Fordham Law Review

Volume 54 | Issue 5 Article 11

1986

Anonymous Juries

Eric Wertheim

ANONYMOUS JURIES

INTRODUCTION

Federal courts in the Southern and Eastern Districts of New York are holding a series of highly publicized trials that represent a potentially devastating setback for organized crime.[1] Encompassing the alleged top leadership of the largest organized crime families,[2] these cases exemplify the sweeping reach of the powers granted to federal prosecutors by the

1. *See, e.g.*, United States v. Persisco, 621 F. Supp. 842 (S.D.N.Y. 1985); Indictment, United States v. Rastelli, No. 85 Cr. 00354 (E.D.N.Y. filed June 13, 1985); Indictment, United States v. Colombo, No. 85 Cr. 00244 (E.D.N.Y. filed Apr. 22, 1985); Indictment, United States v. Salerno, No. 85 Cr. 139 (S.D.N.Y. filed Feb. 26, 1985); Indictment, United States v. Badalamenti, No. 84 Cr. 236 (S.D.N.Y. filed Feb. 19, 1985); Indictment, United States v. Castellano, No. 84 Cr. 63 (S.D.N.Y. filed Oct. 4, 1984). The *Persico* indictment joines the alleged leader and 13 members of the Colombo organized crime family in a 51-count RICO indictment charging labor-related bribery, extortion and embezzlement, the theft and sale of stolen goods, loansharking, narcotics sales and illegal gambling. *See Persico*, 621 F. Supp. at 850, 878. According to the indictment, all of the group's criminal activities were facilitated by threats, beatings, murder, and the public fear of the organization. *See id.* at 878. The indictment also specifically charges that seven of the defendants attempted to bribe a federal prison official and a special IRS agent to illegally assist incarcerated or fugitive family members. *See id.* at 878-79.

The 78-count *Castellano* indictment joins the alleged leader of the Gambino crime family with 23 other defendants. *See* Indictment at 1, *Castellano*. The charges include 25 murders, extortion, drug dealing and the operation of a huge international car theft ring. *See id.* at 19. The current trial was interrupted by the widely publicized murder of Paul Castellano and a close associate. *See* Sullivan, *Sensational Killings Fill Crime Families History*, N.Y. Times, Dec. 19, 1985, at B12, col. 4.

The *Badalamenti* indictment joines 37 defendants, alleged to be affiliated with the Bonnano organized crime family, charging them with participation in a massive heroin importation conspiracy described in the press as the "Pizza Connection." *See* Indictment at 11, *Badalamenti*.

The *Salerno* indictment joins nine alleged leaders of the five principal organized crime families of New York City. *See* Indictment at 9-11, *Salerno*. The indictment charges that the five families have operated as a confederation to promote and reap the benefits of organized criminal activity in the United States since the early 1930's. *See id.* at 2-9.

The *Rasetelli* indictment joins 17 defendants including the alleged leader and key members of the Bonnano crime family. *See* Indictment at 1, 8-10, *Rastelli*. The indictment charges that the defendants illegally dominated the moving and storage industry in the New York area through their control of a labor union local. *See id.* at 4-6.

The *Colombo* indictment joins the alleged leader and key members of a "crew" within the Colombo crime family. *See* Indictment at 2, *Colombo*. The charges, encompassing ten years of activity, include murder, assault, extortion, narcotics theft, possession and sale, loansharking, arson, the attempted murder of an informant and the bribery of a potential witness. *See id.* at 2-5.

All of these cases involve the Mafia, the core group within organized crime. *See* Blakey & Gettings, *Racketeering Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 Temp. L.Q. 1009, 1013 n.15 (1980); *Organized Robbery*, N.Y. Daily News, Apr. 2, 1986, at 7, col. 3.

For a small sample of the publicity surrounding these trials, see *infra* note 698.

For a discussion of the current attacks on organized crime, see Winerip, *High Profile Prosecutor*, N.Y. Times, June 9, 1985, § 6 (Magazine), at 38, 44, 46.

2. See *supra* note 1. *See* McFadden, *Expert Cites Gains Against Mafia*, N.Y. Times, Dec. 23, 1985, at B2, col. 5 (current trials "pose major threats to entire leadership of mob in New York").

1970 Racketeering Influenced and Corrupt Organization Act (RICO).[3] The defendants not only confront long prison terms, but they also face the prospect of severe financial penalties.[4] The stakes are high on both sides and the trials pose significant legal and practical problems for the presiding judges.[5] One issue of particular concern to legal observers is the use of anonymous juries.

In some of these cases, attorneys selected a jury from a panel of prospective jurors whose names, addresses, ethnic backgrounds and religious affiliations remain unknown to either side.[6] This unusual procedure, designed to protect jurors from outside influence and the fear of retaliation,[7] has occasionally been used in New York federal courts[8] since the celebrated trial of drug kingpin Leroy "Nicky" Barnes.[9] Despite appar-

3. *See* Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 941 (codified as amended at 18 U.S.C. §§ 1961-1968 (1982 & Supp. II 1984)); Brill, *Surprise! They're Winning the War on the Mafia*, Am. Law., Dec. 1985, at 1, 25-28 (positing that the current trials represent the belated "flowering" of RICO's power); Stille, *On Trial—The Mafia Cases*, Nat'l L.J., Nov. 4, 1985, at 6, col. 1 ("[Castellano] indictment . . . aimed at nothing less than putting on entire criminal organization in jail. It tried to bring the whole chain of command—from the lowly car thief and hitman to the alleged 'boss,' Paul Castellano—under the broad reach of [RICO]").

4. *See, e.g.*, Indictment at 35-43, United States v. Rastelli, No. 85 Cr. 00354 (E.D.N.Y. filed June 13, 1985) (government seeking forfeiture of all defendants' interests in Teamsters Local 814 as well as approximately $500,000); Indictment at 19-26, United States v. Colombo, No. 85 Cr. 00244 (E.D.N.Y. filed Apr. 22, 1985) (government seeking forfeiture of approximately $3.7 million in property and proceeds); *see also* 18 U.S.C. § 1963 (1982 & Supp. II 1984) (providing for forfeiture of interests gained from or used in violation of RICO); Brill, *supra* note 3, at 25-26 (RICO allows prosecutors to seize convicted racketeers' interests in union locals through which they derived income). *See generally* Blakey & Gettings, *supra* note 1 (RICO provides means to both break organizations economically and to punish individual members).

5. *See* Stille, *supra* note 3, at 6, col. 1 ("judges and lawyers . . . are trying to cope with racketeering cases of a size and complexity that stretch the traditional dimensions of criminal law"); *cf.* United States v. Manzella, 782 F.2d 533, 547 (5th Cir. 1986) (RICO cases are unusually complex and provide many possibilities for confusion and ambiguity).

6. *See* United States v. Persico, 621 F. Supp. 842, 876-79 (S.D.N.Y. 1985); Smothers, *A Mixed Verdict on Anonymous Jurors*, N.Y. Times, Oct. 13, 1985, § 4 (Week in Review), at 6, col. 3. Attorneys are not usually permitted to inquire into religious and ethnic affiliations, *see* United States v. Barnes, 604 F.2d 121, 134 (2d Cir. 1979), *cert. denied*, 444 U.S. 907 (1980); Annot., 28 A.L.R. Fed. 26, §§ 14-15, at 79-81 (1976), but, as a practical matter, can often infer such information from names and addresses. *See* Abramovsky, *Juror Safety: The Presumption of Innocence and Meaningful Voir Dire in Federal Criminal Prosecutions—Are They Endangered Species?*, 50 Fordham L. Rev. 30, 49-51 (1981).

7. *See* United States v. Thomas, 757 F.2d 1359, 1364-65 (2d Cir.), *cert. denied*, 106 S. Ct. 66 (1985); United States v. Barnes, 604 F.2d 121, 140-41 (2d Cir. 1979), *cert. denied*, 446 U.S. 907 (1980).

8. *See, e.g.*, United States v. Ferguson, 758 F.2d 843, 854 (2d Cir.), *cert. denied*, 106 S. Ct. 124 (1985); United States v. Thomas, 757 F.2d 1359, 1364-65 (2d Cir.), *cert. denied*, 106 S. Ct. 66 (1985); United States v. Rosado, 728 F.2d 89, 94-95 (2d Cir. 1984). Recently, a state judge declined to empanel an anonymous jury for the assault trial of a reputed organized crime figure because the state's criminal procedure laws apparently did not permit it. *See* Fried, *Bid for Anonymous Jury in Gotti Trial is Denied*, N.Y. Times, Mar. 8, 1986, at 31, col. 1.

9. *See* United States v. Barnes, 604 F.2d 121, 131-33 (2d Cir. 1979), *cert. denied*, 446

ent benefits,[10] critics assail anonymous juries both as an infringment of the sixth amendment guarantee of an impartial jury[11] and as a serious

U.S. 907 (1980). Prior to trial, the government moved to have the jury sequestered to avoid any possibility of jury tampering that allegedly infected three earlier narcotics cases prosecuted in the Southern District of New York. *See id.* at 134 n.3. The trial judge not only granted the motion, *id.* at 136, but also conducted a limited voir dire, specifically refusing to disclose to either side the names, addresses and neighborhoods of prospective jurors. *See id.* at 133-34. The judge also refused to inquire into the prospective jurors' ethnic and religious backgrounds. *See id.* at 134, 137. Prospective jurors were, however, asked to disclose the counties they resided in. *Id.* at 135.

On appeal, defendants claimed that the limited voir dire deprived them of their ability to meaningfully probe jurors' biases and prejudices and thus violated due process. *See id.* at 137. The Second Circuit held that the extensive voir dire conducted by the judge gave the defendants a fair opportunity to expose biases or prejudices. *See id.* at 142-43. Moreover, any prejudices arguably inferable from the undisclosed information were discoverable through direct questioning about matters and issues involved in the trial. *See id.* at 142. The Second Circuit also flatly rejected the defendant's claim that jurors must disclose their identities and publicly take responsibility for their decisions. *See id.* at 140.

The court did not sanction the practice for every case but found that, in light of the seriousness of the charges, the extensive pretrial publicity and indications of defendants' willingness to interfere with the judicial system, the decision to limit voir dire was proper and necessary "to protect the jury, to assure its privacy, and to avoid all possible mental blocks against impartiality." *Id.* at 141. The court also stated that an actual threat or incident of jury tampering was not, and would not, be necessary to justify the procedure. *See id.* The procedure has been used a number of times since *Barnes* but only in the Southern and Eastern Districts of New York. *See, e.g.*, United States v. Ferguson, 758 F.2d 843, 854 (2d Cir.), *cert. denied*, 106 S. Ct. 124 (1985); United States v. Rosado, 728 F.2d 89, 94 (2d Cir. 1984).

Six years after *Barnes*, in a factually related case, United States v. Thomas, 757 F.2d 1359, 1362 (2d Cir.), *cert. denied*, 106 S. Ct. 66 (1985), defendants convicted by an anonymous jury again challenged the practice before the Second Circuit. This time, they claimed that telling jurors to guard their identities effectively violated defendants' right to be presumed innocent unless, and until, proven guilty. *See id.* at 1363. Taking the cue from *Barnes*, the government had moved, prior to trial, to have voir dire conducted without disclosure of veniremens' names, addresses or places of employment to protect them from intimidation or the fear of retaliation. *See id.* at 1362. In support of the motion, the government alleged that defendants murdered suspected government witnesses, put a "contract" out on "Nicky" Barnes, who had by this time become a government informant, and that the seriousness of the charges left defendants little to lose by tampering with the jury. *See id.*

On appeal, the Second Circuit conceded that the practice might burden the presumption of innocence somewhat but held that there was no per se rule that it may not be burdened. *Id.* at 1364. Moreover, the court found that any possible prejudice was minimized by the judge's credible explanation to the jury that their identities were being concealed to prevent the media and the public from invading their privacy and influencing their deliberations. *See id.* at 1364-65 & n.1. The court concluded that "[u]pon balancing the government's interest in safeguarding jurors with the defendant's interest in avoiding erosion of the presumption of innocence, the scale in this case tips in the government's favor." *Id.* at 1365. While use of the procedure proceeds apace in New York, see *supra* note 1 and accompanying text, it is not currently being used in any other federal district courts.

10. See *infra* notes 119-63 and accompanying text.

11. *See* Abramovsky, *supra* note 6, at 30-31; Note, *The Peremptory Challenge in a Criminal Case After* United States v. Barnes, 71 J. Crim. L. & Criminology, 173, 173-74 (1980) [hereinafter cited as *Peremptory Challenge*].

The sixth amendment expressly guarantees the defendant a trial before an impartial jury. *See* U.S. Const. amend. VI. The right to challenge prospective jurors theoretically

and unnecessary erosion of the presumption of innocence.[12]

Since many attorneys believe trials are frequently won or lost during jury selection,[13] any procedure diminishing the role of counsel invites close scrutiny and criticism. Opponents of anonymous juries argue that the procedure restricts meaningful voir dire and thereby undermines the defendant's sixth amendment right to an impartial jury.[14] Critics also

---

enables counsel to eliminate individuals whose manifest or suspected biases render them incapable of reaching an impartial verdict. *See* Lewis v. United States, 146 U.S. 370, 376 (1892); *see also* Fed. R. Crim. P. 24 (prescribing methods for examining and disqualifying prospective jurors). Initially, either the parties or the trial judge elicit information from prospective jurors through voir dire. *See generally* V. Starr & M. McCormick, Jury Selection §§ 8.0-9.0 (1985) (summarizing vior dire procedures and techniques). Based on this information, both sides may tactically invoke two types of challenges to disqualify prospective jurors—an unlimited number of challenges for cause and statutorily prescribed number of peremptory challenges. *See id.* § 10.4, at 302. A challenge for cause is based on an actual admission of bias or on a response that betrays a prejudice judicially recognized as mandating automatic dismissal. *See id.* at 303. Peremptory challenges, however, require no justification and reflect an attorney's instincts, hunches or suspicions about prospective jurors who cannot be challenged for cause. *See* P. DiPerna, Juries on Trial 151 (1984).

The effectiveness of both types of challenge depends on the breadth of information elicited during voir dire. *See* Abramovsky, *supra* note 6, at 47. Although courts often permit wide latitude in questioning prospective jurors, *see* Swain v. Alabama, 380 U.S. 202, 218-19 (1965), the trial judge enjoys broad discretion in conducting voir dire and satisfies the sixth amendment as long as "he permit[s] at least some questioning with respect to any material issue that may arise, actually or potentially, in the trial." United States v. Barnes, 604 F.2d 121, 137 (2d Cir. 1979), *cert. denied*, 446 U.S. 907 (1980); *accord* United States v. Bosby, 675 F.2d 1174, 1184 (11th Cir. 1982); United States v. Robinson, 475 F.2d 376, 381 (D.C. Cir. 1973). Juror anonymity forcloses inquiry into the names and addresses of prospective jurors, thus precluding challenges on these grounds.

12. *See* Abramovsky, *supra* note 6, at 30-31; Smothers, *supra* note 6, at 6, col. 3.

The presumption of innocence is an integral component of a fair criminal trial. Estelle v. Williams, 425 U.S. 501, 503 (1976); Coffin v. United States, 156 U.S. 432, 453 (1895). While an explicit instruction articulating the presumption need not be given in every case, *see* Kentucky v. Whorton, 441 U.S. 786, 789 (1979), the trial judge must adequately instruct the jury on the prosecution's burden of proving the defendant's guilt beyond a reasonable doubt. *See* Taylor v. Kentucky, 436 U.S. 478, 485-86 (1978). Because the jury's verdict must be based solely on the evidence presented at trial, *id.* at 485, the presumption also directs the jury to ignore the nonevidentiary aspects of the criminal process that might otherwise encourage them to presume guilt. *See* Bell v. Wolfish, 441 U.S. 520, 533 (1979). Obvious examples of potential non-evidentiary influences are the arrest, the indictment, *id.*, the prosecutor's opening and closing statements, *see* Hardee v. Kuhlman, 581 F.2d 330, 331 (2d Cir. 1978), and, perhaps, the defendant's failure to present evidence or take the stand, *see* Bell v. Wolfish, 441 U.S. 520, 533 (1979) (quoting Taylor v. Kentucky, 436 U.S. 478, 483-84 n.12 (1978)); Hall v. Wainwright, 733 F.2d 766, 773 n.8 (11th Cir. 1984) (per curiam), *cert. denied*, 105 S. Ct. 2344 (1985). Preserving the presumption of innocence also requires the court to evaulate any other trial tactics, procedures or circumstances that might undermine the jury's ability to entertain the presumption. Estelle v. Williams, 425 U.S. 501, 503-04 (1976).

13. *See, e.g.*, I. Owen, Defending Criminal Cases Before Juries: A Common Sense Approach 92, 109 (1973); V. Starr & M. McCormick, *supra* note 20, § 3.8, at 75 (quoting H. Zeisel, The American Jury: Annual Chief Justice Earl Warren Conference on Advocacy in the United States 84 (1977)).

14. *See* United States v. Barnes, 604 F.2d 121, 168 (2d Cir. 1979) (Meskill, J., dissent-

claim that jurors interpret their anonymity as proof of the defendant's criminal proclivity, thereby subverting the presumption of innocence.[15] Nevertheless, this Note argues that anonymous juries neither undermine the sixth amendment nor meaningfully dilute the presumption of innocence.

Part I analyzes the argument that anonymous juries impermissibly erode the presumption of innocence and suggests that this proposition rests on dubious assumptions concerning juror psychology. Moreover, anonymity protects jurors while raising inferences far less threatening to the presumption of innocence than other established practices designed to ensure the integrity and safety of the judicial process. Part II discusses whether the effect of juror anonymity on voir dire denies due process or violates the sixth amendment and concludes that the defendant has an interest in, but no constitutional right to, the undisclosed information. In fact, some possible advantages accrue to the defendant. Still, the trial judge should disclose certain information about jurors, in lieu of identity, to attorneys who request it. Part III examines the need for anonymous juries and concludes that in certain cases jurors may either fear retaliation or actually be exposed to intimidation unless the court employs measures to conceal their identities. Finally, Part IV recommends a standard for deciding whether to empanel an anonymous jury.

I. THE PRESUMPTION OF INNOCENCE

No per se rule prohibits burdening the presumption of innocence to accommodate a competing right or vital interest.[16] Juror anonymity, though unusual,[17] strikes a reasonable balance between the defendant's right to be cloaked in innocence and society's need to protect jurors and preserve the integrity of the trial.[18]

A. *Analogous Security Measures*

In *Illinois v. Allen*,[19] the Supreme Court suggested that in extreme circumstances shackling and gagging might be an appropriate way to con-

ing), *cert. denied*, 446 U.S. 907 (1980); Abramovsky, *supra* note 6, at 30-31, 49; *Peremptory Challenge*, *supra* note 11, at 173-74

15. *See* Abramovsky, *supra* note 6, at 30-31, 35, 37; Smothers, *supra* note 6, at 6, col. 3. See *infra* notes 37-38, 50 and accompanying text.

16. *See* Illinois v. Allen, 397 U.S. 337, 343-44 (1970); Allen v. Montgomery, 728 F.2d 1409, 1413 (11th Cir. 1984); Billups v. Garrison, 718 F.2d 665, 668 (4th Cir. 1983), *cert. denied*, 105 S. Ct. 91 (1984); Payne v. Smith, 667 F.2d 541, 544 (6th Cir. 1981), *cert. denied*, 456 U.S. 932 (1983).

17. Although the procedure is unusual, it is not unprecedented. Some Ninth Circuit opinions upheld the practice of concealing prospective jurors' identities from the trial participants. *See* Johnson v. United States, 270 F.2d 721, 724 (9th Cir. 1959), *cert. denied*, 362 U.S. 937 (1960); Wagner v. United States, 264 F.2d 524, 527 (9th Cir.), *cert. denied*, 360 U.S. 936 (1959); Hamer v. United States, 259 F.2d 274, 276-80 (9th Cir. 1958), *cert. denied*, 359 U.S. 916 (1959).

18. See *infra* notes 37-89 and accompanying text.

19. 397 U.S. 337 (1970).

trol a disruptive defendant even though it would clearly prejudice the defendant in a juror's eyes.[20] That severe remedy, only contemplated in *Allen*,[21] has been employed in a number of cases.[22] More commonly, trial judges use other measures to insulate the trial from violence and other illegal interference.[23] When confronted with situations involving threats of disruption or violence, appellate courts have upheld use of such extraordinary safeguards as extra security personnel,[24] courthouse metal detectors,[25] limited cross-examination,[26] courtroom closure[27] and

20. *See id.* at 343-44 (dictum).

21. *See id.*

22. *See, e.g.*, Woodard v. Perrin, 692 F.2d 220, 221-22 (1st Cir. 1982). Most cases following *Allen*, however, permitted physical restraint of defendants when they pose a threat of escape or violence rather than just to the orderly conduct of the trial. *See, e.g.*, United States v. Theriault, 531 F.2d 281, 284-85 (5th Cir.) (defendant who assaulted two officers, escaped from custody on a number of occasions and disrupted the principal case as well as other cases, was properly shackled throughout trial), *cert. denied*, 429 U.S. 898 (1976); Bibbs v. Wyrick, 526 F.2d 226, 227-28 (8th Cir. 1975) (defendant who rose to his feet, announced that he would not be tried with his present attorney, and began to move toward the bench and an exit, and whose own attorney recommended that strong court officers be assigned to the case, was properly handcuffed on the first day of trial), *cert. denied*, 425 U.S. 981 (1976); United States v. Kress, 451 F.2d 576, 577 (9th Cir. 1971) (per curiam) (twice-convicted bank robber who had previously escaped from custody was properly handcuffed throughout trial), *cert. denied*, 406 U.S. 923 (1972). The decision to restrain a defendant need not be based on a defendant's conduct during the trial. *See* Kennedy v. Cardwell, 487 F.2d 101, 111 (6th Cir. 1973), *cert. denied*, 416 U.S. 959 (1974).

23. *See, e.g.*, United States v. Clardy, 540 F.2d 439, 442-43 (9th Cir.) (unusually high number of security guards within the courtroom and around court building was appropriate security measure for trial of two prison inmates charged with attempted murder in light of the large number of inmates testifying and the apparent "interest" of a terrorist group in the outcome of the trial), *cert. denied*, 429 U.S. 963 (1976); United States *ex rel.* Lloyd v. Vincent, 520 F.2d 1272, 1274 (2d Cir.) (exclusion of public during testimony of undercover narcotics agents was proper and necessary to ensure confidentiality and safety of agents), *cert. denied*, 423 U.S. 937 (1975); United States v. Heck, 499 F.2d 778, 788 (9th Cir.) (the use of an electronic metal detector and the presence of federal marshals was appropriate on last day of trial after court received threats, spectators had been disruptive, and a demonstration was planned), *cert. denied*, 419 U.S. 1088 (1974); Kennedy v. Cardwell, 487 F.2d 101, 103, 111-12 (6th Cir. 1973) (court properly permitted defendant to be shackled to an officer in light of defendant's previous escape from jail), *cert. denied*, 416 U.S. 959 (1974); United States v. Hoffa, 367 F.2d 698, 711-12 (7th Cir. 1966) (jury was properly sequestered at nearby naval base in light of allegations of jury tampering and notoriety of the trial), *vacated per curiam on other grounds*, 387 U.S. 231 (1967).

24. *See* United States v. Clardy, 540 F.2d 439, 442-43 (9th Cir.), *cert. denied*, 429 U.S. 963 (1976); Kennedy v. Cardwell, 487 F.2d 101, 108 (6th Cir. 1973), *cert. denied*, 416 U.S. 959 (1974).

25. *See* United States v. Heck, 499 F.2d 778, 788 (9th Cir.), *cert. denied*, 419 U.S. 1088 (1974).

26. *See* United States v. Varella, 692 F.2d 1352, 1355-56 (11th Cir. 1982), *cert. denied*, 463 U.S. 1210 (1983); United States v. Cavallaro, 553 F.2d 300, 304 (2d Cir. 1977).

27. *See* United States *ex rel.* Lloyd v. Vincent, 520 F.2d 1272, 1273-74 (2d Cir.), *cert. denied*, 423 U.S. 937 (1975). Although limited cross-examination, see *supra* note 26, and courtroom closure are usually challenged on sixth amendment grounds, *see, e.g.*, United States v. Varella, 692 F.2d 1352, 1355 (11th Cir. 1982), *cert. denied*, 463 U.S. 1210 (1983); United States v. Cavallaro, 553 F.2d 300, 304 (2d Cir. 1977); United States *ex rel.* Lloyd v. Vincent, 520 F.2d 1272, 1273-74 (2d Cir.), *cert. denied*, 423 U.S. 973 (1975),

sequestration of the jury.[28]

These situations, however, require a particularly difficult balancing of interests.[29] The presumption of innocence and juror safety cannot be weighed against each other as abstract principles. Rather, a court must consider the degree of prejudice to the defendant and the magnitude of the threat to jurors.[30] Because prejudice depends on the procedure's impact on a juror's state of mind,[31] the court must engage in a psychological guessing game with uncertain results.[32] The conflicting assumptions about a jury's reaction to a defendant tried in prison clothes demonstrate the inherent subjectivity of any conclusions. In *Estelle v. Williams*,[33] the Supreme Court observed that defendants should not be forced to attend trial in prison clothes because their appearance could undermine the presumption of innocence.[34] At the same time, the Court noted that defense attorneys often produce their clients in prison uniforms to elicit juror sympathy.[35] Thus, even something that initially seems unambiguously prejudicial to the defendant can raise the opposite inference.

Although the prison uniform example demonstrates the difficulty of predicting juror reaction to a challenged practice, the Supreme Court has stated that "[c]ourts must do the best they can to evaluate the likely effects of a particular procedure, based on reason, principle, and common human experience."[36] Although it cannot preclude competing inferences, common sense can and should govern conclusions concerning the effect of juror anonymity.

B. *Juror Reaction to Anonymity*

Unlike security measures that unequivocally point to the defendant, juror anonymity could be perceived to address potential disturbances wholly unrelated to the defendant. Yet, critics of the anonymous jury contend that prospective jurors could only read the anonymity instruc-

---

courts have recognized that measures taken to protect witnesses may undermine the presumption of innocence, *see* United States v. Thomas, 757 F.2d 1359, 1364 (2d Cir.), *cert. denied*, 106 S. Ct. 66 (1985); United States v. Napolitano, 552 F. Supp. 465, 487 (S.D.N.Y. 1982).

28. *See* United States v. Hoffa, 367 F.2d 698, 711-12 (7th Cir. 1966), *vacated per curiam on other grounds*, 387 U.S. 231 (1967).

29. *See* United States v. Clardy, 540 F.2d 439, 442-43 (9th Cir.), *cert. denied*, 429 U.S. 963 (1976).

30. *See* Zygaldo v. Wainwright, 720 F.2d 1221, 1223 (11th Cir.), *cert. denied*, 466 U.S. 941 (1983); United States v. Clardy, 540 F.2d 439, 442-43 (9th Cir.), *cert. denied*, 429 U.S. 963 (1976).

31. See *infra* notes 37-93 and accompanying text.

32. *See* Estelle v. Williams, 425 U.S. 501, 504 (1976).

33. 425 U.S. 501 (1976).

34. *See id.* at 504.

35. *See id.* at 508; *cf.* Dupont v. Hall, 555 F.2d 15, 17 (1st Cir. 1977) (jurors who inadvertently saw defendant in custody of officers may have felt sympathy rather than hostility).

36. Estelle v. Williams, 425 U.S. 501, 504 (1976).

tion to be a judicial conclusion of the defendant's guilt.[37] Therefore, they cannot obey the contradictory instruction to presume the defendant innocent until the government meets its burden of proof.[38] Although plausible, this conclusion necessarily depends on certain unsupported assumptions about juror perception and knowledge.

For example, one writer suggests that, based on prospective jurors' prior jury experience, they would know that their names and addresses are usually disclosed to the parties.[39] Accordingly, they could only conclude that these defendants are being singled out.[40] Prior jury sevice, however, may not have appeared to be substantially different from serving on an anonymous jury.[41] Depending on the circumstances of a case and the style of the judge and the attorneys, the substance and length of voir dire can vary significantly.[42] Although the criminal defense bar usually supports extensive, unrestrained voir dire in principle,[43] a particular voir dire may be so cursory that prospective jurors might not even be aware that a defendant has access to their names and addresses.[44] Indeed, jurors' names, addresses, ethnic backgrounds and religions have all been withheld from attorneys in the past.[45] The *Barnes* decision was unique only because it foreclosed inquiry into all four areas at once.[46] Thus, there is no rigid, standardized voir dire format with which even an experienced juror could compare a particular voir dire and conclude that something suspicious was afoot.

If awareness of the irregularity of the limited voir dire were the sole source of prejudice, then the trial judge could avoid prejudice to the defendant by excusing all experienced jurors and those indicating special

37. *See* Abramovsky, *supra* note 6, at 35; Smothers, *supra* note 6, at 6, col. 3.

38. *See* Abramovsky, *supra* note 6, at 35.

39. *See id.*

40. *See id.*

41. Factors unrelated to anonymity may, of course, indicate to jurors that a trial is unusual. Pretrial publicity, see *infra* note 78, press coverage of the jury selection process itself, *see, e.g., Big Cases Focus Attention on Jury Selection*, N.Y. Times, Oct. 9, 1985, at B11, col. 1; *Anonymous Juries Being Picked for 2 Trials Focusing on Organized Crime*, N.Y. Times, Oct. 1, 1985, at B1, cols. 1, 6, and the size of the venire drawn, *see* P. DiPerna, *supra* note 11, at 99, are all indications of an unusual case.

42. *See* V. Starr & M. McCormick, *supra* note 11, at 241, 242 n.2.

43. *See id.* at 425.

44. *See* National Jury Project, Inc., Jurywork: Systematic Techniques § 2.02, at 2-2 (2d ed. 1986) (except in notorious cases, attorneys rarely pay attention to voir dire); V. Starr & M. McCormick, *supra* note 11, at 75, 223 (some attorneys accept the first 12 prospective jurors without examination); 30 Am. Jur. Trials 563 (1983) (same).

45. *See, e.g.*, Gold v. United States, 378 F.2d 588, 594 (9th Cir. 1967) (no right to jurors' religious backgrounds); Johnson v. United States, 270 F.2d 721, 724 (9th Cir. 1959) (no right to jurors' addresses), *cert. denied*, 362 U.S. 937 (1960); Wagner v. United States, 264 F.2d 524, 527-28 (9th Cir.) (no right to jurors' names), *cert. denied*, 360 U.S. 936 (1959); *see also* Abramovsky, *supra* note 6, at 41. The defendants in *Barnes* did not claim that jurors' ethnic and religious backgrounds or exact addresses need to be disclosed in every case. *See* United States v. Barnes, 604 F.2d 121, 134 (2d Cir. 1979), *cert. denied*, 446 U.S. 907 (1980).

46. *See* Abramovsky, *supra* note 6, at 41.

knowledge of the judicial system. While the average person probably anticipates some screening to detect partiality or incompetence,[47] it is unlikely that he or she would expect, with absolute certainty, to have to divulge any particular item of personal information to the parties.

The issue, however, is not whether juries perceive anonymity as routine or unusual. In almost every case, the trial judge explains to jurors that, due to the trial's notoriety, anonymity is necessary to prevent the media and the public from invading their privacy and impairing their impartiality.[48] The propriety of using anonymous juries hinges on the credibility of this explanation.[49]

Critics claim that jurors read through this facially neutral instruction because no juror would believe he was being insulated from anyone other than the defendants or their sympathizers.[50] Taken to its logical conclusion, this assumption would require judges to refrain from making any suggestion concerning the jurors' extra-judicial contacts, lest defendants be cast in a negative light. In every case, however, the trial judge is required to make some effort to caution the jury against extra-judicial influences.[51] Indeed, many convicted defendants successfully argue on appeal that the jury was either not adequately cautioned to avoid outside influences or that juror contact with third parties prejudiced the defendant's case.[52]

Cases that inspire significant media attention and public passion raise special concerns about juror insulation.[53] The effect of inflammatory media reports and hostile public opinion on a defendant's fair trial rights has long perplexed judges.[54] When notorious criminals are tried, a juror

47. *See* Press-Enterprise Co. v. Superior Ct., 464 U.S. 501, 513 n.1 (1984) (Blackmun, J., concurring) (most prospective jurors are aware that they will be questioned to detect biases).

48. *See* United States v. Thomas, 757 F.2d 1359, 1365 n.1 (2d Cir.), *cert. denied*, 106 S. Ct. 66 (1985); United States v. Barnes, 604 F.2d 121, 137 (2d Cir. 1979), *cert. denied*, 446 U.S. 907 (1980).

49. If courts used the procedure without comment, the question would be whether it was innately suggestive. Arguably, jurors would not perceive the procedures as anything unusual. *Cf.* Hardee v. Kuhlman, 581 F.2d 330, 331 n.1, 332 (2d Cir. 1978) (the jury would perceive the presence of security as a normal courtroom practice and not one that singled out defendant). Someone unfamiliar with trial procedures might assume that he would not have to reveal his identity to a person who may be exposed to a lengthy prison sentence as a result of the former's verdict.

50. *See* Abramovsky, *supra* note 6, at 35.

51. *See* United States v. Williams, 635 F.2d 744, 745-46 (8th Cir. 1980); Annot., 72 A.L.R.3d 131, 158-59 (1976).

52. *See, e.g.*, Turner v. Louisiana, 379 U.S. 466, 472-74 (1965); Remmer v. United States, 347 U.S. 227, 229-30 (1954); United States v. Williams, 635 F.2d 744, 745-46 (8th Cir. 1980). Moreover, unsanctioned contacts with jurors during trial are presumptively prejudicial. Project, *Criminal Procedure*, 72 Geo. L.J. 249, 558 (1983).

53. *See Report of the Committee on the Operation of the Jury System on the "Free Press—Fair Trial" Issue*, 45 F.R.D. 391, 394-400 (1968) (recommendations in response to increasingly apparent conflict between conduct of media before and during criminal trials and defendants' rights).

54. *Id.*

could easily feel pressure to act as a public avenger and thus could believe that his anonymity is aimed, at least in part, at isolating the jury from forces and opinions hostile to the defendants.[55] In many highly publicized cases, for example, the defense counsel will move to sequester the jury to prevent public pressure or prejudicial information from biasing jurors against his client.[56] Presumably, these attorneys do not fear that sequestered jurors will conclude that they are being insulated from the defendant. Although a juror might logically conclude that anonymity prevents, among other things, a defendant from influencing him, any measure designed to insulate the jury from prejudicial elements could raise this inference.[57] Because some effort is always made to caution the

55. *See* Press-Enterprise Co. v. Superior Ct., 464 U.S. 501, 508-09 (1984) ("Criminal acts, especially violent crimes, often provoke public concern, even outrage and hostility; this in turn generates a community urge to retaliate and desire to have justice done."); Sheppard v. Maxwell, 384 U.S. 333, 342 (1966) (prospective jurors were exposed to interference by cranks and friends and all prospective jurors received anonymous letters); *cf.* Bradley, *Racketeers, Congress and the Courts: An Analysis of RICO*, 65 Iowa L. Rev. 837, 837 (1980) (RICO enacted in hysterical atmosphere reminiscent of Red Scares of the 1920's and 1950's). A number of cases have actually involved attempts to persuade the jury to convict defendants. *See, e.g.*, United States v. Norton, 700 F.2d 1072, 1076 (6th Cir.), *cert. denied*, 461 U.S. 910 (1983); United States v. Hamilton, 490 F.2d 451, 452 (5th Cir. 1974) (per curiam); Andrews v. Shulsen, 600 F. Supp. 408, 416 (D. Utah 1984).

In United States v. Borelli, 336 F.2d 376 (2d Cir. 1964), *cert. denied*, 379 U.S. 960 (1965), the Second Circuit suggested that juror anonymity might be necessary to prevent jury tampering or intimidation in certain types of cases. *See id.* at 392. That suggestion came in response to letters received by certain jurors which read: "Find these guinea sons of bitches guilty. Dont [sic] let them get away with something they did a long time ago. Send them to jail now, all those Mafia bums." *Id.* Ironically, a number of the jurors perceived the letters as a veiled attempt to discourage conviction. *Id.*

A recent incident involving the highly publicized trial of a former Navy radioman accused of spying for the Soviet Union demonstrates the believability of the courts' concern with potential media interference in sensational cases. *See Letter Sent to Jurors by a News Reporter Disrupts a Spy Trial*, N.Y. Times, Apr. 3, 1986, at B8, col. 4 (judge described reporter's letters to jurors as being close to an attempt to influence jury).

56. *See, e.g.*, United States v. Kampiles, 609 F.2d 1233, 1241 (7th Cir. 1979), *cert. denied*, 446 U.S. 954 (1980); United States v. Johnson, 584 F.2d 148, 154-55 (6th Cir. 1978), *cert. denied*, 440 U.S. 918 (1979); Janko v. United States, 281 F.2d 156, 168 (8th Cir. 1960), *rev'd on other grounds*, 366 U.S. 716 (1961); Andrews v. Shulsen, 600 F. Supp. 408, 416-17 (D. Utah 1984).

57. *See, e.g.*, United States v. Hoffa, 367 F.2d 698, 711-12 (7th Cir. 1966) (defendants objected to sequestration of jurors at a naval base), *vacated per curiam on other grounds*, 387 U.S. 231 (1967). Moreover, jurors are occasionally sequestered at the government's request, *see* United States v. Phillips, 664 F.2d 971, 996 (5th Cir. 1981), *cert. denied*, 457 U.S. 1136 (1982), and a number of opinions concerning prejudicial juror contact with third parties involved attempts by the defendant's own friends, relatives or sympathizers to influence the jury, *see, e.g.*, United States v. Forrest, 620 F.2d 446, 456-57 (5th Cir. 1980); United States v. Gardiner, 531 F.2d 953, 954-55 (9th Cir.) (per curiam), *cert. denied*, 429 U.S. 853 (1976); United States v. Harry Barfield Co., 359 F.2d 120, 121-24 (5th Cir. 1966); United States v. Cianciulli, 482 F. Supp. 585, 623-25 (E.D. Pa. 1979). A number of opinions expressly refer to the need to prevent jury tampering or intimidation, as well as the need to protect the defendant from hostile publicity, as reasons for sequestering the jury. *See, e.g.*, United States v. Hoffa, 367 F.2d 698, 711-12 (7th Cir. 1966), *vacated per curiam on other grounds*, 387 U.S. 231 (1967); United States v. Panczko, 353

jury against any outside influence,[58] and defense attorneys in sensational or notorious cases occasionally move to sequester the jury,[59] it seems illogical to conclude that juror anonymity could be perceived only as presumptive evidence of a defendant's guilt.

Perhaps the most significant distinction between anonymous juries and more established security measures is that the latter are usually a constant, overt presence during trial.[60] In *Estelle v. Williams*,[61] Chief Justice Burger observed that forcing the accused to go to trial wearing prison clothes was intolerable because the uniform was "a constant reminder of the accused's condition"[62] and "likely to be a continuing influence throughout the trial."[63] Similarly, in ruling on challenges to either physical restraint of the defendant or extraordinary courtroom security measures, courts often emphasize the defendant's right to the physical indicia of innocence during trial.[64]

Thus, whether a particular safety measure impermissibly burdens the presumption of innocence depends in part on how pervasively it colors the actual conduct of the trial. For example, if a murder defendant claims self-defense and both parties present character evidence, gagging and shackling the defendant obviously would favor the government's theory. Although the phrase "anonymous jury" inspires an image of hooded jurors in secret proceedings,[65] anonymous jurors perceive no overt difference between the conduct of an anonymous jury trial and a conventional one. The defendant is neither saddled with the physical indicia of guilt nor is he forced to face the charges in an atmosphere of imminent violence. Moreover, many trials using anonymous juries are complex and take many months, decreasing the likelihood that the brief pretrial instruction[66]—one among many the jury will hear[67]—might consciously or subconsciously influence the jury's verdict.[68]

F.2d 676, 678 (7th Cir. 1965), *cert. denied*, 383 U.S. 935 (1966); United States *ex rel.* Mayberry v. Yeager, 321 F. Supp. 199, 205-06 (D.N.J. 1971).

58. *See* United States v. Williams, 635 F.2d 744, 745-46 (8th Cir. 1980).

59. See *supra* note 56 and accompanying text.

60. *See, e.g.*, United States v. Gambina, 564 F.2d 22, 24 (8th Cir. 1977) (large number of security guards throughout trial); United States v. Kress, 451 F.2d 576, 577 (9th Cir. 1971) (per curiam) (defendant handcuffed throughout trial), *cert. denied*, 406 U.S. 923 (1972).

61. 425 U.S. 501 (1976).

62. *Id.* at 504.

63. *Id.* at 505.

64. *See* United States v. Gambina, 564 F.2d 22, 24 (8th Cir. 1977); Kennedy v. Cardwell, 487 F.2d 101, 104 (6th Cir. 1973), *cert. denied*, 416 U.S. 959 (1974).

65. See the whimsical cartoon accompanying Smothers, *supra* note 6, at 6, col. 3, depicting jurors holding masks to their faces.

66. *See* United States v. Thomas, 757 F.2d 1359, 1365 n.1 (2d Cir.), *cert. denied*, 106 S. Ct. 66, 67 (1985).

67. *Cf.* United States v. Meinster, 484 F. Supp. 442, 443 (S.D. Fla. 1980) (36-count, multi-defendant RICO trial would be lengthy in light of extensive jury instructions and complexity of trial), *aff'd sub nom.* United States v. Phillips, 664 F.2d 971 (5th Cir. 1981), *cert. denied*, 457 U.S. 1136 (1982).

68. *Cf.* United States v. Haldeman, 559 F.2d 31, 71 n.58 (D.C. Cir. 1976) (possible

Even assuming that the anonymity instruction signals the jury that the defendants might "get" to them,[69] critics of anonymous juries ignore a likely consequence of that perception. A juror who anticipates a defendant's retaliation would be more likely to return a guilty verdict *despite* such fears rather than *because* of them.[70] Thus, even if anonymity incidentally instills the fear it attempts to remedy,[71] the result arguably benefits the defendant by making jurors afraid to convict.[72] On the other hand, if anonymity helps to remedy existing fears, it serves the ideal of dispassionate judgment.[73] Although a defendant would understandably welcome trial before a jury biased toward acquittal, the people, as well as the defendant, are entitled to an impartial jury.[74]

Of course, a juror may interpret anonymity as a measure designed only to prevent jury tampering, not as a measure protecting him from a violent defendant. The question then becomes whether this inference prejudicially alters the juror's perception of a defendant. One defense attorney in a recent organized crime trial claimed that the anonymity instruction convinced the jurors that "these men are members of the Mafia."[75] Although jurors in the current organized crime cases may have such an impression,[76] it is probably neither caused nor exacerbated by anonymity. Whether jurors perceive their anonymity as a measure designed to prevent tampering or violence, it does little to alter their perception of certain defendants.[77]

The current series of organized crime trials and related events have provided a steady stream of colorful headlines for the press.[78] Moreover, a number of the defendants had public, criminal reputations long before

influence of juror's pretrial impressions of defendant's guilt was greatly reduced by three-month period of sequestration during trial), *cert. denied*, 431 U.S. 933 (1977).

69. *See* Abramovsky, *supra* note 6, at 35.

70. *See* Owens v. Estelle, 484 F. Supp. 230, 233 (W.D. Tex. 1979), *aff'd mem.*, 611 F.2d 880 (5th Cir. 1980).

71. *See* Abramovsky, *supra* note 6, at 35.

72. See *supra* note 70 and accompanying text.

73. *See* United States v. Barnes, 604 F.2d 121, 140-41 (2d Cir. 1979), *cert. denied*, 446 U.S. 907 (1980).

74. *See* Swain v. Alabama, 380 U.S. 202, 220 (1965).

75. *See* Smothers, *supra* note 6, at 6, col. 3.

76. *See* Bowles, *Gotti Jury Pool Deep*, N.Y. Newsday, Apr. 8, 1986, at 5, col. 1 (many prospective jurors expressed belief in Mafia and suspicion based on news accounts that defendant was the leader of a crime family).

77. *Cf.* Irwin v. Dowd, 366 U.S. 717, 722 (1961) (most qualified jurors have some pretrial impressions or opinions of merits of important, publicized cases).

78. *See, e.g.*, McFadden, *Expert Cites Gains Against Mafia*, N.Y. Times, Dec. 23, 1985, at B2, col. 5; Roberts, *Mafia Infiltration of Business Costing Consumers Millions*, N.Y. Times, Dec. 19, 1985, at A1, col. 1; Sullivan, *Sensational Killings Fill Crime Families' History*, N.Y. Times, Dec. 19, 1985, at B12, col. 4; Farber, *U.S.-Italian Teamwork Bringing Organized-Crime Chiefs to Trial*, N.Y. Times, Oct. 18, 1985, at A1, col. 3; *F.B.I. Begins Roundup Aimed at Mob Leaders*, N.Y. Times, Oct. 28, 1984, § 4 (Week In Review), at 6, col. 1; Lubasch, *31 Charged by U.S. with Running a $1.65 Billion Heroin Operation*, N.Y. Times, Apr. 10, 1984, at A1, col. 5.

these trials began.[79] Furthermore, the indictments, which are read to jurors before trial,[80] allege that the defendants are members of organized crime families[81] familiar to anyone who occasionally reads the paper or watches television.[82] These defendants understandably complain that pervasive publicity infects the jury and destroys the possibility of a fair trial.[83] Nevertheless, the courts have consistently held that jurors need not be completely oblivious to the facts underlying a particular case.[84] Pretrial impressions or opinions will not disqualify a juror if, in the court's judgment, he can set aside such impressions and base his decision solely on the evidence admitted at trial.[85] While a juror's ability to ignore pervasive media coverage may be questionable,[86] critics of anonymous juries seem to presume that jurors are oblivious to the nature of these cases until they are directed not to reveal their identities. Only then, supposedly, are their minds irrevocably poisoned against the defendants. Unless defense attorneys—who would normally be the last to concede a juror's ability to ignore publicity and the indictment—can empanel twelve hermits oblivious to current events, the media and the indictment, this theory of causation is highly improbable.

Ultimately, the results of an anonymous jury trial should most reliably

79. *See, e.g.*, Fried, *Persico and 3 Indicted in I.R.S. Bribe Attempt Case*, N.Y. Times, Nov. 8, 1980, at A27, col. 1; *Nephew of Mob Figure Is Wounded in "Village"*, N.Y. Times, Aug. 27, 1979, at A32, col. 5; Lubasch, *A Reputed Mobster's 2d Tax Trial Ends in a Mistrial*, N.Y. Times, Dec. 16, 1977, at B21, col. 2; *Crime Figure on Trial*, N.Y. Times, Sept. 21, 1977, at B3, col. 6; Seigel, *Key Witness Jailed For Not Testifying at Castellano Trial*, N.Y. Times, Nov. 11, 1976, at A29, col. 1; *Loan Shark Trial Opens*, N.Y. Times, Nov. 10, 1976, at B3, col. 6; *Hijacker of Truck Loses His Freedom Because of Cohorts*, N.Y. Times, Nov. 6, 1976, at A16, col. 1.

80. *See, e.g.*, United States v. Davis, 766 F.2d 1452, 1455 (10th Cir.) (prosecutor read indictment to jury before giving opening statement), *cert. denied*, 106 S. Ct. 239 (1985); United States v. London, 753 F.2d 202, 206 (2d Cir. 1985) (court read indictment to jury before instructing them that government must prove charges contained therein).

81. See *supra* note 1.

82. See *supra* notes 78-79.

83. *See, e.g.*, United States v. Salerno, No. 85 Cr. 139 (S.D.N.Y. Feb. 6, 1986) (defendant moved for a trial delay because of potentially prejudicial publicity) (available May 5, 1986, on LEXIS, Genfed library, Dist file); United States v. Persico, No. 84 Cr. 809 (S.D.N.Y. Jan. 21, 1986) (defendants alleged that a lead article on organized crime in a popular magazine written by the President of the United States was an intentional effort to prejudice the defendants) (available May 5, 1986, on LEXIS, Genfed library, Dist file).

84. *See* Irvin v. Dowd, 366 U.S. 717, 722-23 (1961); United States v. Medina, 761 F.2d 12, 20 (1st Cir. 1985); United States v. Giacalone, 588 F.2d 1158, 1162 n.6, 1162-64 (6th Cir. 1978), *cert. denied*, 441 U.S. 944 (1979); United States v. Haldeman, 559 F.2d 31, 59-64 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977).

85. *See* Irvin v. Dowd, 366 U.S. 717, 722-23 (1961); United States v. Medina, 761 F.2d 12, 20 (1st Cir. 1985); United States v. Giacalone, 588 F.2d 1158, 1162 n.6, 1162-64 (6th Cir. 1978), *cert. denied*, 441 U.S. 944 (1979); United States v. Haldeman, 559 F.2d 31, 59-64 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977).

86. One critic of anonymous juries noted that a defense attorney would actually become suspicious of any prospective juror who disclaimed any knowledge or impressions of the facts underlying a particularly sensational case and would almost certainly exercise a peremptory challenge against him. *See* Abramovsky, *supra* note 6, at 41.

indicate the prejudicial impact of the procedure, if any.[87] Thus far, these results suggest that the prejudicial impact of the procedure is remote. Only one of the trials resulted in the conviction of all defendants on all counts,[88] and at least one of the cases resulted in a surprising disappointment for the government.[89] Apparently, the procedure did not prevent jurors from differentiating between individual defendants and counts in complex cases. While such results cannot conclusively refute the argument that anonymity prejudices a juror's judgment, they demonstrate that the argument is, at least, vastly overstated.

Anonymity alone does not target a defendant for conviction.[90] By instructing a jury that anonymity prevents the media and interested members of the public from interfering with their deliberations, a trial judge avoids most prejudicial innuendo.[91] Unlike other permissible safety precautions,[92] juror anonymity does not even intrude on the actual conduct of the trial.[93] Consequently, an anonymous jury does not undermine the presumption of innocence.

II. LIMITED VOIR DIRE AND THE PEREMPTORY CHALLENGE

Consistent with due process and the sixth amendment,[94] the trial judge may refuse to ask prospective jurors any questions not reasonably calculated to expose biases or prejudices relevant to the case.[95] Although addresses and group affiliations may, in some circumstances, indicate significant potential for bias,[96] attorneys do not have an unfettered right

87. *Cf.* United States v. Capo, 595 F.2d 1086, 1092 (5th Cir. 1979) (acquittal of four defendants supported judge's conclusion that jurors were impartial), *cert. denied*, 444 U.S. 1012 (1980); United States v. Haldeman, 559 F.2d 31, 60 n.28 (D.C. Cir. 1976) (fact that jury acquitted one defendant was some indication of impartiality), *cert. denied*, 431 U.S. 933 (1977).

88. In the one case where defendants were convicted on all counts, United States v. Rosado, 728 F.2d 89, 92-93 (2d Cir. 1984), the Second Circuit described the evidence as "overwhelming and undisputed." *Id.* at 96. In all the other reported cases, some of the defendants were acquitted on all or some counts. *See* United States v. Ferguson, 758 F.2d 843, 847-48 (2d Cir.), *cert. denied*, 106 S. Ct. 124 (1985); United States v. Thomas, 757 F.2d 1359, 1361-62 (2d Cir.), *cert. denied*, 106 S. Ct. 66 (1985); United States v. Barnes, 604 F.2d 121, 131 (2d Cir. 1979), *cert. denied*, 446 U.S. 907 (1980).

89. *See* P. DiPerna, *supra* note 11, at 111 (discussing *United States v. Ferguson* and suggesting that anonymity may have encouraged acquittals).

90. See *supra* notes 37-89 and accompanying text.

91. See *supra* notes 48-59 and accompanying text.

92. See *supra* notes 19-28 and accompanying text.

93. See *supra* notes 60-68 and accompanying text.

94. U.S. Const. amends. V, VI, XIV.

95. *See* United States v. Jones, 722 F.2d 528, 529 (9th Cir. 1983); United States v. Robinson, 475 F.2d 376, 380-81 (D.C. Cir. 1973).

96. *See* Rosales-Lopez v. United States, 451 U.S. 182, 189-90 (1981); United States v. Robinson, 475 F.2d 376, 380-81 (D.C. Cir. 1973); Abramovsky, *supra* note 6, at 49. Even in such cases, however, group affiliations would not necessarily justify challenges for cause. *See* Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries*, 86 Yale L.J. 1715, 1733 & n.78 (1977) (no known cases where members of groups defined by race, sex or economic class have been successfully challenged on the basis of group affiliation).

to this information in every case.[97] Denying access to these facts may constrain an attorney's ability to assemble an ideal jury, but it violates no constitutional right.[98]

Although the *Barnes* court may have been on firm constitutional ground in rejecting the defendants' request for the ethnic and religious backgrounds and addresses of prospective jurors,[99] it unnecessarily downplayed the relevance of this information to intelligent peremptory challenges.[100] Indeed, racial, ethnic and socio-economic undercurrents are present in every case involving an anonymous jury.[101] Trial judges should acknowledge this fact and permit some inquiry into group affiliations and approximate community in lieu of names and adresses. Because such disclosure does not undermine the purpose of juror anonymity[102] and more than adequately substitutes for the information

97. *See, e.g.*, Gold v. United States, 378 F.2d 588, 594 (9th Cir. 1967) (no right to jurors' religious backgrounds); Johnson v. United States, 270 F.2d 721, 724 (9th Cir. 1959) (no right to jurors' addresses), *cert. denied*, 362 U.S. 937 (1960); Wagner v. United States, 264 F.2d 524, 528 (9th Cir.) (no right to jurors' names), *cert. denied*, 360 U.S. 936 (1959); *see also* Abramovsky, *supra* note 6, at 41 (names, addresses, ethnic backgrounds and religious affiliations have all been witheld before).

98. *See* Schlinsky v. United States, 379 F.2d 735, 738 (1st Cir.), *cert. denied*, 389 U.S. 920 (1967); *cf.* Abramovsky, *supra* note 6, at 40 (during voir dire both parties seek to empanel jurors partial to their side, not impartial jurors).

99. *See* United States v. Barnes, 604 F.2d 121, 140-41 (2d Cir. 1979), *cert. denied*, 446 U.S. 907 (1980).

100. *See* United States v. Barnes, 604 F.2d 121, 174 (2d Cir. 1979) (Meskill, J., dissenting) (a peremptory challenge based on a prospective juror's group affiliations is the archetypical peremptory challenge), *cert. denied*, 446 U.S. 907 (1980).

In a recent Supreme Court case, Batson v. Kentucky, 54 U.S.L.W. 4411 (U.S. Apr. 30, 1986), the Court overruled Swain v. Alabama, 380 U.S. 202 (1965), holding that a black defendant could establish a prima facie violation of his equal protection rights based solely on the prosecutor's use of peremptory challenges to exclude blacks from the jury. *Id.* at 4429-30. While the decision has no immediate impact on defendants' use of discriminatory challenges, Chief Justice Burger noted that the decision would eventually lead to restraints on defendants' ability to exercise peremptory challenges based on race or other group affiliations. *Id.* at 4438 (Burger, C.J., dissenting). In a concurring opinion, Justice Marshall called for the complete elimination of peremptory challenges. *Id.* at 4431 (Marshall, J., concurring). If Justice Burger is correct, the decision undermines the argument for disclosure of jurors' ethnic backgrounds in anonymous jury cases.

101. *See, e.g.*, United States v. Ferguson, 758 F.2d 843, 846 (2d Cir.) (radical black organization responsible for murders and bank robberies), *cert. denied*, 106 S. Ct. 124 (1985); United States v. Rosado, 728 F.2d 89, 91-93 (2d Cir. 1984) (Puerto Rican terrorist group responsible for periodic bombings throughout the United States); United States v. Barnes, 604 F.2d 121, 135-36 (2d Cir. 1979) (predominantly black criminal organization responsible for narcotics distribution in New York and, indirectly, for drug related crime, neighborhood deterioration and resulting racial and ethnic tension), *cert. denied*, 446 U.S. 907 (1980); Indictment at 2-5, United States v. Salerno, No. 85 Cr. 139 (S.D.N.Y. filed Feb. 26, 1985) (predominantly Italian organized crime confederation responsible for widespread, diverse criminal activities since the 1930's).

102. The description of approximate community should be broad enough to prevent the parties from investigating jurors' immediate neighborhoods and talking to their families. *See* United States v. Barnes, 604 F.2d 121, 141 (2d Cir. 1979), *cert. denied*, 446 U.S. 907 (1980).

normally inferable from names and addresses,[103] it should be permitted in every case using the procedure.

Some aspects of juror anonymity may even work to a defendant's advantage. Assuming attorneys are able to discern subtle prejudices from a prospective juror's group affiliations,[104] anonymity equally restrains both sides from eliminating members of the jury pool with undesirable demographic characteristics.[105] Although defense attorneys may be unable to weed out jurors with group characteristics that are supposedly prejudicial to criminal defendants[106] or particular types of defendants,[107] prosecutors will similarly be unable to detect jurors from supposedly sympathetic groups.[108] This equality of ignorance may favor defendants. Because conviction requires a unanimous verdict,[109] anonymity increases the possibility of a hung jury by increasing the likelihood that jurors associated with religious, ethnic or socio-economic groups favoring particular defendants will "slip through" the voir dire.

One commentator has argued that equal access to information about the jury panel is crucial to a fair voir dire.[110] He noted that, in the past, prosecutors have had unilateral access to governmental agency data on prospective jurors.[111] Thus, the prosecution enjoys a potential systemic advantage in every case.[112] He concludes that a relatively broad voir dire is necessary to remedy this institutional disparity.[113] One might more readily conclude, however, that anonymous juries remedy this systemic inequality. Without names and adresses, prosecutors could not take advantage of the superior informational and investigative resources of the government. Anonymity thus ensures that both sides are on equal footing with regard to information about prospective jurors.

Although the limited voir dire is constitutional,[114] it prevents access to information on which attorneys rely substantially in exercising their peremptory challenges.[115] Consequently, attorneys should have alternative access to jurors' ethnic backgrounds and approximate community if the

103. Access to jurors' group affiliations is more helpful than knowing their names. Inferring ethnic and religious background from a name is often guesswork. *See* Abramovsky, *supra* note 6, at 49-51. Surnames do not always indicate ethnic background and can sometimes be misleading.

104. See *supra* note 96 and accompanying text.

105. *See* United States v. Barnes, 604 F.2d 121, 142 (2d Cir. 1979), *cert. denied*, 446 U.S. 907 (1980).

106. *See* Abramovsky, *supra* note 6, at 49-51.

107. *See id.*

108. *See* United States v. Barnes, 604 F.2d 121, 142 (2d Cir. 1979), *cert. denied*, 446 U.S. 907 (1980).

109. Fed. R. Crim. P. 31.

110. Abramovsky, *supra* note 6, at 47-48.

111. *Id.* at 48; *see also* United States v. Payseur, 501 F.2d 966, 974 (9th Cir. 1974) (government's unilateral access to information about jurors is not a ground for objection).

112. *See* Abramovsky, *supra* note 6, at 48-49.

113. *See id* at 60.

114. See *supra* notes 94-98 and accompanying text.

115. See *supra* notes 100-01 and accompanying text.

disclosure would not jeopardize jurors' security.[116] Even without this alternative inquiry, incidental advantages accruing to the defendant from juror anonymity compensate for defense counsel's diminished capacity to assert intelligent peremptory challenges.[117]

III. Are Anonymous Juries Necessary?

Although the prejudicial impact of juror anonymity may be exaggerated, any intrusion on a defendant's fair trial rights is unjustified if anonymity is unnecessary.[118] The need for anonymous juries rests on several grounds.

A. *Juror Fear*

Juror anonymity rests on the assumption that at least some jurors will be intimidated by the characterization of the defendants in the indictment,[119] the corresponding pretrial media attention[120] and, ultimately, the evidence.[121] Consequently, some jurors may be unable to judge the evidence impartially.[122] Critics complain that judges have imposed anonymity without any indication from jurors that they were afraid.[123] Although juror fear may be difficult to prove, assuming its existence is not as specious as this criticism suggests.

First, the impracticality of judicial inquiry into this area is obvious. As Judge Cardamone recently observed, if the jurors are not already apprehensive, extensive questioning about such fears would certainly tend to generate the fear the questions are designed to detect.[124] Second, while no juror expressed any fear of violence on the record in *Barnes* and

116. See *supra* notes 101-03 and accompanying text.

117. See *supra* notes 104-13 and accompanying text.

118. *Cf.* Estelle v. Williams, 425 U.S. 501, 505 (1976) ("Unlike physical restraints, . . . compelling an accused to wear jail clothing furthers no essential state policy."); Walker v. Butterworth, 599 F.2d 1074, 1080 (1st Cir.) (practice of confining defendants to "prisoner dock" served no essential policy that would justify burdening the presumption of innocence), *cert. denied*, 444 U.S. 937 (1979).

119. *See* United States v. Persico, 621 F. Supp. 842, 878 (S.D.N.Y. 1985) (indictment charged that criminal enterprise depended on threats, beatings, murder and the public's fear of the organization).

120. *See* United States v. Barnes, 604 F.2d 121, 141 (2d Cir. 1979) (extensive pretrial publicity detailed violent acts of trial participants), *cert. denied*, 446 U.S. 907 (1980).

121. *See* United States v. Ferguson, 758 F.2d 843, 854 (2d Cir.) (evidence included defendants discussing the murder of two government witnesses), *cert. denied*, 106 S. Ct. 124 (1985).

122. *See* United States v. Thomas, 757 F.2d 1359, 1364 (2d Cir.), *cert. denied*, 106 S. Ct. 66 (1985).

123. *See* United States v. Ferguson, 758 F.2d 843, 854 (2d Cir.) (defendant complained that judge should have questioned prospective jurors about fears before deciding to empanel anonymous jury), *cert. denied*, 106 S. Ct. 124 (1985); Abramovsky, *supra* note 6, at 37 (no showing in *Barnes* that jurors would have felt threatened without anonymity).

124. *See* United States v. Ferguson, 758 F.2d 843, 854 (2d Cir.) ("such interrogation could well have created or heightened such fear"), *cert. denied*, 106 S. Ct. 124 (1985); *cf.* United States v. Calhoun, 510 F.2d 861, 867 (7th Cir.) (defendant complained that judge poisoned jurors' minds against defendant when judge asked jurors if they would fear for

its progeny, jurors have voiced such fears in cases involving less notorious defendants.[125] Most of the current cases using anonymous juries involve powerful organized crime groups[126] whose public reputations for corruption, intimidation and ruthlessness have become matters of contemporary folk wisdom.[127] In a recent racketeering case involving the Teamsters union, a defense attorney commissioned a survey seeking to assess local prejudices and attitudes that might support a motion for individual examination of prospective jurors.[128] Ironically, the prosecutor eventually used the same survey to support a successful anonymous jury motion.[129] The survey strongly supported the assumption of juror apprehension in organized crime cases.[130]

B. *The Likelihood of Tampering*

Another premise underlying the need for anonymous juries is that certain defendants or their sympathizers are likely to try to corrupt or intimidate the jury.[131] Critics assert that courts accept this premise despite a "total absence of any evidence of jury tampering, or of a conspiracy to

---

their safety in the event that evidence convinced them of defendant's guilt), *cert. denied*, 421 U.S. 950 (1975).

125. *See* United States v. Grandison, No. 83-5165, slip op. at 5 (4th Cir. 1986) (Although a juror who lived in an area where certain defendants also resided expressed concerns about what might happen to her after trial, the judge refused to excuse the juror or declare a mistrial.); United States v. Thomas, 632 F.2d 837, 841 (10th Cir.) (jurors asked court officer if they had anything to fear from defendant after hearing testimony that defendant threatened a witness), *cert. denied*, 449 U.S. 960 (1980); Owens v. Estelle, 484 F. Supp. 230, 233 (W.D. Tex. 1979) (jurors expressed concern that defendant might be writing down their names and addresses), *aff'd mem.*, 611 F.2d 880 (5th Cir. 1980).

126. See *supra* note 1.

127. *See Organized Robbery*, N.Y. Daily News, Apr. 2, 1986, at 7, col. 3 (organized crime, dominated by the Mafia, which will earn over $100 billion and cost 400,000 jobs, is an entrenched, pervasive phenomenon with influence in every major legitimate industry); Brill, *supra* note 3, at 24 (Americans accept organized crime as part of fabric of American life).

128. *See* Memorandum in Support of Defendant's Motion to Permit Counsel to Conduct the Examination of Prospective Jurors and to Conduct Such Examination Individually, Outside the Hearing of the Other Prosective Jurors at 4-6, United States v. Cody, 82 Cr. 00013 (E.D.N.Y. Sept. 3, 1982) [hereinafter cited as Memorandum].

129. *See* Affidavit in Support of Government's Motion for Anonymous Selection and Limited Sequestration of the Jury at 3, United States v. Cody, 82 Cr. 00013 (E.D.N.Y. Sept. 7, 1982).

130. *See* Memorandum, *supra* note 128, at 5 (large proportion of group surveyed associated union leaders and the Teamsters union with the Mafia, missing people, violence, coercion, corruption and organized crime). The survey itself did not mention organized crime, *see id.* at 4-6, and the case did not involve members of organized crime families, *see* United States v. Cody, 722 F.2d 1052, 1054-55 (2d Cir. 1983), *cert. denied*, 467 U.S. 1226 (1984), although it was reported in the press that the defendant had connections to the Mafia. *See* Affirmation in Support of Defendant's Motion for a Change of Venue at 2-3, United States v. Cody, 82 Cr. 00013 (E.D.N.Y. Sept. 15, 1982). If, as the survey suggests, jurors would be apprehensive in cases they perceive as having underlying organized crime connections, jurors would certainly be apprehensive in cases actually involving organized crime figures and activities.

131. *See* United States v. Persico, 621 F. Supp. 842, 878-79 (S.D.N.Y. 1985).

tamper, injure, or otherwise adversely affect a juror."[132]

While not every anonymous jury case reveals a specific intent or attempt to interfere with the jury, in each case defendants had demonstrated a willingness to obstruct justice in ways significantly more serious and risky than jury tampering.[133] Juror anonymity has coincided with attempted bribery of government officials,[134] threats to grand jurors and prosecutors,[135] the murder of or threats to potential witnesses and suspected informants,[136] and the bombing of a federal courthouse[137] as well as, in certain cases, indications of jury tampering.[138] If witnesses are killed or intimidated and substantial evidence indicates that defendants have engaged in other serious attempts to evade process,[139] it is reasonable to believe that the defendants may also take less drastic steps, such as making anonymous threatening phone calls to jurors. Furthermore, the factors demonstrating an inclination toward jury tampering are, to a large extent, the same factors that might give rise to juror concerns about intimidation or retaliation.[140] Even a defendant who has no intention of interfering with the jury does not have a right to rely on a fearsome, intimidating reputation to discourage conviction.[141]

In the past, the government has been able to prosecute powerful and notorious criminals without concealing jurors' identities.[142] The prosecutor in *Barnes* did not even ask for the procedure but, rather, benefited from a sua sponte judicial order.[143] The current need for anonymous

132. Abramovsky, *supra* note 6, at 36.

133. See *infra* notes 134-37 and accompanying text.

134. *See* United States v. Persico, 621 F. Supp. 842, 878-79 (S.D.N.Y. 1985); Indictment at 3, United States v. Castellano, No. 84 Cr. 63 (S.D.N.Y. filed Oct. 4, 1984).

135. *See* United States v. Ferguson, 758 F.2d 843, 854 (2d Cir 1985), *cert. denied*, 106 S. Ct. 124 (1985).

136. *See id.* at 854; United States v. Thomas, 757 F.2d 1359, 1362 (2d Cir.) (also referring to the activities of the *Barnes* defendants), *cert. denied*, 106 S. Ct. 66 (1985); United States v. Persico, 621 F. Supp. 842, 850, 878 (S.D.N.Y. 1985); Indictment at 8-19, United States v. Castellano, No. 84 Cr. 63 (S.D.N.Y. filed Oct. 4, 1984).

137. *See* United States v. Rosado, 728 F.2d 89, 93 (2d Cir. 1984).

138. *See* United States v. Thomas, 757 F.2d 1359, 1362-63 (2d Cir.), *cert. denied*, 106 S. Ct. 66 (1985); Indictment at 20-21, United States v. Castellano, No. 84 Cr. 63 (S.D.N.Y. filed Oct. 4, 1984).

139. See *supra* notes 134-38 and accompanying text.

140. *See, e.g.*, Indictment at 3, 8-19, United States v. Catellano, No. 84 Cr. 63 (S.D.N.Y. filed Oct. 4, 1984) (defendants allegedly commited numerous murders to eliminate actual and potential witnesses, competitors and obstacles); *cf.* United States v. Thomas, 632 F.2d 837, 840-41 (10th Cir. 1980) (after hearing evidence that one of the defendants threatened a witness, jurors asked court officer whether they had anything to fear from defendants).

141. *See* United States v. Thomas, 757 F.2d 1359, 1364 (2d Cir.) (even without specific threat, generalized fear of retaliation justified anonymity), *cert. denied*, 106 S. Ct. 66 (1985).

142. *See, e.g.*, Buchalter v. New York, 319 U.S. 427 (1943) (murder prosecution of well-known depression era gangster); Capone v. United States, 56 F.2d 927 (7th Cir.) (tax evasion prosecution of famed Chicago racketeer), *cert. denied*, 286 U.S. 553 (1932).

143. *See* United States v. Barnes, 604 F.2d 121, 168 (2d Cir. 1979) (Meskill, J., dissenting), *cert. denied*, 446 U.S. 907 (1980).

juries, however, arises almost exclusively from the increasing number of RICO cases characterized by unusual size, scope, publicity and severity of charges.[144] Moreover, bolstered by sophisticated electronic surveillence[145] and the increased willingness of insiders to testify due to the federal Witness Protection Program,[146] prosecutors are finding it easier to prove the dramatic charges characterizing the current cases.[147] The scope and strength of the charges in these cases, combined with indications of the defendants' past willingness and ability to obstruct justice,[148] fully justify the use of anonymous juries.

Although *Barnes* was not a RICO prosecution,[149] comparing *Barnes* to *United States v. Bufalino*,[150] a case often cited as an example of the government's ability to obtain major convictions without juror anonymity,[151] illuminates the justification for anonymity in current trials. Barnes received a life sentence for various narcotics and conspiracy charges and his codefendants received sentences ranging from eight to thirty years.[152] The allegations of violent conduct, both within and without the indictment, were extraordinary.[153] The defendants in *Bufalino*, including Paul Castellano, reputed leader of the Gambino crime family, were initially convicted and sentenced to three to five year prison terms for conspiracy to commit perjury and obstruct justice.[154] The case arose out of the government's frustrated attempt to discover the nature of a highly publicized meeting of men alleged to be the leaders of various organized crime factions.[155] The Second Circuit reversed the convictions for insufficiency of evidence and remanded with instructions to dismiss the conspiracy counts.[156]

---

144. See *supra* notes 1-3 and accompanying text.

145. *See* Brill, *supra* note 3, at 28-29.

146. *Id.* at 29.

147. *Id.*

148. *See, e.g.*, United States v. Persico, 621 F. Supp. 842, 878-79 (S.D.N.Y. 1985); Indictment at 3, United States v. Castellano, No. 84 Cr. 63 (S.D.N.Y. filed Oct. 4, 1984).

In United States v. Barnes, 604 F.2d 121 (2d Cir. 1979), *cert. denied*, 446 U.S. 907 (1980), the court noted that there was a history of jury tampering in narcotics cases prosecuted in the Southern District of New York. *See id.* at 134 n.3. According to the testimony of a former attorney affiliated with organized crime, organized crime defendants routinely attempt to bribe or intimidate jurors. *See* Deposition of a Witness Before the President's Commission on Organized Crime at 159-70 (available in the files of the *Fordham Law Review*).

149. *See* United States v. Barnes, 604 F.2d 121, 130-31 (2d Cir. 1979), *cert. denied*, 446 U.S. 907 (1980).

150. 285 F.2d 408 (2d Cir. 1960).

151. *See, e.g.*, United States v. Barnes, 604 F.2d 121, 175 (2d Cir. 1979) (Oakes, J., dissenting), *cert. denied*, 446 U.S. 907 (1980); Abramovsky, *supra* note 6, at 37 & n.40.

152. *See* United States v. Barnes, 604 F.2d 121, 155-56 (2d Cir. 1979), *cert. denied*, 446 U.S. 907 (1980).

153. *See id.* at 141; *see also* United States v. Thomas, 757 F.2d 1359, 1362 (2d Cir.) (members of the *Barnes* conspiracy routinely approved murder of witnesses), *cert. denied*, 106 S. Ct. 66 (1985).

154. *See* United States v. Bufalino, 285 F.2d 408, 410 (2d Cir. 1960).

155. *See id.* at 411-15.

156. *See id.* at 418-19.

If anything, *Bufalino* epitomizes the government's past inability to obtain significant indictments and convictions against major organized crime figures.[157] Had Castellano lived, he would have spent significantly more time in federal court merely defending the charges against him in a series of wide-ranging racketeering cases than he probably would have spent in prison on the *Bufalino* conviction.[158] If convicted in any one of the current trials, he probably would have spent the rest of his life in prison.[159] Thus, the stakes are so high that the risks of jury interference are trivial. Moreover, RICO forfeiture provisions strike at the sources of income of the entire criminal organization, thereby giving unindicted members of the enterprise greater incentive to interfere with the jury.[160] Although the need for anonymity is not limited to traditional organized crime cases,[161] and the factors considered in empaneling anonymous juries existed to a lesser degree in cases preceding *Barnes*,[162] the procedure is an appropriate safety measure in cases that "stretch the traditional dimensions of criminal law."[163]

IV. STANDARD FOR USING AN ANONYMOUS JURY

To guard against unnecessary use of anonymous juries, the circuits should establish specific guidelines governing the imposition of anonymity. This Note recommends a test recently articulated by Judge John F. Keenan of the Southern District of New York.[164]

First, the trial judge should consider whether defendants have participated in " 'dangerous and unscrupulous conduct' . . . with particular consideration of whether such conduct was part of a 'large-scale organized' criminal enterprise."[165] While the seriousness of the charges is important because it creates incentive to interfere with the jury,[166] the criminal enterprise aspect deserves emphasis because it suggests an ability to reach the jury regardless of the situation of individual defendants, who may be in custody.[167] An ongoing criminal enterprise is also likely

157. *See* Raab, *Getting the Drop on the Mob*, N.Y. Times, Dec. 2, 1984, § 4 (Week in Review), at 6, col. 3 (until recently, organized crime families were largely invulnerable).

158. *See* Stille, *supra* note 3, at 6 (series of Castellano trials may take close to a year). Castellano was also facing trial in the "commission" case. *See* Indictment at 1, United States v. Salerno, No. 85 Cr. 139 (S.D.N.Y. filed Feb. 26, 1985).

159. *See* 18 U.S.C. § 1963 (1982 & Supp. II 1984).

160. See *supra* note 4.

161. *See* United States v. Rosado, 728 F.2d 89, 91-92 (2d Cir. 1984) (contempt prosecution of suspected members of terrorist group).

162. See *supra* note 142.

163. Stille, *supra* note 3, at 6.

164. *See* United States v. Persico, 621 F. Supp. 842, 878 (S.D.N.Y. 1985).

165. *Id.*

166. *See* United States v. Thomas, 757 F.2d 1359, 1362 (2d Cir.) (seriousness of charges and widespread publicity left defendants little to lose by obstructing the trial), *cert. denied*, 106 S. Ct. 66 (1985).

167. According to the New York City Police Department, the Gambino crime family has approximately 800 members and associates. *See* Fowler, *5 Organized-Crime Factions Operating in New York Area*, N.Y. Times, Dec. 17, 1985, at B5, col. 1.

to intimidate the jury, especially in the current trials involving the traditional organized crime families.[168] It is certainly no coincidence that a common thread running through all anonymous jury trials to date is the allegation of an ongoing criminal enterprise.[169]

The second relevant factor is evidence of defendants' "past attempts to interfere with the judicial process."[170] As discussed previously, the judge need not consider only actual attempts at jury tampering but should consider all attempts to evade prosecution, especially those involving violence.[171]

Finally, pretrial publicity militates in favor of anonymity because it enhances "the possibility that jurors' names would become public and . . . expose them to intimidation by defendants' friends or enemies, or harassment by the public."[172] While heavy publicity characterizes many criminal trials,[173] the extraordinary length of many current cases[174] increases the possibility that the jurors themselves will become "celebrities" with dangerous exposure to outside influence and intimidation.[175]

Absent evidence of jury tampering, a judge must weigh these factors carefully to avoid unnecessary erosion of the presumption of innocence.[176] In the rare case in which a defendant makes an unequivocal threat to the jury,[177] however, lack of publicity or any other considerations should not preclude anonymity. The government's case might in-

168. The widespread public fear of organized crime and of the Mafia in particular is central to its success. *See, e.g.*, United States v. Persico, 621 F. Supp. 842, 878 (S.D.N.Y. 1985) (Colombo group's criminal activities were aided by the public's fear of the organization); Indictment at 6, United States v. Rastelli, No. 85 Cr. 00354 (E.D.N.Y. filed June 13, 1985) (defendants maintained their control of the moving and storage industry by identifying themselves with organized crime).

169. *See*, e.g., United States v. Thomas, 757 F.2d 1359, 1362 (2d Cir.) (defendants were members of huge narcotics ring operating in New York City throughout the 1970's), *cert. denied*, 106 S. Ct. 66 (1985); United States v. Ferguson, 758 F.2d 843, 846-47 (2d Cir.) (defendants were members of politically motivated criminal organization responsible for a series of bank robberies, two murders and the escape of one member from prison), *cert. denied*, 106 S. Ct. 124 (1985); United States v. Rosado, 728 F.2d 89, 94 (2d Cir. 1984) (defendants were suspected members of terrorist group responsible for periodic bombings throughout the United States); United States v. Persico, 621 F. Supp. 842, 850 (S.D.N.Y. 1985) (defendants are allegedly the key members of large, multi-faceted criminal enterprise); Indictment at 2-4, United States v. Castellano, No. 84 Cr. 63 (S.D.N.Y. filed Oct. 4, 1984) (same).

170. United States v. Persico, 621 F. Supp. 842, 878 (S.D.N.Y. 1985).

171. See *supra* notes 134-38 and accompanying text.

172. United States v. Persico, 621 F. Supp. 842, 878 (S.D.N.Y. 1985).

173. *See* Irvin v. Dowd, 366 U.S. 717, 722 (1961).

174. *See* United States v. Louie, 625 F. Supp. 1327, 1338 (S.D.N.Y. 1985).

175. *See* Sheppard v. Maxwell, 384 U.S. 333, 353-55 (1966).

176. *See* United States v. Persico, 621 F. Supp. 842, 877-78 (S.D.N.Y. 1985).

177. *See, e.g.*, United States v. Ferguson, 758 F.2d 843, 854 (2d Cir.) (evidence of defendant's intent to retaliate against witnesses, grand jurors and prosecutors and, implicitly, any person involved in the prosecution of the group), *cert. denied*, 106 S. Ct. 124 (1985).

clude evidence of the threat,[178] which would certainly intimidate the jury and destroy any hope of objective judgment if their identities were known to the defendants. Moreover, any defendant reckless enough to declare publicly or demonstrate a threat to the jury might be inclined to act on that threat even after a conviction.[179] Finally, explicitly threatening a juror should constitute a constructive waiver of any privilege the defendant may usually have to know the identities of the jurors.[180]

CONCLUSION

Fear, undue influence and prejudice should not be permitted to affect the outcome of a criminal trial. An impartial jury is not only a criminal defendant's constitutional right but a hallmark of any civilized judicial system. In extraordinary cases, juror anonymity is necessary to ensure this goal. Rather than alerting a juror to a defendant's violent persona, anonymity merely allays existing fears and prevents outside forces from prejudicing either side. That a juror who is free from fear and intimidation is more likely to convict speaks more to the strength of the government's case than to any inherent unfairness in the anonymity procedure. Preventing a defendant from using his reputation or resources to discourage conviction preserves, rather than subverts, the integrity of the judicial process.

Eric Wertheim

178. Whether the evidence of defendants' threats to grand jurors, witnesses and prosecutors in *Ferguson* was introduced at trial is not clear. *See id.* at 854.

179. *Cf.* United States v. Ferguson, 758 F.2d 843, 854 (2d Cir. 1985) (evidence of defendant's intent to retaliate against witnesses, grand jurors and prosecutors and, implicitly, any person involved in the prosecution of the group). Since a post-indictment threat to grand jurors would do nothing to undermine or delay the trial, one can only infer that the group would be willing to act on the threat for revenge or as a political statement.

180. *Cf.* Illinois v. Allen, 397 U.S. 337, 342-43 (1970) (constitutional right to confront witnesses can be lost by misconduct).