AN AFRICAN-AMERICAN SENSE OF FACT: THE O. J. TRIAL AND BLACK JUDGES ON JUSTICE

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I. INTRODUCTION

The recent verdict against Orenthal James ("O. J.") Simpson in the civil case raised renewed cries of racial bias in the criminal case, bias discussed in the media and in the private conversations of White America.[1] The O. J. jurors in the criminal case, it was said, acted out of racial solidarity because most of the jurors were Black.[2] Alternatively, the jurors knew of O. J.'s guilt but wanted to "send a message" to police to halt racist practices in enforcing the law.[3] Still others saw the original verdict as evidence of Black gullibility, emotionality, even stupidity, in the face of overwhelming evidence of guilt.[4] The civil verdict,

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[1] *See* Aaron Epstein, *Supreme Court Will Tackle Case of Alleged Racism in Justice System,* YORK DAILY REC., Oct. 31, 1995 at 3. *See also* Sigmund E. Zakrzewski, *Ignorance About DNA Distorted the Outcome,* BUFFALO NEWS, Oct. 7, 1995, at B2; Linda Deutsch, *Black Jurors' Dismissals Spur Charges of Bias in Simpson Case // Courts: For Their Part, Simpson's Lawyers Use Peremptory Challenges Only on Whites,* ORANGE COUNTY REG., Oct. 17, 1996, at A19; *Simpson's Second Verdict,* SACRAMENTO BEE, Feb. 6, 1997, at B6; D'Arcy Fallon, *Defense Attorney Urges Colorblind Justice System/ Speaker Calls for Electoral Judges,* COLO. SPRINGS GAZETTE TELEGRAPH, Feb. 7, 1996, at B2. Being White, I have been privy to many such conversations in ways that most African-Americans were not.

[2] *See* Kevin Cullen, *Black Jurors Called Tough on Crime,* BOSTON GLOBE, Oct. 8, 1995, at 37.

[3] *See* ALAN DERSHOWITZ, REASONABLE DOUBT 14, 97 (1996) (quoting a white student who said, "It's a payback for Rodney King," and concluding, "[Some] . . . jurors may have refused to convict even though they had no reasonable doubt about Simpson's guilt, because they believed that the police may have tried to 'frame' a guilty man."). *See also* John L. Petrancosta Sr., *We Are All Diminished by the Verdict in the O.J. Simpson Case,* PITTSBURGH POST-GAZETTE, Oct. 9, 1995, at A12 ("[A] predominantly African-American jury ignored the overwhelming evidence of his guilt [but] . . . considers this verdict a victory against the white power establishment.").

[4] *See* Petrancosta Sr., *supra* note 3; DERSHOWITZ, *supra* note 3, at 69. *See also* Michael Lerner & Cornel West, *After O.J. And the Farrakhan-led Million Man March: Is Healing Possible?: A Dialogue between Michael Lerner and Cornel West,* 10 TIKKUN 12, 15 (Nov./Dec. 1995) ("In the days immediately following the verdict, the media frequently aired claims that the Black jurors emote but don't think.").

in which a predominantly White jury voted against O. J.,[5] seemed to vindicate the anti-criminal-jury-verdict sentiments. Indeed, new evidence, including O. J.'s own testimony, caused many African-Americans who originally believed in O. J.'s innocence to change their minds.[6]

Some commentators sought to rebut these assaults on the criminal jury by taking what amounts to a color-blind position on O. J.'s guilt.[7] Law professor and O. J. criminal defense "dream team" member Alan Dershowitz is the best-known of these commentators. Dershowitz maintains that any sensible, informed observer would have (or should have) had a reasonable doubt in O. J.'s criminal case.[8] As such, Dershowitz asserts that the attacks on the reasoning of the mostly Black criminal jury are unwarranted.[9]

This analysis is ultimately a facile one, both because it ignores the reality of a racial divide that creates profound differences in how Whites and Blacks view the world and because it simply does not ring true for most of White America.[10] To white America, O. J. looks guilty. [11]An alternative position is that African-Americans and White Americans have different epistemologies, different as-

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[5] *See* SACRAMENTO BEE, *supra* note 1. *See also After the O.J. Verdicts*, SALT LAKE TRIB., Feb. 7, 1997, at A16; *O.J. Simpson's Two Trials Series*, St. Petersburg Times, Feb. 6, 1997, at 20A; *Makeup of Simpson Jury*, ST. LOUIS POST-DISPATCH, Feb. 5, 1997, at 6A.

[6] *See This Time More Blacks Think O.J. is Guilty*, DET. NEWS, Jan. 23, 1997, at A8. In a poll taken shortly after Simpson testified in the civil trial, only 58% of Blacks believed that the criminal verdict was right, a substantial drop from the 90% figure in earlier polls. *See id.*

[7] *See* DERSHOWITZ, *supra* note 3, at 79-80, 87 (1996) (articulating a color-blind defense of the verdict).

[8] *See id.*

[9] *See id.* at 98, 124, 125. Dershowitz concludes that the verdict was well within American justice traditions and did not warrant the "racist and elitist epithets thrown at it by people who believe that [the] system failed." *Id.* at 98. Indeed, Dershowitz finds it troubling that so much criticism is directed against blacks for "closing their minds" to the possibility of Simpson's guilt rather than against whites for "closing their minds" to the possibility of a police-orchestrated frameup. *Id.* at 124-25. Dershowitz further derides those who shout "black bias" while ignoring the context of hundreds of years of bias by white jurors. *Id*

[10] *See* Craig L. Jackson, *Simpson vs. the System/ Can't We Accept that Our Perceptions Differ?* HOUS. CHRON., Oct. 8, 1995, at 1 ("So why should it surprise anyone, black or white, that blacks and whites, who have such different life experiences, would have a different view of reasonable doubt in a case involving what many consider to be such overwhelming evidence of guilt, but also such disturbing evidence and/ or suggestions of either police ineptitude or misconduct?"); Morton Kondracke, *Crime Bill Can Help Correct the Wrongs*, COM. APPEAL (Memphis), Oct. 13, 1995, at 9A ("To most whites, the racist attitudes and claimed abuses of Los Angeles cop Mark Fuhrman seem a wild aberration . . . . But to most blacks, police abuse . . . is an all-too-common experience," making reasonable doubt more understandable.).

[11] *See* Norma Meyer, *Getting Impartial Simpson Jury Difficult*, ST. JOURNAL-REGISTER (Springfield, Ill.), Sept. 25, 1996, at 8.

sumptions about how one can know what "really" happened.[12] These differences are not simply variations in the gut instincts of the masses but are part of the warp and woof of the theoretical writing of Black educated elites. This essay focuses on the theories of these elites.

This essay uses the book *Black Judges on Justice* to examine the theoretical views on fact-finding embodied in the statements of Black trial judges.[13] This book consists of a series of interviews with Black jurists on how their own theories of justice come into play in their courtrooms. The purpose of this review is to illuminate the African-American sense of fact as illustrated by these judges' comments.[14] That sense differs from the White sense of fact in several ways. First, Whites place tremendous emphasis on perceived evidence of character.[15] To Blacks, character also matters.[16] However, Blacks understand, in a way that Whites do not, that the exigencies of the situation — poverty, lack of education, structural unemployment — rather than character, explain much behavior, including crime.[17]

Second, Blacks are particularly wary of the roles of stereotypes, generalizations, assumptions, and preconceptions in fact-finding.[18] It is, of course, impossi-

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[12] *See Lingering Shame/Reminder of Tuskegee Study Makes Clear America's Need for Racial Reconciliation,* HARRISBURG PATRIOT, May 20, 1997, at A10 ("Whites and blacks . . . clearly saw the same set of facts in the O.J. case very differently."); Christo Lassiter, *The O.J. Simpson Verdict: A Lesson in Black and White,* 1 MICH. J. RACE & L. 69, 82 (1996). Black and white differing experiences lead each group to explain what happened in the O.J. case very differently. *See id.* at 118 n.37.

[13] *See* BLACK JUDGES ON JUSTICE (Linn Washington ed., 1994) [hereinafter WASHINGTON].

[14] *See, e.g.*, Julian Abele Cook, Jr., *Dream Makers: Black Judges on Justice,* 94 MICH. L. REV. 1479 (1996) (reviewing BLACK JUDGES ON JUSTICE).

[15] *See* Leonard Baynes, *A Time to Kill, The O.J. Simpson Trials, and Storytelling to Juries,* 17 LOY. L.A. ENT. L.J. 549, 557 (1997). Once O.J.'s character was "blackened," it may have been hard for a White jury to have considered any other evidence, especially where evidence has been offered of O.J.'s alleged prior violent acts. *See id.* at 561-62.

[16] *See infra* text accompanying notes 61-83; Baynes, *supra* note 15, at 552 (Two African-American jurors voted to convict Black prizefighter Mike Tyson in a trial in which Tyson was portrayed as a savage brute.); THOMAS KOCHMAN, BLACK AND WHITE STYLES IN CONFLICT 23-24 (1981) (Many Blacks consider credibility judgments to turn partly on personal knowledge about the speaker or, as one Black student put it, "Ultimately a person's life-style is his point of view").

[17] *See infra* text accompanying notes 61-83; Sam Vincent Meddis, *Many Blacks Think Justice Not Part of System, King Case Reaffirms Sentiment,* USA TODAY, May 13, 1992, at 8A; Robert Wright, *Unusual Suspects: Verdict Perceptions are as Different as Black and White,* PITTSBURGH POST-GAZETTE, Oct. 9, 1995, at A13 (suggesting that the tribulations of inner-city life breed Black criminality); Mark Whitaker, *Whites v. Blacks,* NEWSWEEK, Oct. 16, 1995, at 28 (suggesting that lack of adequate education and employment is a contributing cause of Black crime).

[18] *See* Sheri Lynn Johhnson, *Black Innocence and the White Jury,* 83 MICH. L. REV. 1611 (1985) (Black scholar's summary of the influence and significance of white stereotypes on fact-finding); Carol Stocker and Barbara Carton, *Guilty . . . of Being Black,* BOS-

ble to reason without these hallmarks of human cognition. But African-American jurists seek to minimize these influences, and to individualize justice by focusing as much as possible on the unique particularities of each case.[19]

Third, Blacks are skeptical of the police.[20] They are aware of police abuses and police motives to lie.[21] Consequently, Black jurists do not automatically accept police testimony as gospel. They will subject such testimony to careful scrutiny.[22]

Fourth, Blacks fear that they have unequal access to the resources necessary to fair fact-finding, such as information, competent counsel, and an unbiased and diverse jury.[23] Black jurists are on guard against the way that these inequalities can affect the accuracy of verdicts.[24]

These four theses are not proven but simply suggested by the jurists interviewed for *Black Judges on Justice,* and mostly by a subset of those jurists — the trial judges who face these issues everyday. The hope is that these suggested theses will spark a debate about Black evidentiary epistemology, including further research to support, refute, expand, or modify the theses made here. Furthermore, this article will suggest to White America that verdicts like that in the O. J. case may be fully consistent with a logical, persuasive, coherent view of fact, articulated by Black elites but possibly reflective of the views of Black masses. Indeed, social science research suggests that the African-American sense of fact sometimes may more accurately reflect reality than does the White sense of fact.[25] Reason, not racial solidarity or a "pay-back" mentality, can explain the O. J. criminal verdict, even in the retrospective light of the civil trial.[26]

TON GLOBE, May 7, 1992, at 85 (noting many Black men feel that society presumes that just because they are Black, they are necessarily guilty of some crime); *accord* Baynes, *supra* note 15, at 550-52 (stereotypes of Black men as savage brutes raise likelihood of their conviction by White jurors); *One Verdict, Clashing Voices,* NEWSWEEK, Oct. 16, 1995, at 46 (quoting Black leader Dolores Tucker as expressing view that Black youth are perceived as thugs, rapists, and drug addicts); *cf.* Andrew E. Taslitz, *Patriarchal Stories I: Cultural Rape Narratives in the Courtroom,* 5 S. CAL. REV. L. & WOMEN'S STUD. 387, 467 (1996) [hereinafter *Patriarchal Stories I*] (summarizing study concluding that "whites . . . are more willing to stereotype any individual black, because of his race, as undependable, lazy, or violent, thus resulting in unequal treatment.").

[19] *See infra* Part 3.

[20] *See infra* Part 4; ANDREW E. TASLITZ & MARGARET L. PARIS, CONSTITUTIONAL CRIMINAL PROCEDURE 405-406 (1997) (summarizing empirical data on Black attitudes toward the police).

[21] *See infra* text accompanying notes 105-115; TASLITZ & PARIS, *supra* note 20.

[22] *See infra* text accompanying notes 105-115.

[23] *See infra* Part 5.

[24] *See infra* text accompanying notes 126-52.

[25] *See infra* text accompanying notes 41-60.

[26] *See infra* text accompanying notes 167-82; Mark Miller & Donna Foote, *How the Jury Saw It,* NEWSWEEK, Oct. 16, 1995, at 37 (juror said race had nothing to do with her decision, which was based solely on the evidence); *cf.* Dershowitz, *supra* note 3, at 98 (criminal trial verdict was rationally based on reasonable doubt, rather than being a

This article will repeatedly refer to a "Black" or "African-American" sense of fact, contrasting it with a "White" sense of fact. This view is not essentialist.[27] Many Whites may agree with much that is written here, while many Blacks may not. The article argues only that differences in life experience create a greater on-average likelihood that African-Americans will embrace much or all of this alternative sense of fact than will Whites. The statements of the Black jurists examined here reflect this alternative sense of fact.

II. THE CHARACTER FOR THE SITUATION

The O. J. prosecutors sought to win on the theory of the bad man.[28] O. J. beat

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"payback" for police misconduct). This article takes no position on whether O.J. was in fact guilty or innocent. It argues only that: (1) the African-American sense of fact is one among many sound epistemologies and that, (2) given that sense of fact, reasonable doubt was a rational position to hold on O.J.'s guilt.

[27] "Essentialism" treats gender or race as a set of properties residing in each person's personality. MARY CRAWFORD, TALKING DIFFERENCE, ON GENDER AND LANGUAGE 8 (1995); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 584-89 (1990) (defining and criticizing racial essentialism); Cathy A. Harris, *Outing Privacy Litigation: Toward a Contextual Strategy for Lesbian and Gay Rights*, 65 GEO. WASH. L. REV. 248, 277 (1997) (similar); Stephen Shie-Wei Fan, *Immigration Law and the Promise of Critical Race Theory*, 97 COLUM. L. REV. 1202, 1231 (1997) (debunking racial essentialism). To essentialists, either biology or socialization or both give us certain relatively immutable traits. *See* CRAWFORD, *supra*, at 8-9. Thus an essentialist approach here would be that being Black necessarily (subject to a few exceptions) means having a unique "Black" epistemology. Such an approach allows inadequate room for individual variation and minimizes the role of current experience with power differentials as part of the cause of gendered and racial differences in how we perceive the world. The argument here instead requires conceding that there are only on-average differences, that life experience accounts for those differences, and that individual variation is so wide that many Blacks can hold a White epistemology and vice-versa.

[28] The rules of evidence generally prohibit using character to prove "propensity," that is, to prove, for example, that O.J. was a violent man and, therefore, had a greater "propensity" than most men to hurt or even kill his wife. *See, e.g.*, GERALD F. UELMAN, THE O.J. FILES: EVIDENTIARY ISSUES IN A TACTICAL CONTEXT 54-55 (1998) (citing the defense reply brief in the Simpson case as making precisely this argument). Propensity evidence is disfavored because it is believed to be of low probative value yet highly prejudicial to juries. *See, e.g.*, Michelson v. United States, 355 U.S. 469, 496 (1948). Character is admissible, however, to prove things other than propensity, such as a defendant's motive, intent, or modus operandi. *See* UELMAN, *supra*, at 43-44. My experience as a prosecutor, however, revealed that many prosecutors view non-propensity arguments as moves in a game to get before the jury evidence that the prosecutors will precisely use to prove "propensity." That is what is meant by "the theory of the bad man." That theory is precisely what the defense argued happened in the O.J. case. *See id.* at 55 ("Yet the prosecution cannot articulate a chain of inferences which is not a thinly disguised attempt to suggest propensity") (quoting defense reply brief). Wholly apart from prosecutors' motives is the real danger that a jury will use non-propensity evidence for the prohibited propensity inference, thus requiring caution in permitting the jury to use the evidence for

his wife at least once and threatened her on another occasion.[29] O. J. was convicted of that abuse.[30] Photographs showed the bruises from the beating, and a 911 call tape recorded Nicole's terror of O. J.[31] Such terror does not stem from one or two incidents.[32] Such terror is born of repetition.[33] Therefore, O. J. was

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any purpose. This too was an argument relied upon by the O.J. defense team. *See id.* at 43-45 (defense brief). "The evidence shows that the defendant was an extremely jealous and possessive man." *Id.* at 48 (quoting prosecution's brief). This does not mean to suggest that case law did not support the admissibility of character evidence in the O.J. case on a non-propensity theory. There is a strong argument that case law offered ample support. *See* Roger Park, *Character Evidence Issues in the O.J. Simpson Case — Or, Rationales of the Character Evidence Ban, with Illustrations From the Simpson Case,* 67 U. COLO. L. REV. 747, 753 (1996). My argument is instead that the prosecutors' strategy is to push jurors toward the "bad man" inference within the bounds of the case law, a strategy that often works. *See infra* note 41-47, 54-60 (explaining why jurors are often likely to embrace "bad man" propensity inferences).

[29] There were three events of alleged spousal abuse that the prosecution sought to prove. First, in late 1984 or early 1985, police responding to a call of a family dispute found O.J. and Nicole Simpson on their driveway. Nicole was crying and explained that O.J. had broken his car windshield with a baseball bat. UELMAN, *supra* note 28, at 40-41. Second, on January 1, 1989, O.J. hit Nicole on the forehead and slapped her several times. Police responding to a 911 call found Nicole hiding in the bushes near her house in a bra and sweatpants. Photographs taken later that day revealed several bruises, and O.J. ultimately entered a "no contest" plea to charges of spousal battery, resulting in a sentence of probation. *Id.* at 41. Third, after O.J. and Nicole divorced, police received on October 25, 1993 a 911 call, which they tape-recorded. When police arrived at Nicole's home, O.J. was emotionally upset. Nicole had earlier refused to admit him to her home, so he entered by kicking in the double french doors. Nicole, fearing for her safety, called the police. *See id.* at 41-42. This third incident, if accurate, arguably involved Nicole's believing that Simpson was threatening to hurt her. In the civil trial, O.J. flatly denied ever striking Nicole. *Id.* at 58. For a thorough analysis of what character evidence was admitted in the criminal case and what was not, *see* UELMAN, *supra* note 28, at 40-81.

[30] *See id.*

[31] *See* UELMAN, *supra* note 28, at 82-88 (reproducing in full the transcript of Nicole Brown Simpson's October 25, 1993 911 call to the police). The transcript graphically records Nicole's fear of O.J.: "He's fucking going nuts . . . . [H]e's gonna beat the shit out of me," she said. *Id.* at 84.

[32] The prosecution described the defense's motion to bar evidence of prior alleged acts of spousal abuse as an effort to "exclude evidence that would correctly and fully portray the seventeen year relationship between Nicole Brown Simpson and the defendant." *Id.* at 47. The prosecution continued: "All the acts of abuse and control discussed in this brief were part of this grand design." *Id.* at 48. Moreover, the prosecution argued that the O.J. case was controlled by *People v. Zack,* 184 Cal. App. 3d 409 (1986): "In both cases, the victim and defendant had a long relationship with a pronounced pattern of abuse and violence." UELMAN, *supra* note 28, at 49. Clearly, the prosecution sought to suggest that three prior provable (in its view) instances of abuse were just the tip of an iceberg of almost two decades of habitually abusive behavior.

[33] *See id.;* Josh Meyer & Andrea Ford, *911 Tapes Tell of Stormy Simpson Relationship Inquiry,* L.A. TIMES, June 23, 1994, at A1 (Nicole's fear stemmed from "many, many in-

not simply a man who beat or threatened his wife once or twice.[34] He was a wife-beater, someone for whom hurting his mate was central to his nature.[35] More than this, he was a controlling, angry man.[36] The prosecution argued that the jury should not be fooled by his charm, his football star image, or his apparent warmth.[37] He is a devil but in pleasing form.[38] And when he finally lost control of his property —his wife— he gave her the worst beating of her life.[39] The step from wife-beating to wife-killing is small for such a man.[40]

White judges, lawmakers, and commentators understand the theory of the bad man.[41] They believe, as did the prosecutors, that juries will readily conclude that

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cidents" of O.J.'s threats and abuse).

[34] *See* UELMAN, *supra* note 28; *see also* Meyer & Ford, *supra* note 33, at 1 (authorities say abuse of Nicole by O.J. was "an ongoing, chronic severe problem. It wasn't one time or five times. It was many times.").

[35] *See* UELMAN, *supra* note 28; *see also* Baynes, *supra* note 15, at 561 (prosecution painted a picture of O.J. as a wife beater and controller).

[36] "All of the acts of abuse and control leading up to victim's murder," said the prosecution, "were part of a systematic plan to control her." UELMAN, *supra* note 28 at 48. "To the extent that she was breaking away," the prosecution continued, "the only choice left to defendant was to control her through death — i.e., "if I can't have her no one will." *Id.* The prosecution concluded:

> The evidence shows that the defendant was an extremely jealous and possessive man. Murdering Nicole was also the ultimate act of control and retribution. Contrary to defendant's theory that the abuse and control evidence consists of a series of unrelated acts irrelevant to the murder, victim's murder was the end of an unbroken chain constituting a course of conduct. This motive for murder is well recognized in the scientific literature and by California courts. In short, this is a domestic violence case involving murder, not a murder case involving domestic violence.

Id.

[37] *See* Thomas D. Elias, *Hot-button Issues in Simpson Trial, Race, Spousal Abuse Likely to be Most Explosive Themes,* SAN FRANCISCO EXAMINER, Jan. 22, 1995, at A1 (suggesting that the prosecution believed that O.J.'s charm and warmth were a ploy, hiding his Jekyll-Hyde character); Linda Deutsch, *Simpson's Charm, Success Are Prosecutor's Top Target,* LEDGER (Lakeland, FL), Feb. 5, 1995, at 4A (suggesting that a key goal of the prosecution was to show that he was not the charming hero he appeared to be: "It is not the actor on trial here . . . . There is that other face. And that is the face we will expose to you . . . the other side of O.J. Simpson").

[38] *See* Jeremy Campbell, *O.J. and the Ogre Hidden Behind the Idol,* EVENING STANDARD (London), Jan. 20, 1995, at 20 (suggesting that O.J. was really an ogre masked behind the face of a revered sports celebrity, "a monster lurking in the shadow of a national idol.").

[39] *See id.;* Helen Kennedy, *Report: O.J. Will Take the Stand,* BOSTON HERALD, Aug. 5, 1994, at 1 (discussing prosecution's charge that O.J. was driven to kill by jealousy and bitter loss); Lassiter, *supra* note 12, at 70 ("The police theory was that O.J. Simpson was an overly possessive man motivated by a jealous rage to kill an ex-wife whom he could not have.").

[40] *See* Nancy S. Ehrenreich, *O.J. Simpson and the Myth of Gender/Race Conflict,* 67 U. COLO. L. REV. 931, 933 (1996).

[41] The bad man or propensity theory has deep roots in the common law from a time

bad men do bad things.[42] The jurors will thus assume guilty acts from bad character alone.[43] These authorities fear also that juries will not even care whether a suspect committed the crime.[44] They will convict because the suspect is bad, and society will be better off without him.[45] To avoid this result, most state and fed-

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when few African-Americans were lawyers, much less law professors. *See* JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW §57 (3d ed. 1940) (discussing propensity theory); Lisa Marie DeSanctis, *Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence*, 8 YALE J.L. & FEMINISM 359, 398-99 (1996) (discussing the propensity rule as based on the "bad man theory"). *See generally* J. CLAY SMITH, JR., EMANCIPATION: THE MAKING OF THE BLACK LAWYER, 1844-1944 (1993) (recounting history of exclusion of African-Americans from the legal profession and from its power elites). Indeed, even today, Black participation in the bar and in teaching law is woefully small, and Black lawyers continue to face "glass ceilings" limiting their efforts to rise to the top of their profession. *See, e.g.*, RICHARD ABEL, *Minority Lawyers, in* LAWYERS: A CRITICAL READER 101 (1997) (as of the early 1990's only 3% of U.S. lawyers and 6.4% of U.S. law teachers were Black); David B. Wilkins and G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CAL. L. REV. 493 (1996) (explaining "glass ceiling" effect's limit on black progress in breaking into corporate law firm elites, particularly at the partnership level). For these reasons, the prevailing case law, statutory, and scholarly theories of character evidence can fairly be characterized as "White" theories. That does not necessarily mean that Black lawyers would therefore reject those theories. Rather, this argues that Black voices have not adequately been heard.

[42] *See* UELMAN, *supra* note 28. The prevailing theory of why propensity evidence is to be feared has been summarized thus:

> Specifically, when character evidence is used circumstantially, a jury must determine, first, whether the evidence offered as to the defendant's reputation, opinion, or specific acts proves that the defendant indeed has a certain personality trait and second, whether someone with that trait is more — or less — likely than someone without it to commit the criminal deed. The value of step one turns on the trustworthiness of the proffered evidence: whether it suggests that the defendant has the identified trait. The value of step two turns on another accuracy judgment: whether having that trait affects the likelihood that the defendant committed the crime. *The jury may, without proper guidance, overvalue the worth of the evidence on both points. That is why courts so mistrust character evidence.*

Andrew E. Taslitz, *Myself Alone: Individualizing Justice Through Psychological Character Evidence*, 52 MD. L. REV. 1, 8 (1993) [hereinafter *Myself Alone*] (emphasis added).

[43] *Id.* at 106 ("Jurors are . . . likely to treat a single act as demonstrating what an actor ordinarily does . . . . [They may be tempted] to judge a defendant based on . . . these generalized perceptions of her rather than on the evidence as to her actions or thoughts on the occasion in question.").

[44] *See* RICHARD LEMPERT & STEPHEN SALTZBURG, A MODERN APPROACH TO EVIDENCE: TEXT, PROBLEMS, TRANSCRIPTS AND CASES (2d ed. 1983) (noting jurors aware of a defendant's prior bad acts may have less "regret" about convicting him). *See generally* James Landon, Note, *Character Evidence: Getting to the Root of the Problem*, 24 AM. J. CRIM. L. 581, 589 (1997) (discussing the danger that jurors will convict a defendant because he is a "bad person" rather than because the evidence shows that he committed a bad act).

[45] *See* Taslitz, *Myself Alone*, *supra* note 42, at 7-8, 110-113; *see also* Susan Marlene

eral trials are bound by a rule that generally prohibits the "circumstantial" use of character evidence, that is, the bad man theory.[46] But character-like evidence can be used to support other theories.[47] In the O. J. case, the theory was motive.[48] O. J.'s beatings and threats aimed at Nicole showed his motive for killing her: "[S]he would be punished for having left him, punished for going out with other men, and would no longer be able to make him jealous by doing it."[49] While this was the prosecution's *ostensible* theory, their real hope was that the jury would convict O. J. because he was a bad man.[50] Juries are not skilled at limiting their use of evidence to just one theory.[51] Moreover, the line between "motive" and "character" is sometimes thin. What is the real difference to a jury between concluding that O. J.'s beatings and threats showed that he wanted to kill his wife to assert his dominance in this instance (motive) and concluding that he was a wife-beater, the kind of man who beats his wife (indeed, any woman who would become his wife) generally, and finally killed her to assert such dominance (character)?[52] There is none. The distinction lives in the ossified

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Davies, *Evidence of Character to Prove Conduct: A Reassessment of Relevancy*, 27 CRIM. L. BULL. 504, 523-25 (1991) (summarizing psychological research suggesting that juries may convict a defendant because of his character rather than because of what he thought or did); LEMPERT & SALTZBURG, *supra* note 44 (stating that juries have little regret over the possibility of error when they convict a bad man).

[46] *See, e.g.*, FED. R. EVID. 404(a); RONALD L. CARLSTON ET AL., EVIDENCE: TEACHING MATERIALS FOR AN AGE OF SCIENCE AND STATUTES 314-18 (4th ed. 1997).

[47] *See* FED. R. EVID. 404(b).

[48] *See* UELMAN, *supra* note 28; Lassiter, *supra* note 12, at 70; Benjamin Z. Rice, Note & Comment, *A Voice From People v. Simpson: Reconsidering the Propensity Rule in Spousal Homicide Cases*, 29 LOY. L.A. L. REV. 939, 960-61 (1996).

[49] CHARLES B. ROSENBERG, THE TRIAL OF O.J.: HOW TO WATCH THE TRIAL AND UNDERSTAND WHAT'S REALLY GOING ON 37-38 (1994).

[50] *See* UELMAN, *supra* note 28; *cf.* Baynes, *supra* note 15 (discussing the prosecution strategy of "blackening" Simpson with the prevailing stereotype of a violent Black brute).

[51] *See, e.g.*, Andrew E. Taslitz, *Does the Cold Nose Know? The Unscientific Myth of the Dog Scent Lineup*, 42 HASTINGS L.J. 15, 131 (1990) ("Recent psychological studies, although admittedly preliminary, suggest that jury instructions rarely are understood and often do not have their intended impact on jury verdicts.").

[52] For a clear definition of the distinction between "motive" and "character," *see* Park, *supra* note 28, at 753 ("Evidence of prior violence against the same victim shows motive, not character. The motive is a victim-specific emotion, not a broad cross-situational character trait."). I am not suggesting that there is no *logical* difference between motive and character. Rather, I am suggesting only that juries may sometimes draw character-like inferences ("O.J. was a bad man, so let's just convict him") from some emotionally powerful forms of "motive" evidence, or at least that the prosecution probably hoped that the jury would do so in the Simpson case. This suggestion is supported by social science research revealing that laypersons: (1) are willing to make confident, disposition-based predictions, based upon limited data, and (2) tend to inflate the importance of personality traits while undervaluing the role of the situation. *See* Taslitz, *Myself Alone*, *supra* note 42, at 110-11. These last two observations do not necessarily mean that all

minds of judges and academics but not in the real world. The evidence of prior beatings, police intervention to stop potential bloodshed, and the recording of a crazed, screaming O. J. were also emotionally powerful. The prosecutors reasoned: How could a jury not hate this man?[53]

Psychological research suggests that the prosecutors were correct to believe that evidence of O. J.'s prior bad acts would tilt jurors toward convicting him because he was a "bad man." Character evidence, especially a few, isolated acts, is of little value in predicting an individual's future behavior.[54] Moreover, although character traits do exist, they are not the general, cross-situational traits (similar behaviors displayed in diverse situations) of the "bad man." Rather, a character trait is a tendency or potentiality activated by certain situations.[55] To say that someone is a "tardy person" is therefore usually misleading. Someone can be consistently late in making appointments with friends and loved ones but extraordinarily punctual on the job. A more accurate way to describe the trait of tardiness is likely to be, "He is tardy in his personal life," a character description that incorporates the relevant situation.[56] Similarly, a teenager is better described as a "conscientious student" than "conscientious," which wrongly suggests the unlikely prospect that he is conscientious in all things.[57]

An experiment by Darley and Batson demonstrates the power of the situation. Young seminarians were given directions to a talk. Some were told that they were late and better hurry, while others were told that they had some time. All passed a man slumped in a doorway, head down, coughing and groaning. Seminarians were chosen as people most likely to act as Good Samaritans. The hurried seminarians, however, rarely helped, while the seminarians with time on their hands generally stopped to offer aid. In this study, the situation mattered more than character.[58]

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character or character-analogous evidence should be inadmissible. To the contrary, I and others have argued that some expert character testimony, *see id.*, or close-to-the-line-but-not-quite-expert-character-testimony (such as "social background" on the nature of battering, *see* Myrna Raeder, *The Better Way: The Role of Batterers' Profiles and Expert "Social Framework" Background in Cases Implicating Domestic Violence*, 68 U. COLO L. REV. 147, 186 (1996)), should be admissible precisely because it helps jurors better to appreciate the power of the situational context relative to character in understanding a suspect's thoughts and behavior.

[53] *See* UELMAN, *supra* note 28 (explaining why prosecution probably hoped that spousal abuse testimony would lead jurors to view O.J. as a "bad man," thus using the testimony as evidence of criminal propensity); *cf.* LEMPERT & SALTZBURG, *supra* note 44 (noting jurors' reduced regret about errors when convicting bad men); *see* David Margolick, *Prosecution Quickly Tries to Tarnish Simpson's Image*, N.Y. TIMES, Feb. 1, 1995, at A14; *see also* Park, *supra* note 28, at 749 n.8-10.

[54] *See* Taslitz, *Myself Alone*, *supra* note 42, at 65-72, 104-07; *see also* DERSHOWITZ, *supra* note 3, at 79-80, 87 (1996) (articulating a color-blind defense of the verdict).

[55] *See* Taslitz, *Myself Alone*, *supra* note 42, at 31-33, 69-72, 109.

[56] *See id.* at 33-34.

[57] *See id.*

[58] *See* LEE ROSS & RICHARD E. NISBETT, THE PERSON AND THE SITUATION 49 (1992);

Other studies show that most Americans firmly believe that they can identify and use general personality traits to predict how people will behave in new situations. Furthermore, they are generally willing to make confident judgments about character and future behavior based on very little evidence.[59] Additionally, they suffer from the "halo effect," a willingness to judge others generally on the basis of one outstanding "good" or "bad" quality.[60] In short, the bad man theory often works, and it should have worked for the O. J. prosecution.

Black Judges on Justice suggests why the bad man theory failed. The judges interviewed for this book reflect a keen intuitive awareness of the importance of the situation to human behavior. That awareness comes not from studying psychological data but from their own life experience with discrimination and their awareness of the situational forces affecting much of the Black community.

The judges interviewed in this book show this awareness through their finding that crime is caused as much by life circumstances as by character. This approach is not "soft-on-crime" liberalism. To the contrary, these judges see crime as a scourge on the Black community.[61] Moreover, they strongly believe in personal responsibility, through the offender's acceptance of the consequences of his actions. They do not, for the most part, however, view criminals as evil.[62] The judges believe criminals can change if their situations change. The possibility for redemption is real, and the law has the power and obligation to promote redemption, for example, by treating, rather than punishing, drug addicts.[63] "A better approach [to drug cases] would have been more in the nature of education, medical treatment, and rehabilitation."[64] Apart from redemption, wrongdoers deserve both punishment and compassion where life circumstances have led them astray. Judge McKee sees the question this way:

> A better question is who of the two is more salvageable? It may well be the kid in the projects who has committed a first offense at the age of eighteen. He has escaped all that negative stuff for a long time and has never been involved with drugs— but then finally he makes a mistake. He is probably more salvageable than a kid who has had all the opportunity in the world, all the breaks in the world, and is out there screwing up. So I think society is probably giving the breaks to the wrong folks.[65]

Judge McKee, in his hypothetical, is clearly making a character judgment — that the kid in the projects is a better sort than the one with "all the opportunity in the world." He can say this because he recognizes the role of the situation. The kid in the projects can be deemed a better sort, and his fall from grace forgiven, because bad circumstances had much to do with that fall. Indeed, many

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see also Taslitz, *Myself Alone*, *supra* note 42, at 110.

[59] *See* Taslitz, *Myself Alone*, *supra* note 42, at 110-11.

[60] *See id.* at 107.

[61] *See* WASHINGTON, *supra* note 13, at 36, 96, 171, 175.

[62] *See id.* at 36, 41, 51-52, 56, 107, 117, 148.

[63] *See id.* at 148.

[64] *See id.*

[65] *Id.* at 70.

judges interviewed recognize family breakdown, lack of hope, the absence of role models, and the loss of education as key causes of crime, circumstances the courts should take into account.[66] Perhaps the most salient circumstance these judges observe is drugs.

"I am now at the point where if I see a case and there isn't some aspect of drugs involved, I say to myself that I must have missed something,"[67] says Judge McKee. The drug culture is viewed as a pervasive, deadly disease, sapping the community's strength. The bizarre behavior of addicts and the vicious violence caused by drugs are well understood. The judges are angry about society's ignorance of this state of affairs and its unwillingness or inability to remedy it:

> These drugs are causing all types of problems. They are in the schools. They are behind Black-on-Black crime. There are more Black men in jail than there are in college. The Black male may become extinct because we are killing so many of these young Black males. When you consider the unemployment of Black males, the drug addiction, the percentage that are in prison, we are in serious trouble. Everybody talks about the drug problem, but the drug problem is not down here in Detroit, or in Chicago, Los Angeles, Cleveland, or New York. The problem is: How are all these drugs coming into the country? And no one has been able to answer that with any specificity.[68]

Because these judges understand the role of life circumstances in causing crime, they are creative and energetic in seeking sentences that promote redemption. The word "redemption" rather than "rehabilitation" is used because the former better conveys the religious zealotry with which these judges seek to save the lost souls in their community. Literacy programs, drug programs, and boot camps are the favored methods of redemption. Boot camps work because they alter the defendant's social world. "There are peers of a different type around them. Instead of being around peers who want to cut up, clown, and act the fool, the peers they are around at boot camp are trying to get somewhere."[69] Peer pressure develops into encouragement to get an education and get ahead, rather than to commit crimes.[70]

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[66] *See id.* at 51-59, 67, 87, 93, 106-7, 110-11, 117, 122, 176.

[67] *Id.* at 67.

[68] *Id.* at 117 (quoting Judge Damon J. Keith). The power of drugs to affect behavior is a consistent theme in *Black Judges on Justice*. Judge Fred L. Banks, Jr. notes that "[c]rime is tied to drugs, and the drug problem is a symptom of the breakdown of values and morals in our society." *Id.* at 87. But, he says, "[t]he crack cocaine problem, especially the aspect of selling crack openly on street corners, involves the Black community." *Id.* Similarly, Judge Reggie B. Walton, former "drug czar" in the Bush Administration, wrote a paper stating "that we had to do other things [than just locking people up] if we were going to affect those communities most devastated by the drug problem." *Id.* at 93.

[69] *Id.* at 54.

[70] *See id.*

Experimentation with more novel sentencing concepts is favored by some of the judges. Judge Joseph Brown makes defendants register to vote and punishes thieves by "reverse theft." "Reverse theft" allows the victim of a nonviolent theft, perhaps a burglary, to come to the offender's home under a bailiff's supervision. If the victim sees *anything* he wants (up to a certain value), he may take it. The victim can do this as many times as he wishes over the course of an offender's probation, unannounced, day or night. Offenders sometimes burst into tears, for victims may take something very dear to the offender. Judge Brown believes that this approach teaches offenders to learn the pain of theft and come to understand its consequences. In addition, the victim gets to see the offender as a person, in his home and his life circumstances. That opportunity reduces victim and community rage.[71]

Besides the less off-beat sentences focusing on redemption-by-situation-manipulation, also favored by these judges are job training, graduate equivalency diplomas, and community service.[72] These judges understand that how the system treats offenders is part of the life circumstances that shape their future behavior. "If the judge behaves in a fair fashion . . ., [if he] has earned respect, when he tells them to do something, they do it."[73]

Finally, these judges realize that race and racism are important situational factors which influence those who commit crimes and the communities who suspect them of committing crimes. Thus, a perfectly innocent Black male might more likely be stopped by the police as a suspect just because of his race.[74] For example, Rodney King apparently was brutalized by the police primarily because of his race.[75] "You arrest more Blacks because they are suspected of committing crimes," says Judge Banks, "and then you suspect them of committing more crimes because they are arrested more often than other groups."[76] Even when Blacks are guilty, however, racism plays a role in the commission of the crime. "A kid who grows up in the projects has every reason to rob."[77] His poverty, low self-esteem, and limited life chances are in part due to racism and may deserve some understanding. Indeed, most of these judges argue that there is a need for more Black judges because they will see the racism that Whites will not.[78]

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[71] *See id.* at 49.

[72] *See id.* at 55, 97, 148, 176, 237.

[73] *Id.* at 56.

[74] *See id.* at 116. For a detailed explanation of both the history and current practice of racial discrimination in the criminal justice system, *see* Randall Kennedy, RACE, CRIME, AND THE LAW (1997); CORARAE MANN, UNEQUAL JUSTICE: A QUESTION OF COLOR (1993).

[75] *See* WASHINGTON, *supra* note 13, at 150. For analyses of police brutality and race, *see* JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE 8, 15, 24, 79, 95-96, 105 (1993).

[76] WASHINGTON, *supra* note 13, at 88.

[77] *Id.* at 73.

[78] *See id.* at xii, 23, 149-50, 174, 177.

The Black judges' conception of the importance of the situation in assessing character has important implications for the O. J. verdict. Recognizing the power of circumstances suggests that a few isolated instances of abusive behavior — O. J.'s beating Nicole on one occasion, threatening her on another[79] — may not necessarily reflect O. J.'s character. The situation — an insult, knowledge of an affair — may have provoked O. J.[80] But in most situations, he might be far less violent. He may have beaten and threatened his wife, clearly reprehensible acts, but that does not make him a wife-beater.[81] This distinction is different from that emphasized by the White press, which suggested that Black women are more tolerant than White women of wife abuse.[82] "They expect a cuff now and then from their men" is the message. The approach articulated by the Black judges does not tolerate or condone violence or sexism.[83] Rather, they merely recognize that bad behavior and bad character are two different things.

Even if O. J. were a wife-beater, the Black judges would hesitate to conclude that this reality makes it significantly more likely that he was a wife-killer. The past situations and the degree of violence may just be too different automatically to assume that he killed his wife.

III. INDIVIDUALIZED JUSTICE

The Black judges' understanding of the situational nature of character is part of a broader concern with individualized justice. Justice is "individualized" when we are judged for who we are and what we have done.[84]

The opposite of individualized justice is trial by generalization, assumption, and stereotype.[85] Judges and substantive criminal law scholars pay lip service, of course, to individualized justice, but in practice that goal is realized most often in the breach.[86] Black judges reject this rule and insist on bringing reality in line with aspiration.

The public generalizes, say the Black judges, out of laziness and an unawareness of the the lives of others. "Not everybody who wears red or blue — which are gang colors — actually belongs to a gang. A lot of young Blacks wear col-

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[79] *See supra* note 29; *see also Simpson Focus Turns to Troubled Marriage/History of Abuse to be in Limelight,* STAR TRIB. (Minneapolis-St. Paul), Jan. 10, 1995, at 1A.

[80] *See* Richard J. Bonnie, *Excusing and Punishing in Criminal Adjudications: A Reality Check,* 5 CORNELL J.L. PUB. POL'Y 1, 2 (1995). *See also* Shelby A.D. Moore, *Battered Women Syndrome: Selling the Shadow to Support the Substance,* 38 HOW. L.J. 297, 352 n.142 (1995); Lassiter, *supra* note 12, at 69.

[81] *See infra* Part 6 (discussing Cornel West's speculations on what "really happened" in the O.J. case).

[82] *See* John H. Manor, *Putting Domestic Violence in Perspective,* MICH. CHRON., Jan. 30, 1996, at 1C. *See also* S.R. Boland, *Domestic Violence Hits Minorities, Poor Hard,* MICH. CHRON., Dec. 17, 1996, at 7C.

[83] *See* WASHINGTON, *supra* note 13, at 14, 30-31, 55, 78, 83-84, 88-89.

[84] *See* Taslitz, *Myself Alone, supra* note 42, at 3-6, 14-24.

[85] *See id.* at 25, 120.

[86] *See id.* at 62.

ors because they are scared. Even having a gun in your car doesn't mean you're a gang member."[87] Many police officers unaware of the realities of Black life find it easier to stereotype, arresting young Black males as suspects simply because of their clothes.

One of the first ill effects of racial stereotyping, therefore, is that it skews who the police will arrest. Perhaps the most overt illustration of stereotyping is the frequent use of race by police in drug courier "profiles" — lists of characteristics believed to be typical of drug smugglers and dealers. For example, Judge Damon Keith commented that:

> [I]t was wrong for the police to stop and search a person simply because of his skin color. The detectives testified that the only person they had stopped getting off that airplane was this guy, Taylor, the only Black person getting off the plane. These detectives didn't have a tip from an informant that Taylor had drugs, nor had drugs been detected by a police dog. The detectives said they stopped him because their "profile" said Blacks are more likely to carry drugs than whites. The detectives had no probable cause to stop him, no reasonable suspicion — except he was Black. That's racism, and racism has no place in law enforcement.[88]

Stereotypes and generalizations also affect who is convicted at trial. Memories seem to haunt these judges of trials in which Black men were convicted of attempted rape solely on proximity to a White woman, or on a lie admitted to by a victim.[89] These judges are acutely aware of cross-racial misidentification by victims and a willingness to think the worst of Black suspects. Thus Judge McKee reminds us:

> A couple of summers ago I sat in on the waiver program [the non-jury trials], and most of those cases were drug cases. They almost always involved the same set of facts. Almost exactly the same testimony. There is a bias against the defendant. When you see a young Black guy charged with a crime, there's just a prejudgment of what is going on in the urban community, so much of which is based in reality. But this particular young Black kid on trial may not be a part of that.[90]

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[87] WASHINGTON, *supra* note 13, at 36.

[88] *Id.* at 116. For further analyses of the abuse of race in drug courier profiles, *see* KENNEDY, *supra* note 74, at 138-63 (discussing the problem generally); TASLITZ & PARIS, *supra* note 20, at 393-414 (1997) (discussing the impact of recent United States Supreme Court case law prohibiting inquiry into "racial pretext" as a ground for invalidating a search or seizure under the Fourth Amendment, as well as more broadly examining the role of race under that amendment).

[89] *See* McQuirter v. State, 63 So. 2d 388 (Ala. App. 1953) (discussing an African-American convicted of attempted rape on little evidence other than being near a White woman). *See also* JAMES GOODMAN, STORIES OF SCOTTSBORO (1994) (recounting details of the infamous false inter-racial rape claim of this century).

[90] WASHINGTON *supra* note 13, at 68. For analyses of the psychological literature on cross-racial misidentification, *see* TASLITZ & PARIS, *supra* note 20, at 705.

For similar reasons, Black judges oppose mandatory sentencing laws because "they undercut the whole system of justice and the concept of individualized justice. No matter what the circumstances, mandatory sentencing requires sentences based only on the class of offense."[91] Such class-based reasoning, which fails to view Black men as individuals, is precisely what the Black judges abhor.

How, then, can we prevent trial by stereotype? The judges agree that one way is to have more Black judges, who bring the insights of a different segment of the community, and whose life experiences promote understanding of the unique circumstances of Black life.[92] Judges of other races can also learn to individualize justice, but they must recognize the blinders created by their own life experience. They must commit themselves to removing those blinders by studying the lives and experiences of others. One effective way to learn is through literature:

> You know, it may sound weird, but I think that reading literature is the best on-going training for a judge. I don't have time to read as much as I'd like to, but I think I have gotten more out of reading Dickens, say, than I have out of reading legal textbooks on evidence. As a judge you have to know a lot about men, and reading literature does a good deal to sensitize you, to put you in another man's shoes. That is extremely important for a judge because it is so easy to lose track of the human dynamic that you are dealing with in the courtroom. You can get so wrapped up in the technicalities of legal procedure that the human element gets shoved aside. That's when the system begins to break down. I think the kind of sensitivity you get from reading literature — more than anything else I can think of — helps a judge do his job.[93]

Nevertheless, even in a world of White judges steeped in the classics, Black judges would serve a special role: to promote the *appearance* of individualized justice. All the judges agree that the Black community must perceive that the system is fair.[94] Indeed, that perception helps to explain Black jubilance over the O. J. verdict: the appearance of a verdict that resulted from a loud Black voice (10 out of 12 jurors), bringing a much-needed individualized perspective to the deliberations.[95]

O. J. raised the spectre of stereotypes of violent Black men, beasts who revel in the abuse of White women.[96] That spectre, fed by memories of Southern White show trials and a current reality of police abuses, haunts the Black psyche.[97] False accusations leveled against a highly successful Black man who must have known his conduct would be subject to public scrutiny and who had

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[91] WASHINGTON, *supra* note 13, at 69.

[92] *See id.* at 15-69, 147.

[93] *Id.* at 76.

[94] *See id.* at 112.

[95] *See infra* text accompanying notes 165-66, 173-75.

[96] For an analysis of White images of Black male sexual bestiality, see Taslitz, *Patriarchal Stories I, supra* note 18, at 453-457.

[97] *See, e.g.*, GOODMAN, *supra* note 89; *infra* Part 4.

much to lose by murder seemed plausible. What would his motivation be? Jealousy of Nicole made little sense given how long they had been apart and O. J.'s having a successful relationship with another woman.[98] Moreover, O. J. had achieved great success in other aspects of his life.[99] He knew how to operate in the world of business. He was also smart. Intelligent people do not leave their blood splattered about their car, their home, and their clothes. Further, even if jealousy as a motive made sense, why snap after so long? A precipitating event needed to occur, and the prosecution failed to identify a plausible one. Finally, the irregularities in gathering evidence were overwhelming. The trail of wrongdoing led to the police, not O. J.[100] The media's eagerness to embrace O. J.'s guilt thus seemed especially inappropriate and racially driven.[101] To the Black sense of justice, an individualized consideration of the circumstances suggested reasonable doubt, if not innocence.[102] The burden of proving otherwise lay with the prosecution, and the prosecution failed to meet that burden.[103] When the verdict reflected that failure, therefore, many in the Black community rejoiced. Trial by racial stereotype and innuendo had, for once, not triumphed.[104]

IV. SKEPTICISM OF THE POLICE

Black judges question the police. They do not believe police easily.[105] Moreo-

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[98] *See* Baynes, *supra* note 15, at 562; Christopher B. Mueller, *Introduction: O.J. Simpson and the Criminal Justice System on Trial*, 67 U. COLO. L. REV. 727, 736 n.6 (1996) (noting that the defense argued that Simpson had a "close, loving relationship" with Paula Barbieri, at the time of Nicole Simpson's murder).

[99] *See* Lassiter, *supra* note 12, at 69; Baynes, *supra* note 15, at 558.

[100] *See* Ronald J. Allen, *The Simpson Affair, Reform of the Criminal Justice Process, and Magic Bullets*, 67 U. COLO. L. REV. 989, 1015 n.46 (1996) (noting incompetence of police in gathering evidence in the O.J. case); Lassiter, *supra* note 12, at 70 (discussing general problems with police conduct in the case); West's Legal News 2558, Oct. 4, 1995, 1995 WL 9110113 (asserting that Simpson's criminal jury verdict was the result of police misconduct and evidence-gathering problems).

[101] *See* Christo Lassiter, *TV or not TV— That is the Question*, 86 J. CRIM. L. & CRIMINOLOGY 928, 973-4 (1996) (discussing media's portrayal of Simpson as guilty).

[102] Devon W. Carbado, *The Construction of O.J. Simpson as a Racial Victim*, 32 HARV. C.R.-C.L. L. REV. 49, 75-78 (1997) (arguing that many Blacks felt early on that there was reasonable doubt and that O.J. was just another Black man who had become the subject of racial injustice).

[103] *See* Crystal H. Weston, Essay, *Orenthal James Simpson and Gender, Class, and Race: In that Order*, 6 HASTINGS WOMEN'S L.J. 223, 230-1 (1995).

[104] *See generally* Christopher B. Mueller, *Introduction: O.J. Simpson and the Criminal Justice System on Trial*, 67 U. COLO. L. REV. 727 (1996). *See, e.g.*, Lassiter, *supra* note 101; DERSHOWITZ, *supra* note 3, at 72-74.

[105] *See infra* text accompanying notes 108-115; Bryan K. Fair, *Using Parrots to Kill Mockingbirds: Yet Another Racial Prosecution and Wrongful Conviction in Maycomb*, 45 ALA. L. REV. 403, 408 (1994); Douglas O. Linder, *Juror Empathy and Race*, 63 PENN. L. REV. 887, 905 (1996) (taking position that Blacks on average will not convict other Blacks if "there's a hint of police impropriety").

ver, the judges find stories of police officer abuses — false accusations, excessive force, coerced confessions, and frame-ups — plausible.[106] This attitude should not be confused with a dislike of the police or of their role. Many of the Black judges are former prosecutors who were tough on crime.[107] They recognize the important role the police play in ensuring equal protection by providing Black neighborhoods with the same security as White neighborhoods. Unlike much of the White community, these judges do not see support for crime control efforts nor for police as requiring blind trust in individual officers.[108] These judges recognize not only that most Whites believe police officers, but also that Black judges themselves face strong pressure to do so:

> You are always going to see the same cops coming in, and there is a built-in bias to believe the cop. If you always see policemen who you are familiar with, and you know you have to deal with these guys next week on other cases, it becomes more and more difficult to feel that you have a reasonable doubt. When you believe the defendant, you are basically calling the cop a liar.[109]

The judges must counter these types of pressures that lead jurors automatically to believe the police. Judge Veronica S. McBeth, for example, uses a special jury instruction:

> I've given jurors examples that remove this scrutiny issue from the criminal context. I tell them to pretend they are in an automobile accident with a policeman and each accuses the other of being at fault. This accident can't be resolved — the lawyers can't resolve it, the insurance companies can't resolve it, so it ends up in civil court. Now what would happen if the jury said it couldn't decide based on the evidence, but the cop would never lie. Wouldn't that mean that in certain situations, if a policeman ran into your car, you'd never get any money, you'd never win in court? Jurors laugh, but they think about it.
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> Then I put it in a criminal context. If we are going to believe everything this officer says, the other guy never has a chance. I'm not saying you should disbelieve the officer. I'm saying you should weigh his words the same as anyone else's.[110]

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[106] *See infra* text accompanying notes 108-115. *Cf.* Mary Maxwell Thomas, *The African-American Male: Communication Gap Converts Justice Into "Just Us" System*, 13 HARV. BLACKLETTER J. 1, 17-18 (1997) (discussing African-American attitudes toward the police generally).

[107] *See* WASHINGTON, *supra* note 13, at xxi, 40-41, 96, 171, 175.

[108] *See* Maria Puente, *Poll: Blacks' Confidence in Police Plummets*, USA TODAY, Mar. 21, 1995, at 3A (noting that more Whites than Blacks believe that police testify truthfully); Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 699 n.115 (1995) (discussing a USA Today poll showing that 70% of Whites and 33% of Blacks believe that police generally testify truthfully).

[109] WASHINGTON, *supra* note 13, at 68.

[110] *Id.* at 35-36.

These judges' skepticism of police officers are derived from personal experiences.[111] One of the judges interviewed was falsely accused twice.[112] Others had personal experiences of abuse, such as Judge Joseph Brown, Jr. who recounted that, "I know what it is like to get jacked up on a wall by the police." [113]He also commented that:

> This Rodney King bullshit — I must have seen that ten or fifteen times with my own eyes when I was growing up . . . . I know what it is like to be victimized by somebody with a badge and gun who's saying, "We're the occupation army. We gonna keep all you niggers down on the bottom, flat and Black."[114]

These judges know that perhaps the most bizarre tales of police officer abuse can be true. Judge Reggie B. Walton described the "bunny rabbit" scam:

> There was a tale I used to hear from my clients in Philadelphia about being placed into a room by themselves and they would be there for a period of time and all of a sudden this white bunny rabbit would appear. This was a man dressed up as a white bunny rabbit, and he would come into the room with an orange billy club and beat the hell out of them — and that was when they told the police what they did. The first time I heard that story, I went to court and asked that my client be given a mental examination. But as it turned out, there apparently was this ploy on the part of the police in order to coerce confessions.[115]

Skepticism of police officers does not mean they are automatically disbelieved. The Black judges remain vigilant in watching for evidence that calls police officer credibility into question and are alert to evidence of police officer abuse. For example, in the O. J. case, unexplained flaws in police laboratory procedures, gaps in accounting for blood taken from O. J., and an openly racist cop at the center of the case made a police officer frame-up of O. J. seem like a plausible explanation of the evidence.[116]

V. INEQUALITY IN ACCESS TO FAIR FACT-FINDING RESOURCES

The fundamental assumption of the adversary system is that a clash of equally matched adversaries will produce truth.[117] One problem with this assumption is that opponents often are not evenly matched.[118] Accidental or a natural unequal distribution of talent among lawyers may result in this inequality.[119] To many

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[111] *See infra* text accompanying notes 112-14. *Cf.* Thomas, *supra* note 106, at 17-18.

[112] *See* WASHINGTON, *supra* note 13, at 100-01.

[113] *Id.* at 49-50.

[114] *Id.*

[115] *Id.* at 98.

[116] *See* DERSHOWITZ, *supra* note 3, at 72-79, 83-84, 88.

[117] *See* FRANKLIN STRIER, RECONSTRUCTING JUSTICE: AN AGENDA FOR TRIAL REFORM 32-33, 53-57 (1996).

[118] *See id.* at 75-82.

[119] *See id.* at 75-82 (explaining how and why the adversarial system assumption of

Black judges, inequality is systemic.[120] Race and class deny many defendants equal access to fact-finding resources their lawyers require.[121]

For example, race and class can serve as proxies for proving facts that may be relevant to sentencing or bail decisions such as showing that a defendant is dangerous or lacks community ties.[122] When race alone serves to tip the fact-finder's scales toward a finding of dangerousness, the White defendant has access to a fact-finding resource — the whiteness of his skin — unavailable to the Black defendant.[123] Lower income Blacks also lack economic resources — money and its accompanying "middle class" status — that may serve as proof of close community ties.[124]

Judge Theodore McKee, in discussing Pennsylvania's sentencing guidelines and mandatory minimum sentencing statutes, which sometimes permit judges to deviate from mandated sentences upon an offering of suitable explanations, explained:

> I think it is easy for a judge to deviate from the standard sentence and give a white middle-class defendant a break by deviating below the sentencing guideline because of all the subliminal predispositions. But no break will be given to the Black urban youth. The circumstances that the judge would use to justify the lighter sentencing of the middle-class defendant are all what we call racial identifiers: he's from a good family, he is from a good neighborhood, goes to a good school, has the influence of a good community on him, is active in that community. But what about the kid who grows up in a public housing project? What's good about the community influence in the projects?[125]

Judge McKee demonstrates a sensitivity to the intersection of race and class:

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equally matched attorneys is often wrong); Judith L. Maute, *Peevyhouse v. Garland Coal & Mining Co. Revisited: The Ballad of Willie & Lucille*, 89 NW. U. L. REV. 1341, 1446-55 (1995) (describing the reality of systemic flaws in the adversary system caused by mismatches between counsel).

[120] *See infra* text accompanying notes 124-59. *See generally* Practicing Law Institute, *Race, Sentencing, and Criminal Justice*, 159 P.L.I. CRIM 36 (1991) (Judge Joseph Howard noting an example of systematic racial inequality in the criminal justice system); Rebecca Marcus, Note, *Racism in Our Courts: The Underfunding of Public Defenders and Its Disproportionate Impact Upon Racial Minorities*, 22 HASTINGS CONST. L.Q. 219, 238 (1994) (citing a 1985 ABA study in The Judges Journal documenting inequality in the criminal justice system).

[121] *See infra* text accompanying notes 124-59; David Cole, Essay, *The Paradox of Race and Crime: A Comment on Randall Kennedy's "Politics of Distinction,"* 83 GEO. L.J. 2547, 2563 (1995) (making similar point to that of judges in BLACK JUDGES ON JUSTICE about the roles of race and class in the criminal justice system).

[122] *See* WASHINGTON, *supra* note 13, at 70-71.

[123] *See* KENNEDY, *supra* note 74, at 136-38. *See also* Cheryl I. Harris, *Whiteness as Property,* 106 HARV. L. REV. 1707, 1741-44 (1993).

[124] *See* WASHINGTON *supra* note 13, at 70-71. *See also* MANN, *supra* note 74, at 167-71, 191-210 (analyzing interactions among race, bail, and sentencing).

[125] WASHINGTON, *supra* note 13, at 70.

> I don't think there is equal justice under the law in this country. A large part of it is class. I'm not always sure how much of it is class and how much of it is caste. In this society those two things — class and caste — are almost the same anyhow. I don't think there are many judges on the bench who are just out and out racist, but we all have these subliminal attitudes. If a lower-class Black commits the same crime as an upper-middle-class white, there is going to be an incredible discrepancy of treatment.[126]

Apart from race and class serving as proxies for real proof of dangerousness and the like, race and class can affect credibility judgments at trials, sentencing hearings, bail hearings, and hearings on motions to suppress. Often times, Black defendants have unequal access to the resource of an unbiased fact-finder.[127] Judge McKee confesses that when he hears footsteps behind him in Center City Philadelphia and turns around, he will not be alarmed if "there is a couple of young White dudes" behind him.[128] If he sees "the proverbial Black urban youth," he is unsettled.[129] He hypothesizes that if he can have this reaction, then the average White judge's reaction will be "ten times more intense."[130] "These subliminal attitudes," he said, "come into play in the courtroom in terms of . . . how judges determine the credibility of the defendant."[131]

Insensitivity to the roles of race and class in affecting subliminal attitudes can further affect access to a fair, unbiased fact-finder. Two particular problem areas are choice of venue and jury selection. With a jury trial, fair venue-selection and voir dire procedures are critical because only a diverse jury can have a hope of overcoming psychological obstacles to fact-finder fairness.[132] Such diversity is essential both in ensuring equal access to an unbiased fact-finder and in perceptions of such access. The Rodney King case, according to Judge Walton, provided an ideal example:

> A certain insensitivity went into the process of deciding that the King case should be sent to an almost all-white community. That process had racial overtones, obviously, and the verdict was predestined by the decision to send the case to Simi Valley. The system has to be vigilant in making sure that it has the appearance of being fair. To many people, it appears otherwise.[133]

Racism further interferes with equal access to an unbiased fact-finder because

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[126] *Id.* at 71.

[127] *See id.* at 70-72.

[128] *Id.* at 71.

[129] *See also* Rachel F. Moran, *Milo's Miracle*, 29 CONN. L. REV. 1079, 1107 n.124 (1997) (giving examples of Blacks' general fear of Black inner-city youth).

[130] *See also* Cole, *supra* note 120, at 2563 (discussing Black fears of Black youth); Richard Delgado, *Rodrigo's Eighth Chronicle: Black Crime, White Fears — On the Social Construction of Threat*, 60 VA. L. REV. 504 (1994) (exploring the racist construction of crime).

[131] *Id.*

[132] *See, e.g.*, KENNEDY, *supra* note 74, at 182-86 (describing racism in jury selection).

[133] WASHINGTON, *supra* note 13, at 112.

racism dehumanizes defendants, making their tales easier to ignore or dismiss.[134] Racist stereotyping by the most consciously well-meaning of jurors can be especially insidious, for those jurors who deny their own racism cannot even attempt to guard against its pernicious influence.[135] Judge Damon Keith particularly condemns Whites' unwillingness to confront their own racism. Thus he notes that during his long service as chairman of the Michigan Civil Rights Commission, he never once heard a White corporate person, White landlord, or any other White person admit to their own racism.[136] He points to Cincinnati Reds' owner Marge Schott, who vehemently denies her own racism, as an egregious example.[137] The problem, according to Judge Keith, is that Marge Schott is telling the truth: she *believes* she is not a racist.[138] Yet she placed Blacks in the front office and made them eligible to become team managers only after she was attacked for being racist.[139] Even then, she admits to referring to Blacks whom she placed in positions of authority as her "million dollar niggers."[140] Judge Keith's point is this: "In her heart she doesn't believe that what she is doing is racist, but her actions speak loudly and clearly — and *they* say that everything she does is racist. A lot of White people don't understand that what they are doing is racist."[141]

Unequal access to effective counsel also can affect a defendant's ability to present a complete and convincing case, even to a fair fact-finder. Here, class is probably more of an issue than race.[142] The impact of race on class, the greater

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[134] *Id.* at 72.

[135] *See, e.g.,* JODI ARMOR, NEGROPHOBIA AND REASONABLE RACISM (1997) (discussing how the effects of racism can be reduced by educating well-meaning White jurors about the dynamics of their own subconscious racial stereotyping.).

[136] WASHINGTON, *supra* note 13, at 123.

[137] *See id.* Schott was publicly accused of racist comments and practices occurring in her role as the Cincinnati Reds' owner. *See Schott Says There's No Racism,* N.Y. TIMES, Feb. 12, 1993, at B13.

[138] WASHINGTON, *supra* note 13, at 123.

[139] *See id. See also Cincinnati Reds Owner Marge Schott is Suspended and Fined $25,000 for Purported Use of "Racially and Ethnically Insensitive Language,"* 14 No. 9 ENT. L. REP. 19 (1993) (discussing "contributions" Schott made to fighting prejudice after charges of her racism were raised, including her efforts to establish a minority hiring program).

[140] *Id.*

[141] *Id.*

[142] Thus, the poor are likely to find it harder than others to obtain talented counsel with sufficient resources to conduct an adequate investigation. *See, e.g.,* STRIER, *supra* note 76, at 76 ("In a market economy, the price a professional can demand and a client will pay for services is a traditional barometer of worth of the services. Legal services are no exception . . . ."); Edward C. Monahan and James Clark, *Coping with Excessive Workload, in* ETHICAL PROBLEMS FACING THE CRIMINAL DEFENSE LAWYER: PRACTICAL ANSWERS TO TOUGH QUESTIONS 318 (Rodney J. Uphoff ed., 1995) (counseling public defenders and counsel appointed to represent indigents on how to cope with their enormous workloads). *See also* Binny Miller, *Give Them Back Their Lives: Recognizing Client Nar-*

likelihood of Blacks having lower income or wealth, can also come into play.[143] Judge Reggie Walton shows a special sensitivity to this issue based on personal experience:

> I first became interested in the law as a kid, because I was charged with juvenile offenses on several occasions. I grew up in Donora, Pennsylvania, which was a small city of about twelve thousand, located about twenty-three miles south of Pittsburgh. On several occasions when I was growing up I was falsely accused of various things. Admittedly, on a couple of occasions, I wasn't falsely accused.
>
> On one of the occasions when I had been falsely accused because my parents didn't have money to hire a lawyer and at that time there was no provision in the law for indigent individuals to receive a free lawyer, the local minister ended up representing me. Although he may have been a very good minister he wasn't a very good lawyer, and as a result of that I ended up being convicted of an offense I did not commit.[144]

While indigents are now entitled to counsel,[145] similar problems persist because of overworked public defenders offices and underpaid appointed counsel.[146] Indeed, some public defenders recognize limits to their ability to do their jobs due to massive caseloads, low salaries, and radical underfunding.[147]

Black defendants may also suffer from unequal access to a key fact-finding resource: information. Information-deprivation may result from ineffective counsel, perjurious police secrecy behind the "blue wall of silence," or prosecutors' general unwillingness to share information.[148] This is especially so with poor Black defendants, for whom the prosecutors may particularly lack understanding or sympathy.[149] At the very least, the Black community suspects that this kind of

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rative in Case Theory, 93 MICH. L. REV. 485, 575 (1994) (discussing roles of race and class in receiving competent counsel); Cole, *supra* note 120, at 2563 (obtaining effective assistance of counsel depends on how much money one has).

[143] *See* ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL 93-95 (1992).

[144] WASHINGTON, *supra* note 13, at 100 (discussing caselaw).

[145] *See* TASLITZ & PARIS, *supra* note 20, at 736.

[146] *See, e.g.*, Monahan and Clark, *supra* note 141, at 318-40 (outlining ethical problems raised by excessive public defender workload).

[147] *See id.*

[148] *See* DERSHOWITZ, *supra* note 3, at 54 (coining the term "blue wall of silence"); Albert J. Reiss, Jr., THE POLICE AND THE PUBLIC 213-14 (1971) (discussing widespread practice of police officers' refusal to testify against other officers and adherence to an unwritten code of silence); John Murawski, *A Cop Shatters the Code of Blue*, LEGAL TIMES, Jan. 18, 1993, at 1, 6 (discussing case involving an officer suing the police union for allegedly defaming him after he broke the "blue code of silence").

[149] *See* Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037 (1996); JOSEPH F. LAWLESS, PROSECUTORIAL MISCONDUCT § 5.01, at 254 (1990) ("Unfortunately, one of the drawbacks of the adversary system is its tendency to foster a 'win-at-any-cost' attitude on the part of some prosecutors. This attitude will often manifest itself in prosecutorial efforts to impede or, in some cases, completely

information control is happening. Judge Walton tells this tale:

> Last week in a case where I thought the defendant was obviously guilty, I had to declare a mistrial after four days of trial because the prosecutor had not told the defense that he had shown a photograph to a witness who had participated in the identification procedure after the robbery. Clearly the defense had a right to know about that so they could file a motion to suppress that suggestive identification procedure. However, the prosecutor did not tell the defense lawyer about it, and upon cross-examination, when the witness was being questioned about the photograph that the prosecutor had shown him, it came out for the first time that the witness had been shown the photograph before he came into court, which obviously would give him an advantage in identifying the defendant. Because it was such an unnecessarily suggestive procedure, I had to declare a mistrial and terminate the procedure.
>
> This win-at-all-costs attitude was spread in this jurisdiction by the head of the United States Attorney's office . . . .[150]

Even if racism did not motivate the prosecutor's actions in Judge Walton's case, there clearly was the potential for disparate racial impact. The likelihood of suggestion in improper identification procedures is greatly magnified for cross-racial identifications.[151] Even if this was not inter-racial identification, widespread information-deprivation will disproportionately affect Blacks in inner cities because of their disproportionate presence in inner city criminal justice systems.[152] This disproportion is arguably itself due in part to racial discrimination.[153]

These disparities in access to fact-finding resources can affect all fact-finders, not simply judges and juries. Heavier sentences for crack cocaine possession, for example, purportedly come from legislative or commission findings that crack is more addictive and otherwise more socially harmful than powder cocaine.[154] Yet these findings are weakly scrutinized, ignoring any real consideration in the computation of social harm that crack is more likely to be used by Blacks than Whites. Black judges recognize that a heavier crack sentence, resulting in imprisonment of yet more Blacks relative to Whites, magnifies social harms wrought by racially disparate sentences and young Black male isolation in prisons and jails.[155]

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undermine the efforts of defense counsel to obtain appropriate pretrial discovery of the government's evidence."); Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1284 (1993) (noting that people are more likely to empathize with people similar to themselves).

[150] WASHINGTON, *supra* note 13, at 105.

[151] *See* TASLITZ & PARIS, *supra* note 20, at 705-08, and sources cited therein.

[152] *See, e.g.*, MANN, *supra* note 74, at 39 (discussing African-American arrest rates).

[153] *See id.*

[154] *See* KENNEDY, *supra* note 74, at 368-69.

[155] *See* WASHINGTON, *supra* note 13, at 108-09.

Prosecutors also find facts. Thus prosecutors often have the power to certify defendants for "diversion." Defendants who have not committed grievous crimes, have no prior record, and are likely to benefit from rehabilitation efforts are good candidates for diversion programs.[156] Diversion programs "divert" these individuals away from the usual track toward a criminal trial.[157] Those diverted are expected to comply with certain conditions, such as getting a Graduate Equivalency Diploma, getting drug treatment, and staying out of criminal trouble.[158] If they comply for the specified time period, their cases are dismissed and their records expunged, as if they had never been arrested.[159]

Race plays a powerful role in prosecutors' decisions on diversion and other exercises of prosecutorial discretion. Says Judge McKee:

> I had a case involving a Black guy with two kids, who he was raising on his own. He had been charged with running a methamphetamine lab, and the DA's office initially would not certify this guy for a diversionary program . . . . They wanted to put this guy in prison for two to four years, which would leave his children on their own. Here was a guy who had really turned his life around. He was doing very well in community college, where he worked as a tutor. All of his professors raved about him, and he really had made a whole new person out of himself since the days when he had been involved with the "meth" lab.
>
> About this same time, I was considering another case. A guy had robbed someone on the street with a gun, and the DA's office wanted to certify this gunman for the diversionary program. The gunman was pleading guilty, and I kept asking myself why this case was being certified for diversion. The only reason I could see was that the gunman was white. I later found out that the gunman was a cop's son . . . .
>
> . . . The DA swore up and down that it had nothing to do with race, and then he went on to talk about all those things that are markers for race. The DA said the gunman was from a good middle-class family, from a good middle-class community, and his father was a police officer. I think the police officer part may have been the clincher, but he was basically telling me that it had nothing to do with race and then he is pointing to the guy's neighborhood, what his parents did for a living, all these things that this culture translates into race.[160]

While O. J. clearly was a wealthy defendant, the perception that Blacks ordinarily lack equal access to fact-finding resources clearly played a role. Prosecutors may have kept the case venue in Los Angeles precisely to avoid charges

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[156] *See* Wendy J. Kaplan, *Sentencing Advocacy in the Massachusetts District Courts,* 80 MASS. L. REV. 22 (1995) (discussing details of sample diversion program); TASLITZ & PARIS, *supra* note 20, at 45-46 (describing the nature of "diversion" programs — when defendants may participate and under what conditions); WASHINGTON, *supra* note 13, at 96-97 (discussing the benefit of "diversion").

[157] *See id.*

[158] *See id.*

[159] *See id.*

[160] WASHINGTON, *supra* note 13, at 72-73.

that there was not a diverse and fair jury pool.[161] Yet the defense painted a picture of police officers hiding information, even perjuring themselves to keep complete and correct information from the jury.[162] The defense similarly suggested that police laboratories and prosecutors buried or distorted information, all in an effort to keep the jury in ignorance.[163] Revelations of Mark Fuhrman's prior racist comments and perjury on the stand magnified the image of a racist system trying to handicap a Black man's access to the resources necessary for fairness.[164] Indeed, it seemed that the system had to make special efforts to impose such handicaps given that this particular Black man clearly had the money to purchase effective counsel, in fact a "dream team" of representation.[165] When many African-Americans rejoiced at O. J.'s acquittal, that expression largely was not an embrace of O. J. What was embraced was the fact that at least one wealthy Black man, with lots of struggle and some luck, could gain fair access to the resources necessary for fair fact-finding.[166] Although O. J. may not have been innocent, his lawyers effectively demonstrated reasonable doubt about his guilt. In a system often perceived as blocking such verdicts for Black men deserving them, O. J.'s victory seemed a rare triumph.[167]

VI. TELLING STORIES

Juries reason by crafting plausible tales to explain the evidence.[168] They look for themes, character development, progression, and other features that make a

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[161] *See* Aldore Collier, *Why O.J. Simpson Was Found Not Guilty*, JET, Oct. 23, 1995, at 53. *See also Simpson Trial is Over, But Controversy Continues*, HOUS. CHRON., Feb. 6, 1997, at 33; *Black Leaders Meet DA Series: The Nation*, ST. PETERSBURG TIMES, July 20, 1994, at 3A.

[162] *See* Lassiter, *supra* note 12, at 70.

[163] *See* Giles Whittell, *'Tainted' Blood Samples Boost O.J.'s Defense*, TIMES (London), July 26, 1995. *See also* Cheryl Fiandaca, *Both Sides Helped to Raise Doubts*, NAT'L L.J. Oct. 16, 1995, at A21; Richard Price, *EDTA:* Trial's *Chemical Clue is Itself a Mystery*, USA TODAY, July 27, 1995, at 2A; Kathy Braidhill, *Bloodstain on Sock Called a Smear, Not a Splatter*, THOMAS NEWS SERVICE, July 28, 1995.

[164] *See infra* note 187 (summarizing Fuhrman's alleged racist comments and lies); Mary Maxwell Thomas, *The African-American Male: Gap Converts Justice Into "Just Us" System*, 13 HARV. BLACK LETTER J. 1, 30 (1997); Way of the World: Irony, DAILY TELEGRAPH (London), Oct. 8, 1995; Earl Ofari Hutchinson, *Colin Powell: An American Journey or Dilemma?* INDIANAPOLIS RECORDER, Oct. 28, 1995, at 3A; Cornel Pewewardy, *Commentary: The Only X (Indian) is a Dead X (Indian)*, NEWS FROM INDIAN COUNTY, Jan. 15, 1996, at 17A.

[165] *See* Julian Betrames, *Hard Luck Trails O.J. Simpson and His Dream Team*, OTTAWA CITIZEN, June 6, 1996, at A14; *see also* Larry Kanter, *Simpson "Dream Team" Finds There's a Price for Fame*, L. BUS. J., Feb. 10, 1997, at 4-4A; Mark Heisler, *The Dream Team is Missing Something*, CHARLESTON DAILY MAIL, July 17, 1996, at 1B.

[166] *See supra* text accompanying notes 99-104; *infra* text accompanying notes 173-75.

[167] *See id.*

[168] *See* Taslitz, *Myself Alone*, *supra* note 42, at 94; Taslitz, *Patriarchal Stories*, *supra* note 18, at 436, 439.

coherent tale.[169] Where gaps exist in the evidence needed to create a workable story, jurors speculate that such evidence exists.[170] They draw their rules for good storytelling from culturally prevalent tales and from their own life experience.[171] They compare stories proffered by the attorneys in a search for a "match" to their own life experience.[172]

If the Black experience teaches many African-Americans storytelling rules and story plots different from the White majority, then in many instances Black jurors can be expected to craft different tales than Whites, based on the same evidence. These differences should not be limited to the masses but should extend to African-American elites for whom these different storytelling rules become an alternative theory of reality.

One of the leading intellectuals of the twentieth century, Cornel West, an African-American,[173] reflects how this alternative epistemology, this African-American sense of fact, affects Black views of the O. J. case. In a recent interview in *Tikkun* magazine, West expressed the importance of individualized attention to the evidence in the O. J. case and skepticism about the police:

> WEST: In the Black world there is a deep belief that O. J. didn't do it. The lack of scars or bruises — how can someone kill somebody so brutally and mercilessly without some scars or bruises? When they took pictures of O. J.'s body, there were no bruises or scars. Just a little nick on his finger. One would think there would be some fighting back or injury to the assailant.
>
> And then there is the profound distrust in the Black world of the police department, the criminal justice system. Nearly every Black man one knows has been abused by this criminal justice system in some way, whereas large numbers of whites tend to live in a world of denial when it comes to the systemic abuse of Blacks. It is outside their world and their experience, and that makes it hard to believe.[174]

West showed further sensitivity to a belief in the "character for the situation":

> WEST: You have to distinguish between a wife-beater and a wife-killer. So we have something going on that is wrong and immoral. Some wife-beaters become wife-killers, but thank God they don't all become wife-killers.[175]

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[169] *See* Taslitz, *Patriarchal Stories*, *supra* note 18, at 438-40.

[170] *See id.* at 436-37.

[171] *See id.* at 435.

[172] *See* Taslitz, *Myself Alone*, *supra* note 42, at 94-96.

[173] *See* Michael Lerner and Cornel West, BLACKS AND JEWS IN CONVERSATION, at Book Jacket (outlining Cornel West's credentials); Dwight A. McBride, *Transdisciplinary Intellectual Practice: Cornel West and the Rhetoric of Race Transcending*, 11 HARV. BLACK-LETTER J. 155, 156 (1994) (describing Cornel West as one of the leading intellectuals of the twentieth century).

[174] Cornel West and Michael Lerner, *After O.J. and the Farrakhan-Led March: Is Healing Possible?*, 10 TIKKUN 12 (Nov./Dec. 1995).

[175] *Id.*

West also explained the role that fear of unequal access to fact-finding resources played, even for a wealthy African-American like O. J.: "The jubilation [at the acquittal] had to do with the perception that another innocent Black man was about to be railroaded by a criminal justice system with which they have very bad experience, and then suddenly he had been saved from that."[176]

But, if O. J. did not do it, then who did? What plausible alternative fits a fact-finding scheme sensitive to situational determinants of behavior, attentive to the particulars of individualized justice, skeptical of the police, and fearful of unequal access to fact-finding resources?[177] West gave this answer:

> WEST: I don't have a theory, but I can speculate, as long as you understand that this is nothing but speculation.
>
> This killing has many features of a typical merciless killing in the drug culture. So one just ponders what reasons one might have for killing her in this way. I've heard a rumor that O. J. and Nicole were both linked to some kind of drug activity. No one knows what the actual motivation of a drug-related killing might be, what kinds of intrigues or jealousies or gangsterism lead to this kind of action. So again, let me emphasize that this is pure speculation.
>
> But on this speculation, who knows? It may be that the district attorney's office didn't pursue this line of inquiry and hence never traced any of the potential leads that might have taken an investigation in this direction.[178]

West concedes this story is "nothing but speculation."[179] Moreover, he concedes that there are holes in the story and gaps in the necessary supporting evidence.[180] Nevertheless, West finds his speculation far more plausible than the prosecution's theory of a murder done from jealousy or to gain control.[181] While West believed in 1995 in O. J.'s innocence, at the very least he found the supporting evidence of the killing raised a reasonable doubt about O. J. Simpson's being the killer. And West reached this result not because of racial solidarity or to "send a message" to the police but because he doubted O. J.'s guilt. His African-American sense of fact would not permit him to do otherwise.

VII. CONCLUSION

This article has argued that the jurists interviewed for *Black Judges on Justice* adhere to an alternative sense of fact than that of White America, a sense rooted in the differences of the African-American experience. This different sense of

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[176] *Id.* at 16.

[177] *See supra* Parts 2-5 (outlining elements of an African-American sense of fact).

[178] *See* West & Lerner, *supra* note 173, at 12-13.

[179] *Id.* at 12-13.

[180] *See id.* at 13 (conceding that West's own version of what happened suffered from its own discrepancies).

[181] *See* Rivera Live, Jan. 13, 1997, *available in* 1997 WL 4603244; Kevin Cole & Fred C. Zacharias, *The Agony of Victory and the Ethics of Lawyer Speech*, 69 S. CAL. L. REV. 1627, 1630 (1996).

fact explains the O. J. criminal verdict as the product of reason, not group bias or resentment.

However, Black-White differences should not be exaggerated. The African-American sense of fact should be viewed as a variation on an American sense of fact. Both Black and White Americans share in the many commonalities of American culture. While Blacks might give relatively more emphasis to situation than to character, character matters to Blacks and Whites. Many media images and religious messages of good and bad character will be shared.[182] Although Blacks may be more sensitive than Whites to the dangers of stereotyping, both share an American commitment to the ideal of individualized justice.[183] While Blacks are more skeptical than Whites of the police, Whites also abhor police perjury and incompetence and are increasingly more aware of the problem, thanks to a media somewhat more sensitive to the occasional failings of our men and women in blue.[184] While Blacks better understand the inequality in access to fact-finding resources bred by racism, both Blacks and Whites accept aspirational notions of equal opportunity to present a case to unbiased fact-finders.[185] Cases like O. J. stand out because the differences were highlighted in a case charged with evidence of racist police abuses.[186] In many other cases, however,

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[182] *See* Taslitz, *Myself Alone*, *supra* note 42, at 110-13 (discussing American cultural attitudes toward character).

[183] *See id.* at 19, 22 (discussing American cultural attitudes toward individualized justice); *supra* Part 3 (discussing specifically African-American variant on attitudes toward individualized justice).

[184] *See* Elizabeth Gleick, *The Crooked Blue Line,* TIME, Sept. 11, 1995, at 38; Bill Miller, *Officers' Image Tarnished; Simpson Verdict Highlights Mistrust of the Police,* WASH. POST, Oct. 5, 1995, at C1; Kevin Sack, *Police Chief Says Officers Violated Policy in Beating,* N.Y. TIMES, May 13, 1997, at A1; Kevin Sack, *Racism of Rogue Officers Casts Suspicion on Police Nationwide,* N.Y. TIMES, Sept. 4, 1995, at 1; *supra* Part 4 (discussing Black attitudes toward the police).

[185] *Compare* MIRJAN DAMASKA, EVIDENCE LAW ADRIFT 95-98 (1997) (noting that "devotees of the adversary process" celebrate fact-finder passivity as "the best device for counteracting bias and promoting neutrality" and celebrate the clash of equally matched partisans "animated by self-interest . . . [as] capable of unearthing more data than research that is officially directed . . . .") *with* Part 5 (discussing African-American sensitivity to equal opportunity access to fact-finding resources).

[186] *See* UELMAN, *supra* note 28, at 66-81, 140-171. The O.J. defense team argued that one of the investigating officers in the case, Detective Mark Fuhrman, had planted evidence and lied because of racial animus against O.J. *See id.* at 66-72. A dramatic moment in the trial involved the public debates over whether tapes made by Laura Hart McKinney of her interviews of Detective Fuhrman in connection with McKinney's preparing a screenplay were admissible. *See id.* at 62-67. The defense summarized the relevance of these tapes for the O.J. trial:

> [P]rior instances of planting or manufacturing evidence, covering up police misconduct, ignoring police department policies and regulations in order to make arrests or harass suspects in criminal cases are relevant to show Detective Fuhrman's motive, opportunity, intent, preparation and plan to engage in such activity in this case. . . . The admission by Detective Fuhrman of numerous incidents of police misconduct

Blacks and Whites talk across and learn from their differences. Everyday, throughout America, racially mixed juries reach unanimous verdicts.[187] From difference-in-dialogue comes commonality in belief. And the jurors who leave these experiences learn to respect and cherish both the differences and the common ground.[188] This essay has sought to extend that respect beyond individual

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which he engaged in or assisted in covering up are relevant *both* to assess his credibility *and* to prove his conduct on June 13, 1994.

Id. at 67 (emphasis in original). The defense argued, however, not only that Fuhrman was an abusive police officer, but that he was particularly motivated by a racial bias against African-Americans. Three items of evidence in particular were offered to prove this point: (1) a psychiatric report from a proceeding in which he sought disability pay; the report records Fuhrman using racial epithets when speaking about African-Americans, *id.* at 140; (2) a sworn declaration by Kathleen Bell, who stated that in a conversation with Fuhrman he expressed a desire to burn all African-Americans and said that "he would pull over any vehicle that was occupied by a black man and a white woman," *id.* at 141; and (3) the statements of Joseph Britton, who said that the officer arresting him had used racial epithets and distorted evidence, an officer that other evidence suggested was Mark Fuhrman. *Id.* at 141. *See also* sources cited *supra* note 180. Much of the defense-proffered evidence against Fuhrman was not admitted. *See id.* at 77-81, 169-72. The reference to the case being one "charged with evidence of racist police abuse" therefore refers largely to the media's portrayal of events. Enough evidence of Fuhrman's racist attitudes was admitted, however, for jurors to question Fuhrman's credibility. *See id.* At least one juror has insisted that she in fact found the evidence concerning Mark Fuhrman relevant not because it showed that he was a racist but because it showed that he was a liar. *See id.* at 165 (reflecting on comments of juror Carrie Bess). These comments are fully consistent with the argument here that Blacks are more skeptical that Whites of police credibility. That skepticism was likely amplified when specific evidence was offered of reasons not to believe Fuhrman's testimony.

[187] *See, e.g., Two Convicted of Civil-Rights Violation in Stabbing Death/Hasidic Jew Slain During '91 Race Riots,* STAR TRIB. (Minneapolis-St. Paul), Feb. 11, 1997, at 4A. *See also* Clarence Page, *If at First you Don't Succeed, Try it Again,* Houston Chron. Feb. 16, 1997, at 2; Deborah Tedford, *HCCS Staff Choice Costs Nearly $500,000/Passed Over, Anglo Women Sues, Wins,* Houston Chron., Feb. 6, 1996, at 14; *White Supremacist Will Air Views in a 4-Part TV Series,* BUFFALO NEWS, Feb. 27, 1995, at A2.

[188] I made it a practice, as a prosecutor, if I had the agreement of the court and defense counsel, to interview jurors after they reached their verdict. I did so partly to learn how to improve my trial skills and partly to satisfy my curiosity about the experience of being a juror. Jurors often commented on how the experience increased their respect for the justice system and how, in the course of deliberations, they managed to work through their differences toward a mutually acceptable agreement. While not all jurors expressed these feelings, I was impressed with the large number who did. *See also* JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 104 (1994) ("From personal experience as an assistant district attorney, I can add my own testimony that jurors cross demographic boundaries to reach unanimous verdicts in cases every day."). Abramson also notes that the "research indicates that 'when jurors of different ethnic groups deliberate together, they are better able to overcome their individual biases.' " *Id.* at 104.

experiences, to understand that even decisions with which we disagree can result from logic, sound experience, and a commitment to justice.