Juror Journalism

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The conflict between freedom of speech and the right to a fair trial is hardly new. Hundreds of articles have been written attempting to reconcile the constitutional demand that the defendant receives a fair trial[1] with First Amendment issues posed by pretrial publicity,[2] cameras in the courtroom,[3] or the gagging of lawyers who attempt to try their cases in public.[4] In recent years, however, a new face to the conflict has appeared, having to do not with lawyers or the news media, but with the jury. Increasingly, individuals have tried to capitalize on their jury service by selling their perspective on the trial. This practice of "juror journalism"[5] has been criticized by numerous academics[6] and even lambasted by many journalists[7] as threatening the integrity and fairness of the trial. The fear is that the profit motive may affect the juror's ability to fairly, openly, and without bias deliberate and render a just verdict.

In response to this fear, numerous cities and states have begun to consider statutes regulating or prohibiting juror journalism; several states have adopted laws restricting jurors' ability to contract for profit during the pendency of the

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1. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State. . . . " U.S. CONST. amend VI.

2. *See, e.g.*, Alfredo Garcia, *Clash of the Titans: The Difficult Reconciliation of a Fair Trial and a Free Press in Modern American Society*, 32 SANTA CLARA L. REV. 1107 (1992); Fred W. Friendly, *Order in the Court-Freedom in the Newsroom*, 20 JUDGES J. 14 (1981); D. Grier Stephenson, Jr., *Fair Trial-Free Press: Rights in Continuing Conflict*, 46 BROOKLYN L. REV. 39 (1979).

3. *See, e.g.*, Paul Marcus, *The Media in the Courtroom: Attending, Reporting, Televising Criminal Cases*, 57 IND. L.J. 235 (1982).

4. *See, e.g.*, Scott M. Matheson, Jr., *The Prosecutor, The Press and Free Speech*, 58 FORDHAM L. REV. 865 (1990).

5. This term was used by Kenneth Jost in one of the first articles to question the wisdom of jurors selling a story. Kenneth Jost, *The Dawn of Big Bucks Juror Journalism*, LEGAL TIMES, July 20, 1987, at 15.

In this article, the term "juror journalism" is used to refer to a variety of practices by which the juror might sell a story. The juror might become a journalist and pen an article for a newspaper or magazine, or even write a book. Or the juror might seek payment for an interview by the print media or by radio or television. Finally, the juror might become involved in a movie on the subject, either as a paid consultant or as a scriptwriter. The problems of juror journalism arises throughout the trial proceeding; jurors might contract for payment before, during or after the trial.

6. *See, e.g.*, Michael Freitag, *In the Right Case, Jury Duty Can Pay*, N.Y. TIMES, Nov. 22, 1987, § 4, at 9. In that article, Professor George Fletcher of Columbia Law School stated that "[t]he anticipation of profit could have a distorting effect on the juror's role as an unbiased judge of the facts."

7. *See, e.g.*, Marcia Chambers, *Little Room on Juries for Profit Motive*, NAT'L L.J., Jan. 25, 1988, at 13; Alex S. Jones, *Juror's Attempt to Sell Story Raises Ethics Issues*, N.Y. TIMES, Dec. 24, 1987, at B3; Jost, *supra* note 5.

trial.[8] The incredible amount of checkbook journalism which occurred during the pretrial phase of the O.J. Simpson trial prompted Superior Court Judge Lance Ito to adopt measures that went beyond any existing statutory provision in restricting jurors' speech. In a court order dated September 23, 1994, he declared that every juror and alternate juror had to agree "not to request, accept, agree to accept, or discuss with any person receiving or accepting, any payment or benefit in consideration for supplying any information concerning this trial *for a period of 180 days* from the return of a verdict or the termination of the case, whichever is earlier."[9] Such statutes and judicial orders raise an important question: Can juror speech be silenced or even restricted consistent with the First Amendment's guarantee of freedom of expression and freedom of the press?[10]

This Article attempts to provide an answer to that question. In Section I, the extent of the problem of juror journalism is considered. How pervasive is the practice, and is it likely to persist? I conclude that the problem, while still fairly rare in actual numbers, does occur, and will increase in the future. Moreover, the cases where jurors are most likely to attempt to profit from their service are the most visible, and thus the ones most likely to influence the public's perceptions of the justice system.

Section II describes the possible dangers to a defendant's constitutional right to a fair trial inherent in allowing jurors to profit from their service. The plausible effects on the juror seeking profit, on the other members of the jury, and on the system itself are explored. I conclude that although serious risks to a fair trial theoretically inure in juror profiteering, the evidence is mostly anecdotal and void of real empirical support.

Even the theoretical risks, however, merit consideration of potential remedies. Why not restrict or even prohibit juror journalism? In Section III, I consider the arguments against any such restrictions and in favor of protecting the speech of jurors. Juror speech serves several critically important functions

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8. The legislatures in New York, New Jersey, and California have enacted laws prohibiting jurors from contracting to sell their stories during the course of the trial. *See infra* notes 118-120 and accompanying text. *See also* Gary Spencer, *Albany Moves to Block Jurors on Pre-Verdict Media Dealings; Senate Measure Would Impose Jail, Fines*, N.Y. L.J., Feb. 1, 1990, at 1; Allan Wolper, *Ban on Juror Deals with News Media Weighed*, N.Y. TIMES, Oct. 16, 1988, § 12NJ, at 4. In response to the checkbook journalism during the O.J. Simpson trial, a bill was introduced in California prohibiting jurors prior to discharge from accepting or agreeing to accept any benefit for supplying information about the trial. California 1993-94 Special Session "A" Assembly Bill 168a (amended Aug 22. 1994).

9. Court Order, copy on file with author. Violators of this provision could pay up to $1500 for each violation or be punished by fine or imprisonment for contempt pursuant to Code of Civil Procedure Section 1218.

10. This article does not directly address the court's ability to protect the privacy of jurors who do not want to speak to lawyers or to the press. Rather, this article is primarily concerned with the possibility of silencing jurors who voluntarily seek publicity. *See, e.g.*, State *ex rel.* The Cincinnati Post v. Court of Common Pleas, 570 N.E.2d 1101 (Ohio 1991); United States v. Franklin, 546 F. Supp. 1133 (N.D. Ind. 1982); United States v. Doherty, 675 F. Supp. 719 (D. Mass. 1987).

in society—functions protected under the First Amendment to the United States Constitution. It educates the public on the workings of the court system. It may reveal incompetence, flaws, and corruption; more often, however, it confirms the integrity and fairness of the justice system. Finally, juror speech is essential for the growth and dignity of the juror who often feels compelled to talk about the trial and explain the decision reached.

Thus, there is a potential conflict between the defendant's Sixth Amendment right to a fair trial and the juror's First Amendment right to freedom of expression. In Section IV, an attempt is made to reconcile these competing interests. The various constitutional frameworks for regulating juror speech consistent with the First Amendment are considered.

These constitutional frameworks are then applied to the solutions proposed for restricting juror journalism. First, several possible solutions are explored: prohibiting jurors from speaking about their service; forbidding jurors from selling or attempting to sell their story preverdict; and permitting all speech at any time but forbidding any receipt of profits. I conclude that the current evidence that juror profiteering leads to an unfair trial and thus violates the defendants' Sixth Amendment rights is too weak to justify a blanket, categorical suppression of juror speech under any of these proposed solution. At a minimum, further research must be conducted before the juror's right to freedom of expression is curtailed.

I. THE EXTENT OF JUROR JOURNALISM

The idea of juror as profiteer has so flourished in recent years that one observer felt compelled to label this era the "dawn of . . . big-bucks juror journalism."[11] This phenomenon, moreover, is likely to escalate further as trials become more highly publicized. Televised proceedings like those involving William Kennedy Smith, Rodney King, Amy Fisher, the Menendez

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11. Jost, *supra* note 5, at 15. This practice of profiting from trials is not limited to juries. Witnesses, lawyers, and even judges have tried to cash in on their "moment in the spotlight." *See* Jesse Katz, *Participants in King Case Try to Cash In*, L.A. TIMES, Apr. 25, 1993, at A1. In his article, Katz describes efforts by trial participants to sell their stories; even the judge in the Jeffrey Dahmer case had planned to write a book, and had authorized a screenplay based on his experience with the case. That project was halted, at least temporarily, when the mother of one of Dahmer's victims complained to the Wisconsin Judicial Commission. *Id.*

The notion of profiting from a murder trial reached new heights during the Simpson case. For example, alleged witness Jill Shively sold to Hard Copy, for $5000, her story of seeing Simpson driving near the murder scene around the time that the crimes occurred. Two witnesses at the preliminary hearing who testified regarding a knife Simpson had purchased from their store were paid $12,000 for their "exclusive story" by the *National Enquirer*. Willie Brown, *Curbing Checkbook Journalism*, L.A. DAILY JOURNAL, Aug. 8, 1994, at 6.

In response to these events, Willie Brown proposed that the California legislature make it a misdemeanor for trial witnesses to sell their stories before or during the trial. *See infra* note 120. *See also* Jerry Gillan, *Brown Says Courts Would Uphold Bill on Paid Interviews*, L.A. TIMES, July 27, 1994, at A3.

brothers and, most recently and most significantly, O. J. Simpson[12] whet the public's appetite for news, stories and even made-for-television movies about "real" courtroom dramas.[13] The juror's perspective is one which will be increasingly sought. After all, the juror is not only an insider at the trial, but the decisionmaker as well. And, unlike the judge, the lawyers, or even the parties to the suit, the juror is someone with whom the public can easily identify. Consequently, the media and entertainment industry will increasingly approach jurors, and more and more jurors can be expected to seek out the spotlight. As one news reporter cynically remarked, "who would have guessed it? The juror as superstar."[14]

That jurors themselves anticipate potential royalties and aspire to write articles, bestsellers or even movie scripts is borne out by numerous examples. Perhaps the best known example of juror journalism arose out of the trial of Bernard Goetz, who was accused of shooting several youths who had attempted to mug him in a New York subway. When Mark Lesly was selected as a juror in the trial, he decided to dictate his daily impressions of the case into a tape recorder.[15] He did so, Lesly said, because he wanted a record of the experience and because he "had a reasonable belief that it might be worth something."[16]

He was right. Several days after the jury acquitted Goetz of all but a gun possession charge, Lesly sold a three-part account of the trial to the *New York Post* for close to $5000.[17] Another juror, Diane Serpe, was paid $2500 by the *Daily News* for her "view from the jury box."[18]

Lesly and Serpe are not the first, nor the last, to discover that "jury duty, usually regarded as a thankless civic responsibility, can be lucrative."[19] Even several book deals have been negotiated. James Shannon, a juror in the Pennzoil-Texaco case, wrote a book on the trial after receiving an advance in the low five figures from Prentice-Hall.[20] A juror in the General William

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12. All prior trial coverage pales in light of the media attention focused on the preliminary hearing, pretrial motions, and trial of O. J. Simpson.

13. There is now even a cable channel, Court TV, which broadcasts trials continuously. *See* Joan Biskupic, *U.S. Judges Vote to Keep Cameras Out of Federal Court*, L.A. TIMES, Sept. 21, 1994, at A13. Numerous pilot television shows focus on real-life trial experiences. For example, ABC is considering a one-hour, reality-based pilot in which attorneys play themselves in the dramatization of court cases using trial transcripts and actual participants to help tell the story. *Id.*

14. Dennis Duggan, *The Oh-So-Visible Juror, Under T.V.'s Summoning Lights*, NEWSDAY, Dec. 9, 1990, at 4. *See also* Bennett H. Beach, *The Juror as Celebrity; Does Post-Verdict Press Scrutiny Prevent Abuses or Create Them?*, TIME, Aug. 16, 1982, at 42 ("Citizens chosen to serve in major trials these days may be well advised to pack some pan-cake make up along with their toothbrushes, for much of the global village is likely to be looking in.").

15. Freitag, *supra* note 6, at 9.

16. *Id.*

17. *Id.*

18. Jost, *supra* note 5, at 15.

19. Freitag, *supra* note 6, at 9.

20. Jost, *supra* note 5, at 15.

Westmoreland libel suit against CBS received $15,000 for her book on the trial—"The Juror and the General"—published by William Morrow and Co.[21]

Some jurors have even attempted to profit from their experience during the pendency of the trial. During the Howard Beach trial, in which four white teenagers were convicted of a racially motivated attack on three black youths, the boyfriend of the juror foreperson approached several newspapers to entice bids for her account of the trial.[22] Although representatives from the newspapers all said they would not negotiate until the completion of the trial, two at least expressed a serious interest in obtaining her material then.[23]

The concern over juror journalism has become so widespread in high profile cases that it is a subject of *voir dire*, jury instructions, and even defense motions for mistrials. Potential jurors for the federal prosecution of the four police officers accused of violating Rodney King's civil rights were questioned during *voir dire* as to any personal reasons the juror might want to be on the panel.[24] One juror admitted that he planned to take notes during the trial and was considering writing a magazine article after the trial concluded.[25] Another said that although she had no current plans to sell her story, the idea was appealing: "I'm a capitalist, of course, being an American."[26]

In a recent highly charged case, the judge's instructions to the jury included an admonition against juror journalism. The judge, presiding over the trial of a black teenager accused of stabbing to death an Australian rabbinical student in the Crown Heights section of Brooklyn, New York, urged jurors not to accept media offers to sell stories about the trial: "I don't want any juror to decide this case because they are telling a story."[27]

In another recent case, a defense attorney unsuccessfully moved for a

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21. Freitag, *supra* note 6, at 9.

22. Jones, *supra* note 7, at B3.

23. *Id.* It appears that the newspapers declined to bid on the story as a matter of journalistic ethics. The editor of the *Daily News*, for example, said that after the Goetz trial, the paper had decided not to buy juror material as a matter of policy. The paper was concerned that "if a juror knows going in that money is there, it could affect the outcome." *Id.*

24. Jim Newton, *Potential King Case Jurors Sense Trial's Significance*, L.A. TIMES, Feb. 18, 1993, at B1, B4. Potential jurors in the O.J. Simpson case were questioned in a lengthy questionnaire about, inter alia, any profit motive for sitting on the jury (copy of juror questionnaires on file with author) and admonished by the Judge to refrain from any contracts for sale of their story. *See supra* note 9.

25. *Id.* The juror foreperson in the state trial of the police officers accused of beating Rodney King is writing a book about the experience. Katz, *supra* note 11, at A1. It was speculated by the press that a juror in the federal trial was likewise planning to write about the experience and for that reason sought (unsuccessfully) to become the foreperson of the jury. After the verdict, the jury foreman in the federal trial offered to sell his story to *A Current Affair*, but he was rejected. He later appeared on *Inside Edition*, a rival tabloid television show, where he received an undisclosed sum for his story. *Id.* Two federal jurors received an undisclosed sum for appearing on the *Donahue Show* with defendant Stacy Koon. *Id.* at A7.

26. Newton, *supra* note 24, at B4.

27. *Opening Statements Set in Crown Heights Slay Trial*, UPI, Sept. 22, 1992, *available in* LEXIS, Nexis Library, UPI File.

mistrial on the grounds that a juror's desire to sell her story tainted the trial.[28] The defense attorney accused a juror of taking notes and making secret recordings during the trial of Pamela Smart, a woman charged with, and convicted of, enticing her teenage lover to murder her husband. The defendant argued that the juror tried to sell her material to the defense for $25,000 and hoped that she could sell it to a movie company, magazine or other publisher.[29] The court denied the mistrial on the grounds that there was no evidence that the juror formed the intent to sell the tapes during her service as a juror, and an appellate court affirmed.[30]

While the known number of juror journalists might appear small, these stories represent only the tip of the iceberg. For every juror who succeeds in profiteering from jury service, undoubtedly many contemplate such a prospect, and others likely try and fail. A precise count of such activity is impossible. The number of jurors contemplating fame and fortune, however, will almost certainly increase substantially in the future. The expanding practice of cameras in courtrooms,[31] the public's voracious appetite for crime stories and real-life dramas,[32] the proliferation of talk shows encouraging jurors to reveal the inside details about sensational trials—all these operate to ensure an ever-expanding number of persons seeking to use their jury experience for personal gain.

The experience in the O.J. Simpson case—even weeks before the start of the trial—may be a sign of things to come in high-profile cases. While typically citizens in Los Angeles (and elsewhere) serve only reluctantly on juries, and millions routinely evade such duty, the Jury Commissioner in L.A. County was inundated by calls from citizens requesting to be on the jury that would hear the O. J. Simpson case—despite the spectre of complete sequestration during the trial.[33] Many observers commented that the "lawyers in the Simpson case will have to ferret out those who want to sit in on the former athlete's jury so they can cash in by selling their stories to the tabloid media . . . ."[34]

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28. State v. Smart, 622 A.2d 1197, 1211 (N.H. 1993).
29. *Id.* at 1211.
30. *Id.*
31. *See* Duggan, *supra* note 14, at 42 ("The press has always hounded jurors for their version of what happened during deliberations. But lately it seems that jurors are even more visible—and one reason is probably the increased use of TV in the city's courtrooms. The moment TV is allowed inside, you had people primping for the cameras, writing books about their cases, going on talk shows to say why they voted guilty or innocent—or were the lone holdout.").
32. *See* Paul Marcus, *The Media in the Courtroom: Attending, Reporting, Televising Criminal Cases*, 57 IND. L.J. 235, 235 (1982) ("Americans have always been fascinated by the criminal trial, as demonstrated by the enormously successful novels, plays, films, and television shows based on these trials.") (footnotes omitted).
33. Michael Harris & Thom Mrozek, *Let's Hear it for the Jurors*, L.A. DAILY J., Sept. 16, 1994, at 2.
34. Maura Dolan, *Impartial Jurors Can be Found, Court Experts Say*, L.A. TIMES, July 9, 1994, at A1.

Given this likely escalation in the already significant phenomenon of juror journalism, the question arises: Is juror journalism an innocent or even desirable practice, or does it entail some real risks to the defendant's right to a fair trial?

II. THE EFFECT OF JUROR JOURNALISM ON THE TRIAL PROCESS: JUSTICE DENIED?

A. *The Sixth Amendment Right to a Fair Trial: An Overview*

The Sixth and Fourteenth Amendments to the United States Constitution guarantee to every criminal defendant a fair trial.[35] Specifically, the Constitution requires that a criminal defendant receive a "speedy, public trial by an impartial jury . . . ." This right to an impartial jury constitutes a core—perhaps *the* core—component of the Sixth Amendment guarantee of a fair trial.[36] What, then, is an impartial jury?

There are two separate, but related, strands to impartiality that are relevant here. The first is the notion that a jury must decide guilt or innocence based solely on the evidence introduced at trial.[37] Thus, various trial procedures such as *voir dire* and sequestering of jurors work to ensure that a juror's perception of the facts are not unduly influenced either by outside forces like the media or by the juror's own preconception or biases.[38]

An impartial jury also necessarily requires no conflict of interest nor stake in a particular outcome. Thus, impartiality implies indifference.[39] No interest of the juror should incline them in one direction or the other except the interest in justice and truth.

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35. For a discussion of the Sixth Amendment, see generally Randolph Jonakait, *Foreword: Notes for a Consistent and Meaningful Sixth Amendment*, 82 J. CRIM. L. & CRIMINOLOGY 713 (1992); Terri Belanger, *Symbolic Expression in the Courtroom: The Right to a Fair Trial Versus Freedom of Speech*, 62 GEO. WASH. L. REV. 318 (1994). The Sixth Amendment applies to state trials via the Due Process Clause of the Fourteenth Amendment. Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

Of course, many factors affect the determination of a fair trial. I am focusing here on those aspects potentially impacted by juror journalism.

36. "[A]lthough we rightfully place a prime value on providing a system of impartial justice to settle civil disputes, we require even a greater insularity against the possibility of interference with fairness in criminal cases. Perhaps this is symbolically reflected in the Sixth Amendment's requirement of an impartial jury in criminal cases whereas the Seventh Amendment guarantees only 'trial by jury.'" Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 257-58 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976).

37. Taylor v. Kentucky, 436 U.S. 478, 485 (1978).

38. Jurors need not be totally ignorant of the facts and issues in a case but must not have any fixed opinions of guilt or innocence that would preclude them from judging the facts impartially. Mu'Mi v. Virginia, 111 S. Ct. 1899, 1908 (1991).

39. Irvin v. Dodd, 366 U.S. 717, 722 (1961) ("In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors.").

B. *Does Juror Journalism Threaten a Fair Trial?*

The spectre of jurors penning articles for profit creates numerous concerns for the integrity of the juror journalist, the other jurors on the panel, and the system of justice generally.

1. *The Effect of the Profit Motive on the Juror Journalist*

The potential to profit from jury service may adversely affect juror journalists from the time they are considered for possible empaneling on the jury until the moment they complete their deliberations. In all cases, the ultimate fear is the same: The lure of the dollar will consciously or subconsciously alter the fairness and impartiality of the juror. Because each stage of the proceeding—from the *voir dire* to the actual trial to the deliberations and rendering a verdict—raises unique concerns, each will be considered separately.

a. *In the Beginning: The Attempt to Become a Juror.* An individual being considered for jury duty, even in a high profile case, presumably has no hidden agenda, no special interest to serve on that particular case. Or, it is assumed, any bias or special interest that might make serving on the jury inappropriate will be revealed during *voir dire*. Thus, the juror is expected to answer truthfully and candidly *voir dire* questions posed by the attorneys and judges—questions to determine the individual's ability to fairly and impartially assess the facts of that case.

What if, however, a juror desires to serve on a particular jury because he or she believes it may be financially profitable? A legitimate fear arises that the individual, when questioned, will respond in a way that maximizes his or her chances of being selected for the jury. Consciously or subconsciously, the potential juror will be attempting to answer, not candidly or truthfully, but so as to please or satisfy the attorneys. Thus, the profit motive may cause potential jurors to "evade or deceive to get onto a high profile jury."[40] That may have occurred, for example, with juror Lesly in the Goetz case. Lesly, responding to attorney questioning, said that he had never been the victim of a crime, but he neglected to mention that he had twice intervened to stop street crimes perpetrated on others.[41]

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40. Jost, *supra* note 5, at 15. *Cf.* Bruce Fein, *Lights, Cameras and TV Profits*, WASH. TIMES, Aug. 20, 1991, at G1 (stating that the jury pool members who crave selection as jurors in the William Kennedy Smith trial may "dissimulate during *voir dire* as to their impartiality between the defense and the prosecution. The dissimulation may even be subconscious, as the wish is often father to the thought."). *See also* Katz, *supra* note 11, at A7 (quoting Professor Laurie Levenson: "The concern is: Are you doing your jury service out of a sense of public duty or are you looking down the road to see if you can make some money?").

41. Whether this omission was purposeful or subconscious can never really be known. The real concern remains, however, that Lesly, who was considering the possibility of writing an article on the

In assessing whether juror journalism actually jeopardizes the *voir dire* process, and hence a fair trial,[42] several assumptions must be explored. First, the argument assumes that jurors know, or consider before *voir dire*, the possibility of writing a book or article, or profiting from speaking out about their jury experience. This assumption is likely an accurate one. Undoubtedly, many individuals never consider selling their story until some later point in the trial. As previously discussed, however, some do contemplate that possibility as early as *voir dire*.[43] Others will increasingly do so, moreover, as the phenomena of juror as superstar, appearing on every morning talk show, and juror as writer, making money from the experience, become even more prevalent.

Second, the argument assumes that without a profit motive, individuals would not otherwise seek to sit on high-profile cases. Such a blanket assertion is implausible. To be a participant in such a case might seem particularly exciting, or may provide certain bragging rights even without any monetary rewards. The desire for fame, the excitement of being on the morning talk shows, may appeal to some people even if no financial incentives were involved. If the same individuals who would be lured by financial gains would in any event actively want such service, the added impetus to deceive caused by possibly selling a story may be insignificant.

Thus, it is difficult to quantify the number of individuals who would be tempted, consciously or unconsciously, to lie during *voir dire* simply by the possibility of monetary reward. Undoubtedly, there are many reasons individuals may be attracted to, or shirk from, high-profile cases; separating out the motives and ascribing certain causal behavior to each would be impossible. It is not unrealistic to conclude, however, as did juror expert Howard Varinsky, that whatever other motivation exists, "[w]hen you add the monetary incentive, it just makes it that much harder to ascertain whether people are telling the truth or not."[44] In sum, despite other noneconomic reasons for desiring to sit on a particular jury, it is reasonable to assume that for some unknown and perhaps ultimately unquantifiable number of persons, the possibility of financial benefit would uniquely motivate them to alter their *voir dire* responses. After all, the disincentives to sit in the high-profile trials

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trial at the time, neglected to mention this obviously relevant information for fear of being excluded from the jury. *Cf.* JEFFREY T. FREDERICK, THE PSYCHOLOGY OF THE AMERICAN JURY 29 (1987) (finding that during *voir dire* jurors have difficulty recognizing own biases and prejudices and *voir dire* atmosphere does not encourage honest disclosure of opinions and biases).

42. The Court has long recognized that "*[v]oir dire* plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored. Without an adequate *voir dire* the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled." Rosales-Lopez v. United States, 451 U.S. 182, 188 (White, J., plurality opinion).

43. *See supra* note 25 and accompanying text.

44. Jost, *supra* note 5, at 15 (quoting juror selection consultant Howard Varinsky).

are significant as well. These are often (though certainly not always) long trials; the jury may be sequestered; and the loss of income may be great. For some, the lure of the dollar from selling the story of their jury experience may be the only factor overcoming these negatives.

Third, the argument that potential jurors will alter their answers during *voir dire* in order to be seated on the panel assumes that people are capable of recognizing what responses would enhance their chances of being selected for the jury. Certainly, many individuals are incapable of accurately assessing what is a desired response. Those people, therefore, may or may not provide the "correct" answer, and thus may or may not get seated in a particular case. The point is more one of risk: When individuals consider the chance for financial renumeration, the real possibility exists that some individuals—either bright enough to figure out the best response, or lucky enough to guess at it—will be chosen as jurors, not based on candid answers but on calculated responses.

Fourth, the argument assumes that the current penalties for lying during *voir dire* will not act as a sufficient deterrent.[45] This assumption is likely accurate. It would be difficult to prove that some of the answers are lies. Omissions like Lesly's in the Goetz trial are difficult to punish; subtle shading of truths are virtually immune from sanction.

Finally, the argument assumes that attorneys or judges cannot identify instances where jurors desire service in order to profit. If such jurors can be recognized, then an assessment can be made in the individual circumstances whether that motive rendered the other *voir dire* responses unreliable. Potential jurors who are suspected of having improper motives for serving can be excused.

Perhaps an easy solution would be simply to have the lawyers or judges ask each juror if they are planning to sell, or would consider selling, the story of their service. Attorneys would then be able to evaluate the *voir dire* answers with this response in mind. For those who answer yes, the attorneys can assess whether this interest somehow invalidates or calls into question any previous answer. Of course, to the extent that jurors are conscious of their desire to get on the panel so that they can profit, and are willing to shade the truth to other questions, they might be equally willing to tell a "white lie" here too. Individuals faced with such a question may answer no, telling themselves that

45. Hans Zeisel, Professor Emeritus at Chicago Law School and an expert on the jury system, noted that "while there is a danger of people lying during *voir dire* in order to become jurors in sensational trials in order to write about them, there is a simple solution: punish jurors who did not tell the truth." Freitag, *supra* note 6, at 9. "Knowingly lying during the *voir dire* violate[s] 18 U.S.C. § 1621 (1982) [a federal perjury statute] and subject[s a] juror to possible criminal contempt pursuant to 18 U.S.C. § 401 (1982). . . ." United States v. Colombo, 869 F.2d 149, 151 (2d Cir. 1989). To be punished for criminal contempt, the untruthful answer must have been made "willfully . . . as distinguished from inadvertently or negligently." Bays v. Petan Co. of Nev., 94 F.R.D. 587, 590 (D. Nev. 1982).

it is just an "unrealistic dream" and that such fantasies are not what the judge really meant by "planning" to sell the story.

It is possible, moreover, that asking the question during *voir dire* could exacerbate the problem of juror journalism: The question might plant a seed of thought in some jurors' minds! They might never have thought about the idea before, but now that it is mentioned, it sounds fairly interesting. While they can honestly answer that they were not planning or considering writing an article, the idea takes hold.[46] Assuming the question is timed for the end of the voir dire, the germ of the idea will not affect the other *voir dire* answers. That is, as the last question, the juror who suddenly likes the idea will not be able to revise any answer so as to make it more likely that he or she will sit. (It may, however, affect later aspects of the trial which will be discussed shortly.)[47]

So what can be concluded about the effect of juror journalism on the *voir dire* process? The argument that juror journalism adversely affects the *voir dire* process (and therefore, the fairness of the entire trial) rests on all the above assumptions being true. That is, that there are individuals who desire solely or predominantly for profit reasons to "win" a place on the jury, who would consciously or subconsciously deceive or shade the truth in answering *voir dire* questions despite possible penalties, and who would not admit to such a purpose when directly asked about it during *voir dire* or who could not otherwise be detected. While it is not inconceivable that such people exist, there is no way to even estimate the number of individuals who fall into this category.

b. *In the Middle: The Juror's Perception of the Trial.* The desire to profit from jury service may not only influence the *voir dire* process; it may also distort the juror's perception of the testimony during the course of the trial. Social psychology and communication studies demonstrate that individuals perceive information selectively. That is, information is heard and processed according to preconceived ideas held by an individual or according to how that person wants to hear it.[48] As Donald Vinson explains, "jurors perceive many things that occur during a trial according to preexisting cognitions. . . . Like anyone else . . . jurors see what they want to see, hear what they want to hear and perceive what they want to perceive. . . . This is an unconscious process and can be done without malice by well meaning and very conscientious

46. Or even if Potential Juror A does not want to write an article, hearing other jurors questioned about the possibility may raise concern in A's mind that others will contemplate such an endeavor. *See infra* notes 58-64 and accompanying text.

47. *See infra* notes 48-57 and accompanying text.

48. For application of selective perception principles to the jury system, see DONALD E. VINSON, JURY TRIALS 26-27 (1986); SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, THE AMERICAN JURY ON TRIAL 132-36 (1988). *See generally* HENRY GLEITMAN, PSYCHOLOGY 191-94 (2d ed. 1986).

jurors."[49] Thus, what one person hears, absorbs and remembers as A hit B without provocation, another may perceive simply as A and B fought, and still another as A slugged B. All have different connotations and possibly could lead to different legal conclusions.

What significance does this phenomenon of selective perception have for juror journalism? People's wish to use their jury experience for financial profit may affect what they hear, see and remember about the trial. In other words, jurors' desire to profit—be it by writing a newspaper article, a book, a screenplay, or by selling the story on talk shows—may alter the perception of the testimony at trial. Jurors may hear and perceive the witnesses with that profit motive in mind. Subconsciously, they may "remember" testimony to be more dramatic than it really was. Subconsciously, a quote from a witness may be molded to better fit a dramatic storyline than it objectively does. For example, in the Howard Beach case, testimony detailing some racial animus might be exaggerated in the mind of the juror; emphasizing the racial tensions which were part of the case obviously make the juror's account more dramatic and saleable. It is the only thing distinguishing that case from hundreds of other murders committed each day in New York.

The juror's perception of the trial may be fundamentally altered by the conflicting roles of juror and journalist. Instead of participating in the trial only as a juror sworn to fairly and unbiasedly listen to all sides, they are also in the role of a journalist and profiteer, seeking the "truth" that most effectively sells a story. Even with the best of intentions—even with every desire to listen and remember the testimony accurately and unbiasedly—the role of journalist may intercede and affect the juror's perceptions.[50] Moreover, a prophylactic rule precluding juror journalism may be justified because such influences may be impossible to detect after the fact, especially when the effect is subconscious.

Thus, the fear is that selective perception caused by profit motives may violate the defendant's right to a fair trial guaranteed by the Sixth and Fourteenth Amendments. These Amendments guarantee a "panel of impartial arbiters who reach their verdict based on evidence presented in open court. Our system contemplates that . . . jurors will be 'influenced only by the testimonial and documentary proofs admitted into evidence, the arguments of counsel, and the law as expounded by the trial judge.'"[51] While the justice system inevitably must accept some human frailties, like the imperfection of human memory, perceptual distortions caused by the desire to reap financial benefits

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49. VINSON, *supra* note 48, at 26-27.

50. *Cf.* David Zarefsky et al., *Government Statistics: The Case for Independent Regulation—A Legislative Proposal*, 59 TEXAS L. REV. 1223 (1981) (discussing role expectations and how that affects a person's behavior).

51. Michael E. Swartz, Note, *Trial Participant Speech Restrictions: Gagging First Amendment Rights*, 90 COLUM. L. REV. 1411, 1416 (1990).

from their service should not be one of them.

How significant then is the danger of selective perception when evaluating the risks of juror journalism? Any alarm should be tempered by several considerations. First, the evidence is all theoretical; it is extrapolated from social science research and applied to the justice system without any empirical evidence from the latter domain. That extrapolation, moreover, may well be inaccurate, especially in high-profile cases when there are countervailing pressures that mitigate against any distorting influence of monetary gain. For example, the juror also wants to conform to the expectations of his or her role as an unbiased adjudicator of the facts. Simply recognizing that jurors "wear two hats"—that of impartial juror and that of journalist—does not prove that the latter role always or even sometimes wins out. In other words, the desire to effectively perform the role of juror, and all the objectivity that that role requires, may prevail over any wish to profit. After all, in a high-profile, publicity-laden trial, the role most exposed to the public is the role of the fair and thoughtful juror, not the journalist or profiteer. The desire to conform to this role expectation may be more compelling than any subconscious need to perceive the testimony in a way that maximizes profit.[52] Thus, even a juror who seeks profit may be able to fairly and objectively evaluate the trial. Accordingly, the risk of selective perception remains just that: a risk that is unproven in practice.

Second, does selective perception, if it occurs, truly jeopardize a fair trial? Some selectivity in perceiving and recalling evidence is inevitable even without the possibility of financial renumeration; it is inherent in the different attitudes, experiences and abilities people bring to the jury box. It is a leap to assume that because some selectivity in perception or recall occurs, the defendant is denied a fair trial.

c. *In the End: The Juror Deliberating and Rendering a Verdict.* The final concern is that a juror journalist will attempt, consciously or subconsciously, to manipulate the deliberations and the verdict to ensure an outcome most conducive to the selling of the story. Thus, "the possibility exists that a juror may take actions during the deliberations to produce a more dramatic verdict, rather than responding to the evidence presented."[53] This fear that a

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52. Judge Gibson explained jurors' perception of their role as follows: "The responsibilities placed on jurors . . . [in a courtroom when selected and sworn to try the issues] are sobering and have a solemn impact upon them. In this situation, one's responsibility is felt keenly." Grisby v. Mabry, 758 F.2d 226, 248 n.7 (8th Cir. 1985).

53. Brent K. Ashby, Note, *Juror Journalism: Are Profit Motives Replacing Civic Duty?*, 16 PEPP. L. REV. 329, 330 (1989).

As lawyer and chairman of the Criminal Law Committee of the New York City Bar Association, Jed Rakoff remarked, "It seems to me that if you put a profit motive on jury deliberations, it could potentially influence what a juror said and, perhaps, how he decided." Jones, *supra* note 7. *See also* Fein, *supra* note 40 ("[J]ury deliberations may be skewed if jurors anticipate that a particular outcome

profit motive may distort jury deliberations is analogous to the reason why many states prohibit or regulate attorneys contracting to sell their clients' stories during the course of representation.[54] A financial interest in the lawsuit could influence an attorney to seek the most dramatic, flamboyant defense and not necessarily the one in the client's best interest. Similarly, a juror with an eye toward financial renumeration may attempt to ensure the most "saleable" resolution of the trial, not necessarily the one most consistent with the evidence. As Barry Slotnick, the lawyer for Bernard Goetz, remarked, "I would be concerned about some juror-journalist thinking 'what's a good ending?'"[55]

Certainly, it may be difficult to determine what verdict would enhance the profitability of a story. Is a "not-guilty" or a "guilty verdict" in the Goetz case more "dramatic?"[56] The issue is not whether the juror might correctly assess the most profitable verdict. Rather, the concern is that if a juror believes one is more likely than the other to be profitable, such a belief may influence the deliberative process. Moreover, even if it is hard to assess whether a "not guilty" or "guilty" verdict would be more profitable, it is fairly obvious in most cases that a hung jury would not be very saleable. Thus, a juror might decide to go along with one side or another simply to ensure that some resolution is reached for the sake of the story.

Again, this concern that juror journalists will change the nature of their deliberations, and ultimately, the verdict, remains theoretical. There are no

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and colorfully feisty exchanges in the jury room hold the promise of a best seller or a premier movie . . . [or one] might contrive jury debate and votes to fit a script that would be most fetching to media moguls. . . ."); Freitag, *supra* note 6, at 9 (George Fletcher, Professor of Law at Columbia Law School, stated: "The anticipation of profit could have a distorting effect on the juror's role as an unbiased judge of the facts.").

U.S.C. Law Professor Erwin Chemerinsky expressed the analogous concern regarding the practice by the media of paying witnesses: "There is the danger that people, for the sake of money, might lie, exaggerate or unconsciously embellish." Henry Weinstein, *Free Spending Tabloid Media Causing Judicial Concerns*, L.A. TIMES, July 2, 1994, at A1. Johnnie Cochran, who represented Michael Jackson when he was accused of child molestation, contends that his experience in that case bears out such a concern. Cochran claims that two witnesses sold stories to tabloid TV show "that contradicted and were more sensational than what they said in sworn depositions in a civil suit against Jackson." *Id.*

54. *See, e.g.*, MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-104 (B) (1980) ("Prior to conclusion of all aspects of the matter giving rise to his employment, a lawyer shall not enter into any arrangement or understanding with a client . . . by which he acquires an interest in publication rights with respect to the subject matter of his employment or proposed employment"); *see also* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(d) (1980) ("Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.").

55. Jost, *supra* note 5, at 15.

56. As juror Lesly noted, "The Goetz trial received such massive publicity that a juror could be reasonably assured of a market for a book, article or screenplay no matter what the outcome. It wasn't like we had to come up with a particular verdict to get attention." Freitag, *supra* note 6, at 9. *But see* Fein, *supra* note 40, at G1 ("In the William Kennedy Smith prosecution the opportunities for scripted jury exchanges and polling that would excite a prospective reading or viewing audience abound, such as appraising the evidence of consent to sex, opining on the morals of the defendant, commenting on the psychological stability of the alleged rape victim.").

examples in which such an effect has been proven to occur; there have been no mistrials declared on this ground.[57] Moreover, the same argument discussed above—that a person's desire to conform to the role of a conscientious and fair juror can outweigh any financial interests—may minimize the effect of juror journalism on the deliberation process as well as the perception of the evidence. In fact, the idea of writing about the trial may enhance the performance of the juror. He or she may be more attentive and more serious about the proceedings and the deliberations. Thus, the effect of juror profiteering on the ultimate verdict remains speculative at best; it is grounded in theoretical logic yet remains unproven (and perhaps unprovable) in any empirical sense.

2. *The Effect of a Juror Journalist on the Other Jurors*

Juror journalism risks not only the integrity of the juror seeking profit; it may also impose on the other jurors as well. Most significantly, the knowledge (or even the belief) that a member of the jury is writing or planning to write about the trial may inhibit the frank and open exchange of ideas in deliberations. Simply, jurors may be reluctant to express minority or unpopular views if they believe that such opinions will be aired to the public. As Justice Cardozo wrote, "[f]reedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world."[58] This rationale for juror secrecy may not only apply to confidentiality during the deliberative process itself; if jurors believe that others will freely discuss the thoughts and deliberation of their colleagues after the verdict is returned, the free-flowing process that our system encourages may be chilled.[59]

This frank and open exchange by jurors, moreover, is critical to the effectiveness of the decisionmaking process.[60] Resolution by jury is valued precisely because of the deliberative nature of the process. A just consensus is

57. The very difficulty in proving the effect of juror journalism may be part of its danger.

58. Clark v. United States, 289 U.S. 1, 13 (1933). *Cf.* Chambers, *supra* note 7, at 14 (concerning juror foreperson Nina Krauss's attempt to write about the Howard Beach trial, Shari S. Diamond, a jury expert with the American Bar Foundation in Chicago, noted that if the "fellow jurors knew of her plans . . . they might not feel free to speak their minds and engage in debate in the jury room."). 18 U.S.C. 1508 (1982) imposes criminal sanctions on those who record, observe, and listen to deliberation proceedings.

59. United States v. Doherty, 675 F. Supp. 719, 724 (D. Mass. 1987). For this reason, in military court martials the decisionmakers must swear under oath not to divulge to anyone the nature or contents of their vote at the conclusion of the proceedings. Manual for Courts Martial S.1136 (1969).

60. Numerous court decisions have recognized that it is "fundamental and beyond dispute that the deliberations of a jury are private and confidential and except in a very narrow range of circumstances the court itself is inhibited from inquiring into the contents of such deliberations." United States v. Franklin, 546 F. Supp. 1133, 1142 (N.D. Ind. 1982). Unlike most government bodies, therefore, privacy and secrecy has always been viewed as essential for the effective functioning of the jury. *Id.* at 1144.

most likely to be reached after an open exchange of ideas and beliefs on the credibility and motivation of witnesses and the fairness of various decisions. Without such dialogue, the wisdom and fairness of jury verdicts would be in doubt. The process could not be trusted.

Additionally, jurors, fearing exposure of their deliberations to the public, may be discouraged from reaching unpopular decisions. As one author noted:

> Jurors' willingness to depart from community expectations becomes even less probable if a wide audience may discover precisely how much each individual contributed to an unpopular verdict or which jurors delayed or thwarted a popular one. A juror who realizes . . . that deliberations may become a part of the public domain is less likely to argue for judgments contrary to public opinion and the deliberative process is therefore less likely to produce them.[61]

While the impact of juror journalism on jury deliberations is potentially great, there are a number of considerations that at least challenge the significance of this problem. First, how often do other jurors fear such publicity? That is, even when a juror is writing or plans on writing about the trial, do the other jurors know about this? Or has juror journalism in sensational trials reached such a level that jurors presume or fear that information about the deliberations will be revealed? It should be remembered that the number of cases in which jurors contemplate writing a book or selling the story is, comparatively speaking, minuscule. While there are a few examples of juror journalists revealing their intentions to other jurors,[62] the precise scope of this problem cannot be quantified. Thus, perhaps the worst that can be said is that while the magnitude of the harm may be great, the significance of the problem is unknown.

Second, even the magnitude of the harm may not be as significant as on first consideration. That is, even if jurors believe that the deliberations may be publicized, this may enhance, not detract from, the quality of the deliberations. The assumption that juror deliberations must be conducted in private concededly has been long accepted and rarely questioned. Perhaps it is appropriate now at least to question the need for secrecy at least within the context of jurors later recollecting the deliberation process rather than preventing people from eavesdropping on the actual deliberation. After all, in most other areas of government, the move to open up proceedings to the public stems from the belief that public scrutiny *benefits* the deliberative process. Similarly, it is possible to argue that a juror who knows or suspects that the jury deliberations may become public will be more conscientious, thoughtful, and challenging of others in order to ensure the most defensible verdict.

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61. Note, *Public Disclosures of Jury Deliberations*, 96 HARV. L. REV. 886, 890-91 (1983) (footnote omitted).

62. In the Howard Beach case, the other jurors apparently knew of the foreperson's plan to sell the story of the trial. Chambers, *supra* note 7, at 14.

A study conducted with mock jurors seems to bear out this supposition.[63] In the study, half the juries were told that their deliberations would be private, and half were told that the deliberations would be reviewed by a panel of psychologists and legal experts and that they might be invited to discuss the argument and opinions they had expressed. Although the researchers ultimately found no difference in verdicts between the two groups, they concluded:

> [the] private-condition jurors may adopt an early opinion and feel less inclined to change with time. They perhaps feel less need than public condition jurors to debate, examine, and generally test testimony interpretations, recall, etc., since they do not expect subsequent challenge. Public condition jurors perhaps reacted to the expected scrutiny by playing the role of a particularly conscientious juror. They consequently attempted to avoid "premature" opinion change, and with repeated refutation and counterarguments felt increasingly free to alter their opinion.[64]

Thus, the impact of juror journalism on the deliberative process remains uncertain. It has historically been assumed that the deliberation process must be conducted in secret in order to encourage frank and open discussion; whether this presumption applies only during the actual deliberation process itself, or whether it also applies to a fear of future revelation, has never been established. Yet despite the absence of proof, those lamenting juror journalism still continue to simply assert the importance of secrecy. This mere assertion, however, should not be sufficient to condemn juror journalism, particularly because there is at least some evidence that the possibility of future revelation has a desirable effect on jury deliberations.

3. *Effect on the System of Justice*

All the above arguments detail some deleterious effects on our system of justice and the ability of the defendant to receive a fair trial. In addition, there is the concern that juror journalism jeopardizes the appearance of fairness in the justice system.

The integrity of the criminal and civil justice system is preserved as long as the public perceives it to be fair. It is often said that the appearance of fairness is as important as the reality of fairness.[65] Juror journalism threatens the reality of fairness, as discussed above, but also the appearance of fairness. That is, the public perception that jurors profiting from their jury service

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63. John Davis et al., *Changes in Group Member's Decision Preferences During Discussion: An Illustration with Mock Juries*, 34 J. PERSONALITY & SOC. PSYCHOL. 1177 (1976). Extrapolating from mock jury experiments to real life courtroom experience has been criticized as unscientific. *See, e.g.*, Robert Bray & Norbert Kerr, *Use of the Simulation Method in the Study of Jury Behavior*, 3 LAW & HUM. BEHAV. 107 (1979).

64. Davis, *supra* note 63, at 1182-83. *But see infra* notes 130-131.

65. *See, e.g.*, David Harris, *The Appearance of Justice: Court TV, Conventional Television, and Public Understanding of the Criminal Justice System*, 35 ARIZ. L. REV. 785, 788-90 (1993) (discussing importance of appearance of fairness: "Since most people have little or no personal experience with the criminal justice system, they know only the system's appearance . . . . A system consistently seen as unjust will eventually lose the allegiance of its citizens.").

distort the truth-seeking process—even if in reality there is little empirical support for such a position—may be an independent reason to condemn the practice of juror journalism. To the extent that the public perceives an injustice, its willingness to accept the jury system in general and a specific verdict in particular is jeopardized.

The American public forms much of its impression about the justice system predominantly by its exposure to the high-profile cases—precisely the cases in which jurors are most likely to engage in profit-making endeavors. Thus, while the raw numbers of jurors selling stories is still relatively minuscule, the impact on the system is not. Rather, even a small number of juror journalists may threaten the perceived integrity of the justice system. In this way, the dangers of jurors profiting from their service are magnified beyond the mere numbers of jurors involved.

III. AGAINST RESTRICTIONS: THE VALUE OF JUROR SPEECH

Given these potential—if not necessarily real—harms, why not ban or restrict juror speech? This section explores that question by considering the value of freedom of expression in the context of juror journalism. Should society care about protecting juror speech? Is it the kind of expression that should be valued under the First Amendment?

Juror speech fosters many important values in society—values recognized as compelling by the First Amendment. A core value of the First Amendment is ensuring speech that facilitates democracy and self-government.[66] Because the people are sovereign, they must have access to information allowing them to evaluate governmental processes, including the court system. As the Supreme Court recently noted, "[t]he 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."[67] Simply stated, "the public has a right to know about the operations of the judicial branch, an agency of democratic government."[68] Indeed, "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. . . ."[69]

Speech that explores, criticizes, or merely reveals information about the

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66. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT 15-16, 24-27 (1948).

67. Gentile v. State Bar of Nev., 501 U.S. 1030, 1035 (1991).

68. Swartz, *supra* note 51, at 1420. *See* Grosjean v. American Press Co., 297 U.S. 233, 249-50 (1936) (quoting 2 COOLEY, COOLEY'S CONSTITUTIONAL LIMITATIONS 886 (8th ed. 1927)) ("The evils to be prevented [by the First Amendment] were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens.").

69. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575 (1980).

judiciary falls squarely within this protected area of speech. Juror speech, in other words, serves an essential function in a democracy by revealing flaws, inconsistencies, or unfairness in the judicial process. Juror speech may illuminate incompetence, inefficiency, and corruption in the court system. Moreover, the mere knowledge that jurors can speak freely about the trial and its participants may help to ensure a fair process. "The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power. . . . Without publicity, all other checks are insufficient; in comparison of publicity, all other checks are of small account."[70]

Besides exposing possible flaws in the system or deterring potential abuses, juror speech is also valuable even when revealing what is good about the system. Explanations of how the deliberations progressed could reinforce notions that the jury system does work and thus increase public confidence that justice was served. A juror's description of how a particular verdict was reached may help justify a verdict that appeared to the public to be grossly unfair, and therefore preserve the integrity of the judicial system generally and the role of the jury specifically. Consider, for example, the effect of the jurors speaking out after the acquittals of the four police officers accused in a state proceeding of using unreasonable force against Rodney King. Although many still disagreed with the verdict, the explanations at least may have assured some members of the public that the verdict was based on a certain interpretation of the evidence and could not simply be dismissed as the result of blatant racism.

Finally, juror speech aids lawyers, scholars, and laypersons in understanding the judicial process. As such, it plays an essential role in any attempt to better the justice system. Lawyers frequently request access to jurors after the verdict in order to learn more about their own shortcomings at trial.[71] Scholars may question jurors to assess the effect of various legal tactics, to determine the juries' interpretation of judicial instructions, and to better understand the dynamics of the deliberation process.[72] Jurors' discussions about their trial experience educates the public about their own duties and obligation of jury service.[73] In sum, even when juror journalism is pedantic, it still serves an essential informational function about the justice system.

Besides facilitating democracy and self-government, juror speech is

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70. *In re* Oliver, 333 U.S. 257, 270-71 (1948) (footnote omitted).

71. Although some early court decisions restricted postverdict interviews with jurors, more recent cases have recognized the right of media and attorney access to jurors, with some limited restrictions on lawyers' access to jurors to protect them from harassment. *See, e.g.*, United States v. Sherman, 581 F.2d 1358 (9th Cir. 1978); *In re* Express News Corp., 695 F.2d 807 (5th Cir. 1982). *But see* Note, *Muzzled in Massachusetts: Lawyers Cannot Talk to Jurors After Trial Has Ended,* TRIAL, Jan. 1992, at 81 (discussing recent decision by Massachusetts Supreme Judicial Court that lawyers cannot talk to jurors after the completion of the trial).

72. *See, e.g.*, HENRY KALVEN JR. & HANS ZEISEL, THE AMERICAN JURY (1966).

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

valuable because it enhances the personal growth and self-fulfillment of the speaker. "[T]he freedom to speak one's mind is . . . an aspect of individual liberty—and thus a good unto itself . . . ."[74] In expressing our own thoughts and ideas, we grow as individuals; revealing our inner feelings can serve as a catharsis. Juror speech serves these objectives. As jury expert Hans Zeisel has noted, the urge to talk about the experience of jury duty is a strong one, in part to release the pent-up emotional pressure inherent in the role of juror.[75] Especially when unpopular verdicts are reached, jurors often feel compelled to publicly defend themselves against charges of bias and incompetence.[76]

Identifying the values fostered by juror journalism is only half of the First Amendment analysis. In the next section, I balance these interests against defendants' Sixth Amendment right to a fair trial and the state interest in regulating juror journalism.

IV. RECONCILING THE RIGHT TO A FAIR TRIAL AND THE RIGHT TO FREEDOM OF SPEECH

What happens when two constitutional rights clash? Neither the Constitution itself, nor the drafters of the document, provide any guidance on how to reconcile the defendant's Sixth Amendment right to a fair trial with the First Amendment right to free speech.[77] Two potential resolutions seem possible. First, one right could be deemed preeminent, and take precedence over the other. Second, the conflict could be resolved "without essentially abrogating one right or the other."[78] That is, the court could attempt a solution accommodating both interests.

The first option—developing a hierarchy of interests among the protections enshrined in the Bill of Rights—is typically rejected by the courts. Although the Supreme Court once asserted that the right of the accused to the fair and impartial administration of justice is "the most fundamental of all freedoms,"[79] it has since retreated from the implication that the due process rights of the accused were inherently superior to other interests such as those advanced by the First Amendment.[80] As the Court noted, "[t]he authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one superior to the other . . . [i]t

74. Bose Corp. v. Consumers Union, 466 U.S. 485, 503 (1984). *See also* Procunier v. Martinez, 416 U.S. 396, 427 (1974) (Marshall, J., concurring) ("The First Amendment serves not only the needs of the polity but also those of the human spirit—a spirit that demands self-expression.").

75. Jost, *supra* note 5, at 16.

76. Swartz, *supra* note 51, at 1439.

77. Garcia, *supra* note 2, at 1107-09 (discussing the conflict between the right to a fair trial and the right to freedom of speech).

78. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 612 (1976) (Brennan, J., concurring).

79. Estes v. Texas, 381 U.S. 532, 540 (1968).

80. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 561 (1976).

is not for us to rewrite the Constitution by undertaking what they declined to do."[81]

Thus, the question becomes: Can we accommodate the interests in a way that both protects the defendant's right to a fair trial and maintains fidelity to First Amendment principles?

A. *Restricting Juror Speech Consistent with the First Amendment: The Framework*

An attempt to reconcile the defendant's right to a fair trial with the values of freedom of speech begins with the recognition that the First Amendment, although seemingly absolute, has never been construed to prohibit all regulations of speech. Can we regulate juror journalism consistent with existing First Amendment principles? What is the appropriate First Amendment framework for assessing the constitutionality of juror journalism? Two recent cases pose seemingly different standards of scrutiny for regulating juror speech. This section considers both cases to assess the appropriate framework for analyzing restrictions on juror speech.

1. Simon & Schuster *and the Strict Scrutiny Standard*

Unless the burdened speech occupies a subordinate position in the scale of First Amendment values, expression may only be regulated if a compelling government interest exists, the restriction furthers the government interest, and no other, less intrusive alternative for achieving that interest exists.[82]

Moreover, regulations that burden speech based on its content are especially suspect. The Supreme Court recently noted that incompatibility between content-based restrictions and the First Amendment was so "obvious" as to require no further explanation.[83] Simply, the government's ability to impose content-based restrictions on speech would allow it to effectively drive certain ideas and viewpoints out of the marketplace. Prohibiting the government from discriminating against certain ideas or content was a driving force behind the adoption of the First Amendment.[84] Thus, the Court has consistently held that "[r]egulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment."[85]

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81. *Id.*

82. *See* Perry Education Ass'n v. Perry Local Education Ass'n, 460 U.S. 37, 45 (1983); *see generally* Turner Broadcasting v. F.C.C., 114 S. Ct. 2445, 2459 (1994).

83. Leathers v. Medlock, 111 S. Ct. 1438, 1444 (1991).

84. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

85. Regan v. Time, Inc., 468 U.S. 641, 648-49 (1984). *See also* Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has

Recently, the Supreme Court applied this principle against content-based discrimination to a case whose facts are analogous to the proposed restrictions on juror speech. New York, like many other states and the federal government, had adopted a law to ensure that criminals did not profit from their crimes by, for instance, writing books detailing their deeds. New York's "Son of Sam" law[86] required that an accused or convicted criminal's income from works describing his or her crime be put into an escrow account and made available to the victims of the crime and the criminal's other creditors.[87]

The lawsuit which challenged the constitutionality of the law arose out of a book contract between Simon & Schuster and organized crime figure Henry Hill. Hill and a collaborator wrote a book depicting Hill's life of crime; the book, *Wiseguy*, was a financial success, and in 1990 was converted into the critically acclaimed film, *Goodfellas*.[88] After it was determined that the publication fell within the scope of the statute, and thus, that the profits from the book owed to Hill would be turned over to the escrow account under the statute, Simon & Schuster brought suit, seeking a declaration that the law violated the First Amendment.[89]

Even though the law did not prohibit speech—it simply eliminated profit to the author—the Supreme Court held the law unconstitutional. The Court first noted that the Son of Sam law constituted content-based discrimination: The law "singles out income derived from expressive activity for a burden the State places on no other income, and it is directed only at works with a specified content."[90] Because the law established a financial disincentive to create or publish works with a particular content, the law was unconstitutional unless the state could show that its "regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end."

The Court found that although the state had a compelling interest in compensating victims from the fruits of the crime,[91] the statute was not

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no power to restrict expression because of its message, its ideas, its subject matter or its content.").

86. In 1977, New York was terrorized by a serial killer, David Berkowitz, known as the "Son of Sam." The killer randomly shot young women and their escorts. Berkowitz received $75,000 from McGraw Hill for the rights to his story. Karen M. Ecker & Margot J. O'Brien, Note, Simon & Schuster, Inc. v. Fischetti: *Can New York's Son of Sam Law Survive First Amendment Challenge?*, 66 NOTRE DAME L. REV. 1075, 1075 n.5 (1991).

87. N.Y. EXEC. LAW § 632-a(1) (McKinney 1982). Ironically, the New York law was never applied to Berkowitz because he was declared incompetent to stand trial, and the law at that time covered only convicted criminals. Ecker & O'Brien, *supra* note 86, at 1077 n.12.

88. Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Board, 112 S. Ct. 501, 506-07 (1991).

89. *Id.* at 507.

90. *Id.* at 508. The Court made a cryptic suggestion that other statutes like the Son of Sam law but more narrowly drawn might be analyzed as content-neutral under the decisions in Ward v. Rock Against Racism, 491 U.S. 781 (1989) and Renton v. Playtime Theatres, Inc. 475 U.S. 41 (1986). *Simon & Schuster*, 112 S. Ct. at 511.

91. However, the state did not have a compelling interest "in limiting such compensation to the proceeds of the wrongdoer's speech about the crime." *Id.*

narrowly tailored to achieve such an objective. Rather, the law was significantly overinclusive.[92] The statute applied to works on any subjects, provided that they express the author's thoughts or remembrances about his crime. Moreover, it applied to any author who admitted in his or her work to having committed a crime, whether or not the author was ever accused or convicted.[93] The law, therefore, would have escrowed payment for such works as *The Autobiography of Malcolm X*, in which the author describes crimes he committed in his early years, as well as *Civil Disobedience* by Thoreau, because he acknowledges his refusal to pay taxes and discusses his experience in jail.[94] Thus, the law was not narrowly tailored to achieve the state's objective of compensating crime victims from the profits of crime. The law "clearly reaches a wide range of literature that does not enable a criminal to profit from his crime while a victim remains uncompensated."[95]

Simon & Schuster presents several lessons regarding laws that seek to regulate juror speech. First, like in the Son of Sam laws, legislation to silence jurors' expression about their jury service is a content-based regulation. That is, the prohibition is directed solely at speech with a specified content—the trial experience—and at no other. The juror is presumably free to express his or her thoughts on any other subject; only one prescribed area is impermissible. The content chosen to be restricted, moreover, is speech at the core of First Amendment protection: It is expression about the court system, a central part of government.[96] Thus, if the standard in *Simon & Schuster* was applied, the state would need to demonstrate that banning or restricting jury speech serves a compelling state interest and that no less intrusive alternatives exist.[97]

Additionally, the constitutional analysis in *Simon & Schuster* is particularly germane to suggested proposals for restricting juror speech by prohibiting any financial renumeration to the juror. The Supreme Court in *Simon & Schuster* implicitly treated restrictions on payment for speech as functionally equivalent to restricting the speech itself. That position is a valid one. While the Court has never held that the state must finance speech to ensure access, it should be loathe to pass a law prohibiting profit. No one would doubt the unconstitutionality of a law that said "Any newspaper may be published but cannot be sold for profit." Or perhaps more analogous would be a content-based regulation;

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92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. As Justice Blackmun noted, "[T]he public has an intense need and a deserved right to know about the administration of justice in general; about the prosecution of local crimes 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." Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 604 (Blackmun, J. concurring). *See also supra* notes 66-76 and accompanying text.
97. Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims, 112 S. Ct. 501, 508, 512 (1991).

it would clearly contravene the First Amendment if the law provided that "no newspaper discussing abortion shall be sold for profit." Therefore, the proposed banning of profit for jurors writing about their service should be analyzed in the same way as a restriction on jurors writing or speaking about the jury service.

2. *"Substantial Likelihood of Materially Prejudicing an Adjudicatory Proceeding" Standard and* Gentile v. State Bar of Nevada

It may be argued that a different, more lenient standard than strict scrutiny should be applied to laws restricting the speech of jurors, who, as officers of the court, are subject to greater regulation than members of the general public. Accordingly, the argument would follow, restrictions on juror speech need not meet the stringent *Simon & Schuster* test in order to satisfy First Amendment principles.

Recently, the Supreme Court took such a position with respect to the constitutionality of punishing the speech of lawyers relating to an ongoing proceeding. In *Gentile v. State Bar of Nevada,*[98] the Supreme Court considered whether state rules governing lawyers' extrajudicial statements violated the First Amendment. Prior to *Gentile*, there were three commonly used tests for assessing the constitutionality of attorneys' extrajudicial statements. One was a strict scrutiny test based on a showing that the statement posed a "clear and present danger to the administration of justice."[99] Alternatively, some states had imposed a possibly lesser standard, requiring only a showing of "substantial likelihood of materially prejudicing an adjudicative proceeding."[100] And a few had imposed the clearly lesser standard of "reasonable likelihood of interfering with the administration of justice."[101]

Most states, however, had adopted the "substantial likelihood of material prejudice" standard which was at issue in *Gentile*.[102] There, an attorney was

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98. 501 U.S. 1030 (1991). For a critique of *Gentile*, see Esther Berkowitz-Caballero, *In the Aftermath of* Gentile*: Reconsidering the Efficacy of Trial Publicity Rules*, 68 N.Y.U. L. REV. 494 (1993).

99. The "clear and present danger" test has been the historical standard used by the Supreme Court to review suppression of speech since Schenck v. United States, 249 U.S. 47, 52 (1919). *See generally* Bridges v. California, 314 U.S. 252 (1941). For an application of the "clear and present danger" test to attorney speech, see Markfield v. Association of the Bar, 370 N.Y.S.2d 82, *appeal dismissed*, 337 N.E.2d 612 (N.Y. 1975) (finding that attorney should be charged with misconduct only when extrajudicial statements presented a clear and present danger to the fair administration of justice).

Some courts employ the phrase "serious and imminent threat to the administration of justice" interchangeably with the "clear and present danger" rule. *See* Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976). *See also* Lynn Fulstone, Note, Gentile v. State Bar of Nevada: *Trial in the "Court of Public Opinion" and Coping with Model Rule 3.6—Where Do We Go From Here?*, 37 VILL. L. REV. 619 (1992).

100. *See* Lawrence Solum, *What Remains of Freedom of Speech for Lawyers After* Gentile, CAL. LITIG., 16, 20 (Nov. 1991).

101. *See* Gentile v. State Bar of Nev., 501 U.S. 1030, 1068 n.2 (1991).

102. *See* Solum, *supra* note 100, at 19. *See also Gentile*, 501 U.S. at 1038 nn.1-3.

charged with violating Nevada Supreme Court Rule 177, which prohibits an attorney from making "an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding."[103] This rule also contained a "safe harbor" provision, which described a number of comments that an attorney may make without violating the rule.[104] The attorney, Dominic Gentile, a well-known criminal defense lawyer in Nevada, held a press conference after his client's indictment in order to publicly rebut the publicity adverse to his client allegedly initiated by the prosecution.[105] In his press conference, he accused several police officers of corruption, and accused the police department of using his client as a scapegoat to hide the scandal within the police department.[106]

The Supreme Court, recognizing that Gentile's speech was political speech and therefore at the core of the First Amendment's protections, held that Rule 177, as interpreted by the Nevada courts, was void for vagueness because its grammatical structure failed to provide fair notice to attorneys.[107] Those parts of the rule which described what kind of statements an attorney could make were unclear; thus, attorneys could be misled into making statements that they erroneously believed to be protected.

In analyzing the statute on its face, however, a narrowly divided Court held that the "substantial likelihood of material prejudice" standard employed by Rule 3.6 was constitutional.[108] Justice Rehnquist, writing for four other Justices, found that because of the special role played by lawyers in the judicial process,

> the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than [the strict scrutiny standard] established for regulation of the press. . . . We agree with the majority of the States that the "substantial likelihood of material prejudice" standard constitutes a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the state's interest in fair trials.[109]

This standard, the Court noted, is designed to achieve an important, if not compelling state interest. Specifically, it is aimed at protecting one of the most fundamental rights guaranteed by the Constitution: the right to a fair trial by impartial jurors, unaffected by extrajudicial statements.[110] Moreover, the

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103. *Gentile*, 501 U.S. at 1033.
104. *Id.*
105. *Id.* at 1041-46.
106. *Id.* at 1045.
107. *Id.* at 1048.
108. *Id.* at 1065-76.
109. *Id.* at 1074-75. *But see* Solum, *supra* note 100 (contending that the Court should not have reached this issue and criticizing Rehnquist's analysis).
110. *Gentile*, 501 U.S. at 1074-75.

Court held, the restraint on speech is narrowly tailored to achieve this goal: "[I]t applies only to speech that is substantially likely to have a materially prejudicial effect; it is neutral as to points of views, applying equally to all attorneys participating in a pending case; and it merely postpones the attorney's comments until after the trial."[111]

Because jurors, like attorneys, are also officers of the court, it could be argued that the *Gentile* standard rather than *Simon & Schuster* is the most appropriate test for analyzing restrictions on juror speech. Juror speech, like that of attorneys, should be subject to a different standard of review than would other members of the public or the press. That is, restrictions on juror speech should be analyzed under the same "substantial likelihood to have a materially prejudicial effect" test that governs lawyer's speech.[112]

But jurors are officers of the court only so long as they sit on the jury. While *Gentile* may seem particularly analogous to restrictions on juror speech while the trial is pending, it is far less clear that it is applicable to jurors after the verdict is rendered and the jurors are dismissed. Even Justice Rehnquist emphasized that the rule in *Gentile* was narrowly tailored in part because it governs speech only during the pendency of the trial; it merely postponed the attorney's comments until after the trial.[113] Thus, *Gentile* may be the appropriate standard for assessing rules like those in New York and New Jersey, which prohibit the juror from contracting for profit only during the pendency of their jury service but does not restrict jurors after their release from service.[114]

At least on its face, *Gentile* seems to have less application to restrictions on the speech of jurors post-trial. On the other hand, an argument can be made that *Gentile* is appropriate even then: While an attorney's extrajudicial comments after trial cannot improperly influence the trial proceeding, a juror's *contemplation* of profit during the trial which later reaches fruition after the trial could arguably adversely affect an impartial trial. The argument, therefore, would be that because "contemplation of profit" cannot be regulated, banning post-verdict profit is the only way to protect the integrity and impartiality of the judicial process. Thus, while jurors after dismissal should be treated like any other member of the public in all other regards, with respect

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111. *Id.* at 1076

112. Concededly, a distinction may be drawn between the court's ability to regulate attorneys and its ability to silence jurors. The court has authority to regulate lawyers in part because, unlike juries, they are admitted to the bar and are therefore subject to significant oversight, discipline, and even disbarment. But simply by virtue of participation in the trial, and the court's essential role in overseeing the process to ensure impartial adjudication, both juries and lawyers may be subject to greater regulation than members of the general public or the press. *See, e.g., Gentile*, 501 U.S. at 1072 ("We expressly contemplated that the speech of those participating before the courts could be limited.") (Rehnquist, J., concurring) (emphasis omitted).

113. *Id.* at 1076.

114. *See infra* notes 118-119 and accompanying text.

to this narrow "residue" of their service, they should still be considered as remaining "officers of the court," owing a certain duty to the judicial system.

Even assuming this is true, however, it is unclear what the significance is of adopting a "substantial likelihood of material prejudice" as opposed to a classic strict scrutiny analysis. It is not at all clear that the rule announced in *Gentile* signifies a real retreat from a strict scrutiny, clear and present danger test. While Justice Rehnquist insisted that the substantial likelihood standard is more deferential than the clear and present danger rule,[115] the precise meaning of the test and how it differs from traditional First Amendment jurisprudence is not spelled out. What is the increment of speech that does not pose a clear and present danger but does meet the substantial likelihood of material prejudice standard? Because the Court did not have to apply the test in *Gentile,* the precise manner in which a strict scrutiny test differs from a substantial likelihood of prejudice test is not spelled out.

Moreover, although the Court called the adopted test a "lesser standard," it still largely employed strict scrutiny-type analysis. It described the state interest in a fair trial as a fundamental interest;[116] it noted that the restraint on speech is narrowly tailored to achieve those objectives.[117] Perhaps the best way to understand *Gentile* is that it is actually a specific application of the strict scrutiny test to the trial setting; that is, because the state's interest in a fair trial is clearly a compelling interest, speech that poses a substantial likelihood of material prejudice to the adjudicatory proceeding can be silenced if the restriction is narrowly tailored to meet that interest.

B. *Application of the Test: Can Juror Speech Be Regulated Consistent with the First Amendment?*

1. *The Proposed Legislative Solutions*

Despite the fact that the harms from jurors profiting from their service have

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115. "The question we must answer in this case is whether a lawyer who represents a defendant involved with the criminal justice system may insist on the same standard [of clear and present danger] before he is disciplined for public pronouncements about the case, or whether the State instead may penalize that sort of speech upon a lesser showing." *Gentile*, 501 U.S. at 1071 (Rehnquist, J., concurring).

116. *Id.* at 1075 ("Few, if any interests under the Constitution are more fundamental than the right to a fair trial by 'impartial jurors.'").

117. *Id.* at 1076. Justice Kennedy, in a part of the opinion joined by three other Justices, argued in *Gentile* that the majority's formulation "could prove mere semantics" from the clear and present danger-type standards. *Id.* at 1037 ("The difference between the requirement of serious and imminent threat found in the disciplinary rules of some states and the more common formulation of substantial likelihood of material prejudice could prove mere semantics. Each standard requires an assessment of proximity and degree of harm."). *But see* Gregory Garbacz, Note, Gentile v. State Bar of Nev.: *Implications for the Media*, 49 WASH. & LEE L. REV. 671, 714 (1992) (noting the Court in *Gentile* "applied a lesser standard of review embodied in a wide open balance that neither demands that the restriction be narrowly tailored nor demands that the state's interest be compelling.").

not been empirically proven, the theoretical harms and the anecdotal stories have been sufficient to compel many to suggest—and some states to enact—restrictions on juror journalism. There are a wide range of possible solutions, ranging from the most sweeping—prohibiting all juror statements regarding the trial—to the more narrow and tailored—prohibiting preverdict sales or attempts to sell a story; or prohibiting any profit from jury service, but permitting all speech.

Prohibiting jurors from contracting prior to rendering a verdict was the legislative solution adopted in New York[118] and New Jersey,[119] in response to the Howard Beach incident and the Goetz trial. Both laws essentially make it a crime for a juror to accept, prior to discharge, a benefit in return for supplying information about the case in which the juror is sitting. The laws also punish anyone who solicits or enters into such a contract with a juror. In New York at least, judges are required to explicitly warn the jurors in their preliminary instructions about the ban on sale of information during the pendency of the jurors' service.

The California law goes even further than the New Jersey and New York initiatives. Primarily in response to the publicity surrounding the O.J. Simpson trial, California adopted a law in September 1994 which prohibited jurors and witnesses from contracting to sell their stories prior to ninety days after discharge of the jury in a criminal case.[120]

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118. The New York law provides that "[a] person is guilty of misconduct by a juror in the second degree when, in relation to an action or proceeding pending or about to be brought before him and prior to discharge, he accepts or agrees to accept any payment or benefit for himself or for a third person in consideration for supplying any information concerning such action or proceeding." N.Y. PENAL LAW §215.28 (McKinney Supp. 1993).

119. The New Jersey law provides:

> a. Any person impaneled as a petit or grand juror in any criminal action in this State who, before the rendering of a verdict, entry of a plea, or the termination of service as a grand juror, solicits, negotiates, accepts or agrees to accept a contract for a movie, book, magazine article, other literary expression, recording, radio or television presentation, or live entertainment or presentation of any kind which would depict his service as a juror is guilty of a crime of the fourth degree.
>
> b. Any person who offers, negotiates, confers or agrees to confer a contract for a movie, book, magazine article, other literary expression, recording, radio or television presentation, or live entertainment or presentation of any kind which would depict the juror's service to any person impaneled as a petit or grand juror in any criminal action in this State during the term of service of the juror is guilty of a crime of the fourth degree.

N.J. STAT. ANN. §2C:29-8.1 (West 1989).

120. The California law provides, in part:

> 116.5.
>
> (a) A person is guilty of tampering with a jury when, prior to, or within 90 days of, discharge of the jury in a criminal proceeding, he or she does any of the following:
>
> (1) Confers, or offers or agrees to confer, any payment or benefit upon a juror or upon a third person who is acting on behalf of a juror in consideration for the juror or third person supplying information in relation to an action or proceeding.
>
> (2) Acting on behalf of a juror, accepts or agrees to accept any payment or benefit for himself or herself or for the juror in consideration for supplying any information in relation to an action or proceeding.

2. *Can Jury Speech Be Restricted Constitutionally?*

Proposals to regulate juror speech—either by prohibiting all such speech, all speech for profit, or by prohibiting preverdict contracting for profit—are probably unconstitutional under either the *Gentile* or *Simon & Schuster* standard.[121] There is insufficient evidence to conclude that juror speech can be prohibited because it poses, categorically, a substantial likelihood of materially prejudicing an adjudicatory proceeding. As discussed in Section II, the evidence that juror profiteering prejudices the trial is, on close examination, unsubstantiated. No empirical support exists for concluding that jurors act in accordance with the theory. Nor is there significant anecdotal or other proof.

Concededly, empirical support may be extraordinarily difficult to obtain. For example, it would be extremely difficult to measure the perceptual distortions of jurors and then causally attribute them to a profit motive. In the absence of empirical evidence, strong theoretical evidence accompanied by significant anecdotal support might suffice. But the theoretical evidence is not undisputed. For every assertion of how a juror might act or how a certain procedure might affect a jury, there are countervailing arguments suggesting a different result.

For example, while there may be strong evidence to suggest that the profit motive might influence the juror's perception, the desire to conform to society's expectations in the role of an honest, unbiased juror may exert equal, if not more significant, counterpressure. Jurors may be guaranteed secrecy to the extent that no one may eavesdrop on the deliberations; breach of that guarantee of privacy would likely have a chilling effect on open and frank discussion. But can we extrapolate from the need for secrecy during the actual deliberations to an argument that the deliberations would be stifled if jurors feared that a fellow juror might at some later point discuss the deliberations and thus might reveal their individual comments or votes? The need for secrecy in the latter situation is much more amorphous and undemonstrated.

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(3) Acting on behalf of himself or herself, agrees to accept, directly or indirectly, any payment or benefit in consideration for supplying any information in relation to an action or proceeding.

(b) Any person who violates this section is guilty of a misdemeanor.

(c) In the case of a juror who is within 90 days of having been discharged, otherwise lawful compensation not exceeding fifty dollars ($50) in value shall not constitute a criminal violation of this section.

(d) Upon conviction under this section, in addition to the penalty described in subdivision (b), any compensation received in violation of this section shall be forfeited by the defendant and deposited in the Victim Restitution Fund.

1994 Cal. Adv. Legis. Serv. 869 (Deering) (effective Jan. 1995).

121. To the extent that *Gentile* is a lesser standard than the traditional strict scrutiny, if *Gentile* were not applied and a more demanding test was utilized, restrictions on juror speech obviously would still violate the First Amendment. Thus, these proposals would not withstand a strict scrutiny analysis either.

Never has a category of speech been prohibited based on mere supposition or anecdotal evidence without strong empirical proof of harm. The closest analogy may be the Court's upholding regulation of obscenity[122] based on what many scholars would label as shoddy evidence. But obscene speech has historically been viewed by the Court as low value (and perhaps even of no value); speech by jurors about the justice system is extremely valuable, political speech lying at the core of the First Amendment. A category of "high value" speech should not be prohibited without any evidence of significant harm in actual situations. Regulations of speech should not be upheld simply based on assumptions of dangers extrapolated from general social science research.[123]

Even *Gentile* does not support a categorical ban on juror speech. *Gentile* did not prohibit all attorney extrajudicial statements on the grounds that, as a category, such speech creates a substantial likelihood of prejudicing an adjudicatory proceeding. Rather, the rule upheld in *Gentile* only proscribed specific speech that actually posed such a danger, and permitted the court to punish attorneys whose speech actually created such a harm.

3. *Towards a Future Resolution*

The above discussion is premised on the conclusion that the current state of the evidence fails to establish that juror journalism infringes a defendant's right to a fair trial. The lack of reliable, empirical evidence of harm means that there exists no compelling interest justifying an infringement on freedom of expression.

Future research, however, could demonstrate just such a harm. Would legislative proposals restricting jurors' speech rights then be constitutional?

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122. *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 50-52 (1986) (holding that city need not justify its zoning restrictions on adult entertainment by studies specifically related to problems caused by adult theatres in Renton; city could rely on experience of other cities demonstrating harmful secondary effects of adult theatres). *See also* Miller v. California, 413 U.S. 15 (1973); Paris Adult Theatre v. Slaton, 413 U.S. 49 (1973). It is also arguable that, in the infancy of First Amendment jurisprudence, the Supreme Court punished speech that constituted incitement based on flimsy speculation of possible harm. *See* Schenck v. United States, 249 U.S. 47 (1919); Debs v. United States, 249 U.S. 211 (1919); Abrams v. United States, 250 U.S. 616 (1919). However, over this century, the Court has increasingly adopted a more speech-protective position, culminating in the *Brandenberg* test in 1969. Brandenberg v. Ohio, 395 U.S. 444 (1969). Under *Brandenberg*, the government may only suppress speech if there is proof of an actual, imminent, and serious likelihood of harm. *Id.* at 447. *See also* Hess v. Indiana, 414 U.S. 105, 108 (1973) (per curiam).

123. For example, courts, in justifying the rare regulation of pretrial publicity, have relied on an extraordinarily broad base of specific empirical evidence exploring the link between pretrial publicity and a fair trial as well as analyzed the specific harms in the particular case. *See, e.g.*, Joel H. Swift, *Model Rule 3.6: An Unconstitutional Regulation of Defense Attorney Trial Publicity*, 64 B.U. L. REV. 1003, 1031-41 (1984) (discussing some of the extensive empirical evidence on pretrial publicity); Robert E. Dreschsel, *An Alternative View of Media-Judiciary Relations: What the Non-Legal Evidence Suggests About the Fair Trial-Free Press Issue*, 18 HOFSTRA L. REV. 1 (1988); Matheson, *supra* note 4, at 877 (noting that most federal district courts have adopted rules proscribing categories of statements by attorneys presumed to be highly prejudicial to a criminal defendant).

Would the compelling interest in a fair trial outweigh the free speech rights? And, most importantly, would restricting juror speech or profiteering truly enhance the defendant's ability to receive a fair trial? In other words, would the ban on speech sufficiently foster the state's compelling interest?[124]

Certainly, a rule prohibiting jurors from ever speaking about their jury service would eliminate the problems of juror journalism. A clear and absolute prohibition would discourage jurors from selling any story, or even from contemplating such a sale. Thus, there would be no financial incentive to serve as a juror on a particular case, nor would the juror be serving dual roles during the trial or deliberation phase. Other jurors would no longer fear the release of private information about the deliberation process, at least inasmuch as the disclosure is motivated by financial gain. The public would not suspect that the jurors had a profit motive—thus there would be no appearance of impropriety.

Such an approach clearly would satisfy the government interest at stake—the defendant's right to a fair trial. But banning all discussion by jurors of their service in court, paid or unpaid, would prohibit large areas of speech not thought to threaten the right to a fair trial. In other words, it would likely be found drastically overinclusive, and thus in violation of the First Amendment.

The solution of banning only preverdict sales,[125] while less draconian than the previous one, is also less effective in solving any of the problems of juror journalism. Jurors interested in selling their stories would still be entitled to do so, and could still act accordingly throughout the trial. They simply would not enter a contractual agreement guaranteeing profit preverdict. Yet, even without such a guarantee, all the dangers associated with jurors profiting from their service essentially remain. In fact, some of the distorting effects on the juror anticipating profit—dissimulating during voir dire, selective perception during the trial, desiring the most saleable verdict—might be magnified by the jurors' inability to reach a preverdict sale; the juror might have an exaggerated view of how profitable the sale of a story would be! In other words, the dollar signs might loom even greater when no definite price had been negotiated.

At every stage in the proceedings, therefore, the harms caused by juror journalism would likely persist. The juror may still desire the opportunity to serve on the jury so that the potential for profit is preserved. The perception of the testimony would still be distorted by the desire to ultimately tell the

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124. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 565-67 (1976) (must show likelihood that restraining order would prevent threatened danger to fair trial).

125. I do not consider the post-discharge restrictions (i.e., Judge Lance Ito's court order prohibiting profit for 180 days, or the California law's 90-day ban) separately for the following reasons. To the extent any such ban merely postpones profit for a short period of time, it should fall into the camp of preverdict restrictions. To the extent such a law or order is so onerous that it causes a juror to forever forego profit, it should be treated like a permanent restriction on jurors selling their story.

story. In fact, the selective perception may even be greater; without guaranteed publication, the juror might feel that surely he would have to present an especially exciting, dramatic or compelling ending. Finally, any effect on the deliberation that exists when the juror knows he has a story sold would likely exist when the juror simply desires to have the story sold.

Moreover, the effect of banning preverdict sales on the perceptions of other jurors may be de minimis. Theoretically, the effect of juror journalism on other jurors may be less significant when there is no known arrangement for publication. Nonetheless, if a juror anticipates publication, and conveys that to other jurors, deliberations may well be stifled just the same. Perhaps more significant, the jurors may still fear that one of their colleagues on the panel will reveal the deliberations or votes of the jury after the fact. The incremental difference in effect on the other jurors between a contract to publish and an intent to seek publication once the verdict is rendered seems marginal at best.

Finally, the public's perception of the impropriety of the juror contracting for financial gain during a trial likely would not be solved by banning preverdict attempts to secure publication rights or other contracts for financial gains. The public only sees or hears about the effect of such an arrangement—i.e., the juror writing or speaking for financial renumeration—after the trial. In most cases, the public is unaware of when the actual contractual agreement was arranged. In the public's eye, it is the juror's anticipation of financial profit, be it certain or speculative, that causes concern about a fair trial.

Having said all this, a law restricting juror contracting for profit during the pendency of the trial still stands the greatest chance of withstanding constitutional scrutiny. That is, if evidence did support a causal connection between juror profiteering and bias, this solution poses the least danger to the juror's right to free speech. After all, jurors already are prohibited from discussing the case during the pendency of the trial. The statute we are considering would merely extend the prohibition to forbid any attempt by the juror to sell a story during this time. Once the trial is over, the juror's expression would be unrestricted. Thus, the values of juror speech would still be fostered and the public's interest in receiving information about the particular trial and about the justice system generally would be satisfied. And, unlike other situations where delayed speech loses at least some of its value,[126] the juror's free expression after the trial remains potent and informing.

Nonetheless, for the reasons earlier expressed, I have strong doubts about the *effectiveness* of a ban on preverdict profiting. In other words, to put it in First Amendment terms, the state's ban on speech would not sufficiently foster

126. For example, criticism of a political candidate delayed until after an election loses much of its force.

the compelling interest. Professor Laurie Levenson argues that this ban works because, after trial, the juror's story quickly becomes old news and less likely to be a profitable commodity.[127] Although there is some truth to this argument, in a highly publicized case the juror's tale should likely remain saleable. Moreover, it is the *perception* of the juror that the story would reap profit, not the reality, that matters. And, as argued above, the juror's perception is not significantly altered by a law banning preverdict sales.

A final alternative is to impose no limit on juror speech (particularly after the verdict) but to prohibit any financial compensation. This solution is based on the premise that it is the profit motive, not the speech itself, that poses dangers to the justice system. Without the distorting influence of possible renumeration, juror speech is not to be feared.

The effectiveness of this proposal, however, is also suspect. While this solution may minimize some of the conflicts faced by a juror desiring financial gain, it does not sufficiently eradicate the problem of juror journalism. Jurors will still inevitably face conflicts because of the seduction of media attention—and fame—even if profit is not forthcoming. In other words, not all the citizens clamoring to sit on the O.J. Simpson jury desire or anticipate monetary gain. For some undetermined number, the lure of fame will operate in the exact same distorting manner as did financial remuneration.[128] Moreover, only banning profit will unlikely affect the behavior of other jurors besides the juror journalist. That is, jurors who fear disclosure of the deliberations will do so regardless of whether anyone is ultimately paid for the revelations. Although prohibiting profit may decrease the incentive of jurors to speak about the trial, this likely will not reduce the fears of other jurors. Jurors may anticipate, perhaps incorrectly, that others will still reveal the story out of a desire for notoriety or because of pressure by the media. Accordingly, it is likely that a court would find that "this solution" does not sufficiently eradicate the harm.

Moreover, to the extent that the Court, in *Simon & Schuster*, held that eliminating profit for speech is indistinguishable from barring the speech itself,[129] this solution would likely not pass constitutional muster, even in light of strong evidence that juror journalism risked an unfair trial.

In short, statutory regulations of juror speech may prove constitutionally unacceptable. But while legislative solutions all seem to run afoul of the First Amendment, a case-by-case determination of the effect of juror journalism, in the context of a particular case, may be acceptable. That is, in extraordinary

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127. Of course, Professor Levenson's point is even more compelling with respect to the attempt in California to limit profit for a set period of time after the jury is discharged. Interview with author (Summer 1994).

128. This argument—that fame may be as seductive as profit—is equally telling against any of the proposed solutions except prohibiting all juror speech. It raises serious questions whether the restriction would actually promote the compelling government purpose of ensuring a fair trial.

129. Simon & Schuster v. New York Crime Victims Bd., 111 S. Ct. 501, 508 (1991).

circumstances, if a trial judge were to determine that a particular juror's plan to profit posed a substantial likelihood of materially prejudicing the trial process, then that judge would be justified in suppressing or regulating the speech. In the alternative, after the trial, the defendant could move for a new trial on the ground that a juror's speech created a substantial likelihood of prejudice, and might convince the court to order a retrial.

It would not be sufficient, however, for the defendant merely to prove that a person profited from jury service. Evidence must show (1) that the juror anticipated or contracted for the profit-making activity during *voir dire* and/or the trial itself since a juror who first considers the possibility of profit post-trial does not risk infecting the trial process, and (2) that there was a substantial likelihood that this profiteering materially prejudiced the defendant's right to a fair trial by affecting either the juror journalist or the other jurors. Demonstrating such prejudicial effect will be no easy matter, of course, absent admission by the jurors themselves. How else might prejudice be shown? Possible studies of mock juries could provide useful information for defendants asserting that juror journalism led to an unfair trial, especially for arguments that profiteering caused selective perception. The precise construct of the study must be left to others more versed in empirical research. But unless mock jurors believe that their decisions have real consequences, the role-playing exercise will not be a reliable source of insight into how the jury functions.[130] Unless jurors believe that someone really suffers from their decision, the role of conscientious and fair juror will get deemphasized and the monetary gain may seem unduly important. It is because of this difficulty in replicating real trial conditions that courts have in the past been reluctant to rely on studies by mock jurors.[131]

Concededly, even if some social science research and mock jury studies indicated an effect of profit on jury behavior, "substantial likelihood of material prejudice" in a specific case will still be difficult to demonstrate. That, however, is how it should be. The right of jurors to freedom of expression, especially about their jury service, demands no less.

V. CONCLUSION

There is no dispute that juror journalism is disquieting; it raises legitimate questions that require further exploration and study. Hopefully, this Article will inspire such research, particularly attempts at empirical analysis to answer many of the questions raised within. For the time being, the lack of any real

130. The effectiveness of role playing as a jury simulation method to predict real life behavior was questioned in Wayne Weiten & Shari S. Diamond, *A Critical Review of the Jury Simulation Paradigm*, 3 LAW & HUM. BEHAV. 71, 81-83 (1979).

131. *See, e.g.*, Lockhart v. McCree, 476 U.S. 162, 171 (1985) (noting that mock jurors are not "sworn under oath to apply the law to the facts of an actual case").

empirical evidence militates against any regulation of juror speech. Yet this lack of proof of harm has not stemmed the virulent attack by some on juror journalism; it has not stopped three states from prohibiting jurors from contracting to sell their story during the trial. In the rush to condemn jurors' attempts to profit, it is all too easy to ignore or minimize the First Amendment values implicated. Juror speech, be it motivated by profit or by more altruistic reasons, is valuable expression that teaches us about the functioning of one of our most important institutions, and ensures openness and fairness in the process. Given the current paucity of evidence concerning the real effects of juror profiting on a fair trial, government regulation that risks chilling juror speech is too high a price to pay.