

3-1-2010

## Failure to Yield: How Wecht Might Ruin the Right to a Fair Trial

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### Recommended Citation

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## Failure to Yield: How *Wecht* Might Ruin the Right to a Fair Trial

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### I. INTRODUCTION

Aaron Burr was a well-known individual in his time. Among other things, he was a patriot, war hero, New York state legislator, New York Attorney General, and ultimately Vice President of the United States. One measure of his popularity is evinced by the results

of the 1800 election for President of the United States, where Burr succeeded in obtaining an electoral tie with the eventual victor, Thomas Jefferson.<sup>1</sup>

However, his considerable reputation was also sensationalized by scandal. On the morning of July 11, 1804, Burr shot and killed his rival, the equally popular Alexander Hamilton, in duel over an insult.<sup>2</sup> Although Burr was indicted on charges of murder in two states,<sup>3</sup> he still managed to finish his term as vice president and president of the Senate.<sup>4</sup> Then, because he was an outlaw in his own state and could not return, he headed south and west, where his political ambitions would continue. After purchasing large tracts of land in the newly acquired Louisiana territory, he hoped to start a war/rebellion against Spain and set himself up as the ruler of a new territory.<sup>5</sup> Aaron Burr's imperial ambitions were cut short, however, when one of his close confidants betrayed him to President Jefferson,<sup>6</sup> leading his former Executive co-worker to issue an order for his arrest on the crime of treason.

The sensation of Burr's high-profile case was overwhelming for the new nation.<sup>7</sup> Because "the courtroom [was] too small to accommodate the crush of interested citizens," the probable-cause hearing had to be "held in the Hall of the House of Delegates in Virginia."<sup>8</sup> Chief Justice John Marshall, who presided over this case

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1. They both received 73 of the total 138 electoral votes that were available. For more explanation surrounding the first electoral tie, see BUCKNER F. MELTON, JR., AARON BURR: CONSPIRACY TO TREASON 35–36 (2002). The tie was only broken after a prolonged struggle in the House of Representatives, which declared Jefferson president and, "as the Constitution then provided," Burr vice president. William Wirt Henry, *The Trial of Aaron Burr*, 3 VA. L. REV. 477, 479 (Nov. 1897).

2. Henry, *supra* note 1, at 479–80.

3. Because the duel occurred in New Jersey and Alexander Hamilton died in New York, both states sought to prosecute Aaron Burr. *Id.* at 480.

4. *See id.* at 481.

5. *Id.* at 481–82 (stating that Mr. Burr purchased 400,000 acres of land along the Washita River).

6. *Id.* at 483.

7. *See* Robert Hardaway & Douglas B. Tumminello, *Pretrial Publicity in Criminal Cases of National Notoriety: Constructing a Remedy for the Remediless Wrong*, 46 AM. U. L. REV. 39, 48–49 (1996) ("In the midst of this infamous trial, the issue of jury contamination erupted. Driven by the public's curiosity and by Burr's political stance, the events and proceedings leading up to the trial saturated the newspapers, and the possibility of a fair trial was in question. Given the nature of the crime and the notoriety of Burr himself, it is easy to see why the trial became the center of media attention." (footnotes omitted)).

8. *Press-Enterprise Co. v. Superior Court (Press-Enterprise II)*, 478 U.S. 1, 10 (1986).

as the trial judge while fulfilling his circuit duties, took note of the extreme interest and high publicity and became concerned about the impartiality and fairness of his court. He remarked:

Why do personal prejudices constitute a just cause of challenge? Solely because the individual who is under their influence is presumed to have a bias on his mind which will prevent an impartial decision of the case, according to the testimony. He may declare that notwithstanding these prejudices he is determined to listen to the evidence, and be governed by it; but the law will not trust him. . . . He will listen with more favor to that testimony which confirms, than to that which would change his opinion . . . .<sup>9</sup>

Although Aaron Burr was acquitted, the fear that the negative publicity normally associated with high-profile cases might divest an individual of his or her right to a fair trial has remained present in American society.

Two hundred years later in *United States v. Wecht*,<sup>10</sup> Judge Arthur Schwab, facing one of the highest profile cases of his career on the bench, sought to protect the impartiality of his tribunal by ordering that the names and addresses of both jurors and prospective jurors be sealed until after the empanelment of the jury.<sup>11</sup> Media-intervenors appealed that order, claiming that their First Amendment right of access entitled them to such juror information. The Third Circuit agreed with the reporters, quashed Judge Schwab's order, and effectively placed the measure that he used to protect the fairness of his court beyond the discretionary reach of any trial judge under its jurisdiction.<sup>12</sup> More importantly, the media's right of access not only trumped the judge's method for ensuring an impartial trial, it also trumped the rights of the accused to a fair trial.

Normally, as two conflicting rights meet, one will go dormant as the other is honored. Justice Kennedy's concurrence in *Burson v. Freeman*<sup>13</sup> illustrates this principle when he notes that "the First Amendment permits freedom of expression to yield to the extent necessary for the accommodation of another constitutional right."<sup>14</sup>

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9. *United States v. Burr*, 25 F. Cas. 49, 50 (C.C.D. Va. 1807) (No. 14,692g).

10. *United States v. Wecht*, No. 06-0026, 2008 WL 65605 (W.D. Pa. Jan. 4, 2008).

11. *Id.* at \*2 n.1.

12. *See United States v. Wecht*, 537 F.3d 222, 233-43 (3d Cir. 2008).

13. 504 U.S. 191 (1992).

14. *Id.* at 213 (Kennedy, J., concurring) (joining the majority in its holding that the government may legally ban political speech within certain distances from polling stations in

To illustrate further, it may be helpful to think of each right as an automobile. If two automobiles arrive at an intersection simultaneously, only one may proceed through the intersection at a time if either is to continue on its way unhindered. Customarily, road signs and rights-of-way determine which vehicle will proceed first, so as to ensure order and safety. Likewise, constitutional priorities and prudence determine which right must yield to another at points of intersection. Certainly, the circumstances as well as the particular rights involved also play an important role in that determination. However, when courts imprudently give priority to the wrong right, this inevitably causes catastrophic consequences when the right that is supposed to have the “right-of-way” comes speeding up to an intersection.

In *United States v. Wecht*, the Third Circuit incorrectly forced the rights of the accused to yield to the press’s right of access, in spite of constitutional and prudential considerations to the contrary.<sup>15</sup> This Note will examine how *Wecht*’s imprudent application of right of access jurisprudence—specifically the two-prong *Press-Enterprise II* test—effectively runs an individual’s rights to a fair and impartial trial “off the road,” as well as sets barriers that impede those rights from resuming their proper course. Although there are ample arguments that the Third Circuit misapplied the history prong of the *Press-Enterprise II*<sup>16</sup> test by misinterpreting the historical availability of juror identities,<sup>17</sup> this Note will instead focus on the misapplication of the logic prong of the *Press-Enterprise II* test, as well as the imprudent results of the decision.<sup>18</sup>

Part II of this Note will build a foundation for this argument by introducing and juxtaposing the Fifth and Sixth Amendment right to a fair trial with the developing First Amendment right of access. In

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order to prevent election fraud and intimidation, which otherwise would infringe on a recognized, fundamental right to vote).

15. See *Wecht*, 537 F.3d at 243 (Van Antwerpen, J., concurring in part and dissenting in part).

16. *Press-Enterprise v. Superior Court (Press-Enterprise II)*, 478 U.S. 1 (1986).

17. See *United States v. Scarfo*, 850 F.2d 1015, 1023 (3d Cir. 1988) (en banc) (“Because the system contemplates that jurors will inconspicuously fade back into the community once their tenure is completed, anonymity would seem entirely consistent with, rather than anathema to, the jury concept.”); see also *Newsday, Inc. v. Sise*, 518 N.E.2d 930 (N.Y. 1987) (holding that a statute designed to protect the confidentiality of juror questionnaires also protected the confidentiality of juror names and addresses because of the significant privacy and safety interests at stake).

18. See *Press-Enterprise II*, 478 U.S. at 8.

Part III, this Note will provide some background leading up to the *Wecht* decision, as well as discuss how the Third Circuit came to its conclusion. Part IV will begin by discussing how this decision alters the “right-of-way” priorities essential to jury trials by shifting the paradigmatic focus of the jury trial away from providing an impartial forum to serve justice and toward creating a government showcase of fairness for the public. It will then explain the foreseeable harm caused by this error. Finally, this Note will conclude after offering a way to redirect traffic and fix the problem.

## II. SETTING THE COURSE FOR A COLLISION OF RIGHTS

### *A. The Right to a Trial by an Impartial Jury*

In AD 1215, a group of fed-up English barons at Runnymede successfully coerced King John of England to sign the Magna Charta. The Great Charter is recognized as one of the first documents to “wrest[] from English sovereigns”<sup>19</sup> many of the fundamental and natural rights enjoyed by citizens of republican societies. Among other things, the document requires that “[n]o free-man shall be seized, or imprisoned, or dispossessed, or outlawed, or in any way destroyed; nor . . . condemn[ed] . . . , nor . . . commit[ed] . . . to prison, excepting by the *legal judgment of his peers*, or by *the laws of the land*.”<sup>20</sup>

Possibly due to one of the many alleged abuses that the Framers laid at the feet of their former sovereign,<sup>21</sup> Americans chiseled these ideas into the tablets of their own jurisprudence by incorporating them into the Constitution. The Sixth Amendment assures that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury,”<sup>22</sup> and the Fifth Amendment maintains that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law . . . .”<sup>23</sup> Today,

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19. Slaughterhouse Cases, 83 U.S. 36, 114 (1872) (Bradley, J., dissenting).

20. BOYD C. BARRINGTON, THE MAGNA CHARTA AND OTHER GREAT CHARTERS OF ENGLAND 239 (1900) (quoting Chapter 39 of the Magna Charta of 1215) (emphasis added).

21. The Declaration of Independence lists “depriving us in many cases, of the benefits of Trial by Jury” as one of the many grievances that the colonists maintained against the English King, George III. THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776).

22. U.S. CONST. amend. VI.

23. U.S. CONST. amend. V; *see also* U.S. CONST. amend. XIV § 1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .”).

people do not question the right of the criminally accused to have an impartial jury. “[R]egardless of whether the Sixth Amendment requires [states to provide defendants a jury trial, if a jury is provided], the jury must stand impartial and indifferent to the extent commanded by the Sixth Amendment,”<sup>24</sup> and due process, at a minimum, requires that any individual accused of a crime be accorded a fair trial before a fair tribunal.<sup>25</sup>

Judges are the primary guardians of the right to a fair trial. This, of course, means that judges maintain more than just the authority to ensure proper conduct during a trial and determine questions of law.<sup>26</sup> They also reserve the power, and with that the duty, of supervising and controlling the course of the trial process in such a manner as to prevent injustice.<sup>27</sup> Exercising their “sound discretion,” judges may take actions to restrict the representation of individuals,<sup>28</sup> disallow the withdrawal of representation in criminal cases,<sup>29</sup> limit the presence of the press during judicial proceedings,<sup>30</sup> impose control over statements made to the news media by both counsel and witnesses,<sup>31</sup> and take actions to insulate a jury when the fairness of a trial is threatened.<sup>32</sup>

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24. *Morgan v. Illinois*, 504 U.S. 719, 727 (1992) (citing *Turner v. Louisiana*, 379 U.S. 466, 471–72 (1965)).

25. *See In re Murchison*, 349 U.S. 133, 136 (1955); *In re Oliver*, 333 U.S. 257, 268–72 (1948); *Tumey v. Ohio*, 273 U.S. 510, 523–26 (1927) (holding that a judge may not be an arbiter in a case in which he or she has a direct interest).

26. *Geders v. United States*, 425 U.S. 80, 86–87 (1976).

27. *See Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966) (“The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences.”).

28. *Rhines v. Norlarco Credit Union*, 847 N.E.2d 233, 240 (Ind. Ct. App. 2006) (stating that judges may restrain parties from contracting with non-attorneys for their representation).

29. *See Fondura v. Florida*, 940 So. 2d 489, 491 (Fla. Dist. Ct. App. 2006) (“[A]s long as the attorney-client relation has not deteriorated to a point where counsel can no longer give effective aid in the fair presentation of a defense, [courts are] justified in denying a motion to withdraw.” (internal quotation marks omitted)).

30. *See Sheppard*, 384 U.S. at 358 (“[T]he presence of the press at judicial proceedings must be limited when it is apparent that the accused might otherwise be prejudiced or disadvantaged.”).

31. *See id.* at 360 (stating that in the circumstances of that case, the judge should have “impos[ed] control over the statements made to the news media by counsel, witnesses . . . and police officers”).

32. *See id.* at 363 (“The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences.”).

Nevertheless, the seemingly unlimited power of judicial discretion is not boundless. First, judicial discretion is guided “by the legal and moral conventions that mold the acceptable concept of right and justice.”<sup>33</sup> Justice Cardozo noted that when a judge exercises his or her discretion,

[h]e is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to “the primordial necessity of order in the social life.” Wide enough in all conscience is the field of discretion that remains.<sup>34</sup>

Second, and more importantly, the absolute rights of a party form an impassible limit to a judge’s discretion.<sup>35</sup> Herein lies the current problem. Granting new rights to individuals, especially those who are not parties to a controversy, further restricts the boundaries of a judge’s discretion, limiting his or her capacity to affect the outcome of a trial, and possibly denying an individual one of his or her most basic due process rights<sup>36</sup>—especially when that new right is granted primacy over a pre-existing right.

### *B. The First Amendment and the Right of Access*

In *Wecht*, the Third Circuit placed the right to a fair trial in direct conflict with the First Amendment’s Freedom of the Press. The First Amendment guarantees that “Congress shall make no law . . . abridging the freedom . . . of the press . . . .”<sup>37</sup> Under certain circumstances,<sup>38</sup> this freedom has translated into a “right of access” for media representatives.<sup>39</sup>

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33. *Matire v. State*, 232 So. 2d 209, 210 (Fla. Dist. Ct. App. 1970).

34. BENJAMIN NATHAN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 141 (1921) (footnote omitted).

35. *Tuck v. State*, 231 S.W.2d 436, 442 (Tex. Crim. App. 1950).

36. *See Morgan v. Illinois*, 504 U.S. 719, 727 (1992).

37. U.S. CONST. amend. I.

38. While it is generally understood that the press’s right of access extends to criminal trials, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572–73 (1980), it is still difficult to determine where else, and how far, this right extends. *Compare Pell v. Procunier*, 417 U.S. 817, 833–34 (1974) (rejecting the press’s demand to conduct face-to-face interviews of prison inmates because the press’s right of access is no greater than the public’s), *with Houchins v. KQED, Inc.*, 438 U.S. 1, 16–17 (1978) (Stewart, J., concurring in the judgment) (suggesting that the press should be permitted “some” right of access to the jail in order to cover its inner workings). *Compare City of Oak Creek v. King*, 436 N.W.2d 285, 291–92 (Wis. 1989)

According to Justice Potter Stewart, “The primary purpose of the constitutional guarantee of a free press was . . . to create a fourth institution outside the Government as an additional check on the three official branches.”<sup>40</sup> This fourth branch, or fourth estate as it is often called,<sup>41</sup> grants the masses access to the government and its dealings by attending those dealings as their proxy. The transparency that this creates allows a more “informed citizenry” to make “[e]nlightened choice[s]”<sup>42</sup> when it comes time to exercise their political rights. Consequently, some argue that the right of access is an essential component of self-government.<sup>43</sup>

*I. Richmond Newspapers: The emergence of a competing interest to the rights of the accused*

This right of access extends to the court system. In *Richmond Newspapers, Inc. v. Virginia*, the Supreme Court ruled that “[a]bsent an overriding interest articulated in findings, the trial of a criminal case must be open to the public.”<sup>44</sup>

During the initial trial in *Richmond Newspapers*, John Paul Stevenson was convicted of murder.<sup>45</sup> However, because the trial court had improperly permitted a bloodstained shirt, among some other very incriminating items, to be entered into the record, the Virginia Supreme Court overturned the initial ruling.<sup>46</sup> The local newspapers caught onto this detail and included the inadmissible evidence in a story.<sup>47</sup> As a consequence, both the first and second

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(reasonably excluding the media from an airplane crash scene is not a violation of the First Amendment right of access), *with Florida Publ'g Co. v. Fletcher*, 340 So. 2d 914, 917–18 (Fla. 1976) (accompanying a fire marshal into a burned-out private home was not a trespass because it was “common usage, custom and practice for news media”).

39. Richard J. Ovelmen, et al., *Access*, in 3 COMMUNICATIONS LAW IN THE DIGITAL AGE 415 (Bruce P. Keller & Lee Levine eds., 2009) (“[C]ourts have long eschewed any ‘narrow, literal conception’ of the Amendment’s terms . . . on the theory the Framers were concerned with broad principles, and wrote against a background of shared values and practices.” (citation omitted)).

40. Potter Stewart, “*Or of the Press*,” 26 HASTINGS L.J. 631, 634 (1975).

41. *Id.*

42. *Branzburg v. Hayes*, 408 U.S. 665, 726 (1972) (Stewart, J., dissenting).

43. Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 617 (describing the views of Justice Brennan).

44. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581 (1980).

45. *See id.* at 559.

46. *Id.*

47. *Id.* at 559 n.1.

retrials ended in mistrial.<sup>48</sup> When on trial for the fourth time, Mr. Stevenson's attorney moved to close the proceedings to the public, citing the possibility of further juror interference by those in attendance.<sup>49</sup> In light of the circumstances, the judge was acting within his power by closing the court to the public (and the press) to ensure that the defendant received a fair trial, as guaranteed by the Sixth Amendment.<sup>50</sup>

However, after the media-intervenors carried their case all the way to the Supreme Court, the Sixth Amendment was no longer the sole point upon which this issue would turn. Writing for the Court, Chief Justice Burger explained that "throughout its evolution, the [jury] trial has been open to all who cared to observe."<sup>51</sup> In fact, criminal trials once served an "important prophylactic purpose, providing an outlet for community concern, hostility, and emotion" after the shock of a crime<sup>52</sup>—a purpose which is only served when the "criminal process 'satisf[ies] the appearance of justice.'"<sup>53</sup> However, times have since changed. Now, because the public no longer finds trial attendance to be a preferred pastime, the media operates as "surrogates for the public,"<sup>54</sup> serving to "satisfy the appearance of justice"<sup>55</sup> because "openness, fairness, and the perception of fairness"<sup>56</sup> are so closely connected. Therefore, "a presumption of openness inheres in the very nature of [the] criminal trial under our system of justice."<sup>57</sup>

Proceeding from this presumption of openness, Chief Justice Burger found that "the right to attend criminal trials is implicit in the guarantees of the First Amendment."<sup>58</sup> Furthermore, according to the Chief Justice, and although it is not specifically enumerated in the Bill of Rights, "the amalgam of the First Amendment guarantees of speech and press" have traditionally protected the right of access

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48. *Id.*

49. *Id.* at 559–60.

50. *See supra* Part I.A.

51. *Richmond Newspapers*, 448 U.S. at 564.

52. *Id.* at 571.

53. *Id.* at 571–72 (quoting *Offit v. United States*, 348 U.S. 11, 14 (1954)).

54. *Id.* at 573.

55. *Id.* at 572 (citation omitted).

56. *Id.* at 570–71.

57. *Id.* at 573.

58. *Id.* at 580.

to public places.<sup>59</sup> Because the right of assembly also acts as an important catalyst to the exercise of other First Amendment rights, the government may not inhibit access to public fora outside of reasonable time, place, and manner restrictions.<sup>60</sup> Therefore, since the “trial courtroom . . . is a public place[,] . . . the people generally—and representatives of the media—have a right to be present,” as guaranteed by the First Amendment.<sup>61</sup>

Although Chief Justice Burger failed to see the right of access and the right to a fair trial as necessarily being in tension,<sup>62</sup> this judgment represents the beginning of a paradigm shift in jury trial jurisprudence, which *Wecht* might make complete if it takes root.<sup>63</sup> Since *Richmond Newspapers*, the “structural role” of the press<sup>64</sup> has become more robust, being held to apply to much more than just the criminal trial itself. Courts have construed the First Amendment right of access for media observers of criminal trials to extend to voir dire proceedings,<sup>65</sup> preliminary hearings and their transcripts,<sup>66</sup> suppression hearings,<sup>67</sup> deposition proceedings,<sup>68</sup> and even bench conferences.<sup>69</sup> When the rule is applied in the extreme, courts cannot even exclude the general press and public from the courtroom

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59. *Id.* at 577.

60. *Id.* at 578.

61. *Id.*

62. In fact, Chief Justice Burger later noted, “[O]ne of the important means of assuring a fair trial is that the process be open to neutral observers.” *Press-Enterprise Co. v. Superior Court (Press-Enterprise II)*, 478 U.S. 1, 7 (1986).

63. *Infra* Part IV.A.

64. *See generally Richmond Newspapers*, 448 U.S. at 587 (Brennan, J., concurring in the judgment) (noting that the First Amendment has a structural role in the American form of government).

65. *Press-Enterprise Co. v. Superior Court (Press-Enterprise I)*, 464 U.S. 501, 510–13 (1984) (rejecting a *generalized* interest in protecting the privacy of prospective jurors).

66. *Press-Enterprise II*, 478 U.S. 1, 12–13 (1986).

67. *See, e.g., State v. Sharrow*, 29 Media L. Rptr. (BNA) 2503, 2504 (Fla. Cir. Ct. 2001) (holding that the defendant’s concerns as to the impartiality of the trial did not outweigh the media’s First Amendment rights of access); *State v. Demrey*, 22 Media L. Rptr. (BNA) 2383, 2384 (N.C. Super. Ct. 1994) (denying the defendant’s motion to close pretrial hearing on the admissibility of evidence under both state and federal constitutional standards).

68. *See, e.g., State v. List*, 17 Media L. Rptr. (BNA) 1680, 1680 (N.J. Super. Ct. App. Div. 1990) (granting to the media the right to be present during the taped deposition of a defense witness).

69. *See, e.g., United States v. Smith*, 787 F.2d 111, 115 (3d Cir. 1986) (“We hold . . . that the common law right of access to judicial records . . . is fully applicable to transcripts of sidebar or chambers conferences in criminal cases at which evidentiary or other substantive rulings have been made.”).

during the testimony of minor-victims of sexual crimes, even if the public should wish to protect the young victims from such publicity.<sup>70</sup>

2. *Press-Enterprise II: The current test for determining the right of access to criminal trials*

The current standard for determining the breadth of the right of access to criminal trial proceedings is a two-prong test that was handed down in *Press-Enterprise II*. In that case, a former nurse was charged with the murder of twelve hospital patients.<sup>71</sup> When preliminary hearings began, counsel for the nurse moved that the court exclude the public from those hearings on the grounds that it would be prejudicial to his client's case.<sup>72</sup> In addition to closing the hearing, the magistrate sealed the record after the media sought access to the transcripts of those proceedings.<sup>73</sup> When the California Supreme Court examined the issue, it reasoned that it was distinguishable from other right of access precedent because the preliminary hearings were not the actual trial proceedings, and because the exclusion motion concerned the rights of the accused to a fair and impartial trial, not the privacy interests of witnesses<sup>74</sup> or potential jury members.<sup>75</sup> As a result, the California Supreme Court found no First Amendment right of access.

The U.S. Supreme Court, however, did not agree. In overturning the decision of the California Supreme Court, the Court set out a two-prong test for determining whether a hearing must be open to the public, regardless of whether the hearing is officially part of the "trial." First, the "experience" prong asks a court to examine the history of any proceeding in question so as to determine whether

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70. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607–09 (1982) (holding a Massachusetts law requiring the exclusion of the press and the general public from the courtroom during the testimony of minors who have allegedly been victim to sexual abuse to be unconstitutional because the provision was mandatory and did not allow for a case-by-case determination).

71. *Press-Enterprise II*, 478 U.S. at 3.

72. *Id.* at 3–4.

73. *Id.* at 4–5.

74. *Id.* at 5 (referring to *Globe Newspaper*, 457 U.S. at 607–09 (considering the privacy of minor victims of sexual crimes)).

75. *Id.* (referring to *Press-Enterprise Co. v. Superior Court (Press-Enterprise I)*, 464 U.S. 501, 510–11 (1984) (considering the privacy of jurors and other third parties)).

it has traditionally been open to the press or general public.<sup>76</sup> Second, the “logic” prong requires a court to consider “whether public access plays a *significant positive role* in the functioning of the particular process in question”<sup>77</sup> by “enhanc[ing] both the basic fairness of the criminal trial and the appearance of fairness so essential to the public confidence in the system.”<sup>78</sup>

Writing for the Court, Chief Justice Burger found that under this test, the First Amendment requires preliminary proceedings to be open to the public. Satisfying the experience prong, the Court found that a common law “tradition of accessibility to preliminary hearings of [this] . . . type” already existed in California.<sup>79</sup> Furthermore, appealing to both the logic prong of the test, as well as answering objections that the ruling placed the rights of the accused in further tension with rights of access, Chief Justice Burger found that “the absence of a jury [from preliminary hearings] . . . makes the importance of public access to a preliminary hearing even more significant.”<sup>80</sup> Essentially, the proceedings needed to remain open because public exposure was one important means for assuring their impartiality.<sup>81</sup>

### III. MEETING AT THE INTERSECTION: *UNITED STATES V. WECHT*

Obviously, *Wecht* is not the first time that the right of the accused to an impartial trial and the right of the press to access government proceedings have met at an intersection. The result of such an encounter, however, is what sets this case apart. It thus becomes important to understand the facts surrounding this meeting, as well as the Third Circuit’s reasoning in determining which right deserves to be given the “right-of-way.” Therefore, this Part will first provide some background to *United States v. Wecht*, before proceeding to the outcome of the case, where the right to an impartial trial was forced to yield to the right of access.

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76. See *Press-Enterprise II*, 478 U.S. at 8.

77. *Id.* (emphasis added).

78. *Id.* at 9 (quoting *Press-Enterprise I*, 464 U.S. at 501) (internal quotation marks omitted).

79. *Id.* at 10.

80. *Id.* at 12–13.

81. *Id.* at 7.

### A. Background

#### 1. The celebrity pathologist

On January 20, 2006, when Dr. Cyril Wecht was indicted on eighty-four federal counts,<sup>82</sup> he was already popularly known as the “celebrity coroner.”<sup>83</sup> Having received professional degrees in law and medicine, the former Allegheny County Coroner was a frequent news and talk show guest widely known for his work. Some of his early cases include the deaths of Marilyn Monroe and Elvis Presley.<sup>84</sup> Consequently, Dr. Wecht’s fame, or notoriety, was already well established by the time he was appointed to the House of Representatives’ Select Committee on Assassinations in 1978 to investigate the assassination of President John F. Kennedy. As part of that committee, he continued to establish his reputation by consistently disagreeing with the findings of the other eight forensic pathologists on the committee.<sup>85</sup> Since then, he has worked on many other high-profile cases, such as the death of JonBenét Ramsey,<sup>86</sup> the Charles Manson murders,<sup>87</sup> and the O.J. Simpson murder trial.<sup>88</sup>

Moreover, this indictment was not the first time that Dr. Wecht had been in trouble with the law. More than two decades earlier, Dr. Wecht was indicted on similar charges.<sup>89</sup> In 1979, on the same day that he “announced his candidacy for county commissioner,” Dr. Wecht was accused of using the public facilities available to him as

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82. United States v. Wecht, 537 F.3d 222, 224 (3d Cir. 2008). Among the eighty-four counts were charges of “theft of honest services, mail and wire fraud,” and using public resources for private gain. *Id.*

83. See Amy Worden, *Celebrity Coroner on Trial Today*, PHILA. INQUIRER, Jan. 28, 2008 at B01; United States v. Wecht (*Wecht II*), 541 F.3d 493, 495 (3d Cir. 2008).

84. 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>.

85. H.R. REP. NO. 95-1828, pt. 2, at 43 n.1 (1979), available at <http://www.archives.gov/research/jfk/select-committee-report/part-1a.html#reliance>.

86. Joe Mandak, *Feds Again Reducing Counts Against Top Pathologist*, USA TODAY, Nov. 7, 2008, available at [http://www.usatoday.com/news/nation/2008-11-07-738337286\\_x.htm](http://www.usatoday.com/news/nation/2008-11-07-738337286_x.htm).

87. *Famed Coroner to Give Talk*, PITT. TRIB.-REV., Nov. 6, 2005.

88. *Id.*

89. James O’Toole, *Wecht No Stranger to Controversy*, PITT. POST-GAZETTE, Jan. 21, 2006, at A1, available at <http://www.post-gazette.com/pg/06021/641949.stm> (stating that Dr. Wecht had been previously prosecuted for allegedly using his office perquisites for his own private enterprises).

county coroner for his own private gain.<sup>90</sup> Although he was acquitted of any criminal charges, he was later found liable under similar claims in a civil trial.<sup>91</sup>

## 2. *The scandal surrounding the case at issue*

The circumstances surrounding Dr. Wecht's latest trial only add to his tabloid reputation. This fiasco began with a series of arguments between Dr. Wecht and the Allegheny District Attorney.<sup>92</sup> According to reports, the Allegheny District Attorney refused to investigate some deaths that had occurred during police encounters, or to prosecute the officers involved.<sup>93</sup> Consequently, Dr. Wecht exercised his functions as a private, for-hire pathologist and issued a medical opinion for a civil suit against those officers.<sup>94</sup> Accusing him of using his public office for gain, the District Attorney opened an investigation that would eventually result in Dr. Wecht's federal indictment.

However, many observers would declare that this indictment and investigation, announced during the 2006 election year, was politically motivated.<sup>95</sup> Richard L. Thornburgh, a Republican, former U.S. Attorney General, former Governor of Pennsylvania, and attorney for Dr. Wecht, even testified before the House Judiciary Committee that Dr. Wecht was one among many other prominent Democrats to be the subject of a Republican witch-hunt under disgraced former Attorney General Alberto Gonzales.<sup>96</sup> Even after Dr. Wecht's first trial reached a conclusion, many members of the

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90. *Id.*

91. *Id.*

92. The District Attorney at the time was Stephen A. Zappala Jr. and it appears that Dr. Wecht and the D.A. are still feuding. Jeremy Boren, *Wecht's Charges Against Zappala Reopen Feud*, PITT. TRIB.-REV., Jan. 6, 2010, available at [http://www.pittsburghlive.com/x/pittsburghtrib/news/pittsburgh/s\\_660862.html](http://www.pittsburghlive.com/x/pittsburghtrib/news/pittsburgh/s_660862.html).

93. See Charlie Deitch, *The Wecht Files*, PITT. CITY PAPER, Dec. 20, 2007, available at <http://www.pittsburghcitypaper.ws/gyrobase/Content?oid=oid%3A39852>.

94. *Id.*

95. See, e.g., *id.*; Jason Cato, *Prosecution's Conduct in Wecht Case Labeled 'Troubling'*, PITT. TRIB.-REV., Apr. 12, 2008, available at [http://www.pittsburghlive.com/x/pittsburghtrib/news/s\\_562027.html](http://www.pittsburghlive.com/x/pittsburghtrib/news/s_562027.html).

96. Mary Beth Buchanan was the U.S. Attorney who eventually took the case. She had previously served under Attorneys General John Ashcroft and Alberto Gonzales as director of the Executive Office for United States Attorneys in Washington, D.C., from 2004 to 2005. See Philip Shenon, *Democrats Were Targets in Inquiries, Panel is Told*, N.Y. TIMES, Oct. 24, 2007, at A11, available at <http://www.nytimes.com/2007/10/24/washington/24prosecute.html>.

hung jury left with the impression that the prosecution was fundamentally politically driven.<sup>97</sup>

Because of these conditions, and the resulting “intense and ‘unprecedented’ . . . pretrial publicity” surrounding the controversy,<sup>98</sup> U.S. District Court Judge Arthur Schwab decided to empanel an anonymous jury in accordance with a federal statute that permits a judge to “keep [juror] names confidential in any case *where the interests of justice so require.*”<sup>99</sup> Under these terms, the voir dire process and the entire trial would be open to the public, keeping only the jury’s identifying information confidential.<sup>100</sup> In spite of some open accusations of witness tampering on the part of Dr. Wecht,<sup>101</sup> the judge noted that he did not consider such interior influences when making his order.<sup>102</sup> It was, in fact, solely because of the “local ambience” of frenzied speculation that he did so, with the hope of maintaining an impartial court.<sup>103</sup> The judge also made it clear that his decision was made to ensure a fair process while respecting the public and the media’s right of access.<sup>104</sup>

#### B. United States v. Wecht

Notwithstanding the openness of the process in *Wecht*, when the media’s objection to the innominate jury reached the Third Circuit on appeal, the court of appeals sided with the media.<sup>105</sup> To come to

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97. Carl Prine & Jason Cato, *FBI’s Calls Upset Jurors in Wecht Trial*, PITT. TRIB.-REV., Apr. 11, 2008, available at [http://www.pittsburghlive.com/x/pittsburghtrib/news/cityregion/s\\_561792.html](http://www.pittsburghlive.com/x/pittsburghtrib/news/cityregion/s_561792.html).

98. United States v. Wecht, No. 06-0026, 2008 WL 219314, at \*2 (W.D. Pa. Jan. 25, 2008).

99. 28 U.S.C. § 1863 (b)(7) (2006) (emphasis added).

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

101. Jason Cato, *Wecht Threats Alleged*, PITT. TRIB.-REV., Feb. 18, 2006, available at [http://www.pittsburghlive.com/x/pittsburghtrib/s\\_425208.html](http://www.pittsburghlive.com/x/pittsburghtrib/s_425208.html).

102. United States v. Wecht, No. 06-0026, 2008 WL 65605, at \*2 n.1 (W.D. Pa. Jan. 4, 2008).

103. See United States v. Scarfo, 850 F.2d 1015, 1023 (3d Cir. 1988) (“[In certain circumstances] we must be particularly deferential to the trial judge, familiar as he is with the local ambience.”); see also *supra* text accompanying notes 26–36.

104. See United States v. Wecht, No. 06-0026, 2008 WL 199465, at \*4 (W.D. Pa. Jan. 22, 2008) (holding that the court would not “cloak the public *voir dire* process in secrecy,” but that it would only exercise its discretion to restrict the public’s access to the potential jury members for “legitimate reasons”); United States v. Wecht, No. 06-0026, 2008 WL 219314, at \*2 (W.D. Pa. Jan. 25, 2008); see also *supra* text accompanying notes 26–36.

105. *Wecht*, 537 F.3d at 227.

its conclusion, the Third Circuit applied the two-prong experience and logic test outlined in *Press-Enterprise II* to the release of juror names and identities, because “history and experience shape the functioning of governmental processes” and “[i]f the particular proceeding in question passes [the] tests of experience and logic, a qualified First Amendment right of public access attaches.”<sup>106</sup>

When examining the experience prong of the test, the *Wecht* court noted the fact that the juror selection process has traditionally been open.<sup>107</sup> For the court, this implied that the names and addresses of the jurors have always been available to the public.<sup>108</sup> According to the Third Circuit’s findings, the very concept of anonymous juries was all but non-existent before the mid-twentieth century.<sup>109</sup> Consequently, the Third Circuit did not feel that this practice satisfied the experience prong.<sup>110</sup>

Proceeding to the logic prong of the test, the Third Circuit echoed many of the previously enumerated goals of the right of access when it observed that “[k]nowledge of juror identities allows the public to verify the impartiality of key participants in the administration of justice, and thereby ensures fairness, the

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106. *Press-Enterprise Co. v. Superior Court (Press-Enterprise II)*, 478 U.S. 1, 8–9 (1986); see also *Wecht*, 537 F.3d at 235–42 (discussing and applying *Press-Enterprise II*).

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

108. *Id.* (“Because juries have historically been selected from local populations in which most people have known each other . . . the traditional public nature of *voir dire* strongly suggests that jurors’ identities were public as well.”); see also *In re Baltimore Sun Co.*, 841 F.2d 74, 75 (4th Cir. 1998) (“When the jury system grew up with juries of the vicinage, everybody knew everybody on the jury . . .” so that the required disclosure of juror and prospective juror names is “no more than an application of what has always been the law . . .” (footnote omitted)); Robert Lloyd Raskopf, *A First Amendment Right of Access to a Juror’s Identity*, 17 PEPP. L. REV. 357, 370 (1990) (“An examination of historical tradition indicates that jurors’ identities and places of residence traditionally have been known to the public.”); David Weinstein, *Protecting a Juror’s Right to Privacy: Constitutional Constraints and Policy Opinions*, 70 TEMP. L. REV. 1, 30–31 (1997).

109. *Wecht*, 537 F.3d at 236; see also Ephraim Margolin & Gerald F. Uelman, *The Anonymous Jury: Jury Tampering by Another Name?*, 9 CRIM. JUST. 14, 14 (1994) (“Juror anonymity is an innovation that was unknown to the common law and to American jurisprudence in its first two centuries.”). One of the earliest cases of an anonymous jury that is mentioned in this case is a Ninth Circuit approval of a 1951 district court order that prohibited the pre-trial release of juror names and addresses to anyone. *Hamer v. United States*, 259 F.2d 274, 278–79 (9th Cir. 1958).

110. *Wecht*, 537 F.3d at 237 (“[A] proper analysis of ‘experience’ will evaluate trial practices as they have developed over the past millennium in courts at all levels . . .”) (citing *Press-Enterprise II*, 478 U.S. at 8).

appearance of fairness and public confidence in that system.”<sup>111</sup> In addition, the court found that more factors weighed in favor of mandating disclosure than allowing judges to exercise their discretion in releasing juror information. Although the Third Circuit recognized some of the risks associated with always disclosing juror identities,<sup>112</sup> it felt that there is a strong presumption that all juror and prospective juror identities must be released for two reasons:<sup>113</sup> (1) “[j]uror bias or confusion might be uncovered, and jurors’ understanding and response to judicial proceedings could be investigated”<sup>114</sup> as a result of open access; and (2) “the prospect of criminal justice being routinely meted out by unknown persons does not comport with democratic values of accountability and openness . . . .”<sup>115</sup> While the court did not make the release of juror names an absolute rule, it left little choice to trial judges as they would have to overcome strict scrutiny in order to withhold juror identities,<sup>116</sup> a standard which many scholars recognize as practically impossible to meet.<sup>117</sup>

#### IV. THE COLLISION AND ITS AFTERMATH

In sum, *Wecht*’s holding requires district judges in the Third Circuit to release the names and identifying information of jurors and prospective jurors before their empanelment in a jury. The broad

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111. *Id.* at 238 (quoting *In re Globe Newspaper Co. v. Hurley*, 920 F.2d 88, 94 (1st Cir. 1990)) (quotations omitted).

112. The Third Circuit felt that possible risks of disclosure could be subjecting the jurors to the influence of third parties, the possible resistance of jurors from “serving on high-profile cases” in order to avoid public scrutiny, and the increased risk of jurors lying during voir dire in order to avoid public embarrassment. *Id.*

113. *Id.* at 239.

114. *Id.* (quoting *In re Globe Newspaper*, 920 F.2d at 94) (quotations omitted).

115. *Id.* (quoting *In re Globe Newspaper*, 920 F.2d at 98) (quotations omitted).

116. *Id.* (holding that judges must, on a case-by-case basis, “make particularized findings on the record ‘establishing the existence of a compelling government interest’ and ‘demonstrating that absent limited restrictions on the right of access, that other interest would be substantially impaired’” in order to empanel an anonymous jury) (quoting *United States v. Antar*, 38 F.3d 1348, 1359 (3d Cir. 1994)).

117. *See, e.g.*, Scott R. Bauries & R. Craig Wood, *Rights Without Remedies: The Consequences of Tennessee v. Lane for Disabled State University Students*, 195 EDUC. LAW. REP. 697, 707 (2005) (noting that once the Supreme Court has found a right to be fundamental and applies strict scrutiny, the test becomes “almost impossible to meet”); Ronnie J. Fisher, Comment, “What’s in a Name?: An Attempt to Resolve the “Analytic Ambiguity” of the Designated and Limited Public Fora, 107 DICK. L. REV. 639, 660 (2003) (observing that the strict scrutiny test of the Supreme Court is a “nearly-impossible-to-pass” form of review).

consequences of this decision, however, extend much further than a simple restriction on judicial discretion.

This new, more liberal interpretation of *Richmond Newspapers* has expanded the right of access too far. By improperly signaling that the right of access has priority at its intersection with the right to a fair trial, the Third Circuit has caused a tremendous collision. Not only does this decision diminish the essential purpose of the American court system and jury trials by pushing aside basic rights of fairness and impartiality in favor of “openness” for a media-hungry public, it also places barriers that impede the system from adapting to future circumstances. This Part will focus on these issues in turn by first addressing the declining rights of the accused in the criminal trial process. Then, this Part will bring to light the adverse effects that this decision may have on the courts by exposing how *Wecht* completes the paradigm shift begun in *Richmond Newspapers*—exchanging the former primary purpose of the jury trial, that of providing an impartial tribunal for the accused, with the new purpose of providing “an appearance of openness” for the public. Subsequently, this Part will go on to explain how *Wecht*'s exaggerated interpretation of *Richmond Newspapers* will lead to the fossilization of this aspect of the court system in the face of an ever-changing public and media, further obstructing the system's quest to preserve the rights of the accused.

#### *A. Shifting Paradigms: The Forgotten Purpose of the Jury Trial*

What is the primary purpose of public jury trials? In an otherwise lengthy dissent, Justice Gray answered this question in 1895 by stating that it was “to secure impartial justice between the government and the accused in each case as it arose.”<sup>118</sup> The Supreme Court has since affirmed and reaffirmed this position, stating that the primary purpose of the jury trial “is to prevent oppression by the Government,” because allowing the accused the right to a trial by a jury of his or her peers grants him or her “an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.”<sup>119</sup> Essentially,

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118. *Sparf v. United States*, 156 U.S. 51, 175 (1895) (Gray, J., dissenting).

119. *Ballew v. Georgia*, 435 U.S. 223, 229 (1978) (quoting *Williams v. Florida*, 399 U.S. 78, 100 (1970)) (quotation omitted); see also *Apodaca v. Oregon*, 406 U.S. 404, 410 (1972); *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

criminal trials by jury were created “for the benefit”<sup>120</sup> and protection of the accused,<sup>121</sup> preserving their constitutional rights from abuse by guaranteeing an impartial tribunal.

However, since *Richmond Newspapers*, ancillary goals for criminal trials have come into view.<sup>122</sup> Now, because there is a “nexus between openness, fairness, and the perception of fairness,” courts are necessarily required to “satisfy the appearance of justice” by allowing general access to their courtrooms during trial proceedings.<sup>123</sup> Nevertheless, previous to the *Wecht* decision, these goals were either ancillary to the primary purpose of providing an impartial trial,<sup>124</sup> or complimentary to that purpose. For example, in *Press-Enterprise II*, the Supreme Court recognized that access to pre-trial proceedings not only grants the appearance of openness, but it is also necessary for the protection of a defendant’s rights in a situation where there is not yet a jury of his or her peers to do so.<sup>125</sup> Indeed, it would appear that the secondary principle of openness was originally meant to be subordinate to the principal goal of maintaining fairness in the courtroom; *Richmond Newspapers* did not establish “a First Amendment right of access to all aspects of all criminal trials *under all* circumstances.”<sup>126</sup>

Using his discretion to withhold juror identities in *Wecht*, Judge Schwab’s order was meant to meet the primary objective of impartiality while appeasing the secondary objective of openness. Notably, Judge Schwab’s order did not affect the access of the press or public to trial proceedings. Presumably, journalists and observers

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120. 1 THOMAS M. COOLEY & WALTER CARRINGTON, CONSTITUTIONAL LIMITATIONS 647 (8th ed. 1927); see also Note, *The Right to a Public Trial in Criminal Cases*, 41 N.Y.U. L. REV. 1138, 1156 (1966) (“Despite the importance of the public’s *interest*, however, it does not appear that a public *right* is ‘so rooted in the traditions and conscience of our people as to be ranked as fundamental,’ particularly in view of the uncertain status of this right in the majority of the state courts.”).

121. Lewis F. Powell, Jr., *The Right to a Fair Trial*, 51 A.B.A. J. 534, 538 (1965).

122. See *supra* Part II.B.

123. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 570, 572 (1980) (quotation omitted).

124. Nancy T. Gardner, *Cameras in the Courtroom: Guidelines for State Criminal Trials*, 84 MICH. L. REV. 475, 494 (1985) (“The primary purpose of a criminal trial is to provide the defendant with an impartial forum in which the truth will emerge, not to educate or entertain the public.” (footnote omitted)).

125. *Press-Enterprise Co. v. Superior Court (Press-Enterprise II)*, 478 U.S. 1, 12–13 (1986).

126. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 613 (1982) (Burger, C.J., dissenting) (emphasis added).

were permitted to sit through voir dire as well as any other hearing, and at the end of the trial they would be able to review the Jury Questionnaire used preliminary to voir dire proceedings.<sup>127</sup> Consequently, the parties and observers would know practically everything about the jurors, with the sole exception of their names.<sup>128</sup> Under these circumstances, the presumption of openness during the proceedings, or at least openness under the circumstances, is easily identifiable.

Furthermore, other learned judges also recognize Judge Schwab's order to be an appropriate method of ensuring the impartiality of his tribunal while still respecting the media's secondary right of access to the trial. For example, after holding that the complete closure of voir dire proceedings to protect the impartiality of the jury was unconstitutional, the Second Circuit proclaimed in dictum that limited closure, such as "simply concealing the identities of . . . prospective jurors" would satisfy *Press-Enterprise I* and *II* limitations.<sup>129</sup> In addition, Judge Van Antwerpen's dissent in *Wecht* found that Judge Schwab's method was an appropriate compromise when weighing "the public's interest in openness, the media's interest in knowing certain information . . . and the judicial system's interest in fairness and efficiency."<sup>130</sup> Compared to sequestration—"one of the most burdensome tools of the many available to assure a fair trial"<sup>131</sup>—this method was "far more accommodating to the Media-Intervenors, as well as far less burdensome on the jurors."<sup>132</sup>

Nevertheless, because the *Wecht* decision ignores the primary purpose of a jury trial in order to appease the media, it represents a paradigm shift as priorities among these constitutional rights are

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127. *United States v. Wecht*, 537 F.3d 222, 226 (2008).

128. *Id.* at 226 n.3.

129. *See ABC, Inc. v. Stewart*, 360 F.3d 90, 104–05 (2d Cir. 2004); *Gannet Co. v. State*, 571 A.2d 735, 751 (Del. 1989) (holding that the announcement of juror names was not necessary to provide constitutionally required openness in highly publicized trial proceedings).

130. *Wecht*, 537 F.3d at 266 (Van Antwerpen, J., concurring in part and dissenting in part).

131. *Mastrian v. McManus*, 554 F.2d 813, 819 (8th Cir. 1977); *State v. Smart*, 622 A.2d 1197, 1209–10 (N.H. 1993) ("Sequestration is 'an extreme measure, one of the most burdensome tools of the many available to assure a fair trial.'" (quoting *United States v. Porcaro*, 648 F.2d 753, 755 (1st Cir. 1981))); *see also* *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1057 (1991).

132. *Wecht*, 537 F.3d at 267 (Van Antwerpen, J., concurring in part and dissenting in part).

reorganized. Prior to *Wecht*, judges in the Third Circuit were first required to “take protective measures [to safeguard the due process rights of the accused,] even when they are not strictly and inescapably necessary.”<sup>133</sup> The focus of their discretionary actions was the protection of the accused. Now, judges are required to take measures, or are restrained from action, in order to maintain openness—a right more significantly tied to the rights of the observers than the accused.<sup>134</sup> Moreover, *Wecht* signals that these third-party rights are to be favored even at the expense of the accused.

It is certain that “[t]he First Amendment right of access cannot be overcome by the conclusory assertion that publicity might deprive the defendant of [the right to an impartial verdict].”<sup>135</sup> However, when the Third Circuit decided that preliminary access to juror names is included in the right of access, in spite of the apparent openness guaranteed even when juror information was not released, it imprudently changed the priorities of the judicial system. This change works to the disadvantage of the criminally accused who may risk life and liberty under biased processes.

#### *B. Setting the System Up for Failure*

In addition to this rash realigning of priorities, if the Third Circuit’s improper application of the *Press-Enterprise II* test is adopted elsewhere, it will imprudently place the court system out of touch with an increasingly changing world. In *In re Reporters Committee for Freedom of the Press*,<sup>136</sup> then-Judge Scalia expounded upon the two-prong test, explaining that the crucial logic prong requires

that the historical practice play “*an essential role*” in the proper functioning of government . . . since otherwise the most trivial and unimportant historical practices—for example, the courts’ earlier practice of reading their judgments aloud in open session—would be chiselled [sic] in constitutional stone.<sup>137</sup>

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133. *Gannett Co. v. DePasquale*, 443 U.S. 368, 378 (1979).

134. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603 (1982) (“[T]he press and general public have a constitutional right of access to criminal trials.”).

135. *Press-Enterprise Co. v. Superior Court (Press-Enterprise II)*, 478 U.S. 1, 15 (1986).

136. 773 F.2d 1325 (D.C. Cir. 1985).

137. *Id.* at 1332 (emphasis added).

Even more alarming is the proposition that an unessential yet encumbering historical practice could become equally unalterable. The practice affirmed by *Wecht* is both unessential and burdensome because the practice duplicates voir dire proceedings and forces judges to resort to more cumbersome procedures for ensuring a fair trial, such as sequestration.

*1. Surrendering process: Giving voir dire to the press*

First, the Third Circuit's decision in *Wecht* represents the adoption of a requirement that is plainly superfluous.

The *Wecht* Court felt that permitting press access to juror names would "allow[] the public to verify the impartiality of key participants in the administration of justice" as well as uncover "[j]uror bias or confusion."<sup>138</sup> Consequently, it felt that the logic prong of the *Press-Enterprise II* test required the disclosure of juror names and addresses. Although requiring the disclosure of juror and prospective juror names and addresses could feasibly attain those listed goals, such an analysis completely overlooks the essentiality requirement of the prong.

The American system already has a method for verifying the impartiality of jurors: voir dire. For several hundred years,<sup>139</sup> voir dire has worked to serve the three-fold purpose of determining

whether prospective jurors (a) are eligible to serve based on legal restrictions, (b) will be able to consider in an impartial manner the information presented to them during trial, and (c) will be able to render a verdict based on the evidence of the trial rather than on extralegal factors.<sup>140</sup>

This fact makes the media's need for juror and prospective juror names a redundancy—hardly *essential* to the proper functioning of government, as the logic prong of *Press-Enterprise II* requires. The Supreme Court of Delaware encountered a similar issue when it was asked by media-intervenors to recognize that the announcement of juror names during a trial, an old Delaware practice, was part of their

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138. *United States v. Wecht*, 537 F.3d 222, 238 (2008) (quoting *In re Globe Newspaper Co.*, 920 F.2d 88, 94 (1st Cir. 1990)) (internal quotation marks omitted).

139. JOEL D. LIEBERMAN & BRUCE D. SALES, *SCIENTIFIC JURY SELECTION* 18 (2007) (“*Voir dire* has been used for several hundred years and in the United States can be traced to the 1760 Massachusetts Jury Selection Law.”).

140. *Id.* at 25.

right of access.<sup>141</sup> However, because juror names were made available to the parties at issue, and because the trial proceedings were left “open to the public,” the Delaware Court held that this practice was a redundant formality that was unessential to the proper functioning of government.<sup>142</sup> Likewise, the Third Circuit’s reasoning for requiring the publication of juror names prior to empanelment only chisels into constitutional stone a practice that is unessential.<sup>143</sup>

Moreover, the Third Circuit’s holding discounts the role of voir dire, and builds the right of access up as its essential complement, rather than its beneficial supplement. Like the First Circuit,<sup>144</sup> the Third Circuit found that the press’s role in a trial is important in exposing bias that might not otherwise be discovered among the empanelled jurors.<sup>145</sup> Such may be true, making the right of access a helpful enhancement to voir dire. Nonetheless, listing its role in advancing fairness as a necessary reason for maintaining the right in spite of contravening interests also promotes the role of access from that of a welcome aid to that of a compulsory procedure. Juror names must now be made available in order to help ensure fairness.<sup>146</sup> That argument assumes that voir dire is, by itself, inadequate. Yet, jury qualification is still determined by voir dire and not through the findings of the press.

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141. *Gannet Co. v. State*, 571 A.2d 735, 736, 739 (Del. 1989).

142. *Id.* at 751 (holding that the announcement of juror names was not necessary to provide constitutionally required openness in highly publicized trial proceedings).

143. *Cf. In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325, 1332 (D.C. Cir. 1985).

144. *See In re Globe Newspaper Co.*, 920 F.2d 88, 94 (1st Cir. 1990) (noting that “[j]uror bias or confusion might be uncovered” through a liberal right of access).

145. *United States v. Wecht*, 537 F.3d 222, 240 n.33 (2008) (“The District Court appears to believe that no good can come from any story published about a juror. As we noted above, however, press investigation of jurors might be beneficial in some cases by, for example, revealing possible sources of juror bias or deterring misrepresentation during *voir dire*.”).

146. Recall that the primary reason that the right of access permits the press to attend to judicial proceedings is to help protect the accused. Lewis F. Powell, *The Right to a Fair Trial*, 51 A.B.A. J. 534, 538 (1965) (“We must bear in mind that the primary purpose of a public trial and of the media’s right as a part of the public to attend and report what occurs there is to protect the accused.”). It is interesting that juror information must be made available to the press even when important interests of fairness are raised by the accused in demanding to keep them sealed. *See supra* Part IV.A.

2. *The imprudent fossilization of process in an ever-changing atmosphere*

Secondly, the imposition of this supererogatory detail imprudently burdens the justice system by removing a discretionary tool that was effective in preserving trial impartiality in the face of an increasingly pervasive media.

As early as the 1960s, the Supreme Court recognized the building pressure caused by the growing and evolving media and called for trial judges to take measures necessary to preserve the impartiality of their tribunals.<sup>147</sup> In *Sheppard v. Maxwell*, the petitioner was charged with beating his pregnant wife to death.<sup>148</sup> Later, when he refused to submit to questioning or a lie-detector test, the media interpreted this as a sign of his guilt.<sup>149</sup> As the developing media circus escalated, the entire community became enraptured in the drama, quickly devouring newspaper stories that “tended to incriminate [the accused],” and showing up in droves at hearings in order to observe the suspected killer.<sup>150</sup> When the trial finally began, “[e]very juror, except one, testified at *voir dire* to reading about the case in the Cleveland papers or to having heard broadcasts about it.”<sup>151</sup> Even more troubling was the fact that after “[a]ll three Cleveland newspapers published 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.”<sup>152</sup> The Supreme Court later found that “the judge’s failure to insulate [the jurors] from reporters and photographers,” by allowing “numerous pictures of the jurors, with their addresses, [to appear] in the newspapers before and during the trial itself,” “thrust [them] into the role of celebrities”<sup>153</sup> and denied the petitioner his due process rights to a fair and impartial trial.<sup>154</sup> In response to these facts, and because of “the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors,” the Supreme Court

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147. *Sheppard v. Maxwell*, 384 U.S. 333, 362–63 (1966).

148. *Id.* at 336.

149. *Id.* at 338–39.

150. *Id.* at 339–40.

151. *Id.* at 345.

152. *Id.* at 342.

153. *Id.* at 353.

154. *Id.* at 362–63.

mandated that “trial courts . . . take strong measures to ensure that the balance is never weighed against the accused” by using “rule and regulation that will protect their processes from outside interferences.”<sup>155</sup>

The Supreme Court was not alone in promulgating rules that would aid in protecting the impartiality of jurors. Congress also came to the aid of judges by passing an act that codified a judge’s power to develop his or her own jury selection plan.<sup>156</sup> Among other things, the act permits judges to “keep [juror] names confidential in any case where the interests of justice so require.”<sup>157</sup> Furthermore, shortly after and in response to the *Sheppard* decision, the Judicial Conference recommended that judges, either on the motion of a party or sua sponte, issue a special order directing “that the names and addresses of jurors or prospective jurors not be publicly released except as required by statute,”<sup>158</sup> when the circumstances surrounding the case would require it.<sup>159</sup>

In 1980, after *Richmond Newspapers* recognized a right of access for the media to criminal trial proceedings, the Judicial Conference reconvened to update its stance in light of the new ruling.<sup>160</sup> However, even though all criminal trial proceedings were to henceforth be held under a “presumption of openness,”<sup>161</sup> the Conference made the exact same recommendation.<sup>162</sup> In the face of intense media publicity, the Conference believed that its recommendations would provide additional means for judges to fulfill their responsibility of protecting the impartiality of criminal trials.<sup>163</sup>

These recommendations, made more than twenty years prior to Cyril Wecht’s corruption trial, have become increasingly important in the face of the changing media. Since the proposal of these recommendations, the media have become increasingly omnipresent with the introduction of the Internet. After its humble beginnings in

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155. *Id.*

156. 28 U.S.C. § 1863 (2006).

157. § 1863(b)(7).

158. 45 F.R.D. 391, 410–11 (1968).

159. *See id.* at 409.

160. *See* 87 F.R.D. 518, 522–23 (1980).

161. *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555, 573 (1980).

162. *Compare* 87 F.R.D. 518, 529–31 (1980), *with* 45 F.R.D. 391, 410–11 (1968).

163. 87 F.R.D. at 531.

1969,<sup>164</sup> the Internet has experienced enormous growth. Between the years 2000 and 2009, Internet usage in North America increased 134% to penetrate 74.2% of the population.<sup>165</sup> Today, “with its almost infinitely complex worldwide web of strands and nodes, . . . [the Internet’s] reach extends as far as, and perhaps exceeds, that of newspapers and other traditional media.”<sup>166</sup> Just as important, the Internet is an ever-changing medium, rapidly evolving as it continues to disseminate.<sup>167</sup> Today, as a result of its reach and growth, any person—not to mention any politician or celebrity—can find himself or herself on YouTube in a matter of minutes after a blunder or misstep.<sup>168</sup> The increased prevalence of the media has led to an increased possibility of abuse.

Furthermore, the evolving media have limited the efficacy of other judicial tools. For example, a judge may order a change of venue when prejudice against a defendant in a trial district is so great that he or she would otherwise be unable to obtain a fair and impartial trial.<sup>169</sup> However, the Internet and media have limited the use of this tool by expanding the reach of prejudicial information, and, in some cases, may even render it entirely ineffective.<sup>170</sup> Sensational stories and “viral videos” pass quickly throughout the Internet, penetrating both the frequented and the remote regions of the United States. With this veritable flood of information, it is often difficult to find people ignorant or unbiased toward any important story. O.J. Simpson’s recent trial is a good example of this. After

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164. Paul C. Adams & Barney Warf, *Introduction: Cyberspace and Geographical Space*, 87 GEOGRAPHICAL REV. 139, 140 (1997). The beginnings of the Internet are found in a government project called the Arpanet (ARPA was an acronym standing for the Advanced Research Projects Agency), which connected four computers at centers at UCLA, UC Santa Barbara, Stanford, and the University of Utah. *Id.*

165. Internet Usage Statistics, <http://www.internetworldstats.com/stats.htm> (last visited Sept. 25, 2010).

166. *In re Zyprexa Injunction*, 474 F. Supp. 2d 385, 393 (E.D.N.Y. 2007).

167. John B. Horrigan, *New Internet Users: What They Do Online, What They Don’t, and Implications for the Net’s Future*, TEX. MED. CENTER, [http://www.sahs.uth.tmc.edu/evbernstam/hi6308\\_materials/New\\_User\\_Report.pdf](http://www.sahs.uth.tmc.edu/evbernstam/hi6308_materials/New_User_Report.pdf) (last visited Aug. 20, 2010).

168. Paul Farhi, *Blundering Pols Find Their Oops on Endless Loop of Internet Sites*, WASH. POST, Nov. 3, 2006, at C1 (noting that politicians have often found their mistakes displayed on the Internet for all to see, repeated over and over).

169. FED. R. CRIM. P. 21(a).

170. *E.g.*, *United States v. Cassell*, No. CIV.A.706CR-00098-04, 2007 WL 419574, at \*1 (W.D. Va. Feb. 5, 2007) (“Because the internet is available in every judicial district of which this court is aware, however, the risk that prospective jurors will encounter these stories cannot be cured by a change of venue.”).

participating in one of the most watched trials in the history of the United States,<sup>171</sup> O.J. Simpson was acquitted of two counts of homicide in 1995.<sup>172</sup> In 2008, when Simpson was on trial once again, this time for armed-robbery, all twelve empanelled jurors had heard of Simpson, and all but one knew that he had been acquitted in his 1995 trial.<sup>173</sup> Even more important, almost half of the jurors in that case felt that he was guilty of the 1995 murders and should not have been acquitted.<sup>174</sup> This is in spite of the fact that the original crime, more than ten years before, occurred in another state.

In light of *Sheppard* and the many efforts of courts and politicians to provide the judicial system with a means of adapting to the changing environment within constitutional boundaries, a judge's discretionary freedom to withhold juror names and addresses during trial proceedings becomes an indispensable tool in preserving the rights of the accused in a trial. Considering the facts surrounding the *Wecht* case, such a rule would hardly seem out of the ordinary. Dr. Wecht is a well-known individual, having already written several books,<sup>175</sup> and appeared on national television at least ten times since 2003.<sup>176</sup> In addition, in Pennsylvania, Dr. Wecht's political career has kept him in the news since the late 1960s, having even challenged the incumbent Senator from Pennsylvania in the 1982 election.<sup>177</sup>

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171. George Lipsitz, "The Greatest Story Ever Sold: Marketing and the O.J. Simpson Trial," in GAIL DINES & JEAN MCMAHON HUMEZ, *GENDER, RACE, AND CLASS IN MEDIA: A TEXT-READER* 179 (Gail Dines & Jean McMahon Humez eds., 2d ed. 2003).

172. *Simpson Acquitted*, HOUSTON CHRON., Oct. 4, 1995, at A1.

173. Arthur Brice, *5 O.J. Simpson Jurors Disagreed with 1995 Acquittal*, CNN.com, Oct. 5, 2008, <http://www.cnn.com/2008/CRIME/10/04/simpson.jury/index.html>.

174. *Id.*; William M. Welch, *Simpson Jury Held Strong Views on 1995 Acquittal*, USA TODAY, Oct. 6, 2008, at 3A.

175. *E.g.*, CYRIL H. WECHT ET AL., *MORTAL EVIDENCE: THE FORENSICS BEHIND NINE SHOCKING CASES* (2003); ROXANA FERLLINI & CYRIL WECHT, *SILENT WITNESS: HOW FORENSIC ANTHROPOLOGY IS USED TO SOLVE THE WORLD'S TOUGHEST CRIMES* (2002); CYRIL WECHT, *CRIME SCENE INVESTIGATION* (2004); CYRIL H. WECHT & CHARLES BOSWORTH, *WHO KILLED JONBENET RAMSEY?* (1998); 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* (1996); CYRIL H. WECHT ET AL., *PREPARING AND WINNING MEDICAL NEGLIGENCE CASES* (2d ed. 1994); CYRIL H. WECHT ET AL., *CAUSE OF DEATH* (1994); CYRIL H. WECHT ET AL., *2 HANDLING SOFT TISSUE INJURY CASES: MEDICAL ASPECTS* (1993).

176. Internet Movie Database, Cyril H. Wecht, <http://www.imdb.com/name/nm0917064/> (last visited Sept. 25, 2010).

177. *Where It's Politics in the Raw*, U.S. NEWS & WORLD REP., Oct. 25, 1982 at 32 (noting that during this particular year, the race between the incumbent H. John Heinz III and Cyril Wecht was one of several especially charged races).

Such details ensure a strong Internet presence and publicity for Dr. Wecht;<sup>178</sup> indeed, at the beginning of trial proceedings and throughout the trial, the Pittsburgh Tribune-Review maintained a website specifically dedicated to covering the Wecht trial.<sup>179</sup>

Unfortunately, the *Wecht* court did not take into account any of those factors, or at least did not find them compelling enough to maintain the former order of priorities. As a result, *Wecht* is set to fossilize the criminal trial process in the face of a constantly evolving media. The media have and will continue to become increasingly prevalent, adapting in order to reach larger audiences. In spite of this, *Wecht* seeks to remove from the judiciary a valuable tool that not only effectively upholds the right of the accused to a fair trial, but also preserves the media's right of access to the fullest extent possible.

## V. CONCLUSION

The American judicial system places upon judges the incredible responsibility of ensuring trial impartiality for the benefit of the accused and grants them tremendous latitude in fulfilling those duties. Of course, competing rights—such as the public's right of access to trial proceedings—balance that judicial liberty. Nevertheless, it is up to the trial judge to weigh those competing rights, and then to direct traffic accordingly, ensuring that ancillary rights yield to the accused's right to a fair trial.

However, as a result of an “impermissible micro-management of procedures and decisions that are properly delegated to the discretion of district judges,”<sup>180</sup> the Third Circuit disrupted the normal flow of traffic. *United States v. Wecht* forcefully tips the scales in favor of the public, at the expense of the accused. This decision changes the *essential* priority of the jury trial system from a truth-seeking forum to a forum created to give the “appearance of justice.”

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178. One interesting detail, and measure of a person's web presence may be found by simply performing a Google search. For Dr. Wecht, a Google search for the words “Dr. Cyril H. Wecht” produced 40,000 hits, <http://www.google.com/search?q=%22Dr.+Cyril+H.+Wecht%22> (last visited Sept. 25, 2009), and a search for “Cyril Wecht” produced 31,000 hits <http://www.google.com/search?q=%22Cyril+Wecht%22> (last visited Sept. 25, 2009).

179. PITT. TRIB.-REV., *Dr. Cyril H. Wecht Trial*, <http://www.pittsburghlive.com/x/pittsburghtrib/news/specialreports/wecht/trial/> (last visited Sept. 25, 2010).

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

In addition, this decision imprudently restrains the judicial system from adapting to challenges from an ever-changing media by confiscating a portion of judicial discretion.

As with real roads, when signs fail to properly signal who maintains the right-of-way, collisions are bound to happen. The victim in this case will most probably be some hapless individual who, either unlucky enough to be accused of a particularly heinous crime, or exceptionally famous or notorious prior to his or her trial,<sup>181</sup> is irreparably harmed because a Third Circuit court simply lacked the means “to control the publicity about [a] trial.”<sup>182</sup>

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181. In the case of the unfortunately famous Dr. Wecht, his own trial came to an intriguing conclusion—which was entertainingly filled with as much fanfare as its beginning. First, on remand, Dr. Wecht’s trial ended in a hung jury, Jason Cato, *Wecht Trial Over: Feels to Try Again*, PITT. TRIB.-REV., Apr. 8, 2008, at a cost of over \$204,000 to federal taxpayers, Jason Cato, *Cost of Wecht’s Case Put at \$204,000*, PITT. TRIB.-REV., Apr. 6, 2008. Not pleased with the outcome, federal prosecutors worked to pursue a second trial and had the original trial judge, the Honorable Arthur Schwab, removed for alleged bias “toward the prosecution.” Jason Cato, *Judge Removed from Wecht Case*, PITT. TRIB.-REV., Sept. 5, 2008. In addition, the prosecution hoped to move the trial from the Pittsburgh area to Erie, Pennsylvania, claiming that the “intense media coverage” in Pittsburgh was making “it nearly impossible to pick an unbiased jury . . . .” Jason Cato, *Wecht Lawyers File Papers Opposing Moving Trial to Erie*, PITT. TRIB.-REV., Dec. 20, 2008. Eventually, however, federal prosecutors dropped all charges against Dr. Wecht, Jason Cato, *Remaining Counts Against Ex-coroner Wecht Are Dropped*, PITT. TRIB.-REV., June 2, 2009, leaving him free to write, lecture, and appear on television in the future in order to work to pay off the immense debt that he accrued in attorney’s fees. Paula Reed Ward, *Deep in Debt but Delighted*, PITT. POST-GAZETTE, June 3, 2009, at A1.

182. Sheppard v. Maxwell, 384 U.S. 333, 357 (1966).

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