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THE SHIFT OF THE BALANCE OF ADVANTAGE IN CRIMINAL LITIGATION: THE CASE OF MR. SIMPSON

by

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The intense public interest in the extraordinary trial and acquittal of Mr. O.J. Simpson provides an appropriate occasion to look at the criminal justice system more generally, to note where we have been in the balance of advantage between prosecution and defense, where we are now, and where, perhaps, we should be.

In 1923 Judge Learned Hand wrote:

> Under our criminal procedure the accused has every advantage .... Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.[1]

This "unreal dream" was to become a nightmare. Subsequent to Judge Hand's observations, the Supreme Court led a revolution in criminal procedure, one which shifted focus from the guilt or innocence of the accused to the permissibility of the process, irrespective of the guilt of the accused. Criminal justice decisions became linked to civil rights decisions. The Court employed expansive readings of constitutional language in both contexts in an effort to ameliorate the plight of the disadvantaged, particularly members of racial minority groups. The circumstances of the poor were to be addressed by assuring more equal education,[2] greater voting rights,[3] better access to public assistance,[4] and housing.[5]

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1. United States v. Garsson, 291 F. 646, 649 (2d Cir. 1923). Judge Hand's view was not a unanimous one. Citing investigative disadvantages of the defense, Professor Abraham Goldstein argued that the balance of advantage lay with the prosecution. *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149 (1960). I have borrowed part of Professor Goldstein's title to revisit the issue here.

2. Brown v. Board of Education, 347 U.S. 483 (1954) (state segregated education violates the Equal Protection Clause).

3. Reynolds v. Sims, 377 U.S. 533 (1964) (equal protection requires "one person, one vote" principle to apply to state legislative districting).

4. Goldberg v. Kelly, 397 U.S. 254 (1970) (due process requires pre-termination evidentiary hearing, including right to confront adverse witnesses, prior to withdrawal of welfare benefits).

5. *See* City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (finding no rational

And it was to become more difficult to convict them of crimes. Rather than concentrating on reducing the possibility of convicting an innocent person, the Supreme Court led an attack on the equity, social utility, and moral legitimacy of an enterprise that disproportionately sanctioned the oppressed. What has widely been perceived as an unjust exoneration of O.J. Simpson provides an opportunity to reflect on some of these changes. They remain as a part of our constitutional structure today. Among them are the contemporary law of confessions, of search and seizure, of permissible comment on a defendant's failure to testify in his defense, and the right to trial by jury.

I

Before the Supreme Court's criminal justice revolution, every effort would have been made to quickly arrest and interrogate Mr. Simpson at length, preferably at a police station, before he consulted defense counsel. The object: a confession or detailed explanatory information, which would enable the investigation to proceed to quickly verify or contradict his explanations, or to move in other directions. In 1949, Supreme Court Justice Robert Jackson warned against abandoning these procedures. He cautioned the Court against holding:

> [t]hat the State may not take into custody and question one suspected reasonably of an unwitnessed murder. If it does, the people of this country must discipline themselves to seeing their police stand by helplessly while those suspected of murder prowl about unmolested.[6]

Despite Justice Jackson's warnings, in the 1960s the Supreme Court erected a variety of additional constitutional barriers to these processes.[7] Picking up a suspect for interrogation was held to be a "seizure" that was unreasonable in the absence of probable cause and hence a violation of the Fourth Amendment.[8] While the Fourth Amendment was directed to the federal government, not the states, the Court proceeded to extend it to the latter,[9] along with the exclusionary evidence rule that it had previously invented as

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basis for ordinance used to deny a permit for a group home for handicapped residents).

6. Watts v. Indiana, 338 U.S. 49, 61-62 (1949) (Jackson, J., concurring).

7. *See generally* H. Richard Uviller, *Evidence From the Mind of the Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint,* 87 COLUM. L. REV. 1137 (1987).

8. Brown v. Illinois, 422 U.S. 590 (1975) (incriminating statements made at police station following an illegal arrest must be excluded from evidence, even if police issued Miranda warnings to defendant).

9. *See, e.g.,* Wolf v. Colorado, 338 U.S. 25 (1949) (Fourth Amendment applies to states, but evidence seized in violation of Fourth Amendment does not render evidence inadmissible in state prosecution), *overruled in part by* Mapp v. Ohio, 367 U.S. 643 (1961).

a limit in federal prosecutions.[10] The Court held that a confession obtained by such a violation must henceforth be excluded as a "fruit of the poisonous tree."[11]

Even if the police avoided making an unreasonable seizure, a person in custody was held to have the right to a defense attorney at his side during questioning.[12] The job of the lawyer at a police station, of course, is not to see that the truth be told; it is to prevent the client from confessing. This new constitutional right was initially discovered in the Sixth Amendment provision that the accused was entitled to defense counsel in a "criminal prosecution."[13] At the beginning of the 1960s this was widely understood to refer to counsel during trial. There, a defense attorney can indeed assist in the truth-seeking process by challenging prosecution evidence and presenting that of the defense. The Court extended the right to counsel to the interrogation situation, despite the lawyer's very different function there.[14] It also expanded this right to the far larger arena of state prosecutions — as an element of due process of law,[15]— and made counsel for the indigent free.[16] A confession obtained in violation of this right was held inadmissible.

A third new constitutional barrier to obtaining confessions was erected in the famous *Miranda* decision.[17] The Fifth Amendment prohibition against "compelling" a person to be a "witness against himself" was stretched beyond its literal and historic application to sworn testimony to apply to the interrogation of persons in custody. It too was extended to the states.[18] Furthermore, it was enlarged beyond circumstances of compulsion to become a right to silence whose waiver must be informed by a warning that anything said may incriminate, and that before responding, the suspect had a right to consult a lawyer. Only an informed and completely voluntary waiver of these rights would be valid. In addition, the Court later held that, if the suspect indicated he would like to talk to an attorney, he was immune from further questioning by the police about that or any other crime, unless he initiated such question-

10. Mapp v. Ohio, 367 U.S. 643 (1960) (overruling Wolf v. Colorado and applying the exclusionary rule of Weeks v. United States, 232 U.S. 383 (1914) to the states).

11. Wong Sun v. United States, 371 U.S. 471 (1963).

12. Brewer v. Williams, 430 U.S. 387 (1977); Miranda v. Arizona, 384 U.S. 436 (1966); Massiah v. United States, 377 U.S. 201 (1964). *See also* Akhil Reed Amar and Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause,* 93 MICH. L. REV. 857 (1995).

13. *Massiah*, 377 U.S. 201.

14. *Id.*

15. Escobedo v. Illinois, 378 U.S. 478 (1964).

16. *See* Gideon v. Wainwright, 372 U.S. 335 (1963).

17. Miranda v. Arizona, 384 U.S. 436 (1966).

18. Malloy v. Hogan, 378 U.S. 1 (1964).

ing or counsel had been made available to him.[19]

My sense — informed by my own experience as a state and federal prosecutor prior to these changes — is that most persons accused, with probable cause, of an intra-familial homicide carry such a sense of guilt and remorse that skilled interrogation — in the absence of obstruction by counsel — has a strong likelihood of eliciting a confession. Such cases would usually have been resolved without trial by a guilty plea.

According to news accounts, Mr. Simpson flew to Chicago shortly after the murders of Nicole Simpson and Ronald Goldman occurred.[20] Upon his return, he consulted his lawyer, Howard Weitzman, who begged him not to submit to an interview by the police.[21] Mr. Simpson rejected this advice, and as the police were unwilling to talk with him in the normally futile setting of a defense attorney present, Mr. Simpson spoke with them alone, denying his guilt.[22] This statement was not placed in evidence at the trial. Mr. Weitzman dropped out of the case soon thereafter, citing his long personal relationship with Mr. Simpson and the press of other cases.[23] Mr. Simpson was subsequently charged with two counts of murder in the first degree.

The Simpson case is atypical in a variety of respects. A client represented by counsel ordinarily will not refuse to follow the conventional advice not to talk to the police. Mr. Simpson presumably hoped that he could convince them not to charge him. He also surely must have had the benefit of counsel's prior warnings of the danger of making any inculpatory statements. Furthermore, he was not subject to the psychological pressure of being in custody, and he was an unusually resourceful, articulate, and self-confident man.

II

A second area of American procedural change has been in the law of search and seizure of property, which until the 1960s did not ordinarily result in suppression of evidence against the accused. To paraphrase Justice Cardozo, in most states the criminal did not go free because the constable

19. Edwards v. Arizona, 451 U.S. 477 (1981).

20. Josh Meyer & Eric Malnic, *O.J. Simpson's Ex-Wife, Man Found Slain,* L.A. TIMES, June 14, 1994, at A1.

21. Henry Weinstein, *Talking to Police Limits Defense, Experts Say,* L.A. TIMES, June 23, 1994, at A15; Meyer & Malnic, *supra* note 20, at A1.

22. Henry Weinstein, *supra* note 21, at A15.

23. *See* Weinstein, *supra* note 21, at A15; Jim Newton & Josh Meyer, *Blood Matches Simpson Type, Police Sources Say,* L.A. TIMES, June 16, 1994, at A1; Jim Newton & Andrea Ford, *Detective Tells of Trail of Blood at Simpson Home*, L.A. TIMES, Mar. 18, 1995, at A1.

blundered.[24] In the Simpson case, the police did blunder by not obtaining a search warrant prior to scaling the fence at his residence.

The law now applicable to obtaining search warrants is intricate. Professor Akhil Amar of the Yale Law School recently summarized Supreme Court search and seizure opinions as "a vast jumble of judicial pronouncements that is not merely complex and contradictory, but often perverse."[25] Perhaps this discourages police applications for search warrants, which is a complicated, easily botched, and often time consuming process. If so, the integrity of the criminal justice process is sometimes further eroded by police perjury concerning the circumstances of the acquisition of the evidence, in order to place the case within an exception to the warrant requirement.

The Simpson defense contended that such perjury occurred in connection with the search that yielded the famous bloody glove inside the fence at Mr. Simpson's residence. Even in England, as Lord Devlin noted, "[i]t is the general habit of the police never to admit to the slightest departure from correctness."[26] An implausible account of the basis of the search tends to infect the plausibility of the testimony on the merits, even though there is every reason to believe that police witnesses are far more truthful on the latter than on what they regard as dysfunctional technicalities designed to humiliate them.

At trial, the Simpson defense made much of the lack of credibility of Detectives Mark Fuhrman and Philip Vannatter, the two central investigators in the case.[27] Both testified that they did not consider Simpson a suspect when they drove to his house from the scene of the crimes shortly after the discovery of the homicides.[28] The officers claimed they were only worried that there might be other victims in the Simpson house and that they therefore had not obtained a warrant, which would have been required to search for evidence of the crimes.[29] Had they testified otherwise, the bloody glove and other evidence uncovered in the search would probably have been suppressed.

24. People v. DeFore, 150 N.E. 585, 587 (N.Y.) *cert. denied* 270 U.S. 657 (1926).

25. Akhil Reed Amar, *Fourth Amendment First Principles,* 107 HARV. L. REV. 757 (1994).

26. PATRICK DEVLIN, THE CRIMINAL PROSECUTION IN ENGLAND 47 (1958).

27. Jim Newton & Andrea Ford, *Furhman Tells of His Actions at Scene of Slayings,* L.A. TIMES, Mar. 11, 1995, at A1; Jim Newton & Henry Weinstein, *Vannatter Offers Explanations for Glove Questions,* L.A. TIMES, Mar. 22, 1995, at A1; Newton & Meyer, *supra* note 23, at A1.

28. Andrea Ford & Jim Newton, *High-Stakes Testimony by Furhman Concludes,* L.A. TIMES, Mar. 17, 1995, at A1; Andrea Ford & Jim Newton, *Cochran Queries Officer on Simpson's Reaction,* L.A. TIMES, Feb. 18, 1995, at A1; Newton & Weinstein, *supra* note 27, at A1; Newton & Ford, *supra* note 23, at A1.

29. Newton & Ford, *supra* note 23, at A1.

The prosecution paid a terrible price for this testimony. The detectives were so effectively discredited on the witness stand that the defense went out of its way at the close of its case to have them repeat their versions — given months before in the trial — of what had happened at the search.[30] At the conclusion of the case, Judge Ito read to the jury the standard instruction: "A witness, who is willfully false in one material part of his or her testimony, is to be distrusted in others."[31] The Simpson jury appears to have done so.

III

A third change in the balance of advantage came with the Supreme Court's decisions forbidding comment by a prosecutor or trial judge on a defendant's failure to take the witness stand. Prior to 1965, California— pursuant to its state constitution — permitted such comment. In *Griffin v. California*,[32] a murder case that eventually went to the United States Supreme Court, the prosecutor had argued:

> The defendant certainly knows whether Essie Mae had this beat up appearance at the time he left her apartment and went down the alley with her . . . . He would know how the blood got on the bottom of the concrete steps . . . . These things he has not seen fit to take the stand and deny or explain. And in the whole world, if anybody would know, this defendant would know. Essie Mae is dead, she can't tell you her side of the story. The defendant won't.[33]

The California trial judge told the jury that a defendant has a right not to testify, but he added that the jury was entitled to consider the defendant's failure to deny or explain the prosecution's evidence in its assessment of his guilt.

The Supreme Court reversed Griffin's conviction, holding that the adverse comments were inconsistent with the federal privilege against self-incrimination, a doctrine first extended to the states subsequent to Griffin's trial.[34] While Griffin had not been compelled to testify, the Supreme Court held that the comments had made his choice costly, and thus implicitly violated the Constitution. Presumably, the defense in the Simpson case came to the conclusion that their theory of how the murders occurred would be less

30. Andrea Ford & Jim Newton, *Simpson Lawyers Say Vannatter Lied on Stand,* L.A. TIMES, Sept. 20, 1995, at A1.

31. COMMITTEE ON STANDARD JURY INSTRUCTIONS, CRIMINAL, OF THE SUPERIOR COURT OF LOS ANGELES COUNTY, CALIFORNIA, CALIFORNIA JURY INSTRUCTIONS § 2.212 (5th ed. 1996).

32. 380 U.S. 609 (1965).

33. *Id.* at 610, 611 (1965).

34. Malloy v. Hogan, 378 U.S. 1 (1964).

credible if Mr. Simpson testified. He then would have been subject to cross-examination. While the jury might of its own accord draw adverse inferences from his failure to testify (although they were explicitly instructed not to consider or even discuss it), that was preferable to their likely inferences if he had done so. Under *Griffin v. California,* his decision not to take the witness stand was immune from adverse comment in the courtroom. Strangely, it also largely escaped discussion in the press.

IV

A fourth area of federal constitutional change relates to the right to jury trial. Although the Sixth Amendment guarantees a right to trial by "an impartial jury of the State and district wherein the crime shall have been committed,"[35] it was held inapplicable to the states until 1968.[36] Since then, a host of decisions have sought to enforce jury arrays that are a fair cross-section of the community.[37] Yet, the huge county of Los Angeles is divided into multiple California Superior Court districts, and jurors are drawn from the vicinity of an individual district courthouse, as happened in the Simpson case.[38] One would have expected the prosecutor to file the charges against Simpson in the western Los Angeles judicial district where Nicole Simpson and Ronald Goldman were murdered. A jury impaneled there would likely have been multi-racial but more significantly white.[39] The relative proportion of black jurors on such a panel would not have been inconsistent with the demographics of Los Angeles County as a whole, since Los Angeles is only about 11% black, although it is slightly less than 50% white.[40] However, the catastrophic riots following a largely white jury's acquittal of the police officers involved in the beating of Rodney King were fresh in the minds of everyone, including the Los Angeles District Attorney, Mr. Gil Garcetti.[41] These riots left more than fifty people dead, thousands injured, and nearly one billion dollars in property damage.[42]

35. U.S. CONST. amend. VI.

36. Duncan v. Louisiana, 391 U.S. 145 (1968).

37. *See, e.g.*, J.E.B. v. Alabama, 511 U.S. 127 (1994); Batson v. Kentucky, 476 U.S. 79 (1986); Duren v. Missouri, 439 U.S. 357 (1979); Taylor v. Louisiana, 419 U.S. 522 (1975).

38. Andrea Ford & Jim Newton, *12 Simpson Jurors are Sworn In*; L.A. TIMES, Nov. 4, 1994, at A1.

39. Tim Rutten & Henry Weinstein, *Garcetti's Political Future May Ride on Simpson Case*, L.A. TIMES, Feb. 8, 1995, at A1.

40. Henry Weinstein, *Simpson Jury Could Defy Conventional Wisdom*, L.A. TIMES, Nov. 5, 1994, at A1.

41. Rutten & Weinstein, *supra* note 39, at A1.

42. Don Colburn, *Treating Violence as a Deadly Disease; Federal Health Officials Track Patterns of Risk in the Wake of the Riots in Los Angeles,* WASH. POST, May 19, 1992, at Z6; Paul Lieberman and Richard O'Reilly, *One year After the Riots*, L.A. TIMES, May 2, 1993, at A1.

Garcetti elected to bring charges in the Central Los Angeles District, where a primarily African-American jury was more likely to be impaneled.[43] Rioting by blacks was less probable if such a jury convicted, and presumably rioting in Beverly Hills and along Rodeo Drive was not to be anticipated if there was an acquittal.

Polling data, the verdict itself, and the post-verdict celebrations by many blacks — and expressions of dismay by many whites — suggest that it is likely this decision was outcome-determinative.[44] This is not to say that people who sit on a jury simply decide to vote for the local team. While nullification of obnoxious laws and oppressive prosecutions has a long history in Anglo-American law,[45] here the charge was a particularly gruesome double murder. The jurors who spoke to the press did not concede nullification. Yet, one must not put total credence in how jurors explain their reasoning after they have already rendered their verdict. In part this is because they tend to persuade themselves that they acted properly.[46] Thus, black people have disproportionately come to actually believe that either Mr. Simpson was an innocent man being framed by racists in the Los Angeles Police Department, or at least that the evidence against him was too insubstantial to merit a guilty verdict.[47]

Another factor is fear. Jurors must return to their homes and places of employment once their service ends. They and their families are vulnerable to reprisals, ranging from physical attacks to social ostracism. In a *Los Angeles Times* poll, sixty-seven percent of respondents believed that some acquittals in criminal cases tried after the riots in the Rodney King case were motivated by the jurors' fear for their own safety.[48]

Reports from various parts of the country indicate that inner-city jurors are increasingly likely to reject powerful prosecution cases against black defendants. In 1990, District of Columbia Mayor Marion Barry was charged

43. Henry Weinstein et al., *Miscalculations, Bad Luck Hurt Prosecution,* L.A. TIMES, Oct. 4, 1995, at A1; Rutten & Weinstein, *supra* note 39, at A1.

44. *See* Cathleen Decker, *The Simpson Legacy*, L.A. TIMES, Oct. 10, 1995, at S1; Tony Perry, *The Simpson Verdicts: Snubbing the Law to Vote on Conscience*, L.A. Times, Oct. 5, 1995, at A1.

45. *See., e.g.,* Bushnell's Case, 124 Eng. Rep. 1006 (C.P.1670); Perry, *supra* note 44 , at A5.

46. Of course, one could argue that exercise of the power of nullification is often proper. *See* Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System,* 105 YALE L.J. 677 (1995). Acceptance of Professor Butler's thesis would do much to further the dissolution of the rule of law, particularly in inner-city communities, where the need for law is most insistent.

47. *See* Decker, *supra* note 44, at S1.

48. Carla Rivera, *Majority Says Denny Verdicts Too Lenient,* L.A. TIMES, Oct. 26, 1993, at A1.

with fourteen crimes, including perjury. Despite what United States District Court Judge Thomas Jackson later described as a trial in which he had "never seen a stronger government case," the jury convicted on only one count, a misdemeanor charge of cocaine possession.[49] In the trial over the vicious beating (including a brick to the temple) of prostrate white truck driver Reginald Denny following the Rodney King case acquittals, Damian Monroe Williams was acquitted of attempted murder, despite a videotape of his attack.[50] On the other side of the continent, a Brooklyn jury acquitted Lemrick Nelson, Jr. of fatally stabbing Yankel Rosenbaum, a young Australian Jew who had come to New York to study the Holocaust, and found his own. Nelson had been quickly apprehended by police, identified by the dying Rosenbaum, had a bloody knife in his pocket (DNA analyzed as consistent with the victim's blood), and confessed to the stabbing. After the acquittal, some members of the jury reportedly feted Mr. Nelson at a dinner hosted by defense counsel.[51] In the Bronx — where juries are overwhelmingly black and Hispanic — black defendants are acquitted in almost half of the felony trials, nearly three times the average rate of acquittals nationwide.[52] Detroit and Washington, D.C. also report high acquittal rates.[53]

Of course, statistically non-representative juries can be chosen in any random selection drawing.[54] Traditionally, parties have often exercised peremptory challenges where the characteristics of the pool of prospective jurors make replacing some jurors tactically profitable. Exercising peremptories involves a good deal of conjecture, and superficial aspects of a juror's appearance and personality are necessarily given weight. One such factor is the similarity of a prospective juror to a party and dissimilarity to the opposing party (or victim).[55] However, in 1986, the Supreme Court abruptly limited this practice by holding that such challenges violate a defendant's right to equal protection when exercised on the basis of race.[56] Thus, the

49. Christopher B. Daly, *Barry Judge Castigates Four Jurors,* WASH. POST, Oct. 31, 1990, at A1; Michael York & Tracy Thompson, *Barry Sentenced to Six Months in Prison,* WASH. POST, Oct. 27, 1990, at A1.

50. Edward J. Boyer & John J. Mitchell, *Attempted Murder Acquittal, Deadlock Wind Up Denny Trial,* L.A. TIMES, Oct. 21, 1993, at A1; Edward J. Boyer & Andrea Ford, *Williams Given Maximum 10 Years in Denny Beating,* L.A. TIMES, Dec. 8, 1993, at A1; Eric Malnic, *Last Defendant in Denny Case Gets Probation,* L.A. TIMES, July 9, 1994, at B3.

51. Eric Breindel, *Race and Riots in New York,* WALL ST. J., Nov. 18, 1992, at A16.

52. *Id.*

53. John Leo, *The Color of the Law,* U.S. NEWS & WORLD REPORT, Oct. 16, 1995, at 24.

54. Robert L. Shapiro, one of Simpson's lead lawyers, described the non-representative jury that was chosen as "just the luck of the draw." Ford & Newton, *supra* note 23, at A1.

55. THOMAS A. MAUET, FUNDAMENTALS OF TRIAL TECHNIQUES 32 (1980).

56. Batson v. Kentucky, 476 U.S. 79 (1986) *overruling* Swain v. Alabama, 380 U.S. 202 (1965).

prosecution in the Simpson case was precluded from exercising its peremptory challenges to obtain a jury more representative of the population of Los Angeles. It used only ten of its twenty available peremptories.[57]

Our traditional jury trial system was developed in a more racially homogeneous context, concerned at the outset with erecting a barrier to Royal interference with colonial trials. In the wake of the Simpson verdict, it is natural that some may wish to consider alternatives, such as a trial by court or by a professional judge sitting in collaboration with a very small number of lay judges, as is the practice of some European countries. Trials to judges are far more expeditious, and professional judges have more experience in handling complicated testimony, such as that presented in the Simpson case.

Yet, while providing an interesting subject for speculation, replacing the jury as we know it is not a realistic possibility. This type of change would now require federal as well as state constitutional amendments.[58] Furthermore, substituting judges for juries would not be a panacea. Most American trial court judges obtain their position through their political talents and connections, not their legal acumen, their skills at fact-finding, or their judiciousness. Compensation levels, which are far below that of many attorneys in private practice, are an additional disincentive to recruiting the most able members of the legal profession. In addition, most state judges serve for fixed terms and are subject to the pressures of reelection. In short, the American judiciary is highly variable in its quality, and its impartiality might be particularly suspect in a case such as that of Mr. Simpson.

There is also much to be said for the sort of community group judgment that a jury provides, particularly where the substantive law standards are necessarily vague, as they are in distinguishing degrees of homicide, the capital punishment issue, the consent question in rape, and various defenses, such as insanity and self-defense. Occasionally there is also the problem of ill-

57. It was also reported that the lead prosecutor, Marcia Clark, disregarded polling data showing especially strong support for the defendant among black women, Clark relied on her instincts that concern about spouse abuse would prevail over feelings about race. She dismissed the contrary advice of jury consultant Donald Vinson, whose research showed that most African American women saw Simpson as a symbol of black male success. *See* POSTMORTEM: THE O.J. SIMPSON CASE 8 (Jeffrey Abramson ed., 1996); Lorraine Adams & Serge F. Kovaleski, *The Best Defense Money Could Buy; Well-Heeled Simpson Legal Team Seemed One Step Ahead All Along*, WASH. POST, Oct. 8, 1995, at A1. Vinson's pretrial research also suggested that the pro-Simpson attitude of black women jurors was likely to be unchanged by any conceivable circumstantial evidence of his guilt. Jeffrey Toobin, *The Marcia Clark Verdict*, NEW YORKER, Sept. 9, 1996, at 58, 62. On the other hand, the defense jury selection strategy was guided by the similar findings of their jury consultant, Jo-Ellan Dimitrius. *Id.* (noting that eight of the twelve Simpson jurors were black women).

58. *See* Duncan v. Louisiana, 391 U.S. 145 (1968) (federal right to jury trial applicable in state prosecutions).

considered criminal proscriptions enacted by legislatures, often under interest group pressures. We should hesitate to labor to discard the protections of the jury trial system unless we are convinced that we can do better.

This does not mean that what we have cannot be improved. Juries can be drawn from broader and more diverse populations than was evidenced in the Simpson case. Federal courts do so. Excuses often presented by highly qualified potential jurors to avoid serving can be less readily accepted. Unanimity should not be required to return a verdict. Two states, Oregon and Louisiana, have long permitted non-unanimous verdicts in felony cases, providing ten of twelve (Oregon) or nine of twelve (Louisiana) concur.[59] This practice makes hung juries — the result many observers predicted in the Simpson trial prior to the disclosures of the shocking racial views of Detective Mark Fuhrman — significantly less likely.

Juries function best when the trial is conducted before an able and vigorous judge. This requires a high level of care in assigning judges to especially difficult cases, care that was not reflected in the selection of the inadequate publicity seeker, Judge Lance Ito. Informed observers were appalled at the glacial pace of the Simpson trial. Even the jury complained.[60] An effective judge could have completed it in a fraction of the time. In doing so, such a judge might properly have precluded televising the proceedings, which encouraged the major participants to address the television audience in addition to performing their responsibilities in the courtroom.

A final observation and suggestion. In the Anglo-American jury trial tradition, judges were not mere umpires and reciters of abstract principles of law. They also summarized the evidence and commented upon its probative force. Edmund Burke long ago observed:

> Juries are taken promiscuously from the mass of the people; they are composed of men who in many instances, in most perhaps, were never concerned in any causes, judicially or otherwise, before the time of their service. They have generally no previous preparation or possible knowledge of the matter to be tried; and they decide in a space of time too short for any nice or critical disposition. These Judges, therefore, of necessity must forestall the evidence where there is a doubt on its competence, and indeed observe much on its credibility, or the most dreadful consequences might follow. The institution of juries, if not thus qualified, could not exist.[61]

59. Apodaca v. Oregon, 406 U.S. 404 (1972) (upholding Oregon's practice of permitting 10-2 jury convictions); Johnson v. Louisiana, 406 U.S. 356 (1972) (upholding Louisiana's 9-3 jury convictions).

60. *See* Henry Weinstein & Tim Rutten, *TV, Legal Wrangling Bog Down Simpson Trial,* L.A. TIMES, Apr. 16, 1995, at A1.

61. Edmund Burke's Report on Warren Hastings' Trial, 31 Parl. Hist. 357) (Report to the

As a sometimes visitor to the Old Bailey, the Central Criminal Court in London, I have been struck with the careful notes taken by British judges during the course of a trial, and with the extensive and helpful summary of the evidence — along with comments on its significance — at the trial's conclusion. In most American courtrooms, our populist tradition precludes such summary and comment, and the jury is simply read standard, abstract instructions on the applicable law. This development was regarded by Professor Wigmore as having "[d]one more than any other one thing to impair the general efficiency of jury trial as an instrument of justice."[62] Even in the minority of American jurisdictions where the traditional, common law authority of judges ostensibly continues (including the California and the federal courts), judges risk reversal if their comments are later regarded as unfair or as infringing on the independence of the jury.[63] The result is that instruction from American judges tend to be as abstract and relatively unhelpful to juries, as was Judge Ito's to his. In light of the massive prosecution case, the shockingly short period of deliberation and the simplistic comments of some of the jurors following the verdict indicate that wise assistance in this long and complex trial was sorely needed.

As the Supreme Court has made the character of state jury trials a matter of federal constitutional concern, a return to the common law tradition of summary and comment would present additional opportunities for defense counsel to challenge convictions in federal courts. A body of doctrine preserving the ultimate power of juries to decide the facts of the case and affirming that the judge's comments are advisory and not binding would have to be recognized, while accommodating an enhanced judicial guiding role. This would be no small task. But one consequence might be to attract more able people to a process that would challenge them to judicial service, a result which could only be salutary over the long term in the continuing evolution of our system of criminal justice.

Even if all of these suggestions were adopted, prosecuting crime is likely to continue to become a more difficult task. The continuing and progressive disintegration of the American family, the decline of the schools and of many churches, the increase in drug-related and simply random murders, and the demographic projections all point to a virtual certainty of sharply increasing rates of violent crime in the future. Traditional acquaintance or family homicides are the more easily prosecuted, but they are sharply declining as a per-

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House of Commons, 1794), part 7, supp. p. xliii (Debrett's ed. 1796), *quoted in* 9 JOHN H. WIGMORE, WIGMORE ON EVIDENCE §2551 (Chadbourn Rev. 1981).

62. WIGMORE, *supra* note 61, at §2551.

63. Quercia v. United States, 289 U.S. 466 (1933) (comment by federal trial judge must be "fair").

centage of the total.[64] Other homicides today are frequently simply unsolved, the motive unknown, the witnesses unwilling to identify themselves or intimidated from testifying if they do so. Assuming the preservation of our institutional commitments to civil liberties, sound measures to address the present balance of advantage in the prosecution of criminal cases can only be of assistance on the margins. But we must do what we can.

64. Pierre Thomas, *The New Face of Murder in America,* WASH. POST, Oct. 23, 1995, at A1.