

1-15-1990

A First Amendment Right of Access to a Juror's Identity: Toward a Fuller Understanding of the Jury's Deliberative Process

Robert Lloyd Raskopf

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/plr>



Part of the [Constitutional Law Commons](#), [Courts Commons](#), [Law and Society Commons](#), [Legal History Commons](#), and the [Litigation Commons](#)

Recommended Citation

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. Iss. 2 (1990)
Available at: <https://digitalcommons.pepperdine.edu/plr/vol17/iss2/2>

This Article is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized editor of Pepperdine Digital Commons. For more information, please contact bailey.berry@pepperdine.edu.

A First Amendment Right of Access to a Juror's Identity: Toward a Fuller Understanding of the Jury's Deliberative Process

Robert Lloyd Raskopf*

[I]t would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted

Chief Justice Burger†

I. INTRODUCTION

Since its inception in England in the era before the Norman conquest, the jury has played a central role in justice, politics, and government.¹ The jury's historical role as the safeguard against the wrath of the ruthless prosecutor and the tyranny of the corrupt judge is legendary and need not be chronicled here.²

Despite its undoubted importance, surprisingly little is known about the jury's deliberative process. The few jury studies conducted to date have enhanced public understanding of the fact-finding and

* Partner, Townley & Updike, New York, New York; J.D., 1976, B.S., 1973, Boston College; member, NYCBA Committee on Communications Law and ABA Forum Committee on Communications Law. The author wishes to express his appreciation for the invaluable contributions to this article made by his associate, Paul Grobman. Harry T. Walters, an associate, and Nicholas Aker, a summer associate, also participated in the preparation of this article.

† *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980) (Burger, C.J., plurality).

1. See generally Pope, *The Jury*, 39 TEX. L. REV. 426 (1961).

2. See *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968); Pope, *supra* note 1, at 443 ("One of the great but little discussed checks and balances of our governmental system is [the] separation of functions of judge and jury over law and fact."). But see Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170, 192 (1964) (arguing that by the end of the nineteenth century the jury had come to be viewed as an "outmoded and none-too-reliable institution for resolving disputed questions of fact").

decision-making processes used by juries.³ Moreover, in recent years, post-verdict comments by jurors have been utilized by scholars studying the functioning of our judicial system, as well as by journalists and other members of the media in their reports to the public. The frequency with which juror comments are reported and analyzed appears to be increasing. Indeed, one might reasonably hypothesize that the public anticipates a report of jurors' comments in well-publicized cases.

Although discharged jurors occasionally initiate contact with members of the media, discussions usually are initiated by the media.⁴ However, despite the salutary effect of jurors' comments on understanding the jury's deliberative process, the public's right of access to juror identities has not been uniformly established.

Finding that post-verdict juror interviews have a significant positive effect on the judicial process, several lower courts have held that the public has a right of access to the names and addresses of jurors.⁵ In fact, these courts have instituted safeguards to ensure the protection of jurors' safety and privacy.⁶ Other lower courts, however, have held that no right of access to juror names or addresses exists, and subsequently have refused to release the identity of jurors.⁷ Although the Supreme Court has not yet addressed the issue, a recent line of cases, beginning with *Richmond Newspapers, Inc. v. Virginia*,⁸ has recognized and gradually expanded the first amendment right of access to encompass the right to attend and receive information about most aspects of a criminal trial.

This article will address whether there is a first amendment right of access to the names and addresses of jurors. Parts II and III will

3. See LIBEL DEFENSE RESOURCE CENTER BULLETIN NO. 8, at 72 (Fall 1983).

4. Juror interviews often are possible only if the media has access to a juror's name and address. Many state and federal courts, after a jury has rendered its verdict in a case which has attracted significant public notoriety, attempt to shield the just-discharged jurors from immediate face-to-face interaction by escorting them to a restricted area of the courthouse and providing them with transportation home. See, e.g., *United States v. Doherty*, 675 F. Supp. 719, 722-23 n.4 (D. Mass. 1987). Moreover, in cases in which the discharged jurors leave the courtroom through public exits, few newspapers are able to mobilize the reporters necessary to simultaneously interview twelve jurors. Finally, in cases which assume importance only after a jury has rendered its verdict, a list of the jurors' names and addresses is the only means by which to contact the jurors for an interview.

5. *In re Baltimore Sun Co.*, 841 F.2d 74, 75 (4th Cir. 1988); *Doherty*, 675 F. Supp. at 725; *In re New York Times Co.*, Misc. No. 82-0124 (D.D.C. June 19, 1982).

6. See, e.g., *Doherty*, 675 F. Supp. at 725 (release of jurors' names and addresses seven days after verdict returned to accommodate jurors' legitimate expectation of privacy).

7. *United States v. Edwards*, 823 F.2d 111, 117 (5th Cir. 1987), cert. denied, 108 S. Ct. 1109 (1988); *United States v. Gurney*, 558 F.2d 1202, 1210 (5th Cir. 1977), cert. denied, 435 U.S. 968 (1978); *Newsday, Inc. v. Sise*, 71 N.Y.2d 146, 153, 518 N.E.2d 930, 933, 524 N.Y.S.2d 35, 39 (1987), cert. denied, 108 S. Ct. 2823 (1988).

8. 448 U.S. 555 (1980) (Burger, C.J., plurality).

discuss the series of Supreme Court and lower federal court cases dealing with the first amendment right of access to judicial proceedings, and will show that the constitutional objective underlying this right—contrary to the strict construction rendered by certain courts—requires that it encompass more than a mere right to attend judicial proceedings. Parts IV, V, and VI will analyze the principles articulated by the Supreme Court in other cases involving a right of access and conclude that the interests which led the Supreme Court to recognize a constitutional right of access to various aspects of a criminal trial would be similarly advanced by aiding the ability of the media to contact jurors after the conclusion of their jury service.

II. SUPREME COURT RECOGNITION OF A FIRST AMENDMENT RIGHT OF ACCESS TO JUDICIAL PROCEEDINGS

Until quite recently in American jurisprudence, the Supreme Court had never directly acknowledged a first amendment right of access to judicial proceedings. However, the Court had long held that the sixth amendment provided a criminal defendant with the right to a public trial.⁹ Moreover, the Court had intimated on several occasions that an independent first amendment right to a public trial existed.¹⁰ Nevertheless, some doubt remained, especially in light of the Court's holding in *Gannett v. DePasquale*,¹¹ that an accused's right to a public trial under the sixth amendment conferred no rights on the public or press. It was not until 1980, in *Richmond Newspapers, Inc. v. Virginia*,¹² that the Court recognized a first amendment right of the public and the press to observe criminal proceedings.¹³

In *Richmond Newspapers*, the trial court in a murder prosecution, upon defendant's request and without objection from the prosecution,

9. The sixth amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ." U.S. CONST. amend. VI.

10. *In re Oliver*, 333 U.S. 257, 266 (1948) ("[W]e have been unable to find a single instance of a criminal trial conducted in camera in any federal, state, or municipal court during the history of this country."); *Craig v. Harney*, 331 U.S. 367, 374 (1947) ("A trial is a public event. What transpires in the courtroom is public property."); *Pennekamp v. Florida*, 328 U.S. 331, 361 (1946) (Frankfurter, J., concurring) ("Of course trials must be public and the public have a deep interest in trials."); see *Richmond Newspapers*, 448 U.S. at 573 & n.9.

11. 443 U.S. 368 (1979).

12. 448 U.S. 555 (1980) (Burger, C.J., plurality). The ruling was splintered, but a majority of the court did acknowledge a first amendment public right of access to criminal trials.

13. *Id.* at 580 (Burger, C.J., plurality), 584-85 (Brennan, J., concurring) (Blackmun, J., concurring).

closed the trial to the public.¹⁴ The court denied a motion by news reporters to vacate the order, stating that the presence of people in the courtroom was "distracting to the jury."¹⁵ After the Virginia Supreme Court denied review, the United States Supreme Court reversed.¹⁶

The Court's plurality opinion initially traced the history of the open criminal trial in England and in the American colonies and noted that "the very nature of a criminal trial was its openness to those who wished to attend."¹⁷ The plurality recited several advantages to holding open trials. First, openness assures that the proceedings are conducted fairly to all concerned, since a "nexus [exists] between openness, fairness, and the perception of fairness."¹⁸ Second, the public nature of trials has a "significant community therapeutic value" since allowing the public to see justice in action reassures the public that society is secure, thereby reducing the chance that public outrage at a crime will result in the anarchy of lynch mobs.¹⁹ The plurality further noted that "[t]he crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is 'done in a corner [or] in any covert manner.'"²⁰ Finally, the openness of criminal trials educates the public about the criminal justice system, thus increasing respect for the law.²¹ The plurality conceded that the media's special role in communicating information about criminal proceedings to the public "validates the media claim of functioning as surrogates for the public."²²

In light of the long history of open criminal trials, the plurality held that there is a presumption of openness which attaches to such trials.²³ The plurality then turned to the specific guarantees of the

14. *Id.* at 559-60 (Burger, C.J., plurality). The trial was the defendant's fourth trial; the first trial resulted in a conviction which was overturned on appeal, and the second and third trials resulted in mistrials. One of the mistrials may have resulted from a juror's reading press reports about the previous trials. *Id.* at 559 (Burger, C.J., plurality).

15. *Id.* at 561 (Burger, C.J., plurality) (quoting Transcript of Sept. 11, 1978, Hearing on Motion to Vacate at 19, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980)).

16. *Id.* at 562, 581 (Burger, C.J., plurality).

17. *Id.* at 568 (Burger, C.J., plurality); see *id.* at 564-69 (Burger, C.J., plurality).

18. *Id.* at 569-70 (Burger, C.J., plurality).

19. *Id.* at 570-71 (Burger, C.J., plurality).

20. *Id.* at 571 (Burger, C.J., plurality) (quoting the 1677 Concessions and Agreements of West New Jersey, reprinted in *SOURCES OF OUR LIBERTIES* 188 (R. Perry ed. 1959)).

21. *Id.* at 572 (Burger, C.J., plurality) (citing 6 J. WIGMORE, *EVIDENCE* § 1834, at 438 (J. Chadbourn rev. ed. 1976)).

22. *Id.* at 572-73 (Burger, C.J., plurality).

23. *Id.* at 573 (Burger, C.J., plurality).

first amendment,²⁴ as made applicable to the states through the due process clause of the fourteenth amendment,²⁵ and noted that the guaranteed rights "share a common core purpose of assuring freedom of communication on matters relating to the functioning of government."²⁶ Citing *Branzburg v. Hayes*,²⁷ the plurality held that the explicit first amendment rights to speak, to publish, and to assemble would have little meaning if access to criminal trials could be arbitrarily foreclosed.²⁸

Having recognized and confirmed the first amendment right, the plurality proceeded to balance this right against the accused's sixth amendment rights.²⁹ To account for both of these competing interests, the plurality held that a trial court must consider any less restrictive means to ensure the fairness of a trial before it may order closure of the trial; moreover, if the court does order closure, it must articulate its reasons in findings.³⁰ Since the trial court had failed to even acknowledge the existence of the first amendment right, the plurality, joined by concurring justices, reversed the closure order.³¹

Two years after *Richmond Newspapers*, a majority of the Supreme Court reconfirmed and expanded upon the first amendment right of access in *Globe Newspaper Co. v. Superior Court*.³² In *Globe Newspaper*, the Court assessed the constitutionality of a Massachusetts statute requiring closed trials in prosecutions involving sexual offenses

24. "Congress shall make no law . . . 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.

25. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

26. *Richmond Newspapers*, 448 U.S. at 575.

27. 408 U.S. 665, 681 (1972) (holding that first amendment does not give a reporter the privilege not to answer grand jury questions about a criminal case under investigation).

28. *Richmond Newspapers*, 448 U.S. at 576-77, 580 (Burger, C.J., plurality).

29. *Id.* at 580-81 (Burger, C.J., plurality). The plurality noted the Court previously had held that although the sixth amendment guarantees a public trial to the accused, it does not guarantee the accused a private trial. *Id.* at 580 (Burger, C.J., plurality); see *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 382 (1979).

30. *Richmond Newspapers*, 448 U.S. at 580-81 (Burger, C.J., plurality).

31. *Id.* at 581 (Burger, C.J., plurality). Justice Brennan, in a concurring opinion joined by Justice Marshall, adopted a two-part test substantially similar to the test set out in the plurality opinion. *Id.* at 597-98 (Brennan, J., concurring). Justice Stewart, while finding a first amendment right of access, emphasized that the right is not absolute and may be overridden in certain situations. *Id.* at 600 (Stewart, J., concurring). Justice Blackmun restated his belief that the sixth amendment should be the constitutional source of the public right of access. *Id.* at 603 (Blackmun, J., concurring). Justices White and Stevens, who joined with Chief Justice Burger in the plurality opinion, also filed brief separate concurring opinions.

32. 457 U.S. 596 (1982).

against minors.³³ The Court struck down the statute as violative of the first and fourteenth amendments.³⁴ Utilizing the test laid out by the *Richmond Newspapers* plurality, the Court held that “[w]here, as in the present case, the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.”³⁵ The Court recognized that protecting minor victims of sex crimes was a compelling interest.³⁶ Nevertheless, the Court held that the mandatory closure rule was unjustified because it was not the least restrictive means of achieving that goal.³⁷ The constitutionally required method, according to the Court, is to allow the trial court to determine the necessity of closure on a case-by-case basis³⁸ after considering a host of factors.³⁹

Having firmly established a first amendment right of access to the criminal trial itself, the Supreme Court in 1984 interpreted this right to apply to the jury selection process as well. In *Press-Enterprise Co. v. Superior Court of California*⁴⁰ (*Press-Enterprise I*), the trial court closed most of the voir dire proceedings at the commencement of a criminal trial, a process which lasted six weeks under California law.⁴¹ After the voir dire proceedings, and again after the trial itself, the court refused to release a transcript of the voir dire sessions.⁴²

In reviewing the case, the Supreme Court first explored the development of the jury from its inception in the era before the Norman conquest. The Court concluded that throughout the history of trial by jury, the jury selection process had been presumptively open to

33. MASS. GEN. LAWS ANN. ch. 278, § 16A (West 1981); see *Globe Newspaper*, 457 U.S. at 598 n.1.

34. *Globe Newspaper*, 457 U.S. at 610-11.

35. *Id.* at 606-07.

36. *Id.* at 607.

37. *Id.* at 607-08.

38. Citing the *Richmond Newspapers* plurality opinion, the Court suggested that individualized determinations are always necessary before the right of access may be denied. *Id.* at 608 n.20; see *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581 (1980) (Burger, C.J., plurality). The *Globe Newspaper* dissent, in contrast, averred that mandatory rules were workable but that discretionary rules were not:

Certainly if the law were discretionary, most judges would exercise that discretion soundly and would avoid unnecessary harm to the child, but victims and their families are entitled to assurance of such protection. The legislature did not act irrationally in deciding not to leave the closure determination to the idiosyncrasies of individual judges subject to the pressures available to the media.

Globe Newspaper, 457 U.S. at 618-19 (Burger, C.J., dissenting).

39. Among the factors the Court suggested for consideration are the age and maturity of the minor victim, the nature of the crime, the victim's wishes on the subject of closure, and the interests of parents and relatives. *Globe Newspaper*, 457 U.S. at 608.

40. 464 U.S. 501 (1984) [hereinafter *Press-Enterprise I*].

41. See *id.* at 503.

42. *Id.* at 504.

the public with only rare exceptions.⁴³ After noting the virtues of openness, the Court stated that "[c]losed proceedings, although not absolutely precluded, must be rare and only for cause shown that outweighs the value of openness."⁴⁴ To overcome the presumption of openness, the trial court must articulate specific "findings that closure is essential to preserve higher values and is narrowly tailored to serve [those values]."⁴⁵ When limited closure is necessary, the first amendment may still require that the court release a transcript of the closed proceedings within a reasonable time, with portions redacted, if necessary, to protect the prospective juror from embarrassment.⁴⁶ Without explanation and without consideration of less restrictive means, the Supreme Court held that it was improper for a trial court to close voir dire proceedings to the public.⁴⁷

In its most recent first amendment right of access decision, the Supreme Court in *Press-Enterprise Co. v. Superior Court of California*⁴⁸ (*Press-Enterprise II*) held the first amendment right of access applicable to preliminary hearings as well as to criminal trials.⁴⁹ The Court first examined the historical evidence and determined that preliminary hearings traditionally were accessible to the public.⁵⁰ The Court then assessed the merits of public access to the preliminary hearing and concluded that, as the preliminary hearing is similar to a trial, the same considerations which led the Court to find a constitutional right of access to the criminal trial were equally apparent in the context of preliminary hearings.⁵¹ The Court, therefore, recognized a right of access to preliminary hearings, and held that the hearings could not be closed unless closure was "essential to

43. *Id.* at 505-08.

44. *Id.* at 509 (footnote omitted).

45. *Id.* at 510. For example, in a rape trial, as in *Press-Enterprise I*, prospective jurors may be questioned during voir dire about very sensitive matters. *Id.* at 512. The Supreme Court recognized that jurors may have protectable privacy interests regarding such questioning. However, to minimize the risk of unnecessary closure, the Court stated that the burden must be on the prospective juror to approach the trial judge about a sensitive matter once the judge warns the prospective jurors about the scope of possible questioning. *Id.*

46. *Id.* The Court suggested that it may even be permissible to withhold the name of the juror. *Id.* at 512-13.

47. *Id.* at 511.

48. 478 U.S. 1 (1986) [hereinafter *Press-Enterprise II*].

49. *Id.* at 10.

50. *Id.* at 10-11.

51. *Id.* at 11-13. The Court placed special emphasis on the fact that the preliminary hearing is often the final step in the criminal proceeding, and thus "provides the sole occasion for public observation of the criminal system." *Id.* at 12.

preserve higher values'⁵² Finally, even when closure is justified, it must be narrowly tailored to serve only those higher values.⁵³

III. LOWER COURT EXPANSION OF THE FIRST AMENDMENT RIGHT OF ACCESS TO OTHER FACETS OF THE CRIMINAL PROCESS

A. Generally

Thus far, the Supreme Court's right of access decisions have been largely limited to the question of access to actual criminal judicial proceedings. Although some lower courts have adopted a bright line rule, refusing to extend the right of access beyond actual proceedings or transcripts of proceedings,⁵⁴ most lower courts have recognized that the objective underlying the Supreme Court's recognition of the right of access is served equally by a right of access to other facets of the criminal process.⁵⁵

Indeed, as the Supreme Court itself has recognized, the first amendment does not expressly speak of a right of access to criminal trials.⁵⁶ Nevertheless, the Supreme Court has recognized a right of access to criminal trials and other criminal proceedings by concluding that access to these processes advances a fundamental core purpose of the first amendment by promoting an informed discussion of governmental affairs.⁵⁷

Lower federal and state courts, consistent with the constitutional objective underlying the Supreme Court's decisions recognizing a right of access to various criminal processes, have determined that the first amendment right of access necessarily encompasses the right to acquire the information necessary to ensure an informed public discussion of the criminal process. Consequently, courts have recognized a first amendment right of access to virtually every judicial proceeding in the criminal process.⁵⁸ Moreover, numerous courts

52. *Id.* at 13-14 (quoting *Press-Enterprise I*, 464 U.S. 501, 510 (1984)).

53. *Id.* at 14 (citing *Press-Enterprise I*, 464 U.S. at 510).

54. *United States v. Yonkers Bd. of Educ.*, 747 F.2d 111, 113 (2d Cir. 1984) (first amendment right of access limited to physical presence at trials); *Newsday, Inc. v. Sise*, 71 N.Y.2d 146, 153 n.4, 518 N.E.2d 930, 933 n.4, 524 N.Y.S.2d 35, 39 n.4 (1987) (no constitutional right of access to jurors' names and addresses where petitioner has not alleged denial of access to a judicial proceeding or transcript of a proceeding, *cert. denied*, 108 S. Ct. 2823 (1988)).

55. *See Press-Enterprise II*, 478 U.S. at 10 n.3.

56. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603-04 (1982).

57. *Id.* at 604-05 (first amendment right of access to the criminal process exists to "ensure that [the] constitutionally protected 'free discussion of governmental affairs' is an informed one") (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966); *Press-Enterprise I*, 464 U.S. at 516 (Stevens, J., concurring) (distinction between trials and other official proceedings is not important in evaluating first amendment issues)).

58. *See, e.g., In re Washington Post Co.*, 807 F.2d 383, 389 (4th Cir. 1986) (plea and sentencing hearings); *In re Iowa Freedom of Information Council*, 724 F.2d 658, 661 (8th Cir. 1983) (contempt hearings); *United States v. Chagra*, 701 F.2d 354, 364 (5th Cir.

have found a right of access to materials and information, apart from judicial proceedings, which fundamentally relate to the criminal process.⁵⁹

B. Access to Jurors' Names and Addresses

Several lower courts have specifically addressed whether a constitutional or common law right of access to jurors' names and addresses exists. In *In re Baltimore Sun Co.*,⁶⁰ the Fourth Circuit recognized a right of access to the names and addresses of jurors in a venire.⁶¹ The court's holding was based on the common law right of access to information contained in the public record; the court declined to address the first amendment issue.⁶² Nevertheless, the court acknowledged that it had drawn upon the principles set forth in *Press-Enterprise I* and *Press-Enterprise II*,⁶³ and conducted the two-step first amendment analysis prescribed by the Supreme Court. First, the Fourth Circuit examined the historical evidence of access, finding that "[w]hen the jury system grew up . . . everybody knew everybody on the jury," and that this remained the case in many ru-

1983) (bail hearings); *United States v. Criden*, 675 F.2d 550, 557 (3d Cir. 1982) (pretrial suppression hearings); *In re Romeo*, No. 87-0808RC (D. Mass. May 1, 1987) (LEXIS, Genfed Library, Dist file) (extradition hearings). Courts also have recognized a right of access to various aspects of civil proceedings. See *Publicker Indus. v. Cohen*, 733 F.2d 1059, 1070 (3d Cir. 1984) (civil trials).

59. See, e.g., *In re Search Warrant*, 855 F.2d 569, 573 (8th Cir. 1988) (right of access to affidavits and other materials supporting applications for search warrants served during pre-indictment phase of investigation), *cert. denied*, 109 S. Ct. 793 (1989); *Seattle Times v. United States Dist. Court*, 845 F.2d 1513, 1517 (9th Cir. 1988) (right of access to documents filed in connection with pretrial release proceedings); *In re New York Times Co.*, 828 F.2d 110, 111-13 (2d Cir. 1987) (motion to suppress wiretap evidence filed under seal), *cert. denied*, 108 S. Ct. 1272 (1988); *In re National Broadcasting Co.*, 828 F.2d 340, 345 (6th Cir. 1987) (access to documents filed in connection with proceedings relating to disqualification of judge); *In re Washington Post Co.*, 807 F.2d 383, 388-89 (4th Cir. 1986) (access to affidavits relating to sentencing hearing); *Associated Press v. United States Dist. Court*, 705 F.2d 1143, 1145 (9th Cir. 1983) (access to pretrial documents in criminal case in general); *United States v. Martin*, 684 F. Supp. 341, 343-44 (D. Mass. 1988) (right of access to portion of agent's affidavit supporting application for wiretap); *United States v. Eaves*, 685 F. Supp. 1243, 1245 (N.D. Ga. 1988) (right of access to video and audio tapes admitted into evidence).

60. 841 F.2d 74 (4th Cir. 1988).

61. *Id.* at 75.

62. See *id.* at 75-76 n.4. Information other than names and addresses contained in questionnaires were statutorily exempted from disclosure under 28 U.S.C. § 1867(f) (1982); see *Baltimore Sun*, 841 F.2d at 75.

63. *Baltimore Sun*, 841 F.2d at 76. The court went so far as to state that the contrary holding in *United States v. Gurney*, 558 F.2d 1202 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978), would be different had it followed *Press-Enterprise I* and *II*; see *infra* note 81.

ral communities throughout the country.⁶⁴ Addressing the need for disclosure of the jurors' identities, the court determined that the public would lose confidence in the judicial process if cases were allowed to be tried by anonymous juries.⁶⁵

At least two federal district courts have found a first amendment right of access to jurors' names and addresses. In *United States v. Doherty*,⁶⁶ the United States District Court of Massachusetts applied a first amendment analysis and found that, while the history of post-verdict access to jurors was scant, such access played a "positive role in the actual functioning of the judicial process."⁶⁷ Moreover, the *Doherty* court noted:

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 such information not only serves the cause of justice generally by providing an independent, non-governmental verification of the utter impartiality of the processes 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.⁶⁸

The court, therefore, held that the public had a first amendment right of access to the names and addresses of jurors within a reasonable time after the verdict was delivered.⁶⁹ The court then balanced the first amendment right of access against the interests favoring closure, in this case the defendant's sixth amendment right to a fair trial, and the privacy concerns expressed by the jurors themselves.⁷⁰ With regard to the defendant's sixth amendment rights, the court recognized that the jurors' post-verdict discussion of the particular deliberations of other jurors might ultimately inhibit the deliberative process, but concluded that these concerns could be addressed only by counseling, rather than by ordering, the jury not to discuss their deliberations with anyone.⁷¹

64. *Baltimore Sun*, 841 F.2d at 75.

65. *Id.* at 76.

66. 675 F. Supp. 719 (D. Mass. 1987).

67. *Id.* at 722-23. As an initial matter, the court found it unnecessary for first amendment purposes to determine "whether the post-verdict interviews are considered part of the criminal trial . . ." *Id.* at 722. Quoting Justice Stevens' concurring opinion in *Press Enterprise I*, the district court noted that "'the distinction between trials and other official proceedings is not necessarily dispositive, or even important, in evaluating the First Amendment issues.'" *Id.* at 722 (quoting *Press-Enterprise I*, 464 U.S. 501, 516 (1984) (Stevens, J., concurring)).

68. *Id.* at 723.

69. *Id.*

70. *Id.* at 723-24. The jurors in the *Doherty* case were unanimous in their objection to the court's revealing their identities to the media. *Id.* at 724.

71. *Id.* The court's charge to the jury seems at odds with its earlier statement extolling the virtues of post-verdict interviews. Apparently, the court thought it proper for the press to inquire into the jurors' backgrounds, perceptions of the process, and individual deliberations, but not into the particular deliberations of any of the jurors'

As for the jurors' privacy concerns, the court determined that these concerns could be accommodated by withholding the names and addresses of the jurors until seven days after the verdict was delivered.⁷² The court reasoned that this delay would give the former jurors sufficient time, after seventeen weeks of jury service,⁷³ to re-adjust to their normal lives and to reflect on their jury experience prior to inquiries from the media.⁷⁴ At the same time, the court concluded that a one-week delay would not seriously impede the media's ability to question the jurors as to their impartiality, the effect of their backgrounds on the verdict, or the effects of a seventeen-week trial on the jurors.⁷⁵

Similarly, in *In re New York Times Co.*,⁷⁶ the judge presiding over the trial of John Hinckley, Jr., released the names and addresses of the jurors at the commencement of jury deliberations. The court held that first amendment interests had not been overcome by any "overriding interest," and that publicity about the trial would "play a large role in shaping public and legislative attitudes toward the insanity defense in the future."⁷⁷

colleagues. Assuming that this is what the court sought to prevent, it simply could have counseled the jurors not to reveal their colleagues' deliberations without counseling them in a manner which appeared to contradict recognition of the first amendment right in the first place.

72. *Id.* at 725.

73. *Id.* at 720. The trial commenced on January 12, 1987, and the verdict was announced on May 7, 1987.

74. *Id.* at 725.

75. *Id.*

76. Misc. No. 82-0124 (D.D.C. June 19, 1982).

77. *Id.* The court's prediction proved correct. In 1984, shortly after Hinckley's acquittal of the attempted assassination of the President of the United States, and largely in response to public outrage about the verdict, Congress passed legislation sharply reducing the availability of the insanity defense in federal criminal trials. See Insanity Defense Reform Act, Pub. L. No. 98-473, 98 Stat. 2057 (1984). There surely would have been public outcry even without juror interviews. However, the candid disclosures by the jury confirmed that, given the law as instructed to them by the trial judge, they had no choice but to acquit Hinckley. This acquittal clearly intensified the call for legislative reform. See generally W. WINDSLEY & J. ROSS, *THE INSANITY PLEA* (1983).

In a related line of cases, several courts have held that it is an improper prior restraint in violation of the first amendment for a trial court to order the media not to print information about jurors that it already has obtained, see, e.g., *Capital Cities Media, Inc. v. Toole*, 463 U.S. 1303, 1306 (1983) (Brennan, J., opinion in chambers) (order granting application for stay), *aff'd*, 466 U.S. 378 (1984) (per curiam); *Des Moines Register & Tribune Co. v. Osmundson*, 248 N.W.2d 493, 501 (Iowa 1976); *New Mexico Press Ass'n v. Kaufman*, 98 N.M. 261, 267, 648 P.2d 300, 306 (1982), or to forbid all contact between jurors and the media, see, e.g., *Journal Publishing Co. v. Mechem*, 801 F.2d 1233, 1236-37 (10th Cir. 1986). These cases address the separate first amendment ques-

Conversely, several lower courts, without engaging in any first amendment analysis, have concluded that no right of access to the names and addresses of jurors exists. In *United States v. Edwards*,⁷⁸ the Fifth Circuit upheld the trial court's closure of proceedings involving the mid-trial questioning of jurors, after finding that no presumption of openness attached to such proceedings.⁷⁹ In an attempt to accommodate first amendment values, the court did uphold the release of transcripts of the proceedings after the jury had reached its verdict.⁸⁰ However, the Fifth Circuit refused to overturn the trial court's decision to edit the jurors' names from the transcript, citing the jurors' right to "privacy and to protection from harassment," and averring that the transcripts as released were sufficient to "reveal the substance and significance of the issues."⁸¹

The New York Court of Appeals in *Newsday, Inc. v. Sise*⁸² upheld the appellate division's decision not to disclose the names and addresses of jurors who were unable to reach a verdict in a murder trial.⁸³ The court's holding turned mainly on its determination that disclosure was prohibited by New York statute,⁸⁴ and thus, the court largely ignored the first amendment arguments. The court held that the first amendment right of access applied only to judicial proceed-

tion of prior restraints, but lend support to the recognition of a post-verdict right to interview jurors.

78. 823 F.2d 111 (5th Cir. 1987), *cert. denied*, 108 S. Ct. 1109 (1988).

79. *Id.* at 117.

80. *Id.* at 118-19.

81. *Id.* at 120; *see also* *United States v. Gurney*, 558 F.2d 1202 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978). In *Gurney*, a case preceding *Richmond Newspapers* and its progeny, the Fifth Circuit upheld the trial court's refusal to publicly release the names and addresses of jurors despite the fact that the jurors' names had been called out in open court during the jury selection process. *Id.* at 1210 & n.12. The court held that it was within the discretion of the trial court to withhold this information in order to protect juror privacy, especially in a highly publicized case. *Id.* at 1210. In support of its holding, the court cited the Report of the Committee on the Operation of the Jury System on the "Free Press-Fair Trial" Issue, 45 F.R.D. 391, 410-11 (1968).

82. 71 N.Y.2d 146, 518 N.E.2d 930, 524 N.Y.S.2d 35 (1987), *cert. denied*, 108 S. Ct. 2823 (1988). The author's law firm, Townley & Updike, represented *Newsday, Inc.* in the case.

83. *Id.* at 151-52, 518 N.E.2d at 933, 524 N.Y.S.2d at 38-39. The New York Freedom of Information Law (FOIL) requires disclosure of records maintained by an "agency" unless such records are "specifically exempted from disclosure" by other New York or federal statutes. N.Y. PUB. OFF. LAW § 87(2)(a) (McKinney 1988). One such exemption is for information provided on the juror questionnaires used by the Commissioner of Jurors to determine juror qualifications: "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." N.Y. JUD. LAW § 509(a) (McKinney Supp. 1989). While acknowledging that FOIL was enacted to "encourage public awareness and understanding of and participation in government and to discourage official secrecy," the *Sise* court nevertheless held that the above exception "exempted all information contained in the questionnaires regardless of its nature and the possible effect on privacy or safety interests which disclosure might cause." *Sise*, 71 N.Y.2d at 150, 152, 518 N.E.2d at 932-33, 524 N.Y.S.2d at 37-39 (emphasis in original).

84. *Sise*, 71 N.Y.2d at 153, 518 N.E.2d at 933, 524 N.Y.S.2d at 38.

ings, and that since the plaintiff had not sought access to a judicial proceeding or transcript of such a proceeding, no first amendment interests were implicated.⁸⁵

IV. THE CASE FOR A FIRST AMENDMENT RIGHT OF ACCESS TO THE NAMES AND ADDRESSES OF JURORS

Despite the failure of those courts which have rejected a first amendment right of access to jurors' names and addresses to engage in any form of first amendment analysis,⁸⁶ it is clear both from the broad objectives underlying recognition of the first amendment right,⁸⁷ as well as from its almost uniform application by the judiciary in deciding questions of access to criminal processes and related materials,⁸⁸ that such an analysis must be made. The remainder of this article will apply first amendment analysis and will conclude that the first amendment affords a qualified right of access to jurors' names and addresses after the conclusion of their services.

A. *Application of the Test to Determine Whether a Presumptive First Amendment Right of Access Exists*

Press-Enterprise II provides a two-part test to determine whether a presumptive right of access exists.⁸⁹ First, it must be determined whether the proceeding or practice in question has been traditionally accessible to the public.⁹⁰ Second, the merits of public access must be examined to determine whether such access would play a significant role in enhancing the judicial process.⁹¹ If these two questions are answered in the affirmative, then there is a presumptive right of access which may be overcome only if "closure is essential to preserve higher values and is narrowly tailored to serve" those superior values.⁹²

85. *Id.* at 153 n.4, 518 N.E.2d at 933 n.4, 524 N.Y.S.2d at 39 n.4. The court also rejected the argument that there is a common law right of access to the names and addresses of jurors, on the ground that such information was not contained in any public judicial records. *Id.*; *cf. supra* note 11 and accompanying text.

86. See *supra* notes 78-75 and accompanying text.

87. See *supra* notes 18-22 and accompanying text.

88. See *supra* notes 12-77 and accompanying text.

89. *Press-Enterprise II*, 478 U.S. 1, 10-13 (1986).

90. *Id.* at 10-11.

91. *Id.* at 11-13.

92. *Id.* at 13-14 (quoting *Press-Enterprise I*, 464 U.S. 501, 510 (1984)).

1. The Historical Tradition of Access

An examination of historical tradition indicates that jurors' identities and places of residence traditionally have been known to the public.⁹³ In the early days of jury development, jurors were neighbors of the litigant; in fact, jurors could be disqualified if they were not from the same neighborhood.⁹⁴ This "vicinage" requirement presumed that jurors would be acquainted with the character of the litigants and the witnesses;⁹⁵ and, thus, litigants, witnesses, and observers knew who the jurors were.

In the United States, prior to the mass urban migration that began in the late nineteenth century, both the names and addresses of jurors were freely available to the public.⁹⁶ Criminal trials were open to the public, and in most American communities, residents knew all the members of any given jury; indeed, this is still the case in many rural communities.⁹⁷ Thus, only recently in the history of the jury system have jurors primarily become strangers to the litigants and to the observing public. Nonetheless, jurors' names are still frequently called out in open court during voir dire,⁹⁸ and litigants almost always have access to jurors' names and addresses.⁹⁹

Moreover, interviewing jurors after a trial to determine what led them to reach their verdict has become commonplace throughout the United States.¹⁰⁰ In most cases, jurors who agree to be interviewed

93. While the Supreme Court has never addressed the question of a first amendment right of access to jurors' names and addresses, it has suggested that at least juror names have ordinarily been available absent overriding circumstances. See *Press Enterprise I*, 464 U.S. at 512 (noting that "a [juror's] valid privacy right may rise to a level that part of the transcript should be sealed, or the name of a juror withheld, to protect the [juror] from embarrassment").

94. See Pope, *supra* note 1, at 437-39. Jurors were *required*, moreover, to possess information about the dispute at issue. "Ignorance of the facts was grounds for excuse from jury service." *Id.* at 438.

95. 1 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 107 (1904), *quoted in* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 568-69 (1980) (Burger, C.J., plurality).

96. See *In re Baltimore Sun Co.*, 841 F.2d 74, 75 (4th Cir. 1988).

97. *Id.*

98. *E.g.*, United States v. Gurney, 558 F.2d 1202, 1210 n.12 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978).

99. *E.g.*, United States v. Doherty, 675 F. Supp. 719, 720 (D. Mass. 1987); see also Note, *Anonymous Juries*, 54 FORDHAM L. REV. 981, 988 (1986).

100. Arce & Henneberger, "Jurors Say the [Gotti] Case Left Much Room For Doubt," N.Y. Newsday, Feb. 10, 1990, at 5 (quoting various jurors on their opinion of the witnesses); *Who's Who on the North Jury*, N.Y. Newsday, Feb. 22, 1989, at 6 (graph listing jurors in the trial of Oliver North, their occupations and knowledge of charge); see, *e.g.*, Hayes, *A Jury Wrestles With Pornography*, AM. LAW., Mar. 1988, at 96 (discharged jurors discuss first federal obscenity conviction under RICO); Uhlig, *Jurors Describe "Wild" Shifts of Opinion*, N.Y. Times, Mar. 26, 1988, § 1, at 36, col. 1 (jurors discuss nine days of deliberation preceding plea bargain in a publicized local murder trial); Morgan, *Howard Beach Juror Cites Victim's Fear*, N.Y. Times, Dec. 27, 1987, § 1, at 38, col. 4 (jurors discuss reason behind manslaughter verdict in Howard Beach racial

freely allow their names to be used in the resulting news report.¹⁰¹ Both historical tradition and current practice clearly indicate that the identity and place of residence of jurors have been freely available in the United States.

2. The Contributions of Post-Verdict Access to Jurors to the Improvement of the Judicial Process

Turning to the second prong of the *Press-Enterprise II* test, it is quite clear that information obtained from post-verdict interviews with jurors plays a significant role in the functioning and enhancement of the judicial process and of the government as a whole.

Juror interviews shed light on perhaps the most critical phase of the criminal trial, and are essential if the public is to gain full appreciation of the criminal process.¹⁰² Interviews with discharged jurors also serve an educational function by familiarizing the public with a proceeding in which most individuals will one day be required to take part.¹⁰³

Furthermore, post-verdict interviews serve to assure the public that, through our judicial system, justice can be and indeed has been rendered. Results alone, as the Supreme Court has recognized, do not satisfy "the natural community desire for 'satisfaction.'"¹⁰⁴ To inspire public confidence, justice must satisfy the appearance of justice, and the appearance of justice is not served if those charged with a crime may be regularly tried by juries whose members may remain anonymous.¹⁰⁵

attack trial); Hicks, *Man, Given Death for Rape, Murder, Praises Prosecutor*, L.A. Times, Aug. 25, 1987, Metro, at 1, col. 5 (Orange County ed.) (jurors discuss breakdown of deliberations); *8 Who Protested South Africa are Acquitted*, N.Y. Times, May 18, 1985, § 1, at 33, col. 1 [hereinafter *8 Who Protested*] (juror discusses acquittal of defendants who occupied South African Consulate); Feron, *Jurors in Harris Trial Re-Enacted Night Of Murder Deliberations*, N.Y. Times, Feb. 26, 1981, § A, at 1, col. 5 (jurors discuss what led to verdict in Jean Harris murder trial).

101. See, e.g., Uhlig, *supra* note 100; Morgan, *supra* note 100; *Jurors Discuss Protesters: 'They Did It for a Reason'*, Daily Hampshire Gazette, Apr. 16, 1987, at 1 [hereinafter *Jurors Discuss Protesters*]; *Coercion Fears Linked to Mistrial in Spy Case*, N.Y. Times, Nov. 8, 1985, § A, at 20, col. 5. But see Lindsey, *Jurors Cite Entrapment and Failure to Prove Case*, N.Y. Times, Aug. 17, 1984, § A, at 1, col. 3 (jurors who agreed to discuss their verdict in DeLorean case refused to identify themselves by name).

102. See *Doherty*, 675 F. Supp. at 723.

103. See *id.*

104. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571 (1980) (Burger, C.J., plurality).

105. *In re Baltimore Sun Co.*, 841 F.2d 74, 76 (4th Cir. 1988). Some commentators argue that, rather than inspiring confidence in the judicial system, post-verdict interviews with jurors may actually serve to undermine public acceptance of jury verdicts.

The information obtained through access to jurors' names and addresses improves the quality of each particular criminal proceeding and of the underlying process as a whole. Although the motivation behind media contact with discharged jurors—unlike party or attorney contact with jurors—is not to ferret out information with which to attack the verdict,¹⁰⁶ jury impropriety is, on occasion, uncovered through media interviews with jurors.¹⁰⁷ Moreover, research aided by juror interviews has shed light on certain system-wide problems adversely affecting the proper functioning of our judicial system, which then may be the subject of judicial or legislative correction.¹⁰⁸

Finally, although the modern day jury's role is officially limited to

See, e.g., Note, Public Disclosures of Jury Deliberations, 96 HARV. L. REV. 886, 891 (1983) [hereinafter *Public Disclosures*]. The apparent justness of jury verdicts in the eyes of the public will not be maintained unless the factual and legal premises which motivated a particular juror's deliberations remain shielded to prevent "easy and obvious criticism" of the verdict. *Id.* at 891 (quoting Nessen, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 HARV. L. REV. 1187, 1197 n.25 (1979)). However, the argument itself—that a juror's deliberations must not be disclosed lest it be revealed that the jury was proceeding upon a faulty legal premise or was subject to outside influence—does more to undermine public confidence in jury verdicts than does the information which discharged jurors regularly provide to the press. It is, after all, the verdict itself which serves as the primary focus of the public's attention and emotions. When substantial segments of the public disagree with the verdict rendered by a jury, judicial prohibitions on the jurors' discussion of the factors influencing their decision will do more to cause those segments to reject the judicial system entirely than would discretionary interaction between individual jurors and members of the media, even if doubt is thereby cast on the validity of the individual verdict rendered.

106. *See* *Journal Publishing Co. v. Mechem*, 801 F.2d 1233, 1236 (10th Cir. 1986). Attorneys' post-verdict requests for juror interviews, when the obvious motivation is the search for evidence of improprieties in the deliberations, are strongly discouraged and regularly denied. *In re Express-News Corp.*, 695 F.2d 807, 810 (5th Cir. 1982).

107. *See, e.g., United States v. Posner*, 644 F. Supp. 885, 886 n.2 (S.D. Fla. 1986) (trial court first learned that jury may have been exposed to prejudicial outside influences through newspaper article in which juror was interviewed), *aff'd without opinion sub nom.* *United States v. Scharrer*, 828 F.2d 773 (11th Cir. 1987), *cert. denied*, 108 S. Ct. 1110 (1988). Even if media exposure of improper jury conduct through juror interviews in a particular case is not of the type which may result in invalidation of the verdict, *see Tanner v. United States*, 483 U.S. 107 (1987), exposing such misconduct may result in reforms designed to minimize the possibility of such irregularities in the future. Even if no reform occurs, it is in the public interest to alert the community of the weaknesses, as well as the strengths, of the criminal jury trial system.

108. *See, e.g., Lewis, New York Times v. Sullivan Reconsidered: Time to Return to "The Central Meaning of the First Amendment"*, 83 COLUM. L. REV. 603, 612-13 (1983) (juror interviews disclose that jurors do not understand how to apply *New York Times'* reckless disregard standard); Mansfield, *Jury Notice*, 74 GEO. L.J. 395, 410 (1985) (citing study of juror interviews in support of conclusion that instructions to the jury are ineffectual in dissuading jurors from using information acquired independent of the evidence presented to reach their verdict); Note, *The Frye Doctrine & Relevancy Approach Controversy: An Empirical Evaluation*, 74 GEO. L.J. 1769, 1776-77 (1986) (citing conflicting studies of juror interviews on question of whether jurors overestimate probative value of polygraph testimony); Brozan, *Jurors in Rape Trials Studied*, N.Y. Times, June 17, 1985, § C, at 13, col. 2 (findings obtained from interviews with 360 jurors who had served on juries in sexual assault prosecutions indicated that the victim's allegations were doubted if she was sexually active or if she knew the assailant).

serving as the trier of fact in a particular trial, it is well recognized that the jury's actual role is not nearly so limited. Through its verdict, the jury engages in subtle policy-making on issues as diverse as the point beyond which the government may not step in inducing the commission of a crime,¹⁰⁹ the limits of self-defense,¹¹⁰ the boundaries of the defense of insanity,¹¹¹ and the permissibility of certain types of protest against government policies.¹¹²

Moreover, through the process of juror nullification, the jury in a criminal case has the power to ignore the law as instructed by the judge and to disregard even uncontradicted evidence of guilt.¹¹³ Since before the birth of our nation, in cases as varied as the trial of John Peter Zenger and prosecutions under the fugitive slave laws, juries have used this extraordinary power to acquit those charged with an offense when they find the defendant's actions acceptable or condonable under the mores of the community.¹¹⁴

Thus, it is apparent that, far beyond simply deciding guilt or innocence in a particular case, juries frequently exercise a quasi-legislative function in matters gravely affecting the direction of our society, as well as in cases of lesser import. It is the post-verdict juror inter-

109. In the trial of John Z. DeLorean, for example, the defense successfully asserted that DeLorean would not have independently entered into a cocaine-distribution conspiracy if he had not been induced by the police. Interviews with jurors after the verdict revealed that the jurors sought to send a message to the government that its actions were inappropriate. See Lindsey, *supra* note 101; see also Whelan, *Lead Us Not Into (Unwarranted) Temptation: A Proposal to Replace the Entrapment Defense With a Reasonable-Suspicion Requirement*, 133 U. PA. L. REV. 1193, 1199-1200 (1985).

110. Defendants charged with murdering a spouse or parent frequently raise the defense of self-defense, asserting that their actions were justified in light of prolonged exposure to physical or emotional abuse. Thus, jurors are asked to decide in these cases whether and under what circumstances such conduct is justified. See, e.g., Timnick & Feldman, *Son Acquitted of Trying to Murder Abusive Father*, L.A. Times, Oct. 11, 1986, Part 1, at 1, col. 1 (Home ed.).

111. In *In re New York Times Co.*, Misc. No. 82-0124 (D.C. June 19, 1982), the district court found compelling the argument that it was essential that juror interviews be conducted at the end of the Hinckley trial because "publicity about the case is likely to play a large role in shaping public and legislative attitudes toward the insanity defense in the future." *Id.*

112. In jury trials involving the occupation of foreign consulates, and the forcible prevention of CIA recruitment on college campuses, defendants have successfully asserted that their otherwise illegal actions were necessary to prevent the occurrence of greater harm. See *Jurors Discuss Protesters*, *supra* note 101; 8 *Who Protested*, *supra* note 100.

113. *United States v. Dougherty*, 473 F.2d 1113, 1130, 1132 (D.C. Cir. 1972) (defendants charged with illegal entry and destruction of property at offices of the Dow Chemical Company); *United States v. Spock*, 416 F.2d 165, 180-82 (1st Cir. 1969) (defendants charged with conspiracy to interfere with the military draft).

114. See Levine, *The Legislative Role of Juries*, 1984 AM. B. FOUND. RES. J. 605-06.

view which allows the public to determine the message the jury is sending through its verdict. In the absence of post-verdict interviews, it is impossible to determine whether a jury's verdict resulted simply from the government's inability to prove its case or whether other factors were responsible, such as an acceptance of the defendant's behavior or a disapproval of the government's conduct. Post-verdict interviews, therefore, play an essential role in the public debate of issues critically germane to the criminal process and, indeed, to our government as a whole.

In summary, the interests that led the Supreme Court to recognize a right of access to criminal trials, to the voir dire of jurors, and to preliminary hearings also are promoted by public access to the names and addresses of jurors. Such access is consistent with and necessary to the full enjoyment of the constitutional right of access to various other components of the criminal process. Thus, the first amendment grants a qualified right of access to the names and addresses of jurors sitting in criminal trials after the conclusion of their jury service.

V. BALANCING THE INTERESTS SUPPORTING ACCESS TO JUROR NAMES AND ADDRESSES AGAINST THOSE INTERESTS FAVORING RESTRICTIONS ON ACCESS

The Supreme Court consistently has recognized that, even when a first amendment right of access is found to exist, the right of access is not absolute and may be restricted to protect overriding interests.¹¹⁵ However, the Court requires that a strict standard be met before access to information to which the first amendment attaches may be denied. A restriction on access may be granted only if the restriction is (1) necessitated by a compelling government interest, and (2) narrowly tailored to serve that interest.¹¹⁶

When courts and commentators opposing access attempt to deny the existence of a first amendment right to particular information despite the fact that access has been shown to advance the same interests which have led federal and state courts to recognize a right of access in other judicial contexts, they essentially assert that any positive effects of access are overcome *in every case* by those interests favoring closure.¹¹⁷ In *Globe Newspaper*, however, the Supreme

115. See, e.g., *Press-Enterprise I*, 464 U.S. 501, 509 (1984) (noting that "[c]losed proceedings . . . must be rare and only for cause shown that outweighs the value of openness"); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982) (to uphold closure, "denial [of access must be] necessitated by a compelling governmental interest").

116. *Globe Newspaper*, 457 U.S. at 606-07.

117. See *United States v. Edwards*, 823 F.2d 111, 120 (5th Cir. 1987) (no error in refusing to release jurors' names, as jurors are entitled to privacy and protection from

Court stated that even the compelling state interest in protecting the privacy and well-being of minor sexual assault victims was not sufficient to override in every case the first amendment interests favoring access, "for it is clear that the circumstances of the particular case may affect the significance of the interest [favoring a restriction on access]."¹¹⁸ Accordingly, the Court concluded that the first amendment requires that the interests favoring access be balanced against those interests supporting a restriction on access *on a case-by-case basis*, so that access will be denied only when absolutely necessary to protect an overriding interest, and not upon the mere assertion of a generalized interest.¹¹⁹

Assuming a compelling interest in restricting access exists, a case-by-case balancing of those interests supporting and opposing disclosure is required unless the interests which oppose access are implicated in every case and can never be served by any less restrictive alternatives. In cases in which post-verdict access to the names and addresses of jurors is sought, two competing interests generally are asserted in opposition to access: (1) the jurors' right to privacy and freedom from media harassment after the conclusion of their service; and (2) the concern that freedom of debate and independence of thought central to impartial jury deliberations will be stifled if jurors know that their individual arguments and ballots might be disclosed by fellow jurors contacted by the media.¹²⁰ Each of these interests will be briefly analyzed to determine whether they justify a blanket restriction on access to jurors' names and addresses.

A. *Jurors' Right to Privacy*

One argument presented in support of restrictions on the media's ability to interview jurors after completion of their jury service is that jurors should be "entitled to privacy and to protection [from] harassment."¹²¹ Opponents of access argue that granting a qualified

harassment); *United States v. Gurney*, 558 F.2d 1202, 1210 (5th Cir. 1977), cert. denied, 435 U.S. 968 (1978) (trial judge violated no first amendment right of access in refusing to release names and addresses of jurors because both defendant's sixth amendment right to fair trial and jurors' right to privacy must be respected). See generally *Public Disclosures*, supra note 105.

118. *Globe Newspaper*, 457 U.S. at 607-08.

119. *Id.* at 607-09.

120. Note, *The First Amendment and Post-Verdict Interviews*, 20 COLUM. J.L. LAW & SOC. PROBS. 203, 231-33 (1986) [hereinafter *First Amendment*]; *Public Disclosures*, supra note 105, at 888-92.

121. *United States v. Harrelson*, 713 F.2d 1114, 1116 (5th Cir. 1983), cert. denied sub nom. *El Paso Times, Inc. v. District Court for W. Dist.*, 465 U.S. 1041 (1984).

right of access to jurors' names and addresses will result in discharged jurors being inundated by repeated media requests for interviews, lead to a complete disruption of their lives, and permanently prejudice them against the prospect of future jury service.

Courts which have decided whether an individual has an absolute protectable privacy interest against the public disclosure of his name and address have uniformly held that such an interest does not ordinarily exist.¹²² Moreover, some courts have recognized that not all jurors consider post-trial interviews a burden; indeed, some rather enjoy the interviews.¹²³ To the extent the potential for harassment may exist,¹²⁴ this danger may be alleviated through the imposition of safeguards, such as a prohibition against repeated requests for interviews once a juror has refused, or a commitment from the media that

122. See *United States v. Doherty*, 675 F. Supp. 719, 725-26 (D. Mass. 1987) (although recognizing that jurors have a right to privacy even after trial and that jurors unanimously objected to having their names and addresses revealed, the court released names and addresses seven days after verdict); *Pantos v. City of San Francisco*, 151 Cal. App. 3d 258, 262, 198 Cal. Rptr. 489, 492 (1984) (no compelling interest in privacy presented to justify restricting access to list of qualified jurors); *Lehman v. City of San Francisco*, 80 Cal. App. 3d 309, 313-14, 145 Cal. Rptr. 493, 495 (1978) (release of prospective juror's name to litigants does not violate juror's right of privacy under state or federal constitution); see also *NLRB v. British Auto Parts, Inc.*, 266 F. Supp. 368, 373 (C.D. Cal. 1967), *aff'd* 405 F.2d 1182 (9th Cir. 1968) (privacy rights of employees not violated by NLRB rule requiring employer to file a list of names and addresses of all employees eligible to vote in labor representation election); *In re Request of Rosier*, 105 Wash. 2d 606, 612-13, 717 P.2d 1353, 1358 (1986) (disclosure by public utility of privacy interests). See generally Annotation, *Publication of Address as Well as Name of Person as Invasion of Privacy*, 84 A.L.R. 3d 1159 (1978).

The *Restatement (Second) of Torts* specifies four ways in which privacy may be invaded: (1) an intrusion upon a person's seclusion; (2) appropriation of a person's name or likeness; (3) publication about a person's private life; or (4) publication which places a person in a false light. RESTATEMENT (SECOND) OF TORTS § 625A-I, (Tent. Draft No. 22, 1976). Categories (2) and (4) are irrelevant to the question of disclosure of an individual's name and address. Although categories (1) and (3) seem relevant, each requires that the intrusion or publication be "highly offensive" to a reasonable man, a standard which is not met when the act complained of is the mere disclosure of an individual's name and address, information readily available in the telephone directory as well as in a myriad of public records.

123. *United States v. Moten*, 582 F.2d 654, 665 (2d Cir. 1978).

124. The media generally has not persisted in attempting to interview a juror once that juror has indicated that he or she does not wish to be interviewed. *United States v. Coonan*, 664 F. Supp. 861, 863 (S.D.N.Y. 1987) (indicating that media respected the wishes of jurors in New York City corruption trial who indicated that they did not want to be interviewed). In the overwhelming majority of criminal cases, there is simply no basis for believing that names and addresses are released to the media. See *In re Baltimore Sun*, 841 F.2d 74, 76 n.5 (4th Cir. 1988) (court noted that no violence or jury corruption was involved); *Coonan*, 664 F. Supp. at 863 (noting that "there is a category of persons who, although prone to the most outlandish conduct, seem to draw the line at interfering with those who are engaged in the administration of the judicial process"). Should a credible threat of violence or harassment indeed exist, a court could then deny access to the jurors' names and addresses based on its finding that closure is necessitated by the specific facts of the case.

addresses of jurors will not be published.¹²⁵

Thus, even if the privacy interests arising from the disclosure of jurors' names and addresses are compelling, they still do not justify a blanket rejection of any first amendment right since those interests do not apply to every juror, nor are they implicated in every type of criminal case. Alternatives to denial of access can adequately protect the jurors' interest in privacy without eviscerating the public's first amendment right.

B. The Threat That Post-Verdict Juror Interviews Will Stifle the Freedom of Debate Essential to a Fair and Impartial Jury Deliberation

Courts and commentators opposing post-verdict juror interviews also argue that the ability of the jury to engage in fair and uninhibited deliberations would be threatened if jurors knew that "their arguments and ballots were [to be] freely published to the world."¹²⁶ However, proponents of this argument offer no empirical evidence to support the theory that the prospect of post-verdict juror interviews retroactively influences individual juror's deliberations.¹²⁷ Given the extent to which such interviews are conducted following criminal trials, sufficient opportunity has clearly been presented to garner such evidence if it in fact exists.¹²⁸ Moreover, the American experience with post-verdict juror interviews by the media indicates that judicial admonitions to departing jurors not to discuss the specific votes or positions taken by other jurors¹²⁹ have been largely successful in preventing such exposure.¹³⁰ Thus, the argument that post-verdict

125. *Doherty*, 675 F. Supp. at 726. Members of the media who ignore the judicial imposition of such safeguards may be punished by the court.

126. *First Amendment*, *supra* note 120, at 232.

127. In *Globe Newspaper*, the Supreme Court rejected the argument that denying access to the testimony of minor sexual assault victims would improve the quality of their testimony because of the absence of any empirical support for this proposition. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609 n.26 (1982).

128. This is not the type of situation criticized by Chief Justice Burger in his dissent chastising the *Globe Newspaper* majority for pointing to an absence of empirical support for the government's argument favoring closure since no opportunity to compile such data had occurred. *Globe Newspaper*, 457 U.S. at 617 (Burger, C.J., dissenting).

129. See, e.g., *Commonwealth v. Fidler*, 377 Mass. 192, 201-02 n.9, 385 N.E.2d 513, 519 n.9 (1979) (instruction to jurors discouraging them from revealing fellow jurors' names or how they arrived at verdict).

130. See, e.g., *Morgan*, *supra* note 100 (Howard Beach jurors who agreed to be interviewed refused to disclose how many jurors had been adamant against murder convictions).

interviews adversely affect the deliberative process simply lacks foundation, both in theory and in fact.

VI. CONCLUSION

The factors leading the Supreme Court and lower federal and state courts to recognize a right of access to various aspects of the criminal proceeding are equally served by recognition of a right of access to jurors' names and addresses at some point after the conclusion of their jury service. While interests favoring a denial of access to such information may, in a given case, rise to the level at which the first amendment right is overcome, no interest favoring denial is sufficiently compelling to overcome the constitutional right of access in every case. Thus, the qualified first amendment right of access to jurors' names and addresses must be a factor which is balanced in any judicial determination concerning the question of access.