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**INTRODUCTION: O.J. SIMPSON AND THE
CRIMINAL JUSTICE SYSTEM ON TRIAL**

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In this issue of the Law Review is found a remarkable collection of essays by noted scholars, judges, and practitioners from Colorado and across the country, all undertaking at least the beginning of the task of analyzing the murder trial of O.J. Simpson and what it says about our legal system. The substance of these essays was presented in a live colloquium at the University of Colorado Law School in February 1996, and they are arranged under three broad headings. First is Proving the Case, where specific topics are Character and Prior Acts, Battered Woman and Batterer Syndrome, and The Science of DNA. Second is Perceptions and Decision Making, where the specific topics are Racial Perspectives, Gender Perspectives, and The Jury's View. Third is Reform, where the particular topics are The System, The Police, and The Lawyers.

Recall that on October 3, 1996, the jury in the Simpson trial returned its verdict of not guilty on charges of murdering Nicole Brown Simpson and Ronald Goldman. Recall that this "trial of the century" went on for 252 days, but the jury deliberated less than five hours.¹ The trial was covered live "gavel to gavel" on

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1. In the case of *The People of the State of California v. Orenthal James Simpson*, jury sequestration began January 11 and ended October 3, 1995 (266 days). Jury selection began on September 26, 1994, and on November 3 a mostly black panel of eight men and four women was sworn in. On January 24, 1995, opening statements began. On January 31, Sharyn Gilbert, the Police Dispatcher who took Nicole Brown Simpson's 911 call on New Year's Day 1989, became the first witness actually heard by the jury. On July 6, the prosecution rested, and the next day the defense began its case. On September 21, the defense rested. On September 29, the prosecution completed its rebuttal. On Tuesday, October 3, the jury began and finished deliberations. The jury asked to rehear the testimony by limousine driver Allan Park, and post-verdict reports indicate that one of the two "holdouts" wanted

radio and television. It was a favorite topic on talk shows and an everyday feature in supermarket tabloids. And it received massive coverage in conventional newspapers, magazines, and more serious journal essays. Lawyers, judges, professors, police officers, criminalists and scientists, and anyone who had contact with the principals had their say, giving new meaning to Andy Warhol's famous comment about fifteen minutes of fame as the condition of modern life. Books appeared even before the trial began, and what started as a trickle became a flood after the verdict.

Recall too what the trial was about. In important respects, the Simpson trial presented facts and raised issues that are familiar, even commonplace. Here was a man charged with a crime of passion against an intimate companion in a relationship marked by disturbing evidence of physical and psychological abuse. Here was a trial raising issues of character and syndrome evidence, and the science of DNA. In other respects, however, the trial raised issues that are striking and unusual. Here were allegations of police perjury and racism, investigative bungling, and frameup. Here were black lawyers on both sides invoking racial images and a largely black jury whose verdict was widely seen as an instance of jury nullification.² And here was a trial exposing dramatic differences in human perception that are often understood in terms of race and gender. So important are these issues, and a host of others that were raised vividly by this event,³

to hear again whether Park had described the "shadowy figure" as approaching the house from what might have been the side walkway at Simpson's house, or whether Park had only seen that figure step up on the porch—in fact, what Park said is closer to the latter, and in his later civil deposition Simpson testified that he had gone out to put his golf bag beside the driveway.

2. One of the essayists agrees. See W. William Hodes, *Lord Brougham, the Dream Team, and Jury Nullification of the Third Kind*, 67 U. COLO. L. REV. 1075 (1996). On this point I agree that in substance Johnny Cochran's close invited the jury to acquit even if it thought the case proved. But see Justice Rebecca Love Kourlis, *Not Jury Nullification; Not a Call for Ethical Reform; But Rather a Case for Judicial Control*, 67 U. COLO. L. REV. 1109 (1996), interpreting the Cochran closing argument as improper on other grounds and criticizing the same process of jury nullification that Hodes defends.

3. There are other reasons to look closely at this trial. Unlike most cases, we as outsiders may know almost as much about the evidence as the jury itself because it is so accessible (and was as the trial progressed). And in some respects we may know even more than the jury, since we have access to information the jury never heard. Moreover, in some respects the acquittal did not end the case: O.J. Simpson is protected against re prosecution by the Double Jeopardy Clause (unlike the officers charged with beating Rodney King, O.J. Simpson cannot face federal charges), but

that the O.J. Simpson trial deserves the scholarly attention and analysis that are presented in the pages that follow.

In these introductory comments, I offer first an overview of the Simpson case and then a preview of the perceptive essays that get to the heart of our subject. The overview describes the factual background and the trial itself and ends with a summary of information that was widely reported to be available but was never offered at trial (under the heading Additional Facts, Unheard Witnesses). The preview describes briefly, but really cannot do justice to, the rich and insightful essays to come.⁴

I. OVERVIEW: THE MURDERS, INVESTIGATION, AND TRIAL

The world first learned that O.J. Simpson was in trouble on Monday and Tuesday, June 13 and 14, 1994, when the news broke that his ex-wife Nicole Brown Simpson and a waiter from the Mezzaluna Restaurant named Ron Goldman had been stabbed to death in front of Brown's Brentwood condominium late Sunday night. Days earlier, the *Los Angeles Times* had mentioned Simpson in stories about current nominees for the Heisman Trophy and membership in the exclusive Sherwood Country Club. On Tuesday morning, June 13, the fact that Simpson was a prime suspect in the murders was front-page news.

Recall that on Monday morning Simpson returned from Chicago to his home on Rockingham Drive. That afternoon he went to police headquarters and gave a statement to Detective Vannatter. Simpson spent Monday night at Rockingham in the

further revelations are not out of the question. We have Simpson's desire to defend himself in public appearances and incidentally to market his side of the story. We have continuing media scrutiny that has produced information, virtually since the day of the crime, and continues to produce information into the summer of 1996 (see the discussion under the heading Additional Facts, Unheard Witnesses, *infra*). Literally *everything* that comes out may be suspect because of the pressures and financial incentives that surround the case, and much of what we hear is unsubstantiated rumor. But some of the public information seems more solid, and in the aggregate it may help us appraise the way the system worked. Finally, the civil suit brought by the Goldman family remained pending in the summer of 1996, and might produce still more evidence bearing on the identity of the murderer of Nicole Brown Simpson and Ronald Goldman.

4. This symposium was conceived (and participants invited) before the criminal trial was over. The essays were written and submitted early in 1996 before the outcome of the civil suit brought by the Goldman family was known. If the Goldman suit goes to trial, we may learn still more information of interest.

company of friends and relatives. On Tuesday, he left Rockingham undetected with his friend Robert Kardashian, in clothes borrowed from his old friend Al Cowlings, slipping away unrecognized by the reporters gathered outside. A videotape shows Kardashian carrying a bulging Louis Vuitton garment bag. On Wednesday, Simpson went to the Laguna Hills Mortuary to visit the casket of Nicole Brown Simpson, thereafter going to a family gathering at the home of the Browns. Kardashian then took him to Kardashian's own home in San Fernando Valley, and on Thursday Simpson attended Nicole's funeral.

That evening he spent the night at the home of Al Cowlings in Encino. Amidst reports of evidence that Simpson was the killer, charges were filed on Friday, and police went to the Cowlings home to arrest him. But Cowlings and Simpson had disappeared. Simpson had already hired Robert Shapiro to represent him, and Shapiro had reached an agreement with the Los Angeles police that Simpson was to turn himself in at noon that day. But at 2 P.M. Simpson had not shown up, and the police announced that he was a fugitive from justice. In his civil deposition testimony in January 1996, Simpson said that on that Friday afternoon he and Cowlings were trying to get to Nicole's gravesite but a police car was blocking the entrance. That afternoon, Robert Kardashian read to reporters an apparent suicide note from Simpson, and from 6 P.M. to 8 P.M. on Friday evening the nation watched the famous slow-speed car chase culminate in Simpson's arrest back at his home on Rockingham.

Recall what we know about the murders. Perhaps because of mismanagement or lax procedures, the bodies were not examined promptly and the autopsy could only put the time of death somewhere between 9 P.M. and midnight. The bodies were actually *discovered* close to midnight, and the prosecutor's theory was that the murders had occurred between 10:15 P.M. and 10:35 P.M., as signaled by the wailing of the Akita dog "Kato" (named after Kato Kaelin, the friend and houseguest whom Simpson aptly described as "goofy"). Simpson himself was unaccounted for between 9:36 P.M., when he and Kato Kaelin parted company in front of the Rockingham house after returning from McDonald's where they bought hamburgers for dinner, and 10:55 P.M., when Allan Park (the limousine driver) saw Kaelin on the grounds and simultaneously saw a "shadowy figure" resembling Simpson enter the house. Shortly thereafter, Simpson emerged from the house in preparation for departure to the airport for the midnight flight

to Chicago. At the trial, Simpson himself never testified, but his lawyers said he was sleeping, packing, and chipping golf shots in the front yard during this eighty-minute period. To show Simpson committed the murders during this time frame, the prosecutors relied mainly on three kinds of proof.

First was proof of Simpson's motive, mood, appearance, and behavior. He was angry at his ex-wife for breaking up with him a second time. They had divorced; then she had sought a reconciliation more than a year earlier. He had gone for it, but she dumped him again a month before the murders by returning his birthday gift and excluding him from the family circle at the dance recital and the dinner afterwards. Simpson was angry and withdrawn, as shown by his demeanor at the recital (particularly as described by Candice Garvey); he was in emotional turmoil because he was losing Paula Barbieri, his then-current girlfriend. She had wanted to come with him to the recital, but he had refused and she suddenly left town. Not knowing where Barbieri was, Simpson left Rockingham in the Bronco early in that eighty-minute period after returning from McDonald's with Kato and tried vainly to contact her by cellular phone—making two calls to her L.A. and Florida numbers. But she was in Las Vegas, staying at a hotel in a room paid for by Michael Bolton. Also, Simpson had a fresh cut on the index finger of his left hand when he went to the police station on Monday, June 13, that Kato Kaelin had not seen when the two went out for hamburgers shortly before the murders. No one at the dance recital Simpson had attended earlier that evening had seen the cut either.

Second was the physical proof. A left-handed blood-soaked Aris Isotoner glove and ski cap were found at the murder scene, and what seemed to be the right-hand blood-soaked mate to that glove was found in the outside walkway behind Simpson's house. Fibers on the ski cap matched fibers in the fabric in the Bronco, and similar fibers were found on the gloves and on Ron Goldman's shirt. The glove at Rockingham contained a blond hair that could have come from Nicole and a dark hair that could have come from Ron Goldman. The theory was that Simpson lost the cap and left-handed glove during the murders and, after losing the glove, sustained the cut on his left index finger. The deed done, he rushed back to his house in the Bronco, carelessly parking it on Rockingham while Allan Park waited at the Ashford Street entrance to the house. Simpson entered the grounds and tried to sneak down the walkway alongside the house, intending to bury

or hide the clothing and knife used in the murders. In the dark walkway, he bumped into the air-conditioning unit, which accounted for the noises Kato Kaelin heard, and dropped the glove at that moment. Minutes later he entered the house and turned on the lights, buzzed the gate to let Park in, and then left for the airport. In addition to a suitcase and a bag of golf clubs, Simpson carried a black golf bag that he insisted on taking into the limousine himself. That bag was never seen again, although the prosecutor suggested that it might have left Rockingham with Simpson and Kardashian in the garment bag on Tuesday morning.

Third was the scientific evidence. DNA tests of traces of blood discovered inside the Bronco matched O.J. Simpson, Nicole Brown Simpson, and Ron Goldman. Blood on the glove found at the Simpson residence produced a similar threefold match. A sock found on the floor of Simpson's bedroom had a spot of blood that produced a DNA match for Nicole Brown Simpson. And blood drops on the sidewalk at Bundy (the murder scene) and on the walkway and hallway at Rockingham matched O.J. Simpson. This DNA evidence was presented over a period of many weeks in June, July, and August by singularly impressive witnesses, like Robin Cotton of Cellmark and Gary Sims of the State Crime Laboratory. Their information was developed by the skilled, if somewhat plodding and mannered, questions put by Rochne Harmon. Without going into details, what it suggested is that the various reported matches are very rare—in one instance presented at trial, the testimony was that only one in seven billion people would be expected to have the alleles observed in the crime scene sample and in the defendant. The prosecutor also presented the scarcity figures for the overall population and for various subgroups, including black Americans.

The defense counterattacked on all fronts. First, it argued that the prosecution was wrong about O.J. Simpson's motive, mood, appearance, and behavior. Simpson did *not* want to harm Nicole, and was in fact not angry at her. His behavior at the recital, as captured on a homemade videotape showing him smiling and affable in a brief encounter with another parent outside the recital, reflected a father who was cheerful and normal in his demeanor. Simpson had started anew with Paula Barbieri and was at peace with Nicole. Nobody actually saw him leave Rockingham in the Bronco after he and Kato parted company at about 9:36 P.M., and later on the plane he was

cheerful and friendly. *And* people on the plane did not notice the telltale cuts.

Second, the defense attacked the interpretation and the integrity of the State's physical evidence. In a memorable moment, Cochran ridiculed the suggestion that Simpson would have worn a ski cap as a disguise (Cochran himself donned a similar hat and remarked, "I'm still just Johnny Cochran in a ski hat."). And in what may well have been the downfall of the prosecution's case, the defense argued that the glove at Rockingham was planted there by a racist cop—Mark Fuhrman, who claimed to have discovered it after jumping the fence at Rockingham at about 5 A.M. Monday morning. The initial efforts of the defense in this vein were only partly successful. Lee Bailey tried to develop that Fuhrman had time to enter the yard at Bundy, snatch one glove, and hide it in a baggy in his sock. Then Bailey repeatedly, and with visible anger and frustration, asked Fuhrman whether he had used what Christopher Darden later called the "n-word" in the last ten years, but Fuhrman repeatedly and calmly denied it.

Later in the trial, however, the defense struck paydirt in finding the McKinny tapes, which had been made in 1985 and 1986. Ultimately, Judge Ito let the defense play two out of forty-one instances on the tapes in which Fuhrman had used the word "nigger." The defense was also allowed to call McKinny herself to testify that Fuhrman had used that word forty-one times and two other witnesses who testified that Fuhrman had used the same word in their presence. McKinny was also allowed to testify that Fuhrman had described an incident in which police beat a black suspect, and that Fuhrman had said that police planted evidence against black suspects. The defense offered some evidence that the sock in Simpson's bedroom was planted too, showing that it did not appear on the floor in a videotape of the room taken by an insurance adjuster. It further argued that Fuhrman may have used the left-handed glove that he picked up at the crime scene to plant the blood smears found on the console and inside the driver's side door of the Bronco.

In another unforgettable and symbolic moment, the hapless prosecutor Christopher Darden asked Simpson to don the glove found at the murder scene. Wearing latex gloves to avoid contamination, Simpson tried to put it on, and it was clearly too small—the glove didn't fit. In an image of the Simpson trial most of us will never forget, Simpson looked to his right toward the

jury, tugging downward on a glove that seemed clearly too small for his palm and wrist, while Marcia Clark stood behind him, her mouth open in astonishment and disbelief. (A later demonstration with a similar glove showed it could fit Simpson's hand, although the fit was tight. Pictures of telecasts three years earlier showed him wearing similar gloves, although arguments erupted because the gloves shown in the telecast were a different color from the gloves found at the crime scene and Simpson's residence.)

The defense also sought to show that Detective Vannatter could have planted some of the blood discovered at Rockingham and Bundy, the murder scene. As the defense revealed, Vannatter had carried the sample of Simpson's blood, drawn at the police station on Monday, around with him for about three hours, during which time he returned to Rockingham. The defense further showed that Vannatter had commented to someone, during a smoke break early in the investigation, that the husband of a murdered woman is always a suspect. Because Vannatter had defended the warrantless search that produced the glove at Rockingham on the ground that Simpson was not yet a suspect, however, the defense had at least a plausible claim that Vannatter must have lied in defending the warrantless search. In his closing argument, Cochran linked Vannatter to Fuhrman by suggesting that they are both liars and that both were racially motivated to frame Simpson. Hence Vannatter might have planted the blood found at the Simpson estate and on the back gate at Bundy (the latter being discovered weeks after the murder).

Third, the defense attacked the DNA evidence. It showed that mistakes were made in collecting the blood and that the samples could have been mixed up or "cross-contaminated" at the crime scene or in the laboratory. In this enterprise, defense lawyer Barry Scheck made real progress, showing on cross-examination that Dennis Fung and Andrea Mazzola made careless mistakes at the crime scene and that Colin Yamauchi may have contaminated samples in the LAPD Crime Laboratory, which Scheck called a "cesspool of contamination." Already contaminated before reaching Cellmark or the FBI Laboratory, the crime samples could yield nothing that could be relied upon, even if Robin Cotton and Gary Sims and their colleagues performed their own lab work to perfection. The defense was assisted in its attack on the DNA evidence by a famous criminal-

ist named Henry Lee, who testified that there was just “something wrong” with much of the DNA evidence, especially the trace of blood in the sock that matched Nicole Brown Simpson. Lee argued that this particular spot must have been splattered on the interior surface of the sock because it was not forced into the fabric as would be expected if it had gotten there while someone was wearing the sock. In this connection, Lee helped Scheck by evoking the image of finding a cockroach in a bowl of spaghetti. Lee asked: “Do you search the rest of the spaghetti to see if there are any more cockroaches, or do you just throw it all out?”

Scheck also attacked the database used to generate the frequency estimates for the various alleles, arguing that the database itself was not an adequate sample. He similarly argued that the supposed match between the Bronco fibers and the fibers found on the cap, gloves, and shirt of Ron Goldman meant very little because there was no showing of the scarcity of such fibers generally. Scheck developed as well that EDTA (a preservative used in collection vials) showed up in blood scrapings found on the gate at Bundy and the sock at Rockingham, as evidence that these had been planted from reference samples taken from Simpson or gathered at the crime. And Scheck also showed that the labs had made mistakes in other cases, and he got even Robin Cotton to admit that nobody could explain how some of these errors had occurred.

These facts remind us, in case we need it, that even an exhaustive trial does not tell us everything. As onlookers watching a great drama of murder and its aftermath, we are like readers of Dostoyevsky or Faulkner. We can reach deeper levels of understanding, but we can never know everything. We cannot know everything about O.J. Simpson, even if we think he did it, any more than we can know everything about Joe Christmas in *Light in August* or Raskolnikov in *Crime and Punishment*. And we may never be satisfied that we have learned what we most want to know. When and how was criminal intent formed? How did it get from thought to plan, from thinking to acting? When was the last moment to stop it? And why didn't it stop, or get stopped, before there were deaths and ruined lives of people we can like and even admire?

II. ADDITIONAL FACTS, UNHEARD WITNESSES

The verdict of acquittal ended the possibility that O.J. Simpson will go to jail for the murders of Nicole Brown Simpson and Ronald Goldman. But developments continue and rumors abound. What follows does not exhaust the subject, but the items noted below have at least some persuasive force and merit consideration.

After the trial, O.J. Simpson confirmed that he was the "shadowy figure" seen by limousine driver Allan Park entering the front door at Rockingham.⁵ Paula Barbieri confirmed something the trial evidence suggested, which is that on the day of the murder she decided to end her relationship with Simpson and left phone messages saying as much, although these messages were not proved at trial because the prosecutor could not show Simpson had picked them up, and he has said that he did not.⁶ We also have confirmation of a point urged by the prosecution on circumstantial evidence, which is that on the day of the murders Nicole Brown Simpson must have taken further steps to break off her relationship permanently with Simpson, although this new proof may never be heard by any jury because it depends

5. Compare Darden's rebuttal argument ("Who was the man Allan Park saw walking into the house?"), Official Transcript, Prosecution Rebuttal Argument, *People v. Simpson*, No. BA 097211, 1995 WL 704342, at *10 (Cal. Super. Ct. L.A. County Sept. 29, 1995) with O.J. Simpson's comments to Larry King on October 4, 1995 (agreeing that he was the person Allan Park saw, but that he was not returning from somewhere else, but putting his baggage out), as reported by Cecilia Rasmussen in *Simpson Speaks*, L.A. TIMES, Feb. 7, 1996, at 3, and O.J. Simpson's deposition (confirming that Park had seen him, Simpson, reenter the house after coming downstairs "to see if I had black shoes in my golf bag"), reported by Tim Rutten and Henry Weinstein in *Ex-Wife Fabricated Domestic Abuse Charges, Simpson Says*, L.A. TIMES, Feb. 3, 1996, at 1 [hereinafter *Simpson Says*].

6. In his closing argument, Johnny Cochran replied to the "burning fuse" argument offered by Christopher Darden by saying that Simpson was happy and relaxed on the day of the murder because he and Paula Barbieri had a close, loving relationship. See *Simpson Says* (in deposition, Simpson denied receiving a phone message from Barbieri saying she was breaking off their relationship); Tim Rutten, *Barbieri "Dear John" Letter Told*, L.A. TIMES, Feb. 7, 1996, at 12 (in deposition, Barbieri said Simpson got a "Dear John" letter from her hours before the murders, and that she got three phone messages from him that day, one of which led her to believe he had gotten her note); *For the Record*, L.A. TIMES, Feb. 8, 1996, at 3 (correcting earlier story; Barbieri said in deposition that she left phone message breaking off relationship, and that one of three return messages suggested to her that Simpson had gotten her message).

on what Faye Resnick says Nicole told her by phone just hours before she was killed.⁷

Witnesses who were *not* called at the Simpson trial include the following: (1) Jill Shively, who testified before the grand jury that she encountered Simpson crossing San Vicente Boulevard in a white Bronco at about 10:50 P.M., going south to north in the way one would expect if he were leaving the scene of the crime on his way back to Rockingham;⁸ (2) Faye Resnick, who apparently played the role of go-between for Simpson and Nicole in the year before the murder, has said Simpson often phoned her and told her he would kill Nicole and that Nicole said substantially the same thing;⁹ (3) William Thibodeau, who was reportedly ready to testify that Simpson told him before the murders that he could get into Nicole's house on Bundy and that "sometimes she doesn't know I'm there";¹⁰ (4) several others who were prepared to confirm what other evidence suggested, which is that Simpson struck Nicole.¹¹

7. Compare John Goldman & Tim Rutten, *Simpson's Chief Attorney May Quit, Sources Say*, L.A. TIMES, Feb. 12, 1996, at 1 (reporting that Resnick testified in her deposition that Nicole Brown Simpson phoned her at 9 P.M. and told her that O.J. had phoned and tried to speak to her but that she refused to speak with him) with *Simpson Says*, *supra* note 5 (reporting that Simpson testified in his deposition that he called Nicole's number, but only to speak to his daughter Sydney about her upcoming dance recital).

8. See Official Transcript, Grand Jury Proceeding, *People v. Simpson*, No. BA 097211, 1994 WL 652904, at *1-8 (Cal. Super. Ct. L.A. County June 21, 1994) (Jill Shively's testimony); Official Transcript, Grand Jury Proceeding, *People v. Simpson*, No. BA 097211, 1994 WL 652911, at *1-4 (Cal. Super. Ct. L.A. County June 23, 1994) (prosecutor Marcia Clark develops the fact that Shively sold her story to the television program "Hard Copy" and instructs grand jurors that Shively's testimony is withdrawn and is not to be considered). Shively had also lost a civil fraud suit for a small sum in a dispute over a television script, but she was the *only* eyewitness who placed Simpson in the Bronco close to the crime scene at the crucial time.

9. Resnick was not called to testify, perhaps because she is an unsympathetic social pretender and drug addict who wrote a book that is aptly described as trash. See John Goldman & Tim Rutten, *Simpson's Chief Attorney May Quit, Sources Say*, L.A. TIMES, Feb. 12, 1996, at 1 (describing Resnick's civil deposition). The book is FAYE RESNICK, *NICOLE BROWN SIMPSON: THE PRIVATE DIARY OF A LIFE INTERRUPTED* (1994). See also FAYE RESNICK, *SHATTERED* (1995) (second book recounting conversations with Simpson and alleging that he threatened to kill Nicole).

10. See Ruling on Defendant's In Limine Motion To Exclude Evidence of Domestic Discard, *People v. Simpson*, No. BA 097211, 1995 WL 21768, at *5 (Cal. Super. Ct. L.A. County Jan. 18, 1995) (indicating that expected testimony by William Thibodeau describing comment by Simpson would be admitted).

11. These include Albert Aguilera, who would have reported an incident at Victoria beach in 1986 or 1987. See Official Transcript, Motion in Limine - 1101(B), *People v. Simpson*, No. BA 097211, 1995 WL 9266, at *26, 27 (Cal. Super. Ct. L.A.

Finally, the following items seem worth noting. There are reports that tend to exonerate Mark Fuhrman from the worst of the allegations against him, and a threatened perjury prosecution has not materialized.¹² There are reports that bolster the defense contention that police mishandled the investigation.¹³ And Simpson himself continues to comment on aspects of the case in many different venues. His deposition in the Goldman civil suit was taken in several sessions ending in February 1996, and he has made numerous public appearances through the early summer of 1996, taking the offensive with claims of biased news coverage and remarkable claims that Nicole Brown Simpson was *herself* abusive toward *him*.¹⁴

County Jan. 11, 1995) (description by Mr. Bodin), and Alfred Acosta, a limousine driver who reportedly would have testified to an incident in 1988 or 1989 in which Simpson "backhanded" Nicole in the mouth while riding in the car, *see* People's Response to Defendant's Motion to Exclude Evidence of Domestic Violence, *People v. Simpson*, No. BA 097211, 1994 WL 737964, at *11 (Cal. Super. Ct. L.A. County Dec. 15, 1994) (describing Acosta's expected testimony); Official Transcript, Examination of Richard Rubin, *People v. Simpson*, No. BA 097211, 1995 WL 366155, at *46 (Cal. Super. Ct. L.A. County June 16, 1995) (Darden says Acosta is on the way to court, but the elevator system is so slow that it will take 15 minutes for him to get there).

12. *See* Greg Krikorian, *Co-Workers Paint Different Portrait of Mark Fuhrman*, L.A. TIMES, Nov. 8, 1995, at 1 (reporting that black and Latino colleagues on the force considered Fuhrman to be a good officer and did not think he was racist); Greg Krikorian, *Review of 35 Fuhrman Cases Reveals No Racism*, L.A. TIMES, Jan. 19, 1996, at B3 (preliminary investigation into cases handled by Fuhrman turns up no indication of tampering with evidence). A perjury prosecution would be difficult: Perjury requires false testimony on a "material" point, but the State (even after learning that Fuhrman apparently lied in claiming he had not used the "n-word" in the previous ten years) did not withdraw Fuhrman's testimony from the Simpson trial, thus apparently viewing his perjury as going only to some collateral or nonmaterial point. Mark Fuhrman, however, has invoked his privilege against self-incrimination in a deposition taken in the Goldman suit. *See Official Business: Fuhrman Takes Fifth When Questioned About Simpson Case*, L.A. TIMES, Apr. 30, 1996, at 5.

13. *See* Stephanie Simon, *Simpson Detective Deviated from Usual Practice, Expert Testifies*, L.A. TIMES, June 7, 1996, at 1 (describing deposition testimony by supervising criminalist Gary L. Siglar indicating that Philip Vannatter's handling of the blood sample did not comply with standard procedures).

14. On the Simpson deposition, *see* Henry Weinstein & Tim Rutten, *Deposition of Simpson Shows Squabbling*, L.A. TIMES, Mar. 6, 1996, at 1; *In His Own Words; The Simpson Deposition*, L.A. TIMES, Feb. 3, 1996, at 17. On May 15, 1996, Simpson appeared at the Oxford Union, a debating society. *See* William D. Montalbano, *British Polite to Simpson but Skeptical*, L.A. TIMES, May 15, 1996, at 1. On May 20, he appeared at El Camino College in Los Angeles. *See* Eric Slater & Stephanie Simon, *Simpson Takes a Run at Media*, L.A. TIMES, May 21, 1996, at B1 (describing Simpson speech criticizing media coverage).

III. PREVIEW OF THE ESSAYS

A. *Proving the Case*

The Simpson trial raised important issues in the use of character evidence. The case presented problems of interpreting the past conduct of an intimate companion (Simpson himself) in deciding whether that conduct indicates he committed murder, and the past conduct of an investigating officer (Mark Fuhrman) in deciding whether *that* conduct indicates he might have framed the defendant. In the opening essay of this Symposium issue, Professor Roger Park examines and contrasts these strands of proof. Much evidence of domestic abuse by O.J. Simpson was approved in a pretrial ruling, but much proof of Fuhrman's misconduct was excluded. Park examines the reasons behind our mistrust and caution in admitting such evidence, arguing that fears over jury nullification (misusing evidence to reach results in conflict with the law) can justify excluding what we normally call "character" evidence. In so doing, Park develops the crucial point that the rulings on the Fuhrman evidence could be justified by the lack of *specific* proof that he planted the glove found at Simpson's residence. In his comment on Professor Park's article, Professor Craig Callen invokes communication theory in an imaginative way to argue that the mere fact that evidence is admitted tells jurors that they can properly draw the conclusions such evidence suggests, reinforcing Park's argument that care was warranted in the case of generalized proof relating to Fuhrman's character.

In a sense, "syndrome evidence" is the shoe that *didn't* drop in the Simpson case. Both sides threatened to use expert testimony—the defense spoke of calling Dr. Lenore Walker and the prosecution actually put Dr. Donald Dutton on the stand in a preliminary hearing. But in the end, neither side offered such testimony. Hence the Simpson trial invites consideration of the question whether experts should be allowed to give syndrome evidence in this setting. In her penetrating essay, Professor Myrna Raeder points out that cases like *Simpson* cast the problem of syndrome evidence in an unusual mold. We are not dealing with the familiar spousal assault or murder case in which a "battered woman" is the defendant and the question is what *she* did. In *Simpson*, the "battered woman" was the murder victim, and the question was what the "battering man" did. Raeder

argues that juries need help here, and that such help requires study and development in understanding the behavior of battering men. She also argues that the absence of rigorous scientific data on battering relationships may be less important in light of the "overwhelming quantity of anecdotal evidence" being gathered.

In response, Professor David Faigman suggests that the legal profession itself may be falling prey to "syndromic lawyer syndrome" in its haste to adopt fictional ideas (he refers to a patricidal "Smerdyakov syndrome" based on Dostoyevsky's *Brothers Karamazov*). Importantly, Faigman argues that social science *can* satisfy rigorous standards, urges that anecdotal evidence cannot substitute for scientific (testable) proof, and suggests that today's knowledge about batterers and battered victims does not satisfy scientific standards.

The Simpson trial presented major problems in the use of DNA evidence. There is virtually no question as to the validity of the underlying theories, nor any real question whether such proof can be admitted. The problems raised by the Simpson case involve the proper handling of genetic samples, both at the crime scene and in the laboratory, the proper interpretation of test results, and the proper way of relating the significance of those tests to a lay jury.

In his essay on this subject, Professor William Thompson (who worked with the Simpson defense team) provides a careful and expert explanation of the technical difficulties and discrepancies presented by the DNA evidence. His account should be useful not only for people who could not follow or understand the issues by watching the case or reading popular accounts but also for prosecutors and criminal defenders who face similar issues every day. Thompson argues that these matters were not well explained or reported as the trial progressed but that they did provide a basis on which a reasonable jury could have rejected much of this evidence.

In the next essay, Professor Jonathan Koehler discusses problems of conveying the message of DNA evidence to the jury. Koehler urges that it is crucial to define the hypothesis on which such proof is said to bear (for instance, that the defendant was the source of the genetic markers found at the scene versus the hypothesis that he is guilty of the crime), and that laboratory error rates should be factored into the frequency estimates. Koehler presents the results of his own experiment suggesting

that it makes a big difference whether juries are given frequency estimates (one in a thousand people have such markers) or also likelihood ratios (defendant is two hundred times more likely to be the source of the marker than someone else).

In the third essay on DNA evidence, Professor Edward Imwinkelried examines the precautions that must be taken to insure accuracy in presenting DNA evidence, agreeing with points made by Professor Thompson relating to validation studies, gathering and handling, replicate testing, and objective standards. Addressing an important question of doctrine, Imwinkelried argues that we should not embody these specific requirements into formal legal doctrines controlling admissibility, urging instead that courts should retain flexibility in this area and that the factors bearing on reliability may be treated as matters affecting weight for the jury to resolve.

B. Perceptions and Decision Making

The trial of O.J. Simpson touched raw nerves in American society. Data collected from polls taken before and after the trial showed public opinion on Simpson's guilt or innocence, and on the fairness of the trial itself, to be sharply divided, often along racial and gender lines. In his perceptive essay on racial perspectives, Professor Robert Cottrol describes the trial as a social phenomenon, predicting that this "trial of the century" will fade in significance quickly (and not linger in the American consciousness like the Salem Witch Trials). Cottrol develops the thesis that the real impact of the Simpson trial has less to do with the reactions of Howard law students than with the impact of class on justice, the effect of racial fairness in police work, and differences in the experiences of black and white Americans in the criminal justice system.

In his highly original essay, Professor Paul Campos argues that Simpson, because he could afford what few black (or white) Americans can afford, actually forced the system to do exactly what law-and-process theorists seek, which is to try the case with great care. In short, the Simpson trial was not a monster. Rather, it showed the "rule of law" in actual operation. The real challenge presented by the trial, Campos argues, is to take a close look at the interests maintained by this system, and those that are subordinated by it, and to decide whether this system serves us well.

In her trenchant look at gender perspectives, Professor Nancy Ehrenreich notes the split in reactions between women, who saw Simpson as emblematic of the problem of spousal abuse, and black Americans, who saw the trial and public reaction in terms of racial prejudice. Ehrenreich urges that this apparent dichotomy is false, arguing that themes of subordination link black Americans and women and that the feminist movement should incorporate race into its understanding of domestic violence.

In response to Ehrenreich, Dean Mimi Wesson urges that even Professor Ehrenreich's "nuanced" account of ways that the identity of the observer (male or female, black or white) affects conclusions on guilt or innocence does not explain how juries decide cases. In her immensely interesting argument, Wesson suggests that jurors seek to perform their own constructive and unique roles, looking for outcomes that are "satisfying or 'true' in a narrative sense." Wesson analogizes the situations of jurors to what novelist Robertson Davies calls *Fifth Business*, in reference to a dramatic role that is neither hero nor villain, but is nevertheless a role played by participants in a drama that is essential to a resolution of the underlying conflict.

What perspective did the jurors take in the Simpson case? Turning to this question, Professors Reid Hastie and Nancy Pennington apply their widely respected narrative model of jury decision making to the Simpson trial. They point out that prosecutors presented a single detailed narrative version of events, that the defense presented several different versions, and that in closing argument the defense suggested yet other "stories" for the jury to construct. Hastie and Pennington conclude that race likely made a difference because black Americans have larger bodies of belief and experience on the matter of police misconduct, which probably made claims about Fuhrman more plausible to the largely black jury in the Simpson case than they would have been to white jurors.

In his forceful essay, Judge Murray Richtel argues that the perspective of jurors is heavily affected by the behavior of the presiding judge. While sympathetic to the difficulties Judge Lance Ito faced in trying the Simpson case, Richtel sharply criticizes Ito's performance, arguing that he contributed to an atmosphere in the courtroom that was "not conducive to justice." Richtel contends that Judge Ito let the trial go too long and that he failed to rein in the lawyers with sanctions or otherwise, thus inviting them to turn the trial into an event. As a result, the trial

“spun out of control” and, in this most public setting, produced “a lawless verdict without due deliberation,” bringing “shame to the system.”

In his essay reflecting the experiences of an accomplished trial lawyer, Brian Morgan acknowledges that only the jurors themselves can explain what they did. But citing urban statistics that indicate high acquittal rates where juries and defendants are mostly black and noting that trial lawyers predicted in advance that a largely black jury would not convict Simpson, Morgan argues that racial bias produced the acquittal in the Simpson case. Morgan argues that until the broader problems of “poverty and hopelessness” are resolved, race will continue to play a disturbing role in criminal trials, undermining confidence in the system and demeaning the profession.

C. Reform: The System, The Police, and The Lawyers

Within days after the verdict, responsible officials suggested various reforms of the criminal justice system. Among those most often mentioned were (1) barring cameras from courtrooms, (2) curbing the use of jury consultants, (3) restricting closing arguments, and (4) blocking or regulating the ability of witnesses and participants from selling their stories or writing books about them.¹⁵ Truly outlandish suggestions also emerged, like keeping juries from learning the identities and race of defendants. The California Judicial Council declined to change its rule on cameras, which permits judges to allow or block live coverage at their discretion, but current reports indicate that throughout the state judges have uniformly denied requests to permit live courtroom coverage since the Simpson trial.¹⁶

15. See Henry Weinstein et al., *Miscalculations, Bad Luck Hurt Prosecution*, L.A. TIMES, Oct. 4, 1995, at 1 (describing proposals by Governor Wilson to ban cameras and restrict closing arguments; also quoting Ruben Lopez, as consultant to the State Assembly Judiciary Committee, predicting that legislators would consider ways to limit the role of lawyers in selecting jurors and using jury consultants; noting as well that the author of California's successful “three-strikes” initiative thought juries should not know the identities or race of defendants). See also Maura Dolan, *State Panel Puts Partial Ban on Court Cameras*, L.A. TIMES, May 18, 1996, at 1 (reporting that California Judicial Council rejected a broad ban on courtroom cameras but approved a rule forbidding the broadcast or photography of jury selection, sidebar conferences, spectators or whispering at counsel tables).

16. See *Judges Should Retain TV Option; They, Not Sacramento, Should Decide Camera-In-Court Issues*, L.A. TIMES, Feb. 14, 1996, at 8.

In his highly original essay on reforming the system, Professor Ronald Allen urges caution, arguing that sound reform must first identify the problem and determine whether change will help more than it will hurt. Emphasizing the factors that made the Simpson case unique (an attractive and wealthy defendant who posed no serious risk to the community at large), Allen argues that the American criminal justice system is a "grown" order rather than a "made" order. As such, the system is complicated rather than simple, and introducing change is likely to produce unpredictable consequences. Allen rejects the claim that the Simpson trial would have been better handled under a continental model, then discusses specific reform proposals (like limiting what defendants can spend, or changing jury selection processes).

In his response, Professor William Pizzi applies his internationalist perspective in agreeing with Allen's argument that reform would be difficult in our "grown" system of criminal justice. But Pizzi argues that our system of criminal trials suffers already from the "unintended consequences" of changes that have taken place. Pizzi contrasts the Simpson trial with a similar hypothetical trial in the English system and concludes that we have become "unsure of the proper focus" of a trial, that the English system avoids some of the excesses of the adversary model that we see in this country, and that we tolerate "extremes in advocacy" that made it hard for Judge Ito to control what unfolded in the trial.

In a pathbreaking essay on reforming the police, Professor Christopher Slobogin urges that we take steps to curb "testilying" (police witnesses testifying falsely to convict the guilty). Slobogin examines various approaches to accomplish that task, including changing police training and incentives, employing citizens during searches, and using lie detectors to test police veracity. In the end, Slobogin argues that the probable cause requirement should be changed because it forces police who fervently believe they have grounds to make an arrest or search to alter their testimony to fit unrealistic criteria.

In his careful response to Slobogin, Professor Kevin Reitz argues that we need more information and that much of the flexibility urged by Slobogin is already part of the law of the land. Reitz concludes that further alteration of the probable cause requirement to bring it more into line with existing police practices would travel a rocky road. At the very least, such

alteration would require further study, consideration of social and political issues, and court approval.

Did the Simpson lawyers misbehave by "playing the race card"? Did they invite jury nullification? Does the Simpson case mean we should tighten the rules governing lawyers in this setting? In his vigorous and thoughtful essay on this subject, Professor William Hodes argues that the Simpson lawyers did *not* misbehave. He defends their conduct and tactics even though he thinks that they *knew* Simpson killed Nicole Brown Simpson and Ron Goldman and that they persuaded the jury to engage in "jury nullification of the third kind"—acquitting despite guilt in order to send one or more messages. Hodes submits that the result in the Simpson case is the product of effective advocacy very much within the bounds of the law. And such advocacy, he contends, serves important long-term social interests, however troublesome the result in any particular case, by preserving the necessary "role differentiation" that allows ethical lawyers to provide vigorous defenses for guilty clients.

In a concluding essay reflecting her experiences as a trial and appellate judge and her strong belief in the rule of law, Justice Rebecca Love Kourlis strenuously disagrees with Professor Hodes. She argues that the Simpson lawyers did not invite jury nullification and that if they had, they would have behaved unethically. Moreover, Kourlis asserts, the defense lawyers *did* in fact behave unethically, but in other ways. Likening jury nullification to "anarchy," Kourlis argues that jurors abandon their oath if they engage in the practice and that rules restricting closing argument bar lawyers from suggesting that juries behave this way. But Justice Kourlis also argues that Johnny Cochran violated ethical norms by emphasizing his "personal association" with the jury, by expressing his personal opinions about witness credibility, and by appealing to "sympathies and biases" when he invited jurors "to identify with Simpson as an African American man in a racist society."

My task is done, and you readers now have the opportunity to read and contemplate a truly remarkable and useful collection of essays.

