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American Justice or American Idol? Two Trials and Two Verdicts in the Casey Anthony Case

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In October 2008, I became the trial consultant for Casey Anthony. The media coverage was already vast, heated, and overwhelmingly negative. Over the last two and a half years, my primary concern was how the media's public trial of Casey Anthony, played out through hundreds of shows and headlines, would ultimately affect her real trial. These were the two juries in her case – one at home and one in a courtroom in Orlando, Florida.

When she was unanimously acquitted of the most serious charges, a USA Today/Gallup poll showed that nearly two out of three Americans believed Casey Anthony was guilty of murder[1]. How could these two juries come to such starkly different verdicts? More importantly, what can we learn from this extraordinary trial about the influence that the media has on the trial process? How do we balance freedom of the press with the Constitutional rights of parties in the criminal justice system?

Every mother and father has experienced that moment of panic in a store or a park when you can't find your child. Those moments can seem like hours. When your child is found, an unbelievable wave of relief washes over you. With this universal experience, it becomes natural that most find Casey Anthony's behavior inexplicable after Caylee died: it does not match our expectation of a panicked mother looking for her missing child or our image of a grief stricken parent coping with her child's death. And often when we do not understand the behavior of others, we convert our confusion to fear and anger.

Having done jury research on civil cases involving the death of a child in the past, I have found that jurors almost always believe that a parent is somewhat responsible for that death, no matter how remote that parent was to the accident that took the child's life. This accountability is part of a natural instinct that makes us want to protect children. We simply do not want to believe that, in a just world[2], a senseless accident can take the life of an innocent child. If we can blame someone, we can make sense of it. Then we don't have to face the reality that the world can sometimes be random, dangerous, and incomprehensible.

It is with this mindset that many Americans convicted Casey Anthony of murder – before the trial even started – using a civil trial's standard of proof: more likely than not, she probably had some-

thing to do with the death of her child.

News coverage started almost immediately in the case, with hours of airtime spent on the searches for the missing child, the candlelight vigils, and resulting arrest of Casey. This was where the public's trial began. Florida has one of the most liberal media access laws in the nation. Dubbed "The Sunshine Law"[3], this statute made all evidence exchanged between the prosecution and the defense a public document, accessible on any number of media sites for anyone to read and download into their own evidence collection folder on their computers. This obviously posed an extreme challenge for the defense. In most courts, any juror who has great familiarity with a case, the parties, and the specific facts would be excused for cause because they would not be deemed to be impartial. While many trial courts have said that exposure to news stories does not automatically disqualify a juror, the unique laws of Florida made actual evidence accessible to any prospective juror. Of course, contained in this published discovery were documents, photographs, and witnesses that a Judge would later rule were inadmissible, irrelevant, or prejudicial. Many documents also contained untested or erroneous information. Despite these flaws, these documents were posted on websites for public consumption with scores of commentators and bloggers, usually opining on Casey's guilt.

In an age where people get instant information from limitless Internet sites and 24/7 news cycles, producers and editors have hundreds of television hours and web pages to fill. Since the facts of a news story can often be limited, the required airtime and webpage acreage is often filled with commentary and debate. Producers and editors are keenly aware of what elements of a news story will pique the interest of a viewer or reader. Hence the old news adage, "If it bleeds, it leads." Scott Safon, the executive vice-president of HLN, gave an interview in March of this year discussing how important the Casey Anthony trial was to the network[4]. Its June ratings put it ahead of both CNN and MSNBC, almost doubling its viewers compared to June of last year. Nancy Grace, who dedicated hundreds of shows to the case, averaged 1.5 million viewers a night[5]. Since ratings equal advertising revenue, this prosecutorial perspective drove much of the coverage.

Many of the hosts and regular guests of the HLN have admitted that they believed Casey Anthony to be guilty either before or during the trial. And it was with this prejudgment that both the press and the public became both police and prosecutors, poring over the evidence and forming theories about how and why Casey murdered her daughter. Not if, but how. The media also put the defense team, any potential witness for the defense, or anyone who spoke in favor of the defense on trial, even investigating aspects of their personal lives. As a result, the defense suffered from unfair hardships – potential witnesses were unwilling to testify on Casey's behalf for fear of being denounced or humiliated in the press. Obviously, this impedes a high-profile defendant's ability to put on a full defense, and thus his or her right to a fair trial. In fact, the vitriol on the Internet sites was so venomous and one sided, I purposely ignored the blogger's posts and responses to news articles.

These obstacles create an advantage for prosecutors, who already have an edge in trying a case. In most urban jurisdictions in this country, prosecutors enjoy an 80% – 90% conviction rate[6]. They have more resources and a bigger budget than the average criminal defendant. (Most of the Casey Anthony defense team, including myself, contributed their time pro bono to the case.) In a high profile case, most of the information that is disseminated to the public tells the prosecution's story, including pictures of the "perp walk", specifically staged to give the news media pictures of the defendant in handcuffs. In the Anthony case, Florida State Attorney General Pam Bondi publicly proclaimed on a national news

show before the trial that the "evidence was overwhelming" of Casey's guilt[7].

Because the defense is not obligated by law to present an alternative theory in the case, they usually wait until trial to disclose their theories and to question the validity of the prosecution's case. This is unsatisfying for a media audience desiring an instant response to the prosecution's allegations. So, in a high profile case, the public usually gets only one side of the story: the prosecution version. In the court of public opinion, the defense cannot merely say, "Wait for the trial."

In looking at the negative media deluge in our case, I determined that there was simply no discernable gain from trying to turn the tide of public opinion in the press. Given the zeitgeist, any attempt to explain or persuade would have been met with skepticism or outright scorn. So, I felt it would be best to be patient and wait. If anything, I hoped the negative publicity would reach a tipping point. I believed that the saturation was so great and the hyperbole so charged, that the actual jury might experience a backlash effect. We saw this same phenomenon in OJ Simpson's murder trial. In conducting a community attitude survey before that case, we saw a counterintuitive result: the more exposure a juror had to news stories in that case, the more suspicious jurors were of the actual evidence in the trial. We saw this same skepticism in a focus group we conducted prior to the Casey Anthony trial[8]. In that group, jurors criticized the media for inflaming the case, making it difficult to distinguish the real evidence from the media hype. Since press coverage often needs to create stories to satisfy the public's hunger for a news item, I was also counting on the fact that the saturation would create an expectation that the prosecution would produce a "smoking gun" or new evidence in trial.

Two Juries, Two Verdicts

Casey Anthony's trial was set to start in front of a jury of millions. The jurors at home felt it was their case. They had watched dozens of hours of coverage. They saw the videos of the beautiful Caylee. They saw the pictures of Casey dancing at the nightclub. They were ready to convict her. They just needed the formality of a trial and the decision of a jury to validate what they already knew: that she was guilty of murdering her daughter.

The problem is that those millions were not qualified as jurors in this case. They had already prejudged the defendant and had demonstrated a bias that would not allow them to sit on a case. They also had a familiarity with the evidence that would disqualify them as jurors. You see, the Sixth Amendment of the Constitution guarantees every defendant a right to an impartial jury, jurors who have not already viewed and judged the evidence.

And this is where the First Amendment creates a problem for the courts in the Digital Age. How could a potential juror – someone who had seen more than two years of news stories, discussed the case with friends and family, and come to conclusions about the actual evidence – be a fair and impartial juror? The courts typically respond by asking potential jurors the impossible question, "Can you set those opinions aside and judge this case based on the evidence from the witness stand?" Realistically, people who have invested that much time and emotion into a case cannot simply erase those impressions and disallow them to influence how they view the evidence. Psychologists call this confirmation bias – people actively seek out information that confirms what he or she already believe, while ignoring and dismissing information that does not conform to their belief.

Because of the community's interest in the case and the overwhelmingly negative coverage, I

had submitted an affidavit supporting a motion for a change of venue out of Orlando. The focus group we conducted in Orlando reaffirmed this by unequivocally stating that they believed Casey to be guilty because of the pre-trial publicity and that she could not get a fair trial in the county. Fortunately, the Judge agreed to move the case. However, rather than physically move the location of the trial, he decided to "import" a jury to Orlando. This meant picking a jury in another venue, moving them back to Orlando, and sequestering them in a hotel for the entire trial.

Since the coverage of the case was statewide, the Judge had difficulty finding a venue to import jurors from that did not have pervasive publicity. We were faced with a due process issue: if you are a defendant who is tried in a state where every venue is tainted by the publicity, where can you reasonably get a fair trial? WFTV, an Orlando television station, released polling on the eve of trial showing that in five venues all over the state, 70% - 90% of the Orlando, Jacksonville, Tampa, Palm Beach, and Pensacola communities were familiar with the case and already believed Casey to be guilty of murder[9]. Even more troubling (but unfortunately standard for defense lawyers who try death penalty cases) more than half of those polled supported the death penalty for all first-degree murder cases. This meant that, regardless of the circumstances of the alleged murder in a case, most jurors were preconditioned to believe that once a defendant was guilty of murder, he or she should automatically get the death penalty, obviating the need for a penalty phase of the trial.

In order to prepare for what we assumed to be a difficult jury selection, we requested two things of the Judge – a supplemental juror questionnaire and the location in which we would be picking a jury. The Judge refused both. He stated that the attorneys should be able to pick a jury in five days without a questionnaire. He also stated he did not want to tell us the venue where we would be picking a jury because he did not want the media to inundate that community and infect the pool. This was problematic for us as we wanted to be able to study his chosen venue to see whether there was sufficient bias to make another change of venue motion. In fact, Judge Perry would not reveal the location of the venue to the lawyers until the Friday before the Monday jury selection and, by his order, other members of their staff (including consultants) were not allowed to know the location until the Sunday before the selection would start. He stated repeatedly that he would be picking a jury in five days and that the opening statements would begin the following Monday. At one point, Judge Perry even stated that, if we could NOT pick a jury in five days, he would rescind his change-of-venue order and assemble a jury from people in the Orlando jury pool. He further decided that the jury selection would be broadcast, although the jurors would not be shown, and be identified only by numbers. We faced three major challenges in getting full disclosure and candid responses from potential jurors: the lack of a jury questionnaire that would increase juror candor, the time limitation imposed by the Judge, and the potential juror's knowledge that their vocal responses in voir dire would be broadcast for the entire world.

Because of these challenges, I felt it was important to get a Florida trial consultant involved who knew the various venues in the state. I contacted Amy Singer of Trial Consultants, Inc. and she put together a team of consultants who, although not present in the courtroom during most of the jury selection, would monitor the broadcast voir dire. This innovation allowed all of us to listen and send follow-up questions and recommendations on cause and peremptory challenges to the team in court and at the end of the day.[10]

Needless to say, both the prosecution and defense faced significant challenges in seating a jury. We first had to find people who would be willing and able to leave their family and jobs for six to eight

weeks, work six days a week, and stay holed up in a hotel room with limited television and internet access. Second, we had to eliminate all of those jurors who had already made up their mind about the case. Third, we had to eliminate those people who would automatically vote for or against the death penalty without hearing additional evidence in the "penalty phase". It is this last area that can be the most problematic issue for a defense team as research shows that the process of qualifying jurors for a death penalty case tends to seat a pro-prosecution jury[11]. These three areas did not even include the voir dire we would ordinarily do in a criminal case, including the common expectation of jurors that the defendant should have to prove their own innocence and testify on their own behalf. All of these problems created the concern that the public consensus had shifted the burden to the defense to prove Casey's innocence, and the jury would feel enormous public pressure to convict her[12].

All of these challenges made jury selection truly jury de-selection. Our primary goal was eliminate all or most of those jurors who had pre-judged Casey as guilty and who would automatically give her the death penalty if they found her guilty of the first-degree murder charge. In our profile of a desirable jury, we were not looking for men or women, young or old, black or white jurors. We wanted smart, skeptical, independent, and self-aware jurors. Jurors who could separate their emotional responses from rational evaluations, who could follow the rule of law, and turn a keen probing eye to what we felt were the prosecution's "fantasy forensics" and facile motive. Most importantly, we wanted jurors who were strong enough to ask hard questions and resist the public's demand for a conviction unless they felt the prosecution had really proved their case.

After two weeks, the two juries were seated. Twelve jurors and five alternates in the courtroom, and millions of "jurors" at home in front of their computers or televisions. Each jury had a different set of rules. The jurors at home could talk about the case with each other, speculate, use evidence not allowed in court, freely use their emotions, and proclaim the defendant's guilt as often as they wanted. The jurors in court were instructed they could do none of those things. And there was one other enormous difference between these two juries: the one in the courtroom saw all of the evidence and witnesses. The one at home saw only an editorial selection of it.

In the end, the twelve jurors in the courtroom found Casey Anthony not guilty in the death of her daughter.

The Important Independence of Juries

Both the prosecution and the defense chose the jury in the courtroom. While others have not shown such restraint, prosecutor Jeff Ashton has graciously said he would not criticize this jury. He thought the jury would see it his way and accepts that they did not. All attorneys who try cases know the inescapable truths of absolutely every trial: you win some and you lose some. Often, you are surprised, winning cases you thought you would lose and losing cases you were sure you would win.

Independent juries are the cornerstones of the justice system. We trust that a group of 12 citizens, brave and true, working together to interpret the evidence and the law will use their independent judgment to arrive at a just verdict. There is no formula, no predictable result. Each jury has its own way of piecing together the evidence in the case and applying the law. We rely on that individuality and independence as the hallmark of citizen juries. We, as consultants, study the idiosyncratic process of how juries use their experiences and beliefs to interpret the evidence and the law. The American So-

ciety of Trial Consultants and the research that consultants and academics conduct can help the courts, attorneys, and the parties to better understand this dynamic process.

It is important to listen to those jurors in the Casey Anthony case who have been willing to speak. Their first vote was 10-2 for acquittal. After 11 hours, it was unanimous. The one alternate juror who has spoken, Russell Huekler, also saw the case in the same way as the jury[13]. They describe numerous questions they had about the prosecution's case and gaps they feel were not filled. This jury, nine of whom had university degrees and five who had Masters, also describe very specific reasoning on the legal instructions on "premeditation" and "abiding conviction of guilt"[14]. This tells us that the jury in the courtroom saw a very different case than those at home. And ultimately, they were the only true jury in the case. They were there, every minute, every day. American justice is not American Idol. It cannot and must not be subject to a popular vote.

Consider the sheer courage of these twelve citizens. They all knew the verdict that the public overwhelmingly wanted and even expected. Can anyone honestly say that this jury was eager to go back home and justify acquitting Casey Anthony to their family, friends, and co-workers? Of course not. They all knew that they would face scorn, derision, and possibly ostracism, but they stood up to that extraordinary pressure. They were conscientious of their instructions and duty. While many may not agree with their verdict, I hope we can appreciate and respect the difficult and sometimes brave job the jury does in these cases.

Real trials, like real life, are complicated, messy, sad, confusing, and sometimes inexplicable. They do not fit into an hour-long news show or detective drama. We must learn to balance the First Amendment demands of the press and the Sixth Amendment rights of a criminal defendant. While the Supreme Court has said that a jury does not have to be totally ignorant of the facts of a case[15], press coverage now goes well beyond reading stories in a newspaper. The public, armed with iPhones, computers, and television sets participate in a trial, forever changing how we must think about the concept of impartiality. Without proper management, these new media trials put us closer to the "carnival atmosphere" the Supreme Court envisioned in their ruling overturning the Sam Shepard case[16].

We can learn to understand the unique nature of these trials and manage them so that the public, the press, and, most importantly, the parties can better understand their individual roles. The media can better present a balanced picture of the developing case and the trial. The public can become educated about the dynamic nature of a trial, distinguishing between the legal criteria that judges and juries use to decide cases and what they see at home. The prosecution and the defense can better manage case-related information and understand how publicity will affect the jury pool and their relative expectations in trial. The courts can better administer these trials, protecting the rights of all the parties, the press, and the jurors.

These trials push our criminal justice system to the breaking point. The jurors in this case have received hate mail and one has fled Florida, fearing for her safety. The Anthony family has received death threats. Casey will probably fear for her life for a long time. This is not to say that everyone will or should agree with the verdicts in these cases. There will always be cries of outrage and heated disagreement in these cases. We can, however, conduct these trials in a way that reduces the misperceptions, biases, and sometimes even violence that can accompany such cases. When we reduce these, we can better appreciate that our jury system is a remarkable foundation for democracy.

Endnotes

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[7] Sutow, I., Leach, J., and Zimmerman, G. (2011, April 16). Can Casey Anthony get a fair trial? *CBS News*. http://www.cbsnews.com/stories/2011/04/16/48hours/main20054402.shtml

[8] The focus group was conducted as part of a 48 Hours episode which can be viewed at http://www.cbsnews.com/video/watch/?id=7362976n&tag=contentMain;contentBody

[9] The full results of the poll can be found at http://www.wftv.com/download/2011/0506/27800480.pdf

[10] The live feed also allowed us to watch the trial and send observations and recommendations during the case.

[11] Cowen, C. et al. (1984). The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation. *Law and Human Behavior, 8(53)*.

[12] Some of the very prominent on-air personalities who had proclaimed Casey's guilt would periodically show up in the courtroom to watch the trial.

[13] (2011, July 6). Anthony juror: 'Sick to our stomach' over verdict. *MSNBC*. http://www.msnbc.msn.com/id/43651613/ns/us_news-crime_and_courts/t/anthony-juror-sick-our-stomach-over-verdict/

[14] http://www.tampabay.com/news/courts/criminal/casey-anthony-jurors-still-feeling-effects-of-public-backlash/1181900

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