

**“THIS CASE IS BROUGHT TO YOU BY . . . ”:
HOW HIGH-PROFILE MEDIA
TRIALS AFFECT JURIES**

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On October 3, 1995, long distance telephone calls dropped by 58%, and trading volume on the New York Stock Exchange fell by 41% between 9:30 a.m. and 10:30 a.m.¹ The half-hour between 10:00 a.m. and 10:30 a.m. was judged to be the most unproductive half-hour in U.S. history, costing U.S. businesses roughly \$480 million.² At 10:00 a.m., over 100 million people around the world stopped to watch the verdict in the O.J. Simpson criminal case.³ They had followed the case for more than a year and a half. They had watched as the drama of the case unfolded and knew the personalities of the lawyers, judge, defendant, victims, and witnesses. They had heard and discussed the evidence and had either privately or publicly come to their own verdict. When the verdict was read, they responded with the same jubilation or dismay as fans do when the final buzzer sounds in a world championship sporting event.

Even though the United States has always loved high-publicity trials, the scope and depth of coverage of the *People v. Orenthal James Simpson* trial was so comprehensive that it elevated that jury's verdict to a social decision. This coverage changed the way the American public views criminal trials and it raised significant ques-

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1. See Del Jones, *The Verdict Hits the Street . . . and Workers Everywhere Put Jobs on Hold*, USA TODAY, Oct. 4, 1995, at 1B.

2. See *id.*

3. See David Shaw, *The Simpson Legacy*, L.A. TIMES, Oct. 9, 1995, at S3; Jefferson Graham, *O.J. Verdict Watched by 150 Million*, USA TODAY, Oct. 5, 1995, at 1D.

tions about how the justice system functions in a high-publicity trial. Having worked as a jury consultant on the O.J. Simpson and the Heidi Fleiss cases, and having observed how other high-publicity cases affect jury pools in local venues, I have learned a number of lessons about how these cases affect the attitudes and expectations of jurors and, perhaps more significantly, the public.

I. THE PERVASIVE EFFECT OF MEDIA INFLUENCES ON COURT CASES

The O.J. Simpson trial showed what uneasy bedfellows the First and Sixth Amendments can be. The conflict between these amendments is exemplified by a reverence for freedom of speech and the press on the one hand, and the defendant's right to a fair and unbiased trial on the other hand. Through a history of high-publicity trials—including those involving Fatty Arbuckle, Sacco and Vanzetti, the Lindburgh baby kidnapping, and the Menendez Brothers trials—this constitutional, legal, and social conflict remains.

Media trials are cultural events. The public believes it has a huge stake in them. America loves a great story, and the O.J. Simpson case was routinely characterized as part soap opera, part Shakespearean tragedy, part Kafka short story, and part Keystone Kop farce. It contained all the elements of a compelling story: wealth, celebrity, race, mystery, jealousy, betrayal, and corruption. And while other murder trials contain some of these same elements, the catalyst that made this criminal trial into a culturally significant event was the media.

From June 1994, to October 1995, trial coverage inundated all streams of media. An information consumer could watch the trial live, get headlines and newsbites on the news, or read about it in newspapers, tabloids, magazines, "instant" books, and on the Internet. One could watch television talk shows such as *Larry King Live*, *Oprah, Rivera Live!*, and *The Tonight Show with Jay Leno*. Viewers could watch newsmagazine shows and investigative journalism shows. Interested listeners could tune into radio coverage from *National Public Radio* to *Howard Stern*. In a series of CNBC polls, more than 30% of the population polled said they watched more than sixty minutes of trial coverage every day during the trial.⁴ The O.J.

4. *America's Talking* (NBC television broadcast, July 4, 1995).

Simpson “story” was the top story of 1994, tripling the coverage of the Northridge earthquake. In that year, Judge Lance Ito had greater name recognition than Newt Gingrich and his “Contract with America.”⁵ In fact, many media careers rose and fell depending on the “scoops” that the journalists managed or failed to break. The motivations of the media to generate stories to fill airtime actually created potential evidence and witnesses for the trial.

In fact, the expansive coverage elevated the media to a third party in the case. The frequency of appearances by media organizations in Judge Ito’s court indicated the influence they had on the trial. Many a day, the morning motions included a news organization seeking access to particular court information or seeking to quash a subpoena. Prosecutor Marcia Clark changed her clothing and hairstyle to improve her public image.⁶ The press corps routinely reported stories on their own participation, such as when Court TV inadvertently showed a couple of jurors on their telecast, and when the press corps outside the court wore Robert Shapiro masks at Halloween. Entertainment celebrities routinely showed up to view the trial and were ushered back to Judge Ito’s chambers. Prosecution and defense investigations routinely pursued witnesses who had made appearances on talk shows or who had been uncovered by the print media, and cross-examinations routinely contained questions about prior statements made to the media. An example of this was when defense counsel questioned Detective Fuhrman on the stand about prior racist statements he had made to a fledgling screenwriter.

II. THE CRIMINAL TRIAL AS A NEWS/ENTERTAINMENT/SPORTING EVENT

As jury consultants in the case, my colleagues and I were obviously concerned with the saturation of publicity and its effect on the jury pool. Media attention has a profound effect on the attitudes and expectations of potential jurors in a number of ways. These effects are better understood by understanding the format and purpose of

5. See *Judge Ito Tops Gingrich in Recognition*, HOUS. CHRON., Feb. 19, 1995, at 26.

6. See Tina Daunt, *A Good Hair Day; Prosecutor Marcia Clark Sheds Curls For a New Look*, L.A. TIMES, Apr. 12, 1995, at A17.

various media.

1. Most people get their news from television. Television news tends to present stories in ten-second to three-minute segments, depending on the importance of the story. Within that time, a news story will relay actual facts, the potential effects of the breaking story, emotional witness accounts of the story, and perhaps an expert interpreting the meaning of the event. Since the public's attention span is so short, most news is presented with a headline that is intended to "grab" the audience. A sub-headline or short statement about the essential facts in the story usually follows. The body of the story fleshes out the details and background information and the conclusion wraps the story up in a neatly packaged segment.

2. There are increasing numbers of editorial adjectives and adverbs included in news reports. Reporters routinely talk of news events as "shocking"⁷ or containing "disturbing new revelations."⁸ This informs a viewer—or a potential juror—about how they should feel about a particular news event. In addition, much news these days contains not only the facts of the story, but also includes what is perhaps too grandly called "analysis." That is, a commentator on the news draws conclusions about the facts and their possible meaning, and speculates about what will happen in the future. The news business can be extremely profitable, as many networks, local and cable, found during the O.J. Simpson trial. The newsmagazine shows and twenty-four hour news channels constantly searched for stories to fill time. The packaging of these shows is important in maintaining high Nielsen ratings⁹ and viewership. This packaging includes news pieces that are both entertaining and competitive. Thus, we were treated to pieces about the apparel and grooming of defense attorney Johnnie Cochran or prosecutor Christopher Darden, where they

7. See, e.g., Jim Newton et al., *Fuhrman Tapes Aired: A Recital of Racism, Wrath*, L.A. TIMES, Aug. 30, 1995, at A1 (reporting that the Fuhrman tapes contained "one shocking comment after another").

8. See, e.g., *Senate Endorses IRS Overhaul: Burden of Proof to Shift*, L.A. DAILY NEWS, July 10, 1998, at N1 (referring to a year of "disturbing revelations" about abuses by federal tax collectors).

9. The A.C. Nielsen Company generates statistically based estimates of TV viewership for use by advertisers, among others, to compare one TV station's ranking to others. See generally *WXON-TV, Inc. v. A.C. Nielsen Co.*, 740 F. Supp. 1261 (E.D. Mich. 1990).

dined, and what events they attended.¹⁰ We were given biographies and shocking exposés about the witnesses, and heartfelt testimonials from people who knew the victims and the defendant.

3. Additionally, the trial was like a sporting event. Conclusions were made every day, if not at every break in the trial, about who was winning. The prosecution and the defense were teams (such as “the Dream Team”), the witnesses and lawyers were players, their trial strategies were plays, and the judge was the referee.

III. MEDIA COVERAGE AND ITS EFFECTS ON THE JURY POOL

The “sporting event” format in media coverage is especially problematic during the pre-trial period. This format encourages the viewer to pick a team and root for it. In most high-publicity cases, initial press is typically pro-prosecution, and the public tends to ignore the word “alleged” in front of a defendant’s charge. Thus, many incriminating facts are attached to the defendant’s name in the body of the news story.

This is where the First and the Sixth Amendments collide:

- The court does not permit a real juror to be aware of the immediate facts surrounding a case.
- Jurors are charged by the court not to draw any conclusions or discuss the case until they have heard all of the evidence.
- Jurors are instructed by the court that speculation and guesswork are not to be considered as evidence.
- Jurors are also instructed by the court not to do any independent investigation into the case.
- Jurors are preconditioned by the media about how they should feel by listening to characterizations of anticipated evidence as “shocking,” “disturbing,” or “suspicious.”
- Media reports place significance on facts, issues, and evidence that may be irrelevant or excluded from the case.

When we did community attitude surveys in Los Angeles for the Simpson case, we were afraid that the enormous amount of publicity

10. See, e.g., Betty Goodwin, *An Evening Made for “Real Theater Animals,”* L.A. TIMES, Apr. 5, 1995, at E5; Bridget Byrne, *A Night of Blues—and Other Hues,* L.A. TIMES, Mar. 29, 1995, at E4.

would sway the jury pool toward presupposing Mr. Simpson's guilt. What we found was more interesting. The more media exposure a respondent had, the more he or she was inclined to either believe that Mr. Simpson was not guilty or refuse to form an opinion about his guilt. Since so much of the news coverage was inflammatory and sensationalist, the more viewers had seen, the more they felt unable to tell real facts from the "hype" involved with the case.

IV. HOW PRE-TRIAL PUBLICITY AFFECTS JUROR PREDISPOSITION

Public opinion polls also tell a story about the media and its influence in the case. Eighty-seven percent of those polled said there was too much media coverage in the case.¹¹ In various surveys, approximately 45% said the publicity was too harsh in the case.¹² Fifty percent said that the publicity would work against O.J. Simpson.¹³ In other polls, approximately 60% said they thought the media affects the ability of the defendant to get a fair trial, and 78% said they thought a fair trial was impossible.¹⁴ Further, in various polls, approximately 60% admitted that setting aside their opinion would be difficult.¹⁵

The media's influence on predisposition toward guilt—or liability—was more pronounced in Mr. Simpson's civil trial. Of the initial jury pool of 233 jurors, eighty-four (36.1%) initially stated in their questionnaires that they believed in his guilt. After "for cause" challenges, a final 102 jurors remained. Thirty-two jurors (nearly one-third) of the remaining panel who believed in his guilt were still left in the pool.

V. THE EFFECT OF JURORS' LIFE EXPERIENCES IN A SOCIALLY SIGNIFICANT TRIAL

A common social/psychological phenomenon is called "interpretive bias."¹⁶ This means that jurors view a case through the prism of their experiences and beliefs. This phenomenon is even

11. See ABC Poll (Jan. 8-9, 1995).

12. See CNN and Newsweek Polls (July 1-8, 1995).

13. See AP Poll (Jan. 11-15, 1995).

14. See ABA Poll (Penn and Schoen Associates) (Sept. 23-26, 1994).

15. See CBS Poll (Sept. 21-24, 1994).

16. See Darryl K. Brown, *The Role of Race in Jury Impartiality and Venue Transfers*, 53 MD. L. REV. 107, 121 (1994).

of their experiences and beliefs. This phenomenon is even more relevant in a high-publicity trial. Most prospective jurors will have read about, listened to, or watched news that may become evidence in a case. Because they have not been charged by the court and they are, after all, human, they will begin to form impressions, opinions, and conclusions as a result of this media exposure and their ensuing discussions with family, friends, and co-workers.

While the influence of the media on case predisposition is significant, there are equally important factors affecting how a juror reacts to evidence in a high-publicity trial. As described above, jurors perceive evidence in any case through the filter of their own life experiences and beliefs. These experiences and beliefs become even more important in a media-covered trial because the jurors are rendering what they believe to be a verdict on a variety of social issues, as well as the evidence. Thus, the verdict becomes a personal statement on issues of law enforcement, race, wealth, domestic abuse, and celebrity.

Several issues relating to a juror's background experiences are important in the context of Mr. Simpson's criminal trial. While much attention has been focused on the issue of race as a determining factor in the jury's verdict,¹⁷ most have ignored the socioeconomic factors and life experiences of the actual jurors. Many African American and Latino jurors in the initial pool either themselves had, or knew someone who had, a negative experience with the Los Angeles Police Department (LAPD). One of the dismissed jurors, Michael Knox, said in his book, "[T]here's a long, shameful history of black men being demonized and railroaded in criminal trials. We are skeptical of the white establishment, law enforcement officials, and the courts."¹⁸ Recent revelations about the LAPD's Rampart Division underscore the skepticism that certain populations in Los Angeles have about the LAPD's investigation and prosecution of crimes.¹⁹

17. See Cathleen Decker, *The Times Poll: Most in County Disagree with Simpson Verdicts*, L.A. TIMES, Oct. 8, 1995, at A1.

18. MICHAEL KNOX & MIKE WALKER, *THE PRIVATE DIARY OF AN OJ JUROR* 130 (Dove Books 1995).

19. See Nicholas Riccardi & Beth Shuster, *D.A. to Revive Unit That Investigates Police Shooting*, L.A. TIMES, Sept. 29, 1999, at A1.

VI. THE NATURE OF JUROR BIAS IN HIGH-PUBLICITY CASES

A larger issue is the complex nature of juror bias and how that bias predisposes a juror toward one side in a case. It is no secret that we all have biases. The difficulty comes from understanding how those biases may ultimately affect the viewing of evidence and the deliberations in a case. Because the ramifications and remedies of this issue are far-reaching, the courts have elected to take the “I instruct you not to be biased” approach. As a result, the court can attempt to rehabilitate any juror who expresses bias by appealing to his or her fear (“If the court were to instruct you, as a matter of law, to only consider evidence that is presented from the witness stand . . . ?”) or by appealing to the juror’s inherent sense of fairness (“Don’t you think you could set aside those initial impressions and only consider evidence from the witness stand?”). Rare is the juror who would not be intimidated by an admonishment from the court or who does not think of himself or herself as a fair and unbiased person. In fact, most jurors struggle mightily against their initial impressions.

Several issues make it more difficult for jurors in high-publicity cases:

- Jurors want to appear fair and unbiased in front of the court and the press.
- Jurors want to sit on sensational trials.
- Jurors have a hard time distinguishing between impressions formed by pre-trial publicity and impressions formed in court.
- Jurors mostly do not understand or acknowledge their own biases.
- Jurors themselves sometimes do not know the strength of their impressions and opinions.
- When in a high-conflict situation, such as juror deliberations, jurors revert to their initial impressions, experiences, and opinions.
- The courts make it relatively easy to conceal or not reveal a conscious or unconscious bias.

These issues were highlighted in Mr. Simpson’s civil trial. Despite having stated numerous times in their questionnaires that they believed him to have been guilty at various times during the presen-

tation of the criminal trial, more than 30% of these jurors were not excused for cause because they stated that they were willing to put their opinions and impressions aside in the civil case.

VII. THE ADDITIONAL PRESSURE ON JURORS IN HIGH-PUBLICITY TRIALS

The media create a series of unconscious pressures on a juror in a high-profile trial. Jurors know that they are being watched by the world. They are not only making a decision for themselves, but they are making a statement for their family, co-workers, community, and society as a whole. This elevates their verdict to a level beyond the evidence. In interviewing jurors after the trial of Hollywood madam Heidi Fleiss, many jurors expressed how they hoped that the police would use their resources more wisely than to prosecute victimless crimes. When talking about the testimony of Dr. Irwin Golden, who was the coroner in the Simpson case, juror Marsha Rubin-Jackson said:

But it comes to the point in this particular case where Dr. Golden has made thirty errors. Now, you can't tell me this man has not made errors on previous autopsies But this just happened to be a case that came to the court as a 'high-profile' case and the problems were brought to everyone's attention.²⁰

Another pressure on a jury in a high-publicity trial is the rendering of a verdict. Since the courts, the prosecution, the defense, and the jurors themselves have invested so much time and money in a high-profile case, jurors feel compelled to reach a decision rather than to hang or deadlock. This pressure was significant in the Heidi Fleiss case. In that case, jurors had bartered three guilty counts of pandering for an acquittal on two counts of pandering and a count of narcotics possession.²¹ Even though four jurors were not convinced beyond a reasonable doubt, they believed that Ms. Fleiss would receive probation on the pandering counts. They felt they had to get an

20. ARMANDA COOLEY ET AL., *MADAM FOREMAN: A RUSH TO JUDGMENT?* 162 (Dove Books 1995).

21. See Nora Zamichow, *Fleiss Trial Jurors Say They Improperly Discussed Case*, L.A. TIMES, Dec. 13, 1994, at A1.

acquittal for what they were sure was a mandatory sentence on the drug charge.²² These same jurors met and discussed their deliberation strategy outside the presence of the other jurors and came up with a negotiated solution.²³ Instead of properly returning after four days as a deadlocked jury, they traded counts to try to get the defendant a more favorable verdict.²⁴ When they learned that she would receive mandatory jail time for the pandering counts, five jurors gave declarations and testified in court about their own misconduct.²⁵ Ultimately, the verdicts were overturned on appeal as a result of these disclosures.²⁶

Another pressure on the jury in a high-publicity trial has to do with the burden of proof. When jurors perceive that their verdict will be significant, they will often heighten the standard of proof. Since "beyond a reasonable doubt" is inherently subjective, many jurors in high-publicity cases will make sure they are between 90% to 95% certain before they vote to convict. Because the Simpson criminal case was lengthy, this phenomenon created a problem for the prosecution. While trying to be thorough in presenting a comprehensive mountain of evidence, the prosecution unintentionally allowed the defense to focus on minute details of the police investigation. As a result, the prosecution created "reasonable doubt" in its own case. Jury foreperson Armanda Cooley has written, "When the police were testifying, there always seemed to be controversy over whatever they said or did. Anytime the L.A.P.D. took the witness stand, they always had to come back and reiterate."²⁷

VIII. DIFFERENCES BETWEEN SITTING JURORS AND THE PUBLIC IN HIGH-PUBLICITY TRIALS

After the criminal verdict in the O.J. Simpson case, most commentators underplayed the difference between the role of the jury and the role of the public. The public assumed the jurors knew of all

22. *See id.*

23. *See id.*

24. *See id.*

25. *See id.*

26. *See* Shawn Hubler, *Court Overturns Fleiss' Conviction, Orders New Trial*, L.A. TIMES, May 30, 1996, at A1.

27. COOLEY, *supra* note 20, at 101.

the out-of-court publicity that the public knew. The public also underestimated the effects of sequestration and isolation on the jurors. In addition, unlike the jurors, the public was not legally obligated to listen to or abide by the jury instructions given by Judge Ito. At the time of the trial, most thought that the testimony of prosecution witness Mark Fuhrman undermined the defense's theory and that defense counsel F. Lee Bailey's cross-examination of Mr. Fuhrman was poor to average.²⁸ However, many of the sitting jurors recalled dismissing Mr. Fuhrman's testimony the moment he denied using the "n" word. They did so even before the introduction of Laura Hart McKinney's testimony and taped conversations with Mr. Fuhrman, and before Mr. Fuhrman's return to the stand. Jurors in high-profile trials, especially the sequestered ones, live in a different world from the public.

IX. CONCLUSION

During much of the criminal trial, most Americans did not want to believe that Mr. Simpson was guilty of the heinous crimes of which he was accused. Over time, a majority of the public²⁹ came to believe in his guilt. The majority's outrage over the verdict in the criminal case not only reflects their personal disagreement, disappointment, and disillusionment with the jury's decision, but also their opinions about the issues of celebrity, wealth, race, marriage, domestic abuse, and the purpose of the justice system. Most of the public believe that justice is a result and not a process. Disagreement over the result equates to a belief that justice was not served.

The nature of a media trial raises a series of significant questions about how our justice system functions when there is a high degree of publicity in a case. When the rights of a defendant conflict with the public's right to know, who prevails? How does tremendous pre-trial publicity affect the predisposition and decision-making of the jury? What is juror bias and how do lawyers and judges deal with it at trial? How does a juror distinguish between media coverage and

28. See CNBC Poll (Mar. 15-22, 1995).

29. Fifty percent to 75% depending upon the poll. See AP Poll (Jan. 11-15, 1995); LA Times Poll (Sept. 17-23, 1995); CNBC Polls (Sept. 1994-March 1995).

evidence? What is “justice” in a high-publicity trial?

These are complex questions to which there are no easy answers. One thing is certain. The media will continue to cover and influence these trials. Hopefully we can better understand the social and cultural factors that affect juries so that we can better prepare for the next “trial of the century.”