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O.J. as litmus test

By Harvey A. Silverglate SPECIAL TO THE NATIONAL LAW JOURNAL

THAT EPOCHAL cultural event of the 20th century—the O.J. Simpson case—is still with us, exercising influence over a legal system that has not yet recovered from its polarizing trauma.

The case now threatens to metamorphose, it would seem, into a device for evading the U.S. Supreme Court's command that lawyers not use race as a ground for exercising peremptory jury challenges. Appellate opinions in Texas and in Alabama demonstrate how this is happening.

The attorney for Roy N. Shelling Jr., accused of murder in Texas, objected when the prosecutor posed a question on voir dire, asking veniremen whether they believed the Simpson verdict to have been right or wrong. Defense counsel viewed the question as the prosecutor's disguised way of bouncing black veniremen from the jury. He argued that case was racially polarizing, with most blacks believing the Simpson jury's verdict correct, and most whites thinking a guilty man had gotten away with murder.

In the landmark case of *Batson v. Kentucky*, 476 U.S. 79 (1986), the Supreme Court prohibited the intentional racial manipulation of the makeup of juries by the racially motivated use of peremptory challenges. Because, traditionally, such challenges could be exercised for virtually any instinctual or other reason by an advocate for either side, the court provided a procedure whereby an aggrieved party's counsel could challenge the use of a peremptory that, on its face, appeared to suggest racial motivation. The burden would then shift to the lawyer exercising the challenge to justify it with a race-neutral reason.

A distinct challenge

The prosecutor's use of the O.J. question presented a distinct challenge to the utility of the entire *Batson* doctrine. The prosecutor in *Shelling v. State*, 52 S.W.3d 213 (Texas App., Houston (1st Dist.)) (2001), sought to justify his challenges, which served (either incidentally or intentionally, depending on which side you believe) to eliminate every African-American venireman in the group.

The prosecutor's explanation was that anyone who would not have convicted Simpson despite the "overwhelming" scientific and circumstantial evidence was someone whom he did not want on his jury. Because the Shelling case had some thematic similarities to the Simpson case—the defendant, a jealous husband, was accused of murdering his estranged wife's paramour—the prosecutor arguably was trying to avoid a strain of jury nullification from infecting his jury.

The Court of Appeals majority concluded that although the prosecutor "may" have acted "improperly" by using the Simpson case as a litmus test to ferret out nullifiers, he was not "racially motivated" since he would have, and in two instances did, strike white jurors

who agreed with the Simpson verdict.

A dissenting judge, however, pointed out that the victim, all the witnesses and the defendant were black. The prosecutor did not bother to ask any of the African-American veniremen why they believed the Simpson verdict correct, or to inquire into their thought processes or analysis. Mere sympathy for or agreement with the Simpson verdict was enough to draw a challenge.

The dissent was willing to concede that the Simpson verdict may have been racially motivated, but he concluded, "if the Simpson verdict was racial, then the prosecutor's reasoning for exercising his strikes in the present case also must be racial."

The Simpson case revealed, and continues to reveal, deep racial fault lines in American society. Even if that case was an example, as some have suggested, of the police seeking to frame a guilty defendant, the issue of how blacks and whites responded—some for acquittal of an obviously guilty defendant, others for conviction

even in the face of serious police misconduct—remains a highly contentious and perhaps revealing one.

The question posed by *Shelling* is whether an advocate's use of the attitudes of veniremen toward the Simpson verdict is a legitimate tool to ferret out potential jury nullification or an illegitimate tool to eliminate jurors along racial lines.

More courts are likely going to have to deal with the issue. *Shelling*, in fact, was not the first time the question arose. The Alabama Supreme Court made a similar decision in *Carroll v. State*, 701 S.2d 47 (1997), in which the voir dire question sought the veniremen's views as to whether the evidence in Simpson had been "tampered with or planted by the police officers."

The prosecutor struck the three blacks and one white who responded in the affirmative. A unanimous state high court found racial neutrality. ■

Legitimate tool or 'Batson' dodge?

■ LAW AND LAUGHTER



"I've decided to stay home all day and w

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