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# CONSTITUTIONAL LAW—"HAD ANYTHING BEEN WRONG, WE SHOULD CERTAINLY HAVE HEARD": THE ANONYMOUS JURY IN AMERICA

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CONSTITUTIONAL LAW—“HAD ANYTHING BEEN WRONG,  
WE SHOULD CERTAINLY HAVE HEARD”<sup>1</sup>: THE ANONYMOUS JURY  
IN AMERICA

INTRODUCTION

On the morning of June 30, 2003, Trovon Ross knocked on the door of Annie Christensen, his ex-girlfriend.<sup>2</sup> Annie answered the door and let Trovon into the front room.<sup>3</sup> Annie then called James May, her current boyfriend, from the bedroom.<sup>4</sup> Trovon questioned Annie about James.<sup>5</sup> When Annie was unresponsive, Trovon pulled a gun from his waistband and put the questions to her again.<sup>6</sup> Annie asked the distraught Trovon to leave. But Trovon was not finished.<sup>7</sup> He turned his inquiry to James, who was equally unresponsive.<sup>8</sup>

There are four things that will make any one of us step over the line: love, fear, ambition, and money.<sup>9</sup> That morning, love got the best of Trovon Ross. He grabbed Annie, pointed the gun at her, and pushed her into the bedroom.<sup>10</sup>

James feared the worst and tried to intervene. He warned Trovon that if he went missing the Air Force would come looking for him.<sup>11</sup> Seeing that Trovon was unmoved by this appeal, James fled. He ran to the garage and got into his car.<sup>12</sup> From inside the house he heard three gunshots.<sup>13</sup> He tried to start his car but could not without blowing into a breathalyzer ignition interlock device, and his breathing was too panicked for the device to work.<sup>14</sup>

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1. W.H. AUDEN, *The Unknown Citizen (To JS/07/M/378 This Marble Monument is Erected by the State)*, in COLLECTED POEMS 252 (Edward Mendelson ed., Vintage Int'l 1991) (1939).

2. State v. Ross, 174 P.3d 628, 630 (Utah 2007).

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. ROBERT PENN WARREN, ALL THE KING'S MEN 205 (1946).

10. *Ross*, 174 P.3d at 630.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

Moments later, Trovon entered the garage.<sup>15</sup> James threw the keys out of the car and ran down the street on foot.<sup>16</sup> He did not make it very far before Trovon fired six shots at him.<sup>17</sup> The second of these went through his right arm and into his chest.<sup>18</sup> A passing motorist stopped to help James and phoned the police.<sup>19</sup> By this time, several neighbors had also called the police and directed the officers to Trovon's white van.<sup>20</sup> Several police cars attempted to stop the van, but Trovon would not pull over.<sup>21</sup> Finally, he was cornered in a cul-de-sac.<sup>22</sup> A brief foot chase followed, but the officers arrested him at last.<sup>23</sup>

In November 2004, the State of Utah tried Trovon for the aggravated murder of Annie Christensen, the attempted aggravated murder of James May, and failure to obey a police officer's signal to stop.<sup>24</sup> The trial judge, concerned about publicity and media attention surrounding the case, empaneled an anonymous jury "to protect the identity and privacy of the jurors[ ] and to protect jurors, witnesses, and parties from unnecessary commotion, confusion, or influence."<sup>25</sup> Thus protected, the jury convicted Trovon on all charges.<sup>26</sup> The judge sentenced him to three concurrent prison terms—life without parole, five years to life, and zero to five years.<sup>27</sup>

This Note will examine the *Ross* court's application of established anonymous jury jurisprudence. Empaneling an anonymous jury is an extreme but sometimes necessary step that courts must take during the criminal trials of certain defendants.<sup>28</sup> When the established guidelines for empanelment are properly applied, judges can protect the jury's essential elements from the potentially devastating influence of defendant misconduct and the disruption of procedure that attends extraordinary media coverage. But if

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15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 631.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* (alteration in original) (internal quotation marks omitted).

26. *Id.*

27. *Id.*

28. *See, e.g.,* United States v. Paccione, 949 F.2d 1183, 1192 (2d Cir. 1991); United States v. Gambino, 809 F. Supp. 1061, 1064-65 (S.D.N.Y. 1992); State v. Ferguson, 729 N.W.2d 604, 609 (Minn. Ct. App. 2007).

there is no defendant misconduct, or if the only threat to procedure is from the media, empaneling an anonymous jury is unwarranted, beyond the scope of the judge's discretion, and is itself an impairment of the jury's essential elements.

The first section of this Note will review the history of the jury in England and its adoption by the American colonies. The purpose of this review is to provide a context and background for modern Sixth Amendment jurisprudence and for Justice White's important articulation of the jury's essential elements in *Williams v. Florida*.<sup>29</sup> This section will then consider the use of anonymous juries in federal district courts and their introduction and use in state courts. Two lines of cases will be considered: the *Barnes-Paccione*<sup>30</sup> line of cases, which established the circumstances under which an anonymous jury may be empaneled, and the *Press-Enterprise*<sup>31</sup> cases, which outlined the relationship between the constitutional requirement for a public trial in the Sixth Amendment and the right of the press and public to open access at trial in the First Amendment.<sup>32</sup>

The second section will consider how the anonymous jury doctrine fits into established Sixth Amendment jurisprudence. This analysis will specifically suggest that the guidelines for empaneling anonymous juries, as established in the *Barnes-Paccione* line of cases, achieve legitimacy by securing the essential elements of the jury articulated in *Williams v. Florida*.<sup>33</sup> But because the *Barnes-Paccione* guidelines protect different aspects of these interests in very particular ways, courts cannot haphazardly apply them. A unique calculus ought to be considered when circumstances of the trial do not meet all of the guidelines. The last part of this section will argue that the *Ross* case, in which only two of the five guidelines were met, is a startling example of miscalculation in applying the *Barnes-Paccione* guidelines. This Note will conclude with the suggestion that state courts should be more rigid in their application of these factors when the temptation to empanel an anonymous jury arises.

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29. 399 U.S. 78, 86-103 (1970).

30. *Paccione*, 949 F.2d at 1192; *United States v. Barnes*, 604 F.2d 121, 134-43 (2d Cir. 1979).

31. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 7-14 (1986) (*Press-Enterprise II*); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510-13 (1984) (*Press-Enterprise I*).

32. *See Press-Enterprise II*, 478 U.S. at 7.

33. *Williams*, 399 U.S. at 86-103.

## I. HISTORY OF THE JURY

### A. *The Significance of the Jury*

A jury, in simple terms, is a group of people “taken from the community at large, summoned to find the truth of disputed facts, who are quite distinct from the judges or court.”<sup>34</sup> Juries serve on particular occasions and then recede back into the community once their task is complete.<sup>35</sup> Given the jury’s transient and temporary nature and the fact that it is composed of twelve people of average intelligence, the marvel of the system is that the technicality and complexity of the law, however great, will “not affect [the jury’s] fitness to decide on the effect of proofs.”<sup>36</sup>

But the jury is more than a utilitarian marvel. It is as well a political institution, one that is “as extreme a consequence of the doctrine of the sovereignty of the people as universal suffrage.”<sup>37</sup> “It is to trial by jury,” according to Lord Russell, “more than even by representation . . . that the people own the share they have in the government of the country.”<sup>38</sup> Alexis de Tocqueville celebrated the Anglo-American jury as “[a] judicial institution which has thus commanded the approval of a great nation over centuries and has been copied enthusiastically in every stage of civilization, in every climate and under every form of government.”<sup>39</sup> From its mysterious beginnings, the jury earned its legitimacy not as an efficient decision maker but as a protector of individual rights.

### B. *The Development of the Jury in England*

The jury as we know it seems to have had its beginnings as an innovation of Henry II.<sup>40</sup> Henry consolidated the English legal sys-

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34. WILLIAM FORSYTH, HISTORY OF TRIAL BY JURY 7 (Lawbook Exchange 1994) (1894).

35. *Id.*

36. *Id.* at 9.

37. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 317, 318 (Gerald E. Bevan trans., Penguin Books 2003) (1835).

38. FORSYTH, *supra* note 34, at 358 (quoting JOHN RUSSELL, AN ESSAY ON THE HISTORY OF THE ENGLISH GOVERNMENT AND CONSTITUTION, FROM THE REIGN OF HENRY VII, TO THE PRESENT TIME 199 (1821), available at [http://www.archive.org/stream/essayonhistoryof00russ/essayonhistoryof00russ\\_djvu.txt](http://www.archive.org/stream/essayonhistoryof00russ/essayonhistoryof00russ_djvu.txt)).

39. DE TOCQUEVILLE, *supra* note 37, at 317.

40. HAROLD J. BERMAN, LAW & REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 448 (1983); see THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY 1200-1800, at 9-13 (1985).

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tem by imposing royal law upon all criminal and civil matters.<sup>41</sup> Specifically, he combined the inquest by witness with the issuance of judicial writs.<sup>42</sup> Writs, in Henry’s time, were royal commands ordering a lord to settle a land dispute or ordering the sheriff to convene the hundred.<sup>43</sup> Henry’s writs set forth a narrow factual test, put the questions of fact before a sworn inquest of neighbors, and established royal jurisdiction over the proceedings.<sup>44</sup> The consolidation succeeded because it provided “a more rational type of law and . . . enlist[ed] community participation in administering it.”<sup>45</sup> But it would be a mistake to suppose that the communal nature of Henry’s innovation had to do with anything except calculated Norman efficiency; Henry’s object was “to compel people to inform on one another.”<sup>46</sup> Despite the king’s tyrannical motive, community participation almost certainly lent a popular legitimacy to the enterprise.<sup>47</sup> And circumstances were such that jurors and the accused were known to one another.<sup>48</sup> The persistence of these inquests into modern times is a testament to their popular appeal, for these panels were essentially the forerunners of grand juries.<sup>49</sup>

Along with trial by ordeal in 1215, the other ancient methods of trial—battle and compurgation—eventually fell off.<sup>50</sup> In their

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41. BERMAN, *supra* note 40, at 445-46. **R**  
42. *Id.* at 448.  
43. *Id.* at 447. The “hundred” is an administrative division of an English county. BLACK’S LAW DICTIONARY 809 (9th ed. 2009). Hundreds, in former times, had their own courts. *Id.*  
44. BERMAN, *supra* note 40, at 448; GREEN, *supra* note 40, at 10. **R**  
45. BERMAN, *supra* note 40, at 445-46; *see also* GREEN, *supra* note 40, at 10. **R**  
46. BERMAN, *supra* note 40, at 451. **R**  
47. *See* GREEN, *supra* note 40, at 20 (“The power of the jury may have reflected more than its institutional setting and role: it may have reflected a social understanding about the appropriate circumstances under which a person’s life might be surrendered to the Crown.”). **R**  
48. *See* FORSYTH, *supra* note 34, at 165-66; GREEN, *supra* note 40, at 10. **R**  
49. BERMAN, *supra* note 40, at 451; NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES: THE VERDICT 24 (2007). Panels of this sort were not Henry’s innovation. BERMAN, *supra* note 40, at 448. Rather, Henry made these panels arms of the king’s administration. *Id.* **R**  
50. FORSYTH, *supra* note 34, at 165. There were four methods of proof used to settle disputes in England prior to the jury trial: “trial by wager of battle, trial by ordeal, compurgation, and trial by witnesses.” VIDMAR & HANS, *supra* note 49, at 21. In the trial by battle, the parties would swear to their version of the facts, and each would offer to prove his side by battle or by hiring a champion to do battle for him. MAXIMUS LESSER, HISTORY OF THE JURY SYSTEM 91 (William S. Hein & Co. 1992) (1894). The loser would be severely punished for swearing falsely. *Id.* Trial by ordeal was also called *judicium dei*, a procedure that overlapped with religious ritual. *See id.* at 81; VIDMAR & HANS, *supra* note 49, at 22. There were various methods of ordeal. The accused, for example, might be bound hand and foot and thrown in a lake. *Id.* If she **R**

place arose a tribunal similar to the inquest that had brought the accusation.<sup>51</sup> This new panel retained the neighbors, who likely knew all the circumstances of the case.<sup>52</sup> By the reign of Edward III (1327), the jury that indicted and the jury that tried facts were two separate bodies.<sup>53</sup> The idea behind the separation seems to have been to afford the accused a fair outcome.<sup>54</sup> As the trial by ordeal fell away, there was no other supernatural test to which the accused could appeal.<sup>55</sup> The judges maintained the fiction that the accused must therefore “choose” to accept the verdict of his neighbors.<sup>56</sup> The second jury, different from the one that indicted, made the trial fairer and so encouraged the defendant’s consent.<sup>57</sup> A familiar form of the jury system was thus in place by the middle of the fourteenth century.<sup>58</sup>

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sank, she was innocent; if she floated, she was guilty. *Id.* Floaters were retrieved from the lake and branded or executed. *Id.* Alternatively, she might be made to carry a hot iron so many feet. *Id.* The blister was then examined after several days. A clean blister meant innocence—a festering one guilt. *Id.* By 1215, Pope Innocent III had seen enough. *Id.* at 23. The Fourth Lateran Council forbade priests from participating in the ordeal, and it soon fell away in England. BERMAN, *supra* note 40, at 251; VIDMAR & HANS, *supra* note 49, at 23. Compurgation was “essentially a test of good character.” VIDMAR & HANS, *supra* note 49, at 23. This method of proof required the accused to round up a certain number of people (usually twelve) to swear regarding her good character. Finally, trial by witnesses was similar to compurgation except that the witnesses testified to facts rather than to character. BERMAN, *supra* note 40, at 448; VIDMAR & HANS, *supra* note 49, at 23.

51. See generally FORSYTH, *supra* note 34, at 165-72.

52. *Id.* at 172.

53. *Id.* at 170. A statute of the time declared: “[N]o indictor shall be put in inquests upon deliverance of the inditees of felonies or trespass, if he be challenged for such cause by him who is indicted.” *Id.* (quoting 25 Edw. 3, c. 3 (Eng.)).

54. See FREDERIC W. MAITLAND & FRANCIS C. MONTAGUE, A SKETCH OF ENGLISH LEGAL HISTORY 59-60 (James F. Colby ed., 1915).

55. *Id.* at 59.

56. *Id.* The notion of a choice is illusory, but it demonstrates certain niceties of the medieval mind that, were it not for the often tragic results, would be almost comical. Trial by ordeal was understood to be an ancient privilege—the defendant’s opportunity to invoke the judgment of God. *Id.* at 60. But even after the trial by ordeal was no longer available, the notion persisted that the accused did not have to submit to a trial by mere men. *Id.* at 60-61. Therefore, if the accused did not agree to a jury trial, he was subjected to the *peine forte et dure*. *Id.* at 60. By this innovation, the accused was laid out naked on the dungeon floor, and heaping weights were placed upon him until he agreed to accept the verdict of his neighbors. *Id.*

57. *Id.*

58. FORSYTH, *supra* note 34, at 170; LESSER, *supra* note 50, at 148.

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Once the jury was established, king and subject alike recognized its advantages and frequently exploited them.<sup>59</sup> This reality was not lost on the Framers of the United States Constitution.<sup>60</sup>

C. *The Development of the Jury in America*

1. Colonial and Revolutionary Era Juries

The jury system was present in the American Colonies long before the foundation of the United States.<sup>61</sup> The colonists understood and admired the principles of jury trial, and a fierce desire to protect rights established by this system lay at the very foundation of the United States.<sup>62</sup> These sentiments can clearly be seen in the colonists' response to England's passage of the hated trade and revenue laws in the 1760s and 1770s.<sup>63</sup> A resolution of the Stamp Act Congress of 1765 proclaimed "[t]hat trial by jury is the inherent and invaluable right of every British subject in these colonies."<sup>64</sup> English customs officials recognized that "provincial juries" would not cooperate in enforcing these regulations, and Parliament responded by giving jurisdiction over these cases to judges without juries.<sup>65</sup> Parliament's interference with the colonists' jury rights led to increasing hostility against England.<sup>66</sup> It is no surprise, therefore, that once the egg was hatched, the Declaration of Independence criticized George III for having "combined with others, to subject us to a jurisdiction foreign to our constitutions, and unacknowledged by our laws; giving his Assent to their Acts of pretended Legislation: . . . For depriving us, in many cases, of the benefit of Trial by Jury."<sup>67</sup>

The language of the Constitution likewise demonstrates that the Framers wished to preserve the jury as a fundamental institu-

59. See generally GREEN, *supra* note 40, at 28-64; VIDMAR & HANS, *supra* note 49, at 27-39.

60. See *Duncan v. Louisiana*, 391 U.S. 145, 151-52 (1968); VIDMAR & HANS, *supra* note 49, at 47-54.

61. LESSER, *supra* note 50, at 151; see VIDMAR & HANS, *supra* note 49, at 47. The Virginia Company's charter provided for jury trial in 1606; New Plymouth and the Massachusetts Bay Colony recognized trials by jury in 1623 and 1628 respectively; and jury trial was available in Rhode Island as early as 1647, prior to its formal establishment as a colony. *Id.*

62. See VIDMAR & HANS, *supra* note 49, at 51, 52-54.

63. RANDOLPH N. JONAKAIT, *THE AMERICAN JURY SYSTEM* 24 (2003).

64. *Duncan*, 391 U.S. at 152 (citation and internal quotation marks omitted).

65. JONAKAIT, *supra* note 63, at 24; VIDMAR & HANS, *supra* note 49, at 51-52.

66. JONAKAIT, *supra* note 63, at 24.

67. THE DECLARATION OF INDEPENDENCE paras. 15, 20 (U.S. 1776); see also LESSER, *supra* note 50, at 151.

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tion of justice for the new nation.<sup>68</sup> Article III declares that “[t]he Trial of all Crimes . . . shall be by Jury.”<sup>69</sup> Furthermore, such a trial must be “speedy and public,” and the jury both “impartial” and “of the State and district wherein the crime shall have been committed.”<sup>70</sup>

But it was not until the 1960s and 1970s that the finer contours of the Sixth Amendment right to a jury were marked out by case law. In these decisions, the Supreme Court questioned how much of the common-law jury the Founders wished to preserve in the text of Article III and the Sixth Amendment.<sup>71</sup> These cases considered whether, for example, a jury’s verdict must be unanimous<sup>72</sup> and whether a jury of less than twelve was constitutional.<sup>73</sup> The Supreme Court addressed this last question in 1970 in *Williams v. Florida*.<sup>74</sup>

In *Williams*, the Court reviewed the “very scanty history” of the provision for jury trials in Article III and the slightly less scanty history of the Sixth Amendment.<sup>75</sup> During the drafting of the Bill of Rights, there was some concern that Article III had left out “the common-law right to be tried by a ‘jury of the vicinage.’”<sup>76</sup> James Madison introduced a version of the Amendment in the House of Representatives that stated, “The trials of all crimes . . . shall be by an impartial jury of freeholders of the vicinage, with the requisite of

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68. U.S. CONST. art. III, § 2, cl. 3; *id.* amends. VI, VII.

69. *Id.* art. III, § 2, cl. 3.

70. *Id.* amend. VI.

71. See *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975); *Apodaca v. Oregon*, 406 U.S. 404, 409-10 (1972); *Williams v. Florida*, 399 U.S. 78, 93-94 (1970); *Baldwin v. New York*, 399 U.S. 66, 68 (1970); *Duncan v. Louisiana*, 391 U.S. 145, 151-54 (1968); *Singer v. United States*, 380 U.S. 24, 31 (1965).

72. See *Apodaca*, 406 U.S. at 404.

73. *Williams*, 399 U.S. at 86-103.

74. See *id.*

75. *Id.* at 93-94 (quoting Felix Frankfurter & Thomas G. Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917, 969 (1926)) (internal quotation marks omitted). There is a great deal of scholarship addressing the broad historical question of how far the Founders wished to go (i.e., how radical or conservative they were) with respect to the Constitution and the English system of law they sought to overthrow. For some interesting histories on this subject, see generally RICHARD HOFSTEDLER, *THE AMERICAN POLITICAL TRADITION* (1948); DAVID HACKETT FISCHER, *ALBION’S SEED* (1989); GORDON S. WOOD, *RADICALISM & THE AMERICAN REVOLUTION* (1991). All of these, to some extent, consider the general revolutionary pattern suggested by Mr. Berman. See BERMAN, *supra* note 40, at 19.

76. *Williams*, 399 U.S. at 93 (quoting F. HELLER, *THE SIXTH AMENDMENT* 31-33, 93 (1951)); see also 3 WILLIAM BLACKSTONE, *COMMENTARIES* \*359 (“[B]y the policy of the ancient law, the jury was to come *de vicineto*, from the neighborhood of the vill or place where the cause of action was laid in the declaration.”).

unanimity for conviction, of the right to challenge, and other accustomed requisites . . . .”<sup>77</sup> This version passed the House with little change.<sup>78</sup> But the Senate debated the matter for over a week and returned a significantly altered Amendment to the House.<sup>79</sup> One of the main objections in the Senate was the vicinage requirement.<sup>80</sup> In many of the states, juries were selected from the state at large or from very large districts rather than from the counties.<sup>81</sup> Enacting the vicinage requirement would have created administrative hardships for those states that drew juries from large areas.<sup>82</sup> The Senate also opposed the House’s version of the Amendment because the bill that would become the Judiciary Act of 1789 already included a vicinage requirement.<sup>83</sup>

Attempts at compromise were of little avail. It was suggested that “with the accustomed requisites” be inserted after “Juries,” but even that was rejected.<sup>84</sup> And so the Amendment took on its ultimate form: “[T]he accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .”<sup>85</sup>

In considering the Founders’ debate over the Sixth Amendment, Justice White made three observations that establish a baseline for analyzing the American jury in the context of constitutional history.<sup>86</sup> First, “the mere reference to a ‘trial by jury’ in Article III” was not construed by the drafters of the Sixth Amendment to include the common-law vicinage requirement.<sup>87</sup> If, therefore, the predicate of relation (i.e., to the area from which jurors are drawn) could be abandoned without violence to the Constitution, so too could the predicate of quantity.<sup>88</sup> One can therefore infer that other predicates could be similarly abandoned without constitutional effect. Secondly, “provisions that would have explicitly tied

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77. *Williams*, 399 U.S. at 94 (quoting 1 ANNALS OF CONG. 435 (1789)).

78. *Id.*

79. *Id.*

80. *Id.* at 95.

81. *Id.* at 95 n.39 (quoting Letter from James Madison to Edmund Pendleton (Sept. 14, 1789), in 1 LETTERS AND OTHER WRITING OF JAMES MADISON 491 (1865)).

82. *Id.* at 95 (quoting Letter from James Madison to Edmund Pendleton, *supra* note 81) (internal quotation marks omitted).

83. *Id.*

84. *Id.* at 95-96.

85. U.S. CONST. amend. VI.

86. *Williams*, 399 U.S. at 96-97.

87. *Id.* at 96.

88. Recall that the issue in *Williams* was whether the defendant could be constitutionally tried by a jury of less than twelve. *Id.* at 79.

the ‘jury’ concept to the ‘accustomed requisites [of common law juries]’ of the time were eliminated.”<sup>89</sup> And thirdly, “where Congress wanted to leave no doubt that it was incorporating existing common-law features of the jury system, it knew how to use express language to that effect.”<sup>90</sup> From these observations Justice White concluded, “[T]here is absolutely no indication in the ‘intent of the Framers’ of an explicit decision to equate the constitutional and common-law characteristics of the jury.”<sup>91</sup>

But the Court’s decision in *Williams* does not strip away the common-law protections that go beyond the letter of Article III and the Sixth Amendment. The Court noted that

[t]he purpose of the jury trial . . . is to prevent oppression by the Government. . . . Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group’s determination of guilt or innocence.<sup>92</sup>

Thus, sometimes the Constitution demands more than the common-law jury provided for (for example, the requirement that a jury represent a fair cross section of the community),<sup>93</sup> and other times less (for example, that a jury need not decide a case by unanimous vote).<sup>94</sup> However, two “essential feature[s]” of the jury *must* remain: The jury must continue to interpose between the accused and his accuser “the commonsense judgment of a group of laymen,” and the jury must reflect “the community participation and shared responsibility that results from [its] determination of guilt or innocence.”<sup>95</sup> Everything else appears to be fair game. It can be argued, therefore, that *Williams* opened the door for federal district courts to empanel anonymous juries in the late 1970s.

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89. *Id.* at 96-97.

90. *Id.* at 97.

91. *Id.* at 99.

92. *Id.* at 100.

93. *See, e.g.*, *Taylor v. Louisiana*, 419 U.S. 522, 526-28 (1975).

94. *See, e.g.*, *Apodaca v. Oregon*, 406 U.S. 404, 412 (1972).

95. *Williams*, 399 U.S. at 100; *see also* ALFREDO GARCIA, *THE SIXTH AMENDMENT IN MODERN AMERICAN JURISPRUDENCE: A CRITICAL PERSPECTIVE* 183 (1992).

## 2. History of Anonymous Jury Jurisprudence

### a. *The Barnes-Paccione line of cases lays the groundwork*

The first anonymous jury in American history was empaneled in 1977.<sup>96</sup> *United States v. Barnes* was an organized-crime trial in the Southern District of New York.<sup>97</sup> Leroy “Nicky” Barnes was tried with fourteen codefendants on counts of conspiracy, violations of federal narcotics laws, and possession of weapons.<sup>98</sup> One of the Government’s witnesses for the trial was Robert Geronimo.<sup>99</sup> Before the trial, the United States Marshals, who had custody of Geronimo, received a phone call during which the caller said, “[i]f he [Geronimo] does anything, he’ll be dead.”<sup>100</sup> Right before the trial began, another alleged Barnes associate, Shepard Franklin, actually did turn up dead.<sup>101</sup> The Government moved to sequester the jury for their safety.<sup>102</sup> The trial judge went a step further and “prohibited the disclosure of the names, addresses, and religious and ethnic backgrounds of potential jurors.”<sup>103</sup> In fact, neither the prosecutor nor defense counsel were able to learn what neighborhood the jurors lived in; rather, they could only inquire as to a “juror’s county of residence.”<sup>104</sup>

Two things are worth noting about the manner by which the anonymous empanelling played out. First, neither of the parties requested an anonymous jury; it was done, rather, as a “judicial fluke.”<sup>105</sup> When counsel pressed the trial judge for an explanation, he responded, “I think jurors are entitled to their privacy and I think their families are entitled to their privacy.”<sup>106</sup> Secondly, the trial judge stymied litigation of the issue at trial level.<sup>107</sup> The U.S. Attorney said nothing when the trial judge announced the anonymous empanelling at a pretrial conference, and the judge rejected

96. Abraham Abramovsky & Jonathan I. Edelstein, *Anonymous Juries: In Exigent Circumstances Only*, 13 ST. JOHN’S J. LEGAL COMMENT. 457, 457 (1999).

97. *United States v. Barnes*, 604 F.2d 121 (2d Cir. 1979); Abramovsky, *supra* note 96, at 457, 460.

98. *Barnes*, 604 F.2d at 130; Abramovsky, *supra* note 96, at 460.

99. Abramovsky, *supra* note 96, at 461.

100. *Barnes*, 604 F.2d at 136 (internal quotation marks omitted).

101. Abramovsky, *supra* note 96, at 461.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 458.

106. *United States v. Barnes*, 604 F.2d 121, 168 (2d Cir. 1979).

107. Abramovsky, *supra* note 96, at 461.

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out of hand the defense's numerous objections.<sup>108</sup> And so, the court empaneled the first fully anonymous jury in the United States without the guidance of prior case law or the participation of the parties.<sup>109</sup> Even so, the Second Circuit approved the trial judge's decision, finding that "[t]here is neither statutory nor constitutional law that requires disclosure of information about jurors unrelated to any issue as to which prejudices may prevent an impartial verdict."<sup>110</sup>

After the Second Circuit's decision in *Barnes*, anonymous juries were used mostly in the Southern and Eastern Districts of New York<sup>111</sup> and primarily for organized-crime cases.<sup>112</sup> But it did not take long for courts in other districts to get into the act,<sup>113</sup> and the federal courts of appeals developed a stable set of rules to guide lower courts.<sup>114</sup> These rules were articulated in their entirety for the first time in *United States v. Paccione*.<sup>115</sup> An anonymous jury could be empaneled if (1) there is a compelling reason to believe that the jury needs protection from outside sources, and (2) reasonable precautions are taken to protect the jury's impartiality and the defendant's fundamental rights.<sup>116</sup> Within this framework, it is in the discretion of the trial judge whether or not to allow an anonymous jury.<sup>117</sup> Compelling reasons, under the first heading, could include (1) the involvement of the defendant in organized crime; (2) the participation of the defendant in a group that has the ability to harm jurors; (3) past attempts by the defendant to interfere with the judicial process; (4) the degree of punishment the accused faces if convicted; and (5) extensive media coverage and exposure of the jurors to harassment by journalists.<sup>118</sup>

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108. *Barnes*, 604 F.2d at 169.

109. Abramovsky, *supra* note 96, at 461.

110. *Barnes*, 604 F.2d at 143.

111. Abramovsky, *supra* note 96, at 458.

112. *Id.* at 464. "Although the Second Circuit has held that 'the invocation of the words "organized crime," "mob," or "mafia," without something more, do not warrant use of an anonymous jury,' the federal courts have in practice concluded that 'something more' is present in virtually every organized crime case." *Id.* (citations omitted).

113. *See, e.g.*, *United States v. Darden*, 70 F.3d 1507 (8th Cir. 1995); *United States v. Edmond*, 52 F.3d 1080 (D.C. Cir. 1995); *United States v. Ross*, 33 F.3d 1507 (11th Cir. 1994); *United States v. Crockett*, 979 F.2d 1204 (7th Cir. 1992).

114. *See United States v. Paccione*, 949 F.2d 1183, 1192 (2d Cir. 1991).

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

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Soon, the issue took hold in the states. In Ohio, a court of appeals overturned a murder conviction because the Fairfield County Court of Common Pleas had empaneled an anonymous jury according to its regular rules of procedure.<sup>119</sup> But the Ohio Supreme Court reversed on the ground that the use of an anonymous jury did not amount to structural error and did not violate a fundamental constitutional right.<sup>120</sup>

In Minnesota, following a series of sensational trials for the murder of a police officer, the Minnesota Supreme Court upheld the empaneling of anonymous juries in three of the defendants' trials.<sup>121</sup> Following the lead of other state courts, the Minnesota Supreme Court used the federal courts' two-prong test to determine that the empaneling was proper.<sup>122</sup>

But not all state courts embraced the idea. In the Massachusetts case of *Commonwealth v. Angiulo*, the Supreme Judicial Court ruled that a trial court empaneling an anonymous jury failed to follow a Massachusetts statute,<sup>123</sup> which provides, "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 . . . ."<sup>124</sup> This failure amounted to plain error.<sup>125</sup> The court explained that "[t]he empanelment of an anonymous jury triggers due process scrutiny because this practice is likely to taint the jurors' opinion of the defendant, thereby burdening the presumption of innocence."<sup>126</sup> Five years later, in *Commonwealth v. Dupont*, the Superior Court of Massachusetts granted a defendant a new trial after an improperly empaneled anonymous jury convicted.<sup>127</sup> While not foreclos-

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119. *State v. Hill*, 737 N.E.2d 577, 581-83 (Ohio Ct. App. 2000), *rev'd*, 749 N.E.2d 274 (Ohio 2001).

120. *Hill*, 749 N.E.2d at 281-82.

121. *See generally* *State v. Bowles*, 530 N.W.2d 521 (Minn. 1995); Jodene Jensen, Case Note, *Constitutional Law: Minnesota's First Anonymous Jury*, 22 WM. MITCHELL L. REV. 133 (1996).

122. *Bowles*, 530 N.W.2d at 530-31; *see also* *Major v. State*, 873 N.E.2d 1120, 1127 (Ind. Ct. App. 2007); *State v. Ferguson*, 729 N.W.2d 604, 611 (Minn. Ct. App. 2007); *State v. Ivy*, 188 S.W.3d 132, 144 (Tenn. 2006).

123. *Commonwealth v. Angiulo*, 615 N.E.2d 155, 174 (Mass. 1993).

124. MASS. GEN. LAWS ch. 277, § 66 (2008); *see also* *Angiulo*, 615 N.E.2d at 168-69. There is a similar statute in the U.S. Code, 18 U.S.C. § 3432, which states, "A person charged with treason or other capital offense shall . . . be furnished with a . . . list of the veniremen . . . stating the place of abode of each venireman . . ." 18 U.S.C. § 3432 (2006); *see also* *Angiulo*, 615 N.E.2d at 169 n.18 (citing § 3432).

125. *Angiulo*, 615 N.E.2d at 170.

126. *Id.* at 171 (citation omitted).

127. *Commonwealth v. Dupont*, 9 Mass. L. Rptr. 1, 17 (Super. Ct. 1998).

ing the possibility of anonymous juries in Massachusetts, the court concluded that there had been “no good reason” for empaneling one.<sup>128</sup> Dupont posed no threat to juror safety, and neither the prosecution nor the charges in the indictments suggested any need to protect the jury from improper influence.<sup>129</sup>

In sum, although the introduction of the procedure in the federal district courts was anomalous at the time, the circuit courts of appeals quickly formulated a set of clear standards by which lower courts could empanel anonymous juries without doing violence to a defendant’s constitutional rights. To be sure, there was a considerable amount of litigation on the matter over the next twenty years. But in most cases the lower courts followed the standards faithfully, and the circuit courts of appeals were satisfied with the results.<sup>130</sup> Such has been the case, in large part, in state courts as well.<sup>131</sup> When a legitimate need for an anonymous jury arose, the *Barnes-Paccione* standards proved a practical and workable way to allow judges to protect jurors’ safety and integrity. But then during the eighties the Supreme Court decided two cases that limited judges’ discretion under the aegis of *Barnes-Paccione*.

b. *The Press-Enterprise decisions consider anonymous juries from a First Amendment perspective*

Several years after the *Barnes* case was decided, a California Superior Court judge closed the voir dire examination of prospective jurors for a rape-murder trial.<sup>132</sup> When Press-Enterprise Company moved for the proceedings to be opened, the trial judge permitted Press-Enterprise “to attend only the general voir dire,”

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128. *Id.* at 7.

129. *Id.* at 11.

130. *See, e.g.*, United States v. Darden, 70 F.3d 1507 (8th Cir. 1995); United States v. Edmond, 52 F.3d 1080 (D.C. Cir. 1995); United States v. Ross, 33 F.3d 1507 (11th Cir. 1994); United States v. Crockett, 979 F.2d 1204 (7th Cir. 1992).

131. *See, e.g.*, State v. Ferguson, 729 N.W.2d 604, 611-12 (Minn. Ct. App. 2007) (holding that mere allegations that the defendant, a gang member and murder suspect, had harassed a witness were sufficient for court to conclude that jury needed protection); State v. Ivy, 188 S.W.3d 132, 144 (Tenn. 2006) (holding that trial court did not abuse its discretion in empaneling an anonymous jury by inferring that the nature of the defendant’s crime (the murder of a witness) was sufficient to warrant protecting the jury). *But see* State v. Hill, 749 N.E.2d 274, 281 (Ohio 2001) (recognizing *Paccione* standard but refusing to find that failure to meet it amounts to structural error); Nancy J. King, *Nameless Justice: The Case for the Routine Use of Anonymous Juries in Criminal Trials*, 49 VAND. L. REV. 123, 131-32 (1996) (citing temporary policies of routine empanelment of anonymous juries in Los Angeles and Riverside Counties, California).

132. *Press-Enterprise I*, 464 U.S. 501, 503 (1984).

which amounted to a mere three days out of the six weeks of voir dire proceedings.<sup>133</sup> The remaining six weeks of voir dire were conducted behind closed doors.<sup>134</sup> Following voir dire, Press-Enterprise moved to have the trial court release the complete transcript of the proceeding. Counsel on both sides argued against the release of the transcript, stating that the release would be a violation of the jurors' right of privacy.<sup>135</sup> The trial judge agreed.<sup>136</sup> Press-Enterprise again sought release of the transcript after the accused had been convicted and sentenced to death, and the judge again denied access, citing the jurors' right to privacy.<sup>137</sup>

But the Supreme Court reversed the trial court's ruling.<sup>138</sup> After reviewing the history of the jury in both England and Colonial America, Chief Justice Burger concluded that "[p]ublic jury selection . . . was the common practice in America when the Constitution . . . was adopted."<sup>139</sup> He went on to draw a distinction (which he admitted was hardly necessary) between the "right" to openness that attaches as between the defendant and the public and openness "as a component inherent in the system benefitting both."<sup>140</sup> He loosely characterized this openness as "the right of everyone in the community."<sup>141</sup>

The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.<sup>142</sup>

Because of this essential quality of the jury system, the Court stated that

[t]he circumstances under which the press and public can be barred from a criminal trial are limited . . . . Where . . . the State attempts to deny the right of access in order to inhibit the disclo-

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133. *Id.*

134. *Id.*

135. *Id.* at 504.

136. *Id.*

137. *Id.*

138. *Id.* at 505.

139. *Id.* at 508.

140. *Id.*

141. *Id.*

142. *Id.*

sure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.<sup>143</sup>

The openness of which Chief Justice Burger spoke does not amount merely to competing or overlapping rights between the accused and the public. Chief Justice Burger took considerable trouble to explain the inherent functional value of openness to the system because it ensures that citizens can be, in a general sense, confident both in their system of justice and in the accused's access to due process.<sup>144</sup> "[O]penness has," he explained, a "community therapeutic value" insofar as it serves "a community urge to retaliate and desire to have justice done."<sup>145</sup> More importantly, "public proceedings vindicate the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct by jurors *fairly and openly selected*."<sup>146</sup> Openness is a quality so inherent to the proceedings that its absence invokes the strictest level of judicial scrutiny: "Closed proceedings . . . must be rare and only for cause shown that outweighs the value of openness."<sup>147</sup>

Chief Justice Burger emphasized this inherent quality of openness at trial and its value to the defendant even more explicitly in *Press-Enterprise II*.<sup>148</sup> In that case, the trial court restricted the press's access to the preliminary hearing of a murder trial.<sup>149</sup> The State and Press-Enterprise moved for the release of the preliminary hearing's transcript, and the defendant, a nurse charged with the murder of twelve hospital patients, opposed its release on the ground that it "would result in prejudicial pretrial publicity."<sup>150</sup> Writing again for the Court, Chief Justice Burger reaffirmed *Press-Enterprise I* and again emphasized that criminal proceedings are presumptively open.<sup>151</sup> He noted, in even stronger terms than those of *Press-Enterprise I*, that "[t]he right to an open public trial is a *shared right* of the accused and the public, the *common concern*

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143. *Id.* at 509-10 (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606-07 (1982) (internal quotation marks omitted)).

144. *Id.* at 508.

145. *Id.* at 508-09.

146. *Id.* at 509 (emphasis added).

147. *Id.*

148. *Press-Enterprise II*, 478 U.S. 1, 8 (1986).

149. *Id.* at 5.

150. *Id.*

151. *Id.* at 8.

being the assurance of fairness.”<sup>152</sup> Further, he asserted that “the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public.”<sup>153</sup> So fundamental is the right of both accused and public to an open trial that the “risk of prejudice does not automatically justify refusing public access to hearings on every motion [by the accused] to suppress” and “any limitation must be ‘narrowly tailored to serve that interest.’”<sup>154</sup> The public nature of the trial cannot be easily foreclosed even when doing so is in the interest of the accused.

The *Press Enterprise* cases, although dealing primarily with the First Amendment right of the press to information concerning trial procedures, are significant when considered alongside the *Barnes-Paccione* jurisprudence because the *Press-Enterprise* cases demonstrate that there are two very different ways of litigating claims to the inherent rights of the public and the accused to an open trial.<sup>155</sup> Although the *Press-Enterprise* cases have developed independently from the *Barnes-Paccione* line of cases, the former demonstrate the contours of First and Sixth Amendment rights as between defendant, jury, and public.<sup>156</sup> The particulars of *State v. Ross* suggest that courts must have a clear perception of these contours before empaneling an anonymous jury under the *Barnes-Paccione* guidelines.<sup>157</sup>

### 3. *State v. Ross* Revisited

Trovon Ross appealed his murder conviction to the Utah Supreme Court in 2007, arguing that the trial court committed plain error by empaneling an anonymous jury.<sup>158</sup> The court disagreed, holding that “[j]udges properly enjoy considerable latitude in conducting the affairs of their courtroom so long as courtroom procedures do not communicate bias against the defendant.”<sup>159</sup> The court found that the lower court had “adhered closely to the princi-

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152. *Id.* at 7 (emphasis added).

153. *Id.* (quoting *Waller v. Georgia*, 467 U.S. 39, 46 (1984)) (internal quotation marks omitted).

154. *Id.* at 15 (quoting *Press-Enterprise I*, 464 U.S. 501, 510 (1984)).

155. See generally Babak A. Rastgoufard, *Pay Attention to That Green Curtain: Anonymity and the Courts*, 53 CASE W. RES. L. REV. 1009, 1012-14 (2003).

156. *Press-Enterprise II*, 478 U.S. at 7; *Press-Enterprise I*, 464 U.S. at 508-09; see Rastgoufard, *supra* note 155, at 1014.

157. *State v. Ross*, 174 P.3d 628, 637 (Utah 2007).

158. *Id.* at 636.

159. *Id.* at 637.

ples reflected in [the] guidelines [of the *Barnes-Paccione* standard].”<sup>160</sup> The court further found that the lower court was justified in its finding because Ross’s crime “featured an embittered ex-lover, a gruesome killing, a suspenseful escape, a police chase, and an abundance of other elements that made the trial an irresistible media event.”<sup>161</sup> But nothing in the record demonstrates that the jurors’ privacy or safety was ever actually in peril.<sup>162</sup>

The result in *Ross* brings up the question of whether the trial court’s empaneling of an anonymous jury went too far. The *Barnes-Paccione* standards developed as guidelines for trial judges to use with the exercise of discretion for the purpose of controlling their courtrooms.<sup>163</sup> The standards were formulated to protect the rights of the accused and the integrity of the jury system in the face of extreme circumstances, when the proceedings or the jurors themselves had been threatened with either violence or corruption.<sup>164</sup> But the *Ross* court did not use the *Barnes-Paccione* guidelines to protect jury integrity in the face of an articulated threat; rather, it used them to ward off the speculative threat of a press frenzy.<sup>165</sup> In focusing on the *Barnes-Paccione* guidelines and ignoring the lessons of the *Press-Enterprise* cases, the *Ross* court compromised the integrity of the jury and very likely violated the due process rights of Trovon Ross.

## II. ANALYSIS

### A. *The Scholarship Surrounding the Issue of Anonymous Juries*

#### 1. The Extremes

The scholarly response to the growing use of anonymous juries has been limited and extreme.<sup>166</sup> Professors Abramovsky and Edelstein and Professor King inhabit the issue’s polar regions. Profes-

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160. *Id.*

161. *Id.*

162. *See id.* at 630-31, 637.

163. *See* United States v. Paccione, 949 F.2d 1183, 1192-93 (2d Cir. 1991).

164. *See id.*

165. *Ross*, 174 P.3d at 637.

166. *See generally* Abramovsky & Edelstein, *supra* note 96 (outlining various reasons anonymous juries violate the rights of the accused); King, *supra* note 131; Kory A. Langhofer, *Unaccountable at the Founding: The Originalist Case for Anonymous Juries*, 115 *YALE L.J.* 1823 (2006); 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 (1992); Rastgoufard, *supra* note 155 (considering whether anonymity can coexist with the presumed openness of the court system).

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sor King argues that the main evils of anonymity—impairment of a defendant’s presumption of innocence and right to an impartial jury—can be eliminated by making anonymity routine.<sup>167</sup> Anonymity’s advantages, according to King, include enhancing the reliability of voir dire,<sup>168</sup> improving the quality of the jury’s deliberations,<sup>169</sup> protecting jurors from intimidation during trial,<sup>170</sup> and promoting jury service.<sup>171</sup> Furthermore, King asserts that jurors should not be held accountable for the verdicts they render, so that “enlist[ing] the individual consciences of jurors” need not go so far as to join jurors’ consciences to names.<sup>172</sup>

Professors Abramovsky and Edelstein argue against ever empaneling an anonymous jury.<sup>173</sup> Anonymity, their argument goes, not only fails to serve the purpose of protecting jurors from threats of danger and from corruption,<sup>174</sup> it also impairs the presumption of innocence,<sup>175</sup> threatens judicial integrity,<sup>176</sup> and disrupts the ability of counsel to investigate jurors for bias.<sup>177</sup> Further, anonymity represents an “[e]rosion of the ‘tradition of identified jurors,’” which reaches back to Colonial times.<sup>178</sup>

In short, Professors Abramovsky and Edelstein question, in the broadest terms, whether or not anonymous juries should exist at all. Conversely, the arguments of Professor King question why anonymous juries should not always exist in every circumstance. This general approach is worthwhile scholarship, but it is of little help at present. Anonymous juries are a confirmed part of the American legal landscape at both the federal and state level. But they remain the exception rather than the rule. And judges that elect to empanel anonymous juries need more particular guidance when treading on the ground of exception.

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167. See King, *supra* note 131, at 145-47.

168. *Id.* at 136-37.

169. *Id.* at 137.

170. *Id.* at 138.

171. *Id.* at 139.

172. *Id.* at 140-41; see also Langhofer, *supra* note 166.

173. See generally Abramovsky & Edelstein, *supra* note 96.

174. See *id.* at 466-67.

175. *Id.* at 468-72.

176. *Id.* at 472-76.

177. *Id.* at 476-81.

178. *Id.* at 481.

## 2. A Practical Approach to Anonymous Juries

The purpose of this Note is not to dispute the arguments in favor of or against anonymous juries. In some respects, time has dulled their edge anyway. Anonymous juries empaneled under the *Barnes-Paccione* guidelines have a thirty-year history in American jurisprudence.<sup>179</sup> The Supreme Court appears to be in no hurry to invalidate them.<sup>180</sup> At the other end of the argument, courts' resort to these guidelines suggests that we are no closer to the routine anonymity sought by Professor King than we were when she proposed the idea twelve years ago.<sup>181</sup>

In short, the *Barnes-Paccione* guidelines work. Their legitimacy has been upheld again and again, by court after court.<sup>182</sup> They allow judges to protect the jury's essential elements from defendant misconduct and overzealous media activity, and, more importantly, they are in accord with the essential factors articulated in *Williams*.<sup>183</sup>

Judges ought, therefore, to approach the *Barnes-Paccione* guidelines with the *Williams* factors in mind. If there is no threat of interference from defendant misconduct, or if the threat is only from the media (i.e., the fifth guideline), empaneling an anonymous jury is unwarranted, beyond the scope of the judge's discretion, and an impairment of the essential elements of the jury. The *Ross* court acted beyond the scope of discretion allowed by the *Barnes-Paccione* jurisprudence because it failed to consider the implications of these guidelines within the context of Sixth Amendment jurisprudence. The particular calculus for applying the *Barnes-Paccione* guidelines becomes clear when considered within the Sixth Amendment framework of *Williams v. Florida*.<sup>184</sup>

### B. *The Significance of Williams v. Florida*

Recall that the question presented in *Williams* was, in the broadest sense, whether "every feature of the jury as it existed at common law—whether incidental or essential to that institution—

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

180. *Id.* at 458; Rastgoufard, *supra* note 155, at 1012.

181. King, *supra* note 131, at 124.

182. *See, e.g.*, *State v. Samonte*, 928 P.2d 1, 14 (Haw. 1996); *State v. Hill*, 749 N.E.2d 274, 281 (Ohio 2001); *State v. Ferguson*, 729 N.W.2d 604, 611 (Minn. Ct. App. 2007) (using a variation of the *Barnes-Paccione* guidelines); *State v. Ivy*, 188 S.W.3d 132, 144 (Tenn. 2006).

183. *See Williams v. Florida*, 399 U.S. 78, 96-103 (1970).

184. *Id.*

was necessarily included in the Constitution wherever that document referred to a ‘jury.’”<sup>185</sup> After considering the history of Article III and the Sixth Amendment, Justice White concluded that “there is absolutely no indication in the ‘intent of the Framers’ of an explicit decision to equate the constitutional and common-law characteristics of the jury.”<sup>186</sup>

But recall also that the Court’s decision in *Williams* does not strip away the common-law protections that go beyond the letter of Article III and the Sixth Amendment.<sup>187</sup> There are, according to Justice White, two essential features of a jury: “the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and . . . the community participation and shared responsibility that results from [the jury’s] determination of guilt or innocence.”<sup>188</sup> The first of these features is primarily legal, the other primarily cultural. First, as a legal institution, the jury acts as a safeguard of individual rights.<sup>189</sup> This function is “legal” in the sense that it corresponds with and extends the checks-and-balances structure of the federal system as created and secured by the United States Constitution.<sup>190</sup> Secondly, the jury “provides a vital link between the law and the community.”<sup>191</sup> This quality is harder to identify, but acceptance of this premise is an important part of American jurisprudence.<sup>192</sup> A jury’s legitimacy rests upon “the community participation and shared responsibility that result[ ] from [its] determination of guilt or innocence.”<sup>193</sup> The lesson to take from *Williams* is that a jury can be modified without constitutional effect to the extent that the modification does not impair

185. *Id.* at 91. The immediate question in *Williams* was whether a jury of less than twelve impaired a defendant’s Sixth Amendment rights. *Id.* at 86.

186. *Id.* at 99.

187. *Id.* at 100.

188. *Id.*

189. *Id.* (“The purpose of the jury trial . . . is to prevent oppression by the Government . . .”); *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968) (“A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government.”); ALFREDO GARCIA, *THE SIXTH AMENDMENT IN MODERN AMERICAN JURISPRUDENCE* 183 (1992).

190. *Duncan*, 391 U.S. at 156.

191. GARCIA, *supra* note 189, at 183; *see also Williams*, 399 U.S. at 100; DE TOCQUEVILLE, *supra* note 37, at 319 (“[T]he jury is above all a political institution; it must be considered as one form of the sovereignty of the people; it has to be entirely rejected were the sovereignty of the people discarded; otherwise it should be made to harmonize with those other laws which establish sovereignty.”).

192. *See DE TOCQUEVILLE, supra* note 37, at 319 (“Laws are always unsteady when unsupported by custom[,] which is the only tough and lasting power in a nation.”).

193. *See Williams*, 399 U.S. at 100.

these two essential functions. The *Barnes-Paccione* guidelines assume these essential functions and recognize that legitimate threats to them warrant the extreme step of empaneling an anonymous jury.

### C. *The Barnes-Paccione Guidelines in the Context of Williams*

Recall that, under the *Barnes-Paccione* guidelines, a court should not empanel an anonymous jury unless (1) there is a strong reason to believe that the jury needs protection, and (2) the court takes reasonable precautions to make sure that the defendant is not prejudiced by the anonymous empaneling.<sup>194</sup> There is sufficient reason to protect the jury by this step when (1) the defendant has a connection to organized crime; (2) the defendant has the means and capacity to harm jurors; (3) the defendant has attempted to interfere with the judicial process in the past; (4) the defendant is facing a lengthy incarceration or heavy fine; and (5) there has been extensive pre-trial publicity in the matter.<sup>195</sup> This section will explore how the above guidelines correspond with the two essential elements of a jury identified by Justice White in *Williams*.<sup>196</sup> Four of these five reasons identify how the *Williams* elements may be impaired either by the misconduct of the defendant or by the behavior of the press.<sup>197</sup> A judge may resort to an anonymous jury only *after* the essential elements of the jury have been threatened or impaired.<sup>198</sup> Juror anonymity is thus a last resort—rather than a casual option—taken to protect the jury from threats to its most inherent qualities.

#### 1. The Defendant's Involvement with Organized Crime

Recall that anonymous juries were most often used in organized crime trials in the Southern and Eastern Districts of New York.<sup>199</sup> In 1964, fifteen years before *Barnes*, Judge Friendly reflected the judicial system's frustration in dealing with organized crime when, after confirmed threats were made against jurors, he

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194. *United States v. Paccione*, 949 F.2d 1183, 1192 (2d Cir. 1991).

195. *Id.* at 1192-93.

196. *Williams*, 399 U.S. at 78.

197. The fourth guideline is of no significance to this discussion. All of the cases in which an anonymous jury is at issue are serious cases with severe penalties. *See United States v. Mohammed*, 538 F. Supp. 2d 281, 285-86 (D.D.C. Cir. 2008) (finding that the possibility of a lengthy incarceration is alone insufficient to justify empaneling an anonymous jury).

198. *See Paccione*, 949 F.2d at 1192.

199. *Abramovsky & Edelstein*, *supra* note 96, at 458.

anticipated the need for anonymous juries in *United States v. Borrelli*.<sup>200</sup> In spite of case law warning that the mere connection to an organized crime syndicate is not enough to empanel an anonymous jury,<sup>201</sup> in practice, association with organized crime is all that is necessary for a judge to grant a request for anonymous empaneling.<sup>202</sup>

But this practice is quite proper. A defendant's involvement with organized crime is at odds with the jury's essential function of interposing the commonsense judgment of a group of lay people to protect the defendant from the power and resources of the government.<sup>203</sup> The *Barnes-Paccione* doctrine developed as a result of countless attempts by defendants to circumvent judicial process with the resources of organized crime.<sup>204</sup> A defendant who uses such resources has, in effect, spurned the legal protection offered to her by the jury and by the other legal institutions society provides for the protection of its citizens. While association with organized crime does not mean that a defendant loses all of her rights, it is legitimate for a judge to balance the propriety of empaneling a traditional public jury for the purpose of protecting the defendant's due process rights with the need to protect the jury's safety.

## 2. The Defendant's Participation in a Group with the Capacity to Harm Jurors

Like the first guideline, this guideline assumes that the defendant relies on a group or corporate entity that is antithetical to the protective organizations of the legal system and is willing to corrupt those institutions by threat or force. The second guideline is identical to the first in its recognition of the need to secure the jury's function as a protective corporate barrier between government and defendant from conduct by the defendant or her associates that regards the jury's protective function with contempt.<sup>205</sup> But this guideline also assumes that the defendant has put herself more explicitly at odds with the second *Williams* element, namely, the jury's role as a communal institution of participatory democracy.<sup>206</sup> The

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200. 336 F.2d 376, 392 (2d Cir. 1964); Abramovsky & Edelstein, *supra* note 96, at 463. **R**

201. *United States v. Vario*, 943 F.2d 236, 241 (2d Cir. 1991).

202. Abramovsky & Edelstein, *supra* note 96, at 464; *see also* *United States v. Gambino*, 809 F. Supp. 1061, 1066 (S.D.N.Y. 1992). **R**

203. *Williams v. Florida*, 399 U.S. 78, 100 (1970).

204. *See supra* text accompanying notes 96-118. **R**

205. *Williams*, 399 U.S. at 100.

206. *Id.*

jury's verdict is a legitimate exercise of power because of its "republican character," which "entrusts the actual control of society into the hands of the ruled, or some of them, rather than into those of the rulers."<sup>207</sup> A defendant's involvement with a group that has the capacity to harm jurors mocks the very element that makes the jury a legitimate exercise of power. An institution designed to protect citizens from public tyranny ought not to suffer an attack from private tyranny. This guideline is, then, also a legitimate consideration for a court because a defendant who endangers this particular quality of the jury's essence relinquishes some claim to the protection that the quality secures.

### 3. The Defendant's Attempts to Interfere with Judicial Process or Witnesses

Like the first two guidelines, this requirement responds to conduct by the defendant that is out of joint with the basic premises upon which the *Williams* guidelines are based. The first *Williams* element assumes "[t]he insolence of office."<sup>208</sup> A jury would not be necessary as an interposition between government and accused unless the accused needed protection from the government, even the arm of the government that is responsible for administering justice. Therefore, a defendant who attempts to interfere with judicial process by way of corrupting witnesses or jurors is essentially colluding with the very system that the jury is supposed to guard against. This third guideline allows for a judicial response to protect the integrity of the jury from such collusion when the defendant has demonstrated contempt or disregard for the organs of justice that shield her from the corruption of the government.

### 4. The Potential for Lengthy Incarceration or Heavy Fine

This guideline has little (if anything) to do with the essential elements of the jury. Furthermore, it could never stand by itself as a reason to empanel an anonymous jury. Its presence among the five guidelines is important only insofar as it ensures that the crime involved is of sufficient severity to warrant the extreme step of anonymity.<sup>209</sup>

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207. DE TOCQUEVILLE, *supra* note 37, at 318.

208. WILLIAM SHAKESPEARE, *HAMLET* act 3, sc. 1.

209. *See supra* note 197.

## 5. Extensive Media Attention That Would Expose Jurors to Harassment or Intimidation

Before considering the fifth guideline, two comments are in order on the first four. First, the circumstances anticipated by these guidelines clearly reflect the *Barnes-Paccione* doctrine's organized-crime heritage.<sup>210</sup> In some respects, these guidelines represent the very heart of the doctrine, for they respond most directly to the disruptive circumstances faced by jurors in those early cases.<sup>211</sup> Secondly, the circumstances anticipated by the first four guidelines are all more or less things within the defendant's control. In this respect, the first four guidelines put the defendant on a sort of notice. If she involves herself with organized crime or attempts to corrupt justice, she may end up facing an anonymous jury.

The circumstances anticipated by the fifth guideline clearly implicate both of *Williams*'s essential elements. A press frenzy carries with it the risk of disrupting the commonsense judgment of the jurors,<sup>212</sup> and it discourages citizens from serving on juries at all.<sup>213</sup> In this respect, therefore, this guideline reflects the doctrine's attempt to protect the jury's most essential qualities.

But the fifth guideline is quite distinct from the other four. Unlike the others, the threshold circumstances for the fifth guideline are almost always beyond the control of the defendant. Since a defendant has little control over the behavior of the press, the "tit-for-tat" rationale that grounds the other guidelines in the conduct of the defendant is entirely absent here. Furthermore, unlike the novelty that attended the circumstances giving rise to the first four guidelines, the tension between the fair administration of justice and the chaos that often attends public trials has been long recognized by the courts.<sup>214</sup> Standing by itself, media chaos should not be a reason for departing from the norm. To this end, the *Ross* case is significant because the only determinative factor that the court

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210. See *United States v. Paccione*, 949 F.2d 1183, 1192 (2d Cir. 1991); *United States v. Barnes*, 604 F.2d 121, 141 (2d Cir. 1979).

211. See *United States v. Borelli*, 336 F.2d 376, 392 (2d Cir. 1964).

212. See *King*, *supra* note 131, at 137-38.

213. *Id.* at 126-30.

214. See, e.g., *Press-Enterprise II*, 478 U.S. 1, 4 (1986); *Press-Enterprise I*, 464 U.S. 501, 509-10 (1984); *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 547-54 (1976); *Shepard v. Maxwell*, 384 U.S. 333, 349-52 (1966); *Craig v. Harney*, 331 U.S. 367, 373-76 (1947).

cited in empaneling the anonymous jury was speculation about a media frenzy.<sup>215</sup>

#### D. *The Ross Case*

As the *Ross* court points out, judicial discretion is a hallmark of anonymous jury jurisprudence.<sup>216</sup> “Judges properly enjoy considerable latitude in conducting the affairs of their courtroom so long as courtroom procedures do not communicate bias against the defendant.”<sup>217</sup> But most courts, recognizing this discretion, also note that the decision to empanel an anonymous jury is “an extreme measure.”<sup>218</sup> And the decision usually attends extraordinary circumstances such as gang-related violence or offenses against justice implicated in the first four guidelines.<sup>219</sup>

But in *Ross* there were no such extraordinary circumstances.<sup>220</sup> Although *Ross* carried off his crime in a sensational way, neither the crime nor anything in the record suggested that *Ross* himself was any more of a danger to the jury’s safety than any other angry ex-lover settling a score.<sup>221</sup> The trial court’s decision to allow the empaneling of an anonymous jury rested entirely on “the threat of extensive publicity about the case” and a “desire to protect the jurors’ privacy.”<sup>222</sup>

The Utah court’s rationale is particularly troublesome when considered under the light of the *Press-Enterprise* line of cases. While *Press-Enterprise* does not set the standard that ought to be

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215. *State v. Ross*, 174 P.3d 628, 637 (Utah 2007).

216. *Id.*

217. *Id.*

218. *Major v. State*, 873 N.E.2d 1120, 1126 (Ind. Ct. App. 2007); *see, e.g.*, *State v. Brown*, 118 P.3d 1273, 1281 (Kan. 2005) (referring to the withholding of jurors’ names as “unusual”); *Commonwealth v. Angiulo*, 615 N.E.2d 155, 171 (Mass. 1993) (“The due process clause precludes the empanelment of an anonymous jury at a criminal trial unless anonymity is necessary to protect the jurors from harm or improper influence.”); *State v. Wren*, 738 N.W.2d 378, 387 (Minn. 2007) (stressing that an anonymous jury should only be empaneled in “rare and exceptional circumstances”).

219. *See, e.g.*, *Wren*, 738 N.W.2d at 386 (holding that the court properly empaneled an anonymous jury because the offense involved gang membership and retaliatory shooting); *State v. Ferguson*, 729 N.W.2d 604, 611-12 (Minn. Ct. App. 2007) (finding anonymous empanelment proper because there was “strong reason . . . to believe the jury needed protection from external threats” from gang members); *State v. Ivy*, 188 S.W.3d 132, 144-45 (Tenn. 2006) (holding that the trial court properly empaneled an anonymous jury on the ground that the defendant had committed murder to prevent the victim from going to the police).

220. *See State v. Ross*, 174 P.3d 628, 630-31, 637 (Utah 2007).

221. *See id.*

222. *Id.* at 637.

followed when empaneling an anonymous jury,<sup>223</sup> it does articulate the contours of the constitutional rights involved as between juror and defendant so that the essential elements of the jury, as defined in *Williams*, are preserved.

The *Press-Enterprise* line of cases makes clear that, with respect to any “‘right’ to openness as between the accused and the public,” a distinction “is not crucial,”<sup>224</sup> and “the [r]ight to an open public trial is a shared right of the accused and the public, the common concern being the assurance of fairness.”<sup>225</sup> Most notably, *Press-Enterprise II* asserts that the Sixth Amendment right to a public trial “is no less protective of the open nature of the trial than the First Amendment right of the press and public.”<sup>226</sup>

When there is a media frenzy of such degree that a juror’s right to privacy is violated, the *Press-Enterprise* doctrine does not consider the media’s conduct such a threat to or betrayal of process that it warrants restricting the presumed openness of the trial on the strength of the judge’s discretion alone.<sup>227</sup> Rather, when media scrutiny invades a juror’s right of privacy, *Press-Enterprise I* requires the judge to “seal only such parts of the transcript as necessary to preserve the anonymity of the individuals sought to be protected.”<sup>228</sup> But the purpose of sealing the transcript on such occasions would be to protect a particular juror from embarrassment when answering voir dire questions rather than to protect every juror from the general inconvenience of media scrutiny.<sup>229</sup> Under this line of cases, “[t]he presumption of openness [in judicial proceedings] may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.”<sup>230</sup> If there is a juror privacy interest at issue, the burden falls on the *juror* to show, for example, that voir dire questions pose a unique encroachment upon that interest.<sup>231</sup>

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223. *But see* Rastgoufard, *supra* note 155, at 1018-20.

224. *Press-Enterprise I*, 464 U.S. 501, 508 (1984) (“No right ranks higher than the right of the accused to a fair trial. But the primacy of the accused’s right is difficult to separate from the right of everyone in the community to attend the *voir dire* which promotes fairness.”).

225. *Press-Enterprise II*, 478 U.S. 1, 7 (1986).

226. *Id.* (quoting *Waller v. Georgia*, 467 U.S. 39, 46 (1984)); *see also* Rastgoufard, *supra* note 155, at 1013-14.

227. *See generally* *Press-Enterprise II*, 478 U.S. 1; *Press-Enterprise I*, 464 U.S. 501.

228. *Press-Enterprise I*, 464 U.S. at 513.

229. *See id.* at 512.

230. *Id.* at 510.

231. *Id.* at 512.

It is significant that the *Press-Enterprise I* Court put such rigid restrictions on a trial judge's ability to close proceedings. The requirement that any such closure be narrowly tailored to protect the privacy of a particular juror reflects the Court's reluctance to allow broad, across-the-board closures. By keeping most of the procedures open, the Court maintains the jury as an institution that allows the open participation of the community in the judicial process. In other words, it maintains the jury according to the essential elements set out in *Williams*.<sup>232</sup>

The *Press-Enterprise* cases thus have a very significant effect on the *Barnes-Paccione* doctrine when it comes to a case like *Ross*. *Press-Enterprise* teaches that the Sixth Amendment right to a "public trial, by an impartial jury"<sup>233</sup> is no less important than the First Amendment right the Court sought to protect by requiring trial judges to narrowly tailor their restrictions on access to jurors.<sup>234</sup> If the object of the *Barnes-Paccione* guidelines is to secure the essential elements of the jury; and if the specific object of the fifth guideline is to prevent the media from impairing either of the *Williams* elements; that object, when the fifth guideline is the only guideline in play, must be subject to a standard similar to that of *Press-Enterprise*. In a case like *Ross*, therefore, where the defendant was not associated with organized crime, did not have the capacity to harm jurors, and had no history of interfering with judicial process, the jury was no more vulnerable than it would have been in any other case in which there was intense media scrutiny. In such a case, the trial judge ought not to have the discretion to empanel an anonymous jury (or close any aspect of the trial) unless something more is present.

#### CONCLUSION

The most important legal consideration of this Note is the inconsistency between the *Barnes-Paccione* jurisprudence and the *Press-Enterprise* jurisprudence in addressing juror anonymity. In strictly legal terms, this inconsistency ought to be rectified, or at least more fully explained by the courts.

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232. *Williams v. Florida*, 399 U.S. 78, 100 (1970).

233. U.S. CONST. amend. VI.

234. See *Press-Enterprise II*, 478 U.S. 1, 13-14 (1986) (requiring "specific, on the record findings . . . demonstrating that 'closure is essential to preserve higher values and is narrowly tailored to serve that interest'" (quoting *Press-Enterprise I*, 464 U.S. at 510)); see also *Press-Enterprise I*, 464 U.S. at 501.

In terms of cultural considerations, the idea that media corporations, with the vast resources that attend such enterprises, should have additional advantages and a stronger claim on the presumption of openness than the accused, who is frequently disadvantaged in terms of resources, friends, sympathy, and even (perhaps because of the vastness of the media corporations' resources) the very presumption of innocence that our Constitution demands, seems preposterous but not surprising.

For this reason and others legal professionals must preserve the institutions of their trade. This is not to say that these institutions should not evolve and progress. Preserving institutions does not mean bunkering them so that they no longer serve their purpose. But it does mean establishing contours of identity that are more or less rigid, especially in the face of the worst vices of modern existence—apathy, timidity, and intellectual and ethical sloth.

The arguments in this Note therefore assume that it is not enough to say that a jury is successful if it completes its task and reaches an appropriate verdict. “[T]he community participation and shared responsibility that results from that group’s determination of guilt or innocence”<sup>235</sup> must also be present. The jury not only comes to a decision, it also ratifies the work of the members of the bar who tried the case and the judge who heard it, of the elected officials who passed the substantive laws at issue and the governing procedural rules, and of the centuries of public servants and advocates who have eked out the rule of law by increments and scraps from the grip of tyranny and arrogance. Casually turning such a decision over to mere “consciences”<sup>236</sup> operating from hidden identities betrays this communal responsibility.

*Brian Clifford\**

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235. *Williams*, 399 U.S. at 100.

236. King, *supra* note 131, at 141.

\* I dedicate this Note to my parents.