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Abraham Abramovsky

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JUROR SAFETY:
THE PRESUMPTION OF INNOCENCE AND
MEANINGFUL VOIR DIRE IN
FEDERAL CRIMINAL PROSECUTIONS—
ARE THEY ENDANGERED SPECIES?

ABRAHAM ABRAMOVSKY*

INTRODUCTION

THE presumption of innocence and the right to trial by an impartial jury have long been hallmarks of the American criminal justice system. Recently, however, these cherished doctrines have been substantially restricted. In Bell v. Wolfish,1 for example, the Supreme Court of the United States held that the presumption of innocence has no application to a determination of the rights of pre-trial detainees.2 In Kentucky v. Whorton,3 the Court held that a charge addressing the presumption of innocence need not always be given to a jury prior to its deliberations.4 These cases followed landmark Court decisions which had eroded a defendant's right to a jury trial. In Williams v. Florida,5 the number of jurors deemed essential to a fair trial was lowered by the Court's holding that a twelve person jury is not constitutionally mandated.6 The requirement of a unanimous verdict, which heretofore was deemed essential to assure that a defendant's guilt be established beyond a reasonable doubt, was abandoned by the Court in Apodaca v. Oregon.7

Such decisions have stripped the presumption of innocence and right to a jury trial of much of their vitality. Still, the trend continues. The latest step, this time under the banner of "Juror Privacy," was taken by the Second Circuit Court of Appeals in United States v. Barnes.8 The court in Barnes upheld a trial judge's sua sponte in-

* Professor of Law, Fordham University School of Law; B.A. 1967, Queens College, New York; J.D. 1970, State University of New York at Buffalo; LL.M. 1971, J.S.D. 1976, Columbia University School of Law. The author wishes to express his appreciation to Kathryn Keneally, Fordham University School of Law, 1982, for her assistance in research and editing. The author also wishes to thank Matthew Kaufman.

2. Id. at 533.
4. Id. at 789.
6. Id. at 86.
8. 604 F.2d 121 (2d Cir. 1979), cert. denied, 446 U.S. 907 (1980).

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strucution to potential jurors not to reveal their identities and his preclusion of defense counsel from inquiring on voir dire as to a juror’s street address, and religious and ethnic background. In so holding, the court not only further derogated a defendant’s right to a jury trial by substantially restricting the scope and meaning of voir dire, but dealt a devastating blow to the presumption of innocence before a scintilla of evidence was introduced against the defendant at trial.

Part I of this Article examines the presumption of innocence, beginning with the significant role it has traditionally occupied in the American criminal justice system, and tracing its erosion in several recent Supreme Court decisions to its almost complete evisceration in Barnes. Part II analyzes a line of cases which has substantially limited the scope and extent of voir dire. Contending that many defense-oriented jurors are excluded in the early stages of jury selection and that the prosecution often has access to relevant information about prospective jurors which is unavailable to defendants, it is suggested that any curtailment of voir dire has a disproportionately adverse effect on the defendant. Part III examines the novel doctrine of “Juror Privacy” formulated by the Second Circuit in Barnes, and concludes that it is unsupported by legal precedent. Nevertheless, it is conceded that threats to juror safety by, or on behalf of, the defendant or some disenchanted segment of the public pose a substantial danger both to the individual jurors involved and the jury system as a whole. It is suggested, therefore, that where the prosecution establishes by a preponderance of the evidence that the safety of jurors is likely to be imperiled, a number of precautionary measures short of anonymity be utilized by trial judges. Thus, Part IV provides an analysis of alternatives available to safeguard jurors from physical harm while concomitantly assuring those accused of a crime a fair trial.

I. THE PRESUMPTION OF INNOCENCE

The presumption of innocence has long been perceived as an essential element of the American criminal justice system. As late as 1976, both conservative and liberal members of the Supreme Court of the United States reiterated the paramount role of the presumption in the adjudicatory stage of a proceeding. For example, in Estelle v. Williams, 425 U.S. 501, 515 (1976) (separate opinions of Burger, C.J., and Brennan, J.).

9. 604 F.2d at 137.
10. See infra notes 75-93 and accompanying text.
11. See infra notes 94-100 and accompanying text. In the often cited decision, Coffin v. United States, 156 U.S. 432 (1895), the Supreme Court of the United States stated: The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.” Id. at 453.
Chief Justice Burger, writing for the majority, stated that the right to a fair trial is "a fundamental liberty secured by the Fourteenth Amendment. . . . The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." In his dissent, Justice Brennan elevated the presumption of innocence to constitutional heights when he stated:

One of the essential due process safeguards that attends the accused at his trial is the benefit of the presumption of innocence. . . . This presumption of innocence is given concrete substance by the due process requirement that imposes on the prosecution the burden of proving the guilt of the accused beyond a reasonable doubt.

Even Justice Rhenquist, while holding that the presumption of innocence does not apply to pretrial detainees, reiterated its importance in the adjudicatory stage of the proceeding when, in *Bell v. Wolfish*, he stated:

The presumption of innocence is a doctrine that allocates the burden of proof in criminal trials; it also may serve as an admonishment to the jury to judge an accused's guilt or innocence solely on the evidence adduced at trial and not on the basis of suspicions that may arise from the fact of his arrest, indictment, or custody, or from other matters not introduced as proof at trial. . . . Without question, the presumption of innocence plays an important role in our criminal justice system.

At the same time, however, the Court has placed a number of substantive limitations on this most significant doctrine.

The first limitation was delineated by the Supreme Court in *Bell v. Wolfish*. *Wolfish* was a class action brought by pre-trial detainees challenging the constitutionality of such conditions of custody as "double bunking," the "Publisher's only rule," the prohibition of receiving food packages from the outside, and body cavity searches after contact visits. The Second Circuit Court of Appeals held that under the due process clause of the fifth amendment, pre-trial detainees could "be subjected to only those 'restrictions and privations'
which inhere in their confinement itself or which are justified by compelling necessities of jail administration.'” 22 In reversing the Second Circuit and holding the practices constitutional, the Supreme Court stated:

Our fundamental disagreement with the Court of Appeals is that we fail to find a source in the Constitution for its compelling-necessity standard. . . . [T]he presumption of innocence provides no support for such a rule. . . . [I]t has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun. 23

The next substantive limitation was formulated by the Court in Kentucky v. Whorton. 24 In Whorton, the Supreme Court of Kentucky overturned a conviction on the grounds that the trial judge had failed to include the presumption of innocence in his charge to the jury. 25 The Supreme Court of the United States reversed, holding that the failure to give such an instruction did not, in and of itself, violate the constitution. Rather, whether such a violation had occurred could only be determined “in light of the totality of circumstances” 26 surrounding the judge’s omission.


23. 441 U.S. 520, 532-33 (1979). The Court reiterated the importance of the presumption of innocence at trial, but stated: “[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law. . . . Not every disability imposed during pretrial detention amounts to 'punishment' in the constitutional sense, however. Once the Government has exercised its conceded authority to detain a person pending trial, it obviously is entitled to employ devices that are calculated to effectuate this detention . . . . [a]bsent a showing of an expressed intent to punish on the part of detention facility officials . . . .” Id. at 535, 537-38 (footnotes omitted).


25. Id. at 787.

26. Id. at 789-90. The decision in Whorton was somewhat surprising since, just a year earlier, the Court, in Taylor v. Kentucky, 436 U.S. 478 (1978), reversed a conviction where the trial judge, while instructing the jury that the prosecution bore the burden of proving the defendant’s guilt beyond a reasonable doubt, refused to instruct the jury that the defendant was presumed innocent and that the indictment was of no probative value. The Court stated that an ordinary citizen might be unfamiliar with the presumption of innocence and the requirement to prove a defendant's guilt beyond a reasonable doubt and that it was therefore necessary to impress jurors with their significance. Id. at 483-85. The Court apparently concluded that a presumption of innocence instruction, especially if requested by counsel, was mandated by the due process clause of the fourteenth amendment. Id. at 490. In Kentucky v. Whorton, this interpretation was rejected.
In the span of one year, therefore, the Court held that the cherished presumption was inapplicable to pre-trial detainees, and that, under certain circumstances, an instruction concerning its application and existence could be omitted at the end of the adjudicatory process. Fortunately the Court in Whorton did reiterate that the presumption remained of paramount importance to our system of criminal justice.

In United States v. Barnes, the Court of Appeals for the Second Circuit has further imperiled the vitality and effectiveness of the presumption. Under the rationale utilized by the court in Barnes, the damage occurs at the inception of the adjudication, thereby tainting the entire fact-finding process. This rationale, if followed by federal and state courts, would further exacerbate the recent Supreme Court assault on the presumption of innocence.

In Barnes, eleven defendants, including alleged kingpin Leroy "Nicky" Barnes, were convicted after a ten week jury trial of conspiracy to violate the federal narcotics laws. On appeal, the defendants challenged, inter alia, the trial judge's sua sponte refusal on the eve of trial to permit questioning during voir dire concerning the names, street addresses, ethnic and religious backgrounds of potential petit jurors as having deprived defendants of their right to an impartial jury trial. While conceding that counsel is not always entitled to voir dire prospective jurors regarding their ethnic and religious backgrounds, the defendants maintained that, at the very least, prospective jurors should have been required to disclose their neighborhood or township within a county. In the alternative, appellants maintained that even assuming the names and addresses had been properly withheld, the court should have at least inquired into a prospective juror's ethnic and religious background in order to facilitate the exercise of peremptory challenges.

The thrust of appellants' argument was that the cumulative effect of the restrictions imposed by the trial judge, while knowing that the jury would be sequestered, was to deprive the defendants of due process of law. The Second Circuit, in affirming the convictions, held that

there is neither statutory nor constitutional law that requires disclosure of information about jurors unrelated to any issue as to which prejudices may prevent an impartial verdict. Nor has any case been brought to our attention that casts any doubt on the procedure followed by the trial judge in this case. Since the court gave counsel full opportunity for an intelligent exercise of challenges by inquir-

27. 604 F.2d 121 (2d Cir. 1979), cert. denied, 446 U.S. 907 (1980).
29. 604 F.2d at 134.
30. Id.
ing into the essentials of the case at hand, appellants were not deprived of any trial right which would require a new trial. 31

While the court apparently felt counsel was provided an adequate voir dire, 32 this Article contends that the permitted questioning was insufficient to reveal prejudices which might have prevented an impartial verdict. 33

Perhaps the most damaging aspect of the Second Circuit's decision in Barnes, however, is the devastating blow dealt to the presumption of innocence. In effect, by his instruction with respect to anonymity, the trial judge implied that the defendants were so vicious and dangerous that anonymity was required to protect the jurors and their families from harassment, physical injury, or even death. In any prior jury service, the jurors would not have been instructed to remain anonymous. Therefore the only reasonable inference that a juror could draw from the judge's instruction was that protection was mandated by the character of the defendant. It would have been ludicrous for a juror to conclude that he was being protected from members of the United States Attorney's office, their investigators, or from the judge himself. Thus, before any evidence was introduced in the narcotics prosecution, the defendants were depicted by implication as notorious individuals. This characterization, without any proof by the government of any conspiracy to tamper with the jury, let alone any actual attempts to do so, eviscerated the presumption of innocence to which these defendants were entitled. 34

The difference in the rationale underlying the trial court's decision and that of the Second Circuit is noteworthy. The government did not request anonymity and consequently must be presumed to have determined that such a request was not necessary. The trial court's sua sponte imposition of anonymity was partly prompted by the wish to protect the jurors' privacy from interference by the media. 35

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31. Id. at 143 (footnotes omitted).
32. See infra notes 58-64 and accompanying text.
33. See infra pts. II D, E, F and G.
34. Judge Meskill, who dissented in Barnes, correctly noted: "[T]he majority opinion is itself substantial evidence of how difficult it might have been for the jurors to resist an inference as to the 'real' reason for the decisions regarding juror names, addresses, and sequestration. The [majority] opinion is based largely on the 'sordid' and all-too-often violent history of multi-defendant narcotics trials in the Southern District and [reaches] the conclusion that the safety of the jurors and their families would have been in serious jeopardy but for measures guaranteeing juror anonymity." 604 F.2d at 168 n.4.
35. During the trial when one of the defense attorneys suggested that, based on the sequestration order and the restriction regarding names and addresses, jurors would infer the "real" reason for the judge's decisions, namely, that he believed that the jurors and their families would be endangered by serving on the jury, Judge Werker responded: "It has nothing to do with any real reason. I just do not want them interfered with, their privacy interfered with." Id. at 168 n.4. Moreover, when
majority of the court of appeals, however, explicitly stated that the "sordid history" of narcotics trials in the Southern District "was sufficient [in and of itself] to put the trial court on notice that all safety measures . . . including complete anonymity [should be employed]." Concern for the privacy of the jurors was, at best, a secondary consideration and appears to have been much less important to the court of appeals than to the district court judge. That the majority viewed the anonymity requirement as a necessary device to protect jurors and their families from dangerous, hardened criminals is made crystal clear in its statement that

[a]ppellate judges, from the comparative security of their ivory towers, are not burdened, as was this trial judge (and, indeed, as are all trial judges), with the responsibility of providing for the protection of the jurors, witnesses, and counsel. It can be no answer that no untoward event had occurred up to the opening of the trial. The trial judge had to take such steps as might be necessary in advance to avoid such an event. Cases need not be cited to prove the adage of the futility of locking the barn door after the horse has escaped. This reasoning does not comport with the long prevailing tradition that a defendant, no matter how notorious or unpopular, is cloaked with a presumption of innocence which can only be removed if and when the prosecution proves his guilt beyond a reasonable doubt. In effect, the majority concluded that a judge can determine the degree of danger posed by a defendant and relate his feelings to the jury by affirmatively requiring them to remain anonymous. The total absence of any evidence of jury tampering, or of a conspiracy to tamper, injure, or otherwise adversely affect a juror was specifically held to be irrelevant. In effect, the court created a presumption that defendants in major narcotics trials pose a grave danger to jurors and their families. As a practical matter this forces a defendant to testify, for the only effective way he can even partially rebut such a presumption is by taking the stand to rehabilitate his own character.

the judge actually instructed the jury not to disclose their names and addresses and informed them that they would be sequestered during the course of the trial, he stated: "I think the jurors are entitled to their privacy and I think their families are entitled to their privacy." Id. at 168. Thus, at least in part, the trial judge's ruling was based on the likelihood of extensive publicity regarding the trial and the possibility that the media would attempt to interview members of the jurors' families. Id. at 136-37.

36. Id. at 134-35.
37. The majority stated: "In addition, their rights of privacy had to be respected . . . ." Id. at 135 (emphasis added).
38. Id. at 137 (footnote omitted). It is unclear what the majority had in mind in providing protection for counsel. Which counsel? Defense attorneys? They did not seem to be overly concerned. Prosecutors? They did not seek any protection, nor display any fear. Does the future bode anonymity of prosecutors?
The majority continued its assault on the presumption of innocence by concluding that

[i]f a juror feels that he and his family may be subjected to violence or death at the hands of a defendant or his friends, how can his judgment be as free and impartial as the Constitution requires? If 'the anonymous juror feels less pressure' as the result of anonymity, . . . this is as it should be—a factor contributing to his impartiality. The court's decision as to anonymity and sequestration comported with its obligation to protect the jury, to assure its privacy, and to avoid all possible mental blocks against impartiality. . . . Fear of retaliation against themselves or members of their families would inevitably have been uppermost in their minds during their deliberations. Sequestration would have been no protection in the event of a guilty verdict.39

The majority conveniently disregarded the fact that no showing was made that any juror would have felt threatened in the absence of the sua sponte ruling of the trial judge. The prosecution did not raise the issue, nor did any juror during voir dire express such concern.

Ironically, it may well be that the sua sponte instruction instituted a fear that the jurors prior to the instructions had never entertained. Instances abound where jurors, after having their names and addresses revealed in open court, promptly proceeded to convict some of the most notorious criminals in our history. Many of these convictions were secured in the Southern District.40

The procedures utilized in the Barnes case deprived the defendants of a fair trial in that they were not accorded their axiomatic and elementary right to be presumed innocent at the commencement of the proceedings against them. The characterization of defendants as a source of danger to the jurors was based therefore on "suspicions . . . from other matters not introduced as proof at trial."41 The defendants were, in effect, charged with crimes not included in the indictment and bore the burden of disproving that they were individuals who would engage in such conduct.

39. Id. at 140-41 (emphasis added).
41. Bell v. Wolfish, 441 U.S. 520, 533 (1979). Consideration of such matters was specifically prohibited in Wolfish as a result of the Court's holding that a jury must determine the accused's guilt or innocence based solely on the evidence adduced at trial.
In *Estelle v. Williams*, a case that preceded *Barnes* by three years, a majority of the Court had recognized that the presumption of innocence could be diluted by innuendo, and, therefore, had instructed trial courts to be aware of, and to avoid, overly suggestive statements. Thus, in *Barnes*, the trial judge was under a duty to evaluate the likely effect of his anonymity ruling on a jury "based on reason, principle, and common human experiences." The possibility, therefore, that an average juror could draw the inference that anonymity was utilized to protect his well-being and that of his family so imperils the presumption of innocence as to preclude the use of anonymity at trial. As Justice Brennan noted in his dissent in *Williams*,

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43. Justice Burger, writing the opinion, stated: "To implement the presumption, courts must be alert to factors that may undermine the fairness of the fact-finding process. In the administration of criminal justice, courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt. . . . The actual impact of a particular practice on the judgment of jurors cannot always be fully determined. But this Court has left no doubt that the probability of deleterious effects on fundamental rights calls for close judicial scrutiny. . . . Courts must do the best they can to evaluate the likely effects of a particular procedure based on reason, principle, and common human experience." *Id.* at 503-04 (citations omitted). He then concluded that: "The potential effects of presenting an accused before the jury in prison attire need not . . . be measured in the abstract. Courts have, with few exceptions, determined that an accused should not be compelled to go to trial in prison or jail clothing because of the possible impairment of the presumption so basic to the adversary system. . . . This is a recognition that the constant reminder of the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment." *Id.* at 504-05 (footnotes omitted).
44. *Id.* at 504.
45. Moreover, in *Estelle v. Williams*, the majority formulated an equal protection standard that is pertinent to the facts in *Barnes*. The Court reasoned: "Similarly troubling is the fact that compelling the accused to stand trial in jail garb operates usually against only those who cannot post bail prior to trial. . . . To impose the condition on one category of defendants, over objection, would be repugnant to the concept of equal justice embodied in the Fourteenth Amendment." *Id.* at 505-06. This standard was not adhered to in the *Barnes* case. To impose anonymity in multi-defendant narcotics prosecutions, but not in other serious criminal cases, constitutes a violation of equal protection of the laws. This violation is compounded by the fact that jurors often serve in other cases prior to serving in a narcotics case. When a juror has previously served in a trial in which his anonymity was not required, and which ended the prior day or even the same morning, his awareness of the anonymity requirement in the present case, and the inferences it carries, is heightened, and the rights of the accused substantially derogated. Moreover, unlike the prison garb cases, no possible benefit issues to a defendant from juror anonymity. While in *Estelle*, the Court required compulsion for reversal since "cases show . . . that it is not an uncommon defense tactic to produce the defendant in jail clothes in the hope of eliciting sympathy from the jury." *Id.* at 508. Jury anonymity is not likely to constitute a defense tactic.
the prejudice may only be subtle and jurors may not even be conscious of its deadly impact, but in a system in which every person is presumed innocent until proved guilty beyond a reasonable doubt, the Due Process Clause forbids toleration of the risk. Jurors required by the presumption of innocence to accept the accused as a peer, an individual like themselves who is innocent until proved guilty, may well see [a person who deserves to be convicted].

Moreover, the methods by which anonymity is achieved create an atmosphere that would substantially derogate the defendant's right to an impartial jury trial.

II. THE RIGHT TO A JURY TRIAL

The sixth amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." In the landmark case of Duncan v. Louisiana, the Supreme Court of the United States found that the jury trial guarantees of the sixth amendment are fundamental rights made applicable to defendants in criminal cases in state courts via the due process clause of the fourteenth amendment. The Court noted that the framers of the Constitution sought to prevent governmental oppression by placing a lay jury as a buffer between the defendant and the state. This buffer acts as an "inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased or eccentric judge."

46. Id. at 518-19.
47. U.S. Const. amend. VI.
49. Id. at 149.
50. Id. at 156. Noting that it was the right to a jury trial and not the exercise thereof which acted as the safeguard, the Court upheld the constitutionality of accepting a waiver of this right. Id. at 158. The expansive tone set in Duncan was not matched by a subsequent series of Supreme Court decisions. In 1970, the Court began to define the sort of jury guaranteed to a defendant in state criminal proceedings. In Williams v. Florida, 399 U.S. 78 (1970), the Court held that a state criminal jury need not be composed of twelve members and specifically found that a jury of six persons did not violate the defendant's sixth and fourteenth amendment jury trial guarantees. Id. at 86. The Court also established a functional standard for its subsequent right to jury trial cases. Citing Duncan, it concluded that a jury should be so large as to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross section of the community. Id. at 100. It concluded that a jury of six was sufficient to perform its function with no significant differences in the safeguarding and decision making processes from a jury of twelve. The Court in Williams did not set a minimum number of jurors; it merely noted in a footnote that "six is above [the] minimum." Id. at 91 n.28. However, in Ballew v. Georgia, 435 U.S. 223 (1978), the Court halted the diminution of jury size, and held that a five member jury would not satisfy the jury
A. Voir Dire and the Use of Peremptory Challenges

In their briefs to the Second Circuit, the appellants in United States v. Barnes51 contended that the voir dire amounted to a "blind man's bluff" since the anonymity ruling deprived them of the opportunity to intelligently assess and exercise their peremptory challenges.52 While counsel for appellants were justifiably concerned about the procedure utilized, both as it affected these defendants and the criminal justice system, their claims were somewhat exaggerated. Even though the right to a jury trial is premised on the notion that every juror should be fair and impartial, it is no secret that during voir dire both sides attempt to select the most partial jurors available. Each party seeks to empanel those jurors most favorable to his point of view. In an effort to further the possibility of empanelling impartial juries, all state and federal courts allot to both sides an unlimited number of challenges for cause.54 Each party is also entitled to a specific number of

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51. 604 F.2d 121 (2d Cir. 1979), cert. denied, 446 U.S. 907 (1980).
52. In their petition for rehearing to the Second Circuit, which included the request for a rehearing en banc, the appellants went further, stating that the court's opinion was totally unsupported by any authority. Specifically, the appellants asserted: "A divided panel of this court affirmed the conviction of [the] defendants in an extensive opinion of some 100 pages length. In so doing, a divided majority has ratified a novel—if not strange—rule of law which is totally unsupported by authority from any other circuit, any decision of the United States Supreme Court and which is unique and totally without precedent in the entire history of American jurisprudence. It has sanctioned—for the first time in American legal history—the trial of a defendant in a criminal prosecution before an 'anonymous' petit jury. A jury that was empanelled without the names, identities or residence locales being revealed to counsel during the course of the trial court's voir dire and one that was empanelled without permitting counsel to make any inquiry whatsoever, in light of their anonymity into the individual juror's ethnic or religious background." Brief for Appellants at 2-3, United States v. Barnes, 604 F.2d 121 (2d Cir. 1979), cert. denied, 446 U.S. 907 (1980).
53. See C. Van Dyke, Jury Selection Procedures 282-84 (1977) [hereinafter cited as Van Dyke].
54. Id. at 140.
peremptory challenges, whereby counsel can excuse those jurors who appear biased in favor of his adversary.

The utilization of peremptory challenges is based on the realization that many jurors, although ostensibly impartial, may in fact harbor biases toward one of the parties. Ironically, on certain occasions even those jurors who, in preliminary questioning, have asserted their impartiality should be peremptorily challenged. For example, let us assume that David Berkowitz, the infamous "Son of Sam" killer, was tried in New York City. Imagine the reaction of the lawyers in the case if a potential juror consistently replied in the negative when asked in voir dire whether he had heard of, read about, or discussed the case with his family or friends. While legally the juror would be deemed impartial and thus not subject to a challenge for cause, a person who has lived in a city gripped by fear and has yet managed to insulate himself from it completely would be viewed as a social ascetic at best and a walking cadaver at worst. Without being subject to peremptory challenge, however, this individual, so obviously out of touch with his surroundings, would become one of the "sole judges of the facts."

Some circuits in the past have upheld the right of a trial judge not to disclose names and addresses of potential jurors. Other decisions have affirmed trial court rulings which denied counsel the right to inquire about the religious and ethnic backgrounds during voir dire. The Barnes decision was unprecedented in foreclosing counsel from inquiring into each of these areas in the same case. Nevertheless, the jury was not completely anonymous. The trial judge did examine each juror extensively on other aspects of his background, as well as his perceptions on certain issues vital to the case at bar. For example,

55. Fed. R. Crim. P. 24(b). If the offense is punishable by death, each side has twenty peremptory challenges. If the offense is punishable by more than one year imprisonment, the prosecution has six and the defense ten peremptory challenges. If the offense is punishable by less than one year imprisonment or by fine or both, each side has three peremptory challenges. Id. State laws vary widely concerning the number of peremptory challenges. Ordinarily, both parties have the same number of challenges, but twenty states allow more challenges to the defense than the prosecution. See Van Dyke, supra note 53, at 282-84.

56. As early as 1894, the Supreme Court of the United States recognized the paramount importance of this right: "The right to challenge a given number of jurors without showing cause is one of the most important of the rights secured to the accused. . . . He may, if he chooses, peremptorily challenge 'on his own dislike without showing any cause,' he may exercise that right without reason . . . any system for the empanelling of a jury that . . . embarrasses the full, unrestricted exercise by the accused of that right, must be condemned." Pointer v. United States, 151 U.S. 396, 408 (1894).

57. In fact, David Berkowitz pled guilty to murder in the second degree and was sentenced to life imprisonment.
each juror was questioned concerning his family history,\textsuperscript{58} education, the county where he resided and his length of residence, his occupation,\textsuperscript{59} and membership in any organized group, club, or fraternal organization. Moreover, prospective jurors were asked "whether they had any feelings about undercover agents, paid informants, or electronic surveillance which would prevent their fair judgment of the case"; whether they had seen or read anything in the media which would prevent their fair consideration of the case; whether they worked for the government; and whether they had an opinion about the courts, defense lawyers, prosecutors and law enforcement officers which would prevent them from being impartial.\textsuperscript{60} They were also questioned in depth concerning their attitudes towards blacks, including such inquiries as "whether [they] had ever moved to a different area because [they] had been disturbed by changing conditions,"\textsuperscript{61} and whether they "had ever had any experiences with persons of different races arising out of employment, residence, or school situations."\textsuperscript{62} On the basis of these and the usual boiler plate questions,\textsuperscript{63} the Second Circuit Court of Appeals concluded that the trial court conducted a voir dire which gave defense counsel full opportunity to intelligently exercise their peremptory challenges.\textsuperscript{64} Apparently, the court was persuaded that the voir dire left the defense and the prosecution on equal footing.

\textsuperscript{58} Jurors were questioned concerning their marital status and whether they had any children. United States v. Barnes, 604 F.2d 121, 135 (1979), cert. denied, 446 U.S. 907 (1980).

\textsuperscript{59} Jurors were also asked the occupations of their spouses and children. Id. at 135.

\textsuperscript{60} Id.

\textsuperscript{61} Id. at 136.

\textsuperscript{62} Id. Examples of specific questions asked of potential jurors included: "Can you tell us what your general attitude is toward black people?"; 'Have you had any experience with any member 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 had 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?'; 'Are you in general prejudiced against persons of another race, creed or color so you feel that you could not fairly consider and decide this case on the evidence?" Id. at 136 n.4. (citation omitted).

\textsuperscript{63} These questions included: whether the jury knew any of the participants involved, including defendants, attorneys, or other individuals and businesses which would be mentioned at the trial; whether they could accept and apply the law as instructed by the judge; whether they would be available during a lengthy trial; whether they had previously served on juries; whether they were ever charged with a crime or subject to subpoena, whether they had dealings with the DEA or other police agencies dealing with narcotics detection; whether they or close friends or relatives had any prior experience with narcotics or firearms; whether they had previous knowledge of the indictment or had read anything about the case. Id. at 135-36.

\textsuperscript{64} The court stated: "[T]he [trial] court conducted a voir dire which resulted in the selection of a panel whose background was fully explored, and whose state of
B. Peremptory Challenges — Are Both Parties On Equal Footing At the Commencement of Voir Dire?

The Supreme Court has held that the jury selection process must protect the defendant's right to be judged by a jury which represents a fair "'cross-section of the community." 65 Throughout the process, however, certain segments of society, especially minorities, the elderly, the young, and the poor, 66 are either totally eliminated, 67 or underrepresented, in the jury pools. Moreover, those members of some underrepresented groups who are chosen as veniremen have physical characteristics that render them subject to challenge based solely on visual perception. Because the jury selection process alone will not produce a representative pool, meaningful voir dire is essential for a defendant to salvage a jury which will reflect a cross-section of the community. Under the present system, a defense attorney often finds himself confronted with a petit jury composed of middle-aged, or retired, middle-class individuals who have little in common with his client. Rules which restrict voir dire serve to strengthen the position of the prosecution.

C. Selection of the Jury Pool

Historically, the jury selection process has often been marred by discriminatory exclusion of certain groups. 68 Responding to this problem, Congress, in 1968, passed the Jury Selection and Service Act. 69 In pursuance of the goal of selecting juries at random from a

mind with respect to the racial 'question' was probed as well." Id. at 136 (footnote omitted). In arriving at this conclusion the court was undoubtedly influenced by the fact that five of the jurors chosen were black and one of the alternates was Hispanic. Id. at 136 n.5.


66. For example, persons who cannot speak or write English may be eliminated from consideration.

67. See generally Van Dyke, supra note 53, at 23-42.

68. See, e.g., Ballard v. United States, 329 U.S. 187 (1946) (women); Strauder v. West Virginia, 100 U.S. 303 (1879) (race); Rabinowitz v. United States, 366 F.2d 34 (5th Cir. 1966) (same).

fair cross-section of the community, a master jury list is drawn from either voter registration lists or a list of those citizens who actually voted in a recent election. From this so-called "wheel," jurors are called as needed. Each district or division may provide, consistent with the purposes of the Act, exemptions and excuses from jury duty because of undue hardship. For example, jurors may be excused on the grounds of undue hardship resulting from travel. Although the Act is the most significant recent move toward more representative federal juries, it falls far short of assuring the defendant that his jury will be called from a fair cross-section of the community.

The difficulties in securing a representative jury at the master list stage lie in the nearly exclusive use of voter registration lists as the source of potential jurors. Many of the underrepresented groups tend

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70. For the method of jury selection for the Southern District of New York, see Jury Selection Plan, Southern District of New York (Sept. 1978) [hereinafter cited as the Plan].
71. The Plan, supra note 70, relies solely on voter registration lists, a practice which was upheld in United States v. Guzman, 468 F.2d 1245 (2d Cir. 1972), cert. denied, 410 U.S. 937 (1973).
72. The Plan, supra note 70, states that "[lists of prospective jurors] shall not be made public until the jurors have been summoned and the Chief Judge may order the names kept confidential if the interests of justice so requires." Id.
73. 28 U.S.C. § 1863 (1976). The Act mandates exemptions for active members of the armed forces, police and fire department members and government officials.
74. The Plan, supra note 70, allows excuses for persons over 70, active ministers, women with legal custody of a child under twelve, practicing lawyers, law students, physicians, dentists, registered nurses, teachers and administrators in public or private schools or colleges, sole proprietors of businesses, and "persons as to whom the Chief Judge finds ... that jury service would constitute undue hardship or extreme inconvenience." Id.
75. 28 U.S.C. § 1863 (6)(7) (1976). The Plan, supra note 70, allows the excuse from jury service of persons residing more than 50 miles from the courthouse.
76. Despite the Act's mandate, many segments of society remain vastly underrepresented in jury pools. See generally Van Dyke, supra note 53, at 23-42. In a 1971 federal district court survey, blue collar workers were underrepresented on juries in four-fifths of the districts. Id. at 25. These figures take on added significance in view of a 1973 study demonstrating that the likelihood that jurors would convict increases as the disparity in the socioeconomic status between the jurors and the accused increases. Id. at 27 (citing Adler, Socioeconomic Factors Influencing Jury Verdicts, 3 N.Y.U. Rev. Law and Soc. Change 1 (1973)). In federal district court surveys taken in 1971 and 1974, 77.1% of the available 166 surveys showed an underrepresentation of non-white persons in districts where non-white population was four percent or more; in over half of the districts surveyed, underrepresentation of non-whites was at 20% or more. Id. at 28. Underrepresentation of the young and the elderly is universal throughout the federal district courts. Id. at 35. Women, despite a commonly held belief of overrepresentation on juries due to greater availability, are generally underrepresented, according to the 1971 and 1974 studies. Women who appeared for jury duty were underrepresented in 88.9% of 234 surveyed courts. Id. at 39.
to register to vote at a rate far below the national norm.\textsuperscript{77} The Act does require voter registration lists to be supplemented with additional source lists when the purposes of the Act are not being fulfilled.\textsuperscript{78} The courts, however, remain largely unmoved by the argument that strict dependence upon voter lists is faulty and that multiple source lists should be utilized.\textsuperscript{79} Instead, courts have tended to lay fault with the citizen who fails to register to vote.\textsuperscript{80}

Furthermore, the federal courts have been particularly reluctant to find the existence of underrepresented "cognizable groups" in the categories of age, education and economic status.\textsuperscript{81} The rationale relied upon by the courts in denying the cognizability of these groups is that these segments of the population are too difficult to identify without drawing arbitrary distinctions, and that even within identified groups there exists a gamut of attitudinal shadings that are contrary to the distinctive identifying features of a "cognizable group."\textsuperscript{82} Such reasoning does not take into account the arbitrariness present throughout the process of jury selection, including the congressional decision to use voter registration lists as the primary and often sole source of federal jury pools.

\begin{itemize}
\item \textsuperscript{77} Van Dyke, \textit{supra} note 53, at 88-89.
\item \textsuperscript{78} 28 U.S.C. § 1863(b)(2) (1976).
\item \textsuperscript{80} One court reasoned: "The fact that some persons may from religious conscience or otherwise choose not to register to vote does not, in our view, convert that subclass of nonvoters into a 'cognizable group.'" Camp v. United States, 413 F.2d 419, 421 (5th Cir.), (footnote omitted), \textit{cert. denied}, 396 U.S. 968 (1969). Another court stated: "Congress intended the voter registration lists to serve an important screening function by eliminating those individuals 'who are either unqualified to vote or insufficiently interested in the world about them to do so.'" United States v. Jenkins, 496 F.2d 57, 66 (2d Cir. 1974), \textit{cert. denied}, 420 U.S. 925 (1975), (quoting 1968 U.S. Code Cong. and Ad. News 1795-96). See also United States v. Guzman, 468 F.2d 1245, 1248 (2d Cir. 1972) (voting lists need only be supplemented where obstacles are placed in the paths of certain citizens attempting to register to vote), \textit{cert. denied}, 410 U.S. 937 (1973); Camp v. United States, 413 F.2d 419, 421 (5th Cir.) (Jehovah's Witnesses), \textit{cert. denied}, 396 U.S. 968 (1969).
\item \textsuperscript{82} See, e.g., Hamling v. United States, 418 U.S. 87 (1974) (age); United States v. Potter, 552 F.2d 901 (9th Cir. 1977) (age, education); United States v. Kirk, 534 F.2d 1262 (8th Cir. 1976) (age) \textit{cert. denied}, 433 U.S. 907 (1977); United States v. Olson, 473 F.2d 686 (8th Cir.) (same), \textit{cert. denied}, 412 U.S. 905 (1973); United States v. Gast, 457 F.2d 141 (7th Cir.) (same), \textit{cert. denied}, 406 U.S. 969 (1972); United States v. Kuhn, 441 F.2d 179 (5th Cir. 1971) (same).\end{itemize}
The courts’ refusal to find the existence of clearly cognizable groups on the basis of age, education or economic status is unwarranted. For example, a recent study has indicated that young adults share a distinct set of attitudes that are more highly correlative than attitudes shared by members of accepted cognizable groups. Yet courts persist in finding cognizable groups based solely upon race, sex, occupation or income. To date only one federal case has recognized young adults as a cognizable group.

Even when the federal courts define a segment of society as a “cognizable group,” thereby assuring representation in the jury pools, there remains the hurdle of establishing that this cognizable group was sufficiently underrepresented in the jury pool as compared with its numbers in the local population so as to violate the Act. Jury pools are not required to be statistical mirrors of the community, nor is a criminal defendant entitled to a proportionate number of members of his race either on the rolls from which the jury is selected or on the petit jury that tries him. In order to successfully challenge jury selection procedures, a defendant must either show systematic exclusion of an identifiable class or demonstrate that there is a “substantial deviation” from the group’s representation in the jury pool and its share of the population. The existence of a “substantial deviation” in violation of the Act is established not through a comparison of the percentage of the group in the jury pool and the percentage of the group in the local community, but by determining whether a different jury selection procedure would have changed the number of members of a given class within the jury pool. Granting trial courts such discretion allows jury selection procedures in many districts to circumvent the purposes of the Act and results in unrepresentative jury venires.

84. United States v. Butera, 420 F.2d 564, 570 (1st Cir. 1970). The court also recognized the cognizability of the less educated. Id. at 571.
89. See, e.g., United States v. Potter, 552 F.2d 901 (9th Cir. 1977); United States v. Freeman, 514 F.2d 171 (8th Cir. 1975); United States v. Jenkins, 496 F.2d 57 (2d Cir. 1974), cert. denied, 420 U.S. 925 (1975); United States v. Di Tommaso, 405 F.2d 385 (4th Cir. 1968), cert. denied, 394 U.S. 934 (1969).
The goal of a representative jury is dealt another blow in the second stage of jury selection, where prospective jurors may be excused from service. Excusal may occur at any one of two points in the selection procedure: after the prospective juror responds to a questionnaire sent on the basis of his selection from the "master wheel"; or on the day that the prospective juror is called and arrives at court. The Act directs each district, in formulating its jury selection plan, to delineate which occupational groups should be excused so that its members do not suffer "undue hardship or extreme inconvenience" resulting from jury service. Congress has not specified what particular groups might be excused for hardship reasons, but has left the issue to the determination of the trial judge, subject to the district's selection plan. Unfortunately, this usually results in an unrepresentative jury because "most courts accommodate those who do not want to serve." Courts often assume that the young, the aged, women and blue collar workers will be inconvenienced by jury service and excuse proportionately more jurors from these groups. This higher rate of excusal frequently impedes the goal of representative juries.

Neither Congress, through the Act, nor the courts, since the Act's passage, have effectively addressed the goal of assuring proportionately representative juries. Voir dire, the final step in jury selection, affords a defense attorney an opportunity to correct some of the representation problems created by the two prior stages. By informed exercise of both peremptory challenges and challenges for cause, the defense may be able to bring a jury's composition more proportionally in line with the local community.

D. Selection of the Petit Jury

Meaningful peremptory challenges must be based on thorough questioning of potential jurors. Limiting inquiry to broad questions such as "Can you give this defendant a fair trial?" will not suffice to discern bias or prejudice. Thus, the major issue is the breadth of the inquiry. Critical to the resolution of this issue is whether both sides are on an equal footing with respect to the composition of the pool and

90. Van Dyke, supra note 53, at 111.
92. Congress has only stated that "[s]uch groups might include, among others, doctors, ministers, sole proprietors of businesses, and mothers of young children. Members of excused groups could serve if they desired to do so, but a request for an excuse must be granted." Van Dyke, supra note 53, at 127 (citing S. Rep. No. 891, 90th Cong., 1st Sess. 28-29 (1967)).
93. Id. at 112.
94. Id.
95. In certain cases, he may even increase the representation of some groups which he believes to be more favorable to his client. See Van Dyke, supra note 53, at 139.
the information concerning members of the pool available to each side. As seen in the previous section, the jury pool selection process often benefits the prosecution. In the course of a trial, information available to the prosecution but not the defense further impedes the possibility of an impartial jury. In *Barnes*, the court of appeals assumed that the parties were equally affected by the trial court's rulings. Past cases, especially those involving notorious defendants, render this assumption questionable.

For example, in the prosecution of mobster Frank Costello for federal income tax evasion, the chief prosecutor requested an Internal Revenue agent to check the returns of all veniremen. The reason given for this request was "to find out whether any of the prospective jurors had income tax troubles of their own or had other reasons to be unfavorably disposed to the government." The inspection resulted in the compilation of information concerning the taxpayers' occupations, sources of income and all unusual deductions. This data was utilized by the prosecution to more intelligently exercise its peremptory challenges. Appealing the conviction, the defendant contended that (1) he was tried by a jury which was specially conditioned to find him guilty, and (2) that it was fundamentally unfair to permit the government, for the purpose of exercising its peremptory challenges, to use information which was not available to this defendant and would not be available to even the wealthiest of defendants. In sanctioning the government's conduct in the case, the court relied on *Best v. United States,* and *Christoffel v. United States,* wherein the appellate courts upheld the district courts' refusals to permit defendants the opportunity to review F.B.I. profile reports on prospective jurors to which the prosecution had access. In 1970, in *United States v. Falange,* the government, in the exercise of its peremptory challenges, used information about potential jurors which it had obtained from the F.B.I., state and local police, and even the local credit bureaus. The Second Circuit approved of this practice, holding that the district court did not err in denying a defense motion to withdraw the jury.

Both parties, therefore, do not conduct voir dire on the basis of equal information. Procedures adopted by the prosecution and sanc-

98. *Id.*
100. 171 F.2d 1004, 1006 (D.C. Cir. 1948), rev'd on other grounds, 338 U.S. 84 (1949).
101. See also Martin v. United States, 266 F.2d 97, 99 (5th Cir. 1959).
tioned by the courts place the prosecution well ahead in the race to empanel a favorable jury.

E. Securing Names and Addresses During Voir Dire

While in theory one juror is as impartial as another, in reality jurors are influenced by their own ethnic and religious backgrounds. Furthermore, the perception of a juror will often vary with his economic status, place of residence, and the customs and mores which are prevalent in his everyday existence. Increasingly, courts have candidly acknowledged the importance of the socioeconomic background of the jurors. A case in point is Alvarado v. State.103

In Alvarado, the appellant contended that since all of the prospective jurors lived within fifteen miles of the city of Anchorage, residents of native villages located beyond the fifteen mile limit were unconstitutionally excluded. In reversing the defendant's conviction on the ground that he did not receive an impartial jury trial and was thereby denied his constitutional right to due process of law, the court stated:

[The] evidence vividly portrays the enormous gulf which separates the mode of life of the typical Alaskan villager from the type of existence led by most residents of Anchorage and other cities of the state. The differences between a Native village and the City of Anchorage are neither simple nor superficial; they are not restricted to a single element such as occupation or income. Rather, the lines of separation are profound and intersect areas including occupation, economy, domestic relations, politics, language, religion, race, cultural heritage, and geography.

A defendant may prefer, therefore, certain jurors over others depending on the charge, his own background or a given political or economic climate. The ethnic or religious background of a juror can frequently be ascertained through his name. Although not scientifically accurate, this method is simple and often reliable. In Barnes,105 by instructing the jurors not to identify themselves by name, the trial court even precluded the use of this basic source of information. This obstruction was aggravated further by the court's refusal to permit inquiry into the jurors' ethnic106 and religious backgrounds on voir dire.107 In addition, the defense was precluded from inquiring as to the jurors' street addresses. The attorneys and their clients were thereby denied the ability to assess meaningfully a juror's background and his perceptions concerning the defendants and the crimes with which they were charged.

103. 486 P.2d 891 (Alaska 1971).
104. Id. at 899 (footnote omitted).
105. 604 F.2d 121 (2d Cir. 1979), cert. denied, 446 U.S. 907 (1980).
106. See infra pt. II F.
107. See infra pt. II G.
In districts where one county has a predominantly urban population and another a primarily rural one, the name of the county and the length of residence within that county may be sufficient. This information is inadequate, however, when questioning jurors drawn from the Southern District of New York. In the Southern District, great disparities exist, not only among the counties, but within the various communities and neighborhoods of each county. For example, the South Bronx and Riverdale are two neighborhoods located within Bronx county. It would be fair to say, however, that these areas constitute "two different worlds" whose populace, wealth, mores and customs vary substantially. The South Bronx is a squalid area rife with sickness, addiction, poverty and crime. Gutted buildings, abandoned automobiles ravaged by scavengers, and other assorted debris adorn the street. Crime is rampant. Less than ten minutes away by automobile, however, lies Riverdale, replete with private homes, luxury apartments and gourmet stores. Clearly, the perceptions of the residents of these areas differ significantly. In Riverdale, a police officer is viewed as the protector. In the South Bronx, he is viewed as a symbol of authority whose actions are less than benign. Since the activities of the defendants in *Barnes* were alleged to center in Harlem and the South Bronx, knowledge of where potential jurors resided was of the utmost importance. The defense may not have chosen only those jurors who lived amidst urban poverty and excluded those who lived in affluent neighborhoods, but the nuances inherent in knowledge of a prospective juror's residence would have enabled the defense to utilize their challenges more intelligently.

Factors beyond a prospective juror's place of residence must also be considered. For example, some of the younger people who lived in Harlem and the South Bronx reputedly regarded Nicky Barnes as a folk hero. Others, especially the elderly, either feared or were actual victims of the area's astronomical crime rate, much of which has been attributed to the drug trade and its resulting addicts. Each of these groups would have an entirely different perception of the defendants and the charges for which they were prosecuted. Both groups, however, form their perceptions at least in part as a result of the community in which they reside.

Although knowledge of a juror's name is helpful, it is not so completely informative as to warrant forcing defense counsel to base his decisions of whether or not to challenge a potential juror solely on that knowledge. Even if counsel were to surmise correctly that a potential

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108. The situation that exists in the South Bronx is typified in the description of one of its precincts, the 41st. The precinct was once nicknamed "Fort Apache" due to its epidemic crime rate and the similarity of the area to the wild west. Today, as a result of arson, vandalism and other forms of destruction, it has been renamed "The Little House on the Prairie."
juror was of a particular ethnic background, the information would be insufficient. There is a great deal of difference between the perceptions of an ethnic resident of the suburbs and one who lives in the inner city. This difference in perception may well carry over to the adjudication process.

In light of the potential effect of the factors discussed above, a defendant, in order to exercise his peremptory challenges intelligently, must know, in addition to name and address, the ethnic and religious background of each potential juror.

**F. Ethnic Background of Potential Jurors**

In precluding questions on voir dire regarding a juror's ethnic background, the trial judge in *Barnes* said: "'In my view ... the law states that no juror shall be disqualified by reason of race, color or creed, and in my view of the law he could not be challenged on the basis of race, color or creed.'" 109 While the judge did not identify any specific statute, apparently he was relying on section 1862 of the Jury Selection Service Act of 1968. 110 Section 1862 provides: "No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States ... on account of race, color, religion, sex, national origin, or economic status." 111 If the trial judge, in fact, relied on this section for his ruling, he clearly erred. Section 1862, as all of the Jury Selection and Service Act, is inapplicable to the voir dire process. 112 The Act's purpose is to prevent the intentional and systematic exclusion of cognizable groups from grand and petit jury venires. What occurs after voir dire has commenced is not within its ambit.

In *Barnes*, the majority of the Second Circuit abandoned Judge Werker's rationale. Unfortunately, it substituted a novel and extreme rationale of its own. The majority concluded that the ethnic back-

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109. 604 F.2d at 168.
110. Id. at 168.
112. Id.
113. This point was clearly delineated in the recent decision of the Fifth Circuit Court of Appeals in United States v. Price, 573 F.2d 356, 360-61 (5th Cir. 1978), where the court stated: "'[T]he [Jury Selection and Service] Act does not encompass voir dire of the jury panel. ... Notwithstanding the broad discretion reposed in the trial court in conducting voir dire, it is nevertheless certain that voir dire is not within the ambit of the Jury Selection and Service Act. ... By its very terms, 28 U.S.C. § 1867(a) provides that challenges on the ground of substantial failure to comply with the provisions of the title in selecting grand or petit jury shall be made before the voir dire examination begins, or within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier ... .'" It is obvious that the commencement of voir dire is the cut-off point for challenges under the Act. Hence, objections to the conduct of the voir dire examination cannot be included within the terms of the Act. Id. (emphasis in original).
ground of jurors is irrelevant since no ethnic group looks favorably upon the sale of drugs or the use of firearms.\textsuperscript{114} The court did not address, or perhaps decided to ignore, both social science studies and respected legal folklore which have demonstrated that certain ethnic groups are traditionally favored by the defense.\textsuperscript{115}

It should be noted that, depending on the times and the specific issues in the case, lawyers, often assisted by teams of social scientists, have opted for members of different ethnic groups. Social science techniques have been successfully utilized in such heralded cases as the Mitchell-Stans conspiracy, the Harrisburg 7, Joan Little, the Attica Prison riot and the trial of Indian activists in Wounded Knee.\textsuperscript{116} While reasonable persons may differ on what ethnic group would be most favorably disposed toward a defendant in a given case, ethnicity is clearly an important factor in jury selection.

Even those scholars who have steadfastly opposed the use of social science or any other data in jury selection recognize that ethnicity can influence a jury.\textsuperscript{117} For example, in \textit{The Constitutional Need for Discovery in Pre-Voir Dire Juror Studies}\textsuperscript{118} the author took the position that

\begin{quote}
the use of juror information and studies by prosecutors to secure biased jurors violates the defendant's fourteenth amendment right to due process of law and the sixth amendment right to a trial by an impartial jury drawn from a cross section of the community. It is also suggested that the use of such means by the defense to secure a jury biased in its favor is a violation of the state's right (and hence the people's right) to a fair trial by an impartial jury.\textsuperscript{119}
\end{quote}

This rationale for circumscribing questions regarding ethnicity during voir dire differs from that found in the majority opinion in \textit{Barnes} in that it does not deny the importance of such an inquiry. To the

\begin{itemize}
\item \textsuperscript{114} 604 F.2d at 140.
\item \textsuperscript{115} For example, the highly regarded University of Chicago Jury Project has determined that persons of English and German backgrounds are more likely to favor the government, while Blacks, Italians, and Slavs are more likely to be defense oriented. See Broeder, \textit{The University of Chicago Jury Project}, 38 Neb. L. Rev. 744, 748 (1959). Another study has demonstrated that Blacks are more likely to acquit on the grounds of insanity than any other ethnic group. See R. Simon, \textit{The Jury and the Defense of Insanity} 111 (1967).
\item \textsuperscript{116} See Van Dyke, supra note 53, at 286.
\item \textsuperscript{117} See Note, \textit{Limiting the Peremptory Challenge: Representation of Groups on Petit Juries}, 86 Yale L.J. 1715 (1977). In this Note, the author contends that an attorney should be prevented from challenging jurors merely because they are members of identifiable groups. See Comment, \textit{The Prosecutor's Exercise of the Peremptory Challenge to Exclude Nonwhite Jurors: A Valued Common Law Privilege in Conflict with the Equal Protection Clause}, 46 U. Cin. L. Rev. 554 (1977).
\item \textsuperscript{118} See Note, \textit{The Constitutional Need for Discovery of Pre-Voir Dire Juror Studies}, 49 S. Cal. L. Rev. 597 (1976).
\item \textsuperscript{119} Id. at 608.
\end{itemize}
contrary, the use of ethnicity and its impact on jury selection are deemed to be so extensive as to violate the Constitution. In *Barnes*, the majority could have used this rationale to support the ruling of the district judge. Instead, it curiously chose to adopt the rather extreme position that ethnicity was, for all intents and purposes, irrelevant in the jury selection process.

G. Religious Background of Prospective Jurors

The Supreme Court has acknowledged the influence that religion may have on a juror's perception of guilt and innocence. In the landmark case of *Swain v. Alabama*, the Court stated that

\[\text{[a]lthough '[t]here is nothing in the Constitution of the United States which requires the Congress [or the States] to grant peremptory challenges'. . . nonetheless the challenge is 'one of the most important of the rights secured to the accused', . . . [and] is . . . frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, [or] nationality . . . of people summoned for jury duty.}\]

In affirming the district court's prohibition against questioning potential jurors about their religious beliefs, the majority in *Barnes* correctly observed that neither statutory nor constitutional law requires disclosure of religion in voir dire. The court, however, did not account for the recognition given to these factors by the *Swain* decision when it concluded that

\[\text{[a]s to religion, our jury selection system was not designed to subject prospective jurors to a catechism of their tenets of faith, whether it be Catholic, Jewish, Protestant or Mohammedan, or to force them to publicly declare themselves to be atheists. Indeed, many a juror might have a real doubt as to the particular religious category into which they could properly place themselves.}\]

This reasoning is somewhat perplexing. It is unclear why the majority characterized ordinary questioning as to the potential jurors' religious backgrounds as "subjecting jurors to a catechism of their tenets." In affirming the ruling of the district court, the majority could have relied on a number of cases which have held that, unless religion is an issue in the case, the trial court has wide latitude as to whether to permit questioning concerning this issue in voir dire. Ordinarily, the exercise of discretion will be upheld if it comports with the "essential demands of fairness" in the particular case.

120. 380 U.S. 202 (1965).
121. *Id.* at 219-20 (emphasis added) (citations omitted).
122. 604 F.2d at 143.
123. *Id.* at 141.
124. *See supra* note 123 and accompanying text.
The overwhelming majority of decisions have upheld trial courts' discretion in precluding questions concerning religion, even when religion is of significance in a case, due to either the defendant's membership in an identifiable sect, or the fact that the offense charged will evoke reactions which are at least partially attributable to a person's religion. In Hamling v. United States, an obscenity prosecution, the Supreme Court affirmed the trial court's refusal to specifically question veniremen as to whether they entertained any religious beliefs which would affect their impartiality. The Court held that specific questions were unnecessary when general questions relating to prospective jurors' views on obscenity were sufficient to elicit any biases.

In an apparent attempt to strike a balance between a defendant's right to an impartial jury and the juror's right to privacy, the majority in Barnes decided that a juror's right not to disclose publicly that he is an atheist outweighs a defendant's right to exercise his peremptory challenges on the basis of more than a mere hunch or surmise. The court, however, went beyond this policy by expressing a curious concern that a juror may not be aware of his religion. Even in the unlikely situation that a juror did not know his own religion, the juror could so indicate, thereby affording the attorneys an opportunity to draw their own conclusions as to the juror's self-perception, veracity and character. The majority concluded its newly adopted thesis by stating:

The suggestions made by appellants as to fields into which they would roam would, if we were blindly to accept them, lead to ad

127. Id. at 139-40. See also United States v. Cullen, 454 F.2d 386, 389-90 (7th Cir. 1971) (defendant, accused of interfering with selective service operations and destruction of records, claimed he lacked necessary intent because his acts were compelled by his religious beliefs); Hoapili v. United States, 395 F.2d 656, 658 n.2 (9th Cir. 1968) (defendant claimed his refusal to be inducted into military service stemmed from his beliefs as a Jehovah's Witness), cert. denied, 395 U.S. 930 (1969); Gold v. United States, 378 F.2d 588, 594 (9th Cir. 1967) (obscenity prosecution); People v. Daily, 157 Cal. App. 2d 649, 651, 321 P.2d 469, 472 (1958) (abortion); Adams v. State, 200 Md. 133, 136, 88 A.2d 556, 559-60 (1952) (same); Commonwealth v. Hall, 369 Mass. 715, 729, 343 N.E.2d 388, 398 (1976) (Defendant was a Moslem, yet court refused to ask jurors if they knew "who Allah is"); State v. Weiss, 130 N.J.L. 149, 153, 31 A.2d 848, 850-51 (1943) (abortion), aff'd per curiam, 131 N.J.L. 228, 35 A.2d 895 (1944). Contra Wasy v. State, 234 Ind. 52, 55, 123 N.E.2d 462, 464 (1955) (abortion); State v. Barnett, 251 Or. 234, 236, 445 P.2d 124, 125 (1968) (same). In this manslaughter prosecution emanating from an abortion, the court held that it was an abuse of discretion to limit questions regarding prospective jurors' religious beliefs where the defendant was accused of murder since "[t]here is a widely accepted belief that certain religious faiths feel more strongly about abortion than do others." Id. at 236, 445 P.2d at 125.
128. 604 F.2d at 141-42.
129. Id. at 141.
absurdum ends. If Darrowesque questioning of prospective jurors were allowed . . . any semblance of juror privacy would have to be sacrificed. There is neither statutory nor constitutional law that requires disclosure of information about jurors unrelated to any issue as to which prejudices may prevent an impartial verdict.130

Once again, it is somewhat difficult to ascertain the exact meaning of the court's statement. What constitutes "Darrowesque questioning"? Apparently, it means little more than questioning a potential juror about his religious background, pursuant to the advice rendered by Clarence Darrow, who stated: "In criminal cases I prefer Catholics, Episcopalians and Presbyterians to Baptists and Methodists, because the tenets held and discipline practiced by the latter set higher standards of human conduct and make them less tolerant of human frailty."131

Moreover, in assessing the religious background of jurors, an attorney not only takes into consideration its effect on a defendant directly, but also its relation to the other participants in the trial. Even if a juror maintains an unbiased position toward the defendant, his religious prejudice or preference toward other participants in the trial may influence his deduction of the facts. Like any other group of people, jurors are prone to make character assessments which affect their objectivity. During the trial, they not only weigh the character of the defendant, but also those of the witnesses, attorneys and judge.

For example, a devout juror of a particular faith may be swayed by a belief that a prosecutor who shares his faith would not bring charges against an innocent party. Similarly, such juror, confronted with conflicting stories from two witnesses, might be likely to give greater weight to testimony from a member of his own faith. Finally, a judge who shares a religious affiliation with jurors may be able to rely on this affiliation, coupled with the reverence a judge is often accorded by jurors, to shape the verdict of a trial. Consequently, the jurors' perceptions of and attitudes toward the religion of the prosecutor, judge and witnesses can be important to the outcome of the case.

While it is not proposed that every potential prejudicial combination can be eliminated in jury selection, a liberal voir dire with respect to religious, much the same as with ethnic, background will decrease the possibility of blatantly prejudiced jurors. Such juror prejudice, whether directed at the defendant or at other trial participants, could affect the outcome of the trial and cannot be ignored.

III. "Juror's Right to Privacy"

The doctrine of a "juror's right to privacy" relied upon by the majority in Barnes is novel at best. A review of relevant cases has

130. Id. at 143 (footnote omitted).
revealed that no other court has held that such a right exists. In support of its newly delineated doctrine, the *Barnes* majority did cite a number of cases. An analysis of these cases, however, reveals that rather than establishing a right to juror privacy, they merely stand for the proposition that voir dire should be limited to questions which are reasonably related to the issues in the case. Clearly, there can be no absolute right of juror privacy, or citizens could simply invoke their “right to privacy” and refuse to serve as jurors. Moreover, to date no decision supports the proposition that jurors could refuse, on privacy grounds, to answer relevant questions on voir dire.

In a further attempt to bolster this newly discovered right, the majority in *Barnes* stated: “It can be imagined that, as counsel seek more and more information to aid in filling the jury box with persons of a particular type . . . prospective jurors will be less than willing to serve if they know that inquiry into their essentially private concerns will be pressed.” However, more than twenty years ago in the celebrated case of *United States v. Costello*, the same circuit dismissed an identical contention as “farfetched bogies.”

Even assuming, arguendo, that the finding of a right to jury privacy in *Barnes* has a legal basis, it is difficult to see how a juror’s name, address, religion and ethnic background are “essentially private concerns.” A juror’s name and address are matters of public record. While religion and ethnic background may be deemed somewhat more private than a person’s name, they too are usually a matter of common knowledge and can often be found on school and employment applications, including those for civil service positions.

It is submitted that while the *Barnes* majority used the phrase “juror privacy,” it in fact sought to ensure and enhance “juror safety.”


133. See cases listed supra note 132.

134. 604 F.2d at 140.


136. Id. at 883. Moreover, the *Costello* court noted that unwillingness to serve is an unconvincing argument since jury service is mandatory. *Id.* The one state court which has addressed the issue has rejected the claim of a juror’s right to privacy. In Lehman v. San Francisco, 80 Cal. App. 3d 308, 145 Cal. Rptr. 493 (1978), the court rejected a juror’s assertion that the release of his name as a prospective juror to the parties in the case violated his rights to privacy, freedom of association and due process.

The two doctrines are by no means synonymous. The concept of juror privacy is a right to secrecy, foreign to the American jury system. By jeopardizing a meaningful voir dire, it imperils such fundamental rights as a fair and impartial jury trial and the effective assistance of counsel. Moreover, it contains the ominous signal of a secretive, inquisitorial adjudication rather than the open and public trial upon which our system of criminal justice is based.

On the other hand, the quest for juror safety is a noble goal. The jury, as the sole trier of facts, is at the heart of the criminal justice system. If jurors feel threatened or endangered during the course of the trial, they may be unable to render an impartial verdict. Numerous safeguards could be adopted to ensure that the verdict rendered is based solely on the evidence adduced at trial and not on any irrelevant influence or prejudice. Concomitantly, a citizen who serves on a jury is entitled to expect that neither he nor his family will be threatened or harmed.

While jury members, or their families, have been verbally threatened from time to time, reported instances of actual threats or injury to jurors are rare. Physical injury to a juror has been traced to a defendant in only one case, United States v. Bentvena. In the first Bentvena trial, a mistrial was declared when the jury foreman broke his back under suspicious circumstances. In the second trial, one of the defendants entered the jury box pushing and cursing. As a result of this conduct, he was shackled and gagged. Furthermore, in some cases, the danger to the jurors does not originate with the defendants, but rather with persons or groups who are sympathetic to either side of a controversial trial. For example, following the verdict in the McDuffie case in which four police officers were acquitted of charges that they murdered a black man, the city of Miami erupted with rioting. Fearing retaliation, the court took precautions to protect the jurors. Thus, even though these cases represent a very small percentage of criminal trials, the possibility of harm to jurors does exist.

While juror safety is an important concern, protective procedures must be judiciously utilized. It is suggested that a presumption of juror safety should prevail unless the prosecution makes a substantive

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140. Id. at 918.
142. Id. Three members of the six man, all-white jury said their homes were under police protection. One of the three said his life had been threatened, but he would not elaborate. Only one juror would allow his name to be used; the others said they feared for their safety.
showing of danger. Only where the prosecution can prove by a preponderance of the evidence that juror safety has been threatened should protective procedures be employed. Requiring a showing of substantive facts by a preponderance of the evidence would allow juror protection procedures to be used in those rare instances where juror safety is genuinely threatened. More importantly, it would ensure that neither the presumption of innocence nor a defendant's constitutionally protected trial rights would be unnecessarily jeopardized.

IV. Suggested Precautionary Alternatives

Once the trial court decides that precautionary procedures are warranted, a number of options, short of anonymity, are available. It is recommended that the court employ the least drastic, yet effective, option.

In deciding which method to employ, the first issue to be resolved is the source of the danger. When the source of the danger is the defendant or his cohorts, the court could revoke bail and preclude any visitors other than counsel. Defense counsel would then be given jurors' names and addresses and permitted to discuss this information with the defendant, with the proviso that both counsel and the defendant would be precluded from releasing this information to any other party.

If the trial court concludes that this procedure would be ineffective, it could choose to reveal the jurors' identities solely to defense counsel in an in camera proceeding with the instruction that he not discuss this information with his client or anyone else. While this more stringent alternative impairs the defendant's ability to participate in the selection of the jury that will try him, it at least affords counsel the ability to voir dire prospective jurors meaningfully and to exercise intelligently his peremptory challenges.

There is no doubt that an in camera inspection of juror lists requires the court to trust counsel's integrity. On occasion, such trust may be misplaced. Nevertheless, there is precedent for supplying counsel with sensitive and confidential information by means of in camera hearings. In the past, in camera hearings with defense counsel participating while the defendant and the public were excluded have been used in cases involving profiles of airplane hijackers and drug couriers. Such profiles are compilations of sociological and psychological traits which are exhibited by would-be hijackers and drug couriers. Obviously if routine discovery of these profiles were allowed, persons

143. For example, sending threatening letters or making phone calls to jurors or their families.
engaged in such illegal activities would alter their conduct and appearance, thereby rendering the profiles useless. However, where probable cause for an arrest or search is based on the profile, it is essential that a defendant be afforded the opportunity to challenge the validity of the profile or to assert that his characteristics do not fall within the contours of the profile. In an attempt to balance these objectives, courts have permitted *in camera* hearings while enjoining defense counsel from revealing the contents of the profile. Moreover, trial judges have sanctioned the *in camera* release of the identities of, and information supplied by, confidential informants to defense counsel in the presence of the defendant.\footnote{145. The Court of Appeals for the Ninth Circuit endorsed this practice in United States v. Anderson, 509 F.2d 724 (9th Cir.), *cert. denied*, 420 U.S. 910 (1975), when it stated: "[R]ather than establishing a fixed rule that either requires or precludes disclosure of the informant's identity when probable cause is in issue, we hold that the responsibility for striking the proper balance in each case rests with the trial judge. In striking that balance the trial judge, in the exercise of his discretion, can conduct an *in camera* hearing to which the defense counsel, but not the defendant, is admitted." *Id.* at 729. *See also* Socialist Workers Party v. Attorney General, 565 F.2d 19, 22 (2d Cir. 1977), *cert. denied*, 436 U.S. 962 (1978).}

It is suggested that a similar procedure designed to permit the inspection of juror lists, or the actual voir dire of potential jurors, is warranted. Moreover, such a proceeding poses less danger to potential jurors than informants. While informants have historically been the victims of retaliation attempts,\footnote{146. *See generally* Socialist Workers Party v. Attorney General, 565 F.2d 19, 22 (2d Cir. 1977), *cert. denied*, 436 U.S. 962 (1978).} jurors have infrequently been subjected to physical harm, or even verbal threats. In addition, informants are often involved in subsequent cases, thus requiring a continued reliance on defense counsel's promise to remain silent.\footnote{147. *Id.* at 24 n.4.} The value of jurors' identities, after the adjudication process is complete, is negligible. Only in those cases where the trial judge believes the lawyers cannot be trusted, should he preclude questioning concerning names and street addresses of potential jurors.

Where the source of the danger is someone other than the defendant, the trial judge should limit the dissemination of jurors' names and addresses to the defendant and his counsel. This could be accomplished by not reading the jurors' names in open court\footnote{148. Another possibility is the procedure used in United States v. Gurney, 558 F.2d 1202, 1210 n.12 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978). Although in Gurney many of the veniremen's names were called in open court during the selection process, a sealed jury list did provide some protection for those jurors actually selected.} or by excluding the public from the courtroom during the jury selection process. This alternative is particularly suitable in those instances where the sources of potential danger to jurors are persons or groups who are...
enraged by the defendant, or are inflamed by a controversial issue arising during pre-trial proceedings.

**Conclusion**

Rules which unnecessarily or excessively limit voir dire imperil the presumption of innocence by creating an implication of guilt before the commencement of trial. Such rules also derogate a defendant's right to an impartial jury in that defense counsel is already at a disadvantage in light of both the composition of the jury pool and of the unique sources of information available to the government. In voir dire, defense counsel has the final opportunity to affect the composition of the jury and to assure the defendant his right to an impartial, representative panel. A meaningful voir dire is, therefore, critical to the protection of a defendant's rights.

Concomitantly, threats to juror safety, whether emanating from the defendant or from volatile factions of our society, must be redressed. However, only in those rare cases where the prosecution is able to show that no effective alternative to anonymity exists should a trial judge be permitted to severely limit voir dire by withholding the names and street addresses of prospective jurors from the defense.