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Deliberations and Disclosures: A Study of Post-Verdict Interviews of Jurors

*By Nancy S. Marder**

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I. INTRODUCTION

Although our history is replete with high-profile cases¹ that have been followed closely by the press and public alike,² there is a fairly recent phenomenon in the press's coverage of trials: post-verdict interviews of jurors. Journalists are interviewing jurors after the trial and questioning them about all aspects of the case, including the jury's deliberations. Jury deliberations, unlike trials that are open to the public, take place in the privacy of the jury room and only jurors are present. What, if anything, should jurors be disclosing to the press about these private deliberations?

Jurors receive no guidance from courts about how to respond to these interviews. They are left on their own to decide whether to talk to the press, and if so, what to reveal. Whereas jurors are told at almost every step of the trial proceedings what they can and cannot do, at this stage, courts are strangely silent. At the very least, both federal and state courts need to recognize the issue as one to which a response is needed.³

1. See, e.g., *Capone v. United States*, 58 F.2d 1081 (7th Cir. 1932) (per curiam) (upholding the conviction of Al Capone for income tax evasion); *United States v. Rosenberg*, 109 F. Supp. 108, 110, 115 (S.D.N.Y.) (upholding death sentences for Julius and Ethel Rosenberg for conspiracy to transmit information relative to national defense to the Union of Soviet Socialist Republics), *aff'd*, 204 F.2d 688 (2d Cir. 1953); *United States v. Hiss*, 107 F. Supp. 128, 137 (S.D.N.Y. 1952) (denying a motion for a new trial by Alger Hiss, who had been convicted of perjury after denying that he had turned over State Department documents to Whittaker Chambers), *aff'd*, 201 F.2d 372 (2d Cir. 1953).

2. See, e.g., Meyer Berger, *Capone Convicted of Dodging Taxes; May Get 17 Years*, N.Y. Times, Oct. 18, 1931, at 1 (describing the courtroom scene during the closing arguments and the verdict in which the jury found Al Capone guilty of several counts of income tax evasion); *id.* ("There is no use denying there is a great public interest in the case, but I am asking you [the jurors] to treat it as if the defendant were John Brown and not Alfonse Capone.") (quoting federal prosecutor G.F.Q. Johnson); *Confer on Church News*, N.Y. Times, Oct. 10, 1931, at 4 ("Members of the Religious Publicity Council, an organization in charge of publicity for Protestant churches, were told last night that the reason Al Capone received more space in newspapers than the activities of churches was because Capone was more picturesque than the average clergyman."); William R. Conklin, *Hiss Defense Ends; 2d Doctor Called*, N.Y. Times, Jan. 13, 1950, at 9 (describing the testimony of Dr. Henry A. Murray, who supported another doctor's diagnosis of Whittaker Chambers as a "psychopathic personality"); William R. Conklin, *Psychiatrist Lists Chambers' Phases*, N.Y. Times, Jan. 7, 1950, at 8 (recounting testimony of Dr. Binger, who, as part of the defense of Alger Hiss in Hiss's perjury trial, concluded that Whittaker Chambers displayed 12 well-known symptoms of psychopathic behavior); William R. Conklin, *Spy Jury May Get Case by March 27*, N.Y. Times, Mar. 17, 1951, at 6 (describing several witnesses' testimony in the trial of Ethel and Julius Rosenberg on charges of wartime atomic espionage for the Soviet Union); William R. Conklin, *3 in Atom Spy Case Are Found Guilty; Maximum is Death*, N.Y. Times, Mar. 30, 1951, at 1 (reporting that Ethel and Julius Rosenberg and Morton Sobell were found guilty of being spies and faced a possible death sentence); William R. Conklin, *3 on Trial as Spies Open Defense, Rosenberg Denying All Charges*, N.Y. Times, Mar. 22, 1951, at 1 (describing defense witnesses' testimony in the trial of Ethel and Julius Rosenberg); *Lavish Capone Life and \$5 Tips Bared*, N.Y. Times, Oct. 10, 1931, at 4 (depicting Capone's lavish lifestyle and how money was transferred to him); *Parson Depicts Tilt with Capone in Raid*, N.Y. Times, Oct. 8, 1931, at 2 (describing the trial of Al Capone, including the witnesses who testified against him).

3. Even though I will be drawing more often from federal than from state court

According to one view of the jury's role, post-verdict interviews can pose a threat to the institution of the jury. According to this view, which I describe in Part II, the main function of the jury is to engage in group deliberation to reach a collective judgment. That judgment has both practical significance and symbolic meaning. The verdict has practical significance because it is the verdict that the state will enforce; the verdict has symbolic meaning because it represents the judgment of the entire community. Although individual jurors' views are critical during deliberations, and for this reason the jury should consist of individuals drawn from a broad swath of the community, once these individual jurors have reached a consensus, it is the verdict that is important and not the individual views. The danger posed by post-verdict interviews is that they detract from the verdict, which is the single voice with which the jury speaks. Not all readers, however, will share this vision of the jury's role. For those who do not, post-verdict interviews may appear to be less of a threat and more of a useful tool by which to learn about the workings of the jury.

Whichever view of the jury one holds, it is useful to start with a picture of what jurors are revealing in their post-verdict interviews. In Part III, I analyze post-verdict interviews of jurors that have appeared in several major newspapers and magazines within the past fifteen years. I provide some description and quantitative analysis of questions such as the following: How many jurors in this sampling speak to the press? Why do they choose to do so? What do these jurors choose to reveal about the jury's deliberations? What do they decline to discuss? How much control do jurors really have in deciding whether to speak to the press?

In Part IV, I explore the potential effects of these post-verdict interviews of jurors, and in particular, the ways in which these disclosures may help or harm the jury as an institution. Some of these disclosures, such as when a juror explains that the verdict was based upon the evidence, may bolster public confidence in the verdict; other disclosures, such as when a juror disavows the verdict, may undermine that confidence. Although juror disclosures may encourage public education, public acceptance of the verdict, and juror accountability, they also may undermine juror candor and juror privacy. The effects of post-verdict interviews, however, may not always fit so neatly into such categories.

In Part V, I look to other contexts to see if there are any lessons about deliberations that could be applied to the petit jury. The Supreme Court engages in undisclosed deliberation, as does the executive branch when it invokes executive privilege. Grand jurors' deliberations are protected by secrecy, as are other aspects of the grand jury's proceedings. Confidentiality in these contexts is defended because it promotes candid discussions, gives the institution the appearance of being beyond political manipulation, and affords protection for difficult decisions. These reasons

practices throughout this Article, I believe that both federal *and* state courts need to address the issue of post-verdict interviews of jurors by the press.

might also apply to the petit jury.

Post-verdict interviews also implicate competing constitutional protections, as Part VI briefly explores. The post-verdict interview is consistent with a First Amendment tradition; any restriction on the interview might seem to be an infringement on a juror's right to speak or on the press's right to access. In criminal cases, however, the Sixth Amendment provides a competing constitutional right, namely the defendant's right to a fair trial and an impartial jury.⁴ If jurors focus during deliberations on what they should say and how they should vote based upon how the community will respond when that information becomes available through post-verdict interviews, then there is a question whether such jurors can give the defendant a fair trial, and, relatedly, whether they can be impartial. In addition, to the extent that individual jurors are able to reveal what was said in the jury room and express misgivings or doubts about the jury's verdict, there is a question about whether the jury is speaking with one voice when it renders a verdict.

In light of these competing values and constitutional protections, what response should courts take with respect to these interviews? What guidance, if any, should they provide jurors after the verdict? In Part VII, I explore a range of proposals and how the jury system might work under each. Certainly, the easiest response is for courts to maintain the status quo, but this leaves jurors without any guidance. At one end, disclosure of jury deliberations could become more public and systematic: jurors could deliberate before a camera, write an opinion, respond to an even more detailed special verdict form, or the court could conduct post-verdict interviews of jurors or poll jurors more extensively than is the current practice. At the other end, disclosure of deliberations could be prohibited, as is the case in England.⁵ Occupying a middle ground, jurors could take an oath not to disclose deliberations, at least for a certain period of time, and this oath could be supplemented by an instruction from the judge on the need to preserve the confidentiality of deliberations. Alternatively, judges could simply give an instruction telling jurors that they must keep their deliberations confidential, that they can reveal their own comments and votes but not those of their fellow jurors, or that they can reveal other

4. Even though the Constitution mentions impartiality only with respect to the criminal jury in the Sixth Amendment, few would argue that the civil jury mentioned in the Seventh Amendment is meant to be partial. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 348-49 (1979) (Rehnquist, J., dissenting) ("The essence of [the right to a jury trial] lies in its insistence that a body of laymen . . . participate along with the judge in the factfinding necessitated by a lawsuit. And that essence is as much a part of the Seventh Amendment's guarantee in civil cases as it is of the Sixth Amendment's guarantee in criminal prosecutions."); *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 220 (1946) ("The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community.") (emphasis added) (citations omitted).

5. See *infra* note 385 (citing Contempt of Court Act, 1981, § 8(1) (Eng.)) and text accompanying notes 386-403 (considering British alternative).

jurors' comments but not those jurors' names. These middle-ground alternatives would give guidance to jurors, particularly before deliberations, and would help to ensure that the jury's verdict is not undermined by individual jurors' post-verdict comments.

II. A VISION OF THE JURY

One reason to focus on post-verdict interviews of jurors is that they can undermine a critical role of the jury, which is to engage in a deliberative process to reach a collective judgment as a single body. As prerequisites to this decision-making process it is important that the venire be drawn from a fair cross section of the community, that all who are able to serve are permitted to serve, and that jurors actively participate in the deliberations. At the venire, voir dire, and deliberation stages, the judicial process focuses on the individual and on ways to encourage jurors to express their individual views. Upon reaching a verdict, however, the focus shifts from the individual to the group because it is the jury, as a single body,⁶ that renders a judgment that will be enforced by the State. The post-verdict interviews of jurors, in which jurors speak on their own behalf, undermine the collective nature of the jury's enterprise and the single voice with which the jury speaks when it renders a verdict.

When prospective jurors are summoned for the venire, the goal is that they be drawn from a fair cross section of the community.⁷ One reason for this is so that jurors will bring a variety of perspectives for the jury to consider during its deliberations.⁸ Another reason is that if the jury is seen as representative of the community, the community and the parties will be more likely to accept the jury's judgment.⁹

6. See *infra* text accompanying notes 18-20 (discussing the implications of a jury making a decision as a single entity).

7. See *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) ("We accept the fair-cross-section requirement as fundamental to the jury trial Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial."); *Williams v. Florida*, 399 U.S. 78, 100 (1970) (identifying "a fair possibility for obtaining a representative cross-section of the community" as one of the essential features of the jury guaranteed by the Sixth Amendment); see also *Duren v. Missouri*, 439 U.S. 357, 363-64 (1979) (establishing that a "fair-cross-section" claim requires a showing of disproportionality among distinctive groups in the community arising from a systematic exclusion of that group in the jury selection process).

8. See Valerie P. Hans & Neil Vidmar, *Judging the Jury* 50 (1986) ("[A] jury composed of individuals with a wide range of experiences, backgrounds, and knowledge is more likely to perceive the facts from different perspectives and thus engage in a vigorous and thorough debate."); see also *Peters v. Kiff*, 407 U.S. 493, 503 (1972) ("When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable."); *Ballard v. United States*, 329 U.S. 187, 193-94 (1946) ("The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables.").

9. See, e.g., *Taylor*, 419 U.S. at 530 ("Community participation in the administration of

Jury selection should also entail as few barriers to service as possible so that the jury is more likely to approximate the diversity of the community. Although there is no requirement that the petit jury mirror the community,¹⁰ the closer jury selection is to random selection, the more likely the jury will reflect the diversity of the community. Furthermore, the fewer devices that skew the composition of the jury, such as single venire lists, broad exemptions, and peremptory challenges,¹¹ the more likely the petit jury will be representative of the community.

Jury deliberations are the time for jurors to present their individual views on the case. Ideally, they will voice their views candidly, though not in such a domineering or unrestrained manner that they offend or silence others.¹² One of the benefits of group deliberations is that individuals can contribute their viewpoints, thoughts, and recollections to the decision-making process, and thus provide a range of perspectives unavailable to any one individual acting alone.¹³

The deliberations are not only a time to air individual views, but also a time to reach consensus.¹⁴ Of course, a jury has the prerogative not to reach consensus. If a jury remains hopelessly divided, it will be dismissed as a hung jury.¹⁵ However, if a jury is able to reach a verdict, its verdict is announced in open court.¹⁶ At that point, the jurors might be polled individually to ensure that the verdict accurately represents each juror's vote.¹⁷ Once that is done, then the jury, as a body, has spoken through its verdict.

the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system.”).

10. See *Holland v. Illinois*, 493 U.S. 474, 480-84 (1990) (holding that the fair-cross-section requirement of the venire need not be applied to the petit jury).

11. See *infra* note 153.

12. See Nancy S. Marder, Note, *Gender Dynamics and Jury Deliberations*, 96 Yale L.J. 593, 607-11 (1987) (urging courts to educate jurors on the need for all to participate and to listen to each other during deliberations).

13. See *infra* note 211 and accompanying text.

14. See, e.g., Saul M. Kassin & Lawrence S. Wrightsman, *The American Jury on Trial* 185 (1988) (“[T]he ideal deliberation [i]s one in which the informational influences are strong and the normative influences are weak. Some degree of social pressure is inevitable and perhaps even desirable. . . . The question is, how much pressure is too much?”).

15. Hans Zeisel has described the hung jury as a “treasured, paradoxical phenomenon.” Hans Zeisel, . . . *And Then There Were None: The Diminution of the Federal Jury*, 38 U. Chi. L. Rev. 710, 719 (1971). “The hung jury is treasured because it represents the legal system’s respect for the minority viewpoint that is held strongly enough to thwart the will of the majority,” and it is paradoxical because the hung jury can only be tolerated in “moderation”—“too many hung juries would impede the effective functioning of the courts.” *Id.* at 719 n.42.

16. See, e.g., Fed. R. Crim. P. 31(a) (“The verdict shall be unanimous. It shall be returned by the jury to the judge in open court.”).

17. In criminal trials in federal court, either party or the judge can request that the jury be polled. See Fed. R. Crim. P. 31(d).

A. *Power of a Jury Verdict*

The jury speaks with one voice when it renders a verdict, even if the verdict is not required to be unanimous. It is the verdict that the State will enforce, not the individual views of the jurors. The verdict can have enormous consequence: it can deprive a defendant of his life or liberty.¹⁸

One way to encourage the jury to exercise its power properly is to structure the process by which a verdict is to be reached. The first step in that process is to draw jurors from a fair cross section of the community. The second step is to have jurors retire to the jury room to deliberate and attempt to reach agreement (according to whichever decision rule is in effect). The deliberations are integral to the process; if they were not, then jurors could simply be handed ballots and vote at the close of the trial.¹⁹ One reason for having jurors deliberate may be that the decision is so difficult that for the sake of the juror, it should be reached by a group decision-making process. Another reason may be for the sake of the defendant, who should not suffer serious deprivation at the hands of the State without deliberation by fellow citizens. The verdict signals that closure has been reached, in spite of whatever individual doubts and questions jurors may have struggled with during the deliberations. The verdict may be one with which the community agrees, or it may not, but the hope is that even in the latter case, members of the community will accept the verdict because they respect the process by which it was reached.

B. *Symbolism of a Jury Verdict*

The view of the jury as a single entity that speaks through its verdict has symbolic value because the jury speaks not only for itself, but also for the community. The community has assigned the jury the task of reaching a judgment on its behalf. The jury, then, serves an important function in our public rituals. The community, faced with disputes that are extremely difficult to resolve, has decided that it will give such decisions to a jury drawn from the community. Jurors assume this task as individuals, insofar as they are encouraged to speak their minds and vote their consciences during deliberations. However, once these individuals come to agreement, the decision they reach is the decision of the jury, as well as the decision of the community.

As a group decision, no individual must take responsibility for the jury's verdict; rather, each shares in group responsibility. They reach their

18. Cf. Robert M. Cover, *Violence and the Word*, 95 Yale L.J. 1601, 1609 (1986) ("[J]udges deal pain and death.").

19. As one writer pointed out: "In Brazil, federal juries do not deliberate. At the close of evidence, jurors are individually polled in writing, a secret ballot is taken, and the majority prevails. Such a procedure stands in stark contrast to our own, where deliberation is the essence of a juror's duty." Jeffrey Abramson, *We, the Jury: The Jury System and the Ideal of Democracy* 205 (1994) (citing Herman G. James, *The Constitutional System of Brazil* 122 (1923)).

decision as part of a corporate body. To ask them to take individual responsibility for the decision, especially when the decision would result in the death of the defendant, would be to ask them to shoulder an even greater burden for the sake of the community.²⁰ Of course, they must face their decision when it is announced in open court and when they are individually polled, but at that point they must only say whether they have voted as indicated by the verdict. In attempting to look beneath the verdict, post-verdict interviews, while no doubt revealing of jurors' thoughts and reasons, threaten to undermine the jury's role both as symbol for community judgment and in its ritual function of shouldering the community's most burdensome decisions.

C. Implications of Post-Verdict Interviews for the Jury

Post-verdict interviews of jurors undercut the unitary aspect of the jury. This aspect is important given the power that is accorded a jury verdict and its significance as a judgment of the community. On a practical level, it is the jury verdict, and not the views of individual jurors, that has power; on a symbolic level, it is the jury verdict, and not the views of individual jurors, that represents the judgment of the community. The jury acquires its power and meaning as a group, and post-verdict interviews threaten that group aspect. Such interviews treat the jury as if it is nothing more than a gathering of individuals involved in the exchange of ideas. Although this is certainly part of what the jury does, it does much more; the jury is not simply the sum of its parts. Post-verdict interviews, by focusing on individuals' comments or points of view, overlook the group nature of the jury's task.

There are additional ways in which post-verdict interviews of jurors can pose a threat to the institution of the jury. One way is when jurors make comments in post-verdict interviews that reflect poorly on themselves or their fellow jurors. Such comments may detract from the integrity of the jury. Another way is when jurors express doubts about the verdict or even disavow it. Such comments may undermine public confidence in the jury's verdict and the proceedings that led to it. Yet another way is when jurors refrain from expressing their views fully during deliberations because they fear that fellow jurors will disclose their comments later. Such a chilling effect in the jury room may limit the effectiveness of jury deliberations.

20. Utah, which still maintains execution by firing squad for criminal defendants sentenced to death, confronts a similar problem, albeit in a more extreme setting. *See* Louis Sahagun, *Utah Is Under Fire Over Firing Squads*, L.A. Times, Jan. 22, 1996, at A1 (explaining that John Albert Taylor, who has chosen to be executed by firing squad rather than lethal injection, will be the 40th execution by firing squad in Utah, which has not had an execution by firing squad since the execution of Gary Gilmore in 1977). One of the members of the firing squad has a blank round so that the executioners do not know "who fired the fatal shot." *Condemned Criminal in Utah Seeks Death by Firing Squad*, N.Y. Times, Dec. 11, 1995, at A12. Each member of the firing squad participates in the execution, yet each can maintain the belief that he had the blank and did not deliver the fatal shot.

Finally, the spectacle created by the press as it mobs jurors on the courthouse steps and hounds them to their homes demeans the proceedings and intrudes on jurors' privacy. This treatment of jurors makes their transition from juror to private citizen even more difficult than it might already be after a long and arduous trial. In each of these instances, the integrity of the jury is under seige. Yet, the integrity of the jury, like the integrity of the judge, is paramount if the parties and community are going to accept the verdict. Judges speak only through their opinions and decline to give interviews that might offer further insight into the reasoning they used to reach their decisions. Canons of judicial conduct and norms about appropriate judicial behavior encourage judges to refrain from public comments. The purpose is to safeguard the integrity of the judiciary so that its decisions are accepted and the impartiality of judges is not in doubt. Preserving the integrity of juries, like that of judges, should be of no less importance.

When viewed against this backdrop, post-verdict interviews of jurors seem to pose a threat to the institution of the jury. For those, however, who do not share this vision of the jury, the interviews will be less troubling, and in fact, may even reaffirm their faith in the jury. Such observers may find interviews in which jurors describe the evidence they relied on, the dynamics of their deliberations, or their belief that the jury reached the right decision and performed its job well, to be reassuring in that such interviews suggest that what is taking place behind closed doors is responsible decision-making.

The empirical work that follows can be viewed through these two lenses. The same interviews might trouble some because they threaten the unity and integrity of the jury, whereas for others, such interviews may provide a window into the workings of the jury. I have tried to make clear my own vision of the jury, and of course it is through this lens that I view the post-verdict interviews of jurors and find them troubling. Yet, in the analysis following the empirical work, I try to shift lenses periodically to explore the ways in which these interviews could be viewed as both beneficial and harmful to the jury.

III. CONTENT ANALYSIS OF THE INTERVIEWS

A. *A Methodological Caution*

Interviews in newspapers and magazines are only one means by which members of the public learn about juries. Jurors can describe their jury experiences by writing books,²¹ magazine²² and journal²³ articles, and by

21. In the past 26 years, there have been at least 12 books by jurors describing their jury experiences. See Rosemary Baer, *Reflections on the Manson Trial: Journal of a Pseudo-Juror* (1972); Giraud Chester, *The Ninth Juror* (1970) (trial of Hersey Boyer and John Locker, Jr. for the murder of Emanuel Rosenwasser); Armanda Cooley et al., *Madam Foreman: A Rush to Judgment* (1995) (O.J. Simpson trial); Edwin Kennebeck, *Juror Number Four: The Trial of Thirteen Black Panthers as Seen from the Jury Box* (1973); Michael Knox, *The Private Diary*

appearing on television and radio talk shows. There are also fictional accounts of jury service, from thrillers by John Grisham²⁴ to popular movies, such as "The Juror,"²⁵ and classics, such as "12 Angry Men."²⁶

Although press interviews of jurors do not provide the only window into a juror's experience, they do provide an important one. The importance should not be discounted because of the relatively small number of jury trials. For example, the criminal trial of O.J. Simpson for the murders of Nicole Brown Simpson and Ron Goldman was only one trial, and yet, it occupied the press on a daily basis from arraignment to post-verdict interview and was the subject of myriad articles.²⁷ Thus, even if relatively few cases are resolved by jury trial,²⁸ the ones that are may

of an O.J. Juror: Behind the Scenes of the Trial of the Century (1995); Mark Lesly, *Subway Gunman: A Juror's Account of the Bernhard Goetz Trial* (1988); Bill Roddick, *The Thirteenth Juror at the Lawrence Bembenek Murder Trial* (1982); M. Patricia Roth, *The Juror and the General* (1986) (General Westmoreland's libel suit against CBS and others); James Shannon, *Texaco and the \$10 Billion Jury* (1988); Hazel Thornton, *Hung Jury: The Diary of a Menendez Juror* (1995); Robert L. Williams & Elisabeth Wise Williams, *The Thirteenth Juror: The Story of the 1929 Loray Strike* (1983); Melvyn Bernard Zerman, *Call the Final Witness: The People v. Darrell R. Mathes as Seen by the Eleventh Juror* (1977).

22. See, e.g., William Finnegan, *Doubt*, *New Yorker*, Jan. 31, 1994, at 48 (recounting the author's experience as a juror and the investigations he subsequently undertook as a journalist so that he could uncover additional information about the witnesses and defendant that had not been made available to the jurors at the trial).

23. See, e.g., Mary Pat Treuthart, *A Summer's Tale: Of Marriage, Feminism, and Jury Duty*, 19 *Harv. Women's L.J.* 293 (1996) (describing the process of reporting for jury duty and of being questioned for service on various juries, but not being selected to serve); Deborah J. Golder, *A Different Duty*, 90 *Am. J. Nursing* 92, 92 (1990) (offering a brief account of being called for jury service, but not being selected to serve, yet finding the experience to be "a valuable one").

24. John Grisham, *The Runaway Jury* (1996).

25. *The Juror* (Winkler Films and Columbia Pictures 1996).

26. *12 Angry Men* (Metro-Goldwyn-Mayer/United Artists 1957).

27. For example, a LEXIS search revealed that in the L.A. Times alone there were 300 articles about O.J. Simpson just from the time the murder was reported on June 14, 1994 until the time O.J. Simpson was bound over for trial on July 9, 1994. Search of LEXIS, News Library, LAT File (Feb. 28, 1995). During this period, coverage of O.J. Simpson in the L.A. Times reached a high on June 19, 1994, with 20 articles published. *Id.* Of course, the coverage in one newspaper does not begin to reflect the widespread coverage the case received. The story received national press coverage as well, and the court proceedings were broadcast live by television networks and news radio stations.

28. See Abramson, *supra* note 19, at 6 ("In the civil area, jury trials take place in fewer than 1 percent of the cases disposed of in state courts and in only 2 percent of cases terminated in federal courts. In criminal litigation, two-thirds of all cases are disposed of in state courts through guilty pleas.") (footnotes omitted); John Baldwin & Michael McConville, *Jury Trials* 1 n.1 (1979) ("Most defendants, both in England and in the United States, plead guilty and the vast majority of cases are in any event disposed of in the lower courts without a jury."); James P. Levine, *Juries and Politics* 34 (1992) ("Only about 5 percent of all felony cases are resolved through jury trials . . ."); Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 *U. Chi. L. Rev.* 867, 922 (1994) ("[O]ne statistic dominates any realistic discussion of criminal justice in America today. Ninety-three percent of the defendants convicted of felonies in state courts plead guilty.").

loom large in the public eye.

One final caveat goes to the nature of the material being studied. Juror interviews in newspapers and magazines are necessarily mediated by the press. Although a juror's actual words may be used in an article, often they are not. Even when jurors are actually quoted, the quotations usually constitute only a small portion of the article and may be out of context. Thus, it is the journalist who decides which words to include from the interview, the framework in which to place those words, and which points to highlight about the jury experience.²⁹ Although these published interviews are not direct juror accounts, they are important because they reach a wide audience and help to shape that audience's view about the nature of the jury experience.

B. *How Many Jurors Speak to the Press?*

A LEXIS search of major newspapers³⁰ and magazines³¹ from 1980 to 1995 revealed numerous high-profile cases and yielded fifty-two articles in which jurors were interviewed after the verdict.³² Ninety-four percent of the articles appeared within the past eight years.³³ In 37% (19 out of 52) of the articles, it was unclear how many jurors from a single jury had agreed to be interviewed. In the remaining 63% (33 out of 52) of the articles, however, the number of jurors who agreed to be interviewed was clear. In 85% (28 out of 33) of these articles, six or fewer members of the jury agreed to be interviewed. In 25 out of those 28 articles (89%), only one or two of the jurors from the jury agreed to be interviewed. The highest number of jurors on a single jury to grant an interview was nine,³⁴ and in one case the nine who spoke were attending a jury reunion to which members of the press had been invited.³⁵ On the one hand, the

29. The editor of a television interview may exercise similar control in giving shape to the interview.

30. The newspapers that yielded articles with juror interviews included *The New York Times*, *Los Angeles Times*, *Washington Post*, and *Newsday*.

31. The magazines that yielded articles with juror interviews were *Time*, *The American Lawyer*, and *Jet*.

32. Admittedly, the choice of time period was somewhat arbitrary. However, it is my theory that the post-verdict interview is a relatively recent phenomenon, and the time period was selected with that in mind. Moreover, this search was not intended to be comprehensive, but only to provide a representative sampling. For the same reason, the search was limited to national newspapers and magazines contained in the LEXIS library MAJPAP. My goal was simply to provide a sampling of national coverage of post-verdict juror interviews.

33. The three early stories include: James Feron, *Jurors in Harris Trial Re-enacted Night of Murder Deliberations*, *N.Y. Times*, Feb. 26, 1981, at A1; Bennett Beach, *The Jurors as Celebrity*, *Time*, Aug. 16, 1982, at 42; Robert Lindsey, *Jurors [C]ite Entrapment and Failure to Prove Case*, *N.Y. Times*, Aug. 17, 1984, at A1.

34. All 12 members of the jury that heard the case involving the beating of Reginald Denny appeared before the press. Although they were present, they remained silent; the foreperson simply read aloud a statement, with which the sole alternate juror disagreed. See Seth Mydans, *Leader Denies Bias or Fear on Riot Jury*, *N.Y. Times*, Oct. 26, 1993, at A16.

35. See *Jurors Criticize Beating Sentences*, *N.Y. Times*, Aug. 9, 1993, at A11 (interviewing nine

relatively small number of jurors who speak to the press may indicate that jurors are not under pressure to speak, and post-verdict interviews should not be a cause for concern. On the other hand, even the small numbers may be significant because they suggest that a limited number of vocal jurors may be playing a disproportionately large role in shaping public perception of jury deliberations.

C. *Why Might Jurors Speak to the Press?*

There are a number of reasons why jurors choose to speak to the press after the jury has reached a verdict. In 60% (31 out of 52) of the sample articles, the jurors did not explain, or at least the press did not report,³⁶ why the jurors had agreed to speak to the press. In the remaining 40% (21 out of 52) of the articles, however, explanations varied. In 95% of those articles (20 out of 21), jurors spoke out because they wanted to set the record straight. On occasion, either collectively or singly, jurors agreed to be interviewed in response to public criticism of the jury's verdict. For example, a jury acquitted Damian Williams and Henry Watson of the most serious charges in the beating of truck driver Reginald Denny during the L.A. riots and convicted them on several reduced charges.³⁷ The foreperson arranged a meeting with the press so that she could read a statement from the jury that explained: "The verdicts were decided according to the law, not from intimidation, fear of another riot, nor were the verdicts based on black versus white."³⁸ Subsequently, another juror ("Juror 307") called a reporter in order "to set the record straight after criticisms that the jury had bowed to fears of a public backlash or riots."³⁹ Juror 307 reiterated to the reporter "that the jurors had not been intimidated."⁴⁰ Similarly, after the Crown Heights state trial, in which Lemrick Nelson, Jr. was acquitted of the murder of Hasidic scholar Yankel Rosenbaum, one juror felt compelled to speak out "because of the swirling controversy over the decision."⁴¹ She explained: "The city needs to be told why we came to our decision, rather than second-guess a jury that was

jurors at reunion); see also Robert D. McFadden, *The Bensonhurst Case: Weary Jury Wasn't Convinced That Fama Was the Gunman*, N.Y. Times, May 18, 1990, at A1 (interviewing nine jurors who attended post-verdict news conference).

36. One difficulty in trying to analyze jurors' comments in post-verdict interviews by the press is that all the jurors' comments are filtered through the lens of the press. The questions that the reporter chooses to pose, the extent to which jurors' responses are edited, and the framework in which the comments are presented, are all decisions that remain in the hands of the newspaper writer and editor. Even though I attempt to describe jurors' comments, I recognize that these comments are shaped by the press in many ways, some of which are apparent and others of which are more difficult to discern.

37. See Mydans, *supra* note 34, at A16.

38. *Id.* (quoting foreperson of jury).

39. Seth Mydans, *Juror in Denny Case Recounts Stress and an Obsession with Detail*, N.Y. Times, Oct. 27, 1993, at A18 (citing Juror 307).

40. *Id.*

41. Martin Gottlieb, *Juror: Race Had No Role in Acquittal*, N.Y. Times, Nov. 20, 1992, at B3.

just doing what it was charged to do."⁴²

In addition, individual jurors sometimes spoke to the press so that they could make clear the message behind their own vote. For example, in the Iran-Contra scandal, after the jury acquitted Oliver North of the more serious charges, convicting him only of lesser charges, individual jurors emphasized their view that former President Reagan and other senior officials in his administration were the ones who should be held responsible.⁴³ Jurors also turned to the press when they wished to change their message or even to disavow their vote. After a jury convicted Mike Tyson of rape, five jurors later announced to the press that they had "developed doubts about his guilt."⁴⁴

Jurors also used the interviews for airing their disagreements with fellow jurors. After the St. John's University trial, in which three male students were acquitted of charges of sexually assaulting a female student, one juror reported that he had disagreed with the other jurors' votes to acquit, even though he eventually joined them.⁴⁵ After the Howard Beach trial, in which three white defendants were convicted of manslaughter for the death of a black passer-by, one juror decided to talk to the press because he had heard that "the jury's leader planned to sell information about the deliberations."⁴⁶ He explained: "I read this morning that Nina Krauss was going to sell her story . . . and I don't think she has kept our agreement, which is why I am willing to talk."⁴⁷ In another case, an alternate juror explained to the press that she was suing a fellow juror for slander because of his statement on a TV talk show that she had been dismissed for misconduct.⁴⁸

Jurors also spoke to the press because they felt they had little, or no, choice in the matter. After the John DeLorean trial, eight jurors called a meeting with four reporters after the jury had acquitted the defendant of drug charges because the jurors wanted "to deter members of the press from seeking them out for interviews in the future."⁴⁹ Jurors who convicted Leona Helmsley of tax fraud and evasion did not have such control over the situation. As Leona Helmsley exited through the main entrance to the courthouse and faced "hundreds of reporters, photographers and spectators," the jurors left through a side door and "found themselves at the center of another media spotlight."⁵⁰

42. *Id.* (quoting juror Leslie King).

43. See Jane Sutton, *North Blasts Congress in First Post-Conviction Speech*, UPI, May 6, 1989.

44. *Juror in Tyson Trial Says Almost Half Have Doubts About Guilt*, L.A. Times, Mar. 26, 1995, at C11; see *Two Tyson Jurors Say They Changed Their Minds*, Jet, Dec. 28, 1992 - Jan. 4, 1993, at 46 (reporting that two jurors "have changed their minds about the verdict").

45. See Joseph P. Fried, *St. John's Juror Tells of Doubts in Assault Case*, N.Y. Times, Sept. 14, 1991, at 24.

46. Thomas Morgan, *Jurors Discounted the Key Witness*, N.Y. Times, Dec. 23, 1987, at B4.

47. *Id.* (quoting juror Ramjass Boodrham).

48. See Alan Abrahamson, *Menendez Juror Sues Another Over Comments*, L.A. Times, Sept. 13, 1994, at B3.

49. Lindsey, *supra* note 33, at A1.

50. Craig Wolff, *Helmsley's Personality Not an Issue, Jurors Say*, N.Y. Times, Aug. 31, 1989, at

Although jurors offer seemingly straightforward explanations for the jury's verdict, these explanations, like all other parts of the interview, are filtered through the press. One reason the press might ask jurors to explain why they have agreed to the interview is that by providing a reason, the jurors justify the journalist's role. If the press is performing a public service by giving jurors the opportunity to explain their verdict, then the press need not question whether it is entering a domain that should be free from inquiry.

D. What Do Jurors Discuss in Their Interviews?

1. The Basis for the Jury's Decision

Among the 221 instances⁵¹ in which jurors offered some explanation or observation about the decision the jury reached or the dynamics that characterized its deliberations,⁵² the largest percentage (32%) of comments pertained to the evidentiary basis for the jury's decision. Typically, jurors pointed to the evidence that they had found persuasive: white-out on a bill in the tax case against Leona Helmsley;⁵³ the credibility of the victim in the rape charges brought against Mike Tyson;⁵⁴ the credibility of witnesses in the Bensonhurst case, in which Joseph Fama was convicted of the murder of Yusuf Hawkins;⁵⁵ the implausible testimony of Jean Harris, who was convicted of murdering her lover;⁵⁶ the lack of credibility of John Bobbitt in the unlawful wounding charge brought against his wife Lorena Bobbitt;⁵⁷ the unreliability of the testimony of the

B3.

51. This number is a little soft because in some articles it is not always clear how many different jurors are being quoted. This is particularly so in articles in which the names of the jurors have not been disclosed. If anything, this number is on the low side because whenever an article mentioned an unspecified number of jurors, I counted it as one juror.

52. I used the following categories to organize information offered by jurors about their decision-making: whether the juror commented on the dynamics of the deliberations (either harmonious or discordant), whether the juror provided a basis for the decision (usually evidence), whether the juror commented on the judge, whether the juror commented on the lawyers, whether the juror commented on gender dynamics of the jury, whether the juror commented on race dynamics of the jury, whether the juror spoke about the difficulty of reaching a decision, whether the juror spoke in support of the decision, whether the juror expressed ambivalence about the decision, and whether the juror said he or she decided based upon the law.

53. See Wolff, *supra* note 50, at B3 (citing juror Stephen Maier, who explained that the white-out on the bill indicated to jurors that Leona Helmsley was aware of the tax fraud).

54. See Alison Muscatine, *Jury Finds Tyson Guilty of Rape, 2 Other Charges*, Wash. Post, Feb. 11, 1992, at A1 (noting that the victim was a very credible witness and made a strong case for the prosecution); see also *Juror in Tyson Trial Says Almost Half Have Doubts about Guilt*, *supra* note 44, at C11 (expressing doubts of some jurors about whether they should have found the victim to be so credible); *Two Tyson Jurors Say They Changed Their Minds*, *supra* note 44, at 46 (same).

55. See McFadden, *supra* note 35, at A1 (discounting credibility of witness due to mental disorder).

56. See Feron, *supra* note 33, at A1 ("Mrs. Harris's testimony was the key thing. Without it, we could not have convicted her.") (quoting juror Richard I. Sinnott).

57. See *Bobbitt Jurors Recount Case*, N.Y. Times, Jan. 23, 1994, at 20 (stating simply, "We

prosecution's star witness in the conspiracy and assault charges brought against John Gotti⁵⁸ and in the murder charges brought in Howard Beach,⁵⁹ the sheer accumulation of evidence in the World Trade Center bombing;⁶⁰ inconsistencies in the State's evidence in the rape trial of William Kennedy Smith;⁶¹ and evidence, rather than emotion, in the trial of O.J. Simpson.⁶²

When the jurors were not pointing to the evidence as the basis of their decisions, then they were pointing to the law. In the category that garnered the next largest percentage (15%) of comments about deliberations, jurors explained that they reached their decisions based upon the law as they understood it from the judge's instructions. One juror in the trial of O.J. Simpson felt "compelled to acquit him because the prosecution had not proven its case."⁶³ In Leona Helmsley's case, jurors explained that they did not convict her of extortion because the evidence did not fit "the narrow definition of extortion that was given to them by Judge John M. Walker Jr."⁶⁴ Similarly, in the trial of Dennis Pryba, a self-described "businessman selling smut"⁶⁵ who was convicted of obscenity under the Racketeer Influenced and Corrupt Organizations (RICO) statute,⁶⁶ six of the jurors explained that they reached their decisions by applying the test delineated in *Miller v. California*⁶⁷ as instructed by the

didn't believe John Bobbitt.").

58. See Rose Marie Arce & Melinda Henneberger, *Jurors Say the Case Left Much Room for Doubt*, Newsday, Feb. 10, 1990, at 5 ("[S]everal jurors said the prosecution's star witness, Westies gang hitman James McElroy, who said he was told Gotti ordered the shooting, just wasn't convincing.").

59. See Morgan, *supra* note 46, at B4 (offering the view of one juror who explained that the prosecution's principal witness was not persuasive, but that other prosecution witnesses were); Thomas Morgan, *Howard Beach Juror Cites Victim's Fear*, N.Y. Times, Dec. 27, 1987, at 38 (interviewing another juror who offered a similar view); Sarah Lyall, *Ex-Howard Beach Alternate Juror Discusses Case*, N.Y. Times, Dec. 18, 1987, at B3 (providing further support from alternate juror).

60. See Richard Bernstein, *Juror in Bombing Trial Explains the Rapid Verdict*, N.Y. Times, Mar. 6, 1994, at 34 (commenting on the case, one juror explained that the prosecution had "presented enormous amounts of evidence," which had been persuasive to the jurors).

61. See William Booth & Michael Isikoff, *Courthouse Crowd Cheers Ex-Defendant*, Wash. Post, Dec. 12, 1991, at A22 (describing doubts of two alternate jurors as to the victim's credibility).

62. See Lorraine Adams, *Simpson Jurors Cite Weak Case, Not 'Race Card'*, Wash. Post, Oct. 5, 1995, at A1; Edward J. Boyer & Elaine Woo, *Case Had Many Holes, Juror Says*, L.A. Times, Oct. 4, 1995, at A1 [hereinafter Boyer & Woo, *Case Had Many Holes*]; Edward J. Boyer & Elaine Woo, *Juror: 'There Was Something Wrong'*, Wash. Post, Oct. 4, 1995, at A1 [hereinafter Boyer & Woo, *Juror*]; Julia Campbell, *At First Shy of Publicity, Juror No. 4 Speaks Out*, N.Y. Times, Oct. 10, 1995, at A15; Timothy Egan, *The Simpson Case: The Jury*, N.Y. Times, Oct. 5, 1995, at A1; Bob Pool & Amy Pyle, *Case Was Weak, Race Not Factor, Two Jurors Say*, L.A. Times, Oct. 5, 1995, at A1; *Two Simpson Jurors Cite a Lack of Proof*, N.Y. Times, Oct. 19, 1995, at A19.

63. Adams, *supra* note 62, at A1.

64. Wolff, *supra* note 50, at B3. The jury went back to the judge for clarification of the definition of extortion. See *id.*

65. Arthur S. Hayes, *A Jury Wrestles with Pornography*, Am. Law., Mar. 1988, at 96.

66. 18 U.S.C. §§ 1961-1968 (1994).

67. 413 U.S. 15 (1973).

judge: whether "the average person in the community would find that the works in evidence had prurient appeal and were patently offensive."⁶⁸ After the trial in Crown Heights, the jurors who spoke to the press explained that they had adhered to the standard of "reasonable doubt" and that their verdict was consistent with what the law required.⁶⁹ Jurors who decided the case involving the beating of Reginald Denny felt constrained by legal definitions. They downgraded felony charges to misdemeanor convictions because one definition applied to the use of hands or fists in the assault, but did not mention feet. One juror "described a process of deliberation in which the jury returned again and again to the legal instructions, burrowing deep into its language."⁷⁰ In sum, jurors' explanations for their decisions, whether attributed to the law or evidence, account for 47% of their comments reported in post-verdict interviews with the press.

2. Jury Dynamics During Deliberations

What else do jurors discuss when they meet with the press? Fifteen percent of their comments related to whether the jury had deliberated in a harmonious or discordant fashion. Twenty-four comments referred to good jury dynamics, whereas nine comments noted poor dynamics. For example, six of the jurors in the Rodney King civil suit praised the foreperson for her "conciliatory manner" which helped to "defus[e] tension" during the two weeks of deliberations.⁷¹ According to one juror, the foreperson "kept the jury together."⁷² After the trial of DeLorean, eight of the jurors who met with the press described their deliberations as "emotional" but "very compatible" with "no fights."⁷³ One jury, which became "as close-knit as a family," instituted "hugging sessions" to quell emotions that ran high during deliberations.⁷⁴ On the O.J. Simpson criminal jury, one juror characterized relations among jurors "as warm,"⁷⁵ whereas another described the discussions as "'excited' but not hostile."⁷⁶

68. Hayes, *supra* note 65, at 96.

69. See Gottlieb, *supra* note 41, at B3; Donatella Lorch, *Inquiries Set in '91 Slaying in Crown Hts.*, N.Y. Times, Oct. 31, 1992, at 23; Robert D. McFadden, *Teen-Ager Acquitted in Slaying During '91 Crown Heights Melees*, N.Y. Times, Oct. 30, 1992, at A1.

70. Mydans, *supra* note 39, at A18. Researchers examining jury deliberations in death penalty cases have noted a tendency among jurors to believe that the law is compelling them to recommend a sentence of death so that they are absolved of responsibility: They "want to see the law as more responsible than they themselves for the defendant's punishment. Significantly, this tendency to deny full responsibility for the defendant's punishment appears to make it easier for jurors to vote for death." William J. Bowers, *The Capital Jury: Is It Tilted Toward Death?*, 79 *Judicature* 220, 223 (1996) (footnote omitted).

71. John L. Mitchell & Tina Daunt, *King Jury's Voice of Reason Carried a Private Burden*, L.A. Times, June 3, 1994, at A1.

72. *Id.* (quoting juror Gail Sanders).

73. Lindsey, *supra* note 33, at A1.

74. Lorch, *supra* note 69, at 23.

75. Pool & Pyle, *supra* note 62, at A1.

76. Boyer & Woo, *Juror*, *supra* note 62, at A1 (quoting juror Lionel Cryer).

Jurors sometimes talked explicitly about whether they thought race or gender played a role in their jury deliberations. The question usually arose in cases that were perceived to have race or gender conflicts at their core. Of course, race and gender are always part of a case and part of deliberations because everybody has a race and gender,⁷⁷ and these and other attributes and life experiences help shape how people see the world, and how others see them.⁷⁸ In some cases, however, race and gender are highlighted because these factors are seen as the motivation for the crime or as the basis for the jury's decision. The press tended to view trials such as O.J. Simpson, Crown Heights, Bensonhurst, and Reginald Denny as involving race. Thus, jurors were asked by the press whether race played a decisive role in their deliberations. In all four cases, jurors denied that race was a factor. In the Simpson criminal trial, one juror, when asked if "race played a role," responded: "No way."⁷⁹ In the Crown Heights state trial, one juror who agreed to be interviewed said that "race . . . played no role in the jury's decision."⁸⁰ In Bensonhurst, a juror explained that "race was not a problem among the jurors" and another said that "any racial feeling" was "put . . . aside" when the jurors walked into the jury room.⁸¹ The foreperson for the trial of the beating of Reginald Denny asserted that the jury "was not influenced by racial motives."⁸² In all four of these cases, the jurors who spoke about race were identified by the press as African American or Hispanic. In the trial of Mike Tyson, Tyson's lawyers worried about race because the jury included only two African Americans. In Tyson's case, however, as in the others, the interviewed juror, an African American, said that "race was not an issue in their deliberations."⁸³

Gender mattered to jurors in some cases, though not necessarily in cases that had been identified by the press as "gender cases." For example,

77. As Patricia Cain pointed out, however, those who fit the norm (white, male, heterosexual) do not think about themselves as having a race, gender or sexual orientation; only those who are not part of the mainstream are made aware of the ways in which they are different. See Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 Berkeley Women's L.J. 191, 207-10 (1989-90). "[W]hite, heterosexual women think of gender as something that sets them apart, as something that defines them, whereas neither race nor sexuality seems to matter much." *Id.* at 208.

78. See, e.g., Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 Tex. L. Rev. 1041, 1130 (1995) ("[J]urors have different experiences and perspectives that shape the way in which they view the world."); Marder, *supra* note 12, at 604 ("Gender, like age and race, informs one's relations with others and one's experiences and position in society."); see also David Kairys et al., *Jury Representativeness: A Mandate for Multiple Source Lists*, 65 Cal. L. Rev. 776, 782 n.44 (1977) ("No one is without attitudes and preferences concerning various social, political, economic, cultural and religious issues, and such attitudes and preferences affect one's judgment and perception regarding factual and legal questions and the credibility of witnesses.").

79. Campbell, *supra* note 62, at A15 (quoting David A. Aldana, Juror No. 4).

80. Gottlieb, *supra* note 41, at B3.

81. McFadden, *supra* note 35, at A1.

82. Mydans, *supra* note 34, at A16.

83. Muscatine, *supra* note 54, at A1.

gender differences manifested themselves most dramatically with the Erik Menendez jury, which deliberated in a murder case that was not ostensibly about gender.⁸⁴ During deliberations, however, the jury of six men and six women found themselves split along gender lines, with the men voting for first-degree murder and the women voting for manslaughter. Four female jurors who spoke to the press afterward⁸⁵ explained that they found Erik Menendez's claim of sexual abuse compelling and exonerating, whereas the men rejected it as either false or irrelevant.⁸⁶ They described the atmosphere of the deliberations as "hostile," with the men directing "insults" and "sexual comments" at the women.⁸⁷ According to one female juror: "We were called ignorant asses and empty headed and 'those women.' We had one juror who would put on his sunglasses and be balancing his checkbook and cutting out coupons when the women were talking."⁸⁸ The women accused the men of both homophobia and sexism.⁸⁹ Sexism marred the deliberations from the start, according to one woman, who said that "the jury even had trouble choosing a foreman because of sexual politics."⁹⁰

The jury in the trial of Dennis Pryba also had to confront a gender divide. One male juror explained that the clashes between men and women became most pronounced when the jury had to interpret a rape scene in a film in order to decide whether the film was obscene.⁹¹ In contrast, the case of Jean Harris, which could have provoked different responses from men and women on the jury, instead led one juror to observe that the jury "didn't split along male-female lines."⁹²

Jurors' observations about race or gender accounted for only a small percentage of their total number of comments (6%), and in most of their observations, they expressed the view that race or gender did not play a role in their deliberations.⁹³ One point is that jurors' comments about

84. Erik and Lyle Menendez were charged with the murder of their parents.

85. Two alternate jurors from Erik Menendez's trial and one alternate from Lyle Menendez's trial were also part of this group that met with Leslie Abramson (Erik Menendez's lawyer) and the press, but since they were not part of the deliberations, I have excluded them from the count.

86. One researcher, Rita James Simon, has noted that men and women vote differently on issues pertaining to crimes against children. See Rita James Simon, *The Jury and the Defense of Insanity* 109 (1967). The Menendez jury's gender split is consistent with Simon's studies. Simon also observed that women participated more actively in jury deliberations in criminal cases, and in particular, in cases involving incest. See *id.* at 116.

87. *Female Jurors Assert Sexism Hurt Menendez Deliberations*, N.Y. Times, Jan. 31, 1994, at A13 [hereinafter *Female Jurors*].

88. *Id.*

89. See *id.*

90. *Id.*

91. See Hayes, *supra* note 65, at 100.

92. Feron, *supra* note 33, at A1. Mrs. Harris was charged and convicted of the murder of Dr. Herman Tarnower, who had been her companion and lover for 14 years. See *id.*

93. But see Mitchell & Daunt, *supra* note 71, at A1 (seeing the jury's decision to award compensatory but not punitive damages to Rodney King as "purely black and white,"

race or gender, already a seemingly small percentage of their total comments, becomes strikingly small when compared to the large percentage of articles (71%) in which the press presented the case as having a race or gender component. A second, though less surprising, point is that the jurors usually defend what they have done in the jury room by offering a picture of their deliberations as free from race or gender considerations.⁹⁴ A third point is that while the jurors may be reticent about talking about race or gender, that does not mean the press is equally shy. There were thirty-seven articles in which the press portrayed the particular case as one involving issues of race or gender. In twenty-two of those articles (60%), the press thought it important to include the gender or racial composition of the jury.

3. *The Difficulty of Judging*

Occasionally jurors in post-verdict interviews comment on the difficulty inherent in the act of judging.⁹⁵ Eight percent of the jurors' total comments included some reference to the process of decision-making as difficult, painful, or upsetting. Comments varied among jurors but the sentiment remained the same. For example, one juror in the Oliver North trial described the process as "the most difficult decision of [her] life,"⁹⁶ while another in that case described herself as "mentally and physically exhausted."⁹⁷ A juror in the Tyson trial described decision-making as "a difficult thing to do."⁹⁸ In the Rodney King civil suit, one juror recounted "br[eaking] down in tears on several occasions," "bec[oming] sick to her stomach from watching the taped beating," and being "haunted" by King's screams, while another described how "some nights he tossed and turned in a fitful slumber with the day's debate playing over and over in his head."⁹⁹ A juror in the Gotti trial described decision-making as "tough,"¹⁰⁰ whereas a juror in the trial of Colin Ferguson, who was convicted of several counts of murder and attempted murder in the shooting of several passengers on the Long Island Railroad, described the process as "a once in a lifetime experience that was very, very draining."¹⁰¹ The foreman in the Crown Heights trial, speaking for the entire

according to the sole African-American juror).

94. See *supra* text accompanying notes 77-83 (recounting jurors' statements on race and gender).

95. Robert Cover's observation that "judges deal pain and death" is applicable to juries as well. Cover, *supra* note 18, at 1609.

96. David E. Rosenbaum, *Prayer Was the Turning Point, a Juror Says*, N.Y. Times, May 5, 1989, at A19.

97. *Id.*

98. Trudy S. Moore, *Juror in Tyson Rape Case Gives Behind-the-Scenes View of Verdict*, Jet, Mar. 2, 1992, at 12.

99. Mitchell & Daunt, *supra* note 71, at A1.

100. Arce & Henneberger, *supra* note 58, at 5.

101. John T. McQuiston, *Jury Finds Ferguson Guilty of Slayings on the L.I.R.R.*, N.Y. Times, Feb. 18, 1995, at 1.

jury, described the jury's task as "not easy" and "very nerve-racking,"¹⁰² and the mother of a young juror in the Reginald Denny beating explained that her daughter "had never before been forced to make difficult decisions like this."¹⁰³

4. *Support for the Verdict*

Fifteen percent of jurors' comments fell into the category of an expression of support for the verdict and the job that the jury did. In the Simpson trial, one juror, Brenda Moran, said: "I think we did the right thing"¹⁰⁴ In the Harris trial, "[t]he jurors seemed pleased with the conduct of the deliberations, and with each other."¹⁰⁵ Similarly, in the William Kennedy Smith trial, one juror who spoke to a reporter described her decision as follows: "I thought I made a good decision, and everyone else seems to think so, too."¹⁰⁶ The foreperson in the Reginald Denny beating case, speaking on behalf of the entire jury, said in her statement to the press: "[W]e the jury feel very confident that we did the best job possible given the evidence and the applicable law."¹⁰⁷ After the Leona Helmsley trial, one juror said he "fel[t] confident that justice was served."¹⁰⁸ Echoing those sentiments, a juror after the Mike Tyson trial said: "We were here to do a job and we feel like we did it the best way we could."¹⁰⁹ In Howard Beach, one juror said "he believed he had fulfilled his civic duty."¹¹⁰ In his words: "I felt that I had done justice."¹¹¹ A juror in the Rodney King civil suit offered similar approbation of the jury's performance: "I can tell you we worked very hard at it. I felt we did a good job."¹¹²

5. *Ambivalence About the Verdict*

Jurors were not always so positive in their assessments of the jury; occasionally they expressed ambivalence or doubt about the verdict the jury had reached. Although such comments constituted only a small percentage of the jurors' total comments (4%), they revealed much emotion. For example, the sole African-American juror in the Rodney King

102. McFadden, *supra* note 69, at A1.

103. Mydans, *supra* note 39, at A18.

104. Boyer & Woo, *Case Had Many Holes*, *supra* note 62, at A1.

105. Feron, *supra* note 33, at A1.

106. *Smith Juror Says First Vote Made 'Not Guilty' Obvious*, N.Y. Times, Dec. 13, 1991, at A26. The same juror also said: "We went in there and did a job, and felt we did a good one and it's over." Booth & Isikoff, *supra* note 61, at A22.

107. Mydans, *supra* note 34, at A16.

108. Wolff, *supra* note 50, at B3.

109. Muscatine, *supra* note 54, at A1; *see* Moore, *supra* note 98, at 12 ("[A]t the end, we were all in agreement that we had made the best decision based on the evidence that we had.").

110. Morgan, *supra* note 46, at B4.

111. *Id.*

112. Mitchell & Daunt, *supra* note 71, at A1.

civil trial told reporters that she thought "there was no justice" in the jury's decision to award only compensatory damages to King, even though she had voted that way.¹¹³ The juror who held out for conviction in the St. John's University sexual assault trial eventually went along with an acquittal; however, he subsequently expressed doubts to the press about his capitulation, saying that perhaps he "should have hung the jury," particularly with respect to the two defendants whom he considered "guilty as sin."¹¹⁴ After the Tyson trial, two of the jurors who convicted Tyson "changed their minds about the verdict,"¹¹⁵ and after additional time had elapsed, five of the twelve jurors "developed doubts about his guilt."¹¹⁶ In the first criminal case for the beating of Rodney King, one of the few jurors who wanted to convict the police officers expressed "regrets over the verdict" to acquit.¹¹⁷ She recounted how her arguments, fasting, tears, and prayer failed to persuade the majority; eventually she gave up and joined the majority.¹¹⁸

6. *Assessment of Judges and Lawyers*

Five percent of jurors' comments focused on the judge's performance, while only one percent referred to the job the attorneys had done. As to comments about the judge, several jurors felt "betrayed" by Judge Davies and his lenient sentence of Sergeant Stacey Koon and Officer Laurence Powell for the beating of Rodney King.¹¹⁹ After the trial of Dennis Pryba, six jurors criticized Judge Ellis's instructions, which "failed to make clear that if the jury voted for forfeiture, then all . . . of the defendants' assets would be seized."¹²⁰ There were also several jurors who offered "words of praise for Justice Owens" in the Bensonhurst case.¹²¹ Comments about lawyers were extremely rare and were limited to a description of the defense attorneys in one case as "grat[ing]"¹²² and "combative[]"¹²³ and an assessment by one juror that Colin Ferguson's self-representation "did not matter to the jurors."¹²⁴

113. *Id.*

114. Fried, *supra* note 45, at 24.

115. *Two Tyson Jurors Say They Changed Their Minds*, *supra* note 44, at 46.

116. *Juror in Tyson Trial Says Almost Half Have Doubts About Guilt*, *supra* note 44, at C11.

117. Robert Reinhold, *After the Riots*, N.Y. Times, May 9, 1992, at 1.

118. *Id.*

119. *Jurors Criticize Beating Sentences*, *supra* note 35, at A11.

120. Hayes, *supra* note 65, at 100-01.

121. McFadden, *supra* note 35, at A1; see Morgan, *supra* note 46, at B4 (praising Judge Thomas Demakos in the Howard Beach trial).

122. Lyall, *supra* note 59, at B3.

123. Morgan, *supra* note 46, at B4.

124. McQuiston, *supra* note 101, at 1.

E. When Are Jurors Willing to Reveal Their Interim Votes?

Jurors were often willing to describe not only the dynamics of their deliberations, but also the interim votes of the jury. In 42% (22 out of 52) of the articles, the interviewed jurors revealed one or more of the jury's early votes. For example, in the trial of Jean Harris, the jury moved from 8-4, to 11-1, to 12-0 in favor of conviction.¹²⁵ In the trial of Joey Fama in the Bensonhurst case, the jury took an initial vote in which 4 jurors were undecided and 8 were divided in some unspecified way.¹²⁶ Toward the end of the deliberations, the jurors were deadlocked 11-1 in favor of conviction of Fama on second-degree murder.¹²⁷ The lone hold-out, Steven Berquist, explained that he had voted for acquittal because he was "unsure of the law," but that once the judge clarified the law, he joined the others in voting for conviction.¹²⁸ Tyson's jury began with a vote of 6-6, then moved to 9-3 in favor of conviction, and finally reached a unanimous vote to convict.¹²⁹ Chambers's jury began with an 8-4 vote to acquit, moved to 9-3 to acquit, and then flip-flopped to 9-3 to convict; the jury was at an impasse when a plea was accepted and the jury was dismissed.¹³⁰ In an initial vote, the jury in O.J. Simpson's trial was 10-2 for an acquittal; soon after, it took a second vote, in which it was unanimous for acquittal.¹³¹

F. What Do Jurors Decline to Discuss?

Although some jurors revealed to the press many aspects of their jury's decision-making process, there were some types of information that jurors often declined to disclose, such as their names. In 37% of the articles, one or more jurors who agreed to be interviewed by the press refused to reveal their names. In some cases, the jurors retained their anonymity based upon court order;¹³² in other cases, jurors themselves

125. See Feron, *supra* note 33, at A1. There was some dispute among jurors about the initial vote. One said it was 8-4 to convict, another said it was 4-3 in favor of acquittal with 5 undecided jurors. See *id.*

126. See McFadden, *supra* note 35, at A1.

127. See *id.*

128. *Id.*

129. See Moore, *supra* note 98, at 12.

130. See Mark A. Uhlig, *Jurors Describe 'Wild' Shifts of Opinion*, N.Y. Times, Mar. 26, 1988, at 36. This case, in which Robert E. Chambers, Jr. was tried for the death of Jennifer Levin, whose body had been found near the Metropolitan Museum of Art, ended in a plea-bargain agreement of first-degree manslaughter while the jury was in its ninth day of deliberations. See *id.*

131. See Adams, *supra* note 62, at A1; Boyer & Woo, *Case Had Many Holes*, *supra* note 62, at A1; Boyer & Woo, *Juror*, *supra* note 62, at A1; Campbell, *supra* note 62, at A15; Egan, *supra* note 62, at A1; Jim Newton, *Simpson Not Guilty*, L.A. Times, Oct. 4, 1995, at A1.

132. See, e.g., Lee A. Daniels, *Riots in Los Angeles*, N.Y. Times, May 1, 1992, at A23; *Jurors Criticize Beating Sentences*, *supra* note 35, at A11; Mydans, *supra* note 34, at A16; see also Bernstein, *supra* note 60, at 34 ("The names of the jurors in the five-month-long trade center trial were kept secret.").

insisted on not being identified¹³³ or agreed to give only their first names.¹³⁴ Some jurors also declined to answer any questions,¹³⁵ to reveal other jurors' views¹³⁶ or votes,¹³⁷ or to comment on the dynamics of the deliberations.¹³⁸

G. How Much Control Do Jurors Really Have?

Although jurors have control over how much information they personally disclose to the press, they do not always have control over how much contact they have with the press or in what manner and how much of what they say will be published; nor do jurors have control over what other jurors say to the press. For example, one juror in the Howard Beach case agreed to speak to the press only after he had learned that another juror was going to tell her story; contrary to the agreement the jurors had reached to remain silent.¹³⁹ For the most part, jurors from the Howard Beach trial tried to avoid the press. Some sent family members to tell reporters that they would not talk, and others simply left town.¹⁴⁰ In one instance, a juror had to call the police, who instructed reporters to leave her apartment lobby.¹⁴¹ After the verdict in the Oliver North trial, federal marshals, "acting as bodyguards, helped the jurors through the crowds of reporters and camera crews that lined the sidewalks outside their houses and apartments."¹⁴² One juror's response after the North verdict was to "take the next plane out to Jamaica."¹⁴³ A juror in the Harris trial also chose to "disappear" because "[h]e was being hounded" and decided that it would be best "to stay away."¹⁴⁴ After the verdict of not guilty by reason of insanity in the case of John Hinckley, members of the jury found themselves "pinioned in the spotlight of press attention."¹⁴⁵ Their homes were surrounded by reporters and TV crews, and in response, several

133. See, e.g., Arce & Henneberger, *supra* note 58, at 5; *Bobbitt Jurors Recount Case*, *supra* note 57, at 20; *Female Jurors*, *supra* note 87, at A13; Lindsey, *supra* note 33, at A1; Mitchell & Daunt, *supra* note 71, at A1; Mydans, *supra* note 39, at A18.

134. See, e.g., Moore, *supra* note 98, at 12; Seth Mydans, *Menendez Lawyer Enlists Sympathetic Jurors to Defend Client*, N.Y. Times, Feb. 1, 1994, at A10; *Two Jurors Say They Didn't Believe Tyson*, L.A. Times, Mar. 10, 1992, at C3; Uhlig, *supra* note 130, at 36.

135. See, e.g., Mydans, *supra* note 34, at A16.

136. See, e.g., Morgan, *supra* note 59, at 38; Morgan, *supra* note 46, at B4.

137. See, e.g., Feron, *supra* note 33, at A1; Morgan, *supra* note 59, at 38.

138. See, e.g., *Bobbitt Jurors Recount Case*, *supra* note 57, at 20; Feron, *supra* note 33, at A1 ("Some of the jurors, such as Mary L. Nichols of Chappaqua, who said 'it was a very private thing,' and Alice B. Wilson of Elmsford, chose not to discuss the deliberations.").

139. See Morgan, *supra* note 46, at B4.

140. See *id.*

141. See *id.* (citing the experience of juror Felicia Chapman).

142. Rosenbaum, *supra* note 96, at A19.

143. *Id.* (citing the experience of juror Tara Leigh King).

144. Feron, *supra* note 33, at A1 (citing the experience of juror Ernest Ascherman, who disappeared).

145. Beach, *supra* note 33, at 42.

jurors temporarily moved.¹⁴⁶ After the DeLorean trial, eight of the twelve jurors met with a pool of reporters as a group. This "unusual meeting" was arranged by the jurors "in an effort to deter members of the press from seeking them out for interviews in the future."¹⁴⁷ Several of the O.J. Simpson jurors "tried to do a fast vanishing act, only to discover that their homes . . . had been staked out by media hordes."¹⁴⁸ Although they had left word with Judge Ito "that they did not wish to talk with reporters," many still found the press unrelenting.¹⁴⁹ Among the fifty-two articles, approximately 25% recounted some instance in which one or more jurors felt pressured by the press, and in some of the more extreme cases, felt compelled to disappear, at least temporarily.

IV. AN EXPLORATION OF POTENTIAL EFFECTS OF JUROR INTERVIEWS: PROMOTING OR UNDERMINING VALUES?

As the descriptions of post-verdict interviews in Part III suggest, jurors reveal a variety of aspects of their deliberations to the press. On the one hand, jurors' disclosures can be beneficial, insofar as they promote such values as public education, public acceptance of the verdict, and juror accountability. On the other hand, jurors' disclosures can be harmful, insofar as they undermine other values, such as juror candor and juror privacy. As the following analysis reveals, however, these demarcations are not clear cut.

A. Public Education

When jurors reveal the evidence they found persuasive or the law they were trying to follow,¹⁵⁰ such disclosures potentially serve a positive function. Such disclosures offer the public an opportunity to learn about the workings of the jury. Tocqueville admired the jury for its "political," rather than its "judicial," function, and by that he meant its function as a "free school" for the education of citizens about the workings of a democracy.¹⁵¹ In general, those who serve as jurors tend to have a positive experience.¹⁵² Not every citizen, however, has the opportunity to

146. *See id.*

147. Lindsey, *supra* note 33, at A1.

148. Boyer & Woo, *Juror*, *supra* note 62, at A1.

149. Boyer & Woo, *Case Had Many Holes*, *supra* note 62, at A1.

150. *See supra* text accompanying notes 51-70 (discussing the basis for the jury's decision).

151. Alexis de Tocqueville, *Democracy in America* 275 (J. Mayer rev. ed. 1969) (13th ed. 1850).

152. *See, e.g.,* Arthur Austin, *Another Viewpoint on Juries*, Nat'l L.J., Mar. 22, 1993, at 15 (describing the author's interviews with jurors, in which he found, consistent with the National Law Journal poll, that "[m]ost . . . agreed that jury service was a positive experience"); Martha Engber, *Juries' Prudence*, Chi. Trib., Feb. 10, 1991, at 9 ("Jury duty was the cherry on the sundae of my legal career.") (quoting County Associate Judge Barbara Gilleran-Johnson, who became the first judge in Illinois to sit as a juror during a trial); Pamela Manson & Rebecca Adams, *Jury Reforms Aim to Empower Panel of Peers in Arizona*, Ariz. Republic, Aug. 20, 1995, at A1 ("Jurors after serving are much more positive than they were before

serve on a jury.¹⁵³ Thus, those citizens who do not serve can learn about the jury system by reading accounts from those who have served.

Of course, if jurors who agree to be interviewed by the press have had a poor jury experience, then the lessons that they teach the public about juries will be negative ones. If, as one study reports, "[t]he most vocal jurors are likely those who have had the worst experiences,"¹⁵⁴ then the public's view of the jury may be skewed toward its weaknesses.¹⁵⁵ On the one hand, public awareness of the weaknesses of the jury could inspire debate and reform. On the other hand, the public may fail to ask whether disclosures about jury weaknesses, particularly in well-publicized cases, are idiosyncratic or whether they are indicative of systematic problems.¹⁵⁶

[serving].") (quoting Thomas Munsterman, Director of the Center for Jury Studies at the National Center for State Courts); John Murawski, *Grappling with Juror Shortage*, *Legal Times*, Oct. 14, 1991, at 7 ("By most accounts, jury duty is a positive experience for citizens . . ."); see also Stephanie B. Goldberg, *Caution No Exemptions*, *A.B.A. J.*, Feb. 1996, at 64, 66 (polling lawyers who had served as jurors and finding that 85% described their experience as either "somewhat positive" or "very positive").

153. Citizens may not have the opportunity to serve on a jury for a variety of reasons. Some may not meet the statutory requirements for service. See 28 U.S.C. § 1865 (1994) (including U.S. citizenship, proficiency in English, and minimum age and residency requirements). Others may not be called to serve because the lists from which the venire is drawn may be limited to registered voters. See, e.g., Dennis Bilecki, *Program Improves Minority Group Representation on Federal Juries*, 77 *Judicature* 221, 221 (1994) (reporting that a pilot program in California reveals that when multiple lists are used, such as a list of drivers' licenses in addition to voter registration, then the pool from which the venire is drawn includes more members of minorities); Kairys et al., *supra* note 78, at 780 (urging the use of multiple lists in order to include a broader swath of the population in the venire). Still others who are called for jury service may take advantage of broad exemptions to avoid their obligation, unless they live in a state such as New York that has recently eliminated exemptions. See, e.g., G. Thomas Munsterman, *A Brief History of State Jury Reform Efforts*, 79 *Judicature* 216, 218 (1996) (recounting how New York revised its exemption policy so that "the list of exemptions, once the longest in the nation, was eliminated"); Jan Hoffman, *Judges Screen Jurors Faster Than Lawyers, Study Says*, *N.Y. Times*, June 24, 1995, at 23 ("The State Legislature voted to end exemptions from jury duty for more than 20 professions . . ."); '44' *Centre Street*, *New York*, June 3, 1996, at 14 (observing that more professionals are responding to the summons for jury duty since the State Legislature eliminated automatic exemptions for 21 professions, cut average jury service to three days, and provided for fines up to \$250 for those who fail to comply); The Jury Project, *Report to the Chief Judge of the State of New York* (Mar. 31, 1994) (recommending the elimination of a long list of automatic exemptions for certain professions). Even those citizens who are eligible and eager to serve may be unable to serve if they are struck by one side or the other exercising its peremptory challenges. See, e.g., Marder, *supra* note 78, at 1041 (arguing that the peremptory challenge is used to exclude members of minorities and undercuts the representativeness that the jury is supposed to reflect).

154. Colleen McMahon & David L. Kornblau, *Chief Judge Judith S. Kaye's Program of Jury Selection Reform in New York*, 10 *St. John's J. Legal Comment* 263, 270 (1995).

155. Note that this finding was not supported by the interviews analyzed in Part III of this Article. See *supra* text accompanying notes 104-12 (describing jurors' support for the verdict and the way they had performed their task).

156. See, e.g., Laura Mansnerus, *Under Fire, Jury System Faces Overhaul*, *N.Y. Times*, Nov. 4, 1995, at A9 ("Legal experts say this [current negative] public perception was forged by a few cases that are anomalous but loom large").

Juror interviews might also reveal to the public the extent to which verdicts may be based on juror misunderstandings or subterfuges.¹⁵⁷ The extreme case, not found in the interviews described in Part III, would be if jurors' comments revealed that they misunderstood the law or evidence in a criminal case, and that such misunderstanding led them to acquit a guilty person, who could not be tried again, or to convict an innocent person, who could only hope that the judge would correct the error. The interviews in Part III did reveal that jurors sometimes tried to hide behind the law to absolve themselves of responsibility for their decision. This occurred to some extent in the beating of Reginald Denny "in which the jury returned again and again to the legal instructions, burrowing deep into its language."¹⁵⁸ This tendency has also been noted in a study of capital cases in which sentencing juries believe that the law leaves them no choice but to impose the death penalty, when in fact they have discretion.¹⁵⁹

Disclosure of jury deliberations also educates researchers on the workings of the jury, enabling them to examine the jury's shortcomings and to propose reforms. When the British Parliament passed section 8 of the 1981 Contempt of Court Act,¹⁶⁰ which punishes by criminal contempt any jurors who disclose information about their deliberations and any member of the press who makes any inquiries, jury researchers experienced a serious loss.¹⁶¹ No longer were jury researchers able to gain insight into the workings of the jury by questioning jurors about their experience. Rather, researchers had to rely on alternative, and less direct, methods, such as mock juries,¹⁶² interviews with lawyers and judges, and

157. See *id.* (noting recent trials that "have fed suspicions that juries are not reflecting the community conscience that they are supposed to embody and, at their worst, are chosen for their susceptibility to lawyers' racial or political appeals").

158. Mydans, *supra* note 39, at A18.

159. See Bowers, *supra* note 70, at 223 ("[A]s jurors move closer to the final life or death decision, those who deny full or strict responsibility for the defendant's punishment are more apt to impose the death penalty, indeed are more apt to move from being for life or undecided to a death vote."); Scott Burgins, *Jurors Ignore, Misunderstand Instructions*, A.B.A. J., May 1995, at 30-31 (describing the findings of the Capital Jury Project's study, including the finding that 42.9% of the jurors interviewed believed that "they were required to impose the death penalty if they found the crime was heinous, vile or depraved").

160. Section 8(1) of the 1981 Contempt of Court Act provides: "[I]t is a contempt of court to obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings." Contempt of Court Act, 1981, § 8(1) (Eng.).

161. Section 8 was originally intended to prohibit publication of jury deliberations except when the particular jurors or proceedings could not be identified, thus providing an exemption for researchers. However, the bill was amended at the last minute so that it banned all communications by jurors. See N.V. Lowe, *The Contempt of Court Act 1981—II*, 131 New L.J. 1191, 1191 (1981); C.J. Miller, *The Contempt of Court Act 1981*, 1982 Crim. L. Rev. 71, 83 (responding to a fear of "well-meaning sociologists," several members of Parliament succeeded in attaching an amendment that made it a contempt "to obtain, disclose or solicit any particulars of statements made . . . by members of a jury in the course of their deliberations").

162. See, e.g., Michael McConville & John Baldwin, *The Effect on the Contempt of Court Act on*

statistical analyses.¹⁶³

It should be noted, however, that juror interviews with the press are not the only, or even the best, means for researchers to learn about the workings of the jury. A number of states,¹⁶⁴ such as Arizona,¹⁶⁵ California,¹⁶⁶ New Jersey,¹⁶⁷ and New York,¹⁶⁸ are in varying stages of studying

Research on Juries, Just. Peace, Sept. 26, 1981, at 575 (describing the use of mock juries as a way of learning about jury behavior without having access to actual jurors' accounts of their deliberations); Editorial, *Called to the Bar*, Times (London), Nov. 23, 1991, at 15a (recounting efforts by Granada television to assemble a shadow jury that attended an actual trial and then deliberated, but the editorial questioned whether such experiments control for the effect that cameras might have on the shadow jury or the differences between being an actual juror and a mock juror). One problem with mock juries is that it is difficult to know if the mock jurors will act in the same way as actual jurors, who know that their efforts will result in an outcome that will affect others. Another problem is that mock juries often consist of students "so that the resulting panels do not in any way represent the social mix which would characterize virtually any real jury." Baldwin & McConville, *supra* note 28, at 13.

163. See, e.g., McConville & Baldwin, *supra* note 162, at 575 (indicating that these alternative tools available to the researcher are "inevitably artificial and therefore suspect").

164. See Mark Curriden, *Jury Reform*, A.B.A. J., Nov. 1995, at 72, 73 ("Courts and bar associations in 27 states have committees studying ways to improve the [jury] process.").

165. See, e.g., The Arizona Supreme Court Comm. on More Effective Use of Juries, Jurors: The Power of 12 (1994) (including a list of recommendations and a proposed bill of rights for jurors); B. Michael Dann & George Logan III, *Jury Reform: The Arizona Experience*, 79 *Judicature* 280 (1996) (describing some of Arizona's more controversial reforms to its jury system, including giving jurors preliminary jury instructions, allowing them to ask questions in writing, telling jurors that they can discuss the evidence before the close of trial in a civil case, giving judges discretion about the timing of instructions, and having the judge and jury engage in a dialogue if the jury has reached an impasse); William H. Carlile, *Arizona Jury Reforms Buck Legal Traditions*, Christian Sci. Monitor, Feb. 22, 1996, at 1 (reporting that Arizona has adopted 18 of the jury reform panel's 55 recommendations); Mansnerus, *supra* note 156, at A9 (summarizing Arizona's reforms in which it "will permit jurors to take notes, question witnesses through the judge and, in some cases, discuss evidence while a trial is in progress"); Junda Woo, *Arizona Panel Suggests Jury Reforms*, Wall St. J., Oct. 25, 1994, at B12 (describing the proposals of a reform panel, headed by Judge B. Michael Dann, which include: allowing jurors to take notes and ask questions, providing glossaries to jurors, having lawyers do mini-summations, passing out written summaries of lengthy depositions, urging lawyers and judges to simplify their language, providing counseling sessions after stressful trials, instructing jurors that they can discuss the evidence before the end of trial, and increasing the jurors' pay and the diversity of the venire).

166. See, e.g., Maura Dolan, *Key State Panel to Consider Major Changes for Trials*, L.A. Times, Oct. 31, 1995, at A1 ("A statewide task force of representatives from the judicial, executive and legislative branches will review issues of how well jurors understand the law and technical testimony, sequestration, and the care and treatment of jurors."); Mansnerus, *supra* note 156, at A9 (describing the California Judicial Council's plans "to examine a range of proposals, including limits on sequestration and on lawyers' statements to jurors in closing arguments").

167. See, e.g., James H. Andrews, *Finding Jurors Can Be a Trial*, Christian Sci. Monitor, Oct. 25, 1993, at 12 (describing the New Jersey Law Revision Commission's effort to expand the list from which prospective jurors are drawn as part of its "major reform of the state's jury laws").

168. As a result of Chief Judge Judith S. Kaye's commission of a state-court study of juries, see *The Jury Project*, *supra* note 153, New York has implemented numerous changes, including eliminating most exemptions, see *id.*, establishing an automated, 24-hour telephone line, see Martin Fox, *New Jury Service Rules Seen Off to Good Start*, N.Y. L.J., Jan. 31, 1996, at 1, an "ombuds service for prospective jurors," Mark Hansen, *Complaining Jurors Get a Hearing*, A.B.A.

their jury systems, and have used a variety of methods, from pilot studies to questionnaires, to learn about their jury system's shortcomings and to test possible reforms.

B. Public Acceptance of the Verdict
1. Building Confidence in the Verdict

Post-verdict disclosures by jurors may help convince the public of the legitimacy of the jury's verdict and encourage public acceptance of it. If members of the public are privy to jurors' accounts of the proceedings in the deliberation room, they might conclude that jurors are reasonable, thoughtful people trying to do the best job they can.¹⁶⁹ At the very least, they might conclude that the jurors did not reach their decision based upon bias or arbitrariness.¹⁷⁰ As a result, the public might be more willing to accept the verdict as legitimate, even if it is one with which many disagree. Without disclosure, members of the public are left with nothing but their own speculations as to how the jurors reached their verdict. As Part III reveals, jurors often express support for the verdict. This confidence may persuade dubious members of the public that the decision was a good one.¹⁷¹

J., Sept. 1995, at 24, requiring judges to be present at the beginning of voir dire, establishing mandatory pretrial settlement conferences, see James Barron, *Top New York State Judge Issues Rules to Ease Life on Civil Juries*, N.Y. Times, Nov. 2, 1995, at A1, delaying the selection of alternate jurors until the close of trial, and eliminating mandatory sequestration except in trials for violent crimes, see Hoffman, *supra* note 153, at 23. The study also recommended increasing jurors' compensation. See *id.* The legislature has now provided that jurors will receive \$40 per day, effective February 15, 1998. See S. 2880-A, 1995 Reg. Sess. (N.Y. 1995), 1995 N.Y. ALS 85.

169. See David Margolick, *Juries Lose a Lofty Aura in Glare of Instant Fame*, N.Y. Times, Oct. 22, 1993, at A18 ("The new openness about jury deliberations furthers public understanding and appreciation of the system."). Tony Mauro applies this same argument to why the Supreme Court Justices should not be shy about allowing cameras in the courtroom during oral argument, making their papers available to researchers as soon as they leave the Court, or allowing tapes of oral arguments to be available to the public. In such instances, he suggested, disclosure would teach the public about the serious way in which the Court goes about making its decisions, and in doing so, would imbue the public with much respect for the Court as an institution. He wrote:

The nearly universal verdict, after sifting through the [Justice Thurgood] Marshall papers, is that they ennobled the Court by making it clear to the public that each decision is preceded by careful, if not tortured, deliberation. The [Peter] Irons tapes, as well, are already instilling greater understanding and respect for the Court among high-school and law school students alike.

Tony Mauro, *The Court and the Cult of Secrecy*, in *A Year in the Life of the Supreme Court* 257, 278 (Rodney A. Smolla ed., 1995).

170. Michael Lind, a critic of the jury, subscribes to the view that jurors are, and have always been, motivated by their prejudices. He wrote: "Juries have always abused the institution, sacrificing impartial justice to political or ethnic goals." Michael Lind, *Jury Dismissed*, New Republic, Oct. 23, 1995, at 10.

171. The confidence that jurors express about their verdict, like the confidence with which jurors state their views during deliberations, can play a role in how others perceive what they are saying. Cf. Charlan Nemeth et al., *From the '50s to the '70s: Women in Jury Deliberations*, 39

Although jurors' stated support for the verdict can be reassuring, it should not be necessary. Jurors vote for the verdict behind closed doors and then go into open court, where they are individually polled about whether the vote submitted by the foreperson to the bailiff and read aloud in court represents their vote. Thus, by the time of the post-verdict interview, jurors have acknowledged both privately and publicly that the verdict accurately reflects their votes. It is unclear what more is gained by personal comments of support. Such expressions often sound self-serving; the juror is merely saying: "I think we did a good job and reached the right decision."¹⁷²

One disclosure that might bolster public confidence in the verdict would be when jurors say that race and gender did not influence the jury's deliberations. According to the interviews in Part III, jurors typically make such a statement.¹⁷³ In a society in which race unfortunately bears some correlation to the kind of justice one receives,¹⁷⁴ it is reassuring to hear from jurors that race has not affected their decision-making.¹⁷⁵ Yet, even this reassurance is problematic. First, there is the danger of the press raising race or gender in only select cases, when in fact race and gender are part of every case.¹⁷⁶ This encourages a simplistic view about the way

Sociometry 293, 303 (1976) (concluding that women and men in mock jury deliberations were equally "successful in persuading the group to their opinion," but that they were perceived "quite differently," with the men being viewed as "more influential, rational, strong, independent, confident, aggressive and as more of a leader than were females").

172. A National Law Journal poll of nearly 800 people who had served as jurors in civil and criminal cases nationwide in 1992 indicated that "jurors generally gave themselves high marks" and thought they "understood their mission and performed it well" and comprehended the judge's instructions. Joan M. Cheever & Joanne Naiman, *The View from the Jury Box*, Nat'l L.J., Feb. 22, 1993, at S2. Some jury researchers, however, such as Valerie Hans of the University of Delaware, found the jurors' self-confidence "a little disconcerting." *Id.*

173. See *supra* text accompanying notes 77-83.

174. See, e.g., Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 Yale L.J. 677, 695-97 (1995) (providing cases and statistics "as evidence of racism in criminal justice"); Gerald F. Uelman, *Perspectives on Justice: Why Some Juries Judge the System*, L.A. Times, Jan. 24, 1996, at B9 ("If statistics are the most accurate measure, blacks are resoundingly right about the criminal justice system. Study after study verifies that color makes a difference at every stage of a criminal case.").

175. This is also a message that judges have from time to time tried to convey. See, e.g., *Blank v. Sullivan & Cromwell*, 418 F. Supp. 1 (S.D.N.Y. 1975) (Motley, D.J.):

[I]f background or sex or race of each judge were, by definition, sufficient grounds for removal, no judge on this court could hear this case, or many others, by virtue of the fact that all of them were attorneys, of a sex, often with distinguished law firm or public service backgrounds.

Id. at 4; *Pennsylvania v. Local Union 542, Int'l Union of Operating Eng'rs*, 388 F. Supp. 155, 165-66, 181-82 (E.D. Pa. 1974) (Higginbotham, D.J.) (concluding that African-American judges should not disqualify themselves from presiding over cases involving racial issues just as white judges are not asked to disqualify themselves on matters of race relations). But see Butler, *supra* note 174, at 715-18 (recommending that African-American jurors nullify based on race when the criminal defendant is an African American who has been charged with a non-violent crime).

176. See, e.g., *Peters v. Kiff*, 407 U.S. 493, 503 (1972) (Marshall, J.) ("[T]he exclusion from

in which race, gender, and other characteristics shape the way we see the world. Second, the press seems to ask only those who are not white or male about race or gender, as if they are the only jurors who have a race or gender. Finally, jurors, when asked by the press whether race or gender influenced their deliberations, almost invariably defend their deliberations by denying that race or gender played any role. The result is that public confidence in juries may be enhanced, but at a cost: jurors and members of the public may take refuge in superficial reassurances rather than thinking more deeply about the ways in which gender and race may affect jury deliberations.

2. *Raising Doubts About the Verdict*

As the interviews in Part III make clear, jurors may vote for the verdict in good faith, but later may experience misgivings, or even regrets, about the verdict.¹⁷⁷ Such jurors may appreciate the opportunity the interview provides to express their doubts, even though the verdict is unlikely to be disturbed.¹⁷⁸ At the same time, a public expression of remorse by a juror may make it harder for the parties and public to accept the verdict. Because judges and lawyers are in the best position to know whether a juror's doubt calls for any re-examination of the verdict, perhaps jurors should make disclosures to them, rather than public confessions to the press, which are less likely to change the result and more likely to increase others' dissatisfaction with the process.

Although juror disclosures to the press can increase the opportunities for public questioning of the verdict, the threshold for disturbing a verdict is so high that the verdict is likely to remain final, even if the public has less confidence in it. Thus, it may be that juror disclosures to the press pose little actual threat to verdicts because the circumstances under which a verdict can be disturbed, such as extraneous influences in the jury room,¹⁷⁹ are extremely limited.¹⁸⁰ Another response is to conclude that

jury service of a substantial and identifiable class of citizens has a potential impact that is too subtle and too pervasive to admit of confinement to particular issues or particular cases.").

177. See *supra* text accompanying notes 113-18.

178. See *infra* notes 179-82 (describing Fed. R. Evid. 606(b) and the way it has been implemented).

179. Federal Rule of Evidence 606(b) provides in relevant part:

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.

Fed. R. Evid. 606(b).

180. Under Fed. R. Evid. 606(b), if a juror misunderstands the judge's instructions, or even feels personally coerced by a fellow juror, such circumstances would be insufficient to

perhaps we should make it easier to disturb a verdict so that juror disclosures can actually affect the verdict.¹⁸¹ If disclosures reveal problems with the deliberations, then perhaps the verdict should not be protected under such circumstances.

Under the present system, however, the real danger of jurors revealing their bias, ignorance, or irresponsibility to the press is the potential of shaking public confidence in the verdict, even though the verdict is unlikely to be disturbed.¹⁸² Questionable juror behaviors or

justify inquiry into the verdict. *See, e.g.,* *Scogin v. Century Fitness, Inc.*, 780 F.2d 1316, 1320 (8th Cir. 1985); *Jacobson v. Henderson*, 765 F.2d 12, 14-15 (2d Cir. 1985) (holding that "screaming, hysterical crying, fist banging, name calling, and . . . obscene language" alleged in the jury deliberation room is incompetent evidence); *United States v. Gerardi*, 586 F.2d 896, 898 (1st Cir. 1978) (noting that juror felt "persuaded"); *Stevens v. Cessna Aircraft Co.*, 634 F. Supp. 137, 143 (E.D. Pa.), *aff'd mem.*, 806 F.2d 254 (3d Cir. 1986). Matters of conscience or mental processes of a juror are supposed to remain inviolate and beyond court scrutiny. However, if a juror were approached by an interested third party, such a situation would fall within the exception for external influences and would be admissible to impeach the verdict. *See* Fed. R. Evid. 606(b).

181. *See, e.g.,* Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. Chi. L. Rev. 153, 227 (1989) (characterizing the Supreme Court's reasoning, in which it prefers secrecy over disclosure, as follows: "We could not have a jury system if we faced the truth about it. We want to have a jury system, and we will therefore hide the truth."); Benjamin M. Lawsky, Note, *Limitations on Attorney Postverdict Contact with Jurors: Protecting the Criminal Jury and its Verdict at the Expense of the Defendant*, 94 Colum. L. Rev. 1950, 1969 (1994) ("[F]ears that the integrity of the jury process might be undermined if jurors could more freely be interviewed are fueled by a desire for ignorance as opposed to a willingness for reform.").

182. Among published cases, it appears that federal courts strike the balance in favor of insulating juries from outside scrutiny; claims of jury misconduct based on extraneous influence rarely succeed. In a LEXIS search in the Genfed Library for the period from 1980 to 1996, of the 36 published federal cases alleging a claim of jury misconduct under Fed. R. Evid. 606(b), only 5 verdicts were reversed and remanded for new trials or evidentiary hearings. *See* *United States v. Swinton*, 75 F.3d 374, 380-82 (8th Cir. 1996) (remanding to the district court for an evidentiary hearing as to potential juror misconduct because one juror shared with others the extraneous information that the defendant had a criminal record); *Jeffries v. Blodgett*, 5 F.3d 1180, 1191 (9th Cir. 1993) (vacating and remanding to the district court for a factual determination as to the truth of affidavits of jurors who were allegedly informed by another juror about the defendant's prior conviction but who stated they had no recollection of such extraneous information); *Hard v. Burlington N. R.R.*, 812 F.2d 482, 485-86 (9th Cir. 1987) (holding that juror affidavits indicating possible juror dishonesty required an evidentiary hearing and that a juror's statements regarding railroad settlement practices was an extraneous influence that could be used to impeach the jury's verdict); *United States v. Perkins*, 748 F.2d 1519, 1533-34 (11th Cir. 1984) (concluding that a juror's withholding of information during voir dire and injecting extrinsic evidence into the deliberations required a new trial); *United States v. Greer*, 620 F.2d 1383, 1385 (10th Cir. 1980) (holding that the case must be retried because jurors obtained presumptively prejudicial information about sentencing). In the remaining 31 cases, the claims of juror misconduct under Fed. R. Evid. 606(b) were denied. *See* *Tanner v. United States*, 483 U.S. 107 (1987); *United States v. Caldwell*, 83 F.3d 954 (8th Cir. 1996); *United States v. Tines*, 70 F.3d 891 (6th Cir. 1995); *United States v. Blumeyer*, 62 F.3d 1013, 1018 (8th Cir. 1995) (reversing and reinstating jury's verdict and remanding for sentencing); *United States v. Ruggiero*, 56 F.3d 647 (5th Cir. 1995); *Dunn v. Denk*, 54 F.3d 248 (5th Cir. 1995), *rev'd en banc on other grounds*, 79 F.3d 401

attitudes, while not meeting the standard for juror misconduct necessitating a new trial, may nevertheless be sufficient to create public doubts about the reasonableness or integrity of a verdict. When jurors describe each other, as they did in the first trial of Erik Menendez, as "ignorant asses" and "empty[-]headed" women, they undermine public confidence, at least in that particular jury.¹⁸³ Moreover, the press may have an interest in highlighting the divisiveness of a deliberation (even if such divisiveness does not happen very often) because such stories are dramatic and are more likely to sell newspapers than accounts in which jurors report that everything proceeded smoothly. In addition, the press's presentation of the juror's comments may call into question the legitimacy of the verdict, not because of what the juror said, but because of the way the press either understood or presented that information.¹⁸⁴

A further difficulty with individual disavowals of the verdict is that the jury is supposed to render a collective judgment. Jurors have the opportunity, and in fact the obligation, to voice their individual views during deliberations. It is in that setting that jurors should air disagreements, offer arguments, and express misgivings. Ultimately, however, jurors are supposed to reach consensus, which is then announced as the jury's verdict. Individual jurors can adhere to their points of view, even if it means that consensus is not reached, and this is known as a hung jury. Jurors should not, however, be able to vote for the verdict and then

(1996); *Banghart v. Origoverken*, 49 F.3d 1302 (8th Cir. 1995); *United States v. Estrada*, 45 F.3d 1215 (8th Cir.), *vacated and remanded*, 116 S. Ct. 664 (1995); *United States v. Riggsby*, 45 F.3d 120 (6th Cir. 1995); *Bibbins v. Dalsheim*, 21 F.3d 13 (2d Cir. 1994); *United States v. Rugiero*, 20 F.3d 1387 (6th Cir. 1994); *United States v. Griffith*, 17 F.3d 865 (6th Cir. 1994); *United States v. Davis*, 15 F.3d 1393 (7th Cir. 1994); *United States v. Martinez-Moncivais*, 14 F.3d 1030 (5th Cir. 1994); *United States v. Straach*, 987 F.2d 232 (5th Cir. 1993); *United States v. Tallman*, 952 F.2d 164 (8th Cir. 1991); *United States v. Griek*, 920 F.2d 840 (11th Cir. 1991); *United States v. Rowe*, 906 F.2d 654 (11th Cir. 1990); *United States v. Marrero*, 904 F.2d 251 (5th Cir. 1990); *United States v. Voigt*, 877 F.2d 1465 (10th Cir. 1989); *United States v. Miller*, 806 F.2d 223 (10th Cir. 1986); *United States v. Shackelford*, 777 F.2d 1141 (6th Cir. 1985); *Martinez v. Food City, Inc.*, 658 F.2d 369 (5th Cir. Unit A Oct. 1981); *White v. Cooper*, 919 F. Supp. 1022 (E.D. Tex. 1996); *Bloom v. Vasquez*, 840 F. Supp. 1362 (C.D. Cal. 1993); *United States v. Infelise*, 813 F. Supp. 599, 605-06, 612-13 (N.D. Ill. 1993) (granting motion to vacate conviction on other grounds); *United States v. Abcasis*, 811 F. Supp. 828 (E.D.N.Y. 1992); *United States v. Caro-Quintero*, 769 F. Supp. 1564 (C.D. Cal. 1991); *United States v. Pook*, No. 87-274, 1988 U.S. Dist. LEXIS 3398 (E.D. Pa. Apr. 18, 1988); *Searcy v. Southern Ry.*, No. 86-G-2015-S, 1987 U.S. Dist. LEXIS 10081 (N.D. Ala. Nov. 2, 1987); *United States Football League v. National Football League*, 644 F. Supp. 1040 (S.D.N.Y. 1986), *aff'd*, 842 F.2d 1335 (2d Cir. 1988).

183. See *Female Jurors*, *supra* note 87, at A13.

184. See, e.g., *United States Football League*, 644 F. Supp. at 1044-45 (citing press interviews with four jurors after the verdict, plaintiff sought a new trial, claiming the verdict had been "publicly impeached" and that Rule 606(b) did not apply; however, the court rejected this argument, explaining that "the USFL is asking this Court to do nothing less than negate a rule of competency enacted by Congress on the fortuitous grounds that the harsh glare of publicity has descended upon a jury which has faithfully executed its civic obligation to discharge a verdict").

disavow it (assuming that their vote was not illegally coerced). At the point at which they render a verdict and acknowledge it in open court, their individual votes are transformed into a group decision of extraordinary consequence. Juries, like judges, wield enormous power.

Jurors also bear an awesome responsibility. They often comment on how difficult the act of judging is, and how much anguish it caused them. Such messages may be important for the public to hear. Jurors are able to convey that the job they are asked to perform is a difficult one, and one that they take seriously. However, comments that attest to the difficulty of judging can quickly become comments about doubts and misgivings concerning the verdict. Just as judges are circumspect about expressing their doubts in a case,¹⁸⁵ perhaps jurors should be similarly restrained. Although both judges and jurors may want to express the daunting nature of the task before them and the doubts that beset them, they may have a duty to appear more certain than they feel so that the parties and public will accept the decision.

C. Juror Accountability

Public disclosures by jurors after a verdict might also ensure that jurors are more attentive during the trial¹⁸⁶ and more responsible in the comments they make during deliberations. Jurors may take their role more seriously if they know that what they say may be revealed to the community at large. Although this knowledge may constrain what they say in the jury room,¹⁸⁷ it might also make them think more seriously about the views

185. One exception is Judge William Fernandez's unpublished opinion on the guardianship of Phillip Becker, Superior Court of Santa Clara, California, No. 101981 (1981), in *Family Matters: Readings on Family Lives and the Law* 288 (Martha Minow ed., 1993). In Judge Fernandez's opinion, in which he was called upon to determine who should be the guardians of Phillip Becker, a boy born with Down's Syndrome, he acknowledged the difficulty of the decision and the way it affected him: "Judges are human and not machines. . . . As I read his file and I could see that this little boy was beginning on his trip towards death, and that he realized it, I was stricken with anguish and parental grief. . . ." *Id.* at 298 n.9. Martha Minow, in selecting this opinion as her contribution to Texas Law Review's Favorite Case Symposium, described her choice thus:

Judges tend to hide their selves behind presumptions, precedents, and conceptions of their professional role. . . . [In this opinion,] [t]he judge exposed the decisional process as he experienced it: he implicated his own relationships to the child, to the two sets of parents, to his family and neighbors, and to the general public as well.

Martha Minow, *Guardianship of Phillip Becker*, 74 Tex. L. Rev. 1257, 1259-60 (1996).

186. Relatedly, the Jury Project in New York learned from its pilot study that jurors were more attentive during the trial when they did not know which of them would be selected as alternates. See Jan Hoffman, *Favorable Verdict for Jury Changes; Lawyers Are Unhappy. Other Signs Are Hopeful, Too*, N.Y. Times, Apr. 12, 1995, at B1 ("[J]udges say that when jurors are not classified as standbys, they feel more useful and have more of an incentive to pay attention to the trial."); Hoffman, *supra* note 153, at 23 ("One of the pilot project's most successful experiments was the selection of the entire panel without indicating which jurors would sit as alternates. . . . Comments from jurors indicated that their interest rose and that they felt their time had been better used because they were not preordained to be runners-up.").

187. See *infra* text accompanying notes 205-09 (describing Florida example of open search

they express because they will have to take responsibility for those views once they leave the jury room. For example, if jurors hold views they think others might regard as racist or sexist, they may decide not to articulate them for fear of subsequent community ostracism.¹⁸⁸ By contrast, the knowledge that deliberations may later be disclosed might embolden other jurors, who might be unwilling to reach a verdict unless they know they will have an opportunity to explain it to the public.¹⁸⁹ Yet another way in which post-verdict interviews may make jurors more accountable for their conduct during deliberations is if they know the press is likely to inquire about their jury's dynamics, including whether the dynamics were harmonious or acrimonious.¹⁹⁰ If jurors know they will be asked about their deliberations, then perhaps they will try to make them as harmonious as possible.

Post-verdict interviews may also lead jurors to behave more responsibly during deliberations if they know the press will be asking about race and gender dynamics. If the possibility that racist or sexist comments made during deliberations might be revealed afterward, then perhaps jurors would restrain their comments during deliberations so as to avoid public

and the way it constrained what people would say about the candidates).

188. However, if jurors receive reinforcement from each other for racist or sexist comments made during deliberations, then they are likely to feel free to engage in such comments, regardless of whether disclosure is permitted or curtailed. See, e.g., *Powell v. Allstate Ins. Co.*, 652 So. 2d 354, 358 (Fla. 1995) (holding that jury deliberations, if marked by the kind of racist remarks and jokes alleged to have been made by jurors in this case, would constitute a violation of "both the federal and state constitutions which ensure[] all litigants a fair and impartial jury and equal protection of the law").

189. One instance of a jury wanting an opportunity to explain its verdict, and using the press to do so, occurred in a 1980 trial in Los Angeles involving four police officers charged with the shooting of a gasoline attendant. The jury acquitted three of the officers and was split as to the fourth, but after rendering its verdict, the jury, "[i]n an unusual move," held its own press conference and "issued a statement signed by all jurors expressing their 'concerned dismay with the actions of the officers.'" Janice Fuhrman, *Concern on Case Voiced by Jurors*, L.A. Times, Aug. 13, 1980, § 1, at 24. Even though the jury had acquitted the officers because it felt the prosecution had not proven its case, it nonetheless wanted to register its condemnation of their conduct. The jury wrote:

We do not believe that, in the actions related to the shooting of Mr. Tatum, the police conducted themselves with due concern for the lives and welfare of the persons who could have been seriously injured Two women in a vehicle, almost in the line of fire, were disregarded by the officers.

We believe the Los Angeles Police Department should view with grave concern the actions of these officers. If the actions of these experienced officers are examples of the training they receive, then all citizens should be concerned.

Id.

In a more recent instance, a jury in Indiana exonerated R.J. Reynolds Tobacco Co. in a suit brought by the estate of Richard Rogers, but "took the nearly unprecedented step of holding a press conference to ensure that the verdict wouldn't be 'misconstrued as an endorsement of the tobacco companies' position on smoking and health.'" Mike France, *Who Got Smoked in Indianapolis?*, Bus. Wk., Sept. 9, 1996, at 44.

190. See *supra* text accompanying notes 71-76 (discussing jury dynamics during jury deliberations).

embarrassment later. If, however, jurors voted according to their prejudices, but were afraid to express their views for fear of embarrassment, then other jurors would not have the opportunity to confront them and to try to correct their mistaken notions.

D. Juror Candor
1. Candor in Voting

As noted in Part III, the press sometimes asked jurors about interim votes. If a jury sends a note to the judge signaling an impasse, the judge instructs the jury not to indicate in the note what the interim vote is.¹⁹¹ Only the jurors are privy to this information, unless they choose to reveal it afterward, which some jurors choose to do.¹⁹²

Although newspaper readers might find interim jury votes interesting, dissemination of such information to the public may be harmful to both jurors and parties to the suit. Some jurors assume that such information is to be kept within the walls of the jury room; thus, they might feel that a trust had been breached. The interim vote represents a juror's tentative view of the case; it might even be taken before any deliberations have begun. Thus, a juror should feel that he or she can express a tentative vote without that vote later being publicized. The hold-out juror is perhaps the one who is most harmed by such a disclosure. In general, hold-out jurors have a difficult time maintaining their position, particularly if there are only one or two such jurors.¹⁹³ If a juror knows that even the interim vote can be revealed, then he or she may go with the majority rather than risk standing alone. In at least one case, described in Part III, the hold-out juror was identified by name and asked to explain his initial position before he went along with the others.¹⁹⁴ If jurors know that such questioning awaits them at the end of the deliberations, then that only makes the task of espousing a minority position that much more difficult.

191. See *United States v. Amaya*, 509 F.2d 8, 11 (5th Cir. 1975) (citing with approval an earlier case that held that disclosure of the numerical division of a jury that has reached an impasse is a per se error); 1 Edward J. Devitt et al., *Federal Jury Practice and Instructions* § 5.23, at 163-64 (4th ed. 1992) ("[I]t is a cardinal rule that the court should not ask the jury to report their numerical division. This is ground for reversal.").

192. See *supra* text accompanying notes 125-31.

193. Despite Henry Fonda's ability to convince 11 other jurors to change their votes in the movie *12 Angry Men*, *supra* note 26, "outcomes like this one almost never occur in real life." Hans & Vidmar, *supra* note 8, at 110. Research has shown that the "[p]ressures to conform to the group are strong," and "[i]t is only when a minority juror has initial support, in the form of other jurors with similar views, that the probability that a juror will sway the majority or hang the jury improves." *Id.* Otherwise, the lone dissenters typically capitulate, and "[t]he majority almost always wins." Kassir & Wrightsman, *supra* note 14, at 182.

194. See McFadden, *supra* note 35, at A1 (interviewing hold-out juror Steven Berquist, who explained why he switched his interim vote of acquittal to a subsequent vote for conviction).

2. Candor in Comments

One of the more serious concerns raised by post-verdict interviews of jurors, which a study of the interviews themselves is unlikely to reveal, is to what extent such interviews, or the possibility of such interviews, will lead jurors to be less candid in their comments during deliberations. Those jurors who agree to be interviewed are the ones least likely to be affected. Rather, the cause for concern is more likely to be among those jurors who decline to talk to the press and who are chagrined to discover that their deliberations have been revealed, even to a limited extent, in the newspaper. Such disclosures may leave them with negative feelings about their jury experience and may adversely affect them should they be called to serve again. Juror interviews may also affect the behavior of newspaper readers who eventually serve as jurors and who know that facets of their deliberations might end up on the front page.

Empirical studies on the relationship between confidentiality and candor can shed some light on the effect that disclosures might have on jury deliberations.¹⁹⁵ For example, one recent study examined whether telephone or face-to-face interviews were more likely to elicit candid information about socially undesirable behavior, such as drug and alcohol use, and whether a guarantee of confidentiality had an effect on the information that participants were willing to divulge.¹⁹⁶ The study used the term "confidentiality" to reflect "respondents' beliefs that their responses will not be revealed to others and that they will not be identified at any time after the interview."¹⁹⁷ One of the study's conclusions was that confidentiality did have an effect, and that those who suspected that confidentiality might not be preserved were less forthcoming about providing sensitive information.¹⁹⁸ The study also concluded that face-to-face interviews were more likely to elicit sensitive information than were interviews conducted over the telephone.¹⁹⁹ One explanation was that respondents were more likely to believe a guarantee of confidentiality when it was conveyed in a face-to-face interview than when it was made over the telephone.²⁰⁰

195. See Judith Resnik, *Due Process: A Public Dimension*, 39 U. Fla. L. Rev. 405, 416 (1987) (noting that whether people speak more candidly in public or private is an "empirical question").

196. See William S. Aquilino, *Interview Mode Effects in Surveys of Drug and Alcohol Use*, 58 Pub. Opinion Q. 210 (1994).

197. *Id.* at 212.

198. See *id.* at 231. But see James H. Frey, *An Experiment with a Confidentiality Reminder in a Telephone Survey*, 50 Pub. Opinion Q. 267, 268-69 (1986) (noting that a reminder to respondents in the midst of a telephone interview that their answers would be kept confidential served to discourage their responses).

199. See Aquilino, *supra* note 196, at 234.

200. See *id.* at 231.

In another study designed to examine informed consent,²⁰¹ participants were given a survey that asked questions of both a sensitive and nonsensitive nature. The questions ranged from leisure activities to emotional well-being, mental health, drinking, marijuana use, sexual behavior, and income.²⁰² One of the findings of the study was that when participants were given an absolute assurance of confidentiality, they were more likely to respond to questions than those who were not guaranteed confidentiality or those who were guaranteed only qualified confidentiality.²⁰³ Another finding was that when participants had an assurance of absolute confidentiality, they were more likely to answer the sensitive questions than were those without such an assurance.²⁰⁴

A case study involving the selection of a new president of the University of Florida suggested that the more public a deliberative process is, the less inclined the decisionmakers are to be candid.²⁰⁵ Researchers concluded that a confidential search leads to franker discussions of the candidates, their qualifications, and the goals of the search than does an "open" search.²⁰⁶ The University of Florida, a public university, conducted a search in compliance with the state's "sunshine laws," which require that all aspects of the search, including applications and nominations, letters of reference, resumés, what was said about the candidates in committee meetings or interviews, committee deliberations, and committee votes, be open to the press and public. One result was that members of the search committee were reluctant to evaluate candidates honestly; much was left unspoken.²⁰⁷ Similarly, the presence of the press during interviews limited discussion: "Committee members were uncomfortable asking direct personal questions that they might have asked in confidential settings."²⁰⁸ An interim vote, taken so that committee members could have a sense of

201. See Eleanor Singer, *Informed Consent: Consequences for Response Rate and Response Quality in Social Surveys*, 43 Am. Soc. Rev. 144 (1978). The study was designed to examine aspects of informed consent, including whether information should be given to respondents ahead of time about the content of the interview; whether the promise of confidentiality affected the quality and quantity of responses; and whether a signature to document consent, and the point at which it was requested, affected how people responded to questions. See *id.* at 146.

202. See *id.* at 147.

203. Those who were guaranteed absolute confidentiality were told: "Of course, your answers will remain completely confidential"; those who were given qualified immunity were told: "Of course, we will do our best to protect the confidentiality of your answers, except as required by law"; the remainder were told nothing at all about the confidentiality of their replies. *Id.* at 146.

204. See *id.* at 159.

205. See Judith Block McLaughlin & David Riesman, *The Shady Side of Sunshine*, Change, Jan./Feb. 1989, at 45. The chair of the Presidential Search Advisory Committee, Dean Jeffrey S. Lehman, expressed a similar view about the effects of openness on candor in the selection of a new president for the University of Michigan. See Jeffrey S. Lehman, *University's Presidential Search Process Prevented Candid Exchange*, Law Quadrangle Notes, Spring 1997, at 30.

206. See McLaughlin & Riesman, *supra* note 205, at 57.

207. See *id.* at 48.

208. *Id.* at 49.

how each viewed the candidates, was transformed into a ranking, replete with a frontrunner, when reported by the press. In interviews with committee members after the search had been completed, almost all committee members agreed that public disclosure "had inhibited open and frank discussion of vital issues."²⁰⁹

Admittedly, an open decision-making process, as was used in the search for a university president, is not analogous to interviews of jurors after a decision has been made. After all, jurors still deliberate in private, even if aspects of their deliberations are later made public. But the fear of public exposure, and concomitantly of public criticism or ridicule,²¹⁰ which might have motivated those involved in the search for a university president to mask their real views, could have a similar effect on jurors.

One implication of such studies for the jury is that jurors may be more likely to be forthcoming during deliberations when they know that what they say will not be disclosed at a future date. One reason candor is important for jury deliberations is that jurors might be more willing to offer views with which they believe their friends or neighbors disagree, to cast an interim vote in favor of an unpopular criminal defendant, or to offer comments drawn from personal experience if they know that such information will not be publicized later. Another reason is that the group decision-making process is premised on the idea that various individuals will remember different pieces of information, thus contributing different points of view for group consideration.²¹¹ From this diverse mix of recollections and viewpoints the group can arrive at the best answer, which in the case of the jury, is supposed to be an accurate answer. To the extent that jurors engage in self-censoring during deliberations for fear of public censure later, the jury will miss out on different viewpoints and arguments for its consideration. Ideally, jury deliberations should not be a total free-for-all, in which jurors say anything that occurs to them, including

209. *Id.* at 54 (discussing survey by J. Wayne Reitz).

210. Randolph May, who chaired the Administrative Conference of the United States' Special Committee to Review the Government in the Sunshine Act, observed that "human nature being what it is," the Act's effect on agency meetings has been to "inhibit debate." Randolph J. May, *Taming the Sunshine Act*, Legal Times, Feb. 5, 1996, at 24.

211. See Reid Hastie et al., *Inside the Jury* 236 (1983) ("The group memory advantage over the typical or even the exceptional individual is one of the major determinants of the superiority of the jury as a legal decision mechanism."); *id.* at 81 (describing the impressive collective memory of a jury and noting that jurors remember 90% of the evidence and 80% of the judge's instructions); Levine, *supra* note 28, at 182 ("Remembering what was said is no small part of competent fact finding, and the collective memory of twelve jurors (over even six) is likely to be better than that of one individual."); Harry Kalven, Jr., *The Dignity of the Civil Jury*, 50 Va. L. Rev. 1055, 1067 (1964) ("Different jurors remember, and make available to all, different items of the trial so that the jury as a group remembers far more than most of its members could as individuals."); Daniel Goleman, *Jurors Hear Evidence and Turn It into Stories*, N.Y. Times, May 12, 1992, at C1 ("In a study of more than 700 jurors . . . the average rate at which individual jurors remembered evidence from a trial was 60 percent; for judge's instructions the average was 44 percent. But for the jury as a whole, the memory rates were far better: 93 percent for facts and 82 percent for instructions.").

thoughts that would be offensive to those with whom they are deliberating. Yet, at the other end of the spectrum, if jurors feel inhibited because what they say might be revealed to the public later on, then the parties lose some of the benefit of group deliberation that a jury is supposed to provide.

The more high-profile a case, the more jurors may worry about the confidentiality of what they say in the jury room and the publicity to which they may be subjected afterward.²¹² One jury scholar, Professor Valerie Hans, has noted that public dissatisfaction with juries may stem from a "very strong" public belief that "courts are not doing enough to punish wrongdoers."²¹³ Recent cases that incensed the public, such as "Rodney King, Bobbitt, Menendez, [and] Simpson" were all "prodefendant decisions," and in her view, would not have been as controversial "if these juries were convicting."²¹⁴ To withstand this public pressure for convictions, jurors might need the protection of knowing that their individual comments and interim votes will not be made public, but only that their verdict as a jury will be announced. Although the jurors in the cases mentioned above withstood such public pressure, the effort becomes greater as public skepticism toward the jury mounts.²¹⁵

Of course, it could be that the possibility of public disclosure does not make jurors feel restrained or self-conscious about what they choose to reveal during deliberations. First, they might not be aware of such interviews, so their behavior would not be altered during deliberations. They might only become aware of press interviews after-the-fact, which would, at most, lead them to hold a negative view of their jury experience (if they had assumed that deliberations were confidential and then were disappointed to discover that they were not) or to be wary during deliberations the next time they serve on a jury. Second, the possibility of such interviews still might not change the views they express or the votes they cast. Third, the threat of subsequent disclosure might exert a positive effect, causing people to resist making offensive or bigoted remarks. Admittedly, these are possibilities, but so is the scenario, supported by some empirical studies, that disclosure may affect candor during deliberations.

212. See, e.g., Cheever & Naiman, *supra* note 172, at S2 ("Jurors in high-profile cases said they faced twice the amount of stress as their low-profile colleagues (62 percent to 30 percent), and they were exposed to publicity.").

213. Mansnerus, *supra* note 156, at A9.

214. *Id.*; see also Curriden, *supra* note 164, at 72 ("When people are acquitted in criminal cases, there is a tendency to say that the system is broke and needs fixing.") (quoting Victor "Tory" Johnson, vice president of the National District Attorneys Association); Christopher Johns, *Jury Overhaul Needed, Now More Than Ever*, Ariz. Republic, Apr. 12, 1995, at B5 ("Sensational cases seem to cause most of the public's frustration with the jury system . . .").

215. See, e.g., Geoffrey A. Campbell, *In the Shoes of the Wrongly Accused*, A.B.A. J., June 1995, at 32 (noting that even though many still have faith in the jury, "a growing chorus of criticism of juries, arising primarily from high-profile cases, is undermining confidence" in the jury) (summarizing Beth Bonora of the National Jury Project/West in Oakland, California); Mansnerus, *supra* note 156, at A9 ("Recent polls seem to reflect [public] doubt.").

E. Juror Privacy

The interviews in Part III reveal that jurors sometimes feel compelled to talk to the press about their jury experience. Jurors did not always think they had a choice; at least a quarter of the jurors who were interviewed believed that they could not avoid the press. This figure is probably an underestimation because this portrayal of the press is unflattering, and therefore, an issue that the press might choose to ignore or under-report. Jurors spoke of trying to escape the press by seeking protection of federal marshals, calling the police, fleeing their apartments, or leaving the country.²¹⁶

Such hounding of jurors by the press might lead jurors to characterize their jury duty as a negative experience, and one that they would not wish to repeat. Jurors are ordinary citizens asked to perform the difficult job of judging fellow citizens, without any particular training or expertise. They are summoned from the community and will return to that community. Confidentiality, both during the deliberations and afterward, protects a juror's privacy. After the jury renders a verdict, each juror should be able to resume his or her private life. To the extent that individual comments or votes are subsequently revealed, former jurors will have difficulty shedding their roles as jurors and re-entering the community. Such disclosures may "leave jurors feeling even more pressured, harassed, and exposed than the process of making life-and-death decisions already warrants."²¹⁷

Cases that are emotionally draining or of long duration pose particular problems for jurors. Jurors who have experienced jury duty as difficult and who eagerly await a return to normalcy, suddenly find themselves besieged by journalists and bereft of privacy. Other jurors, however, may feel a need or simply be willing to talk about their experience, particularly in difficult cases, and interviews with the press provide an outlet.²¹⁸

Even if some jurors have decided not to talk to the press, the press's perseverance notwithstanding, others may have reached the opposite conclusion. Furthermore, those jurors who talk to the press often use the exchange as an opportunity to portray themselves in the best possible light. This, in turn, often provokes other jurors, who would not have otherwise spoken to the press, to go public in order to set the record straight. Even

216. See *supra* notes 140-49 and accompanying text (discussing jurors' attempts to escape the press).

217. Margolick, *supra* note 169, at A18.

218. One example is the McMartin preschool molestation trial, "the longest and most expensive criminal trial in history." Beverly Beyette, *A Juror's Trials*, L.A. Times, Feb. 1, 1990, at E1. The cost to one juror, Mark Bassett, was loss of his job and grappling with "extremely emotional issues" and "so much stress"; yet, even as he tried "to repair the damage and get life back to normal," he agreed to be interviewed by the press and ruminate on his jury experience. *Id.*

juries that make pacts to remain silent sometimes find that such agreements are breached by jurors who have been offered attention or momentary fame and have succumbed to these temptations.²¹⁹

Perhaps the extreme case is the juror who reveals what was said and done during deliberations to gain fame and fortune. Such jurors, instead of trying to resume their lives as private citizens, try to capitalize on their role as former jurors. The danger is not simply that the juror transforms the civic duty of jury service into a quest for fame and fortune, but rather, that the prospect of such benefits might alter that juror's, as well as other jurors', behavior at the time of service.²²⁰ For example, some jurors on the O.J. Simpson criminal jury were planning to write books about their jury experiences, even though the end of the trial was nowhere in sight.²²¹ One juror's choice of title suggested that she had already formed a view about the case,²²² Judge Ito's daily admonitions notwithstanding.²²³ If these jurors had not been dismissed from the jury but instead their actions were only subsequently revealed, there would have been a legitimate claim of jury misconduct.

Although the press may be persistent, jurors can choose not to disclose certain information. Some jurors declined to reveal their names or to answer questions that pertained to other jurors' views, and some jurors chose not to give interviews at all.²²⁴ Such instances suggest that jurors do retain some control over the interviews and are able to exercise discretion

219. This point was demonstrated by some of the interviews in Part III, *see supra* text accompanying notes 46-47, and dramatized by a recent play by Joe Sutton entitled *Voir Dire*, which was performed at the Old Globe Theatre's Cassius Carter Center State, in the Simon Edison Centre for the Performing Arts, Balboa Park, San Diego (Mar. 2 - Apr. 7, 1996).

220. *See* Ted Gest, *A Profitable Game: Judge and Tell. (Some Jury Members Are Cashing in on the Celebrated Cases They Hear)*, U.S. News & World Rep., Aug. 17, 1987, at 52 ("If juror writing becomes common . . . 'jurors may become afraid to speak their minds' while deciding a verdict—for fear that a colleague later will ridicule them in print.") (quoting Howard Varinsky, a jury selection expert in Oakland, California).

221. *See, e.g.*, Richard Price, *Simpson Jury May Lose Another of its Members*, L.A. Times, May 30, 1995, at 7A (noting the ouster of juror Francine Florio-Bunten for negotiating a book deal); Henry Weinstein & Tim Rutten, *The O.J. Simpson Murder Trial*, L.A. Times, July 14, 1995, at A31 ("One of the jurors [Tracy Kennedy] bumped from the O.J. Simpson trial because Superior Court Judge Lance A. Ito suspected he was writing a book was discovered to be keeping a list of juror names . . .").

222. *See, e.g.*, Price, *supra* note 221, at 7A (recounting that juror Florio-Bunten was ousted for "negotiating a deal for a book titled, 'Standing Alone for Nicole'"); Tim Rutten et al., *Ito Rejects Introduction of Simpson's Statement*, L.A. Times, May 27, 1995, at A1 (describing Francine Florio-Bunten's husband's efforts to arrange a book deal for his wife, who "intended to write a book about her experiences, entitled 'Standing Alone for Nicole'").

223. Judge Lance Ito's admonition to the jury at the close of each trial session was as follows: "Please remember all my admonitions to you; do not discuss the case amongst yourselves, form any opinions about the case, conduct any deliberations until the matter has been submitted to you, do not allow anybody to communicate with you with regard to the case." 231 Reporter's Transcript of Proceedings, Wed., Sept. 27, 1995, at 47,792, *People v. Simpson* (Cal. Super. Ct. 1995) (No. BA097211).

224. *See supra* text accompanying notes 132-38 (describing what jurors decline to disclose).

about what they reveal.

V. DRAWING LESSONS FROM OTHER CONTEXTS

The norms and rules governing disclosure of other decision-making bodies' deliberations may provide lessons that can be applied to the petit jury. For the most part, these other bodies protect their deliberations from subsequent disclosure even after a decision has been reached, albeit in different ways and for different reasons. The Supreme Court ensures the confidentiality of its deliberations through norms; the executive branch can ensure confidentiality by invoking privilege; and the grand jury is required to maintain secrecy through federal rules, backed by statutes.

A. The Supreme Court

In some ways, the Supreme Court is like a jury. The analogy is an imperfect one in that the Justices are professionals who constitute a permanent body,²²⁵ but certain aspects of the Supreme Court's decision-making resemble those of a jury. During the Term, the Justices meet at a weekly Conference to vote on which petitions to grant.²²⁶ During weeks of oral argument, the Justices have an additional Conference to discuss cases that have been argued and to vote on them. The Conference is attended only by the Justices,²²⁷ and a member of the Supreme Court police stands guard outside the door to the Conference Room, just as a bailiff or deputy clerk does outside the jury room. As is the case with jury deliberations,²²⁸ nobody else is allowed to enter the deliberation room or to overhear the Justices' deliberations. The Chief Justice presides over the Conference, much like the foreperson of a jury. The Justices go around the table, giving their reasons for how the case should be decided; similarly, they go around the table, indicating their initial vote.²²⁹ The reasons they give

225. Another significant difference is that the Supreme Court gives reasons for its decision in its opinions, whereas a jury does not give such explanation. *See infra* text accompanying notes 361-67 (discussing whether juries should write opinions).

226. At the end of the summer recess, there is a Conference at which the Justices vote on all petitions for writs of certiorari that have been filed during the summer months. This Conference, like all the other Conferences, is a "secret session," and the decisions that the Justices make about which petitions to hear are "just as significant in shaping the law" as the votes they cast in the decisions themselves. David Savage, *Supreme Court Gathers in Secret Sessions to Choose Its Battles*, L.A. Times, Sept. 26, 1995, at A5. This is so because the case the Justices choose may influence how the case is finally decided.

227.

The conference has a record for secrecy probably unrivaled in official Washington. So far as is known, no one not a justice of the Supreme Court has ever been allowed into the conference room during one of the sessions. No secretaries, no law clerks, no librarians, no messengers. If a message arrives, the junior justice—the one most recently appointed—goes to the door to get it.

Anthony Lewis, *Gideon's Trumpet* 39 (1964).

228. *See, e.g., United States v. Olano*, 507 U.S. 725, 734-35 (1993) (requiring a party to show that jury deliberations were overheard and that prejudice resulted).

229. *See, e.g., Lewis, supra* note 227, at 40-41; Milton C. Handler, *Clerking for Justice Harlan*

and the votes they cast are tentative and may subsequently be changed. What is said during the Conference is heard only by the Justices, though their law clerks might be given a summary later. The information about a case is closely guarded. Neither Justices²³⁰ nor their law clerks²³¹ speak about pending cases to anyone. There is even a separate dining room for the law clerks so that members of the press and the public do not overhear the clerks' lunchtime discussion of the cases.

Even after a decision has been rendered, neither Justices nor law clerks speak to the press about the opinion;²³² the opinion is supposed to stand on its own.²³³ The initial and tentative thoughts of the Justices are not revealed, even in the final transcript of the oral argument that is on file at the Supreme Court. The Justices are not identified by name when they question lawyers during oral argument; rather, the Court speaks as a single body, and thus, all that appears on this transcript to indicate a

Fiske Stone, 1995 J. Sup. Ct. Hist. 113, 115 ("The procedure at the conference was for the Chief Justice to present a reasoned statement of every item on the agenda, followed by each Justice stating his views briefly in the order of seniority. The votes were taken in the reverse order, the junior Justice voting first."). *But see* Bob Woodward & Scott Armstrong, *The Brethren* 417 (1979) ("[T]he formal conference procedure was to speak in order from senior to junior, but then to vote in the opposite order, junior to senior. . . . That *had* been the tradition. But the formality had been discarded years before.").

230. *See* Model Code of Judicial Conduct, Canon 3(9) (1990). The Model Code states:

A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall require similar abstention on the part of court personnel

Id.

231. *See* Code of Conduct for Law Clerks of the Supreme Court of the United States, Canon 3(E), (F) (1989) ("If friends, representatives of news media, or others inquire concerning any pending proceeding, the clerk should refer them to the official record in the office of the Clerk of the Supreme Court."); *see also* Richard Davis, *Decisions and Images* 122 (1994) ("[C]lerks are warned about the '20-second rule.' This rule states that if a clerk is caught speaking to a reporter, he or she will be fired within 20 seconds.") (footnote omitted).

232. *But see* Davis, *supra* note 231, at 40-42, 113 (providing exceptions in which Justices spoke to the press).

233. *See id.* at 114. Davis, however, argued not only that the Justices' inaccessibility helps to focus the press's attention on the opinions, but also that the Justices go so far as to time the release of their opinions in such a way as to influence media coverage. *See id.* at 115, 130-31. From my experience as a law clerk at the Court (October Terms 1990, 1991), I think his second claim is without support. He has overlooked some of the technological constraints that limit the Justices and undermine his manipulation theory. For example, before the Court moved to personal computers in each Justice's Chambers, the Court had a mainframe and a print shop that was responsible for the final printing of the opinion. The Justices could not control or predict the speed with which the print shop worked. Before the age of the computer, when opinions were typeset, the Justices certainly did not have control over when opinions could be handed down. In fact, the date on which the Court could adjourn for the summer was not set in advance by the Justices, but rather depended upon when the typesetters could complete their work. Moreover, there are other pressures, such as keeping up with the workload, that encourage Justices to hand down their opinions as soon as possible.

question from the Court is "Question." Years later, biographers might interview Justices or law clerks about opinions and try to glean additional information.²³⁴ They may even explore a Justice's papers that have been deposited in the Library of Congress or National Archives, but typically the papers are not made available until years after a case has been decided—when the Justices who sat at the time of the decision are no longer on the bench.²³⁵ As one writer has noted:

[S]ome of [the Court's] secrets have been disclosed by the publication of justices' papers. Most thoughtful persons have concluded that there should be no such publication at least until

234. See, e.g., John C. Jeffries, Justice Lewis F. Powell, Jr. (1994); Carl Rowan, Thurgood Marshall (1992); Woodward & Armstrong, *supra* note 229. See generally Symposium, *National Conference on Judicial Biography*, 70 N.Y.U. L. Rev. 485 (1995) (exploring judicial biography as a multidisciplinary genre); Alexander Wohl, *Read All About Them*, A.B.A. J., May 1995, at 46 (noting that judicial biographies are becoming more prevalent).

235. One exception was Justice Thurgood Marshall, whose papers were made available at the Library of Congress shortly after his death. Past practice, according to lawyer Karen Hastie Williams, was that the Justices' papers were to be kept "private until at least 10 years after their death." David Johnston, *Marshall Papers Reveal Court Behind the Scenes*, N.Y. Times, May 24, 1993, at A10. Another understanding was that papers would be made available to the public only after the last Justice with whom that Justice had sat dies. See Tony Mauro, *Hugs and Wine: Life Beyond the Court*, Legal Times, May 6, 1996, at 10. Justice Marshall's family said that the Justice "had never intended to have his papers released so soon after his death." Neil A. Lewis, *Librarian Vows to Continue Public Access to Marshall's Papers*, N.Y. Times, May 27, 1993, at A24. Chief Justice Rehnquist viewed the immediate availability of the Marshall papers as a breach of the Justices' confidential deliberations. See, e.g., . . . and *Rehnquist's Protest*, N.Y. Times, May 26, 1993, at D21 (reprinting Chief Justice Rehnquist's letter to James H. Billington, Librarian of Congress, in which he criticizes the library for releasing the papers so soon, "[g]iven the Court's long tradition of confidentiality in its deliberations"); Joan Biskupic & Benjamin Weiser, *Chief Justice Castigates Library*, Wash. Post, May 26, 1993, at A1 ("Given the Court's long tradition of confidentiality in its deliberations . . . we believe this failure to consult reflects bad judgment on the part of the Library.") (quoting Chief Justice Rehnquist). According to one writer, "[t]he release of a Justice's private papers to the general public so soon after his retirement is rare in modern Supreme Court history because it reveals much about colleagues still on the Court and about issues that are still hotly debated." Neil A. Lewis, *Rare Glimpses of Judicial Chess and Poker*, N.Y. Times, May 25, 1993, at A1.

Another breach leading to public exposure, and about which the Court voiced its disapproval, was the sale of tapes and transcripts of select Supreme Court oral arguments, entitled *May It Please The Court* (Peter Irons & Stephanie Guitton eds., Earl Warren Bill of Rights Project of the University of California, San Diego and the Northwest Public Affairs Network 1993). See Joan Biskupic, *Marketer of Court Tapes Risks Supreme Censure*, Wash. Post, Aug. 30, 1993, at A6 ("For the second time this year, the Supreme Court is agitated over the release of court materials that allow the public a rare glimpse into an institution wedded to secrecy and decorum."). Peter Irons had signed an agreement that limited his use of the tapes to his private work. See *id.* Since this incident, the Court has made all tapes of oral arguments available to the public. See Linda Greenhouse, *Supreme Court Eases Restrictions on Use of Tapes of Its Arguments*, N.Y. Times, Nov. 3, 1993, at A22 (reporting that the National Archives now makes copies of all Supreme Court oral arguments available to the public). Perhaps in response, the Court has endorsed a project undertaken by the Supreme Court Historical Society in which 300 oral arguments will be put on CD and made available to law students and practitioners alike. See Tony Mauro, *The Supremes' Greatest Hits, on CD*, Legal Times, Oct. 28, 1996, at 8.

all participants in the events described have left the Court, lest freedom of discussion at conference be inhibited by the fear of premature disclosure.²³⁶

Why does the Supreme Court guard its deliberations and why are there norms against subsequent disclosure to the press? One explanation is that such practices allow for candid discussion.²³⁷ Justices can talk about the cases among themselves, knowing that their tentative ideas about a case, no matter how far-fetched, will go no further than their colleagues or their law clerks. They can test out their views, and change them, as they see the merit of different arguments. Discussion provides a means by which an argument's strengths and weaknesses can be explored. Discussion that could be revealed to the public would lead one to be circumspect about one's comments and tentative about expressing one's views.²³⁸ Disclosure also makes it harder to change one's position without losing face.

A second explanation for the Court's practice of not speaking to the press is that it protects the Justices from outside pressures.²³⁹ The Court speaks only through its opinion. Even though individual Justices may write opinions in their own name and announce them from the bench, the opinion is the only accepted channel for disclosure. This formal means of communication allows the Court to frame its arguments in terms of legal precedents and to appear removed from political arguments of the day. Thus, the Court is better able to maintain its independence, which in turn, contributes to the public's confidence in the institution.²⁴⁰ The Justices' aloofness from the press, even after a decision is announced, leaves journalists with only the opinions on which to focus. If jurors took a similar

236. Lewis, *supra* note 227, at 41.

237.

Genuine intellectual exchange among men of strong views is not always easy at best; it would be the more difficult if each justice had to fear public recriminations about some argument he advanced in the heat of debate. The justices must be free to argue to the hilt, without fear of reading in some popular journal that 'Justice X wanted another Munich.'

Id. at 39. Although Anthony Lewis's language is now dated (both men and women are Justices) his point still has validity today.

238. Tony Mauro, a journalist who covers the Supreme Court for *The Legal Times*, wrote that the Justices believe that "[r]eading about their deliberative process in the newspapers would have a chilling effect on their candor," but he questioned whether it would really have such an effect. Mauro, *supra* note 169, at 268.

239. Justices might still have confidential relations with the press, but they are the exception rather than the rule. Justice Louis Brandeis had a friendship with Felix Frankfurter, who was an essayist for *The New Republic* before he became a Supreme Court Justice, and Justice Thomas has as confidant Armstrong Williams, a syndicated columnist and talk-show host, though the latter has raised questions among journalists and Thomas supporters alike. See Tony Mauro, *Speaking Out for Thomas*, *Legal Times*, June 17, 1996, at 7 ("Williams' role has long caused discomfort for some journalists and even some friends of Thomas who question whether he in fact accurately portrays Thomas' views or serves the justice's interests well.").

240. See Robert E. Drechsel, *Playing Hard To Get*, 78 *Judicature* 316 (1995) (reviewing Davis, *supra* note 231).

stance toward the press, journalists would have only the verdict to consider.

A third explanation for the Court's practice of not commenting on its deliberations is that it preserves the Court's mystique. This is not mystique simply for mystique's sake (though there may be some of that as well), but is related to the Court's desire to appear above political manipulation, which, in turn, is meant to inspire public confidence in its decisions.²⁴¹ There are many ways in which the Court preserves its mystique, from the way the Justices' Chambers are cordoned off from public view²⁴² to the rituals of the courtroom where the Justices, attired in long black robes, enter from behind heavy curtains, engage the lawyers in a series of questions and hypotheticals within a strict time period, and then depart just as they entered. The Court cultivates its mystique so that it is seen as an institution bound by tradition and removed from the political fray.

Some of the reasons that the Court does not comment to the press after a decision may apply equally to juries. Both need to engage in candid deliberation; both need to be seen as free from political manipulation. One difference,²⁴³ though, is that while the Court seeks to preserve its mystique of isolation, in part because the writing of opinions requires solitude and in part because the judiciary needs to be seen as an independent branch of government, it is unclear that the same goal exists for juries. After all, a jury is made up of laypersons, drawn from the citizenry, who are supposed to bring to their group decision-making the commonsense of the community. On the one hand, jurors are ordinary citizens and their legitimacy derives from that status; they do not have to distance themselves from others or lay claim to any special knowledge, as do Justices. On the other hand, jurors are playing a role, if only for one case. During that one case, however, jurors represent an arm of the judiciary, and perhaps for that reason, should assume a stance toward the press similar to that of the Justices.

241. "Justices have written publicly, and said in private conversations, that the aura of secrecy is an important factor in maintaining the Court's authority in the eyes of the country." Neil A. Lewis, *Chief Justice Assails Library on Release of Marshall Papers*, N.Y. Times, May 26, 1993, at A1; see also Linda Greenhouse, *Justices Guard Mystique*, N.Y. Times, May 27, 1993, at A1 (noting "a belief among judges that to strip any court of its mystique is also inevitably to strip it of some of its authority and legitimacy").

242. See Tony Mauro, *Exploring a Building's Mystique*, Legal Times, June 3, 1996, at 10 (reviewing a new book, entitled *The Supreme Court of the United States* (1996), in which photographer Fred J. Maroon "was given unprecedented access to the chambers of the justices to take pictures that offer an almost anthropological glimpse into the work habits and aesthetic sensibilities of individual justices").

243. There are, of course, other significant differences between the Court and a jury. The Court, for example, may not want to comment on a decision because it may face related issues in the future, whereas a jury only decides one case and is then disbanded. The Court also may not comment on a decision because its decisions govern other cases, and it is left to the lower courts to figure out how the Court's decision applies to new cases.

B. Executive Privilege

The other branches of government, even though they are elected by the populace and feel under pressure to reassure voters that they represent voters' views, nevertheless may take refuge behind certain exceptions that permit confidentiality and eschew disclosure. For example, members of the executive branch can invoke the doctrine of executive privilege to shield certain documents from legislative or judicial scrutiny. The rationale behind such a doctrine is that in certain instances disclosure would impair the performance of the executive's constitutional responsibilities or would interfere with its functioning as an independent branch of government.²⁴⁴ Underlying these concerns is a view that without executive privilege, members of the executive would be unwilling to engage in candid discussions and would be guarded in what they say for fear of future reprisals. As a result, decision-makers in the executive branch would not have available to them the best information possible. The Supreme Court acknowledged this difficulty in *United States v. Nixon*: "Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision-making process."²⁴⁵

The executive branch has invoked this privilege when information falls into one of three categories:²⁴⁶ (1) information pertaining to military or diplomatic secrets; (2) the informer's privilege "to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law";²⁴⁷ and (3) "intra-governmental documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated."²⁴⁸ It is this third category, which includes deliberations, that bears the closest resemblance to the task performed by the jury. If the reasoning behind the executive privilege were applied to jury deliberations, then jurors would not disclose their deliberations after a verdict so that all jurors would feel they could speak

244. See *United States v. Nixon*, 418 U.S. 683, 708, 713 (1974) (acknowledging the importance of confidentiality in executive decision-making, but rejecting the President's claim of absolute executive privilege in response to a subpoena duces tecum).

245. *Id.* at 705. As a judge in *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, observed: "[T]he privilege subserves a preponderating policy of frank expression and discussion among those upon whom rests the responsibility for making the determinations that enable government to operate . . ." 40 F.R.D. 318, 324 (D.D.C. 1966) (footnote omitted) (upholding the government's claim of privilege), *aff'd sub nom. V.E.B. Carl Zeiss, Jena v. Clark*, 384 F.2d 979 (D.C. Cir. 1967) (per curiam).

246. See Laurence Tribe, *American Constitutional Law* § 4-14 (1978) (discussing three grounds upon which executive privilege has been invoked).

247. *Roviaro v. United States*, 353 U.S. 53, 59 (1957); *id.* at 65 (holding that under the circumstances of the case, "the trial court committed prejudicial error in permitting the government to withhold the identity of its undercover employee in the face of repeated demands by the accused for his disclosure").

248. *Carl Zeiss Stiftung*, 40 F.R.D. at 324.

candidly during decision-making without risk of public embarrassment later.

Of course, when the executive branch invokes its executive privilege it opens itself to question or attack about what exactly it is seeking to conceal, and there is always potential for abuse of the privilege. A recent example is the background reports that the Clinton Administration requested and obtained from the F.B.I., even though many of the people for whom it sought background files were prominent Republicans no longer serving in the White House.²⁴⁹ The Clinton Administration sought to protect these files, which were included in material related to the 1993 White House travel office firings, by claiming executive privilege;²⁵⁰ Congress responded by threatening a contempt-of-Congress vote.²⁵¹ To the extent that juries decline to disclose details about what occurs in the jury room, they may arouse curiosity, suspicion, or anger from a press and public that believes it has a right to know, just as it does with other branches of government. Of course, jurors might not elicit quite the same reaction because they differ from elected officials in significant ways. Even though both juries and members of the executive branch are supposed to "represent" the people, jurors do not seek office, but are summoned to serve. Furthermore, jurors' service does not extend over time, but is limited to only one case. Finally, jurors' service does not typically result in

249. See, e.g., Neil A. Lewis, *White House Got More Files Than Disclosed*, N.Y. Times, June 26, 1996, at A1 (suggesting that the White House might have improperly obtained 500 confidential F.B.I. files in addition to the 407 files identified earlier); Paul Richter & Ronald J. Ostrow, *FBI Files Create Trail of Mystery, Political Fodder*, L.A. Times, June 23, 1996, at A1 (recounting possible theories behind the Clinton Administration's acquisition of F.B.I. files, from preparing to defend itself against the Republican charge that many low-level employees could not obtain security clearance because of prior drug use, to trying to uncover wrongdoings by Republican leaders).

250. See, e.g., Melissa Healy, *Dole Assails White House Over FBI Files*, L.A. Times, June 23, 1996, at A21 ("The White House has refused to release the latest documents [pertaining to the travel office firings and subpoenaed by a House committee] claiming executive privilege."); Robert L. Jackson & Ronald J. Ostrow, *FBI Files Probe Seeks More Papers*, L.A. Times, June 25, 1996, at A8 (citing Jack Quinn, White House Counsel, who "initially said that the president was invoking executive privilege in withholding all 3,000 documents on grounds that many of them dealt with confidential advice from aides on how to handle the congressional travel office inquiry and that others were records furnished to Whitewater independent counsel"); William Safire, *3 Scandals and Out*, N.Y. Times, June 24, 1996, at A11 ("With guilty knowledge of Clintonites' wrongful obtaining and sustained possession of F.B.I. confidential files, Quinn tried to conceal evidence of that abuse under 'executive privilege.'").

251. See, e.g., John M. Broder & Ronald Brownstein, *Specter of Past Disarray Besets White House*, L.A. Times, June 24, 1996, at A1 ("The FBI files affair will continue to percolate, with congressional hearings later in the week and a possible vote on a contempt-of-Congress citation against the White House for refusing to release 2,000 internal documents [pertaining to the 1993 White House travel office firings] because of 'executive privilege.'"); Robert L. Jackson & Ronald J. Ostrow, *White House Aide's Papers on FBI Files Are Handed Over*, L.A. Times, June 26, 1996, at A10 (reporting that the contempt-of-Congress vote was likely to be averted by an agreement in which the House committee would be permitted to examine the confidential documents without copying them).

gain either to their finances or their reputation; on the contrary, jurors are not supposed to have any stake in the outcome of the case.²⁵²

C. Grand Juries

Grand jurors are prohibited from disclosing grand jury proceedings and deliberations, even after an indictment has been handed down. This prohibition is intended to afford grand jurors protection so they can perform the task for which they have been summoned. Unlike the deliberations undertaken by Supreme Court Justices or by members of the executive branch, the secrecy with which grand jurors are to operate is mandated by federal rule²⁵³ and enforceable by federal statutes.²⁵⁴ Federal Rule of Criminal Procedure 6(e) requires grand jurors to keep secret "matters occurring before the grand jury"²⁵⁵ and makes a knowing violation punishable by contempt.²⁵⁶ Grand jurors take an oath by which they swear to secrecy.²⁵⁷ They are not the only ones who must keep all

252. This may be less true in a few high-profile cases. The possibilities of book and movie deals, television appearances, and tabloid interviews are beginning to threaten the financial disinterest that otherwise characterized jurors. See, e.g., Maura Dolan, *Impartial Jurors Can Be Found, Court Experts Say*, L.A. Times, July 9, 1994, at A1 ("Jury consultant Dimitrius said prospective jurors in the federal King and the Reginald O. Denny trials admitted they had considered the possibility of making money from serving on those juries."). Some state legislatures have responded by trying to limit such opportunities. See, e.g., Cal. Penal Code § 1122 (West 1996) (stating that "prior to, and within 90 days of, discharge, [jurors] shall not request, accept, agree to accept, or discuss with any person receiving or accepting, any payment or benefit in consideration for supplying any information concerning the trial").

253. Fed. R. Crim. P. 6(e)(2) provides:

A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, . . . shall not disclose matters occurring before the grand jury except as otherwise provided for in these rules. . . . A knowing violation of Rule 6 may be punished as a contempt of court.

Id.

254. Three statutes are generally available to punish violations of Fed. R. Crim. P. 6(e)(2): 18 U.S.C.S. § 401 (Law. Co-op. 1993 & Supp. 1996) (providing for citations for contempt for general violations of court rules); 18 U.S.C.S. § 1503 (Law. Co-op. 1994 & Supp. 1996) (providing for prosecution for obstruction of justice); 18 U.S.C.S. § 3333(c) (Law. Co-op. 1993 & Supp. 1996) (providing for citations for contempt in unauthorized publications of grand jury reports).

255. See *supra* note 253. Although this discussion focuses on grand juries in federal court, the requirement to maintain the secrecy of the grand jury proceedings is not limited to federal court.

256. See, e.g., *United States v. Girardi*, 62 F.3d 943, 945 (7th Cir. 1995) (determining the appropriate sentence for Girardi, who had, among other things, "disclosed grand jury matters in violation of the laws requiring secrecy of grand jury proceedings," and who was convicted of "criminal contempt of court for disobeying orders and rules of the United States District Court for the Northern District of Illinois"); *United States v. Holloway*, 991 F.2d 370, 374 (7th Cir. 1993) (deciding the appropriate interaction of 18 U.S.C. § 401 and 18 U.S.C. § 3551, as implemented by U.S. Sentencing Guidelines § 5E1.2(a), after defendant Terry Holloway pled guilty to one count of criminal contempt for violation of his grand juror oath of secrecy).

257. A grand juror in federal court takes the following oath:

matters secret; the "General Rule of Secrecy"²⁵⁸ applies to interpreters, stenographers, recorders, typists, government attorneys and their assistants.²⁵⁹ This prohibition, however, does not extend to witnesses, who may disclose their testimony after the term of the grand jury has ended.²⁶⁰ All documents pertaining to the grand jury hearings, such as records, orders, and subpoenas, are kept under seal as well for as long "as is necessary to prevent disclosure of matters occurring before a grand jury."²⁶¹ Secrecy is required of the grand jurors whether the grand jury is performing in its investigative capacity or issuing an indictment.²⁶²

The grand jury has a history of secrecy,²⁶³ with several policy reasons given to justify the secrecy of this institution.²⁶⁴ One reason for secrecy is that it frees grand jurors from fears they might otherwise have if their opinions and votes were later disclosed.²⁶⁵ A second reason is that secrecy might make witnesses more willing to testify.²⁶⁶ A third reason is that

Do you, and each of you, solemnly swear that you shall diligently inquire into and make true presentment or indictment of all such matters and things as shall be given you in charge or otherwise come to your knowledge, touching your grand jury service; to keep secret the counsel of the United States, your fellows and yourselves; not to present or indict any person through hatred, malice or ill will; nor leave any person unrepresented or unindicted through fear, favor, or affection, nor for any reward, or hope or promise thereof; but in all your presentments and indictments to present the truth, the whole truth and nothing but the truth, to the best of your skill and understanding? If so, answer I do.

1 Sara Sun Beale & William C. Bryson, *Grand Jury Law and Practice* § 5:11 (1991). A grand juror in a state court takes a similar oath. *See, e.g.,* Or. Rev. Stat. § 132.060 (1993) (providing similar oath).

258. Fed. R. Crim. P. 6(e)(2).

259. *See id.*

260. *See* *Butterworth v. Smith*, 494 U.S. 624, 626 (1990).

261. Fed. R. Crim. P. 6(e)(6).

262. *See* *Branzburg v. Hayes*, 408 U.S. 665, 695 (1972) ("[G]rand juries characteristically conduct secret proceedings . . ."); *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 399 (1959) (noting that the grand jury has "a long-established policy" of secrecy . . . older than our Nation itself") (citation omitted).

263. The grand jury began in England. It is commonly traced back to the Assize of Clarendon, issued in 1166, although some historians note earlier roots. *See* Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* 347 (1985). The early grand juries engaged in deliberations that could be observed by the public, and it was not until 1368 that the grand jury began hearing witnesses in private. *See* Richard M. Calkins, *Grand Jury Secrecy*, 63 Mich. L. Rev. 455, 456-57 (1965) [hereinafter Calkins, *Grand Jury Secrecy*]; Richard Calkins, *The Fading Myth of Grand Jury Secrecy*, 1 J. Marshall J. Prac. & Proc. 18, 18-19 (1967) [hereinafter Calkins, *The Fading Myth*]; Tim A. Baker, Note, *Grand Jury Secrecy v. The First Amendment: A Case for Press Interviews of Grand Jurors*, 23 Val. U. L. Rev. 559, 563 (1989). For a discussion of the grand jury's more recent history, see Fred A. Bernstein, Note, *Behind the Gray Door: Williams, Secrecy, and the Federal Grand Jury*, 69 N.Y.U. L. Rev. 563, 574-82 (1994).

264. *See* Robert M. Cover et al., *Procedure* 794 (1988) (summarizing policy reasons for the secrecy of the grand jury).

265. Calkins, *Grand Jury Secrecy*, *supra* note 263, at 458.

266. *See, e.g.,* *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 219-21 (1979) (noting that "many prospective witnesses would be hesitant to come forward voluntarily [if they knew] . . . that those against whom they testify would be aware of that testimony");

disclosure by grand juries might allow the accused to flee or to tamper with government witnesses.²⁶⁷ Finally, secrecy is said to protect the reputation of a person who might be brought before a grand jury, but who is not ultimately indicted.²⁶⁸

Even when commentators question the efficacy of secrecy for the grand jury, they typically direct their criticism toward the grand jury when it is issuing indictments, rather than when it is investigating or deliberating.²⁶⁹ According to one commentator, "[o]f paramount importance is the maintenance of secrecy concerning the deliberations and votes of the grand jurors themselves both during and subsequent to a hearing."²⁷⁰ The reasoning behind this statement is that a citizen who serves as a grand juror should not be subjected to the malice or enmity of her neighbor if she votes to indict that neighbor.²⁷¹ Toward that end, a number of jurisdictions, both federal and state, have provided by statute that grand jury votes and deliberations may not be disclosed.²⁷²

Should the petit jury's deliberations be treated in the same manner as that of the grand jury? There are certainly differences between the grand and petit jury. For example, in the federal system, the former may have somewhere between sixteen and twenty-three jurors,²⁷³ whereas the latter may have as many as twelve but no fewer than six jurors, depending upon whether the case is criminal or civil.²⁷⁴ Unanimity is not required for a

Calkins, *Grand Jury Secrecy*, *supra* note 263, at 458. Interestingly, witnesses are not prohibited from disclosing their testimony after they have given it, should they choose to do so. According to an Advisory Note, Rule 6(e) does "not impose any obligation of secrecy on witnesses. The existing practice on this point varies among the districts. The seal of secrecy on witnesses seems an unnecessary hardship and may lead to injustice if a witness is not permitted to make a disclosure to counsel or to an associate." Fed. R. Crim. P. 6(e) advisory committee's note.

267. See *Douglas Oil Co.*, 441 U.S. at 219.

268. See Calkins, *Grand Jury Secrecy*, *supra* note 263, at 458-59.

269. See, e.g., Bernstein, *supra* note 263, at 617 (lamenting that the Supreme Court confuses "grand jury hearings with grand jury deliberations. The latter, like the Supreme Court's conferences but not its oral arguments, must remain closed.").

270. Calkins, *Grand Jury Secrecy*, *supra* note 263, at 459. Calkins also argued for less secrecy on the part of the grand jury; however, he limited his argument to disclosure of grand jury minutes. See *id.* at 460-65; see also Calkins, *The Fading Myth*, *supra* note 263, at 23-36 (analyzing cases prior to *Dennis v. United States*, 384 U.S. 855 (1966), in which courts protected the secrecy of grand jury minutes of a witness's testimony).

271. See Calkins, *Grand Jury Secrecy*, *supra* note 263, at 459.

272. See, e.g., Fed. R. Crim. P. 6(e); Ariz. R. Crim. P. 12; Fla. Stat. Ann. § 905.25 (West 1996); Kan. Crim. Proc. Code Ann. § 22-3012 (West 1996); Neb. R. Crim. P. § 29-1415 (1996); Ohio R. Crim. P. 6E (secrecy of proceedings and disclosure); Wash. Rev. Code Ann. § 10.27.090 (West 1996); Wyo. R. Crim. P. 6(a)(10), (14) (confidentiality).

273. See Fed. R. Crim. P. 6(a)(1) ("The grand jury shall consist of not less than 16 nor more than 23 members.").

274. See Fed. R. Civ. P. 48 ("The court shall seat a jury of not fewer than six members and not more than twelve members . . ."); Fed. R. Crim. P. 23(b) ("Juries shall be of 12 but . . . a valid verdict may be returned by a jury of less than 12 should the court find it necessary . . .").

grand jury to return an indictment,²⁷⁵ whereas a criminal conviction by a federal petit jury must be unanimous.²⁷⁶ However, in both the grand and petit juries, twelve jurors are required for an indictment or conviction.²⁷⁷ Grand jurors serve "until discharged by the court," but their term cannot exceed eighteen months unless required by the public interest.²⁷⁸ In contrast, petit jurors serve for only one trial. The grand jury hears only the prosecutor's case and acts far less independently than the petit jury, which receives the benefit of an adversarial presentation. In addition, the prosecutor presents his or her case to a grand jury in closed proceedings, whereas a trial in which a petit jury sits is open to press and public alike.

Such structural differences between grand and petit juries, however, do not account for why deliberations in one case are protected from subsequent disclosure while deliberations in the other are not. One explanation may be that grand jury secrecy is unnecessary, or even harmful. Thus, rather than extend grand jury secrecy to the context of the petit jury, grand jury secrecy should be abandoned. Grand jury secrecy may encourage prosecutorial abuses or may leave the public in the dark in matters about which it should be informed.²⁷⁹ Yet, the policy goal of assuaging grand jurors' misgivings that their opinions or votes might be disclosed and of encouraging candor in the deliberation room seem applicable in both the petit jury and grand jury settings. Moreover, both the petit and grand juries are intended to serve as a buffer between the government and the accused.²⁸⁰ The grand jury has been described as "standing between the accuser and the accused . . . to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will."²⁸¹ Similarly, the petit jury has been

275. See Fed. R. Crim. P. 6(f) ("An indictment may be found only upon the concurrence of 12 or more jurors.").

276. See Fed. R. Crim. P. 31(a) ("The verdict shall be unanimous.").

277. See Fed. R. Crim. P. 6(f); Fed. R. Crim. P. 23(b).

278. Fed. R. Crim. P. 6(g).

279. In one case, for example, the grand jury resisted the prosecutor's decision to settle with Rockwell International rather than pursuing its investigation of Rockwell's Rocky Flats nuclear weapons plant. See Richard C. Reuben, *FBI Drops Grand Jury Probe*, A.B.A. J., Feb. 1994, at 19. Foreperson Wes McKinley explained: "There are a lot of people who want this information released, and it should be released so that people know what is going on in this country . . ." *Id.*

280. See Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1183 (1991) ("Spanning both civil and criminal proceedings, the key role of the jury was to protect ordinary individuals against governmental overreaching.").

281. *Wood v. Georgia*, 370 U.S. 375, 390 (1962) (footnote omitted); see also Cover et al., *supra* note 264, at 793 ("Apparently, the reason behind a right to indictment by a grand jury was the desire to interpose a group of citizens between government and potential defendants, to ensure that the government could demonstrate probable cause to the grand jury's satisfaction before an individual could be charged with a felony offense."). But see Charles D. Weisselberg, *Federal Defenders of San Diego, Inc., Defending a Federal Case*, § 2.01, at 2-2 (1986) ("The grand jury has not been faithful to its original purpose. A common criticism of the modern grand jury is that it has become the rubber stamp of the prosecutor.").

extolled for providing "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."²⁸² If petit jurors are to fulfill this guardian role without qualms, perhaps the protections afforded to the grand juror should be extended to the petit juror as well.

VI. COMPETING CONSTITUTIONAL PROTECTIONS

Juror disclosures to the press implicate not only competing values but also competing constitutional protections. Both the First²⁸³ and Sixth Amendments²⁸⁴ bear on the question of juror disclosures to the press, and both have been discussed in the literature,²⁸⁵ though not necessarily with the jury as the focal point. Circuit courts remain divided on which amendment should govern juror disclosures²⁸⁶ and which underlying policies should prevail, and the Supreme Court has yet to address the question. My intent is simply to sketch out some of the competing

282. *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

283. "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." U.S. Const. amend. I.

284. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury, of the State and district wherein the crime shall have been committed." U.S. Const. amend. VI.

285. See, e.g., Daniel Aaron, *The First Amendment and Post-Verdict Interviews*, 20 Colum. J.L. & Soc. Probs. 203, 214-36 (1986) (trying to reconcile competing First and Sixth Amendment rights by permitting, albeit with restrictions, post-verdict interviews of jurors); Abraham S. Goldstein, *Jury Secrecy and the Media: The Problem of Postverdict Interviews*, 1993 U. Ill. L. Rev. 295, 310 (describing limits of the press's First Amendment right of access to jurors and recommending a statute "making it a crime for anyone without court permission to seek information from jurors about their deliberations, or for jurors to provide such information"); 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, 359, 369 (1990) (concluding that the First Amendment provides a limited right of access to jurors' names and addresses, which would enable the press "to contact jurors after the conclusion of their jury service"); Bridget K. Sullivan & Mary J. Hart, *Post-Verdict Disclosures of Jury Deliberations in Federal Criminal Trials: Analysis and Proposed Solution*, 16 Comm. & L. 75 (1994) (exploring First and Sixth Amendment rights and proposing a rule of court or federal statute to maintain the secrecy of jury deliberations); Note, *Public Disclosures of Jury Deliberations*, 96 Harv. L. Rev. 886, 905 (1983) (considering First and Sixth Amendment rights and recommending that courts "move to discourage jurors from publicly disclosing deliberations"); Allen Sharp, *Postverdict Interviews with Jurors*, Case & Com., Sept.-Oct. 1983, at 3, 15 (describing competing First and Sixth Amendment concerns and suggesting that courts decide about injunctions limiting access to jurors on a case-by-case basis).

286. Compare *Haeberle v. Texas Int'l Airlines*, 739 F.2d 1019, 1021-22 (5th Cir. 1984) (denying the lawyer's request to interview jurors after the verdict on the ground that the lawyer's First Amendment right did not prevail over defendant's Sixth Amendment right to a fair trial and the jury's right to privacy), and *United States v. Griek*, 920 F.2d 840, 843 (11th Cir. 1991) (holding that a defendant's First or Sixth Amendment right to question jurors after a verdict is outweighed by the need to protect jury deliberations from endless public investigation), with *United States v. Simone*, 14 F.3d 833, 840-42 (3d Cir. 1994) (holding that the press's First Amendment right of access applies to an examination of jurors for alleged juror misconduct, and that the examination should not have been conducted in camera).

arguments. Rather than making the case for one amendment over the other, my interest is in showing that both need to be considered in a discussion of possible solutions.²⁸⁷

A. First Amendment Tradition

One reason to permit jurors' disclosures to the press after a verdict has been reached is that such disclosures are consistent with our First Amendment tradition. The right to free speech, as protected by the First Amendment,²⁸⁸ has been broadly interpreted by courts so that constraints on speech are viewed with disfavor. Although the right to free speech is not absolute and has been curtailed by time, place, and manner restrictions,²⁸⁹ the tradition of free speech in this country nevertheless remains strong. Furthermore, the type of speech in which jurors engage when talking to reporters is speech that the First Amendment is designed to protect because it is speech that could be described as necessary for self-government.²⁹⁰

Moreover, if jurors are prevented from speaking about their deliberative process during post-verdict interviews, then they will have few readily available means to explain the reasons for their decision. Jurors, unlike judges, do not have the vehicle of opinions to explain the steps that led to their verdict. In addition, when jurors leave the courtroom after reaching a verdict, they shed their roles as jurors and resume their roles as private citizens. It is questionable whether at that point they would feel constrained by their earlier oath or role; indeed, without further instruction, they might believe themselves at liberty to speak.²⁹¹

287. See *infra* Part VII.

288. U.S. Const. amend. I.

289. See, e.g., *Adderley v. Florida*, 385 U.S. 39, 47-48 (1966) (upholding as constitutional the trespass conviction of demonstrators who gathered in front of a jail to protest its segregation of inmates and who refused to disperse after warnings by the sheriff); *Poulos v. New Hampshire*, 345 U.S. 395, 414 (1953) (upholding as constitutional a state law requiring a license to hold religious services in a public park); John E. Nowak & Ronald D. Rotunda, *Constitutional Law* § 16.47, at 1142 (5th ed. 1995).

290. Cf. *Haerberle*, 739 F.2d at 1022 (explaining that juror interviews with attorneys "while not without first amendment significance, [were] not 'paramount' like the public's right to receive information necessary for informed self-government").

291. If, however, jurors took an oath to preserve the confidentiality of their jury deliberations, then the First Amendment would not necessarily be violated by requiring jurors to refrain from making comments following trial because courts have allowed the government to limit the speech of some former employees on the basis of secrecy agreements signed as a prerequisite for employment. See, e.g., *Haig v. Agee*, 453 U.S. 280, 307-08 (1981) (describing an extreme case in which the Court upheld the power of the Secretary of State to revoke a former CIA agent's passport because his disclosures threatened national security); *United States v. Marchetti*, 466 F.2d 1309, 1311, 1313-17 (4th Cir. 1972) (holding that a former CIA employee, who had signed a secrecy agreement, could not write about classified information he had obtained in the course of his employment unless the CIA approved such disclosures). See generally Laurence H. Tribe, *American Constitutional Law* § 12-36, at 1052 (2d ed. 1988).

Just as the juror can claim a right under the First Amendment to speak, the press can claim a right under the First Amendment to publish what it hears when jurors choose to speak. Courts have long been reticent about restraining the press from publishing lawfully obtained information²⁹² and have imposed restraints only in extreme circumstances.²⁹³ But even then, the burden is on the party seeking the restraint to show that there is a compelling interest in restraining the publication.²⁹⁴ At first glance, then, the First Amendment would support a juror's right to speak and the press's right to publish what it hears.

B. Limitations on the First Amendment

There are several reasons, however, why the First Amendment might not control exclusively in the context of post-verdict interviews. As to a juror's right to speak, it is unclear how to categorize jurors for purposes of First Amendment analysis. Are jurors like other government employees

292. See, e.g., *Florida Star v. B.J.F.*, 491 U.S. 524, 535 (1989) (punishing a newspaper for the dissemination of information that was already publicly available could not withstand First Amendment scrutiny); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 104-06 (1979) (holding unconstitutional the indictment of two newspapers for violating a state statute forbidding newspapers to publish, without written approval of the juvenile court, the name of any youth charged as a juvenile offender); *Oklahoma Publ'g Co. v. Oklahoma County Dist. Court*, 430 U.S. 308, 311-12 (1977) (per curiam) (holding unconstitutional a state court's pretrial order enjoining the media from publishing the name of an 11-year-old boy in connection with a juvenile proceeding that reporters had attended); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 495-97 (1975) (holding unconstitutional a civil damage award entered against a television station for broadcasting the name of a rape-murder victim that the station had obtained from court records).

293. See, e.g., *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 570 (1976) ("We reaffirm that the guarantees of freedom of expression are not an absolute prohibition under all circumstances, but the barriers to prior restraint remain high and the presumption against its use continues intact."); *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (concluding that the Government had not met its heavy burden for justifying prior restraint of publication of documents pertaining to the Vietnam War); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418 (1971) ("Any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity.") (citations omitted).

294. Consider, for example, the recent case involving a prior restraint of *Business Week*. A U.S. District Court judge ordered *Business Week* not to publish a story containing information filed under seal as part of the court record in Procter & Gamble Co.'s lawsuit against Bankers Trust New York Corp. for allegedly selling speculative derivative securities without explaining their risks. See *Judge Erred in Business Week Order*, *Appeals Court Rules*, *Reuter Bus. Rep.*, Mar. 5, 1996. A *Business Week* reporter had obtained the sealed papers from a source. Several weeks later, after the judge unsealed the documents, *Business Week* ran the story. *Id.* The Sixth Circuit held that the district court erred in granting the permanent injunction because the court "was engaging in a practice that, under all but the most exceptional circumstances, violates the Constitution: preventing a news organization from publishing information in its possession on a matter of public concern." *Id.* The decision was described by First Amendment lawyer Floyd Abrams as "reaffirm[ing] in the most powerful fashion the deeply rooted legal principle that prior restraint on news reporting is virtually unthinkable." Eleanor Randolph, *Appeals Court Says Judge Should Not Have Barred Business Week Story*, *L.A. Times*, Mar. 6, 1996, at D1.

whose speech can be constrained by virtue of their jobs? Public employees' speech, even on matters of public concern, can be limited by their employer when it is determined to be disruptive to the workplace.²⁹⁵ Courts, in determining whether a public employee's speech can be limited, must weigh several factors, including whether the employee's speech undermined the authority of superiors, disturbed harmony among colleagues, interfered with regular operations, impaired the employee's performance of his or her duties, or had a detrimental impact on the close working relationships for which loyalty and confidence are necessary.²⁹⁶ There is no bright-line rule; rather, the challenge "is to arrive at a balance between the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."²⁹⁷

Judges' speech can also be curtailed. The Model Code of Judicial Conduct not only precludes judges from speaking out on cases pending before them,²⁹⁸ but also limits their speech even after they have decided

295. See *Connick v. Myers*, 461 U.S. 138, 149, 154 (1983) (holding that a district attorney's circulation of a questionnaire, even when one of the questions was on a matter of public concern, was so disruptive to the functioning of the office that her discharge did not offend the First Amendment); see also *Dicks v. City of Flint*, 684 F. Supp. 934, 940-41 (E.D. Mich. 1988) (holding that a deputy city administrator who undermined the mayor's policies could be denied a key position in the mayor's administration without violating the First Amendment).

In addition to political speech, a public employee's political associations or affiliations can also be constrained in certain types of government employment, such as those that include access to confidential documents that influence policymaking decisions. However, when the positions do not involve such policymaking, political affiliation cannot be the basis for dismissal. See *Branti v. Finkel*, 445 U.S. 507, 511 (1980) (holding that assistant public defenders, who were dismissed for their political affiliation, did not have policymaking jobs that were related to whether they were Democrats or Republicans, and their dismissal thus violated the First Amendment); *Elrod v. Burns*, 427 U.S. 347, 372 (1976) (plurality opinion) (holding that patronage dismissals are to be limited to policymaking positions; widespread dismissals based upon political belief or association violate the First Amendment). Nor can political affiliation be the basis for promotion, transfer, recall, or hiring decisions. See *Rutan v. Republican Party*, 497 U.S. 62, 74, 76 (1990) (holding that political party affiliation could not be the basis for precluding promotions, transfers, or rehiring for state employees without offending the First Amendment).

296. See *Rankin v. McPherson*, 483 U.S. 378, 389-91 (1987) (holding that an employee's statement about an attempt on President Reagan's life did not interfere with her clerical duties or the efficient running of the Constable's office where she worked and could not be the basis for her dismissal without violating her right to free speech); *Pickering v. Board of Educ.*, 391 U.S. 563, 574 (1968) (upholding a public school teacher's right to speak on an issue of public importance without being dismissed from his job).

297. *Pickering*, 391 U.S. at 568.

298. See Model Code of Judicial Conduct Canon 3(9) (1990); see also ABA Code of Judicial Conduct Canon 3(6), reprinted in *Standards of Professional Conduct for Lawyers and Judges* 262 (Norman Redlich compiler, 1984); California Code of Judicial Conduct Canon 3(6), reprinted in *Standards of Professional Conduct for Lawyers and Judges*, *supra*, at 308; ABA/BNA Lawyers' Manual on Professional Conduct, Code of Judicial Conduct Model

the case.²⁹⁹ Judges sometimes remark upon a case many years after a decision has been reached, but those instances are rare, and as testament to their infrequency, such instances inevitably attract attention,³⁰⁰ if not criticism.³⁰¹ Judges are supposed to curtail their speech to preserve the appearance of impartiality. An additional reason for judges' silence is so they do not call into question cases that have already been decided, thus creating uncertainty or skepticism in an area of the law that has come to be regarded as settled.

Although jurors, unlike judges, only serve in one case, and do not need to preserve the appearance of impartiality over time, jurors, like judges, should not be able to undermine public confidence in the verdict. When jurors admit to uncertainty, misgiving or regret, these expressions could undermine the public's confidence in and acceptance of the verdict. There is "a significant governmental interest"³⁰² in maintaining public confidence in the verdict, and this is an interest that the First Amendment is likely to recognize.

Paradoxically, the First Amendment may be most fully realized when individual juror speech is curtailed. First, as noted in Part IV.D, juror speech during deliberations may be chilled if jurors know that other jurors can reveal what they say to the press in post-verdict interviews.³⁰³ Perhaps subsequent disclosures should be curtailed so that jurors feel that they can engage in truly robust debate in the jury room. Second, even if individual jurors' speech is curtailed, the jury's speech is not limited and is, in fact, probably strengthened by such a limitation.³⁰⁴ The jury speaks through its

Standard (9) (1995).

299. See Model Code of Judicial Conduct Canon 3 cmt. (1990) ("The requirement that judges abstain from public comment regarding a pending or impending proceeding continues during any appellate process and until final disposition.").

300. See, e.g., *The Diary of Wm. O. Douglas*, 1995 J. Sup. Ct. Hist. 80.

301. See, e.g., Linda Greenhouse, *When Second Thoughts in Case Come Too Late*, N.Y. Times, Nov. 5, 1990, at A14. Greenhouse observed:

Talking with some New York University law students two weeks ago, Justice Powell said, 'I think I probably made a mistake' in voting with the majority against applying the constitutional right of privacy to homosexual relations between consenting adults [in *Bowers v. Hardwick*]. . . . Intriguing as Justice Powell's second thoughts may be, the fact is that the [historical moment in constitutional decision-making] passed.

Id.

302. *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976).

303. See *supra* text accompanying notes 191-215 (Part IV.D).

304. The jury's right to speak as representative could be roughly analogized to a union's right to speak on behalf of its membership. Even if individual jurors are foreclosed from making individual comments, much like employees who might want to speak on their own behalf rather than through the vehicle of the union, neither suffers a First Amendment loss because their voices are heard through their representative. See, e.g., *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271, 291 (1984) ("The State has a legitimate interest in ensuring that its public employers hear one, and only one, voice presenting the majority view of its professional employees on employment-related policy questions . . .").

verdict, and its voice may become less clear when individual jurors are able to add their own individual glosses to the jury's pronouncement.

The press's First Amendment claim of right to "access" to all aspects of the public trial³⁰⁵ has traditionally not extended further than the public's right to access;³⁰⁶ jury deliberations are traditionally closed to everyone, at least while they are in progress.³⁰⁷ The question is how to regard deliberations once they have been completed. Does the traditionally closed off area become open once deliberations have concluded? One policy reason supporting a right to access by the press is that the press speaks for the "people." The jury, however, also speaks for the "people," and so it is unclear whether the press needs to play its traditional watchdog function³⁰⁸ vis-à-vis the jury.³⁰⁹

C. Sixth Amendment Claims

Jurors' disclosures of their deliberations to the press implicate not only the First Amendment rights of jurors and the press, but also the Sixth Amendment right of criminal defendants to a "fair trial"³¹⁰ by an "impartial jury."³¹¹ To the extent that there are competing constitutional

305. See Akhil Reed Amar, *Sixth Amendment First Principles*, 84 Geo. L.J. 641, 677-81 (1996) (examining the need for a public trial, and how the public nature of the trial assists in eliciting the truth); *id.* at 680 ("[T]he public trial was designed to infuse public knowledge into the trial itself, and, in turn, to satisfy the public that truth had prevailed at a trial.").

306. See, e.g., *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 608-09 (1978) ("The First Amendment generally grants the press no right to information about a trial superior to that of the general public."); Nowak & Rotunda, *supra* note 289, at 1045 ("The Court held that within the courtroom, the press enjoys no greater rights than does the public, but that the press is free, within broad limits, to report what its representatives have seen at the proceeding.").

307. "It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally." *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972).

308. "The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism." *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966).

309. According to one Anti-Federalist essayist: "[The people's] situation, as jurors and representatives, enables them to acquire information and knowledge in the affairs and government of the society; and to come forward, in turn, as the centinels and guardians of each other." *Letters From the Federal Farmer*, in *The Anti-Federalist* 59 (Herbert J. Storing ed., 1985).

310. Although the Sixth Amendment does not use the language of "fair trial" but only a "speedy and public trial," the Court has interpreted the Amendment to provide for a fair trial. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 157-58 (1968) ("Our conclusion is that in the American States, as in the federal judicial system, a general grant of jury trial for serious offenses is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants."); *Irvin v. Dowd*, 366 U.S. 717, 722 (1961) (noting that failure to accord a fair hearing violates even minimal standards of due process).

311. The Sixth Amendment provides in relevant part that "the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." U.S. Const. amend. VI.

protections, at least in the criminal context,³¹² it is unclear whether the First Amendment prevails.³¹³ In *Branzburg v. Hayes*,³¹⁴ the Court suggested that the press "may be prohibited from attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial before an impartial tribunal."³¹⁵

1. Right to a "Fair Trial"

A defendant in a criminal case could argue that he or she is entitled to a "fair trial" and that the fairness of the trial is compromised when jurors are subsequently able to reveal their views, as well as the views of their fellow jurors, in post-verdict interviews. As previously suggested, some jurors may be intimidated by the knowledge that their individual comments may be disclosed to the defendant and the public at large. In what sense, then, will they be able to give the defendant a fair trial if they feel threatened or pressured and therefore unable to stand up to other jurors in the deliberation room?

2. Right to a "Jury"

The Sixth Amendment also provides for "an impartial jury," and a defendant in a criminal case could argue that post-verdict interviews of jurors undermine the meaning of the word "jury" in the Sixth Amendment.³¹⁶ A jury is a body³¹⁷ that is supposed to engage in free delibera-

312. It might be less of a close question in the civil context, at least as a matter of doctrine. However, there might still be a claim of competing constitutional rights when the First Amendment is pitted against the Seventh Amendment, and this could come about given our understanding of the meaning of a "jury," which is actually used in the Seventh Amendment. See *infra* text accompanying notes 316-20 (discussing meaning of jury in the Sixth Amendment). Moreover, concepts made explicit in the Sixth Amendment such as "impartial jury" and fair "trial" are integral to civil cases even if the language is not explicitly found in the Seventh Amendment. See Marder, *supra* note 78, at 1047-49 (noting that these concepts inhere to the jury regardless of whether the case is civil or criminal).

313. "The authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 561 (1976).

314. 408 U.S. 665, 685 (1972) (holding that reporters cannot claim a privilege for their sources under the First Amendment when subpoenaed to testify before a grand jury investigating possible crimes).

315. *Id.* at 685; see *Nebraska Press Ass'n*, 427 U.S. at 560 ("It is not asking too much to suggest that those who exercise First Amendment rights in newspapers or broadcasting enterprises direct some effort to protect the rights of an accused to a fair trial by unbiased jurors."); *Sheppard v. Maxwell*, 384 U.S. 333, 362, 355 (1966) (reversing the denial of habeas on the ground that petitioner was denied his right to "receive a trial by an impartial jury free from outside influences" when "bedlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom, hounding most of the participants in the trial").

316. Justice Marshall, in his dissent in *Holland v. Illinois*, 493 U.S. 474, 490 (1990), focused on the meaning of "jury" in the Sixth Amendment. See *id.* at 493. In doing so, he concluded that a petit jury selected through discriminatory peremptories was one that undermined the concept of jury, which required that jurors be drawn from a fair cross section of the

tion.³¹⁸ At the end of its deliberative process, a jury renders a verdict, speaking with one voice. To allow jurors subsequently to disclose to the press and the public their individual doubts, misgivings, or turns of heart is to undermine the meaning of a "jury." Just as the Supreme Court describes the author of a majority or plurality opinion as "deliver[ing] the opinion of the Court,"³¹⁹ so too does a jury deliver the verdict of that body. The jurors are involved in a collective endeavor that receives the imprimatur of the State. They are not just twelve private citizens expressing their opinions, but rather, they are twelve jurors performing a governmental function that has the force of the State behind it.³²⁰ To have individual jurors later question or even disavow the collective judgment is to frustrate the very notion of a jury.

3. Right to an "Impartial" Jury

Finally, a defendant in a criminal case might argue that post-verdict interviews are at odds with the Sixth Amendment's command that the jurors be "impartial."³²¹ Although this term is difficult to define and open to manifold meanings,³²² one understanding of an impartial juror is a juror who does not have a fixed view of the case: "[T]he theory of the law is that a juror who has formed an opinion cannot be impartial."³²³ In

community. See *id.* at 494 ("[T]he fair-cross-section requirement is not based on the constitutional demand for impartiality; it is founded on the notion that what is denominated a 'jury' is not a 'jury' in the eyes of the Constitution unless it is drawn from a fair cross section of the community.").

317. The number of jurors may vary. See, e.g., *Ballew v. Georgia*, 435 U.S. 223, 229 (1978) (noting that "common-law juries included 12 members by historical accident"). In criminal cases in federal court, juries usually consist of 12 jurors, see Fed. R. Crim. P. 23(b); in civil cases in federal court, the number is not fixed, but cannot go below six, see Fed. R. Civ. P. 48. The Supreme Court has held that in state criminal jury trials, a five-person jury violates the defendant's right to a jury, as guaranteed by the Sixth and Fourteenth Amendments, see *Ballew*, 435 U.S. at 223; however, a six-person jury is constitutional, see *Williams v. Florida*, 399 U.S. 78, 86 (1970).

318. The importance of deliberation is often downplayed. See, e.g., *Marder*, *supra* note 12, at 593 (urging focus on the deliberations). The temptation is particularly great among those who have used individual verdict preferences as a way of studying the jury, thus overlooking the role that deliberation plays in the verdict that is finally reached. See *id.* at 594 & n.6.

319. Milton Handler, when serving as law clerk to Justice Harlan Fiske Stone, once criticized Justice Van Devanter's practice of rewriting the opinions of other Justices rather than working on his own assignments. Justice Stone responded: "Have you ever read the first line of a Supreme Court opinion?" He then pointed to it and read aloud, 'Mr. Justice Stone delivered the opinion of the Court' (emphasizing the word 'Court')." Milton C. Handler, *supra* note 229, at 119.

320. See *supra* Part II.A.

321. U.S. Const. amend. VI.

322. See, e.g., *Marder*, *supra* note 78, at 1130 (noting ambiguity of the term "impartial" as applied to jurors).

323. *Reynolds v. United States*, 98 U.S. 145, 155 (1878); see *Irvin v. Dowd*, 366 U.S. 717, 723 (1961) ("[A]s stated in *Reynolds*, the test is whether the nature and strength of the opinion formed are such as in law necessarily raise the presumption of partiality . . .").

other words, an impartial juror has not prejudged the case at the outset; rather, she begins the case with the view that she is able to vote either way depending upon the evidence established at trial. If jurors know that their thoughts or views may later be exposed by other jurors, then they may focus on their safety³²⁴ or their standing in the community. They may give more weight to how their views will play out in the community rather than to what has transpired in the courtroom. Such jurors could also be described as partial because they have formed a fixed view as to what the community regards as an acceptable outcome in the case and feel bound to act in accordance with it. Such a juror is no longer the "impartial" juror required by the Sixth Amendment.

VII. POSSIBLE SOLUTIONS

In fashioning a solution to the problem of post-verdict interviews there are competing values and constitutional protections that need to be balanced. Any solution will have to take into account the defendant's rights under the Sixth Amendment while limiting any curtailment of the jurors' and press's rights under the First Amendment. Although the First and Sixth Amendments do not dictate a particular course of action, they do provide some limits to the policies that may be pursued. Within those parameters, there is a range of solutions available, depending upon which values one chooses to emphasize, and it may be useful to envisage how the jury system might work under each of these regimes.

A. *Maintaining the Status Quo*

One possibility, and certainly the easiest possibility, is to maintain the status quo. Under the present system, there are no federal or state rules limiting post-verdict interviews of jurors by the press. Jurors can decide for themselves whether to speak to the press.³²⁵ The decision is left to the

324. See Nancy J. King, *Nameless Justice: The Case for the Routine Use of Anonymous Juries in Criminal Trials*, 49 Vand. L. Rev. 123, 125 (1996) (urging the routine use of anonymous juries to counter jurors' fears about their safety).

325. In some states, judges instruct jurors at the close of the trial that they are free to talk to others, but they are not required to talk to anybody. See, e.g., 1 Colorado Supreme Court Comm. on Civil Jury Instructions, Colorado Jury Instructions 3d § 1:16, at 37 (1988) ("It is now proper for you to talk to anyone, including the attorneys and parties, about this case. Whether you do so is entirely up to you."); Idaho Pattern Jury Instruction Comm., Idaho Jury Instructions—Civil 145 (1988) ("For your guidance, the Court instructs you that whether you talk to the attorneys, or to anyone else, is entirely your own decision."); Tex. R. Civ. P. 226a, at 78 ("[After your discharge] . . . [y]ou will then be free to discuss the case and your deliberations with anyone. However, you are also free to decline to discuss the case and your deliberations if you wish."); 1 Wisconsin Civil Jury Instruction Comm., Wisconsin Jury Instructions (Civil) 197 (1994) ("While nothing prohibits you from disclosing what happened in the jury room, you do not have to discuss the case with anyone or answer any questions about it.").

Some federal courts give similar guidance to jurors through local court rules. See, e.g., Kan. Fed. Loc. Ct. R. 123(a)(9) ("No juror has any obligation to speak to any person about

individual juror and that juror may decide based on a number of factors.³²⁶ There is no uniformity in juror response or court practice. Some jurors choose to speak to the press; others do not. Some jurors desire privacy;³²⁷ others do not.³²⁸ Some judges advise against disclosure; others do not. In sum, the current practice is one of laissez-faire: courts and jurors are free to do as they choose. Although the status quo certainly is in accord with the First Amendment rights of jurors and the press, whether it is consistent with the Sixth Amendment right of defendants is subject to debate.³²⁹

B. Making Disclosure Systematic

Another alternative is to make public disclosure by jurors systematic so as to reduce or eliminate the need for post-verdict interviews by the press. There are several means to accomplish this.

1. Public Deliberations

One fairly radical way to achieve the benefits of disclosure systematically would be to have jurors deliberate in public. In such a system, jurors would still go into the jury room to deliberate, but their deliberations would be recorded by camera and observed by the public. This method would have the advantage of avoiding the distortions created both by juror and journalist recollections. Rather than having the press report on what jurors believed they said and did in the jury room, the public would be able to see what was occurring firsthand. This trend toward live coverage has become more prevalent in a variety of contexts, from courtrooms³³⁰ to Congress.³³¹ This would also offer jurors the

any case and may refuse all interviews or comments."); La. Fed. Loc. Ct. R. (M.D., W.D.) 13.05(a) (same); Okla. Fed. Loc. Ct. R. 47.2 ("Upon discharge from service, each juror is free to discuss, or refuse to discuss, said juror's service with any person if the juror so desires."); Wyo. Fed. Loc. Ct. R. 309(b) ("No juror has any obligation to speak to any person about any case and may refuse all interviews and comments."). Only Connecticut appears to impose a limit on post-verdict interviews that could include the press. See Conn. Fed. Loc. Ct. R. 12(f)(1) ("No juror shall respond to *any* inquiry as to the deliberations or vote of the jury or of any other individual juror, except on leave of Court . . .") (emphasis added).

326. See *supra* text accompanying notes 30-50 (providing data on numbers of jurors who speak to the press and reasons why).

327. See, e.g., Rosenbaum, *supra* note 96, at A19 (recounting one juror's response to "take the next plane out to Jamaica" to avoid the press).

328. See *supra* note 189 (describing the jury that wrote a statement and gave a press conference to explain its verdict).

329. See *supra* text accompanying notes 310-24 (describing plausible ways in which current policy is inconsistent with a defendant's rights under the Sixth Amendment).

330. Forty-seven states allow cameras in the courtroom, and 35 of those states allow filming of criminal trials. See *Let the People Observe Their Courts*, 78 *Judicature* 116 (1994); Ruth Ann Strickland & Richter H. Moore Jr., *Cameras in State Courts: A Historical Perspective*, 78 *Judicature* 128 (1994); see also Carolyn Stewart Dyer & Nancy R. Hauserman, *Electronic Coverage of the Courts: Exceptions to Exposure*, 75 *Geo. L.J.* 1633, 1646 (1987) (noting that "the great majority of states now allow some electronic coverage of the judicial process"); Todd Piccus, Note,

benefit of having notice that what they say and do in the jury room will be reported to the public, rather than believing their deliberations to be confidential, only to discover later that is not necessarily the case. In addition, this proposal would promote the values of public education and accountability.

As extreme as this proposal might sound, there are instances where it has been suggested and even tried in at least some form. For example, one commentator has made a similar proposal for expert witnesses testifying at trial.³³² He has suggested that expert witnesses deliberate before the judge and jury to attempt some reconciliation of opposing points of view.

Jurors have also recreated their deliberations before a camera. In at least one case in federal court, *United States v. Rees*,³³³ jurors who had served together were asked by producers of a television program to reassemble and recreate the deliberations for a television audience. The announcer for the broadcast told television viewers that they would:

'see and hear what actually goes on behind the guarded doors of the jury room as these men turn over in their minds each bit of evidence to determine whether another human being shall be set free or spend the rest of his life in a federal penitentiary, whether another human being shall live or die.'³³⁴

Nine members of the jury, including the foreperson, spent an hour discussing the case, commenting on the evidence, and expressing their views on the defendant's guilt or innocence.³³⁵

In a more recent instance, a British television station used two "shadow" juries that heard and saw everything the real jury saw in five different trials.³³⁶ The shadow juries were then filmed while they engaged

Demystifying the Least Understood Branch: Opening the Supreme Court to Broadcast Media, 71 Tex. L. Rev. 1053, 1064 (1993) (explaining that "forty-seven states permit broadcast coverage of at least part of their court system"). Although federal courts have experimented with cameras in the courtroom, the Judicial Conference has opposed the practice; however, some federal judges have permitted Court-TV to broadcast certain civil trials. See, e.g., Bruce D. Brown, *Cameras Roll into Federal Court Again*, Legal Times, May 6, 1996, at 14.

331. In 1979, the House of Representatives voted to televise its floor proceedings, which were carried by C-SPAN, the Cable Satellite Public Affairs Network, see Stephen Hess, *Live from Capitol Hill* 35 (1991), which is a private, nonprofit cooperative of the cable television industry designed expressly for televising Congress. See John Schachter, *Congress Begins Second Decade Under TV's Watchful Glare*, 47 Cong. Q. Wkly. Rep. 507 (1989). The Senate followed suit in 1986, and C-SPAN II was created. Hess, *supra*, at 35. More recently, C-SPAN III was planned for coverage of congressional committee meetings and other events. See Ronald D. Elving, *C-SPAN Gets Pushy*, 34 Colum. Journalism Rev. 38 (1995).

332. See Curtis Emery Von Kann, *Reinventing the Jury Trial*, Legal Times, Jan. 2, 1995, at 20.

333. 193 F. Supp. 864 (D. Md. 1961).

334. *Id.* at 866 (quoting station manager in statement prior to broadcast).

335. See *id.* The court, though believing that it could not hold the station's attorneys in contempt for approving the program, nonetheless warned others from engaging in such practices in the future: "It seems beyond question that such a broadcast is against the public interest and should not be repeated or imitated." *Id.* at 865. The matter was referred to the state bar association for a determination about whether disciplinary proceedings should be instituted against the counsel for the station. See *id.*

336. Jonathan Caplan, *Trial by Television for the Jury*, Times (London), Nov. 19, 1991, at

in their deliberations, and those deliberations were aired on television. Interestingly, the shadow juries reached the same verdicts as the actual juries in four out of the five trials.³³⁷ One proposal under consideration in Great Britain is whether there should be shadow juries sitting with the real juries in trials so that the shadow jurors' thoughts and views could be observed and studied without the researchers violating the 1981 Contempt of Court Act, which bars disclosure or solicitation of views expressed by actual jurors in the course of their deliberations.³³⁸

The recording of an actual federal jury deliberation occurred in May 1954, when a research group from the University of Chicago, then headed by Professor Harry Kalven, Jr., undertook a study of jury deliberations.³³⁹ As part of the study, the researchers sought and obtained permission to record jury deliberations in six civil cases in the U.S. District Court in Wichita, Kansas. Although the researchers did not have the consent of the jurors, they did have the consent of Federal District Judge Delmas C. Hill and Tenth Circuit Chief Judge Orrie L. Phillips, as well as counsel for the parties and the Assistant United States Attorneys involved in the cases.³⁴⁰ The research team, taking care to remove all identification of the individual jurors, then played an abridged version of the recordings to judges and lawyers attending the Tenth Circuit Judicial Conference.³⁴¹

As word spread, an outcry ensued.³⁴² On October 12-13, 1955,

31a.

337. *See id.* In the fifth case, the real jury convicted, while the shadow jury was unable to agree. *See id.*

338. Contempt of Court Act, 1981, § 8(1) (Eng.); *see* Terence Shaw, *Mackay Casts Doubt on Jury Acquittals*, Daily Telegraph, July 30, 1990, at 2. For a fuller discussion of the 1981 Contempt of Court Act, *see infra* text accompanying notes 385-403.

339. The jury project began on Sept. 1, 1952. *See Hearings on S. Res. 58 Before the Subcomm. To Investigate the Admin. of the Internal Sec. Act and Other Internal Sec. Laws of the Senate Comm. on the Judiciary*, 84th Cong. 3 (1955) (statement of Edward H. Levi, Dean, University of Chicago Law School) [hereinafter *Hearings*]. The research team at the University of Chicago circulated an outline of the study, *see* Bernard D. Meltzer, *A Projected Study of the Jury as a Working Institution*, 287 *Annals Am. Acad.* 97 (1953), and in response, Eugene Stanley, a Wichita, Kansas lawyer, and Paul A. Kitch, a Wichita corporation lawyer, pointed out that the study should use actual jury deliberations, *see Hearings, supra*, at 34. Kitch suggested that he try to arrange with several judges for the use of actual jury deliberations. *See id.* The University of Chicago Law School received a \$400,000 grant from the Ford Foundation, supplemented by \$1 million, to do research on commercial arbitration and income tax law, as well as on the jury. *See The Jury Tappers*, N.Y. Times, Oct. 16, 1955, at 2E. Part of this money was used by the jury research team, which was, at various points, headed by Profs. Meltzer, Kurland, and Kalven. *See Hearings, supra*, at 8 (testimony of Edward H. Levi, Dean, University of Chicago Law School).

340. *See Those Secret Microphones*, 181 *Nation* 355 (1955).

341. *See id.*

342. *See, e.g., Next Week*, 63 *Commonweal* 108 (1955) ("The metropolitan press and representatives of all shades of the political spectrum vied with one another in expressing a sense of outrage. . . . What exactly was done out in Wichita to have caused all this outcry?"); *Those Secret Microphones, supra* note 340, at 355 (observing that a "great editorial and Congressional hue and cry . . . has been raised over the disclosure that microphones were concealed in a Wichita jury room"); *Why Eavesdropping on Juries*, U.S. News & World Rep., Oct.

Senator Eastland (D-Miss.) and Senator Jenner (R-Ind.) held two days of hearings before the Senate Internal Security Subcommittee of the Committee on the Judiciary to consider the issue of jury "bugging."³⁴³ Senator Eastland announced to Professor Kalven, who was called before the subcommittee: "I will guarantee you that you will not do any bugging after Congress passes some legislation."³⁴⁴ The hearings ended with a statement by Senators Eastland and Jenner denouncing "this violation of the sanctity of the jury room" and pledging to seek laws providing "severe punishment" for "eavesdropping" on juries.³⁴⁵ Congressman Emanuel Celler (D-N.Y.), Chairman of the House Judiciary Committee, proposed impeachment of any federal judge who permitted tapping of jury proceedings.³⁴⁶ Attorney General Herbert Brownell, Jr. decried the experiment, which had been undertaken without his knowledge or consent: "We in the Department of Justice are unequivocally opposed to

21, 1955, at 28 ("Why, then, all the outcry when news of jury tapping leaked out?"); see also *Eavesdropping on Juries*, Senior Scholastic, Nov. 10, 1955, at 7 (playing an excerpt of the deliberations tape "caused a sensation that is still making headlines"); *The Jury Tappers*, *supra* note 339, at 2E ("As the facts came out, lawyers and jurists across the country were appalled."); *Warning 'Intruders'*, *Newsweek*, Oct. 24, 1955, at 32 (noting that "[m]ost officials and newspapers denounced the experiment").

343. See, e.g., *Hearings*, *supra* note 339, at 1-195; Don Shannon, *Senators Act to Halt Jury Recordings*, *L.A. Times*, Oct. 14, 1955, at A1.

344. *Hearings*, *supra* note 339, at 62 (testimony of Harry Kalven, Jr., Professor, University of Chicago Law School); see *Warning 'Intruders'*, *supra* note 342, at 32 ("I'll guarantee you that you're not going to do any more bugging!"). As Julius Sourwine, counsel for the subcommittee, questioned the members of the research team, he included numerous questions about any communist associations the men might have. See, e.g., *Hearings*, *supra* note 339, at 16, 23-31 (testimony of Edward H. Levi, Dean, University of Chicago Law School); *id.* at 46-56, 84-103 (testimony of Harry Kalven, Jr., Professor, University of Chicago Law School); *id.* at 149-50 (testimony of Abner Mikva, attorney); *Jury Tapping*, 15 Facts on File 345 (1955). There are a number of reasons why the jury project might have elicited such a strong public reaction. One reason is that the incident came at a time when Communism was feared and the hearings were conducted by a subcommittee that was accustomed to looking for Communists or other subversives; secondly, McCarthyism was still in its heyday; finally, the issue of wiretapping of private citizens' homes was still unresolved. For example, *The Nation* used the episode to ask Attorney General Brownell to clarify his views on wiretapping:

It was Mr. Brownell, wasn't it, who sponsored a wiretap bill before Congress which would have allowed him to designate those whose telephone lines were to be tapped, for purposes which can hardly be described as scientific, and in whose homes and offices secret microphones were to be planted? Is the jury room more sacred than a man's home? Should it be made a criminal offense to eavesdrop on the deliberations of a jury weighing the issues in a personal injury suit while eavesdropping on private conversations is regarded as perfectly proper? Mr. Brownell should make another speech and let us all know just where he stands on wiretapping.

Those Secret Microphones, *supra* note 340, at 355.

345. *Jury Tapping*, *supra* note 344, at 345; see Allen Drury, *2 Senators Ask Law to Bar Eavesdropping on Juries*, *N.Y. Times*, Oct. 14, 1955, at A1 (voicing the view of two senators that the only way to stop such incidents was to make it a crime to "eavesdrop" on jury deliberations).

346. *Eavesdropping on Juries*, *supra* note 342, at 8.

any recording or eavesdropping on the deliberations of a jury under any conditions regardless of the purpose. Such practices, however well intentioned, obviously and inevitably stifle the discussion and free exchange of ideas between jurors."³⁴⁷ He announced that the Justice Department would present a bill to Congress to prevent such invasions of the jury room in the future.³⁴⁸

After several bills were introduced in the House and Senate,³⁴⁹ the result was a new statute. Section 1508 of the U.S. Code makes it illegal to knowingly record, listen to, or observe any grand or petit juries while they are deliberating or voting.³⁵⁰ Violations are punishable by a fine of not more than \$1000 or a prison term of not more than one year, or both.³⁵¹ The legislation, introduced in response to the University of Chicago jury research project, was intended to "protect and assure the privacy of grand or petit juries in the courts of the United States."³⁵² Representative Keating (R-N.Y.), a sponsor of one of the bills in the House, explained that the goal was to enable jurors to "rest easy in the assurance that nothing they say will go beyond the walls of the jury room. Any factors which might stifle their deliberations must be eliminated."³⁵³ He urged passage of the bill "to retain the sacred privacy of the jury room."³⁵⁴

In a more recent state court example, actual jury deliberations were filmed with the consent of the judge and parties and with the knowledge of the jurors.³⁵⁵ WGBH, a public television station, obtained permission to film the case of Leroy Reed. Reed, who had limited intelligence, a second-grade reading ability, and a previous felony conviction, was charged with illegal possession of a handgun. He had purchased the gun so that he could pursue a career as a detective, as he had seen advertised in a magazine. The actual jury deliberations, which lasted approximately two and one-half hours, were condensed to an hour and aired on television on April 8, 1986.³⁵⁶ The broadcast showed the jurors engaged in careful and thoughtful deliberation, as they struggled with the question whether there

347. Warren E. Burger, *Tampering with the Anglo-American Jury System*, in 22 *Vital Speeches of the Day* 78, 79 (1955) (quoting Attorney General Brownell's statement to the press).

348. *See id.*

349. Representative Keating (R-N.Y.) introduced H.R. 8546 in the House, which was identical to S. 2887 in the Senate. *See* 102 Cong. Rec. H14,037 (daily ed. July 23, 1956) (statement of Rep. Keating).

350. 18 U.S.C. § 1508 (1995).

351. *See id.*

352. H.R. Rep. No. 2807 (1956), *reprinted in* 1956 U.S.C.A.N. 4149.

353. 102 Cong. Rec. H14,037 (daily ed. July 23, 1956) (statement of Rep. Keating).

354. *Id.* Rep. Vanik (R-OH) echoed this sentiment: "The deliberations of all juries must be given the sanctity of secrecy." *Id.*

355. *Frontline: Inside the Jury Room* (WGBH television broadcast, Apr. 8, 1986).

356. More recently, Maine's highest court granted CBS permission to place cameras in a jury room and record deliberations in a civil case; however, before CBS could tape the case, it had to obtain the consent of the jurors, parties, and lawyers. *See Jury Deliberations to Air?*, Nat'l L.J., Feb. 19, 1997, at A8. On April 16, 1997, CBS did air edited trials and deliberations filmed in Arizona state court. *See Enter the Jury Room* (CBS television broadcast, Apr. 16, 1997).

was ambiguity in the statute so that they could find that it did not apply in this particular case.

Admittedly, there are several serious obstacles to the implementation of public jury deliberations, particularly in federal courts. First, as previously discussed, 18 U.S.C. section 1508 prohibits the recording of jury deliberations in federal court.³⁵⁷ Second, there is the potential problem of whether jurors would speak candidly if they knew that their deliberations were being observed. Deliberation of other governmental bodies, from the Supreme Court to the executive branch to grand juries, is protected from public view based on the theory that confidentiality is needed to elicit candid discussion.³⁵⁸ Third, there is the issue of whether the role of juror would become so burdensome that an even greater number of citizens would seek to avoid jury duty than is currently the case.³⁵⁹ Finally, while this proposal would certainly satisfy the First Amendment, it would be open to challenge under the Sixth Amendment. The privacy of jury deliberations has long been regarded as a bedrock of the protection afforded to criminal defendants.³⁶⁰

357. See *supra* text accompanying notes 339-54 (describing the events leading up to the passage of 18 U.S.C. § 1508 (1995)). A number of states also have statutes prohibiting the recording of jury deliberations in their courts. See, e.g., Cal. Penal Code § 167 (West 1988); 705 Ill. Comp. Stat. 315/1-1 (West 1994); La. Rev. Stat. Ann. § 129.2 (West 1986); Mass. Gen. Laws ch. 272, § 99A (1994); Mich. Comp. Laws. § 750.120b (1996); N.C. Gen. Stat. § 14-227.2 (1994); N.D. Cent. Code § 12.1-09-05 (1985); 18 Pa. Cons. Stat. § 5103 (1996); Va. Code Ann. § 18.2-468 (Michie 1988).

358. See *supra* Part V (describing other governmental bodies and the ways in which their deliberations are protected from public disclosure).

359. See, e.g., Abramson, *supra* note 19, at 248 ("Most U.S. citizens strongly believe in their right to jury trial, but fewer feel responsibility to serve on juries when called. . . . Unfortunately, the numbers indicate that escaping jury service remains a favorite pastime of citizens."); Stephen J. Adler, *The Jury* 51 (1994) ("The ease with which people can remove themselves from consideration [for jury duty] is one reason that while 80 million Americans have been called for jury duty in state or federal court, fewer than half of those called have ever sat on a jury."); Joanna Sobol, Note, *Hardship Excuses and Occupational Exemptions: The Impairment of the "Fair Cross-Section of the Community,"* 69 S. Cal. L. Rev. 155, 173 ("In Los Angeles County Superior Court, for the 1994 fiscal year, 47.7% of questionnaires sent received no response, 15.2% were returned as undeliverable, and another 24.2% of people were excused.") (footnotes omitted); Fox, *supra* note 168, at 1 (noting that even after improvements to the jury system in New York State, "one thing has not changed . . . and that is the creativity of persons seeking to avoid jury duty"); Nora Zamichow, *County Gets Tough with Jury Duty Scofflaws*, L.A. Times, June 26, 1996, at B1 ("People have gotten used to avoiding jury service.") (quoting Superior Court Judge Aurelio Munoz, chairman of a committee examining the jury system in California); *id.* ("Two years ago, only about half of the 4 million residents who were sent forms bothered to reply—the county's worst response rate ever.").

360. See, e.g., Fed. R. Crim. P. 23(b) advisory committee note (acknowledging that it is a "cardinal principle that the deliberations of the jury shall remain private and secret in every case") (quoting *United States v. Virginia Erection Corp.*, 335 F.2d 868, 872 (4th Cir. 1964)).

2. Jury Opinion-Writing

Another way of revealing the jury's reasoning process would be to have the jury write an opinion, much like a judge does. The jury's opinion, however, would be limited to the finding of facts because that is the function the jury is supposed to perform.³⁶¹ In this respect, the jury's opinion might resemble a judge's opinion after a bench trial. Under Federal Rule of Civil Procedure 52, the judge in such a case is responsible for crafting an opinion that contains a separate section on the finding of facts.³⁶² One advantage to a jury opinion is that it allows the jury to disclose its reasons to the public, while protecting its deliberations, in which jurors may express tentative and initial views. The writing process itself might also structure the jury's deliberations and improve its analysis. Juries might be more likely to engage in methodical and careful fact-finding and provide reasons that would appear sensible to others. Such a process might help the jury to shed its black-box image, thereby satisfying its critics, who often charge juries with reaching irrational, untenable, and inexplicable decisions.³⁶³ Another advantage of jury opinion-writing, like judicial opinion-writing, is that the opinion is available for all to read and study. The press can mediate the experience for the public and try to explain what the opinion says, but the opinion obviates the need for such intervention and allows the public to study the opinion on its own. The jury would have control over the opinion, unlike an interview, and would be able to explain its reasoning more fully and accurately than in an interview. The jury also would be assured that the full text would be made available to the public rather than a few choice quotations that a journalist selects. Furthermore, the opinion reflects the views of the jury speaking as one entity, rather than the thoughts of random jurors speaking individually. This proposal would promote many of the values described in Part IV, such as public education, public acceptance of the verdict, and juror accountability, without sacrificing other values, such as juror candor,

361. Although the jury is supposed to find facts, it performs other functions as well. *See, e.g.,* Stephen C. Yeazell, *The New Jury and the Ancient Jury Conflict*, 1990 U. Chi. Legal F. 87, 88 ("[T]he jury is not now and never has been a simple, functional piece of the judicial machine, to be judged on how well it finds facts. Instead it plays a complicated role, simultaneously functional and symbolic, checking judicial power and strengthening judicial institutions . . ."); Dale W. Broeder, *The Functions of the Jury: Facts or Fictions?*, 21 U. Chi. L. Rev. 386, 405-11 (1954) (providing areas of law in which juries often decide both factual and legal questions).

362. Fed. R. Civ. P. 52. The judge, however, must also include a separate section containing conclusions of law. *See id.* ("[T]he court shall find the facts specially and state separately its conclusions of law thereon . . .").

363. *See, e.g.,* Guido Calabresi & Philip Bobbitt, *Tragic Choices* 57-64 (1978) (pointing out the limitations of juries, including their lack of accountability because they are not required to give reasons for their decisions); *id.* at 57 ("Juries apply societal standards without ever telling us what these standards are, or even that they exist."); Jerome Frank, *Courts on Trial: Myth and Reality in American Justice* 108-45 (1949) (denouncing juries and questioning their decision-making capacity); Lind, *supra* note 170, at 10.

privacy, and jury independence.

As a practical matter, however, this proposal is fraught with difficulties. One difficulty is the size of the jury. The jury in criminal cases in federal court typically consists of twelve jurors.³⁶⁴ Although civil juries in federal court can be smaller,³⁶⁵ and although there has been a move in the past toward decreasing the size of the jury in order to save time and money,³⁶⁶ juries may still be too large for the task of opinion-writing. It is difficult enough to have jurors reach consensus on a verdict,³⁶⁷ let alone have them agree on how to structure and write an opinion, however brief it might be. Admittedly, federal circuit court judges sit in panels of three, and in even larger panels for en banc cases, while the Supreme Court Justices sit in a panel of nine; however, there are many ways in which a jury opinion would be far more difficult to write than a judge's opinion. Judges have many advantages unavailable to jurors: they are professionally trained in the law and skilled in the art of writing; they have as much time and privacy as they need to engage in opinion-writing and have many resources at their disposal, including libraries, law clerks, and secretaries. Finally, only one judge is assigned the task of actually writing the opinion; the others simply decide to join what that judge has written or to write separately. At the very least, though, jury opinion-writing would satisfy the constraints imposed by the First and Sixth Amendments, just as judge opinion-writing does.

364. See Fed. R. Crim. P. 23(b) ("juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12 . . .").

365. See Fed. R. Civ. P. 48 ("The court shall seat a jury of not fewer than six members and not more than twelve members . . .").

366. See, e.g., Zeisel, *supra* note 15, at 719 (noting that a reduction in jury size could lead to less representative juries, greater variation in damage verdicts, and fewer hung juries); Bruce D. Brown, *Federal Court Watch: The Twelve Chairs*, Legal Times, May 20, 1996, at 6 (describing a judicial rules committee vote to recommend that federal civil jury trials consist of 12 jurors and noting that this "would buck a trend toward smaller juries").

367. Consider, for example, California's recent re-examination of the unanimous jury. See, e.g., *California Blue Ribbon Panel Urges Wide Range of Jury Reforms*, West's Legal News, May 3, 1996, available in 1996 WL 260677 (announcing the Judicial Council's Blue Ribbon Commission's proposals for jury reform, which include a recommendation for nonunanimous verdicts); Greg Krikorian, *Committee Hearing a Trial by Fire for the Jury System*, L.A. Times, July 28, 1995, at 3 (describing a proposal by State Senator Charles Calderon (D-Whittier), Chair of the Senate Judiciary Committee, which "would allow 11-1 verdicts in all but capital cases"); Jason L. Riley, *Rule of Law: Should a Jury Verdict Be Unanimous?*, Wall St. J., Nov. 22, 1995, at A11 (recounting California District Attorneys Association's proposal to amend the state's constitution to allow for nonunanimous juries); *Wilson Touts Jury Reform*, L.A. Daily News, July 18, 1995, at N4 ("[Gov. Pete] Wilson told a group of prosecuting attorneys . . . that he supports a bill . . . that would allow criminal convictions on a 10-2 vote of jurors in all but death penalty cases."). California is considering moving from a unanimity requirement in criminal cases to 10-2 or 11-1 juries, in part to save money and in part to "lessen the number of hung juries" in criminal cases. Riley, *supra*, at A11.

3. *Extended Special Verdicts*

Yet another route for making disclosure more systematic would be the release of an extended special verdict form to the press in lieu of post-verdict interviews. Currently, federal judges in civil trials can use a special verdict form in which they submit to the jury a series of questions, and the jury responds with brief, written answers.³⁶⁸ Federal judges in civil cases can also use a general verdict accompanied by an answer to interrogatories, in which the jury is supposed to render a verdict and provide written answers to the questions posed by the judge.³⁶⁹ When the two are consistent, judgment is entered; when the two are inconsistent, judgment is not entered and further deliberations or a new trial may be in order.³⁷⁰ If federal judges use an extended special verdict or a general verdict accompanied by interrogatories more frequently and make sure that each step in the jury's reasoning has been carefully delineated by the series of questions posed by the judge, then such forms might provide the public with more accurate insight into the jury's reasoning process than the recollections of a few jurors during post-verdict interviews. Of course, the press would object to the special verdict, even in an extended form, as a poor substitute for the post-verdict interview and would argue that the First Amendment permits interviews regardless of whether the information is provided through other means.

Another problem with a detailed special verdict, and one reason why judges may hesitate to use it more often, is that it can be seen as intruding into the jury's domain. Ordinarily jurors are free to structure their deliberations anyway they see fit, and the court is reluctant to advise or intrude.³⁷¹ A detailed special verdict, which attempts to structure the jury's reasoning process, may be seen as a device that ineluctably shifts control from the jury to the judge, and in doing so, disturbs the proper balance between judge and jury.

Another problem is that the special verdict and the general verdict plus interrogatories are used in civil cases, but have no counterparts in criminal procedure. A defendant in a criminal case could argue that such forms interfere with his rights under the Sixth Amendment.³⁷² This argument would reach its most compelling form when a jury chooses to engage in jury nullification. In such a case, a special verdict or general verdict with interrogatories could interfere with the jury's power to decide

368. See Fed. R. Civ. P. 49(a).

369. See Fed. R. Civ. P. 49(b).

370. See *id.*

371. See Marder, *supra* note 12, at 606-12 (describing the need for judges to instruct juries on gender dynamics and noting that courts are reluctant to do so for fear of being too intrusive).

372. Although the jury in a criminal case had the inherent authority to render a special verdict, in which it found facts but left the trial judge to find the defendant guilty or not guilty depending upon how he found the law, this practice has fallen into disuse. See Morton R. Kadish & Sanford H. Kadish, *Discretion to Disobey* 46 n.† (1973).

a case contrary to the law. This time-honored power, which belongs to the jury even though the jury is not instructed on it,³⁷³ allows the jury to ignore the law as given to it by the judge and to acquit. Although it would be useful for the public to know when the jury has engaged in nullification and why,³⁷⁴ the defendant would probably prefer that the jury not be obligated to give its reasons in a detailed special verdict form because having to specify why it was flouting the law to return an acquittal might deter the jury from doing so.³⁷⁵

4. Court-Conducted Post-Verdict Interviews

Another mechanism for achieving more systematic disclosure of the jury's deliberations is to have the court conduct its own post-verdict interviews. There are several advantages to having the court rather than the press carry out such interviews. One is that if such interviews become the responsibility of the court, then they will occur in every case. Thus, the court will become a repository of information about juries and how they work. Such information would benefit not only researchers, but also courts: judges would be able to propose changes to the jury process based upon data they would have collected systematically over time. Another advantage to assigning this task to the judge is that the judge is the person who, at least in federal court,³⁷⁶ typically questions prospective jurors during voir dire to determine their fitness to serve.³⁷⁷ Admittedly, judges often conduct a quick voir dire,³⁷⁸ eschewing the kind of open-ended questions that jury consultants advise lawyers to use in order to encourage jurors to reveal personal information.³⁷⁹ Although judges might feel uncomfortable

373. See *United States v. Dougherty*, 473 F.2d 1113, 1136 (D.C. Cir. 1972).

374. Compare Pool & Pyle, *supra* note 62, at A1 ("Repudiating criticisms that they were swayed by emotions and ignored the evidence, two jurors from the O.J. Simpson trial spoke out . . . , asserting that their swift acquittal of the famed ex-athlete was based on glaring weaknesses in the prosecution's case."), with James Pinkerton, *Nullification: Wrong in 1832 and in 1995*, L.A. Times, Oct. 12, 1995, at B9 ("Many Americans learned a new word after the O.J. Simpson verdict: nullification. The Los Angeles jury was accused of ignoring the evidence and refusing to follow the law.").

375. The power of the jury to acquit in a criminal case has been described as follows:

The acquittal is a *diktat*, a 'sovereign power,' for which stated reasons are neither expected nor permitted. The jurors may in no way be held to account for their verdict, or be made to explain it, or even be questioned about it. Their verdict is given conclusive legal effect, no matter how fully it may be proved contrary to law.

Kadish & Kadish, *supra* note 372, at 46-47 (footnote omitted).

376. See Fed. R. Civ. P. 47(a) ("The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination.").

377. See Barbara Allen Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 Stan. L. Rev. 545, 548 (1975) ("Increasingly, judges are conducting voir dire examinations rather than allowing counsel to propound questions.").

378. See *id.* at 549 ("[T]he limited questions put by the judge to the panel as a group greatly reduce the information produced by the voir dire.").

379. See, e.g., 2 National Jury Project, *Jurywork* 11-9 (Release #10, 12/90) (recommending the use of open-ended questions because "panelists' fuller answers to such questions provide

asking questions that they consider overly intrusive, the advantage to having judges perform a closing interview is that jurors will have a sense of closure: the trial process will begin and end with the judge's questions. In addition, judges bring to the task the dignity of their position, thus enabling jurors to avoid interviews in which they feel "hounded" by the press.³⁸⁰ Jurors, knowing that the judge will conduct interviews after a verdict, might feel more accountable and undertake their deliberations with greater care. The information collected from these interviews also would serve to educate the public about the workings of juries. Finally, having the judge conduct the interview rather than the press might lead to more nuanced descriptions of the jury aimed at understanding a complex decision-making body, rather than extreme depictions directed toward selling newspapers.

The resistance to such a proposal is likely to come from both judges and the press. Judges would be wary about adding to their workload when many of them already contend with backlogged dockets and budget constraints.³⁸¹ In addition, some judges may say that they do not want to know how the jury reached its decision, and that such information is better left unknown. The press would claim that such interviews should not take the place of interviews that they might conduct because theirs would likely be more probing. They would also assert their First Amendment right of access to former jurors. The press also would be resistant to ceding any of its power to federal judges, who are unelected government officials protected by lifetime tenure.

5. *Extended Polling by Judge*

A variation on court-conducted interviews would be extended polling of jurors by the court. Currently, after a jury has reached a verdict and the foreperson has delivered it to the bailiff, the jurors re-enter the courtroom, and the verdict is announced in open court. At that point, the judge will often poll the jurors, asking each juror if the verdict represents his or her vote.³⁸² The polling, however, could take a more extended form, in which

more opportunity for hearing and assessing").

380. See *supra* text accompanying notes 140-49 (describing "hounding" of jurors).

381. Under the Civil Justice Reform Act (CJRA) adopted in 1990, federal district courts are required to study and adopt an expense and delay reduction plan. As a result of such studies, some courts have discovered they have huge backlogs, see, e.g., Gordon Hunter, *Judges Clog Federal Docket*, Tex. Law., Nov. 18, 1991, at 1 (describing a report detailing "the depth—and the sources—of the logjam in civil cases facing lawyers and judges in Texas' Southern and Western districts"); whereas others have learned that they are under-utilized, see, e.g., Marcia M. McBrien, *Federal Courts 'Underutilized,' Says Western Judge*, Mich. Law. Wkly., Mar. 15, 1993, at 1A ("Michigan's 'underutilized' federal courts offer early trial dates, individual attention—and no backlog, according to a federal judge.").

382. See Fed. R. Crim. P. 31(d) ("When a verdict is returned and before it is recorded the jury shall be polled at the request of any party or upon the court's own motion."). Polling is not limited to federal court. See, e.g., Md. R. Crim. P. 4-327(e); Minn. R. Crim. P. 26.03, subd. 19(5).

the judge questions jurors more fully in open court to make sure that the verdict is one with which they agree. The judge could, for example, ask such questions as: Did you base your decision on anything other than the evidence admitted in court and the instructions that I gave you? Did race or gender influence your decision in any way?

There are several advantages to extended polling, in addition to those described in the section on court-conducted questioning of jurors. One is that it is done in open court, for all to see and hear and for the record to reflect. Another advantage to such polling is that it allows jurors to respond individually, and yet as part of the jury. In addition, it gives jurors another opportunity to ask themselves whether they are comfortable with the verdict, and if they are not, then the court is still in a position to take action, such as requiring further deliberations.³⁸³ Finally, there might be less resistance to extended polling because it is based on an existing procedure.

Extended polling, however, is not without its disadvantages. One is that even an extended colloquy between judge and juror is unlikely to be very probing because judges are reluctant to intrude into the workings of the jury. Moreover, even if judges were rigorous in their questioning, jurors are less likely to admit their personal views in public than when they are questioned in private, as group voir dire has demonstrated.³⁸⁴ Finally, the press is unlikely to regard extended polling as a substitute for conducting its own interviews, which it believes it is entitled to under the First Amendment.

C. Prohibiting Disclosure: The British Model

At the other extreme, and to achieve consistency in a different way, the United States could follow the British model, prohibiting both juror disclosures to the press and press publication of jury deliberations. Violation of either ban would be punishable by contempt.

When the British Parliament passed section 8 of the 1981 Contempt of Court Act,³⁸⁵ it was motivated by several concerns. It was acting in response to a juror who had revealed the jury's deliberations in the Jeremy Thorpe trial³⁸⁶ to a journalist, who then incorporated the interview in a

383. See Fed. R. Crim. P. 31(d). ("If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged.").

384. See, e.g., Kimba M. Wood, *The 1995 Justice Lester W. Roth Lecture: Reexamining the Access Doctrine*, 69 S. Cal. L. Rev. 1105, 1118-20 (1996) ("I began asking each juror sensitive questions in the robing room . . . without having required them to request a private session. The difference in the quantity and the quality of the information the jurors revealed was striking . . ."); Babcock, *supra* note 377, at 547 ("[A]nother method of restricting the information-gathering function of voir dire is to address all questions to the jury panel at once, rather than as individuals.").

385. Under § 8(1), "it is a contempt of court to obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings." Contempt of Court Act, 1981, § 8(1) (Eng.).

386. The trial that served as a catalyst for the law was the 1979 trial of Jeremy Thorpe on

newspaper article entitled *Thorpe's Trial: How the Jury Saw It*.³⁸⁷ The court, while lamenting the "apparently diminishing respect for the convention of observance of jury secrecy and the risk of escalation in the frequency and degree of the disclosures,"³⁸⁸ nevertheless held that the action did not constitute contempt of court under the law at the time.³⁸⁹ Parliament saw as paramount the need to pass a law that would preserve the secrecy of the jury room.³⁹⁰ Secrecy was necessary so that jurors could engage in "free, uninhibited and unfettered discussion" that was "essential to the proper administration of the system of justice, which includes trial by jury."³⁹¹ Parliament took the view that "the sanctity of the jury room, like the ballot box or the confessional, must remain inviolate."³⁹² Furthermore, "[t]he reason behind the prohibition on jurors telling anyone what went on in the jury room, or which way jurors decided, is a bit like that behind the secret ballot: it precludes bribery and blackmail."³⁹³ Another concern was to protect the jury from inquiries that might destroy public confidence in the system.³⁹⁴ The law was also intended to avoid sensational accounts of a jury's deliberations in a particular case and to protect jurors from outside harassment.³⁹⁵ Finally, section 8 was thought to safeguard the finality of the jury's verdict.³⁹⁶ If jurors could not disclose their deliberations, including any misconduct, then the possibility of disturbing a verdict became quite remote.

charges of conspiracy to murder. See David Pannick, *The Jury Verdict We Cannot Reach*, Independent (London), Sept. 14, 1990, at 15. Thorpe, a former Liberal Party leader and member of Parliament, was acquitted of conspiring to murder former male model Norman Scott, who claimed to have been Thorpe's lover. Three others, David Holmes, John Le Mesurier, and George Deakin, all of whom were alleged to have participated in the conspiracy, were also acquitted. See *Thorpe Acquitted of Murder Charge*, Facts on File World News Dig., June 29, 1979, at 485D3.

387. See *Attorney-General v. New Statesman & Nation Publ'g Co.*, 1 All E.R. 644 (Q.B. 1980) (Widgery, C.J.).

388. *Id.* at 646.

389. See *id.* at 650.

390. See Shiranikha Herbert, *Journalists Must Not Disclose Jury's Secrets*, Guardian (London), Nov. 17, 1992, at 20 ("Section 8 was aimed at keeping the secrets of the jury room inviolate in the interests of justice.").

391. Clare Dyer, *Mail Publishers Fined for Blue Arrow Jury Contempt*, Guardian (London), Nov. 13, 1992, at 9 (quoting Lord Justice Beldam); see Frances Gibb, *Newspaper Guilty of Blue Arrow Contempt—Mail on Sunday*, Times (London), Nov. 13, 1992, at 10a (same).

392. McConville & Baldwin, *supra* note 162, at 575.

393. *The Dangers of Spiritual Guidance*, Times (London), Oct. 25, 1994, at 37a.

394. See *id.* (stating that "public confidence in juries would be undermined as a result of disclosures").

395. See *id.* (noting that "jurors might be harassed or intimidated by 'any investigative journalist, any disgruntled litigant, any inquisitive lawyer or well-meaning sociologist'"); Editorial, *Juries Can Be Fallible, Too*, Independent (London), July 15, 1993, at 25 ("[I]t is hard to see how confidentiality could be removed without making [jurors] feel exposed . . .").

396. See *Jury Room Deliberations*, 131 New L.J. 101, 101-02 (1981) (noting the argument made by Lord Hutchinson of Lullington, speaking before the House of Lords); *The Dangers of Spiritual Guidance*, *supra* note 393, at 37a.

In this country, one major obstacle to regulating jury disclosures by similar legislation is the First Amendment. The British Parliament passed a law that makes *any* disclosure of jury room deliberations punishable by contempt. The British statute sharply curtails the speech of both jurors and the press. Parliament, in trying to strike the proper balance between the administration of justice and the freedom of speech, acted in favor of the former at the expense of the latter.³⁹⁷ Parliament may have struck an appropriate balance for the British justice system,³⁹⁸ which has no First Amendment but a profound belief in the sanctity of the jury room;³⁹⁹ it seems unlikely, however, that such a law would strike the proper balance here.

An additional stumbling block is that the British statute allows for no exceptions, even for research purposes. Even after the Royal Commission on Criminal Justice,⁴⁰⁰ as well as other British commentators, recognized that the law was overly broad and should contain an exemption for research purposes,⁴⁰¹ change has been slow.⁴⁰² As the critics of section 8

397. The Supreme Court, in comparing the British and American systems, has noted that "any comparison between the two systems must take into account that although England gives a very high place to freedom of the press and speech, its courts are not subject to the explicit strictures of a written constitution." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 566 n.10 (1976).

In *Attorney-General v. Guardian Newspapers Ltd.*, 1 W.L.R. 1248 (H.L. 1987), Lord Ackner described the difference between the two countries' systems as follows: "[In America,] the courts, by virtue of the First Amendment, are, I understand, powerless to control the press. Fortunately, the press in [Great Britain] is, as yet, not above the law . . ." *Id.* at 1306.

398. Of course, the law does have its critics, *see, e.g., Repeal the Contempt of Court Act 1981 s. 8*, 140 New L.J. 1257 (1990) (calling for repeal of the statute) [hereinafter *Repeal the Act*]; Pannick, *supra* note 386, at 15 ("Today, the folly of Section 8 is manifest."), including those who believe that there should be an exception for purposes of research. *See infra* note 401 (discussing critics who urge an exception for research).

399. *See Attorney-General v. New Statesman & Nation Publ'g Co.*, 1 All E.R. 644, 647 (Q.B. 1980) (Widgery, C.J.) (asserting that disclosure of jury deliberations "represents a departure from the norm and is a serious and dangerous encroachment into the convention of jury secrecy").

400. *See The Royal Commission on Criminal Justice, Report 2* (1993) ("We recommend . . . that such research should be made possible for the future by an amendment to the Act so that informed debate can take place rather than argument based only on surmise and anecdote.").

401. *See, e.g., McConville & Baldwin, supra* note 162, at 576 (urging that research into jury deliberations be permitted to allow "reasonable scrutiny and public accountability"); *Repeal the Act, supra* note 398, at 1257 (stating that "legitimate research is not merely hampered but strangled by the section and we cannot believe that this was ever really its aim"); Caplan, *supra* note 336, at 31a ("Surely the arguments for bona fide jury research, which maintained the anonymity of jurors and of their cases, are compelling, particularly if the research is licensed by a controlling body."); *Jury Trials: A Mystery*, *Economist*, Jan. 27, 1996, at 51 ("It is high time that a shaft of light was allowed into the jury room."); Pannick, *supra* note 386, at 15 (lamenting the loss of academic research on whether juries understand fraud cases and arguing that a law that punishes such academic research is inimical to an open society).

402. *See, e.g., Jury Room Deliberations, supra* note 396, at 101 (citing Lord Hutchinson's opposition to a research exemption); *The Law: The Secret Room, Economist*, May 6, 1995, at 57 (suggesting that the opposition of Lord Taylor, the Lord Chief Justice, to a research

have noted, it would have been possible to maintain the sanctity of the jury room, and yet to permit research in which jurors are not "questioned about individual and specific cases" or "the result of the questioning . . . [is] not . . . printed in the popular press."⁴⁰³ The law enacted by Parliament, which encompasses any disclosures by jurors, seems to go too far in the direction of absolute secrecy and fails to recognize any competing concerns.

D. Searching for a Compromise

1. An Oath Not to Disclose

There are several ways in which juror disclosures to the press could be curtailed short of adopting the extreme measure taken by England. The judiciary could require jurors to take an oath not to disclose the deliberations, as is required of grand jurors, or not to disclose them until after a certain amount of time, such as several months or even years, has elapsed. There are several advantages to such an approach. To begin with, petit jurors already take an oath when they begin their service.⁴⁰⁴ This oath, unlike the one taken by grand jurors, does not require them to maintain secrecy about the deliberations after a verdict has been reached.⁴⁰⁵ There is no reason, however, that petit jurors, like grand jurors, could not swear to uphold the confidentiality of the jury's deliberations, at least for a certain period of time after a verdict. As one British Chief Justice noted: "It follows that every juryman ought to observe the obligation of secrecy which is comprised in and imposed by the oath of the grand juror."⁴⁰⁶ One way to achieve this result may be to require the petit juror to take the same oath currently taken by the grand juror. Admittedly, the Federal Rules of Criminal Procedure provide that a breach

exemption has led the government to be slow in making any changes to the law).

403. *Repeal the Act*, *supra* note 398, at 1257.

404. In a civil trial in federal court, the petit juror takes the following oath: "You and each of you do solemnly swear that you will well and truly try the matters in issue now on trial, and render a true verdict, according to the law and evidence; So Help You God." Division of Continuing Educ. and Training, Federal Judicial Ctr., *Forms of Oaths for Use in the United States District Courts* 15 (1976).

In state courts, a juror may take a similar oath. *See, e.g.*, Fla. R. Civ. P. 3.300(a) (providing sample oath); S.D. R. Civ. P. 15-14-11 (same).

Courts permit an affirmation for those who have religious reasons not to take an oath. *See, e.g.*, *Biklen v. Board of Educ.*, 333 F. Supp. 902, 905 (N.D.N.Y. 1971) ("The resistance of Quakers and other religious sects to swearing is the basis for the alternative of affirmation explicitly sanctioned in both the federal and state constitutions . . ."). One commentator has suggested that a statement of veracity, subject to the penalties of perjury, should be sufficient, and would allow those whose religious beliefs prevent them from taking an oath or affirmation to serve as a juror. *See* John W. Vinson, *Swearing in Texas Courts: Oaths, Affirmations, and Other Forms of Veracity Insurance*, Tex. B.J., Dec. 1992, at 1116, 1120.

405. *Compare supra* note 404 (quoting an oath taken by a petit juror), *with supra* note 257 (quoting an oath taken by a grand juror).

406. *Attorney-General v. New Statesman & Nation Publ'g Co.*, 1 All E.R. 644, 647-48 (Q.B. 1980) (citations omitted).

of the requirement of grand jury secrecy "may be punished as a contempt of court,"⁴⁰⁷ but even this language is not the mandatory language of England's section 8 of the Contempt of Court Act, and there is no reason that the Federal Rules of Civil Procedure could not be worded in the same manner as the Federal Rules of Criminal Procedure.

What is important about such an oath is not only that it tells the juror that the jury room deliberations are to remain confidential, but also that it puts the onus on the juror to abide by his or her oath. Even if a breach of the oath were not punishable by contempt, it is likely that jurors would abide by their oath. Anecdotal evidence suggests that jurors take their role seriously and try to perform their tasks responsibly.⁴⁰⁸ If part of the role were to maintain the confidentiality of the deliberations, then it is likely that they would perform that task as well.

One way to address any First Amendment concerns about such an oath would be to limit the time period for which jurors were sworn to maintain the confidentiality of their deliberations. Courts have allowed speech to be restricted by time, place, or manner,⁴⁰⁹ and this would merely be a time restriction. Courts have already restricted juror speech by imposing silence on jurors for a limited amount of time; jurors are not allowed to discuss the case with each other or with anybody else throughout the trial. They are only allowed to discuss the trial inside the jury room and when no one else is present.⁴¹⁰ Furthermore, one court counseled jurors to remain silent about a case for a week after the trial had ended and kept their names and addresses from being disclosed during that period.⁴¹¹ Although this proposal calls for a longer delay, the delay need be only as long as it takes for the case to recede from the public eye. Such a delay would strike a much-needed balance: it would protect the integrity of the verdict and the public's confidence in it immediately after trial when the verdict is foremost in the public eye, but it would allow for

407. Fed. R. Crim. P. 6(e)(2) (emphasis added).

408. See, e.g., ABA/Brookings Symposium, Charting a Future for the Civil Jury System 8 (1992) ("The evidence indicates the jurors take their responsibilities very seriously and attempt to reach fair and just results."); Joe S. Cecil et al., *Citizen Comprehension of Difficult Issues: Lessons from Civil Jury Trials*, 40 Am. U. L. Rev. 727, 751 (1991) (discussing a study that "showed that jurors in both long and short trials took their task extremely seriously"). As Professor Kalven observed:

[T]here is much evidence that most people, once actually serving in a trial, become highly serious and responsible toward their task and toward the joint effort to deliberate through to a verdict. Whether they are good at the job may be open to question, but that they are serious about it and give it a real try is abundantly documentable.

Kalven, *supra* note 211, at 1062.

409. See *supra* note 289 (providing case law examples).

410. See *supra* text accompanying notes 228, 306-07 (describing the need for jurors to maintain silence throughout trial and for deliberations to occur in private in the jury room).

411. See *United States v. Doherty*, 675 F. Supp. 719, 723-24 (D. Mass. 1987); *id.* at 725 ("The values to be promoted by press access to the names and addresses of the jurors are no less advanced seven days after the return of the verdict.").

interviews of jurors and study of deliberations sometime afterward so that the institution of the jury was not beyond scrutiny and reform. This approach, in which nondisclosure is required for a certain amount of time, has been readily practiced in other areas of government, from the release of Supreme Court Justices' papers⁴¹² to the Watergate tapes.⁴¹³ In addition, the Supreme Court has suggested that it is preferable to limit access to information that is within government control, rather than to release such information and subsequently punish the press for its truthful publication.⁴¹⁴ The advantage of an oath is that it encourages such values as juror candor, privacy, and jury independence, without sacrificing such values as public education, juror accountability, and public acceptance of the verdict.

2. *An Instruction Not to Disclose Deliberations*

The oath suggested above could be accompanied by an instruction from the judge, or the judge could simply instruct on the need for confidentiality of jury deliberations without requiring the jurors to take an oath. The former is consistent with the practice of grand juries; the latter would be a less intrusive, though perhaps less effective, alternative to an oath.

At the close of the trial, after a verdict has been rendered but before the judge thanks the jurors for their service and dismisses them from the jury, the judge could instruct the jurors that they are not to disclose the deliberations that took place in the jury room. This instruction would resemble the instruction that some judges currently give to grand jurors about their responsibility to keep secret their deliberations.⁴¹⁵ Jurors may

412. See *supra* note 235 (describing the unusual release of Justice Thurgood Marshall's papers while other Justices with whom he sat were still on the Court). One law professor, criticizing the untimely release of the Marshall papers, explained the need for delayed release of confidential deliberations: "Over the long term, as participants leave public service, the need for confidentiality diminishes, while the value of public inquiry remains strong. But the long term is not two years." Richard D. Friedman, Letter to the Editor, *In Marshall Papers Case, Library Abuses Trust*, N.Y. Times, June 3, 1993, at A22. His observation is applicable to jury deliberations as well.

413. See, e.g., *Judge Bars Release of Tapes of Nixon on Personal Matters*, N.Y. Times, Aug. 10, 1993, at A9 (describing the district court's decision to grant Mr. Nixon's request for a preliminary injunction, halting the release of four hours of White House tapes from conversations in July and August of 1972 that were to have been made public later in the month).

414. See, e.g., *Florida Star v. B.J.F.*, 491 U.S. 524, 534 (1989) ("The government may classify certain information, establish and enforce procedures ensuring its redacted release, and extend a damages remedy against the government or its officials where the government's mishandling of sensitive information leads to its dissemination.").

415. For example, a Wyoming statute provides that a judge shall instruct the grand jurors "as to their duty" and "shall call their attention particularly to the obligation of secrecy which their oaths impose." *Hennigan v. State*, 746 P.2d 360, 368 (Wyo. 1987) (quoting Wyo. Stat. § 7-5-205 (1977) (current version at Wyo. Stat. § 7-5-202 (1996))). In other states, the judge also instructs the grand jurors on their obligation to keep the proceedings secret. See, e.g.,

abide by the instruction because the judge is a figure of authority and jurors respect that authority,⁴¹⁶ but there is always a chance that they may not. Once jurors have been dismissed, they are no longer jurors; they are simply private citizens. It is unclear what power the court would have, other than perhaps its inherent power, to ensure that jurors abide by the instruction after the court proceedings have concluded.

If jurors take an oath, and then are instructed on the need to abide by that oath, there is a greater chance that they will feel bound by the combination of the judge's instruction and the oath than if just the oath or the instruction is administered alone. In addition, if jurors are questioned about their ability to adhere to such an oath during voir dire⁴¹⁷ and agree that they understand the need for confidentiality and can abide by such a requirement, then the voir dire may also help to ensure that jurors will follow through after the trial has ended. An oath in combination with an instruction raises enforcement difficulties similar to the ones raised by an instruction. However, with the combination of an oath and instruction, unlike with an instruction alone, there is the possibility of enforcement through charges of contempt. Admittedly, a court might be reluctant to proceed in that manner, but the threat of such charges might be sufficient to inspire appropriate behavior on the part of jurors.

3. *Allowing Disclosure of One's Own Comments*

A third alternative is that the court could instruct the jurors that it is their individual decision whether or not to talk to members of the press, but that if they choose to do so, they are limited to expressing their own

Committee on Criminal Jury Instructions, Office of Court Admin., 1 Criminal Jury Instructions—New York § 1.03, at 8-9 (1989); *id.* at 9 (“I cannot emphasize too much the importance of maintaining the secrecy of your proceedings in the Grand Jury.”); North Carolina Conference of Superior Court Judges, Committee on Pattern Jury Instructions, North Carolina Pattern Jury Instructions for Criminal Cases § 100.10, at 7 (rev. ed. 1980) (“[Y]our oath requires you to keep in absolute secrecy all matters, persons and discussions that occur in your sessions. This duty exists throughout the time of your service and continues forever afterwards.”); Ohio Judicial Conference, Jury Instruction Comm., 4 Ohio Jury Instructions § 401.15, at 12 (1994) (“The oath which has just been administered to you . . . contains your promise that you keep secret the testimony produced and the deliberations had in the grand jury room.”).

416. Jurors might be particularly attuned to what the judge says because they are uncertain about how to perform their new roles and look to the special knowledge, authority, and approval of the judge for guidance. *See, e.g.,* Note, *Judges' Nonverbal Behavior in Jury Trials: A Threat to Judicial Impartiality*, 61 Va. L. Rev. 1266, 1278 (1975) (“[B]ecause of the judge's dress (robe), education, and control over the situation, jurors may rely on him [or her] for the cues to proper behavior.”); Robert J. Hirsh et al., *Attorney Voir Dire and Arizona's Jury Reform Package*, Ariz. Att'y, Apr. 1996, at 24, 32 (“Jurors very quickly pick up on judges' expectations and mannerisms While it is seldom the intention of judges to reveal these, expectations of the court for the jurors in courtrooms are usually quite evident, especially to those anxious jurors.”).

417. 1 Edward J. Devitt & Charles B. Blackmar, *Federal Jury Practice and Instructions* § 3.01 (2d ed. 1970) (noting that a judge has wide discretion in questioning potential jurors during voir dire).

views and votes and may not express the views or votes of their fellow jurors. One advantage to such an instruction is that it gives jurors guidance as to appropriate behavior. Thus, jurors may rest assured that what they say in the jury room will be confidential unless they, themselves, choose to reveal what they said.

Such a compromise, however, is not without its drawbacks. One problem is that those who would like to remain silent may still feel harassed by the press to reveal what they said and how they voted. Thus, jurors would still have trouble resuming their private lives. Another difficulty is that jurors who would like to remain silent may find themselves drawn to speak in order to correct inaccurate statements or mistaken impressions that more outspoken jurors may have given.⁴¹⁸ In addition, any retellings of deliberations by jurors, even if the retellings are limited to what they alone said, will still involve distortions as jurors try to portray their positions and contributions in the best possible light. Moreover, even if jurors are limited to revealing their own views, if their views include disavowal of the verdict, then such disclosures may undermine public confidence in the verdict. Finally, jurors may still not feel sufficiently constrained by the instruction; once they begin to talk to the press, they may go further than instructed and describe what their fellow jurors said and did, thus compromising the confidentiality of the deliberations.

4. Allowing Disclosure but Concealing Others' Identities

Another variation on allowing limited disclosure is for judges to instruct jurors that they can disclose what other jurors said, but not their identities. In this way, jurors would be able to describe the dynamics of the deliberations, their own views, and those espoused by other jurors, as long as they refrain from mentioning any names other than their own. The main benefit to such an approach is that jurors can talk freely to the press while minimizing the embarrassment they may cause to other jurors who would not have chosen to speak to the press. Even if silent jurors are dismayed that their comments have been made public, at least they will not suffer the embarrassment of having their individual names attached to the comments. A related benefit is that jurors will know what to expect; they will have notice when the judge instructs them that their fellow jurors may choose to disclose what was said during deliberations. This approach attempts to ensure that jurors who have not agreed to be interviewed will remain anonymous in the press; it makes no attempt, however, to ensure that what is said during deliberations will remain confidential.

The objections to such an approach are several. First, jurors may still feel chagrined to discover that their comments have appeared in the

418. This point was recently illustrated in a play called *Voir Dire*, *supra* note 219, in which the jurors agreed not to speak to the press about their deliberations, but then one juror broke the agreement, and others felt compelled to correct mistaken impressions conveyed by the juror who had decided to go public.

newspaper, even absent disclosure of their identities.⁴¹⁹ Each juror will know that it is his or her comment, even if others do not. Second, they may believe that the juror who has spoken has mischaracterized what they or others had said during deliberations. As a result, such jurors may feel compelled to speak to the press in order to set the record straight, even though their preference had been to avoid the press. Third, jurors may be identified inadvertently. A juror whose comments are printed in the newspaper, albeit anonymously, may still be recognized by friends and family. Consider, for example, a juror who is described, not by name, but merely as "an African-American woman." If she was the only African American on the jury, then others will be able to identify her, the absence of her name notwithstanding.

VIII. CONCLUSION

Jurors are usually given little guidance on how to proceed when they encounter the press on the steps of the courthouse after the close of the trial. Whether a judge gives any advice or instruction on post-verdict interviews is left entirely to the discretion of the judge, and typically, the judge remains silent. However, courts can and should give guidance to jurors with respect to post-verdict interviews with the press.

The guidance judges give could take a variety of forms—from administering an oath to jurors to maintain the confidentiality of the deliberations for some limited period of time, to supplementing that oath with an instruction from the judge on why confidentiality is important, to giving an instruction to jurors that they are not to disclose other jurors' comments or votes, though they are free to disclose their own. The advantage of each of these alternatives is that they represent a middle ground in which courts give some direction to jurors without being overly controlling. Any of these alternatives would make clear to jurors not only the protections to be afforded to their deliberations, but also how they should respond when members of the press seek interviews. These alternatives would also help foster the jury's role—to engage in a deliberative process to reach a collective judgment—by recognizing that without some limitations on post-verdict interviews, the jury may be impeded in its purpose.

419. Cf. David J. Miller & Mark H. Thelen, *Knowledge and Beliefs About Confidentiality in Psychotherapy*, 17 Prof. Psychol.: Res. & Prac. 15, 17 (1986) (describing a study examining the role of confidentiality in therapy in which the majority of respondents to a questionnaire "did not feel that psychologists would share information with others, even if such information was rendered anonymous").