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Fantasy, Celebrity, and Homicide

Thomas Morawetz*

Introduction

One of the most disturbing aspects of the murder trial of Orenthal James Simpson, the defendant's status as a celebrity, is the least discussed. Both scholarly and journalistic commentators are rightly preoccupied with the effects of race, gender, and publicity on the effort to achieve justice. These issues, however, are not unique to this trial and are familiar concerns of observers (and participants) in many legal contexts, reflecting general concerns about the gap between our practices and our ideals.

Attitudes toward race and gender present both practical and theoretical obstacles to justice. As a practical matter, one may question whether the performance of significant actors (judges, jurors, attorneys) is distorted by bias and prejudice. As a theoretical concern, one may ask whether *any* understanding of the circumstances leading to the trial and of the trial itself is uncolored by partiality and perspective. Concerns about publicity, on the other hand, tend to be purely practical and focus on how public scrutiny affects the performance of all actors. Common law courts in Canada and England, mindful of these dangers, bar coverage that is constitutionally safeguarded under our own Constitution.¹

Although cases that prompt reflection about racial assumptions, gender roles and expectations, and the distorting effects of publicity are common, celebrity trials are much less so. Simpson's celebrity status is of a special kind. He is not the kind of celebrity defendant, such as Patricia Hearst, John Gotti or Adolph Eichmann, who owes his notoriety to involvement in crime. Nor is he known as a political or business figure, like Clark Clifford or Leona Helmsley. O.J. Simpson's fame, insofar as it anteceded his murder trial, is more directly tied to our imagination than to our

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1. See GEOFFREY ROBERTSON AND ANDREW G.L. NICOL, *MEDIA LAW* (2d ed. 1990); PATRICK BIRKINSHAW, *GOVERNMENT AND INFORMATION passim* (1990).

institutions. Both as sports hero and as movie actor, he has been the subject of special narratives and the object of publicly shared fantasies.

There is no inherent reason why the murder trial of a sports hero/movie star cannot achieve procedural and substantive justice.² But the Simpson trial offers special obstacles and opportunities for subverting the kind of ideal scenario of fairness and impartiality to which the rules and practices of criminal law aspire. The most obvious reason for this, the particular celebrity of the defendant, is also the most subtle. In the four main parts of this paper, I shall trace the paradoxical implications of trying someone who is famous as a subject of many kinds of fantasies (parts I and II), consider the truth-eliciting mission of a criminal trial and the role of attorneys as agents of the court in light of these implications (part III), and sketch the jurisprudential implications of this predicament: the pursuit by the court of a master narrative of discrete events in the face of an explosion of seductive narrative possibilities (part IV).

I. Star-gazing

Most defendants in widely-publicized trials, from Captain Dreyfus³ to Jean Harris⁴, owe their notoriety to the events that precipitate the trial itself. Their alleged criminality is the reason for their fame. Other defendants may be public figures long before they are tried, but their activity as public figures is continuous with the subject matter of their alleged criminality. This is as true of Clark Clifford as it is of John Gotti. But it is not true of O. J. Simpson.

The activities for which Simpson had been best known were not merely discontinuous with murder in the obvious sense that he was not seen as a man disposed to criminal violence and murderous passions. They were

2. Consider, however, the observations of former Los Angeles District Attorney Ira Reiner: "It is always extremely difficult to convict a celebrity. It is more difficult to convict someone who is a hero. Before a lot of this, O.J. Simpson was an authentic American Hero, an icon." Andrew Blum, *O.J. Will Walk*, NAT'L L. J., Oct. 10, 1994, at 1, A24.

Making the same point in more flowery language, Lewis Lapham observes, in regard to O. J. Simpson's would-be flight from justice in his Ford Bronco, "the reverent crowds gathering under the eucalyptus trees on Sunset Boulevard had come to pay homage to what passes in late-twentieth-century America for the presence of divinity. The question of Simpson's guilt or innocence wasn't as important as his descent from the starry heavens of network television—a demigod on the order of the doomed Orestes in flight from the pursuing Furies." Lewis H. Lapham, *Terms of Endearment*, 289 HARPER'S MAGAZINE 7, 7 (1994).

3. Roughly one hundred years after its occurrence, the Dreyfus affair remains one of the most discussed trials of all time. See MICHAEL BRUNS, *DREYFUS: A FAMILY AFFAIR* (1991); RICHARD GRIFFITHS, *THE USE OF ABUSE: THE POLEMICS OF THE DREYFUS AFFAIR AND ITS AFTERMATH* (1991).

4. See DIANA TRILLING, *MRS. HARRIS: THE DEATH OF THE SCARSDALE DIET DOCTOR* (1981); SHANA ALEXANDER, *VERY MUCH A LADY* (1983).

also discontinuous in the deeper sense that, as a sports hero and movie star, he has been a figure of fantasy rather than reality, a central player in artificial public dramas of recreation and imagination.

In drawing implications from this fact, we must first distinguish sports fantasies from movie fantasies. Sports heroes deploy real skills in real time, and they play roles in their own name. A significant part of their achievement is not a matter of pretense, of assuming an artificial and temporary persona. But, at the same time, sports would not be central to our collective consciousness if they were not a focus and vehicle of fantasies. It hardly needs to be said that persons experience victory and defeat vicariously through sports, and that they idealize and demonize players.

The "halo effect,"⁵ according to social psychologists, is the tendency to presume that heroes in one domain are heroes in all. Sports heroes become role models. Fans seek to emulate not only their success on the playing field but also their *presumed* success in life as well. In doing so, fans tend to resist counterevidence that sports heroes have the same failings, inconsistencies, and complexities that bedevil mere mortals.

While movie stars are also valued for real skills, these skills are inherently ones of simulation and pretense. Unlike sports heroes, they do not have a single persona characterized by genuine victories. Fans are more comfortable with them adopting multiple personae that are explicitly artificial. Movie stars are the agents through which audiences engage in fantasy. Even though failure to distinguish actors from their roles may be a sign of naivete, all of us to some extent experience actors *as* their parts. To do otherwise is to forego the suspension of disbelief that is considered essential to the experience of movies and plays.⁶

The seductive confusion of actor with role is especially likely when the heroism of a charismatic sports star is transposed to the movies. Imputed superhumanity is carried over intact, as the movie persona spends the psychological capital earned in the sports career. In the instance of O.J. Simpson, this superhumanity could hardly be illustrated better than through his role as television spokesman for Hertz car rental. In this context, his performance implied that ordinary laws, including the law of gravity, simply did not apply to him.⁷

5. A "halo effect" is "a predisposition to admire all of a person's actions, work, etc., because of an estimable quality or action in the past." RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 863 (2d ed. 1987).

6. This idea is explored in countless books and articles. See STANLEY CAVELL, *THE WORLD VIEWED: REFLECTIONS OF THE ONTOLOGY OF FILM* 25-29 (1971); PAULINE KAEHL, *I LOST IT AT THE MOVIES* (1965).

7. The Hertz advertising campaign, broadcast on national television in the late 1970s and early 1980s, depicted Simpson flying through the air into the seat of a Hertz rental car.

Invested as we are in the fantasy lives of sports heroes and movie stars, we are ambivalent toward the real facts of their lives. While many persons seek gossip in fan magazines, tabloid newspapers, and television programs, such gossip stokes the economic engines of pseudo-journalism only when it fuels the fantasies of its audience. As a result, the gossip is loosely, if at all, grounded in fact. Rather, it elaborates audiences' *secondary* fantasies about the lives of sports heroes and movie stars, fantasies that are constructed from the *primary* fantasies played out in the sports events and movies themselves.

II. Deeper into (the Concept of) Fantasy

The notion of fantasy, as I have been using it, rests on the distinction between fantasy and reality, or fiction and truth. The word "fantasy" commonly has two meanings. The simpler meaning is that "fantasy" merely refers to what is false, any claim about the life and deeds of an individual that is at odds with fact. A more complex understanding of "fantasy" refers to artificial personae and events. The rules of sporting events or the scripts of movies and plays, for example, are constructed by imagination and require audiences to use their own experiences and beliefs to uncover meaning.⁸

The seemingly indispensable distinction between truth and fantasy in this context is vulnerable to criticism and attack. Though some facts are considered "hard," or easily resolved by observable data, such as the fact that Jones either was or was not in Kansas City on January 1, other facts may be a matter of endless dispute.⁹ Attributions of motive, intention,

8. Psychologists remind us that fantasy is both an individual and a collective experience. Thus, each of us plays out in our imaginations all kinds of events that we know are not real, imaginings that reflect our hopes, fears and anticipations. Most, but not all of us, can tell the difference between our fantasies and reality most of the time. The reservoir of images and stories from which we draw our fantasies has, in part, contents that are idiosyncratic to our own history and, in larger part, contents that reflect shared cultural, political and social experiences.

9. In the early part of the twentieth century, philosophers were much preoccupied with the epistemological status of our knowledge of the external world, in particular with the relationship between what I am calling hard facts and soft facts. Other ways of referring to this distinction is in terms of brute facts and inferential facts. See BERTRAND RUSSELL, *OUR KNOWLEDGE OF THE EXTERNAL WORLD* (1929); G. E. Moore, *Proof of an External World*, in *PHILOSOPHICAL PAPERS* (1959); JOHN L. POLLOCK, *KNOWLEDGE AND JUSTIFICATION* (1974). More recent epistemological investigations, influenced perhaps by the work of Ludwig Wittgenstein, look at all of our knowledge claims in terms of the patterns of assumptions and justification in which they are embedded. See LUDWIG WITTEGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (1959); HILARY PUTNAM, *REALISM WITH A HUMAN FACE* (1990).

The distinction between hard and soft facts, whatever its epistemological status may be, is intuitively suggested by the distinction in criminal law between questions involving acts (*actus reus*) and those involving mental states (*mens rea*). It is generally assumed that

mood, and character are "soft," or more open to a variety of interpretations, such as whether Jones was greedy, reckless, giddy, or inhumane in his conduct in Kansas City on January 1. With regard to these latter "facts," one person's truth may be another person's fiction. The distinction between hard and soft facts, however, is one of degree. In principle, one can accumulate relevant evidence to make an ever more convincing case about Jones' motives, intention, mood, or character. A large part of our discourse, whether in informal conversation or in formal trials, consists of hardening soft facts by presenting and interpreting evidence.

Thus, the observation that some factual claims are soft does not challenge the dichotomy between fantasy and reality, fiction and truth; it simply takes note of the difficulties we sometimes have, and the disagreements we therefore experience, in determining which is which. But a strain of postmodern¹⁰ reasoning represents a wholesale rejection of these distinctions. According to this view, any so-called event can be seen and described in endless ways, depending on the background, dispositions and powers of the observer. Also, references to "truth" and "reality" betray a naive faith in what can be called a "master narrative," an ideal account of events "as they objectively are." Postmodern critics assert that there is no master narrative, merely (potentially) conflicting individual narratives.¹¹

From this standpoint, what we have been calling "fantasy" in its more complex sense can be generalized to all descriptions of events and

the former can be "directly" observed while the latter are inferential. Of course, to say that act *can* be directly observed is not to say that they are always or generally directly observed; in particular cases, our claims about persons' acts are generally inferential, e.g. from other (trustworthy) persons' reports, etc.

10. Consider the following discussion by Jean-Francois Lyotard:

A postmodern artist or writer is in the position of a philosopher: the text he writes, the work he produces are not in principle governed by preestablished rules, and they cannot be judged according to a determining judgment, by applying familiar categories to the text or to the work. . . .

[I]t must be clear that it is our business [as writers] not to supply reality but to invent allusions to the conceivable which cannot be presented.

JEAN-FRANCOIS LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE* 81 (1985). "Postmodernism means the end of a single world view and, by extension, . . . a resistance to single explanations." Charles Jencks, *Introduction to THE POST-MODERN READER 7* (Charles Jencks, ed., 1992).

11. "Master narrative—how else to translate Lyotard's *grand récit*? . . . [W]hat made the *grand récits* of modernity master narratives if not the fact that they were all narratives of mastery, of man seeking his telos in the conquest of nature? What function did these narratives play other than to legitimize Western man's self-appointed mission of transforming the entire planet in his own image? . . . What is at stake, then, is not only the status of narrative, but of representation itself." Craig Owens, *The Discourse of Others: Feminist and Postmodernism*, in *THE POST-MODERN READER* 339 (Charles Jencks ed., 1992).

experiences. Everyone from the politician speaking to her constituents and posturing in Congress to the corporate executive planning a marketing strategy to the professor of law presiding over a class is playing a role, acting a fantasy that is not significantly different from the roles of movie actors. Attempts by observers to pin down the reality of the politician's life are bound to be frustrated and to collapse into a set of competing narratives, each one vulnerable to the allegation that it is merely that person's own fantasy.¹² In this sense, what we are accustomed to doing overtly in thinking about actors and sports heroes is what we do *covertly* in all of our considerations of the lives of others. We are all actors and storytellers at all times.

III. Trial, Truth, and Fantasy

I shall postpone until part IV any consideration of the merits of the postmodern reduction of truth and reality to fiction and fantasy and its critique of the "myth" of an elusive master narrative. In this part, I shall consider how a postmodern account plays havoc with the bases of legal practice, specifically with the process of trying criminal cases.

The practice of criminal law cannot dispense with the notion of truth. Although eliciting truth is only one of several goals of a trial, and although some aspects of trial conduct may consciously subvert the search for truth, few would deny that the job of the jury is to distinguish truth from falsehood. This job extends equally to both soft and hard facts, *i.e.*, to questions of intent as well as questions of action.¹³

The adversarial roles of criminal attorneys, as prosecution and defense, are only partially defined by the pursuit of truth. One familiar, although widely disputed, justification for the adversarial system is that it is an efficient vehicle for eliciting truth.¹⁴ Within the system, however, attorneys are only required to be truthful in certain ways, *e.g.* by the Model Rules of Professional Conduct.¹⁵ Model Rule 3.4 (e) of Profes-

12. "[Language] can never explain the world, or at least, when it claims to explain the world, it does so only the better to conceal its ambiguity." Roland Barthes, *Authors and Writers*, in A BARTHES READER 187 (Susan Sontag ed., 1982). In a series of essays, Barthes applies the notion to virtually every area of cultural, political and social experience. See Roland Barthes, *MYTHOLOGIES* (1973).

13. See *supra* note 9.

14. The effectiveness of the adversary system as a vehicle for eliciting truth is one of the most fundamentally disputed issues in legal ethics. Monroe Freedman is one of the most single-minded defenders of the adversary system on those grounds. See MONROE FREEDMAN, *UNDERSTANDING LAWYERS' ETHICS* 28-33 (1990). His critics are numerous. See DAVID LUBAN, *LAWYERS AND JUSTICE* 50-103 (1988); Marvin Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975).

15. The Model Rules of Professional Conduct were approved by the House of Delegates of the American Bar Association in 1983. A significant majority of the states have adopted some version of the Model Rules; all have modified the text as adopted by the ABA.

sional Conduct mandates that “[a lawyer shall not], in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence.”¹⁶ Further, according to Model Rule 3.3 (a)(4), “[a lawyer shall not knowingly] offer evidence the lawyer knows to be false.”¹⁷ Finally, according to Model Rule 3.4 (b), “[a lawyer shall not] falsify evidence, counsel or assist a witness to testify falsely.”¹⁸

A layperson is likely to interpret these provisions differently from a lawyer. The former would find in them a broad mandate for lawyers at trial to work together in eliciting the truth. It would seem at odds with a lawyer’s task, for example, to try to persuade the jury to consider and believe an account of the relevant facts that the attorney believes to be false. Having first distinguished to her own satisfaction fact from fiction, a lawyer would then be required to assemble evidence for a narrative that is in accord with the truth.

In fact, both laypersons and lawyers may recognize this account of a lawyer’s conduct as naive. Laypersons, informed by journalists and legal fiction, interpret lawyers’ rhetorical devices as calculated to advantage their clients’ stories in ways that betray the obvious mandate of the Model Rules. Lawyers, on the other hand, argue that laypersons read the Rules too broadly. The rules do prohibit introduction of certain facts, such as a witness’ marital history, when they are not relevant, and require that lawyers present evidentiary support for any claim they want the jury to believe. But the Rule does not demand congruence between the lawyer’s own beliefs about relevant events and the account she will ask the jury to believe.¹⁹ Similarly, Rules 3.3 (a) (4) and 3.4 (b) prohibit the introduction of material evidence or testimony that the lawyer knows to be false. The lawyer, for example, may not submit a piece of clothing as belonging to the defendant when she knows it does not, and she may not introduce testimony that includes deliberate lies.²⁰ The Rules do not prohibit her,

MODEL RULES OF PROFESSIONAL CONDUCT (1983).

16. MODEL RULE OF PROFESSIONAL CONDUCT Rule 3.4 (e) (1983).

17. MODEL RULE OF PROFESSIONAL CONDUCT Rule 3.3 (a)(4) (1983).

18. MODEL RULE OF PROFESSIONAL CONDUCT Rule 3.4 (b) (1983).

19. Indeed, many experts on the role of the criminal defense attorney suggest that the only way of testing the strength of the prosecution’s case is by asking the jury to consider alternative scenarios. Doing so is part of the defense attorney’s obligation, according to this view, and it is irrelevant whether or not she believes the stories she constructs. See FREEDMAN, *supra* note 14, at chs. 2, 5.

20. It is well settled that Rule 3.3 (a)(4) prohibits the use of perjured testimony. The Comment to Rule 3.3, however, notes that “the most difficult situation . . . arises in a criminal case where the accused insists on testifying when the lawyer knows that the testimony is perjurious.” The Comment critically discusses various controversial “resolutions of this dilemma” and concludes that “if withdrawal will not remedy the situation or is impossible, the advocate should make disclosure [of the fact of perjury] to

however, from using genuine evidence or true statements in a deceptive way, a way that leads the jury to infer that which she personally believes to be false.

Accordingly, the Model Rules allow lawyers more latitude than is apparent from an untutored reading. To be sure, lawyers and scholars differ with regard to the proper use of that latitude.²¹ Some argue that the lawyer's own beliefs about the truth are irrelevant to the accounts that she may legitimately develop for the jury in the defense of her client:²² "defense counsel has no . . . obligation to ascertain or present the truth. Our system assigns him a different mission . . . preventing the conviction of the innocent. . . . If he can confuse a witness, even a truthful one, . . . that will be the normal course."²³

Others argue for narrower constraints. In a widely cited and discussed article, for example, Harry Subin criticizes lawyers who are "prepared to stand before the jury posing as an officer of the court in search of the truth, while trying to fool the jurors into believing a wholly fabricated story."²⁴ He sees as disingenuous the suggestion that "the lawyer cannot possibly be sufficiently certain of the truth to impose his or her view of it on the client's case."²⁵

Proponents of the view that defense attorneys are not tethered to the truth-seeking process and function instead "to put the State to its proof, to put the State's case in its worst possible light,"²⁶ may execute that role in different ways. First, they may cast doubt on the State's account by showing that acts and events can be seen in more than one way or that witnesses may be mis-remembering or dissembling. Second, they may construct alternative scenarios and make the argument that the outcome (in the Simpson case, the deaths of the victims) is the result of a wholly independent set of actions. They may, in other words, construct alternative stories.²⁷

the court."

21. William Simon offers a useful general discussion of lawyers' "tactics that cannot plausibly be viewed either as assisting the trier in making an informed determination or as vindicating specific intrinsic procedural rights." See William H. Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703 (1993).

22. See Simon H. Rifkind, *The Lawyer's Role and Responsibility in Modern Society*, 30 THE RECORD 534 (1975).

23. *United States v. Wade*, 388 U.S. 218, 257-58 (1967) (White, J., dissenting in part and concurring in part).

24. Harry I. Subin, *The Criminal Lawyer's "Different Mission": Reflections on the "Right" to Present a False Case*, 1 GEO. J. LEGAL ETHICS 125, 148 (1987).

25. *Id.*

26. *Wade*, 388 U.S. at 257-58 (White, J., dissenting in part and concurring in part).

27. An interesting empirical study of the ways in which juries can be led to disregard evidence, to presume the existence of evidentiary support when little exists, and to be misled in other ways is presented in Saul M. Kassin, *The American Jury: Handicapped*

To what extent must alternative stories of that kind be grounded in evidence? As defense attorneys construct such stories, how is the mandate of 3.4 (e) satisfied? Consider two different ways that these scenarios may be related to the evidence. Model Rule 3.4 (e) anticipates a standard situation in which the relationship is one of *plausibility*. The jury is asked to consider whether the story is plausible in light of the evidence, whether the story is the most plausible account, beyond reasonable doubt, of all available accounts.²⁸

A different relationship between stories and evidence is that of *logical consistency*. By this much weaker standard, the jury is asked whether any evidence is logically incompatible with the offered account or, alternatively, whether they are consistent with each other. Logical consistency is the weakest possible kind of relationship, and an indefinite array of implausible stories may all be consistent with available evidence. To the extent that there is slippage from a higher standard of plausibility to merely one of consistency, the jury's role is radically changed. The jury may come to operate under the assumption that all stories consistent with the evidence are to be considered equally seriously and are presumptively equally plausible.²⁹

One may see the conduct of Simpson's defense attorneys from this perspective. In raising the possibility that a premeditated and comprehensive police conspiracy underlies the established facts of the case,³⁰ and

in the Pursuit of Justice, 51 OHIO ST. L. J. 687 (1990).

28. The Due Process Clause of the Constitution has been held to require "proof beyond a reasonable doubt of every fact necessary to constitute the crime charged." *In re Winship*, 397 U. S. 358, 364 (1970). Model Rule 3.4 (e) refers, of course, not to the standard that the jury must use in evaluating the evidence, but to the minimal requirements the lawyer must satisfy in presenting the case.

29. The situation that I am criticizing, the conceptual move from a standard of knowledge involving plausibility to one involving logical inconsistency, has long been familiar in philosophical discussions of skepticism. A typical skeptical dilemma raises the question of how one knows that one is not dreaming or hallucinating. The suggestion is that any evidence one seeks is equally impeachable in the light of the hypothesis that one is dreaming or hallucinating. Accordingly, all evidence is *logically consistent* with that hypothesis. The skeptic concludes that, as a result, one has no justification for rejecting the hypothesis—and must therefore entertain it as a serious alternative to the belief that one is awake or not hallucinating.

The flaw in this argument is the last step: the inference from logical consistency to equal plausibility—the idea, in other words, that one must entertain the hypothesis merely because it is logically consistent with what one knows: "we are just in one of the characteristic situations of philosophical skepticism: which allows us the alternatives of meaning something different from what we do mean, or of being forever unsure; because the standard for being sure while meaning what we do mean is set self-contradictorily high." P. F. STRAWSON, *INDIVIDUALS* 34 (1959).

30. For a brief and scathing discussion of the implausibility of this hypothesis and of the popularity of conspiracy theories in general, see Bruce Handy, *A Conspiracy of Dunces*, *TIME*, May 22, 1995, at 82.

raising the alternative possibility that the murders are the consequences of drug-dealing by friends of the victims, they are saying that these scenarios are consistent with what is known. Plausibility, in the form of independent evidence that establishes the *likelihood* of these scenarios, seems of secondary concern—or of no concern at all.

Given this methodological shift, defense attorneys may see themselves as licensed to lead the jury through the domains of fantasy with scenarios drawn not from the world of common experience but the world of movie plots and tabloid speculation. In promulgating these suggestions, they may assume that our standards (and the jury's standards) for considering these accounts have merged with the standards that we entertain when we entertain ourselves. The search for truth becomes a search for the most exciting or arousing account that is consistent with the known facts. It is bizarrely appropriate that Simpson, as the creature of two separate worlds of fantasy, sports and movies, continues (in the scenarios of his defense attorneys) to inhabit these domains.

These apparent shifts in defense strategy can be seen in two ways. On one hand, one may argue that they merely represent the logical implications of strategies that artful defense attorneys often use. Accordingly, the devolution of defense scenarios from consideration of truth to comparative fantasies should be recognized as a constant temptation for defense attorneys. This case would be unusual only to the extent that it also happens to reflect the pre-existing background of this defendant and the unconscious expectations of the public. On the other hand, one may see the exploitation of movie-based fantasies by the defense team as a deliberate and cynical strategy designed to take advantage of Simpson's image and of the general suspension of critical judgment with which sports heroes, movie stars, and other totems of gossip are typically regarded.

IV. Truth, Narrative, and Perspective

We saw above that many postmodern theorists argue that the distinction between truth and fantasy is naive and exists only to be deconstructed. According to this account, the cultural artifacts that we label "fiction" or "fantasy" differ only in degree from the narratives that make up our shared experience of history, politics or law. The latter domains, like the former, consist only of multiple competing narratives that are shared and debated within large or small interpretive communities.

We have also seen that this critique wreaks havoc on the assumptions that make criminal trials possible.³¹ This critique implies that the basic

31. Any attempt to justify the presentation of multiple fantasies, *e.g.*, those involving police conspiracies or wars among drug dealers, as multiple competing narratives in this case represents, of course, vulgarization and abuse of the underlying theory of

instruction to a jury, to arrive at a decision about the truth of legally relevant events, is inherently misconceived. The mandate to juries presupposes that there is a master narrative that is "true" and that the juries' role is to find that master narrative.

In the Simpson trial, doubts about a master narrative would be emphasized by the view that jurors, lawyers and observers bring their own experiences and assumptions to bear on the situation. The variant readings that individuals give to the evidence and other observations, and the various narratives that they are disposed to tell and find persuasive, can be deconstructed in light of their personal histories and beliefs. Doing so involves seeing them both as individuals and as members of particular racial groups, genders and social classes. No group is inherently without presuppositions.

A consequence of this deconstructive approach is that any resolution of this trial will be seen as irreducibly political and will be explained in terms of the vindication of certain political biases and the defeat of others. Insofar as participants and observers come to reject any clear distinction between truth and fantasy, the only test of a narrative is the pragmatic one of whether it wins adherents. Any narrative that is likely to win adherents becomes admissible. In this sense, Simpson is an exemplary postmodern defendant, carrying with him an array of available roles in the popular imagination.

Obviously, the mode of analysis that I have called "deconstructive" is, and is intended to be, subversive because it makes unavailable (or at least encumbers seriously) the notion of truth and seems to erase substantially the distinction between presuppositions of judgment and outright bias. Each of these jeopardized notions is essential to the way we think of legal processes, specifically of litigation, and the roles of lawyers, judges, and jurors. Thus, jurors must believe that there is one true, one veridical, account (a master narrative) of the relevant events, and that it is their job to determine it. Although they may and should recognize that the process of judgment has presuppositions, they must at the same time seek to free themselves of bias.³²

The postmodern challenge to the objectivist epistemological premises of our legal procedures implicates the deepest concerns of contemporary

postmodernism. Theorists who reject the idea of a master narrative surely do not believe that the process of trying to determine the relevant "hard facts" is, in principle, misconceived and must be aborted. They do not deny that the identity of the assailant of Nicole Brown and Ronald Goldman is a question of fact rather than a matter of interpretation, dependent on the assumptions of the interpreter. Rather, they might argue that such questions, such as whether racism seriously tainted the police investigation, cannot be answered objectively. *See supra* text accompanying notes 10 through 12.

32. Observers will, of course, disagree about the extent to which this is possible—disagree, that is, about underlying features of human nature.

legal theory. It is impossible to do justice to them in so brief a discussion, just as it is difficult to avoid caricaturing the positions at issue. Nonetheless, the postmodern approach is clearly echoed by some critical legal theorists, including some critical feminist and race theorists.³³ These writers draw attention both to the pervasiveness with which unacknowledged bias and unquestioned presumptions permeate legal, social and political discourse and to the lack of shared criteria for distinguishing mere narratives from a master narrative, for distinguishing mere beliefs from truth.³⁴

For present purposes, perhaps it is enough to distinguish two different roles that these critical approaches to law can have, one of them salutary and the other destructive. The salutary role is that of demanding vigilance on the part of each actor and each observer in questioning her presuppositions and ferreting out her biases. Similarly, critical thinking suggests that we must be cautious in elevating our own narratives, our own way of assembling relevant facts into a master narrative and calling it "truth." Thus, critical thinking emphasizes that *presumption*-free inquiry is an incoherent notion, whereas *bias*-free inquiry is an ideal.

These reminders are not revolutionary and subversive but are merely restatements of the parameters of rational discourse, principles that we have always known. They do not undermine the processes of trial but instead reinforce them and make them possible. In this sense, they must

33. Consider, for example, the following observations by a leading feminist theorist: Feminist analysis begins with the principle that objective reality is a myth The business of living and progressing within our disciplines requires that we give up on 'objective' verification at various critical moments, such as when we rely upon gravity, or upon the existence of others, or upon the principle of verification itself. Feminism insists upon epistemological and psychological sophistication in law: Jurisprudence will forever be stuck in a postrealist battle of subjectivities, with all the discomfort that has represented.

Ann Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1378, 1400-1401, (1986).

The apparent abandonment by some critical theorists of the notion of objectivity in shared discourse has prompted some observers to suggest that critical legal studies imply "the death of law." Owen Fiss, *The Death of the Law*, 72 CORNELL L. REV. 1 (1986). Fiss substantially modified his indictment in a later work. See Owen Fiss, *The Law Regained*, 74 CORNELL L. REV. 245 (1988).

34. These observations derive some of their impact from ambiguity. It is important, for example, to distinguish presuppositions from biases. Reasoning without presupposition is impossible; every instance of reasoning presupposes some beliefs and convictions that are accepted without question. Bias-free reasoning, on the other hand, is a desirable and realizable goal, if biases are seen as beliefs and presuppositions that are unjustifiable. Similarly, the conclusion that one cannot arrive at a so-called "master narrative," namely an account of an event or series of events that is objective and that is the mirror of "reality," does not in itself put in question the project of comparing narratives as better or worse in terms of articulated criteria, among which may be the bias-free ideal.

be distinguished from the genuinely revolutionary, genuinely subversive notion that the effort to distinguish presupposition from bias, truth from fiction, reality from fantasy, is doomed. The latter suggestion is that we must treat all narratives as *equally* suspect and therefore all narratives as *equally* legitimate. This notion is one that we entertain at our peril and that, in the end, we have no good reason to accept. In the Simpson trial, the responsibilities of all participants—the accused, the jurors, the attorneys, the judge, and all commentators—must be defined in terms of discovering the difference between fantasy and reality and acting accordingly.

