BY ANY OTHER NAME: THE MEDIA'S FIRST AMENDMENT RIGHT OF ACCESS TO JUROR NAMES *UNITED STATES V. WECHT*, 537 F.3D 222 (3D CIR. 2008)

I. INTRODUCTION

Before 2004, few people had heard of Ruth Jordan. She was a seventy-nine-year-old grandmother who lived in the Upper East Side of Manhattan and had been employed as a teacher before going to New York Law School.[1] She worked at a couple of law firms after passing the bar in 1981.[2] Ms. Jordan had lived a relatively peaceful and unremarkable life.[3] All of this changed when she was chosen as Juror Four in the high-profile trial of two Tyco executives accused of stealing $600 million from the company.[4] During the six-month trial, Ms. Jordan and the other jurors performed their duties and listened to both sides' arguments. The media was covering the trial intensely, but reporters left the jurors alone, as is the custom among journalists.[5] But during deliberations, Ms. Jordan made a life-changing decision: she swept her hair away from her face in front of the defense.[6] Some journalists interpreted her action as flashing an "OK" sign to defense counsel, which supposedly indicated her intent to hold out for acquittal.[7] Her smiles and nods throughout the trial also made some question her intentions.[8] The following morning, the *Wall Street Journal* and the *New York Post* published her name and their interpretations of her hand gesture the previous day.[9] Following publication, Ms. Jordan received a threatening phone call,[10] and a few days later an anonymous letter threatening her if she acquitted the defendants.[11] The presiding judge declared a mistrial the next day, after nearly six months of arguments and deliberations.[12] This case exemplifies some of the worst problems that can arise when courts do not adequately protect juror privacy interests.

1. Andrew Ross Sorkin & Jonathan D. Glater, *Jurors, Fresh from Deliberations, Recall What Led to Tyco Mistrial*, N.Y. TIMES, Apr. 5, 2004, at B1.

2. *Id.*

3. Rebecca Leung, *Exclusive: Tyco Juror No. 4: Dan Rather Talks to Ruth Jordan About Tyco Mistrial*, CBS NEWS, Apr. 7, 2004, http://www.cbsnews.com/stories/2004/04/06/60II/main610530.shtml.

4. *Id.*

5. See *infra* Part II.B.3 for a discussion about journalistic ethics.

6. Leung, *supra* note 3.

7. *Id.*

8. *Id.*

9. Sorkin & Glater, *supra* note 1.

10. *Id.*

11. David Carr, *Some Critics Say Naming a Juror Went Too Far*, N.Y. TIMES, Apr. 3, 2004, at C1.

12. *Id.*

During the last thirty years, courts have expanded the First Amendment to include a public right of access to certain criminal trial proceedings.[13] That same period has witnessed a general acceptance of the idea that people have privacy interests that deserve protection.[14] The rise of the modern media and its increasing presence in courtrooms have forced judges to determine at what point the press's First Amendment rights and juror privacy interests meet or overlap.[15] Judges found that these interests intersected in many different ways, resulting in seemingly contradictory case law.[16]

One solution increasingly used by judges to combat what some see as media infringement into the courtroom is to empanel anonymous juries.[17] The questions of whether and to what extent juror privacy issues can justify an anonymous jury largely depend on whether a court finds a presumptive First Amendment right of access to juror information. While other federal courts in the past twenty years have both recognized and rejected this right,[18] the Third Circuit remained relatively silent on the issue.[19] But on August 1, 2008, the Third Circuit tackled the issue of a First Amendment right to juror names in the case of *United States v. Wecht*.[20]

Wecht involved a criminal defendant who garnered international fame and publicity for his work as both a public coroner and an author of books about celebrity murders and autopsies.[21] The intense pretrial media attention and the possible improper motives of the defendant's friends and enemies caused the district court judge in the underlying case to issue an order in which he declared that the court would withhold jurors' identifying information from the public.[22] Local newspapers filed an interlocutory motion appealing the court's use of an anonymous jury.[23]

In *Wecht*, the Third Circuit Court of Appeals addressed the issue of whether the press and the public have a qualified First Amendment right of access to the names of prospective and actual jurors. The court had the opportunity to address not only whether the right of access existed, but also at what stage during the trial

13. See *infra* Part II.B for a discussion of the media's expanded First Amendment right of access.

14. *See generally* David Weinstein, *Protecting a Juror's Right to Privacy: Constitutional Constraints and Policy Options*, 70 TEMP. L. REV. 1 (1997) (discussing intersection of constitutional rights and juror privacy interests).

15. Marc O. Litt, *"Citizen-Soldiers" or Anonymous Justice: Reconciling the Sixth Amendment Right of the Accused, the First Amendment Right of the Media and the Privacy Right of Jurors*, 25 COLUM. J.L. & SOC. PROBS. 371, 371 (1992).

16. *See generally id.* (discussing how defendants' Sixth Amendment rights, media's First Amendment rights, and jurors' privacy interests intersect at pre- and post-trial stages, and during trial).

17. *See* Jerry Markon, *Judges Pushing for More Privacy of Jurors' Names*, WALL ST. J., June 27, 2001, at B1 (describing judges' increasing efforts to protect juror privacy).

18. See *infra* Part II.B.2 for a discussion of how courts have treated anonymous juries.

19. See *infra* Part II.B.4 for a discussion of anonymous juries in the Third Circuit.

20. 537 F.3d 222 (3d Cir. 2008).

21. See *infra* Part III.A for a discussion of the defendant, Dr. Cyril Wecht.

22. *Wecht*, 537 F.3d at 225.

23. *Id.* at 226.

it attached. The court found that a right of access exists, and, with limited consideration, held that it attaches prior to empanelment.[24] The Third Circuit is the only federal appellate court to find that the right of access attaches before trial. As a result, the majority contradicted the most analogous case law[25] and instead based its opinion on a flawed analysis of a test adopted by the Supreme Court[26] and a view of the district court's factual findings that lacked the deference they deserved. The holding took away the deference once granted to judges to decide whether or not to empanel an anonymous jury in a criminal case,[27] and placed juror privacy interests at risk,[28] particularly in high-profile cases.

This Note addresses the important analytical disagreements that exist between the majority in *Wecht* and both the dissent and other courts. It argues that the media's First Amendment right of access should not attach until after the trial concludes.[29] Given the increasing presence of the media in courtrooms and the changing nature of trial coverage, threats to juror privacy interests are matters of pressing concern. Part II delineates the development of the laws surrounding the First Amendment right of access and the use of anonymous juries. Part III details the factual and procedural history of *United States v. Wecht.* Part IV summarizes the Third Circuit's analysis in *Wecht*, including Judge Franklin Stuart Van Antwerpen's lengthy dissent. Finally, Part V describes various flaws in the majority's analysis while highlighting arguments that the court could have considered and other courts should address in subsequent cases.

II. PRIOR LAW

The history of anonymous juries is complicated and contested. The rise of the modern media and its constant encroachment into the courtroom has created concerns about the Sixth Amendment rights of defendants to a fair trial. Courts struggled with how to balance the press's First Amendment rights and the defendant's Sixth Amendment rights, ultimately finding the media has a right of access to criminal proceedings under the First Amendment.[30] In part as a response to the expansion of the media's right of access, a number of courts, including those in the Third Circuit, began to empanel anonymous juries.[31] This invigorated the legal discourse centered on the contested and overlapping rights of defendants, the media, and jurors.

24. *Id.* at 239.

25. See *infra* notes 271–79 and accompanying text for a discussion of the most analogous case, *United States v. Black*, 483 F. Supp. 2d 618, 620–26 (N.D. Ill. 2007).

26. See *infra* Part II.B.1 for a discussion of the "experience and logic" test.

27. See *infra* note 76 and accompanying text for a policy upholding the tradition of judicial deference.

28. See *infra* Part V.A.1 for a discussion of the costs of pretrial access to juror names.

29. See *infra* Part V.B.1 for a discussion of why the media should not have access to juror names until after a trial has concluded.

30. See *infra* Part II.A for a discussion of the free press–fair trial controversy.

31. See *infra* notes 73–76 and accompanying text for a discussion of courts that have empanelled anonymous juries.

A. Free Press Versus Fair Trial

The Sixth Amendment guarantees defendants the right to be tried in open court by an impartial jury.[32] The First Amendment gives the press extensive freedom of speech rights as well as the right to publish that speech.[33] These First Amendment rights, however, are only operative "in so far as the press is able to gain access to newsworthy information."[34] As the media has increased its presence in courtrooms, judges have worried that the media's expansive rights might endanger the rights of defendants through damaging press, publication of inadmissible information, or by influencing potential and actual jurors.[35]

In 1966, the U.S. Supreme Court held in *Sheppard v. Maxwell*[36] that judges have a duty to assure defendants a fair trial by controlling the media both inside and outside of the courtroom.[37] The Court raised concerns about the nature of modern media and its effect on the judicial process.[38] It stated, "[g]iven the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused."[39] The Court held that judges have the power to limit the rights of the media in the courtroom to guarantee the defendant a fair trial, which reasonably includes an impartial jury that is free from outside influences.[40] But the Court also reaffirmed the importance of an open courtroom and the media's First Amendment right of access.[41] *Sheppard* is in many respects the inception of the free press–fair trial controversy.

Implicit in the *Sheppard* Court's holding is that the defendant's Sixth Amendment rights trump the press's First Amendment rights when the latter jeopardizes the former. In response to the Court's call to ensure fair trials, judges increasingly limited media access. In 1979, the Second Circuit empanelled what has been called the first fully anonymous jury.[42] In several other federal cases during this time, courts also limited media access by closing various parts of the

32. U.S. CONST. amend. VI; *see also* Weinstein, *supra* note 14, at 9–11 (discussing background of Sixth Amendment and relation to First Amendment and juror privacy interests).

33. U.S. CONST. amend. I.

34. Litt, *supra* note 15, at 377.

35. *See, e.g.*, Rollins v. Wyrick, 574 F.2d 420, 422 (8th Cir. 1978) (discussing pervasiveness of media and effect in courtroom).

36. 384 U.S. 333 (1966).

37. *Sheppard*, 384 U.S. at 357–58, 363.

38. *Id.* at 362–63.

39. *Id.* at 362.

40. *Id.*

41. *Id.* at 350.

42. *See* United States v. Barnes, 604 F.2d 121, 134–35 (2d Cir. 1979) (presenting procedure court used to empanel anonymous jury); Abraham Abramovsky & Jonathan I. Edelstein, *Anonymous Juries: In Exigent Circumstances Only*, 13 ST. JOHN'S J. LEGAL COMMENT. 457, 457–58 (1999) (citing *Barnes* as first fully anonymous jury, noting that previously there had only been partially anonymous juries). The court in *Barnes* focused on the defendant's access to juror identities, but media access was also limited by the ruling. *See Barnes*, 604 F.2d at 137 (including extensive media coverage as part of reason for empanelling anonymous jury).

trial or by limiting attorneys' ability to comment to the press.[43] In one of those cases, *Gannett Co. v. DePasquale*,[44] the Supreme Court upheld an order denying the press entry to pretrial evidentiary hearings, holding that the Sixth Amendment did not encompass a right to attend criminal trials.[45] The majority did not, however, opine whether the First Amendment gave the media this right. Justice Blackmun dissented and argued in favor of media access, saying the burden should be on the defendant to overcome the presumption of access.[46]

B. The First Amendment Right of Access

The following year, in 1980, courts heeded the logic in Blackmun's dissent and started expanding the media's right of access to criminal trials by focusing on the First Amendment.[47] In *Richmond Newspapers, Inc. v. Virginia*,[48] the Supreme Court held that the public, including the media, has a First Amendment right of access to information in criminal cases.[49] The justices agreed that there was a presumption of an open trial, but disagreement as to what could overcome that presumption resulted in a plurality opinion.[50] The Court found that openness served the following purposes:

> (1) ensuring that proceedings are conducted fairly; (2) discouraging perjury, misconduct of participants, and biased decisions; (3) providing an outlet for community hostility and emotion; (4) ensuring public confidence in a trial . . . through the appearance of fairness; and (5) inspiring confidence in judicial proceedings through education regarding the methods of government and judicial remedies.[51]

The Court expanded the media's First Amendment right of access to include the right to attend voir dire and have access to information from the voir dire process in *Press-Enterprise Co. v. Superior Court* (*Press-Enterprise I*).[52] In that

43. *See, e.g.*, *Sheppard*, 384 U.S. at 358 (recognizing judges' authority to limit access of press when defendant might be prejudiced); News-Journal Corp. v. Foxman, 939 F.2d 1499, 1516 (11th Cir. 1991) (affirming restrictive order preventing trial participants from discussing sensational murder case with media); Hirschkop v. Snead, 594 F.2d 356, 374 (4th Cir. 1979) (upholding rule prohibiting attorney comment on all pending legal matters as it applied to criminal jury trials).

44. 443 U.S. 368 (1979).

45. *Gannett Co.*, 443 U.S. at 391.

46. *Id.* at 427–30 (Blackmun, J., concurring in part and dissenting in part).

47. For an example of right of access issues in civil trials, see *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984). The *Publicker* court found a common law and constitutional public right of access. *Id.* at 1070.

48. 448 U.S. 555 (1980).

49. *Richmond Newspapers, Inc.*, 448 U.S. at 580 (plurality opinion).

50. *Id.* at 581 (holding presumption could be overcome only by "overriding interest articulated in findings"); *cf. id.* at 598 (Brennan, J., concurring) (finding case did not squarely present issue of what was required to overcome presumption); *id.* at 600 (Stewart, J., concurring) (finding judge had discretion to impose "reasonable limitations" on media and public access to trial).

51. Steven D. Zansberg, *The Public's Right of Access to Juror Information Loses More Ground*, FINDLAW, Feb. 1, 2000, http://library.findlaw.com/2000/Feb/1/127701.html (citing *Richmond Newspapers, Inc.*, 448 U.S. at 569).

52. Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) [hereinafter *Press-Enterprise I*].

case, the Court held that the presumption of openness could only be overcome by demonstrating a compelling government interest and narrowly tailored means.[53] Several lower courts extended the right of access to include pretrial suppression hearings,[54] pretrial bail hearings,[55] bail reduction hearings,[56] and voir dire of prospective jurors.[57] The Supreme Court extended access to suppression hearings.[58]

1. Supreme Court Adopts the "Experience and Logic" Test

Although lower courts were expanding access to criminal proceedings in the 1980s, they were doing so with little guidance about how to determine the parameters of the media's First Amendment rights. In 1986, the Supreme Court addressed this deficiency in *Press-Enterprise Co. v. Superior Court* (*Press-Enterprise II*).[59] It adopted the "experience and logic" test to clarify what facets of criminal proceedings are included within the media's First Amendment right of access.[60] If a qualified First Amendment right of access attaches, the court must then determine if the restriction satisfies the *Press-Enterprise I* standard of a compelling interest and narrowly tailored means to overcome the presumption of access in a particular case.[61]

In determining whether a claim of access satisfies the "experience" prong, courts must examine "whether the place and process have historically been open to the press and general public."[62] Courts must then apply the "logic" prong, in which they determine "whether public access plays a significant positive role in the functioning of the particular process in question."[63] When addressing this prong, courts have considered various interests, including:

> promotion of informed discussion of governmental affairs by providing the public with the more complete understanding of the judicial system; promotion of the public perception of fairness which can be achieved only by permitting full public view of the proceedings; providing a significant community therapeutic value as an outlet for community concern, hostility and emotion; serving as a check on corrupt practices by exposing the judicial process to public scrutiny; enhancement of the performance of all involved; and discouragement of perjury.[64]

53. *Id.* at 510.

54. *E.g.*, *In re* Herald Co., 734 F.2d 93, 100–03 (2d Cir. 1984); United States v. Brooklier, 685 F.2d 1162, 1169–71 (9th Cir. 1982).

55. *See, e.g.*, *In re* Globe Newspaper Co., 729 F.2d 47, 52 (1st Cir. 1984) (holding that although right of access to pretrial bail hearing exists, it was outweighed by fair trial considerations in this case).

56. *E.g.*, United States v. Chagra, 701 F.2d 354, 362–64 (5th Cir. 1983).

57. *Brooklier*, 685 F.2d at 1169–71.

58. Waller v. Georgia, 467 U.S. 39, 48 (1984).

59. 478 U.S. 1 (1986) [hereinafter *Press-Enterprise II*].

60. *Press-Enterprise II*, 478 U.S. at 9.

61. *Id.* at 13–14.

62. *Id.* at 8.

63. *Id.*

64. United States v. Smith, 787 F.2d 111, 114 (3d Cir. 1986).

Once a court finds a First Amendment right of access, it must then determine whether the closure of the proceedings or documents "is essential to preserve higher values and is narrowly tailored to serve that interest."[65] The court must analyze whether limiting access serves a compelling interest, whether that interest would be harmed absent closure, and whether there are alternatives to closure that would also protect that interest.[66]

2. Privacy Interests and Anonymous Juries

The media's expanded right of access[67] was balanced by courts' increasing focus on the privacy interests of witnesses and jurors.[68] Juror privacy, however, does not rise to a constitutional right and is usually addressed as a compelling interest to be balanced against the rights of the parties and the media.[69] To respect juror privacy and fend off the effects of pervasive media presence in the courtroom, some courts have empanelled anonymous juries.[70] As early as 1968, Congress tackled the issue of anonymous juries and enacted 28 U.S.C. § 1863,[71] which gives judges the discretion to make jury selection plans that prohibit disclosure of juror names "in any case where the interests of justice so require."[72]

The last several decades have seen an increase in the number of federal courts that empanelled anonymous juries or expressed support for their use.[73] In fact, every

65. *Press-Enterprise I*, 464 U.S. 501, 510 (1984).

66. *Press-Enterprise II*, 478 U.S. at 13–14.

67. See *supra* Part II.B for a discussion of how courts have expanded the right of access.

68. *See, e.g.*, Litt, *supra* note 15, at 398 (citing rise of RICO claims as possible reason for courts' increased focus on juror privacy); Robert C. Clothier, *When Can Courts Seal Records and Close Proceedings? A Primer on the Right of Access*, LEGAL INTELLIGENCER, Oct. 27, 2008, at L3 (showing that judges increasingly focus on privacy concerns of jurors, as well as of witnesses such as rape victims and informants); Markon, *supra* note 17, at B1 (describing judges' increasing efforts to protect juror privacy).

69. *Press-Enterprise I*, 464 U.S. at 511–12. *But see* Weinstein, *supra* note 14, at 9 (arguing jurors have constitutional right to privacy).

70. See *infra* note 73 and accompanying text for a discussion of the rising trend of anonymous juries and the reasons behind them.

71. *See* Jury Selection and Service Act of 1968, Pub. L. No. 90-274, § 101, 82 Stat. 53 (codified as amended in scattered sections of 28 U.S.C.) (creating statutory provisions that established random jury selection plan).

72. 28 U.S.C. § 1863(b)(7) (2006). Section 1863(b)(7) states that such a plan shall:

> fix the time when the names drawn from the qualified jury wheel shall be disclosed to parties and to the public. If the plan permits these names to be made public, it may nevertheless permit the chief judge of the district court, or such other district court judge as the plan may provide, to keep these names confidential in any case where the interests of justice so require.

Id.

73. Several federal courts empanelled anonymous juries or affirmed empanelment. *See* United States v. Bowman, 302 F.3d 1228, 1238–39 (11th Cir. 2002) (upholding empanelling anonymous jury during trial of motorcycle gang members who had previously tried to interfere with judicial proceedings); United States v. Talley, 164 F.3d 989, 1001–02 (6th Cir. 1999) (holding court's empanelment of anonymous jury was not abuse of discretion); United States v. DeLuca, 137 F.3d 24, 31–32 (1st Cir. 1998) (holding lower court did not abuse its discretion in empanelling an anonymous jury); United States v. Branch, 91 F.3d 699, 724–25 (5th Cir. 1996) (upholding anonymous jury because of high

circuit court has supported the notion that anonymous juries are appropriate in some circumstances. When empanelling anonymous juries, courts generally withhold jurors' names and addresses from both the parties and the press.[74] There are also numerous state courts that have empanelled anonymous juries,[75] as well as jury selection plans that allow judges discretion to use anonymous juries.[76]

Although a few courts have held that there is a presumptive right of access to juror names,[77] others have held that no such right exists.[78] Courts that find no right

level of media interest); United States v. Childress, 58 F.3d 693, 702–04 (D.C. Cir. 1995) (per curiam) (affirming use of anonymous jury); United States v. Darden, 70 F.3d 1507, 1532–33 (8th Cir. 1995) (same); United States v. Wong, 40 F.3d 1347, 1377 (2d Cir. 1994) (noting that publicity favors courts empanelling anonymous juries due to prospect of juror harassment); *In re* S.C. Press Ass'n, 946 F.2d 1037, 1044 (4th Cir. 1991) (citing potential for jurors to be more candid as reason to empanel anonymous juries); Hamer v. United States, 259 F.2d 274, 276–78 (9th Cir. 1958) (upholding trial court's refusal to release names of jurors to anyone, including defendant).

Other federal courts have expressed support for trial courts' use of anonymous juries. *See Press-Enterprise I*, 464 U.S. 501, 512 (1984) (holding that privacy right may warrant withholding name of juror to protect against "embarrassment"); United States v. Mansoori, 304 F.3d 635, 651 (7th Cir. 2002) (holding anonymous juries are permissible, but only in "unusual" cases); United States v. Scarfo, 850 F.2d 1015, 1023 (3d Cir. 1988) (noting consistency of anonymity with jury system and suggesting courts should give serious consideration to anonymous jury procedure); Yates v. McKune, No. 05-3373-JTM, 2007 WL 2155652, at *3 (D. Kan. July 26, 2007) (discussing with approval other circuit cases upholding empanelment of anonymous juries).

74. *See, e.g.*, *Childress*, 58 F.3d at 701 (noting that district court did not disclose names, or residential or employment addresses); *Wong*, 40 F.3d at 1377 (same). The Fifth Circuit stated that "'[a]nonymous jury' has come to mean something different in recent years, signaling the district court's decision to withhold certain biographical information about potential jurors from the parties involved." *Branch*, 91 F.3d at 723.

75. Some state courts have found that there is not a qualified right of access to juror identities. *See, e.g.*, Gannett Co. v. State, 571 A.2d 735, 751 (Del. 1989) (denying qualified right of access to public announcement of jurors' names during criminal trial and concluding that tradition has given courts discretion over whether to release juror names); Newsday v. Goodman, 552 N.Y.S.2d 965, 967–68 (N.Y. App. Div. 1990) (recognizing right of access to questionnaires completed by jurors, but upholding deletion of their identities) Commonwealth v. Long, 922 A.2d 892, 899, 901 (Pa. 2007) (finding no right of access to jurors' names or addresses under state common law, yet finding qualified right to jurors' names but not addresses under First Amendment). Other state courts have held more generally that anonymous juries are not unconstitutional. *See* State v. Hill, 749 N.E.2d 274, 282 (Ohio 2001) (holding that empanelling anonymous juries is not of constitutional dimension and not subject to structural error analysis). Still other state courts do not approach constitutional issues at all, but rather adopt common law tests to determine whether anonymous juries are appropriate. *See* State v. Tucker, 657 N.W.2d 374, 380–83 (Wis. 2003) (adopting two-prong test for juror anonymity and finding that lower court's failure to satisfy test was harmless error).

76. *See, e.g.*, Order in re: Jury Admin. Procedures at 1, Misc. 06-211 (W.D. Pa. July 13, 2006), *available at* 2006 U.S. Dist. LEXIS 97716, at *1 (requiring prospective jurors to be identified only by juror number).

77. *E.g.*, *In re* Globe Newspaper Co., 920 F.2d 88, 93 (1st Cir. 1990) (recognizing federal statutory right of access where trial had concluded); Cent. S.C. Chapter, Soc'y of Prof'l Journalists v. Martin, 556 F.2d 706, 708 (4th Cir. 1977) (affirming preempanelment anonymity, but indicating in dicta right of access to juror identities once seated); *cf. In re* Baltimore Sun Co., 841 F.2d 74, 75–76 (4th Cir. 1988) (mandating access to jurors' names and addresses under common law); United States v. George, 20 Media L. Rep. (BNA) 1511 (D.D.C. July 23, 1992) (granting access under First Amendment to completed juror questionnaires, which contain jurors' names and addresses).

of access to juror names often focus on the "logic" prong of the "experience and logic" test, and find that the public gains little benefit if courts release juror names.[79] One district court concluded "[t]he right of the Court to protect the anonymity of the jury through trial, deliberations, and verdict appears undoubted."[80] Courts have widely differing interpretations of the "experience and logic" test and what constitutes a compelling interest.[81] This is particularly true when courts balance the interests at the different stages of a trial: preempanelment,[82] during trial,[83] and posttrial.[84] Courts are more willing to grant access to juror names the further into the trial the issue arises, with the vast majority of courts permitting media access at the conclusion of a trial.[85]

The Fifth Circuit held that courts should consider five factors when deciding whether to empanel an anonymous jury: (1) whether the defendant is involved in organized crime; (2) whether the defendant is involved with a group capable of harming the jurors; (3) whether the defendant had previously attempted to interfere in the judicial process; (4) whether the defendant faces a lengthy prison term; and (5) whether the case had already generated extensive publicity.[86] Courts generally agree that a judge violates the First Amendment if she or he prevents the media from printing information about jurors that the media found independently.[87]

78. Some courts found there was no right of access to juror names before the Supreme Court developed the "experience and logic" test. *See* United States v. Gurney, 558 F.2d 1202, 1210 (5th Cir. 1977) (holding press has no First Amendment right to jurors' names and addresses and empanelment of anonymous jury is at discretion of judge). Other courts focused solely on one of the two prongs of the test. *See* United States v. Edwards, 823 F.2d 111, 117 (5th Cir. 1987) (finding no right of access to juror names during midtrial questioning because there is little benefit gained from their release). Still other courts found that neither the experience nor logic prong is satisfied when applied to juror names. *See* United States v. Black, 483 F. Supp. 2d 618, 622–30 (N.D. Ill. 2007) (holding that there is no evidence juror names have historically been public, and release of names provides little benefit); *Gannett Co.*, 571 A.2d at 744–46, 748 (same).

79. *E.g.*, *Edwards*, 823 F.2d at 117 (finding that midtrial voir dire of jurors for bias should be closed to public based on potential "deleterious effects").

80. United States v. Doherty, 675 F. Supp. 719, 722 n.4 (D. Mass. 1987).

81. See *supra* notes 60–66 and accompanying text for a discussion of courts' analyses of the "experience and logic" test.

82. *See, e.g.*, United States v. Antar, 38 F.3d 1348, 1363 (3d Cir. 1994) (holding there has to be particularized findings demonstrating substantial interference with interests, such as juror harassment); *Cent. S.C. Chapter Soc'y of Prof'l Journalists*, 556 F.2d at 707–08 (affirming order for anonymous jury preempanelment).

83. *Compare In re* Baltimore Sun Co., 841 F.2d 74, 75–76 (4th Cir. 1988) (holding media has right to juror names once seated, but not necessarily beforehand), *with* Gannett Co. v. State, 571 A.2d 735, 748 (Del. 1989) (holding no presumptive First Amendment right of access to juror names).

84. *See In re* Globe Newspaper Co., 920 F.2d 88, 91–93, 98 (1st Cir. 1990) (permitting juror identities to be withheld prior to trial but ordering posttrial release); *Doherty*, 675 F. Supp. at 725 (finding press has constitutional right of access to juror names after verdict, but allowing seven-day grace period before releasing names).

85. *See, e.g.*, *Doherty*, 675 F. Supp. at 722 (noting that courts of appeal that addressed this issue have accepted that public's postverdict right of access to jurors is historically protected).

86. United States v. Krout, 66 F.3d 1420, 1427 (5th Cir. 1995).

87. Capital Cities Media, Inc. v. Toole, 463 U.S. 1303, 1306 (1983); United States v. Brown, 250 F.3d 907, 915 (5th Cir. 2001).

Additionally, it is an unconstitutional prior restraint if a court prohibits publication of juror names already made public by reading them aloud during voir dire or by some other means.[88]

3. Courtroom Reporting, Juror Privacy, and the Rise of the Blogger

Even if the media obtained jurors' names either through the court or independently, traditional journalistic ethics would prevent reporters from publishing this information in all but the most extraordinary situations.[89] Yet the nature of courtroom reporting has changed in the last decade because newspapers are losing circulation and profits, and are reducing staff.[90] As a result, fewer reporters are available to cover trials.[91] Given the newsworthiness of larger trials, television and Internet news sources, and even the struggling newspapers, will send someone to cover what is happening.[92] However, the level of daily coverage has clearly diminished.[93] Although most courtrooms do not have a large mainstream news agency presence, a recent trend has intensified the debate about jury privacy and the integrity of courtroom reporting: the rise of the blogger.[94]

Bloggers generally do not report to a higher authority and are less likely to abide by traditional journalistic conventions that would prevent, for example, the publication of juror names before the end of a trial absent extraordinary

88. Neb. Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976). In 1976, the Supreme Court addressed the issue of prior restraint, which relates to judicial orders preventing the media from reporting on matters in the public record. In *Nebraska Press Association*, the Court held that prior restraint is the least tolerable infringement on First Amendment rights. *Id.* Prior restraint issues would only arise with juror names if they were read aloud in court or otherwise published in the public record. Litt, *supra* note 15, at 379–80. If juror names were in the public record, and the court sought to prevent the media from publishing those names in a newspaper, for example, this would violate the media's First Amendment right of free speech. 16A AM. JUR. 2D *Constitutional Law* § 455 (2009). Such an order would only be upheld in emergency situations where the restraint on publication is absolutely necessary and narrowly tailored. *Id.* Emergencies may include a situation where, for instance, a jury was not empanelled anonymously, but at some point during the trial threats made to jurors' lives necessitated judicial protection of their identities. *See* United States v. Wong, 40 F.3d 1347, 1376–77 (2d Cir. 1994) (finding use of anonymous jury constitutional where juror safety was threatened).

89. *See* Al Tompkins, *Tradition Defied: Connecticut Newspaper Names Jurors*, POYNTERONLINE, Sept. 15, 2007, http://www.poynter.org/column.asp?id=101&aid=129839 (discussing journalist ethics in context of courtroom reporting).

90. *See* Richard Pérez-Peña, *Newspaper Circulation Continues to Decline Rapidly*, N.Y. TIMES, Oct. 28, 2008, at B4 (discussing decline of newspaper circulation and staffing).

91. *See* David Simon, *In Baltimore, No One Left to Press the Police*, WASH. POST, Mar. 1, 2009, at B1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/02/27/AR2009022703591_pf.html (describing newspapers' lack of manpower to cover important stories).

92. *See* Anick Jesdanun, *Soft Economy Speeds Newspaper Decline, Job Cuts*, USA TODAY.COM, Aug. 29, 2008, http://www.usatoday.com/tech/products/2008-08-29-1336960762_x.htm (describing how three Florida-based newspapers were exchanging stories during trial due to lack of coverage fueled by staff reductions).

93. *Id.*

94. Weblogs, or blogs, have been defined as "cyberspace's quick-moving, multilinked, interactive venues of choice for millions of people wanting to share information and opinions, commentary and news." Melissa Ludtke, *Journalist's Trade: Weblogs and Journalism*, NIEMAN REP., Fall 2003, at 59.

circumstances.[95] Unlike newspaper editorial rooms, there is generally no one reviewing what a blogger writes or discussing with him or her the merits and pitfalls of publishing certain information.[96]

The first time a federal court seated bloggers in the pressroom was in 2007 during the perjury trial of vice-presidential aide Lewis Libby.[97] Bloggers will likely increase their presence in courtrooms since the numbers of both bloggers and blog readers have increased exponentially in the last few years.[98] Although the increased number of bloggers will help present information to the public when it might not otherwise be available, in the context of courtroom blogging, bloggers may pose threats to juror privacy. Because bloggers are not typically subject to the canons of journalistic ethics and editorial oversight, juror privacy abuse has the potential to grow considerably. One blogger, for instance, interviewed a juror after the completion of a trial and posted the juror's e-mail screen name in his blog.[99] The juror was subsequently harassed and taunted about his role in the trial as well as unrelated personal matters.[100] Even though the juror gave the blogger permission to be identified, journalists would normally not disclose his e-mail because it serves no journalistic purpose.[101] Although no cases have surfaced of bloggers publishing jurors' names before the end of a trial, the nature and number of blogs makes it a likely possibility.[102] The issue of how to protect juror privacy interests remains critical and important.

95. *See* Paul Andrews, *Is Blogging Journalism?*, NIEMAN REP., Fall 2003, at 63–64 (discussing relationship of blogs and journalism, and concluding that most bloggers are not journalists and do not abide by similar code of ethics); *see also* Tompkins, *supra* note 89.

96. *But see* Eric Alterman, *Determining the Value of Blogs*, NIEMAN REP., Fall 2003, at 85–86 (discussing benefits of having editorial board for blogs).

97. *Bloggers in the Courtroom a New Twist in Coverage* (NPR radio broadcast Jan. 14, 2007) (audio recording available at http://www.npr.org/templates/story/story.php?storyId=6854136).

98. *See How Many Blogs Are There? 50 Million and Counting*, CYBERJOURNALIST.NET, Aug. 7, 2006, http://www.cyberjournalist.net/news/003674.php (finding in 2006 that there were at least fifty million blogs and number of blogs doubled every 6.5 months).

99. Steve Bass's Tips & Tweaks, http://blogs.pcworld.com/tipsandtweaks/archives/003779.html (Feb. 22, 2007, 11:03 PST).

100. *Id.*

101. *See* Posting of Melanie Sill to The Editors' Blog, http://blogsarchive.newsobserver.com/editor/index.php?title=what_not_to_post&more=1&c=1&tb=1&pb=1 (Dec. 21, 2005, 12:21 EST) (discussing decision not to post on blog about criminal trial audio that included sounds of man dying from gun shot wound, and pointing out that competitors did post such information).

102. A few blogs have a greater readership than some of the newspapers that would publish information about a trial. *APME Survey: Newspaper Readers Use Blogs Cautiously*, POYNTERONLINE, Jul. 21, 2005, http://www.poynter.org/content/content_view.asp?id=72653. However, roughly four out of five newspaper readers do not regularly read blogs, so it is difficult to gauge their import in the public conversation. *Id.* Bloggers do not generally strive for an unbiased perspective, as do many journalists, so information that is released, including jurors' identities, might be presented in a more inflammatory manner and increase the likelihood of harassment and retaliation. *See* Steve Bass's Tips & Tweaks, *supra* note 99 (showing effects of publishing juror information in biased blog criticizing verdict).

4. Anonymous Juries in the Third Circuit

Courts in the Third Circuit are among those that have used anonymous juries. One of the most prominent cases in which the court empanelled an anonymous jury was *United States v. Scarfo*.[103] In that case, the U.S. District Court for the Eastern District of Pennsylvania empanelled an anonymous jury because the defendant was the boss of the organized crime group La Cosa Nostra.[104] The court found that the defendant's status could reasonably cause anxiety among jurors about their safety.[105] On appeal, the Third Circuit affirmed the anonymous empanelment and went on to hold that anonymity was not indicative of the defendant's guilt; rather, it dispelled jurors' safety concerns and lent itself to impartiality.[106] In *United States v. Eufrasio*,[107] the Third Circuit held that in determining whether to empanel an anonymous jury, a trial court is not required to conduct an evidentiary hearing or to set forth its reasons for doing so if the court believes there is potential for juror fear.[108] The courts in both *Scarfo* and *Eufrasio* focused largely on juror safety issues because the defendants in both cases were allegedly affiliated with organized crime groups.[109]

Information on courts' use of anonymous juries in the Western District of Pennsylvania is scant. In 2006, however, the Board of Judges for the Western District of Pennsylvania ordered that "all jurors shall be identified in court during the jury selection process by his/her assigned juror number ONLY. A prospective juror shall no longer be identified by or identify himself or herself by name."[110] The Board's administrative order also provided that "any and all juror lists generated by this Court for use in the jury selection process shall be deemed confidential and property of the Court and shall not be removed from the Court at any time."[111] One year after this order was published, the Third Circuit affirmed the district court's use of an anonymous jury in *United States v. Cole*.[112] In that case, the defendant appealed a district court conviction of drug dealing and money laundering.[113] The district court's "decision to impanel an anonymous jury for [the defendant's] second trial was based on allegations that jurors from [the defendant's] first trial were biased by fear of retaliation and bribery."[114]

103. 850 F.2d 1015 (3d Cir. 1988).

104. *Scarfo*, 850 F.2d at 1017.

105. *Id.* at 1023.

106. *Id.* at 1023, 1026.

107. 935 F.2d 553 (3d Cir. 1991).

108. *Eufrasio*, 935 F.2d at 574.

109. Both cases arose out of the Eastern District of Pennsylvania and involved defendants who were allegedly affiliated with La Cosa Nostra. Although privacy issues were inherent in the courts' discussions, safety issues dominated the analyses. *See also* United States v. Thornton, 1 F.3d 149, 154 (3d Cir. 1993) (upholding anonymous jury for defendants who had history of extreme violence).

110. Order in re: Jury Admin. Procedures, *supra* note 76, at 1.

111. *Id.*

112. 246 F. App'x 112 (3d Cir. 2007).

113. *Cole*, 246 F. App'x at 114.

114. *Id.* at 116.

Most of the Third Circuit appeals involving challenges to the empanelment of an anonymous jury allege that the anonymous jury impeded the defendant's right to a fair trial.[115] Although the opinions in these cases focused largely on the defendant's Sixth Amendment rights, the courts nonetheless engaged in discussions of the merits of empanelling anonymous juries that would apply in situations that did not directly involve a defendant's constitutional rights. In *United States v. Stewart*,[116] the district court found that

> [i]n determining whether an anonymous jury should be ordered, courts have considered such factors as (1) pretrial publicity from prior related cases that may contribute to juror apprehension; (2) any history of violence by the defendant; (3) the severity of the charges facing the defendant; and (4) any claims that the defendant previously intimidated witnesses.[117]

The court ultimately found that the empanelment of an anonymous jury was appropriate because the defendant was brought up on assault charges and had a history of physical violence.[118]

Although these Third Circuit cases discussed the merits of anonymous juries, the fact that they were brought up on appeal by defendants rather than media-intervenors means that First Amendment analyses were absent. As a result, the courts in the Third Circuit were largely silent on how courts should balance juror privacy interests and the rights of the media until *United States v. Wecht*.[119]

III. FACTS & PROCEDURAL HISTORY

A. The Remarkable Background of Dr. Cyril Wecht

Dr. Cyril Wecht is no stranger to media attention. He has reviewed or written about high-profile deaths such as Marilyn Monroe,[120] Laci Peterson,[121] Elvis Presley,[122] JonBenet Ramsey,[123] and Nicole Brown Simpson.[124] Dr. Wecht

115. *See id.* (upholding trial court's use of anonymous jury after "allegations that jurors from [the defendant's] first trial were biased by fear of retaliation and bribery"); United States v. Thornton, 1 F.3d 149, 154 (3d Cir. 1993) (upholding trial court's use of anonymous jury after defendant with history of violence appealed).

116. 325 F. Supp. 2d 474 (D. Del. 2004).

117. *Stewart*, 325 F. Supp. 2d at 498.

118. *Id.* at 498–99.

119. *See* 537 F.3d 222, 233–43 (3d Cir. 2008) (discussing potential conflict between right of privacy for jurors and First Amendment right of public access for media).

120. *See* CYRIL H. WECHT ET AL., TALES FROM THE MORGUE: FORENSIC ANSWERS TO NINE FAMOUS CASES INCLUDING THE SCOTT PETERSON & CHANDRA LEVY CASES 245–84 (2005).

121. *Id.* at 17–48.

122. *See* David Conti, *Wecht Fights for Career, Again*, PITTSBURGH TRIB.-REV., Jan. 21, 2006, *available at* http://www.pittsburghlive.com/x/pittsburghtrib/news/cityregion/s_415715.html (discussing Wecht's public criticism of Elvis's autopsy results).

123. *See generally* CYRIL WECHT ET AL., WHO KILLED JONBENET RAMSEY? (1998).

performed autopsies on the likes of Anna Nicole Smith's son Daniel,[125] and testified before the U.S. House Select Committee on Assassinations, rejecting the single-bullet theory of the J.F.K. assassination.[126] Wecht served as Allegheny County Coroner during the 1970s and again from 1998–2006.[127] He was sued several times during the late 1970s and 1980s for charges relating to nonconsensual selling of pituitary glands and using government employees for work at his private firm.[128]

Since 2005, Wecht has also been under investigation by the District Attorney for a $5,000 payment he received from a lawyer representing plaintiffs in a wrongful death suit against several police officers.[129] Wecht has written several books, the most recent of which is entitled *A Question of Murder: Compelling Cases from a Famed Forensic Pathologist*,[130] which was published in 2008. "Famed" is no overstatement, as Wecht has garnered widespread media attention during every step of his career, creating controversy at nearly every turn.[131]

B. The Tumultuous Beginnings of United States v. Wecht

On January 20, 2006, a grand jury indicted Wecht on eighty-four criminal counts, finding "'that [Wecht] unlawfully used his public office as the coroner of

124. *See generally* CYRIL WECHT ET AL., GRAVE SECRETS: A LEADING FORENSIC EXPERT REVEALS THE STARTLING TRUTH ABOUT O.J. SIMPSON, DAVID KORESH, VINCENT FOSTER, AND OTHER SENSATIONAL CASES 12–76 (1996).

125. Harriet Ryan, *Cyril Wecht's Next Big Case Might Be His Own*, CNN.COM, Sept. 25, 2006, http://www.cnn.com/2006/LAW/09/25/cyril.wecht/index.html.

126. Conti, *supra* note 122.

127. *Id.*; *see also* Jason Cato & David Conti, *Wecht Resigns, Proclaims Innocence*, PITTSBURGH TRIB.-REV., Jan. 21, 2006, *available at* http://www.pittsburghlive.com/x/pittsburghtrib/news/specialreports/wecht /trial/s_415637.html (noting Wecht's resignation).

128. Conti, *supra* note 122.

129. *Id.*

130. CYRIL H. WECHT & DAWNA KAUFMANN, A QUESTION OF MURDER: COMPELLING CASES FROM A FAMED FORENSIC PATHOLOGIST (2008).

131. *See, e.g.*, *Anna Nicole Hires the Best*, GOLD COAST BULL. (Australia), Sept. 18, 2006, at 11 (discussing Wecht's prominence in field and his role in celebrity autopsy); Clifford Coonan, *U.S. Experts Aid Inquiry into Chen Shooting*, TIMES (London), Mar. 30, 2004, at 16 (discussing Wecht's investigative role following shooting of Taiwanese President Chen); John Eligon, *Autopsy Finds that Death of Gotbaum Was Accident*, N.Y. TIMES, Nov. 10, 2007, at B3 (discussing Wecht's autopsy of Carol Gotbaum, who died in police holding cell at Phoenix airport); Joseph A. Gambardello, *Celebrity Coroner Will Review Officer's Autopsy*, PHILA. INQUIRER, Apr. 25, 2008, at B9 (describing Wecht as "celebrity"); *Pa. Coroner Tries to Keep Post Elective*, WASH. POST, Nov. 29, 2002, at A33 (focusing on Wecht's campaign against making his job appointive position); *Anna Nicole Smith Son Died from Overdose, Says Pathologist*, CARIBBEAN NET NEWS, Sept. 29, 2006, http://www.caribbeannetnews.com/cgi-script/csArticles/articles/000034/003469.htm (discussing Wecht's results from celebrity autopsy); *Doctor: Drug Combo Killed Smith's Son*, CHINA DAILY, Dec. 11, 2007, http://www.chinadaily.com.cn/entertainment/2007-12/11/content_6312880.htm (discussing Wecht's results from celebrity autopsy).

Allegheny County, Pennsylvania, for private financial gain.'"[132] If convicted, Wecht could lose his medical license and possibly spend the rest of his life in prison.[133] The case went to Judge Arthur Schwab of the U.S. District Court for the Western District of Pennsylvania. Parties filed various pretrial motions, including one on May 12, 2006, where PG Publishing Company (doing business as the *Pittsburgh Post-Gazette*) and Tribune-Review Publishing Co. (doing business as the *Pittsburgh Tribune-Review*) ("Media-Intervenors") moved to unseal certain court filings.[134] The court subsequently unsealed these documents.[135]

Judge Schwab issued a pretrial order that addressed voir dire procedures the day after the Board of Judges for the Western District of Pennsylvania released its order mandating juror anonymity.[136] Paragraph 5 of Section B of the judge's order stated:

> Pursuant to the decision of the Board of Judges of this District, counsel shall not have access to the names and addresses of the prospective jurors. Therefore, Jury Administrator Morder is instructed to remove and retain the last page of the Jury Questionnaire setting forth the prospective jurors' names and current addresses.[137]

Neither party objected.[138]

On September 15, 2006, the court released the summoned venire members pending resolution of several appeals to the Third Circuit.[139] Once the appeals were resolved, Judge Schwab entered an order explaining jury procedures and stated that the jury would be anonymous.[140] Wecht objected to juror anonymity and requested that the jurors experience voir dire in open court.[141] The Media-Intervenors filed a petition with the court voicing the same objections as Wecht.[142]

Judge Schwab responded with an order in which he again declared that he would empanel an anonymous jury and opined that voir dire would provide sufficient information about the jurors.[143] Judge Schwab added that he did not base his decision in any part on the Board of Judges' order.[144] Judge Schwab stated that

> the final jury selection process will commence on January 23, 2008, and copies of the completed Jury Questionnaires of the pool of 40 prospective jurors will be returned only to the counsel, parties, and the Court (with a

132. United States v. Wecht, 537 F.3d 222, 224 (3d Cir. 2008) (alteration in original) (quoting United States v. Wecht, 484 F.3d 194, 198 (3d Cir. 2007)).

133. Ryan, *supra* note 125.

134. *Wecht*, 537 F.3d at 224 & n.2.

135. *Id.*

136. *Id.* at 224–25.

137. *Id.* at 225 (internal quotation marks omitted).

138. *Id.*

139. *Wecht*, 537 F.3d at 225.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 225–26. Judge Schwab noted that he preferred the term "innominate jury" since everything was known about the jurors except their names. *Wecht*, 537 F.3d at 225–26 & n.3.

144. *Id.* at 226.

> copy of the last page of the Jury Questionnaire identifying the names and addresses in order by juror number).[145]

Parties and counsel would have access to juror identities. The Media-Intervenors would have access to the jury questionnaire at the end of the trial, but the last page containing the jurors' identifying information would be excluded. The order did not specify whether the Media-Intervenors would have access to this identifying information at any time before or after trial.[146]

C. Case Moves Up to the Third Circuit

The Media-Intervenors filed an interlocutory appeal in the Third Circuit, moving for summary reversal or, alternatively, a stay of jury selection.[147] The Government opposed the motion, and Wecht filed a response with the court supporting it.[148] As a result of Wecht's response stipulating that there was no conflict between his Sixth Amendment rights and the press's First Amendment rights, the issue narrowed to the conflict between the press's rights and juror privacy interests.[149]

On January 9, 2008, the Third Circuit issued an order vacating the district court's order that restricted media access to the names of jurors and prospective jurors.[150] The Third Circuit's order also required that the district court disclose the identifying information before empanelling the jury.[151] The Third Circuit delayed publication of the opinion accompanying its order until August 1, 2008.

IV. COURT'S ANALYSIS

A. The Majority Finds a Right of Access to Juror Names

In *United States v. Wecht*,[152] the Third Circuit held that the First Amendment requires the district court to disclose the identities of jurors and prospective jurors before it seats or empanels a jury.[153] The Media-Intervenors first argued that the

145. *Id.* (internal quotation marks omitted).

146. *Id.*

147. *Id.*

148. *Wecht*, 537 F.3d at 226–27 (citations omitted).

149. *See* Order at 2–3, *Wecht*, 537 F.3d 222 (No. 07-4767) (discussing this tension).

150. *Id.* at 3.

151. *Id.*

152. 537 F.3d 222 (3d Cir. 2008).

153. *Wecht*, 537 F.3d at 239. After a lengthy discussion of the jurisdictional issues surrounding the case, the majority held that it had jurisdiction to hear the case under 28 U.S.C. § 1291 and the collateral-order doctrine. *Id.* at 227–30. *Black's Law Dictionary* defines "collateral-order doctrine" as "[a] doctrine allowing appeal from an interlocutory order that conclusively determines an issue wholly separate from the merits of the action and effectively unreviewable on appeal from a final judgment." BLACK'S LAW DICTIONARY 299 (9th ed. 2009). Title 28 U.S.C. § 1291 states that appellate courts have jurisdiction to hear appeals arising from all "final decisions." 28 U.S.C. § 1291 (2006). This category includes "'collateral orders' that (1) 'conclusively determine the disputed question,' (2) 'resolve an important issue completely separate from the merits of the action,' and (3) are 'effectively unreviewable on

First Amendment creates a right of access that requires the court to disclose jurors' names and other identifying information.[154] In response, the majority pointed out that in 1980, the Supreme Court held in *Richmond Newspapers, Inc. v. Virginia*[155] that the First Amendment includes a "'right to attend criminal trials,'" and that there is a "'right of access'" and a "'right to gather information'" for both the media and the general public.[156] The court observed that this right of access also applies to voir dire.[157]

1. Court Applies "Experience and Logic" Test

The first issue the court examined was whether the right of access extends to juror and prospective juror names.[158] The court held that this was a question of law to be reviewed *de novo*.[159] The court applied the "'experience and logic' test" from the Supreme Court's opinion in *Press-Enterprise II* to determine what aspects of a criminal trial are included within this right of access.[160]

The court first examined whether juror names and identities satisfied the "experience" prong of the "experience and logic" test.[161] The Supreme Court in *Press-Enterprise I*[162] did not specifically mention whether jurors' names were publicly known, and the Third Circuit was "reluctant to draw conclusions solely based on the Court's silence about a question that was not before it."[163] However, the Third Circuit held that juror names were traditionally public and noted the public nature of voir dire, the fact that juries were often selected from small towns where everybody knew each other, and case law and legal commentary also suggesting that jurors' names were public.[164] The majority pointed out that instances of courts empanelling anonymous juries "appear to be very rare before the 1970s."[165] The court admitted such cases exist,[166] but held that these cases did not disprove a tradition of openness with regard to jurors' identities.[167]

appeal from a final judgment.'" *Wecht*, 537 F.3d at 228 (quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 468–69 (1978)). The court found that each of these prongs was satisfied. *Id.* at 228–33.

154. *Wecht*, 537 F.3d at 233.

155. 448 U.S. 555 (1980).

156. *Wecht*, 537 F.3d at 233 (quoting *Richmond Newspapers, Inc.*, 448 U.S. at 555, 576, 580).

157. *Id.* at 233 (citing *Press-Enterprise I*, 464 U.S. 501, 508 (1984)).

158. *Id.* at 234–35.

159. *Id.* at 234.

160. *Id.* at 235.

161. *Wecht*, 537 F.3d at 235. See *supra* text accompanying note 62 for a description of the "experience" prong.

162. 464 U.S. 501 (1984).

163. *Wecht*, 537 F.3d at 235.

164. *Id.*

165. *Id.* at 236.

166. *Id.* at 236 & n.26 (citing Hamer v. United States, 259 F.2d 274 (9th Cir. 1958)).

167. *Id.* at 236. The court also addressed the government's argument that the wording of 28 U.S.C. § 1863(b)(7) is further proof that there is no tradition of openness. *Wecht*, 537 F.3d at 236. See *supra* notes 71–72 and accompanying text for a discussion of this statute. The majority rejected this argument because the statute did not provide the necessary support for the conclusion that this practice was traditionally open and not just a recent phenomenon. *Wecht*, 537 F.3d at 237. The court adopted the

The court then turned its attention to the "logic" prong.[168] The court quoted a case from the First Circuit in which that court found the benefits of public knowledge of juror identities to include the possibility that "[j]uror bias or confusion might be uncovered, and jurors' understanding and response to judicial proceedings could be investigated. . . . [It] could also deter intentional misrepresentation at voir dire."[169] The court then mentioned three possible risks of public access to juror names: (1) it is easier for others to influence the jury's decision; (2) potential jurors may resist serving on high-profile cases for fear that their privacy will be invaded; and (3) jurors might be less candid during voir dire to prevent the release of embarrassing information.[170]

Despite these risks, the court held that the benefits outweighed the risks and that "the judicial system benefits from a presumption of public access to jurors' names."[171] The court stated that in those cases where risks of jury tampering or harassment exist, district judges could address those risks on a case-by-case basis.[172] The judges could empanel anonymous juries only where there are particularized findings on the record demonstrating a compelling government interest and that limiting the right of access is necessary to prevent substantial impairment to the interests of the jurors.[173] Other than in those specific cases, the court held, the right of access attaches no later than when the court empanels the jury.[174]

2. Court Holds District Court Did Not Overcome Presumption of Access

The court then analyzed whether the district court made the particularized findings and consideration of alternatives to overcome the presumption of public access to juror names.[175] The court examined the district court's claims that juror anonymity was necessary to prevent the media from publishing background stories about the jurors and to prevent friends or enemies of Wecht influencing the jurors.[176] The court held that the district court did not articulate why juror privacy concerns were more compelling than usual in this case, as the only distinguishing factor was a locally prominent defendant.[177] The court found this to be an

Supreme Court's suggestion that the court should examine whether jurors' identities have been public over the course of the past millennium in courts at all levels, not just in a few courts in the past few decades. *Id.* The court concluded that "anonymous juries have been the rare exception rather than the norm," and that the public has traditionally had access to jurors' identities. *Id.*

168. *Wecht*, 537 F.3d at 238. See *supra* text accompanying notes 63–64 for a discussion of the "logic" prong.

169. *Wecht*, 537 F.3d at 238 (internal quotation marks omitted) (quoting *In re* Globe Newspaper Co., 920 F.2d 88, 94 (1st Cir. 1990)).

170. *Id.*

171. *Id.* at 238.

172. *Id.* at 239.

173. *Id.*

174. *Wecht*, 537 F.3d at 239.

175. *Id.* at 239–42.

176. *Id.*

177. *Id.* at 241–42.

insufficient reason, calling the explanation "'conclusory and generic'" and holding further that "[t]he mere fact that people might have passionate opinions about a defendant is not enough to justify an anonymous jury."[178] As a result, the Third Circuit held that the court below did not overcome the presumption of public access.[179]

Since the majority held that the Media-Intervenors had a constitutional right to juror names, the underlying case went forward and eventually the district court judge declared a mistrial due to jury deadlock, which opened the door to a retrial.[180] Wecht appealed the holding, and the Third Circuit affirmed.[181] Wecht then petitioned the Supreme Court for a writ of certiorari,[182] and the Court later denied this request.[183]

B. Judge Van Antwerpen Issues a Lengthy Dissent

In his dissent, Judge Van Antwerpen argued that juror identities do not fall within the First Amendment right of access, but that even if they did, the trial court's findings should have overcome the presumption of access.[184]

1. Dissent Does Not Find a Presumptive Right to Juror Names

On the issue of juror identities, the dissent concluded that "[t]he Majority is incorrect that 'access' necessarily includes the identities of the prospective and trial jurors. Additionally, the First Amendment does not require disclosure of the names to the media prior to the empanelment of the trial jury."[185] Judge Van Antwerpen supported this conclusion with a detailed discussion of the "experience and logic" test used by the majority.[186]

In his "experience" prong analysis, Judge Van Antwerpen argued that the majority erred in its reliance on the historical analysis in *Press-Enterprise I* to suggest that juror identities were publicly known.[187] Judge Van Antwerpen posited that the tradition of public access to juror names was far from clearly

178. *Id.* at 240, 242.

179. *Wecht*, 537 F.3d at 242.

180. Petition for Writ of Certiorari at 9–10, Wecht v. United States, 129 S. Ct. 658 (2008) (No. 08-579), *available at* 2008 WL 4772118, at *9–10.

181. *Id.* at 11–16, 2008 WL 4772118, at *11–16.

182. *See generally id.*

183. Wecht v. United States, 129 S. Ct. 658 (2008), *denying cert. to* 541 F.3d 493 (3d Cir. 2008).

184. The dissent first addressed the jurisdictional issue. Judge Van Antwerpen concluded that both the Third Circuit and the Supreme Court have interpreted the collateral-order doctrine narrowly, and that the appeal "is not one of the 'rare' circumstances in which this Court should grant interlocutory review." *Wecht*, 537 F.3d at 245 (Van Antwerpen, J., concurring in part and dissenting in part). See *supra* note 153 for a discussion of the collateral-order doctrine. As a result, Judge Van Antwerpen argued that the court lacked jurisdiction to hear the case. *Wecht*, 537 F.3d at 250–51 (Van Antwerpen, J., concurring in part and dissenting in part).

185. *Id.* at 251.

186. *Id.*

187. *Id.* at 251–52 & n.56.

established, and that legislation, case law, and jury practices indicate that the tradition was one of giving district court judges broad discretion to decide the matter.[188] Turning first to 28 U.S.C. § 1863(b)(7), Judge Van Antwerpen stated that the majority erred by dismissing this statute as proof that few courts before 1968 used anonymous juries.[189] He also mentioned that this statute addressed "concerns raised by the Supreme Court about the pervasive nature of modern media coverage and its effect on the judicial process."[190] He cited numerous jurisdictions that implemented and continued to employ anonymous juries.[191] Judge Van Antwerpen also pointed to a report published in 1968 after two years of research about the best methods to handle "prejudicial publicity."[192] The report stated that in cases where there is likely to be significant publicity, a court can take special measures, including a "[d]irection that the names and addresses of jurors or prospective jurors not be publicly released except as required by statute."[193] The report mentioned that these special measures were consistent with traditional practices.[194] Judge Van Antwerpen noted that the Committee reaffirmed the report in 1980.[195]

After his discussion of congressional support for the proposition that there is not an unquestioned tradition of public access to juror identities, Judge Van Antwerpen then considered case law and trial practice as additional support. He listed several federal cases that advocated for or upheld the use of anonymous juries or held that it was not mandatory that courts disclose juror identities before trial.[196]

Judge Van Antwerpen also discussed the increasing role of the media in the courtroom and the problems that accompany this phenomenon.[197] He argued that while advocating for a more tradition-based analysis of the "experience" prong, "the Majority largely ignore[d] the last half-century of th[e] millennium."[198] The dissent posited that the practice during this time was to grant district court judges more discretion to combat the media's permeating presence, and that this often resulted in court's empanelling anonymous juries.[199] Therefore, Judge Van Antwerpen concluded, the analysis did not result in the finding that the public traditionally had access to jurors' identities.[200]

188. *Id.* at 252.

189. *Wecht*, 537 F.3d at 252–53 (Van Antwerpen, J., concurring in part and dissenting in part).

190. *Id.* at 252–53.

191. *Id.* at 253 (citing jurisdictions in Arizona, Louisiana, Minnesota, North Dakota, Oklahoma, and Washington, among others).

192. *Id.* at 254. *See generally* REPORT OF THE COMMITTEE ON THE OPERATION OF THE JURY SYSTEM ON THE "FREE PRESS–FAIR TRIAL" ISSUE, 45 F.R.D. 391 (1968) [hereinafter REPORT].

193. REPORT, *supra* note 192, at 410–11.

194. *Id.* at 412–13.

195. *Wecht*, 537 F.3d at 254 (Van Antwerpen, J., concurring in part and dissenting in part).

196. *Id.* at 254–55.

197. *Id.* at 255.

198. *Id.* at 256.

199. *Id.*

200. *Wecht*, 537 F.3d at 256 (Van Antwerpen, J., concurring in part and dissenting in part).

The dissenting judge next discussed the "logic" prong and concluded that the analysis does not require the court to disclose juror names prior to empanelment.[201] Judge Van Antwerpen framed the issue as follows: "whether announcing the names of the jurors prior to empanelment is significantly important to the public's ability to oversee the jury selection process and to ensure the judicial system functions fairly and effectively."[202] The dissent argued that the majority did not explain why the benefits that result from disclosing juror identities could only be reaped pretrial rather than posttrial.[203] Judge Van Antwerpen noted that pretrial disclosure might actually make jurors less willing to serve or to provide candid answers during voir dire because they will be exposed to the media.[204] He concluded that there was no support for the majority's argument that the right of access requires disclosure pretrial.[205] He argued that the majority did not accurately account for the risks associated with such disclosure to the media, which outweighed the benefits to be gained.[206]

2. Dissent Argues that District Court Overcame Presumption of Access

The dissenting judge then moved on to his final conclusion, which was that even if there was a presumptive right to jurors' names—which he argued there was not—the district court provided sufficient reasons to overcome this presumption.[207] Judge Van Antwerpen first discussed the concerns the district court put on the record, including potential harassment of jurors and their families, friends, and co-workers.[208] The court also felt that the media exposure would make it difficult to select an impartial jury.[209] The dissenting judge argued that the majority had casually dismissed these possibilities.[210] He noted that the majority argued that publicity would deter misrepresentation and reveal juror bias, but countered that the same arguments could be made in favor of juror anonymity.[211] The dissent also disagreed with the majority's conclusion that there was nothing unusual about this case that warranted prioritizing juror privacy over the media's right of access. Judge Van Antwerpen discussed Wecht's prominent political career and that many perceived the prosecution as politically motivated; he suggested that Wecht's prominence increased the likelihood of efforts to influence juror decisions.[212] He concluded that the district court was in the best position to

201. *Id.* at 256–57.

202. *Id.* at 257.

203. *Id.*

204. *Id.* at 257–58.

205. *Wecht*, 537 F.3d at 259 (Van Antwerpen, J., concurring in part and dissenting in part).

206. *Id.* at 258–59.

207. *Id.* at 263. The dissent highlighted the fact that the First Amendment right of access is not absolute, but merely a presumption. *Id.* To overcome this presumption, the district court needed to document on the record that there was a compelling reason that outweighed the benefits of access. *Id.*

208. *Wecht*, 537 F.3d at 263–64 (Van Antwerpen, J., concurring in part and dissenting in part).

209. *Id.* at 264.

210. *Id.* at 264 n.72.

211. *Id.* at 265 n.75.

212. *Id.* at 265.

assess the risks posed to the jury and threats to impartiality, and that the district court properly determined that the harm warranted empanelling an anonymous jury.[213]

The dissent argued that the district court satisfied the second part of the First Amendment test because the procedures adopted were narrowly tailored to achieve its stated goals.[214] Unlike cases cited by the majority, the media would still have access to all phases of voir dire; the only information the press would not know was the names of the jurors.[215]

Judge Van Antwerpen discussed the majority's remedy of reversing the district court's order. He argued that this remedy was premature and invaded the traditional scope of the district court's authority, particularly because it did not give the district court an opportunity to make additional findings after the announcement of the new constitutional right by the majority.[216]

V. PERSONAL ANALYSIS

The holding in *United States v. Wecht*[217] may have serious consequences for juror privacy because the media can now access and publish juror names before a trial even begins. This media right of access to juror names, combined with struggling newspapers looking for headlines and the rise of blogging,[218] can have significant costs for those who reasonably have an expectation of privacy as jurors. An example of the potential consequences of media access on unsuspecting jurors recently occurred in a Connecticut state court. In 1999, a jury found Russell Peeler guilty of murder and conspiracy in connection with the killing of an eight-year-old boy and his mother because the boy was a key witness against him in a different homicide case.[219] The jury could not, however, unanimously decide whether to give Peeler the death penalty, so the court empanelled a second jury in 2007 to decide sentencing.[220] On September 10, 2007, the *Connecticut Post* did a full front-page spread identifying each of the seated, back-up, and alternate jurors by name, and even including their county of residence and employment information.[221] The article went so far as to include some jurors' answers to voir dire questions along with other biographical information.[222] After the presiding judge told the jurors about the newspaper article, one juror asked to be excused and another voiced

213. *Wecht*, 537 F.3d at 265 (Van Antwerpen, J., concurring in part and dissenting in part).

214. *Id.* at 266.

215. *Id.*

216. *Id.* at 267–68.

217. 537 F.3d 222 (3d Cir. 2008).

218. See *infra* Part V.C for a discussion of the potential costs of the changing media environment. See also *supra* Part II.B.3 for a discussion of the decline of newspapers and the rise of the blogger.

219. State v. Peeler, 857 A.2d 808, 824–28 (Conn. 2004).

220. State v. Peeler, No. CR99148396, 2007 WL 2201267, at *1 (Conn. Super. Ct. July 10, 2007).

221. MariAn Gail Brown, *Decision Time for Peeler Jury: Life or Death*, CONN. POST, Sept. 10, 2007, at A1.

222. *Id.*

concern over her children's safety.[223] This occurred after four months of voir dire had taken place and another juror had been excused due to illness.[224]

Although journalistic ethics normally prevent such flagrant intrusions into the privacy of jurors, such intrusions do happen and will likely occur more frequently because of the changing nature of trial coverage and the increasing prevalence of the blogosphere.[225] As a result, judges, now more than ever, need to have tools at their disposal to protect juror privacy interests. By multiplying the obstacles judges must overcome to empanel an anonymous jury, *Wecht* has virtually removed one of the most effective juror privacy tools available to judges in the Third Circuit. The drawbacks associated with media access to juror names before the end of the trial, as exemplified in the *Peeler* case above, outweigh the benefits,[226] and courts should reevaluate the *Wecht* holding with that in mind. Although there should be a qualified First Amendment right to juror names, this right should not attach until after the trial has concluded and the risks to juror privacy have lessened.[227] Appellate courts should show greater deference to trial court judges' discretion to decide whether to empanel an anonymous jury because they are in the best position to assess the benefits and drawbacks of anonymity in that particular case.[228] Additionally, juror privacy interests, not just juror safety, should be sufficient to overcome the presumptive access in certain cases.

A. Wecht *Overly Expanded Media Rights at the Expense of Juror Privacy*

Wecht will have little effect on the run-of-the-mill criminal cases in the Third Circuit, as anonymous juries are not generally an issue in such cases. But in the wake of *Wecht*, a court's decision in most high-profile cases to empanel an anonymous jury will be overruled, barring a showing of threats to juror safety or that tampering will likely take place. Although there are benefits of media access to juror names, the potential drawbacks are great in those cases in which judges would consider empanelling an anonymous jury.

1. The Costs of Pretrial Access Outweigh the Benefits

There are possible benefits to be gained from access, but those benefits are questionable when put in the context of the *Wecht* case and access at the preempanelment stage. There are also many drawbacks that accompany the media's

223. Tompkins, *supra* note 89.

224. *Id.*

225. See *infra* Part V.C for a discussion of the potential effects of the changing face of courtroom reporting. See also *supra* Section II.B.3 for a discussion of the rise of the blogger and its effects on trial coverage and journalistic ethics.

226. See *infra* Part V.A.1 for a discussion of the costs and benefits of pretrial media access.

227. See *infra* Part V.B.1 for a discussion of why the right of access to juror names should not attach until after trial.

228. See *infra* Part V.B.2 for a discussion of why courts should give greater deference to a trial court's findings. See also *supra* notes 75–76 and accompanying text for a discussion of how judges have traditionally had discretion to empanel anonymous juries.

right of access to juror names—including those affecting judicial economy and juror privacy—which ultimately outweigh the benefits.

Although media access to juror identities might help keep tabs on juror bias and corruption,[229] the parties and courts, rather than the public, should be primarily responsible for this task.[230] Media access might also make jurors less candid during voir dire to avoid publication of embarrassing information,[231] thereby undermining arguments that access might hold jurors more accountable for their actions and encourage candid responses during voir dire for fear that any lies would be discovered.[232]

Proponents of media access have argued that the public gets to see justice in action, so the possibility of outrage at a verdict is reduced and the public is educated about the justice system, which increases respect for the law.[233] But in cases such as *Wecht*, the public had complete access to voir dire and other parts of the trial. It had access to everything but juror names, which would arguably do little to aid its understanding of justice or to prevent or encourage a particular reaction to a verdict. One legal scholar has argued that press access in the form of postverdict interviews has helped scholars and others to explore the decision-making process of juries and has helped the media to report accurately to the public.[234] Yet the benefit of postverdict interviews could be accomplished regardless of whether access was granted pretrial or posttrial.

None of the alleged benefits of media access outweigh the significant costs of such access. The first and most obvious cost is the potential for an invasion of a juror's privacy and that of the juror's friends and family. This invasion is particularly egregious given the involuntary nature of jury duty. Jury duty has even been called a "legal form of involuntary servitude."[235] Given the relative lack of choice people have about whether or not to be a juror, courts should take steps to reduce the burden of jury participation as much as possible.[236] The possibility of an invasion of their privacy may also make people less willing to serve as jurors. In high-profile cases, interviews and investigations by the press and now bloggers are almost certain, and some people may not be willing to serve knowing that there

229. See *supra* note 169 and accompanying text for the majority's discussion of how media access may help curb juror bias.

230. United States v. Wecht, 537 F.3d 222, 239 n.31 (3d Cir. 2008).

231. *Id.* at 257–58 (Van Antwerpen, J., concurring in part and dissenting in part) (citing *In re* S.C. Press Ass'n, 946 F.2d 1037, 1044 (4th Cir. 1991)).

232. *Id.* at 238 (citing *In re* Globe Newspaper Co., 920 F.2d 88, 94 (1st Cir. 1990)). *But see* Kory A. Langhofer, Comment, *Unaccountable at the Founding: The Originalist Case for Anonymous Juries*, 115 YALE L.J. 1823, 1826–31 (2006) (arguing that jurors do not need to be held accountable).

233. *Wecht*, 537 F.3d at 238.

234. Robert Lloyd Raskopf, *A First Amendment Right of Access to a Juror's Identity: Toward a Fuller Understanding of the Jury's Deliberative Process*, 17 PEPP. L. REV. 357, 358 (1990).

235. Steve Chapman, *Why Don't We Protect the Privacy of Jurors? The Case for Making Jury Duty Anonymous*, REASON.COM, Aug. 14, 2008, http://www.reason.com/news/show/128094.html.

236. *But see* Litt, *supra* note 15, at 373 (noting that First Circuit likened jurors to "citizen soldiers" who must tolerate inconveniences for greater good).

is no safeguard for their privacy interests.[237] This drawback could be devastating in locations in the Third Circuit and elsewhere where courts already have a difficult time getting people to serve on juries.

An additional drawback of preempanelment media access to juror names is that it is easier for others to influence the jury's decision or to threaten the jurors themselves. A devastating example of this occurred in the *Tyco* trial mentioned in the introduction of this Note.[238] The judge in that case was forced to declare a mistrial after a seventy-nine-year-old juror received threatening letters after several newspapers published her name and stated that she intended to hold out for acquittal.[239] The newspapers published the juror's name because she supposedly flashed an "ok" sign with her fingers at defense counsel and engaged in other odd behavior during the course of the trial and deliberations. The trial had taken nearly six months and was entering deliberations when the judge declared a mistrial.[240]

2. Courts Should Reevaluate the *Wecht* Holding

It is unclear how the *Wecht* opinion will affect courts outside of the Third Circuit. In *Brown v. United States,*[241] a district court in Georgia recently cited the majority's discussion of the benefits of access.[242] The court ultimately held that in this and all future cases before that judge, juror questionnaires would be published, but the identifying juror information would be redacted from the questionnaires until further notice.[243] This court bypassed the issue of whether there was a First Amendment right to juror names because "no one [was] . . . litigating this issue before the Court."[244] Other courts may also try to bypass the issue if the parties do not directly address it. But where the issue is before the court, the court will hopefully be persuaded by the arguments that there is not a *pretrial* right of access to juror names, and even if there were, juror privacy interests are sufficient to overcome this presumption of access. These arguments should convince judges because the benefits of anonymity are greater than those of access at the pretrial stage.

B. The Majority's Interpretation of the "Experience and Logic" Test Depreciates the Rights of Judges and Jurors Unnecessarily

The question of whether there is a qualified right to juror names hinges fundamentally on when that right would attach. The majority argued that there is a

237. *See* Abraham S. Goldstein, *Jury Secrecy and the Media: The Problem of Postverdict Interviews*, 1993 U. ILL. L. REV. 295, 296–97, 303–06 (1993) (showing that press will almost certainly solicit postverdict interviews in high-profile cases). See *supra* Part II.B.3 for a discussion of the rise of bloggers and their effects on courtroom reporting.

238. See *supra* notes 1–12 and accompanying text for a discussion of the *Tyco* case.

239. Carr, *supra* note 11.

240. *Id.*

241. Nos. 407CV085, 403CR001, 2008 WL 4593386 (S.D. Ga. Oct. 14, 2008).

242. *Id.* at *4 n.5.

243. *Id.* at *4–5.

244. *Id.* at *4.

right, and it attaches before the jury is seated.[245] The dissent adamantly disagreed and argued that a right of access to juror names probably does not exist, certainly not before the trial's conclusion.[246] Judge Van Antwerpen's conclusion was based largely on the majority's insistence that the access right attaches before trial. The dissent implied that there may in fact be a right of access to juror names, but not until after trial.[247] Although not explicitly stated by the dissent, this result would more adequately balance the interests at stake than the result reached by the majority, and it would be more in line with analogous First Amendment case law.

Courts' analyses of the "experience and logic" test have led to divergent conclusions.[248] But even if a court found a right of access to juror names, juror privacy concerns must temper its scope. Juror privacy would be better protected if courts were more deferential to the lower court judge's handling of the issues, because that judge is in the best position to assess the risks involved. In certain circumstances, juror privacy alone should be a compelling interest that can overcome the presumptive access if the means are narrowly tailored.[249]

1. Media Should Have Access to Juror Names, but Only After Trial

Tradition and logic do not support a pretrial right of access to juror names. The tradition has been to give judges discretion over whether to withhold jurors' identifying information and when to release this information, if at all.[250] Courts have diverged on their interpretations of the "experience and logic" test, as have the majority and dissent in *Wecht*.[251] Although the majority cited case law to support its interpretation of the "experience" prong,[252] the dissent properly held that the historical analysis does not necessarily lend itself to the conclusion that juror names have traditionally been open to the public.[253] While juror names may often have been public, this right of access was usually at the complete discretion of the judge.[254]

245. See *supra* Part IV.A for a discussion of the majority's holding.

246. See *supra* Part IV.B for a discussion of Judge Van Antwerpen's dissent.

247. United States v. Wecht, 537 F.3d 222, 243 (3d Cir. 2008) (Van Antwerpen, J., concurring in part and dissenting in part).

248. See *supra* notes 81–85 and accompanying text for a discussion of courts' varying interpretations of the "experience and logic" test.

249. *See, e.g.*, *Press-Enterprise I*, 464 U.S. 501, 512 (1984) (observing that valid privacy right may be so compelling as to require withholding juror's name to protect juror from embarrassment); United States v. Branch, 91 F.3d 699, 724–25 (5th Cir. 1996) (upholding anonymous jury because high level of media interest threatened juror privacy); United States v. Wong, 40 F.3d 1347, 1377 (2d Cir. 1994) (noting that publicity favors courts empanelling anonymous juries due to prospect of juror harassment).

250. See *supra* notes 75–76 and accompanying text for a discussion of how judges have traditionally had discretion to empanel anonymous juries.

251. See *supra* notes 81–85 and accompanying text for a discussion of the various ways courts have interpreted the "experience and logic" test.

252. *See Wecht*, 537 F.3d at 235–36 (relying, in part, on *In re Baltimore Sun Co.,* 841 F.2d 74, 75 (4th Cir. 1988)).

253. See *supra* Part IV.B for a discussion of Judge Van Antwerpen's dissent.

254. See *supra* notes 75–76 and accompanying text for a discussion of how judges have traditionally had discretion to empanel anonymous juries. This history of judicial discretion is consistent

It is the discretion of the judges, and not how judges actually exercised this discretion, that should be the focus of an "experience" prong analysis. The majority stated, "[w]e do not dispute that a trial judge has historically had the power to issue [an order empanelling an anonymous jury] in special cases. We conclude only that a tradition of openness exists and that anonymous juries have been the rare exception rather than the norm."[255] Yet the fact that juror information was often known and the fact that judges had discretion over this information are inseparable. That only a few juries were empanelled anonymously may indicate that the judges did not think that they *needed* to be. Since the 1960s, with the influx of the media in the courtroom, judges have felt compelled to exercise this discretion.[256] The fact that judges are now finding more reasons to empanel anonymous juries should have played a more significant role in the majority's analysis. When viewed in this light, what is significant is not a lack of anonymous juries in the past, but rather a lack of *need* for anonymous juries.

There is no need to disclose juror names prior to trial because the main purpose of that practice—to uncover juror bias for the purpose of achieving a fair trial—can be more effectively accomplished using other, less invasive means. When analyzing the "logic" prong, the majority improperly held that the benefits of pretrial media access to juror names outweighed the drawbacks.[257] In support of finding that the right of access attaches prior to empanelment, the majority stated that "[c]orruption and bias in a jury should be rooted out before a defendant has to run the gauntlet of trial."[258] But it admitted shortly thereafter that giving media access to juror names was not "the most effective method for uncovering corruption or bias in jury selection . . . . *Voir dire*, conducted *by the parties* . . . has traditionally been the primary method for accomplishing this."[259] The court based its decision that there was a right of access on the public's role in verifying an impartial jury. But given the fact that in the vast majority of criminal cases there is no media investigation of jurors, the public would seem comfortable with relying

with the 1968 Report by the Committee on the Operation of the Jury System which gave judges discretion to empanel anonymous juries. REPORT, *supra* note 192, at 409. The Report states that

> [i]t is recommended that each United States District Court adopt a rule of court providing in substance as follows:
>
> In a widely publicized or sensational case, the Court, on motion of either party or on its own motion, may issue a special order governing such matters as . . . the management and sequestration of jurors and witnesses, and any other matters which the Court may deem appropriate for inclusion in such an order.

Id. The comment following this recommendation states that such orders can include "[d]irection that the names and addresses of jurors or prospective jurors not be publicly released except as required by statute." *Id.* at 410–11.

255. *Wecht*, 537 F.3d at 237.

256. See *supra* text accompanying notes 36–41 for a discussion of the Supreme Court in *Sheppard v. Maxwell*, 384 U.S. 333 (1966), acknowledging the rising media presence in the courtroom and recommending that judges take an active role in insulating courtrooms from potentially prejudicial publicity.

257. See *supra* notes 171–74 and accompanying text for the majority's analysis of the costs and benefits of access.

258. *Wecht*, 537 F.3d at 239.

259. *Id.* at 239 n.31 (emphasis added).

on the parties' own investigations, since the parties are personally invested in the outcome and would want to weed out bias and corruption from the jury pool.

The media and the parties are not the only methods of uncovering juror bias; fellow jurors can police their colleagues as well. A recent case of juror bias was discovered in the Third Circuit not by the parties or even the media, but by other jurors. In *United States v. Kemp*,[260] jurors during deliberations detected that Juror Eleven was biased against the government and the police.[261] Different jurors reported the bias to the judge, each time resulting in individual and group questioning by the judge.[262] Once there was near-unanimity that Juror Eleven was in fact biased and therefore violating her civic duties, she was expelled and an alternate juror took her place.[263]

Given the drawbacks associated with media access to juror names before and during trial, the balance leans in favor of access only after the trial has concluded.[264] This is especially true when the majority considers public access to juror names to be "important," but acknowledges that it is not the primary means of accomplishing the social goals it mentioned, like weeding out bias. It is therefore highly questionable whether this "important" right really plays the essential role necessary to raise it to the level of a constitutional right that attaches prior to empanelment.

Legal scholarship and case law also support the notion that the media's right of access claims are strongest after trial, and its interests are satisfied when courts release juror names at that time.[265] One scholar has argued that "a juror's rights are relatively stronger than those of the media at the pre-empanelment stage because a denial of access to the media will lead only to a temporary infringement of First Amendment rights."[266] The potential for injury to juror privacy lessens greatly at the conclusion of a trial, because juror identities themselves are less newsworthy, and generally only become so if the jurors voluntarily give postverdict

260. 500 F.3d 257 (3d Cir. 2007).

261. Interview with "Juror Three," *United States v. Kemp* empanelled juror, in Phila., Pa. (May 6, 2009). Juror Eleven made statements indicating that she believed that the government and the police were not credible. *Id.* She often based her arguments during deliberations on emotions and other nonlegal bases, and she sometimes shut herself out of the deliberative process entirely. *Id.* It was not merely one or two people who happened to disagree with her views who sounded the alarm bells; several jurors expressed their concerns about Juror Eleven to the foreperson or directly to the judge via notes. *Id.*

262. *Kemp*, 500 F.3d at 301–05.

263. *Id.* at 303–05.

264. See *supra* Part V.A.1 for a discussion of the benefits and drawbacks of the media's right of access.

265. See *supra* note 84 for a discussion of cases granting the media posttrial access to juror identities.

266. Litt, *supra* note 15, at 416; *see also* Raskopf, *supra* note 234, at 359 (arguing that right of access should be found after conclusion of trial). *But see* Nancy J. King, *Nameless Justice: The Case for the Routine Use of Anonymous Juries in Criminal Trials*, 49 VAND. L. REV. 123, 152–55 (1996) (arguing for blanket use of anonymous juries at all stages of trial).

interviews.[267] But if the press independently gains access to the information before the end of a trial, the court cannot prevent publication of the juror names unless it is an emergency and the prevention is absolutely necessary and narrowly tailored to address that emergency.[268]

Case law also supports the proposition that the media's right of access to juror information should attach posttrial. As the dissent notes, the majority predominantly relied upon cases in which the media did not seek pretrial access.[269] The dissent, however, introduced the case that is the most factually analogous to *Wecht*.[270] In *United States v. Black*,[271] the district court restricted public access to the juror list in a criminal fraud trial that had attracted widespread media coverage.[272] The court found that there was no constitutional right of access during the trial.[273] The court focused on when the right of access would attach, and in its "experience" prong analysis, the court held that most courts found that there was not a tradition of releasing jury information until *after* the trial had concluded.[274] The court also held that there is no logical, positive connection between access to juror names and the functioning of the jury.[275] In fact, the court reasoned that releasing juror names during trial could have a negative impact on "the integrity of the jurors' ability to absorb the evidence and later to render a verdict based only on that evidence," particularly in a highly publicized trial.[276] Unlike the *Wecht* court, the district court in *Black* couched its entire analysis in terms of whether a right of access attached *at that particular time during the trial*.[277] The majority's opinion in *Wecht* lacked a sufficient response to the dissent's argument that even if there were a right of access, it should not attach before trial.[278] The court in *Black* tackled this argument throughout its analysis, which is largely why its conclusion that the right of access does not attach before trial is so compelling and is more consistent with the case law.

Black is one of the only cases other than *Wecht* that involved a highly publicized defendant, a relative lack of concern for juror safety, and a court determination of whether the media had a right of access to juror names before

267. *See, e.g.*, United States v. Doherty, 675 F. Supp. 719, 725 n.7 (D. Mass. 1987) (discussing apparent lack of newsworthiness of juror information after trials).

268. See *supra* note 88 and accompanying text for a discussion of prior restraints.

269. United States v. Wecht, 537 F.3d 222, 259 n.66 (3d Cir. 2008) (Van Antwerpen, J., concurring in part and dissenting in part).

270. *Id.* at 259–63 (citing United States v. Black, 483 F. Supp. 2d 618, 620–26 (N.D. Ill. 2007)).

271. 483 F. Supp. 2d 618 (N.D. Ill. 2007).

272. *Black*, 483 F. Supp. 2d at 620–22.

273. *Id.* at 630.

274. *Id.* at 623–26.

275. *Id.* at 630.

276. *Id.* at 628.

277. *Black*, 483 F. Supp. 2d at 624–27.

278. *See* United States v. Wecht, 537 F.3d 222, 259 (3d Cir. 2008) (Van Antwerpen, J., concurring in part and dissenting in part) (arguing that if right of access exists, it does not attach prior to jury empanelment).

trial.[279] It is for these reasons that this case should have had more persuasive weight in the Third Circuit's analysis. Instead, the majority relied on cases that were markedly dissimilar, particularly in that none of the cases involved the courts determining whether a right of access to juror names attaches *before* trial. Although a court could reasonably find that the media has a right of access to juror names, the balance of interest weighs in favor of delaying attachment of this right until after the trial's conclusion.

2. District Court Findings Should Have Overcome the Presumption of Access

Although the Third Circuit held that there is a qualified right of access to juror names prior to seating, the district court findings should have overcome the presumption because they were compelling and narrowly tailored. Moreover, the Third Circuit should have been more deferential when reviewing the district court judge's findings because he was in the best position to evaluate the benefits and drawbacks of anonymity.

The prevalence of the modern media, Wecht's fame, and the privacy interests of the jurors were compelling reasons justifying anonymity. The majority held that the district court's reasons for the anonymous jury were "conclusory and generic," and did not contain the required particularized findings.[280] Yet the majority should have given greater deference to the district court judge's findings not only because it did not give the judge the opportunity to make additional findings on the record, but also because the judge articulated reasons that other courts have properly held to be compelling.

The dissenting judge voiced concerns about the heightened possibility of juror tampering by Wecht's friends or enemies and of the media invading juror privacy.[281] Jury tampering would affect not only juror privacy interests, but also the defendant's right to a fair trial. Wecht's Sixth Amendment rights would not have been greatly affected by an anonymous jury because his access to juror information was not restricted. As a result, Wecht and his lawyers could have had the opportunity to investigate and rule out bias, thereby reducing the risks associated with anonymity. The defendant's interests actually provided a compelling interest *in favor* of empanelling an anonymous jury. Many scholars and judges alike have argued that anonymity protects the defendant's right to a fair

279. Judge Van Antwerpen also discussed *Gannett Co. v. State*, 571 A.2d 735 (Del. 1989), as being factually similar to *Wecht*, 537 F.3d at 260–62, but the court in that case largely ignored the issue of when the right to access would attach. However, the *Gannett* court argued during its "experience" prong analysis that any tradition of access to juror names is undercut by the fact that such access was conditioned upon judicial discretion. *Gannett Co.*, 571 A.2d at 746.

280. *Wecht*, 537 F.3d at 239–42 (internal quotation marks omitted).

281. *Id.* at 263–64 (Van Antwerpen, J., concurring in part and dissenting in part).

trial,[282] and the Supreme Court has held that the defendant's right to a fair trial is a compelling interest justifying restricting access.[283]

The threat to juror privacy interests is also a compelling reason justifying juror anonymity. Numerous circuit courts have held that the privacy interests of jurors, witnesses, and informants justified limiting media access.[284] Justice Stevens even stated in his concurring opinion for *Press-Enterprise I*, "[a]s the Court recognizes, the privacy interests of jurors may in some circumstances provide a basis for some limitation on the public's access to *voir dire*."[285] The facts in *Wecht* justified such a limitation because of Wecht's fame and the intense media scrutiny surrounding the case. The district court judge's concern about juror privacy and the heightened threat of jury tampering were compelling enough interests to justify restricting media access to juror identities in this case.

Restricting access to juror names was the least burdensome method of protecting juror privacy available to the judge. The Supreme Court held that a blanket closure when there are other, less-restrictive alternatives would be unconstitutional.[286] The district court judge in *Wecht* did not order a blanket closure, but rather a very limited restriction affecting only the media's access to juror names. The judge did not close voir dire, sequester the jury, or even limit party access to juror identities.[287] In fact, using the term "anonymous" to describe the *Wecht* jury is misleading because the parties knew everything about the jurors, and the public could know everything about the jurors except their names.[288]

Court practices vary widely when it comes to empanelling "anonymous" juries. Some courts restrict access to juror information from everyone, whereas others allow lawyers and sometimes also the parties to have access to this information.[289] The least restrictive option—and that chosen by the lower court

282. See *supra* Part V.A.1 for a discussion of how anonymity can help to ensure a fair trial.

283. *See Press-Enterprise I*, 464 U.S. 501, 510–11 (1984) (holding right to fair trial can justify closure); United States v. Edwards, 303 F.3d 606, 617 (5th Cir. 2002) (arguing that right to fair trial justified closure of hearings on whether to empanel anonymous jury); United States v. Gerena, 869 F.2d 82, 86 (2d Cir. 1989) (holding that defendant's right to fair trial justified closure if likely that publicity would prejudice defendant).

284. *E.g.*, Bell v. Jarvis, 236 F.3d 149, 168 (4th Cir. 2000) (justifying closure during victim's testimony as protecting adolescent rape victim); United States v. Jones, 965 F.2d 1507, 1513 (8th Cir. 1992) (holding that witness's safety justified screening witness from public); United States v. De Los Santos, 810 F.2d 1326, 1333 (5th Cir. 1987) (protecting informant's identity in investigation justified closure of suppression hearing); *In re* Tribune Co., 784 F.2d 1518, 1522–23 (11th Cir. 1986) (protecting jurors' privacy interests justified closure of voir dire examination, although this was combined with interest of government in preserving secrecy of its investigations).

285. *Press-Enterprise I*, 464 U.S. at 519 (Stevens, J., concurring) (citing *id.* at 511–13 (majority opinion)).

286. *Id.* at 510–11 (majority opinion); *see also* Journal Pub. Co. v. Mechem, 801 F.2d 1233, 1236–37 (10th Cir. 1986) (holding that restraints lacking time or scope limitations are prohibited); United States v. Sherman, 581 F.2d 1358, 1361 (9th Cir. 1978) (same).

287. United States v. Wecht, 537 F.3d 222, 226 (3d Cir. 2008).

288. *Id.* at 243.

289. *See, e.g.*, United States v. Childress, 58 F.3d 693, 701 (D.C. Cir. 1995) (per curiam) (affirming judge's decision to restrict access to juror information from everyone but judge); Hamer v.

judge—is when courts allow both the lawyers and parties to have access to juror information, but not the public or the media.[290] One author stated that "[c]ases in which nondisclosure was . . . enforced only against the press or the public, are not [considered anonymous]."[291] The district court judge had several options available to him to protect the privacy of the jurors, and he chose the least restrictive means that still enabled the defendant and the lawyers to access juror information. As a result, even if a presumptive First Amendment right of access to juror names exists before trial, the majority improperly found that the circumstances did not overcome the presumption of access.

C. What Does the Court's Decision Mean to Practitioners?

Judge Van Antwerpen stated in his dissent that the majority's ruling "will result in an avalanche of appeals, as the media can now argue that virtually any district court order that hinders their ability to report in the manner they choose is a violation of the First Amendment."[292] This serves as both a warning and as advice. It is a warning to those who seek an anonymous jury or some other order that may limit the press. It provides advice to journalists seeking access and parties or counsel who seek to harness the power of the media to their own ends.

Now that there is a right of access to juror names in the Third Circuit, there is a very high hurdle to jump to empanel anonymous juries. That being said, cases that do not garner media attention at the outset would not likely be appealed, and orders for anonymity would likely stand. If prosecutors or potential jurors seek an anonymous jury, they will need to supply the judge with sufficient facts to enable him or her to make specific findings on the record to justify anonymity, and it

United States, 259 F.2d 274, 276–78 (9th Cir. 1958) (upholding trial court's refusal to release names of jurors to anyone including defendant).

290. *See generally* Order of Court Re: Jury Selection, Voir Dire, and Other Pretrial Issues, No. 2:06-cr-00026-AJS (W.D. Pa. Dec. 21, 2007).

291. G.M. Buechlein, Annotation, *Propriety of, and Procedure for, Ordering Names and Identities of Jurors to Be Withheld from Accused in Federal Criminal Trial—"Anonymous Juries,"* 93 A.L.R. FED. 135 (1989). Many other authors also define anonymity as restricting a defendant's access to juror information. Langhofer, *supra* note 232, at 1831; José Maldonado, *Anonymous Juries: What's the Legislature Waiting for?*, 66 N.Y. ST. B.J. 40 (1994); Molly McDonough, *Private Lives: More Judges Are Keeping Juries Anonymous, but Others Are Worrying About Accountability*, A.B.A. J., May 2006, at 14, 14–16; Babak A. Rastgoufard, Note, *Pay Attention to That Green Curtain: Anonymity and the Courts*, 53 CASE W. RES. L. REV. 1009, 1010–20 (2003); Eric Wertheim, Note, *Anonymous Juries*, 54 FORDHAM L. REV. 981, 997–1001 (1986).

Other courts have described various restrictions to juror information as "partially anonymous juries." *See, e.g.*, United States v. Dakota, 197 F.3d 821, 827 (6th Cir. 1999) (finding no abuse of discretion in empanelling partially anonymous jury because pretrial publicity and political atmosphere created risk of jury intimidation and improper influence); Johnson v. United States, 270 F.2d 721, 724 (9th Cir. 1959) (requiring juror to state district of residence but not exact address during voir dire); Wagner v. United States, 264 F.2d 524, 527–28 (9th Cir. 1959) (withholding jurors' addresses); Hamer v. United States, 259 F.2d 274, 276–80 (9th Cir. 1958) (withholding prospective jurors' names and addresses).

292. United States v. Wecht, 537 F.3d 222, 250 n.53 (3d Cir. 2008) (Van Antwerpen, J., concurring in part and dissenting in part).

doubtless has to include something more than possible publicity.[293] The holding may benefit lawyers, however, by enabling reliance on media rather than party-initiated investigations to find out any potential juror bias.

The court's decision means the most to those who are least likely to read it: potential jurors. Potential jurors should be prepared for the reality that if they are selected to serve as a juror on a high-profile case, the media, and bloggers in particular, have virtually unfettered access to their identities and have the right to publish this information. Their answers to questions in voir dire, their yawns or hand gestures during trial, and even a snide remark during deliberations may end up being published in the local paper for their friends and family to read. Although journalistic ethical convention can mitigate such brazen intrusions, the *Tyco* and *Peeler* trials serve as reminders that "hot news" may lead journalists and newspaper editors to print very private information. Much worse, the growing number of bloggers, often unschooled in traditional journalistic ethics and unfettered by editorial oversight, stand to severely threaten juror privacy and safety.

VI. CONCLUSION

In *United States v. Wecht*,[294] the Third Circuit was the first federal appellate court to hold that the media has a First Amendment right of access to juror names prior to empanelment. Applying the "experience and logic" test articulated by the Supreme Court in *Press Enterprise II*,[295] the Third Circuit found that there was a tradition of public access to juror names, and that this access played a positive role in the functioning of the criminal justice system. In doing so, the court held, *inter alia*, that juror privacy interests and the risk of prejudicial publicity are not compelling interests that can overcome the presumption of access.

By holding that the media's right of access attaches prior to empanelment, the court unnecessarily expanded the press's rights at the expense of juror privacy. The Third Circuit improperly analyzed the "experience and logic" test by not sufficiently addressing the timing issue of when the right of access should attach, and by not affording judges the discretion they have historically enjoyed. The qualified First Amendment right to juror names should not attach until after the trial has concluded, when the risks to juror privacy interests are lessened.[296] Additionally, juror privacy interests should be sufficient to overcome the

293 . *See* Clothier, *supra* note 68, at L3 (describing difficulties of limiting access). Additional ways that a judge or lawyer could seek to protect juror privacy in high-profile cases include limiting the use of cameras and other recording technology in the courtroom. *See generally* David A. Sellers, *The Circus Comes to Town: The Media and High-Profile Trials*, 71 LAW & CONTEMP. PROBS., Autumn 2008, at 181 (discussing media presence in courtrooms and judicial options to control it).

294 . 537 F.3d 222 (3d Cir. 2008).

295 . 478 U.S. 1, 8–9 (1986).

296 . See *supra* note 84 and accompanying text for a discussion of other courts that have held that the right of access to juror names does not attach until after trial.

presumptive access in certain cases.[297] The potential risks to juror privacy and judicial economy that could result from *Wecht* outweigh the benefits expressed by the majority.

Accordingly, the Third Circuit and courts in other jurisdictions should critically reassess the *Wecht* opinion when determining if a First Amendment right of access exists and when this right attaches, rather than blindly rely on it as authority.

Kaitlin E. Picco[*]

297. See *supra* notes 73–76 and accompanying text for a discussion of how courts have treated jurors' privacy interests.

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