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COMMENTS

Procedure—Scope of Voir Dire—Defendants Are Not Deprived of the Intelligent Use of Peremptories by Voir Dire Restrictions Intended to Protect Potential Jurors' Safety and Privacy

*United States v. Barnes**

I. Introduction

Few attorneys doubt the importance of peremptory challenges. Lawyers have maintained for years that skillful voir dire and an astute use of peremptory challenges can be the crucial factors in achieving a desired jury verdict.¹ In many highly publicized trials, lawyers have used the assistance of psychologists, social scientists, and other jury selection "experts," in their attempts to eliminate the guesswork involved in exercising peremptories.² A recent empirical study indicates that even without such assistance lawyers in more typical trials actually do win some cases through their use of peremptory challenges.³

At least in theory, the function of peremptory challenges is to assist in the seating of an impartial jury.⁴ To effectuate this goal, the voir dire on which peremptories are based ought to provide as much information about jurors as possible so that partiality can be discovered. The logic of the theory, however, is brought up short by reality. Pressures, chiefly from two main directions, have led to restrictions. First, attorneys have attempted to use voir dire and peremptory challenges to achieve goals other than an impartial jury.⁵ Furthermore, for most trials, judges do not have time to supervise protracted examinations of prospective jurors even if abuse were never a concern.⁶ Extensive,

* 604 F.2d 121 (2d Cir. 1979).

1 See W. BRYAN, *THE CHOSEN ONES or (The Psychology of Jury Selection)* (1971) which details the work and opinions of William J. Bryan, a full-time specialist in the practice of medical hypnosis and jury selection, who claims no case has ever been lost when he picked the jury. Attorneys F. Lee Bailey and Melvin Belli, among others, have used Mr. Bryan's assistance in some of their bigger cases. Schulman, Shaver, Colman, Emrich & Christie, *Recipe for a Jury*, *PSYCH. TODAY*, May 1974, at 37; White, *Selecting the Jury*, in *SUCCESSFUL JURY TRIALS* 121 (J. Appleman ed. 1952).

2 See Etzioni, *Science: Threatening the Jury Trial*, *Wash. Post*, May 26, 1974, § C, at 3, col. 1; Sage, *Psychology and the Angela Davis Jury*, *HUMAN BEHAVIOR*, Jan. 1973, at 56-61; Zeisel & Diamond, *The Jury Selection in the Mitchell-Stans Conspiracy Trial*, 1976 A.B.A. RESEARCH J. 151.

3 The authors of this study, done in a federal district court, state:
The first conclusion emerging from this study is that there are cases in which the jury verdict is seriously affected, if not determined, by the voir dire. At times, one attorney will significantly outperform the opposing attorney in challenging hostile jurors. Lawyers apparently do win some of their cases, as they occasionally boast, during or at least with the help of, voir dire.
Zeisel & Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 *STAN. L. REV.* 491, 518-19 (1978).

4 *Swain v. Alabama*, 380 U.S. 202, 218-19 (1965).

5 *Braswell, Voir Dire: Use and Abuse*, 7 *WAKE FOREST L. REV.* 49 (1970).

6 Levit, Nelson, Ball & Chernick, *Expediting Voir Dire: An Empirical Study*, 44 *S. CAL. L. REV.* 916, 926 (1971).

probing voir dire, although not without its champions,⁷ now appears to be the exception rather than the rule.⁸

Although the Supreme Court is still willing to characterize the peremptory challenge as "one of the most important rights secured to the accused,"⁹ much has changed since it declared that "[a]ny system for the empanelling of a jury that presents [*sic*] or embarrasses the full, unrestricted exercise by the accused of the right of peremptory challenge, must be condemned."¹⁰ This erosion of the peremptory challenge is evident in *United States v. Barnes*,¹¹ a recent Second Circuit decision. The *Barnes* opinion affirmed a trial judge's decision to withhold the names and addresses, the religions, and the ethnic backgrounds of the potential jurors. Because *Barnes* is the first time all of these restrictions have been presented in the same case, it prompts an inquiry into the value of, and the court's commitment to, preserving the historic role of the peremptory challenge in securing an impartial jury.

II. Statement of the Case

Fourteen blacks and one Hispanic were indicted by a grand jury in the Southern District of New York on charges of distributing large quantities of narcotics in Harlem and the South Bronx. The drug bust had generated a great deal of pretrial publicity, particularly concerning the activities of Leroy ("Nicky") Barnes, the reputed ringleader.

In order to select the jury for the trial, the district court judge called 150 potential jurors. He announced *sua sponte* that he was abandoning the usual procedure of releasing the names and addresses of the jurors and was assigning each juror a number instead. His justification for doing so was his concern for their safety because violence had been associated with previous cases of this sort in the Southern District of New York.¹² Counsel for the defendants asked the judge to permit inquiry into the religion and the ethnic background of the prospective jurors in lieu of being given their identities. The judge refused, noting that these were not directly at issue in the trial and expressing a desire to guard the jurors' privacy. The judge then followed the common federal practice of conducting the voir dire himself,¹³ choosing from the lists of questions submitted by the prosecutor and the respective counsel for the defendants. Besides asking the standard voir dire questions,¹⁴ he included questions about the jurors' general attitudes and feelings toward blacks.¹⁵

7 See Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545 (1975).

8 See text accompanying notes 34-44 *infra*.

9 380 U.S. at 219.

10 *Pointer v. United States*, 151 U.S. 396, 408 (1894).

11 604 F.2d 121 (2d Cir. 1979).

12 *Id.* at 134.

13 Although FED. R. CRIM. P. 24(a) gives judges the option of allowing the attorneys to conduct voir dire or to do it themselves, federal judges usually exercise this discretion in favor of conducting voir dire themselves. JUDICIAL CONF. OF THE UNITED STATES, REPORT OF THE JUDICIAL COMMITTEE ON THE OPERATION OF THE JURY SYSTEM, THE JURY SYSTEM IN THE FEDERAL COURTS, 26 F.R.D. 409, 466 (1960).

14 *E.g.*, whether the prospective jurors knew any of the defendants or attorneys; whether they could accept and apply the law. 607 F.2d at 135.

15 *E.g.*, whether the prospective jurors had had any experiences with persons of other races, creeds, or colors resulting in civil or criminal confrontations, or had ever had any experiences with persons of different races arising out of employment, residence, or school situations which might make the juror unable to judge such persons fairly. Most were also asked whether they felt that they were generally prejudiced against persons of other races. *Id.* at 135-36.

Eleven of the fifteen defendants were convicted of conspiracy to violate federal narcotics laws and related crimes of distribution and possession of heroin and cocaine. The convictions were appealed by the defendants jointly or individually on approximately twenty assorted issues, but the Second Circuit reached a split decision only on the issue of the trial court's restrictive voir dire.

The appeal was heard before a three-judge panel of the Second Circuit. Writing for the panel majority in upholding the convictions, Judge Moore emphasized the broad discretion given to the trial judge to determine the proper scope of voir dire. He also pointed out that religion and ethnic background were not directly at issue in the trial, and that some ideals of jury selection law have to be accommodated to the realities of modern-day trials in large narcotics cases.

Judge Meskill wrote a vigorous dissent in which he conceded that, under exceptional circumstances, it could be proper to withhold names and addresses of potential jurors. Judge Meskill thought it was error; however, if, at the same time, the defendants were prohibited inquiry into the jurors' religious and ethnic backgrounds. He argued that this "cluster of decisions"¹⁶ restricting voir dire resulted in denying the defendants the ability to exercise meaningfully and intelligently their right to peremptory challenge. Therefore, he maintained that the defendants should be given a new trial.

The defendants then petitioned for a rehearing en banc. Although the majority of the full court denied the petition, three judges voted to hear the question of the propriety of the voir dire examination.

III. The Vital Role of the Peremptory Challenge

There are two basic types of challenges a lawyer has in his jury selection arsenal: the challenge for cause and the peremptory challenge.¹⁷ The number of challenges for cause is unlimited. They are of limited utility, however, because they must be based on a legally cognizable reason. In order to establish cause, the lawyer must be able to convince the judge that sufficient evidence has surfaced to establish a potential juror's inability to decide the case without prejudice.¹⁸ On the other hand, while the number of peremptory challenges is limited by statute,¹⁹ they are "an arbitrary and capricious species of challenge"²⁰ which counsel may exercise for any or no reason.

16 *Id.* at 174 (Meskill, J., dissenting).

17 Though not relevant to this discussion, one could also count the challenge to the panel, or challenge to the array, where the challenge of the whole panel is based on the illegality of drawing or selecting the panel. *See* 47 AM. JUR. 2d *Jury* §§ 224-232 (1969).

18 The judge must be convinced of either actual bias, such as the juror admitting he could not reach an unbiased decision, or implied bias, such as will be presumed if the juror is closely related to one of the parties. *Id.* at § 216.

19 FED. R. CRIM. P. 24(b) provides:

If the offense charged is punishable by death, each side is entitled to 20 peremptory challenges. If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. If the offense charged is punishable by imprisonment for not more than one year or by fine or both, each side is entitled to 3 peremptory challenges. If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

20 380 U.S. at 242 (quoting 4 W. BLACKSTONE, COMMENTARIES *353).

Nowhere in the Constitution are the parties in either a criminal or a civil action specifically guaranteed the right to challenge jurors.²¹ Additionally the Supreme Court has held that the impartial tribunal clause of the sixth amendment²² does not require peremptory challenges in criminal cases as a fundamental right; "trial by an impartial jury is all that is secured."²³

The Supreme Court has, however, consistently characterized the peremptory challenge as "one of the most important of the rights secured to the accused."²⁴ It is "essential in contemplation of law to the impartiality of the trial,"²⁵ and "one of the most effective means to free the jury box from men unfit to be there."²⁶ In the leading modern case supporting peremptories, *Swain v. Alabama*,²⁷ the Supreme Court adopted an extremely strong and controversial²⁸ stance in order to protect the essence of the peremptory challenge. In *Swain* the prosecutor had used his peremptories to remove all blacks from the jury in the trial of a black man accused of raping a white woman. The Supreme Court upheld this use of the peremptory challenge, stating that the peremptory challenge "fails of its full purpose"²⁹ if it cannot be exercised with complete freedom.

Since no reason need be given for the way in which peremptories are used, all the subtle, unquantifiable, unprovable, and generally unspoken factors which might cause a party to doubt the potential juror's lack of bias toward him come into play.³⁰ In addition, "[t]he peremptory, made without giving any reason, avoids trafficking in the core of truth in most common stereotypes. It makes unnecessary explicit entertainment of the idea that there are cases that [some groups] would be unable to decide on the evidence or . . . rule on impartially."³¹ Simply put, the peremptory challenge is, and has long been recognized in this country as, a key factor in seating a jury from which the extremes of bias have been removed³² and to which the parties are willing to trust their fate.³³

IV. The Erosion of the Peremptory Challenge

Peremptory challenges can be effective only to the extent that information about the prospective jurors is available. The Supreme Court has recognized

21 *But see* Gutman, *The Attorney Conducted Voir Dire of Jurors: A Constitutional Right*, 39 BROOKLYN L. REV. 290 (1972) which relates some of the debate which surrounded the drafting of the wording of the sixth amendment. Some drafts specifically mentioned the right to challenge. Madison, however, argued that the right to challenge was incident to the right to trial by jury and, therefore, did not need to be specifically mentioned. *Id.* at 295-99.

22 The sixth amendment states in part: "In all criminal prosecutions, the 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 . . ." U.S. CONST. amend. VI.

23 380 U.S. at 244 (quoting *Stilson v. United States*, 250 U.S. 583, 586 (1919)).

24 *See, e.g.*, 380 U.S. at 219; 151 U.S. at 408; *St. Clair v. United States*, 154 U.S. 134, 148 (1894).

25 *Lewis v. United States*, 146 U.S. 370, 378 (1892) (quoting *Lamb v. State*, 36 Wis. 424 (1874)).

26 *Hayes v. Missouri*, 120 U.S. 68, 70 (1886).

27 380 U.S. 202 (1965).

28 *See, e.g.*, Note, *Swain v. Alabama: A Constitutional Blueprint for the Perpetuation of an All-White Jury*, 52 VA. L. REV. 1157 (1966).

29 380 U.S. at 219 (quoting 146 U.S. at 378).

30 *See* text accompanying note 68 *infra*.

31 *See* *Babcock*, *supra* note 7, at 553.

32 380 U.S. at 219 (1965).

33 *Id.* at 242.

that voir dire "operat[es] as a predicate for the exercise of peremptories,"³⁴ and therefore must often be "extensive and probing."³⁵ Any restrictions on the scope of voir dire are necessarily restrictions on the effective use of peremptory challenges.

To expect voir dire to be totally unrestricted, however, would not be realistic. Understandable pressures have resulted in limitations on its scope. Thus, some controls have been necessary to restrain abuse.³⁶ Others have been imposed by the courts as they have weighed the potential benefits of extensive voir dire against the day-to-day pressures of crowded dockets, inadequate budgets, and increasingly unattractive jury service.³⁷

Though the current restrictions on voir dire have come about gradually, their combined impact has been dramatic. One observer of trials in a federal district court noted that:

The voir dire examinations in the cases studied were more or less perfunctory, stilted affairs, quickly concluded and devoid of the spectacular. The typical voir dire lasted approximately one-half hour and this included the time spent by the Judge in welcoming the veniremen and by the clerk in drawing the names of the twelve veniremen who would first take seats in the jury box.³⁸

The limitations which have reduced the importance of voir dire are now commonplace. Instead of the lawyers being in charge of voir dire, the judge typically handles it.³⁹ Multiple defendants may be allotted only as many peremptories as a single defendant.⁴⁰ To save time, many questions are addressed to the entire panel instead of to the veniremen individually.⁴¹ The scope of questions has been severely restricted.⁴² In addition many lawyers impose limits on themselves rather than risk antagonizing the trial judge.⁴³ They quite understandably choose, when possible, to avoid such conflicts. Courts seem hesitant to halt this erosion, and the current trend is, as *Barnes* demonstrates, toward even greater restrictions on the amount of information available from voir dire.⁴⁴

34 *Id.* at 218-19.

35 *Id.*

36 *See* note 5 *supra*.

37 Besides pointing out the obvious concerns of time and expense, some commentators have noted that, [a]nother variable is the sensibilities of the potential juror himself. The system is only as good as the quality of the jurors who serve. And because it is so easy to avoid jury service, we must make jury service attractive in order to be able to have the luxury of choosing among numerous attractive veniremen. A voir dire examination can totally alienate a juror to the attorney's case. The in-depth questioning in front of the other veniremen can be embarrassing, and lengthy, repetitive, tedious questioning can also make jury service uncomfortable.

Levit, Nelson, Ball & Chernick, *supra* note 6, at 926.

38 Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. CAL. L. REV. 503, 503-04 (1965).

39 *See* note 13 *supra*. This has sparked considerable debate. *See* Gutman, *supra* note 21; Padawer-Singer, Singer & Singer, *Voir Dire by Two Lawyers: An Essential Safeguard*, 57 JUDICATURE 386 (1974); Note, *Judge Conducted Voir Dire as a Time-Saving Trial Technique*, 2 RUT.-CAM. L.J. 161 (1970).

40 250 U.S. 583; *see* note 21 *supra*.

41 *See* Zeisel & Diamond, *supra* note 3, at 529.

42 *Id.*; Note, *Voir Dire: Establishing Minimum Standards to Facilitate the Exercise of Peremptory Challenges*, 27 STAN. L. REV. 1493, 1494 (1975) [hereinafter cited as *Minimum Standards*].

43 *See* Broeder, *supra* note 38, at 522.

44 *See* note 41 *supra*.

V. Appellate Court Deference to Trial Court Discretion

The *Barnes* opinion emphasizes several times that the trial judge has broad discretion in conducting the voir dire, just as he has in conducting the trial generally.⁴⁵ An appellate court reviewing a cold record is hesitant to find an abuse of discretion, especially in an area where clear guidelines and consistent precedent are so lacking.

The broad discretion lodged with the trial court accounts, in large measure, for the disparity in tone evident in appellate court opinions. Appellate courts extol peremptory challenges when trial courts allow their unencumbered use,⁴⁶ but staunchly defend their severe restriction: "Even where appellate courts ostensibly require voir dire to be extensive enough to allow the intelligent exercise of peremptories, appellate courts consistently uphold severe limitations of voir dire."⁴⁷ The permissible span seems to be from wide-ranging voir dire and unbridled peremptory challenges to *Barnes*-type limitations. The net result is that decisions by trial courts about the scope of voir dire are almost never disturbed on appeal.⁴⁸ Trial courts consequently have very little to guide them in deciding what to ask and what not to ask veniremen.

The defendants in *Barnes* argued that they needed more information to be able to eliminate with peremptories the racially biased jurors who had not been dismissed for cause. The Supreme Court has recently made clear in *Ham v. South Carolina*⁴⁹ that the scope of voir dire must encompass an inquiry into racial prejudice when that is likely to be an issue in the trial and is requested by counsel. The Court in the same opinion, however, refused to give any real guidance as to the required extent of voir dire. Though racial bias was at the heart of the defense in *Ham*, the Supreme Court held that it was only because the trial judge refused to make *any* inquiry that reversal was warranted.⁵⁰ Short of a complete refusal to make any inquiry at all regarding racial prejudice when that is raised as a factor by counsel in its request for voir dire questions, a trial court is not likely to be found to have abused its discretion. The *Barnes* decision is consistent with that standard.

Unfortunately this approach may result in serious infringement on a defendant's use of his peremptory challenges. A trial judge is faced with tremendous pressures to expedite and streamline his trials and to protect the safety and privacy of jurors. Because of the wide latitude given on appellate review, he is likely to be more concerned about handling the challenges for cause—his responsibility—than about whether the lawyers have as much information as they consider necessary to exercise their peremptories.⁵¹

The rather standard pattern of appellate courts defending the broad use of peremptory challenges but at the same time permitting their most confined use has generated considerable confusion. Both those calling for more restrictions

45 604 F.2d at 136-41.

46 See, e.g., 380 U.S. 202 (1965).

47 *Minimum Standards*, *supra* note 42, at 1504-05; *id.* at 1505 n.48, where the author lists numerous examples of this principle at work in cases.

48 *Id.* at 1504-05.

49 409 U.S. 524 (1973).

50 *Id.* at 529.

51 See note 47 *supra*.

on voir dire and those calling for less can muster support for their positions. The wide variations of acceptable practice have also fueled a troublesome polarity of opinion among legal writers⁵² and help explain the sharp disagreement in the Second Circuit in *Barnes*.

VI. The *Barnes* Decision: Predictable but Lamentable

A. A Predictable Outcome

Judge Moore did not veer outside established precedent in writing the panel majority opinion. He notes the policy of appellate court deference to trial court discretion and that the ethnic and religious backgrounds of the defendants were not at issue in the trial. He cites precedent permitting the trial judge to withhold, in extraordinary circumstances, jurors' names and addresses and permitting him to prohibit inquiry into their religions and ethnic backgrounds when those are not directly at issue in the trial.

In dissenting to the panel majority opinion, Judge Meskill points to the cumulative effect of these restrictions as an impermissibly severe intrusion into the peremptory challenge right. He also emphasizes that, although some limits on voir dire are permissible, the very essence of the peremptory challenge is that it is exercisable on grounds which may normally be regarded as irrelevant to the issues at trial. In fact, he insists, a peremptory challenge based on race, religion, or nationality is "the archetypical peremptory challenge."⁵³

Judge Oakes' dissent to the denial of a rehearing en banc begins with alarmist hyperbole. He contends that the majority opinion has "adopted an entirely new rule of law that so far as I know stands without precedent in the history of Anglo-American jurisprudence."⁵⁴ His shock, however, is more pronounced than an understanding of relevant case law would appear to warrant. Although he does make the telling point that less drastic alternatives were available to the trial judge, his characterization of the decision as "bizarre, almost Kafka-esque"⁵⁵ is an overreaction. It certainly is more accurate to conclude that the substantial majority of the full court viewed the underlying assumptions and the use of precedent in Judge Moore's analysis as a fair treatment of the state of the peremptory challenge today.

The past emphasis at voir dire on thoroughness and protecting the defendants' right to an impartial jury has shifted to an emphasis on expediting the trial and protecting the jurors from unnecessary intrusion into their private lives. The *Barnes* opinion is not, as Judge Oakes urges, "without precedent."⁵⁶ It simply reflects that shift in emphasis.

B. Identification of Juror Prejudice

The sharp disagreement in *Barnes* between the majority and the dissenters

⁵² The *Barnes* opinion takes judicial notice of the mass of conflicting opinion in this area among legal writers. 604 F.2d at 142 n.10.

⁵³ *Id.* at 174 (Meskill, J., dissenting).

⁵⁴ *Id.* at 175 (dissent to rehearing denial).

⁵⁵ *Id.*

⁵⁶ *Id.*

appears to stem in part from differing assumptions about the weight which should be accorded the ability of jurors to identify their own biases. The trial judge had asked a number of questions which called on each juror to evaluate whether he was too prejudiced to reach an unbiased decision.⁵⁷ According to the majority, these self-analytical questions justified the denial of the defendants' request to inquire into each juror's religion and ethnic background. The conclusion in *Barnes* is little more than a restatement of their initial assumption: any prejudice commonly shared by people of a certain background "would have been uncovered by the questioning about attitudes toward blacks."⁵⁸ If jurors both can and will identify their own biases when asked, the majority's position is virtually unassailable. After all, the jurors were asked "whether they felt they were generally prejudiced against persons of other races,"⁵⁹ whether they had had any experiences "which might make them feel they could not fairly judge such persons,"⁶⁰ and similar self-evaluation questions.

Although the dissenting judges do not attack that assumption explicitly, they implicitly reject it. They appear to doubt the validity of such self-evaluation and consequently give greater weight to the defendants' request for more information about the jurors. They obviously were not convinced, as were the majority, that "the court conducted a voir dire which resulted in the selection of a panel whose background was fully explored, and whose state of mind with respect to the racial 'question' was probed as well."⁶¹

The utility of these self-diagnostic questions is suspect for several reasons. First, biases are widely recognized, at least outside the courtroom, as often being "unconscious" or "subconscious."⁶² Even if a juror tried to answer these questions honestly, he might not be able to do so. Second, even if a juror were aware of his bias, he would have to be able to recognize whether or not this bias would prevent his fair judgment. With the typical prospective juror at least consciously committed to justice, this additional assumption also is flawed.⁶³ Finally, even if the juror could recognize his own bias and even if he understood that it probably would warp his judgment, he would still have to have the desire and the courage to admit that. Studies indicate, not too surprisingly, that jurors often choose to lie rather than admit what they feel is generally considered to be a moral weakness.⁶⁴

The *Barnes* majority is willing to assume that a juror's good faith effort to

57 Questions asked the prospective jurors included: whether they, or close friends or relatives, had had any prior experiences with narcotics or with firearms which would prevent fair consideration of the case; whether they had any opinion about the courts, defense attorneys, prosecutors, and/or law enforcement officers, which would prevent fair judgment of the case; what their "general attitude toward blacks" was; whether they had had any experiences with persons of different races arising out of employment, residence, or school situations which might make them feel they could not fairly judge such persons; whether they felt that they were generally prejudiced against persons of other races. *Id.* at 135-36.

58 *Id.* at 140.

59 *Id.* at 135.

60 *Id.*

61 604 F.2d at 136.

62 *E.g.*, A.B.A. ADVISORY COMMITTEE ON FAIR TRIAL AND FREE PRESS, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS 62-64 (approved draft 1968); W. BRYAN, *supra* note 1; Appleman, *Selection of the Jury*, 1968 TRIAL LAW GUIDE 207; M. BLOOMSTEIN, VERDICT, THE JURY SYSTEM 72 (1972); Kallen, *Peremptory Challenges Based Upon Juror Background—A Rational Use?*, 1969 TRIAL LAW GUIDE 143; *Minimum Standards*, *supra* note 42, at 1513.

63 See Broeder, *supra* note 38, at 526-27.

64 *Id.* at 510-15.

identify and lay aside or ignore any bias eliminates the need to give the fullest possible consideration to providing attorneys with information they feel might be important. In doing so, the Second Circuit unfortunately is merely perpetuating a premise which seems to be shared by most other courts.⁶⁵ Consequently, a widespread dissatisfaction with the *Barnes* opinion on this score is unlikely.

C. *The Cumulative Effect of These Restrictions*

Judge Meskill, dissenting from the panel majority opinion, makes a telling attack to which the majority never satisfactorily responds. He concedes that there is support for each of the individual restrictions imposed by the trial court.⁶⁶ He contends, however, that citing case after case upholding these restrictions individually does not dispense with the need to consider their cumulative effect. Allowing all these restrictions in the same trial, he argues, "denied [the defendants] the ability to exercise meaningfully their right to peremptory challenge."⁶⁷

⁶⁵ *Minimum Standards*, *supra* note 42, at 1513.

⁶⁶ One of the serious consequences of withholding names and addresses is that it completely shuts off outside investigation of jurors, a common practice in trials such as this with explosive issues or extensive publicity (*see* 604 F.2d at 172 n.7) and forces counsel to rely solely on the information gathered at voir dire. The better practice, when names and addresses can justifiably be withheld, would be for the trial judge to allow counsel liberal access to voir dire information which they request since that is the only information available to them.

An ABA study committee, in explaining its position that parties as a general rule should be given a list of prospective jurors with their addresses, comments that, the "obvious purpose" of such a provision is to afford the defendant an opportunity to find out, if he can, something about the prospective jurors, in order the more intelligently and pertinently to examine to determine either the existence of a disqualifying cause, or the advisability of eliminating one or more of them by the exercise of peremptory challenge.

A.B.A. PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO TRIAL BY JURY 60-61 (1968).

Attention should also be called to the fact that other cases have adopted the more justifiable practice that, where addresses need to be withheld, at least the jurors should identify the particular portion of the judicial district where they lived. *See Johnson v. United States*, 270 F.2d 721, 724 (9th Cir. 1959), *cert. denied*, 362 U.S. 937 (1960); *Wagner v. United States*, 264 F.2d 524, 527 (9th Cir.), *cert. denied*, 360 U.S. 936 (1959). This practice contrasts with that used in *Barnes* at the trial level since the defendants were told only in which of the eleven counties of the Southern District of New York they resided, hardly much of an indicator as to where they lived.

Regarding the use of peremptory challenges based on religion and ethnic background, the Supreme Court has said the peremptory challenge,

is no less frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation, or affiliations of people summoned for jury duty. For the question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be. It is well known that these factors are widely explored during the voir dire, by both prosecutor and accused. This Court has held that fairness of trial by jury requires no less. Hence, veniremen are not always judged solely as individuals for the purpose of exercising peremptory challenges. Rather they are challenged in light of the limited knowledge counsel has of them, which may include their group affiliations, in the context of the case to be tried.

380 U.S. at 220-21 (citations and footnotes omitted).

Not only do attorneys consider ethnic background and religion of prospective jurors to be important (W. BRYAN, *supra* note 1; Appleman, *supra* note 62; Kallen, *supra* note 62, at 150-51; *Minimum Standards*, *supra* note 42, at 1496), but surveys taken to help choose jurors in some recent highly publicized trials have found ethnic background and religion to be relevant factors. *See, e.g., DiMonna, The Real Surprise of the Mitchell-Stans Trial*, N.Y. MAGAZINE, July 8, 1974, at 31; Kahn, *Picking Peers: Social Scientists' Role in Selection of Juries Sparks Legal Debate*, Wall St. J., Aug. 12, 1974, at 1, col. 1. In a report of work done in preparation for the trial of seven anti-Vietnam War protestors in Harrisburg, Pennsylvania, several social scientists reported that they discovered through their study that, "Religion was significantly related to all attitudes that concerned us." Shulman, Shaver, Colman, Emrich & Christie, *supra* note 1, at 40. The same correlation was found to be true in the Maryland Rap Brown Case. GINGER, JURY SELECTION IN CRIMINAL TRIALS 497 (1975).

⁶⁷ 604 F.2d at 169 (Meskill, J., dissenting).

The majority's response to this criticism is not persuasive. In fact, it amounts to nothing more than a glib reassertion that enough questions were asked to uncover prejudice and an unsupported assurance that reasonably intelligent lawyers could gain the same insights into jurors through demeanor evidence:

To say, however, that the limitations imposed in this case constituted a denial of the right to an intelligent exercise of the challenge is to underestimate the ability of counsel to gain the same, or substantially the same, insights into the prospective juror's thoughts by observing his demeanor, generally, and by listening to the answers to questions concerning family, education, and other matters (which were covered rather extensively in this case), as one might gain by being informed of a person's residence address or ethnic background.⁶⁸

The *Barnes* majority fails to deal satisfactorily with the possibility that the whole might be greater than the sum of the parts. Their logic reveals a lack of commitment to preserving, to the fullest extent possible, the peremptory challenge as a vital tool for the defendants to secure an impartial jury.

D. Ignoring Less Drastic Alternatives

Some cases are particularly affected by "real world" considerations. *Barnes* was such a case. The appellate opinion attaches great weight to the "'sordid history' of multi-defendant narcotic cases tried in the Southern District [of New York]"⁶⁹ and the trial judge's conclusion of possible danger to the prospective jurors.

Without actually discounting the majority's concern for juror safety,⁷⁰ Judge Oakes, in his dissent to the rehearing denial, lists several trials of defendants at least equally as notorious as these in which the courts did not feel forced to react with a similarly anonymous jury.⁷¹ As Judge Oakes goes on to point out, the trial judge had ready access to other means⁷² to secure the same goal of juror protection without infringing so deeply on the strong, competing interest the defendants had in the fullest possible voir dire. Judge Oakes suggests that a simple alternative would have been the revelation of the identities of the jurors to counsel in camera. Since this would have made outside in-

68 *Id.* at 142.

69 *Id.* at 134.

70 However, Judge Oakes does comment that, "I would add that only so far as appears in the record no one had been threatened—as the majority said, 'no untoward event had occurred up to the opening of the trial'—and sequestration under protection would be an ample remedy if anyone had been." *Id.* at 175 (dissent to rehearing denial).

71 Among others, Judge Oakes lists *Buchalter v. New York*, 319 U.S. 427 (1973) (homicide trial of Murder, Inc.'s Louis "Lepke" Buchalter); *Capone v. United States*, 56 F.2d 927 (7th Cir.), *cert. denied*, 286 U.S. 553 (1932).

72 In the words of Judge Oakes:

It would seem to me that there were other less drastic alternatives available here including revelation of the jurors' identities in camera to counsel, *see, e.g., United States v. Gurney*, 558 F.2d 1202, 1210 n.12 (5th Cir. 1977) (jury listing, including addresses and other personal information, not publicly released), *cert. denied*, 435 U.S. 968 (1978); *see also United States v. Hoffa*, 367 F.2d 698, 710 (7th Cir. 1966) (jurors' names need not be read aloud in open court prior to voir dire), *vacated on other grounds*, 387 U.S. 231 (1967) (per curiam).

vestigation of jurors by counsel possible,⁷³ any objection to the denial of voir dire access to ethnic and religious background would have been less persuasive.

The Second Circuit majority never addresses the possibility of a less drastic alternative, although this seems to present an appellate court in this situation with the easiest and soundest way to test the trial judge's decision for an abuse of discretion. That it was reasonable to take measures to ensure juror safety does not make it reasonable to adopt *any* means to achieve that purpose. Eliminating the jurors completely would produce the ultimate in juror protection, but such a drastic alternative would obviously be an unacceptable denial of defendants' right to trial by jury. In *Barnes* the Second Circuit could have avoided the further erosion of the peremptory challenge right without denigrating the importance of juror safety. Had the entire court been as convinced as the dissenters were that peremptory challenges are vitally important to the defendants' right to an impartial jury, it certainly could have found that the trial judge had abused his discretion by choosing a more severe means to achieve juror protection than was necessary. That the court in *Barnes* would not insist on only those voir dire restrictions which were necessary is a sad reflection of the sagging fortunes of the peremptory challenge today.

VII. Conclusion

The sixth amendment's guarantee of an impartial jury indicates a basic concern with the deleterious effect of bias on verdicts. Voir dire and jury challenges have always been regarded as important elements of this guarantee. Nevertheless, the courts must be engaged in a process of weighing these interests with other important, but, at times, conflicting ones.

Both Supreme Court and Circuit Court opinions indicate that the overall effect of voir dire restrictions should not unnecessarily infringe on a defendant's⁷⁴ full and intelligent use of his peremptory challenges. At first blush the rhetoric seems unequivocal. "Any system for the empanelling of a jury that prevents or embarrasses the full, unrestricted exercise by the accused of that right, must be condemned."⁷⁵ "If this right is not to be an empty one, the defendants must, upon request, be permitted sufficient inquiry into the background and attitudes of the jurors to enable them to exercise intelligently their peremptory challenges."⁷⁶ "Peremptory challenges are worthless if trial counsel is not afforded an opportunity to gain the necessary information upon which to base such strikes."⁷⁷

Upon further inspection, however, ambiguities in applying such principles remain, and the courts alone decide what is sufficient inquiry, intelligent use of peremptories, necessary information, and the like. The Second Circuit

⁷³ See note 66 *supra*.

⁷⁴ Though the prosecution also has an historical right to the use of peremptories, "the peremptory challenge has long been recognized as a device to protect *defendants*." 380 U.S. at 242 (Goldberg, J., dissenting) (emphasis in original). This undercuts Judge Moore's rationale that another important factor in concluding that the voir dire was fair was that both the prosecutor and the defense were equally in the dark as to the names, addresses, ethnic background, and religion. 604 F.2d at 142.

⁷⁵ *United States v. Lewin*, 467 F.2d 1132, 1137 (7th Cir. 1972).

⁷⁶ *United States v. Dellinger*, 472 F.2d 340, 368 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973).

⁷⁷ *United States v. Ledee*, 549 F.2d 990, 993 (5th Cir. 1977).

clearly was not alarmed at the prospect of further restrictions being placed on peremptory challenges, and *Barnes* is now precedent for future restrictions.

This further step in the pattern of the erosion of the peremptory challenge is unfortunate particularly because it was unnecessary. By insisting that the trial judge use means available to him short of such drastic voir dire restrictions, the court could have avoided setting a damaging precedent which other courts are likely to follow. In light of the trend in this direction, however, the decision in *Barnes* is not surprising. It is only when one examines the essential role of the peremptory challenge in securing an impartial jury that it becomes upsetting.

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