SOCIALLY NETWORKED JURORS RAISE CONCERN: EMPANELLING ANONYMOUS JURIES TO PROTECT THE DEFENDANT'S RIGHT TO A FAIR TRIAL

I. INTRODUCTION

In the recent highly publicized criminal prosecution of former Illinois Governor Rod Blagojevich, a federal judge cited the Internet age and the ubiquity of social networking sites as reasons for withholding jurors' names from the media until after the verdict.[1] With over 800 million active Facebook users[2] spending 700 billion minutes per month on Facebook,[3] the judge was appropriately concerned with the risk of the public and press attempting to contact jurors through Facebook. The *Blagojevich* case illustrates how courts, operating against the relatively new backdrop of the Internet age, have revisited some of the basic tenents of the jury trial, including public access to jurors' names.

This Note examines the pervasiveness of the Internet and social networking sites and the challenges that those technologies pose to a criminal defendant's right to a trial by an impartial jury. Part II presents anonymous juries as a logical solution to the problem of socially networked jurors, and analyzes the competing constitutional interests implicated when empanelling an anonymous jury. Part III concludes that the risks of disclosure of jurors' names outweigh the benefits of disclosure in high profile trials. Anonymous juries are the most effective and least burdensome way of protecting the criminal defendants' legitimate interests in having a jury that is free from outside influence, as well as the public's interest in an open trial system.

II. BACKGROUND

A. Challenges the Internet and Social Networking Sites Pose To A Fair Trial

Over the past decade, technological developments have completely revolutionized "the way people interact and communicate with one

1. United States v. Blagojevich, 743 F. Supp. 2d 794, 803 (N.D. Ill. 2010).

2. *Statistics*, Facebook.com, http://www.facebook.com/press/info.php?statistics (last visited Nov. 22, 2011) [hereinafter *Statistics*].

3. Doug Gross, *Who in the world isn't on Facebook?*, CNN TECH (July 22, 2010), http://articles.cnn.com/2010-07-22/tech/facebook.500million_1_facebook-ceo-mark-zuckerberg-social-networking-internet-users?_s=PM:TECH.

another."[4] One such technology is social networking sites. Social networking sites provide means for users to interact over the Internet, by e-mail, or instant messaging, allowing people to communicate across geographic borders. These sites have empowered individuals with the ability to express themselves, communicate with others, and share information with unprecedented ease.[5]

Social networking sites, such as Facebook, Twitter, and LinkedIn, have all experienced explosive growth over the past three years and are "expected to continue unabated in the future."[6] With over 800 million active users,[7] Facebook is the leading social networking site.[8] Facebook allows users to create user profiles, join networks and "friend" other users, which creates online communities with shared interests and connections.[9] Any person, business or organization can create a Facebook account.[10] Facebook users may contact other Facebook users by sending a "friend request" or a message.[11]

Importantly, the ability to instantly access the Internet is now possible in every setting. People no longer access the Internet solely from a desktop or laptop.[12] They now go online via Internet-capable cell phones, such as iPhones and Blackberrys, in addition to their home desktop or laptop computer.[13] There are more than 250 million active

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4. Amanda McGee, *Juror Misconduct in the Twenty-First Century: The Prevalence of the Internet and Its Effect on American Courtrooms*, 30 LOY. L.A. ENT. L. REV. 301, 307 (2010).

5. *Id.* at 308.

6. Randy L. Dryer, *Advising Your Clients (and You!) in the New World of Social Media: What Every Lawyer Should Know About Twitter, Facebook, YouTube, & Wikis*, UTAH B.J. 16, 16 (2010); *see also* Amanda Lenhart et al., *Social Media and Young Adults*, PEW INTERNET & AMERICAN LIFE PROJECT (Feb. 3, 2010), http://pewinternet.org/Reports/2010/Social-Media-and-Young-Adults.aspx ("[T]he number of adults who use social networking websites has grown rapidly over the last several years . . . . As of September 2009, 47% of online adults used a social networking website . . . . On a typical day in 2009, just over one-quarter (27%) of adult [I]nternet users visited a social networking site . . . . As the number of adults who use online social networks has grown, so has the percentage of social networking site users who maintain a profile on multiple sites. In May 2008, 54% of adults with a social networking site profile had a profile on just one site.").

7. *Statistics*, *supra* note 2.

8. *See* Dryer, *supra* note 6, at 16.

9. *Factsheet*, FACEBOOK.COM, http://www.facebook.com/press/info.php?factsheet (last visited Nov. 22, 2011).

10. *Statistics*, *supra* note 2.

11. *Statistics*, *supra* note 2.

12. *See* Lenhart, *supra* note 6, Part II (finding that 81% of adults between the ages of 18 and 29 are wireless internet users. By comparison, 63% of 30-49 year olds and 34% of those ages 50 and up access the Internet wirelessly).

13. *See* Lenhart, *supra* note 6, Part II; *see also* McGee, *supra* note 4, at 309.

users currently accessing Facebook through their mobile devices.[14] As Internet connectivity is increasingly moving off the desktop and into the wireless network, access to the Internet and social networking sites is even more ubiquitous.

The ability to instantly access the Internet and social networking sites poses unique challenges to the jury trial.[15] Due process requires that an accused receive a trial by an impartial jury free from outside influences.[16] The jury's verdict must be "based on evidence received in open court" and not on extraneous information gathered outside the confines of the evidentiary protections of the court.[17] The current rules of evidence ensure that the facts heard by a jury undergo examination and challenge by each side.[18] If a juror uncovers extraneous information in a criminal proceeding, his ability to impartially weigh the evidence presented during the proceedings may be lost.[19] In addition, "jurors tend to be susceptible . . . to passion and sympathy."[20]

In *Remmer v. United States*, the Supreme Court held that any external communication between jurors and third parties is presumptively prejudicial to a defendant.[21] Attempts to communicate with a juror, however heartfelt and impartial, "pose a danger to the rights of the person on trial."[22] If just one juror is unduly biased, prejudiced, or improperly influenced by anything other than what is presented in court, the trial is deemed to be unfair as if all jurors were so influenced.[23]

Easy online access and convenient communication technology have endangered the ability of courts to completely insulate jurors from the outside world.[24] The Internet and social networking sites provide ample

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14. *Statistics*, *supra* note 2.

15. *See* McGee, *supra* note 4, at 302. A related, but different problem is jurors using the Internet "to conduct outside research regarding the cases they sit on, including the applicable law and the parties involved. [Also, t]hrough Facebook and Twitter, jurors are . . . posting messages, blogs, and 'tweets' . . . about what is occurring in the courtroom and during jury deliberations." McGee, *supra* note 4, at 302. For a detailed examination of the problem of juror misconduct in the information age, see McGee, *supra* note 4; *see also* Matthew Mastromauro, *Pre-Trial Prejudice 2.0: How YouTube Generated News Coverage is Set To Complicate the Concepts of Pre-Trial Prejudice Doctrine and Endanger Sixth Amendment Fair Trial Rights*, 10 J. HIGH TECH. L. 289 (2010).

16. Sheppard v. Maxwell, 384 U.S. 333, 362 (1966); U.S. CONST. amend. XIV.

17. *Sheppard*, 384 U.S. at 351.

18. McGee, *supra* note 4, at 303.

19. *Id.*

20. *Id.*

21. Remmer v. United States, 347 U.S. 227, 229 (1954).

22. *Blagojevich*, 743 F. Supp. 2d at 801 (N.D. Ill. 2010).

23. Tillman v. United States, 406 F.2d 930, 937 (5th Cir. 1969).

24. *See* Ken Strutin, *Jury Deliberations in the Digital Age*, LAW TECH. NEWS, May 20, 2009,

means for interested individuals, such as friends or relatives of the defendant, to contact jurors and attempt to influence the verdict by providing outside information about the case.[25] This technology also allows for people to send harassing and threatening messages to jurors.[26] In just minutes, anyone can search a juror's name to see if the juror is a user of a social networking site, and if so, send the juror a message. You do not need to be "friends" with someone on Facebook in order to send them a message. The communications directed at jurors through these technologies could range from insults or seemingly harmless pranks to well-reasoned, articulated arguments.[27] It is obvious how this type of contact would not only be distressing to jurors, but, more importantly, would critically interfere with jurors' ability to perform their sworn duties.[28]

Several recent examples illustrate the problems trial courts face in the age of the Internet and social networking. Following a March 2011 trial in North Carolina, a juror who convicted a defendant of the first-degree murder of a twenty-year-old woman was sent harassing Facebook messages from relatives of the defendant.[29] The day after the verdict was announced, the juror reported that he received a Facebook message from a stranger that read, "How could you even consider first-degree [murder]?" and ended with "Don't ignore the truth."[30] Another Facebook message the juror received "criticiz[ed] the jury's guilty verdict and alleg[ed] that prosecutors and police lied in order to convict [the defendant.]"[31] The messages were enough to make the juror file a report with the police.[32]

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http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202430828839&slreturn=1&hbxlogin=1.

25. *See Blagojevich*, 743 F. Supp. 2d at 802-03.

26. *Juror in UNCC Student's Murder Trial Says He's Being Harassed*, WSOCTV.COM (Mar. 28, 2011), http://www.wsoctv.com/news/27347686/detail.html [hereinafter *Juror in UNCC Student's Trial*].

27. *Blagojevich*, 743 F. Supp. 2d at 802.

28. *Id.*

29. *Juror in UNCC Student's Trial*, *supra* note 26.

30. *Id.*

31. Kevin Ellis, *Juror in UNC Charlotte Student's Killing Trial Files Harassment Complaint*, GASTON GAZETTE (Mar. 28, 2011), http://www.gastongazette.com/news/trial-56303-juror-convicted.html. Twenty-five-year-old Ashley Herms admitted to sending the Facebook messages. *Id.* Herms said she has known the defendant for years and is related to him by marriage. *Id.*

32. *Id.* Someone also posted a sign on a utility pole near the jurors' home that read: "Somebody is guilty but not Neal or Mark . . . . We will fight for justice!" *Id.*

Additionally, "[d]uring a February 2010 criminal trial, a New York juror sent a key witness a Facebook friend request" and a message.[33] The juror stated that after a day of deliberating, she was sitting at her home computer and "impulsively" searched for the witness on Facebook and sent a friend request.[34] The judge found that the juror's communication was a serious breach of her obligations as a juror but ultimately overturned the conviction on other grounds.[35]

The possibility of jurors being inappropriately contacted at their homes is not a new one.[36] However, the possibility of contact through the Internet or social networking sites is a relatively recent development, and the ubiquity of these technologies is unparalleled.[37]

B. A Solution: Anonymous Jury

The ability to instantaneously access the Internet and social networking sites creates a risk that if jurors' names are disclosed during the pendency of trial, they will be subject to improper and prejudicial communications. One logical solution to this problem is to empanel an anonymous jury. A court creates an anonymous jury by withholding the names and other identifying information of prospective and empanelled jurors from the parties, their counsel, the public, and the media.[38] In practice, the definition of "anonymous jury" is a shifting one because courts employ varying degrees of anonymity.[39] To empanel an anonymous jury, the court typically assigns a number to all persons called for jury service and jurors are referred to by their number for the entire term of jury service.[40] Identifying jurors by number greatly diminishes the ability of people to contact them.[41]

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33. Harry A. Valetk, *Facebooking in Court: Coping with Socially Networked Jurors*, TEXAS LAW., Oct. 11, 2010.

34. Noeleen G. Walder, *Jurors' Online Activity Poses Challenges for Bench*, LAW TECH. NEWS., Mar. 5, 2011.

35. *Id.*

36. *Blagojevich*, 743 F. Supp. 2d at 802.

37. *Id.*

38. *See* Christopher Keleher, *The Repercussions of Anonymous Juries*, 44 U.S.F. L. REV. 531, 534 (2010).

39. *Id.* at 531.

40. *Id.* at 538.

41. *Id.* at 548.

C. Standards for Anonymity

Anonymous juries are a relatively modern concept.[42] The first reported use of an anonymous jury was in the 1977 trial of drug kingpin Leroy Barnes in New York City.[43] Since then, many courts have used the procedure to protect jurors' safety and privacy.[44] It is undisputed that courts are empanelling anonymous juries more frequently.[45] But they are doing so without any guidance from the Supreme Court, which has not ruled "under what circumstances, and after what procedures, jurors' names may be kept confidential."[46]

The decision to empanel "an anonymous jury is within the sound discretion of the trial court."[47] Courts require evidence that anonymity is warranted.[48] The generally accepted justifications for anonymous juries include:

> (1) the defendants' involvement in organized crime; (2) the defendants' participation in a group with the capacity to harm jurors; (3) the defendants' past attempts to interfere with the judicial process or witnesses; (4) the potential that, if convicted, the defendants will suffer a lengthy incarceration and substantial monetary penalties; and, (5) extensive publicity that could enhance the possibility that jurors' names would become public and expose them to intimidation and harassment.[49]

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42. *See* United States v. Ochoa-Vasquez, 428 F.3d 1015, 1021-23, 1034 (11th Cir. 2005) (holding that district court's "empanelling of an anonymous jury was justified in prosecution for drug trafficking conspiracy, given specific evidence that linked defendant to a Medellín, Colombia drug cartel, a criminal organization with a history of violence and obstruction of justice").

43. *See* United States v. Barnes, 604 F.2d 121 (2d Cir. 1979). Leroy "Nicky" Barnes was an infamous crime boss who controlled the heroin trade in Harlem, New York during the 1970s. *See* Keleher, *supra* note 38, at 533.

44. *Ochoa-Vasquez,* 428 F.3d at 1034 ("[S]ignificant numbers of federal and state courts throughout the country have utilized the procedure to protect jurors, prevent jury tampering, and limit media influence.").

45. Keleher, *supra* note 38, at 531-32 ("Juror data can be permanently secreted from everyone, given only to counsel, or given only to the parties.").

46. United States v. Blagojevich, 612 F.3d 558, 563 (7th Cir. 2010).

47. United States v. Talley, 164 F.3d 989, 1001 (6th Cir. 1999), *cert. denied,* 526 U.S. 1137 (1999); *see also* United States v. Sanchez, 74 F.3d 562, 564 (5th Cir. 1996); 28 U.S.C. § 1863 (2006).

48. Keleher, *supra* note 38, at 537.

49. United States v. Krout, 66 F.3d 1420, 1427 (5th Cir. 1995), *cert denied,* 516 U.S. 1136 (1996). *See* United States v. Ross, 33 F.3d 1507, 1520 (11th Cir. 1994); United States v. Paccione, 949 F.2d 1183, 1192 (2nd Cir. 1991).

While courts maintain that anonymous juries are a "device of last resort" and a "drastic measure,"[50] in practice, virtually every federal circuit has used them and only once has a district court's decision to empanel an anonymous jury been reversed on appeal.[51]

In connection with courts' increased use of anonymous juries, the justifications given for empanelling anonymous juries have changed.[52] Historically, the decision to empanel an anonymous jury was based on a need to protect juror safety, where the defendant was notoriously dangerous or had previously tried to bribe, intimidate, or harm jurors.[53] As the practice has evolved today, anonymous juries are approved even when juror safety is not a concern.[54] In high profile cases, courts empanel anonymous juries based on the need to protect juror privacy.[55] For example, courts empanelled anonymous juries in the supersized trials of O.J. Simpson, John Gotti, and the World Trade Center bombers.[56]

The trend towards using anonymous juries in high profile cases is in part driven by the growth of the Internet and social networking sites.[57]

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50. *Krout*, 66 F.3d at 1427.

51. *Sanchez*, 74 F.3d at 565 (holding that a defendant "should receive a verdict, not from anonymous decision makers, but from people he can name as responsible for their actions"); *see also* Keleher, *supra* note 38, at 537.

52. Laura N. Wegner, *Juror Anonymity in Criminal Trials: The Media, The Defendant, and the Juror—Providing for the Rights of All Interested Parties*, 3 ALB. GOV'T L. REV. 429, 431 (2010).

53. United States v. Peoples, 250 F.3d 630, 635 (8th Cir. 2001) (holding that a trial court possesses wide latitude in empanelling an anonymous jury "if it finds that a person's life or safety is in jeopardy"); *see also* Karen Monsen, *Privacy for Prospective Jurors at What Price? Distinguishing Privacy Rights from Privacy Interests; Rethinking Procedures to Protect Privacy in Civil and Criminal Cases*, 21 REV. LITIG. 285, 286 (2002).

54. *See* United States v. Koubriti, 252 F. Supp. 2d 418, 421-22 (2003) (holding that an anonymous jury was warranted because of the public attention surrounding the case and where public emotions concerning "terrorism" were highly charged).

55. *See* United States v. Branch, 91 F.3d 699, 724-25 (5th Cir. 1996), *cert. denied*, 520 U.S. 1185 (1997) (quoting United States v. Wang, 40 F.3d 1347, 1377 (2d Cir. 1994)) (finding no error in district court's decision to empanel anonymous jury where "the prospect of publicity militate[d] in favor of jury anonymity to prevent exposure of jurors to intimidation or harassment")); *see also* United States v. Dakota, 197 F.3d 821, 827 (6th Cir. 1999) (finding no error in district court's decision to empanel an anonymous jury "in order to minimize the prejudicial effects of pretrial publicity and an emotional, political atmosphere that created a risk of jury intimidation and improper influence"); United States v. Vario, 943 F.2d 236, 241 (2nd Cir. 1991), *cert. denied*, 502 U.S. 1036 (1992) (approving use of an anonymous jury where there is no issue of threat of jurors safety).

56. Keleher, *supra* note 38, at 549.

57. *See Blagojevich*, 743 F. Supp. 2d at 802; *see also* United States v. Black, 483 F. Supp. 2d 618 (N.D. Ill. 2007) (citing the ease of accessing and distributing information via the Internet as concerns counseling in favor of prohibiting access to jurors' names

These technologies magnify the risk that jurors will be contacted improperly. In the Blagojevich trial, the court held that the media groups were not entitled to the immediate disclosure of jurors' names.[58] Because of the intense media attention surrounding the case, the court determined that there was a significant risk that jurors would be subject to improper outside contact if their contact information were made public.[59] The judge cited the Internet age and the ubiquity of social media as support for this position.[60] The judge noted that he had already received numerous unsolicited communications from individuals attempting to influence the case and he did not want the jurors to be similarly contacted.[61]

In the equally high profile perjury trial of the "Home Run King" Barry Bonds, the judge found it necessary to withhold juror names from the public until after the trial.[62] As with any high profile case, there was a significant risk that people would contact the jurors and attempt to influence the verdict.[63] However, the judge stated that the risk was higher and relatively unique because the court had deemed inadmissible certain evidence and areas of testimony due to the fact that a key witness, Bonds' former trainer, Greg Anderson, refused to testify.[64] The judge stated, "[t]he risk here is that someone might approach a juror specifically to tell that juror about the inadmissible evidence, either in person or by, for example, posting a short message on the juror's Facebook page."[65] This case provides an example of courts' concern

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during pendency of trial); *Koubriti*, 252 F. Supp. 2d at 420 (instructing the jury that "our goal in impaneling [sic] an anonymous jury is to protect your privacy and your ability to decide this case without any external influences brought to bear upon you"); Ashby Jones & Nathan Koppel, *Anonymous Ladies and Gentlemen of the Jury*, WALL ST. J., July 12, 2010, http://online.wsj.com/article/SB10001424052748704799604575357443655839472.html.

58. *Blagojevich*, 743 F. Supp. 2d at 809.

59. *Id.* at 802.

60. *Id.* at 801 (quoting *Black*, 483 F. Supp. 2d at 630-31) ("Also present was the potential transformation of jurors personal lives into public news which, may unnecessarily interfere with the jurors ability or willingness to perform their sworn duties.") (internal quotation marks omitted).

61. *Id.* at 797.

62. Juliet Macur, *Jurors' Names to be Kept Secret in Bonds Case*, N.Y. TIMES, Mar. 15, 2011, http://www.nytimes.com/2011/03/15/sports/15sportsbriefs-JURORSNAMEST_BRF.html?_r=1; Ginny LaRoe, *For Bonds Trial, Illston Will Shield Juror Names*, RECORDER, Mar. 14, 2011.

63. United States v. Bonds, No. C 07-00732 SI, 2011 WL 902207, *2 (N.D. Cal. Mar. 14, 2011)

64. *Id.* at *6.

65. *Id.*

with protecting jurors from being contacted through social networking sites.

The *Blagojevich* and *Bonds* cases illustrate courts' willingness to use anonymous juries in high profile cases in order to protect jurors from being contacted through social networking sites by the media or the public.[66]

D. Competing Constitutional Interests

Empanelling an anonymous jury implicates the media's First Amendment right of access to trial proceedings and the criminal defendant's Sixth Amendment right to a fair trial by an impartial jury. Courts seeking to empanel an anonymous jury must balance these competing constitutional interests.

1. The Media's First Amendment Right of Access

The media argues that withholding juror names undermines its First Amendment right of access to trial proceedings.[67] The Supreme Court has held that the press and public have a *qualified* right to attend a criminal trial.[68] This is known as the public trial requirement. However, not all aspects of a criminal trial receive protection under the First Amendment.[69] In *Press Enterprise I,* the Supreme Court extended the media's First Amendment right of access to the voir dire proceedings of a criminal trial, in which the jury is selected.[70]

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66. *But see Branch*, 91 F.3d at 724 ("Not all celebrated trials merit an anonymous jury.").

67. *See* Nancy J. King, *Nameless Justice: The Case for the Routine Use of Anonymous Juries in Criminal Trials*, 49 VAND. L. REV. 123, 151 (1996).

68. *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606-07 (1982); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 573-74 (1980).

69. *See Black*, 483 F. Supp. 2d at 622 (N.D. Ill. 2007); United States v. Ladd, 218 F.3d 701, 704-05 (7th Cir. 2000) (holding First Amendment right of access applies to evidence admitted at trial); Press Enter. Co. v. Superior Court (*Press Enterprise II*), 478 U.S. 1, 8 (1986) ("Although many governmental processes operate best under public scrutiny, it takes little imagination to recognize that there are some kinds of government operations that would be totally frustrated if conducted openly. A classic example is that 'the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings.'") (internal quotations omitted). *But see* In re Boston Herald, Inc., 321 F.3d 174, 183 (1st Cir. 2003) (holding no First Amendment right of access to withdrawn plea agreements, affidavits supporting search warrants, or presentence reports).

70. Press Enter. Co. v. Superior Court (*Press Enterprise I*), 464 U.S. 501, 513 (1984).

The federal circuits are split over whether the First Amendment right of access extends to jurors' names.[71] A split Third Circuit in *United States v. Wecht* held that the First Amendment right of access includes a right to know the names of the prospective and trial jurors.[72] However, there was a vigorous dissent in *Wecht* that pointed out that other circuits have suggested that limiting the public disclosure of jurors' identities during trials is an acceptable practice in some situations.[73]

The Seventh Circuit, in contrast, rejected an absolute right of access to jurors' names.[74] The Seventh Circuit instead held that there was a presumption in favor of disclosure of jurors' names that cannot be overcome without a finding of "unusual risk".[75] Similarly, the Sixth Circuit held in *United States v. Lawson* that "the Sixth Amendment provides defendants with a right to a public *trial* by an impartial jury, but it does not guarantee a right to a public *jury*."[76]

Assuming the public and the press have a First Amendment right of access to jurors' names, the Supreme Court has made it clear that the right of access is not absolute and "may give way in certain cases to other rights or interests," such as the defendant's right to a fair trial.[77] Under the test articulated in *Press Enterprise I*, the party seeking to close the proceeding must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, and the trial court must consider reasonable alternatives to closing the proceeding.[78]

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71. *See* United States v. Wecht, 537 F.3d 222, 237 (3rd Cir. 2008). *But see* United States v. Blagojevich, 612 F.3d 558, 565 (7th Cir. 2010).

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

73. *Id.* at 254-55 (Van Antwerpen, J. dissenting) (contending that the First Amendment does not require disclosure of the names to the media prior to the empanelment of the trial jury).

74. *Blagojevich*, 612 F.3d at 563 (holding that the presumption in favor of disclosure of jurors' names to newspapers could not be overcome without an opportunity to present evidence or findings of fact).

75. *Id.* at 565.

76. United States v. Lawson, 535 F.3d 434, 440 (6th Cir. 2008) (holding that the district court did not abuse its discretion in empanelling an anonymous jury where the evidence portrayed the defendants as very dangerous individuals).

77. Waller v. Georgia, 467 U.S. 39, 45 (1984) ("[T]he right to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information. Such circumstances will be rare, however, and the balance of interests must be struck with special care.").

78. *Press Enterprise I*, 464 U.S. at 510; *see also Waller*, 467 U.S. at 45.

2. The Criminal Defendant's Sixth Amendment Right to a Fair Trial by an Impartial Jury

The right to a fair trial is one of a criminal defendant's fundamental constitutional rights.[79] The Sixth Amendment of the United States Constitution and basic principles of due process guarantee a criminal defendant "the right to a speedy and public trial, by an impartial jury of the State."[80] An impartial, indifferent jury is one "capable and willing to decide the case solely on the evidence before it" without resorting to outside sources or influences.[81] Any external communication between jurors and third parties is presumptively prejudicial to a defendant.[82] In *Patterson v. Colorado*, Justice Oliver Wendell Holmes explained the logic behind this presumption: "The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."[83] Courts must be assiduous in protecting a defendant's right to a fair trial.

III. ANALYSIS

Empanelling anonymous juries in high profile trials strikes the proper balance between the public's constitutional interest in an open trial system and the defendant's right to a fair trial by an impartial jury. The substantial risks of prejudicial contact with jurors during high profile trials outweigh the minimal benefits of allowing public access to jurors' names.

A. The Benefits of Allowing Public Access to Jurors' Names are Minimal

It is undisputed that the press can play a role in ensuring a jury's integrity.[84] The public trial requirement "guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to

79. *See* Neder v. United States, 527 U.S. 1, 30 (1999) (Scalia, J., dissenting) (noting that the constitutional guarantee to a trial by an impartial jury is the only one to appear in both the body of the Constitution and the Bill of Rights, and calling it "the spinal column of American democracy").

80. U.S. CONST. amend. VI.

81. Smith v. Phillips, 455 U.S. 209, 217 (1982).

82. *Remmer*, 347 U.S. at 229.

83. Patterson v. Colorado, 205 U.S. 454, 462 (1907).

84. *See* Ashby Jones & Nathan Koppel, *Anonymous Ladies and Gentleman of the Jury*, WALL ST. J., Jul. 12, 2010, http://online.wsj.com/article/SB10001424052748704799604575357443655839472.html.

extensive public scrutiny and criticism."[85] Opponents of anonymous juries point to the fact that releasing jurors' names has led reporters to uncover improprieties. For example, during the 2006 criminal trial of Blagojevich's predecessor, former Illinois Governor George Ryan, the *Chicago Tribune* uncovered evidence that two jurors had lied on questionnaires and had criminal records that should have disqualified them or made them subject to challenge.[86] This timely discovery allowed the court to replace the jurors and avoid a mistrial.[87]

However, the potential benefits of allowing public access to jurors' names during trial are minimal. By withholding the names of jurors, courts are not depriving the public of the right to a *public trial.*[88] The public will still have access to all the relevant proceedings and information given by jurors.[89] Withholding jurors' names is not equivalent to closing voir dire proceedings.[90] Access to voir dire proceedings allows the public to scrutinize the process and determine whether an impartial jury has been empanelled.[91] The names of individual jurors add little to the equation.[92] The media could still publish information about a juror that they learn during voir dire, but must refer to jurors by their numbers instead of names.[93] For example, after the *Bonds* anonymous jury was empanelled, many articles surfaced describing the demographics of the jury.[94] News articles published such

85. Sheppard v. Maxwell, 384 U.S. 333,350 (1966).

86. Jones & Koppel, *supra* note 84.

87. *Id.*

88. United States v. Lawson, 535 F.3d 434, 440 (6th Cir. 2008).

89. United States v. Black, 483 F. Supp. 2d 618, 627 (N.D. Ill. 2007); King, *supra* note 67, at 154 ("Press access to the names of jurors *during trial* serves no salutary function when full access to every other aspect of the trial is guaranteed.").

90. *Black*, 483 F. Supp. 2d at 628 (concluding that there is no connection between public access to juror names during trial and the proper functioning of the jury. Disclosure of jurors' names in high profile cases actually interferes with the proper functioning of the jury by enhancing the risk that jurors will not be able or willing to perform their sworn duties).

91. Wegner, *supra* note 52, at 456.

92. *Id.*

93. *Id.*

94. *See e.g.*, Maura Dolan, *Barry Bonds Steroid Case: 8 Women, 4 Men Chosen for Jury*, L.A. TIMES, Mar. 21, 2011, http://latimesblogs.latimes.com/lanow/2011/03/barry-bonds-steroid-case-8-women-4-men-chosen-for-jury.html ("The panel was seated after prosecutors and defense lawyers quizzed potential jurors about their sports preferences, reading habits[,] and attitudes about steroids. Two of the jurors are African American women, and one is a woman who said she had purchased Oakland A's sports memorabilia.").

information as the number of males and females, the racial make-up of the jury, their professions, and their sports preferences.[95]

Moreover, although the public and the press have traditionally been given access to the identities of jurors, it is not clear why this is the case.[96] Some argue that the public trial clause of the Sixth Amendment does not require public access to juror identification information.[97]

B. The Risks of Allowing Public Access to Jurors' Names are Substantial in High Profile Trials

In criminal trials that attract a great deal of media attention, there is a significant risk that if jurors' names are made public, the jurors will be subjected to prejudicial contact.[98] Such contact risks interference with jurors' sworn duties and the possibility that jurors' verdicts could rest on something other than the evidence presented in court.[99]

The risks of improper and prejudicial contact with jurors during high profile cases are neither hypothetical nor speculative.[100] For example, in the *Blagojevich* case, after two months of testimony and fourteen days of deliberations, Blagojevich was found guilty of only one of twenty-four charges.[101] A mistrial was declared on the other charges because the

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95. *Id.*

96. *Lawson*, 535 F.3d at 440 ("[T]he Sixth Amendment provides defendants with a right to a public *trial* by an impartial jury, but it does not guarantee a right to a public *jury*.").

97. *See* Kory A. Langhofer, *Unaccountable at the Founding: The Originalist Case for Anonymous Juries*, 115 YALE L.J. 1823, 1824 (2006).

98. *See Black*, 483 F. Supp. 2d at 628-31 (holding that newspaper did not have qualified First Amendment right to obtain names of jurors during highly publicized criminal fraud trial); United States v. Koubriti, 252 F. Supp. 2d 418, 422 (E.D. Mich. 2003) (stating that with a "heightened level of media attention, the potential for juror harassment is increased").

99. *See Black*, 483 F. Supp. 2d at 628.

100. *See Blagojevich*, 743 F. Supp. 2d at 802; United States v. Cheek 94 F.3d 136 (4th Cir. 1996) (finding that co-defendant contacted a juror during the trial of this case in an attempt to bribe or intimidate that juror); Wegner, *supra* note 52, at 447-48 (citing several other examples demonstrating that juror fears of harassment and threats of violence are not unfounded, including that jurors who acquitted the police officers in the Rodney King case endured threatening phone calls. Jurors in the trial of Dan White, charged with the murder of San Francisco Mayor George Moscone and City Supervisor Harvey Milk, received death threats after returning a verdict of not guilty by reason of insanity. In that case, some of the jurors moved or changed jobs after the trial.)

101. Monica Davey & Susan Saulny, *Blagojevich, Guilty on 1 of 24 Counts, Faces Retrial*, N.Y. TIMES, Aug. 17, 2010, http://www.nytimes.com/2010/08/18/us/18jury.html?scp=1&sq=Blagojevich,%20Guilty%20on%201%20of%2024%20Counts,%20Faces%20Retrial,&st=cse. The jurors were

jurors failed to reach the necessary unanimous decision.[102] In Blagojevich's upcoming retrial, the judge again declared that the jury would be anonymous.[103] The media onslaught that jurors faced after their names were released following the verdict in the previous trial confirmed the need for anonymity in the retrial.[104] One juror reported that "the media was camped outside her home for several days, [and] that she felt unsafe returning home."[105] A helicopter flew over a house where another juror was staying.[106] This case demonstrates how impending press and public pressure, or potential harassment, can improperly factor into jury deliberations in high profile cases if jurors' names are released to the public.

In *Sheppard v. Maxwell*, the highly publicized prosecution of Samuel Sheppard for the second-degree murder of his pregnant wife, the Supreme Court held that Sheppard was denied a fair trial because the trial judge failed to protect the defendant from the pervasive and prejudicial publicity that attended his prosecution.[107] The Supreme Court noted the adverse effects that accompany the public disclosure of jurors' names in high profile trials: "As a consequence [of publishing the names and addresses of the 'veniremen'], anonymous letters and telephone calls, as well as calls from friends, regarding the impending prosecution were received by all of the prospective jurors."[108] The Court decried the judge's failure to insulate the jurors from reporters and photographers and noted that the coverage of the jurors, including publishing their addresses, "exposed them to expressions of opinions from both cranks and friends."[109]

In 1966, the Supreme Court in *Sheppard* was concerned about the risks associated with high profile trials given the pervasiveness of the

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split 11-1 in favor of convicting Blagojevich on one count of conspiring to sell an appointment to fill the Senate seat once held by President Obama. *Id.*

102. *Id.*

103. United States v. Blagojevich, No. 08 CR 888-1, 2011 WL 812116, at *2 (N.D. Ill. 2011) (delaying the release of jurors' names until at least twelve hours after the reading of the verdict).

104. *Id.* at *1.

105. *Id.* at *2. The juror also received a voicemail from a caller referring to the juror as an "idiot . . . . I hope bad things happen to you." *Id.* This call prompted a federal investigation. *Id.*

106. *Id.*

107. *Sheppard*, 384 U.S. at 363.

108. *Id.* at 342. "The fact that anonymous letters had been received by prospective jurors should have made the judge aware that this publicity seriously threatened the jurors' privacy." *Id.* at 353.

109. *Id.* at 353.

then "modern" communications.[110] This concern warrants even more attention today because of the advances in communication technology since 1966. Disclosure of jurors' names in high profile trials poses a significant risk because of the ability to instantly communicate through the Internet and social networking sites.[111] New methods of electronic communication have made it easier than ever to contact jurors and attempt to influence the decision-making process.[112] Members of the press or public who are curious about the case or interested in the outcome can contact jurors via Facebook or other social networking sites at the click of the button. Contact with jurors interferes with their ability to perform their sworn duties due to stress, distraction or intimidation. Courts must take steps "that will protect their processes from prejudicial outside information."[113]

C. The Benefits of Public Access to Jurors' Names are Outweighed By Risk of Third Party Contact Presented By Disclosure in High Profile Trials

The right of access to judicial records and proceedings "must be balanced against competing values."[114] In *Sheppard*, the Supreme Court made it clear that a defendant's right to a fair trial under the Sixth Amendment outranks the media's First Amendment right of access to criminal trials where there is a "reasonable likelihood" that such access will lead to "prejudicial outside inferences."[115]

The risk that jurors will be improperly contacted, or unable to perform their sworn duties due to stress or distraction outweighs the benefits of access to jurors' names in high profile trials. Because

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110. *Id.* at 362 ("Given 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.").

111. *See Blagojevich*, 743 F. Supp. 2d at 802.

112. *Id.*

113. *See Sheppard*, 384 U.S. at 363 ("[C]ure lies in those remedial measures that will prevent the prejudice at its inception.").

114. *In re* Associated Press, 162 F.3d 503, 508 (7th Cir. 1998) (quoting *In re* Knight Publ'g, 743 F.2d 231, 234 (4th Cir. 1984)) ("[R]epresentatives of the press and general public must be given an opportunity to be heard on the question of their exclusion from the proceedings or access to documents.") (internal quotation marks omitted); *see* Waller v. Georgia, 467 U.S. 39, 45 (1984) ("[T]he balance of interest must be struck with special care.").

115. *See Sheppard*, 384 U.S. at 362-63 ("Given 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.").

technological advancements have made it possible to contact jurors with unprecedented ease via social networking sites or the Internet, the risk of prejudicing the defendant's right to a trial by an impartial jury is great. Withholding jurors' names from the public and press in high profile cases is essential to preserve criminal defendants' right to a trial by an impartial jury.

Additionally, anonymity improves jury deliberations because jurors can more confidently render a verdict without fear of reprisal or negative repercussions of their verdict.[116] Jurors often fear that they will be subject to harassment or retaliation if they return an unpopular verdict.[117] In *United States v. Koubriti*, the first post-September 11th case presenting charges related to international terrorism, the court stated it believed that an anonymous jury actually aids in protecting defendants' right to a fair trial: "[W]ith many people anxious about terrorism, the Court is confident that jurors who serve anonymously will be better able to fairly and dispassionately weigh the evidence and follow it to an impartial decision, unperturbed by the personal consequences of rendering an unpopular or controversial verdict."[118]

Also, citizens would be reluctant to serve as jurors in high profile cases without anonymity, knowing that jury service will result in potential harassment and invasions of their privacy.[119] Surveys find an overwhelming majority of people would prefer anonymity.[120]

D. Alternatives to Anonymity

Alternative methods of protecting jurors from prejudicial contact are less effective and more burdensome than anonymous juries. Many of these alternatives would impose substantial hardship on jurors.[121]

One alternative to empanelling an anonymous jury is sequestering the jury. Sequestration would impose significant hardship on the

116. *See Koubriti*, 252 F. Supp. 2d at 426.

117. *See* Keleher, *supra* note 38, at 535.

118. *Koubriti*, 252 F. Supp. 2d at 424.

119. United States v. Wecht, 537 F.3d 222, 258 (3rd Cir. 2008) (Van Antwerpen, J. dissenting).

120. *See* Keleher, *supra* note 38, at 552 (quoting Caroline K. Simon, *The Juror in New York City: Attitudes and Experiences*, 61 A.B.A. J. 207, 210 (1975) ("In one poll, eighty-four percent of respondents believed jurors should be anonymous in criminal cases. A judge who conducted trials with anonymous juries reported that only six out of over 2800 jurors wanted their identities revealed when faced with the option of anonymity.")).

121. *See Blagojevich*, 743 F. Supp. 2d at 805 ("While there exists in theory some alternatives to deferred disclosure [of jurors' names'], many of these alternatives would no doubt impose significant hardship on members of the jury.").

jurors.[122] Sequestration involves the isolation of jurors outside of court proceedings, thus disallowing any external contact. Sequestration is an incredible burden on the personal lives of jurors and should only be used in exceptional circumstances.

Another potential alternative to empanelling an anonymous jury is a jury instruction prohibiting jurors from discussing the case with anyone through cell phones, e-mail, the Internet, or social networking sites. This alternative is not sufficient for two reasons.[123] First, the presumption that jurors follow instructions is questionable.[124] Second, the problem of jurors *being contacted* will not be solved by a jury instruction. The concern lies with the conduct of others, not the jurors.[125] Therefore, instructions would not curtail such conduct.[126]

Moreover, asking the jurors not to read their e-mail or to surrender their cell phone or Internet access while serving on jury duty would be imposing an unfair burden on jurors.[127] As discussed in Part II, *infra*, these technologies are ubiquitous and a part of daily life for many Americans, especially for those who need cell phones or Internet usage to conduct their work.

IV. CONCLUSION

An impartial jury is one of a criminal defendant's fundamental constitutional rights. The pervasiveness of the Internet and social networking sites make the possibility of contacting a juror easier than ever. Public access to jurors' names creates a substantial risk in high profile cases that jurors will be contacted prejudicially. This substantial risk outweighs the minimal benefits of public access to jurors' names. Alternative methods of protecting jurors from improper contact are insufficient and would also impose substantial burdens on jurors. Anonymous juries are the most effective and least burdensome way to protect the legitimate interests of criminal defendants in having a jury

122. For a detailed discussion of the issues regarding sequestration, see Mary Strauss, *Sequestration*, 24 AM. J. CRIM. L. 63 (1996). Strauss examines the costs and benefits of sequestration generally and also in the context of the nine-month O.J. Simpson trial. Strauss discusses the great financial and psychological costs of sequestration. *Id.*

123. *See Blagojevich*, 743 F. Supp. 2d at 806-07.

124. *See* Bruton v. United States, 391 U.S. 123, 135 ("[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.").

125. *See Blagojevich*, 743 F. Supp. 2d at 807 ("[I]nstructions will not curtail such contact.").

126. *Id.*

127. *Id.* at 807-08.

free from outside influence, as well as the public's interest in an open trial system.

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