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Christine J. Iversen

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COMMENTS

POST-VERDICT INTERVIEWS: THE KEY TO UNDERSTANDING THE DECISION BEHIND THE VERDICT

CHRISTINE J. IVERSEN*

Don't you think the public's entitled to know the unusual currents that are swirling amongst the jury panel? . . . Weren't you surprised when you asked people to be sequestered for six to eight months, and we had people volunteering?

*Judge Lance Ito*¹

INTRODUCTION

Millions of people throughout the world collectively held their breath for a few suspenseful seconds as the court clerk slowly announced the jury's verdict: a panel of nine African-Americans, two Caucasians and one Hispanic² found defendant Orenthal James Simpson "not guilty" of the stabbing deaths of his former wife Nicole Brown Simpson and Ronald Goldman.³ After the verdict, some of the jurors, surrounded by microphones, lights and news helicopters, met with the press to discuss their decision.⁴ Several jurors felt that the prosecution's evidence was simply not enough to convict beyond a reasonable doubt.⁵ One O.J. juror said that the

* J.D. Candidate, 1998.

1. 1 JAMES C. GOODALE, 1 COMMUNICATIONS LAW 28-29 (1995).

2. Vincent J. Schodolski, *Simpson Jurors: Police Lost Case; They Concluded That 'it was Garbage in, Garbage out' With Tainted Evidence From Police Who Lied*, CHI. TRIB., Oct. 5, 1995, § 1, at 1.

3. Nomi Morris, *Beyond The Verdict*, MACLEAN'S, Oct. 16, 1995, at 40.

4. Timothy Egan, *With Spotlight Shifted To Them, Some Simpson Jurors Talk Freely*, N.Y. TIMES, Oct. 5, 1995, at A1; See generally Schodolski, *supra* note 2 (noting that jurors spoke to the media after the verdict).

5. Morris, *supra* note 3, at 40. Several jurors stated that the jury was very skeptical of the scientific evidence, including the blood, because the jury believed the evidence to be tainted due to "sloppy handling." Schodolski, *supra* note 2. Another O.J. juror stated the panel's decision that Detective Mark Fuhrman, a witness for the prosecution, was a racist, and therefore not credible, was based upon a letter written to one of Simpson's attorneys. *Id.* This letter stated that the author of the letter repeatedly heard Fuhrman

prosecution had not met its burden of proof and she believed that O.J. had not actually killed Nicole.⁶ Another juror quoted the closing refrain of O.J. Simpson's defense lawyer, Johnnie Cochran: "In plain English, the gloves didn't fit."⁷

Several accounts reported very little "give-and-take" among the O.J. jurors the morning of their deliberations.⁸ Initially, the jurors took a straw poll during the beginning of their deliberations.⁹ Ten out of twelve jurors voted to acquit.¹⁰ According to one juror, one of the two members voting to convict O.J. was Caucasian, but the juror would not identify the dissenter.¹¹ Jurors from the O.J. Simpson criminal trial are not alone in their decision to speak out.

Today, jurors frequently discuss their collective decision with the public through the media.¹² Jurors from the trials for the beating of Reginald Denny¹³ and Rodney King;¹⁴ and from the trials of Lorena Bobbit,¹⁵ the Menendez brothers¹⁶ and John Hinckley, Jr.¹⁷ have publicly appeared on both local and national television shows such as *Good Morning America*¹⁸ and *The Oprah Winfrey Show*.¹⁹

make racist comments regarding African-Americans. *Id.*

6. Egan, *supra* note 4.

7. Morris, *supra* note 3, at 41; *see also* Schodolski, *supra* note 2 (stating that the O.J. jurors did not accept the prosecution's claim that Simpson's violence against his former wife was sufficient evidence of motive because the last documented incidents of abuse occurred so long ago).

8. Egan, *supra* note 4.

9. *Id.*

10. *Id.*

11. *Id.*

12. Kenneth B. Nunn, *When Juries Meet The Press: Rethinking the Jury's Representative Function in Highly Publicized Cases*, 22 HASTINGS CONST. L.Q. 405, 406 (1995).

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 407; *see also* Kenneth B. Noble, *Menendez Brothers Found Guilty Of Killing Their Parents in 1989*, N.Y. TIMES, Mar. 21, 1996, at A1 (stating that during "print and television interviews after the first trial," each brother's jury indicated that they "could not choose between a [first-degree] murder and manslaughter verdict[]" because the jury questioned "how seriously the brothers had been abused and the extent to which that abuse justified their actions.").

17. Daniel Aaron, *The First Amendment and Post-Verdict Interviews*, 20 COLUM. J.L. & SOC. PROBS. 203, 203 (1986); *see also* VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 183 (1987). According to the authors, because of the unpopularity of the jury's verdict (not guilty by reason of insanity), many jurors felt the need to defend themselves and subsequently spoke to the media. *Id.* at 183. Others, in an unprecedented move, volunteered to testify before a Senate Subcommittee about their views of the insanity defense. *Id.*

18. Abraham Goldstein, *Jury Secrecy And The Media: The Problem of Post Verdict Interviews*, 1993 U. ILL. L. REV. 295, 295 (1993).

19. Morris, *supra* note 3, at 41.

Jurors have also spoken on syndicated radio programs²⁰ and many have even held personal news conferences.²¹

The United States Supreme Court has yet to address the issue of whether the press has a First Amendment²² right of access to jurors' names and addresses after a verdict.²³ As a result, courts are unsure of whether the press' newsgathering right under the First Amendment is broad enough to encompass post-verdict access to jurors. Some courts are wary of recognizing this post-verdict access as a First Amendment right because of other important interests that clash with the press' newsgathering interest.²⁴ Two of the courts' main concerns include the accused's Sixth Amendment right to a fair trial²⁵ and the concern for the individual juror's right to privacy.²⁶ Some courts, after balancing these interests against the press' right of access, hold that the press has a right of access to the names and addresses of jurors after a verdict.²⁷ Other courts, unconvinced that the press has a First Amendment right of post-verdict access, hold that the press has no right to speak to the jurors after the verdict.²⁸

20. *Two Simpson Jurors Cite a Lack of Proof*, N.Y. TIMES, Oct. 19, 1995, at A19.

21. Egan, *supra* note 4.

22. The First Amendment provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." U.S. CONST. amend. I.

23. See Aaron, *supra* note 17, at 204 (noting that federal courts have begun addressing the issue of media access to juror information).

24. *In re Globe Newspaper Co.*, 920 F.2d 88, 91 (1st Cir. 1990); *United States v. Harrelson*, 713 F.2d 1114, 1118 (5th Cir. 1983); *United States v. Sherman*, 581 F.2d 1358, 1361 (9th Cir. 1978); *United States v. Doherty*, 675 F. Supp. 719, 723-24 (D. Mass. 1987).

25. The Sixth Amendment 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; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory processes for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

U.S. CONST. amend. VI.

26. *Doherty*, 675 F. Supp. at 721.

27. *Globe Newspaper Co.*, 920 F.2d at 98; *In re Express-News Corp.*, 695 F.2d 807, 811 (5th Cir. 1982); *Sherman*, 581 F.2d at 1361.

28. *Harrelson*, 713 F.2d at 1118; 1 GOODALE, *supra* note 1, at 26-27. Goodale explains the reasoning behind the court's decision in *Michigan v. Mitchell*, No. 95-3822-FC (July 10, 1995). *Id.* at 26. "After the jury returned guilty verdicts" in the much-publicized "Ann Arbor serial rapist" trial, the court refused to disclose juror names and addresses. *Id.* The court stated its decision for non-disclosure was "to prevent harassment" and "to protect juror privacy." *Id.* However, the court failed to cite any "evidence of actual or threatened harassment." *Id.* at 26-27. The court stated that "the need for [juror] privacy . . . is real, and . . . the media's seemingly insatiable demand for unlimited intrusions into these citizens' lives must finally give way." *Id.*

This Comment addresses the issue of whether the press has a First Amendment right of access to jurors after a verdict, and if so, what ramifications arise from the implication of First Amendment protection. Part I sets forth the history of the press' First Amendment right of access to criminal proceedings and explores recent cases involving the question of post-verdict access. Part II discusses the reasons some courts are wary of recognizing the press' First Amendment right of post-verdict access. Finally, Part III suggests a policy that enables courts to impound juror names and addresses for a specific period after the verdict. This policy reconciles the courts' concerns surrounding post-verdict interviews with protecting the press' guaranteed First Amendment right.

I. HISTORY: "EXTRA! EXTRA!" NEWSGATHERING RIGHTS EXPANDED

In the 1972 case *Branzburg v. Hayes*,²⁹ the United States Supreme Court recognized a protected First Amendment right in newsgathering.³⁰ Since then, the Court has gradually expanded this newsgathering right to include most aspects of the criminal trial; however, the Court has yet to address the specific question of post-verdict interviews.³¹ Without guidelines to follow when deciding the issue of whether the press has a right to post-verdict access, courts struggle to balance the clashing interests in hopes of finding a satisfactory middle ground for all of the parties involved. Section A examines the history of the press' right of access as set forth by the U.S. Supreme Court.

A. *First Amendment Expansion to Criminal Trials: Richmond Newspapers, Inc. v. Virginia*

In *Richmond Newspapers, Inc. v. Virginia*,³² the Supreme Court added substance to the press' newsgathering right by extending an explicit right of access to criminal trials for the first time.³³ The Court, in a plurality opinion, reasoned that both the press and the public have a protected First Amendment right to

at 27.

29. 408 U.S. 665 (1972).

30. *Id.* at 681. The *Branzburg* Court stated, "[w]e do not question the significance of free speech, press or assembly to the country's welfare. Nor is it suggested that newsgathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated." *Id.*

31. See generally Aaron, *supra* note 17, at 222-27 (discussing the extension of press access to voir dire, cases involving sexual misconduct with a minor and to trial proceedings in general). In the cases following the *Branzburg* decision, "the press attempted to use the first amendment right of access as a sword to obtain information." *Id.* at 219.

32. 448 U.S. 555 (1980).

33. *Id.* at 573.

attend criminal trials.³⁴ The *Richmond Newspapers* Court's decision relied on historical practice³⁵ and logical deduction.³⁶ The Court "focus[ed] on the effect that the trial might have on the public rather than on the effect the public might have on the trial."³⁷

The *Richmond Newspapers* Court set forth "three objective reasons why criminal trials should be opened" to the public.³⁸ The first reason for openness is to protect the accused from "oppression," and to reinforce the public's perception of judicial fairness.³⁹ The second reason is to "provid[e] an outlet for community concern, hostility and emotion."⁴⁰ Finally, the third reason is to inform the community about the justice system in general.⁴¹

In discussing the First Amendment right of access, the *Richmond Newspapers* Court noted, "any privilege of access to government information is subject to a degree of restraint dictated by the nature of the information and countervailing interests in security or confidentiality."⁴² The Court stated that the right to gather information must be weighed according to the information sought and the opposing interests invaded.⁴³ The *Richmond Newspapers* Court set forth a two-prong test to determine whether a First Amendment right of access exists.⁴⁴ The first prong consists of exploring the history and tradition of public access to the informa-

34. *Id.* at 580.

35. *Id.* at 569. The *Richmond Newspapers* Court stated that the openness of the criminal trial has long been recognized as "an indispensable attribute of an Anglo-American trial." *Id.*

36. Nunn, *supra* note 12, at 419.

37. *Id.*

38. *Id.*

39. *Id.* (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571 (1980)). In *Press-Enterprise Co. v. Superior Court*, the Supreme Court stated:

The open trial thus plays as important a role in the administration of justice today as it did for centuries before our separation from England. The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.

464 U.S. 501, 508 (1980) (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569-71 (1984)).

40. *Richmond Newspapers*, 448 U.S. at 571. The *Richmond Newspapers* Court stated that an open public trial allows public outrage in response to criminal conduct to be manifested in a form of "self-help." *Id.*

41. Nunn, *supra* note 12, at 420. The *Richmond Newspapers* Court proclaimed, "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers*, 448 U.S. at 572.

42. *Richmond Newspapers*, 448 U.S. at 586.

43. *Id.* at 588.

44. *Id.* at 588-89.

tion.⁴⁵ The second prong consists of determining "whether the access to a particular government process is important in terms of that very process."⁴⁶ Using this two-prong test, the *Richmond Newspapers* Court held that the First Amendment guarantees the press' right to attend criminal trials based upon the tradition of openness and the important contributions of public understanding that an open trial creates.⁴⁷

The Supreme Court has used the *Richmond Newspapers* two-prong-right-of-access test and variants of the test over the years to expand the newsgathering right to almost all aspects of the criminal trial. In *Press-Enterprise v. Superior Court*⁴⁸ (*Press-Enterprise I*) the Court narrowed the *Richmond Newspapers* test slightly to enable the media to attend the voir dire examination of potential jurors.⁴⁹ The *Press-Enterprise I* Court stated that only an "overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest" can overcome the presumption of openness.⁵⁰

In another case involving the *Press-Enterprise Co.*, the Court held that First Amendment newsgathering rights include the right

45. *Id.* at 589. The *Richmond Newspapers* Court stated that the tradition of accessibility to the information or the proceeding implies the continued practice of openness. *Id.*

46. *Id.*

47. *Id.* at 573; see also *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982). In *Globe Newspaper*, the Supreme Court determined that a statute excluding the press and the general public from proceedings involving specified sexual offenses against a victim under the age of 18 violated the First Amendment newsgathering right. *Id.* at 598. The *Globe Newspaper* Court applied the two-prong access test it had set forth in *Richmond Newspapers*. *Id.* at 605. The Court first recognized the historical openness of the criminal trial. *Id.* The Court also recognized that significant role the right of access to criminal proceedings has on the judicial process as a whole. *Id.* at 606. The *Globe* Court then set forth a more "narrow" test to use when courts deny the right of access in order to inhibit the disclosure of sensitive information. *Id.* The Court stated that courts must necessitate this denial of access by a "compelling government interest and [one that] is narrowly tailored to serve that interest." *Id.* at 607. Using this test, the *Globe* Court stated that safeguarding the well-being of a minor does not meet the "compelling interest test" so as to justify mandatory closure to the proceedings. *Id.* at 608. The *Globe* Court held that the statute restricting public access to the proceedings violated the First Amendment guarantee as it failed to meet the test. *Id.* at 610-11.

48. 464 U.S. 501 (1984).

49. *Id.* at 513.

50. *Id.* at 510-11. The *Press-Enterprise I* Court reviewed the history of the juror selection process and noted that the process has a presumption of openness with exceptions only for "good cause shown." *Id.* at 509. The *Press-Enterprise I* Court also stated that the interest must be "articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Id.*

to obtain information from a transcript of a preliminary hearing.⁵¹ In *Press-Enterprise Co. v. Superior Court (Press-Enterprise II)*, the Court reviewed the two-prong test and determined that the press' First Amendment protection extends to preliminary hearing transcripts.⁵² The *Press-Enterprise II* Court, considering the "experience and logic"⁵³ of access to criminal proceedings, held that a First Amendment right of access attaches to these transcripts.⁵⁴

Although the United States Supreme Court has set out a two-prong test to determine whether a right of access exists, courts do not always apply this standard when deciding the post-verdict access question. Some courts use this test,⁵⁵ others use a modified version of this test,⁵⁶ and still others simply fail to apply the two-prong test at all.⁵⁷ The next Section explores and analyzes the different post-verdict cases and the assorted standards the courts applied when the question of post-verdict access arose in their courtrooms.

B. First Amendment Expansion to Post-Verdict Access: United States v. Sherman

In *United States v. Sherman*,⁵⁸ the United States Court of Appeals for the Ninth Circuit expanded, for the first time, the First Amendment newsgathering right to encompass post-verdict access to jurors.⁵⁹ The Ninth Circuit held that a district court's order prohibiting anyone, including the news media, from interviewing the jurors was an unconstitutional violation of a protected right.⁶⁰ In *Sherman*, the district court found two members of the George Jackson Brigade, an organization intent on destroying the government, guilty of armed bank robbery.⁶¹ The Brigade received much attention because it claimed responsibility for several rob-

51. *Press-Enterprise Co. v. Superior Court of Cal.*, 478 U.S. 1, 10 (1986).

52. *Id.* at 10-13.

53. *Id.* at 8, 9. The *Press-Enterprise II* Court reviewed the history of the traditional openness of jury trials and the selection of jurors. *Id.* The *Press-Enterprise II* Court noted that access to preliminary hearing transcripts keeps the public informed and this is an important role in society. *Id.* at 12-13.

54. *Id.* The *Press-Enterprise II* Court stated, however, that the First Amendment right of public access is not an absolute privilege. *Id.* at 9. The Court reiterated that "the trial court must determine whether . . . the rights of the accused [should] override the qualified First Amendment right of access. *Id.*

55. *United States v. Butt*, 753 F. Supp. 44, 45 (D. Mass. 1990); *United States v. Doherty*, 675 F. Supp. 719, 722-23 (D. Mass. 1987).

56. *In re Globe Newspaper Co.*, 920 F.2d 88, 97 (1st Cir. 1990); *In re Express-News Corp.*, 695 F.2d 807, 810 (5th Cir. 1982).

57. *United States v. Antar*, 38 F.3d 1348, 1352 (3d Cir. 1994).

58. 581 F.2d 1358 (9th Cir. 1978).

59. *Id.* at 1359-61.

60. *Id.*

61. *Id.* at 1359.

beries and bombings in the Seattle area.⁶² The Seattle news media covered the trial extensively.⁶³ After the verdict, the district court forbade the jurors from discussing the case with anyone, assured the jurors protection from harassment and ordered everyone, including the news media, to distance themselves from the jurors.⁶⁴

The press appealed the decision to the Ninth Circuit. On appeal, the government made three arguments defending the district court's decision. First, the government argued that allowing the press post-verdict access to the jurors would deprive the defendants of a fair trial.⁶⁵ Second, the government declared that allowing the press post-verdict access to the jurors would prevent them from serving on future jury panels.⁶⁶ Finally, the government asserted that the jurors needed protection from the press' post-verdict access for harassment reasons.⁶⁷

All three arguments failed to meet the heavy burden necessary to sustain the order.⁶⁸ The Ninth Circuit considered the "free press-fair trial" issue inapplicable since the trial had ended.⁶⁹ The court of appeals also concluded the inability of jurors to serve on future juries was not such a serious or imminent threat to justify prior restraint.⁷⁰ Finally, the Ninth Circuit did not recognize the jury's need of protection from harassment as a clear and present danger.⁷¹ Viewing the order as "too broad" and clearly erroneous as a matter of law,⁷² the court of appeals issued the press' writ of mandamus.⁷³ The next Section discusses how one Circuit Court overcame the overbreadth problem by adopting a "narrowly tai-

62. *Id.*

63. *Id.* at 1360.

64. *Id.* The Seattle Times "attempted to persuade the [court] to modify or retract [its] order." *Id.* After failing in their attempt, the Seattle Times "filed a notice of appeal, and in the alternative, petitioned for a writ of mandamus" with the *Sherman* court. *Id.* Since the district court's order "clearly restrained the media in their attempts to gather news," which is "an activity protected by the First Amendment," the government's burden was a heavy one. *Id.* at 1361. In order to sustain the burden, the government needed to show that the restrained activity posed a "clear and present danger or a serious and imminent threat to a protected competing interest". *Id.* Also, the restraint needed to be narrowly drawn and "no reasonable alternatives, having a lesser impact on First Amendment freedoms, must [have been] available." *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 1361. The *Sherman* court also stated that there were reasonable alternatives available, such as excusing the jurors from further service, which would have had a lesser impact on First Amendment freedoms. *Id.*

71. *Id.*

72. *Id.* at 1361-62.

73. *Id.* at 1362.

lored" standard when reviewing restrictions on the media's right to gather news.

C. *Application of the "Narrowly Tailored" Test:* *In re Express-News Corporation*

Almost four years after *Sherman*, the Court of Appeals for the Fifth Circuit faced another challenge on barring post-verdict interviews in *In re Express-News Corp.*⁷⁴ Here, a jury convicted two defendants of transporting and conspiracy to transport illegal aliens.⁷⁵ Pursuant to a local court rule, the trial court imposed restrictions on the press' access to jurors.⁷⁶ Petitioning the Fifth Circuit for a writ of mandamus, Express-News argued that the district court's rule violated its constitutional right to gather news.⁷⁷ The Fifth Circuit, while recognizing that the right to gather news is not absolute,⁷⁸ held that the media's right to gather news can only be restricted by a narrowly tailored court rule preventing a substantive threat to the administration of justice.⁷⁹

Applying this test, the appeals court found that the district court's local rule restricted the freedom of the press to gather news and the freedom of those jurors who wanted to talk about their service.⁸⁰ The local rule also forbade all types of communication with the jurors and was unlimited in time and scope.⁸¹ The Fifth Circuit held that a court may not impose such a broad restraint, one which requires "those who would speak freely to justify special treatment by carrying the burden of showing 'good cause.'"⁸² The court furthermore held that the First Amendment right to gather news is "good cause,"⁸³ and if they choose to do so, jurors are free to discuss their service.⁸⁴ The Fifth Circuit then declared Local Rule 500-2 unconstitutional because without any showing that the restriction was necessary, the rule restricted the press' right to gather news.⁸⁵ In another circuit, the court's focus shifted to ana-

74. 695 F.2d 807 (5th Cir. 1982).

75. *Id.* at 808.

76. *Id.* "Local Rule 500-2 of the Western District provides that no person shall 'interview . . . any juror, relative, friend or associate thereof . . . with respect to the deliberations or verdict of the jury in any action, except on leave of court granted upon good cause shown.'" *Id.* A reporter for the Express-News Corporation filed a motion to vacate the restriction prohibiting interviews of the jurors, which was denied. *Id.*

77. *Id.*

78. *Id.* at 809.

79. *Id.* at 810.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 811; see *Journal Publ'g Co. v. E.L. Mechem*, 801 F.2d 1233, 1236-37 (10th Cir. 1986) (holding that lower court's press restrictions were imper-

missibly overbroad). In *Journal Publishing*, district judge E.L. Mechem admonished the jurors at the close of a controversial trial by stating:

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.

Id. at 1235.

Journal Publishing requested the trial court to change or abrogate its order, but the trial court refused. *Id.* *Journal Publishing* then filed a motion for leave to interview the jurors, and when denied, *Journal Publishing* consequently petitioned the *Journal* court for a writ of mandamus. *Id.* The *Journal Publishing* court first reviewed the history of protecting dismissed jurors from attorneys and parties interested in casting doubt on the verdict. *Id.* at 1236. Subsequently, the *Journal Publishing* court recognized that a court "does not have the same freedom to restrict" the press' access to jurors as it does with respect to attorneys or interested parties because the press "has less incentive to upset [the] verdict." *Id.* The court found that the trial court's order included "every possible juror interview situation" without any time or scope limitations. *Id.* Since the trial court's order was "impermissibly overbroad," the *Journal* court granted *Journal Publishing's* petition. *Id.* at 1236-37.

See also *Ohio ex rel. Cincinnati Post v. Court of Common Pleas*, 570 N.E.2d 1101 (Ohio 1991). In this case, the press "challenged the constitutionality of a trial court's post-verdict order that 'no one is to talk to the jurors about the case, and the jurors aren't to talk to anybody about it.'" *Id.* at 1102. The *Cincinnati Post* court stated that the trial court's order was "too broad" and not "narrowly focus[ed]". *Id.* at 1104. The Ohio Supreme Court held that "the order issued . . . violate[d] the First Amendment" right of the press and allowed a writ of prohibition. *Id.* at 1105.

Cf. *United States v. Edwards*, 823 F.2d 111 (5th Cir. 1987). This case was the second trial in which the governor and his co-defendants were charged with racketeering and bribery. *Id.* at 113. The first trial, which generated much publicity, ended in a mistrial when the jury could not reach a unanimous decision. *Id.* Rumors that the jurors were bribed tainted the first trial. *Id.* During the course of the second trial, jury misconduct was alleged; one juror spoke of bribery and another juror was under the impression that one of the defendants was offering bribes. *Id.* The district court ordered closed questioning of these jurors, sealed the record, imposed a ban on public comments of the proceedings and permanently sealed portions of the record, including juror names and addresses. *Id.* at 113-14. On appeal, the Fifth Circuit held that "no presumption of openness" attached to this type of proceeding. *Id.* at 117. The court also held that "the First Amendment guarantees a limited right of access to the record of closed proceedings concerning potential jury misconduct." *Id.* at 118. The Fifth Circuit stated that if a trial court denied post-trial disclosure of a requested transcript, the court must make specific its reasoning and demonstrate a "substantial probability that higher values will be prejudiced and that reasonable alternatives cannot adequately protect those values." *Id.* at 119. The court stated that the interest in maintaining the juries impartiality was "paramount." *Id.* Therefore, the court held that the district court made no error by refusing to release juror names with the transcript, as the transcript themselves would reveal "the substance . . . of the issues." *Id.* at 120.

See also *United States v. Franklin*, 546 F. Supp. 1133, 1145 (N.D. Ind. 1982) (concluding that a court's order, which enjoined all trial participants and others from interrogating both the alternate and paneled jurors, 'may arguably' have conflicted with rights protected by the First Amendment, and

lyzing the justifications for prohibiting press access to jurors.

D. *Application of the "Interests-of-Justice" Standard: In re Globe Newspaper Company*

A battle between the press and a district court's order denying post-verdict access to names and addresses of jurors occurred in *In*

thus resulting in a new order). *But see* *United States v. Harrelson*, 713 F.2d 1114 (5th Cir. 1983). In *Harrelson*, a jury found three defendants "guilty of various acts and conspiracies" regarding a United States district judge's murder. *Id.* at 1115. Pursuant to Local Rule 500-2, the district court admonished prohibited everyone from questioning any juror. *Id.* The press filed a motion requesting that the district court vacate enforcement of the rule, which the court denied. *Id.* During this time, the Fifth Circuit in *In Re Express-News Corp.* held that the local rule was unconstitutional. *Id.* at 1115. In response to the *Express-News* court's holding, the press filed a Motion to Vacate Memorandum Opinion and Order in the district court. *Id.* at 1115-16. The district court denied the motion, reasoning that the *Express* Court's "decision was not yet final." *Id.* at 1116. When the *Express* court issued the mandate in *Express* and the decision was final, the district court partially sustained the press' second motion to vacate the court's order restricting interviews with former jurors. *Id.* The district court's order, however, imposed four restrictions on post-verdict interviews:

1. No juror has any obligation to speak to any person about this case, and may refuse all interviews or comment.
2. No person may make repeated requests for interviews or questioning after a juror has expressed his or her desire not to be interviewed.
3. No interviewer may inquire into the specific vote of any juror other than the juror being interviewed.
4. No interview may take place until each juror in this case has received a copy of this order, mailed simultaneously with the entry of this order.

Id.

On appeal, the press focused on restrictions two and three. *Id.* The press maintained that the court's order restrained them but not others. *Id.* at 1116. The *Harrelson* court did not agree, stating that the language of the order was broad enough to include everyone, not just the press. *Id.* at 1117. The press also argued that the no finding of substantial threat to the administration of justice had been made prior to the court's order. *Id.* The *Harrelson* court disagreed. *Id.* The court stated that the judge is the "governor for the purpose of insuring its [the jury trial's] proper conduct." *Id.* A hearing was unnecessary, as it was obvious the trial was a widely publicized one, and the district court's order could be supported without such a proceeding. *Id.* The *Harrelson* court held that the ban on repeated requests for interviews was a fair restriction as the jurors "are entitled to privacy and protection against harassment," even after the jurors completed their service. *Id.* at 1118 (citing *In re Express-News Corp.*, 695 F.2d 807, 810 (5th Cir. 1982)). The *Harrelson* court concluded that the ban was well within the district court's discretion and the press enjoys no special access right to matters not available to the general public. *Id.* The *Harrelson* court denied mandamus and affirmed the district court's order. *Id.*; *see also* *Newsday, Inc. v. Sise*, 518 N.E.2d 930, 933 (N.Y. 1987) (holding that juror names and addresses obtained from juror qualification questionnaires, which are protected from disclosure by Judiciary Law section 509(a), may not be revealed).

re *Globe Newspaper Co.*⁸⁶ In *Globe Newspaper*, a jury convicted two defendants of conspiracy to conceal illegal drug profits from the Internal Revenue Service.⁸⁷ The district court kept the records listing the names and addresses of the jurors confidential during the trial.⁸⁸ Immediately after the verdict and the jury's discharge, the district court advised the jurors that the press may contact them. The court also suggested that the jurors keep the results of their deliberations secret.⁸⁹ In interpreting section 10(c) of the District of Massachusetts Plan for Random Selection of Jurors, the First Circuit found that the district court must make jury information available, unless the presiding judge points out specific valid reasons for denying access.⁹⁰ To justify impoundment after a verdict, a court must find a "significant threat to the judicial process itself."⁹¹ The First Circuit stated that, but for the jurors own preferences and the district court's distaste for exposing them to the media, the district court did not identify any special reason for denying access to the press.⁹² Although the First Circuit recognized the district court's concern that the press would specifically question the jurors about their deliberations, the First Circuit noted that this possibility could not justify withholding juror identities.⁹³ The court held that because the district court's reasons for withholding juror identities failed to meet the interests-of-justice standard,⁹⁴ the district court must make juror names and ad-

86. 920 F.2d 88, 90 (1st Cir. 1990).

87. *Id.* at 90.

88. *Id.*

89. *Id.* The court stated:

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.

Id.

Reporters sought access to the jurors names and addresses the day of the verdict and were refused. *Id.* The *Globe's* motion to intervene and to obtain the list of jurors was also denied by the district court. *Id.* at 90. The *Globe* then filed an appeal and petitioned for a writ of mandamus with the *Globe* court. *Id.*

90. *Id.* at 91.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 98. The court stated that "we construe the interests-of-justice standard as requiring that the trial court find specific and convincing reasons why, in the particular case, the juror identities are required to be withheld." *Id.* at 93. The court also noted the Supreme Court's narrowing of the interests-of-justice standard: "It is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question." *Id.* (citing *Gomez v. United States*, 490 U.S. 858 (1989)).

dresses available to the public.⁹⁵ Three years before *Globe Newspaper*, one district court attempted to reconcile the many competing interests.

E. *Use of the "Right Of Access" Test: United States v. Doherty*

In *United States v. Doherty*,⁹⁶ the district court held that the best way to balance the competing interests between the press, the accused and the jurors was to impound juror identities for a specific time period after the rendering of a verdict.⁹⁷ In *Doherty*, a jury returned a guilty verdict in a seventeen-week trial against several defendants.⁹⁸ The district court impounded the juror names and addresses during the selection process and throughout the trial.⁹⁹ Although their service was complete and they were free to discuss the case, the court suggested to the jurors that the actual deliberation process remain confidential.¹⁰⁰ Two newspapers seeking access to the discharged jury members sought to have the impoundment of the jurors' names and addresses lifted immediately.¹⁰¹ The court weighed the press' right to gather news against the right of the accused to receive a fair trial, the safeguarding of the jury system and the protection of the jurors themselves.¹⁰²

First, the court recognized that the press' First Amendment right encompasses the right of public access to jurors and concluded that the public has a general right to juror access sometime after the delivery of the verdict.¹⁰³ Additionally, the court bal-

95. *Id.* at 98. The court refused to entertain *Globe's* appeal from denial of the trial judge's order because *Globe* was never a party to the criminal proceeding below. *Id.* at 90. The First Circuit also withheld the actual issuance of the writ of mandamus as the court was confident the district court would comply with its directions. *Id.* at 98.

96. 675 F. Supp. 719 (D. Mass. 1987).

97. *Id.* at 724-25.

98. *Id.* at 720.

99. *Id.*

100. *Id.* at 721. After discharge, the jurors described to the court "their unanimous desire not to have their names and home addresses disclosed to the press." *Id.*

101. *Id.*

102. *Id.* at 723-24.

103. *United States v. Doherty*, 675 F. Supp. 719, 723 (D. Mass. 1987). The court stated:

It is important for the public to receive information about the operation of the administration of justice, including information about the actual people who do render justice in the truest sense of the word. Access to information not only serves the cause of justice generally by providing an independent, non-governmental verification of the utter impartiality of the process involved in selecting jurors and shielding them from improper influences, it also serves to enhance the operation of the jury system itself by educating the public as to their own duties and obligations should they be called for jury service.

Id.

anced the press' First Amendment right against the interests of the accused in receiving a fair trial, the judicial system in protecting the secrecy of jury deliberations and the individual jurors in maintaining their privacy.¹⁰⁴ The court held that it would lift its order of impoundment concealing the jurors' names and addresses seven days after the return of the verdict.¹⁰⁵ Thus, the court granted the motions of the press and lifted the impoundment order with limitations.¹⁰⁶

The preceding Part demonstrates that courts use different standards when answering the question of whether the press has a right of access to jurors after a verdict. Courts are wary of implying a First Amendment right of access to jurors because other im-

104. *Id.* at 724. The court reasoned that courts must maintain the integrity of the proceedings and not allow a possible "carnival atmosphere" to interfere with the accused's fair trial by an impartial jury. *Id.* at 723. The court also stated both the court and the State have an interest in protecting juror privacy, even after trial, to promote honesty in subsequent juries. *Id.* at 724.

105. *Id.* at 725. The court noted: "a postponement of one week will not injure the values to be furthered by a searching press inquiry into the lives of the jurors." *Id.* The seven day break allows jurors to return to their activities, while granting them a chance to reflect upon their service to determine whether or not they wish to speak to the press. *Id.*

See also *United States v. Butt*, 753 F. Supp. 44 (D. Mass. 1990). In *Butt*, a reporter sought the names and addresses of the jurors immediately following the return of a guilty verdict. *Id.* at 45. The court stated that while the press had every right to the jurors' names and addresses, delaying their disclosure was appropriate for this brief period. *Id.* The court reasoned that postponing the release of juror names and addresses would not injure the values served by the press. *Id.* Simultaneously, the seven day break allows each juror time to determine whether the juror will participate in any post-verdict interview. *Id.* at 46. The court held that "[l]ifting the impoundment order seven days after the return of a verdict thus accommodates all the relevant interests without the necessity of balancing one against the other." *Id.* at 46.

See also *Sullivan v. National Football League*, 839 F. Supp. 6 (D. Mass. 1993). In *Sullivan*, a well-publicized case, the Boston Herald sought access to jurors' names and addresses after the verdict was rendered. *Id.* at 7. The court sought to accommodate the promotion of the press' First Amendment values, while protecting the litigants' right to a fair trial and minimizing the invasion of the jurors' privacy. *Id.* The court held that revealing the juror names and addresses ten days after the return of a verdict would accommodate all three interests. *Id.* The court, applying the same reasoning as did the *Doherty* and the *Butt* courts, granted the press' motion to lift the access order ten days after the verdict. *Id.*

106. *Doherty*, 675 F. Supp. at 725-26. The court "stayed the motion to lift the impoundment until May 15, 1987" [seven days after verdict]; by this date, each juror would have received a copy of the court's order stating:

- 1) any juror may refuse any interview request of him or her;
- 2) should a juror indicate that he or she does not wish to be interviewed, no further inquiry or attempt to seek the interview from that juror will be permitted by that newsgathering organization;
- 3) no interview may take place until May 15, 1987, when each juror shall have received a copy of this courts order.

Id. at 725-26.

portant interests such as the interests of the accused and the privacy interests of jurors clash with the press' First Amendment right. These opposing interests weigh intensely upon a court and create heavy burdens when deciding the post-verdict access issue. Part II analyzes the concerns that courts consider when deciding whether post-verdict access is a constitutionally protected right.

II. ANALYSIS: THE HEAVY BURDENS UPON A COURT

When deciding whether the press has a protected right of access to jurors after a verdict, courts must consider other interests aside from the press' right to gather news. However, no two courts use the same tests or the same standards when weighing the opposing interest.¹⁰⁷ The *Doherty* court categorized the competing interests into three major conflicting groups representing the important issues at stake.¹⁰⁸ Those interests include the public's First Amendment right of access to criminal proceedings as advanced by the media, the concern for each juror's personal privacy¹⁰⁹ and the accused's Sixth Amendment right to a fair trial.¹¹⁰

The first Section discusses the concerns of courts regarding the suppression of free debate caused by allowing the media access to jurors after a verdict. The second Section considers the injuries to the jury system as a whole occasioned by media access to jurors. The third Section examines the concern regarding the individual members of a jury and the preservation of judicial integrity. The fourth Section explains the theory that post-verdict interviews may coerce a jury to follow "public opinion." The fifth Section explores the potential synergy between post-verdict interviews and "checkbox journalism." Finally, the sixth Section discusses the impact of post-verdict interviews on a criminal defendant's rights.

A. *The Concern that free Debate Will Be Stifled*

The United States Supreme Court has concluded that the First Amendment prevents the government from closing courtroom doors that have traditionally been open to the public.¹¹¹ Yet while criminal proceedings themselves are open to the public and the press, the jurors deliberate behind closed doors.¹¹² Those who oppose post-verdict interviews express concern that, although deliberations are closed to the public, jurors may feel threatened by the media's attention.¹¹³ Opponents of the interviews believe that jurors will be unable to engage in uninhibited discussions because

107. Aaron, *supra* note 17, at 213.

108. *Doherty*, 675 F. Supp. at 721.

109. *Id.*

110. *Id.*

111. Aaron, *supra* note 17, at 223.

112. *Id.* at 229.

113. *In re Globe Newspaper Co.*, 920 F.2d 88, 96-7 (1st Cir. 1990).

they fear the world will know of their positions.¹¹⁴ Opponents are also concerned that the press' access to jurors will stifle free debate, which is the basis of the decision-making process.¹¹⁵ The fol-

114. *Id.* The court in *Globe Newspaper* stated that it is undisputed that the secrecy of jury deliberations allow free, open and candid debate in reaching a decision. *Id.* at 94; Goldstein, *supra* note 18, at 296. In his article, Goldstein argues that although jurors are told before they retire that their deliberations will be conducted in secret and they are not to speak with anyone regarding the case, jurors now expect to be interviewed about their reasoning. *Id.* at 296-97; see also Robert Lloyd 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, 377 (1990) (noting that opponents argue that jurors will be unable to engage in uninhibited discussions if the press is allowed to conduct post-verdict interviews).

115. *United States v. Antar*, 38 F.3d 1348, 1355 (3d Cir. 1994). In *Antar*, the district court sealed the transcript of the jury voir dire after a fraud trial. *Id.* at 1350. The court weighed the historical practice of open recognition of juror identities against the compelling interest of protecting both the secrecy of jury deliberations and the jurors themselves. *Id.* Five months after the trial, the district court unsealed the voir dire transcripts but placed four restrictions on the press. *Id.* at 1354. The district court's limitations were:

- (1) [N]o juror [was] under any obligation to grant an interview nor may any juror be compelled to do so, . . .
- (2) [R]epeated requests of a juror for an interview [was] strictly prohibited, . . .
- (3) [O]nce a juror expresse[d] a desire to conclude an interview already in progress, that interviewer must immediately cease all questioning [and]
- (4) [N]o inquiry may be made into specific votes, statements, opinions or other comments of any juror during deliberations other than the juror being interviewed.

Id. at 1355.

The district court, in limiting the press, stated that "the restriction [] serve[s] to guard against a future juror's reluctance to openly share his or her opinions for fear that those opinions will be revealed by fellow jurors to all inquiring minds. *Id.* The district court, however, also made no attempt to hide its distaste for the media's interest in the post-verdict interviews by stating that the press' only purpose in conducting these interviews is to "[s]ell newspapers." *Id.* at 1354. Finally, the district court's opinion sets out a letter sent to each juror explaining that their names and addresses were going to be released, warning them that the press would likely be contacting them and suggesting that the jurors keep their deliberations confidential. *Id.* at 1355. This letter is the first of its kind ever issued by a federal court. Robert Rudolph, *Media Plea Fails to Halt Federal Judge's Letter Asking Jurors to Stay Mum Request in 'Crazy Eddie' Case Believed to be a First*, THE STAR LEDGER, Dec. 11, 1993, at B6.

On appeal, the press argued that the district court did not hold a hearing and failed to follow the *Press-Enterprise* test: a compelling need for such an order, no alternative to the restrictions, an order narrowly tailored to meet the compelling need and an order that is effective. Joseph A. Slobodzian, *Press Appeals Jury Restrictions*, 16 NAT'L L. J., Apr. 11, 1994, at A2. The *Antar* court reversed the district court's original sealing order and the second and third restrictions on juror contacts by the press. *Antar*, 38 F.3d at 1364. The court in *Antar* held that those restrictions were impermissible in the absence of findings by the trial court that harassment has occurred or was in-

lowing Section discusses the benefits derived from educating the public and exposing jury misunderstandings through the use of post-verdict interviews.

1. *The Benefits of Judicial System Education Via Post-Verdict Interviews*

While the suppression of free debate is cause for concern, access to jurors enhances the function of the jury system itself by educating the public as to the nature of jury duty.¹¹⁶ If courts allow the jury to communicate with the public through the media, people unfamiliar with the operation of the justice system gain knowledge of their own duties and obligations as a fact-finder in the judicial system.¹¹⁷ Moreover, by allowing the public, vis-à-vis the press, to access jurors, people not attending the trial can have confidence in the rendering of justice.¹¹⁸ Thus, the public gains assurance that the courts are conducting the proceedings fairly¹¹⁹ and the open-

tended. *Id.* The court reasoned that since the district court failed to set forth sufficient reasons to justify its restrictions on access to jurors, the restrictions could not be upheld. *Id.* The court easily affirmed the first restriction. *Id.* at 1364. The *Antar* court also upheld the fourth restriction, although it said it was "troubled" by the constraint. *Id.* The *Antar* court concluded that restrictions on post-verdict interviews must "reflect an impending threat of jury harassment rather than a generalized misgiving about the wisdom of such interviews. *Id.*

See also *United States v. Doherty*, 675 F. Supp. 719, 724 (D. Mass. 1987) (stating that the free flowing process of juror debates may be "chilled" if jurors think that a fellow juror may publicize the thoughts of others); Copernicus T. Gaza, *Getting Inside The Jury's Head: Media Access to Jurors After the Trial*, 12 N.Y.L. SCH. J. HUM. RTS. 311, 337 (1995) (noting that "public disclosure of deliberations serves to undermine the jury process itself"); *Public Disclosures of Jury Deliberations*, 96 HARV. L. REV. 886, 889-90 (1983) (stating that the decision-making process would be "crippled" without juror privacy).

116. *Doherty*, 675 F. Supp. at 723; Raskopf, *supra* note 114, at 371.

117. Nunn, *supra* note 12, at 428.

118. See *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 507 (1984) (stating that this open process gave assurance to those not in attendance that others are able to observe the proceedings); see also *Globe Newspaper*, 920 F.2d at 94 (stating "[k]nowledge of juror identities allows the public to verify the impartiality of key participants in the administration of justice, and thereby ensures fairness, the appearance of fairness and public confidence in that system"); *Antar*, 38 F.3d at 1360 (stating that the basis for the Supreme Court's protection of the media's rights is the media's crucial role of secondary representation); *Doherty*, 675 F. Supp. at 723 (noting the importance of the public's access to information regarding the function of the judicial system); Nunn, *supra* note 12, at 428 (discussing the benefits of educating others about the judicial system through post-verdict interviews); Raskopf, *supra* note 114, at 371 (stating that juror interviews shed light on what could be the most critical phase of the criminal trial).

119. See *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 13 (1986) (stressing the importance of the openness of the criminal trial, which is essential to public confidence in the institution); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982) (stating that when a trial is openly con-

ness has "community therapeutic value."¹²⁰ Citizens learn, through post-verdict interviews, how the judicial branch of the government functions.¹²¹ In turn, this induces confidence in the system by providing verification of the inner workings of the system.¹²² Public access to these procedures through the press¹²³ also serves as a check upon the judicial process.¹²⁴ In addition, post-verdict interviews benefit society by revealing jurors' interpretations of the evidence.

2. *The Benefit of Exposing Misunderstandings Within the Panel*

Post-verdict interviews expose misinterpretations or misunderstandings among jurors themselves¹²⁵ and provide insight into how a specific jury reached a particular decision.¹²⁶ Post-verdict interviews benefit the system by educating both judges and attorneys on how to simplify instructions¹²⁷ and improve the quality of the evidence and arguments.¹²⁸ Post-verdict interviews allow attorneys to discover the "real turning point" in the trial¹²⁹ and to critique their trial performance.¹³⁰ Increased communication between judges, attorneys and jurors also provides a valuable pool of information for gathering local, regional and national data dealing

ducted, society has an opportunity to understand the system both generally and specifically within a particular case); *In re Globe Newspaper Co.*, 920 F.2d 88, 94 (1st Cir. 1990) (declaring that information "obtained from the jurors themselves educates the public regarding the judicial system" and can shed light on its strengths, flaws and means to improve the system); Gaza, *supra* note 115, at 314 (noting that knowledge of the judicial preserves its "legitimacy").

120. *Press-Enterprise*, 464 U.S. at 508.

121. *Id.*; Aaron, *supra* note 17, at 230.

122. *Richmond Newspaper, Inc. v. Virginia*, 448 U.S. 555, 572 (1980); *Antar*, 38 F.3d at 1360; Raskopf, *supra* note 114, at 371.

123. *Antar*, 38 F.3d at 1360. The *Antar* court stated that true public access to a proceeding consists of knowledge of what occurred. *Id.* This knowledge comes from first-hand witnessing, and also learning about it through a secondary source. *Id.* This secondary source is the media, which "functions as a surrogate for the public." *Id.*

124. See *Globe Newspaper*, 457 U.S. at 606 (stating that our form of government necessitates this check upon the judicial process).

125. Goldstein, *supra* note 18, at 300-01; J. Stratton Shartel, *Judge Went too far in Limiting Press Access to Jurors*, INSIDE LITIG., Jan. 1994, at 2.

126. See Nunn, *supra* note 12, at 436 (stating post-verdict interviews reveal whether the jury collectively believed certain instructions were influencing or constraining during deliberations and which strategies used by the parties were effective).

127. Shari S. Diamond, *Instructions Frequently Baffle Jurors*, NAT'L L.J., June 6, 1994, at C7; Shartel, *supra* note 125, at 2.

128. Marjorie Fargo, *Don't Make the Same Mistake DeLorean's Prosecution Made*, CRIM. JUST., Summer 1988, at 2.

129. *Id.*

130. Goldstein, *supra* note 18, at 300-01; Major Holly M. Stone, *Post-Trial Contact with Court Members: A Critical Analysis*, 38 A.F.L. REV. 179, 179-80 (1994).

with frequently tried criminal issues.¹³¹

Both federal and state courts,¹³² concerned with the possibility of doubt being cast upon a jury's verdict,¹³³ regulate the contact attorneys may have with the jurors.¹³⁴ However, post-verdict interviews conducted by attorneys are different from post-verdict interviews conducted by the press, because the media has "less incentive to upset a verdict than does a losing party or attorney."¹³⁵ While courts have broad discretion to limit attorney and party contact with the jury, courts do not have the same freedom to restrict the press' right to interview jurors.¹³⁶

Post-verdict interviews conducted by participating attorneys can leave the attorney feeling defensive because he or she took the juror's criticism too personally¹³⁷ and the jurors feeling guilty because of the attorney's dismay at the uneducated decision.¹³⁸ Someone other than the immediate trial team however, can conduct this type of post-verdict interview.¹³⁹ The interviewer need not be familiar with all of the details of the trial; the interviewer need only rely on the juror to describe what happened during the proceedings.¹⁴⁰ The benefits of a neutral interviewer make the impartial press a perfect party medium to shed light on the decision and increase the understanding of all parties. More general concerns about the impact of post-verdict interviews on the jury system are also present.

B. Concern that Post-Verdict Interviews Will Injure the Entire Jury System as a Process

Opponents of post-verdict interviews believe that future jurors may avoid jury duty if they observe jurors bombarded by the media.¹⁴¹ Fear exists that if courts allow the press access to jurors,

131. Fargo, *supra* note 128, at 38.

132. Stone, *supra* note 130, at 182.

133. See *Journal Publ'g Co. v. E.L. Mechem*, 801 F.2d 1233, 1236 (10th Cir. 1986) (stating that courts have routinely protected dismissed jurors from the "fishing expeditions" of the losing attorney, who wishes to overturn the verdict).

134. See Stone, *supra* note 130, at 183 (stating some courts require a petition to be filed, or an attorney to possess a "reasonable belief" that a challenge exists before an attorney may interview jurors); Fargo, *supra* note 128, at 38 (noting that attorneys and their agents should research the local rules of the jurisdiction to determine whether or not there are any restrictions on press access to dismissed jurors).

135. *Journal Publ'g*, 801 F.2d at 1236.

136. *Id.*

137. Paul M. Lisnek, *Post-Trial Interviews Help Explain Verdicts*, CHI. DAILY L. BULL., July 24 1995, at 6.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Public Disclosures of Jury Deliberations*, *supra* note 115, at 889.

those jurors will be unable to serve on future jury panels.¹⁴² Opponents also worry that exposure to the media will a less unbiased attitude in future cases instill in these jurors.¹⁴³

However, less restrictive alternatives, such as simply excusing a juror from future service, are available for consideration rather than infringing upon a protected right.¹⁴⁴ The potential inability to serve on a future jury panel is not such a "serious or imminent threat" to justify a restraint on the press' access to juror names and addresses.¹⁴⁵ While the inability to serve on a future jury may not be a serious threat to the judicial system, compromising a juror's privacy is a justifiable concern.

C. The Concern for Juror Privacy

Opponents of post-verdict access argue that individual jurors will forfeit their right to privacy if courts allow the press post-verdict access.¹⁴⁶ Opponents are wary that the press will openly harass, intimidate and coerce jurors into revealing discussions that occurred inside the jury room.¹⁴⁷ Similarly, some opponents are concerned with the jurors' safety—a concern that becomes magnified in organized crime trials.¹⁴⁸ This concern also surrounds emotionally charged trials where the public already "convicts" the defendant before the case comes to trial.¹⁴⁹ Opponents believe that if the jury members fear public scorn or harassment because of their decisions, it will be difficult for the jurors to render an impartial verdict.¹⁵⁰

Concern for juror privacy does not justify restrictions on First Amendment rights, and denying access to juror names and addresses will not eliminate this concern.¹⁵¹ Privacy is strictly a matter of individual preference and opinion with each juror.¹⁵² Individual jurors should have the right to determine whether the

142. *United States v. Sherman*, 581 F.2d 1358, 1361 (9th Cir. 1978).

143. Aaron, *supra* note 17, at 232-33.

144. *Sherman*, 581 F.2d at 1361.

145. *Id.*

146. Aaron, *supra* note 17, at 232; Gaza, *supra* note 115, at 316; *Public Disclosure Of Jury Deliberations*, *supra* note 115, at 889; Raskopf, *supra* note 114, at 375-76.

147. *United States v. Antar*, 38 F.3d 1348, 1363 (3d Cir. 1994); *Sherman*, 581 F.2d at 1361; *United States v. Doherty*, 675 F. Supp. 719, 720 (D. Mass. 1987); *United States v. Franklin*, 546 F. Supp. 1133, 1139 (D. Ind. 1982).

148. Gaza, *supra* note 115, at 316, 317; *see also* *United States v. Ross*, 33 F.3d 1507, 1519 (11th Cir. 1994) (stating that anonymous juries, while a "drastic measure" may be used if there is a high risk to juror safety due to such factors as the defendant's involvement in organized crime or extensive media coverage).

149. Gaza, *supra* note 115, at 317.

150. *Id.* at 318.

151. Raskopf, *supra* note 114, at 377.

152. *United States v. Sherman*, 581 F.2d 1358, 1361 (9th Cir. 1978).

media's questions are an invasion of their privacy.¹⁵³ Some jurors even enjoy the media's attention.¹⁵⁴ Moreover, although intrusion into a juror's privacy is a concern, a court cannot prematurely restrict the press because of possible harassment that has not yet occurred.¹⁵⁵ If harassment should occur, then the court undoubtedly has the authority to correct the intrusion.¹⁵⁶ Further, each juror maintains the prerogative to participate in post-verdict interviews.¹⁵⁷ Courts do not require jurors to speak to the media or anyone else regarding their decision.¹⁵⁸ However, courts do consider the possibility that post-verdict interviews may coerce juries into following "popular opinion."

D. The Concern Regarding a "Popular Opinion" Vote

Knowing that they are the focus of the media's attention, juries may reach verdicts based upon popular opinion.¹⁵⁹ Even if juries do not succumb to popular opinion, they may modify their behavior during deliberations, intimidated by the thought of future interrogation.¹⁶⁰ Opponents think that a juror who realizes that deliberations may become part of the public's knowledge is less likely to argue for judgments contrary to public opinion.¹⁶¹ Oppo-

153. *Id.*; Goldstein, *supra* note 18, at 303.

154. *In re Beverly Hills Fire Litigation*, 695 F.2d 207, 212 (6th Cir. 1982). After rendering a verdict for the defendants, one juror wrote an anonymous letter to a Kentucky newspaper of general circulation. *Id.* at 212. In this letter, the juror first challenged the validity of the plaintiff's evidence and then explained the reasons for his decision. *Id.*; Raskopf, *supra* note 114, at 376; *O.J. Juror Poses for Playboy*, LONDON TIMES, Oct. 14, 1995, at 15. The Times reported that a woman dismissed from the O.J. Simpson jury posed for Playboy magazine on a photographic set resembling a courtroom. *Id.*

155. *United States v. Antar*, 38 F.3d 1348, 1363 (3d Cir. 1994). The court stated "[h]ere, for example, the court's concern with harassment was hypothetical, as there was no evidence, or even allegation, of misbehavior by the press." *Id.*

156. *Id.* at 1363; *Sherman*, 581 F.2d at 1361.

157. *See Antar*, 38 F.3d at 1364 (stating that "no juror is obliged, or may be compelled, to grant an interview."); *In re Globe Newspaper Co.*, 920 F.2d 88, 97 (1st Cir. 1990) (asserting that any juror may "flatly refus[e] press interviews when approached"); *In re Express-News Corp.*, 695 F.2d 807, 811 (5th Cir. 1982) (declaring that jurors have no affirmative duty to speak to the media regarding their service).

158. *Sherman*, 581 F.2d at 1361-62.

159. *Gaza*, *supra* note 115, at 315-16; *see also Nunn*, *supra* note 12, at 431. Nunn argues that a risk exists that jurors may render decisions based upon what the panel feels are "community desires." *Id.* "When jurors are aware they will be thrust into the public eye at the end of their service, there is great danger that their ability to exercise their own independent judgment may be affected." *Id.*

160. *Aaron*, *supra* note 17, at 230; *Nunn*, *supra* note 12, at 429.

161. *See Raskopf*, *supra* note 114, at 377 (noting that "uninhibited jury deliberations would be threatened" by post-verdict interviews); *see also Public Disclosures of Jury Deliberations*, *supra* note 115, at 890-91 (stating that

nents also argue that it is possible for one juror to engage in a post-verdict interview, and subsequently, invade another juror's privacy.¹⁶²

Through the jury's verdict and subsequent interviews, the public gains knowledge of the message the jury is sending to society through post-verdict interviews.¹⁶³ The jury also engages in subtle policy making.¹⁶⁴ Since jurors state their decisions and reasoning to the public, these interviews enhance the fact-finding process as jurors defend their decisions to the public.¹⁶⁵ This may, instead of inhibiting juries, prompt them to take the responsibility of jury duty more seriously.¹⁶⁶ Moreover, the press is not asking to attend jury deliberations, but only "to learn from the participants the basis of their verdict."¹⁶⁷ The press' interviews are not an intrusion, but a way of gaining knowledge. However, the relatively new phenomenon of "checkbook journalism" raises concerns that post-verdict interviews might corrupt jury deliberations.

E. The Problem of Checkbook Journalism

Opponents argue that post-verdict interviews encourage jurors to render a decision based upon the hopes of enticing, encouraging or playing-up to the media,¹⁶⁸ a contention reinforced by "checkbook journalism."¹⁶⁹ Jurors who write and sell stories about their trial experience to the press¹⁷⁰ present a problematic issue.¹⁷¹ Selling stories to tabloid television shows¹⁷² and writing books¹⁷³ has become a means to substantial monetary gain.¹⁷⁴ Because of

public pressures could discourage jurors from reaching unpopular verdicts).

162. *United States v. Franklin*, 546 F. Supp. 1133, 1142 (Ind. 1982).

163. Raspkof, *supra* note 114, at 373-74.

164. *See id.* at 373 (stating that the jury's verdict can set the "limits of self-defense, the boundaries of the defense of insanity, and the permissibility of certain types of protest against government policies").

165. Nunn, *supra* note 12, at 429.

166. *Id.*

167. Aaron, *supra* note 17, at 229-30.

168. Nunn, *supra* note 12, at 429.

169. Gaza, *supra* note 115, at 335-37.

170. *Id.* at 335; 1 GOODALE, *supra* note 1, at 28. As a result of the O.J. Simpson trial, California produced legislation which "restricts jurors in criminal cases from selling their stories—or even discussing such a sale—before [ninety] days have passed after the close of the trial." *Id.* However, as applied to a discharged Simpson juror, this statute was declared unconstitutional. *Id.* The court was unconvinced that the waiting period would reduce pressure on jurors to sell their stories. *Id.*

171. Gaza, *supra* note 115, at 335; Jesse Katz, *Participants in King Case try to Cash in*, L.A. TIMES, Apr. 24, 1993, at A17.

172. Katz, *supra* note 171.

173. *Id.*; O.J. Juror Brands Fuhrman a 'Snake' in book, *Foreman Says she did not believe a word Detective said*, CHI. TRIB., Jan. 17, 1996, § 1, at 3.

174. Gaza, *supra* note 115, at 335-36. Two jurors from the Bernard Goetz trial were paid \$2500 and almost \$5000 for their stories. *Id.* A juror from the famous Pennzoil-Texaco case reportedly received at least \$10,000 for his book.

the phenomenon of checkbook journalism, the question now becomes whether a juror is doing his civic duty by serving on the panel or simply anticipating some easy cash down the road.¹⁷⁵ The concern over checkbook journalism is similar to the concern that juries make decisions in anticipation of basking in the media spotlight and reaping the rewards of being a celebrity.

Currently, no law prohibits profiting from one's trial experience.¹⁷⁶ Legally, celebrity-minded or profit-motivated jurors are doing nothing wrong. However, prohibiting the press from conducting informative post-verdict interviews seems unjust if jurors are then allowed to sell their trial memoirs to the highest bidder. Restricting the press from performing its constitutionally protected newsgathering right because of conflicting interests is unreasonable if jurors are then authorized to sell their stories for a profit.

F. *The Concerns for the Rights of Criminal Defendants*

Finally, one of the strongest arguments against allowing post-verdict interviews is the infringement of the accused's Sixth Amendment right to a fair trial.¹⁷⁷ Defendants have a Sixth Amendment right to an unbiased jury, free from public opinion and influence.¹⁷⁸ Opponents claim that when the public's right conflicts with the accused's right, "the accused's Sixth Amendment right to a fair trial must, as a matter of logic, take precedence over the public's First Amendment right of access."¹⁷⁹ To ensure fairness to the defendant, juries deliberate in private, trying to decide a verdict based solely upon the evidence.¹⁸⁰

Federal Rule of Evidence 606(b)¹⁸¹ safeguards the integrity of

Id. at 336; see also Katz, *supra* note 171. The foreman from the Rodney King beating case received an undisclosed sum for his appearance on "Inside Edition." Katz, *supra* note 171.

175. Katz, *supra* note 171.

176. *Id.*

177. *Press-Enterprise v. Superior Court*, 478 U.S. 1, 14 (1986); *United States v. Sherman*, 581 F.2d 1358, 1361 (9th Cir. 1978) (noting that post-verdict juror interviews would not deny the defendants a fair trial because the trial was over); *United States v. Doherty*, 675 F. Supp. 719, 723-24 (D. Mass. 1987). See also Gaza, *supra* note 115, at 315.

178. *Doherty*, 675 F. Supp. at 724; Gaza, *supra* note 115, at 315.

179. *In re Globe Newspaper Co.*, 729 F.2d 47, 53 (1st Cir. 1984).

180. *Public Disclosures of Jury Deliberations*, *supra*, note 115, at 888-89. See Goldstein, *supra* note 18, at 295-96; see also Gaza, *supra* note 115, at 315.

181. The Federal Rule of Evidence 606(b) provides:

Upon an inquiry into the validity of a verdict or indictment, 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 that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly

a verdict or an indictment. This rule excludes the use of juror testimony concerning matters or statements arising in deliberations and concerning the effects of any influences upon jurors' mental processes in connection with a verdict.¹⁸² Under this rule, a juror may testify after the verdict only to "extraneous influences" upon him or her.¹⁸³ These influences include illegal methods of decision, applying personal knowledge or "expressions by the judge for a desire for a conviction."¹⁸⁴

In a proceeding impeaching the verdict, Rule 606(b) prohibits juror testimony of conversations, mistakes, motives, biases, and miscommunications among jurors; the courts do not consider these to be "extraneous influences."¹⁸⁵ The policy considerations for this are to stimulate honest and free discussions inside the jury room, to reduce juror harassment and to encourage the finality of jury verdicts.¹⁸⁶ Since this impeachment rule mainly concerns the courts' use of juror testimony to set aside verdicts, courts require misconduct be shown by "clear and unquestionable evidence," "strong evidence," or "clear evidence."¹⁸⁷

However, because courts require a preliminary showing of misconduct before allowing jurors to testify in a judicial hearing, Rule 606(b) allows the interviewing of willing jurors out of court.¹⁸⁸ Furthermore, since jurors' "descriptions of their own mental processes"¹⁸⁹ may not be the subject of juror testimony, courts will not allow suggestions that public opinion swayed a jury verdict as impeachment testimony.¹⁹⁰

Some defendants claim that they are prevented from determining if their Fifth Amendment¹⁹¹ right to a fair trial or their

brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

FED. R. EVID. 606(b).

182. Susan Crump, *Is The Broad Exclusionary Principal of Rule 606(b) Justified?*, 66 N.C. L. REV. 509, 509 (1988).

183. Goldstein, *supra* note 18, at 299.

184. *Id.*

185. *Id.*

186. Crump, *supra* note 182, at 512.

187. Goldstein, *supra* note 18, at 299-300.

188. *Id.* at 300.

189. *Id.* at 299.

190. *See id.* (noting that common law and statutes prohibits a juror from testifying as to his or her "beliefs, biases, motives, mistakes, miscalculations, or misunderstandings" in order to impeach a verdict).

191. The United States Constitution states:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against him-

Sixth Amendment right to an impartial jury was violated if courts prevent them from speaking with jurors.¹⁹² However, the "First Amendment right of access cannot be overcome by the conclusory assertion that publicity might deprive the defendant of that right [to a fair trial]."¹⁹³ Further, since the press conducts post-verdict interviews at the trial's conclusion, no possibility exists that allowing jurors to speak to the media would deprive the defendant to a fair trial.¹⁹⁴ Thus, the "free press-fair trial" issue is not applicable concerning post-verdict interviews.¹⁹⁵

III. SUMMARY—THE NEED FOR A STANDARD POLICY

In each case discussed in this Comment, the trials themselves had huge public followings.¹⁹⁶ After the each verdict, in order to complete its news coverage of the case, the media wanted to speak with the dismissed jurors.¹⁹⁷ As a result of the press' attention, the courts presiding over these trials either prohibited the interviews altogether or placed restrictions upon the press.¹⁹⁸ While courts use different tests and standards in determining whether to allow the press post-verdict access, the concerns over the post-verdict interviews are consistent. Assuming that the press can invoke its right under the First Amendment to include post-verdict access,¹⁹⁹ a court must weigh this right against the interests of the accused, the rights of the individual jurors and the interest in protecting the function of the jury system. Courts make three distinct choices when dealing with the post-verdict interview issue. Some courts prohibit the press from communicating with the jurors completely. Other courts limit the press' access to jurors. Still others allow the

self, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

U.S. CONST. amend. V.

192. Stone, *supra* note 130, at 183.

193. Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 14-15 (1986).

194. United States v. Sherman, 581 F.2d 1358, 1361 (9th Cir. 1978).

195. *Id.*; Aaron, *supra* note 17, 231-32. In his article, Aaron argues that both the Sixth Amendment and Article III of the United States Constitution cannot be protected interests which would overcome the presumption against post-verdict interview restrictions. Aaron, *supra* note 17, 231-32. Aaron states that interests protected by the Sixth Amendment or Article III cannot overcome the presumption of the constitutionality of post-verdict interviews for several reasons. *Id.* at 231. First, the First Amendment interests must outweigh countervailing state interests. *Id.* Second, the Sixth Amendment protects defendants against adverse acts of the government, not the press. *Id.* Third, Article III does not aid in the analysis of post-verdict interview cases. *Id.* Thus, interests protected by the Sixth Amendment or Article III are not applicable to post-verdict interview issues. *Id.* at 231-32.

196. Aaron, *supra* note 17, at 214.

197. *Id.*

198. *Id.*

199. *Id.* at 235.

press to interview jurors after a verdict has been rendered. The current split of authority on how to deal with post-verdict interviews is troublesome because it is inconsistent. The need for establishing a standard policy of regulating post-verdict interviews is great as the quest for these interviews is more prevalent today than ever before.²⁰⁰

Using the Supreme Court's two-prong test as set forth in *Richmond Newspapers Co. v. Virginia*,²⁰¹ the press can invoke First Amendment protection of post-verdict access to jurors after a trial. The Court's history of First Amendment expansion to most aspects of a criminal trial allows the implication of First Amendment guarantees to extend to post-verdict access. Moreover, the important functions that the public's access to this information give to the community outweigh any possible detrimental effects post-verdict access may have on the judicial system. Therefore, courts should find that the press has a guaranteed First Amendment right of access to jurors after a verdict.

However, courts must protect this guaranteed First Amendment right of access without invading the jurors' rights and the rights of the accused. Giving a court the discretion to control the post-verdict access is the policy best suited toward protecting each of these interests. At the end of a trial, a court should determine whether the proceedings were well-publicized, thus triggering the press' desire to interview the jurors. The court would then have the discretion to impound juror names and addresses for the specified time period of ten days after a verdict before releasing juror identities to the press. The ten day time period strikes a perfect balance between the competing interests. Ten days is long enough to allow jurors to return to their normal lifestyle, yet not so long that the trial loses its newsworthiness. As the *Butt*, *Sullivan* and *Doherty* courts stated, the values promoted by press access to dismissed jurors will be no less advanced several days after the jury returns a verdict.²⁰² Although the postponement of the prompt release of juror identities may diminish slightly the newsworthiness of the trial, "significant news will receive the amount of publicity it warrants."²⁰³ A postponement of ten days will not injure the values served by the press' First Amendment right of access as it functions as the public's watchdog.

Moreover, this break allows jurors time to contemplate what,

200. *Public Disclosures of Jury Deliberations*, *supra* note 115, at 887; Raskopf, *supra* note 114, at 358.

201. 448 U.S. 555 (1980).

202. *Sullivan v. National Football League*, 839 F. Supp. 6, 7 (D. Mass. 1993); *United States v. Butt*, 753 F. Supp. 44, 45 (D. Mass. 1990); *United States v. Doherty*, 675 F. Supp. 719, 725 (D. Mass. 1987).

203. *United States v. Edwards*, 823 F.2d 111, 119 (5th Cir. 1987).

if anything, they will discuss with the press.²⁰⁴ This cooling off period allows a juror to reflect upon his service as a "citizen soldier."²⁰⁵ This hiatus allows jurors to decide whether or not to speak to the press or to remain silent as he or she wishes.

Courts should also warn jurors, through a letter, about overly aggressive reporters and remind the jurors that they are under no obligation to speak with anyone regarding their decision.²⁰⁶ This letter may include ideas on how to handle post-verdict interviews²⁰⁷ or even suggest a way of protecting the jurors, such as providing a neutral area where the press can conduct post-verdict interviews.²⁰⁸ This letter from the court to each juror allows the individual to make an educated, informed decision about whether to participate in any type of post-verdict interview. This standard policy of impounding juror names and addresses for ten days after a verdict, coupled with a letter to each juror, satisfies the interest of each participating party, while still allowing a court control over the situation.

CONCLUSION

Courts and commentators alike recognize the benefits that flow from allowing the media access to jurors following a trial. However, these benefits are usually discussed within the context of concern for both the rights of the jurors and the accused. Under this clash of First Amendment protections, privacy and fair trial rights, a middle ground recommends itself. This middle ground is the discretion to impound names and addresses for ten days after the rendering of a verdict while reminding jurors of their rights to refuse post-verdict interviews. This middle ground can achieve proper conditions for the judicial system deliberations while satisfying the desire of the press and the public to remain informed about this important governmental institution.

204. *Doherty*, 675 F. Supp. at 725.

205. See *In re Globe Newspaper Co.*, 920 F.2d 88, 97-8 (1st Cir. 1990) (stating that jurors are "citizen soldiers" and although it may seem unfair to have their identities revealed to the media, all soldiers, at times, may be asked to perform "distasteful duties").

206. See generally *Shartel*, *supra* note 125, at 2 (suggesting that judges warn jurors about potential harassment by the media and remind jurors that refusing any interview is within the individual juror's discretion).

207. 1 GOODALE, *supra* note 1, at 25-26. Jurors can refuse to participate in post-verdict interviews and should harassment occur, jurors may seek help from the courts. *Id.*

208. *Id.*

