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JURY TRIALS AND FIRST AMENDMENT VALUES IN "CYBER WORLD"*

*John E. Nowak***

IS THERE ANYTHING LEFT TO SAY?

In the past half-century, I suspect, enough trees to constitute a small forest have been turned into paper simply for discussion of free speech and fair trial issues. I doubt that there is little new to say about how legislatures or courts should be dealing with the subject at the moment. The Supreme Court has been able to work out a series of positions that are at least "good enough for government work" concerning subjects such as attorney speech regulations, closure of trials, courthouse picketing, and protective orders related to the discovery process.

Of course, to maintain friendships with persons who planned and participated in the Allen Chair Symposium, I concede that there is great academic merit in the continuing debate regarding the Court's current positions on these issues. Nevertheless, I'm convinced that all persons who debate such issues in terms of 1990s technology are like the proverbial generals who devise military plans that are only good if they are going to fight the last war.

Why, you ask, did I agree to speak at the Allen Chair Symposium and, later, to contribute an article to this law review issue?

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** David C. Baum Professor of Law, University of Illinois. My colleagues Jay Kesan, Peter Maggs, Lynn Branham, Kit Kinports, Wayne LaFave, and Ronald Rotunda provided great help to me in finding many of the reference materials that are cited in this article. I am especially indebted to William Mischo, Director of the Grainger Library of the College of Engineering and Professor of Library Administration, for his help in teaching me how to get started in doing research into many of the technical points that are mentioned in this article. I profited greatly from my discussions with faculty and students of the University of Richmond School of Law at the Allen Chair Symposium.

Good question. The answer is that in the next half-century changes in the distribution of information through cyber systems¹ will make most, if not all, of the last fifty years of debate over the free press versus fair trial issues (in ascending order of rudeness) quaint, irrelevant, or useless.²

The Justices were able to develop standards for litigation related speech that protect both First Amendment and due process values in the twentieth century due, at least in part, to the fact that the ways in which the public received information regarding legal issues, in general, and trial, in particular, changed slowly between the middle of the century and the early 1990s. Cable and satellite TV (including the Court TV station) are simply extensions of the mass communication revolution that started with radio and broadcast television. A small, though rapidly growing, percentage of the population own computers, but the Internet and World Wide Web are not main sources of local or national news for the majority of our country. Perhaps unfortunately, the age of slow-paced changes in information delivery technology is at an end. Courts will need to modify constitutional doctrines to keep up with the impact of twenty-first century information systems on the adjudicative process.

In this article, I will put forth several proposals for how current Supreme Court doctrines should change by mid-century in order to deal with developments in information transmission technology. What many of my listeners in Richmond found and most of

1. I am going to use the term cyber systems to describe all information transfer and storage systems that involve what we now think of as digital or computerized information systems. I may well be using the word improperly, but any attempt to be more precise, at least by me, may be useless. The use of quantum theory to create new cyber systems may make all of today's terminology about computers, e-mail, Internet and the World Wide Web useless or, at least, out-of-date in the near future. See Andrew M. Steane & Eleanor G. Rieffel, *Beyond Bits: The Future of Quantum Information Processing*, COMPUTER, Jan. 2000, at 38.

For a non-geek friendly examination (actually a book that corresponds with a Public Broadcasting Series) of the start of the systems we now refer to as the Internet and World Wide Web, see STEPHEN SEGALLER, NERDS 2.0.1: A BRIEF HISTORY OF THE INTERNET (1998) [hereinafter NERDS].

2. It was over thirty years ago that the American Bar Association first attempted to set out a framework for these issues. See generally STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS (1968).

Of course, my coauthor and I have set out the best summary of the current First Amendment rules in our single and multi-volume treatises. See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW ch. 16 (6th ed. 2000); RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW ch. 20 (3d ed. 1999). For reference work that is almost as good as ours, see RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH (1999).

my readers will find shocking are my conclusions as to how those doctrines should be modified. Here are my three proposals, ranked in order of the shock value, and in reverse order of their appearance in this article. First, all knowledge of potential jurors that is gained through cyber sources (such as information gained from a person connecting with an attorney's Web site or through any service that tracks a potential juror's past activities in cyberspace) must be made available to the opposing party in both civil and criminal cases. Second, trial judges should be given much greater power than they have under current Supreme Court rulings to close parts of pretrial proceedings or civil trials and to prohibit dissemination of information concerning the closed portions of trials. Third, trial judges should be given far greater powers to issue protective orders regarding material disclosed during the discovery process; there should be absolute civil liability for any attorney or party who violates a discovery order. In what should be a noncontroversial part of the article, I will advocate a step-by-step approach to revision of court decisions and rules regarding the ability of attorneys to disseminate information via cyber systems.

ALEXANDER BICKEL AND FLYING CARS

In Richmond, my predictions concerning the technological innovations that would drastically change free speech-fair trial problems were greeted with complete disbelief. Concerns about members of a potential jury pool receiving significant amounts of information via cyber systems were greeted with statements such as: "No one will read all those e-messages you are worried about; I can't get through my e-mail now;" "people will always rely on traditional news media, or their Web sites, for information about trials;" "parties won't have time to identify the Internet activities of potential jurors;" and "opposing parties couldn't have enough time for review of all the documents they might be given concerning potential jurors."

Once I sat down to put my ideas in writing, I realized that I should have been ready for what Alexander Bickel referred to as "remembering the future."³ We do, indeed, remember, rather than imagine, the future. A person's imagination has to be based on the data he knows. For hundreds, if not thousands, of years, persons imagined airplanes and helicopters, for they could see crea-

3. ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* ch. 4 (1970).

tures that flew and leaves that came down from trees in a slow, circular pattern. No one envisioned radio or television, several hundred years ago, because they did not know of the radio waves that would make such “imagination” possible. Remembering the future is not a fault in the thought processes of prior civilizations. Only thirty years ago, AT&T turned down the opportunity to own what we now call the Internet, because persons at AT&T thought that packet switching would not work on a large scale.⁴

An IBM software commercial, which began airing on television in the summer of 2000, has a spokesman who says that, when he was young, he was told that there would be flying cars in the year 2000. He then asks: “Where are the flying cars?” Those persons who think about future free press-fair trial issues in terms of a speeding up of, but not a dramatic change in, cyber systems are like the grade school teachers in the 1950s who told me that there would be flying cars in the year 2000.

Since I have talked about the future, a few words about the past are in order. I do not want to enter the never-ending debate concerning searches for original intent.⁵ I must confess, however, that I really do not care about the “original intent” of drafters of the First Amendment concerning technological issues. I would not claim that the history of the First and Fourteenth Amendments are irrelevant to solving tomorrow’s problems. Rather, I believe that such history is only good for informing us about the values our society has sought to protect over time. Any person who claims that the “original intent” of “The Framers” provides clear answers to the First and Fourteenth Amendment issues that arise with new information delivery technology will be imagining the past, by attributing his views to the views of persons long dead.

In this article I will make an assumption about our society’s values in the future, and several assumptions of a technical nature. All of my assumptions are really predictions about the future. I call these predictions “assumptions” because they are the basis for my positions about how the legal doctrines will have to change in the next half-century.

My value assumption is that, as a nation, we will continue to want a jury system in which we have jurors who know little or

4. NERDS, *supra* note 1, at 72, 74, 108-09.

5. I have stated my views on this topic in other places. *E.g.*, John E. Nowak, *The “Sixty Something” Anniversary of the Bill of Rights*, 1992 U. ILL. L. REV. 445, 445-46 (1992).

nothing about the incident that is the subject of litigation, and who are not prejudiced against any of the parties. I have no way of justifying this assumption except to ask my reader to reflect on the public concern over the outcomes of certain trials (especially in California and New York) that have been held before a jury that was predominantly of one race.

We have never had truly neutral juries in "truly sensational cases." The facts of a truly sensational case dominate the local or national media. Virtually all of the persons called as potential jurors in the truly sensational case will have gained a significant amount of knowledge (which may or may not be correct) about the issues and parties in the case. In all likelihood, these persons may well have come to some judgment about the case. Nevertheless, in such cases we pretend that the voir dire process, and information produced by jury questioners of the type endorsed by the ABA's Standards for Criminal Justice,⁶ will produce a neutral jury, because we have no alternative.

6. STANDARDS FOR CRIMINAL JUSTICE Standards 15-2.2, 15-2.4 (3d ed. 1996).

The text of Standard 15-2.2 (Juror questionnaires) provides:

(a) Basic questionnaire

Before voir dire examination begins, the court and counsel should be provided with data pertinent to the qualifications of the prospective jurors and to matters ordinarily raised in voir dire examination.

(1) The questionnaire should include information about the juror's name, sex, age, residence, marital status, education level, occupation and occupation history, employment address, previous service as a juror, and present or past involvement as a party to civil or criminal litigation.

(2) Such data should be obtained from prospective jurors by means of a questionnaire furnished to the prospective jurors with the jury summons, and to be returned by the prospective jurors before the time of jury selection.

(b) Specialized questionnaire

In appropriate cases, the court, with the assistance of counsel, should prepare a specialized questionnaire addressing particular issues that may arise.

(1) The questionnaire should be specific enough to provide appropriate information for utilization by counsel, but not be unnecessarily embarrassing or overly intrusive.

(2) If questionnaires are made available to counsel prior to the day of the voir dire, the identity of the jurors may be protected by removing identifying information from the questionnaires.

(c) All questionnaires should be prepared and supervised by the court.

(1) The jurors should be advised of the purpose of the questionnaire, how it will be used and who will have access to the information.

(2) All questionnaires should be provided to counsel in sufficient time before the start of voir dire to enable counsel to adequately review them before the start of voir dire.

Id. Standard 15-2.2.

A half-century from now, if the Supreme Court does not revise some of its First Amendment rulings, we will have to make unrealistic assumptions about jury neutrality for many non-sensational cases. My technical assumptions about the future lead me to believe that a significant number of potential jurors (who are receiving their news through a wide variety of cyber sources, and who are attending meetings of associations that exist only in cyberspace) will feel relatively safe in omitting facts about their sources of information and associations. When that time comes, we will have no reason to believe that we have neutral, unbiased juries in any case that is mentioned in e-mails or Web sites.

If we come to the position as a society that we do not care whether juries are neutral, and we are willing to tolerate decisions based on juror biases, then there will be no reason to revisit First Amendment doctrines or privacy concepts. This article is built upon the assumption that our society will not abandon the desire for a neutral jury system. I make this assumption because I believe that a refinement of certain First Amendment principles will seem to be a smaller price to pay for us as a society than would be the abandonment of our current jury system.

The technical assumptions I will use in this article are fairly safe predictions about technological developments that will occur by the year 2050. Most, if not all, of these technological developments may come about in the next ten or twenty years.

My first assumption is that someone will develop "smart" search engines, which are sometimes called spiders (because they crawl the Web). These smart searchers will allow the average person to better find information that exists in cyberspace than can be done through current "dumb" search engines. Today, an individual who uses several search engines (such as Yahoo-Google, Go, Excite, and the like) will be searching only a portion of the Web. A smart search engine would search the entire Web, in a logical progression based on the contents of Web sites, to identify all information the user desires. Sufficient work has been done on the development of smart search engines, otherwise known as intelligent spiders, so that this prediction may become reality shortly after this article is published.⁷

7. *E.g.*, Hsinchun Chen et al., *Intelligent Spider for Internet Searching*, 30 PROC.

After, if not simultaneously with, the development of smart search engines, there will be "smart sorters," which is the term I use for a computer system that can separate incoming messages (what we now think of as e-mail) by the content of the message. Smart sorters, like smart spiders, will be at work in the user's computer without the user being present.

If smart searches and sorters exist, mass mailings from attorneys, businesses, and parties to litigation will be much more effective than they are now. At the present time, I hope and trust, most people throw out mass mailings (junk mail) that come to them via the U.S. mail (snail mail). I doubt that mass e-mailers do better than mass junk mailers. If a law firm, or other business, wants to reach a lot of people via a mass e-mail, it is currently limited to relying on one of the companies that tracks or profiles cyber activities of persons using the Internet or Web.⁸ With such information the attorney or business can send mass e-mail messages to a target audience. Unfortunately for the mass e-mailer, e-mail receivers allow the target recipients to delete messages based on the identity of the sender, or the topic line of the message, without examining the full contents of the message. As a member of my Richmond audience said: "not many people are going to open a lot of e-mail from unknown sources, be they attorneys or other businesses." Businesses who are sending out the

HAW. INT'L CONF. ON SYS. SCI. 178, 179 (1997); Christopher C. Yang et al., *Intelligent Internet Searching Engine Based on Hybrid Simulated Annealing*, 31 PROC. HAW. INT'L CONF. ON SYS. SCI. 415, 416 (1998); Richard Kilmer, *As We May Think-Revisited*, INTERNET COMPUTING (Jan.—Feb. 2000), at <http://computer.org/internet>.

For some real world [money] problems in search system development, see Lucas Introna & Helen Nissenbaum, *Defining the Web: The Politics of Search Engines*, COMPUTER, Jan. 2000, at 54; see also *Search Engine Watch*, at <http://www.searchenginewatch.com> (last visited Oct. 8, 2000).

8. These services may be very good. "It may have once been true that on the Internet no one knew you were a dog, as illustrated in an old New Yorker cartoon. But as they say on the Web now, these days marketers probably know your favorite brand of dog food." Josh Duberman & Michael Beaudet, *Privacy Perspectives for Online Searchers: Confidentiality with Confidence*, SEARCHER (July—Aug. 2000), at <http://www.infoday.com/searcher/jul00/duberman&beaudet.htm>; see also Brian Fonesca, *Blanket Insecurity?: Web Security, Privacy Problems Raise Confidence Issues*, INFOWORLD, July 10, 2000, at 1; Margaret Mannix & Susan Gregory Thomas, *Exposed Online: On the Web, Your Personal Life Is Merely Marketable Data*, U.S. NEWS & WORLD REP., June 23, 1997, at 59.

For excellent, brief, non-technical explanations of how user information is collected on today's cyber systems, see Hope Viner Samborn, *Nibbling Away at Privacy: Cookies Are Lurking in Your Hard Drive, Ready to Grab Your User Data*, A.B.A. J., June 2000, at 26; David P. Hamilton, *Web's Design Hinders Goals of User Privacy*, WALL ST. J., Apr. 3, 2000, at B1.

junk e-mail today may have most of their messages go to receivers' deleted items folder without being read, because the receiving computer cannot sort out the messages by the content of the message.

In a world of smart search engines and smart sorters an individual can tell his receiving computer that he wants to search for, or receive, messages concerning certain topics. The search engine would then find only cyber locations that actually include the information being sought. If the individual was receiving e-mail from unknown sources, the sorter would identify the subject matter of the message as being in compliance, or not in compliance, with the type of information that the receiver wished to look at or hear. The sorter would discard the messages that did not involve topics of interest and would keep only those that met the interests of the user. For example, in the future, an individual will be able to set his personal computer to search for, and his sorter to accept, information about crimes occurring within a hundred-mile radius of his home, or information concerning automobile tires. The spider would search for every type of cyber source that might contain such information, regardless of the name of the Web site. The sorter would discard messages from unknown sources (such as law firms or businesses) unless the substance of the message related to the user's specific topics of interest (local crimes or tires). With a computer doing the sorting of messages, the argument that "people will never have time to look at all these e-mails that attorneys or businesses send out" becomes quaint, at best.

My second assumption is that the increase in chip speed, and reduction in price for computer chips, will continue at a pace roughly equal to that of the 1980s and 1990s. In the past several decades it was a common belief (known as Moore's Law) that there will be a doubling of chip speed and reduction in chip price every eighteen months. The first IBM computers took up a room. In the 1960s and early '70s Apollo astronauts landed on the Moon with computers in their lunar lander that had less power than any law student's laptop. Perhaps the Moore's Law pace for chip improvement cannot continue forever.⁹ Nevertheless, we should

9. *What Is Moore's Law?*, at <http://www.intel.com/intel/museum/25anniv/hof/moore.htm> (last visited Oct. 8, 2000); George A. Chidi, *Blowing Moore's Law to Bits*, Infoworld.com, at <http://www.infoworld.com/articles/hn/xml/00/08/15/000815hnquantum.xml> (Aug. 15, 2000).

see a change in the size and speed of personal computers. In another half-century, if not sooner, small computers should be able to do many of the jobs now that can only be done by today's so-called supercomputer.¹⁰

Along with the increase in speed, and reduction in size, of computers, there should be a drastic reduction in price of computers. I do not ask my reader to believe that fifty years from now every abode, no matter how humble, will have a small, high-tech machine that will do the work of a current supercomputer. I ask you only to accept my assumption that almost every household will have access to some type of computer that receives information through cyber systems. As always, rich households will have the best of everything, including computers. Households of lower income families will have some type of computer, just as most homes have some type of telephone today.

My third assumption is that there will be a rapidly growing number of news sources in the next several decades. Any person with a computer may be able to start a newsletter that actually has real impact on the community in decades ahead. That prediction would be true today, except for the words "real impact." Creating a local news Web site may be a popular activity, but most news Web sites, other than those that are companions to traditional print or broadcast media, are unlikely to reach many persons for two reasons. First, a significant percentage of households do not have computers. All those computers being put into schools today have nothing to do with this point. The fact that little Jane and John have computers at school has nothing to do with whether their parents, who may be part of a jury pool, are getting their news through cyber systems.

Second, when searching for the news, many of today's computer users will only hit traditional sources, such as the cyber versions of major newspapers or the cyber sites of broadcast news media. If a start-up neighborhood newsletter went out to everyone via mass e-mail today, a majority of the receivers might simply delete the message before reading it. Indeed, after receiving a couple of "junk e-mails" from the would-be news distributor, many persons would simply set their e-mail systems to automatically delete any message coming from that sender.

10. Tom Sullivan, *IBM Commercializes Supercomputer*, Infoworld.com, at <http://www.infoworld.com/articles/hn/xml/00/07/20/000720hnsuper.xml> (July 20, 2000).

If we have smart searchers and sorters, the non-traditional purveyor of news will have a realistic chance of reaching most of the persons who are interested in the subject matter that the new news source contains. Many persons are interested in the safety of their community; such persons might set their computer to look for, and receive, messages concerning crimes within 100 miles of their home. A smart search engine or sorter should be able to identify only the portion of the cyber newsletters that discuss local crime, and delete all other portions of the news source. The receiver will easily be able to read or hear the discussion of crime contained in all of the variety of cyber newsletters and cyber mailings. Everyone who sends out cyber messages containing information about such local crime would have a real chance of getting their message to such persons.

In the future, an individual who is called as a juror will be able to say that he or she has never read or learned about a case, with some confidence that he or she will not be caught in a lie. When a person had to get information from newspapers, radio, or television, tripping up a juror who lied about whether he knew the facts of a dispute would be fairly easy for a good attorney during the voir dire process. When there are an unlimited number of news sources, a juror with a bias towards one of the parties, or a specific opinion concerning the case, will feel relatively safe in lying about the amount of his knowledge and opinions.

In the good (or bad—your choice) old days, being a member of an unpopular association might require you to physically go to meetings and to receive tangible documents. These activities would increase the likelihood that your “friends and neighbors” would know that you are a member of the unpopular organization. The increasing speed, efficiency, and availability of computers in future decades should result in an increasing number of “cyber associations,” by which I mean groups that rarely, if ever, have physical meetings. These associations will have real time group meetings, without having to use chat room or bulletin board technology. For unpopular associations this will be a great world, so long as the government is prohibited from monitoring such activities.¹¹

11. See generally D. Ian Hopper, *Agencies Track Online Visitors Despite Rule*, WASH. POST, Oct. 22, 2000, at A13, available at <http://www.washingtonpost.com/wp-dyn/articles/A55051-2000Oct.21.html>. Beware, the “carnivore” program may be swallowing lots of in-

The development of cyber associations may seem like a great First Amendment advancement, because persons will have less fear than ever before that the public will know about their association with unpopular persons or beliefs. On the other hand, an age of cyber associations, with no change in our view concerning how juries are formed, would be a disaster for the jury process. At the moment, if a potential juror (on a jury questionnaire or in voir dire) lies about his association with communist, fascist, militia, or racist organizations, the potential juror raises a serious risk of a contempt citation, if not a perjury conviction. When these associations exist only in cyberspace, a potential juror may feel safe in omitting such facts. Such a juror might have no intention of following instructions given to the jury by the trial judge.

Don't believe me? The Fully Informed Jury Association has been involved in litigation because the government has been concerned that jurors will follow information given to them by Association members regarding the "right" of jurors to engage in nullification of government actions by disregarding court instructions.¹² If the Fully Informed Jury Association had not only a Web site,¹³ but also cyberspace meetings in which its members will never be physically linked, it would be extremely difficult for lawyers to know whether they are selecting jurors who believe in jury nullification.

My final technical assumption should be greeted as good news by those who want to protect fair jury trials, but bad news by persons whose primary interests relate to personal privacy. I assume that it will continue to be as easy as it is now for knowledgeable

formation about cyberspace for the Justice Department. *E.g.* Margret Johnston, *Wiretap Laws to Be Updated for Internet Age*, INFO WORLD, July 24, 2000, at 16; Cheryl Rosen, *FBI's "Carnivore" Takes Bite out of Privacy, Critics Say*, INFO. WK. ONLINE (July 17, 2000), at <http://www.informationweek.com/795/Fbi.htm>. The "poor" CIA is offering grants to help it catch up with cyber technology: *In-Q-Tel Information Technology Fund 2000*, at <http://www.in-q-tel.com/2-Fund.htm> (last visited Oct. 8, 2000); *see also* Paula Shaki Trimble, *Gathering IT Intelligence*, FED. COMPUTER WK. (June 5, 2000), at <http://www.fcw.com/fcw/articles/2000/0605/mgt-inqtel-06-05-00.asp>.

12. Fully Informed Jury Ass'n v. San Diego, 78 F.3d 593 (9th Cir. 1996) (unpublished table decision), *cert. denied*, 519 U.S. 814 (1996); *e.g.*, Turney v. Alaska, 936 P.2d 533, 540-41 (Alaska 1997); *see also* Shayana Boyd, *Recent Development, Criminal Law: United States v. Thomas and Turney v. State: Courts Take Steps to Control Jury Nullification*, 22 AM. J. TRIAL ADVOC. 707, 707-12 (1999); Erick J. Haynie, *Populism, Free Speech, and the Rule of Law: The "Fully Informed" Jury Movement and Its Implications*, 88 CRIM. L. & CRIMINOLOGY 343 (1997).

13. The Association's Web site is: www.fija.org.

providers of information (what we think of now as Web sites) to gain information about the computer identities of site visitors and that there will be at least as many businesses as there are today that can provide their clients with information regarding the cyberspace activities of specific individuals. In other words, it is my belief (or hope, anyway) that the mousetrap makers will stay one step ahead of most of the mice.

Today, as I assume everyone knows, when you travel the Internet or World Wide Web you leave a trail of cyber "footprints." Your computer gives each Web site your internet protocol or IP address. A Web page needs your IP address in order to send you the information that appears on the page, and to interact with your computer. There are ways of shielding your identity, such as through the use of modems that use random IP addresses. Indeed, an old-fashioned telephone modem should give you random IP addresses. However, if you're using an Internet service provider, your provider knows where you have gone throughout cyberspace. When you use a Web browser or search engine, your message to the Web page asking for information may be revealed to your Internet service provider, which may often be your employer or school. When you are using a browser to search the Web, pages that you hit may be able to receive information of the last page viewed. Everybody knows about "cookies" that are files the Web site will place on your hard disk when you go to those sites. Many times cookies just give you an identifier so that you don't have to go through a laborious sign in process whenever you hit that Web page in the future. However, cookies can also be designed to provide a great deal of information concerning you to the Web page host including some information that will allow tracking of some of your activities in the World Wide Web. There is software available to protect privacy on computers and easily available encryption services that will protect your identity as well as the content of your messages.¹⁴ There is proposed legislation in Congress to restrict the use of computer cookies.¹⁵ Nevertheless, it is difficult for me to believe there will be a time when

14. Monique R. Brown, *Revenge of the Cookie Monsters*, BLACK ENTERPRISE, May 1998, at 42-43 (referencing both free and pay-for anti-cookie software that can be downloaded from current Web sites); see, e.g., *Hushmail*, at <http://www.hushmail.com> (last visited Sept. 26, 2000); *Junkbusters Links to Other Resources*, at <http://www.junkbusters.com/ht/en/links.html> (last modified Sept. 14, 2000).

15. Consumer Privacy Protection Act, S. 2606, 106th Cong. (2000).

you will be able to contact a cyber site without leaving some type of identification information. Maybe that's just my hope.

If I am guilty of remembering the future, and total privacy exists for cyber associations in the future, the jury system is doomed. In such a world, there will be no way for an attorney to identify whether jurors have engaged in cyber activities that would demonstrate that they have a bias towards a party in the litigation or a view about the subject matter of the litigation that would make it impossible for them to render a fair and impartial verdict. There will never be perfect knowledge about individual activities in cyberspace. If, however, some information concerning cyber activity of the members of the jury pool is available, the attorney who possesses such information would have an incredibly helpful tool in jury selection. The attorney with information about cyber activities of potential jurors will be able to use jury challenges for cause, and use preemptive challenges, in a strategically wise manner. The attorney without that information may be consenting to the impaneling of a jury that is biased against his client.

With these assumptions in mind, I will give my tentative views regarding free press versus fair trial issues in the next fifty years, and how the Supreme Court rulings should be modified in order to resolve those issues.

FIRST AMENDMENT VALUES AND STANDARDS

Many scholars have looked to the work of Thomas Emerson for a summary of the marketplace (democratic) and libertarian (self-fulfillment) values that are the core of the First Amendment.¹⁶

16. THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* (1970). As Professor Baker has said:

Professor Thomas Emerson, probably America's most thoughtful and influential [F]irst [A]mendment scholar, finds [F]irst [A]mendment freedom essential for furthering four values: (1) individual self-fulfillment, (2) advancement of knowledge and discovery of truth, (3) participation in decision making by all members of the society (which is "particularly significant for political decisions" but "embraces the right to participate in the building of the whole culture") and (4) achievement of a "more adaptable and hence stable community."

C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 47 (1989) (quoting EMERSON, *supra*, at 6-7).

Following Emerson's basic four principles does not give one a set of clear answers

Professor Emerson, in turn, based some of his work on positions set forth by Justice Brandeis. Early in the last century, Justice Brandeis was the first to recognize, (at least in the pages of the United States Reports), the twin values protected by the free speech clause.¹⁷ Speech was a means to an end, according to Brandeis, as it was essential to the development of the ideas that structured our society.¹⁸ Brandeis also explained that the freedom of speech was an end in itself, in that the freedom to speak one's thoughts was essential to the fulfillment of the human spirit. The person who was forbidden from speaking suffered as much or more as did society by the loss of his contribution to the marketplace. I am willing to accept the Brandeis-Emerson position and most of the standards of scholars who might be deemed true "speech protectors."¹⁹

Although I do not want this article to read like a treatise or, worst of all, a law review article, I must mention the First Amendment standards that have been developed by the Supreme Court.²⁰

First, the Supreme Court has used a strict scrutiny standard, which requires a government action to be necessary to a compelling interest, if the government action is aimed at the suppression of an idea or message. The strict scrutiny standard is incredibly difficult for the government to meet. Statutes attempting to control hate speech, ban flag burning, or compensate crime victims have all failed this test.²¹

to speech issues. Thus Professor Martin Redish, who also accepts the approach set out in Emerson's work, arrives at different conclusions than Professor Baker on a number of issues. MARTIN H. REDISH, *FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS* 30-36, 48-51 (1984); see also Martin H. Redish, *Self-Realization, Democracy, and Freedom of Expression: A Reply to Professor Baker*, 130 U. PA. L. REV. 678, 678-79 (1982); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 618-24 (1982).

17. See *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring); EMERSON, *supra* note 16, at 106-07 (quoting *Whitney*, 274 U.S. at 375-76 (1927) (Brandeis, J., concurring)). See generally DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS* (1997) (examining the development of First Amendment theories prior to the time the United States Supreme Court took a real interest in First Amendment values).

18. This marketplace value was described in earlier Holmes opinions in which Brandeis had joined. See *Abrams v. United States*, 250 U.S. 616, 630-31 (1919) (Holmes, J., dissenting).

19. See, e.g., REDISH, *supra* note 16; RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* (1992).

20. NOWAK & ROTUNDA, *supra* note 2, ch. 16 and SMOLLA, *supra* note 2, chs. 3-4.

21. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 (1992) (protecting hate speech); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victim Bd.*, 502 U.S. 105, 123

At the other end of the spectrum from the strict scrutiny standard is the standard used for court review of "time, place or manner" regulations that are not content related. To justify a time, place or manner limitation on expressive activity, the government need only show that its regulation is narrowly tailored to an important interest. In practice, this standard might be called an intermediate test, to separate it from the rationality test used to review economic classifications under the equal protection guarantee.²² In reality, the standard is merely a reasonableness test. So long as the government action is not designed to suppress expression, a content-neutral regulation that is reasonably designed to promote any legitimate interest of government will likely survive.²³ Any reasonable argument will save such laws. Even the preservation of the aesthetic quality of Los Angeles was used to uphold a content neutral regulation of speech.²⁴ Talk about an easy test! Who knew that Los Angeles had any aesthetic quality?

The Court has used a reasonableness test when it has examined regulations of the content of speech in a non-public forum, which is a place or channel of communication that is owned by the government and that has not been thrown open for public discourse (such as a high school class or courtroom, when class or a court is in session). So long as the regulation is not designed to suppress a viewpoint, a content-based regulation of speech in a non-public forum will be upheld if it is arguably reasonable.²⁵

In between the "strict scrutiny" and a reasonableness test is the standard used to examine content-neutral court orders restricting speech. The Supreme Court requires that the judicial order be narrowly tailored to promote a truly important government interest.²⁶ The test that has been developed over the past

(1991) (concluding that a victim compensation statute funded by seizing money from criminals who make money publishing reports of their crimes is unconstitutional); *Texas v. Johnson*, 491 U.S. 397, 399 (1989) (protecting flag burning).

22. NOWAK & ROTUNDA, *supra* note 2, §§ 10.7, 14.3, 16.47, 16.48.

23. *Id.* §§ 16.47 to 16.49; SMOLLA, *supra* note 2, at §§ 8:39 to 8:50, ch. 9.

24. *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 817 (1984).

25. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983); NOWAK & ROTUNDA, *supra* note 2, § 16.47(c); Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219 (1984).

26. *See, e.g., Madsen v. Women's Health Ctr. Inc.*, 512 U.S. 753, 790 (1994); SMOLLA, *supra* note 2, at §§ 13:32, 13:37, 13:38. The strength of the standard may have been weakened by the recent ruling in *Hill v. Colorado*, 120 S. Ct. 2480, 2491 (2000).

two decades has always seemed to me to be an instance in which the Court is saying for content-neutral judicial orders restricting speech that “we’re going to use the wording of that old test for time, place or manner regulations but, damn it, this time we’re really gonna apply the test and require facts rather than just a reasonable argument by the trial judge or government.” This standard is truly an intermediate standard, for it does not involve either a heavy presumption for or against the government.

In the remainder of this article, I will give the reader my tentative views on whether the standards currently employed by the Supreme Court for the control of litigation related speech will be adequate for dealing with mid twenty-first century problems. I sometimes label my views as tentative simply because I want to “wimp out.” This time, my views really are tentative. The degree to which we will need to change First Amendment standards in this area depends greatly on the speed and nature of technological development concerning information transmission.

RESTRAINING ORDERS TO THIRD PARTIES & COURT ORDERS PROTECTING TRIAL MATERIALS

For a quarter of a century, we have seen the Supreme Court develop a First Amendment principle that makes it virtually impossible for a trial court to issue an injunction or restraining order that prevents the press from reporting anything that occurred at an open court session, or anything that is a matter of public record.²⁷ And so it should be, both now and in the future.

The reporting of the facts from public records and trials poses a serious threat to the fairness of trials and to privacy interests of individuals, particularly victims. That danger will grow greater as new information technologies develop, because such reports will go to a far greater number of persons and will last longer than yesterday’s newspaper. In a world of smart engines and sorters, everyone who has some interest in trials regarding certain types of crimes (such as crimes involving sexual violence) will receive all of this information. The smart sorters and search

27. The series of cases starts with *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 568 (1976). For a discussion of this line of cases, see NOWAK & ROTUNDA, *supra* note 2, § 16.25 and SMOLLA, *supra* note 2, §§ 15:27 to 15:40.

engines used by a high tech "Jerry Springer audience" will eliminate other types of information from cyber sources while collecting all of the data available concerning such crimes.

Despite the harm that can be caused by such speech, the value of press reporting regarding the trial process is at the core of the First Amendment. Trial reporting serves what Vincent Blasi termed the "checking function" of the First Amendment.²⁸ This information helps the citizenry evaluate the actions of the judicial branch of government, and other branches of government, in cases wherein a unit of government is a party to the litigation. For that reason, trial reporting is core political speech that should be protected to the greatest extent possible. One of the dangers of attempting to control damage to litigation by controlling press reports of public records of portions of trials that are open to public would be the problem with defining "the press." If we were to have some limited freedom for "the press" to report such matters, but imposed restraints on other disseminators of information via cyber systems, the judiciary would have the judiciary defining the press. Such a definition might inherently favor established press or media sources that were not unduly harsh on the judiciary and disfavor new types of information distribution systems where media sources were particularly critical of the judiciary. The Supreme Court has indicated that there are some First Amendment dangers inherent in governmental attempts to define the press so as to give less protection to some speakers rather than others, though it has been unclear on this point.²⁹

A variety of Supreme Court cases, in addition to those that directly involve so-called press gag orders, provide support for a near ban on judicial orders barring speech about matters of public record or ongoing litigation. Cases involving the physical activities of persons near courthouses, or public statutes by third parties about litigation-related issues, have shown increasing Supreme Court concern with judicial control of litigation-related speech. In 1965, in *Cox v. Louisiana*,³⁰ all of the Warren Court

28. Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521; Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985).

29. See SMOLLA, *supra* note 2, § 22:19. *But cf.* L.A. Police Dep't v. United Reporting Publ'g Corp., 528 U.S. 32 (1999).

30. 379 U.S. 559 (1965). The majority reversed the conviction of the persons who violated the law, but the majority opinion assumed that the law itself presented no constitu-

Justices were willing to accept the constitutionality of a law that prohibited demonstrations near a courthouse with the intent to influence proceedings therein. In 1983, in *United States v. Grace*,³¹ the Supreme Court struck down a statute restricting demonstrations outside of the United States Supreme Court building itself. According to the Court in *Grace*, physical activities near a courthouse could not be banned on the basis of their content unless the government could demonstrate that the third party's speech is truly likely to interfere with the judicial process. What a difference twenty years made!³²

In 1962, in *Wood v. Georgia*,³³ the Supreme Court applied the clear and present danger test to prohibit judges from enjoining speech of third parties concerning ongoing judicial proceedings merely because the third parties' speech would appear in the news media and might be read by persons who might eventually be part of a grand jury or jury process. *Wood* was decided before the Court's use of strict scrutiny to examine context-based punishment. Since that time the Supreme Court has strengthened the clear and present danger test³⁴ and used strict scrutiny to review judicial orders preventing press reporting.³⁵ Today, a judicial order requiring third parties to stop engaging in litigation-related speech should be subject to the heavy presumption against prior restraint, and strict judicial review.³⁶ Thus, for example, a judicial order requiring the Fully Informed Jury Association to shut down its Web site should not be sustained, although an order requiring the association to refrain from giving to jurors trial pamphlets advocating that they disregard judicial instructions might be upheld.

In contrast to the Supreme Court's use of strict scrutiny when

tional problems. *Id.* at 562-64.

31. 461 U.S. 171 (1983).

32. Indeed, the Court now seems to pretend that *Cox* does not exist. *See, e.g.*, *Boos v. Barry*, 485 U.S. 312, 334 (1988) (invalidating a statute that banned certain picketing near embassies that was virtually identical to the statute at issue in *Cox* while mentioning *Cox* in that portion of the opinion).

33. 370 U.S. 375 (1962).

34. *See* *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) (per curiam); *see also* NOWAK & ROTUNDA, *supra* note 2, § 16.15.

35. *See* *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 568 (1976); *see also* NOWAK & ROTUNDA, *supra* note 2, § 16.25; SMOLLA, *supra* note 2, §§ 15:27, 15:40.

36. *See* NOWAK & ROTUNDA, *supra* note 2, §§ 16.25, 16.46; SMOLLA *supra* note 2, ch. 15.

reviewing judicial orders preventing speech by third parties, the Court has been lenient in allowing restrictions on the speech of parties to the litigation and their attorneys, particularly when that speech involves information gained through the discovery process.

In *Seattle Times Co. v. Rhinehart*³⁷ the Supreme Court upheld an order restricting the use of information gained through pretrial discovery in a civil case, even though the party that received the information was a newspaper. The Court appeared to use a reasonableness test for the review of orders barring the disclosure of information gained through discovery. The majority in *Seattle Times* simply ruled that a protective order should not be subject to the presumption against prior restraints, because such pretrial orders were a necessary adjunct of an open discovery system. The newspaper could still publish information similar to that which it received by pretrial discovery, according to the majority, if, but only if, the newspaper could show that it had received the information through means unrelated to the pretrial discovery process.

In future decades, the Supreme Court should give greater powers to the judiciary to impose pretrial restrictions on speech related to information gained through the discovery process, due to the fact that dissemination of such information will have a greater adverse effect on the parties than it would today. For example, let us assume that, in a civil trial involving the Coca-Cola Corporation and the Coca-Cola Bottlers, the formula for Coca-Cola is disclosed to a party through pretrial discovery. A half-century ago, disclosure of that information would be damaging, but Coca-Cola would have been able to control the damage by finding out the precise scope of the disclosure and monitoring rivals' products for presence of new soft drinks that tasted similar to Coca-Cola. Today, disclosure of the information through the Web or Internet would make that information available to every man, woman, and child who searched for the information before steps could be taken to stop republication of the formula. In future decades, smart search engines and sorters should make it likely that all persons interested in soft drinks would immediately have the improperly disclosed information about the Coca-

37. 467 U.S. 20 (1984).

Cola formula, even though they were not personally doing a search for the information. One doesn't need to be an expert in economic analysis to realize that millions of persons making their own "knock-off Coca-Cola" for "home use" would significantly undercut Coca-Cola's sales.

Disclosure of information from pretrial proceedings in criminal trials can have a devastating impact on victims. For example, let us assume that the defendant in a rape prosecution has received, through pretrial discovery, a great amount of information concerning the victim. Disclosure of that information in newspapers, the broadcast media, the Internet or Web would be bad enough today. However, newspapers, particularly in big cities, might not report the details of the case. Persons interested in sex crimes, with current technology, would have to do a time consuming, and perhaps unsuccessful, search for the information. In the future, persons interested in sexual crimes would instantly have information regarding the woman who had been attacked. The victim's name, and details about her life, will be spread quickly through the cyber systems, and will be captured by smart search engines and sorters. The information captured by these computer devices will not disappear the next day, like yesterday's newspaper, in the garbage.

There should be a two-pronged approach to preventing the harm caused by disclosure of litigation-related information. First, the Supreme Court should establish a true rationality test for the review of trial court orders restricting or prohibiting the disclosure of information gained through a litigation discovery process. As long as a reasonable argument can be made that disclosure of information gained through pretrial discovery could cause some significant harm to any person, or the judicial process, a trial court should be able to order the attorneys and clients not to disclose the information.

Second, statutes should establish absolute civil liability, and criminal liability based on negligence, for violation of court orders prohibiting disclosure of information gained through discovery. I would propose absolute criminal liability for violation of such crimes but for the fact that due process principles make it difficult to impose significant criminal sanctions for an activity that is

not defined in terms of some type of mens rea requirement.³⁸

In terms of civil liability, an absolute liability standard is necessary to protect against the devastating harm that can be caused by dissemination of information through cyber systems. If the injured party had to prove that the opposing party, who received the information under a protective order, was responsible for the information being posted on the Web, recovery would be impossible in many cases where the opposing party, in fact, had disclosed the information. The identification of persons who initially post the information on the Web is difficult, as demonstrated by recent searches for persons who have shut down major Web sites through mass hits, or who have created viruses that infect e-mail systems. It may be easy to track each person's e-mail, or the visitors to the Web site, but it is often difficult to find out how information was initially put into cyber systems.³⁹

An absolute liability system would simply shift risk from the party who had to disclose information because of the discovery process to the persons who received information. The party receiving the information is in the same position as the businesses which have usually been subject to strict liability. For example, a jurisdiction might make all building demolition companies subject to strict liability, because persons who enter the business should know that, even though they are perfectly careful, they may cause significant harm to others. Similarly, the party that asks for information that is subject to a protective order knows that disclosure of the information will cause substantial harm to the other party.

The only issue in a case based on violation of a protective order should be the amount of money that should be awarded the injured party. While I would establish absolute liability for parties who disclosed the information, I would require the party whose information was disclosed to the public to prove that real harm resulted from the disclosure. The party who receives the information should only be responsible for harm that actually occurred.

Statutes imposing criminal sanctions for violation of protective

38. For a discussion of the due process principles and the mens rea requirement, see WAYNE R. LAFAYE, *CRIMINAL LAW* § 3.8 (3d ed. 2000).

39. It is getting easier, however, to catch such persons. See Stuart McClure & Joel Scambray, *Security Watch: "Honey Pot" Network Can Gather Evidence for Catching and Prosecuting Hackers*, *INFOWORLD*, Aug. 7, 2000, at 52.

orders are necessary for two reasons. First, a party who is “judgment-proof,” because he has no money, otherwise would be free to cause harm to the other party by disclosing the information in violation of a discovery order. Second, particularly in criminal cases, disclosure of the information may result in severe harm that is hard to quantify in monetary terms, and impossible to remedy. In our rape case example, the defendant might well be willing to sacrifice any monetary resources he has to see the prosecution dropped, or to receive some benefit in the plea bargaining process. If detail regarding the victim and her life are put into cyber systems, the woman has been victimized again. The harm done to the victim from disclosure of information may be so great as to virtually destroy her life. The woman in this situation may well decide to end the continuing damage to her by refusing to testify at trial. If so, the prosecution may be dropped, or the rapist may receive a favorable plea bargain.

The Supreme Court in *Seattle Times* was not concerned with *New York Times v. Sullivan*⁴⁰ and its progeny, which protect false, defamatory speech under some circumstances. Similarly, I am not concerned that the protection of information gained through the discovery process will somehow undercut the marketplace value inherent in the First Amendment. The societal interest in protecting the rights of the parties to the litigation system, and in the operation of a truly open pretrial discovery system, outweigh any First Amendment cost caused by the restriction on speech of parties to the litigation, at least when the injured party is not a public official.

I am not certain whether the Court should create different liability standards for disclosure of information received in the discovery process that relates to “an issue of public concern” as opposed to information that relates only to a “private issue.” Perhaps, the Supreme Court should establish a negligence standard for the disclosure of information concerning issues of public concern.⁴¹ In other words, if the disclosed information related to an issue of public concern, the injured party would have to prove

40. 376 U.S. 254 (1964). For a discussion of Group Libel Laws, the holding in *N.Y. Times*, and libel of public and private individuals, see NOWAK & ROTUNDA, *supra* note 2, §§ 16.32 to 16.35 and SMOLLA, *supra* note 2, ch. 15, §§ 23:1 to 23:6.

41. See generally *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985). See also NOWAK & ROTUNDA, *supra* note 2, § 16.35; SMOLLA, *supra* note 2, ch. 23; RODNEY A. SMOLLA, *THE LAW OF DEFAMATION* (1986, with annual supplements).

that the opposing party was negligent in how they "protected" the information, in order to receive monetary compensation for their injuries. A strict liability standard might deter persons from requesting information about an issue of public concern (particularly from the government).

CLOSURE OF PRETRIAL AND TRIAL PROCEEDINGS

Over the past twenty years, the Supreme Court has restricted the ability of judges to close trial proceedings with a standard of review virtually as strict as that used in the gag order cases. At first, in a fragmented decision and a plurality opinion, the Court indicated that a trial judge should close portions on findings of a need to protect "an overriding interest."⁴² Later, a majority of the Justices favored a compelling interest standard for the review of trial court closure orders.⁴³ Prior to 1980, the Court indicated that a hearing regarding the suppression of evidence in a criminal case could be closed when the defendant and prosecution agreed to the closure and the order was observed to protect the fairness of the trial itself.⁴⁴ The strictness of the narrowly tailored to serve the compelling interest standard is clarified by the fact that the Court has not upheld any closure order since 1980.⁴⁵

American Bar Association's Standard for Criminal Justice 8-3.2⁴⁶ adequately summarizes the current position of the Supreme

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

43. See *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606-07 (1982).

44. See *Gannett Co. v. DePasquale*, 443 U.S. 368, 394 (1979).

45. See ROTUNDA & NOWAK, *supra* note 2, § 20.25; SMOLLA, *supra* note 2, §§ 25:1 to 25:12.

46. STANDARDS FOR CRIMINAL JUSTICE Standard 8-3.2 (3d ed. 1991). The text of Standard 8-3.2 (Public access to judicial proceedings and related documents and exhibits) provides:

(a) In any criminal case, all judicial proceedings and related documents and exhibits, and any record made thereof, not otherwise required to remain confidential, should be accessible to the public, except as provided in section (b).

(b)(1) A court may issue a closure order to deny access to the public to specified portions of a judicial proceeding or related document or exhibit only after reasonable notice of and an opportunity to be heard on such proposed order has been provided to the parties and the public and the court thereafter enters findings that:

(A) unrestricted access would pose a substantial probability of harm to the fairness of the trial or other overriding interest which substantially out-

Court test by stating that a court may order closure of portions of a trial-related proceeding if: (1) "Unrestricted access would pose a substantial probability of harm to the fairness of the trial or other overriding interest which substantially outweighs the defendant's right to a public trial," (2) the closure would prevent the harm, and (3) "there is no less restrictive alternative reasonably available."

Some "nit-pickers" may claim that the Court's compelling in-

weighs the defendant's right to a public trial;

(B) the proposed order will effectively prevent the aforesaid harm; and

(C) there is no less restrictive alternative reasonably available to prevent the aforesaid harm.

(2) A proceeding to determine whether a closure order should issue may itself be closed only upon a prima facie showing of the findings required by Section b(1). In making the determination as to whether such a prima facie showing exists, the court should not require public disclosure of or access to the matter which is the subject of the closure proceeding itself and the court should accept submissions under seal, in camera or in any other manner designed to permit a party to make a prima facie showing without public disclosure of said matter.

(c) While a court may impose reasonable time, place and manner limitations on public access, such limitations should not operate as the functional equivalent of a closure order.

(d) For purposes of this Standard, the following definitions shall apply:

(1) "criminal case" shall include the period beginning with the filing of an accusatory instrument against an accused and all appellate and collateral proceedings;

(2) "judicial proceeding" shall include all legal events that involve the exercise of judicial authority and materially affect the substantive or procedural interests of the parties, including courtroom proceedings, applications, motions, plea-acceptances, correspondence, arguments, hearings, trials and similar matters, but shall not include bench conferences or conferences on matters customarily conducted in chambers;

(3) "related documents and exhibits" shall include all writings, reports and objects, to which both sides have access, relevant to any judicial proceeding in the case which are made a matter of record in the proceeding;

(4) "public" shall include private individuals as well as representatives of the news media;

(5) "access" shall mean the most direct and immediate opportunity as is reasonably available to observe and examine for purposes of gathering and disseminating information;

(6) "closure order" shall mean any judicial order which denies public access.

Id.

terest test may be more strict than the ABA standard. However, I doubt that the adjective describing the word "interest" really changes the test. If we require that there be facts on the record demonstrating that there truly are no other means of protecting a compelling or overriding interest, we have created an insurmountable burden for trial judges to meet. When the Court ruled that trial judges could not close voir dire proceedings unless there was specific evidence that the closure order was "essential to preserve higher values and narrowly tailored to serve that interest"⁴⁷ the Court effectively prevented closure of such proceedings.

The strictness of the Court's current standard is exemplified by *Globe Newspaper, Co. v. Superior Court*,⁴⁸ in which the Court invalidated a state statute requiring trial judges to exclude the press, and general public, from courtroom proceedings during the testimony of victims in certain types of criminal sexual offense cases. Though the Justices left open the theoretical possibility that there might sometimes be a valid closure order, the majority opinion ruled that a trial judge would have to make specific findings as to how closure of the proceeding was narrowly tailored to protect a child victim of a crime from further trauma. Supreme audacity from the Supreme Court! Absent a combination of psychiatric training and an ability to see into the future, it would seem impossible for a trial judge to make specific findings that would meet the Supreme Court standard. I hope that trial judges are disregarding their oaths of office,⁴⁹ by disregarding the standard imposed by the Court in *Globe Newspaper*. Otherwise, no victim of a sexual assault case can be protected.

The continued use of strict scrutiny for reviewing trial closure orders will be nothing less than a societal disaster if even one or two of my predictions regarding technological change are accurate. In the future, without wasting a lot of time "surfing the Web," persons interested in crime will be receiving information regarding details of pretrial hearings and motion dispositions in a wide variety of criminal cases that in years past might not have been deemed worthy of newspaper coverage. The information re-

47. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984).

48. 457 U.S. 596 (1982).

49. The oath of federal and state judges to follow the Constitution, required by Article III or Article VI, includes following the rulings of the United States Supreme Court. See U.S. CONST. art. III, VI. For an examination of this point, see Daniel A. Farber, *The Supreme Court and the Rule of Law: Cooper v. Aaron Revisited*, 1982 U. ILL. L. REV. 387.

garding such cases will be collected from cyber sources by all those persons with an appetite for crime news. The damage done to victims of certain types of crimes, particularly children or other persons who have been victims of sexual violence, will be magnified by disclosure of this information through cyber systems. Victim names and the details of the crimes committed against them will be collected by the computers of persons with a taste for salacious information. Avoiding the damage done to the lives of these victims will be impossible if pretrial or trial proceedings must be left open in the future.

If jury selection processes are to be open to the "cyber press," anyone who has not led a perfect life will not want to be a member of a jury pool. All of the information a potential jury discloses during voir dire might be sent out to the world through cyber systems. Current "Court TV" and other cable or broadcast networks may send out such information, but information sent out through a television channel is difficult to gather and retain. Cyber systems, when combined with smart searchers and sorters, will allow all those interested in trials, particularly criminal trials, to collect the information about jurors easily, and to use the information as they choose.

The Supreme Court should adopt a standard that would allow closure of portions of a trial, or pretrial proceedings, whenever the trial judge could reasonably conclude that closure would protect the fairness of the trial, or the privacy interests of witnesses, victims, or jurors, while still allowing the public to receive information about issues of public concern that were involved in the trial process. So long as a trial judge was allowing information about the nature of the crime, and an edited version of the proceedings, to become public, a closure order that arguably is designed to protect fair trial or privacy interests should be upheld.⁵⁰

My proposed test might result in the closure of virtually all pretrial suppression hearings. In cyber world there will always be the possibility that information about evidence that was suppressed would be received by a wide variety of persons who might appear in the jury pool through cyber systems. Nevertheless, First Amendment marketplace values can be protected so long as reports and records of the pretrial proceedings are made available

50. The case law is to the contrary. *See, e.g.*, SMOLLA, *supra* note 2, §§ 25:7, 25:8.

to the public, including the press, once a jury is sequestered. Of course, there would always be the possibility that the information that was made available at that time might harm the fairness of a future trial if the defendant was re-tried for the crime due to some error in the original proceeding. No system, especially one suggested by me, will be perfect.

If the Supreme Court properly balanced First Amendment and privacy values it would overrule *Globe Newspaper* before the age of smart searchers and sorters is upon us. Court rules or statutes prohibiting the disclosure of names of victims of certain crimes (particularly child victims) to the press should be upheld.⁵¹ Trial court orders closing portions of the trial in which the victim testifies should not be open to the public. Similarly, the Court should overrule any Sixth Amendment ruling that requires the defendant to have every aspect of the trial, including the portion of the trial in which the victim testimony is given, be presented in public.⁵²

In the public access cases, to date, the Court has engaged in a form of balancing. Under the Court's current balancing test, First Amendment and Sixth Amendment public trial values always override privacy values. That balance may be acceptable for the moment. Nevertheless, victims' names or the background of specific jurors adds little to the discussion of public issues. The increased harms from disclosure of such information in an era of smart search engines and sorters should outweigh the marginal value that details regarding witnesses, victims, or jurors might add to public discourse.⁵³

51. If the news media gets this information from public records, or through other lawful means, the reporting of the information should not be punishable for reasons I have earlier discussed. Thus, *Florida Star, Inc. v. B.J.F.*, 491 U.S. 524, 541 (1989) (holding that "where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order . . .") would not be overruled under my proposals. For an in-depth discussion of the Supreme Court's treatment of these issues, see SMOLLA, *supra* note 2, §§ 15:33, 16:20, 22:14, 24:5, 25:11, 25:43, 25:45.

52. The standard for rejecting a defendant's Sixth Amendment request that a portion of the trial proceedings be open to the press and public mirrors the First Amendment standard for closure orders. See *Waller v. Georgia*, 467 U.S. 39, 44-47 (1984).

53. For an excellent analysis of the real pros and cons of restricting litigation-related speech, see David A. Strauss, *Why It's Not Free Speech Versus Fair Trial*, 1998 U. CHI. LEGAL F. 109 (1998).

LAWYERS' SPEECH & THE DISCOVERY OF POTENTIAL JURORS'
CYBER ACTIVITIES⁵⁴

Even if all of my technical assumptions about the future are accurate, American Bar Association Model Rules of Professional Conduct 3.5, 3.6, and 3.8 are capable of protecting First Amendment and due process values in the future so long as drafting committees, courts, and legislatures revise their jurisdictions' version of these rules as information exchange technology progresses. My proposals in this area involve some "tinkering" with the Model Rules, but my focus will primarily be on the collection and disclosure of information regarding the cyber activities of potential jurors. This will have more to do with the collection and disclosure of information held by attorneys and their clients.

Court rules, and statutes, regarding discovery of information held by a party in a civil or criminal trial regarding persons need to be kept in mind when looking at Model Rules 3.5, 3.6, and 3.8. I assume that the leading (or, at least, most cited) treatise on criminal procedure is correct in stating that: (1) most courts will not allow discovery by the government or the defendant, in a criminal case, of information regarding persons in the jury pool; (2) the government might be required to make a disclosure of information regarding potential jurors in rare circumstances where the withholding of the information would create a truly unfair trial.⁵⁵

Rule 3.5,⁵⁶ "Impartiality and Decorum of the Tribunal," prohibits ex-parte communication with jurors or prospective jurors or

54. Anyone interested in the meaning of the American Bar Association Annotated Model Rules of Professional Conduct should consult RONALD D. ROTUNDA, *LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY* (2000).

55. WAYNE LAFAVE, JEROLD ISRAEL & NANCY KING, *CRIMINAL PROCEDURE* § 22.3(a) (3d ed. 2000). For information regarding the frequency of citations to this treatise, at least in law reviews, see Fred R. Shapiro, *The Most Cited Legal Books Published Since 1978*, 29 *J. LEGAL STUDIES* 397, 404 (2000).

56. MODEL RULES OF PROF'L CONDUCT R. 3.5 (1998). Rule 3.5 (Impartiality and Decorum of the Tribunal) provides:

A lawyer shall not:

- (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
- (b) communicate ex parte with such a person except as permitted by law; or
- (c) engage in conduct intended to disrupt a tribunal.

Id.

conduct engaged to disrupt a trial or tribunal process. As the commentary to the Rule indicates, the lawyer is responsible for a client's contacting a juror or a person known to be a member of the jury pool if the lawyer assisted the client. This Rule governs, in part, the investigation of potential jurors by lawyers, clients, or their agents once the potential name of a juror is known.

Rule 3.6,⁵⁷ "Trial Publicity," governs "extrajudicial statement[s] that [the lawyers should] expect to be disseminated by means of public communication." Such statements are prohibited if the lawyer should know that such statements "will have a substantial likelihood of materially prejudicing an adjudicative proceeding." The rule provides a variety of exceptions, including an ability of a lawyer to respond to statements made in public that are adverse to his client.

57. *Id.* R. 3.6. Rule 3.6 states:

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

- (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
- (2) information contained in a public record;
- (3) that an investigation of a matter is in progress;
- (4) the scheduling or result of any step in litigation;
- (5) a request for assistance in obtaining evidence and information necessary thereto;
- (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
- (7) in a criminal case, in addition to subparagraphs (1) through (6):
 - (i) the identity, residence, occupation and family status of the accused;
 - (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
 - (iii) the fact, time and place of arrest; and
 - (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

Id.

Rule 3.8,⁵⁸ the “Special Responsibilities of a Prosecutor,” goes farther than Rule 3.6 and states that prosecutors must “refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused,” except for statements that are necessary to inform the public of the nature of the prosecutor’s actions or that serve legitimate law enforcement purposes. Additionally, Rule 3.8 requires the prosecutor to take “reasonable care” from having investigators or other law enforcement personnel or staff associated with the prosecutor “in a criminal case” make a statement that would violate Rule 3.6 if made by a lawyer or prosecutor.

As soon as possible, in every jurisdiction, judicial rules committees and legislatures should clarify guidelines regarding the applicability of court rules, or statutes, similar to Model Rules 3.5, 3.6, and 3.8 to Web sites and e-mail systems. After a jurisdiction

58. *Id.* R. 3.8 (Special Responsibilities of a Prosecutor). Rule 3.8 directs that the prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
- (e) exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6;
- (f) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
 - (1) the information sought is not protected from disclosure by any applicable privilege;
 - (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
 - (3) there is no other feasible alternative to obtain the information.
- (g) except for statements that are necessary to inform the public of the nature and extent of the prosecutor’s action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused.

Id.

makes Rules 3.5 and 3.6 applicable to e-mails and Web sites, these rules should be clarified on a case-by-case basis. Every state supreme court, and the Federal Judicial Conference, should establish a system for periodic consideration of how rules governing the cyberspace activities of attorneys should be modified so as to protect both free speech values and fair trials. The National Center for State Courts might provide a vehicle through which state courts could receive information concerning the technological changes that will have an impact on the fair trial-free press problems that are addressed by Model Rules 3.5, 3.6, and 3.8.

Under current Supreme Court decisions, attorneys may engage in mass, or targeted, mail.⁵⁹ For reasons mentioned earlier in this article, mass e-mails by attorneys may not pose much danger to the judicial process today. Today's e-mail systems include a lot of junk e-mail that is immediately discarded. Greater danger will come from cyber communications when we enter the age of smart search engines and smart sorters. In an era of smart searchers and sorters, attorneys may be more likely to use e-mail or Web sites to disclose information about parties, victims, or witnesses in an effort to gain an advantage by harming the credibility and reputations of these persons.⁶⁰

In trials for which juries are not sequestered, a trial judge should be able to order the monitoring of all information transmissions to the general public of parties to litigation to ensure that information is not being indirectly sent to sources that are jurors. Serious consideration should be given to banning mass e-mailing or targeted e-mailing by attorneys. If a jurisdiction does not want to enact such a ban, or if a ban is invalidated as a violation of the First Amendment, the jurisdiction should require all attorneys (including government attorneys) to keep records of the types of e-mail they have sent out and the e-mail address lists used.

Attorney Web pages present a problem because of the ability of Web sites to acquire information concerning persons who visit the

59. Compare *Shapiro v. Ky. Bar Ass'n*, 486 U.S. 466, 471 (1988) (striking down a total ban on targeted mailings by attorneys), with *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 620 (1995) (upholding a thirty-day restriction on targeted mail by attorneys to accident victims or their relatives).

60. There are attorneys who use such tactics today, without using cyber messages. See Debra Baker, *Shredding the Truth*, A.B.A. J., Oct. 1999, at 41.

site. Attorneys should be prohibited from placing cookies in the computers of persons who visit their Web site, even if such a practice would be lawful for non-attorney Web sites. Nevertheless, it may be difficult to prevent attorneys from acquiring information about their Web site visitors, even if attorneys are banned from using cookies.

Statutes or court rules should be adopted at the state and federal level requiring any party to a litigation to provide to the opposing party all information in the party's possession regarding cyber activities of potential jurors or witnesses. Such rules will prevent attorneys from hiding behind their clients. These rules and statutes also should apply to information about cyber activities gained by the employment of persons or services that track individual activity in cyberspace. If only one party to the litigation had information concerning cyber activities of potential jurors or witnesses the trial could not be a fair one. The advantage held by the party with that information, once almost all persons are using cyber systems, would be so great that the opposing party, in either a civil or criminal trial, would have little chance of adequately preparing for trial, or participating in a meaningful manner in the voir dire process.

Special rules should be adopted for governing the cyber activities of all government agencies, as well as government attorneys. In any case, civil or criminal, the government (local, state, or federal) should be required to disclose all information in the government's files regarding the cyber activities of any potential juror or witness, including the defendant (or the opposing party in a civil case). The government attorneys and agencies would also be restricted in their acquisition of data by the Fourth Amendment, as would a private attorney or client who worked with the government in a manner that gave the attorney or client "state action."⁶¹ Even if computer privacy legislation were passed, government agencies would be able to acquire information regarding cyber activities of persons if they applied for a search warrant akin to that used to tap telephones.⁶²

61. See NOWAK AND ROTUNDA, *supra* note 2, ch. 12.

62. A study done by *USA Today* showed a dramatic increase in the number of applications for search warrants that would allow law enforcement officials to monitor activity on the Internet. Will Rodger, *Warrants for Online Data Soar*, USA TODAY, July 28, 2000, at A1, col. 2. Margret Johnston, *Wiretap Laws Need to Be Updated for Internet Age*,

Statutes will need to be enacted to require the police and other government agencies to comply with this requirement, assuming that statutes are not enacted at the federal or state level to prohibit the generalized acquisition of information concerning Web site visitors or Internet activities. Courts cannot control the actions of police other than through the indirect, and inefficient, manner of making the prosecutor responsible for the actions of the police. A prosecutor may not have control over police statements concerning an individual case, if the police are not part of the same governmental unit as the prosecutor.

CONCLUSION: THE (PERHAPS) UNACCEPTABLE COSTS OF TRACKING THE CYBER ACTIVITY OF POTENTIAL JURORS

Finding persons willing to be jurors may be more difficult than it is today if my proposals were followed. In order to increase the jury pool, by lessening the number of persons in the population who will seek to avoid jury service, some jurisdictions make jury service easy by having jurors report for only one day unless they are called for a trial. For similar reasons, at the present time, potential jurors often are required to fill out only the most basic questionnaires, such as those suggested by the American Bar Association.

Unfortunately, the changes in information technology should make it impossible to have jury service be easy, in terms of burdens on a person's time, or costless, in terms of intrusions into each juror's privacy. The issue of whether we should compel jurors to submit information that will allow disclosure of their previous cyber activities will be one of the most difficult issues faced by courts later this century.

At the present time, if a member of some "militia" group, or a member of a racial minority, was a party to litigation, and he could afford to pay for a private investigator, he could receive a great deal of information about persons who are in the jury pool. Private investigators, or the government (if the government chooses to make such an investigation in a case in which it is a party), should be able to learn whether a potential juror would be

biased for, or against, one of the parties.⁶³ Even without hiring private investigators, the militia member or racial minority person may be able to use the basic jury questionnaire, and voir dire, to identify potential jurors whose activities would indicate a bias against him. As mentioned at the start of this article, jurors today should feel some apprehension if they consider lying under oath about their activities or organizational memberships. Subscription lists and membership activities, in the physical world, are not hard to trace.

For example, the militia member might find that a potential member of the jury has been going to meetings of the Fully Informed Jury Association and hope that the juror will be likely to disregard judicial instructions in order to grant the defendant "justice." The militia member may want to dismiss a potential juror because he has learned the person is a member of several civil rights organizations and a subscriber to "liberal" publications. Or a racial minority member who was a party to litigation may want to dismiss a potential juror who has attended meetings of the Ku Klux Klan, or the now infamous church created by Mr. Hale, a one-time law student in Illinois (though *he was not* a student at the University of Illinois College of Law).

As I have mentioned earlier, in the cyber age, a biased would-be juror may feel confident that a lie about his cyber activities will go undiscovered. To take away the convenient lie, and eliminate the probability of prejudiced juries, we will need to ask jurors to provide information regarding the computer system they use for getting information from cyberspace systems, and any form of encryption their computer uses to make their activities in cyber systems anonymous. With that information, the government, in criminal cases, might create a complete profile of each juror's activities in cyber systems. The government should then be required to turn the information over to the defendant.

In a civil trial, the potential jurors should be required to provide their computer system information to plaintiffs and defendants. Then, each party could, if he so chose, do a search for the potential juror's cyber activities. However, a party who conducted

63. Rule 4.4 of the Model Rules of Professional Conduct is relevant to the use of investigations of potential jurors. MODEL RULES OF PROF'L CONDUCT R. 4.4 (1998).

such a search should be required to disclose all such information to the other parties in the case.

My juror tracking proposal would ensure truly fair, neutral juries with little economic cost. There will not be a significant delay in jury selection if courts adopt my proposal. Many of the functions of the supercomputer today will be done by a desktop computer at mid-century. A defendant, or opposing party in a civil case, might receive this information concerning potential jurors' cyber activities only a day before jury selection. In the future, the computer for the attorney receiving information would easily be able to identify juror cyber activities that might indicate a bias against the attorney's client in minutes or hours, at most.

The societal cost of my juror tracking proposals, in terms of inroads on personal privacy and First Amendment values, may be greater than our society should be willing to pay. As I mentioned earlier in this article, if a system of full pretrial cyber discovery is in place, any person who is called for a jury would have his whole life exposed to the government, or to all parties in a civil litigation. We might seek to protect such persons with gag orders to the parties, such as I have endorsed previously, to try to minimize the damage that might be done to individuals. Nevertheless, the thought that one's entire life will be open to the government and public through jury service certainly may well deter most people from wanting to serve on a jury.

My proposals, if adopted, will do real damage to First Amendment freedom of association values. In a world where everyone who may be called for jury duty knows that all of his cyber information (including associational activities and messages to political or religious groups) would be disclosed, people will be more hesitant than ever when it comes to joining any unpopular organization. Indeed, organizations that advocate unpopular views (whether conservative, liberal, or otherwise) may find it difficult to attract any members at all in such a system. At the close of the twentieth century, if a person or organization could show that disclosure of membership in an association would impose a significant burden on individual freedoms to join an unpopular organization, the government would have to show that its request for information was narrowly tailored to promote a compelling so-

cial interest.⁶⁴ In the future courts could find that my cyber information disclosure system meets this test despite its damage to the freedom of association. Though there would be a real cost in terms of deterring membership in unpopular associations, tracking the cyber activities of potential jurors could be deemed to be a narrowly tailored means of producing juries that are as unbiased as possible.

There are a variety of alternatives to the two polar choices of requiring jurors to forego all privacy and having juries that we cannot trust. For example, statutes might allow for the investigation of cyber activities of persons in the jury pool only if the party requesting the investigation can demonstrate that there is a high probability that a segment of the public is biased against him. Thus, cyber investigations might not be allowed in a normal tort case involving two "flying cars." An investigation might be required when one of the pilot drivers was a member of an unpopular religious or racial group.

It may well be that none of the ideas set forth in this article regarding orders prohibiting the dissemination of information, closure of trials, discovery of cyber activities of jurors or witnesses, or anything else may make good sense for our society. The First Amendment and privacy costs of ensuring fair trials may be too great for us to pay.⁶⁵

The one thing of which I am certain is that courts and legislatures must not take a wait-and-see approach to problems of reconciling First Amendment and fair trial values in the new information age. Groups such as the American Bar Association, the National Center for State Courts, and the United States Supreme Court Committees on Rules of Criminal and Civil Procedure should begin now to deal with how new information technologies may affect the trial process, and the privacy interests of jurors, victims, and witnesses. If such groups do not do so, our society

64. See NOWAK & ROTUNDA, *supra* note 2, § 16.52(c).

65. Professor Gey has argued persuasively that the Internet and Web should be considered public fora for First Amendment analysis. Steve G. Gey, *Reopening the Public Forum—From Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535 (1998). Although I agree with Professor Gey on this point, I do not think it affects the analysis in this article. With Professor Daniel Farber, I have advocated rejection of a formal forum approach to analyzing First Amendment issues. See Farber & Nowak, *supra* note 25.

will face a "lag-time" full of unfair trials, and unnecessary harm to victims and witnesses, when cyber information systems dominate the "marketplace of ideas."
