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Simms Memorial Lecture Series Explaning the Unexplainable: Analyzing the Simpson Verdict

Peter Arenella

SIMMS MEMORIAL LECTURE SERIES
EXPLAINING THE UNEXPLAINABLE: ANALYZING THE SIMPSON VERDICT

PETER ARENELLA*

INTRODUCTION

Dean Romero: Good evening and welcome. I am Leo Romero, the Dean of the University of New Mexico School of Law, and we are honored tonight by the presence of this year's John Field Simms Memorial Lecturer, Professor Peter Arenella. Now, at the outset, I wish to introduce the sign language interpreter for this evening's lecturer, Mr. Gerald Hahn, at my immediate right.

This evening marks the fifteenth John Field Simms Memorial Lecture. The fund for the lecture series was established by the generous gift of Albert Galatin Simms to the University of New Mexico School of Law in memory of his brother, John Field Simms who died in 1954. John Field Simms was an eminent trial lawyer, a distinguished public servant, a former Justice of the New Mexico Supreme Court and a member of the Board of Regents of the University of New Mexico. His son, Dr. Albert Simms, and his daughter, Anne Simms Clark, are here with us this evening. The gift to establish the John Field Simms Lecture provided for the annual presentation of a lecture or lectures by distinguished and learned members of the legal profession including practicing attorneys, jurists, and outstanding law teachers and scholars. The lectures afford students of the law, members of the legal profession, and the public in general an opportunity to learn about the basic concepts and principles of law and ethics which have proven to be the bulwark of justice and liberty among civilized people. And during their stay on campus Simms Lecturers traditionally meet informally with students and faculty and join in class discussions.

Past Simms Lecturers have included justices of the United States Supreme Court, presidents of universities, law deans and professors, high-level government officials, and United States Court of Appeals judges. We are privileged this evening to have as our Simms Lecturer, Peter Arenella, Professor of Law at the University of California, Los Angeles (UCLA). Thank you for accepting our invitation to come to New Mexico.

Professor Arenella grew up in Boston and then attended Wesleyan University in Connecticut, graduating Magna Cum Laude in 1969. He was also elected to Phi Beta Kappa and won a Woodrow Wilson Fellowship. His distinguished educational career continued at the Harvard

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Law School where he was honored as a Reed-Baldwin Scholar and graduated Cum Laude in 1972. Following law school he served as a law clerk for the Chief Justice of the Massachusetts Supreme Judicial Court. He started his legal career as a criminal defense lawyer, first as a public defender with the Massachusetts Defenders Committee and then as an attorney in private practice. After several years as a criminal lawyer in the real world, he returned to academia in 1975 as a law professor, first at Rutgers Law School and then at Boston University, where he won the university prize for distinguished teaching. In 1987, Professor Arenella moved to UCLA, where he teaches criminal law, criminal procedure, and other specialized courses such as moral philosophy and mental health law.

Professor Arenella is nationally recognized as an expert in the area of criminal law. Because of his influential scholarly writing, congressional committees have sought his advice and testimony concerning proposals to reform federal criminal law on grand jury practices as well as on the insanity defense. In addition, Professor Arenella has been active in national organizations concerned with the criminal justice system. For example, he served as a Reporter and Chair for the Grand Jury Reform Committee of the American Bar Association, drafting major portions of the Model Grand Jury Reform Act. He is also a talented teacher and lecturer. I can attest to his reputation, having worked with him at a national conference on teaching criminal law about ten years ago. But perhaps a stronger and more recent recommendation comes from my son, a 1995 graduate from UCLA Law School. He gave Professor Arenella high marks in the two courses that he took from him.

Professor Arenella has lectured and delivered papers at conferences throughout the United States. He gives annual lectures, for example, to state and federal appellate judges and their legal staff on recent developments in criminal law. And the media—print, radio, and television, both local and national—frequently solicit his comments concerning controversial criminal cases and significant court decisions. He has appeared on *Nightline*, *Larry King*, and the *Today Show* to discuss cases like Rodney King, Reginald Denny, and the Menendez case. And as many of you know, at least those who were addicted to the O.J. Simpson trial, Professor Arenella served as a legal consultant on the O.J. Simpson case for ABC News. But law is not the only thing in Professor Arenella's life. He has two other consuming passions: his family and the Boston Red Sox.

I first talked to Professor Arenella over a year ago about delivering the Simms Lecture. We set a date for March of this year. But then he called and said that the Simpson case would not be completed by that date, so we set another date in May, and then another date in September. But the Simpson case just went on and on and on. We were both delighted to see the case finally end last month so that we could finally bring him here to New Mexico to share with us his insights into the O.J. Simpson case from his vantage point as a front-row observer. According to a recent article in the Los Angeles Times concerning the

media coverage of the Simpson trial, Professor Arenella was cited "over and over again by many who followed the trial as having provided the most reasoned, insightful analyses of all the expert commentators."

It is my pleasure to present the John Field Simms Lecturer, Professor Peter Arenella, and please join me in welcoming him this evening.

EXPLAINING THE UNEXPLAINABLE

Professor Peter Arenella: I want to thank Dean Romero and the Simms family for inviting me to give the Simms Memorial Lecture tonight. The list of past Simms Lecturers, including several Justices of the United States Supreme Court, made me appreciate both the extent of the honor and the responsibility. It has also been a special treat to spend two days at the University of New Mexico Law School. Dean Romero put me to work immediately by having me teach a criminal law and an evidence class today. In both classes, I was impressed by the number of law students who not only care about the state of our criminal justice system but plan to do something to improve it. I have also had the distinct pleasure of getting to know many members of your fine law school faculty, including someone who has always been an inspiration to me, Professor Jim Ellis.

Far too many law school professors spend their careers writing law review articles and books whose arcane discourse can only be deciphered by a few cognoscenti in their selective fields. In contrast, Jim has spent his career writing articles, litigating in the courts, and lobbying legislatures to secure reforms in how our legal system treats mentally disabled individuals. His tireless efforts to achieve a modicum of justice for the mentally retarded merit special recognition. Very few law professors have done as much good or had as much impact on how our legal system actually functions as Jim Ellis.

Let me begin my speech tonight by learning something about you—the audience. I want to ask you three questions about the Simpson verdict in a manner that duplicates one of the few advantages of public opinion polls: their anonymity. If the right questions are asked, polls can accurately assess people's current attitudes and preferences because those who answer the poll's questions can say what they really think without being held accountable for their opinions. To preserve your anonymity, please shut your eyes and keep them shut while I ask these three questions. I promise the experience will brief, painless, and I won't call on any of you afterwards to justify your votes.

First question: How many of you agreed with the jury's verdict? Just raise your hands and I will count quickly. Second question: How many of you disagreed with the verdict? The final question is addressed to those of you who object to the verdict: how many of you believe that the defense's playing of the "race card" and the jury's desire to send a message to the Los Angeles Police Department provide the most plausible explanation for why the jury returned the wrong verdict? Thank you, you can open your eyes now.

Well, you've ruined my speech because your answers do not completely track national opinion polls. No, just kidding. Actually, your answers to the first two questions reflect national trends. Seventy-five percent of this audience believe the jury made a mistake; only twenty-five percent agree with the verdict. Moreover, the racial composition of the two groups reflects how this verdict has aggravated racial tensions in this country. Most of you who disagree with the verdict are white or Hispanic. Most, but not all, of the African-Americans in this audience agreed with the verdict. Moreover, ninety percent of the white women in this room disagree with the jury's resolution of the case. All of these statistics are consistent with what the pollsters are telling us about this country's reaction to the verdict.

Where you differed somewhat from national polls is how those of you who rejected the jury's verdict answered my last question. If you can believe the polls, seventy-five percent of those who disagree with the verdict believe that the "race card" and the jury's desire "to send a message" about police misconduct explain the jury's actions. In contrast, only fifty percent of this audience who reject the jury's verdict have accepted this consensus view that jury nullification offers the best account for "what went wrong." Apparently, more of you are willing to credit the jurors' own explanation for their verdict—that they had a reasonable doubt about Simpson's guilt—even though you don't share such doubts yourself. It is refreshing to see such tolerance for a viewpoint that one does not share.

My overarching goal tonight is to encourage such tolerance by offering an analysis of why the prosecution's evidence failed to convince this jury beyond a reasonable doubt of Simpson's guilt. Even though I disagree with the jury's verdict, I believe that the media and the general public have unfairly trashed the Simpson jury. Part of my agenda tonight is to explain why the majority of white Americans, ranging from political conservatives like George Will[1] to white liberal feminists like Tammy Bruce,[2] have found the jury nullification story so appealing despite its implausibility in a murder case where the jurors clearly recognized the humanity of the two victims and empathized with their family members.

Part of my explanation will rely on a distinction between the *legitimate impact of race* in the Simpson case and the illegitimate use or impact of *racism*. It is an important distinction that the media and the general public have glossed over by relying on the pejorative "race card" label to describe all the different ways that race played a role in this case. While I will say some critical things about how the media covered the trial, my ultimate point is not about how the media failed us but about how much the media reflected our impoverished national discourse about race.

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1. *See* George Will, *People Get Away with Murder*, S.F. CHRON., Oct. 4, 1995, at A19.
2. *See The Simpson Trial Aftermath*, L.A. TIMES, Oct. 12, 1995, at A20.

But race is only part of the story I want to tell tonight. I also want to show you the difficulties of acting like the thirteenth juror who judges the twelve jurors who render verdicts in high profile cases. Can you distinguish between what you have heard in the media and the actual evidence presented to the jury? If, like most Americans, you watched the trial only intermittently and relied on the network news for your information, are you in a position to judge the Simpson jury fairly? To answer this question, I shall focus on the evidence actually presented to the jury to demonstrate why so much of it was riddled with reasonable doubt and to explain why the prosecution's most compelling proof, the DNA evidence at Bundy, was not sufficient in the eyes of the jurors to overcome these reasonable doubts.

Let me offer you my own account of the jury's verdict up front: the evidence the jury understood about timeline and motive was not persuasive and some of the physical evidence at Bundy and Rockingham was tainted by either police incompetence or (less likely) corruption. On the other hand, it is very possible that the jury did not fully understand the significance of some of the physical evidence at Bundy implicating Simpson in the murders. But, when you cannot trust the messenger, sometimes you reject the reliability of the message. I will show you why this jury had ample reason not to trust several of the police officers who testified. Race did play an *appropriate* and significant role in how some of these jurors evaluated police officer credibility.

Finally, if my thesis is correct that the jurors acted in good faith and acquitted based on their reasonable doubts about Simpson's guilt, one must ask why seventy-five percent of those who disagree with them (or fifty percent of this audience) are so willing to reject the jurors' own explanations for their votes as post-verdict rationalizations. My answer to that question will examine the media's role in shaping public perceptions about high profile trials.

Let me begin with a story that serves as a metaphor for this entire speech. When we all learned that the jury had returned a verdict after less than three hours of deliberation which would be announced the following day, the media called on the legal pundits to look in their crystal balls and predict the jury's verdict. The very question posed by the media raises an ethical issue for those of us who served as legal commentators: should we be in the business of making such predictions or restrict our comments to analysis of the legal significance and merits of legal motions filed by the parties and judicial rulings occurring during the proceedings?

Very few commentators resisted the temptation to answer "crystal ball" questions in one form or another. I tried to finesse the issue on television by identifying the type of factors that one would consider in making such a prediction without making one myself. But when a reporter-friend from a national newspaper called with the same question, I weakened and gave a more direct answer to the question.

Part of my motivation for doing so was my surprise at how many pundits were making predictions of conviction based on their personal

interpretation of two "facts." First, the jurors had refused to look at O.J. when they had returned to the courtroom to announce they had reached a verdict. Many trial attorneys pointed out that was usually a bad sign for the defendant. Second, during their deliberations the jurors had asked for a readback of a portion of Allan Park's testimony: the limo driver who took O.J. to the airport the evening of the murders. Most white pundits had viewed that testimony as very damaging to the defense because Park had not seen O.J.'s Bronco when he drove up to Rockingham at 10:20 p.m and hadn't seen or heard from Simpson until he saw a black man enter the front doorway of the residence at 10:50 p.m. Indeed, a good friend of mine who had agreed with me during the trial that a hung jury or acquittal were the most likely outcomes changed his mind and predicted a conviction based on the jury's desire to hear the limo driver's account again.

I told the reporter that neither "fact" necessarily supported a conviction prediction. The rule of thumb about juries not looking at defendants did not apply to this high profile case. The Simpson jurors realized that the media was constantly trying to read their minds by looking at them for non-verbal cues. I assumed that the jurors had agreed to put on their "poker faces," which they had worn for most of the trial, so that the media could not make any predictions from their conduct in the courtroom. I warned the reporter that it was impossible to know why the jury wanted a readback of a portion of the limo driver's testimony. For example, I had been listening to "Black Talk" radio during the trial and had learned that some African-Americans had focused on a mistake Allan Park had apparently made about the number of cars he had seen in the driveway. If Park could make such a mistake, perhaps one couldn't necessarily rely on his visual acuity in terms of seeing whether or not Mr. Simpson's Bronco had been there when he arrived at Rockingham. Finally, I emphasized how unlikely it would be for a jury to convict O.J. Simpson of murder with special circumstances this quickly. Just understanding the complicated verdict forms and nuances between first degree and second degree murder might have taken several hours. In short, I strongly suspected it was an acquittal.

Imagine my surprise the next day when I read my "quote" in the paper. The paper had expert blurbs from one pundit predicting conviction and another predicting acquittal followed by a quote from me suggesting that the speed of the deliberations suggested an acquittal, but the jurors' not looking at O.J. suggested a conviction. I called my friend and asked her why she had me waffling when I hadn't waffled. Her honest response was that she needed a quote from an expert who played it "down the middle" to balance the other two quotes. Because I had that reputation, she had listened to my comments filtered through her expectation that I would offer one of my typical "on the one hand and on the other" remarks.

The point of this story is not to impress you with my accurate prediction. First, I do not believe legal commentators should engage in crystal ball gazing. Second, my prediction track record was less than compelling. I

agreed to write a daily column called the Legal Pad for the Los Angeles Times based on my assumption that the trial would not last longer than four months. I was also the rocket scientist who, on national television, confidently defended the prosecution's decision to permit Simpson's voluntary surrender because "he wasn't a flight risk" the day before the Bronco chase.

Like all of us, the legal pundits and the reporter relied on a series of conscious and unconscious filters to process and interpret information. The reporter misinterpreted my remarks because she filtered them through her expectation of what I was going to say and her desire that I satisfy that expectation to make her quotes "balanced." The pundits who predicted a conviction based on the jurors' review of the limo driver's testimony projected their own interpretation of that testimony's incriminating significance onto the jurors.

Everybody interprets information from their own point of view and their perspective reflects in part their sense of how the world works. Race, gender, and class help to define a person's story of how the world works because these three factors generate so many of one's social experiences. Jurors rely on these stories in interpreting evidence at a criminal trial. Numerous studies point out that "each juror, using her own life experiences, organizes the information she receives about a case into what for her is the most plausible account of what happened and then picks the verdict that fits that story best. Jurors may interpret the same evidence differently depending on which stories they choose."[3]

In a society as racially polarized as ours, a juror's race will have a significant impact on how she evaluates the evidence because the social experiences of most African-Americans are vastly different than those of many middle- and upper-class whites. To a large extent, whites and blacks live in very different social worlds and tell very different stories about how those worlds work.

One obvious example of different stories that can have an impact in a criminal trial concerns competing views of police authority. Most middle- and upper-class whites deal with the police when they are victims of crime or have been caught violating some minor traffic law. In contrast, one quarter of the young black male population between ages fifteen and thirty is under some form of supervision by our criminal justice system's correctional institutions. Clearly, the story about police authority and how it is exercised is a very different and far more complicated one in the African-American community, where the police sometimes help minority crime victims but at other times are seen as the victimizers themselves.

One consequence of these competing views about police authority is that African-American jurors may be more alert to subtle signs of racist

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3. Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63, 78 (1993).

attitudes than their white counterparts in the jury box. Race clearly played this positive role in the Simpson case.

Consider Detective Mark Fuhrman's testimony during the prosecution's case in chief when he was cross-examined by F. Lee Bailey. Most of the mainstream media reported that Bailey's cross had not dented Fuhrman's credibility: Fuhrman appeared to be a credible and very competent police detective who was just doing his job that night.[4] It took the tapes to change the media's evaluation of his credibility and character by demonstrating that he had lied under oath about whether he had held and expressed racist views and attitudes.

Several of the African-American jurors, however, had doubted Fuhrman's credibility based on his answers to Bailey's questions. Had Fuhrman uttered a racial epithet in the last ten years? No, said Fuhrman. Did Fuhrman care if people erroneously believed he was a racist? No. Did he care if people erroneously thought he was a bad cop willing to plant evidence against a suspect? Yes, Fuhrman replied with a trace of indignation in his voice. His answers to these questions prompted two African-American jurors to glance quickly at each other and shake their heads with looks of disbelief and resignation. After the verdict, several African-American jurors reported that they disbelieved Fuhrman long before the tapes had been played in the courtroom. Indeed, the tape excerpts appeared to have a stronger impact on the white woman juror, who had, like the mainstream media, found his initial testimony credible.

What the media pejoratively described as the "race card" was in this context an illustration of why the criminal justice system *values* racial and ethnic diversity on trial juries. Race played a legitimate and positive role by enhancing the ability of some of the jurors to assess Fuhrman's credibility.

African-American jurors' experiences with police authority may also make them more willing than white jurors to believe in the possibility of police misconduct because they have witnessed it firsthand. In short, they might require less evidence of police wrongdoing than white jurors to persuade them "that something is wrong here."[5]

Of course, one might argue that this aspect of race played a negative role in the Simpson case because African-American jurors might have been too willing to accept implausible defense accounts of police misconduct given their mistrust of police authority. But this view overlooks

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4. The Boston Globe viewed Fuhrman as "the prosecution's best witness to date." Adam Pertman, *Simpson Team Fails to Deliver on Promises*, BOSTON GLOBE, Mar. 20, 1995, at 1. The Los Angeles Times felt Fuhrman had "walked away with few apparent bruises." Tim Rutten & Henry Weinstein, *Fuhrman Barely Bruised After Going "Mano a Mano,"* L.A. TIMES, Mar. 17, 1995, at A22. In the column that Laurie Levenson and I wrote for the Los Angeles Times every day, I concluded, "the ultimate measure of Bailey's cross-examination won't come until the jury assesses the credibility of defense witnesses who claim Fuhrman uttered racial slurs." *Legal Pad*, L.A. TIMES, Mar. 16, 1995, at A25.

5. In a recent Los Angeles Times poll, 67% of whites believed false testimony by police officers was "uncommon" while only 21% of blacks shared that view. *The Simpson Legacy: L.A. Times Poll*, L.A. TIMES, Oct. 10, 1995, at S2.

the fact that there was powerful documentation of police incompetence and lies that prompted all of the jurors, including a white woman and several Hispanic jurors, to entertain reasonable doubts about the integrity of some of the prosecution's physical evidence.

Many of those who believe the jury acted in bad faith point out that Fuhrman's racism, by itself, did not prove he had the opportunity or a rational motive to plant the Rockingham glove because he had no idea where Simpson was during the murders. But Fuhrman was not the only police officer who lied to the jury, and the Rockingham glove was not the only piece of incriminating physical evidence that was compromised by questionable testimony and suspect investigatory practices.

One of the two lead police investigators, Detective Vannatter, who controlled both crime scenes and had access to most of the physical evidence, lied to the Simpson jury when he insisted O.J. Simpson wasn't a suspect when he and other officers first went to Rockingham to notify him of his ex-wife's murder. Obviously, the former spouse is always a suspect to be eliminated in murders perpetrated with rage. Jurors could rely on their common sense to determine that Vannatter was being disingenuous at best but they likely did not appreciate what motivated his lack of candor.

What the jurors did not know is that Detective Vannatter had testified in this manner previously at a pretrial suppression hearing when the defense had argued that the police's initial warrantless entry onto the Rockingham estate constituted an unreasonable search of Simpson's home. Vannatter probably believed that if he admitted the obvious—that Simpson was a possible suspect—the magistrate might reject the police's non-investigatory "emergency" justification for their warrantless entry.[6] Remember that the police had spotted a red flyspeck on Simpson's Bronco that could have been blood and no one inside the residence responded to their bell-ringing and phone calls at 5:00 a.m. The prosecution argued that these facts combined with Nicole Simpson's brutal murder in the near vicinity provided reasonable grounds for the police to enter without a warrant to look for other possible victims and to protect human life. Judge Kennedy-Powell accepted this non-investigatory account of the police's actions and denied the defense's motion to suppress evidence seized during this first warrantless search including the bloody glove found by Detective Fuhrman.

Vannatter could not change his testimony at the criminal trial but the jurors likely did not know that a Fourth Amendment search issue had

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6. Ironically, Vannatter's subjective motivation and beliefs are irrelevant to the question under California law of whether a well-trained reasonable officer could believe from the objective facts that an emergency was present justifying a warrantless entry onto the property to save lives. *See* California v. Hull, 41 Cal. Rptr. 2d 99, 103 (1995) (citing California v. Ortiz, 38 Cal. Rptr. 2d 59, 63 (1995) (stating that the emergency requirement for a warrantless entry is measured by an objective standard)). It is the prosecutor's job in preparing her police witnesses to educate them about the law. Apparently, no one told Vannatter that his lie was not necessary to defeat the defense's suppression motion.

motivated his strained account. What made his lie about O.J. not being a suspect appear more sinister in the eyes of the jurors was his decision to take O.J.'s blood sample from downtown police headquarters back to Rockingham instead of booking it as evidence. Vannatter admitted he had never before taken a suspect's blood sample to a crime scene, and his explanation for departing from his usual practice of booking such evidence immediately did not persuade the jurors.

Put yourself in the jurors' shoes. You know he's lying about not considering O.J. Simpson a suspect, and now you have a police officer doing something he's never done before—taking a blood reference sample from a suspect back to the suspect's home. These two facts and the jury's mistrust of Vannatter can breed reasonable doubt not only about that detective's subsequent testimony and actions, but also the actions of other detectives and police officers who have corroborated his testimony.

But the prosecution's problems extended far beyond the dubious credibility of two of its main police witnesses. A police inventory videotape of Simpson's bedroom showed no socks present at a time when they still had not been taken from that room according to a criminalist's time sheet. Worse, neither the criminalist at the scene nor others inspecting the socks downtown discovered any blood on these socks, but weeks later significant blood stains containing both O.J.'s and Nicole's blood turns up on the socks. At best, we have police incompetence and at worst, police corruption. Neither option is very comforting to the party that must prove the defendant's guilt beyond a reasonable doubt.

Nor does the story of police incompetence (or worse) limit itself to the physical evidence found at Simpson's estate. A careful police investigation of the Bundy crime scene initially detected no blood on the Bundy rear gate, yet weeks later such evidence is "discovered." Criminalists used unsound collection practices at Bundy and covered both bodies with a blanket taken from inside Nicole's condo. One of the blood drops at Bundy implicating Simpson in the murders was either mishandled or corrupted at the Los Angeles Police Department (LAPD) lab, leaving Dr. Henry Lee to tell the jury, "Something is wrong here." The list of mistakes goes on and on and left the jurors with that uneasy feeling that something was very wrong with how the police collected and tested evidence in this case.

If we turn from the physical evidence implicating Simpson in the murders to the evidence of his opportunity to commit them (the time line) and his motive for doing so (the domestic violence evidence), we run into further difficulties. Relying on when one of Nicole's neighbors first heard the plaintive wail of a barking dog and Kato's testimony about when he heard the thumps behind his wall at Rockingham, the prosecution told a story of one man killing two young people in their prime, without alerting the neighbors, somewhere around 10:15 p.m. No witness testifies to O.J.'s presence at Rockingham between 9:30 and 10:50 p.m.

But the prosecution was aware of credible witnesses who placed the murders closer to 10:40 p.m. Simpson would still have had time to get back to Rockingham (a five minute drive) but the later time for the killings made the likelihood that he had some help cleaning up after the killings much greater. Many inside the prosecutor's office believed that the killings did occur later and that O.J. had help. But they could not present that story to the jury because they had no persuasive evidence about who helped Simpson get rid of incriminating evidence such as the murder weapon and any bloody clothing. Consequently, the prosecution stuck to a 10:15 p.m.-single-unaided-killer story line that was less than persuasive.

What about Simpson's motive? The prosecution relied on evidence of prior domestic violence to tell a story about how killing Nicole was Simpson's ultimate act of control when he realized he could not get Nicole back. But there were many flaws in how this story was told, when it was told, and its content.

First, there is the question of sequence. Any good trial lawyer will tell you that the power of a story about the killer's motivation depends in part on how the prosecution positions the "why he did it" story with the "he did it" part of his account of the defendant's guilt. The prosecution made a tactical decision to start its murder case by answering the "why" question before answering the "who did it" question. Why did the prosecution begin by presenting the jury with domestic violence evidence from 1989 instead of the physical evidence implicating Simpson in the murders? Because the prosecution was trying to strip O.J. of an advantage that most criminal defendants lack: a real, not just legal, presumption of innocence. Given his popularity and celebrity status, the prosecutors believed they had to destroy his congenial public persona before the jury would listen to the actual evidence implicating him in the murders.

Many of us predicted before the trial started that such a move would backfire: wouldn't the jury wonder if the prosecution's evidence implicating him in the murders was so weak that they had to engage in character assassination before presenting their real case? Apparently, several jurors reacted in exactly this manner.

Let's shift gears and focus on the content of the domestic violence story told by the prosecution. After all, if the story of motive was a compelling one, beginning this way might still have served the prosecution's purpose. Unfortunately, the courtroom testimony concerning domestic abuse paled in comparison to what the media told the public. The prosecution only offered one act of physical violence where Simpson struck Nicole and that act took place in 1989, five years before the killing. Moreover, the theory that the killing was Simpson's ultimate act of control over a woman that had spurned his efforts at reconciliation collapsed when the jury learned that Nicole, not O.J., had initiated the last reconciliation attempt. Finally, the prosecution promised to show the jury that Simpson had obsessively stalked Nicole but they never presented the one dramatic alleged example of such behavior: when O.J. watched

from the bushes as Nicole engaged in a sex act with a boyfriend in her condo late one night.

White feminists were particularly outraged when one of the jurors dismissed the significance of the domestic violence evidence in an interview given after the verdict. In Los Angeles, Tammy Bruce condescendingly remarked that the "jurors just didn't get it." Perhaps, Ms. Bruce didn't get it. First, the public was exposed to far more information about stalking behavior and domestic violence than the trial jury. This discrepancy between what was shown to the jury and the public illustrates part of the reason why the public's harsh judgment of the jury was so unfair.

But the jury's discounting of the domestic violence evidence might also be due in part to the fact that many of the jurors probably had witnessed some form of domestic violence in their own lives.[7] Instead of being shocked by the 1989 incident and the two 911 phone calls, these jurors might have minimized their significance in terms of proving a motive for murder. After all, if you are familiar with such violence but know it usually doesn't lead to murder, you might not be overly impressed with what appeared to be one isolated act of violence presented by the prosecution. Whether such firsthand experience leads one to deny the potential lethality of what you have been exposed to or a jaundiced interpretation of its significance, the bottom line is that the 911 calls had a far greater impact on the public than the jurors.[8]

At this point, I expect that some of you might be saying to yourselves, "What about the DNA evidence implicating Simpson in the murders? Shouldn't odds like 60 million to one that anyone other than O.J. could have been the source of that blood at Bundy resolve any reasonable doubts generated by the other evidence? Isn't it possible that this poorly educated jury just didn't understand the scientific evidence and cavalierly dismissed its significance by only deliberating for three hours before acquitting Simpson?"

I think its important to distinguish between four different issues raised by such a view of the evidence and the jury. First, did the jury act in good faith and do their best to understand the significance of the DNA evidence despite the speed of their deliberations? Second, did they understand this category of evidence. Third, was there sufficient DNA

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7. One juror was dismissed because she concealed the fact that she had been a *victim* of domestic violence during the jury selection process. *Simpson Jury Loses Two More*, WASH. POST, June 6, 1995, at A01. But seeing domestic violence perpetrated against others did not provide good cause for dismissal and the jury questionnaires did not force prospective jurors to volunteer such information. *See Simpson Jury Question List Probes Range of Attitudes*, L.A. TIMES, Oct. 1, 1994, at A1.

8. I am not suggesting that domestic violence evidence could not have been used to aid the prosecution's case. If a more plausible story had been told that did not demonize Simpson and make Nicole into an angel and if that story had been offered after the prosecution had presented its physical evidence linking him to the murders, the domestic violence evidence might have had a greater impact on the jury. The civil trial will likely present a different picture of their relationship where some of Nicole's actions might be viewed as provoking Simpson to kill her in retaliation for what she had done and what she might have threatened to do.

evidence from Bundy to support Simpson's conviction beyond a reasonable doubt despite all of the other problems with the prosecution's evidence? Finally, if there was sufficient uncompromised and uncorrupted DNA evidence to show his guilt beyond a reasonable doubt, why didn't the jury just focus on this category of evidence and ignore all of the more problematic pieces in the puzzle?

I was in court during some of the "dog days" of DNA testimony when some of the media fell asleep in their seats. Very few of us could follow, much less understand, all of the technical detail being thrown at the jury in indigestible bits of information. Since DNA was not used when I had been a criminal trial lawyer eons ago, I had spent over forty hours reading the scientific and forensic literature to get up to speed on this subject. Despite that preparation, I often had trouble following what seemed like a private conversation between Barry Sheck and prosecution witness Robin Cotton. I knew enough to appreciate that the defense had done an excellent job educating the jury about the risks of cross-contamination and how the LAPD lab had not done nearly enough to minimize those risks. But I was not persuaded that those risks materialized in this case to explain away all of the blood evidence at Bundy.

But how can we fairly expect lay jurors with no scientific expertise, who cannot even ask questions when they do not understand a question or the significance of its answer,[9] to follow this testimony and discriminate between well-founded and more speculative defense claims of cross-contamination? What I saw in the courtroom were jurors who were trying far harder than many of the trial's spectators to assimilate a great deal of technical information. Did they understand all of it? No. Indeed, we know that one of the dismissed jurors mistakenly equated DNA with blood-type. Did the jurors begin to tune out some of this technical testimony as it stretched from days to weeks? Yes, but so did the rest of us.

Before you trash the jurors, put yourselves in their shoes and ask whether you could have done a much better job. To those first-year law students in the audience, ask yourself what you do in a class when you know the train has left the station and you're not on it. How do you handle the anxiety and discomfort of your confusion? Do you always try to get back on track or do you sometimes tune out or look for some simple fragment of the conversation that you can latch on to for dear life?

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9. No good teacher would present such technical information in a lecture mode to students and expect them to understand it by simply listening passively to what was being said. Students need to do background reading before the class and then must be given a chance to interact with the material by asking questions seeking clarification. Some trial judges are beginning to experiment with procedures that encourage jurors to become more active participant-listeners by allowing them to submit questions to the judge about testimony they don't fully understand. After screening out improper questions, the judge then questions the expert witness based on the jurors' questions. Judges should also take a more active role themselves in seeking clarification from expert witnesses if they sense that the jurors are not grasping the testimony.

The defense experts offered a jury that was drowning in a sea of technical detail some simple life-rafts like the "garbage in, garbage out" metaphor. The jury gratefully accepted this life-line and concluded they could not convict on the basis of the DNA evidence alone. They looked to the other categories of evidence that they could fully understand, like the time line and motive and those categories of evidence were riddled with reasonable doubt. The speed of their deliberations did not demonstrate their bad faith. Instead, it reflected both the impact of being sequestered so long—they could "deliberate" about the evidence in their own minds for months—and their consensus about the evidence they understood not being fully persuasive.

I hope that I have persuaded you that these jurors acted in good faith and did the best they could to decide whether the evidence they understood demonstrated Simpson's guilt beyond a reasonable doubt. All of them, including a white woman juror who believed Simpson was guilty, agreed that the prosecution had not persuaded them beyond a reasonable doubt. All of their post-verdict comments are consistent with the story of reasonable doubt I have offered tonight. Why, then, do so many Americans who reject the verdict suspect they are lying or being disingenuous about what really motivated their decision?

I believe the media played a very important role in legitimizing the jury nullification account of the jury's verdict. Two video clips on the network news spoke volumes about how badly television dealt with the relevance of race to the jury's evaluation of the prosecution's case. The first video clip comes from Johnny Cochran's closing argument where he draws an analogy between Mark Fuhrman's ugly racism and Hitler and asks the jury to use its verdict to "send a message to the LAPD" about what will no longer be tolerated. All three networks used the same sound-bite from the closing argument on their nightly news that evening. None of them used a later sound-bite where Cochran linked his "send a message" theme to reliability problems with the prosecution's evidence. Nor did the networks use any sound-bites from Barry Sheck's masterful closing argument that pulled together all of the themes of the defense's attack on the reliability of the prosecution's evidence. The second video clip showed live pictures of groups of whites and blacks reacting so differently to the announcement of the verdicts: whites displaying shock, grief, and anger and blacks expressing joy, surprise, and relief.

For most working Americans who only saw snippets of the trial on their evening news or relied on evening cable shows like Geraldo Rivera's for their sense of the trial's progress, Cochran's analogy to Hitler and "send a message" bite clearly demonstrated that he was telling a predominately black jury it was time for racial payback. How else could these comments be interpreted when the media constantly talked about the defense's playing of the "race card" and did not make the connection between the "race card," Cochran's closing rhetoric,[10] and the problems

10. Ironically, the very sound bites that the TV network news showed the nation from the

with the evidence that the defense had demonstrated throughout the trial? Why should the American public view the issue differently than Simpson's own defense counsel, Robert Shapiro, who distanced himself from Cochran's closing rhetoric and the defense's use of the "race card from the bottom of the deck" immediately after the verdict?

The racially divided reactions to the verdict were news, but those pictures required significant explanation and analysis, not fifteen-second sound bites about the court of public opinion displaying its vote as the thirteenth juror. I am referring to my own comment on ABC News right after the verdict. I was making a descriptive point about the court of public opinion, not a normative one concerning the desirability of the public acting like the thirteenth juror. If given more time, I would have made this distinction clear and tried to put those pictures of angry whites and happy African-Americans in a context that did not aggravate racial tensions.[11] However, those of us who worked for the media bear ultimate responsibility for how our comments are used even when we lack control over how much time we have to tell our story. After all, we know the ground-rules, including how little time we have to make any point, much less a subtle one.

By making these types of editorial judgments and repeatedly discussing how the defense had successfully played the "race card," the mainstream media privileged a particular story about the meaning of the jury's verdict: the jurors were engaging in a form of jury nullification by ignoring the evidence so they could send a message about police racism and/or police misconduct.[12] The jury's speedy deliberations only seemed to confirm the point.

The power of television to shape and reinforce public perceptions about the social meaning of the verdict can be seen in how strongly people embrace this story of jury nullification in the face of conflicting evidence from the trial itself and from those who rendered the verdict. Consider how people deal with all the information, accurately reported by the media, that tends to undermine the jury nullification story.

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closing argument did not appear to impress several jurors. One African-American juror was not overly impressed by Cochran's rhetoric. *See In Court One Juror Explains Panel's Vote*, L.A. TIMES, Oct. 4, 1995, at A3.

11. Several points should have been made about those pictures. To list a few: many whites who actually watched the trial everyday understood that there were major problems with the evidence; not all African-Americans believed in Simpson's innocence but many had "reasonable doubts" because of the mistakes that had been made during the investigation; and others who believed Simpson was guilty were still gratified to see that a *racially diverse* jury shared their mistrust of the police. *See* Los Angeles Times poll, *supra* note 5.

12. *See, e.g., Letters from the People*, ST. LOUIS POST DISPATCH, Oct. 8, 1995, at 2B ("Since the Simpson verdict was announced, more than a few people seem to think that the jury system needs to be revamped, that black people cannot discern fact from fiction and that a predominately black jury will acquit a black defendant regardless of the facts."); *Simpson Free*, USA TODAY, Oct. 4, 1995, at 1A ("The prosecution's defenders say the race issue blinded the jurors to the evidence."); George Will, *Circus of the Century*, WASH. POST, Oct. 4, 1995, at A25 ("Incited by Johnnie Cochran—good lawyer, bad citizen—to turn the trial into a political caucus, the jurors did that instead of doing their banal duty of rendering a just verdict concerning two extremely violent deaths. The jurors abused their position in order to send a message about racism, police corruption or whatever.").

First, jury nullification usually occurs when the jury has problems with the crime itself,[13] the discriminatory application of a crime to a disadvantaged group,[14] or believes the victim of the crime provoked its commission.[15] None of these factors applied to the Simpson case.[16]

Nor was this a case where the jury could not identify with the humanity of the victims.[17] All of the jurors were clearly horrified by the brutality of the two murders and expressed sympathy for the victims' families. The media accurately reported that some jurors were moved to tears when they first saw the grisly photos of the two victims. At the very least, the jurors' emotional reactions suggest they would have found it difficult to free someone they believed with certainty was the killer in order to send a message about police misconduct.

Unfortunately, the public believes it is in a position to act like the thirteenth juror in judging the actual jurors even though it lacks sufficient information to make an informed judgment. Even the hard core audience that watched the trial on television did not see all of the trial. Watching the trial on television is not an adequate substitute for being in the courtroom everyday. The TV juror might miss revealing non-verbal behavior of the witnesses or the defendant that the jurors can see from the jury box. Some witnesses appear more credible on TV than in the courtroom while others fare better in person than on the tube. Finally, TV viewers did not see the crime scene pictures of the victims or the jurors' tears and horror in reaction to them.

It is one thing to know at a cognitive level that the jurors were "upset" when the pictures were shown; it is quite another to see their pain and

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13. For example, juries have sometimes acquitted guilty defendants who were charged with violations of "morality" crimes involving sexual activity between consenting adults. *See Considering Jury "Nullification": When, May and Should a Jury Reject the Law to Do Justice*, 30 AM. CRIM. L. REV. 239, 265 (1993).

14. Consider how some juries react to the harsh and unjustifiable differential under federal law between selling powder and crack cocaine that leads to very long jail sentences to a mostly black offender population. *See* Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995).

15. In some cases where battered women kill their abuser in the absence of an "imminent" threat from the victim, juries have been known to ignore the laws of perfect and imperfect self-defense and acquit the battered woman or reduce her degree of guilt to manslaughter. *See* Laurie J. Taylor, *Provoked Reason in Men and Women: Heat of Passion Manslaughter and Imperfect Self-Defense*, 33 UCLA L. REV. 1679 (1986).

16. According to Alan Dershowitz, one black juror, Lionel Cryer, submitted a book proposal in which he claims that the police "attempted to frame a murderer." *See* Alan Dershowitz, REASONABLE DOUBTS (1996) at 92-3. If a juror were to acquit someone whom he believed was guilty of murder because police had planted evidence against him, his vote would be characterized accurately as an act of nullification; albeit a very unusual version of it because of the seriousness of the crime charged. Even those who advocate jury nullification as a way of sending a message to a racist criminal justice system do not suggest that African-American jurors should use this power to free individuals who have caused serious harm to others. *See generally* Butler, *supra* note 14.

There is no way of knowing how much any particular juror's sense of outrage at police perjury that occurred in the trial played a part in that person's thought processes. What we do know from the comments of several jurors is that mistrust of the police affected their view about the reliability of some of the physical evidence in the case. *See* text accompanying note 18 *infra*. Votes for acquittal based on such reliability problems do not constitute any form of jury nullification.

17. Jury nullification sometimes occurred in white on black crimes in the south where the jury's own racism left them indifferent to the victim's fate. *See* Butler, *supra* note 14 at 680 n.11.

the pictures themselves. I was in the courtroom when some of these pictures were shown. I was shocked and upset by them despite having seen hundreds of coroner's photos when I practiced as a criminal defense attorney. Pictures of mutilated bodies often leave the viewer with no sense of the humanity of the victim. Some of the pictures of Nicole Simpson, however, were powerful because they left you with a sense of her character and vitality despite their grimness. No one in the courtroom, including the jurors, escaped the emotional impact of these photos.

Perhaps one could argue that the jury's view of what constituted a reasonable doubt was an unconscious form of jury nullification by relying on the speed of their deliberations coupled with their failure to appreciate the incriminating significance of some of the Bundy evidence. Christopher Darden has suggested in some of his post-verdict comments that this was a jury that was looking to find a reasonable doubt because of their collective anger at the "system." In short, they demanded too much of the prosecution by insisting upon proof beyond any possible doubt because of their "anger" and/or difficulty believing Simpson was capable of such crimes.

Logically, one could ask jurors to throw out all of the evidence that they believed was a product of police corruption or incompetence and focus solely on the remaining untainted evidence at Bundy and Rockingham to determine whether the prosecution had proven its case beyond a reasonable doubt. Many times during the trial, I reminded viewers there were three options in this case: the police had framed an innocent man, the police had done nothing wrong and arrested a murderer, or the police had engaged in misconduct but independent, uncorrupted evidence demonstrated Simpson's guilt.

The difficulty with jurors embracing the third option is not one of logic, but of how juries construct stories of guilt and innocence. If a jury has lost trust not only in Detective Fuhrman but in one of the lead detectives (Vannatter) investigating the case, skepticism and doubts about the latter's testimony will spill over to other evidence at both crime scenes with which he had contact.

Consider the comments of the white juror who originally voted for Simpson's conviction but changed her mind during deliberations. After determining that she could not trust either Vannatter or Fuhrman, she "didn't feel good about the evidence. There was so—so much doubt was thrown into it, you know, with the possibility of Fuhrman, you know possibly planting the glove, you know; plus that same evidence maybe getting into the Bronco. You know, that disturbed me a lot. The way it was collected disturbed me a lot. I think the defense did a lot to, you know, to make me doubt the credibility of [the prosecution's] best evidence, which was blood and trace evidence."[18] In another interview she conceded she was not sure whether Fuhrman planted the glove but

18. Interview of Anise Aschenbach, *This Morning* (CBS) Oct. 12, 1995.

noted, "If we made a mistake, I would rather it be a mistake on the side of a person's innocence than the other way."[19]

If her vote can be accurately characterized as a subtle form of "jury nullification," then juries engage in "jury nullification" all the time when they acquit based on a "reasonable doubt." I told you at the beginning of this speech that my talk's title, "Explaining the Unexplainable," referred to the difficulty of explaining a person's world view to someone who does not share it. The talk's title also refers to the impossibility of defining what constitutes "reasonable doubt." One juror's reasonable doubt can be another's unreasonable doubt because the two jurors view the evidence through very different lenses.

Clearly, most white Americans viewed the evidence through very different filters than the Simpson jurors. I have suggested reasons why the public might not be in the best position to judge these jurors because some of their filters (and the information they have relied on) may have distorted their ability and willingness to put themselves in the jurors' shoes. Of course, all of us are entitled to come to our own conclusions about Simpson's guilt. I know I have. What is unfortunate is the public's failure to separate that question from a very different one—did the jury act in good faith and reach its verdict based on its view of the evidence and the law?

I have suggested that television is partly to blame for the public's trashing of the Simpson jury. But the network executives who made the editorial judgments about which segments of the trial and closing arguments to highlight in the nightly news and magazine shows were reflecting a fault that lies within most of us: a racial-cultural blindness that makes it difficult to see the world from another's point of view. I fear that the ultimate legacy of the trial of the century will be its reconfirmation of a basic flaw in our public discourse—we still have not learned how to talk to each other in ways that acknowledge and tolerate understanding of our differences.

19. *Prime Time Live* (ABC) Oct. 4, 1995.