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A Jury of Your [Redacted]: The Rise and Implications of Anonymous Juries

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NOTE

A JURY OF YOUR [REDACTED]: THE RISE AND IMPLICATIONS OF ANONYMOUS JURIES

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Since their relatively recent beginnings in 1977, anonymous juries have been used across a litany of cases: organized crime, terrorism, murder, sports scandals, police killings, and even political corruption. And their use is on the rise. An anonymous jury is a type of jury that a court may empanel in a criminal trial; if one is used, then information that might otherwise identify jurors is withheld from the parties, the public, or some combination thereof, for varying lengths of time.

Though not without its benefits, anonymous juries raise questions regarding a defendant's presumption of innocence, the public's right to an open trial, the broad discretion afforded to judges, and the impacts of anonymity on juror decision-making. In fact, one mock jury experiment found that anonymous jurors returned approximately 15% more guilty verdicts than their non-anonymous counterparts. The anonymous jury is unquestionably a potent tool that affords a court great flexibility to meet the exigencies of a trial head on. But its extraordinary characteristics counsel care in its empanelment. By adopting the Seventh Circuit's approach to anonymous juries and requiring reasoned verdicts when they are used, anonymous juries may yet become an "inspired, trusted, and effective" instrument of justice.

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INTRODUCTION

The jury is part and parcel of our legal tradition.[1] Since "time out of mind,"[2] juries—a group of people empowered to decide facts and render verdicts[3]—were used in England before finding purchase first in the Colonies, and then in the United States.[4] The jury, like other aspects of the trial, has witnessed its share of innovations throughout time.[5] Some innovations trace their genesis to the Founding.[6] Others claim descent from the changing views of American society.[7] The anonymous jury, however, is of recent vintage.[8] A group of nameless—

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1 *See* U.S. CONST. art. III, § 2, cl. 3 ("The Trial of all Crimes . . . shall be by Jury."); U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."); U.S. CONST. amend. VII ("In Suits at common law . . . the right of trial by jury shall be preserved."). Interestingly, the Constitution contained no specific provision for a jury in civil trials. At least one Founding Father contended that the absence of a specific provision did not mean that the right was entirely abolished. THE FEDERALIST No. 83 (Alexander Hamilton).

2 3 WILLIAM BLACKSTONE, COMMENTARIES *349–50.

3 *Jury*, BLACK'S LAW DICTIONARY (10th ed. 2014).

4 BRIAN H. BORNSTEIN & EDIE GREENE, THE JURY UNDER FIRE: MYTH, CONTROVERSY, AND REFORM 3 (2017).

5 *See, e.g.*, NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES: THE VERDICT 66–70 (2007) (discussing the historical development in the way jurors are selected from the community).

6 *See, e.g.*, VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 32–36 (1986) (discussing a colonial jury's involvement in developing the idea of freedom of the press).

7 *See, e.g.*, VIDMAR & HANS, *supra* note 5, at 71–73 (noting the shift towards jury representativeness as an ideal in the years following the passage of the Fourteenth Amendment).

8 *See* Abraham Abramovsky & Jonathan I. Edelstein, *Anonymous Juries: In Exigent Circumstances Only*, 13 ST. JOHN'S J. LEGAL COMMENT. 457, 457–58 (1999) ("[In 1977] a federal trial judge in the Southern District of New York empaneled the first fully anonymous jury in American history."). The Ninth Circuit, however, anonymized some juror information before the seventies. Johnson v. United

potentially featureless[9]—people sit in judgment and mete out verdicts, in apparent contradiction to our democratic ideals of a free and open society. Since 1977, when the first anonymous jury was empaneled in a federal court in New York,[10] they have been used across a litany of cases: organized crime,[11] terrorism,[12] murder,[13] sporting scandals,[14] police killings,[15] and even gubernatorial corruption.[16] And their use is on the rise.[17] An anonymous jury is a type of jury that a court, upon its own or the parties' motion, may choose to empanel in a criminal trial; if one is used, information that might identify jurors is withheld from the parties or the public for varying lengths of time. Though not without its benefits, anonymous juries raise questions regarding a defendant's presumption of innocence, the public's right to an open trial, judicial discretion, and the

States, 270 F.2d 721, 724 (9th Cir. 1959) (holding that jurors' addresses may be withheld).

9 *See infra* subpart I.B.

10 *See* Abramovsky & Edelstein, *supra* note 8, 457–58.

11 *See, e.g.*, United States v. Barnes, 604 F.2d 121, 131 (2d Cir. 1979); *see also* Arnold H. Lubasch, *Jurors in Gotti Case to Be Sequestered and Not Identified*, N.Y. TIMES (Nov. 15, 1991), http://www.nytimes.com/1991/11/15/nyregion/jurors-in-gotti-case-to-be-sequestered-and-not-identified.html [https://perma.cc/3HQ2-5VVA] (reporting that jurors will be innominate in the trial of infamous mob boss John Gotti).

12 *E.g.*, Neil Harvey, *Jurors in Neo-Nazi Trial Will Remain Anonymous*, ROANOKE TIMES (Oct. 23, 2013), https://www.roanoke.com/news/crime/roanoke/jurors-in-neo-nazi-trial-will-remain-anonymous/article_b643236c-8672-5c61-aab0-99d7ad723516.html [https://perma.cc/8S6S-PZWV].

13 *See, e.g.*, Diane Dimond, *Casey Anthony Jurors Fear Threats After Identities Revealed Oct. 25*, DAILY BEAST (Oct. 23, 2011, 10:59 PM), https://www.thedailybeast.com/casey-anthony-jurors-fear-threats-after-identities-revealed-oct-25 [https://perma.cc/KB3R-KJHW] (reporting juror fear regarding their names being released after the trial of Casey Anthony).

14 *E.g.*, Rebecca R. Ruiz, *FIFA Trial Opens with References to Cash Drops and Bag Men*, N.Y. TIMES (Nov. 13, 2017), https://www.nytimes.com/2017/11/13/sports/soccer/fifa-trial-marin-napout-burga.html [https://perma.cc/9QF4-3ZNV].

15 *E.g.*, Carrie Johnson, *Why Courts Use Anonymous Juries, Like in Freddie Gray Case*, NPR (Nov. 30, 2015, 4:46 PM), http://www.npr.org/sections/thetwo-way/2015/11/30/457905697/why-courts-use-anonymous-juries-like-in-freddie-gray-case [https://perma.cc/J5P7-XC99] (noting that the judge in the Freddie Gray police brutality case empaneled a completely anonymous jury).

16 *See, e.g.*, United States v. Blagojevich, 612 F.3d 558, 561 (7th Cir. 2010); *see also* B.J. Lutz, *Blagojevich Jurors to Remain Anonymous*, NBC CHI. (Feb. 8, 2011, 8:51 PM), https://www.nbcchicago.com/blogs/ward-room/Blagovevich-Jurors-to-Remain-Anonymous-115612614.html [https://perma.cc/Z3UK-6MN6] (reporting that jurors' names in former Illinois Governor Rod Blagojevich's retrial will remain anonymous throughout the trial).

17 Dean Seal, *Called 'Drastic,' Anonymous Juries Nevertheless Rising in Use*, DAILY PROGRESS (Jan. 30, 2016), http://www.dailyprogress.com/news/local/called-drastic-anonymous-juries-nevertheless-rising-in-use/article_be05c22a-6b8e-5d93-a9aa-455d1241aa11.html [https://perma.cc/QAM6-Q3KJ].

impacts of anonymity on juror decision-making. In the absence of Supreme Court precedent, courts have fashioned various approaches to the issue.[18] The anonymous jury is unquestionably a potent tool that affords a court great flexibility to meet the exigencies of a trial head on. But its extraordinary characteristics counsel care in its empanelment.

This Note begins in Part I by providing an overview of the jury, focusing particularly on the definitional issue regarding the myriad configurations an "anonymous jury" takes. Next, Part II provides a survey of various standards federal and state courts use in empaneling anonymous juries. Then, Part III analyzes the many implications that arise when an anonymous jury is used and concludes that the definitional ambiguity, broad discretion, and insufficient juror accountability under the majority test employed across courts are detrimental to the jury's underlying principles and warrant a different approach. Finally, Part IV proposes a solution—adopting the Seventh Circuit's approach to anonymous juries and requiring reasoned verdicts when an anonymous jury is empaneled—and provides an illustration of the proposed test to a modern example: high-profile cases of law enforcement violence.

I
THE JURY AND ANONYMITY

A. A Brief Background on the Jury

Among our societal institutions, the jury occupies a unique place at the confluence of the state, civil society, and political society.[19] In *Williams v. Florida*, the Supreme Court proclaimed that the "essential feature" of a jury is twofold: its interposing of "commonsense judgment of a group of laymen" between litigants and the resulting "community participation and shared responsibility" jurors experience after completing their service.[20] Indeed, both the original states and each state that subsequently joined the Union guarantee some form of

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18 *See infra* Part II.

19 *See* JOHN GASTIL ET AL., THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION 15–17 (2010). Indeed, jury service is a duty for *all* citizens. *See* Scott Simon, *Even (Former) Presidents Have to Go to Jury Duty*, NPR (Nov. 11, 2017, 8:00 AM), https://www.npr.org/2017/11/11/563409708/even-former-presidents-have-to-go-to-jury-duty [https://perma.cc/KKV3-WXU3] (noting that even former presidents, including former President Obama, have been called for jury duty).

20 *See* 399 U.S. 78, 100 (1970).

jury trial.[21] Before the jury may serve, however, it must first be selected.

Voir dire is the investigative jury selection process employed across courts nationwide, used to empanel an ideal, representative jury—a jury composed of a fair, random cross section of the community.[22] During the process, judges and attorneys question prospective jurors, called venirepersons,[23] to determine whether that person is legally qualified to serve and can remain impartial and unbiased toward the parties.[24] Notably, the judge enjoys broad discretion in conducting voir dire.[25] And this discretion extends to anonymity. Generally, voir dire marks the beginning of an anonymous jury.[26] Indeed, various courts have termed a jury anonymous, withholding some combination of juror names, addresses, work information, or even ethnic backgrounds, from the beginning of voir dire.[27] This raises a threshold question: What does the term "anonymous jury" mean? Courts have appended the "anonymous jury" label to various configurations of anonymity.

B. The Amorphous Definition of Anonymity

It is perhaps unsurprising that the spectrum of anonymity among the various anonymous juries empaneled is as broad as the discretion the judge possesses to empanel them. A clear understanding of the several types of anonymity found within the "anonymous jury" label, therefore, is necessary in order to properly evaluate the implications of anonymous juries on the

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21 Duncan v. Louisiana, 391 U.S. 145, 153 (1968).

22 VIDMAR & HANS, *supra* note 5, at 74.

23 *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 618–19 (1991).

24 BORNSTEIN & GREENE, *supra* note 4, at 38. An in-depth treatment of voir dire is outside the scope of this Note. See generally CIVIL TRIAL PRACTICE: STRATEGIES AND TECHNIQUES (William A. Masterson ed., 1986), for a detailed discussion of the various stages of the trial process, including voir dire.

25 *See* FED. R. CIV. P. 47 ("The court *may* permit the parties or their attorneys to examine prospective jurors or *may* itself do so." (emphasis added)); Aldridge v. United States, 283 U.S. 308, 310 (1931); *cf.* Stilson v. United States, 250 U.S. 583, 586 (1919) ("There is nothing in the Constitution of the United States which requires the Congress to grant peremptory challenges to defendants in criminal cases; trial by an impartial jury is all that is secured.").

26 Though beyond the scope of this Note, there are other techniques, such as jury sequestration or gag orders, through which juror information might effectively be anonymized. *See generally* Jaime N. Morris, *The Anonymous Accused: Protecting Defendants' Rights in High-Profile Criminal Cases*, 44 B.C. L. REV. 901, 904–14 (2003) (discussing jury sequestration and gag orders in highly publicized criminal cases).

27 *E.g.*, United States v. Barnes, 604 F.2d 121, 133–37 (2d Cir. 1979) (assigning jurors numbers for identification purposes and withholding their identities, residences, and ethnic backgrounds).

court, the public, and the parties. In contradistinction to the "usual case"[28] of a routinely selected jury, a jury is anonymous when certain information that would otherwise be available to the parties and court is withheld.[29] Juror anonymity may thus be conceptualized on four axes: the quantity of information anonymized, the amount of parties barred from the anonymized information, the duration of anonymity, and the nature of the anonymized information divulged post-trial.

Myriad juror information may be anonymized, such as the jurors' names, ages, addresses, levels of education, and types of employment; the degree of anonymized information varies depending on the exigencies of the case.[30] Among the least anonymizing forms of an anonymous jury is the "innominate jury": a jury in which the only piece of information withheld from the parties are the names of the jurors.[31] A more anonymizing form of an anonymous jury is the aptly named "numbers jury," in which jurors are identified in court by a number instead of their name.[32] Even within the term "numbers jury," however, disagreement exists as to the precise contours of that term.[33] On the other end of the anonymity spectrum, courts have anonymized much more information. For example, in *United States v. Ross*, the court empaneled an anonymous jury that withheld the jurors' "names, addresses, places of employment, and spouses' names and places of employment."[34] Notably, the *Ross* court withheld this information from the outset of the trial.[35]

Moreover, from whom—the parties, the public, the court, or counsel—juror information is withheld likewise varies. The common case involves the court withholding information from the public.[36] Withholding information from the public, of

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28 United States v. Ross, 33 F.3d 1507, 1519 n.22 (11th Cir. 1994) ("In the usual case, the parties know the names, addresses, and occupations of potential jurors, as well as those of any spouses . . . .").

29 *See* State v. Sandoval, 788 N.W.2d 172, 194 (Neb. 2010).

30 *Id.* at 195–96.

31 *See* United States v. Bowman, 302 F.3d 1228, 1236 (11th Cir. 2002).

32 *Sandoval*, 788 N.W.2d at 194 (noting that although jurors were identified in court by numbers, counsel, but not the defendant, knew the names of potential jurors).

33 *See* Perez v. People, 302 P.3d 222, 225–26 (Colo. 2013) (referring to a jury as a numbers jury when jurors were identified in court by numbers yet both counsel and defendant knew the names of jurors).

34 United States v. Ross, 33 F.3d 1507, 1519 (11th Cir. 1994).

35 *Id.* Moreover, the court ordered the jurors to meet in a location from which federal marshals would escort them to and from the courthouse; this was done out of concerns for security and presumably anonymity. *Id.*

36 *See, e.g.*, United States v. Black, 483 F. Supp. 2d 618, 624 (N.D. Ill. 2007).

course, intuitively raises questions regarding whether constitutional issues are implicated; these issues are discussed in Part III below. Courts have also withheld juror information from the defendant and the public; in *Ross*, for example, the court withheld the juror information previously mentioned from both the defendant and the public, reasoning that the defendant had "previously attempted to interfere with the judicial process" and that "harmful pretrial publicity had occurred."[37] In another case, a court disclosed juror information to the defendant's counsel, but ordered that they not disclose the information to anyone, including the defendant.[38]

Furthermore, the timing when it comes to releasing previously withheld information and the extent of the information divulged varies. For example, in *United States v. Brown*, the court empaneled an anonymous jury and took a particularly stringent approach toward timing and information divulged when it denied a news media request for juror information post-verdict.[39] Courts have, on the other hand, imposed durational limits on anonymity; in *United States v. Doherty*, for example, the court allowed juror information to be withheld from the public for only seven days post-verdict.[40] Moreover, even if courts choose to lift the veil of anonymity, they might nevertheless not divulge all previously anonymized information. Courts might, for example, completely withhold all information, as in *Brown*,[41] but they might also release anonymized information in a generalized way so as to preserve a heightened degree of anonymity that detailed information would not have. Consider, for example, *United States v. Melendez*, where the court did not divulge the jurors' first names, specific addresses, and places of employment, but did divulge their surnames, counties and general areas of residence, and types of employment.[42]

In sum, courts have approached the label of anonymous juries in myriad ways. Indeed, the broad discretion involved in empaneling an anonymous jury—a matter of "trial administration"[43]—gives courts wide latitude in determining exactly what

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37 *See Ross*, 33 F.3d at 1519.

38 State v. Sandoval, 788 N.W.2d 172, 194 (Neb. 2010).

39 250 F.3d 907, 910 (5th Cir. 2001).

40 675 F. Supp. 719, 725 (D. Mass. 1987) ("Lifting the [anonymity] order seven days after the return of the verdict thus accommodates all the relevant interests. . . .").

41 *Brown*, 250 F.3d at 918.

42 743 F. Supp. 134, 138–39 (E.D.N.Y. 1990).

43 *See* United States v. Edmond, 52 F.3d 1080, 1090 (D.C. Cir. 1995).

form their anonymous juries will take. In fact, courts might withhold a variety of juror information as early as voir dire. Furthermore, courts might withhold the information from some of the parties, from the public, or it might withhold the information solely from the defendant, while allowing counsel access. Moreover, courts might set deadlines for disclosure, and, even upon disclosure, courts retain discretion with regards to the type and specificity of information divulged. Thus, there exists a wide spectrum bookended by the routine, non-anonymous jury on one end and the completely anonymous jury on the other. There is not, however, a uniform framework for empaneling an anonymous jury. Indeed, various approaches exist among federal and state courts regarding when an anonymous jury might properly be empaneled.

II
ANONYMOUS JURIES AMONG THE COURTS

Though the anonymous jury is but a few decades removed from its inception—a mere fry in the ocean of jury history—it has proliferated far and wide among both federal and state courts. Judicial power to empanel an anonymous jury is variously derived from local court rules, statutes, or common law. Notably, the United States Supreme Court has yet to squarely address anonymous juries: it has provided neither the circumstances in which an anonymous jury may be empaneled nor the analytical framework to determine whether an anonymous jury has been properly empaneled.[44] Accordingly, various standards governing anonymous juries have arisen among federal and state courts. Before examining the anonymous jury in the modern context, however, an overview of the seminal case that produced this "judicial fluke"[45] is instructive.

In *United States v. Barnes*, Judge Werker of the Southern District of New York empaneled the first completely anonymous jury in the trial of Leroy "Nicky" Barnes.[46] Barnes, crime boss of the then-largest heroin distribution network in Harlem,[47] was tried along with fourteen co-defendants on a litany of

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44 *See* United States v. Blagojevich, 612 F.3d 558, 563 (7th Cir. 2010) ("[The United States Supreme Court] has [not] decided under what circumstances, and after what procedures, jurors' names may be kept confidential. . . .").

45 Abramovsky & Edelstein, *supra* note 8, at 458.

46 604 F.2d 121 (2d Cir. 1979).

47 Barnes himself has told his story across myriad media. *See generally* LEROY BARNES & TOM FOLSOM, MR. UNTOUCHABLE (2007) (detailing Barnes' criminal enterprise; his subsequent arrest, trial, and conviction; and his later life as state's evidence); MR. UNTOUCHABLE (Magnolia Pictures 2007) (same).

charges including conspiracy, engaging in a continuing criminal enterprise, violating narcotics laws, and firearm possession.[48] Notably, there were no threats to potential jurors before trial; government officials, however, received an anonymous telephone call that threatened to murder one of the Government's witnesses, who was being held in protective custody, if the witness cooperated with the Government at trial.[49] This threat was not unfounded: before the trial began, another potential witness against Barnes was found dead.[50] At trial, the court rejected the prosecution's motion to sequester the jury and instead prohibited disclosure of the venirepersons' names, addresses, religions, and ethnic backgrounds.[51] Moreover, the trial judge neither solicited the views of either party nor did he allow any challenges to the procedure during trial.[52] Ultimately, Barnes and ten of his co-defendants were found guilty.[53] The defendants appealed, arguing that the anonymous jury violated their due process.[54] The Second Circuit was unpersuaded.[55] It noted that neither statutory nor constitutional law compelled blanket disclosure of juror information.[56] With regards to voir dire, the Second Circuit, after examining precedent, stated that all that was required was "some questioning as to identifiable issues connected in some way with persons, places, or things likely to arise during the trial."[57] After noting the perils of organized-crime investigations, threat of jury tampering, media harassment of jurors, and the broad discretion a trial judge enjoys in conducting the trial,[58] the Second Circuit explained that anonymity "com-

48 *Barnes*, 604 F.2d at 130–31.

49 *Id.* at 136 ("[The Government] was called by an anonymous caller who allegedly said, about [the witness]: 'If he does anything, he'll be dead.'").

50 *Id.* at 137 n.7 ("Indeed, on the eve of trial, in September 1977, a potential witness Shepard Franklin, was reportedly murdered at the Harlem River Motors Garage—the site of much of the trafficking in this case." (citation omitted)).

51 *Id.* at 135.

52 *Id.* at 169 ("[E]very time counsel for the defendants sought to challenge the district court's ruling, either orally or in writing, their requests were sharply denied.").

53 *Id.* at 133. Barnes's conviction on the charge of continuing criminal enterprise resulted in a life sentence. *Id.* at 156.

54 *Id.* at 133.

55 *Id.* at 142–43.

56 *See id.* at 144. The Second Circuit acknowledged the existence of 18 U.S.C. § 3432, which requires disclosure of potential jurors' names and addresses, but noted its inapplicability to non-capital cases. *Id.* at 143 n.11.

57 *Id.* at 139.

58 *Id.* at 137 ("A general principle of law thus has been developed that the trial judge has broad discretion in conducting the *voir dire*, . . . as he does in his conduct of the trial generally." (citations omitted)).

ported with [the court's] obligation to protect the jury, to assure its privacy, and to avoid all possible mental blocks against impartiality."[59] The Second Circuit thus upheld the empanelment of an anonymous jury and provided the principles that underlie its use to this day.[60]

A. Federal Courts

Since their spontaneous beginnings in the Northeast, anonymous juries have spread across the United States—every federal circuit has empaneled an anonymous jury.[61] Most circuits, although requiring some evidence that warrants anonymity, adhere to a similar test that empowers the trial judge with broad discretion to empanel an anonymous jury.

Across the majority of circuits, an anonymous jury may be empaneled if two conditions are met. The trial court must first "conclud[e] that there is [a] strong reason to believe the jury needs protection"; if that condition is met, then the court must take "reasonable precautions to minimize any prejudicial effects on the defendant and to ensure that [the defendant's] fundamental rights are protected."[62] If this two-pronged test is met, then an anonymous jury may be properly empaneled. Several factors have been articulated to guide trial judges when determining whether the first prong has been satisfied. In empaneling anonymous juries, courts generally consider: (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 or witnesses; (4) the potential that, if convicted, the defen-

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59 *Id.* at 141. The Second Circuit, additionally, pointed to the fact that two defendants were entirely acquitted as indicative that all the defendants were accorded all process due. *See id.* at 143 n.12. *But see* Christopher Keleher, *The Repercussions of Anonymous Juries*, 44 U.S.F. L. REV. 531, 536–37 (2010) (describing Barnes and another co-defendant's semi-botched attempt to bribe an acquaintance that had been selected as a juror in their case).

60 *Barnes*, 604 F.2d at 143. Not all Judges agreed with the result reached. *See id.* at 170–74 (Meskill, J., dissenting) (noting with concern that anonymity could not guarantee impartiality and undermined peremptory challenges). The Supreme Court, however, denied the petition for writ of certiorari. Barnes v. United States, 446 U.S. 907 (1980).

61 *See, e.g.*, United States v. White, 810 F.3d 212 (4th Cir. 2016); United States v. Ramirez-Rivera, 800 F.3d 1 (1st Cir. 2015); United States v. Deitz, 577 F.3d 672 (6th Cir. 2009); United States v. Shryock, 342 F.3d 948 (9th Cir. 2003); United States v. DiDomenico, 78 F.3d 294 (7th Cir. 1996); United States v. Darden, 70 F.3d 1507 (8th Cir. 1995); United States v. Krout, 66 F.3d 1420 (5th Cir. 1995); United States v. Edmond, 52 F.3d 1080 (D.C. Cir. 1995); United States v. Ross, 33 F.3d 1507 (11th Cir. 1994); United States v. Paccione, 949 F.2d 1183 (2d Cir. 1991); United States v. Scarfo, 850 F.2d 1015 (3d Cir. 1988).

62 *See Paccione*, 949 F.2d at 1192 (citations omitted).

dant will suffer a lengthy incarceration and substantial monetary penalties; and (5) whether extensive publicity exists that could enhance the possibility that jurors' names would become public and expose them to intimidation and harassment.[63] With regards to the test's second prong, courts have given curative instructions to mitigate the prejudicial risk anonymous empanelment poses; instead of focusing on juror safety from the defendant as justification for anonymity, these instructions typically attribute anonymity toward the need to protect the jury from harassment from the media.[64] The decision whether to empanel an anonymous jury is "entitled to deference and is subject to abuse of discretion review."[65] Some

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63 *Krout*, 66 F.3d at 1427; *see also* United States v. Mostafa, 7 F. Supp. 3d 334, 336–37 (S.D.N.Y. 2014) ("[T]hree factors that a district court should examine [to determine whether to empanel an anonymous jury are]: (1) whether the charges against the defendant are serious, (2) whether there is a substantial potential threat of corruption to the judicial process, and (3) whether considerable media coverage of the trial is anticipated.").

64 *Shryock*, 342 F.3d at 972–73. *United States v. Thomas* exemplifies a typical instruction:

> Now, this should be a very interesting case. Undoubtedly, it could receive considerable publicity, newspaper, radio and television. The media and the public may be curious concerning the identity of the participants, the witnesses, the lawyers and the jurors. That curiosity and its resultant comments might come to the attention of the jury selected here and possibly impair its impartiality by viewpoints expressed, comments made, opinions, inquiries and so forth.
>
> Now, such outside influences could tend to distort what goes on in court, the evidence, and be distracting and divert the attention of the jury, and it might result in people prying into personal affairs of the participants, including those selected as jurors, who are selected only to judge the evidence in the case that can legally come before you, and thus to distort and distract attention from the case.
>
> Consequently, taking into consideration all the circumstances, I have decided that in selecting those who will serve as the jury your name, your address and your place of employment will remain anonymous during the trial of this case, and that's the reason why you have been given numbers.
>
> This will serve to ward off curiosity and seekers for information that might otherwise infringe on your privacy and it will aid in insulating and sheltering you from unwanted and undesirable publicity and embarrassment and notoriety and any access to you which would interfere with preserving your sworn duty to fairly, impartially and independently serve as jurors. It will permit the media complete freedom of coverage of this trial.

United States v. Thomas, 757 F.2d 1359, 1365 n.1 (2d Cir. 1985).

65 *Krout*, 66 F.3d at 1426. Under the abuse of discretion standard, a reviewing court inquires whether the decision reached by the lower court was "grossly unsound, unreasonable, illegal, or unsupported by the evidence." *Abuse of Discretion*, BLACK'S LAW DICTIONARY (10th ed. 2014); *e.g.*, United States v. Sanchez, 74 F.3d 562, 564–65 (5th Cir. 1996) (concluding that the trial court abused its discretion in empaneling an anonymous jury when there was no extensive media publicity and defendant, a police officer, was not involved in organized crime, did

circuits, however, have applied a plain error standard of review when no objection to the empanelment of an anonymous jury is made on the record.[66] Although "something more" than a terrorism or organized-crime label is required to justify anonymity, this does not appear to be a particularly demanding finding to make.[67] Logistically, one way in which courts preserve juror anonymity is by employing marshals who transport jurors from an undisclosed location to the courthouse.[68]

The heavily followed and publicized trial of former Louisiana Governor Edwin Edwards and several others illustrates the application of the majority rule in the modern context: anonymous juries—no longer confined to organized-crime trials—empaneled amid concerns about juror privacy and harassment.[69] Edwards, an infamous politician,[70] and his co-defendants, some of whom were other government officials, were indicted on charges that included "numerous counts of con-

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not attempt to harm jurors, and had not attempted to interfere with the judicial process); *see also* KEVIN M. CLERMONT, STANDARDS OF DECISION IN LAW: PSYCHOLOGICAL AND LOGICAL BASES FOR THE STANDARD OF PROOF, HERE AND ABROAD 45–46 (2013) (discussing that the abuse of discretion standard is ambiguous in theory but concrete in application).

66 *See, e.g.*, United States v. White, 698 F.3d 1005, 1018 (7th Cir. 2012). A plain error is a substantial error that if left uncorrected violates due process and damages the integrity of the judicial process. *Plain Error*, BLACK'S LAW DICTIONARY (10th ed. 2014); *see also* FED. R. CRIM. P. 52(b); CLERMONT, *supra* note 65, at 45–46, 48 ("The power to reverse for plain error is an exception to the adversary principle of party-presentation . . . .").

67 *See, e.g.*, United States v. Gambino, 809 F. Supp. 1061, 1066 (S.D.N.Y. 1992) (finding that defendants' alleged association with an organized crime family that had a history of interference with the judicial process justified empanelment of an anonymous jury); *see also* United States v. Vario, 943 F.2d 236, 241 (2d Cir. 1991) ("This 'something more' can be a demonstrable history or likelihood of obstruction of justice on the part of the defendant . . . or a showing that trial evidence will depict a pattern of violence by the defendant[ ] . . . such as would cause a juror to reasonably fear for his own safety.").

68 *See, e.g.*, United States v. Ross, 33 F.3d 1507, 1519 (11th Cir. 1994). Another way to preserve juror anonymity is by use of the aforementioned "numbers jury": the court assigns each juror a number and only refers to the juror by that number during the trial.

69 United States v. Brown, 250 F.3d 907, 918–19 (5th Cir. 2001).

70 Since beginning his political career in 1954, Edwin Edwards has been a colorful and controversial state senator, a member of the U.S. House of Representatives, and a four-term governor of Louisiana; ultimately, he served eight years in prison after being found guilty of racketeering charges. *See* Bill Nichols, *Edwin Edwards' Last Stand*, POLITICO (Apr. 10, 2014 5:05 AM), https://www.politico.com/story/2014/04/edwin-edwards-louisiana-2014-elections-105563 [https://perma.cc/AZH5-FXYD] (reporting 86-year-old Edwards's post-prison campaign for Congress); *see also* Sean Sullivan, *The Greatest Quotes of Edwin Edwards*, WASH. POST. (Mar. 17, 2014), https://www.washingtonpost.com/news/the-fix/wp/2014/02/20/edwin-edwardss-greatest-hits-crooks-super-pacs-and-viagra/ [https://perma.cc/EH2X-6DD7] ("I will be a model prisoner as I was a model citizen.").

spiracy, mail and wire fraud, insurance fraud, making false statements, and witness tampering."[71] The United States moved for an anonymous jury, and the defendants opposed the motion.[72] The district court discussed three factors that justified empanelment of an anonymous jury: the defendants attempted to interfere with the judicial process through witness tampering, attempted to bribe a judge, and attempted to illegally terminate a federal investigation; the defendants faced potentially lengthy incarceration and substantial monetary penalties; and this case and other related trials received extensive publicity.[73] Remarkably, there were neither elements of organized crime nor physical danger toward the potential jurors;[74] the district court nevertheless granted the motion and empaneled an anonymous jury.[75] Indeed, the district court was particularly concerned with juror privacy and harassment concerns when noting that in a previous, related trial, the media "aggressively followed, identified, and contacted jurors in violation of the anonymous jury order" and that the media's conduct "strongly counsels the Court to protect the panel from foreseeable harassment by the media and others."[76] Although the anonymous jury was not challenged on appeal, the Fifth Circuit noted that, due in part to "[v]ery real threats . . . posed by excessive media coverage," the trial judge's decision to empanel an anonymous jury was appropriate.[77]

B. State Courts

In keeping with their role as laboratories of democracy,[78] states generally exhibit a more diverse approach to anonymous juries. At present, a considerable number of states permit the possibility of anonymous juries through either a statutory or

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71 *Brown*, 250 F.3d at 910.

72 *Id.*

73 *Id.* at 910–11.

74 Whether a group of government officials abusing their positions for ill-gotten gains constitutes organized crime is a question beyond the scope of this Note.

75 *Brown*, 250 F.3d at 910 (withholding jurors' names, addresses, and places of employment).

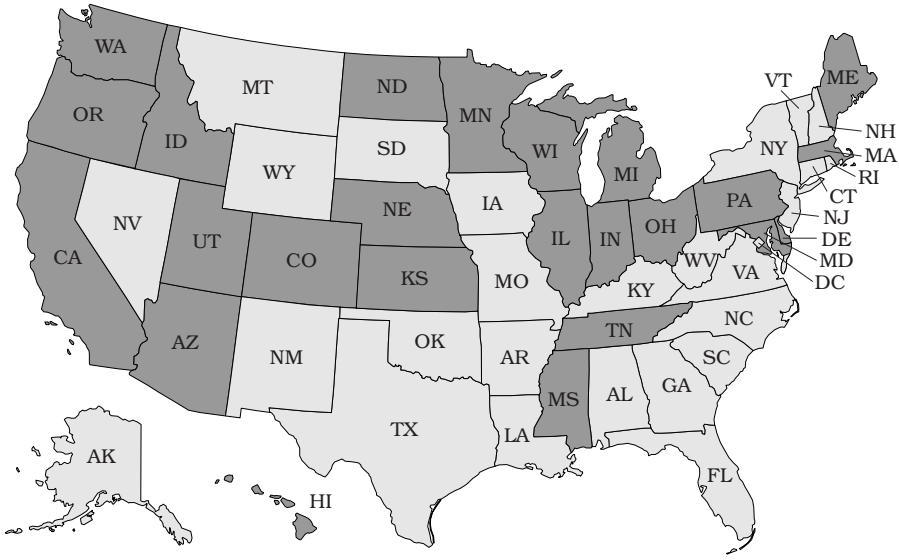
76 *Id.* at 911.

77 *See id.* at 922.

78 *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

common law grant of power to the trial judge, as illustrated in *Figure 1*.[79]

FIGURE 1
ANONYMOUS JURIES AMONG STATES



79 *See* CAL. CIV. PROC. CODE § 237 (West 2017); COLO. REV. STAT. § 13-71-136 (2017); DEL. CODE ANN. tit. 10, § 4513 (2017); HAW. REV. STAT. §§ 612-18 to -27 (2017); IDAHO CODE § 2-220 (2017); IND. CODE § 33-28-5-12 (2017); ME. REV. STAT. ANN. tit. 14, § 1254-B (2017); MD. CODE ANN., CTS. & JUD. PROC. § 8-202 (West 2017); MINN. R. CRIM. P. 26.02 (2017); MISS. CODE ANN. § 13-5-32 (2017); N.D. CENT. CODE § 27-09.1-09 (2017); UTAH R. CRIM. P. 18 (2017); State v. Rodriguez, No. 1 CA-CR 15-0659, 2017 WL 443528 (Ariz. Ct. App. Feb. 2, 2017); Perez v. People, 302 P.3d 222 (Colo. 2013); Gannett Co. v. State, 571 A.2d 735 (Del. 1989); State v. Samonte, 928 P.2d 1 (Haw. 1996); People v. Collins, 813 N.E.2d 285 (Ill. App. Ct. 2004); Green v. State, 994 N.E.2d 1276 (Ind. Ct. App. 2013); State v. Robinson, 363 P.3d 875 (Kan. 2015), *cert. denied*, 137 S. Ct. 164 (2016); Commonwealth v. Angiulo, 615 N.E.2d 155 (Mass. 1993); People v. Williams, 616 N.W.2d 710 (Mich. Ct. App. 2000); Golnick v. Callender, 860 N.W.2d 180 (Neb. 2015); State v. Hill, 749 N.E.2d 274 (Ohio 2001); State v. Washington, 330 P.3d 596 (Or. 2014) (en banc); Commonwealth v. Long, 922 A.2d 892 (Pa. 2007); State v. Ivy, 188 S.W.3d 132 (Tenn. 2006), *cert. denied*, 549 U.S. 914 (2006); State v. Ross, 174 P.3d 628 (Utah 2007); State v. Thompson, No. 23805-5-II, 2001 Wash. App. LEXIS 49 (Wash. Ct. App. Jan. 12, 2001); State v. Tucker, 657 N.W.2d 374 (Wis. 2003). In past years, legislators in Connecticut and New Jersey have introduced bills regarding anonymous juries, but they were not enacted. *See* H.B. 5841, 2015 Gen. Assemb., Jan. Sess. (Conn. 2015) (proposing complete anonymity to prospective jurors in criminal cases); Assemb. B. 1776, 213th Leg., Reg. Sess. (N.J. 2008) (proposing procedure for empaneling anonymous juries). Interestingly, although Louisiana courts have not empaneled anonymous juries, they have expressly used factors from the majority federal test when determining whether to disclose the identity of a *witness* to a defendant. *See* State v. Le, 188 So. 3d 1072, 1080 (La. Ct. App. 2015).

Some states, like Tennessee and Utah, have simply adopted the majority federal test.[80] Other states, like Minnesota, expressly provide a framework for empaneling anonymous juries in their rules of criminal procedure.[81] In a similar vein, California provides a statutory path toward revealing juror information post-verdict: any person, upon a showing of good cause, may access withheld juror information unless there is a "compelling interest against disclosure."[82] Indeed, the principles underlying the use of anonymous juries in state courts are consonant with the principles in federal courts. State courts, generally, look toward whether protecting the jurors from danger, intimidation, or harassment justifies the risk of infringing the defendant's presumption of innocence.[83]

New York, however, counts itself among the states that currently bar the use of anonymous juries.[84] Its state courts have construed their jury selection statute, CPL 270.15, to generally allow judges to only withhold juror addresses; they are, on the other hand, prohibited from withholding juror names.[85] Indeed, a recent case, *People v. Flores*, appeared to be the paradigmatic case for empaneling an anonymous jury. There, the trial judge *sua sponte* empaneled an anonymous jury in a criminal case involving four defendants reputed to be violent gang members.[86] The appellate court, on appeal, held that the anonymous jury violated the defendants' right to a fair trial.[87] More notable than the majority's decision, however, was Judge Dillon's dissent. He began by first noting that an anonymous jury had already been empaneled in a New York court before the passage of CPL 270.15.[88] Moreover, legislative intent indicated that CPL 270.15 was meant to safeguard prospective jurors in criminal cases who faced credible threats of "harm, intimidation, or bribery" and to let them serve as jurors without

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80 *See Ivy*, 188 S.W.3d at 144; *Ross*, 174 P.3d at 636–38.

81 *See* MINN. R. CRIM. P. 26.02 (allowing anonymous jury empanelment but requiring, among other things, detailed findings of fact supporting the empanelment).

82 CAL. CIV. PROC. CODE § 237(b) (explaining that a compelling interest against disclosure includes, among other things, protecting jurors from threats or danger of physical harm).

83 *See Robinson*, 363 P.3d at 1006–07. State courts, like federal courts, allow the use of curative jury instructions as a means with which to minimize prejudice against the defendant. *E.g.*, *id.* at 1004.

84 *See* People v. Flores, 153 A.D.3d 182, 189 (N.Y. App. Div. 2017).

85 *See id.* at 188.

86 *See id.* at 184–85.

87 *See id.* at 188.

88 *Id.* at 206 (Dillon, J.P., dissenting).

fear of repercussions.[89] But that salutary purpose, as Judge Dillon aptly notes, is frustrated by that very statute in the age of ubiquitous, Internet-connected devices and the prevalence of social media. A juror's address may yield a juror's "family relationships, employment details, and general background information[, all] immediately obtained at the courthouse."[90] In other words, statutory construction underpinned by an understanding of 20th century technology is outdated when a wealth of juror information is one click away. Although his fellow judges were unpersuaded, Judge Dillon's dissent may prove convincing elsewhere—the court, after reversing the trial court and ordering a new trial, *sua sponte* granted the prosecution leave to appeal its decision to the New York Court of Appeals.[91] If appealed, it will be the first time New York's highest court considers the issue of anonymous juries.[92]

Anonymous juries are empaneled among state and federal courts. Though the federal and state courts that allow anonymous juries exhibit some variations among the tests used to empanel one, they are generally characterized by a broad grant of discretion to the trial judge. This, of course, allows the trial court to tailor procedures to meet the circumstances of the case before them. Yet concerns remain regarding the use of anonymous juries. Indeed, their use implicates interests beyond the courtroom.

III
THE IMPLICATIONS OF ANONYMOUS JURIES

Anonymous juries, by their very name, instantly evoke consideration for one actor within the judicial system—the jury. And understandably so. Concerns over juror safety, harassment, and undue influence provided the impetus for their

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89 *Id.* at 201.

90 *See id.* at 207.

91 *Id.* at 215 (granting permission to appeal pursuant to N.Y. C.P.L.R. § 5602). The Second Department's unusual procedural move perhaps underscores the significance of this case. In contrast with the more well-known writ of certiorari process in the federal system, parties can ask New York appellate courts for a grant to appeal to the New York Court of Appeals; but an appellate court's *sua sponte* grant to appeal, although possible, is seldom seen and should be done "sparingly." *See* Rob Rosborough, *Second Department Grants Leave to Appeal to Court of Appeals Sua Sponte. Can It Do That?*, N.Y. APPEALS (July 6, 2017), https://nysappeals.com/2017/07/06/second-department-grants-leave-to-appeal-to-court-of-appeals-sua-sponte-can-it-do-that/ [https://perma.cc/5YUK-CZFJ] (analyzing the issue and noting that the N.Y. C.P.L.R., which the *Flores* court cited in its grant to appeal, is normally inapplicable in a criminal case like *Flores*).

92 *See Flores*, 153 A.D.3d at 208.

creation.[93] But juries serve a broader purpose: they infuse a trial with community values, they signal legitimacy toward society, and their judgments prompt civic and political debate.[94] Indeed, juries implicate interests of the parties, the public, the court, and the jurors themselves.[95] Understanding these implications is necessary to understanding the anonymous jury's place within the American legal system.

A. The Parties

Anonymous juries, at their most immediate, affect the parties to the trial in which an anonymous jury is empaneled, and perhaps no consideration is more crucial than the defendant's presumption of innocence stemming from the Sixth Amendment right to a fair trial.[96] But anonymity may introduce deleterious effects. Jurors, as some scholars note, may arrive to court emotionally predisposed against jury duty—they might be angry, upset, or uncertain[97]—and those emotions affect their decision-making.[98] Anonymity, in this heightened emotional state, fuels further uncertainty; after all, anonymity does not comport with common views of juries.[99] These feelings are further fueled by the trial itself; a juror might wonder, in a

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93 *See supra* notes 46–59 and accompanying text.

94 *See* BORNSTEIN & GREENE, *supra* note 4, at 9–10.

95 *See* GASTIL ET AL., *supra* note 19, at 12–17.

96 *See* Estelle v. Williams, 425 U.S. 501, 503 (1976) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." (quoting Coffin v. United States, 156 U.S. 432, 453 (1895))). Indeed, the presumption of innocence is an ancient, bedrock principle worldwide. *See, e.g.*, Canadian Charter of Rights and Freedoms, § 11(d), Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c 11 (U.K.) ("[Persons are] presumed innocent until proven guilty . . . ."); CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 29 ("[Every person is presumed innocent until they have been declared judicially culpable.]"); Art. 27 Costituzione [Cost.] (It.) ("[The accused is not considered guilty until final conviction.]"); KONSTITUTSIIA ROSSIISKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 49 (Russ.) ("[Any person accused of committing a crime shall be considered innocent until his (her) guilt is proven . . . .]"); G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 11 (Dec. 10, 1948) ("[Everyone] has the right to be presumed innocent until proved guilty . . . ."); Charter of Fundamental Rights of the European Union art. 48, Dec. 18, 2000, 2000 O.J. (C. 364) 1, 20 ("[Everyone] shall be presumed innocent until proved guilty . . . ."); DIG. 22.3.2 (Paul, Edict 69) ("Proof lies on him who asserts, not on him who denies." (Roman law)).

97 *See* BORNSTEIN & GREENE, *supra* note 4, at 24–26 (discussing, among other studies, one survey finding that 25% of venirepersons found jury duty inconvenient and another finding that disruptions to daily routines were among the top sources of stress for jurors).

98 *See id.* at 242–46 (discussing how several types of emotions, including emotions that do not arise out of the trial itself, affect jurors' perceptions).

99 *See id.* at 18–23.

numbers jury for example, what the defendant did to merit such a procedure. Indeed, anonymity "rais[es] the specter that the defendant is a dangerous person from whom the jurors must be protected."[100] Thus, although the Supreme Court has yet to directly address anonymous juries, courts should be exceedingly mindful about the risk toward the defendant's presumption of innocence.

Furthermore, an anonymous jury—especially its more anonymizing forms—affects the parties' trial strategy in myriad ways. Lawyers attempt to build rapport and a narrative of their case from voir dire onwards.[101] Additionally, they consider jurors' predilections and beliefs when it comes to presenting evidence and witnesses[102]—a particularly crucial consideration given that evidence is virtually a determinative factor for juror deliberation and decision-making.[103] To be sure, a judge may conduct voir dire and provide the parties with non-identifying juror information that compensates for their paucity of knowledge. But a judge, rightly concerned with chiefly assuring the impartiality of the jury, will likely provide less and less relevant information to the parties, who are concerned with ferreting out advantageous partiality during voir dire. Consider, moreover, recent technological developments like sentiment analysis: algorithms that analyze vast amounts of text and data to determine the opinions, sentiments, and emotions expressed therein.[104] This technology is already incorporated in software services that allow counsel to thoroughly search jurors' online presence, revealing their social media profiles, work experi-

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100 *See* United States v. Ochoa-Vasquez, 428 F.3d 1015, 1048 (11th Cir. 2005) (Barkett, J., concurring in part and dissenting in part) (quoting United States v. Ross, 33 F.3d 1507, 1519 (11th Cir. 1994)).

101 *See generally* MARILYN J. BERGER ET AL., TRIAL ADVOCACY: PLANNING, ANALYSIS, AND STRATEGY (2008) (describing voir dire as the first opportunity to make a favorable impression upon potential jurors and emphasizing the crucial need for a sound voir dire strategy).

102 *See id.* at 51–52 (discussing the need for evidence that comports with the jury's common sense).

103 *See* Reid Hastie et al., *A Study of Juror and Jury Judgments in Civil Cases: Deciding Liability for Punitive Damages*, 22 LAW & HUM. BEHAV. 287, 300–01 (1998) (finding in one study that evidence is the most common deliberation topic, accounting for 36% of deliberation time); Ann Burnett Pettus, *"The Verdict Is In: A Study of Jury Decision Making Factors, Moment of Personal Decision, and Jury Deliberations—From the Jurors' Point of View,"* 38 COMM. Q. 83, 88 (1990) (finding in one study that evidence and witnesses are the two most frequently cited influences on juror verdicts).

104 *See* Bing Liu, *Sentiment Analysis and Subjectivity*, *in* HANDBOOK OF NATURAL LANGUAGE PROCESSING 627, 629 (Nitin Indurkhya & Fred J. Damerau eds., 2d ed. 2010).

ence, interests, and even personalities.[105] Indeed, those services could be used to discover juror biases or prejudices that rise to a level of a strike for cause; but against an anonymous jury, these tools are effectively neutralized. Additionally, peremptory challenges are also hampered when an anonymous jury is empaneled: parties, lacking identifying juror information, must rely on information from a voir dire conducted solely by the judge. In sum, anonymity casts a shadow both on the defendant's presumption of innocence and on practical trial considerations, and that may have public repercussions.

B. The Public

The First Amendment, in addition to granting the freedoms of religion and speech, grants the public a constitutional right to access criminal trials, a right applied to the states through the Fourteenth Amendment.[106] This right, as the Supreme Court has explained, serves to legitimize the criminal justice system; it guarantees both the "basic fairness" and the "appearance of fairness" of the criminal trial.[107] An anonymous jury necessarily casts a shroud over a trial and consequently implicates these constitutional considerations. An anonymous jury hinders the media from fully reporting on a criminal trial, which in turn hinders society's ability to collectively deliberate over the jury's judgments and a court's decisions. In fact, thorough reporting has functioned as a check on judicial proceedings, uncovering impropriety and biases that otherwise would have remained hidden.[108]

Furthermore, one study found that more than half of jurors surveyed felt better toward the justice system after serving,[109] another found that venirepersons who understood why they were dismissed accorded greater legitimacy toward voir dire,[110] and yet another found that a consequential jury experience

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105 *See, e.g.*, VIJILENT, https://www.vijilent.com/ [https://perma.cc/5UPJ-2PC9] (last visited Nov. 9, 2017) (offering comprehensive profiles of individuals created by "powerful" tools that gather "thousands of data points" from "thousands of sources").

106 Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 573–80 (1980) (noting a long history of presumptive openness in criminal trials).

107 *See* Press-Enter. Co. v. Superior Court, 464 U.S. 501, 508 (1984).

108 *See* William R. Montross, Jr. & Patrick Mulvaney, *Virtue and Vice: Who Will Report on the Failings of the American Criminal Justice System?*, 61 STAN. L. REV. 1429, 1438–42 (2009).

109 *See* BORNSTEIN & GREENE, *supra* note 4, at 27.

110 *See* Mary R. Rose, *A Voir Dire of Voir Dire: Listening to Jurors' Views Regarding the Peremptory Challenge*, 78 CHI.-KENT. L. REV. 1061, 1094–98 (2003).

enhances civic engagement.[111] An anonymous jury may impact these salutary effects. Serving on an anonymous jury necessarily involves a more cloistered experience, one that does not offer the juror the full spectrum of jury service. In fact, Gastil and others have found that jurors' cognitive engagement during the trial was a key aspect toward their resultant confidence in the jury system, pride in their civic service, and faith in civic institutions.[112] But, as explained below, anonymous juries may involve psychological effects that result in decreased cognitive engagement.[113] In this way, anonymity might result in detrimental effects on civic engagement. Additionally, potential jurors dismissed after a restrictive voir dire might not be given a full or satisfactory reason for their dismissal because of potential privacy concerns. Indeed, an anonymous juror—under the specter of danger that anonymity may bring—might lose out on the sense of agency and responsibility-taking that result in a meaningful jury experience.[114] In sum, anonymous juries partly shroud a criminal trial and may blunt the beneficial effects of civic engagement, thus affecting the legitimacy of the verdict, an interest "essential to respect for the rule of law."[115]

C. The Court

Questions of consistency across adjudications, uniformity across outcomes, and quality across judgments arise in jurisdictions that commit empaneling anonymous juries to a trial court's discretion. Judicial discretion, essentially, constitutes the broad latitude by the decision-maker to determine a "correct" outcome—without being constrained by bright-line rules of decision—based upon a set of conditions present or absent in the instant case, and it is pervasive across our legal system.[116] Discretion is beneficial because it allows judges—those

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111 *See* BORNSTEIN & GREENE, *supra* note 4, at 30.

112 *See* GASTIL ET AL., *supra* note 19, at 174–76.

113 *See infra* notes 125–133 and accompanying text.

114 *See* BORNSTEIN & GREENE, *supra* note 4, at 29.

115 *See* Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 860 (2017).

116 *See* Richard L. Marcus, *Slouching Toward Discretion*, 78 NOTRE DAME L. REV. 1561, 1562–70 (2003); *see also* Osborn v. Bank of United States, 22 U.S. 738, 866 (1824) ("When [courts] are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law."); Jonathan R. Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure*, 23 J. LEGAL STUD. 627, 630–32 (1994) (contending that judges prefer greater discretion). There are, however, legislative efforts in at least one state to curtail the discretion trial judges enjoy. *See* Press Release, Ash Kalra, Bill to Foster Fair Juries Authored by Assemblymember Ash Kalra Signed Into Law by Governor (Sept. 27, 2017), https://a27.asmdc.org/press-release/bill-foster-fair-

closest to the facts and conditions of the case—to respond to unforeseen complications and to best effectuate the spirit of the law itself.[117] But there are, however, issues that militate against broad discretion: among others, the psychological concepts of bounded rationality and information access. Bounded rationality describes the issue of systemic biases being introduced into a decision when decision-makers, faced with complex decisions, use heuristics to guide decision-making.[118] Moreover, information access describes the problem a judge faces when he or she act on an incomplete factual record; when a judge, for example, makes a decision before all the facts have been introduced and subjected to adversarial proceedings at trial.[119] These problems are particularly acute in the anonymous jury context, especially because a judge might be tasked with empaneling an anonymous jury as early as voir dire. To be sure, there may be dispositive facts; for example, a previous criminal verdict and overwhelming evidence of continued gang affiliation. But when the judge must balance the risk toward the jury against the infringement of the defendant's presumption of innocence and the judge has limited facts, there is opportunity for systemic bias to occur if the judge looks toward some of the factors commonly used like, for example, whether defendants are involved in organized crime, their participation in a group with capacity to harm jurors, or the potential that they will suffer lengthy incarceration or monetary penalties.[120] In these cases, a judge drifts perilously close to prejudging the merits of the case.[121] For example, whether a defendant is involved in organized crime is a conclusory fact that ought to be determined by the factfinder, not the presiding judge, at the

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juries-authored-assemblymember-ash-kalra-signed-law-governor [https://perma.cc/3JQ8-3J57] (announcing passage of California legislation that requires courts to allow "liberal and probing" questioning of venirepersons by counsel). Judicial efforts are, remarkably, likewise underway. *See* Maura Ewing, *A Judicial Pact to Cut Court Costs for the Poor*, ATLANTIC (Dec. 25, 2017), https://www.theatlantic.com/politics/archive/2017/12/court-fines-north-carolina/548960/ [https://perma.cc/PJK9-UTS8] (reporting a commitment by trial judges in North Carolina to consult a "bench card" that reminds them to fully assess a defendant's ability to pay before setting a fine or fee).

117 *See* Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 1965–70 (2007).

118 *See* CLERMONT, *supra* note 65, at 61–71; Bone, *supra* note 117, at 1987–91.

119 *See* Bone, *supra* note 117, at 1991–97; Stephen C. Yeazell, *Judging Rules, Ruling Judges*, 61 LAW & CONTEMP. PROBS. 229, 241–42 (1998).

120 *See supra* note 63 and accompanying text.

121 *See generally* CLERMONT, *supra* note 65, at 12 (providing examples among various legal tests that require judges to evaluate the probability of a future event occurring).

end of an adversarial proceeding and after each party has been given all the process that they are due. Moreover, the factor that looks toward sentence length or penalty is nonsensical because federal crimes routinely result in potentially lengthy incarcerations;[122] thus, a defendant accused of a federal crime might face an anonymous jury as a matter of course. Broad discretion thus has the potential to introduce systemic biases into a trial judge's decision-making because they are faced with obstacles—more so earlier in the trial—that open the door to undue influence placed on incomplete information or bias-prone test factors. Resultantly, this discretion introduces inconsistency across adjudications because of the minimal constraints placed upon judges when they decide whether to empanel an anonymous jury; that inconsistency, in turn, affects the quality of judgments because similar cases run a greater risk of not being treated alike.[123]

D. The Jury

To be sure, anonymity provides benefits that ultimately redound toward increased juror safety. Jurors often express concerns over whether their personal information will be available to the defendant or the public,[124] and an anonymous jury provides a remedy to these understandable fears. Furthermore, anonymity, in a general sense, aids in reducing certain stressors associated with jury service; for example, anonymous jurors are not exposed to publicity nor are they faced with potentially probing intrusions into their personal life.

The potentially concerning effects of anonymity, however, ought to make courts strongly consider other alternatives before empaneling an anonymous jury. One notable mock jury experiment studying the impacts of anonymity on juror decision-making reported that anonymous jurors returned approximately 15% more guilty verdicts than their non-anonymous counterparts.[125] In fact, that same study gave different sets of anonymous jurors different curative instructions: one instruc-

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122 *See* U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: CAREER OFFENDER SENTENCING ENHANCEMENTS 34 (2016) (noting that the average sentence imposed for some defendants found guilty of federal crimes is 145 months); *see also* THE PEW CHARITABLE TRS., PRISON TIME SURGES FOR FEDERAL INMATES 1–3 (2015) (illustrating that the average prison time served by federal inmates more than doubled from 1988 to 2012).

123 *See* Joshua B. Fischman, *Measuring Inconsistency, Indeterminacy, and Error in Adjudication*, 16 AM. L. & ECON. REV. 40, 44–45 (2014).

124 *See* United States v. Grandison, 783 F.2d 1152, 1155–56 (4th Cir. 1986).

125 *See* D. Lynn Hazelwood & John C. Brigham, *The Effects of Juror Anonymity on Jury Verdicts*, 22 LAW & HUM. BEHAV. 695, 704 (1998).

tion stated that anonymity was meant to protect jurors from outside harassment and the other stated that anonymity was meant to protect the jurors' safety.[126] That study found that neither instruction significantly affected the verdicts anonymous juries rendered[127]—in other words, the curative instruction did not have the curative effect that courts assumed it would have. This is, of course, worrying; it calls into question the efficacy that curative instructions have when it comes to ameliorating the effects of anonymity.

Moreover, anonymity necessarily results in deindividuation—the loss of self-awareness in groups[128]—which may result in undifferentiated decision-making performance within a group, thus resulting in social loafing, groupthink, and, ultimately, impaired juror accountability. Undifferentiated performance occurs when individuals within a group no longer feel a sense of distinct identities and roles;[129] an acute concern when individuals are anonymously empaneled. This results in some concerning repercussions: social loafing—the tendency for people to reduce effort in a group—and groupthink—the tendency for groups to uncritically converge upon the same conclusions by using the same assumptions and decision-making processes—both are heightened in undifferentiated groups.[130] A jury is already quite susceptible to group decision-making biases and pressures,[131] and anonymity may not only exacerbate those issues but also introduce new complications. Given that cases in which anonymous juries are used are often criminal cases involving the loss of liberty, a juror might already feel disinclined to voice an opinion in this fraught context, and would be even more susceptible to being swayed by the majority group's decision-making process. In this way, a sole anonymous juror might feel less accountable for the ultimate verdict not only because they are anonymous but because the anonymity has detrimentally impacted their decision-making process. And the lack of accountability—that

126 *See id.* at 701–02.

127 *See id.* at 703.

128 *See* Philip G. Zimbardo, *A Situationist Perspective on the Psychology of Evil: Understanding How Good People Are Transformed into Perpetrators*, *in* THE SOCIAL PSYCHOLOGY OF GOOD AND EVIL 21, 29–30 (Arthur G. Miller ed., 2004).

129 *See* Roy F. Baumeister et al., *Are Groups More or Less Than the Sum of Their Members? The Moderating Role of Individual Identification*, 39 BEHAV. & BRAIN SCIS. e137, at 1–3 (2016).

130 *See id.* at 5–7.

131 *See, e.g.*, BORNSTEIN & GREENE, *supra* note 4, at 40–47 (discussing the role explicit and implicit biases play in juror decision making).

is, the lack of an expectation to define one's beliefs[132]—further impairs decision-making because accountability "emphasizes the responsibility of individuals to behave autonomously and present a valid basis for their actions."[133] These are acute concerns in anonymous juries, and additional measures ought to be taken to ameliorate these detrimental effects.

IV
A PROPOSED SOLUTION AND AN ILLUSTRATIVE EXAMPLE

A. Adopting the Seventh Circuit's Approach and Employing Reasoned Verdicts

In their present iteration, anonymous juries are empaneled in cases seemingly removed from the chief issue first identified in *Barnes*: juror safety. Now, anonymous juries are empaneled in cases where the chief concern revolves around juror influence from the public or media. Moreover, the seemingly endless variations of an anonymous jury mean that the same test can result in little anonymized information or, at the other extreme, complete anonymity.[134] Additionally, the concerns regarding accountability and deindividuation are at their zenith when jurors know that their information is anonymized. In effect, they cease to become the representation of their community because there ceases to be any opportunity for accountability; the community, if it disagrees with the result reached, cannot have a thorough, meaningful debate over the decision because the verdict stands alone as the only piece of information. The incidental trappings of a verdict—conversations about the jurors' identities, their reactions, their questions on the record—are restricted with an anonymous jury. Indeed, the anonymous jury in *Barnes* was unsuccessful in preventing outside juror influence—Barnes and the co-defend-

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132 *See* Baumeister et al., *supra* note 129, at 5–7.

133 *Id.* at 8.

134 This is not unlike the problem of "smooth" and "bumpy" laws, as one scholar terms it: a smooth law is one in which a gradual change in legal input is reflected by a gradual change in legal output; a bumpy law is one in which a gradual change in legal input either dramatically affects legal output or does not affect it at all. Applied to the majority test for anonymous juries, the range of legal inputs bears no real relationship to the type of anonymity that results. In other words, a judge may find one factor present and accordingly order a completely anonymous jury; another judge may find all the factors present and simply order an innominate jury. *See generally* Adam J. Kolber, *Smooth and Bumpy Laws*, 102 CALIF. L. REV. 655 (2014) (describing, among other things, how smooth laws create consistency in adjudications and better preserve morally relevant information than bumpy laws).

ants successfully bribed one of the jurors.[135] Anonymity, ironically, made it more difficult to detect this tampering. In response to these concerns, this Note proposes an adoption of the Seventh Circuit's approach to juror anonymity and the use of reasoned verdicts when anonymous juries are empaneled.

The majority test and its resultant various configurations of anonymity mean that an anonymous jury is often used in cases where the actual interests involved are not those that underlie the paradigmatic anonymous jury, which mediates the interests of the jurors and the defendant, but rather are cases in which the chief interests are those of the jurors and the *public*. This mismatch has been addressed in the Seventh Circuit. There, before applying the majority test, the court begins with a threshold question: what *kind* of anonymity is involved—anonymity with regards to the defendant not knowing juror information, or anonymity with regards to the public not knowing juror information?[136] The former is termed an anonymous jury; the latter is termed a confidential jury.[137] If an anonymous jury is requested or the court determines that an anonymous jury might be required, then it applies the majority federal test.[138] If the court finds that a confidential jury is at issue, then it applies an analysis that focuses on the public's common-law right of access to judicial records.[139] The confidential jury test presumes that disclosure of judicial records is favorable over nondisclosure.[140] This presumption derives

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135 After a co-defendant, Fisher, found out that an acquaintance had been selected as a juror, Barnes and the other co-defendants paid $75,000 in exchange for not guilty votes. But Fisher, unbeknownst to Barnes at the time, betrayed Barnes and the other co-defendants by instructing that juror to vote not guilty only for Fisher and not for the rest of the co-defendants. Keleher, *supra* note 59, at 536–37.

136 *See* United States v. Harris, 763 F.3d 881, 886 (7th Cir. 2014).

137 *Id.* The Seventh Circuit, however, has not definitively decided what constitutes an anonymous jury; it notes that, at least, "one necessary component that must be withheld from the parties is the jurors' names." *Id.* at 885. Given the concerns regarding juror accountability, potential infringements on the defendant's presumption of innocence, and the vast amount of information that may be found with just a juror's name, this somewhat lax definition of anonymity is ideal for the purposes of triggering anonymous jury analysis under the majority test.

138 *Id.*

139 *See id.* The Third Circuit has sometimes applied a First Amendment "experience and logic" test and held that the media has a First Amendment right of access to the names and addresses of prospective jurors. *See* United States v. Wecht, 537 F.3d 222, 238 (3d Cir. 2008). *But see* Seth A. Fersko, Note, United States v. Wecht*: When Anonymous Juries, the Right of Access, and Judicial Discretion Collide*, 40 SETON HALL L. REV. 763, 768 (2010) (contending that the Third Circuit improperly applied the "experience and logic" test to the issue in *Wecht*).

140 *See* United States v. Blagojevich, 612 F.3d 558, 563 (7th Cir. 2010).

from the common-law tradition of open litigation,[141] but it is not absolute and may be overcome by an analysis turning on whether the public's access to judicial records was properly denied;[142] a court considers "the need for accountability of the otherwise independent judiciary, the need of the public to have confidence in the effective administration of justice, and the need for civic debate and behavior to be informed."[143] This approach clearly demarcates which interests are most implicated, provides structure to the types of anonymity at issue, and correctly focuses on the underlying issues in each case—the defendant's due process rights in an anonymous jury analysis, and the public's access to courts in a confidential jury analysis.[144] Additionally, a clear distinction between an anonymous and a confidential jury avoids the confusion that sometimes arises when a reviewing court must figure out what type of anonymity was used in the lower court.[145] Moreover, this approach provides greater consistency in adjudications, as parties will have a better idea of what kind of anonymity they might face and can conform their behavior accordingly, which minimizes potentially high error costs and increases judicial efficiency.[146]

Finally, a form of reasoned verdicts—the requirement that the jury give explanations for its decisions[147]—should be required when an anonymous jury or a confidential jury is empaneled. Anonymous jurors would be required to give their conclusions regarding the verdict, what considerations led to that conclusion, why they were or were not convinced beyond a reasonable doubt, and any other considerations that guided their decision-making.[148] Reasoned verdicts, importantly, protect both the public's interest in legitimate verdicts and the defendant's right to a fair trial by safeguarding against any arbitrary and capricious actions by the jury.[149] In this way, even though the public might be faced with an anonymous jury, they nevertheless have the reasons regarding their deci-

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141 *See id.*

142 *See* United States v. Harris, 763 F.3d 881, 886 (7th Cir. 2014).

143 *See* United States v. Sonin, 167 F. Supp. 3d 971, 974–75 (E.D. Wis. 2016).

144 *See Harris*, 763 F.3d at 886.

145 *See* State v. Rodriguez, No. 1 CA-CR 15-0659, 2017 WL 443528, at *2–8 (Ariz. Ct. App. Feb. 2, 2017) (analyzing what kind of anonymous jury a lower court empaneled).

146 *See* Fischman, *supra* note 123, at 45.

147 *See* Richard L. Lippke, *The Case for Reasoned Criminal Trial Verdicts*, 22 CAN. J. L. & JURIS. 313, 313–15 (2009).

148 *See id.* at 315–16.

149 *See id.* at 319.

sion, which allows for public debate and deliberation that allows "judgments [to] find acceptance in the community."[150] To be sure, reasoned verdicts in criminal trials, akin to special verdicts, implicate the constitutional right to have a jury render a final verdict.[151] Juries, as the argument goes, must remain independent and flexible in their pursuit of justice; requiring explanations from the juries risks burdening those aims.[152] But there is empirical research finding that when written findings are required, jurors feel more informed and confident in the verdict reached.[153] Moreover, there is a distinction between safeguarding juries' independence and requiring findings regarding specific elements of a crime; here, a jury's independence is not necessarily extinguished because they ultimately retain the power to render a guilty or not guilty verdict regardless of the elements of the crime.[154] Indeed, there is another key benefit behind reasoned verdicts: accountability. Reasoned verdicts emphasize responsibility among individuals, and behoove the individual to take agency for their own decisions, effectively blunting some of the detrimental effects of deindividuation.[155] By putting the impetus on the individual juror to provide their own reasons behind their decision, reasoned verdicts stymie the effects of social loafing—because the juror must provide their own reasons behind their decision—and groupthink—because there is less of a chance that the juror will simply and uncritically adopt the decision-making processes of the majority. A more developed record is an additional boon, facilitating public debate over a decision or bolstering a record for purposes of an appellate challenge, should the information be released.

B. An Example: Cases of Law Enforcement Violence

Applying this Note's proposed solution to an increasingly prominent context is instructive. In recent years, there has

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150 *See* Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 860 (2017).

151 *See* United States v. Gaudin, 515 U.S. 506, 522 (1995); United States v. Spock, 416 F.2d 165, 180–81 (1st Cir. 1969).

152 *See Spock*, 416 F.2d at 182 ("[T]he jury, as the conscience of the community, must be permitted to look at more than logic.").

153 *See, e.g.*, Larry Heuer & Steven Penrod, *Trial Complexity: A Field Investigation of Its Meaning and Its Effects*, 18 LAW & HUM. BEHAV. 29, 49–51 (1994).

154 *See* Caisa Elizabeth Royer, Note, *The Disobedient Jury: Why Lawmakers Should Codify Jury Nullification*, 102 CORNELL L. REV. 1401, 1410–13 (2017) (discussing the jury's "inescapable" power to nullify the law).

155 *See* CLERMONT, *supra* note 65, at 72 (suggesting jury innovations like written juror instructions, juror notetaking, and special verdicts as a means to ameliorate jurors' cognitive limitations); Baumeister et al., *supra* note 129, at 8.

been a rise in high-profile, police-related deaths, particularly of black Americans, and anonymous juries have subsequently been empaneled.[156] These trials typically entail expansive and high-profile publicity, including public demonstrations.[157] Generally, these cases involve police officers who have not been involved in organized crime, have not previously attempted to interfere with the judicial process, and have not previously participated in a group with the capacity to harm jurors. Indeed, the officers involved in the death of Freddie Gray exemplify the typical officer; all have years of experience serving in law enforcement.[158] Yet in the case of one of the police officers charged in Freddie Gray's death, the judge ordered an anonymous jury because of "intense media scrutiny" that might expose jurors to "unwanted publicity or harassment."[159]

Applying the majority federal test for anonymous juries in this context—that is, based on the amount of publicity and not concerns over juror safety—means that a finding of high-profile publicity is enough to anonymize information from both the parties and the public. In other words, the parties' access to jurors' identities is a collateral casualty of high-profile publicity. The prosecution is stymied from advantages conferred by juror information not because a defendant poses a risk to juror safety that justifies an anonymous jury but because of high-profile publicity. But the Seventh Circuit's approach would result in a materially different outcome. Under the Seventh Circuit's approach, if an anonymous jury—that is, a jury whose information is withheld from the parties—is sought, the court would use the majority federal test and likely find that an anonymous jury is not warranted because the likelihood of juror harm and resultant harm to the judicial process from the defendant is absent.[160] A confidential jury, however, would likely be empaneled; the sheer amount of national publicity in

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156 *See* Johnson, *supra* note 15.

157 *Id.*

158 Paul Schwartzman, *Accused Officers Have Wide Range of Experience*, WASH. POST (May 1, 2015), https://www.washingtonpost.com/local/who-are-the-police-officers-charged-in-the-death-of-freddie-gray/2015/05/01/dde6bc2e-f01f-11e4-8666-a1d756d0218e_story.html [https://perma.cc/Q4ND-22QB].

159 Maryland v. Porter, No. 115141037, slip op. at 1 (Cir. Ct. Balt. City Dec. 3, 2015).

160 In fact, the police-officer defendants here are not dissimilar to the police-officer defendant in *United States v. Sanchez*. There, the Fifth Circuit found that an anonymous jury was not warranted where a police officer, accused of coercing women to engage in various sexual acts, was not involved in organized crime nor belonged to a group with the capacity to harm jurors. United States v. Sanchez, 74 F.3d 562, 562–65 (5th Cir. 1996).

these cases overcomes the presumption in favor of disclosure of judicial records. Crucially, a confidential jury withholds juror information from the public, but not the parties—a significant difference compared to an anonymous jury because juror information is a key consideration in police violence cases.[161] Additionally, reasoned verdicts aid jurors both in forming their own opinions in such a charged trial and fostering accountability for the ultimate verdict reached.

CONCLUSION

Anonymous juries are a potent tool. Originating from a trial judge's concern over juror safety against a defendant involved in organized crime, they have spread across federal and state courts in cases far removed from the paradigmatic organized-crime case. Although the Supreme Court has yet to address the practice, it is likely that anonymous juries are here to stay. Their usefulness in facilitating trials involving not only organized crime but also heavy publicity have made them an ideal tool in the trial judge's toolbox. And bastions traditionally against the practice, like New York, appear to be on the verge of reconsidering their long-held proscriptions against anonymous juries. But there are concerns regarding the defendant's presumption of innocence, the parties' trial strategy, the court's broad discretion, the public's interest in the legitimacy of verdicts, and the jury's accountability with regards to anonymous decision-making. By adopting the Seventh Circuit's test that demarcates between anonymous and confidential juries and requiring reasoned verdicts when an anonymous jury is empaneled, anonymous juries may yet be an "inspired, trusted, and effective" instrument of justice.[162]

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161 *See* Michael Wines, *In Police Shootings, Finding Jurors Who Will Say 'Not Guilty,'* N.Y. TIMES (May 31, 2017), https://www.nytimes.com/2017/05/31/us/police-shootings-trial-jury.html [https://perma.cc/MP99-YXQD].

162 *See* Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 860 (2017).