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Can Derek Chauvin Possibly Be Acquitted?

By [Joel Cohen](#)

A jury empaneled will decide the case—ostensibly on the merits alone. Or will it really?

This article is not about the merits of the Derek Chauvin prosecution. Not about guilt or innocence. Not about whether Chauvin set about that day last May to deliberately kill George Floyd—clearly he didn't. Not about whether he bore racial hatred or animus toward Blacks. Nor whether he simply lapsed into the killing, oblivious to the life of a man whom he felt had dissed him as a police officer, that day or before. It's about whether this jury, any jury, can silence their minds to the "what ifs?" After all, the Chauvin jurors know—don't they?—what is almost certain to occur if they don't convict on the most serious counts.

A jury empaneled will decide the case—ostensibly on the merits alone. Or will it really? That is, no matter how cautious the judge in his evidence rulings and instructions; no matter how careful the prosecutor in abstaining from introducing questionable evidence; no matter how scrupulous the jury in withstanding the media (or even influence by family watching the trial on TV who might encourage to convict). And it's not about the still-jarring images of the oh-so-relaxed Chauvin casually sitting, his knee on the neck of George Floyd for nine minutes and 29 seconds, as life oozes from him. It's not about the 27 times in that torture session that one can audibly hear Floyd crying out "I can't breathe."

This moment is about the public, and our influence, as unintended as it may be, on what is happening in that Minneapolis courtroom. And, given this pivotal moment and the race divide in America that bubbled to the surface *over this case*, it's about whether true justice is possible—a jury deciding about guilt with total impartiality.

Put otherwise, can the most pristine jury be impervious to the protests outside the courthouse, not to mention the nationwide outcry of marches and protest mobilization that came to define the past year? What juror could ignore what he or she surely knows will happen in Minneapolis, where courthouse protests have already begun and will surely reach quickly across the nation if anxious trial watchers hear the words "not guilty" to each of the three counts or even the two murder charges, at the trial's conclusion? When the courthouse doors spring wide open, how broad will the protests be? And we know/the jurors know that it simply won't be limited to *peaceful* protest.

Rather, it may actually be about what overtly occurred in the wake of Floyd's killing, after the peaceful laying of flowers at George Floyd Square had ended. That is, after "too much time" had passed for the populous while awaiting Chauvin's arrest. And, then, when too much more time elapsed during which Chauvin wasn't yet charged to a criminal degree that satisfied the irate and protesting public.

All of the public, particularly those bent on or moved to violence, have observed a slow-moving killing occurring in real time. It will have literally heard the voices of bystanders on the street imploring Chauvin and his cohorts to stop the killing. Not a gunshot that took one second. A killing act in real time that took more

than nine minutes. And the evidence being presented at trial is actually far worse than what the public had known back in June. No one has to imagine!

Jurors will, of course, hear defense forensic testimony about the cause of Floyd's death that will argue that the immediate causes were his use of amphetamines and fentanyl, and his pre-existing heart condition.

Jurors will be admonished about the prosecution's burden of proof. Yes, it's true—it has the burden. Everyone knows that almost by apostolic succession—but so what, in such an explosive and *sui generis* case?

Yes, indeed, the judge will have instructed the jury several times to decide the case based on what has happened within the four walls of the courtroom and to keep the "noise" outside right there. Still, it's hard to see how a judge's instructions will so move the jurors as to put to the side the visual that they will have seen so many times of Chauvin's knee and full weight on Floyd's neck. Maybe, just maybe, these jurors might somehow be able to overcome the visual through powerful medical testimony raising reasonable doubt at least as to the murder counts.

Still, even if they do that, will the jurors nonetheless be able to ignore what lurks outside the courthouse doors? If there's a conviction, we'll never really know. ("We listened to the evidence and it overwhelmingly pointed to his guilt of murder. We carefully followed the judge's instructions.") No juror will ever admit a feared retaliation if an acquittal had been voted. But if there's an acquittal, it's not hard to imagine what will occur. Past is prologue! This simply isn't like the O.J. trial, where there wasn't reason to anticipate violence after the verdict; the race issue in O.J. wasn't anything like this. That trial took place at a time when the race divide in America wasn't openly acknowledged as it is today, and simply wasn't the same.

Chauvin's defense requested a change of venue out of Minneapolis where so many buildings, including a police precinct, had been ablaze. It was denied. Yes, all of America, and surely all of Minnesota, had seen videos of the killing, and so a venue change wouldn't have been a panacea to address jury prejudice. But still, wouldn't a change to another metropolitan area in Minnesota have provided some (even if a limited) measure of prejudice protection for a criminal defendant against the type of fear that must surely be consuming the jury (at least subconsciously)? But that's an aside.

It won't be the first time a jury will have been under immense pressure to convict. Not the first time that a jury will harbor deep in the recesses of its collective mind, if not consciously at the surface, that street violence might occur if it acquits. And, it won't matter at all to those moved to violence that the jury's composition has included four Black and two biracial jurors. Nor that the Minnesota Attorney General prosecuting the case is Black. Just like it hasn't really mattered that one of Chauvin's fellow officers on the scene when George Floyd was killed is Black. When visceral considerations gain momentum, relevant facts— and the jury's composition is one, certainly to the lawyers—sometimes become inconsequential.

Yes, we know that protesters went wild when the police in Simi Valley, California, were acquitted in 1992 when they were first brought to trial (then in a state court) over their horrendous beating of Rodney King. But this is far different. While the jurors in the second King trial may have theoretically faced a potential similar issue, the protests relating to King's beating had not created a national movement as with Floyd, and violent protests, unlike here, didn't occur even *before* the King officers were acquitted in state court. Now, with Chauvin, sometimes violent protests occurred nationwide in wake of Floyd's killing long before any charges were brought. And then a second time after the grand jury wasn't (yet) asked by the then- prosecutors to vote murder charges.

The Chauvin trial jury must surely realize what an acquittal will likely bring given what transpired last year. Frankly, if they don't, the jury is composed of individuals totally out of touch with, or simply unwilling to appreciate, what surely must be impacting them. That is, they have a mentality that enables them to compartmentalize the testimony in the courtroom (guided by the judge's instructions about it), from what

they surely know as human beings that they will encounter when the trial ends. Put otherwise, if the jurors don't realize that they actually hold "societal peace," for lack of a better term, in their hands when simultaneously attempting to accord a fair trial to (the unsympathetic, but nonetheless legally entitled) Derek Chauvin, they're simply not considering reality. In this case, put simply, the System asks too much of them!

This all paints an excruciatingly negative portrait of justice. It basically argues that the System, given the potential for violent protest that undoubtedly lingers in each juror's mind, is predestined against Chauvin. Meaning, he can't possibly get a fair trial, something especially important that unpopular defendants in our system of justice receive in order to preserve a constitutional system.

In fairness, a very experienced judge friend whom I revere tells me in discussing this issue that I may be mistakenly extrapolating onto everyday jurors what we, as more sophisticated consumers of criminal justice news coverage, might more readily believe will likely occur than do the seated jurors. He firmly believes, not as a shibboleth, that an equipped judge can do much to "silence the noise." Maybe so; but I wouldn't want to be a lawyer in a case involving potentially significant street violence that will impend if an acquittal eventuates, where the jurors probably have the same concern as do I marinating inside their heads.

I do believe it would be impossible for any jury to acquit on the manslaughter charge having watched the video that everyone has seen. A manslaughter conviction, though, won't be nearly enough for the Floyd sympathizers. It may be apostasy for a criminal lawyer to say so, but I, myself, simply want Chauvin convicted of the top murder count—easy to say as I haven't taken an oath. Too much is at stake if that doesn't occur. I fear, though, that the Chauvin jurors, in the dark night of their souls, are likely being moved by the same thoughts expressed here, whether they would ever say so or not. Voir dire jury selection simply doesn't give jurors foolproof lie detector tests.

Notably, Chauvin could have waived a jury trial under Minnesota law—a Minnesota statute provides for it especially in cases involving tremendous prejudicial publicity as in Chauvin. That would have placed the case in the hands of a single judge *hopefully* unmoved by the fear of post-acquittal violence (Judge Cahill, incidentally, had dismissed one murder count before he was reversed on appeal). Most defense lawyers see a nonjury trial as a slow-motion guilty plea—a judge-only trial deprives a defendant of one or more holdout jurors who, for whatever reason, simply won't vote to convict no matter what. A jury trial waiver might have been an escape from a sworn jury fearing violence following an acquittal—but at what cost to the defendant's possibility of an acquittal? And this assumes that the judge himself isn't subconsciously moved by the likely atmosphere outside the courthouse in the event of an acquittal or, indeed, extremely conscious about sticking his neck out by acquitting.

Finally, this is worth saying and, I'm afraid, fairly provocative. Virtually no judge will agree with what has been said here. All judges firmly believe in the jury system, or at least they say they do. And some, including some who are less honest with themselves than others, maintain to the death a belief that jurors scrupulously follow a judge's instructions, no matter what. If there's ever a case that, for the vitality of the System, especially judges who truly believe that jury instructions are closely followed need to be right and for me to be wrong, Chauvin is the one.

I'm truly hoping I'm the one who is wrong.

Joel Cohen practices white-collar criminal defense law as Senior Counsel at Stroock & Stroock & Lavan. He is the author of "Blindfolds Off: Judges On How They Decide," (ABA Publishing, 2014), and is an adjunct professor at both Fordham and Cardozo Law Schools.

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