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What Does the Second Amendment Protect?

SUMMARY: A District of Columbia law prohibiting most residents from registering or carrying a handgun, or from possessing a firearm unless it is unloaded and disassembled or locked, violates the Second Amendment. The United States Court of Appeals for the District of Columbia Circuit decided *District of Columbia v. Heller* on March 9, 2007.

BACKGROUND: Various statutes in the District of Columbia impose substantial gun restrictions. One bars registration of handguns except by retired D.C. police officers. Another prohibits carrying a gun without a license. A third requires that all firearms be kept unloaded and disassembled or secured by a trigger lock.

A group of plaintiffs including Shelly Parker and Dick Heller sued the District, arguing that the laws violated the Constitution's Second Amendment. Parker wanted to possess a handgun in her home for self defense, and Heller, a D.C. special police officer permitted to carry a gun at his job guarding the federal judicial center, was denied a registration certificate to own a handgun.

The district court dismissed their lawsuit, holding that the Second Amendment applies to gun ownership only within the context of a state militia, not in a person's individual capacity. Heller and the others appealed.

ANALYSIS: The Second Amendment says, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed." The District argued that the amendment's initial language established the scope of the right it protected: gun use in collective defense. Because the Founders couched the firearms right in terms of state security, rather than protection of individuals, they did not intend to create a general right to guns outside the militia context.

Heller and the others disagreed. They argued that the militia language was introductory, demonstrating the right's political value—the Founders were wary of standing armies' potential for oppressive use by a tyrannical government. Yet Heller maintained the prefatory language did not limit the general right of firearms possession and use in place when the Bill of Rights was drafted. Guns were commonly owned for hunting and self-defense and this existing right, Heller argued, was not restricted but protected by the Second Amendment.

The circuit court boiled the question down to whose right the amendment protects—the individual's or only the collective right to own guns for militia service. The amendment protects the right "of the people...." To the District, this meant the people serving in a militia. Heller argued that that reading was too narrow. Other amendments defining rights "of the people" protected individual liberties from government encroachment. Likewise, the Second Amendment protected individual firearm ownership.

The circuit court majority explored the history surrounding militias at the time of the Bill of Rights. These defensive bodies were drawn from the general population of men between 18 and 45 years old. Important for the majority was the fact that they were to provide their own firearms for this service. Because ordinary citizens comprised the militia, which was not an organized standing military force, and because they were to provide their own firearms for service, the lawfulness of general and widespread gun ownership by everyday citizens was an essential element of a viable militia. Put another way, an armed militia could not be called up from the general population in time of need if individuals were not widely armed. The court noted that contemporaneous documents both political and non-political recognized firearm use and ownership among the people for purposes such as hunting and self defense.

Another term the majority looked at was "keep." The District argued that this term was unimportant by itself and had significance only as part of the phrase "keep and bear"—in other words, it was military jargon. The majority disagreed. While documents of the period supported the idea that "bear arms" was used in military terms, it was used in other contexts as well, including self defense. The District did not have proof that "keep and bear" was solely a military term. As a result, the majority was unwilling to treat the word "keep," which at that time as now meant to possess or own, as if it did not exist in the amendment.

Both sides relied on a Supreme Court case from 1939 called *U.S. v. Miller* in which a defendant charged with possessing a sawed-off shotgun argued that the law banning the weapon violated the Second Amendment. The *Miller* Court held that because a sawed-off shotgun was not a recognized weapon suitable for militia use, it was not protected by the amendment. The District argued that this opinion limited the amendment to militia purposes. Heller argued no, it dealt only with the types of firearms that could be prohibited. While a sawed-off shotgun could be banned, weapons recognized as common among people and suitable for militia use would be protected in private hands.

The circuit court majority agreed with Heller and reasoned that the firearms plaintiffs in this case sought to own, a long shotgun and handguns, are in widespread use in society and therefore are protected by the amendment.

Finally, the District argued that because it was not a state, and the Second Amendment was directed to the "security of a free State," it could impose any restrictions it wanted on firearms. The majority dismissed this argument, noting that the Supreme Court had held that the Constitution's protections apply throughout the country, including inside the district. Were that not the case, Congress could carve out territory in which it could violate the people's rights. As the Supreme Court reasoned, "Congress cannot do indirectly what it cannot do directly." Thus creation of the District of Columbia did not remove it from the Constitution's protections.

The majority concluded that the Second Amendment did not create the right to keep and bear arms, it merely protected it as it existed at the time the Bill of Rights was drafted. Thus, limitations that were acceptable then, such as restrictions on concealed weapons, are still permissible. The court determined only that to the extent the District's laws prohibited people from using guns as they were commonly used when the Second Amendment was created, it was void. Thus, the District could not prevent virtually all people from registering or carrying a handgun, or from possessing a gun in such condition that it could be used swiftly for self defense.

One judge dissented. She opined that *Miller* limited Second Amendment interpretation to state militias, not individuals. She also disagreed with the majority's conclusion that the District was a state

for Second Amendment purposes. Although she agreed that constitutional protections generally apply in the District, the Second Amendment was an exception because it applied to state militias—for the purpose of protecting them from a tyrannical federal government. Because the District is not a state but is an entity solely of federal creation and management, it has no need of protection from the federal government because it is the federal government.

EXCERPTS FROM THE MAJORITY OPINION (By Judge Silberman): "In determining whether the Second Amendment's guarantee is an individual one, or some sort of collective right, the most important word is the one the drafters chose to describe the holders of the right—'the people.' That term is found in the First, Second, Fourth, Ninth, and Tenth Amendments. It has never been doubted that these provisions were designed to protect the interests of *individuals* against government intrusion, interference, or usurpation. We also note that the Tenth Amendment—'The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people'—indicates that the authors of the Bill of Rights were perfectly capable of distinguishing between 'the people,' on the one hand, and 'the states,' on the other. The natural reading of 'the right of the people' in the Second Amendment would accord with usage elsewhere in the Bill of Rights.

"The District's argument, on the other hand, asks us to read 'the people' to mean some subset of individuals such as 'the organized militia' or 'the people who are engaged in militia service,' or perhaps not any individuals at all—e.g., the states.' These strained interpretations of 'the people' simply cannot be squared with the uniform construction of our other Bill of Rights provisions. Indeed, the Supreme Court has recently endorsed a uniform reading of 'the people' across the Bill of Rights.

"To determine what interests this pre-existing right protected, we look to the lawful, private purposes for which people of the time owned and used arms. The correspondence and political dialogue of the founding era indicate that arms were kept for lawful use in self-defense and hunting.

The pre-existing right to keep and bear arms was premised on the commonplace assumption that individuals would use them for these private purposes, in addition to whatever militia service they would be obligated to perform for the state. The premise that private arms would be used for self-defense accords with [early legal commentator] Blackstone's observation, which had influenced thinking in the American colonies, that the people's right to arms was auxiliary to the natural right of self-preservation. The right of self-preservation, in turn, was understood as the right to defend oneself against attacks by lawless individuals, or, if absolutely necessary, to resist and throw off a tyrannical government.

EXCERPTS FROM THE DISSENT (By Judge Hendrickson): "Although 'the Constitution is in effect . . . in the District,' as it is in the States, '[a] citizen of the district of Columbia is not a citizen of a state within the meaning of the constitution.' Accordingly, both the Supreme Court and this court have consistently held that several constitutional provisions explicitly referring to citizens of 'States' do not apply to citizens of the District. On the other hand, the Supreme Court and this court have held that the District can parallel a 'State' within the meaning of some constitutional provisions. Ultimately, '[w]hether the District of Columbia constitutes a "State or Territory" within the meaning of any particular statutory or *constitutional provision* depends upon the character and aim of the specific provision involved.'

"The Second Amendment's 'character and aim' does not require that we treat the District as a State. The Amendment was drafted in response to the perceived threat to the 'free[dom]' of the 'State[s]' posed by a national standing army controlled by the federal government. In *Miller*, the Supreme Court explained that '[t]he sentiment of the time [of the Amendment's drafting] strongly disfavored standing armies; the common view was that adequate defense of country and laws could be secured through the Militia' composed of men who 'were expected to appear bearing arms supplied by themselves.' Indeed, at the time of the Constitutional Convention, 'there was a widespread fear that a national standing Army posed an intolerable threat to individual liberty and to the *sovereignty of the separate States*.' The Second Amendment, then, 'aimed' to secure a military balance of power between the States on the one hand and the federal government on the other. Unlike the States, the District had—and has—no need to protect itself from the *federal* government because it is a federal entity created as the seat of that government."

COMMENTS & QUESTIONS

The Second Amendment reads: "*A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.*" What does this mean? If the first two clauses of this Amendment were omitted, there would be no dispute: the Amendment would protect an individual's right to bear arms. However, the legal debate arises on whether the first two clauses qualify the rest of the Amendment to protect gun possession only as part of service in a militia or its modern day counterpart, the state controlled National Guard.

In this case, the D.C. Circuit Court of Appeals declared that this means that the right of the people to bear arms is an individual right, not a collective right held by the state governments or the National Guard. The United States Supreme Court will review this decision this spring and will decide this issue. This is your chance to predict how the Court will rule.

The last time the Supreme Court wrote in detail about the Second Amendment, it was 1939. The case was *U.S. v. Miller*, involving bootleggers who claimed the right to transport unregistered sawed-off shotguns across state lines. In that case, the Court observed that since the weapons had no "reasonable relationship to the preservation of a well-regulated militia, [the Court could not] say that the Second Amendment guarantees the right to keep and bear such an instrument." Despite the references in the *Miller* case to a militia, the opinion was sufficiently complicated that both sides claim the decision as precedent.

Because of the lack of legal precedent in the area, the case may well be decided by "historical evidence". Just what did the Framer's mean to protect when they wrote the Second Amendment? When referring to a militia, do you think that the Framers had in mind the National Guard of today? Or were they referring to all able bodied male citizens who might be called upon to defend their country? Or, do you think they were referring to able bodied males who might be called upon to fight against a government that might become to tyrannical? The Framers who drafted the Constitution and Bill of Rights were divided into two main camps, the Federalists and the anti-Federalists. The first group supported a powerful federal government that could coordinate the former colonies and promote a strong new nation. Anti-Federalists felt the troubles that led to the Revolutionary War were caused in large part by government overreaching. They wanted a bare-bones federal government weak enough that it could not easily rise up and oppress the people, allowing a new "king" on this soil to re-enact their prior troubles. The Bill of Rights was added to the Constitution to protect individual rights. Does it seem curious that the Second Amendment would not protect individual rights, as well?

If it is found that the Second Amendment does protect individual rights, does that mean that there can be no regulation of gun ownership? This is unlikely since there are even restraints on Free Speech. Just as the Court has allowed limits on free speech, there could be reasonable limits on gun ownership and use.

Or, do you agree with the dissent and think that the District of Columbia should be treated differently than the States?

Student Expulsion for School Computer Hacking

SUMMARY: A Pennsylvania school had the authority to that expel a student for the rest of the semester after he helped a fellow student hack into the school computer system, even though the maximum penalty described in the student handbook was a 10-day suspension. The Commonwealth Court of Pennsylvania decided *MT v. Central York School District* on November 5, 2007.

BACKGROUND: MT was a high school student in the Central York School District. During the 2005-2006 school year, he was suspended for three days for his role in creating a website through the school computer system that allowed students to print fake identification cards identical to those used in the school district.

In mid-October 2006, a photograph of a student appeared on the school's website without the school's authorization. As school officials investigated the incident, they questioned MT because of his role in the prior year's computer mischief. MT admitted that he had helped a fellow student hack into the school's computer system. Specifically, MT had loaded some software onto the system that allowed those with the necessary passwords to sign on to the system via the internet and make changes. MT cooperated with the school, and officials restored the system to its prior secure state.

The school charged MT with violating the school's computer use policy. This policy was set forth in the student planner, which MT and his family received at the beginning of the school year. Punishments for violating school computer policy are set forth in the planner's appendix. For "second offense," the appendix indicates a 10-day loss of privileges and in-school suspension.

At the close of the hearing, the Central York School Board ordered that MT be expelled for the remainder of the fall semester ending January 27th. MT, through his mother, appealed the board's decision to a Pennsylvania trial court, which affirmed.

MT then appealed to the Pennsylvania Commonwealth Court, which hears appeals in cases by or against the state.

ANALYSIS: The York School Board provided MT and his family with the student planner containing the district's computer use rules. Violations included illegal uses, circumventing computer security, and loading unauthorized data, files or software onto the system. The student planner also stated in a preamble to the Appendix that the punishments set forth were a guide and that individual cases might warrant modification.

MT argued that when the student planner lists a punishment of 10-days in-school suspension for a second computer use violation, the school board exceeds its authority in expelling him for the rest of the semester—a period of several months. He also argued that because he had cooperated fully in the school's investigation of the incident, he did not deserve such a harsh departure from the prescribed punishment.

School officials argued that hacking past the computer system's security measures was a serious offense that could jeopardize critical information and activities within the school. The school also stressed that the listed punishments were a guide only, and that the school code also provided that any violation of state law could result in expulsion; the principal said that computer hacking did violate Pennsylvania law. Finally, officials argued that a 10-day suspension was unlikely to have a strong deterrent effect on MT given that he had violated computer policy the prior year and been suspended for three days.

A majority of the three-judge panel on the Commonwealth court reviewing the case agreed with the school. They were convinced that the language describing the punishments set forth in the student planner as "a guide," along with the provision allowing the school to expel a student for breaking the law, supported the school board's decision.

One judge dissented. She cited the legal principle that specific language trumps general statements in a code of law. By prescribing a maximum 10-day suspension for a second offense, the school was not free to expel MT for the rest of the semester. The dissent likewise took issue with the "violation of law" provision. She opined that a violation of law must be charged and proven, and that no criminal charges were brought against MT. The board was not entitled to enlarge the punishment by stressing that it was a second offense because the 10-day suspension was based on a second offense. The fact that MT cooperated fully with the school, admitting what he had done and describing his actions, was further reason to keep the punishment within the guidelines the school had given MT and his family as explanations of school policy.

EXCERPTS FROM THE MAJORITY OPINION (By Judge Pellegrini): "Student contends that the School Board erred in expelling him because the School District charged him with a violation of the Computer Use Policy *and* a violation of state law. However, under the Computer Use Policy, the maximum penalty was a suspension of up to 10 days, and under the policy violations in the Student Code, which indicated that a student could be punished for violating 'any local, state or federal law,' violation of computer usage was not listed. The Board disagrees and argues that it used the School Code as a whole to determine the appropriate penalties because the Computer Use Policy does not presume to identify all conduct that is also a violation of law or conduct that is so severe that it would be considered a felony under Pennsylvania law.

"In this case, the School Board properly exercised its discretion to expel Student. While the Computer Use Policy *suggested* penalties up to a 10-day suspension, it also indicated in the Appendix that such a punishment was only to act as a *guide*, and an individual case could warrant the modification of the listed penalties. This is such a case. Although Student argues that there is a 'lack of proportionality' between the violation and the sentence, the evidence suggests otherwise. Previously, he committed a serious and potentially damaging violation of the School District's Computer Use Policy when he made false student identification cards, and this time he committed a more serious violation of the School District's Computer Use Policy by decoding encrypted information and helping another student access extremely sensitive and private School District information. Given his history, a 10-day suspension was not likely to get his attention because he did not learn from his prior suspension for computer misconduct, and given that his conduct is felonious under the Crimes Code, an expulsion was entirely appropriate."

EXCERPTS FROM THE DISSENT (By Judge Leavitt): "The School District's [position that an uncharged violation of the law supports expulsion] would give the District authority to expel a student who is seen jaywalking, even though that student never receives a citation for this misadventure or pays a fine. It would be enough, apparently, for the School District to rely on the statement of a witness who saw the deed or to extract a confession from the scofflaw student. No one can read the Student Code and

understand that jaywalking, or not filing taxes on time, will lead to any expulsion from school.

"The School District has the general Exclusion from School provision trumping the very specific provision in the School Code on what happens when a student uses a computer 'in an illegal manner,' which is the opposite of what should occur. When a general provision is in conflict with a special provision and the conflict is irreconcilable, the special provision shall be construed as an exception to the general provision. It is not even clear there is a conflict because the two provisions can be read together. The Exclusion from School provision authorizes suspensions *or* expulsions for violations of law; the specific provision on using school computers 'in an illegal manner' clarifies that the sanction will be a suspension. The School District simply reads the Exclusion from School provision in a vacuum.

"School boards have broad discretion in determining school disciplinary policies, and courts are not inclined to interfere with such matters unless it is apparent that the school board action was arbitrary, capricious and prejudicial to the public interest. However, a school board must operate within statutory and constitutional restraints. One such restraint imposed by the State Board of Education is to require school districts to give students and their parents notification of student conduct rules. To reach that end, a school board must adopt a code of student conduct; publish and distribute the code to students and parents; and define and publish the types of offenses that could lead to exclusion from school, whether by suspension or expulsion.

"The regulation requires a school district to communicate the rules to students to avoid surprise. The regulation is frustrated when a school district purports to reserve to itself unbridled discretion to disregard the express and specific terms of its Student Code. The preamble to the Appendix cannot nullify what follows in the Appendix. However, lest there be any question about the meaning of the preamble, it was resolved by the Student Planner, which provides for a maximum 10-day loss of computer privileges and an in-school suspension. For the foregoing reasons, I believe the School Board abused its discretion by ignoring its own stated policy and arbitrarily expelling Student. I would reverse the order of the trial court and the adjudication of the School Board expelling Student from school. Any other result renders the publication of the Student Code an empty exercise."

COMMENTS & QUESTIONS

1. What did MT do that upset the school?
2. Had he ever done anything like this before?
3. Was he cooperative when the school suspected he might be involved?

Due process is an ancient principle carried over to our legal system from England's. It is the just and logical rule that government must provide citizens with notice of its laws and the penalties for violating them. Likewise, when the government believes a citizen has violated the law, it must provide the citizen with notice of the alleged violation and an opportunity to explain his or her position and offer a defense to the charges. This is the most common notion of due process, also called "procedural due process," as it focuses on fair procedures in the administration of the law. There is also "substantive due process," the principle that the essence of the law or government action must be reasonable in and of itself. Thus, government cannot punish people for secret laws it doesn't publish or disclose (a violation of procedural due process), nor can it pass laws that are unreasonable, like "all smokers shall be shot" or "people taller than 6'6" shall be subject to a 'tall tax' of a dollar a day" (violations of substantive due process).

This case could be challenged on both grounds. Although the court does not use the due process language, MT may have argued that his procedural due process rights were violated because the school gave him notice of the consequences for his behavior and then applied a much harsher one. He could also have argued that depriving him of several months of schooling for a computer violation that produced no permanent damage and over which he cooperated fully was unfair in substance—so harsh as to "shock the conscience," one standard used for a substantive due process violation.

Did MT have notice that he was doing something wrong? What did this "notice" indicate his punishment would be? Did he have any reason to suspect he might be punished more severely?

Is hacking into a school's computer system a serious matter? Did MT appreciate this fact? Do you think he deserved to be expelled?

Does your school have a student code? Does it punish misuse of school computers? What is the punishment for a second offense? If your school prescribes a particular punishment, do you think they would stick to it?

What would you do if you were punished more severely than school rules seemed to indicate was appropriate? Could you still sue if they punished you exactly as the rules say? Under what circumstances?

Juror Anonymity After Completion of Mob Trial

SUMMARY: The Chicago Tribune had no constitutional right to obtain the names and addresses of jurors who were promised anonymity in a "mob trial" even after the trial concluded. The United States District Court for the Northern District of Illinois decided this issue in *U.S. v. Calabrese* on October 4, 2007.

BACKGROUND: Nicholas and Frank Calabrese are alleged mob figures, part of Chicago's organized crime network known as "the Outfit." Government authorities looking to shut down organized crime and punish its perpetrators conducted a lengthy investigation into the Outfit's activities. They brought indictments against various key players, charging them with crimes including loan sharking, illegal gambling, extortion, and murder.

Because of the power the Outfit had wielded and the extent and brutality of its crimes, the court granted the government's motion for an anonymous jury at the start of trial. This was done to prevent jury tampering and for the jurors' protection from harm by other Outfit contacts.

The Chicago Tribune newspaper reported on the case. On September 26, 2007, the Tribune filed an emergency motion to intervene in the trial and to secure the names and addresses of the jurors once they delivered their verdict. Jurors reached their verdict the following day. Trial Judge James Zagel granted the motion to intervene immediately, but delayed deciding the second part until he could reason through the implications of turning over the jurors' names.

ANALYSIS: The Tribune argued that it had the right, under the First Amendment's guarantee of a free press, to intervene in the trial and to interview jurors to inform the public. Judge Zagel agreed with their first contention. The Seventh Circuit Court of Appeals, the federal appeals court whose rulings govern district courts including the Northern District of Illinois, had ruled in another case that the press should be allowed to intervene in order to present arguments regarding its rights to report on judicial matters.

The Tribune cited cases from other courts, including the First and Third Circuits, overturning district court orders to limit the press' access to juror information after trial. In the First Circuit case, the court had compared jurors to citizen soldiers, noting that like soldiers some of their duties might be unpleasant. Facing inquiries about their jury service was one such potentially unpleasant task. The court noted that the press' right of access did not in itself expose private information about any juror; jurors were free to refuse all interview requests. The Tribune argued, in effect, that the right to withhold information about jury duty in a trial of public interest belonged to the individual jurors and that the court overstepped its bounds in withholding their identities once the trial was over.

What the Tribune lacked was a clear-cut rule compelling disclosure. No court had said the duty to provide juror names had no exceptions. Rather, all had noted that withholding names could be appropriate in rare cases. Judge Zagel determined that this situation was exactly the sort where anonymity was appropriate. The issue here was not simply one of juror privacy or potential for inconvenience. The men on trial were linked to numerous murders as well as an organization that operates through fear, intimidation and violence. One of the defendants had been a member of the Chicago police department, and obstruction of justice and witness tampering were among the many offenses alleged. This case involved a risk of actual physical harm to the jurors should their identities be disclosed.

Judge Zagel noted that he had given all of the jurors the opportunity to speak to the press. He had set a room aside in the courthouse and informed the jurors that they could meet with the press there after trial if they chose to do so. Not one juror provided his or her name or went to this room. The judge had not forbidden a meeting of jurors and press and had even provided a voluntary means to facilitate it. He had not, however, jeopardized the jurors' safety by providing their names or addresses. This, he concluded, was the correct course under the law.

In addition to the court cases interpreting this question, the judge also cited the Northern District of Illinois' jury selection plan, which states, "Any judge of this Court may order that the names of jurors involved in a trial presided over by that judge remain confidential if the interests of justice so require." This further supported the judge's conclusion that continued anonymity was permissible generally, and appropriate in this case.

EXCERPTS FROM THE COURT'S OPINION (By Judge Zagel): "The Supreme Court has declared that 'the press and general public have a constitutional right of access to criminal trials.' This right, however, is not absolute. The Court has held that the right of access 'may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information.'

"It is true—and Intervenor correctly points out—that the [First Circuit's *Globe Newspaper* decision] directed the district court to turn over the jurors' names and addresses to the intervenor newspaper. However, the specific outcome of that case notwithstanding, *Globe Newspaper* nevertheless supports the proposition that withholding jurors' names is appropriate in some circumstances. The issue here is not whether a broad rule should be established categorically banning the press from accessing jurors' names in all cases. The question, rather, is whether in the narrow context of *this* case, the circumstances favor withholding that information. The *Globe Newspaper* court premised its ruling on the fact that the trial court did not make specific findings to support the determination that the interests of justice required the post-verdict withholding of jurors' names. Thus, to the extent that I find that the interests of justice here require denying Tribune's request, *Globe Newspaper* poses no barrier.

"The *Globe Newspaper* case supports the result here in other ways as well. Tribune cites the same passage in both its opening and its supplemental briefs:

Jurors, after all, are citizen soldiers; unlike judges and court personnel, they are not full-time professionals. At first glance it will seem unfair that, in addition to giving of their time and talent, they may, in publicized cases, be forced to run a press gauntlet and have their identities exposed to a public which they might fear will contain a few vengeful or unbalanced persons. But there are several answers to this: first, jurors may avoid many problems by flatly refusing press interviews when approached. Second, while privacy concerns following a publicized trial are real-and may understandably include some nervousness about personal security-these unfocused fears must be balanced against the loss of public confidence in our justice system that could arise if criminal juries very often consisted of anonymous persons. While anonymity is acceptable in the exceptional case where there is a particular need for it, the prospect of criminal justice being routinely meted out by unknown persons does not comport with democratic values of accountability and openness. Jurors may be citizen soldiers, but they are soldiers nonetheless, and like soldiers of any sort, they may be asked to perform distasteful duties. Their participation in publicized trials may sometimes force them into the limelight against their wishes. We cannot accept the mere generalized privacy concerns of jurors, no matter how sincerely felt, as a sufficient reason for withholding their identities under the interests-of-justice standard.

"Although relied upon by Tribune, this passage effectively illustrates why the jurors' names should be withheld here. First, the court states that 'jurors may avoid many problems by flatly refusing press interviews when approached.' This observation may have been true in 1990 when the *Globe Newspaper* case was decided, but it is

patently untrue today. Even if a juror declines to be interviewed, the news media can nonetheless force that reluctant juror into the spotlight. The recent trial in this building of *United States v. Warner* demonstrates this point. In that case, a newspaper owned by Intervenor gathered and published a great deal of information about the jurors, without actually having to interview the jurors. The events in that case illustrate that the news media can, and unhesitatingly will, investigate jurors' lives without necessarily ever speaking to the juror. The media may examine all aspects of a juror's background and could, in theory, even wait outside a juror's home to take photographs or request interviews. Today, even a photograph or video of a juror declining an interview or evading a reporter is newsworthy. This is so despite the fact that some might fail to see how it advances the public's understanding of how well our courts do the government's business. The *Globe Newspaper* panel likely envisioned a more-or-less polite request from the media seeking comment, followed by a similarly polite media retreat in the face of a flat 'no.' It is unlikely that this would be the court's vision now. This both strengthens juror preference as a reason to continue anonymity and poses another potential 'harm' (besides physical harm) that could befall jurors if their identities are released.

"The passage Tribune cites supports the result here in another way as well. The court stated: 'While anonymity is acceptable in the exceptional case where there is a particular need for it, the prospect of criminal justice being routinely meted out by unknown persons does not comport with democratic values of accountability and openness. This is the 'exceptional' case. Reading Tribune's motion, one might think that we are on the precipice, perilously close to holding all criminal trials in a secluded room, wholly outside the public's view. That is, quite clearly, not so. First, this case is anomalous. I have presided over criminal trials on this Court for more than two decades, yet this is only the second time that I have seated an anonymous jury. Here, there was an unusual combination of dangerous individuals and dense media coverage focused on popular notions of organized crime, its allegedly colorful leaders, and its allegedly colorful ways. It was this mixture that compelled me to take the extraordinary step of seating an anonymous jury. Second, this trial has been remarkably open. Reporters were present throughout all phases of the trial, including voir dire. Also, to the extent that some matters were heard at sidebar, outside the presence of reporters, nearly all of those transcripts are set to be released now that a verdict has been reached.... In short, the news media thoroughly covered this trial from start to finish. It is simply wrong to suggest that withholding the jurors' names somehow deprives the public of meaningful access to these proceedings or threatens to undermine the public's confidence in the criminal justice system.

"Another factor supporting continued anonymity is the fact that efforts have been made to accommodate both the media's desire to gather news and the jurors' interest in remaining anonymous. Immediately after the jury concluded its deliberations, courthouse personnel set aside a room where the news media could interview any juror who wished to speak. Also, when I addressed the jury to thank the members for their service, I informed them that the media wished to speak to them, that this room was being set up to accommodate such a meeting, and that any juror who wished to speak to the press had an absolute right to do so. I further informed the jurors that should they opt not to talk to the press then, that they remained free to speak to the media later if they changed their minds. No juror chose to be interviewed in the room that was set aside, and to my knowledge, no juror has contacted the press since. The import of all this is that the Globe Newspaper court—by stating jurors could simply avoid problems by refusing press interviews—suggested that the district court's order in that case was infirm, at least in part, because it wholly deprived the media of an opportunity to interview the jurors. That is not the case here. Efforts were made to ensure that the media would have access to any juror who acquiesced to an interview. The fact that the jurors have already expressed such fervent reluctance to speak to the media strengthens my resolve that continued anonymity is appropriate. To be clear, my ruling does not *mandate* anonymity, it merely permits it."

COMMENTS & QUESTIONS

1. What sort of trial was *U.S. v. Calabrese*?
2. How was the Chicago Tribune involved?
3. What was the newspaper hoping to accomplish?

Even where there is a legitimate legal controversy, raising it before a court is not open to everyone. Only a party with "standing" can initiate legal action. Thus, if a woman gets hit by a careless driver and injured, but refuses to bring a lawsuit, a neighbor cannot sue the driver on her behalf. The neighbor lacks standing. In order to have standing, a person must have something at stake, some right or interest to lose, in the dispute. The injured woman's neighbor has nothing to lose if she doesn't sue because the reckless driver did not harm the neighbor. Because she has nothing to lose, the neighbor has no incentive to pursue the claim zealously. She could bring a half-hearted claim, lose interest, lose the case or agree to a settlement offer far below what the hit woman's injuries actually were worth. Once the driver's obligation to the injured woman had been decided in this half-hearted case, the woman could not bring her own claim over the same injury. Courts don't want people without an incentive to reach a just result litigating claims.

The Chicago Tribune had not been defrauded, murdered, or otherwise harmed by the defendants. Thus, the paper lacked standing. The Tribune therefore filed a "motion to intervene," without which they could not demand the jurors' identities. The paper argued that it represented the public and that the public had a right to knowledge of the criminal process at work in this trial that would be harmed if the jurors' names were withheld. The judge agreed that the Tribune did adequately represent the public's interest in the trial to intervene. This gave the paper standing to assert its juror-names request. While the Chicago Tribune had the right to assert this interest, the court decided not to provide the Tribune with the jurors' names and addresses.

Do you agree with the judge's decision?

Why are trials open to the public? Do you think that the judge's decision in this case undermines the right of a defendant to receive a public trial? Does it undermine freedom of the press?

There is always the potential that a losing defendant will be mad at the jury and seek to bother or harm them after trial. Does this mean all juries should be anonymous? Should juries in a murder case with one defendant be anonymous? What about when four or five people are on trial for murder? Should murder trials involving gang members use only anonymous juries?

Which right is more important, the public's right to know about the jurors deciding people's fate in criminal trials or a juror's right to be free of harassment or threats?

If jurors can take to the grave what they thought or talked about before convicting someone, should defendants fear improper considerations? Will this case lead to more anonymous juries?

In what circumstances do you think a jury should be anonymous?

Semen Donor Could Not be Recognized Father

SUMMARY: A man who donated sperm to a woman who bore twins through artificial insemination could not be considered the children's father under Kansas law because his asserted agreement with the mother to share in the child's care and rearing was not in writing. The Supreme Court of Kansas decided *In re KMH* on October 26, 2007.

BACKGROUND: Female SH, a lawyer, agreed with male DH that he would provide her with semen for artificial insemination so that SH could have a child. Both were Kansas residents, but SH drove to Missouri to undergo the procedure. DH accompanied her to the clinic, but the first effort was unsuccessful. DH provided her with semen a second time and she again went to Missouri, this time alone, to have the procedure a second time. The effort was successful, as a result of which SH gave birth to twins.

Immediately after the twins were born, SH filed a Child in Need of Care (CINC) petition, in an effort to deprive DH of any parental rights in the twins. She asserted that DH should be found unfit and his rights terminated. DH filed an answer to the petition along with a separate paternity action. He claimed parental rights and acknowledged financial responsibility for the children. He asked for joint custody and visitation.

The district court ruled that Kansas law required a written agreement between the mother and semen donor who is not her husband in order for the donor to create parental rights. Absent a written agreement, Kansas law cut off any potential rights a donor might assert once the artificial insemination procedure takes place. DH appealed and the Kansas Supreme Court granted review to address this question of first impression (i.e.the first case to address this issue) in the state.

ANALYSIS: Kansas has a statute addressing artificial insemination that provides: "The donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the birth father of a child thereby conceived, unless agreed to in writing by the donor and the woman." DH argued that this statute was unconstitutional because he was unaware of it at the time he donated his sperm to SH, a lawyer, and that she had led him to believe he would be the recognized father and would share in the child(ren)'s life and upbringing. Because the statute cut off his parental rights, even though, he says, they had agreed he would have such rights prior to the twins' birth, DH argued that the law violated equal protection and due process. He also argued that SH's CINC petition, which identified DH as the children's father in numerous places, satisfied the statute's requirement of a written agreement.

A majority of the Kansas court relied on the old adage that "ignorance of the law is no excuse." The Kansas statute providing that a semen donor to an unmarried woman would not be considered the child's father was on the books at the time of the procedure. Before that moment, men and women—here SH and DH—had equal power. SH had the right to resist DH's request to be acknowledged as the father of any resulting children and to share in their lives, and DH had the right to refuse to go forward with his contribution of sperm if she refused to recognize his paternal rights. In the majority's opinion, this scenario satisfied equal protection as both the man and the woman had the power to assert parental rights. The majority also concluded that the statute gave fair notice that DH needed to get a written agreement with the mother if he wanted parental rights. The fact that he failed to meet the statute's requirements did not make the process it prescribed unfair.

DH also argued that because he and SH had an oral agreement that he would be the recognized father, a statute nullifying that agreement with a written requirement violated his rights since the U.S. Supreme Court has recognized that bearing children is a fundamental right. The Kansas majority disagreed. The statute did not deprive DH of anything. He deprived himself. He had the opportunity to become the recognized father of these children by insisting that a written agreement to that effect be made before he participated in the artificial insemination procedure. The fact that he failed to do so did not transform a fair law into an unfair one. The blame for failing to secure his rights rested with DH not the statute. The statutory language was clear.

Finally the court looked at DH's claim that the CINC document served as his and SH's written agreement that he was the children's father. Although he was listed as the children's father some 50 times on that document, the court refused to transform her effort to deprive him of parental rights into a written agreement that he had them just because she had chosen the wrong document. A declaratory judgment motion, seeking a court's legal declaration that he was not the father, would have been more conventional, but the court refused to punish SH because she was in "uncharted waters" with a novel legal controversy.

Two judges dissented. They reasoned that because procreation or parenthood is a fundamental right, the government cannot deprive a person of that right through a passive act—failure to make a written agreement. Instead, fundamental rights must be actively waived. The dissent also challenged the majority to consider where this left the children. The court took a situation where both biological parents sought a role in their lives and stripped one of them from their lives completely, even though he wished to contribute to their upbringing and asserted that he and the mother had had an oral agreement that he would play a role (she denied this at trial). The dissenters believed the correct approach was to remand the case for a hearing on DH's claim that he and SH had made the oral agreement. Without such a hearing, the majority, in the dissent's opinion, was not giving proper consideration to the children's best interests or to DH's fundamental right to be a parent.

EXCERPTS FROM THE MAJORITY'S OPINION (By Judge Beier): "We also reject the argument from D.H. and the Center that the statute inevitably makes the female the sole arbiter of whether a male can be a father to a child his sperm helps to conceive. This may be true ... once a donation is made, a recipient who becomes pregnant through artificial insemination using that donation can refuse to enter into an agreement to provide for donor paternity. This does not make the requirement of written agreement unconstitutional. Indeed, it is consistent with United States Supreme Court precedent making even a married pregnant woman the sole arbiter, regardless of her husband's wishes, of whether she continues a pregnancy to term. As discussed above, before a donation is made, a prospective donor has complete autonomy to refuse to facilitate an artificial insemination unless he gets an agreement in writing to his paternity terms. This is more than most fathers, wed or unwed to their children's mothers, can ever hope for. The requirement that a sperm donor's and recipient's agreement be in writing does not violate D.H.'s due process rights.

"There is no technical definition of 'agreed to' or 'writing' in the Kansas Parentage Act.... Although these words or forms of them are defined elsewhere in Kansas statutes, these definitions, by their terms, are inapplicable. We therefore give these words the meaning accorded them in everyday English.... When we do so, there can be no doubt that the pleadings filed by the parties are 'in writing.' However, interpreting them separately or together to prove the parties 'agreed

to' D.H.'s status as a father would require Lewis Carroll's looking glass. The absence of such an agreement necessitated the drafting and filing of the pleadings in the first place. Their existence and substance do not memorialize accord, rather, its opposite. A CINC petition to terminate D.H.'s parental rights may have been an odd procedural vehicle for effecting S.H.'s desire–a court order stating that D.H. never acquired any parental rights. A declaratory judgment action might have been better suited to her legal position. But she and her counsel were in uncharted waters. We will not hold that the pleadings constitute a written agreement by operation of law.

EXCERPTS FROM THE DISSENT (By Justices Caplinger and Hill): "A putative father has come forward to participate in the rearing of his children, emotionally and financially; consequently, his interest in doing so is entitled to full protection under the Due Process Clause. Instead of being given this protection and an opportunity to prove that he intended to actively parent his children, D.H. has been subjected to the workings of a statute of which he was unaware, that required him to 'opt in' to fatherhood before ever donating his sperm, or be forever barred from parenting his children.

"I strongly disagree with the majority's conclusion that D.H.'s own inaction, whether due to ignorance of the law or otherwise, constituted a waiver of his rights to parent. Because the rights to parent are fundamental, those rights may be waived only through an intentional, free, and meaningful choice. Here, the record indicates D.H. was not even aware of [the artificial insemination statute], much less its requirement that he must enter into a written agreement formalizing his intent to parent his child before he provided his sperm to S.H. I would find the statute's requirement that a known sperm donor affirmatively take action to preserve his fundamental rights to parent constituted a violation of due process as applied to D.H.

"Who speaks for the children in these proceedings?... A man who was once considered a 'putative father' in the initial child in need of care proceeding is now branded a mere 'semen donor.' The majority offers the children sympathy. But is this in their best interests? The trial court never got to the point of deciding the best interests of the children because it was convinced that such a consideration was barred by the operation of [the law] to a known donor.... None of the elaborate and meticulous safeguards our Kansas laws afford parents *and children* in proceedings before our courts when confronted with questions of parentage have been extended to these children."

COMMENTS & QUESTIONS

1. Who are DH and SH? Did they have the same basic understanding of the legal system?
2. Did they know one another before the children were conceived?
3. Was there any agreement between them regarding DH's status?

Why do you think Kansas enacted the artificial insemination law? Why would a state want to prevent a sperm donor to an artificial insemination involving a woman other than his wife from being recognized as the father? Who was the state trying to protect? Were they trying to protect the donors from being forced to pay child support after donating sperm? Were they trying to protect the mother from unlikely claims by a donor? Does this law benefit the mother? The father?

This is an unusual case. It seems that a more likely situation would arise when the mother would seek to have the donor named as the father. Since the donor wants to be part of the children's lives, do you think it is unfair to exclude him? Whose interests is the majority protecting in this case? Should DH have any right to participate in the twins' life? What if SH and DH had been married but got divorced before they agreed to the artificial insemination procedure?

What about the interests of the children. In this case we have a father who wants to participate in the children's lives and wants to support the children. Is it in their best interests to preclude this? Is artificial insemination by a man who will not be allowed to meet or care for or provide financially for the resulting children beneficial to them? Should we allow this?

Should the law have made a distinction between anonymous and non-anonymous donors? Should the law deal with these two situations differently?

If the result of banning anonymous sperm donation was that women who wanted children had to adopt, would that violate anyone's rights? Does a "fundamental right" to bear children mean we have to let women bear them with sperm from men they and their resulting children do not and will not know? How can we say that a person has a right to that? Would a woman have a right to demand a stranger have intercourse with her so she could have a child?

If a child of an anonymous donor wants to know who his or her father is, is it just to say no? Is it lawful to say no? Is the right to bear a child more important than the right to know who bore us? Children cannot look after themselves. Does it make sense to limit their rights to know who might be responsible to and for them?

Do you think that the Kansas statute is good public policy? How would you amend the statute? Should society ban sperm donors?

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