co.*, 464 U.S. at 505.

[45] *Id.* at 510.

[46] *Id.*

[47] *Id.* at 511.

[48] *Id.* at 512.

[49] *Press-Enterprise Co.*, 464 U.S. at 512.

[50] *Id.* at 513.

[51] This is true except for grand jury proceedings. Grand jury proceedings are usually closed to both the press and the public. The Court in Butterworth v. Smith, 494 U.S. 624, 630 (1990) explained the reasons for grand jury secrecy:

> [W]e have noted several distinct interests served by safeguarding the confidentiality of grand jury proceedings. First, if preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements.

Court of Appeals for the Armed Forces ruled that preliminary hearings and courts martials are presumptively open in the military justice system barring a specific showing of an overriding need for security.[52] Similarly, the Supreme Court has ruled that the use of cameras at criminal trials does not violate the defendant's right to a fair trial.[53] Indeed, nearly all states — albeit not the Supreme Court itself, despite much pressure[54] — now permit still and/or television cameras in their courtrooms, though many limit usage to civil trials or appeals and most provide substantial discretion to the presiding judges.[55] Even in cases where the compelling interests articulated in *Globe* might seem applicable, such as juvenile hearings, courts may still need to open their doors to the press and public. As Justice Blackmun once explained: "Too often the juvenile court judge falls far short of that stalwart, protective, and communicating figure the system envisaged."[56] In other words, "without assurances that family court judges adjudicate with 'parental' concern, the public cannot trust in the quality of mandatorily closed proceedings, and a check on the system is necessary."[57]

This strong and rich background of open court hearings rests on the idea that access to these hearings necessarily provides that check on the judicial process. As noted in *Press-Enterprise,* attending public trials was historically viewed as a "virtually compulsory" obligation in given communities,[58] during which members of the public analyzed firsthand the happenings of the proceedings before them. But today, open court proceedings are publicized in very different means through available technologies and developing communication platforms. This begs the question of

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> There also would be the risk that those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment. Finally, by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule.

The *Butterworth* Court also noted, however, that there are limits on the extent of grand jury secrecy. It struck down a Florida statute that prohibited grand jury witnesses from disclosing their testimony after the grand jury had completed its tasks.

[52] *See* ABC Inc. v. Powell, 47 M.J. 363 (C.A.A.F. 1997).

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

[54] *See* Erwin Chemerinsky & Eric J. Segall, *Cameras Belong in the Supreme Court*, 101 JUDICATURE 14, 14 (2017), https://judicature.duke.edu/articles/cameras-belong-in-the-supreme-court/.

[55] KOHLER ET AL., *supra* note 13, at 960.

[56] McKeiver v. Pennsylvania, 403 U.S. 528, 544 (1971).

[57] Jeanne L. Nowaczewski, *The First Amendment Right of Access to Civil Trials after* Globe Newspaper Co. v. Superior Court, 51 U. CHI. L. REV. 286, 308 (1984).

[58] *See Press-Enterprise Co.*, 464 U.S. at 505.

whether the historical justification for open courts can, and should, continue to justify presumptively open hearings moving forward.

II. HISTORY OF MEDIA COVERAGE FOR COURT PROCEEDINGS

Throughout American history, open trials have provided some form of, at minimum, entertainment to members of the public.[59] Today, when the public consumes entertainment, they often do so by electronic means. But prior to the 1920s, such means did not exist in any commercial capacity. Instead, trials were public spectacles much like theater performances, requiring observers to physically show up to attend the event for real-time coverage. And show up they did! Reports on early American trials indicate that people "jammed 'into courtrooms so tightly that it could become difficult to move the defendant in and out.'"[60] Indeed, in 1892, Lizzie Borden, a woman in her thirties, was accused of using a hatchet to brutally murder her father and stepmother. Her trial took place over a twelve-day span in a packed courtroom.[61] Spectators observed court proceedings for nearly two weeks as they assessed her testimony, the evidence presented, and even considered her physical stature and size relative to the crime she had been accused of.[62] Because, at that time, women — as non-voters — were not permitted to serve on juries, women's groups showed up in droves, concerned that Borden would not be judged by a jury truly of her peers and what that might mean for the ultimate verdict.[63] After the highly-attended ordeal, Borden was found not guilty as courtroom spectators "rush[ed] to congratulate" her.[64] The excitement that trials and verdicts resulted in before radio and television was exemplary of the live entertainment value they provided.

Understanding the evolution of open hearings in society, thus, requires recognition of the impact of the technological growth and development that occurred since the Borden trial. Radio aired its first-ever public broadcast in 1920.[65] In 1925, *Tennessee v. John Thomas Scopes* — which has become colloquially known as the Scopes Monkey Trial — was the first

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[59] *See generally* Stuart Banner, *Trials and Other Entertainment*, 55 ST. LOUIS U. L.J. 1285 (2011).

[60] *Id.* at 1285.

[61] *See* JOSEPH A. CONFORTI, LIZZIE BORDEN ON TRIAL: MURDER, ETHNICITY, AND GENDER 140-59 (Peter Charles Hoffer ed., 2015).

[62] *Id.*

[63] *Id.*

[64] *See* Douglas O. Linder, *Lizzie Borden Trial (1893)*, FAMOUS TRIALS, https://famous-trials.com/lizieborden/1437-home (last visited Apr. 27, 2023).

[65] *See History of Commercial Radio*, FED. COMMC'NS. COMM'N (Apr. 12, 2021), https://www.fcc.gov/media/radio/history-of-commercial-radio#:~:text=Under%20the%20call%20sign%20KDKA%2C%20Pittsburgh%27s%20Westinghouse%20Electric%20and%20Manufacturing,2%2C%201920).

trial to be broadcast over the radio.[66] Radio station WGN Chicago strategically "placed microphones throughout the [Tennessee] courtroom" as a reporter "guided" listeners back in Chicago through what was happening at each stage of the proceedings.[67] The case centered on whether the defendant Scopes, a high school teacher, had violated Tennessee's Butler Act which prohibited the teaching of any theory that denied the biblical account of creation. Scopes had been accused of teaching the theory of evolution to his students, in violation of the law. Audience members listened as the judge ruled that "scientists who had been waiting to testify in favor of evolution would not be allowed to speak to the jury."[68] And they heard the prosecutor vigorously argue in favor of Christian fundamentalism as he claimed that he was going to "defend the Word of God against the greatest agnostic and atheist in the United States."[69] By all accounts, the airing of the Scopes Monkey Trial made for compelling radio entertainment, and listeners from states away were able to digest the hearings and the ultimate verdict against Scopes from the comfort of their homes.[70]

A few years after the first radio-broadcast trial, televisions began to emerge onto the news media scene. While the first commercially available television set was sold in 1929, the first commercial publicly-accessible television broadcast was not available until a decade later in 1939.[71] The majority of households, however, did not own a single television set until the mid-to-late 1950s.[72] In December 1955, the first-ever televised trial aired on KWTX-TV, a television station in Waco, Texas.[73] The case concerned the murder of a rancher and well-known architect's wife in Waco

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[66] *See* Scopes v. State, 289 S.W. 363 (Tenn. 1927).

[67] *See Moment 66: Scopes Monkey Trial*, NAT'L ASS'N OF BROADS., https://www.wearebroadcasters.com/radio100/moments/66.asp (last visited Apr. 27, 2023); *see also WGN Radio Broadcasts the Trial*, PBS, https://www.pbs.org/wgbh/americanexperience/features/monkeytrial-wgn-radio-broadcasts-trial/ (last visited Apr. 27, 2023).

[68] *See WGN Radio Broadcasts the Trial*, *supra* note 67.

[69] *Id.*

[70] Scopes was found guilty and fined $100, but, on appeal, the Supreme Court of Tennessee found a technicality in the issuance of the fine and overturned Scopes's conviction while still finding the Butler Act constitutional. *See* James C. Foster, *Scopes Monkey Trial*, FREE SPEECH CTR. (July 30, 2023), https://www.mtsu.edu/first-amendment/article/1100/scopes-monkey-trial.

[71] *See* Nick Vlku, *The History of Television (or, How Did This Get So Big?)* (May 7, 2002), https://www.cs.cornell.edu/~pjs54/Teaching/AutomaticLifestyle-S02/Projects/Vlku/history.html.

[72] *See Golden Age of Radio in the US*, DIGIT. PUB. LIBR. OF AM., https://dp.la/exhibitions/radio-golden-age/radio-tv#:~:text=Before%201947%2C%20only%20a%20few,homes%20had%20a%20TV%20set (last visited Apr. 27, 2023).

[73] *See In December 1955, Local Murder Trial Kept Viewers Glued to TVs*, KWTX-TV (Dec. 6, 2019, 6:50 PM), https://www.kwtx.com/content/news/-In-December-1955-local-murder-trial-kept-viewers-glued-to-TVs-565908081.html.

by means of a car bomb "wired to the ignition of her husband's car."[74] The defendant was the victim's former son-in-law, Harry Leonard Washburn. During the trial, a "colorful" series of witnesses — from barmaids to strippers to wrestlers — testified that they personally knew that Washburn "planned to kill his father-in-law and then extort [protection] money" from his widowed wife (the victim) "to keep the rest of the family from harm."[75] Microphones "were hidden around the courtroom" and "a camera was set up in the balcony out of the sight of the jury" as "local television commercials were cancelled in favor of unending, interrupted coverage for four days."[76] The evidence produced suggested to listeners and jurors alike that the intended target of the car bomb was his former father-in-law and that the victim had been the unlucky and mistaken recipient of the deranged attack. Indeed, a witness who was with Washburn at the time he learned about the car bomb detonation testified that Washburn exclaimed "My God! That's the wrong one!" upon hearing that his ex's mother had died.[77] The four-day trial resulted in a guilty verdict and life prison term.[78] Calling the evidence "quite interesting," the prosecutor explained after the verdict was rendered that "[t]he camera went on when the judge called the court to order every morning and stayed on all day until we recessed."[79] Reports suggest that the televised trial received such great attention and viewership in Waco that one could have "shot a cannon" down the busiest road in town and "not hurt a soul" because everyone was "inside watching the trial."[80]

As televisions continued to grow in popularity, so did trial viewership. Many trials have been broadcast by television since the Waco trial,[81] notably including the O.J. Simpson murder trial of 1995. That trial centered on the murders of O.J. Simpson's ex-wife, Nicole Brown Simpson, and her friend Ronald Goldman. The pair were found brutally slain outside Nicole's townhome in Brentwood, California in June 1994. O.J. was immediately named as a suspect and eventually charged with the murders. The trial spanned nearly a year and garnered significant media attention.

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[74] Terri Jo Ryan, *Harry L. Washburn Trial*, WACO HIST., https://wacohistory.org/items/show/137 (last visited Apr. 27, 2023).

[75] *Id.*

[76] *In December 1955, Local Murder Trial Kept Viewers Glued to TVs*, *supra* note 73.

[77] *Id.*

[78] A procedural error brought up on appeal led to the overturning of the conviction less than a year later. The case was remanded, and he was again found guilty and handed down a ninety-nine-year prison sentence. He died behind bars. *Id.*

[79] *Id.*

[80] Ryan, *supra* note 74.

[81] *See* James Bufalino & Ashley Moran, *A Timeline of Real Trials Shown on TV,* TV INSIDER (Apr. 1, 2016), https://www.tvinsider.com/69819/timeline-of-real-trials-shown-on-tv/.

Indeed, "more than 150 million viewers" ("57% of the country") "tuned in to watch" the trial's verdict on October 3, 1995.[82] But even before then, the public listened eagerly as parties presented evidence and made their arguments to the jury. For example, the prosecution asked the jury to consider a pair of bloody gloves. In introducing the evidence, the prosecutor explained that the left glove was found outside of Nicole's residence after the murder while the right glove was recovered from O.J.'s estate. When the prosecutor asked O.J. to try on the gloves, they appeared to be the wrong size, a dramatic television moment for viewers of the trial.[83] Rising from counsel's table, O.J. held up his hands to the jurors and stated, "they're too small."[84] This gave way to the famous and oft-quoted line from O.J's defense attorney Johnny Cochran's closing argument: "If it doesn't fit, you must acquit!"[85] Cochran's closing argument was posted to YouTube years later and still garnered millions of views.[86] But while many people watched the televised O.J. Simpson trial in groups together via television, it is likely that those YouTube views are of single viewers watching on their own time from many different locations. The innovation of computers, the Internet, and social media has vastly changed the way in which the public consumes information.

Computers were not found in most American households until 2001, according to U.S. Census Bureau reports.[87] As they grew in popularity, however, their impact was tremendous. With more computer owners came more Internet users, with forty-two percent of households reporting that a family member used the Internet at home in 2001.[88] The Internet made it possible for the public to engage in shopping, checking stock quotes, and reading news online.[89] In the years to come, Internet users began interacting with one another through social media platforms. MySpace came out

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[82] Julia Zorthian, *How the OJ. Simpson Verdict Changed the Way We All Watch TV*, TIME (Oct. 2, 2015), https://time.com/4059067/oj-simpson-verdict/.

[83] *See Former Prosecutor Chris Darden Reflects on Asking OJ Simpson to Try On the Gloves*, ABC NEWS (June 23, 2016, 1:08 PM), https://abcnews.go.com/Entertainment/prosecutor-chris-darden-reflects-oj-simpson-glove/story?id=40071934.

[84] Linda Deutsch, *OJ Simpson Murder Trial: "If It Doesn't Fit, You Must Acquit*," NBC (June 10, 2014), https://www.nbclosangeles.com/news/local/oj-simpson-20-years-later-glove-fit-darden-dunne-murder-trial-of-the-century/1976992/.

[85] *Id.*

[86] CNN, *(RAW) O.J. Simpson Defense: 'If it Doesn't Fit, You Must Acquit*,*'* YOUTUBE (June 9, 2014), https://www.youtube.com/watch?v=NH-VuP_5cA4.

[87] *Report Counts Computers In Majority of U.S. Homes*, N.Y. TIMES (Sept. 7, 2001), https://www.nytimes.com/2001/09/07/us/report-counts-computers-in-majority-of-us-homes.html#:~:text=Census%20figures%20showed%20that%2054,50%20percent%2C%20the%20report%20said.

[88] *Id.*

[89] *Id.*

in 2003,[90] followed by Facebook in 2004,[91] YouTube in 2005,[92] and Twitter in 2006.[93] Social media platforms created spaces where users could share short and simple messages: a character-capped Tweet, a status about how one is feeling on a given day, or a video montage to wish a friend happy birthday, for example. But these platforms, like other technological innovations, have grown over time as well.

During the coronavirus pandemic, once in-person courtrooms moved online to reduce the spread of COVID-19, some court hearings took place over real-time communication platforms like Zoom — which was released in the early 2010s but did not gain in substantial popularity until 2020[94] — while other proceedings were live streamed to the public via platforms like YouTube.[95] The ease of access to courtroom hearings by technological means enabled members of the public to engage with the justice system with the click of a button. Some judges have likened the viewing experience to television dramas, with a senior judge in El Paso, Texas remarking, "It's like instead of watching soap operas, you can watch court proceedings"[96] from the comfort of your home. Another judge from Collin County, Texas shared that since streaming her hearings online, she had seen "a lot more engagement from people who don't have the resources to take a paid day off work and drive their working car to the courthouse."[97] Perhaps these experiences indicate that members of the public, when presented with the opportunity to fully and remotely access a trial, are likely to do so and view the proceedings in their entirety. Or perhaps the pandemic simply marks a unique snapshot in time when many other forms of entertainment were unavailable to distract the attentions of online trial viewers. Either way, a concern for keeping trials open drove the decisions of many state court systems to find ways to enable access to hearings during a nationwide shutdown of many courthouses and other public facilities.[98]

As video services advanced online, the opportunity for streaming clips made its way to smartphone devices. Smartphones became first

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[90] *Myspace*, BRITANNICA (Sept. 15, 2023), https://www.britannica.com/topic/Myspace#:~:text=Who%20created%20Myspace%3F,)%2C%20created%20Myspace%20in%202003.

[91] *Facebook*, BRITTANICA (Sept. 29, 2023), https://www.britannica.com/topic/Facebook.

[92] *YouTube*, BRITTANICA (Oct. 1, 2023), https://www.britannica.com/topic/YouTube.

[93] *X*, BRITTANICA (Sept. 30, 2023), https://www.britannica.com/topic/Twitter.

[94] *Zoom*, WIKIPEDIA, https://en.wikipedia.org/wiki/Zoom_(software) (last visited May 3, 2023).

[95] Mia Armstrong, *Justice, Livestreamed*, SLATE (Aug. 14, 2020), https://slate.com/technology/2020/08/zoom-courts-livestream-youtube.html.

[96] *Id.*

[97] *See generally id.*

[98] *See id.*

commercially available a decade after computers, in 1994.[99] Mobile apps came onto the scene in 1997, beginning with the "snake" game that allowed a controlling serpent to pick up pieces of cellular food while avoiding obstacles like its own tail and the edge of the screen.[100] In the subsequent decade, developers worked on creating even more complex apps for smartphone users. Instagram became available for download in October 2010[101] and TikTok followed a few years later in September 2016.[102] While Instagram began as a photo-sharing app, it transitioned in 2020 to also allow the creation of video reels, which began as fifteen-second (and now can go up to ninety-seconds) multi-clip videos that could be edited and shared with the global smartphone community.[103] TikTok videos are related in concept, though they can be extended to slightly longer lengths.[104] Through both of these apps, videos are time-capped and they are more likely to be watched by app users if they are short — optimally no longer than thirty-one seconds according to internal data from TikTok.[105]

The development of video sharing apps has had a monumental impact on how society consumes news and information. If viewers are only going to watch a few seconds of a clip, that clip ought to be catchy and memorable to keep viewers interested in continuing to watch content from the original poster. Social media posters that garner many viewers are sometimes referred to as "influencers." The term "influencer" was added to the

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[99] *A (Mostly) Quick History of Smartphones*, CELLULAR SALES (Sept. 28, 2021), https://www.cellularsales.com/blog/a-mostly-quick-history-of-smartphones.

[100] Fiona Jackson, *Talk About a Blast From the Past! As Snake Turns 25, Experts Reveal How Nokia's Iconic Phone Game Became Such a Phenomenon and Sparked the Dawn of a New Use for the Mobile Phone*, DAILY MAIL UK (July 15, 2022), https://www.dailymail.co.uk/sciencetech/article-11017471/Experts-reveal-Nokias-iconic-game-Snake-phenomenon-turns-25.html.

[101] Dan Blystone, *Instagram: What It Is, Its History, and How the Popular App Works*, INVESTOPEDIA (Oct. 22, 2022), https://www.investopedia.com/articles/investing/102615/story-instagram-rise-1-photo0sharing-app.asp.

[102] Deborah D'Souza, *TikTok: What It Is, How It Works, and Why It's Popular*, INVESTOPEDIA (Aug. 14, 2023), https://www.investopedia.com/what-is-tiktok-4588933.

[103] *Introducing Instagram Reels*, INSTAGRAM (Aug. 5, 2020), https://about.instagram.com/blog/announcements/introducing-instagram-reels-announcement.

[104] TikTok videos can be up to 10-minutes in length. Umber Bhatti, *Ask Buffer: What is the Ideal TikTok Length?*, BUFFER (Feb. 9, 2023), https://buffer.com/resources/best-tiktok-video-length/#:~:text=Currently%2C%20Reels%20can%20only%20be,the%2Dcuff%20feel%20to%20them.

[105] *Id.*

Merriam-Webster Dictionary[106] in 2019. According to its formal definition, an influencer is "a person who inspires or guides the actions of others or is able to generate interest in something (such as a consumer product) by posting about it on social media."[107] Using short and punchy video clips, they draw a large audience of viewers. Many influencers and their content are driven, in large part, by profits; influencing has become a lucrative venture that has turned into a full-time career for some, with the possibility of earning hundreds or even thousands of dollars per post for popular content creators.[108] It is no surprise then that when sexy trials become headlines, some influencers attempt to turn those trials into profits and capitalize on their coverage.

This is precisely what happened in the *Depp v. Heard* defamation trial that took place during the summer of 2022. Johnny Depp, an actor well-known for his lead role as Captain Jack Sparrow in the *Pirates of the Caribbean* franchise, sued Amber Heard, his ex-wife and an actress cast in a notable role in superhero film *Aquaman*, for defamation.[109] Specifically, Depp claimed that Heard defamed him in a 2018 op-ed that she published in *The Washington Post*[110] in which she discussed her experience as a survivor of domestic violence without referring to Depp by name. Depp argued that the op-ed clearly could be tied back to him based on the timeframe in which she alleged experiencing domestic abuse and the timeframe of their relationship, and he claimed that the allegations that she suffered any domestic violence at his hands were false.[111]

Whether the trial would be open and broadcast to the public was a disputed matter between the parties.[112] The Heard defense team sought to close the trial and argued, *inter alia*, that cameras were specifically forbidden pursuant to court rules in the relevant venue where testimony concerned "victims and families of victims of sexual offenses" pursuant to

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[106] Robert Klara, *Don't Look Now, But 'Influencer' is Finally an Official Word in the English Language*, ADWEEK (May 6, 2019), https://www.adweek.com/brand-marketing/dont-look-now-but-influencer-is-finally-an-official-word-in-the-english-language/.

[107] *Influencer*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/influencer (last visited May 4, 2023).

[108] *See* Sydney Bradley, *How Much Money Instagram Influencers Make*, BUSINESS INSIDER (Dec. 23, 2023), https://www.businessinsider.com/how-much-money-instagram-influencers-earn-examples-2021-6.

[109] *See* Jason Guerrasio, *Over 40 Witnesses Were Called During Johnny Depp and Amber Heard's Trial. Here are the Most Shocking Details They Revealed*, INSIDER (June 1, 2022), https://www.insider.com/johnny-depp-amber-heard-trial-most-shocking-revelations-witness-2022-5.

[110] Amber Heard, *Amber Heard: I Spoke Up Against Sexual Violence — And Faced Our Culture's Wrath. That Has to Change.*, WASH. POST (Dec. 18, 2018), https://wapo.st/47IgVNZ.

[111] Complaint, Depp v. Heard, 102 Va. Cir. 324 (2019) (CV 2019-02911).

[112] Maddaus, *supra* note 2.

Virginia Code § 19.2-266.[113] Depp's attorneys, conversely, sought to keep the trial open to the public and press coverage alike. Ultimately, the trial judge rejected the defense's reading of the statute, finding that the statute did not mandate closure in civil cases even where testimony related to sexual assault. The judge also explained that she was getting an influx of media requests and felt that it was her responsibility to use her discretion and allow for broad press coverage, noting "I don't see any good cause not to do it."[114] But perhaps the trajectory of this case and its related media coverage provides a warning for judges — or good cause — to utilize their discretion in the future. Part III discusses the way in which new technology platforms on social media have, as indicated by the *Depp v. Heard* case, altered the way in which open trials are consumed by society at large today.

III. THE PUBLIC'S CONSUMPTION OF AND REACTION TO THE *DEPP V. HEARD* TRIAL

Because social media influencers are usually independent persons driven, in large part, by producing profitable content, it is unlikely that they act as neutral reporters or conveyors of well-vetted information. Indeed, analytics data indicates that, with regard to the *Depp v. Heard* trial, pro-Depp content played more favorably with social media users.[115] This led to the creation of more pro-Depp social media content pushed out to the global social media community in the hope of generating more revenue. One content creator on YouTube who goes by "ThatUmbrellaGuy," for example, reportedly earned $80,000 during the span of the six-week trial after he turned his YouTube channel into a pro-Depp sounding board.[116] But the videos that ThatUmbrellaGuy posts range from seconds long to just under ten-minutes,[117] which begs the question: Is that enough time to view trial proceedings and understand the full story behind a given argument? Does the public's reliance on short, one-off snippets from open trials still support the justification for open trials in the first place? Taking a broad view, it is difficult to understand how these clips, at least viewed in isolation, help to further the efforts of the judicial system to assure that

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[113] *See id.*; *see* VA. CODE ANN. § 19.2-266 (1992).

[114] *See* Maddaus, *supra* note 2.

[115] David Vendrell, *Influencers leached onto Depp vs. Heard for engagement*, THEFUTUREPARTY (June 9, 2022), https://futureparty.com/influencers-depp-heard-trial/; Jennifer Andrus, *Miranda Warnings: Depp v. Heard and the Effects of Social Media on Trials*, N.Y. STATE BAR ASS'N (Sept. 26, 2022), https://nysba.org/miranda-warnings-depp-v-heard-the-effects-of-social-media-on-trials/; Taylor Lorenz, *Who Won the Depp-Heard Trial? Content Creators that Went All-in.*, WASH. POST (June 2, 2022), https://www.washingtonpost.com/technology/2022/06/02/johnny-depp-trial-creators-influencers/.

[116] Lorenz, *supra* note 115.

[117] ThatUmbrellaGuy, YOUTUBE, www.youtube.com/@ThatUmbrellaGuy (last visited May 8, 2023).

a defendant receives a fair and accurate adjudication of guilt or innocence. On the contrary, when presented with only a few seconds of out-of-context testimony, it is easy to make snap judgments without regard to a statement's full context. There is a lower likelihood that those judgments are grounded in fact or capable of being substantiated when, as is the case with many time-limited video clips on social media, the content has been designed for entertainment or persuasive presentation.[118] That is especially true where, as here, popular influencers acknowledged that they "supported Johnny [Depp] because that content did better"[119] and that they steered away from pro-Heard content because posts that "try[] to defend Amber Heard" resulted in influencers "los[ing] followers."[120] An article published by the New York Bar State Bar Association about this case warns that the content produced "had nothing to do with who was winning and . . . for litigants and organizations that's a really tough and scary prospect."[121]

With this in mind, open trials in the social media app age confront new issues and may impact legal team strategies. According to *The Washington Post*, Depp's legal team looked to capitalize on the positive social media coverage he was receiving. One of Depp's attorneys testified that he had "numerous phone calls with several sympathetic YouTubers and content creators" about the case.[122] Traditional news outlets are generally beholden to certain journalistic and professional standards.[123] However, to the extent that influencers care not about substantive content and information conveyed but rather about profit generation based off views on short and entertaining video clips, the public and case outcomes may very

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[118] *See* Kathryn Vercruse, *The influence of social media on the Johnny Depp and Amber Heard trial*, L.A. TIMES (Nov. 1, 2022), https://highschool.latimes.com/mater-dei-high-school/opinionthe-influence-of-social-media-on-the-johnny-depp-and-amber-heard-trial/.

[119] Andrus, *supra* note 115.

[120] Lorenz, *supra* note 115.

[121] Andrus, *supra* note 115.

[122] Lorenz, *supra* note 115.

[123] The debate of whether journalistic protections should extend to bloggers raises a similar back-and-forth question and has been extensively discussed in the existing literature. *See* Benjamin J. Wischnowski, *Bloggers with Shields: Reconciling the Blogosphere's Intrinsic Editorial Process with Traditional Concepts of Media Accountability,* 97 IOWA L. REV. 327 (2011); *Protecting the New Media: Application of the Journalist's Privilege to Bloggers*, 120 HARV. L. REV. 996, 1002 (2007). While the question of whether influencers generally abide by journalistic standards is beyond the scope of this Article, I point out that the question of whether bloggers are considered journalists still varies among state shield laws. I believe that online social media influencers who use video clips on platforms like TikTok and Instagram encompass either a very narrow subset of bloggers or should be considered as an entirely different grouping of content creators.

well suffer from heavy reliance on and consumption of social media reels stemming from the availability of open trials.[124]

The issues related to the social media coverage of sexy open trials are two-fold. On the one hand, members of the public are making quick judgments about how a matter should come out via the court of public opinion without actually considering the whole of the relevant information needed to make a reliable judgment; indeed, the information they *are* receiving is far from impartial as well as being incomplete. And on the other hand, the public's snap judgments can risk influencing the jury's ultimate conclusion about how a case should be decided.

On the first point, the data collected on viewership statistics from YouTube's streaming of the *Depp v. Heard*[125] trial is illustrative. Some viewers relied on YouTube, rather than just social media clips, as a means of observing the trial proceedings. While social media users who chose this mode of consuming trial coverage gleaned more than one would by watching just a few seconds of a curated video, data indicates that YouTube viewers still regularly failed to understand the full picture of evidence presented. Indeed, during the first three days of the trial, at which Depp's friends and family testified, there were only — at most — ever 41,000 viewers of the trial.[126] However, as soon as Depp himself began to testify in court, the number of viewers increased to 214,000.[127] Over the first five weeks of the trial, viewership never experienced seven-digit numbers, but the final week of trial amassed 3.54 million viewers.[128] This suggests that members of the YouTube public audience often picked specific aspects of the trial to consume, likely because they wanted to hear particular testimony or evidence from one side without interest in listening to other perspectives. This is exactly what played out in a more extreme fashion over social media apps like Instagram and TikTok: fans of Johnny Depp were interested in seeing one-sided content in support of a beloved actor, and when that content became more marketable, influencers jumped on the opportunity to create content with that marketable bias in mind until that became the dominating content pushed onto all social media app viewers.

A takeaway from this phenomenon is that keeping trials open for press coverage no longer provides assurance that the public will consume fulsome, nonbiased information about what happens in the courtroom. While open trials are intended to ensure transparency and accountability by allowing members of the public to observe all proceedings and see justice

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[124] *Id.*

[125] Depp v. Heard, No. CL-2019-2911 (Fairfax Cnty., Va. 2022).

[126] Bohdan Zaveruha, *Johnny Depp and Amber Heard trial — how many viewers gathered on YouTube and how it was discussed on Twitch?*, STREAMCHARTS (June 2, 2022), https://streamscharts.com/news/johnny-depp-vs-amber-heard-trial-viewership.

[127] *Id.*

[128] *Id.*

being done, the aim of that tradition fails when the public chooses to observe only snippets of biasedly curated trial content on social media. As the media and technological landscapes change, the way in which the public consumes information has changed with it, urging consideration of whether the traditional justifications for opening trials still hold.

On the second point, if trials remain presumptively open and the public forms snap judgments based on only a small sampling of curated trial content, there is a potential risk that these unfounded judgments can have real impacts on jury outcomes. Legal experts, for instance, repeatedly questioned whether the way in which the *Depp v. Heard* case played out on social media impacted the highly favorable Depp verdict in his case against Heard.[129] Juries that are not sequestered are not sheltered from viewing content or overhearing conversations related to their particular matter, and in some instances where a case may be a heavily discussed topic, as this one was, that exposure — though perhaps unintended — may be unavoidable. Heard's attorney expressed concern about this issue, surmising "[jurors] went home every night. They have families. The families are on social media. There's no way they couldn't have been influenced by it."[130] Furthermore, every day as the jurors in this case walked into the Fairfax, Virginia courtroom, they were greeted outside by numerous fans and protesters with loud signs eager to express their thoughts on the matter. The *Washington Post* reported that outside the courthouse, Depp fans clamored for a limited number of spectator seats.[131] Recounting the scene, the news outlet noted that "[a]lthough there [were] some Heard supporters, the loudest presence [were] Depp loyalists."[132] As jury members walked into the courthouse each day, they were greeted with pro-Depp signage reading "Justice for Johnny" and "Wish He Never Heard!!" as well as pirate flags as a nod to Depp's successful *Pirates of the Caribbean* character, Captain Jack Sparrow.[133] The *New York Post* similarly reported that hundreds of Depp fans lined the streets outside of the courthouse to show their support of the actor during the trial proceedings.[134] In other words, jurors had to walk past hundreds of people vehemently rooting for

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[129] *See* Anya Zoledziowski, *Did Social Media Sway the Johnny Depp Jury?*, VICE (June 3, 2022), https://www.vice.com/en/article/qjkd4q/johnny-depp-heard-trial-jury-social-media.

[130] Scott Stump, *How social media could influence other cases after Depp, Heard trial*, TODAY (June 3, 2023), https://www.today.com/popculture/popculture/social-media-could-influence-other-cases-after-depp-heard-trial-rcna31804.

[131] Emily Yahr, *In Va. court, Depp Fans Clamor for Seats. Alpacas Must Wait Outside.*, WASH. POST (Apr. 25, 2022), https://www.washingtonpost.com/arts-entertainment/2022/04/25/depp-heard-trial-scene/.

[132] *Id.*

[133] *Id.*

[134] Alex Mead, *Hundreds of Johnny Depp Fans Line the Streets Outside Court*, N.Y. POST (May 24, 2022), https://nypost.com/2022/05/24/hundreds-of-johnny-depp-fans-line-the-streets-outside-court/#1.

one party in advance of hearing that day's testimony. And while the First Amendment absolutely provides fans with the right to express their views on a case in a public forum, one can still postulate that the one-sided social media buzz likely served as a real impetus behind the extensive displays.

Indeed, it is hard to know the impact that the public's outcry of support had on the ultimate verdict in the case, but it is difficult to conceive that the environment that jurors stepped into each day had no bearing on their deliberations at least on a subconscious level. And it is similarly difficult to ascertain the impact that even inadvertent exposure to biased, or at least curated, social media content may have on a jury as well. There does, however, seem to be some inherent risk that publicizing a trial in the manner that social media platforms did in this case could compromise the jury's ability to fairly assess the evidence presented; the strong presence of a public that has made a snap judgment about how a case should come out invariably places pressure on jurors to reach that same conclusion.

There have been no studies that examine the effects that stumbling upon (as opposed to explicitly researching or seeking out) social media content or protesters related to a case has on a jury. But group think — a phenomenon that occurs when a group of well-intentioned people makes irrational or non-optimal decisions spurred by the urge to conform or the belief that dissent is impossible[135] — has been the topic of much discussion in the existing literature. Some scholars noted, for example, that "[m]any [jurors] may not be able to stand up against the pressures of group-think" and will change their vote on the outcome of a case to conform with others if they feel pressured by other jury members.[136] It logically follows then that jurors who feel pressure from, say, the public or social media more generally, may likewise conform their votes accordingly. Indeed, some judges believe that jury discussions should be delayed altogether until the end of trial to discourage group think from biasing the ways in which jurors view evidence and testimony presented over the course of trial proceedings.[137] The concern is that "allowing jurors to start discussing the case during trial could lead to more issues than any problem that it seeks to fix" because jurors will not go into each day of court open-minded and ready to fairly examine the evidence presented.[138] But the same concern can be raised for jurors who, each day, walk into or confront an environment — whether online or in-person but driven by online behavior — ahead of the day's proceedings that exposes them to strong

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[135] *Group Think*, PSYCHOLOGY TODAY, https://www.psychologytoday.com/us/basics/groupthink (last visited June 1, 2023).

[136] Jill M. Cochran, *Courting Death: 30 Years Since Furman, Is the Death Penalty Any Less Discriminatory? Looking at the Problem of Jury Discretion in Capital Sentencing*, 38 VAL. UNIV. L. REV. 1399, 1447 (2004).

[137] *See* J. Thomas Marten & Stephen R. Bough, *To Innovate or Not to Innovate: Two Judges' Thoughts on Traditional Versus Modified Civil Jury Trial Procedures*, 68 DRAKE L. REV. 765, 782 (2020).

[138] *Id.*

feelings about the parties and arguments that they will be evaluating. Indeed, the trajectory that social media has taken in proliferating short but curated clips for entertainment and profit value has changed the landscape in which open trials may be viewed and has therefore also exacerbated the risks that accompany opening certain trials.

IV. DISCRETIONARY REVIEW IN DETERMINING WHEN TO CLOSE TRIALS

The way in which open trials are discussed on social media and other technological platforms yields some risk that the public and members of a jury will be influenced by biased content that represents only a small portion of the information available about a case. With this in mind, it is important that judges consider the serious risk that opening trials may have in unfoundedly influencing case outcomes in certain matters. Where cases concern high-profile parties or particularly controversial topics, there may be a greater risk that social media reactions could impact a non-sequestered jury to a greater degree.[139] The *Depp v. Heard* case, for example, amassed more social media interactions per published article from April to May 2022 than any other topic, according to a social media tracking firm.[140] The public, in other words, zeroed in on this particular trial more than other popular topics like abortion (which was being considered by the Supreme Court), the ongoing Russia-Ukraine War, and coronavirus, making it a ripe subject for content creators to capitalize on. Content creators on social media platforms like TikTok and Instagram, aware of the public's fascination with this case, thus curated content with an eye towards generating profits. In so doing, these influencers produced significantly more pro-Depp content seemingly because such content played more favorably with their followers. Followers thereby were able to engage with the ongoing trial at the easy click of an app button, but only in snippets and seconds-long increments of carefully edited and selected clips from trial proceedings.[141] These short clips failed to showcase the whole story behind a given argument, leading members of the public to make strong snap judgments with only incomplete impressions on the matter.

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[139] Of course, there is the counterargument that controversial matters may be ones that the public is most concerned about because they impact the public directly. It then follows that these are precisely the types of matters that the First Amendment demands stay open for the purpose of demanding and ensuring judicial accountability. While I support this general notion, to the extent that such topics may, in fact, be more heavily subjected to media bias, the impact on trial fairness ought to be seriously considered even on publicly relevant but otherwise controversial matters.

[140] Neal Rothschild & Sara Fischer, *America more interested in Depp-Heard trial than abortion*, AXIOS, https://www.axios.com/2022/05/17/amber-heard-johnny-depp-trial-social-media (last visited June 1, 2023).

[141] *See* Vendrell *supra* note 115; *see also* Lorenz *supra* note 115.

Cases which are likely to draw intense public interest and media response, like *Depp v. Heard*, may therefore be the most negatively impacted by opening courtroom doors. This is not to say that such trials should necessarily be presumptively closed, but it does offer pause that they should be presumptively open. Alternatively, at minimum, these circumstances suggest that the presumption of openness should be more easily defeated when social media coverage is likely to be extensive. Indeed, the prudent choice under such circumstances would seem to entrust judges with balancing the competing interests between assuring public fair access to trials in an effort to maintain judicial accountability with the serious risk of bias in a given case. While many courts already provide judges with discretion over such decisions, the historical tradition of open courts that underlies the judicial system often underpins keeping trials presumptively open without serious consideration otherwise. However, in light of the changing media landscape, such a tradition should be but one aspect considered in reaching a conclusion about trial openness, alongside new and equally important considerations that perhaps undermine the justification behind that tradition altogether.

CONCLUSION

Presumptively open trials are deeply ingrained in the United States judicial system. In light of evolving social media and technology, however, this tradition faces significant challenges and problems. While the historical view rests on the idea that open trials promote transparency, public scrutiny, and judicial accountability, new considerations arising from the changing media landscape warrant a reevaluation of this presumption. Or, at the very least, warrant reconsideration of the circumstances in which the presumption can be defeated.

The way in which the public consumes information and coverage of open trials has undergone significant changes over the past century. From in-person attendance, to broadcasts over radio and television, to social media apps today, the mode by which the public receives information about trial proceedings has dramatically changed. The short, curated, and incomplete video reels that permeate today's popular culture and social media platforms are easily accessed and consumed by members of the public, posing a potential threat to the core goals and justifications behind open trials. Indeed, this type of content, which often lacks context and completeness and threatens a risk of bias, has led to the formation of strong but influential opinions and snap judgments. Recent events, such as the highly publicized case of *Depp v. Heard* in 2022, highlighted the potential risks associated with media distortion and the influence of biased, profit-driven content on public opinion and, consequently, the verdicts reached by juries. Such strong public reactions based on limited understanding threatens fair and impartial jury verdicts in matters involving non-sequestered juries. These jurors risk being exposed to public sentiment and

groupthink as well as the actual curated content itself before rendering their judgments.

To address these challenges, judges should seriously consider exercising their discretion to close trials when there exists a real risk of media distortion and pressure that could impact a case's verdict. Such cases may involve high-profile clients or concern otherwise controversial matters that are likely to attract public interest and media response. While this Article certainly does not advocate for a presumption of trial closure, balancing the interests of public access and judicial accountability with the risk of bias is necessary to ensure a fair and unbiased trial process.

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