NEW YORK LAW SCHOOL

NYLS Journal of Human Rights

Volume 12 | Issue 2 Article 3

Spring 1995

GETTING INSIDE THE JURY'S HEAD: MEDIA ACCESS TO JURORS AFTER THE TRIAL

Copernicus T. Gaza

NOTES

GETTING INSIDE THE JURY'S HEAD: MEDIA ACCESS TO JURORS AFTER THE TRIAL

> *This Court has not yet decided that the fair administration of criminal justice must be subordinated to another safeguard of our constitutional system—freedom of the press, properly conceived. [This] Court has not yet decided that, while convictions must be reversed and miscarriages of justice result because the minds of jurors or potential jurors [grew] poisoned, the poisoner is constitutionally protected in plying his trade.*[1]

I. Introduction

On August 22, 1993, in the case of *United States v. Antar*,[2] United States District Judge Nicholas H. Politan issued an order placing a seal on the names and addresses of jurors.[3] Judge Politan effectively barred the press from interviewing any of the jurors in the case, even after the verdict.[4] The highly publicized case involved $80 million in stock fraud and the pursuit of the defendant across three continents.[5] The case was further marked with particularly controversial and bizarre messages coming from the jury during their deliberations, including mention of a juror acting loudly and offensively.[6]

---

[1] Irvin v. Dowd, 366 U.S. 717, 730 (1961) (Frankfurter, J., concurring).

[2] 839 F. Supp. 293 (D.N.J. 1993).

[3] Robert Rudolph, *Judge Bars Juror Contact with Press*, STAR-LEDGER, Aug. 23, 1993, at 1.

[4] *Id.*

[5] *Id.* at 6.

[6] *Id.*

Judge Politan, recognizing that post-verdict interviews create "collision within the whole jury system,"[7] declared that "the press would have an uphill battle to demonstrate what news gathering interests are sufficient 'to overcome the very sacred nature of [the] jury's deliberations.'"[8] The judge was adamant about his ruling:

> This sensationalism has got to stop someplace. We have to get back to our system of justice . . . . I am an avid advocate of First Amendment rights and freedom of the press and all sorts of things like that . . . . But we've got to get our system of justice squared away. There is something radically wrong if we're trying cases in the press. . . .[9]

While Judge Politan eventually ordered the transcript of the jury *voir dire* unsealed,[10] the original order issued by Judge Politan brings into focus the conflicts that exist in highly publicized criminal trials. These conflicts include: (1) the First Amendment right of the news media to gather and disseminate information;[11] (2) the accused's right to a fair trial under the Sixth Amendment;[12] (3) the privacy

---

[7] *Id.* (quoting remarks of Judge Politan while issuing his order).

[8] Rudolph, *supra* note 3, at 6 (quoting Judge Politan).

[9] *Id.* Judge Politan further intimated that "everything we do in this system of justice is designed to protect the secrecy of the jury proceedings." Robert Rudolph, *Antar Trial Judge Defends Jury Interview Ban*, STAR-LEDGER, Aug. 24, 1993, at 16 (quoting comments of Judge Politan during a different proceeding in the case).

[10] *Antar*, 839 F. Supp. at 295. For a discussion of the order and the parameters thereof, *see infra* text accompanying notes 254-59.

[11] The First Amendment of the U.S. Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

[12] The Sixth Amendment of the U.S. Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. CONST. amend. VI.

rights of citizens serving as jurors;[13] (4) the traditional common law notions of a public trial;[14] and (5) the traditional secrecy of jury deliberations.[15]

This Note will examine the relevant case law at the federal and state levels and will suggest a possible compromise between these competing interests beyond those which have already been promulgated. First, the conflicts and competing interests of post-verdict juror interviews are identified and explained. Next, the relevant case law is examined at both the federal and state level. Finally, several compromises are advocated.

II. Arguments and Conflicts

There are well-settled, sound arguments for the right of access of the press to interview jurors about their perceptions and experiences during their service. Initially, it is important for citizens to know how their government operates to dispose of controversies.[16]

---

[13] *See, e.g.*, United States v. Harrelson, 713 F.2d 1114, 1116 (5th Cir. 1983) (stating that "[j]urors, even after completing their service, are entitled to privacy"); *see also* United States v. Gurney, 558 F.2d 1202, 1210 n.12 (5th Cir. 1977) (holding that the judge was "following a well-established practice when he refused to publicly release the jury list . . . . Such protection of the privacy of the jurors was clearly permissible, and certainly appropriate in a trial which attracted public attention . . . ."); *infra* text accompanying notes 82-96.

[14] *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 569 (1980) (concluding that "[c]riminal trials both here and in England [have] long been presumptively open").

[15] *See* Note, *Public Disclosures of Jury Deliberations*, 96 HARV. L. REV. 886, 886 (1983) [hereinafter *Public Disclosures*].

[16] This is to "vindicate the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct by jurors fairly and openly selected." Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 509 (1984). These concerns are vindicated in this way because "it is difficult for [citizens] to accept what they are prohibited from observing." *Id.* Also, "[b]ecause citizens cannot attend criminal trials on a regular basis, and because only a few citizens serve as jurors in any given case, the public relies instead on members of the media to serve as independent auditors of the justice system." Marc O. Litt, *"Citizen-Soldiers" or Anonymous Justice: Reconciling the Sixth Amendment Right of the Accused, the First Amendment Right of the Media and the Privacy Right of Jurors*, 25 COLUM. J.L. & SOC. PROBS. 371, 372 (1992).

The judiciary is no less subject to public scrutiny than any other branch of government[17] and it is a prerequisite for a fair and democratic society that its citizenry be informed about how its elected government functions.[18] The public's knowledge of judicial process helps to maintain the legitimacy of that branch of government.[19] Without public scrutiny and input, the judicial branch tends to lose this legitimacy.[20]

Based on these arguments, advocates for the free access of the media argue for total disclosure of jurors' identities, and with it, the

---

[17] *See* In re Express-News Corp., 695 F.2d 807, 809 (5th Cir. 1982) ("The public has no less a right under the First Amendment to receive information about the operation of the nation's courts than it has to know how other governmental agencies work."); *infra* text accompanying notes 68-87.

[18] *See* New York Times v. Sullivan, 376 U.S. 254, 269 (1964) (citing Roth v. United States, 354 U.S. 476, 484 (1957) (stating that the First Amendment is designed to facilitate discussion in order to bring about "political and social changes desired by the people")); Stromberg v. California, 283 U.S. 359, 369 (1931) (stating that the First Amendment is designed to maintain "free political discussion to the end that government may be responsive to the will of the people"); *see also* Kathryn W. Hughes, Note, *Florida Star v. B.J.F.: Can the State Regulate the Press in the Interest of Protecting the Privacy of Rape Victims?*, 41 MERCER L. REV. 1061, 1065-66 (1990) (arguing that the press serves the vital function of enlightening citizens by providing them with the necessary material to make informed decisions concerning the operation of government).

[19] *See Press-Enterprise*, 464 U.S. at 508 (arguing that "openness . . . enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system").

[20] *See* Gentile v. State Bar of Nevada, 501 U.S. 1030, 1035 (1991) (plurality) ("The judicial system, and in particular our criminal justice courts, play a vital part in a democratic state, and the public has a legitimate interest in their operations."). "The criminal justice system exists in a larger context of a government ultimately of the people, who wish to be informed about happenings in the criminal justice system, and if sufficiently informed about those happenings might wish to make changes in the system." *Id.* at 1070 (Rehnquist, J., dissenting). Other arguments for openness in the system have been stated in the following cases: *Press-Enterprise*, 464 U.S. at 508 (the assurance of fair proceedings); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 556 (1980) (the discouragement of perjury); *In re* Globe Newspaper Co., 920 F.2d 88, 94 (1st Cir. 1990) (the discouragement of misconduct and biased decisions). The court in *In re Globe Newspaper Co.* also argued for the instillation of confidence in judicial proceedings through education regarding the methods of government and judicial remedies. *Id.* (citing *In re* Reporters Commission for Freedom of the Press, 773 F.2d 1325, 1336-37 (D.C. Cir. 1985)); *see also infra* text accompanying notes 40-59.

possibility of juror interviews.[21] The disclosure of juror identities, it is argued, assures the defendant and the public that the fate of the accused is being decided by a fair and impartial jury.[22]

The accused's Sixth Amendment right to a fair trial is balanced against these arguments for free access of the media.[23] There are many ways in which an unrestricted right of access to juror identity may serve to inhibit a fair trial. Initially, the defendant is entitled to be assured that jurors will not be thinking about public opinion when they render a particularly controversial verdict.[24] The deliberation process has historically been shrouded in secrecy[25] and for good reason. It is necessary that the jury deliberate in absolute candor, away from public scrutiny,[26] in order to ensure fairness to the defendant that the verdict will be decided solely on the evidence.[27] Some scholars have argued that if jurors are routinely examined by the press in their functions as triers of fact, they will be less likely to

---

[21] *See* United States v. Harrelson, 713 F.2d 1114, 1115 (5th Cir. 1983), *cert. denied*, 479 U.S. 1011 (1986) (appellant newspaper seeking permission to interview discharged jurors "without restriction of any sort whatsoever"); *see also infra* notes 91-106 and accompanying text.

[22] *See Richmond Newspapers*, 448 U.S. at 569-70 (1980) (arguing that there is a nexus between openness, fairness, and the perception of fairness and that openness assures that the proceedings are conducted fairly).

[23] *See* U.S. CONST. amend. VI.; *see also* United States v. Blanton, 719 F.2d 815, 817 (6th Cir. 1983), *cert. denied*, 465 U.S. 1099 (1984) (defendants contending that inadequate measures in jury selection process to guard against prejudicial effect of "massive adverse pretrial media publicity" denied them of their Sixth Amendment fair trial right). In dissent, after deciding that none of the traditional Sixth Amendment assurances existed at trial, Circuit Judge Engel declared: "We have no control over the verdict of public opinion or the verdict of history. This case, however, concerns something that is more important and fundamental—a man's liberty and his right to a fair trial." *Id.* at 846 (Engel, J., dissenting).

[24] *See* Allen Sharp, *Postverdict Interviews with Jurors*, CASE & COM., Sept.-Oct. 1983, at 3, 6 (arguing that the mere presence of observers during deliberations would unfairly inhibit the deliberation process).

[25] *See* Public Disclosures, *supra* note 15, at 886.

[26] *Id.* at 889-90. "Juror privacy is a prerequisite of free debate, without which the decision making process would be crippled . . . . For the process to work according to theory, the participants must feel completely free to dissect the credibility, motivations, and just desserts of other people." *Id.*

[27] *See* Sharp, *supra* note 24, at 6.

a verdict on the merits, and may in fact be swayed by public opinion.[28]

On the other hand, the personal privacy of jurors must be taken into consideration.[29] Too often, jurors are subjected to a crush of media attention as they leave the courthouse after a highly publicized trial.[30] It is undisputed that there is great competition within the media to get a story and sell papers.[31] As a result, there should be adequate mechanisms to protect jurors from overly bothersome newspeople.[32]

Related to the right of privacy is the concern for jurors' personal security.[33] This problem becomes magnified in trials

---

[28] Daniel Aaron, *The First Amendment and Post-Verdict Interviews*, 20 COLUM. J. L. & SOC. PROBS. 203, 203-04 (1986) (discussing the media's effect on the jurors in the trial of John Hinckley for the attempted assassination of U.S. President Ronald Reagan).

[29] Olmstead v. United States, 227 U.S. 438, 478 (1928) (Brandeis, J., dissenting). The right of personal privacy, that is, the right to be let alone has been called "the most comprehensive of rights and the right most valued by civilized men." *Id.*

[30] *See* Bennett H. Beach, *The Juror as Celebrity; Does Postverdict Scrutiny Prevent Abuses or Create Them?*, TIME, Aug. 16, 1982, at 42 (observing that local papers will often assign a team of four or five reporters to badger jurors in the first days after a trial); Bruce Fein, *Jurors Have a Right To Be Let Alone*, USA TODAY, May 3, 1990, at 10A (arguing that jurors are "typically pummeled by reporters to break the secrecy of the jury room [and] to betray the . . . reasoning of fellow jurors").

[31] *See* Susan M. Bryan, *Loving and Hating PR Peddlers*, ARIZ. REPUBLIC, Sept. 15, 1991, at F4 (arguing that "[i]n the news-and-entertainment-hungry world of the 1990's, competition within the media to generate stories is fierce and furious"); Eleanor Randolph, *Coverage of Hijacking Raises Questions of Who's Exploiting Whom*, WASH. POST, June 23, 1985, at A20 (discussing critics' charges that "grueling competition" to cover a story led to the invasion of privacy by the media of families dealing with hijacking crisis).

[32] *See, e.g.*, United States v. Doherty, 675 F. Supp. 719, 726 (D. Mass. 1987) (implementing waiting period before the media are allowed to interview jurors); *see infra* text accompanying notes 61-70; *see also* United States v. Franklin, 546 F. Supp. 1133, 1145 (N.D. Ind. 1982) (prohibiting the media from interviewing jurors on the premises of courthouse and declaring that any conduct by members of the media constituting harassment would be "handled appropriately by the Court"); *infra* text accompanying notes 120-36.

[33] Concern over the personal security of jurors is not only based upon consideration of their safety as individuals, but is also based upon the Sixth Amendment implications. *See* Eisler v. United States, 176 F.2d 21 (D.C. Cir. 1949), *cert. denied*, 337 U.S. 958 (1949). "Trial by jurors whose personal security will [be affected by conviction or acquittal] is not trial by an impartial jury and is not due process of law." *Id.* at 25 (Edgerton, J., dissenting).

involving organized crime where jury intimidation is not uncommon.[34] Of course, this concern is not limited to situations where a jury might be reluctant to convict for fear of retaliation.[35] It is equally applicable to situations where the public has already convicted a defendant before trial.[36] The jury should be free from the pressures of popular opinion where a defendant has already been

---

[34] *See, e.g.*, United States v. Pasciuti, 803 F. Supp. 499 (D.N.H. 1992) (detailing various methods of juror intimidation by the Hell's Angels, including a threat of "problems" if a guilty verdict were returned); United States v. Barnes, 604 F.2d 121, 140-41 (2d Cir. 1979), *cert. denied*, 446 U.S. 907 (1980) (upholding use of anonymous jury to protect jurors from fear of retaliation). In *Barnes*, the Second Circuit took note of the indications of defendants' "willingness to interfere with the judicial system." *See* Eric Wertheim, *Anonymous Juries*, 54 FORDHAM L. REV. 981, 983 n.9 (1986).

[35] *See Pasciuti*, 803 F. Supp. at 502. This concern not only relates to situations where jurors may be under a fear of retaliation after a conviction but also to situations where they may be reluctant to acquit. *See* United States v. Borelli, 336 F.2d 376 (2d Cir. 1964), *cert. denied*, 379 U.S. 960 (1965). In *Borelli*, the jury was urged, through anonymous letters, to find the defendants guilty. *Id.* at 392. The court declared that there are times when jurors' names must be held in confidence to "protect the integrity of criminal trials against this kind of disruption, whether it emanated from defendants' enemies, from their friends, or from neither." *Id.*

[36] *See* William Kastin, Note, *Presumed Guilty: Trial by the Media—The Supreme Court's Refusal to Protect Criminal Defendants in High Publicity Cases*, 10 N.Y.L. SCH. J. HUM. RTS. 107, 110 (1992) (arguing that "the explosion of communications in the electronic media . . . diminishes the possibility of selecting [an impartial jury]"); Newton N. Minow & Fred H. Cate, *Who Is an Impartial Juror in an Age of Mass Media?*, 40 AM. U. L. REV. 631, 632 (1991) (arguing that "[p]otential jurors may arrive . . . on the first day of the trial with extensive knowledge about the victim, the crime, and the defendant, including inaccurate or influential information which may . . . never be introduced in court"). This is not by any means a new phenomenon, created by a sophisticated electronic media. In 1807, when Aaron Burr was tried for treason, the Supreme Court realized the danger of pretrial publicity and the effect it might have on a court's ability to empanel an impartial jury. Joseph F. Flynn, Note, *Prejudicial Publicity in Criminal Trials: Bringing* Sheppard v. Maxwell *Into the Nineties*, 27 NEW ENG. L. REV. 857, 857 (1993). However, Chief Justice John Marshall noted: "Were it possible to obtain a jury without any prepossessions whatever respecting the guilt or innocence of the accused, it would be extremely desirable to obtain such a jury; but this is perhaps impossible, and therefore will not be required." *Id.* at 857 n.5 (quoting United States v. Burr, 25 F. Cas. 49, 50-51 (C.C.D. Va. 1807)). *See generally* Flynn, *supra* (arguing that the potential danger of pretrial publicity is vastly multiplied in today's technological age, and discussing instances involving substantial pretrial publicity).

"tried and convicted in the press" and should be able to render a verdict without fear of public scorn or harassment.[37]

III. Compelling Interests, Narrowly Tailored Standards, and Juror Privacy: The Federal Cases

While the Supreme Court has never held that the media have an absolute right to gather and disseminate information,[38] it has long been held that any infringements on their function are to be viewed with suspicion.[39] With this in mind, the federal courts generally have frowned upon absolute prohibition of media contact with jurors.[40] The following cases illustrate this point and are examples of how the federal courts have dealt with limitations on post-verdict juror contact by the media.

A. Globe Newspaper Co. v. Hurley[41]

In *Globe*, the defendants were charged in connection with an alleged conspiracy to conceal illegal drug profits.[42] The sensational nature of the trial existed because the defendants included a prominent Boston attorney, a reputed member of organized crime, and a member of the Bahamian government.[43]

---

[37] *See* Public Disclosures, *supra* note 15, at 890 (stating that "juries may be intimidated into rendering certain verdicts by the specter of subsequent pressures").

[38] The Supreme Court 1988 Term, Leading Cases—Freedom of Speech, Press, and Association, 103 HARV. L. REV. 239, 246 (1989) (citing First Nat'l Bank v. Bellotti, 435 U.S. 765, 781 (1978); Hustler Magazine v. Falwell, 485 U.S. 46, 50 (1988); Time, Inc. v. Hill, 385 U.S. 374, 389 (1967); Mills v. Alabama, 384 U.S. 214, 218-19 (1966)).

[39] *Id.* (citing *First Nat'l Bank*, 435 U.S. at 781); *see* Branzburg v. Hayes, 408 U.S. 665, 681 (1972) (finding that "without some protection for seeking out the news, freedom of the press could be eviscerated").

[40] *See, e.g.*, Journal Publishing Co. v. Mechem, 801 F.2d 1233 (10th Cir. 1986) (holding that court could not issue a "sweeping restraint" forbidding all contact between the press and dismissed jurors absent a "compelling interest"); *see infra* text accompanying notes 137-52.

[41] 920 F.2d 88 (1st Cir. 1990).

[42] *Id.* at 90.

[43] *Id.*

After receiving the verdict, the trial judge issued this statement upon dismissing the jurors:

> Members of the jury, the press may call you. It is up to you whether to speak with them. My suggestion is this, though: These are very grave matters. You have deliberated as a body, in confidence, and it is best that the result of your deliberations should remain in confidence.[44]

Although he advised the members of the jury that the press may contact them, the judge made this almost impossible when he denied access to the jurors' names and addresses after they expressed a unanimous wish to remain anonymous.[45] In issuing the order, the judge noted:

> The jurors in this case explicitly expressed a desire that their names and addresses not be released to the press. It is the judgment of the court that interviews of jurors for the sole purpose of exploiting the content of their deliberations, which have been conducted in secret and in confidence with one another, tend to demean the administration of justice in the public's view and to inhibit jurors, present and prospective, from voicing their strongly held views for fear of subsequent public disclosure to the ultimate detriment of the deliberative process.[46]

The Globe moved to intervene.[47] The motion was denied, and the paper applied for mandamus review to the First Circuit, which held that the venire list had to be released.[48] In directing the court to turn over the names and addresses, the First Circuit reasoned that "[t]o

---

[44] *Id.*

[45] *See id.*

[46] *Globe*, 920 F.2d at 90 n.1.

[47] *Id.* at 90.

[48] *Id.* at 98.

justify impoundment after the trial has ended, the court must find a significant threat to the judicial process itself."[49]

In discussing possible "significant threat[s] to the judicial process," the court cited the personal safety considerations of jurors.[50] The court noted that if jurors were to fear for their safety, they might be more likely to tailor their verdict to help ensure their safety and may be less willing to serve in the future.[51] However, in ordering their names to be furnished to the press, the First Circuit mentioned no other considerations as prominently as juror safety and found that a democratic society would not tolerate verdicts from anonymous juries.[52]

In reviewing the decision of the trial judge to impound the jurors' names, the First Circuit examined the Jury Selection and Service Act of 1968.[53] The Act provides that the district judge may keep jurors' names confidential "where the interests of justice so require."[54] In interpreting the section, the First Circuit did not give deference to the trial judge in interpreting the "interests of justice" standard.[55] Instead, the court read the standard narrowly and reiterated federal judicial policy that statutory interpretation should avoid engendering constitutional issues if a reasonable alternative exists.[56] The court refused to draw a line between the First and Sixth Amendments and found that there was a "reasonable alternative"—the restriction of access only where "exceptional circumstances peculiar to the case" exist.[57] These exceptional circumstances were articulated as "credible threat[s] to jury tampering, risk[s] of personal harm to individual jurors, and other evils affecting the administration of justice."[58] The court of appeals ruled that mere personal

---

[49] *Id.* at 91.

[50] *Id.*

[51] *Globe*, 920 F.2d at 91.

[52] *Id.*

[53] 28 U.S.C. § 1863 (1994).

[54] *Id.*

[55] *See Globe*, 920 F.2d at 93; *see also* Hall v. Bolger, 768 F.2d 1148, 1150 (9th Cir. 1985) (reiterating maxim of appellate review that any elements of legal analysis and statutory interpretation which figure in a lower court's decision are reviewable *de novo*).

[56] *See Globe*, 920 F.2d at 93 (citing Gomez v. United States, 490 U.S. 858 (1989)).

[57] *See id.* at 97.

[58] *Id.*

preferences of anonymity do not amount to exceptional circumstances.[59] Thus, the *Globe* court's decision gave more power to the press.[60]

B. United States v. Doherty[61]

In *Doherty*, the jurors unanimously requested anonymity after a sixty-two day trial, including eight days of deliberation.[62] The press applied for immediate access to the venire list by seeking to have an impoundment order vacated.[63] A paramount reason given by the press was their desire to interview the jurors "while the public's attention was still focused intently on the 'jury's performance of its public duties.'"[64] The district court struck a compromise between the competing interests of media access and expressed privacy interests of jurors by staying the motion to lift the impoundment for seven days.[65] The district court did so to allow the jury to get their lives in order after sixty-two days of public service.[66] The court reasoned that the benefits promoted by press access were "no less advanced" by waiting seven days before contacting jurors.[67]

The compromise implemented in *Doherty* is one of many that have been suggested by the federal courts in an effort to balance the competing interests in these situations. Other considerations include: admonishing the jury not to discuss deliberations with the press,[68]

---

[59] *Id.* at 98.

[60] It has been argued that the *Globe* court gave more power to the press, while completely overlooking jurors' privacy interests; that it only provided its "citizen soldiers" with the "illusory shield" of refusing to grant press interviews. *See* John D. Keenan, Comment, *Constitutional Law—First Circuit Overlooks Jurors' Privacy*—Globe Newspaper Co. v. Hurley, 25 SUFFOLK U. L. REV. 781 (1991).

[61] 675 F. Supp. 719 (D. Mass. 1987).

[62] *Id.* at 721.

[63] *Id.*

[64] *Id.* (quoting Memorandum of Globe Newspaper Co. at 3).

[65] *Doherty*, 675 F. Supp. at 724-25.

[66] *Id.* at 725.

[67] *Id.*

[68] *See Public Disclosures*, *supra* note 15, at 903 (stating that restricting the jurors' right to speak to the press presents lesser constitutional problems than interfering with the right of the press to publish jurors' remarks or interfering with the public's right to

reminding the jury of their right not to speak with a member of the media, the right of jurors to seek relief of the court if newspeople continue to harass them[69] and rushing the jury out of the courthouse upon delivering the verdict.[70]

C. In re Express-News Corp.[71]

The Fifth Circuit has ruled on a local rule which prohibited any person from interviewing any juror concerning his or her deliberations or verdict, except upon leave of the court.[72] The court in *In re Express-News Corp.* found the law unconstitutional as applied.[73] The publisher and a reporter of the *San Antonio Express* filed a motion to vacate the restrictions on the press and were denied leave by the trial court to interview the jurors.[74] The Western District of Texas' local court Rule 500-2 was at issue.[75] It provided that:

> No . . . attorney or any party to an action or any other . . . person shall himself or through any investigator or other person acting for him interview, examine or question any juror . . . either during the pendency of the trial or with respect to the deliberations or verdict of the jury in any action,

---

solicit such remarks).

[69] *See* United States v. Franklin, 546 F. Supp. 1133, 1145 (N.D. Ind. 1982) (stating that the court would "deal appropriately with any behavior constituting harassment"); *see also infra* text accompanying notes 120-36.

[70] *See, e.g.*, Joanne Kenen, *Smith Acquitted of All Charges in Palm Beach Rape Case*, REUTERS, Dec. 11, 1991, at 1 (jurors "whisked out" of courthouse under police guard after rendering verdict); Paul Richter, *Jury Acquits Smith of Rape at Kennedy Estate*, L.A. TIMES, Dec. 12, 1991, at 1 (jury "slipped out" of courthouse without comment).

[71] 695 F.2d 807 (5th Cir. 1982).

[72] *Id.* at 808.

[73] *Id.* at 811.

[74] *Id.*

[75] *Id.*

> except on leave of court granted upon good cause shown.[76]

The Fifth Circuit found that a court rule cannot restrict the journalistic right to gather news unless it is "narrowly tailored to prevent a substantial threat to the administration of justice."[77] Under *Express-News*, a court may not impose the burden of showing good cause upon those seeking access to juror names.[78] Instead, the burden is placed upon the government by requiring that it demonstrate the need for curtailment.[79] It should be noted that the court in *Express-News* did not find Rule 500-2 unconstitutional on its face.[80] Instead, the court struck down the law because the impoundment order was unlimited in scope and time, applied equally to those jurors requesting privacy and those anxious to speak, and foreclosed questions relating to jurors' general reactions.[81]

However, some disturbing dicta exists in the *Express-News* opinion for advocates of jurors' privacy rights. First, the court qualified its holding to requests for interviews proposed by the media in this case[82] where the requests were made "in connection with the preparation of a news story."[83] The court decided that the newspeople were not seeking to inquire about the deliberative process and were not seeking to obtain any evidence of improprieties.[84] The court stated that the interviews were sought for a "different purpose."[85]

---

[76] W. D. Tex. R. 500-2.

[77] *Express-News*, 695 F.2d at 810 (quoting United States v. CBS, Inc., 497 F.2d 102, 104 (5th Cir. 1974)).

[78] *Id.* at 810.

[79] *Id.*

[80] *See id.* at 811. The court expressed that it was unconstitutional only *as applied* in that the "petitioners' right to gather news was restricted in the case without any showing that the restriction was necessary." *Id.*

[81] *Id.* at 810.

[82] *See Express-News*, 695 F.2d at 811.

[83] *Id.* at 808.

[84] *Id.*

[85] *Id.*

However, the court did not articulate what that purpose was.[86] Also, the *Express-News* court said that the media were not seeking to impeach any verdict.[87] However, the court failed to recognize that this danger exists when interviewing any juror.[88] Even though the media may only intend to inquire about a juror's general attitude towards the judicial system or the jurors' general perceptions about the trial, a juror might make a statement which is likely to impeach the verdict.[89] The court did not address what happens when such a statement is circulated and how this affects the government's interest in the finality of jury verdicts.[90]

---

[86] The court stated that it had denied requests for "post-verdict juror interviews designed to obtain evidence of improprieties in the deliberations" and implied that it would continue to do so in those situations. *Id.* at 810. The court indicated that the petitioning parties in these cases were more concerned with obtaining information about the jury's activities than they were with impeaching the verdict. *Id.*

[87] *Express-News*, 695 F.2d at 810.

[88] In the trial of John Hinckley, who was accused of attempting to assassinate U.S. President Ronald Reagan, two jurors took the opportunity to tell a badgering press that they had been persuaded to agree with the verdict. Beach, *supra* note 30, at 42. *See Public Disclosures*, *supra* note 15; Aaron, *supra* note 28, at 203.

[89] Statements which serve to undermine the integrity of the verdict cut against the "system's strong interest in finality." *Public Disclosures*, *supra* note 15, at 89 ("[I]f the business of the world is to go on, the system must produce results that are, as far as possible, free from doubt and internal contradiction."). *Id.*

[90] This interest is reflected in Federal Rule of Evidence 606(b) which provides in part:

> Upon an inquiry into the validity of a verdict . . . a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict . . . or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.

FED. R. EVID. 606(b). Notably, the original form of the rule contained no exceptions which prohibited jurors from testifying about their deliberations. Christopher B. Mueller, *Jurors' Impeachment of Verdicts and Indictments in Federal Court under Rule 606(b)*, 57 NEB. L. REV. 920, 928 (1978). Rule 606(b) is an outgrowth of the common law maxim that "a juror may not impeach his own verdict." *Id.* (citing Vaise v. Delaval, 99 Eng. Rep. 944 (K.B. 1785)). The rule is based on four basic principles: (1) prevention of juror harassment; (2) prevention of public scrutiny over what is intended to be a private deliberation process; (3) prevention of the undermining of the

D. United States v. Harrelson[91]

Harrelson involved the conviction of three defendants for various acts and conspiracies surrounding the murder of a United States District Judge.[92] In contrast to *Express-News Corp.*, a different panel of the Fifth Circuit upheld local Rule 500-2.[93] The trial judge placed restrictions on the media's post-verdict questioning of jurors, preventing repeated requests for juror interviews and denying any inquiry into the specific votes of other jurors during their interviews.[94] The El Paso Times relied on the *Express-News* decision and contended that reporters be "permitted to interview the discharged jurors without restriction of any sort whatsoever."[95] The court ruled the jurors "were fair game until [they] express . . . [their] desire not to be interviewed in such a manner that the would-be interviewer knows of that desire."[96] The court noted that once a juror has decided against an interview, it is unlikely that he will change his mind[97] and if he does, he may always initiate the interview.[98]

---

finality of the verdict; and (4) prevention of the tampering with the process that would be difficult to protect. *Id.* at 923-24. The last of these reasons is illustrated by the potential juror who "reluctantly joined in a verdict" and may be "sympathetic" towards the defeated party and "to be persuadable to the view that his own consent rested upon false or impermissible considerations." *Id.* at 924.

The government's interest in the finality of the verdict is reflected in Tanner v. United States, 483 U.S. 107 (1987). In *Tanner*, the Court held that testimony from a juror regarding drug and alcohol use by jurors during trial was properly barred by Rule 606(b) because such actions do not qualify as "outside influences" under the rule. *Id.* at 125. The Court did sympathize with the defendant's contention: "There is little doubt that postverdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior. It is not at all clear, however, that the jury system could survive such efforts to perfect it." *Id.* at 120.

[91] 713 F.2d 1114 (5th Cir. 1983), *cert. denied*, 465 U.S. 1041 (1984).

[92] *Id.* at 1115.

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *Harrelson*, 713 F.2d at 1118.

[97] *Id.*

[98] *Id.*

The court distinguished *Express-News*, stating that the decision dealt with the rule's *application* in that case, an unrelated criminal matter.[99] The court found the implemented restrictions permissible and denied mandamus.[100] First, the *Harrelson* court found the ban on repeated requests for interviews not to be an abuse of discretion by the trial judge.[101] Citing *Express-News*, the Fifth Circuit noted that "jurors, even after completing their duty, are entitled to privacy and to protection against harassment."[102] Second, in addressing the ban on questions relating to other jurors' votes, the court applied *United States v. Gurney*.[103] *Gurney* held that "the press, in common with all others, are free to report whatever takes place in open court but enjoy no special First Amendment right of access to matters not available to the public at large."[104] Because jury deliberations fall within matters not available to the public at large,[105] the court held the trial judge's restriction not to be an abuse of discretion.[106]

E. United States v. Sherman[107]

In *Sherman*, the defendants were tried for a series of bombings and bank robberies in connection with their mission, as part of a revolutionary group, to overthrow the governments of the United States and the State of Washington.[108] At least one occasion of juror tampering occurred during the trial: one of the defendants had written to jurors at their homes, urging them to ignore the

---

[99] *Id.* at 1115 (emphasis added).

[100] *Id.* at 1114, 1115.

[101] *Harrelson*, 713 F.2d at 1115.

[102] *Id.* at 1118 (citing *Express-News*, 695 F.2d at 810).

[103] 558 F.2d 1202 (5th Cir. 1977).

[104] *Harrelson*, 713 F.2d at 1118.

[105] *See, e.g.*, Remmer v. United States, 347 U.S. 227, 229 (1954), *appeal after remand*, 348 U.S. 904 (1955); United States v. Howard, 506 F.2d 865 (5th Cir. 1975); Downey v. Peyton, 451 F.2d 236 (4th Cir. 1971); *see also* FED. R. CRIM. P. 6(c) (stating that grand jury deliberations are to remain secret).

[106] *Gurney*, 558 F.2d at 1210-11.

[107] 581 F.2d 1358 (9th Cir. 1978).

[108] *Id.* at 1359.

judge's instructions.[109] At the close of trial, the judge issued an oral order "forb[idding] the jurors from discussing the case with anyone, [telling them] that they would be protected from further harassment, and . . . order[ing] everyone, including the news media, to stay away from the jurors."[110]

Upon mandamus review, the Court of Appeals concluded that because the trial was over, "there was no possibility that allowing the jurors to speak to newsmen would deprive [the defendants] of a fair trial."[111] In analyzing the trial court's justifications for imposing the order, namely to enable jurors to serve on future jury panels and to protect the jurors from harassment, the court found that less restrictive alternatives were "easily available."[112]

In addressing the issue of the jurors' ability to serve on future jury panels, the court noted that any biases created as a result of media attention could be discovered upon future *voir dire*.[113] Alternatively, the court could always excuse these jurors from any future service.[114] Weighing the competing interests, the court found that the inability to serve on future juries is neither sufficiently serious nor a threat sufficiently imminent to justify the blanket restraint upon media contact with jurors.[115]

Nor was the court persuaded by the harassment argument put forth by the trial court.[116] Because the possibility existed that not all jurors would view interview requests as harassment, such a prospective ban would not be acceptable.[117] The court emphasized that steps be taken against harassment remedially, not preventatively.[118] The court also stressed that its opinion should not

---

[109] *See id.*

[110] *Id.* at 1360.

[111] *See id.* at 1361.

[112] *See Sherman*, 581 F.2d at 1361.

[113] *See id.*

[114] *See id.*

[115] *See id.*

[116] *See id.* at 1361.

[117] *Sherman*, 581 F.2d at 1361.

[118] *See id.*

be construed as requiring jurors to speak to anyone, including the media.[119]

F. United States v. Franklin[120]

In *United States v. Franklin*, the defendant attempted to shoot a prominent civil rights activist and was charged with violating the victim's civil rights.[121] The trial involved "a number of unique security problems to the court, its personnel, witnesses, and the defendant himself."[122] In dismissing alternate jurors, the trial judge made the following remarks:

> [T]he most important thing I want to say to you is that I now enjoin all participants in this trial, and all others, as I always do, from attempting to interrogate any of the four of you. And the same injunction will be applicable to the 12 jurors when they return . . . . I understand that there are those of you who disagree with this almost violently. But as long as I have anything to do with running trials it will be so. And that is I do not think and never have, that jurors should be subject to anybody questioning them when they leave the performance of their duties. They can't question me; I'm a Judge. You're also judges, and they can't question you. And I do not permit it.[123]

Upon releasing the jurors after rendering a verdict of not guilty, the court told them:

---

[119] *Id.* at 1362.

[120] 546 F. Supp. 1133 (N.D. Ind. 1982).

[121] *Id.* at 1134.

[122] *Id.* The court did not articulate these "unique security problems," but did mention jurors' right to privacy: "It is very possible for one juror to engage in post-trial violation of the privacy of another." *Id.* at 1142.

[123] *Id.* at 1135.

> It is the normal practice of this Court to enjoin those who are participants in this trial, all others, from attempting to interrogate you about the contents of your deliberations or the reasons for your verdict . . . . There are reasons for that. Simply stated, you will be called back for other cases. There are other good policy reasons, in my opinion, and in the opinions of judges through the Federal System in reported cases, for that injunction.[124]

When members of the news media applied for mandamus review to the Seventh Circuit, the court modified its oral order prohibiting contact between the press and jury.[125] Judge Sharp emphasized that "[it] is fundamental and beyond dispute that the deliberations of a jury are private and confidential and, except in a very narrow range of circumstances, the court itself is inhibited from inquiring into the contents of such deliberations."[126] The court also recognized the danger of one juror violating the privacy of another juror by discussing the other's thoughts and reasons for arriving at his verdict.[127] The court analogized jury deliberations to the private conferences of the Supreme Court and the private communications between its justices, law clerks, and other court personnel.[128] "[T]hese courts and judges speak through their official records," the court noted, "and are not obligated to grant press interviews."[129] Similarly, Judge Sharp argued, jurors are not obligated.[130]

Judge Sharp defended his order by saying that he never intended to "inhibit the jurors' right, post-trial and away from the courthouse, to initiate or volunteer statements regarding the trial to the press or to the public."[131] In addressing the argument that the

---

[124] *Id.* at 1136.

[125] *Franklin*, 546 F. Supp. at 1145.

[126] *Id.* at 1142.

[127] *See id.*

[128] *See id.* at 1143.

[129] *Id.*

[130] *Franklin*, 546 F. Supp. at 1144. The Court was concerned with protecting the jurors from harassment and undue influence. *Id.*

[131] *Id.*

judiciary should be no less subject to public scrutiny than any other branch of government, and that the judicial process should be open to the public, the court distinguished the judiciary from the other branches of government and recognized the historically private process of the court.[132] The court wrote that "[t]o compare a jury to a legislative council or administrative agency is to totally misconstrue its basic nature."[133]

Recognizing *Sherman*[134] as persuasive authority, the court modified the order to preclude jury interviews on the premises of the courthouse, to enjoin counsel and parties from interviewing jurors after the verdict, and to declare that it is the jurors' exclusive private decision whether they will grant interviews.[135] The order included a warning that the court would deal appropriately with any behavior constituting harassment.[136]

G. Journal Publishing Co. v. Mechem[137]

The *Journal Publishing* case involved alleged civil rights violations by members of the police force and the City of Albuquerque, New Mexico.[138] At the close of the case, the trial judge admonished the jurors not to discuss their verdict:

> You should not discuss your verdict after you leave here with anyone. If anyone tries to talk to you about it or wants to talk to you about it, let me know. If they wish [to] take the matter up with me, why, they may do so, but otherwise, don't discuss it with anyone.[139]

---

[132] *See id.*

[133] *Id.*

[134] United States v. Sherman, 581 F.2d 1358 (9th Cir. 1978).

[135] *Franklin*, 546 F. Supp. at 1144-45.

[136] *Id.*

[137] 801 F.2d 1233 (10th Cir. 1986).

[138] *Id.* at 1235.

[139] *Id.*

In refusing an informal request to modify his order, the judge explained that he admonished the jury to remain silent only in civil actions.[140] In its petition for a writ of mandamus, the petitioner contended that the order deprived it of its First Amendment right to gather news, denied the public the opportunity to know the basis of the jury's verdict, and deprived the jurors of their First Amendment rights.[141]

The Tenth Circuit ordered the trial court to dissolve its order.[142] The court first distinguished the media from counsel in the post-verdict setting.[143] It noted that the media has less incentive to upset a verdict than does a losing party or attorney.[144] Thus, a court does not have the same broad discretion to regulate media contact with the dismissed jury.[145] The court stated that "any inhibitions against news coverage of a trial carry a heavy presumption of an unconstitutional prior restraint."[146] Invoking *Express-News*[147] and *Sherman,*[148] the court reiterated that "the court must narrowly tailor any prior restraint and must consider any reasonable alternatives to that restraint which have a lesser impact on First Amendment rights."[149] Because the order had no time or scope limitations and encompassed every possible interview situation, it was declared a "sweeping restraint" and thus unconstitutional.[150] The court looked to *Globe Newspaper Co. v. Superior Court*[151] and could not find the necessary "compelling government interest."[152]

---

[140] *Id.*

[141] *Id.*

[142] *Journal Publishing*, 801 F.2d at 1237. The Tenth Circuit reasoned that the court's order was overbroad. *Id.*

[143] *Id.* at 1236.

[144] *See id.*

[145] *See id.*

[146] *Id.* (citing United States v. Sherman, 581 F.2d 1358, 1361 (9th Cir. 1978)).

[147] *In re Express-News Corp.*, 695 F.2d 807 (5th Cir. 1982).

[148] *Sherman*, 581 F.2d 1358 (9th Cir. 1978).

[149] *Journal Publishing*, 801 F.2d at 1236.

[150] *Id.* at 1237.

[151] 457 U.S. 596, 606-07 (1982) (attempts to deny right of access in order to inhibit disclosure of sensitive information must be necessitated by a compelling government interest narrowly tailored to serve that interest).

[152] *Journal Publishing*, 801 F.2d at 1237.

IV. Decisions in the States

A. State ex rel. Cincinnati Post v. Hamilton County Court of Common Pleas[153]

In *Cincinnati Post*, the trial judge asked the jury if they wished to talk to counsel or the press after the verdict.[154] The foreman answered, "We don't want to talk."[155] The judge then issued the following order:

> No one is to talk to the jurors about the case and the jurors aren't to talk to anybody about it. They just don't want to talk about it. And I'm going to respect their decision by making it the order of the Court that nobody talks to the jurors.[156]

A writ of prohibition was allowed by the Supreme Court of Ohio.[157] The court found that "while a more narrowly focused order might have been constitutional, this one violates the First Amendment."[158]

Respondent first argued that the order only enforced the existing desire of the jury not to speak to the press.[159] This argument was rejected for two reasons. First, the court found that the foreman's statement did not necessarily speak for the whole jury and could have only spoken for a majority or a consensus.[160] Second, the order failed to allow for a situation where jurors change their minds about speaking to the press.[161] The court showed approval of less restrictive measures, such as those in *Sherman*[162] and *Harrelson*.[163]

---

[153] 570 N.E.2d 1101 (Ohio 1991).

[154] *Id.* at 1102.

[155] *Id.*

[156] *Id.*

[157] *Id.* at 1105.

[158] *Cincinnati Post*, 570 N.E.2d at 1102.

[159] *Id.* at 1103.

[160] *Id.*

[161] *Id.*

[162] 581 F.2d 1358 (9th Cir. 1978).

[163] 713 F.2d 1114 (5th Cir. 1983).

Respondent's second argument, that "the jury system and its deliberations depend upon confidentiality," was also rejected.[164] Noting that courts have upheld orders restricting jurors from discussing another juror's specific vote,[165] the court found that the order here also precluded a juror from discussing *her* vote and found the order to be a "categorical denial of all access and unconstitutional."[166] Further, the court rejected any analogy to post-trial access to the jury of parties or counsel, finding that non-parties "have less incentive to upset a verdict than does a losing party or attorney."[167]

B. Newsday v. Sise[168]

Newsday v. Sise stands in stark contrast to the opinions of the federal courts. In *Newsday*, a paper sought access under the New York Freedom of Information Law[169] (FOIL) to the names and addresses of the jurors after a mistrial was granted in a highly publicized murder trial.[170] In a unanimous decision, the Court of Appeals of the State of New York denied access to juror questionnaires which contained their names and addresses as well as personal family information.[171] At issue was New York Judiciary Law § 509(a), which provides:

> The commissioner of jurors shall determine the qualifications of a prospective juror on the basis of

---

[164] *Cincinnati Post*, 570 N.E.2d at 1103-04. The Respondent's argument was based upon the idea that the jurors' free thought may be stifled if their ballots were to be published; *See* Clark v. United States, 289 U.S. 1, 13 (1933).

[165] *Id.* at 1104 (citing United States v. Harrelson, 713 F.2d 1114, 1118 (5th Cir. 1983)).

[166] *Id.* (quoting *Express-News*, 695 F.2d at 811).

[167] *Id.* (quoting *Journal Publishing*, 801 F.2d at 1236).

[168] 518 N.E.2d 930 (N.Y. 1987), *cert. denied*, 486 U.S. 1056 (1988).

[169] N.Y. PUB. OFF. LAW § 84 (McKinney 1993). The enactment of the "FOIL" law reflected the legislature's desire to extend public accountability by giving the public unimpaired access to government records, unless those records were prepared solely for litigation.

[170] *Newsday*, 518 N.E.2d at 931.

[171] *Id.* at 933.

> information provided on the juror's qualification questionnaire . . . . Such questionnaires and records shall be considered confidential and shall not be disclosed except to the county jury board or as permitted by the appellate division.[172]

Newsday did not seek the questionnaires for itself, but instead argued that it was entitled under FOIL to information contained in other records derived from or containing the information included in the questionnaires.[173] The court discussed the legislative history of the section and recognized that disclosure could result in harassment of jurors, attempts at retribution, or intimidation.[174]

The Court of Appeals rejected petitioner's argument that it was entitled under FOIL to the information contained in other records but derived from the questionnaires.[175] "While [the law] . . . refers only to the juror qualification questionnaires, its obvious purpose is to provide a cloak of confidentiality for the *information* which the questionnaires contain."[176] Further, the court rejected the argument that because the jurors' names were revealed in open court, their privacy rights would not be further trespassed upon by having a list of their names revealed.[177] The court held that because the law in question expressly prohibits the disclosure of names, the mere fact that the names were mentioned publicly does not compel disclosure under the statute.[178] Finally, in a footnote, the court rejected the assertion that the constitutional right of access to criminal proceedings and the common law right of access to judicial records compelled disclosure.[179] It held that because no access to proceedings or transcripts thereof was claimed, and because the information sought

---

[172] N.Y. JUD. LAW § 509(a) (McKinney 1992).

[173] *Newsday*, 518 N.E.2d at 932.

[174] *Id.* at 932.

[175] *Id.* at 933.

[176] *Id.* at 932.

[177] *Id.* at 933.

[178] *Newsday*, 518 N.E.2d at 933.

[179] *Id.* at 933 n.4.

had not been entered into evidence or filed with the court, the constitutional right of access had not been violated.[180]

As the preceding cases illustrate, there is confusion as to what measures a trial judge may permissibly take in attempting to protect a defendant's Sixth Amendment right to a fair trial and a juror's right to privacy.[181] While absolute bans on juror contact may be allowed in exceptional circumstances,[182] the scope of a judge's authority in balancing the rights involved in the post-verdict setting is in doubt in light of *Newsday v. Sise* and the Supreme Court's refusal to address the issue directly.[183] What follows are several additional concerns involved in such situations and some possible reconciliations.

V. *"Checkbook Journalism"*

One major concern over public disclosure of jury deliberations is the prevention of what has been called "checkbook journalism."[184] In some highly publicized cases, jurors have sold their stories about their experiences to the press, sometimes for substantial monetary gain.[185] For example, in the Bernard Goetz case,[186] two jurors were

---

[180] *Id.*

[181] *See generally supra* notes 41-181 and accompanying text (discussing the *Globe*, *Express-News*, *Harrelson*, *Sherman*, *Franklin*, *Journal Publishing*, *Cincinnati Post* and *Newsday* cases).

[182] The First Circuit articulated exceptional circumstances as "[p]ersonal safety of the jurors, special risk of personal harm to the jurors, failure of the court to shield jurors from threatened harm [which] could severely damage the functioning of the courts and the jury system." Globe Newspaper Co. v. Hurley, 920 F.2d 88, 91 (1st Cir. 1990).

[183] *See supra* notes 41-181 and accompanying text.

[184] Kenneth Jost, *The Dawn of Big Bucks Juror Journalism*, LEGAL TIMES, July 20, 1987, at 15.

[185] *See id.*

[186] Bernard Goetz (whose case sparked considerable debate over the subjects of gun control, race, and vigilantism) was convicted in 1989 for carrying an unlicensed pistol during an incident on a New York City subway where he shot four youths who allegedly asked him for five dollars. *See, e.g.*, Carole Agus, *Wolf or Wimp? Myths and Realities of Bernhard Goetz, Subway Vigilante*, CHI. TRIB., Dec. 14, 1986, at C1; Bob Drogin, *Murder Count Rejected in N.Y. 'Vigilante' Case; Goetz Indicted on Illegal Gun Charges*, L.A. TIMES, Jan. 26, 1985, at 1; Barbara Goldberg, *Goetz Gets One Year in Jail for Having Illegal Gun—NYC Shooter Maintains Innocence*, DETROIT FREE PRESS, Jan. 14,

paid $2,500 and nearly $5,000 respectively for their stories.[187] One was a three-part series based on a tape-recorded diary made during the juror's service in the trial.[188] Another such example is the famous Pennzoil-Texaco case which resulted in the largest award ever by a jury—$10 billion.[189] One juror wrote a book defending the award and received an advance from his publisher of at least $10,000.[190]

Concern over this sort of behavior is not without reason. The major problem affecting Sixth Amendment rights is the concern that a juror could intentionally hide any biases to be on a jury, thereby preserving her opportunity for a profit.[191] Perhaps even more dangerous is the potential for a juror to create a verdict that would make a "good ending" to the story.[192]

It has been argued that highly publicized trials make it especially difficult to empanel an impartial jury.[193] The defendant may already have been convicted in the press,[194] or potential jurors may be fearful of rendering a particular verdict because they feel their safety is threatened,[195] or that their verdict will cause public outcry.[196] It is unnecessary to compound these pre-existing problems

---

1989, at 1A.

[187] Jost, *supra* note 184, at 15.

[188] *Id.*; *see* Howard Kurtz, *What a Trial! More Than You Wanted to Know about the Goetz Case*, WASH. POST, Nov. 3, 1988, at C6 (discussing Goetz juror Mark Lesley's co-written account (with journalist Charles Shuttleworth) of his experience during the trial).

[189] Jost, *supra* note 184, at 15.

[190] *See id.*

[191] *Id.*; *see* Marcy Strauss, *Juror Journalism*, 12 YALE L. & POL'Y REV. 389, 395-406 (1994) (giving an overview of the effects of checkbook journalism on the jury trial system).

[192] *Id.*

[193] *See* Kastin, *supra* note 36, at 110 (arguing that "the explosion of communications in the electronic age . . . diminishes the possibility of selecting [an impartial jury]").

[194] *See id.*

[195] *See, e.g.*, United States v. Pasciuti, 803 F. Supp. 499 (D.N.H. 1992) (holding that the potential for intimidation and harassment of jurors merits preventative action).

[196] *See, e.g.*, Bill Rankin, *The Curtis Power Trial Q & A on the News*, ATLANTA J. & CONST., Mar. 9, 1995, at B3 ("The public has shown outrage repeatedly in recent years after surprising jury decisions in high profile cases.").

with the possibility of a juror seeking to become empaneled in an effort to sell her story for financial gain.[197]

Proponents of First Amendment rights argue that publishing jurors' stories is part of a healthy democratic society which serves many crucial functions.[198] Others have called for legislation to prohibit jurors from selling their stories to the press.[199] For example, Barry Slotnick, the attorney who defended Bernhard Goetz, had been in favor of the post-verdict interview.[200] However, when he heard about the bounties paid for the juror stories in his client's case, he called for legislation, along the lines of the "Son of Sam" laws, which prohibit criminals from collecting profits connected with the publishing of stories about their crimes, to be applied to jurors in cases such as his client's.[201]

VI. The Media and Jury Deliberations

The specific concern over checkbook journalism is related to the general concern with public discussion of the deliberative process.[202] It has long been taken for granted that the jury is to conduct its deliberations in private.[203] The purpose of having a jury deliberate in secret is to encourage "free debate, without which the decision making process would be crippled."[204] A thorough exchange

---

[197] *See* Jost, *supra* note 184, at 15.

[198] *See supra* notes 16-22 and accompanying text.

[199] *See generally Recent Legislation*, 108 HARV. L. REV. 1214 (1995) (discussing the constitutional propriety of recently enacted legislation designed to prevent checkbook journalism); Strauss, *supra* note 191 (arguing that legislation that would prohibit jurors from talking about their experiences violates basic First Amendment rights).

[200] Jost, *supra* note 184, at 15.

[201] *Id.*

[202] *See generally* Sharp, *supra* note 24, at 6 ("Were jury deliberations to be open to anyone, a strong likelihood exists that even the mere presence of observers would inhibit unfairly the deliberation process.").

[203] *Public Disclosures*, *supra* note 15, at 886.

[204] *Id.* at 889-90.

of ideas and impressions among the jury is crucial[205] and any restriction on this free debate is undesirable as it may serve to increase concern over the integrity of the verdict.[206] For example, in *Clark v. United States*,[207] Justice Cardozo wrote that "[f]reedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world."[208]

It has been argued that public disclosure of deliberations serves to undermine the jury process itself.[209] It is not enough that justice is served—there must also be the appearance that justice is being served through some fair and impartial process.[210] For example, exposing verdicts to "easy and obvious criticism"[211] chips away at the respect that jury verdicts should be afforded.[212] While faith in the jury system must be "blind, but purposefully and not irrationally so,"[213] it must be blind nonetheless.

This blindness means that the media should not subject the jury to second guesses.[214] The trial court, which has discretion to set

---

[205] *See id.* ("For the process to work according to theory, the participants must feel completely free to dissect the credibility, motivations, and just desserts of other people.").

[206] *Id.* at 891. For a full discussion of restrictions on jurors see FED. R. EVID. 606(b), *supra* note 90.

[207] 289 U.S. 1 (1933).

[208] *Id.* at 13.

[209] *Public Disclosures*, *supra* note 15, at 904.

[210] *See* Teague v. Lane, 489 U.S. 288, 342 (1989) (Brennan, J., dissenting) (destroying the appearance of justice casts doubt on the integrity of the judicial process); Offutt v. United States, 348 U.S. 11, 14 (1954) ("[J]ustice must satisfy the appearance of justice."); *see also* Walker v. Lockhart, 726 F.2d 1238, 1249 (8th Cir. 1984), *cert. denied*, 466 U.S. 958, (1984) *cert. dismissed*, 468 U.S. 1222 (1984) (Arnold, J., concurring) ("If due process means anything, it means a trial before an unbiased judge and jury.").

[211] *Public Disclosures*, *supra* note 15, at 891.

[212] *See* Sharp, *supra* note 24, at 14 n.44 (discussing the "cardinal rule" of appellate review that a jury's verdict will be taken as conclusive and is therefore not subject to review absent a showing that the verdict is clearly erroneous).

[213] *Public Disclosures*, *supra* note 15, at 892.

[214] *See* Sharp, *supra* note 24, at 14 n.44 (verdict taken as conclusive absent "clearly erroneous" showing).

aside a verdict,[215] bears much of this responsibility. Also, there are other mechanisms designed to afford the defendant his Sixth Amendment right to a fair trial. First, there are rules of evidence, either codified or under common law of the jurisdiction, which serve to filter out prejudicial evidence while admitting relevant, non-prejudicial evidence.[216] Second, all procedures taken to ensure an impartial jury should be made *prior* to trial.[217] This can be accomplished through sequestration and through *voir dire* where any potential biases can be exposed.[218] It is simply not in the domain of the media to second guess the jury's verdict and "subject [jurors] to easy and obvious criticism."[219] Simply put, once counsel chooses a jury and the trial is conducted employing the rules of evidence, the verdict must be accepted and not second-guessed by anyone except the trial judge who may have the power to set aside a verdict.[220] Too

---

[215] *See* FED. R. CIV. P. 50(b).

[216] *See, e.g.*, FED. R. EVID. 401 ("Relevant evidence means evidence having any tendency to make the existence of any fact . . . of consequence . . . more or less probable . . . . "); FED. R. EVID. 403 (providing that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice").

[217] In the interests of fairness and judicial economy, this makes the most sense. For example, *voir dire* and sequestration are addressed *before* trial. So should this measure of helping to ensure a fair trial.

[218] *See, e.g.*, Mu'Min v. Virginia, 500 U.S. 415 (1991) (*voir dire* examination serves the purpose of enabling the court to select an impartial jury).

[219] *Public Disclosures*, *supra* note 15, at 891; *see* Sharp, *supra* note 24, at 14 ("Once the verdict has been returned . . . the court has the additional duty to protect [the] verdict from attack.").

[220] *See Public Disclosures*, *supra* note 15, at 897 (interest in finality); Sharp, *supra* note 24, at 14 n.44 (jury's verdict considered conclusive absent a showing of clear error); FED. R. CIV. P. 50(b) (court may direct entry of judgment after verdict as a matter of law). *See also* United States v. Gravely, 840 F.2d 1156 (4th Cir. 1988). In *Gravely*, the defendant sought to have a guilty verdict overturned because of, inter alia, jurors' statements to the media that the verdicts were rendered because of "technicalities" and that the jurors "were under extreme pressure at the end of a two-week trial." *Id.* at 1159. It was contended that another juror stated that there was some expressed sentiment that defendant was innocent but that those jurors changed their views because of "time pressure." *Id.* One juror allegedly told the media that defendant would have been found innocent had deliberations continued. *Id.* The Fourth Circuit held that a request to interview the jurors was properly denied because no threshold showing of improper outside influence was shown. *Id.* (citing Big John, B.V. v. Indian Head Grain Co., 718 F.2d 143, 150 (5th Cir. 1983); Tanner v. United States, 483 U.S. 107 (1987) (holding that allegations of juror misconduct which were raised post-verdict

often in controversial trials, groups with various affiliations and agendas attend the trial and critique the verdict.[221] This sort of behavior is undesirable and, in fact, is subject to legislative regulation even though First Amendment rights are implicated.[222]

Notably, Great Britain has dealt with the problem of the media inquiring into the deliberative process by passing the Contempt of Court Act in 1981.[223] The law makes it illegal for reporters and researchers to question jurors about their deliberations.[224] It also makes it illegal for jurors to discuss their deliberations with anyone and imposes a maximum jail sentence of two years and a fine with no set maximum.[225] While not likely to be enforced against jurors (the Attorney General must pre-approve any such prosecution),[226] no such pre-approval is necessary for prosecuting members of the media.[227]

VII. Possible Reconciliations

In light of the conflicts that exist in highly-publicized cases, a need becomes apparent for a method of balancing the interests wherein jurors' privacy rights and defendants' Sixth Amendment

---

seriously disrupted the finality of the jury process).

[221] One such example is a highly publicized rape case which occurred in Glen Ridge, New Jersey. Over 100 people marched at the courthouse in protest over the handling of the case and a protest was directed at New Jersey Chief Justice Robert N. Wilentz. Women's groups were "poised to protest" if the defendants were acquitted. Robert Hanley, *Revocation of Bail Sought in Glen Ridge Abuse Case*, N.Y. TIMES, May 15, 1993, at A24; Catherine S. Manegold, *A Rape Case Worries Advocates for the Retarded*, N.Y. TIMES, March 14, 1993, § 4, at 3.

[222] *See* Cox v. Louisiana, 379 U.S. 559, 564 (1965), *reh'g denied*, 380 U.S. 926 (holding that a statute which bars picketing or parading in or near a court is not unconstitutional on its face). The court further declared that "judges are human, and the legislature has the right to recognize the danger that some judges, jurors and other court officials, will be consciously or unconsciously influenced by demonstrations in or near their courtrooms both prior to and at the time at trial." *Id.* at 565.

[223] *A British Law Bars Press from Violating Jury Room Secrets*, N.Y. TIMES, Aug. 28, 1981, at D16 [hereinafter *British Law*].

[224] *Id.*

[225] *Id.*

[226] *Id.*

[227] *Id.*

rights are given more weight.[228] It is clear from the federal case law discussed herein that absolute bans on the post-trial release of juror lists are prohibited (absent exceptional circumstances), even at the jurors' request.[229]

In a *Globe*-type situation, where the jurors request anonymity, the First Amendment argument is that the court is not denying anything to the press besides that which the jurors would deny them; in effect, the court is saving the media the trouble.[230] This argument has been deemed to be without merit.[231] Even if the jurors do not wish to speak, the public is still entitled to know who the jurors are.[232] This is necessary to verify their impartiality, ensure fairness, the appearance of fairness, and public confidence in the system.[233]

Another major argument against withholding juror identities is that the Sixth Amendment implications are muted after the rendering of the verdict.[234] However, this argument fails to give enough credit to the concern of jurors who may be reluctant to speak their minds during deliberations.[235] A law similar to the British Contempt of Court Act[236] would be desirable, rendering illegal the discussion of *another* juror's deliberative process or specific vote.[237] This does not seem radical, especially in light of *Gurney*[238] and

---

[228] *See, e.g.*, Tsokalas v. Purtill, 756 F. Supp. 89, 93-95 (D. Conn. 1991); Keenan, *supra* note 60; Kelly Knivila, *Seventeenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1986-1987: Right to Jury Trial*, 76 GEO. L. J. 946, 962 n.2173 (1988); Litt, *supra* note 16.

[229] *See, e.g.*, Journal Publishing Co. v. Mechem, *supra* notes 137-52 and accompanying text.

[230] *See* State *ex rel.* Cincinnati Post v. Hamilton County Court of Common Pleas, 570 N.E.2d 1101, 1103 (Ohio 1991) (respondents arguing that restriction to juror access only enforces an expressed desire not to talk to the press).

[231] *See id.*

[232] *See* Press Enterprise Co. v. Superior Court, 464 U.S. 501, 509 (1984).

[233] *See Globe*, 920 F.2d at 94; *see also Public Disclosures, supra* note 15 at 886; Richmond Newspapers v. Virginia, 448 U.S. 555 (1980).

[234] *Globe*, 920 F.2d at 97 n.9. *Cf. Doherty*, 675 F. Supp. at 724 (opining that defendant's rights at this point are still "vitally implicated"); *Sherman*, 581 F.2d at 1361.

[235] *See* Clark v. United States, 289 U.S. 1, 13 (1933).

[236] *See British Law, supra* note 223, at D15.

[237] *Id.*; *see Harrelson*, 713 F.2d at 1118 (upholding ban on inquiry into specific votes of other jurors).

[238] United States v. Gurney, 558 F.2d 1202 (5th Cir. 1977).

Harrelson.[239] The trial judge could explicitly instruct the jurors *before* the trial or before they retire to deliberate (or at both junctures) that their deliberations are theirs and theirs alone, and that their opinions and votes will not be made public; that they are to deliberate as a body and deliver a verdict as such.[240] The right to privacy necessitates more serious consideration because of Sixth Amendment implications.

Issuing such an assurance would work well when combined with the sort of judicial admonition used in *Doherty*,[241] where the judge "counseled" but could not order that discharged jurors refrain from discussing their verdict with anyone.[242] A law similar to the Contempt of Court Act[243] would allow for such an order, at least toward the prevention of revealing another juror's vote.[244] The judge has considerable influence over the jury in the trial process and in most cases, jurors obey the instructions of the court.[245] Therefore, it is appropriate for the judge to use his influence in requesting that jurors refrain from discussing their verdicts. Indeed, this may be all that is permissible under the case law.

The waiting period implemented in *Doherty* is also appealing in those highly publicized trials where the jury is particularly subject to harassment.[246] If a case is so highly charged that the press feels a special need to gain access to the jurors, then it surely can wait a

---

[239] *Harrelson*, 713 F.2d at 1114.

[240] A jury instruction similar to the post-trial *Globe* charge would be appropriate in this situation. *See Globe*, 920 F.2d at 90 ("[I]t is best that the result of your deliberations should remain in confidence.").

[241] *See Doherty*, 675 F. Supp. at 724.

[242] *Id.*

[243] *See British Law*, *supra* note 223 and accompanying text.

[244] *Id.*

[245] *See* Robert L. Raskopf, *A First Amendment Right of Access to a Juror's Identity: Toward a Fuller Understanding of the Jury's Deliberative Process*, 17 PEPP. L. REV. 357 (1990) (arguing that judicial admonitions to departing jurors not to discuss specific votes or positions of others have been "largely successful"); Rita J. Simon, *Does the Court's Decision in* Nebraska Press Association *Fit the Research Evidence on the Impact on Jurors of News Coverage?*, 29 STAN. L. REV. 515, 523 (1977) (arguing that results of a study showed that jurors take judicial admonitions seriously).

[246] The Hinckley case, *supra* note 28, again provides an example. The heavy and noisome coverage was so bad that at one point, several jurors temporarily moved out of their homes. Beach, *supra note 30*, at 42; *see* Aaron, *supra* note 28 at 206.

week before having the chance for the interview.[247] The reasons for allowing press access are "no less advanced" by the wait.[248] The public still gets to see that the verdict was rendered by twelve members of the community and impartiality will not appear to be compromised after seven days.[249] Also, the "community therapeutic value"[250] is the same.

Along with the proposed law that discharged jurors should not discuss their fellow jurors' votes or the reasons for arriving at a particular verdict, and in addition to the proposed admonitions, judges should implement any or all of the procedures discussed in the cases. When reminding the jury of the law, the judge should remind the jury of their right not to speak, their right to contact the court should any media personnel harass them, and the reasons why it is undesirable to betray the secrecy of the jury room.[251] The combination of all of these factors may help to ensure the Sixth Amendment right to a fair trial and may also help the jurors receive as much from their jury service as they contribute.

VIII. Conclusion

It is recognized that an open trial process is historically and constitutionally mandated. However, it is not entirely clear under the case law what aspects of the jury process are open to the media as the Supreme Court has never directly addressed these conflicts in a post-verdict setting. It is apparent that, absent a compelling interest, absolute bans on post-verdict juror name release and juror contact are prohibited. However, in balancing the interests, more weight should be given to the integrity and finality of the verdict, the privacy rights of jurors, and the defendant's right to a fair trial. While the trial judge should be given broad discretion to implement a waiting period or strongly admonish the jury not to discuss their verdict, legislatures at both the federal and state levels should consider a law which would

---

[247] *Doherty*, 675 F. Supp. at 725.

[248] *Id.*

[249] *See id.* at 725.

[250] *See Richmond Newspapers*, 448 U.S. at 570.

[251] *See, e.g.*, Sharp, *supra* note 24, at 6.

also prevent any juror from discussing the specific vote of one of his fellow jurors or from discussing another juror's logic in deliberation. The combination of the above may help strike the proper balance between these competing interests.

Judge Politan eventually released the names of the jurors in the *Antar* case but in so doing, used his discretion to impose narrowly tailored restrictions upon the questions permitted to be asked of the jurors.[252] The court directed that no person was to inquire into "the specific vote, statement, opinion, thoughts, or other comments of any juror during deliberations other than the juror being interviewed."[253] The court also sent a letter to each juror advising them that they have no obligation to speak to the press, but that they were free to do so should they choose.[254] Judge Politan further reminded the jury of the historical secrecy of deliberations, calling it a "hallmark of the jury system"[255] and suggested to them that they "respect the privacy of the jury room."[256] The court remained skeptical of the First Amendment arguments presented by the press:

> It is naive to blindly acknowledge or adopt the unfettered First Amendment freedoms espoused by the press to support its assertion of a right to invade the secret deliberations of the jury room. The fact is, and courts should candidly recognize it, that the invasion of the jury system by the press is only, and I repeat only, designed to sell newspapers.[257]

Certainly jurors are "citizen soldiers"[258]and "may be called upon to perform distasteful tasks."[259] It must be remembered, though, that real people pay a price and have to live with the consequences of their service. Justice demands that these soldiers be

---

[252] United States v. Antar, 839 F. Supp. 293, 305 (D.N.J. 1993).

[253] *Id.*

[254] *Id.* at 308.

[255] *Id.*

[256] *Id.*

[257] *Antar*, 839 F. Supp. at 297.

[258] *Globe*, 920 F.2d at 98.

[259] *Id.*

given the support that they deserve from the government that is sending them into battle.

Copernicus T. Gaza