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The Trials of Two Centuries: Lizzie Borden Meets O.J. Simpson

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When Judge George Choppelas, who presides over the San Francisco Court of Historical Inquiry, called and invited me to represent Lizzie Borden in a mock retrial, I was vaguely aware of the parallels between Lizzie’s “trial of the century” and the “trial of the century” in which I had recently participated, the case of People v. O.J. Simpson. (“Trial of the century” may be a bit of over-used hyperbole. I’ve located 34 trials in the twentieth century that were labeled the “trial of the century” or “the crime of the century.” We have a trial of the century every three years.)

I knew that Lizzie, like O.J., had been quickly acquitted by a jury, and that much of the public generally rejected that verdict and concluded she was guilty anyhow. Lizzie became a social pariah, taunted by the children’s rhyme that inaccurately tallied the whacks she allegedly administered to the heads of her family. The rhyme is a classic example of media exaggeration. If Lizzie was indeed the perpetrator, she didn’t give “her mother 40 whacks.” It was her stepmother, and the coroner found 19 wounds. And her father was the recipient of 14 whacks, not 41.

What I did not realize, until I delved into the historical accounts of Lizzie’s trial, was that the trial of O.J. Simpson was a historical replay that eerily resembled the Borden trial in dozens of particulars. The defense theory in both cases was precisely the same: the perpetrator of two very bloody murders would have been drenched in blood. Where was the bloody clothing Lizzie wore? Where was the bloody hatchet? There seemed to be just as many theories of how Lizzie disposed of her hatchet and her dress as there were to explain how O.J. supposedly dumped his clothing and shoes and got rid of a knife. In both cases, however, the prosecution could produce little evidence to back up the theories. In Lizzie’s case, the prosecutors argued that Lizzie had casually burned the bloody dress in the presence of two witnesses two days after the murders. The defense had a very plausible explanation, that Lizzie was disposing of a paint-stained garment, naively giving no thought whatsoever to the possibility of incriminating inferences that might be drawn.

In O.J.’s case, the police expended enormous efforts in searching the waste containers of dozens of airplanes, searching the fields surrounding a Chicago hotel, and finally suggesting that the evidence was neatly packed in a carry-on bag that disappeared into the ethereal cosmos. When the barn behind Lizzie’s house was torn down years ago, the remains were carefully sifted in an effort to locate the missing axe. The Borden family home in Fall River, Massachusetts, was recently opened as a bed and breakfast establishment. Thousands
of tourists will now explore every crevice, still looking for a bloody axe. If they ever convert O.J.'s Rockingham mansion into a hotel, they should preserve the white carpets that lead all the way up the stairs to the master bedroom. Guests can marvel at the mystery of how a blood-drenched murderer made his way up those stairs without leaving a droplet of blood on the carpet.

In our mock retrial of Lizzie, the prosecutors offered the explanation that Lizzie removed her clothing and committed the murders in the nude! Actually, this implausible scenario was not original. In a 1975 Emmy Award-winning television movie entitled “The Legend of Lizzie Borden,” Paramount Television portrayed Lizzie removing her clothing, axing her stepmother, cleaning up and dressing again to greet her father, then repeating the strip and wash before dropping the bloody axe down the basement privy. But even in 1892, police had enough sense (and enough stamina) to search the privy. It’s a safe bet that when Hollywood does “The Legend of O.J. Simpson,” they’ll depict O.J. driving up to Rockingham in his boxers shorts.

The most remarkable parallel between the cases of Lizzie Borden and O.J. Simpson, however, was in the role that the American media played in both trials. The media coverage of the O.J. trial was a remarkable demonstration of the principle that bad journalism drives out good. The traditional line between the “legitimate” press and the “tabloid” media coverage was so excessive, tasteless, and speculative that, rather than prejudicing jurors, it made them into skeptics. Defense lawyers prefer jurors who are skeptical of “official explanations.” The media circus actually benefitted the defense because so much was exposed as nonsense before the trial began.

Remarkably, that is precisely what happened in the case of Commonwealth v. Lizzie Borden. Back then, most Americans got their news from newspapers, rather than television, and most American newspapers of the day were, in fact, tabloids without pictures. They paid cash for their stories; and to the newspaper reporters and editors of a century ago, public interest and prurient interest meant the same thing. The October 10, 1892, issue of the Boston Globe appeared two months after the murders, while Lizzie was in custody awaiting trial. Lizzie’s trial did not begin until a year after the murders, so the media frenzy had even more time to build. As “trials of the century” go, O.J. actually set a record for the speed with which the case was prepared for trial. The trial began only four months after the murders.

The front page of the October 10, 1892, Boston Globe screamed, “Lizzie Had a Secret!” Claiming that the newspaper had gained access to investigative reports of the statements of 25 witnesses, the Globe reported that Lizzie was pregnant and that her embarrassing predicament led to a violent confrontation with her father. The newspaper exulted in its “scoop,” making the widespread public amazement at its revelations into a follow-up story, with the self-congratulatory headline, “Police Think the Scoop is a Corker!”

The “scoop,” it turned out, was the product of the fervid imagination of a detective employed by the police, who received $1,000 in cash for delivering the “witness statements” to newspaper reporter Henry Trickey. Trickey was a remarkable character, only 24 years old, and already a top reporter for one of the leading newspapers in the country. In one of the more bizarre twists of Lizzie Borden’s case, the same grand jury that returned her indictment for murder on December 2, 1892, returned a second indictment, of reporter Henry Trickey, for tampering with witnesses. Three days after his indictment, Trickey died under the wheels of a train in Ontario, Canada, an apparent suicide.

Many historians of the Lizzie Borden case conclude that the media excess actually worked in Lizzie’s favor because the jury was quite sympathetic to her defense after seeing so much of the media coverage exposed as malicious lies. I’m personally convinced a similar phenomenon was at work in O.J.’s case. At least in the black community, the blatant racism that pervaded coverage of the case by national newsmagazines, like Time and Newsweek, made a claim that racist police planted evidence much more plausible. It should not be assumed that massive pretrial publicity will inevitably disadvantage a defendant. One recent poll revealed the extent to which Americans are becoming more skeptical of the media. In 1997, more than half, 56 percent, of Americans report an opinion that the (Please turn to page 70)
means faultless—faultless in all details—and language is a detail. If Mr. Lounsbury had only compared Cooper's English with the English which he writes himself—but it is plain that he didn't, and so it is likely that he imagines until this day that Cooper's is as clean and compact as his own. Now I feel sure, deep down in my heart, that Cooper wrote about the poorest English that exists in our language and that the English of Deerslayer is the very worst that even Cooper ever wrote.

I may be mistaken, but it does seem to me that Deerslayer is not a work of art in any sense; it does seem to me that it is destitute of every detail that goes to the making of a work of art; in truth, it seems to me that Deerslayer is just simply a literary delirium tremens.

A work of art? It has no invention; it has no order, system, sequence, or result; it has no lifelikeness, no thrill, no stir, no seeming of reality; its characters are confusedly drawn and by their acts and words they prove that they are not the sort of people the author claims that they are; its humor is pathetic; its pathos is funny; its conversations are—oh! indescribable; its love-scenes odious; its English a crime against the language.

Counting these out, what is left is Art. I think we must all admit that.

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**Legal Lore**

*(Continued from page 58)*

media frequently gets the story wrong, compared to only 45 percent who reported such an opinion ten years ago.

The media frenzy surrounding trials like Lizzie Borden's and O.J. Simpson's has a very seductive influence on ordinary people who want to achieve some sort of notoriety. One of the most difficult tasks facing both the lawyers and the journalists is sorting out the nutcases from the legitimate witnesses. The difference is not always obvious. In Lizzie's case, both police and news reporters were plagued with stories of "sightings" of the perpetrator in the vicinity of Fall River on the day of the murders. Andrew Borden's reputation as a stingy and selfish skinflint helped fuel the stories, which suggested as possible suspects dozens of former employees or business associates who might have had a motive to do him in. Similarly, the lifestyle of Nicole Brown Simpson did not permit one to quickly dismiss all the claims of sightings of suspicious characters lurking about the premises on the night in question. One of the most bizarre "eyewitnesses" to emerge was a man who claimed to be standing at an intersection halfway between the Bundy crime scene and O.J.'s residence at 10:30 p.m. the night of the murders. He said he observed a white Bronco screech to a halt, narrowly avoiding an accident. He saw a person on the opposite curb wave and exclaim, "Hey, O.J.!!" And he had the presence of mind to note the license number as the Bronco sped away. The only reason he did not appear as a star witness at the trial was that the license number he produced was the license number of Al Cowling's Bronco, which everyone saw on television during the slow-speed chase.

Another remarkable replay of Lizzie's trial occurred when a guard at the jail where O.J. was in custody volunteered that he "overheard" an incriminating conversation between O.J. and Roosevelt Grier, the football-great-turned-minister, who was offering spiritual counseling to O.J. While Lizzie was awaiting trial in custody, a local sheriff actually hid himself under her bed so he could listen to her conversations with visitors. In O.J.'s case, the court ruled that the guard could not testify because of the assurances given to Simpson that arrangements for him to confer with his lawyers and minister were secure. The prosecution in Lizzie's case never even offered the jail snoop as a witness, concluding what he had to offer was not worth risking the indignation a jury would feel toward such ungentlemanly conduct.

It took four hours to pick the jury in the Lizzie Borden case. In the O.J. trial, it took two months. But even here, there was a strong parallel. In Lizzie's day, the jurors were all male, and of course, all white. It doesn't take a sophisticated jury consultant to figure out that a jury of males would be to Lizzie's advantage. That advantage was a given; the prosecutors could do nothing to control the gender of the jurors. While much has been written about the "race cards" being played in the selection of the O.J. jury, it turns out that "gender" cards were just as important. Sophisticated jury experts were consulted, and they suggested that a jury of females would be to O.J.'s advantage. The exercise of peremptory challenges by both sides reflected this reality, with the defense less inclined to accept males, and the prosecution less inclined to accept females.

The Lizzie Borden jury returned a verdict in one hour and six minutes. The jury in *People v. O.J. Simpson* was widely criticized for reaching a verdict too quickly, in four hours. Although the Borden verdict was controversial, I have never read one word of criticism of the jurors. Jury bashing was not unknown in the nineteenth century, but by and large, Americans were much more willing to accept the verdict of a jury. Even though Lizzie was treated like a pariah, her jurors were never subjected to the vicious sniping directed at the O.J. jury. The phenomenon of jury bashing, at least to the extent we now practice it, is certainly related to television coverage of trials. By creating the illusion that we all know just as much about the case as the jurors, television creates a license to substitute our judgment for theirs. Another thing that has apparently changed is the willingness of lawyers to join in. The extent to which prosecutors have made the judge and jury the scapegoats for their ineptitude has certainly contributed to the growing popularity of the American sport of jury bashing.

Just like the O.J. case, Lizzie Borden's case turned many of the judges
and lawyers into celebrities. One of the more fascinating comparisons between the two cases is to look at what their celebrity did to the lawyers and judges in the two cases, and, perhaps a more profound question, what they did with their celebrity.

In Lizzie’s case, there was actually a panel of three judges presiding, so there was a collaborative process and collective responsibility that Judge Lance Ito might have welcomed in the O.J. trial. Lizzie’s was actually the first case tried under a Massachusetts statute requiring a three-judge panel for capital cases, which went into effect in 1891. (Massachusetts has since abolished the death penalty.) For all three judges, Lizzie’s was the most spectacular case of otherwise unremarkable careers. All three ended their judicial careers in the same positions they occupied at the time of the Borden trial. Then, as now, presiding over a high-profile trial was not the way to advance a judicial career.

Even though they lost the case, both of Lizzie’s prosecutors went on to spectacular political careers. Hosea Knowlton was elected Massachusetts attorney general in the next election. (Watch for Marcia Clark to be floated as a candidate for California attorney general in 1998!) William Moody was elected to Congress, and later served as Theodore Roosevelt’s attorney general. He ended his career as a Justice of the United States Supreme Court. Gil Garcetti, on the other hand, was nearly unseated as governor of Massachusetts. He had served in Congress, and later served as Theodore Roosevelt’s attorney general. He ended his career as a Justice of the United States Supreme Court. Gil Garcetti, on the other hand, was nearly unseated as governor of Massachusetts. He had served in Congress, and later served as Theodore Roosevelt’s attorney general.

Lizzie’s defense lawyers, who were both very talented trial lawyers, were also ambitious politicians. Andrew Jennings was elected district attorney in the next election, to succeed Hosea Knowlton. George Robinson was already in the twilight of a successful political career. He had been elected to Congress, and served three terms as the governor of Massachusetts. He had even appointed one of Lizzie’s judges to the bench. So, of course, he was regarded by the judges as a lawyer of eminent wisdom! One benefit the Lizzie Borden case brought him was that it certainly made him richer. He received a fee of $25,000 for his services, which would translate in today’s dollars to a cool million.

It’s interesting that the O.J. lawyers and judges are seeing significantly different effects on their careers from their notoriety. Judge Ito may never recover. The judge who awarded O.J. custody of his children faced the threat of a recall election. The obvious lesson for judges is to keep your head down if you want to rise. Many of the O.J. lawyers have parlayed their celebrity into media careers: book deals, television contracts, and a plethora of movies yet to come. Thus, the line between the practice of law and a career in show business also became somewhat blurry in the wake of the O.J. trial. None of the participants in Lizzie’s trial ever wrote a book about it. It can almost be said that none of the participants in O.J.’s trial did not write a book about it. Having written two of them, and read all of them, I can offer one reflection. Every book probably revealed more about its author than it did about the trial. I had to keep asking myself as I read each book, “Were we at the same trial?”

Both the trials of Lizzie Borden and O.J. Simpson offer more lessons about American culture than they do about our system of justice. Neither can be understood except as a uniquely American cultural event. Perhaps the most profound lesson they teach us about American culture is our immutable inability to ever learn anything from our past. We pride ourselves on how far we’ve come in the past century, but our “trials of the century” tell us that we like to keep doing everything the same way.

My real claim to fame from the Simpson trial arose from my role as poet laureate of the defense team. I proudly claim full credit for feeding Johnnie Cochran the line, “If it doesn’t fit, you must adjust.” Thus, in defending Lizzie Borden in our mock retrial, I again sought poetic justice. After all, in judging Lizzie the American people apparently put more credence in a snappy jingle than they did in the jury’s verdict. So let me close with the same couplet that I recited to our jury in the Lizzie retrial by the San Francisco Court of Historical Inquiry:

Without an axe or blood-stained dress, Lizzie’s not a murderer.
Rather than the criminal type, She’s just a victim of media hype. So put aside the childish rhyme, That links her name with brutal crime.
Accept, without a doubt or worry, The verdict of an American jury.

More than one hundred years after her original trial, Lizzie was once again acquitted.

From the Bench

(Continued from page 6)

your eyes at judicial rulings or making faces while your adversary speaks, and everyone in the courtroom—the judge, the jury and your client—expects you to be a professional.

7. Be neat. No one respects a sloppy drunk. Neatness matters both in the bar and at the bench. Written submissions and oral presentations should be prepared and orderly. It is impressive when exhibits are ready and a copy available to the court and your adversary. Know what you are doing and look like it. Bumbler may be bounced.

8. Be truthful. Duffy’s had its share of baloney throwers. Bartenders see the best of them, and, to some degree, they are entertaining. I guess we all appreciate hyperbole at the bar, although no one believes a word of it. This is fun at the bar. It is not in court. In court, it is the sober, straight-shooter who is popular. So save the baloney. Give it to me straight.

9. Know when to leave. There is no “last call” in court. When the court rules in your favor, stop talking and get out. When the court rules against you, it is all right to make sure, but after that, graciously leave, prepared to fight another day. During one of my first oral arguments, the judge did me a big favor by telling me when I tried to interrupt him: “Shut up and sit down, I’m agreeing with you.”

10. Finally, buy a round. Be gracious. Cut your opponent some slack. I am not suggesting you sell out a client for a pal. But there are times when stipulating to a point or sharing an exhibit or giving ground on little things assists the court, enhances the profession, and costs your client nothing.

These lessons may be old, but filtered through the dim lights of Duffy’s they take on new life. The comparisons are scarcely exaggerated. This past year on the bench I have had a witness fall asleep during her cross-examination, a young woman collapse at the bench, a defendant urinate in court, various amounts of cursing and swearing, and a lot of laughing and crying. Sometimes it seems like old times.