Treating People As Equals: Ethical Objections to Racial Profiling and the Composition of Juries

Annabelle Lever

Institute of Science, Ethics and Technology
University of Manchester School of Law and
The Chaire Hoover,
The Catholic University of Louvain, Belgium.

annabelle@alever.net

July 2010

Forthcoming in
The Journal of Ethics: An International Philosophical Review, Jan. 2011

Acknowledgements: This article was originally prepared for a conference on racial profiling which took place in Copenhagen, in May 2010. I would like to thank Jesper Ryberg for organising the conference, and helping to prepare my article for publication, and J. Angelo Corlett for the opportunity to publish it in this journal. Rita Handrich, of *The Jury Expert*, first persuaded me to examine the implications of racial profiling for the composition of juries, and organised helpful responses to my piece. This paper was written while I was a Fellow at the Chaire Hoover, at the Catholic University of Louvain and a Fellow of the Institute of Science, Ethics and Innovation, at the University of Manchester, UK. I am enormously grateful for their financial support and intellectual encouragement.

Do ethical objections to racial profiling have anything to tell us about jury trials? I first started to consider this question a year or so ago, when *The Jury Expert* – a journal published by the American Society of Trial Consultants – asked me to write a brief piece on the subject. As a Briton, living in America, I had always been mystified and disturbed by the peculiar ways Americans went about picking their juries, and the often shamelessly manipulative forms of argument used by Prosecution and Defence to address them. Rather late in the day, it dawned on me that, even if independently arrived at, my ethical objections to racial profiling and concerns with American jury trials shared common assumptions about equality, freedom and justice that were worth articulating and examining. So, the article I wrote tried to show that the reasons why racial profiling is generally unjustified are reasons both to want racially mixed juries in all trials – even when defendant and victim are of the same race – and to be wary of the American practice of 'preemptive strikes' in the construction of juries.[1]

This article is an attempt to expand and clarify those arguments in light of a recent, rather disturbing, comparison of all-white and ethnically mixed juries in the United Kingdom. [2] While Cheryl Thomas, its author, concludes that all-white juries are fair, her data actually shows that all-white juries are much less likely to convict white defendants if the victims are white than if they are not – a bias different from the one we might have expected, but troubling nonetheless. Albeit unintentionally, then, the report provides some support for my concerns with all –white juries. So, in this paper, therefore, tries to explain why the reasons to reject racial profiling are reasons to believe that racially mixed juries promote justice. I will start by discussing the problem of how we are to treat people as equals when the world we live in is characterised by all sorts of inequalities; I will then draw out the implications of this problem for racial profiling and for the construction of juries. But first, it will be helpful to clarify some points of terminology.

Racial Profiling and Race: Some Terminological Remarks

I will follow Mathias Risse in defining racial profiling as 'any police-initiated action that relies on the race, ethnicity, or national origin and *not merely* on the behaviour of an individual', although these arguments can be generalised to the use of race-based predictions in other areas of the law, such as employment law.[3] I am principally concerned with what I will call 'preventative' or 'prospective' profiling, as opposed to 'post-crime profiling', since this is the one that captures what we typically think about when we worry about racial profiling, and is the form that is most troubling morally, politically and legally. Post-crime profiling departs from a witness's description, however

[1] A. Lever, 'Racial Profiling and Jury Trials' *The Jury Expert* 21.1 Jan. 2009, 21-29, and 34-35 (for a brief response to two commentators). Available on-line at http://www.astcweb.org/public/publication/article.cfm/1/21/1/Ethical-issues-in-racial-profiling

[2] Cheryl Thomas, 'Are Juries Fair?' published by the UK Ministry of Justice (2010), and available online at http://www.justice.gov.uk/publications/docs/are-juries-fair-research.pdf

[3] M. Risse, 'Racial Profiling: A Reply to Two Critics', in *Criminal Justice Ethics*, 26.1. (2007) 4 – 19. The emphasis in the text is mine. Risse reviews and explains the justification of this definition at pp. 4- 5 in *Criminal Justice Ethics* and at pp. 135-6 of M. Risse and R. Zeckhauser, 'Racial Profiling', *Philosophy and Public Affairs*, 32.2 (2004), 131-70.

vague, of a suspect who has committed *an actual crime*. Preventive profiling uses a profile based on statistical evidence of who is likely to commit a crime, in order to initiate police stops and searches in order *to prevent crime*. The pre-emptive features of prospective profiling raise worries captured in American constitutional concerns with 'warrantless searches'.[4]

Prospective profiling, then, would be controversial even if it had no racial features to it. However, in addition to the inevitable worries created by pre-emption, prospective racial profiling generates concerns because of its use of race. Put simply, these are that the use of racial characteristics will exacerbate racism in society, and lead to the abuse and harassment of racial minorities.[5] Thus, pre-emptive racial profiling is controversial on two grounds: first, because it is pre-emptive, and secondly, because of the use of race in pre-emptive police work.

It is important, I think, to say something about what 'race' means in this context. What we are concerned with, when we are concerned with racial profiling, is 'race' as a popular construct, rather than a philosophically coherent or justified entity.[6] In other words, we are concerned with ordinary ideas about race, and with the practices and effects of those ideas – however contradictory these may be, and however lacking in logical consistency, clarity, or 'fit' with biological facts. There is, at present, a good deal of philosophical debate about whether the concept of race is so logically incoherent, and so politically damaging, that philosophers (or other people) should simply stop using it.[7] However, we can largely ignore this debate, although it is important to remind ourselves and juries that there are no biological races and no coherent or consistent group to which racial statistics refer.[8]

---

[4] See, for example, *Terry v. Ohio* 392 U.S.1 (1968) and its progeny. In *Almeida-Sanchez v. US*, 413 U.S. 266, (1973) Part II of Justice Potter Stewart's Majority opinion generated this much-quoted position: 'the needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards'. This 'resolute loyalty' seems to have found a different expression in the run of cases since *Oliver v. US*, 466 U.S. 170 (1984).

[5] Randall Kennedy, *Race, Crime and the Law,* (Vintage Books, 1997), especially ch. 4; David A. Harris, *Profiles in Injustice: Why Racial Profiling Cannot Work* (New Press, 2003); A. Lever, 'Why Racial Profiling Is Hard to Justify: A Response to Risse and Zeckhauser', *Philosophy and Public Affairs*, 33.1. (2005), 94-110; and A. Lever, 'What's Wrong With Racial Profiling? Another Look at the Problem' in *Criminal Justice Ethics*, 26. 1. (2007), 20-28. See also Kaspar Lippert Rasmussen, 'Racial Profiling and Community' in *Journal of Applied Philosophy* 23.2 (2006), 191-205.

[6] For the argument that race, as popularly understood, has no scientific basis, see Kwame Anthony Appiah, 'How to Decide if Races Exist', *Proceedings of the Aristotelian Society*, 106 (May 2006), 363-80.

[7] For efforts to 'rethink' the concept of race, rather than to jettison it, see Sally Haslanger, 'Gender, Race: (What) Are They? (What) Do we Want Them To Be?' *NOUS*, 34.1.(2000), 31-55; 'Oppressions: Racial and Other' in *Racism, Philosophy and Mind*, eds. R. Levine and T. Pataki, (Cornell University Press, 2004), 97-123. See also Philip Kitcher, 'Does "Race" have a future?' in *Philosophy and Public Affairs* 35.4. (2007), 293-317.

[8] For example, while Risse's justification of profiling refers to 'African Americans' it is obvious that police on the motorway can scarcely be expected to distinguish people's real or acquired nationality. Most of the time, I suspect, what 'race' means in these contexts is colour, with the idea of a black/white distinction structuring the treatment of those who do not fit into this dichotomy.

Treating Unequals Equally

We live in a world marked not only by *racial difference*, but by *racial inequality*.[9] That is, our world is one in which people do not simply bear different racial characteristics, such as colour and shape, but in which people who count as 'black' typically have less wealth, income, power and status than those who count as 'white'. Both the causes and the degree of these inequalities are contested, and for any single person, race may be a poor predictor of their location on hierarchies of income, wealth, power and status. This is partly because racial differences are not the only ones which are associated with inequalities in our societies – class, sex, and sexual preference, for instance, are also relevant – and partly because luck, effort and native talent also affect where, on a given hierarchy, we find a person. In short, because liberal democracies are characterised by important personal, civil and political freedoms, birth is not destiny.

However, the fact that we cannot accurately predict the fate of an individual does not mean that our societies lack either racial hierarchies, or racial differences – anymore than our failure to guess how high someone can jump means that gravity has no bearing on the result. This is scarcely surprising since there are middle-aged people in the United States who grew up with legal segregation, including laws that made it a crime for white people to have sex with non-whites, that prescribed what areas and what schools people attended, and that ensured that white and black people were unable equally to share public facilities such as transport, restaurants, hotels and swimming pools. [10] Hence, the problem facing all societies committed to democratic forms of equality: how to recognize and respond to claims to equality of people who are situated very differently on hierarchies of power, wealth and status?

Formal Equality Requires Us To Recognise Substantive Inequalities

We cannot treat people as equals if we ignore the different patterns of opportunity, resources, constraints and obstacles which they face in determining how to pursue their objectives, and what objectives it makes sense for them to pursue. That is why a

[9] Not all differences are inequalities, although how a society, or its members, treats individual and group differences can, itself, generate inequalities. My view on the importance of distinguishing differences from inequalities is influenced by Catherine MacKinnon, *Feminism Unmodified*: *Discourses on Life and Law*, (Harvard University Press, 1987), especially chs. 1,2 and 5. and by Martha Minow, *Making All the Difference: Inclusion, Exclusion and American Law* (Cornell University Press, 1990), especially Part 1. However, I differ from MacKinnon in thinking that the concept of subordination does not capture all the forms of inequality with which we might be concerned. For example, we might be concerned about *marginalisation*, whether inequality manifests itself less in relationships of *subordination* and domination than in persistent neglect, invisibility, and relegation to the edges of society, literally as well as metaphorically.

[10] The failure to acknowledge this, and its likely consequences for racial equality, is one of the difficulties of Michael Levin's perspective on racial profiling. See Michael Levin, 'Comments on Risse and Lever', in *Criminal Justice Ethics* 26.1 (2007) 29-35. Levin is an example of someone who denies that racial inequality characterises American society and who seems to believe that there is a significant biological component to racial disparities in crime, notwithstanding the fact that 'There cannot be a crime gene…since crime is a legally defined category of behavior'.

commitment to formal equality before the law requires us to attend to the substantive inequalities which people bring into court with them, just as it requires us to attend to those which shape the dynamics of the classroom or the job market. Criminal courts are principally concerned with whether a given defendant has broken a given law. Facts about the justice or injustice of our world do not alter the factual question that a criminal trial must answer. Nonetheless, they may affect our method for determining guilt or innocence, and the moral, political or legal consequences we attribute to this determination.

For example, given what we know about domestic violence (an unjust fact about our world), it may make sense to revise legal standards of 'reasonableness', in order to accommodate what is likely to seem reasonable to a victim of domestic violence, who may have suffered years of attacks which started with a seemingly petty comment, but ended with her hospitalized for a smashed face, severe burns, or with broken ribs, arms or legs.[11] Given that experience, what to an outsider might seem like a disproportionately violent response to a raised voice or a raised arm, might well seem like a reasonable response to the likely onset of another prolonged assault. Justice would therefore require some understanding of what the world looks like to a victim of domestic violence in order to understand whether or not their behaviour, if they kill their attacker, fits the legal criteria of murder, or of manslaughter.

Similarly, courts may find that certain facts about injustice mitigate or aggravate a potential crime – picking on the blind, for instance, is generally more reprehensible and despicable than picking on the strong and sighted. The reason is that the injustice is greater: factors that ought to deter us from harming, that ought in fact, to incline us to offer defence and aid, are being deliberately used to harm. So, given the vulnerability of the blind to injustice and other harms, it is particularly reprehensible to steal from them, although stealing from the sighted is also wrong and deserving of condemnation.

The inequalities and injustices which mark our societies, then, mean that we cannot treat people fairly by assuming that race is irrelevant to the way we determine and assess crimes, even though the ways in which it is relevant may be complicated and contested. Racial inequality does not turn what was a crime (theft, say) into a non-criminal act – in that sense, knowledge of racial inequalities or even racial differences, is irrelevant to the judgement of a court. In another way, however, justice does require us to identify and to take account of racial inequalities, as well as of racial differences. It requires us to take account of them in so far as (a) they may constitute aggravating or mitigating factors in determining the degree of guilt a convicted defendant bears; (b) they suggest alternative accounts of what happened; and (c) they suggest the need for *different methodologies* for assessing what happened (as with standards of reasonableness).

The questions we therefore need to address are, what do these relatively familiar points imply about racial profiling and the constitution of juries themselves?

---

[11] See, for example, Deborah Rhode, *Justice and Gender*, (Harvard University Press, 1989), ch. 10, esp. pp. 237-244

Racial Profiling, Background Injustice and Equality Before the Law

Societies have a duty to provide for the security of their members – to ensure that they can live their lives free from the often paralyzing fear of violence to themselves and their loved ones, and free from the need constantly to ensure that their homes, tools and possessions are safe from theft, vandalism, and misappropriation. But if societies are to provide security for their members in ways which do not treat some people's lives as less valuable than others', it is necessary (though not sufficient) that we take historical patterns of injustice and inequality into account when trying to provide security for all.

I believe that this means that racial profiling is generally unjustified. There is nothing inherently wrong, with recognizing and arguing about the racial aspects of crime, although French opponents of racial and ethnic statistics are correct that political fashions and interests inevitably affect how people are grouped into different categories for the purposes of gathering such statistics, or how they describe and group themselves.[12] The problem with racial profiling, then, is less that it may lead us to mis-describe or mis-characterize the groups to which individuals belong, or to fail to treat people as individuals, rather than as members of some social group.[13] Rather, the main normative reasons to reject it, are that profiling is likely to exacerbate racial injustices and inequalities that we have a duty to mitigate and remove.

Racial profiling encourages us to consider black people as *perpetrators* of crime, rather than as its *victims* and fixes our attention on inter-racial crime, although most crime is intra-racial. While it is often justified by the facts about racial differences in the incidence of different crimes, the practice of profiling (as well as arguments in its favour) lead us overlook the fact that, for all racial groups, crime is committed by a small minority of members,[14] and is mainly committed by the young, rather than the middle-

[12] For examples of the French debate on 'ethnic statistics' see *French Politics, Culture and Society* 26.1. (Spring 2008), which is a special issue devoted to the subject and organised by Daniel Sabbagh and Shanny Peer. Daniel Sabbagh's *Equality and Transparency: A Strategic Perspective on Affirmative Action in American Law* (Palgrave Macmillan, 2007) may also be of interest.

[13] This is my worry with Risse's claim at p. 14 of his *Criminal Justice Ethics* piece, that white people would not object to racial profiling, because there is nothing unpleasant about being seen as a member of group, in this case, rather than being seen simply as a (white) individual. But that, I think, mistakes the nature of black people's objections to racial profiling. What generally bothers them is not being seen as a member of the group 'black people', rather than being seen as a (black) individual, but being seen as a member of a group 'likely criminals', because they are black. See my article in *CJE* p. 24. My concerns here parallel familiar objections to liberal understandings of sexual discrimination, which see the harm of discrimination as a failure to recognise the individuality of a particular woman, rather than as a failure adequately to recognise the claims of a particular group (and, therefore, of its individual members). See, for example, Catherine MacKinnon's *Feminism Unmodified*, op. cit. ch. 2

[14] Holbert and Rose show that only 2% of black people are arrested for committing any crime in a given year, although in 2000 black people made up 12% of the population and 56% of those arrested for murder; 42% of those arrested for rape; 61% of those arrested for robbery and so on. See Steve Holbert and Lisa Rose, *The Color of Guilt and Innocence: Racial Profiling and Police Practices in America* (Page Marque Press, California, 2004), p. 126 Likewise between 1995-2000 3431 violent offences were reported in 180 Chicago neighbourhoods, but personal violence was relatively rare. See, Sampson, Morenoff and Raudenbush, 'Social Anatomy of Racial and Ethnic Disparities in Violence', *American Journal of Public Health*, 95.2. (Feb. 2005), 227-28

aged or elderly.[15] That is why race is a poor proxy for criminality, and why, even when supplemented by other characteristics, it is poor at predicting the likelihood that a given individual will be engaged in crime.

For example, racial profiling is no solution to the problems of crime that black people face, in so far as its perpetrators are mainly black and are likely to come from areas in which black people form either a majority or a large minority of the population. Just as we are unlikely to help students who are seeking a particular professor by saying, 'he's a middle aged white man', since most professors in Europe and America fit this description, so we are unlikely to help police deal with theft or assault in Brixton via racial profiling. For similar reasons, racial profiling is unlikely to improve police abilities to deter or to apprehend the main perpetrators of crimes against white people – as these are generally other white people, living and working in areas where white people are numerous.

Racial profiling is therefore likely to be a useful crime-fighting tool in only a rather select and narrow groups of cases – cases where, in general, there is some reason, or pattern of reasons, why one racial group, rather than another, is particularly associated with an illegal activity – smuggling, say, or knife crime – and where, for whatever reasons, it is difficult to distinguish the people engaged in crime from the non-criminal members of that racial group, thereby giving race some probative value in preventative policing.

But, even in those cases where racial profiling might be a useful crime-fighting tool, it is unlikely to be our *only* crime fighting tool, let alone our *best one.* That is why racial profiling is generally unjustified: because such benefits as it has are likely to be achievable by other means which are less costly to the freedom, equality and dignity of vulnerable social groups, such as random or universal searches, efforts to increase trust and a willingness to confide in the police, or social policies aimed at addressing what is known about the social causes of crime. The costs of racial profiling are severe, and include the risk of death and serious injury at the hands of the police, increased tension and distrust between young black men and older white officers, and the risk of exacerbating segregated patterns of housing and employment. [16] Hence, while there may be times when racial profiling is justified as a crime-prevention tool, these are likely to be exceptional, and to have little to do with the forms of crime and violence which regularly affect most members of society, whatever their colour, sex, class, religion, nationality or principal language.

---

[15] Sampson et al. p. 229: for all racial and ethnic groups, 'the probability of violence accelerates in early adolescence…reaching a peak between the ages of seventeen and eighteen and then declining precipitously thereafter'. This precise timing may not apply to other areas, but the general tendency does.

[16] Other costs include the likelihood of placing a disproportionate and heavy share of the burdens of security on a vulnerable social group – generally, young black men – although the bulk of the benefits of security so achieved are likely to lie elsewhere (eg. in leafy white suburbs, where middle class people can consume illegal drugs in comparative safety. In the case of the profiling of Muslims at airports, the benefits will largely accrue to white middle-class businessmen and rich 'frequent flyers'). For a fuller discussion of the costs of racial profiling, and the way that 'background injustice' affects the weight we should attach to these costs, see my article in *PAPA*, pp. 103-110 and in *CJE,* pp. 25-26.

The Intersection of Race, Sex and Class in Debates on Crime and Profiling

Before turning to the implications of substantive inequality for the ways we constitute juries, it is worth briefly noting the sexual dimension and implications of racial profiling as a crime-fighting tool, because they raise issues about the intersection of racial, sexual and class inequalities which will be relevant later.

Issues of sex and sexual equality tend not to figure overtly in most discussions of racial profiling, or of race and crime more generally. Yet, while women do not figure overtly in most discussions of the topic, a sexual subtext often underlies them, reflecting the idea that black men pose a particular threat of sexual violence to white women, which white men do not pose to black women. Crimes against black women, in other words, tend not to be of interest to proponents of racial profiling, and crimes against white women are of interest only in so far as their perpetrators are black men. For that reason, it is likely that racial profiling perpetuates unfounded and racist stereotypes about the nature, causes and solutions to sexual violence – even though arguments for and against racial profiling will often contain no discussion at all of crimes against women, or of the likely impact of racial profiling on women. [17]

But – at least in the United States – there is a form of crime which is predominantly, if wrongly, associated with black women, and that is ‘welfare crime’ or the wrongful claiming of welfare benefits to which one is not entitled. If, in Britain, posters representing that crime tend to portray fat working class white women, who are working ‘on the side’ while claiming to be unemployed, in the United States ‘welfare queens’ are, notoriously, black not white. In principle, this picture of poor black women as criminals might have nothing to do with the association of young black men with violent crime. However, in practice this is unlikely, as the same underlying picture of the causes and incidence of crime in the United States is conjured up by the ways that crime is sexualized and racialised.[18]

It is a picture in which young black men are the main perpetrators of violent crime, and appropriately, the main occupants of America’s jails, leaving black women to raise children by themselves, relying overwhelmingly on a variety of different welfare programmes in order to do so. If, in Britain, posters warning against welfare fraud play into an idea of the welfare state as funded by upstanding middle class families for working class families who are assumed to be its main beneficiaries – in America the assumption that the main beneficiaries of the welfare state are black, not white, reflects both the way that poverty itself has become racialised in the United States, and the ways

---

[17] Margaret Burnham, ‘An Impossible Marriage: Slave Law and Family Law’, 5 *University of Minnesota Journal of Law and Inequality* 187 (1987). Patricia J. Williams, *The Alchemy of Race and Rights: Diary of a Law Professor* (Harvard University Press, 1992) and Angela P. Harris, ‘"Race and Essentialism in Feminist Legal Theory", 42 *Stanford Law Review* 581 (1990).

[18] My argument here is influenced by Dorothy Roberts’ study of the intersection of race, class, and sex in efforts to sterilise young women on welfare in southern States of America in the 1990s, and the disproportionate rhetoric and treatment accorded to pregnant women who were addicted to drugs, as opposed to those who were addicted to alcohol. See, Dorothy Roberts, *Killing the Black Body: Race Reproduction and the Meaning of Liberty* (Pantheon, 1997).

that the perception and response to poverty have been shaped by a racialised discourse on violent crime.

An adequate understanding of the ways that racial stereotypes and expectations affect our perceptions and responses to crime, then, needs also to attend to the way that our ideas about racial characteristics and differences are, themselves, shaped by stereotypes about class, sex and gender. This is what legal theorists such as Kimberle Crenshaw refer to as the 'intersectionality of race and sex', and what feminist theorists such as Elizabeth Spelman are concerned with when they dissect 'essentialised' pictures of what it is to be a woman.[19]

Put simply, it seems that our ideas of what it is to be black rather than white depend on what assumptions we make about the class and sex of the person that we are imagining. Hence, it is black *men* not black *women* that racist stereotypes portray as especially violent, although black women were often portrayed as more masculine than white women, and therefore stronger, and better able to cope with arduous work and living conditions than their white counterparts.[20] On the other hand, the assumptions about the differences between white women as compared to white men – their relative delicacy, sensitivity, emotionality, irrationality – are also affected by the assumptions about the class (and, sometimes the religion) of the particular men and women we may have in mind.

In short, even when issues of sexual inequality and injustice have no overt role to play in debates over race and crime, they may structure debate in ways that bear careful investigation, and may in turn shape assumptions about the relative criminality of different women, or the relative efficacy and desirability of different social policies. This is because debates about racial profiling as a crime-prevention tool play out against a background of injustice and inequality in which race and sex are inextricably linked, and because the ways we think and talk about crime inevitably have resonances from an explicitly racist and sexist past, which we may only partially recognize, and only partially control. None of this means that racial profiling is never justified but, I have argued, it means that there will generally be other, better ways, of preventing and detecting crime, even if these have their own costs in terms of time and money or, indeed, in terms of lives, liberties and property.

[19] For influential examples from a large literature see Kimberle Crenshaw, 'A Black Feminist Critique of Antidiscrimination Law' in *Philosophical Problems in the Law*, ed. D. M. Adams, (4th Edition, Wadsworth, 2005), 339-343; and And Elizabeth V. Spelman, *Inessential Woman: Problems of Exclusion in Feminist Thought*, (Beacon Press, 1988), especially pp. 80-132.

[20]See Sojourner Truth's famous cry, 'Ain't I A Woman?' which can be found in *Great Speeches by African Americans*, ed. James Daley (Dover Publications, 2006); Kathleen Hall Jamieson, *Beyond the Double Bind: Women and Leadership* (Oxford University Press, 1995), especially ch. 6 and Barbara Smith, *The Truth that Never Hurts: Writings on Race, Gender and Freedom* (Rutgers University Press, 1998).

Substantive Inequalities, Formal Equality and the Constitution of Juries

Background injustice, I believe, explains why racially mixed juries generally promote justice, given the need to secure equality before the law in circumstances in which power, wealth and status – as well as knowledge of the law – are generally racialised. These reasons reflect epistemological arguments for revising electoral practices in the USA and UK so that the formal equality created by universal suffrage and equally weighted votes does not consistently result in legislatures dominated by relatively elderly, wealthy and middle class white males.[21]

The epistemological claim for revised representation is that we will learn and deliberate better if our legislatures and juries fairly represent the cleavages in our society than if they do not. Arguments for descriptive representation, or what Anne Phillips describes as a 'politics of presence', differ over the remedies for political inequality they favour, and the degree to which they ground their arguments in claims about the value of equality of opportunity, as opposed to the quality of democratic deliberation. Nonetheless, they maintain that the legacy of past inequalities means that there are grounds both of equality and of epistemology for increasing the legislative representation o f such groups.[22] This is because the fundamental social and political cleavages, characteristic of modern democracies, have epistemological, as well as moral and political consequences. As Young says, 'special representation of otherwise excluded social perspectives reveals the partiality and the specificity of the perspectives already politically present'; or as Williams puts it: 'since members of privileged groups lack the experience of marginalization, they often lack an understanding of what marginalized groups' interests *are* in particular policy areas'.[23]

The implication of these arguments is that we cannot expect our legislators to be representative, or our judges adequately to interpret and apply the law, if they are selected from a privileged elite, however competent and well-meaning, and however ideal the procedures by which they were selected.[24] What we need to consider is what these arguments imply about the construction or selection of juries.

Jury Rights and Duties

No one is entitled to be a member of a jury, and it is by no means clear that juries are necessary to fair trials. In at least some cases, in fact, justice may better be served through jury-less trials, than through trial by jury. However, if there is no right to be part of a jury, in judicial systems that use juries to determine the guilt or innocence of

---

[21] Anne Phillips, *The Politics of Presence*, (Oxford University Press, 1995); Melissa S. Williams, *Voice, Trust and Memory: Marginalised Groups and the Failure of Liberal Representation*, (Princeton University Press, 1998); Iris Marion Young, *Inclusion and Democracy*, (Oxford University Press, 2002).
[22] Phillips 1995, 62-64
[23] Young 2000, 144; Williams 1998, 193, emphasis in the text.
[24] I present and support this claim about judges in 'Democracy and Judicial Review: Are They Really Incompatible?' *Perspectives on Politics* 7.4. (Dec. 2009) 805-22.

defendants, people have a right not to be unfairly excluded from jury service. This is distinct from the right that defendants have to a fair trial which, obviously, can be seriously undermined when existing practices and laws mean that juries are made up, almost exclusively, of some favoured social group.

Jury duty can be burdensome, in terms of the time it takes, uncompensated financial costs and the real emotional and intellectual turmoil – as well as the boring waits between cases - which it may involve. That is why many people seek to wriggle out of jury duty, or perform it only reluctantly. When people object that they have been deprived of an opportunity for jury service, then, they are not pretending that jury service cannot be onerous or inconvenient, but that it is stigmatizing to be deprived of an opportunity to serve the community, and that such a deprivation compromises their status and rights as equal citizens.[25] Hence, concerns for *equal citizenship*, and not just *fairness to defendants*, mean that whatever procedures are used to constitute juries cannot deliberately seek to exclude women or racial minorities from juries, or deliberately use procedures which are likely to achieve such exclusion in practice.

But seemingly fair procedures for jury selection may, and often will, result in juries which contain no members of racial minorities, because of the way that the boundaries for jury registration interact with the housing patterns of different social groups. Assuming, for the moment, that the rights of jurors have not been violated because of this unintended and, possibly, unwanted result of the interaction between housing patterns and jury selection practices, the epistemological arguments for revised legislative procedures suggest that fairness to defendants can be compromised by the absence of racial minorities from juries- perhaps even in cases where the defendant and alleged victim(s) are of the same race.

One reason why all-white juries and all-white legislatures are problematic, and why 'token' minority members will not solve the problem, is that they *preclude adequate deliberation* before legally binding decisions are made. The difficulty, if we want our decisions to be reasoned, and to reflect the knowledge of our peers, is that all-white juries are likely to reflect only some of the knowledge of our fellow citizens. So, even if an all-white jury were free of prejudicial beliefs about members of racial minorities, it would still be basing its decisions on a very particular, and inevitably partial, perspective on what the world is like and, therefore, of what, in a given situation, it is reasonable to *expect* other people to do, and what it is possible, albeit less likely, that people *might do*.

Obviously, the particularity and partial knowledge of an all-white jury need not mean that its members are partial, in the sense of biased for or against a particular defendant; nor

---

[25] See Rawls's eloquent discussion of 'the realization of self which comes from a skillful and devoted exercise of social duties' in his discussion of Fair Equality of Opportunity and the human good in *A Theory of Justice*, (Harvard University Press, 1971), Part 1, section 14, p. 84. The following Supreme Court cases also help to illustrate the point. *Batson v. Kentucky*, 476 U. S. 79, (1986), concerning the exclusion of blacks from jury duty; and *J. E. B. v. Alabama ex rel*. T.B., 511 U. S. 127 (1994), concerning the exclusion of women.

need it mean that their own particular interests are bound up in the decision that they are called on to make. Their race, in other words, may give them no more reason to favour or disfavour a given defendant than would their age, sex, level of education. So, while it is sometimes reasonable to want racially mixed juries because we fear that an all-white jury will be prejudiced against a black defendant, we can be worried about all-white juries without casting aspersions on either the willingness of jurors to be fair, or the sincerity of their efforts to understand and evaluate the evidence before them.

Indeed, epistemological arguments for revised legislative representation suggest that *despite* the sincerity of jurors' efforts, the limited knowledge and experience of an all-white jury may adversely affect their ability fairly to evaluate competing claims about matters of fact, given the inevitable interpretive, social-theoretical and counterfactual disagreements which evaluation can involve. Just as juries with no experience of domestic violence may fail to understand what the world looks like to a victim of domestic violence, although such understanding is necessary to evaluate what counts as reasonable behaviour on *her* part, so all-white juries may fail to understand what the world looks like to a young black man dealing with an older white police man, although doing so may be necessary to evaluate what counts as reasonable behaviour on *his* part.[26]

Indeed, I would be inclined to suppose that all-white juries are undesirable for epistemological reasons even in cases that only concerned white people, and where we would not expect racial prejudice to be a factor. We do not well understand the ways in which race intersects with social cleavages based on class, sex, or religion and, consequently, have a poor sense of how racial distinctions shape white people's expectations of other white people - of the way they should behave, the motives they should have, the sorts of homes, jobs, sexual partners and tastes they should have and so on. Put crudely, the legacy of white superiority may mean that some people appear more 'white' than others, even when they fall on the 'white' side of our colour hierarchies.[27] So, white people can disadvantage other white people because of the assumptions about white people that they unconsciously hold; just as black people may disadvantage other black people because they are thought not to be black in the right way, or to the right degree, and so on.

A racially mixed jury is more likely to pick up these problems than one that is composed of white members only, in part because black people may be more attuned to the ways that white people make racial judgements because of their race, and because the presence and comments of white jurors may sensitise black jurors to the ways in which black people may favour or disfavour other black people because of their skin colour, wealth, education and other attributes.

---

[26] David Harris has the striking example of the attitude of a high-ranking police officer who is black to the prospect of his children being stopped by a white police officer – and the surprise this caused his white colleagues. See David A. Harris, *Profiles in Injustice: Why Racial Profiling Cannot Work* (New York: New Press, 2003.

[27] See, for example, Noel Ignatiev, *How The Irish Became White*, (Routledge, 1995)

Hence, even when we are not concerned with racial prejudice, there are good reasons to want a racially mixed jury. The reasons are that this fosters reasoned assessment of the evidence; enables people to reflect on their own assumptions, knowledge and experience; and exemplifies the qualities of free, fair and equal deliberation which give juries their democratic appeal. Epistemological arguments for racially mixed juries do not imply that injustice to defendants *inevitably* follows from juries that are made up of only one racial group, anymore than they imply that legislatures which are disproportionately composed of wealthy, middle-aged white men do not pass important measures which promote sexual and racial justice. The point, rather, is that they *increase the chance* of unfairness in legislative and judicial outcomes because they increase the chance that deliberation will fail to uncover or to reveal matters of fact and of value which were relevant to the outcome.

In general, there are many different paths by which a given group of people could have reached the decision they actually reached – whether we are talking about a group of jurors, of legislators, of employers or of union officials. So it is difficult conclusively to demonstrate that changing the composition of a decision-making group would materially have altered the outcome they actually reached, or the process by which they did so. Nonetheless, the epistemological implications of major social cleavages suggest that racially mixed juries are preferable to single-race juries if you care about justice, and that what is at issue, therefore, is not simply the *appearance* of justice – as some have suggested – but the chances of *achieving* it.[28]

I have argued that historical inequalities are reflected in contemporary social cleavages with epistemological consequences for the construction of juries, as well as of legislatures. Those consequences, I have argued, mean that racially mixed juries are preferable, from the perspective of justice, to single race juries, even in cases where there are no racial differences between defendants and their alleged victims. However, because jury systems are generally created with an in-built bias in favour of defendants – as it takes a unanimous verdict of guilty to convict, but not to acquit – it is possible that the difference between racially mixed and single-race juries does not significantly increase the likelihood that defendants will be *wrongly convicted*. It may, however, increase the likelihood that defendants will be *wrongly acquitted*, and may increase the likelihood of arbitrariness in the acquittal or conviction of defendants, even if it does not increase the rate of unfair convictions overall.

Evidence From England

Recent results from England appear to suggest that such theoretical possibilities may be disturbing actualities – although the quality of existing research, unfortunately, precludes

[28] Cheryl Thomas clearly believes that her study shows that all-white juries are fair, and that the issues they raise, therefore, are questions about the *appearance of fairness.* (pp. iii and 24-5) But the trouble is that she gives no convincing test for what would count as 'fairness' by a jury – and there is no reason to suppose that 'not treating racial minorities worse than other people' is a *sufficient* test of fairness, though it surely is a n*ecessary* one. But that is the only test she appears to use. (ii).

certainty about what is going on. [29] In 'Our Juries Fair?' a report for the UK's Ministry of Justice, Cheryl Thomas argues that all-white juries are fair, because they acquit ethnic minority defendants at roughly the same rate as mixed juries, and appear to be equally solicitous of minority victims of crime.[30] However, her study also shows that all-white juries are significantly less likely to convict a black defendant than a white one, even when the only factual difference in the cases is the race of the defendant, and that all-white juries are more likely to convict defendants, whatever their race, than juries which are racially mixed. Hence, Thomas seems to have uncovered some disturbing ways in which the experience of race shapes jury trials in the UK, although Thomas seems not to have recognized the significance of her findings.

Thomas assumes that as long as all-white juries do not discriminate against minority defendants or victims we can call them fair. But, while her study suggests that all-white juries are as concerned for minority defendants and victims of crime as mixed race ones, her study is very far from showing us that all-white juries are fair. For example, Thomas shows that *all* jurors are more likely to convict a white defendant of assault than a Black or Asian one.

This differential willingness to convict emerges from experiments in which the only difference in facts facing the jury is the race/ethnicity of the defendant/and or victim. In Winchester, an area that is almost completely white,[31]the all-white jurors found 43% of the white defendants in the experiment guilty, as opposed to 35% of the Asian defendants and only 25% of the Black defendants. In Nottingham, an area with a substantial minority enclave in a predominantly white town, the comparable figures were 39% , 34% and 21%; and for Blackfriars in London, the most racially mixed of the three areas, and the only one which had mixed race, as well as all-white juries, the figures were 14%, 10% and 7%.[32]

So, your likelihood of being convicted for assault, Thomas' study suggests, can vary from 43% to 7% depending on the area of the country you are in, and on the racial composition

---

[29] UK law forbids the social scientific investigation of jury deliberation – or the effort to find out how a given jury reached its decision and why. The study of jury deliberation therefore has to work with simulations. Unfortunately, the current, fascinating study by Cheryl Thomas, 'Are Juries Fair?', published by the UK Ministry of Justice in 2010 shows no interest in comparing all white juries to all black ones, or considering the different dynamics and outcomes that might result from 'racially mixed' juries with only one or two black members, and ones on which black members are more numerous or, even, form a small majority of the jury. Thus, what counts as a 'racially mixed' jury in her study is unclear and the possibility that we are talking about juries with only one or two minority members means that we must be cautious about the conclusions we draw about racially mixed, as opposed to all-white juries. Thomas' study can be found at http://www.justice.gov.uk/publications/docs/are-juries-fair-research.pdf My comments below are an expanded version of a short piece, 'Justice, Race and Fairness', available online at http://www.legalnewscentral.co.uk/2010/03/03/the-complexity-of-race-and-juries-annabelle-lever/. The piece was originally published on *The Guardian*'s 'comment is free' website on march 3, 2010, as a response to Marcel Berlins' uncritical celebration of the supposed fairness of UK juries in his *Guardian* column of Monday, 22 Feb., 2010

[30] Cheryl Thomas, pp. ii, 16-19

[31] P. 16 Thomas notes that Winchester has only 3% minority population, as compared to 33% for Blackfriars, which is one of the most diverse areas in the country.

[32] See Thomas' figures 3.2 and 3.3 on pp. 17 – 18.

of the jury, because white jurors convict at different rates depending on the race or ethnicity of the defendant and victim *and* on the race/ethnicity of their fellow jurors.[33] The fact that these disparities appear to *favour* rather than *disadvantage* racial minorities hardly shows that all-white juries are fair nor, as Thomas appears to believe, that race has not adversely influenced the outcome of jury trials. On the contrary, Thomas shows that there are very large and unexplained disparities in conviction rates for seemingly similar crimes in the UK, which appear to reflect the dynamics, beliefs and intuitions of jurors depending on their ethnic and racial characteristics, and those of the defendants and victims whose fate they must consider.

I do not want to put too much weight on the actual figures in Thomas' study, innovative and suggestive though it is, because her methodology leaves something to be desired, and because the way she reports her findings is not always clear.[34] Still, it does look as though racially mixed juries convict at lower rates than all-white juries, and that they may lead to less drastic and, frankly, implausible disparities in conviction rates than all-white juries confronted with cases reflecting a significantly diverse local population.

This does not mean that racially mixed juries are a sufficient solution to problems of unexplained and, seemingly, irrational differences in conviction rates. In fact, while there was only a 7% point difference in the rate of guilty verdicts for white, as opposed to black, defendants by white jurors at Blackfriars - as compared to an 18% difference at Winchester and Nottingham -this much lower overall conviction rate still meant that white defendants were twice as likely to be convicted as black ones.[35] So, it might be necessary for judges to provide some sort of guidance even to mixed juries, reminding them that their expectations about racial or ethnic patterns of aggression may be influencing their interpretation of the case before them, and that they should therefore seek to make those expectations explicit and to justify them.

This is not because our interpretations of disputed facts can always be 'expectation-free' – very often, when facts are disputed, we have to use our prior knowledge and experience to judge what seems most likely to be true, or plausible. The point, however, is that our expectations need to be articulated and justified, in so far as they have a bearing on the

---

[33] Thomas, pp. 16 . She also shows (p.19) that male jurors almost never change their mind and are, therefore, slightly more likely to convict than are female jurors. More details about variations by race, within this over-all trend which is, apparently, cross-racial, would be interesting to investigate.

[34] Thomas notes at p.9, that the ways jury catchment areas are drawn in the UK mean that Nottingham, despite having enclaves where minorities make up 28% of the population, has a jury catchment pool that is 94% white – as compared to Winchester, whose catchment pool is 97% white, but where racial and ethnic minorities are, indeed, a tiny proportion of the population. She appears to see nothing wrong with this (p.2) – or no reason to reconsider the way jury pools are drawn. But, given the way jury-catchment areas interact with population dispersion, it is likely that even in Blackfriars, jurors will mainly be all-white and there is no chance of an all-black or minority jury, and probably little chance of one in which white people are a small minority. Nonetheless, it seems to me highly desirable to do experiments to try to establish how the racial dynamics might affect a group's conclusions and reasoning about a case even if, of necessity, these experiments could not be done with the participation of *actual* juries.

[35] The figures for Blackfriars are 7% and 14% - hence white defendants were twice as likely to be convicted as black ones. The comparable figures for Winchester are 25% and 43%, which is roughly 5/8s; and for Nottingham they are 21% and 39%, which is roughly 3/5s.

verdict we reach, in order to prevent the wrongful acquittal of the guilty, as well as the wrongful conviction of the innocent. At all events, while racially mixed juries seem desirable, they may be insufficient to ensure that race-based differences between people do not adversely affect the outcomes of trials, and so may need to be supplemented in various ways.

Conclusion

There are many ways in which courts can respond to background injustice, in the case of race, as in other cases. Sometimes we want to block the operation of prejudice directly, whether by providing instructions to the jury which would help them to avoid prejudiced decisions, or by constituting a jury that is unlikely to be affected by prejudices that would compromise the fairness of a trial. In others, we seek to acknowledge that formal equality before the law is insufficient to ensure equal justice, given background inequality. However, in these cases, we are not seeking simply to block prejudice, but to open dialogue about what it would mean to treat people as equals; about what justice requires.

It is one thing, therefore, to try to draw jury-catchment areas in order to maximize the chance that a given jury will be racially mixed, and another to try to establish what different jury members are likely to believe *in order to constitute a jury of a particular type*, particularly susceptible to certain types of rhetorical strategies and arguments, and particularly likely to return one verdict rather than another in cases involving race and crime.[36] This latter strategy is characteristic of the use of preemptive strikes in America, reflecting a practice in which jurors are asked to fill out fairly detailed questionnaires about their views, reading habits, leisure activities and employment, so that attorneys are then capable of making statistically-based estimates of how a given juror will vote in the case before them.[37]

It is difficult to justify this practice while sustaining legal or moral objections to the use of race as a proxy for criminality in police efforts at crime-prevention. Even if race were a good proxy for criminality – which it is not - racial profiling is morally objectionable because it is likely to exacerbate racial injustices which are grave and which we already find hard to remove. Similarly, the problem with racially selective strikes is that it seeks

[36] It is important to stress that I do not think mixed juries are always necessary for justice, though sometimes that will be the case. Rather, I have argued that they promote justice, even when they are not necessary for it, by minimising the likelihood that injustice will occur due to avoidable forms of ignorance, misunderstanding or misplaced assumptions and expectations, rather than prejudice or ill-will. The point is important because there is no reason to think that jury catchment areas can be drawn so that juries will always be racially mixed. If mixed juries were really a requirement of justice in *all* trials, we would have to rethink radically the ways we go about constituting juries.

[37] See Douglas A. Green's interesting discussion in *The Jury Expert*, Jan 2009, pp. 29-31. Discussing his own practice, Green says, 'As a general rule of thumb, I believe that information in three general categories is most useful. I want to know about jurors' family life, their work life, and their leisure. …Family structure provides an indication of a person's core values, whether they be traditional or less conventional. Work life usually captures the largest part of a person's time and provides a host of insights. And, finally, how a person chooses to spend their leisure time says a lot about those things they value most'.

to identify and to emphasise race-based differences in jurors' experience and attitudes in order to create juries which are particularly susceptible to certain rhetorical strategies, or particularly likely to reach decisions of one sort, rather than another. The fact that this occurs as part of a competitive legal process, in which Prosecution and Defence each seek to construct a jury favourable to themselves out of an original pool of randomly selected jurors, hardly makes this more edifying. Hence, the reason why racial profiling is generally wrong are reasons why it is wrong to use race-based strikes in an effort to compose a racially mixed jury. [38] The degree of harm may be different in the two cases, and the mechanisms by which it occurs may differ, but the end result is to exacerbate the association of racial minorities with crime, thereby obscuring the ways in which crime is, overwhelmingly, an intra-racial phenomenon, and the product of the activities of a small part of any population.

However, these objections to race-based strikes do not undermine the general claim that racially mixed juries are generally desirable, and sometimes necessary, for justice. Our duty to treat people as equals for moral, political and legal purposes, has to be fulfilled in a world shaped by complex, deep-seated and often overlapping forms of unjust differences in power, status, opportunity and resources. Even when we are not motivated by prejudice or ill-will, or even by misguided or paternalistic forms of benevolence, these patterns of inequality can obscure relevant facts from us, encourage us to attach undue importance to what we know, and blind us to possibilities we have never conceived, let alone experienced. This means that racially mixed juries can help us to overcome some of the obstacles of sentiment, perception and knowledge that we face in an effort to treat each other as equals. Attention to the significance of background injustice, then, means that moral and political objections to racial profiling can support, rather than undermine, the case for racially mixed juries.

[38] For a fuller discussion see my article in *The Jury Expert*, op. cit.