Foreword: Seeing the Elephant

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The O.J. Simpson Trial: Seeing the Elephant

It is a great honor to write the foreword for this special symposium issue of the Hastings Women's Law Journal. I believe that legal scholarship can serve no higher goals than exploring the origins of legal rules and institutions, determining the ways in which they affect peoples' lives, and attempting to articulate proposals for positive change. The Hastings Women's Law Journal is dedicated to these goals, and this symposium issue is a good example of its work. The O.J. Simpson trial has been called the "Trial of the Century," and there is usually only one such trial each decade. Be that as it may, the Simpson trial has caused more ordinary Americans to look closely at the operation of our judicial system than any other event in recent memory. Moreover, the trial and the reactions to it say a great deal about our society as a whole and not just its legal system. Consequently, the Journal's decision to seek the comments and insights of the excellent group of scholars and thinkers represented in this volume on this matter is one which I commend. Interest in their work will not be limited to those of us in the legal profession.

When I hear and read the various and conflicting analyses of the Simpson trial, the verdict, and the reactions to it, I am reminded of the fable "The Blind Men and the Elephant." In one version, four blind men come across an elephant, but they do not know what it is. The first grabs its tusk and declares to the others that the thing they have come upon is very much like a spear. The second touches its ear and disagrees with the first. He asserts that it is very much like a fan. The third approaches the animal and happens to touch its trunk. He shouts to the others that they are wrong. He is sure that it is very similar to a snake. Finally, the fourth touches the elephant on its knee and announces to the others that it

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is like a tree. A long argument follows as each of the men holds faithfully to his theory about the elephant. All are right, at least partially, and they are all clearly wrong because what they have come upon is an elephant. Similarly, there is some truth in many of the seemingly conflicting views of the Simpson trial, but a substantial number of the commentators apparently have failed to see the elephant. Some believe that the trial symbolizes the treatment of battered women in our society. Others assert that it speaks volumes about the importance of race and the pervasiveness of racism. Still others assert that its primary message is about the impact of wealth on the criminal justice system. Others believe that the key factor in the trial, and the reactions to it, is the celebrity status of O.J. Simpson. They are all partially right, but unless they can see the influence of the other factors in producing the phenomenon we have witnessed, they are as wrong as the blind men in the fable.

Each article in this volume focuses on at least one part of the Simpson trial elephant. Each provides in-depth commentary about some aspect of the trial itself, the media coverage, the verdict, or what they say about our country. By using the microscope they provide one can gain a better picture of what we have witnessed and why it happened. Nonetheless, it is important that we not make the mistake of the blind men. We must remember as Hegel said, “[t]he truth is the whole.”1 We need to examine all the major features (and perhaps some of the minor ones) together so that we can see the elephant. It is their interaction that created the spectacle that we observed as well as the social reality that it reflected. Having given that warning, let me begin by discussing a few features of the elephant I see, their implications, and what should be done about them.

Race and Racism

Race and racism have always been a part of the Simpson tragedy and the reactions to it. If Simpson’s wife had been African-American, it would not have been the trial of the century. There would not have been live television broadcasts on network television; there would not have been the “dream team”; and there would not have been the kind of overwhelming media frenzy that we saw. Part of the lure of this case from the beginning was that Simpson had been married to, and was charged with killing, Nicole Brown Simpson, an attractive white woman with blond hair. Black victims of crime rarely enjoy the intense media focus which some white victims are afforded. In April of 1989, when a white investment banker was brutally beaten and raped as she jogged through New York City’s Central Park, the story made national headlines. Of course, that same

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week there were twenty-eight other first-degree rapes or attempted rapes reported in the same city. Almost all of the victims of these other rapes were Black or Latin. One was a twelve-year-old girl who was pulled into an apartment building hallway in Harlem and raped by each of the four teenage boys who assaulted her. The boys were eleven, twelve, thirteen, and fifteen years old. The little girl's story and those of the other victims not only failed to make national headlines, they went largely unnoticed in New York City itself. Less than two weeks after the Central Park rape two men forced a thirty-eight-year-old African-American woman from a Brooklyn street up to the roof of a four-story building at knife point. Upon reaching the roof they raped and beat her and then threw her fifty feet to the ground. Her right leg was fractured, she suffered two broken ankles, and she had abdominal injuries. Again there were no national headlines. Shortly before the verdict in the Simpson case, a three year old white child was killed and her two-year-old brother wounded when the driver of a car in which they were riding took a wrong turn in Los Angeles' mostly Latin Cypress Park neighborhood. It was the focus of national media attention for several days. The entire country was shocked and outraged at the tragic occurrence. Even President Clinton noted the incident. The two young white children were not, however, the first victims of gang violence in that neighborhood. Numerous gang members and innocent bystanders had been killed. Indeed, according to one report there had been three recent murders shortly prior to the time that the little white girl was killed, but none of them had created much of a stir outside the neighborhood. Would there have been the same national attention and outrage if the victim had been a little Latin girl from the neighborhood? Would there have been the same national attention and outrage if it had been a little African-American girl who was in the car that had taken the wrong turn? Do you remember the last time the national media focused for more than one day on an African-American child or adult who was the victim of a crime?

Even when African-American victims receive exposure, often the consequences to the guilty party are not what they would be if the victim were white. I remember a conversation in the Faculty Lounge here at Hastings after Clarence Thomas had been confirmed as a Supreme Court Justice. He was confirmed despite the sexual harassment charges made against him by Anita Hill, an African-American law professor. Although

3. Id.
5. Id.
I was the only African American in the room, everyone agreed that had Ms. Hill been white, Thomas never would have been confirmed. On that occasion I was surprised not by the truth of the statement, but by the fact that everyone in the room accepted it so easily. We all knew that race made a difference in the public perceptions of the seriousness of the misconduct and the need for punishment.

Perhaps the most dramatic evidence that the race of the victim makes a difference in the criminal justice system is discussed in McCleskey v. Kemp. In that case, a Black man who had been convicted of murder and sentenced to death in a Georgia court contended that the state's capital sentencing process was administered in a racially discriminatory manner in violation of the Eight and Fourteenth Amendments to the United States Constitution. In support of his claim he introduced a statistical study that examined over 2,000 murder cases that occurred in Georgia during the 1970s. The raw data showed that defendants charged with killing white persons received the death penalty in eleven percent of the cases, but those charged with killing African Americans received the death penalty in only one percent of the cases. Moreover, in cases involving Black defendants and white victims the death penalty was assessed in twenty-two percent of the cases, while being assessed in only one percent of the cases involving both Black defendants and Black victims. Even after taking into account thirty-nine nonracial variables that could have explained the disparity, defendants charged with killing white victims were 4.3 times as likely to receive the death penalty as defendants charged with killing blacks. The study concluded that Black defendants who kill white victims have the greatest likelihood of receiving the death penalty.

This same combination of white victim and Black or Latin assailant was present in the Central Park rape case, the case of the little girl murdered in Los Angeles, and, allegedly, the Simpson case as well. It is that combination that draws the media and leads to outrage. Why? The answer is obvious to most people of color in this country. Racism is as American as John Wayne on horseback in a Hollywood movie or O.J. Simpson running through an airport in a Hertz commercial. Race makes a difference when African Americans are seeking employment, buying or renting a house, or buying a car in this country. It certainly makes a difference when an African American is charged with committing a crime of violence against a white victim. Thus, it should hardly be considered a major revelation that the fact that O.J. Simpson was African-American.

7. Id. at 286.
8. Id.
9. Id. at 287.
and Nicole Brown Simpson was white made a difference in the way the case was handled by prosecutors and the police and the reaction to it throughout society.

Thus, I was a little surprised to find that it was defense attorney Johnnie Cochran who had introduced the issue of race into the Simpson trial. He played the “Race Card.” Mr. Cochran discovered several witnesses ready to testify that Detective Mark Furman was a loud-mouth racist who used the “N” word like others used “please” and “thank you.” Additionally, there were audio tapes with numerous examples of Detective Furman speaking in this manner and making racist statements about African Americans. Of course, it was this same police detective who had discovered several key pieces of evidence against Cochran's client, O.J. Simpson. Nonetheless, for Cochran to use this information to challenge Furman's credibility was somehow the improper or unethical playing of the “Race Card.” Not to attack Furman's testimony on this basis would have been malpractice and a breach of an attorney’s duty to zealously represent his client, but apparently the media and much of the country did not want to be bothered with such technicalities. If a black detective had made analogous statements about whites, and a white defense lawyer had attacked his credibility on this basis, would major newspapers across the country have run headlines about the playing of the “Race Card”?

Many Black leaders, especially in Los Angeles, used the Furman tapes to talk again about police brutality and racism among police officers. The situation reminded me of the outcry following the widespread showing of the video tape of Rodney King being beaten by several police officers. African Americans attacking police misconduct seem only to be taken seriously when they have strong direct evidence of their charges such as a video or audio tape. Even in these cases, many whites are quick to contend that such incidents are aberrational and not representative. Though the problem of racism in police departments received some attention after the Furman tapes were played in open court, it was not an issue upon which the country focused very long. That is unfortunate. African Americans are often treated as criminals in their own communities simply because of the color of their skin. Moreover, it seems as if they are even more likely to be victims of police misconduct if they travel outside of their communities. Thus, the people who are most likely to be victims of crime often feel that they cannot trust those who are supposed to be charged with their protection. The Black community suffers even more as a result. The Simpson trial demonstrates, however, that it is not only the African-American community that suffers from the plague of racism in police departments; the criminal justice system as a whole suffers. Racist police officers do not make great witnesses. The testimony of such officers is certainly going to be viewed skeptically by many
African Americans. The Simpson trial suggests, however, that white jurors as well may be wary of such testimony. If the messenger is seriously flawed, many will doubt the message. Consequently, it is possible that guilty defendants will not be convicted because jurors will not believe police officers who are suspect. Some believe that is exactly what happened in the Simpson trial. The elimination of officers such as Furman from police departments around the country will reduce the likelihood of such occurrences in the future. But I wonder whether this particular lesson of the trial is one which will be heeded.

Within a month of the murders of Nicole Brown Simpson and Ronald Goldman, it was relatively clear that African Americans as a group and whites as a group had different views on whether or not O.J. Simpson was guilty. Polls by USA Today, CNN, and Gallup showed that sixty percent of black Americans believed him to be innocent of the murder charges filed against him while sixty-eight percent of white Americans believed him to be guilty. Many legal experts consequently thought that a predominantly African-American jury was a big plus for the Simpson defense. Very early in the proceedings, I remember reading that a poll of lawyers showed that the majority predicted either a hung jury or a defense verdict as the likely outcome. Moreover, in July 1995, after the trial was almost over, a poll showed that most Americans, almost seventy percent, believed that there would be a hung jury, fourteen percent thought there would be a not-guilty verdict, and only ten percent predicted a guilty verdict. Nonetheless, when the jury quickly reached a not-guilty verdict, it was as if an earthquake had shook the entire country. There were numerous expressions of shock and outrage. Watching television and reading the newspapers the message seemed to be that the predominantly African-American jury had let Simpson off the hook simply because he was African-American. Presumably they did not care if he was guilty or not. The analysis appeared to be that African-American jurors simply could not be trusted when one of their own was a defendant. The reality that African-American jurors vote in favor of guilty verdicts for African-American defendants every day in this country was not part of the dominant dialogue. Nor was there much discussion about the three members of the jury panel who were not African Americans who also reached the not-guilty verdict. Some politicians talked about fixing the jury system to ensure a “fair-cross section of the community” would serve on jury panels. Translated that apparently meant that there should not have been a predominantly African-American jury and they were going to

fix the problem. I believe the reaction to the verdict reflects a number of different factors. They include the intense media focus on the case for over a year, including live television coverage of the trial, and the very strong circumstantial case against Simpson. However, race and racism also played a role. Many whites were apparently willing to believe that the African Americans on the Simpson jury concluded that he was guilty of two brutal murders but voted to find him not guilty simply because he was African-American. Ironically, many of these same whites probably would argue that racial discrimination against African Americans is no longer wide-spread in this country.

Patriarchy and Misogyny

Race, nonetheless, is not the only feature of the elephant I see. Another big part is patriarchy and misogyny. Large numbers of men still brutalize and terrorize women with impunity in this country. O.J. Simpson, the football hero, was also O.J., the batterer. Judge Ito ruled that evidence of nineteen different incidents of spousal abuse by Simpson were admissible into evidence against him in the trial. In one, a limousine driver said that Simpson slapped Nicole Brown Simpson on the way home from a fund-raiser, and in another, Simpson pushed her out of a moving car. The prosecution in the trial, however, began its case with testimony regarding an incident on New Year's Day 1989. Following a 911 call for help in the early morning hours, a police officer sent to the Simpsons' Brentwood mansion encountered a battered and bruised Nicole, wearing only muddy sweat pants and a bra, hiding in some shrubbery. She came out yelling that O.J. was going to kill her. She told the officer that there were two other women living in the house and the fight started when O.J. had sex with one of them before getting into bed with her. Our hero, O.J., seemed to confirm her story by telling the officer: "I've got two other women; I don't want that woman in my bed anymore." Nicole later told the officer that the police had been out eight times before in response to her calls and had never done anything to him. After learning that the officer planned to arrest him for spousal abuse, Simpson also noted that the police had been out eight times previously and had never done anything like that. He then drove away in his Bentley while the officer was talking with a supervisor.

The officer took Nicole Brown Simpson to a police substation where he took three Polaroid pictures of her injuries. He testified that Nicole Brown Simpson had a one inch cut on her lip, a swollen right forehead, a right eye which was swollen and starting to blacken, some sort of

imprint or swollen mark on her cheek, and a hand imprint on the left side of her throat. The pictures he took that morning were shown to the jury and the world. The pictures and the other evidence presented during the trial and in the media seem to firmly establish that during her marriage Nicole was one of the estimated four million American women who are battered each year.  

As is true in many of these cases of battering husbands, neither the criminal justice system nor society responded as if anything very serious had happened. O.J. pleaded no contest and received a small fine, some community service, and two years probation. Hertz, O.J.'s principal employer at the time, was concerned about the incident, but when it received little press coverage, they decided that it was not a major problem. Thus, by April of 1989, a few months after the no-contest plea, O.J. was racing through Atlanta's airport to launch Hertz's No. 1 Club Gold.

Simpson's crime was certainly not an unusual one. The surgeon general has named battering the largest single cause of injury to women in this country. Perhaps because it is so common place, judges tend not to think of it as a serious offense; however, many people reasonably question if the system took the crime more seriously, whether it would still be so common. Supposedly there is and has been for some time a War on Drugs in this country, but I do not recall any politician calling for a War on Battering. I am not suggesting that the so-called “War on Drugs” is a model for attacking a pervasive societal problem, but the metaphor does demonstrate the intensity of the focus, the widespread recognition that the problem is a major one, and the feeling that something has to be done quickly and forcefully to deal with it. There has not been a similar intense national focus on battering. This is not to say that in recent years a number of police departments, prosecutors, and judges have not been sensitized to the importance of the issue and the need for action. It is rather that the campaign that has been waged has not been as omnipresent, as intense, or as effective as it needs to be. Perhaps the Simpson case will be the catalyst for such an effort.

Nonetheless, the criminal justice system's mishandling of O.J.'s New Year Day 1989 beating of Nicole exemplifies the problem. Although Nicole had called the police on eight other occasions, they had not made an arrest. When charges were brought and Simpson pleaded no contest,

14. *Id*.
he was given the system's equivalent of a slap on the wrist for a beating of his wife which disfigured her face and required her to be hospitalized. On the other hand, if he had been found with a small amount of crack cocaine, he would have been arrested the very first time. If he had pleaded no contest to a federal charge of possession of just five grams of crack, he would have faced a mandatory minimum sentence of five years in prison. What does this say about our sense of moral outrage? An individual who has possession of a small amount of a controlled substance for his or her personal use is deemed much more worthy of serious punishment than a man who brutally beats another human being. Some rightfully argue that we cannot be sure that arresting battering husbands and giving them jail time will reduce the incidence of battering. On the other hand, it is also true that we cannot be sure that it will not. We know that not having police officers make many arrests and having the courts impose light sentences in the cases where they do has not solved the problem. The treatment of Simpson's battering is simply another demonstration of that truth. It is time to try a stricter approach.

But it is not simply the police and the courts that must change their behavior. Society as a whole must begin to treat spousal abuse as the serious offense that it is. It is not simply a "personal matter." If men realize that severe consequences will result from beating their wives and girlfriends, they are more likely to make greater efforts to avoid it. If Hertz had dropped O.J. in 1989, perhaps they would not have had to do so in 1994. Of course, if there had been more press coverage or more public outrage following his no contest plea, we would not have seen O.J. running through any more airports in commercials. Maybe then Simpson would have realized that he had a serious problem and gotten some help. If in 1989 he had pleaded no contest to a drug possession charge, there would have been press coverage and public outrage. Hopefully, in the future both will follow conviction of either a public or private figure for the crime of spousal abuse. They did not follow in 1989, and that failure of our criminal justice system and of our society is a major feature of the Simpson trial.

Single Feature Myopia

Nonetheless, I fear that those who only see the spousal abuse aspect of the trial may undermine some of the efforts to address that problem as well as the others highlighted by it. Women's groups have understandably been enraged and energized by the trial and the verdict. They are committed to making sure that spousal abuse is taken seriously by society and the

criminal justice system. As the above discussion illustrates, it is a commitment we should all share. However, I question whether the expenditure of large amounts of energy and resources on making the rest of O.J. Simpson's life miserable is wise. Unlike Richard Nixon after Watergate, I do not think it is likely that Simpson is going to make much of a comeback. Additionally, Nicole Brown Simpson is no longer suffering from spousal abuse but millions of American women are. Perhaps more emphasis should be placed on getting more local police departments and judges throughout the country to deal with spousal abuse as the serious crime it is as a tribute to Nicole and less on hounding O.J. when he goes to play golf. Most importantly, many, indeed perhaps most, African-American women believe O.J. is innocent. If punishing him for murdering his wife becomes the primary focus of a campaign against spousal abuse, it will probably lack significant African-American support. Look at what happened during the first Women's Legislative Summit in California held soon after the Simpson verdict was announced. Several African-American women walked out of a discussion of domestic violence after one panelist suggested that Simpson was guilty. This situation is one which could be repeated over and over again across the country.

Moreover, the focus on Simpson is likely to be perceived as reflecting the same racist tendencies the women's movement has been criticized for over the years. After the verdict Tammy Bruce, the head of the Los Angeles chapter of the National Organization of Women (NOW), made a number of impassioned statements about the role played by race in the trial. Hundreds of NOW members, civil rights groups, and others called NOW's national headquarters to complain that her statements were racist. The negative reaction to Bruce's remarks was so strong that she was publicly censured by NOW's national board and asked to apologize. NOW's leadership realized that Bruce's myopia threatened the women's movement's long term interest in unity. White women need to unite with women of color to address their common concerns as women and as human beings. On the day of the verdict Bruce asserted, "[w]hat we need to teach our children is . . . not about racism, but is about violence against women." She clearly has it wrong. We need to teach our children about both.

Because we need to teach our children about both, those of us in the African-American community can not put our heads in the sand when it comes to spousal abuse. Even if the trial did not establish that O.J. was

19. Id.
a murderer, it established him as a long-term and frequent batterer. Consequently, he can not realistically be viewed as either a hero or role model. More importantly, spousal abuse is as big (if not bigger) a problem in Black America as it is in white America. If we only see the racism in the Simpson trial, and do not heed the messages about spousal abuse, patriarchy, and misogyny, our communities will have to suffer even longer with the problems and pain they generate. Spousal abuse has to be condemned. To keep silent about it is not to keep a secret from a hostile white society. To keep silent about it is to not deal with it. We must see this feature of the Simpson trial elephant and confront it.

Wealth and the Impact of Money

Perhaps the aspect of the trial which was most apparent to many observers was the manner in which Simpson's wealth affected the proceeding. One television report estimated that Simpson spent approximately six million dollars defending the two murder charges against him. Several of the best known lawyers in the country worked on his defense, and early on the group was declared "the Dream Team" by the media. Such a combination of legal talent required the payment of substantial legal fees. The numerous experts who worked with that team did not come cheap nor did the stable of private investigators the lawyers employed. Clearly, Simpson had and used financial resources that are not available to the ordinary criminal defendant. Many criminal defendants cannot afford a single DNA expert let alone several. Many lack the funds to hire a single investigator, and a team of investigators is an unlikely dream. Do experts, investigators, and the full-time focus of a team of top lawyers make a difference in our criminal justice system? Of course they do. Money makes a tremendous difference in the criminal justice system just as it does in most other aspects of this society.

Take the case of white Texas millionaire Cullen Davis, for example. In 1976 according to three eyewitnesses Davis murdered two people including his twelve-year-old step-daughter. It has been estimated that Davis spent over two million dollars on his defense in his 1977 trial on the charge that he murdered his step-daughter. After the longest murder trial in Texas history, Davis was acquitted. The next year Davis was

21. See, e.g., Joe Hallinan, Facts Get Tangled in Grapevine; Some Reported Domestic Violence Figures are Misleading, STAR TRIB., July 8, 1994, at A4; Joel P. Engardio, Domestic Homicide Rate Down Slightly; Northeastern Study Cites FBI Data to '92, BOSTON GLOBE, June 25, 1994, at 17; Joe Hallinan, New Views on Domestic Abuse, PLAIN DEALER, July 14, 1994, at E10.
arrested for attempting to hire someone to murder the judge who presided over his divorce proceedings. In addition to the testimony of the man that Davis allegedly hired, prosecutors had a tape recording of a conversation between Davis and the man wherein Davis appeared to incriminate himself. Davis testified that he made the incriminating statements because he had been telephoned by someone who identified himself as an F.B.I. agent and who told him to play along with the man so that the agency could crack an alleged extortion ring. He later found out, however, that the caller was not the agent he thought he was. The first trial on these charges ended in a hung jury; the jury deadlocked eight to four in favor of conviction.24 The second trial ended in an acquittal.25 There is little doubt that Davis' money made a tremendous difference in his ability to put on a defense.

Some have responded to the Simpson and Davis trials by seriously contending that we should limit the amount of money criminal defendants can spend on their defenses. In addition to raising serious constitutional concerns, such an approach seems at odds with the fundamental precepts of our system. At bottom, the presumption of innocence and the requirement of proof beyond a reasonable doubt mean that protecting the innocent is even more important than punishing the guilty. It would be contrary to this principle to limit the ability of defendants to use their financial resources to demonstrate reasonable doubt while making the resources of the state available to the prosecution.

Given the impact that financial resources have on the ability of criminal defendants to obtain fair trials, the real question becomes whether our system should only work for those who have the money to make it work to their advantage. The answer to that question has to be a resounding no. Defendants of ordinary means or no means at all need the resources required to make their cases. Such resources will often include experts and investigators. I am not suggesting that every defendant has a right to the dream team and all the trimmings. I am suggesting that every defendant should have access to the resources required under the circumstances of the particular case to present an adequate defense. It is clear that we are a long way from approaching this goal. Furthermore, given the present political climate when school lunches for needy children are under attack, it seems unlikely that providing additional resources to those charged with crimes will become a national priority. I fear that this is another feature of the Simpson trial elephant which will be overlooked and neglected.

Seeing the Elephant

There you have some of my preliminary thoughts on the trial of the century, the reactions to it, and what they suggest about our criminal justice system and our society. The case represents an unusual combination of factors that have intrigued us from the beginning. The articles which follow will examine and explain many of them. Some will offer insight and depth of analysis to some of the matters I have only touched upon. Others will examine features that I failed to mention. Indeed, some center on aspects of the trial that I either had not noticed or failed to give much thought. They are important aids in determining what we witnessed and what it means. But keep what has been written and said in perspective. Examine the details, but keep the big picture in mind. If you lose sight of an elephant, you may be trampled by it.