Toward A Limited Right Of Access To Jury Deliberations

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Nothing in the Constitution prohibits the recording or publication of jury deliberations. As with any other judicial function in our democratic society, the public relies on the work and product of the jury to ensure that justice is done. Unlike any other governmental deliberative process, jury deliberations receive unparalleled protection from the glare of the public eye. An increasing mistrust of the jury has resulted from public displeasure with the results in high profile cases. In addition, access to jurors and the contents of the deliberative process is increasing through the prevalence of postverdict interviews. When freely given, the First Amendment almost insurmountably protects this post-verdict testimony.

Under a contemporary reading of *Richmond Newspapers, Inc. v. Virginia*,[1] faithful to one prong of that majority opinion,[2] and in

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1. 448 U.S. 555 (1980).

2. The most substantive explication of this "logic" or "structural" prong came from Justice Brennan's concurrence in *Richmond Newspapers*. Justice Brennan wrote:

> [T]he First Amendment embodies more than a commitment to free expression and

consideration of the current "treatment" of jury anonymity,[3] a limited right of access should attach to jury deliberations after the end of trial. This right of access should be subject to limitations designed to protect both defendants' fair trial rights and juror privacy and safety.[4]

Discretion whether to permit access to deliberations would thus inhere in much the same way it does in the context of media access to

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> communicative interchange for their own sakes; it has a structural role to play in securing and fostering our republican system of self-government. Implicit in this structural role is not only 'the principle that debate on public issues should be uninhibited, robust, and wide-open,' but also the antecedent assumption that valuable public debate—as well as other civic behavior—must be informed. The structural model links the First Amendment to that process of communication necessary for a democracy to survive, and thus entails solicitude not only for communication itself, but also for the indispensable conditions of meaningful communication.

Id. 587–88 (Brennan, J., concurring) (citations omitted) (emphasis added). It is arguable that the Court moved closer toward this single-pronged focus in Globe Newspapers Co. v. Superior Court, 457 U.S. 596, 605 n.13 (1982) ("Whether the First Amendment right of access to criminal trials can be restricted in the context of any particular criminal trial, such as a murder trial (the setting for the dispute in *Richmond Newspapers*) or a rape trial, *depends not on the historical openness* of that type of criminal trial but rather on the state interests assertedly supporting the restriction.") (emphasis added). *See also* Press-Enter. Co. v. Superior Court (*Press Enter II*), 478 U.S. 1, 21 (1986) (Stevens, J., dissenting) ("The historical evidence proffered in this case is far less probative than the evidence adduced in prior cases granting public access to criminal proceedings."); El Vocero de Puerto Rico v. Puerto Rico, 508 U.S. 147 (1993) (holding that despite no history of openness, access attached). For an exhaustive survey of Justice Brennan's contribution, and how it extended from the First Amendment scholarship of Alexander Meiklejohn, see generally Eugene Cerutti, *"Dancing in the Courthouse": The First Amendment Right of Access Opens a New Round*, 29 U. RICH. L. REV. 237, 269 (1995):

> In most respects, [the two-prong test] fails to justify the extraordinary extension of the right of access to proceedings and documents with no real history of access and no real utility to the governing process. Many [lower] courts have in fact quite explicitly forsaken the two-prong standard while at the same time extending the right.

(citations omitted); *cf.* Clifford Holt Ruprecht, *Are Verdicts, Too, Like Sausages?: Lifting the Cloak of Jury Secrecy*, 146 U. PA. L. REV. 217, 237–41 (1997).

3. The historical model of access—"experience"—fails to address modern advances in media culture. Increased access suggests that more and not less information should be available; the reasons for limiting access to jury deliberations are no longer held sacrosanct either by the courts or by the public at large. If the reasons are no longer persuasive, then the question of access to jury deliberations needs to be recast to address that reality. *See generally* Cerutti, *supra* note 2 (arguing that the right of access needs to be restructured in the interests of doctrinal integrity to account for vast expansions and address claims for more openness in government).

4. Nothing in this proposal implicates the rules prohibiting impeachment of jury verdicts as a legal or judicial matter, nor violates historical concern for *jury* privacy in the deliberative process. If necessary, juror privacy may still be maintained through the use of various technical or legal devices. *See, e.g.*, *Richmond Newspapers*, 488 U.S. at 580–81, and its progeny; *see also* Sheppard v. Maxwell, 384 U.S. 333, 358 (1966) (considering restrictions on access when prejudice or disadvantage might otherwise follow).

judicial proceedings generally.[5] This approach would serve as a basis for demystifying the jury process while educating the public and increasing its confidence in the jury system. Furthermore, a right of access to jury deliberations might lessen the incentive for publicity-hungry media to harass and intimidate individual jurors. Finally, and over time, the publication of jury deliberations, and the accompanying scrutiny by the public, scholars, and bar, might produce better juries, resulting from a broad and *informed* solemnity for the jury process.[6]

This Comment argues that transcripts of jury deliberations, subject to the same balancing exercised by judges in the context of access to judicial proceedings, should be routinely accessible after trial. These transcripts could preserve juror anonymity through the use of codes or numbers to distinguish, but not personally identify, individual jurors. Further, and subject to the consent of the defendant and the jury, audio and visual records of jury deliberations should be permitted, subject to judicial discretion similar to that exercised in the context of televisions in the courtrooms.[7] Additional mechanisms are proposed to mitigate concerns that these recordings would skew the composition of the jury. At no point does this Comment argue that transcripts or audiovisual records should be subject to judicial review, form the basis for appellate litigation, or disturb the common law and statutory prohibitions on the impeachment of jury

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5. A limited right of access in this context

> may be overcome only by an overriding interest based on findings that [post-trial] closure [of that record] is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated long with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

Press-Enter. Co. v. Superior Court (*Press Enter I*), 464 U.S. 501, 510 (1984). In the context of access to the transcript of jury deliberations, a general and unarticulated reference to "jury privacy" would not alone suffice to justify presumptive closure of the jury record.

6. *See generally* Nancy S. Marder, *Deliberations and Disclosures: A Study of Post-Verdict Interviews of Jurors*, 82 IOWA L. REV. 465, 498–501 (1997) (suggesting that access might increase accountability and cause juries to take their work more seriously); Kenneth B. Nunn, *When Juries Meet the Press: Rethinking the Jury's Representative Function in Highly Publicized Cases*, 22 HASTINGS CONST. L.Q. 405, 434 (1995) (arguing in the context of the "Jury's New Representative Function," that "[t]he more public the workings of a jury are, the more likely the community will be to fulfill its role as an arbiter of disputes and accept jury conclusions."). *But see infra* note 41 and accompanying text.

7. The right of access does not attach to recording devices in courtrooms—required access involves merely allowing media to be present during trial proceedings and to inspect court documents related to those proceedings. *See* Nixon v. Warner Comm., Inc., 435 U.S. 589, 610 (1978), where the Court stated:

> Nor does the Sixth Amendment require that the trial—or any part of it—be broadcast live or on tape to the public. The requirement of a public trial is satisfied by the opportunity of members of the public and the press to attend the trial and to report what they have observed.

verdicts.[8]

Part I of the Comment explores the constitutional provisions relevant to access to jury deliberations. Part II outlines the common law traditions regarding access to jury deliberations, specifically impeachment of jury verdicts and the protection of jury privacy. Part III explores the dangers associated with access to jury deliberations, concluding that such concerns are ultimately unpersuasive in the postverdict setting, and in light of already existing practices that compromise the privacy of the jury. In either case, the concern for jury privacy should otherwise be subordinated to the public benefits from a limited right of access. Part IV suggests a framework for limited access to jury deliberations that satisfies most of the historical concerns for jury privacy and concludes with an argument that limited access to jury deliberations might result in an increased and informed solemnity for the function of the jury. A Postscript addresses the particular case of audiovisual recording devices in the jury room.

I. THE CONSTITUTION AND ACCESS TO JURY DELIBERATIONS

Nothing in the Constitution prohibits the recording of jury deliberations.[9] Nevertheless, any positive theory of access to jury deliberations must be grounded in that text in order to mitigate the ongoing

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8. This position contrasts with other arguments for access posed previously, which suggest that judicial, preverdict inquiry should be encouraged and permitted in order to ensure that juries are performing their duties consistent with their commitments. *See, e.g.*, Alison Markovitz, Note, *Jury Secrecy During Deliberations*, 110 YALE L.J. 1493, 1495, 1502 (2001) (arguing for a balance between "jury secrecy" and "judicial inquiry" in the preverdict context, which errs toward more inquiry in order to permit impartial inquiry into ongoing jury deliberations). *But see* United States v. Thomas, 116 F.3d 606, 623 (2d Cir. 1997):

> [W]e are compelled to err in favor of the lesser of two evils—protecting the secrecy of jury deliberations at the expense of possibly allowing irresponsible juror activity. Achieving a more perfect system for monitoring the conduct of jurors in the intense environment of a jury deliberation room entails an unacceptable breach of the secrecy that is essential to the work of juries in the American system of justice. To open the door to the deliberation room any more widely and provide opportunities for broad-ranging judicial inquisitions into the thought processes of jurors would, in our view, destroy the jury system itself.

Case law and conventional wisdom, which insist that juries follow instructions, would seem to support a vision that the integrity of the jury is challenged more by preverdict judicial inquiry than by postverdict public access; particularly upon the assumption that finality of the verdict cannot be challenged. In any event, the competing interests at stake in the preverdict and postverdict settings are sufficiently distinct as to preclude analogy.

9. The realities of the modern context advise that the trend of the federal—if not state—courts is away from access in the context of judicial proceedings. Nevertheless, the absence of constitutional text bearing on the question of restricting access—versus affirmative access, however limited—is evidence that the question remains open and vital.

and inevitable legislative attempts to bar such access.[10] Additionally, such a theory of access must account for constitutional provisions, which, in the context of access to jury deliberations, might be used to affirmatively bar or severely limit such access. Once a limited right of access attaches, similar findings and devices, balanced against the right of access in order to justify closure of courtroom proceedings,[11] can be implemented to mitigate any constitutional privacy or fair-trial implications that arise in the context of access to jury deliberations.

A qualified right of access attaches to judicial proceedings through the First and Sixth Amendments. The Court in *Richmond Newspapers* found that "the right to attend . . . trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, . . . important aspects of freedom of speech and 'of the press could be eviscerated.'"[12] The Court also found that in the absence of identifiable prejudice to the defendant this right of access trumped the defendant's right to a fair trial as protected by the Sixth Amendment.[13] Further, the defendant's right to a public trial did not include the negative right to a private trial.[14] Finally, the Court recognized that in the modern era, the public receives most of their information from the media, which acts as a proxy for the public.[15]

In order to determine whether a right of access attached to judicial proceedings, the Court looked to both logic, the "community therapeutic value" of openness, and experience—whether the trial proceedings in

10. TEX. CODE CRIM. PROC. ANN. arts. 36.215 and 36.22 (Vernon 1981) (prohibiting any recording of jury deliberations, and provides that "[n]o person shall be permitted to be with a jury while it is deliberating"). *See also* Fed. R. Evid. 606(b) (codifying the impeachment doctrine).

11. When "a qualified First Amendment right of access attaches . . . the proceedings cannot be closed unless specific, on-the-record findings are made demonstrating that 'closure is essential to preserve higher values and is narrowly tailored to serve that interest.'" *Press Enter II*, 478 U.S. at 13–14 (quoting *Press Enter I*, 464 U.S. at 510). In *Richmond Newspapers*, the Court asserted that lower courts must: (1) make specific and on-the-record findings; (2) investigate less restrictive alternatives to closure; and, (3) identify the constitutional right of access and balance the findings against that right. 488 U.S. at 580–81 ("[T]he trial judge made no findings to support closure; no inquiry was made as to whether alternative solutions would have met the need to ensure fairness; there was no recognition of any right under the Constitution for the public or press to attend the trial.").

12. 448 U.S. at 580 (quoting Branzburg v. Hayes, 408 U.S. 665, 681 (1972)). The Court found that this guarantee encompassed each of the specific rights to speech, press and assembly. *Id.* at 575–78.

13. *Id*. at 580–81.

14. *Id*. at 580.

15. *Id*. at 577 n.12; *see also* Nixon, 435 U.S. at 609 ("Since the press serves as the information-gathering agent of the public, it [can] not be prevented from reporting what it ha[s] learned and what the public [i]s entitled to know."). *But see* Saxbe v. Washington Post Co., 417 U.S. 843, 850 (1974); Pell v. Procunier, 417 U.S. 817, 834–835 (1974).

question had historically been opened to the public.[16] However, implicit in the Court's opinion are two concerns: (1) the media *increasingly* functions as a proxy for the public and as a check on and observer of government, specifically judicial proceedings; and (2) because of the nature of modern society, where individuals have neither the time nor the proximity to courthouses in order to participate, a more fundamental right of access was needed in order to accommodate and facilitate scrutiny of judicial proceedings.

In this way, *Richmond Newspapers* seems to assert that, in consideration of the public's alienation from the trial experience, a right of access must now attach as an indispensable element of an "informed" democracy, necessary to the "enjoyment of [those constitutional] rights explicitly defined."[17] Viewed in the context of subsequent case law,[18] focusing more specifically on the logic prong, *Richmond Newspapers* can be viewed as a fundamental decision that unlocked the door and grounded the right of access as an indispensable element of modern democracy, a "categorical assurance of the . . . freedom of access to information" in the judicial setting.[19] And the parameters of this right of access must shift with other developments in modern life. Indeed, just as technology will open new and less intrusive avenues to access, the Supreme Court has explicitly recognized that the doctrine of access will similarly accompany such changes.[20] In this sense, the right of access will come to play "a *structural* role . . . in securing and fostering our republican system of self-

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16. 448 U.S. at 570.

17. *Id.* at 580.

18. *See, e.g.*, Globe Newspapers Co. v. Superior Court, 457 U.S. 596 (1982) (right of access attaches to testimony of rape-victim minors, even though historically closed); *Press Enter II*, 478 U.S. at 9 (right of access attaches to preliminary proceedings in California, even though historically closed); In re Krynicki, 983 F.2d 74, 75 (7th Cir. 1992) (resolving persistent claims to secrecy within the appellate process); United States v. Chagra, 701 F.2d 354, 363 (5th Cir.1983) ("[T]he lack of an historic tradition . . . does not bar . . . a right of access."). *See also* Cerutti, *supra* note 2, at 280 (highlighting the structural prong of *Richmond Newspapers* and asserting that this prong has been "significantly extended by the lower courts").

19. 448 U.S. at 585 (Brennan, J., concurring). The primacy of this structural analysis is evident in the majority's citation to Jeremy Bentham:

> Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance.

Id. at 569 (quoting 1 J. Bentham, Rationale of Judicial Evidence 524 (1827)).

20. "When the advances in these arts permit reporting . . . by television without [its] present hazards to a fair trial we will have another case." Estes v. Texas, 381 U.S. 532, 540 (1965). *See also* Chandler v. Florida, 449 U.S. 560 (1981) (overruling *Estes* in everything but name).

government."[21] And this right of access, to gather information, will not be subordinated to the rights or interests of the parties or of the courts except on particularized findings that prejudice will inhere.

Constitutional provisions that might insulate or bear on the roles of jurors and jury are not sufficient to trump the right of access to gather information. A constitutional right of privacy does not attach to the deliberations of the jury, nor does such a right attach for the individual. Indeed, absent articulable findings as to possible danger to jury safety, juror identity is part of the public record generated during trial proceedings.[22] Such concerns for privacy are generally satisfied through enforcement of common law protections of jury secrecy. Alternately, the First Amendment affords almost complete protection for postverdict speech by individual jurors.[23] Indeed, the increase and profile of postverdict interviews in the media today is some evidence both that juror secrecy is no longer sacrosanct in our culture and that limited access to jury deliberations is both desirable and necessary to an informed democracy, albeit one where the distinction between entertainment and news has been significantly eroded.[24]

Finally, any right of access to jury deliberations, as protected by the

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21. *Richmond Newspapers*, 448 U.S. at 587 (Brennan, J., concurring) (citations omitted). Indeed, the majority was explicit in this regard:

> Looking back, we see that when the ancient "town meeting" form of trial became too cumbersome, 12 members of the community were delegated to act as its surrogates, but the community did not surrender its right to observe the conduct of trials. The people retained a "right of visitation" which enabled them to satisfy themselves that justice was in fact being done. People in an open society do not demand infallibilityfrom their institutions, but it is difficult for them to accept what they are prohibited from observing. When a criminal trial is conducted in the open, there is at least an opportunity both for understanding the system in general and its workings in a particular case . . . .

Id. at 572. *Cf*. Cerutti, *supra* note 2.

22. In re Baltimore Sun Co., 841 F.2d 74, 76 (4th Cir. 1988) the court stated:

> 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. If the district court thinks that the attendant dangers of a highly publicized trial are too great, it may always sequester the jury; and change of venue is always possible as a method of obviating pressure or prejudice.

See also United States v. Barnes, 604 F.2d 121 (2d Cir. 1979) (realistic threats to juror safety or jury corruption were compelling reasons sufficient to warrant protection of juror identity).

23. *But see* In re Express-News Corp., 695 F.2d 807, 811 (5th Cir. 1982) (stating in dicta that jurors could be prohibited from disclosing individual votes of other jurors).

24. *See* Markovitz, *supra* note 8, at 1514 ("[T]he extensive postverdict disclosure of jury deliberations makes it likely that jurors *already* enter deliberations with the understanding that their discussion may become public at some point.") (emphasis added).

Fifth and Sixth Amendments, might impair the defendant's right to a fair trial—specifically as fairness is implicated by jury privacy in deliberations. As Justice Cardozo opined, "For the origin of the privilege we are referred to ancient usage, and for its defense to public policy. Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world."[25]The argument follows that, if jurors were aware in advance of the verdict that their deliberations were to be disseminated to the public, their ability to remain free of influence (neighbors, parties, media) and to deliberate freely would be affected, possibly affecting defendant's right to a fair trial. Given that the right to a fair trial is owned by a defendant, and post-verdict release of jury transcripts might be said to impair that right, a "knowing and intelligent" waiver by the defendant could cure this concern.[26]

Nevertheless, the suggestion that postverdict release of jury deliberations might have more affect than media presence and reporting during the trial and after the verdict is not persuasive.[27] Indeed, arguments against postverdict access to jury deliberations are purely speculative,[28] and sound ominously familiar to the "parade of horribles" hypothesized in the wake of the early placement of televisions in courtrooms.[29] Empirical data confirming that juries will be chilled by postverdict access to their deliberations is neither available nor logically sustainable given both the

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25. Clark v. United States, 289 U.S. 1, 13 (1933).

26. *See* Johnson v. Zerbst, 304 U.S. 458, 464 (1938); United States v. Brady, 397 U.S. 742, 748 (1970); *cf.* Iowa v. Tovar, 541 U.S. 77 (2004).

27. A more thorough exploration of this issue will have to await publication of empirical studies. For the purposes of this Comment, I argue that specific parameters for postverdict release—juror anonymity, sufficient time lapse between verdict and release—satisfy those concerns for privacy that might otherwise interfere or balance against a constitutional right of access necessary for an informed democracy.

28. *See* Abraham Goldstein, *Jury Secrecy and the Media: The Problem of Postverdict Interviews*, 1993 U. ILL. L. REV. 295, 307–08, 314 (1993) (arguing without support that "the defendant's right to a fair trial—by a jury confident that its deliberations will remain secret—is seriously threatened when jurors expect that they will have to face the media, or that their fellow jurors will talk to the media." Further, the expectation of such access "will affect how freely [the jurors] talk to each other; it will make them feel visible to the world and accountable as individuals, not as a body."). In the words of the same author, "these are the grossest of speculations." *Id.* at 313. Indeed, the parameters here proposed on access might mitigate the inevitable effects already present from current forms of access—dissemination of transcripts with anonymous identities may actually increase our understanding of the jury as a "body," and not a rag-tag gathering of "individuals."

29. *See Estes*, 381 U.S. at 546, where the Court stated:

> It is the awareness of the fact of telecasting that is felt by the juror throughout the trial. We are self-conscious and uneasy when being televised. Human nature being what it is, not only will the juror's eyes be fixed on the camera, but also his mind will be preoccupied with the telecasting rather than with the testimony.

informal access already generated through interviews and the relative ambivalence to televisions in the courtrooms.

Further, once the jury's work is complete, who "owns" the trial proceedings and the jury verdict? If we are to take the right of access and its intended use to foster and sustain an informed democracy, then "[a] trial is a public event. What transpires in the court room [and in the jury room] is public property."[30] By analogy, and recognizing the need for jury privacy *during deliberations*, a right of access that attaches *after the release of a verdict*, is consistent both with tradition and with the need to know what attaches to any governmental or judicial process. Indeed, "[h]istory ha[s] proven that secret tribunals [are] effective instruments of oppression."[31]

In the context of media access to judicial proceedings, resolution depends upon a balance between speech, societal interest in the proceedings, increasing public confidence in the judicial process, and a defendant's right to a fair trial. While the defendant's right to a fair trial is arguably implicated by postverdict access to jury deliberations, in the absence of particularized findings and mindful of special parameters for release of this information, such a right should be subordinated to the postverdict right of access to jury deliberations.

II. THE JURY AND THE COMMON LAW

Critical to identifying a postverdict right of access to jury deliberations while maintaining allegiance to the common law traditions of jury secrecy is the unrecognized and central distinction between contemporaneous access to jury deliberations and subsequent access to a jury verdict, owned by the public as an expression and representation of our system of justice. The model of access proposed here in no way subverts or challenges the common law traditions of jury privacy that have thus far served as an almost impenetrable barrier to disturbing the finality of the verdict itself. Indeed, the structural model of access above identifies the public as the political body to scrutinize the work of juries, and neither allows for even limited judicial review of these transcripts for the purposes of inquiring into jury deliberations, nor provides a means by which to challenge those verdicts (either post-trial or on appeal).[32]

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30. Craig v. Harney, 331 U.S. 367, 374 (1947).

31. *Estes*, 381 U.S. at 539.

32. *But see* Ruprecht, *supra* note 2 (arguing that limited judicial review—not public access—should flow as the appropriate "check" on jury deliberations). If any limited judicial review should attach, the appropriate context would be the penalty phase of a death penalty case, where the jury is asked to "weigh" aggravating and mitigating circumstances in order to determine whether the defendant is death-eligible. The danger for misconduct or extraneous influence in this context is extreme and might warrant inquiry sufficient to

Federal Rule of Evidence 606(b) codified the long-standing common law proposition that jurors may not impeach their own verdict.[33] Rule 606(b) provides that a juror may not testify on the subject of deliberations to impeach the finality of the verdict, "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."[34] The most recent interpretation of this doctrine came in *Tanner v. United States*,[35] where the Court refused to inquire into jury deliberations despite evidence that the jurors had been doing drugs and drinking alcohol throughout the trial and during deliberations.[36] Notwithstanding the reasonableness of this decision, the Court's concern focused on "the finality of the process,"[37] and the safety of the verdict as it related to the continued vitality of the jury system as a means to administer justice.[38] The Court's concern with juror privacy

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determine whether the jury behaved irresponsibly.

33. *See, e.g.*, 8 J. Wigmore, EVIDENCE § 2352, pp. 696–97 (J. McNaughton rev. ed. 1961) (1904) (explaining that the rule originated from an opinion by Lord Mansfield in 1785 and "came to receive in the United States an adherence almost unquestioned.").

34. FED. R. EVID. 606(b).

35. 483 U.S. 107 (1987).

36. In terms of evaluating whether a verdict should be scrutinized, the Court fashioned from prior case law a sharp distinction between external and internal influences. *See generally* Mattox v. United States, 146 U.S. 140, 149 (1896) ("a juryman may testify to any facts bearing upon the question of the existence of any extraneous influence, although not as to how far that influence operated upon his mind.") (quoting Woodward v. Leavitt, 107 Mass. 453, 466 (1871)).

37. *See Tanner*, 483 U.S. at 120.

38. *Id.* ("There is little doubt that postverdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior. It is not at all clear, however, that the jury system could survive such efforts to perfect it."). Similarly, the court in United States v. Thomas, 116 F.3d 606, 619 (2d Cir. 1997) stated:

> The jury system incorporated in our Constitution by the Framers was not intended to satisfy yearnings for perfect knowledge of how a verdict is reached, nor to provide assurances to the public of the primacy of logic in human affairs. Nor was it subordinated to a "right to know" found in the First Amendment. The jury as we know it is *supposed* to reach its decisions in the mystery and security of secrecy; objections to the secrecy of jury deliberations are nothing less than objections to the jury system itself.

(emphasis in original). *But see Tanner*, 483 U.S. at 142 (Marshall, J., dissenting) (quoting the opinion of the Court):

> The Court acknowledges that "postverdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper jury behavior," but maintains that "[i]t is not at all clear . . . that the jury system could survive such efforts to perfect it." Petitioners are not asking for a perfect jury. They are seeking to determine whether the jury that heard their case behaved in a manner consonant with the minimum requirements of the Sixth Amendment. If we deny them this opportunity, the jury system may survive, but the constitutional guarantee on which it is based will become

in this context represents a policy choice between "redressing the injury of the private litigant and inflicting the public injury which would result if jurors were permitted to testify as to what happened in the jury room."[39]

Concern for the ability of the jury to function in this context is inextricably linked to judicial intervention (at trial or on appeal) and not with public scrutiny of verdicts themselves, which will continue unabated even without a postverdict right of access.[40] This concern for the finality of verdicts is not compromised by postverdict public access to jury deliberations—where scrutiny will not lead to trial challenges or post-trial litigation. On the contrary, knowledge that a limited right of access attaches—with the accompanying public scrutiny—might enhance both jurors' seriousness and commitment to service as well as the public's commitment to the central and solemn function of the jury in our system of justice.

In addition to the common law doctrine restricting juror impeachment, the courts have long recognized a freestanding commitment to jury secrecy during the deliberative process. This tradition has been incorporated in both statutes and judicial canons restricting the presence of individuals (nonjurors or alternates) and recording devices in the jury room.[41] In addition, the commitment to jury secrecy is reflected in judicial

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> meaningless.

(citations omitted).

39. McDonald v. Pless, 238 U.S. 264, 267 (1915). The Court stated:

> [L]et it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding.

Id. However, in *Clark*, the Court stated:

> Assuming that there is a privilege which protects from impertinent exposure the arguments and ballots of a juror while considering his verdict, we think the privilege does not apply where the relation giving birth to it has been fraudulently begun or fraudulently continued. Other exceptions may have to be made in other situations not brought before us now.

289 U.S. at 13–14.

40. *Tanner*, 483 U.S. at 124 (citing S. Rep. No. 93-1277, at 13–14 (1974), which asserted that "[j]urors will not be able to function effectively if their deliberations are to be scrutinized in post-trial litigation.").

41. FED. R. CRIM. P. 24(c) provides that alternate jurors are to be excused at the commencement of deliberation. However, the Supreme Court in United States v. Olano, 507 U.S. 725, 737 (1993), held that deviation from this provision, and allowing jurors to sit in the jury room without deliberating, did not affect the substantial rights of the defendant. *See also McDonald*, 238 U.S. at 268 (recognizing that while limiting access to the jury room may "exclude the only possible evidence of misconduct, a change in the rule would open the door to the most pernicious arts and tampering with jurors. The practice would be replete with dangerous consequences. It would lead to the grossest fraud and abuse and no verdict would be safe.") (citations omitted).

pronouncements founded upon broad policy concerns: (1) the need to assure full and frank discussion in the jury room,[42] (2) to prevent harassment of or retaliation against jurors from both losing parties and other aggrieved members of the public,[43] and (3) to preserve the community's trust in a system that relies on juries to mete out justice.[44]

Again, the concern that jury speech will be chilled flows from the influence that a recording device or alternate presence might have had, and not on the effect created by the knowledge of limited access (anonymously configured) to jury deliberations. In this sense, "the primary if not exclusive purpose of jury privacy and secrecy is to protect the jury's deliberations from improper influence."[45] Whether postverdict dissemination of a jury transcript (anonymously configured) will have prejudicial impact is questionable; whether that concern is as weighty as the public's right to know is doubtful. Furthermore, this calculus must also include the likelihood that postverdict public scrutiny will actually improve the content of jury deliberations through increased public knowledge and respect for the jury process.

The concerns that individual jurors might be harassed are not distinct or persuasive in this context. Indeed, "generalized social claims should not bear upon a decision whether limitations should be placed upon the press's ability to have post-trial access to jurors."[46] As to aggrieved parties, trial courts have limited power to curtail the speech of judicial officers.[47] Further, trial courts cannot silence requests to individual jurors for postverdict interviews.[48] Harassment from aggrieved members of the public can be minimized through release of transcripts that do not identify jurors

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42. *Clark*, 289 U.S. at 13.

43. If privacy did not inhere, "[j]urors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct." *McDonald*, 238 U.S. at 267.

44. *See* Part I, *supra*.

45. *Olano*, 507 U.S. at 737–38. In this sense the Court's scrutiny is focused on "prejudicial impact." *Id.* at 738. *Cf.* Johnson v. Duckworth, 650 F.2d 122, 124 (7th Cir. 1981) (because "the privacy of jury deliberations is so essential to the 'substance of the jury trial guarantee[,]' . . . when strangers are permitted to intrude upon such privacy, an error of constitutional dimension is committed.") (quoting Burch v. Louisiana, 441 U.S. 130, 138 (1979)).

46. United States v. Antar, 38 F.3d 1348, 1363 (3rd Cir. 1994).

47. *See generally* Gentile v. State Bar, 501 U.S. 1030 (1991) ("[D]isciplinary rules governing the legal profession cannot punish activity protected by the First Amendment."); Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) (arguing that any prior restraint on speech in the context of a criminal trial bears a "heavy burden" of justification).

48. *See, e.g.*, *Antar*, 38 F.3d at 1363 (stating that the right of access attaches and "[t]he court must articulate findings of the actual expectation of an unwarranted intrusion upon juror deliberations or of a probability of harassment of jurors beyond what the jurors, rather than what a particular judge, may deem to be acceptable.").

by name. In particularly high profile or other special cases, and subject to the balancing test for closure of judicial proceedings generally, the right of access may be subordinated to absolute juror privacy. Given that juror anonymity itself is only rarely upheld, such instances of closure will be similarly rare. Indeed, the fact that juror anonymity is so rarely imposed and upheld is evidence both of the importance of the right of access, and that arguments for juror privacy are unavailing—the system is not designed to provide postverdict privacy.[49]

The concern for the jurors' privacy has historically been confined to the deliberative process. Access to information after that process is complete implicates that concern for privacy only to the extent that this postverdict access might influence the deliberative process. As noted previously, because this concern is both unsubstantiated and highly speculative, it should give way to the public's right to know. In other words, society owns the verdict after it has been rendered. The verdict is a proxy for justice, and the public has a right to know whether and how justice was done in the individual case.

III. NO DANGER: ABSOLUTE JURY PRIVACY IS A RELIC

The primary danger of a postverdict right of access to jury deliberations is that the transcript might become a vehicle for disturbing jury verdicts or appellate litigation. In this sense, right of access would become a threat "to the jury system itself."[50] This slippery slope argument posits that any inquiry into jury deliberations will inevitably lead to judicial review of those jury deliberations and destabilize the entire foundation of the jury system.[51] Unarticulated, but implicit in this formulation, is that any

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49. *See* ABC, Inc. v. Stewart, 360 F.3d 90 (2nd Cir. 2004) (attaching right of access to voir dire proceedings; subjecting closure to strict scrutiny; publishing the transcript later is irrelevant). This approach is consistent with an historical examination of juror privacy in the context of early American society—where neighbors in relatively confined communities were keenly aware of who was serving on the jury. *See, e.g.*, David Weinstein, *Protecting a Juror's Right to Privacy: Constitutional Constraints and Policy Options*, 70 TEMP. L. REV. 1, 30 (1997) ("Jurors in the early days of this republic were selected from within small communities, and shielding their identity simply was not possible."); *see also infra* note 52 and accompanying text.

50. United States v. Thomas, 116 F.3d 606, 619 (2nd Cir. 1997).

51. *See generally* Goldstein, *supra*, note 28, at 313–14 ("If we let the genie out of the bottle, we probably will be unable to put it back again."). Goldstein goes on to suggest that "[o]nce the inscrutability principle has gone, the time has come to set up another kind of tribunal." *Id.* at 314 (quoting William R. Cornish, THE JURY 258 (1968)). *See also* Abraham Abramovsky & Jonathan I. Edelstein, *Cameras in the Jury Room: An Unnecessary and Dangerous Precedent*, 28 ARIZ. ST. L.J. 865, 881 (1996) ("[T]aped deliberations may indeed reveal jury misconduct or discussion of extraneous factors, but they also open the door to a stream of potential litigation. . . ."). *But see* Ruprecht, *supra* note 2 (arguing that limited judicial review should follow from a right of access to jury deliberations, thus improving

scrutiny of jury deliberations is likely to uncover widespread misconduct and incompetence. Whether such fear is warranted is debatable, but the proposition that we should avoid excavation, because we are likely to dig up evidence that calls into question our current method for administering justice, is unsupportable as a matter of democratic principle. If the effect is to undermine public confidence in the jury, that effect should be welcomed. We might then begin to consider and institute a remedy for this erosion of confidence, if such a remedy is not self-generating through the process of transparency itself.

A reflexive citation to the ancient common law tradition of jury secrecy is also an insufficient response. Any discussion of postverdict access to jury deliberations must acknowledge both the changing nature of privacy,[52] the diffuseness of modern American society, as well as an increasing alienation and mistrust of the jury process. In this sense, an unexplored and rigid adherence to jury secrecy fails to even address whether such access might, in fact, increase accountability and trust for our judicial institutions.

The rationale for this historical preservation of juror secrecy is that any contemporaneous access to jury deliberations might affect free debate within the jury room, thus distorting the process and jeopardizing the fair administration of justice. Of course, this blanket prohibition is completely anathematic to our approach to accessing governmental, particularly judicial, deliberations generally, where case by case scrutiny (adjudication) is undertaken to determine whether those *particular* proceedings need to be closed. Furthermore, there is only a "*generalized social claim*"[53] of prejudicial effect to justify frustrating access. This is an empty and untested hypothesis on balance, and in the absence of empirical evidence, this claim must be subordinated to the public right of access.

The final rationale for jury secrecy is that the release of jury deliberation will compromise juror safety. As an initial matter, juror anonymity is provided for only in cases where a real threat has been identified.[54] Furthermore, absent identifiable, special circumstances which

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our determination of error in the courtroom and the public confidence in the system thereby).

52. It also seems clear that the public enjoyed a level of access to juries at early American common law unheard of to contemporary society. Jurors then were actually neighbors, local figures, etc. who were well known to each other. Indeed, jury lists were presumptively available—consistent with the relative size of those communities and the free flow of information within those communities regarding judicial proceedings. *See, e.g.*, In re Baltimore Sun Co., 841 F.2d 74, 75 (4th Cir. 1988) ("When the jury system grew up with juries of the vicinage, everybody knew everybody on the jury . . . .").

53. *See Antar*, 38 F.3d at 1363.

54. *See, e.g.*, United States v. Fernandez, 388 F.3d 1199 (9th Cir. 2004) (upholding the

would change the entire calculus, a postverdict right of access to anonymously configured jury deliberations would, standing alone, appear to be less likely to compromise juror safety than pretrial publication of jurors' identities.[55]

Again, nothing in this theory of access precludes the balancing test already employed with regard to closure of trial proceedings or empanelling of anonymous juries. Postverdict access to jury deliberations would be presumed, but upon specific findings that such access compromised juror safety or the right of the defendant to a fair trial, access could be denied. As with the other dangers identified above, juror safety is already implicated in the right of access to trial proceedings, and extending that right of access to include postverdict release of transcripts of jury deliberations (anonymously configured) does not inherently increase the risks identified.

Current invasions into jury secrecy clearly subvert many of the claims made by opponents of a postverdict right of access to jury deliberations.[56] Indeed, many proponents of jury secrecy have already identified these intrusions as an irreparable affront to the common law tradition.[57] As noted above, the narrowly tailored limitations on anonymous juries are one indication that our concern for juror privacy must be balanced against a right of access. In addition, the incidence of postverdict interviews already provides an opportunity to scrutinize the content of jury deliberations.

empanelling of an anonymous jury for a Mexican mafia RICO case); United States v. Brown, 250 F.3d 907 (5th Cir. 1991) (upholding district court's decision to empanel anonymous jury and to prohibit media access to information after the verdict had been rendered); United States v. 77 E. 3rd St., 849 F. Supp. 876, 878–80 (S.D.N.Y. 1994) ("History of violence" warranted empanelling anonymous jury in civil forfeiture case to protect jurors from retaliation by Hell's Angels). These cases make clear that empanelling anonymous juries is contingent on identifiable risk to juror safety—based on threats, conduct of the defendant, or history of intimidation.

55. That the media will pore over these transcripts and be able to identify and distinguish individual jurors would be nothing new—postverdict interviews with jurors already facilitate such scrutiny. In addition, this concern is only present in high-profile cases where special circumstances might weigh toward jury anonymity. More traditional media and scholars seeking to demystify and understand the jury process will utilize transcripts from lower profile cases. In this way, by force of repetition and scholarship, the jury process will become both demystified and more mundane, but still accountable, and less subject to publicity. Indeed, the majority of the records that would be synthesized and reported on have little else but scholarly, judicial, and historical value.

56. Not taken up here, but also relevant to inroads into absolute jury secrecy, is the increasing discretionary practice of allowing individual jurors to ask questions via the trial court judge of the various witnesses. *See, e.g.*, IND. JURY R. 20(7) (stating that jurors may seek to ask questions of witnesses by submitting those questions in writing). *See also* State v. Fisher, 789 N.E.2d 222 (Ohio 2003) (on the propiety of juror questions); Commonwealth v. Britto, 744 N.E.2d 1089 (Mass. 2001) (discussing the propriety of juror questions).

57. *See generally* Abramovsky & Edelstein, *supra* note 51; Goldstein, *supra* note 28.

Furthermore, if a record existed and was publicly available, the media would have less incentive to interview or harass jurors, and the financial incentive for jurors to engage in postverdict interviews would be mooted.[58] Ultimately, the prevalence of postverdict interviews itself suggests: (1) a weakening public concern for juror privacy, (2) a correlative increase in public interest in jury deliberations, and (3) a need for access to jury deliberations to increase public confidence in the institution and for the "community therapeutic value" that flows from the gathering and dissemination of information.

IV. PARAMETERS FOR A POSTVERDICT RIGHT OF ACCESS TO JURY DELIBERATIONS

Once the right of access attaches, parameters for release of a transcript of jury deliberations can be tailored to address realistic concerns for juror privacy. As an initial matter, *postverdict* release coupled with an absolute prohibition against use of transcripts for litigation purposes[59] address most of the historical and policy concerns for juror secrecy. Primarily, juror secrecy was intended for the actual process by which juries reach their verdict.[60] This concern is evident in common law doctrine prohibiting jurors from impeaching their own verdict.[61] *Postverdict* release insures that juror safety, which is already implicated by the right of access to jury lists, is not *further* compromised. Protestations that speech will nevertheless be chilled are a general societal claim lacking an evidentiary foundation. The implied postverdict right of access that inhered in early American society[62] casts further doubt on the legitimacy of this claim.[63]

58. I do not mean to suggest that a limited right of access would completely moot the desire or hysteria concerning postverdict interviews with jurors, more that the form of such access would mitigate and counterbalance the hysterical access characterized currently by the sensationalism of postverdict interviews. Indeed, the prevalence of such interviews reinforces the point made above: jury privacy is no longer sacrosanct. Further, and more importantly, creating a limited right of access, while not stemming the hysteria, would offer a countervailing and more solemn and academic approach to assessing jury performance. This argument then flows back into my secondary thesis: that access in this format may have the result of increasing respect for and understanding of the jury process.

59. Prohibiting the use of transcripts for posttrial litigation or verdict inquiry also works to preserve the common law doctrine against the impeachment of jury verdicts. If an absolute prohibition against such use of jury transcripts was instituted, no concern regarding possible impeachment is availing.

60. *See* Goldstein, *supra* note 28, at 299–300 n.19 (discussing the critical "relationship between secrecy and finality").

61. *See, e.g.*, Vaise v. Delaval, 99 Eng. Rep. 944 (K.B. 1785) (opinion by Lord Mansfield) (refusing to accept into evidence the affidavits of jurors to show they had arrived at their verdict by lot); *see* Wigmore, *supra*, note 33.

62. *See* Weinstein, *supra* note 49 and accompanying text.

63. *See supra* note 52 and accompanying text.

Secondly, transcripts of jury deliberations can be configured without identifying individual jurors by name, thus serving as an additional safeguard against potential postverdict harassment or retaliation. This parameter is also consistent with the Fifth Circuit's dictum that prohibiting disclosure of "the ballots of individual jurors" is a "paramount value."[64] Again, the limited right of access should not be viewed as an extension or further invasion of jury secrecy. These invasions already occur, albeit in a less vital and more perverse way. In this sense, a postverdict right of access to jury deliberations might actually enhance the public debate on the jury process, providing a mechanism for informed and circumspect evaluation of that process.

Finally, the parameters that would justify postverdict closure of the jury transcript can be assessed on a case-by-case basis, subject to the same balancing used to assess access to judicial proceedings generally. Arguably the contexts in which such closure might be justified are more numerous with regard to jury privacy; case law development can address these circumstances. As elsewhere, "any privilege of access to governmental information is subject to a degree of restraint dictated by the nature of the information and countervailing interests in security or confidentiality."[65] The attachment of the right of access means that the values that inhere in the structural model are observed—a respect for "th[ose] process[es] of communication necessary for a democracy to survive . . ."[66]

Against the argument for absolute jury secrecy, with its attendant fear-mongering and blind adherence to dated mantras, lies a conception of access to jury deliberations as an "indispensable condition[] of meaningful communication" about the American justice system.[67] The increasing incidence of sensationalistic postverdict interviews with jurors, themselves uninformed and lacking meaning, has already unalterably pierced the veil of juror secrecy.[68] What is needed is reasonable access to these deliberations, not to *perfect* the jury system, but to generate and foster informed debate and serious reflection on that deliberative body. Contrary to opponents' speculations, a right of access to jury deliberations, in text and anonymously configured, is more likely to lead, not down the slippery slope, but to "uninhibited, robust, and wide-open"[69] public dialogue

64. In re Express-News Corp., 695 F.2d 807, 811 (5th Cir. 1982); *cf.* Goldstein, *supra* note 28, at 304.

65. *Richmond Newspapers*, 448 U.S. at 586 (Brennan, J., concurring).

66. *Id.* at 588.

67. *See id.*

68. *See, e.g.*, William R. Bagley, Jr., *Jury Room Secrecy: Has the Time Come to Unlock the Door?*, 32 SUFFOLK U. L. REV. 481, 500–01 (1999).

69. N.Y. Times, Co. v. Sullivan, 376 U.S. 254, 270 (1964).

regarding the jury process and, finally, a renewed sense of public commitment to the solemnity of jury duty.

V. POSTSCRIPT: CAMERAS IN THE JURY ROOM?

As with cameras in the courtroom, future developments in recording jury deliberations for postverdict dissemination should proceed subject to judicial discretion and the dual concerns for jury privacy and defendants' right to a fair trial. Justice Harlan's concurrence in *Estes v. Texas* is instructive: "[T]he day may come when television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process."[70]

Indeed, "[t]he law [] favors publicity in legal proceedings, so far as that object can be attained without injustice to the persons immediately concerned."[71] In these developments, the lower and state courts should serve as laboratories—as long as the state action does not infringe upon constitutional guarantees, the states must be permitted to experiment.[72]

Similarly, the common law of judicial discretion should govern these experiments. The trial judge, through grant of jurisdiction, is generally charged with the maintenance of order within her own courtroom. In this regard, the judge has both inherent power and broad discretion over control of judicial proceedings. For example, a judge may authorize presence of cameras in the courtroom over an objection by the defendant, unless the defendant makes a showing that the presence of those cameras will be prejudicial.[73] Similar discretion, mindful of a tradition of jury secrecy, would inhere in the discretion whether to record jury deliberations for future dissemination.

The following parameters for audiovisual recording of jury

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70. 381 U.S. at 595 (Harlan, J., concurring). *See also supra* note 22 and accompanying text. *Cf. Chandler*, 449 U.S. at 575, where the Court stated:

> The risk of juror prejudice is present in any publication of a trial, but the appropriate safeguard against such prejudice is the defendant's right to demonstrate that the media's coverage of his case . . . compromised the ability of the particular jury that heard the case to adjudicate fairly.

71. *Estes*, 381 U.S. at 542. (citation omitted).

72. *See* New State Ice Co. v. Liebman, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting):

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may . . . serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

Id.

73. *See Chandler*, 449 U.S. at 575.

deliberations could mitigate the constitutional concern for defendants' fair-trial rights as well as the common law tradition providing for juror secrecy. First, defendants would need to waive objection to the recording, precluding them from using the fact or product of recorded deliberations as a mechanism for challenging a verdict or for pursuing appeal.[74] Second, a jury would be empanelled without knowledge that their deliberations would be filmed. This protocol would insure that the jury composition would not be skewed toward only those willing to seek out publicity.[75]

After empanelling the jury, each juror would be asked to approve the unobtrusive placement of cameras in order to record their deliberations. If a single juror objected at this point, then no recording devices would be permitted. Finally, and assuming unanimous agreement to audiovisual recording, each juror would retain a postverdict veto on release of the audiovisual record. Each of these safeguards works to confirm juror autonomy in the deliberative process.

74. This provision is premised on the notion, inherent in the right of access generally, that it is the defendant who owns the right to a fair trial. *Estes*, 381 U.S. at 588 ("[T]he right of 'public trial' is not one belonging to the public, but one belonging to the accused . . . .") (Harlan, J., concurring). *See also* Gannet Co., Inc. v. DePasquale, 443 U.S. 368, 387–388 (1979). While all parties have an interest in the fair administration of justice, only the defendant's right should be able to trump the court's exercise of judicial discretion to permit cameras in the jury room. *But see* State ex rel. Rosenthal v. Poe, 98 S.W.3d 194 (Tex. Crim App. 2003) (prohibiting cameras in the jury room despite waiver by the defendant of use of recording and agreement by all jurors to be taped).

75. Administrative Order, Docket No. SJC-228, 1996 Me. LEXIS 32 at *5 (Fed. 5, 1996) (Glassman & Ridnman, JJ., statement in nonconcurrence) ("Selection of only those jurors who do not mind thinking out loud before millions of observers, or those who will serve but in silence, by its nature will distort the jury's deliberative process.").