The Repercussions of Anonymous Juries

By CHRISTOPHER KELEHER*

Introduction

WE ARE FREQUENTLY ASKED to provide information about ourselves. Commercial transactions, medical care, and travel cannot be accomplished without providing a wealth of personal information. But these are chosen encounters. Change the backdrop to a courtroom where voir dire is occurring. Prospective jurors are peppered with demands for information such as their name, address, place of employment, and family members' names. Being in an unfamiliar setting and having the imprimatur of a judge, they acquiesce.

The right to decline answering personal questions is rarely broached by prospective jurors. Courts, on the other hand, have considered prohibiting disclosure of juror information. They cite juror privacy and safety as reasons to withhold a juror's name, address, and place of employment in criminal trials. But these grounds warrant scrutiny. In the information age, the notion of privacy is becoming increasingly tenuous. The ubiquity of social networking websites demonstrates the popularity of divulging personal information. While juror safety is a legitimate concern, juror information is seldom used for nefarious purposes. It is questionable whether the mere invocation of security suffices to make a jury anonymous.

The definition of "anonymous jury" is a shifting one. While the information kept secret differs by jurisdiction, name, address, telephone number, and place of employment are typically not disclosed. From whom the information is withheld also varies. Juror data can be permanently secreted from everyone, given only to counsel, or given only to the parties. These variations highlight the competing interests underlying anonymous juries. Anonymity implicates the First Amendment freedom of the press, the Sixth Amendment right to a fair trial, and juror safety. While views on anonymity vary, one point is indispu-

* The author is an appellate litigator at the Chicago law firm of Querrey & Harrow. He thanks Megan Monaghan for her assistance.

table: the increasing use of anonymous juries.[1] Although anonymous juries have been *de rigueur* in cases of national prominence, their use in routine matters is a recent trend.

Over the last thirty years, the jury has undergone changes. The twelve person requirement is no longer.[2] Unanimity is not necessary.[3] Anonymity is the latest transformation. But unlike other alterations, anonymity is transpiring with neither Supreme Court consideration nor social science analysis. Thus, how anonymity impacts juror decision making has not been ascertained. Whether it affects a juror's impartiality in the criminal context is not an esoteric question. The state may not create trial conditions adversely affecting jurors' perception of a defendant.[4] But if jurors conflate anonymity with a criminal defendant's dangerousness, the right to a fair trial is eviscerated.

This Article first reviews the origins, history, and use of juries, traditional and anonymous. It then evaluates the benefits and drawbacks of anonymous juries. It concludes with an examination of the psychological aspects of juror anonymity. Anonymity is a multifaceted issue raising difficult questions. But hard choices cannot excuse the unpleasant reality that anonymity undermines the presumption of innocence. The right to a fair trial is also eroded because anonymity diminishes the transparency of the process. Courts should thus curtail the use of anonymous juries.

1. Almost every federal circuit permits anonymous juries. *See* United States v. Deitz, 577 F.3d 672, 685 (6th Cir. 2009); United States v. Quinones, 511 F.3d 289, 295 (2d Cir. 2007); United States v. Shryock, 342 F.3d 948, 971–72 (9th Cir. 2003); United States v. Mansoori, 304 F.3d 635, 649 (7th Cir. 2002); United States v. DeLuca, 137 F.3d 24, 31 (1st Cir. 1998); United States v. Childress, 58 F.3d 693, 701 (D.C. Cir. 1995) (per curiam); United States v. Krout, 66 F.3d 1420, 1426 (5th Cir. 1995); United States v. Darden, 70 F.3d 1507, 1532 (8th Cir. 1995); United States v. Ross, 33 F.3d 1507, 1519 (11th Cir. 1994).

2. *See, e.g.*, Colgrove v. Battin, 413 U.S. 149 (1973) (permitting federal civil trials with juries of six individuals); Williams v. Florida, 399 U.S. 78 (1970) (permitting a jury of less than twelve individuals).

3. Johnson v. Louisiana, 406 U.S. 356 (1972) (holding non-unanimous jury verdicts in state court criminal cases are constitutional).

4. Estelle v. Williams, 425 U.S. 501, 503 (1976) (noting in order to implement the presumption of innocence, trial courts must be aware of factors that undermine the fairness of fact-finding procedures).

I. Background of Juries

A. The History of the Jury

Juries have ancient origins. Historians have unearthed references to juries in the Roman Empire, Greece, Egypt, and the Viking era.[5] While the role of juries has changed over time, the core concept has endured. By the time the jury reached England, every major civilization had utilized it. England's use of the jury dates to the inception of the common law.[6] Early English juries were administrative in nature.[7] This changed in 1154 when King Henry II enacted the assizes and made the jury a recognized instrument of justice.[8] Juries were used infrequently until 1219, when Pope Innocent III proscribed trials by ordeal.[9] This left trial by jury as the method to resolve criminal cases, and juries soon became a fixture of the English system.[10]

The *sine qua non* of English juries was that jurors knew the parties or the facts.[11] Jurors were selected because of who they were or what they knew.[12] English jurors were publicly selected, and this ensured that jurors came from the village in which the dispute arose.[13] The intimacy of such communities guaranteed litigants could identify the jurors.[14]

English colonists imported the jury to the New World, and it quickly became the favored dispute resolution technique.[15] The jury's popularity stemmed from its utility as a bulwark against oppression

5. Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809, 814 (1997).

6. *See generally* WILLIAM FORSYTH, HISTORY OF TRIAL BY JURY (2d ed. 1875) (analyzing the history of jury trials throughout the world); MAXIMUS A. LESSER, THE HISTORICAL DEVELOPMENT OF THE JURY SYSTEM (1894) (discussing the history of the English jury).

7. Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS L.J. 579, 582 (1993).

8. *Id.* at 583.

9. THEODORE PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 118 (Lawbook Exch. 5th ed. 2001) (1929).

10. Landsman, *supra* note 7, at 584.

11. Commonwealth v. DuPont, No. 85-981-987, 1998 Mass. Super. LEXIS 476, at *16 (Mass. Super. Ct. Aug. 24, 1998); *see also* Jerry Pope, *The Jury*, 39 TEX. L. REV. 426, 431 n.27 (1961) (noting that sometimes a sworn inquest of neighbors was used to serve as jurors); James B. Thayer, *The Older Modes of Trial*, 5 HARV. L. REV. 45, 45 (1891) (stating jurors were most likely neighbors).

12. Pope, *supra* note 11, at 438–39.

13. *Id.*

14. *See, e.g.*, *In re* Baltimore Sun Co., 841 F.2d 74, 75 (4th Cir. 1988) (discussing juries of vicinage where everyone knew empanelled jurors); Gannett Co. v. State, 571 A.2d 735, 755–77 (Del. 1990) (outlining the history of public access to juror identification).

15. Stephan Landsman, *The Civil Jury in America*, 62 LAW & CONTEMP. PROBS. 285, 288 (1999).

from the crown.[16] This acceptance remained following the Revolutionary War. The right to a jury trial was so revered that the Founders enshrined it in the Constitution.[17] The Sixth Amendment was ratified in 1791, giving criminal defendants "the right to a speedy and public trial, by an impartial jury."[18] Hundreds of years later, the jury is the crown jewel of the American judicial system.

Considering the jury's roots, jurors who were not only unknown but had their identities hidden would have been anathema to the colonists.[19] Even thirty years ago, the notion would have been dubious. But anonymity has crept into American jurisprudence.

B. The Origins of Anonymous Juries

While juries are thousands of years old, anonymous juries date back thirty years. The fountainhead of anonymous juries was the 1977 case of *United States v. Barnes*.[20] Leroy Barnes was tried with fourteen co-defendants on a myriad of charges including conspiracy, drug possession, and weapons possession.[21] But Barnes was not just another drug dealer. He controlled the flow of heroin into New York, and his power was surpassed only by his fortune.[22] But Barnes' notoriety precipitated his downfall.

The trial occurred in the Southern District of New York. Before voir dire, Judge Werker decided *sua sponte* to impanel an anonymous jury.[23] In doing so, the court refused inquiry into the venire persons' identities, neighborhoods, and ethnic backgrounds.[24] This was the

16. *Id.*

17. U.S. CONST. art. III, § 2, cl. 3 ("The trials of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed. . . ."). The right to trial by jury in civil cases was incorporated into the Constitution in the Seventh Amendment. U.S. CONST. amend. VII.

18. U.S. CONST. amend VI.

19. *But see* Kory A. Langhofer, Comment, *Unaccountable at the Founding: The Originalist Case for Anonymous Juries*, 115 YALE L.J. 1823 (2006) (contending no Founding-era evidence opposes anonymity).

20. 604 F.2d 121 (2d Cir. 1979). The practice of limiting juror information began in *Johnson v. United States*, 270 F.2d 721 (9th Cir. 1959), when the Ninth Circuit ruled that jurors' addresses could be withheld.

21. *Barnes*, 604 F.2d at 130–31.

22. *See generally* LEROY BARNES, MR. UNTOUCHABLE: MY CRIMES AND PUNISHMENTS (2007) (describing Barnes' rise to power as a heroin kingpin and his subsequent arrest and conviction).

23. *Barnes*, 604 F.2d at 133.

24. *Id.* at 135.

first time such a jury had been impaneled.[25] More remarkable than the paucity of legal precedent was the lack of a factual basis. The prosecution had not alleged jury tampering.[26] Nor did the court solicit the parties' views. Every time the defendants sought to challenge the ruling "their requests were sharply denied."[27] The trial proceeded before an anonymous jury, and eleven of the fifteen defendants were found guilty.[28] Barnes' conviction on the charge of continuing criminal enterprise earned him a life sentence.[29]

The defendants appealed, arguing the anonymous jury infringed on the voir dire process.[30] The U.S. Court of Appeals for the Second Circuit disagreed.[31] It determined voir dire was not impeded because anonymity relieved pressure on jurors and protected impartiality.[32] The court recognized the need for sufficient information to formulate juror challenges, but determined venire persons' responses to questions were enough.[33] The court observed that disclosure of identities "is not the law and should not be" and concluded anonymity alleviated jurors' fears of retaliation.[34]

Judge Meskill dissented. He was "troubled by the implications of today's decision and the uses to which it may be put."[35] Secreting names was not problematic, it was that they were withheld with other juror information.[36] Meskill's concerns were twofold. First, anonymity infringed on the constitutional right to an impartial jury because parties could not guarantee impartiality.[37] Second, peremptory challenges were undermined because anonymity prevented "the full,

25. *See* Ephraim Margolin & Gerald F. Uelmen, *The Anonymous Jury: Jury Tampering by Another Name*, 9 CRIM. JUST. 14, 14 (1994) (noting that "jury anonymity was unknown to common law and to American jurisprudence in its first two centuries"); David Weinstein, *Protecting a Juror's Right to Privacy: Constitutional Constraints and Policy Options*, 70 TEMP. L. REV. 1, 25 (1997) (stating the impaneling of anonymous juries was extremely uncommon before *Barnes*).

26. Abraham Abramovsky, *Juror Safety: The Presumption of Innocence and Meaningful Voir Dire in Federal Criminal Prosecutions—Are They Endangered Species?*, 50 FORDHAM L. REV. 30, 35 (1981).

27. *Barnes*, 604 F.2d at 169 (Meskill, J., dissenting).

28. *Id.* at 133 (majority opinion).

29. *Id.* at 156.

30. *Id.* at 133.

31. *Id.* at 142–43.

32. *Id.* at 140–41.

33. *Id.* at 142.

34. *Id.* at 140–41.

35. *Id.* at 168 (Meskill, J., dissenting).

36. *Id.* at 173.

37. *Id.* at 170–74.

unrestricted exercise by the accused of that right . . . ."[38] The Second Circuit denied the petition for rehearing en banc. This denial prompted further rebuke from Judge Oakes who proclaimed other courts would follow the decision like "a flock of sea gulls follows a lobster boat."[39] The U.S. Supreme Court denied the petition for writ of certiorari, solidifying the use of anonymous juries.[40]

Thirty years after the trial, Leroy Barnes wrote an intriguing postscript. His 2007 book, *Mr. Untouchable*, is an unabashed account of his life.[41] Barnes discusses his crimes, trials, jail stints, and the witness protection program. Barnes admits his penchant for bribing jurors, and his 1977 trial was no different. In that regard, Judge Werker's anonymity ruling can be vindicated. But more remarkable than Barnes' admission that he bribed a juror is that the first anonymous jury was not anonymous. After jury selection the defendants went to lunch, lamenting the "unfriendly" jury.[42] But Guy Fisher, a co-defendant and confidant of Barnes, was relishing the selection of an acquaintance.[43] The defendants agreed for Fisher to contact the juror's family.[44] Fisher relayed the results of his efforts the next day—the juror wanted $75,000.[45] The defendants agreed a not guilty vote for each defendant was worth that price. Barnes was happy, "[e]ven if we couldn't get a full acquittal, at least we'd fixed the lottery to ensure a hung jury."[46]

Barnes' gambit failed. The jury found him guilty along with ten of his co-defendants. One of the four defendants not found guilty was Guy Fisher.[47] The jury's failure to reach a verdict on Fisher would not raise Barnes' suspicion until later. Barnes had more pressing concerns, life imprisonment. Languishing in a federal penitentiary, Barnes eventually began talking with federal authorities. During these discussions Barnes learned that Fisher told the juror to vote not guilty only for himself.[48] Fisher was the only defendant for whom the jury

38. *Id.* at 170 (citing Pointer v. United States, 151 U.S. 396, 408 (1894)).

39. *Id.* at 175 (denial of rehearing en banc).

40. United States v. Barnes, 446 U.S. 907 (1980).

41. BARNES, *supra* note 22.

42. *Id.* at 127–28.

43. *Id.* at 128.

44. *Id.*

45. *Id.*

46. *Id.*

47. United States v. Barnes, 604 F.2d 121, 131 (2d Cir. 1979).

48. BARNES, *supra* note 22, at 264. Fisher's actions were discussed in a later Second Circuit opinion in which Fisher's racketeering conviction was affirmed. United States v. Thomas, 757 F.2d 1359, 1362–63 (2d Cir. 1985).

failed to reach a verdict.[49] Fisher's betrayal drove Barnes to turn state's evidence, ensuring his erstwhile partners prison time and himself freedom.

While the backstory of *Barnes* is fascinating, the legal implications of the district court's ruling would prove more profound. Despite this inauspicious birth, the anonymous jury has led a robust life. Judge Oakes' remark in the denial of en banc was prescient, *Barnes* has been the inducement for other jurisdictions to use anonymous juries.

C. Anonymity Spreads

The immediate impact of *Barnes* was negligible. Anonymous juries were limited to federal districts in New York.[50] While acceptance in other jurisdictions was sporadic during the 1980s, the floodgates opened in the 1990s. Anonymity gained traction as additional courts embraced it. "[I]n the space of twenty short years, nameless juries have progressed from a judicial fluke to a well established departure from ordinary procedure . . . ."[51] This spate transpired without a word from the U.S. Supreme Court. How federal courts handle anonymity is examined next, followed by state courts.

1. Anonymous Juries in Federal Courts

"Drastic."[52] "Extreme."[53] "Extraordinary."[54] These are some of the adjectives federal courts use to describe anonymous juries. But such skepticism has not stopped virtually every federal circuit from using them. Anonymity has created a paradox—courts shun the idea but accept the practice.

a. The Standards for Anonymity

While anonymous juries are becoming more common, they are not yet routine. Nor are they implemented on a whim. Courts require evidence that anonymity is warranted. An example of this analysis is *United States v. Thomas*.[55] A byproduct of the *Barnes* litigation, the *Thomas* defendants were alleged to have committed "mob-style" kill-

49. *Barnes*, 604 F.2d at 131.
50. Eric Wertheim, Note, *Anonymous Juries*, 54 FORDHAM L. REV. 981, 982 n.8 (1986).
51. Abraham Abramovsky & Jonathan I. Edelstein, *Anonymous Juries: In Exigent Circumstances Only*, 13 ST. JOHN'S J. LEGAL COMMENT. 457, 465 (1999).
52. United States v. Ochoa-Vasquez, 428 F.3d 1015, 1034 (11th Cir. 2005).
53. United States v. Mansoori, 304 F.3d 635, 650 (7th Cir. 2002).
54. United States v. Calabrese, 515 F. Supp. 2d 880, 884 (N.D. Ill. 2007).
55. 757 F.2d 1359 (2d Cir. 1985).

ings and interfered with the judicial process, including the 1977 trial of Leroy Barnes.[56] The district court impaneled an anonymous jury for the *Thomas* trial. As in *Barnes*, the defendants argued anonymity infringed on the presumption of innocence because it suggested they were dangerous.[57] As in *Barnes*, these arguments failed. The Second Circuit determined the protection of jurors trumped the presumption of innocence if two factors were met.[58] First, the trial court finds a "strong reason to believe the jury needs protection."[59] Second, the trial court takes reasonable precautions to minimize any prejudicial effects of anonymity on the defendant.[60] The Second Circuit's approach has formed the nucleus of other circuits' tests.

The analysis articulated in *Thomas* has been expanded. Justifications for juror protection include: (1) the defendant's involvement in organized crime; (2) the defendant's participation in a group with the capacity to harm jurors; (3) the defendant's past attempts to interfere with the judicial process; (4) the potential of a lengthy incarceration; or (5) extensive media publicity.[61] Satisfying one of these factors triggers the process of impaneling an anonymous jury. While the procedure varies by jurisdiction, the following depiction is typical. The information withheld from the parties entails the venire person's name, address, phone number, and place of employment. The court assigns a number to each venire person.[62] Any reference to a venire person is made according to her number.[63]

Statutory authority also provides for jurors' names to be kept confidential—at least to the public. Federal district courts have discretion to determine if the names of jurors are made public pursuant to the Jury Selection and Service Act.[64] The statute provides:

> The names drawn from the qualified jury wheel shall be disclosed to parties and to the public. If the plan permits these names to be made public, it may nevertheless permit the chief judge of the district court, or such other district court judge as the plan may pro-

56. *Id.* at 1364.

57. *Id.* at 1363–64; *see also* Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Second Circuit, United States v. Fisher, 474 U.S. 819 (1985) (No. 84-1778), 1985 WL 695265, at *14.

58. *Thomas*, 757 F.2d at 1365.

59. *Id.*

60. *Id.*

61. United States v. Carson, 455 F.3d 336, 356 n.18 (D.C. Cir. 2006).

62. G. THOMAS MUNSTERMAN ET AL., JURY TRIAL INNOVATIONS 81 (1997).

63. *Id.* at 82.

64. 28 U.S.C. § 1863 (2006).

> vide, to keep these names confidential in any case where the interests of justice so require.[65]

Some courts prohibit disclosure unless by order. Others grant access unless the "interests of justice" demand otherwise.[66]

Federal appellate courts review a district court's decision to use an anonymous jury under an abuse of discretion standard.[67] Because anonymity falls under the rubric of "trial administration," abuse of discretion is used. There is only one instance, discussed below, in which a district court was reversed for impaneling an anonymous jury. This reversal rate notwithstanding, appellate courts are not enamored with anonymity. The Fifth Circuit noted the procedure is a device of last resort "which should be undertaken only in limited and carefully delineated circumstances."[68] The First Circuit explained that "the prospect of criminal justice being routinely meted out by unknown persons does not comport with democratic values of accountability and openness."[69] But actions speak louder than words.

b. Challenging Anonymity in Federal Courts

The only instance of a federal appellate court reversing because of anonymity is *United States v. Sanchez*.[70] The defendant was a police officer accused of forcing women to engage in sex acts.[71] The court withheld the jurors' names, addresses, employers, and family members' names.[72] The defendant appealed the use of anonymity. The Fifth Circuit noted the defendant was not involved in organized crime and did not participate in a group that might harm jurors. No evidence of interference with the judicial process existed.[73] The Fifth Circuit concluded that actual evidence, not speculation, was needed for an anonymous jury.[74] The court further held the harmless error rule did not apply to anonymity except in limited circumstances. The court concluded a defendant "should receive a verdict, not from anonymous decision makers, but from people he can name as respon-

65. *Id.*
66. *Id.*
67. United States v. Quinones, 511 F.3d 289, 295 (2d Cir. 2007).
68. United States v. Krout, 66 F.3d 1420, 1427 (5th Cir. 1995) (citing United States v. Ross, 33 F.3d 1507 (11th Cir. 1994)).
69. *In re* Globe Newspaper Co., 920 F.2d 88, 98 (1st Cir. 1990).
70. 74 F.3d 562 (5th Cir. 1996).
71. *Id.* at 563.
72. *Id.* at 564–65.
73. *Id.* at 565.
74. *Id.*

sible for their actions."[75] Unfortunately for defendants, *Sanchez* is an anomaly.

While *Sanchez* scrutinized the application of the anonymity factors, it did not question the factors themselves. In fact, most courts have adopted these factors without fanfare. This is troubling because three of the justifications for anonymity are dubious. Two factors, a defendant's involvement in organized crime and his capacity to harm jurors, put the cart before the horse. Whether the defendant is involved with nefarious groups is an issue for the jury. These factors amount to trying the defendant before the trial begins. Another questionable justification is the potential for a lengthy incarceration. The federal docket is bursting with cases in which a defendant faces serious prison time. If this factor was applied literally, then a significant portion of cases would be tried by anonymous juries.

The gravity of anonymity demands greater scrutiny from the federal bench. Courts acknowledge that a practice burdening the presumption of innocence calls for "close judicial scrutiny."[76] The ritual acceptance of anonymity, facilitated by a deferential standard of review, belies this instruction. "Close judicial scrutiny" suggests increased sensitivity to potential problems, including the psychological implications of anonymity. This has not been the case. While federal appellate courts discourage anonymity, they will not prohibit it. Only in state courts can critics of anonymity find solace.

2. Anonymous Juries in State Courts

At first blush, anonymity in the state realm mirrors the federal. State courts consider the same factors for empanelling an anonymous jury. But the systems diverge at two points. First, anonymity is used more often in state courts. Second, state courts have voiced more strident criticism of anonymity.

Many states permit anonymous juries via statute.[77] Some jurisdictions have expanded the practice beyond those instances where jurors' safety is implicated.[78] Virginia and Maryland are considering

75. *Id.*

76. United States v. Thomas, 757 F.2d 1359, 1363 (2d Cir. 1985).

77. *See, e.g.*, CAL. CIV. PROC. CODE § 237 (West 2006) (allowing juror information to be sealed in criminal cases and making it a misdemeanor to improperly obtain or release sealed juror information); 10 DEL. CODE ANN. tit. 10 § 4513(a) (1999) (granting discretion to trial court in whether to release jurors' names); MISS. CODE ANN. § 13-5-32 (2008) (granting trial court discretion to keep jurors' names confidential).

78. *See* Abramovsky & Edelstein, *supra* note 51, at 464–65.

anonymity for all criminal cases.[79] The Virginia General Assembly enacted a law in 2008 that required courts to find "good cause" for secrecy before hiding the identities of jurors.[80] The law directed the Virginia Supreme Court to issue rules for its implementation.[81] The Advisory Committee on Rules of the Supreme Court then issued proposed rule 3A:14.1, which would make all jurors anonymous.[82] Thus, all criminal jurors in Virginia would be assigned a number and "at all times during the course of the trial . . . the court, counsel for the parties, and the jurors, shall refer to jurors by number and not by name."[83] The Court made this proposal "to avoid any implication that this anonymous procedure is being undertaken in any specific case because of the dangerousness of that specific defendant."[84] This proposal was attacked from various quarters, including the Virginia Press Association and the Virginia Coalition for Open Government.[85] The ACLU of Virginia also objected.[86] In a press release, it stated, "[o]penness is essential to a fair judicial system, which is why U.S. courts have universally rejected anything that resembles Star Chamber justice. . . . Simply put, trials must be open to the public and that includes knowing the identities of jurors who are deciding guilt or innocence."[87] The Advisory Committee withdrew the blanket anonymity idea and replaced it with a revised proposed rule.[88] The revision mirrored the General Assembly's law. It requires a judge to find "good cause" for secrecy before withholding juror identities.[89] The new pro-

79. Kristi Jourdan, *Maryland, Virginia Mull Proposals for Juries to be Anonymous in All Trials*, WASH. TIMES, July 26, 2009, at M4.

80. VA. CODE ANN. § 19.2-263.3 (2004).

81. *Id.*

82. ADVISORY COMM. ON RULES OF COURT, VIRGINIA CODE § 19.2-263.3 AND CONFIDENTIALITY OF JUROR INFORMATION (April 2009), *available at* http://www.courts.state.va.us/courts/scv/amendments/juror_anonymity_rule.pdf.

83. *Id.*

84. *Id.*

85. *See* VA. PRESS ASS'N, COMMENTS ON PROPOSED RULE 3A:14.1 (Aug. 20, 2009), *available at* http://www.vpa.net/images/pdf/VPA-Position-JurorAnonym.pdf; VA. COAL. FOR OPEN GOV'T, COMMENTS IN OPPOSITION TO PROPOSED COURT RULE 3A:14.1 (2009), *available at* http://www.opengovva.org/images/stories/misc/anonymousjurorcomments.pdf.

86. AM. CIVIL LIBERTIES UNION OF VA., ACLU OPPOSES PROPOSED RULE THAT WOULD MAKE JURORS ANONYMOUS IN CRIMINAL TRIALS (Sept. 1, 2009), *available at* http://acluva.org/427/aclu-opposes-proposed-rule-that-would-make-jurors-anonymous-in-criminal-trials.

87. *Id.* (quoting ACLU of Virginia Executive Director Kent Willis).

88. ADVISORY COMM. ON RULES OF COURT, VIRGINIA CODE § 19.2-263.3 AND CONFIDENTIALITY OF JUROR INFORMATION, REVISED DRAFT RULE PUBLISHED FOR COMMENT (Oct. 2009), *available at* http://www.courts.state.va.us/news/draft_revisions_rules/2009_10_revised_juror%20anonymity_rule.pdf.

89. *Id.*

posal explains that the Advisory Committee "gave detailed consideration to the many comments and suggestions received on the initial draft rule, and focused on complying with the plain language of the statute."[90]

Virginia's grappling with anonymity is just one example. Some California courts have empaneled anonymous juries in every case.[91] This policy stems from a state commission recommending blanket anonymity. The commission's reasoning was twofold: instill security and encourage jury service.[92] California passed a law requiring that jurors' identities be sealed following a criminal verdict.[93] However, any person can petition for this information if there is no "compelling interest" against disclosure.[94] If such a petition is filed, individual jurors may object to the release of their names.[95] The reasons for the law include protecting "jurors' privacy, safety and well-being."[96]

A county in Ohio made all grand jury and petit jury lists anonymous.[97] Under the rule, jurors' names, addresses, and phone numbers remained anonymous to all, including the court.[98] The Ohio Supreme Court approved of this procedure in *State v. Hill*.[99] In *Hill*, the defendant was convicted of murder by an anonymous jury. The court of appeals reversed because of the anonymous jury.[100] The Ohio Supreme Court disagreed and upheld the conviction. While acknowledging the right to a public trial was "very important," limiting it was

90. *Id.*

91. *See* Catherine Gewertz, *Courthouse Makes Blanket Use of Juror Anonymity*, L.A. TIMES, July 25, 1994, at A1 (discussing court that withholds jurors' names regardless of the nature of the case); *see also* Erickson v. Superior Court, 64 Cal. Rptr. 2d 230 (Ct. App. 1997) (prohibiting a Placer County superior court from implementing its procedure of sealing juror-identifying information in all civil actions and criminal proceedings prior to the return of the jury verdict).

92. J. Clark Kelso, *Final Report of the Blue Ribbon Commission on Jury System Improvement*, 47 HASTINGS L.J. 1433, 1463 (1996).

93. S.B. 508, 1995–1996 Reg. Sess. (Cal. 1995).

94. CAL. CIV. PROC. CODE § § 237(a)(1), (b) (West 1996, as amended).

95. *Id.* §§ 237(c)–(d). According to the statute, "[t]he court shall sustain the protest of the former juror if, in the discretion of the court the petitioner fails to show good cause, the record establishes a compelling interest against disclosure. . . or the juror is unwilling to be contacted by the petitioner." *Id.* § 237(d).

96. S.B. 508, 1995–1996 Reg. Sess. (Cal. 1995).

97. *See* State v. Hill, 749 N.E.2d 274, 278 (Ohio 2001) (quoting Loc.R. 1.14 of the Court of Common Pleas of Fairfield County, Ohio) (repealed Sept. 1, 2007).

98. *Id.*

99. 749 N.E.2d 274 (Ohio 2001).

100. *Id.* at 278.

not reversible error.[101] The court concluded, "there is no unqualified constitutional right to know the identity of jurors."[102]

Another state supreme court decision approving anonymity is *State v. Ivy*.[103] The trial court used an anonymous jury because it found placing jurors "in danger would simply not be very responsible . . . ."[104] It did not instruct the jury on anonymity.[105] The Tennessee Supreme Court affirmed; its rationale threefold. First, state law permitted anonymous juries.[106] Second, matters concerning jury selection were within the trial court's ambit.[107] Third, anonymity enabled trial courts "to preserve the safety and sanctity of the jury."[108] The absence of an instruction was not problematic. "[A] specific instruction as to anonymity simply calls the jury's attention to what it may have believed to be the accepted procedure."[109] Decisions like *Ivy* and *Hill* embody how state courts treat anonymous juries. But exceptions exist.

3. Rejecting Anonymity

State appellate courts have reversed because of anonymity. Courts in Massachusetts, New Jersey, and New York have held an anonymous jury hinders a defendant's rights.[110] Other courts have found jury instructions on anonymity deficient enough to merit a new trial. Those cases are now examined.

a. Massachusetts

In *Commonwealth v. Angiulo*,[111] the defendant was charged with an array of crimes including racketeering and conspiracy to commit murder.[112] The prosecution moved for an anonymous jury to ensure jurors were "free from intimidation."[113] Granting the motion, the court did not inform jurors of their anonymity to avoid adverse inference

101. *Id.* at 281.
102. *Id.* at 282.
103. 188 S.W.3d 132 (Tenn. 2006).
104. *Id.* at 143.
105. *Id.* at 145.
106. *Id.* at 144.
107. *Id.* at 144–45.
108. *Id.* at 144.
109. *Id.* at 145.
110. *See infra* notes 117–43.
111. 615 N.E.2d 155 (Mass. App. Ct. 1993).
112. *Id.* at 158.
113. *Id.* at 167.

against the defendant.[114] The defendant was convicted and sentenced to life imprisonment.[115] On appeal, the defendant argued a Massachusetts law precluded anonymity.[116] That provision mandated "[a] prisoner indicted for a crime punishable with death or imprisonment for life . . . shall have a list of the jurors who have been returned."[117] The appellate court reversed because the defendant had the right to obtain the names and addresses of his jurors.[118] But statutory authority was not the only concern. The court noted anonymity "is likely to taint the jurors' opinion of the defendant, thereby burdening the presumption of innocence."[119] Finally, the court was troubled that no curative instructions were given to the jury about its anonymity.[120]

In *Commonwealth v. DuPont*,[121] the defendant was charged with assault and armed robbery. The court moved *sua sponte* to redact the jurors' information.[122] The court referenced prospective jurors by using only their first names. The appellate court was troubled by this process because it was "likely that the jury included individuals who had served as jurors in the past" and thus had not experienced this approach.[123] The catalyst for a new trial would ultimately be statutory authority. Like in *Angiulo*, the court in *DuPont* invoked the same statute that mandates a defendant be provided with prospective jurors' names and addresses.[124] The trial court's failure to adhere to this statute warranted a new trial.[125] But instead of stopping there, the court considered the "grave constitutional questions" of anonymity.[126] It determined the defendant's presumption of innocence was not preserved because no explanation was given regarding anonymity.[127] The court also could not conclude the jury was fair and impartial. "A juror's name and address are information potentially valuable to a party in deciding whether to challenge a juror either for cause or by the use

114. *Id.*
115. *Id.* at 159.
116. *Id.* at 168–69.
117. MASS. GEN. LAWS ch. 277, § 66 (2008).
118. *Angiulo*, 615 N.E.2d at 169–70.
119. *Id.* at 171.
120. *Id.* at 171–72.
121. No. 85-981-987, 1998 Mass. Super. LEXIS 476, at *1 (Mass. App. Ct. Aug. 28, 1998).
122. *Id.* at *4.
123. *Id.* at *7.
124. *Id.* at *10.
125. *Id.*
126. *Id.*
127. *Id.* at *13.

of a preemptory challenge."[128] The final facet of the court's constitutional analysis concerned the "tradition of identified jurors."[129] The court noted the colonial jury system "did not lend itself towards protecting the identity of the participants."[130] During those times, "everybody knew everybody on the jury."[131] Acknowledging modern urban societies were the antithesis of that milieu, anonymous juries still "undermine[d] the shared values and practices which constituted the common understanding of the drafters of the Sixth Amendment . . . ."[132] *DuPont* offers the most stinging critique of anonymous juries.

b. New Jersey

In *State v. Accetturo*,[133] the defendants were charged with conspiracy, racketeering, extortion, and murder. The defendants' ties to organized crime prompted the state to move for an anonymous jury. The State argued the defendants were "dangerous individuals who will go to great lengths to obtain their ends."[134] The court was unmoved for four reasons. First, no authority in New Jersey provided for anonymity.[135] Second, the risk of prejudice to the defendants was strong. Third, the court could not conceive of truthful instructions as jurors would not be so "naiive as to believe that news media coverage would be the reason for their anonymity."[136] Fourth, the court concluded "it would not be the anonymity itself, but rather the novelty of the procedure which would give rise to the prejudice."[137]

c. New York

In New York, anonymity is precluded by state criminal law. That was the conclusion of *People v. Gotti*,[138] where the court found "the procedure is prohibited by the Criminal Procedure Law."[139] The statute states, "the court shall direct that the names of not less than twelve

128. *Id.*
129. *Id.* at *16.
130. *Id.*
131. *Id.*
132. *Id.* at *17.
133. 619 A.2d 272 (N.J. Super. 1992).
134. *Id.* at 273.
135. *Id.* at 272.
136. *Id.* at 273.
137. *Id.* at 274.
138. Order of Court, People v. Gotti, Indictment No. 359/98 (N.Y. Sup. Ct. Dec. 15, 1989), *reprinted in* United States v. Perry, 754 F. Supp. 202, ex. A at 204 (D. D.C. 1990).
139. *Id.* at 204.

members of the panel be drawn and called as prescribed by the judiciary law."[140] A plain reading of this statute reveals jurors are to be identified by name. This law was again invoked in *People v. Watts.*[141] Like in *Gotti,* the court in *Watts* rejected anonymity because "New York provides a statutory right to [jurors' names and addresses]."[142] The mere possibility of jury tampering was insufficient to justify an anonymous jury.[143]

d. Grappling With Instructions

State courts have also demonstrated a more stringent approach to jury instructions for anonymity. Deficient instructions spawned reversal in several cases. The Kansas Supreme Court reversed a murder conviction because of instructions in *State v. Brown.*[144] After a witness had been threatened, the court decided to refer to jurors only by number. The trial court told jurors they would be identified by numbers because "as a further precaution, insofar as your safety and security is concerned."[145] The Kansas Supreme Court did not take issue with anonymity itself, it was the trial court's failure to minimize the prejudice of anonymity.[146] The Kansas Supreme Court reversed because "the trial court's comments may have bolstered the state's arguments and given the impression that the witnesses had reason to fear retaliation."[147]

Similar to *Brown* is the Wisconsin Supreme Court decision in *State v. Tucker.*[148] Jurors in a murder trial were identified by numbers. The Wisconsin Supreme Court reversed the conviction because the trial court did not avoid prejudicing the defendant.[149] Instead, the trial court only gave general instructions on the presumption of innocence and the State's burden of proving guilt.[150] Since this did not neutralize the effect of anonymity, the court reversed.

Courts are cautious on the issue of instructions. This is understandable, as anonymity impinges the presumption of innocence. Ex-

140. N.Y. CRIM. PROC. LAW § 270.15(1)(a) (McKinney 2002).
141. People v. Watts, 661 N.Y.S.2d 768 (N.Y. Supp. 1997).
142. *Id.* at 772.
143. *Id.*
144. 118 P.3d 1273 (Kan. 2005).
145. *Id.* at 1276 (quoting trial court's statements to jury).
146. *Id.* at 1281–82.
147. *Id.* at 1284.
148. State v. Tucker, 657 N.W.2d 374 (Wis. 2003).
149. *Id.* at 381.
150. *Id.*

plaining to jurors that anonymity is routine is untruthful.[151] Worse, its falsity is transparent. Jurors do not live in a vacuum. They may have been impaneled before, had family members on juries, or have familiarity with the trial process. They may surmise that anonymity is not the norm, and an instruction to the contrary might foster distrust. Using the media as the scapegoat may be more believable, but it is still problematic for the same reasons. Indeed, one trial court rejected the publicity explanation as improper because it was "a subterfuge which concealed the actual reason for anonymity."[152]

In sum, the state realm is more conducive to challenging anonymity than the federal. State courts are more sensitive to the flaws of anonymity. But before those impediments are examined, the reasons for anonymity are considered.

II. The Benefits of Anonymous Juries

Courts articulate different reasons for impaneling anonymous juries. They include insulating jurors from tampering, increasing candor during voir dire, and protecting jurors from media intrusion. The merit of each basis is assessed.

A. Fostering Jury Safety

Juror safety is an oft cited basis for anonymity. For example, the Eighth Circuit cited it in approving anonymity in *United States v. Peoples*.[153] It held that trial courts possess wide latitude in impaneling an anonymous jury "if it finds that a person's life or safety is in jeopardy."[154] In the seminal case of *United States v. Barnes*,[155] the Second Circuit approved of anonymity because of the dangers to jurors. Juror safety has been invoked for trials of alleged terrorists. An anonymous jury tried the six men charged with plotting to blow up the Sears Tower.[156] The jury was also anonymous in the trial of six men charged with attempting to blow up Fort Dix.[157] Attorney Lynne Stewart was

151. Kristan Metzler, *Edmond Appeals Verdict*, WASH. TIMES, Feb. 2, 1995, at C6 (noting that when the judge told jurors that anonymous juries were not unusual, he "told them a little white lie").

152. United States v. Scarfo, 850 F.2d 1015, 1025 (3d Cir. 1988).

153. 250 F.3d 630 (8th Cir. 2001).

154. *Id.* at 635.

155. United States v. Barnes, 604 F.2d 121 (2d Cir. 1979).

156. Curt Anderson, *Defense Questions Fairness for Six in Terror Plot Retrial*, CHARLESTOWN GAZETTE, Jan. 4, 2008, at 7A.

157. Jeffrey Gold, *Jury in Fort Dix Plot Trial Will Be Anonymous*, THE INTELLIGENCER, Sept. 7, 2007, at B6.

found guilty by an anonymous jury of supporting terrorists during her defense of an Egyptian sheik.[158] One exception to this trend was the trial of a man charged with funneling money to Hamas.[159] The district court found no likelihood of intimidation, as "the mere invocation of the word 'terrorism,' without more, is insufficient to warrant such an anonymous jury."[160]

Anonymity does further security. With jurors identified by numbers, the ability to contact them is diminished, making them less susceptible to intimidation and tampering. While threats to jurors are rare, they can happen. Jurors who acquitted the police officers in the Rodney King case endured threatening phone calls.[161] Jurors in the trial of Dan White, charged with the murder of San Francisco Mayor George Moscone and City Supervisor Harvey Milk, were threatened with death.[162] Thus, juror safety is not an abstraction. The Third Circuit empathized with the jurors fear of retaliation in *United States v. Scarfo.*[163] The court described them as "not hypothetical" and that it was aware "that even in routine criminal cases, [jurors] are often uncomfortable with disclosure of their names and addresses."[164] But while these fears are real, experience demonstrates they have not been realized. Moreover, criminal laws already prohibit such contact.[165]

When jurors or witnesses are threatened, anonymity is warranted. But safety should not be a cudgel used to marginalize objections to anonymity. Evidence of intimidation should be anonymity's *raison d'être.* Anything less is not enough.

B. Engendering Juror Privacy

Jury service can be unpleasant. Lengthy questionnaires, background investigations, media exposure, and personal intrusion are occupational hazards. Inquiries regarding medication, religious

158. Julia Preston, *Lawyer Is Guilty of Aiding Terror*, N.Y. TIMES, Feb. 11, 2005, at A1.

159. Rudolph Bush, *Hamas-case Jury To Be Named*, CHI. TRIB., Aug. 10, 2006, at 3.

160. *Id.*

161. Nancy J. King, *Nameless Justice: The Case for the Routine Use of Anonymous Juries in Criminal Trials*, 49 VAND. L. REV. 123, 128 (1996).

162. *Id.*

163. United States v. Scarfo, 850 F.2d 1015, 1023 (3d Cir. 1988).

164. *Id.*

165. *See, e.g.*, VA. CODE ANN. § 18.2-441 (2004) (prohibiting bribery of jurors); *id.* § 18.2-456(2) (allowing summary punishment for contempt, including threat to juror); *id.* § 18.2-460 (describing penalty for obstructing justice).

practices, and personal improprieties can be fair game.[166] One court observed that voir dire "compels jurors to recall their darkest moments, which they may have struggled for years to forget, and then be required to recount them in public."[167] Worse, venire persons are powerless against this privacy invasion.[168]

Anonymity is an antidote to this intrusion. It may make an already stressful situation, less so.[169] Courts are sensitive to this reality. Jury instructions often cite privacy as the basis for anonymity. The D.C. Circuit affirmed an instruction that anonymity was "a common practice followed in the majority of cases in federal court" done to protect juror's privacy.[170] Legislatures are also cognizant of juror privacy. For example, a Georgia statute provides that "in the questionnaire and during voir dire examination, judges should ensure that the privacy of prospective jurors is reasonably protected."[171]

Anonymous juries are a *sine qua non* of high profile trials. Courts have correctly concluded that thrusting jurors into the spotlight simply for doing their civic duty is a legitimate basis for anonymity. Anonymity was used in the trials of O.J. Simpson, Oliver North, the Branch Davidians, and John Gotti.[172] While anonymity has its place in controversial cases, such instances are rare. Nor can such use justify using privacy as the basis for anonymity in non-headline grabbing cases.

Anonymity protects jurors' privacy in an additional way. When parties have access to the names of venire persons before trial they can investigate their backgrounds. Private litigants use investigative

166. David Weinstein, *Protecting a Juror's Right to Privacy: Constitutional Constraints and Policy Options*, 70 TEMP. L. REV. 1, 18–20 (1997).

167. Bellas v. Super. Ct. of Alameda County, 102 Cal. Rptr. 2d 380, 391 (Ct. App. 2000).

168. *See* Brandborg v. Lucas, 891 F. Supp. 352, 360–61 (E.D. Tex. 1995) (overturning contempt conviction of venire person who refused to answer certain questions on juror questionnaire because state trial court ignored juror privacy).

169. *See* James E. Kelley, *Addressing Juror Stress: A Trial Judge's Perspective*, 43 DRAKE L. REV. 97, 107–16 (1994) (reporting an Iowa study of over 500 jurors that demonstrated "severe stress symptoms" from jury service, collecting sources documenting juror stress, and noting that some jurors exhibit post traumatic stress); Daniel W. Shuman et al., *The Health Effects of Jury Service*, 18 LAW & PYSCH. REV. 267, 268 (1994) (surveying relevant research and stating that studies suggest "jurors may experience stress from being removed from their families and jobs, from being shown especially graphic evidence, or from the trial process itself").

170. United States v. Childress, 58 F.3d 693, 702 (D.C. Cir. 1995).

171. GA. CODE ANN. § 15-12-11(b) (2008).

172. *See* Adam Liptak, *Nameless Juries Are on the Rise in Crime Cases*, N.Y. TIMES, Nov. 18, 2002, at A1.

services. Government attorneys use law enforcement agencies.[173] Investigators may view a prospective juror's home, noting her neighborhood, automobile, and other indications of her lifestyle.[174] A drive-by checklist is set forth in a selection manual published by two prominent jury consultants.[175] This surveillance, while disturbing, gleans information on public display. But when the identities of prospective jurors are unknown, such tactics are stymied.

Maintaining juror privacy is a laudable endeavor. But in an age of blogs, Facebook, and Twitter, privacy is at a nadir. The merits of this development can be debated, but the reality cannot be avoided. Courts are rightfully concerned about jurors' privacy. But lamenting the privacy erosion of individuals whose personal information and daily activities are posted online seems futile. In short, this inveterate attention seeking impacts the notion of juror privacy. "Courts now operate within a larger culture of jurors addicted to their handheld devices, chatting with friends and 'Twittering' about the details of their daily lives."[176] That is not to say jurors lose their privacy rights if they use social networking sites. Rather, juror privacy, as a basis for anonymity, must be viewed in the context of truncated privacy notions. And through this purview, the privacy basis for juror anonymity is undermined.

C. Facilitating Voir Dire

A more reliable voir dire process is a benefit of anonymity.[177] "Jurors who are self-conscious and anxious are more likely to give dishon-

173. *See* United States v. Falange, 426 F.2d 930, 932 (2d Cir. 1970) (utilizing FBI and credit bureau records); United States v. Costello, 255 F.2d 876, 882–83 (2d Cir. 1958) (using tax returns); Best v. United States, 184 F.2d 131, 141 (1st Cir. 1950) (utilizing FBI report); State v. Bessenecker, 404 N.W.2d 134, 135 (Iowa 1987) (using criminal records); Commonwealth v. Cerveny, 367 N.E.2d 802, 809 (Mass. 1977) (using probation reports); Losavio v. Mayber, 496 P.2d 1032, 1033 (Colo. 1972) (en banc) (utilizing criminal records); Commonwealth v. Smith, 215 N.E.2d 897, 900 (Mass. 1966) (utilizing police officer investigation of prospective jurors).

174. Jeremy W. Barber, *The Jury Is Still Out: The Role of Jury Science in the Modern American Courtroom*, 31 AM. CRIM. L. REV. 1225, 1236 (1994) (noting that one common type of juror investigation involves the "home surveillance of potential jurors").

175. *See* LISA BLUE & ROBERT HIRSCHHORN, 1 BLUE'S GUIDE TO JURY SELECTION, § 9:1 (West & ATLA 2004) (noting items to look for include whether the yard is kept well, if there are toys outside, and if there are bars on the windows).

176. *See* VA. PRESS ASS'N, *supra* note 85, at 13.

177. *See generally* Nancy J. King, *Nameless Justice: The Case for the Routine Use of Anonymous Juries in Criminal Trials,* 49 VAND. L. REV. 123 (1996) (encouraging judges and legislators to consider the use of anonymous juries in criminal cases, especially in urban areas where anonymity is feasible).

est answers at voir dire."[178] With the ability to conceal her name, employer, or address, a venire person would be more apt to reveal information she might not otherwise disclose. These revelations give litigants a better understanding of jurors.[179] "If the risks of personal humiliation, damage to reputation, and personal embarrassment are minimized by protecting prospective jurors' privacy . . . the task of compiling a competent and conscientious jury may be easier."[180] A voir dire in which individuals are anonymous is more open, leading to a less biased jury.

Individualized voir dire supports the use of anonymous juries. In individualized voir dire, venire persons are queried only in front of the parties and judge. Individualized voir dire allows venire persons to respond to questions more candidly because it provides privacy.[181] Studies demonstrate that individual examination of venire persons better expose bias.[182] This is logical—the need for conformity becomes greater as the need for group affiliation increases.[183] But when other venire persons are absent, these concerns abate and the propensity for being forthright increases. Similarly, anonymity likely increases jurors' willingness to answer voir dire questions more honestly.[184] Without having one's identity known, there is less concern about expressing one's honest beliefs. Internet chat rooms and message boards exemplify this.[185] The cloak of online anonymity enables Internet users to shed their inhibitions.

178. *Id.* at 137.

179. Marcy Strauss, *Juror Journalism*, 12 YALE L. & POL'Y REV. 389, 395–99 (1994) (discussing problems that may arise when a juror is tempted to capitalize on his service by accepting book deals or giving interviews for television programs).

180. Michael R. Glover, Comment, *The Right to Privacy of Prospective Jurors During Voir Dire*, 70 CAL. L. REV. 708, 712–13 (1982); *see also* United States v. Padilla-Valenzuela, 896 F. Supp. 968, 972 (D. Ariz. 1995) (determining that proposed questionnaire was so invasive as to violate right of privacy of prospective jurors).

181. MUNSTERMAN ET AL., *supra* note 62, at 69.

182. Michael T. Nietzel & Ronald C. Dillehay, *The Effects of Variation in Voir Dire Procedures in Capital Murder Trials*, 6 LAW & HUM. BEHAV. 1, 1 (1982); David Suggs & Bruce D. Sales, *Juror Self-Disclosure in the Voir Dire: A Social Science Analysis*, 56 IND. L.J. 245, 258–61 (1981).

183. *See* McGhee & Teevan, *Conformity Behavior and Need for Affiliation*, 72 J. SOC. PSYCH. 117, 120 (1967) (noting likelihood that need for affiliation or conformity varies with the type of affiliational relationship of the members of the group).

184. MUNSTERMAN ET AL., *supra* note 62, at 82.

185. *See* VA. COAL. FOR OPEN GOV'T, *supra* note 85, at 2 ("In today's electronic-communication culture, hateful, vindictive and illogical rhetoric is often spewed anonymously. Hiding behind pseudonyms and inscrutable screen names, individuals are free to make wild accusations and draw erroneous conclusions without fear of being found out. Given a perpetual cloak of anonymity, jurors, too, would be freed of the confines of procedure,

Anonymity, to a certain degree, facilitates voir dire. As one court observed, access to information provided in voir dire "if coupled with the names, could cause the jurors pain and embarrassment."[186] Anonymity ameliorates that problem.

D. Summation

Surveys find an overwhelming majority of people surveyed prefer anonymity.[187] In one poll, eighty-four percent of respondents believed jurors should be anonymous in criminal cases.[188] A judge who conducted trials with anonymous juries reported that only six or seven of the 2800 jurors wanted their identities revealed when faced with the option of anonymity.[189] Some judges also approve of anonymity. In one survey, seventy-six percent of federal judges in Texas favored anonymous juries, while only twenty percent opposed.[190] Forty-four percent of Texas state judges approved while forty-five percent opposed.[191] Two groups not surveyed were criminal defense attorneys and their clients.

Benefits to anonymity exist. Protecting jurors from intimidation, tampering, and media intrusion is imperative. Thus, little debate exists over the ends sought by anonymous juries. The issue is the means with which these means are accomplished. When contemplating anonymity, courts balance "the defendant's interest in conducting meaningful voir dire and in maintaining the presumption of innocence, against [the jury's] interest in remaining free from real or threatened

evidence or common sense, allowing them to render verdicts based on biases without any accountability.").

186. State v. Pennell, 583 A.2d 1348, 1355 (Del. Super. Ct. 1990).

187. *See, e.g.*, Kelso, *supra* note 92, at 1463 (reporting that in an anonymous jury program at a Los Cerritos Municipal Court, only 6 out of over 2800 jurors did not wish to be anonymous); Caroline K. Simon, *The Juror in New York City: Attitudes and Experiences*, 61 A.B.A. J. 207, 210 (1975) (study of 5079 juror responses to a 1972 survey found over fifteen objected to their names and addresses being made known to criminal defendant).

188. A 1995 Glamour magazine survey asked, "Should jurors in criminal cases be allowed to serve anonymously?" Eighty-four percent answered "yes, in all cases." Another eleven percent responded, "yes, but only in cases involving gangs, cults, or possible social unrest." Five percent answered "no." *Should We Protect the Identity of Jurors in Criminal Trials?*, GLAMOUR, Mar. 1995, at 159.

189. Catherine Gewertz, *Judge Halts Use of Jury Anonymity in Bellflower*, L.A. TIMES, Jan. 10, 1995, at B3.

190. John Attanasio, *Foreword: Juries Rule*, 54 SMU L. REV. 1681, 1686 n.29 (2001).

191. *Id.*

violence."[192] These adverse consequences of anonymity comprise the next Part.

III. The Costs of Juror Anonymity

Anonymity has three repercussions. First, it casts the defendant as a dangerous person. Second, it undermines the presumption of innocence. Third, it hampers jury selection. The Sixth Amendment and Due Process Clause guarantee a defendant the right to an impartial jury.[193] Analyzing the Sixth Amendment, Justice Harlan remarked, "jurors will perform their respective functions more responsibly in an open court than in secret proceedings."[194] This concern underlies the following objections.

A. Innocence Lost

The presumption of innocence is integral to the American justice system. While not articulated in the Constitution, courts have long recognized the right is sacrosanct.[195] The Supreme Court observed the presumption of innocence "is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."[196] The prosecution may not create trial conditions that affect the jurors' perception of the defendant unless a substantial governmental interest exists.[197] In *Estelle v. Williams*,[198] the Court noted that the state cannot compel an accused to stand trial while dressed in prison garb because it impacted the presumption of innocence.[199] The Court reasoned this presumption was "a basic component of a fair trial under our system of criminal justice."[200] The concerns of *Estelle* are implicated by anonymity. Jurors can interpret anonymity as a precaution against an unpredictable and violent defendant. These attributes are equated with guilt, prejudicing the jury before the first witness is called. Courts have noted this predicament. Anonymity "implicates the defendant's constitutional right to a pre-

192. United States v. Quinones, 511 F.3d 289, 295 (2d Cir. 2007) (quoting United States v. Amuso, 21 F.3d 1251, 1264 (2d Cir. 1994)).

193. Ristaino v. Ross, 424 U.S. 589, 595 n.6 (1976).

194. Estes v. Texas, 381 U.S. 532, 588 (1965) (Harlan, J., concurring).

195. *See, e.g.*, Coffin v. United States, 156 U.S. 432, 453–54 (1895) (noting the axiomatic nature of this principle).

196. *Id.*

197. *See* Estelle v. Williams, 425 U.S. 501, 505 (1976).

198. 425 U.S. 501 (1976).

199. *Id.*

200. *Id.* at 503.

sumption of innocence by 'rais[ing] the specter that the defendant is a dangerous person from whom the jurors must be protected . . . .'"[201]

Errors emanating from the use of anonymous juries are reviewed under a harmless error standard. But the effects on the presumption of innocence demand more. Structural errors transcend harmless error analysis. A structural error is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself."[202] For example, the right to an impartial judge is a right so fundamental that its violation can never be harmless.[203] Additional errors not subject to the harmless error rule: unlawful exclusion of members of the defendant's race from a grand jury,[204] the right to self-representation at trial,[205] and the right to public trial.[206] Anonymous juries raise similar concerns. Anonymity is not simply an error in the trial process—it denies the right to an impartial jury. Thus, it touches upon the same vital nerves that the Supreme Court has deemed to affect the entire trial framework.

When circumstantial evidence and eyewitness testimony suggest guilt, a defendant often clings to the presumption of innocence. But this defense is rendered nugatory if jurors view anonymity as protection from the defendant. "The most damaging aspect of [*United States v. Barnes*] . . . is the devastating blow dealt to the presumption of innocence."[207] While this repercussion is the most serious, it is not the only one.

B. Inhibiting Voir Dire

Voir dire facilitates the Sixth and Seventh Amendments. The Sixth Amendment provides that criminal defendants "enjoy the right to a speedy and public trial, by an impartial jury."[208] The Supreme Court has explained that "[v]oire dire plays a critical function in assuring the criminal defendant that his [constitutional] right to an impartial jury will be honored."[209] The importance of voir dire was

201. United States v. Ochoa-Vasquez, 428 F.3d 1015, 1034 (11th Cir. 2005) (quoting United States v. Ross, 33 F.3d 1507, 1519 (11th Cir. 1994)).

202. Arizona v. Fulminante, 499 U.S. 279, 310 (1991).

203. Chapman v. California, 386 U.S. 18, 23 n.8 (1967) (citing Tumey v. Ohio, 273 U.S. 510 (1927)).

204. Vasquez v. Hillery, 474 U.S. 254 (1986).

205. McKaskle v. Wiggins, 465 U.S. 168 (1984).

206. Waller v. Georgia, 467 U.S. 39 (1984).

207. Abramovsky, *supra* note 26, at 35.

208. U.S. CONST. amend. VI.

209. Morgan v. Illinois, 504 U.S. 719, 729 (1992) (quoting Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981)).

recognized by the Supreme Court in *Turner v Murray*.[210] If voir dire is inadequate, a defendant's sentence cannot stand.[211]

Voir dire is ground zero for the adversarial process. The proliferation of jury selection consultants embodies this phenomenon. Voir dire can take longer than the trial itself. A study of 462 cases revealed that voir dire was longer than the trial twenty percent of the time.[212] Another survey found that jury selection constituted between twenty to thirty-seven percent of the average criminal trial.[213] The emphasis on voir dire clashes with the increasing use of anonymous juries. Anonymity can foster voir dire, as articulated above, but it also hinders it. Information about the identity and occupation of a prospective juror can spur additional questions leading to the exercise of peremptory and for cause challenges. Hiding information about prospective jurors can stifle lines of questioning. To make an informed selection, a defendant needs as much information as possible.[214] This premise is illustrated by *Commonwealth v. DuPont*,[215] where the appellate court reversed a conviction because the defendant could not determine if a juror lives "in a neighborhood whose residents have demographic characteristics predictive of their likely response to the issues in the case."[216]

Voir dire protects a defendant's right to an impartial jury "by exposing possible biases, both known and unknown, on the part of potential jurors."[217] When an individual has a close connection to the facts, bias is presumed.[218] The failure to respond honestly during voir dire also indicates bias.[219] But when fundamental information about a person is untouchable, these biases are harder to unearth. Anonymity thus violates the Sixth Amendment by inhibiting a defendant's ability

210. 476 U.S. 28, 37 (1986).

211. *Id.*

212. *See* Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 157 n.13 (1989) (citing a study conducted by the New York Governor's Commission on Administration of Justice in the 1980s).

213. NAT'L CTR. FOR STATE COURTS, ON TRIAL: THE LENGTH OF CIVIL AND CRIMINAL TRIALS 40 (1988).

214. *See* Dennis v. United States, 339 U.S. 162, 171–72 (1950) ("Preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury.").

215. No. 85-981-987, 1998 Mass. Super. LEXIS 476 (Mass. Super. Ct. Aug. 24, 1998).

216. *Id.* at *47 (citing United States v. DiDomenico, 78 F.3d 294, 301 (7th Cir. 1996)).

217. McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 554 (1984).

218. Vasey v. Martin Marietta Corp., 29 F.3d 1460, 1467 (10th Cir. 1994).

219. *See* Williams v. Taylor, 529 U.S. 420, 441–43 (2000) (noting juror's failure to divulge material information was misleading and could show juror was not impartial).

to challenge jurors. On this, the Seventh Circuit put it best: "so long as we have challenges for cause and peremptory challenges the objection to anonymous jurors that it deprives the lawyers of information essential to their exercise of a valued procedural right cannot be rated as negligible."[220]

Hampering voir dire does not only hurt the defendant. Jurors can engage in improprieties when not subject to public scrutiny.[221] The prosecution in *Barnes* was precluded from inquiring into the background of a defendant's acquaintance.[222] Thus, anonymity may have enabled Barnes' co-defendant, Guy Fisher, to escape a guilty verdict. *Barnes* is not the only case in which an anonymous juror's identity was compromised. A similar occurrence transpired in John Gotti's murder trial. Anonymity enabled a juror with mob ties to be impaneled.[223] The juror contacted Gotti, and they devised an arrangement whereby the juror would vote not guilty in exchange for payment.[224] Thus, the trials of John Gotti and Leroy Barnes demonstrate that anonymous juries enable the defendant to meddle with jury selection. If the jury had not been anonymous, prosecutors or the press could have investigated the jurors' backgrounds.

C. The Right of Access to Trial Proceedings

Since the sixteenth century voir dire has been conducted in public.[225] The transparency of the process was borrowed from the English system.[226] This openness "enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system."[227] But anonymity undermines the public's right of access.[228] Journalists often consider jurors part of the story.[229] The perspective of jurors adds important insight to a case. Preventing

220. United States v. DiDomenico, 78 F.3d 294, 301 (7th Cir. 1996).

221. Kenneth B. Nunn, *When Juries Meet the Press: Rethinking the Jury's Representative Function in Highly Publicized Cases*, 22 HASTINGS CONST. L.Q. 405, 433–34 (1995) (stating high-profile trials may attract jurors more interested in fame than in returning jury verdicts).

222. *See supra* notes 41–46 and accompanying text.

223. *See Juror Guilty of Taking Bribe in 1987 Gotti Trial*, CHI. TRIB., Nov. 7, 1992 at 11; *see also* JERRY CAPECI & GENE MUSTAIN, GOTTI: RISE AND FALL 173–75 (1996).

224. CAPECI & MUSTAIN, *supra* note 223, at 173–75.

225. Press Enter. Co. v. Superior Court, 464 U.S. 501, 507 (1984) [hereinafter *Press Enterprise I*].

226. *Id.* at 508.

227. *Id.*

228. *See* Brief for Reporters Committee for Freedom of the Press et al. as Amici Curiae Supporting Appellee at 5, Hill v. Ohio, 749 N.E.2d 274 (Ohio 2001) (No. 00-591), *available at* www.rcfp.org/news/documents/hill.html (noting the "important presumption of access to jury selection proceedings has been repeatedly recognized worldwide").

access to the jury omits an important chapter.[230] "If the press and the larger community lose the ability to identify jurors, juror misconduct is far less likely to be unearthed and reported."[231]

The constitutional right of access to criminal trials stems from the First Amendment.[232] The Supreme Court examined the right of access to trial proceedings in *Press Enterprise I*,[233] decided in 1984, and *Press Enterprise II*,[234] decided two years later. In *Press Enterprise I*, a California trial court closed voir dire to the press because of jurors' privacy interests. The U.S. Supreme Court reversed. Jury selection was a "public process" and limitations on it contravened the First Amendment. However, the Court noted that a prospective juror's privacy was a legitimate interest.[235] Voir dire can "give rise to a compelling interest of a prospective juror when interrogation touches on deeply personal matters that person has legitimate reasons for keeping out of the public domain."[236] Thus, the media has the right to attend the jury selection portion of a criminal trial, unless the trial court finds "that closure is essential to preserve higher values."[237]

Press Enterprise II concerned the release of a preliminary hearing transcript.[238] The Court delineated two factors to determine whether a First Amendment right of access to a proceeding exists. "[F]irst, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights."[239] Noting public access to criminal trials and the selection of jurors was essential to the proper functioning of the criminal justice system, the Court held "preliminary hearings are sufficiently like a trial to justify the same conclusion."[240]

229. *See, e.g.*, Gannett Co. v. State, 571 A.2d 735, 738 (Del. 1990) (describing the use of jurors' actions and reactions by one news reporter).

230. *See* Brief for Reporters Committee for Freedom of the Press et al. as Amici Curiae Supporting Appellee, *supra* note 228, at 4 ("Public scrutiny also promotes fairness by operating as a restraint on possible abuses of judicial power . . . .").

231. VA. PRESS ASS'N, *supra* note 85, at 11.

232. *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 603–04 (1982).

233. *Press Enterprise I*, 464 U.S. 501 (1984).

234. Press Enter. Co. v. Superior Court, 478 U.S. 1, 8 (1986) [hereinafter *Press Enterprise II*].

235. *Press Enterprise I*, 464 U.S. at 511.

236. *Id.*

237. *Id.* at 510.

238. *Press Enterprise II*, 478 U.S. at 1.

239. *Id.* at 14.

240. *Id.* at 12.

The *Press Enterprise* cases capture the difficulty of balancing anonymity with the interest of public access. Limits to juror information are usually upheld. An instructive example is *United States v. Brown*.[241] The district court denied media outlets' requests for juror information in the conspiracy trial of former Louisiana Governor Edwin Edwards.[242] On appeal, the Fifth Circuit recognized jurors' right to privacy was a strong governmental interest.[243] It upheld the decision because redacting juror names "may constitute a reasonable alternative to safeguard jurors from unwarranted embarrassment."[244] The court further observed that jurors "need not become unwilling pawns in the frenzied media battle."[245]

While anonymity is an unwarranted limitation on the press, proponents of media access view the issue in an unrealistically sanguine light. There is a dark side to unfettered access. The press has detailed jurors' occupations, marital status, children's ages, and religious beliefs. Jurors whose identities were revealed have been subjected to threats and harassment. The jurors' identities were hidden in *United States v. DeLorean*.[246] Yet reporters used the license plate numbers of jurors' cars to uncover their identities.[247] A similar occurrence played out in the Scott Peterson trial.[248] Post-verdict interviews can invade juror privacy more than voir dire because the media's questioning is not limited by court rules.[249] Yet despite occasional abuse, media pressure is a *sine qua non* of an honest judicial system. The Supreme Court said as much in *Sheppard v. Maxwell*.[250] "The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism."[251]

241. 250 F.3d 907 (5th Cir. 2001).

242. *Id.*

243. *Id.* at 918 (citing United States v. Harrelson, 713 F.2d 1114, 1116 (5th Cir. 1983)).

244. *Id.*

245. *Id.* at 921.

246. *See* Robert M. Takasugi, *Jury Selection in a High Profile Case:* U.S. v. DeLorean, 40 AM. U. L. REV. 837, 840 (1991) (describing the method by which members of the media obtained jurors' telephone numbers for interview purposes).

247. *Id.*

248. *See* Jourdan, *supra* note 79.

249. *See* Abraham S. Goldstein, *Jury Secrecy and the Media: The Problem of Postverdict Interviews*, 1993 U. ILL. L. REV. 295, 307 (1993).

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

251. *Id.* at 350.

D. Summation

The fear that jurors could be harmed because of their verdict is understandable but unfounded.[252] No one has ever been killed because he sat on a jury.[253] Security is imperative. But the same basis could be invoked for witnesses testifying against criminal defendants.[254] While the Sixth Amendment's Confrontation Clause prevents witnesses from testifying anonymously, a court could declare safety necessitates a witness testify anonymously. The rationale of security has limits.

IV. The Impact of Juror Anonymity

Courts have accepted anonymity without knowing its impact. While courts recognize anonymity's inherent problems, their analyses are mired in generalities. If courts delved deeper into the implications of anonymity, they might be less inclined to use it. Anonymity raises two crucial questions. First, do anonymous juries impede the right to a fair trial? Second, does the cloak of anonymity affect a juror? As courts have shed little light on these inquiries, it is imperative that social science research be considered. The law has benefited greatly from social science on subjects like voir dire, the death penalty, and jury psychology. Social science encompasses psychology, sociology, economics, and small-group decision making. This Part demonstrates that social science vindicates the concerns about anonymity. The single study considering anonymous jurors is considered first. Studies involving juror honesty and juror accountability are then examined. Finally, the effects of security measures such as sequestration and law enforcement officers are extrapolated to anonymity. While each discussion is distinct, they each reach the same conclusion—anonymity hurts defendants.

252. *See* VA. PRESS ASS'N, *supra* note 85, at 3–4 ("A Nexis search of press reports published since 1990 reveals few Virginia criminal trials involving alleged juror intimidation by parties or related outsiders.")

253. *See* Robert M. Anselmo, *The Decision in* United States v. Brown: *The Fifth Circuit Interprets "Justice is Blind" Literally*, 33 ST. MARY'S L.J. 469, 471 (2002).

254. This argument could also apply to judges. Safety may become such a concern that judges could preside anonymously over trials. In countries such as Peru, masked judges presiding anonymously in specially constituted courts try many cases. Abramovsky & Edelstein, *supra* note 51, at 482. "Such abdication of judicial accountability is arguably different only in degree from the empanelment of anonymous juries." *Id.*

A. Social Science and Anonymous Juries

Anonymous juries have escaped the focus of social science researchers for several reasons. First, anonymous juries are not routine. Second, they are recent. Third, anonymous jurors never have their identity revealed, making them difficult to contact. Hence, the paucity of research. As one commentator notes, "in a recent review of the past forty-five years of empirical research on jury deliberations . . . not one study, of more than 200 reviewed, examined the impact or significance of confidentiality on jury decision making."[255] While this commentator acknowledges the sole exception discussed below, she concludes that "confidentiality can lead to 'frank but less full' deliberations."[256]

The importance of anonymity's psychological impact cannot be understated. Anonymous jury supporters note that critics' conclusions of how jurors interpret anonymity "depend[ ] on certain unsupported assumptions about juror perception and knowledge."[257] Similarly, the California Commission approving the use of anonymous juries noted: "[t]he criticism that jurors may change their decision making processes because of identification by number is speculative."[258] As long as concerns about anonymity remain "speculative" and "unsupported," anonymous juries will proliferate without regard to defendants' rights.

B. How Anonymity Impacts Jurors

The effects of anonymity vary. For example, one study found that subjects were more aggressive if they were anonymous to their victim.[259] Another found that anonymity had no significant effect on subjects' aggressiveness.[260] Psychologists contend that anonymity reduces feelings of accountability by decreasing public self-awareness.[261]

255. Gia Lee, *The President's Secrets*, 76 GEO. WASH. L. REV. 197 (2008); *see also* Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL'Y & L. 622, 622–24 (2001) (reviewing variables of numerous jury decision-making studies, none of which discuss confidentiality).

256. Lee, *supra* note 255, at 234.

257. Wertheim, *supra* note 50, at 988.

258. Kelso, *supra* note 92, at 1463–64.

259. Edward Donnerstein et al., *Variables in Interracial Aggression: Anonymity, Expected Retaliation, and a Riot*, 22 J. PERSONALITY & SOC. PSYCHOL., 236, 236 (1972).

260. Edward Diener, *Effects of Prior Destructive Behavior, Anonymity, and Group Presence on Deindividuation and Aggression*, 33 J. PERSONALITY & SOC. PSYCHOL., 497, 497 (1976).

261. D. Lynn Hazelwood & John C. Brigham, *The Effects of Juror Anonymity on Jury Verdicts*, 22 LAW & HUM. BEHAV. 695, 699 (1998).

"Thus, individuals are aware of what they are doing but are less concerned about others evaluations . . . ."[262]

Only one study examines the impact of juror anonymity on decision making—*The Effects of Juror Anonymity on Jury Verdicts*.[263] "Twenty four-person anonymous juries and [twenty] four-person non-anonymous juries rendered individual and group verdicts for three student defendants charged with selling drugs . . . . When unanimous guilty verdicts were reached, juries imposed one of five punishments, varying in severity."[264] Non-anonymous participants provided their name and contact information.[265] Those in the anonymous groups were given a paper explaining the "Special Procedures to Maintain Anonymity of Student Jurors."[266]

The authors predicted anonymous juries would be more prone to convict. They were correct. Anonymous juries had a higher conviction rate (thirty-seven percent) than did non-anonymous juries (twenty-two percent).[267] The effect of anonymity was greatest when evidence of guilt was strong. Anonymous juries imposed the harshest punishment (expulsion) more often than did non-anonymous juries.[268] However, anonymous juries did not feel less committed to their decisions or less accountable than non-anonymous juries. The authors concluded, "[t]he results of the present study provide some support for the hypothesis that anonymous juries may be more likely to convict defendants."[269]

This study confirms the suspicions of those critical of anonymous juries. This is only one study, and the sample size was relatively small. But the proof is in the results. Anonymity certainly had an impact on how jurors viewed the defendants. Anonymous jurors were more prone to convict. They also had less compunction about imposing the most severe punishment. The disparity between anonymous and non-anonymous jurors cannot be dismissed as negligible. A fifteen percent increase in convictions is significant. Not being identifiable makes jurors less concerned about the rights of defendants. While the study did not delve into the reasons, the lack of accountability is one likely explanation. Being able to remain anonymous, these jurors may have

262. *Id.*
263. *Id.* at 695.
264. *Id.*
265. *Id.* at 701.
266. *Id.*
267. *Id.* at 703.
268. *Id.* at 695.
269. *Id.* at 712.

felt less need to justify their verdict. After imposing a guilty verdict and the most severe punishment, they can then disappear into the crowd.

While the study needs to be replicated, it demonstrates anonymity alters the decision making process of jurors. Given the study's isolation, the remaining Parts move beyond anonymity and apply the findings of other social science studies to anonymity.

C. Juror Honesty and Juror Accountability

Researchers conducted the following studies for purposes other than anonymity. The first examines honesty during voir dire, and the second considers accountability for juror decisions. Nevertheless, their findings shed light on anonymity.

1. Juror Honesty

The first study examined the effects of juror honesty while answering questions during voir dire.[270] The study's focus was evaluation anxiety—an individual's concern about self image. The study revealed that evaluation anxiety determined whether a response to a question was truthful.[271] The authors thus concluded that concern about self image affected honesty.[272]

A venire person might be less concerned about self image if she was anonymous. There is no proof that anonymity impacts self image. But if a person's name, address, and place of work are unknown she might be less self conscious and thus more honest. This study lends credence to the theory that anonymity engenders openness. If one's background is not known, concerns about self image diminish. Thus, juror responses become more truthful as hesitancy to share personal information abates.

2. Juror Accountability

Social scientists define accountability as "the implicit or explicit expectation that one may be called on to justify one's beliefs, feelings, and actions to others."[273] Decision makers who must justify their con-

270. *See* Linda L. Marshall & Althea Smith, *The Effects of Demand Characteristics, Evaluation Anxiety, and Expectancy on Juror Honesty During Voir Dire*, 120 J. PSYCHOL. 213 (1986).

271. *Id.* at 214.

272. *Id.*

273. Jennifer S. Lerner & Philip E. Tetlock, *Accounting for the Effects of Accountability*, 125 PSYCHOL. BULL. 255, 255 (1999). Although deliberating jurors argue their positions with each other in the jury room, it has been disputed whether this limited form of accountabil-

clusion engage in "preemptive self-criticism" and often think in more complex ways.[274] Thus, jurors who must justify their decisions deliberate more thoughtfully.[275] These realities have important implications for anonymous juries.

Scholar Phillip E. Tetlock conducted an accountability study consisting of seventy-two college students presented with descriptions of evidence from a murder trial.[276] The study considered whether accountability affects how one processes information during jury deliberations.[277] The study defined accountability as "pressures to justify one's impressions to others."[278] The evidence was split equally between incriminating and exonerating.[279] The researchers manipulated the accountability variable by placing the subjects in two groups.[280] The "no accountability" subjects were told that their impressions of the accused would be confidential and could not be traced to them.[281] Subjects in the "accountability" group were told, before looking at the evidence, that they would be asked to justify their decisions.[282] The subjects were given the same information, but in varied orders, to examine the effects of primacy and recency.[283]

The findings are telling. Subjects held accountable recalled more case material than subjects who were unaccountable.[284] The differences were significant between the two groups, regardless of the order of evidence. The mean amount of evidence recalled by those in the unaccountable group was measured at level ten while the accountable group was at level twelve.[285] Accountability also affected the verdict. For those held accountable, the mean likelihood of guilt was forty-seven percent.[286] For those held not accountable, the mean likelihood

ity to each other is sufficient to ensure well-reasoned decisions that inspire public confidence. *See* John D. Jackson, *Making Juries Accountable*, 50 AM. J. COMP. L. 477, 482 (2002).

274. *See* Lerner & Tetlock, *supra* note 273, at 256–57.

275. Phoebe C. Ellsworth & Alan Reifman, *Juror Comprehension and Public Policy: Perceived Problems and Proposed Solutions*, 6 PSYCHOL. PUB. POL'Y & L. 788, 801 (2000) (citing study which holds that accountability can "improve the quality of information processing").

276. Philip E. Tetlock, *Accountability and the Perseverance of First Impressions*, 46 SOC. PSYCHOL. Q. 285, 287 (1983).

277. *Id.* at 285.

278. *Id.*

279. *Id.* at 286.

280. *Id.*

281. *Id.* at 288.

282. *Id.*

283. *Id.*

284. *Id.* at 289.

285. *Id.* fig.2.

286. *Id.* fig.1.

of guilt was sixty-seven percent.[287] Thus, the two groups perceived the defendant's guilt differently.[288] Accountability also reduced the primacy effects, which is noteworthy for criminal prosecutions.[289] Subjects who did not have to justify their impressions of the defendant's guilt were more likely to be influenced by the first presentation of the prosecutor.[290] Tetlock concluded that accountability made people attuned to the reasoning behind their decision and "motivate[d] complex and vigilant information processing."[291]

These results should be viewed with trepidation given the small sample size. The study also used one demographic in one locale, thus lacking a true representation. These concerns aside, the results undermine anonymous juries. While anonymity was not a focus, the study demonstrates that accountability influences the juror's decision making. A decision maker who is not held accountable behaves differently from one who is. Having to justify their reasoning forced jurors to better process the information. It also resulted in a fairer process.

Accountability and anonymity are connected. Jurors are indirectly accountable for their decisions.[292] The Public Trial Clause engenders accountability for jury verdicts.[293] "Accountability to the community is an important pressure on [jurors] to do the right thing."[294] While juries are not accountable *per se*, media attention can prompt jurors to rationalize their decision. Indeed, one commentator contends that post-verdict juror interviews promote accountability in the judicial process.[295] "Mindful that reporters might ask them for post-trial explanations, it has been suggested that jurors will respond by paying more careful attention than they otherwise would to the

287. *Id.*

288. *Id.* at 290.

289. *Id.*

290. *Id.* at 289–90.

291. *Id.* at 286.

292. *See* Roderick M. Kramer et al., *The Social Context of Negotiation: Effects of Social Identity and Interpersonal Accountability on Negotiator Decision Making*, 37 J. CONFLICT RESOL. 633, 638 (1993) (noting that "accountability activates self-presentational concerns because people seek approval and status from the 'audiences' that observe their behavior").

293. *See* Marvin Zalman & Maurisa Gates, *Rethinking Venue in Light of the "Rodney King" Case: An Interest Analysis*, 41 CLEV. ST. L. REV. 215, 238 (1993) ("a local juror in a small town 'may indeed feel a sense of personal responsibility . . . that a resident of an urban area . . . may not.'" (quoting Corona v. Superior Court, 101 Cal. Rptr. 411, 418 (Ct. App. 1972))).

294. Nancy J. King, *Nameless Justice: The Case for the Routine Use of Anonymous Juries in Criminal Trials*, 49 VAND. L. REV. 123, 126–28 (1996).

295. Nicole B. Casarez, *Examining the Evidence: Post-Verdict Interviews and the Jury System*, 25 HASTINGS COMM. & ENT. L.J. 499, 547 (2003).

evidence and arguments."[296] Thus, public pressure is akin to accountability. But if the public does not know who the jurors are, jurors may act less responsibly. Thus, juror accountability is thwarted by juror anonymity. An anonymous juror is just that. He is unknown to the media, and can thus avoid accountability.

Tetlock's accountability study raises questions about anonymous juries. Those held not accountable are more likely to vote guilty, a frightening prospect for criminal defendants being tried by anonymous jurors. As Tetlock notes, "[d]emands for accountability not only affect what people think; demands for accountability also affect how people think."[297] Whether anonymous jurors are more prone to convict and whether they take the role of juror less responsibly are two questions at the heart of the anonymity issue. The Tetlock study answers both in the affirmative.

In sum, accountability engenders more cognitive effort.[298] When subjects are told they will be interviewed about their decision, they invest more cognitive energy.[299] In psychological terms, concerns about accountability lead people "to muster the additional cognitive resources required for data-driven processes, utilizing those processes rather than the schematic processes that are more prone to error."[300] These findings further undercut the case for anonymous juries.

296. Nancy S. Marder, *Deliberations and Disclosures: A Study of Post-Verdict Interviews of Jurors*, 82 IOWA L. REV. 465, 499 (1997) (noting post-verdict interviews may encourage jurors to be more responsible).

297. Philip E. Tetlock, *The Impact of Accountability on Judgment and Choice: Toward a Social Contingency Model*, 25 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 331, 342 (1992).

298. *See* Robert H. Ashton, *Effects of Justification and a Mechanical Aid on Judgment Performance*, 52 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 292, 301 (1992) (justifying decisions creates "significant improvement in accuracy that can be traced in part to a significant improvement in consistency"); Philip E. Tetlock, Linda Skitka & Richard Boettger, *Social and Cognitive Strategies for Coping with Accountability: Conformity, Complexity, and Bolstering*, 57 J. PERSONALITY & SOC. PSYCHOL. 632, 633 (1989) (positing that people are cognitive misers and responding to different forms of accountability takes effort); Elizabeth Weldon & Gina M. Gargano, *Cognitive Loafing: The Effects of Accountability and Shared Responsibility on Cognitive Effort*, 14 J. PERSONALITY & SOC. PSYCHOL. 159, 160 (1988) (citing various studies demonstrating that decision makers who know they are being held accountable use more complex decision processes than those that do not).

299. *See* Lerner & Tetlock, *supra* note 273, at 255 (accountability encourages people to give "compelling justifications" so that they may experience rewards); Philip E. Tetlock & Jae Il Kim, *Accountability and Judgment Processes in a Personality Prediction Task*, 52 J. PERSONALITY & SOC. PSYCHOL. 700, 700 (1987) (describing study showing subjects who are aware of their accountability beforehand invest more effort in evaluations).

300. Ronald Chen & John Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. CAL. L. REV. 1103, 1185 (2004) (citing JACQUES-PHILIPPE LEYENS, VINCENT YZERBYT & GEORGES SCHADRON, STEREOTYPES AND SOCIAL COGNITION 135–37 (1994)).

D. Correlating Anonymity with Other Security Measures

Courtroom security measures also provide insight on the psychological ramifications of anonymity. Social scientists have studied how security impacts jurors. This subpart examines the effects of jury sequestration and armed law enforcement officers on juries and extrapolates them to anonymity.

1. Jury Sequestration

Jury sequestration is the physical isolation of the jury from the public and sequestration can be instituted for the trial or jury deliberations.[301] Common law principles governed sequestration, but now statutory authority controls it.[302] Courts use sequestration as a last resort because it is a logistical nightmare, most detrimental to the sequestered jurors who describe feelings of "imprisonment."[303]

Social science provides minimal research on the effects of sequestration. This is understandable, given the difficulty in simulating such conditions. Logistical barriers render mock sequestration impracticable. One study compared sequestered and non-sequestered juries in New York, revealing that sequestered juries produced sixteen percent more convictions than non-sequestered juries.[304] While the jurors were not asked about their feelings on sequestration and whether it affected their decision, these numbers are instructive because they involved actual trials. This figure shows sequestered juries are more prone to convict, although it did not account for differences in evidence.

Hypotheses exist about the negative effects of sequestration on criminal defendants. A juror may develop animosity towards the defendant when he learns he cannot see his family.[305] This predicament may be attributed to the defendant and thus color the juror's views.[306] Another source of possible prejudice is the repeated contact between

301. James P. Levine, *The Impact of Sequestration on Juries*, 79 JUDICATURE 266 (1996).

302. Marcy Strauss, *Sequestration*, 24 AM. J. CRIM. L. 63, 70 (1996); *see also* 18 U.S.C. § 3432 (2006) ("[A] list of the veniremen and witnesses . . . need not be furnished if the court finds by a preponderance of the evidence that providing the list may jeopardize the life or safety of any person.").

303. *See* Mark Hansen, *Sequestration: Little Used, Little Liked*, 81 A.B.A. J. 16, 16-17 (Oct. 1995) (discussing the cons of sequestration). The jurors in the Simpson case spent more time in confinement than the average criminal defendant in California. *Id.* at 16.

304. Charles Winick & Alexander B. Smith, *Post Trial Sequestered Juries Tilt Toward Guilty Verdicts*, N.Y. L.J., Dec. 12, 1986, at 1.

305. *See* Strauss, *supra* note 302, at 115.

306. *Id.*

jurors and law enforcement officials.[307] Bailiffs, marshals, and sheriffs are often the only outside contact jurors have during sequestration.[308] Such an atmosphere may put the prosecution in a positive light.[309] The study suggests that additional forms of security may result in higher rates of guilty verdicts. Sequestration, like anonymity, is atypical. Jurors may think these security measures are needed to protect them from the defendant. The subsequent step between dangerousness and guilt is hard to resist.

2. Armed Security

The use of law enforcement officers is another court room security measure. But the monitoring of criminal defendants by officers can cause the jury to perceive the defendant as dangerous. Such a negative perception hampers the defendant's right to a fair trial.[310] The Ninth Circuit has suggested that enhanced security measures could impugn the presumption of innocence.[311] The presence of armed law enforcement officers raises concerns similar to anonymity. Each has the potential to skewer the presumption of innocence by portraying the defendant negatively. This is not to suggest officers should not be present; their presence saves lives. This Part merely compares the effects of armed guards to that of anonymity.

In *Holbrook v. Flynn*,[312] the U.S. Supreme Court considered whether armed security in a courtroom violated a defendant's right to a fair trial. The defendant argued the guards' close proximity to him caused the jury to perceive him as guilty.[313] The defendant cited a study discussing the prejudicial effect of armed security.[314] The Court rejected the study and concluded that the guards' presence was not so prejudicial to violate the defendant's constitutional rights.[315]

307. *Id.* at 114–15.

308. *Id.*

309. *Id.*

310. *But see* Holbrook v. Flynn, 475 U.S. 560, 572 (1986) (holding presence of security guards in courtroom was not inherently prejudicial and did not hamper defendant's right to fair trial).

311. Morgan v. Aispuro, 946 F.2d 1462, 1464–65 (9th Cir. 1991) (holding the security measures in this case were not inherently prejudicial but leaving open the possibility that they may be in other cases).

312. 475 U.S. 560 (1986).

313. *Id.* at 562–63, 70.

314. *Id.* at 571 n.4 (citing Gary Fontaine & Rick Kiger, *The Effects of Defendant Dress and Supervision on Judgments of Simulated Jurors: An Exploratory Study*, 2 L. & HUM. BEHAV. 63, 69–70 (1978)).

315. *Holbrook*, 475 U.S. at 571.

The study cited in *Holbrook* was conducted by scholars Gary Fontaine and Rick Kiger. It considered whether armed supervision of criminal defendants influenced jurors.[316] The study's concerns were the effects of supervision on pretrial custody and the ability to obtain bail. The study also examined the effect of a defendant's dress on jurors.[317] The subjects, college students, watched a fifty-minute video of a simulated murder trial.[318] The videotape presented the trial proceedings as it occurred, except when a witness testified, a still picture of the defendant appeared on the monitor.[319] The subjects were split into different groups, each group watching different versions of the same trial.[320] Some subjects saw the defendant in personal dress (suit and tie) while others saw institutional dress (jail shirt and pants). Others saw the defendant either by himself or with an armed guard.[321] After viewing the trial, the subjects determined whether the defendant was guilty of first-degree murder, second-degree murder, or manslaughter.[322]

The Fontaine and Kiger experiment sought to determine whether institutional dress and armed supervision led jurors to infer that defendants were unable to post bail.[323] While unrelated to juror anonymity, the results are important. The researchers concluded the subjects were cognizant of the armed guard, and the armed supervision led jurors to infer the defendant was unable to post bail.[324] Defendants wearing personal dress with armed supervision and defendants wearing institutional dress without supervision received more severe verdicts.[325] Armed supervision alone resulted in more severe verdicts.[326] However, those defendants with institutional dress and armed security received lesser verdicts.[327] The researchers attributed this to a "sympathy effect."[328] The study was conducted again, but with subjects drawn from a voter registration list.[329] The results were

316. Fontaine & Kiger, *supra* note 314, at 63.
317. *Id.*
318. *Id.* at 65.
319. *Id.*
320. *Id.*
321. *Id.*
322. *Id.* at 66.
323. *Id.* at 63.
324. *Id.* at 66.
325. *Id.* at 67.
326. *Id.*
327. *Id.*
328. *Id.* at 69.
329. *Id.* at 68.

similar. Institutional dress with no supervision or personal dress with supervision led to more severe verdicts.[330] The defendant in institutional dress with armed supervision again received more lenient sentences.[331]

While the results are instructive, the study is not without flaws. The subjects rendered their decisions individually. This method ignores the effect of group deliberations on decision making, and group deliberations could have minimized bias against the defendant. Another weakness is that the trial was conducted via a video monitor. Much is lost through a television screen, especially the presence of an armed guard next to a criminal defendant. The repeated use of still pictures made subjects more aware of the independent variables (dress and supervision) than a subject might ordinarily be. These still pictures forced subjects to stare at the defendant while a witness testified, likely affecting their mental processes. Also, the trial lasted only fifty minutes. Actual trials can last for weeks, with jurors seeing the defendant surrounded by armed security repeatedly. The prejudice might wane as jurors became accustomed to the situation. Finally, the study's effects did not capture the true prejudice an actual juror might have when armed security is present. While the study's methods were less time consuming and more cost effective, the prejudicial impact is best determined through procedures mimicking real life.

E. Psychology and Anonymity

Many assumptions about the jury are psychological ones.[332] Juror bias is no exception. Whether anonymity prejudices a defendant's right to a fair trial is steeped in psychological considerations. Thus, the legal system's assumption that an anonymous juror remains neutral and unbiased is challenged by social science. While social science is not a panacea, it illuminates issues touching upon juror psychology. Thus, courts should consider the impact of anonymity through the prism of psychology.

The above studies do not prove beyond a doubt that anonymity's psychological impact harms defendants. But it is a starting point. The findings do establish that anonymity leaves an imprint on a juror's psyche. The degree of this mark, even if minimal, cannot be ignored. A defendant's right to a fair trial is at stake, and courts have failed to

330. *Id.* at 69.

331. *Id.*

332. PSYCHOLOGY OF THE COURTROOM 2 (Norbert L. Kerr & Robert M. Bray, eds., 1982).

consider the psychological implications of anonymity. Examining psychology in the context of anonymous juries may uncover intricate issues otherwise safely interred. But it is the duty of courts to ensure the presumption of innocence does not become an abstraction.

Conclusion

"An institution that has so long stood the trying tests of time and experience, that has so long been guarded with scrupulous care, and commanded the admiration of so many of the wise and good, justly demands our jealous scrutiny when innovations are attempted to be made upon it."[333] The jury has undergone changes in the last several decades. Such results have dismantled jury fixtures, and anonymity is no different. An axiom of the adversarial system is a neutral fact finder. But if a defendant cannot ensure that neutrality, this tenet is undermined. Psychological research instructs anonymity impacts juror decision making, and not in a defendant's favor. As anonymity is inimical to the presumption of innocence, courts need to take a closer look at anonymous juries.

333. Work v. State, 2 Ohio St. 296, 303 (1853).