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BACKGROUND NOISE: LESSONS ABOUT MEDIA INFLUENCE, MITIGATION MEASURES, AND MENS REA FROM ARGENTINE AND US CRIMINAL CASES

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We have translated this article into English, and expanded it for a US audience, from our *Los Medios de Comunicación y Las Causas Penales: Algunas Pautas para Reflexionar, a Propósito del Caso Báez Sosa*, in SUPLEMENTO PENAL NO. 1 (Thomson Reuters La Ley, 2023) (Arg.). The rest of that volume also analyzes the Báez Sosa case. We thank the editors of the *Brooklyn Journal of International Law* for their hard work bettering this article.

INTRODUCTION

A. A Violent Death in Argentina

In the early morning hours of January 18, 2020, eight rugby players (aged nineteen – twenty-one) fought inside a dance club with Fernando Báez Sosa, an eighteen-year-old dark-skinned son of Paraguayan immigrants. Some involved in the affray were thrown out; others left of their own accord. Within ten minutes, Báez Sosa encountered the eight teammates out front. They decided to attack him by surprise and began beating him, as well as friends of his who came to his defense, with at least one player shouting racial slurs. Báez Sosa fell to the ground as blows and kicks—some aimed at his head—continued. Within fifty seconds, he was dead. Some of the teammates embraced only feet away.[1]

All eight were controversially charged with homicide aggravated by the premeditated participation of two or more people.[2] Following a lengthy trial by a panel of three judges (the defendants having selected this instead of a trial by jury), five of the defendants received life sentences, while the other three were sentenced to fifteen years' imprisonment.[3]

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1. *See* Case No. 629: Thomsen, Máximo Pablo; Pertossi, Ciro; Comelli, Enzo Tomás; Benicelli, Matías Franco; Viollaz, Ayrton Michael; Cinalli, Blas; Pertossi, Luciana; Pertossi, Lucas Fidel / homicidio doblemente agravado, [hereinafter Thomsen, Máximo Pablo] (Crim. Ct. No.1 of Dolores, 2023), at 10–12, 14, 146; *see also* Natalie Alcoba, *Argentinian rugby players sentenced to life in prison over teen's murder*, THE GUARDIAN (Feb. 6, 2023), https://www.theguardian.com/world/2023/feb/06/argentina-fernando-baez-sosa-murder-rugby players#:~:text=M%C3%A1ximo%20Thomsen%2C%20who%20prosecutors%20said,carried%20out%20by%20a%20group; *Fernando Báez Sosa: El Caso del Joven que Murió en un Ataque de un Grupo de Jugadores de Rugby que Conmociona a Argentina,* BBC NEWS MUNDO (Jan. 21, 2020), https://www.bbc.com/mundo/noticias-america-latina-51191540 [hereinafter "*El Caso del Joven*"]. Three other people were initially suspected of involvement as well. *See 11 Arrested after 19-Year-Old Beaten to Death by Group in Villa* Gesell, BUENOS AIRES TIMES (Jan. 20, 2020, 3:14 PM), https://www.batimes.com.ar/news/argentina/19-year-old-murdered-by-rugby-players-outside-bowling-alley.phtml.

2. El Caso del Joven, *supra* note 1.

3. *See* Thomsen, Máximo Pablo, *supra* note 1, at 149, 160–62; *see also* Alcoba, *supra* note 1.

B. Intense Media Attention

The Báez Sosa case has been one of Argentina's most significant in recent years due to substantial media attention. From the outset, it received extensive coverage, capturing the interest of the entire population, even across generational and class differences.[4] While criminal cases do generally pique the interest of citizens, this particular case trended consistently in the media and on social networks at key points throughout the proceedings, especially during the January 2023 trial. Thousands of protesters marched in Buenos Aires.[5] Public television aired a report with a banner describing Báez Sosa as having been "murdered by a gang of rugby players" and ending with the declaration, "One demand unites us: justice."[6] Social media users criticized an Argentine Rugby Union statement issued immediately after the killing that lamented Báez Sosa's "death," demanding that the Union instead say "murder."[7] Pope Francis—a native Argentine—even called Báez Sosa's parents, saying he felt from afar the energy to "press forward, fight, and ask for justice."[8]

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4. *See, e.g.*, *Argentina Rugby Players Sentenced in High-Profile Beating Death*, AL JAZEERA (Feb. 6, 2023), https://www.aljazeera.com/news/2023/2/6/argentina-rugby-players-sentenced-in-high-profile-beating-death (describing the case as having "dominated national headlines"); *see also* Lucía Cholakian Herrera, *Báez Sosa Murder Trial: Family and Police Take Witness Stand in First Week*, BUENOS AIRES HERALD, Jan. 6, 2023, https://buenosairesherald.com/society/baez-sosa-murder-trial-family-and-police-take-witness-stand-in-first-week (describing the case as having "gripped the nation" of Argentina).

5. *¿Qué Le Pasó a Fernando Báez Sosa? ¿Cómo Fue Su Muerte?*, CNN ESPAÑOL (Feb. 6, 2023), https://cnnespanol.cnn.com/2023/02/06/caso-fernando-baez-sosa-juicio-rugbiers-muerte-a-golpes-2020-orix.

6. *See TVP Noticias: Cómo fue el crimen de Fernando Báez Sosa* (Televisión Pública Noticias broadcast Jan. 18, 2021), https://www.youtube.com/watch?v=S47PcgMozg0.

7. *See Repudio en las redes tras el comunicado de la UAR: "No falleció, lo asesinaron miembros de su union"*, INFOBAE (updated Jan. 20, 2020, 11:00 AM), https://www.infobae.com/sociedad/policiales/2020/01/20/repudio-en-las-redes-tras-el-comunicado-de-la-uar-no-fallecio-lo-asesinaron-miembros-de-su-union/.

8. *El Papa habló con los padres de Fernando Báez Sosa*, PÁGINA12 (Feb. 3, 2020), https://www.pagina12.com.ar/245447-el-papa-hablo-con-los-padres-de-fernando-baez-sosa.

Some interpreted the case through the lens of race (though "in court, and in coverage of the trial, racism was not the dominant lens").[9] One antiracist activist called the protests "a watershed."[10] The incident was condemned as a "clear racist attack" by a national antiracism organization.[11]

Perhaps the close attention the case garnered from so many different quarters can be explained by the countless videos that depicted the attack and showcased the full extent of its brutality as they spread rapidly through social media. This propagation was likely amplified in visual media outlets (television, the internet, and social media) because criminal news provides material that can be sensationalized, dramatized, transformed into narratives—all accompanied by impactful imagery—making it uniquely able to capture and hold public attention.

We also cannot ignore the existence of scholar-identified mechanisms and techniques through which the media places a particular topic at the forefront of public debate, turning it into a matter of general interest (agenda-setting) and providing an interpretive framework, thus influencing how recipients perceive certain issues (news-framing).[12] Research on the "socio-cognitive effects of the news suggests that media content not only *sets* the public agenda . . . but also *dictates* to the public a way of thinking."[13]

News-framing holds particular relevance here. This refers to a twofold process: (1) the selection and emphasis of "words, expressions, and images" in order (2) to provide a specific "viewpoint, focus, or angle" in conveying information.[14] News-framing is also linked to the "assignment of responsibility": "[i]t has been observed that news frames influence the attitudes,

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9. Natalie Alcoba, *'An everyday thing': A Fatal Beating Reveals Argentina's Racist Bias*, THE GUARDIAN (Feb. 21, 2023, 5:30 AM), https://www.theguardian.com/world/2023/feb/21/argentina-racism-fernando-baez-sosa-death.

10. Alcoba, *supra* note 1.

11. *See id.*

12. *See generally* Daniel Varona Gómez, *Medios de Comunicación y Punitivsmo*, 1.2011 INDRET PENAL 1, 3, 21 (2011) (Spain), https://indret.com/medios-de-comunicacion-y-punitivismo/.

13. *Id.* at 22.

14. Gómez, *supra* note 12, at 22 (quoting Juan-José Igartua et el., *Recepción e Impacto Socio-Cognitivo de las Noticias sobre Inmigración*, 23 REVISTA DE PSICOLOGÍA SOCIAL [INT'L J. SOC. PSYCH.] 3, 5 (2008)).

beliefs, and level of cognitive complexity with which people reflect upon social issues."[15]

C. This Article's Plan

Having noted the extensive media attention given to the Báez Sosa case and some of its possible causes, the purpose of this article is to reflect on the influence that heavy coverage can have on the outcome of high-profile criminal cases. Simultaneously, we aim to consider ways to mitigate such influence, with the objective of reconciling defendants' right to a fair and impartial trial with transparency as a cornerstone of the democratic system.

Professor Mitre begins by discussing the tension between journalists' and defendants' rights (Part I). Professor Cavedon then surveys how the US seeks to mitigate media influence (Part II). Next, Professor Mitre notes two recent Argentine mitigation measures (Part III). She then conducts a legal analysis of the Báez Sosa case, blaming media pressure for errors in the judgment and then proposing a different resolution based on the evolving doctrine of extreme recklessness (Part IV). Finally, Professor Cavedon considers how US criminal proceedings are (similarly and dissimilarly) susceptible to media pressure, considering the Kyle Rittenhouse prosecution and the campaign to pardon Daniel Perry (Part V). We hope that this article's international, interdisciplinary perspective draws from these noteworthy cases useful lessons for the hard balances free societies must strike.

I. TWO APPARENTLY CONTRADICTORY RIGHTS

The media plays a crucial role in making known to the public the actions of the branches of government and helping to secure the democratic system. But within the framework of criminal proceedings, if the media endorses or promotes premature judgments about the responsibility of an accused person, or decisively influences the course of a case, due process can be threatened.[16] Indeed, sustained news coverage of an unlawful

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15. *Id.* (quoting Igartua et al., *supra* note 14, at 5).

16. *See* Jesús-María Silva Sánchez, *Filtraciones a los Medios*, 1.2012 INDRET PENAL 1, 1 (2012) (Spain), https://indret.com/filtraciones-a-los-medios/.

act significantly increases societal condemnation of the crime, resulting in greater public disgrace for the accused.[17]

News amplification also poses a serious threat to the presumption of innocence of the accused, who is exposed to a sort of "pre-conviction" in the media. As Hassemer points out, "press reports that, in reality, refer to suspicions but are perceived by public opinion as pre-convictions . . . constitute the antithesis of the presumption of innocence. Especially taking into account that the media is not a reliable source of information about justice, as it reports according to its own rules of relevance."[18]

When a criminal case garners massive media attention, two dimensions open up. On the one hand are "the media dimension and the positions taken by society" from the first moment that news of the crime appears; on the other hand is "the judicial development of the case" pursuant to legal norms.[19] The challenge is to ensure that the first dimension does not influence or contaminate the second. Can we expect the media in general when covering a criminal case to be mindful of—and scrupulously respect—the basic principles and guarantees of the rule of law when referring to a person under investigation?

To answer this, we must consider another dichotomy, this one more specifically concerning the two sets of rights that come into focus when a criminal case attracts media interest. On one side

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17. *See* David Ray Papke, *Challenges to Criminal Labeling: Three Voices in American Popular Music*, 34 REVUE INTERNATIONALE DE SÉMIOTIQUE JURIDIQUE [INT'L J. SEMIOTICS L.] 191, 196 (2021) (describing how the media contributes to many Americans believing that "a criminal menace threatens their society" and "the state should systematically ferret out and forcefully label the nation's criminals."); *see also* Jim Dwyer, *The True Story of How a City in Fear Brutalized the Central Park Five*, N.Y. TIMES AR1 (May 30, 2019), https://www.nytimes.com/2019/05/30/arts/television/when-they-see-us-real-story.html (criticizing the article author's own role in helping the media turn five Black and Latino teenagers falsely accused of rape into "terror incarnate, a *casus belli* for the city," "[h]ated" by a whole generation as "brutalizers"); Robert Reinhold, *The Longest Trial—A Post-Mortem; Collapse of Child-Abuse Case: So Much Agony for So Little*, N.Y. TIMES (Jan. 24, 1990), https://www.nytimes.com/1990/01/24/us/longest-trial-post-mortem-collapse-child-abuse-case-so-much-agony-for-so-little.html (questioning the media's role in fomenting the daycare-abuse panic of the 1980s).

18. *See* WINFRIED HASSEMER, CRÍTICA AL DERECHO PENAL DE HOY 83 (trans. Patricia S. Ziffer 1997).

19. Carlos González Guerra, *La Democratización de la Justicia*, SEÚL (Feb. 12, 2023), https://seul.ar/sentencia-baez-sosa/.

sit the procedural guarantees for criminal defendants that are enshrined in constitutions and international human rights treaties (the presumption of innocence, the right to a fair trial by an impartial jury or judge, punishment focused on the individual and rehabilitation, the prohibition of excessive punishment, and so on).[20] In particular, the accused is presumed innocent until proven guilty in a fair trial respecting due process where the possibility of innocence is seriously contemplated. The presumption of innocence enshrined in Article 18 of the Argentine Constitution and in the US Constitution's various procedural protections imply the necessity of adjudication by an impartial jury or judge.[21]

On the other side are legal, constitutional, and international guarantees that are equally vital: the freedom of expression, the absolute prohibition of prior restraints on speech, the societal interest in sanctioning serious acts that disrupt coexistence and constitute crimes, the right of citizens to information, constitutionally enshrined rights to petition authorities (including through lobbying and public demonstrations), victims' right to access effective judicial protection, and the public communication necessary in order to effectuate

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20. *See* Arts. 18 & 75 inc. 22, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.); American Convention on Human Rights, art. 8, Nov. 22, 1969, 1144 U.N.T.S. 123; International Covenant on Civil and Political Rights, art. 14, Dec. 19, 1966, 999 U.N.T.S. 176; María Jimena Monsalve, *Law, Economic Crisis, and Diversity: An Overview of Rehabilitation in Argentina*, in THE PALGRAVE HANDBOOK OF GLOBAL REHABILITATION IN CRIMINAL JUSTICE 17, 25 (Maurice Vanstone & Philip Priestley eds., 2022).

21. *See* Art. 18, CONST. NAC. (Arg.); *see also* U.S. CONST. amends. V, VI, XIV § 1; United States v. Wilson, 634 F. App'x 718, 730 (11th Cir. 2015) (per curiam) ("Integral to the presumption of innocence, a criminal defendant must be tried by an impartial, indifferent jury . . . ." (*citing* Woods v. Dugger, 923 F.2d 1454, 1456 (11th Cir. 1991)); Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 26/12/2019, "Rojas, Lucia Cecilia; Jara, Ricardo Omar; Vázquez, Cristina / homicidio agravado," 18–19 (Arg.), *available at* https://sjconsulta.csjn.gov.ar/sjconsulta/documentos/verDocumentoByIdLinksJSP.html?idDocumento=7575621&cache=1690642324315; Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 25/10/2016, "Carrera, Fernando Ariel s/ causa nº 8398 / recurso de hecho," (Arg.), https://sjconsulta.csjn.gov.ar/sjconsulta/documentos/verDocumentoByIdLinksJSP.html?idDocumento=7343072&cache=1690642606123.

punishment's roles of deterring future crime and reinforcing the validity of the violated criminal norm.

Given the importance of all of these values, it is important to reflect on and weigh the ethical duty of the media and journalists to provide objective information without distorting events to make them more attractive or "viral." We believe that these issues are primarily ethical in nature and doubt that the law can regulate them closely without affecting the freedom of the press. But also pertinent are the professional ethics of lawyers: is it morally acceptable for them to use the media to influence public opinion and indirectly influence those who decide cases? We briefly consider some US and Argentine responses to these problems in Parts II and III of this Article.

Regardless of what the media may publish or disseminate about a criminal case, and no matter how heinous an act may be, it is the judge or jury who determines whether or not a person is guilty. That is why it is important to insulate trials from any kind of external influence. It is in this setting where the main legal debate must take place, and where all procedural and constitutional rules must be respected. Of particular importance is the impartiality of the judge and jury, even in the face of social, media, and sometimes political pressure.

A study by Baucells and Peres-Neto analyzed how news frames can affect the criminal justice system.[22] Their research focused on discourse about crime by two popular infotainment programs in Spain and led them to conclude that media framing can negatively impact the criminal justice system.[23] Frames can generate a distorted perception of reality and foster a punitive mentality in society. In turn, these can lead to undue pressure on the criminal justice system and violations of the rights of the accused.[24]

The researchers highlighted the following main characteristics of television discourse in particular:

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22. *See* Gómez, *supra* note 12, at 26–27 (citing Joan Baucells Lladós & Luiz Peres-Neto, *Discurso Televiso Sobre el Crimen: Los Programas Especializadas en Sucesos*, *in* MALAS NOTICIAS: MEDIOS DE COMUNICACIÓN, POLÍTICA CRIMINAL Y GARANTÍAS PENALES EN ESPAÑA 126 *et seq.* (Mercedes García Arán, Joan Botella Corral & Rafael Rebollo Vargas eds., 2008)).

23. *Id.*

24. *See id.* at 27–28. The entire article draws connections between media pressure and broader criminal-justice policy.

> (1) The prominence of the victims (in 'image'—illustration of their suffering—and in 'text': monopolizing the description of the case . . .) (2) the construction of the image of the offender to share dangerousness (the actor is dehumanized, frequently presented as a monster or a madman, removed from all possibility of empathy); (3) the retributive end of punishment used as an ideological anchor [*anclaje ideológico*] (other punitive possibilities are not considered—particularly reintegration or rehabilitation—but solely vengeance); (4) criminal-procedural rights are a burden to the effectiveness of the fight against crime.[25]

If a media campaign disseminates slogans like "Justice is Perpetual" or "Believe the Victim" (our examples) or if the case is spectacularized, highlighting the flaws of some and the virtues of others to arouse passion (such as by creating heartless characters who—these examples are our own as well—"lick their bloody fingers," "laugh at a mother's words of pain," or "go eat a hamburger after committing a cold-blooded murder"), or if the appetite for torture and revenge is encouraged and promoted—it becomes imperative to take legal precautions to prevent the media from hindering the rights of individuals facing criminal charges.[26]

Complicated relationships between the media and the justice system arise in different parts of the world. In the US, for example, the Minnesota Court of Appeals recently rejected the appeal filed by Derek Chauvin, one of the police officers convicted of murdering George Floyd, who claimed that extensive media coverage and the related risk of unrest deprived him of a fair trial.[27] Chauvin's appeal observed that because of "pretrial publicity," his trial was held in a courthouse

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25. *Id.* at 27 (citing Joan Baucells Lladós & Luiz Peres-Neto, *Discurso Televiso Sobre el Crimen: Los Programas Especializadas en Sucesos*, *in* MALAS NOTICIAS: MEDIOS DE COMUNICACIÓN, POLÍTICA CRIMINAL Y GARANTÍAS PENALES EN ESPAÑA 126 *et seq.* (Mercedes García Arán, & Joan Botella Corral & Rafael Rebollo Vargas eds., 2008)).

26. *See, e.g.*, Tyree v. State, 418 S.E.2d 16, 17–18 (Ga. 1992) (reversing murder conviction and death sentence for denial of motion to change venue where local newspapers ran stories and commentaries featuring intense punitivism, including death wishes aimed at the defendant).

27. *See* State v. Chauvin, 989 N.W.2d 1, 18 (Minn. Ct. App. 2023), *review den'd* 2023 Minn. LEXIS 370 (July 18, 2023), *cert. den'd* No. 23-416, 2023 U.S. LEXIS 4642 (U.S. Nov. 20, 2023).

surrounded with "barbed wire fencing and concrete block and . . . National Guard troops along with two armored personnel carriers." He characterized media publicity as "prejudicial extraneous influence" on any juror who learned that the locale was "bracing for a riot" in the event of his acquittal.[28] The appeal also criticized "overwhelming media coverage" for "demonizing Chauvin and glorifying Floyd."[29] Our point in mentioning this case is not to contend that Chauvin's complaints were correct, but simply to note our themes' importance to ongoing legal developments.

In Spain, too, such issues have led to the enactment of laws and protocols to regulate the relationship between the media and criminal cases. That country's Constitutional Court has determined that "access to trials by audiovisual media should be the general rule, subject to limits that judges or courts can establish to safeguard constitutional values and rights."[30] Among the protocols, it is worth mentioning one issued by the General Council of the Judiciary in 2004, urging the media to establish a Self-Regulation Agreement on televised coverage of trials.[31]

Furthermore, the renowned Spanish jurist Jesús María Silva Sánchez has called for the enactment of a law to limit certain practices he describes as "endemic evils" in the judicial system, including the leak of information and documents to the press.[32] This would reduce the risk of "parallel trials" taking place in the press, on the radio, on television, and online, with the resulting possibility of contaminating judges. Silva Sánchez suggests

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28. Brief of Appellant at 44, State v. Chauvin, 989 N.W.2d 1 (Minn. Ct. App. 2023) (No. A21-1228) (citation omitted), https://mncourts.gov/mncourtsgov/media/High-Profile-Cases/27-CR-20-12646/Brief-Appellant.pdf.

29. *Id.* at 43.

30. *See* Vicente J. Navarro Marchante, *Las Imágenes de los Juicios: Aproximación a la Realidad en España*, 3.2007 INDRET 1, 22–23 (2007), https://indret.com/las-imagenes-de-los-juicios-aproximacion-a-la-realidad-en-espana/.

31. *Id.* at 26 (discussing S.T.C., April 19, 2004 (B.O.E., No. 120 Suplemento, p. 46) (Spain), *available at* https://www.boe.es/boe/dias/2004/05/18/pdfs/T00046-00055.pdf).

32. Silva Sánchez, *supra* note 16, at 1 (citing WINFRIED HASSEMER, CRÍTICA AL DERECHO PENAL DE HOY 83 (Ruben O. Villela ed., Patricia S. Ziffer trans., 1st ed. 1995)).

imposing effective deterrent sanctions, including criminal penalties, on media outlets that publish information leaked from criminal proceedings prior to its presentation as trial evidence.[33] (Such penalties could be applied to either natural persons or corporations, depending on the circumstances.) He also proposes the dismissal of proceedings that, "due to media influence, will never come to be a fair trial," as well as "the abstention and recusal of judges whose impartiality is considered (or could be considered) compromised" by extrinsic information and media influence.[34] His other proposals include mitigating legal sentences due to the penalty inhering in media condemnation, and self-regulation by the media (although he considers this last suggestion naïve).[35]

II. US MITIGATION MEASURES

For its part, the US provides at least five important mechanisms for defendants to shield themselves from the harmful effects of media influence. These include the choice of whether to be tried by a judge or a jury, the ability to seek a change of venue, the right to question prospective jurors, the ability to limit the jury's access to media, and the ability to limit media access to the courtroom. In addition, it is worth noting ethical obligations on prosecutors and professional journalism standards.

A. Trial by a Judge or a Jury?

The US Constitution guarantees most criminal defendants the right to a trial by jury.[36] But a defendant can waive this right in favor of a "bench trial" by a judge.[37] The decision of whether or

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33. *Id.* at 1–2.
34. *Id.* at 1.
35. *Id.* at 1–2.
36. *See* U.S. CONST. amends. V, VI, XIV § 1; *but see* Blanton v. City of North Las Vegas, 489 U.S. 538, 543 (1989) (exempting "petty" offenses, defined mostly by whether the maximum prison term is six months or less).
37. *See, e.g.*, Price v. State, 815 S.E.2d 109, 111–12 (Ga. Ct. App. 2018) (discussing the requirements for a knowing and intelligent waiver); *cf.* Smith v. State, 757 S.E.2d 865, 866–67 (Ga. 2014) (recognizing the State's right to demand a jury trial over a defendant's objection). As a Georgia practitioner, Professor Cavedon cites numerous authorities from that state, but these norms are common throughout the US.

not to waive the right to a jury trial involves many considerations, several of them pertaining to intense media coverage. One of the factors that tilts the scale in favor of a jury trial is that a defendant can be convicted only if the jury decides its verdict unanimously.[38] In order to avoid conviction, a defendant needs to convince just one out of twelve jurors that reasonable doubt exists.[39] It is generally easier to convince one person out of twelve than one person out of one. What is more, jurors may be open to factors that judges could consider irrational. For instance, the jury might decide to act on sympathy—perhaps aroused by the media on behalf of a defendant—in a way that a judge would (correctly, from a strictly legal standpoint) deem improper.[40]

Another reason to select a jury could be the social and professional roles of a judge. In some US jurisdictions, trial judges are popularly elected. Regardless of the mode of judicial selection, the public and media critics will know who the judge presiding over a case is, whereas a juror's identity is often hidden unless the juror reveals it after the trial. In a case featuring high emotions and close media scrutiny, possibly broadcast to voters or officials who could determine the judge's prospects for career advancement, it is easy to imagine a judge's fairness being affected.

Pushing from the other direction, though, a trial judge normally has a law degree, which means at least seven years of post-secondary education (for most US-educated lawyers). A judge often has experience handling difficult cases and setting emotions aside in favor of objectivity. Ideally, judges rise to office by demonstrating a deep commitment to fairness. Judges who unethically pander to popular sentiment can be professionally disciplined, sometimes even removed from office. A judge may be more likely to look past things that can disturb the media-consuming public, such as death, sexual indecency, and so on. A judge can be a safer option if a defendant's best chance for

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38. *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1395–97 (2020) (holding that the federal constitutional right to a jury trial includes the requirement that any criminal conviction be unanimous).

39. *See id.*

40. *See, e.g.*, 2 Ga. Crim. Jury Instr. § 1.70.11 (2023) (directing jurors not to decide cases based on sympathy).

acquittal in the midst of a media storm comes from some technical aspect of a case.

Another factor is the identity of the particular judge. One of the greatest risks of presenting a case to jurors is how unknown they are to the attorneys (including with regards to their media habits). Jury selection is a brief and narrow process, with questioning limited to only a few pertinent facts about the juror's background and limited chances to find out if someone is being entirely candid. By contrast, well before trial, the parties in a serious criminal case will likely have filed many motions and had hearings before the judge. That means the judge's sense of the case and approach to the most important issues may be known. If media interest is a concern, the judge's response to it will also be observable. Even if there have been only a few pretrial proceedings, the judge's handling of past cases (including notorious ones) is usually a matter of public knowledge. Attorneys can learn much by talking to their local colleagues and perusing media coverage of past cases.

B. Seeking a Change of Venue

The Supreme Court has held that trials are not supposed "to be won through . . . the newspaper."[41] When the locale where the trial is going to be held has become "permeated with publicity," a defendant can have a constitutional due process right to seek a change of venue to a different region within the same state.[42] This does not change the judge or attorneys, but does mean the jurors will be selected from a different community, hopefully one less saturated by media coverage.

A defendant who seeks a change in venue does not have to show specific reasons why the original community is unsuitable, because it is hard to "prove with particularity" how local news attention prejudices the defense.[43] As the Supreme Court has noted, once a trial attracts heavy interest:

> it becomes a *cause celebre*. The whole community, including prospective jurors, becomes interested in all the morbid details surrounding it. The approaching trial immediately assumes an important status in the public press and the accused is highly

41. Sheppard v. Maxwell, 384 U.S. 333, 350 (1966) (citation omitted).
42. *Id.* at 363.
43. Estes v. Texas, 381 U.S. 532, 544 (1965).

> publicized along with the offense with which he is charged. Every juror carries with him into the jury box these solemn facts and thus increases the chance of prejudice that is present in every criminal case.[44]

The jurors also "cannot help but feel the pressures of knowing that friends and neighbors have their eyes upon them" when community members peruse the news.[45] As Justice Felix Frankfurter once wondered, "[h]ow can fallible men and women reach a disinterested verdict based exclusively on what they heard in court when, before they entered the jury box, their minds were saturated by press and radio for months preceding by matter designed to establish the guilt of the accused."[46] When local media has already effectively convicted the defendant of the charges, the Supreme Court has said that the trial risks becoming "a hollow formality."[47]

Relocating a trial to a new venue not only protects a defendant's rights, it also maintains the appearance of judicial legitimacy in the face of media performativity. However, relocating the trial is not always a helpful remedy, especially in cases with national media attention (such as those we discuss in this article).

C. Questioning Prospective Jurors

The jury-selection process is another setting for addressing media influence. Prospective jurors can be disqualified if they are "substantially impaired" in their "ability to be fair and impartial," including because they: (a) have "formed and expressed any opinion in regard to the guilt or innocence of the accused"; (b) have "prejudice or bias . . . either for or against the accused"; or (c) are not "perfectly impartial between the state and the accused."[48] The more media attention a case has received, the more likely prospective jurors are to be disqualified on these grounds. As a result, cases attracting notoriety often

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44. *Id.* at 545.
45. *Id.*
46. Irvin v. Dowd, 366 U.S. 717, 729–30 (1961) (Frankfurter, J., concurring).
47. Rideau v. Louisiana, 373 U.S. 723, 726 (1963).
48. GA. CODE ANN. §§ 15-12-164 (1), (2), (3).

feature a larger "pool" of community members brought in for questioning and possible jury service.[49]

Of course, many other people may hold disqualifying opinions but be unwilling (or unable) to acknowledge them openly. For this reason, in many US jurisdictions both sides are permitted to pose questions to each individual prospective juror regarding "any fact or circumstance indicating any inclination, leaning, or bias which the prospective juror might have."[50] Such probing can certainly address prejudices arising from media consumption.

Juror disqualification is not a perfect remedy for media influence. As the Supreme Court held over six decades ago:

> It is not required . . . that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.[51]

But the parties are not left completely helpless even if the judge decides that a juror can set aside media influence. Qualified prospective jurors are still subject to one last sifting

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49. *See, e.g.,* Skilling v. United States, 561 U.S. 358, 382 (2010) (noting that a "large, diverse pool of potential jurors" mitigated the likelihood of prejudice arising from media influence); United States v. Hertel & Brown Physical & Aquatic Therapy, No. 1:21-CR-39, 2023 U.S. Dist. LEXIS 180886, at *27 (W.D. Pa. Oct. 6, 2023) ("[I]t may be that the Court will be able to sufficiently remediate any potential prejudice to the defense through precautionary measures such as summoning a larger than usual jury pool . . . ."); Holland v. Warren, No. 2:09-CV-13863, 2011 U.S. Dist. LEXIS 152801, at *19 (E.D. Mich. Nov. 29, 2011) ("[T]he trial court took steps to guard against the danger of prejudice arising from the pretrial publicity by summoning a large jury pool . . . ."); GA. CODE ANN. § 15-12-120.1 ("The presiding judge shall order the clerk to choose the number of jurors necessary to conduct the business of the court.").

50. GA. CODE ANN. § 15-12-133.

51. *Irvin*, 366 U.S. at 722–23 (majority opinion).

process: each side's attorneys can "strike" a certain number of them for any reason other than the prospective juror's race or sex.[52] Only the people accepted by both parties (or whoever the parties have to accept because they have run out of strikes) actually become the trial jury. Many strike decisions consider how much a prospective juror has read and heard about a case.

D. Limiting Juror Access to Media

After the trial jurors have been selected, additional measures to counter media influence can be introduced. The most extreme one is "sequestration"—that is, when the judge "hold[s] and confine[s] the jury overnight under supervision of court officers."[53] When sequestered, jurors are often required to stay at a hotel or motel until the trial concludes, with limited access to television, phones, computers, newspapers, radios, and other modes of disseminating news.

Sequestration is not universally sought even in cases with heavy media interest. One defense attorney explained that letting jurors go home each night would let them "interpret the day's evidence individually rather than combining 'into a one man jury.'"[54] Jurors kept away from their families might also be less willing to carefully deliberate about the case—and quicker to vote in favor of guilt—so the trial will end and they can go home.

A more common mitigation measure is an instruction that the judge reads to the jurors, such as this Georgia pattern jury charge:

> You may not use Google or otherwise search the internet, websites, or blogs, and you may not use any other electronic media to get information about this case. Nor should you use any of these sources to get information about legal terms or about the law. Finally, you may not read or listen to any accounts of this trial that might appear in the news media, whether online, in print or on the radio. . . . [Y]ou may not discuss this case with anyone—including family and friends—or let anyone discuss the case with you or around you. This

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52. *See* Batson v. Kentucky, 476 U.S. 79, 82 (1986) (holding jury strikes based on race violate the federal Constitution); *see also* J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 130–31 (1994) (extending this holding to sex).

53. GA. CODE ANN. § 15-12-142(b).

54. Williams v. State, 692 S.E.2d 374, 378 (Ga. 2010).

> includes discussing or sharing information by e-mail, texting, blogging, or any form of social media.[55]

If a juror violates this directive, the judge can remedy the situation, including (in serious instances) by ordering a new trial.[56]

E. Limiting the Media's Presence Within the Courtroom

A US court can also limit journalists' access to the courtroom. The US Constitution requires that criminal trials be open to the public.[57] But, because parties are entitled to "judicial serenity and calm," there are limits to what news organizations are allowed to do inside the courtroom.[58] In 1965, the Supreme Court decided *Estes v. Texas*, a case where the media built a veritable carnival inside the court.[59] At one pretrial hearing, least a dozen cameramen were present.[60] "Cables and wires were snaked across the courtroom floor," and news microphones were placed on the judge's bench, as well as aimed at the jury box and attorneys' table.[61] For the trial itself, a special video-camera booth was built at the back of the courtroom.[62] At one point, photographers even tried to snap images of a piece of paper the defendant was reading.[63]

Considering this chaotic state of affairs, the Court did praise the press's role in "awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences, including court proceedings."[64] As a result, journalists had to be allowed "maximum freedom."[65] But the

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55. 2 Council of Superior Court Judges of Georgia, Georgia Suggested Pattern Jury Instructions § 0.01.00 (2023).

56. Maltbie v. State, 228 S.E.2d 368, 369 (Ga. Ct. App. 1976) (holding that there was error in the failure to grant the defendant's motion for new trial based on juror exposure to news coverage).

57. U.S. CONST. amend. VI.

58. *Estes*, 381 U.S. at 536.

59. *See generally id.*

60. *See id.* at 536.

61. *Id.*

62. *See id.* at 537.

63. *See id.* at 538.

64. *Id.* at 539.

65. *Id.*

Court also observed the pressure and distraction that trial participants would feel from being broadcasted on television.[66] It noted that the media can even (intentionally or otherwise) "destroy an accused and his case in the eyes of the public."[67] Because the media completely took over the *Estes* trial, the Court reversed the resulting conviction.[68]

Such extreme situations are rare nowadays because news organizations normally have to file a pretrial motion to record or broadcast proceedings, then receive the judge's permission, which can be conditioned on the observance of regulations.[69] What is more, some US courts choose to broadcast proceedings only through permanent, fixed recording devices—or not at all.[70]

F. Ethical Limits on Lawyers

Not all measures meant to mitigate media influence are legal in nature. Two sets of professional regulations also have bearing: the first governing lawyers in criminal cases, the other concerning journalists. In 2017, the American Bar Association promulgated the fourth editions of its standards governing criminal lawyers.[71] Some of these address their relationship with the media. They provide that a lawyer should not make,

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66. *See id.* at 545–49.

67. *Id.* at 549.

68. *See id.* at 535.

69. *See, e.g.*, GA. CODE ANN. § 15-1-10.1.

70. Jonathan R. Bruno, *The Weakness of the Case for Cameras in the United States Supreme Court*, 48 CREIGHTON L. REV. 167, 170 (2015) (noting that even the Supreme Court's "public proceedings are presently off-limits to video cameras"); PAUL LAMBERT, TELEVISION COURTROOM BROADCASTING EFFECTS: THE EMPIRICAL RESEARCH AND THE SUPREME COURT CHALLENGE 130–31 (2013).

71. *See generally* CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION (Am. Bar. Ass'n 4th ed. 2017), https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/ [hereinafter "Prosecution Standards"]; CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION (Am. Bar. Ass'n 4th ed. 2017), https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/ [hereinafter "Defense Standards"]. There are also less-specific and somewhat similar rules applying to all attorneys. *See* AM. BAR ASS'N, MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.6 (accessed Jan. 21, 2024), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/.

authorize, or condone any statements that the lawyer "knows or reasonably should know will have a substantial likelihood of materially prejudicing a criminal proceeding or heightening public condemnation of the accused."[72] Prohibited conduct for prosecutors includes reenacting events for the media, presenting the accused for media examination, and inviting "media presence during investigative actions without careful consideration of the interests of all involved, including suspects, defendants, and the public."[73]

Due to the importance of transparency, the standard does let a prosecutor "inform the public of the nature and extent of the prosecutor's or law enforcement actions" as long as the statement "serve[s] a legitimate law enforcement purpose."[74] The standard authorizes explaining charging decisions, but the prosecutor "must take care not to imply guilt or otherwise prejudice the interests of victims, witnesses or subjects of an investigation."[75] Prosecutors can also "reasonably accommodate media requests for access to public information and events."[76]

Lawyers are not left speechless when facing media commentary; they can "mitigate . . . recent adverse publicity" and "protect the prosecution's legitimate official interests," as well as those of their defendant clients, but only if there is no "substantial likelihood of materially prejudicing a criminal proceeding."[77] If this risk is present, then the lawyer should instead seek redress from opposing counsel or the court.[78]

Lawyers can "offer generalized commentary" about cases they are not working on if it "serves to educate the public about the criminal justice system and does not risk prejudicing a specific criminal proceeding."[79] But they should only comment on "the specific merits" of such cases rarely, only "to address a manifest injustice" and only after becoming "reasonably well-informed

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72. Prosecution Standards, *supra* note 71, at 3-1.10 (c); *see also* Defense Standards, *supra* note 71, at 4-1.10 (c).

73. Prosecution Standards, *supra* note 71, at 3-1.10 (j).

74. *Id.* at 3-1.10 (c).

75. *Id.*

76. *Id.* at 3-1.10 (j).

77. *Id.* at 3-1.10 (f); Defense Standards, *supra* note 71, at 4-1.10 (f).

78. *See* Prosecution Standards, *supra* note 71, at 3-1.10 (f); Defense Standards, *supra* note 71, at 4-1.10 (f).

79. Prosecution Standards, *supra* note 71, at 3-1.10 (i); Defense Standards, *supra* note 71, at 4-1.10 (i).

about the relevant facts and law."[80] These standards help ensure that cases are tried in court and not in print, on the airwaves, or on the internet.

G. Professional Standards for Journalists

As for journalism, the Society of Professional Journalists (SPJ) has a Code of Ethics.[81] It instructs journalists to ensure the accuracy of their reporting and verify information.[82] It also emphasizes the importance of context and taking "special care not to misrepresent or oversimplify in promoting, previewing or summarizing a story."[83] Journalists should correct any erroneous information as a story unfolds.[84] They must identify sources clearly so that the public can "judge the reliability and motivations" behind information, and illustrations and reenactments should be clearly labeled.[85] Reporting should be distinguished from advocacy and commentary.[86]

Of particular salience to criminal cases, the media should seek to ensure transparency in governance. It should also "diligently seek subjects of news coverage to allow them to respond to criticism or allegations of wrongdoing."[87] All members of the public should be treated as "human beings deserving of respect."[88] The Code prizes the balancing of press freedom with defendants' rights, calling for weighing "a suspect's right to a fair trial with the public's right to know" and recommending caution about "identifying criminal suspects before they face legal charges."[89]

Unfortunately, neither the Code nor SPJ's ethics papers address crime reporting in greater detail.[90] The Code's

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80. Prosecution Standards, *supra* note 71, at 3-1.10 (i); Defense Standards, *supra* note 71, at 4-1.10 (i).

81. *See SPJ Code of Ethics*, SOC'Y OF PROF. JOURNALISTS (Sept. 6, 2014), https://www.spj.org/ethicscode.asp.

82. *See id.*

83. *Id.*

84. *See id.*

85. *Id.*

86. *See id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *See SPJ Ethics Committee Position Papers*, SOC'Y OF PROF. JOURNALISTS (accessed Dec. 6, 2023), https://www.spj.org/ethics-papers.asp.

guidelines are sound, but would benefit from greater elaboration.

US laws and regulations do not entirely eliminate the risk of undue media influence in criminal cases (as discussed further in Part V below). But they do address a range of actors—judges and jurors, prosecutors and journalists—and aspire to balance media freedom with defendants' right to a fair trial.

III. TWO ARGENTINE REGULATIONS

The situation in Argentina is not very different. Without intending to conduct an exhaustive analysis, Professor Mitre reviews here a pertinent judicial measure and professional regulation.

A. Resolution 29/2008

In 2008, Argentina's Supreme Court of Justice issued Resolution 29/2008. The purpose of this Resolution is to regulate the radio and television broadcasting of trials, "considering that the principle of publicity of the process constitutes one of the fundamental conditions for the legitimacy of the administration of justice."[91] The Resolution aims to "guarantee the right to information in judicial cases of public importance that generate great interest among citizens."[92] It seeks to weigh such transparency together with "due process, the privacy of accused persons, and their right with respect to the presumption of innocence," as well as the confidentiality of testimony and the measured treatment of trial issues.[93] The Resolution further clarifies that its provisions should not be interpreted as "a restriction on the exercise of the right to inform, as protected by the [Argentine] Constitution and those international human rights treaties" that Argentina recognizes.[94]

Under the Resolution, only the initial acts of the trial, the final arguments, and the reading of the verdict (including its

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91. Corte Suprema de Justicia [CSJN] [National Supreme Court of Justice], Acordada 29/2008, 11/4/2008, "Permiso de Difusión Radial y Televisiva de la Nación," preamble (Arg.), https://www.argentina.gob.ar/normativa/nacional/acordada-29-2008-146757/texto.

92. *Id.*

93. *Id.*

94. *Id.*

operative part and reasoning) can be broadcast.[95] Media outlets are prohibited from recording audio or images during the evidentiary stage.[96] This prohibition is reasonable, aiming to prevent the contamination of not-yet-admitted testimony and expert evidence by media dissemination of previous evidence. This regulation is in line with the provisions of Argentina's Criminal Procedure Codes, which establish prohibitions or precautions to prevent witness influence. These include prohibiting witnesses from consulting notes, writings, documents, etc., about the subject of their testimony; communicating with each other or other individuals about their testimony; and being posed leading questions during direct examination.[97] The Resolution also seeks to safeguard the identity of witnesses and reduce the risk to the criminal process of media outlets making premature evaluations of the evidence.[98]

Given this regulatory framework, it is important to note that in the Báez Sosa case, witnesses and experts were interviewed by the media immediately after exiting the courtroom; they were asked about their testimony and generally repeated it. For example, after testifying, the doctor who performed the autopsy on Báez Sosa's body

> detailed for the press the content of his statement. "I never saw anything like it," the witness said, then added with a broken voice: "The patient suffered damage throughout the central nervous system, both the brain, cerebellum, brainstem, there is not a single injury, there are several . . . the truth is that it is very strong, as a father."[99]

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95. *See id.* Part I.

96. *See id.* Part III (g).

97. Every Argentine state has its own criminal procedure code, but in general, all enact the same basic norms for protecting the rights of the accused. For the points mentioned above, *see, e.g.*, CÓD. PROC. PEN. art. 283 (Tucumán), *available at* https://www.justucuman.gov.ar/documents/jurisprudencia/leyes/1650387008.pdf; *see also* CÓD. PROC. PEN. arts. 178–79 (Río Negro), *available* at https://www.jusrionegro.gov.ar/web/normativa/documentacion/CPP%202017-TA-mayo%202017.pdf.

98. *See* Corte Suprema de Justicia [CSJN], *supra* note 91.

99. *"Nunca Vi Algo Semejante", Dijo el Forense que Realizó la Autopsia al Cuerpo de Fernando*, TÉLAM DIGITAL (Jan. 9, 2023), https://www.telam.com.ar/notas/202301/616725-medico-autopsia-

Subsequently, these interviews were widely disseminated, and surely many of the witnesses or experts who had to testify later saw them. Did this media exposure of testimony condition, bias, or reshape the memories of subsequent witnesses—a risk the Resolution seeks to neutralize?[100] This debate goes beyond the scope of this Article, but reveals the need to reflect on these issues.

B. FOPEA's Code of Ethics

As in the US, reporters' professional rules are also useful. In Argentina, FOPEA (the Argentine Journalism Forum) updated its Code of Ethics in December 2022.[101] Two of the most relevant principles and values are:

> 1. Journalists who form FOPEA commit themselves to seeking the truth, to safeguarding their independence, and to treating information professionally and honestly.[102]
>
> 2. Rigor and precision in handling facts are indispensable objectives for journalists in order to achieve complete, accurate, and diverse information. Deliberate misrepresentation constitutes a serious ethical lapse.[103]

Six relevant methodological commitments are:

> 14. Photographs and video clips must be accurate and faithful to the reality they intend to reflect. Staged scenes for

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fernando.html (featuring video of the witness's press interview); *see also VIRGINA, la JOVEN que INTENTÓ SALVAR a FERNANDO BÁEZ SOSA*, TELEFE NOTICIAS (Jan. 5, 2023), https://www.youtube.com/watch?v=YsXdEIcYmww; *cf. Exclusivo: El Patovica que Sacó a los Rugbiers Narró el Minuto a Minuto*, EL TRECE (Jan. 28, 2020), https://www.youtube.com/watch?v=ZGaDA8-BJ-k (interviewing a witness at length before the trial).

100. In this regard, *see* Agustina Mitre, *La Prueba Testimonial en Jaque a la Luz de las Investigaciones Neurocientíficas*, PENSAMIENTO PENAL (Jul. 2022), *available at* https://www.pensamientopenal.com.ar/doctrina/90257-prueba-testimonial-jaque-luz-investigaciones-neurocientificas; *see also* Agustina Mitre, *El Testigo Inducido, el Testigo Armado y El Recuerdo Implantado: Nulidad Absoluta para la Prueba Testimonial*, 2022-11 REVISTA DE DERECHO PENAL Y CRIMINOLOGÍA 83.

101. *See* Código de Ética, FORO DE PERIODISMO ARGENTINO (FOPEA) (Dec. 28, 2022), https://fopea.org/codigo-de-etica/.

102. *Id.*

103. *Id.*

> manipulative purposes constitute a serious ethical lapse. When a montage is created, it should be explicitly clarified that it is a recreation and is being published only for illustrative purposes. Additionally, when using an archival photograph or image, this must be clarified to avoid any confusion or distortion in the interpretation of the information.[104]
>
> 15. Information must be clearly distinguished from opinion.[105]
>
> 19. Journalistic work should not be governed solely by indicators of audience measurement or content consumption, but by the veracity of information, its newsworthiness, informational balance, plurality, and full respect for individuals. The use of images, words, or concepts for the mere purpose of achieving impact and increasing consumption, without considering the aforementioned principles, deviates journalists from their work, professional objectivity, and social responsibility.[106]
>
> 23. Journalists should never engage in disseminating biased information. If information of interest to the public originates from a source who shared with a specific interest, it for journalists to clearly and precisely clarify its origin.[107]
>
> 26. The pursuit of excellence is a constant in the life of a journalist and this includes continuous training and the improvement of their practices.[108]
>
> 38. In all information, the constitutional principle of innocence of any person must be respected while guilt has not been proven judicially. The imputation and/or prosecution of an accused person does not interrupt the presumption of innocence. Statements from police sources are not sufficient to determine guilt, even when they take the form of official communications.[109]

Such codes of ethics, protocols, and regulations demonstrate the need to regulate journalistic activity and establish ethical norms so that news coverage does not interfere with other rights, especially the presumption of innocence.

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104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*

The issue does not end there, as media and communication platforms are constantly evolving. A new reality requires ongoing reflection: the dissemination of information or opinions through social media by influencers or anonymous reels can threaten the right to the presumption of innocence. We cannot ignore their significant *influential* power (hence their name) or their massive reach. Nor can we ignore the existence of interest groups seeking to impose their ideas, promote their products, and so on by exerting influence through these massively accessible, instantaneous, and addictive tools. This topic, too, goes beyond the scope of this article, but is important to acknowledge.

IV. ANALYZING THE BÁEZ SOSA CASE

In this section, Professor Mitre provides a legal analysis of the Báez Sosa case. She aims to demonstrate that, partly due to sustained media pressure aimed at maximum punishment, the imposed sanction was disproportionate to the guilt of the defendants.[110]

A. The Principle of Culpability

The principle of culpability is one of the fundamental pillars of a state governed by the rule of law. This principle is embraced by modern criminal law as a cornerstone for legitimizing punishment, which represents the most extreme actualization of state power. Throughout history, the objective of the criminal law has been and continues to be the pursuit of penal rationality.

Culpability essentially refers to the subjective component of an offense and can be understood in a broad or narrow sense. Narrowly, culpability refers to blameful judgment of guilt; this constitutes a necessary but not sufficient element of culpability more broadly. The wider notion encompasses all of the prerequisites that allow for the assignment of criminal responsibility. It is divided among different categories of guilt-imputation analysis: there are elements of culpability in subjectivity, illegality, and strict liability. Understood

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110. Professor Cavedon is not trained in Argentine law and takes no position on legal aspects of the Báez Sosa case. He does note the possible need to differentiate guilt, as some of the defendants aimed kicks at Fernando's head—acts that were more foreseeably lethal in nature.

holistically, culpability is what establishes an actor's deservingness of punishment and the attribution of blame in light of the actor's being a responsible and accountable entity with inherent dignity.

This principle requires a link between the conduct of the accused and the legally significant outcome. This implies that the outcome can be connected to the blameful conduct through an imputed subjective factor (either intent or negligence, as strict liability is not an option in Argentina's legal system). Each person must be held accountable only for what they have done, to the extent of their actions, and in accordance with the gravity of their deeds. This principle is encapsulated by the Latin maxim "*nullum crimen, nullum poena sine culpa*" (no crime, no punishment without guilt).

In Argentine law, the principle of culpability is not explicitly stated within the text of the Constitution. However, it has always emerged as a necessary implication of the recognition of the principles of legality under Article 18 and of human dignity.[111] The Supreme Court of Justice has presented culpability as a limit on the punitive power of the state and, at the same time, as a rule for measuring punishment through the criteria of proportionality and prohibition of excess.[112] Because of the principle of culpability, the preventive purposes of punishment cannot go beyond the culpability of the person for the offense (not even, say, to ensure the validity of the violated criminal norm in order to deter similar future cases). Naturally, when collective emotions come into play around highly intense events that require formal, state-based vindication through punishment, the social sense of justice becomes extremely powerful. Nevertheless, it must be nuanced by the principle of culpability.

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111. *See* GUILLERMO YACOBUCCI, EL SENTIDO DE LOS PRINCIPIOS PENALES 521 (2020).

112. *See* Corte Suprema de Justicia [CSJN] [National Supreme Court of Justice], 5/9/2006, "Gramajo Marcelo Eduardo s/ robo en grado de tentativa–causa nº 1573," 329:3680 (Arg.), https://sjconsulta.csjn.gov.ar/sjconsulta/documentos/verDocumentoByIdLinksJSP.html?idDocumento=6078671&cache=1690767835880; *see also* Corte Suprema de Justicia [CSJN] [National Supreme Court of Justice], 23/10/1995, "Esterlina S.A. Casa de Cambio y Turismo; *see also* Bunge, Francisco Ricardo s/ infr. ley 19.359," 318:207 (Arg.), https://sjconsulta.csjn.gov.ar/sjconsulta/documentos/verDocumentoSumario.html?idDocumentoSumario=4940.

Additionally, the criminal sanction should contribute, to the extent possible, to overcoming the potential deficits in the convicted individual's socialization; at the very least, it should not provoke an effect contrary to the intended one. These aims cannot be achieved by disregarding the principle of culpability and the prohibition of excess.

Thus, Argentina's Constitution has always imposed criminal law based on actions and rejects any form of blame towards the criminal actor's personality. Punishment is not imposed based on who someone *is*, but rather on what they have *done*, and only to the extent that this can be attributed to them.[113] Historically speaking, the principle of culpability has not been able to rid the law completely of punishment's preventive functions, both general and specific. But this principle does help limit (out of respect for human dignity) the dilution of subjectivity in legislation, legal institutions, or judicial interpretations driven by policy objectives.[114]

B. The Parties' Theories of the Case

The first major question that the Báez Sosa court had to resolve based on the trial evidence was whether the defendant *intended* to kill Fernando (mens rea).[115] The facts of the death itself and the involvement of the accused were not disputed, but the extent of each individual's participation needed clarification.[116] Did the facts and evidence of the case prove negligence (*imprudencia*) (conscious or unconscious), extreme recklessness (*dolo eventual/indirecto*),[117] or intent to kill (*intención de matar/dolo directo*)?

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113. YACOBUCCI, *supra* note 111, at 554, 572.

114. *See id.* at 561.

115. *See* Thomsen, Máximo Pablo, *supra* note 1, at 145–46.

116. *See id*. at 9–15.

117. We use "extreme recklessness" to convey the seriousness of "*dolo eventual*," though others have used different English renderings. *Contrast* Cecilia Fresnedo de Aguirre, *International Carriage of Goods by Road in the Americas: Looking at Policy Aspects of a Revised Inter-American Convention*, 4 UNIF. L. REV./REVUE DE DROIT UNIFORME 50, 68–70 (1999) (U.K.) (noting problems with a previous translation of the term as "recklessly and with knowledge") *with* Felix A. Cifredo Cancel, *Apropiación Indebida, Hurto, Estafa Y Danos en España, Estados Unidos y Puerto Rico (con Excurso sobre Problemática Concursal)*, 69 REV. JUR. U.P.R. 135, 181 (2000) (translating the term as "recklessness"); *Judicial and Similar Proceedings Argentina: National*

The parties presented different theories of the case. The prosecution argued that the accused acted with the intent to kill (*dolo directo*) and claimed to have proven first-degree murder with treachery (where culpability is aggravated because the individual acts to kill with certainty, taking advantage of the victim's defenseless situation).[118] It also argued that the accused committed aggravated homicide by the premeditated collaboration of two or more persons.[119] Both charges are provided for in Article 80 of the Argentine Penal Code (paragraphs 2 and 6, respectively).[120] They carry a life sentence—a penalty reserved for the most serious and heinous crimes in Argentina's penal system.

Meanwhile, the defense argued that the accused lacked the intent to kill Fernando. They argued that the events should be classified as homicide in a brawl (2–6 years' imprisonment).[121] The court considered also the crime of preter-intentional homicide (3–6 years' imprisonment).[122] Both offenses share the element of causing the death of a human being, but substitute for the intent to kill a lesser intent.[123] As a third alternative, the court considered simple homicide with a mens rea of extreme recklessness (8–25 years' imprisonment).[124] Extreme recklessness assumes that although there was no direct intent, the individuals foresaw Fernando's death. The trial evidence clearly demonstrated the defendants' intention to attack him, but intent to kill was contested.

C. Differentiating Mens Rea

The Báez Sosa case is a good paradigm for considering how to differentiate two bordering categories of mens rea: negligence

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Appeals Court (Criminal Division) Judgment on Human Rights Violations by Former Military Leaders, 26 I.L.M. 317, 29736 (1987) (same).

118. *See* Thomsen, Máximo Pablo, *supra* note 1, at 17.

119. *See id.* at 1.

120. CÓD. PEN. art. 80, incs. 2, 6 (Arg.), *available at* http://servicios.infoleg.gob.ar/infolegInternet/anexos/15000-19999/16546/texact.htm#15.

121. *See* Thomsen, Máximo Pablo, *supra* note 1, at 155; CÓD. PEN. art. 95.

122. *See* Thomsen, Máximo Pablo, *supra* note 1, at 158; CÓD. PEN. art. 81, para. 1 (b).

123. *See* CÓD. PEN. arts. 81, para. 1 (b) & 95.

124. *See* Thomsen, Máximo Pablo, *supra* note 1, at 17–18; CÓD. PEN. art. 79.

with anticipation/conscious negligence (*la culpa con representación/imprudencia consciente*) and extreme recklessness. Criminal jurisprudence has much to contribute on this point. Argentine penal doctrine generally defines intent and extreme recklessness (collectively, *dolo*) as including both knowledge of and willful assent to the offense's elements.[125] The various theories of intent that have emerged over the past century are primarily divided into: (1) anticipation (*representación*) theories, which focus on the cognitive element; (2) will theories, which place more weight on intent or volition; and (3) mixed theories, which require the concurrence of both elements. The cognitive element (knowledge of the risk) is the only one shared by extreme recklessness and intentional homicide (which includes willing the result as well).

The additional element of voluntariness distinguishing intent from extreme recklessness and negligence has to be taken into account when judging an actor's culpability and the extent of the due penalty. The person who intentionally kills another human being with the specific intent to do so deserves greater blame than someone who does so out of indifference or carelessness (even with foresight). Again, "the common denominator" among extreme recklessness and intent to kill is *knowledge*; any manifestation of subjective *will* must be evaluated in considering which kind of culpability to assign and, more specifically, determining whether to impose the maximum (life) penalty.[126]

The German legal scholar Claus Roxin, an indispensable authority on this topic, deems the essence of both intent and extreme recklessness (*dolo directo* and *dolo eventual*) to be the

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125. *See* 1 Código Penal: Comentado y Anotado, Parte General (Artículos 1º a 78 bis) 204 (Andrés José D'Alessio ed., 2005); Ricardo C. Nuñez, Manual de Derecho Penal: Parte General 187–88 (4th ed., 1999); *see also* Enrique Bacigalupo, Derecho Penal: Parte General 315–17 (2d ed., 1999). The discussions that follow draw from Agustina Mitre, *La Prueba del Dolo: Una Discusión Clásica, Siempre Actual*, 31 REVISTA ARG. DE DERECHO PENAL Y PROCESAL PENAL (2022), *available at* https://ar.ijeditores.com/pop.php?option=articulo&Hash=6e1e162f96a7b7d1f12d187a231faa0f.

126. *See generally* María Julia Sosa, *El Gran Problema de los Límites entre el Dolo Eventual y la Culpa con Representación* 70, MARCO ANTONIO TERRAGNI (Nov. 25, 2018), https://www.terragnijurista.com.ar/doctrina/problemalimites.htm.

"realization of the plan."[127] Under his premise, a result must be deemed intentional or extremely reckless (*dolosamente*) when, and because, it corresponds objectively to the subject's plan.[128] According to Roxin's view, this is what distinguishes extreme recklessness from conscious negligence, which is merely "carelessness or lightness."[129] Someone who "includes in their calculations" the possible realization of a criminal offense—"even if it is only as an eventuality and often against their own hopes of avoiding it"—and is not thereby "dissuaded from their plan has consciously decided against the legal interest protected by the corresponding" offense.[130]

Roxin thus conceives of extreme recklessness as the scenario in which subjects "seriously count on the possibility of the offense's realization but, despite this, continue to act to achieve the pursued end, thereby resigning themselves," willingly or unwillingly, to the eventual commission of a crime.[131] On the other hand, conscious negligence consists of perceiving "the possibility of the result's occurrence, but not taking it seriously . . . instead negligently trusting in the offense's non-occurrence."[132] "A person who relies—often due to an overestimation of their ability to control the situation—on a favorable outcome does not seriously consider the criminal result and therefore does not act with intent or extreme recklessness."[133] Roxin argues that "confidence in a successful outcome rising above a faint hope" is incompatible with "a decision against the protected legal interest."[134] "Of course, a person who does take seriously the possibility of a criminal result and does not rely on everything going well may still hope that luck is on their side and nothing will happen."[135] But "this hope does not exclude intent or extreme recklessness

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127. *See* Claus Roxin, *Dolo y Error de Tipo*, in 1 DERECHO PENAL–PARTE GENERAL: FUNDAMENTOS, LA ESTRUCTURA DE LA TEORÍA DEL DELITO 416 (Diego-Manuel Luzón Peña trans., 1997).
128. *Id.* at 416–17.
129. *Id.* at 425.
130. *Id.*
131. *Id.* at 427.
132. *Id.*
133. *Id.*
134. *Id.* at 426.
135. *Id.* at 427.

[collectively, *dolo*] when the subject 'lets things take their course.'"[136]

Roxin takes the decision to act against a protected legal interest as the difference between extreme recklessness and conscious negligence (and as the justification for punishing extreme recklessness more severely).[137] Furthermore, Roxin argues that the line between intent and extreme recklessness (collectively, *dolo*) on one side and negligence on the other not only expresses a difference in the injustice of the act, but also an important difference in subjective culpability, justifying different punishments.[138] "[A] person who decides—even as a mere eventuality—against a legally protected interest exhibits a more hostile attitude toward the law than someone who relies—albeit negligently—on the non-occurrence of the result."[139] Undoubtedly, a negligent person can be blameworthy, "but as they have not made any decision against protected legal values," that warrants a milder penalty.[140]

D. Proving Mens Rea

As mentioned above, determining whether the intent to kill could be imputed to the reprehensible behavior of the rugby players assaulting Báez Sosa was the main dilemma that the court had to resolve. How to prove mens rea is another classic problem in criminal jurisprudence. Cases presented in daily judicial practice raise difficulties relating to how intent is proven or not proven.

The "internal attitude of the subject, or mental state, is inaccessible to the judge" or jury; "empirical verification is impossible."[141] Therefore, in order to ascertain whether a person acted with intent, it is necessary to rely on other available evidence: circumstantial indicators, external data, subsequent actions, and so on.[142] Technically, then, intent is imputed to an actor (at least in the usual absence of direct evidence such as a confession). "[T]he mental state itself is not proven; what is

136. *Id.*
137. *See id.* at 426.
138. *See id.* at 427.
139. *Id.*
140. *Id.* at 426.
141. *See* Mitre, *supra* note 125.
142. *See id.*

verified are facts that allow for the imputation of intent to the subject's conduct."[143]

"[T]o classify an action as intentional, the normative legal framework (that is, criminal statutes) must have previously delineated the specific content of the intent at stake, and in the judicial or evidentiary realm, it is necessary to explicitly present the external events that justify some legal outcome."[144]

The way to "impute intent to specific conduct" is to consider "the social meaning evoked by that conduct" and "analyze the accompanying circumstances."[145] That is, imputing intent requires resorting to a series of objective indicators, among them: "the particular circumstances surrounding the action; the absence of an expressed intention to avoid it; the degree of objective danger posed by the action; whether the subject had any reason to accept the result"; the degree of the perpetrator's "capacity to understand the situation"; whether there was any plan, and if there was, its scope; "the complexity or simplicity of the situation; the time during which the events unfolded, and whether it was sufficient to perceive the danger; the subject's familiarity with the risk"; previous experiences where different results were caused by behaviors that "posed the same or a similar danger"; and "prior and subsequent attitudes toward the act."[146]

E. The Báez Sosa Judgment's Flawed Imputation of Intent to Kill

The Báez Sosa judgment is flawed when it derives from proven premeditated intent to cause harm (that is, the agreement of all of the defendants to assault Fernando) the conclusion that the intent to kill (*dolo directo de matar*) emerged within the few seconds that lapsed during the attack.[147] This imputation violates the rules of logic, psychology, and common experience. In other words, there is no connection between the judgment's

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143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*
147. Recall that the defendants chose to be tried by a court composed of three judges; in such instances, the court is required to provide written justifications substantiating its decision. *See* INTRO.A *supra*.

premises and the conclusion it syllogistically reaches. Its reasoning is fallacious.

The court's judgment found the intent to kill based upon the following:

> 1) The existence of a motive. 2) The means chosen to carry out the act, after the victim had been subdued and rendered semiconscious. 3) The consequent state of defenselessness that was taken advantage of. 4) The unusual violence displayed: the intensity of the blows is evident in light of the scant time in which the homicide materialized. 5) The areas of the body to which the blows were directed: essentially the head. 6) The cohesion of the group: not only were they friends, but it was not the first time they had organized to beat [someone]. 7) The attitude following the commission of the act.
>
> Regarding this last point, I bring up for comparison the video footage extracted from security cameras placed along the street, in which the accused can be observed walking away from the scene of the act, embracing one another . . . .
>
> The rules of logic and experience allow me to infer that the comportment evident immediately after—and what followed until the morning on which they were apprehended—is not compatible with "not wanting to kill" or "we didn't want to kill him." Especially when the result, also in light of the images that we have all seen, clearly indicated the at least extremely serious—if not irreversible—situation in which the victim already was when they stopped beating him.[148]

This analysis does not explain how it is possible for the intent to have shifted from intending to harm to intending to kill in a matter of seconds without simultaneous communication among the individuals.[149] Explicit evidence explaining why the court concluded that the intent had shifted does not exist.

The court imputed to the defendants the intent to kill Fernando based on the following premises: (1) the defendants planned, and intended, to beat him; and (2) after they managed to subdue him and render him semiconscious, they continued to

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148. Thomsen, Máximo Pablo, *supra* note 1, at 146–47.

149. Professor Cavedon notes Georgia precedent (echoed in some other US jurisdictions) holding that malice "may be formed in a moment"; however, proving that multiple actors *all* developed this specific mens rea in a matter of seconds would remain difficult. Jackson v. State, 832 S.E.2d 809, 816 (Ga. 2019).

beat him with unprecedented violence.[150] This reasoning is not supported by inferences logically deducible from the evidence nor by the sequence of valid conclusions derived from it, the principles of psychology, or common experience. The premise asserting homicidal intent is at most ambiguously supported. It lacks the certainty required to consider intent to kill proven.

None of the evidence that the court highlights as relevant to establish intent to kill is conclusive, whether analyzed individually or collectively. Therefore, the court's reasoning in this regard is incomplete. What is more, the evidence cited in the judgment's points 6 (as a cohesive group, the defendants had engaged in fighting previously) and 7 (their post-incident behavior) can be used to argue that the defendants actually *lacked* the intent to kill. The court's judgment implied that the group's previous confrontations supported a finding of intent to kill.[151] But habituation to risk can also weigh against imputing intent to kill. Indeed, a cohesive group of friends who organized to beat someone previously—meaning they had participated in similar experiences involving comparable danger, but where the death of the assaulted individual did not occur—might have assumed that this time they would achieve a similar outcome. The defendants could have reasonably imagined that an identical result would transpire.

This theory of mine (Professor Mitre) has scientific support. In fact, recent neuroscientific research on inhibitory brakes and the prefrontal cortex in adolescents and young adults explains why young people in general engage in riskier behaviors for physiological, developmental, and immaturity reasons, trusting that the objective danger that the action may entail will not materialize.[152] The rugby players' previous experiences could

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150. *See* Thomsen, Máximo Pablo, *supra* note 1, at 146–47.

151. *See id.* at 18–20, 22, 94–96, 108, 146–47, 150–51, 154–55.

152. *See* Miller v. Alabama, 567 U.S. 460, 471 (2012) ("[C]hildren have a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking." (citation and internal quotation marks omitted))); *White Paper on the Science of Late Adolescence: A Guide for Judges, Attorneys, and Policy Makers*, CTR. FOR L., BRAIN & BEHAV. AT MASS. GEN. HOSP. 11 (2022), https://clbb.mgh.harvard.edu/white-paper-on-the-science-of-late-adolescence/ ("Compared to adults, middle adolescents and late adolescents are more likely to engage in behaviors that risk their lives and wellbeing. Many health risk behaviors peak in late adolescence and young adulthood. This includes risk-taking behaviors and risk-related outcomes such

lead us to presume that they relied on the belief that the risk of death would not be actualized when they decided to assault Fernando.

As for the defendants' behavior after the commission of the act, cited in the judgment's point 7, the court emphasized that the defendants' actions of walking away from the scene and then embracing each other while Fernando lay lifeless just a few meters away are incompatible with "not wanting to kill."[153] The court imputes homicidal intent to the defendants' behavior without adequate reasoning. It also fails to explain why this behavior does not actually reveal a *lack* of awareness or understanding of the consequences the defendants had caused.

The court attempts to prove the falsehood of the defendants' claim of "not wanting to kill."[154] First, though, it is not sufficient to demonstrate the falsehood of those statements. The court must positively prove homicidal intent and explain explicitly why such intent can be inferred from that behavior. The behavior described by the court does not have unequivocal social significance, nor do the rules of experience or psychology necessarily dictate that an indifferent attitude masks homicidal intent. Were we to accept the court's reasoning as valid, defendants would have the burden of proving why such behavior does *not* signify intent to kill, thus reversing the burden of proof and undermining the presumption of innocence.

Lastly, the specific circumstances surrounding the defendants' actions after the attack—including the fact that they took place in a public location, in plain view of everyone, exposed to potential filming, with police patrolling the area—are compatible with the absence of intent to kill. Otherwise, the defendants would have taken precautions to avoid such exposure.

As a separate matter, the short duration of the events—which unfolded over a mere fifty seconds—can also evidence the defendants' lack of concrete perception of the danger posed to Fernando's life (assuming that they began the beating with the intent to harm him). In sum, the evidence presented in the trial

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as reckless driving, unprotected sex, and unintentional injuries. Further, overdose deaths and substance misuse peak in late adolescence and early adulthood.").

153. *See* Thomsen, Máximo Pablo, *supra* note 1, at 146–47.

154. *See id.*

did not allow for a precise and unequivocal imputation to the defendants of intent to kill Fernando.

F. Rethinking Extreme Recklessness as Applicable to the Báez Sosa Case

A conviction for mere negligence, though, would have been insufficient in terms of just punishment and blame, which are also elements of culpability. Essentially, a group of rugby players relentlessly attacked a physically weaker young man. None of the attackers wanted to kill him nor consider that possibility; they merely wanted to beat him. Some of them may have briefly entertained the thought that he would die, but trusted that this would not occur based on previous experiences. Still, they failed to realize that the level of their violence here surpassed what they had inflicted before.

Finding mere negligence in such behavior would have been implausible. The appropriate judgment, considering due punishment and blame while respecting the principle of culpability and the purposes of punishment, should have been extreme recklessness. It was possible to convict the defendants of this without distorting the facts or legal categories.

The doctrinal elaboration of extreme recklessness in European and Latin American criminal law is extensive and varied. New proposals even push the cognition-focused anticipation theory to its ultimate consequences by introducing an objective verification parameter. Puppe and Herzberg "have developed proposals tending to objectify" intent by minimizing the consideration of subjective knowledge and will—or even "disregarding both in certain contexts" (similarly to strict liability).[155] Puppe proposes finding extreme recklessness if a reasonable person would deem the danger so great as "not to trust in a successful outcome."[156] This theory "gives a purely objective character" to the outcome of the criminal proceeding, "paying no attention to the true attitude of the actor."[157] Puppe "rejects on principle 'delving into the irrational mechanisms of

155. *See* Mitre, *supra* note 125; *see also* Roxin, *supra* note 127, at 436.
156. Roxin, *supra* note 127, at 436; *see also* Mitre, *supra* note 125.
157. Mitre, *supra* note 125.

the subject's elaboration conditioned by their constitution or situation'; intent, to that extent, is a mere attribution."[158]

Pérez Barberá "also aims to objectify mens rea, but goes beyond Puppe" (who does not entirely abandon the inclusion of a mental state—knowledge of the risk, if only an objectively reasonable person's—in defining extreme recklessness).[159] Instead, Pérez Barberá argues that "defining intent is always a normative task" and every assessor has to "determine the relevance" of mental states.[160] For him, intent "is not an empirical property" existing in the defendant's mind, "but a normative property" defined by society, "because it is based on [a norm] that criminally relevant conduct is judged as more or less devoid of value [*disvaliosa*], and furthermore, the actor is obliged to act according to objective standards."[161]

Pérez Barberá "maintains that any punishable act" is nothing but "what *prima facie* deviates from the established rule in a criminal provision."[162] "[P]unitive intervention becomes necessary when this act achieves a certain 'communicative intensity' sufficient to destabilize the expectations associated with the challenged rule."[163] "This greater or lesser 'communicative intensity' explains . . . the difference in punitive treatment between negligence and intent or extreme recklessness [collectively, *dolo*]," even though, for Pérez Barberá, acts of either kind "violate the same norm."[164]

Pérez Barberá also thinks that the communicative intensity enabling the application of the legal system's "intent" response is present in cases where there is "ignorance or objectively irrational absences of anticipation."[165] This occurs when the

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158. Roxin, *supra* note 127, at 436; *see also* Mitre, *supra* note 125.

159. Mitre, *supra* note 125; *see generally* Gabriel Pérez Barberá, El Dolo Eventual: Hacia el Abandono de la Idea de Dolo como Estado Mental (2011).

160. Ramón Ragués i Vallés, *De Nuevo, el Dolo Eventual: Un Enfoque Revolucionario para un Tema Clásico*, 2012-3 INDRET (Spain) 3, https://indret.com/de-nuevo-el-dolo-eventual-un-enfoque-revolucionario-para-un-tema-clasico/; Mitre, *supra* note 124.

161. PÉREZ BARBERÁ, *supra* note 159, at 817 (quoted in Ragués i Vallés, 2012-3 INDRET at 3).

162. *Id.* at 127–30; Mitre, *supra* note 124.

163. *Id.*

164. Ragués i Vallés, 2012-3 INDRET at 3 (discussing PÉREZ BARBERÁ, *supra* note 159, at 131).

165. *Id.* at 4; Mitre, *supra* note 125.

individual "objectively transgresses obvious realities" or "basic norms of conduct."[166] For Pérez Barberá, the reasons why an actor does not anticipate an outcome are irrelevant; extreme recklessness can exist in mere behavior.[167] Thus, where very high risks exist, "the absence of anticipation cannot exclude intent."[168] "[I]n the face of such levels of probability or improbability, purposes contrary to these objective prognoses must appear, necessarily, as objectively extravagant, even though, at the same time, they are compatible with an individual epistemic or affective basis."[169]

Ultimately, theories like those of Puppe and Pérez Barberá could have been used to resolve the Báez Sosa case without stretching the facts to infer an intent to kill that the defendants did not possess. It should be noted that these theories of extreme recklessness "tend to favor increased punishment" for cases on the borderline between extreme recklessness and negligence.[170] "Therefore, it is necessary to interpret and qualify them through the principles that legitimize criminal law," among them human dignity, legality, and culpability.[171] Such theories can only be used in ways that do not equate to "a system of strict liability" incompatible with Argentine criminal law, "whose effectiveness and legitimacy are based on the principle of culpability."[172] As discussed above, this always requires a subjective connection "between the individual's conduct and the prohibited result."[173]

One way to avoid instrumentalization or excessive generalization could be to apply an objective standard for extreme recklessness, but nuance it with "an individualized benchmark, taking into account the individual's education," age, and specific knowledge.[174] This would maintain the focus on the objectively reasonable person, but also account for "the personal characteristics of the individual, which in some cases may

166. Ragués i Vallés, 2012-3 InDret at 4; Mitre, *supra* note 125.

167. *See* Ragués i Vallés, 2012-3 INDRET at 4 note 9; *see also* Mitre, *supra* note 125.

168. Mitre, *supra* note 125.

169. PÉREZ BARBERÁ, *supra* note 159, at 768–79 (quoted in Ragués i Vallés, 2012-3 INDRET at 8).

170. Mitre, *supra* note 125.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

excuse the lack of anticipation and thereby eschew punishment" appropriate only for some degree of greater intent (*sanción dolosa*).[175]

Returning to the Báez Sosa case, the court could not verify the defendants' intent to kill or validly impute intent to the charged behavior while still upholding the constitutional principles of legality and culpability, or the established criteria for finding intent.

This is where improper media influence entered into the picture. Stirred by coverage and commentary, society's collective sense of justice demanded nothing less than life imprisonment. The court was forced to find intent to kill in order to trigger aggravators for premeditation and treachery, disregarding the facts and the law along the way.

V. MEDIA PRESSURE ON US CRIMINAL PROCEEDINGS

Professor Mitre's discussion of the Báez Sosa case explores how media pressure could have especially great influence on one particular aspect of criminal proceedings: the imputation of mens rea. Her analysis raises the question of whether aspects of US criminal justice could be similarly susceptible to undue media influence. Here, Professor Cavedon discusses two recent high-profile cases, both involving public killings of strangers amidst a backdrop of racial politics, thus resembling the Báez Sosa case.[176] The first, the prosecution of Kyle Rittenhouse, also concerns mens rea. Then, Professor Cavedon turns to an intense media campaign seeking an outcome opposite to the pressure brought to bear in the Argentine case: the movement seeking a pardon for Daniel Perry. While his discussion will be shorter than Professor Mitre's, these cases confirm her finding that the media can exert much influence where indeterminate factors must be weighed. In fact, they can work on more actors and in more directions than just those she explores.

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175. *Id.*

176. Professor Cavedon has chosen not to analyze the similar killing of Ahmaud Arbery because he is not convinced that media pressure—while significant—played a decisive role in the conviction of the two lead defendants; the prosecution's case for murder was strong and the jury rightly returned a guilty verdict.

A. The Kyle Rittenhouse Case

The prosecution of Kyle Rittenhouse is similar in some ways to the Báez Sosa case. Both killings interacted heavily with racial politics, and in both, the media transmitted and amplified intense collective emotion in favor of conviction. Both trials hinged on what degree of culpability could be assigned and what type of mens rea could be imputed to the accused. But there were differences, too: Rittenhouse drew support from right-leaning media.[177] He was tried by a jury. Most notably, the proceedings against him ended in acquittal. No more than for the Báez Sosa case can media pressure's effects be isolated and empirically measured; still, there is enough overlap to make a comparative sketch fruitful.

On the night of August 25, 2020, protesters took to the streets of Kenosha, Wisconsin, demonstrating against a police shooting that left a Black man paralyzed.[178] Previous protests in the city had become riotous.[179] In response to a request from a self-styled militia organizing on social media, seventeen-year-old Rittenhouse went to the city.[180] He said he went to protect private property and provide medical aid.[181] He arrived armed with a rifle.[182]

Rittenhouse encountered Joseph Rosenbaum, who had just been discharged from a hospital following a suicide attempt.[183]

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177. *See, e.g.*, Ray Sanchez et al., *'Self-Defense Is Not Illegal': Kyle Rittenhouse Tells Fox News After Not-Guilty Verdict*, CNN (Nov. 19, 2021), https://www.cnn.com/2021/11/19/us/kyle-rittenhouse-trial-friday/index.html.

178. *See* Hampton Stall et al., *Kyle Rittenhouse and the Shared Meme Networks of the Armed American Far-Right: An Analysis of the Content Creation Formula, Right-Wing Injection of Politics, and Normalization of Violence*, TERRORISM & POLITICAL VIOLENCE at 2 (June 22, 2022), https://doi.org/10.1080/09546553.2022.2074293.

179. *See id.*

180. *See id.*

181. *See* Vanessa Romo & Sharon Pruitt-Young, *What We Know about the 3 Men Who Were Shot By Kyle Rittenhouse*, NPR (Nov. 20, 2021), https://www.npr.org/2021/11/20/1057571558/what-we-know-3-men-kyle-rittenhouse-victims-rosenbaum-huber-grosskreutz.

182. *See* Stall et al., *supra* note 178; Romo & Pruitt-Young, *supra* note 181.

183. *See* Robert Klemko & Greg Jaffe, *A Mentally Ill Man, a Heavily Armed Teenager and the Night Kenosha Burned*, THE WASH. POST (Oct. 3, 2020), *available at* https://www.washingtonpost.com/nation/2020/10/03/kenosha-shooting-victims/.

Rosenbaum, who had a history of mental illness, domestic violence, sexual crime, and homelessness, had previously encountered another militia member and dared that man to kill him.[184] Rosenbaum threw a plastic bag holding deodorant, underwear, and socks at Rittenhouse, then "charged" at him.[185] According to a trial witness, Rosenbaum directed an expletive at Rittenhouse and attempted to grab the rifle.[186] Rittenhouse fatally shot Rosenbaum in the head.[187]

Rittenhouse then ran as protesters shouted for someone to stop him.[188] Anthony Huber, carrying a skateboard, gave chase.[189] During the pursuit, Rittenhouse passed Gaige Grosskreutz, a former paramedic who had also gone to Kenosha to serve as a medic.[190] Questioned by Grosskreutz, Rittenhouse responded that he was "going to get the police."[191] Grosskreutz then drew his pistol and joined the chase.[192]

Rittenhouse quickly fell to the ground.[193] Someone tried to kick him; Rittenhouse fired at this man, but missed.[194] Huber "swung a skateboard at Rittenhouse's shoulder and reached for his rifle."[195] Rittenhouse fatally shot Huber in the chest.[196] Grosskreutz approached, pointing his pistol at Rittenhouse, who fired his rifle and severely wounded Grosskreutz's arm.[197]

As with the Báez Sosa case, and featuring many of the same media-attracting features we described in the Introduction (violence, video footage, ongoing media narratives), the

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184. *See id.* I would not normally mention these factors, as Rittenhouse did not know of them. But they are relevant to Rosenbaum's own actions and mindset and so to assessing his interaction with Rittenhouse.

185. *See id.*

186. *See* Maya Yang, *Kyle Rittenhouse Trial: Yelling, Tears and Surprises Reflect Divided America*, THE GUARDIAN (Nov. 13, 2021), https://www.theguardian.com/us-news/2021/nov/13/kyle-rittenhouse-trial-yelling-tears-and-surprises-reflect-divided-america.

187. *See* Klemko & Jaffe, *supra* note 183.

188. *See id.*

189. *See id.*

190. *See id.*

191. *Id.*

192. *See id.*

193. *See id.*

194. See id.

195. *Id.*

196. *See id.*

197. *See id.*

shootings swiftly became a major public affair. Television political satirist Trevor Noah accused Rittenhouse of going to Kenosha "hoping to shoot someone."[198] US Congresswoman Ayanna Pressley called him a "domestic terrorist."[199] The city of Berlin, Germany, named a skateboard park after Huber, and an online fundraiser for the three people Rittenhouse shot raised a quarter-million dollars.[200]

Notably, though, the media was not unanimously against Rittenhouse. Prominent right-wing news host Tucker Carlson embedded a team with Rittenhouse during his trial.[201] Some social-media users strongly supported Rittenhouse.[202] Then-President Donald Trump endorsed Rittenhouse's claim of self-defense.[203] Supporters raised $2 million for Rittenhouse's bail.[204]

Like the Báez Sosa defendants, Rittenhouse went to trial facing extremely serious charges: "first-degree intentional homicide, first-degree reckless homicide, attempted first-degree intentional homicide, and two counts of first-degree recklessly endangering safety."[205] If convicted of the leading charge, Rittenhouse would have incurred a mandatory sentence of life in prison.[206] But his trial had the opposite outcome as the Báez Sosa proceedings: he was acquitted on all counts.[207]

How did media coverage impact the Rittenhouse trial in comparison with the Báez Sosa case? It is impossible to say for sure. One large difference between the two cases was the nature of the legal defense. The Báez Sosa defendants had to acknowledge that they criminally assaulted their victim, then

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198. Poppy Noor, *Vigilante, Volunteer, Terrorist: How the US Media Covers Kyle Rittenhouse*, THE GUARDIAN (Aug. 28, 2020), https://www.theguardian.com/us-news/2020/aug/28/vigilante-volunteer-terrorist-how-us-media-covers-kyle-rittenhouse.

199. *Id.*

200. *See* Klemko & Jaffe, *supra* note 183.

201. *See* Sanchez et al., *supra* note 177.

202. *See generally* Stall et al., *supra* note 178.

203. *See* Sanchez et al., *supra* note 177.

204. *See Shootings, Arrest, Trial and More: The Kyle Rittenhouse Story Explained*, NBC CHI. (Nov. 15, 2021), https://www.nbcchicago.com/news/local/shootings-arrest-trial-and-more-the-kyle-rittenhouse-story-explained/2684756/.

205. Sanchez et al., *supra* note 177.

206. *See id.*

207. *See id.*

argue only for a lesser degree of culpability. By contrast, the prosecutors in the Rittenhouse case had to prove beyond a reasonable doubt that he was *not* acting in self-defense.[208] All Rittenhouse needed was for the jury to accept that he reasonably believed he was "at risk of death or great bodily harm" and had no means of escape.[209] As former Wisconsin Supreme Court justice Janine Geske told the *New York Times*, Rittenhouse's defense was strong "because most of the victims at some point were approaching Rittenhouse"—to put it lightly.[210] Media influence may have been only a weak factor in light of the facts and legal issues.

Where might media pressure have had an impact? Certainly, outside influence could have affected prosecutors' decision to bring severe charges requiring a heavy showing of guilt. Collective emotion around violence, crime, and racial politics was running high throughout the US in summer 2020; indeed, what triggered the Kenosha protests was the police shooting of a Black man.[211] Rittenhouse armed himself because he anticipated the possibility of confronting rioters or left-wing protesters. The media also frequently portrayed him as a dangerous vigilante and symbol of white supremacy.[212]

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208. *See, e.g.*, State v. Christen, 958 N.W.2d 746, 757 (Wisc. 2021), *cert. den'd* 142 S. Ct. 1131 (2022); *see also* Shaila Dewan & Mitch Smith, *When it Comes to Self-Defense, the Prosecution Has a Heavier Burden*, N.Y. TIMES (Nov. 19, 2021), https://www.nytimes.com/2021/11/19/us/rittenhouse-acquittal-self-defense.html.

209. *See* Dewan & Smith, *supra* note 208.

210. *Id.* For two recent assessments of the merits of US self-defense law (and in the latter article, media narratives about it) in light of the Rittenhouse case, see Eric Ruben, *Self-Defense Exceptionalism and the Immunization of Private Violence*, 96 S. CAL. L. REV. 509 (2023); T. Markus Funk, *Busting the Durable Myth That US Self-Defense Law Uniquely Fails to Protect Human Life*, THE CHAMPION 36, 36 (July 2023).

211. *See* Stall et al., *supra* note 178, at 2.

212. *See, e.g.*, Charles M. Blow, *Rittenhouse and the Right's White Vigilante Heroes*, N.Y. TIMES (Nov. 22, 2021), *available at* https://www.nytimes.com/2021/11/19/opinion/kyle-rittenhouse-not-guilty-vigilantes.html ("[P]erhaps the most problematic aspect of this case was that it represented yet another data point in the long history of some parts of the right valorizing white vigilantes who use violence against people of color and their white allies."); *see also* MSNBC, *Joy Reid: The Rittenhouse Trial Is Fundamentally about American Vigilantism*, YOUTUBE (Nov. 11, 2021), https://www.youtube.com/watch?v=fGDRWEHkEIQ (identifying Rittenhouse

Just as in the Báez Sosa case, the critical decisions around whether and how to charge him came down to the imputation of mens rea. There was no objective way to verify how much of a threat Rittenhouse subjectively perceived each time he pulled the trigger, any more than it was possible to confirm whether the Báez Sosa defendants formed the intent to kill during those fifty brutal seconds. Such matters of imputation are susceptible to external influence. Indeed, given the weakness of the prosecution's case, Professor Cavedon suspects that external social and media pressure did contribute to the charges brought against Rittenhouse.

In any event, the next stage of the proceedings showed a more complex picture of media influence. By the time the jury was weighing the case, competing media narratives had emerged. US media is very fragmented, especially along political lines. A viewer would have encountered very different narratives about Rittenhouse by watching Trevor Noah as opposed to Tucker Carlson (or vice versa), and the audiences of each differ. Media opinion about the case never coalesced.

What is more, a jury in a case like Rittenhouse's is composed of individuals often representing a variety of social classes, political affiliations, and so on. Those who decided the Rittenhouse verdict differed demographically from the three professional judges who rendered judgment against the Báez Sosa defendants. Without speculating as to the media-consumption habits of the Argentine judges, it is easier for any particular narrative to affect a smaller audience with the same educational, professional, and economic characteristics than to convince twelve people representing more cross-sections of a community.

The Rittenhouse case echoes the Báez Sosa case in its outset and reach, as well as in the central issue being the difficult question of imputing mens rea. But the outcome was different, and the effects of media pressure may have differed due to the facts, legal issues, ultimate deciders of the case, and competing media narratives.

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as part of a violent system of white domination stretching all the way back to the European colonization of the Americas).

B. The Daniel Perry Pardon Campaign

Another case from the US—the campaign to pardon Daniel Perry—involves media pressure operating in ways quite different from the Báez Sosa case. There, pressure is being brought not to convict but to exonerate, and not on those involved directly in adjudication but on a state executive. While Professor Mitre inferred the existence of external influence on the judges' decision in the Báez Sosa case, and Professor Cavedon noted its ambivalent effects on the Rittenhouse prosecution, the impact of media pressure here is crystal-clear.

On July 25, 2020, Perry was working as a rideshare driver in Austin, Texas.[213] He had previously messaged a friend saying he might "kill a few people on my way to work" and would "only shoot the ones in the front and push the pedal to the metal."[214] He ran a red light and drove into a crowd of Black Lives Matter protesters (not striking anyone). One protester, Garrett Foster, was openly carrying a rifle; he approached Perry's vehicle.[215] Perry told the police he thought Foster was going to point the gun at him and wanted to deny him the chance to do so, but no

213. *See* Zusha Elinson, *Texas Governor Vows to Pardon Man Convicted of Killing BLM Protester*, THE WALL ST. J. (Apr. 9, 2023), https://www.wsj.com/articles/texas-governor-vows-to-pardon-man-convicted-of-killing-blm-protester-c82d7134.

214. *Id.* Perry also shared a violent racist cartoon on social media, although two Black people who served in the Army with him dismissed it as reflecting "military humor." Elizabeth Findell, *Army Sergeant Sentenced in Killing of Black Lives Matter Protester in Austin*, THE WALL ST. J. (May 10, 2023), https://www.wsj.com/articles/army-sergeant-sentenced-in-killing-of-black-lives-matter-protester-in-austin-32f5a9c6.

215. *See* Findell, *supra* note 214.

witness testified that Foster ever raised the rifle.[216] Perry lethally shot Foster five times.[217]

A jury convicted Perry of murder.[218] The next day—before Perry had even been sentenced (he was later given twenty-five years' imprisonment)—Texas Governor Greg Abbott announced that he was asking the state pardon board to review the case and would approve a pardon recommendation "as soon as it hits [his] desk."[219]

Why this "unprecedented" early intervention?[220] Patently, media pressure. Abbott's statement came within a day of Tucker Carlson calling Perry's conviction a "legal atrocity."[221] Carlson specifically accused Abbott of not believing that Texans have a right to self-defense.[222] The head of the Texas Republican Party joined in the pardon demand as well.[223] Social media played a part, too: a leading conservative activist called the left-wing district attorney prosecuting Perry an "evil, subversive, dangerous Marxist[]" and a "cancerous tumor[]."[224]

The effect of the media pressure around Perry is palpable. Why was it so successful? Unlike in Báez Sosa and Rittenhouse, the narrative had to target only one decisionmaker. That person was not an anonymous community member, but its elected chief politician, whose views and pressure points are well-known. Nor would he fade back into the community (as would a juror) or

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216. *See id.*; *Of Arms and Harms*, THE ECONOMIST (Apr. 22, 2023), at 36; Andrew Fleischman, *Greg Abbott's Pardon of Daniel Perry Would Be Wrong—and Dangerous*, DAILY BEAST (Apr. 17, 2023), https://www.thedailybeast.com/texas-governor-greg-abbotts-pardon-of-daniel-perry-would-be-wrongand-dangerous; *Texas Governor Greg Abbott Tries to Hijack BLM Protester Shooting Case: He's Already Requested the Pardon Board Review Daniel Perry's Conviction for Shooting Garrett Foster in 2020*, DAILY BEAST (Apr. 8, 2023), https://www.thedailybeast.com/gov-abbott-tries-to-hijack-daniel-perrys-blm-protester-shooting-case [hereinafter "*Texas Governor*"].

217. *See* Findell, *supra* note 214; Of Arms and Harms, *supra* note 216; Texas Governor, *supra* note 216.

218. *See* Fleischman, *supra* note 216.

219. *See* Findell, *supra* note 214; Of Arms and Harms, *supra* note 216; Texas Governor, *supra* note 216.

220. Findell, *supra* note 214.

221. Of Arms and Harms, *supra* note 216.

222. *See id.*

223. *See* Elinson, *supra* note 213.

224. *See* Fleischman, *supra* note 216.

enjoy any guaranteed long term of office (as would some judges). Perhaps to an even greater extent than a prosecutor or judge, a governor is accountable to social forces. All the media had to do was target Abbott in a way that many of his constituents found agreeable and a pardon would be forthcoming.

That is unfortunate in the Perry case. According to the evidence-backed judgment of the jury, all Foster did was exercise *his* right to self-defense by bearing a rifle while investigating a driver who had driven into a crowd. Perry killed him based on nothing more than inchoate fear (and possibly Perry's animosity toward Foster as a protester).

Insulating politicians from media pressure is difficult. In fact, it is undesirable in many settings: freedom of the press exists precisely so that official decisions are transparent and subject to criticism by an informed and democratically empowered public. But the prospect of a well-organized campaign thwarting justice is disturbing. Perhaps it would be best to adopt checks and balances in the pardon process.[225] Or, given the legitimate need for discretionary executive relief against real injustices, perhaps all that can be hoped for is leadership more possessed of the virtues of fortitude and prudence. Either way, justice fell swiftly to media pressure here.

CONCLUSION

Professor Mitre argues that in the Báez Sosa case, factors beyond the culpability of the perpetrators led to some receiving the maximum penalty and all meeting with overly harsh punishment. Undoubtedly, one such factor was sustained media pressure aimed at securing the strict punishment of all of the accused. In the US context, Professor Cavedon suspects that media influence pushed prosecutors into overcharging Rittenhouse, and is confident that it led Abbott to commit to an indefensible pardon of Perry.

The presumption of innocence and the freedom of the press are two presuppositions basic to the functioning of a constitutional

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225. *See, e.g.,* Mary Margaret Giannini, *Measured Mercy: Managing the Intersection of Executive Pardon Power and Victims' Rights with Procedural Justice Principles*, 13 OHIO ST. J. CRIM. L. 89 (2015); *see also* Brian M. Hoffstadt, *Normalizing the Federal Clemency Power*, 79 TEX. L. REV. 561 (2001).

state. At times, the interaction of both rights in concrete situations may affect each one's normal development. To reconcile them, it is necessary to find a balance that allows for both the free circulation of information and the protection of the dignity and presumption of innocence of the accused person.

It is important for the media to respect ethical and legal guidelines when reporting on criminal cases in order to cabin its power to influence those with decisional authority. Moreover, it is necessary to consider legal mitigation measures that insulate finders of fact from undue influence, especially in intense cases where collective emotions come into play and require formal, state-based vindication through public adjudication and punishment.

Cases like Báez Sosa's, Rittenhouse's, and Perry's mark milestones—as well as opportunities for legislative or conceptual reconsideration to overcome the problems they reveal. Hopefully, the legal and political community will have the maturity to debate these matters thoughtfully and undertake necessary changes. The tensions inherent in freedom can be resolved better than they were in the three cases we have highlighted.