

Summer 1980

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Recommended Citation

Peter J. Wasserman, The Peremptory Challenge in a Criminal Case after United States v. Barnes, 71 J. Crim. L. & Criminology 173 (1980)

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NOTE

THE PEREMPTORY CHALLENGE IN A CRIMINAL CASE AFTER *UNITED STATES V. BARNES*

INTRODUCTION

The peremptory challenge¹ in a criminal case, while not protected by the Constitution, has been declared by the Supreme Court to be "one of the most important rights secured to the accused."² The peremptory challenge differs from the challenge for cause in that a challenge for cause is based "on a narrowly specified, provable and legally cognizable basis of partiality,"³ while a peremptory challenge may be "based on sudden impressions and unaccountable prejudices."⁴ It is through peremptory challenges and challenges for cause that the defendant is assured an impartial jury as guaranteed by the sixth⁵ and fourteenth amendments.⁶ An impartial jury is attained through the exercise of these challenges by each side removing jurors who sympathize with the other side. This process hopefully will leave jurors who are "indifferent."⁷

¹ The peremptory challenge has been defined as an "arbitrary and capricious species of challenge to a certain number of jurors, without showing any cause at all" and consequently, "without being subject to the court's control." *Swain v. Alabama*, 380 U.S. 202, 212 n.9, 220 (1965).

² *Id.* at 219 (quoting *Pointer v. United States*, 151 U.S. 396, 408 (1894)).

³ 380 U.S. at 220.

⁴ *Id.*

⁵ U.S. CONST. amend. VI reads in part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."

⁶ U.S. CONST. amend. XIV; see *Irwin v. Dowd*, 366 U.S. 717 (1961). Rule 24 of the Federal Rules of Criminal Procedure also guarantees the right to make peremptory challenges. FED. R. CRIM. P. 24.

Blackstone noted, as reasons for granting defendants peremptory challenges, the desire for the accused to have a good opinion of his jury by allowing a challenge for no more than "bare looks and gestures of another" and the desire to protect the defendant from jurors who have been annoyed by the probing questions at voir dire. 4 W. BLACKSTONE, COMMENTARIES* 353.

U.S. Asst. Att'y. Gen. Babcock notes an additional reason for allowing peremptory challenges: the reluctance of counsel to articulate a reason for striking a juror in the case where the challenge is based on the juror's ethnicity, race, or religion. Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545, 553-54 (1975).

⁷ Babcock, *supra* note 6, at 550-51.

While lawyers seek to obtain enough information about each prospective juror through voir dire in order to exercise their peremptory challenges intelligently, the courts sometimes have countervailing concerns. For example, courts may seek to prevent what they regard as unnecessary intrusions into the jurors' privacy.⁸ In addition, they may try to reduce the possibility that a lawyer's probing questions will annoy members of the jury or jeopardize the jurors' impartiality.⁹ Finally, they may limit the time spent on voir dire in order to avoid delay.¹⁰

Consequently, courts have sought means to control the questions asked on voir dire without denying defendants adequate use of their right to make intelligent peremptory challenges. The United States Court of Appeals for the Second Circuit tried to maintain this delicate balance in *United States v. Barnes*.¹¹ In *Barnes*, the court held that the trial court had not abused its discretion by refusing to permit voir dire regarding the names, addresses, ethnic backgrounds, and religions of prospective jurors.¹²

While the court appears to have followed the trend of the case law with respect to peremptory challenges, the opinion in *Barnes* has four weaknesses. First, with respect to counsel's request for the name and address of each juror, the Second Circuit should have required that the trial court employ the least restrictive means available to the court in maintaining the court's interest in ensuring juror impartiality. Second, the court should have found that defense counsel's request for the jurors' residences was proper. This inquiry was relevant for purposes of discovering a bias that had the potential to affect the case at bar. Third, the court appears to have taken the standard established by

⁸ See *United States v. Barnes*, 604 F.2d 121, 135 (2d Cir. 1979).

⁹ See *id.* at 144.

¹⁰ See Note, *Voir Dire: Establishing Minimum Standards to Facilitate the Exercise of Peremptory Challenges*, 27 STAN. L. REV., 1493, 1494 (1975).

¹¹ 604 F.2d 121 (2d Cir. 1979).

¹² *Id.* at 140-43. The panel consisted of Judges Moore, Van Graafeiland, and Meskill. Judge Meskill filed a dissenting opinion.

the Supreme Court for purposes of limiting the questions asked on voir dire one step too far by allowing trial judges to determine not only which biases may be inquired into on voir dire, but also the types of questions that may be used to ferret out a particular bias. Finally, the Second Circuit has placed itself in a difficult position by calling into question the relevance of group biases in general.

THE CASE

In *United States v. Barnes*, eleven defendants appealed their convictions of conspiracy to violate the federal narcotics laws and of various substantive offenses under those laws. One defendant had also been convicted of unlawful possession of a firearm during the commission of a federal felony, which was also appealed.¹³ All of the defendants, except for one Hispanic, were black.

During the voir dire, jurors were asked questions regarding the county in which they resided, their marital status, the number of children they had, their occupation, their education, their affiliations, if any, with the government or agencies thereof, and other questions of this type.¹⁴ In addition, jurors were asked about their attitudes towards minority groups.¹⁵ However, the trial court refused to ask questions regarding the name, address, ethnic background, and religion of each juror.

The defendants argued on appeal, *inter alia*, that the trial court abused its discretion by refusing to ask questions regarding each prospective juror's name, address, ethnic background, and religion. The defendants conceded that the refusal to allow questions regarding the names and addresses of each juror was not, in and of itself, error. However,

¹³ Specifically, the defendants were convicted under federal statutes 21 U.S.C. §§ 846, 848 (1976) and 18 U.S.C. § 924(c)(2) (1976).

¹⁴ 604 F.2d at 135. In addition, jurors were asked whether they had any feelings about undercover agents that might prejudice them as jurors; whether they or close friends or family had any prior experience with narcotics or firearms that might bias them; whether they had seen or read anything that would influence them; and whether they had ever had any contact with any individuals or places that would be referred to in the trial. *Id.*

¹⁵ *Id.* at 136. Examples of these questions were: "Have you had any experience with any members of any race, creed or color other than your own which has resulted in any kind of civil or criminal confrontation in any Court of Law?"; "Have you any experience at your place of employment or residence or school which would make you feel you could not fairly judge a person of a different race, creed, or color?"

the defendants argued that the lack of this information coupled with the court's refusal to allow questions regarding the ethnic background and religion denied the defendants the ability to exercise their peremptory challenges intelligently and thus denied them due process of law.¹⁶

The Second Circuit held that the trial judge had not abused his discretion. First, the court noted that the trial judge has broad discretion in conducting voir dire. The court stated that in exercising this discretion the judge may refuse to ask questions that are "too remote"¹⁷ from the issues in the case at bar, unnecessarily intrude into the jurors' private lives, or have the potential of subjecting jurors or their families to threats or physical harm that might affect the jurors' impartiality.¹⁸ The court claimed that a defendant's rights are given sufficient protection if the voir dire is "fair." Fairness is achieved when the questions asked are "designed to uncover bias among jurors as to issues in the case and to the defendant himself."¹⁹

Using the above criteria, the court addressed more specifically the defendants' request for the name, address, ethnic background, and religion of each prospective juror. As to the trial judge's refusal to allow questions regarding the names and addresses of the jurors, the Second Circuit acknowledged that such refusal might not be appropriate in every case.²⁰ However, in the instant case, there had been much pretrial publicity regarding the reputation of the defendants who were considered by the court to be "undeniably dangerous," and a witness reportedly had been threatened. Consequently, the trial court had felt a duty to protect jurors and their families from physical harm or threats that might impair their impartiality.²¹

The court, apparently finding questions regarding the ethnic background of the jurors "too remote" from the issues in the case, responded to the defendants' contention that those questions should have been asked by noting that nothing indicated

¹⁶ *Id.* at 133-34.

¹⁷ *Id.* at 140.

¹⁸ *Id.* at 139, 140-42.

¹⁹ *Id.* at 140.

²⁰ *Id.* at 141.

²¹ *Id.* at 136-37. The court specifically pointed to the pretrial publicity concerning the defendants' violent acts and to the history of violence in the Southern District of New York in cases of this kind, concluding that "the circumstances were such that the suggestion of disruption was manifest." *Id.* at 141. *See also id.* at 137 n.7 (the court noted that a potential government witness reportedly was murdered on the eve of the trial's commencement at a place that would have been referred to at trial).

that persons of one ethnic background were "more favorably disposed toward narcotic trafficking or to using firearms" than those of another background.²² Moreover, regarding the value of knowing a juror's ethnic background for purposes of assessing racial bias, the court felt that the questions the trial judge did ask regarding racial prejudice were sufficient, and thus fairness was achieved without having to ask about ethnic background.

Taking a different approach with respect to questions concerning the religion of each juror, the court registered a concern for the jurors' privacy by concluding that the "jury selections system was not designed to subject prospective jurors to a catechism of their tenets of faith."²³ Furthermore, jurors, according to the Second Circuit, might have doubts about what religious or ethnic category they fall into.²⁴ The court was also concerned that if jurors knew that their private lives would be inquired into on voir dire, persons might refuse to serve as jurors.²⁵

In sum, the Second Circuit concluded that the defendants had been provided enough information to exercise their peremptory challenges intelligently. The questions the trial court asked provided ample information which defense counsel could supplement through observing the demeanor of the prospective jurors, their clothing, and their speech. Questions regarding the ethnic background, religion, name, and address of each juror were either "too remote" from the issues in the case or might have prejudiced the jury. Thus, the trial court had not abused its discretion by refusing to ask jurors for this information.²⁶

Judge Meskill dissented, attacking the majority for using what he termed a relevancy standard to determine the types of questions that may be asked on voir dire for purposes of exercising peremptory challenges. Apparently concentrating on the

phrase "too remote," Judge Meskill stated that only questions designed to ferret out actual bias, those biases challenged for cause, may be controlled by this relevancy standard. The peremptory, challenge on the other hand, pursuant to the Supreme Court in *Swain v. Alabama*,²⁷ may be exercised on any grounds at all, even those that seem irrelevant to the issues at bar. Thus, by definition, a court, according to Judge Meskill, cannot refuse to ask questions proffered for purposes of exercising peremptory challenges on the grounds that they are irrelevant to the issues in the case. Consequently, the defendants should have been permitted to gather information about the jurors' backgrounds and attitudes.²⁸

LEAST RESTRICTIVE ALTERNATIVE

There is strong support for the court's position that the trial judge may refuse to ask jurors to disclose their names and addresses in order to protect them and their families from threats that might jeopardize their safety and their impartiality. In *Ham v. South Carolina*,²⁹ for instance, Justice Marshall, concurring and dissenting, recognized that questions asked on voir dire can be limited to protect the state's countervailing interest of avoiding jury intimidation.³⁰ The Second Circuit in *United States v. Borelli*,³¹ another narcotics case, suggested the possibility of employing restrictions similar to those employed in *Barnes*. During the course of the *Borelli* trial, the jurors each received a letter they interpreted as a threat. The court, finding no need to reverse the convictions on this ground, still noted, in dicta, that the incident demonstrated "the need for precautions assuring that the addresses, and perhaps even the names, of jurors in cases such as this will be held in confidence; courts must protect the integrity of criminal trials against this kind of disruption."³²

In taking such precautions, courts have taken various steps to protect potential jurors from having their privacy intruded upon by the press or from being intimidated by defendants. The Sev-

²² *Id.* at 140.

²³ *Id.* at 141.

²⁴ *Id.*

²⁵ *Id.* at 140.

²⁶ *Id.* at 140-43. A similar approach was used by the court in *United States v. Delval*, 600 F.2d 1098 (5th Cir. 1979). There the court held that the trial court should look at whether the "overall examination, coupled with [the judge's] charges to the jury affords a party the protection sought." *Id.* at 1102-03 (quoting *United States v. Williams*, 573 F.2d 284, 287 (5th Cir. 1978)). Additional support for the *Barnes* court's finding of "fairness" was that two of the defendants were acquitted on all charges and that defendant *Barnes* was acquitted on three counts.

²⁷ 380 U.S. 202 (1965).

²⁸ 604 F.2d at 171-72.

²⁹ 409 U.S. 524 (1973). The defendant in *Ham*, arrested for possession of marijuana, was a bearded black man active in civil rights.

³⁰ *Id.* at 533 (Marshall, J., concurring in part and dissenting in part).

³¹ 336 F.2d 376 (2d Cir. 1964).

³² *Id.* at 392.

enth Circuit in *United States v. Hoffa*³³ held that a trial judge's order, mandating that the names of potential jurors not be disclosed until voir dire, was proper. The court recognized that while 28 U.S.C. §1864 states that the drawing of a petit jury must be public, it does not require that the names of the jurors be read aloud. It was obvious to the court that the trial judge was concerned about potential jury tampering, and, therefore, the extra precaution was warranted.³⁴

More akin to the precautions taken by the *Barnes* court were those taken in *Wagner v. United States*.³⁵ There the trial court allowed jurors to state only the approximate community in which the juror resided and refused to permit counsel to ask each juror his name either before or during voir dire. The Ninth Circuit concluded that enough information had been elicited on voir dire to enable counsel to exercise its peremptory challenges intelligently.³⁶

It should be noted, however, that while the state in *Barnes* did have a vital interest in protecting jurors from threats or physical harm, the defendants were deprived of important information, especially with respect to the residence of each juror. For instance, without this information it was impossible for defense counsel to ascertain whether jurors resided in the area of the crime and thus knew of the participants involved in the case at bar.³⁷ Moreover, if a prospective juror lived in the general vicinity of a social club frequented by the defendants and central to the case against the defendants and knew that the club had a reputation in the neighborhood for being a meeting place for criminal figures, that juror was potentially biased. However, without knowing the address of the juror, defense counsel had no way of knowing whether the juror was lying about his familiarity with the places or characters involved in the case. Finally, a juror's neighborhood might have indicated something about ethnic background and economic status.³⁸

Because information about jurors' residences

would have helped defense counsel eliminate potentially prejudiced jurors, the court in *Barnes* should have considered whether the trial judge could have preserved the jury's privacy, safety, and impartiality while still supplying the defendants with as much of the information requested as possible. This notion that a court must employ the least restrictive alternative when attempting to protect one right at the expense of others was adopted by the Supreme Court in *Nebraska Press Association v. Stewart*.³⁹ There the Court struck down a trial judge's restrictive order that attempted to preserve an impartial jury by prohibiting the press from reporting on admissions or confessions of the accused as well as other "strongly implicative" facts.⁴⁰ The Court stated that in determining whether the "evil" of pretrial publicity justified the invasion of free speech, one had to determine whether other measures would have been likely to protect the defendant's right to an impartial jury, short of an order restraining all publication.⁴¹

Using the least restrictive alternative approach, the *Barnes* court could have required the trial judge to inquire into the approximate community of each prospective juror, as did the Ninth Circuit in *Wagner v. United States*.⁴² Knowing a juror's neighborhood would provide at least some information as to the area in which the juror lived and some possible information about the juror's ethnic background and economic status.⁴³ A second alternative would have been for the court to voir dire the jury in camera, with only the attorneys present. This procedure of closing the pretrial proceedings from the public with the consent of the defendant was specifically cited by the Court in *Nebraska Press Association* as a way to insure an impartial jury, short of restraining all publication by the press.⁴⁴ In the instant case, such a procedure would have

³⁹ 427 U.S. 539 (1976).

⁴⁰ *Id.* at 567-68.

⁴¹ *Id.* at 562 (quoting *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951)).

⁴² 264 F.2d 524, 527 n.2 (9th Cir.), *cert. denied*, 360 U.S. 936 (1959).

⁴³ For instance, a juror who resides in the borough of Manhattan might actually live in Greenwich Village, Murray Hill, the Upper East Side, or Harlem, to name only a few of Manhattan's neighborhoods. The socioeconomic makeup of these neighborhoods varies a great deal and "knowing that someone is from Manhattan does not give counsel contemplating the same insight" as knowing he is from some specific Manhattan neighborhood. *United States v. Gibbons*, 602 F.2d 1044, 1053 (2d Cir. 1979) (Oakes, J., dissenting).

⁴⁴ *See* 427 U.S. at 564 n.8.

³³ 367 F.2d 698, 710 (7th Cir. 1966), *vacated on other grounds*, 387 U.S. 231 (1967).

³⁴ 367 F.2d at 710.

³⁵ 264 F.2d 524 (9th Cir.), *cert. denied*, 360 U.S. 936 (1959).

³⁶ 264 F.2d at 527.

³⁷ *See* Defendants' Joint Reply Brief at 11, *United States v. Barnes*, 604 F.2d 121 (2d Cir. 1979) (citing *Bulger v. McCloy*, 575 F.2d 407 (2d Cir. 1979)).

³⁸ Interview with E. Chikovsky, attorney for defendant *Barnes*. *See also* Defendant's Joint Reply Brief at 11.

maintained an impartial jury without unduly curtailing defense counsels' right to ask general background questions on voir dire.

THE RELEVANCY TEST AND ITS MISAPPLICATION IN *BARNES*

Not only did the Second Circuit fail to apply the least restrictive alternative standard, it also appears to have applied a relevancy test in limiting the questions to be asked on voir dire.⁴⁵ As pointed out by Judge Meskill in his dissent, it is debatable whether this test should be applied to those questions asked for purposes of exercising peremptory challenges.

In coming to this conclusion, Judge Meskill relied heavily on *Swain v. Alabama* where the Supreme Court held that the striking of blacks from a jury in a particular case, through the exercise of peremptory challenges, was not a denial of equal protection of the law.⁴⁶ In so holding, the Court recognized that peremptory challenges frequently are exercised on grounds irrelevant to the legal issues in the case at hand, including race, religion, nationality, occupation, or affiliation.⁴⁷ Given the fact that the grounds for exercising a peremptory challenge may be irrelevant to the legal issues in the case, it could be argued that the questions asked for purposes of exercising this challenge likewise may be irrelevant to the issues in the case.

However, the scope of the questioning on voir dire is not limitless. Under the relevancy standard developed by the Court in *Ham v. South Carolina*⁴⁸ and *Ristaino v. Ross*,⁴⁹ the bias sought to be probed by the attorney's questions during voir dire must rise to a constitutional level and be "inextricably bound up in the case."⁵⁰

In *Ham*, the Court held that under the facts in that case⁵¹ it was a constitutional error not to inquire whether any of the jurors were prejudiced against blacks. It was not, however, a constitutional

violation to refuse to inquire into potential prejudice against men with beards.⁵² The Court reasoned that compelling an inquiry into racial prejudice was supported by the Court's decision in *Aldridge v. United States*⁵³ and the words and purposes of the fourteenth amendment. An inquiry into prejudice against men with beards had neither the precedential support nor the constitutional underpinning to support such an inquiry. Thus, the Court could not single out this particular prejudice from a "host of other similar prejudices" and hold that the Constitution required that such an inquiry be undertaken on voir dire.⁵⁴

In *Ristaino*, the Court held that the Constitution did not always require voir dire regarding racial prejudice. The Court stated that it is only where the "circumstances . . . suggest a significant likelihood that racial prejudice might infect [the] trial" that the Constitution requires inquiry into racial prejudice.⁵⁵ Thus, in *Ristaino*, while the defendant was black and the victim white, the Court could not find that the trial judge erred in not inquiring about racial prejudice on voir dire. Juxtaposing *Ristaino* with *Ham*, the Court noted that defendant Ham's defense to his drug charge was that his race and civil rights activities gave the police a motive for framing him.⁵⁶ Race did not play a similar role in the *Ristaino* trial. It was not, in the Court's words, "inextricably bound up in the case."⁵⁷

Lower courts too have used this relevancy standard to limit the types of prejudices that a trial court must inquire into on voir dire. For instance, the Third Circuit in *Virgin Islands v. Felix*⁵⁸ determined that the defendant's concern over the possibility that jurors, who once had resided on one island, being prejudiced against the defendant who was a native of a different island was not worthy of inquiry on voir dire. The court reasoned that the alleged bias was "unfocused and diffuse."⁵⁹ The court in *United States v. Robinson*⁶⁰ took a somewhat

⁴⁵ *Id.* at 527-28.

⁵² 283 U.S. 308 (1931). In *Aldridge*, the Court held that in a case where the victim was white and the defendant was black, it was improper for the trial court not to inquire about racial prejudice on voir dire. The Court later noted in *Ristaino* that the basis for the decision in *Aldridge* was not the Constitution but the Supreme Court's supervisory power over federal courts. 424 U.S. at 597 n.9.

⁵³ 409 U.S. at 527-28.

⁵⁴ 424 U.S. at 598.

⁵⁵ *Id.* at 595-97.

⁵⁶ *Id.*

⁵⁷ 569 F.2d 1274 (3d Cir. 1978).

⁵⁸ *Id.* at 1277.

⁵⁹ 475 F.2d 376 (D.C. Cir. 1973).

⁴⁶ 604 F.2d at 142.

⁴⁷ 380 U.S. 202, 224 (1965). The Court continued, however, by stating that when a prosecutor systematically removes all blacks from every jury so that blacks would never sit on juries, there might be an equal protection violation. *Id.* at 223-24, 227.

⁴⁸ *Id.* at 220.

⁴⁹ 409 U.S. 524 (1973).

⁵⁰ 424 U.S. 589 (1976).

⁵¹ *Id.* at 597; 409 U.S. at 527-28.

⁵² In *Ham*, a black man was arrested for possession of marijuana. The defendant claimed that he was framed by the police. He considered the fact that he was black and active in civil rights a motive for the police to frame him in this manner. 409 U.S. at 525.

similar approach while upholding the trial court's decision to deny the defendant's request to question jurors on their views of self-defense. The court noted that racial prejudice and some other biases have become recognized by the courts as "proper subjects" of inquiry on voir dire.⁶¹ When, however, the bias sought to be inquired into on voir dire falls outside of this group, the court required that the "proponent . . . lay a foundation for his question by showing that it is reasonably calculated to discover an actual and likely source of prejudice, rather than pursue a speculative will-o-the-wisp."⁶²

Therefore, while the Supreme Court in *Swain* wanted to avoid subjecting peremptory challenges to judicial "scrutiny for reasonableness and sincerity,"⁶³ courts, in fact, have moved in this direction. As shown, the trial court may limit the biases explored to those that rise to a constitutional level and are "inextricably bound up in the case" or to those biases that have been recognized as "proper subjects" for inquiry on voir dire as the court in *Robinson* concluded. Thus, a trial court also may limit the voir dire to those questions which direct themselves at constitutionally or judicially recognized biases. Consequently, while an attorney still may strike a juror for any reason at all, any bias that cannot be articulated and thereby recognized as a proper subject for voir dire need not be inquired into.⁶⁴

⁶¹ *Id.* at 381. Those biases are: (1) race, where the case carries racial overtones; (2) matters about "which either the local community or the population at large is known to harbor strong feelings"; and (3) where there is police testimony, persons tend to attach "disproportionate weight" to such testimony. *Id.*

⁶² *Id.* at 381; accord, *Ham v. South Carolina*, 409 U.S. at 533 (Marshall, J., dissenting).

⁶³ 380 U.S. at 222.

⁶⁴ *United States v. Gibbons*, 602 F.2d 1044 (2d Cir. 1979). The *Gibbons* court noted that while an attorney need not give a reason for exercising a peremptory challenge, "that can hardly mean that every question suggested by counsel must be put by the trial judge because it might conceivably lead to a peremptory challenge." *Id.* at 1051. *But see United States v. Dellinger*, 472 F.2d 340 (7th Cir. 1972), cert. denied, 410 U.S. 970 (1973), where the court specifically rejected the claim that only questions directed at those prejudices which may be challenged for cause need be asked on voir dire. In *Dellinger*, the "Chicago Seven," convicted under the federal antiriot statute, 18 U.S.C. § 2101 (1976), argued on appeal that the voir dire for their trial was so "perfunctory" with respect to the jurors' attitudes about patriotism and the defendants' values that they were denied due process of law. Note, however, that *Dellinger* was decided before *Ham* and *Ristaino*. In *Barnes*, the court pointed out that the Seventh Circuit in *Dellinger* found that the trial judge abused his discretion because he refused to inquire about

Under this test, however, the Second Circuit appears to have erred. First, the trial court should have asked each juror's address because this information might have alerted counsel that a particular juror might be aware of the defendants' criminal reputations or might know that a place mentioned at trial had a reputation in the community as being frequented by criminals.⁶⁵ A juror's familiarity with the persons or places involved in the case at bar certainly would not constitute cause for the juror's removal. This would be true especially if the juror indicated that he was impartial.⁶⁶ However, given such familiarity, it might be appropriate for counsel to exercise a peremptory challenge, thereby removing that juror. Thus, this bias should have been recognized by the *Barnes* court. Under the test established in *Robinson*, it should have been clear to the trial court that familiarity with a defendant's reputation or the reputation of a place mentioned at trial was "an actual and likely source of prejudice." Moreover, such a bias is not a general bias "unfocused and diffused" as was the bias in *Felix*.⁶⁷

The second way in which the Second Circuit in *Barnes* appears to have erred was by giving the trial judge new, unwarranted discretion with respect to voir dire. Following *Ham*, *Ristaino*, and *Robinson*, trial courts may limit the questions asked on voir dire to those that inquire into biases that rise to a constitutional level and are "inextricably bound up in the case" or that have been recognized by the courts as "proper subjects" for voir dire. Prior case law also has stated that the form of the questions and the number of questions that may be asked are within the trial court's discretion.⁶⁸ *Barnes* went beyond these precedents, however, by allowing the trial judge to decide what types of questions may be used to ferret out a particular bias.

For instance, in *Barnes*, racial prejudice was a concern of both defense counsel and the court.⁶⁹ The questions asked by the court regarding racial prejudice were straightforward in that they inquired about "bad experiences" with minorities or whether the jurors would admit to being racially

issues which "touched on the character of the defendants themselves" and because politics "would surely inject themselves into the deliberation." 604 F.2d 138 n.9.

⁶⁵ See text accompanying note 38 *supra*.

⁶⁶ See generally *Babcock*, *supra* note 6, at 550.

⁶⁷ 569 F.2d 1274 (3d Cir. 1975); see text accompanying note 58 *supra*.

⁶⁸ See 409 U.S. at 527.

⁶⁹ See text accompanying note 15 *supra*.

prejudiced.⁷⁰ Questions regarding ethnic background and religion were considered by the Second Circuit to be "too remote" from the issues in the case.⁷¹

To the extent that questions regarding a juror's ethnic background could have aided counsel in uncovering racial prejudice, the court stated that, "Whatever prejudice may be shared by members of an ethnic group as to black persons would have been uncovered by the questioning about attitudes toward blacks."⁷² Thus, the court appears to have allowed the trial judge to determine what types of questions are appropriate for ferreting out racial prejudice.

The Second Circuit repeated this philosophy in *United States v. Gibbons*,⁷³ another narcotics case decided soon after *Barnes*. In *Gibbons*, the trial court only disclosed the names of the jurors and the borough a juror resided in within New York City.⁷⁴ The Second Circuit held that the trial judge did not abuse his discretion by refusing to ask the specific address of each juror. In dicta, the court stated that a trial judge will abuse his discretion only by "utterly . . . foreclos[ing] a line of inquiry necessary to lay the groundwork for peremptory challenges" with respect to a prejudice that is a "proper subject" for inquiry on voir dire.⁷⁵ Thus, it appears that as long as the trial judge asks some questions with respect to the "properly recognized" bias, he does not abuse his discretion by not asking other questions proffered by the attorney.

One can see the problem of allowing courts to limit the type of question used to ferret out a given bias. For instance, in *Barnes*, information about the jurors' ethnic background, religion, and neighborhood was important in assessing racial prejudice, since jurors often will not admit to a bias.⁷⁶ As one commentator has noted, "[c]ommon human experience, common sense, psychosociological studies, and public opinion polls tell us that it is likely that certain classes of people statistically have predispositions that would make them inappropriate jurors for particular kinds of cases."⁷⁷ Moreover, as

the Supreme Court noted in *Swain*, the question for counsel 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."⁷⁸ Thus, in *Barnes*, information regarding a juror's neighborhood, ethnic background, or religion might have provided additional information that would have been helpful in assessing a juror's unconscious bias or in weighing a juror's disclaimer of such a bias. Questions that inquire about a prejudice in as straightforward a fashion as those asked in *Barnes* would not ferret out this information.⁷⁹

The above, however, assumes that group biases are relevant in assessing whether a particular juror might be prejudiced. With respect to racial prejudice, the court in *Barnes* appeared to acknowledge the relevance of ethnic background and religion, but found that the questions the trial court did ask on the subject were sufficient to uncover that bias.⁸⁰ However, the Second Circuit does not appear ready to acknowledge the relevancy of group biases with respect to a particular prejudice in every case. The Second Circuit appears to require that the attorney submitting a question, whose relevance to a particular bias rests on the recognition of group biases, provide empirical data establishing that such a group bias does exist. In *Barnes*, the court rejected the defense counsel's request for information regarding the ethnic background of each juror by noting, in part, that there was "nothing to indicate that persons of one ethnic type or another are more favorably disposed toward narcotic trafficking or to using firearms."⁸¹ Thus, the court appears to stand ready to assess the validity of a public opinion poll or a psychological study. There is no way, however, for the court to judge the validity of a psychological study or a public opinion poll. The court simply is not qualified for such a task. Most judges are not schooled in statistics or psychology. Nor could a court rely on other statisticians or psychologists since social scientists often disagree with each other's findings. Therefore, group biases should be judicially recognized,⁸² and information requested for purposes of assessing group biases should not be denied where counsel submits at least one poll or study indicating the existence of such a group bias.

⁷⁰ *Id.*

⁷¹ 604 F.2d at 140.

⁷² *Id.*

⁷³ 602 F.2d 1044 (2d Cir. 1979).

⁷⁴ *Id.* at 1050.

⁷⁵ *Id.* at 1051.

⁷⁶ See *United States v. Dellinger*, 472 F.2d at 367, where the court stated: "We do not believe that a prospective juror is so alert to his own prejudices."

⁷⁷ Babcock, *supra* note 6, at 553. See also Note, note 10 *supra*; Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries*, 86 YALE L.J. 1715 (1977).

⁷⁸ 380 U.S. at 220-21.

⁷⁹ See note 15 *supra*.

⁸⁰ 604 F.2d at 140.

⁸¹ *Id.*

⁸² In *Commonwealth v. Soares*, 387 N.E.2d 499 (Mass. 1979), and *People v. Wheeler*, 22 Cal. 3d 358, 583 P.2d 748, 148 Cal. Rptr. 89 (1978), the courts recognized the existence of group biases.

Courts instead might concentrate on the degree to which the question intrudes on the jurors' privacy. Questions regarding a juror's religion or ethnic background are limited intrusions that will not stigmatize a juror nor demand intimate details of the juror's life. Thus, it is difficult to justify the court's refusal to inquire into the jurors' religion and ethnic background when that decision is weighed against the defendants' right for an impartial jury.

CONCLUSION

There appear to be several weaknesses in the Second Circuit's decision in *Barnes*. First, the court should have used the least restrictive alternative approach to balance the jurors' need for protection against counsel's need for the information associated with each juror's name and address. Accepting the fact that the jurors required protection, the court could have refused to allow counsel to inquire as to the name of the juror, but could have allowed inquiry as to his neighborhood. Without a name, it would be very difficult to find someone who lives in a specific New York City neighborhood. The neighborhood of a juror would give defense counsel an idea of the juror's ethnic background or economic and social status. Both of these factors might help to determine whether a particular group bias might be useful in discovering a prejudice that has been judicially recognized as a proper subject for voir dire. Moreover, knowing the neighborhood of a juror would allow an attorney to infer whether or not the juror was familiar with the persons or places involved in the case, perhaps harboring certain prejudices, even if the juror disclaimed such prejudices.

Second, there is the question about whether

ethnic background, religion, and neighborhood were proper inquiries under the facts of this case. A court need not ask any questions unless they are directed at a prejudice that both rises to a constitutional level and is "inextricably bound up in the case" or, as noted by the courts in *Robinson* and *Gibbons*, is judicially recognized as a proper subject for inquiry on voir dire. Under this test, however, it appears that inquiring about a juror's neighborhood for purposes of ascertaining the juror's familiarity with the persons and places intertwined in the case, was proper.

More important, however, is the manner in which the court appears to allow judges to limit the types of questions used to ferret out a particular bias. Given that the court in *Barnes* recognized racial prejudice as a proper subject for inquiry on voir dire, the trial court should not have been allowed to dictate what types of questions were most effective in ferreting out that bias. The Supreme Court in *Ham* and *Ristaino* never gave trial courts that type of control over the voir dire. By allowing trial courts to limit the types of questions used by counsel to ferret out a bias, the Second Circuit has run the risk that the voir dire will fail to discover unconscious or unadmitted biases.

Finally, with respect to group biases in general, the Second Circuit requires attorneys to present empirical evidence to establish that a particular group bias actually exists. Courts, however, are not capable of assessing the validity of group biases and therefore should acknowledge their existence and validity if counsel can submit some empirical proof of their existence. Courts instead should concentrate on the degree to which a particular question intrudes into the private lives of the jurors in determining the question's pertinence.

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