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REVIEW ESSAY

LESSONS LEARNED THE HARD WAY FROM O.J. AND "THE DREAM TEAM"*

Stephen D. Easton†

IN CONTEMPT. By Christopher A. Darden†† with Jess Walter. New York, NY: ReganBooks, An Imprint of HarperCollins Publishers, Inc. 1996. 387 pp. $26.

C'mon, admit it. You watched.

At first, you did not want to have anything to do with it. It was beneath you. After all, stripped of its Super Bowl-like hype, you knew it was merely a run of the mill criminal trial. Thousands like it happen every day.[1] You had too much dignity as a lawyer and a student of the law to have much interest in so pedestrian an event.

Every once in a while, of course, you would sneak a peak at the newspaper reports or the nightly news coverage. Little by little, hard as you tried, your interest grew. Like any addiction, it seemed harmless at first, then snuck up on you. After a while, you were hooked.

Who can blame you? You certainly were not alone. The case of *The People of the State of California v. Orenthal James Simpson* had everything that Americans crave in entertainment:[2] glamour,[3] (failed) romance,[4] sex,[5] vio-

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* The news media bestowed this nickname on the Simpson defense attorneys shortly after the murders and treated the defense team with awe from that point forward. *See, e.g.*, pp. 178, 214-15.

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1. *See* LLOYD E. MOORE, THE JURY: TOOL OF KINGS, PALLADIUM OF LIBERTY 190 (2d ed. 1988).

2. *See* Kenneth Jost, *The Jury System*, 5 CQ RESEARCHER 993, 1007 (1995) ("The case had all the

lence,[6] drugs,[7] blood,[8] outrageous characters,[9] bumbling police officers,[10] celebrities,[11] rage,[12] high tech science,[13] sports,[14] cars,[15] invasions of privacy,[16] lust,[17] and lots of money.[18] It was incredible[19] and hypnotic.[20] In journalistic terms, it was a huge story.[21] In this era of incredibly short attention spans, we were fascinated by it for months.

Now that it is over, we would prefer to forget that it ever happened. Ignoring such a widely watched event would be a mistake for lawyers, legal scholars, social scientists, and judges, however. The "trial of the century" was the public's window to the world of jury trials. If we look carefully, there is much for us to learn.[22]

Because it is in losing that trial attorneys learn, not in winning,[23] *Simpson* prosecutor Christopher Darden has much to teach us. He learned, and learned

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elements of pulp fiction. . . . ").

3. *See* pp. 357-58.

4. *See* pp. 332, 365.

5. *See* p. 216.

6. *See, e.g.*, pp. 231, 330-33, 362-63. Following an unfortunate trend in modern American entertainment, the categories of sex and violence overlapped considerably in the *Simpson* case. *See* p. 216.

7. *See* p. 331. *See also* Henry Louis Gates, Jr., *Thirteen Ways of Looking at a Black Man*, THE NEW YORKER, Oct. 23, 1995, at 56.

8. *See* p. 134 (describing crime scene photographs showing "Goldman slumped against the wall, his jeans tie-dyed with blood, and Nicole lying at the bottom of the stairs, her hair matted in a deep, red slick. I had never seen so much blood.").

9. The cast of characters included a porn actress, *see* pp. 153, 237; the unforgettable Kato Kaelin, who had no apparent job and lived with O.J. Simpson, *see* pp. 297-98; the lead prosecutor's bitter ex-husband, *see* pp. 253-55; and an ex-Marine body builder and aspiring actor whose recollection was based upon things that came to him in a dream, *see* p. 286. As Darden notes, "[W]ho wasn't [an aspiring actor] in this case?" P. 286.

10. *See* pp. 136, 138-39, 244, 300, 309. *See also* Randall Kennedy, *After the Cheers*, THE NEW REPUBLIC, Oct. 23, 1995, at 14 (recognizing that the "police investigators displayed remarkable incompetence").

11. *See* p. 358. *See also* Jost, *supra* note 2, at 1007 (noting the presence of a celebrity defendant). As Darden ruefully notes, celebrity is everything in America, or at least in Los Angeles.

> I'd tried nineteen murder cases without an acquittal. I'd tried gang cases and gone after racist and excessively violent cops. But if you slog in L.A. and haven't worked a single celebrity case, people start to wonder if you've ever really done anything. In the L.A. legal community, unless you can get rappers off murder charges or convict Zsa Zsa Gabor of slapping a cop, you aren't much of a lawyer.

P. 129.

12. *See* pp. 184, 216-17, 366-67.

13. *See* pp. 315-17.

14. *See* p. 40.

15. *See* pp. 127-28, 362.

16. *See* pp. 255-57.

17. *See* p. 236.

18. *See* p. 243. *See also* Jost, *supra* note 2, at 1007 (noting the "battery of high-priced defense lawyers").

19. *See* p. 127.

20. *See* p. 127.

21. *See* p. 128.

22. There are few lawyers in America who have not been asked repeatedly, by non-attorney friends, relatives, and colleagues, "What did you think of the O.J. trial?" *See* pp. 127-28 (Even before Darden became involved in the case, his friends called "from all over the country" to talk about it.) "Not much" is a tempting, but insufficient answer. *Cf.* p 128 ("But I was . . . exhausted and confused, a feeling I will always associate with this case.").

23. An attorney who loses a trial reviews every move made during the trial to identify mistakes that were made. *See infra* notes 258-61 and accompanying text. Given the limitations of human nature, this painstaking self-criticism is impossible after a trial victory. Mistakes made by ultimately victorious trial attorneys tend to fade from the memory in the glow of praise and self-congratulation. *See infra* note 284 and accompanying text.

the hard way, during the ordeal of the *Simpson* trial. His inside account of the trial offers valuable lessons for those willing to peruse and ponder it carefully.

Darden's book is not for everyone. It is written not in the flowing and well-structured language of the university literature course, but in the earthy and often profane tongue of the police station and prosecutor's office.[24] It is sometimes inconsistent.[25] It is not in any respect ennobling to the legal profession or the court system. Instead, it is highly critical of lawyers,[26] judges,[27] the legal system,[28] and for good measure, the media.[29]

Most importantly, those looking for an unbiased account of "the trial of the century" will have to look elsewhere. Darden's book is intensely personal, and therefore decidedly biased.[30]

The bias inherent in Darden's review of the case does not reduce its credibility, however. To the contrary, the frankness of Darden's report adds to its credibility. Darden does not take the familiar tact of the trial attorney who rationalizes a losing performance by claiming that the evidence was weak and the case was therefore unwinnable. Instead, he candidly admits that the evidence at his disposal was overwhelming,[31] and confesses that his own errors contributed to the prosecution's defeat.[32]

What emerges from Darden's tract is a biased, but nonetheless credible, account by an experienced attorney who is deeply embittered with the trial and the justice system.[33] It is not a pretty sight, but it is a valuable source of inside knowledge from a graduate of the school of hard knocks that is the American

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24. *See, e.g.*, pp. 161, 183, 197, 199, 216, 243, 253, 285, 288, 350, 378.

25. At one point Darden insists that a second trial would be pointless. *See* p. 346. Yet later, while describing his preparation for closing argument, he claims that his only hope was to convince a few jurors to hold out for a guilty verdict and hang the jury "to give some other prosecutor a chance with the case." P. 353.

Darden also objects to differential treatment of celebrities, but nonetheless professes allegiance to a prosecutor's office policy requiring "huge" trials (presumably including those involving celebrities) to be tried in the downtown courts building rather than in courthouses serving outlying areas. *See infra* note 116.

26. *See, e.g.*, pp. 214-15, 282, 288.

27. *See infra* note 135.

28. *See, e.g.*, pp. 250, 277, 350

29. *See, e.g.*, pp. 10, 12, 236-37.

30. Like Darden, this reviewer cannot claim to be unbiased. The observations in this review are undoubtedly colored by the reviewer's experience as a trial attorney and a prosecutor, including experience in trying and supervising the trials of stabbing homicides and other violent felonies. This reviewer served as United States Attorney for the District of North Dakota. In the District of North Dakota and a few other federal judicial districts, the United States Attorney's office is responsible for prosecuting violations of the Indian Major Crimes Act occurring in "Indian country" within the judicial district. *See* Stephen D. Easton, *Native American Crime Victims Deserve Justice: A Response to Jensen and Rosenquist*, 69 N.D. L. REV. 939, 945-48 (1993). The Indian Major Crimes Act offenses are murder, manslaughter, kidnapping, maiming, rape, other specified sexual abuse crimes, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and theft. *See* Indian Major Crimes Act, ch. 645, 62 Stat. 758 (1948) (codified as amended at 18 U.S.C. § 1153 (1994)).

31. See *infra* Part I. Darden even admits that one prominent former prosecutor stated that the District Attorney's office "could throw away 80 percent of [the] evidence and still get a conviction." P. 318 (citing Vincent Bugliosi, the Charles Manson family prosecutor).

32. Darden confesses that he not only came up with the idea that resulted in the prosecution's worst moment at trial (having Simpson try on the glove), he also had to convince the reluctant lead prosecutor to let him use this demonstration. *See infra* note 215 and accompanying text.

33. *See infra* Part III.A.

jury trial. Both the lessons the book teaches and the questions it leaves unresolved are disturbing.

I. OVERWHELMING EVIDENCE BUT LESS THAN FOUR HOURS TO ACQUITTAL[34]

Two conflicting realities emerge from any review of the *Simpson* trial, including Darden's insider account: the overwhelming evidence pointing to Simpson as the killer and the jury's rapid not guilty verdict. The lessons and unanswered questions emerge from the clash of these two seemingly inconsistent realities.

Both the variety and the volume of evidence against Simpson were staggering.[35] Before June 12, 1994, he repeatedly threatened to kill his ex-wife and told her that he could get away with it.[36] Nicole Simpson told police that O.J. Simpson was going to kill her.[37] She had good cause for this belief. In the years before the murders, there were over fifty separate incidents of "abuse, manipulation, and threats by Simpson."[38] His Bronco was missing for more than an hour around the time of the killing.[39] He had no alibi evidence.[40] A limited edition glove at his home matched the one at the murder scene.[41] Hair and fiber evidence tied Simpson to the crimes.[42] At his ex-wife's funeral, he stood over her coffin and said, "'I'm sorry.'"[43] Five days after the murder, Simpson wrote a supposed suicide note[44] that seemed to include an apology to the family of one of the victims.[45]

The blood evidence, standing alone, was devastating.[46] DNA and conventional serology tests established the identity of blood beyond any significant

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34. *See* p. 10; David Margolick, *Jurors Are Out for Less Than Four Hours*, N.Y. TIMES, Oct. 3, 1995, at A1.

35. *See* Jeffrey Toobin, *A Horrible Human Event*, THE NEW YORKER, Oct. 23, 1995, at 40. "The case against Simpson was simply overwhelming. When we said otherwise, we lied to the audience that trusted us." *Id.* at 46. Even in the days just after the murders, "[t]here was a ton of evidence, an unreal amount of evidence." P. 124.

36. *See* pp. 4, 217. "Simpson told friend Bill Thobedeau he knew of a secret way to Nicole Simpson's house through a back alley and 'sometimes she doesn't even know I'm here. . . . '" P. 217.

37. *See* pp. 231, 363.

38. P. 217. *See also* pp. 244-45, 364-65 (discussing previous incidents of abuse by Simpson).

39. *See* pp. 165, 298.

40. *See* p. 298. Although defense attorney Johnnie Cochran's opening statement suggested that alibi evidence would be presented, the defense did not deliver on this promise. *See infra* note 129 and accompanying text.

41. *See* pp. 165, 222, 316, 321-22.

42. *See* pp. 222, 316.

43. P. 217.

44. As Darden queried, why would an innocent man write a suicide note or feel compelled to consider suicide? *See* pp. 126, 135.

45. Simpson's note said, "'I'm sorry for the Goldman Family.'" P. 126.

46. *See* pp. 165, 316.

> When these two [DNA] witnesses were done, we had presented a trail of evidence as conclusive as a videotape of Simpson committing the murders. More conclusive, in fact. It would have been more likely for a person who looked exactly like Simpson to show up on videotape than for the blood to have been from someone else.

P. 316.

probability of a mismatch.[47] Simpson had a cut on the middle finger of his left hand,[48] and his blood was at his ex-wife's condo.[49] His ex-wife's blood was in his Bronco[50] and on the socks in his house.[51] The blood of Ron Goldman, a person he had never met before the night of the murders,[52] was also in his Bronco.[53] Goldman's blood was also on the glove at O.J. Simpson's house.[54] Bloody shoeprints matched the exact size and unusual style of Simpson's shoes.[55]

As in any case, not all of the evidence was admitted at the trial.[56] With the exception of the domestic violence evidence, which was pared substantially as a result of a court ruling,[57] however, most of the prosecution's evidence did get to the jury.[58] Darden summarizes the admitted evidence succinctly, "[M]y side was simple: If your blood is tracked all over the scene and the victim's blood is all over your vehicle, if you have motive and opportunity, if there is no way you could have been set up, you are a murderer."[59] The admitted scientific evidence from three separate sites (Nicole Simpson's condo, O.J. Simpson's Bronco, and O.J. Simpson's home) pointed to Simpson.[60]

In stark contrast to this mountain of evidence against Simpson, the defense failed to attempt anything more than conjecture about how Nicole Brown Simpson and Ron Goldman died. The Dream Team did present an explanation

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47. The probabilities established by DNA tests were astounding. According to the prosecution witnesses, the chances that various drops of blood were from someone other than the person identified were one in 21 billion for Nicole Simpson, one in 41 billion for Ron Goldman, and one in 170 million for O.J. Simpson. *See* pp. 316, 318.

The DNA evidence was presented by Cellmark Diagnostics Laboratory of Maryland, "the preeminent DNA lab in the country." P. 315. With the blood from three persons at three different sites, Darden convincingly argues, "Never in our legal system has so much blood and DNA evidence been amassed against one defendant." P. 318.

In response to suggestions that contamination might have somehow influenced the DNA test results, Darden notes that tests were done at separate labs. *See* p. 316.

48. *See* p. 222.

49. *See* pp. 165, 222, 316.

50. *See* pp. 165, 222, 316.

51. *See* p. 316.

52. *See* p. 222

53. *See* pp. 165, 222, 316.

54. *See* pp. 165, 222, 316.

55. *See* pp. 165, 222. The bloody shoe prints were from a $160 pair of Bruno Maglis. *See* p. 321. "In all, only *three hundred pairs* of that particular shoe were sold in size 12." P. 321.

56. Evidence that the prosecution chose not to attempt to introduce included: statements from Nicole Simpson's friend Faye Resnick, confirmed by her ex-boyfriend, that Simpson told her that he would kill Nicole Simpson if he found her with another man, *see* p. 236; a witness' observation of Simpson running a red light near Nicole Simpson's house shortly after the murders, *see* p. 236; and evidence of Simpson's alleged attempted escape at the time arranged for his voluntary surrender to law enforcement authorities, *see* pp. 329-30.

In several instances, the prosecution chose not to try to use otherwise helpful evidence, because witnesses had sold their stories to news media outlets of varying reputes. *See* p. 237 ("Our case was being sold out from under us, a C-note at a time.").

Other evidence was excluded by the court. For example, a sustained hearsay objection excluded evidence that Nicole Simpson had called a battered women's shelter four days before her death and reported that her husband threatened to kill her. *See* pp. 330-31.

57. *See* p. 218.

58. *See* p. 222.

59. P. 190.

60. *See* p. 311.

that is currently popular among the defense bar in stabbing murders, i.e., "some drug dealer must have done it."[61] No evidence of any specific drug dealer was presented, however. Instead, with the court's acquiescence in questions calling for speculation, the defense's cross-examination of police witnesses established only that it was "possible" that a drug dealer killed the two victims.[62] The defense did not explain why a drug dealer, who would ordinarily want to minimize his time at the scene of the crime and therefore minimize his exposure to apprehension, would kill in such a savage and time consuming fashion.[63]

Of course, the defendant does not have to present any evidence in a criminal trial, because the prosecution has the burden of proving its case beyond a reasonable doubt. When the prosecution presents significant evidence of guilt, however, few criminal defense attorneys are comfortable relying solely on the reasonable doubt standard. Most criminal defense attorneys facing substantial evidence of guilt offer evidence establishing an alternative explanation for the crime.[64] In the *Simpson* case, the defense's decision to forego any significant evidence of an alternative explanation for the murders underscores the conclusion that the trial was not about the evidence or the issue of who committed the murders.

For many, the prosecution's monumental evidence and the defense's failure to present any credible evidence of an alternate explanation established that Simpson killed Nicole Brown Simpson and Ron Goldman.[65] Darden himself made sure that he had no doubts before he agreed to take the case.[66] He concluded that it was the strongest murder case he ever prosecuted.[67] Many trial

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61. *See* p. 241. The mysterious unidentified drug dealer defense to a domestic violence stabbing homicide is not an unfamiliar one to this reviewer. *See* Janell Cole, *Jury Convicts Woman of Killing Roommate*, BISMARCK (N.D.) TRIB., May 23, 1991, at 1A.

The current popularity of this defense may spring from its added benefits of demonizing the victim and making evidence of the victim's drug abuse relevant and admissible. Defense attorneys often seek to divert the jury's attention from the issue of whether the defendant committed the crime charged. *See infra* notes 182-87 and accompanying text. The rogue drug dealer defense fits this strategy well, because it can focus the jury's attention on the victim's criminal behavior.

62. *See* Toobin, *supra* note 35, at 42-43.

63. *Cf.* pp. 360-61 (In final argument, prosecutor Marcia Clark argued, "'These are not efficient murders. These are murders that are really slaughters. . . . [T]hey reveal a great deal about who did them. No stranger, no Colombian drug dealer.").

64. F. Lee Bailey, a member of the Dream Team, has recognized the importance of countering a strong prosecution case with evidence presented by the defense. According to Bailey, "The stronger the prosecution's case is, the greater the necessity of calling defense witnesses." F. LEE BAILEY & HENRY B. ROTHBLATT, CRIMES OF VIOLENCE: RAPE AND OTHER SEX CRIMES § 358, at 235 (1973).

65. *See, e.g.*, p. 318. *See also* Kennedy, *supra* note 10, at 14; Jacob Weisberg, *The Truth Card*, NEW YORK, Oct. 16, 1995, at 33. The twelve jurors who sat on the wrongful death civil trial are among those who have concluded that Simpson committed the murders. *See* Elaine Laferty, *The Inside Story of How O.J. Lost*, TIME, Feb. 17, 1997, at 29, 36.

If it is not yet apparent, it should be noted that this reviewer is among the observers who are of the opinion that Simpson murdered his ex-wife and Ron Goldman. Based upon the reviewer's experience as the chief prosecutor in a federal judicial district with a significant violent crime caseload, *see supra* note 30, the reviewer also shares the view that the evidence against Simpson was more convincing than the evidence in almost any known criminal case, *see infra* notes 67-69 and accompanying text. The *Simpson* prosecutors' evidence was certainly more convincing than the evidence in the vast majority of criminal cases that resulted in convictions during the reviewer's tenure as United States Attorney for the District of North Dakota.

66. *See* p. 81.

67. *See* p. 12. This was not the uneducated opinion of an inexperienced trial attorney. Prior to the

observers[68] noted that the evidence against Simpson was far more convincing than the evidence that had resulted in the convictions of thousands of other criminal defendants.[69]

Even for those who choose to believe that this evidence was not sufficient to prove Simpson's guilt beyond a reasonable doubt,[70] it surely seemed sufficient to convince at least one juror to mull over the nine months worth of evidence for more than four hours. The astonishingly quick not guilty verdict established that, for whatever reason, neither the evidence nor the issue of whether Simpson committed the murders was foremost in the jurors' minds.

II. LESSONS

The realization that the jury's decision resulted from something other than a careful review of the evidence forces any student of criminal trials to ponder what really happened in Department 103 of the Central Courts Building.[71] A careful review of Darden's inside observations leads to several lessons that are, in various combinations, obvious, enlightening, subtle, contra intuitive, and all too often troubling for the trial attorney, the legal scholar, and any other fan of the justice system or the country it serves.

A. Race still matters in America

The most widely recognized lesson from the *Simpson* trial is also the saddest. Although the trial was broadcast in living color, many Americans still cannot see beyond two colors, black[72] and white.[73] Much as we would like to will away its presence and power by ignoring it, race still matters in America.[74]

Simpson case, Darden won convictions in the nineteen other murder cases that he tried. *See* pp. 80, 129.

68. Even some who support the jury's not guilty verdict believe that there was sufficient evidence for a guilty verdict. *See* John G. Dunne, *The Slam Dunk*, THE NEW YORKER, April 15, 1996, at 40.

69. *See, e.g.*, Jimmy Breslin, *The Bad News*, ESQUIRE, Dec. 1995, at 108. *See* Toobin, *supra* note 35, at 48. Darden shares this view: "The prisons were full of people convicted on half the evidence we had against Simpson." P. 165. He also opined:

> [T]he Los Angeles County District Attorney's Office presented perhaps the most impressive scientific evidence ever offered in a criminal trial. For six weeks, we presented a solid and high wall of physical evidence: blood, hair, and fiber evidence from *three* separate sites—and showed that it would be impossible to fabricate or plant.

P. 315.

70. Given the sheer volume of the commentary about the *Simpson* verdict, it is perhaps not surprising that the commentators include several who believe that the state failed to prove its case beyond a reasonable doubt. *See* Alexander Cockburn, *Beat the Devil*, THE NATION, Oct. 30, 1995, at 491; Stanley Crouch, *The Good News*, ESQUIRE, Dec. 1995, at 109.

71. *See* p. 369.

72. Following the lead of the reviewed author, *see, e.g.*, pp. 11-13, 172, 201-02, this review will use the terms black and African American interchangeably.

73. Darden blames Simpson defense attorney Johnnie Cochran, who is also black, for solidifying the importance of race in the case by "mak[ing] it painfully clear that there were going to be two sides in this case, not prosecution and defense, but black and white." P. 172.

74. Gender apparently still matters also, even in courtrooms and even among judges. *See* p. 258.

One hundred years ago, the United States Supreme Court issued perhaps its most infamous and reviled decision, *Plessy v. Ferguson.*[75] The Court opined, "If the two races are to meet on terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals."[76] Long before the jury accepted Simpson defense attorney Johnnie Cochran's closing argument invitation to send a message to racist cops,[77] the *Simpson* case made it clear that white and black America are still woefully short of a mutual respect for each other's merits.[78]

From the beginning,[79] African Americans and whites reacted differently to the *Simpson* case.[80] The percentage of African Americans who believed Simpson committed the murders has been an astonishing forty percent or more lower than the percentage of white Americans who reached this conclusion.[81] Given the widespread coverage of every event in the *Simpson* case, blacks and whites reached these starkly different conclusions based upon the same "evidence." Therefore, the widely divergent conclusions of African and non-African

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75. 163 U.S. 537 (1896).

76. *Id.* at 551. Although this observation came from an all-white United States Supreme Court, prominent blacks also believed that race was a pervasive issue in turn of the century America. In 1900, W.E.B. DuBois reported, "'The problem of the 20th Century is the problem of the color line.'" Bob Levin, *The real America, in black and white*, MACLEAN'S, Oct. 16, 1995, at 47 (quoting W.E.B. DuBois).

77. *See* pp. 369, 381. *See also* Jost, *supra* note 2, at 1008 (discussing defense attorney Johnnie Cochran's final argument to the jury).

78. *See* Jonathan Alter, *White and Blue*, NEWSWEEK, Oct. 16, 1995, at 67 ("As early as the first polls, the Simpson case was perceived as racial—and perception became reality."); Breslin, *supra* note 69, at 114 ("The whites had Simpson guilty before he was even arrested. The blacks had him acquitted before anybody ever heard of Mark Fuhrman."); Gates, *supra* note 7, at 56 (quoting musician Wynton Marsalis' admission, "'You want your side to win, whatever the side is going to be. And the thing is, we're still at a point in our national history where we look at each other as sides.'").

79. The "beginning" (or at least the end of the beginning) in the *Simpson* case was the slow "chase" of the white Bronco through the freeways of Los Angeles. *See* pp. 127-28. That unreal spectacle captured the attention of a nation. *See* pp. 127-28. An amazing 95 million viewers watched the "action." Cleveland Horton, *"Ghoul Factor" Fuels Media Fire*, ADVERTISING AGE, June 27, 1994, at 50; *The Simpson Case by the Numbers*, N.Y. TIMES, Oct. 2, 1994, at E2. From those moments on, the *Simpson* case was the primary news and entertainment event in America. *See, e.g.*, Gates, *supra* note 7, at 56; Joe Mandese & Jeff Jensen, *"Trial of the Century," Break of a Lifetime*, ADVERTISING AGE, Oct. 9, 1995, at 2; *Simpson on TV in 1 of 4 Homes*, N.Y. TIMES, July 2, 1994, at L20.

80. The expert commentators (who Darden derisively refers to as "armchair quarterbacks—book lawyers who'd spent not more than a few hours in the courtroom themselves, if that much") who reviewed opening statements talked almost exclusively about Darden's race. Pp. 222-23. As Darden noted, "No one, it seemed, could see past race." P. 222.

81. *See* Janet Elder, *Trial Leaves Public Split on Racial Lines*, N.Y. TIMES, Oct. 2, 1995, at B9.

> In a recent CBS News Poll, 64 percent of whites who were questioned said Mr. Simpson was probably guilty of the crimes with which he has been charged while 11 percent said he was probably not guilty. Among blacks, 12 percent said he was probably guilty and 59 percent said he was probably not guilty.

Id. See also Levin, *supra* note 76 ("[P]olls showed a stark 40-point gap between whites and blacks on Simpson's guilt or innocence."); David W. Moore, *Blacks and Whites Say Treatment of O.J. Simpson Has Been Fair*, THE GALLUP POLL MONTHLY, July 1994, at 2.

> About two-thirds of whites (68 percent) say the charges against Simpson are either 'probably' or 'definitely' true, compared with only 24 percent of blacks who feel that way. Similarly, 60 percent of blacks feel the charges are 'probably' or 'definitely' not true, while only 15 percent of whites feel that way.

Id. See also Mark Whitaker, *Whites v. Blacks*, NEWSWEEK, Oct. 16, 1995, at 28 (eighty-five percent of blacks and thirty-two percent of whites agreed with the verdict). Blacks were much less likely than whites to believe the prosecution's witnesses, including those witnesses who were black. *See* p. 233.

Americans must have resulted from something other than the quality and quantity of that evidence.

Darden's experiences as a black child,[82] adolescent,[83] youth,[84] college student,[85] law student,[86] and prosecutor provide valuable insights regarding the source of the divergent views of black and white America. Although Darden longs for a world where race is insignificant,[87] he realizes that contemporary America is not such a place.[88]

This insight is an important one for those in white America who, as members of the majority, forget both the omnipotence and ubiquitousness of race and racism.[89] Many white Americans were stunned both by the quick not guilty verdict and by the positive reaction the verdict received among many black Americans.[90] In a rare poetic moment, Darden discussed the inability of many white Americans to understand the perspective of African Americans:

> People in the mainstream of white society don't always realize there are other streams, some just as deep and fast-moving, rivers of thought that aren't often reflected in *Time* magazine and on the *CBS Evening News*. In black barbershops, black taverns, and black Baptist churches, there were people very much in their own mainstream who didn't believe for a minute that O.J. Simpson was guilty. These weren't criminals or uneducated people. These were people who wondered why successful black men were so often targeted by law enforcement. They didn't wonder why Washington, D.C., mayor Marion Barry would smoke crack while in office; they wondered why agents would set up a sting to catch him. They didn't wonder about all the evidence gathered against Simpson; they wondered why police were so eager to suspect him.[91]

Unlike the whites in the mainstream, those in the minority rarely have the luxury of forgetting about race. African Americans are constantly forced to factor their race into the small and large decisions in their lives.[92] Even those like Darden, who consciously strive to base their decisions on factors other than race,[93] cannot completely escape its clutches when making decisions.[94]

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82. *See* pp. 206-07.

83. The theoretically integrated junior high school Darden attended "was almost as segregated as if we'd been in different buildings." P. 29.

84. In high school, Darden was a self-described "'baby Panther'" who believed, "The white man was a racist oppressor. The government conspired to jail and kill the brothers who stood up to it." P. 40.

85. *See* pp. 53-54, 56.

86. *See* p. 65.

87. *See* p. 43.

88. *See infra* note 94.

89. Darden receives many letters from Americans asking him to explain race and its effect on the Simpson trial. *See* pp. 377-78.

90. *See* Alter, *supra* note 78 at 67 ("[T]he basic white frustration remains: that race trumps spousal abuse, factual consistency and just about anything else."); Breslin, *supra* note 69, at 111; Crouch, *supra* note 70, at 112; Gates, *supra*, note 7, at 56; Levin, *supra* note 76; Whitaker, *supra* note 81, at 28, 30-31.

91. P. 173. *See also* Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995).

92. *See* pp. 172, 265-66.

93. *See* pp. 30, 41, 169, 189.

94. *See* pp. 41, 86, 173, 234. Darden's struggle over whether he should take the *Simpson* case serves as an example of the influence of race in the decisions of African Americans, even those who work overtime to

Of course, the pervasive effect of race results from far more than race's effect on internal thought processes. For centuries, blacks and whites have been treated differently in America.[95] Despite our hopes, our efforts, and our rhetoric,[96] blacks and whites[97] are still treated differently.[98] While this differential treatment extends across a wide spectrum of modern American life, there is no single sphere where the treatment is any more divergent than in the relationship between citizens and law enforcement.[99] African Americans, particularly males and even more particularly young males, are stopped, questioned, harassed, and even beaten with far greater frequency than white Americans.[100] As a result,

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try to make non-race based decisions. Darden desperately wanted to make this decision based upon his perceived duties as a prosecutor, without considering his race. *See* pp. 161-62. He deeply resents those who believe that he was added to the prosecution's trial team because he is black. *See* pp. 163, 223. Parts of his book seem to be an attempt to convince not just the reader, but himself, that race did not effect this decision. *See* pp. 11, 163, 169, 189. Despite his best efforts, he was not able to ignore the fact that some African Americans would dislike seeing a black man prosecute a black defendant in the most watched criminal trial in history. *See* p. 163. His somewhat internally inconsistent summary of the bases for his decision reflects the internal conflict of a professional who cannot completely ignore his race: "So, in the end, there was only duty: duty to the prosecutors' office, to the families of the victims, and even to the black community." P. 164. Darden notes that other black prosecutors deciding whether to take cases against black defendants now refer to this decision as the "'Darden Dilemma.'" P. 383.

95. *See, e.g.*, pp. 13, 16, 368; U.S. COMM'N ON CIVIL RIGHTS, RACIAL AND ETHNIC TENSIONS IN AMERICAN COMMUNITIES: POVERTY, INEQUALITY, AND DISCRIMINATION—A NATIONAL PERSPECTIVE (Executive Summary and Transcript of Hearing Held in Washington, D.C.) at 9 (1992); Crouch, *supra* note 70, at 113; Gates, *supra* note 7, at 56.

96. Racism is America's great national shame. *See* p. 350. As a result, we pretend it does not exist and rarely discuss it honestly and openly. *Cf.* p. 211 ("There are some things that are *too* true. Some things that we wish so badly weren't true that we don't want to hear about them.") (emphasis in original); U.S. COMM'N ON CIVIL RIGHTS, *supra* note 95, at 8-9 (section of report entitled "National Denial Concerning the State of Racial/Ethnic Relations"); Butler, *supra* note 91, at 681 n.12 ("[B]lacks and whites are unable to engage in an open discussion with each other about race.").

The Simpson trial affected Darden's view of racism and his willingness to identify it:

> As a young man, racism seemed to me a single-edged knife, one that whites used to hold blacks down. Now I see that our own racism can be as dangerous and insidious as that which we have battled for centuries. I see racism in people who purport to represent all African Americans. I see racism in a community that refuses to hold one of its own responsible. I see racism in myself. It is wrong. It has always been wrong. We cannot defeat their racism with our own; we cannot defeat bigotry by cheating justice.

P. 382.

97. This review focuses on the *Simpson* trial and therefore on the differential treatment of blacks and whites and the differing views held by blacks and whites of the criminal justice system. It should be noted, of course, that African Americans are not the sole minority group that has suffered discriminatory treatment and that African Americans are not the only persons who believe the criminal justice system is racially biased. *See* U.S. COMM'N ON CIVIL RIGHTS, *supra* note 95, at 13 (finding that "most minorities believe that the justice system is irreparably biased"). *See also* Michael Lind, *Jury Dismissed*, THE NEW REPUBLIC, Oct. 23, 1995, at 10. "[T]he jury [has been] a means by which white bigots legally lynched Indians, blacks, and Asians (or acquitted their white murderers)." *Id.*

98. *See, e.g.*, pp. 52-56, 85, 96-98; U.S. COMM'N ON CIVIL RIGHTS, *supra* note 95, at 11-13, 18; Butler, *supra* note 91.

99. This differential treatment is a phenomenon that is widely recognized by both African and non-African Americans. *See* Elder, *supra* note 81, at B9. "[H]alf of whites and more than three-quarters of blacks said the police in most big cities are generally tougher on blacks than on whites." *Id.*

100. *See* p. 97. *Cf.* U.S. COMM'N ON CIVIL RIGHTS, *supra* note 95, at 13-14 (discussing the reaction to the police beating of Rodney King); Gates, *supra* note 7, at 58; Levin, *supra* note 76; Don Terry, *Distrust Fuels Racial Divide on Justice for Simpson*, N.Y. TIMES, Oct. 2, 1995, at B9; Robert L. Woodson, *From King to Cochran*, THE NEW REPUBLIC, Oct. 23, 1995, at 13. Even as a prosecutor and law professor in his late thirties, Darden has regularly been pulled over and questioned. *See* p. 110. *Cf.* Gates, *supra* note 7, at 59. "There's a moving violation that many African-Americans know as D.W.B.: Driving While Black." *Id.*

when a police cruiser approaches a scene of trouble, it causes a far different reaction for whites (relief) than it does for blacks (fear).[101]

Differential treatment extends beyond the police to other elements of the criminal justice system. For decades, blacks have watched white juries send black defendants to the electric chair for crimes allegedly committed against whites, while whites who allegedly commit violent crimes against black victims are either acquitted or, perhaps more commonly, not prosecuted.[102] African Americans have also seen "wars" on crime that resulted in seemingly disproportional arrests and prosecutions of blacks.[103]

Years of differential treatment have not gone without effect. On the whole, whites believe that law enforcement officers tell the truth and that those prosecuted in the criminal justice system are usually guilty.[104] African Americans are far less likely to assume that either proposition is correct.[105]

Given the massively different relationship between cops and blacks, as opposed to cops and whites, the massively different reactions between blacks and whites to the *Simpson* evidence is not just understandable, but expected.[106]

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101. *See* p. 98. *See also* Elder, *supra* note 81, at B9. "Fifty-five percent of whites said they think of the police as friends while only 30 percent of blacks said the same." *Id.*

102. *See* Butler, *supra* note 91, at 695-97; Andrew Hacker, *Twelve Angry Persons*, N.Y. REV., Sept. 21, 1995, at 44; Kennedy, *supra* note 10, at 14; John Leo, *The Color of the Law*, U.S. NEWS & WORLD REP., Oct. 16, 1995, at 24; Lind, *supra* note 97, at 10; Richard Posner, *Juries on Trial*, COMMENTARY, Mar. 1995, at 49, 51; Jeffrey Toobin, *Juries on Trial*, THE NEW YORKER, Oct. 31, 1994, at 42, 47.

103. Even a hard-nosed prosecutor like Darden believes that anti-crime rhetoric can have dangerous consequences:

> You can't just toss out the kind of anti-crime rhetoric that was fashionable in the 1980s ("This is a war on crime!") without expecting some casualties. In this case, the casualty was African Americans' trust in the police and the judicial system, which was frail enough anyway. By 1995, I wasn't surprised at all that a mostly black, L.A. jury could be convinced that the police would go to supernatural extremes to frame a prominent black man. In some small way, the police were to blame for that irrationality.

P. 97.

104. *See* Frank E. Haddad, Jr., *The Opening Statement in a Criminal Case*, *in* THE BEST OF TRIAL 211, 214 (ATLA ed., 1990). "Studies have shown that the vast majority of people presume that the defendant is guilty because he is charged with the commission of a crime." *Id. See also* Butler, *supra* note 91, at 699 n.115.

105. *See* pp. 97-98. One prospective Simpson juror said that she believed "'black men get picked on quite a bit'" and that she did not know a single person who had a pleasant encounter with police. P. 167. Other jurors said that police officers lie as witnesses. *See* p. 168. Darden summarized the potential jurors:

> It was a nightmare jury pool, a stagnant, shallow pool of bitterness and anger, and I couldn't say that I was the least bit surprised. The system itself had forged this jury in Simi Valley [the site of the first Rodney King trial] and in the molten anger of a million indignities and injustices, some collective and historical, some deeply personal.

P. 168. *See also* U.S. COMM'N ON CIVIL RIGHTS, *supra* note 95, at 13 (noting that "most" members of many groups believe the criminal justice system is biased); Butler, *supra* note 91, at 699 n.115 (discussing a poll showing that seventy percent of whites and thirty-three percent of blacks believe that police generally testify truthfully); Gates *supra* note 7, at 58 (stating that "white folks trust the police and black folks don't"); Kennedy, *supra* note 10, at 14; Richard Lacayo, *Questionable Judgment*, TIME, Oct. 3, 1994, at 62, 63; Levin, *supra* note 76; Betsy Streisand, *And Justice For All?*, U.S. NEWS & WORLD REP., Oct. 9, 1995, at 47, 50 (stating that sixty percent of blacks and twenty-four percent of whites believe that police regularly frame innocent people).

106. Darden's father's evaluation of likely black reaction was succinct and at least arguably accurate: "'Black folks ain't gonna convict O.J. Simpson. . . . Black folks want two kinds of justice, like everyone else. . . . One for them and one for the other guy.'" P. 130. Research supports the elder Darden's thesis. *See* Lacayo, *supra* note 105, at 63. "Studies show that blacks and whites are both more lenient toward defendants of their own race." *Id.*

Nonetheless, it is troubling for a system that relies upon blacks and whites to determine the truth of allegations against criminal defendants. Despite countless injustices against African Americans, some blacks commit crimes and some of their victims are white.[107] It is possible, in a given case, for the cops to be racists and for the defendant to nonetheless be guilty of the crime charged. The wholly understandable reluctance of some Americans to trust law enforcement officers, prosecutors, and even judges can make it more difficult for them to make correct factual determinations as jurors.[108]

B. Many a trial is won or lost when the jury is picked (and a few are decided even earlier)

The quick not guilty verdict confirmed the importance of jury selection. The *Simpson* jury's quick rejection of the prosecution's mountain of evidence[109] suggests that it may have been biased against the prosecution. Many have argued that the case was decided when the jury was selected.[110] They

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107. *See* Kennedy, *supra* note 10, at 18. Even those who argue that African American jurors should sometimes return not guilty verdicts despite overwhelming evidence of guilt, *see infra* note 108, admit that African Americans sometimes commit crimes. *See* Butler, *supra* note 91, at 692-93.

> The problem with the liberal critique [of the criminal justice system] is that it does not adequately explain the extent of the difference between the incidence of black and white crime, especially violent crime. For example, in 1991, blacks constituted about fifty-five percent of the 18,096 people arrested for murder and non-negligent manslaughter in the United States (9924 people). One explanation the liberal critique offers for this unfortunate statistic is that the police pursue black murder suspects more aggressively than they do white murder suspects. In other words, but for discrimination, the percentage of blacks arrested for murder would be closer to their percentage of the population, roughly twelve percent. The liberal critique would attribute some portion of the additional forty-three percent of non-negligent homicide arrestees (in 1991, approximately 7781 people) to race prejudice. Ultimately, however, those assumptions strain credulity, not because many police officers are not racist, but because there is no evidence that there is a crisis of that magnitude in criminal justice. In fact, for all the faults of American law enforcement, catching the bad guys seems to be something it does rather well. The liberal critique fails to account convincingly for the incidence of black crime.

Id.

108. Some even argue that, given the criminal justice system's history of unequal treatment of African Americans, black jurors should refuse to reach guilty verdicts in some cases, even when there is no doubt in their minds that black defendants committed crimes. *See* Butler, *supra* note 91, at 679. "[I]t is the moral responsibility of black jurors to emancipate some guilty black outlaws." *Id. See also* Breslin, *supra* note 69, at 112 (discussing jury nullification—instances where juries ignore all the evidence presented at a trial and hand down a verdict they like); Kennedy, *supra* note 10, at 14-18 (discussing race relations and the administration of the criminal justice system). Those who share this view surely had to be encouraged by the eventually removed Simpson juror who racially polarized the jury, *see* pp. 303-04, and by the Simpson juror who underscored the verdict by raising his fist in the sixties black power salute as he left the courtroom, *see* p. 4. Even if such jury nullification is acceptable on some ground as a basis for remedying past and present discrimination, it detracts from any legitimacy the criminal justice system can claim as a process that, at least ostensibly, seeks the truth through jury trials.

As a prosecutor, Darden objects to any differential treatment of defendants based upon their race. *See* pp. 11, 169, 196. He believed that black jurors would look beyond past injustices against blacks and convict Simpson if the evidence was sufficient. *See* pp. 130, 133, 166, 308; *but see* p. 10, 382.

> Should I say that, above all, I was ashamed of a jury that needed just four hours to dismiss the lives of two people and a year's work, a jury that picked a dreadful time to seek an empty retribution for Rodney King and a meaningless payback for a system of bigotry, segregation, and slavery?

P. 10.

109. *See supra* Part I.

110. *See* Sandra Stencel, *Role of Race in Verdicts, Jury Selection Debated*, 5 CQ RESEARCHER 997 (ed. 1995).

may be wrong. The prosecution's case may have been doomed far earlier, when the jury pool was drawn.

Despite our machinations about seating unbiased jurors, there is no such thing as an unbiased juror. Every juror is a human being, and every human being is biased in some way.[111] As a result, trial attorneys must use their preemptory challenges effectively.[112] The goal is to identify potential jurors who are biased against the attorney's case and eliminate as many of them as possible.[113]

A trial attorney only has a limited number of preemptory strikes at his or her disposal, however.[114] If there are more negatively biased potential jurors than there are strikes, simple mathematics dictates that some negatively biased potential jurors will become members of the jury.[115]

As soon as the jury pool list was compiled for the *Simpson* trial,[116] the

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111. *See* Levin, *supra* note 76. "There is no such thing as a wholly objective juror any more than there is a wholly objective journalist." *Id.*

112. While Darden states, "Any trial lawyer will tell you that it is impossible to underestimate the importance of jury selection," p. 165, he clearly means to say that it is impossible to overestimate the importance of jury selection. Trial attorneys cannot avoid making some mistakes, even when they are writing books.

113. Trial attorneys often talk about "picking" or "selecting" a jury. *See, e.g.*, p. 165; Chris F. Denove & Edward J. Imwinkelried, *Jury Selection: An Empirical Investigation of Demographic Bias*, 19 AM. J. TRIAL ADVOC. 285, at 285 (1995). However, they actually do no such thing. As long as opposing counsel retains at least one peremptory challenge, a trial attorney cannot do anything to pick a person for the jury (i.e., to guarantee that a person will end up on the jury). Instead, trial attorneys can only guarantee that a person will not be on the jury, by exercising one of their peremptory challenges, and even this limited power disappears when the peremptory challenges are exhausted. Therefore, trial attorneys do not select juries. They "deselect" them. *See id.*

114. A trial attorney's ability to use peremptory challenges to control the make-up of the jury that is ultimately empaneled is actually limited by more than simply the finite number of peremptory challenges. In *Batson v. Kentucky*, 476 U.S. 79 (1986), the Supreme Court held that attorneys could not exercise peremptory challenges to remove all potential jurors of a given race in the absence of a race-neutral reason for exercising the challenges. In *J.E.B. v. Alabama* ex rel. *T. B.*, 114 S. Ct. 1419 (1994), the Supreme Court extended this ruling to limit the exercising of peremptory challenges on the basis of gender. The effect of *Batson* and *J.E.B.* is that the peremptory challenge is no longer a sword for the trial attorney to wield at will. *See J.E.B.*, 114 S. Ct. at 1438 (Scalia, J., dissenting).

> [M]uch damage has been done. It has been done, first and foremost, to the peremptory challenge system, which loses its character when (in order to defend against "impermissible stereotyping" claims) "reasons" for strikes must be given. The right of peremptory challenge "'is, as Blackstone says, an arbitrary and capricious right; and it must be exercised with full freedom, or it fails of its full purpose.'" The loss of the real peremptory will be felt most keenly by the criminal defendant.

Id. (citations omitted).

115. Although they are generally the most effective way to remove negatively biased jurors, peremptory challenges are, of course, not the only tool at the disposal of the trial attorney. If the trial attorney can establish a basis for removal of a potential juror for cause to the satisfaction of the judge, the trial attorney saves a peremptory strike for use on another potential juror. *See* Arne Werchick, *Method, Not Madness: Selecting Today's Jury*, *in* BEST OF TRIAL *supra* note 104, at 161, 166. Even after the jury is selected, judges sometimes remove jurors. Simpson defense attorney Johnnie Cochran "gloated when nonblack jurors were dismissed" after the start of the trial. P. 295.

116. Some suggest that the prosecution was doomed even before the jury pool was compiled. They argue that, given the importance of race in the case, the pool was bound to be biased against the prosecution as soon as the trial was venued in the downtown courthouse, where the jury pool would inevitably have more blacks than a pool drawn for a trial in the Santa Monica courthouse. *See* p. 169. Even lead prosecutor Marcia Clark implied to Darden that she was concerned that a downtown jury might not be willing to find Simpson guilty. *See* p. 133.

Darden strenuously objects to "the hypocrisy of those people who criticize Johnnie Cochran for 'playing the race card,' yet would have had us move the trial to the suburbs to avoid black jurors." P. 169. "According to policy and practice, such huge cases would always be tried in the downtown courts building because no other courthouse was big enough or even remotely prepared for such a behemoth." P. 169.

prosecution was in serious trouble. The pool contained few, if any, persons who met Darden's description of a prosecutor's ideal black or white juror—"an upper-middle-class, college-educated Republican, living in the suburbs because he had to get out of the crime-ridden city; a law-and-justice type, a person who had no use for criminals or those charged with a crime."[117] Instead, the jury panel was loaded with uneducated,[118] non-law abiding,[119] pro-O.J. Simpson,[120] domestic violence tolerant[121] people who suffered, observed, and heard about inequitable treatment[122] and who, therefore, believed that cops pick on black men and, if necessary, lie on the stand to get them locked up.[123] Despite the best efforts of the prosecutors to use their limited peremptory challenges effectively,[124] the trial jury was one of the worst that Darden had ever seen. Disregarding the jurors' race, Darden states that "these were simply not happy-looking, motivated, or successful people. From the first day, I sensed that many of them were angry at the system for various insults and injuries—twelve people lined up at the grinder with big axes."[125] The trial and its result confirmed Darden's first impression of the jury.

It is an article of faith among trial attorneys that most jurors make up their minds very early in a trial, and thereafter selectively accept and reject evidence and arguments to confirm the view they initially adopted.[126] The *Simpson* case supports this view.[127] The jurors reacted quite differently to the prosecutors',

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Darden's loyalty to this policy is admirable in light of the jury's quick verdict. Nonetheless, a policy requiring "huge" cases (presumably those including celebrities) to be tried in the downtown courthouse is inconsistent with Darden's distaste for any differential law enforcement or justice system treatment for celebrities. *See* pp. 126, 163. Furthermore, Darden's view that the case belonged downtown and that downtown jurors had a right to sit on the case ignores the fact that the murders were committed in Santa Monica, not downtown. If downtown citizens have a right to demand to decide a case involving murders in the suburbs, which cases do suburban citizens have a right to demand to decide?

117. P. 168.

118. *See* p. 167.

119. *See* p. 167.

120. *See* pp. 167-68.

121. *See* p. 168.

122. *See* p. 168.

123. *See* pp. 97, 167-68.

124. Darden, a late-comer to the prosecution's trial team, raised his concerns about the jury with fellow prosecutors Marcia Clark and Bill Hodgman. They reacted defensively, noting that those selected as trial jurors "'were the best of the lot.'" P. 167. After reviewing juror questionnaires, Darden agreed. *See* p. 167.

125. P. 165.

126. *See* David C. Johnson, *Voir Dire in the Criminal Case*, *in* BEST OF TRIAL, *supra* note 104, at 181, 181. "Social science studies indicate that 40 percent of potential jurors have reached decisions concerning the case and the advocates involved within four minutes of courtroom exposure to the trial participants, and 80 percent have made a decision before voir dire has ended." *Id. See also* Fred Wilkins, *Art of the Opening Statement*, *in* BEST OF TRIAL, *supra* note 104, at 193, 194. "[M]ost people do not like to change their minds. They'll do it, of course, for good reason, but they don't like it. It implies that there was something wrong with their decision-making process. So final decisions tend to be the same as initial ones." *Id.*

According to this common belief, opening statements are the most important events at trial (with the possible exception of jury selection). Under this theory, most jurors will have made up their minds by the time opening statements are concluded. *See* Robert G. Begam, *Opening Statement: Some Psychological Considerations*, *in* BEST OF TRIAL, *supra* note 104, at 203, 207.

127. The public reaction to the *Simpson* case also supports the theory that people generally make up their minds shortly after they first become aware of a matter and rarely change their minds. Polls taken shortly after the murder of Nicole Simpson and Ron Goldman indicated that sixty-two percent of Americans thought Simpson committed the murders and twenty-one percent believed that he did not. *See* Elder, *supra* note 81.

as opposed to the defense attorneys', arguments, evidence, and mistakes. While prospective jurors expressed admiration for members of the Simpson Dream Team, one accused a prosecutor conducting voir dire of "'pumping me as if I'm on trial or something!'"[128] The jurors presumably simply ignored the defense attorneys' failure to call alibi,[129] character,[130] and expert[131] witnesses that lead defense attorney Johnnie Cochran had promised to call in his opening statement.[132] Jurors were indifferent to gory "crime scene photos that elicited gasps from grizzled prosecutors."[133] They were unmoved by scientific evidence establishing an astronomically high probability that O.J. Simpson was involved in the murders.[134] The quick verdict confirmed that the jurors' nonverbal signals indicating support for the defense were not aberrations.[135]

After the largest, most watched televised trial in American history, fifty-seven percent of Americans thought Simpson committed the murders and eighteen percent believed that he did not. *See id.*

128. P. 168.

129. *See* pp. 225, 227. Although the defense suggested that they would prove that O.J. Simpson was chipping golf balls at his home during the 10:30 p.m. murders, no such evidence was introduced. *See* p. 241.

130. *See* p. 226.

131. *See* pp. 226-27.

132. *See* p. 367. *See also* Dunne, *supra* note 68, at 44. Trial attorneys, including Dream Team member F. Lee Bailey, generally believe that promising to present evidence in opening statement, but failing to deliver on that promise, is a serious and often fatal blow to their credibility in the eyes of the jury. *See* 1 F. LEE BAILEY & HENRY B. ROTHBLATT, DEFENDING BUSINESS AND WHITE COLLAR CRIMES § 16:27, at 353 (1984).

> The [defense] attorney [presenting the opening] should never make a statement to the jury which he may not be able to prove. The prosecution will take advantage of any rash statement. In his summation the prosecutor will point out each item the defense failed to prove. An otherwise good defense could be dissipated. Conversely, the defense should make capital out of every slip or overstatement the prosecutor makes.

Id. See also William A. Trine, *Motivating Jurors Through Opening Statements*, *in* BEST OF TRIAL, *supra* note 104, at 219, 223. "Never exaggerate, overstate, or misstate what you intend to prove. When in doubt, understate." *Id.*

Mindful of this widely followed rule of trial practice, Darden reminded the jury of the defense's failure to call promised witnesses in his portion of the closing argument. *See* p. 367. The jury's early not guilty verdict indicates that the defense's failure to deliver on its promises had little effect on the *Simpson* jury.

133. P. 303. When the first crime scene photograph was shown on a large screen in the courtroom, the jurors "looked on impassively." P. 239. When this photograph of Nicole Simpson's prostrate body in a pool of blood first appeared in the courtroom, Denise Brown wiped her eyes and Kim Goldman cried. Even O.J. Simpson reacted, by turning away. *See* p. 239.

134. *See* p. 309.

135. Darden also complains that Judge Lance Ito, too, favored the defense with his rulings, gestures, and comments. Darden supports this contention with numerous examples. *See, e.g.*, pp. 225-26, 228, 237-38, 251, 338, 340, 357.

These complaints contribute little to Darden's book. Complaining about a trial judge favoring the defense is a little like complaining that faster runners generally win footraces against slower runners. It is true and it may be unfair, but it is a fact of life in the criminal courtroom. The system is set up to favor defendants. Defendants have constitutional rights that must be protected during trial. Prosecutors and victims do not. *See infra* note 278 and accompanying text. Defendants who lose before a jury can request a retrial and appeal their convictions. Because prosecutors who lose can take neither action, there is no possibility that a trial judge's ruling in favor of a defendant will ever result in a new trial. As a result, some trial judges, who hate to try a case once but really hate to try a case twice, naturally (and often subconsciously) favor defendants in their rulings.

The more interesting observations about Judge Ito's handling of the trial concern his inability to control his courtroom. In the first weeks of the case, the judge essentially sat by while his courtroom was overrun by extraneous motions and lengthy cross-examinations. *See* pp. 216, 228, 245, 248, 250. Later in the trial, he realized that he had lost control and attempted to regain it, but it was too late. *See* pp. 302, 338-39. The lesson for judges is that they are not unlike a basketball referee, who can suddenly realize in the middle of the third quarter that a game has become so physical that a miniature riot (or at least a good fight) is likely to start. If judges and referees do not assert and maintain control from the beginning, they may never get control. Strong trial court judges do not relinquish control of the courtroom to attorneys. *See* pp. 76-77, 93.

C. *Cops should never lie*

Lots of people tell lies in courtrooms. Attorneys lie.[136] Judges lie.[137] Witnesses lie.[138] Even jurors lie.[139]

There is one group of people who cannot afford to lie in courtrooms: the police. Successful prosecutions rely heavily upon testimony presented by law enforcement officials. If a defense attorney is able to establish that one law enforcement officer has told a lie on the stand, he or she is doing more than cutting into the credibility of that single witness. Once a cop is caught in a lie, the credibility of the entire prosecution case tumbles like a house of cards. Any lie about any matter, regardless of how inconsequential or how unrelated to the case at hand, will do.

The *Simpson* trial was a perfect example of this phenomenon. The defense attorneys caught a cop, Mark Fuhrman, in a lie[140] about an issue that arguably had nothing to do with his relatively minor role as the tenth[141] cop to arrive at the crime scene. Fuhrman's lie was simple and therefore easily disproved. He categorically and repeatedly denied ever using the word "nigger" any time in the previous ten years.[142] Even before any further evidence was presented on this issue, the statement was difficult to believe. It is difficult to imagine that any American, white or black, can truly state that he or she has never used this word, in any context, for ten years.[143] In Fuhrman's case, the proof to the contrary was inevitable and ruinous.[144]

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136. *See* p. 278. *Cf.* pp. 286-87. Many lies told by attorneys have become so routine that we forget that they are untrue. Lawyers start voir dire with a promise to jurors that they are not going to pry or to ask any embarrassing questions, but then proceed to do just that. They tell jurors that their goal in voir dire is to get a fair jury, when their real goal is to get as many favorably biased persons on the jury as possible. *See supra* notes 111-13 and accompanying text. They announce that they have "only a few questions for this witness" and then conduct lengthy examinations.

137. For example, judges routinely tell jurors that they are not trying to hide anything from them when they conduct sidebar conferences and other hearings outside the hearing of the jury. Of course they are hiding things from the jury. That, after all, is the whole point of conducting hearings without the jury!

In the same vein, jurors watch as court personnel secure promises from witnesses to "tell the truth, the whole truth, and nothing but the truth." Given the evidentiary rules excluding certain testimony, relatively few witnesses are actually called upon to tell the "whole" truth.

138. *See* p. 279. Darden first became involved in the Simpson affair when he served as the lead prosecutor investigating Al Cowlings, the friend of Simpson who drove him around the Los Angeles area in the famous white Bronco incident. When he concluded this investigation without charging Cowlings, Darden echoed a refrain common to prosecutors: "Cowling's version of the Bronco chase was clearly bullshit, of course, but we couldn't charge someone with first-degree bullshit." P. 161. The "crime" Darden identified is a common one.

139. *See* p. 167, 293. "Time after time, jurors wrote [in their responses to the jury questionnaires] that they read tabloids, *People* magazine, and the *L.A. Times*, yet knew nothing of the case. They were so clearly lying, it was ridiculous." P. 167.

140. *See* p. 350.

141. *See* p. 284.

142. *See* pp. 289-90. Defense attorney F. Lee Bailey offered Fuhrman the chance to soften this categorical statement with the question, "'Is it possible that you have forgotten that act on your part?'" Fuhrman refused this offer by responding, "'No. It is not possible.'" P. 289.

143. *See* p. 276.

144. The defense presented taped conversations between Fuhrman and a screen writer who was working with him on a would-be movie about police work. The tapes included many crude references, including repeated use of the term "nigger" by Fuhrman. *See* p. 344.

Even if it had not given the defense attorneys some legitimacy in repeatedly raising race as an issue, Fuhrman's lie might have nonetheless been enough to destroy the prosecution's case.[145] The lesson for prosecutors is a difficult one. If there is any indication that a cop is going to lie about anything on the stand, do not call him as a witness unless you have beaten the importance of telling the truth into the cop's head and assured yourself that the cop will not lie.[146] If this means that you will lose important evidence,[147] so be it. If you cannot win the case without the evidence, dismiss it.[148] If you are forced to call a lying cop to get the evidence admitted, you will lose the case anyway when the defense catches the cop in the lie.[149] In addition, cops and prosecu-

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145. Fuhrman may not have been the only, or even the first, detective to give testimony that was less than wholly honest. The court ruled that detective Phil Vannatter wrote the search warrant affidavit "with a 'reckless disregard for the truth.'" P. 295.

The law enforcement testimony at the preliminary hearing was also suspect. Vannatter and Fuhrman testified that when they went onto Simpson's property hours after discovering his ex-wife's murdered body, they did not consider Simpson a suspect in the murder. *See* Scott Turrow, *Simpson Prosecutors Pay for Their Blunders*, N.Y. TIMES, Oct. 4, 1995, at A21. If these police officers did not suspect Simpson when they first heard of the murder of his ex-wife, they were surely among a small group of Americans who had that reaction to hearing about the murders. *See id.* "If veteran police detectives did not arrive at the gate of Mr. Simpson's home thinking he may have committed these murders, then they should have been fired." *Id.*

At least one other law enforcement witness made incorrect statements while testifying. *See* p. 300.

146. Darden worked with Fuhrman for many hours and emphasized the importance of telling the truth about the use of the term "nigger." He did not assure himself that Fuhrman would not lie, however. To the contrary, he continued to have such uneasy feelings about Fuhrman that he ultimately decided that he could not conduct his direct examination. He, nonetheless, did not insist that the prosecution refrain from calling him as a witness. *See infra* notes 203-07 and accompanying text.

147. There certainly are occasions where a prosecutor will not be able to convince a law enforcement officer to tell the truth. While most cops are honest, *see* p. 350, there are dishonest people in the law enforcement profession (just as there are in any group, including the legal profession), *see* p. 98. Law enforcement officers deal with the worst that society has to offer everyday. They watch criminals ruin the lives of their victims, who often are guilty only of being poor. For some, the need to remove criminals from society supersedes all other issues. *Cf.* p. 103 (discussing the intensively negative reaction of the Los Angeles Police Department to the investigation and prosecution of an infamous instance of civil rights abuses by Los Angeles police officers). For these officers, the paramount goal is apprehension, jailing, and, in some instances, executing the perpetrators of crimes. They have little respect for the trial system and little faith that the truth will prevail in this system. When law enforcement officers develop this mentality, a prosecutor has little chance of convincing them that they must meticulously avoid lies, even about seemingly inconsequential matters.

148. Although some evidence is more important than other evidence, there are few cases that truly turn on one piece of evidence. If a prosecution hinges on a single piece of evidence, the prosecutor is teetering dangerously close to reasonable doubt or to a dismissal by the judge.

The famous bloody glove found by Fuhrman at O.J. Simpson's home is a perfect example of a seemingly crucial piece of evidence that the prosecution did not absolutely need. Even without this glove, the prosecution presented evidence of O.J. Simpson's blood at the murder scene, bloody footprints from his distinct shoes at the murder scene, and blood from Simpson and his two victims in his Bronco. *See supra* notes 48-53 and accompanying text. Although the bloody glove added something to this physical evidence, the physical evidence without the glove still would have been impressive and cumulative. However, once the prosecution decided to call Fuhrman to try to get the glove into evidence, the glove became the critical piece of evidence that the jury, the attorneys, the judge, and trial observers focused on, to the point of obsession. Once that focus occurred, it was impossible for the prosecution to argue that the glove was unimportant.

149. Standard jury instructions include a statement that the jury may disbelieve all of a witness's testimony if it finds that that witness has been untruthful about any single point. *Cf.* Cockburn, *supra* note 70, at 491 (noting that Judge Ito instructed the *Simpson* jury "that if a witness had been caught lying, all of that witness's testimony could be rejected unless independently corroborated"). When the lying witness is a police officer, the jury often rejects not only the lying officer's testimony, but also the testimony of other law enforcement witnesses. *See also* Crouch, *supra* note 70, at 113 (arguing that critics of the *Simpson* jury's verdict "*should know that juries almost automatically acquit when the police are caught lying*").

tors in other cases will watch criminals walk out of courtrooms, because your lying cop will eat into their credibility, through no fault of their own.[150]

D. Americans love conspiracy theories

The defense concentrated its effort on convincing the jury that Furhman and countless other cops conspired together to frame O.J. Simpson.[151] The jury's rapid verdict indicated that it accepted the defense's conspiracy theory.

Only in America would defense attorneys concoct so preposterous a theory.[152] The conspiracy theorists conveniently claimed that Fuhrman himself committed the first overt act in furtherance of the alleged conspiracy. While many other officers looked on, Fuhrman theoretically took a glove covered with Ron Goldman's blood from Nicole Simpson's condo and planted it at O.J. Simpson's home.[153]

The theory did not line up with the evidence.[154] For the conspiracy to succeed, dozens of police officers, some of whom had never met each other before working on the *Simpson* case,[155] would have to be involved.[156] Four-

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150. After the *Simpson* trial, surveys indicate that the public is generally less trusting of law enforcement officials. *See* Elder, *supra* note 81, (finding that only thirty-seven percent of blacks polled had a high level of confidence in their local police); Jennifer Seter et al., *Simpson: Trial and Trivia*, U.S. NEWS & WORLD REP., Oct. 16, 1995, at 42 (finding that after the trial, sixty-six percent of blacks believed the police often frame innocent people). *Cf.* Matthew Cooper, *Quit Worrying*, THE NEW REPUBLIC, Oct. 23, 1995, at 12 (arguing that "[h]atred of law enforcement is now a rallying cry on the left and right"); Jost, *supra* note 2, at 996 (noting that law enforcement experts believe juries are increasingly suspicious of police and prosecutors).

In some jurisdictions, juror distrust of police officers and prosecutors is so endemic that not guilty verdicts are routine, even in cases of overwhelming evidence. *See* p. 168; Butler, *supra* note 91, at 678-79.

Many law enforcement officers understand that one highly publicized instance of police dishonesty can do untold damage. Darden's experiences after the Fuhrman lie are instructive: "On the streets, police officers would stop me and apologize for Fuhrman, clench-jawed with anger that he had defamed all police officers that way." P. 350. As an attorney who dedicated a significant portion of his career to prosecuting dishonest police officers, Darden knows all too well the problems that one bad cop creates for the many honest cops. *See* p. 296.

151. The defense at times suggested that it would pursue other issues, including evidence of alibies and alternate explanations for the murders. *See supra* notes 61-62, 129-32 and accompanying text. By the time of closing statements, however, the defense hinged almost exclusively on the conspiracy to frame theory. Given the quick not guilty verdict, this was clearly sufficient.

152. A reporter who covered the *Simpson* trial gavel to gavel noted:

> [The defense] suggested that police, in their effort to frame Simpson, had planted at least the following items: (1) Simpson's blood on the rear gate at Bundy [Nicole Simpson's home]; (2) Goldman's blood in Simpson's Bronco; (3) Nicole's blood on the sock (which was found in his bedroom); and (4) the infamous glove at [Simpson's home at] Rockingham, which had, as Clark put it in her summation, "all of the evidence on it: Ron Goldman, fibres from his shirt; Ron Goldman's hair; Nicole's hair; the defendant's blood; Ron Goldman's blood; Nicole's blood; and the Bronco fibre."

Toobin, *supra* note 35, at 46. This reporter noted, "[I]t would have been no exaggeration to say that the defense's case against the police was absurd." *Id.*

153. *See* p. 203. *See also* Toobin, *supra* note 35, at 46. "The core of the defense case was, of course, that Fuhrman surreptitiously took the glove from the murder scene to the defendant's home." *Id.*

154. *See* p. 302.

155. *See* p. 296.

156. *See* p. 165. One commentator observed:

> To doubt that O.J. committed the crime, one must believe not just that the LAPD had a few rogue or racist cops but that the entire system of justice—police, prosecutors, and laboratory technicians of many races—was enmeshed in an immense, diabolical conspiracy. That's not reasonable doubt. It's radical skepticism, clinical paranoia.

Weisberg, *supra* note 65, at 33. *See also* Alter, *supra* note 78, at 66. "To have framed Simpson, the level of conspiracy required by detectives *other than* Mark Fuhrman is virtually impossible logistically, no matter how

teen detectives were at the crime scene,[157] and nine officers were there before Fuhrman arrived.[158] Fuhrman discovered the glove at Simpson's house and filed it into an evidence locker long before any blood sample was taken from O.J. Simpson.[159] There was no opportunity for advance planning, because Fuhrman would have to be involved when he supposedly took the glove from Nicole Simpson's condo, an event that could have only occurred very shortly after the murders. At that time, neither Fuhrman nor the other investigating officers knew if Simpson had a lead tight alibi or if he was even in the area.[160] Therefore, each of the dozens of police officers involved would have had to be not only racists with overwhelming dedication to their racism, but also unusually willing to take tremendous risks.

In addition, these conspiring police officers would have to pull off a sophisticated conspiracy without leaving a trace of evidence, despite the same law enforcement officers' bungling of far more basic tasks like simple evidence gathering.[161] Although the defense argued a conspiracy theory,[162] it presented no evidence supporting this theory.[163] None of the dozens of police officers who would have been involved in the conspiracy ever came forward in any forum to admit the presence of a conspiracy. Not a single person overheard a conversation among the conspirators or saw any other evidence of a conspiracy. The motivation for any person who saw evidence of a conspiracy to come forward extended far beyond a desire for truth and justice or, in the case of a conspirator, guilt. Any person with evidence of a conspiracy among officers to frame Simpson could have literally cashed in on what would have been the single biggest story in the case. If people at the periphery of the *Simpson* case

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racist the LAPD might be." *Id.* (emphasis added).

157. *See* pp. 195, 350.

158. *See* p. 284.

159. *See* p. 165. *See also* Toobin, *supra* note 35, at 46 (arguing that Fuhrman could not have tainted the glove).

160. *See* pp. 165, 284. *See also* Toobin, *supra* note 35, at 46 (arguing that a conspiracy was unlikely since the investigatorial steps in question took place immediately after the murders without knowledge of Simpson's whereabouts). Simpson was widely known to be a sportscaster, a representative of Hertz, and a film actor. Each of these roles presumably took him out of town on a regular basis to destinations where dozens of persons could verify his whereabouts. Nonetheless, each of the allegedly conspiratorial police officers would have to be perfectly willing to ignore the risk of being caught in an obvious obstruction of justice, for the sole purpose of framing Simpson.

161. *See* pp. 317, 330. *See also* pp. 138-39 (concerning police officers' failure to collect potentially critical evidence from the white Bronco).

162. While the defense's evidence of a conspiracy was non-existent, its argument was vehement. In closing, Cochran claimed that Fuhrman had been waiting for nine years to frame Simpson, *see* p. 368, and compared Fuhrman to Adolf Hitler, *see* p. 369.

163. *See* p. 348. The defense did present experts who testified that it was possible to interpret the evidence in a manner that left open the possibility of a conspiracy, but did not present any actual evidence that a conspiracy existed. *See* p. 342.

Given the absence of any evidence of a conspiracy, the defense attorneys' questions and argument to the jury about the purely hypothetical conspiracy were arguably unethical. *See* JOHN WESLEY HALL, JR., PROFESSIONAL RESPONSIBILITY OF THE CRIMINAL LAWYER § 19:4, at 654-55 (1996) ("The attorney must have a reasonable basis for stating the 'alleged facts.'"). *See also id.* § 19:8, at 658 (explaining that "[i]t is unethical for a lawyer to ask a question which implies the existence of a factual basis for which a good faith belief is lacking").

were regularly able to demand thousands for their stories,[164] evidence of the alleged conspiracy surely would have commanded a tidy sum.

Furthermore, this alleged conspiracy to frame Simpson was supposedly hatched by officers from the Los Angeles Police Department, an agency that had previously bent over backwards to help O.J. Simpson. On eight occasions, LAPD officers walked away from a battered Nicole Simpson without arresting O.J. Simpson.[165] Over forty LAPD officers had been introduced to Simpson socially by a friend who was an LAPD officer.[166] That LAPD officer knew Simpson for twenty-six years, and did errands for him.[167] Even after the LAPD had accumulated a "ton" of evidence against him in the murders of Nicole Simpson and Ron Goldman,[168] it refrained from arresting him and allowed him to make special arrangements to turn himself in to authorities.[169] When he failed to live up to his word and instead allowed his friend to drive him around Los Angeles freeways in the famous slow white Bronco, the LAPD chose not to exercise its legally justifiable standing to shoot him as an armed[170] fleeing felon,[171] but instead sent dozens of police cruisers to clear the roads for him.[172] Nonetheless, the conspiracy theorists would have us believe, dozens of LAPD officers chose to frame him.

The *Simpson* jury's willingness to accept this implausible notion reinforces a basic component of the American personality: Americans love conspiracy theories.[173] We continually reject plausible, fact-based, but all too ordinary explanations of events, choosing instead to place our trust in factually implausible theories. We refuse to believe that a lone, crazed gunman could have killed President John F. Kennedy, and instead cling to assorted unsupported conspiracy theories despite the lack of evidence supporting any of them.[174] We want to

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164. *See* pp. 236-37. *Cf.* Dunne, *supra* note 68, at 44 (noting that "the Simpson case has turned into a money tree" for the principals, including Darden, who garnered a $1.3 million advance for his book). *See also* Mandese & Jensen, *supra* note 79, at 41 (noting that Judge Ito was offered $1 million to star in a new version of "People's Court").

165. *See* pp. 363, 367. *See also* Gates, *supra* note 7, at 64 (discussing the fact that Simpson enjoyed some deference from the LAPD). The lenient attitude taken by the LAPD undoubtedly contributed to Simpson's disbelief when an arrest was finally made on the eighth domestic violence call. When he was finally arrested, Simpson indignantly and incredulously asked, "'You've been here eight times before and now you're going to arrest me?'" P. 231.

166. *See* p. 232.

167. *See* pp. 231-32.

168. *See* p. 124.

169. *See* pp. 125-26, 367.

170. *See* p. 128.

171. *See* p. 127.

172. *See* p. 128.

173. *See* Kennedy, *supra* note 10, at 14.

174. See *The Conspiracy Theories*, NEWSWEEK, Nov. 22, 1993, at 99; Evan Thomas, *The Real Cover-Up*, NEWSWEEK, Nov. 22, 1993, at 66, 94-95.

> In the end, the Warren Commission was probably right: Kennedy was killed by a lone nut, who in turn was killed by another lone nut. But conspiracy theories die hard: more people believe the wackiest conspiracy theory of all—the CIA-LBJ-Pentagon plot cooked up by movie producer Oliver Stone—than they do the Warren Commission, the combined effort of senators, statesmen and Supreme Court justices.

Id. See generally GERALD POSNER, CASE CLOSED: LEE HARVEY OSWALD AND THE ASSASSINATION OF JFK (1993) (cataloging and debunking the various conspiracy theories concerning the assassination of President

believe that other shooters, acting alone, could not have killed that president's brother[175] and the greatest civil rights leader our nation has ever known.[176] Therefore, it is not surprising[177] that we do not want to believe that a football hero and sportscasting icon would brutally murder his ex-wife and a man who was in the wrong place at the wrong time. Instead, we desperately want to believe that a rogue cop and dozens of his formerly pro-O.J. colleagues at various locations instantaneously created a highly risky conspiracy to frame him, despite the absence of a shred of evidence that the alleged conspiracy existed and the lack of an alternate explanation for the two murders.[178]

Not every criminal trial is ripe for a conspiracy defense, of course. To buy into a conspiracy theory, the intended audience must have some motivation to ignore evidence and look for an alternate explanation.[179] Without the evidence of Mark Fuhrman's racism, and his lies about that racism, the *Simpson* defense might have had a more difficult time selling its conspiracy theory. Darden notes that the simmering anger of those who have suffered from racism made the sales job far easier for the Dream Team:

> [Nigger] is the most inflammatory word in the English language, and as soon as I heard it, I filed it away. I put it in this place inside myself, a place where I have corralled and harnessed the energy and anger. I found this place—as all black people do—inside myself, and as the years went on I filled it with all the wrongs that were told to me by Nanny and Grandpop, by Mama and Daddy, and by [African studies professor] Gloria Alibaruho. I put in there all the indignities that I saw and all the injustices I read about. . . . For hundreds of years, that place was the only thing that kept us alive. . . . But it posed dangers of its own. Like most power, it could be misused in the wrong hands, simply because it could blind us to reason. It had the power to make the implausible highly likely, the impossible probable.[180]

Kennedy).

175. Dan Moldea is an investigative reporter who was formerly the leading proponent of the Robert F. Kennedy conspiracy theory. He now believes that human error explains all of the coincidences that he previously found so suspicious. According to Moldea, "'I now realize that even law-enforcement officials . . . do make mistakes [and] if one does not account for occasional official mistakes and incompetence, then nearly every such political murder could appear to be a conspiracy.'" Steven Waldman, *Closing the Case on RFK*, NEWSWEEK, June 12, 1995, at 32 (quoting Dan Moldea).

176. *See* Ronald Smothers, *King's Assassin Is Given Power of Subpoena in Bid for Retrial*, N.Y. TIMES, Apr. 16, 1994, at L9.

177. Even the accidental canoeing death of a long-retired and essentially forgotten head of the Central Intelligence Agency is enough to spawn several conspiracy theories. *See* Evan Thomas, *The Reluctant Spymaster: Bill Colby—A Vilified CIA Do-Gooder Disappears*, NEWSWEEK, May 13, 1996, at 33.

178. The American fascination with conspiracy theories is not a source of pride.

> To my mind, this [President Kennedy] assassination syndrome, this terrible collapse of the critical people—witness Lane, and Lifton, and Garrison and the rest—it's a suggestion that we are really in trouble as a society. These theorists take us away, fly us to this unknown land of Oz, wherever they take us. They divert our attention from the realty.

POSNER, *supra* note 174, at 467 (quoting University of Wisconsin Professor Richard Wrone).

179. *See infra* note 181.

180. Pp. 207-08. "When you repeat a lie long enough and loud enough it lives." Alter, *supra* note 78, at 66. "If you wonder why blacks seem particularly susceptible to rumors and conspiracy theories, you might look at a history in which the official story was a poor guide to anything that mattered much, and in which rumor sometimes verged on the truth." Gates, *supra* note 7, at 57. "One of the things that nourishes much of this community, particularly that comprised of African Americans, is a vivid and bitter memory of wrongful

The *Simpson* jury, and many other Americans, found it easier to concentrate on a cop's racism than on the evidence suggesting that a hero brutally murdered two people. In the other instances of popular conspiracies, Americans do not want to believe that their leaders are so fragile that they can be killed by lone madmen.[181] If a trial attorney can find similar soft spots in the hearts and minds of jurors that make them want to ignore evidence and search for a deeper alternative explanation, that trial attorney is well on the way to selling a conspiracy theory.

E. The most important battle in a trial is the battle over where the war is going to be fought

To attain a guilty verdict, the prosecution must keep the jury's attention focused on the evidence pointing to the defendant's guilt.[182] If the defense attorney is able[183] to shift the jury's focus to another issue, a guilty verdict is far less likely.[184] The Simpson trial reaffirmed the importance, to both sides, of winning the battle for the jury's attention. The quick defense verdict resulted in large part from the success of the Dream Team in shifting the jury's focus from the evidence against Simpson to the issue of whether Fuhrman was a racist. Fuhrman gave racism[185] a face for the jury to focus on.[186] Even trial observers with no previous experience in criminal trials sensed that the prosecution was doomed when the case became the Mark Fuhrman trial.[187]

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convictions of innocent black men and wrongful acquittal of guilty white men. Kennedy, *supra* note 10, at 14.

181. *See* POSNER, *supra* note 174, at 469 (quoting historian William Manchester, the author of DEATH OF A PRESIDENT).

> "[I]f you put the murdered President of the United States on one side of a scale and that wretched waif Oswald on the other side, it doesn't balance. You want to add something weightier to Oswald. It would invest the President's death with meaning, endowing him with martyrdom. He would have died for something. A conspiracy would, of course, do the job nicely. Unfortunately, there is no evidence whatever that there was one."

Id. See also Michael Beschloss, *The Day that Changed America*, NEWSWEEK, Nov. 22, 1993, at 61, 62. "[B]ecause it is difficult to tolerate the notion that this historical transformation [of America] could turn on something so trivial as the caprice of a surly little egoist, a grander design has been sought—in the Mafia, in foreign intelligence services, in the Cubans, the Russians, the CIA." *Id.*

182. *Cf.* p. 354 (noting the importance of "remind[ing] the jury that . . . there was only one conclusion after looking at the evidence: O.J. Simpson was a murderer. Someone needed to just stand up and shout the things that we had been whispering to the jury with statistics, photographs, and testimony.").

183. When attempting to shift a jury's attention away from the issue of the defendant's guilt, an attorney is walking close to, or over, an important ethical line. *See* HALL, *supra* note 163, § 19:13, at 664-65. "A lawyer should not make an argument which would divert the jury from its duty to decide the case on the evidence by injecting issues broader than guilt or innocence of the accused under controlling law or by making predictions of the consequences of the verdict." *Id.*

184. Cochran was fully aware of the importance of shifting the jury's focus. *Cf.* Weisberg, *supra* note 65, at 33. "Cochran implicitly suggested that truth was not paramount. He tried to convince jurors . . . that the prosecution's case was less important than the fact that black people are framed in the country every day." *Id.*

185. Fuhrman also gave dishonesty a face. *See supra* notes 140-44 and accompanying text.

186. *See* p. 299.

187. Fred Goldman, the father of murder victim Ron Goldman, sensed that the war had been lost when the defense won the battle to focus the trial on Fuhrman's racism:

> Fred Goldman raged against what this trial had become. "Ron and Nicole were butchered by their client. This is not now the Mark Fuhrman trial. This is a trial about the man who murdered my son! I don't understand why the hell we had to listen to two hours of this hate!" Fred told reporters after

Although the ultimate battle is for the jury's focus, it is fought in the first instance not before the jury, but before the trial judge.[188] Once a prosecutor sees a defense attorney attempting to shift a jury's attention away from the issue of the defendant's guilt, he or she must convince the judge that this shift in focus is improper. If the judge allows a defense attorney to introduce irrelevant evidence, that defense attorney will use this opening to shift the jury's attention away from the defendant.

The *Simpson* prosecutors[189] knew how important it was to keep the jury's focus on the evidence implicating Simpson[190] and away from the issue of race.[191] Before the trial began, Darden moved for an order prohibiting the defense from using the word "nigger" in the trial.[192] This set the stage for the battle over where the war would be fought. It was perhaps the most intense dispute in the case.[193] When Judge Ito overruled the prosecution's motion, the defense had won the battle over what issue would consume the jury's attention. That issue would be race.

Once the battleground of race had been set, the prosecution had only a limited chance of success.[194] It is unlikely that a group of law enforcement

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hearing the Fuhrman tapes. "It's disgusting. My son, Nicole, our families have a right to a fair trial. And this is not fair!"

Pp. 349-50. *Cf.* p. 283 (noting Kim Goldman's concern about evidence of Fuhrman's racism). Goldman may have been right about several things, but he was wrong when he said, "This is not now the Mark Fuhrman trial." P. 349. It certainly was the Mark Fuhrman trial, and once it was, the prosecution had little chance of success. A more experienced non-attorney trial "observer" reached the same conclusion. Fuhrman bragged to his screenwriter, "'I'm the key witness in the biggest case of the century. . . . And if I go down, they lose the case.'" P. 345.

188. As Darden notes, a capable defense attorney knows that a significant part of his or her job is to get away with as much as the judge will allow. *See* p. 248.

189. The prosecutors were not alone in their view that their chances of success hinged in large part upon whether the trial would be about race. The defense attorneys shared this view. Just before the hearing on the use of the word "nigger" during the trial, defense attorney Cochran told Darden, "'Let's make this one for the ages.'" P. 201. Whether the hearing itself was "one for the ages" is open to dispute. Whether the result of the trial hinged in the balance probably is not. *Cf.* pp. 245, 282. "[A]ll defense roads led through Mark Fuhrman" P. 245.

190. The prosecution did not have entirely clean hands in this regard, however. After all, the prosecution introduced evidence of Simpson's alleged dreams during the first few days of trial testimony. *See* p. 232. Once the prosecution itself broadened the scope of the trial by introducing this evidence, it could not expect the jury to fully believe the contention made in its final argument that the case should be decided primarily upon the blood evidence. *See* pp. 367-68. If the physical evidence was the only important issue, why did the prosecution rush to introduce evidence about Simpson's alleged dreams?

Given the prosecution's enthusiasm for this evidence, perhaps the moniker "Dream Team" was assigned to the wrong counsel table.

191. *See* pp. 163, 195, 200-03.

192. *See* p. 195. The prosecution asserted that the probative value of the use of the word "nigger" was substantially outweighed by the potential for prejudice. *See* p. 203. *Cf.* CAL. EVID. CODE § 352 (West 1995) (granting the trial judge discretion to exclude evidence if its probative value is substantially outweighed by the probability of creating a substantial danger of undue prejudice).

193. This dispute was certainly the most personal and vitriolic in the trial, at least among the attorneys. Darden argued that the word "nigger" was a call to arms to African Americans and, therefore, so inflammatory that it would infringe upon black jurors' ability to fairly and impartially decide the case. *See* pp. 201-03. *See also* Toobin, *supra* note 35, at 45 (explaining that Darden warned Judge Ito "of the consequences of allowing such inflammatory material to be introduced"). Perhaps because Darden had correctly identified the significance that race was going to play in the defense Cochran reacted with a vehement and largely personal attack accusing Darden of "demeaning" African Americans. *See* pp. 203-04. Darden and others interpreted Cochran's remarks and accusation to mean that Darden was a traitor to his race. *See* pp. 204-06, 210.

194. The prosecutors sensed that they lost the war when they lost the battle to keep race issues out of the

officers as large as the one that investigated the *Simpson* case did not include at least one provable racist.[195]

F. Keep it simple (or "If you are going to kill someone, it is a good idea to do it on a Sunday night")

In a criminal trial, the prosecution's case is only as strong as its weakest witness or its weakest piece of evidence. The weak spot in the case is where the smart defense attorney will try to establish reasonable doubt. If one is clever or fortunate enough, he or she will commit a serious crime on a Sunday night. On Sunday night, police station houses are populated by detectives and officers who do not have the standing, savvy, and skills to avoid the least desired shift in the week. On Sunday night, there is a significant chance that one or more of the cops who reports to the crime scene will ultimately become the weak spot the defense attorney needs to establish reasonable doubt. If the case is about racism, one might even be so lucky that the needed provably racist cop will be at the scene of the crime, handling key evidence.

Few people, other than prosecutors themselves, understand the fundamental "real world" rule of the prosecutor's lot in life: On the whole, you are stuck with the cops who happened to be on duty when the crime occurred or were later assigned to investigate the crime.[196] If one of these cops is a nightmare witness, your case is in trouble.[197]

Little can be done when a nightmare witness is also a necessary witness, but this is rarely the case. The real lesson for prosecutors is to limit their use of bad witnesses, including police officers,[198] whenever possible. The broader lesson for all trial attorneys is to remember that every move that is made in a courtroom is a risk. Every witness might disintegrate on cross-examination. Every piece of evidence might be used against the party offering it. Every argu-

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case. *See* pp. 290, 368, 372.

195. The police officer who ended up being the key witness in the case played a relatively small role in the actual investigation. He was not one of the lead detectives. Instead, he was one of several detectives who went to Simpson's home. The glove he found there was one of over 600 pieces of evidence collected by numerous police officers. *See* p. 202. Many other police officers (including those who worked as technicians) had roles in the Simpson case that were at least as significant as Fuhrman's role. In a nation where racism still exists, *see supra* notes 96-103 and accompanying text, the defense attorneys had a significant chance of finding an avowed racist among those many officers.

196. Second tier police officers, including those who are stuck with the Sunday graveyard shift and follow-up duty are not only poor witnesses, they are also more likely to make investigative errors. They might, for example, use the phone at a crime scene to make a call, thereby losing the chance to hit the redial button to determine the last person called by one of the victims. *See* p. 244. They might botch the collection of blood stains, assign inexperienced assistants too much responsibility, and keep sloppy records. *See* p. 299. If the defendant is particularly fortunate, they might even fail to secure important evidence tying him to the crime scene. *See* pp. 136, 138-39.

197. "Some people just aren't cut out to be witnesses in criminal cases." P. 299. Unfortunately, some of them, like criminologist Dennis Fung, occupy positions that require them to testify. *See* p. 294.

198. Before a prosecutor puts a law enforcement officer on the stand, he or she must believe that the officer is both a competent officer and a capable witness. If the officer fails either test, the prosecutor should avoid putting him or her onto the witness stand. For example, Fuhrman was a careful and meticulous investigator. *See* p. 192. Nonetheless, his racism and his dishonesty about that racism made him a disastrous witness. Therefore, the prosecution should have avoided calling him as a witness.

ment or demonstration might provide a critical opening for the opponent. Of course, attorneys cannot win without witnesses, evidence, arguments, and demonstrations. The trick is to evaluate every witness (and every other move), for both the upside risk and the downside risk. If the potential benefit does not significantly outweigh the potential risk, the smart trial attorney will leave the witness off the stand.

The major strategic shortcoming of the *Simpson* prosecutors was their failure to remember and implement this rule.[199] The prosecution could have presented a simple, tightly woven case centered around the overwhelming physical evidence. As Darden himself notes, many murder trials last less than five days.[200]

Instead, the prosecution's case alone lasted not five days, but five months.[201] During the ninety-two days of testimony, fifty-eight witnesses took the stand, and 488 exhibits were introduced.[202] This gave the defense fifty-eight human beings (to say nothing of the 488 objects) to consider as candidates for the weak spot that they would attack. With that much human frailty exposed, someone was going to be awful. That someone turned out to be Mark Fuhrman. He was the face of racism and dishonesty. The defense needed Fuhrman far more than the prosecution did.

Now that the trial is over, it is easy enough to play Monday morning quarterback and say that Fuhrman should have been left off the stand, even if this meant that the bloody glove he found at O.J. Simpson's home would not be admitted. Still, even Darden himself admits that he seemed to sense the risk of putting Fuhrman on the stand. After many hours of work with Fuhrman to prepare his testimony,[203] Darden backed out of his earlier commitment to conduct his direct examination[204] and asked lead prosecutor Clark to fill this role.[205] His instincts told him that Fuhrman was a dangerous witness.[206] He should have trusted those experienced trial attorney instincts further and insisted that Fuhrman be kept off the stand.[207]

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199. Perhaps an overly risky trial strategy was to be expected. Throughout his life, Darden has not been a person afraid to take risks, even when monumental downside risk significantly outweighs minimal upside risk. *See* p. 50.

200. *See* p. 248.

201. *See* p. 333.

202. *See* p. 333. Media reports put the days of testimony for the prosecution at ninety-nine and the total number of prosecution witnesses at seventy-two. *See* Seter et al., *supra* note 150, at 42. The discrepancy may result from witnesses that appeared in court, but not before the jury.

203. *See* pp. 190, 199.

204. *See* pp. 188, 272.

205. *See* p. 276.

206. *See* Dunne, *supra* note 68, at 44.

207. Both the rumor mill and his own gut told Darden that Fuhrman was a potentially disastrous witness. *See* pp. 131, 191, 199. As a result, he supervised and assisted in a thorough background investigation of Fuhrman. *See* pp. 194, 196-98. This background investigation suggested that Fuhrman was a somewhat unpleasant person, but that he was not currently a racist and he would testify honestly. *See* p. 198. Nonetheless, Darden's instincts still told him that Fuhrman was a very dangerous witness. *See* pp. 199, 273-74, 282, 350. *Cf.* pp. 271-74 (discussing defense attorney Johnnie Cochran's "warning" to Darden about Fuhrman). Fuhrman's repeated denials of racism to Darden did not change his instinctive trepidation. *See* pp. 199, 274. Therein lies yet another lesson to be learned from Darden's experience: Sometimes a trial attorney should

In any event, the lesson is broader than one about Fuhrman alone. While Fuhrman turned out to be the defense's best witness, someone among the many prosecution witnesses was bound to help the defense significantly.[208] The prosecution failed to limit its exposure.[209]

This key strategic error is certainly understandable. The *Simpson* prosecutors were facing a hostile jury and perhaps the most expensive defense history has ever known.[210] They did not want to leave any punches unthrown. Unfortunately, this mind set meant that the prosecutors were letting the defense determine the prosecutors' strategy.[211] While it is important for trial attorneys to be prepared to react to their opponents' moves, trial attorneys should never let their opponents dictate strategy.[212]

The *Simpson* trial event that most demonstrated the disastrous consequences of ceding strategic decisions to opponents was the bloody glove demonstration. In the days leading up to this event, which occurred during the prosecution's presentation of evidence, Darden was concerned that the defense attorneys' lengthy cross-examinations of DNA and other prosecution witnesses was effectively preventing the jury from appreciating the impact of the DNA testimony. Darden believed the prosecution needed to literally put the gloves on Simpson, because the lengthy and tedious defense cross-examinations had kept the jury from understanding that the DNA evidence figuratively put the gloves on Simpson.[213] He also believed that it was symbolically important for the prosecution to put the gloves on Simpson, because the defense might do this in its case if the prosecution did not.[214] Therefore, he convinced lead prosecutor

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follow his or her gut instead of his or her head, especially when the gut urges caution and the head is pushing risk. On the other hand, where the head urges caution and the gut urges risk, it is often best to favor the head. *See infra* notes 213-21 and accompanying text.

208. Darden himself argued to the court that Fuhrman played only "a very, very small role in this case." P. 202. If this was true, why did Darden allow the prosecution's case to be put at risk by allowing Fuhrman and the many other minor witnesses to be called to the stand?

209. As an experienced prosecutor, Darden knew that trial attorneys must inevitably leave some evidence, including some initially attractive evidence, "on the cutting room floor," because presenting the evidence entails unwise risks. P. 330. The *Simpson* prosecution team did refrain from using some evidence, but it failed to fully appreciate the risks it was taking in presenting the great volume of evidence that it chose to use. *See* pp. 235-37, 329-32.

210. Darden openly resented the size, aggressiveness, and financial resources of the defense team. *See, e.g.*, pp. 183, 246. This resentment might have led to lapses in judgment. Darden asserts that "we weren't going to have the defense dictate to us what evidence we might admit" by objecting to evidence offered by the prosecution. P. 183. At the same time, the prosecution did let the defense affect what evidence they would seek to admit.

211. With the undoubtedly maddening clarity of hindsight, Darden admits, "I have to believe that we played into their hands in some respects, trying to anticipate their attacks, spending too long debunking ridiculous theories." P. 318.

212. Personal vendettas against the defendant can also be dangerous. Darden noticed that Simpson hated evidence about his abuse of his ex-wife, because he "just couldn't stand for the world to know the truth about him." P. 218. A desire to make Simpson suffer through domestic violence evidence might have affected Darden's judgment about the appropriate quantity of this evidence. One dismissed juror, herself a victim of domestic violence, indicated that the prosecution's domestic violence evidence did not resonate with the jury. *See* pp. 304-05.

213. *See* pp. 317-19, 322-23.

214. *See* p. 323. In this respect, Darden was probably right. After the demonstration, Judge Ito observed, "'If you didn't put them on him, someone else would have.'" P. 325.

Clark to allow him to ask the judge to have Simpson try the gloves on while the jury watched.[215]

The result was disastrous. The gloves did not readily slide onto Simpson's hands. Whether this resulted from shrinkage of the gloves,[216] the presence of latex gloves on Simpson's hands,[217] an affirmative effort by Simpson to create or feign problems,[218] or from gloves that were actually too small for Simpson, the damage was done.[219] Darden had forgotten the rule of risks. The upside risk from the glove demonstration, a visual affirmation of the DNA evidence, was outweighed by the downside risk, a visual refutation of that evidence. He had also forgotten that a trial attorney must limit risk by maintaining control of the presentation of evidence.[220] Allowing the defendant himself to control so significant a portion of the prosecution's case by "trying" on the gloves was a monumental error that reflected the overall mistake of allowing the defense to determine the prosecution's trial strategy.[221]

G. When the defendant does not look like a criminal, the elevator rule magnifies the prosecution's burden of proof

One of the most important myths in American lore is the belief that "criminals" commit all of the crimes. We want desperately to believe that our crime problems are caused by a class of despicable people who devote their lives to ruining our lives.[222] This myth conveniently divides people into two groups. "Our" group includes only the good people who would never commit a crime, at least not a serious one. "Their" group includes only the bad people who commit all of the crimes. This world view is a defense mechanism that helps us deceive ourselves into thinking that we can be safe from crime if we can only avoid "criminals."[223]

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215. To his credit, Darden accepts full blame for the failed glove demonstration. *See* p. 327. He even admits that Clark was very reluctant to allow him to try the demonstration, and that he had to argue vehemently to talk her into it. *See* pp. 323-24.

216. *See* p. 326.

217. Cochran insisted that Simpson be allowed to wear latex gloves during the demonstration. *See* p. 324. After the glove demonstration, the prosecution demonstrated that the same kind of gloves fit Simpson's hands when the hands were not in latex gloves. *See* p. 326.

218. *See* pp. 325, 328.

219. Defense attorney Johnnie Cochran knew how much the prosecution had lost through the glove demonstration. In numerous allegorical and direct references to the glove demonstration during closing argument, Cochran repeated the theme "'If it doesn't fit, you must acquit.'" P. 368. Listening to this theme that he had bestowed upon the defense must have been among the most difficult moments of Darden's career as a prosecutor. *See* Dunne, *supra* note 68, at 44. "I suspect that [Darden] will go to his grave with Cochran whispering in his ear, 'If the gloves don't fit, you must acquit.'" *Id.*

220. After the disastrous demonstration, Darden remembered the importance of controlling risks. "People ask me now would I do it again. No. Of course not. I should have taken into account shrinkage and the defense team's trickery." P. 326. *See also* p. 326-27 (discussing the steps taken to lessen the damage caused by the failed glove demonstration).

221. *See* p. 320.

222. Politicians, who are adept at sensing and playing on public perceptions, constantly remind us how tough they are on criminals. *See, e.g.*, Butler, *supra* note 91, at 696 and nn.99-100; Richard Lacayo, *Law and Order*, TIME, Jan. 15, 1996, at 48, 53-54. They know that politics is a game won by those who can find a group to blame for society's problems.

223. In the well-documented psychological defense mechanism of denial, "a person does not attend the

Many of the attorneys who pursue careers as prosecutors start out with this world view. Indeed, many become prosecutors for the sole purpose of keeping the world safe from "the bad guys."[224] At some point relatively early in the career of anyone who prosecutes violent felonies, however, the new prosecutor learns that the world is not that tidy.[225] Those who last for more than a few violent crime prosecutions learn that otherwise "good" people occasionally do outrageously repugnant things to other people.[226]

Jurors do not enter courtrooms with the benefit of prosecutors' life experiences, however. Instead, they generally have the good people versus criminals world view.[227] As soon as jurors pick the defendant out in the courtroom, they put him or her into one category or the other.[228]

The "elevator rule" is based upon this reality. If the jurors would be afraid to ride in the elevator with the defendant after the trial is over, they believe that he or she is in the criminal category. In such a case, regardless of what the Constitution says, the defendant has the *de facto* burden of proving that he or

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threat-provoking aspects of a situation and changes the interpretation of the situation so as to perceive it as less threatening." ENCYCLOPEDIA OF PSYCHOLOGY 348 (Raymond J. Corsini ed., 1984). *See also* STUART SUTHERLAND, THE INTERNATIONAL DICTIONARY OF PSYCHOLOGY 112 (1989).

Even those who commit crimes sometimes wish to believe that they remain in the "non-criminal" group, and may use the denial defense mechanism to accomplish this result. *See* Diana Trilling, *Notes on the Trial of the Century*, THE NEW REPUBLIC, Oct. 30, 1995, at 18, 21. "It is my guess that Simpson is convinced that he didn't murder his former wife and her friend Goldman. . . . I believe that he is now in denial, deepest denial—I use the word as it is used in psychoanalysis to connote the complete eradication of a fact." *Id.* An even more powerful defense mechanism for an individual who has committed a crime is repression, "the selective forgetting of material associated with conflict and stress." ENCYCLOPEDIA OF PSYCHOLOGY, *supra*, at 348. *See also* SUTHERLAND, *supra*, at 375. Repression "is *motivated selective forgetting*; rather than being a general loss of memory due to the normal process of forgetting . . . it is a loss designed to selectively eliminate from consciousness the memories or related associations which cause the individual to experience conflict or stress." ENCYCLOPEDIA OF PSYCHOLOGY, *supra*. An individual who has committed a crime but nonetheless wishes to maintain his self-respect and positive public image would have a strong motivation to repress the memory of his crime.

224. The decidedly sexist term "bad guys" is not without its statistical underpinnings. Males are far more likely to commit crimes than females. *See* U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1994, tbl. 5.20 (Kathleen Maguire & Ann L. Pastore eds. 1995) (eighty-four percent of those convicted in U.S. District Courts in 1992 were male). When the crime at issue is murder, the criminal is even more likely to be male. *See* FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 1994: UNIFORM CRIME REPORTS, tbl. 2.6 (1994) (for 1994, sixty-five percent of murder offenders were male, and only seven percent were female, with the remaining twenty-eight percent unknown).

225. Darden states:

> When you learn that a man is capable of calmly playing dominoes while the bodies of two women rot in his bedroom, you understand the darkest part of human nature and you can easily imagine a celebrity, a football player perhaps, walking slowly away, driving off, and casually catching a plane after murdering his wife and her friend.

P. 80.

226. *See* p. 124.

227. Even the victims of crime sometimes start trial with a good guys/bad guys view of the world. *Cf.* p. 351-52.

> Outside my office, I saw Kim Goldman, her long angular face marked by tear-carved lines, haunting the hallways like a whispery ghost. Kim was only twenty-three. She must have felt beset on all sides by evil: by the man who killed her brother, the lawyers whose tricks defiled his memory, and the police officer who gave awful credence to their cruel defense. It is easier to think of the world as having two clearly divided sides—good and evil. Poor Kim Goldman was awfully young to find out that sometimes we encounter evil on all sides.

Id.

228. *See* Johnson, *supra* note 126, at 181.

she did not commit the crime. On the other hand, if the jurors would not worry about that post-trial elevator ride, the prosecutor has a heavy burden indeed.[229] In this type of case, the prosecutor must not only bring forth evidence implicating the defendant. To win, the prosecutor must also overcome the jurors' fundamental belief that "good people" do not commit horrible crimes.[230]

In the *Simpson* case, the prosecutors had an even higher burden. The jurors not only would not fear a ride in the elevator with O.J. Simpson, they would look forward to it as an event that they would remember for the rest of their lives![231] He is not a criminal, but an American hero[232] who overcame a childhood in the ghetto.[233] He was a member of the small group of people that Americans value the most, sports legends.[234]

The *Simpson* prosecutors realized the difficulty of convincing the jury that an American icon could commit double murder.[235] Darden tried to meet the elevator rule burden of proof with evidence of Simpson's prior beatings of his ex-wife,[236] but he was not successful.

Like any other rule, the elevator rule has several corollaries. The first is that a defendant who benefits from the elevator rule should rarely take the stand to testify. The rule of avoiding unnecessary risks[237] applies in this instance. If the jurors already believe that the defendant is in the non-criminal group, the defendant has little to gain by taking the stand and denying that he committed

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229. *Cf.* pp. 181-82 (noting a discussion among prosecutors of the importance of whether the defendant looks like a crook).

230. Of course, the prosecutor must be careful in meeting this burden. As a judge told Darden after he transferred to the Beverly Hills courtroom, "'The people you are prosecuting here are, for the most part, the juror's neighbors, people like them. Jurors don't like you to be confrontational and sarcastic with their neighbors.'" P. 78.

231. *See* pp. 167-68. An expert consulted by the prosecution "believed that it was impossible to underestimate the power of celebrity in this case. Unfortunately for [the prosecution], 'O.J. Simpson is the biggest celebrity these jurors know now. That's a very powerful thing.'" P. 358.

232. When Simpson rode around the Los Angeles area in the white Bronco, people held up signs saying "GO JUICE." P. 128.

233. *See* p. 127.

234. Even Darden had admired Simpson during his football career. *See* p. 40.

235. *Cf.* p. 184 (asking rhetorically, as the jurors later would, *"Why would a rich, successful guy like O.J. Simpson kill his ex-wife?"*); p. 221 (noting that Darden's opening statement asked "'Why would he do it? Not the O.J. Simpson we've all known for years.'"); p. 354 (discussing the importance of overcoming what the jurors thought of Simpson before the trial).

236. In essence, Darden used the domestic violence evidence to try to convince the jury that Simpson belonged in the "criminal" group, not the "good people" group. *See* pp. 180-81, 183-84, 218, 221-22, 231, 362, 366.

In attempting to show that Simpson was in the "criminal" group, the prosecution had compelling evidence. *See supra* notes 36-38 and accompanying text. Before the trial began, law Professor Peter Arenella predicted, "'It will be very difficult for potential jurors to put Mr. Simpson's screaming voice [on the taped 911 telephone call by Nicole Simpson] out of their minds when they go to the jury room.'" Nina Burleigh, *Preliminary Judgments*, A.B.A. J., Oct. 1994, at 55, 58.

Given the quick verdict, it appears that Professor Arenella was wrong. The failure of the prosecution's strategy, *see* p. 304, may suggest, tragically, that many still do not perceive domestic violence as a real crime, perhaps because so many in the "good people" group commit this crime:

> [D]omestic violence remains not really a crime—especially among the men who commit it or sympathize with those who do. The word domestic modifies and diminishes the word that follows so much that it is not considered true violence. Beating up a stranger gets you jailed; beating up a wife lands you in therapy.

Margaret Carlson, *The Victim, You Say?*, TIME, July 4, 1994, at 27.

237. *See supra* notes 198-99 and accompanying text.

the crime. If such a defendant takes the stand, the prosecutor's cross-examination might convince the jury that the defendant is actually not a good person, but a criminal.[238] Simpson's lawyers were smart to keep him off the stand.[239]

A second elevator rule corollary is quite perverse. When the elevator rule applies in favor of the defendant, the burden on the prosecutor is increased even further if the crime is especially heinous. The worse the crime, the less likely the jury will believe that a "non-criminal" committed it. A "good guy" who commits murder is well advised to not just kill, but also brutalize his victims, perhaps by stabbing them repeatedly, and leave behind a gory, bloody mess at the crime scene.[240] A gruesome crime scene adds to the effectiveness of the defense attorney's argument, implicit or explicit, that this defendant simply could not have committed the crime.[241]

III. UNANSWERED QUESTIONS

The *Simpson* trial left us with more than just a series of lessons to be learned. It also raised a number of questions that remain unanswered, including some that challenge the legitimacy of the criminal justice system.

A. If justice really matters to you, can you be a trial attorney?

In a case with dozens of interesting characters, Darden himself may be the most fascinating, at least for other attorneys.[242] Darden was the most volatile of the *Simpson* trial attorneys.[243] Throughout his career as a trial attorney, he constantly fought an at least occasionally losing battle to keep his emotions in

238. "In this game, a prosecutor's best move is to always get the defendant to testify." P. 330.

239. In the *Simpson* trial, the defense had even further reason to keep the defendant off the stand. Over the prosecution's vehement objection, Judge Ito permitted O.J. Simpson to address the court, with television cameras rolling, and state that he did not commit the crime. *See* p. 356. Common sense and news reports suggested that this and other televised events "outside the presence of the jury" filtered to jurors through the visits that the jurors had with family members, despite court instructions to the contrary. *See pp.* 348, 357. Therefore, Simpson was given the best of both worlds. He was allowed to address the jury, albeit indirectly, without the considerable risks inherent in cross-examination. *Cf.* p. 357 (Simpson had not fared well when cross-examined during a practice session). Simpson's well-rehearsed, *see* p. 357, statement was concise, but it cunningly included flattery of the jury, shots at the lead prosecutor, and a plea for an end to the trial so that he could spend time with his children (whom he never wanted to see before the murders, according to Nicole Simpson). *See* p. 356.

240. The Nicole Brown and Ron Goldman murder scene certainly fit the bill. Goldman had sixty-four knife wounds, including deep slashes to his lungs and clean slices across his neck and throat. Nicole Simpson's throat was slit almost from ear to ear. There was blood everywhere. *See* p. 134. Darden, who had prosecuted many murder cases, *see supra* note 67, had "never seen such a brutal murder." P. 134. This gruesome scene was accentuated with bloody footprints indicating that the killer had walked away calmly. *See* p. 118.

241. *See* p. 227.

242. Even one of Darden's harshest critics admits that Darden "was the most complicated of the [trial] participants." Dunne, *supra* note 68, at 40.

243. *See* Toobin, *supra* note 35, at 44. Darden developed his aggressive style early in his career when he prosecuted cases from a poverty-stricken area. *See* p. 76.

check.[244] His fiery demeanor has been criticized for many years,[245] and the criticism intensified during and after the *Simpson* trial.[246]

Darden's career as a prosecutor was an almost continual string of violations of the first rule that is taught to new trial attorneys[247]: Do not get emotionally involved in your cases.[248] He cared deeply about his cases.[249] Perceived injustices[250] have left him a bitter attorney who has vowed never to enter a courtroom again.[251]

Those who argue that all trial attorneys should not become emotionally involved in their cases usually misunderstand the unique position occupied by prosecutors. Any attorney other than a prosecutor (including criminal and civil defense attorneys and civil plaintiffs' attorneys) can try a case even if that attorney personally believes that the client is wrong and that justice would require a verdict against the client. Indeed, the ethical obligation to represent a client zealously compels an attorney to forcefully push the client's cause, regardless of whether the attorney personally believes that it is just.[252] Even if a criminal defense attorney believes that his or her client committed the crime charged, the attorney must nonetheless work for a not guilty verdict.[253]

Only prosecutors are required to personally decide whether their cases are just. A prosecutor's unique ethical obligations require the prosecutor to personally evaluate whether the defendant committed the crime charged. If the prosecutor doubts that the defendant committed the crime, the prosecutor must dismiss the case.[254]

As a result, every time an ethical prosecutor walks into a courtroom, he or she has already determined that the defendant committed the crime. The

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244. *See, e.g.*, pp. 78, 183, 229.

245. *See* pp. 78, 103, 251.

246. *See* p. 249. *See also* Dunn, *supra* note 68, at 44. Simpson himself, a man who certainly should know the dangers of emotion, told Darden, "'Man . . . you need to learn to control your temper.'" P. 149.

247. *See* pp. 78, 80, 87, 251. *See also* Seth Mydans, *In the Joy of Victory, Defense Team in Discord*, N.Y. TIMES, Oct. 4, 1995, at A11 (observing that "Mr. Darden seemed more than any of the other lawyers to have led with his heart").

248. *See* p. 78. *See also* Gerald LeVan, *Wisdom for Workaholics*, TRIAL, July 1994, at 21 (discussing attorneys' unhealthy attachment to work and the importance of stepping back); Ashley S. Lipson & Rachel L. Glick, *How To Be a Less-Stressed Litigator*, TRIAL, Jan. 1993, at 38, 41 ("Normally, it is healthy to accept an adverse decision as a natural by-product of the adversary system. It's time to take a deep breath, be satisfied, and remember that there are two sides to every story.").

249. *See* pp. 73, 86-87, 165, 212, 251.

250. The *Simpson* trial was certainly a source of many of the perceived injustices that drove Darden from the courtroom. *See* pp. 10-12. To illustrate how he feels after the *Simpson* trial, Darden quotes from a letter he received from a Vietnam combat veteran who saw six members of his unit die and twenty-five others receive injuries: "'Even though I did my best, never cowered, nor let my fellow soldiers down I still felt like I could have done more.'" P. 377.

251. *See* pp. 12, 372.

252. *See* HALL, *supra* note 163, § 9:3.

253. *See* p. 81 (criminal defense attorneys "*have* to defend guilty people"). Among criminal defendants, the highest goal is not the seeking of justice, but the avoidance of justice, through a refusal to "snitch." *See* p. 89. Some defense attorneys pursue courtroom strategies that seek to block the truth from judges and jurors. *See* p. 93. None who defend the accused at trial are allowed to let their own evaluation of their client's guilt affect their performance. *Cf.* p. 341 (documenting a conversation between Darden and "one of the defense lawyers" that suggested that the attorney might have believed Simpson committed the murders).

254. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8 (1995); CALIFORNIA RULES OF PROFESSIONAL CONDUCT Rule 5-110 (1996); HALL, *supra* note 163, § 11:1; *see also* pp. 80-81, 165.

prosecutor's job is to see that justice is done, by acquiring a guilty verdict.[255] Prosecutors, and prosecutors alone, can legitimately claim that their job is to see that justice is done at every trial. This job description is the primary benefit to prosecutors' occupations.[256]

This glory of "doing justice" does not come without its price, however, and the price is a steep one. When justice hangs in the balance, the prosecutor has a heavy responsibility.[257] Whenever a prosecutor loses a trial, he or she must admit that a guilty defendant has been set free because the prosecutor did not do the only job a prosecutor has at trial: proving that a guilty defendant committed a crime.[258]

This burden and the related obligation as the only attorneys who will ever "represent" the vast majority of victims and their families[259] are indeed heavy.[260] Only prosecutors who do not care about the outcomes of their trials can be emotionally detached. Those who do not care about justice, however, do not pursue careers as prosecutors in the first instance. Therefore, it is not surprising that many prosecutors cannot follow the standard advice to remain emotionally detached from their cases.

In a larger sense, many non-prosecutor trial attorneys also enter courtrooms seeking justice for their clients. While ethical considerations allow non-prosecutors to try cases they do not personally believe in, many attorneys steer their clients to other trial attorneys when they do not believe in their cases. In other words, many trial attorneys come into courtrooms seeking the same goal as prosecutors: justice. If they care about their cases, they will violate the rule of emotional detachment.

Nonetheless, Darden's disenchantment with a system about which he cares so deeply[261] provides support for the notion that emotional detachment may indeed be a required attribute for trial attorneys. Perhaps trial attorneys are sim-

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255. Darden's belief in the importance of pursuing justice as a prosecutor was rooted in his past and in his ambition that, as a black prosecutor, he could further racial justice. *See* p. 12.

256. *See* p. 81.

257. Like Darden, lead *Simpson* prosecutor Clark "took her job and herself very seriously . . . [and] invested everything she had." P. 161.

258. During the *Simpson* trial, Darden learned (or perhaps relearned) about the agony and regret that a prosecutor must live with when he or she makes mistakes at trial. *See* pp. 32-28, 350, 377. This reviewer is not unfamiliar with a prosecutor's painful remorse after making strategic mistakes that contributed to not guilty verdicts. *See* Betsy Gerboth, *Women Found Innocent in Kensal Bank Robbery*, THE FORUM (FARGO, N.D.), Sept. 22, 1990, at A6 ("U.S. Attorney Steve Easton, for whom the case was his first as the government's chief prosecutor, was visibly shaken by the jury's decision.").

259. *See* pp. 89, 310, 363-64. *Cf.* Mydans, *supra* note 247 ("For the last nine months, the two prosecutors had closely identified themselves with the victims, Nicole Brown Simpson and Ronald L. Goldman, in some ways making the trial their own personal trial.").

260. As a law professor, Darden warns about a prosecutor's obligations:

> I also tell my students that to be a prosecutor is to accept the responsibility of being the only thing standing between the defendant and the jailhouse door sometimes. We have the duty to make sure no one else can be victimized by the person we're prosecuting. That pressure, that fear, can choke you, I tell my students. . . . That fear has a face: the face of a child molested by someone you couldn't convict, the face of a person killed by a murderer you couldn't put away.

P. 327.

261. In Darden's words, "It is the system that I hold in contempt, the criminal justice machine that allowed this thing to become something it wasn't." P. 383.

ply not afforded the luxury of being human beings. A caring nature is generally believed to be a desirable trait for human beings, but caring is considered a character flaw for trial attorneys. Put another way, the rule of emotional detachment is often fundamentally at odds with a trial attorney's desire to seek justice. Can a non-caring human being be an effective trial attorney? If not, can a caring human being survive a career as a trial attorney without burning out[262] so fast that he vows to never again enter a courtroom at the relatively tender age of thirty-nine?[263] Neither question is encouraging.

B. Is banishment punishment enough?

While O.J. Simpson won the trial in Department 103, the verdict from the far larger "jury" that watched the trial on television was far less favorable to him. Post-trial public opinion polls indicate that over fifty-five percent of the American people believe that Simpson committed the murders, and less than twenty percent believe that they were committed by someone else.[264]

With his not guilty verdict from the trial jury, Simpson won his freedom. Given the significant percentage of the American public that believes that he committed a horrendous crime, however, that freedom is not unlimited. Prior to the trial, Simpson made millions as a spokesman for several well known corporations, a television sportscaster, and an actor in high budget movies.[265] Major corporations, television networks, and movie producers are driven by public opinion, however. In the months following the trial, Simpson has not been paid huge sums to be a spokesman, sportscaster, or actor.[266] Instead, he was forced to produce a videotape about the crimes he allegedly committed. Even armed with what should have been a highly marketable[267] videotape about the crime of the century, Simpson could not gain access to the airwaves that were so lucrative for him before June 12, 1994. Many media outlets even refused to sell time or space for advertising about the video.[268]

In a very real sense, Simpson has been banished. That banishment is perhaps not as complete, at least in a physical sense, as a Native American judge's recent banishment of two wayward youths to an otherwise unpopulated is-

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262. In addition to its emotional roots, trial attorney burn out can be at least partially a physical phenomena caused by too many long work days and too little sleep. *See* p. 311.

263. Darden's almost lifelong dream of becoming a lawyer, *see* pp. 19, 26, 28, 53, and the many barriers that he overcame in realizing this dream, *see* pp. 30, 43, 51, 64, make his disillusionment with the justice system particularly heartbreaking.

264. *See* Elder, *supra* note 81. The racial split remains intact. *See* Martin Gottlieb, *Racial Split at the End, as at the Start*, N.Y. TIMES, Oct. 4, 1995, at A1 ("A poll taken by CBS News immediately after the verdict found that about 6 in 10 whites believed the wrong verdict was reached, while 9 in 10 blacks said the jury had come to the right conclusion.").

265. *See* Christy Fisher, *The Nightmare: O.J. Had It All, Then. . .*, ADVERTISING AGE, June 20, 1994, at 1; Jeff Jensen, *O.J. Case Casts Pall on Endorsers*, ADVERTISING AGE, June 27, 1994, at 50; James Sterngold, *Simpson Walks Out of the Courtroom a Free Man and Into a Lucrative Free Market*, N.Y. TIMES, Oct. 4, 1995, at A10.

266. *See* Larry Reibstein, *"Not Guilty" Does Not Mean "Welcome Back,"* NEWSWEEK, Oct. 23, 1995, at 34; Richard Zuglin, *Now, O.J. the Pariah*, TIME, Oct. 23, 1995, at 87.

267. *See* Mandese & Jensen, *supra* note 79, at 1; Sterngold, *supra* note 265.

268. *See* Rance Crain, *Ad Rights Extend to All—Even O.J.*, ADVERTISING AGE, Oct. 9, 1995, at 251.

land.[269] For a former well paid idol who cherishes not only the money but the acclaim that television and movies provide,[270] however, the banishment has been substantial.[271]

Simpson's banishment raises its own issues. If a jury trial in a courtroom allegedly controlled by a judge can be unfair, how can a "defendant" hope to receive a fair banishment trial in the open-ended court of public opinion? What is the burden of proof? Should the verdict form in the actual courtroom allow a jury to find a defendant "innocent," so he can defend himself better in the court of public opinion?[272]

It is also interesting and disquieting to note that Simpson is not the only trial participant[273] who has been banished. As a direct result of the defense's decision to make race the primary issue in the trial,[274] Darden has been banished by significant portions of the African American community who consider him a traitor to his race.[275] Where is the court that will hear Darden's appeal of his banishment?[276]

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269. *See* David Van Biema, *The Banishing Judge,* TIME, Sept. 12, 1994, at 74.

270. *See* p. 378. *Cf.* p. 218 ("Simpson just couldn't stand for the world to know the truth about him."); Reibstein, *supra* note 266.

271. See Barry Hillenbrand, *The Purposeful Tourist,* TIME, May 27, 1996, at 39 (noting "Simpson's pariah status in the U.S."); Jensen, *supra* note 265; Reibstein, *supra* note 266 ("His neighbors in tony Brentwood and Manhattan wanted nothing to do with him. Some members of his Riviera Country Club made it known he's not welcome to golf there. His former high-powered agents, International Creative Management, dropped him."). *Cf. Hey, O.J.! You've Just Been Acquitted of Double Homicide! What Are You Going To Do Now? A Publicist Roundtable,* NEW YORK, Oct. 2, 1995, at 53 (discussing anticipated difficulties for Simpson).

272. The verdict form could ask the jury to decide whether: (a) the defendant is "guilty"; (b) the defendant is "innocent"; or (c) the charges were "not proven." A defendant who was found innocent would presumably fair better in the court of public opinion than one found "not guilty" in the current system, because the defendant in the latter courtroom cannot claim that his innocence has been proven.

The proposed three answer verdict form could have other interesting implications. In cases where the finding was "not proven," the finding roughly equivalent to the current system's "not guilty" verdict, the number of newspaper headlines proclaiming "Defendant Is Innocent" might be reduced. In the current system, these incorrect headlines are common. *See, e.g.,* Gerboth, *supra* note 258.

If a three-answer verdict form was adopted, some would argue that a "not proven" verdict would not prevent a second trial. This interesting double jeopardy question might make the three-answer verdict form a boon to prosecutors, rather than defense attorneys.

273. Even those who did not have any role in the trial fear that their views could result in a banishment similar to that suffered by Darden. *See infra* notes 274-76 and accompanying text. *See* Alter, *supra* note 78, at 67 ("Harlon L. Dalton, a black Yale law professor and the author of a perceptive new book called 'Racial Healing,' says that some black friends of his have admitted that they think Simpson did it, but can't say it publicly for fear of being seen as traitors to their race.").

274. *See* pp. 170-72, 190.

275. *See* pp. 11-12, 172-73, 230-31, 234, 263 (documenting an incident where a black man spit on Darden). Before he agreed to participate in the *Simpson* trial, Darden realized that some African Americans would not like to see an African American try to put another African American in prison for the rest of his life. *See* pp. 130, 162, 172. He was surprised at the intensity of the negative reaction to his role at trial and at his lack of defenders in the black community, however. *See* p. 172.

276. One cannot help but hope that this banishment will eventually recede, and post-trial events suggest an effort by some African Americans to welcome Darden "back" into the black community. *Cf.* p. 381 (discussing an event held by a group of community leaders to honor Darden in December, 1995); Kenneth B. Noble, *Prominent Los Angeles Blacks To Honor Simpson Prosecutor,* N.Y. TIMES, Dec. 17, 1995, at 27. Some black leaders continue to resist an end to Darden's banishment, however, despite previous statements to the contrary. *Compare* p. 334 (noting Cochran's promise to work to get Darden "'back in'" to the black community after the trial) *and* p. 381 (noting Cochran's post trial statement that "he was looking forward to 'welcoming [Darden] back to the community'") *with Verbatim,* TIME, May 6, 1996, at 19 (quoting Cochran as saying about Darden, "He's made his own bed. He's basically a man without a community now.").

C. What about victims?

The *Simpson* trial exposed millions to a dirty little secret about the criminal justice system that those experienced in the system have known about, but have somewhat successfully hidden, for years: The system offers little or nothing for victims and their families other than the pain of publicly reliving the worst event of their lives.[277]

In a criminal justice system that is built around the accused, victims are largely forgotten. The accused has constitutional rights. Victims have none.[278] A criminal trial focuses on whether the accused committed the crime, or whether rogue cops framed the accused. The suffering of the victims is largely irrelevant.

Perhaps this failure to establish rights for victims is inevitable in a free society that believes a defendant is innocent until proven guilty. One set of rights is more than enough for the system to handle. If crime victims had their own set of rights that had to be recognized in a criminal trial,[279] those rights would inevitably clash with the rights of the accused. Unless we are willing to change the fundamental focus of the criminal justice system, victims' rights would be illusory because they would have to bow to the rights of the accused whenever the two sets of rights conflicted.[280]

The pat "that's just the way the system works" response, however, may not be good enough. Although the criminal justice system is and probably must be focused on the defendant, an effective criminal justice system is also a key component of the Lockeian social contract. In any civilized society, the victims of crime and their families are not allowed to seek their own retribution for a

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277. *See* pp. 73, 311-12, 346, 349, 351-52, 357.

278. In his outrage over the defense's success in turning the jury's attention away from Simpson and onto Fuhrman's racism, Fred Goldman exclaimed, "'My son, Nicole, our families have a right to a fair trial.'" P. 350. Despite Darden's statement to the contrary, Goldman is wrong. *See* p. 350. No provision of the Constitution gives crime victims the right to demand a fair trial. Only defendants can make this demand.

279. For those relatively few crime victims who are "fortunate" enough to have suffered at the hands of a defendant with financial resources, the civil justice system provides a set of tort rights that can result in the recovery of monetary damages. The families of Nicole Simpson and Ron Goldman are among the relatively small group of crime victims who can realistically pursue tort recovery. *See* Christopher John Farley, *Simpson's Civil Wars*, TIME, Oct. 23, 1995, at 88; Reibstein, *supra* note 266; Sterngold, *supra* note 265. Even so, their prospects of collecting the civil jury's award of $8.5 million in compensatory damages and $25 million in punitive damages may be slim. *See Squeezed: Where Did O.J.'s Money Go?*, NEWSWEEK, Feb. 17, 1997, at 28; Larry Reibstein & Patricia King, *O.J. Family Values*, NEWSWEEK, Feb. 17, 1997, at 28, 31; *Simpson Penalty: $25 M*, USA TODAY, Feb. 11, 1997, at 1A.

The vast majority of crimes are committed by persons who are essentially judgment proof, however. Unlike many defendants in civil suits, criminal defendants do not have insurance coverage. Insurance for criminal acts is generally considered to be against public policy. *See* 6B JOHN A. APPLEMAN & JEAN APPLEMAN, INSURANCE LAW AND PRACTICE § 4252 (1979). Acquiring a judgment against these defendants would be a Pyrrhic victory, because the resources expended to secure such a judgment would exceed any amount actually collected on the judgment.

In the American system of justice, it is generally far better to be a victim of another person's carelessness than a victim of another person's crime. Consider the family of a woman killed in a car accident and the family of a woman hacked to death by a murderer. The family of the negligence victim will probably be able to recover substantial damages from the careless person's insurance company. The family of the murder victim stands little chance of recovery. This is a difficult distinction to justify.

280. It is difficult to imagine a significant right that could be assigned to victims that would not somehow conflict with the rights of the accused whenever it was enforced.

crime by committing a roughly equivalent act against the perpetrator of the crime. Rather, the criminal justice system is expected to extract retribution for the victim by punishing the criminal.[281]

The criminal justice system's ability to find, prosecute, and punish criminals is a crucial component of the public's continued support for the system. If the system does not perform these tasks effectively, public support for the system will erode. The *Simpson* trial ate into the public's confidence in the criminal justice system, because everyone agrees that the system failed. After all, those who believe that Simpson committed the murders, those who believe that someone else did, and those who are not sure[282] must concur about one fact. No person has been convicted and punished for the brutal murders that were the most publicized crime in American history.

In a country that prides itself as a civilized nation rooted in the law, it is indeed an important question. What about victims?

D. Is winning "the only thing?"[283]

America loves winners. In the months following the *Simpson* trial Johnnie Cochran has basked in the glow of victory.[284] He has been called a brilliant strategist and trial attorney. Even those who begrudge him his victory must admit that it was a remarkable accomplishment to attain so speedy a not guilty verdict despite such seemingly overpowering evidence of guilt.

Amid the din of praise, a few voices of concern can be heard. These voices ask whether a victory based upon making race the primary trial issue came at too high a cost.[285] Even the person who brought Cochran into the case, fellow defense attorney Robert Shapiro, criticized him for "'dealing the race card from the bottom of the deck.'"[286]

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281. Although retribution is perhaps the least aesthetic of the underpinnings of a justice system that also seeks to deter crime, incapacitate criminals, and rehabilitate them, it may indeed be the most fundamental of these moorings. *See* ROBERT C. SOLOMON, A PASSION FOR JUSTICE: EMOTIONS AND THE ORIGINS OF THE SOCIAL CONTRACT 275 (1990) ("[I]f punishment no longer satisfies the desire for vengeance, if it ignores not only the rights but the emotional needs of the victims of crime, then punishment no longer serves its primary purpose, even if it succeeds in rehabilitating the criminal and deterring other crime . . . .").

282. *See supra* text accompanying note 264.

283. Many believe that legendary football coach Vince Lombardi coined the phrase, "Winning isn't everything, it's the only thing." *See* JOHN BARTLETT, FAMILIAR QUOTATIONS 388 (Justin Kaplan ed., 16th ed. 1992) (noting that this phrase was recalled on Lombardi's death). This phrase actually has been credited to another coach, Vanderbilt's Red Sanders, who first used it in 1953. *See* JAMES B. SIMPSON, SIMPSON'S CONTEMPORARY QUOTATIONS 783 (1988). Lombardi's actual contribution was, "Winning isn't everything, but wanting to win is." *Id.* at 783 n.10. Wanting to win is probably an almost universal, and an admirable, instinct among trial attorneys. *See supra* text accompanying notes 257-61. When winning is "the only thing" for trial attorneys, however, the justice system may be damaged.

284. *See, e.g.*, Crouch, *supra* note 70, at 112-13, 116; Dunne, *supra* note 68, at 44; Gates, *supra* note 7, at 59; Toobin, *supra* note 35, at 42; Whitaker, *supra* note 81, at 34.

285. *See* pp. 369-70.

286. P. 371.

Is winning the only thing for a criminal defense attorney?[287] The knee jerk answer for lawyers is yes.[288] After all, the United States Constitution guarantees criminal defendants the right to an attorney.[289] That right would be meaningless if a defense attorney did not do everything in the attorney's power to win. The rules of ethics require a lawyer to zealously represent the client, for good reason.[290]

That answer assumes, however, that an attorney bears no duties other than the duty to his or her client. An attorney is also an officer of the court. This office, like any other public office,[291] has its own responsibilities, because the courts in which attorneys earn their livelihoods are provided by the citizens. If attorneys cause citizens to lose faith in the courts, they are in danger of losing the courts they serve.

As public officers, attorneys must also bear some responsibility to the public outside the courtroom. Raising and flaunting an issue as explosive and potentially destructive as race is not without its risks to public welfare.[292] The most destructive riots in recent American history resulted from the issue of race in a courtroom.[293]

Raising race has other consequences, even if one ignores the risk that a race-centered defense might cause the jurors to lose sight of their duty to determine whether the defendant committed the crimes charged.[294] These repercussions may be less explosive, but they are arguably no less destructive. Using allegations of race-based police conspiracies to defend a man who was coddled by police officers diminishes the injustices suffered by the many African Americans who actually have been mistreated at the hands of police officers and others.[295] Allusions to the civil rights movement in a trial of a man who had little to do with the African American community and once prided himself on being "colorless"[296] cheapens the many sacrifices of those who have fought

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287. Winning cannot be the only thing for a prosecutor. If a prosecutor does not believe the evidence establishes that the defendant committed the crime, ethical considerations require dismissal of the charges, even if the case can be won at trial. *See supra* notes 254-55 and accompanying text.

288. This would certainly be Cochran's answer if he was asked this question, for Cochran openly pushed the race issue, *see* pp. 209, 211-12, when he almost certainly knew the consequences inside and outside the courtroom, *see* pp. 201-03, 338, 369. When he was criticized, he responded with the familiar lawyer's retort, "'I'm just here doing my job.'" P. 370.

289. U.S. CONST. amend. VI.

290. *See supra* notes 252-53 and accompanying text.

291. *Cf.* J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1439 (1994) (holding that attorneys are "state actors").

292. *See* Alter, *supra* note 78, at 67 (finding that "67% of whites think racial issues raised in the trial increased racial tensions; 52% of blacks agree").

293. *See* Jost, *supra* note 2, at 1007 (noting that the Rodney King state court verdict "provoked rioting and looting in Los Angeles that resulted in at least 30 deaths and millions of dollars in property damage"). *See also* David Ellis, *L.A. Lawless*, TIME, May 11, 1992, at 26.

294. *See supra* Part II.A. *See also* Woodson, *supra* note 100 ("Though too many blacks may know the bitter taste of racial discrimination, not all of us believe that truth and reason should be sacrificed in an attempt to vindicate past wrongs.").

295. *See* pp. 166, 208, 339.

296. *See* Levin, *supra* note 76 ("The irony, of course, is that O.J. Simpson—a poor kid from the San Francisco projects—ran determinedly away from his race. He eschewed black causes. . . . He eliminated black diction from his speech. . . . 'Hertz told me in all their surveys that I was colorless,' he said in 1992."). *Cf.* Gates, *supra* note 7, at 64 ("[Amira] Baraka says, 'To see him get all of this God-damned support from peo-

for equality.[297] Perhaps most importantly, repeated emphasis on race in so public a forum as the *Simpson* trial widens the already too vast gap between blacks and whites in America.[298]

IV. CONCLUSION

Millions of Americans watched significant portions of the *Simpson* trial. It was the most public event in the history of the American justice system.

From any perspective, it was not our finest hour. Law enforcement officers mishandled evidence, lied on the stand, and harbored disgusting feelings of racism. A well funded[299] "Dream Team" of camera hogging[300] defense attorneys changed the trial from a quest for the truth into a spectacle of racism. The prosecutors failed to delay a not guilty verdict for more than four hours despite an unprecedented mountain of physical evidence. A publicity conscious[301] judge let his courtroom degenerate into a series of petty fights that resembled a professional wrestling match.[302] Jurors fought among themselves, staged revolts, and openly displayed inappropriate motivations.[303] Even the defendant managed to contribute to the morass when evidence of his repeated abuse of his ex-wife was revealed.[304]

For those who toil in, study, or treasure the jury trial system, it was a disaster.[305] After this trial and too many others like it,[306] public confidence in

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ple he has historically and steadfastly eschewed just pissed me off.'").

297. *See* pp. 12, 116, 339, 368, 382. "The revolution is over when the revolutionaries have nothing better to do than decry the treatment of a millionaire who was given every deference by the system. The movement will be a farce when young blacks are forced to storm the streets, yelling, 'Remember Brentwood.'" P. 368. *See also* Woodson, *supra* note 100. *Cf.* p. 223 ("We were being ratcheted back fifty years because of a lying, murdering ex-jock and his unprincipled legal team.").

298. *Cf.* p. 11 ("As the case became more and more about race, I watched helplessly as it ripped the scabs off America's wounds, which will now take even longer to heal, assuming they ever do."); Alter, *supra* note 78, at 66 ("We [whites] expected more blacks to look beyond race to facts, as thousands of whites had during the Rodney King trial. When so many blacks didn't, it shocked us—and hardened us in ways that shocked us even more."); Weisberg, *supra* note 65, at 104 ("The Simpson verdict is some of the worst racial news in years. It has demonstrated, to those who still had any doubt, that the era of racial progress has now given way to a fracturing of black and white America into alternate universes.").

299. A final, but perhaps already too well known, lesson from the *Simpson* trial is that rich defendants receive more "justice" than poor defendants. *See* Streisand, *supra* note 105, at 47-48 ("Fully 85 percent of all Americans say the trial proves there is a different justice for those who have money and those who do not."). Simpson's millions financed a huge and probably unprecedented team of attorneys and investigators. *See* pp. 161, 378. This massive defense team tied the prosecutor's office into knots. *See* pp. 161, 179, 181. Despite Darden's plea that "[t]he laws enforced against the minimum wage earner in Compton should be the same laws enforced against the millionaire from Beverly Hills," p. 163, the system for enforcing those laws is not, and perhaps cannot be, so even-handed, *see* p. 303. *See also* Alter, *supra* note 78, at 67 ("[T]he truer subtext was always about money and celebrity and the sale of 'reasonable doubt' to any defendant who can afford to plant it.").

300. *See* p. 301.

301. *See* p. 261.

302. *See* p. 347.

303. *See* pp. 4, 305-08; Jost, *supra* note 2, at 1008.

304. *See* p. 218.

305. *See* Streisand, *supra* note 105, at 47 (explaining that the *Simpson* trial "has trashed what little faith many Americans may have left in lawyers, judges, police, and, perhaps, each other").

306. The state court trial of the officers accused of beating Rodney King was eerily parallel to the *Simpson* trial in several respects. *See* Weisberg, *supra* note 65, at 33. Both trials had seemingly overpowering

the system is at an all time low, with good reason.[307] Americans no longer believe that attorneys seek the truth in jury trials.[308] Like Darden, many hold the entire justice system "in contempt."

There is much work for us to do.[309] We cannot hope to regain public confidence in the justice system until we work to again make jury trials a quest for the truth, rather than merely a game to be won at any cost.[310]

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evidence for the prosecutors, serious racial undertones, and not guilty verdicts that produced stunned reactions in many Americans.

The reaction to the Rodney King incident underscores the importance of public faith in the criminal justice system, and the danger of betraying that faith. As one leading observer noted, "even in the days following the Rodney King beating, the absence of an immediate reaction demonstrated initial faith in the justice system. People waited 14 months for justice to work, and only when they detected a breakdown in the system did they react. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 95, at 14 (summarizing the testimony of Clarence Page). Following the two most publicized trials in the past five years, the public's faith in the justice system has been shaken. The system cannot hope to survive without rebuilding that confidence.

307. *See* Jost, *supra* note 2, at 993 ("Public discontent with the jury system appears to be rising."), 995 (For many, "the *Simpson* case represented everything that is wrong with the jury system: protracted trials, manipulative lawyers and erratic verdicts based more on emotion and prejudice than on thoughtful deliberation about evidence and the law."); Laura Mausnerus, *Under Fire, Jury System Faces Overhaul: Unpopular Verdicts Feed A Belief That the Process Doesn't Work*, N.Y. TIMES, Nov. 4, 1995, at L9; Posner, *supra* note 102, at 49 ("In recent years a series of highly publicized criminal trials in which obviously guilty defendants were acquitted by juries . . . has made the American jury a controversial institution.").

308. A 1991 survey of persons eligible for jury duty indicated that sixty-two percent of potential jurors believed it was "somewhat likely" that an attorney would lie to the jury, while only ten percent believed this was "very unlikely." *See* Jeanne J. Fleming & Leonard C. Schwarz, *Juror Opinion Survey Reveals Obstacles for Litigators*, INSIDE LITIGATION, Dec. 1991, at 21.

309. P. 382. *Cf.* p. 223 ("I try to instill in my students the idea that justice needs tending. It will not survive in the face of cynical manipulation and distortion, any more than a garden will survive being constantly trampled.").

310. *See* pp. 165, 302, 346.