Circuitous Thinking

ANONYMOUS JURIES

by Richard Ware Levitt

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> "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."

Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

In 1979 the Second Circuit, in a case of nation-wide first impression, affirmed the use of an anonymous jury. *United States v. Barnes*, 604 F.2d 121 (2d Cir. 1979). Leroy "Nicky" Barnes was the notorious Harlem drug dealer of the 1970s dubbed "Mr. Untouchable" by the New York Times Magazine, who received a life sentence upon his conviction of running a continuing criminal enterprise focused on heroin and cocaine distribution.[1]

There were no murder or obstruction charges in the *Barnes* indictment, nor were there specific allegations that jurors might be targeted for influence. There was, however, evidence that certain defendants had been implicated in violent conduct and that efforts had been made in other Southern District cases to influence jurors. That was enough for Judge Werker to sua sponte withhold the names and addresses of jurors as well as their ethnic and religious backgrounds. And it was enough for Second Circuit Judges Moore and Van Graafeiland to affirm the nation's first anonymous jury, amidst a lengthier discussion of whether the district court's truncated *voir dire* was adequate. The court tersely wrote:

> As to the court's decision to withhold names and addresses of the jurors, appellants take the position that "jurors must publicly disclose their identities and publicly take responsibility for the decisions they are to make ..." (J.Br.28). This, however, is not the law and should not be. If a juror feels that he and his family may be subjected to violence or death at the hands of a defendant or his friends, how can his judgment be as free and impartial as the Constitution requires? If "the anonymous juror feels less pressure" as the result of anonymity (J.Br. 28), this is as it should be a factor contributing to his impartiality. The court's decision as to anonymity and sequestration comported with its obligation to protect the jury, to assure its privacy, and to avoid all possible mental blocks against impartiality.

604 F.2d at 140-41. The court also provided a three-step test for assessing whether an anonymous jury is appropriate: 1) the seriousness of the offenses charged and whether defendants are alleged to be part of a group that possesses the means to harm jurors; 2) whether defendants have engaged in past attempts to interfere with the judicial process, and 3) the degree of pretrial publicity. 604 F.2d at 141.

Judge Meskill, in dissent, found the *voir dire* entirely inadequate to permit the intelligent exercise of peremptory challenges. Although he did not believe the withholding of the jurors' names and addresses alone would have required reversal had other information, such as the jurors' religion and ethnicity, been provided, he saw a slippery slope ahead:

> I am troubled by the implications of today's decision and the uses to which it may be put. "Cases of notorious criminals like cases of small, miserable ones are apt to make bad law. . . . The harm in the given case may seem excusable. But the practices generated by the precedent have far-reaching consequences that are harmful and injurious beyond measurement." *Abel v. United States,* 362 U.S. 217, 241-42, 80 S.Ct. 683, 698, 4 L.Ed.2d 668 (1960) (Douglas, J., dissenting). In my judgment, the district court's decision not to disclose the names and addresses of prospective jurors and at the same time to prohibit inquiry into their ethnic and religious backgrounds on the *voir dire* was error. I would reverse the judgments of conviction and remand for a new trial.

604 F.2d at 167 (Meskill, J., dissenting).

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1. Barnes later cooperated with Rudy Giuliani in the SDNY, and assisted in the successful prosecution of more than 40 murderers and drug dealers -- more than Sammy Gravano. Unlike Gravano, who received a five-year sentence, Barnes served 21 years and was released in 1998 with a new identity and a college degree (*cum laude*).

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Judge Oakes, who dissented with Judges Timbers and Meskill from the denial of rehearing in banc, was just as pointed in his criticism of the panel opinion:

> The panel majority affirming the appellant's convictions adopted an entirely new rule of law that so far as I know stands without precedent in the history of Anglo-American jurisprudence. The panel majority's sanction of the trial of a defendant in a criminal prosecution before an anonymous petit jury, without disclosure of even the approximate community or neighborhood in which the jurors reside and absent requested inquiry into ethnic and religious backgrounds (much of which would be revealed by the usual name and address), strikes a Vermont judge as bizarre, almost Kafkaesque. It makes peremptory challenges for all practical purposes worthless, to me a sorry state of affairs.

604 F.2d at 175 (Oakes, J., dissenting from the denial of rehearing in banc)(footnote omitted).

Today's unprecedented event often becomes tomorrow's yawner. During the many years immediately following *Barnes,* anonymous juries were granted somewhat sporadically, *see United States v. Torres*, 1995 WL 463122, 1995 U.S.Dist. LEXIS 10976 (S.D.N.Y. 1995) (Judge Keenan observing, "In the nearly twelve years during which this writer has been a member of the Federal Judiciary, on only two occasions have anonymous juries been ordered by the Court. *See United States v. Persico,* 621 F. Supp. 842, 876-77 (S.D.N.Y. 1985), *aff'd in part, rev'd in part,* 832 F.2d 705 (2d Cir. 1987), *cert. denied,* 486 U.S. 1022 (1988); *United States v. Montemarano,* 1987 WL 10381, *1, 1987 U.S. Dist. LEXIS 3380 (S.D.N.Y. April 30, 1987)"), but now they are commonplace. True enough, alert district court judges have, on occasion, denied government requests to seat anonymous juries. E.g., *United States v. Millan-Colon,* 834 F.Supp 78 (S.D.N.Y 1993) (Kram, J.); *United States v. Gambino*, 818 F.Supp. 536 (E.D.N.Y. 1993) (Glasser, J.); *United States v. Coonan*, 664 F Supp 861 (S.D.N.Y.) (Knapp, J.), adhered to on reconsideration, 671 F.Supp. 959 (S.D.N.Y. 1987). Additionally, where anonymous juries are impaneled many judges are amenable to extensive *voir dire*, either through questionnaires or in-court questioning, or both.

But the most acute danger of an anonymous jury lies not in the withholding of information but rather in the message sent to the anonymous jurors (who often are escorted to and from court by United States Marshals) that the defendants are guilty and violent. Although the decisional law suggests otherwise, this danger is hardly ameliorated by the "white lie" told to jurors that they are anonymous to protect them from prying reporters; the same jurors who are presumed to understand and apply complex instructions can surely see through this charade. Additionally, meaningful appellate oversight of anonymous juries is virtually non-existent; although the Second Circuit has stressed repeatedly the dangers of anonymous juries, *see, e.g., United States v. Vario*, 943 F.2d 236, 240-41 (2d Cir. 1991), it has never held the empanelling of an anonymous jury to be reversible error. *See United States v. Gibbons*, 602 F.2d 1044 (2d Cir. 1979); *United States v. Thomas,* 757 F.2d 1359 (2d Cir. 1985); *United States v. Ferguson,* 758 F.2d 843 (2d Cir. 1985); *United States v. Persico*, 832 F.2d 705 (2d Cir. 1987); *United States v. Tutino,* 883 F.2d 1125 (2d Cir. 1989); *United States v. Paccione*, 949 F.2d 1183 (2d Cir. 1991); *United States v. Vario*, 943 F.2d 236 (2d Cir. 1991); *United States v. Amuso*, 21 F.3d 1251 (2d Cir. 1994); *United States v. Thai*, 29 F.3d 785 (2d Cir. 1994); *United States v. Wong,* 40 F.3d 1347 (2d Cir. 1994); *United States v. Aulicino*, 44 F.3d 1102 (2d Cir. 1995).[2] In fact, the issue has become so commonplace that all post-1995 Second Circuit decisions discussing the propriety of anonymous juries are "unpublished."

The time has come for the Second Circuit to take a fresh look at the issue. That is not to say that anonymous juries should never be used; certainly there are times when they should be. Just as a defendant may forfeit his right to object on confrontation grounds to the introduction of out-of-court statements made by a person whose absence the defendant has caused or in which he has acquiesced *(see United States v. Mastrangelo*, 722 F.2d 13 (2d Cir. 1983)), so too a defendant can be required to yield whatever right he has to know the identity of his jurors if necessitated by his (or his coconspirators') wrongful conduct. But the Circuit has properly recognized that "[e]mpanelling an anonymous jury undoubtedly has serious implications for a defendant's interest in effectively conducting *voir dire* and in maintaining the presumption of innocence," *United States v. Wong*, 40 F.3d 1347, 1376 (2d Cir. 1994), and the Circuit's continuing oversight of the practice through its published opinions is necessary to assure this extreme measure is not overused.

Recognizing the need for greater Second Circuit oversight does not, however, suggest that defense counsel will – or should – invariably fight the use of an anonymous jury. In truth, virtually every argument for and against anonymity can be turned around and is context-sensitive.[3] For example, to the extent anonymity may restrict the parties' ability to exercise peremptory challenges wisely,

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2. Reversals outside the Second Circuit also are rare. But *see United States v. Sanchez*, 74 F.3d 562 (5th Cir. 1996) (police officer tried for civil rights violations; no evidence of jury threat or extensive pretrial publicity); *United States v. Mansoori,* 304 F.3d 635 (7th Cir. 2002) (use of anonymous jury was error, but harmless).

3. Indeed, anonymity itself provides no sure protection against jury tampering. *See, e.g., United States v. Ruggiero,* 846 F.2d 117 (2d Cir. 1982).

the possibility of a "wild card" juror increases and, consequently, so does the likelihood of a hung jury. On the other hand, to the extent the defense might believe more information is necessarily better, judges granting anonymous jury motions often show greater willingness to engage in extensive *voir dire* on other subjects. Additionally, anonymity might free up a juror to acquit a defendant in a case where the juror might otherwise feel uncomfortable returning to his/her neighborhood after rendering such a verdict. This may well have been the case in the trial of certain of the police officers charged in connection with the assault on Abner Louima.

Although a principal government argument for anonymity is the threat of obstruction of justice – i.e. "reaching" a juror – anonymity might, paradoxically, increase this risk. Anonymous jurors can provide misinformation during voir dire in an effort to be selected for service in a notorious case, believing their lies will not be discovered by counsel or by the press who lack the most basic information to conduct a background check. Judge Meskill made this point in his *Barnes* dissent: "These [juror] lists, and the possibility of investigation, serve another important function as well. They may deter prospective jurors from misrepresenting or minimizing embarrassing or possibly disqualifying aspects of their backgrounds." 604 F.2d at 173.

In John Gotti's 1986 trial before Judge Nickerson in the Eastern District, where an anonymous jury was selected, juror George Pape turned out to have ties Bruno Radonjich, leader of the Westies gang. Pape lied his way onto the jury and contacted Radonjich, who reached out to Sammy "The Bull" Gravano, and accepted a $60,000 bribe to secure Gotti's acquittal. Had the jury not been anonymous, Pape may have been deterred or his potential bias discovered.[4] One commentator observed that notorious trials of the past, such as those of Al Capone and Lucky Luciano, ended in convictions, and muses whether the openness of the jury selection in those cases helped to prevent bribery or other forms of witness tampering. *Secret Justice: Anonymous Juries – The Growing Trend Toward Anonymous Juries*, by Ashley Gauthier, available at http://www.rcfp.org/cecretjustice/anonymousjuries/trend.html.

To the extent defense counsel lament that anonymous juries increase the chance of conviction, the government might respond that society should not place any value on acquittals that result from a jurors' generalized fear of the possible consequences of conviction. Yet neither should society place any value on convictions that result from juror bias created only by virtue of their anonymity. It has been argued that if anonymity instills fear in a jury it is the defendant who benefits, and that any resulting conviction is returned despite those fears, not because of them. But this argument assumes that jurors in such cases are not convicting because the judge's selection of an anonymous jury signaled the jurors that the defendant *is* guilty.

Although even the defense might prefer an anonymous jury in certain cases, in most cases the practice creates risks that far outstrip the benefits, by sending a clear message – whatever the jurors are told is the reason for their anonymity – that the defendants are guilty. Although the Second Circuit has repeatedly said a charge of drug dealing or organized crime-related activity will not, in itself, justify the selection of an anonymous jury but must be supported by additional circumstances, the minimum quantum of additional information required by the case law to satisfy this standard exists in virtually every such case. In organized crime cases, for example, the government routinely cites to instances where organized crime members (such as John Gotti) have bribed jurors or threatened witnesses, and this, combined with intense media coverage, generally suffices to justify anonymity, whether or not such charges have been lodged against the defendants on trial. In *Vario*, where the court rejected the notion that a defendant's organized crime membership would suffice to empanel an anonymous jury, it nonetheless agreed with the district court's decision to do so, citing "[t]he recent experience of jury tampering in the case of *United States v. Gotti*,' an unrelated organized crime trial, coupled with the obstruction of justice charge against one of the co-conspirators..." 943 F.2d at 239-40 (quoting district court opinion). In *United States v. Persico,* the selection of an anonymous jury was upheld based on the district court's allusion to "the violent acts alleged to have been committed in the normal course of Colombo Family business, the Family's willingness to corrupt and obstruct the criminal justice system, and the extensive publicity this case is expected to continue to attract." *United States v. Persico,* 832 F.2d at 717 (quoting district court opinion).

Endorsing such rationales, however, tilts the balance too far in favor of anonymous juries, at the expense of the presumption of innocence and the intelligent use of peremptory challenges. And recent cases have shown the government only too willing to take full advantage of the Circuit's lack of oversight by frequently asking for – and getting – anonymous juries in marginal cases. Greater scrutiny by the Circuit will not eliminate all anonymous juries – nor should it – but it will put the government and the district courts on notice that anonymous juries are not available merely for the asking.

4. Pape was eventually convicted, in 1992, upon Gravano's testimony. Radonjich fled to his homeland and became a Serbian freedom fighter, but was arrested at Miami International Airport on New Year's Day 2000. The charges against him were dropped after Gravano – the intended witness against him – was arrested on drug charges.