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Bobb v. Municipal Court: A Challenge to Sexism in Jury Selection and Voir Dire

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BOBB V. MUNICIPAL COURT: A CHALLENGE TO SEXISM IN JURY SELECTION AND VOIR DIRE

In *Bobb v. Municipal Court*,[1] a divided First District Court of Appeal held a female prospective juror was not in contempt of court when, in good faith and a respectful manner, she refused to answer voir dire questions the trial judge posed only to the female venire members.[2] One panel member, Justice Miller, relied on the equal protection provisions of the California Constitution as the basis for the decision.[3] The second member of the majority, without ever reaching a constitutional issue, concluded that Ms. Bobb's conduct did not constitute contempt.[4] The dissenting justice would have upheld the contempt judgment.[5]

This Note discusses how sexism in the jury selection[6] and voir dire processes[7] can operate to produce a voir dire which vio-

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1. 143 Cal. App. 3d 860, 192 Cal. Rptr. 270 (1983), *hearing denied* (Aug. 11, 1983).
2. *Id.* at 867, 192 Cal. Rptr. at 274.
3. *Id.* at 864-67, 192 Cal. Rptr. at 271-74.
4. *Id.* at 875, 192 Cal. Rptr. at 279.
5. *Id.* at 877, 192 Cal. Rptr. at 281.
6. For the purposes of this article, jury selection will refer to the selection of prospective jurors from the community. *See* CAL. CIV. PROC. CODE §§ 203-214 (West 1982) which set out the procedures for the selection of prospective jurors in California. In a broader sense, jury selection refers to the entire process of selecting which persons will sit as jurors in a particular trial. *See* B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE § 394 (1963).
7. Voir dire is the process of questioning prospective jurors to determine whether they meet the requisite statutory qualifications and whether they possess prejudices which might result in an unfair trial. *See* B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE §§ 406-415 (1963 and Supp. 1983 part I). After questioning the jurors, the attorneys for each side may challenge prospective jurors they feel might be biased against their client. Challenges are of two types: for cause and peremptory. CAL. PENAL CODE § 1067 (West 1970). Challenge for cause may be either general or particular. If general, the juror is legally incompetent to serve. If particular, the juror is actually or implicitly biased in the particular case before the court. CAL. PENAL CODE §§ 1062-1071 (West 1970). Implied bias refers to one of several statutorily defined juror relationships to a party in the case. CAL. PENAL CODE § 1074 (West Supp. 1984). Actual bias refers to the "existence of a state of mind on the part of the juror in reference to the case, or to either of the parties, which will prevent [him/her] from acting with entire impartiality and without prejudice to the substantial rights of either party . . . ." CAL. PENAL CODE § 1073 (West 1970).

A peremptory challenge is an "objection to a juror for which no reason need be given, but upon which the court must exclude [him/her]." CAL. PENAL CODE § 1069 (West 1970). In People v. Wheeler, the California Supreme Court said that "the law recognizes

lates of a prospective juror's guarantee of equal protection. It then outlines California's use of strict scrutiny to analyze gender-based classifications. Third, the Note reviews and evaluates the three *Bobb* opinions. Finally, the significance of Justice Miller's opinion is discussed.

I. BACKGROUND

A. Sexism In The Jury Selection And Voir Dire Processes

1. *Gender-Based Discrimination in Jury Selection*

Until 1975, a state could constitutionally restrict jury service to males.[8] In 1898, Utah became the first state to grant women an affirmative *statutory* right to jury service.[9] The 1957 Civil Rights Act gave women the right to serve on all federal juries.[10] State courts, however, continued to restrict the right of women to serve on juries.[11]

As recently as 1961, the United States Supreme Court held in *Hoyt v. Florida* that a state statute which did not require

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that a peremptory challenge may be predicated on a broad spectrum of evidence suggestive of juror partiality." 22 Cal. 3d 258, 275, 583 P.2d 748, 760, 148 Cal. Rptr. 890, 902 (1976). A record of prior arrests is an example of this kind of bias. *Id.*

8. Strauder v. West Virginia, 100 U.S. 303 (1879). *Strauder* involved a West Virginia statute which denied blacks the right to sit on juries. The Supreme Court held that the statute violated the Equal Protection Clause of the fourteenth amendment. In doing so, the Court stated that states "may confine selection to males . . . ." *Id.* at 310. In 1975, the Court overturned *Strauder* and held that women cannot be excluded from jury service solely on the basis of gender. *See infra* notes 16-19 and accompanying text.

9. *See* Mahoney, *Sexism in Voir Dire: The Use of Sex Stereotypes in Jury Selection*, in Women in the Courts 114, 129 n.3 (1978) [hereinafter cited as Mahoney]. *See* Utah Code Ann. §§ 78-46-3 and 78-46-4 (1977) (repealed and reenacted at 78-46-4, 1979). The statute refers to a jury as "a body of *persons* . . . ." *Id.* (emphasis added).

10. 28 U.S.C. § 1861 (1974). "Any citizen of the United States who has attained the age of twenty-one years and who has resided for a period of one year within the judicial district, is competent to serve as a grand or petit juror . . . ." (amended 1968). Prior to the 1957 amendment, qualifications for federal jurors were the same as those for jurors of the highest court of the state in which the federal court was located. 28 U.S.C. § 411 (1940).

11. California, for example, did not provide women a statutory right to jury service until 1980. ("No person shall be excluded from jury service in the state of California on account of race, color, religion, sex, national origin, or economic status.") Cal. Civ. Proc. Code § 197.1 (West 1982).

women to serve on juries unless they took affirmative steps to be placed on the jury list did not violate a female defendant's fourteenth amendment guarantee of equal protection.[12] The Court observed that "[d]espite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved for men, woman is still regarded as the center of home and family life."[13] Requiring women to serve on juries would therefore interfere with their "distinctive role in society."[14] This reasoning provided the rational grounds necessary to justify the statute.[15]

Women's exemption from juries was not successfully challenged until 1975 when the United States Supreme Court held in *Taylor v. Louisiana*[16] that women may not be excluded from jury service based on gender alone.[17] The Court reasoned that such an exclusion resulted in juries which failed to satisfy a criminal defendant's sixth amendment guarantee of a trial by a jury comprised of a cross-section of the community.[18] The Court

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12. 368 U.S. 57, 62. In *Hoyt*, a woman was charged with the murder of her husband. She was convicted of second-degree murder by an all male jury. On appeal she claimed that the challenged statute violated her fourteenth amendment guarantee of equal protection. The challenged statute provided in part that "the name of no female person shall be taken for jury service unless said person has registered with the clerk of the circuit court her desire to be placed on the jury list." FLA. STAT., § 40.01(1) (1959).

13. 368 U.S. at 61-62.

14. *Id.* at 63.

15. *Id.*

16. 419 U.S. 522 (1975). The statute challenged in *Taylor* provided that "[a] woman shall not be selected for jury service unless she has previously filed with the clerk of court of the parish in which she resides a written declaration of her desire to be subject to jury service." *Id.* at 523 n.2 (citing LA. CODE CRIM. PROC. ANN. art. 402 (West 1966)). The statute was challenged by a male defendant whom an all-male jury had convicted of aggravated kidnapping. At the time of this challenge, three states still had women-exemption statutes.

17. The same statute challenged in *Taylor* was the subject of an earlier, unsuccessful challenge in Alexander v. Louisiana, 405 U.S. 625 (1972). The male defendant in *Alexander* claimed that the statute violated the due process clause of the fourteenth amendment because it resulted in juries not representative of the community. *Id.* at 626-27. The Court overturned the defendant's conviction on other grounds and thus did not address the statute's constitutionality. *Id.* at 633.

18. 419 U.S. at 531. The "cross-section of the community" requirement is an attempt to assure that a criminal defendant is tried by a jury drawn from venires representative of the community. *See* Ballard v. United States, 329 U.S. 187, 191 (1946) (holding that a federal jury panel from which women were systematically excluded was improperly constituted.) The sixth amendment provides in part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an *impartial* jury

distinguished *Hoyt*, noting that it addressed itself only to due process and equal protection challenges.[19] After *Taylor*, women must be included in the community pool of prospective jurors.[20]

2. *Sexism in the Voir Dire Process*

In *People v. Wheeler*,[21] the California Supreme Court explained the purpose of allowing parties to challenge prospective jurors:

> The law . . . presumes that each party will use [his/her] challenges to remove those prospective jurors who appear most likely to be biased against [him/her] or in favor of [his/her] opponent; by so doing, it is hoped, the extremes of potential prejudice on both sides will be eliminated, leaving a jury as impartial as can be obtained from the available venire. The purpose of the challenges also dictates their scope: they are to be used to remove jurors who are believed to entertain a specific bias, and no others.[22]

An attorney's right to question and challenge prospective jurors to assure an impartial jury for his or her client seemingly conflicts with the right of prospective female jurors to equal treatment during this process. A closer examination of this problem demonstrates that these two important interests need not conflict.

When preparing voir dire questions and challenging prospective jurors, trial attorneys frequently rely on negative stereotypes contained in trial practice handbooks. Use of these stereotypes probably effects discrimination against prospective female jurors, which in turn undermines selection of an impartial jury.

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of the state and district wherein the crime [was] committed . . . ." U.S. CONST. amend. VI (emphasis added).

19. 419 U.S. at 534-35.
20. *See supra* note 7.
21. 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978).
22. *Id.* at 274, 583 P.2d at 748, 148 Cal. Rptr. at 901.

One trial practice handbook advises that "[t]he occupation of a woman's husband is important, too, for generally she will feel and think in the same manner as her husband."[23] This same handbook does not suggest, however, that attorneys inquire into the male juror's spouse's occupation. Presumably, the rationale for this distinction is that a man is not likely to be as influenced by his wife's occupation as would be a woman by her husband's. Yet no empirical data are supplied to support this inference. That the question is asked only of female members of the venire results in discriminatory treatment of females and an ineffective effort at identifying possible prejudice among individual jurors. If spousal occupation does in fact affect the impartiality of prospective jurors, obviously the question should be asked of all prospective jurors.

Another trial practice handbook suggests: "where the client is a woman . . . avoid other women on the jury as far as possible."[24] The implication of this observation is that women are less able than their male counterparts to judge members of their own sex in an impartial manner. No data are provided to support this assertion. In fact, studies indicate that the opposite is true.[25] Thus, an attorney who bases his or her challenges on this type of unsubstantiated, stereotypic observation might actually be *jeopardizing* his or her client's chance to obtain a trial by an impartial jury.[26]

Finally, challenging female jurors on the basis of unsubstantiated stereotypes may violate a criminal defendant's sixth amendment right to a trial by an impartial jury. In *People v. Wheeler*, the California Supreme Court held that a prosecutor's use of peremptory challenges to remove prospective jurors on the sole ground that they were black violated the defendant's

23. H. Rothblatt, Successful Techniques in the Trial of Criminal Cases 23 (1961).

24. S. Schweitzer, Encyclopedia of Trial Practice 162 (1970).

25. Mahoney, *supra* note 9, at 125, citing a study performed by Nagel and Weitzman, *Women as Litigants*, 23 Hastings L.J. 193 (1971). The researchers found that women-dominated juries gave civil awards to women that averaged 17 percent above the expected average for that type of injury, and gave men only 3 percent above what would be expected. *Id.* at 194-96.

26. One commentator has noted an instance where, due in part to her irritation with one particular sexist question put forward by a plaintiff's attorney during voir dire, a juror initially voted against recovery for the plaintiff. Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. Cal. L. Rev. 527 (1965).

right to a jury drawn from a representative cross-section of the community.[27] The court reasoned that "when a party presumes that certain jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic or similar grounds—we may call this 'group bias'—and peremptorily strikes all such persons for that reason alone, [s/he] . . . frustrates the primary purpose of the representative cross-section requirement."[28] Basing juror challenges on sexist stereotypes might well violate the *Wheeler* principle.

The interest of an attorney in securing an impartial jury for his or her client and a female member of the venire in securing equal treatment need not be mutually exclusive. As *Wheeler* pointed out, the attorney must seek the elimination of specific biases—those "[biases] relating to the particular case on trial or the parties or witnesses thereto. . . . [T]he characteristics on which they focus cut across many segments of our society."[29] Challenging jurors on this basis—rather than on the basis of stereotypes—would better serve both the interest of equal protection and securing an impartial jury.

B. Strict Scrutiny Review of Gender-Based Discrimination

In *Sail'er Inn v. Kirby*, the California Supreme Court concluded that gender is a suspect classification.[30] The court reasoned that gender, like race and alienage, is an immutable trait, and generally bears no relation to one's ability to perform or to contribute to society.[31] In addition, women, like blacks and

27. 22 Cal. 3d at 277-78, 583 P.2d at 761-62, 148 Cal. Rptr. at 903.

28. *Id.* at 276, 583 P.2d at 761, 148 Cal. Rptr. at 902. In Swain v. Alabama, 380 U.S. 202 (1965), petitioner, a black, was convicted of rape and sentenced to death. Of the eight blacks in the venire for the trial, two were exempt and six were peremptorily struck by the prosecutor. The court held that neither this nor the fact that no black had served on an Alabama petit jury in the past fourteen years established a violation of the equal protection clause of the fourteenth amendment. *Id.* at 222, 224.

29. 22 Cal. 3d at 276, 583 P.2d at 761, 148 Cal. Rptr. at 902.

30. 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329, (1981).

31. *Id.* at 18, 485 P.2d at 539, 95 Cal. Rptr. at 339. The California Supreme Court analogized women to blacks and aliens by way of the now-famous *Frontiero* factors. In Frontiero v. Richardson, 411 U.S. 677 (1973), the United States Supreme Court isolated the characteristics cited in *Sail'er Inn* and indicated that these characteristics are useful

aliens, have historically been denied significant legal and social privileges such as the rights to vote and serve on juries; equal employment and educational opportunities; and equal property and contractual rights.[32]

Suspect classifications are subject to strict scrutiny review.[33] Thus, California courts will uphold a gender-based classification only if the government demonstrates that a compelling state interest underlies its action *and* that the classification is necessary to further that interest.[34]

Since *Sail'er Inn*, California courts have applied strict scrutiny to find unconstitutional minimum security jail facilities with special privileges provided for male but not female inmates;[35] to invalidate a statute which established a conclusive presumption of total dependency of a surviving wife but no such presumption regarding a surviving husband;[36] and to hold unconstitutional the disparate treatment of women inmates in transportation to court and the right of contact visits.[37]

II. THE *BOBB* DECISION

A. Facts

Attorney Carolyn Bobb was a prospective juror in a municipal criminal case. During judge-conducted voir dire, only female venire members were questioned as to their marital status and spouse's occupation. Ms. Bobb refused to answer these questions. She explained that if the questions were relevant to women, they were relevant to men. She said she would answer the questions only if they were also asked of the male prospective jurors. The judge refused to accept this suggestion and instructed Ms. Bobb to answer the questions. She again refused.

in identifying suspect classes. *Id.* at 686-87.

32. 5 Cal. 3d at 19, 485 P.2d at 540-41, 95 Cal. Rptr. at 340-41.

33. Korematsu v. United States, 323 U.S. 214, 216 (1944).

34. *In re* Griffiths, 413 U.S. 717, 721-22 (1973).

35. Molar v. Gates, 98 Cal. App. 3d 1, 154 Cal. Rptr. 239 (1979).

36. Arp v. Workers Compensation Appeal Board, 19 Cal. 3d 395, 563 P.2d 849, 138 Cal. Rptr. 293 (1977).

37. Inmates of Sybil Brand Inst. for Women v. County of Los Angeles, 130 Cal. App. 3d 89, 181 Cal. Rptr. 599 (1982).

She was held in contempt and taken into custody.[38] Ms. Bobb's petition for certiorari was denied by the superior court and the contempt judgment was affirmed.[39] The First District Court of Appeal reversed the contempt judgment.

B. Justice Miller's Opinion

Justice Miller found that posing the challenged questions only to the female members of the venire violated the equal protection provisions of the California Constitution.[40] Consequently, Ms. Bobb was justified in refusing to answer the discriminatory questions and her refusal could not result in a contempt judgment.[41]

Justice Miller first noted the similarity of the instant case with *Hamilton v. Alabama*.[42] In *Hamilton*, the United States Supreme Court, per curiam, annulled a contempt conviction issued when a black witness refused to answer questions as long as she was addressed by her first name.[43] In finding *Hamilton* "directly on point",[44] Justice Miller implicitly accepted Ms. Bobb's contention that a "court which issues an unconstitutional order acts in excess of its jurisdiction and, accordingly, there is no contempt of court on the part of one who refuses to obey such an

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38. *Bobb*, 143 Cal. App. 3d at 863, 192 Cal. Rptr. at 271. Ms. Bobb spent fifteen minutes in a holding cell and then was released on her own recognizance on condition she return later that afternoon for sentencing. After she was denied a continuance to find an attorney and research her case, Ms. Bobb was sentenced to one day in jail, with credit for time served. *Id.*

39. *Id.*

40. *Bobb*, 143 Cal. App. 3d at 867, 192 Cal. Rptr. at 274. Cal. Const. art 1, § 7(a) provides that a "person may not be . . . denied equal protection of the laws. . . ."

41. 143 Cal. App. 3d at 867, 192 Cal. Rptr. at 274.

42. 376 U.S. 650 (1967). In reversing Ms. Hamilton's contempt citation, the Supreme Court cited Johnson v. Virginia, 373 U.S. 61 (1963). In *Johnson*, the Court reversed a contempt conviction of a black who refused to sit in the section of the courtroom reserved for blacks. The Court in *Johnson* stated that the "[contempt] conviction cannot stand, for it is no longer open to question that a State may not constitutionally require segregation of public facilities." *Id.* at 62.

43. The facts of *Hamilton* were set out by Justice Douglas in Bell v. Maryland, 378 U.S. 226, 248-49 n.4 (1964).

44. *Bobb*, 143 Cal. App. 3d at 864, 192 Cal. Rptr. at 272.

order."[45]

Justice Miller next indicated that California regards gender-based classifications as suspect and therefore subjects them to strict scrutiny.[46] In response to the municipal court's argument that its action did not implicate any of Ms. Bobb's fundamental rights,[47] Justice Miller correctly pointed out that California invokes strict scrutiny when either a suspect classification or a fundamental right is at issue.[48]

Respondent argued in addition that since Ms. Bobb was not denied any right to which she was legally or constitutionally entitled, strict scrutiny should not apply.[49] Justice Miller replied that "no right other than the right to equal protection need be asserted" to invoke application of the strict scrutiny standard.[50]

Once it is determined that the strict scrutiny standard applies, the state must demonstrate that it has a compelling interest which justifies the classification, and that the classification is necessary to further that compelling interest.[51] The municipal court failed to articulate any compelling reasons for asking particular questions of female venire members only. As a result, Justice Miller concluded that the trial judge's manner of questioning the venire violated the California constitution. Thus, Ms. Bobb's conduct, like Ms. Hamilton's, in refusing to answer the particular questions was justified.[52]

C. Presiding Justice Kline's Concurrence

In concurring with the decision to reverse the contempt judgment, Justice Kline stated that Justice Miller "reached the right result for the wrong reason."[53] He noted that "the most significant issue raised by this case relates more to the proper

45. *Id.* at 864, 192 Cal. Rptr. at 271.

46. *Id.* at 864-65, 192 Cal. Rptr. at 272. *See supra* notes 30-37 and accompanying text.

47. 143 Cal. App. 3d at 866, 192 Cal. Rptr. at 273.

48. *Id.*

49. *Id.*

50. *Id.* at 867, 192 Cal. Rptr. at 273.

51. *Id.* at 865, 192 Cal. Rptr. at 272.

52. *Id.* at 867, 192 Cal. Rptr. at 273-74.

53. *Id.*

treatment of jurors than the rights of women."[54] Justice Kline next cited California case law providing that unless a case cannot be decided without reaching a constitutional issue, that issue should not be addressed.[55] In his estimation, the unique facts of this case required reversal of the contempt judgment regardless of the constitutionality of the voir dire and thus, he did not address Ms. Bobb's constitutional challenge.[56]

Justice Kline indicated that summary contempt power must be "employed with great prudence and caution, lest it be improperly used to stifle freedom of thought and speech."[57] He found this to be particularly important when the contemner is a prospective juror, since jurors are crucial to our system of justice.[58] He also observed that jury service is a valuable experience for the jurors and[59] he feared that trials by capable juries might be jeopardized if prospective jurors were rebuked for "dar[ing] to speak and act upon their personal truth."[60]

Justice Kline concluded that because the impropriety of Ms. Bobb's conduct was doubtful, the contempt in this case was subject to a higher standard of review than is normally invoked.[61] That is, specific wrongful intent is not ordinarily an essential el-

54. *Id.*

55. Palermo v. Stocton Theatres, 32 Cal. 2d 53, 65, 195 P.2d 1 (1948), quoting Estate of Johnson, 139 Cal. 532, 534, 73 P. 424; *see also*, People v. Williams, 16 Cal. 3d 663, 667, 128 Cal. Rptr. 888, 547 P.2d 1000. For a brief discussion of this same judicial reluctance to reach constitutional issues unless necessary in federal courts, see, Panel Discussion, Judicial Review and Constitutional Limitations, 14 GOLDEN GATE U.L. REV. 645 (1984) (Comments by Judge Patricia Wald, *Judicial Review - The Quest for Legitimacy and Certainty (Notes from the Trenches)* at 647).

56. *Bobb*, 143 Cal. App. 3d at 868, 192 Cal. Rptr. at 274.

57. *Id.* Petitioner did not advance a first amendment freedom of speech challenge to the contempt judgment. In *In Re* Shuler, 210 Cal. 377, 292 P. 481 (1930), the California Supreme Court stated that the "constitutional guarantees of freedom of speech . . . do not . . . go so far as to protect the citizen in making such comments . . . that have for their purpose and manifest tendency an attempted interference with the orderly administration of justice . . . ." *Id.* at 402, 292 P. at 492.

58. 143 Cal. App. 3d at 868-69, 192 Cal. Rptr. at 275.

59. Jury service "should be regarded as a free school which is always open and in which each juror learns [his/her] rights . . . and is given practical lessons in the law . . . ." 143 Cal. App. 3d at 868, 192 Cal. Rptr. at 274 (quoting DE TOCQUEVILLE, DEMOCRACY IN AMERICA 274 (1969).

60. 143 Cal. App. 3d at 869, 129 Cal. Rptr. at 275.

61. *Id.*

ement of a contempt proceeding.[62] When the conduct in question is only of doubtful impropriety, however, then absent specific wrongful intent, the conduct is not viewed as contempt.[63] Justice Kline therefore indicated that unless Ms. Bobb possessed the specific wrongful intent to impeach or embarrass the court or to interrupt its proceedings, the contempt judgment could not be upheld.[64] Further, if the contempt judgment was based on an interruption of the court's proceedings, it could not be upheld unless it amounted to "disorderly, contemptuous, or insolent behavior toward the judge while holding court . . . ."[65] In reviewing the contempt order, Justice Kline noted that even the trial court admitted that Ms. Bobb expressed her views "on the basis of an articulated principle and did so respectfully and in good faith",[66] and that any interruption in court proceedings could not have lasted longer than a minute and a half. He concluded that the record did not warrant upholding the contempt judgment.[67]

Justice Kline stated that the "use of this drastic remedy in the unique circumstances of the present case was in part unwarranted because other alternatives were available."[68] These included: (1) the trial judge could have excused Ms. Bobb from jury service in the case; (2) the trial court could have passed the challenged question and left it to further pursuit by counsel; or (3) the trial court could have put the challenged questions to the male members of the venire.[69] None of these alternatives satisfactorily disposes of the case.

First, Justice Kline suggested that Ms. Bobb could have been excused from jury service. Although this would have prevented the contempt judgment, it would not have remedied the equal protection violation which occurred when the trial judge posed one set of questions solely to the female members of the

62. *Id.* at 869, 192 Cal. Rptr. at 275 citing *In re* Jasper, 30 Cal. App. 3d 985, 106 Cal. Rptr. 754 (1973).

63. *Id.*

64. 143 Cal. App. 3d at 870, 192 Cal. Rptr. at 276.

65. 143 Cal. App. 3d at 870, 192 Cal. Rptr. at 276 (*citing* CAL. CIV. PROC. CODE § 1209 (West 1982)).

66. 143 Cal. App. 3d at 872, 192 Cal. Rptr. at 277.

67. *Id.* at 875, 192 Cal. Rptr. at 279.

68. *Id.* at 874, 192 Cal. Rptr. at 278.

69. *Id.* at 874, 192 Cal. Rptr. at 278-79.

venire. Also, dismissing from jury service all those who refuse to answer unconstitutional questions may impair a criminal defendant's right to a trial by a jury comprised of a cross-section of the community.[70]

Justice Kline's second suggestion, that the trial judge leave the challenged questions to further pursuit by counsel,[71] is also unsatisfactory. The voir dire was conducted in an improper, unconstitutional manner, regardless of how the attorneys would subsequently have conducted their own voir dire.[72]

Finally, Justice Kline suggested that the trial judge could have posed the questions to the prospective male jurors as well, which is what Ms. Bobb requested.[73] Had the trial court done this, no constitutional violation would have occurred and Ms. Bobb would have answered the questions posed to her. Justice Kline's suggestion that the trial judge could have chosen this course hardly remedies the constitutional violation that arose when the trial judge refused to do so.

D. The Dissent

Justice Rouse writing in dissent would have upheld the contempt judgment.[74] He found that Ms. Bobb's refusal to answer the voir dire questions disrupted the court's business, and that the refusal was not a result of misunderstanding but rather a deliberate act on Ms. Bobb's part.[75] Justice Kline's three alternatives, according to Justice Rouse, were of little merit since none of them adequately responded to the defiance Ms. Bobb

70. *See* Taylor v. Louisiana, 419 U.S. 522 (1974) (which established a criminal defendant's sixth amendment right to an impartial jury composed of a cross section of the community). *See also*, People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978) (also recognizing the defendant's right to a jury drawn from a representative cross section of community).

71. *Bobb*, 143 Cal. App. 3d at 874, 192 Cal. Rptr. at 279.

72. Appellant's Opening Brief at 13, Bobb v. Municipal Court, 143 Cal. App. 3d 874, 192 Cal. Rptr. 270 (First District 1983) [hereinafter cited as Brief].

73. 143 Cal. App. 3d at 874, 192 Cal. Rptr. at 278.

74. *Id.* at 875, 192 Cal. Rptr. at 280.

75. *Id.* at 877, 192 Cal. Rptr. at 281.

exhibited.[76]

Justice Rouse also found that Ms. Bobb's refusal to answer the challenged questions did not rise to "a matter of constitutional dimension. . . ."[77] He observed that "the matter of one's marital status and occupation is a common subject of inquiry and discussion at any gathering of two or more persons . . . ."[78] The content of the questions, however, is not what Ms. Bobb objected to; instead, she challenged the discriminatory manner in which they were posed.[79] Thus, the dissent also failed to address the central issue—the violation of Ms. Bobb's equal protection guarantee.

III. SIGNIFICANCE OF JUSTICE MILLER'S OPINION

Bobb is a case of first impression in California. Although Justice Miller's opinion is not binding on lower courts,[80] it is nonetheless important.

The opinion affirmed an individual's right to confront violations of equal protection and thereby implicitly rejected the "non-confrontational alternatives" the superior court, in affirming the contempt judgment, suggested were available to Ms. Bobb.[81] The suggestions that Ms. Bobb write a letter to the trial

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76. *Id.* at 876-77, 192 Cal. Rptr. at 280-81.

77. *Id.* at 875, 192 Cal. Rptr. at 280.

78. *Id.*

79. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356 (1886). *Yick Wo* dealt with the administration of a city ordinance which required those wishing to operate a laundry to obtain the consent of the board of supervisors. Although with regard to national origin, the statute was neutral on its face, it was administered in a discriminatory manner. The required consent of the board was often denied to Chinese laundry operators. After such a denial, Yick Wo was convicted for continuing to operate his laundry without the board's consent. In overturning the conviction, the United States Supreme Court stated that "[t]hough the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with . . . an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances . . . the denial of equal justice is still within the prohibition of the Constitution."

80. *See* Mix v. Ingersoll Candy Co., 6 Cal. 2d 674, 59 P.2d 144 (1936). In discussing the precedential value of a case in which there was no majority opinion, the court stated that the "two associates of the writer of the opinion concurred only in the judgment . . . . It is apparent, therefore, that this reason became thereby only the personal opinion of the justice who wrote the opinion. Such conclusion cannot, therefore, have any controlling weight here." *Id.* at 679, 59 P.2d at 146.

81. Brief, *supra* note 72, at 18.

judge stating her objection to the voir dire[82] or make a short non-confrontational statement in a respectful manner after trial,[83] were clearly unsatisfactory since neither would have remedied the wrong already inflicted upon Ms. Bobb, nor would they in any way guarantee that the trial judge would alter his voir dire questioning in the future.

The superior court also noted that since Ms. Bobb was an attorney, she could have used her privilege of informal access to the judge and arrange a private discussion with him.[84] The right to challenge a violation of one's constitutional rights should not be contingent upon one's status as an attorney. In addition, the same "too little, too late" problem remains.

The opinion should also help to diminish the effects traditional sex stereotypes have had on the jury selection and voir dire processes by sending a signal, albeit from a split court, to trial judges that voir dire should be conducted in a manner consistent with the equal protection provisions of the California Constitution.

V. CONCLUSION

While the result in *Bobb* is clearly correct under either Justice Miller's or Justice Kline's analysis, to the extent that it is a split decision, it is unsatisfactory. Justice Kline's approach is technically correct since California courts do not reach constitutional issues unless a case cannot be decided without doing so. However, precisely because Justice Miller upheld Ms. Bobb's constitutional guarantee of equal protection, his approach is philosophically better than Justice Kline's. Inasmuch as the dissent failed to provide either a correct technical or philosophical resolution of the dispute, it is of little importance.

Since there is no majority opinion in *Bobb*, Justice Miller's analysis is not of compelling precedential value. It should, how-

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82. *Id.*
83. *Id.* at 19.
84. *Id.* at 20.

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ever, serve as a reminder to trial courts that all citizens, in their capacity as jurors and otherwise, are entitled to the equal protection of the laws guaranteed by the California Constitution. Justice Miller's opinion, if implemented, will diminish the negative effect of traditional gender-based stereotypes on the right of women to fully and equally participate in the jury system.

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