

FORUM

The Rodney King Verdict: Why and Where to From Here?

To the editors:

The function of the jury system is to place a citizen barrier between the defendant in a criminal case and the power of government to convict with the attendant loss of life, liberty or property. And the barrier is formidable: to convict, the government must satisfy each of twelve jurors of each element of the crime beyond a reasonable doubt. The constitutionally required intervention of the jury in the criminal process reflects the wariness with which the founding fathers approached the power of government and their fundamental concern that the awesome criminal process be checked by a non-governmental source.

The verdict in the Rodney King case teaches us, in the words often used by economists, that there is no free lunch. In using juries to check the power of government to make a person a criminal, we inevitably give juries the power to declare innocent those who ought to be convicted, for juries bring into the jury room the values and mores of their community. Abstractly stated, that concept is a fine one, and the heroic image of a jury nullifying a pernicious criminal prosecution can cause us to nestle comfortably in the underlying logic of the system. When the values and mores the jury brings into the jury room, however, are not good ones, or even racist ones, there is no real comfort level in the process.

Mayor Bradley, speaking of the videotape of the King beating, said it best: "We saw what we saw and what we saw was a crime." In this case, that videotape was supplemented by the testimony of an official from the Los Angeles Police Department, an instructor of police officers. The official testified with crystal clarity, by referring to the videotape, exactly as to when the line to excessive use of force was crossed. This only augments the shock at the verdict since such testimony connotes *the active participation by the police department in the prosecution*. How could the verdict have happened?

Civil rights prosecutions historically have enjoyed a lower conviction rate than other Department of Justice prosecutions. Part of this has nothing to do with racism. Most jurors, and especially most white jurors, who are anywhere upwards from lower middle class, have strong pro-police feelings. To most such people, the police are the good guys, and they have been the good guys since the juror's early childhood. As a result, the words "reasonable doubt" have a very special meaning to most such jurors in a police brutality case. My own experience with Civil

Rights Act prosecutions against law enforcement officers, even where both defendant and victim are white, confirms the tremendous reluctance of both petit and grand jurors, otherwise very prosecution-oriented, to go against the police. A lifetime of values points in the other direction.

When the component of race is added, the burden on the prosecution is even higher. At a conference of United States Attorneys several years ago, I spoke with the United States attorney from a large urban U.S. Attorney's office. He told me of the shooting death of an unarmed minority teenager by a white police officer in the presence of several eyewitnesses, none of whom saw any threatening conduct on the part of the victim. Further, the police officer testified in the grand jury at variance with his police report, a variance required in order to dovetail his version of the facts with the autopsy report prepared after his police report was filed. The U.S. Attorney made an eloquent plea to the grand jury, reminding it that no one was above the law, not even those who enforce it. In the end, two grand jurors out of twenty-three voted to indict.

In my opinion, it is almost impossible to say that racism did not play a part in the *King* verdict. That the one Hispanic juror was the longest and sole holdout against the acquittals confirms this intuitive conclusion. So where do we go from here?

One approach is to say that the problem is larger than Rodney King and twelve citizens of Ventura County, California. Let us deal with that larger problem and work with both the police and with rebuilding of inner city life. There is a certain level-headedness about this approach but one which runs counter to our deep desire for justice. Since the double jeopardy clause has been held inapplicable in these kinds of cross-sovereignty prosecutions, a prosecution under the federal civil rights act is another viable option.

The problems of jury selection, of course, would not go away in a federal prosecution. Only now they would be augmented by the problem of the police officer defendants' right to a fair trial. Just as a jury made up largely of persons who moved away from the big city to avoid its violence is not fair from the prosecution's perspective, a jury of persons raised to know fear of the police would not be fair from the defendants' perspective. Added to that, there is the problem that any subsequent jury will have every reason to believe that an acquittal would result in another round of rioting, meaning huge property damage and loss of life. Such consequences would be tantamount to a gun to the jury's head, to go off in the event of an acquittal, leaving them little choice but to convict. That is not a fair jury.

The first problem is solvable by the very nature of the Central District of California where a federal prosecution would be venued. That district includes all of Los Angeles County and several other less urban counties around Los Angeles. Although heavily weighted towards the city of Los Angeles because of its high population, such a jury would still be

a bigger cross-section of Los Angeles area. That bigger cross-section would dilute the community values and mores brought to the jury room by including persons from diverse communities. Such dilution of community values and mores inevitably goes with federal juries drawn from a larger area than local juries, which are usually county based.

The second problem is not as easy. A jury with a gun to its head is not a fair jury. Perhaps the defense will insist that jurors remain anonymous so they are at least personally unconstrained in voting to acquit. This would be a mirror image of the jury which recently tried the *Gotti* case in the Eastern District of New York, whose identities were withheld at the request of the prosecution so the jurors would be unconstrained in voting to convict. Trying to find a jury that would be immune to the larger, less personal pressures that a second *King* jury would find itself in would indeed tax the voir dire system, the lawyers trying the case and the judge presiding over it. It is not inconceivable that, after much individual questioning, such a jury could be picked. But it would be a very unusual jury, highly individualistic and unpredictable.

That, however, is probably the best we can do. Legal institutions such as juries are in the end only people, and imperfection is the hallmark of any human endeavor. Seen that way, the *King* verdict is a painful reminder that our effort to accommodate the legitimate interests of governmental power and individual rights will not always strike the right balance. That is hardly a reason to abandon the system, or even to question it seriously. In the end, the *King* verdict tells us more about people than it does about the system. The message is not a comfortable one.

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