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ARTICLES

ANONYMOUS JURIES: IN EXIGENT CIRCUMSTANCES ONLY

ABRAHAM ABRAMOVSKY* AND JONATHAN I. EDELSTEIN**

INTRODUCTION

Slightly more than twenty years ago in *United States v. Barnes*,¹ a federal trial judge in the Southern District of New York empaneled the first fully anonymous jury in American history.² This unprecedented measure,³ undertaken by the court on

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** J.D., Fordham University, 1997; B.A., John Jay College of Criminal Justice, 1992. This essay is dedicated, for the first and hopefully not the last time, to my fiancée, Naomi Rabinowitz.

¹ 604 F.2d 121 (2d Cir. 1979). The trial in the *Barnes* case occurred in 1977. *Id.* at 133.

² See *Barnes*, 604 F.2d at 133 (2d Cir. 1979) (noting that previously, only partially anonymous juries had been empaneled on several occasions in Ninth Circuit during 1950's). See, e.g., *Johnson v. United States*, 270 F.2d 721, 724 (9th Cir. 1959) (requiring

its own initiative without being requested by either the prosecutor or defense,⁴ began as a judicial fluke. Despite its origins, it has had as profound an effect on the operation of the American jury system as any number of solemn Supreme Court decisions.

The impact, to be sure, was not immediate. In the decade following *Barnes*, the empanelment of anonymous juries was not a frequent occurrence. As recently as 1986, the use of such juries was widely viewed as a practice peculiar to the Southern and Eastern Districts of New York.⁵ In the last decade, however, the use of anonymous juries has proliferated throughout the United States.

Although the United States Supreme Court has not yet spoken on the topic, a majority of federal appellate jurisdictions and the highest courts of several states have approved the empanelment of nameless juries under certain circumstances.⁶ Some commentators and judges have gone so far as to call for the routine empanelment of anonymous juries in criminal cases⁷ and even in contentious civil cases.⁸ The use of anonymous juries, almost un-

juror to state district of residence but not exact address); *Wagner v. United States*, 264 F.2d 524, 527-28 (9th Cir. 1959) (empaneling partially anonymous jury); *Hamer v. United States*, 259 F.2d 274, 276-80 (9th Cir. 1958) (withholding prospective juror's names and addresses).

³ See Ephraim Margolin & Gerald F. Uelman, *The Anonymous Jury: Jury Tampering By Another Name*, 9-Fall CRIM. JUST. 14, 14 (1994) (stating 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, 24 (1997) (stating that empaneling of anonymous jury was extremely uncommon before *Barnes* decision).

⁴ See *Barnes*, 604 F.2d at 168 (Meskill, J., dissenting).

⁵ See Eric Wertheim, *Anonymous Juries*, 54 FORDHAM L. REV. 981, 982 (1986) (describing anonymous jury as procedure which has "occasionally been used in New York federal courts."); see also *United States v. PepsiCo*, 621 F. Supp. 842, 877 (S.D.N.Y. 1985) (discussing infrequency of Second Circuit empanelment of anonymous juries); *State v. Bowles*, 530 N.W.2d 521, 529 (Minn. 1995) (announcing framework to determine if anonymous jury violates constitutional right to fair trial by burdening presumption of innocence).

⁶ See, e.g., *United States v. Krout*, 66 F.3d 1420, 1427 (5th Cir. 1995) (arguing that jury empanelment is drastic and should only be used under specific circumstances); *United States v. Paccione*, 949 F.2d 1183, 1192 (2d Cir. 1991) (delineating criteria court should employ before empaneling anonymous jury); Jodene Jensen, *Minnesota's First Anonymous Jury*, 22 WM. MITCHELL L. REV. 133, 136-40 (1996) (discussing empanelment of anonymous juries in state courts).

⁷ See Catherine Gewertz, *Judge Halts His Blanket Use of Anonymity in Bellflower*, L.A. TIMES, Jan. 10, 1995, at A3 (stating that following appellate court decision, California Senate narrowly rejected bill allowing trial judges to exercise greater discretion in empaneling anonymous juries); see also Carl Ingram, *Bill to Ensure Anonymity of Jurors is Killed*, L.A. TIMES, Jan. 17, 1996, at A3 (noting that legislation allowing jurors in criminal trials to serve anonymously was voted down in California).

⁸ See, e.g., *United States v. Real Property Known as 77 East 3rd Street*, 849 F. Supp.

thinkable in an American court even thirty years ago, is now touted as a panacea for everything from jury tampering to "juror stress,"⁹ and threatens to alter the very concept of voir dire.¹⁰

A number of states, however, have rejected or highly restricted the empanelment of anonymous juries on the grounds that they impair the presumption of innocence,¹¹ threaten the integrity of the judicial system,¹² and impermissibly narrow the scope of voir dire.¹³ Among these states are Massachusetts,¹⁴ New Jersey,¹⁵ and, until recently, New York.¹⁶

At first glance, the empanelment of nameless juries would appear impossible in New York, a state which unlike the majority of state and federal jurisdictions, grants criminal defendants and their counsel a statutory right to learn the names and addresses

876, 876 (S.D.N.Y. 1994) (involving civil forfeiture proceeding of real property owned by Hell's Angels motorcycle gang). *But see* Weinstein, *supra* note 3, at 27 (noting that anonymity has rarely been employed in civil trials).

⁹ See generally Nancy J. King, *Nameless Justice: The Case for the Routine Use of Anonymous Juries in Criminal Cases*, 49 VAND. L. REV. 123, 126-29 (1996) (discussing anonymous juries as remedy for juror's fears); Daniel W. Shuman, *The Health Effects of Jury Service*, 18 LAW & PSYCH. REV. 267, 268-72 (1994).

¹⁰ See *United States v. Barnes*, 604 F.2d 121, 168-173 (2d Cir. 1979) (Meskill, J., dissenting) (arguing trial court allowed too much discretion in determining best method of voir dire). For states that have adopted the Uniform Jury Selection and Service Act, 13 U.L.A. 437, 455 (West 1986), see COLO.REV.STAT. 13-71-110(5) (Bradford 1998); 10 DEL.C. § 4513 (Michie 1990); HAW.REV.STAT. §§ 612-18 & 27 (Michie 1997); ID.CODE § 2-210(5) (Michie 1998); IND.CODE ANN. 33-4-5.5-12(6) (West 1996); MD.CTS. & JUD.PROC.CODE ANN. § 8-202(3) (Michie 1997); 14 ME.REV.STAT.ANN. § 1254-A (West 1998); MINN.STAT.ANN. § 593.42 subd.5 (West 1998); MISS.CODE ANN. § 13-5-32 (Lawyer's Co-op 1992); N.D.CODE 27-09.1-09 (Michie 1991); UTAH CODE ANN. 78-46-13(5) (Michie 1996).

¹¹ See, e.g., *United States v. Thomas*, 757 F.2d 1359 (2d Cir. 1985) (addressing issue of whether use of anonymous jury unconstitutionally infringed upon presumption of innocence).

¹² See *State v. Accetturo*, 619 A.2d 272, 274 (N.J. 1992) (describing threat to honesty of judicial system posed by curative instruction).

¹³ See *Toney v. State*, 783 S.W.2d 740, 742 (Tex. App. 1990) (recognizing difference between small town and big city juries and impact on attorneys arguing before them); see also *Gannett Inc. v. State*, 571 A.2d 735, 757 (Del. 1990) (Walsh, J. dissenting) (proposing that anonymity of jury gives rise to implication that defendant is dangerous); *Commonwealth v. DuPont*, available in 1998 WL 559694, at *14 (describing manner in which voir dire was limited by anonymity).

¹⁴ See, e.g., *Commonwealth v. Angiulo*, 615 N.E.2d 155, 170-75 (Mass. 1993) (finding that withholding of identities of jurors without cautionary instruction was sufficient basis for granting new trial); *DuPont*, 1998 WL 559694, at *11 (finding trial court had no reason to empanel anonymous jury).

¹⁵ See, e.g., *State v. Accetturo*, 619 A.2d 272, 273-75 (N.J. 1992) (finding difficult to believe that court may instruct in way that will not impair jury's perception of defendant).

¹⁶ See, e.g., *United States v. Barnes*, 604 F.2d 121, 168-173 (2d Cir. 1979) (affirming lower court's empanelment of anonymous jury).

of potential jurors.¹⁷ In *People v. Watts*,¹⁸ however, a 1997 decision rendered during the trial of a reputed organized crime figure, a New York trial court suggested that defendants might forfeit that right through acts of past or present misconduct.¹⁹ Although an anonymous jury ultimately was not empaneled in *Watts*,²⁰ the court's reasoning left open the possibility that a New York trial judge might do so in the future without the need for legislative action.

Accordingly, this article will examine the history and future of anonymous juries in the United States and in New York. Part I of this essay will discuss the Second Circuit's decision in *Barnes* and its progeny, and trace the growing acceptance of nameless juries. Part II will analyze the factors which counsel hesitation in the use of anonymous juries, the majority of which have received scant discussion in judicial and academic forums. Part III will examine the Richmond County Supreme Court's decision in *Watts*, and discuss whether it constitutes legitimate and sufficient authority for future New York courts to withhold the names of potential jurors. Finally, this article will suggest a standard which strikes an adequate balance between the rights of the accused and the need to protect the integrity of the jury system.

I. FROM UNTHINKABLE TO UNASSAILABLE: A BRIEF HISTORY OF ANONYMOUS JURIES

The trial of Leroy "Nicky" Barnes was one of the first modern organized crime megatrials.²¹ Leroy "Nicky" Barnes, the reputed boss of what was then the largest drug trafficking network in Harlem, was arrested in 1977 and tried with 14 co-defendants on numerous counts of conspiracy, violation of narcotics laws, and weapons possession. The government's case against Barnes and his cohorts depended largely on the testimony of various cooperating informants.²²

Prior to trial, several events occurred which raised questions

¹⁷ See N.Y. CRIM. PROC. § 270.15(1)(a) (McKinney 1998).

¹⁸ 661 N.Y.S.2d 768 (1997).

¹⁹ See *id.* at 772.

²⁰ See *id.*

²¹ See *United States v. Barnes*, 604 F.2d 121 (2d Cir. 1979).

²² See *id.* at 130-33.

as to the potential for harm to prosecution witnesses and jurors. At pretrial proceedings, the office of the United States Marshals, who had custody of a Government informant by the name of Robert Geronimo, reported the receipt of an anonymous phone call allegedly threatening that “[i]f he [Geronimo] does anything, he’ll be dead.”²³ On the eve of trial, another potential witness was in fact found dead. Shepard Franklin, a reputed Barnes’ associate, was found murdered at a “site of much of the [drug] trafficking in [the *Barnes*] case.”²⁴

Although no threats, direct or otherwise, had been made against potential jurors in the *Barnes* trial, the prosecution moved to sequester the jury on the grounds of significant danger to their safety and integrity.²⁵ Rather than grant the Government’s motion, the trial judge employed an entirely unprecedented measure: He prohibited the disclosure of the names, addresses and religious and ethnic backgrounds of potential jurors.²⁶ In fact, the trial court ruled that defense attorneys and prosecutors would not even be informed of the neighborhood in which each member of the jury panel lived; they would be limited in their inquiry to the potential juror’s county of residence.

Not only did the trial judge empanel an anonymous jury, but he largely foreclosed litigation of the issue at the trial level.²⁷ He did not solicit the views of the United States Attorney on his proposed method of jury selection, and “every time counsel for the defendants sought to challenge the district court’s ruling, either orally or in writing, their requests were sharply denied.”²⁸ In sum, the trial court empaneled the United States’ first fully anonymous jury without the guidance of prior case law or the parties themselves.²⁹

²³ *Id.* at 136.

²⁴ *Id.* at 137 n.7 (noting that night before trial began, Shepard Franklin, reputed Barnes’ associate, was found murdered at location where much of Barnes’ drug trafficking occurred).

²⁵ *See id.* at 135 n.3 (noting other examples of high-profile criminal cases to illustrate what could occur in present case).

²⁶ *See Barnes*, 604 F.2d at 168 n.1 (noting that trial court ordered that defense attorneys and prosecutors not be informed of neighborhood in which each juror lived, but allowed limited inquiry as to potential juror’s county of residence).

²⁷ *See id.* at 169 (noting that judge did not solicit views of United States Attorney on anonymous jury selection; “every time counsel for the defendants sought to challenge the district court’s ruling, either orally or in writing, their requests were sharply denied”).

²⁸ *Id.*

²⁹ *See id.*

After a lengthy jury selection process,³⁰ the trial of Barnes and his cohorts began on September 29, 1977.³¹ After three days of deliberations, 11 of the 15 defendants, including Barnes, were convicted and sentenced to prison terms ranging from fifteen years to life.³²

On appeal, the primary issue raised by the defendants was the selection and empanelment of an anonymous jury.³³ The defendants contended that the court's failure to disclose the names, addresses and ethnic backgrounds of potential jurors was an impermissible infringement on the voir dire.³⁴ Over a scathing dissent by Judge Meskill,³⁵ the Second Circuit upheld the procedure in an opinion which encapsulates the arguments which have been raised in support of the empanelment of anonymous juries.

The Second Circuit began its analysis by noting that a trial judge generally has broad discretion in conducting the voir dire.³⁶ Thus, the court stated that the purpose of the voir dire was to ascertain disqualifications, rather than affording deep analysis of individual parties to ensure that a jury "fits into some mold . . . believe[d] [to be] appropriate for [a] case."³⁷ In keeping with this principle, the Second Circuit also stated that "the Constitution does not always entitle a defendant to have questions posed during voir dire specifically directed to matters that conceivably might prejudice veniremen against him."³⁸ In conclusion, the majority in *Barnes* held that "[a]s long as there is some questioning as to identifiable issues connected in some way with persons, places or things likely to arise during the trial, an ap-

³⁰ See *id.* at 135-36 (noting that more than 150 potential jurors were questioned by trial court, and prosecuting and defense attorneys).

³¹ See *Barnes*, 604 F.2d at 133.

³² See *id.*

³³ See *id.* at 134.

³⁴ See *id.* Specifically, the defendants cited the famous passage from Darrow's article, *Attorney for the Defense*, in which the legendary trial attorney contended that a juror's "nationality, his business, religion, politics, social standing, family ties, friends, habits of life and thought; the books and newspapers he likes and reads. . . [even to his] method of speech, the kind of clothes he wears, the style of haircut. . ." were proper subjects for voir dire. *Id.*

³⁵ See *id.* at 168-74 (Meskill, J., dissenting) (arguing that trial court's decision to not release juror's names, addresses, ethnic and religious background denied defense meaningful application of peremptory challenge).

³⁶ See *id.* at 137 (citing *Aldridge v. United States*, 283 U.S. 308, 310 (1931)).

³⁷ See *Barnes*, 604 F.2d at 138 (citing *Schlinsky v. United States*, 379 F.2d 735, 738 (1st Cir. 1967)).

³⁸ See *Barnes*, 604 F.2d at 138 n.8 (quoting *Ristaino v. Ross*, 424 U.S. 589, 594 (1976)).

pellate court faced with a cold record should be satisfied that justice has been done.”³⁹

Based upon this reasoning, the Second Circuit concluded that the empanelment of an anonymous jury did not unconstitutionally restrict the scope of the defendants’ voir dire.⁴⁰ Moreover, the court held that the nondisclosure of potential jurors’ names, addresses and ethnic and religious backgrounds was justified by the threat of jury tampering and media harassment of jurors.⁴¹ In reaching this conclusion, the Second Circuit cited three prior instances in which jurors in the Southern District of New York had reportedly been bribed or intimidated,⁴² and speculated that media accounts at the time of the trial had increased the fears of jurors by incorrectly reporting that threats had been delivered by the defendants.⁴³ According to the *Barnes* majority, anonymity removed pressure from the trial jury and fostered impartiality.⁴⁴

The Second Circuit’s holding represented the fulfillment of Judge Friendly’s prophecy delivered 15 years earlier in *United States v. Borelli*,⁴⁵ in which he stated that confirmed threats to jurors “[demonstrated] the need for precautions assuring that the addresses, and perhaps even the names, of jurors in cases such as this will be held in confidence.”⁴⁶ In *Barnes*, the Second Circuit turned possibility into reality, stating that “the time has come to approve the precautions suggested in *Borelli*.”⁴⁷ In fact, the *Barnes* court exceeded the rationale of *Borelli*, concluding that no actual threats were required for such judicial action where the circumstances suggested profound disruption of the

³⁹ See *id.* at 139.

⁴⁰ See *id.* at 142-43 (“Since the court gave counsel full opportunity for an intelligent exercise of challenges by inquiring into the essentials of the case at hand, appellants were not deprived of any trial right which would require a new trial.”).

⁴¹ See *id.* at 135-37 (discussing past instances of jury tampering and media irresponsibility); see also *id.* at 140-42 (addressing issue of jurors’ fears).

⁴² See *id.* at 135 n.3. It is noteworthy that jury tampering was not actually proved in any of these cases. *Id.*

⁴³ See *id.* at 136-37 (describing incorrect statements made by press).

⁴⁴ See *Barnes*, 604 F.2d at 140-41. The court noted that “[i]f a juror feels that he or his family may be subjected to violence or death at the hands of a defendant or his friends, how can his judgment be as free and impartial as the Constitution requires?” *Id.*

⁴⁵ 336 F.2d 376 (2d Cir. 1964) (supporting actions taken by Trial Court).

⁴⁶ *Id.* at 392 (discussing need for precautions for jury safety where confirmed threats to their safety exist and noting that “the time has come to approve the precautions suggested in *Borelli*”).

⁴⁷ *Barnes*, 604 F.2d at 141.

trial.⁴⁸ In the face of the increasing dangers associated with organized crime and narcotics cases,⁴⁹ even the possibility of jury tampering was enough.

The Second Circuit permanently established anonymous juries in federal criminal jurisprudence by denying the defendants' petition for a rehearing.⁵⁰ In a prophetic dissent, Judge Oakes foretold the powerful precedential impact of the majority holding upon narcotics cases: "[J]udges in other narcotics cases are sure to follow its precedent as, to borrow a simile of Judge Tibers, a flock of seagulls follows a lobster boat."⁵¹ In the two decades since the *Barnes* decision, Judge Oakes' prophecy has been more than fulfilled.

Courts since *Barnes* have sanctioned the use of anonymous juries in narcotics cases, as well as a wide range of cases involving organized crime, homicide or widespread publicity.⁵² Indeed, the use of anonymous juries in certain cases has become almost routine. Although the Second Circuit has held that "the invocation of the words 'organized crime,' 'mob,' or 'mafia,' without something more, do not warrant use of an anonymous jury,"⁵³ the federal courts have in practice concluded that "something more" is present in virtually every organized crime case.⁵⁴

In recent years, an increasing number of state as well as fed-

48 See *id.* ("It will not do to say that, because there were no actual threats received in the case at bar, [the trial court's] action was inappropriate, for the circumstances were such that the suggestion of disruption was manifest.").

49 See *id.* at 141-142 (describing increasing dangers of narcotic prosecutions).

50 See *Barnes*, 604 F.2d at 175 (denying rehearing *en banc*).

51 See *id.* (Oakes, J., dissenting).

52 See, e.g., *State v. Bowldes*, 530 N.W.2d 521 (Minn. 1995) (using anonymous jury in trial of accused murderer of police officer); *Commonwealth v. Angiulo*, 615 N.E.2d 155, 171 (Mass. 1993) (empaneling anonymous jury in racketeering case). See generally Abraham Abramovsky, *Anonymous Juries*, N.Y.L.J., Aug. 11, 1993, at 3 (explaining recent decisions to empanel anonymous juries in various types of cases); Michael Miller, *Trial Starts in Los Angeles Riot Beating Case*, REUTERS NORTH AMERICAN WIRE, July 28, 1993 (noting that completely anonymous jury empaneled in trial regarding brutal beating of Reginald Denny during 1992 Los Angeles riots following Rodney King verdict); Eleanor Randolph, *Four Guilty in Bombing of World Trade Center: Angry Outburst in Courtroom Follows Verdict*, WASH. POST, Mar. 5, 1994, at A1 (noting that four accused of bombing World Trade Center were convicted by anonymous jury).

53 See *United States v. Vario*, 943 F.2d 236, 241 (2d Cir. 1991) (explaining ties to organized crime are not sufficient to justify jury empanelment).

54 See *United States v. Gambino*, 809 F.Supp. 1061, 1066 (S.D.N.Y. 1992) (finding that defendant's reputed membership in Gambino organized crime family, an organization with history of attempting to interfere with judicial process, was sufficient to warrant empanelment of anonymous jury); see also Abraham Abramovsky, *Don't Mask Juries*, N.Y. NEWSDAY, Aug. 20, 1993, at 56 (discussing recent trend toward empaneling juries in organized crime cases).

eral jurisdictions have accepted the use of anonymous juries.⁵⁵ In some cases, in fact, state courts have empaneled nameless juries under even broader circumstances than the federal courts have thus far been willing to sanction. For instance, while the Fifth Circuit recently held that an anonymous jury was not warranted in the case of a non-organized crime defendant charged with civil rights violations,⁵⁶ California trial judges have experimented with juror anonymity in misdemeanor cases.⁵⁷ The call for universal empanelment of anonymous juries has recently been taken up by at least one legal scholar, who argues that "juror stress" alone, even without particularized threats to the safety or integrity of the jury, is enough to warrant anonymity.⁵⁸ Thus, in the space of twenty short years, nameless juries have progressed from a judicial fluke to a well-established departure from ordinary procedure, and a measure which some authorities argue seriously *should* be ordinary procedure.

II. ARGUMENTS AGAINST ANONYMOUS JURIES

Unlike the arguments in favor of juror anonymity, the arguments against anonymous juries have received scant attention by courts or legal scholars.⁵⁹ Many judges, especially in federal jurisdictions, have become almost cavalier in granting motions to

⁵⁵ See, e.g., *United States v. Darden*, 70 F.3d 1507, 1532 (8th Cir. 1995) (holding trial court did not err by empanelling anonymous jury in appropriate circumstances); *United States v. Edmond*, 52 F.3d 1080, 1090-91 (D.C.Cir. 1995) (finding empanelment of anonymous jury valid); *United States v. Ross*, 33 F.3d 1507, 1519-22 (11th Cir. 1993) (holding anonymous jury valid); *United States v. Crockett*, 979 F.2d 1204, 1216 (7th Cir. 1992) (finding use of anonymous jury by trial court legitimate based upon defendant's history of violence including murder of potential witness); *United States v. Paccione*, 949 F.2d 1183, 1193 (2d Cir. 1991) (upholding empanelment of anonymous jury on grounds of defendant's strong ties to organized crime). See generally Georgia Sargeant, *Criminal Defense Lawyers Protest Increased Use of Nameless Jurors*, TRIAL, Sept. 1994, at 112 (noting that practice of empaneling anonymous juries has become widespread in federal and state courts).

⁵⁶ See *United States v. Sanchez*, 74 F.3d 562, 565 (5th Cir. 1996) (stating there was no defined juror threat); see also *United States v. Krout*, 66 F.3d 1420, 1427 (5th Cir. 1995) (calling anonymous jury empanelment drastic measure).

⁵⁷ See Catherine Gewertz, *Courthouse Makes Blanket Use of Juror Anonymity*, L.A. Times, July 25, 1994, at A1 (discussing recent jury empanelment and hesitancy to utilize).

⁵⁸ See generally King, *supra* note 9, at 137 (suggesting anonymity lessens general fears of retaliation, exposure, and intimidation); Shuman, *supra* note 9, at 268 (describing research from recent studies indicating high juror stress).

⁵⁹ See *id.* Moreover, the majority of the instances in which the arguments against nameless juries have been noted are court decisions or articles in which these arguments have been merely mentioned or given lip service before being dismissed. *Id.*

empanel anonymous juries in cases with even a remote link to narcotics or organized crime. Nonetheless, the case against juror anonymity is compelling and implicates the highest values and traditions of the American justice system.⁶⁰ The most striking argument against nameless juries, however, is purely practical. Simply put, anonymous juries are unnecessary and fail to serve their purpose.

The historical record demonstrates the lack of necessity for juror anonymity. In the 200-year history of the American justice system, there are few if any instances in which jurors have been injured, and none in which a juror has been killed, as a result of his service on a jury.⁶¹ Moreover, the trials of many notorious organized crime figures, including Al Capone,⁶² "Lucky" Luciano⁶³ and Murder, Inc.'s Louis "Lepke" Buchalter⁶⁴ were all successfully undertaken without the use of anonymous juries.⁶⁵ In each of these cases, the names and addresses of jurors were read aloud in open court, and in none of them was any juror harmed.⁶⁶ It is doubtful that any modern-day organized crime figure would be more dangerous to his enemies-or to jurors-than the legendary Capone or Luciano.

Furthermore, anonymous juries are an inadequate remedy against the threat of jury tampering. This is amply illustrated by the federal and state trials of Gambino family boss, John Gotti.⁶⁷ At Gotti's first federal trial, the anonymous jury was corrupted when a juror with ties to organized crime figures con-

⁶⁰ See generally Eva M. Rodriguez, *Anonymous Juries: More Common, Controversial*, LEGAL TIMES, May 1994, at 1 (exercising peremptory challenges is difficult when there is lack of juror information).

⁶¹ See Abraham Abramovsky, *The Choices Surrounding Use of Anonymous Juries*, N.Y.L.J., Sept. 11, 1993, at 3.

⁶² See *Capone v. United States*, 56 F.2d 927 (7th Cir. 1932).

⁶³ See *People v. Luciano*, 14 N.E.2d 433 (N.Y. 1938).

⁶⁴ See *Buchalter v. New York*, 319 U.S. 427, 429 (1973).

⁶⁵ See *United States v. Barnes*, 604 F.2d 121, 175 (2d Cir. 1979) (Oakes, J., dissenting from denial of petition for rehearing *en banc*); see also *Buchalter*, 319 U.S. at 429; *Capone v. United States*, 56 F.2d 927 (7th Cir. 1932); *People v. Luciano*, 14 N.E.2d 433 (1938).

⁶⁶ See *Buchalter v. New York*, 319 U.S. 427 (1973) (holding no threat of harm existed toward jury in murder trial of Louis Lepke Buchalter); *United States v. Costello*, 255 F.2d 876 (2d Cir. 1958) (holding no threat to jury tax evasion case); *Capone v. United States*, 56 F.2d 927 (7th Cir. 1932) (holding no potential or actual threat to jury in tax evasion trial of reputed mobster); *People v. Luciano*, 14 N.E.2d 433 (1938) (holding no threat of harm to jury in trial of reputed mob boss for prostitution ring).

⁶⁷ See *United States v. Gotti*, 784 F.Supp. 1013, 1013 (E.D.N.Y. 1992); *People v. Gotti*, 552 N.Y.S.2d. 485, 485 (1990).

tacted Gotti's defense team on his own initiative.⁶⁸ In addition, Gotti's 1990 trial for assault in a New York State court was possibly corrupted, but the tampering which may have occurred in that case was not of the kind which could have been prevented by anonymity. Rather Gotti had more direct access to the jurors, namely that the police officer who guarded them during deliberations was on the Gambino family payroll.⁶⁹ The Gotti trials provide more than sufficient proof that anonymity will not stop a resourceful organized crime figure from tampering with a jury.⁷⁰

Another example of the ineffectiveness of anonymity in protecting the identities of jurors was provided by federal prosecutor's recent motion for an anonymous jury in the Abner Louima case.⁷¹ In that motion, the Government requested an anonymous jury due in part to the alleged prior misconduct of Lester Levine, a private investigator employed by one of the defendants.⁷² Specifically, federal prosecutors charged that Levine had discovered the identities of jurors in a prior trial and investigated their backgrounds, despite a court order protecting the jurors' anonymity.⁷³ Moreover, prosecutors also alleged that Levine uncovered the identity of a juror who was excused during trial and interviewed him concerning the ongoing discussion of the case in the jury room.⁷⁴

It is thus apparent that anonymity has not proven to be an effective procedure in guaranteeing the privacy of trial jurors against a determined defendant. In fact, in another organized crime trial that occurred in Florida, the defendant's associates

⁶⁸ See JERRY CAPECI & GENE MUSTAIN, *GOTTI: RISE AND FALL* 173-75 (1996).

⁶⁹ See *id.* at 328-44.

⁷⁰ See N.Y. CRIM. PROC. §§ 215.19; 215.20; 215.25. In addition, in many jurisdictions, a defendant has little to lose by engaging in jury tampering. In New York, for example, jury tampering is at most a Class D felony and in some cases is only a misdemeanor. *Id.* Thus, a defendant facing serious felony charges has every incentive to tamper with the judicial process. It would seem that upgrading of jury tampering to a more serious felony offense would be a far greater deterrent to potential tamperers than would juror anonymity.

⁷¹ See Joseph P. Fried, *Prosecutors in Louima Case Want to Keep Jurors Anonymous*, N.Y. TIMES, Feb. 2, 1999, at B3.

⁷² See *id.*

⁷³ See United States' Memorandum of Law in Support of Its Motion for an Anonymous and Partially Sequestered Jury, in *United States v. Volpe*, CR-98-196 (E.D.N.Y.), dated February 1, 1999, at 11. The trial in which Mr. Levine was alleged to have improperly breached the anonymity of jurors was the "cyber-rape" trial of Oliver Jovanovic. *Id.*

⁷⁴ See *id.*

obtained the identity of an anonymous juror and posted his name, address, personal data and criminal record on the World Wide Web.⁷⁵ Thus, in purely practical terms, anonymous juries do not fulfill their goal of preventing intimidation, harassment or bribery of jurors.

In addition to these practical objections to the use of anonymous juries, several other effects of juror anonymity strike at the very heart of the American criminal justice system. While the most powerful of these is the effect of nameless juries on the presumption of innocence, anonymity also threatens judicial integrity⁷⁶ and the ability of both defense attorneys and prosecutors to fully investigate jurors for possible bias or interest.

A. Presumption of Innocence

The presumption of innocence, while not specifically mandated in the Constitution, is an "axiomatic norm" of the American criminal justice system.⁷⁷ The importance of the presumption of innocence in the Anglo-American legal tradition⁷⁸ is clearly evidenced by the fact that courts have traditionally been reluctant to infringe upon it. In cases where it was deemed necessary to compromise the presumption of innocence, courts have traditionally applied a balancing test, weighing the magnitude of the stigma to the defendant against the magnitude and urgency of the threat to the criminal justice system.⁷⁹ This balancing test

⁷⁵ See *United States v. Ippolito*, 10 F. Supp.2d 1305, 1310 (S.D. Fla. 1998) (stating that third parties "have learned Juror 505's full name, home address, place of employment, social security number, Florida driver's license number, telephone numbers, automobile registration data, and other personal information useful in locating and contacting Juror 505" and posted information on Internet).

⁷⁶ See Jerry Capeci, *Justice Imperiled When Judges Lie*, N.Y. DAILY NEWS, Aug. 24, 1993, at 14 (stating such action on part of judiciary has been noticed by tabloid media).

⁷⁷ See *Delo v. Lashley*, 507 U.S. 272, 278 (1993) (noting that presumption of innocence is fundamental to fair trial although not specifically provided for in Constitution); *Bell v. Wolfish*, 441 U.S. 520, 533 (1979) ("Without question, the presumption of innocence plays an important role in our criminal justice system."); *Estelle v. Williams*, 425 U.S. 501, 503 (1976) ("The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice."); *Coffin v. United States*, 156 U.S. 432, 453 (1895) ("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.").

⁷⁸ See Weinstein, *supra* note 3, at 26 (noting that court in *Thomas* recognized "centrality of the presumption of innocence in American criminal law").

⁷⁹ See, e.g., *United States v. Tutino*, 883 F.2d 1125, 1132 (2d Cir. 1989) (stating that reasonable precaution must be taken to minimize effect such decision might have on jurors' opinion of defendants); *United States v. Thomas*, 757 F.2d 1359, 1365 (2d Cir. 1985)

was specifically applied in *United States v. Melendez*,⁸⁰ which concluded that a trial judge must “carefully consider the degree of prejudice to the defendant weighed against the magnitude of threat to the jurors.”⁸¹

The eviscerating effect of juror anonymity upon the presumption of innocence has been noted even by those courts which have made use of anonymous juries.⁸² For instance, in *United States v. Ross*,⁸³ the Eleventh Circuit noted that juror anonymity “raises the specter that the defendant is a dangerous person from whom the jurors must be protected, thereby implicating the defendant’s constitutional right to a presumption of innocence.”⁸⁴ Proponents of juror anonymity, however, have used a variety of arguments to contend that the *Melendez* balancing test should be interpreted to permit the empanelment of nameless juries in a wide variety of circumstances.

Some advocates of anonymous juries, have argued that the magnitude of the stigma placed upon defendants by anonymous juries has been greatly exaggerated and furthermore cannot be accurately determined.⁸⁵ At least one court has agreed that “predicting juror responses to the anonymity practice is pure speculation,” and thus declined to weigh the issue heavily as a factor against the empanelment of an anonymous jury.⁸⁶ Advocates of anonymous juries have, in fact, argued that the practice of anonymity is not damaging to the presumption of innocence because in dispelling jurors’ irrational fears, it “serves [the] ideal

(stating court must balance government’s interest in safeguarding jurors against defendants interest in avoiding erosion presumption of innocence); *United States v. Melendez*, 743 F.Supp. 134, 137 (E.D.N.Y. 1990) (stating that trial judge must “carefully consider the degree of prejudice to the defendant weighed against the magnitude of threat to the jurors”).

⁸⁰ 743 F. Supp. 134 (E.D.N.Y. 1990).

⁸¹ *Id.* at 137.

⁸² See *Thomas*, 757 F.2d at 1363 (empanelling of jury must receive strict scrutiny). See, e.g., *United States v. Wong*, 40 F.3d 1347, 1376 (2d Cir. 1994) (stating empanelling anonymous jury has serious implications for defendants interest in maintaining presumption of innocence).

⁸³ 33 F.3d 1507 (11th Cir. 1994).

⁸⁴ See *id.* at 1519; see also Abraham Abramovsky, *The Choices Surrounding Use of Anonymous Juries*, N.Y.L.J., Aug. 11, 1993, at 3 (arguing anonymity of jury imperils presumption of innocence by creating implication of guilt).

⁸⁵ See, e.g., *United States v. Edmond*, 730 F.Supp. 1144, 1150 (D.D.C. 1995) (concluding that “the defendant’s assumption that anti-defendant bias is the only possible, or even the most likely, reaction is suspect”).

⁸⁶ See *United States v. Scarfo*, 850 F.2d 1015, 1026 (3d Cir. 1988) (“Predicting juror responses to the anonymity practice is pure speculation.”).

of dispassionate judgment.”⁸⁷

Proponents of nameless juries also argue strongly in favor of the mitigating effect of curative instructions on the stigma caused by anonymity.⁸⁸ Furthermore, they contend that the prejudice to the defendant is further minimized by the trial court’s specific charge to the jury regarding the presumption of innocence. Instead, advocates of juror anonymity believe that jurors who have been so instructed “will abide by the court’s instructions and will presume the defendants innocent until the prosecution has proved beyond a reasonable doubt each element of the crimes with which the defendants are charged.”⁸⁹

Proponents of jury anonymity have also argued in favor of the routine empanelment of anonymous juries, contending that the stigma caused by the empanelment of nameless juries in specific cases would be vitiated if jurors were kept anonymous in all cases.⁹⁰ This argument has been used even by some who are not in favor of anonymous juries. At least one defense attorney has argued that if anonymous juries are to be empaneled at all, they should be empaneled in every case in order to avoid singling out particular defendants as dangerous.⁹¹

The contention that juror anonymity poses no danger to the presumption of innocence is, to say the least, disingenuous. The failure of curative instructions to prevent prejudice to the defendant has been amply demonstrated. Furthermore, although trial courts instruct anonymous juries concerning the presumption of innocence as a matter of course, prosecutors have compromised

⁸⁷ See King, *supra* note 9, at 142 (arguing that jury empanelment does not impair ability of jury to arrive at sensible decision).

⁸⁸ See, e.g., *United States v. Darden*, 70 F.3d 1507, 1533 (8th Cir. 1995) (concluding that prejudice to defendant had been minimized by trial court’s instruction to jurors that they were being kept anonymous to protect them from media exposure); *United States v. Paccione*, 949 F.2d 1183, 1193 (2d Cir. 1991) (finding curative instructions to jury adequate).

⁸⁹ See *United States v. Edmond*, 730 F.Supp. 1144, 1151 (D.D.C. 1995).

⁹⁰ See King, *supra* note 9, at 145-46 (“Granting juror anonymity routinely, rather than upon proof of a real risk to juror safety, would remove the stigma of guilt that selective anonymity carries.”); see also Gewertz, *supra* note 7, at 3 (stating that California judge believes that “withholding jurors’ names in every case, regardless of its nature, eliminates . . . bias” against defendant); Stephanie Simon, *Judges Advocate Bill to Keep Juries Anonymous*, L.A. TIMES, Oct. 28, 1995, at B1 (discussing California Judicial Council’s announced plan to study juror anonymity as part of project to improve juries).

⁹¹ See King, *supra* note 9, at 134 (arguing automatic jury empanelment eliminates possibility that jurors will be suspicious of defendants); Marcy Strauss, *Sequestration*, 24 AM. J. CRIM. L. 63, 98 (1996) (suggesting jurors are prejudiced when empanelment is not routine).

this presumption and controverted the instruction by stating, in open court, their reasons for requesting an anonymous jury.⁹² If a statement that a defendant is "a murderous and treacherous crime boss," about whom jurors "would be less than human if [they] did not feel some concern"⁹³ is not damaging to the presumption of innocence, it is difficult to fathom a statement that would be. Consequently, even if trial courts are thorough about minimizing the prejudice to a defendant as a result of juror anonymity, prosecutors are able and willing to use the empanelment of an anonymous jury as a means of stigmatizing the accused.

This devastating effect on the presumption of innocence was recognized by the highest court of Massachusetts in *Commonwealth v. Angiulo*,⁹⁴ which recognized that empanelment of anonymous juries can implicate rights of constitutional dimension.⁹⁵ Specifically, the *Angiulo* court held that "[t]he empanelment of an anonymous jury triggers due process scrutiny because this practice is likely to taint the jurors' opinion of the defendant, thereby burdening the presumption of innocence."⁹⁶ The court required the trial judge to make a determination warranting anonymity based upon adequate evidence sufficient to satisfy the due process before such a jury may be empaneled.⁹⁷

This necessity analysis, as the *Angiulo* court noted, is essential to satisfying even the minimal standards of due process.⁹⁸ Based on this rationale alone, routine empanelment of anonymous juries should be found to violate constitutional norms. Moreover, despite the arguments of its proponents, routine juror

⁹² See, e.g., *United States v. Gotti*, 6 F.3d 924, 946 (2d Cir. 1993) (noting closing statement of U.S. Attorney Andrew Maloney stated that defendant was "murderous and treacherous crime boss" about whom jurors "would be less than human if [they] did not feel some concern," is not damaging to the presumption of innocence, it would be difficult to find statement that is).

⁹³ See *United States v. Gotti*, 6 F.3d 924, 946 (2d Cir. 1993) (noting closing statement of prosecuting United States Attorney Andrew Maloney).

⁹⁴ 615 N.E.2d 155 (Mass. 1993).

⁹⁵ See *id.* at 170-75 ("The empanelment of an anonymous jury triggers due process scrutiny because this practice is likely to taint the jurors' opinion of the defendant, thereby burdening the presumption of innocence.").

⁹⁶ See *id.* at 171.

⁹⁷ See *Thomas*, 757 F.2d at 1363 (applying strict scrutiny and determining that "no anonymous jury is to be empaneled. . . unless the trial judge has first determined on adequate evidence that anonymity is truly necessary. . . [because] the due process clause requires that reasonable precautions be taken to minimize the effect of the jurors' anonymity on their perception of the defendant").

⁹⁸ See *id.* at 1365.

anonymity would not eliminate the damage to the presumption of innocence. Although the stigma of anonymity would be reduced if it were not seen as an extraordinary measure, such a stigma would still exist; any gain would be more than offset by the loss from its intrusion into all criminal cases. In fact, routine anonymity would simply categorize all criminal defendants in one class: Menacing persons from whom jurors need to be protected.⁹⁹ Given that the harm to the presumption of innocence would not be eliminated by routine anonymity, the Due Process Clause should be interpreted to preclude such a measure except in the unlikely event that anonymity is found to be "truly necessary" in all cases.

B. Integrity of the Judicial System

Another critical threat posed by anonymous juries springs directly from judicial attempts to contain their damaging effect upon the presumption of innocence. In an attempt to alleviate the severe stigma imposed upon a defendant on trial before an anonymous jury, courts have issued a variety of supposedly curative instructions to the jurors.¹⁰⁰ In many cases, these instructions involve the concealment from the jury of the real reason why their identities have not been revealed.¹⁰¹ For instance, a

⁹⁹ See Gewertz, *supra* note 57, at A1 (quoting defense attorney Terrence Kirk who stated that "if you deny the presumption of innocence across the board . . . it just means the defense suffers in every case because it creates the idea that defendants are a class to be feared").

¹⁰⁰ See, e.g. *United States v. Thomas*, 757 F.2d 1359, 1364 (2d Cir. 1985).

¹⁰¹ See *id.* The *Thomas* court considered the circumstances surrounding the case as supporting the trial judge's decision to empanel an anonymous jury explaining that the defendants were allegedly dangerous persons who had engaged in large scale "mob-style" killings. *Id.* In light of this, and other significant facts, the judge decided to empanel the jury. *Id.* However, the instruction to the jury did not reflect these concerns. *Id.* In fact the judge told the jury:

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.

number of courts have instructed anonymous jurors that their identities were kept secret due to potential media interference rather than fear of jury tampering by the defendant.¹⁰² By means of such instructions, judges imply that the jurors are not being kept anonymous because of any reputation or threat of misconduct on the part of the defendant, and that the jurors should not feel as if they are being protected from the defendant.

Other curative instructions include a statement to the jurors that anonymity is not an extraordinary measure but rather a common procedure in the federal justice system.¹⁰³ Through this method, courts hope to remove any stigma that might result from the jurors' awareness that unusual measures are being taken to protect their safety. Still other curative instructions attempt to describe anonymity as a precautionary measure taken to make sure both sides receive a fair and impartial trial, or to allay any possible fears, whether founded or unfounded, that jurors may have about serving on the jury.¹⁰⁴

Id. at 1365 n.1.

¹⁰² See, e.g., *United States v. Ross*, 33 F.3d 1507, 1522 n.27 (11th Cir. 1994) (citing court's jury instruction which stated that their anonymity was function of fair trial rather than defendant's participation in violent activities toward witnesses); *United States v. Paccione*, 949 F.2d 1183, 1193 (2d Cir. 1991) (instructing jury at outset of trial that special precautions were designed to protect from media contact); *United States v. Ferguson*, 758 F.2d 843, 854 (2d Cir. 1985) (attributing jury's anonymity to need to protect juror privacy and save them from embarrassment); *United States v. Barnes*, 604 F.2d 121, 137 (2d Cir. 1979) (stating that court had chosen to maintain juror anonymity to protect juror privacy and save them from embarrassment); *United States v. Gambino*, 809 F. Supp. 1061, 1068 (S.D.N.Y. 1992) (instructing jury that special procedures are routine and designed to protect jury from any contacts by media); *United States v. Pasciuti*, 803 F. Supp. 499, 503 n.5 (D.N.H. 1992) (borrowing Judge Pollack's instruction in *Thomas*, ostensibly to minimize prejudicial effects on defendants).

¹⁰³ See, e.g., *United States v. Childress*, 58 F.3d 693, 702 (D.C. Cir. 1995) (arguing that selection of anonymous jury is common practice followed by federal courts); *United States v. Thai*, 29 F.3d 785, 801 (2d Cir. 1994) (stating that selection of anonymous jury is not unusual practice); *United States v. Tutino*, 883 F.2d 1125, 1133 (2d Cir. 1990) (stating that common practice in federal courts to keep names and identities of jurors secret).

¹⁰⁴ See, e.g., *Ross*, 33 F.3d at 1522 n.27. The *Ross* court told the jurors that they had been kept anonymous because:

I don't want the defendant to be characterized as someone who would be sending anonymous communications to the jury, and I don't want the government to be characterized as someone who is trying to influence the jury improperly. . . . It's not being done because of any apprehension on the part of this Court that you would have been endangered or subject to improper pressures if your names had been disclosed. . . . The fact that you are anonymously selected is not in any way a reflection on the defendant or the defense or anyone associated with the defense. It is simply a precautionary measure to make sure both sides get a fair trial.

Id.; *United States v. Crockett*, 979 F.2d 1204, 1217 (7th Cir. 1992). The court informed the jury that anonymity "was one of a number of procedures used by the federal courts to avoid any contact between the jurors and the parties to ensure that both sides receive a

Curative instructions have been much criticized as erroneous in their assumptions and lacking in true curative effect.¹⁰⁵ Jurors who have been informed that they are in need of protection or that their fears are being allayed, for example, will likely read between the lines and conclude that the threat alluded to does not come from the prosecutor, the defense attorney, the court officers or even from the court buffs in the third row. In a criminal case, the defendant accused of the criminal acts is usually the only party who would naturally be perceived as a threat. Curative instructions which attempt to alleviate the stigma against the defendant by stating that third parties or the nature of the case are to blame for the empanelment of an anonymous jury assume a great deal of naiveté on the part of the jurors.¹⁰⁶

Similarly, curative instructions which inform jurors that jury anonymity is a common practice assume lack of knowledge on the part of the jurors. In fact, this may well be an erroneous assumption. Studies indicate that 16 to 29 percent of Americans have served on juries.¹⁰⁷ In light of this figure, it is highly likely that an anonymous jury panel will contain one or more people who have previously served as jurors and can inform their fellow jurors that anonymity is by no means a routine procedure.¹⁰⁸

fair and impartial determination by the members of the jury." *Id.*

¹⁰⁵ See *United States v. Scarfo*, 850 F.2d 1015, 1025-26 (3d Cir. 1988) (holding in favor of trial judge who informed jury of true reason for their anonymity was because case dealt with organized crime).

¹⁰⁶ See *State v. Acetturo*, 619 A.2d 272, 274 (N.J. 1992). "Jurors would not be so naive as to believe that news media coverage would be a reason for their anonymity." *Id.* In addition, the *Barnes* decision itself is "substantial evidence of how difficult it might have been for the jurors to resist an inference as to the 'real' reason for the decisions regarding juror names, addresses and sequestration." *Barnes*, 604 F.2d at 168 n.4 (Meskill, J., dissenting). The dissenting judge in *Barnes* noted that even though the trial judge had issued a curative instruction that implied that the names of jurors were being withheld to protect their privacy, the majority opinion in the Second Circuit focused almost entirely upon juror safety and the potential of jury tampering. *Id.* Thus, on at least one occasion, even judges have shown themselves capable of seeing through the deceptive nature of curative instructions.

¹⁰⁷ See Maura Dolan, *Judging the Jury System*, L.A. TIMES, Sept. 27, 1994, at A1 (16 percent); Ellen Goodman, *Today's Juror Must Carry the Baggage of Evolving Values*, CHI. TRIB., Mar. 21, 1994, at 13 (17 percent); Reynolds Holding, *Unanimous Jury Rule is Unpopular*, SAN. FRAN. CHRON., Sept. 12, 1995, at A13 (29 percent).

¹⁰⁸ See *Acetturo*, 619 A.2d at 274. "Experience tells us . . . that in any given jury panel, there will be some, perhaps many, persons who will have previously served on criminal jury panels, and who, therefore, will wonder and speculate as to the matter of anonymity." *Id.* Ironically, other courts have noted that the lack of curative instructions can have the same effect on the jury panel. *Id.*; see also *Commonwealth v. Dupont*, available in 1998 WL 559694, at *6 (Mass. Super. 1998). The identification of jurors by their first names only "is an odd procedure that is likely to cause some prospective jurors to assume that their last names are not being used so that the defendant will not hear

Moreover, in many high-profile cases, the prosecution's motion for an anonymous jury is itself given prominent media coverage. For example, the federal prosecutor's motion for an anonymous jury in the trial of five New York City police officers accused of assaulting Haitian immigrant Abner Louima was covered in all four New York City dailies, as well as on televised news programs.¹⁰⁹ This media coverage included a detailed analysis of the true reasons why an anonymous jury was requested.¹¹⁰ In the face of such extensive publicity, it is likely that many prospective jurors will be aware of the actual reasons for their anonymity and will therefore not be deceived by curative instructions.

The most crucial problem of curative instructions, however, is that they are often deceptive to the jury. In *United States v. Scarfo*,¹¹¹ the Third Circuit noted that unwarranted claims by the trial judge as to possible media interference were deceptive to the jury and therefore represented a potential danger to the integrity of the criminal justice system.¹¹²

Similarly, in *New Jersey v. Acetturo*,¹¹³ the court rejected the State's assertion that the stigma to the defendant resulting from the empanelment of an anonymous jury could be overcome by means of curative instructions. The *Acetturo* court held that an instruction to the jury stating that anonymity was a common procedure or was exclusively a shield against media interference was unacceptable because it would not be truthful.¹¹⁴ Furthermore, the court added that jurors would quickly realize that such a curative instruction was false and that the instruction would inform them, albeit by innuendo, about the potential harm that

them," and that in the absence of a curative instruction it is "likely that such prospective jurors may assume that the judge has some special knowledge about the defendant that would justify such a security precaution." *Id.* at *12-13. Thus, both the presence and absence of curative instructions may lead to the same deleterious effect upon the presumption of innocence, further demonstrating that the prejudice caused by anonymous juries is in fact incurable.

¹⁰⁹ See Christopher Francescani, *Feds Rip Louima Cops' Private Eye*, N.Y. POST, Feb. 2, 1999, at 7; Fried, *supra* note 71, at B3; Patricia Hurtado, *Anonymity Sought for Louima Jury*, N.Y. NEWSDAY, Feb. 2, 1999, at A22; Helen Peterson, *Feds Seek Anonymous Jurors for Louima Trial*, DAILY NEWS, Feb. 2, 1999, at 8.

¹¹⁰ See *id.*

¹¹¹ 850 F.2d 1015 (3d Cir. 1988).

¹¹² See *id.* at 1025 (arguing need for judges to deal honestly with jurors).

¹¹³ 619 A.2d 272 (N.J. 1992).

¹¹⁴ See *id.* at 274.

might come to them as a result of the defendants, their associates, or their agents.¹¹⁵ As the *Acetturo* court correctly recognized, it would threaten the very integrity of the American judicial system if courts routinely lied to potential jurors.

C. Meaningful Voir Dire

Another deleterious effect of anonymous juries is their infringement on the right of criminal defendants to make intelligent use of their peremptory challenges. While the peremptory challenge is not constitutionally mandated,¹¹⁶ it is nevertheless guaranteed by statute in both federal and state jurisdictions¹¹⁷ and has been described as "one of the most important rights secured to the accused."¹¹⁸

The peremptory challenge is both necessary and important because potential jurors' biases are often not readily discernible. Rather, "[t]he public prosecutor (and, presumably, the defendant) may have the strongest reasons to distrust the character of a juror offered, from his habits and associations, and yet find it difficult to formulate and sustain a legal objection to him. In such cases, the peremptory challenge is a protection against his being accepted."¹¹⁹ Thus, it is necessarily important that the peremptory challenge continue to be an arbitrary and capricious challenge that may be exercised on grounds normally thought irrelevant to legal proceedings.¹²⁰

In keeping with this, courts have noted that "[t]he voir dire in American trials tends to be extensive and probing, operating as a predicate for the exercise of peremptories" as well as challenges

¹¹⁵ See *id.* (proposing jurors would not believe media coverage as excuse for empanelment).

¹¹⁶ See *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.").

¹¹⁷ See *United States v. Barnes*, 604 F.2d 121, 170 (2d Cir. 1994) (Meskill, J., dissenting) (noting that Congress has chosen to grant right to peremptory challenge).

¹¹⁸ See *id.* (citing *Pointer v. United States*, 151 U.S. 396, 408 (1894)); see also *Swain v. Alabama*, 380 U.S. 202, 219 (1965) (holding that peremptory challenges are necessary part of jury trial), *overruled on other grounds by Batson v. Kentucky*, 476 U.S. 79 (1986).

¹¹⁹ *Barnes*, 604 F.2d at 170 (Meskill, J., dissenting) (citing *Hayes v. Missouri*, 120 U.S. 68, 70 (1887)).

¹²⁰ See *id.* at 172 (Meskill, J., dissenting) (quoting *Lewis v. U.S.*, 146 U.S. 370, 376 (1892)).

for cause.¹²¹ It is well established that, since a statutory right to peremptory challenges has been conferred by the legislature, courts must grant "sufficient inquiry into surface information as well as the background and attitudes of prospective jurors to enable them to exercise intelligently their peremptory challenges."¹²²

The importance of disclosure of names and addresses of potential jurors to the exercise of peremptory challenges may be illustrated by an analogous line of cases involving witnesses. In *Alford v. United States*,¹²³ the Supreme Court held that it was reversible error to deny cross-examination as to the residence of a witness, stating that one goal of cross-examination is that "the witness may be identified with his community so that independent testimony may be sought and offered of his reputation for veracity in his own neighborhood. . . and that facts may be brought out tending to discredit the witness by showing that his testimony in chief was untrue or biased."¹²⁴ Similarly, in *Smith v. Illinois*,¹²⁵ the Supreme Court held that, even though cross-examination of a witness was not entirely foreclosed, it was reversible error to deny defense counsel the opportunity to ask his true name and address.¹²⁶ Specifically, the court stated that "when the credibility of a witness is in issue, the very starting point in 'exposing falsehood and bringing out the truth' through cross-examination must necessarily be to ask the witness who he is and where he lives. The witness' name and address open countless avenues of in-court examination and out-of-court investigation."¹²⁷ Indeed, failure to allow such a fundamental inquiry essentially emasculates the right of cross-examination.¹²⁸

Jurors, of course, are not witnesses, and the right of confronta-

121 See *Swain v. Alabama*, 380 U.S. 202, 218-19 (1965).

122 See *Barnes*, 604 F.2d at 172 (Meskill, J., dissenting) (providing collective case analyses); see also *U.S. v. Harris*, 542 F.2d 1283, 1295 (7th Cir. 1976).

123 282 U.S. 687 (1931).

124 See *id.* at 691-692 (allowing character to be introduced in order to impeach witness).

125 390 U.S. 129 (1968).

126 See *id.* at 132-134; see also *Alford v. U.S.*, 282 U.S. 687, 688 (1931) (holding that questions about witness's place of residence should be allowed); *People v. Smith*, 69 Ill. App.2d 83, 89 (1966) (holding that informer privilege does not apply when informant is also witness).

127 *Alford*, 390 U.S. at 131.

128 See *id.* ("To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself.").

tion and cross-examination does not apply to jurors.¹²⁹ Nevertheless, the juror credibility is analogously an issue.¹³⁰ The hidden bias of a juror, like that of a witness, may have a devastating effect on a criminal or civil case. Thus, as with the cross-examination of a witness, an attorney conducting voir dire must be afforded the opportunity to explore any avenues which may lead to the uncovering of bias or interest.¹³¹ As with a witness, "the very starting point. . . must necessarily be to ask the [potential juror] who he is and where he lives." Not only will this place the potential juror in his community so that any possible bias stemming from his surroundings may be examined, but the knowledge of a venireperson's name and address will also provide attorneys with additional information which may be necessary to them in evaluating the truthfulness of a jury panelist's answers to other questions.¹³²

An example of the usefulness of jurors' names and addresses to the exercise of peremptory challenges is provided by the Massachusetts Superior Court's decision in *Commonwealth v. Dupont*.¹³³ The *Dupont* trial, which concerned a pharmacy robbery, occurred soon after another pharmacy in a different neighborhood had been robbed in a similar manner.¹³⁴ Thus, the court found that the defendant's lack of knowledge of prospective jurors' addresses handicapped him in determining whether any members of the panel resided near this other pharmacy.¹³⁵ Moreover, the court noted that the defendant could have used

¹²⁹ See *United States v. Barnes*, 604 F.2d 121, 134-37 (2d Cir. 1979) (finding potential threats to jurors and witnesses sufficiently analogous that it cited several instances of witness tampering to justify allowing anonymity for jurors).

¹³⁰ See *Alford*, 390 U.S. at 131.

¹³¹ See *King*, *supra* note 9, at 147 n.98. Professor King argues that the disclosure of names of potential jurors serves no legitimate purpose at the voir dire because such disclosure, at best, would only reveal the ethnicity of the panelist. *Id.* However, it is far from settled law at the present time that the national origin or religion of a prospective juror, as opposed to race or gender, are impermissible grounds upon which to base a peremptory challenge. *Id.*; see also Abraham Abramovsky, *Race, Religion and a Jury of One's Peers*, N.Y.L.J., June 18, 1997, at 3. As long as ethnicity is a lawful ground upon which an attorney may base a peremptory challenge, attorneys must be permitted to explore this topic at voir dire.

¹³² As an example, an attorney's evaluation of the truthfulness of a potential juror's statement that he is unfamiliar with a public park in which a crime took place might be affected by the knowledge that the panelist resides across the street from the park, rather than merely in the same county.

¹³³ 1998 WL 559694 (Mass. Super. 1998).

¹³⁴ See *id.* at *6, *6 n.20, *15.

¹³⁵ See *id.* at *6.

the jurors' identities to screen out venirepersons who resided in affluent neighborhoods or in the vicinity of other robberies in which he had previously been a suspect.¹³⁶ Thus, juror anonymity prevents a defendant from learning whether "[a] juror might turn out to be related to a party or a witness (yet not disclose this on voir dire) or to live in a neighborhood whose residents have demographic characteristics predictive of their likely response to the issues in the case."¹³⁷ Rejecting prosecutors' argument that voir dire on these issues would be "irrelevant," the court stated that "so long as we have challenges for cause and peremptory challenges. . . [the deprivation] of information essential to their exercise of a valued procedural right cannot be rated as negligible."¹³⁸

Thus, the same factors which require inquiry into the names and addresses of witnesses demand that the scope of inquiry at the voir dire include the names, addresses and backgrounds of potential jurors. As at least one jurist has noted, the institution of the anonymous jury "strikes a Vermont judge as bizarre, almost Kafka-esque. It makes peremptory challenges for all practical purposes worthless."¹³⁹

D. Curtailment of Outside Investigation

The use of anonymous juries in fact curtails parties' examination of potential jurors in more than one way. Not only does anonymity foreclose important lines of questioning at the voir dire, but it also indirectly precludes outside investigation of members of the jury panel.¹⁴⁰ Without the names and addresses of potential jurors, prosecutors and defense attorneys are unable to conduct independent investigation of panelists through law enforcement, credit agencies and other sources of public information.¹⁴¹

¹³⁶ *See id.*

¹³⁷ *Id.* at *14.

¹³⁸ *Id.*

¹³⁹ *United States v. Barnes*, 604 F.2d 121, 175 (2d Cir. 1979) (Oakes, J., dissenting from denial of petition for rehearing en banc).

¹⁴⁰ *See id.* at 172 n.7 (noting that independent investigation of jurors was impossible because of their anonymity and express prohibition by trial judge).

¹⁴¹ *See U.S. v. Costello*, 255 F.2d 876, 883 (2d Cir. 1958) (proceeding with government investigation of tax records of panel members); *see also United States v. Falange*, 426 F.2d 930, 933 (2d Cir. 1970) (investigating jurors with aid of F.B.I, local police and credit bureaus).

Outside investigation, like the voir dire, can be an important means of ferreting out potential bias and corruption among jurors. A panelist who has financial problems, for example, might be potentially susceptible to bribery. Independent investigation through law enforcement sources might reveal otherwise unknown connections between potential jurors and defendants or law enforcement, or bring to light other factors which might affect a panelist's bias or interest in the outcome of the case. In addition, the possibility of juror investigation may in fact deter prospective jurors from misrepresenting facts that may potentially disqualify them.¹⁴²

Moreover, this is one area where juror anonymity works against prosecutors as well as defendants. Several cases illustrate the success and efficacy of investigation of potential jurors by federal prosecutors with the aid of law enforcement agencies.¹⁴³ In serious criminal cases, especially those involving organized crime, such investigation might reveal crucial information about the potential for jury tampering. When anonymous juries are utilized, prosecutors are foreclosed from conducting this potentially vital inquiry.

The danger posed to prosecutors by anonymous juries is again illustrated by the first federal trial of John Gotti.¹⁴⁴ In that trial, a juror with ties to an Irish-American organized crime group was bribed by Gotti, resulting in an acquittal.¹⁴⁵ At voir dire, the juror, George Pape, lied about this association with organized crime.¹⁴⁶ If the federal prosecutors in that case had been able to investigate his background, his potential for corruption might

¹⁴² See *Barnes*, 604 F.2d. at 173 ("These lists, and the investigations serve another important function as well. They may deter prospective jurors from misrepresenting or minimizing embarrassing or possibly disqualifying aspects of their backgrounds."); see also Barbara A. Babcock, *Voir Dire: Preserving "It's Wonderful Power,"* 27 STAN. L. REV. 545, 547, 554 (1975) (discussing potential for honesty in investigating jury).

¹⁴³ See, e.g., *United States v. Falange*, 426 F.2d 930, 932 (2d Cir. 1970) (investigating potential jurors through FBI and credit bureau records); *United States v. Costello*, 255 F.2d 876, 882-83 (2d Cir. 1958) (investigating jurors via tax returns); *Best v. United States*, 184 F.2d 131 (1st Cir. 1950) (using FBI reports); *State v. Bessenecker*, 404 N.W.2d 134, 135 (Iowa 1987) (investigating jurors through criminal records); *Commonwealth v. Cerveney*, 367 N.E.2d 802, 809 (Mass. 1977) (utilizing probation records); *Lo-savio v. Mayber*, 496 P.2d 1032, 1033 (Colo. 1972) (using criminal records); *Commonwealth v. Smith*, 215 N.E.2d 897, 900 (Mass. 1966) (using police officer investigation of potential jurors).

¹⁴⁴ See *U.S. v. Gotti*, 6 F.3d 924 (2d Cir. 1993).

¹⁴⁵ See CAPECI & MUSTAIN, *supra* note 68, at 173-75.

¹⁴⁶ See *id.* at 173.

have been unearthed prior to trial.¹⁴⁷ Thus, far from insuring that justice would be done, the empanelment of an anonymous jury in the Gotti case might well have been responsible for delaying justice against Gotti for a further seven years.¹⁴⁸

E. The Tradition of Juror Accountability

At least one court has noted still another detrimental effect of anonymous juries on the rights of the accused: Erosion of the "tradition of identified jurors."¹⁴⁹ The Massachusetts Superior Court noted that the original American colonists "brought with them a system in which a defendant in all types of criminal trials traditionally had been tried by individuals whom the defendant knew or, at least was highly likely to know."¹⁵⁰ Moreover, a verdict rendered by a jury of individuals known to the defendant is personalized.¹⁵¹

The damage done to this personification of justice is especially great "[i]n modern urban society. . . [where] it is extraordinarily unlikely that a defendant will be aware of the identities of the prospective jurors if that information is withheld by the court."¹⁵² Moreover, since the anonymity of urban life is not duplicated in rural areas, empanelment of anonymous juries will effectively create a two-tier justice system in which rural defendants will know the identities of the fellow citizens who judge them while urban defendants will not. Thus, empanelment of anonymous juries "undermines the shared values and practices which constituted the common understanding of the drafters of the Sixth Amendment."¹⁵³

¹⁴⁷ For instance, Pape had appeared prior to the Gotti trial as a character witness in deportation proceedings related to Bosko Radonjich. Radonjich was an organized crime figure associated with the Westies, an Irish-American gang with ties to the Gambino family. A thorough investigation by federal law enforcement authorities would likely have uncovered this prior judicial appearance, and thus provided a reason to question Pape's impartiality.

¹⁴⁸ See King, *supra* note 9, at 149-51. Professor King argues that juror anonymity "does not prevent the discovery of jury misconduct." *Id.* However, Professor King's argument focuses on juror misconduct during deliberations rather than corruption or untruthful responses at the voir dire. *Id.*

¹⁴⁹ See *Commonwealth v. Dupont*, 1998 WL 559694, at *16 (Mass. Super. 1998).

¹⁵⁰ See *id.*

¹⁵¹ See *id.* (citing *United States v. Sanchez*, 74 F.3d 562, 565 (5th Cir. 1996)).

¹⁵² See *Dupont*, 1998 WL 559694, at *17.

¹⁵³ *Id.* at *17, *17 n.40 (citing *In re Baltimore Sun Co.*, 841 F.2d 74, 75 (4th Cir. 1988)) (noting that "the anonymity of life in the cities has so changed the complexion of this country that even the press, with its vast and imaginative methods of obtaining in-

F. The Slippery Slope

As a final measure of caution in extending the use of anonymous juries, courts and legislatures should consider the path down which such extension might lead. From its beginnings as a one-time measure in an extraordinary case, the anonymous jury has progressed to the point where its damaging effect on the presumption of innocence has been felt even by those accused of misdemeanors.¹⁵⁴ If juror anonymity is accepted as a routine measure, future courts might decide that the same issues of safety and integrity which justify nameless juries might also justify allowing witnesses to testify anonymously. Already, in certain non-Article III tribunals, the government may prove its case through sealed testimony from anonymous witnesses.¹⁵⁵ Such testimony in a criminal prosecution would seem unthinkable under present interpretations of the Sixth Amendment, but at one time juror anonymity would have been regarded the same way.

Concern for safety might even override the Constitution to the point where judges preside anonymously over trials. In countries such as Peru, which are or have been plagued by guerrilla warfare and narcotics trafficking, many cases are tried by masked judges presiding anonymously in specially constituted courts.¹⁵⁶ Such abdication of judicial accountability is arguably different only in degree from the empanelment of anonymous juries.

In sum, the arguments in favor of anonymous juries are counterbalanced by equally compelling arguments against them. Not only do nameless juries cause serious damage to the rights of criminal defendants, but they also pose danger to prosecutors and set the American justice system as a whole on a dangerous path.¹⁵⁷ Courts and legislators should seriously consider these

formation, apparently does not know and cannot easily obtain the names of the jurors and of the veniremen and women who did not serve in this case")

¹⁵⁴ See Gewertz, *supra* note 57 (discussing California judge's use of anonymous juries in misdemeanor cases).

¹⁵⁵ See Paul B. Verkuil, *A Study of Immigration Procedures*, 31 U.C.L.A. L. REV. 1141, 1163 (1984) (noting that alien in deportation hearing has no right to confrontation because confidential files can be used by judge).

¹⁵⁶ See Toni Marshall, *Berenson Family Urges U.S. Pressure on Peru*, WASH. TIMES, Jan. 23, 1998, at A17 (noting Peruvian system of "faceless" military tribunals); see also King, *supra* note 9, at 140 (quoting trial judge as predicting that anonymous juries might lead to anonymous judges).

¹⁵⁷ See King, *supra* note 9, at 134 (arguing in favor of routine jury empanelment).

factors in determining whether to allow or extend the use of anonymous juries.

III. *PEOPLE V. WATTS* AND THE FUTURE OF ANONYMOUS JURIES

A recent trial court decision in Richmond County now raises the possibility that New York, which has hitherto resisted the empanelment of anonymous juries, may see its way clear to doing so in the near future. The decision in *People v. Watts*¹⁵⁸ is especially significant in that it concluded that anonymous juries were possible in New York despite the existence of a statutory right to disclosure of the names of jury panelists.¹⁵⁹

This right stems from a combined application of two related statutes, sections 270.15(1)(a) and 270.15(1-a) of the New York Criminal Procedure Law. The first of these sections, enacted as part of the original New York Criminal Procedure Law in 1970,¹⁶⁰ provides in part that, if no challenge to the jury panel as a whole is made at the opening of voir dire, "the court shall direct that the names of not less than twelve members of the [jury] panel be drawn and called as prescribed by the judiciary law."¹⁶¹ The second of these statutes, enacted in 1983,¹⁶² allows courts to restrict disclosure of the addresses of potential or sworn jurors to counsel for either party for good cause.¹⁶³

Until recently, it was taken for granted among New York criminal lawyers that CPL Section 270.15(1)(a) prohibited the empanelment of anonymous juries.¹⁶⁴ In *People v. Gotti*,¹⁶⁵ an

¹⁵⁸ 661 N.Y.S.2d 768 (Sup. Ct. 1997). The defendant, Joseph Watts, was coincidentally an associate of John Gotti, who seems to have made his primary contribution to society in the form of assisting in the development of the law of anonymous juries. *Id.* at 769.

¹⁵⁹ *See id.* at 771 (holding that where defendant is threat to jury, anonymity is permissible); *see also Matter of Holtzman v. Hellenbrand*, 92 A.D. 2d 405, 460 (N.Y. App. Div. 2d Dep't 1983) (holding that defendant's intimidation of jury was reason for jury to hear Grand Jury testimony); United States' Memorandum of Law in Support of Its Motion for an Anonymous and Partially Sequestered Jury in *United States v. Volpe*, CR-98-196 (E.D.N.Y.), dated February 1, 1999, at 11 (noting that jury in 1997 trial in New York County Supreme Court of alleged "cyber-rapist" Oliver Jovanovic was anonymous).

¹⁶⁰ *See* N.Y. CRIM. PROC. § 270.15(1)(a) (McKinney 1998).

¹⁶¹ *Id.*

¹⁶² *See* N.Y. CRIM. PROC. § 270.15(1-a) (McKinney 1998).

¹⁶³ *See id.*

¹⁶⁴ *See, e.g., Abramovsky, supra* note 52, at 3 (noting that prohibition of anonymous juries pursuant to CPL previously taken for granted); Jose Maldonado, *Anonymous Juries: What's the Legislature Waiting For*, 66 N.Y. ST. B. J. 40, 43 (1996) (noting proposed amendment to CPL § 270.15 to allow for anonymous juries).

unreported decision rendered during the New York State assault trial of John Gotti, the trial court concurred in this analysis, finding that the Criminal Procedure Law prohibited the use of anonymous juries.¹⁶⁶ Indeed, the *Gotti* court did so without the necessity for detailed conclusions of law, although it mentioned that empanelment of an anonymous jury would not by itself violate the United States or New York Constitution.¹⁶⁷

In 1997, however, the issue of anonymous juries in New York was revisited by the *Watts* court. While the court in *Watts* agreed that the New York State Criminal Procedure Law prohibits selection of an anonymous jury¹⁶⁸ and that criminal defendants had a statutory right to disclosure of jurors' names, it nevertheless held that this right might be forfeited under certain circumstances.¹⁶⁹

The court began its analysis by finding that CPL Section 270.15(1)(a) indeed constituted a prohibition on anonymous juries. Despite the plain language of the statute, this outcome was far from certain. The Massachusetts Supreme Court had held that a statute similar to CPL Section 270.15(1)(a) created an inalienable right in certain criminal defendants to learn the names and addresses of prospective jurors.¹⁷⁰ However, the Supreme Court of Hawaii in *State v. Samonte*¹⁷¹ reached the opposite conclusion, finding that a Hawaiian statute requiring the names of prospective jurors be called in open court was merely directory

¹⁶⁵ Ind. No. 359/89 (Sup. Ct., N.Y. Co. Dec. 15, 1989).

¹⁶⁶ *See id.*

¹⁶⁷ *See id.* The opinion of the *Gotti* court reads, in its entirety, as follows:

The People's motion for an anonymous jury is decided as follows. Although this court believes that it is not violative of the New York State or federal Constitutions to empanel jurors whose names are not disclosed, the court finds that the procedure is prohibited by the Criminal Procedure Law. The court grants a protective order, however, to preclude disclosure of the business and residential addresses of all prospective and sworn jurors (CPL 270.15, subd 1-a). A further written opinion elaborating the findings of fact and conclusions of law will issue after the jury is selected.

Id. The record does not reflect that any "further written opinion" was ever rendered.

¹⁶⁸ *See Watts*, 661 N.Y.S.2d at 770 ("This Court agrees. . . that the Criminal Procedure Law prohibits selection of an anonymous jury.")

¹⁶⁹ *See id.* at 771 ("The constitutional right to confront a witness may be forfeited through a defendant's act of witness intimidation. . . ."); *see also Matter of Holtzman v. Hellendbrand*, 92 A.D.2d 405, 460 (N.Y. App. Div. 2d Dep't 1983).

¹⁷⁰ *See Commonwealth v. Anguilo*, 615 N.E.2d 155, 171 (Mass. 1988) (holding that anonymous juries could not be empaneled in cases where defendants faced life sentences because Massachusetts statute required that such defendants be provided with names of prospective jurors).

¹⁷¹ 928 P.2d 1 (Haw. 1996).

rather than mandatory and could be set aside by the trial court if necessary to protect the safety or integrity of the jury.¹⁷²

Turning aside the prosecution's contention that this statute was merely a procedural rule, such as described in *Samonte*, the *Watts* court noted that it must be read in combination with CPL Section 270.15(1-a).¹⁷³ Specifically, the court held that:

[I]f CPL Section 270.15(1)(a) was only a procedural statute regulating jury selection rather than also a statute creating a right on behalf of the parties to know the identities of potential jurors, then the 1983 enactment of CPL Section 270.15(1-a) would not have been necessary. . . [as] the Court already would have possessed the inherent power to limit access to jurors' addresses.¹⁷⁴

Rather, "if the Court needed the specific statutory authority provided by CPL Section 270.15(1-a) to limit access to jurors' addresses, it is logically inconsistent to assert that the Court, nevertheless, does not need specific statutory authority to override the mandate. . . that jurors' names be called in open court during jury selection."¹⁷⁵ Moreover, the *Watts* court noted that during the 1991-92 and 1993-94 sessions, the New York State Legislature failed to take action on proposed legislation to amend CPL Section 270.15 to allow for anonymous juries in certain cases.¹⁷⁶ Thus, even though the Criminal Procedure Law allows trial courts the discretion to "limit the scope of voir dire to matters affecting the qualifications of jurors,"¹⁷⁷ it does not allow courts to withhold jury panelists' names.¹⁷⁸

In a seemingly incongruous decision, however, the *Watts* court held that the right to disclosure of jury panelists' names may be forfeited by criminal defendants.¹⁷⁹ In arriving at this conclusion, the court cited *Matter of Holtzman v. Hellenbrand*,¹⁸⁰ in which a defendant's right to confrontation was forfeited through

¹⁷² See *id.* at 11-15.

¹⁷³ See *Watts*, 661 N.Y.S.2d at 770-71.

¹⁷⁴ *Id.* at 770.

¹⁷⁵ See *id.*

¹⁷⁶ See *id.* at 771.

¹⁷⁷ See *id.* at 770 (citing text of N.Y. CRIM. PRO. § 270.15(1)(c)).

¹⁷⁸ See *id.* (finding that while jury empanelment is not violative of New York and federal constitutions, such procedure is barred by Criminal Procedure Law).

¹⁷⁹ See *id.* at 771.

¹⁸⁰ 92 A.D.2d 405 (2d Dep't 1983).

his acts of witness intimidation,¹⁸¹ and *Illinois v. Allen*,¹⁸² in which the Supreme Court held that a defendant forfeited his constitutional right to be present at his own trial through disruptive behavior in the courtroom.¹⁸³ Thus, "by parity of reasoning, the statutory right to knowledge of jurors' names and addresses may be forfeited by a defendant's acts warranting such a result."¹⁸⁴ Accordingly, "in cases where the acts of a defendant represent a clear threat to either the safety or integrity of the jury, the court may find under existing law that the defendant has forfeited his statutory right to the jurors' names and addresses."¹⁸⁵ Notably, the *Watts* court reached this conclusion despite the provision in CPL Section 270.15 (1-a) which states that jurors' addresses must be disclosed to counsel where there is a "likelihood" of jury tampering.¹⁸⁶

The court noted, however, that "unlike acts of witness intimidation or courtroom disruption which may be evaluated after those acts have occurred. . . a decision that a defendant has forfeited the statutory right to know jurors' names and addresses must, of necessity, be made prior to the jurors' names being called."¹⁸⁷ Rather, the only basis upon which a determination of forfeiture could be made was "a prediction that jury tampering will occur."¹⁸⁸ While the court held that prosecutors would "have to present more than a mere possibility of jury tampering to justify a finding that the defendant has forfeited his right to jurors' names and addresses,"¹⁸⁹ it stated that "[a]llegations of actual

181 See *id.* at 412-15 (holding that defendant's acts of witness intimidation forfeited constitutional rights).

182 397 U.S. 337 (1970).

183 See *id.* at 342-43 (excluding defendant from courtroom based on defendant's disruptive behavior).

184 See *Watts*, 661 N.Y.S.2d at 771; see also *Newsday v. Sise*, 71 N.Y.2d 146, 150 (1987) (denying media access to information about jury in order to protect jurors); *People v. Vega*, 363 N.Y.S.2d 214, 220 (1974) (stating that court may issue protective order regulating disclosure of business or residential address of prospective or sworn juror to any person(s) other than counsel for either party for good cause).

185 See N.Y. CRIM PROC. § 270.15(1)(a).

186 See *Watts*, 661 N.Y.S.2d at 771. It is not clear from the language of the *Watts* decision whether the court differentiated between disclosure of jurors' names and addresses to defendants and disclosure to their attorneys. *Id.*; see also *Newsday v. Goodman*, 159 A.D.2d 667, 669 (2d Dep't 1990).

187 *Watts*, 661 N.Y.S.2d at 771.

188 *Id.*; see also *United States v. Alicino*, 44 F.3d 1102, 1116 (2d Cir. 1995) (finding grand jury tampering charge sufficient to empanel trial jury); *United States v. Ruggiero*, available in 1998 WL 23456, at *11 (E.D.N.Y. 1988).

189 See *Watts*, 661 N.Y.S.2d at 771-72.

jury tampering. . . in other cases or allegations of plans to tamper with the jury in this case" would entitle prosecutors to a hearing on the empanelment of an anonymous jury.¹⁹⁰

The *Watts* court, however, omitted a crucial aspect of its analysis of the conditions under which a defendant may forfeit his constitutional or statutory rights. In both of the cases cited in *Watts*, the conduct which resulted in forfeiture was particular to the case in which the forfeiture occurred. In *Holtzman*, for instance, the defendant forfeited his right to confrontation only as to the witness he intimidated, not as to all witnesses.¹⁹¹ Likewise, it would be incorrect to argue that the behavior of the defendant in *Allen* could justify a court barring his presence at a trial other than the one in which he disrupted the proceedings. Thus, "by parity of reasoning," a defendant should not be held to have forfeited his statutory right to knowledge of jurors' names and addresses unless evidence exists that he might attempt to engage in jury tampering in the case at bar.

This rule should apply despite the fact that a determination of whether a defendant has forfeited his right to disclosure must be made prior to any actual tampering. In those cases where jury tampering is most likely to occur, namely, narcotics and organized crime prosecutions, prosecutors have ample access to paid informants who can often provide warning of any plans to tamper with the jury.¹⁹² If such plans come to light, a defendant's past acts of jury tampering will be relevant and probative evidence which may be introduced at the forfeiture hearing. Such past acts alone, however, should not justify the empanelment of an anonymous jury without a credible threat of tampering in the case on trial. The damage which may be done to the rights and interests of both the defendant and prosecutor is too great to permit any lesser standard.

190 *Id.* The *Watts* court declined to empanel an anonymous jury under this standard, noting that the prosecution had submitted no allegations that *Watts* actually tampered with a jury or attempted to do so. *Id.* The District Attorney's mere allegation that *Watts* had "claimed the ability to tamper with another jury" was not enough to support a forfeiture hearing. *Id.*

191 See *Matter of Holtzman v. Hellenbrand*, 92 A.D.2d 405, 415 (N.Y. App. Div. 2d Dep't 1983).

192 HOWARD BLUM, GANGLAND: HOW THE FBI BROKE THE MOB 179-90 (1993) (noting that FBI had knowledge of possible jury tampering during John Gotti's first federal trial, although they did not disclose knowledge to prosecutors for security reasons); see also *Watts*, 661 N.Y.S.2d at 771 ("[T]he access the People apparently have to informants . . .").

CONCLUSION

The presumption of innocence, once among the most hallowed principles of the American judicial system, is increasingly mentioned only in dissenting opinions. So, too, has the right of the accused to a meaningful voir dire and the exercise of peremptory challenges. A time has come for reflection, however, when legal scholars seriously advocate that the presumption of innocence - and other rights of the accused which are of similar importance - are regarded as secondary to "juror stress."¹⁹³

Anonymous juries must be recognized for what they are - an evisceration of criminal defendants' right to be presumed innocent and to investigate jurors for potential bias. As such, there is only one legitimate reason to withhold the names of jurors - that is, to protect the integrity of the jury system from a threat specific to a particular case. Certain steps to alleviate the stress of jury service may be appropriate, but not measures which infringe on rights of constitutional magnitude.

Courts must also differentiate between cases where the integrity of the jury is threatened by outside forces such as the media, and cases where the danger to the jury stems from actions of the defendants. In high-profile cases where publicity is the major concern, measures short of anonymity can be used to protect the jurors from harassment without compromising the rights of the parties. One such method is illustrated in *Gannett, Inc. v. Delaware*,¹⁹⁴ a criminal case in which the trial court ordered that the names of jurors be released to the parties' attorneys and not the media or the public.¹⁹⁵ In upholding this procedure, the Delaware Supreme Court stated:

[T]he persons most involved - the trial judge, the defendant and the State - were provided with the jurors' names and other information. We cannot say that the appearance of

¹⁹³ If the stressful effects of the judicial process are a legitimate reason to burden the presumption of innocence, the courts may wish to alleviate such stress simply by eliminating trials. If this were done, juror stress would not only be reduced but eliminated, as there would be no further need for juries. Judicial stress, as well, would be drastically eased due to the less congested court calendar. Prosecutors, whose role would be simplified to bargaining over sentences, would also lead much less stressful lives. Even defense attorneys would not suffer as much stress as they do in the present system, as the outcome of their cases would now be certain.

¹⁹⁴ 571 A.2d 735 (Del. 1990).

¹⁹⁵ See *id.* at 737, 750.

fairness would have been significantly enhanced by announcement of jurors' names in such a highly publicized setting.¹⁹⁶

The Delaware compromise, releasing jurors' names and addresses to parties only coupled with a gag order preventing their further dissemination, is specifically provided for by statute in New York,¹⁹⁷ and has been sanctioned in at least one high-profile case by a New York appellate court.¹⁹⁸ Such a compromise would allow the prosecution and defense to conduct a meaningful voir dire, and permit jurors to conduct their deliberations free from both media harassment and the distracting effects of anonymity.

Even in cases where the threat of jury tampering emanates from the defendants' conduct, anonymity should be used only as a measure of last resort. It is hoped that New York's higher courts will decline to adopt the holding of *Watts*, and preclude anonymous juries outright. If such juries are allowed, empanelment of a nameless jury should be permitted only if there is credible evidence that one or more defendants intend to engage in jury tampering, and then only after a hearing at which the prosecution carries the burden of proof. Moreover, the prosecutor should be required to prove that there is a realistic threat of jury tampering in the case at bar, rather than any past or related case. If at all possible, the court should also consider less restrictive means of protecting the integrity of the jury, such as releasing names and addresses of potential jurors to counsel in camera while forbidding their disclosure to the defendants themselves, or prohibiting any outside investigation of members of the jury panel.¹⁹⁹ Only if the safety or integrity of the jurors can be protected by no other means should the court empanel an anonymous jury.²⁰⁰

¹⁹⁶ *Id.* at 750.

¹⁹⁷ See N.Y. CRIM. PROC. § 270.15(1-a).

¹⁹⁸ See, e.g., *Newsday v. Goodman*, 159 A.D.2d 667 (2d Dep't 1990).

¹⁹⁹ See *Barnes*, 604 F.2d at 175 (Oakes, J., dissenting from denial of petition for rehearing en banc); see also *Gold v. U.S.*, 378 F.2d 588, 594 (9th Cir. 1967) (refusing to allow questions in voir dire pertaining to potential jurors' religions).

²⁰⁰ See Abraham Abramovsky, *Fraudulently Obtained Acquittals and Double Jeopardy*, N.Y.L.J., Mar. 13, 1996, at 3. As an alternative means of preventing and combating jury tampering, courts might also hold that a defendant forfeits his protection from double jeopardy if he obtains an acquittal through jury tampering. *Id.* This option has the advantage of being reserved for instances where jury tampering actually takes place,

Juror anonymity, like many other recent innovations in the criminal justice system, is a solution which has spread far beyond the problem it was intended to solve. If New York courts choose to empanel anonymous juries at all, they should do so only where exigent circumstances are proven and where no other measure will suffice. Thus, defendants and prosecutors will continue to have the widest possible latitude in selecting an impartial jury - and jurors will continue to deliberate in an atmosphere which does not threaten their impartiality.

rather than being based merely on speculation that jury tampering might occur. *Id.* This remedy will be a strong deterrent against tampering with juries, as a defendant who does so will risk giving the prosecution a second opportunity to convict him. *Id.* Moreover, this measure would be a legitimate exercise of the forfeiture doctrine, as it would be based on proven conduct which is particular to the case at bar. *Id.*