Once I was invited to dinner by an elderly gentleman from China. When my host discovered that I was a law student, he talked about the American legal system. "There, in the courtroom," he said, "are two lawyers. They have been to school for many years. They are wise, able, experienced, and greatly respected in their communities.

And above them, at the head of the courtroom, is the judge. He is even older, even wiser, even more experienced, and even more respected than the lawyers.

But who decides the case? Twelve people brought in from the street!" The old man laughed.

With youthful enthusiasm, I sprang to the defense of the jury system. Law is too important, I said, to be left to the people who do it for a living. I argued that the jury offers an essential check against overzealous prosecutors and against high-handed judges. To my surprise, the more I talked, the more the old man laughed.

Today's newspaper stories, particularly the ones from California, offer good reason to believe that the old man was right. Our jury system appears to have grown preposterous. Perhaps one should not criticize a particular verdict without undertaking a review of all the evidence before the jury.

When viewed in the aggregate, however, the news accounts of jury verdicts in recent high-profile cases seem troublesome.

BY ALBERT W. ALSCHULER
The Menendez brothers drove an Alfa Romeo recently given them by their father to San Diego where they purchased a twelve-gauge shotgun. Two days later, they used the gun to kill their father and their mother. Ambushing their parents as the couple watched television, the young men fired the gun sixteen times before they were done. Two juries heard their essentially uncorroborated (though tearful) claims of sexual abuse and of a paternal threat to kill them if they made the abuse public. In addition, jurors heard expert testimony concerning scientific research on snails and the "rewiring" of Erik Menendez's brain that followed his father's abuse. In a legal system that seems sometimes to trust jurors implicitly and sometimes not to trust them at all, the jurors were not permitted to hear about a play that Erik Menendez had written 20 months before his crime—one in which a young man kills his parents with a shotgun for their money. Neither of the jurors could agree that the Menendez brothers had committed murder.

When Nicole Brown Simpson and Ronald Goldman were murdered, the manner of their killings suggested a crime of passion. At the crime scene, the police discovered a brown, extra-large Aris Isotoner Light glove, model 70263. This glove's mate was found at the estate of O. J. Simpson, the abusive former husband of Nicole Simpson. Soon after the killings, a limousine driver kept an appointment at the estate, but no one appeared to be at home. After the driver repeatedly called the house, he saw a man who looked like O. J. Simpson enter the darkened doorway. Simpson then answered the buzzer, saying that he overslept. DNA testing revealed that stains on the glove found at Simpson's estate matched the blood of Nicole Simpson, Ronald Goldman, and O. J. Simpson. Also on the glove were the letters matching Nicole Simpson's and fibers matching the carpet of O. J. Simpson's Bronco. Nicole Simpson had purchased two pairs of Aris Isotoner Light gloves, model 70263, just before Christmas in 1990; at most 200 of those gloves were sold. Photos and videotapes showed O. J. Simpson wearing similar gloves at football games from shortly after Christmas, 1990, through early 1994, the year of the murders. An expert testified that he was "100 percent certain" that the gloves appearing in one photograph were Aris Isotoner Lights, model 70263. The glove found on O. J. Simpson's estate was only one of nearly three dozen blood exhibits connecting Simpson to the murders. Abundant other evidence pointed to his guilt.

Following an eight-month trial, a jury deliberated three hours and forty minutes before finding O. J. Simpson not guilty of murder. Mark Fuhrman, the detective who testified that he had found the bloody glove at Simpson's estate, had perjured himself before the jury by denying his use of racial epithets. Moreover, when prosecutors required Simpson to try on the Aris Isotoner gloves at trial, the gloves did not fit. (A pair of the same model and size that had not been soaked in blood or subjected to forensic testing, however, did fit.) The defense theorized that Fuhrman had discovered a bloody glove at the crime scene that had gone unnoticed by others, that Fuhrman had concealed this glove in his sock or elsewhere and carried it to Simpson's estate, and that Fuhrman, without knowing whether Simpson had a provable alibi or whether another person could be shown guilty of the crime, had "planted" the glove.

Many observers were stunned by Simpson's acquittal. Many found the failure to convict the Menendez brothers disturbing. Many also raised their eyebrows (at least) when jurors acquitted John and Lorena Bobbitt of brutalizing another; acquitted Damian Williams and Henry Watson of the most serious charges against them following their videotaped attack upon truck driver Reginald Denny; acquitted Dr. Kevorkian of aiding suicide after he had placed a mask over the face of a man with a degenerative muscle and nerve disorder, then pumped carbon monoxide into the man's lungs for twenty minutes; and acquitted Oliver North of all charges of lying to Congress, convicting him only of a single count of obstruction and of two other relatively minor crimes.

Although none of these cases brought protesters to the streets, George Fletcher of the Columbia Law School notes that a number of jury verdicts of the past two decades have. Earlier in our history, Americans marched to protest convictions such as those of Sacco and Vanzetti, but the recent verdicts sparking outrage and protest have all been full or partial acquittals. These acquittals have come mostly in cases in which the asserted victims of crimes of violence were members of racial or other minority groups and in which the defendants were non-members of these groups.

In 1979, a jury that included no homosexuals tried Dan White for murdering George Moscone, the mayor of San Francisco, and Harvey Milk, a San Francisco Supervisor and prominent gay activist. The jury accepted White's partial defense of diminished capacity, a defense often called "the Twinkie defense" because a defense expert testified that junk food was one of the influences that had deprived White of the capacity to act with malice. Following the verdict, 5000 gay men marched on city hall, smashed windows, and overturned and burned eight police cars.

In 1991, a Manhattan jury that included no Jews acquitted El-Sayyid Nosair of killing Meir Kahane, the founder of the Jewish Defense League. The judge who presided at the trial declared that the jury's verdict was "against the overwhelming weight of the evidence and . . . devoid of common sense and logic." Jews in New York and Israel took to the streets in protest.

In 1992, a Brooklyn jury without Jewish members acquitted Lemrick Nelson, Jr. of killing Yankel Rosenbaum during a violent encounter between African-Americans and Jews. Rosenbaum had identified Nelson, an African-American teenager, as his attacker, and the murder weapon had been found in Nelson's possession. Thousands of Hasidic Jews gathered in protest.

The worst race riot in American history began on April 29, 1992, the day that a California jury failed to convict any of four Los Angeles police officers of misconduct despite the fact that most of these officers had been videotaped kicking and beating Rodney King as he lay on the ground. Los Angeles Mayor Tom Bradley voiced the sentiment of many Americans when he said of the videotape, "We saw what we saw, and what we saw was a crime." The jury's action led to two days of violence that cost fifty-eight lives and nearly one billion dollars in property damage.

As Fletcher notes, protesters who take to the streets following jury verdicts are unlike other protesters. Whether violent or nonviolent, these protesters do not have an agenda for change; they simply...
mourn the denial of justice. Perhaps their protests signal an unrelenting demand for vengeance against any outsider accused of victimizing a member of their group. In the embrace of "identity politics," these protesters may cheer for African-Americans over white police officers, or for gays over straights, or for Jews over Muslim fundamentalists.

The new form of protest may, however, indicate the failure of American justice as much as or more than it does the Balkanization of American civic life. The indignation of the protesters usually appears justified. Americans take to the streets following criminal trials because our justice system, unlike those of other western democracies, frequently acquires people whose guilt of violent crime seems obvious.

When a jury reaches a verdict inconsistent with our preconceptions, we should be able to say that the jurors have heard more of the evidence than we have and have struggled with it harder, yet many of us find it increasingly difficult to say, "We must have been wrong." Perhaps our fellow citizens cannot be trusted, or perhaps lawyers, judges, and television broadcasters have done something to them on the way to the forum and inside it.

Juries represent all of us, but jury selection in publicized cases currently seems tilted toward the less informed members of the community. For example, two-thirds of the prospective jurors in the case of Oliver North were dismissed because they had viewed part of North's Congressional testimony on television or had read about it. Among those who remained eligible were the jury's eventual forewoman, who reported that she never looked at the news because "it's depressing," another member of the jury panel who said that he read only comics and the horoscope, one who recalled that North was "a head of soldiers or something like that," and still another who declared that he "didn't understand whatever I heard about this case."

The jurors who tried Imelda Marcos included one who had never heard of her and who could not say whether she was a woman or a man—and another who had not heard of Ferdinand Marcos either. A man who said that the media had made him think of the Menendez brothers as wealthy, spoiled kids was struck from the Menendez jury for cause. A woman who said that she read only Cosmopolitan and Water Ski Magazine was accepted. Forty-five percent of the 196 people summoned as jurors for the 1974 trial of John Mitchell and Maurice Stans had attended college, but only one of them served on the jury.

The Simpson jury included only two college graduates. It included no Republicans or independents. Most jurors indicated that they obtained their information primarily from "early evening tabloid news" programs. One juror reported that she never read anything "except the horse sheet." Three-quarters answered yes to the question, "Does the fact that O.J. Simpson excelled at football make it unlikely in your mind that he could commit murder?" When the lead prosecutor, early in her closing argument, encouraged jurors to take notes, only two did. One juror appeared to doze off repeatedly.

Criticism of the qualifications of jurors is, to be sure, not new, and neither is acquittal of the apparently guilty. American juries have often seemed more tolerant of self-help and of violence than the law on the books says they should be, and "trying the victim" long has been a standard defense strategy. Even without the assistance of psychologists who testify that women who hire thugs to kill abusive husbands suffer from "learned helplessness," juries have recognized that some people just need killing more than others.

American juries have been especially tolerant of violence when victims were black and defendants white. Skin color sometimes has been, for jurors, a good indicator of who needed killing. In 1955, an all-white Mississippi jury took less than an hour to acquit the defendants accused of killing Emmett Till, a 14-year-old African-American visitor from Chicago who had admitted a dare and spoken to a white woman. One juror explained, "If we hadn't stopped to drink pop, it wouldn't have taken that long." (The acquitted defendants later told a journalist that they "had" to kill Till when he refused to beg for mercy.) Southern juries in the 1960s repeatedly failed to convict defendants accused on strong evidence of killing civil rights activists (notably, Medgar Evers, Viola Liuzzo, and Lerruel Penn). At the same time, all-white juries voted not only in the Scottsboro prosecution but also in many others to impose the death penalty on African-Americans who had been accused, often on doubtful evidence, of raping white women and of homicide.

Recent studies of the discriminatory administration of the death penalty as well as the first Rodney King verdict suggest to many that the jury remains an instrument of racial oppression. This year, the Florida Supreme Court ordered an evidentiary hearing in a civil case in which a member of an all-white jury reported that some of his fellow jurors had compared an African-American witness to a chimpanzee, used racial epithets, and joked that the plaintiffs' children were probably drug dealers.

In a reversal of historic roles, whites have begun to fear black jurors too. The acquittal of O. J. Simpson by a predominantly African-American jury, the apparently jubilant response to this verdict of many African-Americans, and the strong racial division concerning Simpson's guilt revealed by public opinion polls have heightened their concern. So have the acquittal of Lemrick Nelson Jr. of the murder of Yankel Rosenbaum and the partial acquittal of Damian Williams in the beating of Reginald Denny. In Washington, D.C., an African-American juror forced a hung jury in the case of an African-American accused of murdering a white aide to Senator Richard Shelby; the jury's foreman had earlier sent a note to the judge accusing this juror of racism and of refusing to discuss the evidence. In Smith County, Texas, African-American jurors blocked the conviction of an African-American accused of sexually assaulting a white woman and then cited as a reason the earlier failure of a grand jury to indict a white police officer for killing a bedridden African-American widow during a botched drug raid.

That enough African-Americans to block conviction may be playing "payback" or otherwise may be unwilling to convict African-Americans of crimes of violence against whites is terrifying to many. Whites have begun to experience a glimmer of the fear of American justice that African-Americans and other members of minority races have experienced throughout our history. Of course most African-American and white jurors seriously seek to do justice, and multi-racial juries often reach unanimous verdicts in cases of interracial crime. "Most" and "often" may not inspire confidence, however. In a nation divided by racial sentiment and tolerant of violence, trial by jury
may appear to be a procedure well designed to promote lawlessness and self-destruction.

The perception that racism on juries now cuts both ways is one reason why the mistrust of juries, particularly on the part of whites, may be greater than in the past. More importantly, the American jury now suffers from some of the problems that plague other democratic institutions.

Although in most governmental matters, the framers of the Constitution preferred representative to direct democracy, they trusted citizens, not their elected representatives, to resolve civil and criminal disputes. Lawyers, however, now hire experts to help them maneuver jurors in the same ways that candidates for public office hire experts to tell them how to push voters' hot buttons. When clients have enough money, these lawyers retain consultants to survey community attitudes and to determine which demographic characteristics indicate favorable jurors. They also hire field investigators to interview neighbors or visit courthouse restrooms to see what reading materials prospective jurors are carrying. With the help of psychologists, they draft endless pages of complex, multiple-part questions probing attitudes, histories, beliefs, memberships, reading habits, viewing habits, and more. Judges then order prospective jurors to answer these privacy-invading questions upon penalty of perjury. The lawyers conduct lengthy voir dire examinations designed partly to determine jury qualifications but mostly to indoctrinate jurors. They sometimes hire shadow juries to observe trials and debrief the lawyers at the end of each court day.

Television may make it easier for trial lawyers with seemingly hopeless cases to confound fantasy and reality—something that the lawyers for O. J. Simpson apparently realized from the outset. As prosecutors at the preliminary hearing in the Simpson case presented a wealth of incriminating evidence, some of which the defendant's attorneys were seeking to suppress, I wondered why the defendant's lawyers had not sought to have the television cameras removed. Broadcasting the preliminary hearing would ensure widespread knowledge of the damaging evidence even if the judge suppressed it.

My first guess was that the lawyers were just grandstanding—seeking publicity for themselves through a broadcast that could only harm their client. On reflection, however, I decided that the lawyers were better strategists than I. They realized that the more the Simpson case came to be seen as a television drama, the better their client's chance of escaping punishment. "Cinematization" of the case might make more plausible the scenarios that talk-radio callers, defense attorneys, and jurors would invent: O. J. Simpson's son, whose DNA is much like his father's, killed Nicole Simpson and Ronald Goldman. Or Colombian drug dealers with very bad eyesight committed the crimes to punish Faye Resnick for not paying her debts. Or racist detectives planted bloody evidence to punish O. J. Simpson for marrying a white woman. Or the real murderer is the shoe salesman who testified that O. J. Simpson always wears size 12 shoes; it is evident that this witness lied, for no one always wears the same size shoe as he shifts from brand to brand.

A basic rule of screenwriting is never to write "on the nose." A scene must not be quite what it seems or what the characters say it is, for the writer must leave room for the imaginative participation of the audience. Jurors, like talk-radio callers, love to play detective. As Judith Gardiner has noted, children now spend more hours in front of television sets than in contact with their parents, and as their substantive encounters with other human beings grow less frequent, some of them find it increasingly difficult to distinguish media representations from reality.

A view of the world through the television set offers blameless victims, uncomplicated villains, capable police investigators, and perfect proof—images that make it easy to be tough on crime in the voting booth and difficult to be tough on crime in the jury room. As Stephen Schulhofer has noted, our cultural dehumanization of offenders provides an easy opening for defense attorneys who can show that their clients do not fit the jury's image of the generic Pusher-Mobster-Mugger. A youth who has killed his parents with a shotgun may sob in apparent anguish as he recounts the abuse allegedly suffered at his father's hands, and a person accused on strong evidence of stabbing and nearly decapitating his ex-wife may be a charming sports hero whom all of us thought we knew. As defense counsel seeks to humanize his or her client, he or she typically works to demonize someone else. This lawyer may suggest that Fuhrman cannot be distinguished from the Fuhrer, or counsel may portray a murdered and therefore voiceless father as an unloved monster. As on television, someone must be cast as the "other" and someone else as the real victim.

The American jury trial needs reform. The following measures would help:

1) Eliminate or greatly restrict the ability of lawyers to challenge prospective jurors peremptorily. The frequent exercise of peremptory challenges on the basis of group stereotypes is demeaning to the jurors who are dismissed, and peremptory challenges facilitate lawyers' efforts to stack juries. These challenges also ensure that, contrary to our rhetoric, juries rarely are composed of a defendant's peers and rarely reflect a cross-section of the community.

2) Eliminate or greatly restrict the use of lengthy jury questionnaires and voir dire examinations. Personal questions that no lawyer would dare ask a judge are also insulting and invasive of privacy when directed to prospective jurors.

3) Eliminate all professional exemptions from jury service. Doctors, firefighters, morticians, and lawyers should be expected to serve.

4) Enforce jury summonses. In some jurisdictions, as many as two-thirds of all jury notices are disregarded, and despite the warnings printed on the notices, nothing happens.

5) Do not disqualify prospective jurors who have seen news accounts of a case unless they have been exposed to inadmissible evidence or appear unwilling to judge the case on the basis of the evidence admitted in court.

6) Do not sequester juries or order changes of venue simply because a case has been the subject of very intense publicity.

7) Reduce the influence of professional jury consultants—perhaps by making their reports available to both sides. If a lawyer could not gain any partisan advantage by hiring a jury consulting firm, he or she probably would not bother to pay the $10,000 to $250,000 per case that these firms charge.

8) Offer jurors instructions on the law at the outset of the trial. As Judge William Schwarzer has observed, the current judicial practice resembles telling jurors to watch a baseball game and determine who
won without telling them the rules until the game is over.

9) Redraft standard jury instructions to enhance their comprehensibility, and permit jurors to take written copies of the court's instructions with them to the jury room. Allow judges to offer further instructions without fear of reversal for imprecise statements of the law unless these statements seem very likely to prove prejudicial.

10) In a lengthy trial, permit and encourage lawyers to present mini-summations and arguments as the trial proceeds.

11) Permit and encourage jurors to take notes. A minority of courts still forbid note-taking even in cases in which the lawyers must carry personal computers to keep track of the evidence. Other courts, without formally prohibiting note-taking, fail to supply paper and pencils or to advise jurors that they are welcome to take notes.

12) Permit and encourage jurors to ask questions of witnesses after submitting these questions in writing for review by the court and counsel.

As helpful as these measures would be, all of them together cannot fix what is fundamentally wrong with the American jury trial. The vices of this institution, which regularly come to you live from Los Angeles, cannot be corrected simply by improving the care and handling of jurors. Replacing our defective evidentiary rules and trial procedures is much more important.

The opponents of televising trials once argued that viewers would watch only lurid cases such as those in which football heroes were accused of killing their ex-wives. The proponents insisted that broadcasts would educate the public about the workings of the third branch of government. Both were right. Viewers might have tuned-in the Simpson trial for entertainment, but many were appropriately appalled as Judge Ito forced lawyers endlessly to "rephrase the question" for reasons that no one could understand, as he admonished jurors twice a day to perform the astonishing task of forming no opinions while they heard the evidence (they disobeyed), as he excluded obviously significant evidence, as lawyers on both sides forced witnesses to repeat their testimony interminably (How long does it take someone to say that he heard a dog barking at 10:15 p.m.? In an American courtroom, the answer seems to be about two hours), as Christopher Darden and F. Lee Bailey demonstrated that what people have heard about Rambo trial lawyers is true, as Johnnie Cochran and Marcia Clark played games of legal "gotcha" (Did an inadequately coached witness mention his belief that the defendant had an alibi? Why, that means that the defendant's unsworn statement should be admitted so that he can avoid cross-examination), as ten of the initially impaneled jurors and alternates were discharged for their sins (mostly arrogance and dishonesty), and as witnesses were never permitted to explain their answers.

The legal profession has formulated its response to people who see in the Simpson trial a tale of legalism and obfuscation: This trial was atypical. It tells us nothing about the American justice system. Besides, things would have been different if Judge Ito simply had said "proceed" more often or if the trial had not been televised.

In fact, the Simpson trial was atypical, and it tells us a great deal about the American legal system. It shows how readily this system can be used, confused, and abused when skillful lawyers have the resources to press it hard. It shows a system in which, in Justice Hugo Black's phrase, the kind of trial a man gets depends upon the amount of money he has. It shows a system that can survive only because very few litigants have the resources to invoke the procedures that it offers on paper. It shows a system with serious structural flaws. Apply, if you like, a discount because the judge did not importune the lawyers more often or because the trial was televised; the over-proceduralization of this system remains.

Because our legal system cannot deliver on its extravagant promises (that is, cannot afford to give O. J. Simpson-style trials to anyone except celebrity defendants whose cases are front-page news), lawyers and judges have effectively repealed the right to jury trial. Ninety-two percent of the defendants convicted of felonies in state courts plead guilty because prosecutors and judges tell them in effect, "You have a right to jury trial, and we have the right to sentence you to fifty years if you exercise it."

The quality of justice in American criminal cases is suggested by a recent study by Michael McConville and Chester Mirsky, which reported that the lawyers appointed to represent indigent defendants in New York City submit no vouchers for investigative expenses in seventy-three percent of their homicide cases (and eighty-eight percent of their other felony cases). These lawyers file no legal motions in seventy-five percent of their homicide cases (and ninety percent of their other felony cases). Defendants charged with felonies frequently are given only fifteen seconds to decide whether to accept the plea agreements offered by calendar judges, and when a judge sees a defendant wince as his lawyer describes the offer, the judge may say, "[The defendant] doesn't appear to like it. Tell him, Mr. [defense counsel], . . . that it is going to go up next time, six to twelve [years]. McBride is going to get four to eight if he is smart, six to twelve if he is dumb." Would a champion of American criminal justice prefer that we forget O. J. Simpson and evaluate our legal system on the basis of a typical case?

The taxpayers spent more than $8 million on the Simpson trial, and the criminal justice system's taste for champagne and caviar in the few cases that reach trial seems to be causing its starvation in the many cases that do not. Moreover, to judge from the Simpson trial, even the caviar does not taste good. The Simpson trial featured a "dream team" of defense attorneys that few defendants could have afforded, the most talented team of prosecutors that a 850-lawyer office could field, the finest expert witnesses that money could buy, and a specially assigned and (until the trial) highly respected trial judge; and still the trial mortified even lawyers.

During a recent discussion of the Simpson case, someone described what the case meant to her elderly father—that he could no longer believe in something in which he had believed all his life, the American justice system. The Simpson trial is likely to be remembered mostly as a flamboyant media event, but it conceivably could prove to be something more. This trial could mark a turning point in our legal history, the moment when the need for America to reinvent a fair and workable trial procedure became too obvious to deny.

Albert W. Alschuler is the Wilson-Dickinson Professor at the Law School. A slightly different version of this article will appear in the Winter 1996 issue of The Public Interest (#122).