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The Jury as a Door-Opener to Race in O.J. Simpson's Criminal Trial

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"There is hardly a political question in the United States which does not sooner or later turn into a judicial one."

Alexis de Tocqueville

People vs. Orenthal James Simpson was in many respects a remarkable case. It had all the elements of a "trial of the century": a high-profile defendant, two hideously slaughtered victims, and a "Dream Team" of defense lawyers. But most notably it was to be known as the trial that popularized the term "playing the race card" in a judicial context. Indeed, many, if not most of the spectators felt that the O.J. Simpson case was "all about race"—to use Alexis de Tocqueville's paradigm, it was the case that brought America's race relations into a courtroom and judged upon it.¹⁾

¹⁾ In a 2009 analysis, it was found that out of a sample of ten introductory criminal justice textbooks with publication dates a decade or more after the 1995 trial, all ten texts refer to the case, and race was the factor most extensively discussed. (Six texts stated that race was an important factor in the case, three referred to the case as a possible example of jury

Given the case's status, it is thus no wonder that the body of literature that emerged during and after the trial is truly immense. It does, however, leave to wonder that most of these writings seem to presuppose a certain assessment of the verdict. The debate seems to be based upon the premise that the verdict was wrong, and that O.J. Simpson "got away with it".²⁾ Working from this premise, the literature then seems to fall into two main categories: One side proceeds to argue that this wrongfulness of the verdict was caused by race, while the other claims that the wrongfulness of the verdict is excused thanks to race. Either way, they both agree that the verdict was wrong.

This paper does not side with either opinion. According to the concept of procedural justice which understands justice as a legal reality, O.J. Simpson was legally found not guilty, and since there is no possibility for appeal or retrial, he will remain so for the rest of his life. This is his and America's legal reality. This paper thus does not attempt to evaluate whether he factually committed the crimes or whether the jury was right or wrong in acquitting him. Instead, this

nullification, and two texts cited the case illustrate race as an issue in the jury selection process.) W. J. Pitts, D. Giacomassi, and K.B. Turner, "The Legacy of the O.J. Simpson Trial," *Loyola Journal of Public Interest Law* (Spring 2009), 208.

²⁾ *State vs. Snyder*, 750 So. 2d 832, 864 (La. 1999) This expression was used when the prosecutor of *State v. Snyder* compared his case to that of O.J. Simpson in front of an all-white jury, insinuating that the defense in his case was trying to make them wrongfully acquit a murderer. The case became very controversial, and in 2008 the US Supreme Court found that the prosecutor by referring to O.J. Simpson had been attempting to play on racial bias as part of his trial strategy, causing the Court to conclude that the jury selection conducted by him (and resulting in the all-white jury) was equally race-based. *Snyder vs. Louisiana*, 128 S. Ct. 1203, 1206 (2008).

paper, based upon the legal reality that the trial provides, attempts to shift the focus onto **how** *People vs. Orenthal James Simpson* brought race into the courtroom. As will be seen, at the core of this implementation of race lies America's most fundamental judicial feature—the jury system.

The Jury System

*"The trial by jury, then, is a trial by the country; that is, by the people as distinguished from a trial by the government."*³⁾

Lysander Spooner

Advocates of America's adversary system hail the jury system as the most democratic way of ascertaining justice. Lysander Spooner, in his 1852 treatise, goes as far back as to the Magna Carta in drawing upon the legitimacy and legacy of the jury system.⁴⁾ According to Spooner, the jury system and the entailing right and duty of jury service are an inherent part of democracy. Only a jury drawn from the people can decide what is right and wrong; only a jury drawn from the people will give a trial the legitimacy of being a "trial by the country".⁵⁾ Spooner thus maintains that the jury assures that a conviction will be one that "substantially the whole country would agree to."⁶⁾ Similarly, Tocqueville recognizes in America's jury system "the sovereignty of the people as universal suffrage".⁷⁾ He considers

³⁾ Lysander Spooner, *An Essay on The Trial by Jury* (Champaign, IL: Book Jungle, 2008), 7.

⁴⁾ *Ibid.*, 8.

⁵⁾ *Ibid.*, 9.

⁶⁾ *Ibid.*, 10.

the jury system “a political institution”⁸⁾ that “places the real direction of society in the hands of the governed, [...] instead of leaving it under the authority of the Government”.⁹⁾ Indeed, Tocqueville and Spooner are not alone in their assessment, for most of the jury’s enthusiasts concur in that “the Anglo-American jury is a remarkable political institution,”¹⁰⁾ as for example Lord Justice Devlin, who stated that “[e]ach jury is a little parliament” and “the jury sense is the parliamentary sense.”¹¹⁾

The problem with the jury, however, lies precisely in the fact that it is a “political institution”—a political institution that paradoxically carries the obligation of having to judge upon a matter of right and wrong. The primary duty of the jury is namely to answer the legal question of a defendant’s guilt, a duty that comes before the educational effect or any other subsidiary advantage that the political nature of the jury may entail. However, as it is, the very political nature of the jury hampers with the fair administration of this primary duty. It is thus that critics of the jury system forcefully argue that “if one proceeds by the light of reason, there seems to be a formidable weight of argument against the jury system.”¹²⁾

Politics and political decision-making processes are inherently based upon majoritarianism. The seemingly democratic nature of the

7) Tocqueville, *Democracy in America and Two Essays on America* (London: Penguin, 2003), 318.

8) *Ibid.*, 317.

9) *Ibid.*, 318.

10) Harry Kalven and Hans Zeisel, *The American Jury* (Boston: Little, Brown, and Company, 1966), 3.

11) Devlin, *Trial by Jury*, 164 (1950), quoted through Kalven and Zeisel, 6.

12) Glanville Williams, *The Proof of Guilt: A Study of the English Criminal Trial* (London: Stevens & Sons Limited, 1955), 207.

jury system transforms the judicial process into a political, "democratic" process of establishing the majority will. It is in this sense that Lord Justice Devlin's emphatic praise for the jury as a little parliament is a two-sided coin, for the absolute question of a defendant's guilt or innocence is not one that should or could ever be decided in a parliament. In fact, the very catchwords that are commonly used to defend the jury system are highly suggestive of this paradox. Who defines the "common sense" that the jury system is supposed to introduce in courts? Who are the "ordinary citizens" who are supposed to bring their "reasoned judgment" into deliberations? In answering these questions, it helps to bring to mind that, however much they praised them, Spooner, Tocqueville, and Devlin's juries never knew to incorporate women, who were excluded from mandatory jury service until even the 1970s. In the end, inevitably the "most common" "common sense" will prevail, and the "most ordinary citizens" are those who form the "most common" majority. In other words, the jury system works to transform the question of justice into a question of majority.

But can justice ever be a question to be decided by majority? If the "democratic" jury system should work to impose the majority's understanding of justice upon minorities, what kind of justice can any minority expect? Furthermore, if a trial should indeed be a question of majority, how does America's historical racial division affect this process? The biggest conflict that America has ever known surrounding majority and minority is that of race, most notably "white" and "black". Is it then not possible to argue that the jury system, by promoting justice as a battle of majority against minority, further actively utilizes the element of race in the process of deciding which

majority will prevail? In fact, this is precisely the role that the jury system played in *People vs. Orenthal James Simpson*. The jury system made it possible for race to enter the courtroom; it was the hand that played the race card. As will be seen hereafter, this becomes especially apparent at the pre-trial stages of deciding the venue of the trial, the jury selection process, and the juror dismissals. After the trial proceedings, the jury system further invites racism through the doctrine of jury nullification.

The Venue

The venue of a trial directly affects the makeup of the jury in that it affects the jury pool from which the jurors are to be selected. The jury pool namely is normally chosen according to voter registration lists and driver's license lists. Under ordinary circumstances, criminal trials are held at the district court of the location where the crime occurred. There is however, an exceptional device that enables this location to be moved post facto—a change of venue. Given the fact that a change of venue results in moving the location of a trial, thereby procuring an altogether new jury pool, allegations of possible abuse have been existent for quite some time, making their way even into popular culture.¹³⁾ What then is the relevance of a change of venue in the O.J. Simpson trial, especially with regard to the jury as a door-opener for race?

A change of venue occurs when there is a lot of pre-trial publicity

¹³⁾ A famous example is the best-selling novel by John Grisham, *A Time to Kill* (New York: Wynwood Press, 1989).

in the location where the trial was originally to be held. When many details of a crime are known to the population from which the jury is to be drawn, there is danger that the prospective jury will come into contact with knowledge that might later be inadmissible in trial, or that they will have pre-formed opinions or biases that will affect the defendant's right to a fair, impartial trial. The request for a change of venue belongs thus into the realm of the defendant's rights, and is to be claimed by the defendant, while it is the judge's discretion to grant a change and to relocate the trial. In the trial of the police officers who beat up Rodney King, for instance, the defense lawyers argued that the exposure of the video tapes and the negative media reaction had biased the prospective pool of jurors, thereby necessitating a change of venue. The judge assented, and the trial was relocated from the racially diverse downtown Los Angeles to a predominantly white suburb, where especially a great number of retired former police officers resided.¹⁴⁾ In this neighbourhood, an almost all-white jury finally acquitted Rodney King's assailants.¹⁵⁾

Given the status of O.J. Simpson and the immediate publicity that the murder of his former wife caused, it can be easily assumed that any publicity and possibility of bias must have been just as high as in the Rodney King beatings, if not higher. Why is it then that the lawyers of the policemen chose to relocate the trial, whereas the defense team of O.J. Simpson waived this right? Both cases occurred in Los Angeles, both cases involved victims and defendants of a different race, and in both cases the jury was originally to be drawn

¹⁴⁾ Jewelle Taylor Gibbs, *Race and Justice: Rodney King and O.J. Simpson in a House Divided* (San Francisco: Jossey-Bass, 1996), 49.

¹⁵⁾ *Ibid.*, 49.

from racially diverse downtown Los Angeles. But in the Rodney King trial, the policemen were white, whereas O.J. Simpson was black. While in both cases, publicity could not have been any higher, it seems that Simpson's defense lawyers weighed non-bias against race—and chose the latter. The racial makeup of the population in the present venue was diverse enough to provide for an equally diverse makeup in the jury, which explains why the defense would not have wanted to forfeit this favourable surrounding. It is thus that Marcia Clark and her prosecution team were “stuck” in a location that was unfavourable to them¹⁶⁾, while Robert Shapiro, despite the great publicity of the case in Los Angeles, never even once considered the possibility of asking for a change of venue, with his colleague Alan Dershowitz strongly affirming that “we [do] not want a change of venue.”¹⁷⁾

It therefore seems that the device of asking for a change of venue in effect relates more to an attempt to manipulate the jury's racial makeup rather than to prevent or stifle bias and publicity. At least in the above-mentioned two cases, the decision of the defense to either request a change of venue or to waive this right seems to have been a crucial factor in deciding the racial makeup of the jury, and conclusively the final outcome of the case. Thus, the location of the trial, which affects the jury, seems to be yet another “race card” to be played in trial.

¹⁶⁾ Ibid., 152.

¹⁷⁾ Shapiro, *The Search for Justice* (New York, NY: Warner Books, 1996), 184.

The Jury Consultants

Comparisons between the O.J. Simpson trial and the Rodney King trial are not limited to the process of choosing the location of the trial. From among the many similarities and singularities of these two cases, there is one factor that has been repeatedly cited as showing the significance of jury selection in America's legal system. More specifically, both cases are widely discussed when it comes to the subject of scientific jury selection, as in both cases scientific "jury consultants" were used.

Scientific jury selection refers to jury selection that is scientifically monitored by "jury consultants" who, through the means of statistical data, try to define the most favourable jurors for a certain case. Nowadays conducted by major firms of experts, scientific jury selection has become a "full-scale industry"¹⁸⁾, and as such can be quite a costly enterprise. In criminal cases, the researchers, analysts and sociologists are thus usually hired by defendants who can afford this costly scientific experiment, whereas it is usually very difficult for the prosecution to procure the help of jury consultants. The Rodney King trial is exemplary of such an instance, as only the defendants' lawyers are known to have been able to employ the help of scientific jury selection, which would in light of the verdict spawn a controversial debate about jury consultants: Is it truly possible to predict and precondition verdicts by means of scientific jury selection? Is scientific jury selection as effective as it claims to be? And if it is, does this signify that America's jury system is prone to be

¹⁸⁾ Joel Lieberman and Bruce Sales, *Scientific Jury Selection* (Washington, DC: American Psychological Association, 2007), 3.

manipulated and racially abused?

This debate was to be continued in the O.J. Simpson trial. The O.J. Simpson trial offers a unique situation because during at least the beginning of juror selection, both the defense and the prosecution were aided by jury consultants. This was made possible by the fact that Vinson, a major jury consulting firm, offered to assist the prosecution pro bono. Thus experts on both sides analyzed the case as well as the litigation strategies of all the involved attorneys, conducting mock trials with simulated jurors and further attending jury selection. It is interesting that from the beginning, the conclusion of both firms were basically concurrent: The decision of the jurors would be overwhelmingly split according to their race. Most notably, both Vinson and Dimitrius, the defense's selection consultant firm, found that African-American women would be most supportive of O.J. Simpson. It was also this group that was deemed to be most negatively impressed by lead prosecutor Marcia Clark's litigation style.¹⁹⁾

In contrast to the agreement between the consulting firms, the prosecution and defense went markedly different ways. The prosecution, especially Marcia Clark, had already lined out that their approach to the murders would focus on the dysfunctional marriage between O.J. Simpson and Nichole Brown; it would also depict O.J. Simpson as a battering husband. The consulting firms strongly discouraged from this approach, as their results showed that African-American women often felt ambivalent towards depictions of African-American males as battering men.²⁰⁾ However, Marcia Clark

¹⁹⁾ Alschuler, Albert W., *How to win the Trial of the Century: The Ethics of Lord Brougham and the O.J. Simpson Defense Team*, McGeorge Law Review (Spring 1998), 312.

²⁰⁾ Lieberman, Joel D., Sales, Bruce D., *Scientific Jury Selection*, 8.

still asserted that female jurors would not only bond with her as a woman, but that they would further be sympathetic towards the victims and feel strongly about spousal abuse. On these grounds, she then soon dismissed the consulting firm, making head defense lawyer Robert Shapiro note that "Vinson was in the courtroom for only a couple of hours; after that, we didn't see him again".²¹⁾ It is difficult to understand on what reasons she grounded her belief, but Shapiro, himself formerly a district attorney, assumes that professional pride and the feeling of "I don't need anybody to tell me how to pick a jury" played a big role in her decision.²²⁾ This is in stark contrast with the way that the defense team deferred to their consulting firm's judgment. In fact, in a press conference after their victory, the defense team credited much of their success to Dimitrius's assistance.²³⁾

As a result of the defense's deference, and the prosecution's dismissal of the jury consultants, the resulting jury was predominantly black—and predominantly female, making it the very jury that both firms had claimed would be most harmful to the prosecution. And indeed, the jury, against all odds, found in favour of the defense.

What then does this tell us? Though the effectiveness of scientific jury selection is too complicated a subject to be judged by only one case, there is a high possibility that at least with regard to O.J. Simpson, scientific jury selection played a major role in deciding the final outcome. It is indeed controversial that the factors pinpointed by the consultants were race and gender. It is even more controversial that this statistically researched racial gap was completely incorporated,

²¹⁾ Shapiro, *The Search for Justice*, 117, 175.

²²⁾ *Ibid.*, 117.

²³⁾ Lieberman, Joel D., Sales, Bruce D., *Scientific Jury Selection*, 7.

even actively employed, into building a jury that was racially inclined to acquit.

The Juror Dismissals

From another legal point of view, *People vs. Orenthal James Simpson* was a record-breaking case in that it reached the unprecedented number of having 10 jurors out of the original 12 dismissed. This excessive use of juror dismissal, which resulted in revamping the jury until only two members of the original jury were part of the jury that reached the verdict, is even more controversial given the limited significance that juror dismissal is usually giving during the course of a trial.

Juror dismissal is a relatively undeveloped field, both as regards case law, as well as theory. Though by no means an extraordinary procedure, it rarely occurs to such a degree as in the O.J. Simpson case. Normally, reasons cited for juror dismissal are medical emergencies, mental diseases, or other very exceptional circumstances that prevent said juror from continuing his or her duty. How then did it happen that O.J. Simpson reached the record of having approximately one juror dismissed every three weeks? Furthermore, how did this affect the trial, and more importantly, what does this say about America's racial relations?

As stated above, the jury began with a set-up of eight women and four men, out of whom eight were African-American, one was Hispanic, one white, and one of mixed race (Native American and white). After ten of these original jurors were dismissed, the final jury was made up of ten women and two men, of which nine were African-American,

one Hispanic, and two white.²⁴⁾

Among the ten dismissals, the majority occurred on grounds of claims that the jurors in question were preparing books to be published after the trial.²⁵⁾ Many of the hints came from unidentified outside sources, which made defense lawyer Shapiro at one point question and doubt the validity of the dismissals. His doubt is indeed justified; to use Shapiro's words "[w]ith the jury sequestered, their names a tightly guarded secret, how could these anonymous tips keep coming in about their conduct of their history, some of it going back many, many years?"²⁶⁾ Though the defense then requested an evidentiary hearing demanding the judge to reveal how the anonymous complaints were being forwarded to the judge and by whom, this hearing was denied.

In light of the surrounding secrecy, it is interesting to note that most of the dismissed jurors pointed at racial tension and conflicts when they were approached by the press. For instance, juror Jeannette Harris, an African-American woman who was the sixth juror to be dismissed because she "allegedly" had once been "shoved by her husband"²⁷⁾, was replaced by Brenda Moran who became the foreman of the jury. Harris, in addition to vehemently denying any history of abuse²⁸⁾, reported that there was a split in the jury caused by "problems in the ethnic makeup of the group"²⁹⁾ which was further

²⁴⁾ Shapiro, *The Search for Justice*, 286.

²⁵⁾ Gibbs, *race and justice: Rodney King and O.J. Simpson in a House Divided*, 152.

²⁶⁾ Shapiro, *The Search for Justice*, 245, 253, 257. 284.

²⁷⁾ *Ibid.*, 257.

²⁸⁾ "Dismissed Juror Jeanette Harris says Simpson Trial will result in Hung Jury," *Jet*, April 24, 1995, 34.

²⁹⁾ *Ibid.*, 33.

promoted by the racial tension surrounding the guards, who were being unkind to black jurors and showing favor to the white ones.³⁰⁾ This allegation was further consolidated by the complaint of Tracy Hampton, another African-American juror, who claimed that three of the sheriff's deputies were giving preferential treatment to white jurors.³¹⁾ This resulted in a replacement of said deputies. Interestingly, approximately one week later, Tracy Hampton herself was dismissed from the jury. Unlike Harris, Hampton declined all interviews with the statement that she simply could not take it anymore. Her dismissal is understood to have been due to her fragile emotional state.³²⁾

But what caused this stress? Was it not the ever escalating racial tension among the jurors? Willie Cravin, another African-American who became the eighth juror to be dismissed, agreed with Harris that there were tensions among the panel members that allegedly flared over the conditions of their confinement, including use of facilities and communal decisions.³³⁾ In fact, Cravin himself was dismissed due to allegations that he was bullying the other jurors and acting as "the king of the video control".³⁴⁾ He denied these claims and argued that he had been targeted due to his race. Yet another African-American former juror called Michael Knox, who also had been dismissed due to allegations of having been negotiating for a book³⁵⁾, claimed that Cravin's greatest problem lay in his refusal to

30) Boyarski, Bill, "The O.j. Simpson Murder Trial Juror's Dismissal Sparks Media Frenzy," *The LA Times*, May 2, 1995

31) Shapiro, *The Search for Justice*, 265.

32) *Ibid.*, 267.

33) Margolick, Dave, "Former Simpson Juror sees weak State Case," *The New York Times*, June 7, 1995.

34) Shapiro, *The Search for Justice*, 286.

cooperate with jurors of a different race. He stated that Cravin and Harris infrequently talked with the other black jurors and almost not at all with the white and Hispanic members.³⁶⁾

It has to be noted that all of these post-dismissal statements concur in citing racial tension and conflict among the jurors as the main problem. Interestingly, none of the many allegations that the dismissed jurors were preparing publication deals seem to have been warranted; in fact, the only book that was ever published was "Madam Foreman" by the jurors who actually stayed on the panel until the verdict was reached. These increasing doubts surrounding the juror dismissals and the secrecy that the judge applied not only spawned the defense's formal claim that the "prosecutors have selectively targeted certain jurors for dismissal," but they further culminated in a motion filed by the American Civil Liberties Union requesting Judge Ito to publish the dismissal records.³⁷⁾ Unfortunately the motion was dismissed, and the dismissal transcripts remain sealed even today.

However, considering the repeated assertion of racial tension and the various claims that racial targeting affected juror dismissal, there undeniably remains a suspicion that the unprecedented use of juror dismissal was meant to affect the racial make-up of the jury. It seems that juror dismissal in the O.J. Simpson case opened yet another door for race to make it into the courtroom.

³⁵⁾ Ibid., 245.

³⁶⁾ Margolick, Dave, "Former Simpson Juror."

³⁷⁾ Weinstein, Henry, "The O.J. Simpson Murder Trial: ACLU Seeks Release of Jury Dismissal Records, Courts: Media groups join in asking Ito to unseal transcripts of closed hearings that have led to ousters," *The LA Times*, June 14, 1995.

Jury Nullification

Once the jury has been chosen and the trial begins, the jury is withdrawn from any public disclosure. The jurors are strictly sequestered, and except for extraordinary circumstances such as the aforementioned juror dismissals, they do not enter the limelight until the actual trial proceedings are over. While lawyers and prosecutors are often available for press conferences and interviews as the trial proceeds, jurors do not enter the field of public scrutiny until they reemerge with a verdict. This secrecy is meant to protect the jury's independence, and in ordinary cases, the veil of silence continues even thereafter. However, when a certain case attracts a high level of public attraction, jurors will soon find themselves surrounded by media hordes asking for the reasons behind their verdict. It is needless to say that this was the case in O.J. Simpson.³⁸⁾

Still, O.J. Simpson presents a rather unique situation, because this public desire to enquire into the motives behind the verdict was not solely motivated by curiosity or interest in the case. Instead, one of the many underlying reasons for this heightened demand lies in yet another feature of America's jury system, namely the possibility of jury nullification.

Jury nullification is known as the factual power of a jury to ignore the legal assessment of a case and to reach a verdict that nullifies the law when the jury believes that to do otherwise would be unjust. Though this "ancient and much-maligned phenomenon"³⁹⁾ has been

³⁸⁾ Boyer E., Woo E., "Case Had Many Holes, Juror Says - Panel: Group agreed with forensic expert Lee that there was 'something wrong' with prosecution's evidence, he reports. Opportunities for contamination are cited," *The LA Times*, October 4, 1995

the cause of much criticism and debate for as much as 800 years,⁴⁰⁾ it is impossible to deny that, as of now, jury nullification is one of the options available to any American jury. Especially in criminal cases that involve jury nullification in the form of acquittal, double jeopardy removes any possibility for appeal, and the jury's de facto power to nullify stands unchallenged. O.J. Simpson's acquittal precisely falls into this scenario, and much of the dispute has been concerned with whether the verdict constitutes jury nullification or not.

Interestingly, the voices involved in this dispute are again split along racial lines. According to a 1995 Gallup Poll, 49% of the white interviewees from the survey sample believed that the verdict was wrong, while 78% of the black interviewees believed that the verdict was right and only 10% thought that it was wrong.⁴¹⁾ In another survey conducted 9 years later, 87% of the white individuals believed that Simpson was guilty while 70% of the black individuals maintained that he was not.⁴²⁾

The jury nullification argument is further argued on the basis that the nullification was racially motivated. According to the CNN/USA Today survey, 34% of the interviewees stated that the verdict was determined by racial issues, and another 38% believed that such issues had been considered by the jury. Similarly, prosecutors Marcia

39) "Recent Case: Criminal Law--Jury Nullification--Second Circuit holds that juror's intent to nullify is just cause for dismissal.--United States v. Thomas, 116 F.3D 606 (2D CIR. 1997)," *Harvard Law Review*, March 1998.

40) Conrad, Clay S., *Jury Nullification: The Evolution of a Doctrine*, p.8.

41) Interviews with 639 adult Americans, conducted October 3, 1995 - *The O. J. Simpson Trial: Opinion Polls-1995 Gallup-CNN*, <http://www.law.umkc.edu/faculty/projects/ftrials/Simpson/polls.html>

42) "10 years after Simpson verdict: Issue of race still figures prominently in public opinion," NBC News Poll, http://www.msnbc.msn.com/id/5139346/ns/datetime_nbc

Clark and Christopher Darden, as well as district attorney Gil Garcetti, chastised the jury for its decision, claiming that the jury had used racially based jury nullification to make the case into a "race case".⁴³⁾

In contrast, many black commentators point at the statements of jurors like Brenda Moran, Lionel Cryer, Anise Aschenbach and Gina Rhodes Rossborough, which cite a lack of evidence and police misconduct to argue that the jury was not nullifying, but rightly acquitting Simpson.⁴⁴⁾ In fact, in the aftermath of the Simpson verdict, commentators like law professor Paul Butler even went so far as to argue that racially based jury nullification should be encouraged as a means to "dismantle the master's house with the master's tools" and thereby to attain black power in America's justice system.⁴⁵⁾ Though he has met with considerable criticism, Butler still maintains that in light of America's race relations, jurors have a right to nullify and refuse to cooperate with a legal system that oppresses black people.

It has been stated in the outset that this paper will not focus on making an assessment of O.J. Simpson's guilt or innocence. Whether the jurors in O.J. Simpson did indeed nullify, and, if they did,

⁴³⁾ Quoted in Butler, Paul, "(Color) Blind Faith: The Tragedy of Race, Crime, and the Law," *Harvard Law Review* (March, 1998), footnote 69; Perry, Tony, "The Simpson Verdicts: Snubbing the Law to Vote on Conscience - History: If Simpson's acquittal was a message about racism, panelists exercised a controversial American legal tradition: jury nullification," *The LA Times*, October 5, 1995

⁴⁴⁾ Boyer, E. and Woo, E, "Case Had Many Holes, Juror Says"; Pool, Bob and Pyle, Amy, "Case Was Weak, Race Not Factor, Two Jurors Say," *The LA Times*, October 5, 1995

⁴⁵⁾ Butler, Paul, "Racially Based Jury Nullification: Black Power in the Criminal Justice System," *Yale Law Journal* (December 1995), 680.

whether the nullification was based on race is irrelevant for the present purpose. Instead, here it is necessary to highlight the fact that much of the dispute concerning the verdict and any possibility of racism is made possible by the jury system. Although in civil law countries, judges always must submit the reasons for reaching their verdicts in written form, the American jury is not imposed with any such obligation. With a veil of secrecy protecting the jury and the power of jury nullification granted, it is in fact not surprising that the jury system is causing spectators to keep questioning juries' judgment, and more importantly, their racial motivations.

Conclusion

"The surface of American society is covered with a layer of democratic paint, but from time to time one can see the old aristocratic colours breaking through."

Alexis de Tocqueville

German sociologist Max Weber once described the jury system as a "rustic irrationality of decision making"⁴⁶⁾, while the distinguished English legal scholar Glanville Williams chose to describe it as "a group of 12 people of average ignorance," who may "not be quite unusually ignorant, credulous, slow-witted, narrow-minded, biased or temperamental," since this, he claimed, was "inherent in the notion of a jury as a body chosen from the general population at random".⁴⁷⁾

⁴⁶⁾ "In der Form der *jury* ragt also die urwuechsige Irrationalitaet der Entscheidungsmittel [...]," Weber, Max, *Rechtssoziologie*, 184.

Since this is not the occasion to go into a detailed analysis of the shortcomings or disadvantages of the jury system, it suffices to say that indeed, there are aspects of the jury system which indicate that it is not necessarily a rational decision-making tool in the search for justice. The jury as a political organ is governed by the principle of majority will, but the majority will is not always going to concur with the question of justice, most notably, the question of a defendant's guilt or innocence.

The jury in O.J. Simpson's criminal trial was like any other jury in America in that it attempted to introduce a democratic element into the courtroom, but in the course of doing so instead permitted race to become a deciding factor in the search for "the majority's justice". In the end, O.J. Simpson's trial seems to demonstrate that America's jury system is not so much an institution that assures democracy in the courtroom, but rather one that promotes strife among majorities and minorities, and ultimately between white and black.

⁴⁷⁾ Williams, Glanville, *The Proof of Guilt*, 207-208.

WORKS CITED

- "10 years after Simpson verdict: Issue of Race Still Figures Prominently in Public Opinion." NBC News Poll,
http://www.msnbc.msn.com/id/5139346/ns/datetime_nbc.
- Alschuler, Albert. "How to Win the Trial of the Century: The Ethics of Lord Brougham and the O.J. Simpson Defense Team." *McGeorge Law Review* (Spring 1998): 291-321
- Boyarski, Bill. "The O.J. Simpson Murder Trial Juror's Dismissal Sparks Media Frenzy." *The LA Times*, May 2, 1995.
- Boyer, E. and Woo, E. "Case Had Many Holes, Juror Says." *The LA Times*, October 4, 1995.
- Butler, Paul. "(Color) Blind Faith: The Tragedy of Race, Crime, and the Law." *Harvard Law Review* (March, 1998): 1270-1288
- _____, "Racially Based Jury Nullification: Black Power in the Criminal Justice System." *Yale Law Journal* (December, 1995): 677-725
- Conrad, Clay. *Jury Nullification: The Evolution of a Doctrine*. Durham, N.C.: Carolina Academic Press, 1988.
- "Dismissed Juror Jeanette Harris says Simpson Trial will result in Hung Jury." *Jet*, April 24, 1995.
- Gibbs, Jewelle Taylor. *Race and Justice: Rodney King and O.J. Simpson in a House Divided*. San Francisco: Jossey-Bass, 1996
- Kalven, Harry and Hans Zeisel. *The American Jury*. Boston: Little, Brown and Company, 1966.
- Lieberman, Joel and Bruce Dennis Sales. *Scientific Jury Selection*. Washington, DC: American Psychological Association, 2007.
- Margolick, Dave. "Former Simpson Juror sees weak State Case." *The New York Times*, June 7, 1995.
- Perry, Tony. "The Simpson Verdicts: Snubbing the Law to Vote on Conscience." *The LA Times*, October 5, 1995.
- Pitts, W.J., D. Giacomassi, and K.B. Turner. "The Legacy of the O.J. Simpson Trial." *Loyola Journal of Public Interest Law* (Spring, 2009): 199-216

- Pool, Bob and Amy Pyle. "Case Was Weak, Race Not Factor, Two Jurors Say." *The LA Times*, October 5, 1995.
- "Recent Case: Criminal Law—Jury Nullification—Second Circuit holds that juror's intent to nullify is just cause for dismissal.—United States v. Thomas, 116 F.3D 606 (2D CIR. 1997)." *Harvard Law Review* (March 1998): 1347–1351
- Shapiro, Robert. *The Search for Justice*. New York, NY: Warner Books, 1996.
- Spooner, Lysander. *An Essay on The Trial by Jury*. Champaign, IL: Book Jungle, 2008.
- "The O. J. Simpson Trial: Opinion Polls—1995 Gallup—CNN."
<http://www.law.umkc.edu/faculty/projects/ftrials/Simpson/polls.html>
- Tocqueville, Alexis de. *Democracy in America and Two Essays on America*. Translated by by Gerald Bevan. London: Penguin Books, 2003.
- Weber, Max. *Rechtsoziologie*. Neuwied: Hermann Luchterland Verlag, 1960.
- Weinstein, Henry. "The O.J. Simpson Murder Trial: ACLU Seeks Release of Jury Dismissal Records." *The LA Times*, June 14, 1995.
- Williams, Glanville. *The Proof of Guilt: A Study of the English Criminal Trial*. London: Stevens & Sons Limited, 1955.
- Zweigert, Konrad und Koetz, Hein. *Einfuehrung in die Rechtsvergleichung*. Tuebingen: J.C.B. Mohr (Paul Siebeck), 1984.

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Abstract

**The Jury as a Door-Opener to Race in O.J.
Simpson's Criminal Trial**

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The purpose of this paper is to analyze O.J. Simpson's criminal trial to provide an understanding of how America's jury system works to introduce race-relations in court. The focus thus lies on how the jury system worked to shift a question of guilt and innocence into a question that inevitably included a racial aspect.

In a review of the jury as a political organ, the paper attempts to point out that the workings of America's jury, unlike those of judge-made law, include a decision-making process that is more politically influenced than judicially shaped. Especially highlighted is the fact that the jury serves to decide upon the majority will concerning a defendant's guilt, but that in doing so, the differences among by America's racial majorities and minorities are inevitably called into question. This is further exemplified at the stage of deciding the venue of the trial, the jury selection process, and the juror dismissals.

At the stage of relocating the venue of the trial, O.J. Simpson's lawyers decided to waive their right to a change of venue. This is contrasted with the case of Rodney King and explained by the fact that the venue directly relates to the racial build-up of the jury. Similarly, the jury selection process further is analyzed to indicate that the jury system is expressly being used as a tool to introduce race. Lastly, the frequent dismissals that occurred during the O.J. Simpson trial are further interpreted to relate to racial interests.

Key Words

Jury System, O.J. Simpson, Racism, Judicial Process, Change of Venue, Jury Selection, Juror Dismissal