Juror Journalism: Are Profit Motives Replacing Civic Duty?

Brent K. Ashby
Juror Journalism: Are Profit Motives Replacing Civic Duty?

I. INTRODUCTION

The attempted assassination of President Reagan by John Hinckley and the ensuing trial captured the attention of the American public as well as the media. When the jury in the Hinckley trial announced its verdict of not guilty by reason of insanity, the media displayed an obsessive interest in ascertaining the reason for the verdict. Because of the intense curiosity with this and other highly publicized criminal trials, jurors are increasingly exposed to overwhelming public and media attention. Now, with juries in the spotlight, it seems jurors are reaping more than just fame and notoriety.

Enticed by the opportunity of receiving significant financial gain, many jurors in high profile trials are becoming more than just fact-finders—they are becoming journalists as well. Widespread interest in such cases often places the content of the jurors’ deliberations in great demand. In fact, two jurors in the widely publicized Bernhard Goetz trial sold their personal accounts of the trial to New York tabloids for handsome sums.

This so called “juror journalism” raises serious legal concerns. Some commentators urge that it threatens the very integrity of the jury system. By documenting personal accounts of their jury experience and then selling them to the press, these juror journalists may be changing the way jury service has been viewed over the past sev-

---

1. As many of the jurors returned home from the Hinckley trial, they found reporters and TV crews anxiously awaiting them for interviews and comments. One juror even exclaimed, “I did just about every radio show there is. I didn’t know there were so many of them.” Beach, The Juror as Celebrity: Does Post-verdict Press Scrutiny Prevent Abuses or Create Them?, TIME, Aug. 16, 1982, at 41.
2. During the recent Howard Beach murder trial in New York, one of the jurors sought to sell her diary to the highest bidding newspaper. Chambers, Little Room on Juries for Profit Motive, Nat’l L.J., Jan. 25, 1988, at 13, col. 4. Similarly, one juror in the Westmoreland libel suit against CBS was paid $15,000 for her book about the trial and a juror in the Pennzoil-Texaco case is just finishing a book soon to be published by Prentice-Hall. Jost, The Dawn of Big-Bucks Juror Journalism, Legal Times, July 20, 1987, at 15, col. 1.
4. Id. at 16, col. 4.
eral decades. If allowed to continue unchecked, juror journalism could conceivably result in prospective veniremen actively endeavoring to gain seats in high publicity cases solely to procure a financial windfall. This sort of conduct counters the very nature of jury service, which has been described as a civic duty. Further, the possibility exists that a juror may take actions during the deliberations to produce a more dramatic verdict, rather than responding to the evidence presented. Perhaps more importantly, the fear of publicized deliberations could inhibit jurors from speaking freely in the jury room. Thus, as juror journalism becomes increasingly prevalent, the courts and the legislature will likely be called upon to take action to alleviate these problems.

The purpose of this comment is to examine these concerns and evaluate the conflicts that juror journalism has produced. To provide an adequate framework for addressing these troubling issues, this comment will explore the history and evolution of the jury system in the United States and then focus on the juror's right to publicly disclose personal accounts of trial proceedings. This right will be contrasted with the rights of the defendant and those of other jurors which may be affected by the disclosure of trial proceedings for a profit. Finally, policy considerations encompassing the duty of the courts along with the need to preserve secrecy in the deliberation process will be analyzed to determine the adverse effect, if any, that juror journalism may invoke in these important areas.

II. THE HISTORY OF THE AMERICAN JURY

A. The Early Jury System

The roots of our modern jury system may be traced back to the Anglo-Saxons. Prior to the invasion of William the Conqueror, a trial was initiated by a hearing before the king's officers and men of prominence in the community. The right of trial by jury as we know it today was nonexistent and trial by ordeal was the common mode of the day for persons accused of criminal wrongdoing.

5. See infra notes 25-33 and accompanying text.
6. See infra notes 22-38 and accompanying text.
9. V. Hans & N. Vidmar, supra note 8, at 23.
10. Trial by ordeal often took many varied forms and was generally instituted if the accused had been previously judged guilty of perjury or was of suspicious character. B. Lyon, A Constitutional and Legal History of Medieval England 101-02 (2d ed. 1980). See also 2 F. Pollock & F. Maitland, supra note 8, at 598. This archaic
type of trial required the accused to endure various forms of physical torture.\textsuperscript{11} God was considered to be the supreme judge, and the people believed that by using this method of trial, God would intercede if the accused was innocent.\textsuperscript{12} Thus, if the person survived the ordeal, he was then declared innocent.

Sometime during the thirteenth century, enlightened thinkers began to realize that trial by ordeal was not a reliable system of rendering justice, and the church began to ban the practice.\textsuperscript{13} Eventually, an individual accused of criminal misconduct was allowed a choice between trial by ordeal or trial by jury.\textsuperscript{14} Given the alternatives, it is easy to see why the preferred choice was trial by jury, or \textit{judicium parium}.\textsuperscript{15}

When the early colonists left England for America, they naturally brought with them many of their customs and governing systems including the notion of a right to a jury trial.\textsuperscript{16} Thus, when the English government restricted that right, the colonists vehemently voiced their disapproval.\textsuperscript{17} In fact, many of the founding fathers believed that the maintenance of individual liberty was predicated upon the right to trial by jury.\textsuperscript{18} In the eyes of the colonists, juries were a political force that could guard the rights and wisdom of the

\textsuperscript{11} One type of ordeal involved the carrying of a hot iron by hand. After the ordeal, the person's hand would be bandaged and examined a few days later. Guilt or innocence depended upon whether the hand became infected. B. Lyon, supra note 10, at 102; 2 F. Pollock & F. Maitland, supra note 8, at 598.


\textsuperscript{13} V. Hans & N. Vidmar, supra note 8, at 26; L. Moore, supra note 10, at 35-45; 2 F. Pollock & F. Maitland, supra note 8, at 599.

\textsuperscript{14} P. DiPerna, supra note 10, at 26; V. Hans & N. Vidmar, supra note 8, at 26.

\textsuperscript{15} This is an Old English phrase meaning judgment of one's peers, or more simply, trial by jury. Black's Law Dictionary 763 (5th ed. 1979).


\textsuperscript{17} Two specific acts were passed by the English Parliament that seriously threatened the right to trial by jury. R. Perry & J. Cooper, supra note 16, at 281. The Stamp Act placed taxes on a variety of items including legal documents and college degrees. Violations of the Act were enforced in admiralty courts operating without juries. Id. at 263. The Massachusetts Government Act overruled the common practice of juror selection by town meeting in allowing sheriffs to make the selections. Id. at 282. See also 1 B. Schwartz, The Bill of Rights: A Documentary History 196-97 (1971) (indicating that colonists believed trial by jury was their inherent and invaluable right).

\textsuperscript{18} V. Hans & N. Vidmar, supra note 8, at 36.
nity against any governmental abuse of authority.19 This strong feeling regarding the right to trial by jury was also brought to the Constitutional Convention. The founders took steps to ensure that the oppressions suffered at the hands of the English king would not recur in America.20 As a result, the right to trial by jury was included in the Bill of Rights in both the sixth and seventh amendments.21

B. The Civic Duty

An essential aspect of the jury system is that juries be composed of common citizens from every walk of life within the same community as the accused.22 In order for this system to function properly, an inherent obligation attached to jury service is necessary.23 As with many other rights, the right to be judged by a jury imposes on every citizen the responsibility to take an active part in this system.24 Consequently, jury service has come to be known as jury duty.

Some courts have long recognized the common law duty to serve on juries,25 an obligation which has now been codified by federal and


20. Thomas Jefferson poignantly expressed the feeling of the time as follows: "Were I called upon to decide, whether the people had best be omitted in the legislative or judiciary department, I would say it is better to leave them out of the legislative. The execution of the laws is more important than the making of them." V. Hans & N. Vidmar, supra note 8, at 36.

21. The right to jury trial became official on March 1, 1792, when the first ten amendments to the Constitution were finally ratified by three-fourths of the state legislatures. 2 B. Schwartz, The Bill of Rights: A Documentary History, 1171 (1971). The seventh amendment provides as follows: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII. See infra note 75 for a description of the sixth amendment right to a jury trial.


23. The Supreme Court acknowledges that to effectively fulfill its function as an instrument of justice, the jury must be representative of the community. See Smith v. Texas, 311 U.S. 128, 130 (1940). It is unlikely that a fair representation of the community can be obtained if qualified individuals are not obligated to serve when called. But see State v. Puente, 69 Ohio St. 2d 136, 431 N.E.2d 987 (1982) (exclusion of doctors, dentists, and lawyers held not to violate fair cross-section requirement), cert. denied, 457 U.S. 1109 (1982).


25. State v. Emery, 224 N.C. 551, 566, 31 S.E.2d 858, 862 (1944) (stating that jury
Such a responsibility is logically necessary to insure that jurors do indeed represent every walk of life. Jury service allows citizens to actually participate in the judicial system, which in turn teaches them the workings of our legal framework. Thus, while jury duty is couched as an obligation, it also serves as an opportunity for all citizens to become involved in assuring that the government does not abuse its power.

Nevertheless, the opportunity to serve on a jury does not create an inherent right to serve. Each state determines the qualifications necessary in order to serve on a jury, and those citizens of the state whose service is an obligation that the law imposes on all who meet the requirements). See also Linn, supra note 19, at 10-11 (referring to the duties of jurors and performance of jury responsibilities).


27. Balzac v. Puerto Rico, 258 U.S. 298, 310 (1922) (noting that jury service provides a unique learning opportunity by participating in the machinery of justice). See also Curtis, The Trial Judge and the Jury, 5 VAND. L. REV. 150, 157 (1952) (jurors are observed to see how the judicial process functions).

28. United States v. Edwards, 465 F.2d 943, 948 (9th Cir. 1972) (recognizing that equal protection might be denied if citizens were intentionally deprived of the opportunity to serve).


30. Many of the qualifications are essentially the same for each state, but the statutes are certainly not identical. See, e.g., ALA. CODE § 12-16-60 (1986) (requiring good character and sound judgment, United States citizenship, residency in county for at least a year, attainment of age 19, and right to vote not lost by conviction for offense involving moral turpitude); ILL. ANN. STAT. ch. 78, para. 2 (Smith-Hurd 1987) (requiring attainment of age 18, habitation in town or precinct, fair character, freedom from all legal exception, and ability to understand the English language); N.Y. JUD. LAW § 510 (McKinney Supp. 1988) (requiring United States citizenship, residency of county, absence of mental or physical defects impairing ability to function, intelligence and good character, and ability to read and write proficiently in the English language); TEX. GOV'T CODE ANN. § 62.102 (Vernon 1988) (requiring attainment of age 18, state and county citizenship, sound mind and good moral character, and ability to read and
who qualify are required to serve if called upon to do so. Indeed, courts may compel qualified individuals to serve unless undue financial hardship would result, and contempt proceedings may be brought against those who defy a court order to serve. The imposition of such a duty may be viewed as a rational requirement for enjoyment of the many other rights that individuals possess as citizens of the state.

While many jurors faithfully fulfill their commitments, though the task is not easily accomplished, others use a variety of excuses to avoid the duty. Because jury service is an obligation owed by everyone, a juror is not fully compensated for his efforts, nor does he enjoy the right to compensation. Although many states have sought to alleviate the financial strain by providing nominal compensation for jurors, some people feel the amounts provided are grossly inadequate write); WASH. REV. CODE ANN. § 2.36.070 (Supp. 1988) (requiring that juror be elector and taxpayer of state, resident of county for more than one year, and of sound mind).

31. State ex rel. Passer v. County Bd., 171 Minn. 177, 179, 213 N.W. 545, 546 (1927); Garrett v. Weinberg, 57 S.C. 127, 144, 31 S.E. 341, 344 (1898). These courts indicated that qualified jurors must serve when called upon. See also 47 AM. JUR. 2D Jury § 90 (1969).

32. The financial hardship exclusion will be invoked only if there is a strong likelihood that the financial embarrassment occasioned by serving will impose a significant burden on the juror. Thiel v. Southern Pac. Co., 328 U.S. 217, 224 (1946). For example, a blanket exclusion of all nonsalaried individuals would not be justified. Id.


34. In the highly publicized and lengthy trial of John DeLorean, not one juror nor even an alternate missed a day or arrived late although many had to travel over 100 miles to get to the courthouse. Brill, Inside the DeLorean Jury Room, AM. LAW., Dec. 1985, at 94.

35. One author, recounting his first call to jury duty, pondered whether he could get an affidavit showing a pressing business need or ill health as excuses for not serving. He also considered friends who might know a judge or clerk who could relieve him of duty. F. WELLMAN, GENTLEMEN OF THE JURY: REMINISCENCES OF THIRTY YEARS AT THE BAR 1 (1924).

36. Patierno v. State, 391 So. 2d 391 (Fla. Dist. Ct. App. 1980) (recognizing that juror compensation is a statutory right which a court may not alter); State v. Setzer, 42 N.C. App. 98, 256 S.E.2d 485 (1979) (noting that jury service is a responsibility, not a form of employment).

37. See, e.g., FLA. STAT. ANN. § 40.24 (West Supp. 1988) (allowing $10 per day for active attendance in court plus 14¢ per mile traveling expense); LA. REV. STAT. ANN. § 13:3049 (West Supp. 1988) (providing at least $12 per day but not more than $25 dollars plus mileage compensation of at least 16¢ per mile); MO. ANN. STAT. § 494.170 (Vernon Supp. 1988) (allowing $3 a day for reporting to court plus 7¢ per mile); 42 PA. CONS. STAT. ANN. § 4561 (Purdon Supp. 1987) (allowing $9 a day for the first three days, then $25 for each day thereafter, plus 17¢ a mile); UTAH CODE ANN. § 78-46-18 (1987) (providing $14 a day plus 15¢ per mile); VA. CODE ANN. § 14.1-195.1 (1986) (allowing $20 a day and other necessary and reasonable costs as the court may determine).
and encourage people to find even more ways to avoid jury duty.38 A corollary to this argument is that people may go to great lengths to get onto the jury in a highly publicized case if the opportunity to receive substantial financial gain exists. Thus, juror journalism poses a threat to the jury system if what has been traditionally considered a civic obligation becomes just another profit-making device.

III. CONSTITUTIONAL CONFLICTS

A. The Juror's Freedom of Expression and the Doctrine of Prior Restraint

Some commentators have indicated that legislation should be enacted to prohibit jurors from selling their accounts of court proceedings.39 However, any restrictions placed on a juror's ability to publicly disclose his impressions could conflict with a juror's first amendment right to freedom of expression.40 "'Expression' includes communication of information or ideas by speech, writing, art, or in any other way."41 The first amendment was included in the Constitution primarily for two reasons: to prevent unchecked government censorship and to put an end to the pernicious doctrine of seditious libel.42 By guaranteeing the freedom of speech, the founding fathers

38. Recently, the California legislature cut juror compensation in half from ten dollars to five dollars. Jurors and judges reacted sharply to the new law, believing it will cause employers to be even less supportive of employees who get called to jury duty. L.A. Daily J., July 30, 1987, at 1, col. 1. See also Thiel v. Southern Pac. Co., 328 U.S. 217, 224 n.4 (1946) (citing House of Representatives report that compensation of only $4 a day imposed extreme hardship when jurors serve for extended periods). In 1967, a task force was organized to study the problems facing criminal courts throughout the country. See Task Force Report: The Courts, Task Force on Administration of Justice, The President's Commission on Law Enforcement and Administration of Justice (1967). Regarding the treatment of jurors, the study found that the lack of adequate compensation is one factor which has led to a negative perception of the judicial system by the public. Id. at 90. Although the task force recognized that jury service is a civic duty, it noted that the repeated intrusions into a juror's personal and business life cannot be tolerated without reasonable compensation. Id. at 91.


40. The first amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I (emphasis added).


42. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW, 833-34 (3d ed. 1986) [hereinafter CONSTITUTIONAL LAW]. In England, the king was considered to be immune from criticism. Any publication openly demeaning either the king or his agents was labeled seditious libel. Id. at 831. The doctrine was especially harsh since
provided for a marketplace of free ideas and individual self-fulfillment.\textsuperscript{43}

1. Emergence of the Prior Restraint Doctrine

The evils of unlimited government censorship power gave rise to the doctrine of prior restraints, which was first enunciated by the Supreme Court in \textit{Near v. Minnesota}.\textsuperscript{44} The doctrine prohibits attempts by the government to suppress speech before being communicated or published.\textsuperscript{45} The English philosopher, John Stuart Mill, hypothesized that two basic premises favor a policy of noninterference with expression over a policy of censorship: free expression tends to promote the spread of truth and society benefits as individuals become more independent and inquisitive.\textsuperscript{46} Two recognized forms of prior restraint involve statutes seeking to prevent future publication and judicial limitations, such as injunctions against future expression, enforced through contempt procedures.\textsuperscript{47} These types of restraints are disfavored by the courts.\textsuperscript{48}

In \textit{Near}, the State of Minnesota had enacted a statute prohibiting the publication or circulation of a malicious, scandalous, or defamatory periodical of any kind.\textsuperscript{49} The Court examined the purpose and effect of the statute to determine its validity. Finding that its object was restraint, which was accomplished by enjoining publication, the Court held the statute to be an invalid infringement of liberty.\textsuperscript{50} Citing Blackstone, the Court commented, "Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press . . . ."\textsuperscript{51} Thus, \textit{Near} merely reinforced the old notion that unbridled censorship power, by

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{43} CONSTITUTIONAL LAW, supra note 42, at 836.
\item \textsuperscript{44} 283 U.S. 697 (1931).
\item \textsuperscript{45} Emerson, \textit{The Doctrine of Prior Restraint}, 20 LAW & CONTEMP. PROBS. 648 (1955). The use of prior restraints arose in England when the printing rights were controlled by the Crown. \textit{Id.} at 650. Licensing acts were enacted prohibiting anyone from printing any material without prior government approval. \textit{Id.} \textit{See also} CONSTITUTIONAL LAW, supra note 42, at 831.
\item \textsuperscript{47} Emerson, \textit{supra} note 45, at 655-56.
\item \textsuperscript{48} \textit{See}, e.g., Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); New York Times Co. v. United States, 403 U.S. 713 (1971); Organization For a Better Austin v. Keeffe, 402 U.S. 415 (1971); \textit{Near v. Minnesota}, 283 U.S. 697 (1931). These cases stand for the proposition that a heavy presumption exists against the constitutional validity of prior restraints.
\item \textsuperscript{49} \textit{Near}, 283 U.S. at 701-02.
\item \textsuperscript{50} \textit{Id.} at 722-23.
\item \textsuperscript{51} \textit{Id.} at 713-14.
\end{itemize}
\end{footnotesize}
way of prior restraint, would not be tolerated in a free society.\textsuperscript{52}

More recently, the Court grappled with the prior restraint problem in \textit{Nebraska Press Association v. Stuart}.\textsuperscript{53} This case involved a court order prohibiting the media from publishing or broadcasting the contents of certain statements made by the defendant, who was accused of murder.\textsuperscript{54} The Court noted that the doctrine of prior restraint had not previously been applied to criminal cases involving protective orders, yet recognized that the doctrine should carry the same weight in this setting as in any other.\textsuperscript{55} To determine if indeed the restrictive order was justified, the Court considered whether "the gravity of the 'evil' . . . justifies such invasion of free speech as is necessary to avoid the danger."\textsuperscript{56}

Applying this test, the Court found the order lacked support because it was not clear that the prior restraint would adequately protect the defendant's rights, especially since the crime was committed in a small town of only 850 people where rumors were apt to travel quickly.\textsuperscript{57} The Court concluded that "the guarantees of freedom of expression are not an absolute prohibition under all circumstances, but the barriers to prior restraint remain high and the presumption against its use continues intact."\textsuperscript{58}

Traditionally, the doctrine of prior restraint has been limited in its application to those cases involving the media and the first amendment right to freedom of the press. However, the doctrine may be applied to a juror's right to free speech as well. In fact, in the juror journalism context, the doctrine may be logically extended to encompass free speech because of the close relationship of the jurors with the press. Government restrictions on a juror's right to communicate a story to the press should be considered as much an abridgement of first amendment rights as would restrictions prohibiting the press

\textsuperscript{52} See Jeffries, \textit{Rethinking Prior Restraint}, 92 \textsc{Yale L.J.} 409, 416 (1983).
\textsuperscript{53} 427 U.S. 539 (1976).
\textsuperscript{54} Id. at 543-44.
\textsuperscript{55} Id. at 556, 559.
\textsuperscript{56} Id. at 562 (quoting United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950), \textit{aff'd}, 341 U.S. 494 (1951)). This test has also been referred to as the "clear and present danger" standard postulated by Justice Holmes in \textit{Schenck v. United States}, 249 U.S. 47, 52 (1919).
\textsuperscript{58} Id. at 570. In response to \textit{Stuart}, the American Bar Association promulgated a new standard prohibiting direct restraints on the media. 2 \textsc{Standards for Criminal Justice} § 8-3.1 commentary, at 8-31 (1986). The standard provides that the media may not be punished for publishing information in its possession pertaining to criminal trials. Id.
from publishing the juror's remarks. Such government action would have the sort of "chilling effect" on expression that the first amendment was designed to prevent.\textsuperscript{59}

Therefore, legislation designed to prohibit jurors from selling their personal accounts could be construed, as in \textit{Near}, to be a constitutionally invalid prior restraint on speech. Similarly, injunctive orders issued by a court prohibiting the sale of a juror's writings might also be an invalid restraint.\textsuperscript{60} In either case, the state must show that the gravity of harm threatened by the publication outweighs the intrusion of free speech rights. Such a showing may prove difficult once a trial has concluded. Furthermore, the fact that courts are public institutions whose proceedings are open to the public strengthens the notion that broad restrictions on speech in connection with trial proceedings are rarely justified.\textsuperscript{61}

2. Balancing the Competing Interests

Although freedom of speech occupies a hallowed position in our society, it is by no means an absolute right.\textsuperscript{62} Consequently, it is subject to the balancing of individual rights against governmental interests where conflicts exist.\textsuperscript{63} For example, one such government interest is the fair administration of justice, which opponents of juror journalism might argue will be adversely affected if jurors have the unfettered discretion to sell their personal accounts of trial proceedings.

Post-verdict interviews provide examples of how courts have attempted to balance these competing interests. In the past, courts have hesitated to allow post-verdict interviews with jurors to protect them from needless harassment.\textsuperscript{64} The Supreme Court in early cases viewed the interrogation of jurors as a "practice . . . replete with dan-

\textsuperscript{59} Freedom of Expression, \textit{supra} note 41, at 36.

\textsuperscript{60} See Emerson, \textit{supra} note 45, at 655-56.

\textsuperscript{61} United States v. Ford, 830 F.2d 596, 599 (6th Cir. 1987) (recognizing that because courts are public proceedings, other alternatives such as sequestering jurors or changing venue should be considered to insure a fair trial rather than placing broad restrictions on speech). See also infra notes 88-91 and accompanying text.


gerous consequences.” However, this view eroded over the years as courts began to recognize that a juror’s freedom of speech would be unnecessarily restricted by a complete prohibition of post-verdict interviews by nonparticipants in the trial.

The importance of this first amendment right was set forth by the Ninth Circuit in United States v. Sherman. Sherman involved a high publicity criminal trial of revolutionary organization members devoted to overthrowing the government. Due to the tremendous amount of media attention, the trial judge issued an order after the verdict was rendered prohibiting the jurors from commenting on the case to anyone and restricting the media from approaching or interviewing the jurors.

The appellate court reasoned, however, that a blanket order prohibiting post-verdict contact with jurors did not have the same remedial effect as would an order issued before or during a trial. Since a verdict had already been rendered, the defendants would in no way be deprived of a fair trial. Furthermore, there was no indication that the jurors would be subjected to unnecessary harassment if the media was allowed to contact them. Henceforth, the court felt there were less restrictive alternatives for dealing with the fair trial and harassment concerns. The court held that the orders be retracted and that although the jurors were by no means compelled to speak

65. McDonald v. Pless, 238 U.S. 264, 268 (1915) (quoting Cluggage v. Swann, 4 Binn. 150, 155 (Pa. 1811)).

66. Both the Fifth and Ninth Circuits have indicated that broad restrictive orders prohibiting post-verdict interviews by the press are unenforceable. See, e.g., In re Express News Corp., 695 F.2d 807 (5th Cir. 1982) (holding district court rule prohibiting juror interviews except by leave of court unconstitutional); United States v. Sherman, 581 F.2d 1358 (9th Cir. 1978) (holding invalid an order prohibiting media from contacting jurors after trial). In United States v. Franklin, 546 F. Supp. 1133 (N.D. Ind. 1982), the evolution of the courts’ views on the rights of the press and jurors is vividly detailed. Citing cases from the Supreme Court as well as the Second, Seventh, and D.C. Circuits, the Franklin court traces the concerns expressed by these courts regarding post-verdict interviews. Id. at 1139-41. Noting the recent outlook on first amendment rights, however, the court acknowledged the Ninth Circuit’s decision in Sherman to be the more current standard. Id. at 1144. Consequently, the court ruled that it was a juror’s exclusive, private decision whether to speak with the press once the trial concluded. Id. Thus, although a court may appropriately limit the locale of such activity, it may not proscribe it altogether. Id. at 1145. See also Comment, The First Amendment and Post-Verdict Interviews, 20 Colum. J.L. & Soc. Probs. 203 (1986) (discussing the impact of In re Express News, Sherman, and Franklin upon first amendment rights).

67. 581 F.2d 1358 (9th Cir. 1978).

68. Id. at 1360.

69. Id. at 1361.
with the media, they were free to do so if they wished.\textsuperscript{70}

The conclusion to be drawn from\textit{ Sherman} and other similar cases is that, after a trial, jurors will usually be allowed to speak liberally with the press if they so desire. Since many courts now permit the interviewing of jury members, jurors may logically assume that they should not be prohibited from receiving compensation in return for revealing their accounts of the trial proceedings to the press. However, jurors' rights are not always evaluated under the same standards as those of the general public.\textsuperscript{71} In promulgating its Standards for Criminal Justice, the American Bar Association emphasizes that in certain respects, jurors are agents of the state because they help to administer justice.\textsuperscript{72} Thus, speech restrictions may be placed on jurors which, if placed on the general public, would violate the first amendment.\textsuperscript{73}

On the other hand, when a juror sells his story to the media after a verdict is rendered, the threat to justice is not as apparent as when a juror sells his story before rendering a verdict.\textsuperscript{74} Additionally, once jurors are released from service, they should no longer be considered agents of the state, and thus should not be held to the same standard. Consequently, any broad statutory or judicial prohibitions on a juror's right to sell his account of trial proceedings would likely be invalid as a prior restraint on free speech.

\textbf{B. The Right to a Fair and Impartial Jury}

The sixth amendment guarantees a criminal defendant the right to a fair trial by an impartial jury.\textsuperscript{75} Determining what constitutes an

\textsuperscript{70} \textit{Id.} at 1362.
\textsuperscript{71} 2 STANDARDS FOR CRIMINAL JUSTICE § 8-3.6 commentary, at 8-54 to -55 (1986).
\textsuperscript{72} \textit{Id. See also Clark v. United States, 289 U.S. 1, 11-12 (1933) (suggesting that jurors are officers of the court); 18 U.S.C. § 201(a) (1982) (providing that jurors are considered public officials for certain purposes).}
\textsuperscript{73} See supra note 71. \textit{But cf.} Broadrick v. Oklahoma, 413 U.S. 601 (1973); United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973). These cases held that first amendment rights were not improperly infringed upon by statutes which prohibit state and federal employees from engaging in certain political activities.
\textsuperscript{74} See, e.g., United States v. Hearst, 466 F. Supp. 1068 (N.D. Cal. 1978), \textit{aff'd in part, vacated in part}, 638 F.2d 1190 (9th Cir. 1980), \textit{cert. denied}, 451 U.S. 938 (1981) (condemning the acquisition by defense counsel of literary rights to the client's story prior to conclusion of the trial). The court clearly indicated that such conduct merited disciplinary action. 466 F. Supp. at 1083; \textit{cf.} Wilson v. Phend, 417 F.2d 1197 (7th Cir. 1969), \textit{appeal filed sub nom.} Wilson v. Lash, 457 F.2d 106 (7th Cir.), \textit{cert. denied}, 409 U.S. 881 (1972) (owner of newspaper reporting events of trial was also defense counsel who changed plea to insanity without consulting defendant); People v. Corona, 80 Cal. App. 3d 684, 145 Cal. Rptr. 894 (1978) (defense counsel obtaining publication rights held improper where counsel openly attempted to generate publicity and failed to provide adequate representation).
\textsuperscript{75} The sixth amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and

340
impartial jury, however, has not been an easy task. Chief Justice John Marshall believed a jury should render a verdict free from "strong and deep impressions which close the mind against the testimony that may be offered in opposition to them . . . ."76

Opponents of juror journalism are concerned that jurors might not judge a case on its merits if given the opportunity to receive significant financial benefit from jury service. These opponents contend, that a juror's desire for a big story may possibly overcome the desire to render justice.77

Arguably, the financial motives dominating the juror journalist should be considered the sort of "strong and deep impressions" to which Marshall alluded. On the other hand, most problems relating to impartiality involve the juror's preconceived opinions or notions which would lead to unreasonable prejudice.78 Some contend that the opportunity of receiving compensation for a personal account of trial proceedings will cause the juror to develop preformed opinions which unduly prejudice the defendant. Nevertheless, courts recognize that pretrial publicity generated by the media may have a significant impact on jurors.79 Similarly, the power of the media may indirectly influence jurors when financial remuneration is offered for a juror's story.80

1. Priority of the Sixth Amendment

It is safe to assume that as courts begin to address the juror journalism issue, they will likely be required to resolve the possible conflict between the juror's right to speak freely and the defendant's right to an impartial jury. How the courts will reconcile this conflict

---

77. One jury selection consultant remarked, "When you add the monetary incentive [to serve as a juror], it just makes it that much harder to ascertain whether people are telling the truth or not." Jost, supra note 2, at 15, col. 4.
79. See, e.g., Sheppard v. Maxwell, 384 U.S. 333 (1966); see also infra notes 100-103 and accompanying text.
80. See Comment, supra note 78, at 654-57 (suggesting powerful press may leave lasting impressions on jurors).
is not entirely clear, although it seems they may be inclined to place sixth amendment rights above first amendment rights.\textsuperscript{81}

In Chicago Council of Lawyers \textit{v}. Bauer,\textsuperscript{82} a lawyer's association sought a declaratory judgment against enforcement of various "no comment" rules imposed by statute and the American Bar Association.\textsuperscript{83} The appellant argued that the rules prohibiting lawyers involved in pending litigation from publicly commenting on the case were an unconstitutional infringement of first amendment rights.\textsuperscript{84} The court held that where there exists an irreconcilable conflict between a lawyer's first amendment right to make extrajudicial comments about a trial and the defendant's sixth amendment rights, the sixth amendment right must take precedence.\textsuperscript{85}

The Bauer court indicated that although the "no comment" rules could not be considered typical prior restraints, they must adhere to the standards of "clearness, precision, and narrowness."\textsuperscript{86} Furthermore, in order to withstand constitutional scrutiny, the rules may only proscribe those comments "that pose a 'serious and imminent threat' of interference with the fair administration of justice . . . ."\textsuperscript{87} Thus, while the court acknowledged that some aspects of free speech involving trial proceedings could be curtailed, it also emphasized that a per se proscription would not be justified.\textsuperscript{88}

The concern for protecting sixth amendment rights, as expressed in Bauer, may cause courts to cautiously evaluate juror journalism. If the courts determine that profit motives will affect a juror's impartiality, it is likely they would be willing to impose necessary restraints in order to ensure a "fair administration of justice."

\textsuperscript{81} In re Globe Newspaper Co., 729 F.2d 47, 53 (1st Cir. 1984) (stating irreconcilable conflict between public's first amendment right to trial access and defendant's sixth amendment right to fair trial must be resolved in favor of the sixth amendment); United States v. Chagra, 701 F.2d 354, 361-62 (5th Cir. 1983) (finding that the press and public's first amendment right to access to criminal trials must give way to defendant's superior right to a fair trial); Chicago Council of Lawyers \textit{v}. Bauer, 522 F.2d 242, 248 (7th Cir. 1975) (resolving conflicts between free speech and right to fair trial in favor of the latter), \textit{cert. denied}, 427 U.S. 912 (1976).

\textsuperscript{82} 522 F.2d 242 (7th Cir. 1975).

\textsuperscript{83} Id. at 247.

\textsuperscript{84} Id.

\textsuperscript{85} Id. at 248. Although the Constitution places no priorities on the various amendments, the court's conclusion is reasonable given the fact that in a criminal trial the defendant's life may be at stake. \textit{See also} Press-Enterprise Co. \textit{v}. Superior Court, 464 U.S. 501, 508 (1984) (stating that "[n]o right ranks higher than the right of the accused to a fair trial"); Estes \textit{v}. Texas, 381 U.S. 532, 540 (1965) (indicating that a fair trial is "the most fundamental of all freedoms").

\textsuperscript{86} Bauer, 522 F.2d at 249. \textit{See also} Procunier \textit{v}. Martinez, 416 U.S. 396, 413 (1974) (stating that first amendment restrictions may not exceed the bounds necessary to protect governmental interests).

\textsuperscript{87} Bauer, 522 F.2d at 249.

\textsuperscript{88} Id. at 250-51.
2. The Right of the Public to be Informed

The sixth amendment does not guarantee the right to a trial completely free of public scrutiny and criticism. Courts acknowledge that a defendant may waive his right to a public trial, yet still not enjoy an absolute right to a private trial. The conflict between the right to a fair trial and the right of the public to be informed of criminal proceedings was exposed by the Court in *Estes v. Texas*. In *Estes*, the public was alerted to the significance of the case by the access given the press and media to the pretrial proceedings. Photographers, reporters, and radio broadcasters were stationed inside a booth within the courtroom where live broadcasts were made constantly.

The Court recognized that the media often provide invaluable services by keeping the public informed of trial proceedings. At the same time, however, it emphasized the need for adequate safeguards to protect the defendant's rights. Quoting Chief Justice Taft, the Court stated:

> The requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a possible temptation to the average man . . . to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the

---

89. Several reasons are advanced for conducting criminal trials open to the public view: (1) trial participants tend to fulfill their responsibilities more conscientiously; (2) the general public becomes informed of developments in the law that may affect it; and (3) increased respect and confidence in the judicial system is fostered when the public is allowed to attend. 6 J. Wigmore, Evidence § 1834 (Chadbourn rev. 1976). See also United States v. Consolidated Laundries Corp., 266 F.2d 941, 942 (2d Cir. 1959). “In general it appears to be sound public policy to avoid secret judicial proceedings in the course of a trial so far as possible; it will promote confidence merely to avoid the suspicions which always attend secrecy.” *Id.* The distrust of secret trials probably relates to the infringement of liberty occasioned by the Spanish Inquisition, English Courts, and French Monarchy, all of which almost exclusively conducted trials hidden from the public view. See *In re Oliver*, 333 U.S. 257, 268-69 (1948).

90. *Singer v. United States*, 380 U.S. 24, 34-35 (1965). In *Singer*, the defendant sought a bench trial in a federal criminal mail fraud case. Refusing the request, the Court noted, “A defendant’s only constitutional [sic] right concerning the method of trial is to an impartial trial by jury.” *Id.* at 36. In *United States v. American Radiator & Standard Sanitary Corp.*, 274 F. Supp. 790, 791 (W.D. Pa. 1967), the defendants sought to exclude the public from a hearing to suppress evidence. The court held that even though the defendants had waived their right to a public trial, they were not entitled to exclude the public from the hearings because the case involved an antitrust action which should be open to the public view. *Id.* at 795.

91. 381 U.S. 532 (1965).

92. *Id.* at 537.

93. *Id.* at 540.
latter due process of law. Proponents of juror journalism might argue that as long as a juror upholds his oath to render a fair and impartial verdict, the defendant is not harmed by the juror selling his story, especially after the trial has concluded. This position may be valid; but as long as financial gain from jury service presents even "a possible temptation to the average" juror, then juror journalism must be carefully scrutinized to assure a fair trial for the defendant.

C. A Juror’s Right to Privacy

In 1890, Professors Warren and Brandeis published their seminal article entitled The Right to Privacy. This work laid the foundation for the development of the privacy rights which are often spoken of today. However, it was not until the landmark case of Griswold v. Connecticut that a constitutional right to privacy was recognized by the Supreme Court. At that time, the right to privacy was established as "a fundamental personal right, emanating from the totality of the constitutional scheme under which we live."

1. Development of a Juror’s Right to Privacy

Courts have recognized that jurors are entitled to privacy but have not set forth any parameters for protecting this right. The Supreme Court acknowledged a juror’s right to privacy in the widely

94. Id. at 543 (quoting Tumey v. Ohio, 273 U.S. 510, 532 (1927)). See also 3 STANDARDS FOR CRIMINAL JUSTICE § 15-3.7 (1986) (duty of judge to see that jurors not exposed to information which could preclude rendering of impartial verdict); cf. 8 J. WIGMORE, EVIDENCE § 2349 (McNaughton rev. 1961) (indicating jurors’ motives in rendering verdict not grounds for setting verdict aside).


96. Until the nineteenth century, the notion of privacy was not of practical concern to most people. D. PEMBER, PRIVACY AND THE PRESS 3 (1972). Because society was basically agrarian, people were not forced to live in close proximity to each other as they are today. However, as the economy evolved from primarily agricultural to industrial, many changes took place leaving a marked impact on society. Id. at 4-8. At the same time, the American press experienced remarkable growth due to expanding communication and transportation systems. It was under these circumstances that the cry for privacy arose. Id. at 8-14.

97. 381 U.S. 479 (1965). Griswold involved a state statute prohibiting the use of contraceptive devices or drugs by anyone. The Court held that the statute violated the right to privacy which is specifically protected within the penumbra of the Bill of Rights. Id. at 484-86.

98. Id. at 494 (Goldberg, J., concurring) (quoting Poe v. Ullman, 367 U.S. 497, 521 (1961) (Douglas, J., dissenting)).

99. Comment, Spotlight on the Jury: Trial Publicity and Juror Privacy, 6 COMM. ENT. L.J. 369, 371-72 (1983-1984). A juror’s right to privacy may be grounded in either a constitutional or tort law basis. Id. at 379-80. Under the constitutional umbrella, the juror would be protected from having personal matters publicly disclosed. Id. The tort protection would be limited to preventing public disclosure of private facts. Id. at 380-81.
publicized case of *Sheppard v. Maxwell*.100 In that case, the Court was appalled at the lack of privacy afforded the jurors. Throughout the trial, jury members were continually subjected to the houndings of photographers and reporters who, at one point, were stationed adjacent to the jury room.101 When the jurors' pictures and addresses were published in the newspaper, they were widely exposed to public ridicule.102 The Court indicated that the extensive amount of publicity posed a serious threat to the jurors' privacy.103 Although not establishing any objective criteria for protecting the privacy of jurors, the Court did indicate that trial judges must be aware of circumstances infringing upon a juror's right to privacy and take reasonable steps to insure that judicial processes remain free from such prejudicial outside influences.104

Commentators have also suggested that prospective jurors have a definitive right to privacy during the voir dire examination,105 a right which has been upheld by some courts.106 Protecting prospective jurors' right to privacy makes sense because these individuals are committing themselves to public sacrifice in serving on a jury, possibly exposing themselves to further public scrutiny through the comprehensive and seemingly endless questions posited by the lawyers.107 Additionally, if prospective jurors' right to privacy is not respected during voir dire, they may feel more constrained and less willing to serve on juries.108

These same compelling reasons which are advanced for protecting a prospective juror's right to privacy during voir dire mandate an ex-

101. Id. at 355.
102. Id. at 353.
103. Id.
104. Id. at 353, 362-63.
108. See *supra* notes 34-38 and accompanying text.
tension of that protection for jurors who are actually called to serve. Moreover, this right should extend to post-trial activities as well. Some courts have already ruled accordingly by restricting the press’s right to conduct post-verdict interviews. In Haeberle v. Texas International Airlines,109 the court stated that although the interests of the press in conducting post-verdict interviews were substantial, they were simply outweighed by the interests of jurors in their own privacy.110

2. Privacy in the Deliberation Room

Perhaps the most important aspect of juror privacy is that which transpires in jury room deliberations. Although a juror certainly understands that comments made to other jurors during the deliberation process are not given any privacy protection, it may be argued that the juror does have an expectation of privacy in that same information not being revealed to the general public.111 Such an assumption is reasonable, especially since jurors are often kept in seclusion during high publicity trials and may even be admonished by the judge to avoid exposure to extraneous information from the media or other sources.112

Efforts to avoid media exposure during trial proceedings tend to create an aura of secrecy which envelops the jury throughout their deliberations. Furthermore, it is not uncommon for jury members to vow not to divulge comments made by individual jurors during deliberations after the trial’s conclusion.113 Although these vows are probably unenforceable and often broken, the fact they are made at all underscores the importance jurors place on keeping the content of their deliberations private.114

However, expectations of privacy usually diminish when a person becomes associated with an event of intense public interest.115 Some courts hold that in such a situation, an individual’s right of privacy is not invaded when publicity is generated in connection with that event.116 Generally, because court proceedings are considered public

109. 739 F.2d 1019 (5th Cir. 1984).
110. Id. at 1022.
111. Sharp, Post Verdict Interviews with Jurors, 88 CASE & COM., Sept.-Oct. 1983, at 3, 10. In United States v. Franklin, 546 F. Supp. 1133, 1142 (N.D. Ind. 1982), the court suggested that jurors maintain a fundamental right to privacy as it pertains to the contents of their deliberations and that post-verdict disclosure of these contents by other jurors may invade the juror’s rights.
112. See infra notes 134-136 and accompanying text.
113. For instance, the jurors in the DeLorean trial vowed not to reveal the comments of individual jurors made during their deliberations. Several jurors later broke this vow when talking with reporters. Brill, supra note 34, at 105.
114. See Sharp, supra note 111, at 10.
116. Elmhurst v. Pearson, 153 F.2d 467, 468 (D.C. Cir. 1946) (publishing legitimate
events, certain aspects of privacy rights may not be fully recognized, and privacy rights enjoyed by a juror may be inferior to other important rights. For example, it may be argued that the public has a legitimate right to know what occurs during the deliberation process. Allowing jurors to publish their accounts of the trial proceedings may in fact remove some of the fear and uncertainty often associated with serving on a jury. Thus, even if jurors do enjoy a right to privacy, this right must be balanced against the right of the public to be informed of trial proceedings.

IV. POLICY CONSIDERATIONS

A. Integrity of Judicial Proceedings

In criminal trials, the judge plays a crucial role in assuring that the trial is conducted fairly and in accordance with established judicial procedures. In highly publicized trials, the judge must often take a strong stand in order to maintain the integrity of the judicial process as the media and public become more involved. For this reason, the entire courthouse premises, including the courtroom, are under the strict control of the court. Judges have wide latitude in governing the daily activities of the court and may prescribe whatever measures reasonably necessary to prevent injustice.

Restrictions may be placed on jurors and others involved in the proceedings even if they limit first amendment rights.
The importance of allowing this judicial discretion was manifested in *Sheppard v. Maxwell*.127 As a result of *Sheppard*, a committee was formed to study the operation of the jury system and the “Free Press-Fair Trial” issue.128 The study was conducted over a two-year period and focused on problems which arose during the *Sheppard* trial. The committee recommended that in highly publicized cases the court be allowed to issue whatever orders might be appropriate to maintain a fair trial and impartial jury.129

Some courts have gone even further by extending judicial discretion into an affirmative duty. These courts maintain that in criminal cases there exists a duty to shield the jury from the prejudicial effects resulting from extensive publicity.130 This duty does not end, however, once a verdict is rendered; the judge has an additional duty to protect the integrity of the verdict as well.131 If jurors are allowed to publish their accounts of the deliberations, it is conceivable that the defendant might find cause to impeach the verdict.

The veracity of evidence suggesting improper juror motives in rendering the verdict would have to be verified by the court. The only reliable way to accomplish this would be to require jurors to testify regarding their process of arriving at the verdict. However, this procedure would violate the Federal Rules of Evidence provision which prohibits juror testimony pertaining to the deliberation process.132 One of the primary purposes of this rule is to promote finality of ver-

---

558, 561 (7th Cir. 1970) (acknowledging validity of rule prohibiting photographing or broadcasting in certain areas of courthouse).


129. *Id.* at 410. *See also* 3 STANDARDS FOR CRIMINAL JUSTICE § 15-3.7 (1986).


131. Traditional standards of appellate review mandate that the jury’s verdict be accepted unless it is clearly erroneous. *See, e.g.*, Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355 (1962). Thus, the trial judge must make a concerted effort to insure as far as possible that the verdict is not clearly erroneous and thereby not subject to attack. *See Sharp, supra* note 111, at 14.

132. The rule states:

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 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 . . . . *FED. R. EVID.* 606(b) (amended 1987). *See also* United States v. Miller, 806 F.2d 223, 225 (10th Cir. 1986) (refusing to question juror who indicated she had second thoughts about her vote two weeks after defendant was convicted); United States Football League v. National Football League, 644 F. Supp. 1040, 1045 (S.D.N.Y. 1986), *aff’d*, 842 F.2d 1335 (2d Cir. 1988) (holding post-trial statements by jurors to the press concerning their own understanding of the verdict’s consequences not admissible to impeach verdict).
dicts and to foster respect for the jury as a fact-finding body.\textsuperscript{133}

Echoing these sentiments, a Senate committee evaluating proposed amendments to the rule commented: “Jurors will not be able to function effectively if their deliberations are to be scrutinized in post-trial litigation. In the interest of protecting the jury system and the citizens who make it work, rule 606 should not permit inquiry into the internal deliberation of the jurors.”\textsuperscript{134} Therefore, the imposition of post-verdict restrictions on a juror’s freedom to sell his account would seem justifiable if necessary to protect the verdict from attack.

\section*{B. Secrecy of Juror Deliberations}

The secrecy of the deliberation process has long been considered fundamental to the judicial function as a whole.\textsuperscript{135} At common law, privacy of juror deliberations was an absolute requirement,\textsuperscript{136} and jurors were often sequestered and sheltered from all outside influences.\textsuperscript{137} Several states have recognized this common law rule and now apply it in their own proceedings.\textsuperscript{138} Furthermore, many states, by statute, have implicitly taken steps to ensure the privacy of juror deliberations.\textsuperscript{139}


\textsuperscript{135} See Comment, supra note 64, at 886.

\textsuperscript{136} See People v. Oliver, 196 Cal. App. 3d 423, 430, 241 Cal. Rptr. 804, 808 (1987). Recounting the common law requirement, the court quoted Sir Edward Coke who stated:

\begin{quote}
By the law of England a jury, after their evidence given upon the issue, ought to be kept together in some convenient place, without meat or drinke, fire or candle, which some bookes call an imprisonment, and without speech with any, unless it be the bailiffe, and with him only if they be agreed.
\end{quote}

\textit{Id.}

\textsuperscript{137} J. BAKER, supra note 8, at 65-66.

\textsuperscript{138} See, e.g., California: People v. Bruneman, 4 Cal. App. 2d 75, 40 P.2d 891 (1935) (recognizing that jury is required to deliberate in private); Indiana: Rickard v. State, 74 Ind. 275 (1881) (jury retiring from court presence to engage in private and confidential discussion); Michigan: People v. Knapp, 42 Mich. 267, 3 N.W. 927 (1879) (finding that jury must have opportunity for private and confidential discussion); New York: Gibbons v. Van Alstyne, 9 N.Y.S. 156 (Sup. Ct. 1890) (error for jury room door to be open during deliberations with judge entering room and several others standing near open door).

\textsuperscript{139} See, e.g., CAL. PENAL CODE \textsection 1128 (West 1985) (officer must keep jury together during deliberations in a private and convenient place and not allow anyone to communicate with them); MICH. COMP. LAWS ANN. \textsection 750.120b (West 1981) (misdemeanor for anyone to attempt to record deliberations of jury in any case); N.Y. CRIM. PROC. LAW \textsection 310.10 (McKinney 1982) (jury must deliberate outside courtroom under supervision of court officer who may not communicate with jurors or permit any other person to do so); OHIO REV. CODE ANN. \textsection 2315.03 (Baldwin 1981) (jury must be kept together
The interest in preserving this privacy is shared by both the government and the public.\textsuperscript{140} Public disclosure of jury deliberations threatens the very foundation of the jury system. Perhaps Justice Cardozo best summarized the nature of the problem: “Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world.”\textsuperscript{141} Confidentiality in this setting provides a shield against extrajudicial influences which tend to weaken the deliberation process and thus the rendering of a fair verdict.\textsuperscript{142}

1. Judicial and Legislative Concerns

Courts have yet to face the problems juror journalism may pose to maintaining the secrecy of the deliberation process, but they have addressed and increasingly recognized the importance of this secrecy. Recently, in \textit{Tanner v. United States},\textsuperscript{143} the Supreme Court reaffirmed the long-held position that any post-verdict examination of a juror’s conduct during deliberations seriously weakens the judicial process. The Court stated that “[F]ull and frank discussion in the jury room, jurors’ willingness to return an unpopular verdict, and the community’s trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of post verdict scrutiny of juror conduct.”\textsuperscript{144}

The legislature has joined the courts in expressing concern regarding the disclosure of jury deliberations. In the early 1950’s, the University of Chicago Law School conducted a research study to evaluate the continued viability of the jury system.\textsuperscript{145} One aspect of the project required recording the deliberations of juries in six different trials. Upon learning of the project, the Senate Committee on the Judiciary conducted a hearing to discuss the impact that recording of jury deliberations would have on the integrity of the jury system.\textsuperscript{146} Although the hearing’s results were inconclusive, they highlighted

\begin{flushleft}
under charge of officer until they agree on verdict—may temporarily separate only for meals and sleep); \textsc{Wash. Rev. Code} § 4.44.300 (1962) (jury must be kept together under charge of officer who shall keep jury separate from other people and shall not communicate to any person the state of their deliberations).

\textsuperscript{140.} \textit{See United States v. Gurney}, 558 F.2d 1202, 1210-11 (5th Cir. 1977) (compelling government interests require privacy of deliberations); \textit{Rakes v. United States}, 169 F.2d 739, 745-46 (4th Cir.) (indicating public duty to report attempts to bring outside influence into jury room); \textit{cert. denied}, 335 U.S. 826 (1948).

\textsuperscript{141.} \textit{Clark v. United States}, 289 U.S. 1, 13 (1933).

\textsuperscript{142.} \textit{See Gurney}, 558 F.2d at 1211; \textit{see also} Comment, supra note 64, at 888-92.

\textsuperscript{143.} 107 S. Ct. 2739 (1987).

\textsuperscript{144.} \textit{Id.} at 2748.

\textsuperscript{145.} \textit{See Recording of Jury Deliberations: Hearings Before the Subcomm. to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Senate Comm. on the Judiciary, 84th Cong., 1st Sess. (1955) [hereinafter Recording Hearings].}

\textsuperscript{146.} \textit{Id.}
\end{flushleft}
the concerns expressed regarding the privacy of deliberations. Not surprisingly, many groups were vehemently opposed to the practice of recording deliberations.¹⁴⁷

Public disclosure of jury deliberations through juror journalism invites the same harmful degradation to the integrity of the jury system as do court-made recordings of the deliberations. In both cases, a permanent record is established which intrudes into and exposes a juror's thought processes.¹⁴⁸ Indeed, juror-made recordings may even be more damaging because they comprise only a subjective analysis made by one juror, whereas court-made recordings provide an objective evaluation of all the jurors. Additionally, any fabrications created to embellish a juror's story would remain unopposed if the story is permitted to be exposed through juror journalism.

2. Impairment of a Juror's Freedom of Action

A more significant threat to the secrecy of the deliberation process arises if a juror contracts to sell his account before conclusion of the trial. Such a scenario is similar to cases where a juror is offered a bribe to render a certain verdict.¹⁴⁹ Although a financial offer from the press may not require or even mention a specific outcome of the trial, the lure of big money may be enough to materially affect that

¹⁴⁷. Executive Director of the American Civil Liberties Union, Patrick Murphy Malin, made the following statement regarding the recording of jury deliberations:

Everybody concerned in a case should have the firm assurance that the jury is as impartial as humanly possible—as free as scrupulous observance of rules can make it from any kind of surveillance, embarrassment, or coercion. This is gravely threatened... if jury room proceedings are later revealed to anyone even a scientist impassionately studying human behavior.... Any destruction of the privacy of jury deliberations is bad, even in the form of a juror's comments after the verdict is rendered. Recording Hearings, supra note 145, at 189. See also 18 U.S.C. § 1508 (1982) (imposing criminal sanctions for recording, observing, or listening to deliberation proceedings).

¹⁴⁸. United States v. Allen, 588 F.2d 1100, 1106-07 n.12 (5th Cir.) (citing several cases which note a reluctance to probe the jurors' minds), cert. denied, 441 U.S. 965 (1979). See also supra notes 111-112 and accompanying text.

¹⁴⁹. See, e.g., Remmer v. United States, 350 U.S. 377 (1956). In Remmer, an outsider approached a juror and informed him that he could probably make a nice profit if he worked a deal with the defendant. Id. at 380. The juror later commented that he was disturbed and distressed by this conversation. Id. Finding that this encounter might have unduly influenced the juror's decision-making process, the Court held that the defendant was entitled to a new trial. Id. at 382. Federal law now provides that a juror who solicits or accepts a bribe may be imprisoned up to fifteen years or fined up to $20,000. 18 U.S.C. § 201 (1982). Cf. COLO. REV. STAT. § 18-8-607 (1986) (juror receiving bribe guilty of class IV felony); MICH. COMP. LAWS ANN. § 600.1347 (West 1981) (juror accepting bribe to render verdict liable for actual damages to aggrieved party plus ten times amount of bribe in addition to possible criminal punishment).
juror’s “freedom of action.” The law will not tolerate unauthorized, extraneous intrusions which may influence, even if indirectly, a juror’s decision-making process.

In People v. Oliver, the California Court of Appeal underscored the importance of this concept, emphasizing that implicit in the right to trial by an impartial jury is “the right to have the jury’s deliberations conducted privately and in secret, free from all outside intrusions, and extraneous influences or intimidations.” The Oliver court confronted the issue of whether a court reporter’s presence in the jury room during deliberations constituted reversible error.

In Oliver, the jurors requested to rehear the testimony of both parties. Complying with the request, the judge allowed the court reporter to enter the jury room and read the testimony from beginning to end. However, the judge forbade the reporter to answer any questions from the jury. After the reporter had been in the jury room for three hours, the defense counsel became concerned because the defendant’s testimony during trial lasted only eighty minutes.

The reporter later testified that although she did not answer any questions, she did pause at the jurors’ request to allow them to discuss various aspects of the testimony. While not participating in these discussions, the reporter did hear some of the jury’s deliberations. The court concluded that inherent in the right to an impartial jury is the assurance that jury deliberations will be conducted in privacy. Nevertheless, because the mere presence of the reporter did not unduly prejudice the defendant, the court held that reversible error was not committed.

The dicta in Oliver emphasizes the general concern that courts have placed in assuring the privacy of jury deliberations. This concern will likely be a focal point in determining the permissibility of juror journalism. If secrecy of deliberations cannot be maintained, those who feel the jury system needs refining will have yet another argument favoring their proposition that the current jury system has outlived its usefulness. Therefore, opponents of juror journalism

---

150. Remmer, 350 U.S. at 381. See also supra text accompanying note 94.
153. Id. at 428, 241 Cal. Rptr. at 806.
154. Id. at 426, 241 Cal. Rptr. at 804-05.
155. Id. at 426-27, 241 Cal. Rptr. at 805-06.
156. Id. at 435, 241 Cal. Rptr. at 812.
157. Criticism over the value of the jury system has been continuously strong. One exasperated critic remarked:

Too long has the effete and sterile jury system been permitted to tug at the throat of the nation’s judiciary as it sinks under the smothering deluge of the obloquy of those it was designed to serve. Too long has ignorance been permitted to sit ensconced in the places of judicial administration where knowledge is so sorely needed. Too long has the lament of the Shakespearean
would advocate that if for no other reason, this practice should not be allowed because it destroys the secrecy of the deliberation process—the part of the jury function which is critical for its continued success.

V. CONCLUSION

The courts clearly mandate that the public has a right to know the details of the proceedings in a criminal trial. It may even be argued that a juror who sits on a case has a right to reveal information concerning the trial to the press in exchange for compensation. Nevertheless, such a right must be evaluated in light of its effect on other rights such as a criminal defendant's right to a fair trial by an impartial jury and the juror's right to privacy. Because the courts have gone to great lengths to protect these rights, they cannot be summarily set aside in favor of a juror's right to free speech. Furthermore, the danger to our jury system imposed by juror journalism far outweighs any benefits it provides.

Jury service is an important civic obligation owed by every citizen. Allowing profit motives to replace this duty will tarnish the respect and dignity that has been accorded the jury system for centuries. The juror's responsibility is to solemnly administer justice, not to enrich himself at the expense of the defendant and other jurors. Consequently, juror journalism should be prohibited, or at least narrowly restricted, to preserve the sanctity of the criminal justice system—one of the hallmarks of our free society.

BRENT K. ASHBY

character been echoed, “Justice has fled to brutish beasts and men have lost their reason.”

Sebille, Trial by Jury: An Ineffective Survival, 10 A.B.A. J. 53, 55 (1924). See generally Broder, The Functions of the Jury: Facts or Fictions, 21 U. CHI. L. REV. 386 (1954) for an excellent discussion and analysis of the functions of the jury and its inability to fulfill the expectations that have been placed on it as a judiciary device. Contra H. Kalven & H. Zeisel, supra note 19 at 498 (providing a comprehensive empirical study of the American jury system which concludes that the jury comprises a unique arrangement of checks and balances to impressively infuse within our legal system the notable attributes of equity and flexibility). Much of the criticism being thrust upon the jury system, however, has been aimed at its use in civil trials. See, e.g., Green, Jurys and Justice—The Jury's Role in Personal Injury Cases, 1962 U. Ill. L.F. 152 (1962); Kalven, The Dignity of the Civil Jury, 50 VA. L. REV. 1055 (1964).