

Has Social Media Destroyed a Federal Rule? The False Promise of Transfer to Cure Prejudice in the Social Media Era

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Under Federal Rule of Criminal Procedure 21(a), criminal defendants can move to have their case transferred out of the local district if local prejudice is so high that impartial jurors cannot be found. Scholars and some courts have been quite fond of transfer for prejudice under Rule 21(a), especially in cases of extreme local prejudice. Courts have continued to grant transfer motions in these cases. And scholars have largely defended these grants of transfer, arguing that transfer is the best way to guarantee a fair trial when local prejudice is high.

This Note challenges this traditional thinking and advocates for a counterintuitive way to guarantee the defendant a fair trial: Eliminate transfer for prejudice under Rule 21(a) altogether. To make this argument, this Note first argues that the Rule's main benefit to defendants, as identified by courts and scholars, is that it allows defendants to move a trial to a less-prejudiced jury pool when local prejudice is high. But this benefit has been stripped away by social media. Social media has made it so transferable cases under the current doctrine will always have national coverage, thus making any transfer pointless at eliminating prejudice because all districts will be equally prejudiced. At the same time, social media has exacerbated some of the harms of the Rule by making a prejudicial transfer—a transfer that harms the defendant—likely. This harm, along with other harms outlined in this Note, shows how leaving the Rule in place actually threatens a defendant's right to a fair trial, and therefore, elimination of the Rule will better protect a defendant's right to a fair trial.

Introduction

In the midst of a World War, the Allies needed a solution. Half of the planes the Allies sent across the English Channel did not come back,¹ and the half that did come back were riddled with bullet holes.² The problem persisted. Morale plummeted. The bombing campaign stagnated. Desperate, Allied officers began studying the bullet hole patterns on returning planes in

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1. Peter Brannen, *Why Earth's History Appears So Miraculous*, ATLANTIC (Mar. 15, 2018), <https://www.theatlantic.com/science/archive/2018/03/human-existence-will-look-more-miraculous-the-longer-we-survive/554513/> [<https://perma.cc/CP6A-K4HK>].

2. *Id.*

hopes of finding the planes' most vulnerable areas.³ Naturally, it was thought that putting extra armor on these areas would better protect the planes.⁴ This was an intuitive solution but a foolish one. Indeed, before the bombers could fly away with the extra protection, mathematician Abraham Wald came up with a different, counterintuitive solution: put the armor where the bullet holes *were not*.⁵ The planes that had bullet holes in those areas did not come back; they crashed. Protecting those areas—the areas *without* bullet holes—would better protect the planes.

Courts have a similarly persistent problem of trying to guarantee defendants a fair trial, a problem that needs a similarly counterintuitive solution. A fair trial by an impartial jury is guaranteed by the Sixth Amendment in “the State and district wherein the crime shall have been committed.”⁶ The defendant, however, may waive this right and have the trial moved to a different venue if “extraordinary local prejudice will prevent a fair trial—a ‘basic requirement of due process.’”⁷ Because transfer in such situations has traditionally been a fundamental requirement of due process under the Fifth and Fourteenth Amendments,⁸ it is provided for in federal and state rules.⁹ Venue transfer for prejudice in federal court is governed by Federal Rule of Criminal Procedure 21(a) (Rule).¹⁰ Upon a defendant’s motion, this Rule requires transfer out of district if the court finds sufficient local prejudice against the defendant such that impartial jurors cannot be found and a fair trial therefore cannot be obtained in that district.¹¹

Transfer for prejudice under Rule 21(a), although only one of many procedures a court can use to purge prejudiced jurors and guarantee a fair

3. *Id.*

4. *Id.*

5. *Id.*

6. U.S. CONST. amend. VI.

7. *Skilling v. United States*, 561 U.S. 358, 378 (2010) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).

8. *Irvin v. Dowd*, 366 U.S. 717, 722 (1961) (discussing the fundamental requirement of an “indifferent,” unprejudiced jury for due process).

9. *See, e.g.*, FED. R. CRIM. P. 21(a) (“[T]he court must transfer . . . to another district if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there.”); MINN. R. CRIM. P. 25.02 (“A motion for continuance or change of venue must be granted whenever potentially prejudicial material creates a reasonable likelihood that a fair trial cannot be had.”); W. VA. R. CRIM. P. 21(a) (“The circuit court . . . shall transfer the proceedings . . . if the circuit court is satisfied that there exists in the county where the prosecution is pending so great a prejudice against the defendant that he or she cannot obtain a fair and impartial trial . . .”).

10. FED. R. CRIM. P. 21(a).

11. *Id.* The frequency that defendants file transfer motions, while uncertain, is likely sizeable. *See* Roger Michalski, *Transferred Justice: An Empirical Account of Federal Transfers in the Wake of Atlantic Marine*, 53 HOUS. L. REV. 1289, 1294 n.16 (2016) (noting that because transfer motions are not contested frequently, there are likely more transfers that actually occur than appear in reported decisions on Westlaw or LexisNexis).

trial, is traditionally favored as the best defense against prejudice, especially in cases of extreme local prejudice.¹² Transfer is favored because it can permit a defendant to “start over” in a new district that is significantly less prejudiced than the original one.¹³ Other procedures, like voir dire, only work *within* the prejudiced district and thus run a higher risk of failing to purge biased jurors when local prejudice is high.¹⁴ The argument in favor of transfer for prejudice then, intuitively, is that transfer works only to the benefit of the defendant and should therefore be favored.¹⁵

But, while this may have been persuasive in the past, this argument does not bear scrutiny in the social media era. Rather, a more effective way to protect a defendant’s right to a fair trial today would be the counterintuitive one: Eliminate Federal Rule of Criminal Procedure 21(a) altogether. Elimination of the Rule is needed because social media has stripped away the Rule’s main benefit while also exacerbating some of its harms. The main benefit of the Rule is that it allows the defendant to “start over” in a new district, where community prejudice against the defendant is much lower than in the original district. This benefit, however, is nullified by the unique interaction between the current transfer doctrine and social media. The current doctrine surrounding transfer motions under the Rule has made it virtually impossible to succeed on the motion: in the current federal system, only extreme cases of prejudice require transfer.¹⁶ These extreme cases worthy of transfer, however, are cases where social media is likely to have broad national coverage of the case. By imbuing all cases worthy of transfer with national coverage, social media makes all venues equally prejudiced to the defendant—eliminating the main benefit of the Rule, i.e., moving to an unprejudiced district.

12. See, e.g., Hillary Cohn Aizenman, *Pretrial Publicity in a Post-Trayvon Martin World*, CRIM. JUST., Fall 2012, at 12, 13–14 (“Trial court will usually grant a venue transfer in only the more unusual cases with extraordinary amounts of pretrial publicity.”); Leslie Y. Garfield Tenzer, *Social Media, Venue, and The Right to a Fair Trial*, 71 BAYLOR L. REV. 421, 422 (2019) (stating that the right to a fair trial demands a change of venue when the unbiased sensibilities of potential jurors is hindered); Kristin R. Brown, Note, *Somebody Poisoned the Jury Pool: Social Media’s Effect on Jury Impartiality*, 19 TEX. WESLEYAN L. REV. 809, 833 (2013) (“[W]here the nature of the community, the crime, and the publicity . . . create a presumption of prejudice, a change of venue is required.”).

13. See *infra* subpart II(A).

14. See *infra* subpart II(A).

15. See *Skilling v. United States*, 561 U.S. 358, 379–84 (2010) (describing the benefits of transfer); Aizenman, *supra* note 12, at 13 (describing that voir dire, unlike transfer, is sometimes ineffective at removing prejudice).

16. *Skilling*, 561 U.S. at 381 (“A presumption of prejudice, our decisions indicate, attends only the extreme case.”). In this Note, I express no view on the soundness of this doctrine, but I note that it is very unlikely to be liberalized. See *id.* at 379–85 (constraining the doctrine, as recently as 2010, and expressing a preference for voir dire to cure prejudice rather than transfer).

At the same time, social media has exacerbated some of the harms of the Rule. Social media has made a prejudicial transfer—a transfer that harms the defendant—more likely because judges fail to incorporate social media into their pretrial prejudice analysis and will therefore transfer cases that should not be transferred. Furthermore, leaving the Rule in place may lead judges to distort the record, violate the community’s constitutional interest in local adjudication, and cause practical inefficiencies. The Rule should thus be eliminated.¹⁷

Part I of this Note begins by analyzing the history of the doctrine around Rule 21(a) and the current application of the doctrine by circuit courts. Part II follows by looking at the interaction between the doctrine and social media, making an argument that social media has stripped the Rule of its main benefit over other procedures. Part III provides an argument for eliminating the Rule, looking to the potential harms of leaving the Rule in place. Part IV continues with an analysis and disposal of counterarguments against eliminating the Rule. Then, the Note briefly concludes.

I. Current Transfer for Prejudice Doctrine

Much of the current doctrine governing transfer for prejudice has its roots in two cases handed down by the Warren Court in the 1960s, each of which found that either presumptive pretrial prejudice (prejudice presumed from the degree of media exposure) or actual prejudice (any prejudice reflected in the voir dire) prevented the defendant’s right to a fair trial.¹⁸ These cases, still cited by the Court today, are important because they are the only examples of the Court finding prejudice sufficient to transfer venue—and as such, they evidence the extreme fact patterns the Court requires under its current doctrine before it grants transfer motions for prejudice.¹⁹

Since these cases, the Court has only considered prejudice questions a few times, and each time it has rejected granting the defendant transfer.²⁰ The

17. Indeed, courts and scholars have found that transfer is wasteful in cases where the coverage is so broad that all jury pools would likely be equally prejudiced. *See infra* subpart II(B).

18. For a brief discussion of earlier Supreme Court cases that touched on the issue of pretrial publicity, see Tenzer, *supra* note 12, at 424–27. During this era, the Court often collapsed the analysis for both types of prejudice into one and used the terms interchangeably. *See infra* subpart I(B). It would not be until 2010, in *Skilling*, where the Court would clear up the distinction. *See Skilling*, 561 U.S. at 381–86 (distinguishing between the two types of prejudice by analyzing the defendant’s claim under both standards separately).

19. While it is important to understand the unique fact pattern of the cases, it is also important to understand the context of these cases. These cases occurred in the heyday of the Warren Court’s interventionism, notable for its impact in the area of criminal procedure. Earl M. Maltz, *Abortion, Precedent, and the Constitution: A Comment on Planned Parenthood of Southeast Pennsylvania v. Casey*, 68 NOTRE DAME L. REV. 11, 23 (1992). In this era, the Warren Court—interested in protecting individual liberty and skeptical of state courts—was more inclined to reach results consistent with granting more rights to defendants. *Id.*

20. *See infra* subpart I(B).

cases of *Murphy v. Florida*,²¹ *Patton v. Yount*,²² and *Skilling v. United States*²³ have crystalized the current doctrine, one in which a defendant can only succeed on a rare fact pattern that evidences extraordinary prejudice.²⁴ Indeed, while the Warren Court never delineated an outer limit to the doctrine, the post-1970s Court made clear that the cases of the 1960s provided the litmus test for finding the extraordinary prejudice needed to transfer.

A. *The 1960s Cases Signal an Openness to a Liberal Transfer for Prejudice Doctrine*

The landmark cases of the 1960s were *Irvin v. Dowd*²⁵ and *Rideau v. Louisiana*.²⁶ In both of these cases, the Supreme Court found sufficient prejudice to require reversal of the defendant's conviction.²⁷ In the process, the Warren Court began developing a doctrine that, at first, seemed quite liberal: it operated as a flexible, totality-of-the-circumstances test primarily looking to both media exposure and voir dire statements for either presumptive or actual prejudice. Under this flexible test, any defendant theoretically had a nonfrivolous claim to prejudice. In these cases, the Court refused to set an outer limit on the doctrine, signaling it was willing to listen to these claims.²⁸

21. 421 U.S. 794 (1975).

22. 467 U.S. 1025 (1984).

23. 561 U.S. 358 (2010).

24. *Id.* at 380–81. There was another pretrial prejudice case, *Mu'Min v. Virginia*, 500 U.S. 415 (1991), decided by the Court in this era. Discussion of this case has been left out because the case's fact pattern does not provide useful comparison to the 1960s cases. For a good discussion of this case, see Tenzer, *supra* note 12, at 439.

25. 366 U.S. 717 (1961).

26. 373 U.S. 723 (1963). There were also two other cases dealing with transfer for prejudice taken by the Supreme Court during this era, *Sheppard v. Maxwell*, 384 U.S. 333 (1966) and *Estes v. Texas*, 381 U.S. 532 (1965). These cases found prejudice that prevented a fair trial and thus permitted transfer. *Sheppard*, 384 U.S. at 358; *Estes*, 381 U.S. at 545–55. But the prejudice in these cases occurred *during* trial. *Skilling*, 561 U.S. at 382 n.14. In both cases, the circus-like atmosphere created at the courthouse by the media led the Court to find prejudice. *Sheppard*, 384 U.S. at 355; *Estes*, 381 U.S. at 536. Accordingly, this Note leaves discussion of these cases out because their fact patterns and discussion focus on prejudice during trial rather than *pretrial* publicity.

27. *Rideau*, 373 U.S. at 726–27; *Irvin*, 366 U.S. at 730 (Frankfurter, J., concurring).

28. Some Justices were clear with their invitation. See *Irvin*, 366 U.S. at 730 (Frankfurter, J., concurring) (lamenting that the problem of prejudice is pervasive and that there are a substantial number of meritorious claims of prejudice the Court should review). And the lower courts seemed to get the message. See, e.g., *United States v. Marcello*, 280 F. Supp. 510, 513 (E.D. La. 1968) (“Recent Supreme Court decisions make it clear that the courts must be ever sensitive and finely attuned to the prejudice inherent in adverse publicity and must be vigilant in correcting abuses; it is certain that a conviction obtained in an atmosphere contaminated by such publicity will not stand.”).

The Court first began formulating the doctrine in *Irvin*, where the Court found prejudice had permeated the jury.²⁹ The facts in *Irvin* are quite extreme. Six murders were committed in a small Indiana county which “aroused great excitement and indignation” throughout the community.³⁰ Just one month after four of the killings were committed, the defendant was arrested and indicted on murder charges.³¹ The local news covered the entire story extensively and made the defendant’s trial the *cause célèbre* of the small community.³² Headlines claiming that the defendant had confessed to the murders began shortly after his arrest and continued all the way up to the trial.³³ He was even referred to as the “confessed slayer of six” in the local media.³⁴ Such publicity led the newspaper itself to report that “impartial jurors are hard to find.”³⁵

Apart from the prejudice outside of the courthouse identified above, inside the courthouse the Court also found that “the ‘pattern of deep and bitter prejudice’ [in the community] was clearly reflected [in voir dire].”³⁶ Indeed, of the 430 prospective jurors in the panel, 370, or approximately 90%, had some suspicion that the defendant was guilty.³⁷ The Court first explained that it was not necessary that jurors be ignorant of everything pertaining to the case because media has made it so “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.”³⁸ But the Court recognized there would be some instances where prejudice would be “manifest.”³⁹ Indeed, in what would be a consistent theme for the Warren Era, the Court expressed distrust of the state court, saying that in some instances setting aside a trial court’s finding of no prejudice in the jury would be necessary.⁴⁰ In this case, despite the trial judge’s impression that the jury was impartial, the Court found that the evidence of the pretrial publicity and biased opinions of the veniremen made

29. *Irvin*, 366 U.S. at 728. Later cases cite to *Irvin* as a presumptive prejudice case too. *See infra* subpart I(B).

30. *Irvin*, 366 U.S. at 719 (quoting *Irvin v. Dowd*, 359 U.S. 394, 396 (1959)).

31. *Id.* at 719–20 (quoting *Irvin*, 359 U.S. at 396–97).

32. *Id.* at 725.

33. *Id.* at 720, 726.

34. *Id.* at 726.

35. *Id.* at 727.

36. *Id.*

37. *Id.*

38. *Id.* at 722.

39. *Id.* at 724 (quoting *Holt v. United States*, 218 U.S. 245, 248 (1910)).

40. *See id.* at 724–25 (noting that prejudice still persisted in the jury despite the trial court voir dire procedures). Indeed, a concurrence penned by Justice Frankfurter argued that the Court was not doing enough to set aside clearly prejudicial proceedings. *See id.* at 730 (Frankfurter, J., concurring) (“For one reason or another this Court does not undertake to review all such envenomed state prosecutions. But, again and again, such disregard of fundamental fairness is so flagrant that the court is compelled . . . to reverse . . .”).

the prejudice “clear and convincing.”⁴¹ Accordingly, the defendant’s conviction was overturned.⁴²

The following case, *Rideau*, had similarly extreme facts. In *Rideau*, the defendant was arrested by local police for a robbery and murder that had taken place just hours before.⁴³ The morning after the arrest, the sheriff coercively interviewed the defendant on video.⁴⁴ In the video, the defendant could be seen, flanked by police officers, confessing to the robbery and murder.⁴⁵ The video was subsequently broadcast on television and viewed by an estimated one-third of the district population.⁴⁶ Without analyzing the voir dire transcript as it did in *Irvin*, the Court *presumptively* found prejudice pervasive in the community.⁴⁷ Indeed, the Court found that the defendant was prejudiced without looking to find any nexus between the prejudice identified and the defendant’s trial.⁴⁸ The Court held that the defendant was denied due process because the spectacle of the confession, which was broadcast to the entire community, “in a very real sense *was* Rideau’s trial” and any subsequent trial was therefore “a hollow formality.”⁴⁹ Due process required that jurors were drawn from a community who had not seen the widely broadcast confession.⁵⁰

B. Post-1960s Cases Emphasized the Need for Transfer Only in Extreme Cases—Enshrining the 1960s Cases as the Litmus Test for Transfer

As the Court addressed prejudice claims in the 1970s and beyond, it compared the facts of the case before it to the facts of *Rideau* and *Irvin* and made clear that it would use the 1960s cases as the benchmark for finding prejudice sufficient to grant transfer, circumscribing the boundaries of the right. The Burger Court began this retrenchment of the transfer doctrine in 1975 with its decision in *Murphy*.

In *Murphy*, the defendant, tried and convicted of robbery, argued that prejudice had prevented his right to a fair trial.⁵¹ Indeed, the defendant’s

41. *Id.* at 724–25 (majority opinion).

42. *Id.* at 729.

43. *Rideau v. Louisiana*, 373 U.S. 723, 723–24 (1963).

44. *Id.* at 724, 728.

45. *Id.* at 725.

46. *Id.* at 724.

47. *Id.* at 726–27 (“Any subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality.”).

48. *Id.* at 729 (Clark, J., dissenting).

49. *Id.* at 726 (majority opinion) (“For anyone who has ever watched television the conclusion cannot be avoided that this spectacle, to the tens of thousands of people who saw and heard it, in a very real sense *was* Rideau’s trial—at which he pleaded guilty to murder.”).

50. *Id.*

51. *See* *Murphy v. Florida*, 421 U.S. 794, 795–96 (1975) (discussing the defendant’s motions to dismiss for jurors’ knowledge of his newsworthy prior crimes).

arrests and subsequent trials for his prior crimes received considerable attention.⁵² Much of the attention was due to the defendant's "flamboyant lifestyle" and notoriety in the media as "Murph the Surf."⁵³ He was most notorious for his theft of the Star of India sapphire from a New York museum.⁵⁴ And about one year before his trial on the robbery charges, the defendant also "drew extensive press coverage" due to an unrelated murder conviction, stolen securities guilty plea, and commitment to a mental hospital.⁵⁵

Over a short dissent, the Court declined to find prejudice sufficient for transfer.⁵⁶ The Court first looked at the voir dire transcript and failed to find any actual prejudice among the jurors.⁵⁷ The Court distinguished between "mere familiarity with petitioner or his past and an actual predisposition against him."⁵⁸ The key to the Court's analysis was that, while each one of the jurors was familiar with the defendant's past crimes, there was a difference between the *potential* for prejudice and actual prejudice, such that "ignor[ing] these real differences in the potential for prejudice would not advance the cause of fundamental fairness, but only make impossible the timely prosecution of persons who are well known in the community."⁵⁹ This difference was key for the Court in distinguishing the current set of facts and *Irvin*. The Court easily distinguished *Irvin*, finding that 25% of the veniremen had an opinion on the defendant's guilt, while 90% had the same in *Irvin*.⁶⁰ The Court reasoned that pretrial publicity did not render the trial presumptively prejudicial because the articles describing the defendant appeared seven months before the jury selection, and these articles, unlike the inflammatory media in *Rideau*, were "factual in nature."⁶¹

The next case, *Patton*, was decided almost a decade later. The facts in *Patton* bore many similarities to those in *Rideau*. In *Patton*, a mathematics teacher in a small Pennsylvania county confessed to a murder the morning after the crime had taken place.⁶² His confession came during a police interrogation.⁶³ The confession was reported heavily in the media and exposed to much of the community.⁶⁴ The defendant was convicted by a

52. *Id.*

53. *Id.* at 795.

54. *Id.*

55. *Id.* at 795–96.

56. *Id.* at 803.

57. *Id.* at 800.

58. *Id.* at 800 n.4.

59. *Id.*

60. *Id.* at 803.

61. *Id.* at 802–03.

62. *Patton v. Yount*, 467 U.S. 1025, 1027 (1984).

63. *Id.*

64. *Id.* at 1027–28.

jury.⁶⁵ His conviction, however, was reversed by the Pennsylvania Supreme Court because a key piece of evidence, the confession, was illegally obtained without giving the defendant his *Miranda* rights.⁶⁶ After the reversal, the defendant was tried again—this time four years after the crime was committed.⁶⁷ At his second trial, the defendant moved for transfer, arguing that prejudicial information had been disseminated too widely in the community to guarantee a fair trial.⁶⁸

In this case, the Court again declined to find prejudice, distinguishing the case from *Irvin*.⁶⁹ Comparing the case to *Irvin*, the Court found that there was no actual prejudice despite the fact that 77% of the veniremen were dismissed for cause because they had an opinion on the defendant's guilt (the number was 62% in *Irvin*) and eight out of fourteen jurors and alternates admitted they had some opinion of the defendant's guilt (the number was eight out of twelve in *Irvin*).⁷⁰ The Court held that while the jurors did have an opinion, time had erased the *strong* opinions about the case: "That time soothes and erases is a perfectly natural phenomenon, familiar to all."⁷¹ Indeed, blessing the use of continuances in place of transfer, the Court found that this time delay significantly distinguished the case from *Irvin* on presumptive prejudice as well: "[T]his lapse in time had a profound effect on the community and, more important, on the jury, in softening or effacing opinion."⁷² Unlike in *Irvin*, here the adverse publicity was at its height during the first trial but subsequently subsided, resulting in low public interest and only factual news accounts (rather than inflammatory news reports).⁷³ The Court noted that the news coverage of the case leading up to the second trial did not "amount[] to a 'huge . . . wave of public passion,' that the Court found in *Irvin*."⁷⁴

Most recently, the Court addressed pretrial prejudice in *Skilling*. Jeffrey Skilling, the former CEO of Enron and defendant in this case, was indicted, *inter alia*, for a variety of securities-fraud-related crimes while at Enron.⁷⁵ Enron had collapsed spectacularly, causing many to lose money in the Enron

65. *Id.* at 1027.

66. *Id.*

67. *Id.*

68. *Id.*

69. Much of the Court's analysis focused on *Irvin*, with the Court making only passing reference to *Rideau* in a footnote, despite the factual similarities (airing confessions) between the cases. *See id.* at 1031–33 (comparing the case to *Irvin*); *id.* at 1038 n.13 (citing briefly to *Rideau* in a footnote).

70. *Id.* at 1029–30, 1030 n.3.

71. *Id.* at 1034.

72. *Id.* at 1033.

73. *Id.* at 1032–33.

74. *Id.* (alteration in original) (citations omitted).

75. *Skilling v. United States*, 561 U.S. 358, 368–69 (2010).

stock they owned.⁷⁶ The collapse profoundly affected the Houston community, which had deep ties to the company.⁷⁷ In Houston alone, “thousands of additional jobs disappeared [and] businesses shuttered.”⁷⁸ Accordingly, Skilling moved for a venue change.⁷⁹ Skilling used media experts who submitted hundreds of news reports on Enron’s collapse and showed community attitudes that were particularly negative toward Skilling.⁸⁰ To compound the prejudice, shortly before Skilling’s trial, another Enron senior executive pleaded guilty.⁸¹ Skilling again moved for transfer, but the motion was rejected by the trial court.⁸² Adverse newspaper articles and editorials continued to be published leading up to the trial.⁸³

The Court rejected Skilling’s claims on appeal, looking particularly to *Rideau* for support.⁸⁴ The Court applied a four-factor test, looking at the size of the district, the tone of the news stories, the time between the crime and trial, and the actions of the jury.⁸⁵ The Court held first that Houston’s geographic size made it likely there were unbiased jurors.⁸⁶ Next, unlike *Rideau*, the Court noted that the stories here, although many, had no “blatantly prejudicial information.”⁸⁷ Third, the Court noted that four years had elapsed since Enron’s collapse and attention to the case had mostly subsided.⁸⁸ Finally, the Court emphasized the jury’s acquittals of Skilling on some charges as evidence of unbiasedness.⁸⁹ Much of the Court’s analysis rejecting the transfer claim relied on the procedures of the trial court.⁹⁰ The Court held that the district court sufficiently avoided presumptive prejudice by delaying proceedings an additional two weeks and asking about the recent publicity during voir dire.⁹¹ The Court mentioned in a footnote that even in

76. *See id.* at 368 (noting the quick, suspicious plummet of Enron’s stock after Skilling’s departure).

77. *Id.* at 427–28 (Sotomayor, J., concurring in part and dissenting in part).

78. *Id.* at 428.

79. *Id.* at 369 (majority opinion).

80. *Id.* at 369–70.

81. *Id.* at 433 (Sotomayor, J., concurring in part and dissenting in part).

82. *Id.* at 434.

83. *Id.* at 433–34.

84. The Court noted that *Estes* and *Sheppard* were inapt for comparison in this case because they dealt with media interference during trial, not before trial. *Id.* at 382 n.14 (majority opinion). The Court also distinguished the case from *Irvin* by finding that *Irvin* bore few similarities to *Skilling*: Houston was much bigger than the small town in *Irvin*, there was no exhibited bias by seated jurors as in *Irvin*, and media coverage was not as pervasive or negative as in *Irvin*. *Id.* at 394.

85. *See id.* at 382–83 (considering four factors to determine pretrial prejudice).

86. *Id.* at 382.

87. *See id.* at 382–83 (“Pretrial publicity about Skilling was less memorable and prejudicial [than in *Rideau*].”).

88. *Id.* at 383.

89. *Id.*

90. *Id.* at 385.

91. *Id.*

cases of massive pretrial publicity, there could still likely be jurors who could form an impartial jury because “[t]his may come as a surprise to lawyers and judges, but it is simply a fact of life that matters which interest them may be less fascinating to the public generally.”⁹² What mattered most then was the trial court’s procedures to find those jurors.

C. *Current Doctrine Among Lower Courts Post-Skilling Reflects the Stricter Approach Staked Out in the Court’s Post-1960s Cases*

Since the Court’s more recent cases on transfer under 21(a), which disfavored transfer except in extreme cases, lower courts have followed the Court’s lead and stringently applied the doctrine. Only in very few exceptional circumstances have courts granted transfer.⁹³ Most claims for transfer for prejudice are dismissed by circuit courts by adopting a deferential position toward the trial court.⁹⁴ For example, in *United States v. Quiles-Olivo*,⁹⁵ the court dismissed the defendant’s claims of prejudice in part by noting that “the record shows a careful investigation by the court into jury bias.”⁹⁶ The appellate court relied heavily on the procedures employed by the trial court to dismiss the claims, concluding that “[o]ur deferential review of the record does not show that the district court erred in denying Quiles’s transfer of venue request.”⁹⁷ The result of this posture of deference to the

92. *Id.* at 391 n.28 (quoting *United States v. Haldeman*, 559 F.2d 31, 62 n.37 (D.C. Cir. 1976)).

93. The outlier is *United States v. Casellas-Toro*, 807 F.3d 380 (1st Cir. 2015), discussed in more detail elsewhere in this Note. *See infra* Part III.

94. *See, e.g.*, *United States v. Yepiz*, 673 F. App’x 691, 699 (9th Cir. 2016) (finding insufficient pretrial prejudice despite some evidence of inflammatory media coverage); *United States v. Claxton*, 766 F.3d 280, 298 (3d Cir. 2014) (finding that, despite the fact that a trial involving a defendant’s conspirators had received media attention and occurred just two weeks before the defendant’s trial, there was insufficient pretrial prejudice because the trial court’s procedures likely eliminated any prejudice); *Ybarra v. McDaniel*, 656 F.3d 984, 988, 992–93 (9th Cir. 2011) (finding that a murder in an extremely small Nevada town did not generate enough prejudice to require transfer because the media coverage was factual rather than inflammatory and, showing deference to the trial court’s findings during voir dire, the jury was presumptively impartial); *United States v. Sabhnani*, 599 F.3d 215, 224, 232–33 (2d Cir. 2010) (finding insufficient pretrial prejudice to grant transfer in a modern slavery case that took place in a small Long Island community and was covered closely by local media); *United States v. Campa*, 459 F.3d 1121, 1126, 1144, 1150 (11th Cir. 2006) (finding that, despite publicity about the defendants’ criminal history as Cuban spies, transfer was not required because of “the court’s effective use of prophylactic measures . . . to isolate the jury from every extrinsic influence”); *Goss v. Nelson*, 439 F.3d 621, 624, 628, 632–34 (10th Cir. 2006) (finding that, although this was the first murder in the local county for the last seventy years and the press extensively covered the murder, manhunt, and subsequent arrest of the defendant, the Supreme Court counseled courts to grant motions only in “rare” cases and this was not one); *Stafford v. Saffle*, 34 F.3d 1557, 1560, 1565–68 (10th Cir. 1994) (finding neither presumptive nor actual prejudice because of the factual nature of the coverage and deference to trial court procedures despite the fact that the defendant committed a murder in a very small town and had been convicted for a separate infamous murder spree just five months earlier).

95. 684 F.3d 177 (1st Cir. 2012).

96. *Id.* at 182–83.

97. *Id.* at 186.

procedures employed by trial courts is that in some of the most high-profile cases of the last decade, the courts have refused to grant motions for transfer.⁹⁸ In fact, reaching back even further to the 1970s, courts have refused to grant transfer in high-profile cases at both the state and federal levels.⁹⁹

II. Social Media Has Stripped Away Rule 21(a)'s Primary Benefit

Social media's unique interaction with the current transfer doctrine has stripped away Rule 21(a)'s primary benefit. Transfer under the Rule is one of many procedures that can be used to guarantee a defendant a fair trial. Transfer is sometimes preferred to other procedures because in certain cases local prejudice is so high in a given venue that other procedures will be unlikely to yield an impartial jury. In such cases, transfer to an unprejudiced venue increases the likelihood of finding impartial jurors. Social media,¹⁰⁰ however, has eliminated this benefit because it has imbued all cases worthy of transfer with national notoriety, making all venues potentially prejudiced to the defendant.

A. *Transfer's Main Benefit over Other Procedures Is Its Ability to Transfer Cases from Venues with High Prejudice to Venues with Low or No Prejudice*

Transfer's advantage over other procedures that trial courts can use to guarantee a fair trial is that it can remove a defendant's case from a district infected with pervasive prejudice to another district where impartial jurors are more readily found.¹⁰¹ The practical effect of transfer, especially in cases of extreme local prejudice, is that the defendant receives a less prejudiced jury pool to choose from, likely increasing the chance of finding impartial jurors. By contrast, other procedures, like voir dire, work to identify biased jurors in the jury pool and purge them.¹⁰² The problem with utilizing voir dire alone is that there is a danger in selecting jurors from a prejudiced pool because the judge may fail to purge a biased juror, whose bias may not be evident.¹⁰³ Transfer's main benefit then is that it gives the defendant a less

98. See, e.g., *In re Tsarnaev*, 780 F.3d 14, 23–24 (1st Cir. 2015) (rejecting a motion for transfer despite massive publicity surrounding the Boston Marathon bombing).

99. *United States v. McVeigh*, 153 F.3d 1166, 1181–83 (10th Cir. 1998) (Oklahoma City bombing); *Calley v. Callaway*, 519 F.2d 184, 213 (5th Cir. 1975) (My Lai massacre); *People v. Manson*, 132 Cal. Rptr. 265, 318 (Cal. Ct. App. 1976) (Charles Manson).

100. I use *social media* throughout to refer to new forms of media including Facebook, Twitter, and the like.

101. See *Rideau v. Louisiana*, 373 U.S. 723, 727 (1963) (holding that due process required that the jury be drawn from a community that had not seen the defendant's televised confession).

102. Aizenman, *supra* note 12, at 16.

103. *Id.*

prejudiced jury pool and therefore greatly decreases the likelihood that other procedures, like voir dire, will fail to purge biased jurors.

B. Social Media Has Eliminated This Benefit

Social media's unique interaction with the current transfer doctrine has eliminated any advantage of transfer under Rule 21(a). As shown in Part I, courts require extreme fact patterns showing high pretrial publicity before transfer is permitted (throughout this subpart I refer to these extreme cases, where the current doctrine would permit transfer, as "transferable cases"). Accordingly, transferable cases, under current doctrine, are often by their very nature newsworthy.¹⁰⁴ And because these transferable cases are newsworthy, in the past, they often had the nation's attention¹⁰⁵—often but not always. Before the social media era, there were two categories of transferable cases: one category of cases that had national notoriety and thus did not benefit from transfer¹⁰⁶ and another category of cases that were not of national notoriety and thus benefited from transfer.¹⁰⁷

The latter category, however, has disappeared almost entirely. Due to social media, it is certain transferable cases will almost *always* have national character like the former category. This occurs because, during even moderately newsworthy events (cases that may not even reach the high bar of newsworthiness to be considered a transferable case), social media stimulates broad coverage of the event. During one foreign protest in the Middle East, users around the world on Twitter sent a collective 221,774 tweets in one hour—each tweet covering the same event that was occurring spontaneously halfway around the world.¹⁰⁸ Or, for example, events like the Mumbai Attacks or the crash of a U.S. Airways flight in 2009 also caused similar explosions of social media news coverage.¹⁰⁹ And more recently, during the Boston Marathon bombing, social media coverage was likewise broad—in fact, journalists on Twitter provided much of the news coverage.¹¹⁰

104. See *Skilling v. United States*, 561 U.S. 358, 381 (2010) (requiring "extreme" facts of pervasive publicity for transfer).

105. See, e.g., *United States v. McVeigh*, 153 F.3d 1166, 1180 (10th Cir. 1998) (explaining that the Oklahoma City bombing, and subsequent developments, had the attention of the national media).

106. See *United States v. Haldeman*, 559 F.2d 31, 63–64, 64 n.43 (D.C. Cir. 1976) (refusing to transfer due to the national character of the trial).

107. See *supra* subpart I(A) (discussing *Rideau* and *Irvin*, cases of local interest that merited transfer).

108. Alfred Hermida, *From TV to Twitter: How Ambient News Became Ambient Journalism*, M/C JOURNAL (2010), <http://www.journal.media-culture.org.au/index.php/mcjjournal/article/view/220> [<https://perma.cc/9MM6-A2EU>].

109. *Id.*

110. Simon Rodgers, *The Boston Bombing: How Journalists Used Twitter to Tell the Story*, TWITTER BLOG (July 10, 2013), https://blog.twitter.com/en_us/a/2013/the-boston-bombing-how-journalists-used-twitter-to-tell-the-story.html [<https://perma.cc/U246-9DNL>].

In this way, social media has made it so news of any event, no matter where in the world it occurs, becomes “omnipresent.”¹¹¹

As social media triggers broad coverage of events, it reaches audiences nationwide.¹¹² Social media today is used by most American adults,¹¹³ and usage is increasing.¹¹⁴ Facebook is the most widely used social media platform today, with almost 68% of U.S. adults on the website.¹¹⁵ Almost 53% of the adult population get their news from social media and other news websites.¹¹⁶ Twenty percent of people get their news from social media alone—a higher percentage than those who get their news from print newspapers.¹¹⁷ And those Internet users are quite trusting of what they read on the Internet.¹¹⁸

With such extensive social media use, it is likely that any transferable case—which again, by its nature must already have considerable publicity—will have the nation’s attention. This is no surprise, given that “[m]edia coverage of criminal trials has expanded dramatically in the past thirty years.”¹¹⁹ Close coverage of cases has become very common.¹²⁰ Indeed, “it is more evident than ever that, given the saturation of electronic communication . . . ‘our present methods of communication’ make it unlikely that any community has been impervious to forming ‘impressions or opinions’ regarding the case.”¹²¹ As one scholar aptly wrote: “[C]ounsel must contend with ever-increasing national attention to cases that were previously

111. Hermida, *supra* note 108 (suggesting that ambient journalism, created by social media, is an omnipresent “mental model” of news in the mind of American citizens).

112. See Brown, *supra* note 12, at 814 (“No longer is our community simply the town we live in, but also the virtual communities that we have created for ourselves through social media.”).

113. Aaron Smith & Monica Anderson, *Social Media Use in 2018*, PEW RESEARCH CTR. (Mar. 1, 2018), <https://www.pewresearch.org/internet/2018/03/01/social-media-use-in-2018/> [<https://perma.cc/SGK5-KMA6>] (showing research that is “broadly indicative of the fact that many Americans use multiple social platforms”); see also Brown, *supra* note 12, at 814 (“The past 200 years brought an explosion of technology, but none faster than in the past fifteen years.”).

114. Smith & Anderson, *supra* note 113.

115. *Id.*

116. Elisa Shearer, *Social Media Outpaces Print Newspapers in the U.S. as a News Source*, PEW RESEARCH CTR. (Dec. 10, 2018), <https://www.pewresearch.org/fact-tank/2018/12/10/social-media-outpaces-print-newspapers-in-the-u-s-as-a-news-source/> [<https://perma.cc/ELV9-W7YW>].

117. *Id.*

118. Keith N. Hampton, Lauren Sessions Goulet & Kristen Purcell, *Social Networking Sites and Our Lives*, PEW RES. CTR. (June 16, 2011), <https://www.pewresearch.org/internet/2011/06/16/social-networking-sites-and-our-lives/> [<https://perma.cc/HE9D-7ELQ>].

119. Robert Hardaway & Douglas B. Tumminello, *Pretrial Publicity in Criminal Cases of National Notoriety: Constructing a Remedy for the Remediless Wrong*, 46 AM. U. L. REV. 39, 41 (1996).

120. See *id.* at 41 n.9 (listing examples of relatively local cases that received considerable national media attention).

121. Steven P. Aggergaard, *Fair Trials in the Age of Facebook*, BENCH & B. MINN., Jan. 2019, at 32, 34 (citation omitted).

of local interest.”¹²² New media has created the new “commonplace” phenomenon of trials of national notoriety.¹²³

The Casey Anthony trial¹²⁴ is a good illustration of how even once-local trials receive national attention. The trial dealt with what could be considered a local crime.¹²⁵ Yet, the case quickly became a national sensation.¹²⁶ Members of the public described the trial as a television show, stating that they didn’t want to miss an “episode.”¹²⁷ Numerous Facebook pages were set up in the victim’s honor.¹²⁸ A court-managed Twitter account provided live updates on the trial and boasted about 400 “reporter-blogger” followers.¹²⁹ The social media accounts covering the case had “tens of thousands of fans.”¹³⁰

This phenomenon removes Rule 21(a)’s principal benefit. Many courts have recognized that, in cases of national notoriety, transfer would be of little value because the case has notoriety in all districts. For example, in *Haldeman*,¹³¹ a case involving a Watergate conspirator, there was “extraordinarily heavy coverage in both national and local news media.”¹³² Because of the national coverage of the case, “a change of venue would have been of only doubtful value.”¹³³ Rather, as the court explained, the trial court’s voir dire procedures would be more valuable than transferring.¹³⁴ Similar sentiments were expressed in *United States v. Poindexter*,¹³⁵ a case involving an Iran–Contra conspirator, where the court found that voir dire was preferable and “a change of venue [wa]s not warranted” because of the

122. Aizenman, *supra* note 12, at 13.

123. Hardaway & Tumminello, *supra* note 119, at 41.

124. Which, it should be noted, took place in 2011 when social media was less pervasive than it is today.

125. See Brown, *supra* note 12, at 824 (discussing the murder accusations against Casey Anthony—a state offense).

126. *Id.* (citing John Cloud, *How the Casey Anthony Murder Case Became the Social-Media Trial of the Century*, TIME (June 16, 2011), <http://content.time.com/time/nation/article/0,8599,2077969,00.html> [<https://perma.cc/BMG5-WQC8>]).

127. *Id.* at 825.

128. *Id.* at 824–25.

129. *Id.* at 824.

130. *Id.* at 824–25 (quotations omitted).

131. *United States v. Haldeman*, 559 F.2d 31 (D.C. Cir. 1976).

132. *Id.* at 59.

133. *Id.* at 64 n.43.

134. *Id.* at 63 (holding that transfer is not necessary “[w]hen the trial court has taken all appropriate measures to minimize pretrial publicity”).

135. 725 F. Supp. 13 (D.D.C. 1989).

national notoriety of the case.¹³⁶ In *United States v. Awadallah*,¹³⁷ the court likewise recognized the ineffectiveness of transfer in high-profile cases. Despite the fact that the defendant was on trial in *Manhattan* for the September 11, 2001, attacks, the court explained that “the effects of the September 11 attacks were felt nationwide, and there is no reason to believe that jurors in a different jurisdiction would lack an emotional response with prejudicial effects.”¹³⁸

Scholars too have recognized the ineffectiveness of transferring cases when a well-known crime is being litigated. For example, one critic has argued that transferring cases of nationally publicized crime would have little use and may actually strain judicial resources for almost no gain.¹³⁹ Indeed, in these cases that draw the most attention, transfer is actually at its most useless: “Ironically, in cases with a higher national profile, the efficacy of a venue transfer . . . diminishes.”¹⁴⁰

III. Rule 21(a) Should Be Eliminated Because Just Leaving It in Place Potentially Harms the Defendant

Leaving Rule 21(a) in place, despite its lack of benefit, will harm defendants, and it should therefore be eliminated. There are four distinct harms that favor elimination of the Rule. First, just having the option to transfer will cause judges to distort the record in a way that may harm the defendant. Second, courts have traditionally undervalued social media, and if they have the option to transfer a case, they are likely to still transfer in cases of national notoriety, to the detriment of defendants. Third, there is a community interest in adjudicating a local case in its original venue. Any transfer violates that interest. Finally, any transfer will cause practical inefficiencies.

136. *See id.* at 37–38 (holding that assembling an impartial jury is preferable to transfer); *see also id.* at 38 n.54 (“It is not apparent, in any event, what a change of venue would accomplish. The publicity regarding the Iran-contra affair, like that accompanying many ‘governmental,’ white collar criminal cases, and unlike those involving common law offenses, has been national rather than local.”).

137. 457 F. Supp. 2d 246 (S.D.N.Y. 2006).

138. *Id.* at 253; *see also id.* at 253 n.54 (citing for support precedent holding that in some cases “it is likely that few, if any, citizens . . . in [a] district, or indeed in any district, will not have read or heard of [a] case” because “the tidal wave” of news can be “of national, not just local, proportions”).

139. *See, e.g.,* Andrew Mayo, Note, “Non-Media” Jury Prejudice and Rule 21(a): Lessons from *Enron*, 30 REV. LITIG. 133, 154 (2010) (“[P]otential jurors in Los Angeles would be just as potentially biased as those in Nashua, New Hampshire, regardless of the location of the crime. For a judge to grant a motion to transfer venue in these cases would defy logic and unnecessarily strain judicial resources.”).

140. Aizenman, *supra* note 12, at 17.

A. *Distorted Record*

Simply by leaving the Rule in place, there is a danger that judges will distort the record of social media prejudice in the community and therefore harm the defendant's right to a fair trial. Distortion of the record is likely because judges generally prefer not to transfer cases.¹⁴¹ This preference will lead judges to use their discretion on fact-finding to credit evidence of no-prejudice over evidence of prejudice so that transfer will become unnecessary. This is not to say that judges will purposely distort the judicial record—I merely wish to emphasize that leaving the Rule in place permits judges to succumb to an implicit bias whether or not they know it. Such implicit bias is *very* prevalent in legal settings and *very* difficult to detect.¹⁴² Although empirical evidence of this bias in the transfer context is difficult to find, this trend is seen in numerous other areas of the law, such as qualified immunity and preemptive strikes.

In the qualified immunity context, for example, a court is often tasked with deciding whether a law was “clearly established” at the time of an officer's actions.¹⁴³ To resolve doubtful cases of qualified immunity when “clearly established” law is borderline, courts often “frame the substantive standard of ‘clearly established’ law in a way that facilitates summary judgment.”¹⁴⁴ Because “clearly established” requires factually similar precedent, courts are given wide discretion to decide which facts are relevant, resulting in a “gross[] distorti[on]” of qualified immunity analysis.¹⁴⁵

Similarly, in the preemptive strike context during voir dire, judges have been hesitant to find *Batson* violations.¹⁴⁶ This has created distorted records where judges have made factual findings that accept the prosecutor's race-neutral reasons for striking a particular juror, even when the reasons are transparently pretextual.¹⁴⁷ One potential reason for such acceptance is that

141. See Donna A. Balaguer, *Venue*, 30 AM. CRIM. L. REV. 1259, 1267, 1270 (1993) (noting that “courts seldom grant motions for change of venue based on pretrial publicity”); cf. Charles J. Ogletree, *Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Preemptory Challenges*, 31 AM. CRIM. L. REV. 1099, 1116 (1994) (positing that one reason for not finding *Batson* violations is that the judge prefers not to reassemble the jury pool).

142. See generally Jerry Kang, Mark Bennett, Devon Carbado, Pam Casey, Nilanjana Dasgupta, David Faigman, Rachel Godsil, Anthony G. Greenwald, Justin Levinson & Jennifer Mnookin, *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012) (discussing various forms of implicit bias in the criminal justice system).

143. John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 852 (2010).

144. *Id.* at 863.

145. *Id.*

146. See Ogletree, *supra* note 141, at 1109–13 (1994) (describing judges' disinclination to find *Batson* violations and therefore restart trials already begun).

147. See Ogletree, *supra* note 141, at 1110–11 (describing a trial court's finding of a race-neutral reason for striking a juror, which distorted the record and factored into the Supreme Court's denial of certiorari).

judges would prefer not finding a *Batson* violation, which would necessitate assembling a new jury pool and restarting the entire jury selection process.¹⁴⁸ Or perhaps judges are just reluctant to call their colleagues racists.¹⁴⁹ Regardless of the reasons for the deference to attorneys' race-neutral reasons for striking jurors, judges have created distorted records that potentially have permitted numerous true *Batson* violations to pass for fear of doing something the judge simply does not want to do.¹⁵⁰

In the transfer context, this distortion of the record harms the defendant in two ways. First, the distorted record will lead the trial judge to require less stringent procedures in voir dire.¹⁵¹ Requiring less stringent voir dire may permit biased jurors to pass undetected, harming the defendant's right to a fair trial. Second, the distorted record will prevent adequate appellate review of the defendant's case.¹⁵² Appellate courts are highly deferential to the trial court's record and are very unlikely to question a trial court's fact-finding, thus preventing proper review of the defendant's case.¹⁵³

B. *Prejudicial Transfer*

Another harm of leaving the Rule in place is the potential for prejudicial transfer—a transfer that intends to help defendants but actually hurts them.¹⁵⁴ This harm results from courts' inability to incorporate social media into their pretrial prejudice analysis. As the Supreme Court has not specified the proper role of social media in pretrial prejudice analysis,¹⁵⁵ the lower courts have

148. See Ogletree, *supra* note 141 (“[T]he inconvenience of having to assemble a new jury pool may be one of the factors that leads trial judges to accept questionable prosecutorial rationales . . .”).

149. See Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 161 (1989) (“Indeed, no respectful adult would ask another adult in polite conversation, ‘Pardon me. Are you a bigot?’”).

150. See Ogletree, *supra* note 141, at 1107 (observing that, due to the unclear *Batson* standard, “a trial judge is likely to err on the side of accepting a challenge with a questionable explanation”).

151. See, e.g., *United States v. McVeigh*, 153 F.3d 1166, 1183–84 (10th Cir. 1998) (giving the defendant less procedure to protect his right to a fair trial because of the lack of evidence of prejudice in the local community); Ogletree, *supra* note 141, at 1106–08 (describing that, because courts sometimes use history of discrimination for deciding a *Batson* violation, the acceptance of pretextual reasons for discrimination can have downstream effects).

152. Cf. Ogletree, *supra* note 141, at 1107 (“The trial judge’s acceptance of the prosecutor’s facially neutral reason [for a peremptory challenge] then constitutes a finding of fact, toward which appellate courts will subsequently show great deference.”).

153. See *supra* subpart I(B).

154. Although this subpart places much of the responsibility for prejudicial transfers on courts, it should be noted that defense attorneys are part of the problem too. The attorneys are the ones seeking transfer in the first place, even when transfer would not be of much value. While this Note does not focus on attorneys’ reasons for seeking transfer, it should be noted that defense attorneys likely suffer from the same biases as judges and may also underestimate social media. See Kang et al., *supra* note 142, at 1140 (describing studies that show attorneys, like others, suffer from bias).

155. See generally *Skilling v. United States*, 561 U.S. 358 (2010) (omitting any discussion of social media).

been on their own with deciding how properly to consider social media in the pretrial prejudice analysis. Some courts have been receptive to social media and have transferred cases partly on the strength of the social media exposure. One case, *United States v. Casellas-Toro*,¹⁵⁶ took place in Puerto Rico, where it generated considerable local prejudice but was unknown in the rest of the United States.¹⁵⁷ The court in this case actually granted a motion for transfer by placing special emphasis on the pervasive social media prejudice.¹⁵⁸ But, unlike *Casellas-Toro*, the vast majority of courts have rejected transfer claims—and have done so with little regard for social media.¹⁵⁹

For federal courts, their analysis of social media often suffers from one of two issues: the analysis either mishandles or altogether ignores social media.¹⁶⁰ The first issue, undervaluing the impact of social media, is common for courts at both the appellate and district court levels.¹⁶¹ For example, in *United States v. Mujahid*,¹⁶² the court recognized online comments about the defendant, many of which were “extremely negative.”¹⁶³ But the court dismissed the social media prejudice in one sentence saying, “The Court is also doubtful that these anonymous comments . . . are truly indicative of the views of the local community or are as influential as editorials, editorial cartoons, or letters to the editor.”¹⁶⁴ This analysis explicitly placed less weight on social media than traditional media—ignoring social media’s

156. 807 F.3d 380 (1st Cir. 2015).

157. *Id.* at 388.

158. *Id.* at 387, 390. It should be noted, however, that the government did not oppose transfer. *See id.* at 387 (“The government agreed the media coverage was ‘massive’ and ‘sensational.’ . . . Nor did it oppose [the defendant’s] change of venue motion . . .”).

159. *See supra* note 94 (listing cases dismissing prejudice claims with little to no mention of social media).

160. State courts, too, undervalue social media. *See, e.g.,* Lockhart v. State, 163 So. 3d 1088, 1142 (Ala. Crim. App. 2013), *cert. denied*, 575 U.S. 979 (2015) (discussing that the commentary from online news media sources, some of which was inflammatory, was insufficient because the news was factual and “those comments alone did not require a change of venue”); State v. Cordoba, No. F-16-001, 2017 WL 5629604, at *2 (Ohio Ct. App. Nov. 22, 2017) (finding negative social media posts but refraining from finding presumptive prejudice). Some state courts, however, totally ignore social media. *See* Commonwealth v. Pal, No. 207 MDA 2015, 2015 WL 7253650, at *5 (Pa. Super. Ct. Nov. 17, 2015) (holding that the trial court did not abuse its discretion when it found social media inappropriate to consider on a transfer motion); Poitra v. State, 275 P.3d 478, 484 (Wyo. 2012) (disregarding “the comments to the newspaper articles and blogs [which] carried ‘little weight’ because they were posted anonymously, and there was no indication as to how broadly read they were”).

161. Although the cases illustrated are district court cases, the mishandling also occurs at the appellate level. *See, e.g.,* United States v. McRae, 795 F.3d 471, 481, 483 (5th Cir. 2015) (holding that “inappropriate” comments worthy of “condemnation” were made by government lawyers, but “[i]n the face of anonymous, relatively low-profile commentary by lawyers who were not directly prosecuting McRae,” the prejudice was insufficient).

162. No. 3:09-cr-00053-TMB-DMS, 2011 WL 13250643 (D. Alaska Sept. 23, 2011).

163. *Id.* at *1.

164. *Id.* at *6.

higher potential for influence on public opinion and ability to prejudice jurors.¹⁶⁵ And in *United States v. Tsarnaev*,¹⁶⁶ the court likewise expressed the same attitude.¹⁶⁷ The court dismissed juror interaction through Facebook, whether “friending” or “liking” a post, as not indicative of bias.¹⁶⁸ This analysis again failed fully to grasp the influence of social media, even if the jurors were merely exposed to the Facebook posts. Studies have found that mere exposure of a juror to traditional media, let alone social media, is sufficient to prejudice a defendant.¹⁶⁹

The second issue, ignoring social media altogether, is also common at both the appellate and trial court levels. In *In re Tsarnaev*,¹⁷⁰ the appellate court dismissed the influence of social media.¹⁷¹ Despite media coverage of the Boston Marathon bombing that was “unparalleled in American legal history,”¹⁷² the majority opinion did not mention anything about social media coverage.¹⁷³ Indeed, much of the majority’s analysis rested on the fact that much of the reporting was factual in nature,¹⁷⁴ ignoring the vast social media reporting in the case that was *not* factual in nature.¹⁷⁵ Similarly, at the district court level, *United States v. Bundy*¹⁷⁶ is an apt example. In deciding on the defendant’s transfer motion, the court focused its analysis on “traditional media outlets [that] . . . have been largely factual.”¹⁷⁷ Although the court recognized that the defendant had submitted “voluminous discovery containing media reports and social-media posts,” the court dismissed any argument as to social media prejudice in one sentence, saying that, of the jurors in the case, “many . . . are not active on social media.”¹⁷⁸

165. See *Brown*, *supra* note 12, at 834 (finding that, “[w]hen [social media is] combined with SNS rapid dissemination of information, the unverified nature of such information, and the introduction of feelings, emotion, rumor, and personal paradigms, the potential for bias towards the defendant is extreme”).

166. 157 F. Supp. 3d 57 (D. Mass. 2016).

167. *Id.* at 60–61.

168. See *id.* at 67 (“[The data] does reflect what we already know from this case’s history: the selective citation of data does not always accurately represent the whole.”).

169. See generally Gary Moran & Brian L. Cutler, *The Prejudicial Impact of Pretrial Publicity*, 21 J. OF APPLIED SOC. PSYCHOL. 345 (1991) (finding that publicity correlated significantly with perceived culpability of the defendant).

170. 780 F.3d 14 (1st Cir. 2015).

171. See *id.* at 24 (majority opinion rejecting the dissenting opinion’s argument that the publicity of the case caused undue prejudice against the defendant).

172. *Id.* at 30 (Torruella, J., dissenting).

173. See generally *id.* at 16–22 (majority opinion) (omitting discussion of social media).

174. *Id.* at 22.

175. See *id.* at 31–32 (Torruella, J., dissenting) (describing the role the Internet played in the case through real-time reporting of the case online, the use of hashtags to create solidarity against the bombers, and feel-good stories that united the community against the defendants).

176. No. 3:16-cr-00051-BR, 2016 WL 9110410 (D. Or. July 15, 2016).

177. *Id.* at *2.

178. *Id.* at *2–3.

Because courts mishandle or fail to consider social media, they are likely to transfer cases of national notoriety—cases that should not be transferred because of transfer’s minimal benefit to defendants.¹⁷⁹ This inclination was evident in the dissent in *Tsarnaev*. The majority in *Tsarnaev* held that the defendant was not entitled to transfer.¹⁸⁰ Part of the court’s reasoning emphasized that transfer may not be useful given the national nature of the defendant’s crime.¹⁸¹ By contrast, the dissent strongly urged for transfer.¹⁸² The dissent rejected the majority’s point of national coverage by highlighting that local media coverage of the trial was much more intense than the national media once the immediate aftermath of the bombing had passed.¹⁸³ In fact, the dissent said, national media coverage overall “waned and pale[d] in comparison to local coverage.”¹⁸⁴

However, the dissent’s opinion only looked to *traditional* media sources to prove this point. The brief evidence that the dissent points to in support of the view that the national media had lost interest was that “national media outlets had essentially stopped covering the bombing and its aftermath prior to trial, but the local news (both television and print) continue to report on it daily.”¹⁸⁵ While making its point, the dissent ignored whether national *social media* coverage had subsided. Surprisingly, however, the dissent actually addressed this implicitly later in the opinion. The opinion cites to an article on the social media sensation, “Snowmaritan,” as proof of prejudice against the defendant shortly before the trial.¹⁸⁶ The problem with citing to this article about a social media sensation was that it appeared in the *New York Daily News*, a local New York newspaper.¹⁸⁷ This is evidence that national social media coverage was actually as broad as the majority contended, and the dissent was just underestimating the coverage.¹⁸⁸

179. See *supra* subpart II(B) (describing the ineffectiveness of transferring in cases of national notoriety).

180. In re *Tsarnaev*, 780 F.3d at 15.

181. See *id.* at 22 (“It is true that there has been ongoing media coverage of the advent of the trial and petitioner’s pre-trial motions, both locally and nationally. But that would be true wherever trial is held . . .”).

182. *Id.* at 30 (Torruella, J., dissenting).

183. See *id.* at 40 (“As described above, the ongoing Massachusetts coverage has been significantly more in-depth and personal than the national coverage which has, for the most part, been sporadic and general.”).

184. *Id.* at 46 n.54.

185. *Id.* at 48–49.

186. *Id.* at 45 n.49. The “Snowmaritan” was a citizen who shoveled the Boston Marathon finish line and received considerable social media attention. See, e.g., Anastasia Williams & Michelle McPhee, *Blizzard Mystery Solved: Man Who Shoveled Marathon Finish Line Revealed*, ABC NEWS (Jan. 28, 2015), <https://abcnews.go.com/US/boston-blizzard-mystery-solved-man-shoveled-marathon-finish/story?id=28550626> [<https://perma.cc/S4P9-VGEE>].

187. In re *Tsarnaev*, 780 F.3d at 45 n.49.

188. See *id.* at 16 (majority opinion) (“[A] jury anywhere in the country will have been exposed to some level of media attention.”).

Another case, *Lam Luong v. State*,¹⁸⁹ albeit a state court case, is illustrative of the points outlined above. In *Lam Luong*, the defendant was convicted of a sensational crime.¹⁹⁰ After his conviction, he argued that it had been error by the lower court to deny his motion for transfer.¹⁹¹ The intermediate appellate court agreed.¹⁹² The court explained that the media coverage in Mobile County was so extensive that the defendant had presumptively been denied a fair trial.¹⁹³ Transfer was therefore appropriate.¹⁹⁴ The Supreme Court of Alabama, in *Luong v. State*,¹⁹⁵ reversed.¹⁹⁶ While both courts did examine the Internet sources at issue in the case,¹⁹⁷ the intermediate appellate court had failed to account for social media's pervasive potential to infect neighboring districts just as much as prejudice had infected the current venue. Indeed, while the Supreme Court of Alabama based its reversal on its application of the *Skilling* factors, the court suggested that social media had rendered transfer a less favorable option.¹⁹⁸ The court noted that stronger voir dire procedures were preferred because this was a "prominent case[] of national concern."¹⁹⁹

These cases illustrate the danger of leaving Rule 21(a) in place. The problem with transfer in cases of national notoriety, as some courts have recognized, is that such a transfer has little benefit to defendants and therefore often actually harms a defendant's right. First, transfer, while doing nothing to cure prejudice, may actually increase publicity rather than lower it. As one court noted, "[T]ransfer from a metropolitan area to a smaller city may result in more rather than less intensive publicity."²⁰⁰ Such increased publicity can

189. 199 So. 3d 98 (Ala. Crim. App. 2013).

190. *Id.* at 99, 122 (stating defendant's conviction for five counts of capital murder—including four counts for the killings of his own children).

191. *Id.* at 103.

192. *Id.* at 122.

193. *Id.* at 121 ("[I]t is clear that publicity surrounding the murders completely saturated the Mobile community in 2008. A great deal of that publicity was prejudicial.").

194. *Id.* at 124.

195. 199 So. 3d 139 (Ala. 2014).

196. *Id.* at 161.

197. *Id.* at 147 ("This Court has also reviewed the personal opinions expressed through comments on the newspaper's Web site, the call-in telephone line, and the editorial pages."); see *Luong*, 199 So. 3d at 122 ("The sentiment displayed by the public in editorials and comments in the 'Sound Off' column of the local paper evidenced the public's clear animosity toward Luong.").

198. *Luong*, 199 So. 3d at 146–48 ("This Court cannot conclude that, in this age of digital communication, the published opinions of certain of the citizens in this particular community constitute grounds for presuming that a fair trial could not be conducted in Mobile County.").

199. *Id.* at 150 (quoting *Calley v. Callaway*, 519 F.2d 184, 210 (5th Cir. 1975)).

200. *United States v. Awadallah*, 457 F. Supp. 2d 246, 253 (S.D.N.Y. 2006) (quoting *United States v. Dioguardi*, 428 F.2d 1033, 1039 (2d Cir. 1970)).

only increase the chance the defendant's right to a fair trial is violated.²⁰¹ Second, in cases that are transferred, the transferee judge will likely assume that the transfer has been sufficient to mitigate any prejudice. This was true in *McVeigh*, the Oklahoma City bomber case. In *McVeigh*, the court had granted a transfer from Oklahoma City, the location of the bombing, to Denver, Colorado.²⁰² The defendant, however, argued that this transfer was still insufficient.²⁰³ The court rejected his claim, placing heavy emphasis on the fact that the case had already been transferred: "McVeigh's attempt to show presumed prejudice is *substantially weakened* by the fact that, unlike the defendants in *Sheppard* and *Rideau*, he did receive a change in venue, removing his trial from the eye of the emotional storm in Oklahoma to the calmer metropolitan climate of Denver."²⁰⁴ Indeed, the court explained that this "substantial[] weaken[ing]" of his claim made it difficult to "clear [the] high hurdle" of granting transfer.²⁰⁵ In this way, a transfer, which has done nothing to mitigate prejudice, may lead a judge to assume that the transfer did in fact cure the prejudice and thus not require other necessary procedures to cure prejudice.

C. Community Interest

By leaving the Rule in place and permitting transfer, the community's interest in adjudicating a local crime in the local venue will be violated. The Sixth Amendment explicitly recognizes the community's interest and requires the trial for a crime to be held in "the State and district wherein the crime shall have been committed."²⁰⁶ This "vicinage provision" strikes a balance between the defendant's due process right to impartial jurors "and the community's interest in meting out justice."²⁰⁷ While the impartiality requirement normally takes precedence, the community interest is also important.²⁰⁸

The community interest in local adjudication is strong. First, because local adjudication imbues the trial with local flavor,²⁰⁹ the community is able to establish community standards through its local trial processes.²¹⁰ Second,

201. *Id.* at 253 n.55 (citing Application of Cohn, 332 F.2d 976, 977 (2d Cir. 1964) ("To remove the trial of a highly publicized case (to accept petitioner's argument) to a small community outside of the City of New York would tend to focus the spotlight more brightly upon the case.")).

202. *United States v. McVeigh*, 153 F.3d 1166, 1176–77 (10th Cir. 1998).

203. *Id.* at 1181–82.

204. *Id.* at 1182 (emphasis added).

205. *Id.*

206. U.S. CONST. amend. VI.

207. Aizenman, *supra* note 12, at 13.

208. Mayo, *supra* note 139, at 135.

209. Marvin Zalman & Maurisa Gates, *Rethinking Venue in Light of the "Rodney King" Case: An Interest Analysis*, 41 CLEV. ST. L. REV. 215, 268 (1993).

210. *Id.*

the jury represents the community in the trial and so feels an obligation to reach a verdict consistent with community values.²¹¹ It allows the community to administer justice in a way only a community deeply affected by the local crime can do.²¹² Any transfer out of district violates this interest.

D. Practical Inefficiencies

There is the potential for practical inefficiencies in the administration of justice if the Rule is left in place. With the option to transfer, some courts will naturally continue to try and take advantage of the option. But by transferring the case, the judge will put unnecessary strain on the parties, witnesses, and physical evidence that are likely located in the local venue.²¹³ Transfer will also create costs that will need to be borne by the parties. Indeed, these inefficiencies and costs may perversely decrease the defendant's chance at a fair trial, as memories fade, evidence is lost, and time passes. By keeping a case local, these issues are avoided.

IV. Counterarguments in Favor of Keeping the Rule in Place Are Unpersuasive Because the Arguments Fail to Demonstrate Any Benefit to Defendants or Ameliorate the Harms of the Rule

Because elimination of a federal rule is a big step, there are strong counterarguments that favor keeping the Rule in place. The first of these arguments is that, despite the rise of social media, the Rule should still be kept because it continues to benefit defendants. The second argument contends that the Rule can be amended to ameliorate the current harms. Below I discuss the counterarguments and conclude that elimination of the Rule is still preferable because the arguments fail to demonstrate any benefit to defendants or ameliorate the harms of the Rule.

The first and strongest of these counterarguments is that the Rule still benefits defendants despite the rise of social media. This argument principally relies on cases like *Rideau* and *Casellas-Toro* and makes the point that the Rule still has some benefit and thus should still be left in place, despite the potential harms. This argument undercuts the point made earlier that most transferable cases will have national notoriety.²¹⁴ This argument contends that, while social media has imbued many transferable cases with national notoriety, there are and still will be local cases of high prejudice, like *Casellas-Toro*, which would benefit from transfer. These are cases where local interest is intense, but the case does not achieve national notoriety as one would expect in the social media era.

211. *Id.* at 268 (quoting Drew Kershen, *Vicinage*, 30 OKLA. L. REV. 1, 84–88 (1977)).

212. *Id.*

213. Mayo, *supra* note 139, at 136.

214. *See supra* Part II.

The problem with this argument is it assumes that any benefit of transfer in these situations cannot be replicated by voir dire or another procedure. By eliminating the Rule, courts will be forced to conduct a strong voir dire (or employ other procedures to ensure a fair trial)²¹⁵ as the Supreme Court has time and time again counseled.²¹⁶ The Supreme Court has found voir dire sufficient to do much of the work that transfer would do.²¹⁷ Many appellate courts have agreed.²¹⁸ A strong voir dire can cure even the most prejudiced jury pools.²¹⁹ Voir dire was sufficient to cure any prejudice in Manhattan against a 9/11 conspirator; in Washington, D.C., against a Watergate conspirator; and in Boston against the Boston bomber.²²⁰ Even cases just like *Casellas-Toro* can be cured with voir dire.²²¹ Furthermore, voir dire, unlike transfer, does not require the court to conduct an in-depth, subjective media analysis and decide whether or not media meets a certain threshold—something courts would prefer not to do.²²² Indeed, courts have traditionally found voir dire in practice to be overwhelmingly preferable to transfer.²²³

Still, some scholars argue that voir dire is an insufficient substitute for transfer. Aizenman argues that “[t]he reality is . . . that even the most searching voir dire is not a complete safeguard against seating jurors who are consciously or subconsciously biased as a result of pretrial publicity.”²²⁴ Voir dire, she contends, often fails to detect implicit bias.²²⁵ And the questions asked during voir dire can often be superficial and fail properly to probe

215. See *Pretrial Publicity’s Limited Effect on the Right to a Fair Trial*, REPORTERS COMM. FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/journals/pretrial-publicitys-limited/> [https://perma.cc/YRG2-9C6U] (arguing that, in the Internet era, courts should remain transparent and use the “host of diligent measures [that] are available to them to preserve important constitutional rights”).

216. See *supra* subpart I(B).

217. See *Skilling v. United States*, 561 U.S. 358, 384 (2010) (“Although the widespread community impact necessitated careful identification and inspection of prospective jurors’ connections to Enron, the extensive screening questionnaire and follow-up voir dire were well suited to that task.”).

218. See, e.g., *United States v. Haldeman*, 559 F.2d 31, 62 n.37 (D.C. Cir. 1976) (relying on voir dire to handle issues of prejudice against a defendant).

219. *Skilling*, 561 U.S. at 396–99 (finding voir dire sufficient to cure the prejudice against the defendant in Houston).

220. See *supra* Part II.

221. The trial of Andrew Thomas Gallo, a drunk driver who killed Nick Adenhardt (a pitcher for the Los Angeles Angels), offers an example. The event caused widespread and intense local media interest but was sufficiently cured of prejudice without transferring the case. REPORTERS COMM., *supra* note 215.

222. Balaguer, *supra* note 141, at 1270 (finding that judges often defer ruling on transfer motions because transfer motions require that “[a] judge must subjectively decide how the community reacted to the pretrial publicity based on the factors described above”).

223. See *id.* (“The courts overwhelmingly hold that appropriate voir dire is preferable to a transfer of venue, and often defer ruling on a venue motion until after voir dire is conducted.”).

224. Aizenman, *supra* note 12, at 16.

225. *Id.*

jurors' actual biases.²²⁶ Accordingly, transfer is still valuable and should remain in effect because "in small communities or where a large portion of the community is connected to the alleged victim or victims" transfer is still "[d]efense counsel's first available shield to combat the effects of publicity in high-profile cases."²²⁷

Such an argument, however, is unpersuasive because it fails to consider all of the procedures properly employable by a trial court. Perhaps voir dire is insufficient in some cases as Aizenman contends, but that does not mean other procedures like gag orders or granting continuances cannot be used in conjunction with voir dire to guarantee an impartial jury.²²⁸ For example, if a critique of voir dire is that it fails to detect bias and that jurors in polluted venues may have formed opinions that will not be shaken, a court can grant continuances. Even Aizenman recognizes continuances as being potentially effective at abating prejudice.²²⁹ The Supreme Court, too, has recognized the value of continuances.²³⁰ Other procedures like gag orders, closing voir dire proceedings, restraining lawyers, and restraining the press, etc., are all also effective and can make up for any deficiency in voir dire.²³¹

The second counterargument argues that the Rule can be amended in some way to save the Rule from elimination. While there are many ways possibly to do this, the most effective of these amendments would likely be a requirement that the judge make specific findings as to why the case is being transferred before he or she decides to transfer the case. An example of this can be found in the trial court decision in *United States v. McVeigh*,²³² where the court stated its reasons for transfer and explicitly identified the community interest and practical inefficiencies it was causing.²³³ Such "reason-stating" may force actors to evaluate their own reasons for transfer, support those reasons, and potentially identify any implicit biases.²³⁴ This requirement may mitigate many of the harms associated with transfer and permit leaving the Rule in place.

226. *Id.*

227. *Id.*

228. See Hardaway & Tumminello, *supra* note 119, at 42 n.14 (describing a trial court's employment of all these procedures effectively to eliminate prejudice).

229. Aizenman, *supra* note 12, at 17.

230. See *Patton v. Yount*, 467 U.S. 1025, 1033 (1984) (highlighting the effectiveness of continuances to abate prejudice).

231. Hardaway & Tumminello, *supra* note 119, at 78–83; REPORTERS COMM., *supra* note 215.

232. 918 F. Supp. 1467 (W.D. Okla. 1996).

233. See *id.* at 1472–75 (“[T]he court is acutely aware of the wishes of the victims of the Oklahoma City explosion to attend this trial and that it will be a hardship for those victims to travel to Denver.”).

234. See Stephanos Bibas, *The Need for Prosecutorial Discretion*, 19 TEMP. POL. & CIV. RTS. L. REV. 369, 374–75 (2010) (explaining that discretionary authority in the context of prosecutorial discretion requires justification and recognition of bias to defend against bias).

But the difficulty with this argument is that there is still no evidence that the Rule has much benefit for defendants.²³⁵ This requirement would do nothing to address those weaknesses. And while this amendment may mitigate one of the harms—that judges transfer cases that they should not transfer—if the Rule is left in place it still has the other harms mentioned above. Leaving the Rule in place may still result in distorted records when the judge does not want to transfer, and transfer will still cause unnecessary practical inefficiencies and violate the community interest. Any amendment to Rule 21(a) would need to address both the Rule’s harms *and* its lack of benefits *vis-à-vis* other procedures.

Conclusion

Courts employ tools, like transfer and *voir dire*, to guarantee the defendant a fair trial. One of these tools, transfer for prejudice under Rule 21(a), has traditionally been favored by scholars and occasionally used by courts to guarantee a fair trial. But social media, in its interaction with the current transfer doctrine, has blunted the effectiveness of this tool. At the same time, social media has exacerbated some of the harms of leaving this tool in place. This Note has therefore argued for a complete elimination of Rule 21(a).

Such a step may seem extreme, but it is the best solution to the persistent problem of guaranteeing a defendant’s right to a fair trial. Intuitive solutions to this persistent problem, while attractive, will ignore the practical consequences of the Rule. In order to protect defendants, we should think counterintuitively, as Abraham Wald did, and find solutions that may not be readily apparent. In this case, the only solution is the counterintuitive one: eliminating Federal Rule of Criminal Procedure 21(a).

235. *See supra* Part II.