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CHARACTER EVIDENCE ISSUES IN THE O.J. SIMPSON CASE—OR, RATIONALES OF THE CHARACTER EVIDENCE BAN, WITH ILLUSTRATIONS FROM THE SIMPSON CASE

ROGER C. PARK*

PROLOGUE: THE "LESSONS" OF THE SIMPSON CASE

Taking "lessons" from the O.J. Simpson murder trial raises the inferential dangers warned about in the literature on flaws in human reasoning. The availability heuristic, which leads us to estimate frequency by the ease with which instances or associations come to mind, can lead us to overgeneralize from a sample of one and to use an aberrational case as if it were typical.¹ When considering an issue that can be studied more systematically, one should use the Simpson case cautiously, if at all—for illustration only, or to generate hypotheses to be tested by other means. Applying this approach, one might find events in the Simpson trial helpful in inferring something about the impact of televising a celebrity trial, or even use it to draw substantive inferences about racism and misconduct in the Los Angeles Police Department, a topic that is difficult (though not impossible) to study by other means because cover-ups limit and distort the available information. But the Simpson case should not be used to draw substantive inferences about jurors' reactions to character evidence, the effect of jurors' racial identity on their decisions, or the seriousness of domestic violence as a social problem.

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1. See, e.g., JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 163-78 (Daniel Kahneman et al. eds., 1982).

I. A PRIMER ON THE CHARACTER EVIDENCE ISSUES IN THE SIMPSON CASE

I will start with a primer on the character evidence issues in the Simpson case, then discuss rationales of the character evidence ban and use the case illustratively.

The character evidence issues in the Simpson case came in two clusters: those dealing with O.J. Simpson's spousal abuse of Nicole Brown Simpson, and those dealing with Detective Mark Fuhrman's conduct and statements.

A. *The Spousal Abuse Evidence*

In the final weeks of 1994, after the start of jury selection but before the opening statements, the parties litigated the admissibility of evidence that O.J. Simpson had beaten, humiliated, and stalked Nicole Brown Simpson. The defense filed a motion in limine asking for exclusion of the evidence.² Briefs and counter-briefs followed, accompanied by affidavits setting forth the parties' versions of the evidence that would be offered. In a disagreement that was typical of the war of words waged in the case, the prosecution and defense could not agree on what to call the evidence; the defense referred to it as evidence of "domestic discord,"³ while the prosecution called it evidence of "domestic violence" or "spousal abuse."⁴

In a nutshell, the defense argued that the spousal abuse evidence was prohibited by the rule against character evidence. Arguing that the only issue in the case was identity, it maintained that under the cases construing the California equivalent of Rule 404(b), the uncharged misconduct was not admissible unless it showed a pattern of acts "so unusual and distinctive as

2. In Limine Motion to Exclude Evidence of Domestic Discord, *People v. Simpson*, No. BA 097211, 1994 WL 737962, at *1 (Cal. Super. Ct. L.A. County Nov. 21, 1994).

3. *Id.*

4. People's Response to Defendant's Motion to Exclude Evidence of Domestic Violence, *People v. Simpson*, No. BA 097211, 1994 WL 737964, at *1, *49 (Cal. Super. Ct. L.A. County Dec. 14, 1994).

to be a signature.”⁵ None of the prior domestic violence incidents was similar to the murder, so they were inadmissible.

The defense also argued that the evidence would consume an undue amount of trial time, given the sequestered jury, the predicted six-month trial, and the possibility that the defense would need to respond with its own character evidence and with expert testimony on battered women’s syndrome and stalking behavior.⁶ It also complained about the difficulty of preparing to meet rapidly multiplying evidence of uncharged misconduct.⁷

The prosecution submitted a longer and less focused brief. It first argued that domestic violence evidence was *sui generis*, admissible without the usual analysis showing its relevance to a noncharacter purpose.⁸ Then it turned to a more conventional theory, that the evidence was admissible to show motive—O.J. Simpson was motivated by a desire to control and dominate Nicole Brown Simpson, as shown by the evidence that he beat, stalked, and humiliated her.⁹ It also argued that the evidence was admissible to show a plan—that the acts of violence and humiliation, including the final murder, were ingredients in a systematic strategy to control Nicole Brown Simpson.¹⁰

Both sides used social science data in one way or another in arguing their positions. The prosecution argued that Nicole Brown Simpson suffered from battered woman syndrome and used the literature on that theory in support of its argument.¹¹ It also cited statistics showing that one-third to one-half of all female homicide victims were killed by husbands or boyfriends.¹² It offered a mixed bag of other statistics, including data that seemed more pertinent to the question whether domestic assault was a serious social problem than to the probative value of evidence of battering to show homicide. For example, it offered

5. In Limine Motion to Exclude Evidence of Domestic Discord, *People v. Simpson*, No. BA 097211, 1994 WL 737962, at *9 (Cal. Super. Ct. L.A. County Nov. 21, 1994) (citing *People v. Ewoldt*, 867 P.2d 757, 770 (Cal. 1994)).

6. *Id.* at *16.

7. *Id.*

8. People’s Response to Defendant’s Motion to Exclude Evidence of Domestic Violence, *People v. Simpson*, No. BA 097211, 1994 WL 737964, at *16 (Cal. Super. Ct. L.A. County Dec. 14, 1994) (citing *People v. Zack*, 229 Cal. Rptr. 317, 319-20 (Ct. App. 1986)).

9. *Id.* at *23-*25.

10. *Id.* at *25-*26.

11. *Id.* at *26.

12. *Id.* at *27 n.6.

data indicating that wife abusers were also child abusers and information about the medical cost of domestic violence.¹³

If one focuses only on the probative value of battering in the Simpson case, as opposed to the question whether domestic violence is a serious social problem, then data on the prevalence of domestic violence would seem to help the defense, not the prosecution. The more widespread the incidence of domestic violence, the more likely a husband picked at random would have a history of it, and the less probative it would be in marking out O.J. Simpson as more dangerous than other husbands. The defense seemed to realize that much, for it also cited statistics indicating that domestic violence was widespread.¹⁴ Not content with that, however, it added a highly misleading statistical argument. It maintained that battering was a poor predictor of murder because fewer than one-tenth of one percent of batterers kill their spouses, so that using battering to diagnose murder is like saying that marijuana use leads to heroin.¹⁵ The argument was put in its most vivid form in the national media when one of the authors of the defense brief, Alan Dershowitz, appeared on the *Today* show and called the evidence "massively irrelevant":

I've been studying the subject and teaching it for 30 years, and I think we've learned a lot about spousal violence in the last 20 or 30 years that we didn't know before. It's much more widespread than we ever believed. Gloria Allred will tell you that there are more than two million, maybe as many as five million cases of spousal abuse every single year. But there are only about 1500 cases of spousal murder every year, which means that 99.9 percent of all people who engage in spousal abuse don't then turn to murder. Yesterday, I ran into Stephen J. Gould, the world famous scientist, and he said it's the most fundamental fallacy of social science research to assume that just because killers may have engaged in battery, that it follows that batterers will kill. It's like the old marijuana-heroin fallacy; namely, just because everyone who ended up using heroin started with marijuana, it still isn't true that many people who start with marijuana turn to heroin.¹⁶

13. *Id.*

14. In Limine Motion to Exclude Evidence of Domestic Discord, *People v. Simpson*, No. BA 097211, 1994 WL 737962, at *10 (Cal. Super. Ct. L.A. County Nov. 21, 1994).

15. *Id.* & n.6

16. *Saturday Today* (NBC television broadcast, Jan. 14, 1995), available in 1995 WL 2709880.

This argument, carried to its logical conclusion, would mean that evidence of a love triangle would be “massively irrelevant” in a murder case because only a tiny percentage of lovers ever kill their rivals. It states the probability that a woman will be murdered by her husband, given that we know he battered her but nothing else; a more useful statistic would be the probability that a woman was murdered by her husband, given that we know he battered her and that we *also* know she was murdered. That probability can be derived by comparing the number of women murdered by battering husbands with the total number of women murdered. Using Dershowitz’s statistics and some figures from the World Almanac, the statistician I.J. Good came up with a probability of one-third to one-half that a battering husband murdered his wife, given that we have no information other than that he battered her *and* she was murdered.¹⁷ Of course, the probability would change if additional incriminating or exculpatory evidence came to light.

The prosecution also argued that it should be permitted to offer experts on battered woman syndrome. Its brief described battering “myths” and used jury questionnaires administered during the jury selection phase to argue that individual jurors in the Simpson case believed the myths.¹⁸ The defense retained its own expert, Lenore Walker, a pioneer theorist on battered woman syndrome, and told the jury in the opening statement that she would testify.¹⁹ In the end, however, Judge Lance Ito never ruled on the prosecution’s motion and neither side actually put experts on battered woman syndrome on the stand.

Judge Ito issued a written ruling on the admissibility of the lay testimony about spousal abuse incidents on January 18, a week after the jurors had been sequestered and six days before the start of the opening statements.²⁰ He admitted evidence, including police photos, of the beating that led to O.J. Simpson’s 1989 conviction for spousal abuse.²¹ He also admitted evidence

17. I.J. Good, *When Batterer Turns Murderer*, 375 NATURE 541 (1995).

18. People’s Response to Defendant’s Motion to Exclude Evidence of Domestic Violence, *People v. Simpson*, No. BA 097211, 1994 WL 737964, at *30-*35 (Cal. Super. Ct. L.A. County Dec. 14, 1994).

19. Official Transcript, Opening Statement by Mr. Cochran, *People v. Simpson*, No. BA 097211, 1995 WL 27396, at *20 (Cal. Super. Ct. L.A. County Jan. 25, 1995).

20. Ruling, *People v. Simpson*, No. BA 097211, 1995 WL 21768, at *1 (Cal. Super. Ct. L.A. County Jan. 18, 1995).

21. *Id.* at *3.

proffered by the prosecution that O.J. Simpson had hit or slapped Nicole Brown Simpson in six other incidents between 1982 and 1989, including one in which he allegedly threatened her with a gun.²² In addition to the evidence showing physical violence, the judge admitted evidence of a 1993 incident—the “911 call”—in which O.J. Simpson kicked down Nicole Brown Simpson’s door and made loud threats, but did not strike her.²³ He also endorsed the admission of seven proffered “stalking” incidents in which O.J. Simpson was reported to have watched Nicole Brown Simpson at her home or elsewhere.²⁴ The prosecution later made a tactical decision not to offer some of the stalking evidence, and what did come into evidence was effectively neutralized by the defense.

Judge Ito also excluded some of the evidence proffered by the prosecution. However, he did not exclude on grounds that the evidence would be used for character attributions. His most potent exclusions were based on hearsay grounds. For example, he excluded what the prosecution called a diary, and what the defense called a memo to her lawyer, that Nicole Brown Simpson had prepared detailing acts of abuse and stalking, some of them more recent than the 1993 911 call.²⁵ Remarking that to “the man or woman on the street,” the probative value of the evidence would be “both obvious and compelling,”²⁶ Judge Ito nevertheless felt compelled by California precedent to exclude it.²⁷

Judge Ito’s decision to admit evidence of domestic violence was, as a matter of legal doctrine, clearly correct. A recent decision by the California appellate court with direct authority established a categorical rule in favor of receiving evidence of prior assaults on the same victim in homicide cases.²⁸ That court held that when a defendant is charged with a violent crime and has had a relationship with the victim, prior assaults on the same victim are admissible on disputed issues, including identity, without any resort to a “distinctive modus operandi” analysis.²⁹

22. *Id.* at *3-*4.

23. *Id.* at *7-*8.

24. *Id.* at *6.

25. *Id.* at *4.

26. *Id.* at *5.

27. *Id.* (citing *People v. Arcega*, 651 P.2d 338 (Cal. 1982) and *People v. Ireland*, 450 P.2d 580 (Cal. 1969)).

28. *People v. Zack*, 229 Cal. Rptr. 317, 319-20 (Ct. App. 1986).

29. *Id.*

That decision is consistent with authority throughout the country.³⁰ While the issue was under consideration by Judge Ito, it was covered with "this is a horse race" commentary, but in retrospect the case presents an instance in which the evidence law was relatively clear.

In homicide cases in which evidence of other assaults against the same victim is offered, the doctrinal analysis is not very complicated. 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. Depending on the case, the emotion may be characterized as jealousy, animosity, a desire to control and dominate, or all three. I disagree with commentators who say that, while perhaps it makes sense to admit the evidence, it makes no sense to posit an intervening emotion such as hate or jealousy, since one could make an inference from previous assaults to the one charged without positing any intervening emotion.³¹ While it is true that one could draw the inference of guilt without positing an explanatory emotion, that would be an arid way of reasoning about propensity. By positing an intervening emotion, one uses a construct that is helpful in forming hypotheses about the usefulness of other evidence—for example, that an attacker left flowers for his victim, pestered her with phone calls, or followed her lover. Postulating an intervening emotion helps fit that evidence into a coherent, plausible story. The story is as old as

30. For a collection of authorities, see Elaine Marie Tomko, Annotation, *Admissibility of Evidence of Prior Physical Acts of Spousal Abuse Committed by Defendant Accused of Murdering Spouse or Former Spouse*, 24 A.L.R. 5th 465 (1994). Though Tomko's annotation lists cases both admitting and excluding the evidence, on examination the cases listed as precedent for exclusion are of quite limited scope, for example, cases finding it to be error to admit an item of remote evidence but approving the admission of more recent instances (*Brown v. State*, 135 S.E.2d 480 (Ga. Ct. App. 1964)), or holding that the evidence was admissible but that the jury should not have been given an overinclusive limiting instruction allowing it to be used as proof of a point not in issue in the case (*People v. Hutchinson*, 579 N.Y.S.2d 109 (App. Div.), *appeal denied*, 79 N.Y.2d 1002 (1992)). For representative cases upholding the admission of evidence, see *State v. Anicker*, 536 P.2d 1355 (Kan. 1975) (holding that evidence of physical assaults was admissible where identity of the murderer was at issue) and *People v. Illgen*, 583 N.E.2d 515 (Ill. 1991) (holding that evidence of prior physical abuse over the course of a seventeen-year marriage was admissible to show intent and motive where the husband was accused of murdering his wife with a shotgun but claimed it was an accident).

31. For a statement of the view that positing an intervening emotion adds nothing, see RICHARD O. LEMPert & STEPHEN A. SALTzBURG, *A MODERN APPROACH TO EVIDENCE* 226 (2d ed. 1982).

the hills and can be evaluated with inductions from history, literature, and experience.

The exclusion of motive evidence would unfairly hamper the prosecution, in *Simpson* and other domestic homicide cases, because the jury would be left without any explanation why the defendant would want to commit the crime. Unlike rape or theft, murder does not have a self-evident motive. The jury would surely expect evidence of motive to be offered if it existed. If the evidence is not presented, the jury will draw the mistaken inference that it does not exist.³²

Be that as it may, in the *Simpson* case Judge Ito admitted the evidence. He let it in subject to the usual stricture that it not be used as evidence of bad character, and those limits were explained in typically obscure fashion in instructions to the jury at the end of the case. The instructions told the jury that the evidence could not be "considered by you to prove that the defendant is a person of bad character or that he has a disposition to commit crimes," but that it was admissible only for a laundry list of other purposes, such as showing plan, scheme, motive, intent, or identity.³³

Though the instruction seems pallid and ineffectual, it may have had some influence. Johnnie Cochran quoted the limiting instruction in his final argument and said, "So this isn't about character assassination of O.J. Simpson, as you might think at first blush. This is about Mr. Darden trying to conjure up a motive for you."³⁴ He added that O.J. Simpson had paid his debt for the 1989 incident and that there had been no physical violence since then.³⁵

32. See Stephen A. Saltzburg, *A Special Aspect of Relevance: Countering Negative Inferences Associated with the Absence of Evidence*, 66 CAL. L. REV. 1011, 1019 (1978).

33. Official Transcript, Discussion re Jury Instructions, Mr. Simpson Waives Right to Testify, Discussion re Exhibits, 1118.1 Motion, and Jury Instructions, *People v. Simpson*, No. BA 097211, 1995 WL 672668, at *12 (Cal. Super. Ct. L.A. County Sept. 22, 1995).

34. Official Transcript, Closing Argument by Mr. Cochran, *People v. Simpson*, No. BA 097211, 1995 WL 686429, at *35 (Cal. Super. Ct. L.A. County Sept. 27, 1995).

35. *Id.*

B. Evidence of Detective Mark Fuhrman's Misconduct and Racism

The second cluster of character evidence issues centered on the defense's attack on Mark Fuhrman. Early on it became clear that the conduct of Fuhrman, the detective who testified that he had discovered a bloody glove at O.J. Simpson's Rockingham estate, was going to be the focus of attention. By summer 1994 there were press reports, including an article in the *New Yorker* that I remember reading with skepticism and surprise,³⁶ that the defense was going to claim that Fuhrman had planted the Rockingham glove, motivated by general racism and by specific prejudice against a black celebrity who married a white woman. Prior to trial, the prosecution filed a motion to exclude what it called "Remote, Inflammatory and Irrelevant Character Evidence Regarding L.A.P.D. Detective Mark Fuhrman."³⁷ In supporting the motion, the prosecution argued that evidence of Fuhrman's racism and hostility were inadmissible for lack of foundation.³⁸ It drew an analogy to cases in which a murder defendant tries to blame a third person for the murder.³⁹ In such cases, evidence that the third person had a motive to kill the victim may be excluded in the absence of other evidence connecting the third person to the offense. Relying mainly upon reports of other officers, the prosecution argued that no one had seen two gloves at the crime scene and that it was preposterous to think that Fuhrman could have believed that others who had arrived before him had overlooked a second glove.⁴⁰ In typical O.J.-trial hyperbole, its brief asserted that "[n]ot only is there no evidence to support the defense theory, there can never be any evidence to support it, for all of the facts disprove this bizarre 'theory.'"⁴¹

The defense argued that it was entitled to attack Fuhrman's credibility, which was important for more than one reason, since

36. Jeffrey Toobin, *An Incendiary Defense*, NEW YORKER, July 25, 1994, at 56.

37. People's Motion in Limine to Exclude from Trial Remote, Inflammatory, and Irrelevant Character Evidence Regarding L.A.P.D. Detective Mark Fuhrman, *People v. Simpson*, No. BA 097211, 1994 WL 737963 (Cal. Super. Ct. L.A. County Dec. 12, 1994).

38. *Id.* at *4.

39. *Id.* at *8.

40. *Id.* at *5.

41. *Id.* at *4 (footnote omitted).

Fuhrman was a witness to more than the glove.⁴² Recognizing that, under the California analogue to Rule 608(b), evidence of specific instances of conduct is not admissible to attack the character of a witness for honesty or dishonesty, it argued that the evidence was relevant to more than character for dishonesty because it also showed bias and hostility toward the defendant.⁴³ The defense also disputed the prosecution's assertion that the defense needed to lay more foundation for the evidence against Fuhrman, saying that the evidence was admissible if "it has a tendency in reason to disprove the truthfulness of Detective Fuhrman," and that this test was certainly met by the racism evidence itself.⁴⁴

Judge Ito issued his first written ruling on the Fuhrman issues on January 20, 1995.⁴⁵ He excluded evidence that Fuhrman had made racist remarks to doctors assessing his eligibility for a disability discharge, pointing out that Fuhrman made the statements in 1980, that the evidence would take up too much time, and that its probative value was at best speculative.⁴⁶ He also excluded evidence of Fuhrman's involvement in the shooting of a suspect, finding that the defense proffer had not adequately linked Fuhrman to the incident.⁴⁷ Judge Ito seemed to have a more receptive attitude toward proffered evidence of the 1985-86 Redondo Beach incident involving Kathleen Bell. In a letter that was included in the defense proffer, Bell had written that Fuhrman told her he would find a pretext to pull over any vehicle that was occupied by a black man and a white woman. She also quoted him as saying, "If I had my way, they would take all the niggers, put them together in a big group and burn them."⁴⁸

In his written ruling on the Bell testimony, Judge Ito agreed with the prosecution's argument that the defense had not laid an adequate foundation for the Bell evidence.⁴⁹ He directed the

42. Defense Response to People's Motion in Limine to Exclude Evidence Regarding the Credibility of L.A.P.D. Detective Mark Fuhrman, *People v. Simpson*, No. BA 097211, 1994 WL 737960 (Cal. Super. Ct. L.A. County Dec. 10, 1994).

43. *Id.* at *2.

44. *Id.* at *4.

45. Ruling, *People v. Simpson*, No. BA 097211, 1995 WL 25898 (Cal. Super. Ct. L.A. County Jan. 20, 1995).

46. *Id.* at *3.

47. *Id.* at *4.

48. *Id.* at *3 n.5.

49. *Id.* at *3.

defense to make an offer of proof, not of further details of Bell's testimony, but of evidence that Fuhrman moved the glove.⁵⁰ Judge Ito backed away from that requirement after oral argument, apparently convinced by the defense's argument that it had an absolute right to cross-examine about racial bias and that preventing cross-examination about alleged statements to Bell would violate that right.⁵¹ In reaching that view, he seemed impressed by another Second District case, *Anthony P.*, in which the appellate court reversed a conviction because the defendant had not been allowed to cross-examine his accuser fully about her alleged racism.⁵²

Ever reactive, the prosecution made an elaborate attempt to "remove the sting" during its direct examination of Fuhrman.⁵³ Marcia Clark displayed Bell's damning letter to the jury and elicited Fuhrman's denial that he had made the statements it ascribed to him.⁵⁴ Then F. Lee Bailey cross-examined Fuhrman about the "N-word" and about Bell.⁵⁵ Commentators at the time treated the cross-examination as a defeat for Bailey, apparently because Fuhrman did not budge from his denials.⁵⁶ In retrospect, Bailey's cross seems a textbook example of meticulously pinning

50. *Id.* Specifically, the ruling stated: "If the defendant can make an offer of proof as to what evidence they will produce to suggest the moving of evidence and the court is satisfied by that offer of proof, the prosecution's objections will be denied." *Id.*

51. Official Transcript, Discussion re Videotape, Discussion re Ex Parte Motion re Defendant's Statement and Demonstration During Opening Statements, Discussion re Proffer of Evidence re Impeachment of Fuhrman, Discussion re Objections to Opening Statements and Exhibits (Resumed), Pre-Instructions to the Jury, *People v. Simpson*, No. BA 097211, 1995 WL 23581, at *18 (Cal. Super. Ct. L.A. County Jan. 23, 1995).

52. *California v. Anthony P. (In re Anthony P.)*, 213 Cal. Rptr. 424 (Ct. App. 1985).

53. Official Transcript, Examination of Mark Fuhrman, *People v. Simpson*, No. BA 097211, 1995 WL 97333 (Cal. Super. Ct. L.A. County Mar. 9, 1995).

54. *Id.* at *2.

55. Official Transcript, Examination of Mark Fuhrman, *People v. Simpson*, No. BA 097211, 1995 WL 109035, at *21-*23 (Cal. Super. Ct. L.A. County Mar. 15, 1995).

56. Susan B. Jordan, *Bailey v. Fuhrman: What Happened?*, O.J. Simpson Case Commentaries, Mar. 19, 1995, 1995 WL 116288, at *1 (O.J. Comm.) ("Fuhrman won this round. Displaying a cool and collected 'you'll never catch me' attitude, Mark Fuhrman treated F. Lee Bailey to a very public defeat, at least for now. Bailey did none of what he had boasted he was going to do."); Erwin Chemerinsky, *How Effective Was Bailey's Cross-Examination of Mark Fuhrman?*, O.J. Simpson Case Commentaries, Mar. 20, 1995, 1995 WL 113336, at *2 (O.J. Comm.) (tentatively finding that "it appears that the prosecution has to be more pleased than the defense with how Fuhrman's testimony went").

an evasive witness to a categorical assertion that will later be contradicted. After some verbal fencing, Fuhrman testified that he was sure he had not used the N-word in ten years.

If Bailey did a skillful job, luck played a role as well, for at the time of the cross-examination the defense apparently did not have any really explosive evidence against Fuhrman.⁵⁷ Then came the McKinny tapes. Laura Hart McKinny, an aspiring screenwriter, had been doing research for a script on police-women.⁵⁸ She engaged Fuhrman as a technical consultant and taped some of their conversations. They spoke over a period of several years, including some conversations that occurred after Simpson was arrested.⁵⁹ She had taped or transcribed (some of the offered evidence was her transcriptions of tapes that were no longer available) at least forty-one instances in which Fuhrman used the N-word.⁶⁰ The tapes and transcripts also contained several statements by Fuhrman that seemed to condone or advocate police violence, fabrication of evidence, framing of suspects, trial perjury, and cover-ups of police misconduct. The tapes changed the whole atmosphere of the trial. As one perspi-

57. As one lawyer who followed the trial closely put it, had the McKinny tapes not been discovered,

it seems likely that the prosecution would have sooner or later renewed its motion to Judge Ito to bar the defense from putting on Kathleen Bell or any other witnesses who purported to have heard Fuhrman utter racial epithets. A few stray comments by the prosecutors suggest that they were preparing to make an argument that would have gone something like this: "Now that you've heard most of the evidence in this trial, your honor, there still isn't anything to suggest that Detective Fuhrman could have moved or otherwise tampered with evidence, and, indeed, the defense hasn't even put on Rosa Lopez (taped or live), so their original thin argument that Detective Fuhrman failed to report Ms. Lopez' supposed exculpatory evidence isn't supported by anything in the record. It's time to end the game, realize that nothing supports the defense theory, and conclude that Detective Fuhrman's racial attitudes are totally collateral. It is thus a total waste of time to hear Kathleen Bell, not to mention the possible prejudice that will result. We shouldn't spend one more moment on this matter."

And then came the McKinny tapes.

Charles B. Rosenberg, *Detective Fuhrman, The Tapes and The Ruling—A History*, O.J. Simpson Case Commentaries, Sept. 5, 1995, 1995 WL 519716, at *3-*4 (O.J. Comm.).

58. Court Order, Fuhrman Tapes, *People v. Simpson*, No. BA 097211, 1995 WL 520692, at *2 (Cal. Super. Ct. L.A. County Aug. 31, 1995).

59. The McKinny evidence also contained a couple of statements by Fuhrman about his role in the O.J. Simpson case. In one of them, he said: "I'm the key witness in the biggest case of the century. If I go down, they lose the case. The glove is everything . . . bye bye." *Id.* at *8.

60. *Id.* at *2, *3.

cacious trial lawyer commented at the time, "it's all over but the gloating."⁶¹

The prosecution argued that the tapes ought to be excluded, offering to stipulate that Fuhrman had used the N-word forty-one times.⁶² Judge Ito's August 31 written ruling did not go that far, but it was nonetheless widely regarded as favoring the prosecution, and it certainly elicited a strong response from the defense, both in the courthouse and in press conferences.⁶³

Judge Ito ruled that the defense could have McKinny testify about her association with Fuhrman, that she had recorded and transcribed conversations with him for a nine-year period ending in July 1994, and that during the course of those conversations between 1985 and 1986 Fuhrman had used the N-word in a disparaging manner forty-one times.⁶⁴ He also ruled that the defense could play and display two excerpts in which Fuhrman had used the N-word.⁶⁵

The ruling severely limited the use of the tapes even for the purpose of showing racial bias. The excerpts allowed did not truly convey the degree of Fuhrman's racial hostility. Fuhrman had made utterances that were much more damning. Moreover, Ito

61. Susan B. Jordan, *The Fuhrman Tapes: It's All Over But the Gloating*, O.J. Simpson Case Commentaries, Aug. 21, 1995, 1995 WL 493252, at *4 (O.J. Comm.).

62. Court Order, Fuhrman Tapes, *People v. Simpson*, No. BA 097211, 1995 WL 520692, at *4 (Cal. Super. Ct. L.A. County Aug. 31, 1995).

63. In its Motion for Reconsideration and/or Clarification of Court's Order re: "Fuhrman Tapes," the defense claimed the court's order

misrepresents the defense theory of the case, ignores the relevance of evidence to corroborate testimony the court has already deemed admissible, improperly precludes evidence which is relevant to show racial bias and hostility, imposes a "threshold" requirement previously unrecognized in any reported decision, ignores evidence already in the record which meets such a "threshold," creates an impossible burden of similarity to make prior conduct relevant, and rejects evidence as hearsay which is not even offered to prove the truth of what is asserted.

People v. Simpson, No. BA 097211, 1995 WL 530100, at *1 (Cal. Super. Ct. L.A. County Sept. 5, 1995). Cochran was particularly displeased, calling Judge Ito's ruling "incoherent" in open court. Official Transcript, Hearing re Defense Motion re Disclosure of Exculpatory Information re Misconduct of Mark Fuhrman, *People v. Simpson*, No. BA 097211, 1995 WL 530467, at *27 (Cal. Super. Ct. L.A. County Sept. 1, 1995). In addition, during a press conference Cochran called the ruling "one of the cruelest, unfair decisions ever rendered in a criminal court in this country. For this judge to rule that only two of those incidents are admissible is outrageous, is specious, and it's unspeakable." *Ito Says Jury Can Hear Part of Tape*, BALTIMORE SUN, Sept. 1, 1995, at 1A.

64. Court Order, Fuhrman Tapes, *People v. Simpson*, No. BA 097211, 1995 WL 520692, at *3 (Cal. Super. Ct. L.A. County Aug. 31, 1995).

65. *Id.*

required that one of the two excerpts admitted be redacted in a way that watered down its hostility—he “sanitized” it, as the defense said in its motion to reconsider.⁶⁶

Judge Ito summed up his understanding of the probative value of the Fuhrman evidence as follows:

The probative value of the evidence of Fuhrman's use of racial epithets comes from the fact that he has testified that he has not used the term in the last ten years, thereby impacting his credibility. Because of Fuhrman's discovery of a bloody glove at the Rockingham residence and its scientific significance, he is a significant although not essential witness against the defendant.⁶⁷

This description misses much of the point of the evidence. In fact, the evidence had probative value in several different ways. It impeached Fuhrman's *credibility as a witness* both by contradicting his prior testimony *and* by showing his racial animus. His racial animus would have diminished his credibility whether he had denied using the N-word or not. It was also *substantive evidence* that, motivated by racial animus, he planted the glove and perhaps fabricated other evidence. It also corroborated Kathleen Bell, a witness the prosecution had been promising to discredit.⁶⁸ The value it had in showing something about his credibility as a witness—particularly his credibility in testifying about the glove—is minimal in comparison with its value for other inferences.⁶⁹

66. Official Transcript, Examination of William Blasini, Rolf D. Rokahr and Laura Hart McKinny, *People v. Simpson*, No. BA 097211, 1995 WL 540596, at *53 (Cal. Super. Ct. L.A. County Sept. 5, 1995).

67. Court Order, Fuhrman Tapes, *People v. Simpson*, No. BA 097211, 1995 WL 520692, at *3 (Cal. Super. Ct. L.A. County Aug. 31, 1995).

68. The exclusion of evidence that directly corroborated Bell may have also had the intended or unintended effect of dampening the cross-examination of her, since Judge Ito could have reconsidered the admissibility of corroborative evidence had her credibility been strongly questioned. As Cochran said in closing argument, “They couldn’t mess with her because now we had those tapes.” Official Transcript, Closing Argument by Mr. Cochran, *People v. Simpson*, No. BA 097211, 1995 WL 697928, at *14 (Cal. Super. Ct. L.A. County Sept. 28, 1995).

69. Applying the approach suggested in Richard Friedman, *Character Impeachment Evidence: Psycho-Bayesian [!?] Analysis and a Proposed Overhaul*, 38 UCLA L. REV. 637, 655-62 (1991), information about Fuhrman's general character for truthfulness or his racist motivations would have had negligible value on the specific issue of his credibility in testifying about the glove. Under the Friedman/Bayesian approach, when evidence E is offered to support conclusion C, the probative value of

The evidence of Fuhrman's racism was evidence of general racial animus. No one contended that Fuhrman had ever applied the N-word specifically to O.J. Simpson. Racial animus evidence *could* be conceived of as character evidence. When racial animus evidence does not directly show hatred of a specific person, but rather shows hatred of an entire racial group, it is evidence of a propensity to do harm across a variety of situations. Moreover, the propensity is an immoral one, a feature some commentators have said helps an item of evidence earn the character label. Despite these features, the decisional law generally puts evidence of general racial animus under the "bias" label instead of the "character" label and gives it the benefit of the more receptive treatment accorded "bias" evidence.

Judge Ito also excluded McKinny's evidence of Fuhrman's boasting about, and endorsement of, police misconduct. In analyzing this evidence, he first resurrected his conditional relevancy ruling, making a "finding" that "the current state of the record does not indicate evidence that would reach the minimal threshold necessary to find inquiry into the planting of evidence theory relevant."⁷⁰ He then changed course, noting that the defense had not rested its case and that such a showing might yet be made. Then he said, "The court will therefore analyze each incident, assuming *arguendo*, the minimal threshold of relevance is later met."⁷¹

After delivering his revised conditional relevancy ruling and suspending it *arguendo*, Judge Ito examined each instance of alleged misconduct. He rejected two instances on what might be

E can be evaluated by asking: how does the chance of finding E, assuming C to be true, compare to the chance of finding E, assuming C not to be true? Thus: (1) Assuming that Fuhrman *did* plant the glove, what is the probability he would tell the truth? Practically zero. (2) Assuming that Fuhrman *did not* plant the glove, what is the probability he would tell the truth? Practically 100%. Does information about racial bias or attitude toward fabrication materially affect either of these probabilities? No.

It should be noted, however, that the credibility attack on Fuhrman was not limited to attacking his credibility in testifying that he did not find the glove. Fuhrman was also a witness to other events, such as the search of the Bronco and one of the prior spousal abuse incidents. The evidence had greater value in assessing his credibility on those points than on the glove issue. Also, even on the glove issue, the evidence had value, not in assessing credibility, but in assessing whether he had a motive to engage in the conduct (planting the glove) in the first place.

70. Court Order, Fuhrman Tapes, *People v. Simpson*, No. BA 097211, 1995 WL 520692, at *4 (Cal. Super. Ct. L.A. County Aug. 31, 1995).

71. *Id.* at *5.

called "scenario" grounds: Fuhrman was helping to imagine scenarios for a screenplay, and the evidence was, the judge believed, either irrelevant or of so little value that it would be a waste of time.⁷²

To the other incidents, he applied a stringent test of similarity, rejecting the evidence partly on grounds that it was not similar enough to the misconduct that the defense alleged in the case at bar. For example, a statement by Fuhrman endorsing a "hype arrest" in which an officer squeezed a scab on a suspected addict to make it look as if the addict had recently shot up was excluded on grounds that this case did not involve an arrest by Fuhrman.⁷³ A statement by Fuhrman approving of officers who lie to cover for their partners was excluded with the comment that "[n]o argument or allegation has been made that Fuhrman has been lying to cover for his partner, Det[ective] Phillips, nor has there been any argument or allegation that Phillips has been lying to cover for Fuhrman."⁷⁴ As the defense argued in its motion to reconsider, it seemed that all that would satisfy Judge Ito would have been another example of moving a bloody glove. Although Fuhrman did not make the arrest in the Simpson case, his discovery of the glove helped provide probable cause for search, and ultimately for arrest, so it seems artificial to hold that prior instances of manufacturing probable cause for arrest were not probative because Fuhrman did not actually arrest Simpson.

Ito did not, however, rely wholly on a similarity analysis. He also repeatedly noted the danger of waste of time and in a footnote explained that the jury had been sequestered since mid-January, making that consideration particularly important.⁷⁵

In limiting the defense as he did, Judge Ito excluded much that would have suggested Fuhrman was willing to fabricate evidence, lie, and break police rules. He also excluded evidence that nicely dovetailed with the testimony of Katherine Bell, strongly corroborating her testimony.

There was no clear doctrinal obstacle to admitting the evidence about Fuhrman's attitude toward fabrication. Evidence showing a propensity to fabricate evidence raises a character evidence flag, but it is a flag that could, with a will, be waved

72. *Id.*

73. *Id.*

74. *Id.* at *7.

75. *Id.* at *6 n.6.

aside by describing it as noncharacter evidence of a "plan." As the defense pointed out, evidence about other fabrications by an accuser has sometimes been received despite the character evidence ban, for example, in cases in which a defendant seeks to show that a rape complainant made a false claim of rape against another person.⁷⁶

Judge Ito's assertion that the evidence of other acts by Fuhrman is not even *relevant* unless a minimum threshold is met showing the glove was planted relies upon a conditional relevancy theory that is at least technically fallacious. Evidence that Fuhrman was a racist and an evidence tamperer on other occasions is not *irrelevant* in the absence of evidence *aliunde* sufficient to support a finding that the glove was moved. Evidence of racism and fabrication proclivity met the minimal requirement of relevance by making a fact of consequence somewhat more likely than it would have been without the evidence.⁷⁷

As an illustration, suppose that the defense had had evidence that Fuhrman, LAPD Detectives Philip Vannatter and Ron Phillips, and the other police investigators belonged to a chapter of the Aryan Brotherhood pledged to uphold white supremacy by lying, murdering, and fabricating evidence. Clearly *that* evidence

76. Defense Trial Brief re: Admissibility of Excerpts from "Fuhrman Tapes," *People v. Simpson*, No. BA 097211, 1995 WL 516154, at *4-*6 (Cal. Super. Ct. L.A. County Aug. 21, 1995). Among the cases cited were *California v. Anthony P.* (*In re Anthony P.*), 213 Cal. Rptr. 424, 430 (Ct. App. 1985), and *People v. Mascarenas*, 98 Cal. Rptr. 728, 733-34 (Ct. App. 1971). *Anthony P.* reversed a conviction because the African American defendant was prohibited from cross-examining the white complainant about racial biases against African Americans. In *Mascarenas*, the appellate court reversed because the trial judge had erroneously excluded evidence that a young police informant had previously fabricated evidence against another suspect. The defense also cited cases upholding admission of evidence that a rape complainant had fabricated a claim against another person, *People v. Franklin*, 30 Cal. Rptr. 2d 376, 379-81 (Ct. App. 1994), and upholding the admission of prior acts of police misconduct to establish habitually coercive police conduct, *People v. Memro*, 214 Cal. Rptr. 832, 848 (1985). On the admissibility of evidence of fabrication by rape complainants, see generally Clifford S. Fishman, *Consent, Credibility, and the Constitution: Evidence Relating to a Sex Offense Complainant's Past Sexual Behavior*, 44 CATH. U. L. REV. 709, 772-75 (1995).

77. Like FED. R. EVID. 401, CAL. EVID. CODE § 210 (West 1995) states a minimal "logical relevancy" test, providing: "'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action."

would increase the likelihood that Fuhrman planted the glove, even without any predicate incident-specific evidence of planting.

The conditional relevancy controversy shares a feature with the controversy over the hearsay status of implied assertions. It has led to a challenging body of scholarly literature, but whether one accepts the Morgan position⁷⁸ or that of his detractors⁷⁹ seems rarely to make a difference in real cases. Here, perhaps Judge Ito would have thought more clearly had he not used the conditional relevancy concept, but it is doubtful that his ruling would have been different. Even if one accepts the idea that evidence of fabrication-proclivity is *relevant* in the absence of incident-specific evidence of fabrication, one might still reasonably require incident-specific evidence because, without such evidence, the fabrication-proclivity evidence would not have *enough* probative value to justify the cost in terms of waste of time and what I will later call nullification prejudice.

Consider the following examples:

1. Suppose that the defendant is accused of murdering a movie producer's wife in Hollywood while the movie producer was making a movie in Italy. The prosecution's case is bolstered by formidable scientific evidence, including DNA and fingerprints. The defense asserts that the producer murdered his own wife and planted all the evidence against the defendant. It proffers evidence that the producer was having an affair. The judge might reasonably make a conditional probative value ruling that, in the absence of other evidence to support the defense theory, the affair is just not worth going into, despite the fact that it might furnish a motive for murder.
2. To go back to the Simpson case, suppose that instead of being an investigating detective, Fuhrman had been an employee of Cellmark—a lab assistant, or to take it a step further, a janitor. If the defense claimed he planted evidence at Cellmark, the judge could reasonably make a conditional probative value ruling that,

78. EDMUND M. MORGAN, BASIC PROBLEMS OF EVIDENCE 45-46 (1962); FED. R. EVID. 104(b) advisory committee's note; Edmund M. Morgan, *Functions of Judge and Jury in the Determination of Preliminary Questions of Fact*, 43 HARV. L. REV. 165 (1929).

79. See Ronald J. Allen, *The Myth of Conditional Relevancy*, 25 LOY. L.A. L. REV. 871 (1992); Vaughn C. Ball, *The Myth of Conditional Relevancy*, 14 GA. L. REV. 435 (1980); Richard D. Friedman, *Conditional Probative Value: Neoclassicism Without Myth*, 93 MICH. L. REV. 439 (1994); Dale A. Nance, *Conditional Relevance Reinterpreted*, 70 B.U. L. REV. 447 (1990).

in the absence of other evidence to support the planting theory, the evidence of racism was not worth the time and money.

Figure 1 shows a curve that illustrates the conditional probative value of the motive/propensity evidence on the issue of planting the glove. With no incident-specific evidence of planting the glove at all (no evidence, for example, that someone reported having seen two gloves at the Bundy crime scene), the probative value of the motive/propensity evidence is low but not zero. As the incident-specific evidence increases, so does the probative value of the motive evidence. At some point the curve turns down because there is so much incident-specific evidence that the motive evidence starts becoming cumulative. (Like the Laffer curve, this figure makes sense at the two ends, but there are probably some undepicted curlicues in the middle, and one would expect disagreement on how fast the curve climbs and where it reaches a point that justifies admitting motive/propensity evidence.)

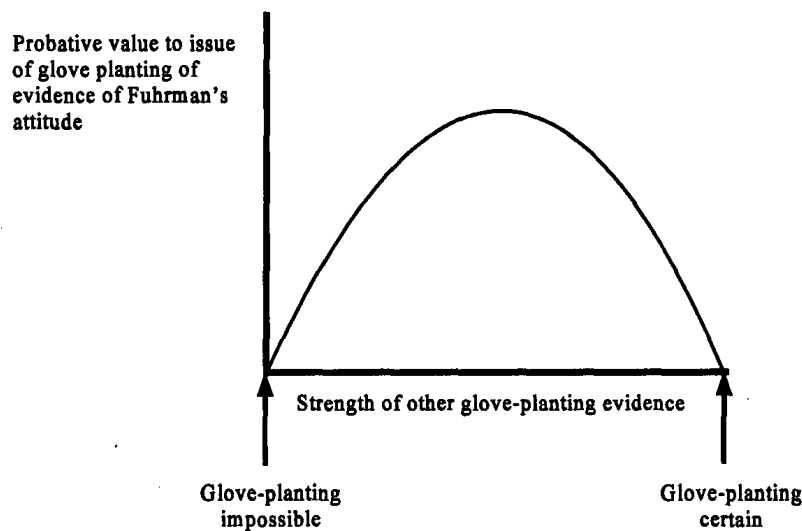


Figure 1

As the figure illustrates, Judge Ito was wrong in two ways. He was wrong in saying that the evidence of Fuhrman's nature was not relevant without some other foundation; it needed no additional foundation to be logically relevant. And he was wrong in thinking that the admissibility of the other evidence would not vary depending upon the amount of foundation evidence later adduced; had the defense suddenly come up with significant

evidence that the glove had been moved, then the probative value of the other evidence about Fuhrman would rise, allowing it more easily to overcome concerns about waste of time and money. Judge Ito erred in assuming that, whether predicate evidence was weak or powerful, the same amount of extrinsic evidence would be admissible.

The effect of Judge Ito's August 31 written ruling was not, however, to exclude all evidence of Fuhrman's willingness to engage in misconduct and fabrication. Judge Ito excluded that evidence when offered in the form of the McKinny tapes and transcripts, but he let in the testimony of three live witnesses, most notably the now-vindicated Kathleen Bell, who testified not only to Fuhrman's genocidal statement but also that he had said he would stop an interracial couple on a pretext. The defense made the most of the Bell evidence. Cochran displayed Bell's letter to the jury in final argument, read parts of it aloud, and commented on it.⁸⁰

Nor did Ito prevent the defense from making arguments based on character attributions. If the law prohibits character reasoning as well as character evidence, you could not tell that by listening to Cochran's closing argument about Fuhrman. Cochran described Fuhrman as a "genocidal racist"⁸¹ who was the "personification of evil,"⁸² described Fuhrman and Vannatter as the "devils of deception,"⁸³ and called Fuhrman a "corrupt police officer who is a liar and a perjurer."⁸⁴

80. Official Transcript, Closing Argument by Mr. Cochran, *People v. Simpson*, No. BA 097211, 1995 WL 697928, at *10-*14 (Cal. Super. Ct. L.A. County Sept. 28, 1995).

81. Official Transcript, Closing Argument by Mr. Cochran, *People v. Simpson*, No. BA 097211, 1995 WL 686429, at *70 (Cal. Super. Ct. L.A. County Sept. 27, 1995).

82. Official Transcript, Closing Argument by Mr. Cochran, *People v. Simpson*, No. BA 097211, 1995 WL 697928, at *6, *15 (Cal. Super. Ct. L.A. County Sept. 28, 1995).

83. *Id.* at *16.

84. Official Transcript, Closing Argument by Mr. Cochran, *People v. Simpson*, No. BA 097211, 1995 WL 686429, at *75 (Cal. Super. Ct. L.A. County Sept. 27, 1995).

II. RATIONALES OF THE BAN ON CHARACTER EVIDENCE

Justice Jackson provided a handy summary of the goals of the rule against character evidence in the *Michelson* case:

The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.⁸⁵

A. *Prejudice*

Of the factors listed by Justice Jackson, the prevention of “undue prejudice” has perhaps received the most attention in the academic literature. Preventing prejudice is of course an important goal. It may, however, have gotten too much emphasis, particularly if one considers prejudice to consist primarily of the “overpersuasion” to which Justice Jackson refers.

The rules of evidence address two distinct forms of prejudice, which I will call inferential error prejudice and nullification prejudice. To illustrate the difference, suppose that under the applicable substantive law the trier is supposed to make a decision based on whether Ultimate Fact U has been established. If the trier is permitted to use Evidentiary Fact E as evidence of U, but the trier *overvalues* E in reaching the conclusion U, then evidentiary fact E has caused inferential error prejudice. Nullification prejudice occurs when the jury, which is supposed to use Evidentiary Fact E as evidence of U, instead decides to use it

85. *Michelson v. United States*, 335 U.S. 469, 475-76 (1948) (footnotes omitted); see also *People v. Zackowitz*, 172 N.E. 466, 468 (N.Y. 1930) (Cardozo, J.) (citations omitted) (quoting 1 WIGMORE, EVIDENCE § 194 (2d ed. 1923)):

The principle back of the exclusion is one, not of logic, but of policy. There may be cogency in the argument that a quarrelsome defendant is more likely to start a quarrel than one of milder type, a man of dangerous mode of life more likely than a shy recluse. The law is not blind to this, but equally it is not blind to the peril to the innocent if character is accepted as probative of crime. “The natural and inevitable tendency of the tribunal—whether judge or jury—is to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge.”

to conclude Y. Having concluded Y, it uses Y as a basis for decision, even though the substantive law forbids decision on that ground.

B. *Inferential Error Prejudice*

A pure example of an argument based on inferential error prejudice is contained in a recent article by Jonathan Koehler arguing that population frequency evidence in DNA cases is prejudicial.⁸⁶ Koehler and his colleagues argue that when jurors are presented with testimony that a genetic profile has an extremely low frequency—for example, one in 800 million—they are likely to overlook the danger that lab error caused an incorrect match to be reported. Even if provided with lab error rates, they might erroneously average the population frequency statistic with the lab error frequency. If they did so, thus vastly overvaluing the frequency statistic, they would be succumbing to inferential error prejudice.

A perceived need to protect against inferential error prejudice undoubtedly helps explain some of the rules excluding evidence, including the hearsay rules and rules restricting expert testimony. Though I doubt its value as a basis for excluding hearsay, it may have a role to play in expert testimony decisions—for example, in deciding whether scientific evidence satisfies the *Daubert* criteria.⁸⁷ The trial judge, with the aid of education and nondeferential appellate review, can play a legitimate role in excluding bad science. Moreover, a judicial decision governing a subject such as polygraph evidence or DNA evidence can serve, at least for a period, as a useful, time-saving precedent for other judges.

In the character evidence context, inferential error prejudice occurs in its pure form when the trier overestimates the diagnostic value of prior crimes in showing the defendant to be guilty of the crime charged. Reasoning “once a thief, always a thief” is an example of inferential error prejudice.

The danger of inferential error prejudice has been emphasized by scholars who use personality theory to evaluate

86. Jonathan J. Koehler et al., *The Random Match Probability in DNA Evidence: Irrelevant and Prejudicial?*, 35 JURIMETRICS J. 201 (1995).

87. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

the rules of character evidence. For example, Martin Kaplan has argued:

If character testimony can do more harm for the defendant than good, what is the nature of this harm? Is it that juries would attribute to the defendant a general character disposition for criminal behavior? Attribution theorists (e.g., Jones, 1979) label as the fundamental attribution error the tendency to infer personal dispositions rather than situational events as the cause for observed behavior in others. Given a litany of past offenses, we are more likely to attribute them to a stable criminal character than to temporary and situational causes. The charged crime can then be seen as another manifestation of this disposition. Moreover, inferences of "bad" character may affect people's interpretation and processing of subsequent evidence (Hamilton, 1981). There is, therefore, evidence to support the fears of prejudice expressed in the [Federal Rules of Evidence].⁸⁸

While the danger of inferential error prejudice no doubt exists, its importance as a justification of the rules against character evidence may have been exaggerated. Rules designed to prevent it are vulnerable to the classic Benthamite critique that it is difficult to make judgments beforehand about the probative value of evidence because so much depends on the circumstances of the individual case. There can be no categorical rule excluding evidence that reflects badly upon character. Because there are so many ways the evidence can be relevant to something other than character, it is impossible for lawmakers to give detailed guidance by rigid *ex ante* rules. Rule 404(b) and its state court analogues are in practice vague balancing tests that have not received much clarification in the decisional law, despite a vast amount of litigation. Because the inferential value of bad act evidence cannot be foreseen categorically, and because close appellate oversight of open-ended balancing is wasteful, trial judges have necessarily ended up with a great deal of discretion in determining what is admissible.

88. Martin F. Kaplan, *Character Testimony*, in *THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE* 150, 160 (Saul M. Kassin & Lawrence S. Wrightsman eds., 1985) (citing David L. Hamilton, *Cognitive Representations of Persons*, in 1 *SOCIAL COGNITION: THE ONTARIO SYMPOSIUM* 135 (E. Tory Higgins et al. eds., 1981) and Edward E. Jones, *The Rocky Road from Acts to Depositions*, 34 *AM. PSYCHOLOGIST* 107 (1979)).

Giving trial judges discretion, subject to deferential appellate review, to prevent inferential error by excluding evidence creates one of the classic tensions of the jury system. Juries are not perfect, but as ad hoc bodies who hear only one case, their fact-finding ability is probably superior to that of judges. For example, the fact-finding of judges is more likely to be distorted, consciously or not, by their self-interest. Judges are more susceptible to political pressure, fears of losing an election, corruption, and ties to repeat players in the system.

In general, juries should have the authority to decide questions of fact in criminal cases. Group fact-finding⁸⁹ by a body relatively untainted by self-interest is likely to be more accurate, under the peculiar conditions of a criminal trial, than fact-finding by a single judge. Although a few special situations can be identified in which appellate courts or legislators should give trial judges the role of screening evidence to prevent inferential error,⁹⁰ it is generally a mistake to ask judges to screen evidence *solely* to prevent factual mistakes by juries, because that process would ask the weaker fact-finder to guide the stronger one.

C. Nullification Prejudice

Nullification prejudice occurs where the trier draws factually accurate inferences from the evidentiary facts, but uses them to make a decision on grounds not permitted by the substantive law.

As an example of nullification prejudice, consider a wrongful death case in which the substantive law provides that damages are limited to compensation for pecuniary loss; recovery for grief is not permitted. Plaintiff offers a video of an emotional family scene at the decedent's deathbed, arguing that it is evidence of a close family relationship and valuable for an inference that the decedent would likely have provided financial support to the

89. MICHAEL J. SAKS, SMALL-GROUP DECISION MAKING AND COMPLEX INFORMATION TASKS (A Report to the Fed. Judicial Ctr. 1981). The study found that large, heterogeneous groups perform better than individuals or homogenous groups in legal fact-finding, particularly in complex cases. Reasons for the superiority of large, heterogeneous groups include "increased net resources, greater memory and cognitive processing capacity, enhanced error-checking, increased stimulation, and competition among viewpoints." *Id.* at 2-3.

90. For example, it makes sense for judges to screen scientific evidence. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

other family members had she continued in life. The evidence is prejudicial, not because the jury will overvalue it for the permitted inference, but because the jury is likely to use it in support of a forbidden basis for decision, giving damages for grief or punishing the defendant.

Considerations of nullification prejudice and waste of time usually have a combined effect. For example, when a defendant wishes to produce evidence showing a war to be unjust in the course of defending against a charge arising from a protest against that war, the two considerations point in the same direction.

In the character evidence context, nullification prejudice would occur if the jury decided to punish the accused for uncharged misconduct. A strong form of the prejudice would be shown if the jury returned a guilty verdict, despite its belief in the defendant's innocence of the crime charged, because it wanted to punish him for his bad character.

Jury nullification, like revolution, is a process about which Americans have profoundly mixed feelings. It is safeguarded to some extent, for example, by rules against directed verdicts in criminal cases.⁹¹ Yet it is clear that the legal system could not function for long if nullification became common. So judges do not instruct juries about the right to nullify, or allow it to be argued too blatantly, and the rules permit exclusion of evidence that would encourage nullification.

There is no mystery or contradiction in postulating that the jury has primacy in fact-finding while at the same time allowing judges to exclude evidence in order to prevent or discourage jury nullification of substantive law. It makes sense that legislators would seek to prevent nullification and that judges, as representatives of the legal establishment, would be the gatekeepers. Because of their learning in law and their interest in preserving the system that elevated them, they are more likely than jurors to appreciate the long-term substantive goals of the law.

91. See *United States v. Mentz*, 840 F.2d 315, 320 (6th Cir. 1988); *FED. R. EVID.* 201(g) advisory committee's note for 1969, 46 F.R.D. 161, 204, and cases cited therein. *Cf.* *FED. R. EVID.* 201(g), which, on the same rationale, prohibits the judge in a criminal case from telling the jury that it must find a judicially noticed fact to be true.

D. *Unfair Surprise*

I now turn to two unglamorous rationales of the character evidence ban—preventing unfair surprise and avoiding waste of time. When these goals are postulated, there is no mystery about why the judge is in charge instead of the jury. The judge is in a better position to manage the trial, know the burdens on the lawyers, and understand how strategic manipulation by adversaries can stymie or promote truth-finding. An understanding of surprise requires an understanding of trial procedure and the dynamics of the adversary system, whereas an evaluation of “once a thief, always a thief” requires knowledge of the way the rest of the world works.

Wigmore believed that the “chief reason for the character rule” was what he called the “doctrine of unfair surprise.”⁹² He counted it as the only instance in which the common law treated surprise as a reason for exclusion, saying that there was “a special and palpable danger of undetectable fraud in allowing the *moral character* of an opposing party or witness to be evidenced by *particular acts of misconduct*, or *particular falsities*, when attempted to be proved otherwise than by cross-examination of the party or witness himself or by record of conviction for crime.” He recognized that other policy considerations contributed to the ban, however; that was the reason why specific acts to show character were not merely prohibited unless notice was given, but prohibited unconditionally. The danger of surprise deserves the prominence that Wigmore gave to it.

Even in the Simpson case, the defense complained about the burden of having to meet the “multiplying allegations.” Suppose no rule against character evidence existed at all, so that the

92. 1A WIGMORE, EVIDENCE § 216, at 1870 (Tillers rev. 1983). See also 6 WIGMORE, EVIDENCE § 1849 (Chadbourn rev. 1976):

To the general rule allowing the use of all circumstantial facts without giving prior notice, and refusing to recognize unfair surprise as a ground for the exclusion of evidence, there seems to be but one generally recognized exception, at common law. There is, as already noticed (§1847 *supra*), a special and palpable danger of undetectable fraud in allowing the *moral character* of an opposing party or witness to be evidenced by *particular acts of misconduct*, or *particular falsities*, when attempted to be proved otherwise than by cross-examination of the party or witness himself or by record of conviction for crime. Other reasons of policy, however, combined to oppose such evidence; and accordingly it was not merely prohibited unless after notice given, but prohibited unconditionally.

defense had to defend not only against evidence of spousal abuse toward Nicole Brown Simpson but also against allegations of other acts of violence. The burden would be staggering, especially if instead of being defended by the “dream team,” the case had been handled by a public defender.

The problem of surprise cannot be completely cured by notice requirements. A rule that required detailed notice so far in advance as to really eliminate the surprise problem would either be so burdensome that it would function as the equivalent of a rule of exclusion, or it would interfere with other goals, such as the goal of having a speedy and inexpensive trial.

E. Waste of Time and Resources

Another underrated goal of the character evidence rule is conservation of time and money. Certainly a resource-conserving rationale helps explain many of the seemingly grotesque features of the character rules. These include such features as the preference for reputation testimony over specific acts and the otherwise highly peculiar rules allowing lawyers to ask questions but not prohibiting them from using extrinsic evidence to disprove the witness's answers. The goal also helps explain why lawyers are given greater freedom to make character attributions in final argument than they are to support those attributions with proof; by merely *arguing* character attributions the lawyer is not using up time and resources.

The “waste of time” rationale has not been very much talked about in the academic literature, though it usually gets a supporting credit. Sometimes academics are like the man who lost his keys in the alley and then looked for them under the lamppost because the light was better there. We try to find what light we can, for example, in personality theory or decision theory. The waste of time consideration has not so far appealed very much to cross-disciplinary character evidence theorists, and from the doctrinal analyst's point of view it tends to be hopelessly case-specific and hard to generalize about. But it certainly has to be credited with an important role. Trials are expensive, and society does not have the money to do perfect justice to everyone—hence the prevalence of plea bargaining. (Moving with dispatch is also important to the judge and jury personally, especially when the jury is sequestered.) One of the reasons for excluding character

evidence is that we simply do not have the time and money to really examine character.

F. The Best Evidence Principle

The best evidence principle also helps support character evidence exclusion. The character evidence guidelines may help encourage the parties to focus on what Dale Nance calls the "epistemically best" evidence—evidence that a rational trier of fact would want to use.⁹³ Often the pressures of the adversary system will encourage the parties to seek the best evidence anyway, but this will not always be true. Sometimes the most effective evidence is not the best evidence—for example, when the party has a chance to win through an appeal to nullification prejudice.

The jury does not have a chance, through rulings on motions in limine or the creation of precedent, to control the efforts of the parties in the investigation and discovery of evidence. It makes sense to give judges an evidence-screening role if one of the goals is to encourage the parties, either in the pending case or prophylactically in future ones, to develop the best evidence.

III. THE SIMPSON CASE AS AN ILLUSTRATION OF THE RATIONALES OF THE RULE AGAINST CHARACTER EVIDENCE

Possibly Judge Ito's evidence rulings were motivated by a belief that Simpson was guilty and a desire to help the prosecution, even to the point of twisting rules. But just as the Simpson jury's decision can plausibly be explained as being based on reasonable doubt rather than on a desire to send a message, so can Judge Ito's decision plausibly be seen as based upon legitimate normative goals of character evidence law.

Precedent provided clear guidance on the spousal abuse issue, though of course Judge Ito had leeway to exclude remote or ambiguous episodes on waste of time grounds. Precedent did not provide clear guidance on the Fuhrman issues, and Judge Ito had to use general principles and his own situation-sense. The ruling

93. Dale A. Nance, *The Best Evidence Principle*, 73 IOWA L. REV. 227, 240 (1988).

he made in the heat of trial may not have been eloquent or elegantly crafted, but its result is defensible.

Judge Ito was right—though perhaps the way he said it was wrong—in thinking that the probative value of the Fuhrman evidence was reduced by the lack of incident-specific evidence making the planting hypothesis more plausible. Moreover, the Fuhrman evidence raised a significant danger of nullification prejudice. Nullification danger was what Darden addressed in his famous N-word speech, in which he said that the N-word evidence would

issue a test, it will give them the test and the test will be whose side are you on? The side of the white prosecutors and the white policemen or on the side of the black defendant and his very prominent and black lawyer? That is what it is going to do. Either you are with the man or you are with the brothers. That is what it does.⁹⁴

That's not an argument about inferential error, it's an argument that the jurors will treat racial solidarity as a more important goal than finding the truth.

Nullification is also what Cochran asked for in the "send a message" part of his final argument,⁹⁵ in which he said "you police the police," "you are the ones who send the message," and "you are the ones in war," and invoked the analogy between letting Fuhrman get away with it and not doing anything about Hitler. In contrast, the spousal abuse evidence raised only a minimal danger of nullification prejudice. The jury was most unlikely to convict O.J. Simpson of murder as a way of paying him back for the acts of spousal abuse.

The Simpson trial also illustrated the importance of the waste of time and surprise rationales. The waste of time danger arose time and again in the Simpson case. It was constantly referred to by the lawyers and the judge. It had a different

94. Official Transcript, Motion to Quash Subpoena (Marguerite Thomas), *People v. Simpson*, No. BA 097211, 1995 WL 15923, at *21 (Cal. Sup. Ct. L.A. County Jan. 13, 1995).

95. For an argument that the "widespread myth about the supposed communicative function of criminal convictions and acquittals is one of the single greatest threats to our most fundamental constitutional liberties, and to the integrity of the criminal justice system," see James Joseph Duane, *What Message Are We Sending to Criminal Jurors When We Ask Them to "Send A Message" with Their Verdict?*, 22 AM. J. CRIM. L. 565, 569 (1995).

impact at different stages. The McKinny tapes were a surprise to everyone, in contrast to the spousal abuse evidence and the Bell testimony, which were known and dissected well ahead of time. So Judge Ito may in part have been concerned about the prosecution's ability to rebut, without consuming undue time, the evidence of Fuhrman's attitude toward fabrication of evidence, since it might involve going through previous arrests by Fuhrman to show that he had not done the things alleged and also examining whether the McKinny transcripts were accurate. And with a uniquely rebellious jury on his hands, Judge Ito may also have been more concerned with the burden that time consumption imposed upon them at that late stage.

The Simpson case may also illustrate the influence of the best evidence principle. For example, Judge Ito's initial conditional relevancy ruling encouraged the defense to develop a "foundation" for the racism evidence. Judge Ito may have been taking the opportunity to express an evidentiary preference, telling the defense not to focus too much on proving Fuhrman a racist a hundred times over, but to aim a bit more at showing circumstantial evidence of tampering in this particular case.

CLOSING

What should we make of this? In keeping with my opening caveats, I've prepared a limiting instruction, using the California Jury Instructions as my literary model. Here's the instruction:

Colleagues,

The Simpson case may not be used by you as substantive evidence of any proposition of law or legislative fact. It may, however, be used solely for illustrative purposes when contemplating a proposition that has been established by independent evidence, taking care, however, not to unduly increase its saliency.