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Nameless Justice: The Case for the Routine Use of Anonymous Juries in Criminal Trials

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ESSAY

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I. INTRODUCTION

We ask a lot of our jurors. The financial and emotional burdens of jury duty can be significant even in mundane cases. Deciding another's fate is often a trying ordeal, aggravated by unintelligible instructions, hostile attorneys or court personnel, miserable working conditions, and interminable delays.[1] The voir dire process may require jurors to reveal intimate, embarrassing, or damning information about themselves and their families that they would not voluntarily choose to reveal.[2] Confronted with allegations of violence, injury, or abuse, some jurors become traumatized or ill.[3] On top of all of this,

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1. In the small proportion of cases in which jurors must endure sequestration, jury service is even more arduous. See, for example, Beth Holland, *Gotti Jurors' Tour of Duty a Stress Test; Counseling Recommended*, Newsday 6 (Jan. 27, 1992).

2. See, for example, Kirk Loggins, *Claypole Jury Pressed on Alcohol Issues*, Tennessean B1 (July 12, 1995) (reporting that a juror began crying after revealing during voir dire that her mother was an alcoholic and her maternal grandfather died from alcoholism); *Brandborg v. Lucas*, 891 F. Supp. 352 (E.D. Tex. 1995) (considering the appeal of a veniremember who was held in contempt and sentenced to three days in jail for refusing to answer questions about his political affiliation, religious preference, viewing and reading habits, medical history, and other personal issues).

3. Daniel W. Shuman, et al., *The Health Effects of Jury Service*, 18 Law & Pysch. Rev. 267, 268-72 (1994) (surveying relevant research and stating that recent studies and anecdotal reports suggest that "jurors may experience stress from being removed from their families and jobs, from being shown especially graphic evidence, or from the trial process itself"); James E. Kelley, *Addressing Juror Stress: A Trial Judge's Perspective*, 43 Drake L. Rev. 97 (1994) (reporting an Iowa study of over 500 jurors that demonstrated "severe stress symptoms" from jury service, collecting sources documenting juror stress, and noting that some jurors exhibit posttraumatic stress disorder long after trials); Thomas L. Hafemeister, *Legal Report: Juror Stress*, 8 Violence & Victims 177, 178-80 (1993); Graciela Sevilla and Dan Beyers, *For Jurors, Grisly Trials Can Take Toll*, Wash. Post C1 (Aug. 20, 1993); Stanley M. Kaplan and Carolyn Winget, *The Occupational Hazards of Jury Duty*, 20 Bull. Am. Acad. Psych. & L. 325 (1992) (detailing the physical and psychological effects of juror stress); Daniel Goleman, *For Many Jurors, Trial Begins After the Verdict*, N.Y. Times C1 (May 14, 1991). Shuman, et al., surveyed hundreds of former jurors from traumatic and non-traumatic criminal trials and found that even in trials of non-violent crimes (such as credit card fraud) 47% of the former jurors reported experiencing symptoms of depression and other stress disorders during the trial, 45% during deliberations, and 37% after the trial. The effect on jurors in traumatic cases involving violence was much higher; for instance over 12% of these jurors met the minimum screening criteria for depression compared to the base rate of 4-5% of the general population. Shuman, et al., 18 Law & Psych. Rev. at 292-98.

One researcher of jury stress warns, however, that its frequency may be overstated, noting that it is more probable that a juror would fall asleep than become traumatized by jury duty. Letter from Thomas L. Hafemeister, Senior Research Associate, National Center for State Courts, to Author (March 21, 1995) (on file with the Author). He notes elsewhere that "virtually no work has been done to determine systematically whether the incidence or severity of juror

jury service exposes jurors, their families, and their friends to exploitation by the press and to retaliatory threats and unwanted attention from defendants, victims, and sympathizers.

There are judges and legislators in this country who believe that risking humiliation and fear need not be part of the job description for jurors, and they have taken unprecedented steps to prove it. They have promised anonymity to jurors in all criminal cases, except in limited circumstances.[4] In this Essay I examine these innovative efforts and encourage other judges and legislators[5] to consider the routine use of anonymous juries in criminal cases,[6] at least in urban areas where anonymity is feasible.[7] By alleviating juror fear, anonymity can enhance the participation of citizens in jury service, the reliability of the voir dire process, the quality of jury deliberations, and the fairness of criminal verdicts.

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stress is increasing or to identify particular sources of it." Thomas L. Hafemeister and W. Larry Ventis, *Juror Stress—Sources and Implications*, Trial 68, 71 (Oct. 1994).

4. See Part III.

5. In many jurisdictions, juror anonymity would require legislative adjustments. Presently, statutes or rules in some states mandate the release of juror information. See, for example, Mass. Gen. Laws Ann. ch.277, § 66 (West, 1994) ("A prisoner indicted for a crime punishable with death or imprisonment for life, upon demand by him or his counsel upon the clerk, shall have a list of the jurors who have been returned"); *Commonwealth v. Angiulo*, 415 Mass. 502, 615 N.E.2d 155 (1993) (finding that a state law barred a judge's effort to empanel an anonymous jury in the trial of a notorious mobster); *In re Globe Newspaper Co.*, 920 F.2d 88, 93 (1st Cir. 1990) (finding that a local district court rule barred sealing juror identities, absent "specific and convincing reasons" why, in the particular case, jurors' names must be withheld); *Juror Privacy* 4-6 (unpublished manuscript prepared for the National Center for State Courts collecting state statutes and rules requiring disclosure of juror names) (on file with the Author).

6. My discussion is limited to the protection of the identities of jurors in criminal cases, primarily because I have found little evidence that juror anxiety about harassment and retribution is common in civil cases. The type of cases a jury hears undoubtedly has something to do with whether jurors fear harassment by parties, their supporters, or the press. Those criminal cases that reach a jury in the U.S. involve a disproportionate number of all violent crimes prosecuted, while civil juries hear mostly automobile collision cases. Compare United States Department of Justice, *Sourcebook of Criminal Justice Statistics—1993* 522-23 (1994), with George L. Priest, *Justifying the Civil Jury*, in Robert E. Litan, ed., *Verdict: Assessing the Civil Jury System* (Brookings Institute, 1993).

7. See *In re Baltimore Sun Co.*, 841 F.2d 74, 75 (4th Cir. 1988) (attributing the inability of the press to identify venirepersons in the case before it to "the anonymity of life in the cities" that "changed the complexion of this country"). Anonymous juries may be impractical in small communities where a glimpse of a face or a few tidbits of employment information or life history would allow community members to zero in on a name.

II. JUROR FEARS

Juror apprehension about safety and privacy may be at an all-time high. Rudolph A. Diaz, chairman of the Municipal Court Presiding Judges Association in Los Angeles and President of the California Judges Association, has reported that many people are reluctant to serve as jurors even in misdemeanor cases and have told him that they fear being approached at home after their assigned case has ended.[8] Fellow Judge Philip K. Mautino, Presiding Judge of Los Cerritos Municipal Court in Bellflower, California, says his wife was frightened by her jury service, and that other jurors have told him that they or their fellow jurors feared retribution if they convicted the defendant.[9]

Jurors elsewhere are expressing similar concerns.[10] During jury selection in Minneapolis for the trial of an alleged gang member charged with the murder of a police officer, jurors expressed fear of the defendant,[11] of his sympathizers who had already staged demonstrations, and of his fellow gang members who were suspected of executing a man believed to have spoken with police about the case.[12] A researcher who recently debriefed jurors in Illinois in a carjacking case noted that some jurors feared that the defendants or defendants' family members might harm them in retaliation for their verdict.[13] In Detroit, a postverdict survey revealed that seven of

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8. Catherine Gewertz, *Courthouse Makes Blanket Use of Juror Anonymity*, L.A. Times A1 (July 25, 1994).

9. Kit R. Roane, *We, The Jury, Who Are Anonymous*, N.Y. Times A20 (Aug. 12, 1994).

10. See Kelley, 43 Drake L. Rev. at 102-03 (cited in note 3) (quoting a judge who related juror nightmares about attacks on their families and friends); *United States v. Scarfo*, 850 F.2d 1015, 1023 (3d Cir. 1988) ("Jurors' fears of retaliation from criminal defendants are not hypothetical. . . . As judges, we are aware that even in routine criminal cases, [jurors] are often uncomfortable with disclosure of their names and addresses to a defendant").

The judge in the Branch Davidian case in Texas noted that the jurors were vulnerable to members of the public who have "expressed highly emotional reactions to this case, and have expressed an interest in affecting its outcome." See Janet Elliott, *In San Antonio Federal Courts, A Double Dose of Jury Secrecy*, Tex. Lawyer 1 (Jan. 10, 1994). And in San Bernadino, a judge reported, "Clearly there is a sense that somehow if [jurors] do their duty they are at risk." Don Babwin, *Before the Verdict, Fear Prowls the Jury Room*, Press Enterprise B1 (Aug. 23, 1995).

11. One juror told the judge that "I don't want [the defendant] to know where I live." David Peterson, *Fear Leads Courts to Special Steps; Jurors' Identities Withheld Even From Lawyers in Trial of Ford in Haaf Slaying*, Minneapolis Star Trib. 1B (April 19, 1993); Margaret Zack, *Potential Juror in Ford Trial Says He's Afraid to Serve*, Minneapolis Star Trib. 1A (April 13, 1993).

12. The judge noted that given the demonstrations, she could easily imagine "riots in front of [jurors'] homes" if the jurors were not given anonymity. Peterson, Minneapolis Star Trib. at 1B (cited in note 11).

13. Connie Lauerman, *Juries on Trial: Defendants Aren't the Only People on the Hot Seat in the Courtroom*, Chicago Trib. at Tempo 1 (July 14, 1994).

twenty-six jurors in the 1993 joint murder trial of police officers accused of killing African-American motorist Malice Green responded that they had been concerned for their safety during trial, even though their identities had been suppressed.[14]

A 1995 survey of 1,059 readers of Glamour magazine, primarily working women ages eighteen to fourty-four, was particularly revealing.[15] When asked, "Should jurors in criminal cases be allowed to serve anonymously?" Eighty-four percent answered, "Yes, in all cases."[16] Another eleven percent answered, "Yes, but only in cases involving gangs, cults, or possible social unrest."[17] Only five percent said no.[18] Only one-fifth of those responding to the survey had served on a criminal jury, but of these, less than one-third (thirty percent) said that they were not afraid of retribution.[19] We cannot know if these surveys and anecdotal reports accurately reflect the prevalence of juror fear in criminal cases. Absent contrary evidence, however, they suggest that a significant number of jurors are afraid.[20]

Fortunately, juror nightmares do not often come true. Like our contemporary fear of crime, our fear of harassment as jurors may well outstrip reality.[21] Still, enough harassment by opponents of verdicts takes place to keep many jurors worried. Jurors who acquitted the

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14. Survey of jurors provided by G. Thomas Munsterman (on file with the Author) (hereinafter "*Green Survey*").

15. *Jurors Should Serve Anonymously in All Criminal Trials, Say 84% of Young Women Surveyed*, PR Newswire (Feb. 13, 1995) (reporting survey details).

16. *Should We Protect the Identity of Jurors in Criminal Trials?*, Glamour 159 (March 1995) (quoting one respondent) ("We can never predict how any person with a vested interest in the outcome of a trial—be it the defendant, the victim or friends of either—will react to an unfavorable verdict. The court system should take no chances with jurors' safety and should offer anonymity in all trials").

17. Id. (quoting one respondent) ("Our criminal justice system is flooded with cases that don't involve dangerous individuals. Anonymity should be the exception, not the rule").

18. Id. (quoting one respondent) ("If a jury is given the right to judge, then a defendant has the right to know who it is who's judging him." Said another, "Jurors are citizens who are sworn to seek truth and determine justice. Where is the honor in anonymity?").

19. Id. (45% of the respondents who have served as jurors in a criminal case said they were very afraid of retribution, 25% said they were afraid but their fear was unrealistic, and 30% said they were not afraid).

20. Over 15% of over 500 jurors in New York City who responded to a 1972 survey about their attitudes toward jury service volunteered comments that they "objected to being required to parade their names and addresses during *voir dire* in open court and in the presence of the defendant in criminal cases." Caroline K. Simon, *The Juror in New York City: Attitudes and Experiences*, 61 A.B.A. J. 209, 210 (1975). This suggests that juror apprehension is not an entirely new problem, at least in some jurisdictions.

21. See *Sourcebook of Criminal Justice Statistics* at 154 (cited in note 6) (noting that the percentage of respondents rating crime as the most important problem jumped from 5% in 1981 to 37% in 1994); United States Department of Justice, *Sourcebook of Criminal Justice Statistics—1994* 305 (1995) (noting that the estimated number of offenses per 100,000 inhabitants dropped from 5,858 in 1981 to 5,483 in 1993).

officers who beat Rodney King endured taunts, threats, and disturbing telephone calls after their names were made public.[22] Death threats also haunted the jurors in the trial of Dan White, convicted of murdering San Francisco Mayor George Moscone and Supervisor Harvey Milk. Some of these jurors moved or changed jobs after their trial. One slept with an axe; another bought a gun.[23] A Houston woman reportedly received threatening phone calls and letters from the cellmate of the man whom she and her fellow jurors had convicted.[24] In Fort Worth, a defendant reportedly telephoned a juror at home and made threatening comments after his lawyer had given him the juror's questionnaire.[25] Jurors in California have reported harassing or threatening mail from prisoners they convicted.[26] In Florida, a kidnapping victim, outraged at the jury for acquitting his alleged captor, obtained the names of the jurors through the state public records law and sent them each a letter "saying that he hoped that someone close to them died a 'horrible, lingering death' so they would know how he felt."[27] Seven of fifteen Florida court clerks that responded to an informal poll following the incident stated that they knew of cases where jurors were frightened by a defendant or an

22. See Sally Ogle Davis, *The Last Angry Woman: Why King Trial Juror Linda Miller No Longer Believes in Truth, Justice and the American Way*, Los Angeles Mag. 58, 58-64 (July 1992) (reporting a letter by the trial judge responding to a jurors' letter demanding to know "why were we thrown to the sharks? How do I protect my children?" in which the judge stated, "Obviously, had I been able to anticipate the terrible events that occurred after the verdict, additional effort would have been undertaken to protect the identity and security of the jurors"); id. at 64 (reporting bomb threats at a juror's workplace); Rogers Worthington, *L.A. Beatings Test Concept of Jury Anonymity*, Chicago Trib. N1 (Feb. 15, 1993); Lou Gelfand, *To Print—or Not to Print—Names of Jury Members*, Minneapolis Star Trib. 27A (May 10, 1992) (defending the newspaper's decision to publish the names and "brief biographical sketches of jurors in the Rodney King trial, plus their views on law enforcement," which after the release prompted "a stream of protests" from readers who charged that the publication had endangered the former jurors and was totally unnecessary); Carol Innerst, *Naming Jurors Draws Criticism*, Wash. Times A6 (May 4, 1992) (collecting charges that publication of the names of jurors was irresponsible).

23. Hafemeister, 8 Violence & Victims at 178 (cited in note 3). One of the jurors was quoted as saying that the trial "was the worst thing that ever happened to me." Maura Dolan, *Why Jurors Err: They're Just Human*, L.A. Times A1 (Sept. 25, 1994).

24. See Elliott, Tex. Lawyer at 1 (cited in note 10).

25. Wendy Benjaminson, *Shroud of Secrecy Increasingly Veils Trials in Texas*, Houston Chronicle A1 (March 13, 1994); Walter Olson, *Juries on Trial*, Reason 56, 58 (Feb. 1995) (stating that the defendant called the potential juror at her home, informed her that he was "impressed with her," and made "threatening remarks").

26. Committee Analysis Statement on Cal. S.B. 508 (Sept. 1995) (stating that "this bill is necessary because there have been incidents where a defendant has received information about the jurors and has harassed or threatened them by mail from prison").

27. Bill Analysis & Economic Impact Statement on Fla. H.B. 109 at 5-6 (March 16, 1995) (hereinafter "Bill Analysis"). Following media reports of the threats, 94% of the 345 respondents answered "No" to a newspaper poll that asked the question, "Do you think home addresses of jurors should be part of the public record?" Id.

associate. Some of the clerks stated that they had been asked by inmates to provide the names and addresses of jurors.[28]

Jurors are beginning to express their concerns about being pursued by the media as well. Although jurors maintain, "[W]e have the right to some privacy,"[29] one wouldn't know it from following trial coverage in recent years. Press reports of information divulged during the selection process spare jurors no embarrassment. The public learns which jurors have been victims of crime, which jurors own expensive homes, and which jurors consider themselves religious.[30] After the trial, the integrity of jurors is commonly attacked in the press by those who cannot accept the verdict.[31] In the Spring of 1995, the Supreme Court of Minnesota took judicial notice that the media and the public had "harassed" jurors who acquitted a defendant of the sexual assault and murder of a child in 1993.[32]

Although some jurors may relish the limelight, most jurors do not want their lives and those of their families to become headline news, nor do they welcome hate mail or fan mail from "cranks and friends."[33] After a recent serial rape trial in Michigan, eleven of the sixteen jurors objected to the release of their identities to the press and public, citing both privacy and safety concerns. None of the jurors wanted to attend a news conference following the verdict. Instead, the jury prepared a statement that read:

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28. Id. See also Tracy A. Bateman, *Threats of Violence Against Juror in Criminal Trial as Ground for Mistrial or Dismissal of Juror*, 3 A.L.R.5th 963 (1992). Reports of threats to judges may also raise jurors' apprehensions. See Martha A. Bethel, *Terror in Montana*, N.Y. Times A23 (July 20, 1995) (detailing death, kidnapping, and arson threats toward a municipal judge who refused to dismiss traffic tickets against a "freeman" with ties to the Militia of Montana).

29. Roane, N.Y. Times at A20 (cited in note 9) (quoting a juror).

30. Gary Kane, *Palm Beach Paper Identifies Jurors*, Houston Chron. A4 (Dec. 9, 1991) (reporting the names of sequestered jurors in the trial of William Kennedy Smith along with details of their lives including their experiences as victims of crime, the names of members of their families, their religious preferences, and the values of their homes).

31. For example, the jurors who considered the cases against the Menendez brothers were accused in the media of being charmed and duped. John Hinkley's jurors, as well, were maligned for their decision. See Saul M. Kassin and Lawrence S. Wrightsman, *The American Jury on Trial: Psychological Perspectives* 2 (Hemisphere, 1988) (noting that 75% percent of those responding to one poll felt strongly that the verdict in the Hinkley case was unjust, and quoting Lincoln Caplan, *Annals of Law: The Insanity Defense*, New Yorker 45, 69 (July 2, 1984), who noted that "jurors might well have felt like Vietnam veterans returning to a country whose distaste for the long war came out as contempt for the soldiers").

32. *State v. Bowles*, 530 N.W.2d 521, 531 n.15 (Minn. 1995).

33. *Sheppard v. Maxwell*, 384 U.S. 333, 353 (1966) (decrying the judge's failure to insulate the jurors from reporters and photographers and noting that the coverage of the jurors, including the publication of their addresses, "exposed them to expressions of opinion from both cranks and friends"). Over a third of the jurors in the Malice Green trials felt uneasy about posttrial contacts by the press. *Green Survey* (cited in note 14).

> We worked hard to reach this verdict. It was the right thing to do. It was hard on everyone, including all of the families involved. We shed a lot of tears. All of our lives have been disrupted and we have been separated from our families for over two weeks. Please respect our privacy and do not attempt to contact us. Thank you for your consideration.[34]

More and more prospective jurors appear to be arriving at the courthouse (if they come at all) dreading the prospect that personal and family information, and even the statements that they make during deliberations, could become the focus of public comment.[35]

III. RECENT RESPONSES TO JUROR FEARS

Several judges and legislators have responded to jurors' fears by protecting juror identities from the press, from parties, or from both. It is no longer unusual for federal judges to empanel anonymous juries to protect jurors whenever there is a credible threat to juror safety.[36] Judges have also withheld juror names where safety is not an issue, but privacy is.[37] In at least four recent cases in Texas,

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34. *People v. Mitchell*, Opinion and Order Regarding Media Requests for Publication of Juror Names and Addresses 6 (Cir. Ct. Wasbtenaw County, Mich. July 10, 1995) (copy on file with the Author).

35. As Professor Abraham S. Goldstein recently observed, "[p]otential jurors are being taught that their deliberations will not be secret at all .... They will be asked for their reasons and those of their fellow jurors for convicting, acquitting, or being unable to agree. And when they return an unpopular verdict, the postverdict 'inquisition' by the media can easily take on the quality of attaint at common law, figuratively punishing jurors for doing their duty." Abraham S. Goldstein, *Jury Secrecy and the Media: The Problem of Postverdict Interviews*, 1993 U. Ill. L. Rev. 295, 296-97 & n.6 (documenting incidents of press harassment of jurors). Thus it is particularly unfair to characterize this concern of jurors as merely a preference to avoid "unflattering descriptions." Marc O. Litt, *"Citizen-Soldiers" or Anonymous Justice: Reconciling the Sixth Amendment Right of the Accused, the First Amendment Right of the Media and the Privacy Right of Jurors*, 25 Colum. J. L. & Soc. Probs. 371, 407, 418 (1992) (arguing that "a juror's concern about being described as 'stern,' 'balding,' or 'serious,' " does not rise to a "level of interest compelling enough" to justify closing proceedings, and stating that media coverage, "while unflattering and perhaps of little journalistic value, does little damage to jurors' ability to do their jobs as independent evaluators of fact").

36. See, for example, *United States v. Ross*, 33 F.3d 1507, 1519-22 (11th Cir. 1994) (reviewing several cases and noting the increased use of anonymous juries in federal courts, but noting that "we feel that courts should be highly circumspect in ordering the empanelment of anonymous juries"); Eva M. Rodriguez, *When Jurors Dare Not Speak Their Name*, Legal Times 1 (May 9, 1994) (reporting that without prompting from prosecutors or defense counsel, Judge Charles Richey arranged for the anonymity of jurors in the federal trial of now-convicted cocaine king Rayful Edmond III). At least one federal judge has employed an anonymous jury in a civil case. *United States v. Real Property Known as 77 E. 3rd St.*, 849 F. Supp. 876 (S.D.N.Y. 1994).

37. See Rita Ciolli, *Trend On to Keep Jury Data Secret*, Newsday 32 (March 25, 1990) (reporting that in a murder trial, the judge deleted the names from juror questionnaires before releasing them to the press and refused to release juror lists after he concluded that there was a risk of juror harassment due to the feuding between the families of the victim and the defendant

judges denied reporters access to jury lists even after trials had ended,[38] relying on a 1993 statute that permits judges to seal this information absent a showing of good cause by a party or a member of the news media. The statute had been passed after reports of juror harassment.[39] The trial judge presiding over a rape trial in Michigan was moved by the emotional refusal of the jurors to talk to the press and refused to release the jurors' names and addresses. Citing the "reality of the rigors of jury service and the brutality of today's media coverage," he wrote:

> Have we not punished, humiliated and harassed them enough by the time they have finished the duty we summoned them to perform? . . . The need for privacy after a verdict is real and it is at that point that the media's seemingly insatiable demand for unlimited intrusions into these citizens' lives must finally give way.[40]

The Supreme Court of California is presently reviewing the decision of a trial judge who declined to reveal juror-identifying information to the attorney of a convicted defendant after concluding that there was "no sufficient cause to invade the privacy rights of the jury and the sanctity of the deliberation process."[41] Meanwhile, the

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and their supporters); *Gannett Co., Inc. v. State*, 571 A.2d 735 (Del. 1989) (denying a qualified first amendment right of access to a public announcement of jurors' names during a criminal trial); Pamela A. MacLean, *Judge Blocks Media Access to Jury After Trial*, U.P.I. (Aug. 22, 1990) (noting that federal Judge Louis Bechtle sealed the list of the names and home towns of jurors in the corruption trial of U.S. District Judge Robert Aguilar in order to prevent questioning by reporters). See also *Bowles*, 530 N.W.2d at 531 & n.15 (upholding the use of numbered jurors since the "jurors could have reasonably concluded that were they to acquit Bowles, they or their families would be vulnerable to harassment from the public," and noting that the jurors in an unrelated case had been harassed after their verdict of acquittal). But see *United States v. Millan-Colon*, 834 F. Supp. 78, 83-86 (S.D.N.Y. 1993) (rejecting the government's request for an anonymous jury where there was no showing of risk to jury safety).

38. Benjaminson, Houston Chronicle at A1 (cited in note 25) (noting that the names of jurors were kept from the press in the ethics trial of Senator Kay Bailey Hutchison; the murder trial of Leroy "Animal" DeGarmo, after the jurors themselves asked the judge to keep their identities from the defendant; the murder trial of Kerry Cook, which was upheld on appeal; and the assault trial of Lorenzo Colston).

39. See id.; Elliott, Texas Lawyer at 1 (cited in note 10); Tex. Crim. Pro. Code Ann. art. 35.29 (Vernon, 1989 & Supp. 1996) (providing that jurors' addresses and phone numbers are confidential and may not be disclosed by the court or the lawyers except upon a showing of good cause by a party or a member of the news media).

40. *People v. Mitchell*, Opinion and Order at 22 (cited in note 34).

41. *People v. Scott*, 34 Cal. Rptr. 2d 557, 882 P.2d 248, 248 (1994) (reversing the trial judge's refusal to order disclosure, finding that the statute requires disclosure upon a defense request). One member of the Court of Appeals panel, a trial judge sitting under assignment, disagreed with the majority's conclusion that the statute in question required disclosure upon request:

> Most jurors are greatly concerned about their privacy. We must anticipate that the public will soon learn that a defendant is entitled to the names, addresses, and tele-

California legislature has enacted a statute designed to protect juror identity more effectively than the state's former law. The new statute seals all records of juror-identifying information at the conclusion of all criminal jury proceedings, prohibiting disclosure to anyone, including the defendant, absent a showing of good cause, as well as prior notice to each affected juror.[42]

More legislation is on its way. A bill that would provide more complete juror anonymity throughout the trial has been introduced in California for the next legislative session.[43] Similar legislation is pending in at least two other states.[44]

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phone numbers of the jurors if they vote to convict him. (The public is likely to overlook the subtle consolation that this information is given only to his lawyer.) This knowledge will impair both the willingness of citizens to serve on juries and the impartiality of those who do serve. A mandatory-disclosure rule gives a new, personally threatening meaning to the standard instruction requiring jurors to reach a just verdict "regardless of the consequences."

People v. Scott, 31 Cal. Rptr. 2d 483, 35 Cal. App. 4th 1345, 1353-54 (1994) (Klein, J., concurring), review granted, 882 P.2d at 248.

42. Act to Amend Sections 206 and 237 of the Code of Civil Proceudre, Cal. S.B. 508 (Oct. 16, 1995). Its first section reads:

> The Legislature finds and declares that jurors who have served on a criminal case to its conclusion have dutifully completed their civic duty. It is the intent of the Legislature in enacting this act to balance the interests of providing access to records of juror identifying information for a particular, identifiable purpose against the interest in protecting the jurors' privacy, safety, and well-being, as well as the interest in maintaining public confidence and willingness to participate in the jury system.

Id. The statute requires the sealing of all juror identifying information, but provides that the court shall reveal the information if (1) a person seeking disclosure demonstrates good cause, (2) the court finds there is no compelling interest against disclosure (a "compelling interest" includes, but is not limited to, protection of jurors from physical harm), (3) notice is then provided to each affected former juror, defense counsel, and the district attorney, (4) the court holds a hearing, which may be closed, at which a juror may appear and protest the disclosure, and (5) no jurors object or the objections are not "sustained" by the court. Id.

43. Act to Amend the Code of Civil Procedure, Cal. S.B. 1199 (introduced by Sen. Mountjoy, Feb. 24, 1995, last amended Jan. 3, 1996). See also Stephanie Simon, *Judges Advocate Bill to Keep Juries Anonymous*, L.A. Times B1 (Oct. 28, 1995) (reporting that California's Judicial Council announced plans to study juror anonymity as part of its comprehensive juror improvement project).

44. A bill in Florida would prevent the disclosure of identifying information about jurors by the court or by attorneys and their agents, absent a showing of good cause. The bill reads:

> The Legislature hereby finds and declares that the limited exemption from § 24(a), Art. I of the State Constitution, the applicable public records law for judicial branch records for identifying information regarding jurors empaneled in a criminal trial, is a public necessity because:
>
> (1) Explicit or implicit threats to jurors or their families or even a general fear of retaliation could affect a jury's ability to render a fair and impartial verdict;
>
> (2) A fair trial requires a jury that is fair and impartial, and jurors should not be expected to take their chances on what might happen to them as the result of carrying out their duties under the law; and
>
> (3) The general and unrestricted release of identifying information on jurors in criminal trials does not benefit the public, aid the public in monitoring the effective and efficient operation of government in general, or contribute to the

Another response to juror fear was tested by Judge Philip K. Mautino and Judge John David Lord, Presiding Judges of the Bellflower and Downey Municipal Courts in Los Angeles. Until several months ago, jurors who had been summoned to their courtrooms enjoyed anonymity upon request. Convinced that protective measures were mandated in at least some cases, these judges sought to remove the taint of prejudice associated with selective anonymity[45] by offering anonymity in every case to any juror who wanted it.[46] As Judge Lord explained, "In those cases where anonymity would not have been thought to be needed, it is still provided so we won't have to bury some hapless juror with the refrain—'Sorry, we had no idea anyone would react this way to your

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> efficacy of the courts in particular. The harm that might result from the continued general and unrestricted release of this information outweighs any public benefit that might result therefrom.

Safety and Privacy for Jnrors Act of 1996 (draft sponsored by Rep. Greg Gay, not yet introduced). In New York, lawmakers are considering legislation tbat would allow judges to maintain the anonymity of prospective and selected jurors. Act to Amend the Criminal Procedure Law, 1995 N.Y. A.B. 1760 (introduced Jan. 25, 1995) ("No prospective juror, whether called to the panel term or not, and no member of the trial jury, may be asked to disclose his or her name in open court, or in the defendant's presence"). Another bill pending in the same committee in the New York Assembly would prohibit disclosure of juror names and addresses upon a showing by the government that anonymity is necessary to prevent bribery, jury tampering, or pbysical injury to, or harassment of the jurors. Act to Amend the Public Authorities Law and tbe Executive Law, 1995 N.Y. A.B. 1279 (introduced Jan. 18, 1995).

Juror fears of retaliation expressed during jury selection for a police-killing case in Minneapolis prompted one state legislator to introduce a measure tbat would allow a judge to keep the names of prospective jurors secret if disclosure would "jeopardize tbe defendant's right to a fair trial by impairing the ability to draw a qualified jury." See Donna Halvorsen, *House Bill Would Let Judges Keep Jurors' Names Secret*, Minneapolis Star Trib. 1B (April 28, 1993). In Massachusetts, a bill is pending tbat would allow anonymous juries if the trial judge concludes that one is necessary. 1995 M.A. S.B. 920 (introduced Feb. 21, 1995).

45. See text accompanying notes 92-96.

46. Don J. DeBenedictis, *Anonymity Now Shields Jurors' Identities*, 80 A.B.A. J. 16, 16 (Nov. 1994). Judge Mautino told reporters that during the year he conducted trials witli nameless panels, only six or seven of the 2,800 jurors called to serve in the Bellflower courthouse cbose to have tbeir names made public wlien given tlie option of anonymity. Catlierine Gewertz, *Judge Halts Blanket Use of Jury Anonymity in Bellflower*, L.A. Times B3 (Jan. 10, 1995). See also Kitty Felde, *California Judge Wants Jurors' Identities Kept Secret*, on National Public Radio, *Morning Edition* (Aug. 31, 1994). Judge Lord has never encountered a single juror who preferred to make identifying information public.

The context and phrasing of any question to jurors about their preferences for anonymity undoubtedly affects how jurors respond. Judge Lord informed me tliat he tried asking in different ways, but eventually settled on informing tlie jurors as a large group that some courts use a selection system in which jurors are referred to by number instead of by name, then asked the jnrors if anyone in the group would prefer to be referred to by number instead of by name. "They'd all raise tbeir hands," lie said. "Tlien I'd ask how many would prefer tliat I use the name system, and no one would raise a hand." Telephone Conversation between Judge John David Lord and the Author (May 2, 1995).

verdict.' "[47] The policy was enjoined after an alarmed public defender's office entreated a higher court to "address the propriety of anonymous juries before the practice becomes rampant and the appellate courts are flooded with a deluge of postconviction appeals on the subject."[48] A similar policy of automatic anonymity was reportedly instituted in Riverside County, California, several months ago.[49]

IV. THE ADVANTAGES OF JUROR ANONYMITY

These efforts to safeguard jurors' identities deserve serious consideration. The presumptive or automatic anonymity proposed in California[50] is especially promising. If a state legislature finds that juror identities warrant protection in criminal cases,[51] it should be free to direct its courts to seal routinely, in every criminal case, the names, telephone numbers, and home and work addresses of veniremembers and their immediate family members.[52]

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47. See Judge John David Lord, *Anonymous Juries* (unpublished manuscript) (copy on file with the Author).

48. See Petition for Writ of Mandate, *Jansen v. Municipal Ct. of the Downey Judicial District*, M.C. No. 94MO4945 (L.A. Cty. Sup. Ct. 1994) (copy on file with the Author); Order Granting Petition for Writ of Mandate, *Jansen v. Municipal Ct. of the Downey Judicial District*, M.C. No. 94MO4945 (L.A. Cty. Sup. Ct. 1994) (copy on file with the Author). The California Court of Appeals stayed the Superior Court's Order, but eventually let the injunction stand without hearing arguments or reaching the merits, finding that the Municipal Courts did not have standing to contest the order of the Superior Court. *Court Rebuffs Judges' Bid to Use Anonymous Juries*, L.A. Times B2 (Dec. 3, 1994).

49. Babwin, Press Enterprise at B1 (cited in note 10).

50. See Cal. S.B. 1199 (cited in note 43). A slightly modified version of the anonymity-upon-request practice of Judges Lord and Mautino holds promise as well. It too would require courts to prevent the disclosure of juror identities to all persons, absent a special showing of need. Individual veniremembers could be asked early in the selection process if they would prefer to be identified by number during the court proceedings and in court records. (Peer pressure would be reduced if the jurors could express their preference privately on a questionnaire or individually.)

I prefer automatic anonymity over anonymity-upon-request because it is more effective in eliminating suspicions that particular defendants are dangerous. Demanding that jurors choose to be named or numbered raises the possibility that a particular venire or jury panel will contain some jurors who are concerned about their anonymity and some who are not, creating administrative complexity and perhaps even prompting jurors who were not initially fearful to become fearful when they learn that others prefer anonymity. Also, anonymity-upon-request still permits the inference that some defendants are more dangerous than others because it allows for some juries to be anonymous and some not.

51. Juror fear may vary from locale to locale. Individual jurisdictions should attempt to make independent findings on the need for anonymity, instead of generalizing from national trends.

52. See, for example, *United States v. Ross*, 33 F.3d 1507 (11th Cir. 1994) (protecting information about a juror's spouse in addition to information about the juror himself).

In practice, this approach would work as follows. Juror questionnaires, voir dire proceedings, and all other records and proceedings accessible to the parties, counsel, or the public would contain references to jurors by number rather than by name.[53] At any time during or after trial, the court could disclose a juror's name to parties and counsel only upon a showing by either party that the juror's identity is likely to lead to evidence sufficient to impeach the verdict or sustain a challenge for cause, and that access to juror information is needed to provide the court with adequate information to rule on a motion for a new trial or a motion to excuse the juror. The standards for identifying allegations sufficient to trigger disclosure could be adopted from federal cases that require a preliminary showing of juror misconduct as a condition of granting posttrial interviews or hearings.[54] The public, jury researchers, and the media would have access to the identity of a juror only after trial. This access would be dependent upon the juror herself revealing her identity, or upon the permission of the court after prior notice to the juror.[55] The judge

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53. Detailed procedures for protecting juror anonymity are available from the National Center for State Courts, the United States District Court for the Southern District of New York, or from other courts that have successfully employed anonymous juries.

"The number of lists providing the cross-reference between the juror numbers and the jurors' names and addresses should be kept to a minimum, and the location and persons having access to these lists should be recorded by the trial judge. In fact, only the payroll clerk needs this information. In the U.S. District Court for the Southern District of New York, which employed the first anonymous jury, not even the judge or other jurors knew a juror's name." Timothy R. Murphy, Geneva Kay Loveland and G. Thomas Munsterman, *A Manual for Managing Notorious Cases* 70 (Natl. Center for St. Cts., 1992) (footnote omitted). Another procedure that some courts have used to safeguard juror identity is court-provided transportation of jurors to a meeting point away from the court. Id. at 72.

54. See *People v. Rhodes*, 212 Cal. App. 3d 541, 552-54 (1989) (proposing standards for the preliminary showing required for defense access to juror-identifying information, referencing federal standards for posttrial interviews and hearings on jury misconduct).

55. The new California statute mandates similar procedures. See note 42. Of course, any juror would be free to reveal his or her own identity at any time. The thornier issue is whether the government can regulate one juror's freedom to disclose the name of another juror, a name otherwise sealed, but which another juror came to know *as a result of his service during the trial.* Prohibiting this type of juror speech implicates the first amendment rights of jurors, but the Court appears open to limits on the freedom of governmental employees and participants in the criminal process to reveal confidential information. For instance, *Snepp v. United States*, 444 U.S. 507 (1980) (approving an agreement by CIA employees not to disclose confidential information without authorization), may support some sort of preclearance requirement before jurors revealed this information. Justice Scalia has also made statements that support limits on jurors' revealing the confidential identities of other jurors. See *Butterworth v. Smith*, 494 U.S. 624, 636-37 (1989) (Scalia, J., concurring) (emphasis added):

> I think there is considerable doubt whether a [grand jury] witness can be prohibited, even while the grand jury is sitting, from making public what he knew before he entered the grand-jury room. Quite a different question is presented, however, by a witness disclosure of the grand jury proceedings, which is *knowledge he acquires not "on his own" but only by virtue of being made a witness*. . . . There may be quite good reasons

would retain the discretion to impose conditions upon access to jurors and their identities. This approach would permit a party to pursue a challenge or allow a researcher to question the juror, while maximizing the protection for jurors.[56]

Before explaining the support for this proposal, a caveat is in order. Many arguments for and against anonymous juries, including those in this Essay, depend on predictions about how jurors behave with and without anonymity. This country has probably seen more anonymous juries in the last twenty years than in the past two centuries. Still, most judges have never used one. With only a few exceptions, the judges who have empaneled anonymous juries have done so rarely, usually in cases involving a high degree of notoriety.[57] Given such a limited set of cases, it is difficult to predict what effects anonymity has on jurors and their verdicts, or whether the effects are good or bad.[58] Nevertheless, cases and commentary concerning anonymous juries have tended to focus on the predicted harmful effects of anonymity;[59] few have explored its potential benefits, which may prove significant. My aim is to present several hypotheses to counter those advanced by the opponents of anonymity.

First, juror anonymity may significantly enhance the reliability of the voir dire process. It is not uncommon for jurors to fail to disclose sensitive information such as their past experience as a

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why the State would want the latter information—which is in a way information of the State's own creation—to remain confidential even after the term of the grand jury has expired. *It helps to assure, for one thing, that grand jurors will not be intimidated in the execution of their duties by the fear of unjustified public criticism to which they cannot respond. To allow them to respond, on the other hand . . . would have its own adverse effects, including the subjection of grand jurors to a degree of press attention and public prominence that might in the long run deter citizens from fearless performance of their grand-jury service.*

But see Marcy Strauss, *Juror Journalism*, 12 Yale L. & Policy Rev. 389 (1994) (concluding that without more evidence of ill effects, governmental regulation of "juror journalism" is an unwarranted infringement of a jurors' first amendment freedom).

56. See text accompanying notes 107-09.

57. Anonymous juries have considered federal charges against the Branch Davidians, the officers who assaulted Rodney King, Mafia hoss John Gotti, and Oliver North. Anonymous juries in state court have acquitted officer William Lozano of unjustifiably shooting an African-American motorcyclist and convicted Paul Hill of murdering an abortion clinic doctor. Nameless federal jurors also convicted Columbian hit man Munoz-Mosquera and gang leader Rayful Edmond III. The jurors in both the O.J. Simpson and World Trade Center bombing cases were anonymous.

58. See also Goldstein, 1993 U. Ill. L. Rev. at 313 (cited in note 35) (stating that predictions about the positive effects of increased media exposure of jury deliberations are "the grossest of speculations").

59. See, for example, Litt, 25 Colum. J. L. & Soc. Probs. at 371 (cited in note 35); Daniel P. Lehner, Note, *Anonymous Juries: Do the Benefits Warrant Jeopardizing the Right of the Accused?*, 11 Crim. Just. J. 187 (1988); Abraham Abramovsky, *The Choices Surrounding the Use of Anonymous Juries*, N.Y. L. J. 3 (Sept. 30, 1993).

victim of crime or the similar experiences of relatives. Researchers who have documented this tendency have suggested that this may be due to the embarrassing nature of this information. In one study, investigators interviewed 190 former jurors in felony trials and found that approximately one quarter of them had not revealed during voir dire that they or members of their families had been victims of crime, and that half of those who had failed to reveal this information had been crime victims themselves. The researchers concluded that, although it was likely that some of these jurors did not answer correctly because they did not understand or have time to answer the question, "other likely possibilities are that jurors seek to avoid embarrassment."[60] Other research suggests that jurors who are self-conscious and anxious are more likely to give dishonest answers at voir dire.[61] Intuitive inferences like these have prompted judges to order or uphold a variety of limitations designed to protect juror information from public scrutiny during voir dire.[62] Anonymity would permit a juror to disclose information freely, knowing that, absent the special showing outlined above, only a few authorized court employees could trace whatever the juror reveals to herself or her family.

Because it can reduce jurors' fears of retaliation and exposure, anonymity may also improve the deliberations of a jury. One jury consultant has explained that "anxious jurors are less able to logically follow an argument. Anxiety produces loose cannon jurors who could be more influenced by their biases or courtroom drama than by the evidence."[63] Other sources of juror apprehension are less subtle. The

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60. Richard Seltzer, Mark A. Venuti and Grace M. Lopes, *Juror Honesty During the Voir Dire*, 19 J. Crim. Just. 451, 460 (1991).

61. Linda L. Marshall and Althea Smith, *The Effects of Demand Characteristics, Evaluation Anxiety, and Expectancy on Juror Honesty During Voir Dire*, 120 J. Psychology 205, 214 (1985).

62. For example, Justice Harry A. Blackmun has observed that "the defendant has an interest in protecting juror privacy in order to encourage honest answers to the *voir dire* questions." *Press Enterprise Co. v. Superior Court of Cal.*, 464 U.S. 501, 513 (1984) (Blackmun, J., concurring) (citation omitted). In one case, a panel of the California Court of Appeals upheld the refusal of a trial judge to let a jury consultant examine juror questionnaires, concluding that disclosure would adversely affect the willingness of prospective jurors to serve and vo lunteer information. *Pantos v. City and County of San Francisco*, 198 Cal. Rptr. 489, 494 (Cal. App. 1984) ("[D]isclosure would breach a juror's reasonable expectation of privacy and would undercut efforts to encourage citizen participation in the justice system"). Other courts have upheld in-camera proceedings for selecting jurors after finding that without such measures, candor was impossible. See, for example, *In re South Carolina Press Assn.*, 946 F.2d 1037 (4th Cir. 1991) (allowing the voir dire of cases involving extortion charges against members of the state legislature to be conducted in camera with the media excluded).

63. Gewertz, L.A. Times at A1 (cited in note 8) (quoting jury consultant David Graeven). A court made the point this way: "If the anonymous juror feels less 'pressure' as the result of

specter of impending examination by, or exposure to, irate litigants and a critical public may stifle jurors from speaking out during deliberations or from taking unpopular or controversial positions.[64]

Juror anonymity also safeguards jurors from intimidation during trials. Letters, phone calls, and other threats to jurors or their families are not uncommon.[65] Not only do these contacts inevitably make a juror's job more difficult, they carry other costs including mistrials, juror replacements, and retrials.

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anonymity, this is as it should be—a factor *contributing* to his impartiality." *United States v. Barnes*, 604 F.2d 121, 141 (2d Cir. 1979) (emphasis added).

64. For instance, questioning the attorney representing the Boston Globe in its challenge to a judge's decision to seal a jury list, then-Chief Judge Stephen G. Breyer reportedly asked if jurors could be influenced by "what it would look like in the press." Elizabeth Neuffer, *Withholding Juror Lists is Violation, Lawyer Says*, Boston Globe at Metro 36 (June 7, 1990). Forty years earlier, Justice Felix Frankfurter voiced the same concern:

> [W]e are living in a time when inroads have been made on the secrecy of the jury room so that, upon failure to agree, jurors are subjected to harassment to disclose their position in the jury room. Ought we to expose our administration of criminal justice to situations whereby federal employees must contemplate inquisitions into the manner in which they discharged their juror's oath?

Dennis v. United States, 339 U.S. 162, 183 (1950). See generally Note, *Public Disclosures of Jury Deliberations*, 96 Harv. L. Rev. 886 (1983) (arguing the case against the exposure of jury deliberations). The effects of accountability on jury deliberations are more fully explored in Part V.A.

65. I make this claim based on the regularity with which discussions of judicial efforts to respond to juror revelations of jury tampering appear in appellate reports. Jury tampering is at least as old as the Republic. Property-holding qualifications for jurors were designed in part to restrict jury service to those men least likely to be tempted by bribes. Jeffrey Abramson, *We, the Jury: The Jury System and the Ideal of Democracy* 5, 29 & n.59 (Basis Books, 1994). For a sampling of cases, see, for example, *Weatherford v. State*, 164 Ind. App. 340, 328 N.E.2d 756 (1975) (ordering a retrial after a call to a juror offering a bribe); *State v. Coburn*, 220 Kan. 743, 556 P.2d 376, 380 (1976) (upholding the denial of a motion for a mistrial after callers warned two jurors to do "the right thing"); *People v. Nickopoulos*, 40 Mich. App. 146, 198 N.W.2d 691 (1972) (ordering a retrial after the trial judge had dismissed two of five jurors contacted by phone because one of the two had been threatened and the other had been frightened by the call); *People v. Sher*, 24 N.Y.2d 454, 248 N.E.2d 887 (1969) (upholding, four to three, the murder conviction and death sentence of a defendant after the trial judge refused to grant a mistrial or dismiss five jurors following their disclosure that they had received anonymous phone calls from a woman telling them that the defendant was a vicious killer and urging them to disregard the defendant's insanity defense and vote for the electric chair); *Commonwealth v. Martin*, 212 Pa. Super. 224, 243 A.2d 456 (1968) (the sustaining a conviction for assault with intent to kill when a juror reported to the judge after the trial that she had been threatened by an anonymous caller during the trial); *Tryon v. State*, 567 P.2d 290 (Wyo. 1977) (involving a caller who told a juror that the defendant had committed other similar acts); *Pertgen v. State*, 105 Nev. 282, 774 P.2d 429 (1989) (upholding a trial judge's refusal to grant a mistrial after three jurors reportedly received calls offering them money if they would vote to acquit and threatening to kill them if they voted to convict); *Miller v. State*, 741 S.W.2d 382 (Tex. Crim. App. 1987) (involving a situation where several jurors received calls threatening death to them or their families); *State v. Smith*, 111 Utah Adv. Rep. 68, 776 P.2d 929, 931 (1989) (involving a caller's threat to a juror's husband that if the defendant is convicted, "I'm going to kill all the jurors"). Even civil jurors are not immune. See Andrew Blum, *Will Fish Sink Valdez Verdict?*, Natl. L. J. A6 (July 3, 1995) (reporting an attempt to intimidate jurors by leaving dead fish on their lawns).

Finally, juror anonymity promotes jury participation. In the Superior Courts of Los Angeles County, where for a time anonymity was routinely provided, jurors reported feeling "safer" and "relieved" by their nameless status. "I kept thinking I was glad [the defendant in a domestic assault case] didn't have a lot of information about me," said one.[66] *Ninety percent* of those responding to one survey about jury service said that they would be more willing to serve on a criminal trial if juror anonymity were guaranteed.[67] Following reports of threats to jurors by an angry victim in Florida, the rate of juror "no shows" doubled.[68] Judge Gregory Mize of the District of Columbia Superior Court spoke for many judges when he warned that attention to jurors may "make people more hesitant to serve because most of our citizens . . . don't enjoy the spotlight."[69]

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66. Another juror said she and other jurors felt nervous about stating their names in open court. Gewertz, L.A. Times at A1 (cited in note 8). Others have surmised that the guarantees of anonymity in the second Rodney King trial, both during and after the trial, "may be the reason[s] so many agreed to be prospective jurors." Worthington, Chicago Trib. at N4 (cited in note 22). A potential juror in that case reportedly demanded of the judge, "You're not solemnly swearing our questionnaires will be kept confidential. Why don't you take an oath?" The judge replied, "Your anonymity, as far as the court is capable of doing, is insured." Rogers Worthington, *All 333 Prospective Jurors for L.A. Beating Case Decline to Bow Out*, Chicago Trib. N5 (Feb. 4, 1993). Many judicial opinions as well have recognized the connection between anonymity and a juror's willingness to serve. See, for example, *People v. Rhodes*, 212 Cal. App. 3d 541 (1989) (noting that the disclosure of juror names would chill participation).

Of course, a judge's promise of anonymity will not always be enough to calm some jurors' concerns. It is conceivable that a situation may arise where nothing short of steps equivalent to the government's witness protection program could completely protect jurors. For example, enterprising media sleuths could nncover juror names, given enough incentive. See, for example, Kane, Houston Chron. at A4 (cited in note 30) (pointing out that the identities of all six William Kennedy Smith jurors and two alternates were discovered by the press); Bill Boyarsky, *Shielding Simpson Jury Seleetion in the Name of Efficiency*, L.A. Times B1, B5 (Sept. 18, 1994) (noting that movie scenes of "hysterical reporters and TV crews chas[ing] people down corridors and streets . . . are not an exaggeration," and predicting that "limiting reporters' access [to jurors] will drive them to [new] heights of rudeness—and ingenuity"); Wade Lambert, *More Angry Men: Militias Are Joining Jury-Power Activists to Fight Government*, Wall St. J. A1, A7 (May 25, 1995) (reporting that the Fully Informed Jury Association mailed each of the jurors who were promised anonymity in the Branch Davidian case pamphlets reminding them that they had the power to acquit against the law, after a supporter followed the jurors to a secret parking lot and obtained their license-plate numbers).

67. Glamour at 151 (cited in note 16) (quoting one respondent) ("I would be happier serving on a jury if the defendant did not have government-provided access to me or my children"). Only 3% of the respondents stated that anonymity would not affect their willingness to serve.

68. Several of the threatened jurors contacted the court clerk and said they would never serve on a jury again. Bill Analysis at 5 (cited in note 27).

69. Garry Sturgess, *Dire Days for Voir Dire—Too Many Trials, Too Few Willing Jurors Place Great Strains on Justice System*, Legal Times 1, 19 (Sept. 10, 1990).

V. OBJECTIONS TO ANONYMITY

Balanced against these potential benefits of juror anonymity are several predicted harms, many of which are based on equally untested assumptions about juries or juror behavior.[70]

A. Anonymity and Jury Accountability

Let me start with what I call the accountability objection to anonymity. "Accountability to the community is an important pressure on [jurors] to do the right thing," said one professor.[71] Editorials have termed proposals for juror anonymity "noxious" and a return to "star chambers."[72] One judge's critique was just as blunt: "Next we'll be putting all the judges under hoods."[73] Underlying these remarks are two assumptions: (1) individual jurors, like judges, *should* be accountable to the public for what they do, and (2) if the public does not know their names and addresses, jurors will act less responsibly.[74] Both assumptions are flawed.

Judges should be accountable to the community; so must legislators, prosecutors, and all other elected or impeachable officials. Jurors are different. Our jury system deliberately *insulates* the jury from political and social pressures that may influence the actions of prosecutors, the press, or politicians. We place our faith in the ability

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70. See Worthington, Chicago Trib. at N1 (cited in note 22) (reporting that U.S. District Judge Marvin Aspen has argued that no one has yet made a convincing case for how the quality of justice is negatively affected by concealing jurors' names).

71. Gewertz, L.A. Times at A1 (cited in note 8) (quoting Professor Paul Rothstein). Some respondents to the magazine survey about jury anonymity said anonymity would eliminate jurors' feelings of accountability. One stated, "If a juror is going to decide the fate of a human being, she should be fully prepared to own up to that responsibility." Glamour at 159 (cited in note 16).

72. *Shrinking into Secrecy*, St. Petersburg Times at Editorials 2D (April 2, 1995).

73. Roane, N.Y. Times at B8 (cited in note 9) (quoting Judge Dickran M. Tevrizian, a federal judge in Los Angeles). For similar concerns, see *Baltimore Sun*, 841 F.2d at 74 ("[T]he risk of loss of confidence of the public in the judicial process is too great to permit a criminal defendant to be tried by a jury whose members may maintain anonymity").

74. Professor Marla Sandys suggested to me, for example, that like the subjects in studies of the effects of "deindividuation" who exhibited more aggression when hooded and anonymous, jurors' urges to punish may be less restrained when they cannot be identified by name. See Philip G. Zimbardo, *The Human Choice: Individuation, Reason, and Order versus Deindividuation, Impulse, and Chaos*, in Arnold and Levin, eds., *Nebraska Symposium on Motivation* (1969) (arguing that anonymity in any area of a person's life increases the chances that the person under a veil of anonymity will be more likely to engage in antisocial behavior). Compare by analogy, *McIntyre v. Ohio Elections Commission*, 115 S. Ct. 1511, 1530-37 (1995) (Scalia, J., dissenting) (criticizing the Court's recognition of a "right-to-speak incognito" in striking down Ohio's prohibition of anonymous election pamphlets, stating that anonymity "facilitates wrong by eliminating accountability").

of the jury selection system to produce a group of conscientious community members who will do the right thing. Cut off from outside information, jurors must consider the evidence and instructions in each case using only the knowledge and experience they bring to the jury box. Unlike the decisions of other public officials, jury verdicts are not subject to voter review. Jury trials enlist the individual consciences of jurors for one isolated task; we do not retain good jurors and boot out the bad.[75] Jury deliberations are shielded from scrutiny, precisely to discourage partisan behavior.[76] Professor Goldstein, who has advocated even greater restrictions on postverdict contacts with jurors, summed up the problem well: "We do not give jurors the robes, the tenure, the professional training, and the perquisites to make it either fair or appropriate to ask them to play so public a role."[77] Promoting community control or influence over jurors would be as foreign to our jury system as holding individual voters accountable for their votes would be to our democracy.[78]

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75. Justice Stanley G. Feldman of the Arizona Supreme Court put it succinctly when he stated that jurors "are accountable to no one but the law and their own consciences." *KPNX Broadcasting Co. v. Superior Court*, 139 Ariz. 246, 678 P.2d 431, 443 (1984) (Feldman, J., concurring in part and dissenting in part). Consider also the remarks of Judge Joseph F. Weis, Jr. of the Third Circuit: "anonymity would seem entirely consistent with, rather than anathema to, the jury concept." *Scarfo*, 850 F.2d at 1023. In addition, because jury service is not voluntary, it would seem appropriate to offer jurors protection from community retribution that we would not extend to judges, legislators, or even voters.

76. Professor Goldstein has collected rules and practices guarding jury secrecy and insulating the jury from community pressures in his article advocating greater restrictions on postverdict interviews of jurors about their deliberations. See Goldstein, 1993 U. Ill. L. Rev. at 297-99 (cited in note 35). See also Abramson, *We, the Jury* at 182-205 (cited in note 65) (defending the requirement that jury verdicts be unanimous in order to preserve "the distinctive genius of the jury system . . . to emphasize deliberation more than voting and representation").

77. Goldstein, 1993 U. Ill. L. Rev. at 314 (cited in note 35). As the Chief Judge of the Hennepin County bench explained, pillory of jurors by the press and public may lead to a "situation where the jury is making the politically correct decision," a throwback to what he describes as the racially driven verdicts in the South decades ago. Doug Grow, *They Can Take Away the Jurors' Names, But Not Their Fears*, Minneapolis Star Trib. 3B (April 13, 1993). Indeed, jurors who are perceived as susceptible to community influence are often maligned as cowards by those who favored a different verdict. For example, after jurors acquitted Damian Williams and Heury Watson of many of the offenses for which they were charged in connection with the beating of truck driver Reginald Denny and other victims, the jurors were accused of succumbing to threats of mob violence. Seth Mydans, *Juror in Denny Case Recounts Stress and an Obsession With Detail*, N.Y. Times A18 (Oct. 27, 1993); Jim Newton, *L.A. Trials Show 'Blind Justice' is Hard to Achieve*, L.A. Times A1 (Oct. 24, 1993).

78. Compare by analogy, *McIntyre*, 115 S. Ct. at 1517 (noting that this country's "respected tradition of anonymity in the advocacy of political causes" is "perhaps best exemplified by the secret ballot, the hard-won *right to vote one's conscience without fear of retaliation*" (emphasis added)). In some jurisdictions, other rules appear to endorse individual accountability for jurors, such as the prohibition in some states against anonymous jury polling. See *State v. Lewis*, 18 Or. App. 206, 524 P.2d 1231, 1233 (1974) (ordering a retrial of the defendant whose jury was allowed to respond by secret ballot to the court's poll about its verdict, explaining that the "practice of anonymous jury polling, while permitting the court to ascertain

In addition to my disagreement with those who assert that juror accountability is the American way, I also object to the suggestion that anonymous jurors will dispense verdicts that are, as a whole, worse than verdicts of identified juries. It is true that, until a juror's identity is disclosed, the only people who could demand that she explain her vote are the other jurors and the juror's family and closest friends. But jurors under these conditions may not necessarily produce verdicts that are any less just or accurate than named jurors who are under public scrutiny at all times.[79]

Predictions that anonymous jurors will not take the time and effort to "get it right" are premature and demeaning. Such warnings hold no greater promise of accuracy, in my view, than the comment of potential juror Betty Blakeley, age fifty-three, who asserted, "Jurors take their job seriously whether you use their names or not."[80] More importantly, even if anonymity does increase the risk that some fraction of verdicts will be the result of cavalier decision making, anonymity undoubtedly *decreases* much jury error by relieving juror anxiety to some extent. If anonymity has any effect on verdicts at all, it seems reasonable to suppose that it will increase, rather than decrease, the ability of a jury to arrive at a sensible decision.

Studies of the effects of accountability on decision making reveal that the benefits of juror naming may be overrated. Several researchers have found that subjects who expect to be required to justify their decisions are more likely than unaccountable subjects to pay closer attention to detail and avoid jumping to conclusions,[81] producing what one researcher termed "complex" and "self-critical" thought.[82]

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that the requisite number of votes for conviction has been obtained, also permits each juror to effectively avoid his individual responsibility to the defendant and the public," yet acknowledging "the possibility that the jurors' desire for anonymity might have been fostered by fear of reprisal").

79. Professor William Stuntz termed this constraint on juror action "internal accountability" and also suggested that the presence of a large number of jurors, 12 in most felonies, promotes careful decision making as well.

80. Roane, N.Y. Times at A20 (cited in note 9). See also Stephen Chapman, *Mouthing Off; Loose-Lipped Jurors Are a Danger to the Justice System*, Chicago Trib. N27 (April 13, 1995) (noting that the "jury has built-in safeguards" to protect against the "abuse" that some predict will result from juror secrecy: unanimity, a large number of jurors, and the power of judges to overturn verdicts when jurors report misconduct).

81. See, for example, Richard M. Rozelle and James C. Baxter, *Influence of Role Pressures on the Perceiver: Judgments of Videotaped Interviews Varying Judge Accountability and Responsibility*, 66 J. App. Psych. 437 (1981).

82. For instance, in a study in which a researcher asked undergraduates to judge the guilt of a hypothetical defendant after hearing competing evidence and arguments, subjects who expected to justify their judgment of guilt or innocence were more likely to revise initial impressions and recall more detail than either subjects who realized they were accountable only after exposure to the evidence or subjects who were not asked to justify their decisions. Philip

This effect, however, is not uniform,[83] nor has it been tested in a deliberative context or shown to affect the verdicts of mock juries. Jurors deliberate together, unlike the subjects in these studies. The process of discussing and defending one's views to fellow jurors, as well as the prospect of defending the verdict to one's closest personal relations, may well generate the self-criticism that researchers suggest total anonymity sometimes removes.[84]

Research also shows that public accountability may exacerbate tendencies we do not want to encourage in jurors. Accountable decision makers, it appears, are more likely than anonymous decision makers to search for ways to pass off responsibility for the decision to others (a special concern for juries deciding a death sentence),[85] to overvalue worst-case scenarios,[86] and to refuse to make concessions. Moreover, they are more likely than anonymous decision makers to shift their decision toward the views they believe are held by their

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E. Tetlock, *Accountability and the Perseverance of First Impressions*, 46 Soc. Psych. Q. 285, 286, 290-91 (1983).

83. Accountable and unaccountable subjects seemed to behave similarly in another study that asked them to judge another person's motivations after the subjects learned of that person's freedom to choose another course of action. Philip E. Tetlock, *Accountability: A Social Check on the Fundamental Attribution Error*, 48 Soc. Psych. Q. 227 (1985). Another study found that decision makers who were worried about fending off high-level critics were most likely to escalate their commitment to their initial decision and were most inflexible in defending their original positions. Frederick V. Fox and Barry M. Straw, *The Trapped Administrator: Effects of Job Insecurity and Policy Resistance upon Commitment to a Course of Action*, 24 Admin. Sci. Q. 449 (1979). The safest conclusion seems to be that people have "dramatically different strategies for coping with" the need to justify their judgments and decisions to others "depending on . . . who is accountable to whom" and in what ways. Philip E. Tetlock, *Accountability: The Neglected Social Context of Judgment and Choice*, 7 Research in Org. Beh. 297, 310 (1985).

84. See, for example, Marla Sandys and Ronald C. Dillehay, *First-Ballot Votes, Predeliberation Dispositions and Final Verdicts in Jury Trials*, 19 Law & Hum. Beh. 175, 191 (1995) (discussing the significant effect of deliberation and other social influences in the jury decision-making process).

Three other researchers into jury decision making, somewhat dismayed to find that individual mock jurors often settled on verdicts without considering alternatives, suspected that deliberations mitigated this effect. Deanna Kuhn, Michael Weinstock and Robin Flaton, *How Well Do Jurors Reason? Competence Dimensions of Individual Variation in a Juror Reasoning Task*, 5 Psych. Sci. 289, 295 (1994) (stating that "social exchange with these other minds may thus go a long way in providing the corrective to what we have found missing in the thinking of individual jurors"). Professor Goldstein recently concluded that existing research does not reveal any attempt to measure the effect on a group (assured of privacy while it performs the group function) of an awareness that its activities will be disclosed afterwards, stating that "systematic research has not been conducted to determine whether individuals and groups are affected by knowledge that their behavior subsequently may be exposed." Goldstein, 1993 U. Ill. L. Rev. at 313 & n.75 (cited in note 35).

85. Philip E. Tetlock, *The Impact of Accountability on Judgment and Choice: Toward a Social Contingency Model*, 25 Advances in Exp. Soc. Psych. 331, 359 (1992) (terming this reaction "buckpassing").

86. Id. at 349-50.

prospective audience.[87] If, indeed, public accountability encourages jurors to act as political partisans seeking to placate whatever group poses the greatest risk of retribution, rather than as individuals with independent consciences, it is exactly what we don't need more of in our jury system today. "Anonymity," as Justice Stevens recently observed, "is a shield from the tyranny of the majority."[88]

Opponents of juror anonymity who view accountability as a needed safeguard may also be concerned that anonymous jury trials will *appear* unfair to observers, reducing public confidence in the fairness of the jury system. Again, this concern is unwarranted. Certainly we have more confidence in the fairness of jury proceedings when we know enough about jurors to conclude that they will act fairly and without undue bias against one party or the other.[89] But the name of a juror is itself empty of meaningful content, at least on the question of how the juror might decide a case. Instead, the public looks to other information—the juror's political views, occupation, race, age, etc. This information is readily available from questionnaires and voir dire proceedings, even when jurors are anonymous. Does our ability to assess the fairness of a criminal jury really depend upon knowing the name and address of Juror Number 92 when we can learn that Juror Number 92 is a white male, fifty-eight years old, born, raised, and still living on the west side of Detroit; that he has worked for the United States Postal Service for the past thirty-five years primarily at a branch serving lower- and middle-class customers; that he grew up as the youngest of six

87. Id. at 341. When decision makers believe that they will be accountable to constituents monitoring their performance, they are more likely to engage in noncooperative behavior during negotiation. When individuals feel accountable only to the person with whom they are negotiating, accountability increases cooperation during negotiation. See Roderick M. Kramer, Pamela Pommerenke and Elizabeth Newton, *The Social Context of Negotiation: Effects of Social Identity and Interpersonal Accountability on Negotiator Decision Making*, 37 J. Conflict Res. 633, 638-40 (1993) (concluding that accountability influences the goals that individuals adopt during decision making and the rules that guide such behavior). See also Tetlock, 25 Advances in Exp. Soc. Psych. at 361 (cited in note 85) ("When accountable subjects feel that their moral mettle is being tested . . . they may be more motivated to hold others responsible and to reject situational explanations or excuses").

88. *McIntyre*, 115 S. Ct. at 1524 (explaining the Court's decision to strike down a state law punishing anonymous election pamphleteering on first amendment grounds). See Abramson, *We, the Jury* at 5 (cited in note 65) ("To get the jury that resists the tyranny of the state, we must risk our freedom on the jury that practices its own petty tyranny"). Abramson also traces the disappearance of the jury's ability to decide questions of law to the fear that jurors would be too influenced by popular will to uphold the equal protection of the law. Id. at 90.

89. See, for example, Nancy J. King, *The Effects of Race-Conscious Jury Selection on Public Confidence in the Fairness of Jury Proceedings: An Empirical Puzzle*, 31 Am. Crim. L. Rev. 1177, 1184-85 (1994) (collecting sources suggesting that jury composition and perceived neutrality affect perceptions of fairness).

siblings with a father who worked at an auto company glass plant; that he believes a woman's place is at home raising children, and considers himself an independent but generally votes Republican; that he reads The Sporting News and the Detroit News, belongs to the Lions and the AARP, watches the Capitol Gang every week on television, enjoys fishing, and works out on a Nordic Track when he can find the time (and so on)?[90] When we can learn all of this about every juror, what more do names and addresses add?

B. Defense Claims

Criminal defendants have argued that anonymous juries deprive them of two entitlements protected by the United States Constitution: the presumption of innocence and a jury that is "impartial." The Constitution, however, cannot be stretched to prohibit the kind of state innovation that I advocate in this Essay.[91]

1. Routine Anonymity Does Not Suggest Guilt

Today, most federal and state courts grant juror anonymity, if they allow it at all, only after a judge is convinced that the case poses a particularly high risk of jury tampering or retaliation.[92] As long as jurors believe that withholding their names is an extraordinary practice, anonymity will suggest to them that the judge considers the defendant to be a particularly dangerous person who may retaliate if

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90. See, for example, the coverage of the jurors in the federal civil rights trial of the white officers who beat Rodney King or the coverage of the jurors in the trial of O.J. Simpson. We know their ages and their occupations; we learn what they said during voir dire, their race, ethnicity, and their hobbies. Norma Meyer, *Their Job Done, the "Unknown" Jurors are Free to Fade Away*, San Diego Union-Trib. A2 (April 17, 1993); Laura A. Galloway and Ann Griffith, *Questionnaires Reveal Attitudes of King Jury*, L.A. Times B1 (March 15, 1992) (detailing juror information given in the Rodney King trial).

91. I am not advocating that the Constitution compels juror anonymity, but merely that the Constitution permits it. States are entitled to some leeway here.

92. See *United States v. Krout*, 66 F.3d 1420, 1427 (5th Cir. 1995) (emphasizing that the decision to empanel an anonymous jury is "a drastic measure, which should be undertaken only in limitod and carefully delineated circumstances"); *United States v. Ross*, 33 F.3d 1507, 1519-20 (11th Cir. 1994) (holding that because "an anonymous jury raises the specter that the defendant is a dangerous person from whom the jurors must be protected," courts shonld not use them unless "there is a strong reason to believe the jury needs protection"); *United States v. Paccione*, 949 F.2d 1183, 1192 (2d Cir. 1991) (requiring a strong reason to believe the jury needs protection), cert. denied 505 U.S. 1220 (1992); *United States v. Crockett*, 979 F.2d 1204, 1215 (7th Cir. 1992) (same), cert. denied 113 S. Ct. 1617, 123 L. Ed. 2d 176 (1993); *United States v. Thai*, 29 F.3d 785 (2d Cir. 1994) (same), cert. denied 115 S. Ct. 456 (1994).

convicted.[93] The resulting apprehension cannot help but erode the presumption of innocence. A prospective juror for the trial of a defendant alleged to have participated in a gang execution of a police officer made just this point when he admitted during jury selection that he feared retaliation by the defendant's gang and that the court's security precautions, including efforts to keep jurors' names secret, only *reinforced* his fears.[94]

Yet this defendant's own lawyer, appealing the anonymity order in the case after conviction, raised an argument that illustrates why automatic or presumptive anonymity would escape this criticism. He conceded that anonymity would not convey the same message to jurors *if jurors believed it was routine*. To make his point, he likened routine juror anonymity to the routine use of airport metal detectors. Screening every flight generates less individual apprehension than would be the case if detectors were used only to screen the most dangerous flights.[95] 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.[96]

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93. 60% of the 5% of survey respondents who rejected anonymity rejected it because it may prejudice juries against defendants. Glamour at 159 (cited in note 16).

94. Zack, Minneapolis Star Trib. at 1A (cited in note 11). Paula DiPerna recounted her discussion with a woman who was not selected to serve on the anonymous jury chosen for the Brinks trial. The woman suggested that many jurors had been frightened by the anonymity and had made up reasons to be excused. Paula DiPerna, *Juries on Trial: Faces of American Justice* 107 (Dembner, 1984).

95. See Mark Brunswick, *High Court Takes Up Issue of Anonymity for Jurors*, Minneapolis Star Trib. 1B (Nov. 3, 1994). The Supreme Court of Minnesota found that the selective use of anonymity did not violate the defendant's right to be presumed innocent. *State v. Bowles*, 530 N.W.2d 521, 531 (Minn. 1995) (finding that the trial judge took adequate precautionary measures to ensure that juror anonymity did not infringe on the defendant's presumption of innocence and noting that he informed the veniremembers that they would remain anonymous to shield them from media harassment).

96. The selective use of anonymous juries has also been criticized because it encourages a judge to lie to the jury about the reason for their anonymity, telling them it is to protect them from the press and not the defendant. See *State v. Accetturo*, 261 N.J. Super. 487, 619 A.2d 272, 273-74 (1992) (expressing skepticism about whether jurors would actually believe that media coverage accounts for anonymity); Daniel P. Lehner, Note, *Anonymous Juries: Do the Benefits Warrant Jeopardizing the Rights of the Accused?*, 11 Crim. Just. J. 187, 196-97 (1988). With automatic anonymity, a judge could forthrightly explain that anonymity is a precautionary measure to protect jurors from the public, the press, victims, witnesses, defendants, or whoever might have an incentive to try to contact, harass, or influence jurors during or after the trial. Judges instructing anonymous juries today already try to reduce the possible prejudicial impact of their anonymous status by telling them that anonymity is a "common practice" and "is in no way unusual." See *Accetturo*, 619 A.2d at 274 (quoting a typical instruction in federal court); Kristan Metzler, *Edmond Appeals Verdict; Jury Procedures Crux of Argument*, Wash. Times C6 (Feb. 2, 1995) (reporting Court of Appeals Judge Laurence H. Silberman's statement that when the judge told jurors that anonymous juries were not unusual, he "told them a little white lie"); *Bowles*, 530 N.W.2d at 528 (quoting the judge's instruction to the jury: "The reason for that anonymity is so that you will not be bothered by people from the media or anyone else during

2. Routine Anonymity Does Not Impair the Selection of an Impartial Jury

Another weak argument against routine anonymity is that it prevents the disclosure of bias during voir dire and hampers litigants from choosing an impartial jury. Defense attorneys have complained that restricting access to jurors' names and addresses deprives them of essential information they need to eliminate biased jurors.[97]

Litigants do not need this information in order to select an impartial jury. It is doubtful that a juror's name or address would lead to a challenge for cause; this information is only helpful in developing hunches of dubious merit for exercising peremptory challenges.[98] Even if the Sixth Amendment provided some sort of entitlement to the informed use of peremptory challenges, access to juror questionnaires and follow-up voir dire can provide more than enough additional information to make up for the lack of names or addresses.[99]

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the jury selection process, during the trial, or after the trial"); Nancy A. Novak, Note, *Jury on Trial: Juror's Constitutional Right to Privacy Falls Under Scrutiny of the Courts*, 3 San Diego Justice J. 215, 223 (1995) (providing an example of jury instructions that explain that anonymous empaneling is to protect against media coverage).

97. For example, they have argued that simply learning what quadrant of a city a person lives in is not enough, given the variety of neighborhoods within those areas. See Eva M. Rodriguez, *Anonymous Juries: More Common, Controversial*, Legal Times 1 (May 9, 1994). See also Cathy E. Bennett and Robert B. Hirschhorn, *Bennett's Guide to Jury Selection and Trial Dynamics in Civil and Criminal Litigation* § 7.16 (West, 1993).

98. See Petition for Writ of Mandate, *Jansen v. Municipal Court of Downey* 9-10 (Cal. App. 1994) (copy on file with the Author); José Maldonado, *Nameless and Fair*, Newsday 56 (Aug. 20, 1993) ("At best, a name reveals ethnicity. This is hardly the kind of information one would deem proper when selecting a juror"). Still some lawyers consider ethnicity very important information, and believe that they can judge ethnicity from a name. See Mark Brunswick, *Ford Trial Foreshadows Bowles: Issues of Race, Jury Privacy and Gang Politics Resurface*, Minneapolis Star Trib. 1B (June 10, 1993) (quoting a defense attorney who objected to anonymity) (stating that "ethnic identity can tell you background, neighborhood; it's very important").

99. See Rodriquez, Legal Times at 1 (cited in note 97) (noting how the judge in the Rodney King civil rights trial had jurors fill out a more than 50-page questionnaire, in part to balance the unavailability of names and addresses); *Scarfo*, 850 F.2d at 1022 (finding that a questionnaire combined with individual voir dire by the judge and counsel allowed more information than is available in most other trials, so that suppressing information about juror identities did not deprive a litigant of information "reasonably necessary to the intelligent exercise of his peremptory challenges"); *Thai*, 29 F.3d at 801 (finding that a 68-page questionnaire made up for the lack of jurors' names and addresses). Those defendants wealthy enough to afford in-depth personal investigations into each juror's life, such as the "drive by checklist" recommended by jury expert Cathy Bennett, which includes descriptions of cars, toys, and pets in the neighborhood, the juror's home, and bumper stickers on neighborhood cars, would just have to get by with more detailed written questionnaires. See Bennett and Hirschorn, *Bennett's Guide to Jury Selection*, App. Vol. at 509-512 (cited in note 97).

Litigants are probably better off picking jurors without access to their names and addresses anyway. It is more likely, given the nature of the voir dire process, that anonymity would enhance, rather than impair, truth-finding. In other words, forgoing information about identity should yield information that is much more valuable to defense attorneys. Judge Philip Mautino, one of the few judges who has actually used anonymous juries consistently for any length of time (admittedly a biased source), claims that prospective jurors who are assured anonymity have been more forthcoming about their lives in pretrial questioning than jurors who have no such assurances.[100] Without anonymity, jurors learn (sometimes through careful warnings by the judge before voir dire) that whatever they say or write may be publicized.[101] Such reminders probably have the same effect on jurors that *Miranda* warnings have on suspects: those warned reveal less.[102] A juror who is confident that she and her family cannot be identified by anyone but a few specified court employees may disclose information about herself that she might otherwise conceal.[103]

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100. See Catherine Gewertz, *Challenge to Anonymity of Jurors Rejected*, L.A. Times B1 (Sept. 1, 1994) (discussing Judge Mautino's anonymous jury policy and the legal challenges it faced from the Los Angeles public defender's office).

101. Indeed this was exactly the result in California where one panel of the Court of Appeals ordered that henceforth all juror questionnaires had to warn jurors that their answers would not be confidential but open to inspection by the press. *Copley Press v. Superior Court of San Diego*, 278 Cal. Rptr. 443, 452 (Cal. App. 1991). See also Robert Buckman, *Press Right of Access Outweighs Juror Privacy*, Ed. & Pub. Mag. 18, 35 (Aug. 7, 1993) (noting that persuading judges to warn jurors was one of the aims of a reporter who appealed a judge's effort to redact the names from questionnaires in the trial of a man who shot a Japanese exchange student who was looking for a Halloween party).

102. Compare Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of* Miranda's *Defenders*, 90 Nw. U. L. Rev. (forthcoming 1996) (concluding that *Miranda* led to a 16% decline in confession rates).

103. Consider, for example, the judge's decision to conceal the names of veniremembers during jury selection in the trial of an art gallery for displaying allegedly obscene photographs depicting males in sadomasochistic acts and others displaying children's genitals. Attorneys for both sides reportedly "grilled" prospective jurors on their views about homosexuality, abortion, AIDS, and their religious backgrounds. *Jury Selection Includes Opinions About Homosexuals*, U.P.I. (Sept. 25, 1990).

Limiting media access to the responses of jurors to questionnaires and during voir dire also encourages jurors to be candid about information that may lead a party to object to their inclusion in the jury. In Colorado, for instance, juror questionnaires prominently display a notice that the questionnaire is *not* a public record, and parties and their agents are not allowed to reveal questionnaire contents. 1995 Colo. Rov. Stat. § 13-71-115. See also Gen. Stat. Conn. § 51-232(a)(3) (1995). But giving the media only names and nothing else undermines two additional interests that I address later: the interest of the press in reporting trials and the interest of promoting public confidence in the fairness of jury proceedings. See text accompanying notes 123-26. This alternative also fails to mitigate juror fear of defendants, victims, or the public. Compare by analogy *Bowles*, 530 N.W.2d at 532 (upholding the use of an

3. Routine Anonymity Does Not Prevent the Discovery of Jury Misconduct

Even assuming jurors are forthright during the selection process, there is no guarantee that their behavior, or the conduct of those who may influence them, will remain beyond reproach for the rest of the trial. Sealing the names or addresses of jurors makes it more difficult for convicted defendants and their attorneys to uncover juror misconduct that could form the basis for a valid challenge to the verdict. Deprived of the ability to mine jurors for evidence of irregularity, defendants must rely on sources independent of the jurors or hope that conscience-stricken or fame-hungry jurors will divulge jury misdeeds themselves.[104] Yet protecting the defendant's right to a fair trial, free from improper influence, has never required more than this. The interest of a criminal defendant in discovering jury misconduct has traditionally been limited by the competing interests advanced by protecting jurors from postverdict inquisition. Convinced that posttrial interviews chill both candid deliberations and jury participation itself, many jurisdictions have forbidden defendants and their attorneys or investigators from contacting former jurors after their verdict, absent a preliminary showing of misconduct and leave of court.[105] The trend seems to be to tighten,

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anonymous jury, stating that "withholding jurors' names from the media would not have eliminated the risk of harassment or retaliation from" the defendant or his supporters).

104. For example, the California Attorneys for Criminal Justice ("CACJ") opposed Cal. S.B. 508 on this ground. Committee Analysis Statement at 9 (cited in note 26) (noting CACJ concern that the bill would make it difficult or impossible to investigate juror misconduct on appeal).

105. See *United States v. Radonjich*, 1 F.3d 117, 120 (2d Cir. 1993) ("Limiting questioning [of former jurors] to those jurors who come forward on their own is proper unless the district court determines, in its discretion, that more inquiry is necessary"), cert. denied 114 S. Ct. 897 (1994); *Globe Newspaper*, 920 F.2d at 92 n.5 (listing federal court rules and state statutes containing similar restrictions); *Maldonado v. Missouri Pacific Railway Co.*, 798 F.2d 764, 769 (5th Cir. 1986) ("[T]he party seeking to question jurors postverdict must make a 'preliminary showing of misconduct' "), cert. denied 480 U.S. 932 (1987); *United States v. Badolato*, 710 F.2d 1509, 1514-15 (11th Cir. 1983) (rejecting the defendant's motion to interview jurors for failure to show evidence of outside influence during deliberations); U.S. S.D. Tex. Rule 12 (providing that "except with leave of the Court, no attorney, party, nor agent of either of them may communicate with a former juror to obtain evidence of misconduct in the jury's deliberations"); *Juror Privacy* at 13-15 (cited in note 5) (listing jurisdictions with court rules and rules of ethics that prohibit postverdict contact with jurors absent a showing of good cause). The explanation offered by one court of its rule barring postverdict investigation of jurors is typical:

> It may appear odd to recognize a ground for the invalidation of a verdict while denying a litigant a chance to find out whether such an event perchance did occur. The fate of a defendant is thus made to depend upon sheer luck, that the wrongful event somehow comes to light. The weight of the criticism is appreciated, but when contending values clash in their demands, a balance must be struck, and the balance struck is not shown to be a poor one because in some unknowable cases there may be an injustice. Overall the

rather than loosen, these restrictions.[106] It is hard to see why courts should balance the same interests differently by granting greater access to the names and addresses of jurors than courts grant to the jurors themselves.

Once a defendant raises a credible reason why he believes a juror's identity could lead to evidence sufficient to impeach the verdict, the court should make a reasonable effort to accommodate defense counsel's investigation, without unnecessarily jeopardizing the integrity of jury deliberations or the privacy or well-being of jurors. This accommodation might involve unconditional release of the juror's name. A court, however, could instead choose to preserve the juror's anonymity by supervising defense interviews of jurors,[107] or by limiting access to jurors' names to the defendant, the lawyers, and their investigators, barring disclosure to the press and public.[108] The

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> instances of invalidating misbehavior are exceedingly few. . . . Thus there is but a small factor of possible hurt. Against this must be weighed the substantial interest of the public and of defendants as a group, in the full and free debate in the jury room.

State v. LaFera, 42 N.J. 97, 199 A.2d 630, 636 (1964).

106. See generally Goldstein, 1993 U. Ill. L. Rev. at 307-12 (cited in note 35) (advocating criminal penalties for jurors who disclose deliberations and for representatives of the media who attempt to solicit them). Heightened concern about the effects of media access to jurors recently prompted the Supreme Court of Connecticut to create a Task Force on Post-Verdict Juror Interviews, which is expected to release its findings this year. Some would prefer to reverse this trend. See Benjamin M. Lawsky, *Limitations on Attorney Postverdict Contact with Jurors: Protecting the Criminal Jury and Its Verdict at the Expense of the Defendant*, 94 Colum. L. Rev. 1950 (1994) (advocating greater access to jurors by defense attorneys).

107. For example, a judge in a recent murder case refused to disclose the jurors' names and addresses to the defendants and their attorneys, even after proof that an uncle of one of the defendants had pressured one of the jurors to acquit. Instead, the judge subpoenaed all the jurors and heard the attorneys question them in open court. This procedure was upheld on appeal. See *People v. Barton*, 37 Cal. App. 4th 709 (1995). See also *State ex rel. Butler v. Howard*, 1994 WL 4300 (Mo. App. Jan. 11, 1994) (noting that "the trial court has a duty, in those cases where good cause has been shown, to provide for juror interviews in any manner which does not amount to harassment and gives the highest degree of reliability to their responses," and suggesting that "the court summon the individual jurors to court and supervise the interrogation in the presence of both parties, in open court, with a court reporter recording the proceedings"); *United States v. Franklin*, 546 F. Supp. 1133 (N.D. Ind. 1982) (detailing the protections judges can impose on postverdict interviews of jurors by defense counsel); *Remmer v. United States*, 347 U.S. 227 (1954) (holding that the defendant was entitled to an open hearing to determine whether the jury had been influenced by an improper source).

108. See, for example, Cal. Civ. Proc. Code § 237(d) (West, 1995) (providing that upon a finding that a compelling governmental interest warrants disclosing juror identities to a criminal defendant, "the court may require agreement that the defendant, defendant's counsel, or defendant's investigator not divulge jurors' identities or identifying information to others"). Protections like these seem most probable when jurors' fears of losing anonymity are particularly acute. In order to limit dissemination of juror identity effectively, a judge would have to be very clear about what the lawyers could do with the information. For example, the judge presiding over the Florida trial of the men who allegedly burned an African-American tourist alive attempted to keep the jurors' identities from the press by releasing them to the attorneys alone. The judge had to select a new jury in a new venue, however, after the prosecutors circulated the list of prospective jurors to more than 300 staff members asking them to ask their

defendant's interest in a fair trial requires no greater protection than this.[109]

C. *First Amendment Objections by the Media to Routine Anonymity*

Like defendants, media representatives claim that their right to learn jurors' identities is protected by the Constitution and cannot be removed or impaired except under the rarest of circumstances. Of the cases in which the Supreme Court has examined this right of access to trial proceedings, two are most instructive: *Press Enterprise I*,[110] decided in 1984, and *Press Enterprise II*,[111] decided two years later. The Court in *Press Enterprise I* established that the media has the right to be present during the jury selection portion of a criminal trial, a right that can only be denied if a judge first finds "that closure is essential to preserve higher values and is narrowly tailored to serve that interest."[112] In *Press Enterprise II*, the Court clarified when this right can be claimed and limited. The Court explained that only if the "place and process have historically been open to the press and general public," and if "public access plays a significant positive role in the functioning of the particular process" will a "qualified first amendment right of access" to the proceedings exist.[113] That right is not absolute, but is violated by a closure order unless the trial court

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spouses and roommates for information about the veniremembers. *Trial Moved to Shield Jury in Case of Burned Tourist*, N.Y. Times B10 (June 17, 1993); Sue Carlton, *Jurors' Privacy at Issue in Case*, St. Petershurg Times 1B (June 16, 1993).

109. Occasionally, defendants will seek access to a jury list for purposes of challenging the demographic composition of the list. See, for example, Bennett and Hirschorn, *Bennett's Guide to Jury Selection*, App. Vol. at 30-33 (cited in note 97) (including a sample motion and memorandum of law for disclosure of jury lists for purposes of preparing a motion challenging the compliance with jury selection procedures). Juror anonymity need not impair this important right. A master jury list, qualified list, or even a list of veniremembers reveals names and addresses, but it does not disclose which of the disclosed names goes with a particular veniremember's numher.

Still, with access to a list, a few litigants who have enough money and incentive may choose to investigate the comings and goings of each veniremember systematically in order to determine which among them have been chosen to serve as jurors. In cases where the judge thinks this might be a problem, the judge could try to provide the demographic information that the defendant needs to assess the legality of the venire without giving access to the identity of the veniremembers. This might be accomplished by redacting particular segments on the list (first names, if the challenge is based on ethnicity, names and street numbers if the challenge is based on geography, or last names if the challenge is gender-based), or even providing revelant statistics through confidential analysis.

110. *Press Enterprise Co. v. Superior Court of Cal.*, 464 U.S. 501 (1984).

111. 478 U.S. 1 (1986).

112. 464 U.S. at 510. Under this test, tlie Court concluded that the decision of the judge to close voir dire without considering alternatives exceeded constitutional limits. Id. at 513.

113. 478 U.S. at 8-13.

makes written findings that (1) there is a "substantial probability" that access would undermine a compelling interest, such as the defendant's right under the Fifth and Sixth Amendments to an impartial jury, and (2) "reasonable alternatives to closure cannot adequately protect" that interest.[114]

The anonymity policy this Essay advances does not infringe any right described by these cases. Indeed, there would appear to be no qualified constitutional right of access to juror *names*, as opposed to jury *proceedings*.[115] First, even accepting tradition as a valid measure of the scope of the rights of the media in the jury context, as the Court seems to do,[116] it is not accurate to conclude that the public has historically enjoyed an unconditional privilege to learn of juror identity. Necessity, not reason, has been the catalyst for public access to juror identity in criminal cases. At the time the First Amendment was adopted, jurors were usually known to the parties and the public—handpicked, white, male, religiously qualified landowners, often farmers, from the community surrounding the crime.[117] Even as

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114. Applying this test, the Supreme Court rejected a trial judge's decision to close a preliminary hearing to press and public. Id. at 13-15. For a recent application of the Court's test, see *United States v. Antar*, 38 F.3d 1348, 1363 (3d Cir. 1994) (criticizing the judge who withheld the transcript of voir dire from the press for failing to make on-the-record findings of "the actual expectation of an unwarranted intrusion upon juror deliberations or of a probability of harassment of jurors beyond what the jurors, rather than what a particular judge, may deem to be acceptable").

115. Distinguished judges applying the two-prong test of tradition and function from *Press Enterprise II* have reached opposite conclusions on this point, some concluding that neither history nor logic supports a constitutionally based entitlement to juror identities. Compare *Baltimore Sun*, 841 F.2d at 76 (finding a right of access to juror names), with *Gannett*, 571 A.2d at 751 (concluding that tradition has given courts discretion over whether to release juror names), cert. denied 495 U.S. 918 (1990); *United States v. Edwards*, 823 F.2d 111, 120 (5th Cir. 1987) (noting that the court had earlier held that a trial judge's refusal to release the names and addresses of jurors violated no first amendment right of access and upholding a similar decision by a judge to redact names from released transcripts), cert. denied 485 U.S. 934 (1988).

116. As new pressures on the jury system have emerged, many "traditional" jury procedures have fallen by the wayside over the years, including the key-man selection system, the twelve-person jury, the prohibition on juror note-taking or questioning, and the requirement of unanimity. For a critique of the historical test and citations to courts that have abandoned it, see Fred A. Bernstein, Note, *Behind the Gray Door:* Williams, *Secrecy, and the Federal Grand Jury*, 69 N.Y.U. L. Rev. 563, 606-611 (1994).

117. See Albert W. Alschuler and Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867, 878-882 (1994) (describing juror selection practices of the late eighteenth and early nineteenth centuries); Abramson, *We, the Jury* at 29 nn.56-57 (cited in note 65) (describing Colonial juror selection practices). Professor Thornton Miller, a historian who recently published a book about Virginia courts of the Colonial period, describes litigation of the time as providing "a justice of familiarity, where the judges, the grand and petit jury members, the attorneys, and the litigants all knew each other." F. Thornton Miller, *Juries and Judges Versus the Law—Virginia's Provincial Legal Perspective, 1783-1828* at 30 (U. Va., 1994). Even though jury districts in federal cases were much larger, extending initially over an entire state, the Judiciary Act specified that capital cases (a majority of federal crimes at the

our agrarian society evolved into an urban one, jury service continued to be reserved for property holders of good character known to the bailiff, sheriff, or judge, who also happened to be among those whose identities would be well known to the press and public.[118] It is only in the past thirty years that random selection of jurors from a cross section of the community has replaced these "key-man" systems, bringing to every jury box the obscure as well as the prominent.[119] Of course, in many places where juries are drawn from smaller towns or neighborhoods, jurors may still be easily identified by acquaintances, relatives, classmates, neighbors, or co-workers. But a vanishing social reality should not be mistaken for an immutable constitutional right.

Second, courts have for many decades retained the "inherent power to control the release of jurors' names,"[120] belying claims that media access to juror identity has enjoyed unwavering protection. Numerous federal and state statutes and rules grant judges the option of sealing juror names from the parties, the public, or both.[121] For

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time) be tried by jurors summoned from the county of the offense. See Abramson, *We, the Jury* at 35-36 (cited in note 65).

118. Professor Alschuler and Andrew Deiss quote as one example a Delaware statute from 1811, which "commanded the sheriff to summon 'sober, discreet and judicious freeholders, lawful men and of fair characters, and inhabitants of his bailiwick, to serve as petit jurors . . . .'" Alschuler and Deiss, 61 U. Chi. L. Rev. at 878 n.57 (cited in note 117). The same authors also note, however, that in some jurisdictions, the jurors who ended up in the jury box were not always the most "upstanding" of citizens. Sometimes bystanders filled in when extra jurors were needed, and some of these did not meet the property-holding requirements of regular jurors. Id. at 882.

119. Robert Lloyd Raskopf, *A First Amendment Right of Access to a Juror's Identity: Toward a Fuller Understanding of the Jury's Deliberative Process*, 17 Pepperdine L. Rev. 357, 370 (1990) (noting that only recently in the history of the jury system have most jurors become strangers to the litigants and to the observing puhlic); Abramson, *We, the Jury* at 99 (cited in note 65) (stating that 60% of federal courts in 1967 still chose jurors by soliciting names of "men of recognized intelligence and probity" from community notables). In the late 1950s, when asked to justify the absence of African-Americans from jury lists, one jury commissioner using the "key-man" system claimed that "neither he nor any of the other 'key-men' in the community with whom he consulted happened to know many qualified blacks personally." Id. at 110.

120. *Gannett*, 571 A.2d at 746-47, 746 n.14 (collecting statutes and rules of the federal courts and eleven states that permit trial judges to keep juror names confidential and rejecting the claim that the historical practice in the nation requires announcement of jurors' names). In many jurisdictions the practice of entering the jurors' names into the record remains. See Colo. Ct. Rule 347(q) (requiring that the clerk enter the jurors' names into the record).

121. See, for example, 28 U.S.C. § 1863(b)(7) (1988 ed.) (noting that federal judges may keep juror names confidential in any case where the interest of justice so requires); Okla. Stat. § 853.1 (1995) (providing that the court upon good cause may withhold "the identity and the business or residential address of any prospective or sworn juror to any person . . . other than to counsel for either party"); Del. Code Ann. § 4513(a) (1974 & Supp. 1994) (providing that courts have discretion to keep the names and questionnaires of jurors confidential); D.C. Code § 11-1904(a)(3) (1981) (providing that a plan for jury selection shall include provisions for disclosure of juror names except in cases in which the chief judge determines tbat

evidence that state judges and legislators are willing to limit media access to protect juror anonymity, one need look no further than rules barring television coverage of jurors in every one of the thirty-five states that presently allow television cameras in criminal trials.[122]

Moreover, as the Court's two-prong test recognizes, even the hoariest of traditions isn't worth preserving if it doesn't work. Press access to the names of jurors *during trial* serves no salutary function when full access to every other aspect of the trial proceeding is guaranteed.[123] The benefits of press access to jury selection and jury tri-

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confidentiality is required); Ind. Code Ann. § 33-4-5.5-12(g) (Burns, 1973 & Supp. 1995) (providing that "[t]he names of qualified jurors drawn from the qualified jury wheel and the contents of jury qualification forms completed by those jurors shall not be made available to the public until the period of service of those jurors shall have expired, except that attorneys in any cases in which these jurors may serve, shall have access to the information"); Ind. S. Dist CR-3 (5) (1994) (permitting judges to direct that "the names and addresses of the jurors or prospective jurors not be publicly released except as required by statute, and that no photograph be taken or sketch made of any juror within the environs of the Court"); Minn. Gen. Prac. Rule 814 (granting the judge discretion to withhold the names and addresses of jurors); N.H. Rev. Stat. Ann. § 91-A:5:I (Equity, 1994) (exempting jury records from the "right-to-know" law). The history of some of these provisions is detailed in Noah B. Salamon, *Comment: All the News that Fits? Anonymous Juries, Particularized Justice and the Appearance of Fairness* 43-47 (unpublished manuscript) (copy on file with the Author).

122. Ruth Ann Strickland and Richier H. Moore, Jr., *Cameras in State Courts: A Historical Perspective*, 78 Judicature 128, 134-35 (Nov.-Dec. 1994).

Another theory with which the press has attempted to gain access to the names and addresses of jurors is to characterize juror lists and accompanying questionnaires as "public records" that the Constitution requires remain open to public inspection. Compare by analogy *Antar*, 38 F.3d at 1360 (finding that the trial judge's refusal to grant the press access to the transcript of voir dire denied a common law right of access to transcripts and judicial records); Raskopf, 17 Pepperdine L. Rev. at 365 n.59 (cited in note 119) (listing cases granting the right of access to related documents such as warrants and sentencing documents); Eugene Cerruti, *"Dancing in the Courthouse:" The First Amendment Right of Access Opens a New Round*, 29 U. Richmond L. Rev. 237, 266-69 (1995) (same). This theory has the same weaknesses as the argument under *Press Enterprise II*, however, since jury lists, as opposed to transcripts of the voir dire proceedings, may not be one of those documents to which the *press* has historically had access, even if *counsel* has. See Joshua Okun, *Investigation of Jurors by Counsel: Its Impact on the Decisional Process*, 56 Georgetown L. J. 839, 850 nn.41-42 (1968) (collecting cases and court rules denying the release of jury lists); *Juror Privacy* (cited in note 5) (same). At least one court has noted that there is no constitutional or common law right of access to jury lists not entered into evidence or filed in court. *Newsday, Inc. v. Sise*, 71 N.Y.2d 146, 518 N.E.2d 930 (1987).

123. See *Gannett*, 571 A.2d at 750-51 (finding that disclosure of the jurors' identities to the press and the public "promotes neither the fairness nor the perception of fairness, when the parties are provided with the jurors' names and all proceedings are open to the public"); *Newsday*, 518 N.E.2d at 933 n.4 ("Inasmuch as petitioner has not contended that it has been denied access to any judicial proceedings or to any transcripts of any proceedings, petitioner's constitutional right of access has not been violated"); *Edwards*, 823 F.2d at 120 (upholding the trial judge's decision to edit juror names from the transcript, noting the jurors' interest in privacy and freedom from harassment and concluding that the redacted transcripts revealed the "substance and significance of the issues"). As an analogy, one could not very well claim that the failure to provide voter identities deprives the press of the ability to cover elections and their results.

als[124] are preserved by unfettered access to proceedings in which the jurors are numbered, not named. As the Supreme Court itself suggested in *Press Enterprise I*, if there is a valid concern for juror privacy, it is better to allow media access to selection proceedings that identify jurors by number than it is to bar the press from the jury selection proceedings altogether.[125] Juror anonymity permits the press to continue to cover jury selection and the jury during the trial in lurid detail (recall the description of Juror Number 92, above), disclosing everything and anything that may titillate and inform readers, listeners, and viewers—except for the faces, names, and addresses of the jurors themselves.[126]

Sometimes press advocates will join the defense bar in the argument that juror anonymity promotes deception during voir dire, belittling the potential benefits of anonymity on the reliability of juror responses.[127] This argument is particularly disingenuous given the media's passionate and steadfast defense of confidentiality for its *own* sources on the basis that absolute anonymity is the only way to obtain information that would otherwise expose these sources to retaliation or embarrassment. (Indeed, when jurors do choose to speak about

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124. See *Press Enterprise I*, 464 U.S. at 508-09 (noting that public trials promote confidence that standards of fairness are being observed and provide an outlet for retributive feelings of the public).

125. Id. at 512-13 (striking down an order barring the press from voir dire in a trial involving the rape and murder of a teenage girl, noting that the judge failed to consider whether he could have disclosed "the substance of the sensitive answers while preserving the anonymity of the jurors involved" and that a valid privacy right may rise to such a level that the name of a juror should be withheld to protect the person from embarrassment); id. at 520 (Marshall, J., concurring) ("[T]he constitutionally preferable method for reconciling the first amendment interests of the public and the press with the legitimate privacy interests of jurors and the interests of defendants in fair trials is to redact transcripts in such a way as to preserve the anonymity of jurors while disclosing the substance of their responses"). See also *Edwards*, 823 F.2d at 120 ("The usefulness of releasing jurors' names appears to us highly questionable. The transcripts will reveal the substance and significance of the issues").

126. In popular trials, the press provides the public with daily reports of when jurors roll their eyes or chuckle, what they wear to court, and how they fix their hair. See Andrea Ford, *Simpson Panelists Offer Jury Watchers Few Clues*, L.A. Times A1, A22 (Feb. 12, 1995) (detailing every move of O.J. Simpson's unnamed jurors, describing their clothes, and listing, in an "infobox," a few tidbits about each juror, such as, "Black woman, 25. Flight attendant, very demure, gives impression of shyness. . . . White woman, 24. Fire department receptionist. A favorite in the press corps for her eccentric hairdo and guileless comments during voir dire").

127. One writer, for instance, blamed anonymity for the failure to discover a relationship between a juror and a defendant, after the juror deliberately lied in order to get on the jury and took bribes from the defendant, a mob boss. Marcia Chambers, *Sua Sponte*, Natl. L. J. 17 (Nov. 30, 1992). This can hardly be a common scenario, given the penalties for perjury and the random nature of jury selection in large communities where anonymity is feasible. See Litt, 25 Colum. J. L. & Soc. Probs. at 415 (cited in note 35) ("Through the publication of jurors' names, the media has, in the past, induced third parties to produce information establishing that a juror had not been completely candid during the *voir dire*").

their jury experiences to the press, they often do so on the condition that they remain anonymous.[128]) On occasion, the publication of a juror's name along with the information provided by that juror has prompted a vigilant news reader to question a juror's honesty.[129] Still, the amount of misinformation revealed by the publication of juror names may be dwarfed by the amount of deception that publicity inspires. Because the practice of juror naming does not play a significant positive role in the trial process today, we need not enshrine it in the First Amendment.[130]

There remains the question of whether the press can claim a right of access *after* the verdict to the names of jurors whose anonymity was protected during trial in order to interview jurors about their experiences and uncover injustice.[131] Unlimited postverdict access to jurors' names, however, is not necessary to secure a *defendant's* right to a fair trial under the Constitution.[132] It is hard to see why the press should enjoy greater privileges. If anyone deserves juror names, it is the attorney for the party most immediately affected by the jury's conduct, who is also bound to follow professional rules of ethical behavior and remains subject to the control of the court.[133]

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128. For a few recent examples, see Tracy Breton, *Judge Refuses to Grant Ex-Brown Coach a New Trial*, Providence Journal-Bulletin 5B (April 28, 1995) (relying on information from a juror who agreed to talk to reporters on the condition of anonymity); Marc Davis, *Bystander Shot by Police Officer Asks for $250,000,* Virginian Pilot B3 (April 6, 1995) (quoting a juror who requested anonymity); Peter Rowe, *Choose to Disagree, but Do it Right*, San Diego Union-Trib. E1 (March 28, 1995) (quoting the jury forewoman in a case against Operation Rescue who asked to remain anonymous); Peg Tyre and Scott Ladd, *Trial Decided by Paper Trail*, Newsday 5 (March 5, 1994) (quoting an anonymous juror in the World Trade Center bombing case and reporting that when given the opportunity to talk to the press after the verdict, all of the jurors declined).

129. See Litt, 25 Colum. J. L. & Soc. Probs. at 415 n.274 (cited in note 35).

130. Even if a court concluded that juror anonymity does implicate the media's qualified right of access to public trials, the stringent requirements that must be met in order to justify closing proceedings to the media do not apply to such a minor intrusion. The substitution of numbers for names does not require the exacting standards of either *Press Enterprise I* or *II*. A judicial or legislative determination that juror apprehension is widespread, or a juror's individually expressed preference for anonymity, should be sufficient proof that removing juror identity from public scrutiny will promote more reliable jury proceedings and encourage citizen participation on juries.

131. As Robert Raskopf has argued, jury impropriety is occasionally uncovered through media interviews with jurors. These revelations may not result in invalidation of the verdict but "may result in reforms designed to minimize the possibility of such irregularities in the future," such as misunderstanding of instructions. Raskopf, 17 Pepperdine L. Rev. at 372 & n.107 (cited in note 119). Of the 5% of respondents to a survey on jury service who opposed anonymity, one-fifth opposed it because they thought it would impede the ability of scholars and journalists to keep tabs on the system. Glamour at 159 (cited in note 16).

132. See text accompanying notes 105-09.

133. At the very least, media access should be no greater than defense access, conditioned upon the same type of good-cause showing that a defendant must advance in order to obtain juror names. See, for example, *Gannett*, 571 A.2d at 750 ("We see no reason to afford the media

Some courts have attempted to balance the benefits of juror anonymity with the interest of the press in publishing jurors' stories by delaying the release of juror names following the trial for a period of time that ranges from one week to six months.[134] Gestures toward anonymity that delay rather than prevent exposure are a good start,[135] but they do not go far enough. It is not much of a comfort to a juror to learn that the court has guaranteed that all harassment, intimida-

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greater rights of access to jurors' names than the Constitution permits the parties to a trial"); Tex. Crim. Pro. Code Ann. art. 35.29 (providing for some preliminary showing of a good cause for both the media and a party); U.S. D. Md. Rule 16 (providing that in order to interview a former juror, anyone must first obtain an order of the court); U.S. D. La. Rule 13.05E ("Under no circumstances except by leave of Court granted upon good cause shown shall any . . . person examine or interview any juror"); West. Ark. Rule E-1 ("No juror shall be contacted without express permission of the Court and under such conditions as the Court may prescribe"). But see *In re Express-News Corp.*, 695 F.2d 807, 810 (5th Cir. 1982) (holding that under a local court rule requiring good cause to be shown to obtain access to jurors, the right to gather news is good cause sufficient to allow interviews).

As Professor Albert Alschuler has recognized, the prevailing practice today is backwards: the press enjoys more freedom to interrogate jurors about their deliberations than defense counsel. See Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. Chi. L. Rev. 153, 226 (1989) ("Our legal system fosters confidentiality by forbidding disclosure only when disclosure would save a defendant from wrongful punishment. We permit disclosure for the sake of informing and entertaining the public and amusing friends at cocktail parties"). Professor Alschuler, however, considers this discrepancy a reason for greater defense access to jurors, equivalent to that enjoyed by the press. Id. See also Lawsky, 94 Colum. L. Rev. at 1962 (cited in note 106). I agree that the limits on parties and press need to be aligned, but I would use the limited access that parties receive as the appropriate standard. See also Goldstein, 1993 U. Ill. L. Rev. at 307 (cited in note 35) (arguing that "there is every reason to suppose that interrogation of jurors by the media is even more likely than questioning by lawyers and judges to interfere with the policies supporting privacy and secrecy . . . . [J]ournalists are not constrained in what they ask, as are lawyers, by professional discipline or by rules of ethics").

For examples of judicial reluctance to limit press access, as distingnished from defense access, to jurors, see *Journal Publishing Co. v. Mechem*, 801 F.2d 1233, 1236 (10th Cir. 1986) (reasoning that because the media has less incentive to upset a verdict than does a losing party or an attorney for a convicted defendant, a court may broadly proscribe attorney and party contact with former jurors, but does not have the same freedom to restrict press interviews with former jurors); *Antar*, 38 F.3d at 1348 (striking down a trial judge's order barring the media from interviewing former jurors when not supported by findings of impending threat of jury harassment by the press); *Globe Newspaper*, 920 F.2d at 91 ("[S]tronger reasons to withhold juror names and addresses will often exist *during* a trial than *after* a verdict is rendered. After the verdict, release normally would seem less likely to harm the rights of the particular accuseds to a fair trial").

134. *United States v. Doherty*, 675 F. Supp. 719 (D. Mass. 1987) (finding that the press has a constitutional right of access to juror names after a verdict, but allowing a seven-day grace period before releasing names to allow intense public interest to dissipate and jurors to "rejoin their families and take up their private pursuits"). The names of the former jurors in the Lozano trial were released six months after the verdict. See Abramovsky, N.Y. L. J. at 3 (cited in note 59).

135. As jury researcher Thomas F. Hafemeister states, "Generally the attention given to a trial dies down dramatically a few days after the verdict as the media moves on to other stories and the trial becomes old news." Hafemeister, *Letter* at 2 (cited in note 3).

tion, or retaliation will be postponed for a little while after she and her fellow jurors announce their verdict.

Unless there is a showing that juror names will assist in establishing that misconduct undermined the fairness of the verdict, we need not offer the press, the public, or defendants any more opportunity to intrude into the safety, privacy, and deliberations of jurors than jurors themselves offer voluntarily. Considering the market for juror tell-all stories, we can hardly expect every juror to remain anonymous forever.[136] In many cases, jurors will relinquish their anonymity willingly, providing insights into jury deliberations.[137] In other cases, journalists and jury researchers may be able to arrange with judges to interview former jurors and report findings without revealing juror identities.

Juror anonymity is also less burdensome to the rights of the press than either restrictions on the publication of known information about jurors[138] or limits on the content and nature of press

136. See Strauss, 12 Yale L. & Policy Rev. at 394 (cited in note 55) (surveying incidents of "juror journalism" and concluding that the relatively small number of reported juror journalists is "only the tip of the iceberg" and that "the number of jurors contemplating fame and fortune . . . will almost certainly increase substantially in the future," noting increased television coverage, public appetite for crime stories, and the proliferation of talk shows encouraging jurors to reveal details).

137. Dolan, L.A. Times at A1 (cited in note 23); Lawsky, 94 Colum. L. Rev. at 1968 n.138, (cited in note 106) (noting television appearances of jurors); Paul Thaler, *The Watchful Eye: American Justice in the Age of the Television Trial* 178 (Praeger, 1994) (recounting media solicitations of ex-jurors); Abramson, *We, the Jury* at 204 n.* (cited in note 65) (recounting juror descriptions of deliberations in the trial of the Branch Davidians, a trial in which the jurors were anonymous); Strauss, 12 Yale L. & Policy Rev. at 421 (cited in note 55) (noting the temptation of fame, even if profit from juror journalism is banned).

138. Prior restraints are invariably struck down, in part because less burdensome alternatives, such as limiting access to jurors' names and addresses, are available. See, for example, *State ex rel. New Mexico Press Assn. v. Kaufman*, 98 N.M. 261, 648 P.2d 300 (1982) (rejecting a court order that prevented the publication of jurors' names because the judge had failed first to explore other reasonable alternatives for guarding against the improper influence of jurors); *State ex rel. Natl. Broadcasting Co. v. Court of Common Pleas*, 556 N.E.2d 1120 (Ohio 1990) (striking down an order preventing publication of jurors' names and pictures as a prior restraint and distinguishing as less restrictive an order that withholds the announcement of jurors' names); *Times Publishing Co. v. State*, 632 So.2d 1072 (Fla. App. 1994) (striking down an order granting the defendant's motion to bar the publication of any juror information, finding that discomfort of potential jurors in the original venue about "being in the glare of media coverage" was not sufficient to warrant a prior restraint and noting that the press did not challenge an order barring the release of juror names and addresses). See generally Diane M. Allen, *Propriety of Order Forbidding News Media From Publishing Names and Addresses of Jurors in Criminal Cases*, 36 A.L.R.4th 1126 (1994).

Allowing reporters to publish names and contact jurors, but only if they can identify them on their own, obviously sends a mixed message about the freedom of the press to report on jury identities. Like many attempts to balance competing interests, however, it is a compromise. See *Globe Newspaper*, 920 F.2d at 88.

investigations of jurors.[139] Anonymous juries are, in sum, an ideal compromise between the interests of jurors, defendants, and the public in a jury free from apprehension about exposure, on the one hand, and the interests of insuring adequate disclosure of the workings of the jury system on the other.

VI. CONCLUSION

The escalating demands of the media upon jurors, intensified in recent years by television coverage of criminal trials, appear to be creating widespread apprehension about jury service. The Supreme Court has recently taken unprecedented steps to protect jurors from the degrading experience of being excluded from jury service because of their race or gender, even when those steps conflict with the interests of criminal defendants.[140] A growing crisis of juror dread may call for strategies that are no less far-reaching.

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139. See *Antar*, F.3d at 1348; *United States v. Sherman*, 581 F.2d 1358 (9th Cir. 1978) (finding that an order prohibiting all contact with jurors by "everyone," including the media, violated the First Amendment absent a finding that such contact would pose a serious and imminent threat to a protected interest); *Express-News*, 695 F.2d at 807 (striking down judicial orders that barred the media from asking jurors about deliberations); *Journal Publishing*, 801 F.2d at 1233 (striking down an order prohibiting all press contact with jurors). But see *United States v. Harrelson*, 713 F.2d 1114 (5th Cir. 1983) (upholding a district court order barring the press from asking jurors about other jurors' votes or asking more than once for an interview).

140. *Georgia v. McCollum*, 505 U.S. 42 (1992) (prohibiting criminal defendants from exercising peremptory challenges on the basis of race); *J.E.B. v. Alabama Ex Rel. T.B.*, 114 S. Ct. 1419, 128 L. Ed. 2d 242 (1994) (prohibiting criminal defendants from exercising peremptory challenges on the basis of gender).