

1-1-2008

Pennsylvania's Common Law and the United States Constitution Provide Members of the Press with a Right of Access to Names but Not Addresses of Jurors Impaneled in a Criminal Trial: *Commonwealth v. Long*

Amy Nicoletti

Follow this and additional works at: <https://dsc.duq.edu/dlr>



Part of the [Law Commons](#)

Recommended Citation

Amy Nicoletti, *Pennsylvania's Common Law and the United States Constitution Provide Members of the Press with a Right of Access to Names but Not Addresses of Jurors Impaneled in a Criminal Trial: Commonwealth v. Long*, 46 Duq. L. Rev. 641 (2008).
Available at: <https://dsc.duq.edu/dlr/vol46/iss4/6>

This Recent Decision is brought to you for free and open access by Duquesne Scholarship Collection. It has been accepted for inclusion in Duquesne Law Review by an authorized editor of Duquesne Scholarship Collection.

Pennsylvania's Common Law and the United States
Constitution Provide Members of the Press with a
Right of Access to Names but not Addresses of
Jurors Impaneled in a Criminal Trial:
Commonwealth v. Long

CONSTITUTIONAL LAW — CRIMINAL TRIALS — JUDICIAL PROCEEDINGS — RIGHT OF ACCESS — The Supreme Court of Pennsylvania held that the common-law right of access to criminal trial proceedings did not extend to impaneled jurors' names or addresses, but the First Amendment to the United States Constitution provided a qualified right of access to jurors' names only.

Commonwealth v. Long, 922 A.2d 892 (Pa. 2007).

Members of the press raised the question of whether a constitutional right or the common law mandated that the public have access to jurors' names and addresses after reporters were barred by the trial court from obtaining this information in the prosecution of Karl Long, on trial for the murder of his wife.¹ Jury selection for the criminal prosecution of Long took place from July 28 through July 30, 2003.² This process was open to the public, and members of the press were present in the courtroom, including reporters for the Tribune-Review Publishing Co., the appellants.³ Potential jurors were referred to only by number during the selection process, and the Tribune-Review did not raise any objection to the process employed during jury selection.⁴

Following the jury selection, the criminal trial of Karl Long proceeded from August 4 through August 20, 2003.⁵ While the trial was ongoing, the court discovered that two of the Tribune-Review's reporters had attempted to ascertain the names and addresses of the impaneled jury members.⁶ On August 15, five days

1. *Commonwealth v. Long*, 922 A.2d 892 (Pa. 2007).

2. *Long*, 922 A.2d at 894.

3. *Id.* Appellants include a local newspaper, the Tribune-Review Publishing Company, and a television station, WPXI, Inc. (a local affiliate of NBC). *Id.*

4. *Id.*

5. *Id.* at 895.

6. *Id.* The reporters were trying to get this information from members of the court's judicial staff. *Id.* However, appellants did not file a request for this information. *Id.*

before the close of the trial, the court raised concerns regarding certain events that could have potentially jeopardized the jury's performance in the trial—specifically, behavior of the victim's family toward jurors, and appellants' reporters requesting jurors' names and addresses.⁷ This led the trial court judge to tentatively arrange to sequester the jury for its protection; however, the court ultimately made other arrangements and did not sequester the jury.⁸

While the jury was still in deliberation, on August 20, 2003, the Tribune-Review requested a hearing to determine whether they had a right to the names and addresses of jury members.⁹ They filed motions to intervene the following day, and a hearing on the issue was scheduled for September 2, 2003.¹⁰ During the hearing, the Tribune-Review contended that they needed the names and addresses of the jurors in order to verify the identity of the jurors.¹¹ They argued that the information requested was necessary for the public to know who was on the jury and how they were selected.¹² The court determined on September 17, 2003, that appellants had standing, and the trial court held a second hearing in November 2003.¹³ The Tribune-Review's petitions ultimately were denied on December 31, 2003.¹⁴

The trial court denied the petitions based on Rule 632 of the Pennsylvania Rules of Criminal Procedure and the concomitant administrative order of the Westmoreland County Court of Common Pleas.¹⁵ The basis of the trial court's decision was that "confidentiality provisions protected all of the information on the forms, including jurors' names and addresses," and that appel-

7. *Long*, 922 A.2d at 895.

8. *Id.* The trial judge has discretion to order sequestration of the jury in the interests of justice. PA. R. CRIM. P. 642(A).

9. *Long*, 922 A.2d at 895.

10. *Id.* The Supreme Court of Pennsylvania has long recognized that a motion to intervene in a criminal case is the proper avenue for the media to bring assertions regarding public rights of access to information in a criminal proceeding. *Commonwealth v. Fenstermaker*, 530 A.2d 414, 416 n.1 (Pa. 1987).

11. *Long*, 922 A.2d at 895.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* Rule 632 provides that jury questionnaires, which are given to potential jurors before the start of voir dire and contain basic questions about the person, are not public record, and the related administrative order called for these questionnaires to be destroyed once proceedings ended. *Id.*

lants did not “present[] any controlling authority [showing] that the procedures [were] unconstitutional.”¹⁶

Following the trial court’s decision, the Tribune-Review appealed to the superior court, arguing that the refusal to release the jurors’ names and addresses violated the common-law right of access.¹⁷ Furthermore, the publishing company contended that the decision also violated the press’s right of access to criminal trials as guaranteed by the First Amendment to the United States Constitution and Article I, Section 11 of the Pennsylvania Constitution.¹⁸ In affirming the trial court’s decision, the superior court concluded that the First Amendment provided a right to attend court proceedings, but did not guarantee the press access to jurors’ names and addresses.¹⁹ Thus, the superior court held that appellants’ qualified right of access was not violated because the reporters were not denied entry to judicial proceedings or access to judicial transcripts.²⁰

The Tribune-Review then filed a petition for allowance of appeal with the Supreme Court of Pennsylvania.²¹ The court granted the petition to decide the issue of whether a right of access to the names and addresses of impaneled jury members in a criminal case was provided by the First Amendment to the United States Constitution, Article I, Section 11 of the Pennsylvania Constitution, and/or the common law.²²

The Supreme Court of Pennsylvania held that no common-law right of access to jury members’ names and addresses existed.²³ It further held that the constitutional right of access encompassed in

16. *Long*, 922 A.2d at 895.

17. *Id.* at 895-96.

18. *Id.* at 896. The First Amendment to the United States Constitution embodies the right of access to criminal trials: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I. Article I, section 11 of the Pennsylvania Constitution provides the following:

All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay. Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.

PA. CONST. art. 1, § 11.

19. *Commonwealth v. Long*, 871 A.2d 1262, 1269 (Pa. Super. Ct. 2005).

20. *Long*, 871 A.2d at 1269.

21. *Long*, 922 A.2d at 897.

22. *Id.*

23. *Id.* at 898.

the First Amendment applied only to jurors' names, and not their addresses.²⁴

In deciding the issue, the court first looked to the United States Supreme Court's decision in *Nixon v. Warner Communications, Inc.*,²⁵ which held that courts recognized a general right to inspect and copy judicial records and documents.²⁶ Based on *Nixon* and the Pennsylvania case of *Commonwealth v. Fenstermaker*,²⁷ Chief Justice Cappy, writing the majority opinion, stated that Pennsylvania recognized a similar right of access.²⁸ According to the court's reasoning, the right of access to judicial proceedings and records was founded in the public's interest in observing the criminal justice process to ensure fairness in the system.²⁹ The inquiry the court undertook, then, was whether the document sought constituted a public judicial record, which required examination of whether the document was filed with the court or was used by the judge in making a decision.³⁰ The Supreme Court of Pennsylvania looked at the information sought by appellants—jurors' names and addresses as listed on the jury questionnaires—to determine whether it was included under the common-law right of access.³¹ The court concluded that because the jury questionnaires were not entered into evidence, did not otherwise become part of the record, and were not made available to the public, no list of jurors' names and addresses became part of the public judicial record.³² Therefore, Chief Justice Cappy decided that the information sought by appellants was not subject to the common-law right of access.³³

The court then analyzed whether appellants had a constitutionally protected right of access to jurors' names and addresses based on the First Amendment to the United States Constitution.³⁴ Justice Brennan wrote in the majority opinion for *Globe Newspaper*

24. *Id.* at 901.

25. 435 U.S. 589 (1978).

26. *Long*, 922 A.2d at 898.

27. 530 A.2d 414 (Pa. 1987).

28. *Long*, 922 A.2d at 898. "In *Nixon*, the Supreme Court articulated that '[i]t is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.' In Pennsylvania, we recognized a similar common-law right to access public judicial records in *Fenstermaker*." *Id.* (citation omitted) (alteration in original).

29. *Fenstermaker*, 530 A.2d at 417.

30. *Id.* at 418.

31. *Long*, 922 A.2d at 898.

32. *Id.*

33. *Id.*

34. *Id.* at 899.

*Co. v. Superior Court*³⁵ that the public's right of access in a criminal trial was embodied in the First Amendment to the extent necessary for the enjoyment of other First Amendment rights.³⁶ Justice Brennan recognized in *Globe* that the institutional value of allowing access to criminal trials was grounded in both logic and experience.³⁷ Two years after deciding *Globe*, the United States Supreme Court undertook a "historical analysis and a review of case law" to determine subsequently that "the right of access [also extended to] voir dire."³⁸ In deciding as such, the Court said that the jury selection process was a matter of importance, not just to the parties involved, but also to the preservation of fairness and the appearance of fairness in the criminal justice system.³⁹

To determine whether the document sought fell under a constitutionally protected right of access, the court in *Long* applied the "experience and logic" test espoused by Justice Brennan in *Globe*.⁴⁰ For the "experience" prong of the test, the court determined whether the process historically had been open to the press and public.⁴¹ Next, the "logic" inquiry was performed to ascertain whether public access made a significant, positive contribution to the functioning of the process in question.⁴² This test was applied to the issue raised by appellants.⁴³ The court found that jurors' names, but not addresses, often were revealed during voir dire and played a significant and positive role in the criminal trial process.⁴⁴ Therefore, according to the majority, the constitutional right of access to proceedings in a criminal trial applied to jurors' names, yet not to their addresses.⁴⁵

35. 457 U.S. 596 (1982).

36. *Long*, 922 A.2d at 899 (citing *Globe*, 457 U.S. at 603-04). The court further noted that this is a right not only to attend proceedings, but to gather information as well. *Id.* (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980)). In addition, the right of the press to observe criminal trials was held to be synonymous with that of the public. *Id.* (citing *Richmond Newspapers*, 448 U.S. at 573).

37. *Id.* (citing *Globe*, 457 U.S. at 606).

38. *Id.* (citing *Press-Enterprise Co. v. Superior Court (Press-Enterprise I)*, 464 U.S. 501 (1984)).

39. *Id.* (citing *Press-Enterprise I*, 464 U.S. at 508).

40. *Id.* at 900.

41. *Long*, 922 A.2d at 900.

42. *Id.*

43. *Id.* at 901. Appellants argued that "denying access to the juror information in the present case, without any findings supporting the denial, was a partial 'closure' of the proceedings in violation of the U.S. Constitution, the Pennsylvania Constitution and the common law." Brief of Appellant at 14, *Long*, 922 A.2d 892 (No. 40 WAP 2005).

44. *Long*, 922 A.2d at 901.

45. *Id.* With respect to appellants' alternative argument under article I, section 11 of the Pennsylvania Constitution, the court held that the state constitution did not provide a

However, the court also acknowledged that cases may arise in which a trial court may be justified in withholding jurors' names during trial proceedings.⁴⁶ Such instances may include concerns for juror safety, jury tampering, or harassment.⁴⁷ In the case at hand, though, the Supreme Court of Pennsylvania noted that the trial court did not make any specific findings that would justify its withholding the requested information.⁴⁸ Accordingly, the Supreme Court found the trial court's refusal to allow access to jurors' names unwarranted and reversed the order of the superior court.⁴⁹

According to the earliest records of the development of the Anglo-American criminal trial, the process was open to all those who wished to observe and has remained open throughout its evolution.⁵⁰ This openness had persisted from ancient England to modern America because of its importance in ensuring that proceedings were conducted fairly, and in discouraging perjury, misconduct of participants, and decision-making based on bias or partiality.⁵¹

In 1979, the United States Supreme Court considered whether certain aspects of a criminal trial were constitutionally required to be open to the public and members of the press, in *Gannett Co. v. DePasquale*.⁵² In the opinion, Justice Stewart pointed out that the right to a public trial under the Sixth Amendment to the United States Constitution existed for the benefit of the *defendant*, al-

greater right of access than the federal constitution. *Id.* at 905 n.15. Because the court had determined that the federal right granted access only to jurors' names, they did not undertake further analysis. *Id.*

46. *Id.* at 905.

47. *Id.* at 905-06.

48. *Id.*

49. *Long*, 922 A.2d at 906.

50. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 564 (1980).

51. *Richmond Newspapers*, 448 U.S. at 569. See also MATTHEW HALE, *THE HISTORY OF THE COMMON LAW OF ENGLAND* 343-45 (6th ed. 1820).

52. 443 U.S. 368 (1979). The petitioner, Gannett, was the publisher of two newspapers in Rochester, New York. *Gannett*, 443 U.S. at 371. The case arose out of the criminal prosecution of Greathouse and Jones for the murder of Wayne Clapp. *Id.* at 371, 374. The trial court in that prosecution granted a pretrial motion to exclude members of the public and press from a pretrial suppression hearing and to temporarily deny access to the transcript of the suppression hearing in order to ensure a fair trial for the defendants. *Id.* at 375-76. Petitioner Gannett then brought a proceeding for prohibition and mandamus to have the orders set forth by Judge DePasquale vacated. *Id.* at 376. Ultimately, the orders were not vacated during this proceeding or on appeal to the New York Court of Appeals, and the newspaper appealed to the Supreme Court of the United States, which granted certiorari. *Id.* at 376-77.

though it also conferred benefits upon the public.⁵³ The decision further discussed that this right had been recognized as a safeguard against the courts being used for persecution, with the belief that review via public opinion effectively acted as a restraint on possible abuse of judicial power.⁵⁴ Justice Stewart held that the text of the Sixth Amendment did not support a constitutionally enforceable right of the public to attend a criminal trial, and history demonstrated nothing more than a common-law rule of open trial proceedings.⁵⁵ However, Justice Stewart explicitly reserved the question of whether the public had an enforceable right of access under the First Amendment.⁵⁶ Eight years later, in *Commonwealth v. Fenstermaker*, the Supreme Court of Pennsylvania held that openness of judicial proceedings, although not included within the Sixth Amendment, was embodied within the First Amendment to the United States Constitution and was protected by the common law.⁵⁷ This right extended to voir dire and jury selection for criminal trials.⁵⁸

As observed in *Fenstermaker*, the United States Supreme Court has articulated the underlying basis for granting members of the public an enforceable right of access to criminal trial proceedings.⁵⁹ A “strong societal interest” is served by conducting publicly open trials.⁶⁰ Openness in criminal court proceedings has

53. *Gannett*, 443 U.S. at 380–81 (citing *In re Oliver*, 333 U.S. 257, 270 n.25 (1948), and *Estes v. Texas*, 381 U.S. 532, 538–9 (1965)). The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy *and public* trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI (emphasis added).

54. *Gannett*, 443 U.S. at 380.

55. *Id.* at 384–85.

56. *Id.* at 392.

57. 530 A.2d 414, 417 (Pa. 1987). In *Fenstermaker*, a newspaper had filed a motion to inspect and copy affidavits of probable cause that were used to support arrest warrants of defendants charged with homicide and rape. *Fenstermaker*, 530 A.2d at 416. The trial court ordered the records to be sealed from public view, the superior court affirmed on appeal, and the Supreme Court of Pennsylvania then took the case for review. *Id.* Justice Flaherty noted in the opinion of the court that in the Commonwealth of Pennsylvania, the tradition of openness was not only based upon common-law tradition but also “upon the First Amendment of the Constitution of the United States.” *Id.* at 417.

58. *Press-Enterprise I*, 464 U.S. at 501.

59. *Fenstermaker*, 530 A.2d at 417 (citing *Gannett*, 443 U.S. 368, and *Richmond Newspapers*, 448 U.S. 555).

60. *Gannett*, 443 U.S. at 383.

been regarded as possibly "improv[ing] the quality of testimony, [encouraging] unknown witnesses to come forward . . . , caus[ing] all trial participants to perform their duties more carefully, and generally giv[ing] the public an opportunity to observe the judicial system."⁶¹

Furthermore, public access to and openness of criminal trials not only increased actual fairness in the system, but also helped to maintain an *appearance* of fairness of the justice system.⁶² In *Richmond Newspapers, Inc. v. Virginia*, the United States Supreme Court underscored the role that the mere appearance of justice, fostered by a transparent criminal system, has played in society.⁶³ The issue before the Court in *Richmond* was whether the right of the press and public to attend criminal trials was guaranteed by the United States Constitution.⁶⁴ The court in *Richmond* stated that the appearance of justice was best sustained by allowing people to observe the process.⁶⁵ In the plurality opinion, Chief Justice Burger explained that it was difficult for people in an open society to accept what they were not permitted to observe, and when a criminal trial was conducted in the open, the public had the opportunity to understand the system in general and also its workings in a particular case.⁶⁶ Therefore, the court held that, although the right to attend criminal trials was not expressly identified in the Constitution, it was a necessary component for enjoying other First Amendment rights and thus was guaranteed, absent an overriding interest for closing the trial as supported by the trial court's findings.⁶⁷

Two years after deciding *Richmond*, the Supreme Court of the United States again faced the issues of right of access and openness in criminal trials in *Globe Newspaper Co. v. Superior Court*.⁶⁸ *Globe* involved a newspaper's challenge to a Massachusetts statute that required trial judges to exclude the press and general public from the courtroom during the victim's testimony for prosecutions of certain sexual offenses involving a victim younger than eighteen.⁶⁹ The issue was whether the statute as construed vio-

61. *Id.* (citing *Estes*, 381 U.S. at 583 (Warren, C.J., concurring)).

62. *Richmond Newspapers*, 448 U.S. at 571-72.

63. *Id.*

64. *Id.* at 558.

65. *Id.* at 572.

66. *Id.*

67. *Richmond Newspapers*, 448 U.S. at 579-81.

68. 457 U.S. 596 (1982).

69. *Globe*, 457 U.S. at 598.

lated the First Amendment.⁷⁰ The Court relied on its opinions in *Richmond* to describe the two features of the criminal justice system that buttress the public right of access to *criminal* trials in particular.⁷¹ First, the criminal trial historically was open to the press and public, and, second, this openness positively contributed to the functioning of the judicial system.⁷² Because the Massachusetts statute controverted the presumption of openness that the Court espoused in *Richmond*, the rule as construed by the Massachusetts Supreme Judicial Court violated the First Amendment.⁷³

Next, the Supreme Court of the United States decided *Press-Enterprise Co. v. Superior Court (Press-Enterprise I)*,⁷⁴ in which it considered whether the guarantee of open public proceedings in criminal trials extended to voir dire examination.⁷⁵ Chief Justice Burger stated that the process of jury selection was a matter of importance not only to the adversaries in a dispute, but also to the criminal justice system.⁷⁶ Chief Justice Burger wrote that prior to the Norman Conquest, it was compulsory for freemen to attend and participate in the local court.⁷⁷ As the jury system evolved, the jury became a smaller segment chosen to represent the community; however, judicial proceedings and jury selection constantly remained public in nature.⁷⁸ This tradition carried over to

70. *Id.*

71. *Id.* at 605.

72. *Id.* at 605–06.

73. *Id.* at 610–11.

74. 464 U.S. 501 (1984).

75. *Press-Enterprise I*, 464 U.S. at 503. This case involved the prosecution of Albert Brown, Jr., for the rape and murder of a teenage girl. *Id.* Before the voir dire of prospective jurors began, *Press-Enterprise* filed a motion to intervene, arguing that the voir dire be open to members of the public and press, that the public had an absolute right to attend the trial, and that voir dire was the commencement of the trial. *Id.* The trial judge permitted petitioner to attend only the general voir dire, and all but three days of the six weeks of voir dire were closed to the public. *Id.* Petitioner's motion was denied, as was its writ of mandate to compel the superior court to release the transcript and to vacate the order that closed the voir dire proceedings. *Id.* at 504–05. The California Supreme Court denied *Press-Enterprise's* request for a hearing, and the United States Supreme Court granted certiorari. *Press-Enterprise I*, 464 U.S. at 505.

76. *Id.* at 505. Justice Burger went on to note the history of an open jury selection process: “[S]ince the development of the trial by jury, the process of selection of jurors has presumptively been a public process with exceptions only for good cause shown.” *Id.*

77. *Id.* The Norman Conquest was the military invasion and conquest of England by William of Normandy that took place in 1066, when William was not crowned king of England as he had expected. *Norman Conquest*, in 8 THE NEW ENCYCLOPAEDIA BRITANNICA 766–67 (15th ed. 2005). Profound political, administrative, and social reform resulted, and changes to the legal system included an increased use of sworn testimony for administrative and judicial purposes and the introduction of canon law. *Id.*

78. *Press-Enterprise I*, 464 U.S. at 506.

the American colonies, and public jury selection was the common practice when the United States Constitution was adopted.⁷⁹ The Court relied on its previous decision in *Richmond* for the basis of maintaining openness and its benefit to society.⁸⁰ The Court held that closing all but approximately three days of the six-week voir dire was unconstitutional because the trial judge should seal only the parts of the transcript that are necessary to preserve the anonymity of individual potential jurors.⁸¹

However, the public's right of access embodied in the First Amendment and in the common law was a *qualified* right that existed only to the extent necessary to enjoy other First Amendment rights, and must always be balanced with the defendant's right to a fair trial.⁸² The circumstances under which the public may be barred are limited, and the state must show sufficient justification for its request to deny access.⁸³ When the state desires to deny the public the right of access in order to inhibit the release of sensitive information, the record must show that the closure was necessitated by a compelling governmental interest and was tailored only to serve that interest.⁸⁴

To illustrate the qualified nature of the public's right of access, the use of an anonymous jury in criminal trials has emerged under extraordinary circumstances.⁸⁵ This maneuver was primarily created by the federal courts to protect juries from potential tampering.⁸⁶ Factors implicated when a court must determine whether to impanel an anonymous jury are whether the defendant was "alleged to have engaged in dangerous or unscrupulous conduct," whether the defendant previously attempted to disrupt the judicial process, and whether the trial had garnered a "substantial

79. *Id.* at 508.

80. *Id.* at 508-09.

81. *Id.* at 513.

82. *Globe*, 457 U.S. at 606. "Although the right of access to criminal trials is of constitutional stature, it is not absolute." *Id.* "No right ranks higher than the right of the accused to a fair trial." *Press-Enterprise I*, 464 U.S. at 508.

83. *Globe*, 457 U.S. at 606. See also *Press-Enterprise Co. v. Super. Ct. of Cal. (Press-Enterprise II)*, 478 U.S. 1, 28 (1986) (holding that the sealing of a judicial transcript must be justified by a compelling or overriding governmental interest, and the closure order must be narrowly tailored to fulfill that interest).

84. *Globe*, 457 U.S. at 606-07.

85. William D. Bremer, Annotation, *Propriety of Using Anonymous Juries in State Criminal Cases*, 60 A.L.R.5th 39 § 1[a] (1998). The annotation identified "anonymous juries" as including those in which specific information regarding jurors' identities, such as names, addresses, or employer information, was not disclosed to or permitted to be revealed by the accused at trial. *Id.*

86. *Id.* § 2[a].

degree of pretrial publicity” such that disclosure of jurors’ names to the public would expose them to intimidation or harassment by the public or people associated with the defendant.⁸⁷

The line of cases leading to *Commonwealth v. Long* demonstrated a trend toward increasing the openness of criminal justice proceedings. The constitutional protection of open access became firmly rooted in 1980 with *Richmond Newspapers v. Virginia*, in which the Supreme Court of the United States held that the right to attend criminal trials was encompassed within the First Amendment and that criminal trials must be open to the public unless the record specifically supports otherwise.⁸⁸ Then, in 1982, *Globe Newspaper Co. v. Superior Court* struck down as unconstitutional a Massachusetts statute that mandated closure of the courtroom during witness testimony of minor victims.⁸⁹ The Court in *Globe* also held that a state must show that closure of a criminal trial to the press and public was necessitated by a compelling governmental interest and narrowly tailored to serve that interest.⁹⁰ In 1984, the guarantee of open criminal trials was extended to cover voir dire as well, and, similar to trial proceedings, the trial court cannot constitutionally close voir dire to the press to protect jurors’ privacy unless specific findings in the record supported the broad order.⁹¹ Based on the historical evolution of the criminal trial and case law, the Supreme Court of Pennsylvania held in *Long* that the common law did not provide the press with a right of access to jurors’ names and addresses, but the Constitution of the United States provided the press with a qualified right of access to jurors’ names only.⁹²

The challenge in providing the press and public with access to criminal trial proceedings lies in the need to balance opposing interests: the defendant has the right to a fair trial under the Sixth Amendment, the press and public have the right to observe criminal proceedings under the First and Fourteenth Amendments, and members of the jury have the right to protect their privacy and safety.⁹³

The Supreme Court of Pennsylvania supported its decision in *Commonwealth v. Long* with a thorough analysis of both history

87. *Id.*

88. 448 U.S. 555, 580–81 (1980).

89. 457 U.S. 596, 610–611 (1982).

90. *Globe*, 457 U.S. at 606-09.

91. *Press-Enterprise I*, 464 U.S. at 513–514.

92. *Commonwealth v. Long*, 922 A.2d 892, 898–99, 904 (Pa. 2007).

93. *See Gannett Co. v. DePasquale*, 443 U.S. 368, 392–93 (1979).

and case law from the Supreme Court of the United States.⁹⁴ The court relied heavily on Justice Brennan's approach in *Globe*, which was formally adopted by the Court in *Press-Enterprise II*.⁹⁵ To determine whether the press had a constitutionally protected right of access to the transcript of a preliminary hearing, the Court applied the "experience and logic" test.⁹⁶ This test incorporated all the relevant factors in determining whether to provide open access to a particular aspect of a criminal trial.

The "experience and logic" test was appropriately used by the court in *Long* to determine both that the names of jurors must be disclosed absent specific findings in the record supporting nondisclosure and also that this guarantee did not extend to jurors' addresses.⁹⁷ Chief Justice Cappy demonstrated that jurors' names historically have been known to the public, and access to this knowledge provided the public with an additional check on the impartiality of the impaneled jury, thus serving a legitimate judicial purpose.⁹⁸ Conversely, Chief Justice Cappy was able to show that public knowledge of jurors' addresses did not have the same historical precedent, nor did it serve any apparent judicial function.⁹⁹ In fact, Chief Justice Cappy posited that disclosure of jurors' addresses would actually hamper justice, as members of the public have expressed fear of being harassed by the media and of incurring physical harm related to serving on a jury in a criminal trial.¹⁰⁰ These fears are considered under the "logic" prong of the test—i.e., only information that serves some judicial function should be disclosed. Because jurors' addresses are not part of the official record, have not historically been open to the public, and serve no significant purpose beyond additional identification of jurors, the ruling in *Long* protects the personal rights of jury members while adhering to the press's right of access to criminal proceedings.

The trial court is entrusted with the responsibility of protecting the safety of the jury and has the sole discretion to take measures

94. *Long*, 922 A.2d at 892. The court looked primarily to federal case law because it determined that article I, section 11 of the Pennsylvania Constitution (which provides a right of access to the public in criminal trials) is read coextensively with the First Amendment of the U.S. Constitution. *Id.* at 905 n.15.

95. *Id.* at 900 (citing *Press-Enterprise II*, 478 U.S. at 8).

96. *Press-Enterprise II*, 478 U.S. at 8–9.

97. *Long*, 922 A.2d at 901–03.

98. *Id.* at 904.

99. *Id.*

100. *Id.*

necessary to safeguard jurors.¹⁰¹ The judge also has discretion to take actions needed to maintain order in the courtroom.¹⁰² The ruling in *Long* did not attempt to limit the trial court judge's control of his or her courtroom; rather, it required that the judge rely on specific findings as included in the record so that the decision may be properly reviewed on appeal.¹⁰³ This strengthens the efficiency of the appeals process, in that a complete record and specific findings can be used to determine whether the trial court abused its discretion; such efficiency can profoundly improve the administration and quality of justice within the criminal justice system throughout the United States.

However, the case law in this area also has demanded that the trial court support any closure with specific findings in the record in order to pass constitutional muster.¹⁰⁴ This ensures that the trial court judge did not arbitrarily close proceedings to the press and public, which would give insufficient weight to the public's qualified constitutional right of access. Requiring the judge to substantiate his or her decision to close any part of the trial proceedings strikes a balance between the First Amendment rights of the public and the Sixth Amendment rights of the defendant. The requirement allows closure if necessary to protect a defendant from possibly prejudicial publicity, but also gives adequate consideration to the qualified open-access guarantee afforded to the public, preserving the different constitutional rights of both entities. Just as transparency is essential to fostering the public's confidence in the criminal justice system and in ensuring a fair trial for defendants, transparency must exist in the trial court judge's decision to bar access to the proceedings for the same reasons.

However, other courts have undertaken similar analyses on the issue of disclosing juror information and have come to different conclusions.¹⁰⁵ In *United States v. Quattrone*, the United States Court of Appeals for the Second Circuit held that an order prohibiting publication of jurors' names and addresses during a trial

101. See Bremer, *supra* note 85, § 8.

102. See *Richmond Newspapers*, 448 U.S. at 600 (Stewart, J., concurring) (discussing the duty and discretion of a trial judge in keeping a quiet and orderly courtroom, which may justify putting limitations on admittance to a courtroom).

103. *Long*, 922 A.2d at 905.

104. *Richmond Newspapers*, 448 U.S. at 581 (plurality opinion). "Absent an overriding interest articulated in the findings, the trial of a criminal case must be open to the public." *Id.* (emphasis added). Cf. *Richmond Newspapers*, 448 U.S. at 605 (Rehnquist, J., dissenting) (the state's reasons for denying public access to a trial should not be subject to any additional constitutional review).

105. *Long*, 922 A.2d at 905.

constituted a prior restraint and therefore violated the First Amendment.¹⁰⁶ Additionally, the Court of Appeals of Michigan determined that the press had a qualified First Amendment right of access to the names and addresses of jury members post-verdict.¹⁰⁷ The court in *In re Globe Newspaper Co.* provided access to jury members' names and addresses under a Massachusetts statute.¹⁰⁸ Although these cases provided alternative arguments and conclusions, the cases of the Supreme Court of the United States, along with the historical background presented, provide a more solid foundation and stronger precedent in the matter.

Because the Supreme Court of Pennsylvania relied on cases decided by the highest court in the country and supported its conclusions with a thorough analysis, the holdings in *Long* will hold up against future challenges and will guide the press's constitutionally protected access to criminal trials. The duty of the press to gather information and disseminate news regarding criminal prosecutions must always be viewed under the umbrella of the United States Constitution and the inviolable rights it affords to criminal defendants. In the same vein, trial court judges must always consider the press's First Amendment right to gather and report information and the right of the public to observe criminal trial proceedings when determining whether to close the courtroom or deny access to judicial documents. By enforcing the "experience and logic" analysis espoused by the Supreme Court of the United States and applied by the Supreme Court of Pennsylvania in *Commonwealth v. Long*, the rights of the press, the public,

106. 402 F.3d 304, 313-14 (2d Cir. 2005).

107. *In re Disclosure of Juror Names and Addresses*, 592 N.W.2d 798 (Mich. Ct. App. 1999). In this appeal stemming from a high-profile prosecution for rape and murder, the Court of Appeals of Michigan ruled that the Detroit Free Press newspaper had a right to access jurors' names and addresses post-verdict. *In re Disclosure*, 592 N.W.2d at 798. This right was further held to be subject to the trial court's discretion regarding jury safety insofar as supported by specific findings in the record. *Id.*

108. 920 F.2d 88, 98 (1st Cir. 1990).

criminal trial defendants, and jury members can be balanced against each other with the aim of protecting the constitutional rights of all.

Amy Nicoletti

