

Spring 2014

## Beyond the Verdict: Why the Courts Must Protect Jurors From the Public Before, During, and After High-Profile Cases

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### Recommended Citation

Ritter, Scott (2014) "Beyond the Verdict: Why the Courts Must Protect Jurors From the Public Before, During, and After High-Profile Cases," *Indiana Law Journal*: Vol. 89 : Iss. 2 , Article 10.

Available at: <https://www.repository.law.indiana.edu/ilj/vol89/iss2/10>

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# Beyond the Verdict: Why Courts Must Protect Jurors from the Public Before, During, and After High-Profile Cases

SCOTT RITTER \*

## INTRODUCTION

Early in the summer of 2011, the nation was captivated by the trial of Florida's Casey Anthony.<sup>1</sup> Anthony was accused of murdering her two-year-old daughter and then disposing of the body, an allegation that provoked intense emotions from the American public.<sup>2</sup> When Anthony was acquitted in early July,<sup>3</sup> those emotions spilled over: the verdict was met with outrage.<sup>4</sup>

Some of that outrage was directed against the twelve-member body that ultimately delivered the acquittal—the jury.<sup>5</sup> Though most of the fury nationwide was general and impersonal,<sup>6</sup> the reaction in Florida hit close to home for some of

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\* Indiana Law Journal Executive Notes & Comments Editor; J.D. Candidate, 2014, Indiana University Maurer School of Law; B.A., 2007, Illinois State University. This Note would not have been possible without the help of a number of people, beginning with my friends and colleagues on the *Indiana Law Journal*. In particular, I must thank Leah Seigel for her valuable help in the editing and proofreading process. I am also grateful to Frank Carrillo and Eileen Bader for their constant encouragement, and to Alex Zagor and Norm Werth for introducing me to this topic what seems like a lifetime ago.

1. See, e.g., John Cloud, *Casey Anthony: The Social Media Trial of the Century*, TIME, June 27, 2011, at 42, 43–44 (“[T]he *Washington Post* and the *Miami Herald* have become the latest major outlets to begin offering live streams of the case. CNN and NBC air so much coverage of the trial that the networks each decided to erect a two-story, air-conditioned structure in a lot across from the courthouse. The broadcast village around the court often grows to hundreds of media vehicles.”); Brian Stelter, *Casey Anthony Verdict Brings HLN Record Ratings*, N.Y. TIMES MEDIA DECODER BLOG (July 6, 2011, 4:18 PM), [http://mediadecoder.blogs.nytimes.com/2011/07/06/casey-anthony-verdict-brings-hln-record-ratings/?\\_r=0](http://mediadecoder.blogs.nytimes.com/2011/07/06/casey-anthony-verdict-brings-hln-record-ratings/?_r=0) (stating that 5.2 million people watched the reading of the verdict on Headline News, a record for the network).

2. See Cloud, *supra* note 1, at 43 (“The sheer horror at the act—and the idea that a mother committed it—catapulted the case from local live-at-5 sideshow to tabloid sensation (MONSTER MOM PARTYING FOUR DAYS AFTER TOT DIED, one recent report said) to national preoccupation.”).

3. Stelter, *supra* note 1.

4. See, e.g., Greg Botelho, *Emotional, Unsatisfying Ending for Many Tracking Anthony Case*, CNN (July 5, 2011, 8:09 PM), <http://www.cnn.com/2011/CRIME/07/05/florida.casey.anthony.reaction/index.html> (“As much as the depth of the emotion, the breadth of the reaction also matched the much-stated assessment that the Casey Anthony case is, thus far, the trial of the 21st century.”); Sharon Tanenbaum, *Intense Emotional Reactions to the Shocking Casey Anthony Acquittal*, EVERYDAY HEALTH (July 6, 2011), <http://www.everydayhealth.com/emotional-health/0706/intense-emotional-reactions-to-the-shocking-casey-anthony-acquittal.aspx> (chronicling the public’s “disgust, disbelief, and disappointment” following the verdict).

5. E.g., Botelho, *supra* note 4.

6. See Tanenbaum, *supra* note 4 (reporting reactions from Twitter).

the jurors.<sup>7</sup> Immediately following the verdict, an enraged crowd gathered at the courthouse, many holding hand-written signs, including ones that read “Juror 1–12 Guilty of Murder!!!” and “Somewhere a Village is Missing 12 Idiots.”<sup>8</sup> A restaurant in Clearwater posted a sign that read “Pinellas County jurors NOT welcome.”<sup>9</sup> But some of the threats went even further: one juror reportedly quit her job and fled the state to avoid the animosity she was receiving.<sup>10</sup> Other threats to jurors were reported to the County Sheriff’s Office, as jurors reported that they felt “like prisoners in their own homes” following the verdict.<sup>11</sup>

The aftermath of the Casey Anthony verdict illustrates just some of the issues faced by jurors serving on a high-profile case. Following the verdict in the Anthony case, a number of media outlets<sup>12</sup> moved to intervene, seeking the release of juror information.<sup>13</sup> Such motions are not uncommon when the public (and, therefore, the media) takes a certain interest in a case, and may occur before,<sup>14</sup> after,<sup>15</sup> or even during the trial.<sup>16</sup>

Those issues were brought to the forefront again two years later when a Florida jury found George Zimmerman not guilty of murdering Trayvon Martin.<sup>17</sup> Zimmerman was charged in 2012 with second-degree murder for the shooting death of seventeen-year-old, African American Martin, and claimed self-defense even though Martin was unarmed at the time.<sup>18</sup> The Zimmerman case, largely

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7. Florida v. Anthony, No. 48-2008-CF-015606-AO, 2011 WL 3112070, at 1–5 (Fla. Cir. Ct. July 26, 2011) (order granting in part motion to intervene for the limited purpose of seeking release of juror information once jury is discharged and detailing the threats made to jurors following the verdict).

8. *Id.* at 4.

9. *Id.* at 4–5 (citing Brad Davis, *Clearwater Chili Restaurant Tells Casey Anthony Jurors They Are Not Welcome*, ABC ACTION NEWS (July 6, 2011), [http://www.abcactionnews.com/dpp/news/region\\_north\\_pinellas/clearwater/clearwater-chili-restaurant-tells-pinellas-jurors-they-are-not-welcome](http://www.abcactionnews.com/dpp/news/region_north_pinellas/clearwater/clearwater-chili-restaurant-tells-pinellas-jurors-they-are-not-welcome)).

10. *Id.* at 5. The juror reportedly quit her job just months short of retirement because her coworkers were upset with the verdict and with her. *Id.*

11. *Id.*

12. The entities intervening in *Florida v. Anthony* were the Orlando Sentinel Communications Company, WFTV, Inc., Media General Operations, Inc., Times Publishing Company, and The Associated Press. *Id.* at 1 n.1.

13. *Id.* at 1.

14. See, e.g., *United States v. Wecht*, 537 F.3d 222 (3d Cir. 2008) (media intervenors challenged pre-trial orders to restrict access to prospective jurors’ names during voir dire and to empanel an anonymous jury).

15. See, e.g., *People v. Mitchell (In re Disclosure of Juror Names and Addresses)*, 592 N.W.2d 798 (Mich. Ct. App. 1999) (media filed post-verdict motion for disclosure of juror information).

16. See, e.g., *United States v. Blagojevich*, 612 F.3d 558 (7th Cir. 2010) (media intervenors appealed district court ruling of untimeliness as trial was ongoing).

17. James Novogrod, Tom Winter, Tracy Connor & Erin McClam, *Jury Finds George Zimmerman Not Guilty*, NBC NEWS (July 16, 2013, 1:40 PM), [http://usnews.nbcnews.com/\\_news/2013/07/13/19441838-jury-finds-george-zimmerman-not-guilty?lite](http://usnews.nbcnews.com/_news/2013/07/13/19441838-jury-finds-george-zimmerman-not-guilty?lite).

18. Martin Savidge, Vivian Kuo, Beth Karas, Jessica Thill & Aletse Mellado, *George Zimmerman Charged, Hearing Expected Thursday*, CNN (Apr. 11, 2012, 10:17 PM), <http://>

because of the victim's age and race, sparked a national controversy.<sup>19</sup> After the jury returned a verdict of not guilty, some of the ensuing outcry was directed at the jury itself.<sup>20</sup> Many suggested that people would be "coming after" the jurors in retaliation for the unpopular verdict, while others sought out the addresses of the six women who served on the jury.<sup>21</sup> One Twitter user wrote: "Somebody should kill one of the jury members [sic] sons and let the killer free."<sup>22</sup>

Prior to jury selection in the Zimmerman case, Judge Debra Nelson granted the defense's request that jurors' identities be kept anonymous throughout the trial.<sup>23</sup> Judge Nelson noted that such a step was necessary in order to "to protect the prospective jurors from harassment and pressure from the public at large."<sup>24</sup> The jurors' identities and addresses would only be known to the attorneys, "so that they may properly inquire during voir dire."<sup>25</sup>

The general disclosure to the public of information from a criminal trial is a First Amendment issue, governed by the experience and logic test, as set forth in the Supreme Court's *Richmond Newspapers*<sup>26</sup> and *Press-Enterprise* cases.<sup>27</sup> If that test is satisfied with respect to a certain proceeding or aspect of a criminal trial, there is a presumption in favor of openness.<sup>28</sup> The Supreme Court has never specifically addressed the issue of disclosure of juror information.<sup>29</sup> Federal

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[www.cnn.com/2012/04/11/justice/florida-teen-shooting/index.html](http://www.cnn.com/2012/04/11/justice/florida-teen-shooting/index.html).

19. *Id.*

20. Joe Newby, 'Twitter Lynch Mob' Targets Zimmerman Jury with Death Threats, EXAMINER.COM (July 14, 2013), <http://www.examiner.com/article/twitter-lynch-mob-targets-zimmerman-jury-with-death-threats> (chronicling death threats made against the Zimmerman jury).

21. *Id.*

22. *Id.* The backlash was not limited to semi-anonymous Twitter users, as Atlanta Falcons wide receiver also suggested that the jurors "should go home tonight and kill themselves." *Roddy White Reacts Harshly to George Zimmerman Verdict on Twitter*, HUFFINGTON POST (July 14, 2013, 12:03 PM), [http://www.huffingtonpost.com/2013/07/14/roddy-white-george-zimmerman-verdict-twitter\\_n\\_3593212.html](http://www.huffingtonpost.com/2013/07/14/roddy-white-george-zimmerman-verdict-twitter_n_3593212.html).

23. *Florida v. Zimmerman*, No. 12-CF-1083-A, 2013 WL 2645615, at 1–2 (Fla. Cir. Ct. June 5, 2013) (order directing that jurors' identities be kept confidential).

24. *Id.* at 1.

25. *Id.*

26. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 589 (1980) (emphasizing the importance of experience and tradition in public access cases).

27. *Press-Enter. Co. v. Super. Ct. of Cal., Riverside Cnty. (Press-Enterprise II)*, 478 U.S. 1, 9 (1986) (formally adopting the "experience and logic" test); *Press-Enter. Co. v. Super. Ct. of Cal., Riverside Cnty. (Press-Enterprise I)*, 464 U.S. 501, 516 (1984) (Stevens, J., concurring) ("The constitutional protection for the right of access that the Court upholds today is found in the First Amendment, rather than the public trial provision of the Sixth.").

28. *Press-Enterprise II*, 478 U.S. at 9.

29. Some have suggested that the question of disclosure of jurors' identifying information was settled directly by the Supreme Court in *Press-Enterprise I*, where the Court held that voir dire transcripts were presumptively open. 464 U.S. at 505. In discussing when that presumption may be overcome, the Court noted: "[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." *Id.* at 512 (emphasis added). Some argue that this passage ties the concept of juror names in with the presumption of openness found in that case. *See, e.g., In re Baltimore Sun Co.*, 841 F.2d 74, 76 (4th Cir. 1988); *Gannett Co. v. State*, 571

appellate courts—along with state courts settling the issue on First Amendment grounds—however, have had many chances to apply the test to this context, with some concluding that the disclosure of jurors’ names and addresses is sufficiently grounded in experience and logic, and thus that there is a presumption in favor of such disclosure.<sup>30</sup>

The waters are muddied further when those courts attempt to determine the threshold for overcoming that First Amendment presumption.<sup>31</sup> This second level of inquiry requires that courts weigh competing concerns in a particular case to decide if they outweigh the benefits of disclosure—a method strikingly similar to the logic prong of the experience and logic test.<sup>32</sup> A similar balancing test has been applied by courts following the common law presumption as well.<sup>33</sup> Resolution of

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A.2d 735, 754–55 (Del. 1989) (Walsh, J., dissenting). The *Wecht* court, among others, has rejected this reasoning, leaving the issue without Supreme Court precedent. *United States v. Wecht*, 537 F.3d 222, 234 n.24 (3d Cir. 2008) (“Although this argument is plausible, we will not conclude from a single passage of Supreme Court dicta that the question is decisively settled.”); *see also* *Commonwealth v. Long*, 922 A.2d 892, 901 (Pa. 2007) (“Although this argument is appealing in its simplicity, we refuse to elevate a single sentence discussing potential limitations on the right of access to *voir dire* proceedings to signify that the United States Supreme Court held that jurors’ names and addresses are part and parcel of *voir dire* itself.”).

30. *See, e.g., Wecht*, 537 F.3d at 238; *In re Disclosure of Juror Names & Addresses*, 592 N.W.2d 798, 808 (Mich. Ct. App. 1999); *State ex rel. Beacon Journal Publ’g Co. v. Bond*, 781 N.E.2d 180, 194 (Ohio 2002); *Long*, 922 A.2d at 63. This conclusion, however, has been far from unanimous, as some courts have found that “experience and logic” dictate no such result. *See, e.g., United States v. Edwards*, 823 F.2d 111, 117 (5th Cir. 1987); *United States v. Calabrese*, 515 F. Supp. 2d 880, 881–82 (N.D. Ill. 2007); *Gannett*, 571 A.2d at 737. Still other courts have refused to address the issue using the constitutional test, turning instead to the common law presumption of openness. *See, e.g., United States v. Blagojevich*, 612 F.3d 558, 562 (7th Cir. 2010); *In re Baltimore Sun Co.*, 841 F.2d at 76 n.4.

31. *Compare* *United States v. Antar*, 38 F.3d 1348, 1362 (3d Cir. 1994) (requiring particularized findings in order to overcome presumption of openness in an individual case), *and Wecht*, 537 F.3d at 239–40 (requiring “pervasive” risks going beyond mere “conclusory and generic” findings), *with In re Disclosure*, 592 N.W.2d at 809 (“We disagree with the *Antar* court’s requirement that the trial court make ‘particularized findings’ that jurors would be endangered if their names were released before restricting media access to the names. Only rarely will a trial court have concrete evidence of a potential risk of harm to a juror.”).

32. *See, e.g., Wecht*, 537 F.3d at 239–42. The *Wecht* court examined the district court’s proffered reasons for withholding jurors’ identifications, and dismissed each as failing to outweigh the benefits of openness. For example, on the possibility that disclosure may lead to harassment of jurors, the court wrote: “[T]his is a necessary cost of the openness of the judicial process. The participation of jurors ‘in publicized trials may sometimes force them into the limelight against their wishes,’ but ‘[w]e cannot accept the mere generalized privacy concerns of jurors’ as a sufficient reason to conceal their identities in every high-profile case.” *Id.* at 240 (footnote omitted) (quoting *United States v. Hurley (In re Globe Newspaper Co.)*, 920 F.2d 88, 98 (1st Cir. 1990)).

33. *See Blagojevich*, 612 F.3d at 561 (“The right question is not *whether* names may be kept secret, or disclosure deferred, but *what justifies* such a decision.” (emphasis in original)); *see also* *United States v. Blagojevich*, 614 F.3d 287, 287 (7th Cir. 2010) (Posner, J., dissenting from denial of rehearing en banc).

this issue has been far from consistent in the many courts to reach it, and no clear consensus seems to have emerged.<sup>34</sup>

Some scholars have offered solutions for the proper analysis or evidentiary threshold at this second tier.<sup>35</sup> Others have taken a step backwards and suggested that the experience and logic test is improper for this question,<sup>36</sup> or that the experience and logic test is simply inapplicable.<sup>37</sup> Furthermore, some scholarship has focused narrowly on the timing of disclosure, rather than the broader issue of disclosure as a whole.<sup>38</sup>

This Note proposes a more straightforward and comprehensive solution. Under the experience and logic test, there should be no constitutional presumption in favor of disclosure of information identifying the actual jurors in a criminal trial, *regardless of the stage of the trial*. This should be the case even in the absence of actual juror safety concerns.<sup>39</sup> The concern for jurors that pervades high-profile trials is not allayed simply by waiting until after the verdict is delivered, as illustrated by the aftermath of the Casey Anthony and George Zimmerman

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34. See Raleigh Hannah Levine, *Toward a New Public Access Doctrine*, 27 CARDOZO L. REV. 1739, 1759 (2006) (“[C]ourts often disagree as to which closures satisfy strict scrutiny. For some, the test is strict in theory but fatal in fact; for others, searching for a way to justify closure, the test is strict in theory but quite flexible in fact.” (footnotes omitted) (internal quotation marks omitted)); cases cited *supra* note 29; cf. Kathleen K. Olson, *Courtroom Access After 9/11: A Pathological Perspective*, 7 COMM. L. & POL’Y 461, 485–86 (2002) (discussing the scattered lower court application of the logic and experience test in all contexts).

35. See Kaitlin E. Picco, *By Any Other Name: The Media’s First Amendment Right of Access to Juror Names* United States v. Wecht, 537 F.3d 222 (3d Cir. 2008), 82 TEMP. L. REV. 561, 589–91 (2009) (arguing that the “prevalence of the modern media” and juror privacy concerns are interests compelling enough to overcome the First Amendment presumption, and that reviewing courts should be deferential in this determination).

36. See Seth A. Fersko, *United States v. Wecht: When Anonymous Juries, the Right of Access, and Judicial Discretion Collide*, 40 SETON HALL L. REV. 763, 788–89 (2010) (arguing that the *Wecht* court “should have attempted to address the Media-Intervenors’ access claims under the common-law right-of-access doctrine rather than creating a new constitutional right”).

37. See Levine, *supra* note 34; Scott Sholder, “What’s in a Name?”: *A Paradigm Shift from Press-Enterprise to Time, Place, and Manner Restrictions When Considering the Release of Juror-Identifying Information in Criminal Trials*, 36 AM. J. CRIM. L. 97 (2009).

38. See Sholder, *supra* note 37, at 104–10 (discussing “The Trial as a Three-Act Play” and the strength of rights for the press, the defendant, and jurors in each of those three acts); Fersko, *supra* note 36, at 768 (focusing on identification of *prospective* jurors at the jury-selection stage).

39. Where there are specific, articulable concerns for juror safety, courts do not hesitate to withhold jurors’ identities. See, e.g., United States v. Scarfo, 850 F.2d 1015, 1023 (3d Cir. 1988) (affirming district court’s decision not to disclose juror names in Mafia trial); United States v. Barnes, 604 F.2d 121, 134–35 (2d Cir. 1979) (withholding identification of potential jurors in the interest of safety); see also *In re Disclosure of Juror Names & Addresses*, 592 N.W.2d 798, 799 (Mich. Ct. App. 1999) (“We qualify this right of access by also holding that trial courts have discretion . . . in some circumstances, perhaps, to refuse disclosure, in order to accommodate all the interests of justice, where safety concerns of jurors are found to be legitimate concerns.”).

verdicts.<sup>40</sup> When a jury fears a public backlash from an unpopular verdict, and that fear finds its way into the jury room, the defendant's Sixth Amendment right to a fair trial is compromised. Failure of the experience and logic test is dictated not only by the far-reaching negative effects of disclosure of jurors' names, but also the lack of any real benefits of such disclosure.

Part II of this Note will discuss the Court's initial adoption of the experience and logic test in the *Richmond Newspapers* and *Press-Enterprise II* cases, and the policy objectives that informed the Court's decisions. In those and subsequent cases, the Court has stressed the importance of fairness in the criminal trial as well as the appearance of fairness, with these concepts underlying the broader policy goal of public confidence in the criminal justice system.<sup>41</sup> With these goals in mind, courts have applied the experience and logic test to a variety of aspects of a criminal trial.<sup>42</sup>

Part III focuses the discussion on one aspect of the criminal trial, the disclosure of jurors' identifying information. The experience and logic test has been applied to this context by federal circuit<sup>43</sup> and district courts,<sup>44</sup> as well state appellate<sup>45</sup> and supreme courts<sup>46</sup> that have decided the disclosure question on First Amendment grounds. Analysis of these cases illustrates the examination of history (experience prong) and balancing of benefits and countervailing interests (logic prong) that courts have applied to the disclosure of juror information. Such an analysis shows that lower courts have tended to apply the experience prong in an improper fashion, and that, in applying the logic prong, courts have put too much weight on vague concerns of appearance of fairness while failing to properly address Sixth Amendment fair trial concerns.

Finally, Part IV argues that the concerns that mandate a failure of the logic prong apply to the identities of the actual sitting jurors in a high-profile criminal

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40. *Florida v. Anthony*, No. 48-2008-CF-015606-AO, 2011 WL 3112070, at 1–5 (Fla. Cir. Ct. July 26, 2011) (order granting in part motion to intervene for the limited purpose of seeking release of juror information once jury is discharged).

41. *See* *Press-Enterprise I*, 464 U.S. 501, 508 (1984) (“The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed . . . .”); *United States v. Hurley (In re Globe Newspaper Co.)*, 920 F.2d 88, 94 (1st Cir. 1990) (noting that openness “assur[es] that proceedings are conducted fairly” and “ensur[es] public confidence in a trial’s results through the appearance of fairness”); *see also* *Levine, supra* note 34, at 1744, 1791–96 (arguing that “[p]ublic scrutiny assures the fairness of proceedings” and increases public confidence).

42. *See, e.g.*, *Press-Enterprise II*, 478 U.S. 1 (1986) (preliminary hearings); *United States v. Wecht*, 537 F.3d 222, 239 (3d Cir. 2008) (juror identities); *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83 (2d Cir. 2004) (court dockets); *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002) (deportation proceedings); *Phoenix Newspapers, Inc. v. U.S. Dist. Court for Dist. of Ariz.*, 156 F.3d 940 (9th Cir. 1998) (transcripts of closed hearings); *United States v. Simone*, 14 F.3d 833, 842 (3d Cir. 1994) (post-trial examination of juror for potential misconduct).

43. *E.g.*, *Detroit Free Press*, 303 F.3d at 695.

44. *E.g.*, *United States v. Black*, 483 F. Supp. 2d 618, 626–29 (N.D. Ill. 2007).

45. *E.g.*, *In re Disclosure of Juror Names & Addresses*, 592 N.W.2d 798, 805–06 (Mich. Ct. App. 1999).

46. *E.g.*, *Commonwealth v. Long*, 922 A.2d 892, 901 (Pa. 2007).

trial—even in the absence of specific, articulable safety concerns—before, during, and even after the trial. Despite arguments that there may be more benefits to disclosure after the verdict,<sup>47</sup> fair trial concerns remain in play. Because these concerns caution against the disclosure of juror-identifying information at the post-trial stage, there should never be a First Amendment presumption of access to jurors' names and addresses in high-profile cases.

#### I. DEFINING A “HIGH-PROFILE” TRIAL

This Note argues that application of the experience and logic test in high-profile criminal trials dictates that juror information should not be disclosed to the media or the public. Because the scope of the argument is thus limited to only “high-profile” trials, it is helpful to first establish a working definition for that term.

In the most basic sense, “high-profile” refers simply to a high “degree or level of public exposure.”<sup>48</sup> Of course, in the context of the courtroom, public exposure is almost entirely a product of the media's coverage<sup>49</sup>—the media, after all, serves as the “eyes and ears” of the public.<sup>50</sup> The amount of media coverage of a criminal trial is causally related to the level of public interest in that trial.<sup>51</sup> Regardless of which comes first—does the media cultivate the public's interest in a certain topic, or does the media merely *reflect* the public's interest?<sup>52</sup>—there can be no doubt that the two go hand in hand.

Thus there are two main factors that tend to make a trial high profile in nature—media coverage and public interest. If these elements are the tinder, then the public's passion may be considered the spark that gives rise to the dangers this Note addresses. To be sure, the public may be interested in a subject without being passionate, and the media may cover subjects that do not ignite passion. But a high-profile criminal trial is generally not one of those situations. Perhaps in large part due to the nature of the alleged crimes that tend to give rise to media-saturated trials,<sup>53</sup> the public's interest in such proceedings goes beyond a mere curiosity in the outcome.<sup>54</sup>

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47. See *infra* Part IV.

48. MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 991 (11th ed. 2004).

49. For further discussion on the importance of the media's role in the courtroom context see *infra* note 52 and accompanying text.

50. Sheila S. Coronel, *Corruption and the Watchdog Role of the News Media*, in PUBLIC SENTINEL: NEWS MEDIA & GOVERNANCE REFORM 111 (Pippa Norris ed., 2010).

51. See generally Dietram A. Scheufele & David Tewksbury, *Framing, Agenda Setting, and Priming: The Evolution of Three Media Effects Models*, 57 J. COMM. 9 (2007).

52. One prominent model in mass communications scholarship is that of agenda-setting theory. See Maxwell E. McCombs & Donald L. Shaw, *The Evolution of Agenda-Setting Research: Twenty-Five Years in the Marketplace of Ideas*, 43 J. COMM. 58 (1993). At its core, agenda-setting theory postulates that media coverage determines what events the public at large will find most important. See, e.g., Maxwell E. McCombs & Donald L. Shaw, *The Agenda-Setting Function of Mass Media*, 36 PUB. OPINION Q. 176 (1972). For further discussion of media theory, see Stephen D. Reese, *Setting the Media's Agenda: A Power Balance Perspective*, 14 COMM. Y.B. 309 (1991) (reviewing a wide range of media agenda-setting studies).

53. From the alleged child murder in the Casey Anthony trial, see *supra* note 1, to

The number of trials that meet this rough definition of “high profile” will pale in comparison to the number of run-of-the-mill trials that do not.<sup>55</sup> In the vast majority of cases, there will be little public interest and minimal—if any—media coverage.<sup>56</sup> In such cases, the application of the experience and logic test may be different.<sup>57</sup> Because there is an obvious gray area between trials not covered by the media and trials pervaded by a “carnival atmosphere,”<sup>58</sup> one obvious issue remains: Where is the precise dividing line that sets “high-profile” trials apart from the rest? Answering this question with any particularity may be impossible. But the serious consequences potentially stemming from disclosure<sup>59</sup> certainly caution in favor of a liberal interpretation of the term “high profile.”

## II. HISTORY OF THE EXPERIENCE AND LOGIC TEST

Criminal trials have historically been presumptively open.<sup>60</sup> This tradition, which goes back to the Norman Conquest of England,<sup>61</sup> is further guaranteed in the First Amendment of the U.S. Constitution, providing the public—and its proxy, the

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multiple counts of alleged child rape in the Jerry Sandusky case, *see infra* note 203, to the alleged racially motivated murder of teenager Trayvon Martin, *see supra* notes 20–25 and accompanying text, examples abound of the public being captivated by shocking charges. Even when the charges are not as extraordinary, cases may become highly publicized when they involve a high-profile defendant. *See, e.g.*, *United States v. Blagojevich*, 612 F.3d 558 (7th Cir. 2010) (trial of former Illinois Governor Rod Blagojevich).

54. *See infra* notes 203–06 and accompanying text. While public passion is often for conviction, *see infra* note 185, it can go both ways. *See, e.g.*, David W. Moore, *Most Americans Believe Charges Against Michael Jackson Probably True*, GALLUP (Apr. 29, 2005), <http://www.gallup.com/poll/16081/most-americans-believe-charges-against-michael-jackson-probably-true.aspx> (analyzing the strong racial divide in attitudes toward the guilt of Michael Jackson and O.J. Simpson).

55. *In re Disclosure of Juror Names & Addresses*, 592 N.W.2d 798, 808 (Mich. Ct. App. 1999) (noting that high-profile trials are exceptional).

56. *Id.* (“In the vast majority of trials, there are no safety implications for jurors and the media has no interest in reporting the names or comments of jurors.”).

57. The question of proper application of the experience and logic test to lower-profile trials is beyond the scope of this Note. However, as the Michigan Court of Appeals alluded to, the question is often moot—if the media and public have little interest in a trial, not only will jurors face no dangers from the public, but there will be no demand for jurors’ information in the first place. *See id.*

58. *Estes v. Texas*, 381 U.S. 532, 577 (1965) (Warren, C.J., concurring). In *Estes*, the Supreme Court held that the exorbitant amount of media in and around the courthouse—what the trial judge had referred to as a “circus”—was presumptively prejudicial to the defendant. *Id.* at 532 (majority opinion). The Court reached similar conclusions in *Rideau v. Louisiana*, 373 U.S. 723 (1963) and *Sheppard v. Maxwell*, 384 U.S. 333 (1966), each time holding that the cases “had been utterly corrupted by press coverage.” *Murphy v. Florida*, 421 U.S. 794, 798 (1975). Though the threshold for a presumed prejudice claim based on media presence is quite high, *see Skilling v. United States*, 130 S. Ct. 2896 (2010), this inquiry is distinct from that of the experience and logic test.

59. *See infra* Part III.B.2.

60. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 556 (1980).

61. *Id.* at 565.

media<sup>62</sup>—the right to access criminal trials.<sup>63</sup> This openness, according to the Court, serves a wide array of important goals:

The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.<sup>64</sup>

In *Press-Enterprise II*, the Supreme Court formally established a test used for determining the portions of a criminal trial to which the media is presumptively guaranteed a First Amendment right of access.<sup>65</sup> *Press-Enterprise II* stemmed from

62. “In new and old democracies, the idea of the media as the public’s eyes and ears, and not merely a passive recorder of events, is today widely accepted.” Coronel, *supra* note 50, at 112. The notion of the media as the public’s proxy can be seen throughout First Amendment access jurisprudence. See, e.g., *Richmond Newspapers*, 448 U.S. at 586 n.2 (Brennan, J., concurring in judgment) (“As a practical matter . . . the institutional press is the likely, and fitting, chief beneficiary of a right of access because it serves as the ‘agent’ of interested citizens, and funnels information about trials to a large number of individuals.”); *United States v. Wecht*, 537 F.3d 222, 251 (3d Cir. 2008) (“It is well-established that the First Amendment protects the right of the public, and the media as its proxy, to have access to criminal proceedings and to gather information.”); *Commonwealth v. Long*, 922 A.2d 892, 899 (Pa. 2007) (“[T]he Court also has generally agreed that the right of the press and public were synonymous, since the media effectively functions as surrogates for the public.”); see also Marc O. Litt, “*Citizen-Soldiers*” or *Anonymous Justice: Reconciling the Sixth Amendment Right of the Accused, the First Amendment Right of the Media and the Privacy Right of Jurors*, 25 COLUM. J.L. & SOC. PROBS. 371, 417 (1992) (“Access to information about the jury is of great importance to the media in carrying out its role as the public’s proxy monitor of trials.”).

63. *Richmond Newspapers*, 448 U.S. at 556.

64. *Press-Enterprise I*, 464 U.S. 501, 508 (1984) (emphasis in original); see also *Richmond Newspapers*, 448 U.S. at 569–70 (discussing “[t]he nexus between openness, fairness, and the perception of fairness”). The Supreme Court’s most succinct review of the benefits of openness in the criminal justice system is perhaps *Globe Newspaper Co. v. Superior Court for the County of Norfolk*, 457 U.S. 596, 606 (1982):

[T]he right of access to criminal trials plays a particularly significant role in the functioning of the judicial process and the government as a whole. Public scrutiny of a *criminal trial* enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole. Moreover, public access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process. And in the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government.

(emphasis in original) (footnotes omitted).

65. 478 U.S. 1, 8 (1986). Though the test was first given its name in *Press-Enterprise II*, the same two factors were considered in *Richmond Newspapers*, 448 U.S. at 573, and that case is usually referred to as the starting point for the experience and logic test. See Alice

the California trial court's decision to exclude the public from pretrial proceedings in the prosecution of a nurse charged with murdering twelve patients.<sup>66</sup> When the court subsequently refused the Press-Enterprise Company's motion to release transcripts of the proceedings, Press-Enterprise challenged the decision.<sup>67</sup>

The Supreme Court reasoned that tests of experience and logic dictated that Press-Enterprise had a presumptive right to the transcripts of the preliminary hearing.<sup>68</sup> In recognizing the changing nature of media scrutiny, the experience and logic test was crafted to strike a "balance between too much and too little public access."<sup>69</sup> If both the experience prong and the logic prong are satisfied, a First Amendment right attaches, and that aspect of the trial is presumptively open to the public and media.<sup>70</sup>

Under the experience prong, a court must determine "whether the place and process [in question] have been historically open to the press and public."<sup>71</sup> When such a tradition is found to exist, the experience prong has been satisfied.<sup>72</sup> The Court in *Richmond Newspapers* explained why such experience is integral in determining if a current right of access exists: "[T]he case for a right of access has special force when drawn from an enduring and vital tradition of public entree to particular proceedings or information. Such a tradition commands respect in part because the Constitution carries the gloss of history."<sup>73</sup> The Court thus concluded that "a tradition of accessibility implies the favorable judgment of experience."<sup>74</sup> This analysis often—in *Richmond Newspapers* and many of the cases to follow—sees courts searching as far back as the Norman Conquest for a historical tradition.<sup>75</sup> In some circumstances, a long tradition of a certain practice is found easily.<sup>76</sup> In others, however, history may provide support for both sides of the openness argument.<sup>77</sup>

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Cole Ortiz, *Our "Eternal Struggle Between Liberty and Security:" A First Amendment Right of Access to Deportation Hearings*, 55 BAYLOR L. REV. 1203, 1210–15 (2003) (discussing the birth of the experience and logic test in *Richmond Newspapers*).

66. *Press-Enterprise II*, 478 U.S. at 3–4.

67. *Id.* at 4.

68. *Id.* at 8.

69. See Fersko, *supra* note 36, at 767 (arguing that the experience and logic test was implemented largely in response to a congressional move to greater judicial discretion in access questions).

70. *Press-Enterprise II*, 478 U.S. at 10; see also David Weinstein, *Protecting a Juror's Right to Privacy: Constitutional Constraints and Policy Options*, 70 TEMP. L. REV. 1, 12 (1997) ("When the need for openness is justified by the twin tests of 'experience and logic,' a qualified right of access attaches.") (footnote omitted). But see Levine, *supra* note 34, at 1742, 1747–50 (arguing that *Richmond Newspapers* does not make clear whether satisfaction of just one prong is sufficient).

71. *Press-Enterprise II*, 478 U.S. at 8.

72. *Id.* at 10.

73. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 589 (1980).

74. *Id.*

75. *Id.* at 565 (discussing the legal system in England both before and after the Norman Conquest); see also *Press-Enterprise I*, 464 U.S. 501, 505–06 (1984) (beginning at the Norman Conquest).

76. See, e.g., *Richmond Newspapers*, 448 U.S. at 565–68 (discussing the absolute openness of trials in England and colonial America). The *Richmond Newspapers* Court

In *Press-Enterprise II*, the Supreme Court's first opportunity to explicitly apply the experience test to a specific aspect of a criminal trial,<sup>78</sup> the Court devoted a considerably smaller portion of its opinion to the experience test than to the logic test.<sup>79</sup> In determining whether preliminary hearings have traditionally been open, the Court began by pointing to the 1806 Aaron Burr trial, in which the probable cause hearing took place in Virginia's Hall of the House of Delegates.<sup>80</sup> Without further discussion, the Court concluded that experience dictated a tradition of openness in preliminary hearings,<sup>81</sup> and went on to cite numerous state cases reaching the same conclusion.<sup>82</sup>

While the early applications of the experience and logic test involved trial aspects where the tradition of openness was plainly clear, the test has, over time, been applied to more complicated issues.<sup>83</sup> This has raised the question of how far back such experience must reach.<sup>84</sup> While the aforementioned analysis in *Press-Enterprise II* made clear that going back to the Norman Conquest is not always necessary,<sup>85</sup> some courts have examined a much narrower frame of history.<sup>86</sup> The Sixth Circuit realized that in some cases a shorter time frame makes

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found no evidence that closure of criminal trials was *ever* the answer in early America:

Indeed, when in the mid-1600's the Virginia Assembly felt that the respect due the courts was "by the clamorous unmannerlynes of the people lost, and order, gravity and decoram which should manifest the authority of a court in the court it selfe neglected," the response was not to restrict the openness of the trials to the public, but instead to prescribe rules for the conduct of those attending them.

*Id.* at 567 (citing ARTHUR P. SCOTT, *CRIMINAL LAW IN COLONIAL VIRGINIA* 132 (1930)).

77. *United States v. Black*, 483 F. Supp. 2d 618 (N.D. Ill. 2007) (examining cases in which juror names were *not* released). The Supreme Court's early applications of the experience prong seemed to recognize that there will always be outliers, but these are exceptions rather than the rule, ultimately finding that experience favored openness. *See Press-Enterprise II*, 478 U.S. 1, 11 (1986) ("[S]everal States following the original New York Field Code of Criminal Procedure published in 1850 have allowed preliminary hearings to be closed on the motion of the accused. But even in these States the proceedings are presumptively open to the public and are closed only for cause shown." (citation omitted)); *Press-Enterprise I*, 464 U.S. at 501 ("The historical evidence reveals that the process of selection of jurors has presumptively been a public process with exceptions only for good cause shown."); *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 701 (6th Cir. 2002) ("Although exceptions may have been allowed, the general policy has been one of openness.").

78. The analysis in *Richmond Newspapers* regarded the history and experience of openness in criminal trials generally. 448 U.S. at 556.

79. The Court disposed of the experience inquiry in just one paragraph, compared to the five dedicated to the logic test. *Press-Enterprise II*, 478 U.S. at 10–13.

80. *Id.* at 10.

81. *Id.* at 11.

82. *Id.* at 10 n.3 (collecting cases).

83. *See Detroit Free Press v. Ashcroft*, 303 F.3d 681, 695 (6th Cir. 2002) (listing just some of the situations in which the experience and logic test has been applied, including certain administrative proceedings); *see also* cases cited *supra* note 42.

84. *See Detroit Free Press*, 303 F.3d at 700.

85. *Id.*; *see also supra* text accompanying notes 78–82.

86. *See, e.g., Cal-Almond, Inc. v. USDA*, 960 F.2d 105, 109 (9th Cir. 1992) (finding

sense, because “the First Amendment concerns ‘broad principles,’ applicable to contexts not known to the Framers[.]”<sup>87</sup> while still noting that “[a] historical tradition of at least some duration is obviously necessary.”<sup>88</sup>

Under the logic prong, a court must examine “whether public access plays a significant positive role in the functioning of the particular process in question.”<sup>89</sup> When such a role is found to be played, the logic prong has been satisfied.<sup>90</sup> The Court in *Press-Enterprise II* looked to benefits generally flowing from openness—ensuring fairness and impartiality and “the ‘community therapeutic value’ of openness”<sup>91</sup>—and found that openness in preliminary hearings served those goals.<sup>92</sup> More recent applications of the logic prong have followed a similar method.<sup>93</sup> Still, the *Press-Enterprise II* Court was sure to point out that these general benefits of openness will not always be applicable, identifying the grand jury as an example of an aspect of the criminal process that would be “totally frustrated if conducted openly.”<sup>94</sup>

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experience prong satisfied through examination of current state statutes); *Apps. of Nat’l Broad. Co. v. Presser*, 828 F.2d 340, 344 (6th Cir. 1987) (reviewing history from 1924 to 1984).

87. *Detroit Free Press*, 303 F.3d at 701 (quoting *Globe Newspaper Co. v. Super. Ct. of Norfolk*, 457 U.S. 596, 604 (1982)).

88. *Id.* (quoting *In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325, 1332 (D.C. Cir. 1985)).

89. *Press-Enterprise II*, 478 U.S. 1, 8 (1986).

90. *Id.* at 11.

91. *Id.* at 13 (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 570 (1980)).

92. *Id.* The Third Circuit, in *United States v. Criden*, 675 F.2d 550, 556 (3d Cir. 1982), identified six interests that the *Richmond Newspapers* Court had found that could be served by public access:

[1] promotion of informed discussion of governmental affairs by providing the public with the more complete understanding of the judicial system; [2] promotion of the public perception of fairness which can be achieved only by permitting full public view of the proceedings; [3] providing a significant community therapeutic value as an outlet for community concern, hostility and emotion; [4] serving as a check on corrupt practices by exposing the judicial process to public scrutiny; [5] enhancement of the performance of all involved; and [6] discouragement of perjury.

*United States v. Smith*, 787 F.2d 111, 114 (3d Cir. 1986) (paraphrasing from *Criden*, 675 F.2d at 556).

93. *See Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 95 (2d Cir. 2004) (finding that logic supports public access to docket sheets because, inter alia, “their availability greatly enhances the appearance of fairness [and] [t]hey have also been used to reveal potential judicial biases or conflicts of interest”); *Associated Press v. State*, 888 A.2d 1236, 1248 (N.H. 2005) (finding that logic supports public access to domestic relations proceeding because of an enhanced appearance of fairness in important proceedings as well as the need to “safeguard[] the integrity of the factfinding process”) (quoting *Globe Newspaper Co. v. Super. Ct. of Norfolk*, 457 U.S. 596, 606 (1982)).

94. 478 U.S. at 8–9; *see United States v. Wecht*, 537 F.3d 222, 238–39 (2008) (recognizing drawbacks to disclosure of jurors’ names and addresses, but finding those drawbacks outweighed by the “benefits of public access”). In his *Richmond Newspapers* concurrence, Justice Brennan was also concerned that a right of access could theoretically be

The logic prong may hold more weight than the experience prong.<sup>95</sup> Though neither the *Richmond Newspapers* nor the *Press-Enterprise* decisions included such a suggestion,<sup>96</sup> the conclusion does follow from reason. On one hand, it is easy to imagine attaching a right of access where a public benefit logically flows from openness, despite a lack of traditional openness; on the other hand, it would be a perverse result to attach a right of access based solely on tradition if that access had dire consequences.<sup>97</sup> Others have argued that the logic prong is simply of greater inherent value.<sup>98</sup> Of course, when it adopted the test, the Court must have suspected that the occasion would be rare when the two considerations were diametrically opposed.<sup>99</sup>

### III. APPLICATION OF THE EXPERIENCE AND LOGIC TEST TO THE DISCLOSURE OF JURORS' IDENTIFYING INFORMATION

The experience and logic test has been applied to the disclosure of jurors' identifying information numerous times in a variety of lower courts.<sup>100</sup> Generally, the identifying information at issue in these cases is the names and addresses of the

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extended ad infinitum based upon the benefits of the public's access to knowledge generally. 448 U.S. at 585 (Brennan, J., concurring in judgment). He thus cautioned that the benefits of access should be weighed against its drawbacks. *Id.* at 558–59; *see also* Levine, *supra* note 34, at 1748–49 (discussing Brennan's concurrence).

95. *See* United States v. Simone, 14 F.3d 833, 840 (3d Cir. 1994) (finding First Amendment right of access based solely on a logic prong analysis). The *Criden* court also explicitly refused to factor history or experience into the equation, though that decision was delivered in 1982, before the *Richmond Newspapers* test had been given its formal name. 675 F.2d at 555 (“We do not think that historical analysis is relevant in determining whether there is a first amendment right of access to pretrial criminal proceedings.”).

96. *See* Levine, *supra* note 34, at 1777 (pointing out the disagreement among lower courts over the relative weight of each prong). *See generally* *Press-Enterprise II*, 478 U.S. 1; *Richmond Newspapers*, 448 U.S. 555.

97. *See* Note, *The Public Right of Access to Juvenile Delinquency Hearings*, 81 MICH. L. REV. 1540, 1552 (1983) (“[H]istory should play a limited role in defining the scope of the right to attend judicial proceedings. Notwithstanding ‘the favorable judgment of experience’ and ‘the gloss of history’ that the Constitution carries, the Court should avoid a rigid historical interpretation of the [F]irst [A]mendment when the result would offend the amendment’s underlying purposes.” (quoting *Richmond Newspapers*, 448 U.S. at 589 (Brennan, J., concurring))).

98. *See* Douglas A. Bahr, *Associated Press v. Bradshaw: The Right of Press Access Extended to Juvenile Proceedings in South Dakota*, 34 S.D. L. REV. 738, 754 n.156 (1989) (arguing that “the ‘logic’ prong should carry more weight”); Harry Todd, *The Right of Access and Juvenile Delinquency Hearings: The Future of Confidentiality*, 16 IND. L. REV. 911, 935–36 (1983) (suggesting that historical review will be of little value where the history of a certain proceeding is not of sufficient length).

99. *Cf.* *Press-Enterprise II*, 478 U.S. at 8, 9 (referring to the two “complementary” notions of experience and logic as “of course, related, for history and experience shape the functioning of governmental processes”); *Richmond Newspapers*, 448 U.S. at 589 (Brennan, J., concurring) (“[A] tradition of accessibility implies the *favorable judgment* of experience.” (emphasis added)).

100. *See* cases cited *supra* note 30.

jurors,<sup>101</sup> though some courts have taken a unique stance on just what information is involved.<sup>102</sup> Courts are largely divided as to the result of the experience and logic test in this context,<sup>103</sup> though the most recent federal court of appeals to address the issue ultimately found that a qualified First Amendment right of access to juror information does exist.<sup>104</sup>

Three key considerations must be kept in mind when analyzing the decisions on this issue. First, each court to apply the experience and logic test to the disclosure of juror information does so only in the narrow context in which the claim arises.<sup>105</sup> Often this means that instead of deciding if the media has a qualified right to the information generally, courts decide whether such a right exists, for example, pretrial,<sup>106</sup> pre-verdict,<sup>107</sup> or even post-verdict (without deciding whether the right exists during trial).<sup>108</sup> The analyses of both experience and logic then are framed only in this narrow context.

Second, when a court finds that experience and logic favor a qualified right of access, it proceeds to the second tier of analysis: whether a compelling interest has been asserted that justifies closure.<sup>109</sup> This means that the court essentially has two

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101. *See, e.g.*, *United States v. Wecht*, 537 F.3d 222, 229 (3d Cir. 2008); *United States v. Antar*, 38 F.3d 1348, 1351 (3d Cir. 1994); *In re Globe Newspaper Co.*, 920 F.2d 88, 93 n.6 (1st Cir. 1990) (“In the case of many familiar names, an address as well as the name is necessary to identify the individual.”).

102. *See Commonwealth v. Long*, 922 A.2d 892, 904 (Pa. 2007) (holding that a qualified First Amendment right applies to disclosure of juror names, but not addresses); *see also Litt*, *supra* note 62, at 410 n.253 (arguing that the court in *Newsday, Inc. v. Sise*, 518 N.E.2d 930, 931–33 (N.Y. 1987), implied that the right of access was limited to names alone).

103. *See supra* note 30.

104. *Wecht*, 537 F.3d at 238–39.

105. *See generally* Sholder, *supra* note 37, at 104–10 (discussing the three stages of criminal trials and the unique factors examined by courts applying the test at each stage).

106. *E.g.*, *Wecht*, 537 F.3d at 239 (finding that the presumptive First Amendment right “attaches no later than the swearing and empanelment of the jury”).

107. *E.g.*, *United States v. Black*, 483 F. Supp. 2d 618, 624 (N.D. Ill. 2007) (addressing issue of whether media has “a constitutional right to learn the jurors’ names before the jury returns its verdict”).

108. *E.g.*, *In re Disclosure of Juror Names & Addresses*, 592 N.W.2d 798, 809 (Mich. Ct. App. 1999) (“We therefore hold that the press has a qualified right of post-verdict access to juror names and addresses . . .”).

109. *See Press-Enterprise I*, 464 U.S. 501, 510 (1984) (indicating that the presumptive First Amendment right may be overcome when there is “an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest”); *United States v. Antar*, 38 F.3d 1348, 1358 (3d Cir. 1994) (discussing the burden for overcoming the presumptive First Amendment right in the juror disclosure context). This modified strict scrutiny standard, to be applied following a positive application of the experience and logic test, has encountered multiple interpretations. *See Levine*, *supra* note 34, at 1759 (“[C]ourts often disagree as to which closures satisfy strict scrutiny. For some, the test is strict in theory but fatal in fact; for others, searching for a way to justify closure, the test is strict in theory but quite flexible in fact.” (footnote and internal quotation marks omitted)); Sholder, *supra* note 37, at 121–23 (discussing variations in strict scrutiny analysis in access cases). Even within the narrower bounds of the juror disclosure issue, courts have tended to disagree. *See cases cited supra* note 31 and accompanying text.

opportunities to find in favor of closure. It is possible that courts will be more inclined to reach this tier, where it may rule based upon the facts of the individual case, rather than issue a precedent-setting denial of a constitutional right at the experience and logic stage.<sup>110</sup>

Finally, the issue here is separate and distinct from the issue of anonymous juries.<sup>111</sup> An anonymous jury refers to the withholding of jurors' identifying information from *the parties*.<sup>112</sup> The cases discussed in this Part—and the thesis of this Note in general—refer only to disclosure to the public/media.<sup>113</sup> While the history of truly anonymous juries may sometimes be discussed in experience prong analysis,<sup>114</sup> the concept of an anonymous jury is wholly distinct from the issue of disclosure to the media and public.

#### A. The Experience Prong

The Third Circuit Court of Appeals applied the experience and logic test to pre-panels disclosure of jurors' name and addresses in *United States v. Wecht*.<sup>115</sup> The *Wecht* appeal stemmed from a pretrial petition from a group of media-intervenors challenging district court orders to empanel an anonymous jury and to conduct initial voir dire through a questionnaire, without venire persons

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For the purposes of this Note, however, delving into this legal morass is unnecessary. Because the disclosure of jurors' identifying information at any stage of the trial should not satisfy the experience and logic test, there is no need to proceed to the second stage.

110. *Cf. Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (“[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.”); *Liverpool, N.Y. & Phila. S.S. Co. v. Comm’rs of Emigration*, 113 U.S. 33, 39 (1885) (holding that the Supreme Court shall “never . . . formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied”).

111. *See Black*, 483 F. Supp. 2d at 624 (differentiating anonymous juries).

112. *See, e.g., United States v. Shryock*, 342 F.3d 948, 970 (9th Cir. 2003) (anonymous jury empaneled “by ordering that the names, addresses, and places of employment of prospective jurors and their spouses not be disclosed to counsel, either before or after selection of the jury panel”); *United States v. Scarfo*, 850 F.2d 1015, 1017 (3d Cir. 1988) (“[T]he trial judge granted the government’s motion to empanel an anonymous jury. During voir dire neither party was permitted to learn the jurors’ names, residence addresses, or places of employment.”); *see generally* Nancy J. King, *Nameless Justice: The Case for the Routine Use of Anonymous Juries in Criminal Trials*, 49 VAND. L. REV. 123 (1996) (discussing “anonymous juries” in terms of disclosure to the parties). Despite this clear case law, some scholarship uses the term “anonymous jury” very broadly, encompassing even those situations where jurors’ identities are disclosed to the parties, but not the public. *See, e.g., Fersko, supra* note 36, at 769–70.

113. *See, e.g., Gannett Co. v. State*, 571 A.2d 735, 751 (Del. 1989) (finding that disclosure of identities to the press and the public “promotes neither the fairness nor the perception of fairness, when the parties are provided with the jurors’ names and all proceedings are open to the public”).

114. *E.g., United States v. Wecht*, 537 F.3d 222, 235–36 (3d Cir. 2008) (discussing the history of “anonymous juries”).

115. *Id.* at 235–39.

actually present in the court.<sup>116</sup> The defendant, Dr. Cyril Wecht, was the Allegheny County coroner, and was charged with eighty-four counts of theft and fraud.<sup>117</sup> The district court judge, noting that Wecht, a prominent person locally, was concerned that the jury's exposure to the media might be harmful.<sup>118</sup>

In its experience prong analysis, the *Wecht* court found that there was a historical tradition of access to juror names.<sup>119</sup> The court followed the lead of the early Supreme Court cases<sup>120</sup> by examining history in the broadest possible scope, looking at "trial practices as they have developed over the past millennium in courts at all levels."<sup>121</sup> Using this scope for its historical analysis, the Third Circuit found particularly significant the fact that juries were traditionally chosen from smaller local populations.<sup>122</sup> "Because juries have historically been selected from local populations in which most people have known each other . . . the traditional public nature of voir dire strongly suggests that jurors' identities were public as well."<sup>123</sup> The Third Circuit also found it significant that the withholding of jurors' names was especially rare before the 1970s,<sup>124</sup> concluding: "[I]t appears that public knowledge of jurors' names is a well-established part of American judicial tradition."<sup>125</sup>

In *Commonwealth v. Long*, the trial court, near the end of the trial and sua sponte, announced that the names and addresses of the jurors would not be revealed.<sup>126</sup> The defendant, Karl Long, had been accused of murdering his wife.<sup>127</sup>

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116. *Id.* at 224–25.

117. *Id.* at 224.

118. *Id.* at 240–41. Specifically, the district court was concerned "that the dissemination of stories about the prospective jurors (and especially the empaneled jury) would have a real impact on the jurors' willingness to serve and, if selected, on the jurors' abilities to remain fair, unbiased, and focused on [the] case." *Id.* at 240. The court also showed concern for possible attempts by Wecht's friends or enemies to influence the jury. *Id.*

119. *Id.* at 235–38.

120. *See supra* note 77 and accompanying text.

121. *Wecht*, 537 F.3d at 237.

122. *See id.* at 235.

123. *Id.* The court then cited with approval a number of scholarly articles indicating that jurors' names were traditionally known, including Weinstein, *supra* note 70 at 30 ("The names of jurors have been available to the public throughout the history of the common law."), and Robert Lloyd Raskopf, *A First Amendment Right of Access to a Juror's Identity: Toward a Fuller Understanding of the Jury's Deliberative Process*, 17 PEPP. L. REV. 357, 370 (1990) ("An examination of historical tradition indicates that jurors' identities and places of residence traditionally have been known to the public."). *Wecht*, 537 F.3d at 235–36.

124. *Wecht*, 537 F.3d at 236.

125. *Id.*; *cf. In re Balt. Sun Co.*, 841 F.2d 74, 75 (4th Cir. 1988) ("When the jury system grew up with juries of the vicinage, everybody knew everybody on the jury . . . . But 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 the jurors . . . . We think it no more than an application of what has always been the law to require a district court . . . to release the names and addresses of those jurors who are sitting . . . .").

126. 922 A.2d 892, 895 (Pa. 2007).

127. *Id.* at 894.

Recognizing that the trial was a “widely publicized and sensationalized event,” the trial court cited concerns for jurors’ privacy in withholding the names and addresses.<sup>128</sup> The media intervened five days later, before the jury had returned a verdict.<sup>129</sup>

Though the situation was technically different from that in *Wecht*, in that the court was addressing a midtrial rather than a pretrial request, the Supreme Court of Pennsylvania’s analysis under the experience prong was virtually identical to that of the Third Circuit.<sup>130</sup> “Looking at the earliest juries,” the court concluded in *Long*, “there can be no question that jurors’ names and addresses were generally known.”<sup>131</sup> Though the Pennsylvania high court explicitly rejected the idea that “everybody knew everybody on the jury,”<sup>132</sup> it still found a historical tradition based upon the practice of calling jurors forward by name.<sup>133</sup>

Proper analysis under the experience prong would seem to turn on the precise phrasing of the issue. The *Wecht* court found a historical tradition of “public knowledge” of jurors’ identities,<sup>134</sup> rather than a historical tradition of courts actively disclosing such information. The *Long* court, perhaps recognizing this distinction, rested its experience prong decision on the tradition of juror names being announced in court,<sup>135</sup> even though this tradition is markedly different from the type of formal disclosure sought by intervenors in these cases. At the very least, though, because the experience prong requires a history of *disclosure* of jurors’ identities, the *Wecht* court’s “everybody knows everybody” rationale must fail.

Experience prong analysis of the disclosure of juror identities also hinges upon some of the unanswered questions following *Richmond Newspapers and Press-Enterprise II*: How far back must the historical tradition go?<sup>136</sup> And just how much countervailing tradition is necessary to defeat the experience prong?<sup>137</sup> While the *Wecht* court found examples of the withholding of juror information to be “very rare” prior to 1970,<sup>138</sup> the practice became considerably more common in the history after that point in time.<sup>139</sup> Looking at the past forty years, one could easily

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128. *Id.* at 905.

129. *See id.* at 895.

130. Like the Third Circuit, the Supreme Court of Pennsylvania traced the earliest iterations of the jury, citing 2 WILLIAM BLACKSTONE & THOMAS M. COOLEY, COMMENTARIES ON THE LAWS OF ENGLAND (4th ed. 1899), at length. *Long*, 922 A.2d at 901–02.

131. 922 A.2d at 901.

132. *Id.* at 902. Despite a discussion that would lead to this conclusion, the court ultimately found that increasing populations and changes in the jury system refuted the idea. *Id.* (“Thus, to simply conclude that jurors’ names and addresses were public knowledge because ‘everybody knew everybody on the jury’ ignores the historical evolution of the jury system.”).

133. *Id.* at 902–03. Resting its experience prong decision on these grounds largely explains why the *Long* court found a presumptive First Amendment right to juror names, but not addresses. *See id.* at 903–04; *see also supra* note 77.

134. *United States v. Wecht*, 537 F.3d 222, 236 (3d Cir. 2008).

135. 922 A.2d at 902–03.

136. *See supra* notes 83–88 and accompanying text.

137. *See supra* note 77 and accompanying text.

138. *Wecht*, 537 F.3d at 236.

139. *See, e.g., United States v. Gurney*, 558 F.2d 1202, 1210 (5th Cir. 1977) (“The

conclude that it is fairly common practice for a trial judge to order that juror information be kept from the public.<sup>140</sup> Furthermore, the changes in media and media technology over the last forty years tend to indicate that more weight should be put on the recent history, not less.<sup>141</sup> Whether or not this truncated history counterbalances the *Long* rationale<sup>142</sup> remains an open question, so a conclusion that experience must favor disclosure is tenuous at best. This question is generally moot,<sup>143</sup> however, as the disclosure of jurors' identifying information fails the logic prong on multiple levels.

### B. The Logic Prong

The *Wecht* court also found that logic favored the pre-empnelment disclosure of jurors' name and addresses.<sup>144</sup> The court concluded that "the purposes served by the openness of trials and voir dire generally are also served by public access to jurors' names."<sup>145</sup> Specifically, the *Wecht* court found that pretrial disclosure of jurors' names and addresses would allow the public to "verify the impartiality" of jurors, which "ensures fairness, the appearance of fairness and public

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refusal to direct that the names and addresses of the jurors be publicly released was well within the bounds of such discretion." (footnote omitted)); *Sanders v. Indianapolis (In re Indianapolis Newspapers, Inc.)*, 837 F. Supp. 956, 957 (S.D. Ind. 1992) ("It has been the operating procedure and long-standing policy of this Court not to disclose to persons, other than the parties to a particular litigation, the names and addresses of a jury panel until after that panel has completed its term of service."). The Federal Plan for Random Jury Selection, 28 U.S.C. § 1863(b)(7) (2006), may also go against a history of juror identity disclosure. The statute, passed in 1968, allows each district to implement a plan for jury selection, and dictates: "If the plan permits these names to be made public, it may nevertheless permit the chief judge of the district court, or such other district court judge as the plan may provide, to keep these names confidential in any case where the interests of justice so require." 28 U.S.C. § 1863(b)(7) (emphasis added). Some courts have incorporated this statute into the experience prong analysis. *See, e.g., United States v. Black*, 483 F. Supp. 2d 618, 625–26 (N.D. Ill. 2007); *see also Gannett Co. v. State*, 571 A.2d 735, 744 (Del. 1989) (arguing that experience analysis should be broadly inclusive); *Fersko*, *supra* note 36, at 773 (arguing that the jury selection statute was intended to codify existing judicial practices).

140. *See Fersko*, *supra* note 36, at 788 (arguing that the *Wecht* court erred in essentially ignoring more recent trends affording trial judges more discretion over release of jurors' names).

141. *See id.* at 791 (arguing that courts should take greater account of modern trends in the experience prong analysis); *see also Wecht*, 537 F.3d at 255–56 (Van Antwerpen, J., concurring in part and dissenting in part) ("Given the increased media presence and role in judicial proceedings, the collective experience of courts over the last few decades in managing high-profile trials is arguably more relevant than is the early development of the jury system on which the Majority bases its holding that jurors [sic] names were known to the public as a matter of experience."). The Supreme Court addressed this issue as early as 1966, discussing the increasing pervasiveness of media coverage of the judicial process in *Sheppard v. Maxwell*, 384 U.S. 333, 362–63 (1966).

142. *See supra* notes 131–33 and accompanying text.

143. *See supra* notes 97–99 and accompanying text.

144. *See Wecht*, 537 F.3d at 239.

145. *Id.* at 238.

confidence.”<sup>146</sup> Beyond this, the court reasoned that the power to decide a criminal defendant’s fate should not be a power exercised by unknown persons.<sup>147</sup>

The Third Circuit did recognize three risks that flow from juror identity disclosure.<sup>148</sup> First, public disclosure of juror names creates the possibility that friends or enemies of the defendant may seek to influence a juror’s decision-making process.<sup>149</sup> Second, prospective jurors may seek to avoid jury duty for fear that they will be harassed by the media.<sup>150</sup> Finally, prospective jurors may have incentive to lie in voir dire, in order to avoid publication of embarrassing secrets.<sup>151</sup> Ultimately, though, the court did not find these possible risks compelling enough to outweigh the aforementioned benefits of disclosure.<sup>152</sup>

Examining pre-verdict (but after empanelment) and post-verdict disclosure of juror information, other courts have reached similar conclusions on the logic prong.<sup>153</sup> The Pennsylvania Supreme Court in *Long* (pre-verdict) relied in part on the positive effects of openness and access to the criminal justice system,<sup>154</sup> quoting at length the United States Supreme Court’s decision in *Globe Newspaper*.<sup>155</sup> Additionally, the *Long* court—like the Third Circuit in *Wecht*—found that public knowledge of jurors’ names would serve as a check on bias, further finding that this would in turn motivate potential jurors to be more honest and forthright in the first place at voir dire.<sup>156</sup> Though it did consider the potential concerns for juror safety, harassment from the media, and the possibility that these concerns would make people less willing to participate in jury service,<sup>157</sup> the *Long* court ultimately concluded that these concerns were outweighed by “the objective of a fair trial to the defendant and . . . assurances of fairness to society as a whole.”<sup>158</sup>

In *In re Disclosure of Juror Names & Addresses*, the Michigan Court of Appeals analyzed the post-verdict disclosure of juror information.<sup>159</sup> The defendant in the case that gave rise to *In re Disclosure* was Ervin Dewain Mitchell, who was

146. *Id.* (quoting *In re Globe Newspaper Co.*, 920 F.2d 88, 94 (1st Cir. 1990)).

147. *Id.* Once again quoting the First Circuit’s *In re Globe* decision, the *Wecht* court stated: “[T]he prospect of criminal justice being routinely meted out by unknown persons does not comport with democratic values of accountability and openness.” *Id.*

148. *See id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 239 (“[W]e are satisfied that district judges are well-positioned to address these risks on a case-by-case basis, and in such cases, to make particularized findings on the record . . .”).

153. *Commonwealth v. Long*, 922 A.2d 892, 903–04 (Pa. 2007) (finding a right of access to impaneled jurors’ names); *In re Disclosure of Juror Names & Addresses*, 592 N.W.2d 798, 808–09 (Mich. Ct. App. 1999) (finding a qualified right of post-verdict access to jurors’ names and addresses).

154. *See* 922 A.2d at 903–04.

155. *Id.* at 899, 903–04 (quoting *Globe Newspaper Co. v. Superior Court for Norfolk Cnty.*, 457 U.S. 596, 606 (1982)).

156. *Long*, 922 A.2d at 904.

157. *Id.*

158. *Id.* at 905.

159. 592 N.W.2d 798, 800 (Mich. Ct. App. 1999).

charged with counts of felony murder and first-degree criminal sexual conduct in Ann Arbor, Michigan.<sup>160</sup> The crimes in the college town were covered extensively, with the media referring to the assailant as the “Ann Arbor serial rapist.”<sup>161</sup> Referring to the case as “the most highly publicized case this County has had in decades,” the trial court took steps during the trial to protect the jurors’ identities.<sup>162</sup> Before a verdict was reached, the *Detroit Free Press* intervened, requesting that the court release the jurors’ names and addresses after the verdict was announced.<sup>163</sup> The court denied the request, noting that any jurors who wished to speak to the media remained free to do so.<sup>164</sup>

The Michigan Court of Appeals pointed out the possibility that but for some qualified First Amendment right of access to juror information, “a court could, with unlimited discretion, totally conceal the identity of jurors and thus create the impression of a secret process.”<sup>165</sup> Though the *In re Disclosure* court did put more emphasis on the drawbacks of disclosure than the previous courts,<sup>166</sup> it still found that these concerns would only occur rarely and could be addressed when they arose.<sup>167</sup>

The disclosure of juror-identifying information should fail the logic prong of the experience and logic test, and should do so for two distinct reasons. First, it is fallacious to say that such disclosure has any positive effects.<sup>168</sup> Many of the benefits identified by the courts amount to nothing more than wishful thinking. Second, even if these benefits are to be taken at face value, they are nevertheless dramatically outweighed by the many harmful effects of disclosure,<sup>169</sup> not the least

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160. *Id.* at 799.

161. *Id.*

162. *Id.* at 799–800.

163. *Id.* at 800.

164. *Id.*

165. *Id.* at 808.

166. *See id.* at 809. The Michigan Court of Appeals noted specifically that safety concerns should warrant stronger safeguards than mere privacy concerns, and that “concrete evidence” of such safety concerns is rarely available, but also that a jury’s subjective concerns alone should not be enough to bar or delay disclosure. *Id.* The Michigan court was also one of the very few to discuss safety concerns in terms of post-verdict retaliation, rather than in terms of midtrial attempts to influence. *Id.* at 808–09; *see also infra* Part III.B.2.

167. 592 N.W.2d at 808–09. The *In re Disclosure* court purported to compromise when it listed the dangers of juror information disclosure, then held only a “qualified” right existed, “subject to the trial court’s discretion” to address concerns, should they come up, and make specific findings. *Id.* at 809. Of course, the experience and logic test was never intended to confer an unqualified right, *see* *Press-Enterprise II*, 478 U.S. 1, 9 (1986), but a qualified one that can be defeated only with specific findings. *Id.* at 9–10.

168. *See* *United States v. Edwards*, 823 F.2d 111, 120 (5th Cir. 1987) (“The usefulness of releasing jurors’ names appears to us highly questionable.”); *Gannett Co. v. State*, 571 A.2d 735, 751 (Del. 1989) (“Contrary to the rather pietistic claims of Gannett and its amici curiae, there is nothing to suggest that [withholding juror information] undermined public trust in the judicial system.”).

169. *See infra* Part III.B.2; *see also* *N. Jersey Media Grp., Inc. v. Ashcroft*, 308 F.3d 198, 217 (3d Cir. 2002) (pointing out that “to gauge accurately whether a role is positive, the calculus must perforce take account of the flip side—the extent to which openness impairs

of which is the defendant's Sixth Amendment right to a fair trial, which may be compromised in a number of ways.<sup>170</sup>

### 1. No Significant Benefits Flow from the Disclosure of Juror-Identifying Information

While the idea that public knowledge will ensure impartiality and accountability is sound when it comes to broader concepts within the criminal justice system, it is a flawed argument when it comes to issues concerning the high-profile adversarial trial.<sup>171</sup> Whatever the source or strength of a juror's bias, that bias, usually, will only direct the juror in one of two directions in a criminal trial: guilt or innocence. Thus, at least one of the parties, the prosecution or the defense, will very much have an interest in rooting out this bias itself. The entire process of voir dire, of course, is devoted to this issue,<sup>172</sup> and either party may continue to be on the lookout for partiality even after voir dire has ended.<sup>173</sup> Indeed, when so much is at stake, investigation of the jurors by both parties is an in-depth and ongoing task.<sup>174</sup>

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the public good," and that "were the logic prong only to determine whether openness serves some good, it is difficult to conceive of a government proceeding to which the public would not have a First Amendment right of access").

170. See *infra* Part III.B.2; see also Press-Enterprise I, 464 U.S. 501, 508 (1984) ("No right ranks higher than the right of the accused to a fair trial.").

171. See Fersko, *supra* note 36, at 803–04 (arguing that "jurors are not accountable to the public in the same way as judges and elected officials"). Unlike judges, prosecutors, or other public officials, jurors serve once, making it impossible for them to somehow craft a tyrannical regime over time: "[J]urors obtain their power at random, and when jurors give up their power, they 'inconspicuously fade back into the community.'" *Id.* at 804 (quoting *United States v. Scarfo*, 850 F.2d 1015, 1023 (3d Cir. 1988)); cf. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 653 (Fred B. Rothman & Co. 1991) (1833) ("The great object of a trial by jury in criminal cases is, to guard against a spirit of oppression and tyranny on the part of rulers . . .").

172. See *Mu'Min v. Virginia*, 500 U.S. 415, 431 (1991) (noting that the selection of an impartial jury is the main goal of the voir dire process). With adversarial parties each seeking to avoid bias or partiality in the other side's favor, voir dire is sufficient for meeting the goal of impartiality, without the help of the public. See *United States v. Black*, 483 F. Supp. 2d 618, 624 (N.D. Ill. 2007) (allowing for withholding of jurors' names where voir dire remained open to the public and media, and where parties received names of potential jurors); see also Fersko, *supra* note 36, at 805 (arguing that voir dire is an acceptable alternative to disclosure of jurors' names); cf. *Edwards*, 823 F.2d at 120 (finding that the substance of transcripts of midtrial proceedings involving questioning of jurors was sufficient to satisfy the First Amendment, and therefore the redaction of actual jurors' names was allowed).

173. See Helen W. Gunnarsson, *Background Checks for Jurors?*, 94 ILL. B.J. 278 (2006) (discussing the benefits and potential drawbacks of background checks for jurors); Caren Myers Morrison, *Can the Jury Trial Survive Google?*, CRIM. JUST., Winter 2011, at 4, 9 (noting that "[b]ackground checks on jurors are becoming commonplace, particularly in high-profile or violent crime cases," and that "[s]ome lawyers are coming to jury selection armed with a phalanx of paralegals to run each juror's name through a variety of social media searches in real time").

174. See Thaddeus Hoffmeister, *Investigating Jurors in the Digital Age: One Click at a Time*, 60 U. KAN. L. REV. 611, 613–14, 620–27 (2012) (discussing the investigation of jurors

As one scholar put it, “[I]f the voir dire process has a flaw because the parties are unable to conduct a proper investigation, then the system should not rely on the media to fix the flaw. Instead, the system should fix the flaw.”<sup>175</sup>

The public as a detector of bias would then be, at best, a prophylactic measure beyond the functions of the parties themselves. But even this concept is flawed, for there is no reason to believe that the public (including the media) has the ability or motivation to go beyond anything the parties might uncover.<sup>176</sup> It is the goal of media entities to sell newspapers or advertising, not to ensure that a trial is fair.<sup>177</sup> While the media may have more resources at its disposal than the general public, there is no indication that these resources would exceed those of the prosecution or defense in a high-profile case.<sup>178</sup>

The argument that public knowledge of juror information contributes to the public’s “perception of fairness” in the justice system is also without merit. The general notion that openness serves this end is certainly a legitimate one, as systemic issues can only be addressed through public knowledge and discussion.<sup>179</sup> But there must be exceptions to this rule.<sup>180</sup> It is hard to imagine—and no court has

after voir dire, from the use of private detectives to modern comprehensive Internet background checks); *see also* *Tricam Indus., Inc. v. Coba*, 100 So. 3d 105, 114 (Fla. Dist. Ct. App. 2012) (finding lack of due diligence where plaintiff’s counsel ignored trial judge’s advice to run background checks on jurors prior to deliberation).

175. Fersko, *supra* note 36, at 805; *see* Picco, *supra* note 35, at 583 (arguing that “the parties and courts, rather than the public, should be primarily responsible” for ensuring an impartial jury).

176. The court in *United States v. Doherty*, 675 F. Supp. 719, 725 n.7 (D. Mass. 1987), for one, expressed skepticism that the media would use juror information for the benefit of the justice system. The court criticized the intervenor’s argument in favor of access:

[T]his is little more than an argument that it wants the information to sell more papers. While this is hardly an ignoble end, it flies in the face of the historic traditions of the courts, [and] does nothing to enhance the jury system (in fact, it may harm it through undue inquiry into the jury’s deliberations) . . . .

*Id.*

177. *See* Fersko, *supra* note 36, at 805 (arguing that reliance “on the media to scrutinize the jurors for problems is speculative at best”). The trial judge in the *Antar* case put these concerns as bluntly as possible when denying the intervenors’ motion to unseal the voir dire transcript: “The fact is, and courts should candidly recognize it, that the invasion of the jury system by the press is only, and I repeat only, designed to sell newspapers.” *United States v. Antar*, 839 F. Supp. 293, 297 (D.N.J. 1993), *aff’d in part, rev’d in part*, 38 F.3d 1348 (3d Cir. 1994).

178. *See, e.g.*, Anthony Colarossi, *Casey Anthony Trial Costs: How Much She’ll Pay Is up to Judge*, ORLANDO SENTINEL (Sept. 2, 2011), [http://articles.orlandosentinel.com/2011-09-02/news/os-casey-anthony-prosecution-costs-hearing-20110902\\_1\\_casey-anthony-cheney-mason-jose-baez](http://articles.orlandosentinel.com/2011-09-02/news/os-casey-anthony-prosecution-costs-hearing-20110902_1_casey-anthony-cheney-mason-jose-baez) (stating that the government spent more than \$500,000 investigating and prosecuting Casey Anthony).

179. *See* *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 587 (1980) (Brennan, J., concurring) (arguing that “debate on public issues should be uninhibited, robust, and wide-open,” and that openness in criminal justice serves the antecedent assumption that such debate must be informed (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964))).

180. *See* *Press-Enterprise II*, 478 U.S. 1, 9 (1986) (singling out the grand jury as an example of the kind “of government operation[] that would be totally frustrated if conducted openly”); *United States v. Wecht*, 537 F.3d 222, 260 (3d Cir. 2008) (“[T]he [*Black*] court

identified—a situation where the public suspects something unfair happened in a trial solely because it does not know the names and addresses of the jurors. A public understanding of the adversarial system and the voir dire process should be enough to alleviate any of the public’s concerns.<sup>181</sup>

## 2. Disclosure of Juror-Identifying Information in a High-Profile Trial May Cause a Number of Negative Results

At bottom, the logic prong analysis is nothing more than a simple balancing of pros and cons.<sup>182</sup> And while the alleged benefits of disclosure are dubious and vague, the countervailing concerns are serious and concrete.

Many courts and scholars have discussed the potential for friends or enemies of the defendant to attempt to influence the jury during trial, thus compromising the integrity of the jury.<sup>183</sup> But as the Casey Anthony case illustrates, the problem can be far broader.<sup>184</sup> In high-profile cases, especially those that stir the emotions of the

noted that open access to juror names did not achieve the same effect of vindicating the public’s right to oversee judicial proceedings as did requiring the process itself to be available to public scrutiny.” (citing *United States v. Black*, 483 F. Supp. 2d 618, 628 (N.D. Ill. 2007))). Similar to the grand jury, secrecy has traditionally been a part of the petit jury system. *See Fersko, supra* note 36 at 803–804, 804 nn.254–55 (arguing that criminal juries work best when insulated from “outside pressures,” and examining the English history behind this argument).

181. The remaining general benefits of openness, *see supra* note 92, are inapplicable to the issue of juror-identifying information. The “community therapeutic value,” *id.*, concerns the crime itself, and no argument has been made that knowledge of juror identities can somehow help the public cope. As for the performance-enhancement benefit, some have actually argued disclosure *hinders* the jury’s performance. *See, e.g., supra* note 176. Likewise, the general benefit of avoiding perjury is also turned on its ear, as disclosure may actually encourage potential jurors to lie during voir dire. *See, e.g., Wecht*, 537 F.3d at 257–58 (Van Antwerpen, J., concurring in part and dissenting in part).

182. *See N. Jersey Media Grp., Inc. v. Ashcroft*, 308 F.3d 198, 217 (3d Cir. 2002) (calling for a balancing between benefits and drawbacks in logic prong analysis).

183. *See Wecht*, 537 F.3d at 238 (discussing possibility that friends or enemies of the accused might attempt to influence the jury); *Commonwealth v. Long*, 922 A.2d 892, 904 (Pa. 2007) (noting that a citizen will be less likely to serve if “the defendant’s family and friends know where he or she lives”); *Fersko, supra* note 36, at 798 (“Access to jurors’ names in high-profile cases poses the risk that a friend or enemy of the defendant will intimidate the jurors . . . .”); *King, supra* note 112, at 126–30 (discussing jurors’ fears largely stemming from friends and associates of defendants).

184. *See Florida v. Anthony*, No. 48-2008-CF-015606-AO, 2011 WL 3112070 (Fla. Cir. Ct. July 26, 2011) (order granting in part motion to intervene for the limited purpose of seeking release of juror information once jury is discharged and detailing the threats made to jurors following the verdict). Such concerns stemming from public reaction to a case should be taken more seriously than those from the friends or enemies of the defendant, because out of a greater sample of people, the likelihood is mathematically greater that someone will follow through on a threat. Concerns remain that the public reaction to the Anthony verdict could have a chilling effect on jury service. Karen Sloan, *Jury Experts Fret About Backlash Against Casey Anthony Jurors*, NAT’L L.J. (July 13, 2011), [http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202500796607&Jury\\_experts\\_fret\\_about\\_backlash\\_against\\_Casey\\_Anthony\\_jurors](http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202500796607&Jury_experts_fret_about_backlash_against_Casey_Anthony_jurors).

public, the public will tend to favor a certain outcome—usually conviction.<sup>185</sup> In Florida, when the jury delivered a verdict scorned by the public, jurors faced threats and harassment.<sup>186</sup> In a close case, a juror might factor this expected public response into his or her decision, even subconsciously, seeking to personally avoid such a backlash. When this outside factor plays even a small role in the jury room, the defendant's rights under the Constitution are compromised,<sup>187</sup> and avoiding such compromise should be the utmost concern of the courts.<sup>188</sup>

The Sixth Amendment to the United States Constitution guarantees an impartial jury to the accused in a criminal prosecution.<sup>189</sup> This pillar of due process ensures that juries in criminal cases will base their conclusions only upon “evidence and argument in open court,”<sup>190</sup> without any internal<sup>191</sup> or external<sup>192</sup> influences. This right protected by the Sixth Amendment has been called the “underlying principle of the United States’ justice system.”<sup>193</sup>

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185. See Darlene Ricker,  *Holding Out* , 78 A.B.A. J. 48 (1992) (detailing public reactions to acquittals in high-profile cases); Priscilla Benfield,  *Being Tried and Convicted in the Court of Public Opinion* , YAHOO! (July 9, 2011), <http://voices.yahoo.com/being-tried-convicted-court-public-opinion-8773721.html> (blaming the backlash from the acquittal and dismissal, respectively, in the high-profile cases of Casey Anthony and Dominic-Strauss Kahn on the public's preconceptions of guilt); Paul Duggan,  *Casey Anthony and the Court of Public Opinion* , WASH. POST (July 5, 2011), [http://articles.washingtonpost.com/2011-07-05/local/35236428\\_1\\_media-assassination-casey-anthony-caylee](http://articles.washingtonpost.com/2011-07-05/local/35236428_1_media-assassination-casey-anthony-caylee) (detailing the public demand for a guilty verdict in the Anthony Case). Perhaps illustrative of this tendency, a Google search for “convicted in the court of public opinion” yields more than four times as many results as a similar search that replaces “convicted” with “acquitted.”

186.  *Anthony* , 2011 WL 3112070, at \*3–6.

187. See, e.g.,  *Sheppard v. Maxwell* , 384 U.S. 333, 362 (1966) (“Due Process requires that the accused receive a trial by an impartial jury free from outside influences.”). While fair trial issues fuel the argument in this Note, the actual safety concerns that give rise to the fair trial argument are certainly a drawback to disclosure in and of themselves. See, e.g.,  *Commonwealth v. Long* , 922 A.2d 892, 905 (Pa. 2007) (discussing juror safety).

188. See Kenneth J. Melilli,  *Disclosure of Juror Identities to the Press: Who Will Speak for the Jurors?* , 8 CARDOZO PUB. L. POL'Y & ETHICS J. 1, 8 (2009) (citing  *Press-Enterprise I* , 464 U.S. 501, 508 (1984)) (calling the fair trial right “an interest of unparalleled magnitude”).

189. U.S. CONST. amend. VI. The Sixth Amendment applies to the states via the Fourteenth Amendment.  *Duncan v. Louisiana* , 391 U.S. 145 (1968).

190.  *Mu'Min v. Virginia* , 500 U.S. 415, 439 (1991) (Marshall, J., dissenting) (quoting  *Patterson v. Colorado ex rel. Attorney General* , 205 U.S. 454, 462 (1907)).

191. An internal influence refers to a juror's (or potential juror's) inherent personal biases. These biases may exist outside of the direct context of the case at hand, such as a juror's predisposition to side with (or against) the government. See  *United States v. Robbins* , 500 F.2d 650, 652 (5th Cir. 1974) (also discussing a juror's inherent mistrust of the medical profession).

192. These external influences may include “private talk or public print.”  *Mu'Min* , 500 U.S. at 439 (Marshall, J., dissenting); see also  *infra*  note 194 and accompanying text.

193. Litt,  *supra*  note 62, at 374; see also  *Murphy v. Florida* , 421 U.S. 794, 799 (1975) (citing  *Irwin v. Dowd* , 366 U.S. 717, 722 (1961)) (referring to the requirement of an impartial jury as a “constitutional standard of fairness”).

A great number of cases involving the intersection of the media and the defendant's Sixth Amendment rights address the issue of jurors drawing conclusions of guilt based upon the amount and nature of media coverage.<sup>194</sup> In these cases, the influence of the media upon the jury is examined for fundamental unfairness based upon a totality of the circumstances.<sup>195</sup> Though these concerns arise in high-profile cases, they are separate and distinct from the concerns stemming from disclosure of jurors' names and addresses. While cases such as *Murphy* and *Sheppard* deal with the ways in which the jury may be influenced by the media, this Note deals with the ways in which the jury may be influenced by the *public*. Specifically, a juror concerned about the backlash he or she may face from the public in response to an acquittal may be more inclined to find a defendant guilty—a clear violation of the defendant's Sixth Amendment rights.<sup>196</sup>

As a practical matter, the threshold for impeaching a verdict based on juror impartiality is high.<sup>197</sup> These difficulties are compounded by the fact that juror bias will be extremely difficult to detect,<sup>198</sup> and even the juror herself may be unaware of it.<sup>199</sup> But these difficulties in identifying and correcting juror biases provide all the more reason to safeguard against such biases where there is an opportunity to do so. The potential inclination, be it conscious or subconscious, for a juror to

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194. See, e.g., *Murphy*, 421 U.S. at 798; *Sheppard v. Maxwell*, 384 U.S. 333, 333 (1966); *Estes v. Texas*, 381 U.S. 532, 577–78 (1965) (Warren, C.J., concurring); *Rideau v. Louisiana*, 373 U.S. 723, 723 (1963).

195. *Murphy*, 421 U.S. at 798–99 (synthesizing cases).

196. See, e.g., *Fullwood v. Lee*, 290 F.3d 663, 678 (4th Cir. 2002) (“[I]f even a single juror’s impartiality is overcome by an improper extraneous influence, the accused has been deprived of the right to an impartial jury.”); see also *Parker v. Gladden*, 385 U.S. 363, 366 (1966) (per curiam) (“[P]etitioner was entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors.”).

197. Allegations of juror impartiality discovered only after the delivery of the verdict are subject to a “hearing to determine the circumstances surrounding the incident and its effect on the jury.” *Remmer v. United States*, 347 U.S. 227, 228 (1954). “A trial court’s findings of juror impartiality may ‘be overturned only for manifest error.’” *Mu’Min*, 500 U.S. at 428 (quoting *Patton v. Yount*, 467 U.S. 1025, 1031 (1984)). For more on the inherent difficulties and strict rules (including evidentiary thresholds) governing *Remmer* hearings, see James W. Diehm, *Impeachment of Jury Verdicts: Tanner v. United States and Beyond*, 65 ST. JOHN’S L. REV. 389 (1991) and KEVIN F. O’MALLEY, JAY E. GRENIG & HON. WILLIAM C. LEE, 1 FED. JURY PRAC. & INSTR. § 9:9 (6th ed. 2013) (“Given that the secrecy of jury deliberations is at the heart of the jury system, Rule 606(b) of the Federal Rules of Evidence generally prohibits a juror from impeaching his or her verdict.” (citations omitted)).

198. See, e.g., *United States v. Dagerdas*, 867 F. Supp. 2d 445, 471 (S.D.N.Y. 2012); see also Valerie P. Hans & Alayna Jehle, *Avoid Bald Men and People with Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection*, 78 CHI.-KENT L. REV. 1179 (2003) (arguing that traditional voir dire is ineffective in weeding out juror bias).

199. E.g., *Crawford v. United States*, 212 U.S. 183, 196 (1909) (“Bias or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible, to always recognize its existence, and it might exist in the mind of one . . . who was quite positive that he had no bias . . . .”); see also Kimberly Wise, *Peering Into the Judicial Magic Eight Ball: Arbitrary Decisions in the Area of Juror Removal*, 42 J. MARSHALL L. REV. 813, 828 (2009) (“Research indicates that jurors may not realize the depth or extent of their own bias . . . .”).

incorporate his or her own safety concerns into deliberations can easily be avoided if the juror is assured that his or her identity will be protected from the public.

The aftermath of the George Zimmerman trial is only the most recent example of a strongly negative public reaction to a verdict. When police officers were acquitted in the Rodney King case, some jurors received “taunts, threats, and disturbing phone calls.”<sup>200</sup> The jury that acquitted O.J. Simpson was notoriously criticized.<sup>201</sup> Sometimes the threats come from the other side, as they did for the jurors who convicted Dan White for the murder of Harvey Milk.<sup>202</sup> Other recent cases, such as that of Jerry Sandusky,<sup>203</sup> serve as examples of cases that have stirred the emotions of the public on a national level.<sup>204</sup> These cases may illustrate a trend. As media coverage changes and increases, it may lead to more widespread emotional reaction from the public at large.<sup>205</sup> Given these concerns, jurors need to be shielded from public backlash to ensure a fair trial.<sup>206</sup>

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200. King, *supra* note 112, at 127–28 (citing Sally Ogle Davis, *The Last Angry Woman: Why King Trial Juror Linda Miller No Longer Believes in Truth, Justice and the American Way*, L.A. MAG., July 1992, at 58, 58–64).

201. See generally Gerald F. Uelman, *Jury-Bashing and the O.J. Simpson Verdict*, 20 Harv. J.L. & Pub. Pol’y 475 (1997) (detailing the extreme negative reaction to the Simpson jury); see also King, *supra* note 112, at 129 n.31 (detailing cases in which the integrity of jurors was attacked “by those who [could not] accept the verdict”).

202. King, *supra* note 112, at 128 (“Some of these jurors moved or changed jobs after their trial. One slept with an axe; another bought a gun.”).

203. On October 9, 2012, Jerry Sandusky, a former Penn State assistant football coach, was sentenced to thirty to sixty years in prison for sexually abusing young boys. Sandusky’s crimes “exact[ed] a tremendous toll” on the Penn State football program, the university, and the community. Tim Rohan, *Sandusky Gets 30 to 60 Years for Sex Abuse*, N.Y. TIMES, Oct. 10, 2012, at A1; see also Stephen Marche, *Why Sandusky’s Punishment Will Never Be Enough*, ESQUIRE CULTURE BLOG (Oct. 9, 2012, 3:26 PM), <http://www.esquire.com/blogs/culture/jerry-sandusky-verdict-13541635> (“The anger this case has provoked is breathtaking.”). The Sandusky conviction was widely considered to be an “easy call,” see Joe Drape & Nate Taylor, *Juror Says Panel Had Little Doubt on Sandusky’s Guilt*, N.Y. TIMES (June 23, 2012), [http://www.nytimes.com/2012/06/24/sports/ncaafotball/no-doubt-about-jerry-sanduskys-guilt-juror-says.html?\\_r=0](http://www.nytimes.com/2012/06/24/sports/ncaafotball/no-doubt-about-jerry-sanduskys-guilt-juror-says.html?_r=0), but one can imagine the public pressure a juror might feel in a close case.

204. More cases will likely create such a reaction from the public at a subnational or local level. See, e.g., cases cited *supra* note 29.

205. See KATHERINE S. WILLIAMS, *Effects of Media on Public Perceptions of Crime*, in TEXTBOOK ON CRIMINOLOGY 60, 60–61 (6th ed., 2012) (describing the three main ways in which media may affect public opinions); cf. Cloud, *supra* note 1 (describing how emerging social media fueled the public furor in the Casey Anthony case); Debra S. Frank, *Preparing for a Media Onslaught*, L.A. LAW, July–Aug. 2008, at 64 (asserting that “the media are more aggressive than ever before”).

206. It is, of course, very possible that some jurors would remain clearheaded even in the face of noise outside the courtroom. However, the possibility that a juror might engage in self-protection by delivering the public’s desired verdict is far from unfathomable. Especially considering the utter lack of benefits to disclosing juror information, see *supra* Part III.B.1, it makes great sense to not even run that risk.

Though concerns for juror privacy are a tertiary concern after Sixth Amendment and juror safety concerns,<sup>207</sup> they should nevertheless be taken seriously. The concern that a juror will be harassed by the media is real,<sup>208</sup> and becomes more so as the face of the media changes in the twenty-first century.<sup>209</sup> For example, Kaitlin Picco has explained the rise of the blogger in the courtroom, and the effect this new media source can have on jurors.<sup>210</sup> Operating outside of traditional journalistic ethics—and without the oversight of an editorial newsroom—bloggers are free to be more zealous in their coverage of jurors.<sup>211</sup>

There are thus three main concerns that accompany the disclosure of juror information: ensuring a fair trial, protecting jurors' safety, and protecting jurors' privacy. Balanced against the serious lack of benefits flowing from such disclosure,<sup>212</sup> it is clear that such disclosure does not play a "significant positive role in the functioning" of a jury.<sup>213</sup> The disclosure of jurors' identifying information therefore fails the experience and logic test.

#### IV. THE SUPREME COURT'S EXPERIENCE AND LOGIC TEST REQUIRES NO DISCLOSURE OF JUROR-IDENTIFYING INFORMATION AT ANY STAGE OF A HIGH-PROFILE CRIMINAL TRIAL

As discussed above, the experience and logic test as applied to the disclosure of juror-identifying information regards only a specific phase of the trial.<sup>214</sup> The *Wecht* court held that the qualified right of access applies before empanelment.<sup>215</sup> The *Long*<sup>216</sup> and *In re Disclosure*<sup>217</sup> courts held that the right applies at least post-verdict. Many courts that have applied the experience and logic test at earlier stages

207. *In re Disclosure of Juror Names & Addresses*, 592 N.W.2d 798, 809 (Mich. Ct. App. 1999). Of course, privacy concerns may also have fair trial implications, insofar as they influence a juror's vote. If a juror expects that an unwelcome or unexpected verdict will lead to intense scrutiny from the media (regardless of a threat from the public), the risk is run that this may factor into his or her decision making. Here, however, "privacy concerns" refer only to the potential for media harassment after a trial, independent of any effect the specter of such harassment may have had in the jury room.

208. *See United States v. Scarfo*, 850 F.2d 1015, 1022 (3d Cir. 1988) (upholding jury anonymity in order to "insulate [the jury] from media harassment"); King, *supra* note 112, at 129 (detailing instances of harassment by the media).

209. *See generally* John Dimmick, Yan Chen & Zhan Li, *Competition Between the Internet and Traditional News Media: The Gratification-Opportunities Niche Dimension*, 17 J. MEDIA ECON. 19 (2004) (discussing the role of the Internet in the landscape of modern news reporting); *see also* Picco, *supra* note 35, at 569–70 (detailing the changing nature of media in the courtroom context).

210. Picco, *supra* note 35, at 569–71.

211. *Id.* at 570 (noting that "juror privacy abuse has the potential to grow considerably").

212. *See supra* Part III.B.1.

213. *Press-Enterprise II*, 478 U.S. 1, 8 (1986).

214. *See supra* notes 105–08 and accompanying text.

215. *United States v. Wecht*, 537 F.3d 222, 239 (3d Cir. 2008).

216. *Commonwealth v. Long*, 922 A.2d 892, 904–05 (Pa. 2007).

217. *In re Disclosure of Juror Names & Addresses*, 592 N.W.2d 798, 799 (Mich. Ct. App. 1999).

have worked under the assumption that, at the very least, juror identifying information *must* be released at *some point*.<sup>218</sup> Many scholars agree.<sup>219</sup> Yet the experience and logic test requires no such result. Juror disclosure fails the logic prong in the context of post-verdict disclosure; thus, a fortiori, juror disclosure must fail the logic prong at earlier stages as well.<sup>220</sup> There should be no First Amendment right to juror identifying information before, during, or after the trial.

The common assumption that juror names must be released after the verdict seems to rely on the notion that the above concerns carry significantly less force once the proceedings are complete.<sup>221</sup> This notion is incorrect. Under the logic prong analysis discussed above,<sup>222</sup> a juror's knowledge that his or her identity will be released at *any* point carries with it the potential to affect the jury's deliberation process. The goal of freeing the jurors' minds from outside pressures in high-profile cases may theoretically be reached only by promising to withhold their identities from the press and public, even if their names and addresses later are disclosed. But this is surely an unjust strategy, and one that would work only once.<sup>223</sup>

Robert Lloyd Raskopf has argued that the immense benefits of post-trial interviews with jurors suffices for the attachment of a First Amendment right of access to juror-identifying information.<sup>224</sup> Raskopf argues that such interviews allow the public to gain a full appreciation of the process and assure the public that

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218. The *Wecht* court, for example, relied on this assumption, dismissing the potential risks of juror disclosure at the pre-empanelment stage in part because those same risks would remain prevalent even after the trial. *Wecht*, 537 F.3d at 238 n.29; *see also* Picco, *supra* note 35, at 569 (finding that "the vast majority of courts" disclose juror names once a trial is complete); *cf.* *United States v. Blagojevich*, 612 F.3d 558, 563 (7th Cir. 2010) ("Neither the Supreme Court nor this circuit has decided under what circumstances, and after what procedures, jurors' names may be kept confidential until the trial's end."); *In re Globe Newspaper Co.*, 920 F.2d 88, 91 (1st Cir. 1990) ("[S]tronger reasons to withhold juror names and addresses will often exist *during* a trial than *after* a verdict is rendered. After the verdict, release normally would seem less likely to harm the rights of the particular accuseds to a fair trial." (emphasis in original)).

219. *See, e.g.*, Fersko, *supra* note 36, at 804–06 (arguing that a presumptive right should not attach pre-empanelment, but should attach at least after trial); Litt, *supra* note 62, at 418 ("Balancing the three competing bundles of constitutional rights at the post-trial stage is not as difficult as in the first two stages."); Picco, *supra* note 35, at 582 ("Although there should be a qualified First Amendment right to juror names, this right should not attach until after the trial has concluded and the risks to juror privacy have lessened."); Raskopf, *supra* note 123, at 370–75 (extolling the benefits of post-verdict access to jurors).

220. The conclusion that no presumptive right of access attaches post-trial forecloses the possibility that one could attach earlier. Affording discretion to the trial judge at the post-trial stage would be meaningless if he or she were forced to disclose the jurors' names earlier in the proceeding.

221. *See, e.g.*, Sholder, *supra* note 37, at 109 (arguing that the accused's fair trial rights are relatively insignificant because "the defendant presumably has had a fair trial").

222. *See supra* Part III.B.2.

223. *Cf.* *United States v. Doherty*, 675 F. Supp. 719, 724 (D. Mass. 1987) (discussing protection at the post-trial stage for its effect on future trials).

224. *See* Raskopf, *supra* note 123, at 371–74.

justice has been done.<sup>225</sup> But the notion that an interview with a juror will demonstrate that justice has been done (evocative of the “perception of fairness” benefit<sup>226</sup>) is flawed. Any solace the public could take in an interview must come from the content of an interview, not simply that an interview was completed.<sup>227</sup> And of course, it also relies upon the juror telling the truth in the interview.<sup>228</sup>

Similarly, Marc Litt has argued that “[i]f access continued to be denied post-trial, the media would never have the opportunity to exercise its right to gather and report news on the justice system.”<sup>229</sup> But the arguments of Raskopf and Litt seem to conflate access to names with mandatory juror interviews. If the identities of jurors are released, jurors are still free to turn down interview requests;<sup>230</sup> if the identities of jurors are withheld, jurors are still free to approach the media of their own volition.<sup>231</sup> A presumptive right of access to juror-identifying information means nothing if jurors do not consent to interviews. A right of access at this stage, therefore, lacks any real benefits, and certainly not enough to outweigh a possible compromise of a defendant’s fair trial right.

225. *Id.* at 371.

226. *See supra* note 64.

227. The idea that a full appreciation of the criminal justice system can be attained through interviews with jurors is nebulous and recalls questions about the true motivations of the media. *See supra* note 177 and accompanying text; *see also* *United States v. Simone*, 14 F.3d 833, 846 (3d Cir. 1994) (Garth, J., dissenting) (“In the post-trial context, even the press itself has recognized that the media’s zeal . . . does not center on a concern for litigants’ rights to a fair trial, but rather on a desire for human-interest accounts of deliberative proceedings as ends in themselves, written to sell papers.” (internal quotation marks omitted)).

228. For example, after the 2005 acquittal of Michael Jackson on charges of child molestation, two jurors came forward to say they believed Jackson was guilty and regretted their votes to acquit. *2 Jurors Say They Regret Jackson’s Acquittal*, TODAY (Aug. 9, 2005, 9:23 AM), <http://today.msnbc.msn.com/id/8880663/ns/today-entertainment/t/jurors-say-they-regret-jacksons-acquittal/#.UOfDUjkhUQ>. These comments came months after one of the same jurors stated in an interview that he believed Jackson was not guilty. *Id.* The interview had no effect on the verdict. *Id.*

229. Litt, *supra* note 62, at 419.

230. Even in this situation though, the media still holds a lot of power in its relationship with jurors. *See* Melilli, *supra* note 188, at 13–14 (“[I]t is naïve to believe that every other television station, radio station, and newspaper will learn of the juror’s refusal and understand and accept that the refusal is general and not limited to just the folks at [the first media entity]. Finally, it is even more ‘unlikely’ that there would be ‘a more-or-less polite request from the media seeking comment, followed by a similarly polite media retreat in the face of a flat ‘no.’” ‘Even if a juror declines to be interviewed, the news media can nonetheless force that reluctant juror into the spotlight.’” (quoting *United States v. Calabrese*, 515 F. Supp. 2d 880, 884 (N.D. Ill. 2007))).

231. Orders simply prohibiting juror interviews are usually found to be unconstitutional prior restraints. *See, e.g., Journal Publ’g Co. v. Mechem*, 801 F.2d 1233, 1237 (10th Cir. 1986) (holding prohibition on post-verdict interviews with jurors was an unconstitutional prior restraint and that the court could have instead “told the jurors not to discuss the specific votes and opinions of noninterviewed jurors”); *see also* *United States v. Brown*, 250 F.3d 907, 914–15 (5th Cir. 2001) (finding that refusal to allow media inspection of documents containing juror-identifying information is not a prior restraint).

## CONCLUSION

Criminal trials in the United States have traditionally been open to the media and the public, a tradition protected by the defendant's Sixth Amendment right to a public trial as well as the First Amendment rights of the media. Despite this general openness, not every possible aspect of a criminal trial may be accessed by the outside world. To determine which portions of a trial are presumptively open to the public, the Supreme Court has adopted the experience and logic test. If a certain facet of the criminal trial has historically been open, and if that public access serves to benefit the functioning of the process, then a presumptive First Amendment right of access attaches to that facet of the trial.

This experience and logic test is the proper vehicle for determining if, and when, the media has a right of access to the identifying information of jurors on criminal trials. Often, this information is simply the jurors' names and addresses. Media requests for juror information naturally arise most frequently in so-called "high-profile" cases, where the public is particularly interested in the proceedings. While satisfaction here of the experience prong is tenuous at best, the release of juror information does not satisfy the logic prong of the experience and logic test. The release of such information fails to serve any benefit that cannot be accomplished better by the court and the parties. Furthermore, the risk in high-profile trials that a publicly known jury could be pressured by the public, either implicitly or explicitly, to reach a certain result is far too great.

The right of the defendant to a fair trial is perhaps the most important right at stake in a criminal trial. It is certainly valued higher than the media's First Amendment rights. Protection of this right, therefore, should not be compromised. When a juror knows that his or her name and address will be made public even after the trial, he or she has motivation not to deliver a verdict that will upset the public. The possibility that a juror may act, even slightly, on such motivation mandates that juror names and addresses not be revealed even once the trial is complete. The experience and logic test, therefore, does not attach any First Amendment right of access to juror-identifying information before, during, or after a criminal trial.