

# A UNANIMOUS JURY IS FUNDAMENTAL TO OUR DEMOCRACY

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In the *Federalist Papers*, Alexander Hamilton wrote:

The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government.<sup>1</sup>

The Founders put the right to criminal jury trial in the body of the Constitution, as is sometimes forgotten, in Article III,<sup>2</sup> and also in the Sixth Amendment.<sup>3</sup> In addition, the right to a jury trial in civil matters is contained in the Seventh Amendment.<sup>4</sup> The jury trial has a long history of being one of the truly fundamental cornerstones of liberty. Yet, in response to recent unpopular verdicts—the O.J. Simpson acquittal, the acquittal in the first Rodney King beating case, the hung jury in the first Menendez parricide—there have been proposals to abolish the unanimity requirement, reduce the number of jurors, and eliminate the peremptory challenge.<sup>5</sup> The problem with these proposals is twofold: (1) they wrongly assume that the jury system is broken; and (2) they could profoundly change its

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1. THE FEDERALIST No. 83, at 499 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

2. U.S. CONST. art. III, § 2, cl. 3 (“The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . .”).

3. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . .”).

4. U.S. CONST. Amend. VII (“In Suits at common law . . . the right of trial by jury shall be preserved . . .”).

5. See Victor E. Bianchini, *Book Review*, 3 SAN DIEGO JUST. J. 573, 577-78 (1995) (reviewing STEPHEN J. ADLER, *THE JURY: TRIAL AND ERROR IN THE AMERICAN COURTROOM* (1994)) (noting legislative proposal to abolish unanimity, and existence of support for reducing the number of jurors); Peter Arenella, *People v. Simpson: Perspectives on the Implications for the Criminal Justice System—Foreword: O.J. Lessons*, 69 S. CAL. L. REV. 1233, 1243 (1996) (noting the proposal to abolish unanimity); *Bill to Eliminate Peremptory Challenges of Jurors Introduced*, Metropolitan News Company, Jan. 16, 1996, available in LEXIS, News Library, CURNWS File (reporting on proposed California legislation).

operation in unpredictable ways.

Make no mistake about it, behind the bold proposals for jury reform is the bald desire for more convictions. Yet proponents of change in the jury system fail to mention that the current conviction rates for cases that go to trial are roughly 66% in state courts and 80% in federal courts.<sup>6</sup> In addition, jury conviction rates in general exceed bench conviction rates. Most people who are accused of a crime plead guilty, and in some jurisdictions (California, for example), the conviction rate on guilty pleas is as high as 87.2%.<sup>7</sup>

Attending these very high conviction rates, however, have been startling acquittals in a few spectacular cases—defined by the horror of the crime, the celebrity of the accused, or, as in the Simpson case, a combination of both. Sometimes the lawyers are famous, and, almost always, defendants who win in the face of overwhelming evidence have money to pay for the best defense.

One example, at the turn of the 19th century, is the case of Lizzie Borden of Fall River, Massachusetts, who was accused of killing her parents with an axe.<sup>8</sup> Her case had these now-familiar ingredients: powerful circumstantial evidence, first-rate defense lawyers, press from all over the world, and a sequestered, though all-male, jury who acquitted after twenty minutes of deliberation. No one wanted to believe that a woman of good family would be capable of such brutality. Her lawyers were accused of playing the “lady card.”

Another example, this one from California more than 100 years ago, is the case of Isaach Kalloch, who shot an unarmed man in full view of his fellow workers and of people on the street who saw the whole thing through a large window.<sup>9</sup> His victim was the editor of the *San Francisco Chronicle*. A jury acquitted Kalloch on a theory either of justification or of temporary insanity because the paper had printed scurrilous stories about his father.

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6. See, e.g., JEFFREY ABRAMSON, WE THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 253-54 (1994).

7. See, e.g., *id.* at 253.

8. See, e.g., JUDGE ROBERT SULLIVAN, GOODBYE LIZZIE BORDEN (1974) (discussing 1893 acquittal of Lizzie Andrew Borden in *Commonwealth of Mass. v. Borden*).

9. See, e.g., JOHN R. BRUCE, GAUDY CENTURY: THE STORY OF SAN FRANCISCO'S HUNDRED YEARS OF ROBUST JOURNALISM 171-178 (1948).

These are but two of the historical instances of notorious mistaken verdicts or verdicts that expressed community sentiment that was, at best, extralegal. Such results are part of the system, part of the price we pay to have a judgment of the people before we deprive anyone of all liberty. Always, from the founding of the Republic, we have been willing to sustain the risk that the jury will be wrong.

For every jury that goes awry, there are a hundred that do the right thing. While the Simpson case was in its long progress, for instance, a South Carolina jury convened for several weeks and returned a verdict of life imprisonment rather than death for a young woman who killed her two little children.<sup>10</sup> It was fitting that a jury should decide this case, because no judge has the same power to speak with the voice of the people, the people in her town, to forgive and to redeem.

I believe in juries. This belief is based on my experience as a young lawyer, when I tried many cases before juries. Losing some and winning others, I represented mostly black men before mostly black juries in the District of Columbia.<sup>11</sup> Though losing a verdict is one of life's crushing blows, I believed, in virtually every case I saw close-up, that the jury had made a correct and wise decision. More than occasionally, I found that jurors who started with one predisposition, and whom I had perhaps chosen because I discerned it, changed their minds through the deliberative process.

The jury comes to us with certain historical attributes: the mystical number twelve, the absolute power to acquit without accountability, the receipt of evidence through a judicial filter, the requirement that jurors come from the defendant's geographical community, the requirement that they engage each other to the point of total agreement, and the requirement that they be strangers to each other at the outset and that during the trial their only interaction occur during the time of deliberation. No one knows which, if any, of these attributes is essential to the integrity of the institution. The institution of the

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10. Susan Smith drowned her two young boys in a South Carolina lake on Oct. 25, 1994. See, e.g., Michael Dougan, *Wheels of Justice Slow in California; Death-Penalty Cases Move Much More Quickly in Other States*, SAN FRANCISCO EXAMINER, Mar. 3, 1996, at B1.

11. Professor Babcock was a staff attorney for the Legal Aid Agency for the District of Columbia from 1966 to 1968. Professor Babcock was then Director of the Public Defender Service for the District of Columbia from 1968 to 1972.

jury trial is just the collection of these attributes.

Eliminating the requirement that a jury return a unanimous verdict is one of the piecemeal jury reforms that have been urged in the wake of the Simpson case and other recent unpopular verdicts. Although unanimity is not constitutionally required, most jurisdictions have retained the requirement that the entire jury must agree on the verdict.<sup>12</sup> Elimination of this requirement could alter in unpredictable ways the very nature of the jury as an institution.

An important benefit of the unanimity requirement is that a group who must persuade those who see the world differently is more likely to deliberate and discuss the evidence thoroughly. This point is particularly relevant because we have just recently arrived at a time when white women and minorities are finally being summoned to jury service in significant numbers.<sup>13</sup> In some places, our juries are as diverse as our communities. Therefore, this is exactly the wrong time to modify the institution, providing a means to simply outvote the newcomers. In other words, if there are two or three minority members on a jury of twelve, our current system, a system that requires they be convinced to join the verdict, is far better than one in which they serve only to be outvoted.

A unanimous verdict is a major accomplishment and carries with it moral authority that a split decision lacks. We see this point easily with appellate courts, and it applies even more forcefully to a judgment from the people. Of course, the Simpson verdict demonstrates that unanimity does not guarantee popularity or credibility, but surely a 10-2 result with the jury divided along racial lines would have been worse.

The jury is not perfect. Like all human institutions, it is surely subject to improvement. Rather than passing reactive legislation that undermines the unanimity requirement or the peremptory challenge, however, legislatures should enact a comprehensive statute that preserves the jury's fundamental attributes and regularizes selection procedures. Such a statute could require a juror questionnaire tailored to the facts of individual cases, include a provision for expedited procedures in cases of

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12. See, e.g., ABRAMSON, *supra* note 6, at 181 (reporting that Louisiana and Oregon are the only States that allow felony convictions with less than unanimous jury verdicts.).

13. See Laura Gaston Dooley, *Our Juries, Our Selves: The Power, Perception and Politics of the Civil Jury*, 80 CORNELL L. REV. 325, 325-26 n.3 (1995).

sequestration, and provide for more reasonable compensation and treatment of jurors than they currently receive. The statute might also reduce the number of peremptory challenges on both sides, or even eliminate them completely for the prosecutor who, with a broad general interest in justice, should be willing to abide by the verdict of all the people. These reforms would correct many of the apparent defects in our system without fundamentally altering the nature of the institution itself.

The criminal jury, right or wrong, is one of our most precious and characteristically American institutions. There is nothing like it anywhere else in the world. Like universal suffrage, with its vote for every citizen regardless of class, race, or gender, the interposition of a jury drawn from the community between the accused and the state is fundamental to our kind of democracy.

