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Richard Boswell

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Richard A. Boswell[*]

"This 'trial of the century' has given us some challenges of a lifetime—challenges we seem emotionally unprepared to meet."

—Clarence Page, Sept. 8, 1995

It would hardly be an overstatement to say that the case against O.J. Simpson has been one of the most publicized trials in recent memory. While one could speculate whether the "O.J." case, as it has come to be known, might have received similar widespread media coverage in another time, the advent of modern technology and market forces brought the case to millions of viewers around the world every day. Whether the coverage was found on Court Television, Cable News Network (CNN) or on some other network, the trial has been a veritable television bonanza.[1] Most

* The author is a Professor of Law and the Director of the Immigrants Rights Clinic at the University of California, Hastings College of the Law. The author would like to thank Professor Anthony Borenstein for his helpful comments. Most of all, he would like to thank Professor Karen Musalo for her insights and comments.

1. While travelling in Guatemala this past summer giving lectures on clinical methodology and trial advocacy, I noted that references to the O.J. Simpson trial were constantly brought up by the participants. In my hotel room, daily doses of the trial and programming from Los Angeles were fed into the television set. Virtually all of my hosts were following the trial on practically a daily basis. Later in the summer, I travelled in Italy and France and found that the trial was receiving similar coverage. It is interesting to note that some of the media have taken the position that their extensive coverage was a financial drain on their enterprise. At the beginning of the trial, Steven Brill, president of Court TV claimed that his station was losing money on the venture. "[S]o far the Simpson case hasn't done much to push Court TV further down the road to profitability. If anything, Simpson could have put us a little behind, because production costs are higher." *See* Mary Voboril, *Only Three Years Old, Court TV is Making its Mark on Cable Programming*, NEWSDAY, Jan. 8, 1995, at 1. However, according to one report, CNN's television rating improved fivefold in the period from January to October 1995 to 2.2 million households between noon and 8:00 p.m. *See* Lawrie Mifflin, *CNN and Others Look Past the Trial*, N.Y. TIMES, Oct. 2, 1995, at D9. As the case approached a verdict, some advertisers were paying up to $300,000 for a 30 second spot on television. *See* Stuart Elliot, *Verdict Mixed on Value of Trial Commercials*, N.Y. TIMES, Oct. 4, 1995, at

newspapers provided their readers with coverage on a daily basis. Individuals profited by writing books about the case even before the jury delivered the verdict.[2] While the media coverage itself is independently an important and interesting issue, the O.J. Simpson case has effectively provided the world with a rare opportunity to learn about both the judicial system as well as some of the profound problems of race and class facing our society.

The extensive media coverage of the Simpson trial has revealed the American judicial system to the entire world, exposing all of its attributes and flaws. While most of what has been disclosed to the public is not new to lawyers, the public has gained new insight into our legal system. From the very outset, the nature of the crime and the facts alleged by the State highlighted the tragedy of routine neglect present at every level of the judicial system's response to domestic violence. Furthermore, throughout the prosecution's case, the defense raised the double issues of police misconduct and lack of competency in conducting criminal investigations.[3] Later in the trial, the defense presented strong evidence that one of the prosecution's key witnesses was part of a secret racist society within the Los Angeles Police Department, a society which routinely targeted racial minorities for abuse.[4] The proceedings have educated the public and have also damaged whatever perception the American people may have held regarding trials as truth-seeking forums. Through this trial, the public witnessed daily efforts by both sides to manipulate the facts.[5]

For African Americans and other people of color, many of the "revelations" of the O.J. Simpson case are not new. Similarly, most of these shortcomings are not surprising to criminal lawyers and veteran court watchers.[6] Large segments of the American public, however, live in utter denial of the role that race plays both on the streets and in every corner of

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2. Among those who have already written books about the case or the personalities involved in the case is the defendant himself, not to mention family members and friends.

3. While the evident level of incompetency might raise the question of how cases are ever successfully prosecuted, most defendants lack the resources to investigate and expose the problems with the prosecution's case.

4. *See* Jessica Seigel, *Simpson Trial Focuses on Fuhrman Tapes: Recordings Jolt, Impede Proceedings*, CHI. TRIB., Aug. 21, 1995, at 8; Kenneth B. Noble, *Many Black Officers Say Bias is Rampant in Los Angeles Police Force*, N.Y. TIMES, Sept. 4, 1995, at 6.

5. The media has contributed to this portrayal of the trial as an arena for battles of deception through its commentary which focused primarily on trial strategy. The media's focus on the trial as a strategic battle is similar to its analysis of political campaigns and wars, which also focus more on strategy than issues of substance.

6. For an excellent critique of some of the race-based problems in the criminal justice system see Bryan A. Stevenson & Ruth E. Friedman, *Deliberate Indifference: Judicial Tolerance of Racial Bias in Criminal Justice*, 51 WASH. & LEE L. REV. 509 (1994).

our legal system.[7] Race-based police brutality has been a part of the national political landscape for the entire lifetime of most people of my generation; however, many have already forgotten that the cry to "stop police brutality" was an important part of the organizing efforts of the Black Panther Party in the 1960s. Nevertheless, claims of police brutality continue to be registered on a regular basis throughout the country,[8] while many white Americans deny that racially-based police brutality is a problem at all.

In this short essay, I will not delve into all of these problems other than to offer a comment about what I see as a profound lack of communication between white Americans and African Americans.[9] I will explore two interconnected aspects of the Simpson trial to make my point about the ever-widening racial division within the country. The first involves the perception of whites, from the very outset of the case, that African-American jurors would be hard-pressed to find O.J. Simpson guilty of the crimes for which he was accused because he is Black.[10] The second involves the opinion, primarily held by whites, that the racist statements by one of the prosecution's key witnesses were irrelevant to a question of guilt and should not be heard by the jury.

The question of whether African-American jurors could convict O.J. Simpson was implicitly, if not explicitly, articulated from the beginning of the case. Even before the trial, there was speculation that the prosecution would be prevented from obtaining a conviction if the death penalty was

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7. Indeed, much of the cry to end affirmative action has been based on the perception that racial discrimination is a thing of the past.

8. *See* Ed Timms, *A Plague of Bad Cops: The Fuhrman Affair is One Among a Wave of Apparent Cases of Misconduct*, S.F. EXAM., Oct. 8, 1995, at A8; Gordan Witkin, Timothy M. Ito, Monika Gittman, Scott Minerbrook & Jill Sieder, *When The Bad Guys are Cops*, U.S. NEWS & WORLD REP., Sept. 11, 1995, at 20; *Violent Acts Against Asians Climb: Prejudice:*
California Leads the Nation in Reported Incidents, L.A. TIMES, Aug. 1, 1995, at A3; William K. Rashbaum, *Out of Control on Night Shift: Cops Accused of Thuggery, Street Crime*, NEWSDAY, May 4, 1995, at A5; Rebecca Carr, *Police Brutality: A Suburb Survey: Most Complaints Dismissed After Internal Probes*, CHI. SUN-TIMES, Jan. 12, 1995, at 3; Deborah Nelson, *Cops' Free Rein Costs City Millions: Police Rarely Punished Over Repeated Misconduct Suits*, CHI. SUN-TIMES, Jan. 8, 1995, at 1; ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, REPORT, A WISER COURSE: ENDING DRUG PROHIBITION 10 (1994).

9. Professor Lani Guinier describes the dialogue between whites and African Americans as "drive-by," in the sense that it is not a conversation but consists of sound bites hurled at one another. *See* Joe Frolik, *Guinier Answers Critics; Wants to Correct Image a "Quota Queen,"* THE PLAIN DEALER, Mar. 5, 1994, at 7A; Delijah Peeples, *Tenuous Racism Cries Not Needed*, STAR TRIB., May 28, 1994, at 16A.

10. No doubt for many, the perception has only been further reinforced by the verdict coupled with the different views of the evidence which seemed divided along racial lines.

requested.[11] The role of the jurors' race was openly discussed from the beginning of the trial. During the jury selection process, and then once the jury was impaneled, the media continually wondered if, because of its racial composition, the jury would be able to find the defendant guilty, even if the evidence dictated such a result.[12] Throughout the trial, the media reported problems among jurors, specifically racial tensions. In this reporting, the media identified one juror or another as pro-defense or pro-prosecution, often basing this conclusion on the juror's race and gender.[13] Indeed, in much of the reporting on the verdict, news announcers have prefaced their comments by first stating the number of African Americans on the jury or by simply describing the jury as a "Black" jury.[14]

The issue of police racism was also present from the beginning of the trial. A major component of the defense's case relied on the theory that the defendant had been framed by the police. An important part of this theory involved proof that a key prosecution witness, detective Mark Fuhrman, was a racist who harbored particular anger towards African

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11. Ultimately, the prosecution decided not to ask for the death penalty because of the hero-status of the defendant and because it believed that with death as a penalty, it would ultimately be unable to obtain a conviction. Jim Newton & Ralph Frammolino, *Prosecution Won't Seek Death Penalty-District Attorney Will Ask for Life in Prison Without Parole*, L.A. TIMES, Sept. 10, 1994, at A1. In defense of the prosecution, African-American community leaders approached the District Attorney's office requesting that the death penalty not be sought because of their fears of social unrest. *See* Laura McCoy, *DA's Simpson Decision: Life, Death and Politics*, SACRAMENTO BEE, Aug. 28, 1994, at A1. Also noteworthy is that had the prosecution requested the death penalty, they would have been more likely to get a "prosecution oriented" jury. The reason for this is that where the death penalty is sought, potential jurors may be asked questions about their views on the subject. Generally, most criminal lawyers believe that jurors who favor capital punishment are more favorably oriented to the prosecution than to the defense. *See* Vincent J. Schodolski, *Prosecutors' Decision Could Help Simpson: "Death-Qualified" Jury Tougher*, CHI. TRIB., Sept. 14, 1994, at 8N.

12. *Both Sides in Simpson Case Claim Racial Bias in Jury Selection*, THE ATLANTA J. & CONST., Nov. 4, 1994, at A5. *See also* Betsy Streisand & Ted Gest, *A Question of Fairness*, U.S. NEWS & WORLD REP., Aug. 1, 1994, at 23; Christine Spolar, *Majority-Black Jury Selected in O.J. Simpson Murder Trial*, THE WASH. POST, Nov. 3, 1994, at A2; Peter S. Canellos, *Deciding What is Just: As Final Arguments Begin, Simpson Jurors Face a Daunting Task-The Law*, BOSTON GLOBE, Sept. 24, 1995, at 77.

13. Jessica Seigel, *Ousted Juror Tells How Panel Has Polarized*, CHI. TRIB., Apr. 14, 1995, at 4; Norma Meyer & Matt Krasnowski, *Ousted Simpson Juror Denies Racial Friction, Has Praise for Prosecution*, S.D. UNION-TRIB., Mar. 2, 1995, at A3; *See also 20/20: The Inside Story of the Simpson Jury. Is There Racial Tension? Will There Be a Hung Jury?*, (ABC television broadcast, Apr. 7, 1995, Transcript # 1514).

14. While most references to the jury characterized them as "predominantly" or "mostly" Black, some referred to the jury as "a black jury." *See* Bill McClellan, *The O.J. Verdict: Could Divergence Possibly Converge*, ST. LOUIS POST DISPATCH, Oct. 2, 1995, at 1B. Others provided incredibly detailed breakdowns of the jurors by race and gender including a description of one of the jurors as "mixed race." *See, e.g.*, *Both Sides in Simpson Case Claim Racial Bias in Jury Selection*, *supra* note 12; *24 Ready for Jury Box in Murder Trial*, USA TODAY, Dec. 12, 1994, at 8A.

Americans, and more specifically towards interracial couples. During the prosecution's case in chief, the defense cross-examined detective Fuhrman on his use of racial epithets, all of which he vigorously denied. It was later revealed that not only were there witnesses to these epithets, but also that some of the statements had been tape-recorded. Ultimately, Judge Lance Ito decided that the jurors could hear recordings of only two occasions in which the detective made offensive racial statements. Furthermore, the jury would not be told of the detective's recorded statement that he had both destroyed and planted incriminating evidence in the past.

Fuhrman had made numerous statements on tape in which he admitted to being motivated against particular defendants on account of their race. He also admitted to tampering with evidence. Based on these factors, it does not seem a far leap of logic to conclude that he might have taken steps to set up the defendant in this case. Therefore, the question of whether Fuhrman actually planted evidence in this case is a perfectly legitimate issue of fact for determination by the jury.[15]

Why did the Court disallow the introduction of evidence regarding Fuhrman's racism and prior actions in light of such obvious connection between his recorded statements and the question of whether he may have planted the glove? The court's ruling on admissibility of evidence of racial animus was rooted in a perception shared by the general public that issues of race are so powerful that they prevent normal discourse and human interaction. These views are based upon a perception that African Americans serving on a jury are driven by race alone. Once Fuhrman's racism was squarely set before the jury, the jury would cease to consider the evidence objectively. Likewise, the assumption that a jury composed primarily of African Americans will give undue attention to racist comments by a prosecution witness, presupposes that such a jury is so driven by race that its members are unable to act as fair arbiters of the facts.

The widely-held perception that jurors in the O.J. Simpson case were motivated by racial considerations rather than the evidence is a particularly

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15. Judge Ito based his decision denying admission of testimony regarding Fuhrman's tampering with evidence by noting that the defendant had not provided sufficient evidence to support the allegation. But as defense lawyers would argue, it is not the responsibility of the defense to make such showings since the legal burden is on the prosecution to prove its case beyond a reasonable doubt.

Viewed from a legal standpoint, the position taken by the court sounded more like the question raised in a civil trial in ruling on a judgment "non obstante veredicto," or JNOV, where the court concludes as a matter of law that no reasonable juror could possibly reach a particular conclusion under a given set of facts. *See* Fed. R. Civ. P. 50 (a)(1) and 56. *See also* Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986); Dace v. ACF Industries, Inc., 722 F.2d 374 (8th Cir. 1983), *aff'd* 728 F.2d 976 (8th Cir. 1984).

offensive form of "juror stereotyping." This kind of stereotyping results in decisions such as Judge Ito's ruling to withhold certain evidence from the jury. While some might argue that the Judge was attempting to avoid jury contamination, the decision makes it clear that our system of justice remains far from achieving its goal of fundamental fairness. At its core, the decision to withhold evidence represents a lack of confidence in the competence of the jury. Such a decision is based on the belief that jurors of color cannot fairly separate fact from fiction once issues of race are interjected.

While the lack of confidence in the jury's ability to deliberate impartially may be attributed to a general distrust of the jury system,[16] lack of jury confidence in this case inherently implicates issues of race. The perception that a jury including African Americans would be unable to find a Black defendant guilty (should the evidence be sufficient) is particularly telling. It stands in striking contrast to my opinion that had the jurors believed that the accused had butchered Nicole Brown Simpson and Ronald Goldman in the manner described at trial, they would have had little difficulty convicting him, even if the jury was comprised *only* of African Americans.[17]

Interestingly enough, these stereotypes of how race impacts decision-making are applied only to African Americans and not to whites serving on juries or appearing as witnesses. Would the public have posed any of these questions had the jury included more white people? Was the white public as outraged with the results in the Von Bulow and De Lorean cases? An instructive parallel can be drawn to another well-publicized case—that of Colin Ferguson, an African American accused of opening fire on a Long Island commuter train, killing 6 people and injuring 20 others.[18]

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16. Notwithstanding the fact that jurors are used extensively in the United States, both in Europe generally and specifically in Great Britain jurors are viewed with great distrust. *See* Jason Scott Johnston, *Uncertainty, Chaos, and the Torts Process: An Economic Analysis of Legal Form*, 76 CORNELL L. REV. 341, 344 (1991). Over the last twenty years juries have come under increasing attack. It has been suggested that neither unanimous juries nor juries of twelve persons are required under the federal Constitution. *See* Valerie T. Rosenson, Note, *Wainwright v. Witt: The Court Casts a False Light Backward*, 66 B.U. L. Rev. 311, 339-40 (1986).

17. The double-murder as described by the prosecution was committed with a knife with the assailant(s) inflicting multiple stab wounds on the victims. This murder was clearly perpetrated at close range and the brutality of the attack indicated special animus. As noted earlier, the prosecution had decided earlier not to seek the death penalty. *See supra* note 11. While the decision not to seek the death penalty against O.J. Simpson might have been defensible because of concerns about the threat of social unrest in and around Los Angeles, it was clearly inconsistent with the particular circumstances of the crime. Certainly, one advantage that O.J. Simpson gained from his notoriety was that he did not have to defend himself from the death penalty.

18. Seth Faison, *Gunman Kills 5 on L.I.R.R. Train: 19 Are Wounded*, N.Y. TIMES, Dec. 8, 1993, at A1; James Barron, *Death on the L.I.R.R.: Portrait of Suspect Emerges*

In the Ferguson case, where the defendant was Black, no questions were raised as to whether the defendant could receive a fair trial with a predominantly white jury. This situation arose regardless of strong evidence that African-American defendants are at peril when they appear before white jurors, especially in cases involving white victims.[19]

While the issues which I have raised are not new, they seem to have been lost in the discussions about this case because of O.J. Simpson's wealth. Along with O.J. Simpson's wealth comes the perception that a well financed defense can neutralize the effect of race in a given case. Obviously, given the way in which race has been a part of this case from the very beginning, O.J. Simpson's wealth has not served as a neutralizer. Moreover, because race predominates so many issues in this society, it was quite unlikely that race would not be a significant factor in the case.

These issues are especially profound because while whites appear to believe that the police and judicial system operate fairly, African Americans do not. Similarly, it seems that many whites do not perceive race relations as all that bad, while African Americans do. No doubt, the marked increase in hate crimes and the resurgence of activities by racist groups is further evidence that the divisions are growing ever wider.[20] Simultaneously, the flames of division are being fanned by political leaders intent on dismantling the hard-fought gains of the civil rights movement. Racial tensions and the widening gaps of perception have provided further support to both white and African-American separatists intent on maintaining a segregated society.

Judges and lawyers should not feel as if they are mere bystanders in these social conflicts, as the ultimate survival of the system depends in large part on how justice is meted out. In our legal system, judges have broad authority as to how trials are conducted. Appellate courts are generally reluctant to intervene in evidentiary matters which are decided regularly and quickly during the course of trial. Thus, the trial judge becomes the arbiter of the information that will reach the jury. When the trial judge lacks confidence in the jury's ability to deal fairly with

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in Shooting on L.I. Train, N.Y. TIMES, Dec. 9, 1993, at A1.

19. *See, e.g.*, DAVID C. BALDUS, EQUAL JUSTICE AND THE DEATH PENALTY (1990); UNITED STATES GENERAL ACCOUNTING OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES (1990).

20. *See, e.g.*, *All Things Considered: Campaign Launched Against Hate Crimes* (National Public Radio broadcast, Dec. 19, 1995, Transcript #2066-15); Kenneth B. Noble, *Attacks Against Asian Americans On the Rise, Especially in California*, N.Y. TIMES, Dec. 13, 1995, at B13; Kathy Walt, *Hate Crimes on the Increase in Houston*, HOUSTON CHRON., Oct. 12, 1995, at A1; David Templeton, *Police Expect Increase in Hate Crimes: White Supremacist Having Success Recruiting Teens*, PITTSBURGH POST-GAZETTE, Oct. 8, 1995, at W1; Maureen O'Donnell, *Race Leading Factor in Hate Crimes Increase*, CHI. SUN-TIMES, Mar. 12, 1995, at 11.

information, her decisions will inevitably prevent the jury from receiving important information.

The way in which Judge Ito made decisions concerning the Fuhrman evidence was a slap in the face to the jurors. Further, it would probably not have occurred had the jury been comprised substantially of whites. Ultimately, the exclusion of this relevant testimony will further undermine the legitimacy of the legal system in the eyes of African Americans. The fact that this jury, with this judge, was not allowed to hear such testimony highlights the extent to which problems of race relations have permeated our society. The jury in the O.J. Simpson case, under the law, should have been allowed to hear that one of the critical prosecution witnesses had repeatedly made racial epithets and claimed to have planted incriminating evidence in the past. The pernicious and corrosive problem of worsening race relations must be dealt with if we ever expect to live together as a people.