Juror Identities in High-Profile Trials: The Case for a First Amendment Right of Access

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I. INTRODUCTION

Reality television, celebrity, and spectacle – the media saturation persists. The themes are embodied in celebrity and corporate trials, which today inundate the media and proliferate faster than reality game-shows. The Kobe Bryant sexual assault case, the Martha Stewart stock scandal, and the Robert Blake murder trial are just a few recent examples. As the tawdry secrets behind glamorous facades are unveiled time and again, the public’s captivation endures.

The American public’s fascination with courtroom drama is not a new phenomenon.¹ From the 1935 trial of the man convicted of kidnapping and murdering Charles Lindbergh’s son to the 1994 O.J. Simpson trial, the public has been repeatedly captured by the torrid details criminal prosecutions reveal about others’ lives.² The great trial reporter Theo Wilson noted:

Real people, victims and defendants both, are dissected at trials . . . We see not only what they want us to see, but what is normally hidden from us, and so these trials tell us about ourselves, our own facades and the secrets behind them, our own potential for good and evil, just as do the stage plays that most intrigue us.³

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2. See id. at 744.

3. Id. (quoting Theo Wilson, Headline Justice 4 (1996)).
The mere spectacle of courtroom drama, however, did not always justify media coverage. Coverage was traditionally based upon "hard" news—the major issues thought to be essential to an informed and participatory citizenry. Coverage of the Sacco and Vanzetti trials, for instance, centered on the defendants' radical politics and immigrant status. Widespread fear of communist infiltration in the American government was the focus of Alger Hiss's highly publicized trial during the McCarthy Era, and the Pentagon Papers trial brought to light secrets of the Vietnam War.

Beginning in the latter part of the twentieth century, however, the news industry witnessed a dramatic growth in the volume and sources of coverage. Radio and television talk shows, 24-hour cable news stations, and the Internet gave the public a whole new array of options. Amid frenzied efforts throughout the news industry to maintain and attract larger audiences, sensationalism began to supersede traditional news values. Stories about sex, crime, and celebrity made headlines over articles examining public affairs and policy. The news media—lumped together with talking-head commentary and reality television—

4. See Kelly L. Cripe, Comment, Empowering the Audience: Television’s Role in the Diminishing Respect for the American Judicial System, 6 UCLA Ent. L. Rev. 235, 263 (1999). Few Americans have had direct experience with the justice system and their knowledge of the criminal process is limited. As a result, the public relies largely upon media coverage for insight into high-profile trials. Id. at 240.
8. Matt Weiser, Book Review, 41 Am. Studies Int’l 256 (2003) (reviewing Darrell M. West, The Rise and Fall of the Media Establishment (2001)). In his book, West notes that the news was once controlled by standard-bearers such as the New York Times, the Washington Post, and the major television networks ABC, NBC, and CBS—but, West says, that is no longer the case. Id.
9. See id.
became simply "the media." 

More recently, the media have begun consolidating under the ownership of corporate titans such as Microsoft, Disney, and Warner Bros. 

Under this new commercial regime, corporate interest has supplanted public interest, ethical standards have given way to the bottom line, and what was once considered a profession has deteriorated into what some now consider a trade – a trade dubbed by some as "infotainment." 

Critics of this trend point to recent celebrity and corporate trials; to the nature and extent of coverage such trials have received by the news media.

The accused hail from the ranks of Hollywood’s A-list and Forbes’ Fortune 500; they include NBA stars and Enron executives, industry icons and pop icons – the


12. See Weiser, supra note 8. Throughout the 1990s, the coverage of criminal trials, such as that of O.J. Simpson, the Menendez Brothers, and Jon-Benet Ramsey, frequently overshadowed news on political and social issues. See RICHARD L. FOX & ROBERT W. VAN SICKEL, TABLOID JUSTICE: CRIMINAL JUSTICE IN AN AGE OF MEDIA FRENZY 73 (2001). For example, an extensive study of news segments on ABC, NBC, and CBS in 1997 revealed eighty-six news segments on the Jon-Benet Ramsey case, compared to nineteen segments on campaign finance reform and thirty-five segments on health care. Id. at 76. Of the public policy topics, Medicare garnered the most coverage, with fifty-eight segments, compared to ninety segments on the O.J. Simpson trial. Id.

13. Cripe, supra note 4, at 240. The author criticizes “infotainment” – a hybrid between news programs and entertainment programs – because they are oversimplified and incomplete. Id. at 241. In the context of high profile trial coverage, they often provide inaccurate accounts of the legal proceedings. Id. “Infotainment” purports to stress its informative value, but the events they cover “undergo careful editing and filtering” to achieve the necessary entertainment element. Id. (citing David A. Harris, The Appearance of Justice: Court TV, Conventional Television, and Public Understanding of the Criminal Justice System, 35 ARIZ. L. REV. 785, 790 (1993)).

“doyenne of the home-lifestyle industry” and the “King of Pop.” 15 Newspapers and magazines print detail after lurid detail of the sex, crime, and scandal unveiled at the trials. Television stations boast of “gavel to gavel” coverage, trial analysis “around the clock,” talking-head legal experts, all news and commentary – “fair and balanced,” of course. Moreover, in light of today’s increasingly intermittent audience, courtroom coverage ad nauseam is regularly supplemented with highlights of celebrity trials’ peripheral aspects: human interest stories featuring lawyers, witnesses, judges and, more pertinently, jurors. 16

As jury deliberations were underway in the highly publicized Tyco International corporate corruption trial in March 2004, debate erupted over media coverage of jurors. The controversy began as the public’s attention in the trial turned from Dennis Kozlowski and Mark Swartz – both wealthy, albeit unpopular, former Tyco executives – to “Juror No. 4,” a seventy-nine-year-old former school teacher, when it became widely reported that “she” was holding out for acquittal. 17 As the jury deliberations were just beginning to make headway, however, The New York Post and The Wall Street Journal broke journalistic tradition and published the juror’s name. 18 The newspapers alleged Ruth Jordan made a supportive hand gesture toward defendant’s counsel, 19 possibly to make a spectacle of herself amid the gaggle of reporters looking for anything to report. Ms. Jordan was publicly vilified and denigrated in chat rooms across the Internet; 20 despite six months of testimony and eleven days of deliberations, the judge

15. In ABC, Inc. v. Stewart, Judge Katzmann refers to Martha Stewart as the “doyenne of the home-lifestyle industry.” 360 F.3d 90, 93 (2d Cir. 2004). Michael Jackson is well known as the “King of Pop.”


was forced to declare a mistrial.\textsuperscript{21}

Amid the fallout, a trend has emerged among lower courts to impose heightened restrictions on public access to juror identities in high-profile trials. A New York federal court judge, for example, ordered the media not to reveal the names of any prospective or sitting jurors in the retrial of a former Credit Suisse First Boston investment banker, Frank Quattrone.\textsuperscript{22} Additionally, in California’s highly-publicized prosecution of Scott Peterson, the trial judge denied the media’s request for copies of completed juror questionnaires because he perceived that the “unique” level of “aggressive and ongoing media scrutiny” would lead to “a violation of the jurors’ right to privacy.”\textsuperscript{23} In sum, courts from New York to California are turning the First Amendment on its head and imposing greater restrictions on public access in cases where public interest is at its greatest. The United States Supreme Court has not yet decided the constitutionality of such restrictions. The Court, however, has acknowledged and gradually expanded the public’s First Amendment right of access to various judicial proceedings – Part II examines those decisions. After a brief survey of the decisions by lower courts that have addressed whether a First Amendment right of access attaches to jurors’ identity, Part III posits that the First Amendment right of access should extend to jurors’ identities. Part IV concludes that, in spite of the motives behind the media’s desire to obtain access to jurors’ identity, the interests which led the Supreme Court to recognize a constitutional right to other aspects of a criminal trial would equally be served by recognition of a right of access to jurors’ identities.

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II. UNITED STATES SUPREME COURT: RECOGNITION AND EXPANSION OF THE FIRST AMENDMENT RIGHT OF ACCESS TO THE CRIMINAL PROCESS

The right of Due Process of Law, guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution, recognizes that "no power [exists] in either the State or the national Government to deprive any person of . . . life, liberty, and property, except by due process of law; that is, by an impartial trial according to the laws of the land."24 Until fairly recently, the Supreme Court had never directly acknowledged a First Amendment right of the press or public to attend the criminal trial.25 However, it had long held that the Due Process Clause embodied the criminally accused's Sixth Amendment right to "a speedy and public trial by an impartial jury."26 Accordingly, the Court suggested that the press should be barred from attending a criminal trial where its presence threatened the accused's right to a fair trial by an impartial jury.

In the celebrated case of Sheppard v. Maxwell,27 a well-known Cleveland physician, Dr. Sam Sheppard, was charged and convicted for the gruesome murder of his wife.28 The publicity surrounding Sheppard's trial, at the time, was without comparison.29

29. The Court noted:
   Typical of the coverage during this period is a front-
The Ohio Supreme Court noted:

Murder and mystery, society, sex and suspense were combined in this case in such a manner as to intrigue and captivate the public fancy to a degree perhaps unparalleled in recent annals. Throughout the preindictment investigation, the subsequent legal skirmishes and the nine-week trial, circulation-conscious editors catered to the insatiable interest of the American public in the bizarre. . . . In this atmosphere of a “Roman holiday” for the news media, Sam Sheppard stood trial for his life.

In 1965 the United States Supreme Court overturned the jury’s verdict and ordered a new trial. The Court found that

page interview entitled: “DR. SAM: ‘I Wish There Was Something I Could Get Off My Chest – but There Isn’t.’” Unfavorable publicity included items such as a cartoon of the body of a sphinx with Sheppard’s head and the legend below: “‘I Will Do Everything In My Power to Help Solve This Terrible Murder.’ – Dr. Sam Sheppard.” Headlines announced, inter alia, that: “Doctor Evidence is Ready for Jury,” “Corrigan Tactics Stall Quizzing,” “Sheppard ‘Gay Set’ Is Revealed by Houk,” “Blood Is Found In Garage,” “New Murder Evidence Is Found, Police Claim,” “Dr. Sam Faces Quiz At Jail On Marilyn’s Fear Of Him.” On August 18, an article appeared under the headline “Dr. Sam Writes His Own Story.” And reproduced across the entire front page was a portion of the typed statement signed by Sheppard: “I am not guilty of the murder of my wife, Marilyn. How could I, who have been trained to help people and devoted my life to saving life, commit such a terrible and revolting crime?”

Sheppard, 384 U.S. at 341-42.

30. Id. at 356 (quoting State v. Sheppard, 135 N.E.2d 340, 342 (Ohio 1956)).

31. Judge Robertson noted the significance of the Sheppard decision in the context of the 1960s, when the Supreme Court rendered a host of decisions implicating aspects of the trial and police tactics. James Robertson, A Distant Mirror: The Sheppard Case From the Next Millennium, 49 CLEV. ST. L. REV.
"bedlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom," and that "the jurors were thrust into the role of celebrities." Holding that "the state trial judge did not fulfill his duty to protect Sheppard from the inherently prejudicial publicity which saturated the community and to control disruptive influences in the courtroom," the Court stated, "where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial . . . [t]he courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences." Thus, Sheppard effectively

391, 394 (2001); see Sheppard, 384 U.S. at 363. For example, Miranda v. Arizona, 384 U.S. 436 (1966), was decided in the same year as the Sheppard case. Other cases from that decade include Mapp v. Ohio, 367 U.S. 643 (1961) (evidence obtained through unconstitutional search inadmissible in criminal trial), Gideon v. Wainwright, 372 U.S. 335 (1963) (right of indigent defendant to appointed counsel), and Brady v. Maryland, 373 U.S. 83 (1963) (requirement that prosecution disclose exculpatory evidence).

32. Sheppard, 384 U.S. at 355.
33. Id. at 353.

[T]he jurors were thrust into the role of celebrities by the judge's failure to insulate them from reporters and photographers. The numerous pictures of the jurors, with their addresses, which appeared in the newspapers before and during the trial itself exposed them to expressions of opinion from both cranks and friends. The fact that anonymous letters had been received by prospective jurors should have made the judge aware that this publicity seriously threatened the jurors' privacy.

Id. (citations omitted).

34. Id. at 363.
35. Id. The Court prescribed eleven steps a court could take to ameliorate the deleterious effects of excessive publicity and guarantee a fair trial by an impartial jury: (1) The number of journalists admitted to the court should be limited; (2) The behavior of journalists in court should be regulated; (3) Witnesses should be insulated from extrajudicial information; (4) The judge should control the release of information to the press by police officers, witnesses, and counsel for both sides; (5) The judge should warn reporters to check the accuracy of their news stories; (6) The court should point out the impropriety of publishing material not introduced in the proceedings; (7) The judge should request that appropriate city and county officials issue regulations governing the dissemination of information about the case by their
imposed an affirmative duty on trial judges to restrict media access where the possibility of prejudicial media coverage exists.

The Court first addressed whether the media has a right to insist upon access to judicial proceedings in *Gannett Co., Inc. v. DePasquale.* Affirming a trial court’s order excluding the press and public from a pre-trial suppression hearing, the Court in *DePasquale* stated that the right to a public trial is “personal to the accused.” Hence, the Court held that “members of the public have no constitutional right under the Sixth and Fourteenth Amendments to attend criminal trials.” Although the Court did not explicitly decide whether the First and Fourteenth Amendments confer a right to the press and public to attend criminal trials, the Court in dicta stated that “the actions of the trial judge here were consistent with any right of access the petitioner may have had under the First and Fourteenth Amendments.”

Less than one year after *DePasquale,* however, the Court in *Richmond Newspapers, Inc. v. Virginia* reversed its position and expressly recognized a First Amendment right of the press and public to observe criminal proceedings, as made applicable to the states through the Fourteenth Amendment. Chief Justice Burger,

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employees; (8) When necessary, a case should be continued until the threat of prejudicial pretrial publicity abates; (9) The trial should be moved to another county where the publicity level is acceptable; (10) The jury should be sequestered where the inflow of information is excessive and prejudicial; and/or (11) If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered. *Id.* at 358-63.


37. *Id.* at 380 (citing Faretta v. California, 422 U.S. 806, 848 (1975)). The Court stated that the Sixth Amendment affords only the defendant, and not the public in general, a right to a public trial. *Id.* at 381. If the defendant wishes to waive that right, he may do so, though the Sixth Amendment “does not guarantee the right to compel a private trial.” *Id.* at 382.

38. *Id.* at 391.

39. *Id.* at 392. “First, none of the spectators present in the courtroom, including the reporter employed by the petitioner, objected when the defendants made the closure motion.” *Id.* “Furthermore, any denial of access in this case was not absolute but only temporary.” *Id.* at 393.

writing for the plurality, opened the door to the media's right of access as he announced for the first time that "the right to attend criminal trials is implicit in the guarantees of the First Amendment."\footnote{41} He noted: "What is significant for present purposes is that throughout its evolution, the trial has been open to all who cared to observe."\footnote{42} Furthermore, "[t]he expressly guaranteed freedoms [of the First Amendment] share a common core purpose of assuring freedom of communication on matters relating to the functioning of government."\footnote{43} Supported by reasons as valid today as in centuries past, the Chief Justice stated, "a presumption of openness inheres in the very nature of a criminal trial under our system of justice."\footnote{44} He further concluded, "[a]bsent an overriding interest articulated in findings, the trial of a criminal case must be open to the public."\footnote{45}

In \textit{Press-Enterprise Co. v. Superior Court} ("\textit{Press-Enterprise I}"), the Supreme Court extended the public's right of access to voir dire jury selection hearings in criminal trials.\footnote{46} The Court,
moreover, announced a heightened standard upon which the right of access may be denied. Chief Justice Burger, once again writing for the Court, stated that “the presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.”

That interest, he concluded, must be “articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.”

47. Id. at 510. Cf. Richmond Newspapers, 448 U.S. at 581 (“Absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public.”). The Court in Press-Enterprise I stated:

When limited closure is ordered, the constitutional values sought to be protected by holding open proceedings may be satisfied later by making a transcript of the closed proceedings available within a reasonable time, if the judge determines that disclosure can be accomplished while safeguarding the juror’s valid privacy interests. Even then a 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 person from embarrassment.

Press-Enterprise I, 464 U.S. at 512 (emphasis added).

As one scholar has noted, “[t]his passage has been read to imply that jurors’ identities are part and parcel of voir dire, and as such are governed by the same principles of presumptive access.” David Weinstein, Protecting a Juror’s Right to Privacy: Constitutional Constraints and Policy Opinions, 70 TEMP. L. REV. 1, 30 (1997). See also State ex rel. Beacon Journal Publ’g Co. v. Bond, 781 N.E.2d 180, 192 (Ohio 2002) (reading Press-Enterprise I “to explicitly include juror identity as part of the voir dire proceedings that should be analyzed under the First Amendment”).

48. Press Enterprise I, 464 U.S. at 510. Here, the Court found the closure order invalid:

The judge at this trial closed an incredible six weeks of voir dire without considering alternatives to closures. Later the Court declined to release a transcript of the voir dire even while stating that “most of the information” in the transcript was “dull and boring.” . . . [The judge failed] to articulate findings
In Press-Enterprise Co. v. Superior Court of California (Press-Enterprise II), the Court extended the First Amendment right of access to pre-trial hearings. Furthermore, the Court expressly adopted the two-prong guidepost of “experience” and “logic” to determine whether a First Amendment right of access exists, i.e., (1) “whether the place and process have historically been open to the press and general public,” and (2) “whether public access plays a significant positive role in the functioning of the particular process in question.” Where “experience” and “logic” dictate the existence of a First Amendment right of access, the Court held that a preliminary criminal hearing may be closed “only if specific findings are made demonstrating that, first, there is a substantial probability that the defendant’s right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant’s fair trial rights.” In so holding, the heightened

with the requisite specificity... [and] to consider alternatives to closure and to total suppression of the transcript.


50. Id. at 8.

51. Id.

52. Id. at 14. In so holding, the Court effectively clarified the “overriding interest” standards established in Press-Enterprise I by explicitly setting forth what “overriding interest” would justify closure. In other words, the new “substantial probability of prejudice” defined the “overriding interest” standard established in Press-Enterprise I. Id. at 13-14. In applying the rules to the facts of the case, the Court recognized that potential for prejudice existed, but that other remedies should have been attempted before closing the proceeding altogether. The Court stated:

But this risk of prejudice does not automatically justify refusing public access to hearings on every motion to suppress. Through voir dire, cumbersome as it is in some circumstances, a court can identify those jurors whose prior knowledge of the case would disable them from rendering an impartial verdict. And even if closure were justified for the hearings on a motion to suppress, closure of an entire 41-day proceeding would rarely be warranted. The First Amendment right of
“substantial probability of prejudice” standard clarified the “overriding interest” standard, which justified closure under *Press-Enterprise 1.*

III. THE DIVIDE AMONG LOWER COURTS: APPLICATION OF THE FIRST AMENDMENT RIGHT OF ACCESS TO JUROR IDENTITIES

The public’s right of access to courtroom proceedings was tested in early 2004 amid the high-profile criminal prosecutions of Martha Stewart and of her former stockbroker, Peter Bacanovic. From the beginning, the case attracted widespread national media attention. Recognizing the problems presented in impaneling an unbiased jury, U.S. District Court Judge Miriam Goldman Cederbaum entered an order in January mandating that “no member of the press [could] be present for any voir dire proceedings [to be] conducted in the robing room”; instead, the order provided “a transcript of each day’s voir dire proceedings access cannot be overcome by the conclusory assertion that publicity might deprive the defendant of that right. And any limitation “must be narrowly tailored to serve that interest.”

*Id.* at 15.


54. See ABC, Inc. v. Stewart, 360 F.3d 90, 96 (2d Cir. 2004). The criminal charges against Stewart stemmed from her sale of 3,928 shares of stock in the biotech company, ImClone Systems, Inc., on December 27, 2001 – just before the Food and Drug Administration announced its rejection of ImClone’s application for approval of its highly touted cancer-fighting drug. *Id.* at 93. After ImClone’s stock price plummeted, the government initiated an investigation into whether Stewart’s sale of stock was “in violation of federal securities laws and regulations that prohibit trading on the basis of material, nonpublic information.” *Id.* Specifically, Stewart was accused of conspiracy to commit offenses against the United States, making false statements, obstruction of agency proceedings, and securities fraud. Peter Bacanovic, on the other hand, was charged with conspiracy to commit offenses against the United States, making false statements and documents, perjury, and obstruction of agency proceedings. *Id.* at 94.

55. *Id.*
[would] be made public the following day, with the names of prospective or selected jurors redacted from the transcripts, as well as such deeply personal information as any juror [should] reasonably request not be made public.56 Seventeen news organizations objected and, at an in-court hearing, argued that the order infringed upon their First Amendment right of access to criminal proceedings.57 Judge Cederbaum, however, declined to vacate or significantly modify the order, observing:

We have had a remarkable amount of extraordinary press effort to treat many aspects of the case which have nothing to do with the trial of the case or the merits of the case or what will the evidence be because there seems to be – and I do not say this critically – an extraordinary interest quite beyond the public’s right to know.58

On appeal, the Second Circuit in ABC, Inc. v. Stewart held that the closure order was both unwarranted and unjustified.59 “[O]ne cannot transcribe an anguished look or a nervous tic,” Judge Katzmann wrote for the appellate court.60 “The ability to see and to hear a proceeding as [it] unfolds is a vital component of the First Amendment right of access – not . . . an incremental benefit.”61 “The burden is heavy on those who seek to restrict access to the

56. Id. at 95 (citing United States v. Stewart. No. 3 Cr. 717, 2004 WL 651592 (S.D.N.Y. Jan. 15, 2004)).
57. See Stewart, 360 F.3d at 96. Specifically, the media argued the following aspects of the order were:

[U]nconstitutional abridgments of the First Amendment: (1) its closure of the voir dire proceedings scheduled to be administered in the robing room; (2) its provision for juror anonymity; and (3) its imposition of a prior restraint on the publication of jurors’ names, regardless of how the media discovered such names.

58. Id.
59. Id. at 106.
60. Id. at 99.
61. Id.
media, a vital means to open justice,” Judge Katzmann declared.62 “Here, the government has failed to overcome the presumption of openness. The mere fact of intense media coverage of a celebrity defendant, without further compelling justification, is simply not enough to justify closure.”63

To the extent that any candor concerns may have been implicated by certain voir dire lines of questioning, Judge Katzmann stated, “[W]e do not see why simply concealing the identities of the prospective jurors would not have been sufficient to ensure juror candor.”64 Nevertheless, he stated, “we fail to see why the media had to be barred from the entirety of the voir dire examinations.”65 For these reasons, the appellate court vacated the portion of district court’s order which “barred the media from attending the voir dire proceedings held in the district judge’s robing room.”66 The Second Circuit’s decision, however, unmistakably suggested that neither the press nor public possesses a First Amendment right to names of jurors.67

Other lower courts have explicitly decided whether the First Amendment confers upon the public a right of access to jurors’ identities. Some courts have found that juror identities are fundamentally related to the criminal process and, thus, have recognized a right of access.68 Conversely, other courts have

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62. Id. at 106.
63. Id.
64. Id. at 104.
65. Id. at 105.
66. Id. at 106.
67. Id. at 104-05.
68. People v. Mitchell (In re Juror Names), 592 N.W.2d 798, 809 (Mich. App. 1999) (holding newspaper had qualified First Amendment right of access post verdict to names and addresses of jurors, subject to trial court’s discretion to fashion order taking into account juror safety and other interests, and remanding for specific findings as to juror safety); State ex rel. Beacon Journal Publ’g Co. v. Bond, 781 N.E.2d 180, 192-94 (Ohio 2002) (applying the “experience and logic” tests espoused in the Press-Enterprise line of cases and finding that a right of access attaches to jury list); see also In re Globe Newspaper Co., 920 F.2d 99 (1st Cir. 1990); In re Baltimore Sun Co., 841 F.2d 74 (4th Cir. 1988); Sullivan v. Nat’l Football League, 839 F. Supp. 6 (D. Mass. 1993); In re Indianapolis Newspapers, Inc., 837 F. Supp. 719 (S.D. Ind. 1992); United States v. Doherty, 675 F. Supp. 719 (D. Mass. 1987), aff’d in part and
concluded that a juror’s identity is merely collateral information, distinct from any judicial proceeding to which the right of access would otherwise attach. Thus, the divide among the courts concerns the threshold issue of whether a trial court’s denial of access to juror identities is a process that triggers First Amendment analysis.

The Delaware Supreme Court was perhaps the first court, post-Richmond Newspapers, to explicitly consider whether a First Amendment right of access attaches to juror identity. In Gannett Co., Inc. v. State, a trial judge had entered an order mandating that jury selection be decided by numbers—not by names—in the highly-publicized case of a serial killer and three female victims. Autopsy photos revealed that each victim had been “bound and tortured, their bodies mutilated.” The lurid details indeed attracted massive pretrial publicity, and the trial judge refused to

69. See, e.g., United States v. Edwards, 823 F.2d 111 (5th Cir. 1987) (ruling that trial judge’s refusal to release names and addresses of jurors did not violate the First Amendment right of access); Gannett Co., Inc. v. State, 571 A.2d 735, 750-51 (Del. 1989) (suggesting that inherent conflicts between the First and Sixth Amendments are to be resolved on a case-by-case basis by the trial judge) [hereinafter Gannett Co.]; Newsday, Inc. v. Sise, 518 N.E.2d 930, 933 n.4 (N.Y. 1987) (distinguishing between voir dire attendance and juror information).

70. See Beacon Journal, 781 N.E.2d at 192 (stating that “the divide among courts concerns the threshold issue of whether juror names and addresses are the type of judicial records that trigger First Amendment analysis.”).

71. Gannett Co., 571 A.2d at 735. Cf. In re Globe Newspaper Co., 920 F.2d 88, 96-97 (1st Cir. 1990) (determining that the media enjoy a common law right of access to juror information, but declining to base its decision on the First Amendment); In re Baltimore Sun, 841 F.2d 74, 75 (4th Cir. 1988) (finding a common law right of access to juror information).

72. Gannett Co., 571 A.2d at 737.

73. Id.

74. Id. The trial court compiled a list of thirty-five articles published in The [Delaware] New-Journal, alone, in the three months leading up to the pretrial suppression hearing. Id. at 737 n.2.
grant Gannett’s motion to vacate the order.75

On appeal, Gannett argued that the order violated its qualified First Amendment right of access to the jurors’ names.76 But the Delaware Supreme Court, applying the Press-Enterprise II threshold test for closure, found no consistent, widespread tradition of public access to juror identities.77 The court, moreover, found that disclosure of juror identities at trial “promotes neither the fairness nor the perception of fairness, when . . . all proceedings are open to the public.”78 Because Gannett failed to show otherwise, the Delaware Supreme Court held that “the trial court’s decision to order court personnel to keep jurors’ names confidential was within its discretion.”79

Farther south, in Louisiana, when racketeering charges were levied against former governor Edwin Edwards and fellow political baron James Harvey “Jim” Brown, the accompanying publicity took the state by storm, and in 2000, the federal district court ordered all prospective juror names redacted from the records.80 The media objected and appealed the district court’s post-verdict order sealing the jurors’ identities; nonetheless, the Fifth Circuit considered the pre-trial empanelment of an anonymous jury.81

At the outset, the court noted that “[e]ager media have entertained the citizens of Louisiana and beyond with nonstop coverage of the current prosecutions of Louisiana’s colorful ex-Governor.”82 The court found that the district court had gone to “extraordinary lengths to preserve the integrity of the jury

75. Id. at 738. In a written opinion, the trial judge stated that the media had no right to require a trial judge to release jurors’ identities under the Delaware Freedom of Information Act, which exempted nonpublic records from disclosure. Id. at 738-39.
76. Id. at 739.
78. Id. at 751.
79. Id.
82. Id. at 912.
system... in the face of relentless publicity,” and detailed the “abundant” evidence which supported that court’s “fears of an imminent and serious threat” to the jury members from both the defendants and the press. The Fifth Circuit concluded that the anonymous jury was in fact needed to prevent the jurors from becoming “unwilling pawns in the frenzied media battle.” While acknowledging that juror names were usually within the public domain, the Fifth Circuit stated that the district court’s order redacting the jurors’ names effectively placed the information within the private area; thus, the restrictions on such non-public, merely collateral information were appropriate.

Conversely, the Fourth Circuit recognized a right of access to the names and addresses of jurors in In re The Baltimore Sun. Applying the principles set forth in Press-Enterprise I and Press-Enterprise II, the court examined the history of access and found that “[w]hen the jury system grew up... everybody knew everybody on the jury.” The court took judicial notice that “this is yet so in many rural communities throughout the country [today].” While acknowledging that its decision might present added difficulties for trial judges in the context of high-profile cases, the court concluded:

[T]he risk of loss of confidence of the public in the judicial process is too great to permit a criminal defendant to be tried by a jury whose members may maintain anonymity. If the district court thinks that the attendant dangers of a highly publicized trial are too great, it may always sequester the jury; and change of venue is always a possible as a method of obviating

83. Id.
84. Id. at 916 (observing Edward’s prior conviction for interference with the judicial process, the prior guilty pleas to witness tampering by two defendants, and the media’s prior pursuit of jurors despite the anonymity order).
85. Id. at 921.
86. Id. at 914-15.
87. In re Baltimore Sun, 841 F.2d 74, 75 (4th Cir. 1990).
88. Id.
89. Id.
pressure or prejudice.\footnote{90}

Perhaps the most recent case addressing whether a right of access extends to jurors' identities was decided by the Ohio Supreme Court in \textit{State ex rel. Beacon Journal Publishing Company v. Bond}.\footnote{91} In 2002, that court held that the First Amendment right of access extends to jury questionnaires, juror names, and juror addresses.\footnote{92} The case arose as the \textit{Akron Beacon Journal} sought access to jury lists amid the highly-publicized "murder-during-rape" and "murder-during-kidnapping" trial of Dennis Ross. The trial judge, however, denied the newspaper's request, stating that "the extraordinary level of pretrial publicity requires the protection of the privacy of the jurors and is necessary to assure \[sic\] the independence and integrity of the jury and to avoid complete sequestration during the trial."\footnote{93} On appeal, the Ohio Supreme Court applied the threshold test of "experience and logic" to determine the constitutionality of the order. After finding a historical tradition of access to jurors' identities,\footnote{94} the court noted that public access to juror identities protects against such improprieties as having juries loaded with a narrow class of people and misrepresentation by jurors during voir dire examinations.\footnote{95} The Ohio Supreme Court concluded that public access 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."\footnote{96} Thus, it determined that both "experience" and "logic" required disclosure.

\section*{IV. THE CASE FOR A FIRST AMENDMENT RIGHT OF ACCESS TO JUROR'S IDENTITIES IN HIGH PROFILE TRIALS}

In \textit{Press-Enterprise II}, the Supreme Court set forth a two-
part test to determine whether and when First Amendment right of access exists. First, it must be determined whether the proceeding or practice in question has been traditionally accessible to the public. Secondly, the purposes served by public access must play a significant role in enhancing the judicial process. Where these two questions are answered in the affirmative, a presumptive First Amendment right of access attaches that may be overcome only where “specific findings are made demonstrating that, first, there is a substantial probability that the defendant’s right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant’s fair trial rights.”

A. The Test of “Experience”

Dating back to 16th century English common law, the selection of jurors has been a public process. From the beginning, jurors were selected from a pool of landowners living de vicineto, i.e., in the immediate vicinity, where the dispute arose. This “vicinage requirement” necessarily limited the pool of prospective jurors to persons familiar with the facts of the dispute and to those who could verify the credibility of the witnesses and accused. Jurors’ identities, therefore, were known to everyone.

As principles of our modern-day jury crystallized, the role
of jurors evolved from witnesses of fact to impartial judges of fact. Thus, courts sought to exclude persons familiar with the facts and parties of the dispute, but jurors continued to be drawn exclusively from the locality in which the dispute arose. The functional role of the jury – as a representative body of the community that “stood for the judgment of the people” – endured. In practice, therefore, prospective jurors were randomly selected from slips of paper on which their names were written, and as their identities were announced before the community in open court, each could be challenged for personal knowledge of the events in dispute.

The English common law practices carried into colonial America and were largely followed when the Constitution was adopted in 1789. In 1670, the names of jurors were publicly announced at William Penn’s trial for inciting unlawful assembly. Jurors’ identities were also made public at John Peter Zenger’s trial in 1735. And despite express opposition to the same in Aaron Burr’s famous conspiracy trial, “the names of jurors were called” and questioned extensively before “[a]n immense concourse of citizens.”

106. Pope, supra note 102, at 444.
107. See Engle, supra note 105, at 1675.
108. Baltimore Sun, 841 F.2d at 75.
109. See Gannett Co., 571 A.2d at 756 n.3 (Walsh, J., dissenting) (“The court . . . commanded that every juror should distinctly answer to his name, and give in his separate verdict, which they unanimously did, saying, Not guilty ’to the great satisfaction of the assembly.’”) (citations omitted).
110. See id.
111. United States v. Burr, 25 F. Cas. 55, 74 (C.C.D. Va. 1807) (No. 14,693). See also Gannett Co., 571 A.2d at 757 (Walsh, J., dissenting). “At the instance of Mr. Hay [the prosecuting attorney] the names of the jurors were called, when forty-six answered to their names, two only being absent.” Id. (quoting Burr, 25 F. Cas. at 74). The prospective jurors were then called one-by-one and questioned extensively on their opinions and the role that the newspapers had played in shaping them. Id. When only four satisfactory jurors could be drawn from the first venire, a second group of potential jurors was summoned and “called, and all except seven answered to their names.” Id. (quoting Burr, 25 F. Cas. at 85). Finally, after a voir dire lasting several
Only in recent history have jurors become relative strangers to the public. As the Fourth Circuit in *In re Baltimore Sun* noted, "the anonymity of life in the cities has so changed the complexion of this country that even the press, with its vast and imaginative methods of obtaining information, apparently does not know and cannot easily obtain the names of [unidentified] jurors."112 But this vanishing social reality should not be mistaken for a new-fangled phenomenon; an emerging trend does not constitute a historical tradition. To the contrary, the considerable body of evidence available suggests otherwise – jurors’ identities were presumptively public both under English and American law. Even today, jurors’ identities remain public in many jurisdictions.113

In *Nixon v. Warner Communications, Inc.*, the United States Supreme Court – prior to its acknowledgment of the First Amendment right of access – recognized a historically based common law right to inspect and copy judicial records and documents.114 Jurors’ names traditionally have been just as much a part of the public record as any other documented fact in a given case.115 Statutes providing otherwise, therefore, may contravene such common law right.116

A number of federal and state statutes, of course, have been enacted to afford judges discretion to seal juror names.117

days, twelve satisfactory jurors were chosen and sworn. *Id.* The names of the selected jurors and of the venire were then called over. *Id.* After which, John M. Sheppard, and Richard Curd were selected to complete the panel, and sworn. The following is, therefore, a complete list of the petit jury: [twelve names]. *Id.* (citing *Burr*, 25 F. Cas. at 87).

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

113. *See Gannett Co.*, 571 A.3d at 757 (Walsh, J., dissenting).


Many state and federal courts have extended the First Amendment right of access to the same.

115. *See, e.g.*, State, *ex rel.* N.M. Press v. Kaufman, 648 P.2d 300, 306 (N.M. 1982) ("[T]he names of the jurors were announced in open court and filed as a public record . . . .").


117. *See, e.g.*, 28 U.S.C. § 1863(b)(7) (2000) (noting that federal judges may keep juror names confidential in any case where the interest of justice so requires); D.C. CODE ANN. § 11-1904(a)(3) (2001) (providing that a plan for jury selection shall include provisions for disclosure of juror names except in
Nevertheless, far more statutes continue to reflect the historical tradition of openness. In several states, statutes expressly provide that jurors shall be named in open court during voir dire. In other states, the law sets forth a presumption of public accessibility to master jury lists. Still others have created a presumption that the names of qualified or selected jurors will be called at voir dire.

Whatever the case, the United States Supreme Court does not require proof that restrictions never have been – or never could

cases in which the chief judge determines that confidentiality is required); DEL. CODE ANN. tit. 10, § 4513(a) (1999) (providing that courts have discretion to keep the names and questionnaires of jurors confidential); 2004 Ind. Adv. Legis. Serv. P.L. 98-2004 ch. 5, § 19(c) (Michie) (“The names of qualified jurors drawn from the qualified jury wheel and the contents of jury qualification forms completed by those jurors may not be made available to the public until the period of service of those jurors has expired. However, attorneys in any cases in which these jurors may serve may have access to the information.”); MINN. GEN. R. PRAC. 814 (2003) (granting the judge discretion to withhold the names and addresses of jurors); N.H. REV. STAT. ANN. § 91-A:5(I) (2004 & Supp. 2004) (exempting jury records from the “right-to-know” law); OKLA. STAT. ANN. tit. 22, § 853.1 (West 1995) (providing that the court upon good cause may withhold “the identity and the business or residential address of any prospective or sworn juror to any person . . . other than to counsel for either party”).


119. See, e.g., ALA. CODE § 12-16-57(C) (1975); IDAHO CODE § 2-206(3) (Michie 2004); IND. CODE ANN. § 33-4-5.5-7(3) (Michie 1976); MASS. GEN. LAWS ANN. ch. 234, § 9 (West 2000); MO. ANN. STAT. § 494.410 (West 1996 & Supp. 2005); N.J. STAT. ANN. § 2B:20-5 (West Supp. 2004); N.C. GEN. STAT. § 9-4 (2003); N.D. CENT. CODE § 27-09.1-05(3) (1991); 42 PA. CONS. STAT. ANN. § 4521(b) (West 2004); UTAH CODE ANN. § 78-46-10(4) (2002); W. VA. CODE ANN. § 52-1-5(d) (Michie 2000); WIS. STAT. ANN. § 756.04(9) (West 2001).

have been imposed. In *Press-Enterprise II*, for instance, the Court acknowledged that more than a few states had enacted statutes and regulations allowing preliminary hearings to be closed. The decisions in *Richmond Newspapers* and *Globe Newspaper Co. v. Superior Court* addressed similar statutes. Just as those laws failed to overcome the historical tradition of openness, the provisions today affording judges discretion to seal juror identities, likewise, fail to overcome the nation's rich history and enduring tradition of public access to juror identities.

**B. The Test of "Logic"**

In *Richmond Newspapers*, the Supreme Court declared that the guarantees of the First Amendment "share a common core purpose of assuring freedom of communication on matters relating to the function of government." Over a century earlier, Alexis de Tocqueville recognized that the American jury was "pre-eminently a political institution." In 1789 Thomas Jefferson famously said that it would be better to leave the people out of the legislative branch than the judicial one, for the "execution of the laws is more important than [even] the making [of] them." Where the jury – or any other political institution – is cloaked in a veil of anonymity, public discourse on matters critically germane to the criminal

121. *Richmond Newspapers*, Inc. v. Virginia, 448 U.S. 555 (1980); *In re Globe Newspaper*, 920 F.2d 88, 96 (1st Cir. 1990) (observing that even though the interest of protecting minor sex crime victims from additional trauma is a compelling one, the statute was unconstitutional because it did not provide for the constitutionally required case-by-case review and findings necessary to justify closure).


124. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 283 (Phillips Bradley ed., Alfred A. Knopf, Inc. 1946) (1835). De Tocqueville continued, "The jury is that portion of the nation to which the execution of the laws is entrusted, as the legislature is that part of the nation which makes the laws." *Id.*

process and, indeed, our government as a whole, is frustrated.\(^{126}\)

In determining whether the press and public enjoy a First Amendment right of access, the United States Supreme Court has identified the following purposes served by openness in criminal proceedings: (1) assuring that proceedings are conducted fairly; (2) discouraging perjury, misconduct of participants, and biased decisions; (3) prophylaxis as an outlet for community hostility and emotion; (4) ensuring public confidence in a trial’s results through the appearance of fairness; and (5) inspiring confidence in judicial proceedings through education regarding the methods of government and judicial remedies.\(^{127}\)

For many of the same reasons, public access to juror identities enhances the criminal process. As the Supreme Court observed, “[k]nowledge of juror identities allows the public to verify the impartiality of key participants in the administration of justice, and thereby ensures fairness, the appearance of fairness and public confidence in that system.”\(^{128}\)

Public access supports our long-standing tradition of selecting disinterested jurors from a representative pool of the community. Indeed, this tradition assures the accused will be judged by the standards of society rather than the biases of distinct groups.\(^{129}\) As Justice Walsh said in his *Gannett Co.* dissent:

If groups such as women or racial minorities are excluded from service, “[s]uch action is operative to destroy the basic democracy and classlessness of jury personnel.” The injury is not limited to the defendant – there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic

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126. See *Gannett Co.*, 571 A.2d at 762 (Walsh, J., dissenting) (“If jurors are cloaked in anonymity, the bond between the jury and the public is weakened.”)


128. *Globe Newspaper*, 920 F.2d at 94.

129. *Gannett Co.*, 571 A.2d at 761 (Walsh, J., dissenting).
ideal reflected in the processes of the courts.\textsuperscript{130}

Moreover, public access to juror identities permits the discovery of juror bias, and it discourages untruthful voir dire testimony.\textsuperscript{131} Where jurors' identities are concealed, on the other hand, the public is unable to challenge either the impartiality of jurors or the accuracy of prospective jurors' voir dire testimony. The adverse consequences of this became apparent in the high-profile trial of Martha Stewart. Following the Second Circuit's ruling in \textit{ABC, Inc. v. Martha Stewart}, Judge Cederbaum chose to withhold the names of jurors until after a verdict was reached.\textsuperscript{132} Oddly enough, Stewart later moved for a new trial, claiming that a prejudicial, publicity-hungry juror lied about his checkered past to get on the jury and evinced his bias upon taking the airwaves after trial to proclaim that Stewart's conviction was a "victory for the little guy."\textsuperscript{133} The court ultimately denied Stewart's motion; nonetheless, it raised questions as to the fairness of her trial.\textsuperscript{134} Had the media and public otherwise been granted access to the jurors' identities, the whole controversy might have been avoided.

In the same way, one may speculate as to the public backlash Judge Obus might have faced in the event that he had not declared a mistrial – or, perhaps alternatively, in the event that \textit{The Wall Street Journal} and \textit{The New York Post} had not published the identity of "Juror No. 4."\textsuperscript{135} Whatever the case, the Supreme Court has made clear: "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."\textsuperscript{136} While anonymous juries create an appearance of injustice, erode public confidence in the system, and contravene the historical precedent of openness, public access to jurors' identities serves to reassure

\begin{thebibliography}{99}
\bibitem{130} \textit{Id.} (quoting Ballard v. United States, 329 U.S. 187, 195 (1946)) (citations omitted).
\bibitem{131} \textit{Beacon Journal}, 781 N.E.2d at 194.
\bibitem{132} \textit{See supra} notes 54-67 and accompanying text.
\bibitem{135} \textit{See supra} notes 17-21 and accompanying text.
\end{thebibliography}
Americans that, through our criminal process, justice is rendered.

V. CONCLUSION

United States appellate court judge Learned Hand observed, "[t]he hand that rules the press, the radio, the screen, and the far-spread magazine, rules the country; whether we like it or not, we must learn to accept it." 137

Amid the advancing technology and the shifting values within the news industry, courts must not depart from their vital role in the American democratic system. More and more, however, judges presiding over cases where the public’s interest is greatest are closing their courtroom doors. The reasons which led the Supreme Court to recognize a First Amendment right of access to criminal proceedings, therefore, would be equally served today by recognition of a right of access to jurors’ identities. While countervailing interests may, in some cases, justify denial of access to such information, specific findings should demonstrate (1) a substantial probability that the defendant’s right to a fair trial will otherwise be prejudiced and (2) that reasonable alternatives to closure cannot adequately protect the accused’s Due Process rights.

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