

PODIUM

Simpson Jury Sends a Subtle Message on Race

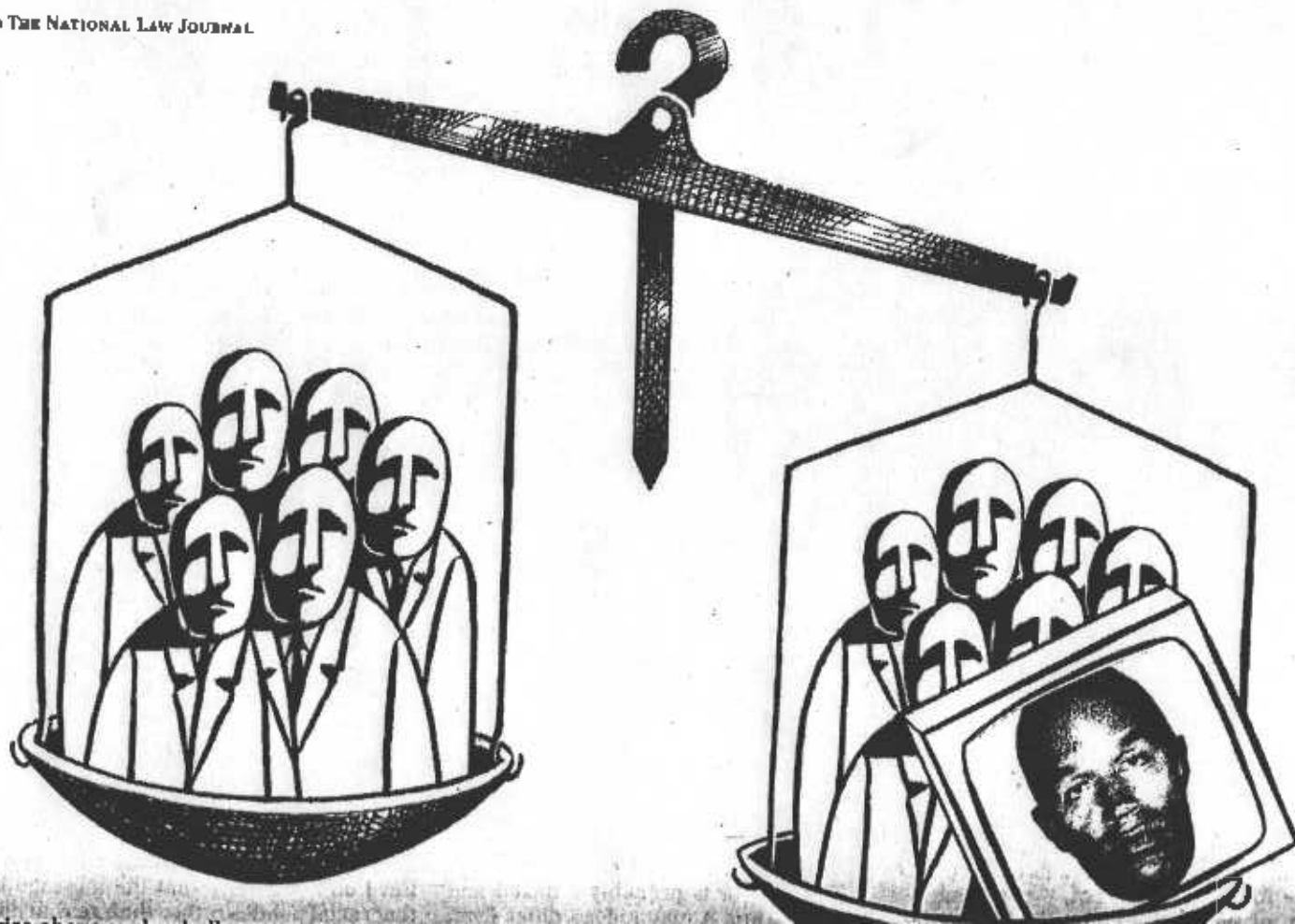
By *Havey A. Silverglate* SPECIAL TO THE NATIONAL LAW JOURNAL

MUCH—PERHAPS MOST—of what has been written and said about the acquittal of O.J. Simpson is either errant nonsense or hypocritical blather. Many of those attacking the verdict as a product of “racial politics” rather than reason and evidence are themselves guilty of making assumptions not based on the evidence. Those celebrating Mr. Simpson’s victory as if they were cheering the result of a sporting event, claiming there was “no case” without knowing the evidence, are equally guilty. Those using the occasion to attack the jury system are perhaps the most cynical of all.

Having refrained from writing or commenting about the case at all until now—for one thing, the case seemed to be an atypical Hollywood-style parody of a judicial production shamefully abetted by most of the participants (including the judge)—the time seems ripe for trying to put the events, and the widely unexpected verdict, into some reality-based perspective.

Overwhelming Number

When pre-verdict polls indicated that the overwhelming number of black citizens thought Mr. Simpson innocent (or at least felt that he should be acquitted) while a like percentage of whites felt to the contrary, it perhaps should have



been predictable that the jury—consisting of nine blacks, two whites and one Hispanic—would acquit. I admit, however, that despite these polling statistics, I did not predict an acquittal.

The reason for this was my own experience as a criminal defense lawyer for 27 years, plus my own recent service as a juror in a federal civil rights "police brutality" case in Boston. These experiences have taught me that jury dynamics are far more complex—and uplifting—than the pollsters imagine.

They have also convinced me that while the public is quick to jump to conclusions and to take sides according to their group identity, jurors frequently

Mr. Silverglate, of Boston's Silverglate and Good, is a regular NLJ columnist.

Any criminal trial lawyer, prosecution as well as defense, has many stories to tell about jurors who overcome group identity and really "do the right thing" by rendering a verdict dictated by the evidence rather than by bias. We are all familiar as well with the occasional jury that has engaged in "jury nullification" and acquitted an obviously guilty defendant because the jury, representing the conscience of the community, found the prosecution morally intolerable. (There were many such acquittals of young men who refused induction into the armed forces during the Vietnam War, which, for better or for worse, sent a message to the government that the hawks found repulsive but which nonetheless represented direct democracy in action).

There is an occasional "nullification"

acquittal today in cases such as marijuana possession prosecutions, or homicides where a battered wife kills her batterer, or where government regulators' zeal exceeds fairness or common sense.

In such instances, nullification shows that the system is working precisely as it is supposed to, rather than evidence that the system of justice, and the nation along with it, are falling apart. Interestingly, however, even in cases in which it is clear that the jurors wanted to nullify the law, they felt comfortable doing so only when they could find some ground for "reasonable doubt."

In the case on which I served as a juror, I found my fellow jurors to be as forthright, rational, conscientious and

possessed of civic virtue as any citizens I'd ever observed in any public or private endeavor. Indeed, despite my own deep-seated skepticism toward police because of my repeated exposure for 27 years to mistreatment of citizens and false testimony, I joined my fellow jurors in voting to absolve the accused officer.

Matter of Race?

However, many claim that the Simpson verdict challenges any such optimism, saying it is a blatant example of "racial politics." The term racial politics connotes an admittedly growing and increasingly disturbing phenomenon in the nation today, whereby people and institutions take positions and actions dictated not by any inherent logic or merit, but rather by a judgment as to which ethnic or racial group would and should benefit. (Even the concept of "benefit" is controversial, since there is considerable reason to doubt that giving an unfair benefit to an individual or group on the basis of race or ethnicity is, over the long run, truly a favor.)

We are all familiar with the phenomenon of public opinion polls taken immediately after a person is indicted in which people in the defendant's racial, ethnic, sex, sexual preference or other identifiable group opine as to guilt or innocence even before the first piece of reliable evidence is presented. I am often hit with the dismaying feeling that the question that should be (and effectively has been) asked in such polls is not, "Do you believe that the defendant committed the crime, and why?" but rather, "Do you think that the black or the white should win?" or "the man or the woman?" Whereas Sgt. Friday of the old "Dragnet" television series used to ask witness for "just the facts, Ma'am," many are prone today to ascertain little other than the group to which a person belongs (or into which he or she can be pigeonholed).

The prevalence of racial politics is an undeniable and sad reality in many

Both Sides Helped To Raise Doubts

By Cheryl Flandaca SPECIAL TO THE NATIONAL LAW JOURNAL

THE DEFENSE TEAM NEVER actually had to defend O.J. Simpson. The prosecution did the job for them.

The tone was established at the outset, when the prosecution fell into the trap of responding to early sniping from the other side. The prosecutors had their hands full, what with defending the perceived blunders of the criminalist, police officers, lab technicians, scientists—even the coroner.

In many instances, the end result of their efforts was to legitimize many of the trial-balloon theories that had been floated by the defense in its opening statement. Why, for instance, did the prosecutors ask their own witnesses if the murders could have been the work of a drug cartel? Why did they suggest through police investigators that there

would not have been time to conspire or to plant evidence? Why even take those suggestions that seriously? The effect was to intimate to the jury that they were real issues—the prosecution helped to endorse reasonable doubt.

Let's face it, the defense team approach was not a pretty one, but it was effective. From the beginning the defense had the prosecution on the run, had the state responding instead of attacking and losing parts of its case in the flight.

The one clear thing about the defense case was its lack of clarity. It wasn't clear-cut. Johnnie L. Cochran Jr. promised to put on witnesses he wouldn't and couldn't deliver (Rose Lopez, whose testimony—outside the hearing of the jury—was so inconsistent it was never used); he spun theories that didn't pan out (that Nicole Brown Simpson's friend and sometime houseguest Faye Resnick owed money to drug dealers because of her cocaine habit). He opened entire avenues never revisited because their rele-

vance couldn't be established.

Then, when the Dream Team finally got up to bat, its lawyers simply ignored their own prognostications and constructed a whole new defense approach. In this they were greatly helped by the prosecution's lack of initiative. Having spent precious time fending off blows, the prosecution had made it possible for the defense to lead the way, capitalizing on prosecution mistakes and creating new scenarios for the jury to consider.

The defining moment of the trial had come when the prosecutors had the floor—when O.J. Simpson stood before the jury wearing the gloves purportedly used in the murders and demonstrated convincingly that they did not fit him. The prosecution reacted with a better-late-than-never suggestion that the gloves shrank because they had been soaked in blood.

The defense had fun with that one. It called in an expert who conducted his own experiment on blood shrinkage—us-

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Ms. Flandaca, a legal analyst for WABC-TV in New York and ABC Network Radio, is also an adjunct professor at John Jay College of Criminal Justice.

Simpson Jury Did Not Give Case Short Shrift

[JURY FROM PAGE A21]

spheres in today's America. But while many members of ethnic groups do indeed appear to take positions that the leaders, pollsters and social engineers dictate, some have escaped such stereotyped allegiance to group identity. And participants in the jury system—lawyers, judges and jurors alike—will bear witness to the fact that with refreshing frequency citizens of many different stripes will rise to the occasion and render impartial jury service and do justice. The key to this achievement is that jury service confers on each and every member the awesome power to make a real difference.

As is not the case in most situations in modern life, one juror's vote has real consequences. This high confidence placed by society in its jurors is frequently rewarded by conscientious performance of duty. True, all jurors bring their experience to bear in deciding which witnesses and evidence to believe or disbelieve—and this is as it should be—but such weighing of credibility is normally done in complete good faith and in a genuine search for the truth, rather than to support a rationalization for voting one's group identity. Bringing one's life experiences to bear does not necessarily have to be an exercise in racial politics.

Race Betrayed Justice?

Did the Simpson jury fail this test, and, if so, does the case, combined with other hard-to-comprehend high-profile verdicts of recent years, tell us that it is time for massive reform, if not elimination of the jury system? Has the racial

Judge Kennedy-Powell's decision before the trial commenced.) And, incidentally, what was Detective Vannatter doing carrying around in his pocket a vial of Mr. Simpson's blood?

Despite the damning Fuhrman tapes (which Judge Ito tried desperately to keep from the jury by allowing into evidence only some of the more innocuous sections, but which likely got to the jury by the route of unmonitored conjugal visits), I still did not expect an acquittal, because I believed that the jury, during its deliberations, might very well throw out all of the evidence produced by Detectives Fuhrman and Vannatter, and then weigh what remained and perhaps convict Mr. Simpson on any "untainted evidence" that might remain.

However, my feeling that the jurors would undertake this search for untainted evidence proved myopic, in light of the three-hour deliberation.

Still, the jury's period of deliberation period did not necessarily connote—as District Attorney Gil Garcetti claimed in an intemperate press conference after the verdict—that racial politics rather than reason were guiding the jurors. They may simply have been deliberating, contrary to the judge's instructions, as the trial progressed, since they were, after all, closeted together day and night.

Mixed Message

Was the verdict the product of racism (the jury's racism, reacting against the LAPD's and the society's racism), or is there a more optimistic slant that is supported by the record of the case?

The answer is probably a mixed and

after all, not only presented Detective Fuhrman's and Vannatter's testimony, but they embraced these witnesses. It was readily apparent to the district attorney's office, before the trial began, that Detective Fuhrman was a racist and a liar, even if the prosecutors were not yet aware of his attitudes toward planting evidence and framing black defendants.

And surely such experienced and worldly prosecutors did not believe Detective Vannatter's explanation for why he scaled the wall of the Mr. Simpson estate. (Ironically, had this evidence been suppressed, it might have robbed the defense of the core of its claim of a racist frame-up.)

Yet the prosecutors were joined at the hip to both of their star witnesses, and the jury could well have decided that nothing that the prosecutors presented or argued was reliable enough to warrant sending the defendant to prison for the rest of his life. After all, the question facing them was not whether they thought Mr. Simpson killed his wife and Ronald Goldman, but whether the state had proved Mr. Simpson's guilt "beyond a reasonable doubt." Once the entire prosecution team lost credibility, very little parsing of the evidence was required to reach a verdict.

I am not saying that the Mr. Simpson case is without its disturbing message. But I do not believe that the message is that racial politics rather than reason de-

system has failed and should be changed or abolished.

What the jurors in the Mr. Simpson case have done is send us a message that the deeply engrained racism found in a disturbingly large number of urban police departments, com-

pounded by an unacceptably common practice of police perjury (frequently committed irrespective of the race of either the officer-witness or the defendant) to which judges and prosecutors turn a blind eye, will cause juries, especially those made up of minority group members who have experienced police arrogance first-hand, to focus upon and very readily latch onto testimony arguably

demonstrating "reasonable doubt." (By the same token, it is probably true that the videotapes of the Rodney King beating are subject to an interpretation that could—and did—lead to the officers' acquittal by a largely white Simi Valley jury, but it is probably also true that the jurors looked very hard for just such a hook on which to hang their hats. Racial politics?)

If we don't like the message sent by the Simpson jury, we would do best to examine the import of that message—what it tells us about flaws in the criminal investigative and justice system—and take steps to begin to set things right.

There is much that is distressing about the Simpson case and the verdict, but the solution is hardly to blame the messenger that has brought us the bad

What the jurors have done is send us a message that the police's racism will cause juries to find reasonable doubt.

polarization in the nation rendered the jury system useless or even counter-productive insofar as doing justice is concerned? (One thinks of the somewhat puzzling acquittal in Simi Valley, Calif., of the police officers who appeared on videotape to be beating the daylights out of Rodney King. And then there's the acquittal in New York of the black man accused of the murder of a young Hasidic scholar, Yankel Rosenbaum.)

I don't think so. I think the Simpson case sends a more complex and subtle message.

Anyone reasonably familiar with the evidence in the case, who has already heard or read substantial portions of the infamous tapes of the interviews of Los Angeles Police Detective Mark Fuhrman and of the witnesses to Fuhrman's racist rantings, cannot help but be disturbed by the implications Detective Fuhrman's role and his attitudes had for the integrity of the evidence.

DNA is, of course, highly probative evidence. However, where the most incriminating items of blood-stained clothing were found by Detective Fuhrman, and where that same officer was heard boasting on tape not only how he hates blacks and intermarriage, but how he was not beyond planting evidence and framing minority group members, then suddenly the force of the forensic evidence was called sharply into question. Nor does it help the prosecution when procedures in the LAPD crime lab were shown to be shockingly loose.

Role at Issue

Nor does such skepticism stop at Detective Fuhrman. How is a jury to assess the credibility and role of Det. Phillip Vannatter, who testified that he and his fellow officers climbed over a fence and onto Mr. Simpson's property shortly after the bodies were discovered because they wanted to help and comfort (rather than interrogate before lawyers showed up) Mr. Simpson? (Indeed, the only people in America who appear to believe this story are Judge Kathleen Kennedy-Powell, who denied Mr. Simpson's pre-trial motion to suppress evidence found as a result of this entry onto his property, and trial Judge Lance Ito, who affirmed

one juror to the next. The prosecutors, terminated the outcome, or that the jury news. 12

Imperfect Strategies Led to Acquittal

['STRATEGY' FROM PAGE A21] ing his own blood and a new pair of gloves—and who testified that the gloves hardly shrank at all. (In a poll taken in my Law and Evidence class at New York's John Jay College, a racially mixed class of 44 students voted 40-4 for not guilty, giving as their main reason the fact that "the gloves didn't fit.")

Overambitious Strategy

Needless to say, the defense was not without its own follies. It was damaged by the overambitious strategy of calling every witness who might raise doubt, while failing fully to evaluate their overall worth and the potential dangers they might bring to the witness stand. Defense witness Robert Hystra, for example, testified that he saw a large truck-like vehicle (read Bronco) leaving the murder scene. Mr. Simpson's doctor was less than helpful. Brought on to testify that, during an office visit a few days after the murder, he found no injuries on his patient indicating a recent struggle, and that the cut on his finger was more consistent with broken glass than a knife, he then went overboard. His statement, on cross, that Mr. Simpson would have been physically capable of committing the murders despite claims that he suffered from crippling arthritis was, plainly put, a defense faux pas.

But, despite the false moves, defense lawyers had one important conviction to support them: They were sure that this jury did not want to convict the defendant. The jurors did not want to believe he could have committed these murders.

The defense hit its pace in the part of the trial in which it is generally most difficult to engage the interest of the jury—

the presentation of technical forensic evidence. It called in the most renowned experts in the country to contradict the findings and test results presented by prosecution expert witnesses. Their ability to marshal this team of experts, people who are more often found testifying for the prosecution, was perhaps the best-laid plan of the entire defense case.

The stage for this evidence had been set earlier, when cross-examination of the prosecution witnesses brought to light many procedural mistakes. Now, in presenting its own experts, it focused on mistakes to which the police experts had not admitted. They testified that apparently no lab procedures or manuals exist for analyzing evidence in the Los Angeles police laboratories, that it was unheard-of for a detective (Phillip Vannatter) personally to deliver to the lab evidence, in the form of a vial of Mr. Simpson's blood, making a stopoff on the way. When asked what effect these lapses could have had, some experts indicated that they made evidence tampering possible.

During this stage, the defense team showed restraint. By limiting the testimony of each expert to just one aspect of the work done by the Los Angeles Police Department, it raised compelling questions. The police nurse said he drew eight milliliters of Mr. Simpson's blood, but after some was found to be missing, the amount was changed from eight to about six milliliters. Any jurors predisposed to believe that O.J. Simpson had been framed by the police now had something to hang their hats on.

In post-trial interviews, the defense team has been divided on the issue of the race card—a straightforward and obvi-

ous attempt to refocus jury attention on the national plight of African-Americans in the criminal justice system. It is possible that those who deny its use are correct, and that the actual issue was more about the credibility of police.

Whom To Believe?

But whether it was race or police, and whether the acceptability of the method may be questioned, the results cannot be faulted. The testimony of screenwriter Laura Hart McKinney and the excerpts of her tapes of Detective Mark Fuhrman uttering racial slurs, were chillingly clear proof of racial animus in a lead investigator for the prosecution—doubly convincing to a jury of nine African-Americans, one Hispanic and two whites.

The seed of reasonable doubt was now truly planted. During his earlier cross-examination, F. Lee Bailey had asked Detective Fuhrman whether he had ever used such a racial epithet in the course of the past 10 years. Mr. Fuhrman said he had not. Now the jury got to evaluate the credibility, not only of that small piece of evidence, but of all that Mr. Fuhrman and the other law enforcement officers had said during the course of the trial. If one could lie, so could they all. And if on one subject, why not another?

With the end of the trial and the continuing round of Monday-morning quarterbacking, we now have sufficient perspective to recognize that, with all the misfires, the defense team must be credited with having thrown the prosecution off its game. It never chose one theory and stuck with it. Despite the union of great minds that made up the Dream Team, it never really presented a coherent or cohesive approach. But what it did was creative enough to convince 12 people that reasonable doubt existed. In the face of overwhelming circumstantial evidence, it raised more than a hair and fiber of reasonable doubt. 12

The defense had one important conviction to support them: They were sure the jury did not want to convict.
