1-1-2003

Examining the Evidence: Post-Verdict Interviews and the Jury System

Nicole B. Casarez

Follow this and additional works at: https://repository.uchastings.edu/hastings_comm_ent_law_journal

Part of the Communications Law Commons, Entertainment, Arts, and Sports Law Commons, and the Intellectual Property Law Commons

Recommended Citation

This Article is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Communications and Entertainment Law Journal by an authorized editor of UC Hastings Scholarship Repository. For more information, please contact wangangela@uchastings.edu.
Examining the Evidence: Post-Verdict Interviews and the Jury System

by

NICOLE B. CÁSAREZ*

I. Introduction ..........................................................................................................500
II. What Do Jurors Tell the Press? A Content Analysis of Eighteen Years of Juror Interviews .................................................507
   A. Methodological Details ..................................................................................507
   B. Looking at the Numbers: Interviews, No Comments, Statements, and Press Conferences ............................................509
   C. The Heart of the Matter: Examining What Jurors Tell the Press .................................................................514
III. Who's Afraid of Post-Verdict Juror Interviews? Addressing the Arguments .................................................................547
   A. Fair Trial Implications of Post-Verdict Interviews: Do They Distort or Enhance the Deliberative Process? .................549
   B. Juror Implications of Post-Verdict Interviews: Do They Violate Privacy or Advance Free Speech? .........................569
   C. Systemic Implications of Post-Verdict Interviews: Do They Undermine or Strengthen Public Confidence in the Jury System? .................................................................585
IV. Conclusion ...........................................................................................................600

* Associate Professor, University of St. Thomas, Houston, Texas. University of Texas, B.J. 1976, J.D. 1979; University of Houston, M.A. 1991. I would like to thank Professor Sandra Thompson at the University of Houston Law Center for reviewing an earlier draft of this article, and Rueben C. Cásarez for his invaluable assistance in database creation and management.
I. Introduction

My hometown of Houston, Texas played host to two high-profile criminal trials in 2002: first, the Andrea Yates capital murder case;¹ then, the obstruction of justice trial against accounting firm Arthur Andersen.² Both cases drew worldwide attention.³ Both cases involved contentious legal issues and resulted in at least somewhat surprising verdicts. Following the trials, jurors in both cases granted post-verdict interviews to the press.

As a Houstonian and a member of the legal profession, I found these post-verdict interviews enlightening. The four jurors who spoke to the press in the Yates case squarely confronted the question posed on hundreds of editorial pages following the verdict: How could a woman who murdered her own children to save them from Satan be sane?⁴ The jurors admitted that they believed Yates was mentally ill at the time of the murders, but pointed to evidence that convinced them that Yates could distinguish right from wrong.⁵ As a result, the jurors said they had to reject Yates's insanity defense, despite her history of severe postpartum depression and suicidal behavior.⁶ The verdict was unpopular with many, but most critical commentators directed their complaints at the law and not the jury.⁷

---

3. With respect to the Yates trial, See, e.g., Karen Brooks, Yates Spared Death Sentence in Murder of 5 Kids, Hamilton Spectator D1 (Mar. 16, 2002); Damon Johnston, Ode to the Innocents, Perth (Australia) Sunday Times (Mar. 17, 2002). For international coverage of the Arthur Andersen case, See, e.g., Alexei Barrionuevo & Jonathan Weil, Andersen Case is Now in the Hands of the Jury, The Scotsman 5 (June 7, 2002); Kristen Hays, Selection of Jury Begins in Andersen Trial, Toronto Star, D6 (May 6, 2002); Laurie Laird, Andersen's Amazing Fall From Global Leader to Global Pariah, Daily Mail 76 (June 20, 2002).
5. Id.
6. Id.
The Andersen case was a riveting drama of a different sort. While Yates jurors reached a verdict in less than four hours, the Andersen jury deliberated for ten days before finding the firm guilty of obstructing justice in the federal Enron investigation. Post-verdict interviews revealed, surprisingly, that Andersen's extensive shredding of Enron-related documents was not essential to the jury's decision. Rather, the verdict rested on the actions of one Andersen attorney who jurors agreed was the "corrupt agent" in the case.

Andersen jurors disclosed other fascinating insights into the jury room following the verdict. In one interview, the foreman noted that the jurors treated each other with respect and civility. He also described how jurors devoted the first two days of deliberations to examining evidence—an example of "evidence-driven deliberations," which are considered by some to be more productive than typical "verdict-based deliberations." Another juror explained how jury members tackled the complex issues in the case using poster-sized tablets and felt-tipped markers. And finally, one juror reported that two unnamed jurors had trouble staying awake during the trial, and were apparently chastised by the judge.

News accounts featuring post-verdict comments by jurors in these cases helped me, and I suspect many others, to gain a better understanding of the verdicts as well as the nature of jury service. By talking to the press about their decisions, these jurors provided average citizens with insight into the reasoning behind the verdicts. Especially in controversial cases, I believe the public is more likely to accept a verdict when citizens are privy to jurors' explanations.

10. Id.
11. Id.
13. Id.
14. "Evidence-driven deliberations" are those in which jurors consider individual pieces of evidence and judge the significance of each before voting on guilt. "Verdict-based deliberations" occur when jurors begin by identifying the majority position and then work to change the minority members' minds. See Stephen J. Adler, The Jury 17 (Times Books 1994).
16. See Eric Berger, Two Jurors May Have Gotten Snooze Warning, Houston Chron. 2 (Bus.) (June 22, 2002).
regarding the decision than when the verdict stands alone, shrouded in mystery. 17

A number of courts and commentators, however, take a much less sanguine view of post-verdict juror interviews. 18 According to these critics, post-verdict interviews jeopardize the very foundation of our jury system because they endanger defendants’ fair trial rights, invade jurors’ privacy, and distort public perception of jury verdicts. 19

Under this view, post-verdict interviews threaten the defendant’s ability to receive a fair trial in several ways. First, the knowledge that jurors could be questioned by the media may intimidate some panel members into basing their verdicts on public opinion rather than on the facts of the case. 20 Second, the threat of post-decision media interviews could stifle free speech during deliberations. 21 Jurors might self-censor their remarks on the chance that another juror will disclose them, which, in turn, could affect the outcome of the case. 22 Furthermore, it has been argued that the possibility of lucrative post-verdict interviews with media outlets that engage in checkbook

17. See infra nn. 625-29 and accompanying text.
20. See id. at 314 (warning that post-verdict juror interviews will cause jurors to reach those verdicts they can justify in the “court of public opinion”); Kenneth B. Nunn, When Juries Meet the Press: Rethinking the Jury’s Representative Function in Highly Publicized Cases, 22 Hastings Const. L.Q. 405, 428-31 (1995) (asserting that through post-verdict interviews, jurors are exposed to public attention that may cause them to render verdicts based on anticipated community sentiment rather than on the merits).
21. See U.S. v. Cleveland, 128 F.3d 267, 270 (5th Cir. 1997), cert. denied sub nom. In re Capital City Press, 523 U.S. 1075 (1998) (upholding trial court order forbidding post-verdict juror interviews regarding deliberations because of “the threat presented to freedom of speech within the jury room”); Goldstein, supra n. 19, at 295 (stating that to deliberate freely, jurors must feel confident that what they say in the jury room will not be revealed to outsiders).
22. See U.S. v. Doherty, 675 F.Supp. 719, 724 (D. Mass. 1987) (stating that chilling effect of post-verdict interviews on future deliberations justified imposing a seven-day waiting period following verdict before jurors identities could be released to public or jurors could be interviewed); Nancy Marder, Deliberations and Disclosures, A Study of Post-Verdict Interviews of Jurors, 82 Iowa L. Rev. 465, 473 (1997) (postulating that post-verdict interviews chill speech in the jury room because jurors fear that their comments will be revealed to the press by fellow panel members); Nunn, supra n. 20, at 432 (arguing that post-verdict interviews discourage jurors from expressing biased views in the jury room, removing the opportunity for other jurors to challenge those views).
journalism could tempt some jurors into altering their votes in an attempt to create the most marketable end product.\textsuperscript{23}

Post-verdict juror interviews are also said to invade jurors' privacy.\textsuperscript{24} Although jurors are free to refuse media comment, their remarks during deliberations may be disclosed to the press by more talkative panel members. It is feared that these vocal jurors may reveal private matters concerning, or opinions held by, a fellow juror that could be embarrassing or could subject the juror to public criticism.\textsuperscript{25} Additionally, the perceived lack of juror privacy resulting from post-verdict interviews, as well as the risk of press hounding in high-profile cases, is thought to discourage other citizens from serving on juries.\textsuperscript{26}

Finally, some scholars fear that by illuminating the inner mechanisms of the jury, juror interviews reduce the "mystery" that traditionally surrounds jury verdicts.\textsuperscript{27} This, in turn, could subject the jury system to criticism that might reduce public confidence in the finality of verdicts.\textsuperscript{28} Juror interviews are said to negatively affect the public's assessment of the justice system,\textsuperscript{29} to weaken the public's perception of jury verdicts as group, rather than individual,

\begin{itemize}
\item[23.] See Nunn, supra n. 20, at 433-34 (indicating that media attention in high-profile trials may attract jurors who are more interested in fame and profit than in returning just verdicts); Marcy Strauss, Juror Journalism, 12 Yale L. & Pol'y Rev. 389, 402-03 (1994) (acknowledging fear that jurors may distort a trial outcome to make a more profitable story, but stating that such fear is theoretical).
\item[24.] See Goldstein, supra n. 19, at 307 (maintaining that post-verdict interviews by the press invad juror privacy to a greater extent than does voir dire, because the media's questioning is not limited by the ethical rules that apply to judges and attorneys).
\item[25.] See William R. Bagley, Jr., Note, Jury Room Secrecy: Has the Time Come to Unlock the Door?, 32 Suffolk U. L. Rev. 481 (1999) (stating that post-verdict juror interviews interfere with juror privacy because one juror may reveal the intimate comments of another juror).
\item[26.] See Goldstein, supra n. 19, at 295-96 (asserting that post-verdict interviews teach future jurors that their deliberations will not be private); Alison Markovitz, Student Author, Jury Secrecy During Deliberations, 110 Yale L.J. 1493, 1507 (2001) (stating that subjecting jurors to an onslaught of post-verdict media scrutiny may cause future jurors to avoid jury service).
\item[27.] See Goldstein, supra n. 19, at 296 (claiming that public confidence will be strongest in a verdict that is "difficult to disagree with because the secrecy of the jurors' deliberations and the general nature of the verdict make it hard to know precisely on what it was based").
\item[28.] Id.
\item[29.] See Nunn, supra n. 20, at 437 (arguing that post-verdict interviews encourage "second guessing" that will reduce respect for jury verdicts and the criminal justice system).
\end{itemize}
decisions, and to detract from jury integrity by creating an undignified spectacle.

A number of remedies have been both proposed and imposed to avert the predicted detrimental effects of post-verdict juror interviews. On the milder side, some trial judges have cautioned jurors not to discuss deliberations with the press, or have forbidden the media from making repeated requests for interviews or from asking jurors about the votes or opinions of other jurors in a case. Other judges have issued orders that entirely prohibit reporters from questioning jurors about their deliberations. In fact, the New Jersey Supreme Court recently upheld a judge’s order barring all juror/media contact following a mistrial until a verdict was returned in the retrial. The U.S. Supreme Court refused to review the decision—a result that will surely invite other judges to limit or ban post-verdict juror interviews.

It has also been suggested that judges administer “secrecy oaths” to jurors requiring them to refrain from discussing their deliberations for at least a set period of time following a verdict. Other approaches involve the use of anonymous juries or the trial judge’s

30. See Marder, supra n. 22, at 470-73 (declaring that post-verdict interviews threaten the essential group nature of jury verdicts, robbing them of “power and meaning”).
31. Id. at 474 (stating that by pursuing jurors for interviews following a verdict, the press creates a scene that debases the trial proceedings).
32. See U.S. v. Antar, 38 F. 3d 1348, 1363-64 (3rd Cir. 1994) (stating that the trial judge may stress to jurors the importance of keeping deliberations confidential); In re Globe Newspaper Co., 920 F. 2d 88, 90-91 (1st Cir. 1990) (describing trial judge’s admonition to jury to keep deliberations private as “proper,” although order withholding juror identities overturned).
34. See, e.g., U.S. v. Brown, 250 F.3d 907 (5th Cir. 2001) (enforcing gag order that prohibited post-verdict juror interviews regarding deliberations).
36. Id.
37. See Marder, supra n. 21, at 542.
38. See U.S. v. Brown, 250 F.3d 907, 918-19 (5th Cir. 2001) (upholding trial court’s refusal to divulge juror identities following verdict as necessary to protect juror privacy and to prevent harassment by the press).

Professor Nancy King has suggested the blanket use of anonymous juries in criminal cases, but for reasons other than to discourage post-verdict juror interviews. Professor King would allow media access to jurors following trials as long as jurors were
temporary impoundment of juror names and addresses.\textsuperscript{39} Post-verdict juror interviews would decline, as a result, because it would be more difficult for the media to locate and contact jurors following a trial. At least one scholar has gone so far as to call for state or federal legislation making it a crime for jurors to discuss their deliberations with anyone, or for the media to question jurors about such deliberations.\textsuperscript{40}

The free speech concerns posed by these solutions to the "problem" of post-verdict juror interviews should be obvious. After a verdict has been reached, jurors have a First Amendment right to speak about their jury experiences,\textsuperscript{41} the media have a First Amendment right both to question jurors\textsuperscript{42} and to publish jurors' comments about their decisions,\textsuperscript{43} and the public has a First Amendment right to know about the operation of our criminal justice system.\textsuperscript{44} To overcome these rights, the state must prove that post-verdict juror interviews create an overriding danger to some other equally important interest, such as jurors' privacy rights or defendants' Sixth Amendment fair trial rights, and that any regulation of juror interviews is narrowly tailored to advance that overriding interest.\textsuperscript{45}

One would assume, therefore, that the evidence collected by critics of post-verdict juror interviews establishing these dangers would be overwhelming. To the contrary, the predicted perils associated with juror interviews are sustained on little more than speculation and conjecture. For example, the opponents of post-verdict interviews not only assume that jurors will restrict their

\begin{footnotesize}
\begin{footnote}
\end{footnote}

\begin{footnote}
\end{footnote}

\begin{footnote}
40. See Goldstein, supra n. 19, at 308-10 (arguing that the media should be held criminally liable for asking jurors about deliberations without court permission); Copernicus T. Gaza, Student Author, \textit{Getting Inside the Jury's Head: Media Access to Jurors After the Trial}, 12 N.Y.L. Sch. J. Hum. Rts. 311, 343-44 (1995) (calling for state and federal legislation making it illegal for a juror to discuss the votes or comments of fellow jurors following a verdict).
\end{footnote}

\begin{footnote}
41. See infra Part II.B.2.
\end{footnote}

\begin{footnote}
42. See infra nn. 647-92 and accompanying text.
\end{footnote}

\begin{footnote}
43. See infra nn. 582-84 and accompanying text.
\end{footnote}

\begin{footnote}
44. See infra nn. 548-51 and accompanying text.
\end{footnote}

\begin{footnote}
45. See infra nn. 552-55, 651-83 and accompanying text.
\end{footnote}
\end{footnotesize}
deliberations for fear a vocal juror may reveal their private comments, but also take for granted that jurors do in fact regularly disclose the private comments of other jurors to the press. Very little empirical research has been done to determine the validity of these presuppositions, in part because of the difficult nature of jury research.

To learn what jurors say in post-verdict interviews, Professor Nancy Marder analyzed fifty-two articles in which jurors spoke to the press and that were published in four major newspapers and two magazines during the fifteen-year period from 1980 to 1995. Although I disagree with her characterization of post-verdict interviews as "troubling," her research provides a valuable beginning. She recognized that by looking at the content of juror interviews, we can better determine whether they pose such a danger to the jury system as to warrant curtailment of First Amendment rights belonging to jurors, the press, and the public. To that effect, I have undertaken a somewhat similar, although more extensive, look at juror interviews.

Part II summarizes the methodology and results of that inquiry. Thanks to search-friendly electronic newspaper archives, I was able to find and examine more than 750 articles published during the past eighteen years in one newspaper, the Houston Chronicle, in which jurors were questioned by the press. While this study sheds light on simple questions such as whether post-verdict juror interviews are becoming more common, it also looks to see how often jurors identify holdouts or reveal statements of other jurors that could be considered private, embarrassing, or otherwise inappropriate.

Part III of the article juxtaposes study results with the arguments both for and against post-verdict juror interviews. For example, do jurors tend to explain their verdicts, or lack thereof in a mistrial situation, when they talk to the press? If not, then post-verdict interviews can hardly be said to serve an educational function or to assist in furthering public acceptance of verdicts. By the same token,

46. See infra nn. 395-398 and accompanying text.
47. See Goldstein, supra n. 19, at 314 (stating that jurors in high-profile cases will "inevitably" be affected in the jury room by knowledge that they may be interviewed by the press, but presenting no findings documenting such an effect); Marder, supra n. 22, at 473 (noting that her research revealed no instance where jurors said they limited their comments during deliberations for fear those comments would be revealed during post-verdict interviews).
48. Marder, supra n. 22, at 476.
49. Id. at 474.
50. Id. at 468.
post-verdict interviews would be unlikely to stifle jury room debate or invade juror privacy if they rarely involve objectionable revelations by one juror about another. Included in this section is an overview of relevant case law applying these arguments to either limit or allow press access to jurors following a trial.

Based on my analysis of 761 articles involving juror interviews, I conclude in Part IV that any furor over the perceived negative effects of post-verdict interviews is little more than a tempest in a teapot. The predicted horrors associated with post-verdict juror interviews have not materialized. Given the undeniable free speech claims associated with post-verdict interviews, and the potential benefits of such interviews with respect to public understanding and acceptance of verdicts, any legislative or judicial attempts to routinely restrict juror interviews would violate both the spirit and the letter of the First Amendment.

II. What Do Jurors Tell the Press? A Content Analysis of Eighteen Years of Juror Interviews

To judge whether post-verdict interviews either benefit or threaten the operation of our jury system, we at least need to know what jurors actually reveal to the press about their decisions or their service. Through my search of the Houston Chronicle electronic archives, I retrieved and reviewed 761 articles in which jurors commented on, or declined to be interviewed about, a case. In this part of the Article, I explain my methodology and set out the results of my content analysis of these pieces, focusing on both the frequency and content of juror comments.

A. Methodological Details

All the juror interviews analyzed in this Article come from one major metropolitan daily newspaper, the Houston Chronicle—although the trials were conducted nationwide. As a result, the time parameters of this study are based on the available electronic archives of that newspaper, which go back to 1985. I felt it was preferable to study as many articles as could be found involving juror interviews from one newspaper than to pick and choose a sampling of articles from several newspapers or magazines. First, this approach eliminated authorial discretion regarding which articles to incorporate into the study—all were included. Second, to the extent that press accounts of juror interviews may influence potential jurors, a comprehensive study from one source helps create a sense of what
The residents of one American city have learned about jury service over the years.

In collecting articles containing post-verdict juror interviews, I was as inclusive as possible. I retrieved articles where jurors (including alternate and dismissed jurors) talked to reporters about, or refused to discuss, high- and low-profile criminal and civil cases, mistrials, and cases that were dismissed or settled before a verdict was rendered. Many of these articles were written by local journalists; others came from national wire services. I encountered letters to the editor, personal essays, and diaries written by jurors. I found editorials and columns that republished juror comments that had already appeared in news articles, and book reviews that quoted juror remarks made to book authors. I ran across news articles that appeared days, months, and years after a decision that repeated comments given by jurors to the press immediately following the verdict. All were included in the study, based on the rationale that each contributed to the public's perception of how often jurors talk to the press, and of what they talk about. However, I did not incorporate the many articles I found where jurors spoke following a verdict not to the press, but only to court personnel, generally prosecutors or defense attorneys, who then repeated the jurors' comments to the press. Although these articles, too, may influence public assessment of the jury system, they raise the issue of whether jurors should be allowed to talk to other trial participants following a trial, rather than whether the press should be permitted to conduct post-verdict juror interviews.

52. See, e.g., Patricia Timpanaro, Mistrial Left Void for Juror, Houston Chron. 1 (Lifestyle) (Jan. 18, 1998) (juror's essay about jury service).
57. See, e.g., Carol Christian, Double-Murder Case Ends in Mistrial, Houston Chron. A22 (May 15, 2002) (recounting defense attorney's discussion with holdout juror following mistrial); Patti Muck, Light Sentence For Killer Stuns Clerk’s Family, Houston Chron. A13 (May 4, 1992) (describing prosecutor's conversation with juror in which juror apologized for awarding lenient sentence).
I must note that while my archival hunt for post-verdict juror interviews was certainly exhausting, it may not be exhaustive. Although I searched in many different ways to find every article where jurors commented—or refused to comment—to a member of the media, a few may have escaped my dragnet. However, I believe that the articles included in this study form a significant and sufficient data pool from which to draw the observations that follow.

B. Looking at the Numbers: Interviews, No Comments, Statements, and Press Conferences

In total, my search unearthed 761 Houston Chronicle articles from 1985 to 2002 where jurors were approached by the press, or contacted the press themselves. In sixty-five of those articles (9 percent), the authors noted that although jurors were approached, none would respond to the media. However, within these sixty-five original "no comments," jurors later talked to the press in nine of the cases (14 percent). Furthermore, in eleven of the no-comment articles (17 percent), jurors refused to talk directly to reporters, but did speak to attorneys or other courtroom sources who then repeated the juror comments to the press.

Of the remaining 696 articles where jurors agreed to be interviewed by the press, 489 articles involved criminal cases (70 percent) and 207 dealt with civil cases (30 percent). Seventy-seven articles (11 percent) referred to cases that ended in a mistrial. The

58. See, e.g., Carol Christian, Cross-Dresser's Sex Abuse Case a Mistrial After Jury Deadlocks, Houston Chron. A37 (Apr. 6, 2002) (noting that the jurors “declined to speak to reporters as they left the courtroom”).

Of course, jurors may have refused press requests for interviews in other instances where the author simply did not mention the "no comment" in his or her article about the case. And admittedly, one or two of the articles were difficult to categorize. For example, jury members in a 1994 retrial refused to comment to the press, but the press account contained quotes from a juror in the original trial, fourteen years earlier. To avoid double-counting, I listed the article as one where jurors spoke to the press, although arguably it also could have fit into the “no comment” pile. See Patti Muck, The ‘Animal' Avoids Second Death Penalty, Houston Chron. A19 (Jan. 21 1994).

59. For example, in a negligence case against the Mormon Church involving a pedophile youth leader, jurors originally refused to comment to the press. See Paul McKay, Molested Boy Wins More Than Sought Against Church, Houston Chron. A37 (Oct. 9, 1998). Seven months later, however, the named jury foreman and other unnamed jurors spoke to reporters about the case. See Paul McKay, Mormons Caught Up in Wave of Pedophile Accusations, Houston Chron. A1 (May 9, 1999).

60. See, e.g., Harvey Rice, Man, 20, Convicted of Two Slayings, Houston Chron. A1 (Mar. 1, 2000) (noting that although jurors refused to comment to the press, jurors spoke to the defense attorney who told reporters that the jury based its guilty verdict on accomplice testimony).
largest number of articles containing juror comments appeared in 1990 (sixty-three) while the smallest number of such articles were printed in 2001 (twenty-four). The following table summarizes year-by-year numbers of articles in criminal and civil cases where jurors spoke to the press:

<table>
<thead>
<tr>
<th>Year</th>
<th>Articles / Criminal</th>
<th>Articles / Civil</th>
<th>Total Articles Containing Juror Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>1985</td>
<td>19</td>
<td>9</td>
<td>28</td>
</tr>
<tr>
<td>1986</td>
<td>34</td>
<td>12</td>
<td>46</td>
</tr>
<tr>
<td>1987</td>
<td>30</td>
<td>10</td>
<td>40</td>
</tr>
<tr>
<td>1988</td>
<td>26</td>
<td>19</td>
<td>45</td>
</tr>
<tr>
<td>1989</td>
<td>32</td>
<td>10</td>
<td>42</td>
</tr>
<tr>
<td>1990</td>
<td>44</td>
<td>18</td>
<td>62</td>
</tr>
<tr>
<td>1991</td>
<td>21</td>
<td>5</td>
<td>26</td>
</tr>
<tr>
<td>1992</td>
<td>26</td>
<td>13</td>
<td>39</td>
</tr>
<tr>
<td>1993</td>
<td>22</td>
<td>6</td>
<td>28</td>
</tr>
<tr>
<td>1994</td>
<td>23</td>
<td>10</td>
<td>33</td>
</tr>
<tr>
<td>1995</td>
<td>26</td>
<td>11</td>
<td>37</td>
</tr>
<tr>
<td>1996</td>
<td>19</td>
<td>10</td>
<td>29</td>
</tr>
<tr>
<td>1997</td>
<td>25</td>
<td>22</td>
<td>47</td>
</tr>
<tr>
<td>1998</td>
<td>33</td>
<td>15</td>
<td>48</td>
</tr>
<tr>
<td>1999</td>
<td>31</td>
<td>12</td>
<td>43</td>
</tr>
<tr>
<td>2000</td>
<td>28</td>
<td>12</td>
<td>40</td>
</tr>
<tr>
<td>2001</td>
<td>14</td>
<td>10</td>
<td>24</td>
</tr>
<tr>
<td>2002</td>
<td>36</td>
<td>3</td>
<td>39</td>
</tr>
</tbody>
</table>

*Figure 1: Articles containing juror interviews published in the Houston Chronicle per year.*
The above table shows that, at least in the *Houston Chronicle*, there
has been no discernible trend towards publishing increasing numbers
of post-verdict juror interviews. This result differs from that obtained
by Professor Marder, who reviewed fifty-two articles published
between 1980 and 1995. She found that 94 percent of those juror
interviews appeared between 1988 and 1995, the last eight years of
her study.  

During those same years in the *Houston Chronicle*, 312
post-verdict juror interviews were published, which equals just 45
percent of the total 696 articles. Articles published within the last
eight years of my investigation, 1995 to 2002, account for just about
the same percentage of total juror interviews—44 percent (307 out of
696).

I classified 43 percent of the juror interview articles (304 out of
696) and 23 percent of the no-comment articles (15 out of 65) as
involving clearly “high profile” cases, although this was necessarily a
subjective determination. Some of these cases were unquestionably
high profile on a national scale, such as the O.J. Simpson, Rodney
King, Amadou Diallo, Susan McDougal, and Timothy McVeigh trials.
Other controversies that I included in the high-profile category might
be well known only to residents of Texas or the city of Houston.
By the same token, I excluded stories about cases that may well have
qualified as high profile in other cities, but not in Houston. The
important point to note is that jurors comment to the press about
their decisions in both high- and low-profile proceedings: post-verdict
juror interviews are not limited to cases that attract intense media
scrutiny.

With regard to the number of jurors who grant post-verdict
interviews, in many articles it was impossible to determine with any
certainty exactly how many jurors spoke to the press. In a story that
identified three jurors, for example, and then referred to comments
from “several jurors,” there was no way to know whether the three
named jurors were the same “several” jurors or additional unnamed
panelists. However, for all 696 articles, I was able to calculate a

---

61. Marder, *supra* n. 22, at 476.

62. A high profile case has been described as one that involves “shocking crimes,
 parental child abuse, toxic and deadly products, famous people, public figures,
 environmental damage, child custody wars and other subjects.” Wetherington, Lawton,
 & Pollock, *supra* n. 33, at 429.

63. *See*, e.g., Deborah Tedford, *Mistrial is Declared in Sting Case*, Houston Chron. A1
 (May 22, 1998) (detailing corruption trial of five Houston public officials).

64. *See*, e.g., Steve Olafson, *21 Steelworkers Who Contracted Asbestos Disease Win
 $115 Million*, Houston Chron. A1 (Feb. 20, 1998) (naming two jurors but also attributing
 remarks to “jurors”.

---
minimum number of interviewed jurors. So, for example, an article that identified four jurors by name and also referred to statements made by “some jurors” or “other jurors” was counted as containing the comments of only four jurors. Any articles that relied solely on “jurors said” for attribution were categorized as including the comments of only one, unnamed juror. The table below lists how many articles contained comments by different minimum numbers of jurors per jury.

<table>
<thead>
<tr>
<th>Number of jurors per jury who spoke to press per article</th>
<th>Number of articles citing that many jurors</th>
</tr>
</thead>
<tbody>
<tr>
<td>12 or more</td>
<td>12</td>
</tr>
<tr>
<td>11</td>
<td>2</td>
</tr>
<tr>
<td>10</td>
<td>0</td>
</tr>
<tr>
<td>9</td>
<td>0</td>
</tr>
<tr>
<td>8</td>
<td>2</td>
</tr>
<tr>
<td>7</td>
<td>8</td>
</tr>
<tr>
<td>6</td>
<td>5</td>
</tr>
<tr>
<td>5</td>
<td>11</td>
</tr>
<tr>
<td>4</td>
<td>22</td>
</tr>
<tr>
<td>3</td>
<td>55</td>
</tr>
<tr>
<td>2</td>
<td>135</td>
</tr>
<tr>
<td>1</td>
<td>444</td>
</tr>
</tbody>
</table>

Figure 2: Number of jurors cited per article.

Included in Table 2 above are articles that contained comments from alternate or dismissed jurors, as well as thoughts from “real” jurors in a case, which explains how more than twelve jurors per jury could theoretically talk to the press.65 Additionally, eight articles

---

65. Only one article was categorized as including comments of more than twelve jurors. See Seth Mydans, Leader of Jury Defends Verdict in Denny Case, Houston Chron.
combined comments from jurors on more than one jury into one story.66 The table shows that out of a total of 696 articles, more than half (64 percent; 444 articles) included remarks from only one juror, or used an uncertain phrase such as “jurors said” for attribution. Approximately 83 percent, or 579 articles, included the comments of no more than two identifiable jurors.

It should be noted that although Table 2 lists fourteen articles that ostensibly included comments by eleven or more members of a specific jury, in no instance did that many jury members grant separate interviews with the press. Rather, these articles all involved criminal cases where the jury called a press conference or issued a joint statement to the media.67 So, for example, in a case where one named juror spoke to the press, but was said to be “summing it up for the others,” I classified the article as containing the remarks of one named and eleven unnamed jurors.68 No more than eight jurors from any one jury actually spoke individually to the media.69 However, it was impossible to know how many jurors in total were contacted by the press for these articles, or whether comments from additional jurors were obtained but not used in the reporter’s story. Furthermore, not every article involved a case that used a twelve-member jury.70

I also kept track of how many jurors were identified in the articles by full name, and how many asked to remain anonymous, or were otherwise unidentified or referred to only by first name. Out of the 696 articles where jurors spoke with the press, 146 (21 percent) contained comments from only unnamed or partially identified jurors. Of the 444 articles where only one discernible juror was interviewed,

66. See, e.g., John Makeig, Simms Sent to Death Row, Houston Chron. A41 (Mar. 8, 1996) (repeating comments from a total of five jurors from three different juries in three of defendant’s four trials).


70. See, e.g., Patti Muck, Sheriff Guilty of Rights Violations, Houston Chron. A29 (June 20, 1996) (reporting comments of three jurors out of eight-member jury).
112 articles (25 percent) did not list that juror's full name. This indicates that although many jurors were fully identified in these articles, a significant number of jurors requested, and were granted, anonymity by the press.

Most commonly, jurors commented to the press contemporaneously with, or just a few days after, rendering a verdict. However, at least forty-four articles (6 percent) involved a significant time lapse between the case result and the juror's comments. These time lags ranged from eighteen days\(^7\) to thirty-seven years,\(^2\) with seventeen articles reporting comments given within two years of a jury's decision, and sixteen articles including juror comments made ten or more years following a trial.

One last point regarding numbers: in reading these articles, I was struck by how often the jury foreman spoke to the press. In fact, the comments of jury foremen were reported in 264 out of the 696 articles (38 percent).\(^3\) In 153 articles out of 444 where only one juror spoke to the press (34 percent), that juror was described as the jury foreman, and in 97 percent of those articles (148 out of 153), the foreman was fully identified by name. It appears that in a significant number of instances, jurors believe communicating with the press is part of the foreman's job.

C. The Heart of the Matter: Examining What Jurors Tell the Press

1. Explaining Why They Do the Things They Do

More than anything else, jurors attempt to explain their decisions when they are interviewed by the press. Of the 696 articles I collected where jurors talked to the media, 556 articles (80 percent) included juror explanations of the case result.\(^4\) Jurors specified evidentiary

---

\(^{71}\) See Nicholas C. Chriss, Juror Says He Admires Beam's Racist Views, Houston Chron. §1 at 1 (Apr. 26, 1988) (quoting juror eighteen days after trial).

\(^{72}\) See Christopher Sullivan, Convicted Killer or Political Prisoner?, Houston Chron. A46 (Feb. 19, 1995) (containing juror comments about case decided in 1957).

\(^{73}\) This is a conservative number, because the jury foreman may not always be identified as such when she or he speaks to the press. Compare Terry Kliewer, Moon Case Takes Shine Off Abuse Law, But Statute Will Stay, Houston Chron. A1 (Feb. 25, 1996) (quoting named juror who was not identified as the foreman) with Patty Muck & Steve Olafson, Moon Found Not Guilty, Houston Chron. A1 (Feb. 23, 1996) (quoting same named juror who is identified as the jury foreman).

\(^{74}\) This total includes articles containing comments from jurors who spoke to the press after mistrials had been declared, or after cases settled before verdicts had been reached, about how they would have decided the case or their interpretations of the evidence. See, e.g., Jerry Urban & George Flynn, HL&P Officials Upbeat Over Nuclear Plant Deal, Houston Chron. A1 (May 2, 1996) (reporting jury foreman's explanation of
reasons for their decisions in 63 percent of those articles (350 out of 556). Sometimes, jurors generically referred to the evidence as "overwhelming" or "flimsy," or that the prosecution or defense "failed to make its case." More frequently, jurors identified physical evidence that they found to be either conclusive or unconvincing. In the Arthur Andersen trial, jurors said their guilty verdict was based on one e-mail memo written by an in-house Andersen attorney—what the jury foreman referred to as "the smoking gun." Jurors also singled out testimony by witnesses or parties that they found to be either persuasive or far-fetched.

Jurors explained not only their verdicts to the press, but also the sentences they imposed or damages they awarded. In capital cases, jurors often described why they did, or did not, impose the death penalty. In cases involving co-defendants, jurors detailed the reasons why they may have decided against awarding identical punishments. Sometimes, jurors indicated that their verdicts were compromises

panel's likely damage award after case settled before verdict reached). Likewise, I included articles that quoted dismissed or alternate jurors. See, e.g., David Margolick, Ex-Juror's Remarks Hint Simpson Case Headed for Mistrial, Houston Chron. A2 (Apr. 9, 1995) (quoting dismissed juror who predicted hung jury).


77. See, e.g., Andrew Buchanan, Mom Found Guilty in Murder of Three Kids, Houston Chron. A16 (Dec. 20, 2001) (repeating juror quote to TV station that the defense attorneys had not established that the defendant was insane at the time of the murders).

78. See, e.g., Associated Press, Jurors Cite Rape Video in Life Term, Houston Chron. A36 (Aug. 24, 1990) (reporting that videotape of rape "clinched" jury's decision to sentence defendant to life in prison).

79. Mary Flood, The Andersen Verdict: Decision by Jurors Hinged on Memo, Houston Chron. A1 (June 16, 2002) (quoting jury foreman who described an e-mail memo as the "smoking gun").


81. See, e.g., Jim Henderson, Jury Gives Rivas What He Asked For—Death, Houston Chron. A1 (Aug. 30, 2001) (quoting juror who said death penalty was appropriate punishment for killing of police officer); U.S. Embassy Bomber To Receive Life Sentence, Houston Chron. A2 (July 11, 2001) (explaining that seven jurors felt executing the defendant would make him a martyr, and that life in prison was a more stringent penalty).

82. See, e.g., DeSoto Officers Found Guilty of Torturing Boy, Houston Chron. A53 (Nov. 24, 2000) (stating that jurors gave one defendant a stronger sentence because she was the abuser, while the other defendant merely failed to stop the abuse).
reached between panel members who wanted either stronger or more lenient sentences. Jurors at times felt a need to justify those sentences, explaining to the press why they imposed punishments that might be criticized as too light or too harsh, or damage awards that might be seen as too high or too low. In acquittals, jurors sometimes indicated that although they may not have been convinced that a defendant was innocent, the evidence created reasonable doubt as to guilt. Especially in civil cases, jurors often told the press that they were trying to "send a message" with their verdicts.

Jurors occasionally expressed confusion or frustration regarding sentencing criteria or options when explaining their decisions. In one Texas death penalty case, for example, jurors told reporters they were unsure how to determine whether a convicted capital murderer constituted a "continuing menace to society"—did the defendant have to pose a risk to society at large or just to the prison community? More than one article included comments from jurors in Texas capital cases who said they wished Texas law provided a life-

83. See, e.g., Jo Ann Zuniga, *Man Gets 10 Years for Halloween Hit-and-Run Death*, Houston Chron. A23 (Sept. 28, 2000) (quoting a juror who said the sentence was a compromise reached to avoid mistrial).

84. See, e.g., Associated Press, *Convicted Killer Gets 10 Years of Probation*, Houston Chron. A23 (Mar. 6, 1988) (quoting jurors saying they gave the killer a probated sentence rather than prison time because they believed he needed counseling); Jennifer Liebrum, *Murderer With AIDS Gets Death*, Houston Chron. A27 (May 20, 1994) (citing a juror group statement explaining why the jury awarded the death penalty to a defendant who would probably die from AIDS within three years).

85. See, e.g., Associated Press, *Jury Awards Widow $29 Million in Death of Oil Patch Worker*, Houston Chron. §1 at 36 (Apr. 19, 1985) (noting juror's description of $29 million award as "not excessive"); Roy Bragg, *Getting Her Goats*, Houston Chron. §1 at 29 (July 27, 1985), (quoting juror's explanation about why the defendant was fined only $2 for keeping goats too close to her home).


87. At least twenty-four articles about civil cases and six articles involving criminal cases included comments from jury members who stated that they intended to "send a message" with their verdicts. See, e.g., Jim Schutze, *Dallas Jury Hits Diocese With Verdict*, Houston Chron. A1 (July 25, 1997) (reporting that jurors intended to "send a message" with $118 million award against Roman Catholic diocese). However, this number must be regarded as conservative, because jurors made the same substantive comment using different words in a number of other articles. For example, one article noted that a $20 million punitive award was intended by the jury to make the company "feel the effects of the award." Associated Press, *Woman Wins $23 Million in Fen-Phen Case*, Houston Chron. A1 (Aug. 7, 1999).

without-parole option. In other cases, jurors told reporters they would have preferred to award a harsher penalty than the maximum sentence allowed by law. Jurors also expressed frustration to the press when they felt bound by the law to convict or acquit a defendant, even though they personally disagreed with the result.

Jurors also explained to the press why their deliberations resulted in a mistrial. Out of the seventy-seven articles where jurors were interviewed following a mistrial, jurors sought to explain why the panel deadlocked 74 percent of the time (57 out of 77 articles). These were often brief remarks to the effect that a certain number of jurors disagreed with the majority and stood their ground. Jurors in about one-half of the seventy-seven interview articles (50 percent) pointed to specific evidence that they considered important in the case, sometimes describing it as troubling or contradictory. Jurors also explained how mistrials resulted because of circumstances unrelated to the merits of the case. For example, in a four-month libel trial, jurors told the press that the judge declared a mistrial because jurors complained of physical and mental stress stemming from the length of their jury service. Additionally, jurors in cases that settled or were dismissed occasionally explained their preliminary thoughts regarding what the verdict might have been.

---

89. See, e.g., Claudia Feldman, Issues of Life and Death, Houston Chron. 1 (Lifestyle) (Jan. 6, 2002) (quoting a juror who wanted to give the defendant life without parole, but could not under Texas law); Kathryn A. Wolfe, Life Without Parole is Debated, Houston Chron. A19 (Feb. 2, 2001) (describing juror’s testimony to Texas legislature regarding life without parole option).

90. See, e.g., Richard Stewart, King Gets Life Term in Sikes Case, Houston Chron. §1 at 1 (Apr. 12, 1988) (stating that jurors wished they could have sentenced kidnapper to death rather than life in prison).

91. See, e.g., Pete Slover, Jury Blames Rumbaut in Wife’s Death, Strips Insurance Benefits, Houston Chron. §1 at 1 (May 28, 1988) (quoting a juror who said that although the court’s definition of “willfully causing” did not match the jury’s definition, the jury had to apply the law).

92. See, e.g., Steve Brewer, Local Man to Receive New Trial in Stabbing Death of His Mother, Houston Chron. A19 (Nov. 16, 1999) (explaining that two jurors who believed the defendant was not guilty by reason of insanity forced a mistrial).

93. See, e.g., David Barron, Murder Retrial Ends in Mistrial, Houston Chron. A29 (Dec. 19, 1992) (quoting juror as saying that mistrial resulted because jurors were puzzled by “dozens of little things”).


95. See, e.g., Maryann Hudson, A Never Ending Story, Houston Chron. Sports at 1 (Oct. 11, 1992) (Sports) (stating that eight jurors interviewed after the case was dismissed favored the defendant); Pete Slover, Accord Averts Rebuff by Jury in AIDS Suit, Houston Chron. A25 (Mar. 18, 1989) (reporting that jurors were twenty minutes away from finding for the defendant when case settled).
Sometimes explanations given to the media revealed that jurors misunderstood or misapplied the law in reaching a verdict. The presumption of innocence was apparently ignored in one case where a juror later told the press that members convicted the defendant “because there was nothing to convince them otherwise.” Similarly, in a North Carolina murder case, a juror told the press that if the state had proven the defendant guilty beyond a reasonable doubt, the jury would have awarded the death penalty rather than life in prison. In a civil antitrust case against the National Football League, a juror told the press that she agreed to a three-dollar damage award because she mistakenly believed the judge could increase the amount at his discretion.

Jurors also blamed unclear jury instructions or verdict forms when explaining incongruous or unexpected results. Jurors in a murder case later told the press (but not the judge or prosecution) that they accidentally awarded a probated sentence rather than a prison term to a convicted killer because they were confused by the jury form. In another case, jurors informed reporters that they inadvertently freed the guilty defendant because they did not understand the legal terms used in the court’s jury instructions. Post-verdict juror interviews also revealed that a felony theft case resulted in a mistrial when a juror brought a legal dictionary into deliberations because jurors could not comprehend the jury charge. And in the John DeLorean criminal fraud case, jurors stated in post-verdict interviews that they interpreted the judge’s instructions to mean that if they could not all agree that DeLorean was guilty, they were required to acquit.

Finally, in explaining their decisions, jurors referred to race, gender, fame, class or sexual orientation in forty-four of the 696

97. Sullivan, *supra* n.72, at A46.
102. *DeLorean Not Guilty: Jurors May Have Misunderstood Judge*, Houston Chron. §1 at 1, (Dec. 18, 1986).
articles in which jurors commented to the press (6 percent). 103 Of the thirty-six articles where jurors mentioned race, twenty-one quoted jurors who said race played no part (58 percent) in their decisions or deliberations. 104 Thirteen articles out of the thirty-six (36 percent) contained juror’s comments to the effect that race did, in fact, play a role. 105 Not included in these percentages are two articles that quoted panelists on the same jury who contradicted each other, both affirming and denying that race was a factor in the case. 106

Jurors mentioned sexual orientation in three articles, two in which it was described as determinative 107 and another in which it was not. 108 Jurors pointed to gender as an issue in three articles, two about the Erik Menendez trial, 109 and one about the O.J. Simpson case. 110 Three articles about cases involving celebrities quoted jurors who insisted that the defendant’s fame played no role in their decisions. 111 Of the forty-four articles where jurors mentioned race, gender, fame,
sexual orientation or class to the press, thirty-five of those articles involved clearly high profile cases (80 percent).

2. Providing a Peek Behind Closed Doors

For reasons that are undoubtedly related to their penchant for providing explanations, jurors also talked to the press about their deliberations. In 253 of the 696 articles (36 percent) where jurors granted post-verdict interviews, jurors gave newspaper readers some insight into what went on in the jury room. Not surprisingly, most of the articles where jurors discussed their deliberations related to criminal trials; only 66 of the 253 articles (26 percent) were about civil proceedings. Jurors also appeared much more likely to talk about their deliberations after a mistrial; of the 78 articles where jurors granted interviews following a mistrial, 51 (65 percent) contained such discussions.

Jurors' statements about their deliberations could be quite general. For example, jurors commonly reported that during deliberations, they went over evidence repeatedly, or that they were leaning towards a particular outcome from the beginning of deliberations. Likewise, jurors in a number of articles revealed that their panels either agreed on a verdict or sentence unanimously, or were divided, on the first ballot. These kinds of statements, standing alone, provide readers with just a glimpse of what went on in the jury room.

Jurors' discussions of the actual mechanics of jury deliberations were usually more meaty. For example, the jury foreman in the conspiracy and obstruction of justice trial of former national security adviser John M. Poindexter gave a detailed account in a post-verdict interview of how the jurors had approached their task. Jurors carefully read each count of the indictment, referred to the judge's instructions on how to interpret the indictment, and gathered and analyzed the applicable evidence before voting on each specific

112. *See, e.g.*, Mark Toohey & Tom Moran, *Asphalt Firm Guilty; Owner Earns Acquittal*, Houston Chron. §1 at 15 (Oct. 4, 1986) (reporting juror's comments that jury went over evidence "again and again").
113. *See, e.g.*, Hazelwood Acquitted of Major Spill Charges, Houston Chron. A1 (Mar. 23, 1990) (stating that panel was leaning toward acquittal from the first ballot).
115. *See, e.g.*, William C. Crum, *Jurors Help Man They Convicted*, Houston Chron. A3 (Jan. 21, 1991) (reporting that panel was divided on its first ballot).
In other cases, jurors also pointed out gadgets—e.g., clipboards and calculators—or other techniques that helped them evaluate or keep track of evidence. Some jurors indicated in post-verdict interviews their practice of asking for divine guidance during or at the beginning of deliberations.

Frequently, jurors' remarks about deliberations concerned some issue or piece of evidence that jurors found to be pivotal in their discussions. In the 2002 San Francisco dog-mauling case, a named juror reported that during deliberations, the jury "repeatedly reviewed" a tape of a TV interview where one of the defendants denied any responsibility for the incident. In situations where jury deliberations were lengthy, jurors sometimes revealed the issue or concern that kept the panel from reaching a swifter decision.

In talking about their deliberations with the press, jurors were also sometimes willing to disclose their preliminary votes. Jurors revealed one or a series of interim votes, or noted how many ballots they took before reaching a decision, in 88 of the 253 articles where deliberations were discussed. Criminal cases in which jurors described their initial votes with respect to either guilt or sentencing accounted for the great majority (90 percent) of these articles. Forty-one out of

---

117. Id.
118. See, e.g., Patricia Davis & Jane Seaberry, In Lorena's Shoes, Houston Chron. A8 (Jan. 23, 1994) (stating that jurors re-enacted the crime during deliberations in the Lorena Bobbitt trial); Constance L. Hays, Myerson Jury Not Convinced of Trio's Innocence but Didn't Trust Witnesses, Houston Chron. A4 (Dec. 24, 1988) (noting that jurors used clipboards to keep track of thirty-seven witnesses); Jury Sought Answers Bakker Didn't Have, Houston Chron. A2 (Oct. 8, 1989) (explaining that one juror added figures by hand and two jurors used calculators to analyze financial evidence).
119. See, e.g., Reed Karaim, The Oliver North Verdict, Houston Chron. A4 (May 5, 1989) (stating that jury began most sessions with a prayer).
121. See, e.g., Associated Press, Carpenter Convicted of Abducting Woman, Houston Chron. §2 at 18 (Mar. 30, 1986) (stating that juror reported deliberations bogged down over conflicting descriptions of assailant's hair color).
122. See, e.g., Mary Flood, The Andersen Verdict: Decision By Jury Hinged on Memo, Houston Chron. 1A (June 16, 2002) (listing series of panel's votes, showing how jury moved from six-six split, to votes of nine-three, eleven-one, and finally a unanimous guilty verdict); Dirk Johnson, Emotional Stress Hit Dahmer Jury, Houston Chron. A2 (Feb. 17, 1992) (revealing jury's initial split vote regarding the defendant's sanity).
123. See, e.g., Cindy Horswell, Fontenot Found Not Guilty in Coach's Slaying, Houston Chron. § 1 at 1 (Feb. 27, 1986) (reporting jury foreman as saying the jury took "as many as seven votes before reaching its decision"). This total does not include articles where jurors revealed that they reached a unanimous decision on the first ballot.
124. See, e.g., Jennifer Liebrum, Jurors Sentence Coulson to Death, Houston Chron. A29 (June 23, 1994) (reporting panel's initial sentencing vote).
88 articles (47 percent) involved mistrials where jurors shared either their “deadlock” vote, or series of votes, with reporters.\textsuperscript{125}

Along with disclosing their preliminary votes, jurors on occasion also referred to the role holdout jurors played in their deliberations. Out of the 696 articles where jurors spoke to the press, 95 (14 percent) included references to holdout or dissenting jurors. Most of the holdout references were made in criminal cases; only 27 of the 95 (28 percent) articles where dissenters were discussed involved civil trials. Fewer than half (37) of these 95 articles concerned cases that I classified as high profile. Mistrials accounted for 26 of the articles where holdout jurors were mentioned in post-verdict interviews (27 percent).

Generally, jurors mentioned holdouts to the press either to explain how conflicting panel viewpoints were resolved,\textsuperscript{126} or to show how irreconcilable disagreements resulted in a mistrial.\textsuperscript{127} Most juror references to panel holdouts were brief and fairly innocuous, and focused on the jury’s ability or inability to compromise.\textsuperscript{128} Jurors often told the press that one or two unnamed panelists argued for a different verdict or penalty before being swayed to the majority position.\textsuperscript{129} For example, a juror discussing the Susan Smith murder case seven years after the verdict told reporters that on the first ballot, the panel voted eleven-to-one to sentence Smith to life in prison, with one holdout who favored the death penalty.\textsuperscript{130} The unnamed holdout changed his mind, the juror said, after the others explained their reasons for favoring a life sentence.\textsuperscript{131}

\textsuperscript{125} See, e.g., Kevin Moran, \textit{Guard Receives Mistrial on Brutality Allegations}, Houston Chron. A23 (July 21, 1999) (stating that jurors were split six-six, after a series of votes that “varied widely”).


\textsuperscript{127} See, e.g., \textit{Another Trial Possible in Rowan Weapons Case}, Houston Chron. A30 (Sept. 30, 1988) (quoting jury foreman who “saw barrels of reasonable doubt” and “would have waded through hell barefoot from now until Christmas” before changing his vote in mistrial).

\textsuperscript{128} See, e.g., \textit{Steinberg Convicted of Manslaughter in Beating Death of Adopted Daughter}, Houston Chron. A1 (Jan. 31, 1989) (including jurors’ comments that manslaughter verdict was compromise reached among holdouts to prevent mistrial).

\textsuperscript{129} See Karam, \textit{supra} n. 119, at A4 (stating that three holdout jurors were convinced to vote with the majority after juror gave an inspiring prayer and panel resolved to work out differences).

\textsuperscript{130} Lisa Teachey, \textit{Deciding Fate Takes Heavy Toll}, Houston Chron. A1 (Mar. 10, 2002).

\textsuperscript{131} \textit{Id.}
A few post-verdict interviews went further, however, to portray holdout jurors as either powerful or powerless. Some panelists expressed their frustration with holdouts in instances where holdouts stuck to their guns to force a mistrial,132 an acquittal133 or a different penalty than that favored by the majority.134 By the same token, post-verdict interviews revealed that despite their doubts, holdout jurors sometimes knuckled under to pressure from other panelists135 or even from outside influences.136 Most frequently, holdout or dissenting jurors told the press why they hesitated or refused to go along with the majority,137 or why they eventually gave in.138

In several instances, jurors who spoke to the press found fault with the holdouts’ reasoning139 or questioned their motives,140 especially in mistrial situations. One article about a murder case that involved four trials and three hung juries quoted jurors who insinuated that unnamed holdouts on two of those juries had acted improperly to block a conviction.141 Again, however, it was not just

132. See, e.g., Steve Brewer, Mistrial is Declared in 4th Beating Death Trial, Houston Chron. A36 (June 12, 1999) (quoting jury foreman that holdouts’ refusal to evaluate evidence was “frustrating”).
134. See, e.g., Mark Toohey, 80-Year Term May Spell 1994 Release for Cross, Houston Chron. §1 at 1 (July 3, 1987) (reporting that eighty-year prison term was compromise between two holdouts who wanted to award life in prison, and two others who wanted to let the defendant go).
135. See, e.g., Associated Press, Death Row Inmate Pins Hope for Freedom on Lowly Maggots, Houston Chron. A7 (June 18, 2000) (reporting that jury foreman voted to convict because she was “beat up mentally” by other jurors, even though she was unconvinced regarding the defendant’s guilt).
136. See, e.g., Kathy Fair, Juror Denies Panel Pushed for Verdict, Houston Chron. §1 at 13 (July 19, 1988) (revealing that holdout juror told panel she was being pressured to convict by her family and friends).
137. See, e.g., Paul McKay, Airline, Pilot Lose in Sex Suit, Houston Chron. A25 (June 12, 1998) (quoting named dissenting juror who refused to go along with panel because he considered the defendant’s conduct “a joke”).
138. See, e.g., Jane Baird, Juror Says She Thought American Airlines Wrong, Houston Chron. Bus. at 1 (Aug. 19, 1993) (quoting lone holdout as having changed her mind because “I was the only one that felt the way I did”).
139. See, e.g., William Booth & Michael Isikoff, Noriega Juror Cites Lone Holdout, Battle of Wills Over Verdict, Houston Chron. A16 (Apr. 11, 1992) (noting juror’s opinion that case almost resulted in a mistrial because holdout jurors “had trouble understanding what was going on with the law” and were “confused”).
jurors who talked to the press following a trial. In the same article, the district attorney told the press about his interview with a holdout juror on the third deadlocked jury, who said she had not voted to convict because she knew the defendant's family and feared reprisals.\footnote{142}

Holdout jurors acknowledged themselves as such to the press in fifty-one articles,\footnote{143} although they sometimes requested that their names not be printed.\footnote{144} Only five articles contained clear references to other panelists who divulged the names of holdout jurors to reporters.\footnote{145} Jurors were not the only sources for reporters seeking to identify holdout jurors: in at least two articles where jurors spoke to the press, names of holdout jurors were provided by "court personnel" or "trial sources."\footnote{146}

In 40 of the 253 articles (16 percent) where jurors spoke to the press about their deliberations (but only 6 percent of the total articles where jurors spoke to the press), jurors described the tone of their jury room discussions. In 21 articles, jurors characterized their

\footnote{142.} \textit{Id.} This same case was the subject of at least three other articles where jurors in post-mistrial interviews lodged complaints against holdout panelists. \textit{See} John Makeig, \textit{Some Jurors Support 4\textsuperscript{th} Simms Murder Trial—at Any Cost}, Houston Chron, A25 (Sept. 28, 1995) (reporting that jurors said holdout was not honest during jury selection); John Makeig, \textit{Tearful Mistrial in Murder Case}, Houston Chron. A1 (Mar. 21, 1993) (disclosing that jurors blamed deadlock on holdout who they believed intentionally provoked mistrial); Michael D. Ooser, \textit{Juror Denies Simms' Race Led to Mistrial}, Houston Chron. A17 (Mar. 25, 1993) (quoting jurors who said holdout used jury service to get back at system, which holdout denied).

\footnote{143.} \textit{See, e.g.,} Patty Reinert, \textit{Selena Jury Gives Killer Life Sentence}, Houston Chron. A1 (Oct. 27, 1995) (quoting named jury foreman's statement that he was one of three initial holdouts who wanted a more lenient sentence). Included in this number is one article where the holdout juror identified herself to the press through her daughter. Julia Campbell, \textit{Hispanic Simpson Juror Says Race Not Issue}, Houston Chron. A3 (Oct. 10, 1995) (reporting that daughter of named holdout juror did TV interview explaining why her mother changed her vote).

\footnote{144.} \textit{See, e.g.,} Paul Lieberman & Stuart Silverstein, \textit{Bush Orders U.S. Forces to LA}, Houston Chron. A1 (May 1, 1992) (noting that juror who requested anonymity was one of "last holdouts" in Rodney King case).

\footnote{145.} \textit{See, e.g.,} Paul Reyes & Kevin Moran, \textit{Nursing Home Jury Criticizes Mistrial}, Houston Chron. §1 at 1 (Mar 26, 1986) (quoting juror who identified three initial holdouts by name; two of the holdouts also spoke to the press). In more than one article where a holdout juror was named, reporters did not specify the source of their information. \textit{See, e.g.,} John Makeig, \textit{Woman Whose Children Burned to Death Gets Probation}, Houston Chron. §1 at 23 (Oct. 1, 1986) (reporting that one, named juror favored a prison sentence for the defendant).

\footnote{146.} \textit{See Roy Bragg & Ross Ramsey,} \textit{Cop Killer's Attorney Predicts a Reversal}, Houston Chron. A20 (July 15, 1993) (citing "trial sources" as identifying one of two holdouts by race, gender and occupation, but not name); John Makeig, \textit{Gonzales Gets Probation in Delaney Death}, Houston Chron. A1 (June 30, 1994) (listing "court personnel" as source for lone holdout's name in capital murder case).
deliberations as hostile or discordant,\textsuperscript{147} while in eight articles, jurors said their deliberations were harmonious, polite or respectful.\textsuperscript{148} Two articles that each contained juror interviews from more than one jury quoted jurors who described deliberations in their respective cases as both cordial and unpleasant.\textsuperscript{149} The other articles contained juror remarks that did not fit neatly into these classifications: jurors depicted deliberations in terms such as "highly charged,"\textsuperscript{150} "intense,"\textsuperscript{151} "deliberate,"\textsuperscript{152} and "emotional."\textsuperscript{153} Related but not included in these totals were a few articles where jurors indicated that the panel got along well or became friendly.\textsuperscript{154} For example, a juror in a murder case described how the jury "grew close," with eleven members signing over their $100 paychecks for jury service to the remaining panelist whose employer refused to pay him during the trial.\textsuperscript{155}

3. Expressing Emotions Relating to Jury Service

Including their occasional descriptions of "painful" or "agonizing" deliberations,\textsuperscript{156} jurors revealed their emotional responses to jury service in 114 of the 696 articles (16 percent) where they spoke to the press. In criminal cases, jurors often told reporters that they

\textsuperscript{147} See, e.g., Steve Brewer, \textit{Man Gets Death Penalty a Second Time in Woman's Slaying}, Houston Chron. A17 (Nov. 23, 1998) (describing jury room proceedings as including both crying and shouting).

\textsuperscript{148} See, e.g., Rad Sallee, \textit{Juror Sees Verdict as a Message to Business}, Houston Chron. §1 at 20 (Nov. 20, 1985) (quoting foreman who described respectful tone of deliberations).

\textsuperscript{149} See, e.g., Bill Murphy & Claudia Feldman, \textit{When Jurors Can't Agree}, Houston Chron. A29 (June 13, 2002) (quoting jurors from three panels, one who said panel members "tried to recognize each other's point of view," one who said that she feared jurors would resort to violence against holdouts and a third who said deliberations got "out of hand" with yelling and name-calling).


\textsuperscript{151} \textit{Ex-White House Aide Deaver is Convicted in Perjury Trial}, Houston Chron. A1 (Dec. 17, 1987).


\textsuperscript{153} David Gonzalez, \textit{Salvadoran Generals Cleared in Deaths of 4 Churchwomen}, Houston Chron. A27 (Nov. 4, 2000).

\textsuperscript{154} See, e.g., Richard Stewart, \textit{Jury Unable to Settle All Verdicts in Racketeering Trial}, Houston Chron. §1 at 18 (Feb. 5, 1987) (stating that panelists became good friends, but nevertheless could not agree on all trial issues).


\textsuperscript{156} See, e.g., \textit{Kin of KAL Victims Deserve Unlimited Damages, Jury Says}, Houston Chron. A2 (Aug. 3, 1989) (stating that jurors "were agonizing...about everything").
had been emotionally affected by the evidence they viewed, or by the vicious nature of the crime itself. Jurors sometimes cried as they talked to the press, and expressed grief or sympathy for the defendants, the victims and their families. In civil cases, jurors occasionally voiced regret on behalf of unsuccessful plaintiffs who suffered injuries but were not awarded damages by the jury. The stress of being on a civil or criminal jury was often described in emotional terms; jurors occasionally reported that they lost sleep or were unable to eat during the proceedings, or complained that jury service took an emotional and physical toll. In mistrials, jurors frequently expressed frustration about failing to reach a verdict.

Serving on a jury in a gruesome criminal case also created fears among some jurors. One juror reported that he became "leery of
strangers" during the trial of a mass murderer;\textsuperscript{169} another noted her concern that another child might be "out there" suffering abuse like the victim whose parents starved him to death.\textsuperscript{170} Jurors in a case involving a racially motivated murder by two teenage skinheads reported that they feared reprisals from racist groups, although lawyers in the case told the jury they were unaware of any such threats.\textsuperscript{171} In a case concerning the attempted murder of a police officer, jurors told the press they feared retaliation from police officers who muttered insulting remarks after the jury found the defendant guilty of a lesser charge.\textsuperscript{172}

Often, jurors shared their emotions regarding sentencing with reporters, stating, for example, that awarding the maximum penalty to a defendant was "gut-wrenching."\textsuperscript{173} Capital cases where jurors sentenced the defendant to death drew expressions of emotion and sometimes regret from jurors, even years after the trial.\textsuperscript{174} Cases involving juvenile offenders could also be especially troubling for jurors. For example, after recommending that a teenager serve a fourteen-year prison term for the smothering deaths of two young children, the jury released a statement describing the case as "tragic and heart-wrenching."\textsuperscript{175} The jurors wrote, "In our minds we had to deal with the law. In our hearts we were dealing with a thirteen-year-old girl."\textsuperscript{176}

Jurors also described their emotional reactions when they learned something after trial of which they had been unaware during deliberations. In an arson case where the jury sentenced the defendant to five years in prison, a juror reported being distraught after learning that under the Texas parole system, the defendant

\begin{flushleft}
\textsuperscript{169} Man Who Killed 7 Co-Workers Faces California Gas Chamber, Houston Chron. A20 (Nov. 3, 1991).
\textsuperscript{172} Stephen Johnson, Jurors Say They Were Afraid After Police Insults in Court, Houston Chron. §1 at 1 (Feb. 13, 1987).
\textsuperscript{173} Jo Ann Zuniga, Katy Babysitter Gets 20 Years in Prison, Houston Chron. A30 (Feb. 28, 1998).
\textsuperscript{174} See, e.g., Claudia Feldman, Issues of Life and Death, Houston Chron. Lifestyle at 1 (Jan.16, 2002) (quoting jurors’ emotional responses in capital murder cases where death penalty was awarded).
\textsuperscript{175} Associated Press, Teen Given 14-Year Term, Houston Chron. A35 (Nov. 11, 1995).
\textsuperscript{176} Id.
\end{flushleft}
would probably serve only five months in jail. In a civil case, a juror wrote a letter to the editor indicating that panel members were emotionally upset after learning, post-verdict, that state law imposed a cap on punitive damages. Similarly, some jurors lashed out when their verdicts were overturned on appeal. In a case where the defendant's death penalty murder conviction was reversed by the state supreme court, several jurors expressed indignation with the criminal justice system, stating that they would never again serve on a jury.

Post-verdict interviews sometimes revealed other lasting emotional effects that jurors attributed to their jury service. Some jurors described the strong emotional bonds they made with other panelists or noted that they kept in touch with their fellow jurors following the trial. Other jurors told the press that serving on a jury had changed their lives forever or that "I'll never be the same person after this." Of course, not all these emotional responses to jury service were critical; jurors also described the experience as emotionally positive. "This is what it is all about," wrote a juror in a letter to the editor. "This is why I am proud to be a citizen of the United States."

---

179. See, e.g., George Flynn, Judge Denies Move to Take Ex-Con's Kids, Houston Chron. A25 (Dec. 6, 1995) (conveying jury foreman's distress that judge overturned jury verdict in custody case).
182. See, e.g., Kathy Fair, Foreman at First Penry Trial Defends Death Verdict, Houston Chron. C1 (July 22, 1990) (reporting that jurors kept in touch ten years after original trial).
183. See, e.g., Man Who Killed 7 Co-Workers Faces California Gas Chamber, Houston Chron. A20 (Nov. 3, 1991) (quoting juror as saying that jury service "changed my life forever").
4. Conveying the Difficulty or Ease of Decision-making

Jurors described to the press the difficulty or, conversely, the ease, of their decision-making process in seventy-five of the 696 articles where jurors talked to reporters (11 percent). To an extent, this category overlaps with juror expressions of emotion regarding their verdicts; articles where jurors described reaching their decision after "long hours of painful and prayerful deliberations" or as "the hardest thing I've ever done" were categorized as both an emotional response and a comment on the difficulty of judging. However, at least 43 articles included jurors' remarks about the effort expended in reaching a verdict, without an accompanying expression of emotion.

Many of these articles contained no more than brief statements from jurors describing their decision in terms such as "tough" or "very hard." So, for example, in the 2002 "Hockey Dad" case, the jury issued a statement following the verdict that simply said it had reached a "very difficult, but proper, decision." In both criminal and civil cases, jurors sometimes explained that their decision was difficult, at least in part, because of the complex legal issues they were required to resolve or the complicated laws they were expected to apply. Jurors noted generally that they "worked hard," or commented specifically on the difficulty of keeping up with large amounts of information or evidence in a number of articles.

188. See, e.g., Patti Muck, Funeral Director Acquitted, A25 (Feb. 10, 1995) (noting jury foreman's comment that verdict was a "tough call").
189. See, e.g., Teen Convicted of Killing Teacher, Houston Chron. A1 (May 17, 2001) (including statement from jury foreman that decision was "very hard").
191. See, e.g., Associated Press, Infertility Specialist Found Guilty of Fraud, Houston Chron. A3 (Mar. 5, 1992) (stating that jurors were "baffled" by the complexity of the case); John Makeig, Gonzalez Gets Probation in Delaney Death, A1 (June 30, 1994) (characterizing voluntary manslaughter law as "enormously complicated").
192. See, e.g., Jo Ann Zuniga, Saunders is Convicted in Baby's Death, Gets 75 Years, Houston Chron. §1 at 17 (June 30, 1988) (reporting that jury had to "work hard" to reach a verdict).
193. See, e.g., Nicholas C. Chriss, Juror Says He Admires Beam's Racist Views, Houston Chron. §1 at 1 (Apr. 26, 1988) (including juror's comments that trial involved "too much stuff to keep in your mind").
Especially in capital cases, jurors stated that while their decision as to guilt was relatively easy, determining the appropriate sentence was much more difficult. In a capital murder case where the defendant was a juvenile at the time of the crime, the jury foreman noted that although the jury reached a guilty verdict on one ballot, the decision to "put a young kid away for the rest of his life" was "tough." Jurors also explained to the press that while they may have reached a verdict quickly, their underlying decision was difficult nonetheless. Civil juries often commented about the difficulty of computing damage amounts; for example, one juror in a wrongful death action said that calculating the size of the award was problematical because "it's hard to put a value on human life." 

Jurors also described their decisions as difficult in instances when they believed they had to follow the law rather than their convictions. In a conspiracy trial against eight Christian sanctuary movement activists, jurors said they found it tough to apply the law. "I just feel really bad about the whole thing," one anonymous juror said. "I think it was unanimous that we didn't want to find these people guilty." Similarly, jurors said it was hard to acquit a defendant who they believed was probably guilty, even though they agreed that the state failed to prove its case.

In sixty-four of these seventy-five articles (85 percent), jurors stated that the decision-making process was in some way difficult or troublesome. Jurors described how they toiled to reach a verdict, and how seriously they took their responsibilities. However, in ten articles, jurors told the press that they reached their decision

---

194. See, e.g., Cindy Horswell, Dayton Man Gets 20-Year Sentence, Houston Chron. A17 (Mar. 6, 1996) (noting that jury found "to punish a person is harder" than to determine guilt).
196. See, e.g., Associated Press, 3 Life Terms Given in Triple Slaying, Houston Chron. A26 (Apr. 27, 1989) (noting that although jury deliberated for less than one hour, juror described decision as "very difficult").
198. Despite Convictions, Activists Vow to Continue Refugee Aid, Houston Chron. §1 at 14 (May 2, 1986).
199. Id.
201. See, e.g., Dianna Hunt & Andrea D. Greene, Moody Jury Spent Most Time Deciding to Acquit Willis, Houston Chron. §2 at 8 (Dec. 1, 1987) (quoting juror who emphasized that "[n]one of us took this lightly").
EXAMINING THE EVIDENCE

regarding guilt, damages or sentencing with relative ease. Jurors in these articles almost always pointed to evidence that they characterized as strong or overwhelming, emphasizing that although their decisions were straightforward, they were nevertheless carefully considered and correct. Not surprisingly, seven of the ten articles where jurors said their decisions came easily involved civil rather than criminal cases.

5. Admitting Doubts, Mistakes, Misconduct

Out of the 696 articles where jurors spoke to the press, only twenty-nine (4 percent) included statements where jurors expressed fear that they made a mistake regarding the verdict. Almost all of these articles dealt with criminal cases; jurors reported that they had erred in civil cases in just six articles, two of which involved the same defendant. In ten of the twenty-nine articles (34 percent), a significant period of time ranging from two to twenty years had elapsed between the verdict and the date of the juror's comment. Fewer than half (twelve) of these twenty-nine articles involved clearly high profile cases.

In some instances, jurors told the press they changed their mind about their decision based on information they learned outside of the courtroom. For example, nineteen years after serving as a juror in the Gary Graham capital murder case, a juror said that although he always had doubts as to Graham's guilt, those doubts were strengthened by statements of two witnesses who never testified at trial. The juror's change of heart was reported in an article printed

202. Not included in these numbers is one article that involved jurors from more than one jury, who characterized their decisions as both hard and easy. See Claudia Feldman, Issues of Life and Death, Houston Chron. Lifestyle at 1 (Jan. 6, 2002).


204. See, e.g., Linda Deutsch, Damages Pile Up for Simpson, Houston Chron. A1 (Feb. 11, 1997) (noting jurors' statements that decision was easy because of amount of evidence).

205. Interestingly, although Professor Marder counted juror "comments" rather than articles and used a smaller sample, she, too, found that only 4 percent of total juror comments expressed ambivalence or doubt about the verdict. See Marder, supra n. 22, at 485.

206. See, e.g., Associated Press, Juror in Murder Trial of Rowlett Woman Says Conviction May Have Been Wrong, Houston Chron. A17 (June 29, 1999) (citing juror saying he regretted his guilty vote because evidence regarding a possible intruder was suppressed at trial).

207. Salatheia Bryant, Graham Juror Says, 'He Might Be Innocent,' Houston Chron. A13 (June 20, 2000).
two days before Graham's scheduled execution. "I don't feel good about the position I'm in now," the juror said.\textsuperscript{208} In a child murder case, two jurors said they regretted giving the defendant life in prison rather than the death penalty upon learning after trial that the defendant had been accused of abusing another child.\textsuperscript{209}

Other jurors reported that they had made a mistake by not holding out for what they believed was the proper outcome in the case all along.\textsuperscript{210} In another murder case, the jury foreman told the press she voted to convict the defendant despite being unconvinced as to his guilt because she was "beat up mentally" by the other jurors.\textsuperscript{211} When she told the judge the next day that she had made a mistake, it was too late to change the outcome.\textsuperscript{212}

Jurors who tried to undo the effect of their votes, sometimes long after trial, also garnered press attention.\textsuperscript{213} Former Arkansas Governor Mike Huckabee commuted a death sentence to life in prison after receiving a letter from a juror in the case stating that the juror had mistakenly voted to convict fourteen years before.\textsuperscript{214} In another case, two jurors talked to the press after spending five years working to uncover new evidence in a murder case in which they had voted to convict.\textsuperscript{215} Their efforts were successful; the defendant was exonerated.\textsuperscript{216}

Jurors also told the press that they made mistakes in rendering verdicts or sentences because they misunderstood the law or the judge's instructions. In a sexual assault trial, for example, jurors told the press they erred in awarding concurrent rather than consecutive sentences to the defendant.\textsuperscript{217} Although jurors asked the judge for

\begin{itemize}
\item \textsuperscript{208} Id.
\item \textsuperscript{209} Steve Brewer, Having Second Thoughts, Houston Chron. A1 (Mar. 11, 2000).
\item \textsuperscript{210} See, e.g., Steve Brewer, Doctor Acquitted, But Daughter Claims Own Victory, Houston Chron. A29 (July 8, 2000) (quoting one juror who said he regretted voting to acquit defendant; two other panelists defended the verdict).
\item \textsuperscript{211} Associated Press, Death Row Inmate Pins Hope for Freedom on Lowly Maggots, Houston Chron. A7 (June 18, 2000).
\item \textsuperscript{212} Id.
\item \textsuperscript{213} See, e.g., Jurors Ask That Their Verdict Be Set Aside, Houston Chron. A12 (July 2, 1992) (reporting that judge set aside guilty verdict after jurors submitted affidavits that the verdict resulted from racial prejudice and a botched vote).
\item \textsuperscript{214} Associated Press, Juror's Letter Leads Governor to Halt Execution, Houston Chron. A9 (Feb. 6, 1999).
\item \textsuperscript{215} William C. Crum, Jurors Help Man They Convicted, Houston Chron. A3 (Jan. 21, 1991).
\item \textsuperscript{216} Id.
\item \textsuperscript{217} Steve Brewer, Jurors Shocked by Sentencing in Assault Trial, Houston Chron. A25 (Oct. 17, 1998).
\end{itemize}
clarification, jurors said he refused to help them, telling them only to reread the charges. Three panelists from another jury told the press that the panel mistakenly freed a juvenile convicted of murder because members were confused about the meaning of legal terms in the jury instructions.

Eighteen out of 696 articles (3 percent) contained juror revelations that during their service, jurors may have engaged in misconduct or behavior that violated the judge’s instructions. Seven years after trial in a high profile murder case where the jurors were sequestered, for example, a juror told the press that panelists talked together about the case in the evenings. “We weren’t supposed to talk about the trial,” he said, “but of course we did.” In another case, a sedition trial of thirteen white supremacists, all of whom were acquitted, two female jurors admitted in a post-verdict interview that they had been romantically attracted to two of the defendants during the trial and sought them out afterwards. A male juror in the same case told the *Houston Chronicle* that he shared similar anti-black feelings expressed by the defendants, leading to charges that the jury had been improperly chosen. Other types of possible misconduct that jurors revealed to the press included sequestered jurors who made unsupervised telephone calls, jurors who improperly discussed potential punishments during deliberations, jurors who slept during trial testimony, jurors who considered inadmissible evidence or applied the wrong standard of proof, and jurors who were swayed by the defendant’s failure to testify.

218. Id.
221. Id.
223. Id.
224. Woes of a Jury Under Pressure, A1 (Apr. 7, 1995) (reporting that jurors discussed the case and their personal feelings about the defendant’s guilt, and made unsupervised telephone calls, in violation of the judge’s sequestration order.)
226. Eric Berger, 2 Jurors May Have Gotten Snooze Warning, Houston Chron. June 22, 2002, at 2 (Bus.) (stating that four jurors tried to send a note to the judge regarding two jurors who were sleeping during the trial).
227. Improper Juror Conduct Alleged in Davis Mistrial, Houston Chron.§1 at 10 (June 23, 1987) (quoting foreman’s allegations that panel considered information learned from
On the other hand, jurors also told the press that they were careful to follow the judge’s orders, even when they were presented with opportunities to break the rules. In one murder case, the jury foreman told reporters that although one panelist knew about the existence of certain inadmissible suicide notes, the foreman had not allowed any discussion on the subject during deliberations. In other cases, jurors noted that they refused to consider irrelevant factors—such as their own emotions, or a party’s wealth, fame, or past sexual history—in reaching their decisions. Furthermore, jurors sometimes told reporters that they followed the jury charge even in those instances when they personally disagreed with the law or the result.

Finally, jurors on occasion told the press about potential misconduct by other court personnel. For example, after the Marion Barry cocaine possession trial, one juror reported that U.S. Marshals had told him during deliberations that two excused alternate jurors had gone on television and pronounced the mayor “guilty, guilty, guilty.” In the same article, jurors said that U.S. Marshals misled the trial judge by telling him that jurors knew nothing about a drug bust that occurred at the hotel where the panel was sequestered. In actuality, jurors reported seeing the bust to marshals immediately after press coverage of the trial and applied the criminal standard of reasonable doubt in civil wrongful death trial.

228. Associated Press, Second Trial of Ex-Mayor to be Moved, Houston Chron. A39 (Sept. 7, 1997) (quoting foreman that the defendant’s failure to testify influenced some jurors to convict).
230. See, e.g., George Flynn, Bittersweet Victory for Woman, 82, Houston Chron. A29 (Sept. 18, 1997) (quoting juror that although “we all have grandmothers,” any feelings panelists had for 82-year-old defendant were not considered).
231. Jo Ann Zuniga, Houston Man Wins Award Against Saudi, Houston Chron. A1 (July 26, 1997) (noting that defendant was a “big businessman, a tycoon type,” the jury considered nothing but the evidence).
233. United Way Figure Guilty in Fraud Case, Houston Chron. A3 (Apr. 4, 1995) (noting that panel did not take into account the defendant’s “sexual escapades” in reaching decision).
234. See, e.g., Steven R. Reed, Railey Verdict: Not Guilty, Houston Chron. A1 (Apr. 17, 1993) (stating that although jurors believed defendant was guilty, they had to acquit based on reasonable doubt standard).
236. Id.
after witnessing it through their hotel windows. "I read in the paper afterwards that the judge was told that we didn’t know about it, but that wasn’t true," one juror said. "I didn’t know who was being busted, but I knew it was a drug bust." 238

6. Appraising the Lawyers, Judges or Justice System

Jurors shared their impressions of the attorneys they observed during their jury service in forty-four out of the 696 articles where jurors talked to reporters (6 percent). Most of these forty-four articles were about criminal trials; only nine articles (20 percent) involved civil suits. Jurors were also much more likely to reveal their opinions about the attorneys in high profile trials; thirty-two of the forty-four articles (73 percent) where jurors discussed the lawyers involved cases that I categorized as high profile.

Juror comments regarding attorneys ranged from substantive critiques of their legal skills, to observations concerning their mannerisms or style, to simple positive or negative evaluations. In the shooting death of Amadou Diallo, jurors who acquitted four New York City police officers accused in the case faulted the Bronx District Attorney for what the jurors described as a "lackluster" prosecution. One panelist criticized the prosecutor more specifically for failing to cross-examine a particular defense witness. Similarly, jurors in a perjury/conspiracy case blamed the defendant’s conviction on his attorney for failing to call any character witnesses. More generally, an alternate juror in another police department corruption

237. Id.
238. Id.
239. I included in this total one article where jurors in the 1993 Long Island Rail Road murder case commended the defendant’s competence in representing himself. See John T. McQuiston, Convicted Train Gunman Asks Lawyers He Fired to File Appeal, Houston Chron. A14 (Feb. 19, 1995) (quoting foreman that defendant did a “pretty good job for himself”).
240. See, e.g., Kathy Fair, Juror Denies Panel Pushed for Verdict, Houston Chron. $1 at 13 (July 19, 1988) (criticizing defense counsel for raising irrelevant points during trial).
241. See, e.g., George Christian, A View From the Jury Box, Houston Chron. Zest at 20 (July 24, 1988) (describing opposing counsel in Pennzoil-Texaco case in terms of their demeanors).
242. See, e.g., Ed Asher, Another Mistrial is Declared in Sting Case, Houston Chron. A1 (May 13, 1999) (stating that prosecutors “didn’t do a very good job”); Rad Sallee, Juror Sees Verdict as a Message to Business, Houston Chron. $1 at 20 (Nov. 11, 1985) (noting that lawyers for both sides in Pennzoil-Texaco case did “fine” or “good” job).
244. Id.
case told the press that panelists "disliked" three of the defense attorneys and "liked" one defense attorney, without giving any particular reasons.246 A voting member of the panel, however, denied in the same article that the jury's feelings toward the defense attorneys influenced the outcome of the case.247

Other critical comments about attorneys included statements that they were arrogant,248 used sexist and racist language,249 and used tactics that jurors viewed as "insulting" or overly aggressive or emotional.250 Predictably, in two cases where questions were later raised about a criminal defendant's guilt and where the defendant was later exonerated, jurors either criticized the state for possible prosecutorial misconduct,252 or the defense for ineffective assistance of counsel.253

Jurors also praised the attorneys whose work they viewed first-hand, both in general and specific terms. In a sexual assault of a minor case, a juror commended the county prosecutor as "focused and intense," someone who "let us know what it was like for that little girl."254 The jury foreman in a murder case said the panel was impressed with the "thoroughness" of the defense attorney, who helped the jury understand the facts by presenting giant, blown-up photographs of the murder scene.255 Jurors tended to be more

247. Id.
250. See, e.g., Associated Press, Punitive Damages a Memo to Industry, Houston Chron. A17 (July 16, 2000) (characterizing defense lawyers' arguments as "insulting").
251. See Jane Baird, Jurors Decide for American in Airline Case, Houston Chron. A1 (Aug. 11, 1993) (criticizing plaintiff's attorney for "wadding up pages and throwing them down in disgust" during trial); Mike Schneider, Lawyer's Knock Has Big Business Falling Hard, Houston Chron. Bus. at 3 (Aug. 16, 2001) (portraying plaintiff's lawyer in civil suit as "trying to disguise the facts with emotions").
253. See Harvey Rice, Justice Deferred, Houston Chron. Texas Magazine at 6 (Nov. 26, 2000) (claiming that the defense attorney "had not put forth a strong argument" of innocence in case where DNA evidence later exonerated defendant).
255. Klimko & Muck, supra n. 200, at 25.
reluctant to compliment attorneys, however, than to point out their shortcomings; twenty-four of the forty-four articles (55 percent) contained critical assessments by jurors. Sixteen of the forty-four articles (36 percent) reported positive statements made by jurors about attorneys, while the remaining four articles contained either neutral comments, or mixed comments of both admiration and disapprobation.

An even smaller number of jurors revealed their impressions of judges to the media. Out of 696 articles where jurors spoke to the press, twenty-six articles included juror comments about a judge (4 percent). Nineteen of these twenty-six articles (73 percent) involved criminal cases and twelve (46 percent) came from trials classified as high profile. Most contained jurors’ criticisms of judges’ official actions, especially with respect to sentencing. In the criminal case against Joseph Hazelwood, captain of the Exxon tanker that spilled 11 million gallons of crude oil into Alaska’s Prince William Sound, the jury foreman told the press that the judge’s sentence of a $50,000 fine and 1,000 hours of community service was too harsh. “I had high hopes that [Hazelwood] would walk out of here a free man and get on with his life,” she said. Understandably, jurors told the press of their shock and anger when judges—including appellate judges—overturned their verdicts, or in civil cases, reduced their damage awards. For example, several jurors in a breach of contract case said they were “appalled” after the judge slashed the jury’s damage award by more than two-thirds, including one juror who said the judge’s intervention “made him sick.”

A few articles mentioned judges’ conduct on the bench that jurors viewed as inadequate or inappropriate. In one article, a juror

256. Again, I did not include in my totals any articles that reported juror comments about the trial attorneys that were made to jury consultants or the attorneys themselves and then repeated second-hand to the press. See, e.g., Seth Mydans, Leader of Jury Defends Verdict in Denny Case, Houston Chron. A4 (Oct. 26, 1993) (quoting jury consultant who told press that jurors praised one of the defense lawyers).


258. Id.

259. See, e.g., Patrick May, Reversal of Murder Conviction Outrages Florida Jurors, Houston Chron. A9 (Feb. 4, 1990) (quoting juror that “blood will be on the hands of those seven justices” after state supreme court reversed jury’s murder conviction).


complained that the panel had not been clearly instructed as to the law, and in another, a juror stated that the judge had not satisfactorily answered a question posed repeatedly by the panel. Several articles referred to what might be termed "boorish" behavior on the part of the judge. In one, a juror complained that both the judge and the prosecutor smoked in the courtroom even though it was designated as a non-smoking facility. Jurors in another case told the press that the judge read Penthouse magazine and was inattentive during a trial. Jurors in a third trial noted that the judge made insensitive courtroom comments about the defendant's illegitimacy.

Only four articles reported jurors' positive evaluations of judges, as opposed to either critical, neutral or mixed remarks. In one, a juror noted that the judge was "just trying to be fair" in dismissing murder-for-hire charges against the defendant because of insufficient evidence. And in the Timothy McVeigh trial, the press noted that the jurors praised the manner in which the judge maintained control over his courtroom. "He was the man," one juror declared.

By speaking their minds about trial attorneys and judges, jurors in these articles were actually communicating their complaints and concerns about the justice system to the press and public. Other articles without references to trial judges or particular attorneys also included juror comments about the justice system. So, for example, jurors in a number of articles criticized the state for bringing groundless criminal prosecutions, or for sloppy, botched investigations. One juror complained that although his jury panel awarded the defendant a 1001-year sentence, the defendant was paroled thirteen years later. "I think there's something seriously wrong with the judicial system," the juror said. "No matter what, even

266. Roy Bragg, Mom Says Judge's Remarks on Illegitimacy 'Insulting', Houston Chron. §1 at 26 (May 9, 1986).
268. Michael Fleeman, Jurors Say Vote on Guilt Was Harder Than Sentence, Houston Chron. A16 (June 15, 1997).
271. Associated Press, Record Jail Terms Didn't Really Last, Houston Chron. §1 at 1 (Jan. 27, 1986).
if we gave him life, he’s out. What’s the difference?” Similarly, in a case where a defendant was awarded a new trial thirteen years after confessing on the stand to murder, jurors from the original trial told the press that any new trial would be a waste of time. “It makes me wonder about our whole judicial system,” one juror said. “Sometimes I wonder if there’s an honest lawyer out there.”

Another relatively common grievance mentioned by jurors concerned the length of their jury service. Jurors in a four-month libel suit, for example, complained to the judge about the hardships they had endured. After the judge declared a mistrial in the case, one juror insisted that “[t]hey have to tell the new jurors how long they expect the trial to be next time.” A juror in another civil case noted in a personal essay about her jury experience that she “wondered if the jury could enter a running objection to the length of this trial.”

On a more positive note, jurors sometimes also expressed their approval of the justice system, in whole or in part. For instance, a juror in the Timothy McVeigh trial stated that panelists could “all sleep better at night, knowing that the system does work.” Jurors who participated in a New Jersey pilot program that allowed jurors to take notes and ask questions in civil trials said they liked being able to question witnesses themselves. “If I couldn’t ask questions, I would have been frustrated,” one juror said. “I wouldn’t feel as comfortable making a decision. You felt like you were closer to the truth.”

Even in a case that settled while the jury deliberated, the foreman admitted the trial was not a total waste of time. “I heard and saw things I had never heard of in my life,” he said about his jury service. “I believe that if a man keeps an open mind, he can learn something.”

272. Id.
273. Id.
274. Id.
275. Id.
276. Id.
277. Id.
278. Id.
279. Id.
280. Id.
281. Id.
7. Endorsing or Defending Their Decision

While jurors expressed doubts about their decisions to the press in only 4 percent of 696 articles, 100 articles (14 percent) included statements of juror support for their verdicts or sentences.282 Sixty-nine of these articles (69 percent) dealt with criminal cases, while fifty-two (52 percent) involved cases that I listed as high profile. Most commonly, jurors told the press that either individually or as a panel, they had made the right decision. For example, in the Andrea Yates case, four jurors told Dateline NBC that although panelists had considered sentencing Yates to death, ultimately the panel correctly chose to award a life sentence.283 In another murder case, one juror would say only that the jury had done its duty, and “[i]t all worked out well.”284 Jurors also expressed support for their verdicts in emotional terms, stating that they felt good285 or were comfortable with or proud of their decisions,286 or that they could sleep at night.287

After a jury panel rejected the death penalty and awarded a life sentence to a defendant, one juror stated that he and his fellow panelists would “be able to look in the mirror in the morning and feel satisfied with the decision we made.”288

In forty of these 100 articles, jurors made statements defending their decisions against real or perceived criticism from trial participants or members of the public and press. After acquitting an Egyptian immigrant accused of murdering a rabbi, a juror responded

---

282. Five articles contained remarks both from jurors who supported and jurors who doubted their decisions. See, e.g., Steve Brewer, Doctor Acquitted, But Daughter Claims Own Victory, Houston Chron. A29 (July 8, 2000) (stating that one juror regretted acquittal, but two others believe jury made the right decision). However, one of these articles involved comments from jurors who served on different juries in the same case. Kathy Fair, Foreman at First Penry Trial Defends Death Verdict, Houston Chron. Cl (July 22, 1990).


to Jewish leaders who objected to the verdict: “If they [protestors] want to be angry at someone, I think they can look at the police,” the juror said. “They destroyed evidence. They obliterated fingerprints . . . They simply didn’t give us enough evidence to convict.” Occasionally, objections to the verdict came from dismissed or dissenting members of the panel itself. In the Reginald Denny beating case, for instance, an alternate juror criticized the verdict acquitting the defendants of the most serious charges, describing it as “a sad day in America.” In the same article, the jury forewoman read a statement defending the outcome as “the best job possible given the evidence and the applicable law,” and denying that the verdict resulted from intimidation, race or fear of racial violence. Jurors also justified the speed with which they returned their verdicts. In the O.J. Simpson criminal case, for example, one juror explained that after a nine-month trial, the jury didn’t need “another nine months” to reach the proper result.

Jurors defended not only the verdicts they reached, but also the sentences they awarded. The jury foreman in a murder case responded to anticipated criticism of the panel’s decision to grant a probated sentence to the defendant, stating that “we decided that he deserved a second chance.” In another murder case involving a convicted cop killer, the jury foreman explained why the jury failed to reach a sentence after deliberating three days. Although the foreman himself said he favored the death penalty, he told reporters that several other jurors believed that the defendant’s rough childhood, immaturity, and subnormal IQ were mitigating factors. As a result of the jury’s failure to agree, the judge was forced to sentence the defendant to life in prison.

In civil cases, jurors tended to respond to criticism regarding the size of their damage awards. After the newspaper published a letter to the editor objecting to the size of a civil judgment, a juror in the case replied in her own letter that “the amount we gave at the . . . trial

291. Id.
295. Id.
296. Id.
wouldn't have set [the defendants] back a day and I feel they should have been forced to pay it."

Conversely, a panelist in another case contacted the newspaper to defend a damage award challenged by plaintiff's counsel as too small. In response, the juror denied that the panel had been influenced by President George H.W. Bush's 1992 Republican National Convention speech, which accused trial lawyers of filing frivolous lawsuits.

8. Divulging the Votes, Remarks, or Opinions of Others

Counting up articles where jurors disclosed the votes of, or statements or opinions held by, other panelists seemed like a straightforward task until I tried to do it. This category proved to be impossible to tally, because it is actually much broader than it appears. First, jurors who reveal preliminary votes or discuss holdouts with the press are automatically disclosing the votes or opinions of panelists other than themselves, even when they do not name names. Second, any juror who explained why a panel reached a particular decision, or stated that a jury voted unanimously on the first ballot, was not just expressing his or her own opinion about the case. These blanket "we" or "the jury" statements ("[w]e wanted to send a message out to the world that it shouldn't have happened in the first place," or "[t]he jury found one person guilty of doctoring a draft memo," were ubiquitous throughout the 696 articles where jurors spoke with the press.

Third, jurors also frequently referred to views held or opinions expressed by a portion of the panel—a portion that may or may not have included the speaker. Most often, panelists reported that "some jurors" questioned a piece of evidence, or resisted giving a certain penalty, or were either convinced or doubtful regarding a pertinent fact. For example, the foreman in the Susan McDougal

298. Kevin Moran, They Didn't Read His Lips, Houston Chron. A16 (Sept. 29, 1992).
299. Id.
301. Mary Flood & Tom Fowler, Enron's Auditor is Given the Max, Houston Chron. A1 (Oct. 17, 2002).
302. See, e.g., Bill Murphy, Jury Awards Shopper $35,000 in Randalls Suit, Houston Chron. A27 (July 27, 2000) (stating that "a majority of jurors" did not believe the defendants had acted maliciously).
303. See, e.g., Kevin Moran, Man Receives Life Term in Beating Case, Houston Chron. A17 (Sept. 12, 1990) (reporting that "some jurors" originally wanted to award a fifty-to-eighty year sentence, rather than a life term).
obstruction of justice case stated that testimony convinced “some jurors” that the defendant had good reasons for refusing to testify to the grand jury. In another case, a juror said that the panel voted against the death penalty because “some jurors” believed the defendant was not the triggerman in the murder.

Occasionally, articles quoted jurors regarding the comments or views of panelists who were described by gender or race, but not by name. Several articles contained juror comments that identified views held by gender-specific portions of the panel. One article, published three years after a mistrial had been declared in a corruption case against several Houston city officials, identified jurors both by race and gender, although not by name. In that article, a juror claimed that an unnamed elderly Hispanic male and an unidentified Anglo female on the panel had accused each other of racial prejudice during deliberations.

That said, I found only thirteen articles out of 696 (2 percent) where jurors pointed the finger at a named panelist and disclosed remarks made or opinions expressed by that panelist during deliberations. Ten of these articles pertained to criminal cases, eight

306. In one, a breast implant case, a female juror told the press that although the men on the jury felt sorry for the plaintiffs, they did not really understand the plaintiffs' suffering. See Mike Tolson, A Matter of Proof, Houston Chron. A1 (Oct. 26, 1997). Following the Menendez murder trial, a number of female jurors accused the male, unnamed, panelists of making insulting, sexist remarks during deliberations. See Associated Press, “It Was Hostile in There,” Houston Chron. A5 (Jan. 30, 1994). And in the trial of Oliver North, one juror noted that three female holdouts “still needed a little convincing” before a verdict could be reached. See Reed Karim, The Oliver North Verdict, Houston Chron. A4 (May 5, 1989).
308. Id.
309. It is possible that some jurors interviewed in these articles may have been instructed, or ordered, by the court not to reveal remarks, opinions, or private information regarding their fellow panelists to the press. None of the articles I reviewed mentioned any such instruction or order, although I found four cases where judges had either asked jurors not to discuss, or prohibited jurors from discussing, their verdicts or deliberations with the press at all. See, e.g., Allan Turner, Slave Trial Jury Sends 2 to Prison, Houston Chron. §1 at 1 (July 19, 1986) (reporting that in organized crime trial, the judge asked the jury not to talk about their verdicts with the press). Given that the media generally consider gag orders extremely newsworthy, it seems unlikely that many of the interviewed jurors had been ordered not to reveal private information about other panelists. Certainly, however, judges may have suggested to jurors that they should not disclose private information about their colleagues. Interestingly, in all four instances I found where judges had tried to
articles involved what I considered to be high profile cases, and six
described cases that ended in a mistrial. All thirteen articles involved
jurors who either identified holdouts by name (six articles), and/or
who accused named panelists of possible misconduct (eight articles).
For example, two jurors in a civil case identified a panelist who they
said "ramrodded" the vote in favor of the defendants, who was
revealed to be the niece of a defendant who had been dropped from
the lawsuit before trial.\[^{310}\] "She said she was going to vote 'no' and
demanded that we all vote the same way," one juror said.\[^{311}\] In
another instance, an alternate juror told the press that the jury
foreman, who she named, had commented before the trial began that
he believed the defendants were guilty.\[^{312}\] The foreman denied the
claim.\[^{315}\]

Five of these thirteen articles involved panelists who revealed
specific jurors' comments or votes to "set the record straight" in
response to assertions made to the press by other jurors. After
identifying himself to reporters as the holdout juror, one man claimed
he forced a mistrial in a murder case because he could no longer
tolerate insults and pressure from the rest of the panel.\[^{314}\] The other
panelists then responded, saying that the named holdout juror was
stubborn, ignored the opinions of the others, and had been
improperly influenced by media accounts of the case.\[^{315}\] In a civil
damage suit, a juror told reporters that during deliberations, she
supported an award of between $200 million to $300
million.\[^{316}\] Another panelist disputed that assertion, stating that the only dollar
amount discussed was a much lower one suggested by a different
juror, whom she identified.\[^{317}\]

\[^{310}\] Richard Stewart, *Lawsuit Verdict Upheld Despite Flap Over Juror*, Houston
Chron. §1 at 21 (Nov. 20, 1986).
\[^{311}\] Id.
Houston Chron. A27 (Nov. 18, 2000).
\[^{313}\] Id.
Insulted Him*, Houston Chron. §1 at 5 (July 18, 1988).
\[^{315}\] Id.
\[^{316}\] *USFL Vows Not to Toss in Legal Towel*, Houston Chron. Sports at 2 (July 31,
1986).
\[^{317}\] Id.
Very rarely, jurors revealed information about other panelists that might be considered personal, private, or otherwise inappropriate. I found only five articles out of 696 (0.7 percent) where a juror disclosed personal, private, or potentially embarrassing information about another panelist. In one, a juror referred to the unnamed holdout as an unemployed man who wanted to keep deliberating so he could receive the $15-a-day juror fee. Another article involved a mistrial where one juror told reporters that the son of the unnamed female holdout had been facing his own legal problems.

Only two of 696 articles (0.3 percent) involved private information regarding a named panelist: in one, the named panelist made claims in the press about jury-room pressure that other jurors disputed, saying that she told them the pressure came from her family and neighbors; in the other, it was unclear whether the panelist was named by other jurors or if he identified himself to the press. The second article included the named foreman’s response to charges by other jurors that he refused to convict the defendant because he wanted to get back at the criminal justice system for “injustices he felt he had suffered over the years at the hands of authorities.” Otherwise, the only “inappropriate” behavior disclosed to the press involved discordant deliberations where jurors accused one another of bullying or yelling, or of racial or other prejudice. For example, two articles involving the O.J. Simpson criminal murder trial quoted dismissed jurors who described what they considered to be racially motivated words or actions by several unnamed black jurors and one

---

318. This category, of course, does not include articles where jurors reveal personal or private information about themselves. See, e.g., Robert L. Jackson, *Experts See Prison Time for North*, Houston Chron. A16 (May 6, 1989) (stating that named juror admitted to using cocaine up until a few months before the trial).


323. *Id.*

324. See, e.g., Steve Brewer, *Mistrial is Declared in 4th Beating Death Trial*, Houston Chron. A36 (June 12, 1999) (quoting jury foreman that during deliberations, jurors were yelling and fighting). See supra nn. 147-53 and accompanying text.

unnamed white juror. However, in none of these articles did jurors reveal personal, private or potentially embarrassing information about panelists who were identified by name.

* * *

In looking again at the eight categories of juror comments listed above, it becomes apparent that these categories are merely variations on the same overriding theme: jurors want the public to understand their decisions. Whether the case ended with a conviction or an acquittal, a gigantic damage award or a two-dollar fine, a unanimous verdict or a hung jury, most jurors quoted in these articles shared the reasons for their decisions with the public. In doing so, panelists may have revealed their preliminary votes or characterized jury room dynamics. They may have defended their decisions from perceived criticism, or explained how it happened that they made a regrettable mistake. They may have exposed their emotional reactions to their service, or expressed frustration with holdout jurors who forced an eventual compromise. In all these instances, post-verdict juror interviews provided the public with a clearer understanding of how and why a jury reached a specific result.

Along with this sense of understanding, the juror comments described above also reflect a desire for accountability, both with respect to the justice system as a whole and the jury in particular. Jurors both criticized and praised aspects of the system that they viewed first-hand, including their own performance, as well as that of trial attorneys, police investigators, and judges. Jurors reported possible incidents of jury misconduct, and sometimes attempted to "set the record straight" when other jurors or court personnel made comments or took action with which they disagreed. Jurors' desire for accountability did not necessarily end after they announced their verdicts; jurors spoke to the press to defend their decisions or to reveal their doubts many years after they were released from their service. As will be discussed below, the fact that the content of post-verdict juror interviews primarily advances public understanding and accountability refutes the belief that such interviews threaten the integrity of the jury system.

326. See Lorraine Adams, Dismissed Juror Calls Simpson Judge Unfair, Houston Chron. A1 (June 1, 1995) (reporting comments of one unnamed black juror, and noting actions of "some" unnamed black jurors); David Margolick, Ex-Juror's Remarks Hint Simpson Case Headed for Mistrial, Houston Chron. A2 (Apr. 9, 1995) (noting dismissed juror's claim that one unnamed white juror kicked or stepped on unnamed black jurors).
III. Who's Afraid of Post-Verdict Juror Interviews? Addressing the Arguments

Although most appellate courts that have considered the question allow at least limited contact between jurors and the press following a verdict, recent decisions tend to uphold judicial attempts to curb post-trial media/juror communications. Whereas some courts have struck down blanket orders prohibiting any questioning of former jurors as impermissibly broad, more narrowly tailored restrictions on post-verdict interviews are generally upheld. So, for example, the Fifth Circuit Court of Appeals in United States v. Cleveland upheld a trial judge's order that blocked reporters from asking former jurors about their deliberations without court permission, but allowed inquiries regarding "the verdict itself." The order was sufficiently narrow, the court said, because it permitted interviews dealing with former jurors' "general reactions" to the case, even though discussions about deliberations would be off-limits to the press without the court's consent.

327. See, e.g., U.S. v. Antar, 38 F.3d 1348, 1364 (3d Cir. 1994) (concluding that restrictions on post-trial juror interviews "must reflect an impending threat of jury harassment" to be permissible); U.S. v. Sherman, 581 F. 2d 1358, 1361 (9th Cir. 1978) (holding that trial court order forbidding all post-verdict contact with jurors constituted unconstitutional prior restraint).


329. See, e.g., Journal Pub. Co. v. Mechem, 801 F.2d 1233, 1236 (10th Cir. 1986) (holding that trial judge's order prohibiting all post-verdict contact between press and jurors was unconstitutionally overbroad); In re Express News, 695 F.2d 807, 810 (5th Cir. 1982) (ruling that district court rule forbidding any person from interviewing former jurors without leave of court was unconstitutional); State ex rel. Cincinnati Post v. Court of Common Pleas, 570 N.E.2d 1101, 1104 (Ohio 1991) (deciding that trial judge's order disallowing anyone from discussing the case with former jurors was impermissibly broad).

330. See, e.g., U.S. v. Antar, 38 F.3d 1348, 1364 (3d Cir. 1994) (upholding provision of trial judge's order that disallowed press from asking jurors about the votes or opinions of any other juror, stating that such a restriction is "appropriate in certain specific cases").


332. Id at 270.
Despite overbreadth concerns, some trial judges continue to impose gag orders that entirely forbid post-verdict juror interviews. For example, in *State v. Neulander*, a New Jersey trial judge ordered the press not to contact or question any jurors for an indefinite time period after a high-profile murder case ended in a hung jury. The New Jersey Supreme Court upheld most provisions of the order and even extended it to prevent jurors from initiating contact with the press themselves; however, the court ruled that the order would terminate after a second jury reached a verdict in the defendant's retrial. As a result of the U.S. Supreme Court's refusal to review the case, more trial judges can be expected to issue similar broad prohibitions on post-verdict interviews.

Courts have also tried to limit press access to juror names and addresses as a way to discourage journalists from contacting jurors after a verdict has been reached. So although the press could theoretically interview jurors regarding the verdict (although not deliberations) in *United States v. Brown*, the Fifth Circuit in that case upheld the trial judge's decision not to release identifying information regarding any juror without that juror's consent. According to the court, these limitations on post-verdict juror

333. See, e.g., Lisa Teachey, *Court Orders Alarm Media Legal Experts*, Houston Chron. A27 (Nov. 20, 2002) (reporting that a state district judge banned all post-verdict juror interviews in murder case where the defendant was accused of killing her husband by running him over with her Mercedes). In another example, a California federal judge barred a ten-member jury from discussing the Earth First civil rights case with news reporters or attorneys from either side until all appeals in the case were completed—a condition that could have taken years to fulfill. See Harriet Chiang, *Lawyers Frustrated by Gag Order Following Earth First Verdict*, S.F. Chron. June 16, 2002, at A7. The judge lifted the gag order with respect to the media twenty-two days later, after the press challenged the order as unconstitutional. See Jim Herron Zamora, *Cops, FBI Lied About Probe, Juror Says*, S.F. Chron. A17 (July 3, 2002).


335. Id. at 258.

336. Id. at 257.

337. Id. at 274. See infra nn. 426-444 and accompanying text.

338. See, e.g., *U.S. v. Doherty*, 675 F. Supp. 719, 725-26 (D. Mass. 1987) (holding that judge could postpone releasing names of anonymous jury, and forbid any post-verdict juror interviews, for seven days after verdict entered). See also Adam Liptak, *Nameless Juries are on the Rise in Crime Cases*, N.Y. Times A1 (Nov. 18, 2002) (reporting an increase in the routine use of anonymous juries in criminal cases at least in part because anonymity "prevents jurors from being badgered by reporters after their verdicts").

339. 250 F. 3d 907, 920-21 (5th Cir. 2001).

340. Id. at 918-19, 920 n. 20, (affirming trial court decision to withhold juror identities from the press after verdict to protect juror privacy and prevent harassment, while noting that post-verdict interviews would necessarily be more difficult for the press to conduct).
interviews were necessary “to prevent real threats to the administration of justice.”^341 A number of commentators, too, have decried post-verdict juror interviews as a growing trend that they fear could destroy the integrity of the American jury system.\(^\text{342}\)

Judicial and scholarly critics of post-verdict juror interviews generally rely on three arguments to support their position: first, that post-verdict juror interviews jeopardize defendants’ fair trial rights; second, that post-verdict interviews invade jurors’ privacy; and third, that post-verdict interviews distort public perception of and confidence in jury verdicts. Supporters of post-verdict juror interviews counter that post-verdict interviews enhance jury accountability, advance First Amendment interests belonging to both jurors and the press, and increase community trust in the integrity of jury verdicts by furthering public understanding of the justice system. This section of the article examines these major arguments against and in favor of post-verdict juror interviews in light of the content analysis presented in Part II above.

A. Fair Trial Implications of Post-Verdict Interviews: Do They Distort or Enhance the Deliberative Process?

One obvious way to gauge the value of post-verdict juror interviews is to examine what effect, if any, they have on the deliberative process, and ultimately, on trial outcomes. According to critics, post-verdict juror interviews threaten defendants’ fair trial rights in a number of ways. For one, it has been argued that jurors may be too afraid of community censure to vote their convictions in the jury room if they must then defend unpopular decisions in the press.\(^\text{343}\) Second, it has been suggested that in high-profile cases, media-savvy jurors might vote to ensure a dramatic final outcome, thus creating the most lucrative opportunity to market their own articles, books, or screenplays about the case.\(^\text{344}\) A third, related,

\(^{341}\) Id. at 921.

\(^{342}\) See Goldstein, supra n. 19, at 296 (stating that the traditional policies underlying secret jury deliberations are “seriously threatened” by post-verdict juror interviews); Marder, supra n. 22, at 470 (describing post-verdict juror interviews as threatening to “undermine a critical role of the jury, which is to engage in a deliberative process to reach a collective judgment as a single body”); Nunn, supra n. 20, at 410 (noting that post-verdict media interviews may “fundamentally transform the jury’s institutional character” because jurors in high-profile cases are now expected to defend their verdicts to the community through the press).

\(^{343}\) See infra nn. 348-49 and accompanying text.

\(^{344}\) See Nunn, supra n. 20, at 433 (asserting that jurors who desire to sell their stories to the press may intentionally alter their votes “for monetary or publicity-seeking reasons”).
argument states that post-verdict interviews diminish defendants' fair trial rights by stifling free debate during deliberations.\textsuperscript{345} In response, it has been suggested that post-verdict interviews may strengthen fair trial rights by encouraging jurors to act more responsibly in the jury room.\textsuperscript{346}

I. Will Post-Verdict Interviews Cause Jurors to Conform to Public Opinion?

Some commentators believe that jurors may be intimidated by the prospect of post-trial media questioning, and as a result change their votes to match public expectations.\textsuperscript{347} Particularly in criminal cases, it is feared that jurors might succumb to public pressure to convict rather than face the media spotlight generated by an unexpected acquittal.\textsuperscript{348} However, proponents of this view cite no examples where jurors actually have altered their votes in deference to community pressures because they feared being questioned by the media. In fact, in my study of eighteen years of post-verdict juror interviews published in the \textit{Houston Chronicle}, out of 696 articles where jurors spoke to the press, no juror mentioned that he or she, or any other panelist, voted differently because media attention

\textsuperscript{345} See Goldstein, supra n.19, at 307-08 (stating that a defendant's right to a fair trial is seriously threatened if the jury is not confident that deliberations will remain secret following the verdict); Marder, supra n. 22, at 473 (claiming that post-verdict juror interviews have a chilling effect on deliberations because jurors fear their comments will be revealed to the press by other panelists).

\textsuperscript{346} See Marder, supra n. 22, at 498-501 (acknowledging that post-verdict interviews could enhance juror accountability); Christine J. Iversen, Student Author, \textit{Post-Verdict Interviews: The Key to Understanding the Decision Behind the Verdict}, 30 J. Marshall L. Rev. 507, 528 (1997) (noting that instead of stifling jury room debate, post-verdict interviews may cause jurors to “take the responsibility of jury duty more seriously”); \textit{but see} Goldstein, supra n. 19, at 313 (describing argument that post-verdict interviews increase juror accountability as “the grossest of speculations”).

\textsuperscript{347} See Marder, supra n. 22, at 526 (suggesting that the prospect of post-verdict interviews may cause jurors to “give more weight to how their views will play out in the community rather than to what has transpired in the courtroom”); Nunn, supra n. 20, at 431 (contending that the public attention associated with post-verdict interviews “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”); Daniel Aaron, Student Author, \textit{The First Amendment and Post-Verdict Interviews}, 20 Colum. J.L & Soc. Probs. 203, 204 (1986) (stating that post-verdict juror interviews pose a danger that jurors will “conform to public opinion in sensational cases and not independently decide the merits of each case”).

\textsuperscript{348} See Marder, supra n. 22, at 504 (suggesting that for jurors to withstand “public pressure for convictions,” jurors need to know that their comments during deliberations will not be made public via post-verdict juror interviews); Symposium, \textit{The Appearance of Justice: Jurors, Judges and the Media Transcript}, 86 J. Crim. L. & Criminology 1096, 1102 (1996) (quoting criminal defense attorney stating that jurors know they will be subjected to media criticism if they fail to convict a criminal defendant) [hereinafter \textit{Symposium}].
surrounding the case had created an unbearable fear of community criticism.

Only nine articles in my study contained juror references to community pressure or criticism at all, and only two of those articles also mentioned the media. Explaining the jury’s decision to acquit all defendants of murder and conspiracy charges in the Branch Davidian case, a juror noted that his close friends were already asking him, “What’d you let those people off so easy for?” Although neither the opinion of his friends nor the fear of media commentary had affected his vote, the juror asked that his name not be published, saying that he wanted to avoid any additional disapproval in the press. In the other article, a juror in the O.J. Simpson criminal trial refused to provide details regarding how he arrived at his decision in the case, stating that he feared public or media ridicule. However, the juror nevertheless described the mechanics of jury deliberations to reporters and said the decision was based on the evidence and not on race. He gave no indication that fear of public or media pressure had in any way influenced his vote. Similarly, a juror who was dismissed from the O.J. Simpson criminal trial speculated in an earlier article that the remaining panelists might fear community pressure resulting from their verdict. However, the juror did not intimate that any panelist would change his or her vote to assure a popular verdict, or that fear of facing the media could exacerbate pressure on the jurors to an intolerable level.

Just one of the nine articles where jurors mentioned public opinion involved a juror who admitted changing his vote because of it. In that instance, a juror in an Arkansas murder case confessed, in a letter to the governor fourteen years after trial, that the juror had agreed to impose the death penalty for fear of being treated as a community outcast. Again, the juror did not mention media pressure as a contributing factor in his decision to go along with the majority, nor was there any indication that he or any other panelist

350. Id.
352. Id.
353. Id.
spoke to the media after trial. As anyone who has lived in a small town can appreciate, had the juror held out for life in prison, his identity would have been common knowledge regardless of whether panelists in the case had spoken with the press following the verdict.

Not only did my study fail to identify any instance where jurors identified media pressure as a factor in their verdicts, four of the nine articles where jurors mentioned public opinion indicated that while jurors were aware of possible community reaction, this knowledge did not affect their decisions. In the Reginald Denny case, for example, a female panelist told the press that the fear of rioting did not influence the jury. 356 "That was the last thing on our minds," the juror said. "If a riot occurred, it would occur." 357 And after the high-profile trial of four Los Angeles police officers accused of beating Rodney King, jurors admitted that they feared retaliation by members of the public who were angered by the verdicts. 358 Nevertheless, one juror speculated that riots would have taken place even had the panel convicted the officers. 359 "It looks to me as though the people that are involved with all the beatings and the killings and the marauding, I believe they would be incited to riot had we voted the policemen guilty," she told the Cable News Network. 360

Because solid evidence is lacking, critics take it as a given that the possibility of post-verdict media interviews will cause jurors to become so hyper-sensitive to potential community criticism that they will sacrifice their scruples to escape it. This conclusion overlooks the obvious fact that any community dissatisfaction that results following an unpopular verdict stems from the verdict itself. 361 Especially with respect to high-profile criminal trials, public interest and emotions regarding jury verdicts inevitably run high. As long as verdicts remain public information, prohibiting post-verdict interviews will do nothing

357. Id.
359. Id.
360. Id.
361. See Robert Lloyd Raskopf, A First Amendment Right of Access to a Juror’s Identity: Toward a Fuller Understanding of the Jury’s Deliberative Process, 17 Pepp. L. Rev. 357, 371 n. 105 (1990) (noting that "[i]t is . . . the verdict itself which serves as the primary focus of the public’s attention and emotions"); Markovitz, supra n. 26, at 1513 (observing that “protecting the secrecy of deliberations does not conceal how jurors ultimately vote”).
to eliminate the threat that jurors could be influenced by community sentiments.

If anything, post-verdict interviews may lessen the frequency or intensity of public outrage following an unexpected verdict because jurors who speak to the press often explain the reasoning behind their decisions. As described in Part II of this article, 556 out of 696 articles studied where jurors talked to the media following a verdict contained juror explanations of the case result (80 percent). Members of the public who are upset about a verdict may be less likely to vilify the jury if jury members are allowed to justify their decisions. In a related context, the Supreme Court ruled in Richmond Newspapers, Inc. v. Virginia that the public has a right to attend criminal trials, in part because “results alone” will not satisfy the public’s desire to understand the criminal justice system. “[W]here the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted,” Justice Burger wrote for the plurality. Similarly, post-verdict interviews may actually defuse the effects of negative public opinion by increasing public understanding of unpopular jury verdicts.

2. Will Post-Verdict Interviews Cause Jurors to Put Fame Before Justice?

Critics have also raised concerns that post-verdict interviews encourage jurors to change their votes or otherwise alter their behavior during deliberations to attract media attention or create a marketable story. This argument postulates that outcomes in high-profile cases could be affected by jurors who desire to turn the attendant media attention into a profitable book, story, or screenplay. Even if profit-seeking jurors do not change their votes

362. See, e.g., Symposium, supra n. 348, at 1144 (quoting trial consultant as describing how post-verdict interviews can increase public understanding of previously incomprehensible verdict).
363. See supra nn. 74-111 and accompanying text.
364. See infra nn. 625-29 and accompanying text.
366. Id.
367. See David A. Andersen, Democracy and the Demystification of Courts: An Essay, 14 Rev. Litg. 627, 650 (1995) (claiming that a juror “who believes that he or she will be rewarded by the media, financially or psychologically, by a particular outcome is not an impartial juror”); Nunn, supra n. 20, at 433-34 (stating reasons why post-verdict interviews may result in unfair trials).
to ensure a dramatic trial finish, it is feared that they may at least concentrate more on maximizing media interest in their jury experience than on the evidence.\textsuperscript{369} Additionally, it has been suggested that by placing jurors in the media spotlight, post-verdict interviews encourage publicity-hounds and gold-diggers to seek out jury service in high-profile trials, thus exacerbating the possible risks associated with juror journalism and destroying the jury’s representative composition.\textsuperscript{370}

It is undeniable that some jurors have written books about their jury service, or have been paid by news outlets for first-hand accounts of prominent trials.\textsuperscript{371} For example, in 1986, The New York Post and The Daily News bought juror accounts of the Bernard Goetz trial for $2,500 and “under $5,000,” respectively.\textsuperscript{372} It may also be true that post-verdict interviews make potential jurors more aware of media interest in high-profile cases. However I have found no evidence, nor do critics provide any, that a juror has ever changed the outcome of a case, disregarded probative evidence, or successfully arranged to be chosen for jury service to further his or her commercial interests.\textsuperscript{373}

\textsuperscript{369} See Nunn, supra n. 20, at 433 (asserting that post-verdict interviews might cause jurors to focus more at trial on what would interest the media, or their own celebrity status, rather than the evidence); Strauss, supra n. 23, at 399-401 (outlining argument that a profit motive might distort a juror’s perception of evidence at trial, but concluding that no evidence exists to prove that such distortion has actually occurred).

\textsuperscript{370} See Nunn, supra n. 20, at 434 (claiming that post-verdict interviews will encourage celebrity-seekers to serve on high-profile juries); Strauss, supra n. 23, at 398 (concluding that while profiteers could lie during voir dire in an attempt to be chosen for a jury, their ability to “win” a panel seat depends on many assumptions).


\textsuperscript{372} See Bids to Buy Juror’s Trial Account Pose Legal, Ethical Questions, Houston Chron. 21 (Dec. 25, 1987).

\textsuperscript{373} See Elizabeth Amon, When Jurors Decide to Write Books, Natl. L.J. A6 (July 8, 2002) (stating that there are no known cases where jurors’ publication ambitions have changed a case result); Strauss, supra n. 23, at 403 (stating that “the effect of juror profiteering on the ultimate verdict remains speculative at best; it is grounded in theoretical logic yet remains unproven . . . in any empirical sense”). Professor Strauss noted that during voir dire, a juror in the Bernard Goetz case who was considering writing an article about the case failed to give a complete answer to one of the attorney’s questions. See id. at 396. However, Professor Strauss concluded that whether the panelist’s response was an intentional ploy to ensure he would be chosen for the jury, or whether it was a subconscious omission, could not be determined. Id. at n. 41.
In my study of post-verdict interviews in the Houston Chronicle, I found only six articles that mentioned "juror journalism," all of which involved high-profile cases. Two articles involved jurors or dismissed jurors who had written books about their experiences, and the other articles contained juror references to possible plans to write books or screenplays. Naturally, none of these jurors volunteered that profit motivated their behavior in any way, but neither did their fellow jurors report that the outcomes in these cases were skewed by the presence of a juror journalist on the panel.

It cannot be assumed, of course, that a juror who writes a book or article about a case must necessarily have been a "bad" juror, or have even entertained thoughts of profiting from his or her experience during the trial. For example, following the Eric Menendez trial, juror Hazel Thornton denied in a post-verdict interview that panelists in that case were influenced by financial incentives:

There was no talk among any of the jurors in my presence of, we are going to be famous, we are going to make money, we are going to be on TV. There was none of that. Everyone took their responsibility very seriously. Nobody was out to get rich being on a high profile jury.

Ironically, Ms. Thornton later wrote a book about her experience as a Menendez juror. Her subsequent decision to write about her jury service, however, does not logically disprove her contention that the jury was unaffected by financial considerations during deliberations. In fact, out of the sixteen articles in my study where jurors revealed potential juror misconduct or failure to follow the

374. See Kenneth Jost, The Dawn of Big Bucks Juror Journalism, Legal Times 15 (July 20, 1987) (defining "juror journalism" as referring to "a variety of practices by which the juror might sell a story").


376. See, e.g., Steve Brewer, Andersen Verdict: 'I Wanted to See Andersen Win', Houston Chron. A33 (June 16, 2002) (noting that foreman was considering writing a book about the case); Julia Campbell, Hispanic Simpson Juror Says Race Not Issue, Houston Chron. A3 (Nov. 10, 1995) (containing references by O.J. Simpson juror that he had kept a diary during the trial that could be made into a book or film).

377. See Symposium, supra n. 348, at 1104.

judge’s instructions, none involved juror journalism-related incidents.\textsuperscript{379}

The only instance I found where jurors complained about the actions of a panelist who entertained literary ambitions came from the Arthur Andersen trial.\textsuperscript{380} Jurors in that case grumbled that the foreman’s desire to write a book caused him to pay too much—rather than too little—attention to the evidence.\textsuperscript{381} His voluminous note-taking and hand-drawing of exhibits, they said, may have slowed down their deliberations by three or four days.\textsuperscript{382} Apparently, the foreman’s efforts were all for naught; to date, publishers have shown little interest in his proposed book.\textsuperscript{383} Given what publishers have described as the disappointing sales history of books by jurors,\textsuperscript{384} the notion that jurors can make easy money from the sale of their memoirs in high-profile cases may well be overblown.

All this discussion overlooks the real question of whether prohibiting post-verdict juror interviews would have any affect on the potential, although unproven, risks associated with juror journalism. Because jurors have a First Amendment right to express themselves, for profit or otherwise, about their jury experiences,\textsuperscript{385} forbidding the press from conducting post-verdict interviews would not curb juror journalism in any significant way. In fact, because most mainstream press outlets do not pay jurors for their post-trial remarks,\textsuperscript{386} limiting post-verdict interviews would have the anomalous result of increasing demand for juror-authored accounts of trial experiences. Furthermore, only jurors in notorious cases can realistically expect

\begin{itemize}
  \item \textsuperscript{379} See supra nn. 220-28 and accompanying text.
  \item \textsuperscript{380} See Amon, supra n. 373. Because this article was not printed in the Houston Chronicle, it was not included in my study.
  \item \textsuperscript{381} Id. The foreman claimed, however, that he took notes to manage the large amounts of evidence in the case, not as material for a book. Id.
  \item \textsuperscript{382} See Jonathan D. Glater, Jury Member Wants to Tell All, But Publishers Aren’t Lining Up, N.Y. Times C1 (June 19, 2002).
  \item \textsuperscript{383} Id.
  \item \textsuperscript{384} Id.
  \item \textsuperscript{385} See infra nn. 547-81 and accompanying text.
  \item \textsuperscript{386} See Bids to Buy Juror’s Trial Account Pose Legal, Ethical Questions, Houston Chron. A21 (Dec. 25, 1987) (quoting several newspaper editors stating that although they might consider purchasing an article written by a juror giving a first-hand account of a trial, they would not pay solely for an interview with the juror); Bruce Selcraig, Buying News, Columbia Journalism Review <http://www.cjr.org/year/94/4/buying.asp> (July/Aug. 1994) (stating that certain jurors in the Rodney King trial would not talk to Los Angeles Times reporters because the reporters refused to pay for the interviews). At the Houston Chronicle, reporters do not pay jurors for post-verdict comments. E-mail interview from Author to Carol Christian, courthouse reporter, (June 17, 2003).
\end{itemize}
any chance to profit from their experiences. In my study of post-verdict juror interviews in the *Houston Chronicle*, however, almost 60 percent of the articles where jurors spoke to the press involved cases that I did not consider clearly high profile. Therefore, in the majority of the juror interviews studied, the risk of juror journalism could not have played a significant role in the outcome of the case.

3. Will Post-Verdict Interviews Discourage Free Debate During Jury Deliberations?

Critics of post-verdict juror interviews also contend that to ensure fair trials, we must do more than just maintain the long tradition of secret jury deliberations. The inviolability of the jury room should be extended to prohibit post-verdict juror interviews, according to this view, so that jurors can deliberate without fear of later exposure. Otherwise, shy or sensitive jurors may prefer to keep their opinions, prejudices, and feelings about a case to themselves rather than risk that another juror may reveal these confidences to the media. It is feared that post-verdict media interviews could result in future deliberations that are less spirited and not as candid, to the detriment of prospective defendants. Specifically, it has been argued that holdout jurors may prefer to go

---

387. *See*, e.g., Glater, *supra* n. 382 (stating that books by jurors are most marketable when they concern trials that involve “salacious elements”).

388. *See* *supra* nn. 62-63 and accompanying text.

389. *See* Goldstein, *supra* n. 19, at 307-08 (stating that fair trial rights are “seriously threatened when jurors expect that they will have to face the media or that their fellow jurors will talk to the media”).

390. *See* Marder, *supra* n. 22, at 500, 524 (noting that the possibility of post-verdict interviews might intimidate some jurors, or encourage biased jurors to vote according to their prejudices without first discussing their “mistaken notions” with the panel, for fear of being considered racist or sexist if their views were later repeated to the media); Nunn, *supra* n. 20, at 432 (hypothesizing that the possibility of post-verdict interviews could encourage racially prejudiced jurors to keep their intolerant views to themselves during deliberations).

391. This argument relies on the prediction that past post-verdict interviews create a future negative effect, because deliberations obviously have been completed in any case where a post-verdict interview is granted. *See*, e.g., *U.S. v. Doherty*, 675 F. Supp. 719, 724 (D. Mass. 1987) (ordering jurors’ names to be withheld from the press for seven days after verdict announced, stating that post-verdict interviews “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.”); Goldstein, *supra* n. 19, at 296-97 (asserting that post-verdict interviews teach potential jurors “that their deliberations will not be secret at all”).
along with the majority rather than be publicly criticized as the lone obstacle to justice.\textsuperscript{392}

The Fifth Circuit Court of Appeals used this fair trial rationale in \textit{United States v. Cleveland} to uphold a district judge's post-verdict order, which held that no juror could be interviewed by anyone regarding jury deliberations in a high-profile criminal racketeering case.\textsuperscript{393} The court found that the order was narrowly tailored to address what it called "a substantial threat to the administration of justice—namely, the threat presented to freedom of speech within the jury room by the possibility of post-verdict interviews."\textsuperscript{394} The court cited no evidence to support its view that post-verdict juror interviews regarding jury deliberations could compromise the integrity of those deliberations, but offered a quote from Justice Cardozo's statement in \textit{Clark v. United States} that "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."\textsuperscript{395}

Critics of post-verdict juror interviews rely on Justice Cardozo's quote or other conclusory statements quite frequently to advance the fair-trial rationale,\textsuperscript{396} no doubt because more substantial evidence to support these arguments is lacking.\textsuperscript{397} For example, in \textit{United States v. Harrelson}, the Fifth Circuit repeated the above-quoted line from Justice Cardozo to uphold a district court order forbidding any interviewer to ask a juror about the specific votes of other jurors. Similarly, in \textit{United States v. Brown}, the Fifth Circuit justified a district court order that prevented interviewers from asking jurors

\textsuperscript{392} Marder, \textit{supra} n. 22, at 500 (suggesting that holdout jurors may prefer to give in to the majority rather than be revealed as the hold-out through post-verdict interviews).

\textsuperscript{393} \textit{Cleveland}, 128 F. 3d 267, 270 (5th Cir. 1997), \textit{cert. denied sub nom In Re Capital City Press}, 523 U.S. 1075 (1998).

\textsuperscript{394} \textit{Id.} at 269.

\textsuperscript{395} \textit{Id.} at 270 (citing \textit{Clark v. U.S.}, 289 U.S. 1, 13 (1933)).

\textsuperscript{396} See, e.g., \textit{U.S. v. Thomas}, 116 F.3d 606, 619 (2d Cir. 1997) (citing Justice Cardozo's comment to bolster claim that that "the mere suggestion that the views of jurors may be conveyed to the parties and the public, even after the trial is over, understandably may... distort the process by which a verdict is reached"); Goldstein, \textit{supra} n. 19, at 325 (concluding, after quoting Justice Cardozo, that the secrecy of jury deliberations and the integrity of jury verdicts are "seriously threatened by interviewing jurors after a trial"); Nunn, \textit{supra} n. 20, at 431 (citing Justice Cardozo's quote to support the proposition that "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").

\textsuperscript{397} See, e.g., \textit{The Great Debate}, \textit{supra} n. 368, at 349 (quoting comments supporting observation that critics have offered no evidence to indicate that post-verdict interviews chill jury deliberations).
about their deliberations because "compelling governmental interests in the integrity of jury deliberations require that the privacy of such deliberations and communications dealing with them be preserved." In neither case did the court provide any data or examples to support its underlying assumption that post-verdict interviews interfere with the frankness or vigor of jury deliberations.

Given the rest of the Clark opinion, reliance on Justice Cardozo's quote to justify prohibiting post-verdict juror interviews appears misplaced. Clark involved a criminal contempt proceeding against a juror who had deliberately lied about her employment history to gain a place on the jury panel. The Court held that in such circumstances, remarks made by the juror during deliberations were admissible as evidence of juror misconduct. Justice Cardozo's statement about the importance of confidential jury deliberations was merely the set-up to the punch line: although deliberative secrecy is an important jury characteristic, it is not absolute and should not be used as an excuse to shield juror misconduct from public scrutiny. According to Justice Cardozo, jurors of "integrity and reasonable firmness" will not need assurances of complete confidentiality to speak their minds in the jury room, and guarding against juror misconduct outweighs any need to shelter reticent jurors who might fear disclosure of their deliberations. Accordingly, he concluded:

The chance that now and then there may be found some timid soul who will take counsel of his fears and give way to their repressive power is too remote and shadowy to shape the course of justice. It must yield to the overmastering need, so vital in our polity, of preserving trial by jury in its purity against the inroads of corruption.

In her research, Professor Marder opined that examining the content of post-verdict interviews would probably not be helpful in determining whether such interviews actually inhibit open debate during deliberations. Certainly, empirical studies regarding the deliberative effects of post-verdict interviews—could they be devised and implemented—would yield the most conclusive data on the

399. For a similar reading of Clark, see Markovitz, supra n. 26, at 1511-12.
401. Id. at 13-14.
402. Id.
403. Id. at 16.
404. Id.
405. Marder, supra n. 22, at 501.
question. In fact, in 1996, a fifteen-member panel of Connecticut judges, lawyers, and media representatives studied the question for six months, and concluded that post-verdict juror interviewing “does not cast a shadow on the jury deliberation process in Connecticut.” However, in the absence of similar studies and after reading 696 articles that included post-verdict juror comments, I believe a content-analysis of what jurors tell the press is also quite revealing on this point.

Logic dictates that for post-verdict interviews to stifle jury room debate, interviewed jurors must expose highly personal, unflattering, or embarrassing comments made by other panelists, or must reveal statements that would subject other panelists to discomfiture, ridicule or derision, on a relatively regular basis. Those talkative panelists must also sufficiently identify the jurors who are the subjects of these disturbing statements, so as to create a reasonable fear in other jurors of similar treatment in the press. Furthermore, to create a “chilling effect” in the jury room, jurors who reveal the votes of other panelists, or discuss panel holdouts, in post-verdict interviews must also somehow distinguish to whom they are referring.

My review of juror interviews published by the Houston Chronicle found little evidence that jurors who talk to reporters do any of these things. As discussed in Part II of this Article, out of 696 articles where jurors consented to be interviewed following a verdict, I found only five articles where a juror disclosed potentially embarrassing or inappropriate information about another panelist. In only two of these five articles were panelists named, and in one of those articles it was clear that the panelist had identified herself to the press.

In fact, interviewees very rarely disclosed the opinions or statements of other, named jurors at all. In eighteen years’ worth of interviews, jurors disclosed remarks, opinions, or votes of other, named panelists in thirteen out of 696 articles (2 percent). More than half of these disclosures involved allegations of juror misconduct—the very situation where Justice Cardozo in Clark stated that absolute confidentiality of juror deliberations should yield to assure the proper administration of justice. Reasonable jurors will not be afraid to

406. See Paul Frisman, The Verdict on Post-Verdict Interviews, Conn. L. Trib. 3 (July 22, 1996).
407. See supra nn. 318-20 and accompanying text.
408. See supra nn. 321-26 and accompanying text.
409. See supra nn. 309-13 and accompanying text.
410. See supra nn. 401-06 and accompanying text.
deliberate freely, I suggest, just because a panelist in a previous case stated that “one juror thought we should acquit the defendant” without giving significant clues as to who that one juror might be.

Much more typically, jurors mentioned the opinions or votes of other panelists in post-verdict interviews by making comprehensive “we” statements explaining the case result.\(^{411}\) For example, in a civil conspiracy case against PTL founder Jim Bakker, the jury forewoman stated that although the panelists believed that Bakker defrauded his former contributors, “we didn’t feel he was a racketeer.”\(^{412}\) Similarly, after a trial in which a businessman was acquitted of murdering a co-worker by pushing her off a hotel balcony, a juror stated that “we believe it was a tragic accident.”\(^{413}\) As noted in Part II,\(^{414}\) when discussing views not held by the entire jury, jurors interviewed by the press almost always referred to the views of “some” jurors rather than singling out particular individuals, regardless of whether or not the interviewee was part of the referenced group.\(^{415}\) For example, in a child custody case where the jury deadlocked seven-to-five, a juror explained that the father’s religious beliefs were crucial to the majority’s decision, whereas the minority group of jurors felt it was unconstitutional to take a child away from his father for religious reasons.\(^{416}\) The juror did not indicate, or at least the reporter did not include in the story, to which group the juror belonged.\(^{417}\) Moreover, in a murder case involving the death of a Houston police officer, the jury foreman explained after the punishment phase that the jury deadlocked regarding the sentence because five unnamed panelists believed that the defendant was too immature to be executed for the crime.\(^{418}\) The foreman indicated that he was personally disappointed with and ashamed of the result in the case. Nevertheless, neither he

\(^{411}\) See supra nn. 300-01 and accompanying text.  
\(^{413}\) Tom Harrigan, Baytown Man Acquitted of Calif. Murder Charges, Houston Chron. A35 (Nov. 6, 2002).  
\(^{414}\) See supra nn. 302-05 and accompanying text.  
\(^{415}\) See, e.g., Ron Nissimov, Arson Investigator Awarded $920,000, Houston Chron. A25 (Aug. 18, 1999) (reporting that named panelist and several other, unnamed, jurors believed “there was wrongdoing” by the defendants).  
\(^{417}\) Id.  
nor the reporter named the five panelists who had stood firm against the death penalty.\footnote{419}

Likewise, the argument that holdout jurors will prefer to vote with the majority rather than be exposed through post-verdict interviews assumes that press-friendly panelists actually name holdouts with some regularity, and that reporters include that information in their stories.\footnote{420} As I mentioned in Part II of this Article, however, my review of post-verdict interviews in the \textit{Houston Chronicle} found few instances where this has occurred. Whereas holdout jurors identified themselves to the press in fifty-one articles, other jurors clearly named holdouts to the media in only five articles during the same eighteen-year period.\footnote{421} In one additional article, two jurors identified the lone holdout as the jury foreman, but the foreman’s name was not revealed.\footnote{422} Nor did jurors often refer to holdout panelists by identifying characteristics other than their names. In fact, the only article I found where a holdout juror was identified by gender, race, and occupation listed “trial sources,” not other panelists, as the informant.\footnote{423}

It is hard to believe that a juror’s bare listing of the panel’s interim vote—with no names or identifying data attached—in a post-verdict interview would jeopardize the fair trial rights of the parties or have an inhibiting effect on current or future panelists.\footnote{424} Whenever a jury deliberates for any length of time, surely the public already assumes that the panelists were not in full agreement about the case. If anything, a juror who reveals an interim vote assures the public that the panel did indeed engage in at least some serious discussion before reaching its ultimate verdict.

\footnote{419. \textit{Id.}}
\footnote{420. Both reportorial and editorial discretion also play a role in how often holdout jurors are identified in the press. Although the \textit{Houston Chronicle} has no official policy on this point, in practice, the paper would be unlikely to print the names of holdout jurors unless they identified themselves as such to the reporter. E-mail interview with Carol Christian, courthouse reporter, Houston Chronicle (Nov. 14, 2003).}
\footnote{421. \textit{See supra} nn. 143-45 and accompanying text. In one of these five articles, it was impossible to determine whether the holdout juror or another panelist actually named the holdout to the press. \textit{See Cosby Killer Receives Life Sentence}, Houston Chron. A11 (Aug. 12, 1998).}
\footnote{422. John Makeig, \textit{Some Jurors Support 4th Simms Trial—At Any Cost}, Houston Chron. A25 (Sept. 28, 1995) (quoting two named panelists as describing lone hold-out as the jury foreman).}
\footnote{423. Roy Bragg & Ross Ramsey, \textit{Cop Killer’s Attorney Predicts a Reversal}, Houston Chron. A20 (July 15, 1993) (citing “trial sources” to characterize one of two holdout jurors as “the panel’s only black member, a retired male military officer”).}
\footnote{424. \textit{But see Marder, supra} n. 22, at 500 (stating that reporting of interim votes to the public “may be harmful to both jurors and parties to the suit”).}
In a troubling new twist on the fair trial argument, the New Jersey Supreme Court in *State v. Neulander* recently upheld a gag order prohibiting juror/media contact following a murder mistrial until a verdict in the retrial; a decision that the U.S. Supreme Court unfortunately elected not to review. In that case, the trial court had ordered media representatives to refrain from contacting or interviewing jurors prior to the entry of a verdict in the case. After the original jury deadlocked, the trial court kept the order in effect indefinitely, claiming that post-verdict interviews might chill jury deliberations at retrial, and might taint the retrial jury pool. On appeal, the New Jersey Supreme Court recognized that insufficient evidence existed to prohibit post-verdict juror interviews on either of these grounds. The state high court called the argument that media interviews inhibit jury room speech “too speculative a basis on which to justify restricting the media’s right of access to consenting jurors.” The court also said it doubted that post-verdict interviews would appreciably interfere with the defendant’s ability to select an impartial jury on retrial.

Nevertheless, the court not only upheld the trial court’s order preventing the press from contacting jurors, but also extended the order to prohibit members of the deadlocked jury from voluntarily contacting the media themselves to be effective until a verdict was reached in a second trial. The court justified its holding on the basis that juror interviews might provide prosecutors with a “significant advantage” in the defendant’s retrial. According to the court, post-verdict interviews were likely to focus on the jurors’ observations regarding the evidence, particularly the strengths and weaknesses of the state’s case. By reading juror interviews, the court said, prosecutors might gain otherwise unavailable insights to help them readjust their trial strategies. While admitting that it had no way to know whether this was a probable, or even possible, result of post-verdict interviews, the court noted that it had to be “extremely

---

426. *Id.* at 258.
427. *Id.* at 258-59.
428. *Id.* at 272.
429. *Id.*
430. *Id.*
431. *Id.* at 257.
432. *Id.* at 272.
433. *Id.*
434. *Id.* at 272-73.
cautious concerning juror interviews” in death penalty cases. “In our view...,” the court concluded, “the risk that such disclosures could provide the prosecution with an undue advantage in the retrial proceeding is sufficiently substantial to persuade us that the safer course is to disallow the interviews despite the attendant limitation on the media’s First Amendment rights.”

Ironically, although the Neulander court rejected the trial court’s original rationale for the gag order as unsupported by evidence, the court’s new justification for upholding and extending the order was every bit as speculative. The court tried to buttress its conclusion by citing Professor Marder’s research finding that “when jurors consent to media interviews ‘the largest percentage (32 percent) of comments pertained to the evidentiary basis for the jury’s decision.” This enabled the court to “reasonably... infer” that juror interviews would lead to prosecutorial epiphanies that would put the defendant’s fair trial rights at risk. The court either failed to realize or ignored the possibility that if post-verdict media interviews could provide the prosecution with a hitherto unknown perspective regarding its case, these same interviews might also reveal significant new strategies for the defense. Therefore, if the “new insight” theory is to be believed, it could be argued that the order prohibiting post-verdict interviews violated the defendant’s Sixth Amendment rights by improperly withholding juror revelations from the defense—certainly an important consideration of fairness in a capital case.

Furthermore, the odds that post-verdict juror interviews could provide valuable knowledge about the case to either the prosecution or the defense seem exceptionally slim, especially considering that the trial had been televised in its entirety by Court TV. As pointed out in a forceful dissent by Judge Long, scholarly commentary and press analysis of the strengths and weaknesses of the case were available to both the prosecution and the defense in daily news reports and on Internet websites. Thus, Judge Long correctly recognized that “it is extremely unlikely that any comments made by former jurors would

435. Id. at 272.
436. Id. at 272-73.
437. Id. at 272 (citing Marder, supra n. 22, at 479).
438. Id.
439. Although the court mentions that juror interviews could affect the retrial strategies of both “the prosecution and defense,” it places significance only on the potential risk that such interviews could provide an “undue advantage” to the prosecution. Id. at 272.
440. Id. at 257.
441. Id. at 277 (Long, J., dissenting).
give even a crumb of new insight to a moderately competent prosecutorial team."\textsuperscript{442}

As described in Part II below, my study of juror interviews in the Houston Chronicle uncovered seventy-seven articles that involved mistrials out of 696 articles where jurors talked to the press (11 percent).\textsuperscript{443} The great majority of those articles—sixty-seven (86 percent)—concerned criminal cases; only ten articles involved civil cases. Most commonly, juror comments sought to explain why the jury deadlocked (57 out of 77 articles, or 74 percent), and jurors in one-half of those articles (39 out of 77) identified evidence that factored into their views of the case or the resulting deadlock. In reviewing these thirty-nine articles, I found that the jurors’ evidentiary statements were generally just as likely to help the defense as the prosecution on retrial. For example, in a murder trial involving a woman accused of shaking her baby goddaughter to death, one of the two holdout jurors said she voted to acquit because the defendant’s mother appeared and stood by her in court.\textsuperscript{444} If the defendant is tried again, I expect that defense counsel will be sure that the defendant’s mother again shows her support in front of the jury. However, obviously there is no guarantee that family support—or any other factor identified by a previous panel—will be a significant consideration for a new jury on retrial.

I discovered only one article where a post-verdict juror comment arguably may have made a difference in the prosecution’s trial tactics. In that case, the defendant was charged with choking and raping a woman in the cargo area of a Jeep.\textsuperscript{445} During the first trial, the victim testified that the defendant kept one hand on her throat during the attack, even while he reached around her to lower the Jeep’s rear seat.\textsuperscript{446} Following the trial, several jurors said they could not understand how the defendant could lower the seat with only one hand.\textsuperscript{447} In the retrial, however, the victim testified that the defendant took his hand off her throat long enough to lower the seat with both hands.\textsuperscript{448} Even in this instance, however, it cannot be assumed that the

\textsuperscript{442} Id.
\textsuperscript{443} See supra nn. 92-95 and accompanying text.
\textsuperscript{444} Bill Murphy & Claudia Feldman, When Jurors Can’t Agree, Houston Chron. A29 (June 13, 2002).
\textsuperscript{445} Associated Press, Fugitive Convicted of Rape After 8 Years Skiing at Parents’ Expense, Houston Chron. A10 (June 13, 1997).
\textsuperscript{446} Id.
\textsuperscript{447} Id.
\textsuperscript{448} Id.
post-verdict interview alerted the prosecution to the apparent inconsistency in the victim's testimony. Any capable defense counsel would have emphasized the logistical problem presented by the victim's original version of events to the jury in open court, assuring that the prosecution would be fully aware of the resulting weakness in its case without having to rely on post-verdict juror interviews.

4 Do Post-Verdict Interviews Encourage Accountability?

Social scientists have defined accountability as "the implicit or explicit expectation that one may be called on to justify one's beliefs, feelings, and actions to others." In our justice system, jurors traditionally have not been held accountable in this way to the public. After deliberating in secret, jurors announce their decisions with no words of explanation. This characteristic inscrutability has been both lauded and criticized. In early common law tradition, the mysterious nature of jury verdicts comported with the belief that they were divinely inspired; therefore, to suggest that jurors be required to justify their decisions would have bordered on sacrilege. Today, some scholars insist that to function properly, jurors must remain independent and free from public oversight; others have noted widespread concerns regarding this lack of accountability. As expressed by one commentator, "If mystery is all that jury verdicts have going for them, the jury system is surely in deep trouble."

Jurors, of course, are not elected officials and cannot be held accountable to society in the same way that an errant lawmaker can be removed from office. As Professor King has noted, "jury verdicts are not subject to voter review." However, "softer" measures of


450. Although deliberating jurors argue their positions with each other in the jury room, it has been disputed whether this limited form of accountability to each other is sufficient to ensure well-reasoned decisions that inspire public confidence. See John D. Jackson, Making Juries Accountable, 50 Am. J. Comp. L. 477, 482 (2002).

451. See Markovitz, supra n. 26, at 1505.

452. See King, supra n. 38, at 140-41 (arguing that jurors should be insulated from public pressures because "[p]romoting community control or influence over jurors would be as foreign to our jury system as holding individual voters accountable for their votes would be to our democracy").

453. See, e.g., Jackson, supra n. 450, at 486 (noting concerns about jury accountability expressed in both the United States and Europe); Clifford Holt Ruprecht, Comment, Are Verdicts, Too, Like Sausages?: Lifting the Cloak of Jury Secrecy, 146 U. Pa. L. Rev. 217, 219 (1997) (stating that current jury practices do not "properly balance the pragmatic tolerance of imperfection and the public's demand for accountability").

454. Adler, supra n. 14, at 206.

455. King, supra n. 38, at 141.
achieving accountability, such as requiring jurors to provide explanations when they convict a criminal defendant, have been suggested as a way to improve the quality of jury verdicts and make the justice system more transparent to the community.\textsuperscript{456} These suggestions are premised on the belief that jurors who know they will have to justify their decisions to the public will engage in more thoughtful deliberations to ensure a defensible verdict.\textsuperscript{457}

Indeed, social science research supports this claim, at least to a point. When decisionmakers know they must justify their choice to an audience, and the views of that audience are unknown, researchers have found that decision-makers are more likely to engage in what is termed “preemptive self-criticism.”\textsuperscript{458} In other words, under those circumstances, decision-makers are more likely to think in complex, self-critical ways and consider different perspectives as a way to anticipate reasonable objections to their position. However, accountability does not appear to improve the sophistication of people’s judgments if the task itself is too complex for those people to carry out.\textsuperscript{459} As explained in one study, “If the only tool at a person’s disposal is a hammer, convincing the person to work harder can only lead to more vigorous hammering.”\textsuperscript{460}

Assuming that most jurors have the mental capacity to decide the cases for which they are chosen,\textsuperscript{461} some basis exists to believe that post-verdict juror interviews can promote accountability in the judicial process. Certainly many commentators have also drawn the same conclusion.\textsuperscript{462} Mindful that reporters might ask them for post-trial explanations, it has been suggested that jurors will respond by paying more careful attention than they otherwise would to the

\textsuperscript{456} See Jackson, supra n. 450, at 483, 522.
\textsuperscript{458} Lerner & Tetlock, supra n. 449, at 255.
\textsuperscript{460} The researchers explain that “when people’s cognitive resources are heavily taxed, their attempts to make especially accurate judgments may backfire.” Id. at 590.
\textsuperscript{461} Obviously, this assumption forms the basis of our jury system.
\textsuperscript{462} See, e.g., The Great Debate, supra n. 368, at 339 (quoting Judge Kenneth Starr stating that jurors’ ability to speak about their deliberations following a verdict “promotes a reasonable and responsible exercise of power”).
evidence and arguments. As a result, some jurors may take their
jury service more seriously, which should promote more reasoned
judgments—what Professor Jackson has termed “cognitive
accountability.” Because no juror can be forced to answer reporters’
questions, post-verdict interviews create this public accountability
without undue interference with juror independence. Requiring jury
members to draft a jury opinion or issue a statement explaining their
reasoning after a verdict would be both substantively and
administratively more difficult to implement.

Post-verdict juror interviews may serve not only to improve the
substantive quality of jurors’ decisions, but also to advance what has
been called “due process accountability,” by ensuring that jurors
follow proper procedures in reaching a verdict. Although judges can
remove jurors who engage in misconduct, jury room secrecy makes
it difficult for judges to discover instances of rule breaking, and
procedural rules limit judges’ abilities to make post-verdict inquiries
regarding jurors’ deliberations. Post-verdict juror interviews can
alert citizens that if they act inappropriately during jury service, such
misbehavior may well come to public attention even if it escapes
judicial notice.

463. See, e.g., Marder, supra n. 22, at 498-99 (acknowledging that post-verdict
interviews may encourage jurors to be more responsible in the jury room); Strauss, supra
n. 23, at 404 (asserting that “a juror who knows or suspects that the jury deliberations
may become public will be more conscientious, thoughtful, and challenging of others”).
464. Jackson, supra n. 450, at 488 (describing cognitive accountability as the disclosure
of thought processes and reasons resulting in a decision).
465. See id. at 521 (acknowledging that getting twelve persons to agree as to the
reasons for their verdict may “prove very difficult”); Akhil Reed Amar, Reinventing
employ “jury clerks” to help jurors compose statements justifying their decisions).
466. Jackson, supra n. 450, at 488.
467. See, e.g., Fed. R. Crim. P. 23(b) (allowing judge to dismiss a juror “for just
cause”).
468. For example, Federal Rule of Evidence 606(b) provides as follows:

Upon 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 deliberations or
to the effect of anything upon that or any other juror’s mind or emotions as
influencing the juror to assent to or dissent from the verdict or indictment or
concerning the juror’s mental processes in connection therewith, except that a
juror may testify on the question whether extraneous prejudicial information was
improperly brought to the jury’s attention or whether any outside influence was
improperly brought to bear upon any juror.

Fed. R. Evid. 606(b).
My *Houston Chronicle* study also revealed that post-verdict interviews can expose, and thereby discourage, misconduct by trial participants other than jurors. For example, after the trial of a garbage collector on public lewdness charges resulted in a hung jury, the foreman complained to reporters that the judge had been too preoccupied reading an issue of *Penthouse* magazine on the bench to pay attention to the proceeding.469 According to the foreman, the judge “was taking calls, reading things and talking to people, and the attorneys had to keep repeating their objections.”470 The jurors’ remarks inspired an editorial two days later, castigating the judge for behavior that most likely would not have been revealed to the citizens who elected him had a juror not spoken to the press.471

**B. Juror Implications of Post-Verdict Interviews: Do They Violate Privacy or Advance Free Speech?**

Some critics of post-verdict juror interviews contend that such interviews unjustifiably intrude upon panelists’ privacy rights by exposing jurors to invasive and unwanted questioning.472 Especially in high-profile cases, members of the press may contact jurors repeatedly for interviews, possibly to the point of harassment.473 As a result, potential jurors may be discouraged from jury service for fear that their privacy, too, will be disregarded by the press.474 The flip side of this argument posits that jurors have a First Amendment right to speak about their experiences after a verdict is delivered,475 and the


470. *Id.*


473. See, e.g., *id.* (stating that in high-profile cases, reporters “spare no effort in contacting members of the jury”).

474. See, e.g., King, *supra* n. 38, at 129-30 (asserting that privacy concerns resulting from media coverage may discourage prospective jurors from jury service); Note, *Public Disclosures of Jury Deliberations*, 96 Harv. L. Rev. 886, 889 (1983) [hereinafter *Public Disclosures*] (stating that “failure to shield current jurors from unwanted scrutiny will cause other citizens to shun jury duty in the future”).

475. See, e.g., *In re Express-News Corp.*, 695 F.2d 807, 810 (5th Cir. 1982) (noting that “a]bsent good cause for restraint, petit jurors are free to discuss their service if they choose to do so”); Marder, *supra* n. 22, at 519 (stating that post-verdict juror interviews constitute “speech that the First Amendment is designed to protect because it is speech that could be described as necessary for self government”).
press has a First Amendment right to report what jurors elect to say.476 While recognizing that jurors should not be exposed to post-trial harassment, proponents of this view argue that jurors have the right to decide for themselves whether to talk to the press.477

1. Do Post-Verdict Interviews Unreasonably Intrude on Juror Privacy?

Although the Supreme Court has never considered juror privacy rights in connection with post-verdict interviews, it has addressed juror privacy in the context of public access to voir dire proceedings. In Press Enterprise Co. v. Superior Court,478 the Court rejected the argument that jurors have an absolute constitutional right to avoid public disclosure of their answers on voir dire.479 Applying an access analysis, the Court recognized that in some circumstances, juror privacy could rise to the level of a compelling interest that could outweigh the qualified presumption of openness attached to voir dire proceedings.480 For example, the Court agreed that prospective jurors could have a valid interest in not wanting to disclose "deeply personal matters" that they have "legitimate reasons for keeping out of the public domain."481 Even in this event, however, the Court emphasized that jurors' privacy interests must be balanced against the need for open trial proceedings, which ensures fairness and encourages public confidence in the jury system.482 The trial judge's order in Press Enterprise violated the First Amendment, according to the Court, because it was based on general concerns for juror privacy that were unsupported by specific findings.483 Furthermore, the trial judge failed to consider less restrictive alternatives, such as sealing only a portion of the transcript or withholding a juror's name, before resorting to full closure of the proceeding.484

476. The Supreme Court has repeatedly held that the First Amendment protects publication of truthful information that is lawfully obtained, absent a "need... of the highest order." Smith v. Daily Mail Publishing Co., 443 U.S. 97, 103 (1979). See infra nn. 585-87 and accompanying text.
477. See, e.g., Raskopf, supra n. 361, at 376-77 (concluding that the press has a limited First Amendment right to juror names and addresses to facilitate post-verdict interviews, despite privacy concerns).
479. Id. at 510.
480. Id. at 511.
481. Id.
482. Id. at 512.
483. Id. at 513.
484. Id.
Under the rationale announced in *Press Enterprise*, if prospective jurors have no absolute privacy right permitting judges to close or seal panelists’ answers to voir dire questioning, neither should judges be allowed to issue blanket prohibitions on post-verdict media interviews based on a mere recital of jurors’ privacy interests.\(^{485}\) If anything, privacy concerns are stronger in the voir dire context, where jurors are generally required by law to answer most, if not all, questions,\(^{486}\) than in the post-verdict interview context, where jurors are free to respond or not as they see fit. Obviously, jurors can protect their privacy from media intrusion after trial by refusing to discuss certain topics or by declining to submit to interviews at all.\(^{487}\) No juror can be forced either to speak with the press or to answer every question posed by the media, and many judges explain this to jurors before discharging them.\(^{488}\) My study of juror interviews published by the *Houston Chronicle* confirms that many jurors know how to say “no” to the press. Out of 761 articles where jurors were contacted by the media following a verdict, jurors declined to

---

\(^{485}\) This assumes, of course, that restrictions on post-verdict interviews of former jurors present a question of access governed by *Press Enterprise*, rather than a problem of prior restraint to which an even more stringent strict scrutiny test would apply. At least one commentator has argued that orders limiting the media’s ability to interview jurors should be treated as access limitations. See Aaron, *supra* n. 347, at 214-15. Although I believe that after jurors have completed their service, the constitutionality of forbidding juror interviews is no longer properly treated as an access problem, the bottom line remains the same. Blanket or overbroad prohibitions on post-verdict interviews that do not survive the *Press Enterprise* test necessarily will also fail the strict scrutiny test. See *infra* nn. 682-87 and accompanying text.

\(^{486}\) A few courts have limited permissible voir dire questioning on the grounds that irrelevant questions constitute an unwarranted encroachment of juror privacy. See, e.g., *U.S. v. Barnes*, 604 F.2d 121, 143 (2d Cir. 1979) (upholding trial court’s refusal to inquire into prospective jurors’ religious or ethnic backgrounds on privacy grounds); *Brandborg v. Lucas*, 891 F. Supp. 352, 360 (E.D. Tex. 1995) (overturning contempt conviction of venire member who refused to answer eleven of 110 questions on juror questionnaire, stating that state trial court should have considered juror privacy in its decision). However, one commentator has noted that despite these decisions, “courts continue to permit open-ended voir dire questions of marginal relevance.” See Weinstein, *supra* n. 472, at 19.

\(^{487}\) See, e.g., *In re Globe Newspaper v. Hurley*, 920 F. 2d 88, 97 (1st Cir. 1990) (noting that jurors may avoid many privacy problems “by flatly refusing press interviews when approached”).

\(^{488}\) See, e.g., *U.S. v. Antar*, 38 F.3d 1348, 1355 (3d Cir. 1994) (describing judge’s instruction that jurors were not obliged, nor could be compelled, to grant post-verdict interviews as “consistent with the routine instructions customarily given to jurors in the federal court system”); *Globe Newspaper, supra* n. 487, at 93 (noting that trial judges customarily advise jurors that they are “free to refuse to disclose what went on in the jury room”); Frisman, *supra* n. 406, at 3 (reporting that most judges in Connecticut tell jurors they are free to grant or withhold post-verdict interviews); but see Marder, *supra* n. 22, at 546 (stating that most judges give jurors no guidance regarding how to deal with the press).
comment, at least initially, in approximately 9 percent of those articles. If anything, this number is probably artificially low because reporters may not always choose to report the fact that they received a “no comment” from jury members following a trial.

Juror privacy interests also appear to be stronger in the voir dire rather than the post-verdict interview context because voir dire questioning is more likely to disclose private information about jurors, including their personal characteristics and beliefs. According to Professor King, during voir dire, jurors may be forced to reveal “intimate, embarrassing, or damning information about themselves and their families that they would not voluntarily choose to reveal.” Post-verdict questioning by the media, on the other hand, tends to focus more on jurors’ reasons for their verdict. As described in Part II of this Article, I found that jurors most often spoke to the media to clarify the case result, not to discuss their personal attributes or those of fellow panelists.

My research also reflected that many jurors do not object to answering at least some questions posed by reporters. In 91 percent of the articles included in my study (696 out of 761), at least one panelist spoke to the press. In fact, numerous jurors respond to the media quite willingly. For example, when journalist Stephen J. Adler interviewed jurors, lawyers, and judges for a book about the jury system, he found to his surprise that most participated enthusiastically. He reported that jurors invited him into their homes, sat through numerous interviews, and gave him access to their

489. See supra nn. 58-60 and accompanying text.
490. See, e.g., Bellas v. Super. Ct. of Alameda County, 85 Cal. App. 4th 380, 391 (1st Dist. 2000) (noting that voir dire often “compels jurors to recall their darkest moments, which they may have struggled for years to forget, and then be required to recount them in public”); Karen Monsen, Privacy for Prospective Jurors at What Price? Distinguishing Privacy Rights from Privacy Interests; Rethinking Procedures to Protect Privacy in Civil and Criminal Cases, 21 Rev. Litig. 285, 286 (2002) (stating that during the jury selection process, prospective jurors “must submit personal information about themselves, which sometimes includes completing lengthy questionnaires”); Weinstein, supra n. 472, at 3 (noting that the prevalent use of jury consultants has resulted in “a more extensive and invasive voir dire”).
491. King, supra n. 38, at 124.
492. At least, these are the questions that jurors tend to answer.
493. See supra nn. 74-111 and accompanying text.
494. See supra n. 58 and accompanying text.
495. See, e.g., U.S. v. Sherman, 581 F.2d 1358, 1361 (9th Cir. 1978) (maintaining that individual jurors may not “regard media interviews as harassing”); Iversen, supra n. 346, at 527 (stating that “[s]ome jurors even enjoy the media’s attention”).
496. Adler, supra n. 14, at vii.
EXAMINING THE EVIDENCE

diaries and notes regarding deliberations. All but two of the jurors he interviewed agreed to be identified in the book by their real names. Adler attributed this display of cooperation to the jurors' desire to “contribute to public understanding of what they had just been through.” Not only do many panelists speak freely to the press when asked, sometimes jurors themselves initiate contact with the press. My study of juror interviews in the Houston Chronicle found twelve instances where jurors telephoned reporters or wrote letters or essays for publication to share thoughts, feelings, or concerns about their jury service with the public.

It has been asserted, however, that jurors really do not have control over their dealings with the press because the media may refuse to take “no” for an answer. In her content analysis of juror interviews, Professor Marder reported that at least 25 percent of the jurors interviewed in the fifty-two articles she reviewed “believed they could not avoid the press.” To prove her point, Professor Marder cited examples from high-profile cases where jurors fled their homes, called the authorities, or otherwise complained about media hounding. My study, however, did not yield comparable results: Out of the 696 articles where jurors spoke with the press, I found only seven (1 percent) where jurors objected, or even referred, to being under intense media scrutiny. A possible explanation of this discrepancy may be that Professor Marder chose articles involving

497. Id.
498. Id. at ix.
499. Id. at vii.
500. See, e.g., Steve Brewer, Having Second Thoughts, Houston Chron. A1 (Mar. 11, 2000) (reporting that two jurors contacted newspaper to express regrets regarding sentencing); John C. Stansbury, Viewpoints: Juror's Ideals Gone Now, Houston Chron. (Outlook) 3 (Aug. 4, 1996) (juror's letter to editor regarding jury service). Also included in this number is a review of a book written by a juror in the Pennzoil-Texaco civil case. See George Christian, A View From the Jury Box, Houston Chron. (Zest) 20 (July 24, 1988).
501. Marder, supra n. 22, at 505 (stating that “jurors sometimes feel compelled to talk to the press about their jury experience”).
502. Id.
503. Id. at 488-89.
504. See, e.g., New Yorkers Protest Cops' Acquittals, Houston Chron. A10 (Feb. 27, 2000) (quoting juror's statement that post-verdict media pressure after Amadou Diallo trial was “hell”); Whether Helmsley Gets Prison Uncertain, Houston Chron. A7 (Aug. 31, 1989) (noting that juror who went on ABC's Nightline called media hoopla surrounding the trial “sickening”). This number also includes an article where a woman with the same name as a juror in a high-profile criminal case pretended to be a juror and spoke to the press. See Associated Press, Woman Now Says She Was Never a Whitewater Juror, Houston Chron. A6 (June 3, 1996). When her deception was discovered, she explained that she gave the interview because she was tired of being called by reporters. Id.
Only high-profile cases for her content-analysis, whereas I included articles concerning both high- and low-profile cases in my research. The media’s tendency to engage in relentless pursuit of jurors is undoubtedly more common in high-profile cases where the newsworthiness of juror comments is at a premium.

Regardless of the degree of media interest in a case, judges clearly have the power to protect jurors from media harassment such as that detailed by Professor Marder. Post-verdict interviews cannot be prohibited in advance, however, simply because a possibility exists that a media representative might engage in inappropriate or unethical behavior. Under Press Enterprise, bans on post-verdict interviews to protect former jurors from potential media harassment are clearly overbroad unless a clear danger of such harassment can be shown. In other words, protecting jurors from media harassment only serves as an overriding interest sufficient to limit post-verdict interviews if instances of harassment have occurred or are threatened. So, for example, in United States v. Antar, the Third

---

505. While it is not completely clear that Professor Marder limited her study to high-profile cases, she indicated that she searched major newspapers and magazines and retrieved cases that received national attention. See Marder, supra n. 22, at 470-73, 476 and n. 30 (noting that her research yielded “numerous high-profile cases” and was intended to “provide a sampling of national coverage of post-verdict interviews.”)

506. According to my study, jurors were significantly more likely to refuse press comment in low-profile cases. Out of the sixty-five articles where jurors refused to comment, only fifteen (23 percent) involved cases that I characterized as high profile.

507. Six of the seven articles I found where jurors referred to “press hounding” involved cases that I considered to be clearly high profile. See, e.g., J. Campbell, Hispanic Simpson Juror Says Race Not Issue, Houston Chron. A3 (Nov. 10, 1995) (noting that juror in O.J. Simpson case spoke to the media after spending “six days dodging reporters”).

508. See, e.g., Journal Publ’g Co. v. Mechem, 801 F.2d 1233, 1236 (10th Cir. 1986) (asserting that trial courts have the power to shield jurors from post-trial harassment); U.S. v. Harrelson, 713 F.2d 1114, 1117-18 (5th Cir. 1983), cert. denied, 465 U.S. 1041 (1984) (upholding court order forbidding media to make “repeated” requests for post-verdict juror interviews as necessary to prevent juror harassment); In re Express News Corp., 695 F.2d 807, 810 (5th Cir. 1982) (stating that jurors are entitled to protection against harassment even after their jury service is complete).

509. See, e.g., U.S. v. Antar, 38 F.3d 1348, 1363 (3d Cir. 1994) (holding that a limitation on post-verdict juror interviews must be based on particularized findings of “a probability of harassment,” and not just the judge’s “personal assessment of generalized, societal concerns”); U.S. v. Sherman, 581 F.2d 1358, 1361-62 (9th Cir. 1978) (striking trial court order that forbid post-verdict access to jurors based on privacy concerns as “clearly erroneous” because no “clear and present danger of such intrusion” had been established); but see Harrelson, 713 F.2d at 1117 (upholding limitations on post-verdict interviews without requiring specific findings as to harassment, on the ground that the persistency and tenaciousness of reporters is “common knowledge”).


511. 38 F. 3d 1348 (3d Cir. 1994).
Circuit Court of Appeals overturned a trial court order limiting the
media's ability to conduct post-verdict interviews ostensibly to
prevent juror harassment because the court made no findings that
media harassment had taken place or was intended. 1 According to
the court, "restrictions on post-trial interviews must reflect an
impending threat of jury harassment rather than a generalized
misgiving about the wisdom of such interviews." 2 Similarly, in In re
Express-News Corp., 3 the Fifth Circuit Court of Appeals held that a
district court order forbidding any person from interviewing
discharged jurors regarding their deliberations or verdict was
unconstitutionally overbroad because the order prohibited "both
courteous as well as uncivil communications." 4

Another related argument posed by critics claims that each
individual juror's power to assent or decline to be interviewed by the
press does not adequately protect juror privacy rights because jurors
who refuse to talk to the press may find their private thoughts or
opinions revealed by more loquacious panelists. 5 This argument
recalls the allegation that jurors will be afraid to deliberate freely in
the jury room for fear another panel member will disclose
confidential matters to the media, 6 and suffers from the same
inherent weakness: lack of proof. Before the privacy rights of timid
jurors can be considered a compelling state interest sufficient to
overcome the First Amendment rights of both the media and other
panelists, 7 it must be demonstrated that post-verdict interviews
constitute a real threat to juror privacy. For this to be plausible, jurors
must at least tend to reveal private, personal, or embarrassing
comments or facts about, or opinions held by, other panelists in post-
verdict interviews. As shown in Part II of this Article, my study does
not support this conclusion. I found only five articles out of 696 where
it might be said that jurors disclosed private or embarrassing
information about other panelists, and in only two of those articles

512. Id. at 1364.
513. Id.
514. 695 F.2d 807.
515. Id. at 810.
516. See, e.g., U.S. v. Franklin, 546 F. Supp. 1133, 1142 (N.D. Ind. 1982) (stating in
reference to post-verdict interviews that one juror "can engage in post-trial violation of
the privacy of another"); Bagley, supra n. 25, at 501 (opining that post-verdict media
interviews send a "message to potential jurors that even if they do not want to express
their opinion to the general public, another member of the panel may do so for them.")
517. See supra nn. 390-97 and accompanying text.
518. See infra nn. 556-84, 651-83 and accompanying text.
were the panelists identified by name.\textsuperscript{519} Furthermore, in only thirteen out of 696 articles did jurors divulge the remarks, opinions or votes of other named panelists.\textsuperscript{520} According to the rationale announced in \textit{Press Enterprise}, post-verdict juror interviews cannot be curtailed on the mere speculation that they may pose a general threat to other panelists' privacy.\textsuperscript{521}

Nonetheless, some courts and commentators have gone so far as to advocate that to protect jurors' privacy, their names and addresses should be withheld from the press and public after a verdict has been entered, even in cases that do not present a continuing threat to juror safety.\textsuperscript{522} Obviously, this would reduce the media's ability to locate panelists to conduct post-verdict interviews. The Fifth Circuit's decision in \textit{United States v. Brown} presents an alarming example of this approach in action.\textsuperscript{523} An anonymous but nonsequestered jury had been empanelled in the case, which involved federal racketeering and bribery charges against Louisiana Insurance Commissioner James Harvey "Jim" Brown and co-defendant Edwin Edwards, the former four-term state governor.\textsuperscript{524} The anonymous jury was proper, the trial court said, because of allegations that the defendants had engaged in witness tampering and had attempted to bribe a judge.\textsuperscript{525} Furthermore, the court said that because of the extensive publicity surrounding the case, it was foreseeable that jurors could be subject to harassment by the media or the public during the trial if panelists' identities were known.\textsuperscript{526}

Just before the jury returned its verdict convicting Brown on seven counts and acquitting Edwards of all charges, the trial judge

\textsuperscript{519} See supra nn. 318-26 and accompanying text.
\textsuperscript{520} See supra nn. 309-17 and accompanying text.
\textsuperscript{521} As noted in Part II above, it is possible that some of the interviewed jurors may have been instructed or ordered not to reveal personal or private information about other panelists. I believe it is unlikely that many interviewed jurors were subject to gag orders of this sort because none of the articles I reviewed made mention of such a specific order. See supra n. 309. Of course, judicial suggestions that jurors refrain from revealing private information about other panelists would not pose First Amendment problems and are within the discretion of the judge.
\textsuperscript{522} See, e.g., King, supra n. 38, at 129 (recommending that judges empanel anonymous juries in all criminal cases, in part to protect jurors from the media); Weinstein, supra n. 472, at 31-32 (asserting that "powerful concerns," including juror privacy considerations, support limiting press access to juror names).
\textsuperscript{523} 250 F.3d 907 (5th Cir. 2001).
\textsuperscript{524} Id. at 910.
\textsuperscript{525} Id. at 911.
\textsuperscript{526} Id.
asked the jurors if they wanted their names made public. All jurors indicated they did not, and the trial judge then extended the panelists’ anonymity indefinitely, denying media access to juror names, addresses, places of employment or questionnaires even after the trial was over. The judge noted that if any juror later desired to waive his or her anonymity, the judge would release the name.

On appeal, the Fifth Circuit upheld the order, stating that it served to protect juror privacy and to protect jurors from media harassment. The court rejected the media’s First Amendment argument that no compelling reason justified continuing juror anonymity after the verdict was issued, stating that “[e]nsuring that jurors are entitled to privacy and protection against harassment, even after their jury duty has ended, qualifies as a such an interest in this circuit.” It did not matter to the appellate court that the trial judge had neither identified any specific media threat to juror privacy nor had made any findings justifying the order; according to the Fifth Circuit, “[s]pecific findings are not required . . . where the reasons for the court’s decision are obvious and compelling.”

The empanelment of an anonymous jury may or may not have been justified in Brown to protect jurors from prejudicial outside influences during trial. However, the court should have recognized that those fair trial interests diminished to the point of insignificance once the verdict was announced. The court’s order clearly did not satisfy the Press-Enterprise test; it was not based on a showing of

527. Id. at 910, 912.
528. Id. at 912.
529. Id.
530. Id. at 918-19.
531. Id. at 918.
532. Id. at 919.
534. See, e.g., U.S. v. Sherman, 581 F.2d 1358, 1361 (9th Cir. 1978) (stating that after a verdict is announced, post-verdict interviews cannot interfere with a defendant’s right to a fair trial).
535. See supra nn. 478-89 and accompanying text. When a court refuses to release juror identities following a trial, the issue presented may be correctly characterized as one of access to which the Press Enterprise test would properly apply. See, e.g., In re Globe Newsp. Co., 920 F.2d 88, 97 (1st Cir. 1990) (holding that the public has a First Amendment right of access to juror identities that could not be overcome based on “mere personal preferences or views of the judge or jurors”).
past or probable inappropriate behavior by any media representative,\textsuperscript{536} nor was it narrowly tailored to restrain objectionable harassment without unjustifiably impeding the press's First Amendment right to gather news. The court should have recognized that the jurors' initial preferences not to be contacted by the media\textsuperscript{537} were outweighed by the public's interest in being informed, through voluntary post-verdict interviews, about the operation of the criminal justice system. Given that \textit{Brown} involved federal prosecutions of current and former state officials, this public interest deserved more than the token acknowledgement provided by the court.\textsuperscript{538}

A California appellate court reached a better result in a 1998 criminal case that also involved allegations of abuse of public office by a state official. In that case, \textit{Contra Costa Newspapers, Inc. v. Superior Court},\textsuperscript{539} the court invalidated a trial judge's order prohibiting all press communication with former jurors despite their indicated preference not to be contacted by the media.\textsuperscript{540} On appeal, the California attorney general argued that members of the public would be unwilling to serve on juries if their privacy was not assured.\textsuperscript{541} The court disagreed, holding that the government had not shown a compelling need to protect jurors' privacy sufficient to encroach on the constitutional rights of both the jurors to speak and the media to gather news.\textsuperscript{542} Here, the court correctly characterized the order as "impermissibly overbroad," noting that "it was not based on any showing of unreasonable behavior by anyone, and it was not

\textsuperscript{536} The trial court in \textit{Brown} cited instances where members of the press had followed and identified anonymous jurors in a prior, related trial as justification for ordering the press in \textit{Brown} "not to attempt to circumvent this Court's ruling preserving the jury's anonymity." 250 F.3d at 911. Although the Fifth Circuit overturned this "non-circumvention order" as a prior restraint to the extent it disallowed independent reporting about the jury based on non-confidential sources, \textit{id.} at 915, the appellate court seemed to rely on these same examples of media misconduct to justify continued juror anonymity after trial. \textit{id.} at 922. However, the fact that certain media representatives had engaged in aggressive reporting in a previous case should not be sufficient evidence under \textit{Press Enterprise} to create a presumption that the media would harass jurors following a verdict in a different prosecution.

\textsuperscript{537} At least one juror changed his or her mind about talking to the press after the trial was over. \textit{Brown}, 250 F.3d at 920.

\textsuperscript{538} The court disingenuously claimed that continued juror anonymity had not harmed the public's perception of the trial's fairness because (1) the trial had been covered by the media and (2) the jury had returned split verdicts, which showed the public that the jurors had not been co-opted by either party. \textit{id.} at 922.

\textsuperscript{539} 61 Cal. App. 4th 862 (1998).

\textsuperscript{540} \textit{id.} at 864.

\textsuperscript{541} \textit{id.} at 867.

\textsuperscript{542} \textit{id.} at 868.
EXAMINING THE EVIDENCE

carefully crafted to restrain conduct while preserving the constitutional rights of those interested in the trial.” 543

2. Do Jurors Have a First Amendment Right to Speak to the Press?

Upon leaving the secrecy of the jury room, jurors return to the world of private citizens and resume their normal activities. They engage in conversations with family, friends, and colleagues about their lives and feelings, including, should they so desire, their jury service. In fact, some jurors may feel an intense need to share their jury experiences with others, especially those panelists who reacted emotionally to the case, the participants, or their responsibilities as jurors. 544 This “freedom to speak one’s mind” has always been a cherished aspect of American liberty, 545 as reflected in the established First Amendment value of individual self-actualization. 546 To paraphrase Professor Baker, when a former juror tells the press that “this was the hardest thing I have ever done,” she is defining herself publicly as a certain type of juror, at least in part for reasons of self-realization or self-fulfillment. 547

543. Id.
544. See, e.g., Strauss, supra n. 23, at 408 (asserting that juror speech can serve as a catharsis).

Journalist Stephen J. Adler, in his book about the jury system, described his post-verdict interviews with jurors in a Texas murder case as follows:

The verdict ended the jurors’ active role in the trial, but it didn’t stop affecting their lives. Talking to them after the trial was like having a conversation with someone who was just back from Nepal or who’d just had sex for the first time. They betrayed the same sense of wonder at having been to a new place and having seen life differently. There was enormous excitement, an eagerness to talk about the experience at the slightest provocation, and a great deal of worry about the consequences of their actions.

Adler, supra n. 14, at 36.

545. See Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 559 (1985) (stating that the “essential thrust of the First Amendment is to prohibit improper restraints on the voluntary public expression of ideas; it shields the man who wants to speak or publish when others wish him to be quiet” (quoting Estate of Hemingway v. Random House, Inc., 244 N.E.2d 250, 255 (Ct. App. 1968)); Bose Corp. v. Consumers Union, 466 U.S. 485, 503-04 (1984) (explaining that “the freedom to speak one’s mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole”).

546. See, e.g., Thomas I. Emerson, Toward a General Theory of the First Amendment, 3-7 (1966) (contending that individual self-fulfillment is a primary value served by freedom of expression).

In describing the difficulty of judging, our ex-juror is also contributing to public debate about the jury system in general. When former jurors share their experiences with the press, they provide other members of the community with information about how the court system operates. Juror speech, therefore, promotes democracy and informed self-government by enlightening citizens about the judicial branch. Ensuring “free discussion of governmental affairs” is a particularly strong First Amendment interest, and the judicial system has been described by the U.S. Supreme Court as a matter of “utmost public concern.” According to Justice Blackmun, the public has “an intense need and a deserved right to know about the administration of justice in general; about the prosecution of local crime in particular; about the conduct of the judge, the prosecutor, defense counsel . . . and all the actors in the judicial arena; and about the trial itself.”

Although the First Amendment has never been interpreted to forbid all limitations on expression, speech about court operations clearly falls into a protected category. Any law or judicial order that prohibits jurors from speaking about their jury experiences would be a content-based restriction that pertains to a core governmental function—the judicial system—to which the strict scrutiny standard would apply. Under strict scrutiny, jurors’ speech cannot be restricted without proof that the regulation was necessary to serve a

548. See Marder, supra n. 22, at 520 (stating that juror speech “could be described as necessary for self-government”); Strauss, supra n. 23, at 407 (concluding that juror speech “serves an essential function in a democracy by revealing flaws, inconsistencies, or unfairness in the juridical process”).

549. Mills v. Alabama, 384 U.S. 214, 218 (1966) (stating that “[w]hatever difference may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs”); see also Richmond Newspapers v. Virginia, 448 U.S. 555, 576 (1980) (concluding that the “core purpose” of the First Amendment is to “assur[e] freedom of communication on matters relating to the functioning of government”).

550. Landmark Communications v. Virginia, 435 U.S. 829, 839 (1978); see also Gentile v. State Bar of Nev., 501 U.S. 1030, 1035 (1991) (noting that “the judicial system, and in particular our criminal justice courts, play a vital part in a democratic state and the public has a legitimate interest in their operations”); Richmond, 448 U.S. at 555 (stating that “it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted”).

551. Richmond, 448 U.S. at 604 (Blackmun, J., concurring).

552. See Gentile, 501 U.S. at 1034-35 (1991) (describing speech critical of the judicial system as being “at the very center of the First Amendment”).

compelling state interest and narrowly tailored to achieve that interest.\textsuperscript{554} Content-based speech limitations pursuant to which the state attempts to regulate or prohibit an entire category of expression are rarely justifiable under this test. Writing for the majority in \textit{Police Department of Chicago v. Mosley}, Justice Marshall explained that “above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”\textsuperscript{555}

Nevertheless, some scholars have argued that that restrictions on post-verdict interviews are necessary to protect the fair trial rights of criminal defendants and jurors' privacy rights, and that these concerns are sufficient to overcome jurors' First Amendment right to speak.\textsuperscript{556} For example, Professor Goldstein used the fair trial/privacy rationale to advocate the passage of federal or state statutes making it a crime for jurors to discuss their deliberations and for anyone to ask jurors about their deliberations without court permission.\textsuperscript{557} According to Professor Goldstein, such statutes “would serve the most compelling of state interests.”\textsuperscript{558}

Although both fair trial and privacy rights may indeed constitute compelling state interests, interference with those interests cannot be established by speculation or surmise.\textsuperscript{559} So, for example, in \textit{Landmark Communications v. Virginia},\textsuperscript{560} the Supreme Court held that the news media could not be punished for publishing truthful information about confidential proceedings of a judicial review commission.\textsuperscript{561} Although the Court assumed that the state interest offered to support the statute—the orderly administration of justice—was legitimate, the Court objected that the state had offered no proof that confidentiality was needed to achieve that interest.\textsuperscript{562} According

\textsuperscript{554} Id. at 116.
\textsuperscript{555} 408 U.S. 92, 95 (1972).
\textsuperscript{556} See, Goldstein, supra n. 19, at 309 (supporting the adoption of federal or state statutes forbidding jurors from disclosing their deliberations); Marder, supra n. 22, at 522 (asserting that “the First Amendment may be most fully realized when individual juror speech is curtailed” because jurors may debate more freely in the jury room if they are forbidden from speaking to the press following the verdict).
\textsuperscript{557} Goldstein, supra n. 19, at 307, 310.
\textsuperscript{558} Id. at 310.
\textsuperscript{559} See, e.g., Bartnicki v. Vopper, 532 U.S. 514, 532 (2001) (stating that to pass the strict scrutiny test, the justification for burdening otherwise protected expression “must be ‘far stronger than mere speculation about serious harms’”) (citing \textit{U.S. v. National Treasury Employees Union}, 513 U.S. 454, 475 (1995)).
\textsuperscript{560} 435 U.S. 829 (1978).
\textsuperscript{561} Id. at 837-38.
\textsuperscript{562} Id. at 841.
to the Court, the statute could not withstand First Amendment scrutiny because the state had “offered little more than assertion and conjecture to support its claim that without criminal sanctions the objectives of the statutory scheme would be seriously undermined.”

Similarly, insufficient evidence exists to show that post-verdict juror interviews distort the deliberative process. As shown in Part III(A) above, critics cite no proof beyond their own assumptions, nor did my Houston Chronicle study indicate, that post-verdict interviews cause jurors to make decisions in accordance with community sentiments, to seek fame or profit instead of justice, or to deliberate less freely in the jury room. In fact, if anything, at least some evidence exists to support the claim that post-verdict interviews may improve juror accountability, which actually would work to strengthen fair trial rights.

Assuming for argument’s sake that jurors’ speech about their deliberations might chill debate in a future jury room, any restriction on post-verdict interviews would also have to be narrowly tailored so as to prohibit just the chilling speech. For example, if it is feared that jurors will deliberate less freely knowing that a panelist might reveal jurors’ personal opinions to the press, then any restriction on post-verdict interviews should encompass no more than juror statements that reveal personal opinions of other panelists who are somehow identified, whether by name, gender, occupation or other combination of characteristics. Judicial orders that forbid jurors from discussing their deliberations at all, such as that upheld by the Fifth Circuit Court of Appeals in United States v. Cleveland, would not qualify as narrowly tailored because they restrict both the arguably dangerous speech as well as innocuous expression that serves to educate the public about the jury system. In my study of post-verdict interviews, jurors often talked to reporters about the mechanics or tone of their deliberations, or focused on evidence they found particularly important in the jury room. These kinds of explanatory statements could hardly be considered intimidating to future jurors.

563. Id.
565. See supra nn. 455-68 and accompanying text.
566. 128 F.3d 267 (5th Cir. 1997), cert. denied sub nom In Re Capital City Press, 523 U.S. 1075 (1998). The judicial order upheld in Cleveland actually prohibited the press from asking jurors about their deliberations, and did not limit jurors regarding what they could say. This related question of whether members of the press have First Amendment rights to question jurors is discussed in Part C below. See infra nn. 651-83 and accompanying text.
567. See supra nn. 112-21 and accompanying text.
Nevertheless, all questions about jury deliberations would have been
off-limits under the judge's order in *Cleveland*.

By the same token, restrictions on post-verdict interviews cannot
be justified on privacy grounds unless such interviews are shown to
present a real danger to juror privacy. As discussed above, my study
of post-verdict interviews shows that jurors very rarely disclose
personal or private matters regarding other panelists to the press.\(^\text{568}\)
Assuming that in a particular context a court could show that juror
interviews did threaten panelists' privacy, a narrowly tailored order
prohibiting jurors from disclosing those particular personal,
embarrassing, or inappropriate matters might be justifiable. Certainly
a judge has the ability to suggest that jurors not discuss private
matters with the press. However, the First Amendment does not
allow a judge to limit a juror's right to speak about jury service just to
enforce the judge's notion of good manners.

To avoid the application of strict scrutiny to juror speech, some
commentators have argued that jurors should be considered
government employees or court officials, whose speech could be
limited under a lesser standard as disruptive to the workplace or
prejudicial to future defendants.\(^\text{569}\) In an example of this approach, the
Supreme Court in *Gentile v. State Bar of Nevada*\(^\text{570}\) endorsed what
appeared to be a less demanding standard with respect to regulations
limiting the ability of attorneys to make extrajudicial statements
about pending cases.\(^\text{571}\) The state rule at issue prohibited attorney
statements that had a "substantial likelihood of materially
prejudicing" a court proceeding, rather than just those resulting in
"actual prejudice or a substantial and imminent threat to fair
trial."\(^\text{572}\) According to the Court, the rule's lower level of speech protection
satisfied the First Amendment with respect to such extrajudicial
remarks made by participating attorneys given their special status as
officers of the court.\(^\text{573}\) The Court also noted that the restriction was

---

568. See supra nn. 318-26 and accompanying text.
569. See, e.g., Goldstein, supra n. 19, at 309 (suggesting that jurors be regarded as
"court officials," who can subject to special limitations on speech about their
deliberations); Marder, supra n. 22, at 520-21 (arguing that jurors are analogous to
government employees and judges, both of whose speech can be limited in certain
circumstances).
571. For a well-reasoned argument that the "substantial likelihood of material
prejudice" standard is really just the strict scrutiny standard applied to a trial setting, see
Strauss, supra n. 23, at 415.
573. Id. at 1074-75.
narrowly tailored because it applied equally to all participant attorneys, and merely postponed their ability to speak out until after trial;\textsuperscript{574} however, the Court ultimately held that the rule was unconstitutionally vague as applied.\textsuperscript{575}

The analogy critics draw between former jurors and court personnel, however, does not ring true. One cannot make a living as a juror, and most jurors serve in only one case. Once jurors have completed their service, they can no longer logically be considered court officials or government employees. Otherwise, jurors could never regain their private status. This raises one obvious problem with the suggestion that jurors be considered court officials whose speech about deliberations could be limited by statute.\textsuperscript{576} The statute would only apply after jurors' service had ended, and therefore could arguably remain in effect for an unlimited period of time. This would burden much more speech than the regulation at issue in \textit{Gentile}, which restricted attorney speech only during trial. It is hard to imagine that such an open-ended speech restriction would be upheld under any standard of First Amendment review. In any event, it appears that even with respect to court officials, strict scrutiny is the appropriate standard to evaluate content-based restrictions on political speech. In the recent case of \textit{Republican Party of Minnesota v. White},\textsuperscript{577} the Supreme Court used a strict scrutiny analysis to invalidate a state rule that prohibited judicial candidates, including incumbent judges, from stating their views on legal and political questions.\textsuperscript{578} Surely former jurors are no more court personnel than judicial candidates or incumbent judges, and are no less deserving of full First Amendment protection against content-based restrictions on speech that concerns a core governmental function.

In my study of post-verdict juror interviews, I found several instances where jurors spoke to the press despite court-imposed gag orders. For example, in a civil suit involving American Airlines, the judge prohibited jurors from discussing the case with anyone except their immediate families for forty-five days.\textsuperscript{579} Nevertheless, two jurors talked to reporters on the day of the verdict on condition of

\begin{itemize}
\item \textsuperscript{574} \textit{Id.} at 1076.
\item \textsuperscript{575} \textit{Id.} at 1048.
\item \textsuperscript{576} \textit{See} Goldstein, \textit{supra} n. 19, at 308 (urging passage of federal or state statutes prohibiting jurors from disclosing their deliberations).
\item \textsuperscript{577} 536 U.S. 765 (2002).
\item \textsuperscript{578} \textit{Id.} at 768, 774.
\end{itemize}
anonymity. Although the judge lifted the gag order one week later, after the media challenged its constitutionality, the press did not wait until the order was dissolved before publishing the jurors' comments. Even when jurors' First Amendment rights to speak are not immediately recognized, does the press nevertheless have a First Amendment right to publish what jurors say? Clearly, any attempt by a judge to prevent the media from disseminating the jurors' comments would constitute a prior restraint, which are almost never upheld against the media barring extraordinary circumstances. The Supreme Court has long recognized that members of the press have a First Amendment right to publish information that they lawfully obtain. The media, therefore, have a constitutional right to publish what jurors tell them, even if the jurors themselves have been gagged. The related question of whether the press has a First Amendment right to question jurors about their verdicts will be considered in Part III.C.2 below.

C. Systemic Implications of Post-Verdict Interviews: Do They Undermine or Strengthen Public Confidence in the Jury System?

A third reason advanced by critics to limit or eliminate post-verdict juror interviews is the fear that they seriously threaten the integrity and essential nature of the jury system. This argument contends not only that juries must deliberate in secret, but that those deliberations must also remain free from public scrutiny to preserve

580. Id.
583. See, e.g., Bartnicki, 532 U.S. at 535 (holding that press could not be punished for broadcasting a tape legally in its possession, even though it had reason to believe the tape had been illegally intercepted by a third party); Smith v. Daily Mail Publ. Co., 443 U.S. 97, 103 (1979) (holding that the First Amendment protects publication of truthful information that is lawfully obtained, absent a “need of the highest order”); Landmark Commun., 435 U.S. at 833 (overturning conviction of newspaper publisher for printing an accurate report of a confidential judicial disciplinary proceeding).
584. See also Marder, supra n. 22, at 520 (acknowledging that the press “can claim a right under the First Amendment to publish what it hears when jurors choose to speak”).
585. See, e.g., id. at 471 (asserting that post-verdict interviews “threaten to undermine the jury’s role both as symbol for community judgment and in its ritual function of shouldering the community’s most burdensome decisions”).
public acceptance of jury verdicts. Post-verdict interviews may endanger public confidence in the jury system by revealing imperfections that could negatively skew the public’s view of juries, or by supplying more reasons for the public to disagree with their decisions. Others argue that post-verdict interviews work to increase public confidence in, and understanding of, jury verdicts by providing insight into how juries work. According to this point of view, by publishing juror interviews, the press educates the public about the justice system and acts as a watchdog to identify areas where reform is needed.

1. Do Post-Verdict Juror Interviews Erode Public Trust in the Judicial Process?

Some scholars believe that public trust in the jury system depends on blind faith; therefore, jury verdicts must remain as inscrutable as the secret deliberations that precede them. According to this argument, post-verdict interviews damage community confidence in the jury system because interviews open up the otherwise impenetrable deliberative process to general observation, and thus to possible criticism and/or doubt. Members of the public are less likely to oppose a verdict, under this view, if they see only the

---

586. See, e.g., Nunn, supra n. 20, at 437 (arguing that post-verdict juror interviews may “ultimately reduce respect for jury verdicts and contribute to the decline of the dignity of the criminal justice system”).

587. See, e.g., Marder, supra n. 22, at 496 (stating that post-verdict interviews can reduce public confidence in jury verdicts by revealing jurors’ “bias, ignorance or irresponsibility”).

588. See, e.g., Public Disclosures, supra n. 474, at 891 (arguing that public acceptance of verdicts may be undermined when jurors reveal “decisional premises with which various members of the public are bound to disagree”).

589. See, e.g., Iversen, supra n. 346, at 523 (1997) (concluding that post-verdict interviews increase public confidence in jury verdicts by “allowing the public, vis-à-vis the press, to access jurors”).

590. See, e.g., Strauss, supra n. 23, at 407 (noting that post-verdict juror speech assists in creating public understanding of, and devising improvements to, the justice system).

591. See, e.g., Markovitz, supra n. 26, at 508 (listing as a justification for jury secrecy the idea that the public’s trust in jury verdicts must be unquestioning); Public Disclosures, supra n. 474, at 892 (asserting that faith in the justice system must be “blind, but purposefully and not irrationally so”).

592. See, e.g., Goldstein, supra n. 19, at 297 (stating that “if the media continue to reveal the contents of jury deliberations, there is a genuine risk that the authority of jury verdicts will decline”); Nunn, supra n. 20, at 437 (claiming that post-verdict interviews may encourage “second guessing” of jury findings, which “may ultimately reduce respect for jury verdicts”); Gaza, supra n. 40, at 338 (asserting that by exposing jury deliberations to public view, post-verdict media interviews “chip[ ] away at the respect that jury verdicts should be afforded”).
end product of the jury's labors, without any whys or wherefores. By shining a light on the jury’s inner processes, it is feared that post-verdict interviews may give the public more to disagree with, thereby "unravel[ing] the distinctive nonrational and intuitive ‘genius’ of this lay tribunal." 

The most striking characteristic of this argument has to be its pessimism—a pessimism not only about the quality of jury deliberations themselves, but also with respect to the justice system’s ability to address or correct its imperfections, and the public’s ability to exercise practical reason. This position assumes that post-verdict interviews will expose something that is better kept under wraps; that jurors will tell the media about some shameful, irresponsible, or at least inexplicable conduct in the jury room that must be kept from public view. In effect, this line of reasoning implies that, at least in high-profile cases, jury deliberations are so defective that were the public to know more about them, the very survival of the jury system would be imperiled. After all, if most jurors conduct themselves in a rational manner, post-verdict interviews should more properly be seen as a method to strengthen, rather than to threaten, community faith in, and respect for, jury verdicts.

In a related vein, critics theorize that post-verdict interviews may make jury verdicts more difficult for the public to accept, or may even jeopardize the finality of verdicts, because jurors could divulge second thoughts or regrets about their decisions. To avoid this predicted loss in public confidence, Professor Marder has suggested that if jurors are allowed to discuss their trial experiences, they “may have a duty to appear more certain than they feel so that the parties and the public will accept the decision.” This argument presupposes that jurors regularly experience qualms about their verdicts, which they then communicate to the press. My study, however, confirms

593. See, e.g., Charles R. Nesson, Reasonable Doubt and Permissive Inferences: The Value of Complexity, 92 Harv. L. Rev. 1187, 1195 (1979) (noting that a jury verdict can be “difficult to disagree with because the secrecy of the jurors' deliberations and the general nature of the verdict make it hard to know precisely on what it was based”).

594. Goldstein, supra n. 19, at 314.

595. See Marder, supra n. 22, at 496 (stating that “the real danger of jurors revealing their bias, ignorance or irresponsibility to the press is the potential of shaking public confidence in the verdict”).

596. See Goldstein, supra n. 19, at 314 (arguing that press interviewing of jurors in “high visibility cases” will ultimately destroy the jury system by exposing to public view the inner workings of the jury).

597. See, e.g., Marder, supra n. 22, at 495 (theorizing that if jurors express misgivings to the press, public confidence in the verdict will be impaired).

598. Id. at 498.
Professor Marder's finding that jurors who talk to the media rarely expressed doubts or concerns regarding the outcome of the deliberative process. In my review of eighteen years worth of post-verdict interviews, jurors talked to the press mainly to explain their verdicts, not to attack the jury system or cast doubt on their decisions. In only twenty-nine articles out of 696 where jurors spoke to the press (4 percent) did jurors indicate that their verdicts may have been in error. In a substantial percentage of these twenty-nine articles (34 percent), jurors communicated their concerns to the press after a significant passage of time, reducing the threat that juror interviews constitute an immediate threat to either public acceptance, or the finality, of verdicts. In fact, jurors were much more likely to confirm or defend their decisions in post-verdict interviews than to criticize them. My study revealed that in one hundred articles out of 696 (14 percent), jurors who spoke with the press expressed support for their verdicts. Jurors who commented to the press regarding the jury system appeared to be more satisfied with the results of that system than post-verdict interview critics have predicted.

Admittedly, sometimes jurors use post-verdict interviews to reveal improprieties in the jury room or to express uncertainty about their verdicts. However, attributing any loss of public confidence in the judicial process on the interviews themselves is a quintessential example of blaming the messenger. Outlawing post-verdict juror interviews because they may expose flaws in either the jury system as a whole or the procedures followed in a specific case makes about as much sense as a doctor refusing to take an X-ray of a patient's leg for fear it may reveal a broken bone. A prohibition on juror interviews will indeed stifle juror criticisms of a verdict or the justice system in the short term, but at a terrible long-term cost. Any resulting public confidence in that verdict will be a hollow shell, based on ignorance, while the systemic failures that post-verdict interviews could have

599. Although she used a different methodology, Professor Marder in her study of post-verdict interviews also found that only 4 percent of total juror comments expressed ambivalence or doubt about the verdict. Id. at 485.
600. See supra nn. 74-111 and accompanying text.
601. See supra nn. 205-06 and accompanying text.
602. See id.
603. This finding casts doubt on the notion that dissatisfied jurors are most likely to engage in post-verdict interviews. But see Symposium, The Appearance of Justice: Juries, Judges and the Media Transcript, supra n. 348, at 346 (discounting value of post-verdict interviews because “research has shown” that jurors who have a grudge or grievance against the jury system are most likely to talk to the press).
604. See supra nn. 282-99 and accompanying text.
revealed remain unchecked and liable to be repeated. Good faith reports by jurors regarding specific or system-wide problems should be welcomed not only as information of interest to the public, but also as a necessary first step in any attempt to reform the judicial process. Although change usually takes time, my study revealed at least one instance where jurors' post-verdict comments to the press resulted in quick action. Within a month after jurors complained to reporters that the jury form was so confusing that they had accidentally awarded a probated sentence rather than a prison term to a convicted killer, several county judges revised their jury forms to clarify sentencing choices.

To allow for redress in specific instances of jury misconduct while still preserving at least superficial public confidence in the jury system, it has been suggested that jurors should communicate any complaints or doubts regarding their verdicts not to the press, but rather to judges or attorneys who can determine whether the case result should be re-examined. Although jurors do bring these concerns to attorneys and judges from time to time, it is unrealistic to believe that jurors would always be willing to discuss such matters with authority figures who are clearly part of the existing system and who would expect full disclosures. A panelist who may be reluctant either to come clean or to "snitch" on a fellow juror to the judge may be willing to give the press a more general statement about questionable jury room behavior. My study revealed at least four sets of circumstances where jurors told the press about mistakes or misconduct where I believe they would have been less likely to make the same revelations to the court: first, where the behavior in question expressly violated the judge's instructions; second, where

605. See, e.g., Adler, supra n. 14, at 206 (stating that "if mystery is all that jury verdicts have going for them, the jury system is in deep trouble").

606. See, e.g., Strauss, supra n. 23, at 407 (indicating that juror speech "plays an essential role in any attempt to better the justice system"); but see Goldstein, supra n. 19, at 313 (describing the claim that jury interviews help identify needed reforms as the "grossest of speculations").


608. Marder, supra n. 22, at 495.

609. See, e.g., Bob Sablatura, Woman Awarded $43,579, Houston Chron. A22 (May 20, 1988) (noting that judge let jurors recast their ballots in civil case after jurors told the judge that they had misinterpreted the law).

610. See, e.g., Second Trial of Ex-Mayor to be Moved, Houston Chron. A39 (Sept. 7, 1997) (reporting juror's comment that some jurors were swayed to find the defendant guilty because he did not testify on his own behalf, even though jurors had been told by the judge not to consider his failure to testify).
the jurors themselves did not recognize the behavior as constituting misconduct; third, where the questionable behavior was performed by the specific juror making the statement; and fourth, where court officials themselves were accused of making a mistake or engaging in misconduct.

Furthermore, juror regrets regarding a verdict sometimes reveal complaints that require legislative, rather than judicial, action to resolve. My study revealed several instances where jurors’ misgivings about their verdicts centered on state laws they felt needed to be changed. In this situation, it makes much more sense for jurors to communicate their concerns to the media, which can raise public awareness about the issue, than to judges or lawyers whose hands are tied.

Finally, it has been asserted that by inquiring into individual jurors’ rationales for their decisions, post-verdict juror interviews undermine the essential nature of the jury as a single, unified body that speaks with only one voice. According to Professor Marder, the jury “acquires its power and meaning as a group, and post-verdict interviews threaten that group aspect.” Under this view, jurors should present their individual opinions about a case only during deliberations, and not after a verdict is announced. In this respect, Professor Marder has suggested that petit juries follow the practice of

611. See, e.g., Christopher Sullivan, Convicted Killer or Political Prisoner? Houston Chron. A46 (Feb. 19, 1995) (quoting juror who told press that the panel sentenced the defendant to life in prison rather than to death because jurors believed the state had not proven its case beyond a reasonable doubt).

612. See, e.g., Nicholas C. Chriss, Sedition Trial Acquittals Ignite Outcry Over Jurors, Houston Chron. A1 (Oct. 9, 1988) (reporting that female juror admitted she was physically attracted to male defendant during the trial).

613. See, e.g., Steve Brewer, Jurors Shocked by_sentencing in Assault Trial, Houston Chron. A25 (Oct. 17, 1998) (containing juror statement that panel incorrectly assumed prison terms would be consecutive rather than concurrent after judge refused to answer panel’s question during deliberations).

614. See, e.g., Juror Says Tampering Led to Huge Award in Galveston Trial, Houston Chron. 3 (Bus.) (Apr. 25, 1992) (stating that juror told reporter that the court bailiff pressured the jury to award high damages to the plaintiffs in a civil case).

615. See, e.g., John Makeig, Gonzales Gets Probation in Delaney Death, Houston Chron. A1 (June 30, 1994) (reporting jury foreman’s comment that the state’s involuntary manslaughter law was so complicated that it was unreasonable to expect jurors to understand it).

616. Marder, supra n. 22, at 470.

617. Id. at 473.

618. Id. at 471.
the U.S. Supreme Court, whose members do not speak to the press after issuing a ruling, in part to preserve the Court's mystique.619

This single voice argument assumes that the content of jurors' post-verdict revelations actually undercuts the collective nature of their decisions. A juror's statement explaining what the panel considered to be the most convincing evidence, for example, would not interfere with the public's view of the verdict as a group decision.620 Even if post-verdict juror interviews indicate that panelists disagreed about an aspect of the case, would this admission really be so startling to the public as to make it lose respect for the verdict or the jury? Community members expect and, indeed, want jury deliberations to include serious reflection and debate. If deliberations extend for any amount of time before a verdict is announced, the public has already guessed that jurors may have experienced some disagreements. Eliminating post-verdict interviews will not make difficult jury verdicts appear more like group decisions, but rather will only make the public wonder more about how those group decisions were reached. Furthermore, the Supreme Court analogy overlooks an extremely important difference between the Court and a regular jury: Supreme Court Justices write opinions explaining their rulings, opinions in which they state their own positions and do not necessarily speak with one voice. So, too, should jurors be allowed to participate in post-verdict interviews to express their individual views about a case, without fear that they will somehow damage the "power and meaning" of their decisions.

2. Do Post-Verdict Juror Interviews Promote Public Confidence in the Justice System by Educating the Public and Encouraging Reform?

In my study of post-verdict juror interviews described in Part II of this Article, I identified the two most common subjects for post-trial juror disclosures as (1) explanations of verdicts, which were included in 80 percent of the articles where jurors spoke to the press;622 and (2) descriptions of, or insights, into deliberations, which were contained in 36 percent of the articles.623 Looking for the

619. Id. at 507-12.
620. As described in Part II of this Article, my study of post-verdict interviews showed that in 63 percent of articles studied where jurors explained their case result to the media, panelists pointed to some evidentiary reason for the verdict. See supra nn. 74-80 and accompanying text.
621. Marder, supra n. 22, at 473.
622. See supra n. 74 and accompanying text.
623. See supra nn. 111-12 and accompanying text.
moment just at these topics, it seems clear that post-verdict interviews educate the public and thereby can increase public confidence in the justice system in at least two ways.

First, by providing jurors’ interpretation of the facts and evidence in specific cases, post-verdict interviews advance public understanding, which makes it easier for the community to accept unexpected or potentially unpopular verdicts. Human nature dictates that people have difficulty accepting what they cannot understand, and bare announcements regarding guilt or liability without an indication of the supporting reasons may be hard in certain instances for the public to swallow. For example, a symposium panelist gave the following description of how juror interviews helped her comprehend the $2.7 million punitive damage verdict in the famous 1994 McDonald’s case where an elderly woman was scalded opening a hot cup of coffee. When you hear about somebody spilling coffee and recouping millions of dollars, you think that’s crazy,” she said. “How can anybody do that? If you read the Wall Street Journal describing the juror interviews about that case, you begin to wonder [if] maybe they were right. It’s possible.” Although some citizens may nonetheless disagree with the result, post-verdict interviews allow jurors to show the community that their verdicts at the very least were not arbitrary or baseless—and thus worthy of respect, even if not universal acclaim.

Second, jurors who describe their deliberative process in post-verdict interviews also give the public an appreciation of how the jury system actually functions. We provide few opportunities for our citizens to learn about the mechanics of jury duty until they are chosen to serve on a panel, leading one jury researcher to conclude that “[w]hen we serve on a jury, power and responsibility are thrust upon us without our expecting it, without our seeking it, and without our being prepared to handle it.” When jurors talk to the press about what it was like to serve on a jury—how long they deliberated

---

624. In a related context, the Supreme Court held that criminal trials must be open to the press and public, noting that “it is difficult for [people] to accept what they are prohibited from observing.” Richmond Newsp. Inc. v. Virginia, 448 U.S. 555, 572 (1980) (plurality). See also E. B. White, Charlotte’s Web 110 (1952) (“Still, I don’t understand how those words got into the web. I don’t understand it, and I don’t like what I can’t understand.”)

625. See Damage Award Cut in McDonald’s Case, Houston Chron. A4 (Sept. 15, 1994). The punitive award was later reduced to $480,000. Id.

626. Symposium, supra n. 348, at 1144.

regarding certain issues, how they got along, how they chose the foreman, how they dealt with their emotions or the stresses of a long trial—the resulting articles paint a picture for other citizens about what to expect when their turn comes to perform this civic duty. Post-juror interviews may enlighten readers regarding deliberative strategies that helped a jury evaluate voluminous evidence, reach agreement regarding punishment options, maintain harmony in the jury room, or feel confident about a verdict. By the same token, former jurors' accounts of their trial experiences can inform the public about juror conduct that could result in a mistrial or a juror's dismissal. In either event, post-

628. See, e.g., Mike Synder, Man Receives 50-Year Term, Fine for Killing 2-Year-Old With Pepper, Houston Chron. §1 at 20 (Oct. 22, 1986) (noting that jurors deliberated four hours regarding punishment).
629. See, e.g., Dirk Johnson, Emotional Stress Hit Dahmer Jury, Houston Chron. A2 (Feb. 17, 1992) (stating that despite jurors' differences, deliberations were not confrontational and panelists did not "exchange harsh words"); Associated Press, Racial-Attack Defendant is Acquitted of Murder, Houston Chron. A4 (July 4, 1990) (quoting juror's comments that deliberations were "not very nice" and involved "a lot of yelling and screaming").
630. See, e.g., George Flynn, Quick on the Draw, Houston Chron. A24 (Jan. 25, 1996) (describing how juror volunteered to be foreman and other panelists did not object).
631. See, e.g., 10 Neo-Nazis Guilty in Racketeering Trial, Houston Chron. §1 at 1 (Dec. 31, 1985) (quoting juror that although panelists cried in the jury room, they were able to disregard their personal beliefs to reach a verdict).
632. See, e.g., Nancy Stancill, Marathon Trial an Experience for Jurors, Houston Chron. §2 at 11 (Mar. 30, 1985) (noting that jurors became fascinated with complex case although they made personal sacrifices during lengthy trial).
634. See, e.g., Mary Curtius, Jury Sentences Killer to Death for Murder of Polly Klaas, Houston Chron. A8 (Aug. 6, 1996) (describing how jury spent twenty-one hours deliberating before sentencing the defendant to death).
635. See, e.g., Mary Flood, The Andersen Verdict: Decision by Jurors Hinged on Memo, Houston Chron. A1 (June 16, 2002) (noting that jury set ground rules for deliberations: one person spoke at a time, all panelists' views were respected, and no personal attacks were allowed).
636. See, e.g., John W. Gonzalez & Nelson Antosh, Winfrey Bests the Beef Barons in Court Battle, Houston Chron. §1 (Feb. 27, 1998) (revealing that jurors reflected on the meaning of the First Amendment, prayed, and slept on their decision before reporting their verdict).
637. See, e.g., Jim Zook, Juror's Query Bags Mistrial, Houston Chron. A27 (Nov. 18, 1989) (reporting that mistrial was declared after juror conducted independent research to learn the potential penalties that would result from a conviction).
638. See, e.g., Tony Freemantle, Juror Who Ogled Photos at Simpson House Dismissed From Panel, Houston Chron. A5 (Mar. 20, 1995) (noting that dismissed juror admitted spending more time than other panelists looking at pictures of the defendant, in violation of judge's order).
verdict interviews help push aside what has been called “the curtain of ignorance.”\textsuperscript{639} that obscures the public’s perception of juries. By educating the public about the jury system, post-verdict interviews increase public understanding of that system and thereby help preserve its legitimacy.

To a lesser extent, my study also showed that jurors sometimes use post-verdict interviews to admit mistakes, reveal misunderstandings, and expose misconduct,\textsuperscript{640} as well as to voice their opinions regarding the operations of the judicial system.\textsuperscript{641} The claim that jurors’ critical statements weaken public trust in the jury system has already been discussed in Part III.C.1 above; however, it bears repeating that true public confidence can only be achieved if flaws are admitted and addressed, rather than hidden from public view via enforced silence.\textsuperscript{642} As Professor Andersen has noted, community faith in the justice system depends on how well it actually performs in reaching proper results, and not on a superficial, manufactured, or manipulated vision of the jury.\textsuperscript{643}

By pursuing and publishing post-verdict juror interviews, the press plays a crucial role both in educating the public about the justice system and in shining a light on any imperfections within it. Two primary functions of the press in a democracy are to inform citizens about the operations of government,\textsuperscript{644} as well as to oversee those operations and bring any malfeasance to public attention.\textsuperscript{645} The Supreme Court has recognized the media’s importance in promoting the effective administration of justice, both by disseminating

\begin{itemize}
  \item \textsuperscript{639} Michael J. Saks, Blaming the Jury, 75 Geo. L.J. 693, 698 (1986) (reviewing Valerie P. Hans & Neil Vidmar, Judging the Jury (1986)).
  \item \textsuperscript{640} See supra nn. 205-38 and accompanying text.
  \item \textsuperscript{641} See supra nn. 239-81 and accompanying text.
  \item \textsuperscript{642} See supra nn. 605-07 and accompanying text.
  \item \textsuperscript{643} Andersen, supra n. 367, at 647.
  \item \textsuperscript{644} See Cox Broad. Corp. v. Cohen, 420 U.S. 469, 491 (1975) (stating that “in a society in which each individual has but limited time and resources with which to observe at first hand the operations of government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations”).
  \item \textsuperscript{645} See id. at 492 (noting that “[w]ith respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice”); see also Vincent Blasi, The Checking Value in First Amendment Theory, 1977 Am. B. Found. Research J. 521, 527 (stating that “checking the abuse of power by public officials” is the key value served by free speech and a free press). 
\end{itemize}
information about the criminal justice system and by acting as a watchdog to ensure the system functions properly.\textsuperscript{646}

To fulfill these roles, the press must have the ability to gather information.\textsuperscript{647} Normally, reporters have a First Amendment right to approach whomever they please to request an interview; as the Supreme Court noted in \textit{Branzburg v. Hayes}, "reporters remain free to seek news from any source by means within the law."\textsuperscript{648} As described in Part III.B.2. above, jurors have a First Amendment right to talk to the press after their verdict is announced, should they so desire, and the press cannot be prevented from publishing what jurors elect to say.\textsuperscript{669} In most instances, however, post-verdict interviews result after media representatives make the initial contact with former jurors.\textsuperscript{650} The question then remains whether members of the press, either as reporters or as citizens, have a First Amendment right to question jurors following a verdict, or if judges can constitutionally prohibit or limit reporters' contact with former jurors.

The first published appellate case to address the issue, \textit{United States v. Sherman}, involved a media challenge to a trial judge's order that prohibited anyone from questioning the jurors about their service.\textsuperscript{651} In invalidating the order, the court characterized it as an unconstitutional prior restraint that limited the media's ability to gather news.\textsuperscript{652} None of the government’s proffered competing state interests—the defendant's right to a fair trial, the ability of jurors to serve on future panels, or the prevention of juror harassment—were

\textsuperscript{646} In \textit{Sheppard v. Maxwell}, 384 U.S. 333 (1966), the Court described the importance of press coverage of the judicial system as follows:

\begin{quote}
A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.
\end{quote}

\textit{Id.} at 350.

\textsuperscript{647} See \textit{Branzburg v. Hayes}, 408 U.S. 665, 682 (1972) (recognizing that "without some protection for seeking out the news, freedom of the press could be eviscerated").

\textsuperscript{648} \textit{Id.} at 681-82.

\textsuperscript{649} \textit{See supra} nn. 544-84 and accompanying text.

\textsuperscript{650} In my study of post-verdict interviews, for example, I found only twelve articles where it was clear that jurors had contacted the press themselves. \textit{See supra} n. 500 and accompanying text. \textit{See also} Raskopf, \textit{supra} n. 361, at 358 (noting that most post-verdict interviews are initiated by the press).

\textsuperscript{651} 581 F.2d 1358, 1360 (9th Cir. 1978).

\textsuperscript{652} \textit{Id.} at 1361.
seen by the court as sufficient to overcome the media’s First Amendment rights in this situation. According to the court, post-verdict interviews could not harm the defendant’s right to a fair trial because the verdict had already been announced. The idea that by talking to the media, jurors could be rendered unfit for future jury panels was dismissed by the court as trivial. Finally, the court noted that the judge could protect jurors from any actual press harassment by punishing such conduct should it occur, but could not assume in advance that jurors would find media attention objectionable.

Other courts, however, have analyzed the question as one of press access to government information, rather than as a prior restraint problem. For example, in In re Express News, the Fifth Circuit evaluated a local court rule prohibiting anyone from interviewing jurors with respect to their deliberations or verdict without court permission by beginning with the proposition that the First Amendment does not “guarantee journalists access to sources of information not available to the public generally.” According to the court, the First Amendment right to gather news could be limited if it were outweighed by a “substantial threat to the administration of justice.” The burden fell on the state, however, to demonstrate both that the rule in question was necessary to protect the defendants’ fair trial rights and that it was narrowly tailored to achieve that end. The court invalidated the rule because the government failed to show that post-verdict interviews threatened fair trial rights. The court indicated that a narrow rule preventing “the disclosure of the ballots of individual jurors” in certain cases might be justifiable. Since then, the Fifth Circuit has upheld judges’ orders that not only disallow anyone from interviewing jurors regarding specific votes of other panelists, but that also prohibit any questioning whatsoever about jury deliberations.

653. Id.
654. Id.
655. Id.
656. Id.
657. In re Express News Corp., 695 F.2d 807, 809 (5th Cir. 1982).
658. Id. at 810.
659. Id.
660. Id.
661. Id. at 811.
662. See U.S. v. Brown, 250 F.3d 907 (5th Cir. 2001); U.S. v. Cleveland, 128 F.3d 267 (5th Cir. 1997), cert. denied sub nom In re Capital City Press, 523 U.S. 1075 (1998); supra nn. 393-98 and accompanying text.
Some commentators have criticized the Sherman court for treating the judge's order in that case as a prior restraint, arguing that the order did not prohibit the press from publishing information it already possessed.\textsuperscript{663} Under this view, the Fifth Circuit's access analysis is seen as more appropriate because post-verdict interview limitations are news gathering restraints; they prevent the media from acquiring information about jury deliberations, which are closed to the press and public.\textsuperscript{664} By characterizing judicial orders limiting post-verdict interviews as restrictions on access, critics hope to avoid the "heavy presumption"\textsuperscript{665} of unconstitutionality that applies to prior restraints, making them rarely enforceable.\textsuperscript{666} Instead, courts would apply the somewhat less stringent test announced by the Supreme Court in \textit{Press Enterprise v. Superior Court}, pursuant to which the press' and publics' qualified First Amendment right of access to jurors following a trial could only be overcome "by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."\textsuperscript{667}

It is far from clear, however, that a judge's order forbidding interviewers from questioning jurors following a trial should be

\textsuperscript{663} See, e.g., Aaron, supra n. 347, at 214-15 (concluding that the Sherman court's prior restraint analysis was incorrect and favoring an access analysis).

\textsuperscript{664} Id.


\textsuperscript{666} See, e.g., id. at 559 (stating that "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights").

\textsuperscript{667} 464 U.S. 501, 510 (1984). This assumes that a qualified right of access to jurors exists post-verdict under the threshold "experience and logic" test established by the Supreme Court in a second case involving the same newspaper, \textit{Press Enterprise Co. v. Superior Court (Press Enterprise II)}, 464 U.S. 1, 8 (1986). Under that test, a qualified First Amendment right of access attaches to court proceedings that have historically been open to the press and public, and to which public access would play a positive and important role. Id. Post-verdict juror interviews satisfy both prongs of this test. The media and members of the public have traditionally questioned jurors about their service; interviews with jurors are nothing new. American newspapers have published juror interviews with regularity at least since the last century. For example, after the 1934 kidnapping and murder trial of Bruno Hauptmann in the Lindbergh baby case, newspaper interviews were published with each of the jurors. See Report of Special Committee on Publicity in Criminal Trials (1936), \textit{reprinted in Oscar Hallam, Some Object Lessons on Publicity in Criminal Trials}, 24 Minn. L. Rev. 453, 495 (1940). The earliest example that I ran across in my research was a letter from a juror in the notorious murder trial of Harvard medical school professor John W. Webster, published in the \textit{Boston Traveller} in 1830. See Dr. James W. Stone, \textit{Report of the Trial of Prof. John W. Webster} 312-14, app. E (repub. Leslie B. Adams, Jr. 1990) (orig. pub. 1850). That post-verdict juror interviews fulfill the second part of the "experience and logic" test by playing a positive role in the functioning of the judicial process has just been discussed above. See supra nn. 622-46 and accompanying text.
treated as an access restriction. Although such an order may not mesh perfectly with traditional notions of prior restraints, neither is it completely off the mark. Quoting Professor Nimmer, the Supreme Court has defined prior restraints as "administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur." This is exactly what a court order that prohibits the press from interviewing jurors about deliberations attempts to do—it forbids questioning a former juror before those questions can be asked. Furthermore, the judge’s order "freezes" speech by preventing juror interviews about a certain topic altogether, rather than merely "chilling" speech by punishing interviewers after the fact. Given these characteristics, such an order bears more resemblance to a prior restraint than it does to a denial of access to government-controlled information.

Admittedly, if media representatives were seeking to sit in the jury room, or to record jury deliberations, the issue could be viewed in terms of access. Similarly, when courts withhold jurors’ names and addresses from the press following a trial, an access issue is presented. However, once jurors are dismissed from their service and re-enter private life, the courts can no longer control their activities or their speech. Former jurors can go where they want and do what they please, and reporters or other members of the public are free to question them about any topic. Perhaps the best way to characterize an order limiting an interviewer’s ability to question former jurors about deliberations is neither as a prior restraint nor a denial of access to information possessed by the state, but rather as a content-based restriction on speech. Conducting an interview with a former juror on a matter of public interest constitutes pure speech, and a judge’s order barring all questions

669. See, e.g., Nebraska Press Ass. v. Stuart, 427 U.S. 539, 559 (1976) (explaining that “[i]f it can be said that a threat of criminal or civil sanctions after publication ‘chills’ speech, prior restraint ‘freezes’ it”).
670. See Bagley, supra n. 25, at 494-95 (describing media attempts to record jury deliberations as an access question).
671. See supra n. 535.
672. See, e.g., Turner Broad. System, Inc. v. FCC, 512 U.S. 622, 643 (1994) (stating that “laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based”).
673. See, e.g., Bannicki, 532 U.S. at 526 (noting that a “naked prohibition against disclosures is fairly characterized as a regulation of pure speech”).
about deliberations restricts only speech about a certain topic.\textsuperscript{674} Such an order would have to survive strict scrutiny review, which would require that the state prove that the order was necessary to serve a compelling state interest and was narrowly tailored to achieve that interest.\textsuperscript{675}

Ultimately, however, whether the precise analytical framework used to evaluate post-verdict interview restrictions is a prior restraint, strict scrutiny, or access analysis makes little difference. Even under the less-demanding access approach, restrictions on post-verdict juror interviews would still violate the First Amendment absent special circumstances. To overcome a qualified First Amendment right of access, the state must demonstrate that "closure is essential to preserve higher values and is narrowly tailored to serve that interest."\textsuperscript{676} This Article has demonstrated that, in general, no empirical evidence exists to establish that post-verdict juror interviews pose a substantial threat to the administration of justice,\textsuperscript{677} to juror privacy rights,\textsuperscript{678} or to public confidence in the jury system.\textsuperscript{679} According to the Supreme Court, a First Amendment right of access cannot be overcome by mere "conclusory assertion[s]"\textsuperscript{680} that as a category, post-verdict interviews result in some unproven harm. Even commercial speech, which receives a lower level of First Amendment protection than political speech, cannot be restricted based on nothing more than "mere speculation or conjecture."\textsuperscript{681}

This is not to say that in the context of a particular case, a judge could never demonstrate that post-verdict media questioning of jurors should be limited. Rather, the judge would have to articulate specific, defensible reasons for any restriction, which would have to be narrowly tailored to prevent only the dangerous inquiries. For example, if a trial judge could establish that disclosure of a juror's medical history discussed during deliberations would invade a juror's

---


\textsuperscript{675} See, e.g., \textit{Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd.}, 502 U.S. 105, 123 (1991) (striking down state law as a content-based speech limitation that was not narrowly tailored to advance a compelling state interest).


\textsuperscript{677} See \textit{supra} nn. 347-66, 374-88, 396-436 and accompanying text.

\textsuperscript{678} See \textit{supra} nn. 485-521 and accompanying text.

\textsuperscript{679} See \textit{supra} nn. 597-605, 616-21 and accompanying text.

\textsuperscript{680} \textit{Press Enter.}, 464 U.S. at 510.

privacy, the judge could craft a narrow order that prohibited reporters from questioning jurors about “personal health matters.” However, an order forbidding the press from questioning jurors about any aspect of their deliberations, for example, would be far too broad to satisfy even the access test.

Furthermore, to meet constitutional standards, restrictions limiting the media’s ability to conduct post-verdict interviews would actually have to be effective to achieve the underlying, justifying purpose. This creates another First Amendment hurdle. A judge’s order prohibiting reporters from questioning jurors about a certain aspect of their trial experiences will not necessarily keep that information out of the media unless attorneys and court officials, as well as jurors’ friends, colleagues and family members, are also forbidden from asking those same questions, and from talking to the media. Otherwise, the press will be able to report jurors’ comments by interviewing third parties, which increases the risk that inaccurate information will be disseminated to the public. Any judicial attempt to gag all these various parties would present insurmountable constitutional problems by infringing on a complicated set of overlapping First Amendment rights belonging to jurors, the press, and the public.

IV. Conclusion

More than a hundred years ago, the Wyoming Territory embarked on a bold experiment by authorizing women to serve on juries. Opponents predicted a parade of horribles, including that women in the jury room would distract male jurors from the serious business of deliberating. Today we can laugh at such an inane assumption, knowing it was based on nothing more than fear and prejudice. Nevertheless, despite their exemplary performance as

682. See, e.g., Smith v. Daily Mail Publg., 443 U.S. 97, 105 (1979) (noting that a publication restraint cannot serve an “interest of the highest order” if it does not effectively prevent dissemination of the restricted information).

683. For example, in the only article I found in my study where a holdout juror was identified by gender, race, and occupation, the information was divulged to the press by “trial sources,” as opposed to other jury members. See Bragg & Ramsey, supra n. 146, and accompanying text.


685. Id. at 1816.
EXAMINING THE EVIDENCE

women in Wyoming were again excluded from jury service a little more than a year after the experiment began.\textsuperscript{687} Currently, some courts and commentators believe that unless jurors' post-verdict contact with the media is restricted, the jury as an institution is at risk. Critics argue that post-verdict interviews interfere with fair trial rights by stifling free speech during deliberations,\textsuperscript{688} by encouraging jurors to make popular decisions that will be easy to defend in the press,\textsuperscript{689} and by tempting jurors to pursue media attention more vigorously than justice.\textsuperscript{690} Others claim that juror interviews violate juror privacy, by subjecting former jurors to invasive questioning and by giving garrulous panelists the opportunity to reveal personal information or opinions held by their more taciturn colleagues.\textsuperscript{691} Finally, juror interviews have been said to destroy the mystery and unity surrounding jury verdicts, thereby undermining public confidence in the jury system itself.\textsuperscript{692} Yet these critics offer no more proof than did those nineteenth-century naysayers who expected female jurors to turn Wyoming jury deliberations into mere flirtations.

Despite this lack of empirical evidence regarding the hazards of post-verdict juror interviews, judges continue to issue orders that limit the media's ability to question, and in some cases even identify, jurors after they have been discharged. The New Jersey Supreme Court's recent decision upholding a trial court's gag order that not only prevented the media from contacting jurors following a mistrial, but also forbid jurors from speaking with the press, is a recent example.\textsuperscript{693} Even more troubling, the U.S. Supreme Court's failure to review the decision is likely to encourage other judges to limit juror/press post-verdict communication.\textsuperscript{694}

What dangerous revelations do jurors make to the press that justify restricting the First Amendment rights of the press to gather

\textsuperscript{686} Id. at 1818 (noting that a judge who presided over mixed juries concluded that "in twenty-five years as a judge across the country he had never seen such faithful and honest jury service").

\textsuperscript{687} Id. at 1820.

\textsuperscript{688} See supra nn. 389-90 and accompanying text.

\textsuperscript{689} See supra nn. 347-48 and accompanying text.

\textsuperscript{690} See supra nn. 367-70 and accompanying text.

\textsuperscript{691} See supra nn. 472-74, 501-03 and accompanying text.

\textsuperscript{692} See supra nn. 585-90, 591-94, 597-98 and accompanying text.


\textsuperscript{694} Id.
news, the jurors to speak their minds, and the public to receive information about the operation of our courts? After reviewing eighteen years' worth of juror interviews published in a major metropolitan newspaper, I can only wonder what all the fuss has been about. As I concluded in Part II of this Article, jurors in my study spoke to the press for two major purposes: to explain their decisions to the public and to ensure that all trial participants remain accountable to the community. These seem to me to be laudable, rather than frightening, results. Juror explanations help citizens understand and accept jury verdicts, and juror evaluations of how courts operate can lead to needed reforms, which in turn, improve public confidence in the ability of the system to achieve real justice.

Nothing prevents a judge from advising jurors, informally, that they need not speak with reporters following a verdict and that they should report instances of press harassment to the court. If a judge believes it necessary to prevent interference with the privacy rights of another panelist, he or she can admonish, rather than order, jurors not to discuss personal, embarrassing, or inappropriate information with the media that may have come to light during deliberations. At the same time, judges must recognize that post-verdict interviews serve valuable purposes: they can help ensure jury accountability; they can help the public understand, and therefore accept, trial outcomes; they can educate the public about the realities of jury service; and they can improve the justice system's functioning by exposing mistakes, misunderstandings, and misconduct. The First Amendment requires that neither a juror's ability to engage in self-expression nor the media's duty to inform the public about the operations of government be curtailed based on purely speculative concerns regarding the adverse effects of post-verdict interviews. As the Wyoming jury experiment should have taught us, our decisions about the justice system must be based on reason, not just fear and prejudice.

695. *See supra* nn. 449-71 and accompanying text.
696. *See supra* nn. 624-26 and accompanying text.
697. *See supra* nn. 627-39 and accompanying text.
698. *See supra* nn. 605-14, 640-46 and accompanying text.