THE O.J. SIMPSON STORIES: BEHAVIORAL SCIENTISTS' REFLECTIONS ON *THE PEOPLE OF THE STATE OF CALIFORNIA V. ORENTHAL JAMES SIMPSON*

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Vivid, personally observed events have a more forceful effect on the mind and on social attitudes than tightly constructed logical arguments or carefully organized instructional lectures. *The People of the State of California v. Orenthal James Simpson* vividly illustrated many of the best and worst aspects of the American adversarial jury trial process. The public saw a "big money" trial, with prominent attorneys performing nine months of trial tactics and courtroom maneuvers. They saw a wide range of evidence, including heart-rending testimonials, horrifying photographs of the victims' bodies, intellectually challenging scientific analysis and mind-boggling statistics, and flaky recollections of Hollywood wannabes. The Simpson trial was also surely the most widely observed legal event of all time. The judge opened the trial to the media; news, commentary, and daily televised events from the trial inundated the public for over a year. Reactions to the verdict were also dramatic; they revealed a wide gap between the attitudes of majority white and minority African American citizens. Even reactions to the reactions became a staple of the media diet fed to the public for weeks after the verdict was announced.[1] The Simpson trial is probably the single most significant source of impressions and attitudes about the criminal trial in America today.

In this essay, we apply a popular cognitive psychological model of the juror decision-making process, "Explanation-based Decision Making," to describe the reasoning of the jurors in the

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1. For example, see Henry L. Gates, Jr.'s comment that attention shifted from the verdict to the reaction, to the reaction to the reaction: ". . . which is to say, black indignation at white anger at black jubilation at Simpson's acquittal." Henry L. Gates, Jr., *Thirteen Ways of Looking at a Black Man*, NEW YORKER, Oct. 23, 1995, at 55.

Simpson trial. The model is used to explicate the impact on the jurors of evidence such as Police Detective Fuhrman's testimony, the results of bloodstain DNA analyses, and the defendant's prior history of domestic violence. The model also explains individual differences among the jurors' decisions as a function of their race and, thus, may shed some light on the differences in citizens' reactions to the verdict. Implications from the analysis are drawn for jury selection and attorneys' trial tactics.

Our focus is thus on the jury's view of the Simpson trial. This essay is a psychological "post-mortem" on the Simpson trial verdict that explicates the jurors' decision-making processes by applying concepts from theories of juror behavior. Although the discussion and commentary is speculative, it offers some useful insights.

Even disregarding the high profile and high stakes of the Simpson trial, the case was a difficult one for jurors. First, it was built on circumstantial evidence—a case that would probably not even have gone to trial ten years ago. There were no witnesses, no weapon was found, and almost no simple physical evidence was available. The primary evidence linking Simpson to the murders was derived from the analysis of DNA patterns in bloodstains at the murder scene and on Simpson's car and clothes. This evidence is especially difficult for jurors to comprehend because the conclusions of the analysis are probabilistic, there is controversy among experts about how to analyze and report conclusions, and bloodstain evidence can be "planted" or contaminated much more easily than fingerprints, ballistic traces, or other comparable evidence.

Second, it was a "reasonable doubt" case, in which the jurors grappled with instructions on the nebulous and unfamiliar standard of proof: What is a reasonable doubt? Third, it was extremely complex. There were many sources of circumstantial evidence and the implications of much of this evidence were filtered through complex, controversial technical analysis procedures. Character, motive, and mood evidence were also presented to be combined with the already massive sample of physical evidence. And, finally, the trial lasted more than a year—the longest sequestration in the history of jury trials.

I. A THEORY OF THE JUROR DECISION-MAKING PROCESS

What do we know *in general* about juror behavior? First, jurors usually accept their primary task, fact-finding, as prescribed by the law. During a typical criminal trial, the individual juror is trying to figure out "What happened?" To do so the juror constructs narratives to summarize the evidence he or she accepts as credible. Attorney's arguments and trial tactics can influence the "figuring out" process but rarely, if ever, alter the basic process.

A. Explanation-based Decision Making

Our model of juror decision-making processes is embedded in a general framework that we call Explanation-based Decision Making ("EBDM").[2] The framework is intended to summarize the general characteristics and stages of decisions that involve the "comprehension" of a complex decision-relevant situation. For example, a military general precedes a tactical decision by trying to understand the current military situation on a battlefield or in a theater of operations. Or a physician generates a "mental model" of a patient's "physiological system" in order to diagnose a medical condition and prescribe a treatment. According to the EBDM approach, jurors begin their decision-making process by constructing a narrative to explain the available facts they have heard at trial. The distinctive assumption in our explanation-based approach to decision making is the hypothesis that decision makers construct an intermediate summary of the evidence and that this explanation, rather than the original "raw" evidence, is the basis of the final decision.

The juror's decision is a prototype of the tasks to which the EBDM model should apply: A massive "database" of evidence is input at trial. The evidence comes in a scrambled sequence, and

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2. Many commentators from the behavioral sciences, the humanities, and the academic and practice sides of the legal profession have noted that narratives play a significant role in legal decisions. *See, e.g.*, Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519 (1991); Nancy Pennington & Reid Hastie, *A Theory of Explanation-Based Decision Making, in* DECISION MAKING IN ACTION: MODELS AND METHODS 188 (Gary A. Klein et al. eds., 1993) (shows that constructing and reasoning about narratives plays an even more prominent role in juror decision making (in typical criminal trials) than has been suggested by other commentators).

witnesses and exhibits convey pieces of a historical puzzle in a jumbled temporal sequence. The evidence is piecemeal and riddled with gaps in its depiction of the historical events that are the focus of reconstruction; event descriptions are incomplete, some critical events were not observed by the available witnesses, and information about personal reactions and motivations is always uncertain and sometimes not presented (often because of rules of evidence). Finally, some evidence (for example, individual witnesses' statements) cannot be assessed in isolation; the meaning of one statement may depend on the meanings of many related statements.

The juror's "explanation" of legal evidence takes the form of a "story" in which causal and intentional relations among events are prominent.[3] The story is constructed both from information presented at trial and from the juror's background knowledge. Two kinds of background knowledge are critical: (1) expectations about what makes a complete story and (2) knowledge about events similar to those that are central in the case. For most purposes, it suffices to say that a story is a temporally organized sequence of actions and events "glued together" by human motives and goals. The story constructed by the juror will consist of some subset of the events and causal relationships referred to in the presentation of evidence, *as well as* additional events and causal relationships inferred by the juror. Some of these inferences may be suggested by the attorneys and some may be constructed solely by the juror. Whatever their source, the inferences will serve to fill out the episode structure of the story. This constructive mental activity results in one or more *interpretations* of the evidence that have a narrative story form.

A juror may construct more than one. However, one story will be accepted as the "best" story and the juror will have a level of confidence in that "best" story that may be quite high or quite low. We call the principles that determine acceptability of a story and the resulting level of confidence in the story *certainty principles*. According to our theory, two certainty principles govern acceptance: *coverage* and *coherence*. An additional certainty principle, *uniqueness*, will contribute to confidence.

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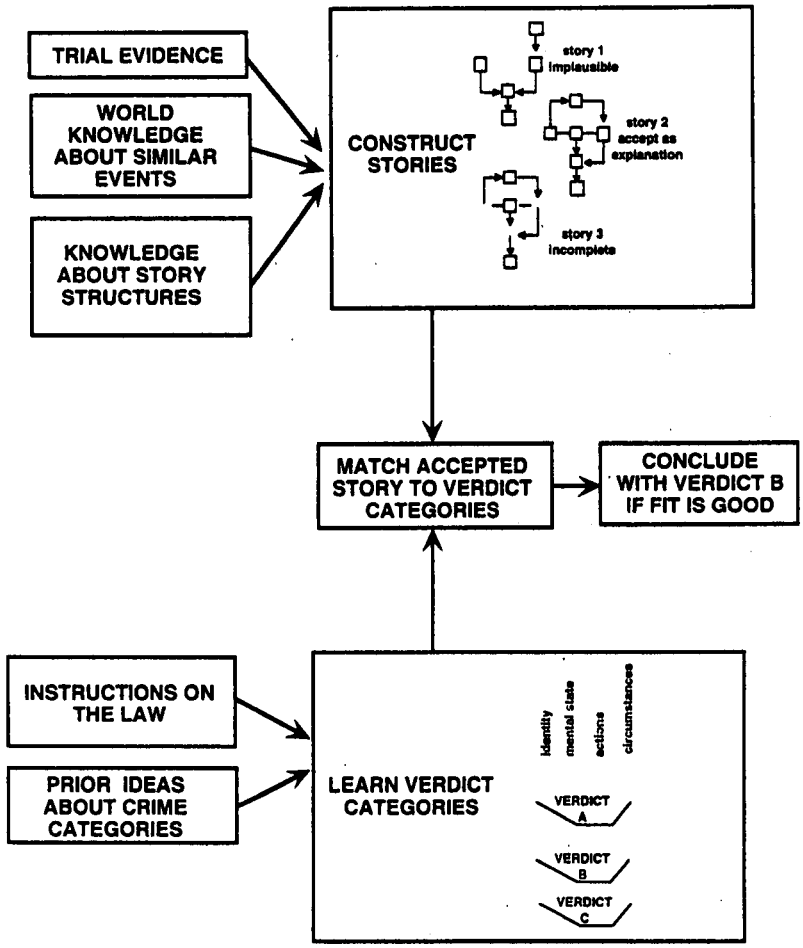
3. W. LANCE BENNETT & MARTHA S. FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE (1981); Nancy Pennington & Reid Hastie, *Evidence Evaluation in Complex Decision Making*, 51 J. PERSONALITY & SOC. PSYCHOL. 242, 243 (1986).

A story's *coverage* of the evidence refers to the extent to which the story accounts for the evidence presented at trial. The greater the story's coverage, the more acceptable the story will be as an explanation of the evidence and the greater confidence the juror will have in the story as an explanation. An explanation that leaves a lot of evidence unaccounted for will have a lower level of acceptability as the correct explanation. Poor coverage should lower the overall confidence in a story and consequently decrease overall confidence in the decision.

A story's *coherence* also affects the level of confidence in an accepted story. Coherence has three components: consistency, plausibility, and completeness. A story is *consistent* to the extent that it does not contain internal contradictions either with evidence believed to be true or with other parts of the explanation. A story is *plausible* to the extent that it corresponds to the decision maker's knowledge about what typically happens in the world. A story is *complete* when the expected structure of the story has, in laymen's terms, "all of its parts." Missing information or lack of plausible inferences about one or more major components of the story structure will decrease both completeness of the story and confidence in the explanation. Completeness also depends on the extent to which a story's component episodes and events are "glued" together with (usually inferred) beliefs about motives, plans, and intentions. A story in which many inter-episode links are missing or attributed to coincidence is less complete and less convincing. Together, these three ingredients of coherence (consistency, plausibility, and completeness) may be present in a given story to a greater or lesser degree; the three components combine to yield the overall level of coherence.

Finally, if more than one story is judged to be coherent, then the stories will lack *uniqueness*. If there are multiple coherent explanations for the available evidence, belief in any one of them over the others will necessarily be diminished. If there is a single coherent story, this story will be accepted as the explanation of the evidence.



Story Model Figure

In summary, our application of the general explanation-based decision model to juror decisions is based on the hypothesis that jurors impose a narrative story organization on trial information in which causal and intentional relations between events are central. Meaning is assigned to evidence through the incorporation of that evidence into one or more plausible accounts or stories describing "what happened" during the crime. This process allows jurors to understand and organize the evidence better, and it actually enables them to make a predeliberation verdict decision.

B. What Are the Uses of a "Theory" Like the Story Model?

In the most general terms, we use scientific theories to control and predict real-world events. A fundamental question is whether the story model is of any use to perform these functions in a real trial. We think the explanation-based framework and its more specific models (here, the story model) are good behavioral theory. We believe EBDM provides the most effective theoretical guide we have to predicting individual jurors' verdicts and designing trial tactics. This raises the question: Why didn't the theory predict the outcome of the Simpson Trial? Well, we think it would have predicted the outcome, *if it had been given the relevant inputs.*

We can use analogies to applications of other more developed scientific theories. Take physics, for example. Suppose we wanted to predict whether or not a crystal goblet would shatter if thrown against the wall of a lecture hall. Would any physicist undertake such a prediction? Probably not. Would they say their theories about the properties of physical objects and the mechanics of forces are "weak" or "unscientific"? No, of course not. They would say, "In principle, we can predict the outcome." But to make a specific prediction, they would demand data about the composition and structure of the goblet, the direction and force of the throw, the composition of the wall, and so on. Or they might insist on conducting experiments with a sample of goblets under the same conditions as in the final test. In either case, even with massive amounts of background information, the physicist would only state a probabilistic forecast. A similar scenario could be constructed for a biologist challenged to predict the phenotypic attributes of offspring of the mating of two organisms or to predict the result of exposure to an infectious virus.

Our claim is that in a situation like the Simpson trial, the story model can be applied (in practice, not just in principle) to predict the outcome, but confidence in the application (as in any scientific prediction of a specific event) will drop sharply if information about the jurors, the evidence, and other circumstances of the to-be-predicted event are unavailable. In the present instance, we have only sketchy information about the jurors' backgrounds and experiences during the trial and so the best we can offer is an *a posteriori* psychological interpretation of their decision.

II. ANALYZING THE SIMPSON TRIAL JURY VERDICT

Not surprisingly, given what trial attorneys know about juror decision making, the trial strategies for both prosecution and defense involved trying to maneuver the other side into committing to specific stories before the trial and in its early stages. For example, Johnny Cochran's rambling opening statement is at least partly explained by his intention to not commit too early to detailed stories of some events. The prosecution's early commitment to a detailed story of the criminal investigation led to defense advantages—when the defense established many small inconsistencies between the different criminalists' descriptions of their activities.

A. The Prosecution's Story

The prosecution (as is usually the case) sought to present a single, linear story. This is partly because it is they who decide whether or not to go to trial with the case. A major consideration in the decision to prosecute is whether the evidence supports a complete, coherent story that can be easily understood by a jury. It is also partly because the events that are defined as "criminal" by our laws usually have a temporally sequential structure. The narrow window of opportunity within which O.J. could have commited the crime heightened the importance of the temporal sequence of events. Thus, Marcia Clark's closing argument used a time line to emphasize the events in the prosecution's story:

O.J. Simpson and Nicole Brown Simpson had a difficult relationship that was punctuated by episodes of domestic violence both during and after their marriage. This frustrating relationship and O.J. Simpson's fundamentally violent character combined to create a reservoir of explosive anger directed at Nicole Brown Simpson. On the day of the killings, a series of incidents with his ex-wife and his then current girlfriend provoked Simpson's rage and led him to decide to kill Nicole Brown Simpson. Once he had found a solution to his "problems," his mood improved and he joked and chatted amiably with acquaintances in the early evening. Simpson parted company from his houseguest, Kato Kaelin, at 9:36 p.m. and drove in his white Bronco to his ex-wife's apartment (approximately six minutes away by car on Bundy Avenue). There he waited, and when, at about 10:15 p.m., he encountered her and another man (whom he

probably assumed was one of her lovers), he attacked, stabbing them both to death with a knife he was carrying for this purpose.

During the fight and his flight from the scene, Simpson dropped a knit ski cap, a leather glove, and left traces of his own blood on the ground, on a fence, and in his car. Simpson then hurried back to his estate on Rockingham Drive, parked his Bronco on a side street, and entered his yard (probably by climbing over the metal fence). At 10:53 p.m., while rushing around attempting to conceal evidence of the crime, he bumped into an air conditioner in the wall behind Kaelin's apartment; there he dropped a glove (the mate to the glove found at the crime scene) covered with traces of blood and hairs from both victims as well as traces of his own blood. At 10:54 p.m., both Kaelin and the driver of an airport limousine saw Simpson as he entered his house. Once inside, Simpson quickly washed, changed clothing, and packed evidence that might have linked him to the murders; at this time he left traces of his own blood in the foyer and bathroom and he left a pair of socks, stained with Nicole Brown Simpson's blood, in the bedroom. At 11:01 p.m., Simpson walked out the front door with his luggage in hand and helped the limousine driver load it into his car. He then departed for the airport to fly to Chicago. At this time he was in a "stressed" mood as a result of the killings and his fear of being caught.[4]

B. The Defense Stories

The defense had several stories available to develop. One source of difficulty for the attorneys (especially on the defense team), because the trial began so soon after the murders, was that discovery was relatively incomplete. Therefore, there was at the outset considerable uncertainty about the ultimate form the defense story would take. As it was, there were several surprises (for example, the discovery of the Fuhrman interview tapes) for both sides. Here are the major defense stories:

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4. Official Transcript, Closing Argument by Ms. Clarke, People v. Simpson, No. BA 097211, 1995 WL 672670 (Cal. Super. Ct. L.A. County Sept. 26, 1995).

1. O.J. Simpson's Story

Simpson was in a pleasant mood on the day before the killings. In the evening, he was cheerful and relaxed when he drove Kaelin to a drive-in restaurant and when he chatted with friends. After he and Kaelin parted company, he chipped some golf balls in his yard and telephoned friends from the cellular telephone that was conveniently at hand in the Bronco parked in front of his house. While he was carrying his luggage to the walkway in front of his house, Simpson was surprised by the limousine driver's "buzz" from the driveway gate. Simpson then hurried to collect the rest of his baggage and get to the airport in time to fly to Chicago. When he heard the news of Nicole Brown Simpson's death, via a telephone call from a California police officer to his hotel in Chicago, he was surprised and upset.

2. The "Real Killers" Story

Drug-dealer-related professional killers laid in wait and murdered Nicole Brown Simpson and Ronald Goldman. It is possible they intended to kill someone else or it is possible that either Nicole Brown Simpson or Ronald Goldman was involved in drug-related activities.

3. The "Rush to Judgment" Story

In the first few hours after the murders, the investigating police officers quickly reached the conclusion that Simpson was the killer. The rest of their investigation (for example, immediately leaving the crime scene to hurry to Simpson's Rockingham home) was myopically guided by their premature assumption that Simpson was the murderer. Detective Fuhrman, a racist who had been involved in a previous incident when (African American) Simpson threatened his (white) wife with violence, was particularly motivated to frame Simpson as the killer. Eventually, probably to ensure what he thought was the correct result of the investigation, Fuhrman (aided by Vannatter) used blood drawn from Simpson after the murders and blood spilled by the victims to plant bloodstains on Simpson's socks, a glove, the Bronco, and a fence at the crime scene.

4. The "Bungling Criminal Investigators" Story

LAPD criminalists, several of them trainees, bungled many procedures in evidence collection. Separate samples of blood were contaminated through mishandling at the crime scene and in the LAPD Crime Lab (labeled by the defense "a cesspool of contamination"). In addition, the outside laboratories that analyzed the DNA samples had laboratory analysis error rates that were not appropriately included in the calculation of summary "random match probability statistics."

C. The Role of Attorneys

What other stories do attorneys tell? Attorneys, especially defense attorneys (who often do not have a simple crime-events story to tell or evidence to support one, if there is one to tell), often use narratives about the "Jury's Role" (a story about *the trial*, not the crime) to induce jurors to adopt favorable orientations towards the evidence.[5] The rhetoric in the Darden and Cochran closing arguments illustrates this practice:

> The People put on their case, the defense put on their case, and I assert that the defense case is a bunch of smoke and mirrors, all about distracting you from the real evidence of this case. So imagine the smoke, imagine the burning house, imagine you are standing in front of a burning house. And from inside the burning house you hear the wail of a baby, a baby's crying, a baby in fear, a baby about to lose its life. And you can hear that baby screaming. And you hear that wail. Now, that baby, that baby is justice . . . and you want to do the right thing for justice is about to perish. Justice is about to be lost. Baby Justice is about to be lost. So you start to wade through that smoke trying to get to that baby. You have got to save that baby. You have to save Baby Justice. And if you happen to run into some smoke, find your way through that smoke. And if you happen to run into a couple of defense attorneys in the way, just ask them to politely step aside and let you find the way through the smoke.[6]

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5. *Cf.* Anthony G. Amsterdam & Randy Hertz, *An Analysis of Closing Arguments to a Jury*, 37 N.Y. L. REV. 55 (1992).

6. Official Transcript, Closing Argument of Mr. Darden, People v. Simpson, No. BA 097211, 1995 WL 686428, at *28 (Cal. Super. Ct. L.A. County Sept. 27, 1995).

> You are the ones who have made a commitment, a commitment toward justice. And it's a painful commitment, but you have got to see it through. Your commitment, your courage, is much greater than these police officers. This man could have been off the force long ago if they had done their job, but they didn't do their job. People looked the other way. People didn't have the courage. One of the things that has made this country great is people's willingness to stand up and say: "That's wrong; I'm not going to be a part of it. I'm not going to be part of the cover-up." That's what I'm asking you to do: Stop this cover-up. Stop this cover-up. If you don't stop it, then who?[7]

III. EXPLAINING THE VERDICT

What else could the jurors be doing other than constructing stories? One traditional view is that conscientious jurors are reasoning "rationally," or at least approximately rationally from the evidence to their verdicts. One thought process attributed to jurors is that they total up the budget of the evidence, probably according to a "weighting and adding" rule, to get a "bottom line" on the issue of guilt or innocence.[8] Lopes has dubbed this approach the "Meter Model"; the juror behaves as though he or she has a unitary "strength of belief" in mind that fluctuates to reflect the impact of items of evidence.[9] At any point in time, the juror could report a current belief about guilt that would predict his or her behavior if deliberation were to begin at that moment.[10] The implications of this view—that evidence would probably be stored in memory in a pro/con, prosecution/defense format and that the relationship between ratings of individual items of evidence and the ultimate verdict can be captured by an "averaging equation"—do not hold in any plausibly complex legal decision. Another view is that jurors reason according to the prescriptions of Bayes Theorem from probability theory and that

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7. Official Transcript, Closing Argument of Mr. Cochran, People v. Simpson, No. BA 097211, 1995 WL 697928, at *7 (Cal. Super. Ct. L.A. County Sept. 28, 1995).

8. Norman H. Anderson, *Test of a Model for Opinion Change*. 59 J. ABNORMAL & SOC. PSYCHOL. 371 (1959); Reid Hastie, *Algebraic Models of Juror Decision Processes*, *in* INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING 84 (Reid Hastie ed., 1993).

9. Lola Lopes, *Two Conceptions of the Juror*, *in* INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING 255 (Reid Hastie ed., 1993).

10. *Id.* at 256.

they are at least qualitatively Bayesian.[11] For the most part, empirical studies of mock-jurors' decisions do not support this model.[12]

A popular view is that jurors' decisions are much less thoughtful than implied by the Story Model or the Meter Models. Instead, the judgments are reflexive reactions evoked by "prejudice triggers" in the evidence.[13] The Simpson trial is remarkable, but doubtless not unique, in the variety of potential "prejudice triggers" it contains. For example: Simpson is a black man who beat his white wife, therefore Simpson should be convicted; Simpson is a black man who sold out to "White Moneyed Society" (he lived in a "White World," married a white woman, etc.), therefore Simpson should be convicted; Simpson is a black man who overcame his disadvantaged background and achieved success in a fundamentally racist society, therefore Simpson should be acquitted; Nicole Brown Simpson led a wanton, immoral life—she deserved to be punished, even killed, therefore Simpson should be acquitted; or the LAPD is an elitist, racist organization, therefore Simpson should be acquitted to send a message to "The System."

It is difficult to rule out these interpretations. In fact, it is possible that at least some of the alternate jurors did harbor prejudices that would have dominated their decisions. Nonetheless, based on their remarks to news reporters, we hypothesize that most of the jurors' decisions were arrived at primarily through their inferences from the evidence (mediated by the construction of a "story summary"). In the (misleadingly) clear gaze of hindsight, how would we "explain" the jury's verdict?

Two defense stories were bolstered by defense witnesses and the cross-examination of prosecution witnesses. We believe jurors

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11. *See, e.g.*, David A. Schum & Anne W. Martin, *Formal and Empirical Research on Cascaded Inference in Jurisprudence*, 17 L. & SOC'Y REV. 105 (1982).

12. Stephen E. Fienberg & Mark J. Schervish, *The Relevance of Bayesian Inference for the Presentation of Statistical Evidence and for Legal Decision Making*, 66 B.U. L. REV. 771, 791 (1986); David H. Kaye & Jonathan J. Koehler, *Can Jurors Understand Probabilistic Evidence?*, 154 J. ROYAL STAT. SOC'Y, SERIES A 75, 77 (1991); *See also* Baruch Fischhoff & Sarah Lichtenstein, *Don't Attribute This to Reverend Bayes*, 85 PSYCHOL. BULL. 239 (1978).

13. This interpretation of the jurors' decision process often includes a qualification that the evidence must be complex enough or its implications must be equivocal enough to "liberate" the jurors to reason according to their prejudices and sentiments, rather than the evidence. *See, e.g.*, HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 165 (1966).

concluded there was a substantial possibility that Fuhrman and Vannatter (and probably other officers) "rushed to the judgment" that Simpson was guilty and that they planted evidence and subverted the investigation to ensure his conviction at trial. The defense may also have convinced jurors that the evidence collection and analytic procedures inside the LAPD Crime lab were sloppy and could have transferred materials from sample to sample contaminating the blood trace evidence. Thus, the defense effectively presented at least two alternate "stories," each of which could independently undermine central parts of the prosecution story and could explain, without incriminating Simpson, much of the prosecution's physical evidence.

The defense attorneys were also successful at identifying and "flagging" inconsistencies in the prosecution stories, especially the conflicting accounts of the actions of police officers, criminal investigators, and medical examiners. For example, after the verdict jurors cited inconsistencies between the Fuhrman and Vannatter accounts of the initial investigation at Rockingham, between Vannatter and Simpson's daughter, Arnelle, about the same events, between investigators (Mazzolla and Fung, for example) about their evidence collection procedures, and in the nurse's own conflicting reports of drawing the blood sample from Simpson.[14] The defense successfully created uncertainties and introduced general feelings of confusion about the events that linked pieces of the prosecution story together. The defense then labeled this global confusion "reasonable doubt." The prosecution sought to counteract this effect by urging the jurors to "find the way through the smoke" to convict Simpson.

Much of the trial evidence (evidence on DNA analysis results and evidence implicating Fuhrman's racism, for instance) was significant to the jurors' decisions only as a function of the role it played in the jurors' stories. No matter how substantial the evidence that Fuhrman was a racist or how extreme the posterior probabilities from the DNA analysis, the impact of this evidence was conditioned on its relevance to the story framework constructed by each juror. That is to say, we could not predict or postdict the impact of evidence about Fuhrman or DNA results

14. ARMANDA COOLEY ET AL., MADAM FOREMAN: A RUSH TO JUDGMENT? 116-17, 201 (1995).

without first assessing the role of that information in the stories constructed by the jurors.

A good example of a failure of relevant evidence to have an impact, because it was explained away *within a story context*, is revealed in jurors' post-trial explanations for why they disregarded evidence about episodes of domestic violence. One juror in a newspaper interview commented, "This was a murder trial, not domestic abuse. If you want to get tried for domestic abuse, go in another courtroom and get tried for that."[15] Another juror explained, "I could not lay a heavy consideration [on it] as far as that being a motive. I feel that if a person is capable of extreme rage, then these types of things happen a bit more often than maybe once every four or five years."[16] A third juror concurred:

> The prosecution was trying to build up a case based on the rage that Mr. Simpson had built up through the time periods between 1985 and 1994, and the information they gave us about that period of spousal abuse was really just not enough information to indicate that this man had built up all this rage over all this time.[17]

And a fourth juror:

> There was the case when Fuhrman came and O.J. had beat up the car. Then there was the case when she ran out of the house, and then there was Denise saying they were sitting around and he pushed them out of the house. And then there was the time he grabbed her crotch. Now, if you put all of those together, they were always drunk. Both of them, all of them. They were always drinking. Here they are, drinking, tempers are flaring . . . . See, that's what I related that to. Alcohol-induced rages. . . . [S]o, when they went from '89 to '92 or '93 when he came through the door—you know, the 911 tape—there was no abuse there. He hadn't hit her or anything, but he did scare her. But there was no abuse there. What they presented to me, well, I related it all to they had been drinking. . . . But I didn't think it was necessarily a motive for murder.[18]

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15. Bob Pool & Amy Pyle, *Case Was Weak, Race Not a Factor, Two Jurors Say*, L.A. TIMES, Oct. 5, 1995, at A6.

16. COOLEY ET AL., *supra* note 14, at 127.

17. *Id.* at 198.

18. *Id.* at 127-28.

Each of these explanations separates the earlier domestic violence from the murder by concluding that there is *no motivational link.*

The decision for many individual jurors seems also to have hinged on their conception of "beyond reasonable doubt." Judge Ito's pattern instruction was relatively nebulous:

> It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.[19]

Several jurors commented that they were uncertain about the verdict going into deliberation and some have even stated that they believed Simpson was involved in the murders in some unspecified manner, but that they harbored enough reasonable doubts to acquit. Their post-trial remarks provide little information about how they conceived of reasonable doubt. But there are hints that for some jurors reasonable doubt took the form of the incompleteness and vagueness of major components of the prosecution story, that is, the existence of *some doubts*, rather than a definite alternate explanation of the credible evidence. For example, as one juror noted, "[I]t is important to remember that a not guilty verdict requires just one thing that can create reasonable doubt. We had much more than that. There were many questions that were not answered."[20]

Did jurors' racial identities have an impact on their verdicts? Yes. Survey results showed that public reaction to the trial was divided along racial lines (although this could in part be explained with reference to different diets of media exposure for different racial groups). But more to the point, jurors' reports on the deliberation process indicate that at least one of the two initial guilty votes was cast by one of the two white jurors.[21]

Specifically, we believe that a juror's race made a difference in the construction and acceptance of the story that Fuhrman (possibly aided by other police officers) planted incriminating

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19. Official Transcript, CALJIC Instructions, People v. Simpson, No. BA 097211, 1995 WL 569648, at *4 (Cal. Super. Ct. L.A. County Sept. 21, 1995).

20. COOLEY ET AL., *supra* note 14, at 194.

21. *Id.* at 150, app. A at 216.

evidence. African Americans, compared with white Americans, hold more beliefs and have more experiences that support the plausibility of stories of police misconduct and police bigotry. Most African Americans—or members of their immediate families—have had direct negative, and possibly racist, encounters with justice system authorities. African Americans know of many more stories (some apocryphal, no doubt) of police racism and police brutality directed against members of their race than do white Americans.[22] Again, in post-trial interviews, jurors told stories of police errors and misconduct, for example, the false arrest of members of their own families.[23] This background of experience, beliefs, and relevant stories made it easy to construct a story in which Fuhrman manufactured and planted key incriminating evidence, and it made the constructed story more plausible to an African American juror than to a white juror.

Not only is the race of jurors relevant to their understanding of the attorneys' stories, but so too is the race of the defendant relevant. Indeed, according to the defense story, the motivation for the police officers' actions was due in fairly large measure to Simpson's race (i.e., the stories are not simply about "misconduct," they are about "misconduct motivated by racism"). It is interesting that few of the examples of police misconduct with African American suspects involve attempts to frame the suspect; rather, they involve other aggressive, hostile actions (e.g., lack of probable cause for an arrest, unnecessary brutality during the arrest, etc.). But as far as we can discern, the verdict was not a simple expression of anti-white sentiments or a nullification of the jury instructions or a disregard for the fact-finding task.

Would a jury composed of more white Americans have been more likely to convict Simpson? Yes. Our impression from a few jurors' post-trial comments to reporters is that the decision was a close one in that there was substantial credible incriminating evidence, but still reasonable doubt. Because we believe that the plausibility of the "Fuhrman Planted Incriminating Evidence" story was important, and we believe there are racial differences in plausibility, we would predict a racial difference in individual verdicts.

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22. Gates, *supra* note 1, at 56-60, 62-65.
23. COOLEY ET AL., *supra* note 14, at 45.

Is this race difference an unreasonable prejudice or bias? This is a tough question, but the answer is probably no. No one knows how frequently acts of police misconduct occur. No one knows how pervasive racist motives are among police officers. And none of us knows (except Fuhrman himself) whether Fuhrman did or did not subvert the police investigation of the Brown-Goldman murders. So no one can say, for example, if a high or a low prior probability of the truth of a police misconduct story is more accurate. Assuming our speculation about the race difference in prior beliefs is true, there simply exists a race difference that would be related to jurors' verdicts in any case with the Simpson trial elements: that is, an African American suspect, mostly white police officers, and a defense argument that racist officers framed the suspect.

IV. IMPLICATIONS FOR THE CRIMINAL JURY TRIAL

Should jury selection procedures be designed to identify such race differences (or other background biases that are not clearly derived from unreasonable or inaccurate beliefs) in jurors' proclivities to find for one side or the other? The answer from the legal side is surely no. These biases are assumed to operate and are even viewed as a positive ingredient that promotes vigorous deliberation in a representative, mixed-viewpoint jury. However, the jury selection procedures, especially the voir dire examinations preceding the exercise of peremptory challenges, played an unreasonably exaggerated role in the Simpson trial. Six weeks of jury selection, an intrusive and suggestive 280-item juror background questionnaire, and the exercise of dozens of peremptory challenges are just too much. Furthermore, even with this enormous expenditure of time and effort, the voir dire process seems to have been wholly ineffective at producing a balanced and impartial panel. In fact, one of the results of the Simpson trial was the revelation that the panel still included some unreasonably biased jurors—prejudiced jurors who had not been identified in the over-long voir dire. By the reports of members of the final jury panel, at least one extremely racist juror remained among the two final alternates.[24]

24. COOLEY ET AL., *supra* note 14, at 43, 188.

We believe that the extended voir dire, especially in high-profile trials when "scientific" jury selection methods are applied, can allow the side with the most resources to obtain an advantage; indeed, the Simpson trial may be an example of a case in which jury selection did help cause the verdict.[25] However, these scientific jury selection methods are not applied to identify and eliminate prejudiced and partial jurors; the major effect of the lengthy examinations and the exercise of peremptory challenges is to create systematically unrepresentative panels and, sometimes, to produce unbalanced juries. We see no sign that the results produce impartial juries. Accordingly, we strongly recommend reforms to limit questioning and to allow few or no peremptory challenges.

The Simpson trial dramatically illustrated many of the features of the criminal justice process that are not truth-seeking: the exclusion of obviously relevant evidence either because attorneys violated discovery rules or to protect the defendant against self-incrimination, the excesses of extended voir dire and the strategic exercise of peremptory challenges, and the effects of media coverage on not only the attorneys and witnesses but also on the trial judge himself. It also illustrated the unique degree to which an American defendant is protected from zealous prosecution by his right to a speedy trial, his right to remain silent, and his right to cross-examine his accusers vigorously.

We thought the trial was too long, the attorneys and judge were too media-conscious, and the attorneys were occasionally inappropriately dramatic, but none of this behavior seemed strictly unethical or inappropriate given our experience with smaller-scale criminal trials. If there were one factor we would criticize, it would be the length of the evidentiary portion of the trial. The judge should have limited the presentation of evidence and arguments. Three months would seem more than adequate to have heard the relevant evidence. The excessive length made the case more complex than it needed to be and it nearly produced a mistrial.

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25. Nonetheless, in general we remain skeptical that even "scientific" jury selection methods are effective in more typical trials. *See* Reid Hastie, *Is Attorney-Conducted Voir Dire an Effective Procedure for the Selection of Impartial Juries?*, 40 AM. U. L. REV. 703 (1991).

We see no clear indication that the jury deliberately nullified the law and disregarded its fact-finding task to send a message to majority white America or to the LAPD.[26] We think that the short deliberation time (approximately three hours of discussion) was more the result of the lengthy sequestration. Jurors were eager to finish; they were willing to concede quickly rather than to flush out the arguments of the minority faction of "conviction" jurors; and perhaps they were simply willing to go along with their friends.[27]

We wish that deliberation had been more vigorous, but we would not label even this cursory deliberation nullification of the law. Although we did not hear the evidence presented to the jury, it seems plausible that the defense was effective enough to create genuine reasonable doubt. Even with our exposure to incomplete and biased media reports of the evidence, several of the reasonable doubts cited in jurors' post-trial interviews were the same issues that had made us doubt the prosecution's case: the time interval (approximately six minutes) for Simpson to clean up, change clothes, and appear at his door to board the airport limousine seemed implausibly short; the possibility of some evidence contamination seemed convincing; and some of the most incriminating bloodstains were questionable (for example, the EDTA-contaminated stain from the fence at Bundy and the stained socks from Simpson's bedroom). Finally, we think the ultimate consequences of the verdict are positive; the system may have worked. Just as one would hope, the trial will have a substantial positive impact on efforts to eradicate racism in our police departments; perhaps this ultimate, distal effect on the LAPD alone is worth the financial and social costs.

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26. *See generally* JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY (1994); NORMAN J. FINKEL, COMMONSENSE JUSTICE: JURORS' NOTIONS OF THE LAW (1995).

27. Pool & Pyle, *supra* note 15, at A6. As one juror put it, "We got to know each other during the nine months. I've grown to love these people. They are my family." *Id.*