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Paul F. Campos

University of Colorado Law School

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THE COLOR OF MONEY

PAUL F. CAMPOS*

I begin with two quotations that touch on matters of personal identity. In Gilbert and Sullivan's *H.M.S. Pinafore*, the Boatswain praises Ralph the able Seaman with the following song:

He is an Englishman!
For he himself has said it,
And it's greatly to his credit,
That he is an Englishman!
For he might have been a Roosian,
A French, or Turk, or Proosian,
Or perhaps Italian!
But in spite of all temptations
To belong to other nations,
He remains an Englishman!¹

This is supposed to strike the audience as absurd: Ralph can hardly be praised for resisting the temptation to be what he cannot be in order to remain what he surely is—an Englishman. Today, when we have come to accept that so much of reality is socially constructed rather than being a reflection of some objectively immutable order of things, there is no longer anything absurd about the idea of choosing to remain a member of one nationality rather than becoming something (or someone) else. Indeed, it seems that various markers of personal identity become more transitory and permeable all the time; and thus in contemporary American culture it is now widely accepted that persons can alter not just their nationality but their class status, their religion, their sexual orientation, and even their gender.

Interestingly, one social marker seems relatively immune from this protean flux: race. In this culture, O.J. Simpson's blackness is understood to be just as much a brute fact about him as the fact that he has two arms and two legs. In America at the end of the twentieth century, the idea that Simpson can choose to remain black remains as ridiculous as the idea that Ralph could

* Associate Professor of Law, University of Colorado.

1. THE COMPLETE PLAYS OF GILBERT AND SULLIVAN 112 (1941).

choose to remain English seemed to his fellow countrymen 120 years ago.

The second quote comes from the former heavyweight boxing champion Larry Holmes. In response to a white reporter's questions about growing up black in the working-class town of Easton, Pennsylvania, Holmes made the following observation: "It's hard being black. You ever been black? I was black once—when I was poor."²

This cryptic statement concerning the complex interplay between the concepts of race and class in American society might serve as an epigram for the O.J. Simpson trial. Indeed, Holmes's observation reminds us that O.J. Simpson was in a unique position to exploit that interplay. Simpson is certainly "black" in Holmes's sense in that his racial identity made possible the sorts of arguments that his defense was able to exploit so well—arguments about the racist proclivities of the likes of Mark Fuhrman. But Simpson is also "white"—again in Holmes's sense—in that he could actually afford to pay for such an elaborate exploitation of those arguments. By successfully synthesizing these aspects of Simpson's identity, his defense was able to produce what even in victim-obsessed America remains a true cultural rarity: the oppressed millionaire.

But this reminds us that all the handwringing over race in the Simpson affair only helped to obscure the much more salient question of social class. Can there be much question that if Simpson had been poor or working class, then, black or white, the overwhelming circumstantial case against him would have led his public defender to convince him of the wisdom of pleading out to second-degree murder? That if, in the unlikely event there had been a trial, it would have taken no more than perhaps two weeks? That the outcome of such a trial would never really have been in doubt? These are not, of course, original observations. All through the trial we heard again and again from a host of legal commentators how only the circumstance of Simpson's wealth made it possible for him to take full advantage of the many generous features that the American legal system makes available to those criminal defendants who can afford them. This, we were led to understand, was a shame. So in a sense, the class

2. Lynn Darling, *Larry Holmes: Undefeated, Undefined and Undeniable*, WASH. POST, Apr. 24, 1983, at D1.

angle was not ignored during the Simpson trial. Yet, these very same commentators seemed to believe it was simply a regrettable (and immutable) feature of social reality that only rich defendants had the resources to exploit fully the complex structure of contemporary American criminal jurisprudence.

What was most curious about this attitude was its orientation toward the very problem it identified. Imagine if Simpson were to receive the sort of defense that could have been put up by an earnest public defender. Then, after the inevitable conviction, the American public is informed that unfortunately only white people are allowed the sort of defense that might have spared the former football star. Such a claim would, of course, be utterly unacceptable. Yet when faced with the disturbing fact that, despite the egalitarian rhetoric of our legal system, only rich people can afford much of what is referred to as "the rule of law," the reaction of the legal establishment is akin to the fatalistic resignation of a Dostoyevskian peasant confronting the onset of another Russian winter. "You shouldn't blame us for this state of affairs," explain various apologists for the legal status quo. "That's just the price we pay for having the rule of law. Justice, after all, isn't cheap." This is then followed by utterly utopian statements to the effect that the government "should" make "high quality" (a.k.a. expensive) legal services available to all the public—statements that in order to be actualized would necessitate the sort of wealth redistribution that would in turn require the elite legal establishment to surrender some of its economic and social privilege, which of course it isn't going to do.

Am I being unfair? Sure—but not *that* unfair. Let us imagine a certain figure: we'll call him a typical liberal legal academic, or "ATLLA" for short. ATLLA believes in what he thinks of as the rule of law. Now this thing he believes in, and which indeed he dedicates much of his professional life defending, isn't, of course, anything nearly as capacious as what it sounds like. For in a literal sense the rule of law must include how they do things in other countries, countries about whose legal systems ATLLA admittedly doesn't know much. For ATLLA, the rule of law is in all likelihood really the rule of *Harvard* law, which is to say of the legal process jurisprudence that has been handed down to a generation of legal academics during their student days in

Cambridge, Massachusetts, or some very similar sort of place.³ I once produced a catechismic imitation of the legal process style that I think captures both the ideological commitments underlying its methods, and the consequences for thought and prose that tend to follow from faithful attempts to carry out the method's rigorous requirements. Here is a representative sample:

What judicial procedures do these methods involve?

They involve, firstly, a careful not to say exhaustive review of all the relevant legal materials whose meaning, properly interpreted, might throw light on the proper resolution of the sorts of cases and controversies that courts display a special institutional competence toward resolving; secondly, the formulation of various complex interlocking directives by means of which the properly interpreted meaning of those materials may be made synonymous with those interpretations that flow from the proper deployment of those interpretive methods which give the meaning of those materials a public and formal character, thereby making that meaning accessible to everyone who has undergone a socialization process resembling that to which students at elite American law schools were subjected, circa 1958; thirdly, the acceptance of the pragmatic yet principled dictum that law is a purposive activity which continually strives to solve the basic problems of social living; fourthly, the full recognition of the indispensable role played by that most lawyerly virtue, procedure, in assuring a kind of objectivity to what would otherwise degenerate into an unconstrained act of judicial fiat; fifthly, the establishment of the principle or public norm that decisions which are duly arrived at as a result of duly established procedures for making decisions of this kind ought to be accepted as binding on the whole society unless and until they are duly changed; and sixthly, the sobering realization that the only alternative to regularized and peaceable methods of decision is a disintegrating resort to violence.⁴

This is a parody, but not a very gross one: in fact, several phrases in the passage were lifted whole from the locus classicus of the movement, Harvard Law professors Henry Hart and Albert Sacks's eternally unfinished "The Legal Process."⁵ Legal process

3. See Paul F. Campos, *A Heterodox Catechism*, in PAUL F. CAMPOS, PIERRE SCHLAG & STEVEN D. SMITH, *AGAINST THE LAW* (forthcoming Nov. 1996).

4. *Id.* at 14 (manuscript on file with author).

5. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (Tentative ed. 1958).

pedagogy, and even more so the ideology from which the teaching method springs, require an exhaustive engagement with the materials and procedures of the legal system that in certain circumstances can rise to the level of a repetition compulsion. (To be clear: it isn't that careful review of legal questions is a bad thing. But then neither is washing your hands—unless you feel compelled to do it forty-seven times per day.) The emphasis on “getting it right,” and the agonized struggle to define just what that might entail, produce a distinctive vision of law that is totalizing, relentless, and mostly oblivious to such crass considerations as time, money, and the possible limits of the human rational inquiry. Nevertheless, as a matter of what can best be understood as a highly contingent quirk of social and intellectual history, the formal characteristics of this jurisprudence have combined with the political orientation of the Warren and Burger Courts to produce what ATLLA now thinks of as the rule of law.⁶

It has been little noted that one of the many fascinating aspects of the Simpson trial was how it provided an unusual opportunity to see a relatively pure example of this rule of law in action. After all, given the economic consequences of taking what is called the rule of law seriously, it isn't surprising that fully ninety percent of all criminal convictions in this country take place without a trial, and that an even higher percentage of civil litigation is settled without the benefit of a courtroom verdict. Those trials that do take place are themselves almost always much more cursory than what rule of law ideology would consider consonant with an adequate exploration of the relevant legal materials. But Americans are by reputation practical people; and most of the time we find it is simply too expensive to enjoy the full benefits of the rule of Harvard law.

The Simpson trial was different. Because of the political importance of the case to the Los Angeles District Attorney's Office, and because of the almost unprecedented economic and social position of the defendant (with the doubtful exception of Aaron Burr, Simpson was the most celebrated American ever to be charged with murder), there was essentially no economic barrier to transforming the rule of law from classroom theory into courtroom practice. Here was a rare occasion where consider-

6. An excellent example of this ideology, expressed in popular rather than academic terms, is ALAN M. DERSHOWITZ, *THE BEST DEFENSE* (1982). Dershowitz, of course, was one of O.J. Simpson's attorneys.

ations of scarcity did not rein in the enthusiasm of the participants, thereby allowing the platoons of lawyers and "experts" deployed by both the prosecution and the defense to exploit the full panoply of options made available to them by the structure of our criminal justice system. Dozens of witnesses were questioned and cross-examined for days at a stretch; evidentiary rulings, interpleadings, and motions of every conceivable sort took up hundreds of hours; the impanelling of the jury and the intermittent expulsion of nearly half of its original members alone took up far more time than was spent on, for instance, the debate and ratification of the original United States Constitution.

None of this, of course, seemed to make much of an impression on the surviving jurors, who disposed of the issue at hand with a brisk indifference to the facts that itself suggested the futility of the whole absurd exercise, and which indeed brought to mind the relative advantages of trial by ordeal. In the days since that surreal climax it has often been said—it has already been said at this Symposium—that recommendations for reform should not be based on the Simpson trial, which, it must be remembered, was in some ways a unique event.⁷ Such statements are of course accurate as far as they go, but consider what they overlook. For what was most unique about the Simpson trial was precisely that it provided an example, *in the practice of an actual courtroom rather than in the theory of the law school classroom*, of contemporary American rule of law ideology in full bloom. Here, in the scarcity-free space of Judge Ito's court, we saw the consequences of actually operationalizing this rule of law. Here we saw in their most extreme form those characteristic features of the American legal system that my colleague Bill Pizzi recently identified as "the worship of proceduralism, the attempt to rationalize every aspect of the decision-making process, the distrust of spontaneous action, the heavy preference for managerial control over participants, and, above all, the daunting complexity of the rules that such a system requires."⁸ It is of course hyperbole, but is there not also some truth in the claim that this, after all, is how the American criminal justice system is *supposed* to work? Indeed, we might want to think of the Simpson trial as a year-long

7. See, e.g., Ronald J. Allen, *The Simpson Affair, Reform of the Criminal Justice Process, and Magic Bullets*, 67 U. COLO. L. REV. 989, 993-94 (1996).

8. William T. Pizzi, *Soccer, Football and Trial Systems*, 1 COLUM. J. EURO. LAW 369, 377 (1995).

demonstration of the ways in which much of what is called the rule of law resembles, in its most florid manifestations, a culturally valorized form of obsessive-compulsive behavior.⁹

Perhaps, then, the question on which the professional defenders of the legal status quo need to focus more attention is the following: Just whose interests are served by this social structure and by the behavior that it elicits? Who benefits from the immense and even neurotic complexity of the modern American legal system? We already know the answer to this question—indeed, our friend ATLLA knows the answer. That is why he “supports” increased funding for legal aid; that is, in part, why sometimes he will even represent a death row inmate for free¹⁰—pro bono publico, “for the public good.” That is a noble-sounding phrase, but let me suggest a scheme that might benefit the wretched refuse of our teeming shores in a more meaningful way. It isn’t going to happen, of course—almost nothing recommended by well-intentioned academics ever happens.¹¹ Still, imagine a system of criminal trials in which juries were seated by picking the first twelve people in the pool who were not related to the defendant or the victims. Imagine a system in which witnesses could say what they had to say in their own words, without constant interruptions for evidentiary rulings by control-obsessed advocates and decision makers. Imagine a system where these advocates played a relatively minor, facilitating role in the proceedings. Imagine a system in which, because of such features, it was simply expected as a matter of course that most trials would take a day or two, with the occasional proceeding lasting as long as a week. Finally, picture a system of criminal justice where mixed panels of legal professionals and laypersons would work together to decide the fate of the defendant. Now despite their exotic flavor, these suggestions are not mere pipe dreams. Something like this is in fact what the criminal justice systems of many other countries already resemble.¹²

What social consequences would flow from such a system? Note that in such a system a middle-class person would be able

9. See Paul F. Campos, *The Chaotic Pseudotext*, 94 MICH. L. REV. 2178 (1996).

10. For a classic rationalization of this mindset, see DERSHOWITZ, *supra* note 6.

11. See Pierre Schlag, *Normativity and the Politics of Form*, in CAMPOS, SCHLAG & SMITH, *supra* note 3.

12. See John H. Langbein, *Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?*, 1981 AM. B. FOUND. RES. J. 195.

to afford a defense to a serious criminal charge that would in most respects be comparable to what a rich person could procure. Furthermore, a system along these lines would give the poor criminal defendant a realistic chance of having his true legal expenses defrayed by the government or absorbed by a lawyer who, under such circumstances, would not need to make a huge economic sacrifice in order to represent an impoverished defendant. Such speculations remind us of how the Will to Process—the urge to rationalize, codify, administrate, proceduralize, and otherwise complicate a system of social coordination and dispute processing—increasingly makes that system available only to the social elites who have the resources to manipulate it. They also remind us that academic visions of what law is have political consequences, although rarely in the way law professors imagine. What matters about what legal academics teach their students is not the substance but the form; or rather in this case the form *is* the substance of what students learn. For instance, ATLLA believes that in his criminal law classroom he is demonstrating that the death penalty is unconstitutional, when what he is really demonstrating is how to produce a system that will not only execute a poor man, but will also spend \$2,000,000 trying to determine whether he was represented adequately by a court-appointed drunkard who was paid \$500 for his trouble. Justice, we are told, isn't cheap. Indeed it isn't: especially when, despite the egalitarian rhetoric within which they are routinely cloaked, the excesses of American legal ideology tend to transform the rule of law into a kind of luxury good.

We may be sure that the defenders of the rule of law will find themselves horrified by any suggestion that the legal system should grant its subjects fewer rights and options, that it should be less rationalist and more open to the role of chance in human decision making, or that it should give up on any ambitions to achieve a high degree of what we call "justice." ("I fear those big words which make us so unhappy," says Stephen Daedalus in *Ulysses*.)¹³ But how can such a system ensure the undeniable benefits of what is called "procedural due process"? How will it weed out prejudicial evidence and jury bias? How, in a word, will it be fair? But the question the defenders of the status quo need to face—that we need to face—is "fair" in comparison *to what*? In

13. JAMES JOYCE, *ULYSSES* 32 (1942).

comparison to a system that has, partially through the efforts of ATLLA and his legion of academic fellow travelers, become so elaborate, so complicated, so unwieldy, and therefore so expensive that it is in most respects fully operationalized only for the benefit of the upper class?

"The rich," noted F. Scott Fitzgerald, "are not like you and me." "Yes," replied his friend Ernest Hemingway, "they have money." In America today, what is celebrated in legal academic circles as the rule of law often functions as a complex cultural mechanism for the protection of class privilege. And, ironically, it is by their very efforts to make law "fair"—efforts that perversely make the benefits of law ever more dependent upon the expertise of a specialized sector of the upper class—that the members of this same sector of the upper class have made many of the benefits of law all but unavailable to anyone other than members of the class to which they themselves belong. Yet the blindness that so many contemporary American lawyers display toward how legal ideology plays an important role in the creation and maintenance of the same class structure from which those lawyers benefit is hardly a new or unique phenomenon. To paraphrase words written by Anatole France more than a century ago,¹⁴ the law in its majestic equality declares that the poor as well as the rich have the "right" to the full analytic rigor of procedural due process, to the endless elaboration of evidentiary standards of review, to the exhaustive deployment of the appellate court system, and to the most socially irresponsible representation money can buy.

14. "[In their] majestic equality . . . the laws . . . forbid rich and poor alike to sleep under the bridges, to beg in the streets, and to steal their bread." ANATOLE FRANCE, *THE RED LILY* 80 (Book League of Am. 1937) (1894).

