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The Race Factor and Trial By Jury

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THE RACE FACTOR AND TRIAL BY JURY

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The institution of trial by jury in criminal cases, one of the great achievements in the history of civilization and a principal foundation of our federal constitutional order, is today under challenge by two different but interrelated developments in American courtrooms. These developments played a crucial role in the public reaction to the first Rodney King verdict and subsequent commentary upon the jury's decision as a talisman of asserted deficiencies in the criminal justice system at large.

The first development is a broad national imperative to eliminate racism in all aspects of American legal, political and social life, including jury selection. The second is the heightened scrutiny that electronic media presence is applying to the jury system. This scrutiny has been made possible by the watchful eye of television cameras in criminal jury trials, provided by national cable programs such as Court TV and network programs such as ABC Television's *Nightline* and public television's *McNeil/Lehrer Newshour.*

These two novel developments in jury service, overt race factoring in the selection and assessment of juries, and the development of the juror as a potential media celebrity have all brought to the forefront certain doubts about the American jury system. The former raises the question of whether jurors focused on race can be even-handed and function collegially as a judgment-giving unit for the whole community. The latter raises the question of whether the public at large will accept and respect jury verdicts where individual jurors, unskilled at self-expression in the pressured and often unfriendly environment of post-trial media interrogation, sometimes appear self-serving, ignorant, malleable or incoherent.

The effect of these developments has been that the American trial jury has become a subject of controversy to an extent not often seen in the nation's history. The utility and fairness of the American trial jury has been challenged on intellectual and moral grounds, and its premise as a democratic and representative body has been questioned.

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Its vulnerability to political, reportorial and attorney manipulation based upon racial factors has been the subject of commentary and critical inquiry. Its decisions have been freighted with the consequence or prospect of urban rioting, looting and violence. Finally, the power of jury nullification, where verdicts are pronounced which are adverse to the law and the facts, has invoked profound misgivings about untrammelled jury power, particularly in cases involving criminal acquittals.

Trial by jury emerged during the late medieval period in England, prior to broad centralization of judicial institutions during the reign of Edward I, when the local peace was maintained by local land owners. The local jury subjected the accused to judgment by his peers, but peers who presumedly knew both him and his accusers well. It assured a verdict that acquired moral validity as a reflection of the community's conscience. Unanimity of the twelve was required in pronouncing the verdict, one way or the other, on the theory that in a matter of such grave public import, only complete consensus would win the broad community support that is essential to any stable order under the regimen of a rule of law. Bearing in mind that an institutionalized prison system did not arise in England until the nineteenth century, and that capital punishment was exacted by law upon conviction for almost any felony crime, jury nullification was valued as an essential mechanism for humanizing the criminal justice process.

In late twentieth century America, of course, the immense density and diversity of most state counties and federal districts have imposed a wholly different meaning on the concept of community, and placed the English origins of trial by jury largely (though not entirely) beyond the relevance of the function of the American criminal trial jury. Our jurors are now selected for service only upon a showing that they are absolute strangers to the parties and the controversy, and that they are completely ignorant of the incidents to be tried, even if those events are subjects of tremendous national significance and pervasive national fascination, as with the case of Colonel Oliver North. More important, however, is the transformation of the jury from a body which had historically emphasized *unum* in our national motto, to one which now emphasizes *pluribus*.

The fate of the peremptory challenge, especially in the hands of a criminal defendant, most dramatically mirrors that change. Peremptory challenges were eliminated in Great Britain in 1989 in an effort to secure greater minority representation in criminal juries. Our Supreme Court has restricted their use in order to prevent, to the greatest extent possible, the exclusion of persons based upon racial

characteristics where a pattern of exclusion emerges in the non-cause challenge rounds. This noble endeavor is, however, fraught with a new peril — that white jurors will get the notion that they represent whites, black jurors represent blacks, Asian jurors represent Asians, Hispanic jurors represent Hispanics, and so forth. It bears emphasis that no defendant is entitled to a particular jury composition, only to a process of selection which does not systematically exclude legally protected groups from venue panels and jury pools. The subject of race is volatile, and its overt introduction into the jury selection process can dramatically alter the chemistry of the body and undermine the prospect for consensus without which the jury cannot succeed.

Outcomes in criminal trials may be affected, irrespective of the admitted evidence, by jury composition. This has been recognized by trial lawyers in America and England for centuries. For example, it is widely believed that women are less likely than men to convict in capital cases, that urban poor are less sympathetic to insurance companies than suburban upper middle-class property owners, and that university professors are more suspicious of government authority than civil servants. This being so, courts have always proceeded upon the assumption that such biases, predilections or emotional dispositions can be exposed in a voir dire inquiry that is comprehensive, case specific, and respectful of the complexities of both human attitudes and the capacity of average people to express themselves about such sensitive and personal matters in the heightened and stressful environment of a public courtroom.

The restriction on a defendant's use of peremptory challenges to minimize the race factor in jury deliberation is a radical step. The profound irony of this latest work of legal realism lies in the impediment it places against the minority defendant in the dock, perhaps on a capital charge, who seeks a jury of his peers which through its verdict may take his liberty or his life. Under the new challenge rules, which are founded at least implicitly on the theory that jury panels are fertile fields for racial and ethnic trumping by opposing lawyers, a black defendant cannot seek to nullify white prejudice by striking a white juror *sub-silentio* in order to find a place for a black juror who might cancel or expose in jury deliberations any white prejudice adverse to the defendant.

At the heart of this dilemma, of course, is the question of whether racially diverse jurors can surmount their prejudices and reach a verdict based solely on the legally admitted evidence. This task is complicated in criminal trials, especially where the jurors live in a neighborhood or city which is grievously afflicted by violent crime,

where the defendants to be tried are charged with violent offenses or drug trafficking, where their accusers are policemen (to whom most citizens, including prospective jurors, look for protection against such crime) and where the defendants are members of a minority group. The principal cause of this is the centrality of crime as a pervasive and intractable problem in American domestic life. The crime issue dominates the private lives and thinking of Americans to an extent exceeding any other concern. This reality has exacerbated racial bias, group suspicion and division among neighbors; the criminal jury may, as an institution, become enmeshed in these fractious and adversarial relations of the races.

As a consequence of this very real and troubling problem, and in light of the Supreme Court's expressed constitutional concerns about racial bias in jury selection, suggestions have come forth which require careful analysis. It has been urged by some minority spokespersons that structured multi-racial juries should be empaneled as a matter of course, without regard to random drawing of names from venire panels. Furthermore, the venire panels themselves are urged to be restructured on a quota system. This proposal is predicated upon the belief that individuals are decisively influenced in their important life decisions by their backgrounds, social position and personal circumstances. Hence, it is expected that one's social class or economic position will dictate the judgment to be decreed in the jury box.

For example, a stock broker will, all other things being equal, acquit a stock broker, an Asian will acquit an Asian, and a minimum wage worker will acquit a minimum wage worker. Such crude, quasi-Marxist theory cannot be taken seriously. Such a view is simply untenable, for example, in light of the broad responses of randomly selected New York juries to police witnesses and defendants of diverse race and status. Jury impasse in New York occurs in only a small fraction of cases committed to juries for decision, despite the fact that a significant majority of police witnesses are white, a significant majority of defendants are members of minority groups, and all white juries are statistically rare. While this may mean that New Yorkers as a discrete group are uniquely even-handed while on jury duty, one doubts that they have a disproportionate share of fair mindedness and objectivity among citizens at large.

It is also argued, in profound misunderstanding of the nature and function of jury deliberations, that a jury must mirror more precisely the composition of the neighborhood or district from whence the defendant comes in order to secure a checks and balances dynamic out of which debate, and ultimately the truth, can emerge. This sugges-

tion implies that jury deliberation is a mechanism for the rationalization of biases, and that sectarian interests, candidly acknowledged and pitched into an egalitarian stew, will produce a verdict palatable to all. Truth will emerge, it is hoped, by folding into the deliberations the jurors' own personal views about whether black defendants in general are likely to be drug dealers and white policemen in general are likely to be perjurers. Such ruminations are, of course, completely improper and entirely irrelevant to the profoundly solemn proceedings to determine whether individual and unique human beings are felons or liars.

Furthermore, any attempt to even facially approximate the racial (and gender, national origin and sexual preference) composition of a community in its jury boxes must ultimately fail in a society as diverse and mobile as ours. We need only look to Florida's recent problems in this regard to appreciate the difficulties that lie ahead for such efforts. When a Hispanic police officer shot two blacks in Miami and three nights of rioting followed, a multi-racial jury convicted him of manslaughter. An appeals court reversed the conviction on the ground that the threat of further riots may have distracted and undermined the objectivity of the jury that found the officer guilty. The court ordered the retrial to be held in a venue other than Miami. The case first went to Orlando, but a substantially lower percentage (though not an underrepresentation) of blacks in the jury pool caused Miami blacks to denounce the transfer as an official rigging in favor of the officer. The case then went to Tallahassee where the city, claiming a tense environment, evaded its responsibility to hear the case. Tampa and Jacksonville have strong representations of potential black jurors, but the officer's lawyer objected to an under-representation of Hispanic jurors, insisting that only Miami was viable, the specter of riots notwithstanding. One can sympathize with the daunting problems confronting the judge, wherever he or she may be, in seeking and finding an impartial jury under such circumstances. The cardinal assumption of both the American and English justice system in modern times has been that all citizens, regardless of race, religion, class, ethnicity and nationality are entitled to sit in judgment of their peers in an atmosphere free of personal bias or incompetence. A parallel assumption is that outcomes in jury verdicts turn overwhelmingly upon the evidence or lack of evidence in the trial record. The trials of Daniel Berrigan and Marion Barry confirmed the soundness of these assumptions. Father Berrigan was tried for destruction of draft records in a period of tremendous political upheaval, where anti-war sentiment was widespread in the general population, and particu-

larly in the urban areas of the northeast. His jury contained a woman whose four sons were conscientious objectors on religious grounds to the Vietnam War. She nonetheless voted for his conviction. The Mayor of the nation's racially polarized capital boasted that all he needed was one black juror to be acquitted, irrespective of the evidence. A jury containing numerous blacks voted unanimously to convict him.

But the more convincing confirmation of the inherent fairness of American juries for this writer has come from observing and interacting with a long line of jurors encountered during ten years as a prosecutor and five years as a trial judge. When I entered my first criminal case in October 1966, I had a very imperfect understanding of what responsibilities awaited me. I knew, of course, that formal legal rules would shape my actions as a public prosecutor. But it seemed almost as if knowledge alone was all one needed to achieve the just result, and that the law would deliver a clean, precise and impersonal resolution in every case if one could find the right rule and apply it intelligently. So too with evidence, which I thought in most cases would simply speak for itself, to one end or the other. This is a common misconception of those newly sent forth from law schools. This view, however, takes no account of the human dimension involved in the work of courts, where it must be remembered that a free citizen can swiftly be placed into the disgrace and danger of a criminal dock, and thence to prison.

In the ensuing years, I have come to understand that whether justice is achieved in individual cases turns not upon the strategies, theories and advocacy of the lawyers, but upon the common sense, labor, courage, fair-mindedness, and honesty of policemen, witnesses, defense lawyers, prosecutors, judges and, most especially, jurors. This has been the enduring lesson of my fifteen-year apprenticeship in the trial courts. I learned it from a long line of shopkeepers, teachers, welders, stockbrokers, street people, bus drivers, and captains of industry — persons from all walks of life, and of all races and classes.

Why does the jury system work so well? First, virtually all jurors recognize and act upon the imperative that hard work and fair-mindedness are required in each matter, whether it be the obscure or the great case. Second, and more directly, systematic thinking, a practice only sporadically pursued in most collective activities, is imposed at the outset by the formal and highly calibrated procedural requirements of evidence and argument. Third, (at least in New York) juries are almost inherently talented and diverse. Finally, American courtrooms have not had about them the odor of a political agenda,

or the aura of a *circus maximus* organized to glorify the players on the evening newscasts. In short, the institutional credibility of the American jury trial has shown great depth and resonance.

What procedures produce good and dedicated juries? The answer may be found in the *voir dire* process that, at its best, represents both an appeal and an inquiry. When an ordinary citizen comes to court and is convincingly told that, as an heir to Thomas Jefferson, he is there to give renewed meaning to great humanist principles, and that citizens like him in every city, town and village in America have been doing that for more than two centuries, he will rise above his biases. When he is convincingly told that the defendant in the dock has a constitutional right to require his honorable, decent and fair-minded hearing and judgment, he will rise above his biases. When such a citizen is convincingly told that the integrity of the nation hangs upon his honorable service, he will transcend his limitations and serve honorably. These are the appeals that must convincingly be made to ensure the integrity of the jury system.

The inquiry that follows must plainly stress the ruinous impact of bias and prejudice upon the institution of impartial trial by jury. It must relentlessly insist that prospective jurors internally search and isolate biases, and acknowledge those biases privately to court and counsel. The juror must be convincingly told that he or she is obligated under the Constitution *not* to serve if there exists even a shadow of a possibility that bias might subtly (or even unconsciously) play any role in his or her participation in the case. Potential jurors do in fact disqualify themselves. Others are disqualified on a cause basis, as a result of a rigorous, focused, skillful, and (if necessary) skeptical inquiry by the judge and counsel at the side bar or in the robing room.

Once empaneled, the jury must often resist extraneous pressures on its objectivity. The electronic media is now widely present in the courtroom when notorious cases are litigated. The nation (or at least that portion which is fixed to its television sets and is statistically expanded by sophisticated polling) becomes a jury of the whole. Understanding this, lawyers and partisans of the parties (and sometimes interest groups) seek to (and do) condition prospective and sitting jurors during the pretrial period and the course of the trial. This conditioning is directed to both anticipated and admitted evidence. Sometimes it goes even further, explicitly invoking and exploiting biases in efforts to derail the result adverse to the exploiter. The eye of the television camera is the medium through which this drama unfolds, and it is exceedingly difficult for the court to control. The magnitude of courthouse television in terms of its scope, reach, and

intensity, is immensely greater than that of a print reporter with a notepad. Since cases become notorious largely as a result of media coverage, the Orwellian eye of the camera can influence the case as a fact finder collateral to the jury. It examines and judges witnesses, usually through named or unnamed surrogates of the adversary, expresses skepticism or belief of evidence, claims, and defenses, and almost invariably presents a fragmented rather than an integrated "snap shot" of the record.

Prior to selection of a jury, this pervasive exposure of a notorious case must *ipso facto* condition those who are later summoned to jury duty. After the case begins, non-sequestered jurors will be exposed to the case in the theater of tabloid and television coverage, regardless of the best of intentions. Courthouses, and sometimes even jury boxes and deliberation rooms, may become targets of "re-education" by the crude manipulation of crowd massing in the service of racial politics.

Courts will, of course, strive to advise jurors to forthrightly disclose any out of court exposure to the matters implicated in the case on trial before them. The more difficult question is whether courts can conclude with sufficient confidence that the juror has not been subtly or subconsciously affected by such exposure, especially where racially charged factual elements are present in the case or its coverage. As a result, courts will likely be required to resort to jury sequestration more frequently in such cases.

In the immediate post-verdict period, jurors in notorious cases often come under intense media pressure to submit to interviews on both their deliberations and subjective feelings about the case. It is not uncommon for their homes or work places to be staked out by the press. We have all winced and felt empathy for average citizens, fresh from the jury box, being assailed on television programs like ABC's *Nightline* by questions from glib lawyers and facile commentators that sometimes evoke confusion, incoherence or truculence.

Under such stressful circumstances, it is hardly surprising that large numbers of Americans might naturally impeach the outcome of jury verdicts rendered in notorious cases, whether or not the race factor is overtly implicated. Furthermore, it is the prominent, not the obscure case, which engages the attention of the public, and it is by such cases that our judicial standards are assessed. Of course, where jurors seek self-aggrandizing media exposure to personally profit from their jury service, trial by jury is severely impugned. The damage caused by such conduct cannot readily be repaired, because of the magnification factor in such cases. Average Americans see their courts and Constitution demeaned by such behavior, and to the extent

that such base conduct is encouraged by journalists, publishers or motion picture companies, they exacerbate the injury.

What may be done to address these conspicuous dangers to trial by jury in criminal cases, which often spawn skepticism in the public at large about the integrity of jury verdicts in notorious cases? Courts must redouble efforts to expose bias and prejudice in painstaking, exhaustive and deliberate questioning of jurors in the empaneling process. Once selected, jurors must be constantly reminded of their position and obligations as surrogates for the community at large, and to keep their service free from any impugning influence or taint. The sequestration power must be resorted to more commonly, in spite of public cost and its impact on the private lives of the jurors. Judges ought not fail to caution jurors, when they are being discharged from service, of the pitfalls and controversy often associated with post-trial public statements by trial jurors in notorious cases.

Finally, it is the responsibility of the commentators, those reporting directly from the courtroom and those observing criminal proceedings, to examine — and if convinced, confirm — the objectivity and fairness of American trial juries generally. If they can find and report upon what we in our courtrooms see and admire daily as American juries go about their tasks honorably and decently, then the jury shall remain, as it should, a peerless instrument in the defense of liberty.