

# SAFEGUARDING JUROR PRIVACY

## A new framework for court policies and procedures

by Paula L. Hannaford

Some time ago, I conducted a workshop on jury service for a local troop of Girl Scouts who were working on their “Law and Justice” badge. From my own upbringing, I expected that most of these 14- to 17-year-olds would have a somewhat fa-

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vorable picture of jury service from their middle school and high school civics classes and possibly from their parents’ experiences as jurors. So I was surprised by the comment of one young woman who said that she would *never* want to be summoned for jury service. I asked what her objection was.

“It’s dangerous,” she said, as many of the young women in attendance nodded their agreement. “Everyone gets to know everything about you—where you live, where you work, where your kids go to school. Even criminals get to know that information. You’re not allowed to keep anything private.”

Regrettably, her perception of jury service reflects the widespread, albeit extreme, concern of millions of Americans who are summoned for jury service every year in state and federal courts. Actual cases of retaliation against jurors are extremely rare, but they do occur and so citizens’ concerns about that possibility are very real. Some of these concerns may be the result of excessive publicity about the lives of jurors who have served in high profile trials in recent

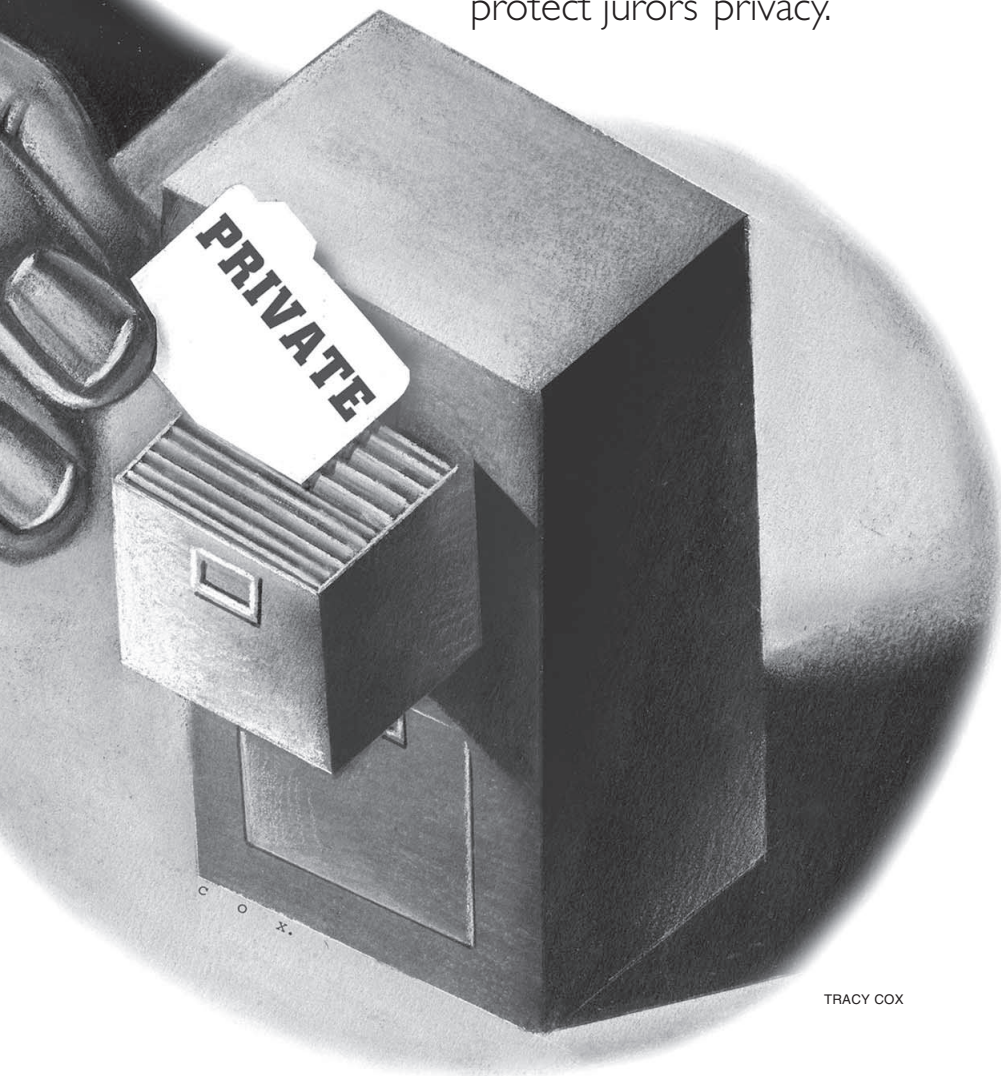
years. But a large part stems from the actual experiences of citizens who serve as jurors in relatively routine criminal and civil trials. Numerous studies document that perceived insensitivity to the privacy concerns of prospective jurors is one cause of dissatisfaction with jury service.

If it were simply a matter of minor discomfort with the disclosure of per-

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Distinguishing between information that is relevant and information that is not relevant to the fairness or impartiality of prospective jurors should be the primary analytical framework for courts seeking to protect jurors' privacy.



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matters.<sup>3</sup> These behaviors by prospective jurors present more serious problems for courts in that venires may be unrepresentative of their communities or juries may include individuals who cannot serve fairly and impartially.

As a result of these considerations, many trial judges and court staff are becoming more sensitive and sympathetic to the privacy concerns of jurors and are modifying their jury procedures. Among the techniques that courts often employ are sealed records, "anonymous juries", *in camera* voir dire, and restrictions on the scope of voir dire and on the specificity of information provided to attorneys. Other courts have not yet confronted these issues or have only begun to seriously consider them. The result is a national hodge-podge of court procedures concerning litigant and public access to juror information—few of which adequately address all facets of juror privacy and many of which are of questionable legality given the strong statutory and constitutional policies in favor of open court proceedings and records.

This article briefly discusses the difficulty courts face in balancing the privacy of citizens summoned for jury service with the rights of litigants and the public to information about those individuals. Case law provides some guidance about how and when courts can protect juror privacy, but the topics discussed in recent court opinions range from disclosure of juror names and addresses on the source list to disclosure of sensitive information revealed during voir dire, to post-trial contact with jurors by attorneys and the media. It is difficult to incorporate all of these aspects of trial management into a coherent policy on juror privacy.

I propose that focusing on the content of the information requested of prospective jurors and the purposes for which juror information is used by courts provide a more helpful analysis than the legal

sonal information, many (perhaps most) trial judges and court staff might be inclined to dismiss these concerns as an unpleasant, but unavoidable, byproduct of an otherwise invaluable institution of American democracy. But recent trends in citi-

zen participation in jury service suggest that ignoring the privacy concerns of persons summoned for jury service actually undermines the integrity of that institution. Some reports describe citizens who intentionally refuse to register to vote as a way of keeping themselves off the jury source list<sup>1</sup> or who fail to respond to jury summonses.<sup>2</sup> Others report that some jurors fail to disclose personal information, even when directly questioned under oath, if those questions touch too closely on sensitive

1. See Ryan, *The American Trial Jury: Current Issues and Controversies*, 63 Soc. EDUCATION 458 (1999).

2. See generally Boatright, *Why Citizens Don't Respond to Jury Summonses and What Courts Can Do About It*, 82 JUDICATURE, 156 (1999).

3. See Mize, *On Better Jury Selection: Spotting UFO Jurors Before They Enter the Jury Room*, 36 COURT REVIEW 10 (1999).

framework traditionally employed in case law. Specifically, I argue that distinguishing between information that is relevant and information that is not relevant to the fairness or impartiality of prospective jurors should be the primary analytical framework for courts seeking to protect the legitimate privacy interests of prospective jurors. This approach is not only more likely to help those courts that recognize and wish to protect the legitimate privacy expectations of citizens summoned for jury service, but will also garner greater public support for and understanding of the legitimate purpose of voir dire questioning and the courts' and litigants' needs for candid responses to those questions.

### Increased sensitivity

Americans hold the concept of personal privacy in very high esteem. Justice Brandeis perhaps articulated it best in his dissenting opinion in *Olmstead v. U.S.* (1928): "the right to be let alone [is] the most comprehensive of rights and the right most valued by civilized men." In recent years, Americans are even more concerned about potential intrusions on personal safety and privacy. These concerns stem in part from increased public awareness of the amount of personal information that is publicly accessible. Financial institutions have access to credit information; insurance companies have access to medical information; retailers have access to information about personal buying habits. Advances in technology facilitate the compilation and exchange of information, making it difficult for individuals to restrict access to personal information, or even to know who has access to that information and for what purposes. It is no surprise that citizens who are summoned for jury service are as concerned about public and litigant access to their personal information as they are about such access in other aspects of their lives.

Courts collect a great deal of personal information about the citizens who report for jury service, but most citizens understand and support the

fact that the court has a legitimate purpose in soliciting personal information. Even those who would avoid jury service if they could are not troubled by the knowledge that courts must ensure that jurors are statutorily qualified to serve. Prospective jurors do not object to giving court staff a telephone number to contact them in the event of a trial cancellation or postponement. They recognize the need for the judge and litigants to screen prospective jurors to ensure a fair and impartial jury. What they do object to are inadequate court procedures to protect their privacy and requirements to divulge personal information that does not appear relevant to these legitimate purposes or that might be used for illegitimate purposes.<sup>4</sup>

### Case law on juror privacy

A detailed discussion of the case law concerning juror privacy issues is beyond the scope of this article and would be superfluous given the large volume of legal commentary published on this topic in recent years.<sup>5</sup> Suffice it to say that the general rule is that jurors do have a qualified right to privacy. However, absent compelling circumstances, that right yields to the Sixth Amendment right of criminal defendants to a fair and impartial jury and to the First Amendment right of the public and press to open court proceedings. The compelling reasons articulated in case law generally consist of threats to the physical safety of jurors or to the integrity of the judicial process (e.g., jury tampering, intimidation, or harassment).

Some commentators criticize the limited circumstances in which juror privacy interests prevail over demands for disclosure from litigants or the press, arguing that the appellate courts have not given sufficient weight to the purely instinctive desire of jurors to keep personal information private.<sup>6</sup> Others contend that the purely legal framework in which these issues are considered underestimates the risk to the integrity of the judicial process inherent in failing to protect juror privacy by

falsely assuming that jurors willfully, albeit begrudgingly, disclose personal information when ordered to do so. One of the limitations of case law is that it tends to focus on the questions framed by the appellants, none of whom are the jurors whose privacy rights are at stake. A cursory reading of these cases gives the impression that juror privacy rights must always yield to the litigant and media rights of access, except in cases with extraordinarily dangerous defendants or high profile trials. It is on this basis that many trial courts, although sympathetic to juror privacy rights, feel powerless to protect those rights.

As a practical matter, however, balancing the competing Sixth Amendment, First Amendment, and juror privacy rights is a complex calculus. Critical factors in the outcome include who is requesting access to juror information (media or litigant); of whom the information is requested (the entire jury pool, the venire, or the empanelled jury); when the information is requested (pre-empanelment, during trial, or post-verdict); and the nature of the information requested (e.g., mundane information such as names and addresses, or more sensitive, personal information revealed during voir dire). Other factors are the existence or absence of state statutes, court rules, or local court practices concerning how juror information is collected, processed, and stored.

It is clear from the opinions articulated in case law that no national consensus yet exists about the importance that courts should ascribe to juror pri-

4. See generally Rose, *Expectations of privacy: jurors' views of voir dire questions*, 85 JUDICATURE 10 (2001).

5. See, e.g., Weinstein, *Protecting A Juror's Right to Privacy: Constitutional Constraints and Policy Options*, 70 TEMPLE L. REV. 1 (1997); King, *Nameless Justice: The Case for the Routine Use of Anonymous Juries in Criminal Trials*, 49 VANDERBILT L. REV. 123 (1996); Novak, *Note, Jury on Trial: Juror's Constitutional Right to Privacy Falls Under Scrutiny of the Courts*, 3 SAN DIEGO JUST. J. 215 (1995); 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); Greenberg, *Note, Spotlight on the Jury: Trial Publicity and Juror Privacy*, 6 COMM/ENT. L.J. 369 (1983-84).

6. See Litt, *supra* n. 5, at 412.

vacancy. But even if clear guidance could be easily discerned from court opinions, the development of coherent, comprehensive policies and procedures regarding juror privacy would still be preferable to adopting an ad hoc, case-by-case approach. An established policy is not only less likely to be challenged, but also more likely to survive a legal challenge if made. Moreover, in developing comprehensive court policies to address juror privacy issues, court leaders can consider the potential impact of disclosing jurors' personal information beyond the immediate context of a single trial—something that appellate opinions only rarely do. Finally, it is easier for judges and court staff to consult a rule or statute than to try to interpret a collection of often conflicting court opinions.

### Rethinking privacy

The most important step in formulating comprehensive policies on juror privacy is to reconsider the purpose for which courts collect juror information. Doing so necessarily requires us to define very carefully the objectives of the jury selection process and the respective roles of the court, the parties, and their lawyers. Perhaps the strongest argument articulated in case law favoring disclosure is that public disclosure satisfies the litigants' and the public's concern that the jurors selected for trial are capable of serving in a fair and impartial manner. It is an argument that few in the American justice system would dispute, but it does lend itself to the possibility of a false syllogism—that is, that all juror information is relevant to the question of the juror's ability to be fair and impartial and thus is subject to disclosure.

**Qualification and administrative information.** Only a portion of the

information courts routinely collect is actually useful for determining juror bias or prejudice. Courts use the remaining information to qualify prospective jurors according to statu-

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tory criteria for jury service and to manage various administrative tasks such as summoning, payment of juror fees and expenses, and routine communications. One of the first steps that courts can take to protect juror privacy is to segregate juror information used for qualification and administrative purposes from that used for examining fairness and impartiality in the context of a particular trial. The former, which does not further the objective of satisfying litigant and public confidence in the fairness and impartiality of jurors, should not be disclosed with the latter. Several states restrict public access to qualification and administrative information as a matter of policy. In New York State, for example, juror qualification questionnaires are exempt from public disclosure under the state's Freedom of Information Law. Other jurisdictions, such as Arizona, have court rules that require summonses to segregate qualification and administrative information from information provided to the litigants during voir dire.

Why shouldn't qualification and administrative information be available for public scrutiny? Historically, public oversight was a critical check on the integrity of the master jury list. It was a common practice to post the list of prospective jurors on the courthouse door and publish it in the

local newspaper to give the public an opportunity to object to anyone listed who was unqualified. In the days of the "key-man" jury system, jury commissioners had extensive discretion to handpick the names on the master jury list. Public access to the master jury list ensured that jury panels were not stacked with the commissioner's political cronies.

Modern jury system management, in contrast, gives virtually no discretion to jury commissioners to select names for the master jury list. Instead, they oversee a highly automated system that randomly selects names from one or more source lists (e.g., registered voters, licensed drivers). As computer memory has become less expensive, courts increasingly download the entire source list for use as the master jury list.

The historical justification for public access to the master jury list has largely disappeared. Nevertheless, some critics have argued that juror qualification information should be subject to public disclosure to ensure that the court conducts the summoning and qualification process in a consistent and effective manner.<sup>7</sup> It is doubtful, however, that the disclosure of individual juror records advances that objective. A visual inspection of names is inadequate for evaluating whether automated systems are functioning properly. Instead, public confidence in the justice system is more likely enhanced by knowledge that procedures to summon and qualify prospective jurors (e.g., random selection, excusal, and deferral policies) are consistently and even-handedly implemented by the courts. At appropriate intervals, the court should conduct internal audits of its procedures to determine whether they secure a jury pool that accurately reflects the demographic characteristics of the community, and the aggregate results of those audits should be made publicly available.<sup>8</sup>

7. See *Gannett Co. v. State*, 571 A.2d 735 (Del. 1989).

Another argument often made in favor of the disclosure of qualification and administrative information is that much of this information is already in the public domain, and thus the court does not violate juror privacy by disclosing it. But that argument overlooks the degree to which public information is conveniently linked to nonpublic information. A telephone book typically lists a person's name, address, and telephone number, but it does not ordinarily link this limited information to the names of spouses, children, or employers. Information collected by the courts for jury service, however, links many aspects of a person's life—home, family, work, citizenship and residency status, criminal history, and finances—in a single, convenient record and no effort is made to place restrictions on public access to information that is not ordinarily in the public domain.

Individuals have the right in most circumstances to place limitations on how personal information can be distributed, and many exercise that right. For example, people can request that the telephone company not publish their telephone numbers, or limit the listing (e.g., surname and first initial only, no address). Federal legislation places restrictions on the ability of financial institutions to disclose financial information without the expressed consent of the individual to whom the information pertains. Similar requirements to protect the privacy of medical records are now under consideration. Citizens have no corresponding right to place limitations on disclosure of personal information collected by the court or to withhold that information from the court because of the court's inability to protect juror privacy.

Recent increases in the incidence of identity theft and other forms of financial fraud make the potential harm to citizens much more severe than the mere discomfort of excessively private citizens. The Superior Court of Los Angeles County, for example, reported several instances of scam artists impersonating court staff

and telephoning recently summoned jurors to request their Social Security numbers "for payroll purposes."<sup>9</sup> Later these jurors discovered that the scam artists had established fraudulent lines of credit in their names. Some Wisconsin jurors experienced a different form of financial harassment from local militia groups who fraudulently reported to the Internal Revenue Service that they had paid income to those jurors. Failing to report the bogus income triggered an automatic IRS audit of the jurors' tax returns.

These cases highlight the potential risks to citizens of making juror information accessible to the public. Even without such risks, disclosure of administrative information about jurors will not promote public confidence in the fairness and impartiality of jurors under the framework I have proposed. Knowledge of a prospective juror's name, address, employer, home and work telephone numbers, and Social Security number are highly unlikely to reveal juror bias or prejudice. One who lives at the corner of Fifth and Main Streets may have lived there her whole life or moved there quite recently from another part of town or even another part of the world. Similarly, a prospective juror's employer is not a reliable indicator of that individual's attitudes or opinions about issues relevant to the trial. Knowledge that a prospective juror works for IBM does not indicate whether that individual is a computer engineer, a salesperson, a secretary, or a janitor. A far more effective method of identifying bias in prospective jurors is to ask them directly during voir dire, ("Do you know any of the lawyers or parties in this case?" "Do you live or work near such-and-such location, where the crime/accident took place?") rather than infer bias based on irrelevant information.

#### **Criminal background checks and independent investigations of jurors.**

Neither litigants nor the media are so naïve as to think that qualification or administrative information about prospective jurors is particularly helpful on its face to reveal juror bias. Rather,

that information is sought as a means to inquire further into a juror's life. As one lawyer once told me, quite candidly, about his desire for access to prospective jurors' home addresses, "You can learn a lot about a juror by driving by their house and checking out their home environment—are there children's toys in the yard? How many cars in the driveway? What make and model? What bumper stickers?" Simply driving by a juror's house seems an old-fashioned and highly inefficient method of obtaining juror information given the amount of information that may be gleaned from on-line databases. Nonetheless, the ability to conduct criminal background checks and independent investigations of prospective jurors is why lawyers and media press so hard for continued access to juror qualification and administrative information.

Independent investigations of prospective jurors have disturbing ramifications not only for juror privacy, but also for judicial oversight of the jury selection process. In their most common form, independent investigations tend to involve criminal background checks of prospective jurors by prosecutors and, more rarely, investigations by trial consultants in civil cases.<sup>10</sup> The ABA Standards Relating to the Administration of Criminal Justice recognize that prosecutors may investigate prospective jurors, but caution that the investigation should normally be restricted to existing records and should not be used to harass, unduly embarrass, or invade the privacy of potential jurors. The regulations governing the use of the federal NCIC database explicitly condone this practice but do not require prosecutors to share this information with the court or defense counsel. Indeed, the court and defense counsel often are unaware that such an investigation has

8. AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO JUROR USE AND MANAGEMENT, Standard 2(c) and (d) (1993).

9. See Granberry, *Court Warns of Door-to-Door, Jury Duty Scam*, LOS ANGELES TIMES, November 15, 1991 at B5.

10. Strier and Shestowsky, *Profiling the Profilers: a Study of the Trial Consulting Profession, Its Impact on Trial Justice and What, If Anything, To Do About It*, 1999 WIS. L. REV. 441, 450-71.

taken place. This was the case in a hotly contested ruling by a Virginia circuit court judge who, after discovering the practice, prohibited local prosecutors from conducting criminal background checks on prospective jurors on grounds that it usurped the duty of the court to oversee jury selection and violated jurors' expectations of privacy.<sup>11</sup>

It is certainly understandable that prosecutors would find such information helpful to determine whether a prospective juror has had any experience with the criminal justice system that might affect attitudes about the police or law enforcement officials. But recognition of that fact does not explain why such an examination should be conducted in addition to questioning jurors during voir dire. Nor does it explain why the results should be kept from the court or from defense counsel, particularly if they pertain to jurors' ability to be fair and impartial.

It also does not explain why the fact that a criminal background check has been conducted should be kept from the jurors themselves. Knowledge that a criminal background check has been done might reduce much of the awkwardness and dissembling that routinely takes place during voir dire when questions concerning prior criminal records are raised. Why ask the question if the judge and lawyers already know the answer? At best, it wastes valuable court time that could be spent more productively. And from

the jurors' perspective, it breeds suspicion and cynicism that the judge and lawyers are merely playing a game of "gotcha", waiting to pounce if a juror fails to disclose some involvement with the criminal justice system, regardless of how minor the offense might have been or how long

selection process involves the disclosure of information that is generally more sensitive than that revealed for summoning and qualification purposes. The questions posed by the judge and lawyers during voir dire are used to screen for bias based on jurors' knowledge of the parties, the lawyers, the witnesses, the facts of the case, or on attitudes related to issues that are likely to arise during trial. Precisely because such information can be highly sensitive or embarrassing to jurors, case law is replete with examples of judges who have tried, usually unsuccessfully, to keep this information from public disclosure. Under the conceptual framework

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## Empirical studies have found that prospective jurors often fail to disclose sensitive information.

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ago it occurred.

These practices are a far departure from the ABA Standards on Juror Use and Management, which state that "[n]o independent investigation by attorneys or any others is contemplated nor should it be countenanced by the court." The standards clearly favor a jury selection process that takes place only in the courtroom, on the record, and under the direct supervision of the trial judge. Many judges and court staff are aware of and tacitly disapprove of independent investigations of jurors, but they rarely take overt steps to prevent them. Two approaches are somewhat helpful in deterring these intrusive and unregulated investigations of jurors. First, restricting the amount of information disclosed to lawyers (e.g., name and zip code only; no Social Security number, street address or date of birth) makes it difficult to conduct background checks with any accuracy. Second, holding identifying information about the venire until shortly before the trial date effectively impedes the ability of lawyers to conduct background checks, especially on large panels.

**Juror information revealed during jury selection (voir dire).** The jury

proposed in this article, juror information revealed during jury selection is directly relevant to the prospective juror's ability to be fair and impartial and should be publicly accessible.

Notwithstanding the importance of public access to voir dire, failing to provide appropriate protections for juror privacy has definite consequences for the integrity of the jury selection process. A number of empirical studies have found that prospective jurors often fail to disclose sensitive information when directed to do so in open court as part of the jury selection process. A 1991 study of juror honesty during voir dire found that 25 percent of jurors failed to disclose prior criminal victimization by themselves or their family members.<sup>12</sup> In a more recent study of the effectiveness of individual voir dire, Judge Gregory Mize (D.C. Superior Court) found that 28 percent of prospective jurors failed to disclose requested information that Judge Mize believed was relevant to their ability to serve fairly and impartially.<sup>13</sup> Failure to protect juror privacy can undermine the primary objective of voir dire—namely, to elicit sufficient information about prospective jurors to determine if

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11. See Order, *In re: Use of Jury Lists* (Cir. Ct. Loudoun Cty., Va., June 2, 1998) and Memorandum re: *Use of Jury Lists* (Cir. Ct. Loudoun Cty., Va., June 2, 1998). The Virginia Court of Appeals later overturned the order on grounds that the statute granting prosecutors access to NCIC database explicitly permitted them to conduct background checks on jurors. *Salmon v. Virginia*, 529 S.E.2d 815, 817-820 (Va. App. 2000). Tellingly, the opinion makes no mention of juror privacy rights.

12. Seltzer, Venuti and Lopes, *Juror Honesty during the Voir Dire*, 19 CRIM. JUST. 451 (1991).

13. Mize, *supra* n. 3.

they can serve fairly and impartially.

Part of the reluctance to reveal sensitive information may be related to jurors' lack of understanding about how the information is relevant in the context of that trial. A brief description of the case does not reveal all the potential nuances of evidence about which the attorneys may be probing jurors for indications of attitudes and opinions. One technique designed to make the focus of voir dire questions more apparent to prospective jurors, and thus increase juror willingness to reveal relevant information, is to permit the attorneys to present a brief, objective opening statement to the entire jury panel.

Judges who have tried this technique report that it often prompts jurors to reveal information that they might not otherwise reveal with a less clear understanding of the context of the trial.<sup>14</sup> In a study of jurors' views of privacy, Mary Rose found that citizens who had the opportunity to serve as jurors in an actual trial felt that questions posed during voir dire were less intrusive and uncomfortable compared to citizens who participated in voir dire but were later excused from jury service and thus did not have the opportunity to see why certain questions were asked during voir dire.<sup>15</sup>

Even when it is obvious that a question is relevant to the issue of juror bias, many choose to withhold personal information for perfectly understandable reasons. After being summoned for jury service in a recent drug trial, for example, a friend confided to me that he declined to identify himself (as did everyone else on the jury panel) when the judge asked whether anyone had ever used illegal drugs. "After all," he explained, "I don't know what else they might use that information for. Isn't there still a Fifth Amendment right not to incriminate yourself?" Similar omissions occur every day in state and federal courts as prospective jurors hedge their answers concerning not only drug and alcohol use, but also criminal victimization, financial and credit status, marital or family difficulties, and

other sensitive topics.

As judges and lawyers have become more aware of the reluctance of citizens to disclose sensitive information, they have developed a number of fairly successful techniques to encourage prospective jurors to be candid in their responses to voir dire questions. Juror questionnaires, for example, permit jurors to respond to voir dire questions in writing, thus avoiding the discomfort of revealing sensitive information orally before a large group of strangers in the courtroom. Another technique is to inform the jury panel that they can decline to answer any question aloud that they feel intrudes excessively on their privacy and instead answer questions with the judge and attorneys in the privacy of the judge's chambers or out of the presence of the jury panel and other courtroom observers. A related technique is to conduct the entire voir dire individually or in small groups (3 to 5 people) of prospective jurors, which tends to make the procedure somewhat less intimidating. None of these techniques provides an atmosphere of true intimacy, as they all necessarily involve the participation of the judge, the attorneys, often the litigants, a court reporter and other court staff, and the public (except in *in camera* interviews).

Jurors' answers to questions become part of the court record. Thus, they are not truly "private" in that the written responses or a transcript of individual or *in camera* must be made available to the press or public on request, which may be a concern in very high profile cases. In those instances, however, the judge has the opportunity to redact information in the transcript or seal the court record if he or she determines that the juror has a legitimate privacy interest that should be protected. The vast majority of cases, however, do not involve such high public scrutiny. The audience to which prospective jurors are most reluctant to reveal information consists of other people assembled in the courtroom for that trial. In such cases, the techniques described above will alleviate much of the dis-

comfort associated with providing sensitive information about themselves and their families. Moreover, acknowledging the privacy concerns of prospective jurors may actually increase jurors' willingness to answer intrusive questions.

Finally, some courts have adopted the practice of referring to jurors by number rather than name during both voir dire and trial. In the Los Angeles Superior Court, for example, most criminal judges do this as a regular practice and report that jurors are very pleased with this procedure.<sup>16</sup> The practice originated in criminal trials in which retaliation from defendants and jury tampering were major concerns. Later it became a popular technique for preventing (or at least inhibiting) media contact with jurors during high profile trials, such as the O.J. Simpson murder trial and the Oklahoma City bombing trial. In early uses of this technique, juror names or other identifying information were protected from the litigants and their attorneys as well as from the public and media. Absent a significant risk to juror safety, however, litigants and their attorneys are now usually given a list of juror names and corresponding juror numbers for jury selection purposes.

Underlying this technique is the theory that "anonymous jurors" will feel less intimidated by litigants, by the potential for subsequent media contact, and by one another. Therefore, they will be more likely to disclose potential bias during jury selection and more willing to engage in deliberations without fear of external consequences. To date, no empirical research has been conducted to substantiate these claims, although anecdotal reports from jurors in courts employing this technique are generally favorable. Severing the link between a juror's identity and his or her role in the context of the trial appears

14. See Amon, *Shaking Up Juries, State by State*, NAT'L L. J. (Feb. 5, 2000) at 1.

15. See generally Rose, *supra* n. 4.

16. See Connor, *Jury Innovation Pilot Study, Los Angeles Superior Court I*, 7, 10-13 (Nov. 1999); CAL. CIV. PROC. § 237 (2001).

to be a reasonable method to protect juror privacy from threats of retaliation from defendants or post-trial intrusions from the media. It is not clear, however, that such efforts are a particularly useful tool for encouraging shy individuals to be more forthcoming in a courtroom crowded with strangers.

#### **Examining the scope of voir dire.**

The techniques discussed above are designed to encourage greater candor by prospective jurors concerning sensitive or private matters. Yet another method of protecting juror privacy is arguably more effective than any of those described: the trial judge restricts the scope of voir dire to those questions that are reasonably related to a determination of a prospective juror's ability to be fair and impartial. While it is abundantly clear that information disclosed by jurors during jury selection becomes part of the public record, it should also be clear that courts are not required to solicit all possible personal information from jurors. Information that is not disclosed during jury selection does not become part of the public court record and does not violate jurors' expectations of privacy.

It should not be surprising that many citizens take offense at being compelled to answer questions that appear only marginally relevant, if at all, to the issue of their ability to serve fairly and impartially. In the Rose study, for example, 43 percent of jurors reported that they found questions that were unimportant to voir dire to be offensive.<sup>17</sup> In one widely publicized case, a Texas juror preferred to face contempt charges rather than answer questions concerning her religious affiliation, fam-

ily income, and other matters she believed irrelevant and unduly intrusive of her privacy.<sup>18</sup> That juror was a notable exception in that she openly refused to disclose the information. Other jurors may simply fail to disclose the information without calling attention to their refusal to do so.

Why do judges permit such questioning to take place? Part of the answer is a lack of consensus within the justice community about the purpose of questioning jurors during voir dire. Although it is widely agreed that its central purpose is to remove individuals from the jury panel who could not serve fairly and impartially, there is much less agreement concerning the legitimacy of a secondary purpose: assisting lawyers in the intelligent exercise of their peremptory challenges. Peremptory challenges are a legal procedure that permit lawyers to remove individuals from the jury panel without having to state a reason. The number of peremptory challenges allotted to each side varies considerably from state to state.

While a debate is growing in this country over the use of the peremptory challenge as a legitimate tool of litigation, few jurisdictions have taken active steps to reduce or eliminate them. The ongoing disagreement about whether the purpose of voir dire extends to the use of peremptory challenges appears to explain much of the variation in the length of jury selection from jurisdiction to jurisdiction. Maryland, for example, formally recognizes only the detection of juror bias or partiality as a legitimate purpose of voir dire. In general, jury selection in Maryland tends to be fairly brief, lasting only a couple of hours for an average felony trial.

In contrast, jury selection in Minnesota, which recognizes information to be used in the exercise of peremptory challenges as a legitimate objective of voir dire, typically lasts as long as the actual trial. Notwithstanding the lack of consensus over the legitimate purpose(s) of voir dire, it is increasingly clear that permitting extensive interrogation of jurors on matters unrelated to the trial not

only heightens juror mistrust of the process and creates unnecessary opportunities for the disclosure of private information to the public, but also is ineffective for achieving the objectives of jury selection.

The practice of permitting expansive voir dire questioning is based on the pervasive belief that the attitudes of jurors, rather than the evidence presented at trial, determine the outcome of the trial. Yet social science research demonstrates repeatedly that the primary factors that influence jury verdicts are evidentiary. In her seminal article on this topic, Visher found that only 2 percent of the variation in jury verdicts could be attributed to juror characteristics.<sup>19</sup> Victim and defendant characteristics accounted for only 8 percent of the variance. Because the study examined juror decision making in sexual assault trials, in which victim characteristics may play a heightened role, Visher concluded that the "impact of extralegal issues on these jurors' decisions is likely an upper bound for the effects of these factors in other serious criminal trials."<sup>20</sup>

In addition to being largely ineffective at identifying juror bias, encouraging false assumptions about the importance of marginally relevant information about jurors introduces an unnecessary degree of adversarialness to the process of jury selection rather than confining it to the presentation of evidence where it belongs.<sup>21</sup> In theory, the scope of inquiry for voir dire should be at least as stringent as that for civil discovery. The standard should be questions that are reasonably calculated to lead to the discovery of actual juror bias or partiality, not a free flowing and unrestricted inquiry into jurors' private lives. To meet this standard, however, judges must be willing to assert control of lawyer questioning during voir dire to a much greater extent than is typically the case in many jurisdictions.

**Records retention.** Many of the concerns about juror privacy stem not from the fact that the limited number of people in the courtroom

*(continued on page 44)*

17. See Rose, *supra* n. 4, at 13.

18. See *Brandenburg v. Lucas*, 891 F. Supp. 352, 353 (E.D. Tex. 1995).

19. See Visher, *Juror Decision Making: The Importance of Evidence*, 11 LAW & HUM. BEHAV. 1, 13 (1987); see also Hannaford et al., *The Timing of Opinion Formation by Jurors in Civil Cases: An Empirical Examination*, 67 TENN. L. REV. 627 (2000); Diamond et al., *Juror Reactions to Attorneys at Trial*, 87 CRIM. L. & CRIMINOLOGY 17 (1996).

20. Visher, *supra* n. 19, at 14.

21. See Hoffman, *Peremptory Challenges Should be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809, 865-870 (1997).

may hear juror information, but from the fact that the information becomes a permanent part of the court record and is therefore available for public dissemination in perpetuity. Few courts have sufficient staff to monitor all the people who might ask to review the court file to ensure that their objectives are appropriate. And indeed, it would be antithetical to the concept of open government records for a court to engage in that level of monitoring.

The question, therefore, is whether and under what circumstances it is appropriate for courts to limit the amount of time juror records are available for public inspection. In the area of records retention, courts have perhaps the most discretion to protect jurors' expectations of privacy. It is certainly one of the areas in which there is the most variation in court practice. In Minnesota, for example, civil voir dire is not even conducted on the record unless the parties affirmatively move to do so, which happens only infrequently. Members of the public or the press have the right to attend voir dire, but there is no record of the jurors' verbal responses to questions.

A similar process is employed in civil cases in New York State. New York jurors complete a four-page carbonless jury questionnaire with standard voir dire questions. At the beginning of jury selection, the judge and the attorneys are each given one copy of the questionnaire; the juror also retains a copy. The judge then asks the jurors under oath if the answers they have provided on the questionnaire are true and accurate to the best of their knowledge, and the answer to that question is made part of the court record. The judge and attorneys may pose additional questions to individual jurors and those answers become part of the court record. But the answers to the written questionnaires are not made part of the trial record. At the end of jury selection, all copies of the questionnaires are returned to those panel members who were not selected for jury service. Unless they

are later selected for another trial, the questionnaires are destroyed at the end of the day. Questionnaires of individuals selected as jurors are destroyed after the trial is over. By employing these procedures, the New York courts drastically reduce the scope of juror information available to the public without violating the principles of public access to court proceedings. Criminal trials, of course, have traditionally required a higher level of documentation. This is certainly true in both Minnesota and New York where voir dire is conducted on the record and the responses to routine jury questionnaires are retained as part of the court file.

The apparent lack of concern about retaining information about the minutia of jurors' lives in civil cases highlights a possibility that few courts have considered. If one accepts the basic premise of this article—that the purpose of making juror information publicly accessible is to ensure that the individuals who are selected as jurors are capable of serving fairly and impartially—there is little justification for retaining information about members of the venire who are not selected for jury service and whose ability to be fair and impartial is therefore irrelevant.<sup>22</sup> Moreover, most jurisdictions require litigants to raise objections to the composition of the jury at trial or forever waive those objections as a basis for appeal. So courts might consider destroying information about all jurors after the period for appeal has expired. If it is clear from the absence of an appeal that the litigants have accepted the jury's verdict as the product of a fair and impartial tribunal, there is no reason juror information should be retained in perpetuity. Rather than inspiring public confidence in the jury system, such unregulated retention of private information wastes valuable court storage space and may invite the intrusive misuse of juror information that citizens fear.

### Rethinking objectives

If anything is clear from this discussion of juror privacy, it is that con-

cerns about how courts treat information about citizens summoned for jury service are multifaceted. None of the techniques or procedures now employed to protect juror privacy are adequate for addressing all concerns in every instance. An anonymous jury may relieve jurors' concerns about the ability of litigants or the media to contact them after the trial, but it does little to encourage the bashful juror to reveal personal information before a crowd of courtroom onlookers. Individuals who would not hesitate to reveal their names, addresses, and marital status in open court may still be reluctant to disclose sensitive information about their criminal history or experience as a crime victim. Most citizens understand the importance of revealing personal information in the context of a specific trial, but are less convinced that the court should permit unrestricted public access to that information forever.

I have argued that the balance between respecting juror privacy and public access to court records will be more easily achieved if courts rethink the objectives of the jury selection process and make disclosure of juror information consistent with those objectives. If the objective of jury selection is to ensure the individuals selected as jurors are capable of serving fairly and impartially, the only information that should be disclosed is that which is relevant to the question of juror bias and partiality. Qualification and administrative information, which is not relevant to fairness and impartiality, should not be disclosed. Juror information that is revealed during voir dire should be disclosed, but subject to protections for sensitive information that individuals might otherwise decline to reveal. Finally, after the litigants accept a verdict as the product of a fair and impartial process, personal information about the jurors should be destroyed or sealed from further public scrutiny to protect the privacy of those citizens from intrusions unrelated to the trial. ❧

22. An exception can easily be made if an objection were made to excusing a member of the venire (e.g., pursuant to a *Batson* challenge).