

JURY-BASHING AND THE O.J. SIMPSON VERDICT

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From the perspective of public opinion, the biggest loser in the trial of *People v. O.J. Simpson*¹ was not the prosecution. It was not Judge Ito. It was the jury.

A survey recently done in a judicial district in Los Angeles asked respondents to rate the performance of the various participants in the O.J. Simpson trial.² The pool surveyed was very conservative. They identified themselves as 55% Republican; 59% "conservative," and 15% "very conservative."³ When asked whether they agreed or disagreed with the statement that California should make convicted criminals do manual labor in chain-gangs, 74% expressed agreement.⁴

This is how those survey respondents rated the performance of the Simpson trial participants: Judge Ito, 70% good or excellent; Marcia Clark, 79% good or excellent; Johnny Cochran, 58% good or excellent; the jury, 30% good or excellent.⁵

These results demonstrate the perils befalling a jury that follows instructions. Following instructions has always been a perilous venture for a jury. There is an honorable and long tradition of jury-bashing in American history. A dramatic example dates back to 1882 in Cincinnati.⁶ When a young

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1. *People v. O.J. Simpson*, No. BA 097211 (Cal. Super. Ct., L.A. County) (Oct. 3, 1995), available in WESTLAW, Notable Trials Library, OJ-TRANS.

2. See *A Survey of the Citrus Municipal Court District* (Nat'l Demographics Corp., Claremont, California), January 18-19, 1996, at tbls.2-6.

3. See *id.* at tbls.53-54.

4. See *id.* at tbl.34.

5. See *id.* at tbls.2-4, 6.

6. See, e.g., Gerald F. Uelmen, *William Howard Taft, Jury Basher*, LOS ANGELES DAILY J., Nov. 6, 1995, at 4. All the information in this and the following two paragraphs can be found in this article.

stablehand who was put on trial for strangling his boss was found guilty of manslaughter instead of murder, there was a huge demonstration. A large crowd went to the music hall, where the judge of the Superior Court for that county in Ohio exhorted the assembled throng to drive from the community the jury that had returned that unpopular verdict, as well as the defense lawyer who had asked for it. The crowd then went to the jail, where they sought to lynch the defendant. They were driven away and then proceeded to burn down the courthouse. Then occurred a Cincinnati riot in which forty-five people were killed.

A subsequent grand jury investigation looked into the incident, and the grand jury concluded the real fault did not lay with the judge who exhorted the crowd, or with the newspapers that fanned the excitement. The real problem lay with the jury that returned a reprehensible verdict, and with the defense lawyer who argued for it. A young assistant prosecutor then led an unsuccessful effort to get that lawyer disbarred.

Incidentally, the name of that defense lawyer was Tom Campbell, and those riots in Cincinnati were known as the Tom Campbell riots. The young prosecutor who sought to get Tom Campbell disbarred was William Howard Taft, providing a wonderful example of how jury-bashing and criminal defense lawyer-bashing can lay the foundations for a spectacular political career.⁷

It is true that even defense lawyers occasionally join in and bash verdicts they don't agree with. For example, regarding the verdict in the first Menendez trial, Alan Dershowitz said: "What I am criticizing is the foolish juries who fall for the sob stories told by the lawyers."⁸ I myself have fallen prey to this temptation. After the first Rodney King verdict, I wrote, "Apparently, it was easy to convince a jury of white suburbanites to disconnect their eyeballs from their brains and not be satisfied with seeing."⁹

Upon rereading those words, I was reminded of the Latin

7. William Howard Taft served as the youngest Solicitor General in American history, and was appointed Chief Judge of the U.S. Court of Appeals for the Sixth Circuit at the age of 35. After service as Theodore Roosevelt's Secretary of War, he was elected President of the United States in 1908. He also served as Chief Justice of the United States from 1921 to 1930. See 4 ENCYCLOPEDIA OF THE AMERICAN PRESIDENCY, 1427 (Levy & Fisher eds., 1994).

8. ALAN M. DERSHOWITZ, *THE ABUSE EXCUSE* 28 (1994).

9. Gerald F. Uelmen, *Need for Civilian Police Review Revisited*, LOS ANGELES DAILY J., May 15, 1992, at 4.

maxim “verba volant scripta manent”—oral words fly away, but written words remain to haunt you. Some may suggest that I lack standing to protest the bashing that the Simpson jury has taken, because I have engaged in jury-bashing myself. Nonetheless, I feel compelled to respond to some of the less-informed criticism of the Simpson jury.

Recently, in California, we were treated to what has become an annual spectacle, the unveiling of a new initiative measure to cure instantly all of the ills of the criminal justice system. That year’s initiative was called “The Public Safety Protection Act of 1996,” and its chief feature was the abolition of the requirement of unanimity in criminal jury trials.¹⁰ This initiative would have allowed a verdict to be returned by a vote of ten of the twelve jurors, except in death penalty cases. Trotted out as the poster boy, at the press conference announcing this new initiative, was Fred Goldman.¹¹

This was *deja vu* for Californians, because the poster boys for the three-strikes-and-you’re-out initiative were the family of Polly Klaas.¹² The Klaases later opposed the measure, after realizing they were being used to promote a measure that really did not address the problem with which they were concerned.¹³

No one really explained the connection between Fred Goldman and a proposal to abolish unanimity in California jury trials. There also seemed to be little obvious connection to the Simpson trial. The chief criticism of the Simpson jury was that it did not deliberate long enough. If this measure had been in effect, the jury would have reached a verdict in ten minutes instead of four hours¹⁴ because the jury would not even have had to listen to the initial doubts of two of their fellow jurors after the first vote was taken. If we truly value deliberation, then we should seek to encourage jurors to listen to the concerns and doubts expressed by minority jurors, rather than seeking to

10. The Initiative sponsors announced in February, 1996, that they had been unable to collect sufficient signatures to qualify the measure for the ballot. See Cris Arguedas, *CAJ Wins July Battle*, 23 CACJ FORUM 5 (1996).

11. See *Goldman Calls for Changes in Criminal Jury Law*, WASH. POST, Nov. 17, 1995, at A16 (noting Goldman’s support for the proposed initiative). Fred Goldman is the father of Ronald Goldman, who was murdered in 1994 along with O.J. Simpson’s ex-wife. See *id.*

12. Polly Klaas, a twelve-year-old girl, was in 1993 kidnapped from her own home and then killed by a repeat violent felon. See Bill Ainsworth, *Three Strikes Spokesman Has Change of Heart*, LEGAL TIMES, Apr. 4, 1994, at 7.

13. See *id.*

14. See *The Simpson Verdicts: The Case, by the Numbers*, L.A. TIMES, Oct. 4, 1995, at A10.

permit an instant verdict to be filed over the objections of two of the jurors.

The foregoing objection does not mean there was no connection between the Simpson case and this proposal. Indeed, there was a connection, but it was much more subtle. The connection was the growing power of minority jurors and the fear of that power by the white majority. That connection was made the day after the Simpson verdict was announced; it was made in *The Wall Street Journal*, which ran a lead story under the headline: "Color Blinded."¹⁵

The story in question was not overtly a story about the O.J. Simpson verdict, but no one could read it without making the obvious connection. The story reported that race was playing an increasing role in jury verdicts around the country and that this phenomenon fit neatly into a tradition of political activism by U.S. juries.¹⁶ An acquittal rate of 47.6% for black defendants in the Bronx was attributed to the fact that juries there are 80% black.¹⁷ The article concluded that this phenomenon may reflect an increase in "jury nullification" by black juries, reporting: "Some jury nullification advocates now say blacks are justified in using their jury room vote to fight what they perceive as a national crisis: a justice system that is skewed against them by courts, prosecutors, and racist police such as former Los Angeles Detective Mark Fuhrman."¹⁸

However, the verdict in the case of *People v. O.J. Simpson* was not jury nullification. Those who suggest it was simply have not listened to the jurors' explanation of their verdict.¹⁹ Shortly after the verdict, one of the jurors said "she thought O.J. 'probably did it,' but she understood that 'probably' wasn't good enough, that she had to be convinced beyond a reasonable doubt."²⁰ What a wonderful affirmation that a juror could understand so clearly and follow so faithfully the instructions of the court. The verdict was a vindication of the principle that guilt must be proven beyond a reasonable doubt.

15. Benjamin A. Holden, Laurie P. Cohen, & Eleena de Liser, *Color Blinded? Race Seems to Play an Increasing Role in Many Jury Verdicts*, WALL ST. J., Oct. 4, 1995, at A1.

16. *See id.*

17. *See id.*

18. *Id.*

19. *See* AMANDA COOLEY, CARRIE BESS, & MARSHA RUBIN-JACKSON, *MADAM FOREMAN: A RUSH TO JUDGMENT?* (1995).

20. UELMEN, *supra* note *, at 180.

Now, did the racial composition of the jury affect their assessment of reasonable doubt? Of course it did. Every defense lawyer knows that factors such as race, religion, gender, and life experience of the jurors will affect how they assess reasonable doubt, and those factors become especially important when assessing the credibility of police officers. No matter what color a client is, a defense lawyer working on a case involving police perjury will want as many black jurors as possible, and the prosecution will want as many white jurors as possible. That is not jury nullification, it is common sense. Similarly, the verdict of the Simi Valley jurors in the Rodney King beating case was not white jury nullification. It was simply white reasonable doubt.

This argument may lead some to conclude that lawyers should not be allowed to affect the racial composition of juries by means of peremptory challenges—i.e., that we should abolish peremptory challenges. That argument is worth discussing, but it has little to do with the Simpson case. What is frequently overlooked about the Simpson case is that, when both sides stood up and announced that they accepted the jury that had been selected, neither side had exercised all of its peremptory challenges. The prosecution had exercised only ten of its twenty peremptory challenges, although it had used eight of those ten challenges to excuse African-American jurors. The defense had exercised only nine of its twenty peremptory challenges, excusing five whites, one African-American, one Hispanic, and two Native Americans.²¹

The diversity of the Simpson jury had nothing to do with peremptory challenges or with the use of jury consultants, for that matter. It had more to do with where the trial was held. The most vigorous criticism of the Los Angeles County District Attorney in the wake of the verdict attacked his failure to move the trial to Santa Monica or the San Fernando Valley, where the jury would have been less diverse. Interestingly, his predecessor as District Attorney was criticized precisely because he did move the Rodney King case to the Simi Valley. But gerrymandering a trial's location to affect the racial composition is not called "playing a race card" in Los Angeles.

21. See UELMEN, *supra* note *, at 86; see also Andrea Ford & Jim Newton, *12 Simpson Jurors are Sworn In*, LOS ANGELES TIMES, Nov. 4, 1994, at A1.

It is also interesting that *Batson v. Kentucky*²² really has little impact on the prosecutorial use of race as a factor in jury selection, and it will have even less effect after the ruling this Term that the explanation for the prosecutor's peremptory challenge does not even have to be a plausible explanation.²³ Any prosecutor with a little imagination can come up with a race-neutral reason for striking a black juror.

The prize ought to go to the Virginia prosecutor who, asked to explain why he excused an African-American man, explained that it was because the man showed evidence of an undesirable "sympathetic disposition." The evidence was the fact that he was wearing a crucifix around his neck, and the Virginia Supreme Court upheld that as a race-neutral explanation for the exercise of a peremptory challenge.²⁴

Is the solution to all of this simply to abolish peremptory challenges? If we could come up with a uniform and fair system of challenges for cause, an abolition of peremptory challenges would be an improvement. The problem is that most judges apply a ludicrous standard in a challenge for cause. They simply let the jurors themselves be the final arbiter of whether or not they are biased. For example, some judges conduct voir dire examinations by walking into the courtroom and asking, "Are any of you here biased against African-Americans? If you are, would you please raise your hand?"²⁵

In a recent Louisiana Supreme Court decision, the court held that a judge was not required to excuse a juror for cause who had gone to the funeral home to visit the murder victim's body and who was employed as a prison guard, because she assured the trial court of her impartiality.²⁶ In another case, a North Carolina judge allowed a prosecutor to sit on a jury, despite the fact that he worked in the same D.A.'s office as the prosecutor trying the case, because he told the judge he could overcome

22. 476 U.S. 79 (1986) (holding race-based peremptory challenges unconstitutional).

23. See *Purkett v. Elem*, 115 S. Ct. 1769, 1771 (1995) (holding that so long as the proponent of a peremptory challenge can produce a facially valid justification—one that need not be even "minimally persuasive"—the burden returns to the opponent of the strike to show impermissible racial motivation).

24. See *James v. Commonwealth*, 442 S.E.2d 396 (Va. 1994).

25. Personal observation of the author.

26. See *State v. Jones*, 474 So. 2d 919 (La. 1985) (upholding a conviction of first-degree murder and finding no error in trial judge's denial of a challenge for cause of a juror who had viewed the victim's body).

the difficulty of remaining objective.²⁷ If this kind of standard is applied in challenges for cause, peremptory challenges are needed as a safety valve to ensure that biased jurors are actually excused from sitting on juries.

Americans are free to accept or reject the verdict of any jury, and apparently felt no reluctance to do so in the case of *People v. O.J. Simpson*. But disagreement with a verdict rendered in good faith by those who patiently sat and listened to all the evidence does not justify publicly bashing the jurors and accusing them of being racists or ignoramuses. If anything will discourage citizens from responding to a summons to perform their civic duty to serve on juries, it is the prospect of their fellow citizens engaging in the American sport of jury-bashing.

27. See *State v. Scales*, 443 S.E.2d 124 (N.C. Ct. App. 1994) (upholding burglary conviction and finding no error in a trial judge's denial of a challenge for cause of a juror who was a member of the district attorney's staff, because the juror said he would be able to follow the law).

