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Political Correctness in Jury Selection

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POLITICAL CORRECTNESS IN JURY SELECTION*

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The values of equality and freedom are in constant tension, or so some think. The more society stresses equality, the less freedom people have. For example, Bruce Ackerman would abolish inheritance in his utopian society to insure that every generation begins on an equal footing.[1] Many commentators have advocated restrictions on pornography and hate speech in order to protect the likely targets of these traditionally protected uses of free speech.[2] Additionally, Catharine MacKinnon has invoked the principle of equality in the form of protecting disempowered minorities to argue for a restriction on liberty and freedom.[3] Conversely, the more economic freedom we exercise in the marketplace, the more likely we are to generate disturbing inequalities between the rich and the poor. Political theorists, understandably, take the tension between liberty and equality for granted.[4]

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1. *See* BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 202-07 (1980) (arguing inheritance creates inequalities in future generations).

2. *See* CATHARINE A. MACKINNON, ONLY WORDS 15-41, 105-07 (1993) (suggesting pornography dehumanizes and endangers women, and advocating restricting pornography and hate speech); Bruce A. Taylor, *Hard-Core Pornography: A Proposal for a Per Se Rule*, 21 U. MICH. J.L. REF. 255, 281-82 (1988) (supporting rule making hard-core pornography per se illegal). *See generally* Andrea Dworkin, *Pornography Is a Civil Rights Issue for Women*, 21 U. MICH. J.L. REF. 55 (1988) (advocating laws restricting pornography because harmful to women).

3. *See* MACKINNON, *supra* note 2, at 71-110 (arguing that free expression damages social equality for women and minorities).

4. *See* F.A. HAYEK, THE CONSTITUTION OF LIBERTY 85 (1960) (noting in many respects liberty produces inequality); ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 164 (1974) (noting individuals' voluntary actions overturn egalitarian principles over time).

This tension has been by no means evident in cases involving the Equal Protection Clause of the Fourteenth Amendment. First, the Supreme Court of the United States has been wary of extending the principle of equal protection to matters that bear directly on the perpetuation of entrenched economic classes in American society.[5] Differential funding for public schools, where some local communities support their schools more than others, obviously impacts the distribution of wealth in the next generation. Yet the Court has refused to interfere with these funding practices, regardless of how much they may disadvantage some groups of children.[6] There is, however, no restriction on the liberty to pick a school, either public or private, that will further the relative chances of one's child for success.[7] Likewise, the Court will not meddle in the greatest inequality of all, the inequality of opportunity that arises from the economic fortunes of one's family. To this extent, liberty interests, the freedom and the economic power to do what one wishes, are fully compatible with the reigning interpretation of the Equal Protection Clause.

The brand of equality promoted by the Supreme Court actually enhances freedom of association.[8] For example, desegregating schools increased the opportunities for social contact among children of different races. Further, by striking down statutes prohibiting interracial marriage, the Court increased the marriage options for everyone without reducing anyone's liberty.[9] Perhaps white segregationists could conceptualize their opposition to integrating schools as the freedom not to associate with other races. But this claim of right, rejected by American history, is more in the nature of an asserted right to a certain environment in which other people behave according to their personal preferences. It is not a claim of personal freedom to act (or not to act) in a particular way.

The assumption of political theory of the contradiction between freedom and equality is not borne out by the jurisprudence of the Supreme Court. Yet the Court has begun, in the 1990s, to intrude heavily, though almost

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5. *See, e.g.*, Maher v. Roe, 432 U.S. 464, 470-71 (1977) (declining to find indigent women seeking funding for medically unnecessary abortion members of disadvantaged class); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 27-29 (1973) (refusing to apply equal protection strict scrutiny review to wealth classification); James v. Valtierra, 402 U.S. 137, 142-43 (1971) (upholding state constitutional amendment that subjected low-income housing projects to referendum approval).

6. *See San Antonio Indep. Sch. Dist.*, 411 U.S. at 56-59 (concluding state legislatures best suited to make taxing and educational decisions).

7. *See* School Dist. v. Ball, 473 U.S. 373, 397-98 (1985) (recognizing individual right to select between public and private schooling).

8. Herbert Wechsler would have preferred to rest the entire law of racial desegregation on the principle of freedom of association. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959) (arguing segregation infringes on right of freedom of association).

9. *See* Loving v. Virginia, 388 U.S. 1, 12 (1967) (recognizing racially-classified statute violates freedom to marry).

unwittingly, in a critical area of personal freedom. No institution is more important to individual liberty than the criminal trial, where criminal defendants face the risk of imprisonment and perhaps even the death penalty.

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy" certain rights, including the right to a "public trial, by an impartial jury."[10] Undoubtedly, the framers thought these rights were essential to living freely in the American Republic. It never would have occurred to them that these freedoms, protected as rights, might someday be seen as standing in conflict with the principle of equality. Yet within the last decade, in the area of jury selection, the Court has discovered that there is indeed a conflict in criminal trials between freedom and equality. In their wisdom, the Supreme Court justices have decided, at least for the time being, that equality should prevail.[11]

The Bill of Rights contained no contradiction between freedoms protected as rights and equality, for the first ten amendments studiously ignore the principle of equality. It was only after the Civil War, when the Fourteenth Amendment cemented the Union victory, that this glaring omission became corrected. For the first time, in the Fourteenth Amendment, we find the principle essential to any modern constitution: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[12]

Within fifteen years of the adoption of the Fourteenth Amendment, the Supreme Court intervened in the process of jury selection by striking down, as a violation of equal protection of the laws, a West Virginia statute prohibiting blacks from serving on juries.[13] Significantly, Strauder, an African-American, properly complained of being tried by a jury that the law required to be all white.[14] The Court readily concluded that "[t]he very fact that colored people are singled out and expressly denied . . . all right to participate in the administration of the law . . . though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, . . . an assertion of their inferiority . . . ."[15] When the Court wrote this language in 1879 it had no trouble invalidating the statute that prohibited "colored people" from serving on juries.[16] The primary focus of the decision, however, was that the statute denied equal protection to

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10. U.S. CONST. amend. VI.

11. *See infra* notes 27-68 and accompanying text (discussing jury selection cases in which equality outweighed freedom).

12. U.S. CONST. amend. XIV, § 1.

13. *See* Strauder v. West Virginia, 100 U.S. 303, 310 (1879) (concluding statute denied blacks' right to equal protection because racially discriminatory).

14. *Id.* at 304.

15. *Id.* at 308.

16. *See id.* at 309-10 (deeming statute unconstitutionally discriminatory against "colored man").

Strauder, an African-American, because the jury that would judge him would very likely include men who would be hostile to his race.[17] The Court extolled jury trials, in William Blackstone's words, as "trial by the peers of every Englishman, and . . . the grand bulwark of his liberties . . . secured to him by the Great Charter."[18] The Court also took note of widespread prejudice against emancipated blacks and concluded that stacking the jury with whites invariably would be detrimental to the proper enjoyment of the right to trial by jury.[19]

The Court did not mention the Sixth Amendment, for at that time in history the Bill of Rights was not yet perceived to be applicable to the states. This development came much later when, in the twentieth century, the Court began reading the Due Process Clause of the Fourteenth Amendment more expansively.[20] The important point about this first decision in the area is that there was no tension between the values of equal protection and the Court's commitment to insuring the black defendant a fair trial. Simply put, discrimination in the jury selection made the trial unfair.

In this century, the Court progressively invalidated other laws that restricted jury service.[21] Today, virtually any discrimination against adult citizens in the composition of the pool or the venire, the list from which attorneys choose jurors, would be invalid.[22] None of these changes in any way compromises the defendant's rights, and indeed the changes only improve the chances of a fair trial for members of minority groups.

The defendant's rights come into play at the moment that jury selection begins for a particular trial. At that point, the prosecution and defense counsel, together with the trial judge, interview prospective jurors and challenge those they regard as biased or potentially biased.[23] The judge

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17. *See id.* at 308-09 (noting prejudice, which could influence jurors, existed in community).

18. Strauder v. West Virginia, 100 U.S. 303, 308-09 (1879); 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 342-43 (1769).

19. *See Strauder*, 100 U.S. at 308-09 (noting blacks denied equal protection when tried by all white, prejudicial jury).

20. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 149-50 (1968) (holding Sixth Amendment right to jury trial applicable to states through Fourteenth Amendment); Washington v. Texas, 388 U.S. 14, 17-19 (1967) (concluding Sixth Amendment right to compulsory process incorporated in Fourteenth Amendment); Klopfer v. North Carolina, 386 U.S. 213, 222-23 (1967) (holding Sixth Amendment right to speedy trial applicable to states).

21. *See, e.g.*, Alexander v. Louisiana, 405 U.S. 625, 630-31 (1972) (declaring unconstitutional jury selection process that recorded race on forms used by jury commissioners); Turner v. Fouche, 396 U.S. 346, 359 (1970) (holding grand jury selection process by which commissioners could disqualify persons for lack of "intelligence" or "uprightness" unconstitutional); Norris v. Alabama, 294 U.S. 587, 599 (1935) (holding jury selection process unconstitutional that recorded race and allowed continuous and total exclusion of blacks from juries).

22. *See generally* JON M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 51-76 (1977) (surveying Supreme Court decisions regarding discrimination in procedures of jury selection).

23. *See* MASS. R. CRIM. P. 20(b)(1) (setting forth rules for examining potential jurors).

decides whether there is "cause" to dismiss the potential juror from service in that case.[24] After using these challenges for cause, both sides to the trial may invoke "peremptory challenges" to remove jurors whom they suspect of bias but as to whom they cannot convince the judge that their intuitions are correct.[25] The use of peremptory challenges in particular trials has now become the battleground for the tension between equality and liberty.[26]

The problem arises because both sides can use their peremptory challenges in a discriminatory manner. They can remove all blacks, all whites, all men, all Jews, all people who go to church, all people who read the *National Enquirer*, or any other group they think would be inclined to vote against their preferred outcome of the case. Of course, if prosecutors used peremptory challenges consistently against a particular group, then that practice would be tantamount to a law that precluded that group from jury service.[27] As we have seen, laws of that sort are patently unconstitutional.[28] It is not surprising then, that in 1965, the Court concluded that the systematic use in all cases of peremptory challenges against African-Americans was tantamount to a law disqualifying them from jury service, and the practice of systematic discrimination was, therefore, flatly unconstitutional.[29] Note, however, that the discrimination condemned in this 1965 case applies across the board, regardless of tactical advantages in particular cases of having people on the jury who would be likely to be sympathetic or unsympathetic to the defense.

As of the early 1980s, the law made sense. There could be no wholesale discrimination, either by statute or in practice, in the selection of the venire or pool from which the attorneys chose the jury; the attorneys could not categorically disqualify a group of citizens from jury service on the grounds of ethnicity, gender, race, religion or any other demographic marker.[30] Yet the retail, individualized selection of juries in particular

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24. *Id.* 20(b)(3).

25. *See id.* 20(c) (outlining peremptory challenge procedure).

26. *See, e.g.*, J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1421-22 (1994) (determining whether prosecution may use peremptory strikes to exclude jurors because of gender); Georgia v. McCollum, 112 S. Ct. 2348, 2351 (1992) (deciding whether criminal defendant prohibited from racially discriminatory use of peremptory challenges); Batson v. Kentucky, 476 U.S. 79, 96-98 (1986) (addressing evidentiary standard for criminal defendant who claims use of racially discriminatory peremptory challenges).

27. *See* Swain v. Alabama, 380 U.S. 202, 223-24 (1965) (indicating unconstitutionality of prosecutor's systematic use of peremptory challenges to exclude blacks from juries).

28. *See* VAN DYKE, *supra* note 22, at 51-76 (outlining unconstitutional discriminatory practices in jury selection).

29. *See Swain*, 380 U.S. at 223-24 (recognizing consistent removal of African-Americans from all juries denies them right to participate on juries).

30. *See* VAN DYKE, *supra* note 22, at 51-76 (discussing cases invalidating unconstitutional jury selection procedures).

cases remained in the hands of the prosecutor and defense counsel, and they could make whatever tactical judgments they desired about selecting jurors in particular cases. If they used their peremptory challenges against people who, according to their psychological profiles of jury behavior, would be likely to vote against them, that was a decision relegated to their professional judgment. In 1986, however, the Court confronted a case that seemed like an easy extension of existing law, and thereby unwittingly fell into a morass of problems that can hardly yield satisfying solutions.[31]

In *Batson v. Kentucky*,[32] the Court began applying the principle of nondiscrimination in jury selection to particular cases and thus ushered in a new and uncertain jurisprudence.[33] The prosecutor in *Batson* had dismissed four African-Americans without any apparent rationale except the likelihood that because of their race they would sympathize with the African-American defendant.[34] The Court held that when a pattern of discrimination emerges, "the burden shifts to the State to come forward with a neutral explanation for challenging black jurors."[35] The Court reaffirmed the long standing principle that "a defendant has no right to a 'petit jury composed in whole or in part of persons of his own race.'"[36] Yet in the *Batson* case, the Court undertook to supervise the tendency of lawyers—for now, just the prosecution—to engage in unfair or invidious discrimination in selecting the jury for particular cases.[37]

The problem with addressing discrimination in the selection of particular juries is that the activity is, by its nature, discriminatory. Lawyers want some people on the jury and not others. It is perfectly sensible to conclude, as did the Court in *Batson*, that when the prosecution discriminates against people who look like the defendant, the defendant is less likely to get a fair trial. This conduct is not discrimination against the jurors who do not get to serve, but against the defendant's interest in maintaining his liberty. Rulings in this vein favor equality and liberty at the same time.

The *Batson* Court could have invoked at least two rationales for its decision. It could have focused on the accused's right to a fair trial and an impartial jury under the Sixth Amendment as applied to the states through the Due Process Clause of the Fourteenth Amendment.[38] Alternatively,

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31. *See* Batson v. Kentucky, 476 U.S. 79, 99 (1986) (mandating courts to become sensitive to use of peremptory challenges in racially discriminatory manner).

32. 476 U.S. 79 (1986).

33. *See id.* at 96-98 (announcing that use of peremptory challenges at defendant's trial establishes prima facie case of discrimination).

34. *Id.* at 83. Because of the prosecutor's use of peremptory challenges, the jury consisted of only white persons. *Id.*

35. *Id.* at 97.

36. *Id.* at 85 (quoting Strauder v. West Virginia, 100 U.S. 303, 305 (1879)).

37. *See* Batson v. Kentucky, 476 U.S. 79, 99 (1986) (requiring supervision of prosecution's use of racially discriminatory peremptory challenges).

38. *See supra* note 20 and accompanying text (discussing application of Sixth Amendment funda-

the Court could have invoked the Equal Protection Clause of the Fourteenth Amendment and placed the case in the line of development that began with the *Strauder* case.[39]

Batson himself had argued the case in the lower courts on the ground of fair trial under the Sixth Amendment.[40] Batson asserted that it was unfair to try the case without members of his own race having a fair opportunity at sitting on the jury.[41] But why is this unfair? Are we to presume that whites, Asians, and Hispanics, properly chosen for the jury, cannot judge him impartially? If that is the case, an African-American defendant should have the right to a jury composed entirely of African-Americans. If that is true, however, all defendants should be tried by a jury consisting of solely their race. It should follow that when the State tried Officer Laurence Powell and his three fellow officers for beating up Rodney King, they had a right to an all white jury. As is well known, that is essentially what happened in Simi Valley, and the inner-city community reacted in outrage.

If the requirement of a fair trial is too elusive to provide a grounding for the decision, then the better argument should be the anti-discrimination principle. To the chagrin of Chief Justice Burger and Justice Rehnquist, the *Batson* Court in fact turned away from Batson's Sixth Amendment argument, and rested the decision squarely on the anti-discrimination principle of the Equal Protection Clause.[42]

The paradox of relying on the anti-discrimination principle in this context is that we are not entirely sure whom the judicial system is discriminating against. Is it the African-American defendant or the African-American jurors who are prevented from serving on the jury by the discriminatory use of peremptory challenges? The majority opinion by Justice Powell seeks to slide off the prongs of this dilemma with the following artful sentences: "The harm from discriminatory jury selection extends beyond that inflicted on the defendant *and the excluded juror to touch the entire community*. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice."[43]

This passage follows a discussion of the evils of discrimination in se-

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mental rights to states).

39. *Strauder*, 100 U.S. at 310 (concluding statute prohibiting blacks from jury service violative of Equal Protection Clause).

40. *Batson*, 476 U.S. at 83.

41. *Id.*

42. *See* Batson v. Kentucky, 476 U.S. 79, 112-16 (1986) (Burger, C.J., dissenting) (noting Batson specifically disclaimed reliance on Equal Protection Clause); *id.* at 137 (Rehnquist, J., dissenting) (disputing majority's use of Equal Protection Clause to limit scope of peremptory challenges).

43. *Id.* at 87 (emphasis added).

lecting the venire, the panel from which the attorneys eventually choose the twelve persons on the jury.[44] The cornerstone of the *Batson* decision seems to be that the principles applicable to the selection of the venire are applicable to the selection of the individual jurors who should serve.[45] The principles that had become true for the wholesale selection of the venire were now also true for the retail selection of the twelve jury members. Or were they? Could the Court actually make good on its promise to eliminate discrimination in jury service?

Batson left a nagging problem in its wake. If the prosecution could not discriminate on the basis of race, did that mean the defense could not do so either? Chief Justice Burger and Justice Rehnquist, the two dissenters in *Batson*, anticipated the temptation to apply the principle of non-discrimination to the defense and found in this danger an argument against entering the field altogether.[46]

The problem of discrimination by the defense did not reach the Supreme Court until the winter of 1992.[47] In *Georgia v. McCollum*,[48] a case structurally similar to the Rodney King trial then gearing up in Los Angeles, involving a white defendant charged with assaulting African-American victims, the prosecution sought a pre-trial order preventing the defense from using peremptory challenges on the basis of race.[49] In Dougherty County, Georgia, forty-three percent of the population was African-American.[50] A non-discriminatory selection of the jury would have practically assured the participation of some African-American jurors.[51] Of course, the defense would have preferred an all-white jury that might sympathize with a white man engaged in a racially motivated assault.[52] After the trial judge denied the State's motion to prohibit the defense from using peremptory challenges in a racially discriminatory manner, the defense would have been able to secure a jury without a singe African-American.[53] This seemed unfair, but it was difficult for the Court to find

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44. *See id.* at 86-87 (discussing effects of purposeful racial discrimination in venire selection).

45. *See id.* at 88-89 (recognizing principles of Equal Protection Clause equally applicable to selection of jury members).

46. *Id.* at 125-26 (Burger, C.J., dissenting) (noting majority's hybrid approach applicable to defense and limitation on usefulness of peremptory challenges).

47. *See* Georgia v. McCollum, 112 S. Ct. 2348, 2354-57 (1992) (discussing constitutionality of criminal defendant purposefully exercising peremptory challenges on racial basis).

48. 112 S. Ct. 2348 (1992).

49. *Id.* at 2351; *see* GEORGE P. FLETCHER, WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS 37-68 (1995) (providing detailed study of Rodney King case).

50. *McCollum*, 112 S. Ct. at 2351.

51. *Id.* Georgia statutory law requires a panel of 42 persons in felony cases. *Id.* at 2351 n.1. Accordingly, a statistically representative panel would have consisted of 18 potential African-American jurors. *Id.* at 2351.

52. *See id.* (noting defense counsel's indication of intent to use challenges on racial basis).

53. *See* Georgia v. McCollum, 112 S. Ct. 2348, 2351-52 (1992) (noting judge's denial of State's

a principle for fairly restricting the options of the defense to select the most sympathetic jury it could find.[54]

Again the problem arises. Discrimination by the defense may seem unfair, but unfair to whom? To the prosecution? American lawyers are reluctant to recognize that the prosecution has rights under the Constitution. There is no liberty interest that is compromised when the prosecution loses the right to discriminate. Is it unfair to victims like Rodney King and those who identify with him? It is indeed, but American courts do not take the rights of victims seriously.[55] The new view that began to crystallize in the Supreme Court was that the discriminatory harm accrued to the jurors who could not serve.[56] The Court reconceptualized jury service from a duty of citizenship to a right of participation.[57]

Denial of the right to participate on a jury on the ground of race began to appear comparable to the denial of the right to vote.[58] In an important transition case, the Court commented, "[i]ndeed, with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process."[59] The upshot of this reorientation was that in the summer of 1992, the Court held by five votes to four that the defense could not inflict harm on potential African-American jurors by excluding them solely on the grounds of their race.[60] Notably, Justice Clarence Thomas wrote a separate opinion arguing that in the long run the decision will be deleterious to the liberty interests of African-American defendants.[61] The decision implied that black defendants could no longer use peremptory challenges against whites in order to secure a jury likely, on grounds of racial and cultural loyalty, to be sympathetic to them.[62] Although, in Justice Thomas' view, the liberty of black defendants was at stake, the majority held that the principle of equality took precedence.

The new philosophy of jury selection became disturbingly transparent in

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motion enabled defense to remove all African-Americans from jury pool).

54. *See id.* at 2357-59 (discussing defendant's constitutional rights regarding peremptory challenges).

55. *See generally* FLETCHER, *supra* note 49, at 9-148 (elaborating on issue of courts' disregard for victims' rights).

56. *See* Powers v. Ohio, 499 U.S. 400, 406-10 (1991) (discussing effects of discriminatory exclusion on individual jurors).

57. *See id.* at 406-07 (describing racial exclusion of qualified persons as foreclosing significant opportunity to participate in democracy).

58. *See id.* at 407 (analyzing jury service with right to vote).

59. *Id.*

60. *See* Georgia v. McCollum, 112 S. Ct. 2348, 2359 (1992) (holding criminal defendants may not purposefully racially discriminate by exercising peremptory challenges).

61. *See id.* at 2360 (Thomas, J., concurring in judgment) (noting decision protects jurors but creates risks for defendants).

62. *Id.* (Thomas, J., concurring in judgment).

April 1994, when the Court ruled that neither the prosecution nor the defense could exclude men or women from a jury solely on the basis of gender (or sex, as the *New York Times* insists on saying).[63] In a suit to establish the defendant's paternity and his obligation to pay child support, the State used nine of its ten peremptory challenges to remove male jurors.[64] The prosecution assumed that women would be more likely than men to impose liability for child support.[65] The defense engaged in the reverse tactic and struck the female candidates.[66] Because there were more women in the pool, however, the jury ultimately consisted of only females, who eventually found the defendant liable.[67] On appeal to the Supreme Court of the United States, six Justices agreed with the defendant's contention that allowing an all-female jury to judge him violated his constitutional right to the equal protection of the laws.[68]

The defendant won his appeal, but the opinion contains only a passing reference to the harm that discrimination caused the male defendant.[69] The Justices devoted all of their rhetorical energy to a recitation of past discriminatory practices toward women.[70] It is true that women gained the right to vote and to participate in juries later than African-American men did. It took the Nineteenth Amendment in 1920 to universalize the suffrage, and as of 1947, sixteen states still denied women the right to jury service.[71] This discrimination, the Court reasoned, was based on stereotypical presumptions about the competence and biases of women.[72] These assumptions about men and women and their propensities "reflect and reinforce patterns of historical discrimination."[73] When lawyers rely on their intuition about men and women, they reinforce the historical pattern of discrimination against women.[74]

It is understandable, then, that the Court said almost nothing about whether it was fair to the defendant in this particular case to be tried by

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63. *See* J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1430 (1994) (holding gender discrimination in jury selection unconstitutional under Equal Protection Clause).

64. *Id.* at 1421-22.

65. *Id.* at 1426.

66. *Id.* at 1422.

67. *Id.*

68. J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1430 (1994).

69. *See id.* at 1426 (quoting Respondent's Brief at 10, *J.E.B.* (No. 92-1239)) (noting claim that women jurors may be less sympathetic to defendants in paternity cases).

70. *See id.* at 1422-24 (discussing historical discrimination against women serving on juries).

71. *See* U.S. CONST. amend. XIX, § 1 (prohibiting denial of right to vote on basis of gender); *J.E.B.*, 114 S. Ct. at 1423 n.3 (discussing slow progression of women's suffrage).

72. *See J.E.B.*, 114 S. Ct. at 1422-25 (analyzing historical reasons for discriminating against women on juries).

73. J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1428 (1994).

74. *See id.* (noting summarily excluding jurors on basis of gender encourages historical discrimination).

an all female jury. Any implication that a jury composed of primarily or exclusively women would show partiality to a female complainant would reinforce the stereotype that women and men think differently about certain issues. To avoid this tempting (and in my view reasonable) conclusion, the Court had to assume that the State violated the constitutional rights of the men whom the prosecution excluded from serving on the jury. It is unclear why this defendant, having received a fair and impartial trial, should secure a reversal of the judgment against him just because the prosecution violated the rights of some other unnamed men.

Curiously, in this line of cases, the most conservative Justices, Scalia, Rehnquist, Thomas, and O'Connor, take on the role of the defendant's champion. Those accused of committing a crime should be able to maximize the possibility of a favorable verdict by striking whomever they wish. In this situation, these Justices favor liberty over equality. Yet the same Justices often vote to curtail the rights of the accused.[75] In the hierarchy of values in the 1990s, liberals and conservatives gravitate toward unfamiliar positions. For liberals, the imperative to extend equal protection to disadvantaged groups trumps the rights of criminal defendants. It is more important to root out stereotypes about women and ethnic groups than it is to protect the traditional options of the accused. For conservatives, the historically rooted conception of a fair trial does not surrender to the new egalitarian politics that seeks to ban "stereotypical presumptions that reflect and reinforce patterns of historical discrimination."[76]

The Supreme Court has spoken. It is not, however, clear that lawyers are willing to listen. Virtually all the speculation about choosing jurors for the O.J. Simpson trial focused on race and gender. The *New York Times Magazine* quoted Robert Shapiro, Simpson's lead defense counsel, as saying that he wanted an "[a]ll women, mixed race" jury.[77] Maybe Shapiro thinks that women will lean toward leniency, as they did in the hung jury for Erik Menendez.[78] Or perhaps he has the same intuition as Linda Fairstein, head of the sex crimes division in the Manhattan District Attorney's office, who has stated that "when the defendant is attractive, articulate and a celebrity, women more than men tend, unfortunately, to base their verdict on external appearances."[79] Because Simpson is an at-

75. *See, e.g.*, Nichols v. United States, 114 S. Ct. 1921, 1928 (1994) (holding due process permits consideration of previous misdemeanor conviction when sentencing for felony); Schad v. Arizona, 501 U.S. 624, 647-48 (1991) (upholding accused's conviction when jury instructions did not require agreement on alternative theories); McNeil v. Wisconsin, 501 U.S. 171, 181-82 (1991) (holding accused's invocation of Sixth Amendment right to counsel in judicial proceeding not *Miranda* invocation).

76. *J.E.B.*, 114 S. Ct. at 1428.

77. Bella Stumbo, *Bobby and O.J. and Howard and Michael and Johnnie and Liz*, N.Y. TIMES, Sept. 11, 1994, § 6 (Magazine), at 76.

78. *See* Maura Dolan, *Jury Is Out on the Role of Gender*, L.A. TIMES, Feb. 14, 1994, at A1 (noting women jurors urged for sentencing for lesser crime).

79. David Margolick, *Ideal Juror for O.J. Simpson: Football Fan Who Can Listen*, N.Y. TIMES,

tractive defendant, the rest apparently follows.

Linda Fairstein and Robert Shapiro are speculating out of bounds. They should not be thinking about whether women are lenient or whether they are attracted to good-looking defendants. All of this smacks, in the Supreme Court's reasoning, "of the arguments advanced to justify the total exclusion of women from juries."[80] The only way to root out discrimination, apparently, is to change the way lawyers think.

Lawyers, however, have not gotten the message. They are still politically incorrect. Shapiro is most incorrect of all; he even complimented prosecutor Marcia Clark for having "great legs."[81] He and his fellow lawyers still pick juries the way they used to, by relying on gut intuitions and by hiring consulting firms who do nothing but trade in stereotypes. The consultants' multi-factorial analysis is more sophisticated than generalizations based solely on gender, but the difference is a matter of degree. There is no way to predict jury behavior, but you can locate people in categories and make statistical predictions based on common experience with people of those categories. In other words, lawyers predict by generating nuanced stereotypes that are only marginally better than those condemned by the Court.

What has gone wrong here? Why do lawyers refuse to listen to the politically correct wisdom coming from the Supreme Court? For one thing, they have a job to do. Neither the prosecution nor the defense has time to worry whether its tactics, in the Court's words, "ratify and reinforce prejudicial views of the relative abilities of men and women."[82] Of course, if Shapiro had used his peremptory challenges against men in order to secure an all-female jury, he would have had to devise a gender-neutral pretext to support his challenge. Though his thinking is not politically correct, his mode of action, at least in court, must conform to the Supreme Court's dictates.

The mistake here is not of the lawyers' making. Advocates use their wits in their clients' interests. The problem lies with the Court. The Justices have gotten carried away with their own passion to reform society. It might be nice for everyone to stop making generalizations about the sympathies of blacks, whites, Jews, gentiles, men, and women. Trials, however, are about convicting the guilty and preserving the freedom of the innocent. They are not about the pursuit of egalitarian ideals.

In 1986, when the Court first embarked on this campaign to reform jury selection, it made a wrong turn. It should have stuck with Batson's own

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Sept. 23, 1994, at A1.

80. J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1426 (1994).

81. Stumbo, *supra* note 77, at 76.

82. *J.E.B.*, 114 S. Ct. at 1427.

argument that the State denied him a fair trial. The trial was unfair because as an African-American man, he was entitled to a jury that gave his own people, African-Americans, a fair crack at sitting in judgment of his actions. Then we ask the converse question: Did Rodney King have a right to a fair crack at having African-Americans sit in judgment of his complaint against the Los Angeles Police Department? The answer is yes.

Of course, the Supreme Court has said over and over again that no defendant has a "right to a 'petit jury composed in whole or in part of persons of his own race.'"[83] As defendants have no right to racial representation, victims like Rodney King have no right to members of their race on the jury. Accordingly, when ruling to prohibit the defense's discriminatory use of peremptory challenges, the Justices rested their case on the problem of discrimination against the excluded jurors.[84] This is criminal justice, 1990s style. "Anti-discrimination" sells better than "victims' rights."

The proper rationale for promoting minority group representation in jury deliberations is insuring a fair trial to the defendant as well as to the prosecution and to the victim. My argument for fairness is not based on a prediction about particular groups and how they will vote in the jury room. The point of seeking a representative jury is rather to guard against prejudiced comments in the deliberations. Anna Deavere Smith reports a post-verdict interview with Maria, the black postal worker who sat on the federal Rodney King trial.[85] Maria disclosed that when the jurors came down for breakfast in the hotel where they were sequestered, some of them said, in effect, "it's a shame to spend so much money on the likes of that man."[86] Maria properly sensed that this not-so-veiled derision toward Rodney King could make a difference in the deliberations, and she protested by putting an end to it. She objected as a black woman and halted the slide toward what she perceived as race- and class-based slurs.

The proper way to structure juries in our time is not even to seek to eliminate stereotypes. We should recognize that men and women are often different. Blacks, whites, and Asian-Americans are often different. Jews and Christians are often different. The European-born and American-born are often different.

This claim would not be a surprise to many people in the academy. Difference-feminists, building on Carol Gilligan's work, argue that one

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83. *Id.* at 1421 (quoting Strauder v. West Virginia, 100 U.S. 303, 305 (1879)).

84. *See id.* at 1430 (announcing that denial of equal opportunity to serve on juries violative of Equal Protection Clause).

85. ANNA D. SMITH, TWILIGHT: LOS ANGELES, 1992 (1994). The interview with "Maria" (last name not given) is not included in the published version of the play. The quotations are based on my recollections of the performance at the Cort Theatre in New York, April-May, 1994.

86. *Id.*

should expect men and women to think differently about a wide range of issues.[87] They would not at all be surprised by the breakdown of the hung jury in the Menendez trial. Six women accepted Menendez' tale of abuse and voted for manslaughter.[88] Six men held out for the more severe verdict of murder.[89] Critical race theorists stress our divergent experiences in American culture as a basis for assuming different sympathies and loyalties in different racial and ethnic groups.[90] In the academy, at least, stereotypes are in. The Supreme Court may be trying to be politically correct in its call to eliminate all stereotypes from jury selection. Their version of political correctness is, however, a partial view. There are many sensible moderns who disagree.

The Supreme Court speaks and nobody listens. The folly of the Justices reminds one of the effort by the Warren Court to regulate police conduct with the exclusionary rule. In *Mapp v. Ohio*,[91] the Court, together with legions of supporters in academia, thought they could discipline and shape the conduct of the police by excluding unconstitutionally seized evidence.[92] The Court spoke, but the police did not listen. If we ever had doubts on the score, all we need to do is reflect on the behavior of the Los Angeles police in the Simpson case. They were outside the wall of Simpson's estate in the early morning of June 13, 1994.[93] They had just investigated the double murder of Simpson's ex-wife Nicole and her friend Ronald Goldman a half mile away.[94] They had reason to think that Simpson might have done it. They could have used their car radios to secure a warrant in a matter of minutes. With a warrant based on their apparent probable cause they could have searched the premises of the estate in full compliance with the constitutional requirements.

They chose instead to scale the wall and investigate on their own. Never mind the Fourth Amendment. They would worry about legal niceties

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87. *See generally* CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982) (discussing differences between women and men in thought, speech, lives, conceptions, experiences, identity, and morality).

88. Dolan, *supra* note 78, at A1.

89. Dolan, *supra* note 78, at A1.

90. *See, e.g.*, Richard Delgado, *When a Story Is Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95, 97-98 (1990) (criticizing view that critical race theorists homogenize nonwhites); Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 809-10 (1993) (noting critical race theorists embrace idea that different backgrounds lead to disparate beliefs and attitudes); Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 760-62 (1994) (discussing critical race theorists' recognition of social movement members' differences).

91. 367 U.S. 643 (1961).

92. *See id.* at 660 (holding police may not suspend Due Process Clause when seizing evidence).

93. Jim Newton & Andrea Ford, *Simpson Evidence Can Be Used, Judge Rules*, L.A. TIMES, July 8, 1994, at A1.

94. *Id.*

after the fact. They ran the risk of blowing the case that was already brewing as one of the biggest of the decade. They found the incriminating bloody glove and other evidence, but then came the problem of getting it all admitted into evidence.[95] The police had to devise an argument to circumvent the case law. They claimed that they were not interested in searching the grounds of the estate, but merely in securing the safety of other people who might have been in danger.[96] Of course, the camouflage worked.[97] In a case of this magnitude, the court was not prepared to let the defendant go because the police had blundered.

With their argument that gave lip service to the Supreme Court's rulings, the prosecution, arguing on behalf of the police, behaved exactly as lawyers do when they seek non-racial and non-gender based reasons for exercising their peremptory challenges. *Plus ça change, plus c'est la même chose.* [The more things change, the more they are the same.] The Supreme Court speaks and lawyers listen, but only to devise arguments to circumvent the Court's efforts to reform society.

In its rulings on jury selection, the Supreme Court has entered upon terrain mined with pitfalls. It sounds good to rule against racial and sexual discrimination, but the Court should first have surveyed the dangers that lie ahead. No one knows whether the new jurisprudence of equality will extend to other demographic markers that dominate jury selection. In May 1994, the Court refused to hear an appeal from a Minnesota decision permitting prosecutorial discrimination on the basis of religion.[98] The prosecutor had struck a man from the jury who professed to be a Jehovah's Witness.[99] The prosecutor explained her decision as flowing from her experience that members of this sect are "reluctant to exercise authority over their fellow human beings."[100] Her thinking obviously leveled all members of the group to the same stereotype, yet for the Supreme Court of Minnesota, this was all right.[101] The Supreme Court of the United States shied away from the case presumably because they could hardly agree about which stereotypes are so offensive as to be unconstitutional and which are not.[102]

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95. *Id.*

96. *Id.*

97. *See id.* (discussing court's decision to permit introduction of evidence found on Simpson's estate).

98. *See* Davis v. Minnesota, 114 S. Ct. 2120 (1994), *denying cert. to* State v. Davis, 504 N.W.2d 767 (Minn. 1993).

99. *Davis*, 504 N.W.2d at 768.

100. *Id.*

101. *See id.* at 771-72 & n.5 (holding striking Jehovah's Witness not improper because religious bigotry not historical basis of jury discrimination).

102. *See Davis*, 114 S. Ct. at 2120 (Ginsburg, J., concurring) (disagreeing with dissent's characterization of religious affiliations); *id.* at 2121-22 (Thomas, J., dissenting) (arguing protection should

Yet this is the kind of discrimination that, if applied to the selection of the jury venire, would encounter swift judicial nullification.[103] A law that prohibited homosexuals, Asians, Jews, or the handicapped from being in the pool or the venire would not stand a chance in the Supreme Court. Yet between the pool to the inner twelve, there is many a slip. The right to the former becomes a chance at the latter. As we move from candidacy to election, the law of discrimination becomes distorted. Neither side may openly discriminate on the basis of race or gender. If this is all a fractured Court can do, then we will be treated to debates in the lower courts about whether, for these purposes, Hispanics are a race or an ethnic group and whether Jews are a race, a religion, or something else (shades of Third Reich!). Debates about the boundaries of "race" as a category hardly befit a modern legal system.

This is just the first step into the thicket. How do we apply the Supreme Court's teaching to homosexuals? In the trial of Dan White, the 1978 assassin of Harvey Milk and George Moscone, could defense counsel exclude all homosexuals from the jury? At the time, Doug Schmidt, the lawyer for Dan White, managed to do just that.[104] Are stereotypical assumptions about homosexuals any less objectionable than those about women? If we must live with the current state of the law, we will witness the decline of a great legal system into the arbitrary allocation of protection from cultural stereotypes.

We are in this unhappy state because we are unsure of what we are trying to accomplish by eliminating discrimination in jury selection. The Court cannot correct the way the masses of people think about homosexuals, Jews, the old, the young, men, or women. We cannot achieve impartial juries by pretending there are no cultural differences that can imperceptibly spin a juror's judgment in a particular direction. It is far better to balance the spin so that the forces offset each other. Both sides are entitled to a fair trial and to a fair crack at having jurors among the twelve who will lean in their direction, who will seek, as did Maria in the federal Rodney King case, to insulate the jury against biased deliberations. The Court should stop trying to reform the way people think. Instead, the Justices should open their eyes and perceive the richness of America as it really is.

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extend to religious classifications).

103. *See* VAN DYKE, *supra* note 22, at 45-83 (surveying decisions invalidating discrimination in jury selection).

104. *See* FLETCHER, *supra* note 49, at 16 (noting White's attorney removed all suspected homosexuals from jury).