



CONTENTS

ON THE EDITORIAL PAGE

READER RESPONSES

TASTE

BOOKSTORE

CONTENTS

ON THE EDITORIAL PAGE

- ◆ Today's Featured Article
- ◆ Also on WSJ.com
- ◆ International Opinion

BEST OF THE WEB TODAY

E-MAIL SUBSCRIPTIONS

- ◆ Political Diary
- ◆ Free Updates

JOHN FUND ON THE TRAIL

PEGGY NOONAN

ELECTORAL COLLEGE
CALCULATOR

PRESIDENTIAL LEADERSHIP

AMERICAN CONSERVATISM

POETRY FOR THE WAR

A MARINE'S JOURNAL

READER RESPONSES

OUR FAVORITE SITES

SPECIAL FEATURES

ARCHIVES

TASTE

LEISURE & ARTS

COLUMNISTS

- ◆ Pete du Pont
- ◆ Daniel Henninger
- ◆ Brendan Minitier
- ◆ Claudia Rosett

Latest Featured Article**PAST FEATURED ARTICLE****AT LAW****'Jews, Hindus Not Wanted'**

Religious discrimination in a London terror trial.

BY HARVEY A. SILVERGLATE*Monday, February 17, 2003 12:01 a.m. EST*

While Americans are vying for gold in the replacement of individual rights with group rights, our friends across the pond sometimes do us one better. The automatic exclusion of members of two of the world's major faiths from performing jury duty in a case of terrorist threats in London does seem to be one step--but only one--ahead of our own institutions.

When it came time, late last month, for the English courts to try radical Muslim cleric Abdullah el-Faisal on charges of inciting race hatred and the murder of "nonbelievers," particularly Jews and Hindus, the presiding judge took special precautions to assure the Jamaican-born preacher a fair trial: He excluded from the jury all Jews, Hindus and their spouses. This extraordinary step by an experienced judge in a cosmopolitan Western country may simply be an instance of the court's not wanting someone likely to identify with the intended victims to be on the jury. (If such were the case, the judge could have questioned potential jurors individually for actual bias.) On the other hand, it could be another step in the trend, emphatic already in the American legal system, of equating a citizen's race or ethnicity with his probable point of view or, more radically still, his ability to judge his fellow citizen fairly on the evidence.



October 18, 2004
10:48am

RESPOND TO THIS ARTICLE

READ RESPONSES

E-MAIL THIS TO A FRIEND

PRINT FRIENDLY FORMAT

FEATURE ARCHIVE

VIEWPOINT**The Federalist Patriot Free by E-mail**

Sponsor of kerry-04.org, the Internet's most comprehensive source on the Kerry legacy

Townhall.com's Free Opinion Alert

THE op-ed page for conservatives

Keep Our Markets Free

Investing commentary from a conservative perspective.

Help Headhunters Find Out About You

Search a directory from Kennedy Information

Advertisement

ABOUT US

- ◆ Our Philosophy
- ◆ Who We Are
- ◆ Terms & Conditions
- ◆ Privacy Policy
- ◆ Contact Us
- ◆ How to Subscribe
- ◆ How to Advertise
- ◆ Op-Ed Guidelines

 Search

GO

OpinionJournal**WSJ Online**

Wall Street Journal
Online Subscribers
GO DIRECTLY TO

WSJ.com Network[Wall Street Journal](#)[CareerJournal](#)[CollegeJournal](#)[RealEstateJournal](#)[StartupJournal](#)[WSJbooks](#)[CareerJournalAsia](#)[CareerJournalEurope](#)

There are two methods by which American courts exclude from juries people thought unlikely to be objective and fair. In some cases a prospective juror makes it clear, either on a juror qualification questionnaire or upon questioning by the judge or the lawyers, that he is unable or unwilling to approach the case with an open mind. Such people are excluded "for cause," that is, for palpable bias. Others might not display their biases directly enough to qualify for "cause" exclusion, but lawyers for either side may exercise a certain number of "peremptory challenges" by tossing a person off a jury panel without having to give a reason--merely on the basis of some hunch or insight.

In recent years, the Supreme Court has ruled it a violation of the "equal protection of the laws" for lawyers on either side to exercise a peremptory challenge solely on the basis of the potential juror's race. These decisions seek to straddle a difficult line between protecting both litigants and potential jurors from intentional racial discrimination in a society which seeks to be "colorblind" and micromanaging the composition of juries on the basis of an assumption that people of a particular race think in a particular way and therefore should be represented on a jury about to try "one of their own kind."

Another straddle that carries its own ambiguity between preventing racial discrimination in jury composition and doing "bean counting" to "balance" juries and achieve "diversity" is the effort to balance the composition of those summonsed to perform jury duty (the so-called *venire*) by insisting that the composition of the venire roughly match the ethnic composition of the community. This undertaking is said to reflect the Constitution's assurances that a defendant will be judged by "a jury of his peers," but courts are understandably hesitant to take the full plunge into an assumption that one's "peer" is defined primarily as a member of one's race.

The effort to avoid racial and ethnic discrimination in the composition of juries is complicated because it runs directly into the same controversy that has placed affirmative action at the top of judicial, political, and media agendas: Whether the use of race-based selection procedures runs afoul of the goal of "equal protection of the laws" and in fact institutionalizes the very practice that the Constitution seeks to prevent, namely discrimination on the basis of race and ethnic origin, or whether giving members of minority racial groups an edge simply corrects for historic racism and "levels the playing field."

Intentional racial discrimination in the composition of jury venires has long ago been ruled unconstitutional. More recently, the Supreme Court has outlawed peremptory challenges solely on the basis of a juror's race, even though courts recognize the practical difficulties in trying to determine whether a juror challenge that may be based upon a lawyer's instincts can, realistically, be examined for a racial motive. The court has tread the awkward line between avoiding discrimination on the one hand, and making the assumption that racially balanced juries are socially desirable--perhaps even constitutionally required because people of a particular race think in a particular way. What, precisely, do we mean by "a jury of one's peers" anyway? In our era, obsessed with notions of racial parity, the boundary between the prevention of discrimination and its institutionalization is dangerously porous.

Shortly after the London judge's exclusion of Jews and Hindus, the Supreme Judicial Court of Massachusetts



handed down a decision in a case where a Hispanic murder defendant argued that the dearth of members of his ethnic group on his jury venire demonstrated ethnic discrimination. While the court ruled that there was not enough evidence to upset Hector Arriaga's conviction, it did take the step of ordering the jury commissioner to keep better statistics in the future so as to give lawyers information by which to argue that discrimination should be presumed by the disparity between the venire's composition and the percentage of each "distinctive" racial or ethnic group in the population.

And how is this to be accomplished? By compelling those called for jury duty to disclose their racial or ethnic identity in their initial questionnaires, until now a purely voluntary exercise. The purpose, said the court, is to enable defendants to assure themselves that they are getting a jury "that is as near an approximation of the ideal cross-section of the community as the process of random draw permits." And, too, "a defendant is entitled to a jury selection process free from discrimination against groups in the community." Here, then, one sees both strands of thought--the defendant and the community are entitled to be free of racial and ethnic discrimination in jury selection, but a defendant is also entitled to a sporting chance to have some people of his ethnic group on his jury because exclusion "deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented."

The tension between eliminating racial discrimination in American life and maximizing the presence of members of one's own race on one's jury--because of the presumption that race equates with point-of-view--is growing. Some argue that it is racism to select jurors, university students, or factory workers by giving preferences based upon race. Others claim that failing to indulge in racial preferences for historically underrepresented groups is itself a form of institutional racism because it deprives juries, colleges, and the workplace of a diversity of skin hues and of the views and experiences supposedly unique to such groups.

The Supreme Court will presumably get involved in this increasingly pervasive social, political and legal controversy when it decides the constitutionality of the University of Michigan's affirmative action program. However that case turns out, one hopes that the court will demonstrate sufficient wisdom to save us from a system where citizens will be chosen for, or excluded from, positions on juries, in colleges, and in the workplace, on the basis of race and ethnicity rather than individual merit and character, and where group-identity bean-counting becomes confused with efforts to eliminate racial and ethnic discrimination. The case in London is a cautionary tale of what our future might hold.

Mr. Silverglate, a lawyer in Boston and co-director of the Foundation for Individual Rights in Education, is co-author of "The Shadow University" (HarperPerennial, 1999).

[RESPOND TO THIS ARTICLE](#)

[READ RESPONSES](#)

[E-MAIL THIS TO A FRIEND](#)

[PRINT FRIENDLY FORMAT](#)

[HOME](#)

[TOP OF PAGE](#)

[ARCHIVE](#)

[SUBSCRIBE TO THE WALL STREET JOURNAL ONLINE](#) OR [TAKE A TOUR](#)

