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Marianne Wesson

University of Colorado Law School

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THAT'S MY STORY AND I'M STICKIN' TO IT:¹ THE JURY AS FIFTH BUSINESS IN THE TRIAL OF O.J. SIMPSON AND OTHER MATTERS

MARIANNE WESSON**

Much public discussion of the Simpson trial, beginning with the earliest speculation, through the trial, the verdict, the reaction and meta-reaction, including this (of course) more detached and scholarly examination in which we are today engaged, has considered the trial as an example—to be lamented or cheered or analyzed—of identity politics and their consequences. The “identity politics” explanation takes several forms but in general supposes that the identity, according to race, gender, or possibly class, of an observer or participant in the trial largely determines that observer’s opinion both of Mr. Simpson’s guilt and of the proceedings that declared him not guilty. Moreover, the identity explanation assumes that the process according to which identity determines outcome is the process of solidarity—so at least in its most naked form it assumes that many or most black observers must have been prompted to declare Simpson not guilty and to approve of the outcome of the trial because they, too, are black. It also assumes that many women, at least feminist women of the sort that profess gender solidarity, must have been prompted to declare him guilty and to disapprove of the verdict because the most prominent victim of the crime was, like them, a woman. In some accounts this solidarity is mediated by shared experiences like having been hassled by police because of one’s color or having been abused in an intimate relationship because of one’s gender; in other accounts, it posits a sort of political calculus in which, for example, a black person might favor the verdict as a small step toward remedying a situation in which a shocking proportion of the black male population of this country is incarcerated. In its crudest form, the explanation imagines that a primal and

* Professor and Interim Dean, University of Colorado School of Law.

1. COLLIN RAYE, *That's My Story, on EXTREMES* (Epic Records 1994).

unmediated identification, and nothing more, determines a juror's vote or an observer's opinion of the proceedings.

Professor Ehrenreich and others who have spoken have quite properly discredited the cruder forms of the identity politics explanation. There is for example the difficulty, to which Professor Campos alluded in his remarks, of whether Simpson really was perceived (by the police? by the jurors? by the public who watched the trial nightly on Court TV?) as a black man, given his celebrity, wealth, and lack of apparent identification with African Americans apart from other sports figures. Not to mention the question of why, if gender solidarity explains so much, nobody has suggested that men who did think Simpson guilty did so because they identified with Ron Goldman, the dead man. But most significantly, as Professor Ehrenreich reminds us, the identity explanation ignores the point about which women of color have complained, justly, for many years now. Captured in the wonderful book title *All the Women Are White, All the Blacks Are Men, But Some of Us Are Brave*,² this complaint asks how to account for the reactions of those who are both black and woman. Professor Ehrenreich shows us convincingly that merely shrugging off this inquiry with the claim that black women either choose to "vote" as women, or choose to "vote" as blacks, fails utterly as an adequate description of the situation of women of color and disregards the tangled roots of race and sex discrimination in our history. But I believe that even Professor Ehrenreich's far more nuanced account, which eschews the explanation of simple identification, suggests that a decision maker or observer might negotiate the pressures of multiple identity to arrive at an outcome that is finally based on some sort of match: a match (however approximate) between one's identity (however complex) and the identity (however ambiguous) of some person or persons that the observer is asked to believe or disbelieve, to condemn or praise, in short, to judge.

For myself, I believe that the processes of self-identity and identity-attribution may have been considerably less significant to either the verdict or the public reaction to the trial (which is of course, as Professor Cottrol suggests, another sort of "verdict")³

2. ALL THE WOMEN ARE WHITE, ALL THE BLACKS ARE MEN, BUT SOME OF US ARE BRAVE (Gloria T. Hull et al. eds., 1982).

3. Robert J. Cottrol, *Through a Glass Diversely: The O.J. Simpson Trial as Racial Rorschach Test*, 67 U. COLO. L. REV. 909, 915-16 (1996).

than even the more nuanced versions of the identity explanation suggest. My own hypothesis about how individuals arrive at judgments is different; it borrows from narrative theory the notion that perception and judgment are largely accomplished in each of us by a process of interior narration in which we strive to incorporate complex conflicting information into a coherent story that gives us a sense of the completion and the integrity of our perceptive and judgmental tasks. Please understand that this is not a scientific hypothesis, and I do not claim to have any evidence of the sort that a scientist would acknowledge. All I have is that recently much-disparaged form of proof, the anecdote.⁴

As a trial lawyer in a former life, I was often amazed by what jurors would tell me had been the basis for their collective decision. For one thing, often they would each tell me something different, and for another, it would often be some item of evidence or nuance of argument or speculation that had never occurred either to me or to my opponent as significant in any way. The sense of pride with which jurors would produce these nuggets, their conviction that *they* had understood what the case was *really* about better than the parties or the lawyers, often left me stricken and humbled.

I have never been on a jury myself, but I have, in a way, seen one at work. When I teach Criminal Law, the first material I offer my students is a one-hour videotape called *Inside the Jury Room*.⁵ This Public Broadcasting System documentary depicts the deliberations of an actual jury after hearing evidence against a defendant who has been charged with possession of a firearm by a convicted felon. The judge has charged the jury carefully that the crime has only three elements: that the defendant had a gun, that he knew it was a gun, and that at the time he was a convicted felon. The case seems profoundly uninteresting at first, at least in a legal sense, because the evidence on these three points is completely undisputed. Such interest as the case presents arises from the fact that the defendant is plainly mentally

4. After Professor Faigman's very convincing demolition of the value of the anecdotal this morning, I tremble somewhat to expose my cherished anecdotes to his pitiless gaze. I would like to emphasize that I do not purport to be describing a "syndrome"—although I think "Fifth Business Syndrome," see *infra* note 6 and accompanying text, has a nice ring to it.

5. *Inside the Jury Room* (PBS television broadcast, 1986).

disabled ("the mental age of a six-year-old" says one expert) and does not seem at all dangerous (as evidenced by the fact that he showed the purchase receipt for the gun to his parole officer, who promptly sent him home alone to get it and bring it back). Still, there is no doubt he was a felon and had a gun, and he himself has testified that he knew it was a gun. And yet the videotape depicts the jury, twelve very conscientious persons, eventually arriving at a decision to acquit.

In the process of reaching this rather remarkable result, members of the jury offer and critique various narratives to justify the outcome of acquittal. Two things are notable about their struggles: although the defendant is black and male and the jury is mixed as to both race and gender, these aspects of the matter play no apparent role in the deliberations. Further, the jurors struggle to find a role for themselves in the outcome that goes beyond the mechanical or ministerial. When one juror suggests that really the evidence and the court's instructions leave no room for an outcome other than guilty, another actually growls "I am not a computer."

Inside the Jury Room suggests to me that jurors, observers like all of us but observers acting under tremendous conditions of constraint, still feel and act on the necessity to make the outcome, which they control, satisfying or "true" in a narrative sense, rather than strictly a historical sense. (We should also remember that with a sequestered jury, as in the Simpson trial, the opportunity to deliberate and vote comes after a long period in which the jurors control practically nothing else in their lives.) A trial lawyer who tells jurors there is nothing of significance left for them to decide is unwise, for this message disparages their importance and denies their need to participate in the telling of the tale as characters rather than simply as reporters, or "computers."

The recently deceased Canadian novelist Robertson Davies named one of his novels *Fifth Business*, explaining the title with a definition he borrowed from a scholar of the theater: "Those roles which, being neither those of Hero nor Heroine, Confidante nor Villain, but which were nonetheless essential to bring about the Recognition or the dénouement; and the player who acted these parts was often called the Fifth Business."⁶ I'm suggesting

6. ROBERTSON DAVIES, *FIFTH BUSINESS* (1970) (quoting THOMAS OVERSKOU, DEN

that jurors aspire, in their various ways, to play the role of Fifth Business, and that this insight explains a great deal more about their behavior than race, gender, or other categorical explanations.

So, in my account, they try out various narratives or accounts of what the trial is really about, accounts that give their deliberations and decision a kind of dignity and significance, for without this they would feel used or even abused by the system that keeps them otherwise silent and powerless for so long. Carolyn Heilbrun, in *Writing a Woman's Life*,⁷ observes that a biographer creates twice in each work. Of course she creates her subject by choosing what narrative to tell about her subject; but the writer also creates herself as a writer by deciding which of the many stories that might be fashioned from the available material she will offer her readers.⁸ A juror must decide what story he will tell to himself (and to others, if he is asked or challenged to do so) about what the evidence means, and in making that choice he is very likely to cast himself in a significant, but not starring, role in the tale—as Fifth Business.

I believe that in a trial each juror comes away with a memory of the trial, and of the deliberations and the verdict, that reflects that individual juror's story. The stories are connected, somewhat like the chapters in one of Stanley Fish's famous chain novels, in which each writer adds to the text in turn, constrained by what has gone before.⁹ But a juror's task as a member of a storytelling collective is different from a chain novelist's in two ways. First, the various narratives must be written not sequentially but simultaneously, which would create an almost insurmountable difficulty were it not for the second difference: the jurors need not integrate their different stories any more thoroughly than is necessary for them to arrive at a verdict. Although there may be some discussion among the jurors about the "story" that each would tell, and although early in deliberations the jurors in a complex case may be disposed to air their disagree-

DANSKE SKUEPLADS (1854)).

7. CAROLYN G. HEILBRUN, *WRITING A WOMAN'S LIFE* 11-31 (1988).

8. The same point is made beautifully in Alison Lurie's novel *The Truth About Lorin Jones*. ALISON LURIE, *THE TRUTH ABOUT LORIN JONES* (1988).

9. Stanley Fish, *Working on the Chain Gang: Interpretation in Law and Literature*, 60 TEX. L. REV. 551 (1982). Fish suggests that the work of judges, in writing opinions, resembles that of an authors' collective engaged in the composition of a chain novel.

ments about what the case is really “about” (that is, what story it tells or ought to tell), I believe that they rather quickly learn that they need not harmonize their stories in all respects so long as they can agree on the much less complex question: what should our verdict be?

In *Inside the Jury Room*, one juror suggested, as I have said, that the trial was really about whether he was required to act as a computer for the government. Another, a teacher who told a story about how his students were unable to leave their classes at night and walk to their cars in safety, suggested it was really about whether the authorities had anything better to do in their crime-ridden city than arrest and prosecute harmless mentally deficient old men. Another suggested that some nuance in the meaning of the verb “to know” as in “to know that he had a gun” might be the real point of their deliberations. Still another more or less invented an entrapment defense (although the jury had received no instruction about entrapment and nobody had argued it) out of the circumstance that the defendant’s probation officer sent him home unaccompanied with instructions to bring the gun back. These different accounts competed with each other, but it was not necessary that one defeat the others, and in the end I believe each narrator walked away with his or her own sense of the real story of the case intact. They had to agree unanimously on the outcome, but not necessarily on the narrative in which it was embedded.

I am suggesting that the juror is more storyteller than historian. He seeks narrative truth, rather than historical truth (to borrow a phrase from the title of a wonderful book in which Donald Spence makes the same claim for psychoanalysis that I am here making for the jury process).¹⁰ Juries that behave like storytellers’ collectives, as opposed to historians’ collectives, may be more prevalent now than at times in the past, but I believe that it is not identity politics but other aspects of our culture that create in jurors this view of what is expected of them. Late-twentieth-century cultural productions often place creative demands on the reader or viewer, requiring her to impose an order on a chaotic stream of images and information. Think of Martin Amis’s *Time’s Arrow*,¹¹ in which time runs backward and

10. DONALD P. SPENCE, *NARRATIVE TRUTH AND HISTORICAL TRUTH: MEANING AND INTERPRETATION IN PSYCHOANALYSIS* (1982).

11. MARTIN AMIS, *TIME’S ARROW; OR, THE NATURE OF THE OFFENSE* (1991).

the reader must bring terrific creative intelligence to the decoding of events; or Ishiguro's *The Remains of the Day*,¹² in which the reader must understand the things that the butler Stevens, a classically unreliable narrator, is *not* telling her. The films *JFK*¹³ and *Pulp Fiction*,¹⁴ to name only two, promote a concept of truth that mocks the methods of the historian and encourages the viewer to decide for himself what story is being told, to locate the truth for himself in the midst of the muddle. Even television, for example, *The X-Files*,¹⁵ often requires attention, skepticism, cynicism, and finally a surrender to the idea that the truth is unknowable, except as each of us creates her own.

I do not claim that one's identification with a race or a gender has no influence on the narrative that a juror chooses to create from the materials available, but I do believe it is only one of many factors. I am certain that some black women, the great-great-granddaughters of former slaves, find profound meaning in aspects of Toni Morrison's story *Beloved*¹⁶ that escape me; but I know that many white women also find the story profound, unbearably sad, and moving. Race and gender, class and age, history and loss, joy and heartbreak and probably biochemistry contribute to our "reading" of a text or event, but do not determine it.

Trained as a trial lawyer, I find very unsettling the idea that trials are not really, in the minds of the most important decision makers, about the historical truth. This proposition is, for defenders of the legal system, the secular equivalent to the proposition that God is Dead. But there may be redeeming features of the situation as I hypothesize it. The multiplicity and complication of identity that prevail in storytelling, the many ways in which one can identify with a character who is in important ways *not* identical to one's self, because of the other ways in which she *is*, restore a sense of common humanity. And it is that sense, which identity politics in its crudest form threatens, on which our almost religious commitment to the jury system depends.

At least, that's my story.

12. KAZUO ISHIGURO, *THE REMAINS OF THE DAY* (1989).

13. *JFK* (Warner Brothers 1992).

14. *PULP FICTION* (Miramax Films 1995).

15. *The X-Files* (FOX television series, 1995-96)

16. TONI MORRISON, *BELLOVED* (1987).

