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## The O.J. Simpson Verdict: A Lesson in Black and White

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## THE O.J. SIMPSON VERDICT: A LESSON IN BLACK AND WHITE

*Christo Lassiter* \*

### INTRODUCTION

Increasingly, important elements in the press are being held up to scrutiny for creating the news they wish to report. No more unfortunate example of press manipulation is manifest than the race-tinted coverage of the O.J. Simpson case,<sup>1</sup> especially the reporting of the verdict. The predominant press impression conveyed on the rise before the fall of O.J. Simpson was somewhat like a Hollywood version of an F. Scott Fitzgerald novel: he rose from the depths of poverty on the streets of San Francisco to the glitzy world of sports and entertainment. O.J. Simpson, the charismatic 1968 Heisman award-winning running back from the University of Southern California, achieved superstar status in the National Football League on his way to a Hall of Fame career during the 1970s. Upon retiring from athletics, O.J. Simpson was among the first superstar athletes to make the successful transition from athletic stardom to entertainment stardom. O.J. Simpson stayed in the spotlight as a sports announcer, television advertising man, and movie actor. Press hype, if that is indeed a realistic criticism, is the only complaint one might levy against the press for chronicling the rise of O.J. Simpson. Not so with his fall.

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1. See, e.g., Michael Gartner, *O.J. Circus? Blame TV*, USA TODAY, Oct. 3, 1995, at 11A; Alexandra Marks, *O.J. Simpson Case Puts Courtroom Cameras On Trial*, CHRISTIAN SCIENCE MONITOR, Sept. 19, 1995, at 10; *Off Camera: Cameras Stand Accused of Disorder in the Court*, NEWSDAY, Oct. 10, 1995, at B3; Joanne Ostrow, *Camera Equally Beholds Circus, Serious Media Fulfill Best and Worst Expectations*, DENVER POST, Oct. 4, 1995, at A14; David Shaw, *The Simpson Legacy: Obsession: Did the Media Overfeed a Starving Public?*, L.A. TIMES, Oct. 9, 1995, at S4; CNN News: *Simpson Trial May Have Brought Media Closer to Tabloids* (CNN television broadcast, Dec. 19, 1995), Transcript No. 1094-5, available in LEXIS, Nexis Library, CURNWS File; *Commentator Looks at TV's Simpson Trial Coverage Mania*, All Things Considered, NPR, Mar. 24, 1995, Transcript No. 1796-9, available in LEXIS, Nexis Library, CURNWS File; *Nightline: The Media and the Trial*, (ABC television broadcast, Oct. 5, 1995), Transcript No. 3749, available in LEXIS, Nexis Library, CURNWS File.

O.J. Simpson was charged with killing his ex-wife and her waiter friend. In this case, classic battle lines were drawn between a zealous prosecution and a hard-charging defense. The police theory was that O.J. Simpson was an overly possessive man motivated by a jealous rage to kill an ex-wife whom he could not have. The prosecution's evidence consisted of old police reports, which chronicled some instances of domestic violence during the marriage. In addition, the Los Angeles Police Department produced blood and fibers, found at the crime scene, that matched those of O.J. Simpson, and blood and fiber evidence from the victims found at O.J. Simpson's home. The defense countered that the Los Angeles Police Department personnel assigned to this case were driven by a volatile mix of racial hatred, greed, and fear of repeated failure in high profile cases, and therefore they directed their attention exclusively to O.J. Simpson and bolstered the considerable circumstantial evidence by cross-pollinating blood and fiber evidence in trekking back and forth between O.J. Simpson's house and the crime scene. Once O.J. Simpson became the police suspect, the defense further argued, an institutional code of silence and shoddy professionalism swelled up to reinforce the frame-up. The defense proved its case with damaging admissions from the mouths of police officers and forensic personnel; and if the jury's speed in deliberation before returning a verdict of not guilty is any gauge, the defense proved its case overwhelmingly. However, the mainstream press reported a very different case than what the jury saw and heard.

One factoid in O.J. Simpson's life stood out in mainstream press analysis and commentary: O.J. Simpson was a Black man—a wealthy Black man—who married White.<sup>2</sup> Because of these demographic facts, the press transcended dutiful legal reporting to make the case a *cause célèbre* of domestic violence. In so doing, the press politicized

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2. White America's historical difficulty with interracial marriage is long documented and did not end with *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (striking down a Virginia statute against miscegenation as violative of a constitutional right of marital privacy). See generally Paul Finkelman, *The Color of Law*, 87 NW. U. L. REV. 937, 944 (1993) (reviewing ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* (1992)) (noting that interracial marriages were a "touchy subject" for 280 years); Paul Finkelman, *The Crime of Color*, 67 TUL. L. REV. 2063, 2081-87 (1993) (discussing antimiscegenation laws of seventeenth and eighteenth century Virginia); A. Leon Higginbotham, Jr., & Barbara K. Kopytoff, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 GEO. L.J. 1967 (1989) (discussing Virginia's history of punishing interracial marriage); Dorothy E. Roberts, *Crime, Race, and Reproduction*, 67 TUL. L. REV. 1945, 1972-73 (1993) (describing laws punishing interracial marriages in the context of anti-rape laws); Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 224-25 (1995) (describing how judges and legislators adhered to the belief in separation of the races as late as the 1960s).

the O.J. Simpson case and furthered the rift in race relations. That the story of a Black man, with money, on trial for the murder of a Californian, blond ex-wife and her friend, a waiter, both found dead by violence, would incite press sensationalism is to be expected under any understanding of realpolitik of American pop culture. Even so, in the O.J. Simpson case, the predominant mainstream press reporting may be characterized as stroking race in an extraordinarily divisive manner.<sup>3</sup> In O.J. Simpson, the predominant mainstream press had its Willie Horton-styled<sup>4</sup> bogeyman<sup>5</sup> whose persecution was necessary to raise the public's consciousness on domestic violence, the evil of the 1990s. But a funny thing happened on the way to the prosecution's trumpeting of the evils of domestic violence: the defense team got in the way by pointing out an old evil from the 1960s—racial bias in the criminal justice system. In terms of mainstream press reporting, a story of racial bias sounds of warmed-over themes from yesteryear; nowadays, claims of racial bias are newsworthy only as to being overplayed. Today the topic of sexism is the darling of the mainstream press, and the topic of racism is *passé*.<sup>6</sup> Because the mainstream press devalued claims of racism in criminal justice, it underreported the defense evidence of racial bias

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3. See, e.g., Michael Miller, *Race Has Vital Role in Simpson Jury Deliberations*, Reuters, Oct. 2, 1995, available in LEXIS, Nexis Library, CURNWS File; *No Racial Motive to New Simpson Prosecutor*, Reuters, Nov. 9, 1994, available in LEXIS, Nexis Library, CURNWS File; *O.J. Lawyers Rebuffed in "Alibi" Bid; Meanwhile, A Ninth Juror May Be Dismissed When Court Reconvenes on Tuesday*, ORLANDO SENTINEL, May 27, 1995, at A14; Larry Reibstein, *Disorder in the Court*, NEWSWEEK, Apr. 17, 1995, at 26; *Simpson Jury Is Mix of Age and Race*, Reuters, Oct. 2, 1995, available in LEXIS, Nexis Library, CURNWS File; Susan Sward, *What Harris Told Ito After She Was Bumped Off the Jury*, S.F. CHRON., Apr. 30, 1995, at 3; *This Week with David Brinkley* (ABC television broadcast, Oct. 1, 1995), Transcript No. 727, available in LEXIS, Nexis Library, CURNWS File.

4. See Edward Walsh, *Clinton Charges Bush Uses Crime Issue to Divide*, WASH. POST, July 24, 1992, at A16. Willie Horton is a convicted murderer who escaped from prison in Massachusetts during a prison furlough program approved by then-Governor Michael Dukakis. *Id.* Horton later raped a woman. *Id.* During the 1988 presidential campaign, the Republican party successfully used Horton's story in repeated negative advertisements to portray the Democratic presidential candidate Michael Dukakis as being weak on law enforcement issues. Howard Kurtz, *Past Brings Perspective to Negative Ads: Risks Seen High for Bush if Topics Stray from Governor's Record*, WASH. POST, July 28, 1992, at A8.

5. The media began fashioning its view of the case from the moment O.J. Simpson was taken into custody and created one of its most bizarre controversies: *Time* magazine's retouched "mugshot" photograph of O.J. Simpson as the cover feature announcing O.J. Simpson's arrest. *TIME*, June 27, 1994 (cover). Critics charged that the darkened photograph made O.J. Simpson appear more sinister. See *Time's Apology*, *TIME*, July 4, 1994, at 4.

6. See, e.g., Jason L. Riley, *Don't Cry Wolf on Racism*, WALL ST. J., Jan. 26, 1996, at A12.

and incompetence in the Los Angeles Police Department. The resultant distortion not only denigrated Black professionals (particularly in juries and defense counsels), but failed miserably the segment of the public who suffers the disservice along the fault lines of racial injustice in the criminal justice system.

As the O.J. Simpson case begins the long passage from contemporary news to history, so too should the analysis of what went wrong begin the passage from cacophonous commentary to historical perspective. In so doing, a thought from George Santayana comes readily to mind: “[T]hose who cannot remember the past are condemned to repeat it.”<sup>7</sup> The lessons of the O.J. Simpson case are nothing new; they are newsworthy only for our failure to learn. The lessons in the O.J. Simpson case are those of a false division, revolving around black and white themes:<sup>8</sup> the symbolic colors of skin, the symbolic colors of police vehicles, and the symbolic colors of ink on paper. The polarizing effect of black and white themes symbolize a divisive past which we are condemned to repeat until we remember and learn.

First, we should learn that sensationalized, agenda-driven news analysis and commentary, in lieu of the facts, ill prepares the public outside of the jury box to receive the verdict from the public inside of the jury box. The failure of the press is the dwindling significance of hard-hitting factual analysis. Compounding this problem is that the trend towards news analysis and commentary in lieu of factual reporting is dominated by personality, not by intellect. The current devolution of news to trendy spinmeisters leaves the public spinning in a sea of loosely based, agenda-driven rhetoric where facts do not matter. My purpose here is not to bury the press, but to honor it with constructive criticism. Because the press plays important roles under our constitutional government, its failings are all the more dooming for democratic society.

The second lesson from the O.J. Simpson case is that a criminal justice system that fails to address a diverse community’s legitimate concerns about due process bears the risk that its cases will not be credited beyond a reasonable doubt by important constituencies within that community.<sup>9</sup> This is as true in the court of world

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7. GEORGE SANTAYANA, *THE LIFE OF REASON* 289 (1905).

8. Black and white were the one-time colors of Los Angeles Police Department squad cars. The colors also represent the demographic characteristics on which the media focused in describing the suspect and the victims in the O.J. Simpson case. The colors black and white describe all too stereotypically the demographically distinguishing characteristic of suspects and police officers, respectively.

9. As Justice William O. Douglas once wrote:

opinion, considering America's distrust of Harry Wu's conviction at the hands of communist China despite overwhelming evidence of guilt,<sup>10</sup> as it is much closer to home, considering Black America's distrust of the Los Angeles Police Department's case against O.J. Simpson.<sup>11</sup>

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We believe that it is better for ten guilty people to be set free than for one innocent man to be unjustly imprisoned.

Yet the sad truth is that a cog in the machine often slips: memories fail; mistaken identifications are made; those who wield the power of life and death itself—the police officer, the witness, the prosecutor, the juror, and even the judge—become overzealous in their concern that criminals be brought to justice. And at times there is a venal combination between the police and a witness.

Furman v. Georgia, 408 U.S. 238, 367-68 n.158 (1972) (Marshall, J., concurring) (quoting William Douglas, *Foreword to J. FRANK & B. FRANK, NOT GUILTY 11-12 (1957)*).

10. See, e.g., Arnold Beichman, WASH. TIMES, July 29, 1995, at C3 ("Harry Wu, an American citizen, is now in a Chinese jail. . . . Stop the presses!—he has just 'confessed' to unspeakable crimes against humanity, as they used to say, in Soviet show trials. You had better believe that 'confession.'"); Maggie Farley, *China Says U.S. Activist Confesses to Lying; Asia: Supporters of Jailed Film Maker Harry Wu Doubt Validity of Claim*, L.A. TIMES, July 28, 1995, at A1 (detailing official skepticism by the U.S. Department of State in China's report on Harry Wu).

11. There is no attempt here to indict all police departments and certainly not all law enforcement officers. The problem concerns bad cops, not good ones. Recent events have decidedly brought the Los Angeles Police Department (LAPD) in particular under fire as a lightning rod for concerns about excessive police error and racial brutality. Following the Watts riots during the 1960s by a generation of melting pot demographics that was supposed to soften artificial differences among people, the Los Angeles Police Department instead showed just how much tensions had sharpened. Author Joe Domanick describes the insular mentality and almost complete lack of civilian oversight that has marked the LAPD's history in his insightful book, *TO PROTECT AND TO SERVE: THE LAPD'S CENTURY OF WAR IN THE CITY OF DREAMS (1994)*. Written after the King incident, Domanick's book traces the roots of the department that saw itself as "Dragnet's" Joe Friday, but was seen by much of Los Angeles's minority population as an occupational force. The police's choke hold policy caused problems for the Los Angeles Police Department in the early 1980s following the deaths of several Black suspects. Comments made at the time by Police Chief Daryl Gates fueled the controversy: "He implied that the deaths had resulted because arteries in black people did not reopen as fast as they did in 'normal' people." *Police Order Calls for End to Choke Holds on Suspects*, RECORD (N.Y.), Nov. 25, 1993, at A5. The videotape of the police brutality during the Rodney King traffic stop played across American television stations countless times, and Mark Fuhrman's audio-taped remarks to North Carolina screenwriter, Laura McKinney, cast serious doubt on the integrity of the LAPD. Defense lawyer Barry Scheck's cross-examination of the criminologist and laboratory personnel coupled with the testimony of defense experts also raised doubts about the competency of the LAPD.

So just how rotten is the Los Angeles Police Department? If leaks of the Mark Fuhrman tapes are accurate, it's a force that revels in beating, shooting, harassing, framing, and intimidating suspects, among other finer police tactics. To take just one example, according to a transcript obtained last week by The New York Times,

This article is an attempt to analyze the O.J. Simpson verdict and the press coverage of it, to suggest ways not only of improving criminal justice in a diverse community, but also of improving press coverage of criminal justice in a diverse community. Part Two of this essay is subdivided into two sections. The first section surveys the op-ed pages of major newspapers to evaluate the analysis of, and the commentary on, the O.J. Simpson verdict. The second section deconstructs the press' spin on the verdict. Part Three of this article discusses the role of a jury and proof beyond a reasonable doubt among a diverse set of jurors. Part Four is an effort to explain reasonable doubt and to provide the factual analysis in support of the jury's verdict in the O.J. Simpson case—an exercise which the press largely shrugged off. The conclusion contains no easy answer, but suggests a role for concerned public constituencies in demanding a better brand of criminal justice and press coverage of criminal justice.

## I. JOURNALISTIC ACTIVISM

### A. *When Facts Don't Matter*

Journalism is the battlefield of ideas. The turf is column inches. The uniforms of the press are their egocentric views. Increasingly, with few exceptions, members of the press wear their demographic

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Fuhrman explains: "Most real good policemen understand that they would just love to take certain people and just take them to the alley and just blow their brains out. All dope members for one. All dope dealers for two. Pimps, three."

Larry Reibstein, *Up Against the Wall*, NEWSWEEK, Sept. 4, 1995, at 24. Los Angeles residents who have long complained of being stopped, harassed, and beaten by police for no other reason than their skin color do not find that Mark Fuhrman speaks in isolation. "'This may be news to white folks, but it's like telling us the earth is round,' Cole Richardson, a 37-year-old black accountant, said while eating breakfast and watching the Simpson trial on television at a Crenshaw-area restaurant." Aurelio Rojas, *L.A. Can't Shake Racial Tension: Fuhrman Tapes Put Police Department Back on Hot Seat*, S.F. CHRON., Aug. 28, 1995, at A1. "What Fuhrman did was break the code of silence that has been long maintained by racist rogue cops within the department who framed Latinos and African-Americans," said John Mack, president of the Los Angeles Urban League. Fred Bayles, *Once Model, LAPD Now Demoralized*, MAINICHI DAILY NEWS, Oct. 9, 1995, at 2.

Things were not always so. The Los Angeles Police Department serving a community dominated by racial diversity once seemed to be the model force of efficiency and respect for peoples of all stripes. The LAPD was the prototype police force pictured in the television series, *Dragnet*. It was the grist for Joseph Wambaugh, a 14-year LAPD veteran whose books offer up the gritty lives of Los Angeles police. Ironically, the department's fall from grace is due in part to strategies that, for decades, maintained order in a sprawling city. "Pro-active policing" was a buzzword for an assertive style of law enforcement that could turn any encounter with an officer into an unpleasant experience, especially for racial minorities. See Bayles, *supra*.

bias on their sleeves, sometimes with nary an attempt at neutral and detached news reporting. Like other instruments of power, the demographic tribalism of the press is commercially driven. By appealing to the segment of the public to which they cater, members of the press help to create the news they wish to report—a form of journalistic activism not unlike judicial activism in pernicious effect. Journalistic activism polarizes the public along the lines deemed politically correct for the intended audience. Thus, segments of the public outside of the jury box may be ill prepared to receive the verdict from the public inside of the jury box.<sup>12</sup>

To underscore its importance in democratic society, the press has been called the fourth branch of government. A public trial, which lodges factual decision making in a jury of peers, is the most democratic of governmental institutions. The Sixth Amendment<sup>13</sup> guarantee of a “public trial” guards against the use of secret tribunals as an instrument of oppression:

The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy’s abuse of the *lettre de cachet*. . . . Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution.<sup>14</sup>

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12. The public was no more surprised than was the press who had managed to fool itself as well. See, e.g., David Margolick, *Not Guilty: The Overview; Jury Clears Simpson in Double Murder; Spellbound Nation Divides on Verdict*, N.Y. TIMES, Oct. 4, 1995, at A1 (reporting that gasps and sobs were heard after the jury rendered the verdict); Stephanie Simon & Jim Newton, *The Simpson Verdict; Simpson Not Guilty*, L.A. TIMES, Oct. 3, 1995 at Special Section 1 (reporting that the victims’ families and the court audience were “stunned”); *ABC News: Jury Finds O.J. Simpson Not Guilty*, (ABC television broadcast, Oct. 3, 1995), Transcript No. 5197-1, available in LEXIS, Nexis Library, CURNWS File; *CNN News: Simpson Trial, Day 160* (CNN television broadcast, Oct. 3, 1995), Transcript No. 160-11208-2, available in LEXIS, Nexis Library, CURNWS File.

13. U.S. CONST. amend. VI. The amendment provides that:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

14. *In re Oliver*, 333 U.S. 257, 268-70 (1948) (footnotes omitted).



Under the First Amendment, the public has a right to know what its government is doing. Indeed, the Court has held that the right to a “public trial” is abridged if the press is excluded. For example, in *Craig v. Harney*,<sup>15</sup> the Court stated:

A trial is a public event. What transpires in the courtroom is public property. . . . Those who see and hear what transpired can report it with impunity. There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it.<sup>16</sup>

In addition to its First and Sixth Amendment roles, the press helps instill public confidence in the judicial branch by educating the public about the legal process and by helping the public gain an informed belief about the fairness of the result in the reported case. As the United States Supreme Court recognized in *Press-Enterprise Co. v. Superior Court*:<sup>17</sup>

The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.<sup>18</sup>

The Court previously observed that “people in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.”<sup>19</sup> The ability to observe the conduct of judicial proceedings becomes particularly important in cases where there are highly charged public issues involved, including claims of prejudice, favoritism, and official misconduct. It may be argued that in high-profile cases, it is even more critical that the public receive the maximum amount of information about the process by which a particular result has been achieved:

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15. 331 U.S. 367 (1947).

16. *Id.* at 374.

17. 478 U.S. 1 (1986).

18. *Id.* at 13 (quoting *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 508 (1984) (emphasis in original) [hereinafter *Press-Enterprise I*]).

19. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980).

When a shocking crime occurs, a community reaction of outrage and public protest often follows. Thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion. Without an awareness that society's responses to criminal conduct are underway, natural human reactions of outrage and protest are frustrated and may manifest themselves in some form of vengeful "self-help," as indeed they did regularly in the activities of vigilante "committees" on our frontiers. . . .

. . . It is not enough to say that results alone will satiate the natural community desire for "satisfaction." A result considered untoward may undermine public confidence, and where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted. To work effectively, it is important that society's criminal process "satisfy the appearance of justice," and the appearance of justice can best be provided by allowing people to observe it.<sup>20</sup>

The press has played an ever-increasing role in providing valuable information to the public regarding the conduct of judicial proceedings.<sup>21</sup> As the United States Supreme Court noted in *Richmond Newspapers, Inc. v. Virginia*:<sup>22</sup>

Instead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media. In a sense, this validates the media claim of functioning as surrogates for the public. While media representatives enjoy the same right of access as the public, they often are provided special seating and priority of entry so that they may report what people in attendance have seen and heard. This "contribute[s] to public understanding of the rule of law and to comprehension of the functioning of the entire judicial system. . . ."

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20. *Id.* at 571-72 (citations omitted).

21. See generally Donald E. Lively, *Modern Media and the First Amendment: Rediscovering Freedom of the Press*, 67 WASH. L. REV. 599 (1992).

22. 448 U.S. at 572-73 (quoting *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 587 (1976) (Brennan, J., concurring)).

The press has a lofty role, which it undershot in the coverage of the O.J. Simpson verdict. Perhaps the most damning injustice in the O.J. Simpson trial was a matter of black and white—the black ink on the white pages of the press.

News analysis and commentary of the O.J. Simpson verdict present an abundantly rich<sup>23</sup> case study on the phenomenon of journalism activism.<sup>24</sup> The survey undertaken here attempts to evaluate the op-ed pages of major daily newspapers across the nation to assess the various themes taken on the O.J. Simpson verdict. The methodology of this survey consisted of generating a database from periodic searches in the LEXIS, CURNWS file containing key phrases such as O.J. SIMPSON, VERDICT, and DATE (AFT 10/4/95), with necessary search limiters to ensure the search yielded news items which focused on the O.J. Simpson verdict. The winnowing-out process entailed eliminating transcripts transmitted electronically as well as all foreign broadcast and press. These sources duplicated the American press, only with more vitriol, and in the case of the electronic media, with greater speed. Thus, limiting the survey to daily op-ed columns made for ease of manageability and concision without sacrifice of independent data.<sup>25</sup>

Evaluation of the op-ed pages of the press revealed seven distinct themes in the analysis of, or comment on, the O.J. Simpson verdict. These were: 1) race, 2) domestic violence, 3) socioeconomic status, 4) police abuse, 5) judicial reform, 6) race relations, and 7) factual analysis of reasonable doubt. There also materialized a strong correlation between the demographic characteristics of the op-ed writers and the ideas championed in their articles. The relevant demographic features of the writers were: race, sex, national syndication (more volatile), local or guest columnists (more constructive) and editorial writers (more inclusive).

### 1. Race

Across America, race dominated the op-ed analysis of, and commentary on, the O.J. Simpson verdict. The racial analysis of the verdict divided into three camps: one camp saw race as the sole

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23. This is so because a great number of reporters, columnists, and editorial writers entered the fray of the media battle.

24. Obviously, analysis of subjective bias in the press may be criticized as being as subjective as the analysis under scrutiny, but comparative analysis provides an opening for gaining distance in perspective, if not objectivity.

25. Citations to transcripts from the broadcast media as well as to weeklies are interspersed throughout the Article.

factor in explaining the verdict, a second camp focused on racial experience as a factor in explaining the verdict, and the third attempted to portray the verdict as symbolic of race relations. The views taken correlated with the race of the writer. The tenor of the view correlated with the writer's affiliation within the community served; national columnists engaged in more emotional rhetoric than editorial writers and guest columnists.

*a. The Jury Voted Its Race, Not the Facts*

The race-baiting theme that Black jurors vote their race, not the facts, was the dominant theme indelibly espoused in nationally syndicated columns, presumably some of America's most thoughtful and respected generals of public discourse.<sup>26</sup> In none of these

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26. See, e.g., William F. Buckley, *The O.J. Verdict Deserves Protest: Outcome Says Nothing about Justice, Speaks Volumes on Race Relations*, ARIZ. REPUBLIC, Oct. 10, 1995, at B5 ("It is simply undeniable that the black majority believed him innocent because he was black."); Mona Charen, *A Triumph for Black Racism*, BALTIMORE SUN, Oct. 10, 1995, at 11A ("Only a nation of fools would lull itself into believing that this was not a racially motivated and a racist verdict."); Linda Chavez, *Race, Not Justice, Wins Out in Verdict*, USA TODAY, Oct. 4, 1995, at 15A (asserting that race overwhelmed reason and perverted justice in the Simpson trial); Martin Gottlieb, *Race, Sex, Sports: Divisions Normal*, DAYTON DAILY NEWS, Oct. 11, 1995, at 10A ("Whites in general do not seem to be driven by race. Absent race, people in general would probably see Simpson as guilty, given all the circumstantial evidence that surfaced early and given the enjoyment that people get out of hating a rich guy's lawyers."); Charles Krauthammer, *America's Show Trial*, WASH. POST, Oct. 6, 1995, at A25 ("We have lived now for a generation under a theory that declares that for officially designated victim classes the ordinary rules do not apply."); Anthony Lewis, *Abroad at Home: An American Dilemma*, N.Y. TIMES, Oct. 6, 1995, at A31 ("In other recent cases black jurors have refused to convict black defendants despite overwhelming evidence of guilt."); Robert Novak, *O.J. Verdict Puts U.S. Racial Crisis in Sharp Focus*, CHICAGO SUN-TIMES, Oct. 9, 1995, at 31 (describing the phenomenon occurring between Blacks and Whites as a "gap in the way the world is perceived [which] explains not only why there was not the slightest chance that the African Americans on the Simpson jury would vote to convict but why acquittal of black suspected felons is rising in inner-city jurisdictions."); Frank Rich, *Journal: The L.A. Shock Treatment*, N.Y. TIMES, Oct. 4, 1995, at A21, (hoping "that some of the anger on all sides, mine included, will linger a bit, red-hot yet controlled, as a prod to find our way out of this country's racial morass. The alternative is solitary confinement for life, for blacks and whites alike, in the big nowhere."); Mike Royko, *Without a Doubt, Verdict in O.J. Case a Real Eye-Opener*, CHI. TRIB., Oct. 4, 1995, at 3 (wondering whether Simpson "can . . . shave without looking in the mirror"); Cal Thomas, *O.J. Verdict Fuels the Fires of Racism*, NEWSDAY, Oct. 10, 1995, at A30 ("The mistakes in this case were made early, before the racism of Mark Fuhrman was revealed, before evidence was presented. When Los Angeles District Attorney Gil Garcetti quickly collapsed under pressure from local civil-rights activists to promise a jury composed substantially of blacks, the die was cast."); Mortimer B. Zuckerman, *The Bitter Legacy of O.J.*, U.S. NEWS & WORLD REP., Oct. 16, 1995, at 100 ("Now many whites have joined blacks and lost confidence in the ability of jurors of the opposite

columns did the writer attempt to analyze the facts to demonstrate the incorrectness of the jury's decision. Instead, the columnists asserted the verdict to be incorrect as a first principle and limited themselves to the task of explaining the incorrect verdict as an exercise of Black racism. An example of this style is found in William F. Buckley's column that began: "It is simply undeniable that the black majority believed him innocent because he was black."<sup>27</sup> Few editorials explicitly pronounced the verdict racist,<sup>28</sup> and fewer still were the publications of guest columns embracing this view.<sup>29</sup> The demographic characteristics shared in common by the writers espousing the claim of a racist verdict were that they were White and mostly men,<sup>30</sup> thus suggesting a demographic linkage between writer and audience.<sup>31</sup>

The view that Black jurors vote for Black defendants regardless of the evidence assumes that a monolith of values exists among Blacks based on a shared demographic feature, such as race, and ignores a wide diversity among Blacks on the same list of issues which diversifies Whites, including political, social, and economic status.<sup>32</sup> The assumption of a Black solidarity more powerful than a sense of justice is both specious and the stuff of divisive demagoguery. The puerile explanation that Black jurors voted their race and not the facts applies with equal inanity possibly to explain

color to reach an honest verdict based purely on the evidence before them.").

27. Buckley, *supra* note 26, at B5.

28. Those who did included *One Verdict, Two Societies*, BOSTON GLOBE, Oct. 8, 1995, at A36 ("National, race-based reactions to the acquittal of O.J. Simpson, more than the trial itself, offer Americans a choice: They can value reason and responsibility over race or they can allow their individuality to be obliterated in collective passions."); *Not Guilty?: The Simpson Verdict Is a Victory for Unreasonable Doubt*, PITTSBURGH POST-GAZETTE, Oct. 4, 1995, at A14 ("At least the O.J. Simpson case was consistent. Conceived in tragedy, it was often farcical through its many numbing months. And so it ended—in a combination of farce and tragedy, with a hugely impatient jury accepting the defense's invitation to be illogical.").

29. See Tom Baxter, *The Simpson Verdict: Not Guilty*, ATLANTA J. & CONST., Oct. 2, 1995, at 1C ("Last week, when many commentators were speculating about the possibility of blacks rioting if Simpson were found guilty, Michael Datcher, a writer for the Black-owned *Los Angeles Sentinel*, wrote a column expressing fears of a 'white riot' if he were set free.").

30. See *id.*

31. Cf. Jay Bookman, *Judging the Verdict: Reaction to the O.J. Simpson Trial; Reaction from the Internet; Racial Ugliness Goes Unchecked in the Safety of Cyberspace*, ATLANTA J. & CONST., Oct. 4, 1995, at 13A (listing reactions from the Internet that generally disparaged African Americans as a result of the Simpson verdict).

32. See, e.g., Chavez, *supra* note 26; Michael Miller, *Analysts Say Race, Not Evidence, Swayed O.J. Jury*, REUTERS, Oct. 3, 1995, available in LEXIS, Nexis Library, CURNWS File; *Unreasonable Doubt*, NEW REPUBLIC, Oct. 23, 1995, at 7; *This Week with David Brinkley* (ABC television broadcast, Oct. 8, 1995), Transcript No. 728, available in LEXIS, Nexis Library, CURNWS File.

White America's rejection of the verdict of not guilty based on its racial identification with the murder victims who were White. The mainstream press could have anecdotally matched case-by-case instances where White jurors seemingly voted their race and not the facts.<sup>33</sup> To have done so would be just as incendiary as the race-baiting evil that the press perpetuated in its coverage of the O.J. Simpson case and would have proven nothing more than that bias is in the eye of the beholder. This fact is becoming more and more apparent to all segments of the public and not just those victimized by press sensationalism.

The pundits who analyzed the case with demographic spins rather than evaluating the facts in effect conducted a form of "ethnic cleansing" of the truth based on racial politics. Such "cleansing" converts the judicial process into a political process by subjugating the evaluation of the facts to champion goals associated with favored segments in society.<sup>34</sup> The race-baiting pundits mixed and matched their analysis, ascribing racial motives to Black jurors, but claimed blessed objectivity onto themselves. It is racially vitriolic in the extreme for journalists to claim a monopoly on objectivity while summarily dismissing Black jurors as racist automatons—somewhat like pointing out the splinter in the eye of the "sinner" while ignoring the log in one's own. This denigration of the intelligence and experience of the Black jurors in the O.J. Simpson case, while claiming a journalist's monopoly on objectivity, ignores the importance of the sworn oath which Black jurors took in agreeing to perform their Sixth Amendment civic duty, and legitimizes a journalistic privilege for petty journalism to find and report the story it chooses to represent as fact. This is nothing short of injudicious

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33. This is not a reference to the substantial historical abuses from the days of yore when overt racial injustice in the criminal justice system was legendary, but rather, current instances of racial favoritism by Whites, especially where self-defense against a racial minority is alleged. Recent high-visibility cases where a majority-White jury found in favor of White defendants alleged to have committed crimes against victims of color include: Bernhard Goetz, the New York subway gunman who shot four youths, permanently paralyzing one, after they had approached him for spare change. See Kirk Johnson, *Goetz Is Cleared in Subway Attack; Gun Count Upheld*, N.Y. TIMES, June 17, 1987, at A1; Rodney Peairs, a White Louisiana man who shot and killed a Japanese exchange student during a Halloween trick-or-treat exercise, see Christopher Cooper, *B.R. Man Admitted Shooting Was a Mistake, Tape Reveals*, TIMES-PICAYUNE, May 22, 1993, at A1; and most dramatically, the first Rodney King beating trial, see Sam V. Meddis, *Many Blacks Think Justice Not Part of System: King Case Reaffirms Sentiment*, USA TODAY, May 13, 1992, at 8A.

34. Cf. Heather MacDonald, *Rule of Law: Law School Humbug*, WALL ST. J., Nov. 8, 1995, at A21 (criticizing critical race theory and feminist jurisprudence as faddish "movements [that] represent a dangerous flight from reason and logic in favor of emotion and group solidarity").

journalistic jingoism. If press analysis goes no deeper than castigating the Blacks on the O.J. Simpson jury for allegedly voting their race, and not the facts, then it is hard to suppress the suspicion that the real story in the coverage of the O.J. Simpson trial was that far too many pundits used this case as a self-serving vehicle to express, perhaps unwittingly, their own heartfelt racial bias.

The public should have been as loathe to accept the press' demographic analysis that Blacks favored acquittal because O.J. Simpson is Black as they would be to accept the proposition that Whites favored a conviction because the victims, Nicole Brown Simpson and Ronald Goldman, were White. This type of race-baiting demagoguery is made to order for press sensationalism and encourages venomous racial venting.<sup>35</sup> The real story was the failure of the press to see and hear the evidence showing reasonable doubt readily apparent to the jury. Not only did the press miss the story it attempted to cover, but the press has not been held to account for missing so badly.

*b. Racial Perspective Factored in the Jury's Analysis*

This view is that Blacks and Whites see events differently, especially allegations of police abuse and attempts to explain the verdict in terms of this black/white dichotomy. An example of this view is found in *Houston Chronicle* columnist Craig L. Jackson's piece:

[T]o avoid the differences of perception based on culture, race, gender, socioeconomic status and geography that lead to so much disagreement over the outcomes of criminal trials, we would have to develop a precise formula for conviction—something less than beyond reasonable doubt.<sup>36</sup>

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35. In this regard, the media's use of Ronald Goldman, father of one of the murder victims, was most unattractive. See, e.g., Allan Hall, *Murderer . . . Murderer; Victim's Dad in Tears as O.J. Says: I'll Find the Killers; O.J. Simpson Acquitted of Double Murder*, DAILY MIRROR, Oct. 4, 1995, (News), at 2; CNN News: *O.J. Simpson Trial Wrap-Up* (CNN television broadcast, June 8, 1995), Transcript No. 92, available in LEXIS, Nexis Library, CURNWS File; CNN News: *Simpson Trial Analysis* (CNN television broadcast, Sept. 27, 1995), Transcript No. 157-11, available in LEXIS, Nexis Library, CURNWS File (commenting on Fred Goldman crying in court during showing of crime scene photographs and during closing arguments); CNN News: *Simpson Trial Day 160* (CNN television broadcast, Oct. 3, 1995), Transcript No. 160-8, available in LEXIS, Nexis Library, CURNWS File (reporting on press conference, following the reading of the verdict, with prosecutors and the Goldman family).

36. Craig L. Jackson, *Simpson vs. The System; Can't We Accept that Our Perceptions*

Only a handful of op-ed pieces attempted to explain the verdict in terms of the racial divide between Blacks and Whites. Their numbers included only two nationally syndicated columnists,<sup>37</sup> both White males, and two local or guest columnists,<sup>38</sup> both Black.

The racial divide presented a worthy challenge to the pundits. But by ducking an exploration of the factual analysis supporting the legitimate concerns of the multiracial jury in the O.J. Simpson trial, where racial concerns about police misconduct dominated, the pundits disappointed an America needful of dealing with the problems of its criminal justice system and poorly served a segment of America for whom matters of race dominate.

### c. Race Relations

In contrast to nationally syndicated columnists, the most prominent theme among editorial opinions<sup>39</sup> and guest columns from

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*Differ?*, HOUS. CHRON., Oct. 8, 1995, at 1C, 4C.

37. One columnist wrote:

The difference between the judgments of blacks and whites about O.J. Simpson's guilt was based in large part on the differing experiences that blacks and whites have with the police. To most whites, the racist attitudes and claimed abuses of Los Angeles cop Mark Fuhrman seem a wild aberration from the norm of police conduct, and therefore appear not so serious as to cloud a jury's judgment about hard evidence pointing toward Simpson's guilt. But to most blacks, police abuse—including false arrest, beatings and planted evidence—is an all-too-common experience. The L.A. jury's experience apparently led it to discount virtually all police evidence, believing it was fabricated. Under those circumstances, the jurors' claims that they had genuine "reasonable doubt" seem entirely believable. . . . What the data—and the spectacle in L.A.—suggest is that the police departments and courts need to be improved to protect the entire population efficiently and fairly.

Morton Kondracke, *Crime Bill Can Help Correct the Wrongs*, COM. APPEAL (Memphis), Oct. 13, 1995, at 9A. Another columnist noted that the "spectacle [i.e., the Simpson trial] dramatized the extent to which racial suspicion poisons our justice system." Tony Snow, *Sentiment Displaces Trial Facts*, DET. NEWS, Oct. 5, 1995, at A13.

38. See G. K. Diamond, *Race Contaminated All Our Judgments*, ST. LOUIS POST-DISPATCH, Oct. 4, 1995, at 7B ("The polls proved the racial divisions. From the outset, more African Americans believed O.J. was innocent and more whites believed he was guilty. Who was biased?"); Jackson, *supra* note 36 (noting that factors such as culture, race, and gender produce differing perceptions, and defending the reasonable doubt standard, even though it may allow the guilty to escape conviction).

39. See also *A Dis-Uniting of America*, CAP. TIMES, Oct. 5, 1995, at 12A (concluding that our nation can be one where all views are respected and all cultures celebrated, and that it must be one where all citizens can view the truth through a prism that is greater than their own experience); *After the Simpson Verdict*, ST. LOUIS POST-DISPATCH, Oct. 4, 1995, at 6B ("Whatever the jury's reasons for disregarding the wealth of scientific evidence against Mr. Simpson, the verdict stands as a stark reminder of the gulf between the races and the urgent need for society's institutions—especially the law-enforcement system—to move aggressively to close it."); *America Is*



Black<sup>40</sup> and White<sup>41</sup> writers was that they cast the O.J. Simpson

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*Still a Melting Pot*, ROCKY MTN. NEWS, Oct. 29, 1995, at 11A; *Crime and Confidence*, FRESNO BEE, Oct. 8, 1995, at B6 ("We can, and should, demand better, but as long as we act as if we have no responsibility for those institutions, they will continue as they are. These are our cops, our courts, our legislatures, and we are the people who are ultimately responsible for them."); *Crucial Dialogue in a Tense Time; Positive Discussions of Race Should Continue*, L.A. TIMES, Oct. 26, 1995, at B8; *For Better or Worse the Marathon Is Over*, NEWS & REC. (Greensboro, N.C.), Oct. 4, 1995, at A16 ("[The] Simpson verdict leaves [the] nation to contemplate what went wrong."); *Nation Needs to Overcome Racism and Work Together*, STATE J. REG. (Springfield, Ill.), Oct. 18, 1995, at 6 (noting that, as "Abraham Lincoln said, '[a] house divided against itself cannot stand.' Right now, the house we know as America is just that."); *One Verdict, Two Societies*, supra note 28; *Rage in Black and White*, DAILY NEWS (N.Y.), Oct. 7, 1995, at 18 ("This was not just the most famous murder trial in U.S. history. It may well turn out to be the most important trial, period. Its aftermath is like a huge window being thrown open. Suddenly visible is the Grand Canyon that separates the races."); *Simpson Verdict: The Great Divide*, NEWS TRIB., Oct. 4, 1995, at A12 ("Rudyard Kipling, were he living today and following the O.J. Simpson case, might have been tempted to write a different poem: Black is black, and white is white. And never the twain shall meet . . ."); *The Simpson Verdict*, N.Y. TIMES, Oct. 4, 1995, at A20 ("Whatever one thinks about the shockingly swift acquittal of O. J. Simpson, this 'trial of the century' has left a stigma on criminal justice that could take years to repair."); *Verdict Reactions Show We Have a Long Way to Go*, ATLANTA J. & CONST., Oct. 5, 1995, at 18A ("Blacks cheered the Simpson verdict because they believe the justice system is tilted against them. Changing that perception is essential. It involves dealing with real problems as they exist, but also in convincing mainstream America, . . . that the criminal justice system is fair, just, and that it shares its values.").

Several editorials discussed race relations in the context of President Clinton's call for a race panel. For example, one editorial opined that

We now know that too much faith was put in Washington. There is no reason to believe that lawmakers and bureaucrats are any better equipped this time around. Improved race relations will come from the dedicated efforts of churches, community organizations, employers and individuals at the local level. That is where people interact with each other every day. It is through personal contact and open, honest dialogue that real improvement will take place.

*Nation Doesn't Need a Kerner II*, TAMPA TRIB., Oct. 30, 1995, at 8. Another editorial opinion stated that:

Another commission to give America an up-to-date report card on civil rights could be useful in sorting out statistics and perceptions. Some studies indicate that middle-class blacks have made enormous progress in recent years. At the same time, rates of illegitimacy have gone up, and record numbers of black men have been incarcerated. A carefully selected commission could dispel some perceptions and affirm others. It would give the nation a new empirical base from which to move forward.

*Race Commission: Do We Need Another Blue-Ribbon Investigation?*, DALLAS MORNING NEWS, Oct. 23, 1995, at 8A.

40. See, e.g., Claude Lewis, *Simpson Reaction Rolls On: A Case of Race or Justice?*, ORLANDO SENTINEL, Oct. 26, 1995, at A15 ("Americans certainly may disagree with a jury's verdict. But what I find so offensive is the unbridled anger from so many whites who appear unalterably convinced that a predominantly black jury would set free a man accused of such beastly and horrific crimes."); Rowland Nethany, *Remember*

verdict in the larger context of race relations in America. This theme played to a much lesser extent in nationally syndicated columns by Black<sup>42</sup> and White<sup>43</sup> writers. The dominant slant taken on race rela-

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*King's Dream; We Shouldn't Allow Hatemongers to Use Simpson Verdict to Further Divide Nation*, ATLANTA J. & CONST., Oct. 5, 1995, at 19A (asserting that the Simpson trial demonstrated, above all else, that "the differences shaped by life experiences of black Americans and white Americans are as great today as during Dr. King's life[, as] polls showed upwards to three out of every four white Americans thought Simpson was guilty while an equal percentage of black Americans believed Simpson was innocent").

41. See, e.g., Tom Baxter, *The Simpson Verdict: Not Guilty*, ATLANTA J. & CONST., Oct. 2, 1995, at 1C; Thomas Eagleton, *Attitudes Transcend the Power of Law*, ST. LOUIS POST-DISPATCH, Oct. 8, 1995, at 3B ("Race consciousness remains deeply ingrained in the American people. It is a two-way street. The suspicion or antagonism of many whites against blacks is mirrored by equal suspicion and antagonism of many blacks against whites."); David M. Fryson, *It Doesn't Fit—Simpson Trial Reaction Revealing*, CHARLESTON GAZETTE, Oct. 6, 1995, at 5A ("The reaction to the O.J. Simpson case is a reflection of the America of 1995. The images around the country in the wake of the acquittal were indicative of the racial divide that our society refuses to acknowledge."); John Jacobs, *Clinton's Leadership on Race*, SACRAMENTO BEE, Oct. 19, 1995, at B8; Peter A. Jay, *Verdict Consequences Are Overstated*, BALTIMORE SUN, Oct. 12, 1995, at 13A ("There are reasons to expect that race relations in America will survive the wounds of the Simpson trial, if for no other reason than that there are so many more people of good sense on both sides than there are demagogues."); Richard Katz, *After the O.J. Simpson Verdict*, ATLANTA J. & CONST., Oct. 9, 1995, at 11A ("[W]e are all less than we can be if something is not done to improve our sense of community."); Daniel Schnur, *Just Do Something, General*, CLEVELAND PLAIN DEALER, Oct. 23, 1995, at 11B ("[N]ow a leader exists who can bridge that divide. To both Americas, to both whites and blacks in post-O.J. America, [Colin] Powell is a symbol, not of the way things are, but of the way they can be."); see also Robert Wright's assessment, as he states:

Part of the gap between black and white world views boils down to conditions in the urban underclass. . . . This gap won't be wholly bridged by "communication." Whites can try to convince blacks that self-pity and conspiracy-theorizing are counterproductive. And blacks can try to convince whites that stereotypes about race and criminality are unfair and pernicious. But in neither case is the message likely to have great effect. Because both perspectives are rooted in statistical truth and serve self-preservation, whether psychological or physical.

Robert Wright, *Unusual Suspects; Verdict Perceptions Are as Different as Black and White*, PITTSBURGH POST-GAZETTE, Oct. 9, 1995, at A13.

42. Clarence Page, *When Race and Justice Collide: The Country Can No Longer Afford to Ignore Its Racial Divide*, CHI. TRIB., Oct. 8, 1995, at C21 ("[W]e Americans have not yet said all that needs to be said about O.J. Americans need to fight the impulse to paint a thin veneer of denial over our racial divide. We need to talk.").

43. One commentator, for example, stated:

In the past few days, The [Washington] Post has published polls dramatizing the gulf in perceptions. . . . Whites predominantly and mistakenly believe that blacks have achieved parity with whites in income, jobs, education, housing and other measures of well-being. As a consequence, few whites but most blacks believe racial discrimination is a continuing problem. The gap is so wide, said Robert J. Blendon, the Harvard professor who analyzed the poll, that "blacks and whites

tions was conciliatory, and even hopeful, especially among Black writers. Boston University economist Glenn Loury's opinion piece appearing in the *Washington Post* was typical of this view:

It is by now a truism verging on cliché to observe that the different reactions of blacks and whites to the Simpson jury's verdict reveal our nation's vast racial divide. But it may be a mistake to put too much weight on what are essentially visceral responses to media-generated national theater.<sup>44</sup>

As Loury's piece indicated, Black writers were particularly solicitous of improved race relations.<sup>45</sup> However, the view that the O.J.

may as well be on two different planets."

David Broder, *Misjudging the Jury System*, WASH. POST, Oct. 11, 1995, at A11. Another writer concluded:

It is a time for men and women of courage to assert themselves, to try to find a way to bring together people whose ignorance of one another is profound and whose hatreds are intensifying. Men and women of good will are also needed to begin reconstituting the disaster we call a criminal justice system.

Bob Herbert, *In America: Madness, Not Justice*, N.Y. TIMES, Oct. 6, 1995, at A31; see also Joan Beck, *When Race and Justice Collide: Simpson Trial Is a Reminder of How We Aren't Yet a Color Blind Society*, CHI. TRIB., Oct. 8, 1995, at C21 ("But we must have one justice system that all of us perceive as being fair if we are to sustain a viable nation. Reaction to the Simpson verdict shows how far we still have to go."); Richard Cohen, *The Simpson Verdict: Two Nations Watched, One Celebrated, One Did Not*, CLEVELAND PLAIN DEALER, Oct. 4, 1995, at 11B ("[I]n the end, Simpson stood at the very center of America's racial divide—whites on one side, blacks on another."); Jack W. Germond & Jules Witcover, *Political Fallout From the Simpson Trial*, BALTIMORE SUN, Oct. 9, 1995, at 21A ("If there is any political message in the reaction to the Simpson verdict, it may be that the racial identity of Colin Powell, apparently a nonfactor in the nation's assessment of him to date, may now play a more prominent role in his political prospects, pro and con.").

44. Glenn Loury, *Not-So Black and White: The Two Americas Are Actually Converging*, WASH. POST, Oct. 15, 1995, at C3.

45. Numerous commentators have begun just a passage. One writer, for example, stated:

Journalists and commentators have cast their predictions of the outcome of this trial in racial terms from the very beginning. I recall race first becoming a part of the trial when the media began insistently keeping a virtual tally sheet of the race and ethnicity of the jurors, with speculation on the possibility of acquittal being directly related, in their minds, with the number of black people on the jury panel. It is posterous to say the defense injected the race issue into the trial.

Elliot G. Hicks, *Why Black Americans See Different Country*, CHARLESTON GAZETTE, Oct. 19, 1995, at 5A. Another writer commented:

Three years ago, after the first jury in the Rodney King case acquitted four white policemen of a beating seen by millions on TV, people of color looted and burned in Los Angeles while whites hid behind gates and walls. This time, whites and blacks gathered together in the public square to point fingers angrily in each other's faces.

Simpson verdict could serve as an opportunity to advance race relations was not universal.<sup>46</sup>

## 2. Domestic Violence

The second major theme in the opinion and editorial page analysis and commentary on the O.J. Simpson verdict dealt with the element of domestic violence. This theme followed the prosecution's theory of motive and struck a responsive chord among White women. Syndicated *New York Times* columnist Maureen Dowd began the first of two columns devoted to the O.J. Simpson verdict by writing that "[t]he Santa Ana winds are blowing hard, so hot and dry, as Raymond Chandler wrote, that 'meek little wives feel the edge of the carving knife and study the back of their husbands' necks."<sup>47</sup>

The columnists who took up the domestic violence theme were White, almost exclusively women, and their central thesis was to

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Others may call that evidence of a new and widening gap between the races, but I don't. I call it progress.

Russ Rymer, *Crossing the Divide*, N.Y. TIMES, Oct. 22, 1995, § 4, at 13; see also Brian Dickinson, *Recent News Stories Transmit and Transmute Racial Divisions*, PROVIDENCE J. BULL., Oct. 22, 1995, at 15C ("For all the gains that America has achieved in [race] relations over the past 40 years, there remains a corrosive reservoir of suspicion between the races. The events of recent weeks have taught us that much. Whether we all can gain from this heightened awareness remains an open question."); Coretta Scott King, *Racism Remains a Festering Wound*, ST. LOUIS POST-DISPATCH, Oct. 22, 1995, at 3B ("The chasm between races is deep and wide, but it need not be permanent if the decent majority will not be swayed by the polarizing demagogues, and will remain focused on building bridges of understanding and friendship, cooperation and unity."); *Name a Race Panel, but Real Job Is the People's*, ATLANTA J. & CONST., Oct. 19, 1995, at 18A (concluding that Americans depend too often, on the federal government to solve problems "that they can do for themselves," yet "[w]hile we support a national commission on race relations, the real, tough work will remain at home. Through focus groups and town hall meetings, through writing to newspapers and talking to one another, we need to work at bridging the racial divide."); *Rage in Black and White*, DAILY NEWS (N.Y.), Oct. 7, 1995, at 18 (positing that the end of the Simpson trial may signal the beginning of "another chapter of progress," a chapter "based on acknowledging how deep the divisions run and therefore how deep the solutions must be. For that to happen, Americans on both sides must quickly forget about the anger that the Simpson case generated. And get on with the business of building bridges over that great divide.").

46. See, e.g., Abigail Thernstrom, *Two Nations, Separate and Hostile?*, N.Y. TIMES, Oct. 12, 1995, at A23 ("Johnnie Cochran's closing argument stated a view of race relations that is essentially that of the Nation of Islam. The system is rigged against blacks. Thus blacks must depend on themselves. They can't trust whites—in the courtroom or out.").

47. Maureen Dowd, *Simpson Verdict Fits Surreal Case*, AUSTIN AM. STATESMAN, Oct. 9, 1995, at A11.

complain about the hierarchy of victimhood, which placed Black victimization from police abuse above spouse-related abuse.<sup>48</sup> The editorial writers who took up the domestic violence theme eschewed the hierarchy of victimhood slant to caution that the O.J. Simpson verdict represented an aberration to a trend toward clamping down on domestic violence.<sup>49</sup>

### 3. Socioeconomic Status

The third major theme generated to explain the verdict levied blame on the monied<sup>50</sup> and celebrity<sup>51</sup> status of the defendant. Nu-

48. See, e.g., Joan Beck, *A Sad Day for Justice*, CHI. TRIB., Oct. 5, 1995, at 31 (characterizing O.J. Simpson trial as sending a message that a “rich and famous man can batter his wife . . . [and, i]f he is black and she is white, a big majority of African-Americans will find an excuse to cheer him on”); Ellen Goodman, *An Apartheid of Perceptions*, BOSTON GLOBE, Oct. 5, 1995, at 23 (complaining that “the trial switched from being a case about domestic violence to a case about race. Now, many white Americans—including this one—are as sobered by this decision as black Americans were angered by the Rodney King verdict”); Richard Grenier, *O.J. Simpson and the End of Trust*, WASH. TIMES, Oct. 6, 1995, at A21 (concluding that the only thing that the Simpson trial proved beyond reasonable doubt, if anything, “it was that race beats gender. . . . If there was any surprise in legal circles it was that the verdict, after a trial lasting nine months, should seemingly have been delivered almost without deliberation, suggesting that the trust black Americans have in our police and judicial systems is stunningly low.”).

49. See, e.g., *He’s an Exception to the Rule*, INDIANAPOLIS NEWS, Oct. 18, 1995, at A16 (citing recent statistics that demonstrate low acquittal rates of spouse murderers to “suggest that the acquittal of Simpson was far more the exception than the rule in cases involving spousal homicides”); *O.J. Freed, but Abusers Face a Harsher Verdict*, PALM BEACH POST, Oct. 5, 1995, at 22A (contrasting Simpson case with recent trends of increased public awareness of, more stringent laws against, and greater prosecution of domestic violence); cf. *Death Threat; “I’m Going to Be Like O.J.”*, ARIZ. REPUBLIC, Oct. 8, 1995, at A16 (pointing out that the Simpson trial increased awareness of domestic violence and denouncing the excuse of “I’m going to be like O.J.” as a means to empower abusers).

50. One writer, for example, asserted:

Gil Garcetti, the district attorney, calls a news conference and says the case was about domestic violence. But it wasn’t. It was about whether the state could prove that O.J. Simpson murdered two people. He laments that the jury acted on emotion. But maybe the jury, while emotion-driven in part, acted in technical adherence to the law because millions of dollars will buy a rich criminal defendant the application of a burden of proof that goes unapplied five days of every week in cities from Little Rock to Los Angeles.

John Brummett, *Big Bucks Buy Reasonable Doubt*, ARK. DEMOCRAT-GAZETTE, Oct. 8, 1995, at 5j; see also Joseph Perkins, *The Juice and Platinum Justice*, SAN DIEGO UNION-TRIB., Oct. 6, 1995, at B5.

51. See, e.g., Jon Morgan, *Acquittal Is Likely to Give Career New Life; As Madison Ave. Recoils, Hollywood Could Rush In; The O. J. Simpson Verdict*, BALTIMORE SUN, Oct. 4,

merous editorials addressed the class warfare theme as well, though with less stridency than the columnists did.<sup>52</sup> For example, *San Diego Union Tribune* columnist Joseph Perkins wrote concerning the influence of money that “[i]f Simpson were an ordinary brother from the ‘hood, he’d probably be doing 25 years to life right about now. But because he had the juice to hire the best defense that money could buy, he’s back at his Brentwood mansion sipping champagne.”<sup>53</sup> Concerning celebrity status, syndicated *New York Times* columnist William Safire wrote that “O.J. Simpson . . . was not about to take any chances on a rational jury decision. The wealthy celebrity who lived white, spoke white and married white wrapped himself in the rags of social injustice and told his black counsel to move black jurors to vote black.”<sup>54</sup>

As with race and sex-based rhetorical spin, the class warfare presentation may be viewed as demagoguery, since the complaint here is that O.J. Simpson had money and status, not that he acquired it illegally or even immorally, nor that he spent it illegally or immorally, but simply that he had it to spend. The O.J. Simpson case is neither the first nor the last case in which money and celebrity

1995, at 17A; William Safire, *O.J. Simpson Is Guilty—Of Exploiting His Own Race*, CINCINNATI ENQUIRER, Oct. 15, 1995, at F4; Debra J. Saunders, *Another Bad Verdict—Only in L.A.*, S.F. CHRON., Oct. 4, 1995, at A19 (“[e]qual injustice for all”); Edwin Yoder, *Conspiracists Find Fodder in O.J. Case*, MONTGOMERY ADVERTISER, Oct. 30, 1995, at 10A (“[T]here is a manifest American susceptibility to conspiratorial explanations of complex events.”).

52. One editorial, for example, stated:

Former superiors and co-workers could not have been oblivious to Fuhrman’s racism and unprofessional behavior, but their culture encourages a code of silence that protects bad cops. Prosecutors in the Simpson trial also were aware of Fuhrman’s record, but they cavalierly chose to make his testimony a central part of their case anyway. Typical criminal defendants, who can afford only the barest of legal representation, would not have been able to impeach Fuhrman’s testimony, but investigators hired by the Simpson legal team were able to do so to devastating effect.

*Race, Wealth and Injustice*, ST. PETERSBURG TIMES, Oct. 8, 1995, at 2D; see also *Commentary on Simpson Verdict, Escapes for Those Who Want Them*, WASH. TIMES, Oct. 14, 1995, at B2 (detailing the blitzkrieg coverage of leading magazines); *Our Say Simpson Verdict: Money, Rhetoric Win Out Over Justice*, CAPITAL, Oct. 4, 1995, at A14 (“It will take this country a long time to live this one down if, indeed, we ever do.”); *Reasonable Doubts Remain in Wake of Simpson Verdict*, AUSTIN AM. STATESMAN, Oct. 4, 1995, at A14 (“Justice may be blind, but the scales are seldom balanced. A rich defendant can overwhelm the system, and a poor one is overmatched by it.”); *Shed a Tear for Justice*, DAILY NEWS (N.Y.), Oct. 4, 1995, at 28 (“It’s too simple, though, to say Simpson walked as an act of revenge. For in the end, what turned the table probably was not the race card, but the credit card. It took a black man with millions to prove a point.”).

53. Perkins, *supra* note 50, at B5.

54. Safire, *supra* note 51.

status aided the defense. Money and celebrity status routinely affect the quality of service received in all aspects of life; the justice system is no different.

#### 4. Police Abuse

The major contention of the defense was that rogue cops, through a combination of racial bias and incompetence, built a circumstantial case around O.J. Simpson. Despite defense attorney F. Lee Bailey's hard-hitting cross-examination of Detective Mark Fuhrman, and the Laura McKinney tapes, which demonstrated Fuhrman's racist attitudes and tendencies toward rogue behavior, the responses of the nationally syndicated columnists and editorial writers were curiously muted, indeed indifferent, as if they did not want to let facts get in the way of the prosecution's case. The exceptions were primarily guest or local columnists,<sup>55</sup> as shown in this excerpt from *Atlanta Journal & Constitution* columnist Joanne Jacobs:

The policeman is your friend. My friend, anyhow. The advice from my first-grade teacher has held up quite well: Police officers always assume I'm a law-abiding citizen and treat me accordingly. I am a law-abiding citizen. But so are a lot of other people who are treated with suspicion because they're young males or they're black or Hispanic or because they're different from the norm. They may come to believe that the policeman is not their friend—even if he's trying hard to find the bad guys, who prey on the law-abiding.<sup>56</sup>

The jury's validation of the defense's contention found very few (one White woman and one Black man) nationally syndicated columnists championing this view.<sup>57</sup> One nationally syndicated col-

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55. See, e.g., Steven Duke, *Simpson Verdict Points Up Crisis of Lawless Law Enforcement; In Federal Court Too*, N.Y. TIMES, Oct. 10, 1995, at A22; Nat Hentoff, *In Defense of the Simpson Jury*, WASH. POST, Oct. 10, 1995, at A13 ("When vital evidence has been so rampantly contaminated and some of the investigating officers—not only Mark Fuhrman—do not have to be in a conspiracy to be disbelieved, it is no wonder that the jury found many avenues of reasonable doubt."); Richard Lempert, *The O.J. Verdict: Why It Had to Be Right*, 1995 WL 580905 (O.J. Commentaries, Oct. 4, 1995); Scott Turow, *Simpson Prosecutors Pay for Their Blunders*, N.Y. TIMES, Oct. 4, 1995, at A21; Andrew Ward, *Good Cop, Bad Cop, My Cop*, WASH. POST, Oct. 14, 1995, at A23.

56. Joanne Jacobs, *Officer Friendly, Where Are You?: It Doesn't Take Many Bad Policemen to Taint the Image of All the Rest*, ATLANTA J. & CONST., Oct. 11, 1995, at 12A.

57. See, e.g., Maureen Dowd, *Liberties; Tiger in Wait*, N.Y. TIMES, Oct. 15, 1995, at 58A ("The truth is that the racist detective was my worst nightmare, too. My father was also a police detective. As a reporter, I avoided working on any stories about

umnist, a White man and a crime control conservative, actually wrote to defend the Los Angeles Police Department.<sup>58</sup> Despite the generally broader perspective characterizing most editorials, surprisingly few editorials addressed the problem of rogue cops.<sup>59</sup>

### 5. Judicial Reform

Perhaps the most strident pens in the press expressed the need for judicial reform, a view that seemed to percolate in the news at least as frequently as in the analysis and commentary. It is in the call for judicial reform that the demographic bias of the writer was demonstrated most strongly. In general, Black men and women voiced the claim that the judicial system is biased against Blacks and is too often used as an instrument of oppression; they therefore heralded the verdict as the first step in the way of a grassroots reform to right a racially biased institution.<sup>60</sup> White women voiced the complaint that the defense counsel unfairly played the race card to trump the prosecutor's domestic violence card.<sup>61</sup> White men

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police brutality or corruption. I couldn't bear to know about bad cops poisoning the quiet bravery of good cops."); William Raspberry, *Johmie Cochran and 'Race Card'*, TIMES-PICAYUNE, Oct. 6, 1995, at B7 ("I am not the first to accept the possibility that the cops tried to frame a guilty man.").

58. Philip Terzian, *Open Season on the Police*, PROVIDENCE J. BULL., Oct. 22, 1995, at 15C (complaining that nothing good will come out of the U.S. Department of Justice's investigation of the Los Angeles Police Department).

59. For a sample of those that did, see *Not Guilty Verdict Indicted LAPD*, CHARLESTON GAZETTE, Oct. 7, 1995, at 4A ("Conventional wisdom . . . is that the predominantly black jury acquitted Simpson for racial reasons. That would not explain, though, why the two whites and one hispanic . . . went along. Another explanation is far more reasonable: The jury did not trust the LAPD's handling of the evidence or the case."); *Race, Wealth and Injustice*, supra note 52; *The Simpson Verdict: A Loud Rebuke for Los Angeles Police*, RECORD (N.Y.), Oct. 4, 1995, at N6 ("This trial was about what 12 [jurors] perceived in a Los Angeles courtroom . . . a reasonable doubt. Mr. Simpson's team of slick lawyers did not make Mr. Fuhrman into a racist or botch the murder investigation. The defense merely took advantage of these fundamental flaws and pointed them out.").

60. See, e.g., Paul Butler, *O.J. Reckoning: Rage for a New Justice*, WASH. POST, Oct. 8, 1995, at C1 ("We were not applauding the release of a criminal, but rather that at last the system could work for an African-American man."); Kimberly Crockett, *Jurors: Don't Accuse Them of Racial Prejudice*, PHOENIX GAZETTE, Oct. 5, 1995, at B5 ("What the Simpson jury did was express the sentiments of many Americans: It sent a spectacular, stunning middle-finger salute to law enforcement and the judicial system in America. Hopefully, they got the message."); Lamont Jones, *The System Worked*, PITTSBURGH POST-GAZETTE, Oct. 8, 1995, at B1 ("For a not-so-brief moment, millions of white Americans got a glimpse of what black Americans have felt for the last 400 years: the shock, horror, disbelief and pain that twist and turn your stomach when you're sure justice has been denied.").

61. See, e.g., Susan Estrich, *The Simpson Case; Not the Facts: Having a Jury Rule on*



complained that the entire judicial system was broken.<sup>62</sup> Editorials written on the subject of judicial reform primarily focused on the role of juries and the problem of jury nullification,<sup>63</sup> perhaps in part

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*Social Problems*, L.A. TIMES, Oct. 1, 1995, at M1 ("Asking the jury to rise up against a racist system is a brilliant defense strategy and a terrible abuse of the criminal-justice system."); Adrianna Huffington, *The Horror Cochran Wrought*, S.F. CHRON., Oct. 11, 1995, at A15 ("The most chilling aspect of the O.J. Simpson verdict is that 12 ordinary women and men were led astray by an artful, unscrupulous man who spoke not to their sense of justice but to their fears, and asked them not to reach a verdict but to send a message."); Mary McGrory, *Views from the Jury Box*, WASH. POST, Oct. 5, 1995, at A2 ("Playing the race card is always unconscionable, but doing it in a double murder trial is a disgrace, even if inept prosecutors have handed it to you in the person of the odious Fuhrman, bigot of the year."); Cokie Roberts & Steven B. Roberts, *Today's South Becoming Region Divided by Race*, ROCKY MOUNTAIN NEWS, Oct. 15, 1995, at 97A. ("When Johnnie Cochran encouraged a predominantly black jury to acquit O.J. Simpson, he was sounding a whole lot like white Republicans in the South who have helped build their party by exploiting racial resentments.").

62. See, e.g., Ray Archer, *Respect for Judicial System Gone Long Before Judicial System*, ARIZ. REPUBLIC, Oct. 16, 1995, at B4. ("Justice, in concept and practice, has lost its meaning in America. Before all respect for law is gone, we, as a society, better try to find it."); Frank Fellone, *Lessons from the Simpson Case: Accept Verdict and Move On*, ARK. DEMOCRAT-GAZETTE, Oct. 9, 1995, at 7B ("The credibility of the Los Angeles Police Department, the legal profession, the media, the mainstream press, and even the jury system is pretty much shot full of holes."); Kingsley Guy, *Trial Demonstrated Perversion of Long-Revered System*, SUN-SENTINEL (Fort Lauderdale), Oct. 5, 1995, at 27A ("As long as the nation tolerates a system that allows a travesty of justice like this to take place, Americans have no moral standing to lecture countries like China and Singapore on the failures of their institutions of government.").

A good number of editorial writers took up this refrain as well. See, e.g., *Crime and Confidence: We Citizens Are Responsible for Whatever Problems the Criminal Justice System May Have; The Solutions Are up to Us*, FRESNO BEE, Oct. 8, 1995, at B6 ("We can, and should, demand better, but as long as we act as if we have no responsibility for those institutions, they will continue as they are. These are our cops, our courts, our legislatures, and we are the people who are ultimately responsible for them."); *For Better or Worse the Marathon Is Over*, supra note 39; *No Doubt About It—It's Over*, WIS. ST. J., Oct. 4, 1995, at 13A; *Simpson Verdict Shakespeare, Not Justice*, HERALD-SUN (Durham, N.C.), Oct. 4, 1995, at A12 ("The trial of O.J. Simpson may have been the stuff of Shakespeare; the tragedy is that it was not the stuff of justice."); *The Simpson Verdict*, WASH. POST, Oct. 4, 1995, at A24 ("There was something here for everybody's prejudice, for everybody's fear, for everybody's anxiety and/or contempt.").

63. See, e.g., *A Deformed Jury System*, DET. NEWS, Oct. 13, 1995, at A10 ("[W]e do believe a close look should be given to jury selection procedures."); *Don't Rush to Judge the Jury System; Simpson Trial Revives Half-Baked Proposals for Change*, L.A. TIMES, Oct. 6, 1995, at B8; *Jury System Still Good*, BOSTON HERALD, Oct. 8, 1995, at 42; *Simpson Verdict; Trial Raises Questions for Judicial System*, DALLAS MORNING NEWS, Oct. 4, 1995, at 20A; *Testing the System: Jury's Reasonable Doubt Lets Simpson Go Free*, ASBURY PARK PRESS, Oct. 4, 1995, at A13 ("The Simpson trial thoroughly tested the American system of justice. Its flaws were emphasized, but ultimately a man was judged by 12 of his peers. That's the way the system is supposed to work."); *The Lawyers' Last Words*, ST. PETERSBURG TIMES, Oct. 3, 1995, at A8 ("[Racial division] is an additional burden that the world's most scrutinized jury did not need. Millions of interested observers can only hope that the jurors were able to look beyond the irrelevancies, minutiae and gamesmanship of the case to render a reasoned verdict based on the

due to Thomas Sowell's article calling for professional juries.<sup>64</sup>

## 6. Factual Analysis of Reasonable Doubt

In spite of an avalanche of rhetorical analysis and commentary spinning different themes explaining why the verdict was incorrect, there was a stunning dearth of columns on the op-ed pages of daily newspapers setting out the facts to explain *whether* the verdict was incorrect, and if so how so. Only one nationally syndicated columnist<sup>65</sup> and a handful of mostly guest and local columnists,<sup>66</sup> mostly Black writers, undertook a factual analysis of the verdict to verify the existence or non-existence of reasonable doubt. Less than a half-dozen editorials even expressed the possibility that reasonable doubt existed.<sup>67</sup> What is, of course, amazing is that the existence or non-existence of reasonable doubt was an important fact of the first order. The majority of commentaries on the verdict was pure rhetoric designed to advance political agendas. The O.J. Simpson verdict was, first and foremost, a fact-laden story that demanded an assessment of the jury's validation of the defense hypothesis that the

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evidence."); *The Simpson Verdict*, N.Y. TIMES, Oct. 4, 1995, at A20 ("Whatever one thinks about the shockingly swift acquittal of O. J. Simpson, this 'trial of the century' has left a stigma on criminal justice that could take years to repair."); *Will Jury Jokes Be Next? (The Issue) The Survival of the American Judicial System (Our View): The O.J. Simpson Jury Didn't Help*, ROCKY MOUNTAIN NEWS, Oct. 5, 1995, at 61A.

64. Thomas Sowell, *Disgust Is Widespread; Maybe Trial Will Spur Reform of Our Legal System*, ATLANTA J. & CONST., Oct. 5, 1995, at 18A ("We need to have professional jurors, people with training in the law, who acquire enough experience not to be taken in by tricks or appeals to their emotions.").

65. Nat Hentoff, *supra* note 55.

66. See, e.g., Martha Ezzard, *Judicial Pendulum Swinging; Simpson Verdict Drives a Larger Wedge Between Blacks and Whites*, ATLANTA J. & CONST., Oct. 4, 1995, at 12A ("I'm not somebody who thinks a jury should ever be blamed for a verdict that may not be popular in the polls."); Bill Hall, *There Was Nothing Fast About the Jury's Decision*, LEWISTON MORNING TRIB., Oct. 4, 1995, at 10A ("Several of the lawyer commentators on telecasts of the O.J. Simpson verdict were outraged that the jury took less than four hours to reach a decision, calling it an insult to both sides. And it was a richly deserved insult to the repetitive windbags on both sides."); Stan Simpson, *The Facts Didn't Support a Conviction*, HARTFORD COURANT, Oct. 5, 1995, at A19 ("Those drawing racial parallels and making the O. J. Simpson verdict the seminal issue on race relations are off base.").

67. See, e.g., *Reasonable Doubt Puts End to Longest Chapter*, COLUMBIAN, Oct. 4, 1995, at A10 ("The L.A. Police Department and its investigating capacity may never recover from the damage."); *Not Guilty Verdict Indicted LAPD*, *supra* note 59; *Testing the System; Jury's Reasonable Doubt Lets Simpson Go Free*, *supra* note 63; *The Simpson Verdict; A Loud Rebuke for Los Angeles Police*, *supra* note 59; *What About the Justice System?*, USA TODAY, Oct. 4, 1995, at 14A ("Whether or not you like the Simpson verdict, the first responsibility of any justice system is to make sure the innocent don't get punished.").

prosecution's case against O.J. Simpson did not exclude the possibility of reasonable doubt. The analysis and commentary on the O.J. Simpson verdict was rich in demagoguery, but factually impoverished.<sup>68</sup>

When press legal analysis and commentary creates the news it wishes to report, as it did in the O.J. Simpson case, it undermines both its First Amendment role to inform the public and its Sixth Amendment role to expose the trial to public censure. If the press served to educate the American public and inspire confidence in our justice system in the O.J. Simpson case, it did so by counter example. The coverage by the mainstream press did not inform, challenge, or educate. Rather, the press' sordid contribution in the O.J. Simpson case was to politicize justice. When the press politicizes cases, three results are preeminent. First, the trial, in reality, begins to operate on a social theme larger than the matter under charge. Second, the adversarial system, which is designed to achieve neutral and dispassionate judicial prosecution of wrongdoing in accordance with law, is converted into an instrument for a politically motivated prosecution on the larger social issue, which the press begins to trumpet. Third, the public outcry leads to a political subjudicial disposition of the trial against a disfavored minority on the larger social issue.<sup>69</sup> Elements of these three factors were present in the O.J. Simpson case to an oppressive degree.

### *B. Deconstructing the Spinmeister's Yarns in the O.J. Simpson Case*

In the immediate aftermath of the O.J. Simpson verdict, Marcia

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68. In the world of sports, where stunning upsets occur with the same frequency as legal events at trials, the sports pages, even though belated, rush to provide factual analysis of the outcome. The same is likely true in other nonpolitical aspects of life as well. Only in dispute resolution has it become fashionable to supplant factual analysis with rhetorical spin. This is a result of politicization by the press.

69. The cases chosen by the media as *cause célèbres* exploit a politically vulnerable defendant to showcase problems with greater implications for society. With uncanny frequency, the media focuses on Black defendants to raise social awareness and coordinate national concern about the social cause *du jour*. Thus the O.J. Simpson trial carries the additional baggage of highlighting a new get-tough attitude on domestic violence. The Michael Jackson accusation suddenly awakened the media to the problem of child sexual molestation. The Mike Tyson trial is heralded as raising consciousness about date-rape, despite not being televised due to a statutory prohibition against cameras, and notwithstanding the contemporaneous televised trial of William Kennedy Smith who was acquitted of a date-rape charge. The Clarence Thomas confirmation hearings/*de facto* trial-by-television precipitated concern to end sexual harassment in office settings. The Marion Barry trial developed heightened concern about personal misconduct by elected government officials.

Clark, lead prosecutor in the case, whined to CNN News that “a majority black jury won’t convict in a case like this. They won’t bring justice.”<sup>70</sup> That was all the mainstream press needed. The predominant news accounts accompanying the verdict noted that nine of the twelve jurors who unanimously acquitted O.J. Simpson after only four and a half hours of deliberation shared a racial identity with the celebrity defendant, and implied that Blacks voted their race, not the facts. This was so despite police admissions constituting overwhelming evidence of police incompetence and police frame-ups on the basis of race.

The mainstream press added fuel to the fire by dutifully compiling statistics focusing anecdotally on the one or two memorable cases where American opinion seemed divided by race<sup>71</sup> and ignored the vast number of cases where multiracial juries routinely convict Blacks. Influential women pundits from the mainstream press bolstered the claim of a racist verdict by misconstruing lead defense lawyer Johnnie Cochran’s closing argument as a call for racial victory.<sup>72</sup> In reality, Cochran’s closing argument called for the jury to reject the O.J. Simpson case—a product of the Los Angeles Police Department—as lacking credibility because the proven virulent racial hostility or incompetence of key police witnesses corrupted the police investigation. Mr. Cochran argued to the jury:

Gee, why would all these police officers set up O.J. Simpson? Why would they do that? I’ll answer that question for you. They believed he was guilty. They wanted to win. They didn’t want to lose another big case. That’s why. They believed he was guilty. These actions rolls [sic] from what their belief was. But they can’t make that judgment. The prosecutors can’t make that judgment. Nobody but you can make that judgment. So, when they take the law into their own hands, they become worse than the people who break

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70. William Claiborne, ‘A Majority Black Jury Won’t Convict in a Case Like This,’ *Clark Says*, WASH. POST, Oct. 6, 1995, at A4.

71. See, e.g., Benjamin A. Holden et al., *Color Blinded?*, WALL ST. J., Oct. 4, 1995, at A1 (“[I]ncreasingly, jury watchers are concluding that race plays a far more significant role in jury verdicts than many people involved in the justice system prefer to acknowledge. Rather than condemn this influence, some legal scholars argue that it fits neatly into a tradition of political activism by U.S. juries.”); Albert B. Hunt, *Politics & People: A Flawed Verdict, but Tread Carefully*, WALL ST. J., Oct. 5, 1995, at A15; Anthony Lewis, *supra* note 26; CNN News: *The Media and the O.J. Simpson Trial* (CNN television broadcast, Oct. 1, 1995), Transcript No. 188, available in LEXIS, Nexis Library, CURNWS File; see also CNN News: *CrossFire* (CNN television broadcast, Sept. 29, 1995), Transcript No. 1461, available in LEXIS, Nexis Library, CURNWS File.

72. See *supra* part I.A.2.

the law because they are the protectors of the law. Who then polices the police? You police the police. You police them, but [sic] your verdict. You're the ones who send the message. Nobody else is going to do it in this society. They don't have the courage. Nobody has the courage. If [sic] a bunch of people running around with no courage to do what is right. Except individual citizens. You're the ones in war. You're the ones who are on the front line. These people set policies, these people talk all this stuff. You implement it. You're the people. You're what makes America so great. Don't you forget it. And so understand how this happened. It's part of a culture of getting away with things. It's part of culture looking the other way. We determine the rules as we go along. Nobody's going to question us. We're the LAPD. And so you take these two twins of deception and if, as you can, under this law, wipe out their testimony, the prosecutors realize their case then is in serious trouble. From Riske to Bushey. They came together in this case cause they want to win. But it's not about them winning, it's about justice being done. They'll have other cases. This is this man's one life that's entrusted, or will be soon, to you. So when we talked about this evidence being compromised, contaminated and corrupted, some people didn't believe that. Have we proved that? Have we proved that it was compromised, contaminated, corrupted, and yes, even something more sinister. I think we did. But there's something else about this man Fuhrman that I have to say before I'm going to terminate this part of my opening [sic] argument and relinquish the floor to my learned colleague, Mr. Barry Scheck. It's something that Fuhrman said and I'm going to ask Mr. Douglas and Mr. Harris to put up that Kathleen Bell letter. You know it's one thing, and I daresay that most of you, when you heard Fuhrman say he hadn't used the 'N' word, that you probably thought, well, he's lying. We know that's not true. That's just part of it and that's what the prosecutors want to just talk about, that part of it. That's not the part that bothers us on the defense. I live in America. I understand, I know about slights every day of my life, but I want to tell you about what is troubling, what is frightening, what is chilling about that Kathleen Bell letter. Let's see if we can see part of it. And I think you will agree. So I want to put the focus back where it belongs on this letter, and its application to this case. You recall that God is good and He always bring you a way to see light when there's a lot of darkness around. Just through chance, this lady had tried

to reach Shapiro's office, couldn't reach it and in July of 1994 she sent this fax to my office and my good, loyal and wonderful staff got that letter to me early on. And this is one you just couldn't pass up. Get a lot of letters, but you couldn't pass this one up because she says some interesting things, she wasn't a fan of O.J. Simpson. What does she say—writing to you in regards to a story I saw on the news last night. I thought it ridiculous that the Simpson defense team would even suggest that there might be racial motivation involved in the trial against Mr. Simpson. Yes, there are a lot of people out there who thought that at that time. And you know. You can't fault [sic] people for being naive. But once they know if they continue to be naive, then you can fault them. That's what it is and that's why this case is important. Don't ever say again in this County, or in this country that you don't know that things like this exist. Don't pretend to be naive anymore. Don't turn your heads. Stand up, show some integrity. So, I then glanced up at the television. I was quite shocked to see that Officer Fuhrman was a man that I had the misfortune of meeting. You may have received a message from your answering service last night, that I called to say Mr. Fuhrman may be more of a racist than you could even imagine. I doubt that, but at any rate, it was something that got my attention. Between 1985 and 1986 I worked as a real estate agent in Rodondo Beach [sp] for Century 21, Bob Maher [sp] realty. Now out of business. Now at the time, my office was located above a Marine recruiting center off of Pacific Coast highway. On occasion I would stop in to say hello to the two Marines working there. I saw Mr. Fuhrman there a couple of times. I remember him distinctly because of his height and build. You know he's tall. While speaking to the men I learned that Mr. Fuhrman was a police officer in Westwood. Isn't that interesting. Just exactly the place where Laura McKinney met him? And I don't know if he was telling the truth but he said he'd been on the special division of the Marines. I don't know how the subject was raised. But Officer Fuhrman said that when he sees a n., as he called it, driving with a white woman he would pull them over. I asked, what if he didn't have a reason? And he said that he would find one. I looked at the two Marines to see if they knew he was joking. But it became obvious to me that he was very serious. Now, let me just stop at this point. Let's back it up a minute, Mr. Harris. Pull it back down please. If he sees an African American with a

white woman he would stop them. If he didn't have a reason, he'd find one, or make up one. This man will lie to set you up. That's what he's saying there. He will do anything to set you up because of the hatred he has in his heart. A racist is somebody who has power over you, who can do something to you. People could have views but keep them to themselves. But when they have power over you, that's when racism becomes insidious. That's what we're talking about here. He has power. A police officer in the street. A patrol officer is the single most powerful figure in the criminal justice system. He can take your life. Unlike the Supreme Court, you don't have to go through all these appeals, he can do it right there and justify it and that's why, that's why this has to be rooted out in the LAPD and everywhere else. He'd make up a reason because he made a judgment. That's what happened in this case. They made a judgment. Everything else after that was going to point toward O.J. Simpson. They didn't want to look at anybody else. Mr. Darden asked, who did this crime? That's their job as the police, we've been hampered, they turned down our offers for help. But that's the prosecution's job. The judge says we don't have that job, the law says that. We'd love to help do that. Who do you think want's [sic] to find these murderers [sic] more than Mr. Simpson? But that's not our job. It's their job and when they don't talk to anybody else, when they rush to judgment in their obsession to win. That's why this became a problem. This man had the power to carry out his racist views. That's what's so troubling. Let's move on. Making up a reason. That's troubling, that's frightening, that's chilling, but if that wasn't enough, if that wasn't enough, the thing that really gets you is she goes on to say Officer Fuhrman went on to say that he would like nothing more than to see all n\_ gathered together and killed. He said something about burning them, or bombing them. I was too shaken to remember the exact words he used. However, I do remember that what he said was probably the most horrible thing I'd every [sic] heard someone say. What frightened me even more was that he was a police officer, sworn to uphold the law. And now we have it. There was another man, not too long ago in the world, who had those same views, who wanted to burn people, who had racist views and ultimately had power over people in his country. People didn't care, people said he's just crazy, he's just a half-baked painter. They didn't do anything about it. This man, this scourge became one of the worst people in the

history of this world, Adolf Hitler. Because people didn't care and didn't try to stop him. He had the power over his racism and his anti-religion [unintelligible]. Nobody wanted to stop him and it end [sic] up in World War II. The conduct of this man, and so Fuhrman, Fuhrman wants to take all black people out and burn them or bomb them. That's genocidal racism. Is that ethnic purity? What is that? What is that? We're paying this man's salary to espouse these views. You think he only told Kathleen Bell? Whom he just had met? You think he talked to his partners about it? You think his commanders knew about it? You think everybody knew about it? And turned their heads? Nobody did anything about it. Things happened for a reason in your life. Maybe this is one of the reasons we're all gathered together here this day. One year and two days after we met. Maybe there's a reason for your purpose. Maybe this is why you were selected. There's something in your background and your character that helps you understand this is wrong. Maybe you're the right people at the right time at the right time [sic] at the right place to say no more. We're not going to have this. This is wrong. What they've done to our client is wrong. This man, O.J. Simpson, is entitled to an acquittal. You cannot believe these people. You can't trust the message. You can't trust the messengers. It is frightening. It is quite frightening and it is not enough for the prosecutors now to stop and say, oh let's just back off. The point I was trying to make, they didn't understand. That it's not just using the 'N' word, forget that, we knew he was lying about that, forget that. It's about the lengths to which he would go to get somebody, black and also white if they're associated with black. It's pretty frightening, it's not just African Americans, it's white people who would associate or dein to go out with a black man or marry one. You're free in America to love whomever you want. So it infects all of us, doesn't it. This one rotten apple and yet they cover for him. . . .<sup>73</sup>

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73. CNN News: *Simpson Trial—Text—Day 158—Part 2* (CNN television broadcast, Sept. 28, 1995), Transcript No. 158-2, available in LEXIS, Nexis Library, CURNWS File. See also *Live Trial Coverage—CA v. Simpson—Day 157—Part 11*, (Courtroom Television Network broadcast, Sept. 27, 1995), Transcript No. 157-11, available in LEXIS, Nexis Library, CURNWS File (start of Cochran's closing argument); *Live Trial Coverage—CA v. Simpson—Day 158—Part 1*, (Courtroom Television Network broadcast, Sept. 28, 1995), Transcript No. 158-1, available in LEXIS, Nexis Library, CURNWS File (continuation of Cochran's closing argument). See also *supra* part I.A.2.



But if the press could misconstrue Cochran's closing argument as calling for a racial victory because he appealed to Black sensibilities about police racism, so too might the press with equally vacuous reasoning misconstrue lead prosecutor Marcia Clark's closing argument as a dual nonjudicial, political appeal calling for the ten women jurors to send a message about domestic violence, and secondarily, calling for all twelve jurors to send a message on behalf of criminal victims—regardless of the possible innocence of the defendant.<sup>74</sup> Instead, the press chose to report Marcia Clark's

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74. Marcia Clark ended her closing argument in rebuttal with a composite 911 tape from 1989 and 1993 domestic violence incidents to coincide with pictures of a battered Nicole Simpson.

MARCIA CLARK: This is a compilation of the 1989 tape 911 call, the 1993 911 call, photographs from [the] 1989 beating and the photographs from her safe deposit box and the photographs from Rockingham and Bundy.

...

[excerpt of 911 call made by Nicole Brown Simpson October 25, 1993]

911 OPERATOR: 911 emergency [unintelligible]

NICOLE SIMPSON: Can you get someone over here now to 365 Gretna Green. He's back. Please.

911 OPERATOR: OK. What does he look like?

NICOLE SIMPSON: He's O.J. Simpson. I think you know his record. Can you just send somebody over here.

911 OPERATOR: OK, what is he doing there?

NICOLE SIMPSON: He just drove up here [unintelligible]

911 OPERATOR: Wait a minute. What kind of car is he in?

NICOLE SIMPSON: He's in a white Bronco. First of all, he broke the back door down to get in.

911 OPERATOR: Wait a minute. What's your name?

NICOLE SIMPSON: Nicole Simpson.

911 OPERATOR: Okay. He's the sportscaster or whatever?

NICOLE SIMPSON: Yeah.

911 OPERATOR: Okay, wait a minute. We're sending the police. What is he doing? Is he threatening you?

NICOLE SIMPSON: He's f going nuts.

911 OPERATOR: Has he threatened you in any way, or is he just harassing you?

[sound of O.J. Simpson yelling in the background]

....

MARCIA CLARK: I don't have to say anything else. Ladies and gentlemen, on behalf of the People of the State of California, because we have proven beyond a

closing argument as a powerful and eloquent statement to the jury that they should accept jealousy as the unfortunate motive for the killings and to view tragedy as the inevitable, but inexcusable, escalation of unchecked domestic violence.

## II. A JURY OF ONE'S PEERS

### A. *Heterogeneous Reasoning*

A jury is charged with scrutinizing the prosecution's case for *reasonable* doubt as to guilt, based upon the admissible evidence presented and the judge's instruction as to the applicable law.<sup>75</sup> Reasonable doubt means a doubt based upon reason—objective, logic-based reasoning, not groundless speculation or, worse yet, subjective reasoning reflecting political simpatico with the idiosyncratic or demographic characteristics of individual members of a politically favored group. Even so, in a heterogeneous society comprising a multiplicity of diverse personal experiences across race, sex, religion, geography, economic standing, culture, education, art, work, and so on, the standard of objective, logic-based reasoning must be individual intelligence guided by individual experiences of the examiner brought to bear on the facts and competing interpretations of those facts.<sup>76</sup> People with differing experiences applying the same objective rule of law will single out different phenomena as constituting facts and will impregnate those facts with different categories of importance. For example, a person who has experienced sexual harassment, date rape, or sexual molestation may identify with different behavioral nuances in evaluating a scenario involving a sexual crime than a person who has never

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reasonable doubt—far beyond a reasonable doubt—that the defendant committed these murders, we ask you to find the defendant guilty of murder in the first degree of Ronald Goldman and Nicole Brown. Thank you very much.

CNN News: *Simpson Trial—Text—Day 159—Part 19* (CNN television broadcast, Sept. 29, 1995), Transcript No. 159-19, available in LEXIS, Nexis Library, CURNWS File; *Live Trial Coverage—CA v. Simpson—Day 159—Part 19*, (Courtroom Television Network broadcast, Sept. 29, 1995), Transcript No. 159-19, available in LEXIS, Nexis Library, CURNWS File.

75. It should not be surprising that a jury charged to ensure that the prosecution's case is free of reasonable doubt may evaluate evidence and draw conclusions quite different from a media that meekly assumes the charge: if not the police-nominated suspect, then who?

76. It is precisely this broad-based feature that makes jury deliberations attractive as the crucible for adversarial testing of competing hypotheses presented by opposing lawyers. See THE FEDERALIST No. 83, at 257-59 (Alexander Hamilton) (Roy P. Fairchild 2d. ed., 1981). In this paper, Hamilton argues for public jury trials and seeks to allay fear of this ancient "palladium of free government." *Id.* at 257-58.

been subjected to such situations. Thus, there remains a broad divergence of public opinion on the validity of the quick verdicts by the United States Senate in the Clarence Thomas confirmation hearing and by juries in the William Kennedy Smith, Mike Tyson, and Oliver North cases.

The difference between right and wrong jury decision making is as small as it is significant. So let me be clear. The practice of jury nullification on the basis of race or other demographic feature or any other factor not relevant to the prohibition alleged to be at issue is terribly wrong.<sup>77</sup> Jury consultants who operate on this principle aggravate the punishing wounds of integration for the sake of unenlightened expediency.<sup>78</sup> What is necessarily right, however, is that the calculus of juries should, and must, include their conglomerate matrix of intelligence and life experiences in evaluating alleged wrongdoing. Thus, objective application of the rule of law, no matter how unambiguously such rules are expressed, can neither be applied nor evaluated neutrally.<sup>79</sup> Jury voting based on demographic identification with one of the parties at trial is terribly wrong, but we rightfully recognize that the demographic character of the jury may have shaped their experiences in a manner that allows them to identify with the individual on trial.<sup>80</sup> Thus, it is with the shared experiences that the jury identifies, and not with the shared demographic characteristics. Broadening influences such as these,

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77. See, for example, assessment of Norman M. Garland, who states that:

Some people argue . . . it is not proper jury nullification when a jury disregards the facts and refuses to convict a guilty accused. According to this view, it would be improper for the jury to find a defendant in a murder trial not guilty because of some sympathy for the accused or, as in the trial of O.J. Simpson, because of police mistreatment of Afro-Americans in the past.

Norman M. Garland, *The Cat's out of the Bag: Prospective Jurors May Now Know About Their Power to Nullify*, 1995 WL 637915 at \*1 (O.J. Commentaries, Nov. 1, 1995).

78. See generally Stephen Adler, *Rigged Juries*, ATLANTA J. & CONST., Nov. 27, 1994, at D1 (describing the need for jury consultants in high-profile cases in order to "compete effectively," and the consultant's reliance "on the continued existence of preemptory challenges," which, while presented by lawyers "as mere hunches, in fact" are often "rooted in racial, ethnic and sex discrimination").

79. A most famous example is Lon Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949). In this classic law review article, the late Professor Fuller poses a hypothetical case in which some trapped cave explorers kill and eat one of their number in order to survive until rescue. After their rescue, the survivors are placed on trial for murder. The applicable law states: "Whoever shall willfully take the life of another shall be punishable by death." *Id.* at 619. In a life and death situation, the requirements of law must conform to the requirements of the situation to improve the lot of man.

80. See Sableman, *Simpson's Fair Trial Right: Impartial, Not Ignorant, Jurors*, 23 ST. LOUIS JOURNALISM REV. 7 (1994).

like any other aspect of life, are the province of laymen, who make our most cherished legal tradition, trial by a jury of common people, possible.<sup>81</sup>

The Sixth Amendment<sup>82</sup> right to trial by jury requires that jurors be fair and impartial. To ensure that jurors are fair and impartial, the prosecution, the defense, and the judge in turn are allowed to question the venire persons in an attempt to discern possible bias or unwillingness to follow the judge's instructions in the determination of guilt and sentencing. The judge who hears the jurors' responses and observes their demeanor has the authority and responsibility either *sua sponte* or by acceding to the motion of either counsel to dismiss a prospective juror for cause. These are called challenges for cause.<sup>83</sup> Challenges for cause may occur before, during, and after seating of the jury and the number of dismissals is limited only by the number of prospective jurors who show bias.<sup>84</sup>

The reasons for juror dismissal are not and cannot be limited by discernible bias, itself not easily ferreted out by open questioning. The adversarial process also allows that fairness and impartiality take into account the wealth of knowledge and diverse experiences that individuals will bring to bear in examining social phenomena. It is for this reason that both the prosecution and defense have the right to exercise a set number of peremptory challenges to dismiss a venire person without having to articulate a reasoned basis for the

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81. Broad-based arguments that bridge the gap of personal knowledge and experience to resonate with the life experience and intelligence across a wide spectrum of people invoke the traditional heartfelt belief in the rationality of the common man, which underlies democratic institutions.

Our civilization has decided, and very justly decided, that determining the guilt or innocence of men is a thing too important to be trusted to trained men. It wishes for light upon that awful matter, it asks men who know no more law than I know, but who can feel the things that I felt in the jury box. When it wants a library catalogued, or the solar system discovered, or any trifle of that kind, it uses up its specialists. But when it wishes anything done which is really serious, it collects twelve of the ordinary men standing around.

GILBERT K. CHESTERTON, *TREMENDOUS TRIFLES* 86-87 (1920). Our faith in the jury system, like our faith in democracy, is based on a simple idea affirmed by Thomas Jefferson in 1787: "State a moral case to a plowman and a professor. The former will decide it as well, and often better than the latter, because he has not been led astray by artful rules." HENRY F. MAY, *THE ENLIGHTENMENT IN AMERICA* 296 (1976).

82. The Sixth Amendment reads: "In all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

83. WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* 973 (2d ed. 1992).

84. *See id.* at 973-78 and cases cited therein.

dismissal.<sup>85</sup> Those who believe that jurors vote their race once looked to peremptory challenges to ensure a racially receptive jury.

### B. *Cracking the Myth of a Racial Monolith*

The assumption that jurors vote their race requires that the process of seating a jury be used as a pretext to limit participation in the judicial system on the basis of race. The United States Supreme Court has long recognized that the criminal justice system, more or less directly, perpetuated racial discrimination in choosing juries in criminal cases. In response, the Court has issued several opinions that seek to ensure that the rights of both Black defendants and jurors are protected against prosecutorial attempts to stack the deck. The most important case is *Batson v. Kentucky*,<sup>86</sup> decided in 1986, which rejected the assumption that jurors vote their race. *Batson* held that the Equal Protection Clause of the Fourteenth Amendment prohibits racial discrimination in jury selection and therefore requires trial judges, upon defense motion or sua sponte, to deny peremptory strikes by the prosecutor in a criminal case unless the prosecutor articulates a race-neutral explanation for an apparent attempt to eliminate racial diversity in the jury.<sup>87</sup> Despite a decidedly more conservative bend, especially concerning matters of crime, the current Supreme Court has shown no intent of backing off *Batson*. To the contrary, its growing progeny includes additional Supreme Court jurisprudence placing further limits on peremptory strikes on the bases of race, sex, and Latino culture in both criminal and civil cases.<sup>88</sup>

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85. In the federal courts, each side has twenty peremptories in a capital case and three in a misdemeanor case, while for a felony trial the defendant has ten and the prosecution six. Fed. R. Crim. P. 24(b).

86. 476 U.S. 79 (1986). In *Batson*, the Court held that prosecutors may not peremptorily challenge jurors solely on account of race or on the assumption that Black jurors as a group would be unable to consider impartially a case against one of their own race. *Id.* at 89. Under the Court's analysis, the discriminatory use of peremptory challenges constituted a violation of the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 91. The Supreme Court's concern that discrimination denying a prospective juror an opportunity to participate in the justice system would taint that system's integrity ran as an undercurrent in *Batson* and the cases that followed it. *Id.* at 87.

87. *Id.* at 88.

88. While *Batson* referred only to peremptory challenges issued to racial minorities, its meaning has transcended the narrow facts of that case to establish a basis for ensuring the equal protection rights of jurors to serve and of defendants to have a jury that has not been purged of minority groups by the state. See, e.g., *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994) (extending the *Batson* rule, requiring heightened equal

The assumption that jurors vote their race is simplistic, exclusive, and politically divisive in nature and furthers movement away from the goal of a melting pot to one of an America balkanized on the basis of group identity in our heterogeneous society. After *Batson*, neither side can act on the assumption that jurors vote their race absent a constitutional amendment to overturn the post-Civil War constitutional amendments guaranteeing racial equality.<sup>89</sup> Therefore, the only practical line of analysis worth pursuing is one that results in an understanding of the diverging perspectives borne of the racial experience that a racially diverse jury brings to bear in examining the social phenomena of a trial. This approach is politically inclusive because it places a premium on jury arguments amenable to the broadest perspective found in our respected, diverse community.

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protection scrutiny of peremptory challenges, to gender-based challenges); *Purkett v. Elem*, 115 S. Ct. 1769, 1771 (1995) (per curiam) (holding that the rule requiring a prosecutor to give a race-neutral justification for peremptory challenges is satisfied even if the explanation is not credible, because credibility is an issue in determining whether the opponent of the strike has carried the ultimate burden of showing discrimination); *Hernandez v. New York*, 500 U.S. 352, 361-62 (1991) (plurality opinion) (holding that a prosecutor's use of peremptory challenges to exclude prospective Latino jurors was race neutral when based on jurors' hesitation about whether they could defer to official translations of Spanish, despite the fact that such exclusions would likely have a disproportionate impact on Latinos); *Powers v. Ohio*, 499 U.S. 400 (1991) (holding that a White defendant has standing to challenge prosecutor's use of peremptory challenges to exclude Black jurors); *Ford v. Georgia*, 498 U.S. 411, 419-20, 424-25 (1991) (holding that the State may not defeat retroactive application of *Batson* in *Griffith v. Kentucky*, 479 U.S. 255 (1986), by retroactively imposing a rule providing that challenges to jury selection must be made after jury selection but before the jury is sworn, or be considered waived, and holding that defendant's allegation that prosecutors had been striking Blacks from local juries "over a long period of time" raises a *Batson* claim even if the Equal Protection Clause was not explicitly invoked); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (holding that private litigants in civil cases may not use peremptory challenges to exclude prospective jurors on the basis of race, but have third-party standing to raise an equal protection claim on behalf of those excluded from jury service on the basis of race); *Georgia v. McCollum*, 505 U.S. 42, 59 (1992) (applying *Batson* rule to prohibit the exercise of peremptory challenges on the basis of race by defense counsel in a criminal case).

89. See *Batson*, 476 U.S. at 84-89. In *Strauder v. West Virginia*, 100 U.S. 303 (1879), the first decision to interpret the Fourteenth Amendment (adopted 1866-1868), the Justices invalidated a state statute excluding Blacks from juries because it violated the Equal Protection Clause. The Court examined the history of the Fourteenth Amendment to discern its purpose, namely that the laws must be the same for Blacks and Whites and prohibited discrimination on the basis of color. See generally Benno C. Schmidt, Jr., *Juries, Jurisdiction, and Race Discrimination: The Lost Promise of Strauder v. West Virginia*, 61 TEX. L. REV. 1401, 1499 (1983) (arguing that *Strauder's* proclamation of a nondiscrimination principle was weakened severely by its lack of practical enforcement at the state court level).

*C. (Un)Shared Experiences Across a Racial Divide*

How and why do Blacks differ from Whites in the perception of criminal justice?<sup>90</sup> All Americans are rightly concerned about crime, and support the distinct possibility that the police suspect brought to trial is in fact the guilty culprit. But Black America has special concerns about human error and prejudice in law enforcement and police investigation in part because Blacks are disproportionately subjected to criminal justice.<sup>91</sup> Blacks, therefore, are more likely to suffer the oppression from the distinct and inevitable possibility of erroneous or rogue police investigations. As comedian Richard Pryor used to say: when Blacks go to criminal court expecting "justice," we notice it's "just us."<sup>92</sup> Both the historical as well as the

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90. The Los Angeles jury need not have gone far in its collective memory to substantiate its distrust. For example, in the aftermath of the acquittal of four White Los Angeles police officers accused in state court of using excessive force against Black motorist Rodney King, many people expressed the feeling that the trial was a prototypical example of the fact that Blacks could not expect justice at the hands of the White-run racist criminal justice system. This perception grew in the public's mind when four Black men accused of beating a White man nearly to death during the riots following the acquittal were treated differently than the White police officers. See Seth Mydans, *The Courts on Trial*, N.Y. TIMES, Apr. 8, 1993, at A14 (arguing that the King verdict fueled the perception among many Blacks that the justice system is racist, and that the trial of four Black men accused of beating a White man, while factually distinct, has strengthened this perception).

91. See, e.g., Jeffrey Abramson, *Making the Law Colorblind*, N.Y. TIMES, Oct. 16, 1995, at A15 (observing that the enforcement of federal drug laws has resulted in a trend towards stiffer penalties for minority offenders than for White offenders); *Equal Before the Law*, ATLANTA J. & CONST., Oct. 20, 1995, at 16A (arguing that "federal sentencing disparities that treat the possession and sale of crack cocaine far more harshly than crimes involving powder cocaine or other drugs favored by white Americans . . . have created a dual system of punishment"); Ted Gest, *A Shocking Look at Blacks and Crime*, U.S. NEWS & WORLD REP., Oct. 16, 1995, at 53 ("The Sentencing Project (i.e., U.S. Sentencing Commission), a Washington-based group that advocates rehabilitation of convicts, reported that nearly one in three black men in their 20s in America is behind bars or elsewhere in the justice system—up from 25 percent five years ago."); David Jackson, *Nearly 1 in 3 Black Men Ages 20-29 Is Under Supervision, Study Says: Criminal Justice Report Cites New Rules*, DALLAS MORNING NEWS, Oct. 5, 1995, at 3A (commenting on the statistic from the Sentencing Project that in 1995, 32.2 percent of Black men between the ages of twenty and twenty-nine were under criminal justice supervision); Lori Montgomery, *1 in 3 Young Black Men Jailed, Paroled or on Probation*, HOUS. CHRON., Oct. 5, 1995, at 7 (noting that "[w]hile black Americans account for only about 13 percent of American drug users . . . they account for 35 percent of all arrests for drug possession, 55 percent of all convictions on those charges and 74 percent of all drug possessors sentenced to prison"); Charles M. Sennott, *Big Rise Recorded in Black Men in Criminal System*, BOSTON GLOBE, Oct. 5, 1995, at 3 (summarizing the findings made in 1995 by the Sentencing Project that Black men and women are disproportionately "under some form of criminal justice supervision").

92. See, e.g., Lawrence W. Levine, *Laughing Matters*, N.Y. TIMES, Feb. 27, 1994, § 7,

current political aspects of criminal justice in America give Black Americans a substantial basis to look upon police authority with healthy distrust—a distrust of government, incidentally, which libertarians champion as against all exercises of government power.<sup>93</sup> Black distrust of police confrontations is contrary to the cozy assumption of unassailable credibility that White America bestows upon the police force—the “thin blue line”<sup>94</sup> that maintains the separation between civility and incivility.<sup>95</sup>

Race matters dominated the Supreme Court’s agenda during the 1960s under Chief Justice Earl Warren, but only obliquely. “Crime control” and “due process,” not “white” and “black,” were the two opposing paradigms that guided the legal debate then.<sup>96</sup> The labels may change, but not the analysis. The key proposition of the crime control paradigm is that repression of crime is the motivating purpose of the social contract and the most important domestic goal of government. While not discounting the harm from crime or the desirability of repressing it, the due process paradigm requires more of government, asserting that the purpose of government is not only to suppress crime, but also to maximize human liberty from the abuses of government excesses, be they wholesale illegitimate

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at 1 (reviewing MEL WATKINS, *ON THE REAL SIDE: LAUGHING, LYING, AND SIGNIFYING—THE UNDERGROUND TRADITION OF AFRICAN-AMERICAN HUMOR THAT TRANSFORMED AMERICAN CULTURE, FROM SLAVERY TO RICHARD PRYOR* (1994)).

93. Fear of abuse in the exercise of governmental power is a libertarian tradition that dates back to the Founding Fathers. Their monumental achievement was the drafting of a constitution that created a limited government accountable to the people by separating the powers of government, whose limitations would be self-enforcing by virtue of a scheme of checks and balances. See *THE FEDERALIST* No. 51 (James Madison) (Clinton Rossiter ed., 1961).

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

*Id.* at 322.

94. Legendary Police Chief William Parker coined the phrase “The Thin Blue Line” to suggest that only the police uniform protected law-abiding citizens from criminal violence. See Fred Bayles, *Once a Model, LAPD Now Demoralized*, *MAINICHI DAILY NEWS*, Oct. 9, 1995, at 2.

95. Elizabeth Fernandez et al., *Race Relations on Trial: Society Again Seems Black and White*, *S.F. EXAMINER*, Oct. 8, 1995, at A1 (“That’s the crux of the polarization. . . . The legal system, with its protracted history of discrimination against racial minorities, lies at the heart of much racial disharmony.”).

96. The “due process” and “crime control” discussion summarizes HERBERT PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 146-246 (1968).



governmental intrusion into individual rights or the retail rogue behavior of individual government agents. In general, when the rights of the individual and those of the community conflict, the due process advocate is more likely to favor the interests of the individual, including persons suspected of crime, than is the proponent of crime control.

From the perspective of crime control, the key goal of the criminal justice system is the promotion of efficient police investigation, prosecution, and sentencing of law violators. In contrast, from the due process perspective, justice is defined as much by the methods employed to obtain evidence as the truth implicated by the evidence.

The key operational precept facilitating the crime control agenda is the reliance on informality, uniform processing, and the presumption of factual guilt. Informality, i.e., nonjudicial processes at the police investigatory stage, allows law enforcement officers substantial opportunity to function free of legal impediments as they search for evidence necessary to arrest and convict criminals. The adjudicatory process, with its rigid rules of evidence and adversarial conditions, is delayed until the state is ready to showcase the guilt of the defendant. Uniform processing describes routine and stereotypical criminal law procedures. Thus, the efficiencies of the crime control model owe to its faith in the benign humanity of law enforcement officers. The final precept of the crime control paradigm is acceptance of the presumption of factual guilt of criminal suspects. By presuming the factual guilt of a suspect, the crime control advocate expresses confidence in the criminal justice system in that, regardless of occasional human error or bias, only the truly guilty remain in the system through conviction.

In contrast, the due process advocate questions the reliability of informal systems of criminal justice. While the crime control paradigm pictures the law enforcement officer as a skilled criminal investigator likely to ascertain the truth if obstacles are not placed in his way, the due process paradigm focuses on the risk of human error and human predilections towards abusive behavior, which inevitably flows from the competitive and unsavory enterprise of ferreting out crime. As a consequence of these concerns, the key operating precept of the due process model is early intervention of formality in police investigation—judges and lawyers—to provide independent oversight of the search and seizure of evidence. The due process advocate would place the same defense resources before the indigent suspect as the wealthy might command. Since the crime-control paradigm relies on the due diligence of thoughtful law enforcement officers, and not the intervention of defense

lawyers to ensure that only the guilty are brought to trial, financial ability is not relevant to the crime-control paradigm. Finally, the due process advocate focuses on the doctrine of legal guilt versus factual guilt—i.e., a criminal suspect is not legally guilty of a crime unless and until (guilty pleas aside) the prosecutor proves the defendant's guilt beyond a reasonable doubt in the courtroom through the adversarial process, on the basis of legally admissible evidence. The doctrine of legal guilt fosters a countering mood to factual guilt that heightens appreciation for setting limits on government power. A belief in the presumed innocence of the suspect increases the likelihood that an innocent person will avoid conviction, although it also increases the possibility that factually guilty persons will escape conviction.

Individual experience, not intellectual argument, is imbued with the capacity to convert due processors to crime controllers and vice versa. Thus, these differing paradigms will exist as long as law enforcement remains a paramount mission of government, but one which must be performed by human actors. The O.J. Simpson case presented a grand stage for debating the merits of these two paradigms, a debate that is as exciting as it is endless. In truth, both paradigms have some application in varying degrees. Law enforcement officials are certainly not oblivious to factual innocence in carrying out their charge. But law enforcement officials are only human and the cop on the beat faces a daily grind of violence, which brutalizes even the best of souls. Some go bad, and some started out bad. Good cops and bad cops exist in numbers that surprise only those who see the world in black and white. Which paradigm had the better grip on reality in the O.J. Simpson case is as much a matter of personal experience as it is intelligence.

Viewing the O.J. Simpson case through the prism of crime control, people who view the police as doing what is necessary to protect "us" from "them" and who turn a blind eye toward police methods will be unfazed by the due process concerns staring them in the face from the O.J. Simpson case. And yet the due process concerns in the O.J. Simpson case were substantial.

### III. REASONABLE DOUBT IN THE CASE OF O.J. SIMPSON

Instead of complaining about the performance of Black jurors, perhaps Marcia Clark, like Moira Lasch, the losing prosecutor in the William Kennedy Smith trial<sup>97</sup> (verdict of not guilty returned in

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97. See Timothy Clifford, *Willie Walks: It's a Quick Acquittal; Palm Beach Jury Takes*

seventy-seven minutes), might have been wise to consider the prosecution's own failings to account for her inability to connect with a diverse jury who swore to uphold the law and did so for endless months. The jury's quick vote for acquittal signaled that the prosecution's claim of a mountain of evidence actually amounted to a molehill in the eyes of the jurors. In the collective minds of the jurors, the defense proved the existence of reasonable doubt by demonstrating two major faults with the prosecution's case. First, the most active homicide detective on the case, Mark Fuhrman, was a racist and the chief detective, Phillip Vanatter, was a liar. Second, the defense also conclusively demonstrated that Dennis Fung, the lead criminalist, and Andrea Mazolla, his entry-level assistant, exercised shoddy evidence collection techniques. The existence of blind cover-ups and shading of evidence was plainly evident. Next, we turn to a step-by-step analysis of how the defense picked the prosecution's case apart.

First, the break and entry into O.J. Simpson's home, which led to the discovery of the bloody glove and other forensic evidence placing O.J. Simpson at the crime scene, was a warrantless search that fell, albeit tenuously, within the exigency exception only because the court was willing to credit the testimony of Mark Fuhrman that a minute speck of red on O.J. Simpson's imperfectly parked, white Ford Bronco caused Detectives Fuhrman and Vanatter to fear that whoever killed O.J. Simpson's ex-wife and her waiter friend some four or five hours earlier might have visited similar violence on O.J. Simpson.<sup>98</sup> These two headed up a team of four, the entire investigative team in the early hours, and left the crime scene, *en masse*, to trek to O.J. Simpson's house for the stated purpose of notifying him as the next-of-kin. To sustain the search the court had to perform logical gymnastics, which the jury clearly could not follow. The court had to credit the police officers' professed mental state despite the fact that an ex-husband is not a next-of-kin (nor was there any movement to notify the next-of-kin for either victim).<sup>99</sup> To do so, the court dismissed the testimony of Michael Wachs, the FBI agent who testified that he heard lead homicide Detective Vanatter say that he considered O.J. Simpson a suspect from the beginning because the husband or ex-husband is always the prime

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*Just Over Hour to Decide*, NEWSDAY, Dec. 12, 1991, at 5; Hugh Davis, *High-Flier in the Dock Over Bungled Cross-Examination: The Prosecutor*, DAILY TELEGRAPH, Dec. 12, 1991, at 3; *Top Defense Lawyers Agree: Smith Prosecutor Bungled*, ATLANTA J. & CONST., Dec. 12, 1991, at A21.

98. David Barstow & Jean Heller, *What the Jury Knows*, ST. PETERSBURG TIMES, Sept. 30, 1995, at 8A.

99. *Id.*

suspect in the death of a woman.<sup>100</sup> Detective Fuhrman also testified that he was aware of the Simpsons' history of domestic violence.<sup>101</sup> Indeed, to sustain the search, the court had to suspend its own disbelief of Detective Vanatter.

Second, once on Simpson's private property, the detectives found the dropped bloody glove located in the back alley (which, by the way, showed no evidence of recent activity)—a bloody glove that fit neither the prosecution's theory of the case of a front entry, where the detectives found drops of blood allegedly left by O.J. Simpson when returning from the crime scene, nor O.J. Simpson's hands.<sup>102</sup> Detective Fuhrman, who is credited with finding the glove, admitted with casual arrogance to Laura McKinney, a North Carolina screenwriter, that he planted evidence in cases past.<sup>103</sup> Detective Fuhrman's comments to Laura McKinney arose in the context of explaining his perspective on why career advancement for women police officers lagged behind that of men: namely, that women police officers failed to cover-up misdeeds of fellow rogue cops. Detective Fuhrman's fellow cops in the O.J. Simpson investigation were all male, except for criminalist Andrea Mazzola. Mazzola, with hopes for a bright future in the Los Angeles Police Department, testified that she was sitting on a couch at the crime scene with her eyes closed when Detective Vanatter passed the vial containing O.J. Simpson's blood to criminalist Dennis Fung.<sup>104</sup>

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100. Jim Moret, *CNN News: Simpson Trial Analysis* (CNN television broadcast, Sept. 19, 1995), Transcript No. 152-9, available in LEXIS, Nexis Library, CURNWS File; *CNN News: O.J. Simpson Trial Wrap-Up* (CNN television broadcast, Sept. 19, 1995), Transcript No. 1138-2, available in LEXIS, Nexis Library, CURNWS File.

101. *CNN News: O.J. Simpson Trial Wrap-Up*, *supra* note 100.

102. *Id.*

103. Judge Ito allowed the public to hear two-and-a-half hours of Detective Fuhrman's comments on videotape, before declining to admit that evidence to the jury. In addition, Judge Ito ruled that Fuhrman's comments in his denied disability claim were inadmissible.

104. The following is a CNN excerpt from Mazzola's testimony:

CHARLES FELDMAN, Anchor: . . . [Y]esterday, Neufeld got into the defense theory that police conspired against O.J. Simpson. The defense is suggesting that detectives did not really give criminalists a vial of Simpson's blood on June 13th, the day after the killings, but kept the blood overnight, and used it to frame Simpson. Neufeld questioned Mazzola yesterday about the time she and fellow criminalist Dennis Fung spent inside Simpson's house on June 13th.

PETER NEUFELD, Simpson Attorney: And you said you left this bag, with evidence in it, next to your kit in the foyer?

ANDREA MAZZOLA, LAPD Criminalist: The kit was not there, but that is where we had the kits before, and the area was secured.

NEUFELD: And you simply left it there, and then walked into the living room?

Third, the bloody socks, the only forensic evidence which showed that O.J. Simpson returned from the crime scene carrying blood from the victims, were at various times present and not present, as demonstrated by police crime scene and inventory photographs, in O.J. Simpson's bedroom.<sup>105</sup> In addition, the blood on the socks was not visible by criminologists and crime laboratory technicians until weeks after collection.<sup>106</sup> Moreover, Dr. Henry Lee, the foremost forensic expert in the country, testified that because the blood on the socks soaked through from one side to the other, the blood pattern found on the socks was consistent with droplets placed on the sock without an intervening ankle; the blood evidence did not fit a splatter pattern.<sup>107</sup>

Fourth, the blood on the back gate, seized weeks after the crime

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MAZZOLA: Yes.

NEUFELD: And after you went into the living room, you then sat down on the couch?

MAZZOLA: I sat down, yes.

NEUFELD: And as you sit here today, ma'am, you have—do you have an independent recollection of your eyes being closed while you're sitting in that living room couch?

MAZZOLA: I believe they were closed at—partially at the time.

NEUFELD: Ms. Mazzola, did you invent this notion that your eyes were closed, so that Mr. Fung could testify that he received the vial without you seeing it?

[HANK GOLDBERG, Prosecutor, states an objection.]

Judge LANCE ITO, Los Angeles Superior Court: Sustained.

NEUFELD: Ms. Mazzola, do you have an independent recollection, without the help of a videotape, of you picking up the hat and the glove at Bundy? Without seeing that videotape?

MAZZOLA: Not a clear recollection, no.

NEUFELD: Yet you have an independent recollection that while you were sitting on the couch, you closed your eyes? You have that recollection 10 months later?

MAZZOLA: Yes.

*CNN News: Simpson Trial—Analysis—Day 60—Part 1* (CNN television broadcast, Apr. 27, 1995), Transcript No. 60-1, available in LEXIS, Nexis Library, CURNWS File. For analyses of this testimony, see Jim Newton & Andrea Ford, *Mazzola Denies Cover-Up After Credibility Attacked; Trial Judge Ito Reiterates Determination to Speed Up Simpson Case. He Also Tightens Rules on Lawyers' Conduct*, L.A. TIMES, Apr. 27, 1995, at A1; *Commentary—CA v. Simpson—Day 60—Part 1*, (Courtroom Television Network broadcast, Apr. 27, 1995), Transcript No. 60-1, available in LEXIS, Nexis Library, CURNWS File.

105. See Newton & Ford, *supra* note 104.

106. *Id.*

107. *Id.*

occurred, contained a police preservative, which only the blood from O.J. Simpson's voluntary submission should have contained.<sup>108</sup> Thus, samples of O.J. Simpson's blood found at the crime scene could have fallen from an open cut on his finger as he committed the crimes or could have come from the vial of blood that Detective Vanatter carried around the crime scene rather than checked into evidence. The police never accounted for the missing 1.5 cc of O.J. Simpson's blood from that vial.<sup>109</sup> The prosecution's response to the growing evidence of police misconduct and police error was to produce a shady videotape of hospital bedside testimony of Thano Peratis, a police medical technician, in which he recanted sworn testimony.<sup>110</sup>

Fifth, Andrea Mazzola and Dennis Fung, the police criminologists who collected the blood evidence, admitted making numerous mistakes and admitted that their fellow officers made mistakes—such as placing a blanket over the victim's body and tracking through the crime scenes interchangeably, as well as not changing gloves before handling different blood swatches and using bare hands,<sup>111</sup> all of which made the possibility of contamination too rich to discount.<sup>112</sup> In his testimony, Dennis Fung personally criticized the handling of the blood evidence and expressed concern for cross contamination.<sup>113</sup>

The prosecution's time line necessary to make O.J. Simpson the culprit of the crime was the most believable part of the prosecution's case because the time-line evidence derived from nonpolice witnesses. The time of death was set by a wailing dog and neighbors passing by; O.J. Simpson's whereabouts before and after the time of

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108. *Id.*

109. *Id.*

110. *CNN News: Simpson Trial—Text—Day 148—Part 13-15* (CNN television broadcast, Sept. 13, 1995), Transcripts No. 148-13-15, available in LEXIS, Nexis Library, CURNWS File (prosecution's introduction of Thano Peratis videotape); *CNN News: Simpson Trial—Text—Day 148—Part 16-20* (CNN television broadcast, Sept. 13, 1995), Transcript Nos. 148-16, 148-20, available in LEXIS, Nexis Library, CURNWS File (defense challenges to the Thano Peratis videotape).

111. Jim Newton & Andrea Ford, *Simpson Lawyer Assails Collection of Evidence; Courts: Defense Attorney Zeros in on Criminalist Fung's Credibility in Gathering Samples for DNA Tests*, L.A. TIMES, Apr. 12, 1995, at A1. Defense attorney and DNA expert Barry Scheck based his accusation on a videotape in which Fung can be seen handling a white, rectangular object without his gloves. Pouncing on a frame of that tape in which the object changes hands, Scheck barked: "There, there, how about that, Mr. Fung?" *Id.* Scheck also used a second videotape showing Fung's colleague Andrea Mazzola at the coroner's office to impeach Fung on the order of evidence collection.

112. Newton & Ford, *supra* note 111.

113. *Id.*

death were set by house guest Kato Kaelin and Allan Parks, the limousine driver.<sup>114</sup> However, the jury asked to review the testimony of Allan Parks as it related to the time line and found that the timing could not exclude reasonable doubt. What evidence of guilt supported the crime control view? Other than the questionable police evidence, the only evidence reasonably pointing to the guilt of O.J. Simpson were police records of past domestic violence<sup>115</sup> and the testimony from an errant ex-police officer that O.J. Simpson once confided to him that he dreamed about killing his ex-wife.<sup>116</sup> This was powerful evidence to be sure, but no more so than the evidence undermining the credibility of the police department. In short, the O.J. Simpson case was a product of the Los Angeles Police Department. Doubt about the competence and integrity of the Los Angeles Police Department meant doubt about its work product, namely the O.J. Simpson case. Prosecutor Hank Golberg's attempt to ridicule the evidence pointing to an alleged police cover-up with the following question during rebuttal examination of police witnesses—"Sir, are you a member of a widespread conspiracy?"<sup>117</sup>—hardly

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114. See *ABC Breaking News—O.J. Simpson: The Verdict—Part 3* (ABC television broadcast, Oct. 3, 1995), Transcript No. 214-2, available in LEXIS, Nexis Library, CURNWS File (post-verdict prosecution and defense news conferences); *Charlie Rose*, (WNET News broadcast, Oct. 6, 1995), Transcript No. 1481, available in LEXIS, Nexis Library, CURNWS File (interview with defense lawyers Barry Scheck and Peter Neufeld). However, some commentators found such evidence lacking:

All the prosecution evidence—this mountain, this ocean, this wealth of evidence that took months to present—amounted to a molehill, a puddle, a pittance from the instant jurors began their deliberations. . . . The jury may have decided that even a person with Simpson's fast moves couldn't have killed two young people, ditched bloody clothes and a knife, bumped into an air-conditioner at 10:45 p.m. and caught a limo ride to the airport, all by 11 p.m.

*The Simpson Verdict: O.J. Didn't Have Time Enough to Kill*, CHI. TRIB., Oct. 3, 1995, at C8.

115. See *The Simpson Verdict*, *supra* note 114.

116. *Id.* In addition, there was prosecution evidence of a size twelve print from an Italian-made shoe that O.J. Simpson was never shown to have bought. The blood evidence found at the crime scene and at O.J. Simpson's house was admittedly collected under circumstances where it would have been impossible for cross contamination and degeneration not to have occurred. The blood evidence on O.J. Simpson's white Ford Bronco was not collected until after the vehicle had sat unguarded in a private impoundment lot for two weeks. The prosecution presented evidence found at the crime scene of dyed hair that experts said came from a Black person. However, O.J. Simpson's barber testified that Simpson did not dye his hair. *Id.*

117. See, e.g., *CNN News: Simpson Trial Wrap-Up—Part 2* (CNN television broadcast, Apr. 28, 1995), Transcript No. 496-2, available in LEXIS, Nexis Library, CURNWS File (discussing redirect of LAPD criminalist Andrea Mazzola); *Live Trial Coverage—CA v. Simpson—Day 157—Part 11* (Courtroom Television Network broadcast, Apr. 13, 1995), Transcript No. 52-29, available in LEXIS, Nexis Library, CURNWS File

inspired confidence that the prosecution cared about a fair trial.

As lead defense counsel Johnnie Cochran stated to the Blacks on the jury in closing argument, if the judicial system could be so cavalier with the life of a rich and accepted celebrity who is Black—whose money enabled him to prove the existence of substantial police incompetence and police misconduct that directly related to the credibility of the police evidence—just imagine the lack of concern for the average Black without the good fortune to have his police encounter videotaped.<sup>118</sup> While O.J. Simpson may have committed the crimes for which he was accused—this we will never know<sup>119</sup>—there is a clear ground for an acquittal on the basis of reasonable doubt.<sup>120</sup> The greatest reason for the reasonable doubt, the racial hostility of Mark Fuhrman whose investigative prowess by his

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(re-direct of LAPD criminalist Dennis Fung); *Commentary—CA v. Simpson—Day 60—Part I* (Courtroom Television Network broadcast, Apr. 27, 1995), Transcript No. 60-1, available in LEXIS, Nexis Library, CURNWS File (discussing re-direct of LAPD criminalist Andrea Mazzola); see also Jim Newton & Andrea Ford, *The O.J. Simpson Murder Trial; Simpson Defense Presses Police Conspiracy Claim; Courts: Lawyer Focuses on Alleged Missing Blood. But Chief Forensic Chemist Says Amount Is Exaggerated*, L.A. TIMES, May 5, 1995, at A1 (prosecutor Hank Goldberg mocks conspiracy theory).

118. *CNN News: Sherry Salmons Says Jury Unswayed by Race, Celebrity*, (CNN television broadcast, Oct. 3, 1995), Transcript No. 168-6, available in LEXIS, Nexis Library, CURNWS File. The police abuses in the O.J. Simpson case may allow it to serve as a prototype for the proper application of the exclusionary rule. This case is reminiscent of Justice Douglas' concurring opinion in *Mapp v. Ohio*, 367 U.S. 643, 671, *reh'g denied*, 368 U.S. 871 (1961) (Douglas, J., concurring), in which he was at pain to observe "the casual arrogance of those who have the untrammelled power to invade one's home and to seize one's person."

119. No man or woman truly knows whether a person accused of committing a crime is guilty or not. In a world of perfect information, absolute certainty is attainable, but not so in reality. Thus, legal decision making is made against a backdrop of possible and unknowable error. The presumption of innocence is an evidentiary device used to increase the probability that any unknowing error made in the final outcome of a criminal trial favors the liberty interest of the accused over the security interest of the community. Justice Harlan said it most eloquently: "[I]t is far worse to convict an innocent man than to let a guilty man go free." *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) (interpreting the federal constitutional requirement of due process). *Winship* may be criticized for elevating the rights of criminal suspects over those of criminal victims, but that remains the fundamental tenet of Anglo-American jurisprudence. Thus, it is said that the presumption of innocence is the "golden thread" that runs through criminal law. The "golden thread" analogy comes from Lord Sankey in the 1935 case of *Woolmington v. DPP*, (1935) A.C. 42, 44, in which he repudiated instructions that jurors are to presume malice from the mere fact of killing: "one golden thread is always to be seen: that it is the duty of the prosecution to prove the prisoner's guilt." The fictional British barrister, Rumpole of the Bailey, has helped to popularize this analogy in countless oratory, calling the presumption of innocence the "golden thread" running through the common law. See, e.g., JOHN MORTIMER, *RUMPOLE AND THE GOLDEN THREAD* 90-91 (1983).

120. Noted leading legal commentators, legal authors and academicians have fairly concluded as much. See, e.g., sources cited *supra* note 55.



own admission consisted of framing Black suspects, (a practiced art in which fellow police officers, prosecutors, and all elements of the judicial system became willing accomplices,) should be a cause for greatest concern for due process from all quarters of society. The message that Johnnie Cochran called for in his closing argument is one that needed to be sent: if the Black community expects better of the criminal justice system, which its tax dollars help to support, the time and the forum to make that concern known is now or never.

The judicial philosophy of permitting a guilty man to go free as a way to deter systemic police misconduct is unique to Anglo-American jurisprudence, where it has an established pedigree. In *Weeks v. United States*,<sup>121</sup> the dawning of the constitutional age of criminal procedure, the Supreme Court established the “exclusionary rule” which forbade introduction of evidence if obtained by federal officers through a violation of Fourth Amendment law governing search and seizure. Justice Holmes eloquently defended the exclusion of illegally obtained evidence in his dissenting opinion in *Olmstead v. United States*: “We have to choose, and for my part I think it a less evil that some criminals should escape than that the government should play an ignoble part.”<sup>122</sup>

While the exclusionary rule serves to reduce the number of false arrests and detentions by depriving law enforcement officers the benefit of arbitrary and capricious abuses of police power, it only gives direct relief to those who are actually charged with a crime. Relief for those incorrectly apprehended remains a civil action.

However, the test of time weighed in favor of the exclusionary rule and its underlying philosophy to permit a guilty man to go free as the only effective way to deter systemic police misconduct. The conspiracy of silence made internal police investigation and civil relief meaningless theoretical possibilities. In *United States v. Johnson*,<sup>123</sup> Justice Frankfurter recognized that police credibility inevitably would come into question because police objectivity inevitably would be lost in the hurried judgments of a law enforcement officer engaged in the often competitive exercise of ferreting out crime. In its landmark criminal procedure decision, *Mapp v. Ohio*,<sup>124</sup> the Warren Court made the exclusionary rule applicable to the states because no other remedy to deter police conduct had effect.

In *Miranda v. Arizona*,<sup>125</sup> the Warren Court applied the exclu-

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121. 232 U.S. 383, 391-92 (1914).

122. *Olmstead v. United States*, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting).

123. 333 U.S. 10, 14 (1948).

124. 367 U.S. 643, 657-58 (1961).

125. 384 U.S. 436, 478-79 (1966).

sionary rule to confession law and expanded its rationale to reject lawless police investigations, not only because they violated constitutional rights of criminal suspects, but also because lawless police investigations render the primary evidentiary product of that investigation, namely the confession, incredible. This is so even though confessions are the most reliable form of evidence.<sup>126</sup> Finally, in *Crane v. Kentucky*,<sup>127</sup> the Rehnquist Court, in a unanimous opinion written by Justice O'Connor, held that criminal defendants are entitled to the opportunity to persuade factfinders that confessions should not be believed because of the manner in which they were elicited, even after the Court found sufficient indicia of reliability to permit the admission of the confession into evidence. In short, juries have long been entitled to reject a case either because they find the police investigation unworthy of belief or because the police investigation, even if believable, is the product of police lawlessness of a constitutional magnitude.

#### CONCLUSION

What lessons might we learn from the O.J. Simpson trial? There are lessons of substance both for law enforcement officials concerned with criminal justice and for the press crime beat. Rogue cops will always exist; however, official public tolerance of them should always be at zero. This means that prosecutors cannot wait until closing argument—after they have been caught—to claim shock at the existence of rogue cops.<sup>128</sup> However, if, as in the O.J. Simpson

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126. *Hopt v. Utah*, 110 U.S. 574, 584-85 (1884).

127. 476 U.S. 683, 688-89 (1986).

128. Having argued successfully to suppress evidence of all but the smallest hint of Mark Fuhrman's character, Marcia Clark demonstrated nothing less than unmitigated gall when she remarked in closing argument, like Captain Renault in the classic, *CASABLANCA* (Metro-Goldwyn-Mayer 1942), that she was "shocked, shocked to learn" (she used these words in her successful argument to suppress the Fuhrman tapes, see *CNN News: Simpson Trial—Text—Day 140—Part 21* (CNN television broadcast, Aug. 29, 1995), Transcript No. 140-21, available in LEXIS, Nexis Library, CURNWS File) that her key witness had admitted to casual observers that he could not stand Blacks, especially those involved in interracial relationships, that he would fabricate reasons to stop and harass Blacks, and, most significantly, that cops needed to lie and plant evidence to meet trial evidentiary standards. See *CNN News: Simpson Trial—Text—Day 159—Part 19* (CNN television broadcast, Sept. 29, 1995), Transcript No. 159-19, available in LEXIS, Nexis Library, CURNWS File; *Live Trial Coverage—CA v. Simpson—Day 140—Part 10* (Courtroom Television Network broadcast, Aug. 29, 1995), Transcript No. 140-10, available in LEXIS, Nexis Library, CURNWS File; *Nightline* (ABC television broadcast, Aug. 29, 1995), Transcript No. 3722, available in LEXIS, Nexis Library, CURNWS File; see also Paul Feldman & Robert J. Lopez, *Fuhrman Case: How the City Kept Troubled Cop; Police: He Showed Racist Views and Boasted of Violence in*

case, the prosecution ignores, suppresses, and obfuscates incontrovertible evidence that its lead police investigator planted evidence and that police methods facilitate cover-up rather than serve as independent checks against the inevitable personal bias of some police officers, due process advocates will have a reason to doubt the credibility of police investigations—notwithstanding the addition of a Black to the prosecution team.

The lessons to improve press coverage are also ones specifying a role for the public. First, the press readership should attempt to take in news accounts from multiple sources in order to form a basis of comparison. Second, the public should discuss news across self-imposed and self-defining demographic bounds. Third, and most importantly, the press readership should call the pundits to task when they spin analysis and commentary without demonstrable factual support. Diverse feedback, in the form of letters to the editor, guest columns, and letters to the nationally syndicated columnists will broaden the press's horizon and force greater objectivity.

The O.J. Simpson case is troublesome because it placed the criminal justice system and the press coverage of criminal justice on trial along with the accused. As in the landmark cases of the Warren Court, *Mapp v. Ohio*<sup>129</sup> and *Miranda v. Arizona*,<sup>130</sup> we must recognize that rogue cops are a problem that must be dealt with even before that of criminal suspects. The lesson of the O.J. Simpson case is not one that goes down easily<sup>131</sup> nor calmly, given the elements of interracial marriage, fame, and fortune. However, when the police draw as much, if not more, criticism than the policed, society is obviously not well-served. The main lesson of criminal justice, of which the O.J. Simpson case painfully reminds us, is that race matters and politics should not. When all Americans, Black and White, prosecutors and defense counsel, demand a better brand of criminal justice for all members of our great and diverse country, more Americans in great and diverse numbers will buy into our system of criminal justice.

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<sup>83</sup> *Disability Claim. Officials Said They Didn't Believe Him*, L.A. TIMES, Oct. 2, 1995, at A1.

129. 367 U.S. 643, *reh'g denied*, 368 U.S. 871 (1961).

130. 384 U.S. 436 (1966).

131. The distinct possibility that some members of the Los Angeles Police Department framed a man whose factual guilt would probably have been converted into legal guilt had the jury been able to comprehend any sense of fair play in the prosecution of O.J. Simpson is just another lesson that repressive government has yet deigned to learn.