When Juries Meet the Press: Rethinking the Jury's Representative Function in Highly Publicized Cases

By KENNETH B. NUNN*

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I. Introduction

On October 25, 1993, in the Los Angeles courtroom of Superior Court Judge John W. Ouderkirk, something unusual occured: a juror and an alternate juror each read prepared statements to the press defending and attacking, respectively, the verdicts they had handed down in a recently concluded criminal case.[1] The media had been

* Associate Professor of Law, University of Florida College of Law. A.B., 1980, Stanford University; J.D., 1984, University of California, Berkeley School of Law (Boalt Hall). I wish to thank Gerald Bennett, Wendy Fitzgerald, Tracey Maclin and Michael Seigel for helpful comments on earlier drafts of this article. I am grateful to James Ezeilo, Douglas Harrison and Kent Showalter for their research assistance. I would also like to thank Dean Jeffrey Lewis and the University of Florida College of Law for research support.

1. Seth Mydans, *Leader Denies Bias or Fear on Riot Jury*, N.Y. TIMES, Oct. 26, 1993, at A16.

hastily assembled in the courtroom at the behest of the jurors themselves, who felt obligated to respond to questions raised about the verdicts they had rendered one week earlier.[2] Not only is it unusual for jurors to communicate with the media via press release in such a formal setting, it is also unusual for jurors to initiate such contact themselves. These, however, were no ordinary jurors. These were the jurors in the case of *People v. Williams*,[3] better known as the Reginald Denny beating case.[4]

Traditionally, the province of the jury was too highly respected to permit the press to intrude with questions and requests for interviews. The jury, with its responsibility to sift through the evidence impartially, was sacrosanct.[5] The increasing media saturation of society, however, has led to a greater demand for jurors in cases which draw significant media coverage to defend and explain their verdicts through the avenues of mass communication.[6] This phenomenon has been observed in many recent high-profile cases, such as the federal and state Rodney King prosecutions,[7] the Lorena Bobbitt trial,[8] the

2. *See id.*

3. Cal. Super. Ct. for L.A. Cty. No. BA-058116. These jurors heard the charges against Damian Williams and Henry Keith Watson. Two other defendants, Antoine Miller and Gary Williams resolved their cases through plea negotiations. Seth Mydans, *Acquittal and Deadlock End the Trial of 2 In Riot Beating*, N.Y. TIMES, Oct. 21, 1993, at A1 (Gary Williams sentenced to three-year term for grand theft and assault); *Man Gets Probation in 1992 Riot Shooting*, N.Y. TIMES, July 11, 1994, at B7 (Antoine Miller placed on probation).

4. Strangely enough, at the conclusion of the jury's press conference, the judge announced that several jurors would be appearing on a number of "newsmagazine" shows to discuss their verdicts. This caused a tumultuous scene, as other media representatives scrambled to present their credentials to the jurors so that they might obtain interviews as well. Mydans, *supra* note 1.

5. *See* David Margolick, *Juries Lose a Lofty Aura in Glare of Instant Fame*, N.Y. TIMES, Oct. 22, 1993, at A18.

6. Robert L. 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, 358 (1990) (Due to the frequency with which juror comments are reported, "one might reasonably hypothesize that the public anticipates a report of juror's comments in well-publicized cases."). Other authors have written about the increasing prevalence of post-trial media interviews with jurors. While these analyses typically explore conflicts that may arise between the media's right of access and the defendant's right to a fair trial or a juror's right to privacy, they do not consider the effect of post-trial interviews on societal conceptions of the appropriate role of the jury within the criminal justice system. *See, e.g.*, Abraham S. Goldstein, *Jury Secrecy and the Media: The Problem of Postverdict Interviews*, 1993 U. ILL. L. REV. 295; Raskopf, *supra*; Eileen F. Tanielian, *Battle of the Privileges: First Amendment vs. Sixth Amendment*, 10 LOY. ENT. L. J. 215 (1990). For a thoughtful article that does consider the systemic consequences of post-verdict juror interviews, but is somewhat dated, see Note, *Public Disclosures of Jury Deliberations*, 96 HARV. L. REV. 886 (1983).

7. *See, e.g.*, Lee A. Daniels, *Some of the Jurors Speak, Giving Sharply Differing Views*, N.Y. TIMES, May 1, 1992, at A10 (state Rodney King prosecution); *Jurors Criticize Beating Sentences*, N.Y. TIMES, Aug. 9, 1993, at A11 (federal Rodney King prosecution).

Menendez brothers trial,[9] the McMartin Preschool prosecution,[10] and the trial of John DeLorean.[11] One can reasonably anticipate that the jurors serving in the pending trial of O.J. Simpson[12] will receive an unprecedented barrage of requests for interviews, notwithstanding a recently passed California law preventing such interviews for a period of 90 days.[13]

The Reginald Denny beating trial was one of the most publicized criminal cases in recent memory.[14] Indeed, the violent acts the defendants were accused of committing had been televised for all to see. Television audiences observed the horrible spectacle of truck driver Reginald Denny being dragged from his cab, kicked and beaten, then struck in the head by a forcefully thrown brick.[15] The beating of Reginald Denny, like the similarly televised beating of Rodney King, assumed substantial symbolic importance.[16] The Reginald Denny case

8. *See, e.g., Bobbitt Jurors Recount Case*, N.Y. TIMES, Jan. 23, 1994, at A20.

9. *See, e.g.*, Seth Mydans, *Menendez Lawyer Enlists Sympathetic Jurors to Defend Client*, N.Y. TIMES, Feb. 1, 1994, at A10. Several jurors from the Lyle Menendez trial also appeared on the Maury Povitch Show.

10. *See, e.g.*, Robert Reinhold, *2 Acquitted of Child Molestation in Nation's Longest Criminal Trial*, N.Y. TIMES, Jan. 19, 1990, at A1.

11. *See, e.g., Inside the DeLorean Jury Room*, THE AMERICAN LAWYER, Dec. 1984, at 1.

12. The trial of actor and former footbal great O.J. Simpson for the murder of his estranged wife and her male friend has garnered more publicity than any other criminal trial in history. *See* Bill Carter, *Networks' Simpson Vigil: A Low-Cost Reply to CNN*, N.Y. TIMES, Jul. 11, 1994, at D1. As this article goes to press, the trial's daily proceedings are being telecast live to huge national audiences. *Id.*

13. *See infra* note 158.

14. *See* William A. Schroeder, *A No-Fault System of Justice?*, ST. LOUIS POST-DISPATCH, Feb. 23, 1994, at 7B (reviewing outcomes of several highly publicized recent trials, including the Reginald Denny trial).

15. Denny had the misfortune to drive his truck into the intersection of Florence and Normandie Streets, where public protest against the verdicts rendered in the Rodney King case quickly degenerated into chaos. Denny and several other white and Latino motorists were assaulted as they attempted to pass through the intersection. A news helicopter hovering above recorded the assaults. Mydans, *supra* note 3. The assault on Denny was one of the most vicious. According to evidence submitted at trial, Denny suffered more than 90 skull fractures. Seth Mydans, *One Jury's Journey; Amid Case's Facts and a City's Fears, Seeking Rationale for Jurors' Findings*, N.Y. TIMES, Oct. 25, 1993, at A16.

16. As a story in *Time* noted:

> The actions of police and prosecutors helped weight the trial with symbolism. The uncommon spectacle of Williams being arrested at home, in front of TV cameras, by no less a figure than police chief Daryl Gates, strengthened the case of those who said the accused were being made scapegoats for the entire riot. When Williams and Watson, along with co-defendants Antoine Miller and Gary Williams, were booked on high bail—$580,000 for Williams alone—it added power to that argument.

Richard Lacayo, *A Slap for a Broken Head*, TIME, Nov. 1, 1993, at 46.

attracted great public interest in part because it reversed the racial symbolism of the Rodney King beating. Rodney King, a black motorist, had been beaten by white officers. In the Denny case, the victim of the televised beating was white, while the perpetrators were black. Interest in the case only intensified after the jury returned verdicts acquitting the first two defendants to be tried, Damian Williams and Henry Keith Watson, of the most serious charges.[17]

Many parallels may be drawn between the Rodney King and the Reginald Denny trials.[18] The jury that heard the case against Williams and Watson, however, cannot be subjected to the same criticism that ultimately tarnished the first Rodney King verdict. That verdict was attacked as unfair because it was rendered by a jury with few and marginalized racial minorities.[19] In the Denny case, the jury was more representative of the multi-ethnic character of the Los Angeles area. Ultimately, four African-Americans, four Latinos, two Whites, and two Asian-Americans were seated on the Reginald Denny jury.[20]

The racial diversity of the jury, however, was not enough to give the Reginald Denny verdicts legitimacy. Many thought that the verdicts may have been influenced by external considerations, chiefly the concern that guilty verdicts might ignite more public disturbances of the sort that followed the first Rodney King verdict.[21] Others wondered whether the jurors decided to be lenient out of fear for their own personal safety.[22] Still others believed the verdicts were an at-

17. *See* Mydans, *supra* note 15.

18. Among other things, both were racially polarized trials involving televised beatings and interracial crimes. In addition, both trials took place in a large media market—Los Angeles—and generated great publicity, before, during and after the trial. *See* Bill Boyarsky, *The Underlying Tensions In the Denny Case*, L.A. TIMES, Mar. 24, 1993, at B2; Jim Newton, *L.A. Trials Show "Blind Justice" Is Hard to Achieve*, L.A. TIMES, Oct. 24, 1993, at A1; Jim Newton, *Defense in Denny Beating Parallels King Case*, L.A. TIMES, May 16, 1992, at B1.

19. Only one Latino and one Asian served on the Rodney King jury. Some felt this sparse minority presence undermined the appearance of justice. Others went further and argued that the verdict itself was the result of racist sentiment on the part of the majority jurors which could have been prevented if blacks or more people of color had been seated on the jury. *See, e.g.*, Kenneth B. Nunn, *Rights Held Hostage: Race, Ideology and the Peremptory Challenge*, 28 HARV. C.R.-C.L. L. REV. 63 (1993).

20. Seth Mydans, *Judge Voids Verdicts and Drops 2d Juror in Riot Assault Trial*, N.Y. TIMES, Oct. 13, 1993, at A1. Originally a jury consisting of three whites, four blacks, four latinos, and one asian was selected to hear the trial. The racial composition of the jury, however, changed as jurors were removed from the case and replaced with alternates. *See id.*

21. *See* Edward J. Boyer, *Juror Says Evidence, Not Fear of Riots, Led to Verdicts*, L.A. TIMES, Oct. 22, 1993, at B1.

22. *See* Mydans, *supra* note 15; Seth Mydans, *Juror in Denny Case Recounts Stress and Obsession with Detail*, N.Y. TIMES, Oct. 27, 1993, at A18.

tempt to teach the Los Angeles Prosecutor's office a lesson for overcharging the case in the first place.[23] In addition, some speculated whether the verdicts were a perverse form of racial revenge for the Rodney King verdict—facilitated by the presence of African-American jurors.[24] As a result, the jury took the extraordinary step of launching, beginning with their in-court press conference,[25] what amounted to a public relations campaign to convince the public of the correctness of their verdicts.[26]

The circumstances surrounding the Reginald Denny trial demonstrate a substantial shift in the way the jury is perceived. In the past, the presence of a cross section of the community on the jury was sufficient for the verdict to be accepted as fair. Now, however, it appears that simple demographic representativeness is not enough to insure that jury verdicts will be accepted as legitimate. A new form of representativeness is required; juries not only must be representative *of* their communities, they must also be able to represent their verdicts *to* their communities. In high-profile cases, juries have the additional

23. This explanation may have been at least partially true. At least one juror verified that she thought the prosecution had overcharged the case. Mydans, *supra* note 15.

24. *See Crime Without Punishment*, NATIONAL REVIEW, Nov. 15, 1993, at 14 (editorial).

25. The statement read at the press conference by the jury foreperson on behalf of the entire twelve person jury addressed the many concerns raised about the propriety of the verdicts. *See* Boyer, *supra* note 21. The statement read as follows:

> There has been a lot of expressed anger, shock, disbelief and speculation regarding the verdicts. The verdicts were decided according to the law, not through intimidation, fear of another riot, nor were the verdicts based on black versus white. The verdicts were based on the evidence and facts presented in court. We followed the judge's instructions and all 12 of us understood the law as presented to us. We feel the verdicts rendered were within the confines of the law, not due to any outside influences or considerations. We do not condone what happened at Florence and Normandie. However, we the jury feel confident that we did the best job possible given the evidence and the applicable law.

Id.

26. Shortly after their press conference, a total of eighteen jurors and alternates appeared on the NBC newsmagazine show, *Now*. Both individual and group interviews were conducted with jurors on camera. The group interviews took place with the jurors arranged in a faux jury box. The lighting was arranged so that those jurors and alternates that wished to remain anonymous were shown in shadow. *Now*, (NBC Television Broadcast 1993) *Cf. United States v. Rees*, 193 F. Supp. 864, 865 (D. Md. 1961), where an hour-long recreation of the jury deliberations in a rape and murder trial, featuring the participation of nine jurors, was found to "interfere with the orderly processes of justice." In addition, the jury forewoman from the Denny trial gave an interview to Time Magazine; *See* Elizabeth Gleick, *The Head of the Denny Jury Tells What Happened Before; The Verdict*, TIME, Nov. 8, 1993, at 87. Also the alternate juror who initially criticized the verdicts appeared on the Larry King Show. *See Larry King Show* (CNN Television Broadcast, Oct. 26, 1993).

duty of explaining and defending their verdicts, a responsibility that juries in routine cases do not have to bear.

The development of this new representative function does not merely create additional responsibilities for jurors. The jury's new role as the emissary of the criminal justice system to society has the ability to fundamentally transform the jury's institutional character. Ascribing a new representative function to the jury raises several critical questions. For example, what effect does requiring the jury to defend its verdict to the public have on the jury's fact-finding function, or on the legitimacy or respect afforded to its verdicts? How might the prospect of intense publicity affect the type of people who might be willing to serve on a jury, or perceptions of who might be competent to serve on a jury? And, finally, what impact would requiring juries to explain their verdicts to the public have on the fairness of the trial?

This article explores these and other questions related to the emergence of the jury's new representative function. Section II examines traditional notions of jury representativeness by demonstrating how the jury came to be viewed as a means of providing community input into the criminal justice process. Section II also describes how a broadly representative jury can aid in fact-finding and provide legitimacy for the verdict. Finally, section II explains how a jury system, closed to public exploitation, was traditionally seen as a way to protect the jury's ability to reach independent judgments.

Section III reviews selected cases which reveal judicial recognition of the jury's new representative function and determines that efforts to facilitate greater communication between the public and jurors should be favored by the courts. Section IV evaluates how the jury's ability to perform its traditional fact-finding and legitimating functions is affected by the practice of encouraging jurors to explain their verdicts to the broader community. This article concludes that while the jury's new representative function may serve valuable educational ends and enhance the legitimacy of jury verdicts, it does so at the expense of the jury's fact-finding ability.

II. Traditional Views of Jury Representativeness

When the institution of the jury was in its infancy, the identity of those called to serve as jurors was widely known. In medieval England, a person accused of a crime was often required to produce a certain number of supporters from the community where the crime took place, who would swear to the truthfulness of the defendant's

version of events.[27] The supporters, or *compurgators*, had a sacred duty to "accuse no innocent person [nor] conceal a guilty one."[28] The defendant was found not guilty and released if all compurgators swore to the innocence of the accused.[29]

Trial by compurgation was a less than ideal fact-finding process.[30] Substantial evidence suggests that compurgators took their oaths less than seriously.[31] In fact, one historian of the period stated that "[p]erjury was the dominant crime of the Middle Ages, encouraged by the preposterous rules of compurgation."[32]

Over time, trial by compurgation evolved into trial by jury.[33] Rather than seeking out friends and relatives of the accused who would swear to the accused's innocence, medieval court officials commanded twelve people to testify, based on personal knowledge, to the

27. PAULA DIPERNA, JURIES ON TRIAL: FACES OF AMERICAN JUSTICE, 26 (1984); VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY, 24 (1986) [hereinafter JUDGING THE JURY]. The number of individuals required may have been as many as thirty-six (if the defendant had an especially bad reputation), although the usual number was twelve.

28. JUDGING THE JURY, *supra* note 27.

29. *Id.*

30. The difficulties created by the compurgation procedure are recounted by Professors Hans and Vidmar: "sometimes, disputes were resolved on the basis of who got the most compurgators. To make matters worse, bribery and other inducements to compurgators were common." *Id.* at 25. *But see* R.H. Helmholz, *Crime Compurgation and the Courts of the Medieval Church*, 1 LAW & HIST. REV. 1, 17 (1983) (noting that the fairly rigid requirements needed to qualify compurgators and arguing that the low conviction rate of trial by compurgation was comparable to that of early jury trials).

31. JUDGING THE JURY, *supra* note 27, at 25-26.

32. *Id.*

33. The jury trial resulted from a century-long evolution in English law and custom. THOMAS A. GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY 1200-1800 at 4 (1985). Compurgation and its ancient contemporary, trial by ordeal, were supplemented after the Norman conquest by the institution of the "appeal." *Id.* at 5. An appeal commenced when an injured party, or appellor, made a public accusation of another—the appellee. Roger D. Groot, *The Early-Thirteenth-Century Criminal Jury*, *in* TWELVE GOOD MEN AND TRUE: THE CRIMINAL TRIAL JURY IN ENGLAND, 1200-1800 at 3,4 (J.S. Cockburn & Thomas A. Green, eds. 1988). Proof of an appeal was made by duel or combat. *Id.* In 1166, the Assize of Clarendon instituted the precursor of the modern grand jury as an accusatory procedure. GREEN, *supra* at 3. Compurgation was used sporatically after the Norman conquest, but it was not finally abolished until 1833. JON M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 3 n.a (1977). There is much evidence to suggest that many of the features of the jury trial were borrowed from its anglo-saxon predecessor. *See, e.g.*, LLOYD E. MOORE, THE JURY: TOOL OF KINGS, PALLADIUM OF LIBERTY 39 (2d ed. 1988) (suggesting jury numbers twelve because this was the number traditionally used for compurgation). For more detailed treatment of the evolution of compurgation into trial by jury, see WILLIAM FORSYTH, HISTORY OF TRIAL BY JURY (2d ed. 1971) (originally published 1878); MAXIMUS A. LESSER, THE HISTORICAL DEVELOPMENT OF THE JURY SYSTEM (1894 & photo. reprint 1979); JOHN PROFFATT, A TREATISE ON TRIAL BY JURY (1986) (originally published 1877).

facts or about the parties involved.[34] Eventually, courts came to rely on these "disinterested" juries for a judgment of guilt or innocence.[35]

As the function of the jury changed, so too did notions of the jury's representativeness. As Professors Hans and Vidmar point out:

> Originally, when jurors were considered to be witnesses, it made sense that they should be from the community in which the alleged incident took place. Only community residents would have knowledge bearing on the case. As the jury developed into a body of impartial fact-finders, community residence was no longer so important. However, a new rationale developed. It was argued that the jurors should be from the county in which the incident took place so that the jury could express the opinions of the community about a fair and proper verdict.[36]

These interpretations of the jury's representative function crossed the Atlantic with the colonizers of the New World.[37] For American colonists, the need for a representatively constituted jury was a concrete matter. One of the grievances specifically mentioned in the Declaration of Independence was the English practice of transporting

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34. JUDGING THE JURY *supra* note 27, at 26.

35. *Id.* at 27. The expansion of the role of the jury to include the evaluation of evidence along with its traditional role of determining the veracity of witnesses was the final step in the evolution from compurgation to trial by jury. Anthony Valen, *Jurors Asking Questions: Revolutionary or Evolutionary?*, 20 N. KY. L. REV. 423, n.8 (1993). This transition, too, was a gradual one. FRANCIS H. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES: A STUDY IN CONSTITUTIONAL DEVELOPMENT 8 (1969) originally published 1951). Bushnell's Case was one of the first to draw a clear distinction between jurors and witnesses. *Bushnell's Case*, Vaughan, 135, 6 How. St. Tr. 999 (1670). Chief Justice Vaughan's opinion underscored the jury's duty as evaluator of evidence by requiring jurors with personal knowledge of the facts to offer their testimony as witnesses. *See* Valen, *supra*. It was not until Lord Ellenborough held that a verdict could not be sustained when it was based on a juror's own knowledge rather than evidence produced at trial, however, that the jury's role as impartial judge of the facts was securely established. *See* Rex v. Sutton, 34 Eng. Rep. 931, 934-35 (K.B. 1816); Valen, *supra*.

36. JUDGING THE JURY, *supra* note 27, at 28-29.

37. By the time the American Colonies were established, jury trial in criminal cases was considered one of the undeniable rights of Englishmen. HELLER, *supra* note 35 at 14. Juries were empaneled in criminal cases in the colonies from the very beginning. *Id.* at 16. It would be a mistake, however, to view the early American jury as a mere copy of the English original. According to Heller:

> [T]he development of jury trial in America reflects the fact that there was first "a period of rude, untechinal popular law," an attempt by laymen to order their affairs by themselves in an atmosphere of pronounced hostility toward the legal profession and their methods. The jury trial of colonial days is, therefore, not a rigid copy of its English prototype but rather the result of variegated experiences, experimentation, and adoption.

Id. at 15 (footnotes omitted) (quoting Paul S. Reinsch, *The English Common Law in the Early American Colonies*, 2 BULL. U. WIS. (1899)).

colonists accused of treason to England for trial.[38] The colonists viewed removal to England as an unwarranted infringement of their right to jury trial.[39] When an accused colonist was tried by the Crown of England, he was depreived of "the benefit of being known by those who prosecuted and tried him, the benefit of having his friends and relatives close at hand to provide legal and moral support, and the benefit of knowing the jurors and thereby being able to challenge jurors intelligently."[40] The English abuses ultimately led to the adoption of two constitutional provisions, both of which were viewed as necessary to uphold the traditional notions of trial by jury. The concern over requiring accused persons to be tried where they cannot easily defend themselves, whether in England or another state, was addressed by the venue provision of Article III.[41] The concern over requiring accused persons to be tried before a group of strangers, who knew little about the offense or the circumstances surrounding it, was addressed by the Sixth Amendment's vicinage provision.[42]

The Sixth Amendment requires that the jury be selected from "the State and district wherein the crime shall have been committed."[43] In addition to the requirement that the jury be selected from the locale in which the crime took place, the Supreme Court has held that the jury selected must also be "representative" of that locale.[44] In order to fulfill the jury's representative function, the court has explained, the jury must be selected from a "fair cross section" of the community.[45]

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38. Drew L. Kershen, *Vicinage*, 29 OKLA. L. REV. 801, 807 (1976).

39. *Id.* at 806-07.

40. *Id.* at 808.

41. *Id.* at 805-12. Article III of the Constitution provides that "[t]he trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed." U.S. CONST. art. III, § 2, cl. 3.

42. *See* Kershen, *supra* note 38, at 828-833.

43. U.S. CONST. amend. VI. This is referred to as the "vicinage" requirement. *See* Ruthenberg v. United States, 245 U.S. 480 (1918).

44. Smith v. Texas, 311 U.S. 128, 130 (1940) ("[I]t is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community.").

45. Taylor v. Louisiana, 419 U.S. 522, 527 (1975). The court first mentioned the constitutional significance of insuring that juries were selected from a cross-section of the community in Glasser v. United States, 315 U.S. 60, 86 (1942) (Sixth Amendment requires jury selection process that "comport[s] with the concept of the jury as a cross-section of the community."). In *Taylor*, the Court held that although there is "no requirement that petit juries actually chosen must mirror the community," a jury selection process that excluded "large, distinctive groups" from the jury pool could not pass constitutional muster. *Taylor*, 419 U.S. at 530, 538.

The fair cross section requirement is justified as a means of insuring a representative jury. The Supreme Court has identified several reasons why it is important for juries to be representative of the community at large. First, representative juries "make available the commonsense judgment of the community" to guard against the exercise of arbitrary power by a prosecutor or judge.[46] Second, representative juries help build and maintain public confidence in the fairness of the criminal justice system.[47] Third, representative juries enable a broad section of the populace to share responsibility for the administration of justice.[48] Finally, the "broad representative character of the jury" is desirable because it ensures that the jury's deliberations will be marked by "a diffused impartiality."[49]

The first (protection against state excesses) and second (public confidence) justifications for the fair cross section requirement are related. Public confidence is maintained in the criminal justice system because the jury has the power to shield the defendant from the excesses of the state. The second justification, public confidence, is also related to the fourth justification, impartiality. The jury maintains public confidence because it is impartial. Thus, central to the jury's representativeness is its ability to confer legitimacy. The jury confers legitimacy for two reasons. First, it is assumed that its broadly representative character will protect a defendant against manipulative government tactics. Second, a representative jury will prevent any one special interest group from gaining control of the deliberative process and rendering a verdict based on bias or prejudice.

The jury's representative function, then, consists of two aspects: the effect of the representative jury on fact-finding and the legitimation of the criminal justice process.[50] The representative jury aids fact-finding because "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."[51] In addition, the verdict of a representative jury is considered less skewed by nonevidentiary considera-

46. *Taylor*, 419 U.S. at 530.

47. *Id.*

48. *Id.*

49. *Id.* at 530-31 (citation omitted). *See also* JUDGING THE JURY, *supra* note 27, at 50.

50. *Cf.* Globe Newspapers Co. v. Superior Court, 457 U.S. 596, 606 (1982) (noting that public access to trial similarly both intensifies "the quality and safeguards the integrity of the factfinding process," and "fosters an appearance of fairness, thereby heightening public respect for the judicial process").

51. JUDGING THE JURY, *supra* note 27, at 50.

tions. As Professors Hans and Vidmar explain: "The jury's heterogenous makeup may also lessen the power of prejudice. Biases for and against the defendant, if evenly distributed on the jury, may cancel each other out."[52]

Representative juries also further the legitimacy of the criminal justice system. Juries in which a cross-section of the community is represented sanction their verdicts as the results of a democratic process. Their verdicts are consequently imbued with greater validity. Juries can either support or undermine the acceptability of the state's accusations merely by the representativeness of their makeup. In sum: "Regardless of whether or not the composition of the jury actually makes a difference in any particular case, people look to the composition of the jury to explain verdicts. Thus, not only for fact-finding but also for legitimation, a representative jury is desirable."[53]

While there are many benefits to be gained from insuring that jury composition is representative, there are some potential dangers as well. First, there is an inherent tension between the desire to represent community views on juries and the need to ensure that external views do not unduly influence the jury's deliberative processes. The objective of the fair cross section requirement is for the jury to reflect community *thinking*, or to process information in a manner like that used by members of the community, without adopting pre-formed community *opinions* about the issues under consideration. While juries are expected to be representative of the community, they are also expected to be independent of the community. Thus, for the criminal justice process to operate properly, an inherent contradiction must be balanced—a representative jury must also be an unbiased jury.[54]

One way to manage the conflict between the quest for a representative jury and the desire for an unbiased one is to emphasize the independence of the jury and minimize the cost to jurors of exercising their independent judgment. Thus, jurors are instructed that the opinion they render must be their own, and that they must not discuss the case with persons who are not on the jury.[55] Efforts are made to protect the jury from outside influences, whether these arise before or

52. *Id.*

53. *Id.* at 51.

54. Commentators Wayne LaFave and Jerold Israel have observed that relying on the voir dire process to remove potential jurors who harbor prejudicial bias against the defendant "may also produce a side effect of a less representative jury when the voir dire can be expected to result in the exclusion of a substantial proportion of the array." WAYNE LAFAVE & JEROLD ISRAEL, CRIMINAL PROCEDURE § 23.2, at 996 (2d ed. 1992).

55. FEDERAL JUDICIAL CENTER, PATTERN CRIMINAL JURY INSTRUCTIONS 4 (1988).

during the jury's deliberations. Jurors are sought who have not predetermined the defendant's innocence or guilt, or who can at least act impartially.[56] In addition, jury tampering is treated as a serious offense.[57] In notorious cases, the jury may even be sequestered,[58] and some courts have taken the controversial step of seating "anonymous" juries.[59] These efforts privilege the concept of the jury as an independent body—separate from the community—that should be protected from outside influences so its deliberations can proceed untainted.[60] This perspective is epitomized in Professor John Henry Wigmore's observation that it is the obscurity of the average juror that keeps the jury inaccessible to "the arts of corruption and chicanery."[61] In Wigmore's view: "The grand solid merit of the jury trial is that the jurors of fact are selected at the last moment from the multitude of citizens. They cannot be known beforehand, and they melt back into the multitude after each trial."[62]

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56. Most jurisdictions have provisions that allow jurors to be challenged for cause whenever it is demonstrated that a "juror has a state of mind . . . which will prevent him from acting with impartiality." LAFAVE & ISRAEL, *supra* note 54, § 22.3(c), at 844. But this does not mean that a juror may be dismissed simply because he or she has heard something about a case or has formed an opinion about it. As the Supreme Court noted in Irvin v. Dowd, 366 U.S. 717, 723 (1961):

> To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

57. *See, e.g.*, 18 U.S.C. § 1503 (1988) (providing criminal penalties for any attempt to "influence, intimidate, or impede" jurors); N.Y. Penal Law § 215.25 (McKinney 1988) (classifying jury tampering as class A misdemeanor); Cal. Pen. Code § 95 (West 1988) (providing criminal penalties for "corrupt[ ] attempts to influence a juror").

58. *See* Richmond Newspapers v. Virginia, 448 U.S. 555 (1980) (recommending sequestration of jurors as alternative to exclusion of press from trial).

59. For a more in-depth discussion of anonymous juries, *see* discussion *infra* part III(C).

60. As Professors LaFave and Israel explain:

> For the defendant to have a fair trial, the jury should decide his case on the basis of the evidence admitted at trial and not by considering other facts or allegations appearing in the media or assertions in the media as to what the outcome of the trial ought to be.

WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE, § 22.1, at 885 (1985). *See* Gannett v. DePasquale, 443 U.S. 368, 369 (The right to fair trial may be adversely affected when publicity has "influence[d] public opinion against a defendant."). *See also* Sheppard v. Maxwell, 384 U.S. 333 (1966); Irvin v. Dowd, 366 U.S. 717 (1961).

61. John H. Wigmore, *To Ruin Jury Trial in the Federal Courts*, 19 ILL. L. REV. 97, 98 (1924).

62. *Id.* at 98.

While Wigmore's observation may still ring true in the majority of cases, it is obvious that the media saturation of contemporary American society has resulted in the appearance of a class of cases where the jurors are anything but obscure. In 1995, juries in high profile cases are the focus of public attention. These juries have a new representative function—that of representing the criminal justice system to those who did not serve. Section III attempts to discover the practical justifications for the jury's new representative function. This section therefore analyzes media attempts to gain access to juror identities, explicit media requests for post-trial interviews and attempts to impanel anonymous juries.

III. Judicial Recognition of the Jury's New Representative Function

A. Supreme Court Cases

The Supreme Court's changing interpretation of the jury's representative function can be seen in its opinions permitting greater media access to events that take place in criminal courtrooms. In its early decisions, the court was skeptical of the media's role in the criminal justice process and careful to protect the jury from outside influences. The Court, however, now views the media as a valuable public watchdog that provides an open and public view of the institutions of justice.

The court's early attitude toward the interaction of the media with the jury is typified in *Irvin v. Dowd*.[63] In that case, decided in 1961, the Supreme Court took notice of the adverse impact that the media could have on a defendant's chances for a fair trial.[64] The court's opinion chronicled the negative media campaign and led it to conclude that the jury impaneled to hear the defendant's case was not impartial.[65] The Court noticed that "a barrage of newspaper headlines, articles, cartoons and pictures was unleashed against" the defendant and that "the force of this continued adverse publicity caused a sustained excitement and fostered a strong prejudice" in the minds of potential jurors.[66] Yet, the Court suggested no procedures to insu-

63. 366 U.S. 717 (1961).

64. *Id.* at 719-20.

65. *Id.* at 728.

66. *Id.* at 725-26.

late prospective jurors from negative publicity or to keep the press from publicizing potentially damaging information.[67]

Only five years later did the Court attempt to provide any guidance to courts on how to manage media publicity. In *Sheppard v. Maxwell*,[68] the Court insisted that trial courts "regulate[ ] the conduct of newsmen in the courtroom."[69] Further, the Court suggested specific procedures that trial judges could employ to ensure that publicity occasioned by the media did not threaten the fairness of the trial.[70] The *Sheppard* Court stated that it was "unwilling to place any direct limitations on the freedom traditionally exercised by the news media"[71] even though the court repeatedly emphasized the importance of insuring that "the accused receive a trial by an impartial jury free from outside influences."[72] The Court viewed the *Sheppard* jury's new found "celebrity" status as a great tragedy. According to the Court:

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

67. The majority opinion recited the facts of the case, but offered no analysis of the role of the press. In a concurring opinion, Justice Frankfurter posed the following question:

> How can fallible men and women reach a disinterested verdict based exclusively on what they heard in court when, before they entered the jury box, their minds were saturated by press and radio for months preceding by matter designed to establish the guilt of the accused[?]

Id. at 729-30. Justice Frankfurter suggested that the First Amendment protections of the media should not be interpreted to allow the press to interfere with the right of a defendant to receive a fair trial. "The Court," he stated rhetorically, "has not yet decided that, while convictions must be reversed and miscarriages of justice result because the minds of jurors or potential jurors were poisoned, the poisoner is constitutionally protected in plying his trade." *Id.* at 730 (Frankfurter, J., concurring).

68. 384 U.S. 333 (1966).

69. *Id.* at 358. In the term before *Sheppard* was decided, the Supreme Court's concern for courtroom decorum led it to banish television cameras from criminal trials. *See* Estes v. Texas, 381 U.S. 532 (1965). *Estes* was later overturned by the court in Chandler v. Florida, 449 U.S. 560 (1981).

70. *Sheppard*, 384 U.S. at 389. These included insulating witnesses from confrontations with the press, controlling the release of information by participants in the trial, admonishing jurors to avoid publicity about the case, changing venue, granting continuances, and ordering the sequestration of the jury. *Id.* at 353, 363, 369.

71. *Id.* at 350.

72. *Id.* at 362.

> aware that this publicity seriously threatened the jurors' privacy.[73]

Therefore, the Court in *Sheppard* adopted a traditional view of the jury's representative function. Rather than viewing the jury as an institution that would benefit from greater public exposure, the Court portrayed the jury as a body that must be protected from the excesses of "a recalcitrant press."[74] From the *Sheppard* court's perspective, the jury was expected to render its verdict in thoughtful isolation, insulated from the passions and prejudices of public opinion.[75]

The Supreme Court's skepticism over the media's role in the criminal justice system began to change in a series of decisions beginning with *Richmond Newspapers, Inc. v. Virginia*.[76] In *Richmond Newspapers*, a plurality of the Court recognized a First Amendment-based public right of access to criminal proceedings for the first time.[77] Further, the Court agreed that "the media claim of functioning as surrogates for the public" was valid because the media has the broad ability to disseminate information about the criminal justice process.[78]

The plurality in *Richmond Newspapers* reasoned that open, public trials were supported by both historical practice and logical deduction. After reviewing the history of the criminal trial in England and the United States, the court concluded that "the very nature of a criminal trial was its openness to those to attend."[79] The plurality opinion listed three objective reasons why criminal trials should be opened, focusing on the effect that the trial might have on the public rather than on the effect the public might have on the trial. First, the plurality opinion noted that open trials guarded against the oppression of criminal defendants,[80] and encouraged the public to acknowledge the fairness of the criminal process.[81] Second, the Court reasoned that publicity engendered by criminal cases provides an outlet for public outrage over crime. Therefore, public criminal trials reduce the possi-

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73. *Id.* at 353.

74. *Id.* at 358.

75. *See id.* at 350-51.

76. 448 U.S. 555 (1980).

77. The Sixth Amendment guarantees "the accused the right to a . . . public trial," but this personal right of the defendant was held to not apply to the general public. *See Gannett v. DePasquale*, 443 U.S. at 382.

78. *Richmond Newspapers*, 448 U.S. at 572-73 (Burger, C.J., plurality opinion).

79. *Id.* at 568 (Burger, C.J., plurality opinion).

80. *See In re* Oliver, 333 U.S. 257 (1948) (holding denial of public trial violates Due Process).

81. There is a "nexus," stated the Court, "between openness, fairness, and the perception of fairness." 448 U.S. at 570 (Burger, C.J., plurality opinion).

bility of vigilantism where a community might take the law into its own hands through bursts of anarchy or the formation of lynch mobs. Consequently, public trials have a "significant community therapeutic value."[82] The Court observed that "[t]he crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is 'done in a corner [or] in any covert manner.'"[83] Finally, the plurality asserted that the open criminal trial fulfilled a needed educational function by informing the public about the workings of the criminal justice system.[84]

The court, in *Richmond Newspapers*, made it difficult for courts to close criminal proceedings and exclude the press on the grounds that such exclusion would violate the defendant's Sixth Amendment rights to a public trial. Interestingly, though, the plurality claimed to balance the newly recognized right of the public to attend trials against the equally important right of the criminal defendant to receive a fair trial.[85] In reality, the Plurality gave far greater deference to the public right of access than it did to the defendant's right to a fair trial. After *Richmond Newspapers*, a court must consider whether there are any less restrictive means of ensuring the fairness of the trial before closing a trial to the press.[86] If the court does order closure, then it must indicate why in specific, written findings.[87] "Absent an overriding interest articulated in findings," the plurality stated, "the trial of a criminal case must be open to the public."[88]

Relying on reasoning similar to that set forth in *Richmond Newspapers*, the Court quickly granted the media access to a variety of criminal proceedings, including trials. In *Press-Enterprise Co. v. Superior Court*[89] (*Press-Enterprise I*), for example, the Supreme Court extended the media's First Amendment right of access to voir dire proceedings. In addition, in *Press-Enterprise Co. v. Superior Court*[90]

82. *Id.* at 570 (Burger, C.J., plurality opinion).
83. *Id.* at 571 (Burger, C.J., plurality opinion) (citation omitted).
84. *Id.* at 572 (Burger, C.J., plurality opinion).
85. *See id.* at 580-81 (Burger, C.J., plurality opinion).
86. This requirement has turned out to be a fairly substantial hurdle for courts to meet. Not only did "none of the Justices articulate[ ] the type of 'findings' which might constitute an 'overriding interest' that would overcome the presumption of open trials," Lewis F. Weakland, Note, *Confusion in the Courthouse: The Legacy of the Gannett and Richmond Newspapers Public Right of Access Cases*, 59 S. CAL. L. REV. 603, 610 (1986), but the Supreme Court has yet to determine in any of its subsequent decisions that *any* reason would be sufficient to order closure of the trial.
87. *Richmond Newspapers*, 448 U.S. at 580-81 (Burger, C.J., plurality opinion).
88. *Id.* at 581 (Burger, C.J., plurality opinion).
89. 464 U.S. 501 (1984).
90. 478 U.S. 1 (1986).

(*Press-Enterprise II*), the Court permitted the media the right of access to preliminary hearings. Finally, in *Globe Newspaper Co. v. Superior Court*,[91] the Court invalidated a Massachusetts statute that required courts to exclude the press from courtrooms during the testimony of child victims of sexual assault. These cases solidified and expanded the newly recognized public right of access to criminal trials, and, in the process, set the stage for a transformation of the jury's traditional representative function.

The decision in *Press-Enterprise I*, in particular, illustrates the Supreme Court's willingness to reinterpret the jury's representative role. In that case, the court held that voir dire cannot be closed to the media unless "the presumption of openness [is] overcome . . . by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."[92] The Court determined that the jury selection process, like the trial itself, had been historically open to the public. In addition, the Court stated that, under ordinary circumstances, voir dire should remain open to the media so "that people not actually attending trials can have confidence that standards of fairness are being observed."[93] Open jury selection procedures also inform the public "that offenders are being brought to account for their criminal conduct by jurors fairly and openly selected."[94] The Supreme Court's focus was therefore on the decisionmaking process' effect on the public. Thus, while the Court has not directly addressed the question of post-verdict interviews of jurors, it appears that the Court would interpret the jury's representative function to emphasize its role as liaison to the community-at-large.

The remaining parts of this section review lower court decisions to determine how widely the jury's new representative function is accepted. One line of cases decided by lower courts, jury access cases, seems to adopt and expand the Supreme Court's new version of the jury's role. The role of the jury embraced in anonymous jury cases, however, is not so clear. While juror anonymity would seem to make information about the jury and its decision-making process harder to come by, the seating of an anonymous jury is not entirely compatible with the jury's new representative function.

91. 457 U.S. 596 (1982).

92. *Press-Enterprise I*, 464 U.S. at 510.

93. *Id.* at 508.

94. *Id.* at 509.

B. Jury Access Cases

In cases where the media has sought access to the names and addresses of jurors for the purpose of conducting post-verdict interviews, lower courts have generally required the requested information to be released. Lower courts tend to view greater media involvement in the criminal justice system favorably. Among the values promoted by post-trial media interviews are: (1) greater public confidence in the criminal justice system; (2) increased public education about the criminal trial process; and, (3) helping ensure the trial itself is fair.[95] Even though courts proclaim the public's right of access to criminal trials is not absolute, relatively few courts will restrict media access to jurors in favor of other competing rights, such as the jurors' right to privacy or the defendant's right to a fair trial.

In *In re Baltimore Sun Co.*,[96] for example, the Fourth Circuit Court of Appeals ordered the release of names and addresses of sitting jurors, as well as members of the venire who were not chosen to serve as jurors in a criminal prosecution arising out of a savings and loan scandal. Relying on the Supreme Court's decision in *Press Enterprise I*, the Fourth Circuit decided that jury selection had been a historically open process and that other alternatives, like change of venue or sequestration, were available safeguards against possible prejudice. Therefore, the court decided in favor of releasing juror identities:

> We recognize the difficulties which may exist in highly publicized trials such as the case being tried here and the pressures upon jurors. But we think the risk of loss of confidence of the public in the judicial process is too great to permit a criminal defendant to be tried by a jury whose members may maintain anonymity.[97]

The First Circuit also ordered the release of names and addresses of jurors at the conclusion of a highly publicized trial. In *In re Globe Newspaper Co.*,[98] the Court of Appeals overturned the district court's decision to withhold juror identities in a drug-related conspiracy case involving several prominent defendants.[99] After the verdict was announced, the *Boston Globe* sought access to court records which con-

95. *Cf.* United States v. Doherty, 675 F. Supp 719, 723 (D. Mass. 1987) (listing verification of trial's fairness, public education and public confidence as reasons to permit post-trial interviews). *See* text accompanying note 108-110, *infra.*

96. 841 F.2d 74 (4th Cir. 1988).

97. *Id.* at 76.

98. 920 F.2d 88 (1st Cir. 1990).

99. The district court judge questioned whether juror publicity would be beneficial. His order denying access to the jury list stated:

tained names and addresses of jurors who had served in the trial. The First Circuit held that a local federal district court rule required the records in question be made available to the public.[100] Although the First Circuit did not reach the First Amendment issue, it determined that the purposes served by media access to trials were "equally served by access to the identities of the jurors."[101] According to the appeals court, publicizing juror identities allows the public to verify the impartiality of the trial's key participants, ensuring fairness, the appearance of fairness, and the promotion of public confidence in the criminal justice system.[102]

In several cases, courts have directly addressed the question of whether the media should be allowed to conduct post-trial interviews with jurors.[103] One such case is *United States v. Doherty*.[104] The district court's opinion in *Doherty* is notable since it attempts to deli-

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> It is the judgment of the Court that interviews of jurors for the sole purpose of exploiting the content of their deliberations, which have been conducted in secret and in confidence with one another, tend to demean the administration of justice in the public's view and to inhibit jurors, present and prospective, from voicing their strongly held views for fear of subsequent public disclosure to the ultimate detriment of the deliberative process.

Id. at 90 n.1.

100. The court rules made juror names and addresses available to the public, "unless the presiding judge identifies specific, valid reasons necessitating confidentiality in the particular case." *Id.* at 91. The appeals court found that there were no reasons, such as threats to the personal safety of jurors that would justify withholding the identities of the jurors. The court also noted that "[a]fter the verdict, release normally would seem less likely to harm the rights of the particular accuseds to a fair trial." *Id.*

101. *Id.* at 94.

102. According to the court of appeals:

> It is possible, for example, that suspicions might arise in a particular trial (or in a series of trials) that jurors were selected from only a narrow social group, or from persons with certain political affiliations, or from persons associated with organized crime groups. It would be more difficult to inquire into such matters, and those suspicions would seem in any event more real to the public, if names and addresses were kept secret.

Id. at 94.

103. In United States v. Sherman, 581 F.2d 1358 (9th Cir. 1978), the Ninth Circuit Court of Appeals held that a trial judge could not order the media to stay away from jurors after the close of a trial. It was the appeals court's view that, since the trial had concluded, the First Amendment did not compete with the defendant's right to a fair trial. Although the trial court claimed its order was intended to protect the jurors from harassment and enable them to serve in future trials, the court of appeals held that "[l]ess restrictive alternatives are clearly available for each of these claimed threats." *Id.* at 1361. The court of appeals suggested that any taint occasioned by a juror's interview with the press "could be discovered on future voir dire and the juror excused." *Id.* Harassment, on the other hand, could be dealt with when and if it occurs, since individual jurors "may not regard media interviews as harassing." *Id. See also In re* Express-News Corp., 695 F.2d 807 (5th Cir. 1982) (overturning order denying leave to interview jurors on First Amendment grounds); Journal Publishing Co. v. Mechem, 801 F.2d 1233, 1237 (10th Cir. 1986) (holding trial court

cately balance all the interests implicated by media interviews of jurors following trial. Applying the history and logic tests adopted by the Supreme Court in its media access cases,[105] the court in *Doherty* decided to release the names and addresses of jurors to the media after a one week delay. The court admitted that "the history of post-verdict interviews appears scant,"[106] but concluded that courts have interpreted the practice of post-verdict interviews in light of the "broad latitude afforded the press in gathering news."[107] The court also stated several logical reasons why post-verdict interviews of jurors should be permitted. First, the court argued that the practice allows the public to obtain "information about the actual people who do render justice."[108] Second, post-verdict interviews provide for an "independent, non-governmental verification of the utter impartiality" of the jury selection and deliberation processes.[109] Finally, the process "educat[es] the public as to their own duties and obligations should they be called for jury service."[110]

Unlike other courts that have decided to release juror identities to the media, the court in *Doherty* considered whether the practice might have an adverse impact on the criminal justice system. The court stated:

> Even though an accused's fair trial rights may diminish and appear to evaporate upon the reaching of the jury verdict, the rationale for juror secrecy during deliberations applies equally well to secrecy post-verdict. For one juror to make public the thoughts and deliberations of his or her colleagues in the deliberation room will "chill" the free flowing process that our system encourages, especially if other jurors come to believe that it is the accepted practice for jury deliberations to be freely discussed once the verdict is returned.[111]

The court stated that the "rights of the defendants . . . are still vitally implicated" even after the jury has reached a decision.[112] This

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"could not issue a sweeping restraint forbidding all contact between the press and former jurors without a compelling reason.").

104. 675 F. Supp. 719 (D. Mass. 1987).

105. *See, e.g.*, Richmond Newspapers, Inc. v. Virginia, 488 U.S. 555 (1980) (discussed at text accompanying notes 76-88, *supra*).

106. *Doherty*, 675 F. Supp. at 722.

107. *Id.* The court shrewdly remarked that "the Courts of Appeals that have addressed this issue have apparently accepted, sub silentio, that the public's right of access to jurors after the verdict is returned is historically protected." *Id.* (footnotes omitted).

108. *Id.* at 723.

109. *Id.*

110. *Id.*

111. *Id.* at 724 (citations omitted).

112. *Id.*

finding, however, did not weigh in the court's ultimate decision to release juror identities. The jurors' right to privacy was of greatest concern to the court. Indeed, it was this interest that the court balanced against the media's right of access. In order to provide some protection to jurors, however, the court decided to delay the release of their names and addresses until seven days after the return of the verdict.[113]

Not all lower courts have agreed to release juror names and addresses, even after *Press-Enterprise I* and *II*.[114] In *United States v. Edwards*,[115] for example, the Fifth Circuit Court of Appeals refused to release the names and addresses of jurors who had been questioned in two closed mid-trial hearings investigating potential jury misconduct, even after the return of the verdict and discharge of the jury. At the conclusion of the trial, representatives of three media organizations sought transcripts of the closed proceedings. The trial judge released the transcripts but redacted portions containing the names of jurors, and "portions that if released would be unnecessarily embarrassing to the jurors involved."[116] The Fifth Circuit admitted that "the values of openness are significantly implicated in jury misconduct matters,"[117] yet the court declined to order the release of the withheld information. The Fifth Circuit reasoned that greater harm could be done to the jury as an institution if the names of suspected jurors were provided to the press, than if they remained under seal. The court noted that reports of juror misconduct create distrust among jurors: "The potentially divisive effects on relationships between jurors would be exacerbated by a 'public hearing.'"[118] In addition, the court pointed out that the process of uncovering juror misconduct may "create un-

113. *Id.* at 725.

114. Both the Delaware Supreme Court and the New York Court of Appeals have refused to order the release of juror names and addresses so that the media could conduct interviews with jurors following the trial. *See* Gannett Co. v. State, 571 A.2d 735 (Del. 1989) (holding fairness of the trial was adequately protected by the fact that the jurors names were disclosed to the parties and the court and by the fact that the trial itself was open to the public); Newsday, Inc. v. Sise, 518 N.E.2d 930 (N.Y. 1987) (refusing to release names and addresses of jurors under either New York statute or federal Constitution). The Delaware Supreme Court took a particularly jaundiced view of the media's role as intermediary between the public and the jury. In *Gannett*, the court stated that:

> The courts, the State and the defendant have concurrent paramount concerns for, and obligations to assure, a fair trial. This includes a proper solicitude for the jury so that it is not subject to the extraneous influences of a media representative which is also engaged in the business of selling newspapers.

571 A.2d at 750.

115. 823 F.2d 111 (5th Cir. 1987).

116. *Id.* at 114 (internal quotations omitted).

117. *Id.* at 116.

118. *Id.* at 117.

desirable bias against the defendants," especially if jurors are required to "defend" themselves in open court.[119]

United States v. Harrelson,[120] was another Fifth Circuit case that restricted the media's ability to conduct post-trial interviews with jurors. *Harrelson* involved the trial of three defendants charged with conspiracy in connection with the murder of a federal district court judge.[121] The trial court issued an order preventing media representatives from making repeated requests for interviews with discharged jurors.[122] In addition, the court's order prevented interviewers from inquiring into "the specific vote of any juror other than the juror being interviewed."[123] While the Fifth Circuit acknowledged that media representatives could not be completely barred from interviewing ex-jurors, it upheld the trial court's order based on the jurors' right to privacy and to protect the institutional integrity of the jury. The court explained its decision to prevent the media from inquiring into jurors' specific votes: "Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their argument, and ballots were to be freely published to the world."[124]

C. Anonymous Juries

The most extreme way to ensure that names and addresses of jurors remain secret is through the use of an anonymous jury. When anonymous juries are seated, the identities of the jurors are concealed from the press and public, as well as the parties to the trial. Anony-

119. *Id.* The decision in *Edwards* may have been a result of the particular facts raised in a case where members of the jury accuse other jury members of wrongdoing. In deciding *Edwards*, however, the court followed an earlier Fifth Circuit case, United States v. Gurney, 558 F.2d 1202 (5th Cir. 1977), in which no allegations of jury misconduct were at issue. Relying heavily on language contained in the Supreme Court's decision in *Sheppard*, the *Gurney* court refused to overturn the trial court's decision to not release jurors' names and addresses. The court did not view its decision as a major infringement on the rights of the press since the district court did not place any prior restraints on the media's news gathering ability. Instead, the court characterized its decision as a "mere[ ] refus[al] to allow the appellants to inspect documents not a matter of public record." *Id.* at 1208.

Gurney was decided before the Supreme Court determined that the First Amendment guaranteed a public right of access to criminal trials in *Richmond Newspapers*. The *Edwards* court did not mention this fact in citing *Gurney*, suggesting that the Fifth Circuit continues to believes that withholding juror identities from the media is constitutionally permissible.

120. 713 F.2d 1114 (5th Cir. 1983).

121. *Id.* at 1115.

122. *Id.* at 1116.

123. *Id.* at 1116.

124. *Id.* at 1118 (citing Clark v. United States, 289 U.S. 1, 13 (1933) (Cardozo, J.)).

mous juries were first approved in *United States v. Barnes*.[125] In *Barnes*, jurors were identified by number throughout voir dire and the trial. Anonymous juries are justified as a means of providing for the safety of jurors and protecting the deliberation process from outside influences.[126] Thus, courts usually do not consider what effect, if any, the concealment of juror identities will have on the jury's representative function in deciding whether to allow the selection of an anonymous jury.[127] In *Barnes*, however, the court expressly rejected the argument that "jurors must publicly disclose their identities and publicly take responsibility for the decisions they are to make."'[128]

The concept of the anonymous jury appears to conflict with any notion that juries must be open to public inquiry. Some anonymous jury cases support this conclusion by treating extensive publicity as a reason for keeping the identities of jurors secret.[129] The seating of an anonymous jury, however, need not prevent public review of the jury's verdict. Indeed, a court could both seat an anonymous jury and encourage post-trial communication between the media and the jury, as the trial court did in the Reginald Denny case.[130] Anonymous jury cases tell us little about how courts typically view the proper role of

125. 604 F.2d 121, 140-41 (2d Cir. 1979), *cert. denied*, 446 U.S. 907 (1980). *See also* United States v. Borelli, 336 F.2d 376, 392 (2d Cir. 1964) (suggesting, in dicta, use of anonymous jury as means of preventing jury tampering). Other cases approving of anonymous juries include United States v. Tutino, 883 F.2d 1125, 1132-33 (2d Cir. 1989), *cert. denied*, 493 U.S. 1081 (1990); United States v. Persico, 832 F.2d 705, 717 (2d Cir. 1987), *cert. denied*, 486 U.S. 1022 (1988); United States v. Ferguson, 758 F.2d 843, 854 (2d Cir. 1985), *cert. denied*, 474 U.S. 1032 (1985). *See* United States v. Scarfo, 850 F.2d 1015, 1022 (3d Cir. 1988) (citing cases). *See generally* Eric Wertheim, Note, *Anonymous Juries*, 54 FORDHAM L. REV. 981 (1986) (approving of use of anonymous juries in appropriate circumstances).

126. For example, *Barnes* involved the highly publicized trial of a purported drug overlord. The appeals court approved the district court's decision to seat an anonymous jury in view of allegations of violence from the defendant's henchmen and the history of violence in the district. 604 F.2d at 141. Given the massive publicity of violent acts associated with the case, the trial court also wanted to make sure that jurors felt secure from harm even if the actual potential of violence was slight. *Id.*

127. In United States v. Melendez, 743 F. Supp. 134, 137 (E.D.N.Y. 1990), the court identified the following three factors as reasons to impanel an anonymous jury:

> (1) the seriousness of the offenses charged, including whether the defendants are alleged to have engaged in dangerous and unscrupulous conduct in the context of a large-scale criminal organization and whether the defendants have access to means to harm jurors;
> (2) whether the defendants have engaged in past attempts to interfere with the workings of the judicial process, such as by jury tampering or attempts to evade prosecution; and,
> (3) the nature and degree of pretrial and expected trial publicity.

128. 604 F.2d at 140.

129. *See, e.g., Melendez*, 743 F. Supp at 137.

130. *See* Mydans, *supra* note 1.

the jury[131] because anonymous juries are normally seated only where some compelling and extraordinary threat is present. In most criminal trials—even highly publicized ones—anonymous juries will not be empaneled.[132]

D. Summary

There appears to be a trend toward increased judicial acceptance of a new interpretation of the jury's representative role, even though some lower courts remain skeptical. Formerly, courts viewed the jury as a body that needed to be isolated from publicity and represent a fair cross section of the community. Recently, courts have begun to view juries as having additional representative burdens to fulfill once the verdict has been returned. This new concept of the jury is especially evident in cases which have permitted media access to juror names and addresses for the purpose of facilitating post-verdict interviews. In justifying post-trial interviews, courts routinely mention the beneficial effects of allowing former jurors to communicate with the general public through the media. These benefits include educating others about the nature of jury service, explaining the reasons for the decision reached in the case, and ensuring the community that the outcome of the case was fair. These cases evidence a new judicial perspective on the appropriate role of the jury because the opinions either do not address, or expressly reject, traditional arguments that media influence will interfere with the deliberative process or otherwise undermine the legitimacy of the verdict, or of the jury as an institution. Section IV examines the jury's new representative function

131. *Cf.* United States v. Scarfo, 850 F.2d 1015, 1023 (3d Cir. 1988) (holding that juror anonymity does not change the role that jurors play in criminal cases because, ordinarily, "[t]he lack of continuity in their service tends to insulate jurors from recrimination"). In *Scarfo*, the court stated:

> Because the system contemplates that jurors will inconspicuously fade back into the community once their tenure is completed, anonymity would seem entirely consistent with, rather than anathema to, the jury concept.

Id.

132. Marc O. Litt, *"Citizen-Soldiers" or Anonymous Justice: Reconciling the Sixth Amendment Right of the Accused, the First Amendment Right of the Media and the Privacy Right of Jurors*, 25 COLUM. J.L. & SOC. PROBS. 371, 397-98 (1992) ("use of an anonymous jury is an extraordinary solution that is only justified in extreme circumstances"). *See* United States v. Melendez, 743 F. Supp. 134, 137 (discussed *supra* at note 127) and Wertheim, *Anonymous Juries*, *supra* note 125, at 1001-002 (arguing that anonymous juries should be restricted to cases where: (1) defendant has engaged in dangerous conduct especially in connection with organized crime; (2) defendant has made past attempts to interfere with criminal justice; and (3) case is subject of extensive pre-trial publicity).

more closely and investigates its effect on the jury's traditional role in the criminal justice process.

IV. The Jury's New Representative Function

The jury's new representative function is defined by the desire of juries in high profile cases to defend its verdict in the arena of of public opinion. The jury must now be representative *to* instead of merely representative *of* the community. Clearly, this novel interpretation of jury representativeness cannot be explained by the same terms that describe traditional views of the jury's representative function. Furthermore, the need for juries to explain their verdicts may work against the interests that are served by providing a fair cross section of the community on the jury pool. This section analyzes how the jury's new and different representative function affects the fact-finding, legitimating, and educational roles that the jury is expected to play within the criminal justice system.

A. Fact-Finding

The central function of a jury within the criminal justice system is that of a fact-finder. The selection of a jury that is representative of the community is promoted, in part, because it furthers the fact-finding process.[133] Divining the effect of the jury's new representative function on fact-finding, however, is much more complicated. Arguably, subjecting jury verdicts to public review may enhance the fact-finding process because jurors will be required to defend their decisions at the close of trial. In theory, this imperative could motivate jurors to take their responsibilities more seriously and review the evidence more carefully. On the other hand, community oversight—if it were to have any effect on the decision-making process at all—may encourage jurors to decide the facts of a case in anticipation of expected community pressure. That is, jurors may reach their verdicts based on how they would expect their findings to play to media audiences.[134] Thus, jurors may be tempted to give less consideration, rather than more, to the evidence in a particular case.

133. A jury that is representative in the traditional sense may be able to lessen any prejudices jurors may have and draw upon the varied experiences of diverse jurors to enhance its fact-finding ability. *See* text accompanying notes 50-51, *supra*.

134. The concern over whether the verdicts in the Denny case were reached merely to avoid a violent public reaction provides one of the more extreme examples of this problem. *See* Jim Newton, *L.A. Trials Show "Blind Justice" Hard to Achieve*, *supra*, note 18.

The negative impact of community pressure on juries is not merely speculative. In *Sheppard v. Maxwell*,[135] the Supreme Court held that the defendant was denied due process because he had been tried before a jury that was heavily influenced by "massive, pervasive and prejudicial publicity."[136] In *Sheppard*, the names and addresses of prospective jurors were published in the local papers and, as a result, all of them received anonymous letters and telephone calls expressing opinions about the case.[137] The Court overturned the defendant's conviction, holding that "[d]ue process requires that the accused receive a trial . . . free from outside influences."[138] The Court emphasized the importance of jury independence. "[N]o one," the Court stated, should "be punished for a crime without a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power."[139] The Court also stressed that too much is at stake in criminal cases to allow the outcome of the trial to depend entirely on the arts of persuasion; "legal trials are not . . . to be won through the use of the meeting-hall, the radio, and the newspaper."[140] Thus, *Sheppard* suggests that while community input is desired, direct democracy should not be embraced as a means of resolving criminal matters.

Sheppard addresses the negative effects of community influence on jurors before or during trial. *Wiley v. State*,[141] a Georgia death

135. 384 U.S. 333 (1966).

136. *Id.* at 335. The court recounted the facts of the case as follows:

> The jurors . . . were constantly exposed to the news media. Every juror, except one, testified at voir dire to reading about the case in the Cleveland newspapers or to having heard broadcasts about it. . . . As the selection of the jury progressed, individual pictures of prospective members appeared daily. During the trial, pictures of the jury appeared over 40 times in the Cleveland papers alone. The Court permitted photographers to take pictures of the jury in the box, and individual pictures of the members in the jury room. One newspaper ran pictures of the jurors . . . when they went . . . to view the scene of the murder. Another paper featured the home life of an alternate juror. The day before the verdict was rendered . . . the jury was separated into two groups to pose for photographs which appeared in the newspapers.

Id. at 345.

137. *Id.* at 342. A year before *Sheppard* was decided, the Supreme Court commented on the need to protect the jury from outside influence. Estes v. Texas, 381 U.S. 532 (1965). In *Estes*, the Supreme Court forbade the televising of a criminal trial. (This holding was later overturned by Chandler v. Florida, 449 U.S. 560 (1981)). The court recognized that "[p]retrial [publicity] can create a major problem for the defendant in a criminal case," because it can "set the community opinion as to guilt or innocence." *Estes*, 381 U.S. at 536.

138. *Sheppard*, 384 U.S. at 362.

139. *Id.* at 350 (citation omitted).

140. *Id.* (citation omitted).

141. 296 S.E.2d 714 (Ga. 1982).

penalty case, illustrates the danger of revealing jurors' identities to the public after the trial has concluded. In *Wiley*, the jury had returned a guilty verdict but had deadlocked on the question of whether to impose the death penalty. The judge identified the lone holdout in open court prior to dismissing the jury. The juror was strongly reproached by the prosecutor and the juror's identity was subsequently published in the press. According to published accounts, "[a]fter the trial this juror had acid thrown into his locker at work and received several death threats over the phone."[142]

Exposing the jury to public attention creates a risk that jurors will render decisions based on community desires and not the facts of the case in order to avoid public vilification. Public review of jury verdicts may raise few concerns where the community is aware of all of the circumstances of the case and harbors no unfair prejudices against the defendant. In cases where such prerequisites are not met, however, great injustice can be done if the jury is required to defend its verdict through the media. Personal experience and sociological inquiry indicate that normative social influence can cause "people [to] conform because they fear the negative consequences of appearing deviant."[143] Psychologists determined many years ago that "jurors are better able to resist normative pressure when their judgments are made anonymously."[144] When jurors are aware that they will be thrust into the public eye at the end of their service, there is a great danger that their ability to exercise their own independent judgment may be affected.[145]

142. D. Ranii, *Judge is Criticized for Identifying Holdout Juror*, NAT'L. L. J. 2, 14, (Jan. 4, 1982), discussed in SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES 191 (1988).

143. KASSIN & WRIGHTSMAN, *supra* note 142, at 175. The fear is justifiable since "[d]ecision-making groups often reject, ridicule, and punish individuals who frustrate a common goal by adhering to a deviant position." *Id.*

144. *Id.* at 191. *See* also SOLOMON E. ASCH, SOCIAL PSYCHOLOGY (1952) (study showed subjects knowingly answered test questions incorrectly in order to conform to majority position); Morton Deutsch & Harold B. Gerard, *A Study of Normative and Informational Social Influence upon Individual Judgment*, 51 J. ABNORMAL & SOC. PSYCH. 629 (1955) (subjects who answered test questions anonymously less likely to follow incorrect majority).

145. As Justice Cardozo warned in Clark v. United States, 289 U.S. 1, 13 (1933), "[f]reedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world." The court in United States v. Doherty, 675 F. Supp. 719 (D. Mass. 1987), makes the same point. *See infra* note 111 and accompanying text. *See also* Note, *supra* note 6, at 890-91 ("A juror who realizes, consciously or subconsciously, that deliberations may become a part of the public domain is less likely to argue for judgments contrary to public opinion, and the deliberative process is therefore less likely to produce them.").

In addition, jurors that expect their fellow jurors to report the substance of their deliberations to the press may not be as open and honest as they might otherwise be. This could also skew the outcome of a case. For example, if a juror were to express racial prejudice in arguing for a conviction,[146] other jurors might be able to convince the juror to keep an open mind. At the very least, the other jurors can discount the prejudiced juror's opinion as they formulate their own. If it is likely that the jurors will be discussiing their deliberations with the press after the trial, however, the first juror might be less forthcoming about his prejudices. The opportunity to persuade him to open his mind would be lost, and the risk that his opinion would be overvalued by others would be increased.[147]

The potential "chilling" effect of public disclosure on jury deliberations is one of the justifications for the common law rule prohibiting the admission of juror testimony to impeach jury verdicts.[148] As the Supreme Court explained in *McDonald v. Pless*,[149] permitting jurors to testify about the conduct of their discussions would "make what was intended to be a private deliberation, the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference."[150] Several states[151] and the federal

146. *See, e.g.*, Wisconsin v. Shillcut, 350 N.W.2d 686, 688 (Wis. 1984) (A juror in solicitation case reportedly remarked, "let's be logical, he is black, and he sees a seventeen year-old white girl—I know the type.").

147. I am indebted to my colleague, Michael Seigel, for providing me with this illustration.

148. *See* Susan Crump, *Jury Misconduct, Jury Interviews, and the Federal Rules of Evidence*, 66 N.C. L. REV. 509, 513-17 (1988). The common law rule, dating from the 1785 English case of Vaise v. Delaval, 99 Eng.Rep. 944 (K.B. 1785), prohibits admission of juror testimony to impeach a jury verdict unless the deliberation process has been contaminated by an "extraneous influence." 8 JOHN H. WIGMORE, EVIDENCE § 2352, at 696-97 and § 2354, at 716 (J. McNaughton rev. ed. 1961).

149. 238 U.S. 264 (1915).

150. *Id.* at 267-68. *See also* Clark v. United States, 289 U.S. 1, 13 (1933); Rakes v. United States, 169 F.2d 739, 745-46 (4th Cir. 1948) *cert. denied*, 335 U.S. 826 (1948); *ABA Standards for Criminal Justice*, Standard 15-4.7 (1980).

151. Fifteen states (Arizona, Arkansas, Florida, Maine, Michigan, Minnesota, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, South Dakota, Wisconsin and Wyoming) have evidentiary rules, patterned after the federal rule, prohibiting juror testimony, except as to "extraneous prejudicial information" or "outside influences." *See Developments in the Law—Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1595 n.3 (1988). Other jurisdictions prohibit juror testimony only as to matters that "inhere in the verdict" (the "Iowa rule"), or permit juror testimony only when there is competent evidence of misconduct from a source other than the juror (the "aliunde rule"), when the misconduct is that of a third party other than the juror, or if the misconduct occurred outside the jury room. *See generally* LAFAVE & ISRAEL, *supra* note 54, at 1048-49.

courts[152] have adapted the common law position in evidentiary rules which also restrict the use of juror testimony for impeachment purposes. Federal Rule of Evidence 606(b),[153] which adopts the common law rule generally prohibiting juror testimony of misconduct, was favorably reviewed by the Supreme Court in *Tanner v. United States*.[154] In *Tanner*, the Court held that Rule 606(b) could be properly invoked to bar juror testimony about drug and alcohol use by several jurors during the defendants' trial. The Court cited "the weighty government interest in insulating the jury's deliberative process" as a basis for its decision.[155] According to the Court, "full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of postverdict scrutiny of juror conduct."[156]

The jury's fact-finding role may also be adversely affected where jurors are tempted to return verdicts that would enhance their ability to gain fame or fortune. Under this scenario, jurors would focus their attention on what they might be able to reveal to media representatives rather than concentrating on the evidence before them.[157] At best, this focus on achieving pecuniary gain or celebrity status might result in cases where jurors do not give their best efforts to their fact-finding responsibilities. At worst, this would result in verdicts that are intentionally skewed for monetary or publicity-seeking reasons.[158]

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152. *See* FED. R. EVID. 606(b).

153. Rule 606(b) provides in 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 . . . 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).

154. 482 U.S. 107 (1987).

155. *Id.* at 120.

156. *Id.* at 120-21.

157. *See* Maura Dolan, *Impartial Jurors Can Be Found, Court Experts Say*, L.A. TIMES, Jul. 9, 1994, at A1 (noting reports that some prospective jurors in the King and Denny cases admitted they had considered the possibility of making money from serving on jury and that one prospective juror had thought about keeping a diary to later sell as a book). Possibilities also exist for former jurors in high-profile cases to gain monetarily. *See* Jesse Katz, *Participants in King Case Try to Cash In*, L.A. TIMES, Apr. 25, 1993, at A1 (foreperson of federal King trial received money to appear on Inside Edition, while foreperson of state trial was working on a book).

158. *See* Note, *Juror Journalism: Are Profit Motives Replacing Civic Duty?*, 16 PEPP. L. REV. 329 (1989); Bennett H. Beach, *The Juror as Celebrity*, TIME, Aug. 16, 1982, at 42. Chiefly in response to fears that jurors might shirk their responsibilities in the quest for profit, California has recently passed legislation making it a misdemeanor offense for ju-

The desire for fame may also corrupt the fact-finding process in less direct ways. If jurors in high-profile cases repeatedly appear on television and in print, then jury service in those types of cases may become more attractive to potential jurors interested in fame and less attractive to potential jurors that desire anonymity. Therefore, each type of juror may consciously seek inclusion or exclusion from jury service depending on the potential publicity of the case. Such conscious exclusion or inclusion will ultimately result in a jury that does not fairly represent the community.[159] Further, a less representative jury may turn out to be a less accurate finder of fact, for reasons that I have already discussed.[160]

B. Legitimation

Allowing jurors to explain their decisions to the community at large improves the jury's ability to legitimize its verdicts. Certainly, subjecting jury findings to public review would enhance public confidence in the results of jury trials. If the jury was isolated from public scrutiny, then members of the community might reasonably fear that juries would have the opportunity to work injustice.[161] Indeed, the more public the workings of a jury are, the more likely the community will allow the jury to fulfill its role as an arbiter of disputes and accept jury conclusions.

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rors to accept compensation related to their service on a case until ninety days after being discharged. Carl Ingram, *Legislation Inspired by Simpson Case Signed*, L.A. TIMES, Sep. 27, 1994, at A21.

159. Of course this effect may not be significant when compared to the unrepresentativeness of juries that results from the exclusion of racial minorities from jury pools, the exclusion of venire persons who have been exposed to prejudicial publicity, or the practical exclusion of jurors with family or work conflicts. As a result, the juries that wind up hearing some criminal cases are decidedly unlike everyone else.

160. *See supra* notes 50-51 and accompanying text.

161. The Supreme Court characterized the secret trial, as exemplified by such institutions as the Spanish Inquisition, the English Court of Star Chamber, and the French monarchy's *lettre de cachet*, as a "menace to liberty." *In re* Oliver, 333 U.S. 257, 268-269 (1948). These examples show that "[i]n the hands of despotic groups . . . [the trial can] become an instrument for the suppression of political and religious heresies in ruthless disregard of the right of an accused to a fair trial." *Id.* at 269-270. But an open and public trial could prevent such abuse. As Justice Hugo Black wrote:

> Whatever other benefits the guarantee to the accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.

Id. at 270.

Juries in criminal cases do more than merely determine the guilt or innocence of the accused. Jury verdicts also "grant or withhold social approbation for defendants' behavior."[162] This "quasi-legislative" function[163] is exercised by juries in many instances. As one author explains:

> Through its verdict, the jury engages in subtle policy-making on issues as diverse as the point beyond which the government may not step in inducing the commission of a crime, the limits of self-defense, the boundaries of the defense of insanity, and the permissibility of certain types of protest against government policies.[164]

Presumably, the jury's policy-making procedures should be disclosed to the public so that these decisions acquire legitimacy. Arguably, then, "[p]ost-verdict interviews . . . play an essential role in the public debate of issues critically germane to the criminal process and . . . to our government as a whole."[165]

Traditionally, however, jury verdicts were deemed legitimate precisely because they were rendered by an independent body and not subject to the influence of popular opinion.[166] According to this point of view, requiring jurors to explain their verdicts to the general public gives jury verdicts less legitimacy, not more. The legitimacy of jury verdicts, however, is generated from the grass-roots of society.[167]

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162. Nunn, *supra* note 19, at 65.

163. *See* Raskopf, *supra* note 6, at 373.

164. *Id.* (citations omitted).

165. *Id.* at 374.

166. *See* VAN DYKE, *supra* note 33, at 47 ("We can safely say by 'impartial' our country's founders meant at least a jury that was not biased in favor of the prosecution, a jury independent of outside influence, a jury that was—as far as could be ensured—fair.").

167. For state power to succed, the citizenry must be persuaded to acquiesce in its exercise. *See* JURGEN HABERMAS, COMMUNICATION AND THE EVOLUTION OF SOCIETY 199 (T. McCarthy, trans. 1979) ("[T]he legitimacy of an order of domination is measured against the belief in its legitimacy on the part of those subject to domination."); Robert W. Gordon, *New Developments in Legal Theory*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 281, 285-86 (David Kairys ed. 1986) ("[I]n order to be bearable to those who suffer most from it, law must be perceived to be approximately just."). The notion that ordinary citizens have some influence on the rules that govern them (and in this case, on the acceptability of jury verdicts) is central to anti-instrumentalist accounts of the dynamics of power. *See* MICHEL FOUCAULT, POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972-1977 at 98 (1980) (describing manifestation of power as an interactive process in which "individuals . . . are always in the position of simultaneously undergoing and exercising . . . power"); William L.F. Felstiner & Austin Serat, *Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions*, 77 CORNELL L. REV. 1447, 1447-448 (1992) ("[T]he view that social relations are constructed and power is exercised through complex processes of negotiations is now widely shared.").

Neither the state nor elite authorities[168] can dictate what the community will ultimately accept as legitimate. Jury verdicts must therefore be in accord with popular notions of fairness and justice in order for them to be successfully defended in the arena of public opinion. In this sense, public review augments the legitimacy afforded jury verdicts. The legitimacy bestowed upon the verdict by public review derives from the community determination that the verdict was correct.

The increasing occurrence of post-trial juror interviews may mean that the theory linking the legitimacy of the verdict to jury autonomy lacks validity.[169] In the eyes of the general public, the possibility that its influence might warp the truth-finding function of the jury may not be sufficient to diminish the legitimacy of jury verdicts that have been subjected to public review. Thus, verdicts that have been explained to the public may gain more legitimacy than those not discussed in the media.

C. Education

The jury's traditional representative function was to educate the public by exposing citizens to the workings of the criminal justice system first hand. In other words, jury service functions as a democratic process, directly involving community members in the criminal justice system. Media attention to former jurors is also educational. The comments of former jurors may better explain the jury deliberation process. In this way, members of the public might be better informed "as to their own duties and obligations should they be called for jury service."[170] In addition, public review of jury trials could provide insight into how a particular jury reached a particular decision. For example, post-trial interviews could reveal whether the jury found certain witnesses to be credible, whether the jury was influenced or felt constrained by the judge's instructions, and whether the strategies employed by the defense or prosecution were effective. Such infor-

168. By "elite authorities" I mean government officials, corporate managers, opinion leaders and other wielders of institutional power and prestige. *Cf.* STUART HALL, CHAS CRITCHER, TONY JEFFERSON, JOHN CLARKE & BRIAN ROBERTS, POLICING THE CRISIS: MUGGING, THE STATE AND LAW AND ORDER 58 (1978) (referring to same as "primary defenders" in a semiotic process that works to produce meaning).

169. Certainly in the Rodney King case, the independence of the jury did little to enhance the legitimacy of the verdict. But the verdict in that case may have lacked legitimacy in the first place because the jury was not representative of the community in which the crime took place. If the jury had been more representative, then it is possible that the verdict may have been more readily accepted. It is not likely that riots would have broken out in Los Angeles and other cities if an all-black jury had returned the not-guilty verdicts.

170. United States v. Doherty, 675 F. Supp. 719, 723 (D. Mass. 1987).

mation not only educates the public as to the importance of jury service and the complexity of the deliberation process, but also provides invaluable insight to legal reformers and trial practitioners.[171]

For example, juror comments following the first Rodney King trial revealed that one of the two minority jurors did not initially agree that the appropriate verdict should be not guilty.[172] This juror then changed her vote in the face of pressure from the other jurors.[173] This revelation verified social science findings about jury dynamics[174] and underscored the importance of insuring that sufficient numbers of minority jurors were seated in the second trial.

Negative lessons, however, may be learned from juror's post-trial appearances in the media. The dissection of jury verdicts by the popular media may encourage the "second guessing" of jury findings. Such questioning of jury decisions may ultimately reduce respect for jury verdicts and contribute to the decline of the dignity of the criminal justice system.[175] In addition, the sight of former jurors defending their verdicts may teach prospective jurors that jury independence is,

171. However, the value of post-trial juror interviews as a window into the internal functioning of the jury depends entirely on how accurate the information related by the jurors is. As any student of human nature can confirm, "what people say about their own behavior can be very unreliable." KASSIN & WRIGHTSMAN, *supra* note 142, at 16. People can forget or have their own motivations for not telling the truth. *Id.* Psychologists and jury researchers Saul Kassin and Lawrence Wrightsman question the ability of jurors to correctly relate the events that occurred during their deliberations. Kassin and Wrightsman point out that "[p]robably few people can accurately recall what counterarguments were raised, by whom, and what effect they had on the group." *Id.*

172. Nina Bernstein, *Bitter Division in Jury Room*, NEWSDAY, May 14, 1992, at 5. The juror, identified as Virginia Bravo Loya in press reports, "complained several times during the deliberations of feeling pressured to give in to the majority." *Id.* After the verdict, she spoke to reporters about the other jurors. She said, "it's like they wanted to see what they wanted to see." *Id.*

173. *Id.*

174. Several jury studies have shown that at least three minority jurors are required to withstand the pressure of a nine-person racial majority on a jury. *See* HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 463 (Phoenix ed., Univ. of Chicago 1976); MICHAEL J. SAKS, JURY VERDICTS 16-18 (1977); S. E. Asch, *Effects of Group Pressure upon the Modification and Distortion of Judgments*, *in* GROUP DYNAMICS 151, 152-155 (Dorwin Cartwright et al. eds., 1953); Dale W. Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744, 748 (1959); Rita Simon & Prentice Marshall, *The Jury System*, *in* THE RIGHTS OF THE ACCUSED 211, 227 (Stuart S. Nagel ed., 1972). *See generally* Sheri Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1698-99 (1985) (arguing for inclusion of at least three minority jurors on 14th Amendment grounds); Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment As a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 113-15 (1990) (arguing for inclusion of at least three black jurors in trials of black defendants on 13th Amendment grounds).

175. Note, *supra* note 6, at 891.

at best, a myth and that decisions should be tailored to match public expectations.

The conflict between the positive and the negative educational effects of post-trial interviews is intensified in the high-profile case. In the highly publicized case, there may be a greater need to eductae the public as to the reasons for the decision in order to prevent broad dissatisfaction with the verdict. But increased public interest in a case may also signal the presence of strong community feelings regarding the defendant's guilt or innocence. If so, then greater publicity would only underscore the risks that serving in these types of cases entail, thereby encouraging potential jurors to shirk their responsibilities if selected. The possibility that the jury's new representative function will have a chilling effect on potential jurors seems more likely—and more troubling—than the risk that jurors would fail to learn the nature of their obligations in the absence of post-trial interviews.

D. Summary

Recognizing a new representative function for juries entails both benefits and costs. The fact-finding ability of the jury, in particular, may be affected when juries are subjected to post-verdict public scrutiny. Jurors may be encouraged to decide a case out of fear or intimidation, or simply from the psychological need for public acceptance. Furthermore, promoting post-trial communication with jurors may tempt them to decide cases out of a desire for money or fame. The fact-finding ability of the jury may also be skewed as publicity-shy potential jurors exclude themselves from jury service.

Conversely, submitting jury verdicts for public review may enhance their legitimacy. While the traditional theory holds that the jury's independence from public pressure gives verdicts their legitimacy, the public may be more likely to accept a verdict that is explained to them.

Finally, a new representative role for the jury may be justified on the ground that it furthers public education. The public can learn of the reasons for a jury's decision and of the nature of a juror's responsibilities from the post-trial interviews. Potential jurors, however, can also learn of the adverse consequences that may flow from not conforming to the public's viewpoint in a case.

Conclusion

Within the past two decades, perceptions of the jury and the nature of its role in the criminal justice system have slowly changed. As

the power and influence of the Fourth Estate has grown and expanded, the relationship of the institutions of criminal justice to the media have transformed. The jury, once considered a retreat where jurors could ponder the weighty questions in seclusion, has become an object of public attention and debate. Through the use of post-verdict interviews with jurors, the media has shed light on the process of jury deliberation. In high profile cases, the public may now anticipate an announcement of the verdict, as well as an explanation of it.

Courts have fostered the transformation of the role of the jury through decisions allowing greater media access to jurors following trial. Courts generally speak favorably of the benefits that flow from keeping the public informed about how the jury functions. These benefits, however, are typically discussed in the context of a clash of rights between the First Amendment protections of the press and, either the privacy rights of jurors, or the defendant's right to a fair trial. By approaching the issue in this fashion, courts have failed to fully consider how the changing role of the jury might impact the criminal justice system as a whole.

Courts correctly conclude that allowing juries to explain and defend their verdicts through the media may enhance the legitimacy of jury verdicts and better educate the public. As this Article demonstrates, however, the process courts assume will afford greater legitimacy to jury verdict, also works to undermine the jury's value as a fact-finding instrument. While public opinion may reasonably be courted to ensure that jury verdicts are accepted, public opinion cannot be permitted to influence the outcome of trials. This tension, of course, is inherent in the nature of the jury itself. The jury has always operated as a popular democratic check on special interests that may be represented by the prosecutor, the judge, or the defendant in a criminal trial.[176] Through the participation of former jurors in interviews with the media, the jury has unquestionably become more open and more democratic. In the process, however, it has also become more susceptible to the passions and politics that invariably infuse public life.

176. *See* Patrick E. Higginbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power*, 56 TEX. L. REV. 47, 58-59 (1977) (discussing democratizing effect of juries).